

SUPREME COURT OF NIGERIA
MONDAY 25TH FEBRUARY, 2002. SC. 70/1997
CORAM: - M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI JJSC

TYOGBIDE AKULAKU & 4 ORS APPELLANTS
AND
IKYUME YONGO RESPONDENT

LAND LAW - Title - Identity of land - Proof - Since respondent defined with certainty the extent of the disputed land - He was rightly adjudged to be the owner (H1)

APPEALS - Judgment - Reversal - Correctness of - Judgment of High Court was rightly reversed - As Court of Appeal did not find contradictions in evidence of respondent and his witnesses (H2)

APPEALS - Findings of trial court - Interference - Justification - Appellate court may interfere with such findings - Where it is satisfied that trial judge - Failed to evaluate evidence (H3)

COURTS - Native courts - Need to do justice - The courts are to do justice in terms of issue in controversy - As disclosed by writ and evidence - And not to consider technicalities (H4)

LAND LAW - Inheritance - Appeals - Judgment - Validity of - Since judgment of Court of Appeal is not perverse - It rightly held that High Court wrongly rejected - Evidence of how respondent inherited the land (H5)

FACTS

Plaintiff/respondent commenced this action against defendants/appellants before the Upper Area Court of Benue State, for trespass and for a declaration of title to the land in dispute between the parties. Appellants on the other hand counterclaimed against respondent for a declaration of title, an order of forfeiture and perpetual injunction in respect of same piece of land. At the trial, respondent testified in person and called one witness. Respondent accurately

described the identity of the land in dispute and gave traditional evidence of how he inherited same from his father.

Appellants called three witnesses and equally gave traditional evidence to the effect that the land belonged to their forefathers who had settled on same. In a bid to garner more evidence, the court conducted a visit to the locus in quo. In its judgment, the court upheld the claim of respondent and dismissed the counter claim of appellants. Being dissatisfied, appellants appealed to the High Court of Benue State, Gboko. The court gave judgment in favour of appellants. Aggrieved, respondent filed appeal at the Court of Appeal, Makurdi Division. The court reversed the decision of the Gboko High court and upheld the judgment of Upper Area Court. Not satisfied, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. *“Whether the Court of Appeal was right in affirming the decision of the trial Area Court, Gboko when the Respondent as Plaintiff failed to identify clearly by evidence the land claimed.”*

2. *“Whether the Court of Appeal was right in law in affirming the judgment of the trial Upper Area Court, Gboko when the Respondent failed to proof (sic) his instrument of title to the said land.”*

3. *“Whether the Court of Appeal was right in law in setting aside the judgment of the Gboko High Court on the ground that the High Court had clearly usurped the functions of the trial Court by ascribing credibility to the evidence of witnesses.”*

4. *“Whether the Court of Appeal was right in law in setting aside the judgment of the Gboko High Court when there was sufficient and unchallenged evidence in support of the Appellants’ counter claim.”*

HELD (Unanimously dismissing the appeal per

EJIWUNMI JSC)

Title - Identity of land - Proof

1. It would appear from the above passage from the judgment of the Upper Area Court, that the identity of the land in dispute was carefully set down having regard to the evidence led before the court during the trial and also during the visit of the

Court to the locus-in-quo.

The trial court namely the Upper Area Court made observations in respect of the disputed land when he visited the locus and as a result made findings in that regard and which I have already reproduced above in the course of this judgment. Having regard to the observations so made and the findings made by trial court, then it is my humble view that a surveyor would surely upon those findings which are quite clear and definitive of the disputed land, prepared an accurate plan of the disputed land. It is therefore my considered view that the Respondent having been shown to have clearly defined with certainty the extent of the disputed land was rightly adjudged to be the owner of the disputed land. (pp. 149 D/155 E)

Judgment - Reversal - Correctness of

2. As I have already said above, the Court below then quite properly reversed the judgment of the High Court for the reasons inter alia above. I find myself in entire agreement for the raison d'être for doing so. By reversing the judgment of the High Court, the Court below therefore upheld the findings of the Upper Area Court and left undisturbed the evidence of the Respondent and his witness.

It is evident from a careful perusal of the above passage that the Court below did not find the alleged contradictions in the evidence of the Respondent and his witness. The Court below therefore held that the High Court was wrong to have reversed the judgment of the Upper Area Court. (p. 154 D)

APPEALS - Findings of trial court - Interference - Justification

3. The position taken by the Court below was in my view right, having regard to the settled principles upon when an Appellate Court may interfere with the findings and conclusions of a trial court. It is not out of place, in my respectful view to refer to Etowa Enang & Ors v. Fidelis Ikor Adu (1981) 11-12 SC where at page 38-39, Nnamani JSC, explained the relevant principles. Thus: -

"It has been established by several authorities that a Court of Appeal must approach the findings of fact of a trial

judge with extreme caution. The principles under which a court of appeal can interfere have been well settled. A Court of Appeal which has not had the same advantage which the trial judge has enjoyed of seeing the witnesses and watching their demeanour would only disturb the findings of fact of such a court where it is satisfied that the trial judge has made no use of such an advantage. If the trial court has unquestionably evaluated the evidence before him it is not for the Court of Appeal to reevaluate the same evidence and come to its own decision. (p. 154 G)

Native courts - Need to do justice

4. It must be borne in mind that on this question, the Court was considering the evidence led at a customary trial where no pleadings have been filed. It is a fundamental principle that undue technicality does not apply in native Court. Native Courts are to do substantial justice in terms of the real issue in controversy as disclosed by the writ and the evidence without being weighed down by the technical rules designed for common law courts. (p. 156 D)

LAND LAW - Inheritance - Appeals - Judgment

5. It is therefore my view that in so far as the judgment of the Court below has not been shown to be perverse or contrary to the rules of natural justice, the Court below was right to have held that the evidence of the Respondent as to how he inherited the disputed land was wrongly rejected by the High Court sitting on appeal upon the judgment of the Upper Area Court. (p. 156 F)

NOTABLE POINT OF INTEREST

ONU JSC

1. Land law – Proof of title can be by traditional history

On issue 2, the principle of law is settled that a plaintiff in a declaration of title can rely on either traditional history or positive and numerous acts of ownership over a long period of time to sustain his claim. The plaintiff having traced his root of title to one whose title to

ownership has been established, the onus then shifts to the defendant to show that his own possession is of such a nature as to oust that of the original owner. Where, however, a plaintiff fails to prove the base upon which he found his title, the claim will fail. (p. 161 B)

REPRESENTATION

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A. O. Okeaya-Inneh Esq., for the appellants

C. I. Iornongu Esq., with C. C. Obeagu Esq., for the respondent.

CASES REFERRED TO

C

Arabe v. Asanlu (1980) 5-7 SC 78

Epi v. Aigbedion (1972) 10 SC 53

Kojo II v. Bonsie (1957) NLR 1223

Are v. Ipaye (1990) 2 NLR (Pt. 132) 299

Etowa Enang & Ors v. Fidelis Ikor Adu (1981) 11-12 SC

D

Woluchem v. Gudi (1981) 5 SC 319

Ebba v. Ogodo (1984) 1 SCNLR 372

Moregbe v. Edo (1971) 1 ALL NLR 282

Ogoyi v. Umagba (1995) 9 NWLR (Pt. 419) 283

Ezewani v. Onwordi (1986) 4 NWLR (Pt. 33) 27

E

Onamade v. A.C.B. (1997) 1 SCNJ 65

Ekpenga v. Ozogula II (1962) 1 All NLR 265

Odofin v. Ayoola (1984) 11 SC 72

Mogaji v. Cadbury Nig Ltd (1985) 2 NWLR 393

F

Ajani v. Ladepo (1986) 3 NWLR 276

STATUTES REFERRED TO

Court of Appeal Act 1976, s. 16

Constitution of Federal Republic of Nigeria 1999, s. 233(1)

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LEAD JUDGMENT BY EJIWUNMI JSC

The Appellants were the Defendants in this action, which was commenced against them jointly and severally by one Usue Aga as Plaintiff in the Upper Area Court of Benue State in the Gboko Judicial division holding at Gboko, for trespass and for a declaration of title to the said land situate and lying at Mbaadeda of Yandev. The Appellants also filed a counterclaim against the said Use Aga wherein they counter claimed against the said Usue Aga, for (1) a declaration

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of title (2) an order of forfeiture and (3) perpetual injunction in respect of a piece of land situate at Mbaakumba, Yandev. At the Upper Area Court, Usue Aga testified in support of his case and called one witness. The Appellants, who were the Respondents in the court below, called three witnesses. The judge of the Upper Area court after
B hearing the evidence of the parties visited the locus-in-quo. At the locus-in-quo, further evidence was taken, and the court made some observations in respect of the evidence given during the course of the visit to the locus-in-quo. Thereafter, the Upper Area Court judge
C gave a well-considered judgment. By that judgment, the claim of the Respondent was upheld and the counter claim filed by the Appellants was dismissed and the Court took the view that the Appellants had failed to prove their counter claim. The judge of the Upper Area Court accordingly entered judgment for the Respondent and
D declared him to be the owner of the disputed land. He however made an order restraining the Appellants, their servants, agents and their privies from entering on the said land from the date of the judgment.

The Appellants were dissatisfied with the judgment and orders of the Upper Area Court. They appealed to the High Court of Justice, Benue State, Benue Judicial Division holding at Gboko. The
E appeal was heard by that court sitting in its Appellate jurisdiction (Coram A. Idoko C. J. and A. O. Onum, J). Whilst this matter was pending before the High Court, it was reported that the Respondent, Usue
F Aga who instituted the action against the Appellants originally was dead. The present Respondent, Ikyume Yongo was substituted for the deceased, Usue Aga. In that court, after argument of counsel appearing for the parties, the court delivered a considered judgment which resulted in the success of the Appellants before that court. As
G the Respondent was dissatisfied with the judgment of the High Court aforesaid, an appeal was lodged to the Court below. In the Court below, the Respondent was successful as that court reversed the decision of the Gboko High Court sitting in its Appellate jurisdiction. The Appellants were aggrieved with the decision of the Court below.
H They have now appealed to this Court.

Pursuant thereto, the Appellant filed five grounds of Appeal, which without their particulars read thus:

“(1) The decision of the lower Court is against the weight of evidence.

(2) *The Court of Appeal erred in law in affirming the decision of the trial Upper Area Court, Gboko when the Respondent as Plaintiff had woefully failed to identify the piece of land claimed with definite certainly and clarity as required by law and this led to a grave miscarriage of justice to the Appellants.*

(3) *The Court of Appeal erred in law in affirming the judgment of the trial Upper Area Court, Gboko when Respondent (as plaintiff) woefully failed to prove his root of title to the said land as required by law and this led to a grave miscarriage of justice to the Appellants.*

(4) *The Court of Appeal erred in law in setting aside the judgment of the Gboko High Court in its Appellate jurisdiction on the ground that the said Gboko High Court “had clearly usurped the functions of the trial by ascribing credibility to the evidence of the witnesses who it had not seen and whose evidence the trial Court had implicitly rejected”, even the findings of the trial Upper Area Court were obviously perverse.*

(5) *The Court of Appeal erred in law in setting aside instead of affirming the judgment of the Gboko High Court (sitting on appeal) in favour of the defendant/appellant in respect of their counterclaim when there was sufficient and unchallenged evidence in support of the counterclaim; and this led to the miscarriage of justice to the appellant.”*

Later, the parties filed and exchanged their respective briefs of argument in accordance with the rules of this Court. The learned counsel who appeared for the parties adopted and placed reliance on their respective briefs namely, the Appellants’ brief, the Respondent’s brief and the Appellant’s reply brief. In the Appellants’ brief, the following are the issues identified for the determination of the appeal.

Issue 1 (Ground 2)

“Whether the Court of Appeal was right in affirming the decision of the trial Area Court, Gboko when the Respondent as Plaintiff failed to identify clearly by evidence the land claimed.”

Issue 2 (Ground 3)

“Whether the Court of Appeal was right in law in affirming the judgment of the trial Upper Area Court, Gboko when the Respondent failed to proof (sic) his instrument of title to the said land.”

Issue 3 (Ground 4)

“Whether the Court of Appeal was right in law in setting aside the judgment of the Gboko High Court on the ground that the High Court had clearly usurped the functions of the trial Court by ascribing credibility to the evidence of witnesses.”

Issue 4 (Ground 5)

B *“Whether the Court of Appeal was right in law in setting aside the judgment of the Gboko High Court when there was sufficient and unchallenged evidence in support of the Appellants’ counter claim.”*

C For the Respondent, three issues were set out for determination in this appeal in the Respondent’s brief. They are as follows:-

1. Whether the plaintiff/Respondent proved his case at the trial court on the balance and preponderance of evidence and whether the Court of Appeal was right in affirming the position of the trial
D Court on the evidence so adduced.

2. Whether the Court of Appeal was right in the exercise of this power under section 16, Court of Appeal Act (1976) when it re-evaluated the evidence of the printed Record.

E 3. Whether the issue of counter claim was applied (sic) before the Appellate High Court, Gboko or the Court of Appeal.

Though the issues framed by the Respondent are also worthy and deserve to be considered in the determination of this appeal, I will, however, in this judgment focus upon the issues raised in the Appellant’s brief for the determination of this appeal. Before consid-
F ering the argument of counsel, a resume of the case presented by the parties at the trial would be given. Beginning with the Respondent, who was the Plaintiff at the trial, he gave evidence that the land, which is in dispute, is situate and lying at mbaadeda in yandev. He
G claimed that he was living on one side of Umatyough stream while the Appellants were living on the other side of the said stream. That stream, he alleged was their common boundary. This stream flows South to North. Looking at the stream from the direction of its flow, he stated that his compound is on the west of the stream, and the
H Defendants are on the east side of the stream. He also added that in the North, the disputed land stops at a natural gutter. And on its southern side, it shares a common boundary with Ioryen Atiker who is in the same area with the Respondent. In support of his contention that the land belongs to him, the Respondent stated that he inherited

the land from his father. He stated further that the old settlement of his father is still on the land. But he had moved a little bit further from that old settlement of his father. The Respondent added that he has been farming yam, rice and cassava. And that indeed, the old heaps for yams and of ridges for cassava etc, are still on the land. As he had always been in full possession of the land, the respondent claimed that before they started to encroach on his land, the Appellants used to obtain permission from him to farm on the land. However three years before he instituted this action, the Respondents who are from Mbaakumba started to encroach on the land without obtaining his permission. He therefore claimed that he warned them several times to quit the land, more so when he noticed that they started to mould blocks on the disputed land, though they never got to the stage of building houses on it. When he was cross-examined, Respondent admitted that Aga Bahi was his father, he also admitted Achagh Aga was his brother. He further admitted that when his father Aga died, Achagh inherited the disputed land. And that at his death, he the Respondent inherited the land. The only witness called by the Respondent was Tijimie Adabom, from Mbaadeba. This witness stated that he knew the parties. He then added that the land was inherited by the Respondent from his father. He claimed that the Respondent planted bananas on the land before the Respondents entered into the disputed land.

For the Appellants, Tyogbide Akulaku, a farmer, was the principal witness. He stated that the land in dispute is not situated in Mbaadeba, but in Mbaakumba and claimed that they farmed and shared common boundary with the Respondent. And at its northern end of the disputed land, their land stops at Unyakyum stream. Appellants claimed that they also farm there and share common boundary with Mbamkor people. In the south, the land extends to the farmland of Mdeda people, where they share common boundary with Iorye Antura at Hon on the road from Ugba to Aparmunbu. The land which he claimed starts from the east extends to the road from Gboko to Apeinumbe. It is then claimed by the Appellants that the Respondent trespassed into their land at the west of the disputed land where he built his compound. He also planted oranges on it and had also given a portion of the land to his brother who has also planted oranges and built his compound thereon. The Appellants,

also, by virtue of the evidence of DW1, Tyogbide Akulaku, gave traditional evidence to prove their claim to the disputed land. In this respect evidence was given that the land belonged to their forefathers, and that their ancestor, Akeme Igia was the first man to settle on the land. After his death, his son Swende took over the land. After Swende's death, Amune took over. He was described as a very big man in his days and also the family head at the time. The witness continued by saying that when the Tombo people were going with Achagh Aga, their maternal relation, Akume received him and showed him a place to settle. It is claimed that Achagh Aga is the brother of the Respondent as he was present when Achagh was received by Akune and showed a place to settle. When cross-examined, DW.1 admitted that the Respondent planted melina trees in his compound about ten years old. And he further admitted that apart from the Respondent, there were no other persons from Mbaadeba on the disputed land.

Before the judge of the Upper Area Court delivered his judgment, he visited the locus-in-quo. And in the presence of the parties and their lawyers, evidence was taken from witnesses with regard to the area visited by the court. The court then made observations during the visit to the locus-in-quo. They read thus:

"1st observation by Court: The melina trees claimed by Defendant are about eight years old."

Before the 2nd observation was made the following evidence given by the Respondent and DW1 were recorded thus:

"P1: The compound belongs to Kembo Indev. He was placed here by his age mate. He is from Mbaakumba but he is settling on the land of Mbaadeba. He is paying tax to Mbaakumba."

Def: This is my compound across Unyatyum stream at the East. This is another one across the stream at the West."

Observation. The two compounds are outside the land claimed by the plaintiff."

And after receiving evidence from the Respondent and DW1 with regard to the location of the land in dispute and who was in possession of the land, the Court made the following observation:

"The disputed land is partly farmland and two compounds of the plaintiff and his relations. The plaintiff's compounds an old compound (sic). It has three groves one is cemented. The defendants

have yam farms on the north of this land. The defendants have planted malina trees along a line from East to West about 50 meters (sic) away from the plaintiff's boundary at the North."

The judge of the Upper Area Court, as previously observed, delivered his judgment wherein he upheld the claims of the Respondent, and dismissed the counter-claims of the appellants to this appeal. The Appellants who lost, and as earlier mentioned, then appealed to the Gboko High court, sitting in its Appellate Jurisdiction. As they succeeded in that Court, there was a further appeal by the Respondent in this appeal to the Court below. The present Appellants have now appealed to this Court. In upholding the appeal of the Respondents in this appeal, the Court below formed the view that the Gboko High Court wrongly set aside the judgment of the Upper Area Court Judge. It is against that judgment that the Appellants have now appealed. The issues raised upon the grounds of appeal filed have been set out above. They will now be considered. However, though as earlier noted, four issues were identified for the determination of this appeal, the merit of this appeal depends principally on whether the Court below was wrong to have held that there were no contradictions in the evidence led by the Respondent in support of his claim to the land, and secondly whether the identity of the disputed land was duly established by the Respondent.

I will consider first the question as to whether the identity of the land was duly proved. The learned counsel for the Appellants examined this question by referring to the general principle pertaining to declaration of title to land. It is, as he argued, well settled that before a declaration of title to land can be granted, the finding of the court has to pass the acid test. This acid test which has also been well settled is whether the land, the subject of the declaration can be ascertained with "*definitive certainty*." See *Arabe v. Asanlu* (1980) 5-7 S.C. 78; *Epi v. Aigbedion* (1972) 10 S.C. 53. The learned counsel for the Appellants then referred to the evidence on record for the Respondent to argue that the Respondent failed to pass this acid test. It is submitted further that the Court of Appeal failed to properly consider the Respondent's evidence in chief and under cross examination, and also the evidence of the Respondent's witness which lacked clarity and precision as to the area claimed by the Respondent as the land in dispute. It is therefore submitted for the Appellants that the

Respondent failed to discharge the burden on him to prove with certainty the area of land that formed the basis of his action.

In his reply to this issue, learned counsel for the Respondent in the Respondent's brief considered together the argument with regard to the identity of the land, with whether the Respondent established his root of title to the disputed land. Though it is his submission that the questions raised be resolved in favour of the Respondent, I will consider first the question as to whether the identity of the disputed land was proved with certainty to justify the claim of the Respondent. In asking for the resolution of this question in favour of the Respondent learned counsel for the Respondent referred first to the various pieces of evidence given by the Respondent and his witness. Then he argued that the pieces of evidence so given by the Respondent and his witness in support of the case for the Respondent are not contradictory and inconsistent with each other. Then he submitted that the Upper Area judge arrived at the right conclusion in upholding the claims of the Respondent. And then went on to argue that it was the Gboko High Court, sitting on appeal that fell into error in reversing the judgment of the upper Area Court. He concluded his argument by contending that the Court below was right to have reversed the judgment of the High Court sitting in its appellate jurisdiction and restored that of the Upper Area Court.

I have earlier in this judgment set out the relevant parts of the evidence of the witnesses to this appeal. In view of the contention made by learned counsel for the parties, I will now set down the findings made by the Upper Area Court Judge, in the course of his visit to the locus-in-quo with regard to the identity of the land. In the course of his judgment, the Upper Area Court then said at page 55, thus:

"At the end of their evidence, the Court visited the disputed land for inspection. The court was taken round the disputed land by both parties. The land is bounded at the East by Unyaty stream in the West by the motorable road Yandev to Buruku road to Apeinumbu. In the South from Melina and nune tree on Apemumbu road down east to Unyaty stream. In the North the land extends by inheritance, by grant or by sale."

And at page 57, he also made the following findings, which read:-

“At the locus, the Court was only shown the compounds of the plaintiff and his relation on the disputed land. The compounds of the defendants are across the Unyatyun stream. I find the natural boundary between the Plaintiff’s farms and defendants farm is at Unyatyun at the East. The 1st defendant stated that when trouble started over this land between him and Ikume Iyongo the elders came and created a demarcation between them at Nune tree at the North. They were all satisfied. This is the nune tree the plaintiff showed at the West near the road to Apeinumbu down East to Unyatyun to be boundary with the defendants. I find that this is their natural boundary at Nune tree flowing a gutter down to Unyatyum stream. At the West the land is bounded by the road to Apeinumbu. In the south the boundary is at malina and nune tree near Apeinumbu road down East to Unyatyum stream. I find that the plaintiff’s father got this disputed land by settlement and the plaintiff inherited it from him after his death.”

It would appear from the above passages from the judgment of the Upper Area Court, that the identity of the land in dispute was carefully set down having regard to the evidence led before the court during the trial and also during the visit of the Court to the locus-in-quo. But the High Court sitting in its appellate jurisdiction considered that the contradiction in the evidence of the Respondent and his witness did not support the above findings of the Upper Area Court. The High Court therefore in its judgment held that if the trial court had properly adverted its mind to the unchallenged evidence of the 1st Appellant which was adopted by all the other witnesses for the Appellants, it should have come to the conclusion that the Appellants proved their counterclaim by preponderance of evidence. In this appeal, it is still the contention of the Appellants that the evidence of the Respondent and his witness are conflicting and contradictory. It is therefore necessary to now consider whether that contention of the Appellant is sustainable having regard to the judgment of the Court below. It is after the judgment of the Court below has been considered that the question as to whether the identity of the land was properly established at the trial by the Upper Area Court judge would be determined. The Court below as I have already stated, set aside the judgment of the High Court. The reasoning of the Court below per the judgment delivered by Oguntade

JCA that led to the reversal of the judgment of the High Court deserves to be set down in this judgment as the alleged contradictions in the evidence of the Respondent and his witness were carefully analysed in the course of the judgment. The relevant portion of which reads:-

“We notice that at page 22 of the record the trial court without
 B considering these contradictions concluded that the respondent established his root through traditional history just like the appellants. With this erroneous approach the court concluded at page 22 that there was a conflict of traditional evidence between the parties and
 C proceed to embark on what is called test by acts of ownership. Incidentally the plaintiff’s compound, malina trees, mangoes which the court said were evidence of numerous and positive acts of plaintiff’s exclusive possession over the land from time immemorial were not mentioned in the plaintiff’s evidence. He made some efforts to identify new features at the locus-in-quo but the 1st defendant joined
 D issues on the features. The parties were said to be present at the locus but only the 1st defendant is seen to have participated in the proceedings thereat. At best the court found that both parties exercised possessory rights over the land. We do not consider that the respondent proved any superior right to entitle him to a declaration of title
 E over the land.

In the passage reproduced above the Court below made three observations about the judgment of the Upper Area Court:-

F ‘(1) That the contradictions in the case of the plaintiff were not considered.

(2) That the Upper Area Court adopted an erroneous approach by deciding to test the evidence of traditional history against the recent acts of possession of parties.

G (3) That the plaintiff in his evidence did not mention his compound, malina trees and mangoes which the Upper Area Court later described as evidence of “numerous and positive acts” of plaintiff’s exclusive possession.’

H ‘With respect to the lower court, I do not agree with it in its critical views about the judgment of the Upper Area Court. The contradiction which the lower court referred to were:

(1) Plaintiff said he had no crops on the land while his witness P.W.1 said that the plaintiff had bananas on the land.

(2) When plaintiff said that the boundary between his land

and the defendants' was a stream and later again that the boundary was a natural gutter.

(3) When plaintiff said that the defendant's people were not on the west side of Untyugh stream which PW.1 said that defendants' people are on both sides of the stream.

(4) Plaintiff said he inherited the land from his father. He later said that he inherited the land from Achagh. B

(5) There was no evidence of any relationship between Achagh and plaintiff's father.'

Now, the plaintiff in his evidence in chief said:-

'I have been farming yam, rice on this land. My old heaps and ridges for cassava are on it.' C

Under cross-examination, plaintiff said:-

'Now I have bamous(sic) And my old soyabean farm on the land. I have no crops on the land.' D

And in his evidence in chief said:-

'The plaintiff had planted bananas on the land before the defendants came to farm on the land.'

Can the evidence of PW.1. that plaintiff had bananas on the land be regarded as a contradiction of plaintiff's evidence that he had not crops on the land? I think not. One would need to know whether the plaintiff, a farmer regarded bananas as crops to determine whether or not there was a contradiction. In any case plaintiff had said he had yam and rice on the farm. Are these crops or not? Clearly therefore there was no contradiction between the evidence of plaintiff and PW1 on the point." E
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The Court below when dealing with whether the Upper Area Court correctly decided whether the Respondent established his right to the land, then considered the traditional evidence of the parties in that respect. The Court below then considered whether the High Court was right to have interfered with the conclusions and findings of the Upper Area Court upon the evidence before it. I would again set down the reasoning and observations of the Court below on the matters raised above. G
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"As to the boundary of the plaintiff with the defendants, the plaintiff testified thus:-

'1(sic) border with the defendants at the north at the natural gutter. Unyatyough runs beyond the natural gutter. I have boundary

with the defendants at this natural gutter. The defendants have both farm land on both side of Unyatyough beyond the gutter.

I produced earlier in this judgment a rough sketch of the land in dispute. This is in accordance with the evidence of the plaintiff. The sketch reveals that the plaintiff's land borders the defendants on the north beyond the natural gutter and on the East across Unyatyough stream. The defendants land extends northward across the natural gutter on the east of the stream and westward to the north of plaintiff's land. It is only if one does not attempt to follow plaintiff's evidence that one sees a contradiction on the point. The same explanation can be found for the evidence of the plaintiff when he said that the defendants Mbaakumba people did not cross the Unyatyough to farm on the west of the stream. PW1 later said that the Mbaakumba people were on both sides of Unyatyough stream. Obviously if one bears in mind that the plaintiff said he had a boundary with the defendant's people to the north across the natural gutter, it would be easy to understand PW1's evidence that the defendants' people were on both sides of the stream. The presence of defendants' people was only across the stream to north of plaintiff's land. The evidence that plaintiff inherited the land from his father and later Achagh was seen as a contradiction. It was also said that the plaintiff did not establish his relationship with Achagh.'

At pages 13 and 14 of the record of proceedings under cross-examination, the plaintiff testified:-

'Aga Baki is my father. He had no wife by name Wanye. I knew Achagh Aga. He is my brother when Aga died Achagh inherited the disputed land. Aga was on the other side of Umanyauh stream with the plaintiff before he moved over to my stream. Achagh's mother hails from Tombo. I inherited land in disputed from Achagh.'

The above piece of evidence shows that both plaintiff and Achagh Aga were sons of Aga Baki. After Aga Baki died, plaintiff's elder brother Achagh Aga inherited the land. When Achagh Aga died plaintiff inherited the land. The plaintiff was therefore correct to have said that he inherited the land from both his father Aga Baki and Achagh Aga his brother who had inherited the land before him.

*Did the Upper Area Court adopt the wrong approach in the treatment it accorded the evidence on traditional history? In *Kojo II v Bonsie* (1957) 1 N.L.R. 1223 at 1226 Lord Denning explaining the*

best approach when dealing with evidence of traditional history said.

'Witnesses of the utmost veracity may speak honestly but erroneously of what took place a hundred years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is title guide to the truth. The best way to test the traditional history is by reference to the fact in recent years as established by evidence and by seeing which of the two compelling histories is more probable. This is how the native court approached the matter and their Lordships think they were right.'

The dictum above was given a trial interpretation by the Supreme Court in the case of *Alade v. Awo* (1975) S.C. 215 at 223. In the instant case, the Upper Area Court at page 57 said concerning the evidence of traditional history given by parties:-

'From these testimonies, i find that the traditional evidence by both parties conflict. The trite law is that where the parties evidence as to ownership conflict, the court is to test their evidence with acts of ownership. This is the court should make reference to factual uses of the land. See the case of Are v. Ipaye (1990) 2 NLR (Pt. 132) page 299 at 311.'

'After saying the above, the Upper Area Court then proceeded to consider the evidence available as to acts of possession in recent years by the parties. On this scene the Area Court decided in favour of the plaintiff. It is my firm view that the Upper Area Court followed the right approach. Again the lower court opined that plaintiff did not mention his compound, malina tress and mangoes in his evidence but that the Upper Area Court later described the presence of these as evidence of numerous and positive acts' of plaintiff's exclusive possession. At page 52 of the record, the Upper Area Court at the visit to the locus-in-quo recorded that the plaintiff said. 'P1- The compound belongs to Atoo Karse. My brother, he built the compound four years ago. This is my compound. It is an old compound. My land extends to this malina tree at the west along the road from Yandev to Apeinumbu. The boundary extends from this nune tree at the west to the east to another Nune tree down to Unyatum stream. I am from Mbaadeba while the defendants are from Mbaakumba.'

'Unless the lower court had it in mind that the evidence given by parties at the locus was not to be regarded as part of the evidence

before the Upper Area Court, it is difficult to understand why the lower court held that the plaintiff had not testified as to his compound and malina trees. And in any case, the practice of visiting land in dispute which is very much in use in native courts adjudicatory system would be meaningless if native courts could not later make use in their judgments the observations they made on their visit to the locus.’

At page 79 in its judgment, the lower court concluded thus:-
 ‘Rather we see the plaintiff admitting at page 9 lines 1-2 that he inherited the land from Achagh. If the trial court had properly adverted its mind to the unchallenged evidence of 1st defendant which was adopted by all the defendants. It should have come to the conclusion that the defendants proved their counterclaim by preponderance of evidence. With respect to the lower court, it had clearly usurped the function of the trial court by ascribing credibility to the evidence of witnesses who it had not seen testify and whose evidence the trial court had implicitly rejected.’

As I have already said above, the Court below then quite properly reversed the judgment of the High Court for the reasons inter alia above. I find myself in entire agreement for the raison d’etre for doing so. By reversing the judgment of the High Court, the Court below therefore upheld the findings of the Upper Area Court and left undisturbed the evidence of the Respondent and his witness.

It is evident from a careful perusal of the above passage that the Court below did not find the alleged contradictions in the evidence of the Respondent and his witness. The Court below therefore held that the High Court was wrong to have reversed the judgment of the Upper Area Court. The position taken by the Court below was in my view right, having regard to the settled principles upon when an Appellate Court may interfere with the findings and conclusions of a trial court. It is not out of place, in my respectful view to refer to Etowa Enang & Ors v. Fidelis Ikor Adu (1981) 11-12 SC where at pages 38-39, Nnamani JSC, explained the relevant principles, thus:

“It has been established by several authorities that a Court of Appeal must approach the findings of fact of a trial

judge with extreme caution. The principles under which a court of appeal can interfere have been well settled. A Court of Appeal which has not had the same advantage which the trial judge has enjoyed of seeing the witnesses and watching their demeanour would only disturb the findings of fact of such a court where it is satisfied that the trial judge has made no use of such an advantage. If the trial court has unquestionably evaluated the evidence before him it is not for the Court of Appeal to reevaluate the same evidence and come to its own decision. See *A. M. Akinloye v. Bello Eyiola & Ors* (1968) N.M.L.R. 92 at page 95; *Steamship Houtestroom (owners)* (1927) A.C. 37; *Fatoyinbo and ors v. Williams* (1956) 1 F.S.C. 87; *Lawal v. Dawodu & Ors* (1927) 1 ALL N.L.R. 270,271; *Agbedegudu v. Ajenifuja & Ors* (1963) 1 ALL N.L.R. 109 at 114. "See also *Chief Victor Woluchem & Ors. Chief Simon Gudi & Ors* (1981) 5 S.C. 319; *Ebba v. Ogodo* (1984) 1 SCNLR 372; *Omeregbe v. Edo* (1971) 1 ALL N.L.R. 282."

The only question that is in my view outstanding is whether the disputed land for which the declaratory title was granted by the upper Area Judge to the Respondent was ascertained with certainty: the test being whether a surveyor can from the record produce an accurate plan of such land. *The trial court namely the Upper Area Court made observations in respect of the disputed land when he visited the locus and as a result made findings in that regard and which I have already reproduced above in the course of this judgment. Having regard to the observations so made and the findings made by trial court, then it is my humble view that a surveyor would surely upon those findings which are quite clear and definitive of the disputed land prepare an accurate plan of the disputed land. It is therefore my considered view that the Respondent having been shown to have clearly defined with certainty the extent of the disputed land was rightly adjudged to be the owner of the disputed land.*

Counsel for the Appellants had argued that in view of the evidence of the Respondent that he inherited the said land from his father and later contradicted himself that he inherited the said land from his brother, the Respondent is therefore not entitled to the declaration of title claimed. That contention was considered by the Court below and was rejected. I have earlier reproduced in this judgment

the observation of the Court below on the alleged conflicting evidence, it would be reproduced here for ease of reference. It reads:-

“The above piece of evidence shows that both plaintiff and Achagh Aga were sons of Aga Baki. After Aga Baki died, plaintiff’s elder brother Achagh inherited the land. When Achagh Aga died plaintiff inherited the land. The plaintiff was therefore correct to have said that he inherited the land from both his father Aga Baki and Achagh Aga his brother who had inherited the land before him.”

Now, the Appellant’s counsel has also argued in their brief that there is a fundamental difference between inheriting a land from a father and inheriting the same land from a brother. He therefore submitted that it is a fundamental error for the Court below to have rationalized the evidence of the Respondent as it did to uphold the claim of the Respondent. In the first place this argument is misconceived. ***It must be borne in mind that on this question the Court was considering the evidence led at a customary trial where no pleadings have been filed. It is a fundamental principle that undue technicality does not apply in native Courts. Native Courts are to do substantial justice in terms of the real issue in controversy as disclosed by the writ and the evidence without being weighed down by the technical rules designed for common law courts.*** See *Iyaji v. Eyigebe* (1987) 3 NWLR (Pt 61) 523; *Efi v. Enyiful* (1954) 14 WACA 424; *Ekpu v. Utong* (1991) 6 NWLR.

It is therefore my view that in so far as the judgment of the Court below has not been shown to be perverse or contrary to the rules of natural justice, the Court below was right to have held that the evidence of the Respondent as to how he inherited the disputed land was wrongly rejected by the High Court sitting on appeal upon the judgment of the Upper Area Court.

As all the issues canvassed for the Appellants have been shown to lack merit for the reasons given above, this appeal must be dismissed. It is therefore dismissed accordingly. The judgment of the Court below is hereby affirmed. The Respondent is awarded costs in the sum of N10,000.00 only.

OGUNDARE JSC

I have been privileged to read in advance the judgment of my learned brother Ejiwunmi JSC just delivered. I agree with him that this appeal lacks merit and should be dismissed.

The first issue canvassed by the Appellants relates to the identity of the land in dispute. The plaintiff gave evidence at the Upper Area Court, of the boundaries of his land and the features marking his boundary with the defendant. He testified thus:

"I am from Mbaadede in Yandev. I live on one side of Umatyough stream why the defendants, live on the other side. This is our common boundary. This stream flows from south to North. If you face it flow direction, my compound is on the west of the stream. The defendants are on the East of the stream."

Further in his evidence he deposed:

"In the North the land in dispute stops at a natural gutter. At the South i share common boundary with loryem Ankera who is in the same area with me."

The defendant in his testimony also described the land. He testified:

"The land starts from the East. The land extends to the road from Gboko to Buruku. In the West the land extends to the road from Gboko to Apeinumba."

The trial Court visited the land and recorded its observations at the inspection. The court requested the parties to show it the extent of the land they claimed and the features they had on the land. The parties did so. In its judgment, the court recorded:

"At the end of their evidence, the court visited the disputed land for inspection. The court was taken round the disputed land by both parties. The land is bounded at the East by Unyatya stream. In the West by the motorable road from Yandev to Buruku road to Apeinumba. In the South from Malina and Nune tree on Apeinumbu road down east to Unyatyu stream. In the North the land extends to inheritance, by grant, or by sale."

The court found:

"I find that the natural boundary between the plaintiff's farms and defendants farm is at Unyatyu at the East. The 1st defendant stated that when trouble started over this land between him and Ikume lyongo the elders came and created a demarcation between them at

Nune tree at the North. They were all satisfied This is the Nune tree the plaintiff showed at the West near the road to Apeinumbu down East to Unyatyu to be his boundary with the defendants. I find that this is their natural boundary at Nune tree flowing a gutter down to Unyatyu stream.

B *At the West the land is bounded by the road to Apeinumbu. In the South the boundary is at Malina and Nune tree near Apeinumbu road down East to Unyatyu stream. I find that the plaintiff's father got this disputed land by settlement and the plaintiff inherited it from him after his death."*

C From all these descriptions it is puerile to argue that the identity of the land in dispute is uncertain. I see no substance in the arguments for the defendant on Issue I which is resolved against him.

D On Issues 2, 3 & 4, a lot of fuss is being made of the evidence of the plaintiff wherein he claimed that he inherited the land in dispute from his father and, under cross-examination; he said he inherited it from his brother. I think plaintiff's evidence is clear enough. All he is saying is that the land passed from his father to his brother and, on the death of his brother, to him. I can see no such contradiction in
E plaintiff's evidence to derogate from its value. The trial Upper Area Court saw and heard the witnesses testify and ascribe credibility to them. The court visited the land and saw the features on it. I think the Court of Appeal is right in affirming the findings of fact made by the
F trial court. The appellate High Court was clearly in error to reverse those findings which are adequately supported by the evidence before the trial court. The Court of Appeal rightly reversed the findings of the appellate High Court. And having restored the judgment of the trial court in favour of the plaintiff, it rightly also dismissed the
G defendant's counterclaim as did the trial court.

I find no substance in this appeal which I hereby dismiss with costs as assessed by my learned brother Ejiwunmi JSC.

H **MOHAMMED JSC**

I have had the privilege of reading the judgment of my learned brother, Ejiwunmi, JSC, in draft, and I agree with him that this appeal ought to be dismissed. For the reasons given in the lead judgment I dismiss the appeal and affirm the judgment of the Court of

Appeal. I award N10, 000.00 costs in favour of the respondent.

ONU JSC

Having been privileged to read before now the leading judgment just delivered by my learned brother Ejiunmi, JSC I entirely agree with him that the appeal lacks merit and I, too, accordingly dismiss it. B

In expatiating on the three issues for determination, I wish to commence by treating the first and dominant issue first. That issue which overlaps Ground 2 complains whether the Court of Appeal was right in law in affirming the decision of the Upper Area Court, Gboko when the respondent as plaintiff failed to identify clearly by evidence the land claimed. C

ON THE IDENTITY OF THE LAND the Appellant's contention is whether the Court of Appeal (hereinafter in the rest of this judgment referred to as the court below) was right in affirming the decision of the trial Upper Area Court, Gboko when the respondent as plaintiff failed to identify clearly by evidence the land in dispute. The trite and settled law on identity of land in dispute, it was contended, is that there must be evidence on the record such that a surveyor looking at it, will draw up the plan of the said land without necessarily going to the site. After citing with approval a string of cases in support thereof, the case of Joseph Olusanmi v. Dayo Oshasona (1992) 6 SCNJ page 282 at 282 where it was held "... that the onus lies on the plaintiff who seeks a declaration of title to show clearly the area of land to which his claim relates... that the plaintiff can discharge this onus by such oral description of the land that any surveyor acting on such description could produce a plan of the land in dispute..." was relied upon. See also the cases of Joseph Ekwere v. Nakmakosi Iyiegbu & Ors (1972) Vol. 2 ECSLR 835; (1972) 6 SC. 116, 138 and Aromire v. Awoyemi 1 All NLR 101, where it was held that where title to or possession of land is in issue, the identity of the land and where it is located must be clearly given in evidence, otherwise it would be impossible to give effective judgment in relation to the land. See too the cases of Baruwa v. Ogunshola 4 WACA 159 and Awote v. Owodunni (No. 2) (1987) 2 NWLR (Part 57) 367. F G H

In the instant case where the evidence adduced at the trial

Upper Area Court by the Respondent was very certain and un-faulted as to the identity of the land in dispute, he said in his testimony, inter alia, as follows:

“...I have on one side of Umtough stream why (sic) the defendants live on the other side. This is our common boundary. This stream flows from South to North. If you face it (sic) flow direction, my compound is on the west of the stream. The defendants are on the east of the stream...”

Further down in his testimony, the plaintiff deposed thus:

“... In the North the Land in dispute stops at a natural gutter. At the South I share common boundary with Iornem Ankeru who is in the same area with me.”

Under cross-examination the plaintiff said:

“... I border (sic) with defendants at the North at the natural gutter Unyatough runs beyond the natural gutter. I have boundary with the defendant at this natural gutter...”

At the locus in quo which the trial court visited, the Respondent as plaintiff, identified:-

(a) Unyatough at the east of the land in dispute

(b) Melina tree at the west along the road to Apenumbe. The boundary extends from this nune tree at the west to the east to another nune tree down to Unyatough stream.

(c) At the West the land in dispute adjoins plaintiff’s other land (which is not in dispute).

In its judgment the trial court had this to say on page 57 lines 3 - 20 but of particular note:

“I find that the natural boundary between the plaintiff’s farms and defendant’s farm is at Unyatough at the east... I find that this is their natural boundary at nune tree flowing (sic) a gutter down to Unyatough stream. At the west the land is bounded by the road to Apeinumbe. In the South the boundary is at the malina and nune tree near Apeinumbe road down east to Unyatough stream...”

It was on the basis of this clear and unequivocal evidence that the trial court found in favour of the respondent. It is also based on the evidence on the record and the legal principle of the identity of the land herein stated that the learned Justice of the Court of Appeal (per Oguntade, J.C.A.) Held that:

“...From the evidence led, the sketch hereunder represents a

fair drawing of the land in dispute..."

and then proceeded to reduce the land in dispute into a sketch with perfect ease, clarity and certainty. I will decline to uphold the High Court of Appeal, Benue State's decision that set aside this otherwise unimpeachable conclusion of fact and hold that the ground of appeal is misconceived. It fails and ought to be dismissed as lacking in merit. B

On issue 2, the principle of law is well settled that a plaintiff in a declaration of title can rely on either traditional history or positive and numerous acts of ownership over a long period of time to sustain his claim. See *Olalere Ige & 1 Or v David Akoju* (1994) 6 SCNJ 88. The plaintiff having traced his root of title to one whose title to ownership has been established, the onus then shifts to the defendant to show that his own possession is of such a nature as to oust that of the original owner. See *Thomas v. Holder* 12 WACA 78; *Abinabina v. Enyimadu* 12 WACA (1953) 207; *Sanyaolu v. Coker* (1983) 3 SC. 124 and *Dosunmu v. Joto* (1987) 4 NWLR (Part 65) 297. Where, however, a plaintiff fails to prove the base upon which he founded his title, the claim will fail. See primate *Adejobi's case* (1978) 3 SC. 65; *Preston Holder v. Thomas* 12 WACA 78; *Odojin v. Ayoola* (1984) 11 SC. 72; *Mogaji v. Cadbury (Nigeria) Ltd.* (1985) 2 NWLR 393 at 395 and *Ajani v. Ladepo* (1986) 3 NWLR 276. C

In the case in hand, both parties adduced evidence of traditional history to prove their claims. In proving his root of title, the Respondent in his evidence-in-chief said inter alia: D

"...the land is mine. I inherited it from my father. My father's old settlement is on this land...."

Under cross-examination the Respondent said he inherited the land in dispute from Achagh Aga his brother. As to the relationship between the Respondent (Usue Aga) and Achagh Aga, PW.1 said: E

"...I know one Aga Baki, he is the same father with my father. I know his wife called Wanyua, she is the mother of plaintiff. When Aga died Achagh married Wanyua Achagh and the plaintiff are the same father. Plaintiff is the son of Aga. Aga owned the land in dispute. After his death, Achagh inherited the land..." F

In the light of the above, I agree with the Respondent's submission that Achagh Aga being the same father with the Plaintiff took

the land in trust for him after the death of his father. In fact, Achagh Aga did not only take the land but also took the plaintiff's mother as wife (a notorious Tiv custom of which any Native Court will take judicial notice.) See *Ekpenga v. Chief Ozogula II* (1962) 1 All NLR 265 at 268/9 and *Oba Adekunle Aromolaran & Anor. v. Jeje Oladele* B (1990) 7 NWLR (part 165) 359 at 367. The trial court believed and rightly so, in my view, that the plaintiff / respondent inherited the land from his father. Also, the Appellants too led traditional evidence. They testified that the land belonged to their forefathers that they C only made a grant of the land to Achagh Aga, plaintiff's brother.

At the end of it all the trial court arrived at the inevitable conclusion when it held:

"...From these testimonies I find that the traditional evidence by both parties conflict. The trite law is that where the parties evidence as to ownership conflict, the court is to test their evidence with acts of ownership..." D

The above is a correct statement of the law. A fortiori, the court below was right when it agreed with the trial court (although disagreeing with the High Court of Appeal) on employing the correct E legal approach in arriving at its decision, quoted in the dictum of Lord Denning in *Kojo v. Bonsie* (1957) 1 WLR 1223 at 1226 (the locus classicus on this issue). That issue having been properly resolved by the trial court and upheld by the court below, I see no reason to F disturb the conclusion arrived at.

On issue 3, the short answer is that:-

(i) since the Appellants abandoned the counterclaim, which was accordingly struck out in the Gboko High Court of Appeal, it is pertinent to conclude that the decision of the trial Upper Area Court G to dismiss the counterclaim against the Respondents who was the Plaintiff as no appeal was lodged against it, was right.

(ii) Further, since the issue was not raised at the Appeal Court, this Court cannot entertain any appeal that lies directly from the trial Upper Area Court Gboko. Consequently, upon the principles of law H decided in *K. A. Onamade & Or. v A.C.B.* (1997) 1 SCNJ 65 at 88 and whether the Supreme Court has jurisdiction under Section 213 of 1979 Constitution to entertain appeal against judgments of the High Court - see *Ogoyi v. Umagba* (1995) 9 NWLR (Part 419) 283, the judgment of the trial court which is totally unconnected with the

decision of the court below ought to be and is declared null and void for want of jurisdiction and is accordingly struck out by me.

(iii) Besides, by virtue of Section 233(1) of the Constitution of the Federal Republic of Nigeria, 1999, the appellate jurisdiction of the Supreme Court is to hear and determine appeals from the Court of Appeal. B

(iv) Finally, the declaration of title in favour of the Appellants by the Appellate High Court, Gboko was null and void as well as baseless and made without jurisdiction. Since Ground 6 which dealt with the counterclaim by the Appellants has been struck out, the court had no more powers to declare any title in their favour as they no longer had any issue of counterclaim before that court. The law is settled that in a declaration for title, even if the plaintiff fails, title does not automatically confer on the defendant without a counterclaim. C
See Chief Salami Adesina v. The Commissioner Boundary Commission Oshogbo (1996) 4 SCNJ 112 at 120-121; Ezewani v. Onwordi (1986) 4 NWLR (Part 33) 27. D

This issue fails and since the counterclaim the platform upon which the Appellants' contention rests has been dismantled, the appeal in its entirety fails as they have nothing left to be declared in their favour. E

Accordingly, I too dismiss the appeal and award similar consequential order as to costs as contained in the leading judgment of my learned brother Ejiwunmi, JSC. F

UWAIFO JSC

I read in advance the judgment of my learned brother Ejiwunmi, JSC. I fully agree with it for the reasons he has given. The G
issues of fact have been adequately considered and resolved by the court below in support of the position taken by the Upper Area Court and I think the appeal to that court solely depended on that. I too consider that the appeal lacks merit and dismiss it with N10,000.00 H
to the respondent.