

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2002. SC. 14/1997
CORAM:- S. A. BELGORE, A. B. WALI,
I. L. KUTIGI, A. I. IGUH, E. O. AYoola, JJSC

1. UGORJI OBI

& 4 ORS APPELLANTS/CROSS-RESPONDENTS

(For themselves and
on behalf of Akokwa
Community)

AND

DANIEL MBIONWU

& 2 ORS RESPONDENTS/CROSS-APPELLANTS

(For themselves and
on behalf of Osina
Community)

LAND LAW - Appeals - Court - Germane issue - Controversial issue is determination of boundary between parties - But trial judge missed same - And thus arrived at erroneous decision (H1)

APPEALS - Evidence - Evaluation - Court of Appeal decision - Correctness of - The court was right to hold that trial judge - Did not properly evaluate evidence (H2)

APPEALS - Retrial order - Basis - Retrial is ordered where there was error in law or procedure - Which neither renders trial a nullity - Nor makes appellate court to rule that there was no miscarriage of justice (H3)

APPEALS - Courts - Exercise of discretion - Where Court of Appeal in exercise of its discretion orders a retrial - Supreme Court will not interfere - Save where such discretion was contrary to justice (H4)

LAND LAW - Locus in quo - Visit to - When irrelevant - Such visit is not necessary - Where identity of land is known to court and parties - And where court's judgment is not based on impressions from the visit (H5)

LAND LAW - Locus in quo - Visit to - Purpose - The visit is made to clear doubts about conflicting evidence of parties - As to state of facts relating to property in issue (H6)

ACTIONS - Courts - Land law - Locus in quo - Visit to - Exercise of discretion - Order to conduct the visit in action de novo is inappropriate - As new trial judge has discretion whether or not to conduct such visit (H7)

FACTS

The parties are two neighbouring communities sharing a common boundary in the Ideato Local Government Area of Imo State. They were involved in dispute over a piece of land. Consequently, plaintiffs/respondents commenced this action against defendants/appellants at the High Court of Imo State, Orlu, wherein they claimed declaration of title to the land and an injunction to restrain appellants from the disputed land. Respondents claimed that sometime in the past, a boundary was established between the communities. They further stated that despite the boundary, appellants trespassed on the side of respondents' land.

Hence, the need for this action to restrain appellants from further trespassing on the land. Appellants denied the boundary, relied on their numerous acts of possession and raised the issue of res judicata over the land. At the end of hearing, the court dismissed respondents' claim. Dissatisfied, respondents filed appeal at the Court of Appeal, Port Harcourt. The court allowed the appeal and set aside the judgment of the trial court. The court was a view that in order to do justice in the matter, there is need for a trial de novo before another judge of the trial court, who must conduct a visit in quo on the disputed land. Both parties were aggrieved by this decision. Hence, appellants filed the main appeal, while respondents cross-appealed at Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the Court of Appeal was right by holding that the learned trial Judge in his approach to the trial misconceived the case before him by his repeated reference to "land in dispute" as if the claim before the court was that of declaration of title to a specific

piece or parcel of land in dispute between the parties when the claim before him was simply that of declaration that the “ekpe trench is the boundary between the parties.

(ii) Whether the Court of Appeal was right when it held that the learned trial Judge did not properly evaluate the evidence before him relating to the main fact in issue, namely, whether or not the ancient “ekpe” trench is the boundary between two parties.

(iii) Whether the decision for a retrial of the case ordered by the Court of Appeal is justifiable having regard to all the circumstances of the case.

HELD (Unanimously dismissing the appeal and the cross appeal per lead judgment of **IGUH JSC**)

Court - Germane issue

1. There can be no doubt that the Court of Appeal is absolutely right in its above observations with regard to the approach of the learned trial judge to the case before him. It is plain that from the plaintiffs’ claim before the court and the pleadings filed, no issue was joined by the parties with regard to any particular piece or parcel of land nor was title to any piece or parcel of land claimed. The trial court throughout its judgment repeatedly made reference to the land in dispute in the case in such an unmistakable context as to convey the definite impression that the plaintiffs’ claim before the court was that of title to a definite piece or parcel of land.

In my view, the trial court by succumbing to the submissions of learned defence counsel and by giving the impression that the claim before the court was that of title to a piece or parcel of land, if I may say with respect, completely misses the real issue for determination in the suit. It is evident that the frequent references to “land in dispute” in the judgment of the learned trial Judge in spite of the claim and the pleadings before the court deprived him of a clear perception of the real issues for decision in the case. I am satisfied that the learned trial Judge completely lost sight of the real issues in controversy between the parties which was simply a declaration that

the “ekpe” trench is the boundary between the parties and not a claim for declaration of title to a particular piece or parcel of land. He therefore approached the evaluation of the entire evidence led at the trial from a faulty position and consequently arrived at an erroneous decision in the case.

B (pp. 1871 G/1873 A)

Evidence - Evaluation - Court of Appeal decision - Correctness of
2. But, with profound respect, the learned trial Judge seemed to overlook the fact that no piece of evidence was adduced on behalf of the defendants in the present case to contradict the existence, nature or extent of the said “ekpe” trench over which the plaintiffs sought the declaration they sought. Both survey plans of the plaintiffs and defendants, Exhibits A and B, properly identified and indicated the said “ekpe” trench. No issue was joined by the parties either in their pleadings or from their evidence with regard to the existence or identity of the said trench. More importantly, no particular part or portion of the previous proceedings, Exhibit H, was tendered for the purpose of contradiction of evidence of the plaintiffs or any of their witnesses. I think, on the whole, the court below was right to hold that the learned trial Judge did not properly evaluate the evidence before him on the issue of the “ekpe” trench, the subject matter of the suit. (p. 1873 F)

Retrial order - Basis

3. An appellate court will order a retrial where it is satisfied that there has been such an error in law or an irregularity in procedure of such a nature which neither renders the trial a nullity nor makes it possible for the appellate court to say that there has been no miscarriage of justice so long as there are not special circumstances in the case as would render it oppressive to put the defendant on trial a second time.

H (p. 1874 B)

APPEALS - Courts - Exercise of discretion

4. The law is settled that where the Court of Appeal in the exercise of its discretion orders a retrial, unless this court

comes to the conclusion that the exercise of such discretion was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice, it cannot interfere even if it might have exercised the discretion differently if the discretion were that of this court. I can see nothing in the order of retrial made by the court below in this case which is manifestly wrong, arbitrary, reckless, injudicious or contrary to justice and I am therefore unable to interfere with it. (p. 1874 H)

LAND LAW - Locus in quo - Visit to - When irrelevant

5. With profound respect to the court below, it is now well settled that the inspection of a locus in quo is strictly not necessary where the area of land in dispute is clear to the court and the parties and the trial court must arrive at its judgment not on the impressions from the locus in quo but upon its impressions from the evidence led before the court. A trial court is only bound to record the fact of the inspection and need not give its details although it is good practice where possible to record the full details of such inspection. (p. 1876 A)

LAND LAW - Locus in quo - Visit to - Purpose

6. The purpose of a visit to the locus in quo, as has been stated repeatedly, is not to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to a physical object, and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is permissible for the learned trial Judge and he is entitled to apply the court's visual senses in aid of its sense of hearing by visiting the locus in quo to resolve the conflict. But whether or not such a visit is desirable rests entirely with the discretion of the court having regard to the nature of the evidence led and all the circumstances of the case and as to whether or not there is conflicting evidence as to physical facts which may easily be resolved by a visit or inspection of the locus and/or whether such a visit or inspection will enable

the court to understand the questions that are raised and to follow and properly apply the evidence adduced before it.
(p. 1877 H)

- Courts - Land law - Locus in quo - Visit to - Exercise of discretion*
- B **7. Nor do I consider it appropriate as ordered by the court blow that “the new trial Judge must, and should visit the locus” at the trial of this action de novo. In my view, the discretion must rest with the new trial Judge who must not hesitate to visit the locus in quo if in his opinion such course of action appears to him desirable for a judicious determination of the dispute between the parties.** (p. 1878 G)

REPRESENTATION

- D M. O. Nlewedim Esq. for the Appellants
T. E. Williams Esq., with Mrs. F. Gambari-Mohammed, for the Respondents

CASES REFERRED TO

- E Onifade v. Ayiwola (1990) 7 NWLR (Pt. 161) 158
Duru v. Nwosu (1989) 7 SCNJ 154
Bakare v. Apena (1986) 4 NWLR 1
Ayoola v. Adebayo (1969) 1 All NLR 159
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 145
F Nwabueze v. Nwosu (1988) 4 NWLR (Pt. 88) 257
Anyah v. African Newspapers Nig Ltd (1992) 6 NWLR (Pt. 247) 319
SPB Co. Nig. Ltd. v. Cola (1978) 3 SC 1183
Egonu v. Egonu (1978) 11-12 SC 111
G Seismograph Services Ltd. v. Aporuovo (1974) 6 SC 119
Briggs v. Briggs (1992) 3 NWLR (Pt. 228) 128
Ejidike v. Obiora (1951) 13 WACA 270
Maji v. Shafi (1965) NMLR 33
Garba v. Akacha (1966) NMLR 62
H Olusanmi v. Oshasona (1992) 6 NWLR (Pt. 245) 32

LEAD JUDGMENT BY IGUH JSC

Both parties are two neighbouring communities sharing a common boundary in the Ideato Local Government Area of Imo State.

By a writ of Summons issued on the 24th day of December, 1975, the plaintiffs, for themselves and on behalf of the people of Osina Community in Imo State, instituted an action against the defendants jointly and severally as representing their Akokwa Community at the Orlu Judicial Division of the High Court of Justice Imo State claiming as follows:-

“1. A declaration that the “Ekpe” - an ancient trench is the boundary between Osina and Akokwa.

2. An injunction to restrain the defendants and the people of Akokwa from crossing the said ancient boundary and laying claim to land on the Osina side of the “ekpe” ditch.”

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

At the subsequent trial, both parties testified on their own behalf and called witnesses.

The case for the plaintiffs, briefly, is that from time beyond human memory, there has been an ancient “*ekpe*” trench that lies between the plaintiffs’ town of Osina and the defendants of Akokwa town. This trench was constructed by the joint effort of the ancestors of both communities and demarcated the land boundary between the two towns. The “*ekpe*” trench is more particularly shown on the plaintiffs’ survey plan No. MG.326/76 which was tendered in evidence at the trial and marked Exhibit “A”. The plaintiffs and defendants from time immemorial had accepted and respected the said “*ekpe*” trench as the boundary between their two towns.

The plaintiffs’ claimed that in 1974, the defendants’ people of Akokwa in disregard of the ancient “*Ekpe*”: boundary crossed the trench into the territory of the plaintiffs’ people and forcibly laid claim to land on the plaintiffs’ side of the boundary by farming and building houses thereon. The plaintiffs claimed that unless restrained by an order of court, the defendants’ people would continue to cross the said ancient “*ekpe*” trench at other points into plaintiffs’ territory thus involving plaintiffs in long drawn out and expensive litigation.

The defendants denied the plaintiffs’ claims and asserted that the “*ekpe*” trench shown on the plaintiffs’ survey plan which is the only “*ekpe*” trench on what the defendants called “*the land in dispute*” did not constitute the boundary between Osina and Akokwa towns. They stated that the said “*ekpe*” trench lied well within the

defendants' "*Uhu Ehihi Oke*" land which they claimed was in dispute and that it was built by the defendants' ancestors from time immemorial as their last line of defence. They claimed that the boundary between the plaintiffs' Osina town and the defendants' Akokwa "*Ikpa*" land was and had always been as shown verged brown in the defendants' plan No. IM/GA.5349/77. They stated that at no time did they or their ancestors accept the "ekpe" trench as the boundary between Osina and Akokwa towns.

The defendants referred repeatedly to what they called "*the land in dispute*" and sated that it is a portion of their land known as "*Uhu Ehihi Oke*". They claimed that the said "*Uhu Ehihi Oke*" land "*in dispute*" had from time immemorial been in their exclusive and undisturbed ownership and possession. They stated that the said boundary verged brown was from time immemorial demarcated by the defendants with life trees and that both towns had always accepted the said trees as their correct boundary marks. The defendants pleaded a number of court cases which they claimed related to what they described as "*the land in dispute*" and relied on *res judicata*, numerous acts of ownership and possession of "*the land in dispute*" and estoppel by record.

At the conclusion of hearing, the learned trial Judge, Johnson, J. after what looked like a full scale declaration of title to land claim by the plaintiffs dismissed the suit.

Dissatisfied with this decision of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Part Harcourt Division which court in a unanimous decision on the 5th day of November, 1996 allowed the appeal and set aside the judgment and orders of the trial court delivered on the 6th January, 1985. The Court of Appeal further directed that in order to do substantial justice to both parties in the suit, it was desirable that the suit be tried *de novo* before another Judge of the Imo State High Court of Justice, Orlu Judicial Division other than Johnson, J. The Court of Appeal further ordered that the new trial Judge must, and should visit the locus in quo in order to have a thorough appraisal of what is actually in dispute between the parties once and for all.

Aggrieved by this decision of the Court of Appeal, both parties have now appealed to this court.

Pursuant to the Rules of this court, the parties filed and ex-

changed their written briefs of argument. In the defendants/appellants' brief of argument, the following four issues are set out as arising for determination in the main appeal, that is to say:-

"(a) Whether having regard to the pleadings of the parties, issue was joined in respect of any piece of land: Ground One.

(b) Whether it was competent for the Court of Appeal to have considered Exhibit "K", if the answer is in the affirmative, whether the Court of Appeal was right in upholding the interference with the decision in Exhibit "K", Grounds Two and Three.

(c) Whether the Court of Appeal was right in relying on the omnibus ground of appeal as a basis for evaluation of evidence demanded in the Respondents' issue No. IV; Ground Four.

(d) Whether a second visit to the locus in quo was necessary in order to do justice to the case: Ground Five."

The plaintiffs/cross-appellants, on the other hand, submitted one issue which they described as the major question that arises for determination in the main appeal. This is couched thus:-

"Whether the appeal in the court below can be successfully argued under the omnibus ground."

They added that if the answer to the major question is in the negative, another minor issue for determination would arise. This is framed thus:-

"Were the remaining grounds of appeal sufficient to sustain the appeal."

The plaintiffs/cross-appellants further contended that if the major question is answered in the affirmative, that would naturally result in the dismissal of the defendants' appeal.

In respect of the cross-appeal, two issues were identified on behalf of the plaintiffs/cross-appellants for the determination of the cross-appeal. These are set out as follows:-

"(i) Having regard to the findings of the Court of Appeal on both the facts and the law in the matter herein, what order should that court have made?"

(ii) Was the court below correct in striking out grounds 4, 9, 10 and 11 of the Grounds of Appeal and consequently Issues nos. (ii) and (iii) raised by the Appellants in their Brief of Argument."

For the defendants/cross-respondents, two issues were also distilled from the cross-appellants' grounds of appeal for the determina-

tion of the cross-appeal. These are set out as follows:-

“(1) *Whether the lower Court was correct in striking out Grounds 4, 9, 10 and 11 of the Grounds of Appeal and issues (ii) and (iii) in the Appellants’ Brief of Argument: Ground (1)*

B (2) *Whether the Appellants were entitled to judgment as a result of the conclusion of the lower Court: Ground (ii)”*

I have given a close attention to the various issues raised by the parties in both the main appeal and the cross-appeal but must, with respect, observe that some of them appear to me as not touching the root of the main question that calls for decision in these appeals. It is clear from the appeals of both parties that the real dispute revolves on the order of the court below which allowed the appeal of the plaintiffs before it, set aside the judgment and orders of the trial court and remitted the case to the High Court for trial de novo before another Judge. Whilst the defendants argued that the judgment and order of retrial of the Court of Appeal are erroneous on point of law and that the judgment of the High Court ought to be restored, the plaintiffs contended that the said order of retrial ought to be set aside and judgment entered in their favour as they established their case on the balance of probability.

It seems to me that having regard to the central question in controversy between the parties and the grounds of appeal filed in both the main appeal and the cross-appeal, the following issues are adequate for the determination of these appeals, namely:-

F (i) Whether the Court of Appeal was right by holding that the learned trial Judge in his approach to the trial misconceived the case before him by his repeated reference to “*land in dispute*” as if the claim before the court was that of declaration of title to a specific piece or parcel of land in dispute between the parties when the claim before him was simply that of declaration that the “*ekpe*” trench is the boundary between the parties.

(ii) Whether the Court of Appeal was right when it held that the learned trial Judge did not properly evaluate the evidence before him relating to the main fact in issue, namely, whether or not the ancient “*ekpe*” trench is the boundary between two parties.

(iii) Whether the decision for a retrial of the case ordered by the Court of Appeal is justifiable having regard to all the circumstances of the case.

At the oral hearing of the appeals, both learned counsel for the parties adopted their respective briefs of argument and high-lighted some of the more important of the issues therein canvassed.

The main argument of learned counsel for the appellants, M. O. Nlewedim Esq. is that what was in issue before the trial court is a land case as the learned trial Judge could not have done justice to the respective contentions of the parties without deciding the question of ownership of what he called “*the land in dispute*”, in respect of which trespass was alleged against the respondents. He explained that it was in this context that the trial court made reference to the “*land in dispute*”. He submitted that having regard to the cross-appellants’ claim for an injunction to restrain the appellants from crossing the alleged ancient “*ekpe*” boundary, the approach of the trial court must be regarded as impeccable. He conceded that the trial court made references to “*the land in dispute*” several times in its judgment but argued that no miscarriage of justice was thereby occasioned. Relying on the decision in *Ladejo Onifade v. Alhaji Ayiwola and others* (1990) 7 N.W.L.R. (Part 161) 158 at 171, learned counsel submitted that mere existence of an error in a judgment need not lead inexonerably to its reversal unless a miscarriage of justice was thereby occasioned.

On issue 2, Mr. Nlewedim contended that the omnibus ground of appeal was not a proper basis for the lower court to consider evaluation of evidence by the trial court. He submitted with regard to issue 3 that the order for a retrial of the case based on the need for the trial court to visit the locus in quo was made in error as there were no conflicts in the evidence of the parties vis-a-vis their pleadings as suggested by the court below which necessitated a second visit to the locus. He urged the court to resolve all three issues in favour of the appellants and to allow the main appeal, set aside the decision of the Court of Appeal and dismiss plaintiffs’ claims and the cross-appeal.

Learned counsel for the plaintiffs/cross-appellants, T. E. Williams Esq., in his reply, referred to the judgments, Exhibits D and E and Submitted that they established that the “*ekpe*” trench is the boundary between the two towns. He pointed out that the oral evidence adduced by the respondents was in line with their pleadings and documentary evidence. He contended that the Court of Appeal having resolved all the material questions for determination in the

appeal in favour of the respondents ought to have proceeded to enter judgment in their favour. He submitted that all the issues raised by the cross-appellants were successfully argued under the omnibus ground of appeal.

B On the question of visit to the locus in quo, Mr. Williams conceded that there was no need for a second visit to the locus. He urged the court to dismiss the appellants' appeal, allow the cross-appeal and to enter judgment for the cross-appellants as claimed.

C I think it is convenient to deal with all three issues together. The starting point in dealing with these issues is to examine briefly the pleadings of the parties. In this regard, it is necessary to set out paragraphs 4 to 7, 11 to 13, 18 and 19 of the plaintiffs' Statement of claim. These aver as follows:-

D *"4. From time immemorial there is an ancient "Ekpe" trench that lies between the plaintiffs town of Osina and the defendants' town of Akokwa. This "ekpe" trench is specifically shown on Plan No. MG. 326/76 filed with the Statement of Claim.*

E *5. The plaintiffs and the defendants in olden days had consistently accepted and respected that "ekpe" trench as the boundary between the two towns.*

6. As time went on the people of Akokwa became more populous and affluent whilst the people of Osina lost a lot of their members by death and are mostly farmers.

F *7. The people of Akokwa relying on their superior number and wealth sought avenues to accommodate its teeming population and started to cross the traditional boundary into Osina land defacing the trench in certain places.*

G *11. Several civil cases had been fought between the defendants and their neighbours because the defendants crossed the traditional boundary.*

H *12. The defendants' people of Akorkwa in search for more land crossed the "ekpe" trench into Uzii - a neighbouring village - the case went up to the West African Court of Appeal which found for the people of Uzii and declared that the "ekpe" was the traditional boundary.*

13. The defendants' people of Akokwa crossed the "ekpe" wall, laid claim to and occupied Osina land at Umuakpaka Ofeke Osina. This resulted in a long drawn case which ended in favour of

Umuakpaka Osina at the West African Court of Appeal - the Court declared the "ekpe" ancient ditch to be the traditional boundary. The plaintiffs will at the trial rely on the proceedings and judgment in WACA 145/1953.

18. In or about 1974 the people of Akokwa crossed the Ekpe trench laying claim to farming and building houses on Osina side of the trench as shown on Plan No. MG: 326/78 filed with the statement of Claim, moving deep into Osina homestead despite protests from the plaintiffs. ^B

19. Unless restricted the Akokwa people will certainly cross the said Ekpe trench at any other point thus involving the people of Osina in long drawn out and expensive litigation; as well as numerous Police action. " ^C

The plaintiffs then claimed as earlier set out in this judgment: perhaps, for ease of reference, I should repeat the plaintiffs' claims against the defendants jointly and severally which are for:- ^D

"1. A DECLARATION that the Ekpe - an ancient trench is the boundary between Osina and Akokwa.

2. AN INJUNCTION to restrain the defendants and the people of Akokwa from crossing the said ancient boundary and laying claim to land on the Osina side of the "ekpe" ditch." ^E

The above paragraphs of the plaintiffs' Statement of claim were answered by the defendants in paragraphs 4 to 6 and 9 of their Statement of Defence. These aver as follows:-

"4. The defendants deny paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Statement of Claim and put the Plaintiffs to strict proof thereof. ^F

5. The Defendants deny paragraphs 4 and 5 of the Statement of Claim and aver that the Trench shown on Plaintiffs' Plan NO. IM/GA.5349/77 which is the only EKPE Trench on the land in dispute does not lie at the Boundary of Osina and Akokwa. The said EKPE Trench lies well within the Defendants' "UHU EHIHI OKE" Land in dispute and was built by the Defendants' ancestors from time immemorial as a last line of defence, well within Akokwa Lands. ^H

6. The Defendants further aver that the Boundary between the Plaintiffs Osina Town and the Defendants' IKPA Lands of Akokwa is and has always been as verged BROWN in Plan No. IM/GA. 5349/77 filed with this Statement of Defence. At not time did the defen-

dants or their ancestors before them accept the EKPE Trench as the Boundary of Osina and Akokwa. The said Boundary verged BROWN as aforesaid is and has from time immemorial been demarcated by the Defendants - Osisiocha, Alakaramodu, Ube, Omaraegbe, Uhi, Ujuju, Ukpaka Ototi, Ogiri and other Economic boundary trees
 B planted by defendants' ancestors. The defendants and plaintiffs and their ancestors before them have always accepted the said boundary as such. The defendants will found on plan No. IM/GA.5349/77 filed with the Statement of claim.

C 9. The defendants further aver that the case No. HOR/555C/74, WACA 145/1953, FSC.229/58, HO/62/72 and all other cases cited by the plaintiffs in paragraphs 12, 13, 14, 15, 16, and 17 of the Statement of Claim have no bearing on the "UHU Ehihi OKE" Land in dispute in this suit and do not concern the defendants herein."

D It is crystal clear from the claim before the court, and the pleadings of the parties that the main issue between the parties is whether, as claimed by the plaintiffs, they are entitled to a declaration that the "ekpe" trench delineated in their survey plan Exhibit A, is the boundary between Osina and Akokwa towns. It is either that the said "ekpe"
 E trench was established as the boundary between the parties or that it was not. The claim for an injunction naturally depended on the success or otherwise of the declaratory relief claimed. The real question for resolution must be how the learned trial Judge approached this very all important issue between the parties and whether this ap-
 F proach misdirected him into arriving at a wrong decision in the suit.

The court below carefully considered this question as closely as possible and commented thus:-

G "...the learned trial Judge gave the impression that some piece of land was in dispute in the case before the court. On the pleadings of the plaintiffs, now appellants, it was doubtlessly clear that the issue in the case was whether or not "the Ekpe" (the ancient trench) shown in the plans filed by both sides was the boundary between the two towns (Osina and Akokwa) or whether or not as alleged by the de-
 H fendants, now respondents, it was an alleged line of live trees between two trenches that formed the boundary between the said two towns. I have no doubt in my mind that the frequent references to "land in dispute" in the judgment by the learned trial Judge despite the pleadings and evidence and counsel's clarification in address de-

prived the learned trial Judge of achieving a clear perception of the issues for decision and thereby came to a wrong conclusion and decision vis-a-vis the claims and pleadings placed before the court."

A little later in its judgment, the court below went on:-

"Thus, it can be readily seen and manifest from the pleadings that the claims of the parties are diametrically opposed to each other. The plains of the parties - Exhibits 'A' and 'B' are also opposed to each other. Whilst the witnesses for the appellants hammer on the "Ekpe" trench in their testimonies, those of the Respondents concentrated on the purported land in dispute between the two communities." It continued:-

"In the course of his judgment at page 115 lines 8 to 22 the learned trial Judge said:

"From my own specific findings of fact, the following are the areas of common agreement between both parties:

1. That the defendants have long been in occupation of the land to the exclusion of the plaintiffs.

2. That the land in dispute is the same, well known to both sides even though each gave it a different name. Plaintiffs called it "Ogbugbaja Ehiwesu" while defendants called it "Uhu Ehihi Oke."

It has been held that the fact that parties called the land in dispute by different names is immaterial once they are familiar with its identify and location. See Aromire v. Awoyimi (1992) All NLR pt. 1 page 101 at page 113."

With due respect to the learned trial Judge, the above quoted findings of fact are not supported by the evidence and the pleadings of the parties placed before him. One can then safely hold that his other findings thereafter are predicated on the above position he has already held to tenaciously. To say the least, the findings are perverse. A court should not speculate on evidence but decide on the evidence and pleadings presented before it."

There can be no doubt that the Court of Appeal is absolutely right in its above observations with regard to the approach of the learned trial judge to the case before him. It is plain that from the plaintiffs' claim before the court and the pleadings filed, no issue was joined by the parties with regard to any particular piece or parcel of land nor was title to any piece or parcel of land claimed. The trial court throughout its

judgment repeatedly made reference to the land in dispute in the case in such an unmistakable context as to convey the definite impression that the plaintiffs' claim before the court was that of title to a definite piece or parcel of land. Indeed a

B measure at the trial in misleading the court on the nature of the claim before it. So, recording the submissions of learning defence counsel in his address at the trial, the following notes by the learned trial Judge appeared:-

C “...*He contended that in an action for declaration, the plaintiff must clearly show the boundary, their acts of ownership over a long period of time and the traditional history. And that the burden of proof lies on the plaintiff and the weakness of defence cannot help him.*

D ...*He said the plaintiffs have failed to prove the South-eastern and the South-western boundaries of the land they are claiming*

E ...*He referred to plaintiffs' Statement of Claim which failed to disclose the name of the land they are claiming.*” (Underlining supplied for emphasis) The trial court, for its own part, in its judgment also had cause to state:-

F “*I have some observations on certain points of law. Firstly, the name of the land for which the declaration was sought was not disclosed in the plaintiffs' pleadings. It will be difficult to order a declaration over a piece of land whose identity has not been established... Lastly, the defined boundaries of the plaintiffs' land had not been established. Apart from the Ekpe, plaintiffs led no evidence at all as to the boundaries of their land over which they are laying claim... Defendants' acts of possession are more real and acceptable. They*

G *cultivate and make use of the land exclusively, with their economic fruits and trees thereon. Plaintiffs' evidence of acts of possession is that some of their houses were taken over by force by the defendants.*” (Underlining supplied for emphasis) It went on:-

H “*On long, undisturbed possession:*

The Courts, from various judicial decisions, are known to be very reluctant to grant a declaration to a party who has for a long period of time not been in occupation of the property. On absence of the name and the defined boundaries of the land:

It is a fatal omission that the name of the land was nowhere

contained in the pleadings filed by the plaintiffs.” (Underlining supplied for emphasis)

In my view, the trial court by succumbing to the submissions of learned defence counsel and by giving the impression that the claim before the court was that of title to a piece or parcel of land, if I may say with respect, completely misses the real issue for determination in the suit. It is evident that the frequent references to “land in dispute” in the judgment of the learned trial Judge in spite of the claim and the pleadings before the court deprived him of a clear perception of the real issues for decision in the case. I am satisfied that the learned trial Judge completely lost sight of the real issues in controversy between the parties which was simply a declaration that the “ekpe” trench is the boundary between the parties and not a claim for declaration of title to a particular piece or parcel of land. He therefore approached the evaluation of the entire evidence led at the trial from a faulty position and consequently arrived at an erroneous decision in the case.

I will now turn to the issue of whether or not the trial court properly evaluated the evidence before it on the question of the “ekpe” trench, the subject matter of the dispute between the parties.

In this regard, the learned trial Judge referred to what he described as “*contradictions over the “ekpe” boundary in evidence between the present proceedings and the previous proceedings in Exhibit H*” and went on to identify four areas which he considered to be such contradictions. ***But, with profound respect, the learned trial Judge seemed to overlook the fact that no piece of evidence was adduced on behalf of the defendants in the present case to contradict the existence, nature or extent of the said “ekpe” trench over which the plaintiffs sought the declaration they sought. Both survey plans of the plaintiffs and defendants, Exhibits A and B, properly identified and indicated the said “ekpe” trench. No issue was joined by the parties either in their pleadings or from their evidence with regard to the existence or identity of the said trench. More importantly, no particular part or portion of the previous proceedings, Exhibit H, was tendered for the purpose of contradiction of evidence of the plaintiffs or any of their witnesses. I think, on the whole, the***

court below was right to hold that the learned trial Judge did not properly evaluate the evidence before him on the issue of the “ekpe” trench, the subject matter of the suit. The next point for consideration is whether the court blow was right in the order of retrial it made in the case.

- B ***An appellate court will order a retrial where it is satisfied that there has been such an error in law or an irregularity in procedure of such a nature which neither renders the trial a nullity nor makes it possible for the appellate court to say***
 C ***that there has been no miscarriage of justice so long as there are not special circumstances in the case as would render it oppressive to put the defendant on trial a second time.*** See
 Duru v. Nwosu (1989) 7 S.C.N.J. 154 at 159; Bakare v. Apena and
 others (1986) 4 N.W.L.R. 1 at 16 - 17; Isaac Ayoola v. Adebayo
 D (1969) 1 All N.L.R. 159. So, too, where an appeal is allowed because
 of failure of the trial court to make findings, of fact on material issues
 and the determination of such material issues depends on the cred-
 itability of witnesses, the proper order the appellate court ought to
 make is an order for retrial. See Karibo v. Glend (1992) 3 N.W.L.R.
 E (Part 230) 426; Okpaloka v. Ume (1976) 9 - 10 S.C. 269; Egonu v.
 Egonu (1978) 11 - 12 S.C. 111; Shell B.P. Petroleum Development
 Co. of Nig. Ltd. v. Cole (1978) 3 S.C. 183.

In the present case, it cannot be disputed that the learned trial
 Judge, with respect, totally missed the central point in issue between
 F the parties in the case when, aided and abetted by the defence, he
 erroneously converted a case of a declaration that a certain ancient
 “ekpe” trench is the boundary between Osina and Akokwa to that of
 declaration of title to some undefined piece or parcel of land, a claim
 G which plaintiffs neither sought nor was any counter claim made by
 the defendants in respect of any such land. Speaking for myself, I am
 unable to say that no miscarriage of justice has thereby been occa-
 sioned. I also find myself unable to identify any special circumstances
 that would render it oppressive to either side for a retrial of the suit.

- H I think I need to mention that it was in the exercise of the
 discretion of the court blow and in its attempt to ensure that there
 had been no miscarriage of justice in the trial that it was able to make
 an order for the retrial of the suit. ***The law is settled that where
 the Court of Appeal in the exercise of its discretion orders a***

retrial, unless this court comes to the conclusion that the exercise of such discretion was manifestly wrong, arbitrary, reckless, injudicious or contrary to justice, it cannot interfere even if it might have exercised the discretion differently if the discretion were that of this court. See *University of Lagos v. Olaniyan* (1985) 1 N.W.L.R. (Part 1) 156 at 165; *University of Lagos v. Aigoro* (1985) 1 N.W.L.R. (Part 1) 145; *Nwabueze v. Nwosu* (1988) 4 N.W.L.R. (Part 88) 257 at 260; *Anyah v. African Newspapers of Nigeria Ltd.* (1992) 6 N.W.L.R. (Part 247) 319. **I can see nothing in the order of retrial made by the court below in this case which is manifestly wrong, arbitrary, reckless, injudicious or contrary to justice and I am therefore unable to interfere with it.**

In making the order of retrial, however, the court below per the leading judgment of Rowland, J.C.A. with which Katsina-Alu, J.C.A. as he then was, and Onalaja, J.C.A. agree, observed thus:-

"It seems to me that this is a proper case in which the trial court should have undertaken a visit to the locus in quo in order to clear the conflicts in the evidence of the parties vis-à-vis their pleadings and their plans, Exhibits 'A' and 'B'. It is pertinent to mention that in the course of writing this judgment I observed at page 42 of the record that there was a visit to the locus in quo in an application for injunction. The ruling in connection with the application is at pages 45 - 53 of the record. However, in the course of the judgment of the learned trial Judge, he did not make any reference to his visit nor his ruling thereon. Moreover neither of the parties made the said visit to the locus in quo an issue in this appeal. Having regard to the pleadings vis-a-vis the evidence adduced the conflicts would only have been resolved by a visit to the locus in quo with a finding made upon it." It then concluded:-

"Without much ado, I allow this appeal, I set aside the Judgment of Johnson J, delivered at the Orlu High Court of Imo State on 16th January, 1985. In its place, I make an order of a trial de novo of the case before another Judge at Orlu High Court of Imo State. The new trial Judge must, and should visit the locus in quo in order to have a thorough appraisal of what is actually in dispute between the parties once and for all. The retrial should be done expeditiously because of the age of the case. I make no order as to costs."

It is thus clear that one of the reasons given by the court below

for its order of retrial of the case is to enable the trial court to visit the locus in quo for a thorough appraisal of what is in dispute between the parties. Indeed it was ordered that the new trial court “*must and should*” visit the locus in quo for the purpose aforementioned.

With profound respect to the court below, it is now well settled that the inspection of a locus in quo is strictly not necessary where the area of land in dispute is clear to the court and the parties and the trial court must arrive at its judgment not on the impressions from the locus in quo but upon its impressions from the evidence led before the court. A trial court is only bound to record the fact of the inspection and need not give its details although it is good practice where possible to record the full details of such inspection. See Dza v. Konla (1956) 1 W.L.R. 145 at 146; Kofi Badoo v. Ohene Ampung (1949) 12 W.A.C.A. 439; Chief Aaron Nwizuk and others v. Chief Eneyok and others (1953) 14 W.A.C.A. 354; Ejidike v. Obiora (1951) 13 W.A.C.A. 270 at 273.

It has been said that the purpose of an inspection of a locus in quo is not to substitute “*the eye for the ear*” but rather to clear any ambiguity that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. In other words, the purpose of an inspection of a locus in quo is primarily for the purpose of enabling the court to understand the questions that are being raised at the trial and to follow the evidence and apply such evidence. Although the ideal practice is for the court to record the full notes of the inspection in its record book, absence of such record of the inspection of a locus in quo is not fatal to the validity of the judgment. See Maji v. Shafi (1965) N.M.L.R. 33; Briggs v. Briggs (1986) 5 N.W.L.R. (Part 41) 362; Garba v. Akacha (1966) N.M.L.R. 62; Olusanmi v. Oshasona (1992) 6 N.W.L.R. (Part 245) 32 at 38.

The whole question of inspection of a locus in quo by a trial court was given a rather comprehensive consideration per the judgment of Verity, Ag. P. in the West African Court of Appeal case of Ejidike v. Obiora (1951) 13 W.A.C.A. 270 at 273 - 4 where the learned President of the court stated as follows:-

“We have been invited by counsel to lay down certain rules as to the way in which such inspections should be made and the manner in which the results should be recorded, but I do not consider it

desirable that we should venture upon any such course. It will suffice, in my opinion, if we recall the purpose of such visits as defined in London General Omnibus Co. v. Lavell (1901) 1 Ch. 135, when Lord Alverstone said.

"I have never heard it said and, speaking for myself, I should be very sorry to endorse the idea that a Judge is entitled to put a view in place of the evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply the evidence"

To, this, I would do no more than add that in all cases in which a visit is paid by the court to the locus in quo in a civil action, the Judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based upon his personal observations of which there is no evidence upon the record. When there is conflicting evidence as to physical facts, I have no doubt that he may use his own observations to resolve the conflict, but I do not think it is open to him to substitute the result of his own observations for the sworn testimony nor to reach conclusions upon something he has observed in the absence of any testimony on oath to the existence of the facts he has observed. Should he do so, he would, in my view, be usurping the position of the witnesses, and if his decision is materially affected by conclusions drawn from facts of which there is no evidence upon the record, this may result in the reversal of his judgment or the order of a new trial."

In my view, the above observations seem to represent a concise statement of the law on the subject and I must, with respect, fully endorse the same.

As already indicated earlier on in this judgment, the trial court inspected the locus in quo before it delivered its ruling on the cross-appellants application for interlocutory injunction. I have myself closely studied the record of proceedings in this case and must observe that I am unable to identify any "*conflicts in the evidence of the parties vis-à-vis their pleadings*" as alluded to by the court below which would warrant a second inspection of the locus in quo by the trial court. The object of a visit to a locus in quo has been the subject of authoritative pronouncements by this court in several cases. ***The purpose of a visit to the locus in quo, as has been stated repeatedly, is not***

to recite the evidence already led but to clear doubts which might have arisen as a result of the conflicting evidence of both sides as to the existence or non-existence of a state of facts relating to a physical object, and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue. Where there exists such conflicting evidence as aforesaid, it is permissible for the learned trial Judge and he is entitled to apply the court's visual senses in aid of its sense of hearing by visiting the locus in quo to resolve the conflict. See *Seismograph Services Ltd. v. Aporuovo* (1974) 6 S.C. 119, *Briggs v. Briggs* (1992) 3 N.W.L.R. (Part 228) 128 at 149 etc. **But whether or not such a visit is desirable rests entirely with the discretion of the court having regard to the nature of the evidence led and all the circumstances of the case and as to whether or not there is conflicting evidence as to physical facts which may easily be resolved by a visit or inspection of the locus and/or whether such a visit or inspection will enable the court to understand the questions that are raised and to follow and properly apply the evidence adduced before it.**

I have closely studied all the evidence led in this case before the trial court and cannot see my way clear, having regard to the evidence before the court, that it is necessary for any reason whatever for the trial court to visit the locus in quo a second time. It is my view that since the trial court visited the locus in quo in order to give proper consideration to the application for interlocutory injunction before it and made definitive observations in respect thereof, it was clearly unnecessary that a second visit to the locus should be made before the determination of the substantive suit. I think the court below was in error in holding to the contrary. **Nor do I consider it appropriate as ordered by the court below that "the new trial Judge must, and should visit the locus" at the trial of this action de novo. In my view, the discretion must rest with the new trial Judge who must not hesitate to visit the locus in quo if in his opinion such course of action appears to him desirable for a judicious determination of the dispute between the parties.**

The conclusion I have therefore reached is that issues I and 2

must be and are hereby resolved in favour of the respondents. Similarly, issue 3 is resolved substantially in favour of the respondents but with the qualification that the order of the Court of Appeal to the effect that the new trial Judge “*must and should visit the locus in quo*” at the retrial is hereby set aside. These appeals are otherwise without substance and are hereby dismissed. The order of retrial of the suit before another Judge of the Orlu Judicial Division of the High Court of Imo State, other than Johnson, J. made by the Court of Appeal is hereby affirmed. I think this is a proper case where no order as to costs ought to be made. Accordingly, the parties will bear their own costs.

BELGORE JSC

It is clear in the record of proceedings that learned trial judge, despite great effort at analyzing the evidence laid by the parties before him, missed the crucial point for determination. He concentrated on matter of title, which was not the issue he was asked to determine, and left undecided the crucial issue of whether the boundary between the parties was EKPE (the ancient trench) that seems to separate the two contending Communities. This error has affected his judgment and the only way to correct this is by way of a retrial. It is therefore in the overall interest of the parties that the real issues between them be determined, that will be the justice of the case. Neither Court of Appeal nor Supreme Court can determine the issue from the proceedings of trial court; it could only be decided by a retrial. Such a retrial is necessary and far from being oppressive to any of the parties; otherwise the issue will remain in abeyance. Ayoola v. Adebayo (1969) 1 All NLR 159; Duru v. Nwosu (1989) 7 SCNJ 154; Egonu v. Egonu (1978) 11 - 12 SC 111; SPB Co. Nig. Ltd. v. Cola (1978) 3 SC 1183; Bakare v. Apena (1980) 4 NWLR 1, 16.

It is therefore in the overall interest of justice to order a retrial in this matter, which Court of Appeal rightly ordered. This appeal therefore has no merit and I also dismiss it and abide by the consequential orders made by Iguh JSC who in the lead judgment dismissed the appeal.

WALI JSC

I have had the advantage of reading the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal. For the same reasons contained in the lead judgment, I also hereby dismiss the appeal and affirm the order for a trial de novo of the suit before another judge of the High Court of Imo State. I endorse the orders made in the lead judgment, that of costs inclusive.

C

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Iguh, J.S.C. I agree with his reasoning and conclusions. I will also dismiss both the appeal and cross-appeal and order a fresh trial of the suit before another judge of the High Court. I make no order as to costs.

AYOOLA JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Iguh JSC. The fundamental error in the approach of the trial judge was that he treated the case as one for declaration of title to a piece of land whereas it was a declaration as to the boundary between the areas of land. The erroneous approach was manifested in his criticizing the plaintiff for not disclosing the “*name of the land for which declaration was sought*” and is not showing the identity of the land over which a declaration was sought.

Where the claim is for declaration of boundary between two areas of land, to treat the action as if it were a declaration of title to a parcel of land and insist on proof that would have satisfied the requirement of a grant of declaration of title to land is a fundamental misdirection which affects the decision. So it was in this case. For this reason and the detailed reasons in the judgment of my learned brother, Iguh JSC, I too would dismiss the appeal.