

SUPREME COURT OF NIGERIA
14TH DECEMBER, 2001. SC. 142/1998
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, A. I. KATSINA-ALU, S. O. UWAIFO, JJSC.

EZEANYA DURU & 5 ORS DEFENDANTS/APPELLANTS
(For themselves and on behalf of the
people of Obinabo Quarter Nkpologwu)

AND

PETER ONWUMELU & ANOR PLAINTIFFS/RESPONDENTS
(For themselves and as representing
the members of Umuekpili Family
of Ula Ekwulobia)

*APPEALS - Retrial - Failure of plaintiffs claim - Retrial is
erroneous - As paramount consideration is to see justice done (H8)*

*CUSTOMARY LAW - Native or customary courts - Procedure -
Courts making use of such courts' decisions - Should allow some
latitude in procedure - Provided substantial justice was done (H2)*

*ESTOPPEL - Standing by doctrine - Is what is applicable in this
case - And not res judicata (H3)*

*ESTOPPEL - Standing by - Person who failed to defend his interest
- At time of litigation - Cannot reopen what was decided (H4)*

*EVIDENCE - Admissibility - Document - That is not tendered by any
of the parties - But is a sketch made by trial court - Lower Court
wrongfully rejected it as inadmissible (H1)*

*EVIDENCE - Exhibits - Land law - Document - Relevance - An
exhibit that is not relevant - In proving exclusive possession - Is*

LAND LAW - Title – Proof by inference s. 46 Evidence Act - Based on acts of possession over adjoining land - Does not avail the plaintiffs (H7)

LAND LAW - Title - Proof - Long possession - Where it is the basis for plaintiffs' claim - They must prove numerous acts of ownership and possession - Over a sufficient length of time (H6)

FACTS

Before the High Court Awka, Anambra State, the plaintiffs/respondents filed an action against the defendants/appellants. Plaintiffs claimed declaration of title in respect of the land in dispute, damages for trespass and an injunction restraining defendants from further trespass. They based their claim on long possession usually stated as numerous acts of ownership and possession from time immemorial and inference of ownership under s. 45 (now s. 46) of the Evidence Act. Defendants pleaded and relied on two earlier decisions of native courts.

The trial court found that the two basis of claim do not avail the plaintiffs and dismissed their claim. Their appeal to the Court of Appeal was upheld. Defendants being aggrieved have now appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

“1. Whether the court below was right in holding that exhibit ‘K’ relied on by the trial court to dismiss the respondents’ case is violative of sections 108 (now 109), 110 (now 111) and 111 (now 112) of the Evidence Act, and whether the sketch attached to the said exhibit ‘K’ is also violative of s.3(1)(b)(i) of the Survey Law Cap. 124 Laws of Eastern Nigeria.

2. Whether on the evidence which gave rise to exhibit ‘M’ which was held properly admitted by the lower court the respondents can ever succeed in an action rooted in exclusive possession and ownership.

3. Whether the court below was right in holding per Achike JCA that in the absence of a plan exhibit ‘L’ was worthless.

4. If the answers to the above issues or some of them are in the negative, whether a retrial is the right order to make where the respondents failed in toto in an action for declaration of title, damages for trespass, and injunction and where the respondents' principal witnesses were disbelieved on the evidence before the court. "

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

Evidence - Admissibility

1. It is my view that the lower court should have been reminded by that fact that the issue of admissibility of the said sketch did not arise at any time and that it should not have busied itself with going into considering and finding on the effect of section 3(1)(b)(i) of the said Survey Law in relation to the sketch.

It is evident that before the said provision of the Survey Law can be applied, a party in the case would have tendered a document in evidence in which land is delineated and it is tendered as a plan. I think the learned trial judge was right for treating the sketch as part of the judgment of the Native Court in suit No.81/35. (p. 3298 C)

Native or Customary courts - Procedure

2. A Native Court or Customary Court or an Area Court must be permitted to illustrate such or similar decisions with a sketch where appropriate, and I think in a number of the old cases this was usually the practice: see *Ojemen v. Momodu* (1983) 1 SCNLR 188. I think that must be regarded as an aspect of procedure which such courts may adopt where it does not occasion any miscarriage of justice. It seems to me that an appeal court as well as a trial court called upon to make use of decisions of those courts should allow some latitude in regard to matters of procedure adopted by them in reaching those decisions so long as they are seen to have done substantial justice: see *Dinsey v. Ossey* (1939) 5 WACA 177 at 178-179; *Ikpong v. Edoho* (1978) NSCC (vol. 11) 423 at 431. I think it can simply be added here that the argument that exhibit K violated sections 109, 111 and 112 of the Evidence Act has no basis since exhibit K is a public document duly certified. (p. 3299 D)

Standing by doctrine - Is applicable

3. The learned trial judge thought that what was involved in the said pleading was the defence of estoppel per rem judicatam when he proceeded to say that to sustain a plea of res judicata the parties, subject matter and issues must be the same as in the previous suit adjudicated upon to finality by a court of competent jurisdiction. That led him, in error, to overlook the defence of standing by raised in para. 11 of the statement of defence. He however accepted exhibit K as evidence of act of possession by the defendants. That would clearly, of course, properly understand be regarded as deriving from the consequences of the boundary so decided as per exhibit k. But even in this palpably obvious result, the lower court played down this finding. In truth, the averment clearly supports estoppel by conduct known as the *standing-by doctrine*. (p. 3301 F)

Standing by - Person who failed to defend his interest

4. So, a person may consider he has a right to protect in a subject-matter over which two other persons are litigating to his knowledge. It would not be in his interest not to join in the litigation but to watch while it raged on, or to show his awareness by positively getting involved to testify on behalf of either side. If he did that, he would be bound by the result of the litigation. It seems to me that the plaintiffs in the present case cannot re-open what was virtually decided by the judgment of 1935 as per exhibit K because the land now in dispute is essentially what that judgment gave to the present defendants. Issues I should be regarded as having been resolved in the negative. (p. 3302 D)

Evidence - Exhibit

5. In my view, exhibit M is not relevant to the question whether the plaintiffs have exclusive possession of the land in dispute in this case. As to issue. 3, exhibit L which contains the proceedings of Mbamisi District Court in case NO.87/51-52 where judgment was given on 7 January, 1952 for the present defendants (as plaintiffs) against the

present plaintiffs (as defendants) for damages for trespass, there is nothing in the proceedings by which the land, the subject-matter of the trespass, can be ascertained. Exhibit L, in my view serves no purpose as far as the present case is concerned and I think the lower court was right to hold that it was worthless. (p. 3303 E) B

Title - Proof - Long possession

6. Simply put in relation to this case where, as already said, the plaintiffs base their right to a declaration of title to the land on the fact of long possession, the principle is that they must prove acts of ownership and possession of the land in dispute over a sufficient length of time, numerous and positive enough to warrant the inference that they are exclusive owners. In my view, it will not do if merely there are numerous acts, since these might qualify, on the part of an intrusive party, as acts of trespass. There is the requirement that the acts ought to extend over a sufficient or appreciable period of time and must be positive. To be positive, the acts ought to be such that can be verified upon strong evidence such as old structures and settlements, well-beaten roads or paths, economic crops or trees tending visibly to be long-lived, old farms and huts, community shrines which have long been in existence, and to which the plaintiffs as a community can satisfactorily lay claim etc. in the present case, evidence of such acts of ownership and possession is starkly lacking. (p. 3304 D) D E F

Title - Proof by inference s. 46 Evidence Act

7. As to the claim based on section 46 (formerly section 45) of the Evidence Act, there is nothing in the litigation survey plan (exhibit A) G tendered by the plaintiffs to show any connection of the land in dispute with the plaintiffs' other contiguous land by way of similarity in acts of possession or user, or of locality, which may lead to the inference that the plaintiffs own the land in dispute. That said section provides: H
"Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece of quantity of land with reference to which such acts are

done, but also of other land so situated or connected therewith by locality or similarity, that what is true as to the one piece of land is likely to be true of the other piece of land.” (p. 3304 H)

B Appeals - Retrial

8. A retrial order is not made without sufficient grounds. It is fundamental that an appellate court should bear in mind that in exercising its discretion to make an order for the retrial of a case, the paramount and only consideration is to ensure that justice is done to both parties and that the discretion should not be exercised in a manner that will make it appear that the court is only concerned with one party being given an unjustifiable opportunity to relitigate a case which has either truly failed or truly succeeded: See *Onyenma v. Amah* (1988) 1 NWLR (pt 73) 772.

D Where it is clear, therefore, from the evidence that the trial court rightly concluded that a plaintiff had failed to establish the claim he presented to court and there was no irregularity affecting the proceedings which would warrant a retrial of the case, an order of retrial will be erroneous: see *Elias v. Disu* (1962) 1 AllNLR 214.

In the present case, the plaintiffs failed completely to prove the claim. There is no evidence upon which they might have succeeded and therefore they do not deserve to have an opportunity for a retrial. It has been shown that the court below misunderstood exhibit K and misconceived section 46 of the Evidence Act. It has also been shown that there is no evidence of such possession or acts of ownership that can support the plaintiffs' claim. I hold in the circumstances that the lower court was in error to have ordered a retrial. (p. 3308 E/3309 D)

G REPRESENTATION

Appellants absent. Not represented.

A.N. Anyamene Esq. SAN, with him Miss Rachael Ordu, - for the Respondents.

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CASES REFERRED TO

Onwumelu v. Duru (1997) 10 NWLR (pt. 525) 377

Lydia Erinosho v. Owokoniran (1965) NMLR 479

Ojemen v. Momodu (1983) 1 SCNLR 188

Dinsey v. Ossey (1939) 5 WACA 177 at 178-179

Ikpang v. Edoho (1978) NSCC (vol. 11) 423 at 431

Atta I v. Bonsra II (1958) A.C. 95

Wytcherley v. Andrews (1871) L.R.P. & M. 327 at 328

Uwalaka v. Agba (1955) 15 WACA 63 at 65

Ekiti v. Ezeobibi (1976) 12 S.c. 123 at 131

Ekpo v. Ita (1932) 11 N.L.R. 68

Stanley v. White (14 East, 332)

Sunday Piaro v. Tenalo (1976) 12 SC 31 at 43-44

Onyenma v. Amah (1988) 1 NWLR (pt.73) 772

STATUTES REFERRED TO

Survey Law (Cap. 124) Laws of Eastern Nigeria s. 3 (1) (b) (1)

Evidence Act ss. 109 - 112, 46

LEAD JUDGMENT BY UWAIFO JSC

This case originated in the High Court of Awka Judicial Division of Anambra State. It was filed on 22 May, 1974. For reasons I need not go into hearing of the case did not commence until 13 January, 1987 before Obiesie J., who on 13 April, 1992 gave judgment dismissing the plaintiffs' claim in which they had sought:

“(i) A declaration of title (ownership) under native law or custom to the plaintiffs' piece or parcel of land known as and called ‘AGU UDUDONKA’ or ‘AGU AKWALA’ which situates at Ula village Ekwulobia, within jurisdiction and shown verged red in the plaintiffs' plan No. NLS/AN.572/83 filed with this statement of claim. The annual rental value of this land is about N10.00 (ten naira).

(ii) Special and General damages for trespass committed on this land on or about the 20th day of March, 1974, limited to N1,000.00 (one thousand naira).

(iii) An injunction restraining the defendants, their servants, agents and or workmen from committing further trespass

on the said land.

Particulars of Special Damage

(a) *The value of the first building including door and window frames destroyed by the defendants*

B *on this land on 20/3/74 is about...N500.00*

(b) *The value of the second building destroyed by the defendants*

on this land on 7/5/74 is about N300.00

C (c) *General damages for trespass limited to N200.00*

Total N1,000.00"

The learned trial Judge considered the two main planks upon which the plaintiffs based their claim to title. These are: (1) long possession, usually stated as numerous acts of ownership and possession from time immemorial, and (2) inference of ownership that may be drawn under section 45 (now section 46) of the Evidence Act. He found that both did not avail the plaintiffs. Furthermore, the learned trial Judge held that two earlier decisions of the Native Courts pleaded and relied on by the defendants made the plaintiffs' claim unmaintainable, one is a decision of the Isuofia Native Court given in 1935 and admitted as Exhibit K. The other is the decision of Mbamisi Native Court given in 1952, admitted as exhibit L.

The plaintiffs then appealed to the Court of Appeal, Enugu Division. In the leading judgment given by Achike JCA, Exhibit K which was accompanied with a sketch to support the boundary agreed upon and drawn by the Native Court was severely criticised. It was said that the sketch did not conform to section 3(1) (b)(i) of the Survey Law (Cap. 124), Laws of Eastern Nigeria, and accordingly, Achike JCA observed that "the sketch attached to Exhibit K was a worthless document" and ought not to have been admitted in evidence. It was also held that the learned trial Judge accorded an erroneous interpretation to section 45 of the Evidence Act when he concluded that the plaintiffs could not rely on the provisions of the section in view of the way the relevant lands were situated and located. On 8 July, 1997, the lower court allowed the appeal and ordered a retrial. The judgment is reported as Onwumelu v. Duru (1997) 10 NWLR (Pt.525) 377.

On a further appeal to this court by the defendants, they have raised in the brief of arguments four issues for determination, namely:

“1. Whether the court below was right in holding that Exhibit ‘K’ relied on by the trial court to dismiss the respondents case is violative of sections 108 (now 109), 110 (now 111) and 111 (now 112) of the Evidence Act, and whether the sketch attached to the said Exhibit ‘K’ is also violative of s.3(1)(b)(i) of the Survey Law Cap. 124 Laws of Eastern Nigeria.

2. Whether on the evidence which gave rise to Exhibit ‘M’ which was held properly admitted by the lower court the respondents can ever succeed in an action rooted in exclusive possession and ownership.

3. Whether the court below was right in holding per Achike JCA that in the absence of a plan Exhibit ‘L’ was worthless.

4. If the answers to the above issues or some of them are in the negative, whether a retrial is the right order to make where the respondents failed in toto in an action for declaration of title, damages for trespass. And injunction and where the respondents’ principal witnesses were disbelieved on the evidence before the court.”

The respondents also raised four issues for determination in their brief of arguments but I am of the view that they are in essence the same as the appellants’ issues except that they are differently worded. By way of illustration, the first issue in each brief of arguments is concerned with the admissibility of Exhibit K together with the sketch. The second and third issues are about the evidential value of each of Exhibits M and L while the fourth issue is about the appropriateness of the retrial order made by the lower court.

In considering issue 1, it is well to recall that the lower court regarded the sketch attached to Exhibit K as a worthless document. Exhibit K is the 1935 proceedings and judgment by Isuofia Native Court in suit No. 81/35. The suit was between two neighbouring communities of Aku (now Ezinifite) as plaintiffs and Nkpologwu (appellants’ community) as defendants. What was determined as an issue was the boundary between the said two communities. The court in fixing the boundary, made out a sketch which it considered would reflect its de-

scription of the said boundary in its judgment. It was certainly in my view, intended to be part of the judgment. On the said sketch the following inscription appears:

B *“Boundary: Fixed by the court from Aja-ofia to junction of P.W.D. road and Old Provincial Road (mile 18, 1300x). Thence to point on old provincial road mid-way between pan walled compound and defendants house. Thence towards east comer of Nwajagu bush until it enters Ekwulobia land.”*

C There can be no argument that the sketch was produced by the native court itself to indicate and illustrate what it had found as the boundary between the parties. There also can be no contention of the fact that it was to support and be part of the judgment which it gave as follows:

D *“Judgment: The boundary between Aku and Nkpologwu will be from Aja Ofia (which is 340 yards on a bearing of 2380 from Mile stone 19) to a junction of the old Provincial Road and the P.W.D Road (at the comer of the latter 460' from Mile stone 19) thence in a straight line to a point midway between the pan house*
 E *compound wall and the defendant's compound wall on a bearing of 100 and thence in a straight line towards Nwajagu bush, 3540 (where the Old Provincial Road passes to the cast of it) till the boundary enters Ekwuluobia land at some point not determined. Costs to neither party.*

F *From the point of junction of the roads northwards the boundary follows roughly the Old Provincial Road but as this old road is now only a bush path and as such liable to change its course slightly, the boundary will be straight lines as indicated.*
 G *(Note the compass bearings may not be entirely accurate but the information given should be sufficient to indicate the boundary. The distances are measured by pacing a pace being as a yard).”*

H It is true that some members of the Native Court in their own judgment adjusted the boundary decided by the divided court on the issue as represented by the President of the court, Mr. Grey, Asst. District Officer. But the overall effect is still that whichever boundary it was, it was in settlement between Ezinifite and Nkpologwu communities. As a fact, as will be shown later, the present plaintiffs would

appear to have conceded what constitutes the boundary which put Ezinifite on the west of it. That concession is relevant here as to what area the defendants allege they are in possession of. It must be remembered that Ezinifite community are not involved in the present case so as to give any cause for inquiry whether they ever disputed the boundary laid out in the sketch attached to Exhibit K. The plaintiffs B here having impliedly recognised that boundary. the issue is. having regard to Exhibit K, and the circumstances it was made of which the plaintiffs were aware, can they lay claim to the eastern portion of that boundary in disregard of exhibit K?

The court below was under a misconception to have thought C that the sketch was a separate document from the record of proceedings. Exhibit K. It was also a result of a misunderstanding on its part that led it to assume that the said sketch was a document tendered. or supposed to be tendered, to be received in evidence. It was because of D these misleading views that it made the following observation inter alia per Achike JCA (1997) 10NWLR (pt.525) at p. 396]:

“There is nothing in the said Exhibit K to show that the said sketch was ever received in evidence at the trial in the Native Court. The usual endorsement in an exhibit is conspicuously absent. E It is for all these that, I think, there was compelling need for a proper foundation to be laid for its reception in evidence, rather than insist on this the learned trial judge dismissed such a pivotal issue, and erroneously in my view, busied himself in establishing F that the sketch was ‘a page of a judgment and proceeding’ in the suit. Afterall, the sketch was not a separate piece of documentary evidence tendered by any party at the trial of the suit. In my view, the learned trial Judge was clearly in deep error to have admitted the sketch along with the proceedings and judgment in the Native G Court suit as exhibit K without ensuring that a proper foundation was laid for its admissibility ... It was also the further complaint of the appellants that the reception of Exhibit K with the attached sketch was not even admissible evidence viewed from the provisions of section 3(1)(b)(i) of the Survey Law, Cap. 124, Laws of H Eastern Nigeria, applicable in Anambra State of Nigeria which stipulates that

‘No map, plan or diagram of land, if prepared after the

20th day of October 1897 shall, save for good cause shown to the court, be admitted in evidence in any court, unless the map, plan or diagram has been prepared and signed by a surveyor or is a copy of a map, plan or diagram so prepared and signed and is certified by a surveyor as being a true copy.’

B It is clear that Exhibit K was not a legally admissible evidence by the express provisions of section 3(1)(b)(i) of the said Survey Law; the provision of the Survey Law is an absolute bar to its reception in evidence in any court unless the map, plan or diagram was prepared and signed and is so certified by a surveyor as being a true copy.” (Emphasis in italics mine)

D The italicised portion of the passage quoted above is right. The sketch was not a document tendered by any of the parties at the trial in the Native Court. **It is my view that the lower court should have been reminded by that fact that the issue of admissibility of the said sketch did not arise at any time and that it should not have busied itself with going into considering and finding on the effect of section 3(1)(b)(i) of the said Survey Law in relation to the sketch.** By doing so, it was led to misapply the decision of this court in Lydia Erinosho v Owokoniran (1965) NMLR 479 where the Survey Law (Cap. 121) of Western Region came up for consideration and at page 484 it was said:

F “When a plan is tendered in evidence as a plan, issues as to its admissibility will be governed by section 3 of Cap.121 aforesaid, if the plan was prepared after 1897.” [Idigbe JSC’s italics]

G It is evident that before the said provision of the Survey Law can be applied, a party in the case would have tendered a document in evidence in which land is delineated and it is tendered as a plan. I think the learned trial judge was right for treating the sketch as part of the judgment of the Native Court in suit No.81/35. I am entirely in agreement with appellants’ counsel, Mr. G.E. Ezeuko, SAN, when he submitted in the appellants’ brief of arguments, and I quote him:

H “The sketch is obviously a practical illustration of the judgment by the court and forming part of the judgment and was neither a map nor a plan tendered by any of the parties. The judg-

ment is exactly as indicated in the sketch. It was not an act of the parties and was not within the contemplation of s.3(1)(b)(i) of the Survey Law Cap.24 Laws of Eastern Nigeria.

The case of Lydia Erinoshio v Owokoniran & Anor (1965) NMLR 479 relied on by the lower court relates to a plan tendered in evidence by a party, the admissibility of which is governed by the Survey Law, and not a practical illustration by a Native Court of its judgment when the said court dealt with boundary dispute. The lower court was in error when it excluded the sketch attached to Exhibit 'K' on the ground that it was not prepared and signed by a surveyor."

What the Native Court did in suit No.81/35 in regard to the sketch it prepared was to illustrate in visual form the terms of the boundary it decided between the parties so that as much as possible there would be no misunderstanding as to the said boundary. **A Native Court or Customary Court or an Area Court must be permitted to illustrate such or similar decisions with a sketch where appropriate, and I think in a number of the old cases this was usually the practice: see Ojemen v. Momodu (1983) 1 SCNLR 188. I think that must be regarded as an aspect of procedure which such courts may adopt where it does not occasion any miscarriage of justice. It seems to me that an appeal court as well as a trial court called upon to make use of decisions of those courts should allow some latitude in regard to matters of procedure adopted by them in reaching those decisions so long as they are seen to have done substantial justice: see Dinsey v. Ossey (1939) 5 WACA 177 at 178-179; Ikpong v Edoho (1978) NSCC (vol. 11) 423 at 431. I think it can simply be added here that the argument that Exhibit K violated sections 109, 111 and 112 of the Evidence Act has no basis since Exhibit K is a public document duly certified.**

In the present case, the respondents as plaintiffs and the appellants as defendants produced survey plans. The plaintiffs' plan is Exhibit A and the defendants' plan, Exhibit J. The two plans show the old provincial road and the road leading to Ekwulobia village of the plaintiffs. The two plans also show ekpe wall running alongside the Old

Provincial Road. These feature were clearly shown in the sketch attached to Exhibit K and the two survey plans (Exhibits A and J) substantially conform to the boundary indicated in the sketch. It is the Old Provincial Road that was the predominant boundary decided between Agu (now Ezinifite) and the defendants' Nkpologwu village. The land to the west of that boundary was declared for the Ezinifite people while the land to the east was declared for Nkpologwu people.

At the Native Court proceedings in which the said boundary was decided, three representatives of the present plaintiffs' village (Ekwulobia) testified. As recorded, they are Ezeigbekwe, Hedekiah Eze and Peter. The first two were not able to give any positive description of the boundary, but seemed to have indicated that if the court moved to the locus in quo they would be able to assist. However, the third one said the boundary ran "between Ajagu bush and Ajofia in which people used to bury bodies.' In other words, the plaintiffs' Ekwulobia people knew of that litigation, testified as witnesses in the dispute of boundary between Agu (Ezinifite) and the defendants' Nkpologwu community, and accordingly stood by while the parties thereto fought the battle as to which party owned what land.

As I said, the decision was that the land to the west of that boundary (The Old Provincial Road) was declared for Ezinifite while the defendants' Nkpologwu community were given the land to the east of the boundary. Now, the plaintiffs' surveyor in the present case, Cyprian Pulumachie Chukwujindu Nwosa, testified as p.w.1.

In cross-examination, he said:

"I showed the Old Colonial Road in my plan. It was shown to me by the plaintiffs. On the western side of the Old Colonial Road, there was an ekpe wall. I was told that the land west of the road belongs to Ezinifite by plaintiffs. I showed an ekpe wall running from the south to the north. All land east or right of the colonial road looking north is the land in dispute except a small portion of land on the southern part of the plan. " [Emphasis in italics mine]

What the above-quoted passage signifies is that the plaintiffs concede that (1) the land to the west of the boundary belongs to Ezinifite,

and that is in consonance with the boundary decided by the Native Court per Exhibit K; (2) it is the boundary of which they helped to establish by their contribution to the evidence before the court; (3) the vast area of the land to the east of the boundary awarded to the defendants is now being claimed by the plaintiffs who were aware of the proceedings in which that decision was reached. B

The purpose of tendering Exhibit K by the defendants was to establish that the plaintiffs could not now be heard to lay claim to the land in dispute. This was pleaded in paragraph 11 of the statement of defence as follows: C

“In 1935, in Isuofia Native Court Civil Suit No.81/35, one Umeakuka on behalf of Aku people now renamed Ezinifite, sued Ezeokoli of Obinabo, Nkpologwu claiming declaration of title to Ikpankita now the land in dispute. In its judgment the court held that the boundary between the Aku people and the defendants is the Old Provincial Road shown on the defendants’ Plan. All lands West of the said old Provincial Road belong to Ezinifite people while the lands East of the said road belong to the defendants. The plaintiffs’ people as well as other people from the surrounding towns gave evidence in the said suit. The Judgment in this action as well as the proceedings therein and the sketch showing the boundary fixed by the court would be founded upon. The plaintiffs were fully aware of the proceedings and in fact gave evidence for the parties in the case and stood by while the battle raged.” D E F

The learned trial Judge thought that what was involved in the said pleading was the defence of estoppel per rem judicatam when he proceeded to say that to sustain a plea of res judicata the parties, subject-matter and issues must be the same as in the previous suit adjudicated upon to finality by a court of competent jurisdiction. That led him, in error, to overlook the defence of standing by raised in para. 11 of the statement of claim. He however accepted Exhibit K as evidence of act of possession by the defendants. That would clearly, of course, properly understand, be regarded as deriving from the consequences of the boundary so decided as per Exhibit K. But even G H

in this palpably obvious result, the lower court played down this finding. In truth, the averment clearly supports estoppel by conduct known as the standing-by doctrine. In *Atta II v. Bonsra* 11 (1958) A.C. 95, Lord Denning delivering the judgment of the Privy Council, cited at page 102 with approval, the principle stated by Lord Penzance in *Wytcherley v. Andrews* (1871) L.R.Z.P & M. 327 at 328 in these words inter alia:

“ ... if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case.”

See also *Uwalaka v. Agba* (1955) 15 WACA 63 at 65; *Etiti v. Ezeobibi* (1976) 12 S.C. 123 at 131.

The above was explained further by Lord Denning when he added that the doctrine of standing by applies either when a person stood by and watched the legal battle affecting his interest being fought out by others or when he gave evidence in support of one side or the other in the litigation. So, a person may consider he has a right to protect in a subject-matter over which two other persons are litigating to his knowledge. It would not be in his interest not to join in the litigation but to watch while it raged on, or to show his awareness by positively getting involved to testify on behalf of either side. If he did that, he would be bound by the result of the litigation. It seems to me that the plaintiffs in the present case cannot re-open what was virtually decided by the judgment of 1935 as per Exhibit K because the land now in dispute is essentially what that judgment gave to the present defendants. Issue 1 should be regarded as having been resolved in the negative.

I do not think there is much in issues 2 and 3 canvassed. Issue 2 raises the point that the lower court having found that Exhibit M was properly admitted, it was bound to apply the effect of it as against the plaintiffs' claim. That exhibit dated 12th November, 1965 shows that both parties here jointly conveyed a parcel of land of some 23.56 acres to Aguata County Council. The appellants' counsel's argument is that that land is part of the land in dispute and therefore the transaction as per Exhibit M shows that the respondents could not claim to be in exclusive possession of the land in dispute. In fact the learned trial

judge said: “*Exhibit M does not in any way support plaintiffs’ case that they alone own portion of the land involved.*” This is obvious if what is meant by the “land involved” is the very portion of land stated in Exhibit M. That is the sense in which I understand it.

It is therefore necessary to show if that portion of land is within the land the plaintiffs put in dispute in their survey plan, Exhibit A. The defendants did not counterclaim and so it is the plaintiffs’ plan which determines which area of land is in dispute. The lower court per Achike JCA observed as follows:

“I will deal with Exhibit M very briefly. It was an agreement for the acquisition of site for the Aguata community hospital. Exhibits A, Band J show that the said site is traversed by the Ezinifite/Nkpologwu Road: the land in dispute in this suit lies north of this road while the respondents’ land not in dispute lies on the south. This site not being within the land in dispute the question as it relates to admissibility of Exhibit M is really unimportant.”

I think that is a fair conclusion. **In my view, Exhibit M is not relevant to the question whether the plaintiffs have exclusive possession of the land in dispute in this case.**

As to issue 3, Exhibit L which contains the proceedings: of Mbamisi District Court in case No.87/51-52 where judgment was given on 7th January, 1952 for the present defendants (as plaintiffs) against the present plaintiffs (as defendants) for damages for trespass, there is nothing in the proceedings by which the land, the subject-matter of the trespass, can be ascertained. Exhibit L, in my view, serves no purpose as far as the present case is concerned and I think the lower court was right to hold that it was worthless.

Issue 4 raises the question whether a retrial was an appropriate order in this case. The respondents set out to prove that they are the owners of the land in dispute and in possession thereof., that the appellants trespassed thereon and therefore that they are entitled to damages for the trespass they committed, and to an order of injunction against them. The learned trial judge rightly held inter alia that:

“From the pleadings and evidence adduced, plaintiffs’ case is predicated on acts of long possession and enjoyment of land ...

Secondly, plaintiffs are also relying on proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such adjacent land would in addition be the true owner of the land in dispute.”

The learned trial judge then came to the conclusion, after considering the evidence as a whole, that the plaintiffs did not succeed in their assertion of long possession and enjoyment of land and therefore failed to discharge the onus placed on them.

Now, by relying on acts of possession in proof of title to the land in question, the plaintiffs as a community inevitably put in issue the totality of the numerous acts of possession and ownership they claim to have been enjoyed by them, the positive nature of those acts and the long period over which the said acts have spanned so that the circumstance as a whole will be seen to have come within the principle long laid down in *Ekpo v. Ita* (1932) 11 N.L.R. 68. **Simply put in relation to this case where, as already said, the plaintiffs base their right to a declaration of title to the land on the fact of long possession, the principle is that they must prove acts of ownership and possession of the land in dispute over a sufficient length of time, numerous and positive enough to warrant the inference that they are exclusive owners. In my view, it will not do if merely there are numerous acts, since these might qualify, on the part of an intrusive party, as acts of trespass. There is the requirement that the acts ought to extend over a sufficient or appreciable period of time and must be positive. To be positive, the acts ought to be such that can be verified upon strong evidence, such as, old structures and settlements, well-beaten roads or paths, economic crops or trees tending visibly to be long-lived, old farms and huts, community shrines which have long been in existence, and to which the plaintiffs as a community can satisfactorily lay claim etc. In the present case, evidence of such acts of ownership and possession is starkly lacking.**

As to the claim based on section 46 (formerly section

45) of the Evidence Act, there is nothing in the litigation survey plan (Exhibit A) tendered by the plaintiffs to show any connection of the land in dispute with the plaintiffs' other contiguous land by way of similarity in acts of possession or user, or of locality, which may lead to the inference that the plaintiffs own the land in dispute. That said section provides: B

“Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece of quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity, that what is true as to the one piece of land is likely to be true of the other piece of land.” C

It is important to recognise that this provision which is stated as a compendium has its ramifications such that different conditions for its application are accommodated. The authorities to which I shall refer in relation thereto clearly illustrate this tendency as will be shown. D

The learned trial Judge felt unable to apply this provision in favour of the plaintiffs, giving as his reason that they “do not own the land on the western portion of the land in dispute and the one on the south is conceded by plaintiffs to belong to the defendants.” He relied on the principle stated by this court in *Idundun v. Okumagba* (1976) NSCC (vol. 10) 445 at 454-455 per Fatayi-Williams JSC *inter alia*: E

“proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute, may also rank as a means of proving ownership of the land in dispute; “ F

as learned counsel for the respondents has rightly submitted, for the provisions of section 45 of the Evidence Act to apply, there must be an admission by the respondents, or a finding by the trial Judge, that the land in dispute was surrounded by other lands belonging to the appellants.” G

This is, of course, the most obvious circumstance for the application of the said section in regard to locality, that is to say, when the plaintiffs other lands, if any, surround the land in dispute as said in H

Idundun v Okumagba (supra), or that the land in dispute is reasonably hedged or hemmed in to the advantage of the plaintiff: see Archibong v. Ita (1954) 14 WACA 520 at 522 where Coussey J.A. delivering the judgment of the court said inter alia:

B “there is a general proposition in the law of evidence that repeated acts of ownership done with respect to other places connected with the locus in quo by such a common character of locality as to give rise to the inference that the owner of one is likely to
C be the owner of the other is receivable. Thus, in Jones v. Williams, 2 M, and W 326 at 331, Parke, B, said that ‘evidence of acts in another part of one continuous hedge adjoining the plaintiffs land was admissible in evidence on the ground that they are such acts as might reasonably lead to the inference that the entire hedge
D belonged to the plaintiff.’ “

I think it will be of immense benefit, in order to make this aspect of the general principle embedded in section 46 a bit clearer, first to state the summary of facts in Jones v. Williams (supra) reported
E as 150 ER 781 as reviewed by Abinger, C.B. at p.783 inter alia, and then refer to the further observation per Parke, B. Said Abinger, C.B:

The object of the plaintiff was to prove that he was the owner of the whole stream, and for that purpose it was important to shew that the usual proposition of law, that each party was entitled ad medium
F filum aquae, was not applicable in the present case; and in order to shew that, he was endeavouring to prove that upon both sides of the river - on the same side with the land of the defendant - he had exercised acts of ownership, such as repairing the hedge; and therefore he
G claimed a right up to the hedge; and then going further, he shews that the hedge continued a visible line of demarcation without any thing occurring to break its continuity, - except that a cross hedge ran down to it, dividing the defendant’s farm from his neighbour’s land on the same side of the river, - down to a considerable distance, till it came
H opposite to the extremity of the plaintiff’s land on the other side. From these facts the plaintiff purposes to shew that it is all his; and it appears to me that the evidence ought to have been received, in order to rebut the proposition that the middle of the river was to be considered as the

boundary between two distinct closes. [Emphasis mine]

This is largely in respect of inclosures or boundaries wholly or partially defining land which may lead to inference of ownership of it being in one person as a result of acts of ownership done in part of it.

Upon these facts, Parke, B at pages 783-784 stated how the principle applies in the following observation inter alia: B

“Ownership may be proved by proof of possession, and that can be shewn only by acts of enjoyment of the land itself, but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes reasonable inference that the other belongs to the same person: though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; So I apprehend the same rule is applicable to a wood which is not inclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; and the case of Stanley v. White [14 East, 332], I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person by shewing acts of ownership on his part along the same fence.” [Emphasis mine] D

But, as can be seen from the observation of Parke, B, the plaintiff need not have lands or distinct boundary demarcations which surround or almost completely surround the land in dispute. He may E

just, in the alternative, have or occupy land connected, by virtue of its similarity, (in user), with the land in dispute with respect to which acts are done, that it may be possible to infer that what is true of the ownership of that land is likely to be true of the land in dispute: see Sunday
 B Piaro v. Tenalo (1976) 12 SC 31 at 43-44. It seems clear that the entire implication of section 46 is better understood if it is recognised that it provides for alternative situations. This is what the court below failed to do. It is usually easier to draw the necessary inference from some
 C of the alternatives because it is rather obvious to do so when the facts clearly do show, such as distinct boundary created. Other situations could be more problematic. It should always be remembered that it is a matter of evidence which may reasonably lead to the inference. The learned trial Judge probably chose the wrong alternative of the provisions of section 46 but, in my view, he rightly declined nevertheless to
 D apply the effect of the said section in favour of the plaintiffs since the evidence did not justify that course, and in the end dismissed their claim.

The court below disturbed the order of dismissal on appeal
 E and made an order for a retrial. The question is, on what basis was this done? It did this after taking the view that section 46 of the Evidence Act was not properly applied, that Exhibit K together with the sketch did not help the defendants' case and that there was inadequate evaluation of the evidence. **A retrial order is not made without sufficient**
 F **grounds. It is fundamental that an appellate court should bear in mind that in exercising its discretion to make an order for the retrial of a case, the paramount and only consideration is to ensure that justice is done to both parties and that the discretion should not be exercised in a manner that will make it appear that the court is only concerned with one party being given an unjustifiable opportunity to relitigate a case which has either truly failed or truly succeeded: see Onyemna v. Amah (1988) 1 NWLR (Pt.73) 772.** Where it is clear, therefore, from the
 G evidence that the trial court rightly concluded that a plaintiff had failed to establish the claim he presented to court and there was no irregularity affecting the proceedings which would warrant a retrial of the case, an order of retrial will be erroneous:
 H

see **Elias v. Disu (1962) 1 All NLR 214**; Ayoola v. Adebayo (1969) 1 All NLR 159. Such irregularity which will compel an order of retrial could be where, if the trial Judge failed in his primary duty in the evaluation of evidence to make findings of fact on the issue or issues joined on the pleadings, material for reaching a just decision and it is not such evidence upon which an appellate court can itself make such findings of fact, the Court of Appeal will be perfectly justified for that reason to order a retrial: see **Okeowo v. Migliore (1979) 11 SC 138**; **Abibu v. Binutu (1988) 1 NWLR (Pt.68) 57**; **Ezeoke v. Nwagbo (1988) 1 NWLR (pt.72) 616**. Or, there has been a mistrial, a substantial misdirection by the trial court, or some other vice by the court but for which the plaintiffs case might have succeeded, or at any rate might not have been regarded as having failed in toto, and so the defendant is not entitled to have judgment in his favour: see **Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130**.

In the present case, the plaintiffs failed completely to prove the claim. There is no evidence upon which they might have succeeded and therefore they do not deserve to have an opportunity for a retrial. It has been shown that the court below misunderstood Exhibit K, and misconceived section 16 of the Evidence Act. It has also been shown that there is no evidence of such possession or acts of ownership that can support the plaintiffs' claim. I hold in the circumstances that the lower court was in error to have ordered a retrial. I accordingly allow this appeal, set aside the order of retrial together with the order for costs, and affirm the order of dismissal made by the trial court. I award N5,000.00 as costs in the court below and N10,000.00 costs in this court in favour of the appellants.

KARIBI-WHYTE JSC

I have read the leading judgment in this appeal of my learned brother Uwaifo JSC. I agree entirely with him that this appeal be allowed. I also will, and hereby allow the appeal.

Respondents shall pay N5,000 as costs to the appellants in the

3310 Duru v. Onwumelu (2001) 12 KLR Karibi-Whyte JSC
court below, and N10,000 as costs in this court.

OGUNDARE JSC

B I agree entirely with the judgment of my learned brother Uwaifo, JSC Just delivered. I have nothing more to add. I too allow the appeal, set aside the judgment of the court below and restore that of the trial High Court dismissing plaintiffs/respondents' claims.

I abide by the order for costs made by Uwaifo, JSC.

C

ONU JSC

D I have had the opportunity to read before now the judgment of my learned brother Uwaifo, JSC just delivered. I am in full agreement with him that the appeal is meritorious and ought therefore to succeed. I wish to expatiate albeit briefly on the matter as follows:

E The respondents who were the plaintiffs in the trial High Court, Awka sued the appellants who were defendants and claimed in the following terms as contained in their (plaintiffs') further amended statement of claim:

F *"(a) A declaration of title (ownership) under native law or custom to the plaintiffs' piece or parcel of land known as and called "AGU ODUODONKA" or "AGU AKWALA" which situates at Ula Village, Ekwuolbia, within jurisdiction and shown and verged red in the plaintiffs' plan No. NLS/AN572/83 filed with the statement of claim. The annual rental value of this land is about N10.00.*

G *(b) Special and general damages for trespass committed on this land on or about the 20th day or March, 1974 limited to N1,000.00.*

(c) An injunction restraining the defendants, their servants, agents and or workmen from committing further trespass on the said land. Particulars of special damages were set out."

H Pleadings were filed and exchanged and while the appellants rested their defence on (their statement of defence dated the 25th of February, 1975 and filed on the 27th February, 1975, in particularly paragraphs 11, 12 and 14, the respondents rested their case on their

further amended statement of claim dated the 10th of June, 1985 filed on the 17th June 1985.... It is not disputed that the respondents founded their case on two roots of title ... to wit:

1. Exclusive possession
2. Ownership of adjoining land under section 45 (now Section 46) of the Evidence Act. B

Whichever name or names parties chose to call the land, the areas in dispute were amply shown delineated and demarcated in the plans filed by the appellants and the respondents as Exhibits 'W' and 'J'. Both plans show the area in dispute and appear substantially ad C idem on the said area in dispute.

At the conclusion of hearing which did not commence until 13th January, 1987 and after carefully considering the totality of the evidence adduced before him, the learned trial Judge, Obiesie, J, dismissed the respondents' case on 13th April, 1992. Before doing so, D however, the learned trial Judge had particularly weighed and considered the legal effects of Exhibits "K", "L", "M" and "B", coupled with a finding that the 1st plaintiff who gave evidence at variance with his pleadings along with PW.4, held that both had not been witnesses of E truth. The learned trial Judge in addition, came to the conclusion that on the face of Exhibits "K", "L" and "M", it would be impossible for the plaintiffs, to succeed in their case based on long and exclusive possession and enjoyment of the land in dispute. Such that when Exhibit "K" F was sought to be tendered and the respondents' counsel raised objection to its admissibility on two grounds, to wit that -

- (a) The proceedings did not indicate the stamp of the court.
- (b) The sketch forming part of the proceedings was not separately G certified.

These objections were over-ruled by the learned trial Judge.

Being dissatisfied with the learned trial Judge's dismissal of their case the respondents, who for purposes of this appeal are called appellants, appealed to the Court of Appeal, Enugu Division (hereinafter H referred to as the court below). The court below after considering arguments on both sides along with the briefs of the parties, allowed

the appeal and ordered a retrial, principally on the ground that Exhibit “K” was not admissible in evidence.

The four issues formulated by the appellants and submitted for our consideration are:

- B 1. Whether the court below was right in holding that Exhibit “K” relied on by the trial court to dismiss the respondents’ case is violative of sections 108 (now 109), 110 (now 112) of the Evidence Act, and whether the sketch attached to the said Exhibit “K” is also violative of section 3(1) (b)(i) of the Survey Law Cap. 124 Laws of Eastern Nigeria.
- C 2. Whether on the evidence which gave rise to Exhibit “M” which was held properly admitted by the lower court the respondents can ever succeed in an action rooted in exclusive possession and ownership.
3. Whether the court below was right in holding per Achike, J.C.A. that in the absence of a plan Exhibit “L” was worthless.

D 4. If the answers to the above issues are or some of them are in the negative, whether a retrial is the right order to make where the respondents failed in toto in an action for declaration of title, damages for trespass and injunction and where the respondents’ principal witnesses were disbelieved on the evidence before the court.

The respondents for their part have similarly submitted four identical issues as arising for determination.

F For the purposes of my consideration of this appeal, I wish to restrict myself to the arguments of appellants’ issues herein before set out seriatim thus:

ISSUE NO 1.

G For a clearer appreciation of this issue, it is pertinent to ask and answer the following questions, to wit: what is Exhibit K and what did it deal with? In answer, Exhibit K is an Isuofia Native Court proceedings and judgment in suit No. 81135 which determined the boundary between two neighbouring communities of Aku and Nkpologwu (Appellants’ Community). Both parties in this case showed in their plans - Exhibits “A” and “J” that the land now in dispute has boundary on the west with a town known as Ezinifite but which in 1935 was known as Aku. On this western boundary are shown on both plans of the parties such features as old Colonial or Provincial Road and an

Ekpe wall. It is common ground, at least from the evidence of PW.1 and PW.2, that standing on this Colonial or Provincial Road and looking northwards towards Igbo-Ukwu as shown on Exhibits A and J, the land on the right is the land in dispute. This is where Exhibit K is relevant since it is a public document as provided in section 109(ii) of the Evidence Act, having satisfied the conditions stipulated by section III of the said Act. It is for this reason that I agree that the court below was grossly in error when it held as it did that Exhibit UK' is violative of sections 108 (now 109), 110 (now 111) and 111 (Now 112) of the Evidence Act. The court below fell into a fundamental error by failing to differentiate between Exhibit UK' which is the certified copy of the proceedings and judgment of the Native Court in a matter decided sixty three years ago, and the sketch attached to the said judgment which the court below devoted almost 10 pages thereof to attack.

What, one may ask, did Exhibit UK' set out to do? As demonstrated in its judgment, that court set out to determine the boundary between Aku (now Ezinifite) and the appellants in this case. From the features on the western boundary with Ezinifite as demonstrated in Exhibits "K' and "J' from the evidence of PW 1 and PW.2 earlier referred to it cannot be doubted that the land litigated those sixty three years ago i.e. in 1935 between Aka (now Ezinifite) and the appellants' community of Nkpologwu is the land now in dispute between the appellants and the respondents.

Evidence adduced clearly showed how the respondents' people of Ekwulobia grouped themselves into two, some testifying for Aku (now Ezinifite) while some testified for the appellants' community of Nkpologwu. At the time of the proceedings, the respondents' people never laid claim over the land in dispute nor asserted having any boundary with Aku (Ezinifite). Rather, they testified for the disputants its and disclaimed any interest. It is obviously difficult to understand how the respondents after those sixty-three years can turn round in a matter in which they testified for both parties and inferentially disclaimed ownership, to say now that they have boundary with Aku (now Ezinifite).

See *Atta II v. Bonsara II* (1959) A.C.95 at page 103.

In its indictment of Exhibit “K”, the court below took the view that the sketch attached to Exhibit “K” is violative of section 3(1)(b)(1) of the Survey Law, Cap. 124 Laws of Eastern Nigeria and should not have been received in evidence. It is noteworthy, however, that the sketch under reference was not made or tendered by any of the parties to the proceedings in Exhibit “K”.

For a proper appreciation of what gave rise to the sketch (Exhibit “K”) which is neither a plan, map nor a diagram of any area of land made or tendered by any of the parties it is necessary to reproduce the relevant portion of the judgment of the Native Court demonstrated by the sketch itself thus:-

“Judgment The boundary between Aku (now Ezinifite) and Nkpologwu will be from Aja Ofia (which is 3400 yards on a bearing of 2380 from milestone 19) to a junction of the Old Provincial Road and PWD Road (at the corner of the latter 4600 from milestone 19) thence in a straight line to a point midway between the pan house compound wall on a bearing of 100 and thence in a straight line towards Nwajagu bush, 3540 (where the Old Provincial Road passes east of it) till the boundary enters Ekwulobia land at same point not determined.

From the point of junction of the road northwards the boundary follows roughly the Old Provincial Road but as this Old Road is now only a bush path and as such liable to change its course slightly the boundary will be straight lines as indicated The distances are measured by pacing, a pace being taken as a yard.

*(Sgd) P. P. Grey President.
26 September, 1935.”*

The sketch illustrated, I agree, is obviously a practical illustration of the judgment by the court and forming part of it being neither a map nor a plan tendered by any of the parties. Indeed, the judgment is exactly as indicated in the sketch, being neither an act of the parties nor within the contemplation of section 3(1)(b)(i) of the Survey Law, Cap.24 Laws of Eastern Nigeria.

The case of *Lydia Erinosho v. Tunji Owokoniran & Anor.* (1965)

NMLR 479 relied on by the lower court relates to a plan tendered in evidence by a party, the admissibility of which is governed by Survey Law, and not a practical illustration by a Native Court of its judgment when the said court dealt with boundary dispute. I am inclined to the appellants' view that the court below was in error when it excluded the sketch attached to Exhibit "K" on the ground that it was not prepared and signed by a surveyor. The decision of the court below that res judicata would not apply in view of the fact that the parties to the action were different and also that the learned trial Judge was certainly right for holding that Exhibit "K" constituted an act of possession on the part of the appellant vide *Udeze v. Chidebe* (1990) 1 NWLR (Pt. 125) 141; (1990) Vol.21 (Pt. 1) NSCC 114 at 115 and *Uluba v. Sillo* (1973) 1 SC.37 at 55 - 56 is, in my opinion, therefore unimpeachable. B C

Issue 1 is accordingly answered in the negative.

ISSUE NO.2

In dealing with this issue, it ought to be remembered that the main plank of the respondents' argument revolved on exclusive possession of the land in dispute. Albeit, the court below made no finding in their (respondents') favour on their claim over ownership of the land in dispute based on section 45 (now 46) of the Evidence Act - see *Okechukwu v. Okafor* (1961) 2 SCNLR 369; *Anyanwu v. Mbara* (1992) 5 NWLR (Pt. 242) 386 and *Okonkwo v. Kpajie* (1992) 2 NWLR (Pt.226) 633. D E

Exhibit "M" was an agreement jointly executed by the appellants and the respondents granting Aguata County Council a portion of the land in dispute for the building of a hospital. This area is verged green in the respondents' plan Exhibit 'A' and orange in the appellants' plan Exhibit "J". The Evidence of DW.3, Chief Michael Okpala which was relevant and corroborated the evidence of DW. 1, Alexander Ezeobi, was believed and accepted by the trial court while Exhibit "M" was tendered by the appellants to show their acts of ownership and possession and to negative the respondents' claim to exclusive ownership as a root of title see *Idundun v. Okumagba* (1976) 9-10 SC 227. It is no surprise therefore that the trial court ended its findings on Exhibit "M" in different parts of its judgment as follows: F G H

“Exhibit ‘M’ does not in any way support plaintiffs’ case that they alone own the portion of the land involved.”

B When the devastating effect of Exhibit “M” was realised by the respondents, the 1st respondent as 1st plaintiff in the trial court brazenly denied the existence of the hospital site and this notwithstanding the fact that their plan Exhibit “K” clearly depicted the site of the hospital. Little wonder then that the learned trial Judge disbelieved his (1st respondent’s) evidence and the court below under no guise could reverse the tables. My answer to issue 2 is also rendered in the negative.

ISSUE NO. 3

D The role played by the respondents in refraining to join issues raised in the appellants’ paragraphs 11 and 12 of their (appellants’) statement of defence of 27th February, 1975 left unresolved the dispute between the parties as one of exclusive possession as demonstrated by Exhibits “K” and “M”, trespass of title simpliciter is examined next.

E On the 2nd December, 1974, the respondents filed their statement of claim which they served on the appellants vide pages 11 -15 of the record. On the 27th of February, 1975, the Appellants filed their defence which they served on the respondents and therein raised completely new issues in paragraphs 11 and 12 of the said defence and copiously and in extenso pleaded Exhibits “K” and “L” as well as the conduct of the respondents in relation to these exhibits. On the 19th of April, 1975, the respondents filed an amended statement of claim and therein again refrained from commenting on the new issues raised by the appellants touching on the land in dispute or filing any reply thereto.

G Ten years later namely, on 19th June, 1985, the respondents filed a further amended statement of claim pursuant to an order of court dated 10th June, 1985 and still refrained from joining issues on the very important new issues raised by the appellants in paragraphs 11 and 12 of their statement of defence of 27th February, 1975.

H As pleaded in paragraph 12 of the statement of defence, the dispute in Exhibit “L” was between the respondents and the appellants’ people of Umuekpili of Ula Ekwulobia. As also clearly pleaded, the dispute was in respect of the land in dispute and was an action in

trespass simpliciter. No declaration of title was sought or prayed for. The area of trespass complained of, then as shown in the appellants' plan Exhibit "J" - a claim not contradicted by the respondents. Further that in as much as DW.1 testified and tendered Exhibit "L", he asserted that he took the survey and showed him the features on the land in dispute as well as having subsequently been cross-examined in extenso. Yet, riot one of these questions could contradict Exhibit "L' even to throw any doubt on the event contained in the said exhibit. It is not enough for the respondents to say as the 1st plaintiff did during cross-examination, that Exhibit "L" concerned a different piece of land albeit that they (the respondents) failed to join issues with the appellants in relation to the land in dispute in their pleadings. B C

The principal ground relied on by the court below to impeach Exhibit "L" was absence of the plan delineating the boundaries of the land involved in the said exhibit. As Exhibit 'L' concerned an action in trespass simpliciter, in such a case a plan is not a sine qua lto. In Exhibit "J", the area which was the subject of trespass in 1951 was shown and that area is within Exhibit "A". The court below went all out to find diverse answers for Exhibit 'L' which the respondents could not find for themselves. This was not a valid reason for the court below to contend on behalf of the respondents that there was no plan attached to Exhibit 'L' to show and indicate the area litigated in suit No. 87/51 - 52 - the appellants' complaint in Exhibit 'L' being simply that the respondents disturbed their possession by cutting the straw planted by them. D E F

This issue is also answered in the negative.

ISSUE NO. 4 G

The contention here is that if the answers to the above issues or some of them are rendered in the negative, whether a retrial is the right order to make where the respondents failed in toto in an action for declaration of title, damages for trespass and injunction and where the respondents' principal witnesses were disbelieved, on the evidence before the court. H

I am of the firm view that even if the court below were right in holding that the sketch attached to Exhibit "K" is inadmissible, Exhibit

“K” itself and Exhibit “M” set an impregnable barrier against the respondents’ success in an action based on exclusive possession. See *Atunrase v. Sunmola* (1985) 1 NWLR 105 at 110. The western boundary of the appellants’ land litigated in Exhibit “K” between them and
 B Aku (now Ezinifite) was sufficiently and clearly described in Exhibit “K” in as much as both Exhibit “A” respondents’ plan and Exhibit “F” appellants’ plan clearly reflect the Provincial or Colonial Road on the western boundary.

C From the above, it is clear that the land, the subject of this appeal is the land adjudged to the appellants in Suit No.81/35 and in relation to which some of the respondents’ people testified for the appellants as clearly shown in Exhibit “K”. As the respondents had based their case on exclusive possession on the face of Exhibit “K” and
 D Exhibit “M” in particular, a retrial will serve no useful purpose. To order a retrial therefore would obviously be wronging the appellants to the extent that there would be a miscarriage of justice occasioned thereby. No retrial would assist them to get over Exhibits “K” and “M” in particular which proved beyond doubt that the respondents were not in
 E exclusive possession. The learned trial Judge did not hesitate to so find particularly on the evidence founded on Exhibits “K”, “L” and “M”.

The principle of law governing retrial was clearly stated in *Isaac Ayoola v. Jinadu Adebayo & Ors* (1969) 1 All NLR 159 thus:

F “An order for a retrial inevitably implies that one of the parties usually the plaintiff is being given another opportunity to re-litigate the same matter and certainly before deciding to make such an order an appellate tribunal should satisfy itself that the
 G other party is not thereby being wronged to such an extent that there would be a miscarriage of justice. An order for retrial is not appropriate where it is manifest that the plaintiff’s irregularity of a substantial nature is apparent in the records or shown in the court.”

H See also *Awote v. Owodunni* (No.2) (1987) 2 NWLR (Part 57) 366 at 378. I am therefore in complete agreement with the appellants that a retrial is not the proper and/or right order to make in the instant case, in view of the evidence accepted by the learned trial Judge

and in view of the nature of the respondents' claim before that court which failed in toto on the evidence brought by them. The court below was therefore wrong in the conclusion it arrived at and I so hold.

My answer to this issue is also rendered on the negative. It is for the above reasons and those fully articulated and contained in the leading judgment of my learned brother, Uwaifo, JSC that I too allow this appeal. I make similar consequential orders contained in the leading judgment.

KATSINA-ALU JSC

I read in draft the judgment of my learned brother Uwaifo JSC. I agree with it for the reasons he has given. The plaintiffs/respondents who relied on title derived from long possession obviously failed to adduce evidence in support of sufficient acts of possession and ownership over a long period of time numerous and positive enough to warrant the inference that they are exclusive owners. They also tried to rely on the inference of ownership of land that may be drawn under section 46 of the Evidence Act.

There was nothing shown to lead to such inference in their favour. The plaintiffs/respondents having failed in toto to prove their case, the trial court was right to dismiss the same. The lower court which ordered a retrial was in error as the evidence and circumstances did not warrant the order of retrial. I too, accordingly allow the appeal and dismiss the claim. I abide by the costs awarded in the leading judgment.