

**SUPREME COURT OF NIGERIA**  
FRIDAY 17TH JANUARY, 2003. SC. 15/1997  
**CORAM:- M. E. OGUNDARE, U. MOHAMMED,**  
**S. U. ONU, A. I. KATSINA-ALU, N. TOBI, JJSC**

SULE SANNI ..... APPELLANT  
AND  
DUROJAIYE ADEMILUYI ..... RESPONDENT

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LAND LAW - High Court - Jurisdiction - Adisa v. Oyinwola - By the case law authority - HC can deal with urban or rural land - And power of Governor to grant statutory right of occupancy - Is not restricted to the area land is situate (H1)

COURTS - Parties - Issues - Binding nature of - Court is to decide between parties on the basis of case put before it - And should confine itself to adjudicating on such issue (H2)

APPEALS - Courts - Evidence - Evaluation - Where trial court failed to make findings of facts on the case before it - It is not for CA which did not observe the witnesses give evidence - To make findings based on credibility of witnesses (H3)

APPEALS - Retrial - Courts - Pleadings - Failure to consider - Where trial court failed to determine vital issue raised in pleadings - The CA is to make an order for retrial by another Judge (H4)

***FACTS***

By amended statement of claim, plaintiff/respondent filed this action at the High Court of Osun State, claiming declaration of title and perpetual injunction restraining defendant/appellant from trespassing on the land in dispute. Respondent is the son of one Okero Ademiluyi who died some years ago leaving behind the disputed parcel of land. Respondent's contention is that all land in the Ife kingdom belongs to the Ooni of Ife who has dominion over same. He further stated that the land was granted to his father by the Ooni many years before the institution of this action.

Appellant's case was a different one. He contended that every

family in Ife has its own farmland and that the land in dispute belongs to appellant's family. After hearing in the matter, the learned trial Judge found respondent's claim not proved. He therefore dismissed the action. Being dissatisfied, respondent appealed to the Court of Appeal, Ibadan Division. The court set aside the judgment of the High Court and entered judgment in favour of respondent. Appellant was displeased with the judgment and thus filed appeal against same at Supreme Court.

### **ISSUES FOR DETERMINATION**

*"(i) Whether the High Court has jurisdiction to even entertain an action subject of land situate in a village (by plaintiff's admission 22 miles from Ife) Idi-Ogun, and given the position of the law, both statutory and case laws on the court with jurisdiction to entertain such matter. Meanwhile there is a customary court in the area.*

*(ii) Whether the court has jurisdiction to entertain an action wherein a plaintiff is claiming entitlement to statutory right of occupancy in respect of land situate in a village.*

*(iii) Whether the plaintiff was able to prove by credible evidence the averment that all land by Ife custom belong to the crown (King) and that ownership by settlement is alien to Ife and in essence that the land was a grant made to his family by the Ooni of Ife.*

*(iv) Whether the plaintiff was ever in possession of the land in dispute as against the defendant.*

*(v) Whether even if the Court of Appeal were to admit the exhibits on criminal charges and evidence adduced thereon there are still no materials before the learned trial Judge, who saw witnesses and heard evidence to come to the same decision dismissing the plaintiff's case in its entirety."*

**HELD** (Unanimously allowing the appeal per **OGUNDARE JSC**)  
*LAND LAW - High Court - Jurisdiction*

**1. I think I must resolve these 2 issues against the defendant in this case. The case of Adisa v. Oyinwola (supra) is a complete answer to the question of jurisdiction of the High Court in dealing with land whether in urban or rural and the power of the Governor to grant statutory right of occupancy is not restricted to which area the land is situate. (p. 207 C)**

*Parties - Issues - Binding nature of*

**2. It is apparent that the trial Judge did not address his mind to the case put before him. The function of a court is to decide between the parties on the basis of the case put before it by them; it should confine itself to adjudicating on issues raised before it. It is not the duty of a trial Judge to find on an issue which was neither pleaded nor raised in the case before him. In the circumstance, the court below was right in setting aside the judgment of the trial court. (p. 209 H)**

*Courts - Evidence - Evaluation*

**3. The Court of Appeal however, went on to consider on the printed record the case of the parties and came to the conclusion that plaintiff's case must succeed. In doing so that court unwittingly ascribed credibility to witnesses it did not see nor hear testify. I think the court went wrong there. The trial court having failed to make findings of fact on the case put before it by the plaintiff, it is not open to the Court of Appeal which did not have the opportunity of observing the witnesses give evidence to make important specific findings based, as it were, on the credibility of the witnesses. (p. 210 B)**

*APPEALS - Retrial*

**4. The duty of ascribing probative value to evidence is a matter primarily for the court of trial. Where therefore, the trial court in this case had failed to address and determine the vital issue raised on the pleadings, the proper order to make is an order of retrial. Having concluded as it did and rightly in my respectful view that the trial Judge did not address his mind to the case put before him, the proper order to make is one sending the case back for rehearing before another Judge. It is not for the court to ascribe credibility to witnesses it did not see.**

**To this extent, therefore, I must set aside that part of the judgment of the court below entering judgment in favour of the plaintiff. Consequently I affirm the judgment of the Court of Appeal setting aside the judgment of the trial High Court. I however, set aside its order entering judgment for the plaintiff. In the place of that order, I hereby order that this case be**

***remitted to the High Court of Osun State sitting at Ile-Ife to be heard on the case as put forward in the pleadings of the parties.*** (p. 210 D)

**NOTABLE POINTS OF INTEREST**

**B OGUNDARE JSC**

***1. Stool land & Communal land – Difference***

A proper understanding of plaintiff’s case is that the land in dispute forms part of the communal land of Ife over which the Ooni has power to make a grant. The defendant clearly understood the plaintiff’s case put as stated above hence his pleading as in paragraph 25 of his amended statement of defence. There is a world of difference between stool land and communal land. Stool land is land appertaining to chieftaincy and is vested in the Chief absolutely; the Chief has the complete use of stool land as he pleases. Communal land on the other hand belongs to the community and is vested in the head of the community only as a sort of trustee. (p. 209 A)

**E TOBI JSC**

***2. Respondent who has objection must indicate same in his brief***

He once again urged the court to allow the appeal. Let me first take the apparent objection to Issue No.3 formulated by the appellant. I say “apparent” because the objection is not elegantly phrased, and properly headed. A respondent who has an objection to raise should clearly indicate in his brief as follows:

“*Preliminary Objection*” and this should normally be the first point in the brief. Learned counsel for the respondent obscurely raised the objection in Issue No.4 of his brief. That is not how to do it. And what is more, learned counsel appears to have conceded in his brief that the issue could be covered by ground 3 of the notice of appeal. If he so conceded, why the objection? I entirely agree with learned counsel that Issue No.3 of the appellant is clearly vindicated by ground 3. The issue is therefore competent. (p. 216 G)

***3. Overruled decision does not represent the state of the law***

Where a previous decision of a court has been overruled, submis-

sions of counsel based on the overruled judgment will not avail the party he is representing. Where a previous decision of a court has been overruled, the decision so overruled no more represents the state of the law and counsel should no more rely on it, but should rely on the judgment which overruled the previous decision. Relevantly, it was no more open to learned counsel to rely on Oyeniran but he must rely on Adisa. I must also say that the submission on the so-called defect in the claim at page 8 of the appellant's brief is neither here nor there. The objection therefore fails. (p. 218 E)

### **REPRESENTATION**

O. Shonibare, Esq., for the Appellant

O. Ojo, Esq., for the Respondent

### **CASES REFERRED TO**

Oyeniran v. Egbetola (1997) 5 NWLR (pt. 504) 122

Sadikwu v. Dalori (1996) 5 NWLR (pt. 447) 151

Salati v. Shehu (1986) 1 NWLR (pt. 15) 198

Adisa v. Oyinwola (2000) FWLR (pt. 8) 1349

Odiase v. Agho (1972) 3 SC 71

Balogun v. African Continental Bank Ltd. (1972) 1 SC 77

Adeniji v. Adeniji (1972) 4 SC 10

Animashaun v. Osuma (1972) 4 SC 200

Anukanti v. Ekwonyeaso (1978) 1 SC 37

Shell-BP v. Cole (1978) 3 SC 183

FCDA v. Noibi (1990) 3 NWLR (pt. 138) 270

Abusomwan v. Mercantile Bank Ltd. (No.2) (1987) NWLR (pt. 60) 196

Odofin v. Ayoola (1984) NSCC 711

Ogundipe v. Awe (1985) 1 SCMLR 94

Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 352

### **STATUTE REFERRED TO**

Land Use Act, s. 5(1)(a)

### **LEAD JUDGMENT BY OGUNDARE JSC**

By paragraph 23 of the amended statement of claim, the plaintiff (who is the respondent in this appeal) had claimed from the de-

fendant, now appellant:

*"23. Whereof the plaintiff's claim against the defendant is for a declaration that the plaintiff is entitled to occupation and possession of the farmland situate lying and being at Idi-Ogun village, Ife in accordance with native law and custom of Ife having been in lawful occupation & possession of the said land long before Land Use Act.*

*The plaintiff also claims perpetual injunction restraining the defendant, his servants, agents or privies from further entry or trespass on the said farmland."*

The defendant resisted the claim and filed a statement of defence which he subsequently amended. The matter went to trial at which the parties called witnesses. After learned counsel for the parties had addressed the court, the learned trial Judge Adeniran, J. in a reserved judgment found plaintiff's claim not proved and dismissed it with costs. The plaintiff being dissatisfied with the judgment of the trial High Court appealed to the Court of Appeal. The appeal was successful. The Court of Appeal set aside the judgment of the trial High Court and entered judgment in favour of the plaintiff and his claims. That court per Dalhatu Adamu, JCA adjudged as hereunder:

*"Finally with the resolution of all the issues in this appeal in favour of the appellant, his appeal has succeeded and must be allowed. The appeal is consequently hereby allowed. The decision of the trial court is hereby set aside. In its place judgment is hereby entered in favour of the appellant as per paragraph 23 of his amended statement of claim. He is consequently hereby declared to be entitled to occupation and possession of the farmland situate and being at Idi-Ogun village, Ife in accordance with native law and custom of Ife and having been in lawful occupation and possession of the said farmland long before Land Use Act. I assess the cost of this appeal at N1, 000.00 which I hereby award in favour of appellant."*

It is against this judgment that the defendant has now appealed to this court upon 4 grounds of appeal contained in his amended notice of appeal filed with the leave of this court. In his amended brief of argument in this court the defendant through his counsel Olatunde Shonibare Esq. formulated 5 issues which run thus:

*"(i) Whether the High Court has jurisdiction to even entertain an action subject of land situate in a village (by plaintiff's admission 22 miles from Ife) Idi-Ogun, and given the position of the law, both*

*statutory and case laws on the court with jurisdiction to entertain such matter. Meanwhile there is a customary court in the area.*

*(ii) Whether the court has jurisdiction to entertain an action wherein a plaintiff is claiming entitlement to statutory right of occupancy in respect of land situate in a village.*

*(iii) Whether the plaintiff was able to prove by credible evidence the averment that all land by Ife custom belong to the crown (King) and that ownership by settlement is alien to Ife and in essence that the land was a grant made to his family by the Ooni of Ife.*

*(iv) Whether the plaintiff was ever in possession of the land in dispute as against the defendant.*

*(v) Whether even if the Court of Appeal were to admit the exhibits on criminal charges and evidence adduced thereon there are still no materials before the learned trial Judge, who saw witnesses and heard evidence to come to the same decision dismissing the plaintiff's case in its entirety."*

The plaintiff for his part in his own respondent's brief formulated the following 4 issues:

*"1. Whether it was right for the trial court to assume jurisdiction and try the case based on the location of the land in dispute and the claim as formulated before the trial court.*

*2. Whether the Court of Appeal should have allowed the judgment of the trial court to stand notwithstanding the reliance placed by the trial Judge on inadmissible evidence, exhibits 2 and 3 in arriving at his decision and whether it would not have made a difference to the judgment if exhibits 2 and 3 were expunged.*

*3. Whether the court of Appeal should not have interfered with the judgment of the trial court which was based on speculation that the appellant and his predecessor in title been (sic) in unlawful possession the respondent's father would not have condoned the situation when issues were not joined by the parties on this in their pleadings.*

*4. Whether the respondent did not adduce enough evidence to establish his claim."*

Having regard however, to the judgment appealed against and the grounds of appeal contained in the defendant's notice of appeal to this court, I think the issues as formulated in the appellant's brief by the defendant are to be preferred.

Before I proceed to the consideration of the issues raised in this appeal, I think this is an opportune moment to state the facts how-be-it briefly. The plaintiff is the son of one Okero Ademiluyi who died some years ago leaving behind a piece or parcel of land now in dispute. Plaintiff is representing the family of the said Okero  
B Ademiluyi in these proceedings. The land in dispute is situate at Idi-Ogun village in Ife district.

Okero Ademiluyi was the son of Oba Ajagun Ademiluyi, the Ooni of Ife who reigned from 1910 -1930. According to the plaintiff  
C by the customary law of Ife, all land in the Kingdom belongs to the Ooni of Ife who has dominion over it. Okero Ademiluyi was a hunter and a farmer. His father the Ooni Ademiluyi granted the land in dispute to him about 70 years before the institution of this action in 1986. Following the grant of the land to him, Okero Ademiluyi took  
D possession and did hunting and farming on the land until his death on or about 1981. He planted cocoa, kola, palm trees etc. on the land and had several servants working for him. The plaintiff was placed on the land by Okero his father as an overseer. Okero also granted  
E part of the land to other people to do farming. One Jimoh Ajani was one of the servants who worked on the land.

The case for the defendant was quite different. It is his own case that every family in Ile-Ife has its own farmland and that the farmland in dispute belongs to the family of Sanni Fogbonja. Sanni  
F Fogbonja was the father of the defendant Warobi the great grand father of the defendant and a hunter and farmer in his day was the first to settle on the said farmland about 100 years before the filing of this suit. Warobi died and was succeeded on the land by Fogbonja his son who continued to practice hunting and farming on the land as  
G Warobi did in his day. After the death of Fogbonja his son Sanni succeeded him on the land. This Sanni was the father of the defendant and he farmed and did hunting on the land. Both the defendant and his father farmed on the land and did hunting. Sanni died in December 1982 and it was after his death that the plaintiff started  
H harassing the defendant and his late father's tenants on the land. According to the defendant the plaintiff's family land is at Elegberun village in Ife.

Issues (1) and (2): It is the contention of the defendant that the High Court has no jurisdiction to entertain any suit in respect of land

the subject matter of a customary right of occupancy. He relied on Oyeniran v. Egbetola (1997) 5 NWLR (pt. 504) page 122; Sadikwu v. Dalori (1996) 5 NWLR (Pt. 447) 151 and Salati v. Shehu (1986) 1 NWLR (Pt 15) at 198. Learned counsel for the defendant however, referred the court also to a recent decision Adisa v. Oyinwola (2000) FWLR (Pt. 8) pg. 1349 at 1354; (2000) 10 NWLR (Pt. 674) 116 B where the previous decision of this court in Oyeniran v. Egbetola (supra) was overruled. Learned counsel for the defendant however, submitted that in spite of this decision the claim of the plaintiff to a statutory right of occupancy to land in a rural area is incompetent. C The plaintiff's counsel has argued to the contrary. It is learned counsel's submission that the claim was competent.

***I think I must resolve these 2 issues against the defendant in this case. The case of Adisa v. Oyinwola (supra) is a complete answer to the question of jurisdiction of the High Court in dealing with land whether in urban or rural and the power of the Governor to grant statutory right of occupancy is not restricted to which area the land is situate.*** Section 5(1)(a) provides.

*"5(1) It shall be lawful for the Governor in respect of land, whether or not in an urban area -*

*(a) to grant statutory rights of occupancy to any person for all purposes;"* (Italics are mine)

It is therefore, a misconception that the claim here is incompetent. F

Issue (3)

The plaintiff in paragraphs 8, 11 and 11(a) of his statement of claim averred as follows:

*"8. The land in dispute forms part of a larger area of land granted to the plaintiff by Ooni Ajagun, Oba Ademiluyi, who reigned from 1910-1930.*

*11. By the native law and custom of Ife, the reigning Oba in Ife is the owner of all land in his domain.*

*11(a) All farmland in Ife are traceable to grant by an Ooni of Ife in accordance with native law and custom of Ife and ownership of land by settlement is unknown to Ife custom."*

The defendant in his own amended statement of defence in paragraph 25 averred as follows:

*“25. Every family in Ile-Ife has its own farmland in Oranmiyan Local Government area and the farmland in dispute belongs to the family of Sanni Fogbonja.”*

From these averments the issue that arose between the parties is as to whether or not the Ooni Ademiluyi had right to grant the land in dispute to the plaintiff’s father Okero Ademiluyi. Each party led evidence in support of the case put forward in the averment above.

The learned trial Judge however, in his judgment went on the basis that the plaintiff claimed the land in dispute as stool land which was granted to his father by Oba Ademiluyi. He, with respect to him, misconceived the plaintiff’s case. After quoting some paragraphs of the amended statement of claim, the learned Judge said:

*“The plaintiff is thereby basing his root of title on a grant from Oba Ajagun Ademiluyi as his stool land.”*

That clearly was not plaintiff’s case put before the learned trial Judge. Again in his judgment the learned trial Judge said:

*“In his amended statement of claim the plaintiff says all land in Ile-Ife according to its native law and custom belongs to the reigning Ooni as stool land. The Ooni grants whoever he pleases. In that capacity the Ooni Ajagun granted Okero Ademiluyi one of his children the land in dispute located at Idi-Ogun. In his testimony in court the plaintiff merely said it was Ajagun Ademiluyi Ooni and Okero’s father who granted the land in dispute to his father Okero. He did not say how and in what capacity Ajagun granted the land in dispute to Okero or how Ajagun Ademiluyi came to own the land. This omission may seem minor but in my considered view it is very important and it may adversely affect plaintiff’s case if no other relevant evidence is available. Plaintiff’s evidence of grant is inconclusive in (sic) - the land granted to plaintiff’s father might be stool land no (sic) in that capacity Ooni Ajagun had absolute discretion of what to do with same. It might well be chieftaincy family land; in which case Ooni Ajagun would have to seek consent of head of the family and principal members of chieftaincy family to grant same. It is not sufficient for the plaintiff to have merely said as he did that according to native law and custom as at that time Ajagun Ademiluyi the then Ooni and father to my father Okero Ademiluyi granted farmland in dispute to my father.”*

It is clear from the above passage that there is a complete misconception of the case of the plaintiff.

A proper understanding of plaintiff's case is that the land in dispute forms part of the communal land of Ife over which the Ooni has power to make a grant. The defendant clearly understood the plaintiff's case put as stated above hence his pleading as in paragraph 25 of his amended statement of defence. There is a world of difference between stool land and communal land. Stool land is land ap- B  
 pertaining to chieftaincy and is vested in the Chief absolutely; the Chief has the complete use of stool land as he pleases. Communal land on the other hand belongs to the community and is vested in the head of the community only as a sort of trustee.

Going by the pleadings and the evidence in this case all the C  
 plaintiff was saying was that all land in Ife was communal land vested in the Ooni of Ife as a sort of trustee who could make grants of part of such land to any indigene of his choice. The defendant on the other hand was saying that each family in Ife had its own family land. In D  
 effect the defendant rebutted the plaintiff's claim to communal land ownership of land in Ife. In my respective view the misconception of the case before him obviously blurred the learned trial Judge's consideration of the case for the plaintiff.

I think Mukhtar, JCA was right when she observed in her con- E  
 curring judgment that "*with due respect again, the learned Judge went on an unnecessary voyage of discovery when he suo motu conferred on himself the right to decide whether or not the land was a stool land.*"

After citing some paragraphs of the amended statements of F  
 claim the learned Justice of the Court of Appeal went on to say:

*"The way I understand the above averments, I do not think they evolve or signify stool land. Besides, there was no evidence by the plaintiff that the land he was claiming was a stool land. In the G  
 absence of this and the clarity in the said averments, the learned trial Judge (with due respect) had no right to import the issue of stool land into the case before him, not to talk of going it in extenso, for that matter."*

***It is apparent that the trial Judge did not address his H  
 mind to the case put before him. The function of a court is to decide between the parties on the basis of the case put before it by them; it should confine itself to adjudicating on issues raised before it - Odiase v. Agho (1972) 3 SC 71. It is not the***

***duty of a trial Judge to find on an issue which was neither pleaded nor raised in the case before him*** - Balogun v. African Continental Bank Ltd. (1972) 1 SC 77; Adeniji v. Adeniji (1972) 4 SC 10, Animashaun v. Osuma (1972) 4 SC 200. ***In the circumstance, the court below was right in setting aside the judgment of the trial court.***

***The Court of Appeal however, went on to consider on the printed record the case of the parties and came to the conclusion that plaintiff's case must succeed. In doing so that court unwittingly ascribed credibility to witnesses it did not see nor hear testify. I think the court went wrong there. The trial court having failed to make findings of fact on the case put before it by the plaintiff, it is not open to the Court of Appeal which did not have the opportunity of observing the witnesses give evidence to make important specific findings based, as it were, on the credibility of the witnesses*** - Anukanti v. Ekwonyeaso (1978) 1 SC 37. ***The duty of ascribing probative value to evidence is a matter primarily for the court of trial. Where therefore, the trial court in this case had failed to address and determine the vital issue raised on the pleadings, the proper order to make is an order of retrial*** - Shell-BP v. Cole (1978) 3 SC 183. ***Having concluded as it did and rightly in my respectful view that the trial Judge did not address his mind to the case put before him, the proper order to make is one sending the case back for rehearing before another Judge. It is not for the court to ascribe credibility to witnesses it did not see.***

***To this extent, therefore, I must set aside that part of the judgment of the court below entering judgment in favour of the plaintiff. Consequently I affirm the judgment of the Court of Appeal setting aside the judgment of the trial High Court. I however, set aside its order entering judgment for the plaintiff. In the place of that order, I hereby order that this case be remitted to the High Court of Osun State sitting at Ile-Ife to be heard on the case as put forward in the pleadings of the parties.*** I make no orders as to the costs of this appeal but order that the costs in the two courts below shall abide result of the rehearing.

**MOHAMMED JSC**

I have had a preview of the judgment of my learned brother, Ogundare, J.S.C, on this appeal. I agree that the proper order to make in respect of this appeal is to send this case back to Osun State High Court for retrial before another Judge. I also make no order as to costs. B

**ONU JSC**

Having been privileged to have a preview of the judgment of my learned brother Ogundare, JSC just read, I am in complete agreement with him that the appeal succeeds and ought to be allowed. C

I make no order as to costs of this appeal but order that the costs in the two courts below shall abide the result of the rehearing ordered. D

**KATSINA JSC**

I have had the advantage of reading in advance the judgment of my learned brother Ogundare, JSC in this appeal. I agree entirely with it and for the reasons which he has given, I also allow the appeal and order a retrial of the case before another Judge. I also abide by all the other orders made by my learned brother Ogundare, JSC. E

**TOBI JSC**

This is an appeal against the judgment of the Court of Appeal, Ibadan Division, setting aside the judgment of the High Court. The respondent, as plaintiff, claimed a declaration that he is entitled to be granted statutory right of occupancy of a farmland and perpetual injunction, restraining the appellant as defendant, his servants, agents or privies, from further trespass on the farmland. G

The case of the respondent was that the land in dispute was a royal grant to his grandfather by Ooni Ajagun Ademiluyi. His father made use of the land till he died in 1982. He never heard of the appellant or his father until the appellant enured the land and up-rooted some palm trees. H

The appellant, on the other hand, based his root of title on

settlement. He claimed that Warobi, his great grandfather, a powerful hunter and farmer, was the first man to settle on the farmland in dispute at Idi-Ogun Sanni Village, about 100 years ago for the purposes of hunting and farming when Warobi, the father of Sanni Fagboja, inherited the farmland and continued to practice his hunting and there undisturbed until he died about 40 years ago.

The learned trial Judge dismissed the case of the respondent as plaintiff. The Court of Appeal allowed the appeal of the respondent.

Dissatisfied, the defendant as appellant, has appealed to this court. Briefs were filed and duly exchanged. The appellant formulated the following issues for determination in his amended brief of argument:

*“(i) Whether the High Court has jurisdiction to even entertain an action subject of land situate in a village (by plaintiff’s admission 22 miles from Ife) Idi-Ogun, and given the position of the law both statutory and case laws on the courts with jurisdiction to entertain such matter. Meanwhile there is a customary court in the area.*

*“(ii) Whether the court has jurisdiction to entertain an action wherein a plaintiff is claiming entitlement to statutory right of occupancy in respect of land situate in a village.*

*“(iii) Whether the plaintiff was able to prove by credible evidence the averment that all land by Ife custom belong to the crown (King) and that by settlement is alien to Ife custom and in essence that the land was a grant made to his family by the Ooni of Ife.*

*“(iv) Whether the plaintiff was ever in possession of the land in dispute as against the defendant.*

*“(v) Whether even if the Court of Appeal were to expunge the admitted exhibits on criminal charges and evidence adduced thereon there are still no materials before the learned trial Judge, who saw witnesses and heard evidence to come to the same decision dismissing the plaintiff’s case in its entirety.”*

The respondent formulated the following issues for determination:

*“1. Whether it was right for the trial court to assume jurisdiction and try the case before the trial court.*

*2. Whether the Court of Appeal should have allowed the judgment of the trial court to stand notwithstanding the reliance placed*

*by the trial Judge on inadmissible evidence, exhibits 2 and 3 in arriving at his decision and whether it would not have made a difference to the judgment if exhibits 2 and 3 were expunged.*

*3. Whether the Court of Appeal should not have interfered with the judgment of the trial court which was based on speculation that the appellant and his predecessor in title have been in unlawful possession the respondent's father would not have condoned the situation when issues were not joined by the parties on this in their pleadings.*

*4. Whether the respondent did not adduce enough evidence to establish his claim."*

Learned counsel for the appellant, Mr. Tunde Shonibare, on Issues 1 and 2 that the High Court, Ile-Ife, has no jurisdiction to hear and determine the suit or action when there was abundant evidence before the court that jurisdiction was vested in customary court. He cited *Sadikwu v. Dalori* (1996) 5 NWLR (Pt. 417) 151 and *Salati Shehu* (1986) 1 NWLR (Pt.15) 198. He however conceded that on the authority of *Adisa v. Oyinwola* (2000) FWLR (Pt. 8) 1349 at 1354, (2000) 10 NWLR (Pt. 674) 116, the court has jurisdiction to hear the matter.

On Issues 3 and 4, learned counsel submitted that in view of the joinder of issue on the original ownership of the land in dispute, it behoves the respondent to adduce concrete, cogent, credible and convincing evidence on the fact of crown grant. It was the argument of counsel that where a party pleads fact on which no evidence or credible evidence were not led to establish the facts in support with thereof, those paragraphs of the amended statement of claim having to do with crown grant to the plaintiff's forbears, should be deemed to have been abandoned. He cited *FCDA v. Noibi* (1990) 3 NWLR (Pt. 138) 270; *Ojikutu v. Feliah* 14 WACA 629; *Abusomwan v. Mercantile Bank Ltd. (No.2)* (1987) NWLR (pt. 60) 196 and *Odofin v. Ayoola* (1984) NSCC 71 at 73 (1984) 11 SC 72.

Attacking the finding of the Court of Appeal in the light of the findings of the trial Judge, learned counsel submitted that there is nothing like concurrent possession in law. Possession cognizable by law must be de jure exclusive possession, not a mere physical control or occupation, learned counsel argued. He cited *Ogundipe v. Awe* (1985) 1 SCMLR 94 at 97; (1985) 1 NWLR (Pt. 68) 118; *Buraimoh*

v. Bamgbose (1989) 3 NWLR (Pt. 109) 352. The Court of Appeal has no legal ground to disturb the findings of the trial Judge, counsel submitted. He cited Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745. Learned counsel argued that proof of grant and proof of title are not the same although both work hand-in-hand. Where a party bases his title to a grant, that party must go further to plead and prove the original of the title of that particular person's family, institution or community unless the title has been admitted, counsel contended. He cited Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (pt. 7) 393 at 431 and Elias v. Omo-Bare (1982) 5 SC 25 at 57-58. Counsel contended that the court below had no legal ground to disturb the findings of the trial Judge, who heard and saw the witnesses before coming to his decision, except where the same is perverse. He cited Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745.

On the decision of the court below in a situation where there are no corresponding issues in the respondent's brief, learned counsel argued that it is not sufficient to prefer the brief and issues argued therein but that the reasons for the preference must be clear. He cited Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 24 at 36, 39 and 55; Narumal & Sons Nig. Ltd. v. Niger Benue Transport Co. Ltd. (1989) 2 NWLR (Pt. 106) 730 at 745 and Nzekwu v. Nzekwu (1989) 2 NWLR (pt. 104) 373 at 442.

Citing Olasope v. NBN (1985) 3 NWLR (Pt. 11) 147 and Elias v Omo-Bare (1982) 5 SC 25 at 47, learned counsel submitted that the plaintiff/respondent did not discharge the onus placed by law on him to prove the averments in paragraphs 11, 11(a), 12, 13, 14, 15 and 16 of the statement of claim. He also cited Olufosoye v. Olorunfemi (1989) 1NWLR (Pt. 95) 26; Onwuka v. Ediala (1989) 1 NWLR (Pt. 96) 182; Odofin v. Ayoola (1984) NSCC 711 at 731 (1984) 11 SC 72 and Alhaji Adisa v. Oyinwola (2000) FWLR (Pt. 8) 1349 at 1382 (2000) 10 NWLR (pt. 674) 116 in respect of evaluation of two versions of evidence and ascribing probative value to each on root of title to the land in dispute.

On Issue No.5, learned counsel submitted that the court below was wrong when it came to the conclusion that once the inadmissible document in respect of the criminal charges or cases were expunged from the record, there would then be nothing before the trial court to warrant a dismissal of the plaintiff's claim. To counsel, there are

more than sufficient evidence to show that the plaintiff merely instituted the action knowing fully well that the odds were against him. He urged the court to allow the appeal. Learned counsel for the respondent, Mr. Adeniyi Akintola, submitted on Issue No. 1 that the plaintiff/respondent's claim in paragraph 23 of the amended statement of claim supersedes the writ of summons. He cited *Lahan v. B* *Lajoyetan* (1973) 1 NMLR 44 at 45 and *Keshinro v. Bakare* (1967) 1 All NLR 280.

The respondent's claim, counsel claimed, is not one for statutory right of occupancy or akin to it but one for customary right of occupancy and nothing more. Accordingly, by section 41 of the Land Use Act, both the trial court and the Court of Appeal were to have assumed jurisdiction, learned counsel submitted. Citing the case of *Adisa v. Oyinwola* (supra) learned counsel contended that the court has jurisdiction to hear the matter. He pointed out that the case of *Oyeniran v. Egbetola* (1997) 5 NWLR (Pt. 504) 122 has been overruled by this court in *Adisa v. Oyinwola* (2000) LRCN 2180 at 2227; (2000) 10 NWLR (Pt. 674) 116. C

On Issue No.2, counsel contended that the learned trial Judge placed too much reliance on exhibits 2 and 3 in his judgment and that the exhibits could not have been tendered the way they were tendered and used by the court. To counsel, the highest exhibit 2 could have been used for was to cross-examine the respondent as to his credibility. He cited *Owonyin v. Omotosho* (1961) 1 All NLR 304; *Ajala v. Awodele* (1971) 1 NMLR 127 at 132 and *Famuroti v. Agbeke* (1991) 5 NWLR (Pt. 189) 1. Still on exhibit 2, learned counsel submitted that it was an irrelevant document which ought not to have been admitted and relied upon by the court. He cited *Igbodim v. Obianke* (1976) NMLR 212; *Alase v. Olori-Ilu* (1964) All NLR 390 G and *Owonyin v. Omotosho* (supra) once again.

On exhibit 3, learned counsel submitted that the trial Judge was wrong to draw inference, most especially with reference to the evidence of the plaintiff/respondent that the defendant's father predeceased the plaintiff's father. In the circumstances, the Court of Appeal, counsel contended, was right to have interfered with the findings of fact by the learned trial Judge. He cited *Fabumiyi v. Obaje* (1968) NMLR 242 at 247; *Fashanu v. Adekoya* (1974) 1 All NLR 35 at 41. H

On Issue No.4, learned counsel urged the court to strike out Issue No.3 in the appellant's brief as it does not relate to any of the grounds of appeal. Counsel submitted in the alternative that the judgment of the Court of Appeal is not against the weight of evidence; rather it was the judgment of the trial court that was against the weight  
 B of evidence and the Court of Appeal was right to have set it aside.

Learned counsel attacked the finding of the learned trial Judge as to whether the land was a chieftaincy family land, a finding, counsel described as speculative. To learned counsel, the trial Judge failed  
 C to consider the evidence of the plaintiff/respondent together with the evidence of his witnesses before coming to his conclusion. Counsel dealt with the evidence of PWI, 3, 5 and 6 at pages 17 to 19 of his brief. He cited Chief Woluchem v. Chief Gudi (1981) 5 SC 291 at 306; Metal Construction (W.A.) Ltd. v. Miglore (1978) 6-7 SC 163 at  
 D 171 and National Investment Properties Company v. Thompson Organization Ltd. (1969) 1 NMLR 99 at 103. He urged the court to dismiss the appeal.

Learned counsel for the appellant submitted in his reply brief that issues are formulated against a ground or grounds of appeal and  
 E it is only where an issue raised is not related to any ground or grounds of appeal that the issues become incompetent. Where an issue is related to a ground of appeal for which no leave of court was obtained, where the same requires leave, is equally valueless. He cited  
 F Omo v. Judicial Service Committee Delta State (2000) FULR (Pt. 20) 676 at 686 (2000) 12 NWLR (Pt. 682) 444; Idika Erisi (No.2) (1988) 2 NWLR (Pt. 78) 563; Osinupebi v. Saibu (1982) 7 SC 104; Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523 and Western Steel Works Ltd.  
 G v. Iron and Steel Workers Union of Nigeria (1987) 1 NWLR (Pt. 49) 284, and submitted that all the five issues for determination of this appeal are related to the relevant and appropriate grounds of appeal.

He once again urged the court to allow the appeal. Let me first take the apparent objection to Issue No.3 formulated by the appellant. I say "apparent" because the objection is not elegantly phrased,  
 H and properly headed. A respondent who has an objection to raise should clearly indicate in his brief as follows:

*"Preliminary Objection"* and this should normally be the first point in the brief. Learned counsel for the respondent obscurely raised

the objection in Issue No.4 of his brief. That is not how to do it. And what is more, learned counsel appears to have conceded in his brief that the issue could be covered by ground 3 of the notice of appeal. If he so conceded, why the objection? I entirely agree with learned counsel that Issue No.3 of the appellant is clearly vindicated by ground 3. The issue is therefore competent. B

I now take the issue of jurisdiction. Learned counsel for the appellant raised the issue. Although he relied on three earlier decisions of this court in *Oyeniran v. Egbetola* (1997) 5 NWLR (pt. 504) 122 at 132; *Sadikwu v. Dalori* (1996) 5 NWLR (Pt. 447) 151 and *Salati v. Shehu* (1986) 1 NWLR (Pt. 5) 198, he was not ignorant of the later decision of this court in *Adisa v. Oyinwola* (supra), when he said at page 8 of his brief as follows: C

*“The Supreme Court in the very recent case of Alhaji Karimu Adisa v. Emmanuel Oyinwola and Others ... overruled the earlier D decision in the case of Abraham Oyeniran v. Egbetola (supra) giving as its reasons ...”*

It is clear from the above that learned counsel know the decision of *Alhaji Adisa v. Oyinwola* (2000) 10 NWLR (Pt.674) 116 and its effect and impact on the previous decisions. Learned counsel, by the above, said that this court overruled its earlier decision in *Oyeniran v. Egbetola*. I think he is right. In *Adisa, Ayoola, JSC* in his lead judgment, said at page 172: E

*“In this case there are compelling reasons why the decision in F Oyeniran v. Egbetola should be overruled and departed from.”*

And the learned Justice gave his reason for so doing at the same page 172. He continued very firmly at page 176:

*“In my judgment the decision of this court in Oyeniran v. Egbetola (supra) was erroneous and made per incuriam. This court G should not be bound by that decision which would create much unnecessary problems and difficulties in States where area courts and customary courts or courts of equivalent jurisdiction do not exist and may lead some State Governors to resort to designating land in all areas of the State as urban land contrary to the spirit and intention of the Act. I hold that the High Court had jurisdiction to try the proceedings and resolve the jurisdictional issue against the defendant.” H*

Ogundare, JSC agreed with Ayoola, JSC. He said at page 180:

*“I have read in advance the judgment of my learned brother*

*Ayoola, JSC just delivered. I agree with his conclusion on Issue (I) that this court should depart from its earlier decision in Oyeniran v. Egbetola (1997) 5 NWLR 122 that the High Court had jurisdiction to try the case leading to this appeal."*

And what is now the position of the law as stated by this court in Adisa? The position of the law is that the High Courts in the States also have jurisdiction over matters involving customary rights of occupancy, a jurisdiction which was hitherto vested only in the customary courts and by extension, area courts. The decision of this court is correct and solid. It has taken care of situations in States that do not have customary court, area court and courts of like and similar jurisdiction. Before Adisa, the position of the law was most unfair to States that did not have customary courts, area courts and courts of like jurisdiction. Adisa has taken care of the situation and since all States have High Courts, the problem created by Oyeniran and the group of cases is no more. That is good, very good indeed.

And what is the effect of Adisa on the objection raised by learned counsel for the appellant? The effect is clear, and it is that the objection fails as it was based on Oyeniran which has been overruled in Adisa. Adisa has admirably, successfully and rightly replaced or, should I say, displaced Oyeniran.

Where a previous decision of a court has been overruled, submissions of counsel based on the overruled judgment will not avail the party he is representing. Where a previous decision of a court has been overruled, the decision so overruled no more represents the state of the law and counsel should no more rely on it, but should rely on the judgment which overruled the previous decision. Relevantly, it was no more open to learned counsel to rely on Oyeniran but he must rely on Adisa. I must also say that the submission on the so-called defect in the claim at page 8 of the appellant's brief is neither here nor there. The objection therefore fails.

I now take the issue of stool land. The learned trial Judge said at page 97:

"On the issue of what is stool land and the custom and tradition pertaining to same I prefer their evidence to that of the plaintiff and the witnesses. I hold therefore that while stool lands exist in Ile-Ife, other lands also co-exist belonging to individual families and over which the Ooni has no authority - absolute or otherwise. However, I

*do not from the evidence led in this case accept that the land in dispute is a stool land and so also the larger area marked green in exhibit A and 1. I am the more fortified in this conclusion by the incredible and improbable and inconclusive nature of the evidence led by the plaintiff in support of his claim.”*

The case of the plaintiff/respondent was not based on stool land but was based on communal land. The learned trial Judge was therefore clearly wrong in dealing with a matter that was not before him. The role of a court is to adjudicate on matters presented to it by the parties. A trial court has no jurisdiction to raise a matter not before it and resolve it suo motu. The case is that of the parties and not the court. The only role of the court is to decide on the matters as presented in the pleadings and oral evidence. B  
C

My learned brother, Ogundare, JSC has correctly stated that there is a world of difference between stool land and communal land. The matter involved communal land, not stool land. Accordingly, the conclusions of the learned trial Judge on stool land go to no issue. D

That takes me to the issue whether the court below was right in ascribing credibility to witnesses that did not testify before it. Credibility of a witness is a matter for a trial Judge, not an appellate Judge. The witness is seen by the trial Judge. An appellate Judge reads the evidence of the witness from the record and he is certainly not in a position to determine the credibility of the witness. Demeanour is one vital area of credibility and the only person who sees and watches the demeanour of the witness is the trial Judge. In other words, it is within the exclusive role of the trial Judge to watch the mannerisms, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before him. The court below was wrong in taking upon itself ascribing credibility to the witnesses. E  
F  
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In view of the fact that the learned trial Judge failed to determine the main issue before him, I order a retrial of the case before another Judge of competent jurisdiction. I abide by all the other orders made in the lead judgment by my learned brother, Ogundare, JSC. Appeal allowed in part. H