

**SUPREME COURT OF NIGERIA**

27TH APRIL, 2001. SC. 74/1996.

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

**CHIEF JACOB CLEOPAS BIARIKO & 7 ORS.**

(For themselves and as representatives

of Ayamboko Village, Andoni) ..... DEFENDANTS/APPELLANTS

**AND**

**CHIEF A. M. EDEH-OGWUILE & 2 ORS**

(For themselves and as representatives..... PLAINTIFFS/RESPONDENTS

of Ayama Agana Village in Andoni)

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***APPEALS*** - Concurrent findings of facts - Circumstances when the Supreme Court will interfere with such findings (H 2)

***APPEALS*** - Judgment - Conclusion of a trial court - Which was not appealed against in the Court of Appeal - The Supreme Court cannot pronounce on it (H 6)

***ESTOPPEL*** - Constitution of - To constitute estoppel - The parties subject matter and issue - Must be the same (H 1)

***JUDGMENTS*** - Appeal - Finding not appealed against - Is deemed correct until the contrary is shown (H 7)

***LAND LAW*** - Possession - Adverse possession - Where both parties claim to be in possession - Possession would be presumed in favour of the party who shows a better title (H 3)

***LAND LAW*** - Title - Root of title - A party claiming land - Is not bound to plead and prove more than one root of title to succeed (H 4)

***LAND LAW*** - Title - Traditional history - The principles in *Kojo v Bonsie* - When it will be resorted to (H 5)

### **FACTS**

In the Bori (Port Harcourt) High Court the plaintiffs/respondents claimed against the Defendants/Appellants a declaration that the plaintiffs are entitled to the Customary Right of Occupancy in respect of the land in dispute known as Oron Inyong Anwasi, general damages for trespass and order of perpetual injunction. The Defendants/Appellants brought a Counter-claim seeking the following reliefs: a declaration that the defendants are entitled to the Customary Right of Occupancy of the land in dispute known as and called Inyong Oron Anwasi and Oron Otuburu Anyamboko; special and general damages for trespass and perpetual injunction. The plaintiffs traced their title to Ede who they claimed was the first to settle on the land in dispute. The defendants' case was that the entire Anyamboko village was founded by Okpareke, their ancestor. They stated further that the lands they claimed consisted of two distinct parcels mentioned above. And that the land although founded by Okpareke, the first person to settle thereon permanently was Anwasi Ikan Anyamboko from whom it took its name Inyong Oron Anwasi. The defendants pleaded and relied on a certain native court suit concerning part of the land in dispute (Exhibit G). They claimed that the plaintiffs should not dispute their title to the land in Exhibit G because the plaintiffs stood by *pendente lite*.

The learned trial judge in a considered judgment granted all the claims of the plaintiffs and dismissed the defendant's counter-claim. The defendants' appeal to the Court of Appeal was dismissed. The defendants have further appealed to the Supreme Court raising nine issues while the plaintiffs raised three issues. The three issues raised by the plaintiffs were preferred by the court as being more concise and to the point.

### **ISSUES FOR DETERMINATION:**

(i) *Whether the court below was right in not placing any reliance whatever on Exhibit G, as did the court of first instance?*

(ii) *Whether the court below was right in confirming the accuracy and probability of the Respondents traditional history/root of title as against that of the Appellants?*

(iii) *Whether the court below treated and considered all the (4) four issues raised by the Appellants in their brief of argument in its judgment?*

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

***Estoppel - Constitution of***

1. Secondly, Exhibit G. did not declare title in favour of either of the parties. It was a mere case of boundary demarcation. The law is trite that, to constitute estoppel, the parties, subject-matter and issue must be the same. One cannot talk of Exhibit G. in this regard. Besides, the land contained in the present appeal is bigger than the one contained in Exhibit G. Assuming without so holding that Exhibit G. decree title in the Appellants, the fact that the Appellants had acquired rights of possession over parts of "ORON INYONG ANWASI" would not affect the right of the Respondents to seek a declaration of title to the whole piece of land. (p. 1225 D)

***Appeals - Concurrent findings***

2. An appellant who urges the Supreme Court to upset the concurrent findings of facts by the two lower courts as is being done in the instant case must show exceptional circumstances why this Court should interfere. Such exceptional circumstances, as decided by a long line of case are that either:-

(a) That the findings are perverse or unsupportable from the evidence before the courts.

(b) That there is a miscarriage of justice in any way. (p. 1229 F)

***Land law - Possession***

3. Where both parties claim to be in possession, possession would be presumed in favour of the party who can show a better title. The Appellants cannot rely on their adverse possession. (p. 1233 E)

***Title - Root of title***

4. The party claiming land is not bound to plead and prove more than one root of title to succeed. If he relies on more than one root, that is merely to make assurance doubly-sure. In other words he does that ex abundanti  
 B cautela. (p. 1233 H)

***Title - Traditional history***

5. The courts will resort to the principles in KOJO V. BONISIE'S (supra)  
 C when the traditional history of the parties is inconclusive and none is preferable to the other. The two courts below accepted the traditional version of the Respondents, in which case, there would be no need to have recourse to the rule in KOJO V. BONISIE (supra). The principle will apply  
 D in a situation that presents a conflicting traditional history in respect of ownership of the land. (p. 1234 B)

***Appeals - Judgment***

6. It suffices to say that this conclusion of the trial court was not appealed  
 E against in the court below, it being settled law that this court cannot pronounce on the issue of trespass which was not raised in the court below for them to express their views on the issue either rightly or wrongly. See Ogoyi v. Umagba (1995) 9 NWLR (part 419) 283. ( p. 1235 H)

F  
***Appeal - Finding not appealed against***

7. The law is trite that a conclusion or finding not appealed against is deemed correct until the contrary is shown. See Odiase v. Agho & Ors  
 G (1972) 1 ALL NLR 170 at 176. (p. 1236 G)

**NOTABLE POINT OF INTEREST**

**UWAIFO JSC**

1. *When the principle in Kojo II v. Bonsie will apply*  
 H I think it is now quite elementary that in order for the principle in *Kojo II v. Bonsie* (1957) 1 WLR 1223 to be applicable as to which is preferable, the evidence adduced must satisfy the court that both histories are plausible. If there is internal or intrinsic conflict in either or both, the prin-

ciple will not arise. The trial judge will be entitled to treat the evidence in the ordinary way and reject one or both histories as the case may be: See *Mogaji v. Cadbury Nigeria Ltd* (1985) 2 NWLR (pt.7) 393. (p. 1238 D)

### **REPRESENTATION**

M. I. Onochie Esq., with him Amaechi Nwaiwu Esq., for the Appellants.  
Alhaji F. A. Oso for the Respondents.

### **CASES REFERRED TO**

*Okiji v. Adejobi* (1990) 5 FSC 44; (1960) SCNLR 133  
*Ekretsu v. Oyobebere* (1992) 9 NWLR (Part 266) 438  
*Dokubo v. Omoni* (1999) 70 LRCN 1769  
*Morinatu Oduka & Ors v. Kasumu & Anor* (1968) NMLR 28  
*Ezewani v. Onwordi* (1986) 4 NWLR (part 33) 27  
*Bakare v. Ibiyemi & Ors. v. Lawani Olusoji & Anor.* (1957) WRNLR 25  
*Onifade v. Alhaji Alimi Olayiwola & Ors.* (1990) 7 NWLR (part 161) 130  
*Dibiamaka v. Osakwe* (1989) 3 NWLR (Part 107) 101  
*Dr. Maja v. Dr. Learndoro Stocco* (1968) NMLR 372  
*Nana Ofori Atta II v. Nana Abu Bonsra* (1957) 3 WLR 830 at 834 - 836  
*Akinola v. Oluwo* (1962) 2 ALL NLR 224 at 227

### **STATUTE REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979; s. 213 (now s. 233 of the 1999 Constitution)

### **LEAD JUDGMENT BY ONU JSC**

This is an appeal against the judgment of the court of Appeal, port Harcourt Judicial Division delivered on 29th May, 1995 in Appeal No. CA/PH/45/91. That Court which I shall hereinafter refer to as the court below, had dismissed the appeal filed by the Defendants/Appellants against the decision of the Bori High Court that sat in Port Harcourt on 15th January, 1990 and which decreed title to the land known as Oron Inyong Anwasi, delineated and verged red in the plaintiffs/Respondents' Plan No. BOE/R.34/85/LD excepting the area called Agbanchichama in

favour of the Respondents. The trial court (coram Ichoku, J. as he then was) found in favour of the Respondents by also awarding general damages against the Appellants for trespass. The Appellants in addition, were restrained from committing further acts of trespass on the said Respondents' land while the counter-claim filed by the Appellants was dismissed in its entirety.

It is pertinent to state at this juncture, albeit briefly, how the case on appeal found its way through the courts below to this court thus:

The plaintiffs now Respondents, claimed against the Appellants, then defendants in the trial High court as follows:

*"(a) A declaration that the plaintiffs are entitled to the Customary Right of Occupancy in respect of a piece or parcel of land known as Oron Inyong Anwasi and which piece of land is Iying and situate at Ayama, Agana Village in the Bonny Local Government Area within the jurisdiction of this honourable Court.*

*(b) N5,000.00 being general damages for trespass committed by the Defendants through their servants and/or agents on the said piece of land on the 26th day of January, 1985.*

*(c) An order of perpetual injunction restraining the defendants by themselves, through their servants and/or agents from committing further trespass on the said land. Please see paragraph 19 of the Amended Statement of claim dated 9th day of May 1987 and filed on 11th day of May, 1987."*

The Defendants/Appellants (hereinafter referred to as the Appellants simpliciter) in their counter-claim sought the following reliefs:

*"(a) A declaration that the defendants are entitled to the Customary Right of Occupancy of their piece and parcels of land known as and called INYONG ORON ANWASI and ORON OTUBURU ANYAMBOKO situate at ANYAMBOKO ANDONI.*

*(b) N16,000.00 special and general damages for trespass committed by the plaintiffs, their servants or agents on the defendants said pieces or parcels of land between 1980 and 1985 at Anyamboko.*

*(c) Perpetual injunction restraining the plaintiffs, their agents or servants from further trespass onto the defendants' said piece or par-*

*cels of land."*

It is pertinent to demonstrate firstly, that even though the Appellants were sued in their personal capacities, on the 14th day of January, 1986, they applied and were granted leave to bring their counter-claim by the trial court in a representative capacity i.e. on behalf of Anyamboko community. B

Secondly, pleadings were filed and exchanged by the parties while each applied and were granted leave, to amend them respectively. The Respondents' plan was tendered and received as Exhibit "A" while the Appellants' plan was tendered and received as Exhibit "H". C

In proof of their respective cases both parties led evidence with the Respondents calling a total of five witnesses while the Appellants called six witnesses in proof of theirs. The first witness called by the Respondents (P.W.I) was Surveyor B.O. Ejekwu through whom Exhibit A was received in evidence. PW.2 was the 1st plaintiff on record and the paramount Chief of Ayama Agana. As the plaintiffs' star witness, he first traced the Respondents' title to Ede who he claimed was the first to settle on the land in dispute. The witness under cross-examination admitted that there was a certain native court suit concerning part of the land now in dispute. The Appellants' case as borne out in their pleadings and particularly in the evidence of D.W.2 (Chief Ernest Anya), was that the entire Anyamboko Village was founded by Okparaeke, their ancestor. It was further their case that the lands they claimed consisted of two distinct parcels to wit: INYONG ORON ANWASI and ORON OTUBURU and that although founded by OKPARAEKE, the first person to settle thereon permanently was ANWASI IKAN ANYAMBOKO from whom it took its name INYONG ORON ANWASI. Although the Jeffrey's report did not state whether the Andoni settlement or Ngo settlement was the first to be on the land in dispute, the Appellants in proof of their case called DW.3 (the Chairman of Egwede Council of Chiefs) who testified that the people of Ayama Agana were granted their present place of settlement by Egwede people. In short, after the parties had adduced both oral and documentary evidence to buttress their cases, learned counsel on either side addresses the trial court. The learned trial judge in a consid- D E F G H

ered judgment delivered on 15th March, 1990, granted all the claims of the Respondents. The Appellants' counter-claim was dismissed by the learned trial judge. The Appellants' appeal to the court of Appeal sitting in Port Harcourt, hereinbefore alluded to was dismissed.

B Aggrieved by the said decision, the Appellants have further appealed to this Court on a Notice of Appeal containing nine grounds dated 2nd August, 1995. Later, by an amended Notice of Appeal dated 18th February, 1997 and filed on 25th February, 1997, the Appellants sought and were granted, leave by this Court to argue in place of the earlier nine, C fourteen new grounds of appeal therein contained.

From the fourteen grounds of appeal, nine issues have been formulated and submitted as arising for our determination. They are:

1. Were the learned Justices of the court below right in holding D that the defendants have not proved any relationship between the land in dispute in Exhibit "G" and the land now in dispute in this case?

2. Whether the court below was right in refusing to act on the admission made by PW.2 that the land that was in dispute in Unyeado/ E Ngo Native Court in Suit No.47/57 forms part of the land being litigated in the present proceedings on the ground that to do so would amount to vary the contents of Exhibit "G".

3. Whether the court below was right in holding that the finding F in Exhibit "G" that the plaintiffs present place of abode - New Agana, was leased to them by Egwede people cannot be "*imported*" into this case even where the conditions for the operation of issue estoppel had been established?

4. Whether the learned Justices of the court below were right G when they held that Exhibits "C", "D" and "G" ought to have been used to discredit the plaintiffs' even though the said Exhibits were not made by them?

5. Whether the conflicting traditional history proffered (sic) by H both parties ought to have been resolved by applying the rule laid down by the privy council in Kojo v. Bonsie.

6. Whether the traditional evidence led by defendants as to the founding of the land in dispute was self contradictory and unreliable.



7. Whether the Justice of the Court of Appeal were right in affirming that portion of the judgment of the trial court awarding damages for trespass against the defendant when the plaintiffs failed to prove that they were in exclusive possession of the land in dispute?

8. Were the learned Justices of the Court of Appeal right when they failed to consider issues No. 3 and 4 raised and canvassed in the appellants' brief in spite of the fact that the said issues were canvassed in the appellants' brief in spite of the fact that the said issues were canvassed before them and flow from the appellants' grounds of appeal and were brought before them for adjudication.

9. Were the learned Justices of the Court of Appeal right in holding that the traditional evidence of the plaintiffs was more probable than that of the defendants in spite of the fact that there was overwhelming evidence before them of acts of possession, and ownership exercised by the defendants on the land in dispute?"

From the same fourteen grounds of appeal, the Respondents have identified only three issues for our determination, to wit:

(i) Whether the court below was right in not placing any reliance whatever on Exhibit G, as did the court of first instance?

(ii) Whether the court below was right in confirming the accuracy and probability of the Respondents traditional history/root of title as against that of the Appellants?

(iii) Whether the court below treated and considered all the (4) four issues raised by the Appellants in their brief of argument in its judgment?

Having carefully taken a hard look at the issues formulated by both sides in this appeal as set out above, I hold the view that being more concise, brief and to the points, the Respondents' three issues be adopted in the argument of this appeal.

**ISSUES No 1.** The first issue based as it were on the first three of nine issues, is, whether the court below was right in not placing any reliance whatever on Exhibit G, as did the court of first instance. The pith of the Appellants' argument in paragraphs Nos. 3.01, 3.02 and 3.03 in Exhibit G i.e the Onyeado/Ngo Native Court Suit No. 47/57 is that, since the Re-

spondents did not join issue with the Appellants on Exhibit G, the fact that the land defined therein formed part of the disputed land should be deemed as having been admitted. Furthermore, that with the admission of PW.2 that the land contained in Exhibit G. was part of the disputed land therefore, the two courts below should have acted upon his admission.

Finally, the Appellants contended that, on the principle of issue estoppel, the present AYAMAAGANA, was released to them by the people of EGUEDE as decided in Exhibit G. Exhibit G. was pleaded in paragraph 7 of the Appellants' statement of Counter-claim. In that paragraph, the Appellants pleaded as follows:

*"The plaintiffs would be estopped from disputing the title of the defendants to the disputed land by standing by and watching the defendants and the people of EGWEDE fight out the case themselves."*

From the above extract, it is the Appellants' contention that the Respondents should not dispute their title to the land in Exhibit G because the Respondents stood by pendente lite. Exhibit G, be it noted was tendered by DW.2, who, after rendering his evidence-in-chief but before Exhibit G. was tendered and admitted in evidence, DW.2 said:

*"..... About 1957, something happened between us and Chief Nsirem. In about that time, Chief Nsirem employed somebody to plant on our land ..... That land was part of ORON INYONG ANWASI."*

Under cross-examination, the following dialogue ensued between DW.2 and the Respondents' counsel:

*"Q: Exhibit G, the proceedings tendered yesterday does not contain the name of the land in dispute between your Village and EGWEDE people?*

*Ans: It is part of that land.*

*Q: What name did you call it in the Native Court?*

*Ans: They did not call it any name but initially, the name they called it is OKOLONDIDI UKWA but I do not know whether they wrote it like that....."*

DW.3, under cross-examination stated as follows:-

*Q: In 1957, your people went to court with the AYAMABOKO*

people?

Ans: Yes

Q: You won that case-EGWEDE people won that case?

Ans: The case was not against us, the court came to make peace between us and them made boundary.

Q: Part of the land in dispute between you and AYAMBOKO are in the area in dispute in this case.

Ans: The area that the court decided in that case is not in dispute in this case.

DW.4, is the Appellants' surveyor. He also had the following to say under cross-examination:

Q: Did you demand to see the Native Court judgment before fixing the boundary or they just told you this is the boundary and you fix it?

Ans: I demanded to see the judgment and got it before fixing the boundary.

Q: See Exhibit GI. Is that the Native Court judgment you saw?

Ans: It is the judgment.

Q: Did you fix the AYAMBOKO boundary at any of the two (2) burial grounds?

Ans: No. This is the evidence."

In its judgment and after a painstaking review and evaluation of the evidence, the learned trial judge commented on Exhibit G. as follows:

"looking through Exhibit G it would be observed that Exhibit G never mentioned throughout Inyong Oron Anwansi. The two land therefore cannot be one. This been (sic) the case can it be said that Exhibit G will operate as an estoppel in any form against the plaintiffs. The DW.2 in his evidence has shown that the land in Exhibit G had no connection with Inyong Oron Anwansi though shown as being on Inyong Anwansi. It can then be noted that if the land in dispute in 1957 case is called Ololo Nkwa and has no connection with Inyong Oron the land in dispute, then the defendants claim that it is part of the land in dispute cannot be true and is but fake. This being the case Exhibit H is also equally misleading. DW.3 on 13/7/89 in his evidence on the identity of the land in

*dispute in 1957 the DW.3 stated that the area of the land in dispute between them and Anyamboko people in 1957 is not in dispute in this case. That the site of plaintiff' juju shrine is in dispute in this case but the defendants were asked to shift back. The defendants having thus raised the issue of standing by the plea of estoppel res judicata it is for the defendants to show that the parties in those cases are the same. The subject-matter is the same in the two cases and the decision between the parties is in respect of the same cause of action. Thus, in ODUKA V. KASUMU (1968) NMLR 28 the Supreme Court said res judicata estoppel per res judicata is a rule of evidence whereby a party (or its privy) is precluded from disputing in any subsequent proceedings matters which had been adjudicated upon previously by a competent court between him and his opponent. In this case, it is not the same parties and their privies. It is thus my findings that the land in dispute in 1957 as shown in Exhibit G. can never be the same with the land in dispute in the present case. The evidence of DW.2, DW.3 and DW.5 point too on and only one conclusion namely that the two lands are not identical. It is thus unnecessary in the circumstances for the plaintiffs to have joined Egwede people in this Suit in 1957 for the subject-matter of that suit different from the present case."*

(Underlining above is mine for emphasis.)

The court below in affirming this judgment of the learned trial judge on 25th may, 1995, held (per Rowland, J.C.A.) as follows:

*"The above findings of fact by the learned trial judge is in line with my own thinking in respect of Exhibit G. I therefore agree with that findings (sic) of the court below. It seems to me that Exhibit G. from the totality of the evidence contained in the record is totally irrelevant to the entire proceeding. Exhibit G., is not supported by Exhibit H that is the Appellants' plan. The law is that, any party relying on a Native Customary Court judgment in a subsequent Suit must relate it to a plan. The plan must show the features contained in the Native Court judgment. The appellants in this case from the record failed to do just that. See ADOMBA V. ODIASE (1990) 1 NWLR (part 125) page 169."*

I have gone into an elaborate explanation of the genesis of Exhibit G. to

show that the conclusions of the two courts below on it, were far from being perverse to warrant this Court to interfere therewith. See Incar Nigeria Ltd. v. Adegboye (1985) 2 NWLR 455 and Ramonu Atolagbe v. Shorun (1985) 4 SC. (part 1) 250 at 282; (1985) 1 NWLR 360 at 373. There is indeed abundant evidence on record to support those conclusions. B The law is well settled that this Court will not normally interfere with the concurrent findings of facts by the two lower courts' findings unless it is shown that such conclusions and findings are not supported by the evidence or record. The foregoing aside, Exhibit G suffers from other inherent deficiencies, as follows:- C

In the instant appeal, the land in dispute is known and called as "ORON INYONG ANWASI," which is further sub-divided into EPELEMA, AGANIJA and ANWASI LANDS respectively. It is worthy of note firstly, that these pieces and parcels of lands are not contained in Exhibit G. D

**Secondly, Exhibit G. did not declare title in favour of either of the parties. It was a mere case of boundary demarcation. The law is trite that, to constitute estoppel, the parties, subject-matter and issue must be the same. One cannot talk of Exhibit G. in this regard. Besides, the land contained in the present appeal is bigger than the one contained in Exhibit G. Assuming without so holding that Exhibit G. decree title in the Appellants, the fact that the Appellants had acquired rights of possession over parts of "ORON INYONG ANWASI" would not affect the right of the Respondents to seek a declaration of title to the whole piece of land. See Okiji v. Adejobi (1960) 5 FSC 44; (1960) SCNLR 133; Ekretsu v. Oyobebere (1992) 9 NWLR (Part 266) 438. In the case of Dokubo v. Omoni (1999) 70 LRCN 1769, this Court held:** E F G

*"The plea of estoppel ought not to have been allowed by the court below for any reason whatsoever. This is because, the respondents failed to prove that the piece of land in respect of which the appellants sought a declaration of title is the same as the piece of the land in respect of which exhibit B was decided in the 1934 Suit. See MORINATU ODUKA & ORS. V. KASUMU & ANOR. (1968) NMLR 28; EZEWANI V.* H

ONWORDI (1986) 4 NWLR (part 33) 27; see also BAKARE V. IBIYEMI & Ors. v. LAWANI OLUSOJI & Anor. (1957) WRNLR 25."

In the latter case, the plaintiffs sued the defendants for a declaration of title to a piece of land, included another piece of land part of which had already been adjudicated upon. It was held that the plea of estoppel failed.

From the foregoing, if exhibit G. does not constitute estoppel in any form against the Respondents, then, the finding in exhibit G. that the present day AYAMA AGANA was leased to the Respondents by the EGWEDE people cannot be supported by the story of PW.2 that their movement in 1938, from Old Agana to New Agana is one from one portion of EDE'S LAND to another. See page 229 lines 18-21 for the evidence of DW.5. If EGWEDE means the land owned by EDE, can the descendants of EDE be lessees of any portion of their ancestral land? I think not. The only logical conclusion one would reach is that, exhibit G. is absolutely irrelevant in these proceedings.

My answer to the first issues is accordingly rendered in the affirmative. ISSUE NO. II - Based on or overlapping Appellants' issues 4,5,6, and 7

The grouse in the above issue is whether the court below was right in confirming the accuracy and probability of the Respondents' traditional history as against that of the Appellants.

On traditional history, PW.2 testified for and on behalf of the Respondents. For the Appellants, DW.2 was their star witness. The learned trial judge after weighing the versions of the two sides, held as follows:

"Thus, the question may be asked if the entire Anyamboko Village was founded by Okparaka can an inch of that land again be founded by Anwansi Ikan Anyamboko. This is impossible and thus the story as to the founding of the place as pleaded and given in evidence is not probable ..... claim cannot avail the defendants in that the defendants had presented both Anwasi Ikan Anyamboko and Okparaka as two original settlers of Inyong Anwasi should either succeed one and the other. The answer is quite clear namely, No."

In agreeing intoto with the learned trial Judge's conclusion, the court

below (per Rowland, J.C.A.) said:-

*"I am unable to see anything perverse in the findings of the lower court that should make me interfere. I am also unable to see any inadequacies in the said findings that have occasioned a miscarriage of justice. It is my view that the evidence before the trial court were abundant to sustain its findings."* B

In his contribution to the leading judgment, Edozie, J.C.A. stated as follows:

*"In the instant appeal, the learned trial Judge compared the two (2) traditional histories. He found the appellants' tradition history conflicting and contradictory and accordingly rejected it. On the other hand, he found the respondents' traditional history consistent, credible, cogent and more probable and he therefore accepted same. There is no appeal against these findings and no useful argument has been advanced in this appeal to persuade us to interfere with those findings."* C D

The issue is this: Are the trial court and the court below correct to have arrived at these concurrent findings of facts?

In answer to this question, it becomes pertinent to advert to the following the question and answer sessions that occurred when DW.1 and DW.2 testified as witnesses before the trial court as follows:

*"Q which is up and which is bush*

*Ans. INYONG ORON ANWASI means the name of the person who lived there before or the founder of Anwasi."* F

*Q. What of Oron Inyon Anwasi?*

*Ans. It does not mean anything but it is Anwasi Bush"*

Examined in chief, DW.2 said: *"Why we called the place 'INYONG ORON ANWASI is that the first settler on that land was 'ANWASI IKAN AYAMBOKO'"* G

DW.2 said: *"The first person who settled on that land was*

*OKPARAKA i.e. the founder of all these three*

*(3) pieces of land and he was from AYAMBOKO."* H

Further examined, DW.2 said: *"OKOLO-ILE and OKOLO-NTITA at the same time he founded AYAMBOKO*

JEFFREY'S REPORT AND THE TRADITIONAL EVIDENCE OF THE

APPELLANTS.

The Jeffrey's Report was admitted in evidence as Exhibits C and D respectively. Under Cross-examination DW.2 gave the following answers to questions administered to him by the learned counsel for the

B Respondents as follows:

*"Q. See exhibit D. Jeffrey's report you tendered, you said Jeffrey's report was based on facts supplied by your ancestors.*

*Ans. Yes*

C *Q. You agree with the historical presentation by your ancestors to Jeffry?*

*Ans. I agree*

*Q. See page 3, paragraph 13 of exhibit D. which one is the correct version or Jeffrey's?*

D *Ans. Both what I said and the Jeffrey's report are all true.*

*Q. See exhibit D. paragraph 13 of page 3, I asked which of the two version were correct and you said both.*

*Ans. Yes*

E *Q. Paragraph 14 of the same exhibit D. refers. And page 4 of the same exhibit D. This is the historical account your ancestor gave to Jeffrey and it is included in the report. The AYAMBOKO people are refugees in Andoni land.*

F *Ans. It is not true. See page 207, lines 1-30 and page 208, lines 1-5 of the record.*

*Q. Ngo is not one of the twenty-one original Andoni settlement (sic).*

*Ans. Ngo is not.*

G *Q. Your village AYAMBOKO is an off-shoot of Ngo.*

*Ans. AYAMBOKO did not originate from Ngo but it is under Ngo clan.*

*Q. Your village AYAMBOKO is an off-shoot of Ngo.*

H *Ans. AYAMBOKO did not originate from Ngo but it is under Ugo clan.*

*Q. Open exhibit D. pages 10-11 paragraphs 50-53. I am suggesting to you that your village is an off-shoot of Ngo.*



*Ans. That is not true. See page 210, lines 3-13."*

Be it noted that Jeffrey in his report exhibit D. said that the Appellants are strangers to Andoni land. Their ancestors migrated to Ngo in Andoni in the 18th Century from the Anang tribe to the Cross-River State. When the ancestors of the Appellants arrived at Andoni land they settled at Ngo but due to lack of space at Ngo, they moved to their present abode under the auspices of the Chiefs, elders and people of AGWUT-OBOLO. They (AGWUT-OBOLO) people, then gave the Appellants a place at their burial ground to stay, because the Appellants were professional grave diggers or church sextons. The word 'MBOKO' is the Obolo (Andoni) word for the Ibibios and AYA or AYAN is the Anang town from which the Appellants originated - the person who led the movement from AYA town in Cross River State being known and called 'OKPARAKA' while originally and traditionally AYAMBOKO Village or town was the original burial ground of the Andoni people. A cursory glance at exhibits C. and D., the Jeffrey's Report will confirm this.

From the forgoing, can it be said that the two courts arrived at perverse decisions in their summing up of the evidence available to them. I think not. And if OKPARAKA was the leader of the Appellants to their present Village, from Aya town in Cross River State and its original settlor, then IKAN ANWASI ANYAMBOKO cannot be the founder and original settler at the same time with him. This then the point at which the traditional history of the Appellants held to be improbable and impossible by the two courts below becomes impeccable and cannot be faulted.

**An appellant who urges the Supreme Court to upset the concurrent findings of facts by the two lower courts as is being done in the instant case must show exceptional circumstances why this Court should interfere. Such exceptional circumstances, as decided by a long line of case are that either:-**

(a) That the findings are perverse or unsupportable from the evidence before the courts. See Ladejo Onifade v. Alhaji Alimi Olayiwola & Ors. (1990) 7 NWLR (part 161) 130

(b) That there is a miscarriage of justice in any way. See Dibiamaka v. Osakwe (1989) 3 NWLR (part 107) 101; Akeredolu v.

**Akinremi (No.3) (1989) 3 NWLR (part 108) 164 at 167).**

I am therefore of the firm view that the conclusions of the trial court which were confirmed by the court below have not been shown to be perverse. There were no inadequacies, in my view, in the conclusions arrived at by the two courts below that would have occasioned a miscarriage of justice. As a matter of fact, the supportive evidence is overwhelming. It is also for these reasons that I hold that for findings of the two courts below to be held to be perverse, the duty that lay on the Appellants to show that the learned trial Judge failed to make the necessary inference from accepted facts has not been discharged. See Olale v. Ekwelendu (1989) 4 NWLR 326 at 347; Okafor v. Idigo (1984) 6 S.C 1 and Dr. Maja v. Dr. Learndoro Stocco (1968) NMLR 372.

In the instant case, the learned trial judge drew proper inference from the evidence before him before rendering his decision or at the conclusion, he arrived at and the Court below affirmed it, quite rightly in my view.

Accordingly, this Court will decline to re-open the dispute or issue since the decision is not perverse. See 1. Obodo v. Ogba (1987) 2 NWLR (part 54) 1. 2. Balogun v. Agboola (1974) 10 S.C 111: (1974) 1 ALL NLR (PART 11) 66; and Idika v. Erisi (1988) 2 NWLR (part 78) 563. It is for these reasons that I hold the attack by the Appellants on the use made of exhibits C, D and G by the two courts below as misconceived.

It is also the contention of the Appellants that exhibit G. was tendered to serve two purposes:

- (i) Firstly, to establish estoppel per rem judacatan in respect of the area covered by exhibit G.
- (ii) To deflate the Respondents' traditional history that AYAMA AGANA was founded by the Respondents' ancestors.

With due respect to the Appellants, that submission cannot be supported, in that Exhibit G. was pleaded to estop the Respondents by standing by and no more. See Nana Ofori Atta II v. Nana Abu Bonsra (1957) 3 WLR 830 at 834 - 836 where the Privy Council recognised that 'standing by' includes "giving evidence in support of one side or the other" and which has been approved and followed in Nigerian decisions, some

of which are:

1. Onisango v. Akinkunmi & Ors. (1955-56) WNLR 39;
2. Ojiako v. Ogueze (1962) WNLR 58;
3. Balogun v. Agboola (1974) 10 SC. 111 at 119;
4. Ekpoke v. Usilo (1978) 6 - 7 SC. 187
5. Ikpang v. Edoho (1978) 6 - 7 SC.22 and
6. Augusto v. Joshua (1976) 1 ALL NLR 312.

B

Secondly, that submission overlooked the evidence of DW.2, DW.3 and DW.5 to the effect that EGWEDE is an extension or part of the land of Ede, the progenitor of the Respondents or EGWEDE people. On exhibits C and D (i.e. Jeffrey's Report), these were pleaded by the Appellants in paragraphs 6, 7, 8, 9 and 10 of their Amended Statement of Defence. To show the movement to Andoni land and to show that they are indigenes or aborigenes of Andoni land as one of the original twenty-one Villages, Exhibits C and D disprove this claim showing the Appellants not only as refugees, but strangers who migrated to AYAMBOKO in Andoni land from AYA town of the Anang tribe of Cross River State. In other words, Exhibits C and D contradicted the claim by the APPELLANTS that the original settlor and founder of the disputed land is OKPARAKA instead of IKAN ANWASI AYAMBOKO as pleaded. The same exhibits (C and D), be it noted, supported the RESPONDENTS' story that their Village AGANA, was one of the original 21 Villages that make up the Andoni kingdom.

D

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F

In that respect, the case of the APPELLANTS (defence) did indeed strength the RESPONDENTS' case. See Akinola v. Oluwo (1962) 2 ALL NLR 224 at 227; Akunwata Nwagbogu v. Chief M.O. Ibeziako (1972) Vol. 2 (part 1) ECLR 335 at 338 and Alhaji Amuda I. Adebambo & Ors. v. Alhaji Lamidi D. Olowosago (1985) 3 NWLR (part 11) 207.

G

That the decisions of the two courts below cannot also be faulted albeit upon the complaints of the Appellants on trespass can be deciphered from the Respondents' case that despite the fact the Appellants infringed their possessory right on the land in dispute for the first time in 1979 and they (Appellants) were reported to the Chiefs and Elders, nothing came out of their report. This, it is contended by the Respondents can be seen

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clearly from the following extract of the dialogue between PW.2 and the Appellants' counsel, to wit:

*"Q. The claim to this land arose from your own time?*

*Ans. Yes. It is this time that they had trespass (sic)."*

B A little later, the following question and answer session between PW.2 and Appellants' counsel went as follows:

*"Q. Do you know or not that the boundary between EGWEDE and the defendants' Community passes through Awayok i.e their juju playground or traditional play ground.*

C *Ans. It is not true.*

*Q. It is this demarcation that the defendants put their survey beacons.*

*Ans. It is not true*

D *Q. It is this survey beacons that you and your people reproved (sic) that brought this case to court.*

*Ans. The defendants made a survey, put their beacons and cut through part of ORON INYONG ANWASI, the land in dispute, cutting E the burial ground belonging to AGANA people and then 2 Fishing Villages AGANA-IJA, and EPELEMA. That is why we have brought this suit against them. See page 90, lines 1-24 of the record for more details. Thus, while DW.1 admitted that he and other appellants were standing F prosecution for destroying the respondents villages of AGANA-IJA and EPELEMA DW.2 had this to say:*

*"We surveyed our own portion of land which (sic) a demarcation was made between us and EGWEDE. We surveyed our land because the new Agana people were secretly going to the land to build G small houses and for that, we decided to survey the land."*

In its judgment, the trial court had the following to say on the issue of trespass:

*"The evidence in support of trespass and survey of the land which H were cause of action were not in dispute. The defendants alleged they did (sic) for it is their land and they were entitle to do so. There is evidence that the Villages of EPELEMA and AGANIJA were destroyed. The DW.2 admitted facing a criminal charge on the (sic) account of such*

*allegation. In the circumstances therefore, it is clear that the trespass alleged by the plaintiffs had been established. In that wise, the plaintiffs have also established the case of injunction and in the circumstances the injunction sought would be granted."*

The trial court then proceeded to find the tort of trespass established against the Appellants and awarded damages accordingly.

The Appellants further contended that the Respondents were not in physical occupation of the disputed land and therefore could not sustain the claim for damages and trespass. With due respect, this submission cannot hold since there was evidence before the learned trial judge that the islands of EPELEMA and AGANIJA were sacked and destroyed by the Appellants as admitted by DW.1 when they were carrying out a sort of survey. P.W.3 and P.W.4 gave evidence of physical occupation of EPELEMA and AGANIJA, and they were in possession, having houses on them before their destruction by the Appellants. Assuming without conceding that the Respondents were not in physical possession of the disputed land, since the Respondents have been shown to have a better title to the disputed land than the Appellants, possession must be presumed in their favour. See Kareem v. Ogunde (1972) 1 SC.182; Alhaji J. Aromire & 2 Ors. v. J.J. Awoyemi (1972) 1 ALL NLR (part 1) 101 at 112-113; Umeobi v. Otukoya (1978) 4 SC.33 and Ajani v. Ladepo (1986) 3 NWLR (part 28) 276. It is trite law that **where both parties claim to be in possession, possession would be presumed in favour of the party who can show a better title. See Amakor v. Obiefuna (1974) 1 ALL NLR 119; Aromire v. Awoyemi (supra). The Appellants cannot rely on their adverse possession.**

The Appellants have further contended that the two courts below are wrong in upholding the traditional history of the Respondents as against their own-urging that at best, the rule in KOJO V. BONISIE (1957) 1 WLR 1223 should have been applied.

With utmost due respect to the Appellants, this cannot be so as the attacks are unjustifiable. This is the more so because, the law is well settled that **the party claiming land is not bound to plead and prove more than one root of title to succeed. If he relies on more than**

one root, that is merely to make assurance doubly-sure. In other words he does that ex abundanti cautela. See Balogun v. Akanji (1988) 1 NWLR (part 70) 301 at 321.

In the instant appeal, the two parties rely on traditional history of the Respondents as against that of the Appellants. It is trite law that the courts will resort to the principles in KOJO V. BONISIE'S (supra) when the traditional history of the parties is inconclusive and none is preferable to the other. The two courts below accepted the traditional version of the Respondents, in which case, there would be no need to have recourse to the rule in KOJO V. BONISIE (supra). The principle will apply in a situation that presents a conflicting traditional history in respect of ownership of the land. The legal position is this:

It is not the law that once there are conflicts in the traditional histories adduced, the court must promptly declare them inconclusive and thereupon proceed to consider recent acts. What indeed happens is that the case being one fought on hearsay upon hearsay, the trial court has a duty to find which of the two histories is more probable by testing it against other evidence in the case. It is when it can neither find any of the two histories probable nor conclusive that he will declare both inconclusive and proceed to decide the case on the basis of numerous and positive acts of possession and ownership. See Obioha v. Duru (1994) 8 NWLR (part 365) 631 at 641 paragraphs B-F of the same judgment Ogundare, JSC therein put paid to the appellants contention when he said:

*"This is the approach to a resolution of conflict in traditional histories as enunciated in KOJO V. BONISIE (1957) 1 WLR 1223, traditional histories applicable where both histories are plausible and capable of credibility. Where, however, the traditional histories put out by one of the parties is so intrinsically conflicting that a reasonable tribunal would not place credence on it, there is no room for the application of the approach. Thus, where witnesses of one party, as the witnesses for the defence in the instant case, contradict each other, on the traditional history relied on for the defence, the trial court will be right to reject the*

*traditional history relied on by the defence. Similarly, where there are evidence adduced by one side supportive of the traditional history relied on by the other side, the trial court will be right in accepting the latter traditional history."*

In the light of the above proposition, I see no sameness or similarity in the traditional evidence adduced by the parties in this case. The trial court and the court below in the instant case accepted and confirmed the tradition history of the Respondents. There was no cause or reason therefore in the circumstance of the present case to apply the rule in KOJO V. BONSIE (supra) as it is inapplicable. The Appellants have argued in their Brief as follows:

*"Founding of a piece of land, is not synonymous with settlement. A founder of a piece of land, is the first person to live permanently on the piece of land....."*

With utmost due respect, this submission is a distinction without a difference. For, a settlor on land is synonymous with the founder of that land. The stark reality of the situation is that the Appellants, as concurrently found by the two courts below, and which conclusions were fully supported by evidence, presented conflicting, unreliable and improbable traditional history. The argument also cannot avail the Appellants for it is pertinent to stress at this juncture, that both in the claim and counter-claim, the subject-matter in the list is the area of land known and called "ORON INYONG ANWASI" There was no time in the entire proceedings when ORON OTUBURU was made the focus of the parties' contention. Therefore, the claim by the Appellants that they are entitled to ORON OTUBURU is not only superfluous but unnecessary. Indeed, most of the points raised by the Appellants in their grounds of appeal from which their issues were distilled apart from being tautologous and repetitive, are boring in their dove-tailing effect. Hence, my having to merge the several issues formulated to make their consideration more manageable in this judgment and to make them more pungent, shorter and to the point.

**It suffices to say that this conclusion of the trial court was not appealed against in the court below, it being settled law that this court cannot pronounce on the issue of trespass which was not raised in**

the court below for them to express their views on the issue either rightly or wrongly. See Ogoyi v. Umagba (1995) 9 NWLR (part 419) 283; Olatunji v. Adisa (1995) 2 NWLR (part 376) 167; U.B.N. Ltd. v. Ogboh (1995) 2 NWLR (part 380) 647.

B It is also settled that, to entertain the issue of trespass in this appeal would amount to hearing an appeal against the judgment of the court of trial which is contrary to Section 213 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 233 of the 1999 Constitution). See Ogoyi v. Umagba (supra) and Falomo v. Banigbe (1998) 7 NWLR C (part 559) 679.

Bases upon the foregoing, I agree with the Respondents' submission that this aspect of the appeal ought also to fail and be dismissed.

D Finally, I will consider the third issue, which is whether the court below treated and considered all the (4) four issues raised by the Appellants in their Briefs of argument in its judgment.

In this regard, I wish to remark that it is not correct as contended by the Appellants that issues Nos. 3 and 4 in the court below were E not considered. A cursory look at the records shows that the court below set out the issues formulated by the parties and decided to adopt the issues formulated by the respondents as encompassing. The court below thereupon considered them most comprehensively and after meticulously advertng to them concluded as follows: F

*"It must be pointed out before I concluded this judgment that the 2 (two) issues I considered for the determination of this appeal covered all the 6 (six) grounds of appeal of the appellants."*

This portion or conclusion of the court below is yet to be appealed against. G **The law is trite that a conclusion or finding not appealed against is deemed correct until the contrary is shown.** See Odiase v. Agho & Ors (1972) 1 ALL NLR 170 at 176 and Melifonwu v. Egbuji (1982) 9 S.C 145 at 165. My consideration of these issues disposes of issue No.3 H (ibid) formulated by the Respondents Brevi Manu by being resolved against the Appellants.

The decisions of the two courts below clearly amount to concurrent findings of facts of these two lower courts. The attitude of this



Court over time is that it will not interfere with such findings of facts except the appellants can show special circumstances - either that there was a miscarriage of justice or serious violation of some principles of law or procedure or that the findings are erroneous i.e. error in substantive or procedure law. See Ojomu v. Ajao (1983) 9 S.C 22 at 53; Lokoyi v. Olojo (1983) 8 S.C 61 at 63; (1983) 2 SCNLR 127; Ibodo v. Enarofia (1980) 5-7 S.C 42 at 58; Nwadike v. Ibekwe (1987) 4 NWLR (part 67) 718 and Fatoyinbo v. Williams (1956) SCNLR 274; (1956) 1 FSC 87 to mention but a few.

The result of all I have been saying is that all 3 issues canvassed on Appellants behalf are separately and collectively resolved against the Appellant. In consequence thereof, this appeal fails and it is accordingly dismissed with N10,000.00 costs against the Appellants.

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**BELGORE**

I agree with my learned brother, Onu JSC, that this appeal has no merit. For the reasons clearly set out in his judgment I also dismiss the appeal with the same consequential order as to costs.

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**OGWUEGBU JSC**

I read in advance the judgment just delivered by my learned brother Onu, J.S.C. I agree with his reasoning and conclusions.

I, too, see no reason to disturb the concurrent findings of fact of the courts below. The appeal fails and I hereby dismiss it with N10,000.00 costs to the respondents.

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**KALGO JSC**

I have read in advance the judgment just delivered in this appeal by my learned brother Onu JSC. I entirely agree with the reasoning and conclusions reached therein. In the result I am clearly of the view that there is no merit in the appeal and I dismiss it accordingly. I award N10,000.00 costs in favour of the respondents.

**UWAIFO JSC**

I read in advance the judgment of my learned brother Onu JSC which he has rendered in much detail as to the facts and the applicable law. I fully agree with him that the appeal is without merit.

B The case was decided principally on the worth of the traditional history relied on by each party and the issue of estoppel per rem judicatum raised by the defendants/appellants. The learned trial judge resolved the issue of estoppel against the defendants in that, as found by him, the land in dispute in this case was obviously not the same as the one in dispute between the parties in an earlier case. The lower court upheld this finding of fact. Having examined the facts available, I have no doubt that there is strong support for that finding.

D As regards the traditional histories, the learned trial judge found that the one presented by the defendants contained internal conflict and contradiction material enough to make the history incredible. The lower court upheld that finding. Again, there is clear evidence in support of the findings of the two court below. I think it is now quite elementary that in order for the principle in *Kojo II v. Bonsie* (1957) 1 WLR 1223 to be applicable as to which is preferable, the evidence adduced must satisfy the court that both histories are plausible. If there is internal or intrinsic conflict in either or both, the principle will not arise. The trial judge will be entitled to treat the evidence in the ordinary way and reject one or both histories as the case may be: See *Mogaji v. Cadbury Nigeria Ltd* (1985) 2 NWLR (pt.7) 393; *Obioha v. Duru* (1994) 8 NWLR (pt.365) 631.

G In the present case, the concurrent findings of fact by the two courts below are unimpeachable. This court cannot therefore interfere with them: See *Ibodo v. Enarofia* (1980) 5-7 SC 42; *Nwadike v. Ibekwe* (1987) 4 NWLR (pt.67) 718; *Ivienagbor v. Bazuaye* (1999) 9 NWLR (pt.620) 552.

H For these reasons and those more elaborately stated by my learned brother Onu JSC, I dismiss this appeal with N10,000.00 costs against the appellants.