

SUPREME COURT OF NIGERIA
19TH JANUARY, 2001. SC. 20/1991
CORAM:- A. G. KARIBI - WHYTE, M. E. OGUNDARE,
S. U. ONU, O. ACHIKE, A. O. EJIWUNMI, JJS

BETWEEN:

ELOM ONWE OKE & 5 ORS APPELLANTS
(For themselves and on behalf of
Umuezeaka Village Mgbo, Ishielu Division)

AND

EZE NWAOGBUINYA & 13 ORS RESPONDENTS
(For themselves and representing
the people of Amechi Village
Ezzamgbo, Ishielu Division)

***APPEALS** - Evidence - Wrongful admission or expulsion of evidence -
Is not an interlocutory decision - And need not be brought under the
provision of s.25 (2) (a) Court of Appeal Act 1976.*

***APPEALS** - Leave - Interlocutory order or ruling - Appeal thereon -
Must be brought within the time stipulated by s.25 (2) (a) Court of Ap-
peal Act - Or else leave of court should be obtained.*

***APPEALS** - Issues - Consideration of - Failure to consider vital issues
set out for determination - Amounts to breach of right to fair hearing.*

***APPEALS** - Issues - Resolution of - Failure of Court of Appeal to
resolve relevant issues - Supreme Court will not deliberate upon them -
But remit the appeal back to that Court.*

FACTS

The Appellants as representing the Umuezeaka Mgbo Commu-
nity had been sued in a suit AB/8/66 for declaration of title, damages for
trespass and Injunction in respect of a piece of land called Azu Agu. The

Appellants had also in a separate suit AB/28/72 sued the Respondents representing the Amechi Ezzamgbo Community claiming declaration of title, damages for trespass and an injunction to the same piece of land which they called Agu Azu Uwoga. The two suits were subsequently consolidated and the Appellants were the defendants in the consolidated suit. In their statement of claim the Respondents/plaintiffs claimed a specific boundary between them and the Appellants/defendants and that the land had been owned and possessed by their ancestors from time immemorial. The Appellants/defendants on their own claimed a different root of title and a different boundary tendering in evidence two Native Court judgments as creating estoppel against the interest of the plaintiff. After due consideration of the evidence, the trial judge upheld the plaintiff's claim and gave judgment for the plaintiff. The defendant therefore appealed to the Court of Appeal who dismissed the appeal. The Appellant have therefore appealed to the Supreme Court raising several issues.

ISSUES FOR DETERMINATION

1 Whether the Court of Appeal was right in not considering the appellant's Brief of Argument properly filed.

2. Whether the defendants/appellants can raise the issue of the rejection in evidence of the plans marked "Identification E" and "Rejected I" when no appeal was made against the interlocutory rulings by the trial court against the admissibility of the said plans in evidence, and when no leave was obtained to raise the said issue.

HELD (Unanimously allowing the appeal in part per lead judgment of **EJIWUNMI JSC**)

Leave - Interlocutory order or ruling

1. In my humble view therefore, it may be said, that ordinarily, where an appellant failed to appeal against an interlocutory order or ruling of a trial Court within the time prescribed by S. 25(2)(a) of the Court of Appeal Act 1976, he must obtain the leave of court for his appeal to be competent. (p. 181 E)

Wrongful admission or expulsion of evidence

2. Where on the other hand, the complaint of the appellant against the ruling is concerned with the wrongful admission of evidence or wrongful rejection of evidence, such an appellant would not require the leave of court as the ruling appealed against is not regarded as interlocutory decision. The appellant may therefore include the ground of appeal against that ruling of the trial Court when appealing against the final judgment of the trial Court.

In the instant case it is manifest that the complaint of the appellants in ground F of their amended grounds of appeal is that the learned trial judge wrongly excluded their pieces of evidence, namely plans No. IN/12 and CC. 14/51, by his rulings in the course of the trial. Now having regard to what I have said above, ground (F) is a competent ground of appeal. The preliminary objection of the respondents to the said ground is hereby over ruled as I had earlier said when the appeal was heard. (p. 181 F)

Issues - Consideration of

3. It is patent that the Court below failed or neglected to consider the case set out for the appellants in their brief of argument. It is clearly the duty of an appellate court to consider the issues set out for determination by the parties before the Court. It is an inescapable duty, and more so where as in this case all the issues required to determine the merit of the case for the appellants had been carefully set down in their brief. I have before now said that one of the issues which required the determination of the court below related to *res judicata*. This was never considered in any shape or form by the Court below. It cannot, therefore, be right for the respondents to argue that the only complaint of the appellants in the Court below bordered "on evaluation of evidence by the trial judge".

It is therefore, in my view, manifest that the appellants cannot be said to have had a fair hearing before the Court below. (p. 186 B)

Issues - Resolution of

4. In the instant case, there is no doubt that the complaint of the appel-

lants is meritorious. There is no doubt that the issues placed by appellants before the Court below were not considered, particularly with regard to the determination of estoppel or res judicata. Without the resolution of the issues raised before the Court below, this Court cannot deliberate upon them. For that reason this appeal will be remitted to the Court below for the appeal to be reheard by a different panel of that Court.
(p. 187 A)

REPRESENTATION

B.A. Fashanu for the Appellants

Chief O. Ugolo for the Respondents

CASES REFERRED TO

- D Odigie v Obiyan (1997) 10 NWLR (Pt. 524) pg 179 at 195 F-G
Tijani v Akinwunmi (1990) 1 NWLR (Pt. 125) pg 237 at 250 (G-H)
Okobia v Ajanya (1998) 6 NWLR (Pt. 554) p.348 at p.360 E-F
Onifade v Olayiwola (1990) 7 NWLR (Pt. 161) 130
E Ogigie v Obiyan (1997) 10 NWLR (Pt. 524) 179 at 195
Ajani v Giwa (1984) 3 NWLR (Pt. 32) 796
Ukpai v Okolo (1983) 2 SCNLR 380
Nwokoro v Onuma (1990) 3 NWLR (Pt. 136) 22

F

STATUTES REFERRED TO

Court of Appeal Act 1976 - s. 25 (2) (a)

Evidence Act - s.227

G

LEAD JUDGMENT BY EJIWUNMI JSC

This appeal lies from the judgment of the Court below in suit No. FCA/E/229/83. In that court the appellants had appealed against the judgment in suit No. AB/28/72. They remained as plaintiffs in the consolidated suit.

The defendants in suit No. AB/8/66 were the plaintiffs in suit No. AB/28/72, and they became the defendants when the two suits were

consolidated.

In order to appreciate the nature of the action before trial court, it is necessary to refer to the claims of the parties. In suit NO. AB/8/66, the reliefs sought are for

(a) declaration of title to the land called Azu Agu at Amechi Ezzamgbo; B

(b) Damages of #200 [pounds] (N400) for trespass;

(c) Perpetual injunction

In suit No. AB/28/72, the reliefs sought are also:-

(a) Declaration of title to the plaintiffs piece and parcel of land called "AGU AZU UWOGA" situated at Umuezeaka village, Ngbo Ishielu Division Abakaliki and of annual value of #10 and as show in plan No. ABC/10/72. C

(b) #100 (One hundred pounds) or (N200 general damages for the defendants jointly and severally entered the said land in dispute, cultivated in it and built huts on it. D

(c) Perpetual injunction to restrain the defendants, their servants and/or agents from further trespassing into the said AGU AZU UWOGA. E

With the consolidation of the two suits, the respective pleadings in the Statement of Claim of the plaintiffs in suit No. AB/8/66, and that of the defendants as plaintiffs in suit NO. AB/27/72 were relied upon for the determination of the issues as joined in the said pleadings. However the case of each party as could be gathered from their pleadings and the evidence on record deserve to be stated briefly. It would appear that the plaintiff's case is that the Ogwurube Stream forms the ancient and natural boundary between the plaintiffs and the defendants. It is also their case that not only does the Ogwurube Stream form their boundary with the defendants, it also is the boundary of all Ezzamgbo (which clan the plaintiffs belong) and Mgbo (the clan to which the defendants belong). With regard to the land dispute, it is the contention of the plaintiffs that the land has always been owned and possessed by their ancestors from time immemorial. Although they did not allege with particularity how their ancestors became F G H

seised of the land, they contend, however, that they referred to numerous acts of possession over the land. These included the building for their occupation, farming, cutting of timber trees, and installing of juju shrines thereon.

B The defendants on the other hand are claiming that the land in dispute used to be inhabited by four different clans, namely Odifu, Umauma, Ulai and Otobola. According to them the four clans installed juju on the land which they worshipped together but that during intervillage wars the defendant's ancestors drove away the said four clans took and worshipped the juju left on the land, and also installed their own. C They also claimed that the land was their share of the land which was founded by their ancestor. That, then, was how they came to acquire the land in dispute. In that regard it is their contention that the Ogwurube D Stream is not the natural boundary between them and the plaintiffs. They further contended that the boundary between them lies south of the Ogwurube Stream and is marked by a line of Akparata and other trees and at a place the Iyi Achi and Uwoga streams and a footpath. In support also of their claim to the disputed land, the defendants pleaded two E Native Court judgments suit No. 26/47, and suit No. 13/51, and gave oral evidence thereon.

F It is therefore contended for the defendants that an estoppel was thereby created against the interest of the plaintiffs with respect to their claim to the disputed land.

G With regard to the disputed land, it would appear from the plans admitted as exhibits, the pleadings of the parties and the oral evidence given at the trial, that there is no dispute about its identity. It is also well known to the parties. It seems clear that the question arising from the pleadings and the evidence on record is which of the two boundary lines is the actual boundary between the parties. After due consideration of the evidence presented before the trial court, followed by addresses of H their learned counsel, the learned trial judge in a reserved judgment upheld the claim of the plaintiffs to the disputed land. As the defendants were dissatisfied with the judgment of the trial Court, they appealed to the Court of Appeal. In that court, defendants also lost and have now

appealed to this court. They shall from henceforth be referred to as the appellants, while the plaintiffs would be referred to as the respondents.

Pursuant to this appeal the appellants filed with leave, an amended notice of appeal, in which was incorporated eight grounds of appeal. They read, without their particulars, thus:-

"(A) *The learned Justices of the Court of Appeal erred in law holding that.....in the appellants brief of argument, the issues for determination were not set out. The grounds of appeal and argument in support are like expending a lot of efforts to achieve little or no result. The grounds of appeal without the particulars amount to nothing other than the manner in which the judge treated the evidence before him.....*

(B) *The Court of Appeal erred in law in not considering at all or properly the appellant's brief of argument.*

(C) *The Court of Appeal misdirected itself in law by confirming the decision of the trial Court awarding to the plaintiffs/respondents title, damages for trespass and injunction in respect of the land in dispute called "Azu-Agu" (Azu-Agu Uwoga) when there was no legal basis for making the award and this has occasioned a miscarriage of justice.*

(D) *The learned Justices of the Court of Appeal misdirected themselves in law and in fact in confirming the declaration (SIC) title of "Azu-Agu" (Azu-Agu Uwoga) land to the plaintiffs/respondents when it was clear from the evidence that the boundaries of the "Azu-Agu" (Azu-Agu Uwoga) land were not proved by the plaintiffs/respondents.*

(E) *The Court of Appeal erred in law and in fact when it failed to consider the legal of exhibits 'D' and 'F' on the findings of the learned trial judge in the case and this failure has occasioned a miscarriage of justice.*

(F) *The Court of Appeal was wrong in failing to direct its mind to the ruling of the trial Court in the case in which the learned trial judge wrongfully excluded plains No. IN/12 and CC. 14/51, both rejected and marked as "identification E" and "rejected I" respectively which rejection has occasioned a miscarriage of justice.*

(G) *The learned Justices of the Court of Appeal erred in law and in fact in their entire findings of the U.P.E. School issue, prefaced thus: "the question of siting of the U.P.E. School is non-sequitur", thereby failing to give adequate consideration to the siting of the U.P.E. School and its legal effect on the defendants/appellants claim.*

(H) *The judgment is against the weight of evidence."*

In the Brief of Argument filed for the appellants, the following are the issues identified for the determination of the appeal:-

C "(1) Whether the Court of Appeal was right in not considering the appellant's Brief of Argument properly filed.

(2) Whether if exhibits "D" and "F" were considered by the Court of Appeal they would not have agreed that the land the subject matter of this suit has been litigated upon by the same parties.

D (3) Whether under the evidence law "identification E" and "rejected I" are not admissible in law.

(4) The legal effect of the siting of the U.P.E. School on the defendants/appellant's claim.

E The respondents also had filed for them, the respondent's Brief of Argument. Although the issues raised therein are somewhat similar, they would however be set down. This is partly because their issue (1) set the stage for the objection of the respondents to certain of the grounds of appeal of the appellants and the issues raised thereon. Though the issues would be set down, yet it must be pointed out that the setting down of issues should not be a veiled attempt to advance or indicate the arguments that would be relied upon to oppose the issues raised for the determination of appellant's appeal. See Order 6 Rule 5(b), Supreme Court Rules (1985) as amended.

G Be that as it may, the issues raised in the respondent's brief, read thus:-

H "1. Whether the defendants/appellants can raise the issue of the rejection in evidence of the plans marked "Identification E" and "Rejected I" when no appeal was made against the interlocutory rulings by the trial court against the admissibility of the said plans in evidence, and when no leave was obtained to raise the said issue.

2. Whether the complaint that the court did not consider the appellant's "Brief of argument properly filed" is justified.

3. Whether the complaint that the land in dispute had been the subject matter of litigations in the past by the same matters is justified.

4. Whether the Court of Appeal was wrong in its determination of the evidence on the sitting of the U.P.E School said to be the land in dispute.

5. Whether the judgments of the Court of Appeal and the trial court are perverse so as to warrant the setting aside of the two concurrent decisions".

At the hearing of the appeal learned counsel for the parties, adopted and placed reliance of the Briefs of Argument filed respectively for the appellants and respondents.

It was Chief O. Ugolo, learned counsel for the respondents who began by referring to the preliminary objection raised and argued in the respondent's brief. After hearing learned counsel for the parties I overruled the objection. I now give my reasons for overruling the objection of learned counsel for the respondents.

Chief O. Ugolo, learned counsel for the respondents began his submission by stating that the appellants are appealing against two rulings of the trial court delivered on the 13th June, 1974 and 17th July, 1974 respectively. And further submitted that by these two rulings, that trial court refused to accept as exhibits the two plans tendered by the appellants as part of their case. As a result the court marked the first plan tendered, as "*Identification E*" in its ruling of 13/6/74, and in the ruling of 17th July, 1974, the second plan was marked, "*rejected I*".

Learned counsel for the respondents, then, argued that as the rulings were interlocutory orders of the trial court, the appellants ought to have appealed against them within 14 days of the day the court made the orders. Having failed to appeal against the orders. Having failed to appeal against the orders within that period, the ground of appeal now filed against the orders are incompetent. It would, have been competent he further submitted, had the appellants sought the leave of this court or the Court below, to appeal out of time. The learned counsel for the

appellant therefore urged that the ground (F) of the appellant's ground of appeal be struck out being incompetent. In support of his submission, he cited the following cases:- Ogigie v. Obiyan (1997) 10 NWLR (Pt. 524) 179 at 195; Tijani v. Akinwunmi (1990) 1 NWLR (Pt. 125) 237 at page 250-251 and Ajani v. Giwa (1984) 3 NWLR (pt.32) 796.

Replying, B.A.M. Fashanu Esq., learned counsel for the appellants, submitted that the preliminary objection was not well founded. He then argued that it is the current practice that where interlocutory decisions have been made on issues that form part of the case leading to final judgment, a complaint against such interlocutory decisions could be made when appealing against final judgment in respect of the case. For this proposition he referred to Okobia v. Ajanya (1998) 6 NWLR (pt.554) 348 at 360. Further more, learned counsel for the appellants invited the Court to note that the respondents did not raise the complaint now raised in their preliminary objection in the Court below. In this regard, he referred to ground 5 of the amended and or additional grounds of appeal, filed by the appellants against the judgment of the trial Court pursuant to their appeal to the Court below. The Court below, he submitted touched upon this ground in the course of its judgement.

In response to the contention of learned counsel for the respondents that no issue was raised in respect of the said ground 5 in the appellant's brief, learned counsel for the appellant's submitted that issue I in their brief arose from that ground. It is the further submission that the ground of appeal (F) in the amended grounds of appeal to this Court should be regarded as rooted in wrongful rejection of evidence. He therefore urged that the Court should so hold, and that the preliminary objection be over ruled.

It now remains for me to consider and contrast the authorities relied upon by learned counsel in support of the position that each of them took in this matter. One of the authorities relied upon by learned counsel for the respondent's is Ogigie v. Obiyan (1997) 10 NWLR (pt. 524) 179. In that case, the question that arose for the determination of this Court was whether the appellants could properly appeal against the interlocutory ruling of the trial court with the grounds of appeal filed

against the final judgment of the trial Court. In the lead judgment delivered by Uwais JSC (as he then was), this question was considered and determined at page 199, thus:-

"Now, no reference was made throughout the judgment of the trial judge to the issue of applicability of Land Use Act or Bendel State Legal Notice No. 22 of 1978. Such references were made only in the ruling delivered on the 31st May, 1984. Can the appellants, therefore, raise such interlocutory issue in the appeal against the judgment?. I respectfully think not. Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. By section 25 subsection (2) (a) of the Court of Appeal Act, 1976, the period prescribed for appealing against an interlocutory decision is 14 days, while the time prescribed for appealing against a final decision is three months.

In order to marry the two appeals together one has to obtain leave to appeal out of time against the interlocutory ruling of the learned trial judge, which contains the point about the applicability of the Land Use Act and Legal Notice No. 22 of 1978 as to whether the land in dispute is situated in an urban area or rural area so as to determine the trial Judge's jurisdiction, is incompetent".

It is clear from the passage from the judgment of this Court, in Ogigie v. Obiyan (supra) per Uwais JSC, that by section 25 (2) (a) of the Court of Appeal Act 1976, the period prescribed for appealing against a final decision is three months. It therefore follows that where an appellant has failed to appeal within the period of time so stimulated, he must, to have a competent appeal, obtain leave to appeal out of time against the interlocutory ruling. Having said that, it must also be noted that in that passage it was also observed that an appeal against an interlocutory ruling may be included in the appeal against the final decision of the Court. This would, it was further noted help to avoid unnecessary delay in the determination of the main issue joined by the parties in the case under consideration. An appellant wishing to adopt that procedure would how-

ever need to obtain the leave of court.

I would now consider Onehi Okobia v. Mamodu Ajanya and Anor (1998) 6 NWLR (pt. 554) 348, referred to us by the learned counsel for the appellants to support his contention that, leave of the Court is not required to appeal against an interlocutory decision when appealing against the final judgment of the Court.

In that case, the 1st and 2nd respondents appealed against the decision of the trial Court to the Court of Appeal. During the pendency of the appeal at the Court of Appeal which challenged the ruling of the trial Court in the course of the trial rejecting exhibits G and M in evidence. The appellant appealed to this Court against the decision of the Court of Appeal. Some of his grounds of appeal complained that the Court of Appeal was wrong to have entertained the additional grounds of appeal filed by the respondents before it in that the grounds of appeal were incompetent. The appellant also contended that as the ruling of the trial judge on the admissibility of exhibits G and M were made in the course of trial, the respondents required extension of time to appeal against them.

In the determination of this issue raised by the appellant in Court, Mohammed JSC, who prepared the leading judgment, reviewed some of the decisions of this Court that are germane to the question under consideration. These included Ogigie v. Obiyan (supra) and Owena Bank (Nigeria) Plc. v. N.S.E. Ltd. (1977) 8 NWLR (Pt. 515). And as the ruling which was under consideration in the appeal was concerned with the wrongful rejection of evidence, viz exhibits G and M, my noble and learned brother, Mohammed JSC, after referring to the provisions of section 227 of the Evidence Act, which reads:-

"(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the Court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

(2) The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to

the Court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same.

(3) *In this section the term "decision" includes a judgment, order, finding or verdict".*

Then held, inter alia, thus:-

"A decision made by the trial Court on wrongful admission of evidence or wrongful rejection of evidence is part of the main trial and not an interlocutory decision unless a special case has been made in respect of the issue. Thus a party wishing to appeal against the judgment of the trial Court can file one of the grounds of appeal alleging that inadmissible evidence had been admitted during trial or admissible evidence had been rejected. Both are fundamental as the error might occasion a miscarriage of justice".

I am in entire agreement with the above statement of my learned brother, Mohammed JSC. It is however desirable to note that the dictum of Uwais JSC in Ogigie v. Obiyan quoted above on the requirement of leave in respect of an interlocutory ruling of a trial Court where the appellant had failed to file his appeal against that pleading within the time stipulated by section 25 subsection (2)(a) of the Court of Appeal act 1976, is no less valid in its own context. **In my humble view therefore, it may be said, that ordinarily, where an appellant failed to appeal against an interlocutory order or ruling of a trial Court within the time prescribed by S. 25(2)(a) of the Court of Appeal Act 1976, he must obtain the leave of court for his appeal to be competent. Where on the other hand, the complaint of the appellant against the ruling is concerned with the wrongful admission of evidence or wrongful rejection of evidence, such an appellant would not require the leave of court as the ruling appealed against is not regarded as interlocutory decision. The appellant may therefore include the ground of appeal against that ruling of the trial Court when appealing against the final judgment of the trial Court.**

In the instant case it is manifest that the complaint of the appellants in ground F of their amended grounds of appeal is that the learned trial judge wrongly excluded their pieces of evidence,

namely plans No. IN/12 and CC. 14/51, by his rulings in the course of the trial. Now having regard to what I have said above, ground (F) is a competent ground of appeal. The preliminary objection of the respondents to the said ground is hereby over ruled as I had earlier said when the appeal was heard.

Now, with the conclusion reached on ground (F), the question then is whether the appeal ought to be allowed.

Before deciding that question it is necessary to refer to the argument proffered by counsel in their respective briefs. The pertinent point that must first be made is that in ground (F) of the grounds of appeal the plans which were rejected were marked "Identification E" plan No. IN/12 "Rejected 1" plan NO. CC. 14/51. It is therefore argued for the appellants that if "Identification E" had been allowed to go in as exhibit in support of exhibit D, the case of the appellants would have been further strengthened in establishing their claim that the land in dispute had been litigated upon between the two parties. And that the said litigation resulted in favour of the appellants. It is also argued for the appellants that the trial Court was plainly wrong in rejecting plan CC. 14/51, which was marked "Rejected I". In the view of learned counsel for the appellants a proper nexus had been laid "between exhibit F" and the Plan marked "Rejected 1". It would appear from the respondent's brief that having raised the preliminary objection to ground F of the grounds of appeal of the appellants, no further argument was advanced on the matter.

The appellants have also complained in their brief that the Court below did not in its judgment consider the grounds of appeal filed against the judgment of the trial, and the issues raised thereon in the appellant's brief. It is also their contention that the appellant's brief was also not considered by the Court below in its determination of the appeal.

In the brief of the respondent, it is conceded that the Court below did state that the appellants did not set out the issues for determination. But, it is further argued for the respondents by their learned counsel that the Court below duly considered all the issues raised in the appeal in the judgment of the Court. The merit of the contention of the learned counsel for the appellants also lies in the fact that they had in their plead-

ings pleaded these plans and had also raised the defence of *res judicata* in respect of the disputed land. I, therefore, would refer to the appellant's Statement of Claim (as amended) in suit No. AB/28/72, where as plaintiffs (defendants in the consolidated suit) they pleaded in its paragraphs 18 and 19, thus:-

"(18) *The Southern boundary of the said land in dispute was clearly demarcated. At the time of the said action, suit No. 26/47, the portion of land now in dispute was not claimed by the defendants or any other person. The plaintiffs will at the trial found (sic) their case on the judgment in the said case No. 26/4 and the plan No. IN/12 used in the said case which plan was prepared by the Native Authority surveyor Mr. Inyang and which plan showed that the land now in dispute is plaintiff's land.*

(19) *Sometime about 1950 the defendants were again let unto eastern portion of the plaintiff's land by Ugbongha Ishieke People led by Chief Nwiboko Obodo. The plaintiffs were again forced to take out an action for a declaration of title against Ishieke people and people from defendant's village. The suit was No. 13/15 at Ngbo Native Court. The plan used was No. CC. 14/51. The plaintiffs got judgment against the defendants and all their subsequent appeals were dismissed. The plaintiffs will at the trial found their case on the said judgment and plan. This plan used in the said judgment is charted in plan No. ABC/10/72. The parties in that case were Alike Oduma and 4 Ors. v. Egbe Eji of Amechi and 23 Ors".*

The thrust of the argument advanced by their learned counsel in their brief, and before us is that the Court below misdirected itself in its determination of the appeal. It is also contended for them that the Court below failed and or neglected to consider on its judgment their grounds of appeal against the judgment of the trial Court, the issues raised thereon and the arguments proffered in support in the appellant brief.

In support of that contention, reference was made to the following passage in the lead judgment of Uwaifo JCA, (as he then was). It reads:-

"The defendants have appealed against that judgment. In the

appellant's brief of argument, the issues for determination were not set out. The grounds of appeal and argument in support are like expending a lot of efforts to achieve little or no result. The grounds of appeal without the particulars amount to nothing other than the manner in which the judge treated the evidence before him.

I must say that it is indeed difficult to understand the assertion made in the above passage that no issues were raised in the appellant's brief as the appellants duly set them down in their brief. See pages 254-255 of the record.

The learned Justice of the Court of Appeal, after setting down the appellants 5 grounds of appeal without their particulars then made the scathing remarks about them thus:-

"It is hardly necessary to seriously scrutinize the grounds of appeal but I cannot help saying, with due respect, that they are amateurish. They relate mainly to the evidence with, perhaps, the fifth ground being the only possible exception. But even then that fifth ground is worthless and also fails to realize that there was no question of shifting burden of proof as long as the land in dispute was concerned since the judge was dealing with a consolidated action. Each party had a duty to prove its case. The defendants in the consolidated action must not erroneously be regarded as mere defendants, as counsel for the appellants seems to have done.

All that can be seen to be the real contention as revealed in the conclusion made in the brief borders on evaluation of evidence by the trial judge. The following issues are raised for setting the judgment aside: that there was no evaluation of the traditional history or acts of possession, that on balance the case put forward by the appellants is better than that of the respondents; that no proper evaluation of exhibit D was done (i.e. the decision of the District Officer in 1947; wrong evaluation of the evidence as to the siting of the U.P.E. School on the land in dispute; wrongful rejection of a certain plan; drawing wrong inference in favour of the respondents".

After this remark, the learned Justice then endorsed the trial Judge for writing a well considered judgment. It is manifest from the printed

record that no further reference was made to the appellant's arguments in their brief. Hence their complaint in their issue (1). It is therefore, contended for them that by the failure of the Court below to consider their brief and the arguments proffered therein, they were denied fair hearing by the Court of Appeal. In support of that contention, reference B was made to Onifade v. Olayiwola (1990) 7 NWLR (Pt.161) 130.

In their brief, the respondents replied thus:-

"It might be correct to say that the Court of Appeal's judgment contained the statement that in the appellant's brief of argument the issue C for determination were not set out'. But that does not mean that the Court of Appeal had not considered the Appellant's Brief. The Appellants, it must be truly stated, did not set out issues for determination in their Brief. All that they had done was to set out at pgs. 254-5 of the records what they said were questions for determination'. Even though' D questions for determination' might have the same effect and meaning as issue for determination, it has always been the issues for determination that, by the rules, should be set out in the Brief. If therefore, the appellants had chosen not to use the more conventional language of Brief E writing by using questions for determination in place of issues for determination they ought not to complain that the Appellate Court had said that the issues for determination were not set out in the Brief".

With due respect that argument advanced for the respondents F cannot be regarded as anything but simplistic. It must however be noted for chief Ugolo learned counsel for the respondents conceded during the oral hearing of the appeal that the appellants formulated issues for determination. But learned counsel however, submitted that the error of the court below did not occasion miscarriage of justice as that Court considered all the issues raised before it. In support of that contention, the respondents referred to pages 295-296 of the printed record, wherein G Uwaifo JCA, said:-

"The following issues are raised for setting the judgment aside; H that there was no evaluation of the traditional history or acts of possession, that on balance the case put forward by the appellants is better than that of the respondents; that no proper evaluation of the exhibit D was

done (i.e. the decision of the District Officer in 1947; wrong evaluation of the evidence as to the siting of the U.P.E. School on the land in dispute; wrongful rejection of a certain plan; drawing wrong inference in favour of the respondents"

B After a careful consideration of the argument of learned counsel for the appellants and the response of learned counsel for the respondents, I am quite satisfied that the argument of learned counsel for the appellant has merit. **It is patent that the Court below failed or neglected to consider the case set out for the appellants in their brief**
C **of argument. It is clearly the duty of an appellate court to consider the issues set out for determination by the parties before the Court. It is an inescapable duty, and more so where as in this case all the issues required to determine the merit of the case for the appel-**
D **lants had been carefully set down in their brief. I have before now said that one of the issues which required the determination of the court below related to *res judicata*. This was never considered in any shape or form by the Court below. It cannot, therefore, be**
E **right for the respondents to argue that the only complaint of the appellants in the Court below bordered "on evaluation of evidence by the trial judge".**

It is therefore, in my view, manifest that the appellants
F cannot be said to have had a fair hearing before the Court below. In Onifade v. Olayiwola (supra) at page 165 (G-H) Agbaje JSC said thus:-

"It is implicit in section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 which provides for the right to fair-hearing that a trial court ought to hear and consider the evidence on all the issues
G joined before it. See Ukpai v. Okoro (1983) 2SCNLR. 380. In the same vein an appellate court ought to hear and consider the arguments on all the issues raised before it".

Akpata JSC in the same case observed at page 177 E-F:-
H "The complaints in these grounds which *ex facie* are far reaching, were placed before the Court of Appeal but were not considered and resolved. Just as it is the duty of a trial court to make findings on evidence placed before it, so it is the duty of an appellate court to resolve

the complaints against the judgment of a trial court placed before it".

See also Nwokoro v. Onuma (1990) 3 NWLR (Pt.136) 22 at p.33C-D.

In the instant case, there is no doubt that the complaint of the appellants is meritorious. There is no doubt that the issues placed by appellants before the Court below were not considered, particularly with regard to the determination of estoppel or res judicata. Without the resolution of the issues raised before the Court below, this Court cannot deliberate upon them. For that reason this appeal will be remitted to the Court below for the appeal to be reheard by a different panel of that Court.

Having resolved issue (1) as I have done, it is unnecessary to consider the other issues raised in this appeal.

In the result, this appeal is allowed, I set aside the judgment of the court below and it is hereby ordered that the appeal of the appellants be heard de novo by a panel of that Court different from that which previously heard the appeal. I award to the appellants costs of this appeal in the sum of N10,000.00 only.

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother, A.O. Ejiwunmi, JSC in this appeal. I agree with his reasoning and conclusion allowing this appeal. I agree with the order remitting the case to the Court of Appeal Enugu for hearing.

I also abide by the costs awarded in the leading judgment.

OGUNDARE JSC

I read in advance the judgment of my learned brother Ejiwunmi JSC just delivered. I agree with him that this appeal has merit.

This case has a chequered history and it is rather unfortunate that as a result of the conclusion reached in this appeal it would have to take a longer time before the dispute before the parties is finally resolved. In suit No. AB/8/66 in the Abakaliki Division of the old Anambra State

(now of Ebonyi State), the plaintiffs as representing the Amaechi Ezzamgbo Community has sued the defendants as representing the Umuezeaka Ngbo Community claiming declaration of title, damages for trespass and injunction in respect of a piece of parcel of land called Azu B Agu shown on plan No. L/D207. The people of Umuezeaka Ngbo on the other hand also in Suit No. AB/28/72 sued the people of Amaechi Ezzamgbo claiming declaration of title, damages for trespass and an injunction, to the same piece of land which they called Agu Azu Uwoga. The two suits C were subsequently consolidated for the purpose of hearing and the plaintiffs in AB/8/66 became the plaintiffs in the consolidated suits while the defendants in that suit were defendants in the consolidated suits. They shall similarly be referred to in this judgment.

D Pleadings having been filed and exchanged in the two suits, the matter went to trial and after an exhaustive hearing the learned trial Judge Araka J. (as he then was) on 28th February 1975 found for the plaintiffs and entered judgment in their favour granting title to the disputed land to them and awarding them ₦100.00 damages for trespass. He also granted E in their favour an injunction restraining the defendants etc from encroaching on the said land.

The defendants were dissatisfied with the judgment and appealed to the Court of Appeal (Enugu Division) which Court dismissed the appeal. The defendants have now further appealed to this Court upon 8 F grounds of appeal contained in their amended Notice of Appeal. Pursuant to rules of this Court the parties filed and exchanged their respective written briefs of argument. In their written brief the defendants/Appellants raised the following 4 issues as calling for determination in this G appeal. These are:

- "1. Whether the Court of Appeal was right in not considering the appellant's Brief of Argument properly filed.
2. Whether if exhibits 'D' and 'F' were considered by the H Court of Appeal they would not have agreed that the land the subject matter of this suit has been litigated upon by the same parties.
3. Whether under the evidence law 'identification E' and 'rejected I' are not admissible in law.

4. The legal effect of the siting of the U.P.E. School on the Defendants/Appellants claim".

The plaintiffs/respondents for their part proffered the following 5 issues:

"1. Whether the defendants/appellants can raise the issue of the rejection in evidence of the plans marked 'identification E' and Rejected I' when no appeal was made against the interlocutory rulings by the trial Court against the admissibility of the said plans in evidence, and when no leave was obtained to raise the said issue.

2. Whether the complaint that the Court of Appeal did not consider 'the appellant's brief of Argument properly filed' is justified.

3. Whether the complaint that the land in dispute had been the subject matter of litigations in the past by the same parties is justified.

4. Whether the Court of Appeal was wrong in its determination of the evidence on the siting of the U.P.E. School said to be on the land in dispute.

5. Whether the judgments of the Court of Appeal and the trial Court are perverse so as to warrant the setting aside of the two concurrent decisions."

Both in their brief and in oral arguments by their learned counsel Chief Ugolo, the plaintiffs raised a preliminary objection to Ground (F) of the defendant's Grounds of Appeal and issue (3) predicated on it. The basis for the preliminary objection is that the rejection in evidence of the two documents mentioned in ground F was as a result of two rulings given in the course of trial of the case on 13/6/94 and 17/7/94 respectively. There were no appeals against the rulings which are interlocutory decision of the trial court nor were there any application for extension of time within which to appeal against those decisions. It is the contention of the plaintiffs, therefore, that ground (F) was incompetent, the complaint being out of time. Chief Ugolo cited to us ODIGIE V. OBIYAN (1997) 10 NWLR (Pt.524) pg. 179 at 195 F-G and TIJANI V. AKINWUNMI (1990) 1 NWLR (Pt.125) pg. 237 at 250 (G-H). Learned H counsel urged us to strike out ground (F) and issue (3) predicated on it.

Mr. Fasanu learned counsel for the defendants/appellants submitted that the preliminary objection was not well founded. He submitted

that the current state of the law was that where an interlocutory decision was made on an issue that formed part of the trial of the case leading to the final judgment the complaint against such interlocutory decision could be made in an appeal against the final judgment. He relied for the proposition on the case of OKOBIA V. AJANYA (1998) 6 NWLR (Pt.554) p.348 at p.360 E-F. Learned counsel argued that the complaints in ground (F) related to wrongful rejection of evidence and that this issue could be raised in the final appeal. He argued that the issue of wrongful admission of evidence was raised in ground (5) in the appeal from the High Court to the Court of Appeal and that the plaintiffs did not raise any objection to that ground in the Court of Appeal. He urged the Court to over rule the objection.

After a consideration of the arguments of learned counsel, we unanimously over ruled the preliminary objection and intimated that we would give our reasons for so doing in the final judgment. Before proceeding with the consideration of the appeal before us, I now intend to give my reason for over ruling the preliminary objection of the plaintiffs.

Ground F reads:

"The Court of Appeal was wrong in failing to direct its mind to the ruling of the trial court in the case in which the learned trial judge wrongfully excluded plans No. IN/12 and CC. 14/51, both rejected and marked as 'identificational E' and 'Rejected I' respectively which rejection has occasioned a miscarriage of justice.

PARTICULARS.

i. Defendants were dissatisfied with the reasons given by the trial court in its ruling excluding this vital evidence which when tied up with Exhibit 'D' and 'F' could have strengthened the defendant's plea of res judicatum in respect of the land now encroached upon by the plaintiffs.

ii. The Court of Appeal was wrong in failing to notice the issue of admissibility of these document".

The complaint here is that the Court below did not pronounce on the question of the wrongful rejection of the two documents tendered but not admitted in evidence at the trial. The complaint against the wrongful

rejection of the two documents was made in original grounds 5 and 6 and additional ground 5 in the appeal before the Court below. It is before that Court that the objection now raised by the Plaintiffs should have been raised. Defendant's complaint in this Court is that the Court below did not pronounce on their complaint about wrongful rejection of evidence produced by them. That cannot be an interlocutory decision of the Court below but a point arising from the judgment of that Court. It is therefore, not necessary for me to go into the ground for the objection as this would amount to mere academic exercise. It is for this reason that I over ruled the Plaintiff's preliminary objection to ground (F) and issue (3) predicated on it.

Now to the appeal before us. I do not consider it necessary to state the facts in this judgment. Suffice it to say that both parties laid claim to the land in dispute each relying on traditional evidence and possession. I will proceed straight to the issues formulated by the Defendants for the determination of this appeal.

ISSUE (1)

The Defendants/Appellant's written brief in respect of their appeal from the High Court to the Court of Appeal was filed on 8 January 1987 and is contained on pages 245 to 246 of the record of appeal. It appears on the face of it to comply with the requirements of Order 6 rule 3 of the Court of Appeal Rules. The Court below, in the lead judgment of Uwaifo JCA, as he then stated:

"The defendants have appealed against that judgment. In the appellant's brief of argument, the issues for determination were not set out. The grounds of appeal and argument in support are like expending a lot of efforts to achieve little or no result. The grounds of appeal without the particulars amount to nothing other than the manner in which the judge treated the evidence before him,....."

(Underlining is mine)

I pause here to remark that it cannot be correct to say that in the appellant's brief in the Court below issues for determination were not set out. They are in the brief on pages 254-255.

The learned Justice of the Court of Appeal, after setting down 5

grounds of appeal without their particulars, went on to say:

It is hardly necessary to seriously scrutinize the grounds of appeal but I cannot help saying, with due respect, that they are amateurish. They relate mainly to the evidence with, perhaps, the fifth ground being the only possible exception. But even then that fifth ground is worthless and also fails to realise that there was no question of shifting burden of proof as long as the land in dispute was concerned since the judge was dealing with a consolidated action. Each party had a duty to prove its case. The defendants in the consolidated action must not erroneously be regarded as mere defendants, as counsel for the appellants seems to have done.

All that can be seen to be the real contention as revealed in the conclusion made in the brief borders on evaluation of evidence by the trial Judge. The following issues are raised for setting the judgment aside: that there was no evaluation of the traditional history or acts of possession; that on balance the case put forward by the appellants is better than that of the respondents; that no proper evaluation of exhibit D was done (i.e. the decision of the District Officer in 1947; wrong evaluation of the evidence as to the siting of the U.P.E School on the land in dispute; wrongful rejection of a certain plan; drawing wrong inference in favour of the respondents.

After this remark or observation, the learned Justice proceeded to praise the trial Judge for a job well done and concluded by dismissing the Defendant's appeal. Needless to say that no further reference was made to the arguments in the briefs of the parties. It is the treatment given to their argument in their brief that has grounded the complaint in issue (1). They contend that by ignoring their brief and the arguments proffered therein they were denied fair hearing by the Court of Appeal and relied on *ONIFADE V. OLAYIWOLA* (1990) 7 NWLR (Pt.161) 130 in support of their argument:

The Plaintiffs, in their brief, replied thus:

"It might be correct to say that the Court of Appeal's judgment contained the statement that 'in the appellant's brief of argument the issue for determination were not set out'. But that does not mean that the

Court of Appeal had not considered the Appellant's Brief. The Appellants, it must be truly stated, did not set out issues for determination in their Brief. All that they had done was to set out at pages 254-5 of the records what they said were 'questions for determination'. Even though 'questions for determination' might have the same effect and meaning as 'issues for determination, it has always been the issues for determination that, by the rules, should be set out in the Brief. If therefore, the appellants had chosen not to use the more conventional language of Brief writing by using questions for determination in place of issues for determination they ought not to complain that the Appellate Court had said that the issues for determination were not set out in the Brief.'

With respect, the argument above sounds rather puerile. It is however, to the credit of Chief Ugolo, for the Plaintiffs, that he conceded at the oral hearing of this appeal that the Defendants formulated issues for determination. Learned counsel, however, submitted that this error of the Court below did not occasion a miscarriage of justice as that Court considered all the issues raised before it. The Plaintiffs in their brief, referred to page 295-296 wherein Uwaifo JCA said:

"The following issues are raised for setting the judgment aside; that there was no evaluation of the traditional history or acts of possession; that on balance the case put forward by the appellants is better than that of the respondents; that no proper evaluation of exhibit D was done (i.e. the decision of the District Officer in 1947; wrong evaluation of the evidence as to the siting of the U.P.E. School on the land in dispute, wrongful rejection of a certain plan; drawing wrong inference in favour of the respondents."

And argued that this showed the Court below bore in mind all the issues raised before it.

I do not think the Plaintiffs are right in their assertion that the Court below considered all the issues raised before it. To begin with Uwaifo JCA who delivered the lead judgment with which the other Justices that sat with him agreed, set out five grounds of appeal. But the Defendants had in all eleven grounds of appeal which they set out in their brief in that Court. One of the issues raised in the brief relates to the

question of res judicata, which was never considered at all in the judgments of the Court below. It cannot, therefore, be correct to say that the only complaint of the Defendants in the Court below bordered "on evaluation of evidence by the trial Judge". The position then is this that the Defendants cannot be said to have had a fair hearing before the Court below. As Agbaje JSC put it in ONIFADE V. OLAYIWOLA (supra) at page 165 G-H:

"It is implicit in section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 which provides for the right to fair-hearing that a trial court ought to hear and consider the evidence on all the issues joined before it. See UKPAI V. OKORO (1983) 2 S.C.N.L.R. 380. In the same vein an appellate court ought to hear and consider the arguments on all the issues raised before it".

D Akpata JSC in the same case opined at page 177 E-F thus:

"The complaints in these grounds which ex facie are far reaching, were placed before the Court of Appeal but were not considered and resolved. Just as it is the duty of a trial court to make findings on evidence placed before it, so it is the duty of an appellate court to resolve the complaints against the judgment of a trial court placed before it".

There seems to have been a breach of this duty by the Court below. And considering the nature of the grounds of appeal placed before it, particularly the complaint of wrongful rejection of documents that could have assisted the Defendants in substantiating their plea of estoppel or res judicata, it is difficult to say that the Defendants had fair hearing in that Court.

I have considered the desirability of calling on learned counsel for the parties to address us on the issues raised in the Court below to enable us resolve those issues in this Court. I, however, decline to follow this course. It is desirable that this Court has before it the views of the Court below on those issues. In the circumstance, therefore, the better course is to remit the case to the Court below for the appeal before it to be reheard by a panel of that Court differently constituted.

In view of the conclusion I reach on issue (1), i think it is unnecessary to go into a consideration of the other issues placed before us.

I allow this appeal, set aside the judgment of the court below and order that the appeal of the Defendants to that Court be heard de novo by a panel of that Court differently constituted.

I award to the Defendants/Appellants costs of this appeal assessed at ₦10,000.00.

B

ONU JSC

I had the advantage of a preview of the judgment of my learned brother Ejiwunmi, JSC just delivered. I am in full agreement with him that had the Court of Appeal (hereinafter referred to as the court below) properly and fully considered the grounds of appeal placed before it, the issues raised thereon for determination, the arguments proffered in the appellants Brief as well as if it dispassionately looked into them, the questions now identified in the appeal herein for our determination would indeed have been unnecessary.

It is for these reasons set out in the leading judgment of my learned brother Ejiwunmi, JSC, foremost among which is that admissible evidence was rejected while inadmissible evidence was admitted pursuant to section 227 of the Evidence Act, Cap. 112 - a conclusion with which I entirely agree - that I too allow the appeal, set aside the judgment and orders of the court below. I also endorse all the consequential orders inclusive of those as to costs therein made.

ACHIKE JSC

I have had the privilege of reading before now the judgment of my learned brother, Ejiwunmi, J.S.C., I agree with his reasoning and conclusion wherein he allowed the appeal. I too would allow the appeal and remit the case to the trial High Court for trial de novo. I abide by the order as to costs as set out in the leading judgment.

H