

SUPREME COURT OF NIGERIA

27TH APRIL, 2001. SC. 15/1996

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

DURUAKU EKE & 3 ORS. DEFENDANTS/APPELLANTS
(For themselves and as representing
the other members of Umuduruohome
family, Umuofeke, Okohia Isiekenesi)

AND

UDEOZOR OKWARANYIA & 2 ORS.
(For themselves and as PLAINTIFFS/CROSS-APPELLANTS
representing the other members
of Umuokwaraku family, Umuelekuba,
Okohia Isiekenesi)

***APPEALS** - Retrial - Civil case - Conditions under which an appellate court may order a retrial in a civil case (H 6)*

***APPEALS** - Retrial - Failure of case - When a plaintiff's case has failed - A retrial order is inappropriate (H 7)*

***ARBITRATION** - Customary arbitration - Validity of - Ingredients that must be pleaded and proved (H 5)*

***JUDGMENTS** - Declaratory relief - Evidence - To obtain a declaratory relief as to a right - There has to be evidence - The right will not be conferred simply upon the state of the pleadings (H 4)*

***PLEADINGS** - Issue - Joinder of issue - In determining whether issue has been joined on a point - It is not proper to consider a particular paragraph of the statement of defence - In isolation of the other paragraphs (H 1)*

PLEADINGS - *Purpose and procedure* - *The purpose of pleadings is to bring the parties to issues that arise - But there is no obligation to set out the subordinate facts that may help as evidentiary material (H 2)*

PLEADINGS - *Statement of defence* - *Traverse* - *Lewis & Peat v. Akhimien* - *The purport of that authority* - *Is that in respect of essential and material allegations* - *There should be no general traverse (H 3)*

FACTS

In the High Court of Imo State holden at Orlu, the Plaintiffs/Cross-Appellants brought an action for themselves and as representing their Umuokwaraku family against the Defendants/Appellants who were also sued for themselves and as representing their Umuduruohome family. The Plaintiffs sought the following reliefs: Declaration that the plaintiffs are entitled to the customary right of occupancy in respect of the land in dispute; general damages for trespass and an order of perpetual injunction. Both parties relied on traditional history for their respective root of title. The substance of the plaintiffs traditional history is that the land was founded by their ancestor Okwaraku and that the land successively devolved through his descendants to the plaintiffs. That the land in dispute was originally a juju forest which housed the Ibekwe rain juju. Part of the forest was cleared by the first known Chief rain-making juju Priest, the plaintiff's ancestor, who performed maximum acts of ownership and possession thereon by way of farming the land and ministering unto the said rain juju. The Ibekwe juju has also successively devolved through his descendants to the plaintiffs and that the 1st plaintiff (Udeozor Okwaranya) is the present Chief Priest of Ibekwe juju. The plaintiffs averred that they permitted members of the defendants family to build on the land in dispute.

The defendants on the other hand denied the plaintiffs version of the case but admitted that the land has always been a juju forest housing a juju they also called Ibekwe. They claimed that the pieces of land in dispute were founded by Okohia the common ancestor of both parties and the founder of Okohia village. They also pleaded successive descen-

dants to whom the land devolved until it got to the defendants. The defendants further stated that members of their family live on the land and carry on all manner of farming but that the plaintiffs do not live on any part of the land. Also, the Chief Priesthood of the Ibekwe juju has remained in their family, the present Chief priest of the juju being the 4th defendant (Duru Echefu). They also pleaded and gave evidence that there was arbitration in respect of a dispute over a portion of the land which was in their favour.

The learned trial judge considered the traditional histories of both parties to be inconclusive. He then considered recent acts of ownership based on the principle laid down in *Kojo v. Bonsie*, as well as the question of arbitration, and concluded that the plaintiffs failed to prove their case and accordingly dismissed it. The plaintiffs appealed against the judgment, and the Court of Appeal, Port Harcourt Division allowed the appeal, because of an alleged evasive pleading by the defendants to certain averments in the statement of claim, and the treatment by the learned trial judge of the evidence of an alleged customary arbitration. The Court of Appeal accordingly set aside the judgment of the trial court and ordered a retrial. Dissatisfied the defendants have appealed against the judgment to the Supreme Court, while the plaintiffs cross-appealed to contest the retrial order. The Court reduced the issues raised by the parties to three which it considered adequate to resolve both the appeal and the cross-appeal.

ISSUES FOR DETERMINATION

1. *Was there such inadequate joinder of issues which justified the Court of Appeal setting aside the trial court's judgment?*
2. *Was there a binding customary arbitration which the Court of Appeal ought to uphold?*
3. *Was there any circumstances manifest in the entire case found at the end of the appeal to justify the Court of Appeal ordering a retrial?*

HELD (Unanimously allowing the appeal and dismissing the cross-appeal per lead judgment of **UWAIFO JSC**)

Pleadings - Issue

1. The law is that in determining whether issue has been joined on a point, it is not proper to consider a particular paragraph of the statement of defence in isolation of the other paragraphs. This is so because those other paragraphs may contain averments which amount to specific denial in the sense that they put up a case different from that of the plaintiff although not directly mentioning the paragraphs of the statement of claim being denied or disputed. That is how to ascertain the issues properly joined on the pleadings. (p. 1198 G)

Pleadings - Purpose and procedure

2. The purpose of pleadings is to bring the parties to issues that arise so that either part may know the real points to be discussed and decided when the case comes on for trial. In other words, the issues to be resolved are defined before hand. But they must be issues upon facts which are relevant for pleading purposes in the sense that they go to the substance of the matter calling for a decision; and there is no obligation as a pleading procedure to set out the subordinate facts that may help as evidential material. In that case, the parties must only plead in such a way as to prevent surprise when leading evidence in support of their case. (p. 1199 C)

Pleadings - Statement of defence - Traverse

3. I think *Lewis & Peat v. Akhimien* (supra) has quite often been misapplied. That authority is concerned with the traverse of essential and material allegations. It is there stated in that case that in respect of essential and material allegations, there should be no general traverse, but rather they should be specifically traversed: see page 365. What is essential and material will depend on the real question for determination in any particular litigation. (p. 1201 A)

Judgments - Declaratory relief

4. The law is thus established that to obtain a declaratory relief as to a right, there has to be evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon

the state of the pleadings or by admissions therein. (p. 1202 C)

Arbitration - Customary arbitration

5. Over and above the irregularities pointed out in the alleged arbitration, it has been firmly held by this court in at least two cases, namely, *Agu v. Ikewibe* (1991) 3 NWLR (pt.180) 385 and *Ohiaeri v. Akabeze* (1992) 2 NWLR (pt.221) I that for there to be a valid customary arbitration, five ingredients must be pleaded and proved, namely:

"(a) *That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons.*" C

(b) *That it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding.*

(c) *That the said arbitration was in accordance with the custom of the parties or of their trade or business.* D

(d) *That the arbitrator(s) reached a decision and published their award.*

(e) *That the decision or award was accepted at the time it was made."* E

I think anything short of these conditions will make any customary arbitration award risky to enforce. In fact it is better to say that unless the conditions are fulfilled, the arbitration award is unenforceable. F (p. 1204 A)

Appeals - Retrial

6. The conditions under which an appellate Court may order a retrial in a civil case are well known. Some of them may be stated here. It may well happen that a trial court made no finding of fact on conflicting material evidence adduced on an issue by both parties to an action, the resolution of which is essential to the just determination of the case; the proper course is to order a retrial unless the circumstances of the case do not warrant such an order: see *Atanda v. Ajani* (1989) 3 NWLR (pt.111) 511 at 536; or there has been a substantial misdirection by the court, or that some other substantial error by the court itself has oc- G H

curréd and the error cannot be corrected by the appeal court: see *Onifade v. Olayinwola* (1990) 7 NWLR (pt.161) 130 at 161, 167; or where it appears that the rules of fair hearing have been violated. In general, the appeal court must be satisfied before ordering a retrial that: (1) the other party is not thereby being wronged in a manner that there would be a miscarriage of justice; or (2) it cannot, in the exercise of its appellate jurisdiction, do justice in the case and bring all the litigation to an end; or (3) the justice of the case, looked at in all its special circumstances, justifies it. (p. 1205 H)

Retrial - Failure of case

7. When a plaintiff's case has failed in toto, that is to say, he has not succeeded in discharging the burden on him going by the evidence, a retrial order is inappropriate and will not be made. To make such an order in such circumstances will amount to affording the plaintiff a second chance, which he does not deserve, to prove what he failed to do at first: see *Elias v. Disu* (1962) 1 SCNLR 363. The proper course to take in that situation so long as the failure to prove is not due to a technical hitch or some other cause justifying a non-suit, is to make an order dismissing the action: see *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336. (p. 1206 E)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. What an issue is

An "issue" is a disputed point or question to which parties to an action have narrowed their several allegations and upon which they desire to obtain a decision of the court. The issue may be that of law or fact. (p. 1210 A)

2. The purport of a "joinder of issue"

A "joinder of issue" operates as a denial of every material allegation of fact in the statement of claim or in the proceeding pleading which is not expressly admitted. (p. 1210 B)

3. *Proper* traverse

The defendants are not expected to write out and traverse every sentence in the statement of claim. Allegations which do not go to the gist of an action need not be denied. There was a proper traverse. (p.1210 F)

B

REPRESENTATION

J.T.U. Nnodum Esq. for the Defendants/Appellants.

Chief F. A. Ilobi for the Plaintiffs/Cross-Appellants.

C

CASES REFERRED TO

Okagbue v. Romaine (1982) NSCC (Vol.13) 130 at 135-140

Katto v. Central Bank of Nigeria (1991) 9 NWLR (pt.214) 126 at 152

African Continental Bank Ltd v. Gwagwalada (1994) 5 NWLR (pt.342) 25 at 35

D

Sorungbe v. Omounwase (1988) 3 NSCC (Vol.19) 252 at 262

Lewis & Peat (N.R.I) Ltd v. Akhimien (1976) 7 S.C. 157

Agu v. Ikewibe (1991) 3 NWLR (pt.180) 385

Ohiaeri v. Akabeze (1992) 2 NWLR (pt.221)

E

Abusomwan v. Aiwerioba (1996) 4 NWLR (pt.441) 13

Kodilinye v. Mbanefo Odu (1935) 2 WACA 336

Ejiofor v. Onyekwe (1972) 12 SC 171

Okpaloka v. Umeh (1976) 9-10 SC 269

F

RULES REFERRED TO

High Court Rules, Laws of Eastern Nigeria, 1963. O. 33 r.11

LEAD JUDGMENT BY UWAIFO JSC

G

This appeal is from a judgment of the Court of Appeal, Port Harcourt Division delivered on 28th June, 1995. The case originated in the High Court of Imo State holden at Orlu. It is in respect of a land dispute between two families: namely, *Umuokwaraku* family (as plaintiffs) and *Umuduruohome* family (as defendants). The plaintiffs call the land *Ohia Ibekwe*. The defendants however say that two parcels of land are involved which they call *Ala Ohia Ibekwe* and a portion of *Ala Oforo*.

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On 21 October, 1985, the plaintiffs took out a writ of summons to commence this action. The reliefs eventually sought in the statement of claim were for:

"(a) *Declaration that the plaintiffs are entitled to the Customary or Statutory Rights of Occupancy to the said Ohia Ibekwe land in dispute shown in plaintiffs' plan No.DS4305/IM2291/85 filed with this Statement of Claim and of an annual value of about N10 (Ten Naira).*

(b) *N1,000 (one thousand Naira) as general damages for trespass.*

(c) *Perpetual injunction to restrain the defendants and members of their Umuaduruohome family, by themselves or by their agents and privies from further trespass on the said land and from further acting in violation of the plaintiffs' rights to their said land."*

The plaintiffs' case is that Ohia Ibekwe land was originally a juju forest which housed the ibekwe rain juju. Part of the forest was cleared by the first known chief rain-making juju priest of the plaintiffs' family. The traditional founder of Ohia Ibekwe forest land was one Okwaraku. He performed maximum acts of ownership and possession thereon by way of farming the land and ministering onto the said rain juju. On his death, his three sons, namely, Iheakongaonome, Nwaire and Ewuzie succeeded to all his lands including Ohia Ibekwe juju forest land. Iheakongaonome became the chief priest of ibekwe juju and took charge of the juju forest. On the death of Iheakongaonome, his eldest son Okwaranyekwere succeeded him. He was himself succeeded by eldest son Chigbue and then Dike the eldest son of Chigbue; and then Okwaebuzie the eldest son of Dike; followed by Okwaranya the eldest son of Okwaebuzie; and finally by the 1st plaintiff the eldest son of Okwaranya.

The plaintiffs gave three instances in which they permitted members of the defendants' family to build on the land in dispute. First, that sometime in 1952, one Mazi Ezete Eke along with his relations from the defendants' family approached the plaintiffs' family with customary wine to give land to his son Francis to establish a compound. The plaintiffs obliged. Second, that one Mazi Obiala of defendants' family was allowed an area of land adjoining the land in dispute by the plaintiffs' family to

build his compound. Third, that one Mrs. Duruihesie of the defendants' family who, although her mother hailed from the plaintiffs' family, was permitted by the plaintiffs' family to erect a store partly on a portion of plaintiffs' land sharing common boundary with the defendants' family land.

The defendants on their part, while denying the plaintiffs' side of the case, admitted that the forest has always been a juju forest housing a juju they also call ibekwe. They claim, as already said, that two pieces of land are in dispute, namely, one called Ala Ohia Ibekwe and a portion of another called Ala Oforo. They say that the said pieces of land were founded by their ancestor Okohia (founder of Okohia village). They trace the genealogy and the way the land devolved as follows: Okohia begat Duruoleme, Ofeke (defendants' ancestor), Elekuba (plaintiffs' ancestor), Nnakwe and Durunokwara in that order of seniority. Ofeke inherited the land on the death of Okohia. He begat Okwaraozumba, Durugbo, Okoroezonwanokwutere, Duruonome (the defendants' forefather) and Duruaro. The defendants who are the descendants of Duruonome are known as and called Umuduruohome. Duruonome inherited the land in dispute. He begat Duruoha, Ubawugo and Okolie, all three of whom are the direct progenitors of the defendants and those they represent in this suit. The defendants' case further shows that members of their family live on the land and carry on all manner of farming but that the plaintiffs do not live on any part of the land. In addition, the defendants' family members have exploited indian bamboo and felled economic trees on the land over the years. Also, the chief preisthood of the ibekwe juju has remained in the Duruohome family descending to the lineage of his first son while the second son's lineage is the rain-maker. The defendants also pleaded and gave evidence that there was arbitration in respect of a dispute over a portion of Ala Ohia Ibekwe which was in their favour. Finally, they pleaded the ancient trench (*Nkoro*) as the common boundary between the parties and gave evidence accordingly. It is important to mention that the plaintiffs clearly acknowledge in their pleading and evidence the existence of the said ancient trench. Indeed, P.W.1, Romanus Ezimoha, although denying that the trench forms the boundary between them and the defendants, admitted in evidence that sometimes an ancient trench could form

the boundary between communities or families.

Thus, from the pleadings and evidence, essentially, the root of title put forward by each party was based on traditional history as to the founding and devolution of the land in dispute. The learned trial judge (Ononuju, J) proceeded to consider the case by examining the traditional histories of both parties. He held the view that they were inconclusive. He then considered recent acts of ownership. This was obviously on the principle laid down in *Kogo v. Bonsie* (1957) 1 W.L.R. 1223. On the facts available he made the following observation:

"On acts of ownership and possession there are (sic) abundant evidence in support. It is agreed on all sides that the defendants live on parts of the land in dispute. On three sides they share common boundary with other people. They live almost round the land in dispute.... Some of the defendants' people who lived on the land in dispute and died there were buried there without any permission from the plaintiffs."

Next, the learned trial judge touched on the assertion by the plaintiffs that they permitted some of the defendants' people to build on the land and live there. He said:

"On the question of allowing the defendants' people to live on the land in dispute, plaintiffs were unable to show the manner in which the portions of the land in dispute were allowed to the defendants' people to live. Is it outright grant, pledge or temporary grant. What were the conditions of the grant, the plaintiffs did not say."

The learned trial judge later concluded:

"I am not satisfied with the evidence of the plaintiffs that they allowed the people of the defendants to live on Ohia Ibekwe land and Ala Oforo. The plaintiffs have not explained to the satisfaction of the Court why they do not live on Ohia Ibekwe and Ala Oforo but allowed the defendants' people to live there."

As to what separates the plaintiffs' land from the defendants' land, the learned trial judge had this to say by reference to the survey plan, exhibit A:

"From Exhibit A there seems to me to be no road leading from the compound of the plaintiffs to the land in dispute. According to Ex-

hibit A there is a road from the land of the plaintiffs - 'Not in Dispute' - from the west which joins the Nkoro - ancient trench, to the north, separating the land in dispute from where the plaintiffs own their houses and where they live. It is this Nkoro or ancient trench that defendants say is the boundary between them and the plaintiffs. It is admitted by the plaintiffs that some times Nkoro or ancient trench can form boundaries. I am inclined to believe the defendants that that Nkoro or ancient trench is their boundary with the plaintiffs in respect of the land in dispute. From Exhibit A there appears nothing to show how the plaintiffs cross the said Nkoro or ancient trench to the land in dispute to worship the said juju or make rains on the land in dispute. The 1st plaintiff who was said to be the present juju priest did not give evidence. I do not believe the traditional evidence of the plaintiffs"

The learned trial judge also considered the questions that arose from the arbitration alleged by the plaintiffs. In the arbitration which p.w.3, Chief Alphonsus Obi, was supposed to have conducted, the said p.w.3 said he found the land in dispute to belong to the plaintiffs. Although the witness said he could neither read nor write, he could sign his name. Curiously, he said he awarded "123 feet of the land in dispute" to the defendants and "103 feet of the land in dispute" to the plaintiffs. The learned trial judge regarded this as absurd because it is inconceivable that the said p.w.3 found the land to belong to the plaintiffs and yet not only would be decide to share it between the disputing parties but would give a smaller share to the alleged owners. Of course, the defendants who could not accept to share their land with non-owners appealed to the Chief of the area, Eze C.U. Okwarauba (d.w.2), who awarded the land to the defendants. The learned trial judge finally concluded that the plaintiffs failed to prove their case and accordingly dismissed it.

The plaintiffs appealed against the judgment, and on 21 June, 1995, the Court of Appeal, Port Harcourt Division, allowed the appeal, set aside the judgment of the trial Court and ordered a retrial before another judge. It seems to me that main reasons of the lower court [per the leading judgment of Muntuka-Coomassie JCA, concurred in by Edozie and Onalaja JJCA] for its decision are grounded on two matters, namely: one, an

alleged evasive pleading by the defendants to certain averments in the statement of claim which the lower court considered crucial; and two, the treatment by the learned trial judge of the evidence of an alleged customary arbitration. The defendants have appealed against the judgment on the complaint that it was wrong to have upturned the learned trial judge's decision on any of those reasons. The plaintiffs have themselves cross-appealed to contest the retrial order by the lower court and to argue for outright judgment granting the reliefs they sought. I shall henceforth refer to the defendants as the appellants and the plaintiffs the cross-appellants.

The appellants have raised four issues for determination. The cross-appellants in their response raise virtually the same issues although couched rather slightly differently. The issues are (as put by the appellants):

- "1. Whether the Court of Appeal misconceived the essence of joinder of issues in relation to the pleadings in this case.*
- 2. Whether the Court of Appeal was right in holding that the appellants did not join issues with the respondents on material aspects of the case.*
- 3. Whether the Court of Appeal was right in disregarding the customary arbitration of the traditional ruler of the parties which ended in favour of the appellants.*
- 4. Whether the Court of Appeal was justified in making an order of retrial."*

These issues can actually be reduced to three and when so done they may be stated thus:

1. Was there such inadequate joinder of issues which justified the Court of Appeal setting aside the trial court's judgment?
 2. Was there a binding customary arbitration which the Court of Appeal ought to uphold?
 3. Was there any circumstances manifest in the entire case found at the end of the appeal to justify the Court of Appeal ordering a retrial?
- As already indicated, there is a cross-appeal. I think a resolution of the above-stated issues will decide the fate of the cross-appeal in which the

sole issue is:

"Whether in all the circumstances of the case, the Court of Appeal was justified in ordering a retrial instead of granting the plaintiffs the reliefs sought?"

This is, in effect, the same as issue No.3 above-stated which arises in the main appeal. B

Issue No.1

This issue gives rise to the further questions (1) whether paragraphs 7 and 10 of the statement of claim raise issues each of which must be met as a matter of pleadings in the statement of defence; (2) whether they were in fact sufficiently met in the way they were answered in the relevant paragraphs of the statement of defence; and (3) whether in the nature of the action in which a declaration was sought, the cross-appellants (as plaintiffs) could rely on what they regard as admissions in support of that relief. C D

Learned counsel for the appellants has submitted that one of the major points canvassed by the cross-appellants in their appeal to the Court of Appeal was that the appellants did not, in their statement of defence, join issues with them on the averments of original ownership and deforestation of the land in dispute. He contends that the lower court was first confused about the difference between the raising of issues and the joinder of issues and mixed up both, but that it however came to the conclusion that the appellants (as defendants) made an evasive denial of the issues raised in the statement of claim. Learned counsel argues that it is not every issue of fact raised on the pleading of a party (which fact may be in issue) that is an issue for the purposes of pleading. He further argues that, in any case, the issues in question in the present case, were sufficiently met and joined in the statement of defence. Learned counsel for the cross-appellants, on the other hand, contends that an effective joinder of issue is not achieved by a mere or general denial. He says that a proper traverse arises when a party affirms a fact and the opponent denies that fact specifically or by necessary implication. I think that is the legal position of effective pleadings in general. Learned counsel argues further that the lower court found that the appellants were evasive in E F G H

their pleadings and accordingly by the applicable rules of procedure, the facts evaded were deemed established.

Let me here set out the relevant averments in paragraphs 7 and 10 of the statement of claim and the response to them in the statement of defence:

"7. *The Ohia ibekwe was originally a juju forest which housed the Ibekwe rain juju. Most of it was cleared by plaintiffs' family of its forest vegetation and farmed as shown in plaintiffs' plan. Only the portion in dispute has its forest vegetation still left uncleared as that portion contains the ancient juju shrine verged orange in plaintiffs' plan.*

10. *The larger Ohia Ibekwe land including its portion in dispute was originally the reserved juju forest owned by the plaintiffs Umuokwaraku family which is a traditional rain making family in Okohia village Isiekenesi. The first known chief rain-making juju priest and traditional founder of the Ohiaibekwe forest lands was Okwaraku, from whom the plaintiffs' family descended. During his time, he performed maximum acts of ownership and possession over the entire Ohia Ibekwe land verged green in the plan as well as over the adjoining lands south and west on which members of plaintiffs' family live and farm as shown in plaintiffs' plan. He ministered unto the rain juju called Ibekwe and was consulted by persons who needed favours or services of the said Ibekwe juju.*"

The cross-appellants as well as the lower court thought that the response to the above-stated averments in paragraphs 4 and 7 of the statement of defence was evasive.

I shall now reproduce the said para.4 and relevant aspect of the said para.7 as follows:

"4. *While denying paragraphs 7,8 and 9 of the statement of claim, the defendants state that a part of ALA OHIA IBEKWE has always been a juju forest housing a juju known as IBEKWE. The precincts of the juju are known as and called IHU IBEKWE and verged yellow in the defendants' survey plan. The chief priest of the juju is Duru Echefu, the 4th defendant. The juju was founded by Duruohome, the ancestor of the defendants.*

7. *The defendants strenuously deny paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of the statement of claim as they are tissues of lies. The defendants state further that the lands in dispute descended to the defendants from OKOHIA the parties' ancestor and founder of Okohia village....."*

The argument of appellants' counsel is that the cumulative effect of the two paras. 4 and 7 above is a total denial of paras.7 and 10 of the statement of claim. He says that while the said para.4 expressly denied para.7 of the statement of claim, it went further to aver about the juju forest and the founding of the juju itself. Again, para. 7 of the statement of defence specifically denied para.10 among others of the statement of claim and proceeded further to aver that the parties to this action descended from a common ancestor called Okohia, the founder of Okohia village. Therefore, argues learned counsel, the appellants directly challenged the averment in the statement of claim that the root of title was in the plaintiffs' family. That having been done, he says, there would be no need to specially allude to deforestation, rain-making juju etc pleaded by the appellant in elaboration of their averment. I think there is much force in appellants' counsel's submission as I shall show.

In the meantime, it is pertinent to refer to a further argument of cross-appellants' counsel on why he considers the defence in question evasive or inadequate. He analyses what he understands to be the issues in the said paras.7 and 10 of the statement of claim in the sense in which they "comprise the facts and highlights of the traditional history of the larger ancient Ohia Ibekwe land including its only remaining axe-shaped portion in dispute which has remained undeforested as shown in both plans filed by the parties" which the appellants ought to have met frontally in their statement of defence. I shall take his analysis verbatim from the cross-appellants' brief of argument as follows:

(1) That the original or larger Ohia Ibekwe land verged green was a reserved juju forest of the plaintiffs' founding ancestor. (2) That it housed the plaintiffs' family's Ibekwe rain juju. (3) That most of the original forest verged green in plaintiffs' plan was subsequently cleared of its forest vegetation by the plaintiffs' family. (4) That the deforested

parts except the axe-shaped portion as shown in the parties plans were farmed by the plaintiffs' family. (5) That the only portion containing the physical shrine stone was left undeforested because of the shrine structure shown in both plans (rain making stone) (6) That the undeforested portion out of the original expanse of the forest land is the only portion in dispute in this case (7) That the plaintiffs' family is the parties' village traditional rain making family. (8) That the founder of the juju forest was the plaintiffs' ancestor who performed rain making and juju ministerial activities in the forest land. (9) That the founder's activities in the juju forest land were those of an owner and of maximum import and extended over the entire ancient larger Ohia Ibekwe land verged green in the plaintiffs' plan as well as over the adjoining lands South and West where plaintiffs' people live and farm. Learned counsel then asks, to use his very words, with the above specific facts frontally placed for specific answers, can it be truly argued that the defendants came forward with answers as required by the Rules of Court? He went on to answer that the defendants could not be said to have traversed the above specific facts by their general denial.

It was this same argument that the cross-appellants' counsel presented to the lower court. The lower court saw merit in it. In resolving the issue, Muntaka-Coomassie JCA observed and concluded *inter alia*:

"I have already reproduced the submissions of both counsel on the position of the pleadings, evidence and exhibits coupled with the relevant authorities cited thereon. Having considered paragraphs 4, 7 and 10 of the statement of claim and the area verged green in their plan Exh. 'A' together with the relevant evidence of the plaintiffs vis-a-vis the statement of defence, relevant to this issue, and their evidence thereto, I believe there was joinder of issues, therefore I hold that the plaintiffs in the lower court had pleaded in their paras. 7 and 10, material facts which metamorphosed into issues I therefore agreed that to counter same, the defendants must specifically and distinctively traverse them. Failure to specifically and materially traverse these specific issues by the defence in their statement of defence tantamounted (sic) to admitting

same. See Order 33 Rule 11 of the High Court Rules, Laws of Eastern Nigeria 1963 which provides thus:

'When a party denies an allegation of fact he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.'

..... I think paras. 7 and 10 of the statement of claim could be sufficiently described as issues because on them alone the plaintiffs can earn a relief and the defendants can try and demolish them for their own defence. Any material fact which can suit this description can be regarded as an issue requiring thereby a specific traverse or else it would amount to admission on the part of the defence... I hold therefore that the defendants before the trial court had a clear evasive denial to material issues filed by the plaintiffs. The defence therefore must be deemed to admit the specific pleadings in those paragraphs under consideration, namely, paras.7 and 10 of the statement of claim Having decided that the defendants had no answer to a very vital issue the learned trial judge with respect cannot be justified in ignoring the evasive denial of the defence. Had he taken proper course, he would have arrived at a different decision."

I have decided to quote the learned Justice in extenso for three main reasons. First, to show that he may not have proceeded to resolve the issue on the basis of the substance of the said averments in the statement of claim and the direct denial together with the accompanying further averment in the statement of defence having regard to the traditional histories by both parties. Second, the learned Justice seemed to imply from his observation that every fact put in issue by the plaintiff necessarily raises an issue for pleading purposes and for the determination of the litigation in which it arises. Third, it is clear beyond dispute that this question of the alleged evasive denial affected the decision of the lower court. It is therefore necessary for a fair resolution of this appeal to pay due attention to whether there was evasive or insufficient denial.

It is important to realise that both parties rely on traditional his-

tory for their respective root of title. The substance of the cross-appellants' traditional history is that the land was founded by their ancestor Okwaraku and that the land successively devolved through his descendants to the cross-appellants. The substance of the appellants' traditional history on the other hand is that the land was founded by Okohia who indeed founded Okohia village. They say the said Okohia was the ancestor of both parties to this action. They also plead successive descendants to whom the land devolved until it got to the appellants. What was at that state of the pleadings at issue was who founded the land in dispute in accordance with the traditional history put forward by each side. It was on this contention issue was joined. It is true that the cross-appellants further pleaded other issues concerning, for example, ibekwe rain juju, rain-making stone, traditional rain-making family, the present chief priest of the juju being Udeazor Okwaraonyia (1st plaintiff) etc. But so also did the appellants plead ibekwe juju; the juju having been founded by one Duruohome said to be an ancestor of the defendants; the present chief priest of the juju being Echefu (4th defendant); rain-making stone said to be in the possession of Echefu etc.

By and large, there are some similarities in the averments of both parties. These other averments may have been pleaded by each side as issues they would rely on in achieving what was really at issue. The appellants having pleaded a founder of the land in dispute different from the one pleaded by the cross-appellants could not be expected to specifically deny every other issue raised by them particularly as they pleaded their own issues in support of what they put at issue, namely, the founding of the land in dispute. That is the gist of the action. That was sufficiently, in my view, met by the appellants in their statement of defence. **The law is that in determining whether issue has been joined on a point, it is not proper to consider a particular paragraph of the statement of defence in isolation of the other paragraphs. This is so because those other paragraphs may contain averments which amount to specific denial in the sense that they put up a case different from that of the plaintiff although not directly mentioning the paragraphs of the statement of claim being denied or disputed.**

That is how to ascertain the issues properly joined on the pleadings: see *Ugochukwu v. Coop. & Commerce Bank Ltd* (1996) 6 NWLR (pt.456) 524 at 537. There was no general traverse or denial in those relevant paras. 4 and 7 of the statement of defence in this action in the way general traverse is understood. What order 33, r.11 of the High Court (Civil Procedure) Rules applicable to this case provides is that:

"11. When a party denies an allegation of fact he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given." (Italics for emphasis) C

The purpose of pleadings is to bring the parties to issues that arise so that either part may know the real points to be discussed and decided when the case comes on for trial. In other words, the issues to be resolved are defined before hand. But they must be issues upon facts which are relevant for pleading purposes in the sense that they go to the substance of the matter calling for a decision; and there is no obligation as a pleading procedure to set out the subordinate facts that may help as evidential material. In that case, the parties must only plead in such a way as to prevent surprise when leading evidence in support of their case: see *Okagbue v. Romaine* (1982) NSCC (Vol.13) 130 at 135-140; *Katto v. Central Bank of Nigeria* (1991) 9 NWLR (pt.214) 126 at 152; *African Continental Bank Ltd v. Gwagwalada* (1994) 5 NWLR (pt.342) 25 at 35. D
This court in Okagbue v. Romaine (supra) at p.140 per Idigbe JSC made reference to the observation of much relevance in *Williams v. Wilcox* (1838) 112 E.R. 857 at 863, per Denman C,J, which observation I think is valid here and I again endorse it as this court earlier did. E
F
G

The reference to the observation arose like this. The plaintiff in the statement of claim (respondent in the appeal) in the *Okagbue case* pleaded (a) persons who were the earliest settlers on the land in dispute in Onitsha; (b) that the land was formerly held by the Royal Niger Company; and (c) that she occupied the land as land which originally belonged to the Mgbelekeke family although at one time or the other it came H

into the possession of the Royal Niger Company. At page 139, Idigbe JSC then observed:

"These facts were put in issue by the appellants. It then behoved the respondent to lead evidence (but not to plead such evidence) by which she intends to prove the averments. In the circumstances, although [learned counsel for the appellant] put forward a sustained argument to that effect, he failed to persuade me that it was not open to the learned trial judge to consider such evidence in coming to the conclusion which this appeal challenges; nor, that the Court of Appeal was wrong in upholding the said judgment. [Learned counsel for the appellant] contended that the respondent should have pleaded (but never did), (1) how the Royal Niger Company came to possess the land in dispute, (2) how and when they surrendered the same to the Government and (3) how the Mgbelekeke family came to own the land so surrendered. These are unnecessary in the circumstances of this case."

(parenthesis in square brackets by me)

It was in this connection the said observation made by Denman C.J. was quoted as follows:

"it is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, and almost identical with the present, if a trespass be justified by a plea of highway, the pleader never states how the locus in quo became highway; and, if the plaintiff's case is that the locus in quo, by an order of justice, award of inclosure commissioners, Local Act of Parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to shew, in proof, that it had before then ceased to be such."

[Italics by Idigbe JSC]

The cross-appellants relied both in the lower court and in this court on *Lewis & Peat (N.R.I) Ltd v. Akhimien* (1976) NSCC (Vol.10) 360 to argue that the averments of the appellants in paras. 4 and 7 of their

statement of defence amounted to a general denial of issues raised in paras. 7 and 10 of the statement of claim. It was that same case the lower court relied on to reach a decision that there was evasive denial. **I think *Lewis & Peat v. Akhimien* (supra) has quite often been misapplied.** That authority is concerned with the traverse of essential and material allegations. It is there stated in that case that in respect of essential and material allegations, there should be no general traverse, but rather they should be specifically traversed: see page 365. What is essential and material will depend on the real question for determination in any particular litigation. This point was made clear by this court in *Lewis & Peat* case at page 363 per Idigbe JSC when he observed:

"When as a result of exchange of pleadings by parties to a case a material fact is affirmed by one of the parties but denied by the other, the question thus raised between the parties is an 'issue of fact'.... It is not, however, every issue of fact raised on the pleadings and which although 'in issue' that is 'an issue' in the sense used in the contentions of learned counsel, on both sides In every litigation a number of issues of fact may arise but unless they have a bearing on the principal question for determination they certainly do not by themselves or together form 'an issue' in the sense in which the expression is used in the contention of learned counsel....."

[Italics for emphasis]

I have made it clear in the course of this judgment that the principal question in regard to the root of title is the reliance on traditional history by either party whereof the founder of the land in dispute together with the line of devolution as averred by one party is different from that averred by the other. The cross-appellants pleaded other 'supporting' issues of that principal question. So did the appellants. An issue was clearly joined on that principal question as to the respective traditional histories. The traverse was specific and definite enough. I therefore find myself, with due respect, unable to support the finding of the lower court that the defence of the appellants in paras. 4 and 7 of their statement of defence was evasive.

I must add that in the present case in which a declaration was sought by the cross-appellants, it would have been futile to seek refuge in admission arising impliedly from any alleged evasive traverse or denial. In *Vincent Bello v. Magnus Eweka* (1981) 1 SC 101 at 102, this court observed per Obaseki JSC:

"It is true as was contended before us by the appellant's counsel that the Rules of Court and Evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence, not by admission in the pleading of the defendant that he is entitled to the declaration."

[Italics for emphasis]

The law is thus established that to obtain a declaratory relief as to a right, there has to be evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or by admissions therein: see *Helzger v. Department of Health & Social Welfare* (1977) 3 ALL ER 444 at 451 where Megarry V-C observed:

"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument: that is quite plain."

I may here also refer to what was observed in *Sorungbe v. Omotunwase* (1988) 3 NSCC (Vol.19) 252 at 262 per Nnamani JSC as follows:

*"The Court of Appeal relied on the decision of this Court in *lewis & peat (N.R.I) Ltd v. Akhimien* (1976) 7 S.C. 157 to the effect that an averment which is not expressly traversed is deemed to be admitted. Admittedly one does not need to prove that which is admitted by the other side. But in a case such as one for declaration of title where the onus is clearly on the plaintiff to lead such strong and positive evidence to establish his case for such a declaration, an evasive averment does not remove the burden on the plaintiff."*

I must in the circumstances of this case come to the conclusion

that the lower court was wholly in error in its view that there was evasive traverse or denial resulting in inadequate joinder of issues at the trial court; while concluding at the same time which, I think, is an obvious contradiction having regard to the final judgment it arrived at, that the alleged evasive traverse amounted to admission. If it amounted to admission the consequence would have led the lower court to give judgment for the cross-appellants, allowing their claim, rather than ordering a retrial. There is no doubt in my mind that its decision to reverse the judgment of the learned trial judge, was utterly unjustified. I therefore answer issue No.1 in the negative. C

Issue No.2

The evidence of an alleged customary arbitration was given by Chief Alphonsus Obi (p.w.3). He said the cross-appellants reported a land matter to him against the appellants. He summoned the parties, they appeared and stated their respective cases. He found that the land, called Ohia Ibekwe, belonged to the cross-appellants. But when cross-examined he said: D

"After the arbitration I awarded 123 feet of the land in dispute to the defendants. It is true I awarded 103 feet of the land in dispute to the plaintiffs." E

There is nothing to suggest why, after finding that the cross-appellants (i.e. the plaintiffs) were the owners of the land in dispute, he had to share the said land and awarded it between them and the appellants (i.e. the defendants); not only that, why he gave a large share to the alleged non-owners. This is a completely ridiculous evidence coming from the plaintiffs. The witness added that they appealed against his decision to the Eze. F

The said Eze testified as d.w.2. he is Eze C.U. Okwarauba the Ononigwe II of Isiekenesi. He said he invited both parties and heard each side and the witnesses. He inspected the land in dispute which he called *Ihu Mbakwe*. He came to the conclusion that the land belonged to the appellants and awarded it to them which he recorded in exhibit C. Although he alleged that he took the decision with his Cabinet, he admitted that exhibit C made no reference to the fact that his Cabinet took the decision with him and that the said exhibit did not contain the names of G H

the members of the said Cabinet. It must also be observed that the name *Ihu Mbakwe* which the witness said the land in dispute was called is not what either of the parties called it. **Over and above the irregularities pointed out in the alleged arbitration, it has been firmly held by this court in at least two cases, namely, *Agu v. Ikewibe* (1991) 3 NWLR (pt.180) 385 and *Ohiaeri v. Akabeze* (1992) 2 NWLR (pt.221) I that for there to be a valid customary arbitration, five ingredients must be pleaded and proved, namely:**

"(a) That there had been a voluntary submission of the matter in dispute to an arbitration of one or more persons.

(b) That it was agreed by the parties either expressly or by implication that the decision of the arbitrator(s) would be accepted as final and binding.

(c) That the said arbitration was in accordance with the custom of the parties or of their trade or business.

(d) That the arbitrator(s) reached a decision and published their award.

(e) That the decision or award was accepted at the time it was made."

I think anything short of these conditions will make any customary arbitration award risky to enforce. In fact it is better to say that unless the conditions are fulfilled, the arbitration award is unenforceable. In *Ohiaeri v. Akaeze* (supra), Akpala JSC who read the leading judgment proffered a rationalisation for the need to be circumspect about customary arbitration. He observed at page 24 thus:

"It is a common feature of customary arbitration in a closely knit community that some of the arbitrators if not all, not only have prior knowledge of the facts of the dispute, but also have their prejudices and varying interests in the matter, and are therefore sometimes judges in their own cause and are likely to pre-judge the issue. Prior knowledge and pre-judging issues are more pronounced in land disputes having bearing with the founding of the village and how families migrated to the village and come to occupy parcels of land. The arbitrators are well informed on these matters. The position however is that traditional his-

tory is sometimes transmitted, received or construed with a slant by the person using it for a purpose. Hence it is essential before applying the decision of a customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted to the arbitration, consciously indicated their willingness to be bound by the decision and had immediately after the pronouncement of the decision unequivocally accepted the award." B

The learned Justice had earlier quoted the observation of Karibi-Whyte JSC in *Agu v. Ikweibe* (supra) at page 407 as follows:

"It is well accepted that one of the many African customary modes of setting dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which becomes binding only after such signification of its acceptance, and from which either party is free to resile at any stage of the proceedings up to that point....." C D

Karibi-Whyte JSC in that same case also at page 407 gave a definition of customary arbitration much in line with his observation quoted above. E He said:

"What then is a customary arbitration? I venture to regard customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the Arbitrators who are either the Chiefs or Elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable." F

The learned Justice virtually maintained this view in *Ohiaeri v. Akabeze* (supra) at page 28; so did Belgore JSC at page 29. That is certainly the position of the law in regard to customary arbitration. In the present case both the pleadings and evidence on the alleged arbitration are completely defective. The ingredients were not pleaded and not proved. The so-called arbitration is worthless. The lower court correctly pointed out the deficiencies in the arbitration. I therefore answer Issue No. 2 in the negative. G H

Issue No.3

The conditions under which an appellate Court may order a

retrial in a civil case are well known. Some of them may be stated here. It may well happen that a trial court made no finding of fact on conflicting material evidence adduced on an issue by both parties to an action, the resolution of which is essential to the just determination of the case; the proper course is to order a retrial unless the circumstances of the case do not warrant such an order: see *Atanda v. Ajani* (1989) 3 NWLR (pt.111) 511 at 536; or there has been a substantial misdirection by the court, or that some other substantial error by the court itself has occurred and the error cannot be corrected by the appeal court: see *Onifade v. Olayinwola* (1990) 7 NWLR (pt.161) 130 at 161, 167; or where it appears that the rules of fair hearing have been violated: see *N.B.N. Ltd v. P.B. Olatunde & Co Ltd* (1994) 3 NWLR (pt.334) 512 at 526. In general, the appeal court must be satisfied before ordering a retrial that: (1) the other party is not thereby being wronged in a manner that there would be a miscarriage of justice; or (2) it cannot, in the exercise of its appellate jurisdiction, do justice in the case and bring all the litigation to an end; or (3) the justice of the case, looked at in all its special circumstances, justifies it: see *Abusomwan v. Aiwerioba* (1996) 4 NWLR (pt.441) 13. However, when a plaintiff's case has failed in toto, that is to say, he has not succeeded in discharging the burden on him going by the evidence, a retrial order is inappropriate and will not be made. To make such an order in such circumstances will amount to affording the plaintiff a second chance, which he does not deserve, to prove what he failed to do at first: see *Elias v. Disu* (1962) 1 SCNLR 363. The proper course to take in that situation, so long as the failure to prove is not due to a technical hitch or some other cause justifying a non-suit, is to make an order dismissing the action: see *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336; *Ejiofor v. Onyekwe* (1972) 12 SC 171; *Okpaloka v. Umeh* (1976) 9-10 SC 269; *Okeowo v. Migliore* (1979) 11 SC 138; *Anyaoke v. Adi* (1986) 3 NWLR (pt.31) 731.

In the present case, the learned trial judge after carefully examining the evidence made vital findings in consonance with the evidence.

First, he rejected the traditional history of the cross-appellants. Second, he held that the *Nkoro* or ancient trench as depicted in the survey plan, exhibit A, constituted the common boundary between the two parties, and that boundary places the land in dispute outside the jurisdiction of the cross-appellants. Third, he rejected the assertion by the cross-appellants that they permitted the appellants to live on Ohia Ibekwe land and Ala Oforo, the land in dispute. Finally, he concluded: *"I have carefully considered the evidence before me, the submissions of learned counsel on both sides and the decided cases to which this Court is referred, it is my considered judgment that plaintiffs have not proved their case as required by law, and their claim is hereby dismissed with costs."*

I am satisfied that the learned trial judge reached the correct conclusion on this case upon the evidence. I must remark that he did not in the end rely on the so-called arbitration award and I think he was perfectly right in that regard. The lower court was therefore, in my view, in error to have ordered a retrial. This accordingly disposes of the cross-appeal which I hereby dismiss as having no merit. I allow the appeal, set aside the judgment of the lower court together with the order for costs and restore the judgment of the trial court. I award N5,000.00 as costs in the court below and N10,000.00 as costs in this court to the appellants against the cross-appellants.

BELGORE JSC

I agree that this appeal has great merit. The evidence on the pleadings before trial court has no ambiguity and the findings of fact in that court ought not be disturbed by Court of Appeal. I agree with the judgment of my learned brother, Uwaifo JSC that the order for retrial by Court of Appeal is not right. I therefore also allow the appeal, set aside the judgment of Court of Appeal and restore the judgment of trial court. I make the consequential orders as in the fuller judgment of my learned brother, Uwaifo JSC.

OGWUEGBU JSC

I have had the privilege of a preview in draft of the leading judg-

ment just delivered by my learned brother Uwaifo, J.S.C. and I am in agreement with his reasoning and conclusion.

I agree that the defendants' appeal succeeds and the plaintiffs/cross/appellants' appeal fails. I will however wish to make some contribution on the issue whether there was such inadequate joinder of issues which justified the setting aside of the judgment of the learned trial judge by the court below. This appears to be the main plank upon which the court below reversed the decision of the trial judge. In that court the plaintiffs who were the appellants contended that the defendants did not join issues with them on the averments in the statement of claim as to the original ownership and deforestation of the land in dispute. The arguments before the court below turned on whether the defendants effectively denied paragraphs 7 and 10 of the statement of claim of the plaintiffs in paragraphs 4 and 7 of their statement of defence.

The court below agreed with the plaintiffs that the defendants had a clear evasive denial of material facts pleaded by them. I will set down the relevant pleadings and examine them. Paragraphs 7 and 10 of the statement of claim read as follows:

"7. The Ohia Ibekwe was originally a juju forest which housed the Ibekwe rain juju. Most of it was cleared by plaintiffs' family of its forest vegetation and farmed as shown in plaintiffs' plan. Only the portion in dispute has its forest vegetation still left uncleared as that portion contains the ancient juju shrine verged orange in plaintiffs's plan.

10. The larger Ohia Ibekwe land including its portion in Dispute was originally the reserved juju forest owned by the plaintiffs Umuokwaraku family which is a traditional rain making family in Okohia village Isiekenesi; The first known chief rain-making juju priest and traditional founder of the Ohiaibekwe forest land was Okwaraku, from whom the plaintiffs' family descended. During his time, he performed maximum acts of ownership and possession over the entire Ohia Ibekwe land verged green in the plan as well as over the adjoining lands South and West on which members of plaintiffs' family live and farm as shown in plaintiffs' plan. He ministered unto the rain juju called Ibekwe and was consulted by persons who needed favours or services of the said

Ibekwe juju."

The reply of the defendants to the above averments can be found in paragraphs 4 and 7 of their statement of defence and they read thus:

"4. While denying paragraphs 7, 8 and 9 of the statement of claim, the defendants state that a part of ALA OHIA IBEKWE has always been a juju forest housing juju known as IBEKWE. The precincts of the juju are known as and called IHU IBEKWE and verged yellow in the defendants' survey plan. The chief priest of the juju is Duru Echefu, the 4th defendant. The juju was founded by Duruohome, the ancestor of the defendants.

7. The defendants strenuously deny paragraphs 10,11,12,13,14,15,16,17,18,19,20, and 21 of the statement of claim as they are issues of lies. The defendants state further that the lands in dispute descended to the defendants from OKOHIA the parties' ancestor and founder of Okohia village. Okohia begot Duruoleme, Ofeke (defendants' ancestor), Elekuba (plaintiffs' ancestor), Nnakwe and Duruokara in their order of seniority. OFEKE, whose descendants (the defendants) are known as and caled UMUOFEKE, inherited the lands in dispute after Okohia's death and begot Okwaraozumba"

The court below examined the above averments of the parties and stated as follows:

"Having considered paragraphs 4, 7 and 10 of the statement of claim and the area verged green in their plan Exh. 'A' together with the relevant evidence of the plaintiffs (all reproduced hereunder) vis-a-vis the statement of defence relevant to this issue, and their evidence thereto, I believe there was joinder of issues, therefore I hold that the plaintiffs in the lower court had pleaded in their paras 7 and 10 material facts which metamorphosed into issues.I therefore agreed that to counter same, the defendants must specifically and distinctively traverse them. Failure to specifically and materially traverse these specific issues by the defence in their statement of defence tantamounted (sic) to admitting same.I hold therefore that the defendants before the trial court had a clear evasive denial to material issues filed by the plaintiffs."

I have no doubt that the court below misconceived the purport of "an

issue" and "joinder of issues". This is manifest in the contradictory posture of that court. An "issue" is a disputed point or question to which parties to an action have narrowed their several allegations and upon which they desire to obtain a decision of the court. The issue may be that of law or fact. In one breadth the court below said that there was "joinder of issues" and in another, it said that the defendants had evasive denial of the material issues. A "joinder of issue" operates as a denial of every material allegation of fact in the statement of claim or in the proceeding pleading which is not expressly admitted. If there was a joinder of issues as found by the court below, how did the evasive denial come about?

Be that as it may, the vital and material facts affirmed by the plaintiffs and denied by the defendants in their pleadings are their respective roots of title based on traditional histories and the devolution of the land from the respective ancestors down to the present claimants. Furthermore, the defendants averred in their said paragraph 7 that the lands in dispute descended from Okohia, the common ancestor of both parties and founder of Okohia Village. Issues were joined on these material averments. Each of these vital allegations of the plaintiffs were denied by the defendants in their statement of defence. The principal question for determination in the action is "the founder" of the lands in dispute based on the traditional history pleaded. A close look at the pleadings in this case reveals that paragraphs 4 and 7 of the statement of defence specifically denied the averments in paragraphs 7 and 10 of the statement of claim. The defendants are not expected to write out and traverse every sentence in the statement of claim. See *John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd. & Ors.* (1946) 2 ALL E.R.685. Allegations which do not go to the gist of an action need not be denied. There was a proper traverse. See *Lewis Peat (N.R.I.) v. Akhimien* (1976) ALL N.L.R. (Reprint) 305 at 369-371, *Howell v. Bering* (1915) 1 K.B.54 at 62 and *Fidelitas Shipping Co. Ltd. v. V/C Exportchleb* (1965) 2 ALL E.R.4.

The court below was therefore in error in holding that the defendants' averments in paragraphs 4 and 7 of their statement of defence was evasive. The defendants admitted nothing and even if they did (which is

not the case) the aforesaid paragraphs of their statement of defence would not have relieved the plaintiffs of the burden on them to satisfy the court by evidence that they are entitled to the declaration sought. See *Bello v. Magnus Eweka* (1981) 1 S.C.101 at 102 and *Sorungbe v. Omotunwase* (1988)3 NSCC (vol.19)252. B

For the above reasons and the fuller reasons contained in the judgment of my learned brother Uwaifo, J.S.C., I hereby allow the appeal, set aside the judgment of the Court of Appeal, Port Harcourt Division dated 21st June, 1995 and restore the judgment of Ononuju, J. delivered on 11th December, 1989. The cross-appeal is dismissed by me. I subscribe to the order as to costs. C

ONU JSC

I had the advantage to read before now the judgment just delivered by my learned brother Uwaifo, JSC in draft form. I subscribe to his reasoning and conclusions that the appeal is meritorious. Accordingly, I too allow the appeal, set aside the judgment of the lower court together with the order for costs and restore the judgment of the trial court with N5,000.00 as costs in the court below and N10,000.00 as costs in this Court to the appellants against the Cross-Appellants. D E

KALGO JSC

I have had a preview of the judgment just delivered by my learned brother, Uwaifo JSC, and I entirely agree with his reasoning and conclusions. F

On the first issue of joinder of issues, it is very clear to me looking at paragraphs 4 and 7 of the appellants' statement of defence at the trial that they joined issue with the respondents / cross - appellants' paragraphs 7, 8 and 10 of the Statement of claim, on the substantive issues in controversy between them. It is not necessary in my view, and in the circumstances of this case, for the appellants in their pleadings, as defendants, to challenge every point or issue raised in the Statement of claim, if on the whole it is obvious that the main issues in controversy have been taken up in other paragraphs of their pleadings. In that case, G H

the issues in the case would be treated as being properly joined. I do not agree with the Court of Appeal that failure to challenge all the points raised in the Statement of claim by a defendant in his statement of defence would render the statement of defence as evasive. It was also wrong for the Court of Appeal to find that because the appellants' pleadings were evasive, according to them, it amounted to an admission. This in my respectful view, is a misconception of the issues involved and a clear contradiction on the part of the Court of Appeal. I hold that the appellants by their pleadings at the trial in paragraphs 4 and 7 had properly joined issues with the respondents/cross-appellants on material aspects of the case.

It is common ground that the parties relied on traditional history in proof of their title to the land in dispute. The customary arbitration which was conducted by the elders of their community or traditional rulers, did not comply with all the conditions necessary for its enforcement as set out in the leading judgment. It cannot therefore be accepted as valid in support of appellants' case. See Agu v Ikewibe (1991) 3 NWLR (pt.180) 385. But the learned trial judge has in my view, carefully reviewed the evidence before him and made clear findings based on acceptable evidence, before up-holding the appellant's case and dismissing the respondents / cross - appellant's case. I entirely agree with his findings and disagree with the Court of Appeal that the trial court misdirected himself on the evidence and the credibility of the witnesses. I also find that the order of retrial made by the Court of Appeal was unjustifiable and not in accordance with the conditions for retrial enunciated by this Court. See Yesufu Abodunde v The Queen (1959) SCNLR 162, Abibu v Binutu (1988) 1 NWLR (pt.68) 57; Briggs v Briggs (1992) 3 NWLR (pt.228) 128; Sanusi v Ameyogun (1992) 4 NWLR (pt.237) 527 at 549. Onifade v Olayiwola (1990) 7 NWLR (pt.161) 130.

In the result I allow the main appeal, set aside the decision of the Court of Appeal and restore that of the trial Court. I also find no merit in the cross-appeal which I hereby dismiss and abide by the consequential orders made in the leading judgment including the orders as to costs.