

SUPREME COURT OF NIGERIA
26TH JANUARY, 2001. SC 122/1995
CORAM:- A. B. WALLI, I. L. KUTIGI, S. U. ONU,
A. I. IGUH, A. I. KATSINA-ALU, JJSC

MARK EHIGIATOR OJO APPELLANT
AND
COMFORT E. AZAMA RESPONDENT

***APPEALS** - Concurrent findings of fact - Will not be interfered with by Supreme Court - In the absence of sufficient reasons.*

***APPEALS** - Specific findings - That was not challenged - Cannot be appealed against.*

***CUSTOMARY LAW** - Judicial notice - Notoriety of custom - Doctrine of priority under Bini customary law fulfills the condition.*

***LAND LAW** - Bini customary law - Alienation - Whether by formal conveyance or not - Goes to no issue - As far as there is transfer of estate or interest - And purchaser is in peaceful possession.*

***LAND LAW** - Bini customary law - Oba's approval - Marks complete transfer of legal estate.*

***LAND LAW** - Bini customary law - Priority - Applies only to claims in respect of same land.*

***LAND LAW** - Bini customary law - Title - Equal equities - The 1st in time prevails.*

***LAND LAW** - Competing claims - Priority doctrine - Applies to both legal and equitable titles.*

LAND LAW - Title - Concrete and indefeasible title - Must be established by plaintiff to sustain his claim.

LAND LAW - Title - Nemo dat quod non habet - One cannot convey title from a void or nonexistent title.

LAND LAW - Title - Onus of proof - Plaintiff must prove both the purchase of the land and priority of his purchase.

LAND LAW - Title - Proof - Must be on the strength of plaintiff's case - Not on weakness of the defence.

LAND LAW - Title - Proof of legal estate - Is sufficient to give title - Even in the absence of evidence of conveyance.

FACTS

The Appellant/plaintiff claimed for declaration of title to the land in dispute situate at Ugbowo, Benin City as well as N20,000.00 as damages for trespass and an injunction against the Respondent in respect of the said land. His claim for title to the land was based on a transfer from one of the plaintiff's witnesses (P.W.5) in 1967 which was later reduced to a Deed of conveyance in 1970 and registered in the Lands Registry, Benin City. The Appellant's vendor (P.W.5) had bought the land from one Samuel Ogbewe and had through the Plot Allocation Committee in charge of Ward 23L (where the land is situate) applied and obtained the Oba of Benin's approval for transfer of the land to him in November 1962. The Appellant further claimed to have been in continued and undisturbed possession of the land in dispute from 1969 to 1983 when the Respondent trespassed on the land having broken into the land with workers who started digging and laying foundation of a building. In the process they converted the Appellant's planks, blocks and a 500 gallon of water tank on the land.

The Respondent in her defence and counterclaim (in which she

did not claim title but only special damages) alleged she bought the land in dispute from one of her defence witnesses (D.W.I) who in turn obtained approval of the Oba through the Ward 23L Allotment Committee on 12th April, 1962. She further contended that the transfer of the disputed land to her was documented. The learned trial judge dismissed Appellant's case in its entirety on the grounds that his title (Oba's approval Exh. D) was later in time than the Respondent's title (Oba's approval Exh. K). He further dismissed Respondent's counterclaim for special damages and only awarded N500 general damages for trespass against the Appellant. Having appealed, the Court of Appeal dismissed Appellant's appeal although it allowed his appeal against the N500 general damages in favour of the Respondent. The Appellant has further appealed to the Supreme Court raising the following issues for determination.

ISSUES FOR DETERMINATION

I. Whether the Court of Appeal was right in holding that the land in dispute is the same as that claimed by the parties in this case.

II. Whether the Court of Appeal was right in holding that the Appellant's Vender P.W.5 had no title to the land in dispute vis-a-vis the prior acquisition of the said land by the Respondent's D.W.I

III. Whether the Court of Appeal was right in dismissing the Appellant's case after holding that he had no title to the land in dispute.

HELD (Unanimously dismissing the appeal per lead judgment of **Onu JSC**)

Judicial notice - Notoriety of custom

1. Indeed, it is now trite law that the doctrine of priority of title under the Bini Customary Law has acquired some notoriety sufficient to justify the court taking judicial notice of same. See Section 74(1) (a) of the Evidence Act, Cap. 112 Vol.8 Laws of the Federation of Nigeria, 1990; also Finnih v. Imade (1998) 1 NWLR(part 219) 571. (p. 91 D)

Land law - Competing claims

2. In general, whenever the court is faced with two competing claims over the same parcel of land as in the instant case, the question arises as

to which of the claimants is entitled to the judgment of the Court, or put more explicitly, to the declaration of title. In other words, which of the competing titles takes priority? The doctrine of priority applies (though with different principles) whether the competing titles are both legal or equitable. (p. 91 E)

Bini customary law - Priority

3. It is in the light of the above that I hold the above principle to operate only in respect of the same land. Thus, it cannot operate as between persons claiming different pieces of land. In this case, the trial court as well as the court below have found as a fact that the land which was given approval by the Oba on 1st November, 1962 - Exhibit 'D', and that approved by the Oba on 12th April, 1962 are one and the same parcel of land. A fortiori, this is a proper case for the application of the principle of priority of interest and/or estate. See Arase v. Arase (1981) 5 SC. 33. (p. 94 B)

E Concurrent findings of fact

4. As the decisions of the two courts below constitute concurrent conclusions of fact, this court has made it a policy not to interfere therewith. See Mogo Chinwendu v. Nwanegbo Mbamali (1980) 3/4 SC. 31 at 53. Since both lower courts having found in favour of the Respondent as to her priority of interest and/or estate against the Appellant as well as the identity of the land in dispute, I see no reason to interfere with the flawless findings. (p. 94 E)

G Bini customary law - Title - Equal equities

5. The court below was right, in my opinion, in holding that the Appellant's Vendor - PW.5 had no title to the land in dispute vis-a-vis the prior acquisition of the said land by the Respondent's D.W.I.

H It is abundantly clear from the uncontradicted documentary evidence before the trial court that the Respondent's Vendor (D.W.1) in accordance with the Bini Customary Law, applied for the land in dispute, and his application was given the Oba's approval on 12th April, 1962 vide

Exhibit "K". On the contrary, however, the application of the Appellant's Vendor (P.W.5) was approved by the Oba on 1st November, 1962 - (Exhibit "D"). In this regard, I am of the firm view that from the foregoing alone, the Appellant's claim for title to the land in dispute should fail on the issue of competing interests. Indeed, where the equities are equal, B the first in time prevails. (p. 94 H)

Appeals - Specific findings

6. In the instant case, the Appellant did not appeal against this specific and crucial finding, and he is therefore estopped from challenging same C on appeal. See Yesufu v. Kupper International N.V.I. (1996) 5 NWLR (part 446) 17 at pages 25 - 26. (p. 96 D)

Title - Nemo dat quod non habet

7. Thus, it is in my opinion, incontrovertible from the evidence adduced at the trial court, especially the documentary evidence relating to the competing approvals given by the Oba of Benin in respect of the parties' Vendor, that the Appellant's root of title (his Vendor's i.e. PW.5's) applica- E tion and approval were later in time; whilst that of the Appellant's Vendor (PW.5) was approved by the Oba on 1st November, 1962, (Exhibit "D"), that of Respondent's Vendor was approved on 12th April, 1962. In effect, the Appellant's Vendor (PW.5) acquired no title or interest whatso- F ever in respect of the land in dispute which he could convey to the Appellant. The Latin maxim Nemo dat quod non habet is, in my view, apposite in this respect. (p. 96 H)

Bini customary law - Oba's approval

8. The observation of Ubaezonu, J.C.A at page 161 of the Report to the effect that:

"The position in this appeal is therefore as follows:-

At the time the purported grant was made by the Oba to PW.5, a grant H had already been made to D.W.I; PW.5 therefore got nothing. Consequently, PW.5 could not transfer anything to the Appellant".

is quite instructive. This is because the Oba's approval is not merely an

administrative acknowledgment of the Respondent's Vendor's title, but indeed, marks the complete transfer to the Respondent's Vendor of the legal estate in the land concerned. (p. 97 D)

B Title - Concrete and indefeasible title

9. From the foregoing, I am of the firm view that the Appellant having failed to establish his concrete indefeasible root of title against the Respondent, must have his case dismissed by the trial court, while the court below was accordingly right in affirming same. (p. 98 B)

Bini customary law - Alienation

10. The fact that her Vendor's Conveyance was not tendered in evidence and/or that her evidence in that respect is inadmissible is immaterial.

D Hence, from the decision in Mrs. Aigbe v. Edokpolo (supra), it is immaterial whether the grantee who obtained the Oba's approval alienates his estate or interest in favour of another person by means of a formal conveyance or not. What matters is that he has sold his estate or interest and E legally put the other person in possession of the land and there is no dispute between him and that other person. (p. 98 F)

Land law - Proof of legal estate

F 11. As the Respondent's Vendor has been demonstrated on the totality of evidence adduced before the two courts below to be vested with the legal estate in respect of the land in dispute on 12th April, 1962; in other words that she had a better title against the whole world including the appellant, the law is settled that it is immaterial that she did not tender any G conveyance between her and DW.I. Indeed, it is of no moment since the indefeasible title of DW.I through whom she claims is valid, subsisting and first in time to Appellant's approval - Exhibit "K". (p. 99 E)

H Title - Onus of proof

12. In sum, I am of the firm view that it is trite law that in order to discharge the onus of proof in this case, it became incumbent that the Appellant must establish not merely an alleged purchase of the land in

dispute from PW.5, but also priority of his said purchase to that of D W.1 through whom the Respondent claimed. (p. 100 C)

Proof - Must be on the strength of plaintiff's case

13. The fact that the Respondent did not tender any conveyance between her and DW.I or that the Respondent's evidence in that regard was inadmissible, would not and did not confer priority on the Appellant's Vendor - PW.5. The Law insists that he must prove his case on the strength of his own case and not on the weakness of the defence. (p. 100 D)

REPRESENTATION

P. C. Okorie for the Appellant

Okiemute Mudiaga Odje, for the Respondent

CASES REFERRED TO

Enang v Adu (1981) 11- 12 S. C. 25 at 42

Nwadike v Ibekwe (1987) 4 N.W. L. R.(Part 67) 718

Igwego v Ezengo (1992) 6 N.W. L. R.(Part 240) 561 at 576

Ugbo v Aburime (1994) 8 N. W. L R. (Part 360) 1

Vincent Bello v Magnus Emeka (1981) 1 S. C. 101 at 120

Finnih v Imade (1992) 1 N. W. L. R. part (219) 571.

Atiti Gold v Beatrice Osaseren (1970) 1 All NLR 124

Awoyegbe v Ogbeide (1988) 1 NWLR (Part 73) at 695

STATUTE REFERRED TO

Evidence Act Cap 112 Vol 8. LFN 1990 - ss.74 (1) (a), 132

LEAD JUDGMENT BY ONU JSC

This is an appeal from the decision of the Court of Appeal sitting at Benin City, which on the 4th day of July, 1994 upheld the decision of Omo-Agege J. (as he then was) of the High Court, Benin delivered on the 10th November, 1989 wherein he dismissed the Plaintiff/appellant's claim for:

- "(1) *A declaration of title of statutory right of occupancy to the piece or parcel of land situate in the then ward 23/L Ugbowo, Benin City.*
(2) *N20, 000.00 (twenty thousand Naira) damages for trespass*
(3) *perpetual injunction to restrain the Defendant, her servants or agents from further trespass*".

On her part, the Defendant/Respondent set up a defence of prior and better title to the land in dispute and counter-claimed against the appellant for:

"SPECIAL DAMAGES		
5 tipper loads of granite at N200 per load	N1,000.00	
2 water tank at N250.00 each	500.00	
2 4 bundles of corrugated iron sheets at N160		
per bundle	2,400.00	
10,000 cement blocks at N1.00 each	10,000.00	
TOTAL	N13,900.00	
GENERAL DAMAGES:	N36,100.00	
GRAND TOTAL:	<u>N50,000.00"</u>	

The facts of the case may be briefly stated as follows:
The appellant (as plaintiff) at the trial Court claimed for declaration of title to the land in dispute verged PINK in plan No. 150/BD/504/83 - Exhibit 'A'. He also claimed N20,000.00 (twenty thousand Naira) damages for trespass and an injunction against the Respondent in respect of the said land. The Appellant's claim of title to the disputed land was based on a transfer from one Felix Irabor (P.W.5 at the trial) in 1967 which transfer was later reduced to a Deed of Conveyance in 1970 vide Exhibit E and registered as instrument No. 46 at page 46 in Volume 92 of the Lands Registry, Benin City.
The Appellant's Vendor (P W.5) had bought the land from one Samuel Ogbewe and had through Egwa Edaiken plot Allotment Committee in charge of ward 23/L (where the land is situate) applied and obtained the Oba of Benin's approval for transfer of the land to him on 1st November, 1962 vide Exhibit D.

The Appellant claimed to have been in continued and undisturbed

possession of the land in dispute from 1969 to 1983 when the Respondent trespassed on the land. The Appellant stated in particular, that the Respondent on the 7th day of March, 1983 broke and enter the disputed land with workers and thugs and started digging and laying the foundation of a building and in so trespassing converted the Appellant's planks, B blocks and a 500 gallon of water tank on the land. These acts were reported to the police.

The Respondent in her defence and counter-claim - the latter in which she did not claim title but only special damages - alleged she bought the land in dispute from one Immaculate Osanwonyi (D.W1) who in turn obtained approval of the Oba through Ward 23/L Allotment Committee on 12th April, 1962 - Exhibit 'K'. It was the Respondent's further case that the transfer of the disputed land to her by DW.I was documented. C

The learned trial Judge in his judgment dated 10th November, 1989 D dismissed the Appellant's claim in its entirety on the ground that his title (PW.5's approval) was later in time than the Respondent's title (DW1's approval), apparently on the conviction that DW.1's title was validly transferred to the Respondent. The learned trial Judge also found that E Respondent's counter-claim for special damages was not proved but nonetheless awarded in his (Respondent's) favour N500.00 general damages for trespass against the Appellant.

On 4th July, 1994 the Court of Appeal, Benin City (hereinafter in F the rest of this judgment referred to simply as the Court below) dismissed the Appellant's appeal, although it allowed his appeal against the N500.00 awarded as general damages in favour of the Respondent.

Being further aggrieved by this decision of the court below, the Appellant has now appealed to this Court on six grounds with leave. G Briefs of argument were filed and exchanged in accordance with the Rules of Court.

The Appellant identified three issues for determination in his Brief to wit: H

1. Whether the learned Justices of the Court of Appeal were right in dismissing the Appellant's appeal against the judgment of the trial court for declaration of title in view of the court's finding that the Respondent

had no title whatsoever to the land in dispute vis a vis the Appellant's title which stood alone and whether the doctrine of priority of title under Bini Customary Law has not been wrongly applied?

B 2. Whether in any event, the Appellant was not entitled to judgment in his claim for trespass and injunction after the learned Justices of the Court of Appeal held that the Respondent had no title whatsoever to the disputed land?

C 3. Whether the learned Justices of the Court of Appeal were right in comparing the title of the Appellant (Exhibit 'K') and in holding that title to the disputed land resides in D.W.1 when D.W.1 was not a party to the suit and when Exhibits 'D' and 'K' did not relate to the same land nor was Exhibit 'K' related to the disputed land and whether such comparison has not occasioned injustice to the Appellant?

D The Respondent equally proffered three identical but more succinct issues for determination. They are:

I. ISSUE I

E Whether the Court of Appeal was right in holding that the land in dispute is the same as that claimed by the parties in this case.

II. ISSUE II

F Whether the Court of Appeal was right in holding that the Appellant's Vender P.W.5 had no title to the land in dispute vis-a-vis the prior acquisition of the said land by the Respondent's D.W.1

III. ISSUE III

Whether the Court of Appeal was right in dismissing the Appellant's case after holding that he had no title to the land in dispute.

G The Appellant's counsel at the hearing of the appeal on 31st October, 2000, adopted his Brief and after citing additional authorities expatiated on issues 2 and 3 respectively. Learned counsel for the Respondent after adopting her (Respondent's) Brief made an oral expatiation thereon.

H I will now embark on the consideration of the issues I have adopted seriatim thus:

ISSUE NO. 1

In answering this issue wherein the query is whether the Court below was right in holding that the land in dispute is the same as that

claimed by the parties in this case, it is well to begin by the saying that under Bini Customary Law, particularly before the promulgation of the Land Use Act, 1978, all land in Benin City was vested in the Oba of Bini in trust for Bini people. The Oba's approval for a grant to any individual marked a valid transfer of the land in question to the individual. B

The procedure was for anybody who desired to acquire land, to apply to the Oba through the Ward Allotment Committee in charge of the land sought to be acquired. The acquisition was effected by the Oba's approval of such application.

This system of land acquisition led to a situation where the same parcel of land came to be granted to more than one person thus giving rise to several litigations by competing claimants and several decided cases on priority of title, some of which were decided by this Court. **Indeed, it is now trite law that the doctrine of priority of title under the Bini Customary Law has acquired some notoriety sufficient to justify the court taking judicial notice of same. See Section 74(1) (a) of the Evidence Act, Cap. 112 Vol.8 Laws of the Federation of Nigeria, 1990; also Finnih v. Imade (1998) 1 NWLR (part 219) 571; (1992)1 SCNJ 87.** C D E

In general, whenever the court is faced with two competing claims over the same parcel of land as in the instant case, the question arises as to which of the claimants is entitled to the judgment of the Court, or put more explicitly, to the declaration of title. In other words, which of the competing titles takes priority? The doctrine of priority applies (though with different principles) whether the competing titles are both legal or equitable. F

Thus, it was further contended that it is well settled under Bini Customary Law, as in the instant case, that whenever the doctrine of priority is called in issue, the relevant question ought to be and, in fact, is which of the parties has made a better title to the land in dispute and not which of them first obtained the Oba's approval. It would not help the plaintiff to say that he got the Oba's approval first. G

This, in my view, was not what the learned Justices of the Court below had in mind when they said inter alia at pages 153 - 154, lines 30 -

34 of the Record:-

"from the briefs of argument and the several issues formulated therein, it seems to me that the most vital issue for determination is - who as between the appellant and the respondent has a better title to the land in dispute? Rather, the Appellant after referring us to and quoting from a number of cases, decided by this court over the years namely, Atiti Gold v. Beatrice Osaseren (1970) 1 All NLR 124 at 134 (per Coker. JSC): Awoyegbe v. Ogbeide (1988) 1 NWLR (part 73) at 695 and more recently Mark Ugbo & Ors. v. Anthony Aburime (1994) 8 NWLR (part 360) at 20 paragraph D (per Iguh, JSC), adding that the cases of Finnih v. Imade (1992) 1 NWLR (part 219) 571 and Okeaya Inneh v. Aguebor (1970) 1 All NLR (part 1) 8 - 9 relied upon by the court below in its judgment and all other decision in which the doctrine of priority had arisen, clearly depicted that the doctrine applies only as between the competing claimants in the suit"

In the case on appeal herein, between the Appellant and the Respondent as both the trial court and the court below rightly held.

It was the Appellant's further contention that there would really have been no need for the learned trial Justices of the court below to compare the title of PW.5, per Exhibit 'D' and Exhibit 'K' described and related to different lands which differences the court accepted. It was therefore not necessary, he further contended, to employ the doctrine of priority at all or for that matter, the maxim Nemo dat quod non habet" which the learned Justices of the court below have tended to invoke that branded the Appellant a trespasser having neither title thereto nor was he in possession of the land thereof. This point the Appellant reserved for a more lucid consideration in Issue III though for our present purpose it was assumed (though not conceded) that Exhibit 'D' and Exhibit 'K' related to the same land. The foregoing observation notwithstanding, the Appellant argued, the Justices of the court below were in serious error of law in their above holding. The Appellant then maintained that the settled position under Bini Customary Law is that once a grant is made by the Oba even if subsequently to another in respect of the same parcel of land, it remains valid and subsisting unless and until set aside by the Oba. This

much Appellant observed, was stated by this court in Okeaya Inneh v. Aguebor (supra) at page 9 where it was held:-

"An approval once given remains valid until set aside by the Oba of Benin when evidence is subsequently produced of a prior approval for the same land, the second approval being bona fide and in ignorance of the existence of an earlier one"

Continuing, the Appellant contended that it is contrary to Benin Custom to set aside an approval made in error upon an exparte application by one of the affected parties vide Agbonifo v. Aiweroba (1988) 1 NWLR (part 70) 325 at 336 paragraph E.

As I shall seek to demonstrate hereunder, these submissions of the Appellant are misconceived for the following reason:-

In affirming the decision of the learned trial judge, the court below held, rightly in my view, as follows:-

"There are certain differences in the land described by the Appellant and the land as described by the Respondent. These differences have been outlined in the Appellant's brief of argument which has been summarised earlier in this careful comparison of both Exhibits. I am satisfied that the area verged pink in Exhibit "A" is the same as the area verged pink in Exhibit "L" "The land being claimed by the Appellant is therefore the same as the land which the Respondent also claimed".

It was making a correct decision based on the facts.

The above passage which, in my opinion, is flawless and unimpeachable was arrived at upon a consideration of the contents of the documentary evidence (Exhibits "A" and "L" which are the respective plans of the parties).

Thus, the court complied with Section 132 of the Evidence Act Cap. 112 Laws of the Federation having to do with evidence of terms of judgments, contracts, grants and other dispositions of property reduced to documentary form. It must be remembered that although the first arm of above passage at a first glance would seem to suggest that there are differences between the land in dispute and the one claimed by the Respondent. However, as Edozie, J. C. A. put it in Asiemo v. Abraham (1994) 1 NWLR (part 361) 191:

"The law is well settled that where the parties by evidence adduced, both oral and documentary, are *ad idem* on the identity of the land in dispute, the fact that different names are ascribed to it or that the area where it is located is called different names is not fatal to the case of the party claiming". Vide *Asiemo v. Abraham* (*supra*) at page 217 paragraphs E-F.

It is in the light of the above that I hold the above principle to operate only in respect of the same land. Thus, it cannot operate as between persons claiming different pieces of land. In this case, the trial court as well as the court below have found as a fact that the land which was given approval by the Oba on 1st November, 1962 - Exhibit 'D', and that approved by the Oba on 12th April, 1962 are one and the same parcel of land. *A fortiori*, this is a proper case for the application of the principle of priority of interest and/or estate. See *Arase v. Arase* (1981) 5 SC. 33; *Adukofi v. Adjei* 8 WACA 198 and *Vincent I. Bello v. Magnus Eweka* (1981) 1 SC. 101.

As the decisions of the two courts below constitute concurrent conclusions of fact, this court has made it a policy not to interfere therewith. See *Mogo Chinwendu v. Nwanegbo Mbamali* (1980) 3/4 SC. 31 at 53; *Ibodo & Ors. v. Enarofia & Ors.* (1980) 5 SC. 42; *Ogiesoba Otubu & Ors. v. B. A. A. Guobadia* (1984) 10 SC. 130 and *Ezewani v. Onwordi* (1986) 4 NWLR (part 33) 27. Since both lower courts having found in favour of the Respondent as to her priority of interest and/or estate against the Appellant as well as the identity of the land in dispute, I see no reason to interfere with the flawless findings.

For the above reasons I will answer Issue 1 in the affirmative.
ISSUE 2

This issue poses the question whether the Court of Appeal was right in holding that the Appellant's Vendor - PW.5 had no title to the land in dispute vis-a-vis the prior acquisition of the said land by the Respondent's D.W.I.

The court below was right, in my opinion, in holding that the Appellant's Vendor - PW.5 had no title to the land in dispute vis-a-

vis the prior acquisition of the said land by the Respondent's D.W.I.

It is abundantly clear from the uncontradicted documentary evidence before the trial court that the Respondent's Vendor (D.W.1) in accordance with the Bini Customary Law, applied for the land in dispute, and his application was given the Oba's approval on 12th April, 1962 vide Exhibit "K". On the contrary, however, the application of the Appellant's Vendor (P.W.5) was approved by the Oba on 1st November, 1962 - (Exhibit "D"). In this regard, I am of the firm view that from the foregoing alone, the Appellant's claim for title to the land in dispute should fail on the issue of competing interests. Indeed, where the equities are equal, the first in time prevails. This principle of competing interests was given expression in Bello v. Eweka (supra) wherein Eso, JSC said thus:

"The Respondent claims to be the prior purchaser and this being the case, would prevent the Appellant from having the declaration sought". This Court re-echoed these principles in Finnih v. Imade (supra) where Babalakin, J.S.C. delivering the leading judgment, said at page 531:

"Under Benin Customary Law, where there is a grant of the same land to two people, the earlier grant is superior to and better than the latter one".

In the case on hand, the court below complied with the above principles in its judgment when it said that:

"On the authority of Finnih v. Imade (supra) PW.5's title to the land is inferior to the title of DW.I. This is as between PW5 and DWI" This Court revisited the issue of competing interests under Bini Customary law in Ugbo v. Aburime (supra) where Iguh, JSC delivering the leading judgment stated as follows:

"It would however still be right, in my view, to state that where all the equities surrounding such two allocations are equal, then obviously, the first in time must have priority. In the present case, the Appellant and the Respondent were found by both courts below to have complied with the necessary formalities connected with the acquisition of the piece of land in dispute. The Respondent's approval, Exhibit "2", bears the date 8th December, 1970, whilst the 1st Appellant's approval, Exhibits "9"

and "10" are dated the 7th October, 1972 and 2nd October, 1973 respectively. The applications were all recommended to the Oba of Benin for approval by the same Ward 11K Elders. It seems to me clear and I endorse the findings of both courts below that the Respondent's grant -
 B Exhibit "2" is superior to the 1st Appellant's grants, Exhibits "9" and "10" .

See also Sodimu v. Akande (1978) WSCA Vol.1 204 at 208 where the law is succinctly stated as he who is first in time is first in law. The above authority, is in my respectful view, on all fours with this case
 C where the learned trial judge observed inter alia that:

"The fact is well established that both applications were routed through the same plot Allotment Committee, which is 23/L Egua - Edaiken".

D In the instant case, the Appellant did not appeal against this specific and crucial finding, and he is therefore estopped from challenging same on appeal. See Yesufu v. Kupper International N.V.I. (1996) 5 NWLR (part 446) 17 at pages 25 - 26. In the recent not-too-dissimilar case of Eholo v. Ekhaton (1996) 2 NWLR (part 430) 338 the
 E Court of Appeal per Ubaezonu, J.C.A. stated as follows:

*"In the case in hand, the grant to the Appellant's predecessor-in-title (Akenzuwa) as per Exhibit "B" was approved by the Oba on 20/5/63 while the grant to the Respondent's predecessor - in - title as per Exhibit
 F "D" was approved by the Oba on 16/5/63. Thus, the grant to or acquisition by the Respondent is 4 days older than the grant to or acquisition by the Appellant. Every other thing equal, the Respondent's title is prior and I may add, superior to the Appellant's and therefore a better title. It
 G is incumbent on the Appellant who was the plaintiff in the court below to show or prove a better title to get the declaration he is asking for. If anything, the Respondent's title is better, being earlier in time. The learned trial judge was therefore right in holding that the Defendant/Respondent
 H acquired legal title in the land in dispute before the Plaintiff/Appellant".*

Thus, it is in my opinion, incontrovertible from the evidence adduced at the trial court, especially the documentary evidence relating to the competing approvals given by the Oba of Benin in

respect of the parties' Vendor, that the Appellant's root of title (his Vendor's i.e. PW.5's) application and approval were later in time; whilst that of the Appellant's Vendor (PW.5) was approved by the Oba on 1st November, 1962, (Exhibit "D"), that of Respondent's Vendor was approved on 12th April, 1962. In effect, the Appellant's Vendor (PW.5) acquired no title or interest whatsoever in respect of the land in dispute which he could convey to the Appellant. The latin maxim Nemo dat quod non habet is, in my view, apposite in this respect.

The above submission are further augmented since the legal estate in the land in dispute had been completely and wholly transferred to the Respondent's Vendor by the earlier approval of the Oba of Benin endorsed on the application of the Vendor seven months prior to the approval alleged to have been obtained by the Appellant's Vendor.

The observation of Ubaezonu, J.C.A at page 161 of the Report to the effect that:

" The position in this appeal is therefore as follows:-

At the time the purported grant was made by the Oba to PW.5, a grant had already been made to D.W.I; PW.5 therefore got nothing. Consequently, PW.5 could not transfer anything to the Appellant".

is quite instructive. This is because the Oba's approval is not merely an administrative acknowledgment of the Respondent's Vendor's title, but indeed, marks the complete transfer to the Respondent's Vendor of the legal estate in the land concerned. This, as Idigbe J.S.C. put it in Mrs. D.M.Aigbe v. Bishop John Edokpolor (1977) 2 SC. 1:

"There was a complete transfer of the legal estate in the land in dispute long before the proceedings commenced (i.e. when the Oba endorsed his approval".

Also in Evbuomwan v. Elema (1994) 6 NWLR (part 353) 638 at pages 654 and 655 this Court per Adio, JSC reiterated the above principle of law when he held:

"(1) The Oba of Benin would as a rule accord his approval in writing to a recommended application and an applicant whose application is

approved by the Oba of Benin becomes the beneficial owner of the land as approved for him".

From the foregoing, I am of the firm view that the Appellant having failed to establish his concrete indefeasible root of title against the Respondent, must have his case dismissed by the trial court, while the court below was accordingly right in affirming same. See the cases of Ajibona v. Kolawole (1996) 10 NWLR (part 476) 22 at pages 32 - 33, paragraphs H - A; (1996) 12 SCNJ 270 at page 280 and Chief Adeyemi Lawson & Anor.v. Chief Ayodele Ajibulu & Ors. (1997) 6 NWLR (part 507) 14 at 45.

My answer to issue 2 is accordingly rendered in the affirmative.

ISSUE 3

The question posed in this issue is whether the court below was right in dismissing the Appellant's case after holding that the Respondent had no title to the land in dispute.

It is pertinent to point out here that the learned Justices of the court below had before them the respective title deeds as well as the conveyances between the parties. The Appellant relied on the Oba's approval issued to his Vendor (PW.5) on 1st November, 1962 as well as the conveyance between him (Appellant) and PW.5. The Respondent claimed her title through her Vendor; DW.I who got the Oba's approval on 12th April, 1962. **The fact that her Vendor's Conveyance was not tendered in evidence and/or that her evidence in that respect is inadmissible is immaterial. Hence, from the decision in Mrs. Aigbe v. Edokpolo (supra), it is immaterial whether the grantee who obtained the Oba's approval alienates his estate or interest in favour of another person by means of a formal conveyance or not. What matters is that he has sold his estate or interest and legally put the other person in possession of the land and there is no dispute between him and that other person.**

Thus, the learned trial judge found as a fact that:

*"The said Immaculate Imafidon Osamwony is DW.I. He confirmed that he sold the plot measuring 100 * 200 to the Defendant and their Exhibit "K" was his Oba's approval which he passed to her".*

Ogebe, J.C.A who concurred with the leading judgment of the court below in the case herein, further observed that:

"From the evidence led before the trial court, it was clear that the Appellant bought the land from the wrong man P.W.5 (Felix A. Irabor) who had title to pass, while the Respondent was put in possession by the rightful owner of the disputed land - D.W.I (Immaculate I. Osanwonyi). It was the duty of the Appellant to prove his case on the strength of his own case and not on the weakness of the Respondent's case".

As Iguh, J.S.C. clearly stated this principle in Nwankpu v. Ewulu (1995) 7 NWLR (part 407) 269 at page 288 paragraphs E-F:

"It has been settled law for many years now that in a suit for declaration of title, the onus of proof lies on the plaintiff and he must succeed on the strength of his own case and not on the weakness of the Defendant's case His success must not be because the defence has offered weak evidence".

See also Edosomwan v. Ogbeyfun (1996) 4 NWLR (part 442) 266 at page 278 E - H; and 282 F- H and Woluchem & Ors. (1981) 5 SC. 291 at 294.

As the Respondent's Vendor has been demonstrated on the totality of evidence adduced before the two courts below to be vested with the legal estate in respect of the land in dispute on 12th April, 1962; in other words that she had a better title against the whole world including the appellant, the law is settled that it is immaterial that she did not tender any conveyance between her and DW.I. Indeed, it is of no moment since the indefeasible title of DW.I through whom she claims is valid, subsisting and first in time to Appellant's approval - Exhibit "K". For as Ejiwunmi, J. C. A. stated in Udo v. William (1997) 1 NWLR (part 483) 548 at 562, E:

"Any form of possession is sufficient to maintain an action for trespass against a wrong doer as long as it is clear and exclusive. It is not necessary in order to maintain trespass that the plaintiff's possession should be lawful; and actual possession is good against all except those who can show a better right to possession in themselves. (See Halsbury's Laws of England, 3rd Edition, Vol.38 at page 743, paragraph 1213".

legal title to the land in dispute was found to be defective as in the instant appeal, when he held:

"But the law is that, barring fraud which was neither alleged nor proved in this case, the person in possession (it does not matter how he got his possession) can maintain an action for trespass against everyone except the true owner. The plaintiff/respondent having lost on the issue of title has nothing to meet and defeat the defendant/appellant's claim for damages for trespass".

In sum, I am of the firm view that it is trite law/that in order to discharge the onus of proof in this case, it became incumbent that the Appellant must establish not merely an alleged purchase of the land in dispute from PW.5, but also priority of his said purchase to that of D W.1 through whom the Respondent claimed. The fact that the Respondent did not tender any conveyance between her and DW.I or that the Respondent's evidence in that regard was inadmissible, would not and did not confer priority on the Appellant's Vendor - PW.5. The Law insists that he must prove his case on the strength of his own case and not on the weakness of the defence. See Bakare Elufisoye v. Samuel Alabetutu (1968) NMLR 298 at page 302 per Coker, JSC; Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 at 337 (per Webber, C.J.) and Imah v. Okogbe (1993) 9 NWLR Part 316) 159.

In the result, I answer this issue (Issue III) in the positive and dismiss the Appellant's appeal with N10,000.00 costs to the Respondent.

WALI JSC

I have had the privilege of reading in advance a copy of the lead judgment of my learned brother Onu JSC, and I agree that the appeal lacks merit and should be dismissed.

For the same reasons advanced in the lead judgment, I also hereby dismiss the appeal with N10,000 costs to the respondent.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother

Onu, J.S.C. I agree with his reasoning and conclusions.

It is now history that before the promulgation of the Land Use Decree, 1978 legal title to land in Benin was vested in the Oba of Benin who was the trustee of the land for the Bini people. The Oba's approval of a grant of land to any Bini individual was a valid transfer of the land in question to the individual. In this case there are two such approvals for two different people. Exhibit "D" is the Oba's approval for the plaintiff's vendor. It is dated 1st November 1962. Exhibit "K" is another Oba's approval for the Defendant's vendor. This is dated 12th April 1962. It is clear therefore that

Oba's approval in Exhibit K, preceded his approval in Exhibit D. In other words, the Plaintiff's vendor got his approval from the Oba about seven months after the Defendant's vendor had obtained his approval from the same Oba. I have no doubt in my mind therefore, that the lower courts rightly rejected the Plaintiff's claim to the land in dispute since the Plaintiff's vendor had no title to the land in dispute which he could have transferred or sold to the Plaintiff or any other person for that matter (see for example FINNIH VS IMADE (1992) 1 N.W.L.R. (PT.219) 571.

The appeal therefore fails and it is hereby dismissed. The judgment of lower courts are hereby affirmed. I award costs of N10,000 to the Defendant.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Onu, JSC. And I agree that appeal lacks substance and ought to be dismissed.

There is concurrent finding of fact by both courts below that the parties are disputing over one and the same piece or parcel of land. The respective roots of title relied on by the parties are Exhibits D and K. D is the Oba's approval in favour of the appellant's vendor's while Exhibit K relates to a similar approval by the oba in favour of the person from whom the respondent claimed to have obtained a grant of the land.

Exhibit D was approved by the Oba on the 1st November, 1962.

Exhibit K, on the other hand, was approved by the same Oba on the 12th April, 1962. It is therefore clear that the approval of the Oba with regard to the land in dispute, Exhibit K, preceded his approval in respect of Exhibit D. Accordingly, D.W. I who claimed to be the respondent's vendor obtained an earlier approval of his grant than P. W. 5 who was the appellant's vendor in respect of the same land.

All the above findings were made by the trial court and affirmed by the Court of Appeal. It is settled principle of law that this court does not interfere with the concurrent findings of fact of both courts below except where they are found to be perverse or not supported by the evidence or where they were reached as a result of a wrong approach to the evidence or a wrong application of a principle of substantive law or procedure. See Enang v. Adu (1981) 11- 12 S.C. 25 at 42, Nwadike v. Ibekwe (1987) 4.N.W.L.R. (Part 67) 718, Igwego v.Ezengo (1992) 6 N. W. L.R. (Part 240) 561 at 576. Both courts below having found in favour of the respondent as to her priority of interest and/or estate in respect of the land in dispute as against the appellant, this court can find no reason to interfere with the same. On this ground, alone, the appellant's claim for title to the land in dispute must fail pursuant to the time honoured maxim that where the equities are equal, the first in time prevails. See Ugbo v. Aburime (1994) 8 N.W.L.R. (Part 360) 1, Vincent Bello v. Magnus Emeka (1981) 1 S.C. 101 at 120 and Finnih v. J.O. Imade (1992) 1 N.W.L.R. 511, (1992) 1 S.C. N.J. 87. Indeed in the Finnih Case, this court had cause to pronounce thus:-

"Under Benin Customary law, where there is a grant of the same land to two people, the earlier grant is superior to and better than the latter one"

In the present case the applications for the Oba's approval in respect of the plot of land by the appellant and the respondent were channelled through the same ward and Plot Allocation Committee. The equities here are clearly equal and the first in time, that is to say, the approval in favour of the respondent's vendor must prevail.

Elaborating on this aspect of the case, the Court of Appeal explained the position in very clear terms as follows:-

"The oral evidence given by D.W.I or the respondent about the transfer of the land to her is caught by section 132(1) of the Evidence Act and therefore inadmissible. When that portion of the evidence is expunged from the proceeding there will be no evidence left about any transfer of the land in dispute to the respondent. Exhibit K on which the respondent founds her title stops with D.W.I, Immaculate Imafidon Osamwonyi the purported grantor or transferor to the respondent. Thus, the position is that while the title of P.W.5 Felix Aiyanyor Irabor who is the predecessor - in - title of the appellant is inferior to that of D.W.I in that P.W.5 obtained his approval from the Oba after D.W.I has obtained his own, yet P.W.5's title is superior to whatever interest the respondent claims in the land because she has no title at all to the land in view of the fact that there is no admissible evidence to support the alleged transfer to her. This is unfortunate for the respondent but that is the law".

It concluded:-

The position in this appeal is therefore as follows :- At the time the purported grant was made by the Oba to P.W.5, a grant had already been made to D.W.I, P.W.5 therefore got nothing. Consequently , P.W.5 could not transfer anything to the appellant. The appellant had neither title nor legal possession. If the appellant was on the land he was there as a trespasser. His appeal against the judgment of the lower court for declaration, damages for trespass and injunction fails and is hereby dismissed.

This dismissal does not confer any title to the land in dispute on the respondent. She has no such title. The title to the land still resides in D.W.I. There is no legally admissible evidence that D.W.I has divested himself of his title."

I think the above observations are well founded and I must, with respect, fully endorse them. The maxim is nemo dat quod non habet. The appellant's vendor, P.W.5, not having acquired any title or interest whatsoever in respect of the land in dispute had nothing to convey to the appellant.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Onu, J.S.C. that i too, dismiss this

appeal. I abide by the order as to costs therein made.

KATSINA - ALU JSC

B I have had the advantage of reading in draft the judgment of my learned brother Onu, JSC in this appeal. I agree with it. The trial Court and the Court of Appeal have found as a fact the land to which the Oba of Benin gave approval on 1st November, 1962 - Exhibit 'D' and that approved by the Oba on 12th April, 1962 Exhibit 'K' are one and the same
C parcel of land. In its judgment the Court of Appeal held that:

"The Appellant tendered Exhibit "A" as the Plan of the land in dispute; while the Respondent tendered Exhibit "L" as her Plan of the land in dispute. After a careful comparison of both Exhibits, I am satisfied that the area verged pink in Exhibit "A" is the same as the area verged pink in Exhibit "L". The land being claimed by the Appellant is therefore the same as the land which the Respondent also claimed"..

From this finding, the Appellant's claim for title to the land in dispute was bound to fail. Let me explain. Under Bini Customary law where there is a grant of the same land to two people the earlier grant is superior to the latter one. In other words where the equities are equal, the first in time prevails: See Bello v. Eweka (1981) 1 SC 101 at 120;
F Finnih v. Imade (1992) 1 SCNJ 87.

In the present case, the Respondent is the prior purchaser. This means that the Appellant cannot have the declaration sought. His claim must therefore fail.

G For this reason and the fuller reasons given by my learned brother, Onu, JSC I, too, would dismiss this appeal with N10,000.00 costs to the Respondent.

H