

SUPREME COURT OF NIGERIA
FRIDAY 20TH SEPTEMBER, 2002. SC. 118/1998
CORAM:- M. E. OGUNDARE, U. MOHAMMED,
U. A. KALGO, E. O. AYoola, N. TOBI, JJSC

EUGENE NNAEKWE EGESIMBA APPELLANT
AND
EZEKIEL ONUZURUIKE RESPONDENT

PLEADINGS - Statement of defence - Reply - Failure to file - Failure to rebut averment in statement of defence - Which does not contain counterclaim - Is not tantamount to an admission (H1)

RULES OF COURT - Pleadings - Reply - Filing - H.C. Rules of Eastern Nig O.33 r. 1 - Where court did not order reply to be filed - Plaintiff who considers a reply to statement of defence essential - May apply for leave (H2)

PLEADINGS - Issues - Joinder of - Where last pleading filed is statement of defence - Without a counterclaim - Joinder of issues is implied thereon (H3)

PLEADINGS - Statement of defence - Issue - Proof - Plaintiff is entitled to lead evidence on a point - Raised in defendant's pleading (H4)

EVIDENCE - Evaluation - Court evaluating evidence given at trial - Acts within its responsibilities if it attaches no weight - To bare assertions of a party (H5)

ARBITRATION - Customary arbitration - Ingredients - Essential characteristics of the arbitration are inter alia - Voluntary submission of dispute - And agreement by parties that decision therefrom is binding (H6)

APPEALS - Fresh issue - Raised without leave - Validity - Fresh issue of inadequacy of defendant's pleadings - Cannot be raised in Supreme Court (H7)

FACTS

Plaintiff/appellant had sued and obtained judgment against defendant/respondent at the High Court of Imo State for a declaration of title to land, damages for trespass and injunction. The immediate cause of the quarrel that led to that suit was the action of respondent felling and sawing an iroko tree on the disputed land. The case of appellant was that the land belongs to him by inheritance from his forebears and that generation of his people had exercised maximum acts of ownership on the land. And that they were still exercising acts of ownership on it when respondent trespassed in to the land. On the other hand, respondent contended that his own forebears were the owners of the land but that they had made a grant of it to appellant's forebears on condition that they pay tribute and that the land would revert to the owners in the event of the appellants vacating it. Respondent contended that appellants vacated in 1938 whereupon they repossessed the land and had farmed on it ever since without interruption.

According to the respondent, appellant had challenged their right to the land before an arbitration panel which heard and determined the case in favour of respondents. But appellant claims the arbitration did not hold as respondents did not submit to it after appellant initiated it. Trial judge found that respondent did not prove the fact of the alleged arbitration. Consequently he gave judgment to appellant. Respondent appealed to the Court of Appeal which held, *inter alia*, that respondent had proved the fact of the arbitration having been held and an award made in his favour. Accordingly that court held that appellant was estopped from re-litigating on the ownership of the land. The court also held that failure of appellant to file a reply in rebuttal of the respondent's assertion of a conditional grant to them amounted to an admission. It is against that judgment of the Court of Appeal that appellant has now appealed to Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether failure by the appellant to file a Reply to the Statement of Defence amounted to an admission of a grant or relieved the respondent of his duty to prove a grant of the land.

(2) Whether the respondent proved a binding customary arbitration in his favour as against the appellant's assertion that there was

no customary arbitration.

(3) Whether the appellants proved the value of the; iroko tree felled and sawed by the respondent."

HELD (Dismissing the appeal per **AYOOLA JSC**, TOBI JSC dissenting)

PLEADINGS - Statement of defence - Reply - Failure to file

1. It is not difficult to agree with Mr. Nnodum, counsel for the plaintiff, that the Court of Appeal was in error when it held that non-filing of a reply to the statement of defence in the case was tantamount to an admission of a grant of the land to the plaintiff. The Court of Appeal relied on the cases of Joe Igah & Ors. v. Chief Ezekiel Amakiri (1976) 11 S.C. 1 and Egbuna v. Egbuna (1989.) 2 NWLR (Pt.106) 733 for a proposition that "failure to file a reply to rebut the far reaching averment that the land in dispute was granted to the ancestors of the respondent on payment of customary tributes is tantamount to an admission." However, those two cases are not apt because the issues they dealt with are different from the present one. There is no general proposition of law that failure to file a reply to rebut an averment in a statement of defence which does not contain a counter-claim is tantamount to an admission. Where the defendant by his pleading sets out a case which cannot be met by mere denial it is a matter of utmost prudence, it not necessity, to file a reply.

Where, of course, the plaintiff seeks to contradict the allegations in the statement of defence not merely by a traverse but by raising issues of fact which would take the defendant by surprise, he should raise such issues by a reply. But, even then, the consequence of his not so raising it is not that he is taken to have admitted the truth of the allegation to lead evidence in proof of what he alleges, but to deprive the plaintiff from adducing evidence of facts not pleaded by the pleadings as they stand.

When a court is faced with the contention that the failure of the plaintiff to file a reply should affect the result of the case

the proper approach is first, to enquire whether a reply was essential; and secondly, if it was, whether evidence of facts which should have been pleaded in the reply had been adduced and admitted. It is a wrong approach to proceed straightaway as the court below did, to hold that failure to file a reply to a statement of defence not accompanied by a counterclaim amounted to an admission. (p. 2887 E/2889 B/G)

C Pleadings - Reply - Filing

2. It is evident that O.33, r. 16 is not relevant to the question whether or not failure to file a Reply is tantamount to an admission of the material averments in the statement of defence, it is merely an enabling provision permitting the High Court to order service of pleadings subsequent to that last filed consequently upon an order made by the Court pursuant to O.33, r. 1 which provided that written pleadings shall be ordered by it court. Where the High Court did not order a Reply to be filed when ordering pleadings pursuant to O. 33, r. 1, a plaintiff who considers that pleadings subsequent to the statement of defence is essential may apply for leave to file a reply O. 33, r. 16 is not, in my opinion, intended to authorize the High Court to seize the initiative to order pleadings subsequent to a statement of defence where the plaintiff has not asked for such an order. (p. 2888 D)

PLEADINGS - Issues - Joinder of

3. Where the only pleading filed is the statement of claim, absence of a statement of defence means that no issue is joined. That there is an implied joinder of issues on a defence which is unaccompanied by a counter-claim if no reply is served appears to me to be a general principle of our procedural law which, for avoidance of doubt, is often incorporated in rules of civil procedure in many of our jurisdictions. Parties are brought to an issue where the last pleading is the statement of defence to which a counter-claim had not been appended. In such a case, it is assumed that the plaintiff does not intend to rely on any excuse or justification in answer to any allegation

in the statement of defence or raise any fresh facts not already contained in the pleadings filed, but is content to traverse the allegations in the statement of defence and, thereby, challenge the defendant to prove the truth of those allegations.

(p. 2888 H)

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PLEADINGS - Statement of defence - Issue - Proof

4. I may further add, as held in a number of cases, that a plaintiff is entitled to lead evidence on a point raised in the defendant's pleading.

(p. 2889 F)

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EVIDENCE - Evaluation

5. A court reviewing and evaluating evidence given at a trial acts within its responsibilities if it attaches little or no weight to bare assertions of a party. It all depends on the circumstances. A statement becomes a "bare assertion" or a "mere ipse dixit" when other evidence in proof of the fact stated can be, but was not adduced in support of the statement. Thus, in this case the members, or any member of the body to which the plaintiff lodged a complaint could have been called to testify to that fact and to the fact that the body summoned the defendant who refused to honour the summons. In the circumstances of this case I cannot see anything objectionable in the opinion of the court below that the plaintiff's evidence on the issue of arbitration was a repetition of paragraph 12 of the statement of claim.

(p. 2892 E)

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Customary arbitration - Ingredients

6. The four ingredients usually accepted as constituting the essential characteristics of a binding customary arbitration are: (i) voluntary submission of the dispute to the arbitration of the individual or body (ii) agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding (iii) that the arbitration was in accordance with the custom of the parties and (iv) that the arbitrators reached a decision and published their award.

(p. 2895 A)

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APPEALS - Fresh issue - Raised without leave - Validity

7. It was not the case of the plaintiff at the trial or in the court below that these ingredients were not established, nor indeed, that the pleading was in any way deficient to raise the issue of estoppel. No issue as to the validity of the arbitration was raised at any stage of the proceedings in the High Court or in the court below. It is now belated for the plaintiff to attempt to raise these issues at this stage without the leave of the court. It is no wonder, therefore, that counsel for the defendant had on his appeal appeared to have chosen to ignore the submission of counsel for the plaintiff on the points, even though it would have been more appropriate for the defendant to have objected to the raising of the issues without leave of court. Be that as it may, the arguments on the points of inadequacy of the defendant's pleadings or of validity or bindingness of the arbitral proceedings should be discountenanced. (p. 2895 C)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Appellate court does not ordinarily interfere with findings of trial court

The attitude of an appellate Court to findings of fact made by a trial Court has been stated in a number of decisions both of this Court and of the Court of Appeal. It is now well settled that an appellate Court will not lightly set aside findings of fact made by a trial court unless such findings are perverse. (p. 2898 C)

2. It is not all contradictions that results in rejection of evidence

Not all contradictions result in the rejection of the evidence of a witness but only those that are material and result in a miscarriage of justice. I do not see how the seeming contradictions highlighted by the learned trial judge could be said to result in a miscarriage of justice in the circumstances of this case. (p. 2901 A)

TOBI JSC (Dissenting)

3. Further pleadings will not be ordered where pleadings sufficiently discloses real issue in dispute

The rule does not specifically provide for filing of a reply. By the rule, the court is enjoined to make for further pleadings from either of the parties or from both parties if the court is of the view that the pleadings filed insufficiently disclose and fix the real issues between the parties. By the rule, an order to file further pleadings is not automatic. Where in the view of the court, the pleadings sufficiently disclose and fix the real issues in controversy, filing of further pleadings will not be ordered.

In this case, I am of the view that the pleadings sufficiently disclosed and fixed the real issues between the parties and it is the ownership of the land in dispute. The lower court was therefore wrong in coming to the conclusion that a reply was necessary. (p. 2911 B)

4. Hearsay evidence cannot take precedence over direct evidence

What the appellant told PW.2 in my view, is not that material to the live issue whether there was an arbitration or not. And what is more, the lower court would appear to have preferred hearsay evidence to direct primary evidence. I say this because what PW.2 alleged that PW.1 told him is hearsay evidence, which cannot on the face of it have precedence over the direct evidence of the appellant. In my humble view, the lower court was wrong in believing hearsay evidence to dislodge direct evidence. (p. 2916 H)

5. Plaintiff may rely on weakness of defence case in some instances

It is almost a recitation in the judicial system that a plaintiff cannot rely on the weakness of a defendant's case. With respect, that is talking half law; not full law. While a plaintiff will not rely on the weakness of the case of a defendant in most cases, there are instances when he can so rely. One clear instance is when, by the nature of the pleadings, the burden of proof is on the defendant. In such a situation, where the defendant has not discharged the burden of proof, the ultimate or evidential burden is not shifted on the plaintiff. The best strategy of the plaintiff is to keep quiet and submit at the end of the

day that the defendant did not lead evidence to prove the averment in the statement of defence. (p. 2919 H)

6. “Estoppel” and “Res judicata” – Meaning of

Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it. Res judicata on the other hand, operates not only against the party whom it affects but also against the jurisdiction of the court itself. The party affected is estopped per rem judicatam from bringing a fresh claim before the court and at the same time the jurisdiction of the court to such claim is ousted. (p. 2921 A)

D 7. Supreme Court must always strive to do substantial justice in a matter

Assuming that I am wrong, and I think not, I should take an alternative position and it is the position that this court, should do substantial justice in this appeal. Should this court, the highest court of the land, sound so hopeless or helpless in a matter such as this? Can this court not invoke its equitable jurisdiction to do substantial justice in this matter? Should this court hide under legal technicalities and leave the appellant in a state of limbo and complete helplessness? Should this court rest on abstract legalism in the face of the clear procedural deficiency in paragraph 11 of the statement of defence, which at the expense of prolixity is repeated here for ease of reference:

“The Defendant pleads estoppel and res judicata.”

It is clear that the above averment does not satisfy the rules of pleading estoppel and this court has a duty to so hold notwithstanding any apparent technical constraint. If this court is miserly in doing justice and therefore closes our doors to doing substantial justice in relevant cases, the lower court will follow and the administration of justice will run into serious problem. We should open our doors of doing substantial justice so that the lower courts can enter and do similar justice. That is the only way the administration of justice will triumph in our democracy. (p. 2924 G)

REPRESENTATION

P. V. Nnodum, for Appellant

Respondent absent, not represented

CASES REFERRED TO

Igah v. Amakiri (1976) 11 SC I

Egbuna v. Egbuna (1989) 2 NWLR (Pt. 106) 733

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Alao v. African Continental Bank Ltd. (1998) 1 - 2 SC 177

Agu v. Ikewibe (1991) 1 NSCC 385

Debs v. Cheico Nig Ltd (1986) 2 NSCC 837

Ohiaeri v. Akabeze (1992) 23 NSCC (Pt. 1) 139

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Njoku v. Ikeocha (1972) ECSLR 199

Okpiri v. Jonah (1961) All NLR 102

Akinyemi v. Akinyemi (1963) All NLR 340

Ebba v. Ogodo (1984) 1 SCNLR 322

Akeredolu v. Akinremi (1989) 5 SC 102

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Alao v. A.C.B Ltd (1998) 1-2 SC 177

Bakare v. Ibrahim (1973) 6 SC 905

Assampong v. Amuaku (1932) 1 WACA 192

Idika v. Erisi (1988) 2 NWLR (Pt. 78) 573

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RULES REFERRED TO

High Court Rules of Eastern Nigeria Cap 61 Laws of Eastern Nigeria 1963) O. 33, rr. 1 and 16

LEAD JUDGMENT BY AYoola JSC

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In the High Court of Imo State, judgment was entered on 14th April, 1988, for the plaintiff on his claim against the defendant for declaration of title to land, damages for trespass and injunction. The defendant appealed to the Court of Appeal which on 20th November, 1996, allowed his appeal, set aside the judgment of the High Court and entered judgment dismissing the plaintiff's claim in its entirety with costs. The plaintiff has appealed to this Court.

The plaintiff's case was that the land in dispute was owned and farmed by his ancestor, one Obom, from whom it descended to him by inheritance through several of Obom's descendants. He relied on several acts of ownership and possession such as farming, building, raising families and burying their dead on the land, amongst other acts. The plaintiff alleged that he was still farming on the land when

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the defendant seized it from him sometime in 1976.

The defendant's case on the other hand was that the land in dispute was his, also by inheritance, it having descended to him from one Okorie, through his father, one Onuzuruike. The kernel of his case was that his grandfather, one Egwin, gave the land to one B Onyebuere, to build upon on condition that Onyebuere would pay tribute and that the land would revert to the owner in the event that Onyebuere vacated it. That event happened in 1938 when plaintiff's family vacated the land and stopped paying tribute. Consequently, C the defendant took possession of the land in 1938 since been using it for farming without interruption. The defendant relied on a previous arbitral settlement of the dispute between the parties over the land which went in his favour and pleaded that the plaintiff was estopped from relitigating the same question which had been resolved in his D favour by arbitration.

The trial Judge ruled in favour of the plaintiff on the several issues that arose in the case. He found that the flip plaintiff and his forebears lived on the land in dispute and farmed on it, that his parents and his forebears died and were, buried there, and that the E family had moved out to another part of Obinaikpa Umuokwaraeke Umuobom to live." He held that "there was no credible evidence adduced by the defendant to support the arbitration he alleged." He therefore, found as a fact that there was no native arbitration of dispute over the land. Being of the view as above as stated, it was inevitable that, as he did, he should enter judgment for the plaintiff. F

On the defendant's appeal to the Court of Appeal the issues raised by counsel on behalf of the defendant were mainly of fact, concerning the correctness of the finding of the trial Judge that the G plaintiff proved his title to the land and whether he was correct in holding that there was no arbitration in the dispute over the land. The Court of Appeal resolved the appeal on two grounds, one of which was purely procedural while the other was on the factual question whether or not there was arbitration.

H The procedural ground arose from the state of the pleadings. Katsina-Alu, JCA., (as he then was), who delivered the leading judgment of the court below was of the view that the crucial issue to be resolved in the case was whether there was a grant to the plaintiff's ancestors. However, he held that since the defendant averred by his

statement of defence that his ancestors made a grant of the land in dispute to the plaintiff's ancestors upon condition, the plaintiff not having filed a reply to rebut the averment must be taken to have admitted the averment with the consequence that evidence adduced by him in denial of the averment went to no issue, in regard to the arbitration issue, the court below, after an extensive review of the printed evidence, disagreeing with the view of the trial court, came to the conclusion that the defendant "had called credible evidence to establish the fact that the elders mediated over the dispute and found in his favour."

By the time the matter reached this court the issues have been considerably narrowed. They are formulated by the plaintiff in the appellant's brief as follows:

"(1) Whether failure by the appellant to file a Reply to the Statement of Defence amounted to an admission of a grant or relieved the respondent of his duty to prove a grant of the land (Ground Three).

(2) Whether the respondent proved a binding customary arbitration in his favour as against the appellant's assertion that there was no customary arbitration. (Grounds One & Two).

(3) Whether the appellant proved the value of the; iroko tree felled and sawed by the respondent (Grounds Four).

It is not difficult to agree with Mr. Nnodum, counsel for he plaintiff, that the Court of Appeal was in error when it held that non-filing of a reply to the statement of defence in the case was tantamount to an admission of a grant of the land to the plaintiff. The Court of Appeal relied on the cases of Joe Igah & Ors. v. Chief Ezekiel Amakiri (1976) 11 S.C. I and Egbuna v. Egbuna (1989.) 2 NWLR (Pt.106) 733 for a proposition that "failure to file a reply to rebut the far reaching averment that the land in dispute was granted to the ancestors of the respondent on payment of customary tributes is tantamount to an admission." However, those two cases are not apt because the issues they dealt with are different from the present one. There is no general proposition of law that failure to file a reply to rebut an averment in a statement of defence which does not contain a counter-claim is tantamount to an admission. Where the defendant by his pleading sets out a case which

cannot be met by mere denial it is a matter of utmost prudence, it not necessity, to file a reply.

It is common ground that the High Court Rules of Eastern Nigeria, (Cap 61, Laws of Eastern Nigeria 1963), ('the Rules') then applicable in Imo State, did not contain provisions as to filing of Reply to a Statement of Defence. Counsel for the parties, however, adverted to O.33, r. 16 of the Rules which provided that:

"The Court if it considers that the statements of claim and defence filed in any suit insufficiently disclose and fix the real issues between the parties may order such further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue."

Mr. Nnodum, counsel for the plaintiff; argued that the Rule applied only where the statements of claim and defence insufficiently disclosed and fixed the real issues between the parties and it was, thereby, necessary to have further pleadings, including a Reply, in order to bring the parties to an issue. Mr. Okoroafor, counsel for the defendant on the other hand referred to the same rule as foundation for the submission that failure to file a Reply amounted to an admission.

It is evident that O.33, r. 16 is not relevant to the question whether or not failure to file a Reply is tantamount to an admission of the material averments in the statement of defence, it is merely an enabling provision permitting the High Court to order service of pleadings subsequent to that last filed consequently upon an order made by the Court pursuant to O.33, r. 1 which provided that written pleadings shall be ordered by it court. Where the High Court did not order a Reply to be filed when ordering pleadings pursuant to O. 33, r. 1, a plaintiff who considers that pleadings subsequent to the statement of defence is essential may apply for leave to file a reply O. 33, r. 16 is not, in my opinion, intended to authorise the High Court to seize the initiative to order pleadings subsequent to a statement of defence where the plaintiff has not asked for such an order

Where the only pleading filed is the statement of claim, absence of a statement of defence means that no issue is joined. That there is an implied joinder of issues on a defence

which is unaccompanied by a counter-claim if no reply is served appears to me to be a general principle of our procedural law which, for avoidance of doubt, is often incorporated in rules of civil procedure in many of our jurisdictions. Parties are brought to an issue where the last pleading is the statement of defence to which a counter-claim had not been appended. In such a case, it is assumed that the plaintiff does not intend to rely on any excuse or justification in answer to any allegation in the statement of defence or raise any fresh facts not already contained in the pleadings filed, but is content to traverse the allegations in the statement of defence and, thereby, challenge the defendant to prove the truth of those allegations. Where, of course, the plaintiff seeks to contradict the allegations in the statement of defence not merely by a traverse but by raising issues of fact which would take the defendant by surprise, he should raise such issues by a reply. But, even then, the consequence of his not so raising it is not that he is taken to have admitted the truth of the allegation to lead evidence in proof of what he alleges, but to deprive the plaintiff from adducing evidence of facts not pleaded by the pleadings as they stand.

In *Alhaji Taofik Alao v. African Continental Bank Ltd.* (1998) 1 - 2 S.C. 177, (1998) 56/57 LRCN 3809, this court said (per Iguh, JSC):

*“Where, however, because of the nature of the averments in the Statement of Defence filed, the plaintiff proposes to lead evidence in rebuttal or to set up some affirmative case of his own in answer to the facts alleged by the defendant or raise issues of fact not arising out of two previous pleadings, the plaintiff, as a matter of prudence and general practice shall put in a Reply. See *Bakare Anor. v. Ibrahim* (1973) 6 S.C. 205.”*

I may further add, as held in a number of cases, that a plaintiff is entitled to lead evidence on a point raised in the defendant’s pleading. See *Agu v. Ikewibe* (1991) 1 NSCC 385, 400.

When a court is faced with the contention that the failure of the plaintiff to file a reply should affect the result of the case the proper approach is first, to enquire whether a reply was essential; and secondly, if it was, whether evidence of facts which should have been pleaded in the reply had been adduced

and admitted. It is a wrong approach to proceed straight-away as the court below did, to hold that failure to file a reply to a statement of defence not accompanied by a counterclaim amounted to an admission.

B However, this will not affect the result of the case if the court below was right in its conclusion that the defendant's plea of estoppel succeeded. The plea of estoppel was based on a decision of arbitration alleged by the defendant. In paragraph 10 of the statement of claim, the plaintiff averred that the defendant entered the land and cut down an Iroko tree, whereon the plaintiff took a civil action against him. In paragraph 12 of the statement of claim he averred that:

C *"The defendant refused to answer the plaintiffs (sic) call before the elders who according to Umuobom native law and; custom, would have looked into the matter with view to settling the same."*

D It was thus the plaintiff who first pleaded his willingness to have the dispute submitted to customary arbitration. For his part the defendant averred in paragraph 11 of his statement of defence that

E *"The entire Umuobom representatives have handled this matter and decided that the land in dispute belongs to the defendant The Defendant pleads estoppel and res judicata."*

F It was thus clear that at the close of pleadings, the only question as regards arbitration was whether there was an arbitration or not. That was the issue of fact which the trial Judge resolved when he held that:

"There is no credible evidence adduced by the defendant to support that arbitration he alleged"

G The Court of Appeal disagreed with this view of the trial Judge. It reviewed the printed evidence and came to its own conclusion, as it was entitled to do, that the defendant called "credible evidence to establish the facts that the elders mediated over the dispute and found in his favour."

H The evidence that there was no arbitration was that of the plaintiff and the hearsay evidence of his second and fourth witnesses. The plaintiff said that he reported the defendant before the "Amala of Umuobom" "in our customary way but he refused to answer the native summons." His Second witness said: "Plaintiff told me that he made complaint against the defendant about this land in dispute. Plaintiff told me that he reported the matter to Engene Ezeroha, our

leader but he did not tell me the outcome.” The evidence that there was such arbitration was that of the defendant and several of his witnesses. The trial Judge found that there was no arbitration for two principal reasons, which were the focus of challenge in the court below. First, he did not find the evidence adduced by the defendant on the issue reliable because of inconsistencies and contradictions in the evidence of two of the defence witnesses which he found and were made the butt of criticism in the court below, as follows: (i) D.W.1 said that the arbitration took place about 1957 whereas D.W.2 said it was in 1976; and (ii) D.W.2 said that the decision of the arbitration was oral whereas D.W.1 said it was in writing. Secondly, although the defendant had averred in paragraph 13 of the amended statement of defence that paragraph 12 of the statement of claim was a “complete fabrication and utter falsehood”, he said in his evidence-in-chief that: *“It is true that the plaintiff sued me before the elders of Umuobom.”* He held that he thus *“contradicts his pleading in paragraph 13 but Supports plaintiff’s pleading and evidence.”* It may well be noted that the averment in paragraph 12 of the statement of claim was that the defendant refused to answer the plaintiff’s call before the elders. Denial of that fact both in the statement of defence and in the defendant’s evidence could not at all have been a contradiction.

The Court of Appeal did not consider that the plaintiff’s evidence denying arbitration amounted to much. The court below was of the opinion, correctly in my view, that the plaintiff’s evidence was a mere repetition of his paragraph 12 of the statement of claim and that the testimony of his P.W.2 did not support the averments in paragraph 12. That the plaintiff submitted the dispute to customary arbitration by lodging a complaint before the customary arbitral body, the Amala Umuobom, was not in dispute. What was in issue was whether the defendant submitted to arbitration by honouring the summons to appear before the arbitral body so as to make the arbitral proceedings take off. On that issue the evidence of P.W.2 was silent.

The plaintiff said that he reported the defendant before the Amala of Umuobom which, obviously, was a body and not an individual, but there was no member of that body called to testify in favour of what the plaintiff alleged, that is to say, that the defendant refused to answer the summons of that body. In these circumstances,

the plaintiff's evidence repetitive of the averments in paragraph 12 of the statement of claim became a mere assertion without proof.

However, counsel for the plaintiff relied on *Debs and Anor v. Cheico (Nig) Ltd.*, (1986) 2 NSCC 837 in his criticism of the view of the court below that the plaintiff's evidence was a mere repetition of paragraph 12 of the statement of claim. Deb's case dealt with the weight to be given to the mere ipse dixit of a party. In that case Oputa, JSC., at p. 843 said:

"Now *ipse dixit* literally means he himself said it. It is thus a bare assertion resting on the authority of an individual. There can be no question that 'a mere *ipse dixit*' is admissible evidence but it is evidence resting on the assertion of the one who made it. Where there is need for further proof, a 'mere ipse dixit' may not be enough." (Underlining mine)

Then further, he said:

"A mere ipse dixit is in any event evidence. The weight to be attached to such evidence is an entirely different matter."

In the same vein, Eso, JSC., agreeing, said:

"With respect, there is nothing 'mere' about any evidence just because it was given by a person interested. It is still evidence. Whether it would be accepted or not depends on other circumstances and not on its being 'mere ipse dixit.'"

A court reviewing and evaluating evidence given at a trial acts within its responsibilities if it attaches little or no weight to bare assertions of a party. It all depends on the circumstances. A statement becomes a "bare assertion" or a "mere ipse dixit" when other evidence in proof of the fact stated can be, but was not adduced in support of the statement. Thus, in this case the members, or any member of the body to which the plaintiff lodged a complaint could have been called to testify to that fact and to the fact that the body summoned the defendant who refused to honour the summons. In the circumstances of this case I cannot see anything objectionable in the opinion of the court below that the plaintiff's evidence on the issue of arbitration was a repetition of paragraph 12 of the statement of claim.

It is evident that the court below did not agree with the reasons given by the trial Judge for rejecting the evidence in support of the

fact that there was an arbitration. It is true that the first defence witness (“D.W.I”) said that the arbitration was in 1957 while (“D.W.2”) said it was in 1976. However, there was no inconsistency in the evidence of those two witnesses that they were members of the arbitral panel which heard the dispute between the parties. There was only one dispute and that occurred in 1976. D.W.I testified that he was a member of the body called Amala Umuobom to whom the plaintiff made a complaint. To that extent his evidence supports that of the plaintiff that the plaintiffs lodged a complaint to that body. The divergence in the evidence of D.W.I and the plaintiff was on the question whether the defendant answered the complaint. The witness said that he did and proceeded to narrate what transpired at the ensuing arbitral proceedings, including the visit by the panel to the land in dispute and the participation of the plaintiff in the proceedings. Although D.W.1 said in cross-examination that the arbitral decision was made in 1957, it seems clear that he must have been mistaken as to date. Such mistakes about dates by illiterate witnesses are not unusual. There was no dispute in 1957 and the complaint lodged by the plaintiff was not in 1957. When a person of such circumstances as the D.W.1 a farmer, gives evidence, description of events are of more significance than dates not fixed by reference to any public event in the locality of the person giving evidence. I think the trial Judge attributed undue significance to the mention of “1957” without having regard to the rest of the witness evidence which clearly fixed the date of the event he was testifying about. The second apparent contradiction pointed out was the evidence about whether the decision of the arbitration was in writing or oral. D.W.1 said that the decision was reduced into writing, but he did not say who did, while D.W.2 said that they gave an oral decision. I agree with the court below that since an oral decision can be reduced into writing, there is no obvious contradiction. D.W.I said in cross-examination:

“The Amala decision was put down in writing. I cannot remember the date the decision we took was put into writing.”

D.W.2, who was the chairman of the arbitral panel said that the decision of the panel was oral and that “we do not put ‘Amala Umuobom’ decisions in writing” The evidence given was clear as to a decision of the arbitration. Much consequence cannot be placed on the evidence that Amala decision was put down in writing without

stating who did. Any member of the body could have put the decision in writing. When the question is that the decision of a body is in a particular form more particularity is required that the incomplete statement of a witness who was not asked who had reduced the decision he spoke about into writing Contradictions are not founded on vague statements. The evidence by the D.W.2 that the decision was oral was unambiguous. The evidence that it was reduced into writing cannot be contradictory without further evidence that it was reduced into writing as representing the arbitral decision by someone designated to reduce it into writing by the body. The court below was correct in not agreeing with the trial Judge on this score.

Confining myself to the points raised in argument concerning the appreciation of the evidence concerning the fact of arbitration, I hold that there is no reasonable cause to disagree with the conclusion of the court below that there was such arbitration and that it decided in favour of the defendant.

Learned counsel for the plaintiff finally raised the last resort argument that there was no averment that the parties to the alleged arbitration submitted themselves to the jurisdiction of the arbitral body and undertook to be bound by the decision of the body. He relied on *Ohiaeri v. Akabeze* (1992) 23 NSCC (Pt.1) 139 and *Agu v. Ikewibe* (1991) 22 NSCC (Pt.1) 385 for his submission that the court below overlooked the fact that the defendant did not plead the ingredients of a conclusive customary arbitration Although in *Agu v. Ikewibe* there was an opinion expressed by Nnaemeka-Agu, JSC., (at p. 408), in the dissenting judgment delivered by him, that before a party in a case in the High Court can defeat the right of his adversary to have his case adjudicated upon by the courts on the ground that there has been a previous binding arbitration which raises an estoppel between them, four ingredients of a binding customary arbitration must be pleaded and established. The opinion of the majority, as expressed in the leading judgment delivered by Karibi-Whyte, JSC, that prevailed was not that the ingredients should be pleaded but that such ingredients should be established by evidence. The view implied in the majority judgment in *Agu's* case was expressly put by Akpata, JSC., in *Ohiaeri v. Akabeze* at pp. 153 - 4 that:

"...where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he (will

rely on it,) it will not be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estoppel by customary arbitration."

The four ingredients usually accepted as constituting the essential characteristics of a binding customary arbitration are: (i) voluntary submission of the dispute to the arbitration of the individual or body (ii) agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding (iii) that the arbitration was in accordance with the custom of the parties and (iv) that the arbitrators reached a decision and published their award.

It was not the case of the plaintiff at the trial or in the court below that these ingredients were not established, nor indeed, that the pleading was in any way deficient to raise the issue of estoppel. No issue as to the validity of the arbitration was raised at any stage of the proceedings in the High Court or in the court below. It is now belated for the plaintiff to attempt to raise these issues at this stage without the leave of the court. It is no wonder, therefore, that counsel for the defendant had on his appeal appeared to have chosen to ignore the submission of counsel for the plaintiff on the points, even though it would have been more appropriate for the defendant to have objected to the raising of the issues without leave of court. Be that as it may, the arguments on the points of inadequacy of the defendant's pleadings or of validity or bindingness of the arbitral proceedings should be discountenanced.

However, even if the points were proper to be considered I would have held that they are lacking in merit. Once it was found, as in the court below, the defendant established that he submitted to such proceedings, the issues of voluntariness is established. Neither the plaintiff who as found by the court below, initiated the arbitration by lodging a complaint, nor the defendant who submitted to the proceedings has denied the bindingness of the decision. There is ample evidence that the arbitration was in accordance with the custom of the parties and that the arbitrators reached a decision and published their award. The truth of the matter, it seems to me, is that the plaintiff having nailed his case to the mast of a denial of arbitration, with-

out giving himself the leeway of contending, by any alternative averment, that even if there was one it was not valid, left himself with no latitude to contend as vigorously as he may have wanted to, that the arbitration was not binding. Once there was the slightest evidence of the probability of a valid arbitration the point must go in favour of the defendant.

The upshot of all I have said is that the decision of the court below on the issue of estoppel must be upheld. There is therefore no cause to consider the third issue relating to the felling of an Iroko tree. The plaintiff's appeal fails and I would dismiss it. Accordingly, I dismiss the appeal. As the defendant, the respondent was neither present nor represented by counsel at the hearing of the appeal I make no order as to costs.

D

OGUNDARE JSC

I agree with the conclusion and the reasoning leading thereto of the judgment of my learned brother, Ayoola, JSC., a preview of which I had before now. I too dismiss the appeal and make no order as to costs.

Going by the pleadings of the parties at the trial the paramount issue to be decided in this appeal is whether the trial court was right in holding that there was no arbitration involving the parties or whether it was the court below that was right in holding that there was an arbitration resulting in Defendant's favour. The Plaintiff pleaded that he reported the dispute over the land in controversy between the parties to the Amala Umuobom of their community who were the elders and empowered by the custom of the community to settle the dispute. He further pleaded that the defendant refused to attend to the invitation of the Amala to look into the matter with a view to a settlement. In effect the Plaintiff was saying that although he reported the matter to the Amala for settlement, the defendant refused the invitation of the Amala, consequent upon which there was no arbitration in the matter. The Defendant on the other hand pleaded that it was true the plaintiff reported the dispute to the Amala and that the Amala invited him for a settlement, he went further to say that he accepted the invitation of the Amala and that the parties led evidence before the Amala who went into the matter and resolved the dispute

in his (Defendant's) favour. Thus the issue is: was there any arbitration? If there was no arbitration, there would be no justification for setting aside the judgment of the trial court which so held. If however, there was arbitration which resulted in Defendant's favour, the Plaintiff would be bound by it and his case ought to have been dismissed by the trial Judge on the ground of estoppel. B

The classical case on the effect of customary arbitration is *Agu v. Ikewibe* (1991) 3 NWLR (Pt.180) 385 where this Court laid down the attributes of a valid customary arbitration. This Court per Karibi Whyte, JSC., cited with approval the dictum of Ikpeazu, J., in *Njoku v. Ikeocha* (1972) ECSLR 199 where the learned Judge said: C

"Where a body of men, be they Chiefs or otherwise, act as arbitrators over a dispute between two parties, their decision shall have a binding effect, if it is shown firstly that both parties submitted to the arbitration. Secondly, that the parties accepted the terms of the arbitration and thirdly, that they agreed to be bound by the decision, such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel." D

This dictum was accepted by this Court as a good definition of customary arbitration. For a customary arbitration to be valid, it must be shown: E

(a) that parties voluntarily submit their disputes to a non-judicial body, to wit, their fitters or Chiefs as the case may be for determination; and F

(b) the indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied,

(c) that neither of the parties has resiled front the decision so pronounced - see: *Agu v. Ikewibe* supra and the cases cited therein. G

It must be observed that in the case on hand the plaintiff admitted that he submitted the dispute between him and the defendant to arbitration but that the Defendant refused to attend to the call of the arbitrators. The Defendant on the other hand maintained that at the instance of the Plaintiff both parties voluntarily submitted their dispute to the Amala, that the Amala arbitrated between the parties and both of them accepted the decision of the Amala, in his favour. H
So the narrow issue is as to whether the Defendant submitted to

arbitration by the Amala and that the Amala did arbitrate between the parties. The reasons given by the learned trial Judge for rejecting the defendant's version and accepting the plaintiff's version are the contradictions in the evidence of D.W.1 and D.W.2, members of the Amala Omuobom who testified to the effect that there was arbitration between the parties over the land in dispute and that the arbitration was resolved in favour of the Defendant. For the reason that there were contradictions in the evidence of these two witnesses, the learned trial Judge held that there was no arbitration. The Court of Appeal faulted the reason given by the learned trial Judge and found that there was arbitration. It is now contended before us in this appeal that the Court of Appeal was wrong to disturb the finding of fact of the learned trial Judge on the issue.

The attitude of an appellate Court to findings of fact made by a trial Court has been stated in a number of decisions both of this Court and of the Court of Appeal. It is now well settled that an appellate Court will not lightly set aside findings of fact made by a trial court unless such findings are perverse - *Okpiri v. Jonah* (1961) All NLR 102; *Akinyemi v. Akinyemi* (1963) All NLR 340; *Ebba Ogodo* (1984) 1 SCNLR 322.

With this general principle at the back of my mind, I now approach the issue before us. D.W.1 testified that the arbitration between the parties was held in 1957 and the decision was reduced into writing. D.W.2 testified to the contrary. He said the arbitration was held in 1976 and that an oral decision was given) in the matter. The learned trial Judge in treating the seeming contradictions in the evidence of these two witnesses said:

"...the defendant made such fuss about native arbitration over the land in dispute... The two witnesses contradicted themselves as to the manner of the decision. D.W.1 said it was in writing while the Chairman D.W.2 said it was oral. Again D.W.1 said the decision took place in 1957 while D.W.2 said it was in 1976. The two contradictory pieces of evidence cancel themselves out. I reject, their evidence as manifestly unreliable. Having called the D.W.1 and D.W.2 as his witnesses, the defendant is bound by their discredited evidence There is no credible evidence adduced by the defendant to support the arbitration he alleged as those he referred court to as having taken active part as member and chairman - D.W.1 and D.W.2 -

respectively have been discredited. I am satisfied and find as a fact from the pleadings and evidence before me that there was no native arbitration by the Elders of Amala Umuobom or Umuobom representatives of dispute over the land in dispute between plaintiff and defendant."

The Court of Appeal was of a different view. The Court found: B

"Next, how did the appellant fare in this connection. D.W.1 and D.W.2 testified that they were members of the Panel that mediated in the dispute. D.W.2 was in fact the chairman of the panel. The learned trial Judge, as I have already shown, held that their evidence was contradictory and accordingly rejected same. The contradictions are said to be two fold. Firstly, D.W.1 said that the decision of the elders was reduced into writing. On the other hand, D.W.2 who was the chairman of the Panel said it was oral. Although there would appear to be a contradiction, it is not in my view material. This is because the real issue is whether the elders looked into the dispute and handed down a decision. Moreover it is not uncommon that the decisions of native arbitration although given orally are later reduced in writing for record purposes. A closer look at the evidence of D.W.1 would suggest that the decision was oral but later reduced into waiting, it. In his evidence-in-chief this witness testified that 'We inspected the land and thereafter decided the matter before we decided in favour of the defendant.' When he was cross-examined this witness said: 'The Amala decision was put down in writing. I cannot remember the date the decision, we took was put into writing.' My understanding of this piece of evidence is that an oral decision was given which was later reduced into writing. There is therefore, no contradiction' between the evidence of D.W.1 and the testimony of D.W.2 who said that they gave oral decision after the inspection of the land." C
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On the contradiction as to the year the arbitration was held the Court observed:

"In the second place it was said that there was contradiction in the evidence of D.W.1 and D.W.2 with respect to the date the decision was made" H

Again I do not think that this is material. This is so because the respondent himself pleaded and gave evidence to the effect that the cause of action arose early in 1976 and that he reported to the elders. The correct date cannot be anything else but 1976. It could not

be 1957 when no wrong had been committed. It was simply a case of a witness who did not know his date especially having regard to the date the cause of action arose, I think the learned trial Judge was in error when he read it against the appellant. On the state of the evidence, I hold that the appellant had called credible evidence to establish the fact that the elders mediated over the dispute and found in his favour."

It is evident in the judgment of the learned trial Judge that his view of the credibility of the evidence of D.W.2 was not based on the demeanour of these witnesses but rather on the contradictions in their evidence? Thus the Court of Appeal was in a good position to examine the reason given by the learned trial Judge for rejecting the evidence of the two witnesses and if it found the reason given not substantial, it was in a position to set aside that finding.

I have examined the evidence of these two witnesses along with the other evidence led at the trial by both parties and I am satisfied that the Court below was right in coming to the conclusion that the evidence of these two witnesses* was not discredited by the seeming contradictions. That a report was made by the Plaintiff in 1976 was not in dispute. This was generally accepted by both sides. If, therefore, D.W.1 spoke of arbitration in 1957 he must have been mistaken as to the year. Neither party talked of two arbitrations. As to whether the decision of the Amala was given orally or reduced to writing, I cannot see any contradiction in the evidence of these two witnesses. D.W.2 said the decision was given orally, he was not asked whether it was reduced to writing and gave no evidence as to that. D.W.1 said it was reduced to writing. Whether the decision was given orally and or reduced to writing was not the issue in controversy between the parties. The issue between them was as to whether there was an arbitration. On this point the two witnesses were agreed that there was such an arbitration at the instance of the Plaintiff. Had the Plaintiff's case been that there was an arbitration as a result of his complaint to the Amala and that the arbitration ended in his favour rather than in favour of the Defendant, the other consideration on which the learned trial Judge based his findings would have become relevant. Having admitted that he laid a complaint before the Amala, and leading members of the Amala, having given evidence that the complaint led to an arbitration between the Plaintiff and the Defen-

dant which ended in the Defendant's favour as pleaded by him, I think the Court below was right in holding as it did.

Not all contradictions result in the rejection of the evidence of a witness but only those that are material and result in a miscarriage of justice. I do not see how the seeming contradictions highlighted by the learned trial judge could be said to result in a miscarriage of justice in the circumstances of this case. B

For the reasons given herein and those of my learned brother, Ayoola, JSC., in affirming the decision of the Court of Appeal, I too come to the conclusion that that Court was right in reversing the finding of fact made by the learned trial Judge. As there was arbitration between the parties which ended in Defendant's favour that arbitration decision estops the Plaintiff from further litigating on the matter. His action was rightly dismissed by their Lordships of the Court below. C D

MOHAMMED JSC

I have had the privilege of reading the judgment just read by my learned brother, Ayoola, JSC., and I agree that this appeal has failed. I dismiss it and affirm the judgment of the Court of Appeal. I also award N10,000.00 costs to the respondent. E

KALGO JSC

I have had the privilege of reading in advance the judgment in this appeal which has just been delivered by my learned brother, Ayoola, JSC. I agree entirely with his reasoning and conclusions. F G

The facts of the case have been clearly set out in the leading judgment of Ayoola, JSC., and I do not find it necessary to restate them here. It is sufficient, in my respectful view, to observe that both parties to this appeal claimed the land in dispute on the grounds that they each inherited it from their respective ancestors. But the respondent who was the defendant at the trial court further alleged in his statement of defence that his ancestors made a grant of the land in dispute earlier to the appellant's ancestors on the grounds that whenever the latter vacated the land, it reverted to the former. It is not in H

dispute that the appellant's ancestors vacated the land in dispute in 1938 and the respondent's ancestors occupied it immediately. It is the act of felling an Iroko tree in the land in dispute by the respondent which sparked off the controversy.

The Court of Appeal in allowing the appeal before it examined the pleadings of the parties and came to the conclusion that non-filing of a reply by the appellant to rebut the allegation of grant of the land to his ancestors by the respondent's ancestors was "a monumental error" which "*tantamount to an admission*".

With due respect to the learned Justices of the Court of Appeal, according to the circumstances of this particular case. It was not necessary to file any reply to the statement of defence as the issues between the parties are very dear. That was why in my view, the trial court did not make any order to file a reply pursuant to Order 33 rule 16 of the High Court Rules (Cap. 61) Laws of Eastern Nigeria 1963, applicable to this case. Also following the decisions of this court in *Akeredolu v. Akinremi* (1989) 5 S.C. 102; (1989) 3 NWLR (Pt.108) 164 at 172 *Alao v. A.C.B Ltd* (1998) 1-2 S.C 177, (1998) 3 NWLR (Pt 542) 339 at 369 - 370; and *Bakare v. Ibrahim* (1973) 6 S.C. 905, this cast did not come within ambit of those cases where a reply to statement of defence is essential.

The Court of Appeal was therefore wrong to hold that failure by the appellant to file a reply to the allegation of grant of the land in dispute to the respondent's ancestors was an error amounting to an admission.

The other important issue in this appeal is whether there was arbitration in this matter or not. The evidence adduced by both parties at the trial taken together indicated very clearly that there was customary arbitration in this matter, and it ended up in favour of the respondent. And although admittedly there was some contradictions in the evidence, I am of the view that the contradictions did not affect the finding that arbitration took place. In fact the totality of the evidence on record showed that all the necessary ingredients of customary arbitration are established as enunciated in the case of *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt. 221) 1 at pages 24-25.

Customary arbitration by elders of the community is one of many African customary modes of settling disputes and once it satisfied the necessary requirements indicated above as in the case, its

decision shall have a binding effect, and has the same authority as the judgment of a judicial body having binding effect on the parties and thus create an estoppel. See *Assampong v. Amuaku* (1932) 1 WACA 192 *Ikewibe* (1991) 3 NWLR (Pt. 180) 385 at 407-8; *Idika v. Erisi* (1988) 2 NWLR (Pt. 78) 573. I therefore find that there was a binding arbitration between the parties in this case which dilated an estoppel. B

In the circumstances I do not also think it is of any use to consider the issue concerning the felling of the iroko tree in this appeal. From all I have said above and the more detailed reasons given by my learned brother, Ayoola, JSC., in the leading judgment, I find that there is no merit in this appeal, and it is hereby dismissed. I make no order as to costs. C

D

TOBI JSC (DISSENTING)

In the High Court of Orlu, late Nnaekwe Egesimba and his brother instituted an action against the defendant who is the respondent in this appeal claiming three reliefs: declaration of title to land, general damages of N 100.00 for trespass and perpetual injunction. E The learned trial Judge gave judgment to the plaintiffs. The defendant appealed. The lower court allowed the appeal. Judgment was given to the defendant who was the appellant in that court. While the appeal was pending at the lower court, Nnaekwe Egesimba died. F Eugene Nnaekwe Egesimba, the present appellant, was substituted in the place of the deceased. This was by an order of the lower court made on 12th January, 1994. Dissatisfied with the judgment of the lower court, the defendant as appellant appealed to this court.

The case of the plaintiff, who is the appellant, is that he owned G the land in dispute known as and called "Ala Ihu Okpanku" situate at Obinaikpa, Umuokwaraeke, Umuobom, within the Orlu Judicial Division, through inheritance from his ancestors. He itemized acts of ownership and possession of the land exercised by his ancestors and himself which included habitation, farming, harvesting and reaping H of economic crops and trees. Exhibit A, the survey plan, indicated the ruins of the buildings of the appellant and his forebears, and the graves of the appellant's forebears.

The case of the respondent is that the land in dispute belonged

to him, having inherited it from his ancestors. He claimed that his forefather made a grant of the land to the appellant's forebear on payment of tributes and that it was on the basis of the grant that the appellant's family lived on the land and vacated. Exhibit B is the survey plan of the respondent. As it is, both parties claimed: that they B inherited the land from their ancestors.

Briefs were filed and exchanged. The appellant formulated the following issues for determination:

C *"(1) Whether failure by the appellant to file a Reply to the Statement of Defence amounted to an admission of a grant or relieved the respondent of his duty to prove a grant of the land. (Ground Three).*

D *(2) Whether the respondent proved & binding customary arbitration in his favour as against the appellant's assertion that there was no customary arbitration. (Grounds One & Two).*

(3) Whether the appellant proved the value of the Iroko tree felled and sawed by the respondent. (Ground Four)."

The respondent formulated the following issues for determination:

E *"1. Whether in view of the state of pleadings and evidence adduced at the trial, the respondent proved a binding traditional arbitration. (Ground 1).*

F *2. Whether the contradictions noticed in the evidence of D.W.1 and D.W.2, are sufficient to disregard their testimonies on Traditional Arbitration on the disputed land. (Ground 2).*

G *3. Whether failure by the Plaintiff/Appellant to file a reply to the new issue raised in the defence, that the Appellant's ancestors were granted the land in dispute by the grandfather of the Defendant/ Respondent for residential purposes on payment of tributes, that as was the custom when the Appellant's people vacated the land in 1937, the land reverted to the Respondent, did not amount to an admission? (Ground 3).*

H *4. Whether the Applicant proved the value of the Iroko tree specifically and strictly as required by law to entitle him to judgment. (Ground 4)."*

On Issue No. 1, learned counsel for the appellant, Mr. J. T. U. Nnodum, submitted that having regard to the state of the pleadings, it was the duty of the defendant to prove the allegation of a grant to

the appellant's father or forefather positively alleged by him. He cited *Messrs Lewis and Peat (NRI) Ltd. v. Akhimien* (1976) 7 S.C. 157.

Attacking the decision of the court below on the non-filing of a reply to the allegation of a grant as tantamount to an admission of the allegation, learned counsel examined the cases cited by the lower court and contended that they did not support the conclusion reached by the court. He referred us to Order XXXII J Rule 16 of the High Court Rules, Cap. 61, Laws of Eastern Nigeria, 1963. Bullen and Jacob's *Precedents of Pleadings*: 12th Edition, page 106, and the following cases: *Akeredolu v. Akinremi* (1989) 5 S.C. 102; (1989) 3 NWLR (Pt. 108) 164 and *Alhaji Alao v. African Continental Bank Ltd.* (1998) 1-2 S.C. 177, (1998) 56/57 LRCN 3209. B
C

On Issue No. 2, learned counsel submitted that the contradictions between the evidence of D.W.1 and D.W.2 are material and the lower court was wrong in coming to the conclusion that the contradictions are not material. He specifically highlighted the evidence in respect of the year the arbitration was held and whether the decision of the arbitration was made orally or in writing. He cited *Debs v. Cheico (Nig.) Ltd.* (1986) 6 S.C. 179 at pages 180, 192-194. D

Learned counsel also submitted that failure on the part of the defence to plead any fact or evidence to show that the parties in dispute accepted the decision of the arbitration body or undertook in advance to be bound by the decision, goes against the case of the respondent. He cited *Ohiaeri v. Akabeze* (1992) 1 NWLR (Pt. 221) 1 at pages 24-25 and *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385 at page 407. Counsel urged the court to hold that there was no proof of any customary arbitration involving the parties over the land in dispute. E
F

On issue No.3, learned counsel submitted that the appellant proved the value of the Iroko tree felled and sawed by the respondent. He referred to paragraph 13 of the statement of claim of the appellant and that of the respondent and submitted that contrary to the decision of the lower court, expert evidence was not necessary in the circumstances of the case. He cited *Omoregbe v. Lawani* (1980) 3-4 S.C. 108 at page 117; *Debs v. Cheico (Nig.) Ltd.* (1986) 6 S.C. 179 at pages 180, 192-194; *West African Shipping Agency v. Alhaji Kalla* (1978) 3 S.C. 21 at page 31; *Imana v. Robinson* (1979) 3 and 4 S.C. 1. Learned counsel urged the court to allow the appeal. G
H

On Issue No. 1, learned counsel for the respondent, Mr. Ikechukwu Okoroafor, submitted that based on the pleadings of the parties the onus of proof that the defendant/respondent was called by the Amala of Umuobom in respect of his complaint but he refused to answer to the call and that mete was no decision reached by the Amala Umuobom lies on the plaintiff/appellant Examining the evidence of P.W.2, D.W.1 and D.W.2 in the light of paragraph 12 of the statement of claim and paragraph 11 of the statement of defence, learned counsel argued that the burden of proof rests on the party whether plaintiff or defendant who substantially asserts the affirmation of the issue. He cited Messrs Lewis and Peat (NRI) Ltd. v. Akhimien (1976) 7 S.C. 157 at page 169.

It was the submission of learned counsel that the appellant failed totally to establish the fact he pleaded by his failure to call any of the Elders that he reported the matter to them. Counsel recalled the evidence of P.W.2 and submitted that the evidence conflicted with the pleadings of the appellant He contended that such evidence was valueless and ought to be disregarded. He cited *Emegokwue v. Okadigbo* (1973) 4 S.C. 113; *George v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71 at 78; *Overseas Construction Ltd. v. Creek Enterprises Ltd.* (1985) 3 NWLR (Pt.13) 407.

To learned counsel, finding of fact or decision on issues neither raised nor canvassed in the pleadings would be perverse and would naturally occasion a grave miscarriage of justice hence the Court of Appeal did not hesitate in disregarding the piece of evidence.

Learned counsel attacked the decision of the learned trial Judge on the issue of arbitration, submitting that he was in great error in not deciding the suit based on the preponderance of evidence before him in favour of the defendant/respondent which the Court of Appeal rightly did. Justifying the right of the Court of Appeal to interfere with the findings of fact and evaluation of evidence of the trial court, counsel cited *Fatoyinbo v. Williams* (1956) 1 FSC 87 at page 89 and *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 at page 315. Counsel urged the court to hold that it was the plaintiff/appellant who summoned the defendant/ respondent before the Amala Umuobom, a body which gave a binding decision in favour of the defendant/ respondent. He cited *Chief Assampong v. Amuaku* 1 WACA 192 at page 196 and *Nwoti v. Chidozie*, FCA/E/82 decided on 30/11/87

(unreported).

On Issue No. 2, learned counsel submitted that the learned trial Judge erred in law when he discredited the evidence of D.W.1 and D.W.2 with respect to the traditional evidence based solely on the inconsistency or contradiction regarding to date and mode of the arbitration. He contended that where there are minor or insignificant inconsistencies in the evidence of a party, the court is entitled to ignore such inconsistencies. He cited *Chief Odumesi v. Oyenola* (1998) 8 NWLR (Pt. 563) 601 at page 616 and 617 and *Chief Whyte v. Chief Jack* (1996) 2 NWLR (Pt. 431) 407 at page 447. Counsel urged the court to hold that the learned trial Judge was in error in disregarding the entire testimonies of D.W.1, D.W.2, D.W.3, D.W.4 and D.W.5. He urged the court to uphold the decision of the Court of Appeal that the contradictions were minor and immaterial.

On Issue No.3, learned counsel submitted that the failure of the plaintiff/respondent to file a reply to the fresh issues raised in the defendant/respondent's statement of defence which goes to the bottom of the entire dispute as to reversionary nature" of the grant of land for residential purposes to the ancestors of the plaintiff/appellant, amounted to an admission. He cited Order XXXII Rule 16 of the High Court Rules, Cap. 61, Laws of Eastern Nigeria, 1963 and the following cases: *Iga v. Chief Amakiri* (1976) 11 S.C. 1 at page 12; *Egbuna v. Egbuna* (1989) 2 NWLR (Pt. 106) 773 at page 774 and 777; *Ejimofo v. Munier Construction Co. (Nig.) Ltd.* (1978) 1 MSLR 100 at page 108; *Alhaji Alao v. African Continental Bank Ltd.* (1998) 1-2 S.C. 177, (1998) 3 NWLR (Pt. 542) 339 at page 370 and *Habib Nigeria Bank Ltd. v. Koya* (1992) 7 NWLR (Pt. 251) 43.

On issue No. 4, learned counsel submitted that the plaintiff/appellant did not prove his entitlement to the sum of N600.00 being general damages for the value of the Iroko tree cut down by the defendant/respondent in accordance with, law and rules governing same. Counsel referred to paragraph 13 of the statement of claim and the evidence of the appellant and submitted that the appellant did not state how he came about the N600.00 value of the Iroko tree. He submitted that in law special damages must be specifically and strictly proved. He cited *Odibia v. Azege* (1991) 7 NWLR (Pt. 206) 729; *Strabag Construction Nigeria Ltd. v. Ogarekpe* (1991) 1 NWLR (Pt. 170) 733 and *Kalu v. Mbuko* (1988) 3 NWLR (Pt. 80)

86. Counsel urged the court to dismiss the appeal.

Let me take the issue of reply first. The appellant's 15 paragraph statement of claim was filed on 22nd February, 1978. The respondent's 15 - paragraph statement of defence was filed on 10th July, 1978. It would appear from Issue No. 3 of the respondent that the new issue he claimed to have raised is in paragraph 7 of the statement of defence. The paragraph averred as follows:

"The Defendant's fore-fathers then granted the area shown on the aforementioned plan to the Plaintiff's father to live and pay tribute and whenever the Defendant's forefathers wanted they could have the land."

The above is the new issue which the respondent claimed that a reply was needed. A new issue to attract a Reply must in law be really new in the sense of being brand and fresh. The issue must be really new to the statement of claim in that it was not existing therein and was therefore brought into existence or introduced for the first time in the statement of defence by the defendant. The new issue both in its content and materiality, must be further and additional to the statement of claim.

The mere fact that a defendant states his own side of the case does not necessarily make it new, particularly when the plaintiff has told a contrary story in his statement of claim. In such a situation, the case stated by the defendant amounts to joining Issue with the plaintiff and that does not wear the name of a new Issue in law. A new issue in my humble view, arises where the plaintiff did not advert to or touch the content of the defendant's averments in anticipation, and the defendant's averment was introduced to the pleadings for the first time and therefore unique and novel to his pleadings.

Let me pause here to examine a bit of the case law. In *Obot v. Central Bank of Nigeria* (1993) 8 NWLR (ft. 310) 149, the Supreme Court held as follows* (i) In general, it is not necessary for a plaintiff to file a reply if his only intention in doing so is to deny any allegations that the defendant may have made in the statement of defence, (ii) A reply to merely join issues is not permissible. If no reply is filed, all material facts alleged in the statement of defence are put in issue. (iii) The proper function of a reply is to raise, in answer to the defence, any matter which must be specifically pleaded, which makes the defence not maintainable or which otherwise might take, the

defence by surprise or which raised issues of fact not arising out of the defence. Also a reply is the proper place for meeting the defence by confession and avoidance, (iv) In order to allow a party to file a reply the trial court must be satisfied that both the statement of claim and the statement of defence filed by the parties have not, when read together, sufficiently disclosed and fixed the real issues between the parties and that further pleadings in the reply to be filed will achieve the purpose of bringing the parties to an issue. B

In his judgment, Uwais, JSC., (as he then was), said at 160:

"It is clear from the foregoing that the purpose of filing the reply is to Join issues on the allegations made in the statement of defence. As pointed out above issues are deemed to have been joined in respect of allegations made in the statement of defence even where no reply is filed" See also *Akeredolu v. Akinremi* (1989) S.C. 109, (1989) 3 NWLR (pt. 108) 164. C D

Where no counterclaim is filed, a reply is generally unnecessary if its sole object is to deny allegations contained in the statement of defence, see *Akeredolu v. Akinremi* (supra); *Alhaji Ishola v. Societe Generate Bank (Nigeria) Limited* (1997) 9 NWLR (pt. 488) 405.

Learned counsel took us to the mainstream of the law of pleadings, particularly the law of traverse and the consequences of failure of the adverse party to deny averment. He cited three cases. With respect, the cases are inapposite as they deal with the rule that an adverse party will be deemed to have admitted an averment in pleading which is not denied. The case here is not one of non-denial of an averment but rather one in which the appellant, as plaintiff, clearly covered the ground walked over by the respondent, who was the defendant in the High Court. E F

I do not seem to sound clear. Perhaps I will sound clearer if I take the "almighty" paragraph 7 of the statement of defence in the light of some of the averments in the statement of claim. The fulcrum of paragraph 7 is that of ownership of the land in dispute. The paragraph averred that the land in dispute was granted by the forefathers of the defendant to the plaintiff's father. G H

This is against the averments in paragraphs 4 to 8 of the statement of claim. For ease of reference, I produce the ipissima verba of the paragraphs:

"4. The land in dispute belongs absolutely to the plaintiffs since

very many years as an estate of inheritance.

5. The land in dispute was a part of the land inherited by Egesimba Agbarapuruonu when Agbarapuruonu's lands were shared or portioned among his sons.

6. On the death of Egesimba the plaintiffs inherited the land in dispute and have not partitioned or shared the said land.

7. Ever since this succession the plaintiffs and before then their ancestors have been in exclusive possession and ownership of the land in dispute.

8. The plaintiffs and their said ancestors had exercised and still exercise maximum acts of possession and the ownership over the said land by farming on the land, harvesting and reaping all manner of economic crops and trees without let and hindrance from the defendant. The ruins of the buildings of the plaintiffs and their ancestors are shown on the land in dispute. The graves of the parents and ancestors of the plaintiffs are shown on the said Plan as well as Urasi and Agwu juju shrines near Ama Onyemaere. The plaintiffs and their ancestors had permitted their relations to live and farm thereon."

Such was their claim of allodial right of ownership to the land, as told by the plaintiffs. In the light of the above comprehensive story of ownership, it is not, with the greatest respect, well thought out to contend that since the appellant did not specifically deny paragraph 7 of the statement of defence, he must be deemed to have admitted the paragraph. That looks to me like children's kindergarten play of hide and seek to outsmart or cleverly overrun one another. Litigation is not a game of smartness but one in which the parties must not cunningly but decently and overtly place their cards on the table of justice for purposes of measuring where the pendulum really tilts. Justice in its total practical content is truth in action. And the court has a duty to search for the truth and find it. Justice is not built on technicalities or caricatures.

It is clear from the submission of learned counsel to the respondent that all he wanted the appellant to do was mainly deny and possibly admit the averment in paragraph 7 of the statement of defence. The cases I have examined above do not agree with his submission. I therefore reject it. In other words, I am of the firm view that a reply was not at all necessary in this matter, and I so hold. After all, filing of a reply to a statement of defence is not automatic as the day

follows the night or vice versa.

As indicated above, learned counsel cited Order 33 rule 16 of the High Court Rules of Eastern Nigeria, 1963, to buttress his argument that a reply was necessary. The rule reads:

“The Court if it considers that the statement of claim and defence filed in any suit insufficiently disclose and fix real issues between the parties may order such further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue.” B

The rule does not specifically provide for filing of a reply. By the rule, the court is enjoined to make for further pleadings from either of the parties or from both parties if the court is of the view that the pleadings filed insufficiently disclose and fix the real issues between the parties. By the rule, an order to file further pleadings is not automatic. Where in the view of the court, the pleadings sufficiently disclose and fix the real issues in controversy, filing of further pleadings will not be ordered. C D

In this case, I am of the view that the pleadings sufficiently disclosed and fixed the real issues between the parties and it is the ownership of the land in dispute. The lower court was therefore wrong in coming to the conclusion that a reply was necessary. E

And that takes me to the big issue of arbitration under customary law. Arbitration under customary law is recognised in Nigerian jurisprudence, therefore any decision to the contrary is bad law. See *Okpuruwu v. Okpokam* (1988) 9 NWLR (Pt. 90) 554. In *Idika v. Erisi* (1988) 3 NWLR (Pt. 78) at page 573, the Supreme Court recognised and accepted arbitration under customary law. See also *Njoku v. Ekeocha* (1972) 2 ECSLR 199; *Mbagbu v. Agochukwu* (1973) 3 ECSLR (Pt. 1) 90. F

The main issue for determination is whether there was arbitration by Ndi Amala or Amala Umuobom. There are two clearly diametrically opposed versions. The appellant stated in evidence that there was no arbitration. The respondent stated in evidence that there was arbitration which was in his favour. D.W.1 and D.W.2 gave evidence in support of the respondent. G H

D.W.1 and D.W.2 gave contradictory evidence on the issue of arbitration. Although both witnesses said in evidence at the trial court that there was arbitration which went in favour of the respondent, they did not agree as to the year of the arbitration and whether it was

oral or in writing. It is convenient at this stage to hear them. D.W.I said under cross-examination at page 72 of the Record:

"The Amala decision was put down in writing. I cannot remember the date the decision we took was put into writing. The decision was made about 1957."

B D.W.2, the person who claimed to be the Chairman of the arbitration panel, in his evidence-in-chief said at page 75:

"The Amala panel decided in favour of the defendant, Ezekiel Onuzuruike. We gave oral decision in the matter. The said decision or verdict was given in 1976."

C Under cross-examination, witness said at page 78 of the Record:

"I do not know about any arbitration in respect of the land in dispute in 1957 but I know of the 1976 arbitration in which I took part. Our decision was oral. We do not put Amala Umuobom decisions in writing."

D The learned trial Judge, Ugoagwu, J., held that the contradictions in the evidence of D.W.I and D.W.2 were material. He therefore rejected their evidence. I will quote him in some material detail from page 131 of the Record:

E *"This finding ordinarily disposes of the issue of ownership of the land in dispute. Nevertheless, the defendant made such fuss about native arbitration over the land in dispute... The two witnesses contradicted themselves as to the manner of the decision. D.W.I said it was in writing while the Chairman D.W.2 said it was oral. Again D.W.I*
 F *said the decision took place in 1957 while D.W.2 said it was in 1976. The two contradictory pieces of evidence cancel themselves out. I reject their evidence as manifestly unreliable. Having called the D.W.1 and D.W.2 as his witnesses the defendant is bound by their discred-*
 G *ited evidence...*

There is no credible evidence adduced by the defendant to support the arbitration he alleged as those he referred court to as having taken active part as member and chairman - D.W.1 and D.W.2 -respectively have been discredited. I am satisfied and find as a fact
 H *from the pleadings and evidence before me that there was no native arbitration by the Elders of A mala Umuobom or Umuobom representatives of dispute over the land in dispute between plaintiff and defendant."*

The lower court did not accept the above findings of fact. The

court overturned the findings. Again, I will quote the court in some material detail at pages 243 and 244 of the Record:

“Next, how did the appellant fare in this connection. D.W.1 and D.W.2 testified that they were members of the Panel that mediated in the dispute. D.W.2 was in fact the chairman of the Panel. The learned trial Judge, as I have already shown, held that their evidence was contradictory and accordingly rejected same. The contradictions are said to be twofold. Firstly, D.W.1 said that the decision of the elders was reduced into writing. On the other hand D.W.2 who was the chairman of the Panel said it was oral. Although there would appear to be a contradiction, it is not in my view material. This is because the real issue is whether the elders looked into the dispute and handed down a decision. Moreover it is not uncommon that decisions of native arbitration although given orally are later reduced in writing for record purposes. A closer look at the evidence of D.W.1 would suggest that the decision was oral but later reduced in writing. In his evidence-in-chief this witness testified that ‘We inspected the land and thereafter decided the matter before we decided in favour of the defendant.’ When he was cross-examined this witness said: ‘The Amala decision was put down in writing. I cannot remember the date the decision we took was put into writing.’ My understanding of this piece of evidence is that an oral decision was given which was later reduced into writing. There is therefore no contradiction between the evidence of D.W.1 and the testimony of D.W.2 who said that they gave an oral decision after the inspection of the land.”

On the contradictions as to the year of the arbitration the lower court said at page 245:

“In the second place it was said that there was contradiction in the evidence of D.W.1 and D.W.2 with respect to the date the decision was made Again I do not think that this is material. This is so because the respondent himself pleaded and gave evidence to the effect that the cause of action arose early in 1976 and that he reported to the elders. The correct date cannot be anything else but 1976. It could not be 1957 when no wrong had been committed. It was simply a case of a witness who did not know his dates especially having regard to the date the cause of action arose, I think the learned trial Judge was in error when he read it against the appellant. On the state of the evidence, I hold that the appellant had called credible

evidence to establish the fact that the elders mediated over the dispute and found in his favour.”

The question before me is whether the lower court was right in the conclusion reached above. It is elementary law that an appellate court can only interfere with the findings of a trial court if it correctly comes to the conclusion that the findings are perverse. See *Ajadi v. Okenihun* (1985) 1 NWLR (pt. 3) 484; *Balogun v. Lab/ran* (1988) 3 NWLR (Pt. 80) 66; *Narumal and Sons Ltd. v. NBTC Ltd.* (1989) 4 S.C. (Pt.11) 116; (1989) 2 NWLR (Pt. 106) 730; *Ejabulor v. Osho* (1990) 5 NWLR (Pt. 148) 1.

An appellate court has not the eagle eyes of the trial court and so must walk on the line of evaluating and overturning the findings of the trial court with utmost caution, this is because the appellate court was not there. It deals with the cold records before it. On the contrary, the trial court was there and saw it all, including the demeanour, and to a restricted extent, the mannerisms and habits of witnesses in the box. Appellate courts should not play or toy with findings of trial courts just like that. There must be valid legal reason for interference.

I do not see the legal basis for interfering with the findings of the trial Judge in respect of the evidence of D.W.I and D.W.2 relating to the contradictions in their evidence. While D.W.1 gave the 1957 year, D.W.2 gave the 1976 year as the year that the arbitration was held. Between 1957 and 1976 is quite an age. It is an age of 19 years, one year behind or below a score. To say such an age in the adolescent bracket is not material, beats me hollow, and almost hands down. The lower court held that since the appellant admitted the 1976 date in the statement of claim, the contradiction as to whether it was 1957 or 1976 is not material. That may well be so, but the contradiction must certainly shake the authenticity or veracity of the evidence of D.W.I. That is one vital area that the lower court did not consider, which the trial Judge considered; and properly too. It is in that circumstance that I agree with the learned trial Judge who rejected the evidence of the two witnesses. He did so because he had no jurisdiction to repair their evidence.

I am rather surprised that the lower court described the evidence of the witnesses as “credible”. The English word “credible” means deserving to be believed, trusted or taken seriously. Does this really portray the evidence of D.W.1 and D.W.2? While I entirely

agree with the lower court that the real issue was whether the elders looked into the dispute, the fact that contradictory evidence in respect of the real issue was given certainly destroys the claim that an arbitration was conducted at the instance of the appellant. And it is unfortunate that the lower court described the evidence of D.W.1 and D.W.2 as credible in the light of the contradictions. B

The other contradiction is in respect of the mode of the arbitration. Dealing with this area, the lower court, as indicated above, came to the conclusion that “decisions of native arbitration although given orally are later reduced into writing for record purposes.” Where is that evidence in the Record? Where did the lower court get that evidence? I did not see it and there is no such evidence, it is a speculation or conjecture on the part of the lower court and courts of law have no Jurisdiction to speculate or conjecture. C

An appellate court must not introduce in a Record evidence D that which is not there and construe the Record as if it is there. That will be most unfair to the trial court because it did not see such “evidence” to the Record and therefore did not have the opportunity to evaluate “it”. That will be tantamount to stabbing the trial court through the back door. Appellate courts should not do that. E

The above apart, I cannot see how the conclusion of the lower court can fly over and above the very dogmatic evidence of D.W.2 that Amala Umuobom decisions are not put into writing. And that was the Chairman speaking. And yet the lower court held that the decision was first made orally and thereafter reduced into writing. F

There is yet another related aspect. While the lower court concluded in one breath that “there would appear to be a contradiction” it held in another breath that “there is therefore no contradiction between the evidence of D.W.1 and the testimony of D.W.2”. I am at loss of what conclusion I should take and I must not guess. Matters of such nature do not lie in an appellate court picking or choosing which version it likes. What this court should do is to reject the entire conclusion as another material contradiction. I so reject the conclusion. G

The lower court interpreted the evidence of D.W.1 to the effect H that an oral decision was given which was reduced into writing. The evidence which led to the interpretation by the lower court is as follows:

“The Amala decision was put down in writing. I cannot re-

member the date the decision we took was put into writing.”

With respect, I do not agree with the interpretation the lower court gave to the above sentences. There are two sentences in the evidence given by D.W.1. The first sentence is very clear and dogmatic. It is that the decision was in writing. The second sentence follows the first sentence and it is that he could not remember the date the decision was put into writing. There is nothing in that sentence to suggest in the remotest sense the interpretation the lower court gave to it. In other words, the second sentence does not mean that the decision was earlier made orally, and the sentence cannot be so read or construed in the light of the first clear, exact and unambiguous sentence. All that the witness did not remember was the date the decision was made in writing. The sentence has not the slightest connection or nexus with oral decision.

I should pause here to say that learned counsel for the respondent did not touch the material issue of whether the arbitration was made orally or in writing. Did he forget such a material issue or is it a matter of counsel not staking his head and brain on a matter which is indefensible. I do not want to speculate. I leave that.

The lower court could appear to have found contradiction in the evidence of P.W.1 and P.W.2 and came to the conclusion that the evidence of P.W.2 was at variance with the statement of claim and therefore went to no issue. The court cited *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 835 and *Nwaocha v. Odoemelam* (1995) 1 NWLR (Pt. 369) 13. The court said:

“The evidence of the respondent (P.W.1) is a mere repetition of his paragraph 12 of the statement of claim. The testimony of P.W.2 does not support the averment in paragraph 12 of the plaintiff/ respondent’s pleadings. This is because in the pleadings the respondent pleaded that he reported the dispute between himself and the appellant to the elders of Umuobom for adjudication. Whereas in his evidence P.W.2 disclosed that the respondent told him (P.W.2) that he reported the matter to Eugene Ezerioha. It seems to be particularly plain that this evidence is at variance with the pleading..... In other words parties are bound by their pleadings.”

What the appellant told P.W.2 in my view, is not that material to the live issue whether there was an arbitration or not. And what is more, the lower court would appear to have preferred hearsay evi-

dence to direct primary evidence. I say this because what P.W.2 alleged that P.W.1 told him is hearsay evidence, which cannot on the face of it have precedence over the direct evidence of the appellant. In my humble view, the lower court was wrong in believing hearsay evidence to dislodge direct evidence.

Flowing from the finding the court arrived at in respect the evidence of P.W.2, the court concluded:

“The consequence of this is that there is no evidence which supports the respondent’s assertion that there was no arbitration by elders with respect to the land in dispute. That being so, it cannot be said that the respondent proved the averment in paragraph 12 of his pleadings. In my judgment therefore, the learned trial Judge was in error to hold that respondent proved that there was no arbitration.”

With the greatest respect, it is the lower court and not the learned trial Judge that was in error. The appellant in his evidence as P.W.1, said under cross-examination:

“It is not true that at some time past some selected Emuobom people had arbitrated dispute over this land in dispute. It is not true that in February 1976 some influential people including Ndi Eze from Emuobom looked into the dispute over this land .and decided in favour of the defendant. There was no such arbitration. It is not true that I lied to the court when I said the defendant did not answer my native summons (itu mmanya) before Amala Umuobom.”

It is clear that the lower court did not believe the above evidence of the appellant, evidence that the learned trial Judge believed. While I do not see any justification for the lower court not believing the above evidence, that court, with respect, wrongly came to the conclusion that no evidence supported the evidence of the appellant (P.W.1) that there was no arbitration conducted by the elders. In the first place, this is not an area of law where corroboration of evidence is necessary and so the search for supporting evidence is neither here nor there. The issue does not need a carton full of evidence.

Above all, the supporting evidence the lower court was looking for and did not find is in the Record. Let me quote part of the evidence of P.W.2 at page 53 of the Record:

“I know nothing about any native arbitration in respect of the land in dispute between the plaintiff and the defendant.”

The above sentence is so clear. P.W.2 said that he knew noth-

ing about any native arbitration in respect of the land in dispute between the appellant and the respondent. Is the above not evidence in support of the appellant's case since the lower court needed that evidence to enable paragraph 12 of the statement of claim "talk". I should concede the point that the sentence is capable of a hybrid
B interpretation and it is that the witness did not know anything about the arbitration thus giving rise to the possibility of whether the arbitration was held or not.

Are the contradictions material to destroy the case of the respondent? A contradiction is material to the extent that, but for the
C contradiction, judgment should have been given in favour of the party who called the contradictory evidence. Negatively, contradiction is not material when the contradictory evidence does not affect the live issue or issues in the matter to the extent that judgment would
D be given in favour of the party who called the contradictory evidence. In my humble view, the contradictions are material." I have held above that although appellant averred that the wrong was committed by the respondent in 1976, the 1957 year of D.W.I destroyed the totality of his evidence. He could not be believed and that was
E the correct conclusion of the trial Judge.

From the totality of the evidence before the learned trial Judge, I am of the firm view that he was correct when he held that there was no arbitration in respect of the land in dispute. I accept the decision
F of the learned trial Judge. I reject the decision of the lower court.

In the most unlikely event that I am wrong, I want to deal with the requirements of a valid arbitration under customary law and see how they apply in this case, on the assumption that there was an arbitration. For the avoidance of doubt, I repeat my decision that
G there was no arbitration. And so I take this aspect in the alternative.

In *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385, the Supreme Court defined customary law arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the Arbitrators who are either the Chiefs or the Elders of their community and the agreement to be bound by such decision or freedom
H to resile where unfavourable. The Supreme Court cited with approval the decision of Ikpeazu, J, in *Njoku v. Ekeocha* (1972) a ECSLR 199 where the learned Judge said:

"Where a body of men, be they Chiefs or otherwise act as

arbitrators over a dispute between two parties, their decision should have binding effect; if it is shown firstly that both parties submitted to the arbitration. Secondly, that the parties accepted the terms of the arbitration and thirdly, that they agreed to be bound by the decision. Such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel.”^B

In *Okere v. Nwoke* (1991) 8 NWLR (Pt. 209) 317, Ogundare, JCA., (as he then was), quoted with approval the above two decisions. In *Ohiaeri v. Akabueze* (1991) 2 NWLR (Pt. 221) 1, the Supreme Court relied on its earlier decision in *Agu v. Ikewibe* (supra) and held that before a party to a case in the High Court, which had unlimited jurisdiction under the Constitution, can defeat the right of his adversary to have his case adjudicated upon by the court on the ground that there has been a previous binding arbitration which raises an estoppel between them, five ingredients must be pleaded and established by the party relying on the decision. These are, (a) that there has been voluntary submission of the matter in dispute to an arbitration of one or more persons; (b) that it was agreed by the parties either expressly or by implication that the decision of the arbitrators will be accepted as final and binding; (c) that the said arbitration was in accordance with the action of the parties or their trade or business; (d) that the arbitrators reached a decision and published their award; (e) that the decision or award was accepted at the time it was made. See also *Awosile v. Chief Sotunbo* (1992) 5 NWLR (Pt. 243) 514; *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561; *Onwuanumkpe v. Onwuanumkpe* (1993) 8 NWLR (Pt. 310) 186; *Abunsi v. Ugwunze* (1995) 6 NWLR (Pt. 401) 255; *lime v. Okoronkwo* (1996) 10 NWLR (Pt. 477) 133; *Oparaji v. Ohanu* (1999) 6 S.C. (Pt.1) 41, (1999) 9 NWLR (Pt. 618) 290.^C^D^E^F^G

I have searched in vain in the averments in the statement of defence and the totality of the Record for evidence as decided in *Ohiaeri v. Akabeze* and the group of cases. *Ohiaeri* gave five ingredients of a valid customary law arbitration. Not even one of the ingredients was established by the respondent, and the burden was on him to so establish.^H

It is almost a recitation in the judicial system that a plaintiff cannot rely on the weakness of a defendant's case. With respect, that

is talking half law; not full law. While a plaintiff will not rely on the weakness of the case of a defendant in most cases, there are instances when he can so rely. One clear instance is when, by the nature of the pleadings, the burden of proof is on the defendant. In such a situation, where the defendant has not discharged the burden of proof, the ultimate or evidential burden is not shifted on the plaintiff. The best strategy of the plaintiff is to keep quiet and submit at the end of the day that the defendant did not lead evidence to prove the averment in the statement of defence.

What the above comes to in practical terms is that the respondent, who is the defendant, did not lead any evidence as to the five ingredients of a valid customary law arbitration as decided in *Ohiaeri v. Akabeze* and the group of cases. Accordingly, the appellant who is the plaintiff, has no legal duty to give contrary evidence. After all, there is nothing to counter in law.

Although D.W.1 and D.W.2 gave evidence in respect of the customary arbitration, the statement of defence did not plead the relevant customs of the Amala Umuobom as required in law. After all by the Evidence Act, customary law is a fact which must be proved in evidence. See Section 14 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria. See also *Ekpan v. Uyo* (1986) 2 NWLR (Pt. 261) 63; *Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt. 137) 182; *Oladele v. Aromolaran II* (1996) 6 NWLR (Pt.453) 180.

And that takes me to the pleas of estoppel and *res judicata*. The second sentence of paragraph 11 of the statement of defence averred as follows:

“The Defendant pleads estoppel and res judicata.”

Estoppel and *res judicata* do not mean the same thing. In *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 the Supreme Court held that when a party pleads a judgment as estoppel what he is telling the court is that the court should take that judgment into consideration in considering the totality of his present case before the court. Whereas when he pleads *res judicata* he is saying that although he has already got judgment on, say, a piece or parcel of land he wants the court to adjudicate on the matter that has already been adjudicated in his favour. This, the court held, is contradiction in terms because he is asking the court to judge what has already been judged, hence it is said that *res judicata* ousts the jurisdiction of the court. The

plea of *res judicata*, the court held, will arise where the plaintiff in the said previous judgment or his privy in title was the plaintiff in the previous judgment reached upon. On the other hand, the pleading will be estoppel where the plaintiff or his privy in title was defendant in the case pleaded as estoppel.

Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it. *Res judicata* on the other hand, operates not only against the party whom it affects but also against the jurisdiction of the court itself. The party affected is estopped per rem judicatam from bringing a fresh claim before the court and at the same time the jurisdiction of the court to such claim is ousted. See *Alhaji Ladimeji v. Salami* (1998) 4 S.C.1, (1998) 5 NWLR (Pt. 548) 1.

While I am familiar with the plea of estoppel per rem judicata, I am not familiar with the pleas of both estoppel and *res judicata* in one paragraph. And so I ask: What does the respondent mean by the two pleas put together in one paragraph?

As it is, the two pleas lumped in paragraph 11, if anything, will certainly increase the burden of proof placed upon the respondent.

Is the plea in paragraph 11 enough to sustain a customary law arbitration, if any? In *Ohiaeri v. Akabeze* (supra), Akpata, JSC, said at pages 24 and 25:

"Hence, it is essential before applying the decision of a customary arbitration as an estoppel for the court to ensure that parties had voluntarily submitted to the arbitration, consciously indicated their willingness, after the pronouncement of the decision unequivocally accepted the award..."

While it may be sufficient to simply plead the fact of a previous judgment by a regular court as the basis of an estoppel, merely pleading such a decision in respect of a customary arbitration without pleading the ingredients that project it as creating estoppel, will not be proper pleading because not every decision of a customary arbitration, unlike that of a regular court, can create an estoppel. On the other hand, where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he will be relying on it as creating estoppel, it will not be necessary for him to

plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients necessary to sustain the material plea of estoppel by customary arbitration."

A customary law arbitration must be specifically pleaded. See Awosile v. Chief Sotunbo (1992) 5 NWLR (Pt. 243) 514. It is trite law that for a plea of res judicata to succeed, the parties, the subject matter and the issues in the two cases must be shown to be the same. See Kusu v. Udom (1990) 1 NWLR (Pt. 127) 421; Chinwendu v. Mbamali (1980) 3-4 S.C. 31; Yoye v Olubode (1974) 10 S.C. 209; tee v, Farinde (1994) 7 NWLR (Pt. 354) 42; Chief Balogun v. Adejobi (1995) 2 NWLR (Pt. 376) 131.

For estoppel per rem judicatam to apply the court should know the exact terms of the judgment or decision. In Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563, Obaseki, JSC, said:

"Whether the decision will operate as estoppel per rem judicatam or issue estoppel can only be decided when the terms of the decision are known and ascertained."

What is the evidence on the Record? D.W.1 said at page 71:

"I know the land in dispute We the Amala visited the land in dispute and the parties were present. We inspected the land and thereafter decided the matter. We decided in favour of the defendant."

D.W.2 said at page 75:

"I know the land in dispute between the parties After the parties had stated their cases we visited the land concerned in order to find out the owner and those that have land sharing common boundary with it The Amala panel decided in favour of the defendant."

And that is the evidence closest to the plea of estoppel per rem judicatam. Can the above evidence really sustain the plea? I think not. In order to put the plaintiff on proper and adequate notice, a plea of estoppel per rem judicatam must be precise, specific as to the description of the land in dispute which forms the basis of the plea. In this respect, the party should be able to describe the beacons of the land including other peculiar features.

In customary law arbitration the defendant need not give evidence as to the beacons as known in English property law because they are not available most of the time, if not all the time. But the

defendant should be able to lead evidence as to the traditional name of the land, the owners of land adjacent to the land in dispute or appurtenant to the land in dispute and whether it was an agrarian land and if so who was farming on it at the material time; and the material time for this purpose is the time the dispute arose. The point should be conceded however that an owner of a farm may not always be the owner of the farmland. B

In the light of the contradictory evidence of D.W.1 and D.W.2, I am not in a position to say whether the arbitration, if held, (and I have held that there was no arbitration), was oral or in writing. If it was made in writing, the defendant ought to plead the decision citing the specific date the decision was given. Where however the plea is based or predicated on oral arbitration, the burden is on the defendant to lead precise and specific evidence on the decision of the Arbitration Panel to enable the plea to apply. The burden is so much on the defendant in an oral arbitration in terms of probative value of the evidence, as it is not available to the court to see and determine, as in the case of arbitration in writing. In the latter case, the court sees the wordings of the decision and this makes the evaluation of the evidence easier in terms of the parties, the subject matter and the issues involved in the dispute. C D E

In this appeal, I am in a dilemma as to whether the arbitration was oral or in writing. In the light of the contradictory evidence, I am not in a position to make any further progress on the issue and this goes against the respondent because the burden of proof is on him. F

It is said that because the deficiency in respect of the estoppel was not raised by the appellant at the trial court, he cannot raise it on appeal. I am in grave difficulty to agree with this view. It was not the case of the appellant at the trial court that an arbitration was held. Accordingly, he could not have contended that the pleading of estoppel was deficient. His case was that there was no arbitration and he could not have with the same breath contended that the pleading of estoppel was deficient. That, in my humble view, should have amounted to talking from one side of the mouth two different matters or things of opposing dimension. I do not think the principles of equity will allow him to do so. G H

And what is more, the deficiency in the pleading of estoppel was not an issue at the trial court because judgment was given in

favour of the appellant on the basis that there was no arbitration. The plea of estoppel therefore did not arise. It became an issue for the first time at the Court of Appeal when the judgment of the trial court was, in my view, wrongly overturned and when that court wrongly invoked the plea of estoppel against the appellant, despite
B the deficiency in the pleading. It was in that circumstance that the appellant rightly raised the issue in this court. It is not the province of the law to expect a party to unnecessarily anticipate the adverse party in litigation to the extent that it borders on ridiculous speculation or
C conjecture. An issue on appeal arises from the judgment of a lower court and it is only when the issue arises that an appellant can procedurally raise it on appeal. Where an appealable issue does not arise from a judgment, there cannot be a ground of appeal. Therefore in the circumstances of this appeal, the law did not expect the appellant
D to raise the deficiency of the pleading of estoppel at the trial court because there was no issue at that stage of the proceedings. I have sounded prolix but I have no choice.

It is also said that since the appellant denied any arbitration, he was no longer in a position to contend that the arbitration was not
E binding. Can the law so gag him? I do not think so. Such a contention, with respect, has the clear implication of shifting the burden of proof that the arbitration, if held was not binding on the appellant, who is the plaintiff. That will be against the law on the burden of
F proof as it relates to or affects the law of pleadings.

Although the burden of proof is generally on the plaintiff, there are other equally competing principles of law. One of such principles of law is that the burden of proof is on the party who alleges the affirmative. Putting it another way, the burden of proof is on the
G party who will fail if the burden is not discharged.

And who is that party in this appeal? He is the respondent, the defendant who alleged that there was arbitration. He must lead evidence to show that the arbitration which he claimed was held was binding on the appellant. There was no such evidence.

H Assuming that I am wrong, and I think not, I should take an alternative position and it is the position that this court, should do substantial justice in this appeal. Should this court, the highest court of the land, sound so hopeless or helpless in a matter such as this? Can this court not invoke its equitable jurisdiction to do substantial

justice in this matter? Should this court hide under legal technicalities and leave the appellant in a state of limbo and complete helplessness? Should this court rest on abstract legalism in the face of the clear procedural deficiency in paragraph 11 of the statement of defence, which at the expense of prolixity is repeated here for ease of reference: “*The Defendant pleads estoppel and res judicata.*” B

It is clear that the above averment does not satisfy the rules of pleading estoppel and this court has a duty to so hold notwithstanding any apparent technical constraint. If this court is miserly in doing justice and therefore closes our doors to doing substantial justice in relevant cases, the lower court will follow and the administration of justice will run into serious problem. We should open our doors of doing substantial justice so that the lower courts can enter and do similar justice. That is the only way the administration of justice will triumph in our democracy. C D

The learned trial Judge disbelieved the evidence of D.W.3, D.W.4, D.W.5 and D.W.6. He said at page 133 of the Record:

“I also reject the evidence of D.W.3 to D.W.6 on the issue of arbitration. Each of them D.W.3, D.W.4, D.W.5, D.W.6 testified that his land shares common boundary with the land in dispute. D.W.6 at a stage testified that his land shares common boundary with the defendant’s land but not the one in dispute. Under cross-examination Defendant said: ‘It is true that the land of the witnesses from D.W.3 to D.W.6 do not share common boundary with the land in dispute.’ By that answer he discredited the said witnesses. Exhibit B supports the answer of defendant and contradicts D.W.3, D.W.4, D.W.5 and D.W.6. By Exhibit B, only the defendant has land that shares common boundary with the land in dispute. I do not believe the evidence of D.W.3, D.W.4, D.W.5 and D.W.6” E F G

It is superfluous, in my view, going into the evidence of boundary men. I only did that to show that the witnesses called by the defendant are shameless liars who were brought to come and support the defendant’s speculative claim to ownership of the land in dispute.” H

The lower court did not agree with the above. That court, with the greatest respect, from nowhere, accepted the evidence of the witnesses. The court said at page 241:

“D.W.3 Bennet Ibe, D.W.4, Odoemene Ideato, D.W.5 Mishack Ekpunobi and D.W.6 Lewis Obiagwu were in unison that they were

present during the arbitration by the elders of Umuobom and that they acted as boundary men. It was also their evidence that the elders found in favour of the appellant."

It is rather sad that the lower court believed the evidence of witnesses that the learned trial Judge saw and rightly disbelieved. In disbelieving the evidence of the witnesses, the learned trial Judge went into specifics which the lower court ignored. An appellate court has no jurisdiction to supplant its own views in the place of the trial court to arrive at a desired conclusion, outside the Record. In my humble view, the findings of the learned trial Judge are clearly supported by the evidence and the lower court has no business to interfere. The lower court, in my humble view, was clearly in error in believing the evidence of D.W.3, D.W.4, D.W.5 and D.W.6.

I now take the issue of the iroko tree. Appellant averred to the cutting down of the iroko tree (oji) in paragraphs 10 and 11. Although the respondent denied paragraphs 10 and 11 "as complete fabrication and utter falsehood", the respondent, as D.W.7 said in evidence, and I quote him at page 101:

"In 1973 I felled an Iroko tree on the land in dispute, because of it the plaintiff sued me in the native way (itummanya) before representatives of Umuobom community. I also sued plaintiff before the said Elders. It is not true that I did not allow the Elders of Umuobom to look into the complaint according to our native law and custom."

Where then lies the denial in paragraph 13 of the statement of defence? Only the respondent and probably his counsel can answer the question. Let me go to a more fundamental issue and it is the claim of N600.00 being value of the Iroko tree. Appellant as P.W.1, said in examination-in-chief at pages 47 and 48:

"The defendant trespassed upon the land in dispute ten years ago. The defendant entered the land in dispute when he felled my Iroko tree thereon. When defendant felled the said Iroko tree I reported him before the 'Amala' of Umuobom in our customary way but he refused to answer the native summons..... The defendant sawed the Iroko tree he felled on the land ;n dispute and sold the timber. He made use of the proceeds from the sale of the timber from the Iroko tree. The value of the Iroko tree at that time was N600.00."

In his evidence, respondent as D.W.7 said at page 102;

"I will not pay plaintiff N100.00 damages for trespass because the land is mine, nor will I pay him N600.00 value of Iroko tree which has been declared to be my own."

Rejecting the award of N600.00 damages by the learned trial Judge, the lower court said:

"The law with respect to special damages has long been settled. Because special damages are exceptional in character, the law requires that they must be claimed specifically and proved strictly. Although the respondent claimed specifically the N600.00 he certainly did not prove it strictly as required by our law... What the respondent said in his evidence was a mere repetition of the averment in his pleadings... The value of the Iroko tree being special damages must be strictly proved with the evidence of an expert in the trade."

The evidence given by the respondent is relevant here. He did not deny that the value of the Iroko tree was N600.00. All he said was that he would not pay the value because he was the owner of the land in dispute. Respondent agreed that he cut down an Iroko tree on the land in dispute. He recognised the N600.00 value of the Iroko tree when he said "nor will I pay him N600.00 value of Iroko tree." The law is elementary that a party has no legal duty to prove what is admitted. The court takes an admitted fact as a fact and uses it in the judgment.

There is yet another aspect. The lower court talked about evidence of an expert in the trade. Did the lower court expect evidence from a forest guard, a forester, a joiner or a carpenter? The law does not require expert evidence in all cases for the proof of special damages. An expert witness is only necessary if by the nature of the evidence, scientific or other technical information, which is outside the experience and daily common knowledge of the trial Judge as Judge of fact, is required. In the light of the admission by the respondent, there was no need on the part of the appellant to prove further the N600.00 claim beyond his ipse dixit.

It is in the light of the foregoing (Issue No.1 not included) that I am unable to convince myself to go along with the majority judgment. I therefore dissent. I hereby set aside the judgment of the lower court and allow the appeal. I uphold the judgment of the learned trial Judge, Ogoagwu, J., It is a very brilliant one. I award N10,000.00 cost in favour of the appellant.