

**SUPREME COURT OF NIGERIA**  
FRIDAY 15TH FEBRUARY, 2002. SC. 79/1995  
**CORAM:- A. B. WALI, E. O. OGWUEGBU,**  
**U. MOHAMMED, A. I. IGUH, U. A. KALGO, JJSC**

MICHAEL AROWOLO ..... APPELLANT  
AND  
CHIEF TITUS IFABIYI ..... RESPONDENT

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EVIDENCE - Evaluation - Trial court evaluates and ascribes probative value to evidence - And appellate court does not ordinarily interfere (H1)

APPEALS - Concurrent judgments - Supreme Court does not interfere - Save there is established miscarriage of justice - Which does not exist in this case (H2)

ACTIONS - Limitation - Concealed fraud - Where such fraud is involved - And no laches is established on the part of person defrauded - No length of time can be a bar to relief (H3)

ACTIONS - Cause of action - Nature of - The action is on return of respondent's documents - Hence there is no need to prove commission of crime (H4)

ACTIONS - Crime - Allegation of - Standard of proof - By s. 138(1) Evidence Act - Where commission of crime by a party is in issue - Such must be proved beyond reasonable doubt (H5)

ACTIONS - Crime - Proof - Standard of - As crime was not directly in issue - Standard of proof required is on balance of probability - Or preponderance of evidence (H6)

**FACTS**

Plaintiff/respondent had sometime in 1978 collected a loan from defendant/appellant. Respondent deposited his title documents to appellant as security for the said loan transaction. Respondent duly paid up the loan in 1979 as agreed by the parties. Thereafter,

respondent made repeated demand to appellant to release his (respondent's) title documents. Appellant however continued to delay the release of the documents. It was not until 1987 when respondent threatened to report the matter to the police that appellant to respondent's astonishment, confessed for the first time that he had used respondent's documents to raise loan for himself from a bank.

The bank confirmed that the transaction was purely between it and appellant. However, appellant contended that respondent was fully aware of the transaction. In a bid to recover his title documents, respondent instituted this action at the High Court of Kwara State, Ilorin. The court gave judgment in favour of respondent. Appellant was dissatisfied. Hence, he appealed to the Court of Appeal, Ilorin. The court unanimously dismissed the action. Appellant went on another appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the court below was right to have held that the trial court properly evaluated and ascribed probative value to the evidence led at the trial and whether the respondent proved his case as required by law or whether he discharged the onus of proof placed on him by law.*

*2. Whether the Court of Appeal was right to have endorsed the view of the trial court that the Statute of Limitation did not avail the appellant in the circumstances of this case.*

*3. Whether the Court of Appeal was right to have agreed with the trial court that the case of the respondent was not founded on allegation of fraud or commission of crime which called for proof beyond reasonable doubt and whether the respondent could succeed on his claim if the allegation of fraud is expunged from his claim."*

**HELD** (Unanimously dismissing the appeal per **IGUH JSC**)

*EVIDENCE - Evaluation*

**1. It is trite law that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified at the trial in the witness box. It is**

**equally basic that where such court of trial unquestionably evaluates the evidence before it and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. What the Court of Appeal ought to do in such circumstance is to find out whether there is any evidence on which the trial court could have acted. Once there is such evidence on record before the trial court from which it arrived at its findings of fact, the appellate court cannot interfere. (p. 175 A)**

*APPEALS - Concurrent judgments*

**2. This court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure. No such special circumstance to warrant setting aside this concurrent finding of fact of both the two courts below has been established by the appellant. Issue 1 must accordingly be resolved against the appellant. (p. 177 B)**

*ACTIONS - Limitation - Concealed fraud*

**3. It is clear that the respondent only became aware for the first time in June, 1987 that the appellant surreptitiously and fraudulently made use of the respondent's title documents to mortgage the respondent's house for a loan from the 2nd defendant Bank. The respondent exactly three months thereafter filed the present action against both the appellant and the 2nd defendant Bank. It seems to me clear under such circumstance that in equity, no length of time can be a bar to relief particularly in a case, such as the present, where concealed fraud is involved and no laches on the part of the person defrauded, in this case, the respondent, is established.**

**It is obvious from the concurrent findings of both courts below that the respondent was totally unaware that the documents he pledged with the appellant under circumstances lucidly testified to by him were surreptitiously used to secure a loan by the appellant from the 2nd defendant Bank. This sur-**

*reptitious and unauthorized use of the respondent's title documents by the appellant was evidently a clear case of concealed fraud by the appellant against the unsuspecting respondent. It is also plain from the accepted facts of the case that no question of laches can operate against the respondent on the facts of the transaction in issue as it was not until in June, 1987 that the respondent became aware of the appellant's fraud against him. It was immediately thereafter, indeed in September, 1987 that the respondent filed the present action against the appellant. In these circumstances, I do not think it can be suggested with any degree of seriousness that there is any room in equity for the application of the Statute of Limitation, 1623 against the respondent's action when the respondent remained ignorant of what the appellant had done with his documents of title without any fault of his own. Issue 2 is hereby resolved against the appellant.* (pp. 179 F/180 F)

*ACTIONS - Cause of action - Nature of*

*4. There can be no doubt that the Court of Appeal was perfectly right when it held that the commission of a crime is not directly in issue in any of the reliefs claimed by the respondent in the present action. The respondent's claims against the appellant and the 2nd defendant Bank have been set out earlier on in this judgment. A close study thereof discloses in the clearest possible terms that they principally concern the return of the respondent's various documents together with the declaration in respect of his mortgaged property. None of those items of claims needed proof of the commission of any criminal offence to succeed.*

*But as I have already observed, fraud was never made the foundation of the respondent's case whether from the pleadings or from his evidence before the court. The respondent in the present case could quite easily prove his case, as indeed he did, without alleging or proving fraud notwithstanding the fact that the adverb "fraudulently" was grammatically used to describe the appellant's conduct or motive in the transaction.*

*I need perhaps add in the above regard that where a*

**strong language is employed to describe one's conduct or motive in a transaction as was done in the present case by the use of the word "fraudulently" that does not ipso facto convert the basis of a claim to a crime.** (pp. 182 G/183 C)

*ACTIONS - Allegation of crime - Standard of proof* B

**5. Without doubt, the preponderance of evidence or the balance of probability constitutes sufficient ground for a verdict in civil cases. This general rule is however subject to the statutory provision in the former section 137(1), now section 138(1) of the Evidence Act to the effect that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.** (p. 183 A) C

*ACTIONS - Proof - Standard of* D

**6. I therefore entertain no doubt that the standard of proof required in the present case must be the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt as provided for under section 138(1) of the Evidence Act. The application of the provisions of Section 138(1) of the Evidence Act only comes into play where the commission of a crime by a party is directly in issue in any proceeding, civil or criminal, and not otherwise. I am in complete agreement with learned counsel for the respondent that the respondent's case was not founded on crime and proof beyond reasonable doubt under section 138(1) of the Evidence Act, 1990 cannot therefore apply in the present case. Issue 3 is accordingly resolved against the appellant.** (p. 183 F) E F G

## **REPRESENTATION**

A. O. Adelodun Esq., with Mr. S. A. Isan for the Appellant  
Chief S. F. Odeyemi for the respondent

## **CASES REFERRED TO**

Akpagbue v. Ogu (1976) 6 SC 63  
Odofin v. Ayoola (1976) (1984) 11 SC 72  
Amadi v. Nwosu (1992) 5 NWLR (Pt. 241) 273

Woluchem v. Gudi (1981) 5 SC 291

NICON v. Power & Ind. Engineering Co Ltd (1986) 1 NWLR (Pt. 14) 1

Mora v. Okonkwo (1987) 3 NWLR (Pt. 60) 314

Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561

B Nwobodo v. Onoh (1984) 1 SCNLR 1

Ajasin v. Omoboriowo (1984) 1 SCNLR 108

Benson Ikokwu v. Enoch Oli (1962) 1 All NLR 194

Nwankwere v. Adewunmi (1967) NMLR 45

C Kodilinye v. Odu 2 WACA 336

Mogaji v. Odofin (1978) 4 SC 91

Bulli Coal Mining Co. v. Patrick Osborne & Anor (1899) AC 351

### **STATUTE REFERRED TO**

D Evidence Act LFN 1990, 138(1)

### **LEAD JUDGMENT BY IGUH JSC**

By a writ of summons issued on the 14th day of September, 1987 in the Ilorin Judicial Division of the High Court of Justice, Kwara State, the plaintiff who is the respondent herein instituted an action jointly and severally against the 1st defendant, who is now the appellant, and the 2nd defendant claiming as follows:-

1. *A declaration that the defendants are not entitled to a lien on the plaintiff's building situate at Sabo Oke, Ilorin by virtue of an alleged mortgage between the 1st and 2nd defendants in respect of the said building.*

2. *An order that the defendants return to the plaintiff, his Permit to Alienate land No. 3633, Building Plan, Site Plan, Land Agreement dated the 1st September, 1977 and Tax Receipts.*

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

The case for the plaintiff is that sometime in the month of October, 1978, the 1st defendant lent the sum of N4,000.00 to the said plaintiff to enable him complete the construction of his building Sabo Oke, Ilorin. As security for this loan, the plaintiff surrendered his documents of title now claimed to the 1st defendant. It was also a condition of the loan that the plaintiff shall pay interest at the rate of N1,000.00 for one year to the 1st defendant in respect of the trans-

action.

As repayment of the loan with the accrued interest was due on or about September, 1979, the plaintiff in fulfillment of the terms of the agreement paid N5,000.00 to the 1st defendant whereof N4,000.00 was the principal amount borrowed and N1,000.00 represented the agreed interest thereon for one year. After payment of the said N5,000.00, the plaintiff duly demanded for the return of his documents of title from the 1st defendant who endlessly made promises upon promises to the said plaintiff that he would return the documents. B

Between 1979 and 1987, the plaintiff persistently made both oral and written futile demands for the return of his documents from the 1st defendant. He also made reports to diverse persons with regard to the non-return of the said documents by the 1st defendant. It was not until in 1987 when the plaintiff threatened to report the matter to the police that the 1st Defendant, to the plaintiff's astonishment, confessed for the first time that he had used the plaintiff's said documents to raise loan for himself from the 2nd defendant Bank. C

Further investigations by the plaintiff disclosed that the 1st defendant had fraudulently used his building and documents to raise a loan of N10,000.00 from the 2nd defendant bank under the amorphous and fictitious name, Chief Titus Arowolo Ifabiyi, and, in the process, executed a deed of mortgage dated the 3rd October, 1978 with the plaintiff's said building as security. The plaintiff claimed that he never knew or consented to his building and documents of title being mortgaged by the 1st defendant to the 2nd defendant Bank. D

The 2nd defendant, for its own part, confirmed that the plaintiff's documents were used as security to obtain a loan of N10,000.00 by the 1st defendant from its Bank. It explained that the loan had not been liquidated as there remained an outstanding debit balance of N55,646.36 being the principal amount lent together with interest that had accumulated over the years. The 2nd defendant Bank asserted that the documents in issue would remain with it until the said outstanding debit balance was fully settled by the 1st defendant. The Bank frankly admitted that it did not know the plaintiff and that it was the 1st defendant who applied for the loan and that an account was opened for him in that regard. It described as untrue that the plaintiff was known to the Bank. It confirmed that the loan E  
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transaction was between the 1st and 2nd defendants only.

The 1st defendant's position is a total denial of the plaintiff's claims. He claimed that when the plaintiff approached him for a loan of N5,000.00, he informed the plaintiff that he had no money but that he could arrange to secure a loan from the 2nd defendant Bank against the security of the plaintiff's uncompleted building together with the documents of title relating thereto. The 1st defendant claimed that the plaintiff agreed to this proposition and surrendered his documents of title to him. The 1st defendant stated that the plaintiff was fully in agreement that the N10,000.00 loan should be obtained from the 2nd defendant Bank and that each of them would take N5,000.00 and repay his own loan with interest to the Bank. He duly obtained the loan of N10,000.00 from the Bank, took N5,000.00 out of it and gave the balance of N5,000.00 to the plaintiff. The 1st defendant asserted that the plaintiff had failed to pay his own portion of the loan with interest. He claimed that the respondent was fully aware that his documents of title were going to be used for the purpose of obtaining the loan of N10,000.00 from the Bank. He admitted that he executed a mortgage deed with the 2nd defendant Bank.

At the subsequent trial, all the parties testified on their own behalf and the 1st defendant called one witness. Several Exhibits were also tendered by the plaintiff and the 2nd defendant Bank. At the conclusion of hearing, the learned trial Judge, Ibiwoye, J., after a careful review of the evidence on the 21st day of September, 1989 found for the plaintiff. He declared:-

*"...the 1st defendant merely used a clever device on the plaintiff to obtain exhibits 1, 2, 3, and 5 and secured a loan with the documents from the 2nd defendant. To my mind the plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the best interest of justice to make the plaintiff a victim of a transaction he knows nothing of .*

*For the foregoing reasons I am convinced that the plaintiff has proved his case to the satisfaction of the court. As such I hold that the plaintiff is entitled to the reliefs he sought and I give judgment for the plaintiff. Consequently I declare that the defendants are not entitled to a lien on the said plaintiff's building by virtue of the said Mortgage Deed. The defendants are hereby ordered to return to the*

*plaintiff his (plaintiff) Permit to Alienate Land No. 3633, Building Plan, Site Plan, Land agreement dated 1/9/77 and tax receipts."*

Dissatisfied with this decision of the trial court, the 1st defendant lodged an appeal against the same to the Court of Appeal, Kaduna Division which court in a unanimous decision on the 13th day of October, 1994 dismissed the appeal and affirmed the decision of the trial court. It concluded thus:-

*"It is my view that the evidence adduced by the respondent at the trial which in fact was accepted by the trial Judge is credible enough to entitle him to the declaration granted to him by the trial court. I have no reason to interfere with that finding."*

*On the whole, I find no merit in this appeal. The appeal fails and it is accordingly dismissed."*

*The decision of IBIWOYE J. dated 21/9/89 is hereby affirmed. I award N1,000.00 costs in favour of the respondent."*

Aggrieved by this decision of the Court of Appeal, the 1st defendant has further appealed to this court. I shall hereinafter refer to the 1st defendant and the plaintiff in this judgment as the appellant and the respondent respectively.

Eight grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the appellant, pursuant to the Rules of this Court filed his brief of argument in which three issues were identified for the determination of this appeal. These are set out as follows:-

*"1. Whether the court below was right to have held that the trial court properly evaluated and ascribed probative value to the evidence led at the trial and whether the respondent proved his case as required by law or whether he discharged the onus of proof placed on him by law."*

*2. Whether the Court of Appeal was right to have endorsed the view of the trial court that the Statute of Limitation did not avail the appellant in the circumstances of this case."*

*3. Whether the Court of Appeal was right to have agreed with the trial court that the case of the respondent was not founded on an allegation of fraud or commission of crime which called for proof beyond reasonable doubt and whether the respondent could succeed on his claim if the allegation of fraud is expunged from his claim."*

The above three issues were adopted by the respondent in his own brief of argument as properly arising for the consideration of this appeal.

At the oral hearing of the appeal learned leading counsel for the appellant, A. O. Adelodun Esq. adopted the brief of argument filed on behalf of the appellant and high-lighted the more important submissions therein made. His main contention under issue 1 is that both the trial court and the court below were wrong to have failed to evaluate properly the pieces of evidence tendered by the appellant. He argued that all the learned trial Judge did was to reproduce the evidence that was led at the trial without more and that he made no findings of fact on the salient issues that arose for consideration in the suit before his application of the law to the case. In particular, learned counsel argued that there was no finding on whether or not the loan had been repaid by the respondent to the appellant to warrant the return of the documents to the said respondent. He did however concede that none of the appellant's grounds of appeal specifically covered this complaint of the appellant that there was no finding on the issue of the repayment of the loan by the respondent.

Learned counsel for the respondent, Chief S. F. Odeyemi, in his reply on issue 1 submitted that the two courts below carefully evaluated the facts and the evidence before the court and held, rightly in his view, that the respondent was entitled to judgment. He argued that the appellant failed to establish any special circumstance why this court should disturb the concurrent findings of the two courts below. He contended that from the totality of the findings of the learned trial Judge as affirmed by the court below, the respondent's version of the transaction between the appellant and himself was fully considered and accepted as established. This is as against the appellant's version which was at complete variance with that of the respondent. He stressed that the appellant's version of the transaction in issue was expressly rejected by the trial court and that the said rejection was affirmed by the court below. He submitted that from the trend of the judgment of the trial court, it could not be doubted that the fact of the repayment of the principal loan of 4,000.00 with the accrued interest of 1,000.00 by the respondent to the appellant was fully complied with as agreed to by the parties hence it proceeded to enter judgment for the respondent for the return of his documents of title

which the appellant was unlawfully withholding. He urged the court to resolve issue I against the appellant.

***It is trite law that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified at the trial in the witness box. It is equally basic that where such court of trial unquestionably evaluates the evidence before it and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. What the Court of Appeal ought to do in such circumstance is to find out whether there is any evidence on which the trial court could have acted. Once there is such evidence on record before the trial court from which it arrived at its findings of fact, the appellate court cannot interfere.*** See Akpagbue v. Ogu (1976) 6 S.C. 63, Odojin v. Ayoola (1976) (1984) 11 S.C. 72, Amadi v. Nwosu (1992) 5 N.W.L.R (Part 241) 273 at 280, Woluchem v. Gudi (1981) 5 S.C. 291 at 320 etc. the question now is whether the trial court properly evaluated the evidence before it and appropriately ascribed probative value thereto, and, in particular, whether or not it made any finding on or was satisfied that the respondent duly repaid his loan of #4,000.00 with the agreed interest of #1,000.00 to the appellant as the respondent claimed.

In this regard, I have already set out in some detail the case as presented by the parties before the trial court. To put it briefly but at the risk of repetition, the respondents case is that in October 1978, the appellant lent him the sum of 4,000.00 with interest at the rate of 1,000.00 for one year. As security for this loan, the respondent surrendered certain documents, the subject matter of this action to the appellant returnable on his repayment of the loan. The principal loan with the agreed interest was duly repaid to the appellant by the respondent in September, 1979 whereupon the respondent demanded the return of his title deeds from the appellant without success hence this action.

The appellant's defence is a total denial of the respondent's claim. Again, briefly, his case is that both the respondent and himself jointly agreed to borrow and did borrow the sum of N10,000.00 from the second defendant Bank on the security of the respondent's

building, title deeds and/or documents. He claimed that the respondent failed to repay his half share of the loan to the Bank. In particular, he stated that the respondent was fully aware that his house and documents of title were used as security for the mortgage transaction with the Bank.

B        It is not in dispute that the trial court fully and extensively reviewed the two versions of the transaction between the parties as presented by them. Indeed, learned counsel for the appellant in his brief of argument frankly conceded that the learned trial Judge did reproduce in paraphrase form the various versions of the transaction between the parties as presented before the court. It is also plain from the record of proceedings that the trial court upon a close consideration of the aforesaid conflicting versions of the transaction between the parties adduced reasons why he was satisfied with the case that was presented by the respondent as against that of the appellant which he expressly rejected. Said he:-

“.....the 1st defendant merely used a clever device on the plaintiff to obtain exhibits 1, 2, 3, and 5 and secured a loan with the documents from the 2nd defendant. To my mind the plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the best interest of justice to make the plaintiff a victim of a transaction he knows nothing of “.

F        The learned trial Judge then concluded:-

“For the foregoing reasons I am convinced that the plaintiff has proved his case to the satisfaction of the court. As such I hold that the plaintiff is entitled to the reliefs he sought and I give judgment for the plaintiff.” (Underlining supplied for emphasis)

G        And I ask myself whether it can be suggested with any degree of seriousness that the learned trial Judge was not satisfied with the respondent’s version of the transaction between the appellant and himself and that he duly repaid the principal amount he borrowed with interest to the appellant as he claimed. I think not. This is because his claim before that court was precise and clear. The trial court in no mistaken terms was satisfied that the respondent had established the case he presented before it. It is plain that the learned trial Judge in the clearest possible terms had accepted the respondent’s version of the transaction between him and the appellant and re-

jected the appellant's version which he described as a "*clever device*" on the part of the said appellant to obtain the respondent's title documents to secure a personal loan from the 2nd defendant Bank. I think the Court of Appeal was clearly right when on this issue it observed thus:-

*"In the circumstances, I cannot subscribe to the complaint of the learned counsel for appellant that the learned trial Judge did not review and evaluate the evidence of the parties and failed to make any findings of facts on the evidence."*

***This court will not interfere with the concurrent judgments or findings of both the trial court and the Court of Appeal on essentially issues of fact except there is established special circumstances such as a miscarriage of justice or violation of some principles of law or procedure.*** See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R (Part 14) 1 at 36, Mora v. Okonkwo (1987) 3 N.W.L.R (part 60) 314 at 321, Igwego v. Ezeugo (1992) 6 N.W.L.R (Part 249) 561 at 574 etc. ***No such special circumstance to warrant setting aside this concurrent finding of fact of both the two courts below has been established by the appellant. Issue 1 must accordingly be resolved against the appellant.***

The question posed with regard to issue 2 is whether the Court of Appeal was right to have endorsed the view of the trial court that the English Statute of Limitation, 1623 did not avail the appellant. It is the contention of the appellant that the respondent's action was caught by the said Statute and that it is therefore statute barred. The appellant's case is that there was evidence from the respondent himself that the transaction which is the subject matter of the suit took place in 1978. The action that gave rise to this proceeding was filed on the 7th September, 1987, well over 6 years from the said 1978. The appellant therefore argued that the respondent's suit was statute barred.

The respondent, for his own part, contended that his action was not statute barred in that although the transaction between the parties took place in 1978, the facts constituting the cause of action in this suit did not manifest themselves until in 1987 when the respondent threatened to report the appellant to the Police whereupon the said appellant confessed for the first time and to the respondent's

bewilderment that he had used the documents in issue to raise loan for himself from the 2nd defendant Bank. The respondent's action was filed in the same 1987 immediately after the true facts constituting the cause of action in the suit were brought to his knowledge by the appellant. In such circumstances, it was submitted that the  
 B respondent's action cannot be statute barred.

In this regard, the trial court observed thus:-

*"On the question of whether or not this suit is statute barred, the submission of Mr. Alli learned counsel for the 1st defendant that  
 C the action of the plaintiff is statute barred has no place in the circumstances of this case. It is obvious that the plaintiff was unaware that his documents were used to secure a loan from the 2nd defendant as revealed by the evidence of the plaintiff himself. In the absence of anything to the contrary the case of Bulli Coal Mining Company v.  
 D Patrick Hill Osborne & Another (1899) A.C. 351 at 363 cited by Chief Odeyemi, learned counsel for the plaintiff is most appropriate."*

It went on:-

*"As the record shows in our present case on hand, the plain-  
 E tiff cannot be said to be guilty of any laches and as such the 1st defendant cannot also be allowed to take advantage of his dubious conduct towards the plaintiff. I therefore agree with Chief Odeyemi that the transaction between the plaintiff and the 1st defendant is  
 F merely a pledge which cannot be statute barred ... Since it was only in June, 1987 that the plaintiff became aware that his document was with the bank deposited as security for a loan, the plaintiff cannot be expected to institute on a cause unknown to him. I am therefore in full agreement with the learned counsel for the plaintiff that the  
 G plaintiff's case is not statute barred since it is a transaction in respect of title to land. Since the evidence of the plaintiff shows that he has been worrying the 1st defendant for his documents without success, I wonder what further evidence Mr. Alli required from the plaintiff to show that there was concealment. It is therefore my considered view  
 H that this court has jurisdiction to entertain this case. The plaintiff cannot be rightly said to have slept over his right ..."*

The Court of Appeal, for its own part, after a careful consideration of the issue commented thus:-

*"It is clear that the main reason given by the learned trial Judge*

*in his finding that the action of the respondent was not statute barred was that the respondent only became aware for the first time, that his documents were used by the appellant to secure a loan from the bank in June 1987. In the circumstances, the action instituted in September, 1987 could not be caught by a statute of limitation."*

It concluded:-

*"I very much share the view of the learned trial Judge, that since the respondent only became aware that the appellant used the respondent's document to secure a loan from the bank in June 1987, the action filed by the respondent in September 1987 could not have been caught by the Statute of Limitation Act of 1623. The action is not statute barred."*

I have given the above reasoning of the Court of Appeal on the issue of whether or not the respondent's present action is statute barred a close study and confess that I can find no reason to fault the same. On the finding of the learned trial Judge which was affirmed by the court below, it is plain that after repayment by the respondent to the appellant of the loan of N5,000.00, the respondent consistently made demands, both oral and written, for the return of his documents from the appellant without success. It was not until in June 1987 when the respondent threatened to report the matter to the Police that the appellant for the first time confessed his use of the respondent's house and documents to raise loan for himself from the 2nd defendant Bank. It was following this confession that the respondent was obliged to file the present action against the appellant in September, 1987.

***It is clear that the respondent only became aware for the first time in June, 1987 that the appellant surreptitiously and fraudulently made use of the respondent's title documents to mortgage the respondent's house for a loan from the 2nd defendant Bank. The respondent exactly three months thereafter filed the present action against both the appellant and the 2nd defendant Bank. It seems to me clear under such circumstance that in equity, no length of time can be a bar to relief particularly in a case, such as the present, where concealed fraud is involved and no laches on the part of the person defrauded, in this case, the respondent, is established.***

The above proposition of law was succinctly laid down in the

case of Bulli Coal Mining Co. v. Patrick Osborne and Another (1899) A.C. 351 at 363 (P.C.) Where Lord James of Hereford delivering the judgment of Her Majesty's Privy Counsel in England put the matter thus:-

B *"Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the Statute (of Limitation) in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own."* (Words in brackets supplied for clarity)

C By way of elucidation, the noble Lord dealing with the rationale behind this principle of law went on:-

*"The contention on behalf of the appellant that the Statute is a bar unless the wrongdoer is proved to have taken active measure in order to prevent detection is opposed to common sense as well as the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so wearily, that he can safely calculate as not being found for many a long day. Why is the one to go scot free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as a secret thing and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."*

I have given very close attention to the above observations of the learned Lord James of Hereford and must confess that I entirely agree with them as an accurate statement of the law on the subject. **It is obvious from the concurrent findings of both courts below that the respondent was totally unaware that the documents he pledged with the appellant under circumstances lucidly testified to by him were surreptitiously used to secure a loan by the appellant from the 2nd defendant Bank. This surreptitious and unauthorised use of the respondent's title documents by the appellant was evidently a clear case of concealed fraud by the appellant against the unsuspecting respondent. It is also plain from the accepted facts of the case that no question of laches can operate against the respondent on the facts**

***of the transaction in issue as it was not until in June, 1987 that the respondent became aware of the appellant's fraud against him. It was immediately thereafter, indeed in September, 1987 that the respondent filed the present action against the appellant. In these circumstances, I do not think it can be suggested with any degree of seriousness that there is any room in equity for the application of the Statute of Limitation, 1623 against the respondent's action when the respondent remained ignorant of what the appellant had done with his documents of title without any fault of his own. Issue 2 is hereby resolved against the appellant.***

The gist of the complaint of the appellant under issue 3 is that the respondent having made fraud the foundation of his claim had the legal burden or duty to plead and prove the alleged fraud beyond reasonable doubt since it imported the commission of a crime. In this regard, reliance was placed by the learned counsel for the appellant on the provisions of Section 137(1) of the Evidence Act and the decisions of this court in *Nwobodo v. Onoh* (1984) 1 S.C.N.L.R 1 at 4 and *Ajasin v. Omoboriowo* (1984) 1 S.C.N.L.R. 108. Learned counsel submitted that the respondent failed to prove the allegation of fraud raised by him beyond reasonable doubt or as required by law and that the courts below were in error to have entered judgment for the respondent on the basis of his ipse dixit alone.

Learned counsel for the respondent, for his part, contended that fraud was never the foundation of the respondent's case in this suit. He made reference to the reliefs claimed in the action and pointed out that the commission of any crime was not directly in issue for the grant of the two reliefs claimed by the respondent. He submitted that the respondent could prove his case without any allegation of fraud. He drew attention to the decision of this court in *Benson Ikoku v. Enoch Oli* (1962) 1 All N.L.R 194 and submitted that notwithstanding the fact that the adverb "*fraudulently*" was grammatically used to describe the appellant's conduct or motive in mortgaging the property in dispute, the commission of any crime was not directly in issue in the case. He further contended that where a strong language is used to describe motive, that fact alone does not automatically transform the basis of a claim to a crime. He argued that the standard of

proof required in the present case is that of balance of probability. He added, in the alternative, that even if the basis of the respondent's claim is fraud, which is denied, the same was proved beyond reasonable doubt.

In dealing with the issue under consideration, the court below stated thus:-

*"It is clear that from the writ of summons and the amended statement of claim of the respondent, the prime concern of the respondent was the return of his documents used by the appellant to secure a loan from the bank. See paragraph 23 of the amended statement of claim which reads as follows:-*

*23. Despite repeated demands the defendant refused to discharge his building and documents from mortgage and return his documents to him. Whereof the plaintiff claims against the defendants as follows:-*

*1. A declaration that the defendants are not entitled to a lien on the said plaintiff's building by virtue of the said Mortgage Deed.*

*2. An order that the defendants return to the plaintiff his Permit to Alienate land No. 3633, Building Plan, Site Plan, Land Agreement dated 1.9.77 and Tax receipts. The evidence given by the respondent had been on the same line. I am also of the view that commission of a crime is not directly in issue in the respondent's claim. The respondent merely described the scenario, how the appellant smartly obtained the documents from the respondent and used them to obtain loan from the bank. I also share the view of the learned trial judge that the case of Nwankwere (supra) applied and was correctly followed by the learned trial Judge. I also hold the view that the standard of proof required in this case is not proof beyond reasonable doubt as contended by the learned counsel for appellant."*

***There can be no doubt that the Court of Appeal was perfectly right when it held that the commission of a crime is not directly in issue in any of the reliefs claimed by the respondent in the present action. The respondent's claims against the appellant and the 2nd defendant Bank have been set out earlier on in this judgment. A close study thereof discloses in the clearest possible terms that they principally concern the return of the respondent's various documents together with***

***the declaration in respect of his mortgaged property. None of those items of claims needed proof of the commission of any criminal offence to succeed.***

***Without doubt, the preponderance of evidence or the balance of probability constitutes sufficient ground for a verdict in civil cases. This general rule is however subject to the statutory provision in the former section 137(1), now section 138(1) of the Evidence Act to the effect that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.*** See Benson Ikokwu v. Enoch Oli (1962) 1 All N.L.R 194. B  
C

***But as I have already observed, fraud was never made the foundation of the respondent's case whether from the pleadings or from his evidence before the court. The respondent in the present case could quite easily prove his case, as indeed he did, without alleging or proving fraud notwithstanding the fact that the adverb "fraudulently" was grammatically used to describe the appellant's conduct or motive in the transaction.*** D  
E

***I need perhaps add in the above regard that where a strong language is employed to describe one's conduct or motive in a transaction as was done in the present case by the use of the word "fraudulently", that does not ipso facto convert the basis of a claim to a crime.*** See Godwin Nwankwere v. Joseph Adewunmi (1967) N.M.L.R. 45. ***I therefore entertain no doubt that the standard of proof required in the present case must be the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt as provided for under section 138(1) of the Evidence Act. The application of the provisions of Section 138(1) of the Evidence Act only comes into play where the commission of a crime by a party is directly in issue in any proceeding, civil or criminal, and not otherwise. I am in complete agreement with learned counsel for the respondent that the respondent's case was not founded on crime and proof beyond reasonable doubt under section 138(1) of the Evidence Act, 1990 cannot therefore apply in the present case. Issue 3 is accordingly resolved*** F  
G  
H

***against the appellant.***

All the three issues having been resolved against the appellant, this appeal fails and it is hereby dismissed with cost to the respondent against the appellant which I assess and fix at N10,000.00.

B

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***WALI JSC***

I have had the privilege of reading before now the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal.

C

The appeal involves concurrent findings on fact and issues of law by the trial court and the lower court which I find not to be perverse. See *KODILINYE v. ODU* 2 WACA 336; *WOLUCHEM v. GUDI* (1981) 5 SC 291 and *MOGAJI v. ODOFIN* (1978) 4 SC 91.

D

I also find no substance in this appeal and I hereby dismiss it with N10,000.00 costs to the respondent.

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***OGWUEGBU JSC***

E

I have had the advantage of reading in advance, the judgment just delivered by my learned brother Iguh, JSC with which I fully agree with his reasoning and conclusions.

F

I will dismiss the appeal with costs of #10,000.00 in favour of the plaintiff/respondent.

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***MOHAMMED JSC***

G

I agree that this appeal has failed and ought to be dismissed. I have had the privilege of reading the judgment of my learned brother, Iguh, JSC, and I have nothing more to add to his opinion. I will also award #10,000.00 costs to respondents.

H

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***KALGO JSC***

I have read in draft the judgment just delivered by my learned brother Iguh JSC in this appeal and I entirely agree with him that there is no merit in the appeal. I will also dismiss the appeal for the reasons which he has fully and clearly given, in my view, and which I

hereby adopt as mine. I however wish to emphasize some of the points which have already been made in the lead judgment in the following paragraphs.

Iguh JSC has precisely set out the facts of the case which gave rise to this appeal. I do not intend to repeat them here. It is however obvious from the briefs of parties in this court that 3 issues arose for determination, which have direct bearing on:-

1. Evaluation of evidence by the trial court which was upheld by the Court of Appeal;

2. Application of the Statute of Limitation 1623;

3. Presence of criminal imputation or allegation requiring proof beyond reasonable doubt.

On issue 1, the respondent gave clear evidence of repayment of N5,000.00 to the appellant of the loan given to him in 1978 with interest. The evidence was uncontradicted and was accepted by the trial judge who saw and heard the witnesses. The learned trial judge rejected the appellant's version of the story and after considering the whole issue concluded that:-

*"...the 1st defendant merely used a clever device on the plaintiff to obtain exhibits 1, 2, 3 and 5 and secured a loan with the documents from the 2nd defendant. To my mind the plaintiff has proved to the court that he is completely ignorant of the transaction between the 1st and 2nd defendants. I am of the view that it will not be in the interest of justice to make the plaintiff a victim of a transaction he knows nothing of".*

And the Court of Appeal agreed with the trial judge when it found:-

*"....at the evidence adduced by the respondent at the trial which in fact was accepted by the trial judge is credible enough to entitle him to the declaration granted to him by the trial court".*

After going through the evidence of the parties in the record of appeal, I cannot agree more with the findings of the trial court as affirmed by the Court of Appeal on this issue. Those findings cannot in my view be faulted and this issue must be resolved against the appellant.

Issue 2 deals with the period of limitation for filing an action in court. The generally accepted principle is that the period starts to run from the day the cause of action arose. In this case, it is very clear

that the respondent did not know that the documents which he earlier gave to the appellant for the loan given to him were not with the appellant or that the appellant used them for other purposes. He only came to know this in June 1987, when after continuous refusal by the appellant to return the documents to him, he threatened to  
B report the matter to the Police. And in September 1987 (three months later) he filed this action in the trial court. Under the Limitation Act 1623 of England, the period of limitation is 6 years. Here, the cause of action arose in June 1987 and the action was filed in September  
C 1987, a period of 3 months duration. The action was clearly filed within a good time and the said statute of limitation did not apply. Issue 2 also fails.

On issue 3, I entirely adopt the treatment of that issue by Iguh JSC in the leading judgment. I have no doubt in my mind that  
D the fact that the respondent used the word "*fraud*" in the conduct of the appellant in dealing with the documents in question did not mean that that was the main foundation of his claim or was directly in issue between them. Without using the word "*fraud*", the respondent can successfully prove his case as he did on the balance of probabilities or  
E the preponderance of evidence at the trial, which is all what is required in a civil case such as this. The evidence necessary in this type of case is such that can support the relief claimed and which in the end, when put on the scale of justice, will tilt it in favour of the plaintiff. See *Mogaji v. Odojin* (1978) 4 SC 91. This makes the provision  
F of S. 138 (1) of Evidence Act inapplicable in the circumstance.

Finally, I find that the decision of the trial court and the Court of Appeal in this case are concurrent findings or decisions which cannot generally be disturbed in the absence of special circumstances  
G such as where the findings were perverse or there was miscarriage of justice or violation of some principles of law or procedure. This was not shown to have occurred in this appeal. This court will not therefore interfere with the decision of the Court of Appeal confirming that of the trial court. Accordingly, and for the more detailed reasons  
H given in the leading judgment, I find no merit in this appeal. I dismiss it with N10,000.00 in favour of the respondent.