

**SUPREME COURT OF NIGERIA**  
FRIDAY 14TH JUNE, 2002. SC. 15/1998  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI,**  
**M. E. OGUNDARE, A. I. IGUH, E. O. AYOOLA, JJSC**

CHIEF ALIMONU AJUKWARA & 2 ORS ..... APPELLANTS  
AND  
SEBASTINE IZUOJI & 5 ORS ..... RESPONDENTS

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LAND LAW - Courts - Judicial precedents - Kojo v. Bonsie - Application of - Trial court properly applied the principle - And Court of Appeal erred in its criticism of same (H1)

LAND LAW - Title - Proof - Claimant can establish his title solely on traditional evidence - Which is among five ways of proving ownership of land (H2)

LAND LAW - Title - Conflicting evidence - Resolution - Since there were competing versions of traditional evidence - The principle in Kojo v. Bonsie is applicable (H3)

LAND LAW - Trespass - Determination - Claim for trespass is not dependent on claim for title - As relevant issue in trespass is whether plaintiff established possession - And whether defendant trespassed (H4)

LAND LAW - Injunction - Claim for - Sustainability of - Claim for injunction does not necessarily fail - After claim for title fails - Unless the land is not clearly defined (H5)

APPEALS - Land law - Evidence - Rejection of - Propriety - Court of Appeal was wrong to reject plaintiffs' traditional history - Without considering whether or not they were physically on the land (H6)

APPEALS - Land law - Courts - Findings of facts - Court of Appeal erred by dismissing the cross-appeal - And proper finding of trial court should be - That Owerre deforested the land in dispute (H7)

### **FACTS**

In the High Court of Imo State holden at Oguta, plaintiffs/appellants claimed inter alia against defendants/respondents as follows: - declaration of title to disputed pieces of land, N10,000.00 general damages for trespass and perpetual injunction restraining respondents and their agents from committing further acts of trespass on the land. At the trial, PW1 & 2 testified on behalf of appellants to the fact that it was one Owerre (appellants' ancestor) who deforested the land. Appellants also gave further account of traditional histories in support of their case. Respondents gave their own version of traditional evidence to support their case. The court eventually held in favour of appellants but made a finding that the founder of the land was Anyaoha and not Owerre. Both parties were displeased. Hence, respondents filed main appeal at the Court of Appeal, Port Harcourt Division, while appellants cross-appealed against the said finding of the High Court. In a unanimous judgment, the court allowed respondents' appeal and set aside judgment of the High Court. The court also dismissed appellants' cross-appeal. Aggrieved, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"i. Whether the Court below was right when it held that the trial Court misapplied the Rule in KOJO V. BONISIE (1957) 1 W.L.R. 1223.*

*(ii) Whether the Court below could rely on the alleged misapplication of the rule in KOJO v. BONISIE (supra), to deny the appellants (plaintiffs) success even on their claim for trespass.*

*(iii) Whether the Court below was right when it dismissed the entirety of the claims of the Plaintiffs simply because it rejected the traditional history put forward by the plaintiffs.*

*(iv) Whether the Court below was right when it dismissed the Cross-Appeal."*

**HELD** (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)

*Courts - Judicial precedents - Kojo v. Bonsie - Principle - Application of*

**1. In short the learned trial judge was in order at the stage he applied the rule or principle in KOJO v. BONSIE (supra) and he was properly guided. The Court of Appeal was therefore clearly in error when it held as above that the trial Court appeared to have “walked the principle in KOJO v. BONSIE (supra) on its head.” That criticism is not borne out by the record. I have examined the record myself and the opinion I form is that the learned trial judge properly applied the principle stated in KOJO v. BONSIE to the instant case and made his numerous findings of fact in favour of the plaintiffs including numerous acts of possession and ownership enumerated in the judgment.**

**The Court of Appeal was therefore clearly in error when it held that the trial Court misapplied the rule or principle in KOJO v. BONSIE (supra), and thereafter proceeded to dismiss plaintiffs’ claims.** (pp. 1723 F/1724 B)

*LAND LAW - Title - Proof*

**2. As for the law involved, it is now settled that there are five ways in which ownership of land may be proved which include proof by traditional evidence as has been done in the case in hand. Both parties in this case pleaded and relied on traditional history as their root of title and there is no doubt that a claimant can establish his title solely on the basis of traditional evidence.** (p. 1723 H)

*LAND LAW - Title - Conflicting evidence - Resolution*

**3. And since there were competing versions of the traditional evidence led in the case, the principle laid down in KOJO v. BONSIE (supra) which is simply that the trial judge should evaluate the competing versions of the traditional evidence led and test the veracity thereof by reference to recent facts and see which is more probable was applicable.** (p. 1724 A)

*Trespass - Determination*

**4. The claim for trespass is certainly not dependent on the claim for a declaration of title as the issue to be determined on the claim for trespass was whether the plaintiffs had**

**established their actual possession of the land and whether the Defendants trespassed on it.** (p. 1724 E)

*LAND LAW - Injunction - Claim for - Sustainability of*

**5. A claim for injunction too is not necessarily to fail after a claim for a declaration of title fails unless the land in respect of which an injunction is sought is not clearly defined or ascertained.** (p. 1724 F)

*Land law - Evidence - Rejection of - Propriety*

**6. The Court of Appeal was therefore wrong when it simply rejected Plaintiffs' traditional history and dismissed their claims in their entirety without considering whether or not the plaintiffs were physically on the land. The issues are accordingly resolved in favour of the plaintiffs.** (p. 1724 G)

*Land law - Courts - Findings of facts*

**7. I think the Court of Appeal was clearly in error here again. Having properly come to the conclusion in the passage above that the learned trial judge could not justify his finding that Anyaoha deforested the land, the cross-appeal ought to have been allowed, "gaps and mysterious nexus" notwithstanding. The issue is about the founder or deforester not about "gaps" and mysterious nexus" which occurred down the line. The issue was simply one of fact.**

**From the foregoing it is clear that the plaintiffs pleaded OWERRE as their forbearer and progenitor and acknowledged him as the person who deforested the land in dispute. There is no doubt that P.W.1 in his evidence in chief mentioned "Anyaoha" as the person who deforested the land but while under cross-examination, he recollected and said it was Owerre who deforested the land. Clearly under the law, reference to 'Anyaoha' by P.W.1 which was not pleaded went to no issue and ought to have been ignored. The evidence of P.W.2 left nobody in doubt that it was Owerre who deforested the land in dispute. My conclusion therefore is that the Court of Appeal was wrong to have dismissed the Cross-Appeal. Issue (4) must therefore be resolved in favour of the plaintiffs.**

***The proper finding which the trial High Court ought to have made, is that the land in dispute was founded and deforested by Owerre and this shall be the finding of the trial High Court.***  
(pp. 1725 E/1726 E)

## NOTABLE POINT OF INTEREST

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### **OGUNDARE JSC**

#### ***1. Trespasser can maintain an action for trespass against anyone except the true owner***

The law is settled that a trespasser on land can maintain an action for trespass against anyone, except the true owner, who interferes with his possession. It follows that the court below was in error to dismiss the claims of the plaintiffs in trespass and injunction. (p. 1727 G)

### **REPRESENTATION**

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Chief Mike Ozekhome with Nwagu Uche, Esiofoloh Marcel and N. H. Chidi for Plaintiffs/Appellants  
L. O. Onumajulu for Defendants/Respondents

### **CASES REFERRED TO**

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Kojo v. Bonsie (1957) 1 WLR 1223  
Kareem v. Ogunde (1972) All NLR 75  
Oluwi v. Eniola (1967) NMLR 339  
Emegokwe v. Okadigbo (1973) 4 SC 113

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### **LEAD JUDGMENT BY KUTIGI JSC**

In the High Court of Imo State, holden at Oguta the Plaintiffs in paragraph 15 of their Further Amended Statement of Claim, claimed against the Defendants jointly and severally as follows-

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“(a.) Declaration that the Plaintiffs are entitled to the Customary Right of Occupancy to pieces or parcels of land known as and called “OKWU OVURUEGBU,” “OKWUNKPURUNKWU,” “OKWU ADU,” “OKWU OGWUGWU,” “OKU NWAOKWU KWOFE” and “OKWUNWAOKWOTU.”

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(b.) N10,000.00 (Ten Thousand Naira) being general damages for trespass.

(c.) Perpetual injunction restraining the Defendants, their

*servants or land agents from entering the said pieces of land.”*

After the filing and exchange of pleadings the case proceeded to trial.

At the trial nine witnesses testified for the Plaintiffs while five witnesses testified for the Defendants.

B The Plaintiffs’ case is that the land in dispute is a vast area of land comprising six (6) contiguous pieces or parcels of land of different names as stated above and which is verged pink in their Plan, Exhibit ‘A’. That the land in dispute has been theirs from time immemorial. It was deforested by their ancestor called OWERRE who C farmed on the land until his death, and that after his death it was inherited by his two sons Dioha and Azuokwu. Both used the land, and after their death it passed through successive heads of their family to the present generation of their family. The family farmed on the D land and built farm houses thereon. The family also established juju shrines and planted economic and fruit trees on the land.

The Defendants on the other hand said the land in dispute is only part of the larger parcel of land known and called “ORU ELUA UMUOPARA” verged green in their plan, Exhibit “C”. They said the E land was deforested by one ULILI their ancestor. At the death of Ulili the land devolved to his only son called Opara and thereafter to Opara’s four sons. The Defendants maintain that members of their family have been in possession of the land as owners from time F immemorial and making use of same without anyone challenging them.

At the end of the trial and after addresses by counsel on both sides, the learned trial judge in a reserved judgment found for the Plaintiffs awarding them the declaration of title, N2,000.00 being G general damages for trespass and an order of perpetual injunction.

Aggrieved by the decision of the trial High Court, the Defendants appealed to the Court of Appeal holden at Port-Harcourt. The Plaintiffs also cross-appealed to the Court of Appeal in respect of the finding by the learned trial judge to the effect that the founder of the H land in dispute was ANYAOHA instead of OWERRE. The Court of Appeal in a unanimous judgment allowed the defendants’ appeal. The judgment of the High Court was set aside and in its place an order dismissing Plaintiffs’ claims was substituted with N1,500.00 costs in the High Court and N2,500.00 costs in the Court of Appeal in

favour of the defendants. The plaintiffs' cross-appeal was also unanimously dismissed.

Dissatisfied with the judgment of the Court of Appeal, the Plaintiffs have now appealed to this Court. As provided by the Rules of Court the parties filed and exchanged briefs of argument.

The plaintiffs have in their brief of argument identified the following issues as arising for determination in the appeal-

*"i. Whether the Court below was right when it held that the trial Court misapplied the Rule in Kojo v. Bonsie (1957) 1 W.L.R. 1223.*

*ii. Whether the Court below could rely on the alleged misapplication of the rule in KOJO v. BONSIE (supra), to deny the appellants (plaintiffs) success even on their claim for trespass.*

*iii. Whether the Court below was right when it dismissed the entirety of the claims of the Plaintiffs simply because it rejected the traditional history put forward by the plaintiffs.*

*iv' Whether the Court below was right when it dismissed the Cross-Appeal."*

The issues will be treated one after another.

Issues (i)

This issue deals with the parties' traditional histories and the applicability or otherwise of the rule or principle in KOJO v. BONSIE (supra). The complaint is centered around the portion of the lead judgment of the Court of Appeal where it is stated on page 258 of the record thus -

*"Both parties pleaded boundary neighbours and acts of possession. They led evidence, and after the learned trial judge made effort to review it, he made the following findings and observations inter alia:*

*"I am satisfied that by virtue of the evidence of primary facts in their favour, the plaintiffs' account of the traditional evidence of the land in dispute is preferred and accepted as true - KOJO v. BONSIE (supra) refers.*

*I am satisfied that the land in dispute was deforested by plaintiffs' ancestor called Anyaoha from whom it passed to Odunze his son. From Odunze it passed to Chukwu Nwodo from whom it passed to Azuwuike his brother. From Azuwuike it passed to James Mgbelu the present head of plaintiffs' family."*

It seems to me I ought to comment briefly on the manner the learned trial judge reasoned towards applying the principle or test in KOJO v. BONSIE (1957) 1 W.L.R. 1223. He appeared to have first proceeded to consider what he called primary facts which I understand him to include facts in recent years regarding acts of possession and the evidence of some of the witnesses in respect of what they observed or knew personally, before adverting to the traditional histories by the parties to reach a conclusion that the plaintiffs' history was preferable.

I do not think that was the right approach to the evidence of traditional history. I must say with the greatest respect, that the learned trial judge appeared to have walked the principle in KOJO v. BONSIE (supra), as I understand it, on the head, for want of a better expression by me. I hope I shall not through inadequate explanation on my part, lead anyone to misunderstand my view of how the principle in that case is expected to work."

The question is - was the Court of Appeal right in its observation above? I have carefully examined the judgment of the learned trial judge myself. The judgment is to be found on pages 117 - 146 of the record. What I have been able to find out going through the judgment from page to page is that pages 117 to 122 are devoted to summarizing the cases put forward by the parties as they arose from their pleadings. And on page 123 the learned trial judge said -

*"What issues arise from these pleadings? Now from the traditional history pleaded by the plaintiffs, they have been the owners in possession of the portions of land in dispute from time immemorial. It has been their farmland used in their entire family. Apart from farming, they said they planted economic and fruit trees which they harvested. They also built farm houses there."*

*The Defendants denied the traditional history as given by plaintiffs. On their own part, they also claim to be owners in possession farming exercising all manners of acts of ownership over the land from time immemorial. There is therefore a fundamental conflict. First major issue. Whose traditional history is to be preferred - plaintiffs or Defendants?"*

On pages 123 to 126 problems associated with traditional histories were narrated and a number of cases were cited by the court including KOJO v. BONSIE (supra). Again he had this to say on



page 126 -

*“Let me re-emphasize that the evidence I will now look at is the evidence of recent acts of ownership and possession as pleaded by the parties and which I have referred to above. As I pointed out both sides made claims to recent acts of ownership and possession.”*

Addresses of Counsel were then summarized on pages 134<sup>B</sup> & 135 of the record. The learned trial judge thereafter proceeded to critically examine the entire evidence led before him and made his findings as he proceeded along, till the end of the judgment on page 146. Indeed he began his critical examination of the evidence and making findings thereon from page 135 of the record where he said<sup>C</sup>

*“Indeed, a very convenient point to start a critical examination of the evidence before me in this respect of the case are the plans Exhibits ‘A’ and ‘B’.”*

In fact the finding of the learned trial judge which the court of Appeal complained above was made on page 144 of the record before the judgment ended on page 146. On page 144 he held thus<sup>D</sup>

*“I am satisfied that the plaintiffs proved the boundaries of the land in dispute as shown in their Plan Exhibit ‘A.’ I find as a fact that the boundary between Plaintiffs and Defendants is the Umuopara road as shown in Plaintiffs’ plan Exhibit ‘A.’ I am satisfied that by virtue of the evidence of primary facts in their favour, the plaintiffs’ account of the traditional evidence of the land in dispute is preferred and accepted as true - KOJO v. BONSIE (supra).”*

***In short the learned trial judge was in order at the stage he applied the rule or principle in KOJO v. BONSIE (supra) and he was properly guided. The Court of Appeal was therefore clearly in error when it held as above that the trial Court appeared to have “walked the principle in KOJO v. BONSIE (supra) on its head.” That criticism is not borne out by the record.***

***As for the law involved, it is now settled that there are five ways in which ownership of land may be proved which include proof by traditional evidence as has been done in the case in hand. See IDUNDUN & ORS v. OKUMAGBA (1976) 9 & 10. Both parties in this case pleaded and relied on traditional***

*history as their root of title and there is no doubt that a claimant can establish his title solely on the basis of traditional evidence. And since there were competing versions of the traditional evidence led in the case, the principle laid down in KOJO v. BONSIE (supra) which is simply that the trial judge should*  
 B *evaluate the competing versions of the traditional evidence led and test the veracity thereof by reference to recent facts and see which is more probable was applicable.*

*I have examined the record myself and the opinion I form*  
 C *is that the learned trial judge properly applied the principle stated in KOJO v. BONSIE to the instant case and made his numerous findings of fact in favour of the plaintiffs including numerous acts of possession and ownership enumerated in the judgment.*

D *The Court of Appeal was therefore clearly in error when it held that the trial Court misapplied the rule or principle in KOJO v. BONSIE (supra), and thereafter proceeded to dismiss plaintiffs' claims.* Issue (i) therefore succeeds. I resolve it in favour of the plaintiffs.

E Issues (ii) & (iii)

Having resolved issue (i) in favour of the plaintiffs, issues (ii) & (iii) must be answered in the negative the reason being that the rule in KOJO v. BONSIE (supra) was not misapplied by the learned trial judge as held by the Court of Appeal. *The claim for trespass is*  
 F *certainly not dependent on the claim for a declaration of title as the issue to be determined on the claim for trespass was whether the plaintiffs had established their actual possession of the land and whether the Defendants trespassed on it. A*  
 G *claim for injunction too is not necessarily to fail after a claim for a declaration of title fails unless the land in respect of which an injunction is sought is not clearly defined or ascertained.*  
 See for example KAREEM v. OGUNDE (1972) A.N.L.R. 75, OLUWI v. ENIOLA (1967) NMLR 339. *The Court of Appeal was therefore*  
 H *wrong when it simply rejected Plaintiffs' traditional history and dismissed their claims in their entirety without considering whether or not the plaintiffs were physically on the land. The issues are accordingly resolved in favour of the plaintiffs.*

Issue (iv)

This issue arises from the finding by the learned trial judge where he held (erroneously I believe) on page 144 of the record thus -

*“I am satisfied that the land in dispute was deforested by plaintiffs’ ancestor ANYAOHA from whom it passed to Odunze his son. From Odunze it passed to Chukwu Nwodu from whom it passed to Azuwuike it passed to James Mgbelu the present head of Plaintiffs’ family.”* <sup>B</sup>

The plaintiffs contended at the Court of Appeal that the learned trial judge was wrong when he held that the land in dispute was deforested by the plaintiffs’ ancestor called ANYAOHA instead of OWERRE as pleaded by them and attested to by their witnesses. <sup>C</sup>

The Court of Appeal in its lead judgment on page 267 of the record stated as follows -

*“I have shown the state of the pleadings and the evidence in D question. It is true that the learned trial judge could not justify his finding that Anyaoha deforested the land. But that was not the only error arising from the evidence as against the pleadings. There were gaps and mysterious nexus in the line of succession which made the history incurably defective. I therefore dismiss the cross-appeal as E lacking in merit.”*

***I think the Court of Appeal was clearly in error here again. Having properly come to the conclusion in the passage above that the learned trial judge could not justify his finding F that Anyaoha deforested the land, the cross-appeal ought to have been allowed, “gaps and mysterious nexus” notwithstanding. The issue is about the founder or deforester not about “gaps” and “mysterious nexus” which occurred down the line. The issue was simply one of fact.*** <sup>G</sup>

The plaintiffs had pleaded in their Further Amended Statement of Claim in paragraphs 4 & 4(a) as follows -

*“4. The plaintiffs from time immemorial and from time of their forefathers have been on this land and entitled to the Customary H Right of Occupancy over the land in dispute. The plaintiffs descend from Owerre a common ancestor who first founded and deforested the land in dispute and to whom it originally belonged, hence their name - Umuowerre. Owerre had two male children namely Dioha and Azuokwu both begotten by two different wives of Owerre. From*

tradition, the two family branches produced male heads who jointly managed and superintended the land of the plaintiffs in quick succession. Normally the eldest is mentioned but in fact what happened is that the eldest is assisted by the second eldest. Thus in the present circumstance the 1st plaintiff is second in command to James B Gbelu who is now sick, too old and inactive, just as Chukwu Nwodu assisted Odunze over 50 years ago and was to take over on his death.

4(a) According to the tradition of the plaintiffs, Dioha and Azuokwu inherited the land from their father Owerre and used it in common. Odunze succeeded Dioha and Azuokwu and took over the land in dispute upon their death. When Odunze died, he was succeeded by Chukwu Nwodu. Upon the death of Chukwu Nwodu Azuike took over the land. Mgbelu succeeded Azuike, Elijah succeeded Mgbelu, Ifuru Orji succeeded Elijah and now upon the death of Ifuru D Orji James Mgbelu with the 1st plaintiff Chief Alimonu Ajukwara being assisted by the 2nd and 3rd plaintiffs in this case. At all material times during the planting seasons, the plaintiffs as heads partitioned the land in dispute to members of their Umuowerre kindred for farming and enjoyed the economic trees therein in common.”

E **From the foregoing it is clear that the plaintiffs pleaded OWERRE as their forebearer and progenitor and acknowledged him as the person who deforested the land in dispute. There is no doubt that P.W.1 in his evidence in chief mentioned “Anyaoaha” as the person who deforested the land**  
 F **but while under cross-examination, he recollected and said it was Owerre who deforested the land. Clearly under the law, reference to ‘Anyaoaha’ by P.W.1 which was not pleaded went to no issue and ought to have been ignored.** See for example  
 G **EMEGOKWE v. OKADIGBO (1973) 4 S.C. 113. The evidence of P.W.2 left nobody in doubt that it was Owerre who deforested the land in dispute. My conclusion therefore is that the Court of Appeal was wrong to have dismissed the Cross-Appeal. Issue (4) must therefore be resolved in favour of the plaintiffs.**  
 H **The proper finding which the trial High Court ought to have made, is that the land in dispute was founded and deforested by Owerre and this shall be the finding of the trial High Court.**

All the issues having been resolved in favour of the plaintiffs, the appeal succeeds and it is hereby allowed.

The judgment of the Court of Appeal is set aside while that delivered by the trial High Court dated the 17th day of February 1994 is restored with costs assessed at N2,000.00 in the High Court, N3,000.00 in the Court of Appeal, and N10,000.00 in this Court.

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**BELGORE JSC**

I agree with my learned brother Kutigi JSC that this appeal and Cross-appeal must be dismissed. Retrial ordered by Court of Appeal is affirmed. I make the same order as to costs.

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**OGUNDARE JSC**

I agree with the judgment of my learned brother Kutigi JSC just delivered. With profound respect to their Lordships of the court below, their approach to the case was clearly wrong. What would have proved fatal to the case of the plaintiffs was the evidence of PW1 wherein he testified that Anyaoha deforested the land in dispute, contrary to the pleadings that it was Owerre who deforested the land. But the witness corrected himself later in his evidence when he deposed that it was Owerre who first deforested the land. In the light of the totality of the evidence before him, the learned trial Judge was in error when he found that the land was deforested by Anyaoha. To this extent, the plaintiffs' cross-appeal to the Court below ought to have been allowed by that court.

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The trial court found possession to the land to be in the plaintiffs. This finding was not found to be wrong by the court below. And it was enough to sustain plaintiffs' claim for trespass and injunction. Thus, even if the court below were right in their conclusion that plaintiffs failed to prove their title to the land, that was not enough to dismiss their claim in trespass and injunction. It must be observed that that court did not find that the Defendants were the owners of the land. The law is settled that a trespasser on land can maintain an action for trespass against anyone, except the true owner, who interferes with his possession. It follows that the court below was in error to dismiss the claims of the plaintiffs in trespass and injunction.

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For the reasons given by my Lord Kutigi JSC, which reasons I adopt as mine, I too allow this appeal, set aside the judgment of the

court below and restore that of the trial High Court. I abide by the order for costs made by Kutigi JSC.

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***IGUH JSC***

B I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kutigi, JSC and I agree entirely with the reasoning and conclusions therein reached.

C Accordingly, this appeal succeeds and the same is hereby allowed. The judgment and orders of the Court Appeal are set aside and those of the trial High Court are hereby restored. I abide by the order for costs contained in the leading judgment.

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***AYOOLA JSC***

D I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kutigi, JSC. For the reasons he gives I too allow the appeal. I abide by all the consequential orders he makes and with the orders for costs.

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