

**SUPREME COURT OF NIGERIA**  
FRIDAY 28TH FEBRUARY, 2003. SC. 80/1997  
**CORAM:- M. L. UWAISS CJN, M. E. OGUNDARE,**  
**S. U. ONU, A. I. KATSINA-ALU, N. TOBI, JJSC**

1. CHIEF D. M. OKOCHI  
2. CHIEF S. O. NAZIKE ..... APPELLANTS  
3. CHIEF EKPAH ENEBELI

(For themselves and on behalf of  
Emu-Ebendo Community)

AND

1. CHIEF AMUKALI ANIMKWOI  
2. NMOR ALAMA ..... RESPONDENTS  
3. CHIEF OSSAI ODAKPO

(For themselves and on behalf of  
Obodougwa Community)

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LAND LAW - Boundary - Proof - When boundary is in dispute -  
Plaintiff must prove by evidence - The identity of land he claims (H1)

APPEALS - Hearing - On incomplete records - Conditions - Appeal  
must not be so heard unless parties consent on record to it - Or that  
the missing part is immaterial - That it cannot affect the decision there-  
from (H2)

APPEALS - Hearing - Missing records - Procedure to adopt - Where  
a material part of the record cannot be found - Court should order a  
retrial (H3)

APPEALS - Courts - Pleadings - Averments - Need to read - Court  
must read all paragraphs of pleadings together - To get a flowing  
story of the parties (H4)

JUDICIAL PRECEDENTS - Case law - Citation by court - Correct-  
ness of - Court is entitled to invoke rules in case law - Without the  
prompting of parties (H5)

EVIDENCE - Credibility - Basis - Belief or disbelief of evidence of

parties - Does not depend on number of witnesses - But on the probative value of evidence - As evaluated by trial court (H6)

APPEALS - Courts - Findings of fact - Interference - Appellate court cannot reject findings of trial judge on evidence of witnesses - Unless such findings are perverse (H7)

### **FACTS**

Plaintiffs/appellants sued defendants/respondents in High Court of Delta State, claiming declaration of title to the property in dispute, injunction and damages for trespass. At the trial, in addition to their pleadings, appellants tendered Exhibit A - a survey plan to prove the identity of the disputed land. After hearing, the learned trial judge found for appellants and gave judgment in their favour.

Aggrieved, respondents appealed to Court of Appeal, Benin City. The Court reversed the judgment of the trial Court and held inter alia that appellants failed to establish the boundaries of the land with certainty. It is on record that Exhibit A was omitted from the record of appeal transmitted from the High Court to the Court of Appeal and upon which the appeal was heard. The court held that Exhibit A was immaterial to the outcome of the appeal. Dissatisfied, appellants filed appeal at Supreme Court.

### **ISSUE FOR DETERMINATION**

*“(a) Were the Justices of the Court of Appeal right in their finding that the appellants did not establish the boundaries of the disputed land?”*

*“(b) Whether it was not prejudicial to the appellants for the Court of Appeal to have proceeded to deliver judgment without the perusal of Exhibit A, the appellants’ survey plan.*

*“(c) Whether the Court of Appeal was right to have suo motu introduced, considered and relied on the rule in *Kojo II v. Bonsie* (1957) 1 WLR 1223.”*

**HELD** (Unanimously allowing the appeal per **TOBI JSC**)

*LAND LAW - Boundary - Proof*

**1. In the action for declaration of title to land, it is the plaintiff's first duty to prove the area over which he claims with certainty and precision. Where a plaintiff fails to lead satisfactory evidence of boundaries to the land in dispute which he claims, the action must fail.**

**In an action for declaration of title to land when the boundary is in dispute, the duty of the plaintiff is to prove by evidence the identity of the land he claims. In doing so, he must prove with certainty the boundaries of the land in dispute.**

**I have carefully examined Exhibit A**

**I have no difficulty in coming to the conclusion that Exhibit A clearly shows the boundaries of the land in dispute. Accordingly, the appellants have satisfied the burden of proof in respect of the identity of the land in dispute. (p. 643 H)**

*APPEALS - Hearing - On incomplete records - Conditions*

**2. Exhibit A was not before the Court of Appeal.**

**As an appellate court hears an appeal on the Records before it, it must ensure that the Records are complete as settled by the parties. An appellate court must be wary to hear an appeal on incomplete Records and must not hear an appeal on incomplete Records unless the parties by consent, agree that the appeal should be so heard. And such a consent which, will be a basis of a successful defence of waiver in the event of a retraction on the part of any of the parties, must be recorded by the appellate court.**

**There could however be another situation where an appeal could be heard when the Records are incomplete. Such a situation will be where the missing part of the Record, in the view or opinion of the court, is so immaterial, clearly so immaterial that it cannot affect the decision of the appeal one way or the other. This is a very difficult decision and an appellate court can only take it in very obvious and clear circumstances. Where there is doubt in the mind of the court as to the materiality or otherwise of the missing Record, the doubt must be resolved against hearing the appeal in the interest of justice. (p. 644 G/645 D)**

*APPEALS - Hearing - Missing records - Procedure to adopt*

**3. Where all diligent efforts to procure the missing part of the Record fails, the court should take the most painful decision of ordering a retrial in the matter if the missing portion of the Record is material to the appeal. This must be a decision of last resort which must be taken after all efforts at locating the missing portion of the Record fails. Although the decision to order a retrial will protract the litigation, an appellate court has no option in the matter. It is a better evil, if I may use that expression unguardedly, for the litigation to protract and do justice at the end of the day than doing injustice by hearing an appeal on incomplete Record.** (p. 645 H)

*D Courts - Pleadings - Averments - Need to read*

**4. In dealing with pleadings, a court must read all the paragraphs together to get a flowing story of the parties and not a few paragraphs in isolation. It is the totality of the pleadings, whether it is the statement of claim or the statement of defence, that state the case of the party and it will be injustice to invoke only a few paragraphs to come to the conclusion that a missing portion of a Record could not have made any difference even if it was made available to the court.**

**Let me take further paragraph 15(a), which the court below took to arrive at the conclusion that Exhibit A could not have made any difference in the appeal.**

**Paragraph 15(a) deposed essentially to the origin and founding of Emu-Ebendo as a community. In my view, for the purposes of Exhibit A paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 are more important and material. If the court below had adverted its mind to the above paragraphs, it could not have arrived at the conclusion that Exhibit A would not make any difference to the fortunes of the appeal in favour of the appellants. In conclusion, I am of the firm view that the non-perusal of Exhibit A by the court below was prejudicial to the case of the appellant, as grave injustice was done to them.**

(p. 646 D)

*JUDICIAL PRECEDENTS - Case laws - Citation by court*

**5. If a case is made in the pleadings in respect of acts of ownership or possession in recent times, the court is perfectly entitled to invoke the Rule in *Kojo II v. Bonsie* without the prompting of any of the parties. *Kojo* is a decided case and a court of law need not wait for a party to cite it before making use of it. There is the common aphorism or axiom that the law is in the breast of the Judge and he can make use of it at any-time.** <sup>B</sup>

**The learned Judge, being learned in the law, is conversant with the case law and he is at liberty to make reference to any legal authority, including case law, to improve his judgment. It is not the tradition for judges to rely and use only cases cited by counsel. They go outside cases cited by counsel and make use of other cases in their judgments. We do that everyday in our judgments and there is nothing wrong with it.** (p. 648 D) <sup>C</sup>

*EVIDENCE - Credibility - Basis*

**6. The belief or disbelief of evidence of parties does not depend upon the number of witness who gave evidence in the court. Belief or disbelief of evidence depends on the probative value of the evidence as evaluated by the trial court in terms of veracity or authenticity of the witnesses. A village or community of witnesses may give evidence which the trial court may not believe. On the other hand, the trial court may believe the evidence of a single witness on acts of ownership or possession. Belief or disbelief is not a matter of numbers but a probative matter in our law of Evidence. It is not a matter of population census.** (p. 649 G) <sup>E</sup>

*APPEALS - Courts - Findings of fact - Interference*

**7. The learned trial Judge believed the evidence of the appellants and held as a fact that both pieces of land, Oluji and Iyiechi, are part of the land of the appellants. He also held that the respondents trespassed on the land in dispute and destroyed the crops and shrine of the members of the appellants' community.** <sup>H</sup>

***I do not see in the judgment where the court below considered the evidence of the first plaintiff and rejected it on the ground that the findings of the learned trial Judge were perverse. It is elementary law that an appellate court cannot reject the findings of a trial judge on the evidence of witnesses unless such findings are perverse.***

***As I do not see any perversity in the findings of the learned trial Judge, I hold that the court below lacked the competence to reject the findings and supplant its own. There is no legal basis for doing so.*** (p. 651 B)

## NOTABLE POINT OF INTEREST

### **TOBI JSC**

#### ***1. Self-help should not be resorted to in place of legal action***

It is sad that court of law should give its approval or credence to an act or conduct or self-help which was condemned by this court in Chief Ojukwu v. Governor of Lagos State (1986) 1 NWLR (Pt. 18) 621. Certainly, self-help has no place in our civilized world as it is clearly against the rule of law in a democracy.

The conclusion that the timely demolition of the houses and sign boards operates as acts of ownership by the appellants, with the greatest respect, may not be entirely correct. The demolition could also constitute an act of trespass if the property demolished was built on the land of the appellants. Even if the property is built on the land of the respondents, the answer is not in self-help but in commencing a legal action to abate the trespass. (p. 650 E)

### **REPRESENTATION**

K. E. Mozia with E. I. Usoh, for the Appellants  
T. E. Williams, for the Respondents

### **CASES REFERRED TO**

Akpapuna v. Nzeka (Pt.83) 7 S.C. 1  
Elufisoye v. Alabetutu (1968) NMLR 298  
Kasali v. Lawal (1986) 3 NWLR (Pt. 28) 305  
Olusanya v. Olusanya (1983) 3 S.C 41  
Ajani v. Ladepo (1986) 3 NWLR (Pt. 28) 276

Olatunji v. Adisa (1995) 28 LRCN 295  
 Nkado v Obiano (1997) 50 LRCN 1084  
 Ibrahim v. Barde (1996) 43 LRCN 1919  
 Onu v. Agu (1996) 5 NWLR (Pt. 451) 652  
 Ebba v. Ogodo (1984) 1 SCNLR 371  
 Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141  
 Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195  
 Okedare v. Adebara (1994) 6 NWLR (Pt. 394) 157  
 Osho v. Ape (1998) 6 S.C. 121; (1998) 60 LRCN 4077  
 Dibiamaka v. Prince Osakwe (1989) 5 S.C. 53

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C

### **STATUTES REFERRED TO**

Land Use Decree, 178, s. 40

### **LEAD JUDGMENT BY TOBI JSC**

D

This is an appeal from the judgment of the Court of Appeal, Benin Division, in which the court allowed the appeal of the respondents, who were the appellants in the lower court. At the High Court, the plaintiffs, who are the appellants in this court, sought for (1) a declaration of entitlement to a statutory right of occupancy. (2) E N50,000.00 special and general damages for trespass. (3) Recovery of the sum of N15,000.00 payable to the plaintiff (4) Perpetual injunction. The learned trial Judge gave judgment in favour of the appellants, which, as indicated above, was overturned by the Court of F Appeal.

In the last paragraph of the judgment at page 404 of the Record, the Court of Appeal said:

*“In view of the foregoing, I am of the firm view that the learned trial Judge was in error when he entered judgment for the Respondents. The claim of the Respondents should have been dismissed in its entirety. This appeal therefore succeeds and is hereby allowed. The judgment of the court below is hereby set aside. In its place, judgment is hereby entered dismissing the claim of the Respondents at the court below.”* H

Dissatisfied with the judgment, the appellants filed an appeal. Briefs were filed and duly exchanged. Appellants formulated three issues for determination:

*“(a) Were the Justices of the Court of Appeal right in their*

*finding that the appellants did not establish the boundaries of the disputed land?;*

*(b) Whether it was not prejudicial to the appellants for the Court of Appeal to have proceeded to deliver judgment without the perusal of Exhibit A, the appellants' survey plan;*

B *(c) Whether the Court of Appeal was right to have suo motu introduced, considered and relied on the rule in Kojo II v. Bonsie (1957) 1 WLR 1223."*

Respondents formulated two issues for determination:

C *"(a) Whether the Court of Appeal was right, having regards to the evidence and the pleadings, when it held that the Plaintiffs failed to prove the boundaries of their land and that they were not prejudiced by the fact that their survey plan was not considered by the Court? And*

D *(b) Whether on a proper appraisal of the evidence and application of the rule in Kojo II v. Bonsie, the Court of Appeal was right in its decision that the Defendants' acts of ownership/possession far exceeded that of the Plaintiffs, if any?"*

E Learned counsel for the appellants, Mr. Ken E. Mozia, submitted on Issue No. 1 that the factors that informed the conclusion of the court below to the effect that the boundaries of the land were not established are not well founded. Counsel also submitted that the interpretation of the portion of the evidence of the 1st plaintiff by the court below to the effect that the boundary between the appellants  
F and Umuseti Community is missing is unjustifiable. Counsel claimed that the 1st plaintiff clearly indicated in his evidence that the portion of land where they farm together constitutes the boundary between them.

G It was the submission of learned counsel that the court below clearly elevated the issue of the boundary between the appellants and Umuseti community to an undeserved height or level. The Umuseti community were not parties to the proceedings and did not lay claim to any portion of the land in dispute verged green in the  
H appellants' plan, learned counsel opined.

Dealing with the onus of proof, learned counsel submitted that the appellants established their case on the preponderance of evidence by producing a survey plan clearly setting out the boundaries of the area claimed and calling evidence of those who have bound-



aries with them in, at least, three of the four sides as confirmed by the court below. The onus on the plaintiffs in a case for declaration of title is to prove their case on a preponderance of evidence in their favour, counsel contended. He cited *Nkado v Obiano* (1997) 50 LRCN 1084 at 1114 and *Elufisoye v. Alabetutu* (1968) NMLR 298. He also examined the case of *Kwadzo v. Adjei* 10 WACA 274 in the light of the decision by the court below. B

Learned counsel submitted that the issue as to whether or not the appellants were in exclusive possession of their land did not arise for consideration in the appeal before the court below. The issue raised by the respondents in the court below related to the question of alleged insufficiency of evidence as to the boundaries of the appellants' land, counsel argued. The argument by the respondents on the issue and the grounds of appeal did not touch upon, or raise the issue of, alleged lack of exclusive possession as a basis for refusing to grant the declaration sought or for seeking a reversal of the decision of the court of first instance on the point, learned counsel argued. D C

Counsel submitted that the Court of Appeal is limited to the issue raised before it for consideration and the excess pronouncement or conclusion which substantially formed the basis of the conclusion by that court on the issue was not valid and clearly prejudicial to the appellants. Judgment must be confined to the issues raised by the parties and it is not competent for the court *suo motu* to make a case for either or both of the parties and then proceed to give judgment on the case so formulated. An appellate court has no business to deal with an issue not placed before them, counsel submitted. He cited *Olatunji v. Adisa* (1995) 28 LRCN 295 at 318 ; *Olusanya v. Olusanya* (1983) 3 S.C 41 at 56 ; *Oje v. Babalola* (1991) 3 LRCN 928 and *Sheldo v. Bromfields Justices* (1964) 2 QB 573. Citing the case of *Ibrahim v. Barde* (1996) 43 LRCN 1919 at 2027 and *Ebba v. Ogodo* (1984) 1 SCNLR 371 at 378-379, learned counsel contended that since some of the findings of fact in the court of first instance were not challenged on appeal, they are taken as correct and will not be interfered with by an appellate court. F E G H

On Issue No. 2, learned counsel submitted that the Court of Appeal ought to have either called on counsel to produce their copies of the missing plan for use or should have taken further steps to direct the Kwale High Court to forward the plan when it became

apparent to the court that the plan was indeed not forwarded. To learned counsel, the reasons given by the court in a bid to justify proceeding to judgment without the very vital document are not valid.

On Issue No. 3, learned counsel submitted that an appeal is not a rehearing and the court below is not entitled to substitute its views for that of the trial court save for issues validly placed before it through the means of grounds of appeal on which such issues may be based. Counsel pointed out that the court below was wrong when he raised suo motu the decision in *Kojo II v. Bonsie* (1957) 1 WLR 1223 and its alleged effect on the appeal. He urged the court to declare the issue thus raised void. Counsel submitted in the alternative that the approach adopted by the court of first instance is in accord with the decision in *Kojo II v. Bonsie* (supra). He examined the evidence of D.W.1, D.W.2, D.W.3 and D.W.9 and cited the case of *Idundun v. Okumagba* (1976) 10 S.C. 277.

Learned counsel submitted that for the rule in *Kojo II v. Bonsie* (supra) to apply, both parties must plead and lead credible evidence of their respective traditional history. He cited *Eboade v. Atomesin* (1997) 50 LRCN 1133 at 1147. Challenging some conclusions of the court below at page 13 of the brief, learned counsel urged the court to allow the appeal.

Learned counsel for the respondents, Mr. Williams, submitted that the criticism of the judgment of the Court of Appeal by the appellants is unjustified. Counsel contended that the Court of Appeal was right to have held that the plaintiffs' plan, Exhibit A, would not in circumstances of the case, have improved their chances in the matter. Citing the cases of *Onu v. Agu* (1996) 5 NWLR (Pt. 451) 652 at 662 and *Okedare v. Adebare* (1994) 6 NWLR (Pt. 394) 157 at 173, learned counsel submitted that Exhibit A, if produced can only show that there is no boundary on the side and the legal implication will remain that the plaintiff would not have proved the limits of their land.

It was the submission of learned counsel that the plaintiffs have failed to prove that they have any boundary with the Umuseti Community at all. Accordingly, the Court of Appeal was entitled to hold that the plaintiffs failed to prove that the land in dispute belonged to them, counsel submitted further.

On Issue No. 2, learned counsel submitted that the Court of

Appeal correctly applied the rule in *Kojo II v. Bonsie* (supra). He argued that even if the interpretation of the trial court is correct, the evidence of D.W.9 does not support the plaintiffs' case as they never claimed to be the tenants of the defendants/respondents. He cited *Ude v. Chimbo* (1998) 9-10 S.C. 97; (1998) 12 NWLR (Pt.577) 169 at 189 and *Okedare v. Adebare* (supra). Counsel urged the court not to disturb the application of the rule in *Kojo II v. Bonsie* (supra) by the Court of Appeal. He urged the court to dismiss the appeal. B

In his Reply Brief, learned counsel for the appellants, in his response to Issue No. 1 in respondents' brief, submitted that where three sides of a parcel of land are established or proved, the court can and ought to, on its own, draw a line to arrive at a conclusion as to the location of the fourth side. He cited *Osho v. Ape* (1998) 6 S.C. 121; (1998) 60 LRCN 4077 at 4084. He however, claimed that the land was specifically delineated in Exhibit A. Learned counsel submitted that where the identity of the land is known to both parties to a conflict, a survey plan is even unnecessary. He cited *Makanjuola v. Balogun* (1989) 5 S.C. 82; (1989) 5 SCNJ 43; *Emordi v. Kwentoh* (1996) 2 NWLR (Pt.433) 391. C D

Reacting to Issue No. 2, of the respondents' brief, learned counsel submitted that the issue of acts of possession/ownership was raised and considered suo motu by the Court of Appeal as it was not raised in any issue presented to the court for consideration. To validly arise for consideration, there should have been a specific complaint by way of a ground of appeal raising the issue, counsel argued. He cited *Adeyemi v. Olakunri* (1999) 12 S.C. (Pt. II) 100. E F

On whether the consideration of the rule in *Kojo II v. Bonsie* (supra) by the Court of Appeal was proper, learned counsel submitted that it was not enough that vague and oblique reference was made to an alleged paucity of "evidence of use or exercise of occupational rights by the plaintiffs" in the portion of the Respondents' Brief while arguing about proof of boundaries. The issue can only properly arise for consideration if there is an issue arising from a ground of appeal based on the rule and not otherwise, counsel contended. G H

Let me first take the issue whether the appellants did not establish the boundaries of the land in dispute. ***In the action for declaration of title to land, it is the plaintiff's first duty to prove the area over which he claims with certainty and precision.***

See *Baruwa v. Ogunsola* (1938) 4 WACA 159 and *Udeze v. Chidebe* (1990) 1 NWLR (Pt. 125) 141. **Where a plaintiff fails to lead satisfactory evidence of boundaries to the land in dispute which he claims, the action must fail.** See *Aboyeji v. Momoh* (1994) 4 NWLR (Pt. 341) 646.

B **In an action for declaration of title to land when the boundary is in dispute, the duty of the plaintiff is to prove by evidence the identity of the land he claims. In doing so, he must prove with certainty the boundaries of the land in dispute.**

C PW.1, the surveyor, tendered the survey plan as Exhibit A. The first plaintiff stated in evidence:

D *“While facing the direction of Obodougwa, the land on the left is called Iyechi farm land and the one on the right is called Onyi farm land and both pieces of land belong to the Emu-Ebendo Community. I showed both pieces of land to P.W.1 before he carried out the survey.”*

E **I have carefully examined Exhibit A** the survey plan, and I agree entirely with the submission of learned counsel for the appellants that Exhibit A “shows the relative position of the features mentioned by the plaintiff and their witnesses relative to the compass or geographical stipulations of North, East, South and West as the true North and the geographical co-ordinates and scale are duly set out on the plan”. In order words, **I have no difficulty in coming to the conclusion that Exhibit A clearly shows the boundaries of the land in dispute. Accordingly, the appellants have satisfied the burden of proof in respect of the identity of the land in dispute.**

G **Exhibit A was not before the Court of Appeal.** The court said at page 395 of the Record:

H *“I should also mention that the survey plan of the respondents, though tendered and admitted as Exhibit A at the trial, was not forwarded to this court and the covering letter from the High Court of Justice, Kwale, Delta State dated 5/1/92 mentioned only the plan filed by the Defendants/Appellants as Exhibit B. A letter from this office dated 17/11/96 calling for the said Exhibit A-A2 was later sent from this court. In reply to the said letter, the High Court of Justice, Kwale, wrote back in a letter dated 29/11/96 to say that the*

*plan had already been forwarded, when in fact it was not so forwarded. Be that as it may, the fact still remains that even if the survey plan was produced, and it said something different from what was in the statement of claim, such discordance would be fatal to the plaintiffs' case. This is because under our law, parties are bound by their pleadings. Any evidence not supported by the pleadings goes to no issue, and must be ignored."* B

With respect, I am not satisfied with the reasons given by the court below for dispensing with Exhibit A in delivering the judgment. I entirely agree with learned counsel for the appellants that the court ought to have involved them in the search for Exhibit A. Two correspondences dated 17/11/96 and 29/11/96 were not enough for the court to close the matter and write judgment outside Exhibit A. The matter was much more important than the way the court treated it. C

***As an appellate court hears an appeal on the Records before it, it must ensure that the Records are complete as settled by the parties. An appellate court must be wary to hear an appeal on incomplete Records and must not hear an appeal on incomplete Records unless the parties by consent, agree that the appeal should be so heard. And such a consent which, will be a basis of a successful defence of waiver in the event of a retraction on the part of any of the parties, must be recorded by the appellate court.*** D

***There could however be another situation where an appeal could be heard when the Records are incomplete. Such a situation will be where the missing part of the Record, in the view or opinion of the court, is so immaterial, clearly so immaterial that it cannot affect the decision of the appeal one way or the other. This is a very difficult decision and an appellate court can only take it in very obvious and clear circumstances. Where there is doubt in the mind of the court as to the materiality or otherwise of the missing Record, the doubt must be resolved against hearing the appeal in the interest of justice.*** E

In such a situation, other efforts should be made to procure the missing portion of the Record. F

***Where all diligent efforts to procure the missing part of the Record fails, the court should take the most painful decision of ordering a retrial in the matter if the missing portion of*** G

**the Record is material to the appeal. This must be a decision of last resort which must be taken after all efforts at locating the missing portion of the Record fails. Although the decision to order a retrial will protract the litigation, an appellate court has no option in the matter. It is a better evil, if I may use that expression unguardedly, for the litigation to protract and do justice at the end of the day than doing injustice by hearing an appeal on incomplete Record.**

The court below would appear to have invoked the second principle I mentioned in respect of when an appellate court can hear an appeal on incomplete Records and that is when the missing portion of the Record is immaterial to the appeal. I say this because the court came to the conclusion that “*even if the survey plan was produced and it said something different from what was in the statement of claim, such discordance would be fatal to the plaintiffs’ case.*” In coming to this conclusion, the court below only made use of paragraphs 7 and 15(a) of the Further Amended Statement of claim in isolation of other equally relevant paragraphs. **In dealing with pleadings, a court must read all the paragraphs together to get a flowing story of the parties and not a few paragraphs in isolation. It is the totality of the pleadings, whether it is the statement of claim or the statement of defence, that state the case of the party and it will be injustice to invoke only a few paragraphs to come to the conclusion that a missing portion of a Record could not have made any difference even if it was made available to the court.**

And in this respect, it is my view that paragraphs 8, 9, 10, 11, 12, 13, and 14 are equally important for the determination of the legal strength of Exhibit A. **Let me take further paragraph 15(a), which the court below took to arrive at the conclusion that Exhibit A could not have made any difference in the appeal.** Paragraph 15(a) is a very long paragraph of about 73 lines. The court below made use of only 9 lines and came to the conclusion that Exhibit A could not have made any difference in the appeal. With respect, the totality of paragraph 15(a) does not lend support to the conclusion reached by the court below. And what is more, **paragraph 15(a) deposed essentially to the origin and founding of Emu-Ebendo as a community. In my view, for the purposes of**

**Exhibit A paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 are more important and material. If the court below had adverted its mind to the above paragraphs, it could not have arrived at the conclusion that Exhibit A would not make any difference to the fortunes of the appeal in favour of the appellants. In conclusion, I am of the firm view that the non-perusal of Exhibit A by the court below was prejudicial to the case of the appellant, as grave injustice was done to them.**

That takes me to the case of *Kojo II v. Bonsie* (supra) as applied by the court below to the appeal in that court. Learned counsel for the appellants has raised two issues on *Kojo II v. Bonsie*. I will take them in turn.

The first is that the court below raised the rule in *Kojo II v. Bonsie* suo motu. Learned counsel for the respondents submitted that the issue was not raised suo motu as the respondents had earlier raised it at page 367 of the Records as follows;

*“In attempting to prove the boundaries of the land in dispute, it is submitted that the evidence of Plaintiffs themselves cannot be treated as sufficient. This is more so when such evidence is not coupled with evidence of use of exercise of occupational rights by the Plaintiffs. On this basis, the court ought to have treated the evidence of the Plaintiffs in this issue as insufficient and should have accepted the evidence of the Defendants and their witnesses.”*

The Rule in *Kojo II v. Bonsie* was propounded by Lord Denning. The Law Lord who did not see much help from the demeanour of witnesses in cases involving traditional history which was handed down by word of mouth from generation to generation, said at page 1223:

*“The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motive whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way to test the traditional history is by reference to the facts in recent years as*

*established b evidence and by seeing which of two competing histories is the more probable.”*

The Rule had been followed by this court and the other courts below it. See Aikhionbare v. Omoregie (1976) 12 S.C. 11; Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195; Thanni v. Saibu B (1977) 2 S.C. 89; Adenle v. Oyegbade (1967) NMLR 136; Akpapuna v. Nzeka (Pt.83) 7 S.C. 1; Kasali v. Lawal (1986) 3 NWLR (Pt.28) 305; Ajani v. Ladepo (1986) 3 NWLR (Pt. 28) 276; Dibiamaka v. Prince Osakwe (1989) 5 S.C. 53; (1989) 3 NWLR (Pt. 107) 101.

C I entirely agree with learned counsel for the respondents that the issue of acts of ownership or possession in recent times was raised by the respondents. That is clearly conveyed by the words “evidence of use or exercise of occupational rights by the Plaintiffs’ Evidence of use or exercise of occupational rights by the plaintiffs will certainly be D consistent with acts of ownership or possession in recent times.

I should like to extend the argument further and on the assumption that the respondents did not make the submission of acts of ownership or possession in recent times. ***If a case is made in the pleadings in respect of acts of ownership or possession in recent times, the court is perfectly entitled to invoke the Rule in Kojo II v. Bonsie without the prompting of any of the parties. Kojo is a decided case and a court of law need not wait for a party to cite it before making use of it. There is the common aphorism or axiom that the law is in the breast of the Judge and he can make use of it at anytime.*** E F

***The learned Judge, being learned in the law, is conversant with the case law and he is at liberty to make reference to any legal authority, including case law, to improve his judgment. It is not the tradition for judges to rely and use only cases cited by counsel. They go outside cases cited by counsel and make use of other cases in their judgments. We do that everyday in our judgments and there is nothing wrong with it.*** G

The point raised by learned counsel for the appellants, therefore, H fails.

The second point is whether the Rule in Kojo was rightly applied by the court below? The learned trial Judge, in the closing paragraphs of his judgment, said at page 324 of the Record:

*“I have carefully weighted the case of both sides and find that*



*the case presented by the plaintiff overweighs that of the Defendants in terms of probative value and I accept it. I accordingly hold that the plaintiffs have discharged the onus of proving that they were in exclusive possession of the land in dispute. I find as a fact that both pieces of land, Oluji and Iyiechi are part of the land of the plaintiffs.”*

The Court of Appeal came to a different conclusion at page 403 of the Record:

*“In view of the foregoing, it will be seen that the Appellants’ acts of ownership/possession done on the land far exceed those of the Respondents if any.”*

And so while the learned trial Judge gave judgment to the appellant, the Court of Appeal gave judgment to the respondents.

Both parties pleaded acts of ownership or possession in their pleadings. For example, while appellants pleaded acts of ownership or possession in paragraphs 6, 7, 11, 12 and 14, the respondents pleaded similar acts in paragraphs 6, 7, 8 and 10. I must say that the above paragraphs do not exhaust the acts of ownership or possession pleaded by the parties.

In arriving at the decision that the respondents’ acts of ownership/possession far exceeded those of the appellants, the court below said at page 401:

*“In this connection, I should say that only one witness (1st plaintiff) testified about acts of ownership on behalf of the plaintiffs.”*

I expected from the above statement that the court below would give the number of witnesses who gave evidence for the respondents in respect of acts of ownership or possession to drive home, whatever it is, his conclusion that the respondents, acts of ownership or possession far exceeded those of the appellants. It did not do that, rather it dealt with the evidence of D.W.8 and D.W.9.

***The belief or disbelief of evidence of parties does not depend upon the number of witness who gave evidence in the court. Belief or disbelief of evidence depends on the probative value of the evidence as evaluated by the trial court in terms of veracity or authenticity of the witnesses. A village or community of witnesses may give evidence which the trial court may not believe. On the other hand, the trial court may believe the evidence of a single witness on acts of ownership or possession. Belief or disbelief is not a matter of numbers but a***

**probative matter in our law of Evidence. It is not a matter of population census.**

Dealing with the evidence of buildings, the court below said at page 402, and I will quote the court in extenso:

“From the above evidence it will be seen that the so-called acts of possession/ownership of the Respondents consisted mainly of building sign boards between 1981 and 1984, soon after compensation of N15,000.00 was paid to the appellants by Elf Nig. Ltd. According to the appellants, they considered the erection of those houses and sign boards as unjustified encroachment on their land, so as to share from the compensation money. So the houses and sign boards were instantly pulled down by the Appellants. The matter was reported to the police; police investigated the matter, and found as a fact that the Appellants were defending their territories from encroachment by trespassers (the Respondent). So no arrests were made and the matter was referred civil (sic) and so this action was instituted. In effect therefore what the Respondents regard as their acts of user of the land, were in fact acts of trespass on land of the Appellants. The timely demolition of houses and sign boards erected by the Respondents would operate as acts of ownership by the Appellants in that they were defending their territory from encroachment by trespassers.”

This is a rather unfortunate conclusion. It is sad that court of law should give its approval or credence to an act or conduct or self-help which was condemned by this court in Chief Ojukwu v. Governor of Lagos State (1986) 1 NWLR (Pt. 18) 621. Certainly, self-help has no place in our civilized world as it is clearly against the rule of law in a democracy.

The conclusion that the timely demolishment of the houses and sign boards operates as acts of ownership by the appellants, with the greatest respect, may not be entirely correct. The demolishment could also constitute an act of trespass if the property demolished was built on the land of the appellants. Even if the property is built on the land of the respondents, the answer is not in self-help but in commencing a legal action to abate the trespass.

The first appellant gave evidence of recent acts of ownership or possession of the land in dispute. Detailed acts of ownership or possession are stated at pages 268 to 269 of the Record. I reproduce

here a bit of the evidence:

*“There is also a camp founded by one Oghani Obi with his oil palm truffle on it. There are pear trees, coconut trees and orange trees, cocoa trees planted on the land by Oghani. The Ogbogwe juju shrine belonging to the Emu-Ebendo Community was also on the land but this was destroyed by the Obodougwa. There are also many fish ponds owned by the Emu-Ebendo community on the land, e.g. Ogbogwe Pond. There are also other ponds owned by individuals from Emu-Ebendo Community. I also have a fish pond on the land.”*

**The learned trial Judge believed the evidence of the appellants and held as a fact that both pieces of land, Oluji and Iyiechi, are part of the land of the appellants. He also held that the respondents trespassed on the land in dispute and destroyed the crops and shrine of the members of the appellants’ community.**

**I do not see in the judgment where the court below considered the evidence of the first plaintiff and rejected it on the ground that the findings of the learned trial Judge were perverse. It is elementary law that an appellate court cannot reject the findings of a trial judge on the evidence of witnesses unless such findings are perverse.** See *Kate Enterprises Ltd. v. Daewoo Nigeria Ltd.* (1985) 2 NWLR (Pt.5) 116; *Emenimaya v. Okorji* (1987) 3 NWLR (Pt. 59) 6; *Godwin v. C.A.C.* (1998) 12 S.C. 1; (1998) 14 NWLR (Pt. 584) 162; *Okelola v. Boyle* (1998) 1-2 S.C. 60; (1998) 2 NWLR (Pt. 539) 533; *Ude v. Chimbo* (1998) 9-10 S.C. 97; (1998) 12 NWLR (Pt. 577) 169.

**As I do not see any perversity in the findings of the learned trial Judge, I hold that the court below lacked the competence to reject the findings and supplant its own. There is no legal basis for doing so.**

In sum, I allow the appeal and set aside the judgment of the Court of Appeal. I restore the judgment of the trial High Court. I award N10,000.00 costs for appellants in respect of this appeal and N2,500.00 costs in respect of the proceedings in the court below.

### OGUNDARE JSC

I was privileged to read in advance the judgment of my learned

brother, Tobi, JSC. I agree with him that the appeal deserves to succeed.

The Plaintiffs, who are Appellants in the appeal, in the High Court of Delta State in suit No. HCK/20/85 sued the Defendants (now Respondents) claiming as per their further amended Statement of Claim:

“(i) A declaration that the plaintiffs are entitled to possession and statutory right of occupancy under Emu-Ebendo Customary land law tenure and/or the Land Use Decree, 1978, to a piece of land particularly delineated on and verged green described in a survey plan prepaid, produced and signed by a Licensed Surveyor, M. N. Chukwurah filed with this Statement of Claim. The extent and area of this land are shown and described on the survey plan herein before mentioned and the land is situated within the jurisdiction of this Honourable Court.

(ii) N50,000.00 as special and general damages for defendants breaking and entering the plaintiffs’ close described above, and did damage thereon.

(iii) Recovery of the sum of N15,000.00 being sum of money due and payable to the plaintiff which Elf (Nig) Ltd. erroneously paid to the defendants without plaintiffs’ knowledge, authority and consent.

(iv) Perpetual injunction restraining the defendants, their agent, servants, workmen, and/or privies from further acts of trespass to Iyiechi and Oruji portion of plaintiffs’ land hereinbefore described or mentioned.”

Pleadings having been duly filed and exchanged, and with leave of Court amended, the case proceeded to trial at which evidence was led on both sides. At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial Judge in a reserved judgment adjudged as hereunder:

“Judgment is therefore entered for the Plaintiffs against the Defendants jointly and severally and it is hereby ordered as follows:

(i) A declaration that the plaintiffs are entitled to the statutory/customary right of occupancy to the land in dispute as shown verged green in the survey plan of the plaintiffs, Exhibit A, subject to the provision of Section 40 of the Land-Use Decree of 1978.

(ii) Recovery of the sum of N15,000.00 erroneously paid to

*the Defendants by Elf Nigeria Limited.*

*(iii) N5,000 general damages.*

*(iv) Perpetual injunction restraining the defendants, their agents, servants and/or privies from further acts of trespass to the Iyiechi and Oruji portions of the plaintiffs' land hereinbefore described."*

The learned trial Judge made a number of findings in arriving at his verdict, principally amongst which are-

1. *"It may be necessary for me at this stage to refer again briefly to the evidence of the 1st plaintiff as to the boundaries of the land in dispute. According to the 1st plaintiff, the land in dispute is made up of the Iyiechi and Oruji farm lands and they have common boundaries with Igbe-Ogume marked with a cotton tree; Ogboli-Ogume marked with Uwadieni juju shrine and Oriedo tree; Umusam also marked with Oriedo tree and Umuseti where both communities farm together."*

He found the evidence of boundarymen called by the defence contradictory in many ways and concluded that "as a matter of fact I found the evidence of the boundarymen called by the Plaintiffs more convincing and I so hold."

2. *"I accordingly hold that the plaintiffs have discharged the onus of proving that they were in exclusive possession of the land in dispute. I find as a fact that both pieces of land, Oluji and Iyiechi are part of the land of the plaintiffs."*

3. *"I also find as a fact that the Defendants trespassed on the land in dispute and destroyed the crops and shrine of the members of the plaintiffs' community."*

Being dissatisfied with this judgment, the defendants appealed to the Court of Appeal which Court allowed the appeal, set aside the judgment of the trial High Court and dismissed plaintiffs' claims. It is against that judgment that plaintiffs have now appealed to this Court upon four grounds of appeal contained in the amended Notice of Appeal and in their brief of argument set out three issues as calling for determination, to wit:

*"(a) were the Justices of the Court of Appeal right in their finding that the appellants did not establish the boundaries of the disputed land?;*

*(b) whether it was not prejudicial to the appellants for the Court of Appeal to have proceeded to deliver judgment without the remisal*

(sic) of Exhibit A, the appellants' survey plan;

(c) *Whether the Court of Appeal was right to have suo motu introduced, considered and relied on the rule in Kojo II v. Bonsie (1957) 1 WLR 1223 and if properly considered, was the approach of the trial Judge inconsistent with the dictates of the said rule?*"

B Issues (a) and (b) above are really one as formulated by the defendant in their own brief; their issue (a) reads:

C “(a) *Whether the Court of Appeal was right, having regards to the evidence and the pleadings, when it held that the plaintiffs failed to prove the boundaries of their land and that they were not prejudiced by the fact that their Survey plan was not considered by the Court? and*”

Issue (c) in the plaintiffs' brief is the same as issue (b) in the defendants' brief.

D Boundaries of the Land in Dispute: At the hearing of the appeal in the Court of Appeal, Exhibit A, the plaintiffs' plan tendered at the trial was not made available for use of that Court. Without looking at it, nor calling for it, that Court came to the conclusion that the plaintiffs failed to prove the boundaries of the land they laid claim to at the trial. We called for Exhibit A. The perusal of that plan cannot justify the conclusion of their Lordships of the Court below. Going by the pleadings and the 2 plans - Exhibits A and B - tendered by the parties, there was really no dispute between them as to the identity of the land in dispute. What was in dispute were the boundarymen as claimed by both parties and some features on the land. The learned trial Judge gave adequate consideration to the evidence adduced on both sides and concluded as highlighted by me above that the evidence of the boundarymen called by the defendants was unreliable in view of the contradictions in the evidence of these witnesses. The learned trial Judge, rightly in my humble view, accepted the evidence for the plaintiffs. I think it is wrong with respect for their Lordships of the Court below, to find, as they did, that plaintiffs failed to prove the boundaries of the land they laid claim to.

H The Rule in *Kojo II v. Bonsie*: The questions for determination placed by the defendants as Appellants before the Court below were:

(i) Whether the trial court properly understood and applied the evidence of the 9th Defence witness.

(ii) Whether, in evaluating the evidence of the 2nd, 3rd and

4th Plaintiffs' witnesses, the trial court gave any consideration to the fact that they are members of the plaintiffs' Community and are not independent or neutral witnesses.

(iii) Whether the Plaintiffs proved the boundaries of parcels of land claimed by them in this action.

(iv) Whether it was lawful for the trial court to grant the plaintiffs a declaration that the plaintiffs are entitled to the statutory/customary right of occupancy to the land in dispute. B

(v) Whether, on the evidence before the court, the Plaintiffs established any lawful basis for the award of N15,000.00 in their C  
favour.

Nowhere did they raise the issue of the test in *Kojo II v. Bonsie* (1957) 1 WLR 1223. It was their Lordships of the Court below that took up the point suo motu and without calling for addresses by the parties faulted the judgment of the Court below for non-observance D  
of that rule.

I think what they have done here is also wrong. The rule or test laid down in *Kojo II v. Bonsie* (Supra) which has been followed by the courts in this country in numerous cases is predicated on the dictum of the Privy Council per Lord Denning in that case wherein E  
the noble and learned Lord had this to say:

*"The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from F  
generation to generation, mistakes may occur without any dishonest motive whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In G  
such a case demeanour is little guide to the truth. The best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable."*

In the case on hand, there is no question of conflicting tradi- H  
tional evidence being resolved in the appeal before their Lordships.

This Court has frowned in a number of cases on courts taking up matters suo motu and resolving the dispute before them on such matters without calling on the parties to address on those matters. I

am sure if their lordships of the Court below had invited addresses from counsel on applicability of the rule in *Kojo v. Bonsie* (supra) they would have been told it did not apply in this case.

For the reasons I have given above and the other reasons given in the judgment of my learned brother, Tobi, JSC. I allow this appeal and set aside the judgment of the Court of Appeal and restore the judgment of the trial High Court entering judgment for the plaintiffs in terms of their claims. I abide by the order for costs made by Tobi, JSC.

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### **ONU JSC**

Having had the advantage of reading the judgment of my learned brother, Niki Tobi, JSC., just delivered before now, I agree with him that this appeal has merit. Accordingly, I too allow it and make the same consequential orders inclusive of those as to costs in the Appellants' favour.

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### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother, Niki Tobi, JSC., with which I am in entire agreement. For the reasons given by him, I too would allow the appeal with N10,000.00 costs to the Appellants.

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