

SUPREME COURT OF NIGERIA
FRIDAY 8TH MARCH, 2002. SC. 82/1997
CORAM:- I. L. KUTIGI, U. MOHAMMED, A. I. IGUH,
U. A. KALGO, E. O. AYOOLA, JJSC

MOSES OKHUAROBO & 2 ORS APPELLANTS
AND
CHIEF EGHAREVBA AIGBE RESPONDENT

PLEADINGS - Binding nature of - Effect - Parties are bound by their pleadings - And evidence which is at variance with averments - Goes to no issue and should be disregarded by court (H1)

COURTS - Pleadings - Limitation - Courts must limit themselves to issues raised by parties in their pleadings - As to do otherwise may result in denial of fair hearing (H2)

LAND LAW - Title - Proof - Plaintiff must satisfy court on strength of evidence he adduced - And not on weakness of defence - Save where his case is supported by defence (H3)

LAND LAW - Root of title - Failure to plead - Effect - Since plaintiff failed to lead evidence of his root of title - Judgment dismissing his claim is proper (H4)

APPEALS - Land Law - Decision of trial court - Interference - Since the court rightly dismissed plaintiff's claim to title - Court of Appeal was wrong to have interfered with same (H5)

LAND LAW - Trespass - Right of action - Where there are conflicting titles - Person in possession can rightly maintain action - For damages for trespass (H6)

LAND LAW - Trespass - Claim for Damages - Sustainability - Failure of claim to title will not necessarily lead to - Failure of claim for damages for trespass (H7)

LAND LAW - Title - Counter claim - Failure to file defence - Effect -

Such failure is irrelevant because court does not make declaration of rights - Without hearing evidence and being satisfied of same (H8)

FACTS

Plaintiff/respondent and defendants/appellants were involved in dispute over title to a property known as No. 192 2nd East Circular Road, Benin City – Edo State. The dispute led to the institution of this action by respondent at the High Court of Edo State, Benin City, wherein he claimed inter alia, declaration of title, damages for trespass and injunction restraining appellants from the said property. Respondent pleaded that the property in dispute was given to him as a gift by one Uwague Ehanire in appreciation for domestic services rendered.

Appellants on the other hand counter-claimed on similar grounds as respondent did. Appellants grounded their root of title to the property by virtue of sale of the said property to 1st appellant's father for the sum of £19 (pounds) or N38.00. At the end of hearing, the court dismissed respondent's claim for declaration of title and injunction. However, respondent's claim for trespass was granted since he is in possession of the land. The court nevertheless granted declaration of title to appellants but dismissed their claim for trespass. Being dissatisfied, respondent appealed to the Court of Appeal, Benin City. The court allowed the appeal and set aside the judgment of trial court. Aggrieved, appellants filed appeal at the Supreme Court.

HELD (Allowing the appeal in part per **IGUH JSC**,
KALGO JSC Dissenting)

PLEADINGS - Binding nature of - Effect

1. In the first place, it is a well established principle of law that if the evidence of a party is at variance with the averment in his pleadings on a material and relevant point, the claim would fail and stand dismissed. This is because parties are bound by their pleadings and evidence which is at variance with the averments in his pleadings goes to no issue and should be disregarded by the court.

Consequently, parties cannot deviate from their pleadings

unless such pleadings are duly amended by the court and the court cannot found its judgment on the evidence of material facts not pleaded as such evidence, in law, goes to no issue.
(pp. 580 H/581 E)

COURTS - Pleadings - Limitation

2. In the same vain, evidence must be directed and confined to the proof or disproof of the issues as settled in the pleadings and trial courts must limit themselves to the issues raised by the parties in their pleadings as to do otherwise might well result in the denial to one or the other of the parties of his right to fair hearing. (p. 581 D)

Title - Proof

3. In the second place, it is a fundamental and well established principle of law applicable to claims for declaration of title to land that it is for plaintiff to satisfy the trial court on the evidence produced by him that he is entitled to such a declaration. In discharging this onus, the plaintiff must rely on the strength of his own case and not on the weakness of the defence.

This rule is however subject to the important exception that the defendant's case may itself support the plaintiff's case and contain evidence on which the plaintiff is entitled to rely. This exception is not, however, applicable to the facts of the present case.

The above is a definite finding of fact on the part of the trial court in the face of which, speaking for myself, the defendant's counter-claim for title to the property cannot be sustained having regard to their alleged root of title which they were unable to establish. No doubt, it would appear that there was no defence filed in reply to the defendants' Counter-Claim. This, however, is neither here nor there as the onus is as much on the defendants in their counter-claim as on the plaintiff in the main claim to establish their counter-claim in respect of title, trespass and injunction therein claimed. This onus they must, to succeed, discharge to the satisfaction of the court and on the evidence brought by them. In this regard, as al-

ready pointed out, the defendants, as plaintiffs in the counter-claim, must rely on the strength of their case and not on the weakness of the case for the plaintiff. If this onus is not discharged the proper judgment will be against them.

(pp. 581 G/587 B)

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LAND LAW - Root of title - Failure to plead - Effect

4. I cannot, with profound respect, accept this line of reasoning as entirely sound. The simple reason for this is that it is indisputable that the evidence of the plaintiff is at complete variance with and did not support his pleaded root of title and the plaintiff to succeed in his claim for title, must established proof of the root of title pleaded and claimed. This he failed to do. In my view the burden on the plaintiff in proof of his claim for title to the property in dispute was not discharged and the proper judgment in the circumstance is one of the dismissal of his claim in respect of title to the property.

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The conclusion I have therefore reached is that there is no legal evidence of whatever nature in proof of the plaintiff's root of title as pleaded by him in his further amended Statement of Claim. Under such circumstance, this claim for title cannot but fail. (pp. 582 F/583 F)

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Land Law - Decision of trial court - Interference

5. I am therefore in agreement with the submission of learned counsel for the appellant that there is nothing on the evidence of either P.W. 6 or P.W. 7 on the issue of the plaintiff's pleaded root of title which was capable of faulting the decision of the learned trial Judge in his dismissal of the plaintiff's claim for title to the property in dispute. I think, with respect, that the court below was in definite error to have interfered with the said decision of the trial court on the issue. (p. 583 D)

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LAND LAW - Trespass - Right of Action

6. These findings of the learned trial Judge in favour of the plaintiff on the issue of possession have not been faulted and were in fact affirmed by the court below. I think both courts below are right on the issue. This is because, the trial court,

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earlier on in its judgment had found that the defendants' counter-claim for title to the premise was unsatisfactory. I will, however, revert to this aspect of his findings later in this judgment. It suffices for now to state that where the plaintiff's title is defective and that of the defendant is also defective and the plaintiff is in possession, then the plaintiff can rightly maintain an action for trespass. This is because only a person in possession of land in dispute can rightly maintain an action for damages for trespass. (p. 584 H)

LAND LAW - Trespass - Claim for Damages - Sustainability

7. No doubt, the plaintiff's action in declaration of title to land in dispute failed, this did not necessarily mean that his action on damages for trespass on the same property must fail. (p. 585 C)

Title - Counter claim - Failure to file defence - Effect

8. I am also not oblivious of the fact that the plaintiff for some undisclosed reasons filed no defence to the defendant's counter-claim. But as I have already observed, this cannot be any matter of great moment. This is because the court does not make declarations of right either on admissions or in default of defence without hearing evidence and being satisfied by such evidence. (p. 587 G)

NOTABLE POINT OF INTEREST

IGUH JSC

1. Contradictory claims – Fate

Accordingly, where from the evidence led, title of the plaintiff if any, was a title at native law and custom but his claim as pleaded was for title in fee simple, the nature and incidents of which are very different, such claim would be liable to dismissal. (p. 581 B)

REPRESENTATION

T. J. O. Okpoko, SAN with O. Ovwah and C. A. Ajuyah for the Appellants

D. O. Okoh with C.O. Ihensekhien for the Respondent

CASES REFERRED TO

- Emegokwue v. Okadigbo (1973) 4 SC 113
 Metalimpex v. A-G Leventis & Co. Ltd (1976) 2 SC 91
 Adegbite v. Ogunfoalu (1990) 4 NWLR (Pt. 196) 578
 B Oduaran v. Asarah 1972) 1 All NLR (Pt. 2) 137
 Amakor v. Obiefuna (1974) 9 NSCC 141
 Kalio v. Kalio (1997) 2 SC 15
 Shell v. Abedi (1974) 1 All NLR 1
 C Arase v. Arase (1981) 5 SC 33
 Onibudo v. Akibu (1982) 13 NSCC 199
 Ayinla v. Sijuwola (1984) 1 SC NLR 410
 Johnson v. Ayinke (1971) 1 All NLR 56
 Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt. 34) 676
 D Metalimpex v. A.G. Leventis (1976) 2 SC 91

LEAD JUDGMENT BY IGUH JSC

The appellants are the surviving defendants in a suit instituted by the plaintiff at the then High Court of Justice, Bendel State
 E wherein the plaintiff's claims as set out in paragraph 40 of his amended Statement of Claim are as follows:

- “(a) A declaration that the plaintiff is entitled to a statutory
 Right of Occupancy to all that house, land and premises situate at
 F and generally known as No. 192 2nd East Circular Road, in Ward
 “E” Council otherwise known as Ward 10 ‘E’ in Oredo Local Government Area, Benin City in the Benin Judicial Division and that the
 purported sales of the said property by the 1st, 4th and 5th Defendants to the 2nd Defendant is void and of no legal effect whatsoever.
 G (b) N10,000.00 damages for trespass committed by the defendants and or their servants and agents on the said house and
 premises on or about the 16th day of January, 1978.
 (c) An order of the Court to set aside the sale of the said
 property by the 1st, 4th and 5th defendants to the 2nd defendant
 H on or about the 5th day of October, 1976.
 (d) A perpetual injunction preventing the defendants their
 servants, agents and privies from intermeddling with the said property in any manner inconsistent with the Plaintiff's right now and in
 the future.”

The 1st, 2nd and 3rd defendants set up a counter-claim in paragraph 27 of their further amended Statement of Defence in which, as against the plaintiff they claimed thus:

“(a) A declaration that they are entitled jointly or severally to a statutory Right of Occupancy to all that property known as and situate at No. 192 2nd East Circular Road, in Ward ‘E’ Council otherwise known as Ward “10E” in Oredo Local Government Area, Benin City within the Benin Judicial Division.

(b) N10,000.00 (Ten Thousand Naira) being damages for trespass committed on the building by the servants or agent of the Plaintiff.

(c) An order of perpetual injunction restraining the plaintiff, his servants and or agents, privies from interfering with the said property in any manner inconsistent with the defendants rights over the said property.”

In this land dispute, therefore, both parties claimed entitlement to a Statutory Right of Occupancy to all that house and premises situate at and known as No. 192, 2nd East Circular Road, Benin City, damages for trespass and perpetual Injunction.

It is clear from the pleadings of the parties and their oral evidence before the trial court that the main issue between them is as to who has a better title to the premises in dispute. It is also not in dispute that the principal contestants, to wit, the plaintiff of the one part and the 1st and 2nd defendants of the order part claimed respectively to have derived their title to the property from a common vendor, to wit, Uwague Ehanire.

From the state of the pleadings, it is crystal clear that the plaintiff’s root of title is founded on a gift of the property in dispute by the said Uwague Ehanire to the plaintiff in appreciation for domestic services rendered. This is pleaded in paragraph 8 of the plaintiff’s further amended Statement of Claim as follows:

“8. The plaintiff avers that about 1909 the plaintiff was house boy to his late cousin, Uwague Ehanire who died in the early 1950s.

9. In appreciation of the service the plaintiff rendered to the said Uwague Ehanire, the latter excised a portion of his piece of land measuring 55 x 100 feet and gave it to the plaintiff.”

The defendants, for their own part, denied the plaintiff’s averments and in specific answer to paragraph 9 of the further amended

Statement of Claim grounded their root of title to the property in dispute by virtue of a sale of the house to the 1st defendant's father for the sum of £19 (pounds) of N38.00. They pleaded in paragraphs 6 and 7 of their further amended Statement of Defence as follows:-

B “6. With particular reference to the denial of paragraph 9 of
the Further Amended Statement of Claim the defendants will at the
hearing of this suit adduce evidence to establish that one Uwague
Ehanire now deceased on the 14th day of March, 1950 transferred a
portion of his land measuring 42 ft by 100 ft along Second East
C Circular Road, Benin City to one Okhwarobo Egbarevba (spelt
Egharevba) now deceased for a consideration of £19 (pounds) now
(N38.00) A receipt evidencing the said transaction dated 14/3/50
shall be relied on at the hearing of this suit.

D 7. The land transferred or sold to the said Okhwarobo
Egharevba was later known as No. 192, 2nd East Circular, Road,
Benin City.”

It is clear from the state of the pleadings that the main issue
joined by the parties is whether the property in dispute was acquired
by the plaintiff by way of gift from the said Uwague Ehanire in con-
E sideration of loyal and past domestic services rendered or whether it
was acquired by the 1st defendant's father by way of sale from the
said Uwague Ehanire for the sum of £19.00 or N38.00.

The learned trial Judge in his consideration of this vital issue
F said of the plaintiffs' evidence as follows:

“In his (meaning the plaintiff's) evidence-in-chief, the plain-
tiff was completely silent as to how he acquired his title. It was not
until under cross-examination that he stated how he acquired the
land. And he stated that he acquired title by purchase of the land for
G the sum of £40 from Ehanire Uwague. This is diametrically opposed
to his pleadings where he said that the parcel of land was given to
him as a gift by Ehanire Uwague whom he had served faithfully as a
house boy.”

H There can be no doubt that the evidence of the plaintiff with
regard to his root of title is completely at variance with that averred
and relied upon in his pleadings.

In the first place, it is a well established principle of law that if the evidence of a party is at variance with the averment in his pleadings on a material and relevant point, the

claim would fail and stand dismissed. This is because parties are bound by their pleadings and evidence which is at variance with the averments in his pleadings goes to no issue and should be disregarded by the court. See *Emegokwue v. Okadigbo* (1973) 4 S.C. 113; *Odumodu v. A.C. B.* (1976) 11 S.C. 261; *Kalu Njoku & ors v. Nkwu Eme and ors* (1973) 5 S.C. 293; *Mogaji and others v. Cadbury (Nigeria) Ltd. and others* (1985) 2 N.W.L.R (Part 7) 393 etc. Accordingly, where from the evidence led, title of the plaintiff, if any, was a title at native law and custom but his claim as pleaded was for title in fee simple, the nature and incidents of which are very different, such claim would be liable to dismissal. See *Commissioner for Works Benue State and Another v. Devcon Development Consultants Ltd. & Anor.* (1988) 3 N.W.L.R (Part 83) 407; *Rihawi v. Aromashodun* 14 W.A.C.A 204; *Ochonma v. Ashirim* (1965) N.M.L.R 321. **In the same vain, evidence must be directed and confined to the proof or disproof of the issues as settled in the pleadings and trial courts must limit themselves to the issues raised by the parties in their pleadings as to do otherwise might well result in the denial to one or the other of the parties of his right to fair hearing.** See *Metalimpex v. A.G. Leventis and Co. Ltd* (1976) 2 S.C. 91, *Oniah v. Onyia* (1989) 1 N.W.L.R (Part 99) 514, *Alhaji Ogunlowo v. Prince Ogundare* (1993) 7 N.W.L.R (part 307) 610 at 624; *Kalio v. Kalio* (1977) 2 S.C. 15. **Consequently, parties cannot deviate from their pleadings unless such pleadings are duly amended by the court and the court cannot found its judgment on the evidence of material facts not pleaded as such evidence, in law, goes to no issue.** See *Shell v. Abedi* (1974) 1 All N.L.R. 1.

In the second place, it is a fundamental and well established principle of law applicable to claims for declaration of title to land that it is for plaintiff to satisfy the trial court on the evidence produced by him that he is entitled to such a declaration. In discharging this onus, the plaintiff must rely on the strength of his own case and not on the weakness of the defence. See *Kodilinye v. Mbanefo Odu* 2 W.A.C.A 336; *Frempong v. Brempong* 14 W.A.C.A 13. **This rule is however subject to the important exception that the defendant's case may itself support the plaintiff's case and contain evidence on which the**

plaintiff is entitled to rely. See Akinola v. Oluwo (1962) 1 All N.L.R. (Part 2) 224 at 225, Oduaran v. Asarah (1972) 1 All N.L.R. (Part 2) 137. **This exception is not, however, applicable to the facts of the present case.**

It is not in doubt that the court below appreciated the ground upon which the trial court dismissed the plaintiff's claim for declaration of title for it had cause to observe:

"The main reason given by the learned trial judge for refusing to grant the Plaintiff's claim for declaration was that the plaintiff deviated from the pleaded source of his title which was a gift of the land in dispute from his late cousin, Uwague Ehanire, by testifying in the court that he bought it from the same person."

The finding by the trial court that the plaintiff's oral testimony before it was in contradiction of the averment as to his root of title as pleaded was not controverted or faulted in any way. On this ground alone, it seems to me that the court below would appear to have no other option open to it than to affirm the dismissal of the plaintiff's action for declaration of title to the property in dispute. True, the court below tried to justify its departure from the above with established principle of law. In this direction it held that since the learned trial Judge did not reject the evidence of P.W. 6 and P.W. 7, his failure to take their testimony which came within the plaintiff pleadings into consideration was a major omission on his part as a result of which the court below would be entitled to interfere with the trial court's evaluation of the facts placed before it in the case. ***I cannot, with profound respect, accept this line of reasoning as entirely sound. The simple reason for this is that it is indisputable that the evidence of the plaintiff is at complete variance with and did not support his pleaded root of title and the plaintiff, to succeed in his claim for title, must established proof of the root of title pleaded and claimed. This he failed to do. In my view the burden on the plaintiff in proof of his claim for title to the property in dispute was not discharged and the proper judgment in the circumstance is one of the dismissal of his claim in respect of title to the property.***

It must however be pointed out that neither P.W. 6 nor P.W. 7 gave any material evidence in proof of the plaintiff's pleaded root of title. Although P.W. 6, the plaintiff's son, claimed that he knew how

his father got the land and that it was given to him in 1950 by one of his relations called Uwague Ehanire, he admitted under cross-examination that he had no personal knowledge of the transaction he testified about. He said:-

"It is true that I had not been born at the time my father lived with Uwague Ehanire. I was not a witness to the transaction in which Uwague Ehanire gave the land to my father; but my father told me. He also told me that he lived with Uwague, but did not tell me for how long. I do not know the village that Uwague came from; but I learnt that he was living at Igun Street in Benin City. I cannot tell when he died."

His evidence on the matter was therefore entirely hearsay and, at all events, contradictory with the evidence of the plaintiff himself that he bought the land for £19.00 or N38.00.

In the case of PW 7, it is apparent from a close study of his evidence that no part thereof touched on the plaintiff's pleaded root to title. ***I am therefore in agreement with the submission of learned counsel for the appellant that there is nothing on the evidence of either PW. 6 or PW. 7 on the issue of the plaintiff's pleaded root of title which was capable of faulting the decision of the learned trial Judge in his dismissal of the plaintiff's claim for title to the property in dispute. I think, with respect, that the court below was in definite error to have interfered with the said decision of the trial court on the issue.***

The conclusion I have therefore reached is that there is no legal evidence of whatever nature in proof of the plaintiff's root of title as pleaded by him in his further amended Statement of Claim. Under such circumstance, this claim for title cannot but fail.

On the issue of the claim of both sides in respect of trespass, it is the finding of the learned trial Judge that possession of the premises in dispute was at all material times and certainly since 1950 in the plaintiff. Said the learned trial Judge.

"I now come to the evidence given by either side in support of the claim for trespass which is a legal right attached to possession. The first issue to decide in this regard therefore is as to who was in possession as at the time of the acts which brought about this suit I have closely examined the evidence and come to the conclusion that

the defendants were never really in possession in their own right. I am satisfied that when 1st and 4th defendants lived in that house they did so at the sufferance of the plaintiff.

Plaintiff, on the other hand, gave overwhelming evidence of possession over the years. First, although he lived in the village, he always lived in the house when he visited Benin City. Secondly, I accept his evidence that from the 1950s he let all his children who were attending school in Benin City to live in the house. He also allowed his grand children (including the 1st and 4th defendants) to live in the house. Thirdly, he had tenants who were living in the house and who paid rents through the 6th P.W. to his son Robert (7th P.W.). Fourthly, plaintiff had various documents relating to the house which showed that he was in possession. He gave custody of these documents to his son, Robert (7th PW) who tendered them in evidence. They included twelve water rate bills (Exhibit N-N11) which he settled. The next question is whether plaintiff's possession was interfered with. From the evidence before me I am satisfied that the 1st, 2nd and 3rd defendants interfered with plaintiff's possession. I am satisfied that when 6th P.W. and the tenants in the house refused to heed the various letters (Exhibit G, H, O and O1) written to them, the 1st to the 3rd defendants decided to use force by removing the roofing sheets, door frames and window frames of the house. I believe 6th PW absolutely that he saw the three of them engage in the act. Exhibit A and A1 (the photograph and negative) confirm the havoc that was done to the house. I am not impressed by the evidence given in denial by the 2nd and 3rd defendants. They gave no satisfactory explanation as to why 6th P.W should pick on them as the perpetrators of the act. In other words, I am satisfied that plaintiff has proved his case for trespass while 1st and 2nd defendants have failed to prove their counter-claim for trespass." He then proceeded to award N9,000.00 as general damages to the plaintiff against the 1st, 2nd and 3rd defendants for the most barbarous act of trespass committed by the three defendants". He went on:

"Plaintiff's claim for damages for trespass succeeds and damages in the sum of N9,000.00 are hereby awarded against the 1st, 2nd and 3rd defendants jointly and severally."

These findings of the learned trial Judge in favour of the plaintiff on the issue of possession have not been faulted

and were in fact affirmed by the court below. I think both courts below are right on the issue. This is because, the trial court, earlier on in its judgment had found that the defendants' counter-claim for title to the premise was unsatisfactory. I will, however, revert to this aspect of his findings later in this judgment. It suffices for now to state that where the plaintiff's title is defective and that of the defendant is also defective and the plaintiff is in possession, then the plaintiff can rightly maintain an action for trespass. See Adeshoye v. Shiwoniku 14 W.A.C.A 86. **This is because only a person in possession of land in dispute can rightly maintain an action for damages for trespass.** See Olugbenro v. Ajagungbade III (1990) 3 N.W.L.R (Part 136) 37; Adebajo v. Brown (1990) 3 (Part 141) 661. **No doubt, the plaintiff's action in declaration of title to land in dispute failed, this did not necessarily mean that his action on damages for trespass on the same property must fail.** See Adegbite v. Ogunfaolu (1990) 4 N.W.L.R. (Part 196) 578; Ojibah v. Ojibah (1991) 5 N.W.L.R. (Part 191) 296 etc.

There is next the issue of perpetual injunction from which the plaintiff tried to protect his established possessory rights in an over the property. This claim was dismissed by the trial court on the sole ground that the plaintiff's claim for title had failed. He said:

"From the foregoing, it is clear that I am of the view that plaintiff's claim for title to the land in dispute has not been made out. It follows automatically that his claim for injunction also fails."

This decision of the learned trial Judge on the question of injunction was rejected by the Court of Appeal when upon a close consideration of the issue it concluded thus:

"...the learned trial Judge also totally failed to take into consideration the evidence of uninterrupted occupation of the house now in dispute by the plaintiff up to the time when the 2nd defendant took steps to eject the plaintiff's children and the plaintiff's tenants living in the house shortly before this action was instituted and after the purported sale of the house by the 1st and 4th defendants to the 2nd defendant in 1976 as per Exhibit Q. My conclusion, therefore is that the appellant led satisfactory evidence before the lower court to warrant his being granted ...the injunction he claimed. I therefore allow the appeal in respect of the 1st and 4th arms of the claim."

In so far as the plaintiff's claim for perpetual injunction in protection of his established possessory rights in respect of the property are concerned, I think the Court of Appeal is right in that regard. It is on the question of declaration of title to the property in dispute that I think the court below was in error by reversing the trial court thereupon.

Turning now to the defendants' counter-claim, the trial court after a consideration of the evidence stated thus:-

"Again, from the evidence before me, I am satisfied that the 1st and 2nd defendants have offered a reasonably better evidence in support of their counter-claim for title. Judgment will therefore be given for them in respect of that arm of the counter-claim. Their claim for injunction also succeeds. Their claim for damages for trespass however fails." It then concluded:

"(c) The counter-claim of the 1st and 2nd defendants succeeds in respect of the 1st and 3rd arms, and it is hereby declared that they are entitled jointly and severally to a statutory right of occupancy to all that property known as and situate at No. 192 2nd East Circular Road, Benin City, in ward 10E in Oredo Local Government Area, Benin City within the Benin Judicial Division.

An order of perpetual injunction is also granted in their favour restraining the plaintiff, his servants and/or agents, privies, from interfering with the said property in any manner inconsistent with the said defendant's rights over the said property.

(d) The 2nd arm of the counter-claim of the 1st and 2nd defendants is hereby dismissed.

(e) The order of injunction granted in (c) above against the plaintiff will only become operative on the 1st, 2nd and 3rd defendant or any of them paying the sum of 9,000.00 ordered in (a) above direct to the plaintiff or through the court to him."

This decision of the trial court in favour of the defendants on the issue of title to the land in dispute and perpetual injunction was faulted by the Court of Appeal which was of the opinion that the 1st and 2nd defendants had not established satisfactory evidence in proof of their entitlement to both arms of their counter-claim. In my view, the Court of Appeal is on firm ground in this regard.

In the first place, the learned trial Judge after a close consideration of the evidence of both parties arrived at the unequivocal

conclusion that both parties had not succeeded in establishing “*satisfactory proof*” of their claims to title to the property in dispute. He said: “*Having examined the evidence with particular reference to these crucial paragraphs of the pleadings on both sides, I am of the view that neither side has given particularly satisfactory proof of their claims to title. Strange enough neither side called evidence from the common vendor or from his successors.*” B

The above is a definite finding of fact on the part of the trial court in the face of which, speaking for myself, the defendant’s counter-claim for title to the property cannot be sustained having regard to their alleged root of title which they were unable to establish. No doubt, it would appear that there was no defence filed in reply to the defendants’ Counter-Claim. This, however, is neither here nor there as the onus is as much on the defendants in their counter-claim as on the plaintiff in the main claim to establish their counter-claim in respect of title, trespass and injunction therein claimed. This onus they must, to succeed, discharge to the satisfaction of the court and on the evidence brought by them. In this regard, as already pointed out, the defendants, as plaintiffs in the counter-claim, must rely on the strength of their case and not on the weakness of the case for the plaintiff. If this onus is not discharged the proper judgment will be against them. See *Kodilinye v. Mbanefo Odu, Oduaran v. Asara* (supra). C D E

In the present case, the learned trial Judge who saw and observed the witnesses testify before him found in the clearest possible terms that neither side to the dispute gave satisfactory proof of their claim to title to the property in dispute. In my view this findings cannot be faulted and it would appear to conclude the case of the parties on the issue of title to the property in dispute. ***I am also not oblivious of the fact that the plaintiff for some undisclosed reasons filed no defence to the defendant’s counter-claim. But as I have already observed, this cannot be any matter of great moment. This is because the court does not make declarations of right either on admissions or in default of defence without hearing evidence and being satisfied by such evidence.*** See *Vincent Bello v. Magnus Eweka* (1981) 1 S.C. 101; *Motunwase v Sorungbe* (1988) 4 N.W.L.R (Part 92) 90; *Wallersteiner v. Moir* (1974) F G H

3 All E.R. 217 etc.

In the present case the trial court heard the evidence of the parties and came out with a definite finding that neither side had established its root of title to the property in dispute as pleaded. I think the court below was right in the circumstance when it dismissed the 1st and 2nd defendants' counter-claim in respect of title to the house in issue. It is also my view, having regard to all my observation above, that the defendants' counter-claims in respect of trespass and perpetual injunction were rightly dismissed by the court below as they were neither in possession of the land in dispute nor did they establish any proprietary right or interest in respect thereof to be protected by an order of perpetual injunction. In the final result, this appeal is allowed in parts and it is hereby ordered as follows:

(i) Plaintiff's claim for declaration of title to all that property known as No. 192 2nd East Circular Road in Ward "E" Council otherwise known as Ward 10 "E" in Oredo Local Government Area, Benin City in the Benin Judicial Division is hereby dismissed.

(ii) Plaintiff's claim for damages for trespass succeeds and the sum of N9,000.00 general damages are hereby awarded to the plaintiff against the 1st, 2nd and 3rd defendants jointly and severally.

(iii) There being no appeal against the order of the court below in respect of the setting aside of the sale of the property in issue by the 1st, 4th and 5th defendants to the 2nd defendant on or about the 5th day of October, 1976, no further orders in that regard will be made.

(iv) Perpetual injunction restraining the defendants, their servants, agents and privies from trespassing on or intermeddling with the said property in any manner inconsistent with the plaintiff's possessory rights over the property is hereby granted.

(v) All 1st, 2nd and 3rd arms of the counter-claims of the 1st and 2nd defendants fail in their entirety and are hereby dismissed. There will be no order as to costs.

H

MOHAMMED JSC

I agree that this appeal has merit and ought to be allowed. I have had the privilege of reading the judgment of my learned brother Iguh, J.S.C. in draft, and for the reasons given in the judgment I will

also allow the appeal. The root of plaintiff's title as pleaded was that he acquired the land through a gift made to him by his late cousin, Mr. Uwague Ehanire. The gift was made to him in appreciation of the services he rendered to his late cousin. However, when he gave evidence, the respondent told the trial court that Uwague Ehanire sold the disputed land to him for the sum of £40 over 30 years ago. B

It is settled law that where the evidence adduced is at variance with the pleadings, the proper order to make is to dismiss the claim or counter-claim. In the case of Oyediran v. Amoo (1970) 1 All NLR 313 the plaintiffs had not pleaded a grant and had made no attempt to amend their pleadings to do so. They pleaded that they obtained title by settlement and their claim was dismissed by the Supreme Court because the evidence of the root of their title derogated from their pleadings. Also in the case of O. Ogunde v. Ojomu (1972) NSCC 240 at 246 the case of the plaintiff was dismissed because the evidence adduced was contrary to averments in his pleadings as regards to his root of title. See also Uzonwanne Nwakuche v. Peter N. Azubike and 2 ors. (1955) 15 W.A.C.A 46. C D

The respondent in this appeal has failed to prove his root of title as pleaded and the proper order the court should make is to dismiss his claim. Consequently, I agree that the majority judgment of the Court of Appeal is in error to reverse the decision of the trial High Court which dismissed the respondent's claim in which he applied for an order of declaration that he was entitled to a statutory right of occupancy over the land in dispute. I however agree that the defendant's counter-claim in respect of trespass and injunction were rightly dismissed by the Court of Appeal. Therefore the appeal against award of damages for trespass and injunction is dismissed. E F

For these reasons and fuller reasons in the lead judgment of my learned brother, Iguh, J.S.C, the appeal is allowed in part. The majority judgment of the Court of Appeal is hereby set aside. I also restore the decision of the trial High Court on the issue of title. Parties to bear own costs. G

H

KALGO JSC (DISSENTING)

This is a land dispute which started in the former Bendel State High Court in Benin City. It has had a chequered history in that it

suffered casualties in the deaths of parties and witnesses in the course of the proceedings. It also involved closed relations as parties. The appellants were surviving defendants in the suit before the trial court and the respondent was the plaintiff.

The plaintiff (hereinafter referred to as the “respondent”) claimed against the appellants as per paragraph 40 of the amended statement of claim the following reliefs:-

“(a) A declaration that the plaintiff is entitled to a statutory Right of Occupancy to all that house, land and premises situate at and generally known as No. 192, 2nd East Circular Road, in Ward “E” Council otherwise known as Ward 10 “E” on Oredo Local Government Area, Benin City in the Benin Judicial Division and that the purported sales of the said property by the 1st, 4th, and 5th Defendants to the 2nd defendant is void and of no legal effect whatsoever.

(b) N10,000.00 damages for trespass committed by the defendants and or their servants and agents on the said house and premises on or about the 16th day of January, 1978.

(c) An order of the Court to set aside the sale of the said property by the 1st, 4th and 5th defendants to the 2nd defendant on or about 5th day of October, 1976.

(d) A perpetual injunction preventing the defendants, their servants, agents and privies from inter-meddling with the said property in any manner inconsistent with the plaintiff’s right now and in the future.”

The appellant as defendants set up a counter-claim in their further amended statement of defence which reads:-

“The 1st and 2nd defendants by way of counter-claim repeat paragraphs 6 to 27 of the joint amended-further Amended Statement of Defence and counter-claim against the plaintiff as follows:-

(a) A declaration that they are entitled jointly or severally to a statutory right of occupancy to all that property known as situated at No. 192, 2nd East Circular Road, Benin City in Ward ‘10E’ in Oredo Local Government Council Area, Benin City within the Benin Judicial Division.

(b) N10,000.00 (Ten thousand Naira) being damages for trespass committed on the said building by the servants or agents of the plaintiff.

(c) An order of perpetual injunction restraining the plaintiff

his servants and agents, privies from interfering with the property in any manner inconsistent with the defendants rights over the said property.”

Pleadings were filed and exchanged by the parties in the trial court but it is pertinent to observe that the respondent did not file any defence to the counter-claim. B

The respondent gave evidence and called 6 witnesses to prove his claim and the appellant called 4 witnesses including the 2nd appellant in their defence and proof of the counter-claim. At the end of the trial, learned counsel for the parties addressed the court at length and the case was adjourned for judgment. On the 19th of January 1989, the learned trial Judge Oki J. (as he then was) delivered his judgment and ordered as follows: C

“(a) *Plaintiff’s claim for damages for trespass succeeds and damages in the sum of N9,000.00 are hereby awarded against the 1st, 2nd and 3rd defendants jointly and severally.* D

(b) The 1st, 3rd and 4th arms of plaintiff’s claim are hereby dismissed.

(c) The counter-claim of the 1st and 2nd defendants succeeds in respect of the 1st and 3rd arms, and it is hereby declared that they are entitled jointly and severally to a statutory right of occupancy to all that property known as and situate at No 192 2nd East Circular Road, Benin City, in Ward ‘10 E’ in Oredo Government Area, Benin City within the Benin Judicial Division. E

An order of perpetual injunction is also granted in their favour restraining the plaintiff, his servants and or agents, privies from interfering with the said property in any manner inconsistent with the said defendants’ right over the said property. F

(d) The 2nd arm of the counter-claim of the 1st and 2nd defendants is hereby dismissed. G

The order of injunction granted in (c) above against the plaintiff will only become operative on the 1st, 2nd and 3rd defendants or any of other them paying the sum of N9,000.00 ordered in (c) above direct to the plaintiff or through the court to him.” H

The respondent was not happy with this order and he appealed to the Court of Appeal Benin, on a total of 15 grounds of appeal. The appellants also cross-appealed to the same court on 4 grounds of appeal. The Court of Appeal heard the appeal and the

cross-appeal. It allowed appeal of the respondent granting title of the land in dispute to him and dismissed the cross-appeal of the appellants in its entirety.

The appellants were dissatisfied with this decisions and appealed to this court. They filed their joint brief of argument and the respondent also filed his brief as required by the rules of this court. At the hearing of the appeal both counsel for the parties adopted and relied upon their respective briefs and urged the court to act accordingly. By way of emphasis, the learned counsel for the appellants, Okpoko SAN drew the attention of the court to the pleadings of the respondent in paragraphs 7, 8, 9, 10, and 11 of his amended statement of claim on page 50-51 of the record and paragraph 6 and 7 of the appellant's Amended Statement of Defence and pointed out that the evidence of the respondent that he bought the land in dispute went contrary, to his pleadings, whereas that of the appellants was in full compliance with their pleadings. Learned SAN then submitted that the respondent, bound by his pleadings, has clearly failed to prove his claim as found by the trial court and that the Court of Appeal was wrong to reverse the decision of the trial court.

In his brief, the respondent formulated four issues for the determination of this court and the same issues were adopted by the appellants. The issue are:

1. Were the learned Justices right to interfere with or reverse the judgment of the trial Judge on the ground that plaintiff led satisfactory evidence in proof of his title? Or put in another way, did the plaintiff on the evidence produced by him successfully establish the title he pleaded?

2. Were the learned Justices right in the circumstance of this case in holding that the judgment of the learned trial Judge was perverse?

3. Were the learned Justices right to apply the principle of priority of acquisition of interest or title under Benin Land Tenure against the Defendants in this case?

4. Were the learned Justices right in their view that defendants ought to have called Omoruyi Omo in this case?"

I shall now deal with issues 1 and 2 together. These issues dealt with the question whether the plaintiff/respondent has, by evidence satisfactorily proved his title to the land which he claimed and

whether the judgment of the trial judge was perverse.

There is no doubt, and it is now well settled that where a plaintiff claims a declaration of title to a piece of land, he or she must produce satisfactory evidence in proof of that title. In discharging that burden of proof, the plaintiff can only rely on the strength of his own case and not on the weakness of the defence. See *Kodilinye V. Odu* 2 WACA 336. B

But where the evidence of the defence favours the plaintiff, it has also been held that the plaintiff can also rely on it to prove his claim. See *Edosomwan v. Ogbeyefun* (1996) 4 NWLR 266 at 280; *Seismograph Services (Nig) Ltd v. Ejuafe* (1976) 9 - 10 SC. 135 at 146; *Akinola v. Oluwa* (1962) 1 SC NLR 352. C

It is also trite law that parties are fully bound by their respective pleadings, so that all evidence produced by a party at the trial must be in accordance with what is contained in the pleadings. See *George V. Dominion Flour Mills Ltd* (1963) 1 All NLR 71; *Nsirim V. Nsirim* (1990) 3 NWLR (pt. 138) 285; *Shell B. P. v. Abedi* (1974) 1 All NLR 1; *Metalimpex v. A.G. Leventis* (1976) 2 SC. 91. If any evidence is given outside the pleadings, that evidence whether material to the case of the party or not, goes to no issue and must be ignored or disregarded. See *Overseas Construction Ltd v. Creek Enterprises & Anor.* (1985) 3 NWLR (pt. 13) 407 at 414; *African Continental Seaways Ltd v. Nigerian Dredging Roads & General Works Ltd.* (1977) 5 SC. 235 at 249. E

In his amended statement of claim, paragraphs 7-10 the respondent made the following averments: F

“7. The plaintiff avers that one Uwague Ehanire (deceased) who was his cousin was the owner of 190 second East Circular Road, Benin City. G

8. The plaintiff avers that about 1909 the plaintiff was house boy to his late cousin Uwague Ehanire, who died in the early 1950s.

9. In appreciation of the services the plaintiff rendered to the said Uwague Ehanire, the latter excised a portion of his piece of land measuring 55 x 100 feet and gave it to the plaintiff in 1950. H

10. The plaintiff then went into possession of the said portion of land and started uprooting the trees and shrubs thereon without any let or hindrance”.

By these paragraphs, the respondent pleaded that he served

his late cousin uwague Ehanire as his house boy from about 1909 until early 1950 when Uwague Ehanire died, and that before Uwague Ehanire died, he excised part of his land and gave it to him (respondent) in 1950.

The appellants on the other hand denied all the respondent's averments in the above paragraphs and pleaded in paragraph 6 of the further amended Statement of Defence thus:

"6. With particular reference to the denial of paragraph 9 of the further Amended Statement of Claim the defendants will at the hearing of this suit adduce evidence to establish that one Uwague Ehanire now deceased on the 14th of March, 1950 transferred a portion of his land measuring 42 feet by 100 feet along second East Circular Road Benin City to one Okhwarobo Egharevba now deceased for a consideration of £19 pounds now (N38.00). A receipt evidencing the said transaction dated 14th March, 1950 shall be relied on at the hearing of this suit."

From the pleadings of the parties, it is very clear that the parties fully identified the land in dispute as the land along second East Circular Road Benin City and that it was a portion of the land originally belonging to one Uwague Ehanire. But what is clearly in controversy is whilst the respondent pleaded that the land in dispute was given to him by Uwague Ehanire by way of gift, the appellant pleaded that they bought the same land from Uwague Ehanire for £19 pounds (N38.00).

Let me now examine the evidence adduced by each of the parties on their respective pleadings before the trial court.

The respondent who was the plaintiff at the trial gave evidence himself and called 6 other witnesses to prove his claim. In his examination in chief, apart from relating his blood relationship with Uwague Ehanire, he said nothing about the gift to him of the land in dispute. But during his cross-examination he said:

"I knew one Uwague Ehanire who is now dead. It is true that my house in the land now in dispute, has common boundary with the house of the said Uwague Ehanire. It is true that the land on which the house in dispute was situated formerly formed part of Uwague's land but he sold the portion of the land to me for £40 (N80.00)."

He added later that -

“I bought the land from Uwague Ehanire over 30 years ago... I know Uwague Ehanire very well. His own mother was a relation of my father...”

From the above, there is no doubt that the evidence of the respondent himself as to how he came to own the property in dispute was “*diametrically opposed to his pleadings*” as found by the learned trial Judge but that should not be the end or the only evidence in support of his claim as a plaintiff, since he called other witnesses to prove his case. B

It is well settled that evidence which was contrary to the pleadings of a party and which was admitted or accepted on record during the trial under any circumstances, goes to no issue and should be completely ignored and not considered when the court comes to write its judgment. See *Ogbuokwelu v. Umeanafunkwa* (1994) 4 NWLR (pt. 34) 676. C

The evidence of the respondent was what one might call the foundation of the substance of his claim in this action. He testified that he knew the land in dispute and he described the house which he built on the land, and how he had occupied it since then. He further told the court that he handed over all documents relating to the building of the house to his son Robert Egharevba (PW.7). He blankly denied that the house belonged to the 1st appellant’s father. D

PW.1 only took photograph of the house in dispute in preparation for the case and PW.2 was the licence surveyor who surveyed and prepared a plan for the land which was admitted in court as Exhibit B. PW.3 was an officer in the Ministry of Land and Survey, Town Planning Division Benin City who had custody of all documents relating to survey and layout plans in Benin City, including those approved by Native Authorities. He tendered those relating to the land in dispute which were admitted as Exhibit ‘C’ and ‘D’ (in respect of Uwague Ehanire’s original grant) and Exhibit ‘E’ and ‘F’ (in respect of respondents grant). PW.4 was a carpenter who testified that he roofed the house of the respondent adjacent to that of Uwague Ehanire some 32 years ago. PW.5 confirmed that the respondent who lived in the same village with him had a house in Benin City which he built some 32 years ago at the material time and that he participated in the building at that time. The 6th and 7th plaintiff’s witnesses are the children of the respondent. I shall come to consider F

their evidence later.

The learned trial judge closely examined the evidence of all the respondent's witnesses in his judgment but nowhere did he say that he disbelieved the evidence of P.W.'s 6 or 7. That Evidence is available unchallenged on the record and I agree with majority decision of the Court of Appeal that it is entitled to consider that evidence in the determination of the issues in this case. In his testimony, P.W. 6 said inter alia that:

"I know one Uwague Ehanire who is now dead, he was my father's relation. The land was given to him by one of his relations called Uwague Ehanire. He gave the land to my father in 1950. I know one Sunday the carpenter who roofed the house. I also know the 5th P.W. - Onabor Erhahon. He was among the persons whom my father begged to build the house from the foundation." (Underlining mine)

This evidence would appear to be perfectly in support of the respondent's claim and in accordance with his pleadings, but for the fact that in cross examination, the witness said:-

"I was not a witness to the transaction in which Uwague Ehanire gave the land to my father; but my father told me." (Underlining mine)

The words underlined definitely show that P.W.6 did not know what actually happened but he was told by his father the respondent. This piece of evidence is clearly within the definition of hearsay as the witness was not giving evidence of what he knew or did personally, and there was no evidence by the respondent that he told the story to P.W. 6. This evidence though material to be the pleadings of the respondent must be rejected and is hereby rejected.

I now turn to evidence of P.W.7, Robert Egharevba. There was evidence of the respondent to the effect that he handed over all documents relating to the house and the land in dispute to his son, P.W.7. P.W.7, in his testimony confirmed this and tendered all the documents at the trial. They were admitted as Exhibit 'K', 'L', 'M', 'N'-N11 and 0-01.

Exhibit 'L' was the application for building plot through ward 10E Council Benin City to the Native Authority Benin City dated 1st April 1950.

The application reads:

“Chief Egharevba,

Benin City.

1st April, 1950.

Thro: The Ward ‘E’ Council,

Benin City.

To: The Native Authority

Benin Division,

Benin City.

Sir,

I have the honor most humbly to apply for a Building site 55' x 100' granted me by my brother Mr. Uwague Ehanire out of his approved plot bearing No. 290/45.

2. I shall be grateful should this application be early approved.

I have the honor to be

Sir,

Yours Obedient Servant

(Sgd)

Chief Egharevba

(His X mark)”

On the 16th of April, 1950, this application was endorsed to the Native Authority Benin by a member of Ward ‘E’ Council Benin City for the approval of the Native Authority as follows:

“The Native Authority.

Benin,

Sir,

No dispute of any kind therefore bearer is recommended for approval. We have the honour be

Sirs

Your Obedient Servants,

Ward ‘E’ Council Members.

(Sgd)

Sec. Ward ‘E’ 16th April, 1950

‘E’

16th April, 1950”

The application was stamped “*APPROVED*” by the Native Authority, Benin Division on the 28th day of September, 1950. There was evidence that the building of the house on the land in dispute commenced in 1950 and was finished in 1951, using the approved

building plan Exhibit ‘F’.

P.W.3, an employee of the Ministry of Land and Survey, Benin City at the material time tendered Exhibit ‘C’ in evidence and this was the original application by Uwague Ehanire for a plot of land from the Oba of Benin. The application which was dated 30th August 1945 reads thus:

“Benin City 30th August, 1945.

Through the Ward No. 10,

The Omo N, Oba N, Edo,

Uku Akpolokpolo

Akenzua ii,

I have the honour most respectfully to apply for Allocation of plot. The plot is vacant and no dispute.

It is situated on second East Circular Road under the Ward No. 10. I am a native of Benin. I hope this my humble application will meet with kind approval, Gharía Omo,

Your obedient servant,

Uwague Ehanire,

His X marks (sgd)”

This application was also endorsed by the Chairman and Ward Clerk of Ward 10 Benin City on the 15th of September, 1945, as follows:

“Ghari Omo,

We are your obedient servants,

Chairman Chief Eholo x His marks Chief Ohonbanu x His marks. (sgd) (Ward’s Clerk) 15th September, 1945”

The Oba approved the application on the 19th of September, 1945 and affixed his office stamp thereon.

This means that Uwague Ehanire earlier in 1945 got the Oba’s approval for his land out of which the land in dispute was taken. and by Exhibit ‘L’ the respondent has obtained approval of his own portion of land out of that of Uwague Ehanire as was clearly stated in that Exhibit where reference was made to Uwague Ehanire’s plot.

This evidence was not challenged or contradicted in any way. This also clearly indicated that the respondent was able to show his root of title to the land in dispute through Uwague Ehanire the original owner who was granted the large piece of land by the Oba of Benin in 1945.

Also Stella Paul who was the 4th Defendant at the trial and the daughter of the 1st Defendant who died before giving evidence, testified to a large extent in favour of the respondent. She said:-

"I knew the land in dispute at No. 192, 2nd East Circular Road Benin City. It was my grandfather's house. I do not know whether my father own any house before he died. Even when I grew up no one told me that my father had a house." B

Surely this piece of evidence is in support of the respondent's claim particularly as it was not rejected by the learned trial judge and D.W. 4 was not treated as a hostile witness. C

For the defence and counter-claim only 4 witnesses testified. The first witness was the 1st defendant who is now the 1st appellant. He testified that he bought the house on the land in dispute from the 1st defendant (who died before giving any evidence) and his half-sister D.W.4. The 1st defendant did not testify at all and D.W. 4 testified that as far as she knew, the house in dispute was not the property of her father, the son of the respondent, and she did not take part in the sale of the said house. D

The 1st appellant as the purchaser, produced in court 5 documents which were admitted as Exhibits 'R', 'R1', 'R3' and Q of which Exhibits 'R', 'R1' and Q are the most relevant. Exhibit "R1" was the sale agreement and it reads: E

*"Benin City,
14th March, 1950,
An agreement between Mr. Uwague Ehanire and Okhwarobo Ekharevba"* F

This is to certify that I the undersigned have sold a part of my plot measuring 42' x 100' situated in the second East Circular Road Benin City to Okhwarobo Egharevba of Evbosmufi village via Benin City. G

I, Mr. Uwague Ehanire also received the sum of Nineteen Pounds (£19) cash being the value of the Above mentioned plot".

Exhibit "R1" was thumb printed by Uwague Ehanire, the wife of Uwague Ehanire and the buyer Mr. Okhwarobo Ekharevba. H

It is pertinent to observe that the appellants did not call the wife of Uwague Ehanire to confirm the sale nor did they confront the plaintiff/respondent when he gave evidence at the trial with Exhibit 'R'. The only witness called in support of this issue is D.W. 2, Joseph

Omo Osadolor. D.W.2. is not a relation of the common vendor Uwague Ehanire nor member of the vendee' family. He was the secretary of Ward 10E Council Benin City, from 1958 - 1978. He testified that in 1961, the father of the 1st appellant Okhwarobo Egharevba applied to the Oba of Benin for approval of a plot of land B which he bought from Uwague Ehanire. This application was Exhibit 'R'. Uwague Ehanire was, according to him, invited by the council and he confirmed the grant. He further added that the council then sent one Mr. Omoruyi Omo to go and inspect the land concerned C and report back to them. This, D.W. 2 said, was done and Omoruyi Omo reported that there was no dispute; thereafter Oba's approval was given on 1st February 1962.

Exhibit 'R' which was addressed to His Highness Oba Akenzua II through Ward 10 E Allotment Committee, Benin City and dated D 11th November, 1961 reads:

"Sir,

I have the honour most humbly and respectfully to apply for building plot measuring 42 ft by 100 ft in the new traces in Ward 10E Benin City, for residential building purposes." (Underlining mine).

E The application which was signed by the applicant was recommended by Chairman, Secretary and other members of the Allotment Committee on 5th December, 1962.

In the first place the application (Exhibit 'R') was for building F plot "*in the new traces in Ward 10E Benin City*". It is not for any particular land in Benin City and the name of the original owners or sellers of the land was not mentioned in the application. Exhibit 'R' cannot favourably be compared with Exhibit 'L', the respondent's application to the Oba for approval. In Exhibit 'L', the building plot G for which approval was sought was clearly identified as land 55' x 100' granted to the respondent by a named person Uwague Ehanire and reference was specifically made to plot bearing No. 290/45 of the grantor. Exhibit 'R' was of building plot 42' x 100' in new traces in ward 10E Benin City. The size of the plots in Exhibits 'L' and 'R' are H different and whereas the grantor of the plot and his bearing number was mentioned in Exhibit 'L', it was only to be in "*the new traces in Ward 10E Benin City*" in Exhibit 'R'. It would appear therefore that there is no apparent connection or relationship between Exhibit 'R1' the sale agreement in 1950, and the approval of the plot 1962 by

the Oba. This is because there is nothing to show that the application for approval of the Oba in Exhibit 'R' was directly in respect of the land allegedly sold in Exhibit 'R1'. I so hold.

Exhibit 'Q' was headed "*Receipt for sale/Transfer of land and building.*" It was allegedly signed/thumb printed by 1st appellant and Stella Paul who was 4th D.W. at the trial. To me and looking at its contents carefully, Exhibit 'Q' was merely a receipt acknowledging the receipt of N8,000.00 for sale of land. It is not and cannot under any circumstance be construed as a conveyance or transfer of land. In fact in one of the clauses in it, the parties gave instructions to a surveyor to survey the land with a view to preparing the deed of conveyance.

The two signatories to Exhibit 'Q' were the 1st appellant and D.W. 4 Stella Paul, but only D.W. 4 gave evidence. In her testimony she strongly denied that she took part in the sale of the property concerned and that she was forced to thumb print Exhibit 'Q' when she was told that it was for the sale of her late father's rubber plantation. She denied that D.W.2 interpreted Exhibit 'Q' to her. Therefore Exhibit 'Q' has no evidential value at all and that is why the learned trial judge said in his judgment at page 92 of the record that:

"What is missing on defendants side is evidence of how the property eventually devolved on 1st defendant who sold to the 2nd defendant."

And the Court of Appeal also on page 207 of the record said:

"However, for effective sale and transfer of the property involved satisfactory evidence must be led to establish that payment was made and that the land in fact transferred to the purchaser."

It finally held that no such sale or valid transfer of the property concerned took effect in this case having regard to the oral evidence and the documents produced. I entirely agree with this finding in view of what I said earlier in this judgment. I also agree with the Court of Appeal that the learned trial judge did not explain the criteria he used in preferring the evidence adduced by the appellants in their counter-claim to that of the respondent. It was not enough to say that because the respondent gave evidence outside his pleadings (in this case purchase instead of gift) the respondent's claim must fail. The evidence of other witnesses for the respondent and the docu-

ments in support of his case must also be considered. I entirely agree with the Court of Appeal when it said on page 212 per Akintan JCA thus:

B “*My conclusion therefore is that the conclusion reached by the learned trial judge when he chose to prefer the evidence adduced by the defendants in support of their counter-claim for the declaration of title to the land in dispute as opposed to the evidence adduced by the plaintiff in support of his case for declaration of title to the same piece of land, is in my view, perverse.*”

C And although I agree with the learned trial judge that none of the parties before him adduced direct evidence to prove their respective claim of title to the land in dispute, but on the oral evidence and in particular the documents produced by the respondent at the trial, he was, by preponderance of evidence and on the balance of D probabilities entitled to the declaration sought. See *J. K. Johnson v. Ayinke* (1971) 1 All NLR 56 at 62; *K. Ayinla v. Sijuwola* (1984) 1 SC NLR 410 at 419.

E The respondent has adduced useful evidence of how he built the house on the land immediately after he obtained the approval of the Oba but the appellants called no evidence to prove that they built anything on the land. Also the respondent has produced evidence of use of the house on the land for sometime e.g. receipt for F water rates which he paid over the years (Exhibit ‘N’ - N11). The appellants produced nothing except documents for the alleged purchase and approval of the Oba twelve years after the said purchase. (Exhibit ‘R’ and ‘R1’). The trial judge also found that the respondent has sufficiently proved possession since he built the house on the land in dispute. I therefore answer issues 1 and 2 in the affirmative.

G Issue 3 is simple and straight forward. It is whether the principle of priority under the Benin Land Tenure in respect of the competing rights of parties is applicable in this case. My straight answer here is in the negative. This is because neither in the pleadings of parties nor of course in the evidence at the trial did that issue arise H directly. It is true that the approval of Oba Akenzua II of the respondent’s application was given on 28th September, 1950, and that of the 1st appellant’s father was given on 1st February 1962, but the case was not fought on who got approval first. In the circumstances, I resolve this issue in favour of the appellants.

Issue 4 asks the question whether the Court of Appeal (majority decision) was right in saying that Omoruyi Omo ought to be called as a witness. It was while D.W. 2, Joseph Omo Osadolor, was giving evidence about the application to Oba Akenzua II for plot approval through Ward 10 E that the name Omoruyi Omo was mentioned, as the person who was instructed by the Ward 10 E Committee to inspect the plot concerned so as to confirm that there was no dispute on it before being recommended to the Oba for approval. D.W.2 testified that the said Omoruyi Omo confirmed that there was no dispute on the plot applied for. This was in respect of Exhibit 'R1' which was approved by the Oba on 1st February 1962. What the Court of Appeal was saying was that if Omoruyi Omo was called as a witness or any person who visited the plot before the approval and confirms that there was no dispute on the plot concerned, it would have given stronger credit to the claim that Uwague Ehanire transferred the land to the applicant, Okhwarobo Egharevba. But as it stood like this, and in view of the evidence adduced in favour of the respondent, Exhibit 'R' has no evidential weight or value. I will also agree with the Court of Appeal on this. For this reasons, I answer this issue in the affirmative.

In sum, I agree with the majority decision of the Court of Appeal and find that the learned trial judge was wrong when he refused to grant the respondent's claim for declaration of title to the land in dispute on the preponderance of the evidence adduced at the trial. Accordingly, I dismiss this appeal in its entirety and uphold the decision of the majority decision of the Court of Appeal, Akintan and Akpabio JJCA. I award the respondent the costs of N10,000.00 against the appellants.

AYOOLA JSC

The appellants in this appeal who for convenience, are referred to as 'the defendants' in this judgment were the 1st, 2nd and 3rd defendants (including the successor of the original 1st defendant, now deceased) in the High Court of Edo State (then Bendel State of Nigeria) in a suit instituted against them by the original plaintiff (now dead but referred to as 'the plaintiff' in this judgment), who was succeeded by the present respondent, his surviving eldest son. The

plaintiff claimed a declaration that he was entitled to a statutory right of occupancy to 'all that house, land and premises situate at and generally known as No. 192, 2nd East Circular Road, in Ward 'E' Council otherwise known as Ward 10 'E' in Oredo Local Government Area, damages for trespass on the said house and premises on or about the 16th day of January 1978, and injunction.

The plaintiff at the time of the suit was about 80 years old and partially blind. The 1st and 4th defendants were, respectively, his grandson and grand-daughter, their father being one Okhwarobo Egharaevba (deceased) who was the plaintiff's eldest son. The plaintiff's case was that one Uwague Ehanire ("Ehanire") was the owner of 190, 2nd East Circular Road, Benin City, and that about 1909 he was house boy to Ehanire who died in the early 1950s. In appreciation of the services the plaintiff rendered to the said Ehanire, the latter excised a portion of his piece of land measuring 55 x 100 feet and gave it to the plaintiff in 1950.

The plaintiff then went into possession of the land and started up-rooting the trees and shrubs thereon without any let or hindrance. Earlier, in 1945, Ehanire himself had applied to the Oba of Benin for a parcel of land of which the land now in dispute was part and the Oba approved the application on 19th September 1945. For his part, the plaintiff on or about 1st April, 1950 applied to the Native Authority through the Ward E. Council for approval of his name in respect of the land and for demarcation of and planting of concrete pillars on the land. At the request of the Native Authorities he paid N4 for the purpose of the survey. Since 1950 the plaintiff had been in possession of the land, had lived there with his children and had paid water rate in respect of the premises. In 1951 he obtained necessary approval for him to build on the land and he built a house on the land.

This dispute started because sometime in 1976 the plaintiff's tenants showed him letters claimed to have been written by the 1st defendant, whose father had died in 1964 without owning house, claiming that the house had been transferred to him, and another letter claiming that he had transferred the house to the 2nd defendant. The 2nd defendant by his solicitor gave notice to quit to the plaintiff's tenant and sometime in January 1978 the 3rd defendant came with workmen to remove the roof, windows and doors of the house.

The 1st and 2nd defendants filed a defence and counter-claimed. Their case as well as that of the 3rd defendant was that Ehanire on 14th March, 1950 transferred a portion of his land measuring 42 ft by 100 ft along second East Circular Road, Benin city to Okhwarobo Ehagarevba for a consideration of £19 and issued a receipt evidencing the transaction. The land so transferred was later known as No. 192, 2nd East Circular Road, Benin City. Soon after purchases the 1st defendant's father took possession of the land and built thereon after obtaining permission to dig a burrow pit to obtain mud for the building and remained there until 1964 when he died. The 1st and 2nd defendant counterclaimed for declaration of statutory right of occupancy of the land, damages for trespass and injunction.

Before he could testify in the suit the 1st defendant died. The 1st appellant in this appeal was substituted for him. After hearing the evidence, the trial judge, Oki, Chief Judge, gave judgment dismissing the plaintiff's claim for declaration and injunction and the defendant's counter-claim for trespass. He entered judgment for the plaintiff for trespass and awarded N9,000 against the 1st, 2nd and 3rd defendants as damages for trespass and entered judgment for the 1st and 2nd defendants on their counter-claim granting them the declaration they sought and ordering a perpetual injunction against the plaintiff, that is to say, against the successors of the plaintiff. The plaintiff appealed to the Court of Appeal which allowed their appeal, set aside the declaration granted to the 1st and 2nd defendants and the order of injunction against the plaintiff and granted the plaintiff declaration and injunction. The cross-appeal of the defendants against the award of damages for trespass was dismissed in its entirety. The defendants have now appealed to this court from that decision.

Aspects of the judgments that led to this appeal are now briefly stated, albeit without any effort at exhaustiveness. The learned trial Christ Judge early in his judgment and after reviewing the evidence adduced by the parties stated:

"Having examined the evidence with particular reference to the pleadings on both sides, I am of the view that neither side has given particularly satisfactory proof of their claims to title. Strange enough neither side called evidence from the common vendor or from his successor." (Emphasis mine)

With this initial comment, one would have expected that the claim and the counterclaim for declaration of statutory right of occupancy would have been dismissed. However, that was not to be. The Chief Judge proceeded to look for the evidence of which side was ‘slightly better’. It seems to me to be pure common sense, if not logic, that where evidence on both sides is unsatisfactory to prove a fact, that one of the two sets of unsatisfactory evidence is ‘slightly better’ will not make it satisfactory. The ‘slightly better’, or even for that matter ‘much better’ but unsatisfactory, evidence will still remain unsatisfactory to prove the fact. To reduce it to simple imagery, if two candidates have failed to meet the qualifying requirements for an office, that one is better than the other makes no difference, both will still remain unqualified. Had the learned Chief Judge reflected on the apparent illogicality of his approach, he would have declined to give judgment for the defendants on the claim for declaration of right to statutory right of occupancy and injunction, because, at the end of the day, he had left the question that made the evidence of the defendants unsatisfactory unanswered. As he himself put it; the 1st defendant who alleged that he derived title from his father failed to prove how the property devolved on him. The learned Chief Judge said:

“What is missing on the defendant’s side is evidence of how the property eventually devolved on 1st defendant who sold to the 2nd defendant”.

Up to the time he granted the declaration the learned Chief Judge did not seem to have returned to this point to look for, the missing link. It seems clear to me that the defect in the defendant’s case was such that could not have been cured by anything in the evidence before the learned Chief Judge. The defendants’ case was plainly irredeemably bad. This was the difference in the plaintiff’s case and the defendant’s case that created, in my view, an initial comparative strength in the plaintiff’s case, which in turn should evoke the need to take closer look at the plaintiff’s case; the reason why the Chief Judge declined to grant him the declaration he sought; and the correctness of the majority judgment of the Court of Appeal remedying the situation.

The main reason why the learned Chief Judge dismissed the plaintiff’s claim for the declaration he sought was because of an in-

consistency between his evidence under cross-examination and his pleadings as to how he acquired the land from Ehinare. In the latter he said he purchased it for £40 while in the former he said it was gift from Ehinare. It is true, as observed by the learned Chief Judge, when the plaintiff gave evidence in chief he did not say how he got the land from Ehinare. It was only for this reason that the Chief Judge dismissed the plaintiff's claim for declaration. B

On appeal to the Court of Appeal it was argued by counsel for the plaintiff that the learned Chief Judge should have ignored the evidence of sale which went to no issue. It does not seem that the court below disagreed with the view. Indeed, Akpabio, JCA, in his judgment said: C

"It is not our law however that every and any discrepancy between the pleadings of a party and his oral evidence in court must lead to the case being dismissed. Rather it is the law that any evidence not pleaded should be expunged from the sum total of a party's evidence. If the balance is still sufficient to sustain the claim, he should be given; but if the balance was insufficient to sustain the claim, then his claim should be dismissed." D

So, the question was whether the balance left was sufficient. E It was clear that the plaintiff relied not only on oral evidence to prove that the land was vested in him but also documents, which the Chief Judge himself described as 'useful'; and, possession, which the Chief Judge described as overwhelming, and which cannot be explained otherwise than that he acquired it lawfully from the original owner. F

The learned Chief Judge indeed acknowledged that:

"...plaintiff and his witnesses tendered various useful exhibit in support of title and possession as pleaded in his statement of claim." [Emphasis mine] G

It is because the learned Chief Judge did not appear to have evaluated, considered and given due value to these 'useful exhibits in support of title' and ascribe significance to possession which he found nor demonstrated a holistic evaluation of the evidence before him that the majority of the Court of Appeal felt unable to uphold his decision. Akintan JCA, who delivered the leading judgment of the court below with which Akpabio, JCA, agreed and from which Nsofor, JCA dissented, reevaluated the evidence. H

The court below considered the evidence of the main wit-

ness who gave evidence in support of the defendants' counterclaim, one Joseph Omo Osadolor, (DW.2). It is clear that the majority of the court did not think that the evidence of the witness amounted to much. Indeed, Akintan, JCA viewed the evidence of the witness with justifiable suspicion when he commented as follows:

B *"It is strange to note that the same Joseph Omo Osadolor (D.W.2) who was the principal witness for the defence at the trial, also told the court that he signed the application made by the 1st defendant's father Exhibit R as the Secretary to the B.P.A.C. Ward 10E and he was also the only witness on Exhibit Q, the receipt for the sale/transfer of the building in dispute to the 2nd defendant's application. He also claimed that he interpreted the contents of the document, Exhibit Q, to Stella Paul (nee Okhwarobo), 4th defendant, who also testified as D.W.4. The said Stella Paul . . . told the court... that the house and the land in dispute belonged to her grandfather, the plaintiff... She denied that Joseph Osadolor ever translated the content of Exhibit Q to her."*

But a more damaging comment on the defendants' case was that the transaction about which the witness testified and the documents tendered through him were not shown to relate to the land in dispute. Akintan, JCA, noted that although the witness said that the Allocation Committee sent one Omoruyi to inspect the land in respect to which the 1st defendant's father was said to have made an application and the said Omoruyi made a report. Omouruyi was not called to give evidence or to say that there was no house on the land. Besides, the 1st defendant's father application made to the Allocation Committee, Exhibit R, made no reference to Ehanire's plot but merely to a plot in 'new traces ward 10E, Benjin City for residential purposes'. Then, as regard exhibit R1 dated 14th January 1950 there was nothing to link it with the land in dispute.

With these weighty comments it is hardly surprising that at the end of the day the learned Justice held that *"it has not been proved that the land approved for the first defendant was the one in dispute in the present case"*; that even if that has been proved the plaintiff who had the Oba's approval earlier than the 1st defendant's father had a better title having regard to doctrine of priority under the Benin Customary law; and, that the judgment of the Chief Judge *"when he chose to prefer the evidence adduced by the defendants in*

support of their counterclaim for the declaration of title to the land in dispute as opposed to the evidence adduced by the plaintiff in support of his case for declaration of title to the same piece of land, is . . . preserve.”

The main criticism of the judgment of the Court of Appeal by learned counsel for the defendants, put in a nutshell, is that judgment should not have been given for the plaintiff on the claim for declarations and injunction because of absence of evidence as to how plaintiff acquired the land from Ehinare.

It was argued that the plaintiff who claimed a declaration must rely on the strength of his own case; that being bound by his pleadings, the plaintiff could not deviate from his case as pleaded; that a party seeking declaration of title to land who is unable to prove his root of title has thereby failed to prove his case; that the doctrine of priority should not have been introduced by the court below; that the judgment of the High Court was not perverse; and that it was wrong for the court below to have interfered with the findings of fact of the trial Chief Judge.

For the plaintiff it was argued that the majority decision of the court below was correct; and, that there was no deviation from the pleaded title as all that happened was that the plaintiff gave evidence under cross-examination that went to no issue and should be ignored. Reference was made to the application made by the plaintiff to the Native Authority (Exhibit L) in respect of the land wherein he stated as far back as 1st April 1950 that the land was ‘granted me by my brother Uwague Ehanire’, to the findings made by the trial judge as to possession by the plaintiff since 1950 and to the documentary evidence produced by the plaintiff. Learned counsel for the plaintiff justified the reevaluation of the evidence by the court below by reference to several issues on which the trial court failed to make findings.

This is a case in which the applicable principles are not at all controversial, It is profitable at the outset to set out the main principles which I think should guide the approach to this appeal and the bearing they have on this appeal. First, appeals to the Court of Appeal are by way of re-hearing. The appellant court should reconsider the materials before the trial judge and should not hesitate to overrule his decision even on facts where, after giving due regard to the advantage which the trial court has of seeing the witnesses, it is clear

the decision is wrong. Secondly, by virtue of section 146 of the Evidence Act, whenever the question of ownership of a thing is in issue, the person in possession is presumed to be owner of the thing. The burden of proving that he is not the owner is on the person who affirms that he is not the owner. Thirdly, the principle of law in *Kodilinye v. Odu* 2 WACA 337 that onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration and that such plaintiff must rely on the strength of his own case and not on the weakness of the defendant's case applies with equal force to a defendant who counter-claims for a declaration.

The court below was correct in reconsidering the materials before the trial Chief Judge. In regard to the receipt (Exhibit R1) relied on by the defendants, the Chief Judge failed to realize that the receipt was said to be signed by Uwague Eghareveba and not by Uwague Ehanire. On the same receipt the seller of the plot was stated to be Okhwarobo Eghareveba. None of the witnesses for the defendants participated in the making of exhibit R1 and so none of them spoke on it in order to explain these discrepancies.

The result is that the Chief Judge had before him a document which on its face appeared to be worthless to prove what it was intended to prove, namely that Ehanire sold the land to the 1st defendant's father in 1950. Besides, even assuming that the receipt was given by Ehanire, on this appeal there has been no challenge to the finding of the court below that a sale of land under native law and custom by Ehanire to the 1st defendant's father had not been proved.

There was also the question of the identity of the land referred to in the receipt exhibit R1 in relation to the land for which the application by the 1st defendant's father (Exhibit R) related. The former was said to be on 2nd East Circular Road while the latter referred to the 'new traces in Ward E/10. Akintan, JCA, commented thus:

"In the instant case, it has not been satisfactorily proved that the land approved for the 1st defendant's father was the one in dispute in the present case. The person who was sent by the Benin Land Allocation Committee who reported that there was no dispute on the land was not called as a witness. He would have been able to

clarify if the plaintiff's house was not on the land as at the time of his visit. No reason was given for not calling the man as a witness by the defence."

These, to my mind, were valid and I dare say with respect, very sensible comments in view of the finding of the trial Chief judge that the plaintiff had built on the land and occupied the house thereon since 1950. The obvious logic of the comments is that if the plot visited had been the plot on which the plaintiff had built, the person who went on inspection would have seen it and, if he had, he should have been called to recount the enquiries he made that enabled him to come to the conclusion that there was no dispute on the land. In the absence of all this, the possibility that he visited another land was there.

I think learned counsel for the defendants missed the point when he argued that there was no issue of the identity of the land in dispute. Even though the identity of the land in dispute was certain, the defendant still had to relate the evidence he relied on to that land. It needs to be said that where evidence of a witness is needed to prove a fact the burden is on the person who seeks to prove that fact to account for the absence of the witness. It is not for the court to speculate as to the reason for his absence. It was thus in order for the court below to comment on the unexplained absence of the man not called as witness by the defendants.

The learned Chief Judge made the following findings:

"Plaintiff on the other hand gave overwhelming evidence of possession over the years. First, although he lived in the village, he always lived in the house when he visited Benin City. Secondly, I accept his evidence that from the 1950s he let all his children who were attending school in Benin City to live in the house. He also allowed his grand children (including the 1st and 4th defendants) to live in the house. Thirdly, he had tenants who were living in the house and who paid rents through the 6th P.W. to his son Robert (7th P.W.). Fourthly, plaintiff had various documents relating to the house which show that he was in possession."

While these findings related directly to possession, it also cast grave doubt, to which the Chief Judge was indifferent, on the credibility of the defendants, particularly that of the main witness for the defendants who said that the 1st defendant's father's house was on

the land in 1961. What made the decision of the learned Chief Judge perverse is that although he found overwhelming evidence of possession by the plaintiff, he did not relate it to the rest of the evidence and draw the appropriate conclusions which would have exposed the utter improbability of the defendants' claim. There was, for instance, no evidence that Ehinare who died after all these acts of possession had begun on the land or his successor after him challenged the plaintiff. There was no evidence, either, that the 1st defendant's father at any time challenged the plaintiff over the land or laid claim to the land up to the time of this death in 1964.

Another aspect of the perversity of the judgment was the rather casual manner in which the learned Chief Judge came to a conclusion that the plaintiff should be restrained from going on the land after he himself had enumerated these several act of possession, and had held that the evidence adduced by the defence was unsatisfactory to prove title. It is not only when there is no evidence to support a decision that the decision can be held perverse. Absence of proper evaluation of evidence and failure to draw appropriate inference from them can also amount to perversity where the inference is so clear that no reasonable tribunal would fail to draw them, or where the inference drawn by the trial judge does not follow from the evidence or the conclusions that should reasonably follow from the findings of fact he made.

For my part, I do not attribute as much decisive significance as the Chief Judge did to the fact that, in cross-examination, the plaintiff had said that he bought the land whereas he had pleaded that it was a gift. Granted that there is a chain of authorities which support the proposition that a plaintiff who seeks declaration of title to land must establish that he acquired title to the land as pleaded by him, I am nevertheless of the opinion that cases should not be tried in a world of make belief. What is required in proof of title to land is not proof with mathematical exactitude. See *Onibudo v. Akibu* (1982) 13 NSCC 199, 206. There may be instances, and they are perhaps numerous, where the slightest departure from the pleadings will make a lot of difference or where much would depend on whether a party acquired title by gift or by sale. The extent to which these may matter should, in my view, depend on the circumstances of the case and the whole evidence taken together, not one in isolation of the other.

As far as I can see, whether the plaintiff had a gift of the land or whether he bought it should be of little moment when the question is, as in this case, whether the land vested in him for the purpose of declaring him entitled to a statutory right of occupancy against a person who cannot establish title at all. The facts found by the Chief Judge cannot be explained on any other reasonable hypothesis than the land was vested in the plaintiff as owner. To decide otherwise merely on the basis of an alleged inconsistency of the pleadings of the plaintiff with a statement he made under cross-examination, while ignoring a host of other convincing factual evidence and the benefit of a presumption of ownership which the law ascribed to possession is, in my respectful opinion, to descend to a level of abstraction which the law neither envisages nor encourages.

As far as the question of priority which the court below found and which has been subject to criticism by learned counsel for the defendants on this appeal is concerned, I do not think that from the view I take of the entire case anything should turn on priority. Counsel for the defendant presented an interesting argument which if correct defeats his own case. He argued thus in his brief of argument:

“Exhibit L was said to show that the Oba approved the application for the land on 28/9/50. It is beyond dispute that once the Oba validly approves an application for land in Benin, title passes to the applicant or grantee and the Oba ceases to have any more title. Exhibit C shows that title to the land passes to Uwangué Ehanire in 1945. Therefore Exhibit L which is a formal approval by the Oba could not have and did not vest title already vested in Uwangué Ehanire in the Plaintiff in respect of the land. Consequently, Exhibit L proves no title in Plaintiff.”

The question is: By the same token and on the same argument, assuming that Exhibit R which was put forward as approval of the Oba granted to the 1st defendant's father was in respect to the same land, does that approval vest any title in the 1st defendant's father? I am of the opinion that the argument of learned counsel missed the significance of the Oba's consent to a transfer of land in Benin. It is part of Benin customary land law recognized in *Arase v. Arase* (1981) 5 S.C. 33 that the owner's right of transfer of his interest in land in Benin is subject to the limitation that he must obtain the consent of the Oba. I venture to think that obtaining consent to a

transfer of an interest in Benin land completes the transfer of such interest. Besides it is evidence of the fact of existence of transaction to which consent is being obtained, for it is inconceivable that the Oba would be giving his consent to a transaction that never existed. So, even if Exhibit L in his case was not a document vesting title, it is evidence, in my view, that at some point in time before the consent was sought and obtained there was a transaction of transfer of interest in land between Ehinare and the plaintiff to which approval was sought and obtained.

Even if this were a case to be determined on the question of priority, I am of the opinion that the question of priority will not arise for determination in a case until both parties have first proved that they derive title from the same source and to the same land. Priority is between two possibly good titles and not between one good title and another which was initially a bad one. In this case, the question of priority does not arise because of the incurably bad state of the defendants' case in regard to the title they claimed as earlier pointed out by the Chief Judge.

From what I have said about the direction in which I think the law should grow in relation to proof of title to land; and, were the principles of law as they exist now less well settled, I would have been of the view that the plaintiff did prove his entitlement to the declaration he sought. After very anxious consideration and being a lonely voice in this regard I become hesitant to resist the contention that the court below should not have granted the declaration sought by the plaintiff. But, notwithstanding that concession, I feel no hesitation in holding that even if a declaration of right to a statutory right of occupancy is denied him by reason of inconsistency in his pleadings as regards acquisition of title as pleaded and his evidence, that cannot affect his entitlement to damages for trespass and injunction as against the defendants who have not been able to discharge the burden laid on them by section 146 of the Evidence Act of proving that he was not the owner or establish their own title to the land.

The opinion of the Chief Judge that the defendants have not shown how title devolved on the 1st defendant brings into play the principle of law in *Amakor v. Obiefuna* (1974) 9 NSCC 141. In that case this court, per Fatai-Williams, JSC as he then was, said at p. 145:

"It is trite law that trespass to land is actionable at the suit of

the person in possession of the land. That person can sue for trespass even if he is neither the owner nor privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong-doers except a person who could establish a better title. Therefore, anyone other than the true owner, who disturbs his possession of the land, can be sued in trespass and in such action, it is no answer to show... that the title to the land is in another person. To resist the plaintiff's claim, a defendant must show either that he is the one in actual possession or that he has a right to possession."

The law protects the plaintiff's right to undisturbed enjoyment by restraining a defendant found to be trespasser from disturbing such enjoyment. The defendants in this case cannot show better title themselves because, apart from the unsatisfactory nature of the evidence they adduced, they have not been able to trace their title to the 1st defendant's father even if it is held that he had title, and I do not so hold. To permit the defendant to rely on the title of the 1st defendant's father without tracing how such title devolved on the 1st defendant will amount to permitting a defence of ius tertii.

In sum, I come to the conclusion that, besides other defects in his judgment, the Chief Judge took a wrong turn in the case by looking for 'slightly better' evidence between two sets of evidence which he regarded as unsatisfactory to prove title failing to realize that the defendants as counter-claimants for declaration themselves had to succeed on the strength of their case; as a result of this, by failing to evaluate the evidence in support of the defendant's case as he should the evidence of a plaintiff seeking a declaration of title; by failing to give due effect to the presumption of ownership in favour of the plaintiff in regard to the burden of proof as it related to the plaintiff's case; and, having found that the defendants have failed to prove how title devolved on them, by not giving due effect to that finding both in regard to the plaintiff's claim and the counter-claim, by holding that the defendants had not satisfactorily rebutted the former nor proved the latter. The intervention of the majority decision in Court of Appeal has put all these right to a large extent.

For all the reasons I have given, I agree that this appeal should be dismissed as regards the counter-claim. And, with considerable hesitation that it should be allowed in part as regards the plaintiff's

claim to the extent only that the judgment of the court below awarding a declaration to the plaintiff be set aside. Each should bear their respective costs of this appeal.

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