

**SUPREME COURT OF NIGERIA**

25TH MAY, 2001. SC. 224/1993

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

ALHAJI GONI KYARI	.....	APPELLANT
AND		
1. ALHAJI CIROMA ALKALI		
2. HON. ATTORNEY-GENERAL		
(BORNO STATE)	.....	RESPONDENTS
3. HON. COMMISSIONER FOR		
LAND AND SURVEY (BORNO STATE)		

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***APPEALS*** - Error of lower court - Dismissal of counterclaims - In the circumstances of the case - Based on the evidence and applicable law - The Court of Appeal was wrong in dismissing the appellants counter-claim (H 13)

***APPEALS*** - Error of lower court - The lower court was in error - For holding that the case - Was fought in a personal capacity - Because the representation - Was not indicated in the counter claim - Despite the averments in the pleadings - And evidence led at the trial (H 16)

***APPEALS*** - Interference - Findings of trial court - Ought not to have been interfered with by the Court of Appeal - In the absence of cogent reasons (H 7)

***EVIDENCE*** - Pleadings - Fair hearing - Evidence must be directed and confined - To proof or disproof of issues - As settled by the parties in their pleadings -To avoid denial of fair hearing to any of the parties (H 4)

***LAND LAW*** - Declaration of Title - Identity of disputed land - Where this is not the issue - No onus lies on the claimant - To prove the identity

**1754** Kyari v. Alkali (2001) 5 KLR (pt. 123) 1753; (2001) 11 NWLR  
*of the land (H 2)*

**LAND LAW - Evidence - Statute - S. 145 Evidence Act - Where a person in possession of land - Is said to be a trespasser - He that so asserts must prove better title to the land (H 5)**

**LAND LAW - Title to land - Any of the five methods of proving title to land - Will suffice independently to prove title to land (H 12)**

**LAND LAW - Title to land - Documents - Merely tendering an instrument of title in court - Is only a prima facie evidence of title - But does not validate spurious or fraudulent instruments - Or an invalid transfer (H 6)**

**LAND LAW - Title to land - Identity of Land - A declaration of title may be made - Without necessity of tying it to a survey plan - If no difficulty exists in identifying the land (H 1)**

**LAND USE ACT - Certificate of occupancy - Where the issue of certificate of occupancy - Is rooted on no foundation - As no title exists or is available to be transferred to anyone - Then no title is or can be conferred by the certificate of occupancy (H 11)**

**LAND USE ACT - Grant of land - A second grant of the same piece of land - During the subsistence of the 1st grant - By the same authority - Is unjustifiable, unlawful, invalid and of no effect (H 9)**

**LAND USE ACT - Grant of land - Land Use Act ss.36(2) & 6(1)(a) - A deemed grant of land - Is to all intents and purposes - Not different from an actual grant of land (H 8)**

**LAND USE ACT - Revocation of Right of Occupancy s. 28(1) - In the absence of revocation of appellant's right by the governor - And payment of compensation to him - The statutory right of occupancy subsequently**

*granted vide Exhibit B - Is tainted with illegality and is defective (H 10)*

***PLEADINGS*** - Admissions - Any allegation of fact - In the statement of claim - Not denied specifically or by implication - Is deemed admitted - And the court was in error - To demand proof of such facts from the plaintiff (H 3)

***PRACTICE & PROCEDURE*** - Courts - Writ of summons - Pleadings - Representative capacity - Failure to indicate this capacity on the writ of summons - Will not ipso facto invalidate the proceedings - As the appellate court - May suo motu amend the title - Once the pleadings and evidence so indicate (H 15)

***PRACTICE & PROCEDURE*** - Pleadings - Evidence - Representative capacity - Where the pleadings and the evidence of a party - Disclose a representative capacity - Judgment can be entered for such a party - Even if an amendment to reflect that capacity has not been obtained (H 14)

### **FACTS**

The 1st respondent who was plaintiff at the trial court instituted an action against the 1st defendant now appellant at the High Court of Justice Borno State claiming a declaration that the defendant is not entitled to enter and use the disputed farmland, an order of injunction and other reliefs. The 2nd and 3rd defendants now respondents were joined as third parties. In his pleadings the 1st defendant counter claimed for declaration of title to the said piece of farmland and a declaration of the illegality of the certificate of occupancy issued to the plaintiff over the piece of land amongst other reliefs.

At the trial the plaintiff's case was that he applied to the Konduga Local Government Council in 1978 and was issued a Customary Right of occupancy over the piece of land in dispute - Exhibit A which was later converted to a statutory Right of occupancy in 1981 Exhibit B by the Governor of Borno State. He claimed to have been in possession till the 1st defendant started claiming ownership in 1984. The 1st defendant on

his own part claimed that the land purportedly granted to the plaintiff belonged to him and his family from time immemorial and led traditional evidence of devolution and inheritance of the land from their ancestors. He further claimed that their right over the land has not been revoked and they have remained in possession and as such the purported grant to the plaintiff was void. The 3rd parties on their own part testified that in reaction to the complaints of the defendants and his family they had directed that an alternative land be provided for them which they were not aware whether it had been complied with and testified that the Statutory Right of occupancy was granted in reliance on the earlier Customary Right of Occupancy to the plaintiff.

The trial judge in her judgment upheld the defendant's counter claim and granted his claims. On appeal the Court of Appeal reversed the judgment giving judgment to the plaintiff. The defendant has therefore appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Whether the learned Justices of the Court of Appeal were right in dismissing the appellant’s counter-claim.*

*2. Whether the learned Justices of the Court of Appeal were right when they held that the appellant did not prove the identity of the land in dispute.*

*3. Whether having regard to the pleadings and evidence led, the judgment of the Court of Appeal is not against the weight of evidence i.e. who, between the appellant and the 1<sup>st</sup> Respondent proved a better title.*

*4. Whether the Konduga Local Government and Borno State Certificates of Occupancy (i.e. Exhibits “A” and “B” respectively) were unlawfully and illegally issued to the 1<sup>st</sup> respondent.*

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

***Identity of land - Use of survey plan***

1. There can be no doubt that the most common and, perhaps, the easiest way of establishing the precise area of land in dispute is by the

production of a survey plan of such land. It is, however, equally clear that it is not in all cases for declaration of title to land that it is necessary to survey and/or tender the survey plan of the land in dispute. There are many cases in which no survey plans are essential for a proper determination of the issue. What the court must consider is whether, in a particular case, it is necessary for the proper trial of the action for a survey plan to be produced. Where there is no difficulty in identifying the land in dispute, a declaration of title may be made without the necessity of tying it to a survey plan. See Chief Sokpui v. Chief Tay Agbazo (1951) 13 W.A.C.A. 241. I should perhaps add that the above evidence was neither challenged nor disputed by the appellant or any other party. It can therefore be said that the land in dispute is not only very well known to the parties, its identity is clearly not in dispute. Both the claim and the counter-claim were tried together in the same suit. It is clear to me that having regard to the state of the pleadings, the evidence before the court and the Exhibits tendered, particularly exhibits A and B, and the survey plan of the land in dispute which relates no more and no less to the claim and counter-claim of the parties, failure of either the appellant or the 1<sup>st</sup> respondent to file a further survey plan of the land in dispute could not be fatal since the identity of the land was clearly known to them. Issue 2 must therefore be resolved against the respondents. (p. 1775G/1780 B,F)

***Identity of land - If not in issue - No onus lies on claimant***

2. Similarly, where the identity of the land in dispute is not in issue between the parties, no onus, naturally, lies on a claimant for declaration of title to such land to prove the said identity as that fact is not an issue for determination between the parties in the suit. See Atolagbe v. Shorun (1985) 1 N.W.L.R. (Part 2) 360 at 365. It seems to me crystal clear from the pleadings of the parties that the land in dispute is that piece or parcel of farm land covered by the 1<sup>st</sup> respondent's Certificates of Occupancy No. 00080 of the 4<sup>th</sup> October, 1979 and No. BO.3508 of the 7<sup>th</sup> April, 1981, Exhibits A and B respectively. The appellant joined no issue, whether directly or indirectly, with the 1<sup>st</sup> respondent with regard to the identity of the said land. This farm land, as pleaded in paragraph 7

of the Statement of Claim, is more particularly described and delineated both in the Certificate of Occupancy No. BO/3508, Exhibit B and the survey plan attached thereto. The appellant neither denied this material averment, whether specifically or by necessary implication, nor did he  
B state that it was not being admitted. (p. 1776 B/ 1778 D)

***Pleadings - Admissions***

3. It is trite law that every allegation of fact in a Statement of Claim if not denied specifically or by necessary implication or stated not to be admitted in the Statement of Defence shall be taken to be admitted. It is plain from the pleadings of the parties that it is the same very piece or parcel of land covered by the Certificates of Occupancy therein pleaded which is the subject matter of the 1<sup>st</sup> respondent action against the appellant that  
D is the campus bellum with regard to the appellant's counter-claim against the 1<sup>st</sup> respondent in the same suit. I can find no reason whatever to fault the trial court when, upon a close examination of the pleadings, it concluded thus:-

E “On the question of the identity of the land claimed by the defendant which Mr. Ba’aba, learned counsel for the plaintiff argued has not been identified, it is my view that since the said matter had not been raised on the pleadings of the parties, I hold that it is a none issue and  
F that which is not for consideration.”

I think the court below, with respect, was in error when it held in effect that there was a duty on the appellant to prove the identify of the land he counter-claimed against the 1<sup>st</sup> respondent when that fact, on the pleading was not in dispute between the parties in the suit. (p. 1778 F)  
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***Pleadings - Fair hearing***

4. In this regard, it cannot be over-emphasised that evidence must be directed and confined in courts of trial to the proof or disproof of the  
H issues as settled by the parties in their pleadings. See Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A. C. 218. To act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. See Metalimpex v. A G. Leventis and Co. Ltd. 1976 2 S.

C. 91. (p. 1779 C)

***Statute - S. 145 Evidence Act***

5. It is clear that the above section of the Evidence Act places the burden of proof on the appellant to prove that the 1<sup>st</sup> respondent who was in possession of the land in dispute at the time of the institution of this suit is not the owner thereof. Section 145 of the Evidence Act, however, merely creates a rebuttable presumption of ownership and no more. Its operation can have no place but is automatically dislodged when another person proves a better title to the property in dispute. See Mustafa Lawal v. Abdul Ijale (1967) N.M.L.R. 155. Accordingly, where one in possession of land is said to be a trespasser, the onus is on the person asserting such an allegation to establish that he has a better title to the land than the person in possession. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C. 67. (p. 1783 H)

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***Title to land - Proof by document***

6. As above stated, it is beyond dispute that one of the recognised methods of establishing title to land is by the production of valid documents of title evidencing the title claimed. See too Piaro v. Tenalo (1976) 12 S.C. 31 at 37, Nwodike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718. It must however be stressed that this does not and cannot mean that once instrument of title to land, such as a Deed of Conveyance or a Certificate of Statutory or Customary right of occupancy is tendered in court, this automatically proves that the land therein purportedly conveyed, granted or transferred by that instrument becomes the property of the grantee. See Prince Ngene v. Chike Igbo and Another (2000) 4 N.W.L.R. (Part 851) 131. The existence of a certificate of occupancy is merely a prima facie evidence of title to the land it covers and no more. Nor does mere registration validate spurious or fraudulent instrument of title or a transfer or grant which in law is patently invalid or ineffective. See Lababedi and Another v. Lagos Metal Industries (Nig.) Ltd and Another (1973) 8

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***Appeals - Interference with findings of trial court.***

7. Now, the learned trial Judge after a thorough review of the evidence  
B found in the clearest possible terms that the appellant proved a better title  
to the land in dispute than the 1<sup>st</sup> respondent. She found that the appellant  
and his family members and before them, their predecessors in title, had  
from time immemorial been the owners in possession and occupation of  
C the land in dispute up till the 4<sup>th</sup> October, 1979 when Exhibit A was is-  
sued. These findings are amply supported by evidence on record and,  
with profound respect, the court below ought not to have interfered with  
them in the absence of cogent reasons for so doing. (p. 1787 G)

***A deemed grant of land***

8. It is not in dispute that the land is not in an urban area. There is also  
a finding by the learned trial Judge that the appellant's people have been in  
occupation and used the land from time beyond human memory for ag-  
E ricultural purposes. In these circumstances, it cannot be disputed that  
title to the possession of the land in dispute for agricultural purposes was  
as at the 29<sup>th</sup> March, 1978 vested in the appellant and members of his  
family as if a customary right of occupancy had been granted to them by  
F the Konduga Local Government as the occupiers, holders and customary  
law title owners thereof. This is by virtue of the deemed grant in their  
favour by the operation of law pursuant to the provisions of Section  
36(2) of the Land Use Act, 1978. This grant, to all intents and purposes  
is no different from an actual grant to the appellant and members of his  
G said family under the provisions of Section 6(1)(a) of the Act. It is my  
view that the one grant is in all respects as good as the other and that the  
appellant and members of his family from the 29<sup>th</sup> day of March, 1978  
became the lawful beneficiaries and/or grantees of the aforesaid custom-  
H ary right of occupancy over the land in dispute with the Konduga Local  
Government as their grantors. (p. 1788 E)



***Grant of land***

9. It is my further view that the land in dispute having been deemed granted to the appellant by the operation of law by the Konduga Local Government as from the 29<sup>th</sup> March, 1978 could not thereafter be lawfully or validly granted a second time by the same Local Government during the subsistence of the first grant as the land would then not be free for allocation under the well known maxim, nemo dat quod non habet. The purported grant under Exhibit A is therefore patently unjustifiable, unlawful and clearly invalid and of no effect. See Rossek v. A.C.B. Ltd. (1993) 8 N.W.L.R. (Part 312) 382 at 485. Turning now to Exhibit B, it cannot be disputed that the same was issued solely on the basis of Exhibit A and that if Exhibit A is defective and without validity, Exhibit B would be equally vitiated and without foundation and consequently ineffective. But more importantly is the fact that as at the 7<sup>th</sup> April, 1981 on which date Exhibit B was issued by the Borno State Government in favour of the 1<sup>st</sup> respondent the land therein purportedly granted was effectively in the occupation and possession of the appellant and his family by virtue of their right of occupancy over the same pursuant to the provisions of Section 36(2) of the Land Use Act, 1978. (p. 1789 A/F)

***Revocation of right of occupancy***

10. By the provisions of Section 28(1) of the Land Use Act, 1978, it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. At no time was the appellant's validly subsisting right of occupancy over the land in dispute revoked by the Borno State Governor nor even was notice of such revocation served on the appellant or on his predecessors in title. It is also not in dispute that no compensation in respect of the land was ever paid to the appellant. It ought also to be borne in mind that the purported grant made by the State Government to the 1<sup>st</sup> respondent was not for any overriding public interest but for his personal use for farming purposes. In these circumstances, it seems to me that Exhibit B is equally tainted with illegality and is as incurably defective as Exhibit A. (p. 1790 A)

***Land Use Act - Certificate of occupancy***

11. I repeat that the mere issuance of the Certificates of Occupancy, Exhibits A and B does not and cannot confer title in respect of the land in dispute on the 1<sup>st</sup> respondent where no such title either existed or was available to be transferred to any one. It is my view that Exhibits A and B were both issued at the time the customary title of the appellant and members of his family over the piece of land in dispute was subsisting and vesting properly in them and had not been revoked. Both Certificates of Occupancy were rooted on no foundation whatsoever and they are, in my view, totally ineffective and void ab initio. It is also clear to me that having regard to the findings of the learned trial Judge which are in no way perverse and were not faulted by the court below, the appellant proved a better title to the land in dispute than the 1<sup>st</sup> respondent. Issues 3 and 4 must therefore be resolved in favour of the appellant. (p. 1790 D)

***Appeals - Dismissal of counter-claim***

12. Issue 1 poses the question whether the Court of Appeal was right in dismissing the appellant's counter-claim. In the first place, it is the finding of the learned trial Judge, a finding fully supported by the evidence and all applicable law, that Exhibits A and B upon which the 1<sup>st</sup> respondent relied for his alleged title to the land in dispute are ineffective and null and void because at the time of their issuance, the right of occupancy of the appellant in respect of the same land had not been revoked. In the second place, the appellant's customary title to the land in dispute based on traditional history was thoroughly considered by the trial court and found established. In this regard, it is a well settled principle of law that each of the five methods of proving title to land set out by this court in Idundun and others v. Okumagba and others (1976) 9-10 S.C. 227, inclusive of proof of ownership by traditional history or evidence, will suffice independently of the others to prove title to land. Thirdly it was the finding of the trial court that the appellant and before him, his predecessors in title, from time immemorial had been in continuous possession and occupation of the land in dispute as the owners thereof right up to the 29<sup>th</sup> March, 1978 and at the time Exhibits A and B were issued.

They were therefore vested with right of occupancy in respect of the land in dispute as the occupiers, holders and customary title owners thereof by virtue of Section 36(2) of the Land Use Act well before Exhibits A and B were issued in favour of the 1<sup>st</sup> respondent. In these circumstances, I find it difficult to accept that the court below was right in dismissing the appellant's counter-claim. (p. 1790 G/ 1791 C) B

***Title to land - 5 methods of proving title***

13. In this regard, it is a well settled principle of law that each of the five methods of proving title to land set out by this court in Idundun and others v. Okumagba and others (1976) 9-10 S.C. 227, inclusive of proof of ownership by traditional history or evidence, will suffice independently of the others to prove title to land. See Nwosu v. Udeala (1990) 1 N.W.L.R. (Part 125) 188. (p. 1791 B) C D

***Practice & procedure - Representative capacity***

14. With the greatest respect to the court below, it cannot be right to suggest that the plaintiff was only claiming his own personal portion of land in the suit and that he was not defending the suit or counter-claiming against the respondents as a representative of the descendants of Bulama Sheriff Bukar. It is long settled that once the pleadings and the evidence of a party conclusively disclose a representative capacity and it is clear that the case was fought throughout in that capacity, the trial court can properly and justifiably enter judgment for and/or against the party concerned in such representative capacity, even if an amendment to reflect that capacity had not been applied for and obtained. See Afolabi and others v. Adekunle and Another (1983) 2 S.C.N.L.R. 141 or (1983) 14 N.S.C.C. 398. It would be otherwise if the case is not made out in a representative capacity. See Onwunalu Ndidi and Another v. Osademe (1971) 1 All N.L.R. 14 at 16. (p. 1792 B/ 1793 H) E F G

***Practice & procedure - Courts***

15. This is because the law in such circumstance is that the court should do substantial justice and save multiplicity of suits by amending the ca- H

capacity in which the suit is brought or defended so as to bring it in line with the pleadings and the evidence. Where, therefore, an action is brought in a representative capacity, failure to express that fact on the writ of summons does not ipso facto invalidate the proceedings and an appellate court may on its own motion amend the title to the proceedings in order to show clearly the capacity in which a party has sued or is sued provided the pleadings and the evidence conclusively show that the action is prosecuted or defended in a representative capacity. See too Iro Ezera v. Inyima Ndukwe (1961) All N.L.R. 587. Where no evidence of representation has been given, such a case cannot be one where an amendment can be made by the court to the writ of summons and the Statement of Claim or Defence for that by itself would not cure the lack of evidence. (p. 1794 C)

***Appeals - Error of lower court***

16. In the present case, there are copious averments in the pleadings and corresponding evidence to establish that the appellant's case was fought before the trial court in a representative capacity for and on behalf of the appellant and members of his family, namely, the descendants of one Bulama Sheriff Bukar and the trial court was perfectly entitled to have granted the appellant's counter-claim in that capacity. In my view, the court below, with respect, was in error to have held otherwise for the simple reason that there was failure on the part of the appellant to express the fact of representation at the heading of his Counter-claim. See too Lawrence Elendu and others v. Felix Ekwoaba 1993) 12 N.W.L.R. (Part 578) 320 at 331 – 332. (p. 1794 G)

**NOTABLE POINTS OF INTEREST**

**IGUHJSC**

***1. Title - Counter claimant - Duty to prove the identity of land in issue.***

The first point that must be made is the basic principle of law that in a counter-claim, just like in any other claim for declaration of title to land, the onus lies on the claimant to prove with precision and certainty and without inconsistency the identity of the land to which his

claim or counter-claim relates. See Onwuka v. Ediala (1989) 1 N.W.L.R. (Part 96) 182. (p. 1775 E)

2. *Long possession cannot found a claim for declaration of title, trespass or perpetual injunction against the true owner of such land* B

In the second place, the principle of law is well settled that even in appropriate cases of long possession by a plaintiff, and this is clearly not one of them, long possession cannot found a claim of declaration of title to land, damages for trespass and perpetual injunction against the true owner of title to such land. A trespasser in possession is only entitled to sue in trespass, persons who are not the true owners of the land. As against a trespasser, possession attaches to title or ownership of the land in dispute and if he sues one who has a better title to the land than himself, he cannot succeed. See Mogaji v. Cadbury Nig. Ltd. (1985) 2 N.W.L.R. (Part 7) 393. (p. 1795 F) C D

### **REPRESENTATION**

Messrs A.A. Kayode, R.O. Yusuf, E.J. Ekanem, R.K. Orlu (Miss) and N. E Wathanafi (Miss) for the appellant.

Mr. L. O. Sanyaolu for the 1st respondent.

Mr. T. A. Dibal, Director of Civil Litigation, Borno State for the 2nd and 3rd respondents. F

### **CASES REFERRED TO**

Atolagbe v. Shorun (1985)1 NWLR (Pt.2) 360

MC Foy v. U. A. C. (1962) A.C.152 at 160

Rossek v. A. C. B. (1993)8 NWLR (Pt.312) 382 at 485 G

Odogwu v. Odogwu (1992)2 NWLR (Pt.225) 539 at 554

Ogunleye v. Oni (1990)2 NWLR (Pt.135) 745 at 773

Gilbert Onwuka and others v. Micheal Ediala and others (1989)1 NWLR (Pt.96) 182 at 196 H

Joseph Olusanmi v. Dayo Henry Oshasona (1992)6 NWLR (Pt.245) 22 at 28-29

Ezeokeke v. Umunocha Uga (1962)1 ALL NLR 477

Udeze v. Chidebe (1990)1 NWLR (Pt.125) 141

Chief Sokpui v. Chief Tay Agbazo (1951)13 WACA 241

Chief Daniel Ibuluya v. Dikibo (1976)6 SC. 97

Esso Petroleum Co. Ltd v. Southport Corporation (1956) A.C.218

B Metalimpex v. A.G Leventis and Co. Ltd. (1976)2 S.C.91

Onyia v. Onyia (1989)1 NWLR (Pt.99) 514

Alhaji Ogunlowo v. Prince Ogundare (1993)7 NWLR (Pt.307) 610

### **STATUTES REFERRED TO**

C Land Use Act 1978 ss.6(1)(a), 28(1), 34(2), 36(2)

Evidence Act s.145

### **LEAD JUDGEMENT BY IGUH JSC**

D By a writ of summons issued on the 28<sup>th</sup> day of June, 1986, the plaintiff, who is the 1<sup>st</sup> respondent herein, instituted an action against the 1<sup>st</sup> defendant, who is now the appellant, at the Maiduguri Judicial Division of the High Court of Justice, Borno State, claiming as follows:-

E “(a) A declaration that the defendant is not entitled to enter or use the said farmland.

(b) An injunction to restrain the defendant either by himself, his servants or agents or otherwise whoever from entering or using the said farmland.

F (c) Damages

(d) Further or other relief”.

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

G On the application of the 1<sup>st</sup> defendant, both the Attorney-General and the Commissioner for Lands and Survey, Borno State were on the 16<sup>th</sup> day of June, 1987 joined as “third parties” in the suit. The “third parties” are now the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively in this proceeding.

H The question whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were properly joined as “third parties” in the suit has not been raised as an issue in this appeal by any of the parties. I do not, therefore, propose to make

any comment on the subject.

The 1<sup>st</sup> defendant in his Statement of Defence vigorously denied that the plaintiff was entitled as claimed or at all and counter-claimed against the said plaintiff as follows:-

“(a) A declaration that the Defendant has an equitable and customary interest and title in the said farmland, having acquired customary law title and possession from his predecessors in title in an undisturbed long possession and his said rights cannot be defeated merely by subsequent issuance of certificates of occupancy Nos. 00080 and BO/3508. B

(b) Declaration that the issuance of the certificates of Occupancy Nos. 00080 and BO/3508 to the plaintiff in so far as they cover the areas in the possession of the Defendant is wrongful, illegal and unconstitutional and in breach of the Fundamental Rights of the Defendant entrenched in the Constitution of Federal Republic of Nigeria as modified, and the Land use Act, 1978. C D

(c) An order of this Honourable court directing the immediate cancellation of the certificates of Occupancy Nos. 00080 and BO/3508 issued in favour of the plaintiff. E

(d) A perpetual injunction restraining the plaintiff by himself, his agents or privies claiming from him from trespassing into the said piece of land.”

The plaintiff filed a reply to the 1<sup>st</sup> defendant’s counter-claim wherein he denied the 1<sup>st</sup> defendant’s entitlement to any of the reliefs counter-claimed. F

In their joint Statement of Defence, the “third parties” did not dispute the plaintiff’s claims against the 1<sup>st</sup> defendant. It was their case that the plaintiff was properly granted the Statutory Right of Occupancy by the Borno State Government in respect of the land in dispute. They also filed a reply to the 1<sup>st</sup> defendant’s counter-claim wherein they joined issue with the said 1<sup>st</sup> defendant on the averments in his Statement of Defence and Counter-claim. They therefore urged the court to dismiss H the 1<sup>st</sup> defendant’s counter-claim.

At the subsequent trial, all the parties testified on their own behalf and called witnesses.

The case for the plaintiff, briefly put, is that some time in 1978 he applied to the Konduga Local Government Council for a piece of land for the purpose of farming. His application was granted. On the 4<sup>th</sup> October, 1979, the Council issued him with a Certificate of Customary Right of Occupancy No. 00080 covering a piece or parcel of land at Lamboa/Jakana Village in the Auno District of Konduga Local Government Area of Borno State. This Certificate was tendered in evidence as Exhibit A. Thereafter the plaintiff in 1980 again applied for a Statutory Right of Occupancy in respect of the same piece of land from the Borno State Governor. After the necessary surveys, the Governor of Borno State through the relevant Commissioner issued the plaintiff with the Statutory Right of Occupancy No. BO/3508 dated the 7<sup>th</sup> day of April, 1981 in respect of the land. This Certificate is Exhibit B. The plaintiff claimed that he had since been in possession of the land for farming purposes until in 1984 when the 1<sup>st</sup> defendant came to him and asserted that the land covered by the Right of Occupancy belonged to him. The plaintiff claimed title to the land by virtue of the issuance to him of the Customary Right of Occupancy, Exhibit A, which later was converted to the Statutory Right of Occupancy, Exhibit B.

The 1<sup>st</sup> defendant, on the other hand, claimed that the said piece or parcel of land in dispute purportedly granted to the plaintiff per Exhibits A and B belonged to him and his family, the descendants of one Bulama Sheriff Bukar, their ancestor from time immemorial. He asserted that members of his said family belong to Jakana village in the Konduga Local Government Area and had been the owners under customary law in possession of the land from time beyond human memory. He claimed title to the land in dispute by virtue of devolution and/or inheritance under customary law in that the same from time immemorial had been in the exclusive ownership and possession of successive generations of his said family. He contended that the said piece of land over which Exhibits A and B were issued remained his family land and that his interest over the same had neither been revoked nor was any compensation paid to his family in respect thereof before Exhibits A and B were issued. It was his case that the land in dispute was unlawfully and illegally granted to the plaintiff



and that the Certificates of Occupancy, Exhibits A and B, were therefore null and void and of no effect. He further alleged that the certificates were obtained through active concealment of the material fact, to wit, that the 1<sup>st</sup> defendant and members of his family and before them, their ancestors, were at all material times the actual owners in possession of B the land. He stated that they remained the title owners under customary law and in possession of the land, and the occupiers thereof prior to the purported issuance of Exhibits A and B to the plaintiff. He claimed that the Borno State Government had at no time given notice to him, his C people or their predecessors in title of Government's intention to acquire the land. He then counter-claimed as aforementioned.

There was finally the case for the 3<sup>rd</sup> parties. This was essentially in line with the plaintiff's case. They claimed that following complaints from the 1<sup>st</sup> defendant and his family of acts of trespass by the D plaintiff over the land in dispute, the matter was referred to the Borno State Governor who directed that an alternative land be provided for them. They did not know whether or not the alternative piece of land had been provided the 1<sup>st</sup> defendant and his family. They testified that the E issuance of Exhibit B was as a result of reliance on Exhibit A issued by the Konduga Local Government and the certification made of lack of encumbrances by the Ministry of Agriculture.

At the conclusion of hearing, the learned trial Judge, Ogunbiyi, F J., after a careful review of the evidence on the 29<sup>th</sup> day of March, 1990 held that title to the land in dispute and actual possession thereof were in the 1<sup>st</sup> defendant and his family from the time of his ancestors from time beyond human memory. She found that the said land at the time it was purportedly granted to the plaintiff per Exhibit A was not unencumbered G but that it was in the ownership and possession of the 1<sup>st</sup> defendant and his family. She ruled that Exhibits A and B were issued in contravention of the provisions of the Land Use Act, 1978 and that they were therefore void and had no legal validity. She concluded as follows:- H

*"Accordingly and in the result, therefore, on the totality of the case before the court, while the plaintiff's claims as per paragraph 12 of his statement of claim fail, the defendant's counter-claim as per para-*

*graph 17 of his defence succeeds and consequent to which I make the following orders:-*

(a) *A declaration that the defendant has an equitable and customary interest and title in the said farmland, having acquired customary law title and possession from his predecessors in title in an undisturbed long possession and his said rights cannot be defeated merely by subsequent issuance of Certificates of Occupancy Nos. 00080 and BO/3508.*

(b) *Declaration that the issuance of the certificates of occupancy Nos. 00080 and BO/3508 to the plaintiff in so far as they cover the areas in the possession of the Defendant is wrongful, illegal and unconstitutional and in breach of the fundamental rights of the defendant entrenched in the Constitution of Federal Republic of Nigeria as modified, and the Land Use Act, 1978.*

(c) *An order is made for the immediate cancellation of the Certificates of Occupancy Nos. 00080 and BO/3508 issued in favour of the plaintiff.*

(d) *A further order is also made for a perpetual injunction restraining the plaintiff by himself, his agents or privies claiming from him, from trespassing into the said piece of land which is the property of the said defendant.*

(e) *I shall also award costs of this action which I would assess at N350.00 to be paid by the plaintiff and 3<sup>rd</sup> parties to the defendant.*

*While the plaintiff's action fails and is dismissed, the defendant's counter-claim succeeds as per above with costs of N350.00"*

Dissatisfied with this decision of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Jos Division. It is noteworthy that although the third parties supported the plaintiff's case in the trial court, they did change gear before the court below and joined forces instead with the 1<sup>st</sup> defendant and argued that the appeal be dismissed. The Court of Appeal, however, in a unanimous decision on the 17<sup>th</sup> day of May, 1993 allowed the plaintiff's appeal and concluded thus:-

*"In the result, this appeal succeeds and it is hereby allowed. The judgment of the trial court, Ogunbiyi J., entered in this case on the 29<sup>th</sup> March, 1990 is set aside in toto. In its place judgment is hereby entered*

in favour of the appellant as follows:-

1. It is hereby declared that the defendant is not entitled to enter or use the farmland covered by the Right of Occupancy No. BO/3508.

2. An injunction is hereby ordered restraining the defendant whether by himself, servants or agents or otherwise however from entering or using the said farmland. B

3. Nominal damages of N3000.00 is hereby ordered to be paid by the defendant to the plaintiff.

4. The defendant's counter-claim is dismissed.

5. The appellant is entitled to his costs against the 1<sup>st</sup> respondent only both in the lower court and in this court which are assessed at N575 and N725.00 respectively". C

Aggrieved by this decision of the Court of Appeal, the 1<sup>st</sup> defendant has appealed to this court. I shall hereinafter refer to the 1<sup>st</sup> defendant as the appellant, and the plaintiff and the third parties as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively. D

Pursuant to the Rules of this court the parties through their respective counsel filed and exchanged their written briefs of argument. In the appellant's brief of argument, the following five issues are set out as arising for determination in this appeal, namely:- E

"1. Whether the learned Justices of the Court of Appeal were right in dismissing the appellant's counter-claim. F

2. Whether the learned Justices of the Court of Appeal were right when they held that the appellant did not prove the identity of the land in dispute.

3. Whether having regard to the pleadings and evidence led, the judgment of the Court of Appeal is not against the weight of evidence i.e. who, between the appellant and the 1<sup>st</sup> Respondent proved a better title. G

4. Whether the Konduga Local Government and Borno State Certificates of Occupancy (i.e. Exhibits "A" and "B" respectively) were unlawfully and illegally issued to the 1<sup>st</sup> respondent. H

5. Whether the lower court should have ordered a retrial."

The 1<sup>st</sup> respondent, on the other hand, submitted three issues in

his brief of argument for the determination of this appeal. These are couched thus:-

B *“(a) Whether the Court of Appeal was right in holding that the Appellant did not prove with definitive certainty, the identify and boundaries of the land claimed by him in his Counter-claim for a declaration of title to land.*

*(b) Whether the Court of Appeal was right in dismissing the Appellant’s Counter-claim rather than ordering a non-suit or a retrial.*

C *(c) Whether having regard to the evidence and the pleadings on the printed record, the Court of Appeal was right in giving judgment for the 1st Respondent as it did.”*

D There is also the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ joint brief of argument in which three issues were distilled from the appellant’s grounds of appeal as calling for determination in this appeal. These issues are set out as follows:-

*“(a) Whether the learned Justices of the Court of Appeal were right in dismissing the counter-claim or not.*

E *(b) Whether the learned Justices of the Court of Appeal rightly held that the appellant had failed to proof (sic) the identity of the land in dispute with definitive certainty.*

F *(c) Whether having regard to the pleading and evidence on the printed record, the judgment of the Court of Appeal is against the weight of evidence”.*

G I have closely examined the three sets of issues identified in the respective briefs of argument of the parties and it is clear to me, having regard to the grounds of appeal filed, that the first four issues raised on behalf of the appellant are sufficiently comprehensive for the determination of this appeal. I shall therefore adopt them for my consideration of this appeal.

H At the oral hearing of the appeal, learned leading counsel for the appellant, Mr. A. A. Kayode adopted the briefs filed on behalf of the appellant and proffered additional arguments in elucidation of the submissions therein made. So did learned counsel for the 1<sup>st</sup> respondent, Mr. L. O. Sanyaolu; and learned Director of Civil Litigation, Borno State

for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr. T. A. Dibal respectively.

The main contention of Mr. Kayode is that the court below anchored its decision almost entirely on the identity of the land in dispute claimed by the appellant. He submitted that the Court of Appeal was in definite error when it held that the identity of the said land was not proved by the appellant before the trial court. Learned counsel argued, in the first place, and relying on the decision in Atolagbe v. Shorun (1985) 1 N.W.L.R. (Part 2) 360 at 365 that the identity of the land in dispute not being an issue between the parties in the case needed no further proof by either of the parties. In the second place, learned counsel pointed out that the land in dispute, both in the main claim and in the counter-claim, related to the piece or parcel of land purportedly granted to the 1<sup>st</sup> respondent by both the Konduga Local Government and the Borno State Government. He pointed out that the identity of this piece of land is clearly certain as it is more particularly and accurately delineated in the survey plan attached to the Certificate of Statutory Right of Occupancy, Exhibit B.

On the validity of the Certificates of Occupancy, Exhibits A and B, learned counsel pointed out that the 1<sup>st</sup> respondent relied entirely on those documents in proof of his alleged title to the land in dispute. He submitted that the finding of the trial court that title to the land in dispute was in the appellant and his family who were in occupation and possession thereof from time immemorial and, in particular, at the time Exhibits A and B were issued to the 1<sup>st</sup> respondent was unimpeachable. He referred to the decisions in Mc Foy v. U.A.C. (1962) A.C.152 at 160, Rossek v. A.C.B. (1993) 8 N.W.L.R. (Part 312) 382 and 485 and Odogwu v. Odogwu (1992) 2 N.W.L.R. (Part 225) 539 at 554 and stressed that one cannot put something on nothing and expect it to stand. He submitted that Exhibits A and B are invalid and transferred nothing to the 1<sup>st</sup> respondent.

On the question of who as between the appellant and the 1<sup>st</sup> respondent proved a better title to the land in dispute, learned counsel for the appellant stated that the land covered by Exhibits A and B was occupied by the appellant and his family at the time it was purportedly granted

to the 1<sup>st</sup> respondent. It was at all material times, therefore, not a vacant land for allocation to any third party. He stressed that customary title to the land was at all material times in the appellant who was in possession and occupation thereof. He submitted that the appellant's title to the land was not revoked by any one before Exhibits A and B were issued to the 1<sup>st</sup> respondent. He therefore contended that the 1<sup>st</sup> respondent got nothing by virtue of the said Exhibits A and B. He referred to the decision in Ogunleye v. Oni (1990) 2 N.W.L.R. (Part 135) 745 at 773 and submitted that Exhibits A and B are void ab initio. Mr. Kayode pointed out that the appellant's traditional evidence in respect of their ownership and possession of the land in dispute since time beyond human memory was accepted by the trial court as established. He submitted that there was no reason for the Court of Appeal to have interfered with these findings which are supported by abundant evidence on record. He urged the court to uphold the decision of the trial court to the effect that the appellant has a better title to the land in dispute than the 1<sup>st</sup> respondent. He invited the court to resolve all four issues against the respondents and to allow this appeal, set aside the decision of the Court of Appeal and restore the judgment and orders of the trial court.

For his own part, learned counsel for the 1<sup>st</sup> respondent, Mr. L. O. Sanyaolu submitted that the identity of the land claimed by the appellant was never established before the court. Relying on the decisions in Gilbert Onwuka and others v. Michael Ediala and others (1989) 1 N.W.L.R. (Part 96) 182 at 196 and Joseph Olusanmi v. Dayo Henry Oshasona (1992) 6 N.W.L.R. (Part 245) 22 at 28 – 29, he claimed that the first duty of one who claims declaration of the title to land is to prove with definitive certainly the identity and boundaries of the land claimed by him. This, he claimed, the appellant failed to do with regard to his counterclaim. He did not accept that issue was not joined by the parties with regard to the identity of the land in dispute. On the issue of title to the land in dispute, learned counsel referred to the decision in Joshua Ogunleye v. Babatayo Oni (1990) 2 N.W.L.R. (Part 135) 745 at 780 and submitted that Exhibits A and B are instruments of title which raise the presumption that the 1<sup>st</sup> respondent is the owner in possession of the land in dispute.

He argued that the appellant failed to rebut this presumption. He submitted that the 1<sup>st</sup> respondent's title to the land in dispute is superior to the appellant's claim thereto. He also contended that the validity of Exhibits A and B is unimpeachable and that they conveyed valid title to the land therein covered on the 1<sup>st</sup> respondent. He urged the court to resolve all four issues in favour of the 1<sup>st</sup> respondent and to dismiss this appeal.

The substance of the arguments of learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr. T. A. Dibal revolved around those of Mr. Sanyaolu. He however pointed out that the appellant, as 1<sup>st</sup> defendant before the trial court, defended the suit and counter-claimed as shown in his Statement of Defence and Counter-Claimed in his personal capacity. But his evidence revealed that his defence and counter-claim were prosecuted in a representative capacity for and on behalf of members of his family. He contended that as the appellant failed to show what area of the land in dispute that he claimed personally, this was fatal to his counter-claim. He therefore urged the court to resolve the issues against the appellant and to dismiss this appeal.

It is convenient to deal with issue 2 first. This poses the question whether the court below was right when it held that the appellant failed to prove the identity of the land he claimed. The first point that must be made is the basic principle of law that in a counter-claim, just like in any other claim for declaration of title to land, the onus lies on the claimant to prove with precision and certainty and without inconsistency the identify of the land to which his claim or counter-claim relates. See Onwuka v. Ediala (1989) 1 N.W.L.R. (Part 96) 182, Ezeokeke v. Umunocha Uga (1962) 1 All N.L.R. 477, Olusanmi v. Ochasona (1992) 6 N.W.L.R. (Part 245) 22 at 36, Udeze v. Chidebe (1990) 1 N.W.L.R. (Part 125) 141 etc. **There can be no doubt that the most common and, perhaps, the easiest way of establishing the precise area of land in dispute is by the production of a survey plan of such land. It is, however, equally clear that it is not in all cases for declaration of title to land that it is necessary to survey and/or tender the survey plan of the land in dispute. There are many cases in which no survey plans are essential for a proper determination of the issue. What the court**

must consider is whether, in a particular case, it is necessary for the proper trial of the action for a survey plan to be produced. Where there is no difficulty in identifying the land in dispute, a declaration of title may be made without the necessity of tying it to a survey plan. See Chief Sokpui v. Chief Tay Agbazo (1951) 13 W.A.C.A. 241, Chief Daniel Ibuluya v. Dikibo (1976) 6 S.C. 97 etc. Similarly, where the identity of the land in dispute is not in issue between the parties, no onus, naturally, lies on a claimant for declaration of title to such land to prove the said identity as that fact is not an issue for determination between the parties in the suit. See Atolagbe v. Shorun(1985) 1 N.W.L.R. (Part 2) 360 at 365 where Coker, J.S.C. in dealing with the main function of pleadings in the trial of an action had this to say:-

*“The primary function of pleadings is to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called to adjudicate between them. It is designed to bring the parties to an issue on which alone the court will adjudicate between them... A party is bound by his pleading and cannot go outside it to lead evidence or rely on facts which are extraneous to those pleaded.”*

The question that must now be asked is whether from the pleadings filed and the evidence led in this case, the identity of the land in dispute was an issue between the parties before the trial court. I will examine the pleadings first.

The 1<sup>st</sup> respondent, as plaintiff at the trial court, had pleaded in paragraphs 3, 4, 5, 6 and 7 of his Statement of Claim as follows:-

*“3. Sometimes in 1979, the Plaintiff applied to the Konduga Local Government Council for a piece of farmland for the purpose of farming.*

*4. The Plaintiff avers that consequent upon the said application stated in paragraph 3 above, the Konduga Local Government Council on the 4<sup>th</sup> of October, 1979 issued a Certificate of Occupancy No. 00080 covering a piece of farmland at Lamboa/Jakana village in Auno District of Konduga Local Government Council of Borno State. The Plaintiff*



will rely on the said Certificate of Occupancy at the hearing of this matter.

5. Pursuant to the grant made to the Plaintiff by the Konduga Local Government Council in 1979 as evidenced by Certificate of Occupancy No. 00080 of 4<sup>th</sup> October, 1979, the Plaintiff sometime in 1980 applied to the Ministry of Lands and Survey, Maiduguri for the grant of a Statutory Right of Occupancy in respect of the farmland covering an area of about 522.26 hectares. B

6. That on or about the 13<sup>th</sup> day of March, 1980, the plaintiff's application was approved by the Ministry of Land and Survey and he was issued a Certificate of Occupancy No. BO/3508 dated 7<sup>th</sup> day of April, 1981. This Certificate of Occupancy is hereby pleaded and will be relied upon by the Plaintiff at the trial of this suit. C

7. Since 1979, the plaintiff has been in possession of the said farmland more particularly described in the Certificate of Occupancy No. BO/3508 and in the Survey drawings attached to the said Certificate of Occupancy." D

The appellant, as 1<sup>st</sup> defendant, in reply to the above stated paragraphs of the 1<sup>st</sup> respondent's Statement of Claim averred thus:- E

"3. The defendant in answer to paragraphs 3 and 4 of the Statement of claim avers that the said piece of land purportedly granted to the Plaintiff by the Konduga Local Government belongs to the Defendant and his family since time immemorial and the said land is owned by over hundred people, descendants of one Bulama Sheriff Bukar, including the Defendant, all of Jakana Village in Konduga Local Government Area. F

4. The Plaintiff is not from Konduga Local Government Area of Borno State, hence he cannot lawfully acquire any interest, equitable or otherwise, in the said piece of land in dispute as opposed to the Plaintiff who hails from Jakana, the area of land in dispute. G

5. The Defendant in answer to paragraphs 5, 6 and 7 of the Statement of Claim avers that the issue that the piece of land which is in dispute was illegally granted to the Plaintiff under certificates of occupancy Nos. 00080 and BO/3408, the said purported certificates were obtained by the Plaintiff through the active concealment of the fact that H

*the Defendant has an equitable interest in the land with his family and that each of them derived his title and possession of the piece of land jointly and severally from their ancestor, Bulama Sheriff Bukar Garami, who died about 35 years ago in an undisturbed long possession, having*  
 B *customary Law title and the Defendant with his people were in possession of the said piece of land years prior to the issuance of the said purported Certificates of Occupancy.*

PARTICULARS

C *The defendant including all the descendants of one common ancestor, one Bulama Sheriff Bukar Garami, first settled on the piece of land in dispute over a hundred years ago and did exercise acts of undisturbed ownership over the said piece of land save until the present Plaintiff entered upon the land.”*

D **It seems to me crystal clear from the pleadings of the parties that the land in dispute is that piece or parcel of farm land covered by the 1<sup>st</sup> respondent’s Certificates of Occupancy No. 00080 of the 4<sup>th</sup> October, 1979 and No. BO/3508 of the 7<sup>th</sup> April, 1981,**  
 E **Exhibits A and B respectively. The appellant joined no issue, whether directly or indirectly, with the 1<sup>st</sup> respondent with regard to the identity of the said land. This farm land, as pleaded in paragraph 7 of the Statement of Claim, is more particularly described and delineated both in the Certificate of Occupancy No. BO/3508, Exhibit**  
 F **B and the survey plan attached thereto. The appellant neither denied this material averment, whether specifically or by necessary implication, nor did he state that it was not being admitted.**

G **It is trite law that every allegation of fact in a Statement of Claim if not denied specifically or by necessary implication or stated not to be admitted in the Statement of Defence shall be taken to be admitted. It is plain from the pleadings of the parties that it is the same very piece or parcel of land covered by the Certificates of**  
 H **Occupancy therein pleaded which is the subject matter of the 1<sup>st</sup> respondent action against the appellant that is the *campus bellum* with regard to the appellant’s counter-claim against the 1<sup>st</sup> respondent in the same suit. I can find no reason whatever to fault the**

trial court when, upon a close examination of the pleadings, it concluded thus:-

*“On the question of the identity of the land claimed by the defendant which Mr. Ba’aba, learned counsel for the plaintiff argued has not been identified, it is my view that since the said matter had not been raised on the pleadings of the parties, I hold that it is a none issue and that which is not for consideration.”* B

I think the court below, with respect, was in error when it held in effect that there was a duty on the appellant to prove the identify of the land he counter-claimed against the 1<sup>st</sup> respondent when that fact, on the pleading was not in dispute between the parties in the suit. In this regard, it cannot be over-emphasised that evidence must be directed and confined in courts of trial to the proof or disproof of the issues as settled by the parties in their pleadings. See Esso Petroleum Co. Ltd. v. Southport Corporation (1956) A. C. 218. To act otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. See Metalimpex v. A G. Leventis and Co. Ltd. 1976 2 S. C. 91, Oniah V. Onyia (1989) 1 N.W.L.R. (Part 99) 514, Alhaji Ogunlowo v. Prince Ogundare (1993) 7 N.W.L.R. (Part 307 610 at 624 etc. I will now turn to the evidence. D

A study of the evidence of the parties discloses that the subject matter of the 1<sup>st</sup> respondent’s claims against the appellant before the trial court is the piece or parcel of farm land purportedly granted to him by the Konduga Local Government per Exhibit A. Exactly the same piece or parcel of farm land was on the 1<sup>st</sup> respondent’s application granted to him by the Borno State Government per Exhibit B. Exhibit B has a survey plan attached to it which shows in great details the identity, boundaries and delineation of the land in dispute. From the evidence of the parties and from the survey plan attached to Exhibit B itself, 31 property beacons numbers 24459 to 24489 serially were planted all around the H land in dispute thus demarcating it from other lands. The Third Party Witness No. 2 testified thus:-

*“The grant of Right of Occupancy was conveyed to Alhaji Ciroma*

*Alkali on the 8<sup>th</sup> March 1980. The said Alkali Ciroma Alkali accepted the grant to him. When we received his acceptance of the grant of the Right of Occupancy, an instruction to survey was given and the survey was carried out and 31 beacons were accordingly planted demarcating the area starting from property beacons Nos. 24459 to 24489 serially.”*

**I should perhaps add that the above evidence was neither challenged nor disputed by the appellant or any other party. It can therefore be said that the land in dispute is not only very well known to the parities, its identity is clearly not in dispute.**

The only parting of the ways by the parties is that whereas the 1<sup>st</sup> respondent claimed to have obtained a grant of the land in dispute in 1979 by virtue of Exhibits A and B, the appellant’s case is that he and his family had been the owners in possession thereof from time immemorial until it was purportedly granted to the 1<sup>st</sup> respondent by the Government. It is the land covered by the Certificates of occupancy, Exhibits A and B and in respect of which the 1<sup>st</sup> respondent sued the appellant for a Declaration that the appellant was not entitled to enter the land, Injunction and damages for trespass. It is the same land in respect of which the appellant counter-claimed against the 1<sup>st</sup> respondent for Declaration of title, Cancellation of the said Exhibits A and B, the Certificates of Occupancy issued to the 1<sup>st</sup> respondent by the Konduga Local Government and the Borno State Government respectively, Perpetual Injunction etc.

**Both the claim and the counter-claim were tried together in the same suit. It is clear to me that having regard to the state of the pleadings, the evidence before the court and the Exhibits tendered, particularly exhibits A and B, and the survey plan of the land in dispute which relates no more and no less to the claim and counter-claim of the parties, failure of either the appellant or the 1<sup>st</sup> respondent to file a further survey plan of the land in dispute could not be fatal since the identity of the land was clearly known to them. Issue 2 must therefore be resolved against the respondents.**

I will next deal with issues 3 and 4. These concern who, as between the appellant and the 1<sup>st</sup> respondent, proved a better title to the farmland in dispute and whether the Certificates of occupancy, Exhibits

A and B issued in favour of the 1<sup>st</sup> respondent are valid or otherwise of no effect. It is convenient to consider both issues together.

In this regard, the 1<sup>st</sup> respondent for his title to the land in dispute relied entirely on the Certificates of Occupancy, Exhibits A and B. Each of the two Certificates relates to the land in dispute; Exhibit A was issued by the Konduga Local Government and Exhibit B by the Borno State Government in respect of exactly the same piece of land. Exhibit A was issued on the 4<sup>th</sup> October, 1979. It was by virtue of its issuance that the 1<sup>st</sup> respondent for the first time went into possession of the land in dispute. Exhibit B was said to have been issued based on Exhibit A.

The appellant and his witnesses, on the other hand, claimed that the appellant and members of his family had been in occupation and possession of the land in dispute as owners thereof for over 100 years. They inherited the land in dispute by devolution from their ancestors. They regarded the unauthorised entry on the land by the 1<sup>st</sup> respondent as an act of trespass for which they addressed protest letters to the Borno State Government.

It is admitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the third parties, that following these protest letters, the State Governor directed that the appellant and members of his family be provided with another land. There is no evidence that this directive was complied with. The appellant stressed that they remained in effective occupation of the land from the time of their forefathers until the 1<sup>st</sup> respondent suddenly appeared on the land for the first time in 1979. The land, as at 1979, was therefore not unoccupied or vacant land for allocation to the 1<sup>st</sup> respondent.

The learned trial Judge after a painstaking consideration of the evidence of title adduced by the parties stated as follows:-

*“... From the foregoing, it is my view that the defendant has despite the possession by the plaintiff proved a better title to the land in question. The claim by the plaintiff of being in possession for 11 – 12 years and thus entitling him to title is misconceived as stated in the authority of Mogaji’s case, supra. This is so because the defendant has been able to show his title is traceable to his ancestors from time immemorial. This therefore goes to prove that the land at the time it was*

shown to the plaintiff and exhibit A made out was not vacant but that which belonged to the defendant. Further more the plaintiff's witness No. 2 Bulama Ward, who is ward Head of the said area for 25 years did not say in his evidence that the land was vacant with no owner. By virtue of his position and period of stay he was in a good position to have confirmed. Consequently, therefore, the answer to the 1<sup>st</sup> issue raised must be in the negative, to the effect that no declaration and injunction could be made in favour of the plaintiff against the defendant."

On the validity of Exhibits A and B, she observed:-

"Without the land being vacant, Exhibit A could not have been properly in order... There was no evidence from the Konduga Local Government of the person who ascertained the vacant nature of the land in question. Furthermore, in respect of exhibit B, the third parties witness No. 2, the Deputy Chief Lands Officer said the Ministry for Lands and Survey relied on exhibit A and also the Ministry of Agriculture for the certification of lack of encumbrances on the land for the issuance of exhibit B. As rightly argued by the learned counsel Mr. O. P. Popoola, there was no witness from the Ministry of Agriculture to testify in confirmation to what the Deputy Chief Lands Officer said. There was also no document certifying same. This has thrown a heavy cloud upon the arguments by the learned counsel Mrs. Ngadda for the third parties who in her submission heavily relied on exhibits A and B in order to give a legal backing to the claim by the plaintiff.

Furthermore, by the provision of Sections 5 and 6 of the Land Use Act, the Military Governor and Local Government have the power to grant statutory and customary rights of occupancy in urban and in respect of land not in urban area respectively. However, and again as rightly argued by Mr. Popoola, as a prerequisite justice demands that adequate enquiry must have been made before allocating the land to individuals. In the matter at hand, exhibits A and B were in my view both issued in contravention of the provisions of the Land Use Act... It follows therefore that the said Exhibits A and B do not have any legal effect.

*Furthermore, with the evidence before the court that the plaintiff needed the land for his own private purpose, the question of acquisition for an overriding public interest does not arise as sought to be argued by the learned counsel, Mr. O. P. Popoola.”*

The Court of Appeal, for its own part, reversed the above findings of the trial court, and held that the respondent was in possession of the land for a period of 11 – 12 years prior to the institution of this action and that on the finding of the trial court, the land was vacant when it was granted to the 1<sup>st</sup> respondent in 1979. With the greatest respect to the court below, it is patently incorrect that the trial court found the land in dispute to be vacant at the time it was granted to the 1<sup>st</sup> respondent in 1979. The finding of the trial court on the issue is, in my opinion, the very opposite of what the court below would appear to suggest. The plain finding of the trial court is that the land in dispute was not vacant in 1979 but that it was in the occupation and ownership of the appellant and his family from time immemorial until the purported allocations to the 1<sup>st</sup> respondent per Exhibits A and B.

It seems to me, again with respect, also incorrect to suggest, as the court below would appear to have done, that the 1<sup>st</sup> respondent was in possession of the land in dispute for 11 – 12 years prior to the institution of this action. Paragraph 7 of the 1<sup>st</sup> respondent’s Statement of Claim pleaded that it was in 1979 that he went into possession of the land in dispute. The writ of summons in this case was issued on the 28<sup>th</sup> June, 1986 after which the appellant waited in vain for the provision of another land for his family as directed by the State Governor. It is convenient at this stage to dispose of the question of possession of the land in dispute by the 1<sup>st</sup> respondent as at the date the writ of summons in this case was issued.

Section 145 of the Evidence Act provides as follows:-

*“145. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”*

**It is clear that the above section of the Evidence Act places the**

burden of proof on the appellant to prove that the 1<sup>st</sup> respondent who was in possession of the land in dispute at the time of the institution of this suit is not the owner thereof. Section 145 of the Evidence Act, however, merely creates a rebuttable presumption of ownership and no more. Its operation can have no place but is automatically dislodged when another person proves a better title to the property in dispute. See Mustafa Lawal v. Abdul Ijale (1967) N.M.L.R. 155, D. O. Idundun v. Daniel Okumagba (1976) 9 – 10 S.C. 227 at 249, Da Costa v. Ikoni (1968) 1 All N.L.R. 394 at 398. Accordingly, where one in possession of land is said to be a trespasser, the onus is on the person asserting such an allegation to establish that he has a better title to the land than the person in possession. See Pius Amakor v. Benedict Obiefuna (1974) 3 S.C. 67. It will now be necessary to ascertain whether the appellant was able to prove a better title to the land in dispute than the 1<sup>st</sup> respondent.

In this regard, it is long settled that there are five methods by which ownership of land may be proved by a claimant. These are as follows:-

- (i) By traditional evidence;
- (ii) By production of document of title which must be duly authenticated;
- (iii) By the exercise of numerous and positive acts of ownership over a sufficient length of time to warrant the inference that the person is the true owner of the land;
- (iv) By acts of long possession and enjoyment of the land; and
- (v) By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

See Idundun & ors v. Okumagba and others (1976) N.S.C.C. 445. While the 1<sup>st</sup> respondent claimed ownership of the land in dispute as per the second method, that is to say, by the production of documents of title, Exhibit A and B; the appellant asserted his ownership of the land as per the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> methods above set out. I will now turn to the claim of the 1<sup>st</sup> respondent in respect of his ownership of the land in dispute.



**As above stated, it is beyond dispute that one of the recognised methods of establishing title to land is by the production of valid documents of title evidencing the title claimed. See too *Piaro v. Tenalo* (1976) 12 S.C. 31 at 37, *Nwodike v. Ibekwe* (1987) 4 N.W.L.R (Part 67) 718. It must however be stressed that this does not and cannot mean that once instrument of title to land, such as a Deed of Conveyance or a Certificate of Statutory or Customary right of occupancy is tendered in court, this automatically proves that the land therein purportedly conveyed, granted or transferred by that instrument becomes the property of the grantee. See *Prince Ngene v. Chike Igbo and Another* (2000) 4 N.W.L.R. (Part 851) 131. The existence of a certificate of occupancy is merely a prima facie evidence of title to the land it covers and no more. Nor does mere registration validate spurious or fraudulent instrument of title or a transfer or grant which in law is patently invalid or ineffective. See *Lababedi and Another v. Lagos Metal Industries (Nig.) Ltd and Another* (1973) 8 N.S.C.C. 1. As The position was explained by this court in *Romaine v. Romaine* (1992) 4 N.W.L.R. (Part 238) 650 per E Nnaemeka-Agu, J.S.C.:-**

*“But it does not mean that once a claimant produces what he claims to be an instrument of grant he is automatically entitled to a declaration that the property which such an instrument purports to grant is his own. Rather production and reliance upon such an instrument inevitably carries with it the need for the court to enquire into some or all of a number of questions, including:-*

- (i) whether the document is genuine and valid;*
- (ii) whether it has been duly executed, stamped and registered;*
- (iii) whether the grantor had the capacity and authority to make the grant;*
- (iv) whether the grantor had in fact what he purported to grant and*
- (v) whether it had the effect claimed by the holders of the instrument.”*

Exhibits A and B must therefore be examined with a view to ascertaining

their validity or otherwise.

For a better appreciation of the issue, it is necessary to observe that under the Land use Act, 1978, two types of rights of occupancy were thereby created. These comprise of Statutory right of occupancy B and Customary right of occupancy.

Both Statutory right of occupancy and Customary right of occupancy are of two classifications. The first is the Statutory right of occupancy granted by the State Governor pursuant to Section 5 (1) (a) C of the Act and the Customary right of Occupancy granted by the Local Government under Section 6 (1) (a) of the Act. The second classification is the Statutory right of occupancy deemed to have been granted by the State Governor pursuant to Section 34 (2) of the Act and the Customary right of occupancy deemed to have been granted by the Local D Government under Section 36(2) of the Act. In both cases of Statutory and Customary rights of occupancy, therefore, there exist an actual grant as well as a deemed grant.

An actual grant is naturally a grant made by the Governor of a E State or a Local Government whilst a deemed grant comes into existence automatically by the operation of law. See Savannah Bank (Nig.) Ltd. v. Ajilo (1989) 1 N.W.L.R. (Part 97) 305 and Alhaji Adisa v. Emmanuel Oyiwola and others (2000) 10 N.W.L.R. (Part 674) 116. It is in the F light of these categories of grant that the validity of Exhibits A and B must now be examined.

As I have already indicated the Certificates of Occupancy, Exhibits A and B, are merely prima facie evidence of title and no more. The 1<sup>st</sup> respondent's root of title is the Certificate of Customary right of G Occupancy, Exhibit A. The Certificate of Statutory right of Occupancy, Exhibit B, was issued by the Borno State Government solely on the basis of Exhibit A. Indeed Exhibit B was not only issued on the basis of Exhibit A, it was described as the conversion of the 1<sup>st</sup> respondent's Certificate H of Customary right of Occupancy, Exhibit A, to a Certificate of Statutory right of occupancy, Exhibit B. It does not appear from the evidence that any further or serious investigations were carried out by the Borno State Government before Exhibit B was routinely issued. On the evidence of

the 3<sup>rd</sup> Party witness No. 2, Mallam Ibrahim Magaji Wala, the Deputy Chief Land Officer, Borno State the 1<sup>st</sup> respondent applied for the “conversion” of his Customary right of Occupancy No. 00080 to Statutory right of occupancy. Said he:-

*“The application (i.e. of the 1<sup>st</sup> respondent) was based on a conversion of his Customary Certificate of Occupancy No. 00080 which he obtained from Konduga Local Government dated 4<sup>th</sup> October, 1979”*

(Words in brackets supplied for clarity)

Under cross-examination by the 1<sup>st</sup> respondent, he stated:-

*“Although we (i.e. Borno State Government) did not contact the Konduga Local Government, we believed that the Konduga Customary Certificate of Occupancy was genuine”*

(Words in brackets and underlinings supplied for clarity and emphasis)

He added:-

*“I have nothing to do or know whether or not the Konduga Local Government did inquire before issuing the Customary Right of Occupancy. The application for the certificate on the land was for mixed farming for the use of the plaintiff”*

(underlining supplied for emphasis)

The above witness was the star witness who testified for the Borno State Government in respect of Exhibit B. It is clear from his testimony that the State Government in issuing Exhibit B relied entirely on the issuance of Exhibit A by the Konduga Local Government, irrespective of whether or not the said Exhibit A was regularly issued and whether or not it was valid. Exhibit B, it was stated, was issued by the State Government in the belief that Exhibit A was valid, or, in the word of the witness, genuine. If Exhibit A is defective and invalid, it will stand to reason that Exhibit B which is dependent on and finds its roots from the said Exhibit A can hardly be any different.

**Now, the learned trial Judge after a thorough review of the evidence found in the clearest possible terms that the appellant proved a better title to the land in dispute than the 1<sup>st</sup> respondent. She found that the appellant and his family members and before them, their predecessors in title, had from time immemorial been**

the owners in possession and occupation of the land in dispute up till the 4<sup>th</sup> October, 1979 when Exhibit A was issued. These findings are amply supported by evidence on record and, with profound respect, the court below ought not to have interfered with them in the absence of cogent reasons for so doing. See Woluchem v. Gudi (1981) 5 S.C. 291 at 295 – 6, 326 – 9, Balogun v. Agboola (1974) 10 S.C. 111, Ike v. Ugboaja (1993) 1 N.W.L.R. (Part 301) 539 at 555.

Section 36(2) of the Land Use Act provides thus:-

*“Any occupier or holder of such land (i.e. land not in an urban area as in the present case) whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government...”*

(Words in brackets supplied for clarity)

The Land Use Act, 1978 came into operation on the 29<sup>th</sup> March, 1978. **It is not in dispute that the land is not in an urban area.** There is also a finding by the learned trial Judge that the appellant’s people have been in occupation and used the land from time beyond human memory for agricultural purposes. In these circumstances, it cannot be disputed that title to the possession of the land in dispute for agricultural purposes was as at the 29<sup>th</sup> March, 1978 vested in the appellant and members of his family as if a customary right of occupancy had been granted to them by the Konduga Local Government as the occupiers, holders and customary law title owners thereof. This is by virtue of the *deemed grant* in their favour by the operation of law pursuant to the provisions of Section 36(2) of the Land Use Act, 1978. This grant, to all intents and purposes is no different from an actual grant to the appellant and members of his said family under the provisions of Section 6(1)(a) of the Act. It is my view that the one grant is in all respects as good as the other and that the appellant and members of his family from the 29<sup>th</sup> day of March, 1978 became the lawful beneficiaries and/or grantees

of the aforesaid customary right of occupancy over the land in dispute with the Konduga Local Government as their grantors. It is my further view that the land in dispute having been deemed granted to the appellant by the operation of law by the Konduga Local Government as from the 29<sup>th</sup> March, 1978 could not thereafter be lawfully or validly granted a second time by the same Local Government during the subsistence of the first grant as the land would then not be free for allocation under the well known maxim, nemo dat quod non habet. The purported grant under Exhibit A is therefore patently unjustifiable, unlawful and clearly invalid and of no effect. See Rossek v. A.C.B. Ltd. (1993) 8 N.W.L.R. (Part 312) 382 at 485, Mc Foy v. U.A.C. (1962) A.C. 152 at 160, Okafor Egbuche v. Chief Idigo 11 N.L.R. 140, Sanyaolu v. Coker (1983) 3 S.C. 124 at 163 – 164 etc. I think the Court of Appeal was in error when upholding Exhibit A in favour of the 1<sup>st</sup> respondent, it observed:-

*“There was also abundant evidence that the land was vacant when the initial grant was made by the Local Government through the District Head.”*

With profound respect, there was no such accepted evidence by the trial court. On the contrary, the finding of the learned trial Judge was that the land in dispute at the time Exhibit A was issued was in the possession and occupation of the appellant and his family and that the land was therefore not vacant or unoccupied for allocation by the Konduga Local Government.

Turning now to Exhibit B, it cannot be disputed that the same was issued solely on the basis of Exhibit A and that if Exhibit A is defective and without validity, Exhibit B would be equally vitiated and without foundation and consequently ineffective. But more importantly is the fact that as at the 7<sup>th</sup> April, 1981 on which date Exhibit B was issued by the Borno State Government in favour of the 1<sup>st</sup> respondent the land therein purportedly granted was effectively in the occupation and possession of the appellant and his family by virtue of their right of occupancy over the same pursuant to the provisions of Section 36(2) of the Land Use Act, 1978.

**By the provisions of Section 28(1) of the Land Use Act, 1978,** it shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. At no time was the appellant's validly subsisting right of occupancy over the land in dispute revoked by the Borno State Governor nor even was notice of such revocation served on the appellant or on his predecessors in title. It is also not in dispute that no compensation in respect of the land was ever paid to the appellant. It ought also to be borne in mind that the purported grant made by the State Government to the 1<sup>st</sup> respondent was not for any overriding public interest but for his personal use for farming purposes. In these circumstances, it seems to me that Exhibit B is equally tainted with illegality and is as incurably defective as Exhibit A.

**I repeat** that the mere issuance of the Certificates of Occupancy, Exhibits A and B does not and cannot confer title in respect of the land in dispute on the 1<sup>st</sup> respondent where no such title either existed or was available to be transferred to any one. It is my view that Exhibits A and B were both issued at the time the customary title of the appellant and members of his family over the piece of land in dispute was subsisting and vesting properly in them and had not been revoked. Both Certificates of Occupancy were rooted on no foundation whatsoever and they are, in my view, totally ineffective and void *ab initio*. It is also clear to me that having regard to the findings of the learned trial Judge which are in no way perverse and were not faulted by the court below, the appellant proved a better title to the land in dispute than the 1<sup>st</sup> respondent. Issues 3 and 4 must therefore be resolved in favour of the appellant.

**Issue 1** poses the question whether the Court of Appeal was right in dismissing the appellant's counter-claim. In the first place, it is the finding of the learned trial Judge, a finding fully supported by the evidence and all applicable law, that Exhibits A and B upon which the 1<sup>st</sup> respondent relied for his alleged title to the land in dispute are ineffective and null and void because at the

time of their issuance, the right of occupancy of the appellant in respect of the same land had not been revoked. In the second place, the appellant's customary title to the land in dispute based on traditional history was thoroughly considered by the trial court and found established. In this regard, it is a well settled principle of law that each of the five methods of proving title to land set out by this court in *Idundun and others v. Okumagba and others* (1976) 9-10 S.C. 227, inclusive of proof of ownership by traditional history or evidence, will suffice independently of the others to prove title to land. See *Nwosu v. Udeala* (1990) 1 N.W.L.R. (Part 125) 188, *Sunday Piaro v. Chief Tenalo and others* 1976 12 S.C. 31 at 42. *Okonkwo v. Okolo* (1988) 2 N.W.L.R. (Part 79) 632 at 656. **Thirdly it was the finding of the trial court that the appellant and before him, his predecessors in title, from time immemorial had been in continuous possession and occupation of the land in dispute as the owners thereof right up to the 29<sup>th</sup> March, 1978 and at the time Exhibits A and B were issued. They were therefore vested with right of occupancy in respect of the land in dispute as the occupiers, holders and customary title owners thereof by virtue of Section 36(2) of the Land Use Act well before Exhibits A and B were issued in favour of the 1<sup>st</sup> respondent. In these circumstances, I find it difficult to accept that the court below was right in dismissing the appellant's counter-claim.**

One issue that seemed to have troubled the Court of Appeal in no small measure was that the appellant failed to express in his Statement of Defence and Counter-claim the fact that he was prosecuting the case in a representative capacity for himself and on behalf of members of his family. In this regard, the court below stated:-

*"... But he (meaning the appellant) was claiming for his own portion of the land. He was not claiming as a representative of all the descendants of Bulama Sheriff Bukar. It is clear that in paragraph 11, of the counter-claim, the land allocated to the appellant was inherited by over a hundred people. Accordingly for the 1<sup>st</sup> respondent to succeed in his counter-claim, he must prove the boundary and the identity of that*

*portion of the land which he, as one of the descendants of Bukar was inherited by him, since apparently the other descendants are not claiming any land from the appellant. Now has he done that? The answer is in the negative. He has failed to prove the area he was claiming."*

B (Words in brackets supplied for clarity)

**With the greatest respect to the court below, it cannot be right to suggest that the plaintiff was only claiming his own personal portion of land in the suit and that he was not defending the suit or counter-claiming against the respondents as a representative of the descendants of Bulama Sheriff Bukar.** In this respect, reference may, once again, be made to paragraphs 3 and 5 of the defendant's statement of Defence and Counter-claim which were earlier on set out in this judgment. Those paragraphs, in effect, aver that the land in dispute purportedly granted to the 1<sup>st</sup> respondent belongs to the appellant "and his family", the descendants of their ancestor, one Buladma Sheriff Bukar, who number over 100 from time immemorial. Paragraph 5 further avers that the appellant and the said members of his family as owners of the land in dispute had been in long undisturbed possession of the land until the issuance of Exhibits A and B.

Additionally, there are also paragraphs 6 and 11 of the said Statement of Defence and Counter-claim which aver thus:-

F *"6. The Defendant being one of the descendants of the said Bulama Sheriff Bukar has since over thirty years ago been cultivating the piece of land in dispute with other descendants of the said Bulama Sheriff Bukar Garami who inherited the farm land from their grand father. The plaintiff further avers that there was nothing like mixed farming being executed on the farm by the plaintiff as claimed."*

G *"11. The Defendant on 24<sup>th</sup> July 1986 through his Solicitors wrote to the Governor about the nonchalant attitude of the Sole Administrator, Konduga Local Government to provide any alternative farm-land to the defendant and his men of over 100 in number whose farm was illegally allocated to the plaintiff, without notice or compensation."*

Copious evidence was led by the appellant and his witnesses with regard to the communal ownership of the land in dispute by the



appellant and members of his family. Said the appellant:-

*“My portion of farmland is one out of the 110 farmlands on the area in question. I have been farming the land for 28 years before the plaintiff took over. I have a farm at Jakana. What was given to the plaintiff was not a bush but a farmland belonging to 110 people. The answer to our petition to the governor was given to the Local Government which we eventually got through the District Head. I cannot tell whether or not the governor looked into the matter seriously. I had no idea that the farmland was given to the plaintiff by the local government. It was the plaintiff that gave me the information. Apart from farming I have no other business.”*

There was also the evidence of D. W. 6, Kachalla Modu, a member of the appellant’s family. He testified inter alia as follows:-

*“Apart from the 26 of us, the members of the defendant’s family were also farming on the land before it was taken from us. The defendant’s family were on the land for about 60 years before it was taken away. Before I was made to leave the land I was not paid anything in lieu of compensation. Up till now neither myself nor any of the others had been paid any compensation in respect of the land taken away from us... It is true that about 100 people from the defendant’s descendants have the pieces of their portions on the land from time immemorial and which the defendant also has his own portion. It is true that there are 99 others apart from the defendant and including myself all who have interest in the land now in question... It is not true that the land claimed by the plaintiff was a thick bush which the plaintiff cleared. It is also not true that the land initially belonged to no one when it was acquired by the plaintiff. I was one of those who petitioned the Military Governors in respect of this piece of land.”*

There can be no doubt, therefore, that both the pleadings and the evidence of the appellant and his witnesses disclose in the clearest possible terms that the case was being defended and the counter-claim prosecuted for and on behalf of the appellant and members of his family.

**It is long settled that once the pleadings and the evidence of a party conclusively disclose a representative capacity and it is**

clear that the case was fought throughout in that capacity, the trial court can properly and justifiably enter judgment for and/or against the party concerned in such representative capacity, even if an amendment to reflect that capacity had not been applied for and obtained. See Afolabi and others v. Adekunle and Another (1983) 2 S.C.N.L.R. 141 or (1983) 14 N.S.C.C. 398, Ayeni v. Sowemimo (1982) 5 S.C. 60 Dokubo v. Bod Manuel (1967) 1 All N.L.R. 113 at 121, Mba Nta and others v. Ede Anigbo and Another 91972) 5 S.C. 158 at 174 – 176. It would be otherwise if the case is not made out in a representative capacity. See Onwunalu Ndidi and Another v. Osademe (1971) 1 All N.L.R. 14 at 16. This is because the law in such circumstance is that the court should do substantial justice and save multiplicity of suits by amending the capacity in which the suit is brought or defended so as to bring it in line with the pleadings and the evidence. Where, therefore, an action is brought in a representative capacity, failure to express that fact on the writ of summons does not ipso facto invalidate the proceedings and an appellate court may on its own motion amend the title to the proceedings in order to show clearly the capacity in which a party has sued or is sued provided the pleadings and the evidence conclusively show that the action is prosecuted or defended in a representative capacity. See too Iro Ezera v. Inyima Ndukwe (1961) All N.L.R. 587. Where no evidence of representation has been given, such a case cannot be one where an amendment can be made by the court to the writ of summons and the Statement of Claim or Defence for that by itself would not cure the lack of evidence.

In the present case, there are copious averments in the pleadings and corresponding evidence to establish that the appellant's case was fought before the trial court in a representative capacity for and on behalf of the appellant and members of his family, namely, the descendants of one Bulama Sheriff Bukar and the trial court was perfectly entitled to have granted the appellant's counter-claim in that capacity. In my view, the court below, with respect, was in error to have held otherwise for the simple reason that there was

**failure on the part of the appellant to express the fact of representation at the heading of his Counter-claim. See too Lawrence Elendu and others v. Felix Ekwoaba 1993) 12 N.W.L.R. (Part 578) 320 at 331 – 332** where this court, per Onu J.S.C., succinctly put the proposition of law under consideration as follows:-

*“Once the pleadings and evidence show conclusively a representative capacity and the case was fought throughout in that capacity, the trial court can justifiably properly enter judgment for and/or against the party in that capacity even if an amendment to reflect that capacity had not been applied for and obtained. Moreover, an appeal court has the power in the interest of justice to amend the parties’ capacity in the writ of summons and to enter judgment for them accordingly.”*

I will finally dispose of the mountain of a mole hill which the Court of Appeal, with respect, made of the 1<sup>st</sup> respondent’s alleged long possession of the land in dispute for 11 – 12 years. This is one of the reasons for which it was able to dismiss the appellant’s counter-claim and judgment entered for the 1<sup>st</sup> respondent as claimed.

In the first place, I have already alluded to the undisputed fact that it is, again with profound respect, incorrect to suggest that the 1<sup>st</sup> respondent was in possession of the land in dispute for 11 – 12 years before he was sued. On his evidence, this cannot be right as he went into occupation of the land in dispute after exhibit A was issued to him late in 1979 and the present action was filed in June, 1986. In the second place, the principle of law is well settled that even in appropriate cases of long possession by a plaintiff, and this is clearly not one of them, long possession cannot found a claim of declaration of title to land, damages for trespass and perpetual injunction against the true owner of title to such land. A trespasser in possession is only entitled to sue in trespass, persons who are not the true owners of the land. As against a trespasser, possession attaches to title or ownership of the land in dispute and if he sues one who has a better title to the land than himself, he cannot succeed. See Mogaji v. Cadbury Nig. Ltd. (1985) 2 N.W.L.R. (Part 7) 393, Da Costa v. Ikomi (1968) 1 All N.L.R. 382 at 398. In the former case this court per Obaseki, J.S.C. had cause to observe as follows:-

*“It is my view that the submission made on behalf of the appellants that their long possession of the land should entitle them to a declaration to be made in their favour is highly misconceived. The respondents, in my view, have been able to show that their claim to the land in dispute is traceable to Ashade family who have over the years been declared owners of the land in and around the land in dispute in a series of judgments pleaded and tendered in the course of the proceedings in the court below.”*

In the present case, the learned trial Judge was right in holding that title to and ownership of the land in dispute was in the appellant and members of his family. I entirely agree with her finding that the 1<sup>st</sup> respondent’s claim of being in possession of the land in dispute for 11 – 12 years and thus entitling him to ownership thereto is misconceived having regard to the appellant’s established title to the land in dispute.

The conclusion I therefore reach is that there is merit in this appeal and the same is hereby allowed. The decision of the Court of Appeal dated the 17<sup>th</sup> day of May, 1993 including the order as to costs is set aside and the judgment of the trial court delivered on the 29<sup>th</sup> day of March, 1990 is hereby restored. However, having regard to the fact that the 1<sup>st</sup> respondent’s action was defended and the appellant’s counter-claim prosecuted before the trial court in a representative capacity for and on behalf of the appellant and members of his family, judgment is hereby entered for the said appellant in the counter-claim for himself and on behalf of all the members of his family, that is to say, the descendants of Bulama Sheriff Bukar of Jakana Village in the Konduga Local Government Area of Borno State and the heading of the appellant’s counter-claim is hereby amended accordingly.

There will be costs to the appellant against each set of respondents, namely, the 1<sup>st</sup> respondent, of the one part, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, of the other part, which I assess and fix at N1,000.00 in the court below and N10,000.00 in this court respectively.

**WALI JSC**

I have had the privilege of reading in advance, a copy of the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion for allowing the appeal. B

My learned brother Iguh, JSC has so exhaustively and adequately dealt with all the issues raised and canvassed in this appeal and as such I have nothing more useful to contribute. I adopt the reasons as mine.

I therefore also allow the appeal and adopt the consequential C orders including that of costs, made in the lead judgment.

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**OGUNDARE JSC**

I have had the privilege of a preview of the judgment of my D learned brother Iguh JSC just delivered with which I am in full agreement. He has admirably covered all the issues raised in this appeal. I have nothing more to add to the reasons given by him for allowing the appeal.

I too allow the appeal, set aside the judgment of the Court of E Appeal and restore the judgment of the trial High Court with the amendment that the Appellant counter-claims for and on behalf of himself and members of the family of Bulama Sheriff Bukar Garami.

I abide by the order for costs made by my brother Iguh JSC. F

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**KATSINA-ALU JSC**

I have had the privilege of reading in draft the judgment of my G learned brother IGUH JSC in this appeal. I entirely agree with it. For the reasons which he has given I would also allow the appeal with costs as awarded.

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**EJIWUNMI JSC**

I have had the privilege of reading in advance the draft of the judgment just delivered by my learned brother Iguh JSC. As I am in H

entire agreement with the reasons given by him for upholding the appeal, I also would uphold the appeal. The appeal is therefore hereby allowed. The judgment of the Court of Appeal dated the 17th day of May, 1993 including the order as to costs is set aside and the judgment of the trial B Court delivered on the 29th of March, 1990 is hereby restored. I also make further orders made in the leading judgment with regard to costs.

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