

SUPREME COURT OF NIGERIA
FRIDAY 7TH JUNE, 2002. SC. 116/1998
CORAM:- I. L. KUTIGI, M. E. OGUNDARE, S. U. ONU,
U. A. KALGO, E. O. AYoola, JJSC

1. NNANTA ORIANWO & 4 ORS APPELLANTS
(For themselves and on behalf of
Rumuorianwo Wogozo Family)

AND

1. HARRISON OKENE
2. EMMANUEL OKENE
(For themselves and on behalf
members of Okene Family)

AND

1. L. O. OKENE & 2 ORS RESPONDENTS
(For themselves and as representing
The Okene Amadi Family)

AND

1. FYNEFACE LAWAL & 2 ORS

APPEALS - Court - Findings - Misdirection in - Conclusion made by
Court of Appeal is a misdirection - Which has occasioned a miscarriage of justice (H1)

APPEALS - Courts - Perverse findings - Fate - Court of Appeal gave
perverse judgment for defendant - And same must not be allowed to
stand (H2)

LAND LAW - Courts - Issue for determination - Relevant issue is
participation of the sons in burial of their father - As to entitle them to
a share in his estate - And not consideration of Ikwerre's inheritance
custom (H3)

COURTS - Evidence - Evaluation - Correctness of - Trial court rightly
evaluated evidence - As plaintiffs are entitled to take advantage of
evidence for defendants - That support their case (H4)

ACTIONS - Cross action - Proof - Burden of - Defendants who were

plaintiffs in the cross action - Had equal burden as plaintiffs in main action - To prove their case (H5)

ACTIONS - Cross action - Proof - Where main action fails - It does not imply that cross action succeeds - Unless findings are made in favour of the cross action (H6)

APPEALS - Cross appeal - Striking out - Propriety - The cross appeal was rightly struck out in the circumstance - Having become an academic exercise in the Court of Appeal (H7)

LAND LAW - Injunctions - Quic Quid plantatur solo solo cedit - Implication - There is no need for special order in respect of the house in issue - Since whatever is planted on land - Accrues to the land (H8)

FACTS

Appellants (in a representative capacity) instituted suit no. PHC/119/81 at the High Court of Rivers State, Port Harcourt against respondents (also in a representative capacity), claiming inter alia, for a declaration of customary right of occupancy to a disputed land situate at Port Harcourt, N50,000.00 being general damages for trespass committed by respondents on the disputed land and a perpetual injunction to restrain respondents and their agents from the land. Shortly after the aforementioned suit was instituted, respondents (in a representative capacity) filed cross-action in suit no. PHC/126/81 claiming from Fyनेface Lawal & 2 Ors, the sum of N20,000.00 as special and general damages for trespass committed on respondent's land situate at Rumuokwurusi and perpetual injunction restraining the aforementioned persons from further acts of trespass on the land. Both suits were thereafter consolidated since they relate to same land and family.

At the trial, appellants called 6 witnesses in support of their case, while respondents called 5 witnesses. At the conclusion of trial, the learned trial judge found for appellants and entered judgment in their favour in terms of their claims in suit No.PHC/119/81. The court dismissed respondents' suit no. PHC/126/81. However, the court failed to make specific order in respect of one Charles Okene's house

since appellants did not ask for a particular relief. Respondents were dissatisfied and thus appealed to the Court of Appeal, Port Harcourt. Appellants too were not happy with the judgment on Charles Okene's house. Hence, they also filed cross appeal at the same Court of Appeal. The court set aside judgment of the trial court and entered judgment for respondents as claimed in suit no. PHC/126/81. Appellants' claim in suit no. PHC/119/81 and their cross appeal were thus dismissed. Being aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the learned Justices of the Court of Appeal were right in allowing the appeal on the ground that the trial Court had failed to make a finding of fact on the issue of the states of Amadi and Okene, when a finding of fact on that issue was actually made by the trial Court.

2. Whether the failure by the learned Justices of Court of Appeal to consider the vital issue of 'on whom the land in dispute vested on the death of Wokerebe' had not occasioned a grant miscarriage of justice.

3. Assuming that the issue as to the status of Amadi and Okene was not resolved by the trial Court, were the learned Justices of the Court of Appeal right in entering judgment for the Defendants/Respondents having not by themselves resolved the issue in favour of the Defendants/Respondents?

4. Were the learned Justices of the Court of Appeal right in entering judgment for the Defendants/Respondents on the ground of the non-pleading by the plaintiffs/Appellants of the Ikwerre Native law and custom of burial rites of deceased person when what were the said burial rites had never been an issue in the case.

5. Were the learned Justices of the Court of Appeal right in not considering the plaintiffs/Appellants cross-appeal and in making an order striking out the cross-appeal?

6. Were the learned Justices of the Court of Appeal right to have awarded damages to the Defendants/Respondents in trespass and in making as order of injunction against the Plaintiffs/Appellants?"

HELD

(Unanimously allowing the appeal per

OGUNDARE JSC)

Court - Findings - Misdirection in

1. With profound respect to their Lordships of the Court below they were wrong when they found that the learned trial Judge failed to resolve the conflict in the name of Defendants' ancestor who was the son of Wokerebe, the common progenitor of the parties. By coming to the conclusion they arrived at they clearly misdirected themselves. And since their finding was the main reason for their setting aside the judgment of the trial court, I think the misdirection occasioned a miscarriage of justice. (p. 1962 D)

Courts - Perverse findings - Fate

2. It is significant to observe that although their Lordships of the court below held great premium on a finding of the name of Defendants' ancestor and held, erroneously though, that the trial Judge made no finding on such "important" issue, they themselves made no finding on it either before finding in favour of the Defendants and entering judgment for them. They seemed to have overlooked the fact that the Defendants as plaintiffs in PHC/126/81 had the burden of also proving their case. They made no findings whatsoever on Defendants' case in PHC/126/81 before entering judgment for the Defendants. Their Lordships, with respect, seemed to have done with Defendants' case what they wrongly criticized the learned trial Judge of doing in respect of Plaintiffs' case. I think the verdict for the Defendants as plaintiffs in PHC/126/81 must not be allowed to stand; it is perverse.

G In the case on hand, the Defendants as plaintiffs in the cross-action (PHC/126/81) claimed damages for trespass and injunction. By their pleadings they put in issue their title to the land. Nowhere in the judgment of the court below was any finding made in their favour either as to title to or possession of, the land in dispute. Yet that court proceeded to enter judgment in their favour for damages for trespass and injunction. With respect to their lordships of the court below, I think they are wrong. As they made no findings in favour of the Defendants in respect of either suit but particularly in respect of

PHC/126/81, they could not enter judgment for them as they did. That judgment cannot stand and it is hereby set aside.
(pp. 1965 A/1973 G)

Courts - Issue for determination

3. It can be seen from the evidence on both sides that the matter of the custom of Ikwerre people as to right of inheritance by a male child in the estate of his father was never in dispute between the parties. What was in dispute was whether or not the 5 younger sons, including Defendants' ancestor, took part in the burial rites of Wokerebe, their father as to entitle them to a share in his estate. This, of course, is a question of fact to be determined by the trial judge, based on the evidence adduced before him. In the light of the evidence on both sides, I think the details of the Ikwerre custom paled into insignificance. (p. 1967 H)

Evidence - Evaluation - Correctness of

4. The learned trial judge reviewed the evidence adduced on both sides and painstakingly evaluated it. He arrived at the conclusion that the plaintiffs' case was "more probable to the truth than that of the Defendants." In my respectful view, having regard to the admissions and inferences contained in the evidence of and for the Defendants, the learned Judge's conclusion cannot be faulted. It is trite that plaintiffs are entitled to take advantage of evidence for the Defendants that support their case. Their Lordships of the Court below were clearly in error to disturb the learned trial Judge's judgment. With profound respect to their Lordships of the Court below, the learned trial Judge showed a better understanding of the case than they appeared to show. (p. 1968 B)

Cross action - Proof - Burden of

5. Here again, his lordship of the Court below, with respect to him, did not advert his mind to the fact that Defendants were plaintiffs in the cross-action PHC/126/81 and had equal burden as the Plaintiffs in PHC/119/81 to prove their case. Had he remembered this, he would have held that the learned trial

judge's remark was not unjustifiable. (p. 1971 A)

Cross-action - Proof - Standard of

6. I think the law is clear. Where there is an action and a cross-action and plaintiff in the main action fails; it does not necessarily follow that the cross-action succeeds unless findings are made in favour of the plaintiff in the cross-action entitling him to succeed. This is so because the cross-action is an independent action by itself and plaintiff therein can only succeed on the strength of his case and not on the weakness of the defence. (p. 1973 E)

Cross-appeal - Striking out - Propriety

7. In the light of the conclusion reached by the Court below on plaintiffs' case in PHC/119/81 that the case failed and was dismissed, their cross-appeal in that court had become an academic exercise. It was, in my respectful view, rightly struck out in the circumstance. (p. 1974 A)

LAND LAW - Injunctions - Quic Quid plantatur solo, solo cedit

8. If the land in dispute is adjudged to belong to the plaintiffs and an injunction is granted in their favour in respect thereof, will it be right to say that the plaintiffs did not seek a relief in respect of Charles Okene's house? I do not think the learned trial judge was right in this respect. Charles Okene built on plaintiffs' land without their leave or licence. The latter obtained an injunction restraining the defending family from further trespassing on their land. Charles Okene, along with his house, is caught by the order of injunction. There is no need for any special order in respect of Charles Okene's house. The age-long maxim is quic quid plantatur solo, solo cedit - whatever is planted on the land accedes (or accrues) to the land. The learned trial judge's observation is wrong and it is hereby expunged from the record. (p. 1975 A)

REPRESENTATION

C. O. Akpamgbo, SAN with C. Uche & Miss P. Adimekwe, for the Appellants

B. M. Wifa, SAN with G. N. Okonkwo, for the Respondents

CASES REFERRED TO

Egonu v. Egonu (1978) 11/12 SC 111	
Akinola v. Oluwo (1962) 1 All NLR 224	
Emegokwue v. Okadigbo (1973) 4 SC 113	B
Amadi v. Nwosu (1992) 5 NWLR (pt. 241) 273	
Ibuluya v. Dikibo (1976) 6 SC 97	
Sokpui II v. Agbozo (1961) 13 WACA 241	
Atolagbe v. Shoran (1985) 1 NWLR (pt. 2) 360	C
Amadi v. Ohuru (1978) 6-7 SC 217	
Olatunji v. Adisa (1995) 2 NWLR (pt. 376) 167	
Ibenye v. Agwu (1998) 1 NWLR (pt. 574) 375	
Ibuluya v. Dikibo (1976) 6 SC 97	
Sokpui II v. Agbozo (1961) 13 WACA 241	D
Atolagbe v. Shoran (1985) 1 NWLR (pt. 2) 360	
Karibo v. Grand (1992) 3 NWLR (pt. 230) 462	
Okpiri v. Jonah (1961) ALL NLR 102	

LEAD JUDGMENT BY OGUNDARE JSC

In Suit No. PHC/119/81 in the Port Harcourt Judicial Division of the High Court of Rivers State, Nnanta Orianwo, Richard Wosu, Franklin Amadi, Thomas Acho and Boniface Elewa, for themselves and on behalf of Rumuorianwo Wogozo Family (hereinafter are referred to as Plaintiffs) sued L. O. Okene, Harrison Okene and Maxwell Okene, for themselves and as representing the Okene Amadi Family (hereinafter are referred to as Defendants), claiming as per paragraph 24 of their amended statement of claim:

“(i) *A declaration of the plaintiffs’ customary right of occupancy to all that piece or parcel of land known as and called ‘Ohia Otuloro’ lying and situate at Rumuokwurusi, Obio, Port Harcourt, which said piece or parcel of land is more particularly delineated and verged red on the survey plan No. FO/1A/82 L.D. annexed to this statement of claim.*

(ii) *N50,000.00 (fifty thousand Naira) being general damages for trespass committed by the defendants on the portion of the plaintiffs’ said land outside the area verged brown on the said survey plan;*

(iii) *A perpetual injunction to restrain the defendants and each*

of them whether by themselves, their servants, agents or otherwise howsoever from entering the plaintiffs' said land or ever interfering with the plaintiffs in their possession, occupation, use and enjoyment of their said land, save and except the said portion of land verged brown."

B Pleadings were filed and exchanged and, with leave of court, amended.

Shortly after the above suit was instituted, Harrison Okene and Emmanuel Okene, on behalf of themselves and other members of Okene Family instituted a cross action in suit No. PHC/126/81 CLAIM-
C ING FROM Fyनेface Lawal, Cyprian Lawal and James Achor:-

"1. the sum of N20,000.00 as special and general damages for trespass committed on the Plaintiffs' land known as 'OTULORO' situate at Rumuwokerebe Village, Rumuokwursi within the jurisdiction of
D *this Honourable Court;*

2. perpetual injunction restraining the defendants, their privies, agents and servants from further acts of trespass on the said land"

Following the death of Harrison Okene, Lawrence Okene was by order of court substituted in his place. Pleadings were ordered,
E filed and exchanged and, by leave of court, amended. The plaintiffs in the action also filed a reply to the statement of defence.

As the two actions related to the same land and were between the same families, the suit No. PHC/126/81 was, on the application of learned counsel for the parties in the case, transferred by order of
F court to the court handling suit No. PHC/119/81 presided over by Ungbuku, J. as he then was. And on the application of plaintiffs in suit No. PHC/126/81 and defendants in suit, No. PHC/119/81, the two suits were, by order of court made on 31/10/85, consolidated. It
G was further ordered that-

"By this consolidation the Plaintiffs in Suit PHC/119/81 are the Plaintiffs and the defendants in the said suit who are plaintiffs in Suit NO. PHC/126/81 are the defendants"

At the trial, plaintiffs called 6 witnesses in support of their case.
H The Defendants called 5 witnesses. At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial judge (Ungbuku, J) in a well considered judgment found for the plaintiffs and entered judgment in their favour in terms of their claims in Suit No. PHC/119/81; he dismissed the Defendants' suit No. PHC/126/

81.

The plaintiffs' case is that one Wokerebe was the original owner of the land known as "Otua Otuloro" in Rumuokwurisi Village, Obio, Port Harcourt. Wokerebe (or Okerebe) lived many years ago. At his death he left behind 9 sons named (in order of seniority by age) Wosu, Wogozo, Ikeani, Wuche, Chukwuntu, Amadi, Wolu, Ndumati and Okekem. B

The Plaintiffs descended from Wogozo while the Defendants descended from Amadi. Only Wosu, Wogozo, Ikeani and Wuche were adults at the time of the death of their father Wokerebe and it was only these four sons that performed the burial rites of their father and took part in the sharing of his estate. The other five sons being minors, did not share in the estate of Wokerebe; they were instead given to the older sons as wards. Amadi, Defendants' ancestor was given as ward to Ikeani who took him in and gave him land to settle upon. It is the case of the plaintiffs that according to Ikwerre custom only male children who performed the burial rites of their father can inherit his estate. The five sons of Wokerebe, that is Chukwunta, Amadi, Wolu, Ndumali and Okekem, being minors at the time Wokerebe died, did not take part in his burial rites and, therefore, did not inherit in his estate. Wokerebe's lands were shared between Wosu, Wogozo, Ikeani and Wuche. The land "Ohia Otuloro" was shared between Wosu and Wogozo; an ancient footpath marked their boundary. C D E

When Amadi was living with Ikeani, he committed adultery with Ikeani's wife for which Ikeani drove him away from his land. Amadi sought refuge with Wogozo who gave him part of his "Ohia Otuloro": to settle. Amadi soon got into another trouble. Wogozo had died then and had been succeeded by his son Orianwo. Amadi killed the cow of one Chief Okpoko of Maleri village and dumped the carcass in a pit. Chief Okpoko grew annoyed and invoked his "juju" to punish the wrongdoer. F G

The juju killed some of Amadi's children; only his son Okene escaped death. Amadi, in fear of his life, had to run back to Ikeani's land with his son Okene. Ikeani had died then. Amadi was taken back and resettled on the old land given him by Ikeani. There he lived and died and was buried. His son Okene also lived there. When Okene's family grew large and the land became insufficient for them H

to live on, Okene in 1946 approached the plaintiff's family for permission for his children to reoccupy part of plaintiffs' land that was previously given to his father, Amadi by Wogozo. Onyenweibea was the head of Plaintiffs' family at that time. Onyenweibea gave permission to Okene who settled thereon his children Harrison Okene, B Maxwell Okene and Emmanuel Okene, all of whom built houses on the land. The portion of Ohia Otuloro given to Amadi and on which Okene's children later settled is demarcated on Plaintiffs' land Exhibit A in this case. Plaintiffs remained in possession of the rest of Ohia C Otuloro belonging to compound and were buried there.

In 1964 it was discovered that someone had planted some palm tree seedlings on the land. As the plantation did not belong to any member of Plaintiffs' family, they went on the plantation and cut down the seedlings. Emmanuel Okene who owned the plantation D did not complain nor sue the plaintiffs. Some of the palm tree seedlings survived and in 1971 Plaintiffs again went on the plantation and destroyed those that survived. Some members of Plaintiffs' family later built on portions of the land without any disturbance from the Defendants or any one else. One of the houses was occupied by one E Dr. Kolade who was running a medical clinic there. People around the area including the Defendants, attended Dr. Kolade's clinic. In 1981, Charles Okene of the Defendants' family went outside the area given his family to build on the land in Plaintiff' possession. The plaintiffs protested and subsequently instituted the action leading to F this appeal.

The Defendants admitted the history that Wokerebe was the common progenitor of the parties and the original owner of Ohia Otuloro. They also admitted that Wokerebe died and left behind 9 G sons. They gave the names of the 9 sons as Wosu, Wogozo, Ikeani, Nwuche, Chkwurutu, Okene, Amadi- , Amadi-Wolu and Ndumati. They admitted that the plaintiffs descended from Wogozo but claimed that their own ancestor was Okene and not Amadi as claimed by the Plaintiffs. They admitted in evidence H that when Wokerebe died only the first four children were married and owned their own houses; the remaining 5 sons, including Amadi their ancestor, were not married then and had no houses of their own because they could not afford it. They claimed, however, that all the 9 sons inherited their father's estate and that the

land Ohia Otuloro was given to Amadi, their ancestor. Okene, Wokerebe's son begat Amadi who in turn begat Okene, Nwosu, Enwudebe and Enwumelu. They claimed that when Okene died his son Amadi continued to live on the land Ohia Otuloro inherited by Okene. They also claimed that Amadi's slaves killed a cow belonging to Okpoko and the latter in consequence invoked his juju. The juju killed Amadi and three of his children, leaving only his son Okene. Amadi left Okene in the care of Amadi Ikeani, his relation. On the death of Amadi Okene and for fear of Okpoko, Amadi Ikeani took Okene into his care and gave him land to settle on. Okene grew up, and lived in Ikeani's compound and raised up his family there. He did not return to Ohia Otuloro. In 1946 when the land given to him in Ikeani's compound could not contain his family, he took some of his sons to build houses on Ohia Otuloro and to live there. Okene lived, died and was buried in Ikeani's compound. His children, Harrison Okene, Maxwell Okene and Emmanuel Okene built houses on Ohia Otuloro and in 1963 established a palm plantation on the land. They harvested the plantation until 1981 when plaintiffs came to set it on fir. James Achor and Nwanele also came on the land and started to erect buildings on it. As a result of these acts they instituted their action PHC/126/81.

The Defendants admitted in evidence that according to Ikwerre custom any male child who does not participate in the burial rites of his father does not inherit in the father's estate. The also admitted that some members of plaintiffs' family built on the land, particularly the one occupied by Dr. Kolade and they did nothing about it.

In his judgment, the learned trial judge after a review and evaluation of the evidence before him, found:

1. *"I am convinced from the facts and circumstances of this case that the defendants are of the lineage of that son of Wokerebe called Amadi by the plaintiffs or Okene by the defendants."*

2. *"It is in evidence that the nine families, descendants of the nine sons of Wokerebe are existing still as separate identities. Corroborative evidence of whether Amadi or Okene was a direct son of Wokerebe can easily be got from any of the other family groups. It is only the plaintiffs who called Chief Abel Nwosu PW 4 to corroborate their version. Chief Abel Nwosu is from Rumuwosu family, the first son of Wokerebe. Chief Jonathan Sam Amadi DW5, the defendants*

called, admitted that Wokerebe had nine children but did not mention their names.

The version of the plaintiffs on this is better preferred to that of the defendants."

3. "I am convinced from the facts and circumstances so far considered, to hold that the traditional history of the plaintiffs, placed side by side with that of the defendants, is more probable to the truth than that of the defendants."

4. "...the poultry house, of Emmanuel Okene, the house of Harrison Okene and Maxwell Okene are all built within the residential area of the defendants. The said houses are clearly shown in all the Survey plans, Exhibits A, B, C, & D, tendered in evidence. From Exhibits A, B, C and D and the evidence of plaintiffs, the land in dispute excludes the residential area of the defendants. The residential area of the defendants is verged Brown in plaintiffs plan Exh. A, and is to the east of the land in dispute. The land in dispute is verged yellow in Exh. 'A' and it is only Charles Okene's house that is there within. That house is the cause of action in PHC/119/81"

5. "It is true that Emmanuel Okene made a palm plantation on the land in dispute sometime 1963/64 but I do not accept the defendants claim that the said plantation was of 20 acres or as shown in their plans."

6. "The defendants have not enjoyed uninterrupted acts of ownership and enjoyment over the land in dispute."

7. "The defendants silence in their pleadings as regards these acts of the plaintiffs, is indicative of admission of the facts the plaintiffs assert."

8. "The land in dispute as shown in all the survey plans tendered in evidence is almost identical, particularly the boundaries. On the north is the land of the plaintiffs, on the east is the residential area of the defendants, on the south is Rumuwosu family land and on the west is defendants land acquired from Rumucheta family in Mbuesilaru Village."

9. "On the whole it was plaintiffs alone that called witnesses to prove the boundaries of the land in dispute."

10. "I am inclined to believe and I do accept that the eastern boundary of the land in dispute is that shown in Exhibits A and B, the plaintiffs Survey plans."

11. *"I have considered the evidence of both parties on traditional history, acts of ownership, possession and enjoyment and of boundaries, over the land in dispute and I am convinced thereby to hold that the plaintiffs have proved their title, and possession over the land in dispute and are therefore entitled to judgment."*

The learned trial Judge observed that, going by the case of the defendants, they appeared to be *"a people trying to extend their territorial boundaries as a result of population growth."* It is upon the above findings that the learned trial Judge entered judgment for the Plaintiffs and dismissed the claims of the Defendants in Suit No. PHC/126/81. After entering judgment for the Plaintiffs, the learned Judge added:

"I make no particular order in respect of Charles Okene's house which was completed during the pendency of this case because the plaintiffs did not ask for a particular relief."

The Defendants were dissatisfied with the judgment against them and appealed to the Court of Appeal. The plaintiffs, too, were not happy with the trial judge's addendum to his judgment on Charles Okene's house and appealed against that part of the judgment.

The Court of Appeal allowed the Defendants' appeal, set aside the judgment of the trial Court and entered judgment for the Defendants in the sum of N1,000.00 as general damages for trespass and injunction as claimed in Suit No. PHC/126/81. The Court dismissed Plaintiffs' claims in Suit PHC/119/81 and their cross appeal. In resolving the appeal before it, the Court of Appeal found, per Nsofor JCA who read the lead judgment of that Court:

1. *"The trial judge stated the issues, narrowly in my view, when he said:-*

'The name of the defendants' ancestor to my mind is lesser evil than the issue of inheritance. The crucial question is whether or not the defendants' ancestor by whatever name called, was a minor at the death of his father and inherited nothing from the father's estate because he did not perform the burial rites of the late father.'

The issue, with due deference to the trial Judge was so narrowly formulated that he appeared to overlook gravamen of the contest, the back of it all on the pleadings and evidence as led. Each party had traced its general logical history differently. The appellants have consistently maintained that Okene, through whom they claim

the land in dispute, was a son of Wokerebe, and, that Amadi, whom the respondents asserted was their (appellants') ancestor and, son to Wokerebe, was the son of Okene. Therefore, who or what Amadi was became material. So also, who or what Okene was, was material before it would be resolved whether either Amadi or Okene performed the burial rites of Wokerebe. Unless and until it be found one way or the other, based on the evidence, who performed any rites and so entitled to participate in the partition of the Wokerebe's lands would be a subsidiary question, a corollary to the principal question of who was who and, so what."

2. *"...the respondents, qua plaintiffs in the Suits as consolidated, not having proved the Ikwerre native law and custom on which they hoisted their claims in the context I discussed above, and the failure of the trial court to make findings on material and vital facts, it is my judgment, that judgment ought to be entered in favour of the appellants, qua defendants in the Suits as consolidated."*

It would appear that it is upon these two findings that the Court below disturbed the judgment of the trial High Court. This is manifested in the judgments of Nsofor JCA and Katsina-Alu JCA, as he then was. Uwaifo JCA, as he then was, appeared to add another issue, failure to prove the certainty of the land claimed by Plaintiffs, as another factor for finding against the Plaintiffs.

The Plaintiffs have now appealed to this Court against the judgment of the Court of Appeal upon 6 grounds of appeal contained in a Notice of Appeal filed with the leave of this Court. The Parties filed and exchanged their respective briefs of argument; the Plaintiffs also filed a Reply Brief. The Plaintiffs formulated 6 questions as arising for determination in this appeal, to wit:

1. *Whether the learned Justices of the Court of Appeal were right in allowing the appeal on the ground that the trial Court had failed to make a finding of fact on the issue of the states of Amadi and Okene, when a finding of fact on that issue was actually made by the trial Court.*

2. *Whether the failure by the learned Justices of Court of Appeal to consider the vital issue of 'on whom the land in dispute vested on the death of Wokerebe' had not occasioned a grant miscarriage of justice.*

3. *Assuming that the issue as to the status of Amadi and Okene*

was not resolved by the trial Court, were the learned Justices of the Court of Appeal right in entering judgment for the Defendants/Respondents having not by themselves resolved the issue in favour of the Defendants/Respondents?

4. *Were the learned Justices of the Court of Appeal right in entering judgment for the Defendants/Respondents on the ground of the non-pleading by the plaintiffs/Appellants of the Ikwerre Native law and custom of burial rites of deceased person when what were the said burial rites had never been an issue in the case.*

5. *Were the learned Justices of the Court of Appeal right in not considering the plaintiffs/Appellants cross-appeal and in making an order striking out the cross-appeal?*

6. *Were the learned Justices of the Court of Appeal right to have awarded damages to the Defendants/Respondents in trespass and in making an order of injunction against the Plaintiffs/Appellants?"*

The Defendants formulated 5 questions in their brief. I have compared their set of questions with that of the plaintiffs. The two sets of questions raise more or less identical issue. I am however, satisfied that, having regard to the grounds of appeal and the judgment appealed against, Plaintiffs' set of questions is to be preferred.

I now come to consider the questions raised in this appeal. And in doing so I shall take Questions 1,2 and 3 together:

Questions 1, 2 and 3:

Nsofor JCA in his lead judgment had criticized a passage in the judgment of the trial court where that Court had indicated that the crucial question in the case before it was whether or not the Defendants' ancestor inherited nothing from Wokerebe's estate. I have quoted earlier in this judgment what Nsofor JCA said. But for ease of reference I shall quote it here again.

The learned Justice of the Court of Appeal wrote:

"The trial Judge stated the issues, narrowly in my view, when he said:-

'The name of the defendants' ancestor to my mind is lesser evil than the issue of inheritance. The crucial question is whether or not the defendants' ancestor by whatever name called, was a minor at the death of his father and inherited nothing from the father's estate because he did not perform the burial rites of the late father.'

The issue, with due deference to the trial judge was so nar-

rowly formulated that he appeared to overlook gravamen of the contest, the back of it all on the pleadings and evidence as led. Each party had traced its general logical history differently. The appellants have consistently maintained that Okene, through whom they claim the land in dispute, was a son of Wokerebe, and, that Amadi, whom
 B the respondents asserted, was their (appellants') ancestor and, son to Wokerebe, was the son of Okene. Therefore, who or what Amadi was became material. So, also, who or what Okene was, was material before it would be resolved whether either Amadi or Okene per-
 C formed the burial rites of Wokerebe. Unless and until it be found one way or the other, based on the evidence, who performed any rites and so entitled to participate in the partition of the Wokerebe's lands would be a subsidiary question, A corollary to the principal question or who was who and, so what."

D Katsina-Alu, JCA in his concurring judgment put it this way:
 "The first issue to be resolved by the trial court was who was the ancestor of the defendants/appellants? Was it Amadi or Okene? The appellants throughout their case have maintained that Amadi was the grandson of Wokerebe. Indeed they claim that it was Okene
 E their ancestor who begat Amadi.

How did the learned trial Judge resolve this issue? In the course of his judgment the learned trial judge said:

"The name of the defendants' ancestor to my mind is lesser
 F evil than the issue of inheritance. The crucial question is whether or not the defendants' ancestor by whatever name called, was a minor at the death of his father and inherited nothing from the father's estate because he did not perform the burial rites of the late father."

The result is that the issue of who was the ancestor of the ap-
 G pellants remains unresolved."

This finding of their Lordships of the Court below has come under attack in this Court. It is submitted in the Appellants brief of the plaintiffs that their Lordships were grossly in error when they held that the trial court made no finding on the status of Amadi and Okene
 H when in fact the learned trial Judge did so. The Defendants, in their brief, argued that the Justices of the court of appeal were right in their conclusion on the status of Amadi and/or Okene.

After a careful consideration of the arguments advanced in this appeal and a consideration of the judgment of the Court below vis-

a-vis the judgment of the trial court, I think the Plaintiffs are right. I agree entirely with Nsofor JCA in his remarks that the learned trial judge “*reviewed the evidence (before him) admirably exhaustively*” and that he (the trial Judge)” had the facts on the crucial and central issues in hand.” The learned trial Judge in this admirably exhaustive manner had this to say in his judgment: B

“*From the pleadings and evidence led on both sides certain facts appear not in dispute and such facts need no comments in this judgment. The said facts are:*

(1) *That both plaintiffs and defendants are of a common ancestor called Wokerebe.* C

(2) *That Wokerebe had nine sons.*

(3) *That the first four in order of seniority were Wosu, Wogozo, Ikeani and Wuche.*

(4) *That the Plaintiffs own ancestor was Wogozo.* D

(5) *That the defendants own ancestor Amadi or Okene was among the rest five children.*

(6) *That the land in dispute was part of the estate of their common ancestor.*

(7) *That at one time or the other in the history of the defendants, they (the defendants) lived in Ikeani’s compound because of the menace of Chukwu Okpoko’s juju.”* E

The learned Judge identified, and quite rightly in my respectful view, the issues to be resolved in the conflict in the traditional evidence of the parties when he observed: F

“*What is in controversy in this area of traditional evidence is whether*

(1) *Amadi and Okekem were among the direct sons of Wokerebe, as claimed by the plaintiffs or grandsons as put up by the defendants.* G

(2) *Whether the defendants ancestor was a minor at the time of Wokerebe’s death and did not participate in the burial of their father, and therefore, did not inherit any property of the father.”*

He resolved the first above issue this way: H

“*From the narrative of the plaintiffs, the nine sons of Wokerebe were Wosu, Wogozo, Ikeani, Wuche, Chkwuntu, Amadi, Worlu, Ndumati and Okekem, in order of seniority. The defendants own account of the nine sons in order of seniority is Wosu, Wogozo, Ikeani,*

Wuche, Chukwuntu, Okene, Amadi-Ndukuru, Amadi-Worlu and Ndumati. I am convinced from the facts and circumstances of this case that the defendants are of the lineage of that son of Wokerebe called Amadi by the plaintiffs or Okene by the defendants. It is in evidence that the nine families, descendants of the nine sons of Wokerebe are existing still as separate identities Corroborative evidence of whether Amadi or Okene was a direct son of Wokerebe can easily be got from any of the other family groups. It was only the plaintiff who called Chief Abel Nwosu PW4 to corroborate their versions. Chief Abel Nwosu is from Rumuwosu family, the first son of Wokerebe Chief Jonathan Sam Amadi DW5, the defendants called, admitted that Wokerebe had nine children but did not mention their names.

The version of the plaintiffs on this issue is better preferred to that of the defendants.” (Italics are mine for emphasis)

With profound respect to their Lordships of the Court below they were wrong when they found that the learned trial Judge failed to resolve the conflict in the name of Defendants’ ancestor who was the son of Wokerebe, the common progenitor of the parties. By coming to the conclusion they arrived at they clearly misdirected themselves. And since their finding was the main reason for their setting aside the judgment of the trial court, I think the misdirection occasioned a miscarriage of justice. This is borne out by the following passage in the lead judgment of Nsofor JCA:

“Each party had traced its general logical history differently. The appellants have consistently maintained that Okene, through whom they claim the land in dispute, was a son of Wokerebe, and, that Amadi, whom the respondents asserted, was their (appellants’) ancestor and, son to Wokerebe, was the son of Okene. Therefore, who or what Amadi was became material. So, also who or what Okene was, was material before it would be resolved whether either Amadi or Okene performed the burial rites of Wokerebe. Unless and until it be found one way or the other, based on the evidence, who performed any rites and so entitled to participate in the partition of the Wokerebe’s lands would be a subsidiary question, a corollary to the principal question of who was who and, so what.

If Amadi be a grandson of Wokerebe, or, a son of Okene, as

the appellants asserted, then, it might be that being a grandson, he (Amadi) had nothing to do or perform in the burial of Wokerebe under the Ikwerre Native law and custom. This would be assuming the fact that Amadi was born and alive when Wokerebe died. In that case, the question of Amadi being disinherited in or from the estate of Wokerebe would be a non issue. The case was not fought on the pleadings on that question. B

It will, therefore, be that the status of Okene would be further established and found upon before the questions:-

(1) Whether he performed the burial rites of Wokerebe would arise, and C

(2) Whether he was entitled to inherit of participate in the sharing of the Wokerebe's lands would arise. A conclusion finally on whom the land in dispute vested, following the partition of Wokerebe's lands on his death, amongst his nine sons, before the status of Amadi and Okene be resolved, would, in my view, be putting the cart before the horse. And this, again, with respect to the trial judge, was exactly what he did. The effect is disastrous. The horse will knock down the cart and hurt itself. Therefore, the name of the defendants' ancestor cannot be a 'lesser evil than the issue of inheritance.' E

Did the learned trial judge evaluate the evidence as held, to make any finding on this vital question of fact before reaching his final conclusion on whom or, here 'title' in the land in dispute vested? Certainly not. With respect, again, to the trial Judge, he shied away from the real question in formulating the issue as above reproduced. F

What, then, is the legal consequence of this failure to make this finding on way or the other on this vital issue of fact, a question based on the credibility of the witnesses who testified? The legal effect of such a failure is clear to me. It is this. G

Where a trial court fails to make a finding (of fact) on material or important issues of fact or approaches the evidence called by the parties wrongly, the appellate court has no alternative but to allow the appeal. After allowing the appeal for failure to make findings of fact), the appellate court will consider whether it will order a re-trial or enter judgment for the appellant. See *Karibo v. Grand* (1992) 3 NWLR (pt. 230) 462 at page 441 per Nnaemeka-Agu JSC; *Okpiri v. Jonah* (1961) ALL N.L.R. 102 per Ademola, CJF at page 105; *Polycarp OJOGBUE V. AJIE NNUBIA*, (1972) 1 ALL N.L.R. (PART H

2) 226 PER COKER, JSC AT PAGE 232. BUT SEE ALSO TOTAL (NIGERIA) Ltd. v. WILFRED NWAKO (1975) S.C. 1 at page 14.

This appeal, in my respectful opinion, ought to succeed on this point and, be allowed accordingly.

B Surely, if their Lordships had not misdirected themselves in the way they did, if they had adverted their minds to the specific finding of the learned trial judge accepting the plaintiffs' version of the traditional history on the issue who was Wokerebe's son, Amadi or Okene, they would not have allowed the Defendants' appeal to them based on that issue.

C Assuming, without so deciding, that their Lordships were right in holding that the trial Judge did not resolve the issue as to the name of defendants' ancestor, what order should they have made? If the issue was vital to the resolution of the dispute between the parties, D they would be expected to either order a retrial or resolve the issue themselves upon the evidence available if the question of credibility of witnesses would not arise. Strangely, however, they did neither but proceeded to dismiss plaintiffs' case. With respect to them, I think they are wrong. If, however, the issue was not as vital to the case as E their Lordships took it to be - and this is the view of the learned trial Judge with which I am in full agreement - the non-resolution (if any) of the issue would not be sufficient to vitiate the judgment of the trial judge.

F The learned trial Judge opined:

"The name of the defendants' ancestor to my mind is a lesser evil than the issue of inheritance. The crucial issue is whether or not the defendants' ancestor by whatever name called, was a minor at the death of his father and inherited nothing from the late father's G estate because he did not perform the burial rites of the late father."

Their Lordships of the court below criticized the learned trial Judge for this view and held that he had a narrow view of the issues before him. With profound respect to their Lordships I think they are again wrong in their criticism. There is general agreement between H the parties that Defendants' ancestor was as son of Wokerebe. What is in dispute is whether or not this son took a share in the estate of Wokerebe. What then does it matter what name either party gave to this son? I believe that what is important is to determine whether or not this son shared in the estate of his father Wokerebe.

It is significant to observe that although their Lordships of the court below held great premium on a finding of the name of Defendants' ancestor and held, erroneously though, that the trial Judge made no finding on such "important" issue, they themselves made no finding on it either before finding in favour of the Defendants and entering judgment for them. They seemed to have overlooked the fact that the Defendants as plaintiffs in PHC/126/81 had the burden of also proving their case. They made no findings whatsoever on Defendants' case in PHC/126/81 before entering judgment for the Defendants. Their Lordships, with respect, seemed to have done with Defendants' case what they wrongly criticized the learned trial Judge of doing in respect of Plaintiffs' case. I think the verdict for the Defendants as plaintiffs in PHC/126/81 must not be allowed to stand; it is perverse.

I resolve Questions 1, 2, and 3 in favour of the Plaintiffs.

Question 4

Another reason for deciding against the Plaintiffs was given by Nsofor J.C.A. in these words:

"The Respondents by their pleadings, (see e.g. paragraphs 5 and 6 of the Amended Statement of Claim in Suit No. PHC/119/81) had pleaded and relied on the Ikwerre native law and custom dealing with the effect of the non-performance of the burial rites of a deceased father. The effect of this was to disinherit the son, who failed to perform those burial rites, in the estate of the deceased. One is inclined to question:-

Q. (1) - What are those burial rites?

Q. (1) - Would the Ikwerre native law and custom, non-performance of which would have the effect of disinheriting a son from sharing in the estate of the deceased father need not be pleaded fully or in great details and proved in evidence? Disinheritance from an estate of a deceased father, seems to be, a rather serious matter.

What are the Ikwerre Native Law and custom of burial rites, the incidents of its non compliance on a death, in my respectful opinion ought to be matters to be pleaded and proved in evidence and by evidence. This, the Respondents failed to do. Aligned with and germane to the above, is, also, the question of 'Adulthood' and 'minority' under the Ikwerre native law and custom. What constituted

‘adulthood’ or minority’ under the native law and custom? By their pleadings and their evidence, the respondents assert that the ancestor of the appellants was a ‘minor’ son of Wokerebe and that he did not perform the funeral rites of the deceased father. All these, in my view, are matters of fact to be proved in evidence. And they are all an aspect of the attack on the ‘decisions’ hoisted on proper evaluation of the totality of the evidence as led.”

Katsina-Alu, J.C.A. put it more succinctly when in his concurring judgment, he said:

“I now come to burial rites. The respondents in paragraphs 5 and 6 of the amended Statement of Claim in Suit No. PHC/119/81 pleaded and relied on the Ikwerre native law and custom dealing with the effect of the non-performance of burial rites of a deceased father. What then are these burial rites? The respondents did not set them out. In other words they were not pleaded. The result is that these burial rites were not established. That being so, the respondents had failed to prove their claim against the appellants. Their claim should have been dismissed.

In the light of the foregoing and for the fuller reasons given by Nsofor JCA, I also allow the appeal and set aside the decision of the lower court. The claim in Suit No. PHC/119/81 is dismissed. I abide by the orders for cost.”

Uwaifo JCA in his own concurring judgment reasoned along the same line as his other two learned brethren.

With profound respect to their Lordships, I think they tried to make a mountain of a molehill. True enough, the plaintiffs pleaded in paragraph 6 of their amended statement of claim thus:

“6. On the death of the plaintiffs’ said ancestor, Wokerebe, his lands were shared among those of his aforesaid children who were then adult and could bury him, namely Wosu, Wogozo, Ikeani and Wuche. By Ikwerre native law and custom only the adult male children of a deceased person who performed his burial rites can share his estate and they take in order of seniority by age. The rest of the children who were minors and so could not bury their father were then placed under the guardianship of the adults in accordance with Ikwerre custom. Thus Ikeani became the guardian of Chukwunta, Amadi and Ndumati while Wogozo became the guardian of Wolu and Okekem.”

Apart from the bland denial of paragraph 6 among other paragraphs of the amended statement of claim the Defendants did not specifically deny the custom pleaded in paragraph 6. In paragraph 5 of their amended statement of defence, they pleaded thus:

“The Defendants admit paragraph 5 of the Amended Statement of Claim only to the extent that Wokerebe begat nine children but deny that he begat Amadi or Okekem; instead, Wokerebe begat Okene and Amadi-Ndukwure. It was Okene who begat Amadi while Amadi-Ndukwuru begat Okekem. The Defendants aver further that the last five children of Wokerebe were not minors but grown-ups who were at his death only unmarried but also shared in his estates contrary to the averments in paragraph 6 of the amended Statement of Claim.”

At the trial, plaintiffs led evidence to the effect that according to Ikwerre custom a male child who did not perform the burial rites of his father would not share in the father’s estate. See the evidence of PW1, PW2 and PW4. But they were not the only witnesses that confirmed the custom. The defendants too did. DW1, one of the Defendants (indeed 1st Plaintiff in PHC/126/81) and their star witness, testified:

“The estate of the deceased is shared among the adult males who performed the burial with the senior ones having more shares than the juniors.

DW2, 2nd plaintiff in PHC/126/81 testified thus:

“It is correct that a son who did not take part in the burial of the late father will not be given anything from the father’s estate.”

DW2 even went further to explain what is done by the son at the burial rite. He said:

“It is important for a son to provide wine and food to guest at the burial of his father. The burial expenses are determined by the status of the deceased.”

DW5, Chief Jonathan Sam Amadi in his testimony said:

“The Ikwerre custom is that even minor male children take part in the burial ceremony of their late father. A male child who did not participate in the burial of the father does not inherit the father’s property.”

It can be seen from the evidence on both sides that the matter of the custom of Ikwerre people as to right of inherit-

ance by a male child in the estate of his father was never in dispute between the parties. What was in dispute was whether or not the 5 younger sons, including Defendants' ancestor, took part in the burial rites of Wokerebe, their father as to entitle them to a share in his estate. This, of course, is a question of fact to be determined by the trial judge, based on the evidence adduced before him. In the light of the evidence on both sides, I think the details of the Ikwerre custom paled into insignificance.

The learned trial judge reviewed the evidence adduced on both sides and painstakingly evaluated it. He arrived at the conclusion that the plaintiffs' case was "more probable to the truth than that of the Defendants." In my respectful view, having regard to the admissions and inferences contained in the evidence of and for the Defendants, the learned Judge's conclusion cannot be faulted. It is trite that plaintiffs are entitled to take advantage of evidence for the Defendants that support their case - Egonu v. Egonu (1978) 11/12 SC. 111; Akinola v. Oluwo (1962) 1 All NLR 224; (1962) ANLR 225. Their Lordships of the Court below were clearly in error to disturb the learned trial Judge's judgment. With profound respect to their Lordships of the Court below, the learned trial Judge showed a better understanding of the case than they appeared to show.

An example of this is the treatment given to the evidence of DW5 by both courts. During cross-examination this witness was asked the question:

"Is it not true to suggest that the reason for only the four sons attending the Ikwali Rumu-Kurushi meeting and sharing gifts is because the rest five sons were minors at the time Wokerebe died and did not take part in his burial?"

The witness answered:

"It is too difficult a question for me to answer."

The witness is from the ikeani branch of Wokerebe extended family; the Plaintiffs are from Wogozo branch and the Defendants from Amadi (Or Okene as they choose to call their ancestor) branch. Ikeani branch were the guardians of the Defendants. Indeed the Defendants' immediate father Okene lived, died and was buried in Ikeani compound. So also his eldest son Isiah Okene. The present

Defendants also lived in that compound until in 1946, for lack of space, their father settled them on part of Ohia Otuloro which is indicated on all the plans as their residential area. It should not be difficult for a man so placed as DW5 to answer the question put to him in cross-examination except that he knew the truth would be harmful to the case of the side that called him to testify. The inference B to be drawn from DW5's refusal to answer that vital question put to him is not far-fetched. He knew the true answer must be in the affirmative but declined to be candid with the court.

What did the Court below make of the evidence of DW5? C
Uwaifo JCA said:

“Reference was made to the evidence of Chief Jonathan Sam Amadi (DW5) in cross-examination when he was asked:

‘Is it true to suggest that the reason for only the four sons attending the Ikweli Rumukwursi meeting and sharing gifts is because D the rest five sons were minors at the time Wokerebe died and did not take part in his burial?’

He answered, after he was alleged to have paused for a while:

‘It is too difficult a question for me to answer.’

Although the learned trial judge did not indicate what he made E of that, that piece of evidence is neither here nor there.”

In my respectful view, a proper understanding of the facts of the case will suggest that the witness evaded the question because he knew that a true answer to it would be damaging to the case of the F Defendants and support the case for the plaintiffs.

Another example I will give relates to the following passage in the judgment of Uwaifo JCA:

“As I said earlier on, custom and evidence which are intended to disinherit or to defeat the right to inherit must be strong and con- G vincing. The learned trial judge, with due respect to him, may have taken this issue lightly, or should I say found it difficult to satisfactorily resolved it, when he said:

‘In this case the plaintiffs are entitled to rely on the evidence of DW5, Chief Jonathan Sam Amadi on the custom of sharing gifts in H Wokerebe extended family and the admission that male children who did not perform burial rites of their father are not entitled to inherit the father's estate. In addition, a reasonable inference can be drawn in favour of the plaintiffs' claim from the 1st defendant's admission

that the five other sons of Wokerebe, including their ancestor had neither wives nor houses of their own when their father died.'

There can be no justification for the above-quoted observation. First, the method of sharing gifts by the extended family of Wokerebe was not an issue joined on the pleadings. The evidence as regards that is inadmissible and ought to have been discountenanced as going to no issue: see Emegokwue v. Okadigbo (1973) 4 S.C 113 at 117; Amadi v. Nwosu (1992) 5 NWLR (pt.241) 273. Second, the practice adopted by the said Wokerebe family of sharing gifts has no relevance to a supposed custom of a community as to inheritance. It was most unreasonable to make such an extension by the family even up to the fourth generation of the appellants' ancestor. Third, no reasonable inference can be drawn from the fact that because a person neither married nor built a house at a particular time, he would have been a minor then."

With respect, a clear understanding of the case will reveal the relevance to the case of the practice of the Wokerebe extended family being represented at community council meetings by descendants of the 4 eldest children of Wokerebe and the sharing of gifts by the 4 branches to the exclusion of the other 5 branches - acts which tend to show which version of traditional history - Plaintiffs' or Defendants' - is more probable.

It is instructive to observe that the admissibility of the evidence as to the practice of the Wokerebe extended family was not raised by the Defendants in their grounds of Appeal nor in issue formulated by the Court below nor touched upon by Nsofor and Katsina-Alu JJCA; it was an issue raised suo motu by Uwaifo JCA and decided upon by him without the parties addressing on it.

Before I am done with Question 4, I like to refer to yet another criticism by Uwaifo JCA of the court of trial. Uwaifo JCA said:

"I think it was also erroneous for the learned trial judge to hold that because the appellants did not call evidence from any of the other four families to say they performed burial rites and inherited property, then section 149(d) of the Evidence Act would be invoked against them. It was the cross-appellants who asserted that the appellants' ancestor and others were minors and therefore that they did not perform the burial rites of Wokerebe to entitle them to inherit his property. They had the burden to prove that because the law is that

he who asserts must prove.”

Here again, his lordship of the Court below, with respect to him, did not advert his mind to the fact that Defendants were plaintiffs in the cross-action PHC/126/81 and had equal burden as the Plaintiffs in PHC/119/81 to prove their case. Had he remembered this, he would have held that the learned trial judge’s remark was not unjustifiable.

Uwaifo JCA on identity of the land in dispute said:

“The cross-appellants did not also adequately prove the identity of the land inherited by their ancestor Wogozo particularly in reference to the evidence of PW2.”

This finding is clearly in conflict with the finding of Nsofor JCA (with whom Katsina-Alu JCA agreed) that-

“It was the contention by the counsel for the appellant that the respondents failed to discharge the onus on them of proving the identity of the land to which their claim related. But is this correct? Certainly, of course, it has been stated in a number of decided cases beginning from *Baruwa v. Ogunsola* (1938) 4 W.A.C.A. 159 that the first duty of a claimant to title to land is to prove the area over which he claims with ‘ascertainable certainty.’

In the cases giving rise to the appeals, the parties plead and tendered their respective survey plans (exhibits A, B, C and D respectively). All the plans were drawn to the same Scale of: ‘Scale 1: 1000.’ But was the identity of the land in issue in these case I think not. Why? Because of the reasons (1) the learned counsel, Mr. John who appeared for the appellant, qua defendants at the trial, ‘Dominus Litis’, did agree (See page 265 of the Record) that ‘the identity of the land in dispute is clear to both parties.’ It is enough, therefore, to say to dispose of the matter that Mr. John with the appellants is caught by *Horn*, a case decided as long ago as 1825 in *College v. Horn* 130 E.R. 459. And it is, now perfectly settled that a plan is not a sine qua non in every land case. Where in a case like those giving rise to the appeals, the identity of the land in dispute is clear to both parties, then, on the high authority of *Chief Allison Ibuluya v. Tom Benebo Dikibo* (1976) 6 SC. 97 at page 107; *Chief Sokpui II v. Chief Tay Agbozo* (1961) 13 W.A.C.A. 241; *Atolagbe v. Shoran* (1985) 1 NWLR (Pt.2) 360, and their other line of decisions, a plan ceases to be of an absolute necessity. It is clear from the Record before me that the

parties were in doubts as to the identity of the land in dispute. No. So ‘Cedit quaestio’. In the interest of fullness in treatment, attention may be drawn to the testimony by the PW1 in page 205 Lines 19 to 23 of the Record. The PW3 (Geofrey Nwanwe) (see page 228 Lines 27 to 33 of the Record) knew or knows the land in dispute. He testified as
 B to the boundaries just as did the PW4 also. And the leaned trial judge did write in page 281 of the Record that:-

“...it is admitted that the parties (plaintiffs and defendants) have a common ancestor... and that the identity of the land in dispute is
 C clearly known to both parties.”

My view is that on the evidence before the court, particularly the plans of the parties, Exhibit A, B, C and D, Nsofor JCA was right when he held that the identity of the land in dispute is clear and is known to the parties. It would appear that Uwaifo JCA was in the
 D minority as to some issues raised in his judgment he did not carry his colleagues along with him.

For all I have said on Question 4 I resolve the issue in favour of the Plaintiffs.

Questions 5 and 6

E After concluding his consideration of Plaintiffs’ case and dismissing same, Nsofor JCA in his lead judgment said:

“There shall be judgment in favour of appellants, qua plaintiffs in Suit No. PHC/126/81. The plaintiffs shall be trespass. The defendants in Suit No. PHC/126/81 are restrained by themselves, their
 F servants and or; agents from further acts of trespass on that parcel or piece of land shown on the plaintiffs’ Survey plan No. OK/RSD.2/81 (Exhibit ‘C’). The Appellants, qua plaintiffs in Suit No. PHC/126/81, shall be entitled to the costs of the action fixed at N1,000.00. The
 G above shall be the judgment of the Court below.”

It is submitted for the plaintiffs that judgment could only be entered for the Defendants, if the Court below had made its own findings of fact in favour of the Defendants and that it amounts to a miscarriage of justice when vital and important issues had not been
 H resolved in favour of the Defendants, to enter judgment for them. It is also submitted that -

“... it is nothing but a miscarriage of justice to dismiss the plaintiffs/appellants’ case for failure by the trial court to make findings of fact on vital and important issues when no attempt whatsoever was

made by the court of appeal to resolve those issues in favour of the Defendants/Respondents.”

Two cases - Olatunji v. Adisa (1995) 2 NWLR (Pt. 376) 167 and Obasi Ibenye & ors. v. Abram Agwu (1998) 1 NWLR (Pt. 574) 375 are cited in support. It is argued that “the court of appeal being erroneously of the view that the trial court had not decided a vital issue in the case made no attempt whatsoever to give any reason for deciding to enter judgment outright for the Defendants/Respondents without a resolution of the issue instead of remitting the case to the trial court for rehearing.” It is finally submitted that as the learned trial judge adequately dealt with the case before him and made copious findings in favour of the plaintiffs particularly on possession, it was wrong of the court below to have dismissed their claims and to enter judgment for the Defendants.

It is submitted for the Defendants that the court below was right, having found title in them to dismiss plaintiffs’ claims and grant Defendants’ reliefs. It is also submitted that there has been no demonstrable injustice caused to the plaintiffs by the purported error of striking out of their cross-appeal.

I think the law is clear. Where there is an action and a cross-action and plaintiff in the main action fails; it does not necessarily follow that the cross-action succeeds unless findings are made in favour of the plaintiff in the cross-action entitling him to succeed - see Amadi & Co. v. Ohuru & Ors. (1978) 6-7 SC 217; (1978) 11 NSCC 436. ***This is so because the cross-action is an independent action by itself and plaintiff therein can only succeed on the strength of his case and not on the weakness of the defence.***

In the case on hand, the Defendants as plaintiffs in the cross-action (PHC/126/81) claimed damages for trespass and injunction. By their pleadings they put in issue their title to the land. Nowhere in the judgment of the court below was any finding made in their favour either as to title to or possession of, the land in dispute. Yet that court proceeded to enter judgment in their favour for damages for trespass and injunction. With respect to their lordships of the court below, I think they are wrong. As they made no findings in favour of the Defendants in respect of either suit but particularly in respect of

PHC/126/81, they could not enter judgment for them as they did. That judgment cannot stand and it is hereby set aside.

In the light of the conclusion reached by the Court below on plaintiffs' case in PHC/119/81 that the case failed and was dismissed, their cross-appeal in that court had become an academic exercise. It was, in my respectful view, rightly struck out in the circumstance.

Having now concluded in this court that that case was wrongly dismissed, the cross-appeal of the plaintiffs will now be revisited.

On the findings of the trial court, particularly that possession to the land in dispute is in the plaintiffs it follows that Charles Okene was in trespass when he built a house on part of the land. The trial court so found and awarded damages for trespass and injunction against the Defendants. Curiously however, the learned trial judge observed that -

"I make no particular order in respect of Charles Okene's house which was completed during the pendency of this case because the plaintiffs did not ask for a particular relief" (italics mine for emphasis)

The plaintiffs in paragraph 24 of their amended statement of claim sought for -

"A perpetual injunction to restrain the defendants and each of them whether by themselves, their servants, agents or otherwise howsoever from entering the plaintiffs' said land or ever interfering with the plaintiffs in their possession, occupation, use and enjoyment of their said land, save and except the said portion of land verged brown."

This relief was granted as claimed by the trial court.

Exhibit A, plaintiffs' plan in PHC/119/81 shows the entire area the plaintiffs call Ohia Otuloro said to belong to them. The plan shows their boundary to the south with the Rumunwosu branch, the descendants of Wosu between whom and Wogozo the entire Ohia Otuloro was partitioned. On the eastern part of Exhibit A is the residential area of the Defendants clearly delineated; this is the area the plaintiffs said their ancestor gave to defendants' ancestor and on which as from 1946 the children of Okene built without interruption. The plan also shows the area, clearly delineated, which the plaintiffs said the defendants infiltrated into by cultivating a palm tree plantation and Charles Okene building a house. Charles Okene's act of trespass

was the immediate cause of the action, according to the plaintiffs. It is this area both sides agree that is the land in dispute. The plans of both parties also bear this out.

If the land in dispute is adjudged to belong to the plaintiffs and an injunction is granted in their favour in respect thereof, will it be right to say that the plaintiffs did not seek a relief in respect of Charles Okene's house? I do not think the learned trial judge was right in this respect. Charles Okene built on plaintiffs' land without their leave or licence. The latter obtained an injunction restraining the defending family from further trespassing on their land. Charles Okene, along with his house, is caught by the order of injunction. There is no need for any special order in respect of Charles Okene's house. The age-long maxim is quid quid plantatur solo, solo cedit - whatever is planted on the land accedes (or accrues) to the land. The learned trial judge's observation is wrong and it is hereby expunged from the record.

The plaintiffs' cross-appeal to the court of appeal succeeds and it is allowed. Issues 5 and 6 are resolved against the Defendants.

All the Issues canvassed in this appeal having been resolved in favour of the plaintiffs, this appeal succeeds and it is hereby allowed. The judgment of the court of Appeal is set aside, that of the trial High Court is restored. The observation of the learned trial judge as it states that an order is not being made in respect of the house of Charles Okene is, however, expunged..

I award to the plaintiffs N10,000.00 costs of this appeal and N3,000.00 costs of the appeal in the court below.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ogundare, JSC. I agree with his reasoning and conclusions. I will also allow the appeal. The judgment of the court of appeal is accordingly set aside while that of the trial High Court delivered on 22nd July, 1988 is restored. I endorse the consequential orders in the said judgment.

ONU JSC

Having had the advantage of a preview of the judgment of my learned brother Ogundare, JSC just delivered, I am in entire agreement with his reasoning and conclusion that the appeal and cross-appeal be and are accordingly allowed by me. I have nothing further to add thereto. I abide by the consequential orders made inclusive of costs awarded therein.

KALGO JSC

I have had a preview of the judgment of my learned brother Ogundare JSC just delivered in this appeal. I agree with the findings and conclusions reached therein. I find that there is merit in the appeal, and it ought to be allowed. I allow it and set aside the decision of the court of appeal and restore the decision of the trial court. I abide by the order of costs made in the leading judgment.

AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother Ogundare, JSC. For the reasons he gives, I too would allow the appeal. I award N10,000.00 costs to the plaintiffs.

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