

SUPREME COURT OF NIGERIA
FRIDAY 13TH DECEMBER, 2002. SC. 162/1997
CORAM:- I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, U. A. KALGO, A. O. EJIWUNMI, JJSC

1. MR. MARVIN FAITHFUL AWARA
 2. CHIEF ANTHONY OPUARI APPELLANTS
 3. CHIEF OSIMA GOGO PRETORU
(For themselves and as representing
Kula Community)
 - AND
 1. MR. ALAYE ALALIBO
 2. BROTHER WARIBOKO EKINE RESPONDENTS
 3. CLINTON IGBANIBO
 4. CHIEF TETEMA IMMOH
(For himself and as representing
Soku Community)
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PLEADINGS - Binding nature of - Parties are bound by their pleadings
- And evidence which is at variance with averments in pleadings -
Must be disregarded by court (H1)

ACTIONS - Claims - Basis - It is clear from claim before court - That
Aba Boko is the settlement in dispute - As it is wrong to impute what
respondents did not make as their case (H2)

APPEALS - Evidence - Reevaluation - Correctness of - Court of Appeal
rightly reevaluated the evidence - By being satisfied that respondents
had proved title to the land (H3)

LAND LAW - Title - Proof - Plaintiff must satisfy court that he is entitled
to the declaration he seeks - Based on evidence brought by him
(H4)

FACTS

The dispute here was originally between Idama/Ekulama people
and plaintiffs/respondents herein. The dispute arose when Shell-BP
discovered oil at Aba-Boko settlement. Shell- BP was to pay com-

pensation to the villages or communities on whose land oil was found. The matter first went before the Divisional officer at Degema but no agreement was reached. The Idama/Ekulama people then sued respondents at High Court of Rivers State, Port Harcourt in suit No PHC/97/91 claiming declaration of title to the Mangrove swamp, the site of the location. Defendants/appellants herein, applied to be joined as second set of defendants to the suit of the Idama/Ekulama people and were so joined. The court dismissed the claims of the Idama/Ekulama people. Respondents then sued appellants for a determination of which of them were rightly entitled to the compensation money.

Meanwhile, Shell-BP paid the compensation money into the treasury of the Rivers State Government pending the outcome of this suit. Both parties claimed title to Aba- Boko settlement. Appellants relied on traditional history to establish their claim, while respondents relied on factual evidence and tendered a plan No TJ. R41LD which they used in the previous suit. At the hearing, respondents relying on s. 34 (1) of the Evidence Act applied to tender the evidence of certain witnesses of appellants in the said Idama/Ekulama suit who were now dead. The court admitted the evidence. At the end of trial, learned trial judge dismissed the claim of respondents. Respondents appealed to the Court of Appeal which allowed the appeal and granted respondents' claims. It is against the judgment of the Court of Appeal that appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether Aba Ama was in dispute so as to make it necessary for the Lower Court to resolve issues relating thereto in reaching a decision on Aba Boko.

2. Whether Court of Appeal had in fact shifted the burden of proof unto the Appellants.

3. Whether the Court of Appeal actually made a case for the Respondents different from the case placed before the Trial Court by the Respondents.

4. Whether there were enough materials on the record of proceedings before the Court of Appeal upon which the Court of Appeal's decision that the Respondents have proved their title to Aba Boko can be based,"

HELD (Dismissing the appeal by majority decision per **MOHAMMED JSC**, OGUNDARE & EJIWUNMI, JJSC dissenting)
PLEADINGS - Binding nature of

1. It is crystal clear that the respondents case was not based on traditional history but, as Chief Debo Akande submitted, it was based on direct and positive evidence. The position of the law of evidence is clear in regards to pleadings. Parties are bound by their pleadings and evidence which is at variance with the averments in the pleadings must be disregarded by the court, whether objected to or not.

But is it correct that in paragraph 10 of the Statement of Claim the respondents pleaded traditional history? With respect to the learned counsel for the appellants the averments in that paragraph cannot be said to have been based on traditional history. (p. 3087 H)

ACTIONS - Claims - Basis

2. In issue 1 learned counsel for the appellants tried to make Aba Ama relevant to the case in issue. He referred to contradiction in Plaintiffs/Respondents' evidence on Aba Ama. He pointed to the evidence of P.W.1 where he told the trial court that one Idiom founded Aba Ama and to the evidence of P.W. 4 where he said that Idiom was not the founder. It is however very clear from the declaration sought before the court that Aba Boko is the only settlement in dispute. Aba Ama was not. I have reproduced the claim of the respondents earlier, in this judgment and it can be seen from the claim that the respondents asked the court to declare that they were the persons entitled to be paid compensation from Shell B.P for the oil location at Aba Boko Fishing Port. Aba Ama was only mentioned in order to show that Aba Ama and Aba Boko were in the same area.

The wordings of the claim before the trial court are clear that Aba Boko is the settlement in dispute. It is wrong to impute what the respondents did not make as their case. I agree with

the Court below that Aba Ama is not in dispute between in parties. (p. 3088 D/3089 A)

Evidence - Reevaluation - Correctness of

3. It was an error of the trial High Court to say that from the pleadings the respondents had onus of proving traditional history and acts of ownership in order to succeed in their claim. As quite rightly pointed out by Senior Advocate, Chief Debo Akande, the Court of Appeal after finding that the trial High Court was in error to hold that the respondents based their case on traditional history had to evaluate the whole evidence in order to weigh it on imaginary scale.

In re-evaluating the evidence, the Court of Appeal was satisfied that the respondents had established their title to the land in dispute, and quite rightly found that case of the appellants not convincing enough. I have affirmed this findings because in my view, the respondents have established that they were the founders of Aba Boko and the evidence to that effect is very convincing. (p. 3089 C)

LANDLAW - Title - Proof

4. The claim of the respondents is clear and unambiguous and it concerns ownership of Aba Boko Fishing Port and no where else. In such a claim the onus is on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration he seeks. The acts of ownership must be positive enough to warrant the inference that the plaintiff is the exclusive owner.

The respondents have proved through positive and convincing evidence that they were the community in control of Aba Boko before the oil was discovered by Shell-B.P. there. Evidence was given that stranger non-Kalabari settlers were paying rents to them.

I am satisfied that the learned Justices of the Court of Appeal had considered all the issues canvassed before them in respect of this case and had arrived at the correct conclusion that the respondents had established their root of title to the disputed Fishing Port of Aba Boko.

This appeal has therefore failed and it is dismissed.
(pp. 3089 H/3091 B)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC (Dissenting)

1. Factual evidence alone cannot support a claim to title

In the case on hand, PW.1's evidence is not traditional evidence as rightly found by the Court below. It is factual evidence and which alone cannot support a claim to title. As Plaintiffs relied on acts of ownership, they must satisfy the test laid down in *Ekpo v Ita* 11 NLR 68 at p. 69 and that is proof of

"acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the plaintiffs were exclusive owners..."

Had PW1's evidence been traditional evidence and was accepted by the trial judge it would suffice to establish Plaintiff's claim to ownership without the necessity of resorting to acts of ownership. That is the decision in *Abinabina v Enyimadu*. In one breadth, their Lordships said the evidence was not traditional evidence but in another breadth accorded it the value of traditional evidence. There lies, in my respectful view, their Lordship's error. (p. 3102 D)

2. Plaintiff has to prove ownership of land delineated on their plan

Another area where this complaint appears to be substantiated is in the findings of the Court below that Aba Ama was not in dispute but that what was in dispute was Aba Boko. By paragraphs 3 and 5 of the Statement of Claim, the Plaintiffs averred that "*The area in dispute is a mangrove swamp forest*" shown on Plan No. T.J.R. 41 LD dated 20/11/73 tendered by them in the previous suit No. PHC/97/71 between Idama/Ekulama Community on the one hand and the Plaintiffs and Defendants in the present action on the other hand. I have looked at that plan; it shows a vast area as being in dispute and within this area are the fishing ports of Aba Ama and Aba Boko.

The land in dispute as defined on their plan is a much larger area than the fishing port of Aba Boko. Ekulama flow station is not in Aba Boko as shown on the plan but in area not far from the fishing

ports of Aba Ama and Aba Boko and within the land in dispute. The plaintiffs' duty is to prove their ownership of the land delineated on their plan and not just a part of it. If they fail in this duty, as they seem to have done, their case ought to have been dismissed as was adjudged by the learned trial judge. The case they made was to a piece of land certain and this includes Aba Ama. It was wrong of the court below to make out another case for them to a much smaller area. (p. 3108 H)

3. There was no evidence that the Soku fishermen acted for Soku Community

On the founding of Aba Boko, the witness testified thus:

“Four Soku fishermen were the people who first went to Aba Boko fishing port originally. They cut the mangrove swamp and developed it, built houses and settled there and fish. Later other fishermen came and joined them. The four fishermen were: Isaac Kio, Green Ogonobene, Ila Eferebo and Dokubo Warri.

The other people who joined in the settlement were Kalabari, Ijaw and Okrika and Ibibio.”

To further question, he answered:

“Kio was the father of Isaac Kio, Oghenebere was the father of Green. Iwari was the father of Dokubo Wari. Eferebo was the father of Ila Eferebo. Aba-Boko was founded over 30 years ago before Nigeria civil war. I am not sure of the exact date.”

That Aba-Boko “was founded over 30 years ago before Nigerian Civil War” was not part of the pleadings. Nor did P.W.1 say that he was present when the fishing port was allegedly founded by the four fishermen from Soku. More importantly, the witness did not say that the four fishermen acted on behalf of Soku Community. Even if his evidence was accepted as reflecting the true position, the fishing port would belong to the four fishermen and, after them, devolved on their families. (p. 3110 H)

4. Appellate court should have ordered retrial and not re-evaluate evidence

I think it is wrong for the Court below, per Katsina-Alu, JCA., to describe the evidence of P.W.1 on Aba Boko “as direct, positive and unequivocal” and to hold on that evidence that “the plaintiffs (that is

Soku community)... established their claim to Aba Boko.” P.W.1 testified at the trial and not before the Court of Appeal. The credibility of his evidence is a matter for the learned trial Judge to decide and not for their Lordships of the Court below. The trial judge did not accept the evidence of P.W.1, otherwise he would not have dismissed plaintiffs’ case. Even if the learned trial judge was mistaken in describing plaintiffs’ case on Aba Boko as based on traditional history, which I do not accept on the state of the pleadings and the stance of the plaintiffs at the trial - it must be remembered that Defendants contested Plaintiffs’ evidence on that issue and, indeed put up a rival account of the founding of Aba Boko; a question of credibility was thereby raised which the court below was not in a position to decide as that Court did not see or hear the witnesses testify. What it should have done would have been to remit the case to the trial court to be reheard by another judge. The credibility of the evidence of P.W.1 is very much in issue as he did not testify as to what he himself did but as to what others did. His means of knowing that Kio and others founded Aba Boko was not disclosed. This lapse must obviously affect the weight to be attached to his evidence. The Court below did not advert its mind to all these weaknesses in the case for the plaintiffs. Had it done so it would not have entered judgment for the plaintiffs on such flimsy evidence of P.W.1. (p. 3111 H)

5. Evidence of witness taken at previous trial is irrelevant for current trial

In *Ariku v. Ajiwogbo* (1962) ANLR 623, 631-2 the Federal Supreme Court again held that (1) the evidence of a witness taken in earlier proceedings, is not relevant in the case on trial; except for the purpose of discrediting such witness on cross-examination, and for that purpose only; (2) it is reversible error for a trial judge, in his judgment, to treat the evidence of witnesses in previous proceedings as evidence of truth; when he himself has not seen or heard those witnesses. Ademola, CJF (as he then was) observed at p. 626 of the report:

“This Court has frequently directed attention to the practice, now not uncommon, of making use of evidence of a witness in another case as if it were evidence in the case on trial. As was pointed out in Alade v Aborishade 5 F.S.C. 167 at p. 171, this is only permissible under Section 33 or 34 of the Evidence Act. Where a witness in a

former case is giving evidence in a case in hand his former evidence may be brought up in cross-examination to discredit him if he was lying, but evidence used for this purpose does not become evidence in the case in hand for any other purpose. There are also prerequisites to the making use of the former testimony of a witness; for example, B his attention must be called to the former case where such evidence was given and he should be reminded of what he had said on that occasion.”

See also *Sosan v Ademuyiwa* (1986) 3 NWLR 241.

C Chief A. K. Diaba Offor in Exhibit 29 was recorded as having said:

“it is not correct that Shell BP met Ekulama people and their tenants at the area in dispute; no, Shell BP did not meet Kula at ‘Aba Boko’ but when we saw them we told them that we owned the area D in dispute; that was in 1956. We did not tell our solicitor that we talked with Shell BP in 1956.”

Throughout his evidence in the present proceedings this portion of his evidence in PH/97/71 was never put to him to affirm or deny his saying so. It is, on the authorities, therefore wrong, to use that E evidence to make a finding that the appellants herein were not in possession on Aba Boko when Shell BP struck oil there. It is the duty of the learned trial judge, as well as of the appellate courts, to discountenance that piece of evidence which was not given in the F present proceedings as the trial court did not see nor hear the witness testify in that earlier proceedings. It is not evidence in the present proceedings that can be acted upon. Nor can a valid finding be made by reference to such evidence in another case - *Sosan v Ademuyiwa* (supra). That is the state of the Law as evinced by the authorities I G have earlier cited. (p. 3117 B)

REPRESENTATION

R. A. Ogunwole, Esq., for the Appellants

Chief Debo Akande, SAN with C. A. Ajuyah, for the Respondents

H

CASES REFERRED TO

Njoku v. Eke (1973) 5 SC 293

N.I.P.C. v. Thomspon Organisation (1969) 1 All NLR 138

Mogaji v. Odofin (1978) 4 SC 91

Nneji v. Chukwu (1996) 10 NWLR (pt. 478) 265

Okiji v. Adejobi (1960) SCNLR 133

Itauma v. Akpe-Ime (2001) 7 SC (pt. 11) 24

Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 380

Ohiaeri v. Akabeze (1992) 2 NWLR (pt. 221) 1

Akinfolarin v. Akinola (1994) 3 NWLR (pt. 335) 659

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718

Agbaisi v. Ebikorefer (1997) 4 NWLR (Pt. 502) 630

Abaye v. Ofili (1986) 1 NWLR (Pt. 15) 134

Enang v. Akpan (1962) ANLR 524

Sosan v. Ademuyiwa (1986) 3 NWLR 241

Kodilinye v. Odu 2 WACA 336

STATUTE REFERRED TO

Evidence Act Cap 112 LFN 1990, ss. 34 and 45

LEAD JUDGMENT BY MOHAMMED JSC

The appellants were defendants to an action instituted against them and their Community by the respondents, as plaintiffs in the High Court of Rivers State, holden at Degema. In the Suit the respondent's claim is as follows:-

i. "That the plaintiff as the owners-in-possession of the Aba Boko Fishing Port are the persons entitled to the compensation payable by the Shell-PB Petroleum Development Company of Nigeria Limited for the flow station called Ekulama location opposite the Aba Boko Fishing Port.

ii. An order directing the Ministry of Finance, Rivers State to release to the Plaintiffs all the sums of money paid into the Rivers State Treasury by the Shell-BP Petroleum Development Company of Nigeria Limited as compensation in respect of the Ekulama Location at Aba Boko".

The respondents explained in their Statement of Claim the subject matter in dispute between them and the appellants. Originally the dispute was between the respondents and Idama/Ekulama people. The dispute arose when Shell-BP discovered oil at Aba Boko Settlement. Shell-BP decided to pay compensation to the villagers or communities on whose land the oil was found. The dispute went before the Divisional Officer at Degema but no agreement was

reached. The Idama/Ekulama Community thereafter sued the respondents before the High Court, in Suit No. PHC/97/91, and claimed for declaration of title to the mangrove swamp, the site of the location and an injunction restraining the respondents from interfering with their title, rights and interests in and over the location.

B The appellants, in the present case, applied to be joined as second set of defendants to the Suit filed by Idama/Ekulama Community. Their application was granted and they filed their Statement of Defence. The High Court dismissed the case of Idama/
C Ekulama. The appellants and the respondents now locked horns on which of the two communities is entitled to the compensation money. Meanwhile, Shell-BP paid the compensation money into the Treasury of the Rivers State Government pending the determination of the dispute over the party rightly entitled to be paid the compensation
D money.

Pleadings were called and delivered. Each party called witnesses in proof of their respective claims. The learned trial Judge, at the end of the trial, dismissed the action filed by the respondents against the appellants. Dissatisfied with that decision the respondents appealed
E to the Court of Appeal, Port-Harcourt Division. The Court of Appeal, in a considered judgment, found that the respondents had established their claim to Aba Boko fishing port. The appeal was allowed.

It is against the judgment of the Court of Appeal that the
F appellants have now come before this court. Four issues were identified by the appellants for the determination of this appeal. The issues are as follows:-

- “1. Whether the Court of Appeal properly considered all the issues raised in the appeal.
- G 2. Whether the Court of Appeal was right in shifting the onus of proof on the Defendants/Appellants.
3. Whether Court of Appeal was right in making a case for the Respondent which is contrary to the case put forward in the High Court.
- H 4. Whether the Court of Appeal was right in holding that the Respondents have proved their radical title to the land in dispute.”

After going through the issues raised by Chief Debo Akande, SAN, for the respondent, I will accept that those issues are more relevant to the grounds of appeal filed for the consideration of this

appeal. The respondents' issues read as follows:-

"1. Whether Aba Ama was in dispute so as to make it necessary for the Lower Court to resolve issues relating thereto in reaching a decision on Aba Boko.

2. Whether Court of Appeal had in fact shifted the burden of proof unto the Appellants. B

3. Whether the Court of Appeal actually made a case for the Respondents different from the case placed before the Trial Court by the Respondents.

4. Whether there were enough materials on the record of proceedings before the Court of Appeal upon which the Court of Appeal's decision that the Respondents have proved their title to Aba Boko can be based," C

I will start with issue 4 which is common to both the appellants and respondents. It is, in my view, the main issue for the determination D of this appeal. Before I go further in considering the matter raised in this issue I would like to state that there is no dispute over the fact that communities which first settled within the oil locations are entitled to be paid compensation. The appellants stated this fact in paragraph 5(a) of the Amended Statement of Defence. In that paragraph they E averred thus:

"5(a) With further reference to paragraph 13 of the Statement of Claim, the defendants averred that communities which first settled within the oil locations are entitled to be paid compensation and by F virtue of first settlement within the area in dispute the defendants are entitled to be paid compensation to the exclusion of the plaintiffs."

The respondents on their part, made similar averment in paragraph 13 of their Statement of Claim wherein they pleaded as follows: G

"13 The plaintiffs will contend at the trial that even though the mangrove swamps within the Kalabari territory are for the common use of every Kalabari person yet communities who have established settlements within the mangrove swamps are entitled to compensation and Shell-BP paid and still pays compensation for locations to the villages or Communities in whose vicinity the location situates, for H example:-

Soku Locations are claimed by Soku Community. Idama Locations claims by Idama Community. Abisa Location claimed by

Abisa Community. Krakrama Locations claimed by Krakrama Community. Bogi Village Locations claimed by Soko Community. Elem Sangama Locations claimed by Elem Sangama. Elegbaboko Location claimed by Princewill Family of Buguma.

Jumojumo Kiri Location claimed by the Lawson House of Buguma, and several others.”

The appellants relied on traditional history to establish their claim to both Aba Boko and Aba Ama. They argued that Aba Boko which was a fishing port and Aba Ama which was an ancient settlement were founded by their ancestors, Omonise and Abe, respectively, from Opukula over 400 years. The appellants exercised acts of ownership over their various original settlements for many years unchallenged. They also founded many fishing settlements in the area and were paid compensation by oil companies who discovered oil in the location of those settlement.

The respondents on their part, as plaintiff at the trial court, submitted that they were the owners of both Aba Boko Kiri and Aba Ama. They tendered a plan No. TJ. R41LD dated 20/11/73 in Suit No. PHC/97/71 (which I mentioned earlier in this judgment) in a case the respondents fought with Idama/Ekulama people over the oil location at Aba Boko. The respondents called evidence to show that four fishermen from their Community founded Aba Boko Fishing Port. The names of the fisherman were given as Isaac Kio, Green Oghenebere, Ila Eferebo and Dokubo Wari. They founded the Fishing Port by reclaiming the Mangrove Swamp and building huts thereat.

The most important witness for the respondents is Chief Walter Omoni Alasia. He gave evidence as Defence witness No. 1 in Suit No. PHC/97/71 which I mentioned earlier in this judgment. In that Suit both the present appellants and present respondents were co-defendants in the claim filed by Idama/Ekulama Community over the ownership of “Alagba Mburu” in Aba Boko. Each set of defendants in that suit called witnesses to establish their title to the dispute Fishing Settlement. The Idama/Ekulama people lost the case leave the two defendants to fight out who is the rightful claimant to the compensation paid for the oil location at Aba Boko.

During the hearing of this case in the High Court, learned counsel for the respondents referred to S. 340 of the Evidence Act and applied to tender the evidence of Chief A. K. Offor which he gave in suit No.

PHC/97/71. Chief A. K. Offor was a leading witness for Kula people in that Suit. Learned counsel for the respondents in the case in hand told the trial High Court that Chief Offor was dead and that his evidence was vital for the determination of the plaintiffs/respondents' case. Mr. Ogunwole who appeared for the defendants/appellants raised no objection and the whole evidence of Chief Offor was admitted and marked as Exhibit 4. In his testimony before the trial High Court in that Suit, Chief Offor told the court that Kula settlement was very far away from Aba Boko. He further testified as follows:

"It is not correct that Shell BP met Ekulama people and their tenants at the area in dispute; no, Shell BP did not meet Kula at 'Aba Boko' but when we saw them we told them we owned the area in dispute; that was in 1956. We did not tell our Solicitor that we taken with Shell BP in 1956."

It is clear from this piece of evidence that the appellants were not in possession of Aba Boko when Shell BP struck oil there as is evidence from the testimony of Chief A. K. D. Offor. He told the Court that Kula people were not present in the Fishing Port when Shell B.P., entered the location.

In his evidence before the trial High Court Chief Walter Omoni Alasia testified that the Aba Boko oil location was established in 1956 and that he knew the four fishermen from their Community who established Aba Boko. He gave the trial court the names of the fisherman and their fathers in the following testimony.

"Four fisherman were the people who first went to Aba Boko fishing port originally. They cut the mangrove swamp and developed it, build houses and settle there and fish. Later other fishermen came and joined them. The four fishermen were: Isaac Kio, Green Oghenebere, Ila Eferebo and Dokubo Wari."

PWI continued at page 55 of the record thus:

"Kio was the father of Isaac Kio, Oghenebere was the father of Green. Iwari was the father of Dokubo Wari. Eferebo was the father of Ila Eferebo. Aba Boko was founded over 30 years ago before the Nigerian Civil war. I am not sure of the exact date..."

It is crystal clear that the respondents case was not based on traditional history but, as Chief Debo Akande submitted, it was based on direct and positive evidence. The position of the law of evidence is clear in regards to pleadings. Parties are

bound by their pleadings and evidence which is at variance with the averments in the pleadings must be disregarded by the court, whether objected to or not. Njoku v. Eke (1973) 5 S.C 293, N.I.P.C. v. Thompspon Organisation (1969) 1 All NLR 138.

But is it correct that in paragraph 10 of the Statement of Claim the respondents pleaded traditional history? With respect to the learned counsel for the appellants the averments in that paragraph cannot be said to have been based on traditional history. P.W.1 who gave evidence on the establishment of Aba Boko told the trial court that the fishing settlement was founded 30 years before the Nigeria civil war. He gave the name of the fishermen who established the port and gave the names their fathers. The defence, during the trial did not cross-examine him as to whether he knew those fishermen personally or not. His evidence is positive on the identity of the fishermen. It is axiomatic that there was enough materials on the record of proceedings before the trial High court which guided the Court of Appeal to hold that the respondents have proved their radical title to the land in dispute.

In issue 1 learned counsel for the appellants tried to make Aba Ama relevant to the case in issue. He referred to contradiction in Plaintiffs/Respondents' evidence on Aba Ama. He pointed to the evidence of P.W.1 where he told the trial court that one Idiom founded Aba Ama and to the evidence of P.W. 4 where he said that Idiom was not the founder. It is however very clear from the declaration sought before the court that Aba Boko is the only settlement in dispute. Aba Ama was not. I have reproduced the claim of the respondents earlier, in this judgment and it can be seen from the claim that the respondents asked the court to declare that they were the persons entitled to be paid compensation from Shell B.P for the oil location at Aba Boko Fishing Port. Aba Ama was only mentioned in order to show that Aba Ama and Aba Boko were in the same area. In his evidence P.W. 4 explained how Soku people owned both Aba Ama and Aba Boko in the following words:

"I know Aba-Ama. Aba-Ama and the land in dispute are in the same vicinity. Soku people are the owners of Aba Boko fishing port and Aba-Ama. In the olden days Aba Ama was small town. In those days bigger towns used to go and conquer smaller towns. Because of

this, Aba-Ama moved with their households to Soku because Soku was a very powerful town."

The testimony clarified any assertion that Aba Ama is also in dispute between the parties. ***The wordings of the claim before the trial court are clear that Aba Boko is the settlement in dispute. It is wrong to impute what the respondents did not make as their case. I agree with the Court below that Aba Ama is not in dispute between in parties.*** B

The appellants submitted, in issue 2 that the learned trial Judge shifted the onus of proof on the appellants. Learned counsel for the appellants opened his argument, on this issue, with an erroneous submission; that the respondents relied on traditional history in establishing their title to the land in dispute. I have already ruled that the case of the respondents was not based on traditional history. ***It was an error of the trial High Court to say that from the pleadings the respondents had onus of proving traditional history and acts of ownership in order to succeed in their claim. As quite rightly pointed out by Senior Advocate, Chief Debo Akande, the Court of Appeal after finding that the trial High Court was in error to hold that the respondents based their case on traditional history had to evaluate the whole evidence in order to weigh it on imaginary scale.*** See Mogaji v. Odofin (1978) 4 S.C. 91 at 94 and Nneji v Chukwu (1996) 10 NWLR (pt. 478) 265. C D E

In re-evaluating the evidence, the Court of Appeal was satisfied that the respondents had established their title to the land in dispute, and quite rightly found that case of the appellants not convincing enough. I have affirmed this findings because in my view, the respondents have established that they were the founders of Aba Boko and the evidence to that effect is very convincing. PW.1 was old enough to know when Aba Boko was founded 30 years before the Nigerian Civil War. His evidence could not therefore be said to have been based on traditional history. F

Learned counsel for the appellants referred to contradiction in the evidence adduced by the respondents on the founding of Aba Ama. Such contradiction, if any, is not relevant to this case because Aba Ama is not the settlement in dispute. ***The claim of the respondents is clear and unambiguous and it concerns*** G H

ownership of Aba Boko Fishing Port and no where else. In such a claim the onus is on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to the declaration he seeks. The acts of ownership must be positive enough to warrant the inference that the plaintiff is the exclusive owner. See *Okiji v Adejobi* (1960) SCNLR 133 and *Itauma v Akpe-Ime* (2001) 7 S.C. (pt. 11) 24.

The respondents have proved through positive and convincing evidence that they were the community in control of Aba Boko before the oil was discovered by Shell-B.P. there. Evidence was given that stranger non-Kalabari settlers were paying rents to them. Clifford Quaker who gave evidence for the respondents in Suit No. PHC/97/71 was not a Soku man. His testimony was tendered as an Exhibit in the case in hand. He explained how he went about collecting rents from stranger settlers in the following testimony:

"I used to go round and collect rents from stranger settlers along Kalabari rivers. I collected the rents for the Kalabari people as a clan. I know these Soku people. My grand mother and I lived at Opukiri which was Soku settlement: it is along Soku river and on to Kula. I know those rivers and I collected rents along all those rivers. I knew all the fishing settlements there. Soku people came each month to Opukuri and collected rents from the stranger settlers there - from non Kalabari people. The settlement after Opukiri is Aba Boko and I had collected rents from stranger settlers for Kalabari. Aba Boko belongs to Soku people because Soku collected rents from strangers' settler there. After Aba Boko downstream are Opunongi and Kala Onongi. I know the fishing settlement called Olomaboko near to Dabibi Kiri on the left after Apiboko.

Cross-examination by Dapps:

I lived at Opukiri in 1932 then at Aba Boko. I lived at Apiboko too. I was fishing in 1932. I do not know that Opukiri belongs to Ekulama. I do not know Aba Boko belongs to Ekulama. I do not know Ilumaboko; we call it Nembe Boko - both Soku and Nembe sacrifice to the juju there. I know the Ekuleama and Kula people here and they know me.

Cross-examination by Douglas:

I was a fisherman in 1932. I went to School in 1925. Even as

a school boy lived with my grand mother at Opukiri. Was in school up to 1937. I am still the head of Opukiri Fishing Port.”

The relief claimed by the respondents at the close of their pleadings is very clear. They prayed the trial court to order for the payment of compensation money paid by Shell-BP for the oil location at Aba Boko. They further prayed for an order directing the Ministry of Finance, Rivers State, to release to them all sums of money paid into the Treasury by Shell B.P as compensation in respect of oil location discovered at Aba Boko.

I am satisfied that the learned Justices of the Court of Appeal had considered all the issues canvassed before them in respect of this case and had arrived at the correct conclusion that the respondents had established their root of title to the disputed Fishing Port of Aba Boko.

This appeal has therefore failed and it is dismissed. The judgment of the Court of Appeal is hereby affirmed. I award N10,000.00 costs in favour of the respondents.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother, Mohammed, JSC. I agree with the conclusion to dismiss the appeal. The plaintiffs' claim is clearly confined to the Aba Boko Fishing Port where they claim to be owners in possession thereof. Any averment in the Defendants' pleadings which goes outside the relief claimed before the Court goes to no issue and cannot be considered by the Court (see for example *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 380, *Ohiaeri v. Akabeze* (1992) 2 NWLR (pt. 221) 1. Therefore despite the pleadings in respect of Aba Ama Settlement in the Defendants' pleadings, the issue of Aba Ama did not call for any resolution (see for example *Akinfolarin v. Akinola* (1994) 3 NWLR (pt. 335) 659, *Nwadike v. Ibekwe* (1987) 4 NWLR (pt. 67) 718. The Court of Appeal was therefore right when it held that Aba Ama was not in dispute. It was equally right when it resolved the issue of title to Aba Boko to the Plaintiffs based on the direct oral evidence of witnesses before the Court and not on any traditional evidence which the trial Court had described as contradictory and which was in respect of Aba Ama settlement only. The Court of Appeal was again right when

it held that the Plaintiffs had established their claim to Aba Boko and that the learned trial Judge was in error to have found otherwise (see for example *Agbaisi v Ebikorefer* (1997) 4 NWLR (Pt. 502) 630.

I have no hesitation whatsoever in dismissing this appeal as unmeritorious. It is accordingly dismissed with N10,000 costs in favour
B of the Plaintiffs.

KALGO JSC

C I have read in draft the judgment just delivered by my learned brother, Uthman Mohammed, JSC., in this appeal, I agree with his reasoning and conclusions which I adopt as mine and find no reason to disturb the decision of the Court of Appeal. I therefore dismiss this appeal and affirm the decision of the Court of Appeal. I award
D N10,000.00 costs in favour of the respondent.

OGUNDARE JSC (DISSENTING)

E The Plaintiffs (who are Respondents in this appeal) sued the defendants (non Appellants) claiming as per their Statement of Claim:

“(a) they as owners of the Aba Boko Fishing Port are the persons entitled to be paid compensation for the Shell-BP location called Ekulama Location opposite the Aba Boko Fishing Port.

F *(b) An Order directing the Ministry of Finance Rivers State to release to the plaintiffs all sums of money paid into the Treasury by Shell-BP as compensation in respect of Ekulama Location at Aba Boko.”*

G The Plaintiffs represent the Soku community Rivers State while the Defendants represent the Kula community in the same State. The original nominal parties had all died before now and were, by order of this Court made on 23/9/02, substituted by the present parties.

In support of their claim Plaintiffs pleaded as follows:-

H *“3. The subject matter of this action is as to the person or persons entitled to the compensation payable by Shell-BP for its oil location at Aba Boko on the western bank of the San Bartholomew River popularly known as Ekulama Location. When Shell BP discovered oil in the said area the Idama/Ekulama people disputed the area of the location with the plaintiffs in this action. The area in*

dispute is a mangrove swamp forest.

4. *The dispute between the Idama/Ekulama people and the plaintiffs went before the then Divisional officer at Degema but there was no agreement as to who should be entitled to the compensation. The Idama/Ekulama Community then sued the plaintiffs in Suit No. PHC/97/71 for declaration of title to the mangrove swamp the site of the location and an injunction restraining the plaintiffs in this action from interfering with their title, rights and interests in and over the said location. On 6/4/73 the Idama/Ekulama community filed their Statement of Claim and plan No. OK/RSD/1/73 dated 8/1/73. The Statement of Claim and plan herein referred to will be relied on at the trial.*

5. *The plaintiffs as defendants in Suit No. PHC/97/71 could not file their Statement of Defence and plan until 23/3/74. The said Statement of Defence and plan No. TJ.R41 LD dated 20/11/73 will be relied on at the trial.*

6. *On 23/11/73 the defendants in this action applied to join in Suit NO. PHC/97/71 as second set of defendants and their application was granted the same day. The proceedings of the Court will be relied on to prove this averment. They later filed their Statement of Defence and plan No. TJ.R 58 LD dated 28/11/74. These documents will be relied on at the trial of this case.*

8. *Suit No. PHC/97/71 was determined on 31/1/77 dismissing the claim of Idama/Ekulama and the plaintiffs in this action would have been entitled to the compensation if the defendants did not join in that action, because all the witnesses for the defendants (the Kula Community) in Suit. No. PHC/91/71 agreed that even though mangrove swamps are for the general use of all Kalabari people, communities which founded fishing camps are entitle to collect rents from non-Kalabari settlers in such fishing camps and are also entitled to be paid compensation for oil location within the vicinity of such fishing camps, and it was agreed by the witnesses of the defendants (Kula Community) in PHC/97/71 that since Aba Boko Kiri and Aba-Ama are nearest the Oil Locations, the owners of these fishing camps are entitled to compensation for the Oil Location in dispute. Because of defendants intervention plaintiffs could not recover the compensation money which Shell-BP had paid into the Treasury of the Rivers State Government until the Court declares them entitled.*

9. *The plaintiffs are the owners of Aba Boko Kiri and Aba Ama which are shown on plaintiffs' plan No. T.J.R 41 LD dated 20/11/73 in Suit No. PHC/97/71. Aba Ama (old Village of Aba) was originally a village of its own, but later migrated to Soku under the leadership of Odum due to insecurity of those days. Ever since the migration of Aba people to Soku the Soku people have exercised maximum acts of ownership over the old Aba Village and the creeks and lands adjoining it. There is the Opungbe juju at the old Aba Village represented by the Odumdum tree which the plaintiffs sacrificed to annually.*

10. *Four fishermen from Soku namely Isaac Kio, Green Oghenebere, Ila Eferebo and Dokubo Wari founded the Aba Boko Fishing Port by reclaiming the mangrove swamp and building fishing huts thereat. Later other Kalabari, Okrika and Ijaw fishermen also settled at the place. Kalabari settlers paid the usual (Kulo Iru) customary drink to the Soku people while non-Kalabari settlers paid rents to them. Aba Boko Fishing Port became so large that it had two sections - Ijaw and Kalabari sections. Ibibio people also settled at old Aba Village and Aba Boko Fishing Port and cut wood for pits props and paid rents to the Soku people. The plaintiffs had also appointed Mr. Clifford Quarker Dokubo of Abonnema to collect rents from non-Kalabari settlers of Aba Boko and Opukiri fishing ports. Ibibio people used to cut and heap pit props on the site of the location and paid rents to the plaintiffs.” (Underlining are mine for emphasis)*

The defendants for their part based their claim to compensation from Shell Petroleum on paragraphs 11,12 and 13 of their further amended Statement of Defence which read as follows:-

“11. *The defendants aver that Aba Boko which is a fishing port and Aba Ama which is an ancient settlement were founded by Omonise and Aba respectively from Opukula over 400 years ago before Opukula moved to the present site of Kula.*

12. *The defendant exercised act of ownership over their various original settlements communally for very many years unchallenged and they also founded among others the following fishing settlements: Opu Onongi, Kala Onongi, Freetown, Gold Cost (sic) and they also had shrines in their homestead and fishing settlements all these are clearly shown on the plan filed with the Amended Statement of Defence. They founded MINJIDU PIRI- a bush where the defendants*

obtained their drinking water. They also built houses. In Suit No. PHC/97/71: issues were joined as to the rightful owners of some of the fishing ports referred to in paragraph 7 above. The Plaintiffs admitted that the defendants founded Onongi Fishing Establishments and also Minjidu Piri (bush were Defendants obtained water to drink)

13. When the defendants' community left their original settlements to settle in their present Town, they put some fishermen at their different fishing ports including the land in dispute and the non-Kalabaris amongst them paid rent to the defendants. "The defendants will rely on some of the receipts issued to the non-Kalabari fishermen at the trial of this action."

Evidence was led by both sides. At the conclusion of evidence and after addresses by learned counsel for the parties, the learned trial Judge Opene, J., (as he then was) found Plaintiffs' claim not proved and dismissed the same. In his judgment he identified the three following issues as arising for determination-

"(1) Whether the Plaintiffs or the Defendants are the original founders of Aba Boko and also Aba Ama which is also very near to Aba Boko.

(2) Whether the Plaintiffs or Defendants have exercised positive and numerous acts of ownership over Aba Boko and Aba Ama.

(3) Whether or not Section 45 (sic: Section 46) of Evidence act applicable." (Words in brackets are mine)

On issue 1, he found:

i. "in any event the Plaintiffs' traditional evidence is in no way better than that of the defendants."

ii. Plaintiffs evidence on Aba Ama is contradictory and they, therefore, failed to prove their claim to that settlement.

On issue, 2, the learned trial Judge found:

i. "The plaintiffs led evidence to show that they collect rents from the stranger elements in their fishing ports, but they are not able to tender a single receipt issued to any of their tenants."

ii. "In respect of Amatemeso which the plaintiffs said is at old Aba and that P.W. 4 goes there annually to make the sacrifice, the Opumgbe juju and the life tree Odumdum and Izikara tree which P.W. 4 said that if one goes to Aba that he would see, were not shown in the plaintiffs' plan Exhibit "2" and these are some of the important features on which the plaintiffs are relying to establish their acts of

ownership.”

iii. *“The defendants on the other hand have shown that they have tenants in their settlements from whom they collect rents and they have tendered the counterfeits of the receipts issued to them especially in respect of Aba Boko.”*

B iv. *“It can not be over emphasized that the defendants have adduced a much stronger evidence than the plaintiffs in support of their acts of ownership.”*

C v. *“As regards to acts of ownership, they (that is, plaintiffs) have not been able to establish such acts which are numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.”* (Words in brackets are mine)

On issue (3) the learned trial Judge observed:

D *“The Defendants pleaded Section 45 of Evidence Act and gave evidence to this effect, if they can show that they own all the fishing ports around Aba Boko and the oil location in dispute, obviously they can succeed on that alone.”*

And found:

E *“Howbeit, this does not derogate from the fact that from Opu Onongi to Ekulama Location is one stretch of land and that people at the said oil location, Aba Boko and Aba Ama go to fetch their drinking water at Minjidu Piri and also that the defendants own Kala Onongi, Opu Onongi, Minjidu Piri and other fishing ports near to the oil location.”*

F He also found, after a consideration of the evidence before him; that-

G *“The Defendants pleaded Section 45 of Evidence Act and they have gone further to show that all the fishing ports near the area in dispute belong to them and that the area in dispute is in the same stretch of land with their fishing ports”*

Commenting generally on the evidence adduced by both parties, the learned trial Judge found:

H *“in fact, the defendants have put up a very stronger case that they put tenants in Aba Boko and that they issue receipts to such tenants for payment of rents, that they have some shrines- Odumdum tree, Ovo and 2 houses at Aba Boko.....*

I have well and carefully considered all the evidence before me and I am fully satisfied that the plaintiffs have not discharged the

burden of proof that is cast upon them by the law.”

The plaintiffs were dissatisfied with the judgment of the trial Judge and appealed to the Court of Appeal upon the following grounds of appeal which, without their particulars except as regards ground (1), read as follows:

“(i) *The learned trial Judge erred in law in holding that the plaintiffs’ traditional evidence had been contradicted.*” B

Particular of Error

“a. *The Plaintiffs have given evidence of tradition strictly in accordance with the pleading and none of the witnesses for the plaintiffs contradicted what another witness said on tradition.*” C

b. *The traditional evidence of the defendants cannot be said to have contradicted that of the plaintiffs, for the duty of the Court is to weigh the traditional evidence of both parties on the imaginary scale and decide which is more cogent.* D

c. *A careful examination of the traditional evidence of both parties, bearing in mind that traditional evidence is also factual as to actual events occurring within living memory, clearly reveals that the plaintiffs traditional evidence is more cogent.”*

(ii) *The learned trial Judge erred in law in holding that Section 45 of the Evidence Act applied to this case.* E

iii. *The learned trial Judge erred in law when he held that the plaintiffs have not been able to establish such acts which are numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.* F

iv. *The learned trial Judge erred in law in giving judgment to the defendants when their case is full of inconsistencies and falsehoods.*

v. *The judgment is against the weight of evidence”*

The Court of Appeal in its judgment allowed Plaintiffs’ appeal, set aside the judgment of the trial judge and entered judgment for him. It is against this judgment that the Defendants have now appealed to this Court upon 10 grounds of appeal contained in their notice of appeal filed on 26/11/96, after having obtained leave of the Court below to appeal. H

In Appellants brief of argument filed by the Defendants, they identified the following four issue as arising for determination in this appeal

“1. *Whether the Court of Appeal properly considered all the*

issues raised in the appeal.

2. *Whether the Court of Appeal was right in shifting the onus of proof on the Defendants/Appellants.*

3. *Whether the Court of Appeal was right in making a case for the Respondent which is contrary to the case put forward in the High Court.*

4. *Whether the Court of Appeal was right in holding that the Respondents have proved their radical title to the land in dispute.”*

The Plaintiffs in their Respondent’s Brief of argument set out the issues as follows:-

“1. *Whether Aba Ama was in dispute so as to make it necessary for the Lower Court to resolve issues relating thereto in reaching a decision on Aba Boko.*

2. *Whether the Court of Appeal had in fact shifted the burden of proof unto the Appellants.*

3. *Whether the Court of Appeal actually made a case for the Respondents different from the case placed before the Trial Court by the Respondents.*

4. *Whether there were enough materials on the record of proceedings before the Court of Appeal upon which the Court of Appeal’s decision that the Respondents have proved their title to Aba Boko can be based.”*

Having considered the judgment of the Court of Appeal appealed against in this appeal and the grounds of appeal contained in the Defendant’s Notice of Appeal, it is my view that the only issue that need consideration in this appeal is issue (3) raised in the two Briefs of Argument before us. Issues (2) and (4) in the Defendants’ brief and Issues (1), (2) and (4) in the Plaintiffs’ Brief dovetail into this one issue and will be considered along with it.

The Court of Appeal in the lead judgment of Katsina-Alu, JCA., (as he then was) with which Okezie and Rowland, JJ.CA agreed, said:

“As I have already indicated PW.1 was 60 years old as at the time he gave evidence in this case. That means that at the time of the founding of Aba Boko this witness was already an adult. Clearly therefore he was giving evidence of what he witnessed. He gave evidence of what he saw and knew first hand. The plaintiffs’ root of title was not in antiquity and history oblivion. The evidence of the

plaintiffs in respect of their founding of *Aba Boko* cannot be classified as traditional evidence. See *Alade v. Awo* (1975) 4 S.C. 215; *Nabina (sic) v. Enyimadu* 12 WACA 171 at 172. The Plaintiffs acquired control of the land on behalf of *Soku Community* direct from their four fishermen who founded *Aba Boko*.

This piece of evidence is in line with paragraph 10 of the statement of claim which reads:

“Four fishermen from *Soku* namely *Isaac Kio*, *Green Oghenebere*, *Ila Eferebo* and *Kokubo Wari* founded the *Aba Boko Fishing Port* by reclaiming the mangrove swamp and building fishing huts thereat. Later other *Kalabari*, *Okrika* and *Ijaw* fishermen also settled at the place...

It can be seen clearly that the *Soku Community* traced their root of title to *Isaac Kio*, *Green Oghenebere*, *Ila Eferebo* and *Dokubo Wari*. It was their case that these four fishermen founded *Aba Boko* 30 years before the *Nigerian Civil War*.

With regard to *Aba Ama*, the founder's name was not pleaded. All that was pleaded was that *Aba Ama* was originally a village of its own which later migrated to *Soku* under the leadership of *Odum* due to the insecurity of those days. The plaintiffs called evidence in proof of this averment. P.W.I. in the course of this testimony said at page 50 lines 19-28 thus:

Soku Community own *Aba Ama*. In the olden days when there was inter tribal wars, for the fear of these was, the original settlers of *Aba Ama* left there and went to *Soku* and settled, so that old *Aba Ama* belongs to *Soku Community*, *Soku Community* is the owner of the old settlement of *Aba Ama*. *Soku community* used to go *Aba Ama* annually to have a festival for the juju of that place. The juju is called *OPUMGBE*. *Karibi Alalibo* is the juju priest.’

Under cross examination this witness said at page 54 thus:

Idiom was the founder of *Aba Ama*. *Idiom* and *Odum* are not the same person.’

P.W.4 who claimed to be a member of *Idiom* family also gave evidence of traditional history. When he was cross-examined he said H at page 63 lines 3-7 as follows:

‘*Ama* means town or village. I don't know the meaning of *Aba Ama*. *Idiom* was the founder of *Aba Ama*. I don't know where *Idiom* came from. I don't know when the village was founded’.

At page 63 line 12 the witness said:

It was Idiom that took Aba Ama people to Soku’.

Still under cross-examination P.W. 4 testified as follows at page 63 lines 27 to 29:

B *‘Idiom is not the founder of Aba Ama but he led the Aba Ama people to Soku’*

It must be pointed out that the name of the founder of Aba Ama was not pleaded. Therefore the evidence that Idiom founded the settlement goes to no issue and accordingly must be disregarded.

C *See Agu v. Ikewibe (1991) 3 NWLR (pt. 180) 380; Ohiaeri v Akabeze (1992) 2 NWLR (Pt. 221).*

It must also be observed that the evidence of traditional history called by the plaintiffs is contradictory. While P.W.1 said it was Idiom who founded Aba Ama, P.W. 4 said he was not.

D *Also the plaintiffs pleaded that it was Odum who led the people of Aba Ama to Soku where they settled. In his evidence at the trial. P.W. 4 said that it was Idiom who led the Aba Ama people to Soku. This piece of evidence is not supported by the pleadings. It goes to no issue and must be disregarded. It must however be pointed out that*
E *Aba Ama was not in dispute.*

The respondents on the other hand pleaded their traditional history in paragraph 11 of the Amended Statement of Defence. It reads:

F *‘11. The defendants aver that Aba Boko which is a fishing port and Aba Ama which is in ancient settlement were founded by Ononise and Aba respectively from Opukula over 400 years ago before Opukula moved to the present site of Kula’.*

D.W. 6 clearly in his evidence testified in part thus:

G *‘I know the land in dispute. I am a native of Kula. Aba Boko was founded by Omonise. Aba Ama was founded by Aba. His happened by 400 years ago. These two people were living at Opu Kula before they founded these two villages.’*

H *There is in the pleadings and the evidence of the respondents a total absence of facts about the persons who have held title or on whom title has devolved in respect of the land since the founding before the respondents acquired control of the land on behalf of Kula Community. It is now settled law that where in an action for declaration of title, the line of succession is not satisfactorily traced,*

and that line of succession has gaps and mysterious linkage of nexus which are established, such line of succession will be rejected. See Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (pt. 7) 393 and Piaro v. Tenalo (supra).

As I have already indicated the learned trial Judge held that the traditional evidence of the plaintiffs had been contradicted. He however did not state the nature of the contradiction. Be that as it may, as I have already shown the evidence of the appellants with respect to Aba Ama settlement was contradictory. Again I have to point out that Aba Ama settlement was not in dispute. It was therefore, an error to transfer the contradictions in the evidence in respect of Aba Ama to Aba Boko fishing port. The evidence in respect of Aba Boko was direct, positive and unequivocal.”

It is clear from the above passage that the Court below in allowing Plaintiffs’ appeal before it was of the view that Plaintiffs’ case in respect of Aba Boko fishing port was not based on traditional evidence and as such the learned trial Judge was in error to so regard it. It was the further view of the Court below that the evidence led by the Plaintiff in support of their case in respect of Aba Boko fishing port was “...direct positive and unequivocal.” That Court also was of the view that it was Aba Boko only that was in dispute and that Aba Ama was not.

Before I proceed further I need to point out that their Lordship of the Court below, with profound respect to them, misdirected themselves in a number of ways in the passage just quoted. First, there is no shred of evidence to show that the four fishermen from Soku was allegedly founded Aba Boko did so on behalf of the Soku Community.

Secondly, while I agree that the evidence, as distinct from the pleadings, given by P.W.1 as to the alleged founding of Aba Boko “cannot be classified as traditional evidence” - it is factual evidence - *Abinabina v Enyimadu* 12 WACA 171 cited was, with respect, misapplied. In that case, the trial Judge had directed himself thus:

“In claims for declaration of title the onus lies upon the plaintiffs to establish his cause upon the strength of his own case and not upon the weakness of this opponents. In such action he must evidence such positive and numerous acts within Living Memory sufficiently frequent and positive to justify the inference that he is the exclusive

owner”.

By this direction the learned Judge inferentially seemed to say that such title could not be supported by traditional evidence alone. The Privy Council held that the Judge’s direction was not well founded. Lord Cohen, delivering the judgment of the Council said at
B page 174 of the report:

“*Their Lordships are satisfied by reference to authorities that the opinion of Jackson, J., that frequent and positive numerous acts within living memory are essential to justify the inference of exclusive ownership is not well founded. It will be sufficient to refer to two*
C *cases. In Nchirahene Kojo Ado v. Buoyemhene Kwadwo Wusu 4 WACA 96 and 6 WACA 24 the actual decision in the Court of Appeal was on a point of equity but it is clear from the judgment of the court that, apart from the point, the court would have accepted the plaintiff’s*
D *title solely on the basis of traditional evidence.*”

Though this case is a Gold Coast (now Ghana) case, the principle decided herein represents the law also in this Country.

In the case on hand, PW.1’s evidence is not traditional evidence as rightly found by the Court below. It is factual evidence and which
E alone cannot support a claim to title. As Plaintiffs relied on acts of ownership, they must satisfy the test laid down in Ekpo v Ita 11 NLR 68 at p. 69 and that is proof of

“*acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that the*
F *plaintiffs were exclusive owners....*”

See Idundun v Okumagba (1976) 1 NMLR 200. Had PW1’s evidence been traditional evidence and was accepted by the trial judge it would suffice to establish Plaintiff’s claim to ownership without the
G necessity of resorting to acts of ownership. That is the decision in Abinabina v Enyimadu. In one breadth, their Lordships said the evidence was not traditional evidence but in another breadth accorded it the value of traditional evidence. There lies, in my respectful view, their Lordship’s error. See Alade v Awo (1975) 4 S.C. 218, 224-
H 225- a case relied on by the Court below. In that case Ibekwe JSC., (as he then was) delivering the judgment of this court observed:

“*A careful study of the record of appeal also shows that the learned trial judge was of the view that, in order to succeed in his claim for declaration of title, the plaintiff, in the present case, must*

prove positive and numerous acts of ownership extending over a length of time, so numerous as to warrant the inference that he is the exclusive owner of the disputed land. We simply observe that burden of proof will only be thrown on the plaintiff if the evidence of tradition is inconclusive, which is not the case here.”

Thus, the cases relied on by Katsina-Alu, JCA., relate to B traditional evidence and not to factual evidence, as he found P.W.’s evidence to be. The cases are, therefore, not applicable to the present case except as to the nature and sufficiency of the acts of ownership that will sustain a claim to title, where the claimant relies on acts of C ownership, as it is the case on hand.

It is the submission of learned counsel for the Defendants both in the brief and in oral argument, that the Court below was making a case for the Plaintiffs different from the case they made for themselves at the trial. First, it was contended that the Court below was in error D where it held that Aba Ama was not in dispute when by the pleading and evidence on both sides, its ownership was hotly contested. It was also contended that the Plaintiffs fought their case at the trial on the basis that they relied on traditional evidence. It was, therefore, wrong of the Court of Appeal to hold that Plaintiffs’ case was not based on E traditional history. Thirdly, it was contended that the Court below was in error in shifting the onus of proof on the Defendants. It is submitted that the conclusion of the Court of Appeal was perverse. It is argued forcefully in the Defendants’ Appellants’ Brief thus:

“4.23 From the pleadings as settled the Respondent is relying F on traditional evidence and acts of ownership. The evidence that 1st P.W. gave under cross-examination cannot be used unless and until his pleadings is amended. See *Woluchem v Gudi* (1981) 5 S.C. 91 at 320. Besides, the answer as shown above did not show that 1 P.W. G (sic) was at Aba Boko when it was founded. If the evidence does not qualify as traditional evidence, see *Alade v. Awo* (1975) 4 S.C. 215 at 225. Then it was hearsay evidence which cannot be acted upon. This piece of evidence is not pleaded as such it goes to no issue.

4.24 But surprisingly judgment was given to the Respondent H on the piece of evidence.

‘As I have already indicated P.W. 1 was 60 years old as at the time he gave evidence in this case. That means that at the time of the founding of Aba Boko this witness was already an adult. Clearly

therefore, he was given (sic) evidence of what he witnesses. He gave evidence of what he saw and knew first hand. The plaintiff's root of title was not lost in antiquity and historical oblivion. (Page 259 lines 20-27)'.

B 4.25 *There is no where the witness said he witnessed the founding of Aba Boko. Aba Boko was founded beyond living memory hence the Respondent in his pleading is relying on traditional evidence and acts of ownership as can be seen from the pleadings and submission of the appellant's counsel at the trial court. It is trite law*
C *that a party cannot be allowed to set up different case in each of the hierarchy of courts:*

i. *Abaye v Ofili (1986) 1 NWLR (Part 15) p. 134 at pp. 147-148.*

ii. *A-G Anambra State v. Onuselegu (1987) 4 NWLR (Pt. 66)*
D *page 547.*

4.26 *The Court is not a charitable organisation where if a party fails to establish his claim he will be offered an alternative relief:*

i. *See Chugbo Chemists Ltd. v. Chugbo (1996) 5 NWLR (Pt. 447) at 247.*

E ii. *Odofin v Agu (1992) 3 NWLR (Pt. 229) p. 350 at p. 359*

4.27 *It is my respectful submission that the decision is perverse and ought to be set aside."*

Further on in the Brief, it is argued thus:

F "4.32 *What the Court of Appeal found is quite different from the case put forward in paragraph 10 of the Respondent's Statement of Claim. Paragraph 10 pleads traditional history and nothing else. If the evidence of PW.1 is not traditional evidence then it is hearsay and it is not admissible in evidence.*

G 4.33 *Again the Plaintiff did not trace his history to those who founded Aba Boko. It is wrong to hold that the Plaintiff acquired control of the land in dispute on behalf of Soku Community direct from their four fishermen who founded Aba Boko."*

H For the Plaintiffs, it was contended that from the wording of claim (a), the plaintiffs' claim was limited to Aba Boko. It is argued that the Court would have no jurisdiction to consider title to Aba Ama which was not the subject of any relief claimed before it. It was contended that despite the averments in the Plaintiffs' pleadings on Aba Ama, Aba Ama was not a live issue and it is, therefore, submitted

that the Court of Appeal was right in disregarding the averments on Aba Ama. On the nature of the case put forward by the Plaintiffs, it was contended that the pleadings of the Plaintiffs did not raise issue of traditional history. It was argued in the Respondents' brief thus:

"6.4 The pleadings of the Respondents did not raise issue of traditional history, there is no averment in the Statement of Claim which required proof of title to Aba Boko to be by traditional evidence. And none of the Respondents' witnesses gave traditional evidence in proof of title to Aba Boko. A party is limited by the averments in its pleadings."

It was submitted that the Court below did not make a different case from the one put forward by the Respondents at the trial.

I have given careful consideration to the submission of learned counsel for the parties both in their respective Briefs and in oral arguments. Plaintiffs' case was based on paragraph 9 and 10 of their statement of claim, which at the risk of repetition, but for emphasis, read as follows:

"9. The plaintiffs are the owners of Aba Boko Kiri and Aba Ama which are shown on plaintiffs' plan No. T.J.R. 41 LD dated 20/11/73 in Suit No. PHC/97/71. Aba Ama (old Village of Aba) was originally a village of its own, but later migrated to Soku under the leadership of Odum due to insecurity of those days. Ever since the migration of Aba people to Soku the Soku people have exercised maximum acts of ownership over the old Aba Village and the creeks and lands adjoining it. There is the Opumgbe juju at the old Aba Village represented by the Odumdum tree which the plaintiffs sacrificed to annually."

10. Four fishermen from Soku namely Isaac Kio, Green Ogonobere, Ila Eferebo and Dokubo Wari founded the Aba Boko fishing Port by reclaiming the mangrove swamp and building fishing huts thereat. Later other Kalabari, Okrika and Ijaw fishermen also settled at the place. Kalabari settlers paid the usual (Kulo Iru) customary drink to the Soku people while non-Kalabari settlers paid rents to them. Aba Boko Fishing Port became so large that it had two sections - Ijaw and Kalabari sections. Ibibio people also settled at old Aba Village and Aba Boko Fishing Port and cut wood for pit props and paid rents to the Soku people. The plaintiffs had also appointed Mr. Clifford Quarker Dokubo of Abonnema to collect rents from non-

Kalabari settlers of Aba Boko and Opukiri Fishing Ports. Ibibio people used to cut and heap pit props on the site of the locations and paid rents to the plaintiffs.”

Reading these two paragraphs together, I think it is not too far-fetched for anyone to conclude that Plaintiffs relied on traditional history in proof of their claim. Clearly, from the pleading as settled, Plaintiffs were relying on traditional evidence and acts of ownership in proof of their case. There is nothing in either paragraphs 9 and 10 particularly paragraph 10, to suggest that Plaintiffs were relying on contemporary history. The case was fought at the trial on the basis that Plaintiffs relied on traditional history. This is borne out more from the submissions of Mr. Peter Kio, their learned counsel, in his final address before the trial judge. Learned counsel had argued thus:

“The question is who are the owners of Aba Boko and Aba Ama? Ownership of land can be proved in one of the 5 ways.

Refers to Piaro v Tenalo & Ors. (1976) 12. S.C. 31 at pp. 40-43. Plaintiffs pleaded traditional evidence in Paragraph 9 and 10 of Statement of claim. This is also the fact that we pleaded in Exhibit ‘2”

Mr. Kio in urging the trial court to accept Plaintiffs case submitted that-

“Plaintiffs’ traditional evidence is cogent and reliable than that of the Defendants.....”

Both parties claimed that their respective case was based on traditional history. The learned trial judge, rightly in my respectful view, considered the case along that line. He was of the view that the traditional evidence of one was not better than that of the other and fell back on the evidence of acts of ownership proffered by each side in resolving the dispute. I don’t think he can be faulted on this course.

I have already set out the grounds of appeal of the plaintiffs in their notice of appeal to the Court of Appeal. In their ground (1) they still complained about the treatment the learned trial judge gave to their “traditional evidence” and in Issue (1) formulated by them in that Court they posed the following question:

“Whether the Plaintiffs/Appellants or Defendants/Respondents have established ownership to the land in dispute either by Traditional Evidence or Acts or Ownership or both”.

This was the issue placed before the Court below. Rather than

give an answer to that question as posed and as dictated by the accepted and findings of the trial court, the Court below erroneously, in my respectful view, went on the basis that Plaintiffs' case was not based on traditional history but on event of contemporary history. With profound respect to their Lordships of the Court below, I think they are wrong in their approach. If the parties fought their case on traditional history and acts of ownership, neither of them would be allowed on appeal to change course and proffer a different case. B

At the Court of Appeal, Plaintiff in their Appellants brief now claimed that their case was based not on traditional history but on acts of ownership. It was argued in that brief thus: C

"In relation to ground 1 of the grounds of appeal and issue (1) of the issue for determination it is the case of the Appellants that the learned trial Judge greatly misconstrued the traditional evidence led on both side and came to the erroneous conclusion that the traditional evidence of the Appellant has been contradicted. At page 167 lines 21 - 28 of the Record, the learned trail Judge held as follows:- D

'In the instant case, the plaintiff have adopted 2 of the five methods of establishing ownership of land which are proof by traditional evidence and proof by acts of ownership. E

In respect of the traditional evidence, it has been contradicted and the evidence adduced is not better than that of the Defendants and in fact the Defendants' evidence appears to have an edge over it'. F

It would be seen from the above statement of the learned trial Judge that the nature of the contradiction of the traditional evidence is not stated. In fact one is left in the dark as to the nature of the contradictions that the learned trial Judge is referring to.

Be that as it may it is the respectful contention of the Appellants that it was not the Appellants case at the Court below that they were relying on traditional evidence in proof of their ownership of the land in dispute. Nowhere in their pleadings that the Appellants plead any fact of traditional evidence. The facts which the Appellants relied on in proof of their ownership are contained in paragraph 10 of their statement of claim as follows: page 13) G H

'Kalabari settlers paid the usual (Kulo Iro) Customary drink to the Soku people while non-Kalabari settlers paid rents to them. Aba Boko Fishing Port became so large that it has two sections- Ijaw and

Kalabari sections. Ibibio people also settled at old Aba Village and Aba Boko Fishing Port and cut wood for pits props and paid rents to the Soku people. The plaintiffs had also appointed Mr. Clifford Quarker Dokubo of Abonnema to collect rents from non-Kalabari settlers of Aba Boko and Opukiri fishing Ports. Ibibio people used to cut and heap pit props on the site of the location and paid rents to the plaintiffs.'

In other words the Appellants were relying on acts of ownership as proof of their ownership of the land in dispute. It was never their case that ownership of the land vested in them by virtue of traditional history. It was in line with their pleading that they called Clifford Quarker Dokubo PW. 3 to show that he had collected rents from non-Kalabari settlers of Aba Boko and this evidence constituted proof of acts of possession and enjoyment which the learned trial Judge himself listed as one of the 5 ways in proving ownership of land - See page 167 - lines 1 - 10'.

That was the case they now made before the Court of Appeal. That Court, however, based its judgment not on acts of ownership but on the nebulous evidence of settlement given by PW.1. The Court, per Katsina-Alu JCA., said:

"The plaintiffs in my view clearly established their claim to Aba Boko. Once radical title has been pleaded and proved acts of ownership or possession resulting from such title need no longer be considered for they are the non-issues. See Fasoro v. Beyioku (1988) 2 NWLR (Pt. 76) 263. In the circumstance I need not consider the acts of ownership and possession set up by the plaintiffs."

Surely, the evidence of PW.1 is only an aspect of proof by acts of ownership which the learned Justice of Appeal refused to consider, and which must be proved as laid down in Ekpo v. Ita (supra) - see Idundun v. Okumagba (supra).

I think there is substance in the complaint of the Defendants in this appeal that the Court below made a case of the Plaintiffs different from that made by them at the trial.

Another area where this complaint appears to be substantiated is in the findings of the Court below that Aba Ama was not in dispute but that what was in dispute was Aba Boko. By paragraphs 3 and 5 of the Statement of Claim, the Plaintiffs averred that "*The area in dispute is a mangrove swamp forest*" shown on Plan No. T.J.R. 41

LD dated 20/11/73 tendered by them in the previous suit No. PHC/97/71 between Idama/Ekulama Community on the one hand and the Plaintiffs and Defendants in the present action on the other hand. I have looked at that plan; it shows a vast area as being in dispute and within this area are the fishing ports of Aba Ama and Aba Boko. And as depicted on Defendants' plan are other fishing ports within the land in dispute. It was in the realisation of the existence of Aba Ama and Aba Boko in the area claimed by the Plaintiffs to be in dispute that they pleaded their ownership of Aba Ama and Aba Boko. The Ekulama flow station of Shell Petroleum for which compensation the parties are disputing is within this land in dispute. Indeed PWI testified thus:

"After Aba Boko, the next fishing port is Aba Ama"

Both parties hotly contested ownership of Aba Ama and Aba Boko. It is, therefore, a serious misdirection for the Court below to find that Aba Ama was not in dispute.

It is true that the Plaintiffs by their claim (a), to wit:

"(a) they as owners of the Aba Boko Fishing Port are the persons entitled to be paid compensation for the Shell-BP Location called Ekulama Location opposite the Aba Boko Fishing Port."

seem to be restricting their claim to Aba Boko fishing port but this is not the case put forward in their pleadings for in paragraph 8, they pleaded inter alia:

".....since Aba Boko Kiri and Aba-Ama are nearest the Oil Locations, the owners of these fishing camps are entitled to compensation for the Oil Location in dispute."

The land in dispute as defined on their plan is a much larger area than the fishing port of Aba Boko. Ekulama flow station is not in Aba Boko as shown on the plan but in area not far from the fishing ports of Aba Ama and Aba Boko and within the land in dispute. The plaintiffs' duty is to prove their ownership of the land delineated on their plan and not just a part of it. If they fail in this duty, as they seem to have done, their case ought to have been dismissed as was adjudged by the learned trial judge. The case they made was to a piece of land certain and this includes Aba Ama. It was wrong of the court below to make out another case for them to a much smaller area.

I now turn to the evidence for the Plaintiffs on which the Court below found for them. I will begin by quoting once again, but for

ease of reference, paragraph 10 of the Plaintiffs' statement of claim:

“10 Four fishermen from Soku namely Isaac Kio, Green Ogonobere, Ila Eferebo and Dokubo Wari founded the Aba Boko Fishing Port by reclaiming the mangrove swamp and building fishing huts thereat. Later other Kalabari, Okrika and Ijaw fishermen also
 B settled at the place. Kalabari settlers paid the usual (Kulo Iru) customary drink to the Soku people while non-Kalabari settlers paid rents to them. Aba Boko Fishing Port became so large that it had two sections - Ijaw and Kalabari sections. Ibibio people also settled at old Aba
 C Village and Aba Boko Fishing Port and cut wood for pit props and paid rents to the Soku people. The plaintiffs had also appointed Mr. Clifford Quarker Dokubo of Abonnema to collect rents from non-Kalabari settlers of Aba Boko and Opukiri Fishing Ports. Ibibio people used to cut and heap pit props on the site of the locations and paid
 D rents to the plaintiffs”.

Testifying in support of the above paragraph, Chief Walter Omoni Alasia (PW1) deposed:

“According to Kalabari custom, the whole mangrove swamps belong to Kalabari community as a whole irrespective of where it is
 E situated. No Kalabari man can be sued to trespass if he goes to mangrove swamp cut any wood or anything. According to Kalabari people, the laid down policy is that if one develops a mangrove swamp as a fishing port, people who thereafter come there to settle and fish
 F will pay rent to that person and if anything like Shell location is established there, the owners of the fishing port is entitled to compensation.

Any community whose settlement is nearest to the locations is entitled to compensation. That is if that locations is in a mangrove
 G swamp near where that community settled. The settlement nearest to this locations is ABA BOKO Fishing port is nearest settlement of the Shell location now in dispute. Whoever that owns Aba Boko is entitled to the compensation. Kula community or Defendants agree that the owner of the Aba Boko is entitled to the compensation.”

H On the founding of Aba Boko, the witness testified thus:

“Four Soku fishermen were the people who first went to Aba Boko fishing port originally. They cut the mangrove swamp and developed it, built houses and settled there and fish. Later other fishermen came and joined them. The four fishermen were: Isaac

Kio, Green Ogonobene, Ila Eferebo and Dokubo Wari.

The other people who joined in the settlement were Kalabari, Ijaw and Okrika and Ibibio.”

The witness had earlier in his evidence testified that Shell Location was established in 1956. It must be that Aba Boko existed long before that year. B

Cross-examined, the witness deposed:

“I can’t say when Aba Boko was founded. I don’t know when Aba Ama was founded.”

To further question, he answered:

“Kio was the father of Isaac Kio, Ogonobere was the father of Green. Iwari was the father of Dokubo Wari. Eferebo was the father of Ila Eferebo. Aba-Boko was founded over 30 years ago before Nigeria civil war. I am not sure of the exact date.” C

That Aba-Boko “was founded over 30 years ago before Nigerian Civil War” was not part of the pleadings. Nor did P.W.1 say that he was present when the fishing port was allegedly founded by the four fishermen from Soku. More importantly, the witness did not say that the four fishermen acted on behalf of Soku Community. Even if his evidence was accepted as reflecting the true position, the fishing port would belong to the four fishermen and, after them, devolved on their families. D

On Aba Ama P.W.1 narrated how Soku Community came to claim ownership of it. He testified thus:

“Soku Community own Aba Ama. In the olden days when there was inter tribal wars, for the fear of these wars, the original settlers of Aba Ama left there and went to Soku and settled, so the old Aba Ama belongs to Soku Community. Soku Community is the owner of the old settlement of Aba Ama. Soku Community used to go to Aba Ama annually to have a festival for the juju of that place. The juju is called OPUMBE.” F

Other than that the four named fishermen who allegedly founded Aba Boko were indigenes of Soku, there is no shred of evidence to link ownership of the port with the Soku community as the witness narrated in respect of Aba Ama. H

I think it is wrong for the Court below, per Katsina-Alu, JCA., to describe the evidence of P.W.1 on Aba Boko “as direct, positive and unequivocal” and to hold on that evidence that “the plaintiffs

(that is Soku community).....established their claim to Aba Boko.” PW.1 testified at the trial and not before the Court of Appeal. The credibility of his evidence is a matter for the learned trial Judge to decide and not for their Lordships of the Court below. The trial judge did not accept the evidence of PW.1, otherwise he would not have dismissed plaintiffs’ case. Even if the learned trial judge was mistaken in describing plaintiffs’ case on Aba Boko as based on traditional history, which I do not accept on the state of the pleadings and the stance of the plaintiffs at the trial - it must be remembered that Defendants contested Plaintiffs’ evidence on that issue and, indeed put up a rival account of the founding of Aba Boko; a question of credibility was thereby raised which the court below was not in a position to decide as that Court did not see or hear the witnesses testify. What it should have done would have been to remit the case to the trial court to be reheard by another judge. The credibility of the evidence of PW.1 is very much in issue as he did not testify as to what he himself did but as to what others did. His means of knowing that Kio and others founded Aba Boko was not disclosed. This lapse must obviously affect the weight to be attached to his evidence. The Court below did not advert its mind to all these weaknesses in the case for the plaintiffs. Had it done so it would not have entered judgment for the plaintiffs on such flimsy evidence of PW.1.

Defendants also complained in this appeal that the Court below wrongly shifted the burden of proof on them. The Court, per Katsina-Alu, JCA., said:

“There is in the pleadings and the evidence of the respondents a total absence of facts about the persons who have held title or on whom title has devolved in respect of the land since the founding before the respondents acquired control of the land on behalf of Kula Community. It is now settled law that wherein an action for declaration of title, the line of succession is not satisfactorily traced, and that line of succession has gaps and mysterious linkage or nexus which are established, such line of succession will be rejected. See Mogaji v Cadbury Nig. Ltd. (1985) 2 NWLR (Pt. 7) 393 and Piaro v. Tenalo (supra).

As I have already indicated the learned trial Judge held that the traditional evidence of the Plaintiffs had been contradicted. He however did not state the nature of the contradiction. Be that as it

may, as I have already shown the evidence of the appellants with respect to Aba Ama settlement was contradictory. Again I have to point out that Aba Ama settlement was not in dispute. It was therefore an error to transfer the contradictions in the evidence in respect of Aba Ama to Aba Boko fishing port. The evidence in respect of Aba Boko was direct, positive and unequivocal. The plaintiffs in my view clearly established their claim to Aba Boko. Once radical title has been pleaded and proved, acts of ownership or possession resulting from such title need no longer be considered for they are then none issues. See. *Fasoro v Beyioku* (1988) 2 NWLR (Pt. 76) 263. In the circumstance I need not consider the acts of ownership and possession set up by the plaintiffs.

On the other hand the defendant/respondents clearly failed to establish their claim by traditional evidence which they pleaded. Could they in the circumstance proceed to establish their claim by acts of ownership and possession? I would answer the question in the negative. For it is now settled law that where the root of title is known and pleaded and not lost in antiquity and historical oblivion, the circumstances for any inference of title created by acts of ownership does not arise ...

Where as in the case of the defendants, the roof of title pleaded has not been proved, it will be unnecessary to consider acts of possession because those acts became no longer acts of possession but acts of trespass. Their possession was therefore that of a trespasser. They could not rely on acts of ownership when they had not proved their ownership of the land in dispute."

The court relied on *Mogaji v Cadbury (Nig.) Ltd* (1985) 2 NWLR (Pt.7) 393 and *Fasoro v Beyioku* (1988) 2 NWLR (Pt. 76) 263 in support.

With profound respect to their Lordships of the Court below, these cases are inapplicable. To begin with, it is trite law that the onus is on a plaintiff seeking declaration of title to prove his case; he can only rely on the strength of that case and not on the weakness of the defence except in few instances which are not applicable here. The defendant is under no duty to prove anything unless where the onus shifts on him. And that is not the case here either.

In *Mogaji v Cadbury (Nig.) Ltd*. what this court decided is that long possession does not confer title on a party where another traces

his title to the true owner unless such possession is of such a nature as to oust the title of the true owner by acquiescence. In *Fasoro v. Beyioku*, the issue was whether a claimant to land, having failed to prove its root of title as pleaded through sale and conveyance can fall back and rely on acts of possession or on other matters not pleaded.

B This Court held that where a plaintiff pleads sale or conveyance as his root of title and he failed to prove his title as pleaded, it will be wrong for him to turn around to rely on other matters like acts of ownership or acts of possession which acts are in the nature of things derivable from and rooted in the radical title pleaded.

C The correct position of the law is as given by Idigbe, JSC., in *Aderemi v. Adedire* (1966) NMLR 398 at pp. 402-403 where the learned and noble Justice of this Court observed:

“Learned counsel for appellant has argued that the principle of law enunciated in the well known case of Ekpo v. Ita II NLR 68 is inapplicable to the present case since, in his submission, the respondents can only succeed in this claim on a clear and satisfactory proof of a specific grant in their favour, of the communal land (i.e. the land in dispute). We are unable to accede to that submission and we take the view that, as decided in Ekpo’s case (supra, in a claim where as in the case in hand, the evidence of ‘traditional history’ given by plaintiffs in an attempt to establish their ownership of the land in dispute is inconclusive, a Court may yet determine ownership of the disputed land in their favour if they succeed in establishing acts of ownership, numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.”

F It must be remembered that this Court in *Idundun v Okumagba* (supra) laid down 5 ways by which a party may prove his ownership of land. These are:

1. by traditional evidence
2. by production of documents of title
3. by proving acts of ownership (such as selling, leasing, renting out or farming on all or part of the land) extending over a sufficient length of time, or which are numerous and positive enough as to warrant the inference that the person is the true owner (*Ekpo v Ita supra*).

H 4. by proving acts of long possession and enjoyment of the land. These are really more of a weapon of defence than offence (by

section 146 Evidence Act possession raises a presumption of ownership although this presumption may be defeated).

5. by proof of possession of connected or adjacent land in circumstances rendering it probable that claimant is also owner of such adjacent land (Section 46 of Evidence Act).

A party may rely on any or more of the above ways in proof of his claim. B

It would appear in this case that Plaintiffs from the evidence led by them, relied on the 3rd way, that is, acts of ownership. This they failed to establish by the finding of the learned trial Judge which was not disturbed by the court below. The Defendant on the other hand, relied on the 1st and 3rd ways. They did not succeed on proof by traditional evidence but, by the findings of the trial Judge, succeeded on the 3rd way, by acts of ownership. The court below was clearly in error to have held as it did in the passage of the lead judgment of Katsina-Alu, JCA., quoted earlier in this judgment. C D

Earlier in this judgment, the learned Justice of the Court of Appeal had found that the Plaintiffs evidence on Aba Ama was contradictory. Their case on Aba Ama was, therefore, rightly rejected by the learned trial Judge. Having failed on Aba Ama could they be said to have proved their ownership to the land in dispute nor their claim to compensation in view of the averment in paragraph 8 of their Statement of Claim that "... since Aba Boko Kiri and Aba Ama are nearest the Oil Locations, the owners of these fishing camps are entitled to compensation for the Oil Location in dispute"? I rather think not. E F

From all have been saying above, I am of the view that this appeal has merit. The learned trial Judge found the evidence on acts of ownership to weigh heavily in favour of the Defendants. This finding has not been disturbed by the Court below. That Court was wrong in setting up a case for the Plaintiffs that they relied on contemporary history when by their pleadings and submission of their learned counsel at the trial they relied on traditional evidence which the learned trial Judge found not to be cogent. Nor can it be said that the evidence of PW.1. which the Court below relied on in finding for the plaintiffs, not being evidence of what the said witness did or took part in and there being no evidence that the said four fishermen acted on behalf of their community, SOKU COMMUNITY, would be sufficient H

to establish ownership in that community.

The only evidence of act of ownership upon which the Court below based its finding was as to the founding of Aba Boko, an issue of credibility, which an appellate court not decide. And yet, on the authorities, acts of ownership that would sustain a claim to title, must be positive and numerous enough to warrant the inference that the plaintiff is the exclusive owner. A simple act of ownership, even if accepted, will not, in my respectful view, suffice to discharge the burden on a plaintiff. If the plaintiffs in the case on hand were not relying for proof of their title to Aba Boko on traditional evidence, then they must be relying on proof by acts of ownership which must be numerous and positive enough to satisfy the test laid down in Ekpo v Ita (supra)- see: Idundun v. Okumagba (supra). The learned trial Judge having rejected, for good reasons, their evidence on acts of ownership, their case failed and was rightly dismissed by him.

Plaintiffs' evidence on Aba Ama was found contradictory by the learned trial Judge. This findings was affirmed by the Court below. With this finding Plaintiffs failed to prove their ownership of Aba Ama, part of the land in dispute. In the light of all these lapses in plaintiffs' case, they must be held not to have proved their case which was rightly dismissed, in my respectful view, by the trial Court.

Before I conclude this judgment, I want to comment briefly on some issues arising on the records. I notice that extracts of evidence given by some witnesses at the trial of the previous action that is, PH/97/71 were tendered and admitted in evidence in the present proceedings and references were made to some of them in the addresses of learned counsel for the parties and by the learned trial Judge. For instance, the evidence of Chief A. K. Diaba Offor and one Clifford Quaker. Chief Offor gave evidence in the present proceedings but Quaker did not. The use that can be made of the evidence of a witness in previous proceedings has been the subject of many decided cases.

In Alade v Aborishade 5 FSC 167, Abbott, FJ, delivering the judgment of the Federal Supreme Court observed at page 171 of the report:

“There is, however, one important matter to which I must refer. The learned trial judge in more than one passage in his judgment evidently accepted as evidence before him certain evidence given in

the 1951 case, the proceedings in which were put in as Exhibit 'C' and this, with respect to him, was clearly a serious misdirection..."

And at page 173, he said:

"...evidence given in a previous case can never be accepted as evidence by the Court trying a later case except where Section 34(1) of the Evidence Ordinance applies. The evidence given in an earlier case by persons who also testify in a later case may be used for cross-examination as to credit but it is of no higher value than that."

See also Enang & Ors. v. Akpan & Ors. (1962) ANLR 524. In *Ariku v. Ajiwogbo* (1962) ANLR 623, 631-2 the Federal Supreme Court again held that (1) the evidence of a witness taken in earlier proceedings, is not relevant in the case on trial; except for the purpose of discrediting such witness on cross-examination, and for that purpose only; (2) it is reversible error for a trial judge, in his judgment, to treat the evidence of witnesses in previous proceedings as evidence of truth; when he himself has not seen or heard those witnesses. Ademola, CJF (as he then was) observed at p. 626 of the report:

"This Court has frequently directed attention to the practice, now not uncommon, of making use of evidence of a witness in another case as if it were evidence in the case on trial. As was pointed out in Alade v Aborishade 5 F.S.C. 167 at p. 171, this is only permissible under Section 33 or 34 of the Evidence Act. Where a witness in a former case is giving evidence in a case in hand his former evidence may be brought up in cross-examination to discredit him if he was lying, but evidence used for this purpose does not become evidence in the case in hand for any other purpose. There are also prerequisites to the making use of the former testimony of a witness; for example, his attention must be called to the former case where such evidence was given and he should be reminded of what he had said on that occasion:"

See also Sosan v Ademuyiwa (1986) 3 NWLR 241.

Chief A. K. Diaba Offor in Exhibit 29 was recorded as having said:

"it is not correct that Shell BP met Ekulama people and their tenants at the area in dispute; no, Shell BP did not meet Kula at 'Aba Boko' but when we saw them we told them that we owned the area in dispute; that was in 1956. We did not tell our solicitor that we talked with Shell BP in 1956."

Throughout his evidence in the present proceedings this portion of his evidence in PH/97/71 was never put to him to affirm or deny his saying so. It is, on the authorities, therefore wrong, to use that evidence to make a finding that the appellants herein were not in possession on Aba Boko when Shell BP struck oil there. It is the duty of the learned trial judge, as well as of the appellate courts, to discountenance that piece of evidence which was not given in the present proceedings as the trial court did not see nor hear the witness testify in that earlier proceedings. It is not evidence in the present proceedings that can be acted upon. Nor can a valid finding be made by reference to such evidence in another case - *Sosan v Ademuyiwa* (supra). That is the state of the Law as evinced by the authorities I have earlier cited.

The same consideration applies to the evidence of Clifford Quaker given in PHC/97/71 but whose evidence was tendered as an exhibit at the trial of the present action where he has not testified. The evidence of Clifford Quaker in PHC/97/71 would only be relevant if there was compliance with Section 34(1) of the Evidence Act; and that is not the position in this case. Section 34(1) provides:

“34(1) Evidence given by a witness in a judicial proceedings, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later state of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable:

Provided-

- a. that the proceedings was between the same parties or their representatives in interest;
- b. that the adverse party in the first proceeding had the right and opportunity to cross-examine; and
- c. that the question in issue were substantially the same in the first as in the second proceeding.” (Underlining are mine)

See *Enang & Ors. v. Akpan & Ors.* (supra)

Any use made of these two exhibits to the detriment of either party cannot but occasion a miscarriage of justice.

It is for the reason given in this judgment that I, with respect, dissent from the judgment of my learned brother, Mohammed JSC.

In sum, I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court of Rivers State dismissing Plaintiffs' claims. I award of the defendants/Appellants N10,000.00 (Ten Thousand Naira) costs of this appeal and N3,000.00 (Three Thousand Naira) costs in the Court of Appeal.

EJIWUNMI JSC (DISSENTING)

I ought to mention that the parties named above are not those who commenced this action in the High Court of Rivers State, holden at Degema in Suit No. DHC/7/79. The parties named above were with the leave of this Court, ordered to be substituted for the nominal parties who commenced that action pursuant to a motion no notice dated 10th September, 2002 brought to that effect by the learned counsel for the defendants/appellants, Mr. R. A. Ogunwole.

The plaintiffs (respondents in this appeal) sued the defendants (now appellants) for the following declarations:-

"(1) That the plaintiffs as the owners in possession of the Aba Boko Fishing Port are the persons entitled to compensation payable by the Shell-BP Petroleum Development Company of Nigeria Limited for the Flow Stations called Ekulama Location opposite the Aba Boko Fishing Port.

(2) An order directing the Ministry of Finance Rivers State to release to the Plaintiffs all sums of money paid into the Rivers State Treasury by the Shell-BP Petroleum Development Company of Nigeria Limited as compensation in respect of the Ekulama Location at Aba Boko".

Pleading were later filed, exchanged and amended. By their Statement of Claim the plaintiffs inter alia, pleaded in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, & 13 thus:-

"(3) The subject matter of this action is as to the person or persons entitled to the compensation payable by Shell-BP of its oil location at Aba Boko on the western bank of the San Bartholomew River popularly known as EKULAMA LOCATION. When Shell-BP discovered oil in the said area the Idama/Ekulama people disputed the area of the location with the plaintiffs in this action.

(4) *The dispute between the Idama/Ekulama people and the plaintiffs went before the then Divisional Officer at Degema but there was no agreement as to who should be entitled to the compensation. The Idama/Ekulama Community then sued the plaintiffs in Suit No. PHC/97/71 for declaration of title to the mangrove swamp the site of the location and an injunction restraining the plaintiffs in this action from interfering with their title, rights and interest in and over the said location. On 6/4/73 the Idama/Ekulama Community filed their Statement of Claim and plan No. OK/RSD/1/73 dated 8/73. The Statement of Claim and plan herein referred to will be relied on at the trial.*

(5) *The plaintiffs as defendants in Suit No. PHC/97/71 could not file their Statement of Defence and plan until 23/3/74. The said Statement of Defence and plan No. T.J.R. 41LD dated 20/11/73 will be relied on at the trial.*

(6) *On 23/11/73 the defendants in this action applied to join in Suit No. PHC/97/71 as second set of defendants and their application was granted the same day. The proceedings of the Court will be relied on to prove this averment. They later filed their Statement of Defence and plan No. T.J.RLD dated 28/11/74. These documents will be relied on at the trial of this case.*

(7) *The plaintiffs will contend at the trial of this case that the defendants joined in Suit No. PHC/97/71 merely to frustrate their chances of success in the case because*

(i) *The defendants knew about the Shell-BP location at Aba Boko about the year 1956, and yet did not claim compensation from Shell-BP even though they knew that Shell-BP pays compensation for land.*

(ii) *The defendants did not know that the plaintiffs and Idama/Ekulama people were disputing for compensation over this area and had gone to the Divisional Officer for arbitration until the Idama/Ekulama Community invited them to be witnesses against the plaintiffs in Suit No. PHC/97/71.*

(iii) *Settlement such as Gold Coast and Okoroboko which belongs to Idama/Ekulama and are shown as such in the plaintiffs' plan No. T.J.R. 58 LD filed in Suit No. PHC/97/71 merely to mislead the Court, and was so admitted by them.*

These facts are revealed in the evidence of Chief A. K. D. Ofor

defendants' star witness in Suit No. PHC/91/71. The proceedings in that Suit and particularly the evidence of defendants' witnesses in that case will be relied on at the trial of this case.

(8). *Suit No. PHC/97/71 was determined on 31/1/77 dismissing the claim of Idama/Ekulama and the plaintiffs in this action would have been entitled on the compensation if the defendants did not join in that action, because all the witnesses for the defendants (the Kula Community) in Suit No. PHC/97/71 agreed that even though mangrove swamps are for general use of all Kalabari people, communities which founded fishing camps are entitled to collect rents from non-Kalabari settlers in such fishing camps and are also entitled to be paid compensation for oil locations within the vicinity of such fishing camps, and it was greed by the witnesses of the defendants (Kula Community) in PHC/97/71 that since Aba Boko Kiri and Aba Ama are nearest the oil Locations, the owners of these fishing camps are entitled to compensation for the oil location in dispute. Because of defendants intervention plaintiffs could not recover the compensation money which Shell-BP had paid into the Treasury of the Rivers State Government until the Court declares them entitled.*

(9). *The plaintiffs are the owners of Aba Boko Kiri and Aba Ama which are shown on plaintiffs' plan No. TJ.R 41 LD dated 20/11/73 in Suit No. PHC/97/71. Aba Ama (old Village of Aba) was originally a village of its own, but later migrated to Soku under the leadership of Odum due to insecurity of those days. Ever since the migration of Aba people to Soku the Soku people have exercised maximum acts of ownership over the old Aba Village and the creeks and lands adjoining it. There is the Opumgbe juju at the old Aba Village represented by the Odumdum tree which the plaintiffs sacrificed to annually.*

(10) *Four fishermen from Soku namely Isaac Kio, Green Ogonobere, Ila Eferebo and Dokubo Wari founded the Aba Boko Fishing Port by reclaiming the mangrove swamp and building fishing huts thereat. Later other Kalabari, Okrika and Ijaw fishermen also settle at the place. Kalabari settlers paid the usual (Kulo Iru) customary drinking to the Soku people while non-Kalabari settlers paid rents to them. Aba Boko Fishing Port became so large that it had two sections - Ijaw and Kalabari sections.*

Ibibio people also settled at old Aba Village and Aba Boko

Fishing Port and cut wood for pit props and paid rents to the Soku people. The plaintiffs had also appointed Mr. Clifford Quarker Dokubo of Abonnema to collect rents from non-Kalabari settlers of Aba Boko and Opukiri Fishing Ports. Ibibio people used to cut and heap pit props on the site of the location and paid rents to the plaintiffs.”

B (11) *The defendants are not the founders of Aba Boko Fishing Port and do not even live there. It is Kalabari and Ijaw Fishermen that live there. Shell-BP did not meet any Kula man at Aba Boko Fishing Port and the defendants did not know when the plaintiffs and*
 C *Idama/Ekulama were disputing over compensation. This was the evidence of defendants’ star witness Chief A. K. D. Offor in Suit No. PHC/97/71, the proceedings of which case will be relied on at the trial. The defendants had neither tenants at Aba Boko Fishing Port nor had they collected rents therefrom.*

D (13) *The plaintiffs will contend at the trial that even though the mangrove swamps within the Kalabari territory are for the common use of every Kalabari person yet communities who have established settlements within the mangrove swamps are entitled to compensation and Shell-BP paid and still pays compensation for locations to the*
 E *villages or Communities in whose vicinity the location situates, for example:-*

Soku Locations are claimed by Soku Community. Idama Locations claimed by Idama Community. Abisa Location claimed by
 F *Abisa Community. Krakrama Location claimed by Krakrama Community. Bogi Village Locations claimed by Soku Community. Elem Sangama Locations claimed by Elem Sangama. Elegbaboko Location claimed by Princewill family of Buguma. Jumoju Kiri location claimed by the Lawson House of Buguma, and several*
 G *others.”*

By this Amended Statement of Defence, the defendants pleaded, inter alia in paragraphs 2, 3, 4, 5, 5a, 11, 13, 14, 17, 18 & 19

H “(2) *The Defendants deny paragraphs 5, 7, 9, 10, 11, 12, 13 and 14 of plaintiffs’ Statement of Claim.*

(3) *With further reference to paragraph 10 the plaintiffs are estopped from saying that they collected rents from non-Kalabari people at Aba Boko when issues have been joined in respect of the said matter in PHC/97/71 when in part of their evidence they denied*

that rents were being paid, and in another part they said that rents were collected from non-Kalabari people from Amanyanabo and Chiefs of Kalabari. The Defendants will rely on the Statement of Defence filed by both the Plaintiffs and the Defendants (who were 1st and 2nd sets of Defendants respectively) in the said case and the judgment. B

(4) With reference to paragraph 4 of the Plaintiffs' Statement of Claim, the Defendants admit only that the Idama/Ekulama Community sued the Plaintiffs in Suit No. PHC/97/71 for Declaration of title to the mangrove swamp, the site of Oil Location and an injunction restraining the Plaintiffs from interfering with their title, rights and interests in and over the said location but admit nothing more in that paragraph. The defendants further state that they were not aware of any dispute between the plaintiffs and the Idama/Ekulama community before the D. O. Degema in connection with the area in dispute but when they were aware of the acquisition of the said land by the Shell-BP the defendants wrote to the then D.O. for compensation over the said location which forms part of their land. C D

(5) With reference to paragraph 8 of the Plaintiffs' Statement of Claim, the Defendants admit only that communities which founded fishing camps are entitled to collect rents from Non-Kalabari Settlers but admit nothing more in that paragraph. E

5(a) With further reference to paragraph 13 of the Statement of Claim, the defends aver that communities which first settled within the oil locations are entitled to be paid compensation and by virtue of first settlement within the area in dispute the defendants are entitled to be paid compensation to the exclusion of the plaintiffs. F

(11) The defendants aver that Aba Boko which is a fishing port and Aba Ama which is an ancient settlement were founded by Ominise G and Aba respectively from Opukala over 400 years ago before Opukala moved to the present site of Kula.

(13) When the defendants' community left their original settlements to settle in their present Town, they put some fishermen at their different Fishing ports including the land in dispute and the non-Kalabaries amongst them paid rent to the defendants. H

(14) In exercise of their acts of ownership the defendants have been paid compensation by various Oil Companies in the following locations:-

a. *Between Opukiri and Aba-Boko i.e. oil well at Kalaba, the defendants have been paid compensation and they also received compensation for their juju, Orubu which was on the said location.*

b. *The defendants were paid compensation for Shell-BP acquisition at Onongi.*

B c. *The defendants have also been paid compensation for Shell-BP acquisition from Boro to St. Barabas (Owanga Toru)*

All the above locations are within the locality of the area in dispute and all including the land in dispute belong exclusively to the defendants.

C 17. *The defendants will contend at the hearing that the defendants have no boundary with the Plaintiffs in the area in dispute.*

D 18. *The Defendants aver that the area in dispute and the different fishing settlements founded by the defendants are within the same locations and are easily accessible by foot-paths until recently when the Shell-BP dredged out an artificial creek (Canal) between the Oil location which is in dispute and Kala Onongi fishing port both owned by the defendants.*

E 19. *The Defendants will contend at the hearing that the whole area verged Yellow on the Plan filed with Amended Statement of Defence and within which falls the area in dispute is the property of the Defendants to the exclusion of the Plaintiffs. The Plaintiffs are not entitled to any compensation in respect of the said land. NEMO DAT QUOD NON HABET”.*

F Following the exchange of pleadings, parties led evidence in the course of which Exhibits of various kinds were tendered and admitted. Following addresses of counsel for the parties, the learned trial judge delivered a considered judgment. In the course of that G judgment and after a review of the evidence led, the learned trial judge decided that the issues to be resolved in the matter before him are as follows:-

H “(i) *Whether the plaintiffs or the defendants are the original founders of Aba Boko and also Aba Ama which is also very near to Aba boko.*

(ii) Whether the plaintiffs or defendants have exercised positive and numerous acts of ownership over Aba Boko and Aba Ama.

(iii) Whether or not Section 45 of Evidence Act is applicable.”

The learned trial judge then went on to evaluate and examine

the evidence of the witnesses and the applicable law in a greater detail before reaching this conclusion. I hereby quote him:-

“The burden in such a case which tests squarely on the plaintiffs a very heavy one; for it has as far back as 1935 been laid down as a matter of law that a plaintiff seeking a declaration of title to land must establish to the satisfaction of the court by the evidence brought by him that he is entitled to such a declaration. The plaintiffs must rely on the strength of his own case and not on the weakness of the case of the defendant whose duty is merely to defend. If the onus of proof is not discharged the weakness of the defendants’ case will not help him and the proper judgment is for the defendant. (See J. M. Kodilinye v Mbanefo Odu 2 WACA 336 at p. 337.

So at the end of the day, the question is, have the Plaintiffs proved their case? In *Piaro v Tenalo* (1976) 12 S.C. 31 at PP. 40-41 Obaseki, JSC., observed:-

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

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

(2) Proof by acts of ownership. This is normally provided by acts of person or persons claiming the land such as selling, leasing, renting out all or part of the land of farming on it or on a portion of it or otherwise utilizing the land beneficially; all evidence of ownership provided they extended over a sufficient length of time and are numerous and positive enough to warrant the interference that he is the owner. Ekpo v Ita 11 NLR 68 at 69.

“In Aikhionbare v. Omoregie (1976) 12 S.C. 11 at p. 27 Sowemimo JSC., (as he then was) said:-

“We wish to state that we are in agreement that traditional evidence, that is, of traditional history and tradition, where such evidence is not contradicted or in conflict and found by the court to be cogent can support a claim for declaration of title. See. F.M. Alade v. Lawrence Awo (1975) 4 S.C. 215 at p. 228; Olu Jebu of Ijebu v. Oso, Eleda of Eda (1972) 5 S.C. 143 at 151. In the instance case, the plaintiffs have adopted 2 the five methods of establishing ownership of land which are proof by traditional evidence and proof by acts of ownership. In respect of the traditional evidence, it has been

contradicted and the evidence adduced is not better than that of the Defendants and in fact the Defendants' evidence appears to have an edge over it.

As regards to acts of ownership, they have not been able to establish such acts which are numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.

In fact, the defendants have put up a very stronger case that they put tenants in Aba Boko and that they issue receipts to such tenants for payment of rents, that they have some shrines- Odundum tress, Ovo and 2 hours at Aba Boko. The defendants pleaded Section 45 of Evidence Act and they have gone further to show that all the fishing ports near the area in dispute belong to them and that the area in dispute is in the same stretch of land with their fishing ports.

If the evidence adduced by the plaintiffs is weighed in an imaginary scale with that adduced by the defendants, it can easily be seen that the scale weighs very heavily in favour of the defendants. I have well and carefully considered all the evidence before me and I am fully satisfied that the plaintiffs have not discharge the burden of proof that is case upon them by the law."

In the result, the learned trial judge dismissed the claim of the plaintiffs in its entirety. As the plaintiffs were not satisfied with the judgment of the learned trail judge, they appealed to the Court below.

Upon the grounds of appeal so far, the plaintiffs/appellants raised 5 issues for the determination of the appeal, which was filed on their behalf by their learned counsel, R. A. Ogunwole. They read thus:-

"(i) Was the learned trial judge right when he held that the traditional evidence tendered by the appellants had been contradicted?

(ii) Was the learned trial judge right in his interpretation of Section 45 of the Evidence Act in relation to this case?

(iii) Did the appellants prove their case at the trial?

(iv) Did the learned trial judge properly weigh the case of the parties?

(v) Is the judgment of the learned trial judge right?

Having heard addresses by learned counsel, the Court of Appeal in considering the judgment resolved the appeal in favour of the appellants before it. In the course of the lead judgment of the

Lower Court delivered by Katsina-Alu, JCA., (as he then was) he made this observation:

“As I have already indicated the learned trial judge held that the traditional evidence of the Plaintiffs had been contradicted. He however did not state the nature of the contradiction. Be that as it may, as I have already shown the evidence of the appellants with respect to Aba Ama to Aba Boko fishing port. The evidence in respect of Aba Boko was direct, positive and unequivocal. The plaintiffs in my view clearly established their claim to Aba Boko. Once radical title has been pleaded and proved, acts of ownership or possession resulting from such title need no longer be considered for they are then none issues. See Fasoro v. Beyioku (1988) 2 NWLR (Pt. 76) 263. In the circumstances I need not consider the acts of ownership and possession set up by the plaintiffs.”

His Lordship then went on to say thus:-

“On the other hand the defendant/respondents clearly failed to establish their claim by traditional evidence which they pleaded. Could they in the circumstance proceed to establish their claim by acts of ownership and possession? I would answer the question in the negative. For it is now settled law that where the root of title is known and pleaded and not lost in antiquity and historical oblivion, the circumstances for any inference of title created by acts of ownership does not arise. See. Mogaji v. Cadbury Nig. Ltd. (supra).

In that case the Supreme Court per Obaseki, JSC., said:-

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

In other words, where a party’s root of title is pleaded, that root has to be established first, and any consequential acts following there from can then property qualify as acts of ownership. It is ownership which forms the quo warranto of these acts as it gives legality to acts which would have otherwise been acts of trespass. See Fasoro v. Beyioku (supra). In that case the Supreme Court per Oputa, JSC., said:

‘I am in complete and total agreement that once radical title has been pleaded and proved, acts of ownership or possession resulting from such title, need no longer be considered for they are then non issues. Conversely where, as in this case the Court of Appeal rightly

held that the Conveyances Exs. B, C, D and E did not transfer valid title to the plaintiffs- that is to say that the title pleaded had not been proved, there, also it will be unnecessary to consider acts of possession and the dictum in Ekpo v. Ita (supra) for the acts there become no longer acts of possession but acts of trespass: Da Costa v. Ikomi (supra)

B *Where, as in the case of the defendants, the root of title pleaded, has not been proved, it will be unnecessary to consider acts of possession because those acts become no longer acts of possession but acts of trespass. Their possession was therefore that of a trespasser.*
 C *They could not rely on acts of ownership when they had not proved their ownership of the land in dispute.*

In the result and for the reasons given above, this appeal succeeds and it must be allowed. It is accordingly allowed and the judgment of the court below is set aside. There will be costs of
 D *N3,000.00 against the respondents in favour of the appellant."*

The defendants who lost in the Court below then appealed to this court upon 10 grounds of appeal. In their brief filed pursuant to the appeal, the issues for determination were settled as follows:-

E *"(1) Whether the Court of Appeal properly considered all the issues raised in the appeal.*

(2) Whether the Court of Appeal was right in shifting the onus of proof on the defendants/appellants.

F *(3) Whether the Court of Appeal was right in making a case for the respondent which is contrary to the case put forward in the High Court.*

(4) Whether the Court of Appeal was right in holding that the respondents have proved their radical title to the land in dispute"

G The plaintiffs/ respondents also in their brief filed on their behalf by their learned counsel, Chief Debo Akande, SAN, filed the following issues for the determination of the appeal:-

"(i) Whether Aba Ama was in dispute so as to make it necessary for the Lower Court to resolve issues relating thereto in reaching a decision on Aba Boko.

H *(ii) Whether the Court of Appeal had in fact shifted the burden of proof unto the appellants.*

(iii) Whether the Court of Appeal actually made a case for the respondents different from the case placed before the Trial Court by the respondents.

(iv) *Whether there were enough materials on the record of proceedings before the Court of Appeal upon which the Court of Appeal's decision that the respondents have proved their title to Aba Boko can be based.*"

After due consideration of the issues identified by the lower court for the plaintiffs, it is manifest that the issues raised for them are not dissimilar. I will in the course of the consideration of the argument of the counsel relate to each of these issues, as I consider pertinent in what I have to say in this judgment.

On the first issue raised by the appellants in their brief, it would appear that the thrust of the argument advanced for the appellants is that the Court Judge, who after considering the evidence of traditional history called by the plaintiffs/respondents concluded that their evidence on this point is contradictory. This is because the learned trial Judge took the view that while P.W.I. said it was Idiom who founded Aba Ama. P.W. 4 said he was not. A perusal of the records would also reveal that these two witnesses on this aspect of who founded Aba Ama and Aba Boko gave contradictory evidence in the course of their testimonies at the trial. The following examples would suffice. P.W.I, under examination-in-chief, deposed as pleaded at page 48 of the Printed Record that four Soku fishermen were the people who first went to Aba Boko fishing port originally, and added that they cut the mangrove swamp and developed it, built houses and settled there. But under cross-examination at page 52 of the Printed Record, he said thus:-

"I am from Soku. Soku is not the founder of Soku, Odun was the founder....Idiom was the founder of Aba Ama. Idiom and Odun are not the same person."

Still under cross-examination, P.W.I at page 55 of the Printed record, said thus:-

"I can't say when Aba-Boko was founded. I don't know when Aba-Ama was founded. It has taken a long time when my people stopped living underground. I can't say the time. I don't know where the founder of Aba-Ama came from".

With regard to P.W.4, this witness is recorded in the Printed Record at the beginning of his evidence-in-chief as saying that:-

"I am a native of Soku. I am a member of Idiom family. I am a fisherman. I know the land in dispute. It is between Soku and Kula

communities. There are fishing settlements near them. Aba Boko is the nearest fishing settlement. I know Aba-Ama. Aba-Ama and the land in dispute are in the same vicinity. Soku people are the owners of Aba-Boko fishing port and Aba-Ama”.

But under cross-examination, P.W.4 had this to say:-

B “...Idion was the founder of Aba-Ama. I don’t know where Idion came from. I don’t know when the village was founded.”

As stated earlier, the pieces of evidence quoted above were meant to show primarily the contradictions evident in the testimonies of P.W.1. and P.W.4. The evidence also reveal that those pieces of evidence are not supported by the averment of the plaintiffs/ respondents in their Statement of Claim. On this point, it is necessary to point out that the Court of Appeal at page 262, lines 1-7 made the following observation:-

D “Also the plaintiffs pleaded that it was Odun who led the people of Aba-Ama to Soku where they settled. In his evidence at the trial. P.W.4 said that it was Idion who led the Aba-Ama people to Soku. This piece of evidence is not supported by the pleadings. It goes to no issue and must be disregarded.”

E Having made that observation learned counsel for the appellants then argued that the Court of Appeal should have then dismissed the appeal. But rather than dismissing the appeal, the Court below per Katsina-Alu, JCA., held as follows:-

F “It must however be pointed out that Aba-Ama was not in dispute”.

It is my respectful view that the learned counsel for the appellants is right in his submission that the Court of Appeal ought to have considered the plaintiffs’ claim as pleaded. In this regard, it must be borne in mind that the main function of pleadings is to ascertain with as much certainty as possible the various matters actually in dispute among the parties and those in which there is agreement between them. See *Morinatu Oduka & Others v. Kasumu & Anor.* (1968) NMLR 28, 31; *Adesoji Aderemi v. Joshua Adedire* (1966) NMLR H 398.

It is also settled principle that it is not open to a party to depart from his pleadings and to put up an entirely new case at the hearing nor can a judge depart from the case as pleaded by the parties. See *Obazee Ogiamen & Anor v. Obahan Ogiamen Ogiamen* (1967)

NMLR 245; (1967) 1 All NLR 191; Y. A. Oseni & Ors. v. Salami Taylor (1975) 2 WACA 66. A party will only be permitted to call evidence to support his pleadings and evidence which was deliberately or through inadvertence in fact adduced which is contrary to his pleadings must be expunged when considering the case. See The National Investment and Properties Co. Ltd. v. The Thompson Organisation Ltd. & Ors. (1969) NMLR 99; George & Ors. v. Dominion Flour Mills Ltd. (1963) 1 All NLR 71. See generally Aguda's Practice and Procedure of the Supreme Court, Court of Appeal and High Court of Nigeria. It must be also added for emphasis that as the parties are bound by the pleadings, so the courts are also bound by the settled pleadings of the parties. The Courts can therefore adjudge a case only upon the evidence given in accordance with the pleadings of the parties. Courts cannot therefore depart from the pleadings of the parties to set up a case other than that pleaded by them.

In the instance case, the plaintiffs are bound by paragraph 9 of their pleadings, which I have fully set down earlier in this judgment. But permit me to repeat it in part to emphasis the point at issue. That part of paragraphs 9, reads:-

"The plaintiffs are the owners of Aba Boko Kiri and Aba Ama which are shown on plaintiffs' plan No. TJR 41 LD dated 20/11/73 in Suit No. PHC/97/71. Aba Ama (old village of Aba) was originally a village of its own, but later migrated to Soku under the leadership of Odun due to insecurity of those days. Even since the migration of Aba people to Soku the Soku people have exercised maximum acts of ownership over the old Aba village and the creeks and lands adjoining it..."

In my humbly view the plaintiffs deliberately pleaded in paragraph 9 of their Statement of Claim that they owned Aba Boko Kiri and Aba Ama in order to be entitled to the compensation that was to be paid for the oil location in dispute. It is manifest that it is with that expectation that the plaintiffs had in paragraph 8 of their Statement of Claim, that they pleaded thus:-

"...and it was agreed by the witnesses of the defendants (Kula Community) in PHC/97/71 that since Aba Boko Kiri and Aba-Ama are nearest the Oil Locations, the owners of these fishing camps are entitled to compensation for the oil location in dispute. Because of defendants intervention plaintiffs could not recover the compensation

money which Shell-BP had paid into the Treasury of the Rivers State Government until the Court declares them entitled”.

I think it seems clear from their pleadings that plaintiffs were aware and indeed knew that for them to be paid compensation money made available by the Shell-BP for their oil locations, they needed to prove that they are the owners of Aba Boko and Aba-Ama being the nearest to the oil locations. That being the position taken by the plaintiffs in their pleadings, it cannot be right for the Court below to have held that Aba Ama was in dispute and the case of plaintiffs must be considered upon the evidence led by them to prove their ownership of Aba Boko Kiri and Aba-Ama as pleaded. In reaching the conclusion that Aba-Ama was not in dispute between the parties, the Court of Appeal clearly interfered with the findings of fact by the trial Court. But in this context, it must be stated that an Appellate Court will only interfere with the findings of fact of the trial court in the under-mentioned circumstances where

- “(a) *the findings are perverse; or*
- (b) *the findings are not supported by evidence; or***
- (c) *the findings have not been arrived at as a result of a proper***
- E** *exercise of judicial discretion; or*
- (d) *the trial court has not made a proper use of the opportunity***
- of seeing and hearing the witnesses at the trial; or*
- (e) *the trial court had drawn wrong conclusion from accepted***
- F** *credible evidence; or*
- (f) *the trial court had taken an erroneous view of the evidence***
- adduced before it; or*
- (g) *the findings were reached as a result of wrong application***
- of some principles of substantive law or procedure.”*

It is manifest that the learned Judge of the trial Court did not accept the evidence of the plaintiffs in support of their claim as pleaded, and the trial Court then went on to dismiss plaintiffs’ claim. In dismissing the claims of the plaintiffs, it must be presumed in favour of the trial Court that as it had the opportunity of hearing and seeing the witnesses, the trial Court came to its conclusion not to believe the witnesses for the plaintiffs because their evidence was not satisfactory. It is only the trial Court that has the singular opportunity of ascribing credibility to the evidence of witnesses given before it. See *Abisi v Ekwealor* (1993) 6 NWLR (Pt. 302) 643; *Obodo v. Ogba* (1987) 2

NWLR (Pt. 54); Woluchem v. Gudi (1985) 5 S.C. 291; Atolagbe v Shorun (1985) 1 NWLR (Pt. 2) referred to (PP. 77-78, paras. G-A). As the Appellate Court do not have that opportunity, they are not to embark upon that exercise where the mistake in the conclusion reached by the trial Court is so glaring or was based upon accepted or documentary evidence, which the Appellate Court can also read and reach its own conclusion. See Ebba v. Ogodo (1984) 1 SCNLR 372; (1984) NMLR 92; (2000) FWLR (Pt. 27) 2094. B

As the position in the case before the Court below cannot be so designated, I must with the greatest respect uphold the submission of learned counsel for the appellants that by not upholding the settled principle of pleadings, the Court below inadvertently made a case other than that which the plaintiffs sought to make for themselves by their pleadings. As I am of the clear view that the appeal has merit from what I have said above. I do not consider it necessary to examine the 4th issue set out in the appellants' brief. C D

It therefore follows that this appeal must be allowed and it is hereby allowed by me. The judgment of the Court below is accordingly set aside for the reasons given above. In the result, the judgment of the trial Court is hereby restored in favour of the appellants. It is for all the reasons given by me in this judgment that I am unable to agree with the lead judgment of my learned brother, Mohammed, JSC. As I have allowed the appeal, I hereby award to the defendants/appellants N10,000.00 (Ten Thousand Naira) costs of this appeal and N3,000.00 (Three Thousand Naira) cost in the Court of Appeal. E F

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