

COURT OF APPEAL CALABAR DIVISION
FRIDAY 16TH JUNE, 2000. CA/E/183/98
CORAM:- D. O. EDOZIE, O. OPENE, S. O. EKPE, JJCA

1. ETIM OKOKON ITA
2. AKPANDEM OKOKON ITA APPELLANTS
AND
1. NKOYO EKPENYONG
2. EFFIONG EKPENYONG RESPONDENTS

LAND LAW - Title - Proof - Burden is on plaintiff to prove his case on preponderance of evidence - Or balance of probabilities (H1)

EVIDENCE - Evaluation - Matters relating to assessment of evidence - And consideration of veracity of testimony of witness - Are to be determined by trial court (H2)

EVIDENCE - Evaluation - Interference - Where trial court properly made findings of fact - Appellate court does not interfere - Save where such findings are perverse (H3)

DOCUMENTS - Improper admission - Fate - Where document has been improperly received in evidence - Trial and appellate court have powers - To expunge it from the record (H4)

FAIR HEARING - Actions - Procedure - Irregularity - Party cannot take advantage of irregularity - Which he acquiesced in and thereafter be heard - To complain on appeal (H5)

EVIDENCE - Cross examination - Purpose - Cross examination seeks to discredit a witness - And to water down the case of an adversary (H6)

EVIDENCE - Cross examination - Party - Document extracted from a party by his adversary during cross examination - Cannot be used against the party - If facts therein were not pleaded (H7)

PLEADINGS - Rules of - An essential rule of pleadings is that - Only material facts must be pleaded by parties - But not evidence (H8)

PLEADINGS - Binding nature of - Parties are bound by their pleadings - And any evidence which is at variance with pleadings - Ought to be expunged by court (H9)

DOCUMENTS - Rejection - Effect - Document which is rejected in evidence - Cannot subsequently be admitted - As it has no value (H10)

JUDGMENTS - Court - Signature - Every judgment of court shall be dated and signed by judge or magistrate - At the time of pronouncing the judgment (H11)

PLEADINGS - Amendment - Pleadings can be amended at any stage of proceedings - Save where inter alia - Such amendment is made mala fide - Or will cause unnecessary delay (H12)

PLEADINGS - Amendment - Fresh issue - After evidence has been concluded by parties - An amendment that introduces new defence - Will not be entertained by court (H13)

FACTS

By a writ of summons issued at the High Court of Cross-River State, Calabar plaintiffs/respondents claimed against defendants/appellants the following reliefs, inter alia - a declaration that the property known as No. 37 Goldie street, Calabar is the property of the Estate of their late mother Madam Umo Ekpo Edem Odo and an injunction restraining appellants from further meddling with the said estate.

On his part, appellants claimed that their father bought the disputed property and a receipt of purchase was issued thereto. However, appellants contended that the said receipt got missing during the Nigeria civil war. Appellants further stated that after the war, respondents wanted their (appellants') father to return the property. However, their father neither returned the property nor accepted the purchase money. In his judgment, the learned trial Chief Judge held in favour of respondents and concluded that appellants were unable

to prove a valid sale. Aggrieved, appellants filed appeal at the Court of Appeal Calabar Division.

ISSUES FOR DETERMINATION

“1 Whether from the totality of the evidence before the lower Court, the learned trial Judge was right in entering judgment for the respondents as per their writ of summons and statement of claim?.

2. Whether the admission of Exhibit 2 and the rejection in evidence of the original purchase agreement were right and if not, whether these acts are not prejudicial to the case of the appellant (sic)?.

3. Whether a valid judgment of a court can carry two different dates.

4. Whether the learned trial Judge was right in law in disallowing the application for amendment to plead the purchase agreement and the equitable defence of laches and acquiescence only to turn around in his judgment to say that the defences were not pleaded?”

HELD (Unanimously dismissing the appeal per EKPE JCA)

LAND LAW - Title - Proof

1. Of all the submissions made by both Counsel for the parties in their respective brief of argument on this issue, the two most important and decisive ones are the submissions on the burden of proof and on the evaluation of evidence before the learned trial Judge. I shall dispose of them one after the other. I take the submission on the burden of proof first. The general law is that in an action for declaration of title to land, the burden is on the plaintiff to prove his case on the preponderance of evidence or balance of probabilities. (p. 1807 A)

EVIDENCE - Evaluation

2. On the submissions regarding the evaluation of evidence and finding of fact by the learned trial judge, the law is so notorious that it does not require the citation of any authority. However, for avoidance of doubt it is settled law that matters relating to evaluation of facts, assessment of evidence and consideration of veracity in the testimony of witnesses are essentially and intrinsically questions of fact to be determined primarily by the Court of trial. (p. 1812 B)

EVIDENCE - Evaluation - Interference

3. Where a court of trial unquestionably evaluates the evidence and appraises the facts it is not the business of a Court of Appeal to substitute its own views for the views of the trial Court. A Court of
B Appeal can only interfere and does interfere where as a result of such exercise it is found that the findings of the trial Court are perverse resulting from drawing wrong conclusions from the accepted evidence or proved facts or due to wrong approach in the determination of
C these facts in a manner which these facts cannot and do not support, it would re-assess and evaluate the evidence in order to come out with a just decision even if it is different from that of the trial Court. (p. 1812 D)

DOCUMENTS - Improper admission - Fate

- D 4. It is trite law that when a matter or document has been improperly received in evidence both the trial Court and the appeal Court have powers to expunge it from their record and decide the case on the properly and legally admitted evidence. (p. 1815 G)

E Actions - Procedure - Irregularity

5. The irregularity was acquiesced in by the learned Counsel for the defendant/appellants who notwithstanding the irregularity, took part in the proceedings. A party cannot take advantage of an irregularity
F which he adopted or acquiesced in and thereafter be heard to complain on appeal. (p. 1816 D)

Cross-examination - Purpose

6. Now to the consideration of the submission on the wrongful admission of Exhibit 2 in evidence. The pertinent question is whether
G Exhibit 2 was wrongly admitted in evidence and if so, whether the wrongful admission affected the decision of the lower court. It is the law that the purpose of the use of cross-examination is to contradict, destroy or discredit a witness and to water down the case of an adversary. A party's case is made on his pleading and evidence in-chief
H and not necessarily in cross-examination. (p. 1816 F)

Cross-examination - Party

7. Again, it is a correct principle of law that a document or evidence extracted from a party by his adversary under or during cross-examination cannot be used against the party if the material fact relating to the evidence or the document was not pleaded by the party seeking to make use of it. Hence in such a case, an amendment of pleading is a necessary requirement in order to accord with the evidence or document though not pleaded, which was received or extracted under cross-examination before the evidence or document can be used. There is no doubt that Exhibit 2 was not pleaded. Having not been pleaded, it is inadmissible in evidence and the facts extracted from it go to no issue since parties are bound by their pleadings. (p. 1817 E)

PLEADINGS - Rules of

8. It is settled law that one of the essential rules of pleadings is that only material facts must be pleaded by the parties but not evidence. (p. 1820 B)

PLEADINGS - Binding nature of

9. It is also a rule of pleading that parties are bound by their pleadings and any evidence led by a party which is not pleaded or is at variance with such pleadings ought to be discounted and disregarded or even expunged by the court as going to no issue. (p. 1820 D)

DOCUMENTS - Rejection - Effect

10. Furthermore, the purchase agreement having been rejected and marked 'rejected' by the Court below, the application for leave to amend the statement of defence whereby the purchase agreement was then pleaded for the sole purpose of reintroducing it at the trial for admission in evidence seems to me to constitute an abuse of process of the court. It has been decided by this court that a document which is marked rejected when tendered in evidence cannot subsequently be tendered and admitted in evidence as an exhibit in the case. It cannot be made use of as it has no value. (p. 1821 D)

JUDGMENTS - Court - Signature

11. At the end of the Judgment at page 212 of the records, the learned trial Judge signed his name, denoted his designation and wrote the date of the judgment as '23/10/95'. There is a rule of practice that

every judgment of the court shall be dated and signed by the Judge or Magistrate at the time of pronouncing the judgment. This rule of practice is re-enforced by section 245 of the Criminal Procedure Law, Cap 32; Volume II, Laws of Cross River State, 1979, which provides as follows:

B ***“The Judge or Magistrate shall record his judgment in writing and every such judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the Judge or Magistrate at the time of pronouncing it.”***

C From the above provision, it follows without ado that to discover the date a judgment is pronounced or delivered one has to look at when it was signed and dated by the Judge or Magistrate who delivered it. In other words, where a Judgment carries two dates, the date on the judgment representing the date it was signed and dated is the actual
D and effective date to the judgment i.e. the date when the judgment was delivered; any other date on the judgment should be ignored as the date of the delivery. The judgment in this case was signed and dated on '23/10/95'. Therefore, I am satisfied that the learned trial
E Judge delivered the judgment on the 23rd of October, 1995 and not the 17th of October, 1995. (p. 1822 E)

PLEADINGS - Amendment

12. It is settled that amendment of pleadings can be made at any stage
F of the proceeding before judgment, but before granting an amendment of pleadings the courts are guided by certain well established principles which are replete in the decisions of the Supreme Court and the Court of Appeal. The guiding principles governing amendment of pleadings have been crystallized from decided cases to the effect that a court ought to refuse an application for amendment where:

- G (i) It is made mala fide
- (ii) It would cause unnecessary delay.
- (iii) It will in any way unfairly prejudice the opposite party.
- (iv) It is quite irrelevant, useless or immaterial.
- (v) It will entail injustice to the respondent.
- H (vi) By his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise.
- (vii) It would only and merely raise technical issues.

(p. 1824 B)

PLEADINGS - Amendment - Fresh issue

13. By the amendment of pleading sought, new defences of laches and acquiescence were being introduced by the defendants/appellants when the parties had closed their respective cases. It is a settled proposition of law that after evidence has been concluded by the parties, an amendment that will introduce new or fresh defences or issue will not be entertained by the court. (p. 1825 D)

NOTABLE POINT OF INTEREST

EKPE JCA

1. Evidence may be admitted provisionally for expeditious hearing

That procedure adopted by the learned trial Judge in ‘provisionally’ so to say, admitting Exhibit 2 in evidence pending argument on its admissibility during the address stage has been vehemently attacked by the appellants’ Counsel. I will say straightaway that even though such a procedure is not highly commendable in all cases; it should not be condemned outright. It can be used depending on the circumstances of each particular case especially where there is need for urgency and expeditious hearing and determination of a case. The important thing is that the trial court as in the instant case should eventually take argument from counsel for the parties on the admissibility of the document provisionally admitted in evidence and decide on it one way or the other before writing his judgment and making use of it in the judgment, if he decides that it is admissible. If on the other hand he decides that the document is not admissible in evidence, he has the power to expunge it from the record or disregard or ignore it in his judgment. (p. 1815 D)

REPRESENTATION

J. A. Dada, Esq., for the Appellants

Alex Umoh, Esq., for the Respondents

CASES REFERRED TO

Ajayi v. Fisher (1956) SCNLR 279

Sadhwani v. Sadhwani (Nig.) Ltd. (1989) 2 NWLR (Pt. 101) 72

- Owoyin v. Omotosho (1961) 2 SCNLR 57
 Chigbu v. Tonimas (Nig.) Ltd. (1999) 3 NWLR (Pt.593) 115
 Agbaje v. Adigun (1993) 1 NWLR (Pt.269) 261
 Nalsa & Team Associates v. NNPC (1991) 8 NWLR (Pt.212) 652
 Noibi v. Fikolati & Anor (1987) 3 SC 105
 B Onwumere v. Agwumedu (1987) 3 NWLR (Pt. 62) 673
 Emegokwe v. Okadigbo (1973) 4 SC 113
 Ganiyu Olanipekun v. I.G.P (1963) 2 ALL NLR 206
 Woluchem v. Gudi (1981) 5 SC 291 at 320
 C Ewarami v. African Continental Bank Ltd (1978) 4 SC 99
 Udechukwu v. Okwuka (1956) 1 F.S.C. 70
 Chigbu v Tonimas (Nig) Ltd (1999) 3 NWLR (Pt.593) 115
 A-G Anambra State v. Onuselogu Ltd (1987) 4 NWLR (Pt.66) 547

LEAD JUDGMENT BY EKPE JCA

D This is an appeal against the judgment of Hon. Justice Ecoma, Chief Judge of Cross River State, dated 23rd October, 1995 and delivered at the Calabar High Court in suit No. C/138/76.

In the writ of summons issued at the Calabar High Court and dated the 23rd day of September, 1976, the plaintiffs claimed
 E against the original defendant on record, Chief Okokon Ita Nyoki, now deceased the following reliefs:

“1. Declaration that the property known as No. 37 Goldie street, Calabar is the property of the Estate of late Madam Umo Ekpo
 F Edem Odo.

2. Recovery of possession of their mother, Madam Umo Ekpo Edem Odo’s property known as No.37 Goldie Street, Calabar now in the possession of the defendant.

3. An injunction to restrain the defendant by himself, by his agent or assigns from further meddling with the said estate.”

G Pleadings were ordered, filed and exchanged. While the suit was pending in the court the original defendant on record died and was by an order of the court pursuant to an application substituted by his children the present defendants on record.

H At the hearing the 1st plaintiff (Nkoyo Ekpenyong) testified as PW1 and tendered as Exhibit 1, the certified true copy of record of proceedings in the unconcluded earlier trial of the suit wherein the 1st plaintiff and two other witnesses namely, Bassey Edem Odo and

Ekpenyong Eyo had testified as PW1, PW2 and PW3 respectively for the plaintiffs. The plaintiffs closed their case.

The defence opened. For the defence, the 2nd defendant testified as DW1 and called two other witnesses as DW2 and DW3. Thereafter the defence case was closed. At the close of the case for the parties, Counsel on their behalf addressed the court. In a considered judgment, the learned trial Chief Judge concluded as follows: B

“It is therefore my view after considering the facts put forward by the plaintiffs that they are facts which would entitle them to succeed on the balance of probabilities. The defendants have failed to produce evidence to show that there was a valid sale. The plaintiffs have proved that the property in question belong to their late mother. Any purported sale of the said property by a 3rd party is void. On the recovery of possession, I think since the plaintiffs are entitled to possession, they are right to ask for possession from anyone under whom the property is in possession.” C

Consequently, the learned trial Judge entered judgment for the plaintiffs against the defendants in terms of the plaintiffs’ claims. Aggrieved by this judgment, the Defendants have appealed to this Court on six grounds of appeal. D

Let me at this stage set out the relevant facts of this case which gave rise to this appeal. The plaintiffs are the only surviving children of one late Madam Umo Ekpo Edem Odo who died in 1937. The 1st plaintiff was born on the 12th of February, 1928, while the 2nd plaintiff was born on the 30th of January, 1935. Two other children of the late Madam Umo Ekpo Odo had predeceased her. The late Madam Umo Ekpo Edem Odo was the undisputed owner of the property known as No. 37 Goldie Street, Calabar which was granted to her by the Queen Duke family to which she belonged. She built a mud and wattle house on the property and lived there with her husband and the plaintiffs until she died. At the time she died, the 1st plaintiff was nine years old while the 2nd plaintiff was only two years old. As at that time, the plaintiffs did not know that their late mother was the owner of the said property, No.37 Goldie Street, Calabar, now the subject-matter of the dispute in this suit. After the death of the plaintiffs’ mother, their father vacated No. 37 Goldie street, Calabar and took plaintiffs to Creek Town, Calabar where they stayed until the 1st plaintiff got married and went away to live with her husband E

at Awka in Ibo land taking away with her the 2nd plaintiff. On her return to Calabar from Awka before the Nigerian Civil war, her father took her to No.37 Goldie Street, Calabar, the disputed property, and told her that it belonged to her late mother. The deceased defendant on record was occupying the house at the time. The 1st plaintiff made
 B several efforts to recover the property from the deceased defendant on record including consulting a solicitor who wrote to the defendant to hand over the property to her, but she failed. She denied that her mother sold the property to anybody. She also denied that the
 C property was sold to defray any funeral expenses of her late mother's burial as alleged by the deceased defendant. According to the 1st plaintiff, the funeral of her late mother was arranged by her father and one Chief Bassey Edem Odo, a relation of her mother.

The Defendants' case on the other hand is that the late Madam Umo Ekpo, the mother of the plaintiffs, was sick and she
 D sent one Okon Edem Odo to their father, the deceased defendant on record, to buy the said property at No. 37 Goldie Street, Calabar in order to make money available for her burial upon her death and their father bought the property for ₦100. It was also their case that a receipt was issued to their father for the sale of the property but it
 E was lost during the Nigerian civil war. Then after the Nigerian civil war the plaintiffs wanted their father to return the property to them and collect back the ₦100 purchase price but their father refused. That their father had carried out renovation, built some rooms and
 F stores on the property, and so the plaintiffs are not entitled to the ownership of the property.

In accordance with the Rules of this Court, the parties through their respective counsel filed and exchanged briefs of argument. The Defendants now Appellants have identified four issues for the determination of the appeal, to wit:

G "1 Whether from the totality of the evidence before the lower Court, the learned trial Judge was right in entering judgment for the respondents as per their writ of summons and statement of claim?.

2. Whether the admission of Exhibit 2 and the rejection in evidence of the original purchase agreement were right and if not, whether these acts are not prejudicial to the case of the appellant
 H (sic)?.

3. Whether a valid judgment of a court can carry two different

dates.

4. Whether the learned trial Judge was right in law in disallowing the application for amendment to plead the purchase agreement and the equitable defence of laches and acquiescence only to turn around in his judgment to say that the defences were not pleaded?"

The plaintiffs now Respondents have on their part framed three issues for the determination of the appeal. They are: B

"(1) Whether from the totality of the evidence before the lower Court, the learned trial Judge was right in entering Judgment in favour of the respondents and if yes, whether the Appellants were prejudiced by the date on the Judgment?." C

(2) Whether the trial Judge was right in refusing to admit in evidence a document affecting land which was not pleaded and not registered?. And whether the admission of Exhibit 2 was prejudicial to the appellants' case? D

(3) Whether the trial Judge was right in refusing an amendment to the statement of defence to plead a document earlier rejected by the court, at the close of the case of both the plaintiffs and the defendants and after final addresses by both counsel?"

After considering the two sets of issues framed by the learned Counsel for the parties, I am of the view that the two sets of issues are similar notwithstanding how they are numbered. I shall however prefer to treat the issues in the Appellants' brief of argument for the disposal of this appeal. E

On Issue No.1, the learned Counsel for the Appellants has argued that the learned trial Judge did not advert his mind to the fact that the legal burden of proof in this case lies on the Respondents. He submitted that, it is elementary though fundamental principle that in civil cases, subject to well established exceptional cases, the burden of proof lies on the plaintiff/respondents but they woefully failed to discharge this burden and yet judgment was awarded in their favour. He referred to sections 135, 136 and 137 of the Evidence Act 1990, and *Obijiaku v. Offia* (1995) 7 SCNJ 142 at 153, (1995) 7 NWLR (Pt. 409) 510 and other cases. The second point made by the learned Counsel for the Appellants on this issue is in respect of the evaluation of evidence by the learned trial Judge whose findings of fact, learned Counsel contended, are inconsistent with the evidence before him. It was submitted by the learned Counsel that although F
G
H

an appellate Court will not readily disturb the finding of facts by a trial judge, however, in appropriate cases, such as in this case, this Court can do so. He cited *Nwaobi v. Ihebie* (1990) 2 NWLR (Pt. 134) 589; *Nwobosi v. A.C.B. Ltd.* (1995) 6 NWLR (Pt.404) 658 at 678; *Ogunsanya v. Ogunsanya* (1995) 6 NWLR (Pt.404) 704. He
B therefore urged this Court to set aside the findings of the learned trial Judge as being inconsistent with the evidence before the trial Judge.

The learned Counsel for the Respondents in his reply urged the Court to uphold the findings of the learned trial Judge as such
C findings are clearly supported and based on the evidence before the lower Court. On the burden of proof, he submitted that the Appellants having admitted in their pleading that ownership of the land in dispute originally vested in the mother of the Respondents, the onus of proof was on the Appellants to show conclusively that title had been shifted to the Appellants and referred to *Onobuchere*
D *v. Esegine* (1986) 1 NWLR (Pt.19) 799 at page 806. The learned Counsel contended that the Appellants clearly failed to discharge this burden of proof on them, and so the learned trial Judge was right in his judgment in holding that “if the house was so sold with the consent of the plaintiffs’ (respondent) mother, then there should
E have been evidence to support the said consent.”

Of all the submissions made by both Counsel for the parties in their respective brief of argument on this issue, the two most important and decisive ones are the submissions on the burden of proof
F and on the evaluation of evidence before the learned trial Judge. I shall dispose of them one after the other. I take the submission on the burden of proof first. The general law is that in an action for declaration of title to land, the burden is on the plaintiff to prove his case on the preponderance of evidence or balance of probabilities. See *Kodilinye v. Mbanefo Odu* (1935) 2 WACA 336 at page 337; *Mogaji & Ors v. Odofoin & Ors* (1978) 4 SC 91; *Bello v. Eweka* (1981)1 SC
G 101 at pages 117 to 120. However, it is not an inflexible rule or law that onus of proof should always be on the plaintiff. It could be on the defendant depending on the state of the pleadings.

Now in order to determine on whom the onus of proof lies
H in the instant case, I shall reproduce the relevant paragraphs of the pleadings of the parties. In the statement of claim, the plaintiffs/respondents pleaded in paragraphs 1, 3, 4, 5, 7, 8, 9 and 11 as

follows:-

“1. The plaintiffs are the only surviving children of the late Madam Umo Ekpo Edem Odo who died in 1937....

3. Madam Umo Ekpo Edem Odo was the owner of the property known as 37 Goldie Street, Calabar. She built the houses on the land granted to her by the Queen Duke family of which she was a member. B

4. The said No. 37 Goldie Street, Calabar is well known to the defendant.

5. Plaintiffs lived with their mother as young children on the said property until she died in 1937 without any knowledge by the plaintiffs as young children as to the ownership of the house. C

7. Plaintiffs made inquiries and discovered that the property is now in possession of the defendant. This was shortly before the last civil war in the country. D

8. The plaintiffs went with some elders notably Chief Mborah Eteta and Madam Afiong Okon to the defendant after they had made several fruitless efforts to regain possession of the property. Defendant refused to give back the property to the plaintiffs.

9. In desperation, the plaintiffs contacted a firm of solicitors Messrs Orok Ita Orok & Company who wrote to the defendant on the 4th August, 1976. On the 20th August 1976, the defendant replied that the house was sold to the defendant by one Okon Edem Odo with the knowledge and consent of the plaintiffs who were only nine years and 2 years old respectively. E F

11. That the funeral of the plaintiffs' late mother was arranged by the plaintiff's father and Chief Bassey Edem Odo who is still alive arranged by the plaintiffs' father and chief Bassey Edem Odo who is still alive amongst others. The house was not sold to defray any funeral expenses of the burial of the plaintiffs' late mother as alleged by the defendant.” G

In the statement of defence the defendants/appellants pleaded in paragraphs 2, 5, 6, 10, 11 and 13 thus:

“2. That the defendant admits that the plaintiffs are the only surviving children of Madam Umo Ekpo Edem Odo, but deny that the said person died in 1939. The defendant says that the mother of the defendant (sic) died in 1934. H

5. The defendant admits paragraph(s) 3 and 4 of statement

of claim.

6. The defendant admits as stated in paragraph 5 of the statement of claim that the plaintiffs lived at No. 37 Goldie Street, Calabar, with their mother but deny that they continued to live with her up to the time of her death.

B 10. The defendant denies that Chief Mbora Eteta and Madam Afiong Okon ever made any effort to regain possession of the property for the plaintiffs as stated in paragraph 8 of the statement of claim. He however admits that the plaintiffs came with the said persons to ask him to allow them to refund the purchase money the plaintiff C (sic) paid for the house and the cost of renovating and building an extension to the same but the plaintiff (sic) refused to entertain such plea.

D 11. The defendant admits receiving a letter from Orok Ita Orok & Company as stated in paragraph 9 and says that when the mother of the plaintiff was about to die, she sent for Edem Odo, the head to the plaintiffs' mother's family and Asuquo Edem Odo, a principal member of that family and asked them to arrange to sell the house to enable them bury her. Thereupon the defendant was sent for and, with the knowledge and consent of the mother of the E plaintiffs, the house at No. 39 (sic) Goldie Street, Calabar was sold to the defendant for the sum of ₦100 or N200.00. She collected the said amount with her own hands. The receipt was prepared by the said Okon Edem Odo, and the mother of the deceased appended her F thumbprint to the receipt which unfortunately was destroyed during the Nigerian civil war.

13. The defendant denies paragraph 11 of the statement of defence”.

G From the above pleadings of the parties, it is clear that the father of the present defendants/appellants admitted paragraphs 2, 3 and 4 of the statement of claim in his paragraphs 2 and 5 of the statement of defence to the effect that No. 37 Goldie Street, Calabar, the property in dispute belonged originally to late Madam Umo Ekpo Edem Odo, the mother of the plaintiffs/respondents. It is also clear that by paragraph 11 of the statement of defence the father of the H defendants/appellants further pleaded that the said property was sold to him with the knowledge and consent of the late Madam Umo Ekpo Edem Odo, the mother of the plaintiffs/respondents for the sum of

₦100 or N200.00.

Now, after a critical examination of the state of the pleadings of the parties, it is my considered view that the defendants/appellants having thus admitted in the statement of defence that the ownership of the property in dispute was originally in Madam Umo Ekpo Odo, the mother of the plaintiffs/ respondents, the onus was on them (the defendants/appellants) who were substituted in the suit for their late father, (the original defendant) to prove that the ownership or title to No. 37 Goldie Street, Calabar in Madam Umo Ekpo Edem Odo had been extinguished by the alleged sale pleaded in paragraph 11 of the statement of defence. In other words, having regard to the state of the pleadings by the parties in this case the burden of proof for the determination of the case shifted on the defendants/appellants to prove the alleged sale of the property in dispute to their father, if judgment was not to be given in favour of the plaintiffs/respondents on the admission by the defendants/appellants in the statement of defence that the property in dispute originally belonged to late Madam Umo Ekpo Edem Odo. There is a surfeit of authorities in this regard on the onus of proof. See: *Onyekaonwu v. Ekwubiri* (1966) 1 ALL NLR 32; *Sogunle & Ors v. Akerele & Ors* (1967) NMLR 58; *Ezeudu v. Obiagwu* (1986) 2 NWLR (Pt. 21) 208; *Onobruhere v. Esegine* (1986) 1 NWLR (Pt.19) 799; *Ochonma v. Unosi* (1965) NMLR 321. In *Bello Isiba & Ors v. J.T Hanson & Ors* (1967) 1 ALL NLR 8 it was held by the Supreme Court that it is an established rule that once it is proved or admitted by the defendants (as in the instant case) that the original ownership of the property in dispute is in a party, the burden of proving that that party had been divested of the ownership rests upon the other party. It is quite clear therefore that from the arguments advanced in the brief of argument of the defendants/ appellants, the defendants/appellants totally misapprehended and misconceived the position that the legal burden of proof had shifted to them to prove the alleged sale of the property having regard to the state of the pleadings.

The question therefore is whether the defendants/appellants had successfully discharged this onus of proof on them? The answer to this question will invariably lead to the issue of evaluation of evidence by the learned trial Judge. For this purpose, I shall reproduce the defence evidence before the court below. The 2nd defendant/

appellant testified at the trial as DW1. At page 151 of the record of proceedings he gave evidence at the court below thus:

“when my father received a letter from Nkese Orok Ita & Co., I asked questions and my father told me No. 37 Goldie is the property in dispute in this action. My father told me something about that property in connection with the case to acquire the property. He told me that the late Madam Umo Ekpo, the mother of the plaintiffs, Okon Edem Odo her brother and Asuquo Edem Odo also a brother to Madam Umo Ekpo sold the land to him. The thumb impression of the mother of the plaintiffs appeared on the document xxxxxxxx she was sick at that time. She then sent Okon Edem Odo to my father. My father appeared before these and the land was sold to him. He said the Madam wanted to sell the house since she was sick so that when she died the money could be used for her burial. He paid ₦100. The receipt was with my father. During the civil war he lost the receipt.”

Under cross examination, DW1 had this to say at page 155 of the record of proceedings:

“My father bought the house from the owner of the house, the plaintiffs’ mother. The brother to their mother Okon Edem Odo arranged for the sale. He had the consent of their mother to sell the house since she was not well. The house was sold in the thirties. There were many witnesses e.g. Mrs. Nkoyo Ita Nyoki. Others had died. The receipt is there. What my father told me is what I am telling the court. He told me he bought the land from the father of the woman when she was seriously ill and was about to die xxxxxx. I saw the receipt before the civil war. I did not understand everything in the receipt till this case came up. I did not go through the receipt so I did not take note of the cost price of the house. I did not go through the receipt thoroughly. I cannot remember the date of the sale of the house. I got the issue of ₦100 from what my father told me and what was said in court.”

The DW2 Mrs. Ita Nyoki was the mother of the defendants/appellants and widow of Okokon Ita Nyoki, the deceased defendant on record. In her evidence in-chief at the trial she had the following to say at page 157 of the record of proceedings:

“I came to live at No. 37 Goldie Street with my husband xxxxxxxx Mr. Odo Edem Odo and his son came once to my husband and told him they have a house to sell. This was a long time ago. My

husband bought the house. I do not know how much the house was sold. I know the plaintiffs'. She died long time ago. The house was sold before the death of the plaintiffs' mother. The plaintiffs' mother took part in the sale of the house. She was seriously sick."

Under cross-examination DW2 at page 160 of the record said thus: B

"Okon Edem Odo informed me that the sister was sick and they had something to sell. There were Okon Edem Odo, Umoh Edem Odo and Asuquo Edem Odo who were present when the sale was reduced to writing. I was present when the sale was reduced to writing and conducted. Okon Edem Odo had no such right to sell the property at No. 37 Goldie Street. I do not have a copy of the document but my husband had. I thumb-printed the document. This is the document. My husband showed it to me. I did not thumb-print the document." C D

The learned trial Chief Judge in his judgment critically in my view appraised and evaluated the evidence of DW1 and DW2 and came to the conclusion that their evidence was unreliable due to inconsistencies. He did not believe their evidence. He then stated at page 211 of the record as follows: E

"The defendants have failed to produce evidence to show that there was a valid sale."

This finding of the learned trial Judge is unassailable and I totally agree with him. Having so failed to prove the said sale, the logical conclusion is that No. 37 Goldie Street, Calabar, the property in dispute still belonged to and remained the property of late Madam Umo Ekpo Edem Odo, which the plaintiffs/respondents pleaded in their statement of claim and established by evidence. F

On the submissions regarding the evaluation of evidence G and finding of fact by the learned trial judge, the law is so notorious that it does not require the citation of any authority. However, for avoidance of doubt it is settled law that matters relating to evaluation of facts, assessment of evidence and consideration of veracity in the testimony of witnesses are essentially and intrinsically questions of fact H to be determined primarily by the Court of trial. See *Kisiedu & Ors v. Dompreh & Ors* (1935) 2 WACA 253; *Fatoyinbo v. Williams* (1956) SCNLR 274; (1956) 1 F.S.C. 87. Where a court of trial unquestionably evaluates the evidence and appraises the facts it is not the business

of a Court of Appeal to substitute its own views for the views of the trial Court. See *Akinloye & Anor v. Eyiola & Ors* (1968) NMLR 92. A Court of Appeal can only interfere and does interfere where as a result of such exercise it is found that the findings of the trial Court are perverse resulting from drawing wrong conclusions from the accepted evidence or proved facts or due to wrong approach in the determination of these facts in a manner which these facts cannot and do not support, it would re-assess and evaluate the evidence in order to come out with a just decision even if it is different from that of the trial Court. See *Fabumiyi & Ors v. Obaje & Ors* (1968) NMLR 242; *Salako & Ors v. Dosunmu* (1997) 7 SCNJ 278, (1997) 8 NWLR (Pt. 517) 371. In the instant case, I do not see any thing wrong with the appraisal and evaluation of the evidence and findings of fact by the learned trial Judge. As I have earlier said, the mistake of the defendants/appellants emanated really from their misapprehension or misconception on the burden of proof. This issue is therefore decided in favour of the plaintiffs/respondents’.

Issue No.2 is whether the admission of Exhibit 2 and the rejection in evidence of the original purchase agreement were proper, and if not whether the appellants were not prejudiced thereby. The first arm of Issue No.2 is about the wrongful admission of Exhibit 2 in evidence. It is the submission of the learned Counsel for the defendants/appellants that Exhibit 2 was inadmissible in evidence as it was not pleaded by the plaintiffs/respondents and section 209 of the Evidence Act 1990, under which application was made for its admission in evidence did not apply. Moreover, it is contended that the witness through whom Exhibit 2 was admitted in evidence was not the maker or custodian or address of the document, and besides the witness was an illiterate who did not execute the document. The Counsel further contended that the document (Exhibit 2) should not have been provisionally admitted in evidence for the time being by the learned trial Judge, subject to address by both counsel on its admissibility at the address stage of the case, as such a novel procedure does not exist. He urged that Exhibit 2 should be expunged from the record as it was improperly admitted in evidence contending that this Court has the power to expunge wrongly admitted evidence (1994) 9 NWLR (pt. 368) 347 and referred to *Inyang v. Eshiet* (1990) 5 NWLR (Pt.149) 178; *Akpan v. The State* (1994) 12 SCNJ 140 at 150, (1994)

9 NWLR (Pt.368) 347. The learned Counsel further contended that the admission of Exhibit 2 in evidence had a damaging and prejudicial effect on the case of the defendants/appellants as the judgment of the learned trial Judge was predicated on it as it weighed heavily in his mind even though the learned trial Judge stated that the judgment was not based on it. The learned Counsel urged the Court to hold that the wrongful admission of Exhibit 2 tilted the scales in favour of the Respondents. B

The second arm of issue No.2 is on the wrongful exclusion of the purchase agreement by the learned trial Judge. The learned Counsel for the defendants/appellants has contended that the learned trial Judge erred in rejecting the said document because it was not pleaded, while the same Judge had refused an application for amendment to plead the said document. He submitted that the law is that documents in support of facts pleaded need not be pleaded before the same are admissible in evidence. For this proposition of law, he referred to *Odunsi v. Bamgbala* (1995) 1 NWLR (Pt.374) 641 ratios 6 to 9. He further contended that the wrongful exclusion of the document is prejudicial to the defendants/appellants' case and this is enough to have the judgment reversed by this Court and cited *Gbafé v. Gbafé* (1996) 6 NWLR (Pt.455) 417; *Iwuno v. Dieli* (1990) 5 NWLR (pt.149) 126 and section 227 (2) of the Evidence Act, 1990. D E

In his response to the argument of the defendants/appellants' Counsel on the first arm of Issue No.2 that Exhibit 2 was wrongly admitted in evidence, the Counsel for the plaintiffs/respondents contended in his brief of argument that Exhibit 2 was properly tendered during cross-examination of DW2 and received in evidence for the sole purpose of challenging the credibility and veracity of DW2. He referred to page 16 on lines 11 to 16 of the records and cited *The Registered Trustees of the Apostolic Faith Mission & Anor v. Bassey Eyo James & Anor* (1987) 3 NWLR (Pt. 61) 556 at 566. He also relied on sections 104 and 123 of the Evidence Act 1990 in support of his argument. He contended that there was nothing wrong or prejudicial to the appellants' case with the procedure adopted by the trial Judge in admitting Exhibit 2 in evidence provisionally or for the time being, pending the address stage of the case when counsel on both sides should address the court as to its admissibility in evidence. Furthermore, the plaintiffs/respondents' Counsel submitted that in any F G H

case there was no miscarriage of justice occasioned by the admission of Exhibit 2 in evidence as the judgment of the lower Court was not based on Exhibit 2 which was even stated by the learned trial Judge at page 210 lines 6 to 11 of the record of appeal. He opined that even if Exhibit 2 was never tendered in evidence the decision of the lower Court would have been the same.

Replying on the second arm of this Issue, the learned Counsel for the plaintiffs/ respondents submitted that the document in question was rightly rejected by the learned trial Judge when it was sought to be admitted in evidence through DW3 on the ground that parties are bound by their pleadings and since the document was not pleaded by the Appellants it was inadmissible in evidence and was properly marked 'Rejected'. He cited NITEL v. Ogunbiyi (1992) 7 NWLR (pt. 255) 543 at 563 Emegokwe v. Okadigbo (1973) 4 SC 113 at page 117. Furthermore, the document being an unregistered but registrable instrument affecting land was inadmissible in evidence to prove title to the land in dispute. He referred to Akintola v. Solano (1986) 4 SC 141 at 183; (1986) 2 NWLR (Pt. 24) 598; Ole v. Ekede (1991) 4 NWLR (pt.187) 569; Umofia v. Ndem (1973) 12 SC 69 at pages 76 to 77.

I have carefully considered all the submissions relating to issue No.2, I shall first take the submissions in respect of the wrongful admission of Exhibit 2. It will be recalled that the learned trial Judge admitted Exhibit 2 in evidence for the time being during cross-examination of DW2, without hearing argument on the objection to its admissibility, but he made it known to the counsel for the parties that they would be at liberty to address him as to its admissibility during the address stage of the case after conclusion of evidence. Consistent with what the learned Judge stated, he eventually took argument from both Counsel on the admissibility of the document, Exhibit 2, and agreed with the submission of the learned Counsel for the plaintiffs/respondents that Exhibit 2 was properly admitted in evidence under cross-examination to test the credibility and veracity of the witness.

That procedure adopted by the learned trial Judge in 'provisionally' so to say, admitting Exhibit 2 in evidence pending argument on its admissibility during the address stage has been vehemently attacked by the appellants' Counsel. I will say straightaway that even

though such a procedure is not highly commendable in all cases; it should not be condemned outright. It can be used depending on the circumstances of each particular case especially where there is need for urgency and expeditious hearing and determination of a case. The important thing is that the trial court as in the instant case should eventually take argument from counsel for the parties on the admissibility of the document provisionally admitted in evidence and decide on it one way or the other before writing his judgment and making use of it in the judgment, if he decides that it is admissible. If on the other hand he decides that the document is not admissible in evidence, he has the power to expunge it from the record or disregard or ignore it in his judgment. B
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It is trite law that when a matter or document has been improperly received in evidence both the trial Court and the appeal Court have powers to expunge it from their record and decide the case on the properly and legally admitted evidence. See *Ajayi v. Fisher* (1956) SCNLR 279, (1956) 1 FSC 90; *Sadhwani v. Sadhwani* (Nig.) Ltd. (1989) 2 NWLR (Pt. 101) 72; *Owoyin v. Omotosho* (1961) 2 SCNLR 57 (1961) 1 All NLR 304 at page 307; *Chigbu v. Tonimas* (Nig.) Ltd. (1999) 3 NWLR (Pt.593) 115, *Agbaje v. Adigun* (1993) 1 NWLR (Pt.269) 261. By eventually hearing argument from both Counsel for the parties on the admissibility of Exhibit 2 before finally admitting the document, the learned trial Judge in my view complied with the principle of fair hearing by giving each side a hearing on the matter of the admissibility of Exhibit 2. If he had done otherwise, then there would have been a serious ground for complaint. This complaint in my view is one of mere technicality based on procedure rather than substance and for the courts the era of technicality is over. D
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However, assuming but not conceding that the procedure adopted by the learned trial Judge was irregular, it is submitted that it was merely a breach of the rules of practice and procedure. This does not render the proceedings a nullity but merely irregular. See *Nalsa & Team Associates v. NNPC* (1991) 8 NWLR (Pt.212) 652. The irregularity was acquiesced in by the learned Counsel for the defendant/appellants who notwithstanding the irregularity, took part in the proceedings. A party cannot take advantage of an irregularity which he adopted or acquiesced in and thereafter be heard to complain on appeal. See *Akhiwu v. The Principal Lotteries Officer*, G
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Mid- Western State & Anor (1972) 1 ALL NLR (Pt.1) 229 at page 234 or (1972) 3 SC 183 at page 188; Noibi v. Fikolati & Anor(1987) 3 SC 105; (1987) 1 NWLR (Pt. 52) 619.

Now to the consideration of the submission on the wrongful admission of Exhibit 2 in evidence. The pertinent question is whether Exhibit 2 was wrongly admitted in evidence and if so, whether the wrongful admission affected the decision of the lower court. It is the law that the purpose of the use of cross-examination is to contradict, destroy or discredit a witness and to water down the case of an adversary. A party's case is made on his pleading and evidence in-chief and not necessarily in cross-examination. See Onwumere v. Agwumedu (1987) 3 NWLR (Pt. 62) 673; Emegokwe v. Okadigbo (1973) 4 SC 113; Ganiyu Olanipekun v. I.G.P (1963) 2 ALL NLR 206. As I have earlier stated, Exhibit 2 was admitted in evidence during cross-examination of DW2 to test the credibility and veracity of the witness. Sections 199 and 209 of the Evidence Act 1990 (formerly sections 198 and 208 of the Evidence Act Cap. 62 of 1958) have made almost identical provisions for this purpose and are usually relied upon. Section 199 of the Evidence Act, 1990, reads:

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

I have carefully scrutinized Exhibit 2 and my candid observation is that although DW2's original or maiden name as Nkoyo Okon Effiom was written in Exhibit 2 as a witness to that document, yet she neither signed nor thumb-printed the document, Exhibit 2 as a witness. She was not the maker of the document. The writer or maker of Exhibit 2 wrote his name therein as A. E. Oddoh. For section 119 or section 209 of the Evidence Act, 1990, to apply, the witness to be cross-examined must be the maker of the previous statement in writing or one reduced into writing for the purpose of contradicting or discrediting him. From all indications therefore, it cannot be said that Exhibit 2 was made by DW2. I am therefore of the view, with respect to the trial Chief Judge, that he was wrong in admitting Exhibit 2 in

evidence through DW2 during her cross-examination.

Again, it is a correct principle of law that a document or evidence extracted from a party by his adversary under or during cross-examination cannot be used against the party if the material fact relating to the evidence or the document was not pleaded by the party seeking to make use of it. See: *Dina v. New Nigeria Newspaper Ltd.* (1986) 2 NWLR (Pt. 22) 353. Hence in such a case, an amendment of pleading is a necessary requirement in order to accord with the evidence or document though not pleaded, which was received or extracted under cross-examination before the evidence or document can be used. See *Woluchem v. Gudi* (1981) 5 SC 291 at page 320; *Ewarami v. African Continental Bank Ltd* (1978) 4 SC 99 at 108; *Udechukwu v. Okwuka* (1956) 1 F.S.C. 70, (1956) SCNLR 189. In *Chigbu v Tonimas (Nig) Ltd* (1999) 3 NWLR (Pt.593) 115 it was held that once a relevant fact has not been pleaded, a party shall not be allowed to cross examine on the unpleaded fact as to allow such a situation would constitute element of surprise which is contrary to the concept of fair hearing. See also *Isaac Patrick Okeke Ibik v. Mobil Oil Nig Ltd* (1970-71) 1 ECSLR 151. There is no doubt that Exhibit 2 was not pleaded. Having not been pleaded, it is inadmissible in evidence and the facts extracted from it go to no issue since parties are bound by their pleadings. See *National Investment & Properties Ltd v. Thompson Organizations Ltd* (1969) NMLR 94 at page 104; *George v. Dominion Flour Mills Ltd* (1963) 1 SCNLR 117; *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Pt.349) 131.

Having regard to the foregoing circumstances therefore, I hereby expunge Exhibit 2 from the record of this appeal. The next aspect to the matter is what effect the wrongful admission of Exhibit 2 in evidence has on the decision of this case by the learned trial Judge. Section 227(1) of the Evidence Act 1990 dealing with the matter reads:

“The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.”

In *Idundun v. Okumagba* (1976) 9 -10 SC 227 at page 245,

the Supreme Court stated the position thus:

“It is settled law that any wrongful admission of evidence shall not constitute a ground for reversing a decision unless the party complaining can show as well that without such evidence the decision complained of would have been otherwise.” See *Iwuno v. Dieli* (1990) 5 NWLR (pt.149) 126. There is no doubt that the learned trial Chief Judge made use of Exhibit 2 in his judgment but he clearly emphasized that the judgment was not based on Exhibit 2. I will in extenso reproduce page 209 lines 29 to 31 and page 210 lines 1 to 10 of the record on the portion of the judgment thus:

“Exhibit 2 was admitted to state what the truth is. It revealed that Okon Edem Odo sold the house of “which he was now the rightful owner for *ú* 7: 15.” Exhibit 2 did not establish that the said Okon Edem ado was selling the house for and on behalf of plaintiffs’ mother. The effect is that Exhibit 2 had gone to complicate the issue of sale. I am satisfied that it was admitted when it was tendered in these proceedings. I must make it clear that this judgment is not based on Exhibit 2, since the judgment could have gone the same way even if Exhibit 2 was not received in evidence xxxxxx” (*Italics mine for emphasis*).

Even without saying so much in the judgment as the learned Chief Judge has stated that the judgment was not based on Exhibit 2, the question is whether the judgment complained against would have been the same if Exhibit 2 had not been admitted in evidence. My answer is unhesitatingly and emphatically in the positive.

At the trial, the plaintiffs/respondents led evidence consistent with their pleading that the ownership of the land in dispute was vested in their mother who was also in possession of the same until her death. That sometime after her death the deceased defendant on record was found in possession of the said property and efforts to reposess it from him were futile. The defendants/appellants in their pleading admitted the ownership of the land in dispute by the plaintiffs/ respondents’ mother and further pleaded that the said property was sold to the deceased defendant on record by the said mother of the plaintiffs/respondents before her death. Clearly, by the state of the pleadings, the onus of proof shifted to the defendants/appellants to prove the said sale. See *Onobruhere v. Esegine* (supra). But the defendants/appellants woefully failed to discharge the onus of proof

on them to prove the said sale as the learned trial Chief Judge found in his judgment that evidence of the defendants/appellants was inconsistent and unreliable as they failed to produce evidence to show that there was a valid sale.

In my view therefore, having regard to the admissible evidence before the court below, the wrongful admission of Exhibit B 2 in evidence did not make any difference to the sound and solid judgment of the learned trial Judge.

Lastly, on the second arm of this Issue (No.2) which I have earlier in this judgment summarized the submissions of counsel for both parties. The document that was rejected by the learned trial Judge when it was tendered by DW3 is a purchase agreement dated 1st day of July, 1930 in respect of the land in dispute. Basically, the document was rejected by the learned trial Judge and marked 'rejected' because it was not pleaded by the defendants/appellants. D The subsequent application by the defendants/appellants for leave to amend their statement of defence by pleading the purchase agreement in paragraph 11A of the Proposed Amended Statement of Defence was also refused by the learned trial Judge who held that allowing amendment would have the tendency of permitting a document E which had once been rejected in the case to be received in evidence.

It is settled law that one of the essential rules of pleadings is that only material facts must be pleaded by the parties but not evidence. See: A-G., Anambra State v. Onuselogu Enterprises Ltd F (1987) 4 NWLR (Pt.66) 547. Order 25 rule 4(1) of Cross River State High Court (Civil Procedure) Rules, 1987, lays emphasis on this. It provides thus:

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading G relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved..."

It is also a rule of pleading that parties are bound by their pleadings and any evidence led by a party which is not pleaded or is at variance with such pleadings ought to be discounted and disregarded or even expunged by the court as going to no issue. See H Emegokwue v. Okadigbo (Supra); Aderemi v. Adedire (1966) NMLR 398; National Investment & Properties Ltd v. Thompson Organisation Ltd (supra); George & Anor v. United Bank for Africa Ltd. (1972)

8-9 SC 264. In the present case, the learned Counsel for the defendants/appellants has argued that the purchase agreement which was tendered through DW3 and was rejected because it was not pleaded ought not to have been rejected by the trial Court on the ground that it was not pleaded. For this, he placed reliance on the case of
 B Odunsi v. Bamgbala (1995) 1 NWLR (Pt.374) 641. In that case, it was held by the Supreme Court that documents in support of facts pleaded need not be pleaded and they can be tendered in support of facts pleaded. See also Thanni v. Saibu (1977) 2 SC 89; Monier
 C Construction Co. Ltd v. Azubuike (1990) 3 NWLR (pt.136) 74. My understanding of the decision in the Odunsi v. Bamgbala case (supra) is that in that case the Supreme Court was dealing with the issue of pleading document in support of facts pleaded and not with the issue of pleading documents which constitute material facts in themselves. In my view, as far as documents which constitute material facts are
 D concerned, they should be pleaded in accordance with the rules of pleadings. Where a document or series of documents are relied upon it is always necessary in order to determine correctly whether or not they should be pleaded expressly, to distinguish those documents which constitute material facts from those that are mere evidence to
 E establish facts in issue; those documents which have the former effect must be pleaded while those of the latter need not be pleaded. See Phillips v. Phillips (1878) 4 Q.B.D. 127 at page 133 to 134.

From the pleading in the statement of defence in the instant
 F case, I hold the view that the purchase agreement which constitutes the foundation upon which the sale of the land in dispute was anchored is a material fact that ought to have been pleaded and since it is not pleaded any evidence on it goes to no issue. The document also is inadmissible in evidence.

Furthermore, the purchase agreement having been rejected
 G and marked 'rejected' by the Court below, the application for leave to amend the statement of defence whereby the purchase agreement was then pleaded for the sole purpose of reintroducing it at the trial for admission in evidence seems to me to constitute an abuse of process of the court. It has been decided by this court that a document which
 H is marked rejected when tendered in evidence cannot subsequently be tendered and admitted in evidence as an exhibit in the case. It cannot be made use of as it has no value. See Oyetunji v. Akanni

(1986) 5 NWLR (pt.42) 461 at page 470; Agbaje v. Adigun (1993) 1 NWLR (Pt. 269) 261 at page 272, therefore the entire Issue No.2 is resolved in favour of the plaintiffs/respondents.

Issue No.3 is whether a valid judgment of a court can carry two different dates. On this issue, the learned Counsel for the defendants/appellants has submitted in the brief of argument that a valid judgment of a court must be sufficiently precise and informative in all respects including the date of its delivery. But the judgment of the learned trial Judge in the case in hand shows in one breath that it was given on the 17th day of October, 1995, and in another breath that it was delivered on the 23rd day of October, 1995, thus creating inconsistency. He therefore contended that the inconsistency is grave enough as to render the judgment ineffective, null and void and urged this court to so hold. The learned Counsel for the plaintiffs/respondents in his reply brief submitted that, it is trite law that a Court of Appeal will not normally nullify a judgment of the lower Court on the ground of irregularity except the party complaining of the irregularity in the judgment shows clearly that it has occasioned a miscarriage of justice to him. He contended that, the defendants/appellants have not pointed out how their substantial rights have been prejudiced by the two dates as shown in the judgment complained against. He asserted that the judgment was delivered on 23rd day of October, 1995 and this was clearly to the knowledge of the defendants/appellants who even stated that date in their notice and grounds of appeal. He submitted that the defendants/appellants were not misled as to the date the judgment was delivered and he urged the Court to discountenance the complaint.

The question for consideration here is whether the judgment of the learned trial Judge carries two different dates? and if so, what is its effect on the judgment?. A look at page 203 of the record of appeal from where the judgment of the learned trial Judge started shows the heading of the case recorded as follows:

“Resumed at Calabar on Tuesday the 17th day of October, 1995. Before His Lordship Hon. Justice S.E.J. Ecoma- Chief Judge” (Italics mine for emphasis).

At the end of the Judgment at page 212 of the records, the learned trial Judge signed his name, denoted his designation and wrote the date of the judgment as '23/10/95'. There is a rule of

practice that every judgment of the court shall be dated and signed by the Judge or Magistrate at the time of pronouncing the judgment. This rule of practice is re-enforced by section 245 of the Criminal Procedure Law, Cap 32; Volume II, Laws of Cross River State, 1979, which provides as follows:

B ***“The Judge or Magistrate shall record his judgment in writing and every such judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the Judge or Magistrate at the time of pronouncing it.”***

C From the above provision, it follows without ado that to discover the date a judgment is pronounced or delivered one has to look at when it was signed and dated by the Judge or Magistrate who delivered it. In other words, where a Judgment carries two dates, the date on the judgment representing the date it was signed and
D dated is the actual and effective date to the judgment i.e. the date when the judgment was delivered; any other date on the judgment should be ignored as the date of the delivery. The judgment in this case was signed and dated on '23/10/95'. Therefore, I am satisfied that the learned trial Judge delivered the judgment on the 23rd of
E October, 1995 and not the 17th of October, 1995.

From the foregoing therefore, I hold the view that the judgment does not carry two different dates as contended by the learned Counsel for the defendants/appellants. This issue is also resolved in
F favour of the plaintiffs/respondents.

The 4th and last Issue is, was the learned trial Judge right in law in disallowing the application for amendment to plead the purchase agreement and the equitable defences of laches and acquiescence only to turn round in his judgment to say that the defences were not pleaded?. On this issue, it was the argument of the learned
G Counsel for the defendants/appellants that the refusal of the application for amendment in the ruling of the court below dated 16th May, 1995 was improper and cannot be validly predicated on any sustainable legal premise: having regard to the principles of law that application for amendment can be made at any stage before judgment. He submitted that it was an improper exercise of discretion
H for the learned trial Judge to refuse the application for amendment. He cited Imonikhe v. A-G., Bendel State (1992) 6 NWLR (Pt.248)

396 on the circumstances for granting application for amendment and further submitted that the amendment would have been allowed in the interest of justice and alluded to the case of Jallco Ltd & Ors v. Owoniboy Technical Services Ltd (1995) 45 SCNJ 256 at 273, (1995) 4 NWLR (pt. 391) 534.

In his reply, the learned Counsel for the plaintiffs/respondents referred to Adekeye v. Akin-Olugbade (1987) 3 NWLR (Pt.60) 214; Nwafomso v. Taibu (1992) 1 NWLR (pt. 219) 619 at 629; Adetutu v. Ademhunmu (1984) 1 SCNLR 5 15 at 524 on the principles governing amendment of pleadings. It was also his contention that by the application for amendment the defendants/appellants were merely seeking to perfect a fatal imperfection in the proceedings by introducing once more the purchase agreement which had been tendered and rejected thereby facilitating its easy acceptance as an exhibit in the same proceedings. He referred to Bello v. Governor of Kogi State (1997) 9 NWLR (Pt.521) 496 at 501. The learned Counsel therefore submitted that the trial Judge rightly refused the application for amendment.

It is settled that amendment of pleadings can be made at any stage of the proceeding before judgment, but before granting an amendment of pleadings the courts are guided by certain well established principles which are replete in the decisions of the Supreme Court and the Court of Appeal. The application for amendment was brought by the defendants/appellants at the final address stage of the learned Counsel for the parties after the parties had closed their respective cases. From the proposed amended statement of defence it is obvious that the purpose of the amendment sought was to:

(1) Amend the statement of defence by adding paragraph 11A thereto and pleading a photocopy of the purchase agreement of which the original copy had been tendered in evidence earlier and rejected by the court and marked 'rejected'.

(2) Substitute a new paragraph 14 for the existing paragraph 14 of the statement of defence.

(3) Add new paragraph 15 and thereby introduce new defence of laches and acquiescence.

The guiding principles governing amendment of pleadings have been crystallized from decided cases to the effect that a court ought to refuse an application for amendment where:

- (i) It is made mala fide
- (ii) It would cause unnecessary delay.
- (iii) It will in any way unfairly prejudice the opposite party.
- (iv) It is quite irrelevant, useless or immaterial.
- (v) It will entail injustice to the respondent.

B (vi) By his blunder, the applicant has done some injury to the respondent which cannot be compensated by costs or otherwise.

(vii) It would only and merely raise technical issues. See *Adetutu v. Aderohunmu* (1984) 1 SCNLR 515; *Adekeye v. Akin-Olugbade* C (1987) 3 NWLR (Pt.60) 214; *Imonikhe v. A-G., Bendel State* (1992) 6 NWLR (Pt.248) 396. Guided by the principle set out above, the question is whether the refusal of the application for amendment in the instant case by the learned trial Judge was proper.

The view which I hold is that the learned trial Judge properly exercised his discretion when he refused to grant the application for amendment. In the first place, the application was brought in bad faith and in abuse of the process of the court as the amendment sought if granted, would have had the effect of admitting in evidence the purchase agreement that had been earlier tendered and rejected, a situation which was stressed against in *Bello v Governor of Kogi State* D (1997) 9 NWLR (Pt. 521) 496 at page 501 thus:

E “A document once tendered and rejected, stands rejected. It is therefore not for any of the parties to start perfecting any imperfection thereon, thereby facilitating its easy acceptance as an exhibit in the same proceedings.” See *Agbaje v. Adigun* (supra) at page 272.

Secondly, by the amendment of pleading sought, new defences of laches and acquiescence were being introduced by the defendants/appellants when the parties had closed their respective cases. It is a settled proposition of law that after evidence has been concluded by the parties, an amendment that will introduce new or fresh defences or issue will not be entertained by the court. See *Araromi Rubber Estates Ltd v. Orogun* (1999) 1 NWLR (Pt. 586) 302 at page 312 to 313; *Akinkuowo v. Orogun* (1965) NMLR 349; *Oguntimehin v. Gubere* (1964) 1 ALL NLR 176. Such amendment if granted, would result in prejudice, injury or overreaching to the opposite party which cannot be compensated by costs or otherwise. H It would also entail injustice to the respondents. Furthermore, it would also entail injustice to the respondents. Furthermore, it would cause

undue or unnecessary delay arising from consequential amendment of the pleading of the opposite party, followed by fresh evidence for the parties and fresh address by the counsel for the parties before the eventual determination of the case. In view for the above considerations, the 4th issue is hereby decided in favour of the plaintiffs/respondents. B

In the final result therefore, I hold that this appeal lacks merit. It is accordingly dismissed. The judgment of the learned Chief Judge is hereby affirmed. I award the sum of N5,000.00 costs to the plaintiffs/respondents. C

EDOZIE JCA

The dispute between the parties culminating in this appeal is the ownership of the property known as No. 37 Goldie Street, Calabar. From the pleadings exchanged between the parties, the plaintiffs/respondents' case was that the said property belonged to their late mother Madam Umo Ekpo Edem Odo and remained vested in her until her death in 1937. The defendants/appellants admitted that fact but went on to assert that the property was sold to their late father by the plaintiffs'/respondents' mother for the sum of ₦100 to raise money in the event of her death, for her burial. D
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There is no doubt that the primary onus of proving his case lies on the plaintiff. But that onus may be discharged in the pleadings as by the rule of pleadings there is no onus to prove that which has been admitted. *Lawrence Onyekaonwu v. Ekwubiri & Ors* (1960) 1 All NLR 32, *Balogun v. Labiran* (1988) 3 NWLR (Pt.80) 66 at 83. In an action for a declaration of title to land where the plaintiff traces his root of title to one whose title to ownership has been established, the onus then shifts to the defendant to show that his own possession is of such a nature as to oust that of the original owner. *Thomas v. Holder* (1946) 12 WACA 78; *Sanyaolu v. Coker* (1983) 1 SCNLR 161, *Dosunmu v. Joto* (1987) 4 NWLR (pt. 65) 297; *Odunsi v. Bamgbala* (1995) 1 NWLR (pt.374) 641 at 663; *Ochonma v. Unosi* (1965) NMLR 321; *Buraimoh v. Bamgbose* (1987) 6 SCNJ 36 at 45, (1989) 3 NWLR (pt.109) 352. F
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In the case in hand, the defendants/appellants having in their pleadings conceded that the property in dispute belonged to the late

mother of the plaintiffs/respondents, the evidential burden shifted on them to prove that the ownership of the property had been divested from her and vested in their father by sale. Their evidence in proof of this vital issue was found by the court below unreliable. The attitude of an appellate Court to the finding of fact of the trial Court is well settled and it is that an appellate Court will not ordinarily disturb the findings of a Court of trial unless it is based on legally inadmissible evidence, not supported by evidence or is perverse or is riddled with errors in law that the inadequacies could lead to miscarriage of justice: See *Ofondu v. Niweigha* (1993) 2 NWLR (pt.275) 253; *Onifade v. Olayiwola* (1990) 7 NWLR (Pt. 161) 130; *Ogunbiyi v. Adewunmi* (1985) 5 NWLR (pt. 93) 215. Nothing canvassed in this appeal is substantial enough to warrant a reversal of the impeccable findings made by the court below to the effect that the defendants/appellants had failed to prove the sale of the land in dispute to their father.

I am therefore in complete agreement with the lead judgment of my learned brother Ekpe, J.C.A. that the appeal lacks substance. I also, would dismiss it and endorse the consequential orders as to costs.

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OPENE JCA

I have been privileged to read in advance the judgment just delivered by my learned brother, Ekpe, J.C.A. I agree with him that the appeal is devoid of merit and that it should be dismissed.

In the instant case, the Respondent instituted an action for declaration of title. It is settled that the onus of proof lies on the Respondent as provided by section 136 of the Evidence Act, that is on the balance of probabilities. There is therefore the need for the respondent to succeed on the strength of his own case. See *Braimah v. Abasi* (1998) 13 NWLR (Pt.581) 167, *Kala v. Potiskum* (1998) 3 NWLR (pt.540) 1, *Alh. Karim Laguro v. Honsu Toku & Anor.* (1992) 2 SCNJ 201, (1992) 2 NWLR (Pt. 223) 278. However, the burden of proof is not static and it shifts when evidence given by one party gives rise to a presumption favourable to it. See

High Grade Maritime Services Ltd. v. First Bank of Nigeria Ltd. (1991) 1 SCNJ 110,(1991) 1 NWLR (pt.167) 290.

This shifting burden of proof has been described in the law of evidence as the tactical burden of proof. The appellants' case is that their mother, Madam Umo Ekpo Edem Odo was the owner of the property at No. 37 Goldie street, Calabar, and this was admitted by the appellants in their statement of defence and they went further and pleaded that the said property was sold to them. The burden of proof automatically shifts on them to prove that the title has been shifted to them, that is, that the property was sold to their father the original defendant. B

They can only succeed if there is credible evidence to show that Madam Umo Ekpo Edem Odo sold the property to their late father or that she consented to the sale of the property. The learned trial Judge took this course of action and evaluated the evidence before him and rightly found in my view that the Appellants failed to discharge this burden and entered judgment in favour of the Respondents. C D

I do not see any reason why this Court can interfere with that decision. In respect of the purchase agreement which was rejected in evidence because it was not pleaded and which the Appellants sought an amendment of their pleading so that the document could be re-tendered, I must observe that before a counsel tenders a document to be admitted in evidence, that he must acquaint himself with the relevant law of evidence and ascertain that the document is a legally admissible document and also how it is tendered in evidence. It is not a matter of a game of chance where a counsel will seek to tender a document and it is rejected because it was not pleaded and therefore marked rejected, and the counsel will again apply to amend his pleadings at the end of the trial so that he could plead the rejected document so that it could be re-tendered in evidence. No doubt, this makes nonsense out of the whole process and it is in fact an abuse of judicial process which is using the judicial process for what it is not meant for. See *Gomwalk v. Military Administrator Plateau State* (1998) 6 NWLR (Pt. 555) 653, *Mohammed v. Hussein* (1998) 14 NWLR (pt.584) 108, *Attahiru v. Bagudu* (1998) 3 NWLR (Pt. 543) 636. E F G H

Once a document is rejected and marked so, it remains rejected and the only course open to the counsel is to appeal against the decision of the court. The learned trial Judge has rightly reject-

ed the Appellants' application for an amendment as the application is nothing but an abuse of process.

For these and the fuller reasons given in the leading judgment, I am of the firm view that the appeal is unmeritorious and that it should be dismissed, and it is accordingly dismissed by me.

B I abide by the consequential order made in the leading judgment including the order as to costs. Appeal dismissed.

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