

**SUPREME COURT OF NIGERIA**

22ND JUNE, 2001. SC. 79/1996

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,  
U. MOHAMMED, O. ACHIKE, E. O. AYOOLA, JJSC.**

SUNDAY TEMILE & ORS. .... APPELLANTS/DEFENDANTS  
AND  
JEMIDE EBIGBEYI AWANI ..... RESPONDENT/PLAINTIFF

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***APPEALS** - Concurrent findings - Title - The court below rightly granted the declaration of title - And the reasons for the findings are unassailable - And should not be disturbed (H 10)*

***CUSTOMARY LAW** - Grant of land - By the chief and head of the family - With the concurrence of principal members - Is valid (H 2)*

***CUSTOMARY LAW** - Land law - Title - Where family land is involved - Plaintiff must trace his title to the family - To succeed in his action for declaration of title (H 8)*

***CUSTOMARY LAW** - Proof of custom - Appeals - The plaintiff/respondents - Discharged the burden on them - To prove the relevant Itsekiri native law on which they relied (H 5)*

***CUSTOMARY LAW** - Proof of custom - Burden of proof - Is on the person alleging The existence of the custom - Where the custom is not judicially noticed (H 4)*

***LAND LAW** - Location of land - As no issue was joined in the pleadings - As to certainty of the land in question - The evidence of the surveyor - Implying uncertainty goes to no issue (H 3)*

***LAND LAW** - Survey plan - Title - Court can grant a declaration of title - Without production of a survey plan by the plaintiff - As long as the*

*land can be ascertained with certainty (H 9)*

**LAND LAW** - Title - Evidence - Plaintiff is required to satisfy the court by evidence - And not by admission in the defendants' pleadings - That he is entitled to the declaration of title (H 7)

**LAND LAW** - Title - Proof - Onus of proof is on the party seeking the declaration - And he must succeed on the strength of his own case - Not the weakness of the defence (H 6)

**PLEADINGS** - Admissions - Evidence - Facts admitted or not disputed by the defence - Need no further proof by evidence (H 1)

### **FACTS**

The plaintiff/respondent had instituted this action against the defendants/appellants at the Warri High Court claiming for declaration of title, damages for trespass and injunction against the defendants.

The Awani family in or about 1968 started a project for developing their parcels of land into planned layouts and employed the services of a professional surveyor. The plaintiff was detailed to work with the surveyor under the directions of the chief and head of the Awani family - Chief B.A.M.E. Awani. According to the plaintiff, in appreciation of the part played by him in this project, the family granted him plots 8 and 9 in the developed layout. The head of the family also instructed the surveyor to prepare a survey plan in the plaintiff's name. Consequent upon a disagreement with the head of the family, the head informed him that plot 8 in the layout has been given to the appellant and that it was plot 31 that was given to him. The defendants denied the grant of plot 8 and 9 to the plaintiff and led evidence to the effect that it was plot 31 that was granted to the plaintiff.

After the evidence and address of counsel the trial judge held that the plaintiff had made out his case and found in his favour. The appellants' appeal to the Court of Appeal was unsuccessful and they have further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“(i) Was the Court of Appeal right when it found and or held that the requirement of a gift of land under native law and custom was fulfilled by the Plaintiff/Respondent on the testimonies of PW2 and the surveyor (See p.278 lines 24-29 of the Record).*

*(ii) Whether mere proof of the existence of a gift without credible evidence of the identity, extent and location of the gift is sufficient to entitle the respondent to judgment for a declaration of title, damages for trespass and order of injunction.*

*(iii) Whether the Plaintiff tendered sufficient evidence to entitle him to the declaration sought, put in another way did the plaintiff discharge the burden of proof required in law to entitle him to the judgment of the trial Court, and the Court of Appeal.”*

**HELD** (Unanimously dismissing the appeal per lead judgment of **KARIBI-WHYTE JSC**).

***Pleadings - Admissions***

1. In respect of facts in the statement of claim which are admitted or not disputed by the defence, and accordingly no issue was joined between the parties, no proof of such fact is required and no evidence is necessary or admissible in further proof of such admitted facts – See Chief Okparaেকে of Ndiakaere & ors. v. Obidike Egbuonu & ors. (1941) 7 WACA.53. It is therefore not necessary to prove the fact of the gift to Plaintiff.

Learned Counsel to the Appellants has submitted that the testimonies of PW2, the current head of the Awani Family and of the Surveyor were not sufficient to fulfil the requirement of a gift of land to Plaintiff/Respondent under native law and custom. It is important to observe that learned Counsel to the Appellant is not disputing the fact that a gift of land has been made by the Awani family to the Respondent/Plaintiff under native law and custom. (p. 2178 H)

***Customary law - Grant of land***

2. It is not easy to find and I have not discovered any conflict with the

testimony of PW2 that he did not accompany them to the lay-out at the time the two plots were allotted to the Plaintiff but that he later got to know that they were plots 8 and 9 (or 9 and 10). Thus whereas the averment in para.7 was talking about the gift of the land, the testimony of B PW2 was in respect of the identity and location of the land already granted. It was admitted and not disputed that PW2 was an elder and one of the principal members of the Awani family who made the gift of the land in dispute to the Plaintiff. It is a general and well settled principle of customary law that land granted by the Chief and Head of the family with the concurrence of the principal members of the family is valid – See Ekpendu v. Erika (1959) 5 SCNLR.186 so in this case. The allotment of plots 8 and 9 was made by Chef B.A.M.E. Awani with the consent of the principal members of the family is unimpeachable. (p. 2180 B)

D

### ***Location of land***

3. There are no averments in the pleadings which render the land in question uncertain. There is no suggestion in the pleadings that the parties were speaking about more than one layout. Accordingly, evidence of the surveyor relied upon does not enjoy any support in the pleadings and goes to no issue. No issue was joined as to the particular layout in which the plots 8 and 9 or 31 is located. The plan prepared by the surveyor and F accepted by the parties and admitted in evidence sufficiently identified the subject matter. The tendering of the survey plan was not intended as evidence of ownership, but to identify the land in issue. It is therefore correct to say that the testimony of the surveyor goes to the identification of the gift by the Awani Family. (p. 2180 F)

G

### ***Burden of proving custom***

4. The important consideration in this case is whether the relevant native law and custom governing the grant was pleaded. The law is that the H burden of proof of custom is on the person alleging its existence - See S.14(1) Evidence Act. Proof of native law and custom which is regarded as a question of fact to be pleaded is necessary unless where by frequent proof it has been judicially noticed. – See Olowu v. Olowu (1985)

3 NWLR.372, Agbai v. Okagbue (1991) 7 NWLR.391. (p. 2181 A)

***Proof of custom - Appeals***

5. It is well settled that the onus is on the party who claims the existence of a particular customary law to be applicable to the situation to call evidence to establish the custom – See Adeyeri II & ors. v. Aderibigbe Atanda & ors. (1995) 5 NWLR.512. There seems to be no doubt that Plaintiff/Respondent by the averments in the pleading and the oral evidence in support established that the plots allotted to him belong to him exclusively and absolutely according to Itsekiri native law.

The Court of Appeal was therefore right and correctly found that Plaintiff/Respondent fulfilled the requirement of a gift of land under native law and custom when they relied in addition to the averments in the pleadings of the parties, also on the testimonies of PW2 and the surveyor. I accordingly resolve this issue against the Appellant and in favour of the Plaintiff/Respondent. (p. 2182 A)

***Title - Onus of proof***

6. It seems quite clear from the submissions summarised above that Appellant having conceded that there was an allotment by the Awani family of a plot to the Plaintiff is criticising the court for the declaration sought by Plaintiff. It is well established law that in an action for declaration of title, the plaintiff must succeed on the strength of his case and not on the weakness of the Defendants – See Melifonwu v. Egbuji (1982) 9 SC.145, Atuanya v. Onyejekwu (1975) 3 SC.161, Elias v. Omo-Bare (1982) 5 SC.25. The onus in a claim for declaration of title is on the party who seeks the declaration. This he can do by satisfying any of the five ways of proof of title to land prescribed by this court in Idundun v. Okumagba (1976) 9-10 SC.227. (p. 2183 H)

***Title - Evidence***

7. It is invariably necessary where Plaintiff pleads and traces his root of title to a particular family or person and as to how the title vested in him he must establish that title by credible evidence – See Ndukwe v. Acha

(1998) 6 NWLR. 25, Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR. 393. The Plaintiff in an action for declaration of title is required to satisfy the Court by evidence and not by admission in the pleadings of the Defendant of his right to the declaration he claims – See Bello v. Eweka B (1981) 1 SC. 101. This is because the grant of a declaration by the court is discretionary – See Kodilinye v. Odu 2 WACA. 336, Akinola & Ors. v. Oluwo & ors. (1962) WNLR.135. (p. 2184 B)

C ***Customary law - Title - Family land***

8. Where family land is involved under customary land tenure a Plaintiff in order to establish his title to the land must trace his title to the family – See Thomas v. Preston Holder (1946) 12 WACA 78, Lion Buildings Ltd. v. Shadipe (1976) 12 SC. 325. There is no doubt that an owner of land D under native law and custom can transfer his absolute interest in the land to another and grant exclusive possession. – See Aboderin v. Morankinyo (1968) NMLR.179. (p. 2184 E)

E ***Title - Survey plan***

9. It is a well-settled principle of our law that a court can grant a declaration of title to land even without production by the Plaintiff of a survey plan. The accepted acid test is whether the land the subject of the declaration can be ascertained with “definitive certainty” so that a surveyor F taking the record of proceedings can produce a plan showing accurately the land which title has been granted. – See Arabe v. Asanlu (1980) 5-7 SC.78. (p. 2186 C)

G ***Appeals - Concurrent findings***

10. In the instant case in the light of what Plaintiff has established, the learned trial Judge was right to have granted the declaration sought, and the Court below correctly affirmed the Judge. Learned Counsel for the H Appellant has not adduced any convincing reasons why these findings of the two courts below should be disturbed. I find the reasons in support of the findings unassailable. I agree with them. – See Mohammed v. Hussaini (1998) 14 NWLR (pt.584) 108 SC. I again resolve this issue

against the Appellant and in favour of the Respondent. (p. 2186 E)

## NOTABLE POINT OF INTEREST

### KARIBI-WHYTE JSC

*1. Party who fails to file his brief - Can only be heard with leave* B  
Respondent did not file his brief of argument and was not represented by learned counsel at the hearing. The situation does not fall within the provision of Order 6 r.8(7) Rules of the Supreme Court 1999 where if only one brief was filed for one of the parties, and neither of the parties C  
nor their Counsel was present at the hearing to present oral argument the appeal shall be regarded as having been argued on that brief. In this case Appellant has filed his brief of argument, the Respondent who has failed to file his brief of argument was not represented by counsel and was not present at the hearing. Accordingly the question of seeking leave of the D  
Court to be heard in oral argument did not arise (See Order 6 r.9 – See Onumajuru v. Akaninu (1994) 3 NWLR (pt.334) 620. We nevertheless heard Appellant on his brief of argument in accordance with Order 6 r.8(7) Rules of the Supreme Court (as amended) 1999. The appeal was E  
taken as having been argued on Appellants’ brief of argument. In the instant case the Respondent having been served with Appellants’ brief of argument. It will be inequitable and not be in the interest of justice to delay the hearing of the appeal. Even if learned Counsel to Respondent F  
were present in Court he will require leave of the Court to be heard.  
(p. 2172 F)

### REPRESENTATION

Chief V.E. Otomiewo for the Defendants/Appellants. G  
Plaintiff/Respondent absent, not represented.

### CASES REFERRED TO

Onumajuru v. Akaninu (1994)3 NWLR (Pt.334) 620 H  
Management Enterprises Ltd. & Anor. v. Otusanya (1987)2 NWLR (Pt.55) 179  
Nneji & Ors. v. Chukwu & Ors. (1988)3 NWLR (Pt.81) 184

Odutola v. Kayode (1994)2 NWLR (Pt.324)1 SC.

Obiara v. Duru (1994)8 NWLR (Pt.365) 631 at p.645-646

Marankinyo v. Adesoyero (1995)7 NWLR (Pt.409) 602 at p.616

Omeregie v. Idugienwaye (1985)2 NWLR (Pt.5) 41 at p.60

B Aja v. Okoro (1991)7 NWLR (Pt.203) 260 at 273

Olusanmi v. Oshasona (1992)6 NWLR (Pt.245) 22

Fasoro & Ors. v. Beyioku & Ors. (1988)SC.151 at 161

Nwoye v. Bolarin (1991)4 NWLR (Pt.184) 257 at 264

C Chief G.A. Titiloye & Ors. vs. Chief Loupo & Ors. (1991)7 NWLR (Pt.205) 519

Bello v. Emeka (1981)1 SC.101

Igwe v. ACB Plc (1999)6 NWLR (Pt.605) 1

**D STATUTE REFERRED TO**

Evidence Act s.14(1)

**LEAD JUDGMENT BY KARIBI-WHYTE JSC**

E This appeal is against the judgment of the Court of Appeal, Benin Division, Benin City, delivered on the 26<sup>th</sup> November, 1993. The Court in a unanimous decision of Akpabio, Ejiwunmi and Ogebe JJCA dismissed the appeal of the Defendants/Appellants against the judgment of the learned trial Judge, Unurhoro J of Warri High Court with costs against the Appel-  
F lants assessed at N700. Defendant has further appealed to this Court.

The facts of this case are fairly simple and straightforward. The real issue between the parties is whether Plaintiff/Respondent was allotted plots 8 and 9 of the Ajamimogha Lay Out, as a gift by the family as he  
G claims, or was allotted plot 31 by the family as a gift as claimed by the Defendants/Appellants. The learned trial Judge and the Court below have found for the Plaintiff/Respondent. The learned trial Judge also awarded N1,000 damages and granted perpetual injunction restraining Sunday  
H Temile, the 3<sup>rd</sup> Defendant/Appellant from interfering with the possession of the Plaintiff. N200 damages was awarded against all the Defendants.

It is pertinent to set out the claim of the Plaintiff/Respondent and a short background story of the facts leading to the litigation for a proper



appreciation of what will be stated hereafter.

The claim as endorsed in paragraph 20 of the further amended statement of claim reads –

“1. Plaintiff’s claim against the Defendants jointly and severally is for a declaration that all that pieces or parcel of land lying situate B and being Plot 8 in the Awani Family Layout Ajamimogha Warri within the jurisdiction of this Honourable Court is the property of the Plaintiff in accordance with Itsekiri Native Law and Custom and being the person in whom by possession it was vested before the commencement of the Land Use Act 1978 is deemed to be the holder of a statutory right of C occupancy and is entitled to a grant of statutory right of occupancy in respect of same.

2. As against the 3<sup>rd</sup> Defendant N2,000.00 damages for trespass in that the 3<sup>rd</sup> Defendant in or about January, 1984, without D Plaintiff’s consent or permission broke and entered the Plaintiff’s said Plot 8 in the Awani Family Layout and laid building foundation thereon.

3. As against the 3<sup>rd</sup> Defendant an order of perpetual Injunction restraining him, his Servants or agents from entering the Plaintiff’s E said Plot 8 in Awani Family Layout or interfering in any way with Plaintiff’s possession of it.”

#### Short Synopsis of the facts

In or about 1968, the Awani family, conceived of and started a F project for developing their parcels of land into planned layouts. They employed a professional surveyor for the purpose. He is Theophilus John. The surveyor was to cut survey lines, and produce a master plan of the Awani family land. The Plaintiff was detailed to work with the surveyor, to identify and show to the surveyor the extent of the family G land; and its boundaries with neighbouring landowners. Plaintiff worked under the directions of Chief B. A. M. E. Awani, the Chief and Head of Awani family.

In appreciation of the part played by the Plaintiff in the comple- H tion of the development of the Awani layout into 75 plots, the family, in a family meeting granted Plaintiff Plots 8 and 9 of the layout as compensation in recognition for his efforts in the project. Pursuant to this gift

Chief B. A. M. E. Awani instructed the Surveyor, Mr. Theophilus John to prepare a survey plan of plots 8 and 9 in the name of the Plaintiff, and for Plaintiff to pay the surveyor the necessary survey fees. The surveys plan No. T. M. 1913, showing the freehold property of Jemide Awani, of plots 8 and 9 at Awani family Lay-Out at Ajamimogha Warri, made by Theophilus John on 11<sup>th</sup> June, 1975, was admitted in evidence at the trial and tendered as Exhibit P.1.

Following disagreement between Plaintiff and Chief B. A. M. E. Awani, (now late), Plaintiff refused to continue working under him. Chief B.A. M. E. Awani, then informed Plaintiff that he had leased out Plot 8 to the 3<sup>rd</sup> Defendant/Appellant, Sunday Temile. When confronted about the lease of Plot 8 to Sunday Temile, Chef B. A. M. E. said that the family gave the Respondent Plot No.31 and not Plot No.8.

According to the Plaintiff, relying on the grant by the family he had leased out Plot No.9 to one Madam Ekpemina, who had since erected a storey building on it. Plaintiff Respondent denied ever having been allotted plot No.31. He stated that plot No.31 was among the plots Nos.23-36 allotted by late Chief B. A. M. E. Awani to the Plush Organisation Ltd. in a lease dated 15<sup>th</sup> day of September, 1975. At the trial this lease was tendered in evidence and admitted as Exhibit P3.

The Defendants in their statement of defence, denied that Plaintiff/Respondent was ever allotted plots 8 and 9. They averred that Plaintiff/Respondent was only one of three persons who the Awani family detailed to assist their Surveyor, Theophilus John in the survey of the Ajamimogha layout. The two others were Chief C. A. Lori and Achegogo Sharndoff. In appreciation of their efforts, each of them was allotted one plot as the family had no money to give them. The plots allotted to them were plots Nos. 30 to Chief C. A. Lori, plot No.31 to the Respondent/Plaintiff and plot No.32 to Achegogo Sharndoff. Each of them was to pay N100, instead of the N800 paid by other members of the family for such allotments. They paid and were accordingly issued with receipts. The Defendants/Appellants contend that Plaintiff/Respondent had given his own plot No.31 to the Plush Organisation Ltd. as part payment of his share in that Company. They also averred that Chief B. A. M. E.

Awani never gave any letter of authority to the Surveyor to survey plots 8 and 9 for the Plaintiff/Respondent as was the usual practice. The defendants/Appellants alleged that Plaintiff/Respondent fraudulently manoeuvred the surveyor to survey plots 8 and 9 in his name. When the surveyor realised this he got the written instruction of Chief B.A. M. E. Awani as to the proper owners of the plot, which is Sunday Temile, the 3<sup>rd</sup> Defendant/Appellant for whom the Surveyor surveyed the plot and Madam Ekpeminaghan. B

At the trial, Plaintiff/Respondent testified and called four witnesses including the current Chief of the Awani family, Chief Pius Awani, the 1<sup>st</sup> Defendant to the action. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not testify for the defence. The 3<sup>rd</sup> Defendant/Appellant testified and called one witness. Learned Counsel to both parties addressed the Court. The learned trial Judge in his judgment held that the Plaintiff/Respondent had made out a case for damages for trespass and injunction and accordingly entered judgment in favour of the Plaintiff in the following terms – D

1. As against the defendants jointly and severally, plot Nos.8 and 9 in the Awani Family Lay-Out in Ajamimogha, Warri is the exclusive property of the Plaintiff in accordance with Itsekiri Native Law and Custom before the commencement to a grant of a certificate of occupancy, Warri having been declared by the Governor of Bendel State as an urban area. E

2. As against the 3<sup>rd</sup> Defendant only, the sum of N1,000 as general damages for trespass. F

3. As against the 3<sup>rd</sup> Defendant only, an order of perpetual injunction restraining him, his agents and/or privies from entering into the said plot 8 or in any way interfering with the Plaintiff's possession of the said plot 8 in the Awani Family layout in Ajamimogha Warri. G

Appellant appealed against the judgment to the Court of Appeal Division at Benin City; alleging six grounds of appeal out of which four issues for determination of the appeal were formulated by the Appellant. Respondent formulated two issues. The Court below contracted the issues formulated by the parties into the two issues reproduced hereunder. H

1. Was the learned trial Judge right in law and on the fact in

entering judgment for the Plaintiff when the Plaintiff did not prove the “Gift” of the plot of land for which he is seeking declaration as required by Law.

2. Whether the gift of land by the Awani Family to the Plaintiff/  
B Respondent was plot 8 or plot 31?

On the first issue, the Court below after hearing arguments of learned Counsel held that “There was no dispute whatsoever as to whether there was or was no “Gift” of family land to Respondent. Both sides are agreed on this. Even the 1<sup>st</sup> Defendant (the current Head of the Awani  
C Family stated categorically in his evidence (as D.W.2) that it was he as the second in command to their then Family Head who personally suggested to the Head of the Family.

*“To compensate the members of the Family who had worked  
D with him (the surveyor) by giving them some of the plots as the family had no money to pay them at the time.” (See p.269 lines 18-31).”*

The Court below went on to hold as follows –

*“With the above declaration by one who was even the 1<sup>st</sup> Defen-  
E dant in the case, it becomes clear that there was no dispute as to whether there was a gift of family land to the Respondent or not. It was unnecessary therefore to prove the existence of a gift, because under our law “Facts admitted need not be proved” (See Section 75 of Evidence Act  
F 1990) (See p.270 lines 1-9).*

The Court below concluded the resolution of this issue with the positive assertion, that “what was in dispute and which had to be proved was the  
subject matter of the gift. Which plot was given? Was it plot 8 or plot 31  
(See p.270 lines 10-13).”

G On the crucial issue whether the subject matter of the gift was plot 8 or plot 31, the Court below considered carefully the submissions of learned counsel to the parties and came to the conclusion that the only point in controversy in this issue is the identity of the plot or plots actu-  
H ally given or granted. In the resolution of this issue the Court below cast the onus on the Plaintiff to prove that he was given plots 8 and 9, and on the Defendant it was plot 31 and not plots 8 and 9. Relying on the pleadings and the evidence both documentary and oral in this case the

Court below was satisfied on a balance of probabilities that Respondent had established that plots 8 and 9 were given to him, whereas the Appellant could not establish that the plot No.31 was given to Respondent.

The Court below in coming to this conclusion stated as follows (at p.282 lines 10-21).

*“Apart from the evidence of the surveyor and that of the 1<sup>st</sup> Defendant which supported the contention that it was plot 8 and 9 that were initially allotted to Respondent, the subsequent production of the Deed of Lease, Exhibit p3 to show that Plot 31 was one of the plots (23-36) leased out to the PLUSH ORGANISATION, by the same B. A. M.E. Awani, on 15/9/75, meant that the lone defence witness D.W.1 could not have been telling the truth. That finally put the last nail on the coffin of the defence case.”*

Accordingly, the judgment of the learned trial Judge that it was plot No.8 that was allotted to the Plaintiff/Respondent and not plot 31 as contended by the Defendant/Appellant was affirmed. Appellant’s appeal was dismissed by the unanimous judgment of Akpabio, Ejiwunmi and Ogebe, JJCA.

The 3<sup>rd</sup> Defendant/Appellant dissatisfied with the judgment of the Court of Appeal has with leave of the Court of Appeal, further appealed to this Court alleging five grounds of error in law and misdirection on the facts. The grounds of appeal without their particulars are as follows –

**“GROUNDS OF APPEAL**

(i) *The learned Justices of the Court of Appeal misdirected themselves on the facts when per Akpabio JCA they held:-*

*“It is my view that with the combined testimonies of both P.W.2 (present 1<sup>st</sup> defendant) and the surveyor John already highlighted above, there can be no doubt that the requirement of a gift of land by native law and custom has been fulfilled. P.W.2 testified about the existence of the gift, while the surveyor testified about the identity of the plots that were actually given, and these were said to be plots 8 and 8.”*

(ii) *The Learned Justices of the Court of Appeal erred in law in entering judgment for the Respondent when he did not prove “Gift of Land” under customary Law as required by Law:-*

(iii) *The Learned Justices of the Court of Appeal erred in Law in confirming the judgment of the trial Court granting plaintiff title to plot 8 in Awani Lay-Out when:-*

(a) *Exhibit P2 and the Evidence in Court showed that there were two or three Awani Family layouts.*

(b) *Plaintiff did not establish in which of the Awani family layouts he had the plot 8.*

(c) *The Location, extent and boundaries of plot 8 were not established.*

(iv) *The Learned Justices Court of Appeal misdirected themselves On the facts when per Akpabio J.C.A. they held inter-alia as follows:-*

*“From both the pleadings, and evidence, both documentary and oral, available in this case it appears to me that the Respondent was able to prove on balance of probability that plots 8 and 9 were given to him, while the appellant could not prove that it was plot 31 that was given.”*

(v) *The judgment of the Court of Appeal is against the weight of evidence.”*

Appellant has filed his brief of argument. The Respondent has not filed a brief of argument despite service on him of Appellants’ brief of argument. Only Appellants’ Counsel was present at the hearing of the appeal. Respondent did not file his brief of argument and was not represented by learned counsel at the hearing. The situation does not fall within the provision of Order 6 r.8(7) Rules of the Supreme Court 1999 where if only one brief was filed for one of the parties, and neither of the parties nor their Counsel was present at the hearing to present oral argument the appeal shall be regarded as having been argued on that brief. In this case Appellant has filed his brief of argument, the Respondent who has failed to file his brief of argument was not represented by counsel and was not present at the hearing. Accordingly the question of seeking leave of the Court to be heard in oral argument did not arise (See Order 6 r.9 – See Onumajuru v. Akaninu (1994) 3 NWLR (pt.334) 620. We nevertheless heard Appellant on his brief of argument in accordance with Order 6 r.8(7) Rules of the Supreme Court (as amended) 1999. The

appeal was taken as having been argued on Appellants' brief of argument. In the instant case the Respondent having been served with Appellants' brief of argument. It will be inequitable and not be in the interest of justice to delay the hearing of the appeal. Even if learned Counsel to Respondent were present in Court he will require leave of the Court to be heard. – See Management Enterprises Ltd. & Anor. v. Otusanya (1987) 2 NWLR (PT.55) 179; Nneji & ors. v. Chukwu & ors. (1988) 3 NWLR (pt.81) 184; Odutola v. Kayode (1994) 2 NWLR (pt..324) 1 SC.

Learned Counsel to the Appellant adopted Appellants' brief of argument, which he relied upon in his argument before us in this appeal. The following three issues for determination have been formulated as arising from the five grounds of appeal. They are.

“(i) *Was the Court of Appeal right when it found and or held that the requirement of a gift of land under native law and custom was fulfilled by the Plaintiff/Respondent on the testimonies of PW2 and the surveyor (See p.278 lines 24-29 of the Record).*

(ii) *Whether mere proof of the existence of a gift without credible evidence of the identity, extent and location of the gift is sufficient to entitle the respondent to judgment for a declaration of title, damages for trespass and order of injunction.*

(iii) *Whether the Plaintiff tendered sufficient evidence to entitle him to the declaration sought, put in another way did the plaintiff discharge the burden of proof required in law to entitle him to the judgment of the trial Court, and the Court of Appeal.”*

These are the only issues formulated from the grounds of appeal as Respondent though served has not filed his brief of argument and was not represented by counsel at the hearing of this appeal.

I have carefully examined the issues formulated by learned counsel to the Appellant. They cover the grounds of appeal filed. I shall consider the issues formulated in the order in which learned counsel to the Appellant has argued them in the Appellant's brief of argument. I shall start with issue 1 which dealt with the contention whether the court below was right to hold that Plaintiff/Respondent fulfilled the requirement of a gift to him of land under native law and custom on the testimonies of

PW2 and of the Surveyor.

In his submission on this issue learned counsel to the Appellants referred to the claim of the Plaintiff/Respondent and pointed out that it is a declaration of title which can only succeed on credible and satisfactory evidence in proof of his claim. Relying on Obioha v. Duru (1994) 8 NWLR (pt.365) 631 at p.645-646 and Morankinyo v. Adesoyero (1995) 7 NWLR (pt.409) 602 at p.616. Counsel submitted that Plaintiff must rely on the strength of his own case and not on the weakness of the case of the defendant. The Plaintiff/Respondent in the instant case has founded his claim and his root of title on the Gift from the Awani family to which he belongs. The family are the defendants to the action. This is also the averment in his pleading in paragraphs 5, 6, 7, 8 and 18 of the further amended statement of claim. The averments have been denied by the Defendants/Appellants at paragraphs 5, 6, 8, 16 and 19 of the further amended statement of defence.

Learned Counsel referred to the observation of the learned trial Judge of the Plaintiff/Respondent's pleading. Learned Counsel went on to point out in agreement with the observation of the learned trial Judge and the court below that the primary dispute between the parties in this case was not whether a gift was made to the Respondent, the real question in controversy was whether it was plots 8 and 9 as claimed by the Respondent or plot 31 as alleged by the Appellant that was the gift made to the Respondent.

Learned Counsel to the Appellants referred to the judgment of the court below where they considered the testimonies of PW2 and of the surveyor and came to the conclusion that the requirement of a gift of land by native law and custom has been fulfilled. Quoting the passage in extenso it was submitted referring to the evidence of PW2 that the conclusion of the court was erroneous on the facts. It was submitted that the testimony of PW2 and of the surveyor with regard to the identity of the gift and its nature and extent was ambiguous and equivocal. He referred to the testimony of the surveyor that there were two or three layouts, and he was called from time to time to layout the plots and number them. The surveyor testified that the 1<sup>st</sup> Defendant asked him to



prepare plots 8 and 9 for the Plaintiffs/Respondents. He prepared the plan and gave it to the Plaintiffs/Respondents.

Counsel then asked the question, which in his opinion both courts below did not advert to in the resolution of the issue; namely Plots 8 and 9 in which of the lay-outs? Where the other party has put in issue, the particular location and identity of the land in dispute, mere tendering of a surveyor's plan will not be sufficient evidence of ownership and identity of the land. Counsel cited as authorities in support Omeregbe v. Idugienwaye (1985) 2 NWLR (pt.5) 41 at p.60, Aja v. Okoro (1991) 7 NWLR (pt.203) 260 at 273 Olusanmi v. Oshasona (1992) 6 NWLR (pt.245) 22.

Learned Counsel referred to the evidence of the surveyor who testified that the instruction given to him to survey plots 8 and 9 for the Plaintiffs/Respondents was countermanded by the Head of the Family and that the latter instruction superseded the first. He criticised the finding of the court below on the acceptance of the evidence of the surveyor on the ground that there was no evidence before the court that the surveyors completed work was sent or given to the head of the family for his approval. It was submitted that the Court of Appeal came to the conclusion and held without any evidence that once family land had been granted or sold to a member or other person, the family automatically divests itself of that plot or piece of land, and cannot thereafter have the same plot to give out or convey to another person.

Learned Counsel argued that the court overlooked the fact and the law that the mere act of carrying out a survey of land is not conclusive evidence of customary grant and/or proof of ownership/title. It was submitted citing Fasoro & ors. v. Beyioku & ors. (1988) SC.151 at 161; Nwoye v. Bolarin (1991) 4 NWLR (pt.184) 257 at 264 that mere survey of land is not one of the ways of proving title to land.

Again, it was submitted that the evidence of PW2 relied upon in the judgment of the Court of Appeal was in contradiction of the pleading of the Plaintiff/Respondent on the question of the identity and location of the land in dispute. The witness denied in his evidence being present when the gift was made, whereas the averment in the pleadings at para-

graph 7 of the further statement of claim was that he was present when gift was made. It was finally submitted on this issue that since the proof of the gift and its location constitute the foundation of the Plaintiff's claim, that foundation having been shown to be shaky, equivocal and ambiguous, the Plaintiff's claim ought to have been dismissed. Learned Counsel cited and relied for his submission on Chief G. A. Titiloye & ors. vs. Chief Loupo & ors. (1991) 7 NWLR (pt.205) 519 and Bello v. Emeka (1981) 1 SC.101.

I shall now consider in its correct perspective the submissions on this issue by learned Counsel to the Appellants. The question raised was whether the Court below was correct in holding that the Plaintiff/Respondent had satisfied the requirement for a gift of land to him under native law and custom. Learned Counsel to the Appellants has answered the question in the negative. It is however, important to examine the pleadings of the parties to consider whether this issue arose from the pleadings.

For ease of reference and clarity I reproduce hereunder the relevant averments of paragraphs 4, 5, 6, 7 and 8, 9, 9(a)(b) of the further Statement of claim of Plaintiff/Respondents, where the facts of the "Family Gift" and the Native Law and Custom on which it was based was pleaded.

*"4. The Plaintiff's job with the family surveyor involved a great deal of risk with neighbouring Land owners and was time consuming at the expense of Plaintiff's personal business*

*5. In appreciation of the arduous job done by the Plaintiff for the family, when part of the Awani Family land was laid out into 75 plots referred to as Awani Family Layout Ajamimogha, Warri, the Family compensated the Plaintiff by giving him plots 8 and 9 in the said Awani Family Layout as a gift.*

*6. Late Mr. B. A. M. B. Awani as the then Head of the Awani Family with the concurrence of other principal members of the family gave the said plots 8 and 9 to the Plaintiff as a reward/compensation for the difficult and time consuming work which Plaintiff did in the overall interest of the family and the Plaintiff took actual possession of same.*

*7. The 1<sup>st</sup> Defendant the elder next to Late B. A. M. E. Awani in*

order of birth and seniority in Awani Family was present at the meeting along with other principal members of the family when the said Family gift was made to the Plaintiff.

8. Pursuant to the family gift, the Late B. A. M.E. Awani ordered the family surveyor Mr. Theophilus John to prepare a plan of the said plots 8 and 9 in the name of the Plaintiff and Plaintiff to pay the Surveyor the necessary survey fees thereafter. B

9. The plan No. T.M. 1913 made by Theophilus John on the 11<sup>th</sup> day of June, 1975 showing freehold property of Jemide Awani plots 8 and 9 at Awani Family Layout Ajamimogha Warri is filed with this Statement of Claim with the Land in Dispute plot 8 shown coloured pink. C

(a) The Surveyor had given evidence in this case before. The Plaintiff will rely on the active evidence of the Surveyor when the case is tried denovo as he has become and unfit to attend as a witness. D

(b) The Plaintiff will also rely on the evidence of Frederick O. Adegbeyegbe, Esq. a Legal Practitioner resident in Lagos, who testified in this case on behalf of the Defendants before.”

The Defendants/Appellants have in their further amended statement of defence at paragraphs 5, 6, 7, 8, reproduced hereunder joined issues with respect to the averments of Plaintiff /Respondent in paragraphs 5, 6, 7 and 8 supra, but specifically not joining issues on the fact that a gift of land was made to him by the Awani family. The relevant averments read, F

“5. With further reference to paragraph 5 of the Statement of Claim 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the three members that assisted the Surveyor were namely: Chief C. A. Lori, Plaintiff (Jemide Awani) and Achegogo Sharndorf and were thereafter allotted plots 30, 31 and 32 respectively. 1<sup>st</sup> and 2<sup>nd</sup> Defendants will further contend at the trial that at no time was Plaintiff allotted plots 8 and 9 as compensation in the said Layout. G

6. 1<sup>st</sup> and 2<sup>nd</sup> Defendants categorically and vehemently deny H paragraphs 6, 7, 8, 9, 10, and 11 of the Statement of Claim and will at the trial insist on the strictest proof of all the allegations contained therein.

7. With further reference to paragraphs 6 and 7 of the Statement

of Claim 1<sup>st</sup> and 2<sup>nd</sup> Defendants state that Chief B. A. M.E. Awani alone as the Head of Awani Family and in exercise of his Prerogative powers under the Itsekiri Customary Law in that regard allotted 30, 31 and 32 to the three members mentioned in paragraph 5 of this Further Amended Statement of Defence and asked them to pay the sum of N100.00 (one hundred Naira) each as consideration instead of N800.00 (Eight hundred Naira) paid by other members of the Family for such allotments. They paid the said N100.00 (one hundred Naira) and were accordingly issued with receipts. 1<sup>st</sup> and 2<sup>nd</sup> Defendants further contend that any purported meeting held by the family members including Chief P. O. Awani to grant Plots 8 and 9 of the Plaintiff was a ruse.

8. In further answer to paragraphs 8 and 9 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the late B. A. M.E. Awani never gave any letter of authority to the Surveyor to survey plots 8 and 9 for the Plaintiff as was the usual practice but the Plaintiff fraudulently manoeuvred the Surveyor to survey plots 8 and 9 in his name and when the Surveyor realised this, he got the written instruction of the Late Chief B. A. M.E. Awani as to the proper persons who owned the plots and he surveyed same for Sunday Temile 3<sup>rd</sup> Defendant herein and Madam Ekpeminaghan. 1<sup>st</sup> and 2<sup>nd</sup> Defendants will at the trial rely on the late Chief B. A. M. E. Awani's written instruction to the Surveyor Plans Nos. TJBD 746 in respect of Sunday Temile for Plot 8 and Plan No. TJBD 1081 of 14/5/84 in respect of Madam Ekpeminaghan in respect of Plot 9."

It is clear from the averments of the Defendants/Appellants at paragraph 7, that they admitted Plaintiff/Respondent was a beneficiary together with two others of family land by way of gift. The only dispute therefore has been the identity of the gift of the plot or plots actually made to the Plaintiff/Respondent. Accordingly there was no dispute that there was a gift of land made to the Respondent by his family, i.e. the Awani family in appreciation of the role he played in the surveying and preparation of the Awani family layout.

**In respect of facts in the statement of claim which are admitted or not disputed by the defence, and accordingly no issue was joined between the parties, no proof of such fact is required and no**

evidence is necessary or admissible in further proof of such admitted facts – See Chief Okparaekwe of Ndiakaere & ors. v. Obidike Egbuonu & ors. (1941) 7 WACA.53, Pioneer Plastic Containers Ltd.v. Commissioner of Customs & Excise (1968) Ch.597, Onwuka v. Ediala (1989) 1 NWLR (pt.96) 182 SC. Igwe v. ACB Plc (1999) 6 NWLR B (pt.605) 1. **It is therefore not necessary to prove the fact of the gift to Plaintiff.**

**Learned Counsel to the Appellants has submitted that the testimonies of PW2, the current head of the Awani Family and of the Surveyor were not sufficient to fulfil the requirement of a gift of land to Plaintiff/Respondent under native law and custom. It is important to observe that learned Counsel to the Appellant is not disputing the fact that a gift of land has been made by the Awani family to the Respondent/Plaintiff under native law and custom.**

The Court below had relied on the evidence of PW2 and the Surveyor to hold that the requirement of a gift of land by native law and custom has been fulfilled. The testimony of PW2 as to the existence of the gift and of the surveyor of the location of plots 8 and 9 were regarded as satisfying the requirements. I do not think learned Counsel for the Appellant is correct in his criticism that PW2 ‘s evidence at the trial was in conflict with the pleading of the Plaintiff. The averment in paragraph 6 of the further amended statement of claim is as follows –

*“6. Late Mr. B.A.M.E. Awani as the then Head of the Awani Family with the concurrence of other principal members of the family gave the said plots 8 and 9 to the Plaintiff as a reward/compensation for the difficult and time consuming work which Plaintiff did in the overall interest of the family and the Plaintiff took actual possession.”*

This averment is in respect of the gift of the plots 8 and 9 to the Plaintiff/Respondent. It did not refer to the identity of the location. The averment criticised as in conflict with the testimony of PW2 is paragraph 7 of the further amended statement of claim which states –

*“7. The 1<sup>st</sup> Defendant, the elder next to late B.A.M.E. Awani in order of birth and seniority in Awani Family was present at the meeting along with other principal members of the family when the said family*

*gift was made to the Plaintiff.*”

It is important to note the underlined words which are significant. The averment is that PW2 was present at the meeting of the family members when the plots 8 and 9 were given to the Plaintiff.

**B It is not easy to find and I have not discovered any conflict with the testimony of PW2 that he did not accompany them to the lay-out at the time the two plots were allotted to the Plaintiff but that he later got to know that they were plots 8 and 9 (or 9 and 10). Thus whereas the averment in para.7 was talking about the gift of the land, the testimony of PW2 was in respect of the identity and location of the land already granted. It was admitted and not disputed that PW2 was an elder and one of the principal members of the Awani family who made the gift of the land in dispute to the Plaintiff. It is a general and well settled principle of customary law that land granted by the Chief and Head of the family with the concurrence of the principal members of the family is valid – See Ekpendu v. Erika (1959) 5 SCNLR.186 so in this case. The allotment of plots 8 and 9 was made by Chef B.A.M.E. Awani with the consent of the principal members of the family is unimpeachable.**

**F Learned Counsel to the Appellant has criticised the Court below for accepting the testimony of the surveyor as evidence of the grant of the land to the Plaintiff. He submitted that the evidence of the surveyor shows that there are two or three layouts; therefore rendering the evidence with regards to the identity of the land ambiguous and equivocal.**

**G There are no averments in the pleadings which render the land in question uncertain. There is no suggestion in the pleadings that the parties were speaking about more than one layout. Accordingly, evidence of the surveyor relied upon does not enjoy any support in the pleadings and goes to no issue. No issue was joined as to the particular layout in which the plots 8 and 9 or 31 is located. H The plan prepared by the surveyor and accepted by the parties and admitted in evidence sufficiently identified the subject matter. The tendering of the survey plan was not intended as evidence of ownership, but to identify the land in issue. It is therefore correct to**

say that the testimony of the surveyor goes to the identification of the gift by the Awani Family.

**The important** consideration in this case is whether the relevant native law and custom governing the grant was pleaded. The law is that the burden of proof of custom is on the person alleging its existence -See S.14(1) Evidence Act. Proof of native law and custom which is regarded as a question of fact to be pleaded is necessary unless where by frequent proof it has been judicially noticed. – See Olowu v. Olowu (1985) 3 NWLR.372, Agbai v. Okagbue (1991) 7 NWLR. 391. C

In this case Plaintiff pleaded and relied in paragraphs 4-9, 18, and 20 of the further amended statement of claim on the Itsekiri native law and custom applicable to the transaction. It was averred that under Itsekiri law such a gift conferred on the allottee exclusive or absolute ownership of the land. This pleading was not controverted and Defendant has not joined issues in paragraph 18 of the further amended statement of defence. Examination of the averments in paragraph 10 of the further amended statement of claim and paragraph 18 of the further amended statement of defence discloses clearly that the tenure or grant or interest or title or right conferred on the Plaintiff was not the issue. The Defendants in paragraph 18 of the further amended statement of defence without disputing the exclusive ownership in Itsekiri native law averred that the said plot was never allocated to the Plaintiff. Impliedly conceding it was averred that such a right according to the Itsekiri Native Law and Custom will only not accrue if the said plot was not allotted to Plaintiff by the head of the Family. It seems to be accepted by both parties that in Itsekiri Native Law and custom such a family gift of land conferred on the allottee the exclusive and absolute ownership of the property. D E F G

In addition to the averments in the pleadings there was the oral evidence of the Plaintiff that he became the absolute owner of the plot allotted to him according to Itsekiri custom. Indeed, the 1<sup>st</sup> Defendant and current Head of the Awani family, Chief Pius O. Awani gave evidence that the plots allotted to Plaintiff belong to Plaintiff exclusively according H

to Itsekiri custom. It is pertinent to observe that the Defendants did not tender any contrary evidence.

**It is well settled that the onus is on the party who claims the existence of a particular customary law to be applicable to the situation to call evidence to establish the custom – See Adeyeri II & ors. v. Aderibigbe Atanda & ors. (1995) 5 NWLR.512. There seems to be no doubt that Plaintiff/Respondent by the averments in the pleading and the oral evidence in support established that the plots allotted to him belong to him exclusively and absolutely according to Itsekiri native law.**

**The Court of Appeal was therefore right and correctly found that Plaintiff/Respondent fulfilled the requirement of a gift of land under native law and custom when they relied in addition to the averments in the pleadings of the parties, also on the testimonies of PW2 and the surveyor. I accordingly resolve this issue against the Appellant and in favour of the Plaintiff/Respondent.**

I now turn to the second issue, which is whether mere proof of the existence of a gift without credible evidence of the identity, extent and location of the gift is sufficient to entitle the Respondent to judgment for a declaration of title, damages for trespass and order of injunction. The implication and inference to be drawn from the formulation of the second issue is that the trial court found for the Plaintiff and the court below affirmed the finding that Respondent was entitled to a declaration of title to the plots claimed merely on the proof of the existence of a gift in native law and custom to him. That there was no credible evidence of the extent identity and location of the plots necessary for the declaration of title sought. If this interpretation of the judgments is accepted, there is no doubt that the case of the Plaintiff/Respondent has not been sufficiently proved. I shall now consider the submissions of Learned Counsel to the Appellants on the issue.

Learned Counsel to the Appellants submitted that the case of the Plaintiff as disclosed in the pleadings and the testimony of the witnesses in respect of the nature and extent of the gift and the Itsekiri native law and custom is scanty, very weak and unconvincing. It was contended



that Exhibits D3, D6, D7, D1 and D2A tendered in court which the Court of Appeal failed to consider showed equivocally that it was plot 31 that was allotted to the Plaintiff/Respondent.

He pointed out that the evidence of the exercise of ownership in respect of plot No.9 pleaded in paragraphs 8 and 9 of the further amended statement of claim was contradicted by his own witness PWQ3, who testified that plot No.9 was conveyed to her by Chief B.A.M.E Awani. This testimony was confirmed by the Plaintiff in his evidence. It was pointed out that there was no evidence throughout the trial of witnesses who witnessed the grant. There was on the admission of the Plaintiff no physical handing over of the plots. Commenting that the Plaintiff admitted not taking the surveyor to plots 8 and 9 allotted to him, Counsel wondered how Plaintiff located plots 8 and 9 of the three Awani family layouts?

Learned Counsel to the Appellant criticised the findings rejecting the defence evidence based on the testimony of Chief Company Lori, DW1, and the evidence of Fred Agbeyegbe PW4, the Chairman of the Flush or Plush Organisation, that it was plot 31 and not plot 8 that was allotted to Plaintiff. It was submitted that the court was wrong to have held that DW1, Chief Company Lori, was an outsider, when there was clear and uncontradicted evidence that he was a member of the Awani family maternally. Again, the evidence of Fred Agbeyegbe PW4, and Exhibit PW3 tendered by him and relied by the Court was inclusive, PW4 did not conclude his evidence to continue his cross-examination. These are weaknesses in the case of the Plaintiff which the court used to support and strengthen the case, and at the same time rejecting the Defendants' case. This is not the situation where the weakness in the case of the Plaintiff is strengthened by the case of the Defendant – Umesie v. Onuagbuluchi (1995) 9 NWLR (pt.421) 515 at p.528.

**It seems quite clear from the submissions summarised above that Appellant having conceded that there was an allotment by the Awani family of a plot to the Plaintiff is criticising the court for the declaration sought by Plaintiff. It is well established law that in an action for declaration of title, the plaintiff must succeed**

on the strength of his case and not on the weakness of the Defendants – See *Melifonwu v. Egbuji* (1982) 9 SC.145, *Atuanya v. Onyejekwu* (1975) 3 SC.161, *Elias v. Omo-Bare* (1982) 5 SC.25. The onus in a claim for declaration of title is on the party who seeks the declaration. This he can do by satisfying any of the five ways of proof of title to land prescribed by this court in *Idundun v. Okumagba* (1976) 9-10 SC.227.

It is invariably necessary where Plaintiff pleads and traces his root of title to a particular family or person and as to how the title vested in him he must establish that title by credible evidence – See *Ndukwe v. Acha* (1998) 6 NWLR.25, *Mogaji v. Cadbury (Nig.) Ltd.* (1985) 2 NWLR.393. The Plaintiff in an action for declaration of title is required to satisfy the Court by evidence and not by admission in the pleadings of the Defendant of his right to the declaration he claims – See *Bello v. Eweka* (1981) 1 SC.101. This is because the grant of a declaration by the court is discretionary – See *Kodilinye v. Odu* 2 WACA.336, *Akinola & ors. v. Oluwo & ors.* (1962) WNLR.135.

Where family land is involved under customary land tenure a Plaintiff in order to establish his title to the land must trace his title to the family – See *Thomas v. Preston Holder* (1946) 12 WACA 78, *Lion Buildings Ltd. v. Shadipe* (1976) 12 SC.135. There is no doubt that an owner of land under native law and custom can transfer his absolute interest in the land to another and grant exclusive possession. – See *Aboderin v. Morankinyo* (1968) NMLR.179.

It is of utmost importance to refer to the pleadings and evidence of the parties in this case and to the findings of the courts below. I have already referred to and reproduced in this judgment the averments of the parties relating to the allotment of the gift of land by the Awani family in paragraphs 4, 5, 6, 7, 8, 9, 10, 18 of the further amended statement of claim and paragraphs 2, 5, 6, 7, 8, 9, 11, 14, 15 of the further amended statement of defence. I have also referred to the evidence of the Plaintiff the DW1, PW2, and PW4 and of the Defence at the trial.

The issues identified by learned Counsel for the Appellants as

precluding the declaration of title to the Plaintiff were the identity of the plots 8 and 9 which is disputed and the weakness in the case of the Plaintiff. Appellants also complained that there was no evidence of witnesses to the grant, and actual handing over of the plots allocated.

It is important to refer to the finding of the learned trial Judge on this issue. Relying on the testimony of PW2, Chief Pius Awani, that of the Plaintiff, Exhibit P2 the evidence of the PW4, the Managing Director of “Plush” or “Flush” Organisation Ltd, and who tendered Exhibit P3 in these proceedings. He also considered the evidence of Chief Company Lori, the DW1, who tendered Exhibit D9, a Lease Agreement. The learned trial Judge rejected the evidence of Atsegogo Schandorff who testified that he and another and Plaintiff were allotted plots 30, 32 and 31, respectively as not speaking the truth. The evidence was rejected because of the more credible testimony of Mr. Fred Agbeyegbe PW4 and of Exhibit P3 which showed those plots were included in the 14 plots (i.e. 23-36) allotted to the Plush Organisation Ltd. The learned trial Judge believed DW1 who testified that the Plaintiff and the two others were each given two plots. He rejected the evidence that Plaintiff was given Plot 31. He then held that on the facts tendered before him Plaintiff discharged on the balance of probabilities, the burden on him that late Chief Awani allotted Plots 8 and 9 and not Plot 31 as compensation for services rendered to the family.

The criticism that there was no evidence of witnesses of the handing over of the plots 8 and 9 allotted would seem to ignore the evidence that the allotment was made at the family meeting in which the Head of the family and principal Members were present. The inescapable presumption is that they were witnesses to the grant. – See Erinosho v. Owokoniran (1965) NMLR.479, Ajadi v. Olarenwaju (1969) 1 All NLR.382.

This finding was affirmed by the court below after considering the evidence, agreed with the learned trial Judge in addition to the evidence that in view of Exhibit P3 and the evidence of PW4, the DW1 could not have been telling the truth. It is thus obvious that the identity of the Plots 8 and 9 were never in issue, as there was no averment in the

pleadings to that effect. Learned Counsel who suggested the ambiguity on the suggestion there were three lay-outs of the Awani family only raised this in the address. The surveyor who gave evidence and none of the witnesses on either side had any doubts as to the identity of the Lay-  
 B Out or the Plots 8, 9, or 31 in issue. This argument is clearly devoid of any merit. It is obvious from the foregoing the Plaintiff did not merely establish the existence of a gift of Plots 8 and 9 to him, the identity, the location were all established by credible incontrovertible evidence.

**It is a well-settled principle of our law that a court can grant a declaration of title to land even without production by the Plaintiff of a survey plan. The accepted acid test is whether the land the subject of the declaration can be ascertained with “definitive certainty” so that a surveyor taking the record of proceedings can**  
 D **produce a plan showing accurately the land which title has been granted.** – See *Arabe v. Asanlu* (1980) 5-7 SC.78, *Kwadzo v. Adjei* (1944) 10 WACA.274 – See *Anyaoke v. Adi* (1986) 3 NWLR (pt.31) 731, *Onwuka v. Ediala* (1989) 1 NWLR (pt.96) 182 SC.

**In the instant case in the light of what Plaintiff has established, the learned trial Judge was right to have granted the declaration sought, and the Court below correctly affirmed the Judge. Learned Counsel for the Appellant has not adduced any convincing**  
 F **reasons why these findings of the two courts below should be disturbed. I find the reasons in support of the findings unassailable. I agree with them.** – See *Mohammed v. Hussaini* (1998) 14 NWLR (pt.584) 108 SC. I again resolve this issue against the Appellant and in favour of the Respondent.

G In view of what has been decided in issue 2, it is no longer necessary to consider issue 3, the Plaintiff having adduced sufficient evidence to enable the court grant the declaration sought.

H All the relevant issues having been resolved in favour of the Respondent and against the Appellants, all the grounds of appeal from which they were formulated fail, and are hereby dismissed.

There is no order as to costs.

**KUTIGI JSC**

I read in draft the judgment just delivered by my learned brother Karibi-Whyte, J.S.C. I agree with the conclusion that the appeal lacks merit and ought to be dismissed. Both the trial High Court and the Court of Appeal rightly found for the Plaintiff on the facts of the case which are largely undisputed. The appeal is dismissed with no order as to costs.

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**MOHAMMED JSC**

I have had the privilege to read the judgment of my learned brother, Karibi-Whyte, JSC., in draft. I am in agreement or entire agreement with, and do not desire to add to the conclusions expressed in the said judgment. In the result, I concur in holding that the appeal having been brought against two concurrent findings is without merit. It is for this reasons given by noble learned friend that I dismiss this appeal. I also make no order as to costs.

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**ACHIKE JSC**

I have had the privilege of reading, in advance, the judgment just delivered by my learned brother, Karibi-Whyte, JSC. I do not wish to add anything save to say that I agree that the appeal is devoid of merit and deserves to fail. Accordingly, I, also, would dismiss it without any order as to costs.

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**AYOOLA JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Karibi-Whyte, JSC. For the reasons he gives, with which I am in entire agreement, I too dismiss the appeal. I too make no order as to costs.