

SUPREME COURT OF NIGERIA

6TH APRIL, 2001. SC. 206/1994

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.
KATSINA-ALU, A. O. EJIWUNMI, JJSC.**

LASISI ADEGBESAN ABIMBOLA APPELLANT
(For himself and on behalf of
Abimbola family)

AND

SAKA ABATAN RESPONDENT
(For himself and on behalf
of Abatan family)

***APPEALS** - Concurrent findings of fact - Have not been faulted in any way - So the plaintiff's claim must fail (H 5)*

***APPEALS** - Findings of lower courts - Are amply supported - By abundant evidence on record - From all the witnesses (H 4)*

***APPEALS** - Judgment - Errors - Only substantial errors - That occasion miscarriage of justice - Will warrant interference by appellate court (H 7)*

***APPEALS** - Suo motu issues - Must not be raised by the court - And resolved without hearing the parties (H 6)*

***CUSTOMARY LAW** - Land law - Customary tenancy - An absolute grant of land - Not limited by any condition - Is inconsistent with customary tenancy - As in this case (H 3)*

***CUSTOMARY LAW** - Land law - Customary tenancy - May be established - Without the payment of tribute (H 2)*

***PRACTICE & PROCEDURE** - Burden of proof - As nothing in the*

defendants case - Supported that of the plaintiff - Plaintiff must rely on the strength of his own case (H 1)

FACTS

The plaintiff for himself and on behalf of the Abimbola family instituted an action against the defendant for himself and on behalf of the Abatan family claiming a declaration that the defendant as their customary tenant had forfeited his right to occupy the land situate at Abimbola's compound on grounds of misconduct and for recovery of the said land. The plaintiff's case was that the land in dispute was settled upon from time immemorial by their ancestor Abimbola and that the defendants came into the land in dispute as a result of a grant by the Abimbola family after one of their relations Odeyale married the defendant's junior sister. The plaintiff however testified under cross-examination that it was an out grant in which the defendants do not pay tribute to his family. He stated that the defendants had been challenging his title to the land hence this action was instituted.

The defendant on the other hand claimed ownership of the land in dispute. He claimed that the land in dispute formed part of a large tract of land granted to their family ancestor about a hundred years ago over which they had been exercising maximum acts of ownership. He further denied the plaintiff's claim as to any marriage between the plaintiffs and any member of his family.

The learned trial judge after reviewing the evidence, dismissed the plaintiff's claim on the grounds of inconclusiveness of the traditional evidence of the parties as to title to the land in dispute, and failure to prove that the defendant's ancestors were their customary tenants amongst others. The plaintiff was dissatisfied and appealed but his appeal was dismissed unanimously by the Court of Appeal. He has further appealed to the Supreme Court raising some issues but the appeal was determined on the respondent's sole issue.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right in dismissing the appellant's case having regard to the evidence proffered in proof of the

Plaintiff/Appellant's case at the trial court."

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

Defendant's case supporting that of the plaintiff

1. This basic principle of law is however not applicable in cases where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely. See Josiah Akinola and Another v. Fatoyinbo Oluwo and others (1962) 1 All NLR (Part 2) 224 at 227, I think I need to observe straight away that it was neither suggested by learned counsel for the plaintiff/appellant nor is there in fact evidence on record from the defendant/respondent or any of his witnesses which tended to support the case of the plaintiff. It can thus be said that the facts of the present case do not fall within the exception to the said general principle of law to the effect that the plaintiff, to succeed, must rely on the strength of his own case and not on the weakness of the defendant's case. On the contrary, it is the finding of the trial court as affirmed by the court below that there exist various pieces of evidence from the plaintiff and a number of his witnesses which directly supported the case of the defendant. (p. 1159 G)

Customary tenancy - Payment of tribute

2. There can be no doubt that payment of a tribute cannot be said to be a condition precedent to the creation of a valid tenancy under customary law. Non payment of tribute is therefore not inconsistent with the creation or existence of customary tenancy as such tenancy may quite properly be established without the payment of tribute under customary law. See Lawani v. Adeniyi (1964) NSCR Vol.3) 231 at 233. (p. 1160 D)

Absolute grant

3. But it does clearly appear, however, that the aspect of the plaintiff's evidence that the alleged grant of the land in dispute by his family to the defendant's family was an "*out and out*" grant seemed to suggest an absolute grant not limited by any conditions and certainly inconsistent

with customary tenancy. (p. 1160 F)

Evidence in support of findings

4. I have, myself, closely examined the above findings of both courts
 B below on the question of whether or not the defendant is a customary ten-
 ant of the plaintiff against the entire evidence led at the trial. In my view,
 there can be no doubt that the said findings are amply supported by abun-
 dant evidence on record not only from the defendant and his witnesses but
 C from the plaintiff's witnesses as well. (p. 1162 G)

Concurrent findings of fact

5. Where there are concurrent finding of both the trial court and the Court
 D of Appeal and there is sufficient evidence in support thereof, then unless
 those findings are found to be perverse or are not supported by evidence or
 were reached as a result of a wrong approach to the evidence or as a result
 of a wrong application of a principle of substantive law or of procedure,
 this court, even if disposed to come to a different conclusion upon the printed
 E evidence cannot do so. See Enang v. Adu (1981) 11 – 12 SC 25 at 42,
 The above findings of both courts below have not been faulted in any way
 and I have no difficulty in affirming that the plaintiff failed to establish that
 the defendant is a customary tenant of his family. (p. 1163 A)

F
Suo motu issue raised by the court

6. It is settled law that on no account should a court of law raise a point
suo motu, no matter how clear it may appear to be, and proceed to resolve
 it one way or the other without hearing the parties. See Ugo v. Obiekwe
 G (1989) 1 NWLR (Part 99) 566 at 581. (p. 1163 F)

Error or mistake in judgment

7. It is not every mistake or error in a judgment that will result in the
 H appeal being allowed. It is only when the error is substantial in that it has
 occasioned a miscarriage of justice that an appellate court is bound to
 interfere. See Onajobi v. Olanipekun (1985) 4 SC (Part 2) 156 at 163,
 The error complained of on the part of the trial court not having occa-

sioned any miscarriage of justice, I can find no justification to interfere with the judgment of the trial court as affirmed by the Court of Appeal in this case. (p. 1163 H)

NOTABLE POINTS OF INTEREST

B

IGUHJSC

1. Proper formulation of issues

I need, perhaps, observe, with due respect to learned counsel for the appellant, that issue one raised in the appellant's brief of argument can hardly pass as a competent issue. In my view, that issue is essentially a typical academic question which students of law may be confronted with in an examination and by no means wears any garb whatever resembling a properly formulated issue for the determination of an appeal. There is nothing for resolution by this court under the alleged issue, whether for or against either party and, at any rate, I cannot conceive that it is a question remotely relevant for the determination of the present appeal. (p. 1157 E)

2. Proof of customary tenancy

E

It does not appear to me that ownership or original title to land must necessarily be established before a customary tenancy may be proved as it is not unknown under customary law for a tenant to create a sub-tenancy in respect of his holding. In my view, issues 2 and 4 as formulated in the appellant's brief of argument cannot be said to be related to the real questions for resolution in this appeal. (p. 1158 A)

3. Plaintiff's duty to rely on the strength of his own case

G

It is an elementary principle of law that in civil cases, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the remedy he claims. Plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case and if this onus is not discharged, the weakness of the defendant's case may not help him and the proper judgment will be for the defendant. See Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 at 337. (p. 1159 E)

REPRESENTATION

Mr. D. Belgore Esq., with Mr. M. I. Hanafi for the appellant.

A. Akintola Esq., with J. E. Ogor Esq. for the respondent.

B CASES REFERRED TO

Kodilinye v. Mbanefo Odu (1935) 2 W.A.C.A. 336 at 337

Frempony v. Brempony (1952) 14 W.A.C.A. 13

Woluchem v. Gudi (1981) 5 S.C. 291

C M. O. Ibeziako v. Nwogbogu and others (1972) 1 ALL N.L.R. (part 2) 200

Lawani v. Adeniyi (1964) N.S.C.R. Vol. 3) 231 at 233

Andu Makinde and others v. Dawuda Akinwale and others (2000) 2 N.W.L.R. (part 645) 435

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

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

Igwego v. Ezeugo (1992) 6 N.W.L.R. (part 249) 561

Chikwendu v. Mbamali (1980) 3 - 4 S.C. 31 at 75

E Ugo v. Obiekwe (1989) 1 N.W.L.R. (part 99) 566 at 581

LEAD JUGDMNT BY IGUH JSC

F This is an appeal against the judgment of the Court of Appeal, Ibadan Division, which had on the 30th day of June, 1992 dismissed the appeal by the plaintiff from the decision of Ajileye, J. sitting at Ibadan in the High Court of Justice of Oyo State.

G The plaintiff for himself and on behalf of the Abimbola family of Gbenla, Ibadan had instituted an action against the defendant for himself and on behalf of the Abatan family claiming as follows:-

H “1. A declaration that the defendant as a Customary Tenant has forfeited on grounds of misconduct his right to occupy all that piece or parcel of land situate, lying and being at Abimbola’s Compound, Gbenla H area, Ibadan and more particularly described in a plan to be later filed in court.

2. Recovery of possession of the said land.”

Pleadings were ordered in the suit and were duly settled, filed

and exchanged.

The plaintiff's case as pleaded and testified to is that the land in dispute is part of a much larger portion of land first settled upon from time immemorial by one Abimbola, now deceased, the ancestor of the plaintiff. The land was granted to the said Abimbola by Oderinlo and the area thus granted is known as Abimbola compound. The defendant who was in no way related to the Abimbola family got into the land in dispute as a result of the marriage between Odeyale, Abimbola's relation to the defendant's junior sister, Ajayi. Thereafter the Abimbola family at the request of Odeyale made a grant of the land in dispute to Abatan, his wife's brother.

By paragraphs 11 and 12 of the Statement of Claim, the plaintiff averred as follows:-

"11. Ajayi asked Odeyale to beg Abimbola to grant her senior brother Abatan land as a customary tenant."

12. The land requested for was given to Abatan with the permission of the Abimbola family."

Under cross-examination, however, the plaintiff testified thus:-

"The defendant built one house on the land in dispute. Other members of his family built 4 more houses. Neither the defendant nor the other members of his family pay tributes to me or my family on the land. The land to the defendant was an out and out grant."

The plaintiff stated that the defendant had consistently challenged the title of his family to the land in dispute and claimed to be the original owner thereof hence this action.

The defendant, on the other hand, claimed ownership of the land in dispute. His case was that the land in dispute formed part of a large track of land granted to the ancestor of his family, Durojaiye by Ogunmola about one hundred years ago. He testified that his said ancestor, Durojaiye, immigrated from orile-Owu to Ibadan and settled at Oke Mapo. It was following a fire disaster at Oke Mapo that the place was abandoned and Ogunmola brought Durojaiye to the land in dispute and granted the same to him. Durojaiye family has since been exercising maximum acts of ownership over the said land in dispute known as and called Abatan compound. Members of the defendant's family also erected several

residential houses on the land. He denied that there was any one called Ajayi in their family who at any time married Odeyale as alleged by the plaintiff. Abatan was one of the great grand children of the said Durojaiye.

At the conclusion of hearing, the learned trial Judge, Ajileye, J. after a careful review of the evidence on the 11th day of December, 1984 found for the defendant and dismissed the plaintiff's claims. This, he did on the grounds of:-

- (i) Inconclusiveness of the traditional evidence of both parties at the trial in respect of their claim of title to the land in dispute.
- (ii) Failure by the plaintiff to prove that the defendant's ancestors were the customary tenants of the plaintiff and
- (iii) That the acts of ownership proved by the defendant's family were numerous and positive enough to warrant the inference that they are the owners of their own part of the land in dispute.

Dissatisfied with this judgment of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Ibadan Division. The Court of Appeal in a unanimous decision on the 30th day of June 1992 dismissed the appeal and affirmed the decision of the trial court. The plaintiff has now further appealed to this court.

Six grounds of appeal were filed by the plaintiff against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

Four issues were identified in the appellant's brief of argument as arising for determination in this appeal. These are set out as follows:-

"(i) Where there is a failure by the trial court to adopt the test in Kojo v. Bonsie 14 WACA 242 in resolving conflict in traditional evidence, what should be the attitude of the Court of Appeal.

(ii) Whether, having regard to the materials before the lower court the learned Justices of the Court of Appeal were right in failing to make a finding on the root of title relied upon by the parties.

(iii) Whether having regard to the evidence on the record the lower court was right in holding that the plaintiff/appellant failed to prove his case.

(iv) *Having found the complaints of the appellant that the trial court raised and resolved some issues suo motu established, was the lower court right in holding that there was no miscarriage of justice notwithstanding that the trial court based its decision partly on those issues.*”

The respondent on the other hand, submitted that the one issue for the determination of this court in this appeal is:-

“Whether the Court of Appeal was right in dismissing the appellant’s case having regard to other evidence proffered in proof of the Plaintiff/Appellant’s case at the trial court.”

It is plain that the lone issue formulated by the respondent in his brief for the resolution of this appeal covers the same ground as issue 3 raised on behalf of the appellant. That issue, in effect poses the question whether the Court of Appeal was right in affirming the dismissal of the appellant’s suit by the learned trial Judge, having regard to the evidence before the trial court and the findings of that court thereupon.

It is crystal clear to me that the single issue formulated in the respondent’s brief is the main question that arises for determination in this appeal. I need, perhaps, observe, with due respect to learned counsel for the appellant, that issue one raised in the appellant’s brief of argument can hardly pass as a competent issue. In my view, that issue is essentially a typical academic question which students of law may be confronted with in an examination and by no means wears any garb whatever resembling a properly formulated issue for the determination of an appeal. There is nothing for resolution by this court under the alleged issue, whether for or against either party and, at any rate, I cannot conceive that it is a question remotely relevant for the determination of the present appeal.

There is also issue 2 identified in the appellants brief. That primarily concerns the question of original title to the land in dispute. The plaintiff’s claim against the defendant as per his writ of summons and Statement of Claim is for a declaration that the defendant as a customary tenant has, on grounds of misconduct, forfeited his right to occupy the land in issue and recovery of possession of the said land. It seems to me that the simple, straight forward and practically the main questions for determination in the case are whether or not the defendant is a customary

tenant of the plaintiff in respect of the land in issue and, if the answer is in the affirmative, whether forfeiture of the tenancy on ground of his alleged misconduct and recovery of possession of the land may be ordered against him. It does not appear to me that ownership or original title to land must necessarily be established before a customary tenancy may be proved as it is not unknown under customary law for a tenant to create a sub-tenancy in respect of his holding. In my view, issues 2 and 4 as formulated in the appellant's brief of argument cannot be said to be related to the real questions for resolution in this appeal. I therefore, propose in this judgment to adopt the sole issue formulated by the respondent in his brief of argument which is substantially the same with the appellant's issue 3 for my determination of this appeal.

At the oral hearing of the appeal, learned leading counsel for the appellant, M.D. Belgore, Esq. adopted the appellant's brief of argument together with his reply brief to the respondent's brief of argument. He submitted that although the testimony of the plaintiff and his witnesses could not be said to be perfect, there was enough evidence to establish that the defendant is a customary tenant of the plaintiff/appellant. He referred to the evidence of the plaintiff where he testified that Abatan family came on the land in dispute with the leave and licence of the Abimbola family. Learned counsel dealt extensively with the issue of proof of title to land in dispute. He contended that the ownership of the land was found in favour of the plaintiff/appellant by the trial court and that the court below was in error by not holding that the defendant's ancestor was a customary tenant on the said land. He urged the court to allow this appeal.

Learned leading counsel for the respondent, Mr. A. Akintola, in his reply, similarly adopted the respondent's brief of argument. In elaboration thereof, he stressed that there is no evidence whatsoever from the plaintiff to establish that the defendant/respondent's ancestors were the customary tenants of the plaintiff/appellant in respect of the land in dispute. He submitted that the onus is on the plaintiff to prove his case and that this he failed to do. He pointed out that the contention by the learned appellant's counsel that the ownership of the land was found in favour of the appellant cannot be correct as this is not borne out by the record. He referred to the

evidence of PW3, PW7 and PW8 and submitted that these are at variance with the case of the plaintiff for whom they testified. He stressed that the plaintiff did not prove the customary tenancy he founded his case upon and he argued that on that ground alone, the plaintiff's action was bound to fail. He finally pointed out that this appeal is caught by concurrent findings of fact of both courts below which are fully supported by the evidence. He argued that there is nothing perverse or patently erroneous about those findings. He cited a number of decided cases on the point and he urged the court to dismiss the appeal. B

As I have already indicated, the relevant issue that arises for the determination of this court in this appeal is whether the court below was right in affirming the dismissal of the plaintiff's suit by the trial court, having regard to the evidence and the findings of the court of first instance. This, in effect, is a resolution of the question whether or not in the evidence and the findings of both courts below, the defendant was established to be a customary tenant of the plaintiff in respect of the land in issue and, if the answer is in the affirmative, whether forfeiture of the customary tenancy and recovery of possession of the land may be ordered against the said defendant. C D E

It is an elementary principle of law that in civil cases, the onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the remedy he claims. Plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case and if this onus is not discharged, the weakness of the defendant's case may not help him and the proper judgment will be for the defendant. See Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 at 337, Frmpong v. Brempong (1952) 14 WACA 13, Woluchem v. Gudi (1981) 5 SC 291. **This basic principle of law is however not applicable in cases where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely.** See Josiah Akinola and Another v. Fatoyinbo Oluwo and others (1962) 1 All NLR (Part 2) 224 at 227, H Oduaran and others v. Asarah and others (1972) 1 All NLR (Part 2) 137, M. O. Ibeziako v. Nwogbogu and others (1972) 1 All NLR (Part 2) 200. F G

I think I need to observe straight away that it was neither

suggested by learned counsel for the plaintiff/appellant nor is there in fact evidence on record from the defendant/respondent or any of his witnesses which tended to support the case of the plaintiff. It can thus be said that the facts of the present case do not fall within the exception to the said general principle of law to the effect that the plaintiff, to succeed, must rely on the strength of his own case and not on the weakness of the defendant's case. On the contrary, it is the finding of the trial court as affirmed by the court below that there exist various pieces of evidence from the plaintiff and a number of his witnesses which directly supported the case of the defendant.

Now, dealing with the main issue of whether or not the defendant is a customary tenant of the plaintiff in respect of the land in dispute, the trial court noted the evidence of the plaintiff himself under cross-examination. This is to the effect, firstly, that neither the defendant nor the other members of his family paid tribute for the alleged customary tenancy and, secondly, that the grant of the land to the defendant was an “*out and out grant*”. There can be no doubt that payment of a tribute cannot be said to be a condition precedent to the creation of a valid tenancy under customary law. Non payment of tribute is therefore not inconsistent with the creation or existence of customary tenancy as such tenancy may quite properly be established without the payment of tribute under customary law. See Lawani v. Adeniyi (1964) NSCR Vol.3 231 at 233, Andu Makinde and others v. Dawuda Akinwale and others (2000) 2 NWLR (Part 645) 435 etc. But it does clearly appear, however, that the aspect of the plaintiff's evidence that the alleged grant of the land in dispute by his family to the defendant's family was an “*out and out*” grant seemed to suggest an absolute grant not limited by any conditions and certainly inconsistent with customary tenancy. In particular, the trial court referred to the evidence of PW7, Gabriel Okebukola, who claimed that he was living on the land in dispute. He stated:-

“I live at E9/70A Gbenla, Abimbola compound Ibadan ... I know the plaintiff and defendant. I have a building in Abimbola's compound ... The land (in dispute) is a family land and it jointly belongs to Abatan (i.e. defendant), Abimbola (i.e. plaintiff) and Daramola's families. I am also

a member of the family. I am entitled to the land as of right". (Words in brackets supplied).

Further reference was made by the trial court to the evidence of PW8, Murana Adigun who also lived within the land in dispute which he called Abatan's compound. He stated:-

"I live at Abatan's compound, Ibadan. I know the plaintiff as my boundary man. I have a house in the compound. I built it about 10 years ago... I know the land in dispute. Abimbola's (i.e. plaintiff) land is one, that of Abatan (i.e. defendant) is another and we are on our own father's land. Abatan got not grant from Abimbola family. IT WAS Ogunmola who granted my father land in the area". (Words in brackets supplied)

The learned trial Judge next proceeded, rather exhaustively, to consider the entire evidence led on behalf of the parties and their witnesses in the case. On the traditional evidence led by the parties on their respective claims to title to the land in dispute, he commented thus:-

"Learned counsel for the plaintiff, Mr. Ogunsola, submitted that the traditional evidence proved by either side is inconclusive. I cannot agree more. There is nothing to choose between Oderinlo and Ogunmola as to who owns the land from Oke Mapo to Orita-Bashorun or to Agodi gate."

On the more important question of whether the defendant's family members are customary tenants of the plaintiff's family he found:-

"... but generations of both Abatan and Abimbola families have settled there several years ago, perhaps well up to about one hundred years ago. Both sides had built houses there. I have painfully examined the evidence to see whether the Abatan family were settled there as guests of Abimbola family with liability to pay tributes as tenants. The onus is on the plaintiff to establish this fact on the balance of probabilities. Regrettably however, the evidence of the plaintiff and of the seventh and eighth plaintiff witnesses fail to support this fact. The plaintiff said that the grant to Abatan family was an out and out grant. It was in effect, a gift. According to him, no tributes are paid."

The seventh plaintiff witness put ownership of the land on Abatan, Abimbola and Daramola families. The eighth plaintiff witness

put ownership of the land in both Abimbola and Abatan families. In my finding therefore I hold that the two families moved to the site about one hundred years ago, no tributes are paid and members of each side built houses there as neighbours and settled, not as tenants of the other but as owners.

He then concluded:-

“In my conclusion, the defendant has settled on the land and exercised acts of ownership numerous and positive enough to warrant the inference that they are owners of their own parts of the land.”

It is thus clear from the foregoing findings of the trial court as affirmed by the court below that the submission of learned counsel for the plaintiff/appellant to the effect that ownership of the land in dispute was decreed in favour of the said plaintiff cannot, with respect, be right. On the contrary; it would appear that ownership of the land was found in favour of the defendant although no such claim for title was specifically claimed by either side to the suit. Accordingly, the plaintiff’s claim was dismissed by the trial court.

In upholding the above findings of the trial court, the Court of Appeal per the leading judgment of Ogundere, JCA with which Salami and Muhammed JJCA concurred stated thus:-

“It seems to me therefore, that the evidence of the plaintiff in support of his case was not as inconclusive as opined by the learned trial Judge. The obvious inference is that the plaintiff failed to prove that the defendant was a customary tenant. Further at page 38, he made a specific finding that no tributes were paid. He then concluded that the plaintiffs failed to discharge the onus on them and that they cannot rely on the weakness of the defendant’s case and that judgment must be given for the defendants.”

I have, myself, closely examined the above findings of both courts below on the question of whether or not the defendant is a customary tenant of the plaintiff against the entire evidence led at the trial. In my view, there can be no doubt that the said findings are amply supported by abundant evidence on record not only from the defendant and his witnesses but from the plaintiff’s witnesses as

Where there are concurrent finding of both the trial court and the Court of Appeal and there is sufficient evidence in support thereof, then unless those findings are found to be perverse or are not supported by evidence or were reached as a result of a wrong approach to the evidence or as a result of a wrong application of a principle of substantive law or of procedure, this court, even if disposed to come to a different conclusion upon the printed evidence cannot do so. See Enang v. Adu (1981) 11 – 12 SC 25 at 42, Nwadike v Ibekwe (1987) 4 NWLR (Part 67) 718, Igwego v. Ezengo (1992) 6 NWLR (Part 249) 561, Chikwendu v. Mbamali 91980) 3-4 SC 31 at 75 etc. The above findings of both courts below have not been faulted in any way and I have no difficulty in affirming that the plaintiff failed to establish that the defendant is a customary tenant of his family.

Learned counsel for the appellant then submitted that the trial court was in error by raising the question of whether the suit was fought by the parties personally or in their representative capacities suo motu and by proceeding to resolve the issue without hearing from the parties.

The trial court considered the relevant Rules of Court on the issue of representative actions and came to the conclusion that the present suit, irrespective of its title, was fought by the parties in their representative capacities. This it did without inviting the parties to address it on the point.

It is settled law that on no account should a court of law raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties. See Ugo v. Obiekwe (1989) 1 NWLR (Part 99) 566 at 581, Okafor v. Nnaife (1972) 3 E.C.S.L.R. 261, Oje v. Babalola (1991) 4 NWLR (Part 185) 267 at 280. I have however given a most careful consideration to whether the plaintiff/appellant suffered any miscarriage of justice in this exercise by the trial court and must resolve the issue in the negative. I must also add that learned appellant's counsel was also unable to identify in what respect the decision of the learned trial Judge on the matter occasioned any miscarriage of justice.

It is not every mistake or error in a judgment that will result

in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an appellate court is bound to interfere. See Onajobi v. Olanipekun (1985) 4 SC (Part 2) 156 at 163, Azuetonma Ike v. Ugboaja (1993) 6 NWLR (Part 301) 539 at 556, Ukejianya v. Uhecndu 13 WACA 45 at 46, Anyanwu v. Mbara (1992) 5 NWLR (Part 242) 386 at 400 etc. **The error complained of on the part of the trial court not having occasioned any miscarriage of justice, I can find no justification to interfere with the judgment of the trial court as affirmed by the Court of Appeal in this case.**

In the final result and for all the reasons that I have given above this appeal fails and the same is hereby dismissed with N10,000.00 costs to the respondent against the appellant.

D

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Iguh, JSC and I agree with the reasoning and conclusion for dismissing the appeal.

The concurrent findings of fact by both the trial court and the Court of Appeal are unimpeachable. I find no valid reason to interfere with the decisions of the two lower courts and I therefore affirm them.

For the same reasons ably advanced in the lead judgment, I also hereby dismiss this appeal with N10,000.00 costs in favour of the Respondent.

G

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Iguh JSC just delivered. I adopt his reasonings therein as mine. The Plaintiff/Appellant predicated his case on the Defendant/Respondent being his customary tenant. Having failed to prove this assertion, his case obviously must fail. It was rightly dismissed by the two Courts below. I too dismiss it. The appeal fails and it is accordingly dismissed by me too with costs as assessed by my learned brother Iguh, JSC.

KATSINA-ALU JSC

I have had the privilege of reading in draft the judgment of my learned brother Iguh JSC in this appeal. I entirely agree with it. For the reasons he has given, I would also dismiss this appeal with N10,000.00 costs in favour of the Respondent. B

EJIWUNMI JSC

I have had the advantage of reading before now the judgment just delivered by my learned brother, Iguh JSC. This appeal was deservedly dismissed for all the reasons given in the said judgment. And I agree entirely for the reasons given for dismissing the appeal. C

May I also add that this appeal must inevitably fail as it became manifest that the evidence called in support of the appellant's claim are clearly contrary to the averments made in the pleadings of the appellant that the land in dispute was granted to Abatan as a customary tenant. In this context, I refer to the evidence of the 7th and 8th appellants' witnesses whose evidence revealed that the disputed land belonged to the families of Abatan, Abimbola, and Daramola, and as so found by the Courts below. D E

I think in a situation such as this where evidence led is contrary to the pleadings of the party who called the witnesses, reference may be made to the apt dictum of Lewis JSC in National Investment and Properties Company Ltd. v The Thomson Organisation Ltd. & Anor. (1969) NMLR (Vol. 1) 99 at 103 – 104. It reads:- F

“Now just as an appellant is bound by his grounds of appeal so at the earlier stage of the action both parties are bound by their pleadings and it is elementary that admissions in pleadings do not have to be proved. In so far as pleadings do not contain admissions then the matters alleged must be proved in evidence, but that evidence cannot derogate from the pleadings... A plaintiff must call evidence to support his pleadings, and evidence which is in fact adduced which is contrary to his pleadings should never be admitted... It makes no difference,... that the other side did not object to the evidence or that the judge did not reject it. G H

It is of course, the duty of counsel to object to inadmissible evidence, but if notwithstanding this evidence is still through oversight or otherwise admitted then it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as it had never been admitted. This has long been the case but it is clearly set in the judgment of this Court in Bada v The Chairman LEDB (SC 501/65 of 23rd June, 1967). We cannot therefore look at or accept evidence on the record here when it runs to the pleadings of the plaintiffs.”

Now, in the instant case, the evidence led by the appellant having been adjudged to be contrary to the pleadings of the appellant, should have been rejected by the trial Court. But, that notwithstanding, this Court cannot look or accept such evidence in the consideration of the merits for this appeal. In the absence of any other evidence which can justifiably support this appeal it is manifest that the appeal must be dismissed.

I therefore would dismiss this appeal for the above reasons and the fuller reason given in the lead judgment. I also abide with the other orders made in the said judgment.

F

G

H