

**SUPREME COURT OF NIGERIA**

22ND JUNE, 2001. SC. 80/1996.

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

CHIEF J. E. BABATOLA ..... PLAINTIFF/APPELLANT  
(For and on behalf of the Olora  
Chieftaincy Family of Ado-Ekiti)

AND

OBAALADEJANA, THE ALAWOROKO  
(For and on behalf of the ..... DEFENDANT/RESPONDENT  
Iworoko Community, Iworoko-Ekiti)

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***APPEALS*** - Issue - Which was not raised at lower court - And for which no leave was sought - Before it was formulated - Is incompetent and is struck out (H 7)

***EVIDENCE*** - Exhibits - Rejected evidence - Once a document is tendered - And declared inadmissible - It is wrong to refuse to mark it "Tendered and Rejected" (H 1)

***JUDGMENTS*** - Jurisdiction - Parties - Court cannot give judgment against a person - Who was not made a party to the action - Or who had no opportunity to defend the suit (H 8)

***LAND LAW*** - Identity of land - Where there is failure - Of both oral and documentary evidence to identify the land - Mere mention of names is not enough - And the claim must fail (H 5)

***LAND LAW*** - Identity of the disputed land - Must be stated with clarity - In order to identify the land trespassed upon (H 3)

***LAND LAW*** - Survey plan - Admissibility - Survey plan which is not prepared by a qualified surveyor - Is inadmissible - For failure to comply

*with s.3 Survey Law of Ondo State (H 2)*

**LAND LAW** - *Trespass - Damages - Having failed to prove the identity of the trespassed land - The claim for damages must fail (H 6)*

**LAND LAW** - *Trespass - Proof - The onus is on the plaintiff - To prove the identity of the land trespassed upon (H 4)*

### **FACTS**

The appellant as plaintiff commenced this action at the Customary Court in Ado-Ekiti but it was later transferred to the Ado-Ekiti High Court. The appellant claimed for N20,700.00 as general damages for trespass by the defendants, and a perpetual injunction against the defendants to restrain further trespass amongst other reliefs.

The trial high court after considering the evidence adduced before it concluded that the claim of the plaintiff was proved and granted him the reliefs sought. Whereupon the respondents appealed to the Court of Appeal which allowed the appeal and dismissed all the claims of the plaintiff. The appellant has now appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. whether or not the Court of Appeal was right to have expunged from the records, Exhibit “C” which was admitted by the trial court after the trial court had initially refused an application to tender it (Exhibit “C”) as an Exhibit because it was not pleaded.*

*2. whether or not the Court of Appeal was right to have expunged from the records, Exhibit “C” or Exhibit “H” in view of S.3 of the Survey Law of Ondo State.*

*3. Whether or not the plaintiff established the identity of the land in dispute.*

*4. whether or not the plaintiff who has failed to identify the land trespassed upon is entitled to damages for trespass on the said land.*

*5. Whether or not the Court of Appeal was bound to Non-suit the plaintiff after setting aside the judgment of the trial court.*

*6. Whether or not the plaintiff made a claim for, or established a*

*claim of trespass against Mr. Kola Aladejana in respect of the area covered by Exhibit “G”.*

*7. Whether or not the decision of the Court of Appeal should be set aside in view of the evidence.”*

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

***Exhibits - Rejected evidence***

1. The learned Justice of Court of Appeal is quite right, that once a document is entered during proceedings and declared inadmissible by the trial judge it should be marked “Tendered and Rejected”. The rejected document shall be sent to the appellate court where there is an appeal. It is wrong to declare a document inadmissible and to decline to mark it “Tendered and Rejected”. The Court of Appeal is therefore right to declare that Exhibit “C” should be expunged from the records. (p. 2149 H)

***Admissibility of Survey plans***

2. The appellant, who is said to be a geography teacher, told the trial court that he personally drew the sketch map (Exhibit “C”). The sketch map is therefore inadmissible in evidence having been prepared and signed by a person who was not a surveyor as is required by the law. Exhibit “H” too was not made by a licensed surveyor. It was made by the 2<sup>nd</sup> defendant and this is how he told the court about the making of the Exhibit. He said as follows:

*“I knew when this case was in the Customary Court. I filed a plan. The plan was not drawn by a Surveyor. It is a sketch by me. This is the sketch. It is not drawn to scale. I seek to tender it. (No objection). Sketch is admitted as Exhibit “H”.*

Exhibit “H” will obviously suffer the same fate as Exhibit “C” because it was not made by a qualified Surveyor. I have already stated above that a plan which does not comply with the provisions of Survey Act is inadmissible in evidence. See Agboola V. Abimbola (1969) All NLR 277. Therefore both Exhibits “C” and “H” are inadmissible in evidence and the proper procedure is to record that they had been marked

“tendered and rejected”. Learned Counsel for the appellant argued that Section 3 of Survey Law of Ondo State speaks of accepting a plan for registration only and that neither of the two Exhibits is for registration of plans or maps. It is very clear in sub Section 3(b) that such map, plan or diagrams cannot be admitted in evidence unless if prepared and signed by Surveyor. I therefore resolve issues I and II in favour of the respondents. (p. 2150 E)

C ***Identity of the disputed land***

3. It is without doubt that where a claim is based on trespass and injunction, the area of the disputed land must be stated with clarity in order to identify the land trespassed upon. (p. 2151 H)

D ***Trespass - Proof***

4. The issue of identity of the land trespassed upon was contested vigorously by both parties at the trial court. In a land dispute the boundaries of the land in dispute must be proved with certainty, such that a Surveyor, taking the record, could produce a survey plan showing with accuracy the land in dispute. In a claim for trespass and injunction the onus is on the plaintiff to prove the identity of the land trespassed upon with clarity and certainty. This is mandatory because where an area of land is uncertain, it will be difficult and impossible to prove trespass to the land and thereafter grant injunction. (p. 2153 D)

G ***Identity of land - Failure of oral & documentary evidence***

5. It is instructive in a land dispute that a mere mention of names without more is not enough for identification of land. See Chief Asuquo Oko & ors. (1993) 2 NWLR (Part 274) 124 at 134. In Enuri & Ors. v. Imieyeh & Ors. (1999) 4 NWLR (Part 599) 442 at 463 this court, per Kalgo JSC, held that one important way now commonly used by parties in land dispute is to establish the identity of the land in dispute by filing a detailed and accurate survey plan of the land showing the various features on such land sufficient to point to the clear boundaries thereof.

With the failure of both documentary and oral evidence to establish, with certainty, the area of the land in dispute, the appellant's claim; based on trespass and injunction, must fail. I therefore resolve issue 3 in favour of the respondent. (p. 2155 C)

B

***Trespass - Damages***

6. The fourth issue questioning whether the plaintiff who has failed to identify the land trespassed upon is entitled to damages for trespass on the said land should not have been asked at all. This is because it is trite law that a party must succeed in identifying the land trespassed upon before his claim for damages can be considered. A party claiming damages for trespass has a duty to satisfy the court that at the time of the alleged trespass he was in possession of the particular portion of the land in respect of which the trespass was committed. See Chief Imah and Anor. V. Chief Okogbe and Anor. (1993) 9 NWLR (part 316) 159 at 172. Ogundipe v. Awe (1998) 1 NWLR (part 68) 118 at 123. (p. 2155 F)

D

***Appeals - Issues***

E

7. The issue of non-suit is incompetent because it was not raised before the court below. The learned counsel for the appellant knows that this court will not consider an issue which was not raised at the court below and no leave of this court was sought before the issue was formulated. In consequence the issue raising the question of non-suit is struck out. (p. 2155 H)

F

***Judgments - Jurisdiction***

8. I do not see the relevance of this issue to the case in hand. The Court of Appeal, pointed out that respondents brother, DW4 who obtained a grant of a Certificate of Occupancy was not made a party to this action. It is therefore wrong to make any decision in respect of the Certificate of Occupancy, Exhibit "G" or the way and manner he obtained it. The court below is correct. It is a well settled law and practice that the court cannot give a judgment against a person who will be affected by its decision if such person is not made a party or has no oppor-

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tunity of defending the suit. The court has no jurisdiction to decide the fate of a person or a matter concerning him when such person is not made a party to the action. This issue has also failed. (p. 2156 D)

**B REPRESENTATION**

A. O. Akanle, for the Appellant  
Chief M. Esan, SAN, with him, Olayinka Esan,  
for the Respondent.

**C CASES REFERRED TO**

Adebakin V. Odunjeba (1972) 6 SC 208  
Agboola V. Abimbola (1969) All NLR 277  
Etiko V. Aroyehun 1959, 4 FSC 129 at 130

- D** Erbugnwan V. Elema, (1994) 6 NWLR (Part 353) 638 at 651  
Bajidemi V. Iromcon (1995) 7 NWLR (Part 410) 655 at 664 -665  
Chief Asuquo Oko & ors. (1993) 2 NWLR (Part 274) 124 at 134  
Enuri & Ors. V. Imieyeh & Ors. (1999) 4 NWLR (Part 599) 442 at 463  
**E** Chief Imah and Anor. V. Chief Okogbe and Anor. (1993) 9 NWLR (part 316) 159 at 172  
Ogundipe V. Awe (1998) 1 NWLR (part 68) 118 at 123

**F STATUTE REFERRED TO**

Survey Law of Ondo State s.3

**LEAD JUDGMENT BY MOHAMMED JSC**

- This is an appeal from the decision of the Court of Appeal, Benin  
**G** Division. The plaintiff who hereinafter shall be referred to as the appellant started this action in a customary court in Ado-Ekiti. Later the case was transferred to Ado-Ekiti High Court. During the hearing of the case in the High Court the appellant amended his pleading and claimed for the  
**H** following reliefs:

*“(a) N20,700.00 as general damages for trespass committed and still being committed by the defendants, their servants, agents and privies on plaintiff’s land along Ado/Tworoko road and known as Omosuo or*

*Isegele or Eliju Agbon or Olora farmland or Babatola land;*

*(b) a perpetual injunction restraining the defendants, their agents, servants and privies from committing any other or further acts of trespass whatsoever on the said land;*

*(c) an order declaring as null and void the certificate of occupancy referred to in paragraph 14 of the defendant's Statement of defence as the same was obtained fraudulently, dishonestly and clandestinely without the permission, consent, knowledge or concurrence of the plaintiff or his family and because it was obtained in 1983 during the pendency of plaintiff's case in court and was in addition obtained against the standing interim order referred to above in paragraph 19 hereof as the land under reference is beyond defendant's cassava plantation Ado-Wards and obviously without disclosing to the Ministry of Lands that the land was and is subject to litigation".*

The trial High Court considered all the evidence adduced before it, and in a considered judgment, the learned trial judge concluded as follows:

*"I therefore award the plaintiff on leg (a) of the claim the sum of N5,000 as general damages against the defendant for trespass committed and still being committed by the defendant their servants, agents and privies on the plaintiff's land along Ado-Iworoko Road and known as Omosuo or Isegede or Eliju-Agbon or Olora farmland or Babalola land as shown in yellow on Exhibit "C".*

*I also order a perpetual injunction restraining the defendants, their agents, servants or privies from committing any order (sic) or further acts of trespass whatsoever on the said land shown in yellow on Exhibit "C".*

*As regard the third leg, the Certificate of Occupancy tendered as Exhibit "G" in this case, dated 5<sup>th</sup> July, 1983 and issued to, and in favour of Prince Kola Aladejana is hereby declared null and void as it was obtained dishonestly during the pendency of the plaintiff's case in court without the consent of the plaintiff who was in lawful possession of the piece of land to which the said document related".*

Dissatisfied with the above decision, the defendant, who will be referred to as the respondent in this appeal, appealed to the Court of Appeal. The Court of Appeal (Atinuke Ige, Ogebe and Uba Ubaezonu

JJCA) allowed the appeal and dismissed all the claims of the appellant. The appellant has finally come to this court challenging the decision of the court below in which it dismissed his claim against the respondent.

Both parties identified issues similar in meaning but couched in different terminologies. It is however clear that the issues formulated by the respondent are more explicit of the matters disclosed in the grounds of appeal and I will use those issues only in determining this appeal. The issues read as follows:

*“1. whether or not the Court of Appeal was right to have expunged from the records, Exhibit “C” which was admitted by the trial court after the trial court had initially refused an application to tender it (Exhibit “C”) as an Exhibit because it was not pleaded.*

*2. whether or not the Court of Appeal was right to have expunged from the records, Exhibit “C” or Exhibit “H” in view of S.3 of the Survey Law of Ondo State.*

*3. Whether or not the plaintiff established the identity of the land in dispute.*

*4. whether or not the plaintiff who has failed to identify the land trespassed upon is entitled to damages for trespass on the said land.*

*5. Whether or not the Court of Appeal was bound to Non-suit the plaintiff after setting aside the judgment of the trial court.*

*6. Whether or not the plaintiff made a claim for, or established a claim of trespass against Mr. Kola Aladejana in respect of the area covered by Exhibit “G”.*

*7. Whether or not the decision of the Court of Appeal should be set aside in view of the evidence.”*

Issues 1 and 2 deal with the main subject matter in this appeal and I will consider them together. Exhibit “C” is a sketch map of the land in dispute. The appellant made the sketch map of the land in dispute. He said so in his evidence in chief, in the following testimony.

*“Plaintiff continues: I filed this sketch plan in court on 6<sup>th</sup> June, 1985. I made the plan. I drew it. I made three copies and filed two copies – one for the court and one for the Defendants’ counsel. All the writings on the sketch are mine. I did not sign my name on the sketch*

*because I did not know that it was necessary. Everything on the sketch was drawn by me. This is the sketch. I seek to tender it”.*

Initially, when the sketch map was tendered by learned counsel for the appellant for admission as an exhibit in the case, learned counsel for the respondent, Mr Fajuyi, objected because it was not pleaded. The learned trial judge, S.A. Afonja J, agreed with Mr. Fajuyi that the sketch map was not pleaded. He sustained the objection and refused to admit the sketch map in evidence. There and then Mr. Akanle, for the appellant, applied orally to amend the appellant’s pleadings in order to incorporate the sketch map in the Statement of Claim. Mr Fajuyi raised an objection on the ground that since the sketch map had been rejected it should be marked “tendered and rejected”, the learned trial judge overruled the objection and permitted the appellant to amend the Statement of Claim orally. The sketch map was tendered for the second time. Mr. Fajuyi again raised an objection. He was again overruled and the sketch map was admitted as Exhibit “C”.

The admission of Exhibit “C” was an issue before the Court of Appeal. In the lead judgment of the Court of Appeal, Atinuke Ige JCA, agreed that Exhibit “C” was wrongly admitted in evidence in the following words:

*‘The law is very clear on what should happen to a document that has been declared inadmissible by the court. It should be marked “Tendered and Rejected”’. See Order 29 Rule 11 of High Court Civil Procedure, Rules of Ondo State 1978 and the case of Adebakin V. Odunjeba (1972) 6 SC 208.*

*A document that is not rejected is marked “Tendered and Marked” as Exhibit. A document that is withdrawn is returned to the party who sought to tender it without any mark on it. The learned trial judge I hold was wrong to have admitted Exhibit “C” in evidence after first rejecting it. Exhibit “C” should be expunged from the records.*

*I also agree with appellants’ counsel that Exhibit “C” which is the product of the plaintiff (a Geography Teacher) has violated the provisions of section 3 of the Survey Law”.*

**The learned Justice of Court of Appeal is quite right, that**

once a document is entered during proceedings and declared inadmissible by the trial judge it should be marked “Tendered and Rejected”. The rejected document shall be sent to the appellate court where there is an appeal. It is wrong to declare a document inadmissible and to decline to mark it “Tendered and Rejected”. The Court of Appeal is therefore right to declare that Exhibit “C” should be expunged from the records.

The next question is whether the making of Exhibits “C” and “H” is a violation of S.3 of the Survey Law of Ondo State (which now applies to Ekiti State). Section 3 of Survey Law of Ondo State reads:

- “3. No map, plan or diagram of land –  
 (a) if prepared after the 1<sup>st</sup> June, 1918, shall be accepted for registration with any registrable instrument which is required by any written law to contain a map, plan or diagram; and  
 (b) If prepared after the 20<sup>th</sup> October, 1897 shall, save for good cause shown to the court, be admitted in evidence in any court, unless the map, plan or diagram has been prepared and signed by a surveyor or is a copy of a map, plan or diagram so prepared and signed and is certified by a surveyor as being a true copy”.

The appellant, who is said to be a geography teacher, told the trial court that he personally drew the sketch map (Exhibit “C”). The sketch map is therefore inadmissible in evidence having been prepared and signed by a person who was not a surveyor as is required by the law. Exhibit “H” too was not made by a licensed surveyor. It was made by the 2<sup>nd</sup> defendant and this is how he told the court about the making of the Exhibit. He said as follows:

“I knew when this case was in the Customary Court I filed a plan. The plan was not drawn by a Surveyor. It is a sketch by me. This is the sketch. It is not drawn to scale. I seek to tender it. (No objection). Sketch is admitted as Exhibit “H”.

exhibit “H” will obviously suffer the same fate as Exhibit “C” because it was not made by a qualified Surveyor. I have already stated above that a plan which does not comply with the provisions of Survey Act is inadmissible in evidence. See Agboola V.

**Abimbola (1969) All NLR 277. Therefore both Exhibits “C” and “H” are inadmissible in evidence and the proper procedure is to record that they had been marked “tendered and rejected”. Learned Counsel for the appellant argued that Section 3 of Survey Law of Ondo State speaks of accepting a plan for registration only and that neither of the two Exhibits is for registration of plans or maps. It is very clear in sub Section 3(b) that such map, plan or diagrams cannot be admitted in evidence unless if prepared and signed by Surveyor. I therefore resolve issues I and II in favour of the respondent.**

The next issue is whether or not the appellant established the identity of the land in dispute. Learned Counsel for the appellant submitted that although it is always good to tender a survey plan of a disputed land, it is not the law that one must always be tendered in a land matter. If the certainty of the land can be established by oral evidence a survey plan is not a sine qua non. He referred to Etiko V. Aroyehun 1959, 4 FSC 129 at 130; Erbugunwan V. Elema, (1994) 6 NWLR (Part 353) 638 at 651 and Bajidemi V. Iromcon (1995) 7 NWLR (Part 410) 655 at 664. Learned Counsel referred also to Exhibits A, B, C, and H to confirm the identity of the land in dispute and its boundaries. He further, in his submission, pointed to the evidence of boundary men who told the trial court that they shared boundaries with the land the appellant claims. The boundary men were PW2, PW3, PW4 and PW5. Counsel also said that the appellant tendered Exhibit L which was a court proceeding in a land case in which the appellant’s family were plaintiffs and that he, the appellant, gave evidence, in that case showing that one Opoakin or Iwere was a fourth boundary man to the land in dispute. The appellant, in addition, gave evidence of the farm holdings of members of his family and their tenants on the disputed land. Learned Counsel submitted that all this had established the identity of the land in dispute.

**It is without doubt that where a claim is based on trespass and injunction, the area of the disputed land must be stated with clarity in order to identify the land trespassed upon.** Let me pause here and refer to the relevant pleadings exchanged by the parties in order

to see their respective averments on the issue of identity of the land in dispute. In paragraphs 6, 7 and 8 of the Amended Statement of Claim the appellant pleaded as follows:

“(6) *The land in dispute is between Ado-Ekiti and Iworoko townships and is known as Omosuo or Isegele or Eliku Agbon or Olora family land or Babatola farmland.*

*It starts from a point about two kilometres from Ado-Ekiti post office and stretches Iworoko wards up to a point about one kilometres to Iworoko.*

“(7) *The said land is on both sides of the Ado-Iwroko tarred road but in between it is what is known as Ilokun family land but the said land which originally belonged to plaintiff’s family before the Ewi of Ado-Ekliti got it granted to the said Ilokun family by consent of plaintiff’s family.*

“(8) *The part of the land of the plaintiff now in dispute is bounded as follows:*

*(a) On the first side by the land now known as Ilokun but formerly plaintiff’s land.*

*(b) On the second side by the land of Irasa and Ilewu families of Ado-Ekiti.*

*(c) On the third side by the land of Iwere (Opo-Akin) family of Ado-Ekiti.*

*(d) On the fourth side by the land of Ijafin family of Iworoko-Ekiti”.*

The appellant pleaded also that an ordinary survey plan and a sketch map drawn by himself would be tendered in support of his claim. The respondent on his part, dealt with the identity of the land in dispute in the following paragraphs:

“4. *The defendants deny knowledge of the land claimed by the plaintiff as described by him or at all and state further that the plaintiff has confused the claim and will contend that it is therefore not possible to defend the case without a plan showing with some clarity, the area which the plaintiff claims is in dispute.*

*6. In relation to the land in dispute, the defendant denies that*

*the Ilewu family or the Ijafin Community of Iworoko has any boundary with the plaintiff. The defendant averred that Iworoko Community has farmland boundaries with the following communities: On the 1<sup>st</sup> side: Ifaki-Ekiti farmland commencing from Omipupa. On the 2<sup>nd</sup> side Ika, Irasa and Ilewu Communities. On the 3<sup>rd</sup> side by: Ilokun family of Ado-Ekiti and Are-Ekiti Communities by River Ogbese on Ado/Iworoko Road. On the 4<sup>th</sup> side by: Arigidi in Ekiti North.* B

*7. The defendant denies the ownership of the land claimed and avers that Iworoko farmland commence from Omipupa, a place 1.5km from Ifaki-Ekiti market and terminate on Ado-Iworoko Road, at Eliju Agbon or Igbo-Ogbese which land is the traditional boundary between the Iworoko and Ado-Ekiti Communities.* C

*19. The plaintiff was very familiar with the late Alaworoko Faturoti (Aladejana I) and with his permission farmed on a part of the Iworoko land on the Iworoko side of Igbo-Ogbese with one or two Igbiras working on the land for him".* D

**The issue of identity of the land trespassed upon was contested vigorously by both parties at the trial court. In a land dispute the boundaries of the land in dispute must be proved with certainty, such that a Surveyor, taking the record, could produce a survey plan showing with accuracy the land in dispute. In a claim for trespass and injunction the onus is on the plaintiff to prove the identity of the land trespassed upon with clarity and certainty. This is mandatory because where an area of land is uncertain, it will be difficult and impossible to prove trespass to the land and thereafter grant injunction.** E F

The trial High Court, in a considered judgment, referred to the evidence of witnesses who said that they shared boundaries with the land the appellant claims and the sketch plans tendered in support of each party's claim to the land in dispute. Upon such evidence the learned trial judge held that the parcel of land in dispute had been identified. G H

The Court of Appeal held a contrary view over the identity of the land. Atinuke Ige, JCA, emphasised in her judgment that the question of identity of the land in dispute is very important in this case especially

when the claims of possession by the appellant and his family are considered against the rival claims by the respondent and his family over the land in the same neighbourhood. The learned justice of the Court of Appeal explained further on the evidence identifying the land thus:

B *“The only plan left in this case is Exhibit “A”. I am afraid Exhibit “A” has not helped the plaintiff/respondent in ascertaining the land in dispute with sufficient clarity. Exhibit “A” is a plan showing part of property of Olora family land along Iworoko Road, Ado-Ekiti, Ekiti Central Local Government Area of Ondo State – Area 119,857 hectares. One of the makers of Exhibit “A” who tendered it in evidence as a Survey Assistant said categorically that the plan does not show the area in dispute. With regard to identity of the land in dispute the learned trial judge in his judgment stated thus:*

D *“I therefore find that identity of the parcel of land in dispute is clear to the parties and the court and has been established by both parties in their pleadings, in Exhibit A, B, C, and H as well as in their respective testimony to the satisfaction of the court.*

E *Exhibit “B” is a plan showing land in dispute between;*

*1. Benjamin Olowunlana & Anor. On behalf of themselves and Irasa family. and*

*2. Peter Akandidu and 3 Ors .at Irasa farm Ado-Ekiti.*

F *Surely this document does not relate to plaintiff’s land nor the land in dispute.*

*Exhibit “C” & “ H” which are not worth the papers on which they were drawn have been expunged from the record.*

G *It is my view that the learned trial judge had relied on wrong and inadmissible and ineffective documents to find that the identity of the parcel of land in dispute was clear to the parties”.*

H *I agree that it is difficult to ascertain the land in dispute from the testimony of witnesses and the evidence given by the appellant, before the trial High Court. Part of appellant’s testimony reads;*

*“My family farmland has different names. Portions of the farmland are known as Ofin Isegele, igbo-Ogbese, Eliju-Agbon (Western Savannah area of Isegele) Ita-Edu (Wooded area of Isegele), Omosuo (Area*

around Omosuo river), the whole of Isegele is Olora farmland. I have taken this action because sometime early in 1977, I found a cassava farm, I asked who owned it and I was told it was owned by Francis Oguntoyinbo i.e. the 2<sup>nd</sup> defendant. I went into the farm where I saw labourers working. I stopped them from working and asked them to tell their employers to see me. The 2<sup>nd</sup> defendant refused to see me. I regarded this as a trespass. The 1<sup>st</sup> defendant was brought in later when he too made a farm on a part of my family land. This is the sketch of the land in dispute. I seek to tender the sketch".

**It is instructive in a land dispute that a mere mention of names without more is not enough for identification of land.** See Chief Asuquo Oko & ors. (1993) 2 NWLR (Part 274) 124 at 134. In Enuri & Ors. v. Imieyeh & Ors. (1999) 4 NWLR (Part 599) 442 at 463 this court, per Kalgo JSC, held that one important way now commonly used by parties in land dispute is to establish the identity of the land in dispute by filing a detailed and accurate survey plan of the land showing the various features on such land sufficient to point to the clear boundaries thereof. With the failure of both documentary and oral evidence to establish, with certainty, the area of the land in dispute, the appellant's claim; based on trespass and injunction, must fail. I therefore resolve issue 3 in favour of the respondent.

**The fourth issue questioning whether the plaintiff who has failed to identify the land trespassed upon is entitled to damages for trespass on the said land should not have been asked at all.** This is because it is trite law that a party must succeed in identifying the land trespassed upon before his claim for damages can be considered. A party claiming damages for trespass has a duty to satisfy the court that at the time of the alleged trespass he was in possession of the particular portion of the land in respect of which the trespass was committed. See Chief Imah and Anor. V. Chief Okogbe H and Anor. (1993) 9 NWLR (part 316) 159 at 172. Ogundipe v. Awe (1998) 1 NWLR (part 68) 118 at 123.

**The issue of non-suit is incompetent because it was not raised**

before the court below. The learned counsel for the appellant knows that this court will not consider an issue which was not raised at the court below and no leave of this court was sought before the issue was formulated. In consequence the issue raising the question of non-suit is stuck out.

Learned counsel for the appellant submitted that when the dispute about the land was before the customary court, the court made an order restraining the respondent and his people from committing further trespass on the land. Yet the respondent's brother, D.W 4, secured a Certificate of Occupancy in respect of part of the land. This action, according to the learned counsel, is both an act of trespass and disobedience to a court order. Counsel urged this court to declare the action null and void, moreso as the case was still pending at the time the certificate was obtained. **I do not see the relevance of this issue to the case in hand.** The Court of Appeal, pointed out that respondents brother, DW4 who obtained a grant of a Certificate of Occupancy was not made a party to this action. It is therefore wrong to make any decision in respect of the Certificate of Occupancy, Exhibit "G" or the way and manner he obtained it. The court below is correct. It is a well settled law and practice that the court cannot give a judgment against a person who will be affected by its decision if such person is not made a party or has no opportunity of defending the suit. The court has no jurisdiction to decide the fate of a person or a matter concerning him when such person is not made a party to the action. This issue has also failed.

Finally, I have no doubt that the court below had considered all the evidence adduced before the High Court and dispassionately evaluated the said evidence before reversing the decision of Afonja J.

In the result, this appeal has failed and it is dismissed. The judgment of the Court of Appeal is hereby affirmed. I award N10,000 costs in favour of the respondent.

**KARIBI-WHYTE JSC**

I have read the leading judgment of my learned brother Uthman Mohammed, JSC in this appeal. I agree with the conclusion that all the grounds of appeal having failed, the appeal should be dismissed, and is hereby dismissed. I also hereby dismiss the appeal with N10,000 as costs in favour of the Respondent.

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**KUTIGI JSC**

I read advance the judgment just delivered by my learned brother Mohammed, J.S.C. I agree with his reasoning and conclusions. Failure to establish the identity of land in dispute was fatal to the plaintiff's case. The Court of Appeal rightly dismissed his claims. I will also dismiss this appeal and award N10,000 costs to the Defendant.

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**ACHIKE JSC**

I have, before now, had the privilege and opportunity of discussing the issues raised in this appeal. I agree with the judgment delivered by my learned brother, Uthman Mohammed, JSC. According, I too would dismiss this appeal and award N10, 000.00 costs to the respondent.

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**AYOOLA JSC**

I have the privilege of reading in draft the judgment just delivered by my learned brother, Uthman Mohammend, JSC. I agree entirely with his conclusion and the reasons he gives. I too dismiss the appeal with =N=10,000 costs to the respondent.

H