

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2002 SC.130/1998
CORAM: S. M. A. BELGORE, I. L. KUTGI,
M. E. OGUNDARE, U. MOHAMMED, U. A. KALGO, JJSC

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|-----------------------------------------|-------------------|
| 1. EBE EBE UKA | APPELLANTS |
| 2. CHIEF BENJAMIN UDUMA ABAM | |
| (For themselves and as representing Ndi | |
| Ojiugwo Village of Abam) | |
| AND | |
| 1. CHIEF KALU OKORIE IROLO | |
| 2. OLUGWO OKEKE | |
| 3. NICHOLAS UKA KALU | RESPONDENTS |
| 4. SUNDAY DIKE KALU | |
| 5. KALU OKORIE | |
| 6. KALU EBE | |
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COURTS - Issues - Failure to determine - Effect - Failure to consider all issues joined by parties - May or may not result in setting aside decision reached - Depending on whether miscarriage of justice is occasioned (H1)

LAND LAW - Title - Proof - *Idundun v. Okumagba* - Ownership of land can be proved - By traditional evidence - Document of title - Positive acts of ownership - Acts of long possession - Prove of ownership of adjacent land (H2)

LAND LAW - Title - Conflicting claims - Proof - Onus lies on both sides to prove to court - That they are exclusive owners of the land - And this must be decided on balance of probabilities (H3)

JUDGMENTS - Issue - Miscarriage of justice - It is a misdirection to assume that a miscarriage of justice in an issue - Renders other findings in the judgment perverse (H4)

JUDGMENTS - Perverse decision - Meaning - Decision is perverse when it runs counter to evidence - Where court considered extraneous matters - Or when miscarriage of justice was occasioned (H5)

JUSTICE - Miscarriage of justice - Basis - To constitute miscarriage of justice - There must be a departure from rules - Which permeates all judicial procedure (H6)

APPEALS - Supreme Court - Issues - Resolution - Supreme Court can resolve an issue not based on credibility of witnesses - But on inference to be drawn from proved facts (H7)

FACTS

Plaintiffs/respondents commenced this action against defendants/appellants at the High Court of Abia State, Ohafia Division, claiming inter alia for declaration of title over a land, fees for annual rentage of the land and order of perpetual injunction against appellants. Appellants in a counter-action also lay claim to the same land and made similar claims as respondents did. Thereafter, the two actions were consolidated by order of the court on application of the parties. Both parties in their respective pleadings relied on traditional histories to prove their claims. After the hearing, the court held in favour of appellants. Dissatisfied, respondents filed appeal at the Court of Appeal. The court held that there was miscarriage of justice in the judgment of the trial court. Hence, the court allowed the appeal and ordered that the case be retried. Aggrieved, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right (having due regards to the pleadings and evidence) to have reversed the decision of the trial court and order a retrial.

2. Whether the court below was right in setting aside the judgment of the trial court on the reliefs of trespass and injunction.”

HELD (Unanimously allowing the appeal Per

OGUNDARE JSC)

COURTS - Issues - Failure to determine - Effect

1. A breach of the rule of fair hearing results in the nullification of the proceedings however well decided they might be

but a failure on the part of a court to consider all the issues that have been joined by the parties and raised before it for determination may, or may not, result in the setting aside of the decision reached depending on whether or not miscarriage of justice is occasioned thereby. (p. 2502 B)

LAND LAW - Title - Proof - Idundun v. Okumagba

2. I think I need begin by setting out some salient principle of law involved in this case. It is now well settled that there are five ways of proving ownership of land, each of which suffices to establish title to a piece or quantity of land in dispute. Fatayi-Williams, J.S.C., (as he then was) delivering the judgment of this court in *Idundun v. Okumagba* [1976] 9/10 S.C. 277 at pages 246-250 laid down the law thus:

“As for the law involved... Firstly, ownership of land may be proved by traditional evidence as has been done in the case in hand...

Secondly, ownership of land may be proved by production of documents of title which must, of course be fully authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circumstances giving rise to the presumption in favour of due execution in the case of documents twenty years old or more at the date of the contract.

Thirdly, acts of the person (or persons) claiming the land such as selling, leasing or renting out all or part of the land, or farming on it or in a portion of it, are also evidence of ownership, provided the acts extend over a sufficient length of time and are numerous and positive enough as to warrant the inference that the person is the true owner.

Fourthly, acts of long possession and enjoyment of the land may also be prima facie evidence of ownership of the particular piece or quantity of land with reference to which such acts are done. Such acts of long possession, in a claim of declaration of title are really a weapon more of defence than of offence; moreover under section 145 of the Evidence Act [now section 146], while possession may raise a presumption of ownership, it does not do more and cannot stand when

another proves a good title. It cannot be gainsaid that, in the present case, not only did the learned trial judge reject the appellants' evidence as to possession of any portion of the land in dispute, he also found that the respondents have proved by evidence, which he accepted, that they are the owners of the land in dispute.

Finally, proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute, may also rank as a means of proving ownership of the land in dispute.

A plaintiff may plead any number of these five ways but to succeed he must establish at least one of them, and any one so established suffices. (p. 2505 D)

LAND LAW - Title - Conflicting claims - Proof

3. In the instant case, both the plaintiffs and appellants claimed title to the land in dispute, the onus lay on both sides to prove to the court that they are the exclusive owners of the land and, from their pleadings, this they could do either by conclusive traditional evidence or by exercise of maximum acts of ownership over a sufficient length of time, numerous and positive enough to warrant the inference that they are exclusive owners of the land; the case must be decided on the balance of probabilities. (p. 2513 C)

JUDGMENTS - Issue - Miscarriage of justice

4. It is a misdirection to say that where there has been a miscarriage of justice as regards an issue, all other findings in the judgment are perverse. (p. 2513 H)

JUDGMENTS - Perverse decision - Meaning

5. Onu JSC in State v. Ajie (2000) 11 NWLR 434 at 449 defined a perverse decision thus:

"A decision is said to be perverse

(a) when it runs counter to the evidence; or

(b) where it has been shown that the trial court took into account matters which it ought not to have taken into account

or shuts its eyes to the obvious; or
(c) when it has occasioned a miscarriage of justice.
 (p. 2514 A)

Miscarriage of justice - Basis

6. To constitute a miscarriage of justice, however, there must be such a departure from the rules which permeates all judicial procedure as to make what happened not in the proper sense of the word judicial procedure at all. (p. 2514 D) B

Supreme Court - Issues - Resolution C

7. In the light of the findings of the learned trial judge on the question of acts of ownership he would have resolved, had he cared to do so, the conflicting traditional history in favour of the defendants by preferring their version of the history as being more probable. By preferring not to resolve the issues, it is the defendants that stand to be prejudiced and not the plaintiffs. And the defendants have not complained. I, therefore, do not find any miscarriage of justice in this case, as erroneously found by the Court of Appeal. In any event, the issue is one that this court can resolve as it is not dependent on the credibility of witnesses but on inference to be drawn from proved facts. (p. 2515 B) D

NOTABLE POINT OF INTEREST F

OGUNDARE JSC

1. A judge should not shy away from performing his duty

In Akpan v. Otonong, the trial judge just shied away from deciding which version of traditional history was preferred. The same attitude was adopted by the trial judge in the case presently under consideration. To shy away from doing one's duty is not an attitude to be encouraged. It is a lapse in the performance of one's duty. Where such a lapse occasions a miscarriage of justice an appellate court must not hesitate to intervene and set aside a verdict resulting therefrom. Whether there is such a miscarriage of justice in the case on hand will be seen later. (p. 2509 G) G

REPRESENTATION

F.C. Ofodile, with I. F. Chude, for the appellant
 Namaeka Ngige Esq., with I. O. Iroma, C.A. Chuks Nnadi and perpetual Ademekwe, for the respondents

CASES REFERRED TO

- Okonji v. Njokanma (1991) 7 NWLR 131
- Ibenye v. Agwu (1998) 11 NWLR 372
- Idundun v. Okumagba (1976) 9/10 SC 277
- Piaro v. Tenalo (1976) 12 SC 31
- Kehinde v. Irawo (1973) 3 SC 29
- Ishola v. Abake (1972) 5 SC 321
- Akinloye v. Eyiylola (1968) NMLR 92
- Olujinle v. Adeagbo (1988) 2 NWLR 238
- Adejumo v. Ayantegbe (1989) 3 NWLR 417
- Anyanwu v. Mbara (1992) 5 NWLR 386
- Balogun v. Akanji (1988) Vol. 19 1 NSCC 180
- Odunsi v. Pereira (1972) 1 SC 52
- State v. Ajie (2000) 11 NWLR 434
- Missr. v. Ibrahim (1975) 5 SC 55
- Incar Ltd. v. Adegboye (1985) 2 NWLR (pt. 8) 453

LEAD JUDGMENT BY OGUNDARE JSC

- In Suit No. HU/59/74, Elder James Okoro and Chief Benjamin Uduma Abam, for themselves and as representing Ndi Ojiugwo Village of Abam sued Chief Kalu Okorie Irolo, Alugwe Okeke, Nicholas Uka Kalu, Sunday Dike Kalu, Kalu Okorie and Kalu Ebe, for themselves and on behalf of Ndi ebe Village of Abam, claiming (i) declaration of title over the piece or parcel of land known as and called OGBUEBULU situated at Ndi Ojiugwo Village Abam in Ohafia Division within the judicial division of this Honourable Court and of the annual rental value of N10.00 and (ii) perpetual Injunction to restrain the Defendants their servants, workmen and/or agents from in any way interfering with the Plaintiffs' ownership and possession of the aid OGBUEBULU LAND.

And in a counter action, HU/19/76 instituted by the Ndi Ebe Village against the Ndi Ojiugwo Village, Chief Kalu Okorie Irolo, Alugwe Okeke Alugwe and Nicholas Uka Kalu, for themselves and as

representing the people of Ndi ebe Village Abam claimed from elder James Egbe Okoro, Chief Benjamin Uduma Abam, Ikpo Ibiam, Ebe Uka, Daniel Mba, Usu Ukwa Omegbe Egbe Okoro and Gbagalugu Usu, for themselves and as representing Ndi Ojiugwo Village, Abam:

“1. Declaration of title to all that lot, piece or parcel of land known as and called OGBUEBULU situate at Ndi Ebe, Abam with Umuahia judicial Division- annual rental value N10.00 B

2. N1,000.00 being general damages for trespass upon the said land.

3. Injunction permanently restraining the defendants, their servants agent and/or workmen from entry upon or interference with the said land. C

Both sides sought and were granted leave to sue and defend as representatives of their respective communities of Ndi Ojiugwo and Ndi Ebe Villages.” D

Pleadings in each case were ordered, filed and exchanged and, with leave of court, amended. The parties, the subject matters and claims in both actions being the same, the two actions were, on the application of the parties and by order of court, consolidated with the parties in suit No. HU/59/74 being Plaintiffs and Defendants respectively in the consolidated suits and shall hereinafter be so referred to accordingly. E

The Plaintiffs in their amended statement of claim averred, inter alia, as follows:-

“4(i) The land in dispute was founded by the ancestor of the Plaintiffs called ‘OJI ONWU UGWU’ simply called Ojiugwo a name he was given because his father had lost all his sons by death before he was born after sacrifices to the sun god Kamalu. Ojiugwo first cleared the land of virgin forest and started to farm it and harvest palm fruits therefrom. F

(ii) Ojiugwo was the son of Amaizu who was one of the sons of Abam Onyerubi the founder of Abam. In Abam custom, Ndi Ojiugwo are entitled to the waist part of any animal killed for Abam Onyerubi. It is Ndi Ojiugwo that offer Abam traditional annual sacrifice of ‘IZAA AFIA’ after clearing bushes before the bushes in Abam are burnt for farm work for each farming season. G

(iii) When Defendants’ ancestor an Ibibio man called Ebe, nicknamed Ebenta Ite who was a fisherman and a hunter desired to H

settle near the Igwu River, his master Urji Ndi Okpo-ogu brought him to Ojiugwo who made him customary grant of the area now known as Ndi Ebe for settlement with the Igwu River as the boundary. This was many yards after Ojiugwo had settled and established Ndi Ojiugwo.

(iv) From time immemorial the Igwu River has been the natural boundary between the land of the Plaintiffs and that of the Defendants. From the time of Ojiugwo the following predecessors of the Plaintiffs as head of Ndi Ojiugwo have with their people exercised maximum acts of ownership and possession over the land in dispute:- Okite Ojiugwo, Okeke Agwu, Agwu Okeke, Kalu Agwu, Ola Ngwobia and then the 2nd Plaintiff who is the present village head of Ndi Ojiugwo. Until the acts that led to the present action no one from defendants village has ever had claim to plaintiffs' land across the Igwu River which has been the boundary from time immemorial.

5. The plaintiffs and their predecessors have been making use of the land in dispute by farming there harvesting palm fruits, placing tenants therein and pledging some portions; Job Eechi, Ikpo Ibiam and Zuoke Egbuta are tenants of the plaintiffs still living in the land in dispute. Portions of the land in dispute were pledged to George Agbai Ogbuagu deceased and Ibe Agwu. The pledges were oral but when each one of them left the portion pledged to him, he gave a receipt for the money refunded to him. These receipts will be tendered at the hearing. The following persons of the plaintiffs' village have their cocoa farms in the land in dispute:-

(1) Ota Usu (2) Ebe Ebe Uka and (3) Chief Kalu Agwu. The plaintiffs' juju shrine by name Ogbuebulu is on the land in dispute.

6. The first plaintiff had cocoa farm in the area now planted with rice by Ikpo Ibiam, a tenant of the plaintiffs. In 1968, the Rice Work Unit of the Ministry of Agriculture, Bende stationed at Ndi Ebe Abam cut down the cocoa trees and burnt some to plant rice. The first plaintiff protested and in reply received letter No. BE/104/ 182 of 25th June, 1968 which will be tendered at the hearing.

7. Between the plaintiffs and the defendants the customary practice has been when in any year any individual member of the defendants wanted to cross the Igwu River to the side of the plaintiffs and farm there he would approach the chiefs of the plaintiffs with a pot of palm wine and 2/- or 20 kobo worth of meat. After this the plaintiffs would give him farm strips in the land in dispute to farm and

after harvesting he would quit the land. Within the living memory of the plaintiffs the following persons of the defendants' village have done so:- Chief Agunta who once was the Head Chief of the defendants' Village, Ejike Kalu, Iche Odachi and Okeke Uba. The point is that Ndi Ojiugwo is much smaller village than Ndi Ebe and the defendants have need for more farming land. B

8. In the time past it was custom in Abam clan to which the parties belong for neighbouring villages cross their boundaries with other neighbouring villages to harvest palm fruits from palm trees growing in the land of their neighbours. This did not ipso facto make such land communal in ownership to the villages. It is by this practice that the defendants' people could cross the Igwu River to harvest palm fruits growing in the land in dispute. But when the need to pay school fees communally arose in modern times this practice was stopped all over Abam Clan. Despite protests by the plaintiffs who are only one fifth in population of the defendants, to the defendants to stop crossing the Igwu River to harvest palm fruits from the land in dispute on the ground that the plaintiffs need money to maintain their children in school and that the custom no longer prevails in Abam Clan, the defendants have persisted to harvest palm fruits in the land in dispute. In 1974 when the plaintiff challenged the defendants for harvesting palm fruits in the land in dispute, the defendants instructed their Solicitor K. Ifegwu, Esq., to write to Ebe Ebe Uka and Ikpo Ibiam, tenants of the plaintiffs, It was from this letter the plaintiffs noted for the first time since time immemorial that the defendants were laying claim to the ownership of the land in dispute. This letter will be tendered in evidence at the hearing. The defendants after their solicitor had written the letter above referred, reported the plaintiffs to the police all Ohafia. The plaintiffs approached their solicitor A.K. Uche, Esq., and instructed him to write to the Divisional Police Officer, Ohafia explaining their own stand in the matter. He wrote a letter dated 3rd September, 1974 which will be tendered at the hearing. The D.P.O. heard both parties and advised civil action. His letter No. AB. 7050/EC/UF/Vol.5/117 of 7th September, 1974 to plaintiffs solicitor will be tendered at the hearing. It was on the strength of this advice that the plaintiffs took the present action in this Honourable court." C D E F G H

The defendants, on the other hand, in their own amended

statement of defence pleaded thus:-

"4. The land in dispute was founded by Ebe, the first ancestor of the plaintiffs who cleared it of virgin forest and took it into effective possession. Since the founding of this land by Ebe, it has descended from generation to generation of the plaintiffs' village until the present.

B The plaintiffs have as their ancestors before them did, exercised maximum acts of possession and ownership over the land in dispute, farming thereon, reaping fruits from economic trees thereon, lumbering, fishing in the Igwu River and other streams on the land, cutting sticks therefrom for building purposes and for use as firewood, collecting ropes therefrom for building purposes and renting and allowing portions to individuals for farming and for establishing plantations without let or hindrance by the Defendants or anybody else. The plaintiff's 'Thusi' and 'Ogbuebulu' juju shrines are on the land. There are many plantations on the land in dispute established by members of the plaintiffs' village or strangers who were authorized by the plaintiffs.

5. The land Ogbuebulu is named after Ogbuebulu stream which flows across the land and joins the Igwu river. There are bridges across both the Ogbuebulu stream and the Igwu river which bridges were constructed by the plaintiffs' village by communal effort. The road between the Ogbuebulu stream and Igwu river used to be very swampy during the rainy season and it was constructed and made an all season road by the plaintiffs. The Igwu river was in the habit of being flooded during the rainy season covering much of the farmland in the area because the course of the said Igwu river was blocked by many logs of fallen trees and many big trees and plants growing along the course of the river. But these logs, trees and plants were cleared by the plaintiffs to enable the river have a thorough flow and thereby avoided flooding the nearby farmlands during the rains. When the plaintiffs were constructing the bridges across the Igwu river and Ogbuebulu stream constructing the road between the two rivers and clearing the course of the Igwu river, the defendants did not aid the plaintiffs nor did the defendants challenge them. There are many, plantations and farms on the land in dispute owned by the plaintiffs people or their tenants.

6. One Okoro Agba of Amuru Abam the late father of the 1st defendant went to the defendants' village from Umuhu Abam as a native doctor many years ago. He later went to the plaintiffs' village

also as a native doctor and asked to settle there and Ejirika Ebe, the then head of the plaintiffs' village allowed him to settle on a portion of the land in dispute. He settled there and planted some economic trees. It was when Okoro Agba was living at that portion of the land in dispute that the 1st defendant was yet very young and was buried by Ejirika Ebe and his people. The 1st Defendant was allowed to Continue to enjoy the economic trees his father had planted. The first Defendant lived at Ndi Ebe village and while he lived there he planted some cocoa on the portion allowed to his father. He married his first and second wives from Ndi Ebe village. In fact he was treated as Ndi Ebe man by the plaintiffs and was allowed to farm on lands of the plaintiff without discrimination. The 1st defendant later moved to the defendants' village where he now lives. He is using the facts of his late father's settlement and the first defendant's subsequent use of portions of the land in dispute to support the defendants' claim to the land. The old abode of Okoro Agba is indicated on the plaintiffs' plan. Many of the cocoa trees planted by the 1st Defendant were destroyed by Mr. Jackson and his team when they were allowed a portion of the land in dispute by the plaintiffs to plant rice after the 1st Defendant had long settled at Ndi Ojiugwo village.

7. During the Nigerian Civil War many refugees flocked to Ndi Ebe from Edda in Afikpo division. When Ndi Ebe village became congested because of the influx of these refugees the plaintiffs showed them a portion of the land in dispute where they cleared and settled and planted food crops around their settlement. At the end of the war many of them went away while a few remained and the few that remained went to the plaintiffs during planting seasons to ask for portions of the land in dispute to cultivate and they cultivated mainly rice. The plaintiffs gave them portions of the land in dispute on payment of money. In 1975 the defendants intimidated the said Edda settlers who were forced to make payment to the defendants for the portions of land on which they cultivated rice without the knowledge of the plaintiffs. When the plaintiffs got to know about this they questioned the Edda settlers who informed the plaintiffs that the defendants threatened their lives hence the Edda settlers had to pay the defendants for the portions the settlers cultivated. The plaintiffs asked the settlers to leave the land and they did so. The area allowed to the Edda settlers is shown in the plaintiffs' plan and verged ochre. This

area where the Edda settlers were allowed to stay during the Nigerian civil war used to be rented out to some persons from Edda to harvest palm fruits therefrom on payment of annual rent.

8. During the Nigerian Civil War, the Rice Unit of the Ministry of Agriculture approached the plaintiffs for a portion of land to plant rice. One Mr. Jackson an expatriate employed for the rice scheme went to the plaintiffs village with other Nigerian personnel engaged in the scheme and made the request. The plaintiffs showed the rice team a portion of the land in dispute and they planted rice. The said portion is verged light green in the plaintiff's plan.

9 Ndi Ojiugwo village is comparatively new. It came into existence many years after Ebe had established Ndi Ebe village. One Amioma Okweji of Ozu Abam had twins. Her husband drove her out of his compound as bearing twin babies was forbidden in the whole of Abam clan at that time. She could not return to her father Okweji because of the same reason. Amioma went to live at Ndi Ezinta compound at Ozu Abam where twin mothers were allowed to live. From there she was attending market at Ndi Ememe Abam on Ede days, the Ndi Ememe Abam market days. She met Ezenta Oji at Ndi Ememe and became friendly with him. Ezenta Oji who was the son of the Nze' (-meaning Chief Juju priest of Abam, approached Okweji and asked to marry Amioma. When Oji got the information that his son was associating with mother of twins, he drove him away and Ezenta stole a duck at Ndi Ezinta compound and was driven away together with Amioma.

10. Plaintiffs say that Amioma's father appealed to Okoro Okekwu then the head of the plaintiffs' village to allow Amioma and her husband to settle on a portion of Ndi Ebe land. Okoro Okekwu agreed and allowed Amioma and her husband to settle on a portion of Ndi Ebe land which portion now forms part of Ndi Ojiugwo village. When Amioma and Ezenta settled at the area allowed them by Okoro Okekwu, the father of Amioma demanded bride price for Amioma from Ezenta Oji who could not pay because he had no money. He was then nicknamed 'Ojiugwo' because he paid no bride price for Amioma and he was known to be a habitual debtor. The Defendants are the descendants of Ezenta Oji alias Ojiugwo and Amioma and that is why the Defendants are known as Ndi Ojiugwo.

11. The plaintiffs say there are two areas within the land in

disputes which are thickly forested. One area to the north is called Osan Nkoko because crabs breed in large numbers in that area and the other Oka Ururo to the south because it is very muddy. These areas are very swampy during the rains and the plaintiffs did not farm these two areas as often as they did on the other parts of the land in dispute. The plaintiffs are now gradually deforesting these two areas by converting parts of them to rice and cocoa plantations. The- said two areas are verged light blue in the plaintiffs plan. B

12. Sometime in 1971 one Ikpo Ibjam of Edda (3rd Defendant), Ebe Ebe Uka of Ndi Ojiugwo (4th Defendant) and Daniel Mba (5th Defendant) entered three separate portions of the land in dispute and cleared those portions for the cultivation of rice without the consent of the plaintiffs. The plaintiffs questioned the Defendants' people who admitted they authorized the said three persons to clear the portions and the said three persons also confirmed what the Defendants' people said. The plaintiffs instructed a solicitor, K. Ifegwu, Esq., to write to the trespassers and to defendants to desist from entering the land. The Defendants continued to trespass by harvesting palm fruits on the land. C D

13. The plaintiffs say they reported the Defendants to the police at Ebem Ohafia. The police investigated the matter and said it was civil and the Divisional Police Officer, Ohafia asked the councillors of Ohafor Abam Community Council to go into the matter. Councillors of Ohafor Community Council went into the matter with consent of the plaintiffs and the Defendants. The said Councillors made a demarcation asking plaintiffs to leave part of the land to the Defendants. They made a demarcation as shown in the plaintiffs' plan. The councillors pleaded with the plaintiffs to leave for the Defendants a small area of the land in dispute to the west of the demarcation line. While the plaintiffs were yet considering the decision of the Ohafor Community Councillors, the Defendants took out action for declaration of title against them - HU/59/74: Elder James Egbe Okoro and another v. Chief Kalu Okoro Irolo and others refers. E F G

14. In or about January, 1976 the Defendants, their servants, agents and/or workmen without leave licence or consent of the plaintiffs went on the land in dispute and cut down and sawed one Ihusi tree growing at the Ihusi juju shrine of the plaintiffs. The stump is shown H

on the plaintiffs' plan."

It is clear from the pleadings of the parties that they each relied for their claim to title to the land in dispute on traditional history and acts of ownership and possession that, is, two of the five methods by which title is proved. At the trial the plaintiffs called six witnesses while the Defendants called seven. After addresses by learned counsel for the parties, the learned trial judge, in a well-considered judgment found for the defendants, that is, the plaintiffs in Suit No. HU/19/76. The learned judge found -

"1. The plaintiffs and Defendants have same name for the land in dispute. It is called 'Ogbuebulu'"

2. I have taken a close look at the plans filed by both sides. The plaintiffs' plan is Exhibit A and Defendants' plan Exhibit G. In spite of the differences in details, the area in dispute verged pink in plaintiffs' plan Exhibit A is approximately same area verged pink plus the small portion verged yellow in the defendants' plan exhibit G. So, the location of the land in dispute is clear.

3. Now it is clear to me from the performance of the witnesses for the plaintiffs, that they have nothing at all to show as positive and numerous acts of possession and ownership of the land in dispute extending over a long period of time to warrant the inference that they are owners of the land.

4. On the contrary, the Defendants have demonstrated by evidence, indeed supported by plaintiffs' witness PW2 Ibe Agwu that as far back as the twenties and thirties, they had been using this land for farming and putting tenant farmers there.

5. D.W. 1 Chief Alugwe Okeke had his rice farm in the land in 1960. DW3, DW4 and DW5 gave very convincing evidence of their farming activities, on the whole the Defendants i.e. Ndi Ebe people produced evidence of farming activities numerous and positive enough in the land and extending over a long period of time and unchallenged by the plaintiffs. When the evidence of the parties are therefore weighed in the imaginary scale (see Mogaji v. Odofin above) by virtue of the preponderance of evidence, it tilts very heavily on the side of the Defendants of Ndi Ebe."

6. This finding clearly shows that the Igwu river flows through the lands of Ndi Ebe people and is not a boundary.

7. The evidence of the traditional ruler of the Community of

the parties Eze Ike Okoroafor is true and I believe him. I have already dismissed the alleged pledge to PW2 as a mere fabrication. Indeed the documents received as Exhibits C and D are false documents, They were fabricated to support a false claim.

8. In the light of my finding that the Ndi Ebe people successfully demonstrated numerous and positives acts of possession and ownership extending over a long period of time in the land in dispute. They are definitely entitled to succeed in their case HU/19/76. The Defendants in HU/19/76 admitted the trespass. By virtue of my finding above, they are not the owners of the land in dispute and have never been in possession. My finding confirms that Ndi Ebe people have always been in possession of the land in dispute and by farming in it without their permission or consent, the Defendant who admitted that they gave out farm plots in the land to farmers are as liable for trespass as those people whom they put there.” He finally adjudged: D

“In the final result, the plaintiffs in suit No. HU/59/74 i.e. Ndi Ojiugwo people cannot succeed in their suit. It is hereby dismissed. The plaintiffs in suit No. HU/19/76 i.e. Ndi Ebe people succeed in their claim for declaration of title to the land in dispute and I hereby declare in favour of the plaintiffs in suit No. HU/19/76 i.e. Ndi Ebe people title to right of occupancy of all that piece or parcel of land known as and called ‘Ogbuebulu’ which lies at Ndi Ebe Abam in Ohafia Local Government Area, and more particularly shown and delineated and verged pink in Plan No. IH/GA246/76 Exhibit G1 in these proceedings. F

I award against the defendants in suit No. HU/19/76 (i.e. Ndi Ojiuwo) jointly and severally the sum of N500.00 being general damages for trespass and I order perpetual injunction against the defendants and those they represent i.e. the people of Ndi Ojiugwo G Abam, their servants and/or agents from committing any further acts of trespass in the said land.”

The plaintiffs being dissatisfied with this judgment appealed to the Court of Appeal which court, on the premise that the trial judge failed to consider and pronounce on the “crucial issue of traditional H history which was vital for the parties to discharge the burden placed upon them to trace their roots of titles to the radical or original title owners amounted to a breach of fair hearing leading to substantial miscarriage of justice” allowed the appeal, set aside the judgment of

the trial court and ordered a retrial before another judge. It is against this judgment that the Defendants have now appealed to this court, they having obtained the leave of this court so to do.

Pursuant to the rules of Court, the parties filed and exchanged their respective written Briefs of Argument. From the five grounds of appeal they rely on, the Defendants have distilled two issues as arising for determination, to wit:

“1. Whether the Court of Appeal was right (having due regards to the pleadings and evidence) to have reversed the decision of the trial court and order a retrial.

2. Whether the court below was right in setting aside the judgment of the trial court on the reliefs of trespass and injunction.”

They appear to have abandoned ground 5 which in any event is incompetent and is hereby struck out.

The two issues formulated in the plaintiffs’ Brief (Respondents’ Brief) are not too dissimilar to those formulated by the Defendants. At the oral hearing of the appeal learned counsel for the parties relied on their respective briefs and did not proffer further arguments.

ISSUE ONE

Whether the Court of Appeal was right (having due regards to the pleadings and Evidence) to have reversed the decision of the Trial Court and order a retrial.

I have stated earlier in this judgment the pleadings of the parties as to their respective roots of title to the land in dispute. Both relied on traditional history and acts of ownership. The learned trial judge said as much. On the plaintiffs, he said:

“The plaintiffs alleged that the land in dispute was disforested by their ancestor called Oji Onwu Ugwo shortened to Ojiugwo a name they say he got because all the sons born to his father Amaizu before him died and he was born after sacrifices to their local god called Kamalu. Ojiugwo used the land for farming and harvested the palm trees in it. Succeeding generations after him similarly farmed in the land and harvested palm fruits there. The heads of the succeeding generations after Ojiugwo were pleaded. They were Okite Ojiugwo, Olulu Agwu Okeke -Kalu Abam, Abam Kalu, Kalu Okeke, Kalu Agwu, Ola Ngwobia to Chief Benjamin Uduma Abam 2nd plaintiff - see paragraph 4(1) and (iv) and 5 of the amended statement of claim. The last sentence of paragraph 4(iv) reads thus ‘until the facts that

led to the present action no one from Defendants (sic) village has ever had (sic) claim to plaintiffs land across the Igwu River which has been the boundary from time immemorial.” And on the defendants, he observed:

“The defendants alleged that the land in dispute was disforested by their great ancestor called Ebe whose posterity now make up Ndi Ebe village, he used the land for farming and succeeding generations made maximum use of the land for farming without any disturbance from anyone - see paragraph 3. “

The traditional history as pleaded by the plaintiffs was conflicting with that pleaded by the Defendants. Each party in its pleadings alleged that the progenitor of the other was a stranger in Abam. The learned trial judge, in addressing his mind to the conflict in the traditional history as pleaded, had this to say:

“Before I proceed to identify the issues which emerge from the pleadings, let me deal very summarily on a point which both sides have canvassed in their pleadings but which, in my view, is of no consequence at all in this case. Each side has tried to show that the other side are the posterity of a non-native of Abam. But both sides are relying for title on acts of possession and ownership from time beyond any living memory i.e. from time immemorial. If for purposes of argument the plaintiffs are the posterity of a stranger in Abam and if the claim that they have been in the land and exercising acts of possession and ownership over it from (time) immemorial is proved, their origin will not defeat a declaration in their favour. Same goes for the defendants who are seeking declaration of title in the second case HU/19/76. So, clearly this judgment will concentrate on the very crucial issue on which the plaintiffs seek declaration i.e. the assertion by the plaintiffs but denied by the defendants that the land in dispute has been their farmland from time immemorial and that they have been exercising positive and numerous acts of possession and ownership over it without anyone challenging or disturbing them before the present dispute. The plaintiffs have asserted that these act include farming in the land and granting portions to tenant farmers. The defendants made similar claims for themselves.”

Thus, without saying so in clear terms, he disregarded the traditional history as pleaded by both sides; he examined and considered the evidence led by each side on acts of ownership in determin-

ing who, of the two parties, owned the land in dispute. The Court of Appeal faulted this approach of the learned trial judge. Onalaja, J.C.A. (who read the lead judgment of that court and with which Edozie and Muntaka-Coomasie, JJ.C.A. agreed) summed up the case of the parties in these words:

B *“From the pleadings and evidence both sides claimed their ancestor was the first to settle on the land in dispute. It was common ground that either party called the land in dispute as Ogbuebulu and that Ojiugwo and Ebe were the respective ancestors of the parties.*
 C *The controversy was who amongst them was the first to settle on the land in dispute each side maintained to be the first to settle on the land in dispute. The parties also dispute about the relationship of Igwu River to the land in dispute. The plaintiffs maintained that the Igwu river or stream was their natural boundary whilst defendants*
 D *claim to own the land on both sides of the Igwu stream, the claim of the respondents was not so reflected in their survey plan Exhibit G and G1. In the survey plan more features were shown on the west of Igwu river whilst the east of Igwu river was just described as the land of the Defendants.”*

E After setting out the issues formulated by the parties, the learned justice of the Court of Appeal observed:
“In our considered opinion the respondents have not met the issue of finding or non finding about the traditional history averred
 F *by the parties which each side led evidence in support, which issue of traditional history was treated by the learned trial judge in the manner already referred to above in this judgment. We consider this issue as very vital and crucial in the determination of this appeal most especially as the parties based their original titles on them through their ancestors*
 G *and or progenitors. “*

The learned justice after a review of the submissions of learned counsel for the parties and some decided authorities went on to say:
“The parties having pleaded and led evidence on traditional history which evidence is covered by section 45 Evidence Act, the
 H *traditional history is relevant to the issue of title with the attendant duty and responsibility being admissible evidence on pleaded facts had been adduced by the parties in the instant appeal it is the duty of the court to consider, assess and evaluate the evidence. The trial judge is not entitled to abandon this duty on any pretext.....”*

He asked the question:

“The crux of this appeal is that the learned trial judge having failed to consider a fundamental issue being the roots of titles in the consolidated suit, what is the legal consequence. “

and answered: “Under our adversarial system of jurisprudence is a pillar of the rule of natural justice that any person before a court of law must have his civil rights and obligations decided by an impartial adjudicator by ensuring fair play, justice and equity as enshrined in section 33(1) of 1979 Constitution of fair hearing. As in the instant appeal where there had been a fundamental breach of failure to decide on all the issues canvassed before it and which led to dismissal of appellants’ case could it be said Appellants’ have had fair hearing of their case.”

I must pause here to observe that the introduction of section 33(1) of the 1979 Constitution (then applicable) is a misconception of the correct effect of failure by a trial judge to consider and decide on a vital issue placed before him. It is not a denial of fair hearing to either the parties but an abandonment of a duty placed on the judge adjudicate. It is noteworthy that the authority cited by Onalaja, JCA does support his assertion that there has been a denial of the rule as to fair hearing. In *Obi Nwanze Okonji & Ors. v. George Njokanma & Ors.* [1991] 7 NWLR 131 Uwais, Ag. CJN (as he then was) observed at p.150 of the report:

“Now, if is quite clear from the foregoing that the Court of Appeal misdirected itself when it failed to consider the additional ground of appeal filed with leave of the court as Ground 5A and the question for determination which arose from the additional ground of appeal, as issue No. (c) in the appellants’ brief of argument. The question to be considered here is: has the misdirection led to a miscarriage of justice? It is the duty of a court, whether of first instance or appellate, to consider all the issues that have been joined by parties and raised before it for determination. If the court failed to do so, without a valid reason, then it has certainly failed in its duty, for in our judicial system, it is a fundamental principle of administration of justice that every court has a duty to hear, determine and resolve such questions,”

Olatawura, JSC had in his lead judgment in the case observed at page 146:

“As it was held in Ebba v. Ogodo & Anor. [1984] 1 SCNLR 372, [1984] NSCC (Vol. 15) 255, that a court of appeal should not deal with issues not before it: so also when a party submits an issue to the court for determination the court must make a pronouncement on that issue except where the issue is subsumed another issue.”

- B A breach of the rule of fair hearing results in the nullification of the proceedings however well decided they might be but a failure on the part of a court to consider all the issues that have been joined by the parties and raised before it for determination may, or may not, result in the setting aside of the decision reached depending on whether or not miscarriage of justice is occasioned thereby.**

C Coming back to the case on hand, Onalaja JCA concluded that: *“Having held that the judge failed to consider all the issues raised before him especially the failure of the crucial issue of the traditional history which was vital for the parties to discharge the burden placed upon them to trace their roots of titles to the radical or original titled owners amounted to a breach of fair hearing leading to substantial miscarriage of justice.”*

E After citing and claiming to rely on the dicta of Olatawura, JSC and Uwais Ag. CJN in *Okonji & Ors. v. Njokanma & Ors.* (supra) and which, as I have stated above, do not, with respect, support his view that a denial of fair hearing is occasioned by failure to consider all issues placed before a court, Onalaja, JCA finally held:

F *“Applying the above authorizes to the instant appeal the failure of the trial judge to decide on all the issues raised before it is a denial of fair hearing of audi alteram partem and that it has resulted in a substantial miscarriage of justice thereby rendering the other findings of facts to be perverse with liberty to this court to interfere as against the general principle of law than an appellate court shall not ordinarily or generally interfere with the findings of facts by the trial court Lawrence Elendu & Ors. v. Felix Ekwoba & Ors. [1995] 3 NWLR (pt. 386) page 705 at 735 applied”*

H Edozie, JCA in his concurring judgment had this to say:
“Both parties copiously pleaded their traditional histories and numerous positive acts of ownership and led evidence in support to establish title to the land in dispute. In such a situation, the first function of a trial judge is to find out which of the two conflicting

cases of tradition is more probable. This is a task of primary importance because even though there are five different ways of proving title, where evidence of tradition has been adduced it is necessary to go into it first. For evidence of traditional (history) usually goes to the root as to how a claimant and his predecessors in title first came upon the land. As Obaseki, JSC put it in O.K.O. Mogaji & Ors. v. Cadbury (Nig.) Ltd. [1985] 2 NWLR (pt. 7) 313 at p. 431 -

‘It is my opinion that where the root of title is known and pleaded and not lost in antiquity and historical oblivion, the circumstance for any inference of title created by acts of ownership does not arise.

If in considering the evidence of tradition of the parties, the learned trial judge upholds the traditional history of one of the parties, then the acts of possession of the party on the land in dispute become trespassory unless the case comes within the principle in Akpan Awo v. Cooke Gam [1913] 2 NLR, Saidi v. Akinorunmi [1956] I F.S.C. 107 Edu v. Cole [1956] L.L.R. 52 and Akuru v Olubadan-in-Council [1954] 14 W.A.C.A. 523.

It is only where the evidence of tradition is unconvincing or inconclusive that the matter must rest on question of fact, that is, the trial court will then consider the various acts of possession of the parties. See Sanusi v. Ameyogun [1992] 4 NWLR (pt. 237) at 548; Alade v. Awo [1975] 61 S.C. 215; Onwuka v. Ediala [1989] NWLR (pt. 96) 182. In the case in hand, not only did the learned trial judge start considering the case of the parties with their various acts of possession, quite amazingly, he completely glossed over their traditional histories. In so doing, he has failed to resolve a crucial issue before him. This is the main grouse of C. O. Akpamgbo, the learned Senior Advocate for the appellants. There is no doubt that he is on very firm grounds. It is trite law that where a trial court fails to make findings of fact on specific issues of fact and this fails to resolve material issues that arose in the pleadings of the parties, the proper course the appellate court should take is to send the case back to the trial court for retrial. See Olufosoye v. Olorunfemi [1989] 1 NWLR (pt. 95) 26; Idika v. Erisi [1988] 2 NWLR (pt. 78) 563.”

It is the contention of learned counsel for the Defendants, who are appellant in this appeal, that the decision of the Court of Appeal is wrong. It is submitted that on the pleadings and evidence,

the parties, cannot be said to have relied on traditional history as their only or principal root of title as opposed to acts of ownership and possession. It is further submitted that the parties placed reliance on two modes of proof of title, to wit, traditional history and acts of ownership. Learned counsel cited a passage from the judgment of the trial court in which the trial judge directed himself as to reliance by both parties on acts of possession and ownership and submitted that the approach of the learned trial judge was right having regard to the state of the pleadings, the evidence and the law. Learned counsel then cited the dictum of Iguh, JSC in *Onwugbufor & Ors. v. Okoye & Ors.* [1996] 1 NWLR 252 at 272, 279 G - 285 D and submitted that in the case on hand the defendants (a) neither pleaded sufficiently nor gave evidence in support of ownership by tradition as known to law, (b) reliance was fundamentally placed on another method of proof of title acts to ownership/possession and (c) did not place exclusive reliance on traditional history. Learned counsel also cited to us a dictum of Onu JSC in *Akpan v. Otong* [1996] 1 NWLR 108 at 125-126. He urged us to restore the judgment of the trial High Court.

Learned counsel for the plaintiff who are now respondents in this appeal, urged us to dismiss the appeal and affirm the order of retrial made by the Court of Appeal. Citing a dictum in *Owoade v. Omitola* [1988] 2 NWLR 413 to the effect that -

“A court of trial has a duty to confine its judgment to facts pleaded and also a duty to make finding of facts on important issues raised on the pleadings.”

Learned counsel argued in his brief thus:

“In the instant case, the trial judge refused to make a finding on the hotly contested issue of traditional history raised by the parties. Rather than make a finding, he chose to treat the issue as of no consequence at all”. While agreeing that other issues like ownership and possession were equally canvassed by the parties, we submit that that does not relieve the trial court of the duty to make a finding, on the issue of traditional history raised by the parties. This is because if the plaintiffs’ version is accepted, a declaration of title can be granted in their favour.” (italics mine)

Learned counsel distinguished the facts in the present case from the facts in *Onwugbufor v. Okoye* (supra). He similarly distinguished

the approach of the learned trial judge in the case on hand from that in Akpan v. Otong (supra). He cited to us Ibenye v. Agwu [1998] 11 NWLR 372 which, learned counsel submitted, was on all fours with the present case. He pointed out that as the trial judge in that case did not consider the traditional evidence adduced by the parties, this court ordered a retrial. Counsel urged us to follow that case and not disturb the verdict of the Court of Appeal in this case. B

To begin with, I am deeply indebted to learned counsel for the parties in this case for their well-researched briefs. I have given careful consideration to the submissions made by them in the briefs. Learned counsel for the defendants urged us to follow Onwugbufo v. Okoye (supra) and Akpan v. Otong (supra) in determining this appeal. Learned counsel for the plaintiffs, on the other hand, distinguished these two cases from the present case and urged us rather to follow Ibenye v. Agwu (supra) which he submitted was on all fours with the case on hand. Incidentally I took part in two of the three cases, that is Onwugbufo v. Okoye and Ibenye v. Agwu. I shall consider the three cases in the course of my judgment in this case. C D

I think I need begin by setting out some salient principle of law involved in this case. It is now well settled that there are five ways of proving ownership of land, each of which suffices to establish title to a piece or quantity of land in dispute. Fatayi-Williams, J.S.C., (as he then was) delivering the judgment of this court in Idundun v. Okumagba [1976] 9/10 S.C. 277 at pages 246-250 laid down the law thus: E F

“As for the law involved... Firstly, ownership of land may be proved by traditional evidence as has been done in the case in hand...

Secondly, ownership of land may be proved by production of documents of title which must, of course be fully authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circumstances giving rise to the presumption in favour of due execution in the case of documents twenty years old or more at the date of the contract (see section 129 of the Evidence Act and Johnson v. Lawanson [1971] 1 All N.L.R. (pt. 56). G H

Thirdly, acts of the person (or persons) claiming the land such as selling, leasing or renting out all or part of the land, or

farming on it or in a portion of it, are also evidence of ownership, provided the acts extend over a sufficient length of time and are numerous and positive enough as to warrant the inference that the person is the true owner (see Ekpo v. Ita 11 N.L.C. p. 68)

- Fourthly, acts of long possession and enjoyment of the land may also be prima facie evidence of ownership of the particular piece or quantity of land with reference to which such acts are done (see section 45 of the Evidence Act, Cap, 62) [now section 46]. Such acts of long possession, in a claim of declaration of title (as distinct from a claim for trespass) are really a weapon more of defence than of offence; moreover under section 145 of the Evidence Act [now section 146], while possession may raise a presumption of ownership, it does not do more and cannot stand when another proves a good title (see Da Costa v. Ikomi (1968) 1 All N.L.R. 394 at page 398. It cannot be gainsaid that, in the present case, not only did the learned trial judge reject the appellants' evidence as to possession of any portion of the land in dispute, he also found that the respondents have proved by evidence, which he accepted, that they are the owners of the land in dispute.***

- Finally, proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute, may also rank as a means of proving ownership of the land in dispute, (see section 45 of the evidence Act Cap. 62)."*** (words in square brackets are mine).

- A plaintiff may plead any number of these five ways but to succeed he must establish at least one of them, and any one so established suffices.***

In *Piaro v. Tenalo* [1976] 12 S.C. 31 at 40-41 this court, per Obaseki, Ag. J.S.C. (as he then was) said:

- "It is now settled law that there are 5 ways in which ownership of land may be proved and only two of the 5 methods were adopted by the respondents in this case. They are:***

(1) Proof by traditional evidence. (Abinabina v. Chief Enyimadu [1953] A.C. 207 at 215 - 216: and

(2) Proof by acts of ownership. This is normally provided by

acts of person or persons claiming the land such as selling, leasing, renting out all or part of the portion of it or otherwise utilizing the land beneficially: all evidence of ownership provided they extended over a sufficient length of time and are numerous and positive enough to warrant the inference that he is the true owner, Ekpo v. Ita, 11 NLR 68 at 69.” B

In Kehinde v. Irawo [1973] 3 SC 29, at 35-36; [1973] NSCC 156, 159 Elias, C.J.N., delivering the judgment of this court observed:

“We observe that when a plaintiff sues for a declaration of title to land, he may rely either on a grant under a conveyance or otherwise, or on the exercise of acts of ownership numerous and positive enough to warrant the inference that he is such owner, in accordance with the rule in Ekpo v. Ita [1932] 11 N.L.R. 68.” C

Another case I need to mention to this issue and which is relevant to the case on hand is Ishola v. Abake [1972] 5 -SC 321 at D 329-330 where Sir Ademola, CJN observed:

“There is ample evidence of long possession and acts of ownership by the plaintiff, and his ancestors before him, extending over a sufficient length of time, numerous and positive enough to warrant the inference that they (plaintiff and his ancestors) were exclusive owners of the land in dispute to bring the case within the principles laid down in Ekpo v. Ita 11 N.L.R. 68. On this point also we are of the opinion that the learned judge had enough facts before him to come to the conclusion that the plaintiff had established his title to the land in dispute.” E F

I now turn to a consideration of the three cases cited to us by learned counsel for the parties. In Onwugbufo v. Okoye (supra), the parties relied on traditional history and acts of ownership and possession, in their respective claims to the land in dispute. The trial judge G found evidence of tradition inconclusive but on the evidence of acts of ownership and possession, which he accepted, he found for the plaintiffs. On appeal by both parties to the Court of Appeal the decision was reversed and plaintiffs' claim was dismissed. On appeal to this court, the judgment of the Court of Appeal, by majority of 4 to 1 H was set aside and judgment entered for the plaintiffs. Iguh, JSC who delivered the lead judgment in the case after setting out the five ways by which title to land may be proved observed at page 280 of the report:

“What is of paramount importance is that a party claiming declaration of title to a statutory or customary right of occupancy to land needs not plead and prove any more than one of the above methods to succeed. It must however be stressed that if, as it is sometimes the case, the claimant pleads and/or relies on more than one method to prove his title, he merely does so *ex-abundanti cautela* as proof of one single root of title is sufficient to sustain a plaintiff’s claim for declaration of title to land. See: *Balogun & Ors. v. Akanji & Another* [1988] Vol. 19 1 NSCC 180; [1988] 1 NWLR. (pt. 70) 301.”

This is undoubtedly a correct statement of law; I agree entirely with it. See also *Balogun v. Akanji* [1988] 1 NWLR 301 at 321 where this court stated’:

“What is to be noted and re-emphasized is that the party claiming title to land is not bound to plead and prove more than one root of title to succeed. If he relies on more than one root, that is merely to make assurance doubly sure. He does that, *ab abundantia cautella*.”

An examination of the plaintiffs’ pleadings in the case - see pages 278 -279 of the report-shows clearly that traditional history was, in fact, not pleaded as required by decided cases. There was no pleading as to who founded the land, how it was founded and the particulars of intervening owners through whom the plaintiffs claimed - see: *Akinloye v. Eyiylola* [1968] NMLR 92; *Piaro v. Tenalo* (supra); *Olujinle v. Adeagbo* [1988] 2 NWLR 238; *Adejumo v. Ayantegbe* [1989] 3 NWLR 417; *Anyanwu v. Mbara* [1992] 5 NWLR 386. The learned trial judge decided the case on the third mode of proving title which was pleaded that is, acts of ownership extending over a sufficient length of time, numerous and positive enough as to warrant the inference that the person exercising such proprietary acts are the true owners of the disputed land - *Ekpo v. Ita*. 11 NLRL 68; *Balogun v. Akanji* [1988] Vol. 19, 1 N.S.C.C. 180; [1988] 1 NWLR 301.

I participated in the case and dissented not on the law but on the conclusion drawn on the facts adduced in evidence, which, in my respectful view, was not cogent enough to meet the standard in *Ekpo v. Ita* (supra). In the sense that traditional history was neither pleaded nor proved in evidence even though the trial judge found traditional evidence inconclusive, I find *Onwugbufo* not really on all fours with

the present case but the law enunciated by Iguh, J.S.C., in that case equally applies here too. That is, *“if, as it is sometimes the case, the claimant pleads and/or relies on more than one method to prove his title, he merely does so ex abundanti cautela as proof of one single root of title is sufficient to sustain a plaintiff’s claim for declaration of title to land.”* B

The second case is Akpan v. Otong (supra). The plaintiffs had sued for declaration of title, damages for trespass and injunction. In proof of their title they pleaded and relied on (a) traditional history, (b) acts of ownership and possession and (c) estoppel by virtue of a C decision of native tribunal which was in their favour. The trial High Court found for them and entered judgment in their favour on their claims. On traditional evidence, the learned trial judge stated:

“This court cannot stick out its neck as to the truth of any of the two versions of the traditional history since none of the witnesses was D an eye witness... where traditional evidence is inconclusive, as in this case, ownership of the land could still be established if there are numerous and positive acts of ownership over a long period. See the case of Ekpo v. Ita (1932) 11 NLR 68. It is necessary to examine the E evidence before me and see which of the parties has established more positive and numerous acts of ownership on the disputed land.”

On appeal by the defendants to the Court of Appeal, a retrial was ordered. On further appeal by the plaintiffs to this court, the judgment of the Court of Appeal was set aside and that of the trial F High Court restored. I have read the lead judgment of Onu, J.S.C., in the case; I cannot see where he pronounced on the propriety or otherwise of the treatment the trial judge gave to the evidence of the parties on the traditional history they each pleaded. It is, however, clear in the judgment that as the plaintiffs proved their root of title by G acts of ownership and possession, it would not matter if they failed to prove their title through traditional history pleaded.

In Akpan v. Otong, the trial judge just shied away from deciding which version of traditional history was preferred. The same attitude was adopted by the trial judge in the case presently under consideration. To shy away from doing one’s duty is not an attitude to be H encouraged. It is a lapse in the performance of one’s duty. Where such a lapse occasions a miscarriage of justice an appellate court must not hesitate to intervene and set aside a verdict resulting therefrom.

Whether there is such a miscarriage of justice in the case on hand will be seen later.

The third case is *Ibenye v. Agwu* (supra) which learned counsel for the plaintiffs claimed was on all fours with the case on hand. On the pleadings of the parties in the case, each relied mainly on its traditional history in proof of its claim to title to the land in dispute. This point I made clear in my judgment in the case where, after setting out the penultimate paragraphs of the pleadings of the parties, I said at page 391 of the report:

“*Traditional history is clearly the main basis of the claim of each side to the land in dispute. Evidence was led by each side in support of its traditional history.*”

The trial judge in that case on the issues before him, had observed

“*Having disposed of the issue of res judicata I will now proceed to identify the major issues that emerged from the pleadings. The first is the traditional history of the land. The plaintiffs have asserted that their forebearers moved into the land in dispute in the olden days of tribal or village wars before the advent of the colonial government. Briefly put, they claim to be part of Ndume stock and that the need arose of Ndume people to strengthen themselves against invaders. A strategy was adopted whereby each village of Ndume including theirs-Umuohu sent some of her brave sons to live in their land away from their traditional homes to form the first line of defence as it were in case of invasion. These sons formed the nuclei of villages which later developed from the settlements. This was how their homes were established in the land in dispute, the plaintiffs claimed.*

The defendants agree that each village of Ndume, (four in all according to them) sent some of her brave sons to start new settlements to strengthen their flanks as the plaintiffs say but they contend that Umuohu Azuke did not at all have its origins in that way. They alleged that the ancestors of Umuohu Azuke people were emancipated slaves and had not come to Ndume when the sub-villages were established.

The second major issue of fact was the assertion by the plaintiffs but denied by the defendants that the Umuohu people have been exercising maximum rights of ownership over the land in dispute including farming on it from time immemorial unmolested and

unchallenged.”

On traditional history he had this to say:

“On the issue of traditional history let it be noted that in spite of the attendant difficulties which may result from facts embedded in the distant past, if accepted, it provides sufficient basis for declaration of title under our law... Happily there is a rule of very sound common sense which provides the proper approach to the assessment and evaluation of traditional evidence. The rule is simply this, where there is a conflict in the traditional history in a land case, and evidence of traditional history on either side is inconclusive, a trial court should be guided by evidence of acts of ownership in recent times - i.e. moving from the known to the unknown - see Lord Denning in the Privy Council case *Kojo v. Bonsie* (1957) 1 W.L.R. 1223 at 1226-7.

A lot of heat was generated during the trial of this case over the posterity of Ndume. The controversy was most unnecessary. Indeed it is very irrelevant in this case. Whether the great ancestor of the plaintiffs was Ohu a son of Ndume (as plaintiffs claim) or called Umuohu (as defendants say) the facts of the establishment of the plaintiffs’ settlement by the plaintiffs’ forbearers which become the nucleus for their present village had nothing to do with their status. So, I make no finding whatever on that issue which is not at all a major one in this case.” (italics are mine)

Commenting on the above passage, I observed in my judgment at p. 392:

“In effect, he avoided resolving what, in my respectful view, is the most important issue between the parties. That the plaintiffs are on part of the land in dispute was not the question but how they got there. Did they get there in the manner narrated in their traditional history, that is, as of right? Or did they get there as claimed by the defendants in their traditional history, that is by permission of the defendants?”

After wading through once again the evidence for the plaintiffs in the consolidated suits before him, the trial judge, in spite of his refusal to resolve the conflict in the evidence of traditional history proffered by the parties came to this conclusion:

“I noticed that when plaintiffs gave evidence as to the origins of their homes in the land in dispute the witnesses PW1 and PW2 did not in fact link the founding of their village to the strategy of war

adopted by Ndume people. They did not in fact give evidence in support of the allegations in their pleadings. I am inclined to accept the evidence of the defendants that where the plaintiffs live was part of Ugwute land which their ancestors granted the plaintiffs' ancestors for dwelling."

B I commented at page 393 of the report on this conclusion in these words:

"By this finding, the learned judge appeared to have tactfully accepted the traditional history of the defendants without saying so and without applying the test in Kojo v. Bonsie (supra) to which test he had adverted his mind earlier in his judgment."

C I have gone to all this length in discussing the third case of Ibenye v. Agwu in order to show that, contrary to the submission of learned counsel for the plaintiffs, there was only one main issue in D the consolidated suits in the case and that was the traditional history set up by each party and which the learned trial judge in the case declined to resolve and yet, without a consideration of the history set up by the plaintiffs in the suit, resolved in favour of the defendants. The case for this reason, is not on all fours with the case on hand. E Although the trial judge in Ibenye v. Agwu claimed that acts of ownership and possession was a second major issue in the case, I did not hesitate to fault him on this. For on page 398 of the report, I observed:

F *"The root of title pleaded by each side is of paramount importance in this case. Both the courts below recognized this fact. The respective claim to possession of the land in dispute was depended on each party's traditional history. To the extent, therefore, that in Ibenye v. Agwu the parties placed reliance on only one root of title,*
G *unlike in the present case where reliance is placed on two roots of title, the present case is not on all four with that case.*

In the case on hand both parties pleaded traditional history and acts of ownership and possession as their respective roots of title. The trial judge did not resolve the issue of traditional history. That is
H *bad enough. It is his bounden duty, on the evidence before him, to resolve it either way and if he found the history pleaded by both sides to be inconclusive he should say so. And that is resolving it. To the extent that he was wrong in abdicating his responsibility to resolve the issue of the conflicting traditional history placed before him, I*

agree with their Lordships of the court below. To say however, that this lapse was fatal to the judgment of the trial court, I must, with due deference to their Lordships, differ. On the principles of law enunciated in such cases as *Idundun v. Okumagba* (supra); *Piaro v. Tenadi* (supra); *Balogun v. Akanji* (supra) *Onwugbufo v. Okoye* (supra); and *Akpan v. Otong* (supra), it is enough that a plaintiff pleads and succeeds on one of the five methods of proving title, even where he pleads more than one method. Where, however, a plaintiff pleads a primary root of title such as traditional history or documents of title and acts of ownership, which are dependent on that main root of title, he cannot succeed if he fails to prove that main root of title see *Ibenye v. Agwu* (supra) and *Balogun v. Akanji* (supra).”

In the instant case, both the plaintiffs and appellants claimed title to the land in dispute, the onus lay on both sides to prove to the court that they are the exclusive owners of the land and, from their pleadings, this they could do either by conclusive traditional evidence or by exercise of maximum acts of ownership over a sufficient length of time, numerous and positive enough to warrant the inference that they are exclusive owners of the land; the case must be decided on the balance of probabilities - see *Odunsi v. Pereira* (1972) 1 S.C. 52, 64. The trial judge after a painstaking review and evaluation of the evidence found in favour of the defendants on exercise of maximum acts of ownership and entered judgment in their favour as per their claims. His findings have not been faulted by the court below nor have the plaintiffs done so in this court. I find no justification for disturbing those findings.

The court below, for the reasons that, by the failure of the trial judge to resolve the conflicting traditional history of the parties, there was “a denial of fair hearing of *audi alteram partem*” resulting in a substantial miscarriage of justice, held that the other findings of the trial court are rendered perverse and ought, therefore, to be interfered with. Their decision, with respect, is fraught with misdirection. As I have said earlier in this judgment it is a misdirection to say that because a trial judge fails to resolve an issue before him, there is a breach of the fair hearing rule. Secondly, ***it is a misdirection to say that where there has been a miscarriage of justice as regards an issue, all other findings in the judgment are perverse.***

Onu JSC in State v. Ajie (2000) 11 NWLR 434 at 449 defined a perverse decision thus:

“A decision is said to be perverse

(a) when it runs counter to the evidence; or

(b) where it has been shown that the trial court took into account matters which it ought not to have taken into account or shuts its eyes to the obvious; or

(c) when it has occasioned a miscarriage of justice.

See: *Missr. v. Ibrahim* [1975] 5 S.C. 55; *Incar Ltd. v. Adegboye* (1985) 2 NWLR (pt. 8) 453 and *Ramonu Atolagbe v. Shorum* [1985] 1 NWLR (pt. 2) 360; [1985] 4 S.C. (pt. 1) 250 at 282.

Surely all the findings made by the learned trial judge in relation to the issue dealing with acts of ownership cannot meet that definition. A miscarriage of justice will result in the nullification of the decision reached however well decided it may be.

To constitute a miscarriage of justice, however, there must be such a departure from the rules which permeates all judicial procedure as to make what happened not in the proper sense of the word judicial procedure at all. See: *Total (Nigeria) Ltd. & Anor. v. Wilfred Nwako & Anor.* [1978] 5 SC 1 at 14; *Devi v. Roy* (1946) AC 508,521; *Nnajifor v. Ukonu* [1986] 4 NWLR 505 at 516-517. As Onu JSC put in *State v. Ajie* (supra) at p. 448:

“What will constitute a miscarriage of justice may vary, not only in relation to particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question, and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. See: *Adigun v. A.G. of Oyo State* [1987] 1 NWLR (pt. 53) 678. *It is enough if what is done is not justice according to law. See: Okonkwo v. Udo* [1997] 9 NWLR (pt. 519) 16 at page 20.”

In the case on hand, though the trial judge was wrong not to have made a finding on the conflicting traditional history pleaded by the parties, his error has, however, not occasioned a miscarriage of justice for the following reasons:

1. The learned judge resolved the question of acts of ownership in favour of the defendants and this was enough for the defendants to succeed on their claim for title.

2. There being a case of conflicting traditional evidence adduced by the parties, this is not resolved by demeanour of witnesses but by testing each version of traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable - see *Kojo v. Bonsie* [1957] 1 W.L.R.L. 1227; *Adekanbi v. Ayorinde* [1970] ANLR 330; *Aikhonbare v. Omoregie* (1976) 12 SC 11. B

In the light of the findings of the learned trial judge on the question of acts of ownership he would have resolved, had he cared to do so, the conflicting traditional history in favour of the defendants by preferring their version of the history as being more probable. By preferring not to resolve the issues, it is the defendants that stand to be prejudiced and not the plaintiffs. And the defendants have not complained. I, therefore, do not find any miscarriage of justice in this case, as erroneously found by the Court of Appeal. In any event, the issue is one that this court can resolve as it is not dependent on the credibility of witnesses but on inference to be drawn from proved facts. See: *Balogun v. Akanji* (supra). C D

There are competing traditional histories pleaded by the parties. Applying the test laid down by the Privy Council in *Kojo v. Bonsie* (supra) to the facts found by the learned trial judge the conclusion is inescapable that the traditional history of the defendants is to be preferred, that is, it was their ancestor, Ebe who first settled on the land in dispute. On the materials before them, their Lordships of the court below could have come to this conclusion, rather than send the case back for retrial. The conclusion I reach on Issue One is that the issue must be resolved in the negative. This, in my respectful view, is sufficient to determine this appeal which I accordingly allow. I set aside the judgment of the Court of Appeal and restore that of the trial High Court given on 11th July, 1989. I award to the defendants N10,000.00 costs of this appeal and N1,500.00 costs of the appeal in the Court of Appeal. E F G

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BELGORE JSC

I agree with the conclusion of Ogundare, JSC, and I also allow the appeal by setting aside the judgment of Court of Appeal and I

hereby restore judgment of trial High Court. I award N10,000.00 as costs of this appeal and N1,500.00 as costs in the Court of Appeal.

KUITIGI JSC

B I read in advance the judgment just rendered by my learned brother Ogundare, J.S.C, I agree with the conclusion that applying the test laid down in KOJO VS. BONSIE (1957) 1 W.L.R. 1227, to the facts found by the learned trial judge, it is inescapable that the traditional history of the defendants is to be preferred and that it was their ancestor, Ebe, who first settled on the land in dispute. I will therefore allow the appeal, set aside the decision of the Court of Appeal and restore the judgment of the trial High Court endorse the order for costs.

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MOHAMMED JSC

E I have had the privilege of reading the judgment of my learned brother, Ogundare, J.S.C., in draft and I agree with him that this appeal ought to be allowed. For the reasons given in that judgment I too hereby allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court. I also award N10,000.00 to the defendant/appellants for the appeal in this court and N 1,500.00 for the appeal at the Court of Appeal.

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KALGO JSC

G My learned brother, Ogundare, JSC in his judgment just delivered in this appeal, and which I had the opportunity of reading before now, fully dealt with the issues which arose in this appeal. I adopt all his reasoning and conclusions reached therein as mine and have nothing useful to add. I therefore find that the appeal is meritorious and I allow it. I set aside the decision and orders of the Court of Appeal and restore the decision of the trial court. I award N10,000.00 costs to the appellants against the respondents.

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