

SUPREME COURT OF NIGERIA
13TH DECEMBER, 2001. SC.90/1995
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.

MR. EMMANUEL A. ADENIRAN APPELLANT
AND
1. MR. EMMANUEL ALAO
2. TOSIL HOLDING LIMITED RESPONDENTS

PLEADINGS - Bindingness on court and the parties - The court must not stray away from the pleadings - To deal with issues not properly before it (H1)

APPEALS - Error of trial court - Issues not arising - The courts below fell into error - To have insisted on the proof of an issue - Which did not arise before the court (H2)

LAND LAW - Proof of - Title to land - By documents - Requirement of authentication - The decision in *Idundun v. Okumagba* - Merely means that the document must be authenticated by execution of it by the owners - And not that authentication is a different requirement from execution (H3)

LAND LAW - Proof of - Title to land - By documents - Requirement of authentication - The signature on the deed of conveyance - Is the authentication required - And is sufficient evidence to support the award - Sought of title to land (H4)

JUDGMENT - Perversity - Failure of court to consider necessary exhibits - Which establishes title to the land and the identity of the land - Would render the judgment perverse (H5)

EVIDENCE - Proof - The plaintiff must succeed on the strength of his case - Not the weakness of the defendants case (H6)

LAND LAW - *Trespass to land - Damages - An owner of land in possession of the land - Who has not alienated it by way of lease or tenancy -Is entitled to damages - If a third party gives on the land without his consent (H7)*

LAND - *Trespass to land - Acts of possession - What amounts ot sufficient acts of possession - To entitle the owner of land to damages for trespass (H8)*

FAIR HEARING - *Defences not raised by the defendant - Where the court proceeds to give judgment - Based on defences not raised by the defendant - He is deemed to have descended into the arena - To fight the defendants battle for him (H9)*

PLEADINGS - *Equitable defences - Must be specifically pleaded with full particulars - Before the defendant can rely on them or lead evidence on them (H10)*

FACTS

This was an appeal emanating from a dispute over land situate at plot No. 53 Opebe Street, Omgbagbo Village, Ikeja Lagos. At the trial High court the plaintiff/appellant had sued the defendants seeking a declaration of title to a statutory right of occupancy to the said parcel of land, damages for trespass and an order of perpetual Injunction.

At the trial it was agreed by the parties that one Felix Olatunde Thomas owned a large tract of land at Agbole Omgbagbo in Omgbagbo village, Ikeja District Lagos, which he had inherited from his mother, Mariam Ayodele Gooding. By an instrument dated 25th September 1972 and duly registered in the Land Registry office at Lagos, Felix Olatunde Thomas conveyed a portion of his Land to the appellant. The survey plan attached to the deed of conveyence shows that the vendor had laid out his land into ten plots, which he duly numbered 1 to 10. The portion conveyed to the appellant comprised two of the plots numbered 3 and 4. The beacon Nos. are EB 164, EB 219, EB 225 and EB 226 for plot 3, while plot 4 bears EB 212, EB 213, EB 225 and EB 226. The two plots

share a common boundary length wise with beacon Nos. EB 225 and EB 226. The deed of conveyance was admitted as exhibit I. By an instrument dated 31st January, 1973, registered as No. 29 at page 29 in volume 1415, Felix Olatunde Thomas conveyed plot No. 2 to one Mr. Nasirudeen Akintola Durosimi-Etti. The beacon numbers are EB 160, EB 212, EB 224, and EB 225. Plot 2 shares common boundary with plot 4 breadth wise with beacon Nos. EB 212 and EB 225.

The appellant retained his said parcel of land of two plots while Durosimi-Etti did not retain his. On 21st April, 1977, he conveyed his land to one Madam Hannah Mende and this was duly registered. On November 30th, 1979, Madam Hannah Mende conveyed to Iyabo Omobonike Adebisi and this was also duly registered and is exhibit 5. The history of the transfer of that land by deed of conveyance terminated with exhibit 5. Then on 30th September, 1983, the 1st respondent, Mr. Emmanuel Alao, issued a receipt in the sum of N80,000.00 to the 2nd respondent "being full purchase price of my plot of land known as No. 9 on survey plan No. J.O. 333/77 with pillar Nos. BL 2951, BL 2952, BL 2972, and BL 2973". The receipt is exhibit 7. It is the land for which exhibit 7 was purportedly issued that is now alleged was plot 2.

Some of the issues which arose at the trial included, how the 1st respondent became the owner of the land, how the land became plot 9, how the beacon numbers completely became different, how from some of the survey plans and a composite plan relied on by the respondents, the land shifted physically from its location to another totally different and far away position and how the land has become rather larger in size. The trial judge at the end of trial however dismissed the claim of the plaintiffs and gave judgment on behalf of the defendants. The appeal of the plaintiff to the Court of Appeal was also dismissed. They have therefore finally appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether under the facts and circumstances of this case where parties are agreed that no issue was joined due execution of exhibit 1, the learned Justices of the Court of Appeal were right to have affirmed the decision of the trial court that the appellant ought to prove the due

execution of exhibit 1 and or failed to prove same.

(2) *Whether the appellant established his claim of being entitled to the grant of statutory right of occupancy to the land in dispute, trespass and injunction as against the respondents.*

B (3) *Whether the facts and circumstances of this case, the Court of Appeal rightly held that the equitable defences of estoppel, laches and acquiescence availed the respondents.*

(4) *Whether the learned Justices of the Court of Appeal properly evaluated the evidence led in this case.*

C (5) *Whether in view led by the parties the land sold by Felix Olatunde Thomas (late) to the Durosimi Etti DW4 is not different from the land in dispute in this case."*

D **HELD:** (Unanimously allowing the appeal per leading judgment of **UWAIFO JSC**)

Pleadings - Bindingness

1. At no stage, as rightly submitted by appellant's counsel, was the due execution of exhibit 1 joined as an issue on the pleadings of the parties. It is elementary principle that parties and the court are bound by the parties' pleadings. Therefore, while the parties must keep within them, in the same way but put in other words, the court must not stray away from them to commit itself upon issues not properly before it: see *African Continental Seaways Ltd v. Nigerian Dredging Roads & General Works Ltd* (1977) 5 SC 235 at 250 where this court observed:

G *"The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by their pleadings."* (P. 3680 C)

H Appeals - Error of trial court

2. The question of due authentication by execution other than by Mr. Thomas did not arise as an issue in this case where, as I have said earlier, the land sold was the personal property of Thomas who signed the deed

of conveyance and not that of a native community or the Egba Refugees Descendants' Community to require their consent or approval of the sale. The court below fell into error to have, like the trial court, insisted on it. (P. 3683 B)

Land law - Proof of title to land by document

3. But in the said case of *Idundun v Okumagba* (1976) NSCC (Vol. 10) 445 relied on by the learned Justice, this court per Fatayi – Williams JSC (later CJN) said at p. 454:

“... ownership of land may be proved by production of documents of title which must, of course be duly authenticated in the sense that their due execution must be proved...”

[Emphasis mine]

The above-quoted observation means no more than that a document of title must be authenticated by due execution of it by the owner or owners of the land it purports to alienate.

This does not suggest that authentication is a different or additional requirement to the execution of the document itself. But that is what the two courts below have said, or at least implied. (P. 3683 G)

Proof of title to land - Signature on deed of conveyance

4. The signature on exhibit 1, the appellant's deed of conveyance, is similar to that on exhibit 3 or 3A, the deed of conveyance of Durosimi-Etti who claimed he passed on his title to his successors. That signature on exhibit 1 is the authentication required. The learned counsel for the appellant has in the very forceful presentation of his case before this court made this point again plain beyond any argument, and I accept the merit of it. Once it is shown that the appellant's deed of conveyance (exhibit 1) has been duly executed by the owner of the land as vendor, it is sufficient evidence to support the award he seeks of title to the land. Relying on *Idundun v. Okumagba* (supra) this court reached that conclusion in the recent case of *Aliyu v. Sodipo* (1994) 5 NWLR (pt. 342) 1. I must therefore answer issue 1 in the negative. (P. 3684 H)

Judgment - Perversity

5. It seems to me the two courts below either did not look at those exhibits or peruse them carefully or did not appreciate what they essentially convey. But they are, in my view, very plain and instructive. They are part of the evidence which would assist in arriving at the justice of the case. Neither of the two courts below, on a close perusal of their judgments, called exhibits 1, 2, 3 and 6 in aid. These are the exhibits which help to establish the appellant's title to the land in dispute and to put its identity beyond doubt. Not having done so, their judgments were bound to be perverse. (P.3687 D)

Proof - Success of plaintiff on the strength of his case

6. It is true that a plaintiff must succeed on the strength of his case. If his case is weak it does not matter that the defendant's case is also weak or that he makes no case at all. The plaintiff's case will fail: see *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336. (P.3687 F)

Land law - Trespass to land - Damages

7. He also certainly proved that he was entitled to damages for trespass and an order of injunction. He is the owner of the land and was, from the evidence, in possession. He allowed his daughter, Modupe Adeniran (p.w. 3), to farm the land. An owner of land who has not alienated it by way of lease or tenancy is prima facie entitled to damages if a third party goes upon the land without his consent. (P.3689 D)

Trespass to land - Acts of possession

8. The slightest evidence of possession by him is enough. In the present case p.w.3 was simply a licensee; the appellant was in effective physical possession through her. It has in fact been held that to cultivate a piece of land, erect a fence thereon, demarcate it with pegs or survey beacons may be sufficient act of possession in certain circumstances: see *Wuta Ofei v. Danquah* (1961) 3 All ER 596. (P.3689 E)

Fair hearing - Defences not raised

9. I cannot find where those defences were raised in any of the submissions made to the two courts below even by way of mere mention. The learned Justice nonetheless proceeded to discuss them in his judgment and to hold that their effect militated against the claim the appellant set out to make when none of the parties canvassed them. He clearly descended into the arena in that sense to fight the respondents battle. (P. 3690 E) B

Pleadings - Equitable defences - Must be specifically pleaded C

10. In actual fact and as a matter of practice, the respondents did not, in conformity with pleading procedure, raised those defences in their statement of defence. All they pleaded in that regard is in para. 40 as follows:

“40. Further in the alternative the defendants will among other legal and equitable defences open to them rely on (a) Estoppel, (b) Laches, (c) Standing by and (d) Acquiescence.” D

On this type of pleading, a defendant will be precluded from leading evidence and will not be allowed to rely on the defences. The law is clear that those defences must be specifically pleaded with full particulars. It is the facts averred which determine what the real defence is and so it is necessary that the facts be adequately and carefully stated. I need not say more on this but, for example, see *Bullen & Leake & Jacob’s Precedents of Pleadings*, 13th edn pp. 1254 – 1255. I accordingly answer issue 3 in the negative. (P. 3690 D) F

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. A party who pleads any unnecessary fact will not fail in his claim because he failed to prove such fact G

He contended further that neither party suggested nor pleaded that the Egba Refugees had any proprietary interest in the land to necessitate their consent or confirmation of sale in order to make it valid; and that a party who pleaded any unnecessary fact would not fail in his claim simply because he failed to prove such fact. That was obviously a point well taken with which the court below agreed but the argument as a whole did H

not seem to have weighed with that court in the end as to whether the appellant proved that there was due execution of his deed of conveyance (exhibit 1) in order to confer title in him. (P. 3682 B)

B ONU JSC

2. An admission of law made before a trial judge - Is binding and cannot be ignored by the Court of Appeal

I am satisfied that it is stark clear that the issue of due execution of Exhibit 1 did not arise for determination by the court below as the Respondents had conceded that point before the trial court. Such an admission or concession on a point of law is binding and cannot be ignored by the Court of Appeal vide Okonkwo v. Kpajie (1992) 2 NWLR (Part 226) 633 at 656 paragraphs H – B. I am also mindful of the duty of court to decide the crucial issues in contention between litigants and not to purport to resolve them when there is no dispute or disagreement between the parties to base its decision thereon. (P. 3703 F)

3. Appeals - Issues raised suo motu - The court cannot raise and determine issue suo motu - Without hearing the parties on it

What the learned Justice said above, is with due respect, wrong. Nowhere in their submission both at the trial court and in the court below, did they raise it. The court below therefore raised and considered same suo motu, relying on Section 16 of the Court of Appeal Act. I hold the view that it is beyond the power and/or jurisdiction of the Court of Appeal under Section 16 of the Act to so raise and consider issues as well as determine them suo motu. Clearly, therefore, although the court below had in its judgment berated the trial court for raising and considering the issue suo motu, it also fell into the same error. In the result, I hold that the court below cannot raise and determine this issue suo motu and decide it without hearing the parties on it. (P. 3709 E)

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REPRESENTATION

Mohammed Fawehinmi Esq. for the Appellant.
Respondent absent . Not represented

CASES REFERRED TO

Kodilinye v. Mbanefo Odu (1935) 2 WACA 336	
Enigwe v. Akaigwe (1992) 2 NWLR (pt. 225) 505	
Adeyeri v Okobi (1997) 6 NWLR (pt. 510) 534	
Wuta Ofei v. Danquah (1961) 3 All ER 596	B
Alatishe v. Sanyaolu (1964) 1 All NLR (pt.1) 398	
Mogaji v Cadbury Ltd (1972) 2 SC 97	
Ladipo v. Ajani (1997) 8 NWLR (pt. 516) 356	
Okonkwo v. Kpajie (1992) 2 NWLR (Part 226) 633 at 656	
Carlen (Nig.) Ltd. V Unijos (1994) 1 NWLR (Part 323) 631 at 665	C
Jallco Ltd v. Owoniboyas Tech. Service Ltd (1995) 4 NWLR (pt. 391) 534 at 549	
Oro v Falade (1995) 5 NWLR (Part 396) 385 385 at 402	
Adeniji v Adeniji (1972) 1 All NLR (Part 1) 298	
UBA Ltd v Achoru (1990) 6 NWLR (Part 156) 1	D

LEAD JUDGMENT BY UWAIFO JSC

This is an appeal from a judgment of the Court of Appeal, Lagos Division given on 12 December, 1991 now reported as *Adeniran v Alao* (1992) 2 NWLR E (pt. 223) 350. It affirmed the judgment of the High Court of Lagos given on 12 December, 1986 which dismissed the plaintiff's claim. In his claim, the plaintiff (now appellant) sought three reliefs against the defendants (now respondents) which I paraphrase as (1) a declaration of title to a statutory right of occupancy to F a parcel of land at plot No. 53 Opebi Street, Oniagbo village, Ikeja Lagos; (2) N1,000. 00 damages for trespass; and (3) an order of perpetual injunction.

Having lost in the two courts below, the appellant has asked this court to consider his appeal on the following issues:

"(1) Whether under the facts and circumstances of this case where parties G are agreed that no issue was joined due execution of exhibit 1, the learned Justices of the Court of Appeal were right to have affirmed the decision of the trial court that the appellant ought to prove the due execution of exhibit 1 and or H failed to prove same.

(2) Whether the appellant established his claim of being entitled to the grant of statutory right of occupancy to the land in dispute, trespass and injunction as against the respondents.

(3) *Whether the facts and circumstances of this case, the Court of Appeal rightly held that the equitable defences of estoppel, laches and acquiescence availed the respondents.*

B (4) *Whether the learned Justices of the Court of Appeal properly evaluated the evidence led in this case.*

(5) *Whether in view led by the parties the land sold by Felix Olatunde Thomas (late) to the Durosimi Etti DW4 is not different from the land in dispute in this case.*”

C Let me first state the facts of the case briefly. One Felix Olatunde Thomas owned a large tract of land at Agbole Oniagbo in Oniagbagbo Village, Ikeja District, Lagos. He inherited it from her mother, Mariam Ayodele Gooding. She herself had inherited the land from her father, James Gooding, being his only child. These facts were agreed by both parties. By D an instrument dated 25 September, 1972, registered as No. 42 and page 42 in volume 1409 of the Lands Registry in the Office at Lagos, the said Felix Olatunde Thomas conveyed a portion of his land to the appellant. The survey plan attached to the deed of conveyance shows that the vendor had E laid out his land into ten plots, which he duly numbered 1 to 10. The portion conveyed to the appellant comprised two of the plots, numbered 3 and 4. The beacon Nos. are EB 164, EB 219, EB 225 and EB 226 for plot 3, while plot 4 bears EB 212, EB 213, EB 225 and EB 226. The two plots F share a common boundary length-wise with beacon Nos. EB 225 and EB 226. The deed of conveyance was admitted as exhibit 1. By an instrument dated 31 January, 1973, registered as No. 29 at page 29 in volume 1415, Felix Olatunde conveyed plot No. 2 to one Mr. Nasirudeen Akinola-Etti. The beacon boundary with plot 4 breath-wise with beacon Nos. EB 212 G and EB 225. The survey plan attached to the deed of conveyance, which was admitted as exhibit 3 (photostat copy) or 3A (original), clearly shows these facts.

H The appellant retained his said parcel of land of two plots. Durosimi Etti did not retain his. On April 21, 1997, he conveyed his land to one Madam Hannah Meude and this was registered as No. 53 at page 53 in volume 1622. The deed of conveyance is exhibit 4 (Photostat copy) or exhibit 4A (original). On 30 November, 1978, Madam Hannah Meude

conveyed to Iyabo Omobonike Adebisi and the deed was registered as No.22 at Page 22 in volume 1764. it is exhibit 5. The history of the transfer of that land by deed of conveyance terminated with exhibit 5. Then on 30 September, 1983, the 1st respondent, Mr. Emmanuel A. Alao, issued a receipt In the sum of N80, 000. 00 to the 2nd respondents “being full B purchase price of my plot of land known as No. 9 on survey plan No. J.O. 333/77 with pillar Nos. BL 2951, BL 2952, BL 2972 and BL 2973” The receipt is exhibit 7. It is the land for which exhibit 7 was purportedly issued that is now alleged plot 2. How the 1st respondent became the C owner of the land, how the land became plot NO. 9, how the beacon numbers completely became different, how from some of the survey plans and a composite plan relied on by the respondents, the land *shifted physically* from its location, to another totally different and far away position, and how the land has become rather larger in size are now with long posers D which have turned out to be real puzzlers, and must be dealt with along with other issues in this judgment.

I have already set out five issues the appellant has called upon this court to determine in resolving his appeal. The respondents have also set E out five issues. Although they are differently couched, they are essentially the same as the appellant’s issues except issue 2 by the respondent which states.

“2. Whether the appellant was able to prove title to plot 2 claimed F by the respondents and upon which the claimed respondents had been in possession since 1971.”

This issue, in my view, is misconceived apart from not having been based on any ground of appeal. In the first place, the appellant’s case has G never been a claim to plot 2 but that instead of the respondents staying upon plot 2, they trespassed upon his own plots 3 and 4. Second, the respondents’ assertion that the said pot 2 has now become plot 9 is in conflict with the reality on the ground having regard to the relevant documents of title and survey plans. Third, the respondents have no document H of title to show that plot 2 was ever conveyed to them let alone that it is now plot 9. Fourth, Durosimi-Etti who was the earliest person to acquire plot 2 from Felix Olatunde Thomas was not given possession

until January, 1973. I shall therefore rely on the appellant's issues for the determination of this appeal.

ISSUE 1

The appellant pleaded a deed of conveyance from Felix Olatunde Thomas and tendered it in evidence, exhibit 1. Exhibit 1, as already shown, relates to plots 3 and 4. The respondents pleaded a similar deed of conveyance from Thomas and tendered it in evidence, exhibit 3 (or 3A). This relates to plot 2. The two exhibits were executed in person by the said Felix Olatunde Thomas. A comparison of both shows exactly similar signatures.

At no stage, as rightly submitted by appellant's counsel, was the due execution of exhibit 1 joined as an issue on the pleadings of the parties. It is elementary principle that parties and the court are bound by the parties' pleadings. Therefore, while the parties must keep within them, in the same way but put in other words, the court must not stray away from them to commit itself upon issues not properly before it: see African Continental Seaways Ltd v. Nigerian Dredging Roads & General Works Ltd (1977) 5 SC 235 at 250 where this court observed:

"The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by their pleadings."

In the present case, the two courts below went into diversionary issues not relevant and not canvassed by the parties. The real issue is whether the appellant's deed of conveyance, exhibit 1, was executed by Felix Olatunde Thomas, just as the respondents relied, initially, on exhibit 3 which was similarly executed by the said Thomas. In his address before the trial court, the respondent's counsel submitted that the appellant did not call any member of Opebi family to confirm that he got land from Felix Olatunde Thomas "or called (sic) anybody to identify plaintiff's vendor (sic) signature. On the contrary the defendants through 4th defence witness proved due execution of exhibits 3 and 3A." Learned counsel for the appellant in reply submitted that exhibits 1 and 3 were executed

by the same Thomas and therefore there was nothing else as to due execution that the appellant needed to prove. The learned trial judge in his judgment observed and held:

"...a party relying on ownership of land by production of document of title must prove due authentication in the sense of due execution of the said execution (sic). After a careful consideration of the evidence led by the plaintiff on this point I hold that the plaintiff failed woefully to establish due authentication and due execution of exhibit 1 every evidence determined with Felix Olatunde Thomas, no evidence whether the said family of Felix Olatunde Thomas died childless and the family thereby extinct. It is to cover this gap that plaintiff averred ratification and confirmation by Egba Refugees Descendants Community but no satisfactory and credible evidence was led to support the averment."

Apart from the fact that the question of due execution by Felix Olatunde Thomas was never raised as an issue on the pleadings, I am quite baffled how the learned trial judge came by his finding and a good portion of his observation quoted above. The respondents' counsel's submission before him was that the appellant called nobody to identify Mr. Thomas' signature on exhibit 1 but that on the contrary the respondents through the 4th defence witness proved due execution of exhibit 3. The appellant who got exhibit 1 from Mr. Thomas said in evidence:

"Mr Thomas sold the piece of land to me for 500 or N1,000.00. I was later given a conveyance. This was in 1972. This is the conveyance executed in my favour."

The deed of conveyance was then received in evidence as exhibit 1. No suggestion was ever made by the defence to the appellant that exhibit 1 was not executed by Mr. Thomas. In the same manner, 4th defence witness, Mr. Nasirudeen Akinola Durosimi-Etti, who got exhibit 3 from Mr. Thomas, said in evidence as contained in the printed record:

"I have heard of Mr. Felix Olatunde Thomas before. In 1973 Thomas sold a parcel of land to me he showed me the land at Opebi Road he executed a deed of conveyance in (my) favour in respect. I see exhibit 3 is the deed of conveyance made in my favour by Thomas."

The original deed of conveyance was then admitted as exhibit 3A.

As can be seen both sides obtained a deed of conveyance each from Mr. Thomas in the same circumstances so that the question of due execution in respect of the appellant's could not reasonably arise. This point was seriously canvassed by Chief G.O.K. Ajayi SAN on behalf of the appellant B at the court below in the appeal against the trial court's decision. He argued that both parties were agreed that the land was the personal property of James Gooding which devolved to Felix Olatunde Thomas from whom each of the parties obtained a conveyance. He contended further C that neither party suggested nor pleaded that the Egba Refugees had any proprietary interest in the land to necessitate their consent or confirmation of sale in order to make it valid; and that a party who pleaded any unnecessary fact would not fail in his claim simply because he failed to prove such fact. That was obviously a point well taken with which the court D below agreed but the argument as a whole did not seem to have weighed with that court in the end as to whether the appellant proved that there was due execution of his deed of conveyance (exhibit 1) in order to confer title in him.

E In his leading judgment, Tobi JCA stuck to the issue of due authentication and execution when he observed [(1992) 2 NWLR (pt. 223) at pp. 369 – 370]:

F *“A Deed of Conveyance without due authentication and execution is in law worthless for the purposes of proving title to land. It has no probative or evidential value beyond the printed document. A document by itself has no legal life unless there is a human intervention by way of due execution.*

G *Apparently, learned Senior Advocate did not specifically react to this aspect of authentication and execution. He merely submitted that since both parties to the suit pleaded Deeds of Conveyance from the descendant of James Gooding and did not suggest or plead that the Egba Refugees or the Leader had any proprietary interest in the land, his consent H or confirmation was not necessary to the acquisition of a legal title to the land. With respect, I am not with learned Senior Advocate here. The point made is neither here nor there. The requirement of due authentication and execution in Idundun [i.e. Idundun v. Olumagba (1976)]*

NSCC (vol. 10) 445] is so clear and has been followed in subsequent cases, as not to admit (of) the submission of learned Senior Advocate.

While I concede to learned Senior Advocate that a party is under no legal duty to prove an unnecessary averment in his pleadings, I am of the firm view that he is under a strenuous and compelling duty to prove averments which are not only germane to his case but affect the props, the foundations and the roots of his cause of action and claim." [Parenthesis supplied]

The question of due authentication by execution other than by Mr. Thomas did not arise as an issue in this case where, as I have said earlier, the land sold was the personal property of Thomas who signed the deed of conveyance and not that of a native community or the Egba Refugees Descendants' Community to require their consent or approval of the sale. The court below fell into error to have, like the trial court, insisted on it. Apart from this however, I think, with due respect, the learned Justice of the Court of Appeal may have misconceived the essence of Idundun's case as regards the requirement of due authentication by execution. The learned Justice, just as the learned trial judge did, talked about the "requirement of due authentication and execution" of a document of title (e.g. a deed of conveyance) when a party relies on such a document in support of his claim to ownership of land. He used 'authentication' and 'execution' conjunctively as if they are two separate requirements that have to be fulfilled in such documentary transaction. In my view, when so used in this context one is faced with a meaning difficult to comprehend as though a document of title must be proved to have gone through the process of authentication and then execution to have validity. If not, as observed by Tobi JCA, it is "worthless for the purposes of proving title to land." ***But in the said case of Idundun v Okumagba (1976) NSCC (Vol. 10) 445 relied on by the learned Justice, this court per Fatayi – Williams JSC (later CJN) said at p. 454:***

"... ownership of land may be proved by production of documents of title which must, of course be duly authenticated in the sense that their due execution must be proved..."

[Emphasis mine]

The above-quoted observation means no more than that a document of title must be authenticated by due execution of it by the owner or owners of the land it purports to alienate.

This does not suggest that authentication is a different or additional requirement to the execution of the document itself. But that is what the two courts below have said, or at least implied. The learned Justice quoted inter alia the learned trial judge's observation thus –

"After a careful consideration of the evidence led by the plaintiff on this point I hold that the plaintiff failed woefully to establish due authentication and due execution of exhibit 1."

He himself then said: *"It is extremely difficult to fault this finding of the learned trial judge."* See [(1999) 2 NWLR (pt. 223) at p. 339]. Had the court below appreciated the principle in Idundun's case to mean that a deed of conveyance (or document of title) must be duly executed by the owner of the land or his agent so as to authenticate it; or put in other words, a document of title must be authenticated by due execution, then it would have only had to consider whether exhibit 1 was executed by Felix Olatunde Thomas. That the said Thomas executed exhibit 1 was never in dispute. In a most compelling submission on this point in the court below, Chief Ajayi SAN said that the evidence of the appellant that the said Thomas executed exhibit 1 in his favour as the sole owner of the land was not challenged by the respondents and so the evidence must be accepted to have established due execution. He added that if the respondents were minded to falsify the signature on exhibit 1 as being that of Thomas, they had every opportunity to do so since they themselves had in their possession their own deed of conveyance bearing the signature of the same Thomas. I find it difficult to understand how such a plain and incontrovertible argument was of no moment to the court below. ***The signature on exhibit 1, the appellant's deed of conveyance, is similar to that on exhibit 3 or 3A, the deed of conveyance of Durosimi-Etti who claimed he passed on his title to his successors. That***

signature on exhibit 1 is the authentication required. The learned counsel for the appellant has in the very forceful presentation of his case before this court made this point again plain beyond any argument, and I accept the merit of it. Once it is shown that the appellant's deed of conveyance (exhibit 1) has been duly executed by the owner of the land as vendor, it is sufficient evidence to support the award he seeks of title to the land. Relying on *Idundun v. Okumagba* (supra) this court reached that conclusion in the recent case of *Aliyu v. Sodipo* (1994) 5 NWLR (pt. 342) 1. I must therefore answer issue 1 in the negative.

Issue 2

The submission on behalf of the appellant by his counsel in pressing this issue is that the appellant is armed with a valid deed of conveyance (exhibit 1) derived from a root of title not in dispute. The said exhibit clearly identifies the parcel of land (plots 3 and 4) in the survey plan attached thereto. That survey plan bears all the beacons and, as already shown, plot 2 acquired by Durosimi-Etti (d.w.4) is shown as having a common boundary with plot 4. It is through d.w.4 the respondents would ordinarily have traced their entitlements to that plot 2. This is because their pleading throughout suggests that. So is the evidence up to a stage. The surveyor called by the respondents, Joel Olusola Ogunsanya, testified as d.w.1. He produced what looks like a composite survey plan for the respondents. It is interesting that he indicated the exact positions of plots 2, 3 and 4 which right from the beginning, shows their relationship. That 'composite' plan is exhibit 6. He said in evidence:

"I know the yellow portion in exhibit 6 was prepared by the plaintiff for the Egba Refugees in 1971... I see exhibit 3 and the survey plan attached to it. It (i.e. exhibit 3) is the predecessor in title of the 1st defendant. Plot 2 was conveyed in 1973, January, 1973 to Durosini Eti (sic). I see the four pillars shown in exhibit 3 are reflected on exhibit 6."

The yellow portion is a correct representation of the layout of the land in the survey plan attached to the appellant's exhibit 1 wherein plots 2, 3 and 4 among others are depicted. Plot 2 which is the subject of the deed of conveyance, exhibit 3, has been shown by this witness in exhibit 6 as hav-

ing a common boundary with plot 4 (which belongs to the appellant).

Now, if plot 2 is what was available to be traced through Durosimi-Etti to the respondents, one must wonder how it is that this witness has shown the said land contained in plot 2 in a completely different position he re-names plot 9, far away from plot 4. They no longer share common boundary as they must. The said land to which the respondents pretend to lay claim now has different beacon numbers BL 2951, BL 2952, BL 2972 and BL 2973. Instead of the size being about 50' x 100', it is now 60' x 120': see exhibit 6A, a survey plan tendered by the respondents. This is a curious state of affairs, where a parcel of land is made to shift from its original position completely without being the result of a dislocation of the earth's crust in that area! But the respondents could not quite demonstrate that it was possible for plot 2 to shift to become plot 9 in the present case because in exhibit 6 produced by d.w.1, plot 2 with beacon numbers EB 160, EB 212, EB 224 and EB 225 in common boundary with plot 4 by beacon numbers EB 212 and EB 225 is still where it has always been; while at the same time a certain plot 9 is shown on the same exhibit 6. The two plots are shown to exist, not that plot 2 has been renamed plot 9. Therefore, the so-called plot 9 is a strange element to this case and to the land Durosimi-Etti acquired from Mr. Felix Olatunde Thomas.

The correct position is that d.w.1 saw plot 2 physically and depicted it in exhibit 6. Mr Durosimi-Etti (d.w.4) himself gave evidence. After rambling in his evidence, he faced the reality when he said:

"I have heard of Mr. Felix Olatunde Thomas before. In 1973 Thomas sold a parcel of land to me he showed me the land at Opebi Road he executed the deed of conveyance in (my) favour in respect. I see exhibit 3 is the deed of conveyance made in my favour by Thomas."

Then he moved away to the impossible when he said:

"Plot 2 was conveyed to me in exhibit 3A. The land in dispute is the same land as plot 2 that was conveyed to me by Felix Olatunde Thomas."

This evidence that the land in dispute is the same land as plot 2 i.e. that plot 2 is the land in dispute, would better be told to the marines. This is clearly controverted by the respondents exhibit 6. Not quite

exhausted yet, the witness continued under cross-examination:

"I was taken round plot 2 shown to me. I see the plan attached to exhibit 3. I see plots 3 and 4 under plot 2. plot 2 became plot 9 when the master plan was eventually made."

If the witness was saying that plot 2 has been renumbered plot 9 one would have wondered what sense he intended to convey. But looking at exhibit 6, there is simply no room for thinking along with him. He is saying what is impractical to convince anyone looking at exhibit 6. Rather, the appellant has produced a composite plan (exhibit 2) showing a parcel of land with beacon numbers BL 2951, BL 2952, BL 2972 and BL 2973 together with a wall fence all round sprawling on a substantial part of plots 3 and 4, and touching small areas of plots 1 and 2, and the fringe of Opebi Road. That shows the manner and extent of the trespass by the respondents on the appellant's land. There could be no difficulty in discovering the extent of the trespass if one cared to examine the survey plan exhibits before the court. ***It seems to me the two courts below either did not look at those exhibits or peruse them carefully or did not appreciate what they essentially convey. But they are, in my view, very plain and instructive. They are part of the evidence which would assist in arriving at the justice of the case. Neither of the two courts below, on a close perusal of their judgments, called exhibits 1, 2, 3 and 6 in aid. These are the exhibits which help to establish the appellant's title to the land in dispute and to put its identity beyond doubt. Not having done so, their judgments were bound to be perverse.***

It is true that a plaintiff must succeed on the strength of his case. If his case is weak it does not matter that the defendant's case is also weak or that he makes no case at all. The plaintiff's case will fail: see Kodilinye v. Mbanefo Odu (1935) 2 WACA 336; Kaiyaoja v Egbunla (1974) 12 SC 55; Enigwe v. Akaigwe (1992) 2 NWLR (pt. 225) 505; Adeyeri v Okobi (1997) 6 NWLR (pt. 510) 534. In the present case, the respondents traced their root of title to the same source of the appellant's although in respect of different parcels of land. Their source was Mr. Thomas down through Durosimi-Etti, then to Madam Maeude,

and later to Madam Adebiyi. All these transactions were by means of deeds of conveyance, exhibits 3, 4 and 5 in that order. The 1st respondent was pleaded in the statement of defence as a caretaker to Madam Adebiyi in respect of this land as follows:

B *"22. Madam Iyabode Omobonike Adebiyi had a caretaker on her land known as Mr. E. A. Alao who was her attorney who was responsible for the maintenance, (sic) building and the consequent (sic) sale of same to Tosil Holding Ltd.*

C *27. Tosil Holding Ltd since then had exercised the following acts to demonstrate fully its undisputed ownership and possession of the said piece or parcel of land –*

D *(i) Purchase receipt form Emmanuel A. Alao to Tosil Holding Ltd being full purchase price of land covered by Survey Plan No.JC 333/77 with pillars No. BL2951, BL 2952, BL 2972 and BL2973 at Opebi Scheme, Ikeja, Lagos..."*

It will be noted that no mention was made of the deed of conveyance (exhibit 5) by which Madam Meude conveyed land known as plot 2 E with beacon numbers EB 160, EB 212, EB 224 and EB 225 to Madam Adebiyi. The land purported to have been sold per the said purchase receipt (exhibit 7) has no known root of title. It has no connection with plot 2 although Durosimi-Etti (d.w.4) made concerted effort to say they are the F same. There is nothing on record to indicate that Madam Adebiyi is even aware that her land has been brought into this matter apart from the evidence of 1st respondent (Mr. Alao) that Madam Adebiyi is his wife and he her attorney or caretaker of her land. It seems to me that it is the 1st respondent and the d.w.4 with the assistance of some legal practitioners G involved who have engaged in this crooked device to try to deprive the appellant of his land (plots 3 and 4). They decided to resort to a mere purchase receipt instead of deed of conveyance by which Madam Adebiyi got her land. Mr. Alao who testified as d.w.5, in his evidence which was H inconsistent with the pleading of the defence, said inter alia:

"I know the land in dispute in 53 Opebi Road, Ikeja. I know the land in dispute. I negotiated for the land through J. A. Adebamawo. Later I purchased the land and a deed of conveyance was executed in

favour of my wife. I identify exhibit 5. I am the attorney to my wife."

But there is obviously no connection between exhibit 5, the deed of conveyance of Madam Adebiyi, and the land of which exhibit 7 (the purchase receipt) speaks about. It is easy to see that exhibit 7 was the hocus-pocus B employed by the respondents to fight their cause with the appellant.

I cannot comprehend how the two courts below were so easily unable to see that the appellant's case was very firm and that the respondents do not have a ghost of a chance on the baseless purchase receipt they rely C on. This is a very simple case if the exhibits are carefully understood. The two courts below, unfortunately, concerned themselves with irrelevancies, but I can say that the Court of Appeal, with the greatest respect, was more steeped in that frolic per the judgment of Tobi JCA. The appellant proved D all he was expected to in order to have his claim for entitlement to a statutory right of occupancy awarded. ***He also certainly proved that he was entitled to damages for trespass and an order of injunction. He is the owner of the land and was, from the evidence, in possession. He allowed his daughter, Modupe Adeniran (p.w. 3), to farm the land. An owner of land who has not alienated it by way of lease or tenancy is prima facie entitled to damages if a third party goes upon the land without his consent. The slightest evidence of possession by him is enough. In the present case p.w.3 was simply a licensee; the appellant was in effective physical possession through her. It has in fact been held that to cultivate a piece of land, erect a fence thereon, demarcate it with pegs or survey beacons may be sufficient act of possession in certain circumstances: see Wuta Ofei v. Danquah (1961) 3 All ER 596; Alatishe v. Sanyaolu (1964) 1 All E*** G
NLR (pt.1) 398; Mogaji v Cadbury Ltd (1972) 2 SC 97; Ladipo v. Ajani (1997) 8 NWLR (pt. 516) 356. I accordingly answer issue 2 in the affirmative.

Issue 3

The court below dealt with the defences of estoppel, laches, standing by and acquiescence. These defences were not pursued at the trial court nor raised at the Court of Appeal. In his judgment Tobi J ob-

served inter alia [(1992) 2 NWLR (pt. 233) at pp. 373 – 375]:

‘Although the respondent did not specifically raise the issue of the statute of limitation, he raised the equitable defences of estoppel, laches, standing by and acquiescence in paragraph 40 of the statement of defence.

B *The law is common place that a party who wants to rely on the above equitable defences must specifically plead them. This is to enable the plaintiff (to) react to them one way or the other. The plaintiff will not be said to have been taken by surprise. A defendant who does not specifically plead the equitable defences cannot rely on them in the proceedings...*

C *I must say that the learned trial judge did not specifically raise the issue of the defence in his judgment but the parties did in their submission. Since the equitable defences were duly pleaded by the respondent and there is evidence before him in vindication of the defences, this is a case*
D *where this court can invoke its section 16 of the Court of Appeal Act jurisdiction. And I so invoke it. For the avoidance of doubt, I should say that the defences were raised in the alternative. I have also invoked them in the alternative.”*

E Learned counsel for the appellant submits that the learned Justice was in error to say that the parties raised the issue of those equitable defences in their submissions as no where does it appear recorded that they were raised in either the trial court or the Court of Appeal. I think learned
F counsel is definitely right in that contention. ***I cannot find where those defences were raised in any of the submissions made to the two courts below even by way of mere mention. The learned Justice nonetheless proceeded to discuss them in his judgment and to hold that their effect militated against the claim the appellant set***
G ***out to make when none of the parties canvassed them. He clearly descended into the arena in that sense to fight the respondents battle. In actual fact and as a matter of practice, the respondents did not, in conformity with pleading procedure, raised those de-***
H ***ferences in their statement of defence. All they pleaded in that regard is in para. 40 as follows:***

“40. Further in the alternative the defendants will among other legal and equitable defences open to them rely on

(a) Estoppel, (b)

Laches, (c) Standing by and (d) Acquiescence.

On this type of pleading, a defendant will be precluded from leading evidence and will not be allowed to rely on the defences. The law is clear that those defences must be specifically pleaded with full particulars. It is the facts averred which determine what the real defence is and so it is necessary that the facts be adequately and carefully stated. I need not say more on this but, for example, see Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn pp. 1254 – 1255. I accordingly answer issue 3 in the negative.

Issue 4 and 5

From the facts already discussed in the course of this judgment, it is plain to me that the court below did not properly evaluate the evidence led in this case. It will be inevitable for me to repeat myself when stating the facts to resolve these issues. The evidence is largely documentary. The deed of conveyance exhibit 1, indisputably confers upon the appellant a valid title in respect of plots 3 and 4. Exhibit 2 shows that it is upon those plots the respondents trespassed the building erected thereon by the 2nd respondent was obviously done in a rush. The 1st respondent who testified as d.w.5 said:

"In October 1983 the land was sold to 2nd defendant. In November 1983 the uncompleted structure on the land was pulled down in my presence. The following day 2nd defendant dug the land for foundation of the building."

The evidence of d.w.6, Mohammed Muritala Shittu, a building contractor shows when the building was completed. He said:

"I then commenced the building by laying the foundation on 9th September 1983. The building was completed in 1984."

On the question whether the land sold by Felix Olatunde Thomas to Durosimi-Etti (d.w.4) is not different from the land in dispute, even the evidence led by the respondents betrays them on this. In his evidence, H d.w.4 said that plot 2 which was sold to him by Thomas is the same as the land in dispute. In fact, he claimed that the said plot 2 became plot 9 although at the same time he said plot 2 was under plots 3 and 4. In

the same way, d.w.5 claimed that plots 2 and 9 are the same.

Both d.w.6 and d.w.7, Sylvester Okokhune Eguabor, 2nd respondent's General Manager, claimed that the land sold to them was 60 ft by 120 ft, the latter adding that they built on plot 9. As earlier said in this judgment, plot 2 is about 50 ft by 100 ft whereas the so-called plot 9 is 60 ft by 120 ft. They could not therefore be the same, that is to say, plot 2 and plot 9 could not be the same plot. That this is definitely so, exhibit 6 which is a composite plan produced by the respondents as apart of their case shows plot 9 far away from the toward the top right side of the position of plots 3 and 4, whereas plot 2 is still shown to be below plot 4 and in boundary with it. In other words, both plot 2 and 9 are shown by the respondents themselves to exist as separate entities which would be an impossibility if their case were to have any probability of truth. Therefore both d.w.4 and d.w.5 lied to deceive the court. Once the respondents claim to rely on the title covering plot 2, it is clear that the land conveyed to Durosimi – Etti (d.w.4) is different to the land in dispute in this case. The truth is that exhibit 7, a purchase receipt, which purports to 'sell' plot 9 to the 2nd respondent, has no root of title. The further truth is that the building erected by the 2nd respondent is not on the so-called plot 9 but, as already shown, on plots 3 and 4 as demonstrated in exhibit 2, while plot 2 is supposed to be there though shown in exhibit 2 as having been partially encroached upon by the wall fence erected by the 2nd respondent on plots 3 and 4. I will answer issue 4 in the negative and issue 5 in the affirmative.

The appellant no doubt adduced compelling evidence in support of his claim and was entitled to the judgments of the two courts below. He proved his title to the land in dispute and the blatant act of trespass thereon by the respondents. The two courts below failed to evaluate the evidence properly. I find great merit in this appeal and allow it. I therefore set aside the judgments of the two courts below together with the costs awarded. Going by the claim, I enter the following judgment in favour of the appellant (as plaintiff) against the respondents (as defendants) jointly and severally:

1. A declaration that the plaintiff is entitled to a statutory right of

occupancy to all that piece or parcel of land situate, lying and being at No. 53 Opebi Street, Onigbagbo, Ikeja, Lagos State which is more particularly described and delineated on plan No. L/EB174/71 and marked plots 3 and 4 demarcated with beacons EB 164, EB 219, EB 225, EB 226, EB 212 and EB 213 dated 19 December, 1971 (and countersigned by the Surveyor-General Lagos State on 17 July, 1972) attached to a deed of conveyance dated 25 September, 1972 and registered as No. 42 at page 42 in volume 1409 of the Lands Registry in the Office of Lagos.

2. N1000.00 general damages for trespass.

3. An order of perpetual injunction restraining the respondents either by themselves or their servants, agents and/or privies or howsoever from entering upon the said land and committing further acts of trespass thereon.

I award N2,5000 as costs in the trial court, N5,000.00 as costs in the Court of Appeal and N10,000.0 as costs in this court against the respondents jointly and severally in favour of the appellant.

KARIBI-WHYTE JSC

I have read the judgment of my learned brother Uwaifo JSC in this appeal. I agree with his reasoning that this appeal has merit and ought to succeed. I also, will, and hereby allow the appeal. I abide by the consequential orders made on the leading judgment.

OGUNDARE JSC

I have read in advance the judgment of my learned brother, Uwaifo JSC just delivered. I agree with him that this appeal has merit. I, too, like him, allow it; I set aside the judgments of both trial High Court and the Court of Appeal and, in their stead, enter judgment for the Appellant (as plaintiff) in terms of his claims.

The Plaintiff (who is appellant in this appeal) had sued the Defendants (now respondents) claiming -

“(a) A Declaration of title to a statutory right of occupancy to all that piece or parcel of land, situate, lying and being at plot No. 53 Opebi Street, Onigbagbo Village Ikeja, Lagos State which is more particularly described and delineated on plan No. LS/EO.17A/74 and

marked Plots 3

and 4 and demarcated with beacons No. EB164; EB219; EB225; EB226; EB213 and EB212 dated the 19th day of December, 1971 attached to a Deed of conveyance dated 25th day of September 1972 and registered as
B No. 42 at page 42 in volume 1409 of the Lands Registry in the office at Lagos.

(b) 1,000.00 damages for trespass committed by the Respondents.

(c) An order for perpetual injunction restraining the Respondents,
C their servants, agents and/or privies from entering upon the land and committing further acts of trespass.”

In his amended statement of claim he pleaded, inter alia:

“4. The land in dispute is that piece or parcel of land situate, lying and being at No. 53 Opebi Street, Onigbagbo Village, Ikeja, Lagos State
D which is more particularly described and delineated on Survey Plan No. LS/WD/17A/71 attached to a Deed of Conveyance dated the 25th day of September, 1972 Registered as No. 42 at page 42 in Volume 1409 of the Land Registry Office at Lagos.

E 6. The Plaintiff states that the land in dispute forms portion of a large area of land originally owned by one James Gooding who died several years ago survived by an only daughter Mariam Ayodele Gooding now deceased.

F 7. The Plaintiff states that subsequent upon the death of the said Mariam Ayodele Gooding the said land including the land in dispute devolved upon her son Felix Olatunde Thomas as an Estate inheritance.

G 8. The Plaintiff avers that in 1972 he bought the land in dispute from Felix Olatunde Thomas as evidenced by a purchase receipt and a Deed of Conveyance dated the 25th day of September 1972 with a Layout Plan No. LS/ED/17A/71 aforementioned.

H 19. The Plaintiff states that the Defendants has (sic) no right or interest in the land in dispute and therefore has (sic) no right to erect any structure on the said land.

20. The Plaintiff will at the trial of this matter rely on the following documents:

(i) The Deed of conveyance dated the 25th day of September 1972

and Registered as No. 42 at Page 42 in volume 1409 of the Land Registry Office at Lagos.

(ii) *The Survey Plan No. LS/ED17A/71 counter-signed by the Surveyor-General of Lagos State on 17/7/72 with the beacon pillars shown thereon.*"

B

In their statement of defence the defendants averred:

"2. The Defendants are not in a position to admit or deny paragraphs 1, 6 and 20 of the Statement of Claim and put the Plaintiff to the strict proof thereof.

C

3. The Defendants state that in 1971 Mr. Nasirudeen Akinola Durosimi-Etti his (sic) predecessor-in-title applied to the Egba Refugees Descendants Community (1867) Opebi Village, Onigbagbo via Ikeja for a Residential Building Plot at Opebi Village, Ikeja.

4. That late Chief J. B. Ola Opebi the head of the Family and Representative of Egba Refugees Descendants Community (1867) Opebi Village, Onigbagbo via Ikeja gave a plot of the said land of (50 x 100) to the said Mr. Durosimi-Etti as he Mr. Etti is a member of the Egba Refugees Descendants Community. The said document is hereby pleaded.

E

5. The said parcel of land specifically formed a portion of a larger area of land at Opebi Village at Onigbagbo Area, Ikeja Division of Lagos State which was originally owned by one James Gooding who died many years ago.

F

6. The said James Gooding was survived by one Marian Ayodele Gooding who inherited the larger area of land according to Yoruba native Law and Custom.

7. The Defendant (sic) aver that consequent upon the death of the said Marian Ayodele Gooding the said land devolved upon her son FELIX OLATUNDE THOMAS.

G

8. The Defendants contend that in 1972 the said NASIRUDEEN AKINOLA DUROSIMI-ETTI bought his piece or parcel of land from FELIX OLATUNDE THOMAS as evidenced by a purchase receipt.

H

9. The aid FELIX OLATUNDE THOMAS duly executed a Deed of Conveyance in favour of the said NASIRUDEEN AKINOLA DUROSIMI-ETTI which was registered as land Instrument no. 29 at page 29 in Vol-

ume 1415 of the Lands Registry in the Office at Lagos which is

hereby pleaded.

B 10. *The said Survey Plan No. LS/EB13/72 attached to the said Conveyance was not only counter-signed by the Surveyor-General of Lagos State of Nigeria but was also signed by the Plaintiff and dated 16th December, 1972. The said Plan attached to the said Conveyance is hereby pleaded.*

C 11. *The defendants state that the Plaintiff's Plot or piece of land (if any) is different and distinct from the Defendants'. The Defendants shall rely on a composite plan No. JO/1/85 dated 24th day of January, 1985 drawn by N. Olushola Ogunsanya, Licensed Surveyor.*

D 12. *The said Survey Plan No. LS./EB13/72 of 16th December, 1972 (mentioned in paragraph 10 above) has beacon Nos. EB 225, EB224, EB 212 and EB 160 respectively in respect of Plot 9 while Plaintiff's Plot 3 and 4 as shown on Survey plan LS/ED17A/71 are demarcated with beacon Nos. EB 219, EB 164, EB 225, EB 226 EB 213 and EB 212 as shown by the Plaintiff's Conveyance and Plan thereof.*

E 16. *The said Mr. N. A. DUROSIMI-ETTI having enjoyed his peaceful possession and ownership for about five years sold and conveyed the said parcel of land to Madam Hannah Meude which Conveyance was duly executed by Mr. ETTI in Madam Meude's favour and registered as Land Instrument No. 53 at page 53 in Volume 1622 of the Lands Registry in the Office at Lagos. The said Conveyance is hereby pleaded.*

F 20. *Late Madam HANNAH MEUDE sold and conveyed the said piece or parcel of land situate, lying and being at Opebi Village Ikeja to YABO OMOBONIKE ADEBIYI.*

G 21. *MADAM MEUDE executed a conveyance in favour of Madam Iyabo Omobonike Adebisi which was duly registered as land instrument No. 22 at page 22 in volume 1764 of the Lands Registry in the office at Lagos. The said Conveyance is hereby pleaded.*

H 22. *Madam Iyabode Omobonike Adebisi had a Caretaker on her land known as Mr. E. A. Alao who was her Attorney who was responsible for the maintenance, building and the consequent sale of same to TOSIL HOLDING LTD.*

27. *TOSIL HOLDING LTD* since then had exercised the following acts to demonstrate fully its undisputed ownership and possession of the said piece or parcel of land;

(i) Purchase receipt from Emmanuel A. Alao to *TOSIL HOLDING LTD* begin full purchase price of land covered by Survey Plan No. JO 333/77 with pillars No. BL 2951, BL 2952, BL 2972 and BL2973 at Opebi Scheme, Ikeja, Lagos. It was signed by Mr. E. A. Alao as seller with Mr. S. O. Egbareh as buyer for *TOSIL HOLDING LTD* and witnessed by Dr. E. O. Oloyede. The said purchase receipt is hereby pleaded.

(ii) The Defendants have built a storey building of FOUR FLOORS on his (sic) said parcel of land which he (sic) bought from Madam Iyabode Adebisi's Attorney Mr. Alao.

(iii) That on the 16th day of November, 1983 when construction work commenced on the land Mr. Opebi 'alias Sugarbaby' of No. 33 Opebi Road through Mr. Tiamiyu summoned Mr. Alao to see the Egba Refugees Community of Ikeja; that Mr. Alao gave N2,000.00 cash to Mr. G. T. Opebi of No. 34 Osho Street, Opebi, Ikeja (the elder brother of 'Sugarbaby') for and on behalf of the Egba Refugees of Ikeja. The incidence was witnessed by one Mr. Oyawale and Mr. Shittu and also Mr. Opebi 'alias Sugarbaby'.

(iv) The 2nd Defendant's Managing Director Mr. S. O. Agbareh resides in the said building with his family.

(v) The 2nd Defendant has his office and premises within the said parcel of land.

(vi) The 2nd Defendant paid the sum of 1,000.00 (One Thousand Naira) to the Lagos State Government before it commenced the said storey building, receipt of which is hereby pleaded.

(vii) The 2nd Defendant has drawn a building plan which has been assigned NO. DCB/4019/35K and submitted same to the Lagos State Government for approval. Relevant building plan and document are hereby pleaded.

(viii) *TOSIL HOLDING LTD* had applied to the Lagos State Government for the issue of Certificate of Occupancy and the Land Use and Allocation Office, Planning Way, Ilupeju, Lagos has acknowledged receipt

of the said application. All relevant documents for the Certificate of Occupancy and the receipt No. B968015 of 23rd November, 1983 are hereby pleaded.

(ix) *On the 21st day of April, 1984 the Land Use and Allocation Committee published the application of the 2nd Defendant for the issuance of Certificate of Occupancy as Advert No. 28 at page 8 serial No. 269 in the GUARDIAN, the said publication is hereby pleaded.*

(x) *In the publication referred to above the Committee invited any interested party to object within 21 days from the date of the publication in that advertisement but nobody objected. Appropriate officials shall testify at the trial.*

(xi) *The Defendant only started in earnest the effective construction of the said storey building which is now COMPLETED when there was no adverse claim to his said land after the publication in THE GUARDIAN as aforesaid.*

(xii) *The Defendant employed the services of Messrs. Shittu Construction Company who laid the foundation of the story building and built it to COMPLETION without any let or hindrance. The contractor shall testify at the trial and shall tender relevant documents.*

(xiii) *Madam Adebisi's Attorney Mr. E.A. Alao, not only helped in clearing the parcel of land earlier on but also fenced round the said property before formally handing same over to the Defendants for use and occupation."*

From the pleadings above, it is self-evident that both parties traced their root of title to Felix Olatunde Thomas who executed a conveyance in favour of the Plaintiff in respect of the land he bought from Thomas and in favour of Durosimi-Etti (through whom the 2nd Defendant claimed title) in respect of the land Durosimi-Etti bought from Thomas. The pleadings of the parties have obviously narrowed down considerably the question in dispute between them which is: Is the land in dispute plots 3 and 4 sold to the Plaintiff or plot 2 (or 9?) Sold to Durosimi-Etti? It is not in dispute that Olatunde Thomas laid out his land into plots which he sold to various people including the Plaintiff and Durosimi-Etti. With profound respect to their Lordships of the two courts below, had they adverted their minds

properly to this main issue raised on the pleadings of the parties, it would not have been necessary for them to go on the adventure of “authentication and execution” of Plaintiff’s deed of conveyance.

At the trial of the suit, Plaintiff tendered in evidence the conveyance Olatunde Thomas executed in his favour (Exhibit 1). Defendants also B tendered the deed of conveyance Olatunde Thomas executed in favour of Durosimi-Etti (Exhibit 3 & 3A) Exhibit 1 shows that the land sold to Plaintiff is described as *“Plots 3 and 4 measuring 513.04 sq. yds and 520.37 sq. yds. respectively and more particularly described and delineated with its C dimensions and abutments on the plan annexed to this Deed of Indenture and thereon coloured RED (and demarcated with beacons Nos. EB164; EB219; EB225; EB226; EB213 and EB212) on the PLAN NO. LSED 17A/71 dated 19.12.71”*

The Plan attached to Exhibits 3 & 3A on the other hand, show that D the land Olatunde Thomas sold to Durosimi-Etti is Plot 2 and consists of an area of 603.38 sq. yds. and is bounded by beacons Nos. EB225; EB224; EB160 and EB212; the land is “100 feet” in breadth; 51.3 feet” in length on the western side and “58.7 feet” in length on the eastern side. It is this E land that Durosimi-Etti sold to Madam Hannah Meude in April 1977 - see the plan attached to Exhibits 4 and 4A the deed of conveyance from Durosimi-Etti to Madam Meude. And it is this same land that Madam Meude sold to Iyabo Adebisi in March 1978; the plan attached to the deed F of conveyance (Exhibit 5) from Madam Meude to Iyabo Adebisi bears this out.

The plan attached to Exhibit 1 (Plaintiff’s conveyance), Exhibit 2 (Plaintiff’s composite plan) and Exhibit 6 (Defendant’s composite plan) G show the relative positions of plots 3 and 4 (land bought by Plaintiff), plot 2 (land bought by Durosimi-Etti which passed to Madam Meude and subsequently to Iyabo Adebisi) and plot 9 on Thomas’ lay out. They are all distinct and separate pieces of land - plot 9 being far removed from the lands sold to plaintiff and Durosini-Etti. H

The case of the Defendants is that 1st Defendant is Iyabo Adebisi’s attorney and that he, as attorney, sold Iyabo Adebisi’s land to 2nd Defendant. If this is true, the Defendant could only sell plot 2 in Thomas’ lay out

to 2nd Defendant and that land is 603.38 sq yds and is delineated by beacon Nos. EB225, EB224, EB160 and EB212. How then did the Defendants come about the land shown on Exhibit 6C and said to belong to the 2nd Defendant which land measures 120 feet by 60 feet and is 799.28sq yds in area and is delineated by beacons Nos. BNL2952, BL2972, BL2973 and BL2951? This is the land 1st Defendant sold to 2nd Defendant as per the purchase receipt the former issued on 30th September 1983. How did the 1st Defendant come about this land which he sold to 2nd Defendant? The purchase receipt (Exhibit 7) describes the land 1st Defendant sold (in his own right and not as attorney to Iyabo Adebiji or anyone else) to 2nd Defendant as “my plot of land known as No. 9 on Survey Plan No. J. O. 333/77 with Pillar nos. BL 2951, BL2952, BL2972 and BL2973...” There is no averment in the statement of defence that 1st Defendant owned any land which he laid out into plots or that he owned plot 9 in any layout estate. It was he who introduced “plot 9” to confuse. Before him, Durosimi-Etti’s land was always referred to as plot 2.

Exhibit 2 (Plaintiff’s composite plan) shows that the 2nd Defendant was developing plots 3 and 4 on Thomas’s layout with slight encroachments on plots 1 and 2. Had their Lordships of the two courts below properly considered the evidence before them which, in the main, is purely documentary they would have answered the main question raised on the pleadings of the parties in Plaintiffs’ favour, that is, that the land in dispute is plots 3 and 4 sold by Olatunde Thomas to the Plaintiff in 1972 and not plot 2 sold to Durosimi-Etti. If 1st Defendant had authority to sell Iyabo Adebiji’s land, it could only be plot 2 which found its way to Iyabo Adebiji through Madam Meude.

The result of the proper evaluation of the evidence adduced in this case is that Plaintiff has title to the land in dispute whereas the Defendants have none. Possession in the land is, therefore, in the Plaintiff and for disturbing his right to this possession, the Defendants are liable to him in trespass. Because of the conduct of the Defendants the Plaintiff is entitled to an order of injunction to protect his possessory right.

It is for the above reasons and the other reasons given by my learned brother Uwaifo JSC that I too allow this appeal and enter

judgment for the Plaintiff in terms of his writ.

ONU JSC

Having been privileged to read before now the judgment of my learned brother Uwaifo, JSC I am in entire agreement with him B that this appeal is meritorious and must perforce succeed.

I however wish to add by way of expatiation the following words of mine.

The Appellant as Plaintiff in the High Court of Lagos State by C a Writ of Summon dated 16/8/84 sued the Respondents as Defendants claiming the following reliefs:

“1. A declaration of title to a statutory right of occupancy to all that piece or parcel of land, situate, lying and being at Plot No. 53 Opebi Street, Onigbagbo Village, Ikeja Lagos State which is more D particularly described and delineated on Plan No. LS/ED/17A/71 and marked plot 3 and 4 demarcated with beacons No. EB164; EB219; EB225, EB226, EB213 and EB212 dated the 19th day of December, 1971 attached to a Deed of Conveyance dated 25th day of E September, 1972 and Registered as No. 42 at page 42 in Volume 1409 of the Land Registry in the Office at Lagos.

2. N1,000.00 Damages for trespass committed by the Defendants on the Plaintiff's land between January and August, 1984 F by commencing a building on the Plaintiff's said land.

3. An order of perpetual injunction restraining the Defendants, his servants and/or privies from entering upon the land and committing further acts of Trespass thereon.”

Pleadings were ordered, filed and exchanged but before the G case went to trial, the Appellant amended his Statement of Claim. The facts of the case are as admirably set out in the leading judgment of my learned brother Uwaifo, JSC. I adopt them in their entirety in my consideration of this appeal. H

At the trial, which later ensued the Appellant called three witnesses while the Respondents called seven witnesses. The trial High Court dismissed the Appellant's action and on his further appeal to the

Court of Appeal, Lagos Division (hereinafter in the rest of this judgment referred to as the Court below), the latter affirmed the trial court's decision on the grounds that:

(1) Appellant did not prove due execution of Exhibit 1, his document of title, which is a deed of conveyance of 25th September, 1972.

(2) That the equitable defence of estoppel, laches, standing by and acquiescence availed the Respondents.

The appeal herein is against that decision.

C Five issues each were submitted as arising by the parties to this appeal for our determination but I adopt those culled out at the Appellant's instance as being enough to dispose of this appeal when they complain in the following terms:

D *"(1) Whether under the facts and circumstances of this case where parties are agreed that no issue was joined on due execution of exhibit 1, the learned Justices of the Court of Appeal were right to have affirmed the decision of the trial court that the appellant ought to prove the due execution of Exhibit 1 and or failed to prove same.*

E *(2) Whether the appellant established his claim of being entitled to the grant of statutory right of occupancy to the land in dispute trespass and injunction as against the respondents.*

F *(3) Whether under the facts and circumstances of this case, the Court of Appeal rightly held that the equitable defence of estoppel, laches and acquiescence availed the Respondents.*

(4) Whether the learned Justices of the Court of Appeal properly evaluated the evidence led in this case.

G *(5) Whether in view of the evidence by the parties the land sold by Felix Olatunde Thomas (late) to Durosimi-Etti DW.4 is not different from the land in dispute in this case."*

TREATMENT OF THE ISSUES

ISSUE 1

H It is without doubt established that both parties herein are ad idem as to the roots of title. They both agreed that Felix Olatunde Thomas was the owner of the disputed land and consequently each traced his title to him. See paragraph 8 of the Amended Statement of Claim of the Appel-

lant vis a vis paragraphs 8 and 9 of the Statement of Defence of the Respondents. In addition to the above, the Respondents averred in paragraph 12 of their Statement of Defence as follows:

“The said Survey Plan No. LS/EB13/72 of 16th December, 1972 (mentioned in paragraph 10 above) has beacon No. EB 225, EB.224, EB.212 and EB160 respectively in respect of Plot 9 while Plaintiffs plot 3 and 4 as shown on Survey Plan LS/ED1 7A/71 are demarcated with beacons No. EB.219, EB164, EB.225, EB226, EB213 AND EB212 as shown by Plaintiff’s Conveyance and plan thereof.”

The above shows clearly that both parties never challenged the authenticity of each other’s deed of conveyance but merely joined issue on the identity of the land sold to each party or his predecessor in title as the case may be, by late Felix Olatunde Thomas. I am of the firm view that this contention is further buttressed by the unequivocal admission by the Respondents’ counsel at the court below where he said:

‘I concede the issue of authenticity of (sic) due execution of conveyance Exhibit 1 is not crucial to the dispute place (sic) for adjudication before the trial court since both parties traced their title to same vendor Felix Olatunde Thomas. Both parties also agreed that plots 3 and 4 belonged to plaintiff while plot 2 belonged to the defendant.’

Further, at page 98 of the Record, the defence counsel while addressing the learned trial Judge had this to say *inter alia*:

“It is common ground that both parties traced their title to a common vendor one THOMAS who signed Exhibit 1.”

I am satisfied that it is stark clear that the issue of due execution of Exhibit 1 did not arise for determination by the court below as the Respondents had conceded that point before the trial court. Such an admission or concession on a point of law is binding and cannot be ignored by the Court of Appeal vide Okonkwo v. Kpajie (1992) 2 NWLR (Part 226) 633 at 656 paragraphs H – B. I am also mindful of the duty of court to decide the crucial issues in contention between litigants and not to purport to resolve them when there is no dispute or disagreement between the parties to base its decision thereon. See the cases of Carlen (Nig.) Ltd. V Unijos (1994) 1 NWLR (Part 323) 631 at 665 L – D; Jallco Ltd v. Owoniboyos

Tech. Service Ltd (1995) 4 NWLR (Part 391) 534

at 549 G, per Mohammed, JSC and Oro v Falade (1995) 5 NWLR (Part 396) 385 385 at 402.

In view of the foregoing, I am of the firm view that the learned
B Justices of the court below erred in law when they affirmed the decision of the trial Judge by holding as follows:

*A Deed of Conveyance without due authentication and execution is in law worthless for purposes of proving title to land. It has
C no probative or evidential value beyond the printed document. A document by itself has no legal life unless there is a human intervention by way of due execution. Apparently, learned Senior Advocate did not specifically react to this aspect of authentication and execution. He merely submitted that since both parties to the suit pleaded
D Deeds of Conveyance from the descendant of James Gooding and did not suggest or plead that the Egba Refugees or their Community Leader had any proprietary interest in the land, his consent or confirmation was not necessary to the acquisition of a legal title to the land.
E With respect, I am not with learned Senior Advocate here. The point made is neither here nor there. The requirement of due authentication in Idundun is so clear and has been followed in subsequent cases, as not to admit of the submission of learned Senior Advocate in this regard. While I concede to learned Senior Advocate that a party is
F under no legal duty to prove an unnecessary averment in his pleadings, I am of the firm view that he is under a strenuous and compelling duty to prove averments which are not only germane to his case but affect the props, the foundations and the roots of his cause of
G action and claim."*

Accordingly, I agree with the submission that the court below lacked jurisdiction to determine this point of due execution which was not in issue before it. See Adeniji v Adeniji (1972) 1 All NLR (Part 1) 298. See Egri v Uperi (1974) 1 NMLR 22 and UBA Ltd v Achoru (1990) 6 NWLR (Part 156) 1. In the result, I am of the firm view that the Respondents having conceded that THOMAS signed Exhibit 1 as hereinbefore demonstrated cannot now be heard to say that due execution was not proved.

My answer to issue 1 is accordingly in the negative.

ISSUE 2

Issue 2 asks whether the Appellant established his claims of being entitled to the grant of statutory right of occupancy to the land in dispute, trespass and injunction against the Respondents. B

One of the five ways of proving title to land is by the production of the documents of title executed in favour of the claimant (as the Appellant in the case in hand) by an acknowledged owner of the land in dispute vide *Idundu v Okumagba* (supra). In the instant case, the Appellant relies on exhibit 1 as evidence of his title – Exhibit C 2 being his composite plan. The Respondents as hereinbefore demonstrated, have conceded that the said Exhibit 1 was duly executed by the acknowledged rightful owner of the land in dispute – a point requiring no further proof from the Appellant, the same having been D conceded. Consequently, I firmly hold that the Appellant discharged the onus, which lay on him to establish his title by reliance on Exhibit 1 – a document of title. Se *Kodilinye v. Odu* (1935) 2 WACA 336 at 337 for the proposition that Appellant in all cases, must rely on strength E of his case and not on the weakness of the defence.

The Appellant's grouse in this issue as pointed out above is whether the Appellant established his claims of being entitled to the grant of statutory right of occupancy. F

In the instant case, the Appellant relies on Exhibit 1 as his evidence of title. The Respondents, as earlier pointed out, have conceded that the said exhibit 1 was duly executed by the acknowledged rightful owner of the land in dispute. The said exhibit clearly identifies the parcel of G land (plots 3 and 40 in the survey plan attached thereto. The Survey plan bears all the beacon numbers while plot 2 acquired by DW. 4 (Drosimi-Etti) is shown as having a common boundary with plot 4. The beacon numbers stated above are contained in the plans attached to the respective conveyances of the parties namely Exhibit 1 for the Appellant and Exhibit 3 relied H on by the Respondents. In view of the beacon numbers on the respective deeds of conveyance, that of exhibit 1 and exhibit 3 and/or 3A, the two portions of land conveyed by late Felix Olatunde Thomas must be con-

iguous or touching each other. This is because the

two survey plans which were prepared by the Appellant show the two portions of land covered by exhibits 1 and 3 sharing two beacons or beacon numbers in common viz EB212 and EB225 (the parties survey plans of exhibits 2 and 6 clearly bearing this out).

Thus, the point of confusion as to the identity of the land in dispute seems to have arisen from exhibit 6, the composite plan of the Respondents. It was asserted in support of exhibit 6 that plot 2 covered exhibit 3, the deed of conveyance relied upon by the Respondent which later became plot 9 when the master plan of Lagos State was made. It ought to be noted that this assertion by DW,4 is not supported by DW.1, the Respondent's Surveyor. From a cursory glance of the documentary evidence in this case, it is clear that the land now being claimed by the Respondents is not the land identified as plot 9 in exhibit 6 –

1. Firstly because, plot 9 in exhibit 6 is located far away from plots 2, 3 and 4 in the same exhibit 6 which plots bear the beacon numbers in both exhibits 1 and 3, the original conveyances. This cannot be so in view of the beacon numbers in exhibits 3 and/or 3A, which indicate that it is contiguous to exhibit 1.

2. Exhibit 6 also shows clearly the area on which the Appellant had prepared survey plans for the Egbas in 1971 and 1972 which were the plans attached to exhibits 1 and 3. The whole of that area is verged yellow. As it has turned out, plot 9 did not fall within that area, yet the Respondents assert that the Appellant prepared the plan attached to exhibit 3 which have the beacon numbers pleaded in paragraph 12 to wit: beacon Nos EB 225, EB224, EB212 and EB160.

3. Exhibit 6 shows plot 2 bearing the same beacon numbers as for numbers in exhibit 3 and which is within the area identified as having been surveyed by the Appellant. That plot 2 is clearly contiguous to plots 3 and 4 in exhibit 1 cannot be derogated from.

4. DW.1, the Respondents' surveyor, admitted the facts stated in (1), (2) and (3) above when he stated at page 83 of the record as follows:

"I see Exhibit 3 and the survey plan attached to it. It is the

predecessor in title of the 1st defendant. Plot 2 was conveyed in 1973,

January, 1973 to DUROSIMI ETTI. (That is DW.4) I see the four pillars shown in exhibit 3 are reflected on exhibit 6. ”(Parenthesis are mine).

The above evidence I agree, is an admission by the Respondents’ surveyor that Plot 9 as depicted in Exhibit 6 was not the land sold to DW 4 in 1973 which the Respondents claim is now the land in dispute. B

5. The beacon numbers pleaded and shown by evidence clearly establish that while exhibit 1 has six beacon numbers indicating 1 plot of land in plots 2, 3 and 4 in exhibit 6 this is not so. C

6. To buttress the facts in (5) above, while the Respondents claim that the land in dispute is 1 plot of land, DW.1 admitted under cross examination that he surveyed 2 plots for the Respondents. Clearly therefore, the land shown as plot 9 by the Respondents cannot be the actual land in dispute. This is because their own evidence of the land in dispute is contradictory, having arisen, I perceive, from their attempt to hide the truth from the court. It is in this wise that I agree with the submission of the Appellant that this was because of the courts below indeed glossed over these contradictory evidence as to the identity of the land in dispute that they wrongly decided the case against him. To exemplify this, if one asked the question of where the land conveyed to DW.4 in exhibit 3 is situate, the evidence of the selfsame witness was to the effect that: D E

‘The land in dispute is opposite my house. My vendor is dead and signed 3A (i.e. Exhibit 3A) which is the same as Exhibit 3’. F

The house DW4 was referring to in his evidence was in fact the same as plot 2 sold to him by virtue of exhibits 3 and 3A and cannot be otherwise. This is the plot of land that is supposed to be contiguous to plots 3 and 4, which are the real plots of land in dispute in this case. Apart from exhibits 3 and 3A, which relate to plot 2, there is no other evidence of a conveyance in favour of DW.4 of any other piece of land owned by Thomas. The entire case in its setting was that in which both parties traced their titles to Thomas, the undisputed owner. Thus, while the connection of the Appellant to Thomas is direct and unbroken, there is no link between the title asserted by the Respondents with the said Thomas. For instance, G H

DW.5 who was 1st Respondent testified as follows:

“Later I purchased the land and a deed of conveyance was executed in favour of my wife. I identify Exhibit 5. I am the attorney of my wife.”

Be it noted that DW.5’s name is Emmanuel Alao and the person he called his wife is Madam Adebiji.

Later on DW.5 said:

“In October 1983 the land was sold to 2nd Defendant. In November, 1983 the uncompleted structure on the land was pulled down in my presence. The following day 2nd Defendant dug the land for foundation of the building. Later a purchase receipt was issued to TOSIL LTD. This is the purchase receipt to the 2nd Defendant. I seek to tender Chief Morohundiya has no objection.

RULING

The purchase land receipt was pleaded and is admitted without objection as Exhibit 7.”

DW. 5 further testified to the following effect:

“My power of attorney is with my counsel. My wife lives in Ibadan.”

As transpired, no power of attorney was eventually tendered in evidence.

This definitely was a failure to produce evidence and the provisions of Section 149(d) of the Evidence Act, Cap. 112 Laws of the Federation 1990 was invoked against the Respondents and rightly so, in my view.

My answer to this issue is resolved against the Respondents.

ISSUE 3

The grouse in this issue is whether under the facts and circumstances of this case, the Court of Appeal rightly held that the equitable defences of estoppel and laches availed the Respondents.

In paragraph 40 of the Statement of Defence at page 40 of the Records, the Respondents pleaded the above defences. However throughout his counsel’s address at the trial court the learned counsel did not raise any of these equitable defences. They are, in my view, deemed abandoned, obviously because the trend of evidence led did not establish them.

Accordingly, the learned trial Judge did not consider them in his judgment.

On appeal to the court below, none of the parties complained about this non-consideration of these equitable defences by the trial Judge. The Respondents only raised the issue of Statute of Limitation, which was being argued at the Court of Appeal for the first time. Rather than considering the said unpleaded issue of limitation, the learned Justices of the court below raised suo motu in their judgment and determined same without the benefit of argument of counsel, the issue of the applicability of these defences. As Niki Tobi, JCA put it:

"I must say that the learned trial Judge did not specifically raise the issue of the defences in his judgment but the parties did in their submission. Since the equitable defences were duly pleaded by the respondent and there is evidence before him in vindication of the defences, this is a case where this court can invoke its Section 16 of the Court of Appeal Act jurisdiction. And so I invoke it. For the avoidance of doubt, I should say that the defences were raised in the alternative. I have also invoked them in the alternative." (Emphasis supplied).

What the learned Justice said above, is with due respect, wrong. Nowhere in their submission both at the trial court and in the court below, did they raise it. The court below therefore raised and considered same suo motu, relying on Section 16 of the Court of Appeal Act. I hold the view that it is beyond the power and/or jurisdiction of the Court of Appeal under Section 16 of the Act to so raise and consider issues as well as determine them suo motu. Clearly, therefore, although the court below had in its judgment berated the trial court for raising and considering the issue suo motu, it also fell into the same error. In the result, I hold that the court below cannot raise and determine this issue suo motu and decide it without hearing the parties on it. See Oro v Falade (1995) 5 NWLR (Part 396) 408 paragraphs C – D. As those defences were not pleaded specifically with adequate particulars their consideration by the court below was wrong.

In Olusanya v Olusanya (1983) 3 SC 41 at 56/57 the Supreme Court said: "this Court has on a number of occasions said that although an appeal court is entitled in its discretion to take points suo motu if it

sees fit to do so, yet that discretion must be exercised sparingly and in exceptional circumstances only. Where the points are so taken the parties must be given opportunity to address the appeal court before the decision on the points is made by the appeal court..." see also Odiase & Anor v. Agho & Ors. v Devcon Development Consultants Ltd & Ors. (1988) 3 NWLR (Part 83) 407 at 408 & 420 per Karibi-Whyte, JSC; Ebba v Ogodo (1984) 4 SC. 84; Umar v. Balyero University Kano (1988) 4 NWLR (Part 86) 85 at 87 per Belgore, JSC; Maijaki v Maidoya (1988) 3 NWLR (Part 81) 226 at 227 per Maidama, JCA; Ugo v Obiekwe (1989) 1 NWLR (Part 99) 566 and 582 per Nnaemeka-Agu jsc AND Saude v. Abdullahi (1989) 4 NWLR (Part 116) 384. Otherwise, parties must be given the opportunity to be heard on the point.

My answer to the issue is rendered in the negative.

D ISSUE 4 AND 5

In treating these two issues I can do no more than respectfully adopt the reasoning and conclusion of my learned brother, Uwaifo, JSC in their entirety and wholesomeness.

Accordingly, while I answer Issue 4 in the negative my answer to Issue 5 is rendered in the affirmative.

It is for the above reasons proffered by me and the more comprehensive ones contained in the leading judgment of my learned brother Uwaifo, JSC that I too allow the appeal and make the same consequential orders as to costs contained therein.

EJIWUNMI JSC

The draft of the judgment just delivered by my learned brother, Uwaifo JSC, was read by me before now. I am in complete agreement with him that the appeal is meritorious. The appeal for the reasons given in the said judgment, is also allowed by me. The judgments of the trial High Court and the Court of Appeal are hereby set aside. In their place, judgment is hereby entered in favor of the Appellant (as Plaintiff) in terms of his claims in his writ of summons. I also award costs as ordered in the leading judgment.