

SUPREME COURT OF NIGERIA

11TH MAY, 2001. SC. 35/1996

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, U. MOHAM-
MED, O. ACHIKE, E. O. AYoola, JJSC .**

AGUDORO EKPE & ORS.

(For themselves and on behalf DEFENDANTS/APPELLANTS
of other members of Umuanyanwu
Family of Umudim Okporo)

AND

BEN OKE & ORS.

(For themselves and on behalf of PLAINTIFFS/RESPONDENTS
other members of Umumeaku
Family of Umudim Okporo)

ARBITRATION - Customary arbitration - Submission to arbitration -
Where a party submitted to arbitration - He is bound by the result of the
arbitration (H 2)

CUSTOMARY LAW - Grant of land - Acts of ownership over the land -
Can only be exercised according to the terms of the grant (H 3)

EQUITY - Equitable defences - Laches and acquiescence - Conduct
that will amount to laches and acquiescence - Will be such that will be
repugnant to equity and good conscience (H 4)

JUDGMENTS - Findings - Supported by evidence - The court of Ap-
peal was right to have affirmed the findings (H 5)

JUDGMENTS - Slip - Which has not occasioned a miscarriage of jus-
tice - Cannot result in the appeal being allowed (H 1)

FACTS

In the High Court of Imo State holden at Orlu the Plaintiffs/
Respondents, claimed against the Defendants/Appellants for a declara-

tion that the plaintiffs are entitled to the customary rights in respect of the land in dispute; possession, and injunction restraining the Defendants, their servants, agents and privies from interfering with the rights of the Plaintiffs over the said parcel of land or in any manner selling parcels of the said land to anybody. It is the case of the plaintiffs' that the Defendants' ancestors migrated from their original home. They were given the three parcels of land in dispute by the plaintiffs' ancestors to live and cultivate upon payment of customary tributes and on the condition that the Defendants' ancestors would not alienate any portion of the land. The land in dispute is part of the land they inherited from their great ancestor DIM. They stated that the present dispute arose when the Defendants stopped paying the customary tributes and had in addition engaged in selling portions of the land in dispute without their knowledge and consent. The Plaintiffs claimed that the dispute was submitted by the parties to a body called Okporo Community Assembly for arbitration, and that the arbitrators awarded the land in dispute to them. They relied on the record of proceedings and decision of the arbitrators (Exhibit C).

The Defendants on the other hand denied that they are strangers and customary tenants of the Plaintiffs. As the Plaintiffs, the Defendants also traced their root of title to DIM. They claimed that their ancestor ANYANWU was one of the four sons of DIM, the plaintiffs' great ancestor, and that the land in dispute was the share that ANYANWU got when the children of DIM shared his landed property. The Defendants denied that they submitted to arbitration by Okporo Community Assembly over their dispute with the Plaintiffs. To show that the Defendants participated in the arbitration proceedings, their statement which they made to the arbitrators was tendered in evidence by the Plaintiffs as Exhibit D.

At the conclusion of trial, the learned trial judge in a reserved judgment found for the plaintiffs and entered judgment in their favour. The Defendants appealed to the Court of Appeal, Port Harcourt Division. The Court of Appeal, allowed the appeal in part when it refused the claim for possession and modified the order of injunction granted by the learned trial judge. Still dissatisfied, the Defendants have now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

“1. Whether the learned Justices of the Court of Appeal (like the trial court) by deciding the issue of title to the land in dispute by recourse to a different issue from the one upon which the case was pleaded, have by their judgment caused grievous injustice to the appellant’s case.

2. Whether there was sufficient evidence from which the Justices of the Court of Appeal could find that the defendants/appellants submitted to the arbitration pleaded by the Plaintiffs and received in evidence as Exhibit “C” in the light of exhibit “D” which was also pleaded and given in evidence and other relevant evidence.

3. Whether the Defendants/Appellants could not avail themselves of the defences of estoppel, laches and acquiescence pleaded and given in evidence by the Defendants to bar the plaintiffs’ judgment for title to the land in dispute.

4. Whether the learned Justices (like the trial Court) evaluated the evidence of the defendants at all or adequately on all the issues submitted for adjudication, particularly the issue whether the defendants are non-indigenous members of Umudim Okporo.

HELD (Unanimously dismissing the appeal per lead judgment of **KU-TIGI JSC**)

Judgments - Slip

1. It is trite law that it is not every slip committed by the lower court that can result in the appeal being allowed. Such will be the result only where it was substantial in the sense that it had occasioned a miscarriage of justice vide ALHAJI ABDULLAHI BABA VS NIGERIAN CIVIL AVIATION & ANOR (1991) 5 NWLR (PT. 192) 388 at 422. In this case the learned trial judge undoubtedly appreciated his duty with respect to the traditional history set up by the parties and after a thorough scrutiny of the evidence led, preferred the traditional history of the Plaintiffs which he regarded as more probable than that of the Defendants. He did not rely on any grant to find for the Plaintiffs and any reference to a grant in the judgment must have been a mere slip which has not in my view occasioned a miscarriage of justice.(p. 1513 C & F)

Arbitration - Customary arbitration

2. It is therefore not correct to say that the Court of Appeal did not consider Exhibit D in its resolution of whether or not the Defendants submitted to arbitration. The trial High Court certainly did and the Court of Appeal agreed with the finding of the High Court that the Defendants did submit to arbitration and that they are therefore bound by the result of arbitration as shown in Exhibit C. (p. 1517 D)

Customary Law - Grant of land

3. Part of that traditional history which was accepted was to the effect that the parcels of land in dispute were granted to the Defendants' ancestors by the Plaintiffs' ancestors partly for occupation and partly for farming on payment of customary tributes and on the condition that the Defendants would not alienate any part of the land. Therefore acts of ownership over the said parcels of land by the Defendants could only be exercised according to the terms of the grant as anything to the contrary would make the grant liable to forfeiture. (p. 1518 B)

Equity - Equitable defences

4. Throughout the trial the Plaintiffs' conduct could be seen to be free from blemish to warrant any of the equitable defences (see OKALOKA & ORS VS UMEH & ANOR (1976) 9-10 SC. 269. The type of conduct that will amount to laches and acquiescence will be such that will be repugnant to equity and good conscience. Nothing was shown in this case. (p. 1518 E)

Judgments - Findings

5. The learned trial judge certainly made findings on many issues before him, all disfavoured to the Defendants including amongst others the question of inter marriage, new yam festivals and the worship of juju of Umutanze. The Defendants have been unable to show that those views or findings are wrong. I think the Court of Appeal was right to have affirmed the findings which were amply supported by evidence at the trial. (p. 1519 H)

NOTABLE POINT OF INTEREST

ACHIKE JSC

1. Use of pagination instead of dividing document into two exhibits

I entirely agree with the view expressed in the leading judgment of my learned brother that Exhibit D was in fact part of Exhibit C and should not have been separately exhibited. For me, since the entire record of proceedings had been received in evidence as Exhibit C, the defendants' statement submitted to the arbitrators which was contained therein would have been sufficiently identifiable for emphasis by proper pagination of Exhibit C and would accordingly not have necessitated being marked out as a separate exhibit. The emphasis of identifying defendants as a party and participants in the arbitration proceedings would have been achieved with less fanfare.(p. 1523 C) D

REPRESENTATION

B. C. Ogbuli with him J.E.O. Ogbuli for the Defendants/Appellants
Dr. Onyechi Ikpeazu with him Ugonna Nwachukwu for the Plaintiffs/ Respondents. E

CASES REFERRED TO

Abdullahi Baba v. Nigerian Civil Aviation (1991) 5 NWLR (pt.192) 388 F
Agu v. Ikewuibe (1991) 3 NWLR (pt.180) 385
Agile v. Kelani (1985) 3 NWLR (pt.12) 248 at 269
Abaye v. Ofili (1985) 1 N.W.L.R. (pt.15) 131
A.G. Anambra State v. Onuselagu (1987) 9-11 S.C. 197 at 203 G
Ramsden v. Dyson (1866) L.R.I.H.L. 129
Nwokobi v. Nzekwu (1961) ALL NLR part 3) 445 at 450
Yusuf v. Dada (1990) 4 N.W.L.R. (pt.146) 657 at 681
Okaloka & Ors v. Umeh & Anor (1976) 9-10 SC 269
Rafat v. Ellis (1954) 14 WACA 430 H
Gbadamosi & Ors v. Mogaji & Ors 1985) 2 S.C. 168
Onisiwo v. Fagbenro (1954) 21 N.L.R.3

LEAD JUDGMENT BY KUTIGI JSC

In the High Court holden at Orlu, the Plaintiffs claimed against the Defendants in the manner following:-

B *“(a) Declaration that the Plaintiffs are entitled to the customary rights of ALA AKABO UKWUEKWURU, UZO ULO and ALA AKABO lands situate at Umudim OKPORO within jurisdiction and each being of the annual value of N10.00 (Ten Naira).*

C *(b) Possession of the said ALA AKABO UKWUEKWURU, UZO ULO and ALA UHU ABO Lands.*

(c) Injunction restraining the Defendants, their servants, agents and privies from interfering with the rights of the Plaintiffs over the said parcel of land or in any manner selling parcel of the said lands to any body.”

D Pleadings were ordered, filed and exchanged. The action then proceeded to trial. Evidence was led on both sides. The Plaintiffs called six witnesses while eleven witnesses testified on behalf of the Defendants. Briefly stated, Plaintiffs’ case is that the Defendants’ ancestors migrated
E from Umuebu Umutanze their original home. They were given the three parcels of land in dispute by the Plaintiffs’ ancestors to live and cultivate upon payment of customary tributes and on the condition that the Defendant’s
F ancestors would not alienate any portion of the land. The land in dispute is part of the land they inherited from their great ancestor DIM. The Plaintiffs said the present dispute arose when the Defendants stopped paying the customary tributes and had in addition engaged in selling portions of the land in dispute without their knowledge and consent.

G The Defendants on the other hand denied that they are strangers in Umudim Okporo and customary tenants of the Plaintiffs. They claimed that their ancestor ANYANWU was one of the four sons of DIM, the Plaintiffs’ great ancestor, and that the land in dispute was the share that ANYANWU got when the children of DIM shared his landed property. It should be
H noted that the Plaintiffs said the land of DIM was shared among his three children which did not include Anyanwu, the ancestor of the Defendants.

The learned trial judge in a reserved judgment carefully evaluated the evidence in respect of the various issues contended by the parties and

found for the Plaintiffs when he concluded his judgment thus:-

“In conclusion, I make the following orders:-

(1) I declare that the plaintiffs are entitled to the customary rights of occupancy of Ala Akabo or (Ala Akabo Ukwuchwuru), Ala Uzo Ulo and Ala UHU ABO, together called that land in dispute, situate at Umudim Okporo within the jurisdiction of this Court.

(2) I do declare that the plaintiffs are entitled to the possession of the said land in dispute subject to the portions of the land in dispute which were granted by the defendants to live and farm.

(3) I grant an injunction restraining the defendants their servants, agents and privies from interfering with the rights of the Plaintiffs over the said parcels of land in any manner selling of the said lands to anybody.”

Aggrieved by the judgment of the trial High Court, the Defendants appealed to the Court of Appeal holden at Port Harcourt.

The Court of Appeal painstakingly considered the appeal and in a unanimous judgment allowed the appeal in part when it refused the claim for possession and modified the order of injunction granted by the learned trial judge. The amended judgement/orders of the High Court now read as follows:-

“(1) I declare that the plaintiffs are entitled to the customary right of occupancy of Ala Akabo or (Ala Akabo Ukwuekwuru), Ala Uzo Ulo and Ala Uhu Alo, together called the land in dispute situate at Umudim Okporo within the jurisdiction of this court.

(2) I grant an injunction restraining the defendants, their servants, and agents and privies from further alienating any portion of the said land in dispute.”

Still dissatisfied with the judgment of the Court of Appeal, the Defendants have now further appealed to this court.

In compliance with the Rules of Court, the parties filed and exchanged briefs of argument through their respective counsel. These briefs were adopted at the hearing during which additional oral submissions were also made.

In his brief of argument learned counsel for the Defendants, Mr.

Ogbuli formulated four issues for determination in the appeal as follows:-

B *“1. Whether the learned Justices of the Court of Appeal (like the trial court) by deciding the issue of title to the land in dispute by recourse to a different issue from the one upon which the case was pleaded, have by their judgment caused grievous injustice to the appellant’s case.*

C *2. Whether there was sufficient evidence from which the Justices of the Court of Appeal could find that the defendants/appellants submitted to the arbitration pleaded by the Plaintiffs and received in evidence as Exhibit “C” in the light of exhibit “D” which was also pleaded and given in evidence and other relevant evidence.*

D *3. Whether the Defendants/Appellants could not avail themselves of the defences of estoppel, laches and acquiescence pleaded and given in evidence by the Defendants to bar the plaintiffs’ judgment for title to the land in dispute.*

E *4. Whether the learned Justices (like the trial Court) evaluated the evidence of the defendants at all or adequately on all the issues submitted for adjudication, particularly the issue whether the defendants are non-indigenous members of Umudim Okporo.*

I shall now proceed to consider the issues.

Issue (1)

F The gist of the complaint here is simply that while the Plaintiffs pleaded and relied on traditional history to prove their title to the land in dispute, the learned trial judge relied on a grant and found for the Plaintiffs which was not their case. That the Court of Appeal by confirming that decision had caused grievous injustice to the Defendants. Learned counsel for the Defendants referred particularly to the judgment of the High Court G on pages 152 where it is stated thus:-

H *“The main issue in this case is in my view, whose traditional evidence of the land in dispute is more probable. The evidence of grant given by the Plaintiffs and their witnesses support their avements in their statement of claim. The admissions made by the Defendants and their witnesses in my view support the plaintiffs’ story. It is the law that when a party relies on a grant and proves that grant by Traditional evidence, he need not go further and prove possession or acts of ownership or any*

of the other way of proving title to land.”

We were also referred to the judgment on page 153 of the record where the learned trial judge said:-

“The Plaintiffs in a claim for declaration of title could succeed solely on the basis of traditional evidence. The case of EKPO VS ITA B (supra) does not apply where the Plaintiff (like in the present case) relies and proves title by grant.”

The Court of Appeal when faced with this same issue had this to say on page 277:-

“... The Respondents did not rely on a grant as their root of title C as was the case in ABDULAI VS MANUE (supra). It was not their case that their ancestor DIM was granted the land in dispute... **It is trite law that it is not every slip committed by the lower court that can result in the appeal being allowed. Such will be the result only where it was D substantial in the sense that it had occasioned a miscarriage of justice vide ALHAJI ABDULLAHI BABA VS NIGERIAN CIVIL AVIATION & ANOR (1991) 5 NWLR (PT. 192) 388 at 422. It seems to me clear that what the learned trial judge meant was that the Respondents had proved E their case by traditional history and that it was not necessary that the case should be considered on question of possession and acts of ownership of the land in dispute.**”

I agree entirely.

The pleadings of the parties clearly show that both sides heavily F relied on traditional history in proof of their respective titles. Both sides at least traced their respective roots of title to DIM who was said to be their progenitor and founder of the land in dispute. **In this case the learned trial judge undoubtedly appreciated his duty with respect to the G traditional history set up by the parties and after a thorough scrutiny of the evidence led, preferred the traditional history of the Plaintiffs which he regarded as more probable than that of the Defendants. He did not rely on any grant to find for the Plaintiffs and any reference H to a grant in the judgment must have been a mere slip which has not in my view occasioned a miscarriage of justice. Issue (1) therefore fails.**

Issue (2)

The grouse of the Defendants under this issue is that Exhibit D which should actually form part of Exhibit C as the record of proceedings, and decision of the arbitrators, was not considered by the Court of Appeal to find out whether or not the Defendants submitted to the arbitration as to be bound by it. AGU VS IKEWUIBE (1991) 3 NWLR (PT.180) 385 was relied upon. The story behind this is that the record shows that the Plaintiffs in their Statement of Claim pleaded in paragraphs 18 & 19 that the dispute herein was submitted by the parties to a body called Okporo Community Assembly for arbitration, and that the arbitrators awarded the land in dispute to them. They also pleaded that they “will found and rely on the record of proceedings and decision of the arbitrators.” The paragraphs read:-

“18. Before the plaintiffs instituted this action against the defendants the plaintiffs had under Okporo customary law complained to the Okporo Community Assembly sitting jointly with the “Odinala” Elders from the nine villages of Okporo as a Panel to arbitrate upon this land dispute between the plaintiffs’ family of Umuomeaku and the defendants’ family of Umuanyanwu. The members of plaintiffs’ family and the defendants’ family submitted themselves to the said arbitration of the said Okporo Community Assembly sitting with the said “Odinala” Elders of Okporo on the authority of Eze Ugo Palace of Okporo. The said Panel set over this land dispute at the Umuekee Hall Okporo and sitting over the dispute began on 1st December 1983 until the month of April 1984 when the panel passed their verdict or Judgment upon the matter.

19. The arbitrators heard the parties in dispute and their witnesses during their several sittings and on the 3rd of April 1984, gave their decision and found as a fact among other things that the plaintiffs are the owners of the parcels of land in dispute. In the said decision of the Okporo Community Assembly, the defendants’ family of Umuanyanwu were restrained by Okporo Community not to sell any portion of the said plaintiffs’ parcels of land without the consent of the plaintiffs as the owners of the land. The plaintiffs will found and rely on the record of proceeding and decision of the arbitrators comprising of the Chairman of

Okporo Community, Chief Uzoigwe, the chairman of "Odinala" Nze Agbarakwe Okeke, the General Secretary to Okporo Community, Nze Jones U. Otiwu and eight others stamped and dated 3/4/84."

The Defendants in paragraph 17 and 18 of their Amended Statement of Defence denied paragraphs 18 and 19 of the Statement of Claim that they submitted to arbitration by Okporo Community Assembly over their dispute with the Plaintiffs. B

It was pleaded thus:-

"17. The Defendants deny paragraph 18 of the State of Claim. The Defendants deny that they submitted to arbitration by Okporo Community Assembly over their dispute with the Plaintiffs..." C

18. The Defendants deny paragraph 19... of the Statement of claim.

At the trial P.W.5 who was the Secretary of Okporo Community D tendered the record of proceedings of arbitration panel of which he was also the Secretary. This is Exhibit C. Under cross-examination it was put to P.W.5 that the Defendants did not submit to arbitration. This was denied. To show therefore that the Defendant participated in the arbitration E proceedings, their statement which they made to the arbitrators was then tendered in evidence as Exhibit D during re-examination of the witness. Although Defendants counsel objected to the tendering of Exhibit D on the ground that it was not pleaded, he was overruled. I will say straight away F that the learned trial judge was right here because the Plaintiffs had pleaded in paragraph 19 of their Statement of Claim stated above that they:-

"will found and rely on the record of proceedings and decision of the arbitrators."

The statement submitted by the Defendants to the arbitrators is G necessarily a part of the proceedings of arbitration which is pleaded and therefore admissible. In fact it should strictly speaking have been part of Exhibit C and not a different Exhibit D even though the effect is to properly H fix the Defendants at the arbitration and as active participants in the arbitration proceedings as well. The Court of Appeal was therefore wrong to have held that Exhibit D was not pleaded. It was pleaded.

The Court of Appeal was also with due respect wrong when it said

in the lead judgment on page 289 thus:-

“The true position is that while Exhibit C is the complete record of the proceedings of the arbitration, Exhibit D is the statement presented by the Appellant’s representatives to the arbitration. Both documents are not and were not intended to be the same.”

Both Exhibits C & D together are complete record of the proceedings of the arbitration. Not one without the other. And the purpose of tendering the record of proceeding of arbitration is to enable anybody interested to see what took place, who participated and the decision arrived at.

But the Court of Appeal was right when it said:-

“Secondly Exhibit D was not ... relied upon by Appellants in the Court below. In deed their counsel objected to its reception in evidence. A party should be consistent in the case he pursues. He will not be permitted to spring surprises on the opposite party from one stage to another. AGILE VS KELANI (1985) 3 NWLR (Pt. 12) 248 at 269, ABAYE VS OFILI (1985) 1 N.W.L.R. (PT.15) 131. A.G. ANAMBRA STATE VS ONUSELAGU (1987) 9-11 S.C. 197 AT 203.”

Clearly the Defendants apart from denying participation in the arbitration proceedings, pleaded and relied on no document in that regard. That did not mean however, that they were not entitled to use to their advantage anything in the plaintiffs’ case which support theirs. And I hasten to say that Exhibit D offered no such support to the Defendant. The Plaintiffs produced Exhibit D to show that the Defendants submitted to arbitration and both the High Court and the Court of Appeal agreed with them. The Defendants were therefore not believed. And it was too late in the day for the Defendants to have required the Plaintiffs to prove the signatures on Exhibit D as contended by them, this being a point on which no issues were joined and not arising from the pleadings. The Court of Appeal again in its lead judgment on page 290 of the record had this to say:

“In his acceptance of the customary arbitration of the Respondents, the learned trial judge at page 150 lines 18-23 of the record observes as follows:-

“The decision of the Arbitration of Okporo Community and

Odinala Elders was quite clear on the issue whether or not the defendants came from Umutanze. PW. 5 was the Secretary of Okporo Community P.W.6 was the then Chairman of Okporo Community and one Nze Agbarakwe was the then chairmen of Odinala Elders of Okporo. The proceedings were admitted without any objection and marked Exhibit C. Both parties submitted to this arbitration, made statement and called witnesses. The members of the arbitration visited the land in dispute. The arbitration was made up of people from all the villages in Okporo. From Exhibit 'C', I am satisfied that their enquiry was without bias and malice. All the parties were given equal opportunities to present their case and call their witnesses. I am quite impressed with the proceedings of the arbitration and hold that its decision strongly supports the case of the plaintiffs."

"I have myself read Exhibit C and share the views of the learned trial judge."

I also agree with the Court of Appeal.

It is therefore not correct to say that the Court of Appeal did not consider Exhibit D in its resolution of whether or not the Defendants submitted to arbitration. The trial High Court certainly did and the Court of Appeal agreed with the finding of the High Court that the Defendants did submit to arbitration and that they are therefore bound by the result of arbitration as shown in Exhibit C. This issue also fails.

Issue (3)

The Defendants contend that because they pleaded in paragraph 19 of their Amended Statement of Defence estoppel, laches and acquiescence as bar to Plaintiffs' claim of title to the land in dispute and that they led evidence at the trial showing that they had made grants of at least two portions of the said land to two different people in 1969 (See Exhibit L) and in 1982 (see Exhibit G) respectively, the Plaintiffs ought to have been denied title to the said land because they had acquiesced in the Defendants' adverse acts of ownership over the land which they had supposed to be theirs. Section 151 of the Evidence Act was relied upon as well as the cases of RAMSDEN VS. DYSON (1866) L.R.I.H.L 129, NWOKOBI VS

NZEKWU (1961) All NLR (PART 3) 445 AT 450; YUSUF VS DADA (1990) 4 N.W.L.R. (PT. 146) 657 at 681.

I must bear in mind the fact that from the state of the pleadings and evidence led at the trial, the Plaintiffs' case rested squarely on traditional history which was accepted by the learned trial judge and upheld by the Court of Appeal. **Part of that traditional history which was accepted was to the effect that the parcels of land in dispute were granted to the Defendants' ancestors by the Plaintiffs' ancestors partly for occupation and partly for farming on payment of customary tributes and on the condition that the Defendants would not alienate any part of the land. Therefore acts of ownership over the said parcels of land by the Defendants could only be exercised according to the terms of the grant as anything to the contrary would make the grant liable to forfeiture.**

Section 151 of the Evidence Act and the cases cited by the Defendants which I have read, are therefore of no assistance to them in these circumstances because as customary tenants of the Plaintiffs they knew they cannot and should not alienate any portion of the land to anybody. There was thus no question of any mistaken belief on the part of the Defendants that the land is theirs, nor the question of them (Defendants) been made to act to their (Defendants) detriment by the Plaintiffs. **Throughout the trial the Plaintiffs' conduct could be seen to be free from blemish to warrant any of the equitable defences (see OKALOKA & ORS VS UMEH & ANOR (1976) 9-10 SC 269. The type of conduct that will amount to laches and acquiescence will be such that will be repugnant to equity and good conscience. Nothing was shown in this case (see RAFAT VS ELLIS (1954) 14 WACA 430 GBADAMOSI & ORS VS. MOGAJI & ORS (1985) 2 S.C. 168).** In fact the Defendants made ill-gotten gains by selling or leasing parts of the land to the detriment of the Plaintiffs who own same. All alienations are therefore necessarily nullified as the Defendants cannot sell what does not belong to them. The Defendants can properly be said to have forfeited their right to occupy the land and to give up possessions thereof to the Plaintiffs. They are therefore not in a position to ask for any equitable treatment. They were fortunate that the Plaintiffs have not sought for an order of forfeiture of their tenancy as stated by the

Court of Appeal. And that explains why the Court of Appeal set aside the order of possession made against them (Defendants) by the learned trial judge. (See ONISIWO VS FAGBENRO (1954) 21 N.L.R. 3. I will say no more on this point. It follows also from what I have been saying that there is no question of any estoppel to be considered in this case. The issue accordingly fails. B

Issue (4)

The Defendants certainly are not happy with the finding by the learned trial judge that they (the Defendants) are strangers in Umudim, which finding was also upheld by the Court of Appeal. C

The learned trial judge on page 148 of the record said:-

"I would like to start with the last issue – namely, are the Defendants of Umuanyanwu strangers in Umudin Okporo from Umutanze? This seems to me the basis of the case for the Plaintiffs. Plaintiffs rely very heavily on traditions history. In this regard the Court will have to compare the two traditional evidence and come to the conclusion as to which of the two traditional history is more probable." D

The judgment continued on page 152 thus:- E

"From the totality of the evidence before me, I am satisfied that the Defendants are strangers in lUmudin and that their ancestors were granted portions of the land in dispute to live and to farm."

He had also before now on page 150 held:- F

"Defendants and their witnesses are not truthful witnesses. I do not agree with them that Anyanwu was one of the sons of DIM."

The record and particularly the pleadings of the parties, show that DIM was the founder of the land in dispute. The Defendants claimed through their ancestor Anyanwu who they said was one of the children of DIM. The learned trial judge having found as above that Anyanwu was not a son of Dim, the logical conclusion must be that they (Defendants) must have come from somewhere else as contended by the Plaintiffs and accepted by the trial court, that they (Defendants) came from Umutanze. I think he H was right.

The learned trial judge certainly made findings on many issues before him, all disfavourable to the Defendants including

amongst others the question of inter marriage, new yam festivals and the worship of juju of Umutanze. The Defendants have been unable to show that those views or findings are wrong. I think the Court of Appeal was right to have affirmed the findings which were
B amply supported by evidence at the trial. I find nothing wrong with the approach of the Court of Appeal to this issue which has now failed here as well.

All the issues having been resolved against the Defendants, the appeal must fail. It is accordingly dismissed with N10,000.00 costs against
C the Defendants in favour of the Plaintiffs.

KARIBI-WHITE JSC

D I have had the opportunity of reading the leading judgment of my learned brother Kutigi, JSC in this appeal. I agree with his reasoning and conclusion dismissing this appeal. I too will and hereby dismiss the appeal against the decision of the Court below by the Defendants/Appel-
E lants.

Defendants/Appellants shall pay N10,000 as costs to the Plaintiffs/Respondents.

F

MOHAMMED JSC

I agree that this appeal has failed. I have gone through the draft judgment of my learned brother Kutigi, JSC, in which he considered all the salient issues raised in this appeal before dismissing it. I have nothing more
G to add. The appeal is dismissed. I award N10,000.00 costs to the respondents.

H

ACHIKE JSC

I have, before now, had the opportunity of reading the judgment just delivered by my learned brother, Kutigi J.S.C. I entirely agree with him. I wish however to make a brief contribution.

The plaintiffs/respondents instituted the action leading to this appeal at the Imo State High Court, holding at Orlu wherein they claimed against the defendants/appellants for three reliefs, namely (a) declaration of certain parcel of land, (b) possession and (c) injunction in respect of the said parcel of land. After due trial in which both parties fielded together B a total of 17 witnesses, in a reserved judgment, the learned trial judge, after painstakingly evaluating the evidence placed before him, found for the plaintiffs in respect of the declaratory and injunctive reliefs while he limited the relief for possession to the area outside that previously granted to the C defendants.

Dissatisfied, the defendants appealed to the Court of Appeal, Port Harcourt Division. The lower court allowed the appeal in part: it affirmed the declaratory relief, modified the order for injunction and refused the claim for possession. D

Yet, not satisfied, the defendants have appealed to this Court. Their learned counsel Mr. B. C. Ogbuli identified four issues for determination. These have been copied in the leading judgment. There is no necessity to reproduce them, more so as, I intend to deal with only the second E issue.

Issue No.2

“Whether there was sufficient evidence from which the Justices of the Court of Appeal could find that the Defendants/appellants submitted F to the arbitration pleaded by the Plaintiffs and received in evidence as Exhibit “C” in the light of Exhibit “D” which was also pleaded and given in evidence and other relevant evidence.”

The gravamen of this complaint is that Exhibit “D” which ought G to be part of Exhibit “C”, the record of the alleged arbitral proceedings between the parties, and the decision of the arbitrators, was not duly considered by the lower court as to be in a position to decide one way or the other whether the defendants, in fact, submitted to arbitration as to be H bound by its finding. The parties’ pleadings narrated the facts of the arbitration. First is the plaintiffs’ elaborate pleadings, particularly paragraphs 18 and 19 of the statement of claim which run as follows:

“18. Before the plaintiffs instituted this action against the

defendants the plaintiffs had under Okporo customary law complained to the Okporo Commuting Assembly sitting jointly with the “Odinala” Elders from the nine villages of Okporo as a Panel to arbitrate upon this Land dispute between the Plaintiffs’ family of Umuomeaku and the defendants’ family of Umuanyanwu. The members of plaintiffs’ family and the defendants’ family submitted themselves to the said arbitration of the said Okporo Community Assembly sitting with the said “Odinala” Elders of on the authority of Eze Ugo Palace of Okporo. The said Panel set over this land dispute at the Umeekee Hall Okporo and sitting over the dispute began on 1st December 1983 until in the month of April 1984 when the Panel passed their verdict or Judgment upon the matter.

19. The arbitrators heard the parties in dispute and their witnesses during their several sittings and on the 3rd of April 1984, gave their decision and found as a fact among other things that the plaintiffs are the owners of the parcels of land in dispute. In the said decision of the Okporo Community Assembly, the Defendants’ family of Umuanyanwu were restrained Okporo Community not to sell any portion of the said plaintiffs’ parcels of land without the consent of the plaintiffs as the owners of the land. The plaintiffs will found and rely on the record of proceedings and decision of the arbitrators comprising of the Chairman of Okporo Community, Chief Uzoigwe, the chairman of “Odinala” Nze Agbarakwe Okeke, the General Secretary to Okporo Community, Nze Jones U. Otiwu and eight others stamped and dated 3/4/84.”

The defendants’ response was a complete denial of such arbitration by Okporo Community Assembly between them and the plaintiffs. Inter alia, they pleaded rather tersely and cautiously in their Amended Statement of Defence.

“17. The defendants deny paragraph 18 of the Statement of Claim. The Defendants deny that they submitted to arbitration by Okporo Community Assembly over their dispute with the Plaintiffs...”

18. The Defendants deny paragraph 19 and 20 of the Statement of Claim...”

The Secretary of Okporo Community, who testified as PW5 tendered the record of arbitration as Exhibit C while the defendants’

statement to the arbitrators was admitted in evidence as Exhibit D. Defendants stiffly opposed the admission of Exhibit D on the questionable ground that it was not pleaded. The opposition was overruled by the learned trial judge, and rightly in my view, because the comprehensive pleadings of the plaintiffs that they “will found and rely on the record of proceeding and decision of the arbitrators...” Obviously, the statement submitted by the defendants to the arbitrators, now sought to be tendered as Exhibit D, unquestionably formed part of the record of proceedings, Exhibit C, and therefore its admission into evidence ought not to have been opposed in the ordinary course of events. I entirely agree with the view expressed in the leading judgment of my learned brother that Exhibit D was in fact part of Exhibit C and should not have been separately exhibited. For me, since the entire record of proceedings had been received in evidence as Exhibit C, the defendants’ statement submitted to the arbitrators which was contained therein would have been sufficiently identifiable for emphasis by proper pagination of Exhibit C and would accordingly not have necessitated being marked out as a separate exhibit. The emphasis of identifying defendants as a party and participants in the arbitration proceedings would be achieved with less fanfare.

The Court of Appeal by some rather difficult deduction had argued in this regard in the leading judgment at p.289 as follows:

“The true position is that while Exhibit C is the complete record of the proceedings of the arbitration, Exhibit D is the statement presented by the Appellants’ representatives to the arbitration. Both documents are not and were not intended to be the same.”

Earlier, the Court of Appeal also held that Exhibit D was not pleaded. With due respect, I think the lower court was clearly in serious error to have held that Exhibit D was not pleaded. I think that the leading judgment oversights the lucid averment in the last sentence of paragraph 19 of the Plaintiffs’ Statement of Claim wherein the plaintiffs expressly averred that they would “found and rely on the record of the proceeding and decision of the arbitrators...” I am satisfied that the fact of Exhibit D was properly pleaded.

I now focus on the above-quoted excerpt of the leading judgment

of the Court of Appeal. The incontrovertible fact is that Exhibit D is part of a comprehensive document, i.e. Exhibit C. Literally, Exhibits C and D can be considered as two separate documents but it is unquestionably undeniable that Exhibit D is part of Exhibit C and, therefore, the latter is incomplete without the former. For purposes emphasis, I would reiterate that it was superfluous for the plaintiffs to have tendered Exhibit D separately.

I am satisfied that the finding of the learned trial judge that the defendants duly submitted to arbitration and that they are accordingly bound by the decision reached by the arbitrators as embodied in Exhibit C are supportable. I also accept the confirmation of this finding by the Court of Appeal and it is therefore erroneous for the appellants to have submitted that the lower court did not give consideration to Exhibit D in reaching the conclusion that the defendants duly submitted to arbitration.

Issue No. 2 is accordingly resolved against the appellants.

After an elaborate consideration of Issue No. 2 which includes the pleadings and averments in respect thereof, particularly paragraphs 18 and 19 of the Statement of Claim and paragraphs 17 and 18 of the Amended Statement of Defence, not to overlook Exhibits C and D, one cannot agree more with the learned trial judge, when, after a painstaking evaluation of the totality of evidence placed before him, his Lordship at p.150 of the record summarised tersely and conclusively:

“Defendants and their witnesses are not truthful witnesses.” Certainly, my close reading of the cold record of appeal leaves me in no doubt that the learned trial High Court judge was in full grips with the case before him and arrived at a reasonably good decision that has been aptly modified by the Court of Appeal on appeal. My worry is that if the defendants/appellants were untruthful with regard to the existence of an arbitration embodied in a written document, Exhibit C, involving them, they would be strangers to the truth regarding even obvious facts.

The three other issues postulated by the appellants have been comprehensively and adequately considered in the leading judgment of the Court. I am in agreement with the decisions arrived thereat and have nothing useful to add save to respectfully adopt them as mine.

All in all, the four issues postulated in the appeal, having been resolved against the appellants, the appeal accordingly fails. I, too, would dismiss the appeal with N10,000.00 costs in favour of the plaintiffs/respondents.

B

AYOOLA JSC

For the reasons given in the judgment delivered by my learned brother, Kutigi, JSC, which I have had the advantage of reading in draft, I too would dismiss the appeal. I abide by the order for costs made by him.

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