

SUPREME COURT OF NIGERIA

27TH APRIL, 2001. SC. 76/1993.

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,
S. O. UWAIFO, E. O. AYOOLA, JJSC.**

1. DANIEL BASSIL

2. THE WEST AFRICAN PHARMACEUTICALS

CHEMICALS, INSECTICIDE AND APPELLANTS

PERFUMERY COMPANY (NIGERIA)

LIMITED

AND

1. CHIEF LASISI FAJEBE

2. BECO CONCRETE INDUSTRIES RESPONDENTS

LIMITED

APPEALS - Evaluation of evidence - Where not properly done before upholding trial court's finding - Supreme Court will set aside the judgment (H 7)

CONVEYANCING - Exhibit - From the evidence in this case - The land in dispute was not within the land conveyed (H 1)

COURTS - Evidence - Of relevant facts - Should not be ignored in deciding the probability of a question of fact - Lest public confidence in judicial process be severely eroded (H 6)

LAND LAW - Boundaries - Survey plan - Where there is clear evidence of boundaries - It will be perverse to rely on imprecise description of the land (H 2)

LAND LAW - Possession - Claim of possession by both parties - Preponderance of evidence is in favour of the appellants - Surveying and burying survey pillars - Can be evidence of possession (H 4)

LAND LAW - Sale - Title - Where from the evidence - It is clear that land conveyed did not include the land now in dispute - Court should hold that title had not been established (H 3)

LAND LAW - Title - Acts of ownership - Demonstrated by the appellant cannot be brushed aside - Apart from these acts - Proof of ownership is proof of possession (H 5)

FACTS

The respondents who were plaintiffs in the High Court claimed from the appellants, who were defendants and counter claimants in that suit, damages for trespass and injunction. The case of the respondents/ plaintiffs was that the land in dispute was part of a large tract of land originally belonging to one Aina Ogundipe. The said Aina Ogundipe, it was alleged, sold lands of which the land now in dispute was a portion to one Chief Abraham Akinola as far back as 18th July, 1925. The land was later duly conveyed to him for an estate in fee simple absolute and in possession. Abraham Akinola, in turn, sometime in 1965 conveyed portion of the land to the 1st respondent.

The respondents further alleged that their root of title was not a conveyance but was sale according to Yoruba native law and custom by Aina Ogundipe to Abraham Akinola as borne out by purchase receipt dated 18th of July, 1925. The respondents averred in their pleadings possession of the land in dispute by Akinola since 1925 and by 1st respondent from 1965 until 1977 when 2nd respondent came into joint possession of the land with him on 1st respondent's invitation. Between November and December 1977, the 1st defendant broke and entered a portion of the land, hence this action. The trial judge entered judgment for the respondents and dismissed the counter claim. The appellants appealed to the Court of Appeal and the appeal was dismissed. They have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the land in dispute falls within the parcel of land which was sold by Aina Ogundipe (Bale of Ewu) to the plaintiff's prede-

cessor in title, Chief Abraham Akinola in 1925 under Yoruba native law and custom.

2. *If the answer to issue No. 1 is in the affirmative, whether the said sale was valid and effective."*

HELD: (Allowing the appeal per lead judgment of **AYOOLA JSC**, Onu JSC, dissenting)

Conveyancing - Exhibit

1. It is clear, and it seems to be common ground, that the land in dispute was not within the land conveyed to Akinola by Ogundipe family as per Exhibit K. The evidence is also clear as given by Akinola's that all the land sold to Akinola by Ogundipe was the one conveyed by Exhibit K. It is also worthy of note that no member of Ogundipe family gave evidence in support of the respondents' assertion that the land sold by Ogundipe to Aina covered land which included the land in dispute. The son of Abraham Akinola did not give evidence in support of the contention that only part of the land sold to his father was conveyed. (p. 1288 D)

Boundaries - Survey plan

2. In my judgment it is perverse to ignore that evidence and the clear evidence of the defined boundaries of the land sold as delineated on the plan attached to Exhibit K and rely on the imprecise description of the land sold to Akinola by Ogundipe as contained in Exhibit C. The land described in Exhibit C was described as "*bounded on the North by the Shasha Stream, on the South of the Nigerian Civil Aviation, Ikeja on the West by Ewu family land and on the East by the Ajakaye and Doherty landed property.*" There was no oral evidence to locate these boundaries. (p. 1289 B)

Land law - Sale - Title

3. In my judgment, had the trial judge properly evaluated the evidence he would not have made the finding that the Ogundipe family had made a sale of land of which the land in dispute was part to Akinola. In the face of Exhibit K and it being undisputed that the land conveyed by the family

of Ogundipe to Akinola, did not include the land now in dispute, it was clear that the title of Akinola to the land in dispute had not been established. The Court of Appeal should have so held. The conclusion by the trial judge based on a finding that the family had made a sale of the land in dispute to Chief Abraham Akinola in 1925 should not have been upheld by the Court of Appeal. (p. 1294 B)

Claim of possession by both parties

C 4. The only reliable evidence of title which Akinola had being Exhibit K and the land in dispute being outside the land conveyed by Exhibit K, the long possession that could be of any use to the respondent must be possession of Akinola of the land in dispute. Akinola was not shown to have been in such possession or any at all.

D One cannot but be impressed by the argument advanced in the appellants' brief that there was preponderance of evidence in favour of the possession of the appellants' predecessors in title, dating from 1953. The learned counsel for the appellant relied on contiguity of the land E owned by Chief Doherty to the land in dispute over which Chief Doherty received compensation upon acquisition of the land by the Government, and evidence that the land in dispute was surveyed by and conveyed to Chief Doherty in 1953. In certain circumstances surveying land and F burying survey pillars on it is evidence of possession. (p. 1295 G)

Title - Acts of ownership

G 5. In this case the activities of the 2nd appellant regard to the land since 1971 cannot be brushed aside or wishes away. Not only did it cause the land to be surveyed, it was also active in claiming compensation when the land was believed to have fallen within land compulsorily acquired by the Government and pursued that claim until the land was released by the Government as not falling within the acquisition area.

H Quite apart from these acts, the law is clear that proof of ownership is proof of possession. In Badejo v. Sawe (1984) NSCC 481. (p. 1296 E)

Evidence of relevant facts

6. In deciding the probability of a question of fact the court should not ignore evidence of relevant facts about which there cannot be any doubt. In the light of the activities of the 2nd appellant in respect of the land as given in evidence for the appellants and attested to by several letters B exchanged between it and the Government over the land spanning over several years from 1972 to 1975, it should have appeared improbable to the trial judge that the appellants would have entered the land only in 1977 as the respondents claimed or that the 1st respondent was on the land before 1977. It must be said that public confidence in the judicial C process will be severely eroded if trial courts ignore or show scant regard to vital evidence which is unanswerable and proceed to make findings and give judgments which fly in the face of obvious facts. (p. 1297 B) D

Appeals - Evaluation of evidence

7. It is evident that the appellants have shown better title to the land than the respondents who have shown no title at all. There was really no E evidence on which the learned trial judge could rightly have found laches and acquiescence to defeat the appellants' claim or, as I have said, long possession to support the respondents' case. The Court of Appeal affirmed the judgment of the trial judge without evaluating the evidence on F which the trial judge relied for his findings of fact. Had the court below carried a proper evaluation of the evidence as it was expected to do, it would have found that the learned trial judge was in error to have dismissed the appellants' counter-claim and to have entered judgment for G the respondents on their claim. For these reasons, I would allow the appeal, set aside the judgment of the court below and of the High Court. I dismiss the respondents' claim. (p. 1297 E)

NOTABLE POINTS OF INTEREST H**AYOOLA JSC*****1. What proper evaluation of evidence means***

Evaluation of evidence involves reviewing and criticising the evidence

given and estimating it. That any decision arrived at without a proper or adequate evaluation of the evidence cannot stand is now almost a truism. Evaluating evidence does not stop with assessing the credibility of witnesses, although that, in appropriate cases, is part of the exercise. It extends to a consideration of the totality of the evidence on any issue of fact in the circumstances of each case in order to determine whether the totality of the evidence supports a finding of fact which the party adducing the evidence seeks that the trial court should make. (p. 1284 B)

C 2. *When appellate court will give necessary consequence to evidence*
When the appellate court comes to a conclusion that the trial judge did not properly advert to the evidence or give necessary consequence to the evidence given, the appellate court will itself perform that exercise. To do so is not a usurpation of the province of the trial judge. To fail to do so is an abdication of responsibility. (p. 1284 F)

3. *Inconsistency in pleadings - Damages one's case*
E Parties are bound by their pleadings and will not be permitted to set up a case different from what they have pleaded. Parties are permitted to make inconsistent averments. However, it is not the law that parties are permitted to make inconsistent assertions on the same question of fact or adduce inconsistent evidence over one and the same issue. A party who adduces inconsistent evidence over one and the same issue damages his own case unless he can reconcile the apparent inconsistency. (p. 1285 H)

G 4. *Direct and specific evidence on one of two inconsistent averments - Should not be ignored*
Where there is direct and specific evidence on one of two inconsistent averments and there is none on the other, it will be wrong for the court to ignore such direct and specific evidence and proceed to a finding of fact in regard to the alternative averment on which there has been no such evidence. (p. 1287 E)

ONU JSC (Dissenting)

5. *Assessment of evidence by trial court - Is entitled to the highest respect.*

The law is trite that the learned trial Judge who saw and heard the witnesses was in a better position than appellate court to assess the evidence and his assessment thereof is entitled to the highest respect.
(p. 1312 B)

6. *Concurrent findings of fact - Should not be departed from lightly*

It is now trite that ordinarily, the Supreme Court ought not to lightly depart from concurrent findings of fact of two lower courts because it has no opportunity of seeing and listening to the witnesses testify. Where, however it is manifest that those concurrent findings were based on wrong premises (the same cannot be said of the case in hand), the Supreme Court has not only the right but the duty to interfere on the issues of fact. See Balogun v. Agboola (supra) and Ebba v. Ogodo (supra).
(p. 1312 F)

UWAIFO JSC

7. To justify the court correcting a mistake in an instrument the evidence must be clear and unambiguous, that is, there must be convincing proof, and that a mistake, whether of fact or law, has been made in recording the parties' intention. It must be shown what the intention was and that the alleged intention to which it is desired to make the agreement conformable continued concurrently in the parties' minds down to the time of the execution of the instrument: see Josclyne v. Nissen (1970) 1 All ER 1213 at 1222 per Russell LJ; Crane v. Hegeman-Harris Co. Inc. (1939) 4 ALL ER 68. (p. 1316 E)

REPRESENTATION

Professor Taiwo Osipitan for the Appellants
Tani A. Molajo, SAN with M.A. Akinsanya Esq. for the Respondents.

CASES REFERRED TO

Jadesimi v. Okotie-Eboh (1986) 1 NWLR 264

Benmax v. Austin Motors Co Ltd (1955) ALL ER 326, 328-329)

Atekwadzo v. Robert Kwesi-Adjei 10 WACA 27

B Wuta-Ofei v. Mabel Danquah (1961) W.L.R 1238 (PC) at p. 1243

Oshongondiya v. Oreofero (1956) SCNLR 269 at 272

Akinloye v. Eyiola (1968) NMLR 92 at 95

Chief Frank Ebba v. Chief Warri Ogodo & Ors. (1984) 4 SC.84

C Asani Balogun v. J.R. Akinrinmisi (1974) 1 ALL NLR (Part 2) 666

C Bale Adegbaie v. J.R. Akinrinmisi (1974) 1 ALL NLR (Part 2) 75 at 84

RULES REFERRED TO

Court of Appeal Rules, O. 3 r. 2

D

LEAD JUDGMENT BY AYOOLA JSC

By the time this matter reached this court the main question has been narrowed down to a short one; namely, whether judgment entered
E for the respondents on their claim for damages for trespass and injunction can be correct in the face of undisputed evidence that the land in dispute was not part of the land conveyed to their predecessor in title by an instrument registered as No. 43 at page 43 in volume 1615 of the
F Register of Deeds kept in the Lands Registry, Lagos.

The respondents who were plaintiffs in the High Court of lagos State claimed from the appellants, who were defendants and counter-claimants in that suit, damages for trespass and injunction. Their case was that the land in dispute which was "*more particularly and more*
G *precisely shown and delineated on the plan accompanying an indenture of Conveyance dated the 20th day of December, 1977, and registered No.8 at page 8 in volume 1674 of the Register of Deeds kept in the Lands Registry office in lagos and thereon edged RED.*", was part of a large
H tract of land originally belonging to one Aina Ogundipe, one-time Bale of Ewu and now represented by the families of Olukotun and Ajamogun of Ewu in the District of Ikeja. The said Aina Ogundipe, it was alleged, sold lands of which the land now in dispute was a portion, to one Chief Abraham

Akinola as far back as 18th July 1925. The land was "*later duly conveyed to him for an estate in fee simple absolute and in possession*". Abraham Akinola, in turn, sometime in 1965 sold portion of the land to the 1st respondent and conveyed it to him by the instrument registered as 8/8/1674 and dated 20th December, 1977. The respondents further alleged that their root of title was not a conveyance registered as No. 43 at page 43 in volume 1615 of the Register of Deeds kept in the lands Registry lagos ("*Exhibit K*") but was sale according to Yoruba native law and custom by Aina Ogundipe to Abraham Akinola as borne out by purchase receipt dated the 18th of July, 1925. The respondents averred in their pleadings possession of the land in dispute by Akinola since 1925 and by 1st respondent from 1965 until 1977 when 2nd respondent came into joint possession of the land with him on 1st respondent's invitation. Between November and December 1977 the 1st defendant broke and entered a portion of the land. Hence this action.

The appellants defended the action and raised a counter-claim. The 1st appellant was a managing director of the 2nd appellant. He was sued as having physically entered the land. The 2nd appellant was the company which claimed title to the land. The joint case of the appellants was that their predecessor in title derived title to the land from Ajamogun, Onilude, Onikun families. 2nd appellant had been in uninterrupted possession of the land since June 1971 until the respondents wrongfully ejected it in October, 1977. They relied on title through Chief T. A. Doherty who had leased the land to the 2nd appellant. Chief Doherty himself had derived title to land as to one party by virtue of a Deed of Exchange dated 1st August, 1967 whereby Messrs. Cappa and D'Alberto Ltd. passed title to him in exchange for another land, and as to another part which is the land in dispute by virtue of a deed of conveyance made to him by three families dated 11th April, 1953. Cappa and D'Alberto Ltd., itself had derived title from one Mr. A. S. O. Coker who had purchased the land from the three families and had it conveyed to him by a deed of conveyance dated 17th December, 1951. It was averred that Coker, Cappa and D'Alberto and Doherty had severally been in continuous and undisturbed possession of the land they bought as was the 2nd

appellant of the land in dispute until it was ejected by the respondents.

B Balogun, J., who heard the case, in a rather lengthy judgment covering 57 pages, entered judgment for the respondents and dismissed the counter-claim. Notwithstanding the length of the judgment, it is not difficult to summarise the grounds of the decision which cover only 9 pages or so (from pages 254 -263) of the 57 pages of the judgment.

C Balogun, J., proceeded on the footing that the respondents have traced their title to the land directly to one whose title to ownership had been established; that, consequently, the appellants had the burden of showing that their own possession was of such a nature as to oust that of the original owner; and, that the appellants and respondents were tracing their root of title to the same family. Having proceeded thus it was inevitable that the trial judge concluded, as he did, that family having sold D the land to the 1st respondent's predecessors in title in 1925 the 1st respondent had proved a better title. In the alternative, he held that if he had found that the three families were the owners of the land, he would nevertheless have given judgment for the respondents on the basis of E adverse possession of the land by Akinola from 1925.

F On the appellants' appeal to the Court of Appeal, that court proceeded, as the trial judge did, on the footing that both parties claimed from the same root of title and that the party who proved a better title to the land in dispute would succeed. Babalakin, JCA., (as he then was) who gave the leading judgment accorded respect to the view of the trial judge that *"the land in dispute was sold as far back as 1925 to one Akinola, the predecessor in title of the 1st respondent."* Being of the opinion that the findings made by the trial judge settled the question of the G identity of the land in dispute and the facts of possession of the respondents and their predecessors in title he dismissed the appeal of the appellants. Awogu, JCA, and Kalgo, JCA (as he then was) agreed.

H Counsel for the appellants on this appeal argued that in several instances that Court of Appeal wrongly affirmed the findings of fact made by the trial judge, namely; that the land in dispute was part of the land sold by Ogundipe to Akinola and that there was an effective sale of family land in 1925. Mr. Molajo, SAN, in the respondent's brief suc-

cinctly identified the two main issues in this appeal as follows:

"1. *Whether the land in dispute falls within the parcel of land which was sold by Aina Ogundipe (Bale of Ewu) to the plaintiff's predecessor in title, Chief Abraham Akinola in 1925 under Yoruba native law and custom.*

2. *If the answer to issue No. 1 is in the affirmative, whether the said sale was valid and effective.*"

These were not the only issues, but I am content to start with them since in my opinion they are the issues that first have to be determined for a just resolution of this appeal.

In the leading judgment of the Court of Appeal that court having noted that, "*This appeal is essentially on facts and the learned judge understood what it is all about*", proceeded to hold that the trial judge resolved the discrepancies about the survey plans. After quoting several findings of fact made by the trial judge, the Court of Appeal said:

"*Thus in the above findings the question of identity of the land in dispute was ascertained and settled; facts of possession of the Respondents and their predecessors in title were upheld and that of the Appellants were rejected.*"

It also held:

"*I am satisfied that the findings of facts of the learned trial judge on the above issues are not perverse but are supported by the evidence adduced in the case.*"

Having so held the court below upheld the findings and the decision of the trial judge.

Appeal to the Court of Appeal from the High Court is by way of rehearing: 03 r.2 Court of Appeal Rules. Such rehearing, however, does not entail retrying the action and taking fresh evidence. It is a rehearing on the record with the attendant duty on the appellate court to evaluate the evidence and draw inferences from primary facts. (See Jadesimi v. Okotie-Eboh (1986) 1 NWLR 264). That an appeal turns on the facts does not free the appellate court from discharging this duty. Where the finding of fact turns on credibility of oral evidence the appellate court, acknowledging the advantageous position of the trial court, will not usurp

the function of the trial court which is placed in a better position to ascribe credibility to the evidence of witnesses it had seen and heard. Where, however, the finding of fact depends on inferences to be drawn from primary facts, the position is different and the appellate court is in as good a position as the trial court to evaluate the evidence and draw such inferences as it deems appropriate. (See Benmax v. Austin Motors Co Ltd (1955) ALL ER 326, 328-329).

Evaluation of evidence involves reviewing and criticising the evidence given and estimating it. That any decision arrived at without a proper or adequate evaluation of the evidence cannot stand is now almost a truism. Evaluating evidence does not stop with assessing the credibility of witnesses, although that, in appropriate cases, is part of the exercise. It extends to a consideration of the totality of the evidence on any issue of fact in the circumstances of each case in order to determine whether the totality of the evidence supports a finding of fact which the party adducing the evidence seeks that the trial court should make. After giving due concession to the advantageous position in which the trial court is in regard to credibility of witnesses, the responsibility of the appellate court to consider the finding of the fact and ensure that it is arrived at after an adequate consideration of the totality of the evidence or whether a reasonable tribunal, properly advertent to the evidence, would make such finding remains where the findings of fact are challenged. When the appellate court comes to a conclusion that the trial judge did not properly advert to the evidence or give necessary consequence to the evidence given, the appellate court will itself perform that exercise. To do so is not a usurpation of the province of the trial judge. To fail to do so is an abdication of responsibility.

In this case part of the case put forward by the appellants is that the judgment of the court below is severely flawed by an inadequate consideration of the evidence before it affirmed findings of fact made by the trial judge. It is appropriate at the outset to appreciate that there is no question of credibility of witnesses here as what was before the trial court on the main issue in this appeal was evidence adduced by the respondents themselves and documentary evidence in form of the instru-

ment of title, Exhibit K, and purchase receipt, Exhibit C, relied on by the respondents, the appellate court was in as much a position as the trial court to evaluate such evidence and draw inferences therefrom. The failure of the Court of Appeal to do so seems to have emanated from an erroneous view that the appeal being on facts it was precluded from such B exercise. The value of its findings as concurrent findings of fact is diminished by the deficiency in its evaluation of the evidence relied on by the trial judge. We should now evaluate the evidence and consider whether the findings of fact confirmed by the court below were justified having C regard to the evidence.

The first step in determining the materiality of evidence and the issues of fact that arise in an action is to ascertain what facts were pleaded. In this case, the respondents pleaded in paragraphs 5 and 6 of the Amended Statement of Claim as follows: D

"5 The said land is part of a large piece or track of land originally belonging according to native law and custom to one Aina Ogundipe, one-time Bale of Ewu and now represented by the families of Olukotun and Ajamogun of Ewu in the District of Ikeja aforesaid. E

6 The plaintiffs aver that the said lands a portion of which is now in dispute were sold by the said Aina Ogundipe, late Bale of Ewu to one Chief Abraham Akinola as far back as the 18th July, 1925 and later duly conveyed to him for an estate in fee simple absolute and in possession". (underlining mine) F

It is clear from the above, reading the underlined portion together, that the case put up by the respondents at the trial was that the land conveyed to Akinola was the entire land covered by the purchase transaction and that the land in dispute was part of that land. The case now being put G forward that the land conveyed to Akinola was not the entire land sold to him was based on an inconsistent averment made by the respondents in paragraph 8(e) of the amended statement of claim thus: "this conveyance H which only covered part of the land as per Purchase receipt dated 18th July, 1925, only became necessary for planning purpose of a layout of that section."

Parties are bound by their pleadings and will not be permitted to

set up a case different from what they have pleaded. Parties are permitted to make inconsistent averments. However, it is not the law that parties are permitted to make inconsistent assertions on the same question of fact or adduce inconsistent evidence over one and the same issue.

B A party who adduces inconsistent evidence over one and the same issue damages his own case unless he can reconcile the apparent inconsistency. In this case the assertion that the land sold in 1925 to Akinola was conveyed to him is not consistent with the assertion that only part was conveyed.

C There is clear evidence that is consistent with the facts pleaded in paragraphs 5 and 6 of the amended statement of claim quoted above. The relevant evidence was given by the 5th plaintiff witness who was the son of Abraham Akinola as follows:

D *"Q: Do you know that the children of Ogundipe made a conveyance to your family in respect of his farmland?"*

A: That is correct, the children of Ogundipe made a conveyance for my father about the land he bought from their family.

E *Q: Have you seen the conveyance before?*

A: Yes.

Q: Does that conveyance cover all the whole land which your father bought from Ogundipe?

F *A: Yes; it is part of the land which the children of Ogundipe conveyed to my father, that he (my father), sold a portion to the 1st Plaintiff, Chief Lasisi Ishola Fajebe.*

Q: Has your father any other land in that area?

A: No, but he had some land at Otta also. I see Exhibit K.

G *Q: Is that the conveyance made by the children of Ogundipe to your father?*

A: I cannot read and write; so I cannot say whether it is or not

H *Q: Do you know some of Ogundipe's children who made that conveyance to your father? Do you know Momodu Ashimi Ajamogun, Samimu Kumi Yese Olukotu?*

A: Yes, I know them. Those whom you have just named were the children of Ogundipe who made the conveyance to my father. The con-

veyance was made to cover the land which my father bought from the Ogundipe family in 1925 and evidence the receipt issued to him in 1925. I have seen the 1925 receipt many times before. I see Exhibit C. I identify the receipt of 1925." (Emphasis is mine)

The evidence quoted above is specific and direct on the question whether or not the land conveyed to Akinola by the Ogundipe family was the land covered by the 1925 receipt - Exhibit C. There was no evidence by Akinola's son in support of the inconsistent averment in paragraph 8(e) of the amended statement of claim. Counsel for the respondents on this appeal was constrained to fall back on a rather convoluted understanding of a portion of the evidence of the 5th plaintiff witness where he said in answer to the question: "*Does that conveyance cover ALL THE WHOLE LAND which your father bought from Ogundipe*", "*Yes. Yes it is part of the land which the children of Ogundipe conveyed to my father that he (my father) sold a portion to the 1st plaintiff, Chief Lasisi Ishola Fajibe.*" In my view, that piece of evidence confirmed that the conveyance covered ALL THE WHOLE LAND which Ogundipe sold to Akinola. The witness answered the question directly by simply saying "yes". He confirmed that position by saying further that the land which Akinola sold to the 1st respondent was part of the land which the Children of Ogundipe conveyed to his father, Akinola.

Where there is direct and specific evidence on one of two inconsistent averments and there is none on the other, it will be wrong for the court to ignore such direct and specific evidence and proceed to a finding of fact in regard to the alternative averment on which there has been no such evidence. There was no evidential basis to find that the land in dispute was excluded from the land covered by the instrument exhibit K because the 1st respondent had bought the land before Exhibit K was made.

In this case, not only was the oral testimony of PW5 consistent with the averment that the entire land sold by Ogundipe to Akinola was the one conveyed by the instrument, Exhibit K, there were also the contents of that instrument itself which clearly indicated that the instrument was made to carry out the promise contained in Exhibit C wherein it was

stated that:

"The family will be willing to convey that property to the purchaser whenever he called upon them to do so."

Part of the recital in Exhibit K reads as follows:

B "3. By virtue of a private agreement and treaty the said family of the vendors headed by Aina Ogundipe agreed to sell and did sell to the purchaser the area of land hereby conveyed and granted for the sum of N350 (the #175) Three Hundred and fifty Naira) evidenced by purchase receipt dated 18th July, 1925.

C "4. By virtue of an agreement and private treaty and in consequence of the sale to the purchaser referred to in paragraph 3 above and the Vendors have agreed to grant and convey unto the purchaser the said area of land hereby conveyed and granted for a further sum of N=1,000.00 D (One thousand Naira)."

Now to hold that only part of the land sold was conveyed will be inconsistent with the clear terms of the deed of conveyance.

It is clear, and it seems to be common ground, that the land E in dispute was not within the land conveyed to Akinola by Ogundipe family as per Exhibit K. The evidence is also clear as given by Akinola's that all the land sold to Akinola by Ogundipe was the one conveyed by Exhibit K. It is also worthy of note that no member of F Ogundipe family gave evidence in support of the respondents' assertion that the land sold by Ogundipe to Aina covered land which included the land in dispute. The son of Abraham Akinola did not give evidence in support of the contention that only part of the land sold to his father was conveyed.

G However, the learned trial judge apparently considered that it is inconsequential that the land in dispute was not within land conveyed in Exhibit K because, as he said, there had been a valid sale as evidenced by Exhibit C and *"the Plaintiff's Deed (exhibit D) dated 20th December, H 1977 is merely evidence of the earlier sale therefore, as it does not and cannot detract from the completed sale under Native Law and Custom also evidenced by Exhibit C (the purchase Receipt), and any defect in Exhibit D, defect therein, is not detrimental to the plaintiff's case."* Hav-

ing reasoned thus the learned trial judge felt comfortable with the conclusion that as between the 1st respondent and the 2nd appellant the former had proved a better title to the land in dispute.

The critical flaw in reasoning thus is that it ignored the clear evidence by the 5th pw that the land sold as evidenced by the receipt, Exhibit C, was the one conveyed by the Ogundipe family to Akinola. **In my judgment it is perverse to ignore that evidence and the clear evidence of the defined boundaries of the land sold as delineated on the plan attached to Exhibit K and rely on the imprecise description of the land sold to Akinola by Ogundipe as contained in Exhibit C.** The land described in Exhibit C was described as *"bounded on the North by the Shasha Stream, on the South of the Nigerian Civil Aviation, Ikeja on the West by Ewu family land and on the East by the Ajakaye and Doherty landed property."* **There was no oral evidence to locate these boundaries.** No member of the Ogundipe family or any of the boundary-men named in Exhibit C was called to testify as to the boundaries and extend of the land sold to Akinola in 1925 or of any boundary contrary to what was delineated in the plan attached to Exhibit K.

Where the identity and extent of land described in a document is in issue the certainty of the land so described must be tested by the same yardstick as it would have been tested were a party claiming declaration of title to such land. The rough and ready test as stated in Atekwadzo v. Robert Kwesi Adjei 10 WACA 27 is whether a surveyor armed with the record (in this case, the document) and going on the land would be able to produce an accurate plan of such land. It is evident that a surveyor armed with the document Exhibit C alone would not have been able to produce an accurate plan of the land described in that document. One result of all this is that in the face of the evidence of the 5th pw and the contents of the conveyance, Exhibit K, made by Ogundipe family to Akinola, reliance on Exhibit C to define the extent and identity of land sold by Ogundipe to Akinola in 1925 does not appear reasonable.

The trial judge reasoned that it was inconsequential that the land in dispute fell outside the land conveyed to 1st respondent under the

Deed of Conveyance Exhibit D because the sale of land to Akinola was a valid sale. The logic of this reasoning is elusive. It is evident that if the land conveyed to Akinola was the totality of the land sold to him, conveyance of any land outside that area of land to the 1st respondent by Akinola was futile. Exhibit C could only serve any useful purpose if the land to which it related was ascertainable or had been ascertained with reasonable certainty. The conclusions that the land to which Exhibit C related was the same land purported to be sold by Chief Doherty to the 2nd appellant was arrived at without adequate consideration of the evidence and without any acceptable evidential basis.

While Exhibit C could serve the purpose of providing evidence of payment of the purchase price, it fails to define the precise extent of the land to which it related. That land is sold under native law and custom does not dispense with need, where such question arises, to prove the identity of the land so sold. Payment of purchase price and delivery of land sold to the purchaser by the seller in the presence of witnesses are essential to the validity of sale of land under the Yoruba customary law which is the relevant customary law in this case. The requirement that the land must be delivered and that such delivery must take place in the presence of witnesses completes the formality of sale but it could also serve the purpose of identifying the land to which the transaction relates and its extent.

The delivery is often notional. However, the court is more likely to hold that delivery has taken place where the purchaser can show possession of the land. Where the question raised is, as in this case, to the identity of the land sold, possession of the land by the purchaser pursuant to the sale may be, and usually is, sufficient circumstantial evidence of the identity of the land sold. Where the question is as to the extent of the land sold, evidence of possession must be cogent and adequate enough to enable the court to decide on the balance of probabilities that the land sold was as extensive as a party claimed. Thus, although there may not be dispute as to the location of the land sold there may be dispute as to its extent and its boundaries. Where there is direct evidence to resolve such dispute in form of the evidence of persons who can speak to such facts,

such should be produced. Where direct evidence is not available circumstantial evidence, in form of possession of the land, may be acceptable. However, such evidence must be cogent and the possession must be of such nature and extent as to lead to a reasonable probability that the land sold was indeed of such extent as the purchaser had claimed. B

The present case concerns sale of land which the 5th plaintiff witness, Chief Michael Akinola, had said was over 200 acres. He said in his evidence in chief:

"My father bought the land from one Aina Ogundipe Ewu and it was a large piece of land. It was over 200 acres. It was only a portion of that land that my father sold to the 1st plaintiff." (Emphasis is mine) C
He described the location of his father's farm land thus:

"If we are going to Agege from here, we will first of all get to Doherty's farmland and Ajakaye's land and thereafter we will get to my father's farmland and Ajakaye's farmland before the construction of AJAKAYE'S STREET. The Abeokuta Express Road now divides Ajakaye's land from my father's farmland. At another boundary of my father's land is Airdrome. The land in dispute forms portion of the land sold by my father to Chief Fajebe, the 1st plaintiff." D E

As regards possession of the land he said when cross-examined:

"My father's farmland was thick bush before the modern development thereon. We were farming on it then." F

(Emphasis is mine)

Further, he said:

"My father bought his farmland in 1925. I have know the land which my father bought right from the time he was put in possession thereof immediately after he bought it in 1925. After he was put in possession thereof my father built a farmhouse of mud on the land sold to him and we lived there." G

(Emphasis is mine)

It must be in the context of his knowledge of the farmland which his father bought and of which he was put in possession that he said further when cross-examined:

"The children of Ogundipe made a conveyance for my father

about the land he bought from their family."
and also:

"*The conveyance was made to cover the land which my father bought from Ogundipe family in 1925 and evidence (sic) by the receipt issued to him in 1925.*" (Emphasis is mine)

The receipt Exhibit C does not contain acreage nor does it contain dimensions. As earlier said in regard to description of the land, the boundaries stated therein were vague. The only delineated boundaries of the land are those shown on the plan attached to the conveyance, exhibit K, which was executed by the vendor's family and which the 5th pw said covered the land which his father bought.

Other than the bald, and passing, assertion by the 5th pw that his father farmed on the land which he bought in 1925 and built a mud house thereon there was no other evidence by the 5th pw of possession of the land by Akinola pursuant to the sale by Ogundipe. In paragraph 8(d) of the Amended Statement of claim the respondents pleaded as follows:

"..... *the root of title to the land now in dispute is based on the sale by Aina Ogundipe to Abraham Akinola fashioned out according to the Yoruba native law and custom and the said transaction was further borne out by purchase receipt dated the 18th of July, 1925, issued to the said Abraham Akinola. The plaintiff will found on this document at the trial.*"

The purchase receipt shows payment of purchase price. There was averment of possession of the land of Akinola in paragraph 13 of the Amended Statement of Claim and particularly in paragraph 14 as follows:

"*The plaintiff aver that in further exercise of his right as owner in possession of the said land a portion of which is now in dispute the aforesaid Chief Abraham Akinola sold portions of the said land to him, farmed some portion of the same and let out portions to rent - paying and other tenants and employed portions of same for his own use.*"

There was no evidence showing what portions of the land that Akinola bought he farmed on or let out to tenants or employed to his own use. When the area allegedly sold under native law and custom is as vast as was alleged in this case and there is a question as to the actual extent of

the land sold, evidence of the location of the several acts of possession claimed by the purchaser becomes important in determining the probability that the land is as extensive as the purchaser had claimed. Such evidence was lacking in this case.

Where there is critical paucity of evidence of sale under native law and custom, as in this case, the plaintiff's title cannot be founded on such sale under native law and custom. In the case of Ajadi v. Olanrewaju (Vol 6) 1969 - 1970 NSCC 331 (in which I was privileged to participate as counsel before this court) this court had to consider the critical importance of proving compliance with the requirement of the law in regard to sale of land under native law and custom. At page 338 this court, per Coker JSC., said:

"As for the testimony of the plaintiff/respondent that she had sold portions of the land, it is our view, even if the portion allegedly sold had been part of the land in dispute (which they are not), that evidence is not sufficient to prove a sale of land, whether under customary law or not. Much more is necessary. Thus, in order to transfer an absolute title to land under native law and custom, it is necessary that such a sale should be concluded in the presence of witnesses who saw the actual 'handing over' of the property. To transfer the legal title under 'English law' a deed of conveyance would need to be executed (see Cole v. Folami 1 F.S.C 66 and Erinosho v. Tunji Owokoniran (1965) NMLR 479."

(Emphasis mine)

Where a purchaser envisages that there may be difficulties in proving compliance with the stringent requirement of sale of land under customary law, he could employ the option of calling, at the time of the sale or at any subsequent time, for the use of non-customary formalities. Thus in Ajadi v. Olanrewaju (supra) at p 338 this court (per Coker, JSC) said:

"As there was no evidence that the admitted sale of portions of land by the plaintiff/respondent was 'carried out in the proper way' either by the actual handing over of the property in the presence of witnesses or by using non-customary formalities such as a deed of conveyance, the sale has not been proved and the

learned Acting Chief Justice was right to have discountenanced

it."

Resort to the Deed of Conveyance, Exhibit K, was an option which the parties to the sale transaction employed to vest title in the land to which the transaction related in the purchaser, Akinola. There is no reasonable evidence that sale of any other portion of Ogundipe's land under native law and custom was 'carried out in the proper way'.

In my judgment, had the trial judge properly evaluated the evidence he would not have made the finding that the Ogundipe family had made a sale of land of which the land in dispute was part to Akinola. In the face of Exhibit K and it being undisputed that the land conveyed by the family of Ogundipe to Akinola, did not include the land now in dispute, it was clear that the title of Akinola to the land in dispute had not been established. The Court of Appeal should have so held. The conclusion by the trial judge based on a finding that the family had made a sale of the land in dispute to Chief Abraham Akinola in 1925 should not have been upheld by the Court of Appeal.

Having held that the land in dispute had not been shown to be part of the land sold by Ogundipe to Akinola, the argument that the respondents' case must fail, the respondents having averred by their Amended Statement of claim that Aina Ogundipe originally owned the land and that he sold it as his property whereas it was family property, becomes superfluous. A finding that Aina Ogundipe was not shown to have sold the land in dispute makes a further enquiry into the claim of the respondents that Aina Ogundipe was the original owner of the land or into whether he purported to sell it as his personal property superfluous. Besides, it is clear from the deed of conveyance, Exhibit K, that the family had regarded Ogundipe as acting on behalf of the family and as its head.

What is material for the purpose of this appeal is that the trial judge had found that the land was family property and that the appellants have traced their title to that family. That finding is implicit in the passage of the judgment of the trial judge quoted with approval by the Court of Appeal as follows:

"It is however clear that in this case both the Plaintiffs and the Defendants are tracing their title to the same family. If that family had made a valid sale of portion of its land in 1925 to Chief Abraham Akinola (as pleaded by the Plaintiff) and which was satisfactory established before me, then the family cannot sell the same land to other persons thereafter, and such purported sale by them of the same land to any other person will be null and void. Nemo dat quid non abet (sic). It seems to me therefore that in so far as the land sold to Chief T.A. Doherty by the 'Ajamogu, Onilude and Oniku families' (the said family) by virtue of the Deed of Conveyance dated 11th April, 1953 and registered as No. 57 at page 57 in Volume 960 forms portion of (or is the same as) the land sold to Chief Abraham Akinola in 1925 by Aina Ogundipe (the original owner), the 1953 sale to Chief T.A. Doherty to the 2nd Defendant will also be null and void."

As advanced in argument by Professor Osipitan the clear inference of the above passage is that had there been no prior sale of the land in dispute by Aina Ogundipe, the sale of Chief T.A. Doherty would not have been null and void. By simple deduction, given that Akinola and Chief Doherty had the same root of title, there being no proof of any prior sale of the land by the family, the sale to Chief T. A. Doherty was valid and title of the appellants traced to Chief Doherty is, in consequence, also valid.

The judgment of the trial judge was severely flawed when he held that the respondents pleaded and relied on, and in finding that, Chief Abraham Akinola had possession from 1925 "after the sale to him under Yoruba native law and custom of the land evidenced by the said purchase receipt of 1925 (Exhibit C) was adverse to the right of the original owners." As has been seen there was no such possession proved as the learned judge imputed and Exhibit C which he relied on shows nothing that approximated to possession of land of any dimension. **The only reliable evidence of title which Akinola had being Exhibit K and the land in dispute being outside the land conveyed by Exhibit K, the long possession that could be of any use to the respondent must be possession of Akinola of the land in dispute. Akinola was not shown to have been in such possession or any at all.**

One cannot but be impressed by the argument advanced in the appellants' brief that there was preponderance of evidence in favour of the possession of the appellants' predecessors in title, dating from 1953. The learned counsel for the appellant relied on
 B contiguity of the land owned by Chief Doherty to the land in dispute over which Chief Doherty received compensation upon acquisition of the land by the Government, and evidence that the land in dispute was surveyed by and conveyed to Chief Doherty in 1953. In
 C certain circumstances surveying land and burying survey pillars on it is evidence of possession. In Wuta-Ofel v. Mabel Danquah (1961) W.L.R 1238 (PC) at p.1243 Lord Guest said:

*"Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active steps in relation
 D to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession.
 E Moreover, the possession which the respondents seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession must be sufficient."*

In this case the activities of the 2nd appellant regard to the land
 F since 1971 cannot be brushed aside or wishes away. Not only did it cause the land to be surveyed, it was also active in claiming compensation when the land was believed to have fallen within land compulsorily acquired by the Government and pursued that claim until the land was released by the Government as not falling within
 G the acquisition area.

Quite apart from these acts, the law is clear that proof of ownership is proof of possession. In Badejo v. Sawe (1984) NSCC 481 this court (per Aniagolu, JSC, at page 482) said:

H *"The principle in Lows v. Telford (1876) 1 App. Cas. 414, at 426, which is accepted in our law, has been that where there is a dispute as to which of two persons are in possession, the presumption is that the person having title to the land is in possession."*

In this case the 2nd appellant's predecessor in title has been shown to have title to the land since 1953 and the 2nd appellant since 1971. The presumption of their possession is reinforced by evidence that is presently referred to, in the face of which there could be no reasonable justification for the finding that the predecessors in title of the respondents had any long possession. B

In deciding the probability of a question of fact the court should not ignore evidence of relevant facts about which there cannot be any doubt. In the light of the activities of the 2nd appellant in respect of the land as given in evidence for the appellants and attested to by several letters exchanged between it and the Government over the land spanning over several years from 1972 to 1975, it should have appeared improbable to the trial judge that the appellants would have entered the land only in 1977 as the respondents claimed or that the 1st respondent was on the land before 1977. It must be said that public confidence in the judicial process will be severely eroded if trial courts ignore or show scant regard to vital evidence which is unanswerable and proceed to make findings and give judgments which fly in the face of obvious facts. C D E

It is evident that the appellants have shown better title to the land than the respondents who have shown no title at all. There was really no evidence on which the learned trial judge could rightly have found laches and acquiescence to defeat the appellants' claim or, as I have said, long possession to support the respondents' case. The Court of Appeal affirmed the judgment of the trial judge without evaluating the evidence on which the trial judge relied for his findings of fact. Had the court below carried a proper evaluation of the evidence as it was expected to do, it would have found that the learned trial judge was in error to have dismissed the appellants' counter-claim and to have entered judgment for the respondents on their claim. F G H

For these reasons, I would allow the appeal, set aside the judgment of the court below and of the High Court. I dismiss the respondents' claim.

I enter judgment for the 2nd appellant on the counter-claim. I award N2,000 damages against the respondents for trespass and order an injunction restraining them from committing further acts of trespass on the land.

B I set aside the award of costs made by the High Court and the Court of Appeal and order costs to be paid by the respondents as follows:

i. *costs of the trial assessed at N1,000*

ii. *costs in the court below assessed at N5,000*

iii. *costs of this appeal assessed at N10,000*

C

BELGORE JSC

This is a land matter along Agege Motor Road, Agege, Lagos. The land originally belonged to Ogundipe family who in 1925 sold it to Chief Abraham Akinola. Some portion of the same land was in 1965 sold by Chief Akinola to Chief Fajebe (this is indicated in Plan Nos. 214/78 of 20th June 1978). In the plan, the portions marked 'A' and 'B' were then excluded in the second plan, No. MAL 120/79 caused to be made by Chief Akinola prior to the sale to Fajebe in 1965. Parcel B is the portion now in dispute. In a remarkably detailed manner the trial judge set out the root of respondents' title and the identity of the land in dispute as quoted by my learned brother, Onu, J.S.C., in his judgment. Court of Appeal had no reason to interfere with the findings of fact, by trial court and dismissed the appeal. Thus the appeal to Supreme court.

At the hearing of the appeal by this court, for some inexplicable reasons the exhibits used in trial court and Court of Appeal were not in court. The matter was adjoined so that counsel for both sides could make effort to retrieve the exhibits which are mainly plans. What is not contentious is that both parties rely on the same root of title i.e. Ogundipe family. The record of proceedings at pages 251 - 252 contains the unsailable findings of fact by learned trial judge and to the interest of the respondents and the purported sale to Chief T.A. Doherty in 1953 which he found conveyed nothing. Babalakin, J.C.A. (as he then was) on the findings of trial court held as follows:

" Thus in the above findings of question of identity of the land

in dispute was ascertained and settled, facts of possession of the respondents and their predecessors in title were upheld and that of the appellants were rejected.

With these findings the appellants' counter-claim was bound to fail as it did and was consequently dismissed. I am satisfied that the findings of facts of the learned trial judge on the above issues are not perverse but are supported by the evidence adduced in this case. I uphold the findings and the decisions."

The findings of facts by trial court on the evidence before it were thus affirmed by Court of Appeal. At the return date to continue with this appeal, counsel on both sides came to court and exhibited a new plan as "given by the former surveyor" while the surveyor was not called to testify; neither was there an application to offer additional evidence.

To my mind, with all sense of responsibility the latest plan should not be taken seriously as evidence to brush aside the overwhelming finding of facts of the two lower courts. There must be something more to tilt the scale that will upset the concurrent findings of fact. It is for this reason that I am in full agreement with the clear and succinct judgment of Onu J.S.C., I therefore dismiss this appeal and award against the appellant N10,000.00 as costs in this appeal.

OGWUEGBU JSC

I have had the advantage of a preview, in draft, of the judgment just delivered by my learned brother Ayoola, J.S.C. and I agree with him that the appeal should be allowed. My learned brother Ayoola, J.S.C. has dealt fully with the issues of law and findings of fact that I need only add by way of emphasis to the core question, whether the plaintiffs who are respondents in this court proved that the parcel of land the subject of the proceedings leading to this appeal is part of the parcel of land conveyed to their predecessor in title by virtue of a conveyance dated 28-3-77 and registered as No. 43 at page 43 in volume 1615 of the Register of Deeds kept in the Lands Registry, Lagos (Exhibit "K").

The courts below answered that question in the affirmative. The appellants' counsel contended both in the appellants' brief of argument

and in oral submissions before us that the courts below were wrong in reaching that decision because the learned trial judge did not properly evaluate the evidence on record before making his findings and the court below wrongly affirmed those findings in the circumstances which this court will be justified in interfering.

The plaintiffs' case as averred in their amended statement of claim is that the 2nd plaintiff obtained a conveyance of the land in dispute from the 1st plaintiff. The first plaintiff had in turn obtained a conveyance from Chief Abraham Akinola in 1977. Prior to that conveyance the land was said to have been sold by Chief Abraham Akinola to the 1st plaintiff in 1965. Chief Abraham Akinola bought the said land from the original owner, Aina Ogundipe, Bale of Ewu on 18-7-25 under Native Law and Custom. A conveyance of the same parcel of land was made to Chief Abraham Akinola by the Ogundipe family again in 1977. The sale to Chief Akinola by Aina Ogundipe in 1925 is also evidenced by Exhibit "C" (a document which is unknown to Native Law and Custom). Exhibit "K" is a conveyance of the said parcel of land sold to Abraham Akinola by Aina Ogundipe in 1925 under Native Law & Custom and Exhibit "D" is the conveyance of the same parcel of land by Chief Abraham Akinola to the first plaintiff. Exhibit "D1" is a survey plan of the land conveyed in Exhibit "D" and forms part of it.

The defendants in their pleadings and evidence stated that the 2nd defendant obtained a lease of the land in dispute on 21-2-74 (Exhibit "D5") from Chief T.A. Doherty and it is registered as No. 73 at page 73 in volume 1448 of the Deeds Register kept at the Lagos State Land Registry, Lagos. The survey plan of the land demised is part of Exhibit "D5". Before the said lease to the 2nd defendant, the land had been in its possession since 1971. Chief T.A. Doherty got his title to the land from Cappa & D' Alberto Ltd. (Exhibit "D4") and the latter derived its title from A.S.O. Coker (Exhibit "D3") and the said A.S.O. Coker derived his own title (Exhibit "D1") from the original land owners namely the Ajamogun, Onilude and Oniku families of Ewu, Ikeja.

By virtue of a conveyed dated 28-3-77, Momodu A. Ajomogun and Saminu K. Olukotun both of Ewu Village, Ikeja as head, principal

members for themselves and on behalf of Aina Ogundipe (late Bale of Ewu) and as Vendors conveyed the land part of which is in dispute to Abraham Akinola as purchaser. The conveyance is registered as No. 43 at page 43 in volume 1615 of the Register of Deeds kept at the Lagos State Land Registry, Lagos. The recitals in exhibit "K" read as follows: B

"1. The vendors herein are descendants of Olumokun and Ajamogun families who were the original owners by settlement of a large area of land situate and being at near the Airport Road, Off Agege Motor Road, on the way to Otta town.

2. Whereas the Vendors herein have exercised maximum rights of ownership and possession thereon.....without any disturbance or interruption from any quaters. C

3. By virtue of a private agreement and treaty the said family of the vendors headed by Aina Ogundipe agreed to sell and did sell to the purchaser the area of land hereby conveyed and granted for a sum of N350 (then /-175) Three Hundred and Fifty Naira evidenced by a purchase receipt dated 18th July, 1925. D

4. By virtue of an agreement and private treaty and in consequence of the sale to the purchaser referred to in paragraph 3 above The vendors have agreed to grant and convey unto the purchaser the said area of land hereby conveyed and granted for a further sum of N1,000.00 (one thousand Naira)" E

The above recitals refer to the purchase receipt - Exhibit "C". The parcel of land conveyed in exhibit "K" covered the area of land sold to Abraham Akinola by Aina Ogundipe and it is more particularly described and delineated on the survey plan No. DSC/L/947A-G dated 25th January, 1977 drawn by Mr. D. A. Nzenwa. It is attached to exhibit "K". F G

On 20-12-77, Abraham Akinola as Beneficial Owner conveyed to Chief Lasisi Fajede (1st plaintiff) for a consideration *"all hereditaments and premises lying being and situate at Idi Mangoro near Murtala Airport and forming part or portion of the hereditaments and premises duly assured and covered by an indenture of conveyance dated 28th of March, 1977 herein before recited and which with its boundaries abutments approaches appertinances and measurements is more particu-* H

larly and more correctly shown and delineated on the plan accompanying these presents....."

The above excerpt is part of the operative part of the conveyance from Abraham Akinola to the 1st plaintiff. The conveyance is exhibit "D" and it is registered as No. 8 at page 8 in volume 1674 of the Register of Deeds kept at the Lagos State Land Registry, Lagos. Exhibit "D" recited Exhibit "K" as the vendor's root of title. Exhibit "D" showed that Abraham Akinola conveyed to the 1st plaintiff the entire parcel of land which he got from the original land owners by virtue of exhibit "K" without any reservation. Any uncertainty as to the boundaries of the land sold in Exhibit "C" was cured by the survey plan attached to Exhibit "K". These being the case, I will treat the plaintiffs' averments in paragraph 8(a) to (g) of the amended statement of claim as an afterthought, not made in good faith and introduced to draw the attention of the court away from exhibit "K" and "D".

The plaintiffs did not lead any credible evidence to show that the parcel of land described in exhibit "C" is not the same as that shown in the survey plan attached to exhibit "K" and "D". In addition, p.w.5, son of Abraham Akinola testified that he knew that the children of Ogundipe made a conveyance of the land bought from their family by his father and that the conveyance covered the whole land which his father bought from Ogundipe in 1925. The boundaries of the land described in Exhibit "C" are vague and of no evidential value in that the parcel of land it purports to describe cannot be ascertained with certainty and a surveyor armed with it and going on the land will not be able to produce an accurate plan of the land described in the said exhibit "C". See *Atekwadzo v. Kwasi- Adjei* 10 WACA 274. Therefore, the conclusion drawn by the learned trial judge that the land described in Exhibit "C" was the same land demised by Mr. Doherty to the 2nd defendant has no foundation. If there was any error or mistake in Exhibit "K", or "D", the plaintiffs would have taken steps to rectify the documents at the time the error was first discovered. It is a serious averment requiring strict proof and this was not done.

P.W.2 (Majekodunmi A. Laoye) a licensed surveyor who testi-

fied for the plaintiffs was shown a certified copy of Exhibit "K" and the survey plan attached to it. In answer to cross-examination by Mr. Oluwole, learned counsel for the defendants, he answered as follows:

"I see the plan attached to Exhibit "K". I have seen that plan before. I used it in preparing my own compilation plan. The plan attached to Exhibit K is the plan No. DSC/L/947 A-C referred to in the public Notice Exhibit B. The parcel of land edged purple on Exhibit H is the same as the parcel of land edged pink on the plan attached to Exhibit K. The land in dispute which is edged Yellow on Exhibit G is not within the area of land edged pink on the plan attached to Exhibit K."

The witness used the plan attached to Exhibit "K" in preparing Exhibit "G" for the plaintiffs. He categorically stated that the land edged purple on Exhibit "H" is the same as the parcel of land edged pink on the plan attached to Exhibit "K" and the land edged Yellow in Exhibit "G" is not within the area of land edged pink on the plan attached to Exhibit "K". There is therefore no doubt that the land in dispute fall outside the area of land conveyed to Abraham Akinola, the plaintiffs' predecessor in title by the Ogundipe family.

The learned trial judge was in error in holding that the land in dispute comprises the land sold by Aina Ogundipe to Abraham Akinola in 1925. The above finding is as a result of the improper evaluation of the evidence as to the identity of the land in dispute. A careful and proper evaluation of Exhibit "K" and "D" with the evidence of P.W.2 and P.W.5 by the trial judge would have led to the conclusion that the plaintiffs failed to establish the nexus between the land sold in 1925 and the land in dispute and the plaintiffs' claim would have been dismissed.

In this case the learned trial judge failed to make use of the advantage he had of seeing and hearing the witnesses before him. This court is no doubt, in as much a good position as the court of trial to deal with the facts. See *Fabumiyi & Or. v. Obaje & Or.* (1968) N.M.L.R. 242, at 247, *Woluchem & Ors. v. Chief Gudi & Ors.* (1981) 12 N.S.C.C. 214, *Watt (Or Thomas) v. Thomas* (1947) 1 All E.R. 582, *Ogbechie & Ors. v. Onochie & Ors.* (1986) 2 N.W.L.R. (pt. 23) 484 and *The Hontestroom (Owners Of)*(1927)A.C.37 at 47-48.

The findings of fact made by the learned trial judge which were affirmed by the court below are unsatisfactory, not reasonably justified and not supported by credible evidence before him. I entertain no doubt that the findings of the trial judge are perverse and the court below was equally in error not to have reversed the findings, more so, when they are not based mainly and substantially on his assessment of the quality and credibility of the witnesses who testified before him

The learned trial judge found that the land was family property and that the defendants traced their title to the family that executed Exhibit "K" in favour of Abraham Akinola. This finding was also affirmed by the court below and since the land in dispute does not form part of the portion conveyed in Exhibit "K" or "D", the sale to Chief Doherty could not have been null and void. Title having been put in issue as a result of the counter-claim of the defendants, for the plaintiffs to succeed, they must establish a better title to the land in dispute. The defendants led cogent evidence to the effect that Chief Doherty, the defendants' predecessor-in-title owned land contiguous to the land in dispute and was paid compensation by the Federal Government for the acquisition, that the land in dispute was surveyed in 1953 as against the plaintiffs' plan Exhibit "D1" attached to Exhibit "K" made in 1977, the existence of correspondence between the defendants and the Federal Government over compensation for the land in dispute in 1972. (See Exhibit "D6"- "D10" and "D18"). The defendants proved better title and possession. Proof of ownership is prima facie proof of possession, the presumption being that the person having title to land is in possession. See *Jones v. Chapman & Ors.* (1847) 2 Ex. 803. The counter-claim should have succeeded and the plaintiffs' claim dismissed.

It is for the above reasons and the more detailed reasons set out in the leading judgment of Ayoola, J.S.C. that I would allow the appeal, set aside the judgment and orders of the courts below and enter judgment for the defendants on their counter-claim. I subscribe to all the consequential orders made in the judgment of Ayoola, J.S.C. including the orders as to damages and costs.

ONU JSC (Dissenting)

In the High Court of Lagos State holden at Ikeja, the Respondents who were Plaintiffs, claimed against the Appellants then Defendants, jointly and severally, the following relief:-

"1. N35,000.00 (Thirty-five thousand Naira) as general and special damages for trespass committed by the Defendants and each and everyone of them on to the plaintiffs' lands at Idi Mangoro, Agege in the Ikeja Area of Lagos State; and

2. An order of perpetual injunction restraining the defendants and each and everyone of them, their servants and/or agents from further trespassing on the said land or any part of the same."

Pleadings were filed and duly exchanged parties. In the defence filed by the Appellants, they set up a counterclaim against the Respondents who had earlier amended their Statement of Claim.

After evidence was led by either side, the learned trial Judge (A.L. Balogun, J.) in a well considered, painstaking but characteristically rather long judgment, granted the Respondents' claims while dismissing Appellants' counterclaim in its entirety. Describing the land in dispute and setting out in bold relief the Respondent's root of title as borne out in the Amended Statement of Claim, the learned trial judge in his judgment observed their alia as follows:

"The land the subject matter of this action is situate at Idi Mangoro, New Abeokuta Motor Road, Agege in the Ikeja District of Lagos State, and is more particularly shown and delineated on the survey plan accompanying a Deed of Conveyance dated the 20th day of December, 1977, and registered as No.8 at page 8 in Volume 1674 of the Register of Deeds kept at the Lands Registry in the Office at Lagos and of land which originally belonged under (Yoruba) Native Law and Custom to one Aina Ogundipe, who was one time Bale of Ewu, who are now represented by the families of Olukotun and Ajamogun of Ewu in the district of Ikeja aforesaid. A portion of that vast area of land was sold by Aina Ogundipe to Chief Abraham Akinola as far back as 18th July, 1925; and was duly conveyed later on 20th December, 1977 aforesaid for an estate in fee simple absolute and in possession. The said original owners of the

said land (and their successors in title) settled upon their lands exercised dominion and maximum acts of ownership and possession thereon without any let or hindrance whatsoever. In 1965, Chief Abraham Akinola sold portions of his said land to the 1st Plaintiff and the parcels, which formed the subject matter of that sale, include the land in dispute in this Suit. Upon the sale of the land in dispute in 1965 by Chief Abraham Akinola to the 1st Plaintiff, the 1st Plaintiff was put into possession thereof and continued in such possession until 20th December, 1977, when a Deed of Conveyance registered as No.8 at page 8 in Volume 1974 was executed in his favour by his said Vendor. When sometime in 1978, the said Chief Abraham Akinola later caused a layout Plan of his Landed Properties to be prepared for him he did not include therein the two parcel of land marked Parcels "A" and "B" of the land in dispute in this present action is the land described as "B" or Parcel "B" on the said survey plan MAL/214/78" (The underlining is mine for emphasis.)

At the end of his judgment, which spanned 57 pages before concluding, the learned trial Judge held:

"The results of all my findings and conclusions is clear. I observe in conclusion that where evidence of special damages suffered by a claimant remains unchallenged and uncontradicted (as in the present case) the Court must act on it. See Incar Nigeria Ltd. and Anor. v. Mrs. M.R. Adegboye (1985) 2 NWLR 453."

Being dissatisfied with the said decision, the Appellants appealed to the Court of Appeal holden in Lagos (hereinafter referred to as the court below). That court, in a unanimous decision (per Babalakin and Kalgo, J.C.A. as they then were with Awogu, J.C.A. concurring), dismissed the appeal, albeit reducing the award of damages made to the Respondents to N1,000.00.

The court below in affirming the decision of the trial after a dispassionate appraisal of the facts and evaluating the entire evidence adduced before the trial court made such crucial findings as that:

"This appeal is essentially on facts and the learned trial Judge understood what it is all about - he set out issues for determination in the case thus:-

Among the numerous vital issues for determination in this case are the following:

(a) *Whether or not the land in dispute falls within the parcel of land which is alleged by the plaintiffs to have been sold by Aina Ogundipe (late Bale of Ewu) to one Chief Abraham Akinola as far as 18th July, 1925 under Yoruba Native Law and Custom, (which sale was evidenced by a purchase Receipt of that date issued by the said Aina Ogundipe to Chief Abraham Akinola); and if so, whether that sale was valid and effective.*

(b) *Whether or not the parcel of land alleged to be leased by Chief T.A. Doherty (now deceased) under and by virtue of a Deed of Lease dated the 21st February, 1974 and registered as No.73 at page 73 in Volume 1448 of the Register of Deeds kept at the same as the Land in dispute or whether the land in dispute falls within the parcel so leased."* Continuing, the court below observed:

"Both parties claimed from the same root of title and therefore, the party who proved better title to the land in dispute will succeed. The learned trial Judge found that a piece or parcel of land which includes the land in dispute was sold as far back as 1925 to one Akinola, the predecessor in title of the first Respondent thus:- "I hold specifically that the 1925 sale pleaded in the Statement of Claim did take place."

Alluding to what the learned trial judge said at pages 251 - 252 of the printed record of proceedings the court below set out the same on the issue as follows:-

"it is however clear that in this case both the plaintiffs and the Defendants are tracing their root of title to the same family. If that family had made a valid sale of portions of its lands in 1925 to Chief Abraham Akinola (as pleaded by the plaintiffs) and which was satisfactorily established before me, then the family cannot sell the same land to any other person thereafter, and such purported sale by them of the same land to any other person will be null and void. Nemo dat quid (sic) non habet. It seems to me therefore that in so far as the land sold to Chief T.A. Doherty by the Ajamogun, Onilude and Oniku Families (the said Family) by virtue of the Deed of Conveyance dated 11th April, 1953 and Reg-

istered as No.57 at page 57 in volume 96 forms portion of (or is the same as) the land sold to Chief Abraham Akinola in 1925 by Aina Ogundipe (the original owner), the 1953 sale to Chief T.A. Doherty conveyed nothing. It is null and void and of no effect whatsoever; and therefore any
 B lease of that land under a Deed of Lease from Chief T.A. Doherty to the 2nd Defendant will also be null and void."

Commenting that the learned trial Judge found with respect to recent possession by the Respondents and their predecessors in title on the land for 52 years as established, the court below quoted from the trial court
 C and went on to reject possession by the Appellants in the following words:-

"To displace a person who is in possession of land, the claimant (or person in the position of the 1st and 2nd Defendants, as counter-claimants) must show a better title against the whole world. This the
 D Defendants have failed to do in this case.

The second issue relates to long possession and acquiescence, long possession and acquiescence are weapons, which a defendant to a counter-claim can use to defeat that claim. It follows that, as respects the counter-
 E claim, that even if the 1st plaintiff's title were defective (which is not my finding) the first plaintiff could successfully in this case use his long possession and acquiescence as a weapon to defeat the claim set up by the Defendants (by original action) in their counter-claim. The evidence
 F of the plaintiffs as respects their acts of possession of the land in dispute (and those of the predecessors in title to the 1st plaintiff) is cogent and satisfactory. I reject the evidence of the Defendants to the contrary."

Before proceeding to conclude its judgment, the court below (per Babalakin, JCA. as he then was) went on to hold:

"Thus in the above findings the question of identity of the land in dispute was ascertained and settled; facts of possession of the Respon-
 G dents and their predecessors in title were upheld and that the Appellants were rejected With these findings the Appellants' counterclaim was bound
 H to fail as it did and was consequently dismissed. I am satisfied that the findings of facts of the learend trial Judge on the above issues are not perverse but are supported by the evidence adduced in this case. I uphold the findings and decisions."

In their Notice of Appeal to this Court in a further appeal containing ten grounds, which the Appellants filed against the decision of the court below, they contracted their complaints into four issues as arising for determination as follows:

1. Whether there were instances of the Court of Appeal Wrongly affirming findings and/or decisions of the Trial Court in circumstances justifying a reversal; (Grounds 1,2,4 and 8)
2. Whether the pleadings of the parties as to the root of title were misconstrued and the relevant principles wrongly applied. (Grounds 3 and 5)
3. Whether the Respondents proved a better title to the land in dispute than the Appellants. (Grounds 6, 7 and 10)
4. Whether Exhibit C was duly proved in accordance with the Evidence Act. (Ground 9.)

On behalf of the Respondent, learned counsel for him proffered only two issues which he considered were vital or enough for the effectual determination of the appeal. They are:

1. Whether the land in dispute falls within the parcel of land which was sold by Aina Ogundipe (Bale Ewu) to the plaintiff's predecessor in title, Chief Abraham Akinola in 1925 under Yoruba Native Law and Custom.
2. If the answer to Issue No. 1 is in the affirmative, whether the said sale was valid and affective.

For a proper resolution of this appeal, it is my intention to consider two issues submitted by the Respondent as adequate to dispose of the appeal.

ISSUE NO.1

In answering the question posed by this issue as to whether the land in dispute falls within the parcel of land which was sold by Aina Ogundipe (Bale Ewu) to the plaintiff's predecessor in title, Chief Abraham Akinola in 1925 under Yoruba Native Law and Custom, the evidence of 5th p.w., Chief Michael Akinola, is crucial. He testified *inter alia* that "*The land in dispute formed portion of my father's fatherland and also forms a portion of the land sold by my father to Chief Fajebe, the 1st plaintiff.*" When asked in cross-examination by learned counsel for the (Defendants) Appellants "*Does that conveyance cover all the whole land*

which your father bought from Ogundipe?" he replied, "Yes it is part of the land which the children of Ogundipe conveyed to my father that he (my father) sold a portion to the 1st plaintiff, Chief Lasisi Ishola Fajebe. Now, Exhibit K is the Deed of Conveyance executed in favour of the 1st plaintiff's predecessor in title to wit: Chief Abraham Akinola by the children of Ogundipe dated 28/3/1977.

Be it noted that the 1st plaintiff had bought part of the land covered by Exhibit C i.e. the receipt of 1925, in 1965. Testifying about that piece of land 1st p.w.(i.e 1st plaintiff) said:

"I know the two defendants in this case against whom I have instituted this action. The land, which I sold to the 2nd plaintiff, became my property in January, 1965 when I purchased that land from the former owner thereof, one Abraham Akinde. The land is the land in dispute in this present action. I bought the land from Abraham Akinola in January, 1965 for the sum of 17, 500 pounds (seventeen thousand, five hundred pounds), now N35,000.00 (thirty five thousand Naira). I bought about three separate (sic) parcels of land from my vendor at three different times. A is the parcel, which is now in dispute that I first bought from my vendor....."

The foregoing explains why the plan attached to the plan Exhibit 'K', did not cover all the land sold as per Exhibit 'C' - the latter which has not been copied into the proceedings before the trial court.

In the face of the preponderance of evidence, it is little wonder that the learned trial Judge had this to say in his judgment:

"I hold specifically that the 1925 sale pleaded in the statement of claim took place".

Further, the learned trial Judge said categorically in his judgment:

"I will agree that the description of the land receipt Exhibit 'C' is a correct description of the land which Aina Ogundipe, Bale Ewu sold to Akinola (The Father of 5th p.w.) in 1925."

From the above findings of fact and more, it is little wonder that the learned trial Judge found no difficulty as to the identity of the land in dispute. Indeed, as later transpired the court below wasted no time in affirming these findings in its own judgment, as these clearly amounted to

concurrent findings of fact as they were rightly so held to wit:-

"Thus in the above findings the question of identity of the land in dispute was ascertained and settled; facts of possession of the Respondents and their predecessors in title were upheld and that of the Appellants were rejected."

B

It went on to hold as follows:

"I am satisfied that the finding of facts of the learned trial Judge on the above issues are not perverse but are supported by the evidence adduced in the case."

C

The ascertainment of the identity of the land in dispute was on the preponderance of evidence led before the trial court and the affirmation of the judgment thereof by court below, became a foregone conclusion and I so hold. See Arabe v. Asanlu (1980) NSCC. 213.

Heavy reliance seems to be unfairly placed on the evidence of p.w.5 (son of Akinola the original buyer of the land in dispute from Aina Ogundipe and who in his testimony confessed to being an illiterate.) This was with a view to discrediting him (p.w.5) as an unreliable witness. It ought not to be forgotten, however, that other witnesses were called by the Respondents whose evidence the trial court believed and the court below affirmed as credible, emphatic, satisfactory, cogent and far from being perverse. I see no reason to derogate from the unassailable findings of facts of the two lower courts.

F

The two courts below having fully evaluated the evidence adduced, irrespective of certain discrepancies in the pleadings in paragraphs 8, 8a and 8b of the Amended Statement of Claim and some errors in the evidence of witnesses called by the Respondents, the identity of 1st Respondent's Deed of Conveyance Exhibit 'D' or that of his predecessors in title which case no doubt are, notwithstanding such discrepancies, entitled to judgment. See Oshongondiya v. Orefero (1956) SCNLR 269 at 272 where Jibowu Ag. FCJ in a similar situation, held as follows:

G

"In spite of the discrepancy in the description in the receipt and the conveyance there could be no doubt that the land the plaintiff bought and which was conveyed to him is the land in dispute between him and the appellant, and it is the land shown in the plan Exhibit

H

'A'..... *The evidence discloses that the trespass complained of had taken place after the plaintiff had bought the land in dispute and taken possession of it. He subsequently got his title perfected by a conveyance which he tendered in evidence to prove his title to the land....."*

The law is trite that the learned trial Judge who saw and heard the witnesses was in a better position than appellate court to assess the evidence and his assessment thereof is entitled to the highest respect. See:

C 1. Alhaji Surakatu Amida & Ors. v. Taiye Oshoboja (1984) 7 sc. 68 at 89

2. Akinloye v. Eyiola (1968) NMLR 92 at 95

3. Chief Frank Ebba v. Chief Warri Ogodo \$ Ors. (1984) 4 SC.84 at 109-110

D 4. Asani Balogun v. J.R. Akirinmisi (1974)1 All NLR (part 2) 666 at 72-73

5. Bale Adegbaiye v. J.R. Akirinmisi (1974) 1 All NLR (part 2) 75 at 84.

E Indeed, after the sale of 1925, the owners had no interest in the land which they could sell to Chief Doherty, the Appellants' alleged predecessor in title. Ne- mo dat quod non habet. In consequence, the Appellants' counter-claim failed. This is because when the appellants counter-claimed for damages for trespass and injunction, they put their title in issue. See F Ogunde v. Ojumu (1972) 4 SC. 105 at 106; Kponunglo v. Aja kodadja. 2 WACA 24; Aromire v. Awoyemi (1972) 1 All NLR 101 and Nzekwu v. Nzekwu (1989) 2 NWLR (part 104) 373.

G It is now trite that ordinarily, the Supreme Court ought not to lightly depart from concurrent findings of fact of two lower courts because it has no opportunity of seeing and listening to the witnesses testify. Where, however it is manifest that those concurrent findings were based on wrong premises (the same cannot be said of the case in hand), H the Supreme Court has not only the right but the duty to interfere on the issues of fact. See Balogun v. Agboola (supra) and Ebba v. Ogodo (supra).

In the light of the foregoing, Issue No.1 must be resolved in the

affirmative by me.

My answer to Issue No.2 must perforce be rendered in the affirmative in the light of all that I have discussed in Issue I above and which I adopt in its entirety.

It is for the above reasons that I find myself most respectfully, B unable to agree with the reasons and conclusion of my learned brother Ayoola, JSC in his leading judgment just read.

The two issues having been resolved against the Appellants, this appeal be and is accordingly dismissed by me with N10,000.00 costs to C the Respondents.

UWAIFO JSC

I read in advance the judgment of my learned brother Ayoola JSC. I fully agree with him in the conclusions reached and for the D reasons he has carefully stated. I cannot improve on the views he has expressed so lucidly. I merely wish to add my voice to emphasise that the land in dispute could not have formed part of the land sold to Chief Abraham Akinola by Aina Ogundipe, the late Bale of Ewu as per receipt E of 18 July, 1925, exhibit C, having regard to all the circumstances of the transaction which culminated in the conveyance that was executed. Consequently, the said Akinola could not have validly sold to the 1st respondent. Paragraph 6 of the amended statement of claim contains a clear F averment which shows that the land sold to the said Akinola was later conveyed in its entirety by Ogundipe's children to Akinola as per the deed of conveyance dated 28 March, 1977 and registered as No.43 at page 43 in volume 1615 of the Register of Deeds kept in the lands Registry, Lagos, exhibit K. The said para. 6 reads: G

"The plaintiffs aver that the said lands a portion of which is now in dispute were sold by the said Aina Ogundipe, late Bale of Ewu to one Chief Abraham Akinola as far back as the 18th July, 1925 and later duly conveyed to him for an estate in fee simple absolute and in possession." H

This is reflected in the evidence of p.w.5, Chief Michael Akinola, a son of Chief Abraham Akinola when he testified that:

"The conveyance was made to cover the land which my father bought from Ogundipe family in 1925 and evidence (sic) the receipt issued to him in 1925."

Attention may also be drawn to one of the recitals in the said conveyance, exhibit K, which reads:

"By virtue of a private agreement and treaty the said family of the vendors headed by Aina Ogundipe agreed to sell and did sell to the purchaser the area of land hereby conveyed and granted for the sum of N350 (then #175) Three hundred and fifty naira, evidenced by purchase receipt dated 18th July, 1925."

It was certainly the land originally bought as per the said receipt that was later conveyed as per exhibit K. Ordinarily the deed of conveyance represents the intention of the parties unless a good case for rectification is made out. By virtue of section 132 of the Evidence Act, no oral evidence will be admissible to contradict, alter, add to or vary the contents of the said exhibit K- a deed of conveyance - unless such oral evidence comes within matters stated in the proviso of that section. Nothing in the present case makes the proviso in question applicable.

The basic case of the respondents is that the land conveyed in 1977 to Akinola by Ogundipe per exhibit K was less in size than what was agreed as per the receipt of 1925, exhibit C. Upon that premise they led copious oral evidence to impugn the integrity of the conveyance as regards the description of the land in the survey plan attached to it. In other words, this was a frontal violation of section 132 of the Evidence Act. It therefore means that the bulk of the evidence led in this direction by the respondents was not only irrelevant but also inadmissible. The two courts below hardly realised this. The trial court laboured tenaciously to make findings of fact on that nature of inadmissible evidence upon which its decision wholly rested. The entire exercise was futile and those findings were certainly of no value in law. That inadmissible evidence was led freely in an action in which Ogundipe family which conveyed to the respondents' vendor was not involved, the claim by the respondents against the appellants being for-

" 1. N=35, 000.00 (thirty-five thousand naira) general and

special damages for trespass committed by the defendants and each and every one of them on to the plaintiffs' lands at Idi Mangoro, Oshodi in the Ikeja Area of Lagos State.

A. *Special damage:*

complete residential building up to roof level demolished

N28,000.00

Some sixty feet section completed wall fence demolished

6,000.00 .

N34,000.00

B. *General damages* *N1,000.00*

Total damages claimed *N35,000.00*

2. *A perpetual Injunction restraining the defendants and each and every of them their servants and/or agents from further trespassing on to the said lands or any part of same."*

It was in pursuit of this claim in this action that the respondents led evidence in assertion of their right to the land in dispute in which they maligned the conveyance in question. The lower court confirmed those so-called findings of the trial court.

I think it ought to be made abundantly clear that in the type of action brought before the court, it was patently improper to entertain any evidence which tended to dispute the area covered by the plan attached to the said deed of conveyance. There must be an action in which ratification is sought by the present 1st respondent in collaboration with his vendor against his vendor's vendors (Ogundipe family) and, possibly, to which the present 1st appellant is a party before such evidence may be entertained. There is no doubt that there is jurisdiction in the courts to rectify an instrument, such as a conveyance, where it is established that there was a mutual mistake in reducing the agreement of sale of land to the conveyance. But rectification can only be decreed in a proper action between the proper parties. In *Craddock Bros. v. Hunt* (1923) 2 Ch. 136 it was alleged by the plaintiffs that the conveyance did not represent the land they actually bought from the vendors. The vendors recognized that a mistake had been made and did not object to a rectification of the contract and conveyance to the plaintiffs. They had even executed an-

other conveyance to correct the error amounting to an assent to such a rectification. It was for the court to compel the defendant to whom part of the land had wrongly been conveyed to be bound by the rectification in an action brought against him. In the course of his judgment Lord B Sterndale M.R. observed at page 150, *inter alia*:

" are the plaintiffs entitled to say that they have bought the brown land and have a title to it as against the vendors? If the construction which I have put upon the contract is right it is necessary as a first step to show that the plaintiffs, as against the vendors, are entitled to have the contract and conveyance rectified. I think there is ample ground in fact for asking for such a rectification The contract was wrongly drawn so as not to include the brown land by a careless blunder on the part of Mr. Stirk, and accepted by Mr. George Craddock as carrying out what he believed to be the bargain. It seems to me as clear a case of mutual mistake as could occur and, if there be no legal difficulty in the way, I think the plaintiffs could claim rectification of the contract and conveyance in a suit against the vendors."

To justify the court correcting a mistake in an instrument the evidence must be clear and unambiguous, that is, there must be convincing proof, and that a mistake, whether of fact or law, has been made in recording the parties' intention. It must be shown what the intention was and that the alleged intention to which it is desired to make the agreement conformable continued concurrently in the parties' minds down to the time of the execution of the instrument: see *Josclyne v. Nissen* (1970) 1 All ER 1213 at 1222 per Russell LJ; *Crane v. Hegeman-Harris Co. Inc.* (1939) 4 ALL ER 68. There has been no case for rectification in the present proceedings and therefore any dispute as to the area conveyed to the respondent cannot be entertained. In any event, on a close consideration of the description of the land sold to Chief Abraham Akinola as stated in the receipt, exhibit C, it is fairly clear to me that, after all, the conveyance, exhibit K, is not lacking in that description at least on the easterly direction. The description of the land in exhibit C is that it is "bounded on the North by the Shasha Stream, on the South by the Nigeria Civil Aviation Aerodrome, Ikeja, on the west by Ewu family land and on

the East by the Ajakaye and Doherty landed property." It is clear that exhibit C took into account the existence of Doherty's landed property even at the time it was issued by Aina Ogundipe. It is evident that in 1953 and 1967 Doherty got more land probably still farther eastward by two deeds of conveyance, exhibit D2 and D4. Exhibit D2 is dated 11 April, B 1953 and registered as No.57 at page 57 in volume 960 in the Land Registry, Lagos while exhibit D4 is dated August 1, 1967 and registered as No.17 at page 17 in volume 1022 in the Land Registry then at Ibadan. The evidence is that Doherty's landed property is on the eastern side of the land described in the survey plan attached to exhibit K. It is out of Doherty's landed property that the appellants got their land in dispute per a deed of conveyance dated 21 February, 1974 and registered as No.73 at page 73 in volume 1448 at the Land Registry, Lagos (exhibit D5). It is that land that is depicted pink in the litigation survey plan No. MAL 120/ 79 (exhibit G). So Doherty could be the boundary man to the east (even if partially) of Akinola and this would appear to be supported by the evidence of p.w.5 which reads:

"If we are going to Agege from here, we will first of all get to E Doherty's farmland and Ajakaye's land and thereafter we will get to my father's farmland and Ajakaye's farmland before the construction of Ajakaye's (sic) Street."

It is amazing how the respondents could claim that they acquired any land from Akinola outside of the land the said Akinola got from Aina Ogundipe per exhibit K. This is because in the deed of conveyance dated 20 December, 1977 and registered as No. 8 at page 8 in volume 1674 at the Lagos Registry, Lagos (exhibit D) by which Akinola sold land to the 1st respondent (Chief Lasisi Fajebe), the source of his title, that is, exhibit K dated 28 March, 1977, was disclosed in the habendum as follows:

"NOW THIS INDENTURE witnesseth that in further consideration of the sum of N 35,000.00 now paid by the said purchaser Chief Lasisi Fajebe unto the said Vendor (the receipt whereof the said Vendor Chief Abraham Akinola doth hereby acknowledge) the said Vendor as BENEFICIAL OWNER doth hereby GRANT AND CON-

VEY unto the said purchaser *ALL THAT the hereditaments premises lying and being at Idi Mangoro near the Murtala Airport in the Agege District of Ikeja and forming part or portion of the hereditaments and premises duly assured and covered by the indenture of Conveyance dated B 28th of March, 1977 herein before recited [in exhibit K as registered as No.43 at page 43 in volume 1615 of the Register of Deeds kept in the Lands Registry Office in Lagos]....."*

[Parenthesis supplied as what was recited and italics for emphasis]
C Obviously, the land so conveyed to the 1st respondent is understood be part of the land in exhibit K. The plan attached to exhibit D is unarguably outside that attached to exhibit K as demonstrated in exhibit G which is a composite plan. This clearly means Akinola conveyed nothing to the D 1st respondent as he could not give what he did not have- nemo dat quod non habet.

The respondents canvassed strenuously that there have been concurrent findings by the two courts below which this court should be E slow to disturb. I think the principle behind giving due cognizance to concurrent findings is founded on the understanding that the facts that have been deliberated on by two courts carefully before they arrived at certain conclusions should not ordinarily be disturbed by a higher court if F those conclusions can in some way be supported from the evidence particularly if much of the conclusions or findings depended on the trial court having heard and seen vital witnesses testify. But this principle does not envisage that perverse findings be accorded any respect. When G a trial court is found to have made perverse findings, a confirmation of those findings by an appellate court is merely a replication of that perversity. They have no value of concurrent findings of fact that may not be disturbed: see *Ajeigbe v. Odedina* (1988) 1 NWLR (pt.72) 584; *Are v. Ipaye* (1990)2 NWLR (pt.132) 29; *Iroegbu v. Okwordu* (1990)6 NWLR H (pt.159) 125.

From the totality of the evidence, the trial court as well as the lower court made faulty inferences from primary facts both oral and documentary, and also relied on inadmissible evidence as to the extent of

land sold to Akinola. They together amount to perverse findings of fact. The facts available are not facts which depend on the credibility of the witnesses for their assessment in order to ascribe probative value to them before making findings. Demeanour of witnesses is not a factor for consideration here. This principle of concurrent findings of fact is clearly B inapplicable. This court can make its own inferences and arrive at findings from those primary facts: see *Kate Enterprises Ltd. v. Daewoo Nigeria Ltd* (1985) 2 NWLR (pt.5) 116; *Olujinle v. Adeagbo* (1988) 2 NWLR (pt.75) 238; *Adegbite v. Ogunfaolu* (1990) 4 NWLR (pt.146) C 578.

The lower court (as did the trial court) misdirected itself in its understanding that the land sold by Ogundipe to Akinola extended beyond what was shown in the conveyance, exhibit K, to include the portion claimed by the appellants, i.e the land in dispute. My finding is that D it did not and could not. Even the licensed surveyor, Majedodunmi Akinloye Laoye, p.w.2, called by the respondents, admitted in cross-examination thus: *"The land in dispute which is edged yellow (sic: red but the area verged yellow claimed by the respondents encroaches heavily E on it) on exhibit G is not within the area of land edged pink on the plan attached to exhibit K."* To have said otherwise would have amounted to altering exhibit K by oral evidence contrary to s. 132 of the Evidence Act. That was how the two courts below faltered and thereby misdirected themselves by completely misconceiving simple facts supported F by solemn documents in the nature of deeds of conveyance, particularly exhibit K. But for that misdirection, judgment would obviously have been given for the appellants by the two courts below on their counter-claim. G

For these reasons and the detailed reasons given in the judgment of my learned brother Ayoola, JSC, I too allow this appeal and dismiss the respondents' claim. I accordingly also enter judgment for the appellants on their counterclaim in the terms made by Ayoola JSC and abide by H the costs he awarded.