

SUPREME COURT OF NIGERIA
FRIDAY 4TH APRIL, 2003. SC. 135/1998
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, A. O. EJIWUMNI, JJSC

1. MRS. LYDIA OMOWARE THOMPSON
2. KOSEMANI ENTERPRISES LIMITED APPELLANTS
AND
ALHAJI JIMOH AROWOLO RESPONDENT

APPEALS - Evidence - Evaluation - Interference - Where there is no issue of credibility of witnesses - Then CA can interfere with discretion of trial court - In order to determine justice of the case between the parties (H1)

LAND LAW - Appeal - Retrial - As respondent did not challenge the claim of appellants at trial court - The order made by CA for retrial was improper (H2)

LAND LAW - Title - Identity of land - Proof - Although respondent has no burden of proof - Yet by reason of his claim over the land in dispute - He ought to establish identity of the land by survey plan (H3)

LAND LAW - Title - Identity of the land - Proof - Sufficiency of - Is whether a surveyor can by the given description - Produce a plan showing the land - Respondent failed to prove the land (H4)

LAND LAW - Root of title - Defective pleadings - For failing to show how the land devolved on him - Respondent's evidence which is at variance with his pleadings - Must be rejected as it is not legal evidence (H5)

COURTS - Appeal - Inadmissible evidence - Objection - Counsel is to object to such evidence - But where mistakenly admitted - Court must during judgment treat such evidence - As if it had never been admitted (H6)

LAND LAW - Title - Proof - Means - May be established by production of documents of title - Which must be duly authenticated - Unless they are produced from proper custody (H7)

LAND LAW - Title - Proof - 20 years document - Regularity of - Presumption contemplated by Evidence Act s. 130 is applicable to exhibit B - Since it is more than 20 years old at date of the contract (H8)

LAND LAW - Title - Proof - As respondent did not challenge the recitals in exhibit B - 1st appellant has proved her ownership in fee simple - Free from encumbrances of the portion apportioned to 2nd appellant (H9)

DOCUMENTS - Authentication - Proof - Where document proved to be 20 years old is produced from proper custody - Court may presume that the signature and every part of it were duly executed (H10)

LAND LAW - Title - Possession - By virtue of exhibit E executed between the parties - 2nd appellant acquired equitable interest in the property - Capable of being converted to legal estate (H11)

LAND LAW - Trespass - Proof - As claim of trespass to land is rooted in exclusive possession - All a plaintiff need to prove is that he has exclusive possession (H12)

LAND LAW - Possession - Determination - There is no particular mode to show - That a plaintiff had been in exclusive possession of disputed land - As each case must be considered upon its own facts (H13)

LAND LAW - Title - Possession - Proof - By virtue of exhibit B - 1st appellant proved her entitlement to legal estate in the property - And had only sold equitable interest to 2nd appellant (H14)

FACTS

Plaintiffs/appellants commenced this action at the High Court of Lagos State, claiming declaration of title in favour of 1st appellant,

N50,000.00 damages in favour of 2nd appellant and perpetual injunction restraining defendant/respondent and his agents from trespassing on the land. 1st appellant's contention is that the public trustee of the estate of her deceased father one Frederick Ephraim Williams, vested on her the tracks of land owned by the deceased. 1st appellant subsequently transferred her interest in the portion of the land now in dispute to 2nd appellant for a monetary consideration. 2nd appellant was thereupon immediately put into possession of the land.

1st appellant further stated that respondent committed various degrees of acts of trespass on the said land. 1st appellant tendered various documents in proof of her title to the land in dispute. Respondent however did not establish how the land devolved on him. After hearing in the matter, the court dismissed the claims of appellants. Thus, appellants appealed to the Court of Appeal Lagos Division. The court despite allowing the appeal, gave an order for trial of the matter de novo by another Judge of the High Court. Appellants were again dissatisfied and have lodged a further appeal to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the retrial order made in the circumstances of this case was right.

2. Whether the Court of Appeal was in a good position to determine the case on the evidence on record.

3. Whether the plaintiffs proved their case?"

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

Evidence - Evaluation - Interference

1. It is clear from the above quoted statement of principle with regard to when a Court of Appeal should in an appeal before it consider itself to be in as good a position as the trial court to evaluate and resolve the questions raised in the appeal. It seems to me that in order to arrive at its decision, the Court of Appeal ought to ask itself primarily whether the questions raised in the appeal affected the issue of credibility of witnesses. It seems, having regard to the principles adum-

brated above, that where the questions that fall to be determined do not raise the issue of credibility of witnesses, then the Court of Appeal has the duty to interfere with the discretion of the trial court in order to determine the justice of the case between the parties.

B *I must therefore hold from what I have said above that the Court of Appeal was in a position to have interfered and determined the questions in issue in the appeal before it.*
(pp. 987 C/990 B)

C *Appeal - Retrial*

2. *The next question is whether the order made by the Court of Appeal that the case be heard de novo by another Judge of the High Court of Lagos State was proper in the circumstances.*

D *On this point, there are certainly wealth of judicial authorities wherein the principles that should guide an Appeal Court when considering whether to order a retrial or not. In the case of Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt. 341) 676 where at pages 712-713 Ogundare, JSC, stated the applicable principles thus: -*

“Where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made.”

F *From what I have said above, the conclusion that must be reached is that at the trial, the respondent did not make out a case to challenge the claim of the appellants. This is because he failed entirely to prove the identity of the land, which he is claiming as against that of the appellants, nor did he lead legal evidence in support of how he became seised of the land.*
G *It is therefore my view that it would not be proper and indeed it will amount to allowing the respondent to have a most undeserving second chance to reconstruct his case with a better defence. The justice of this case demands that an order of retrial was not proper in the circumstances. The court below having allowed the appeal, the proper order should have been one upholding in its entirety claims of the appellants. I will therefore hold that the court below fell into error in ordering that the case be re-heard de novo. The justice of his case de-*
H

mands that an order of retrial was not proper in the circumstances. I will therefore hold that the court below fell into error in ordering that the case be re-heard de novo. In the result, issues (1) and (2) are resolved in favour of the appellants. (pp. 990 C/994 D)

B

LAND LAW - Title - Identity of land - Proof

3. Returning to the case in hand, it is manifest from what I have said above that the appellants who have the burden of establishing their claim had shown by the several documentary exhibits admitted at the trial and the evidence thereon, their rights to the land in dispute. On the other hand, apart from the evidence of the respondent that he owned a vast area of land which he inherited from his ancestors, and which allegedly included the land claimed by the appellants, there is no evidence whatsoever to show the identity, extent and scope of the land of the respondent. It is manifest from the printed record that during his evidence at the trial, he alluded to a survey plan J061A/76 and a composite plan J030/86, which he claimed that he had commissioned a licensed surveyor to prepare for him. Though the case at trial was adjourned for him to produce these documents, yet he failed to make them available to the court before the trial was concluded with the delivery of the judgment of the trial Judge.

C

D

E

F

The respondent, though only a defendant has no burden to prove anything as required of the appellants who were the plaintiffs at the trial, yet where as in this case he is alleging that he is the owner of a vast area of land allegedly in the same area as the land in dispute, then he ought to establish the identity of the land by a survey plan of the land he is claiming. (p. 991 F)

G

LAND LAW - Title - Identity of the land - Proof

4. Now, though there is no law or practice which established that a plan is a sine qua non to identify land being claimed, yet there must be some clear description to make a disputed land ascertainable. The acid test on the sufficiency of such proof is whether a surveyor taking the record of proceedings, can pro-

H

duce a plan showing accurately the land to which title has been given.

Having regard to the observation made above with regard to the acid test required in such circumstances, it is my considered view that a licensed surveyor cannot be expected to draw
B a plan of the respondent's land upon such evidence as above. It follows that I must hold that the respondent did not prove the identity of the land that he is claiming as his in this action.
 (p. 992 C)

C LAND LAW - Root of title - Defective pleadings

5. Apart from the failure of the respondent to prove the identity of the land he is contending as his own, it is also necessary to consider whether he properly pleaded in his statement of defence how the land devolved on him from his ancestors. Moreso, as the court below had in passage of its judgment quoted earlier, observed that the 'learned trial Judge failed to make specific findings of facts upon the ample evidence produced at the trial by both parties. True enough, the
E respondent gave some evidence at the trial with regard to how he inherited the disputed land from his ancestors. But the question is, whether by his pleadings in his statement of defence, it can be said that he can properly give such evidence in support of his case that he became the owner by inheritance from
F his ancestors.

It is no doubt a settled principle of our law that parties are bound by their pleadings.

A careful perusal of paragraph 7 of the respondent's statement of claim referred to above show that the evidence given by the respondent was not pleaded. That is apart from the fact that the averments made in the said paragraph did not trace how the property devolved on the respondent as claimed. The effect then of this defective pleading having regard to the
H settled principles that evidence at variance with the pleading is that the evidence of the respondent in relation to how the property devolved on him must be rejected. In my humble view, if the court below considered the evidence of the respondent in this light, it would have concluded that the evidence of the

respondent is not legal evidence for the purpose of deciding the case. (pp. 992 G/994 B)

Appeal - Inadmissible evidence

6. It is also the duty of counsel to object to inadmissible evidence, but if despite this, evidence is still, through an oversight or otherwise admitted, then it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted. The court must also not admit evidence which is contrary to the pleadings of the party who adduced such evidence. And where such evidence escapes the scrutiny of the courts below, then an appellate court seised of the case must reject such evidence and decide the case of the appeal on legal evidence. (p. 993 D)

LAND LAW - Title - Proof - Means

7. Now it is settled law that the production of documents of title is one of the five recognised ways by which a plaintiff may prove ownership of land. Such documents of title must be duly authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circumstances giving rise to the presumption in favour of due execution in the case of documents 20 years old or more at the date of contract. (p. 997 G)

LAND LAW - Title - Proof - 20 years document - Regularity of

8. As the above statement on the proof of ownership of land is more fully set out in s. 130 (formerly s. 129), Cap. 90, Laws of Nigeria Evidence Act, the provisions of said section will be set out hereunder: -

“Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of the National Assembly, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.”

The applicability of the above provisions appeared unsettled until the case of *John Kobina Seys Johnson & Ors. v.*

Irene Ayinke Lawanson & Anor (1971) 1 All NLR 56, Coker, JSC delivering the judgment of this court held at page 67, thus:-

“We hold therefore that a deed to be competent for the presumption contemplated by section 129 of the Evidence Act must be 20 years old “at the date of the contract” and not 20 years old at the date of the proceedings at which such a deed is being offered in evidence.”

Turning to the case in hand, it is manifest that exhibit B was executed on the 10th day of March, 1913. It is also clear that the property in dispute was apportioned to the 1st appellant by the Order of court dated 29th day of May, 1961 and the Deed of Assent, exhibit was executed on the 5th day of July, 1977. It is evident that either of the two dates referred to above could be the dates of the contract which vested the 1st appellant with the ownership of the disputed land. This is because, on the 29th of May, 1961, the Order of court for partitioning the property of the testator was made. The Deed of Assent made on 5th July, 1977 between the Lagos State Public Trustee and the 1st appellant being the contract, which vested the 1st appellant with the disputed property. Now, exhibit B, the Deed of conveyance which was executed in 1913 is certainly more than 20 years old at the date of the contract. It follows that the presumption contemplated by section 130 (formerly s.129) of the Evidence Act is applicable to exhibit B. (p. 998 A)

LAND LAW - Title - Proof

9. And as the respondent did not in any way challenge in rebuttal of the recitals in exhibit B, I must hold that the 1st appellant proved that her father, Mr. Frederick Ephraim Williams was the owner in fee simple free from encumbrances of the total land he bought from his vendors. I also hold that the 1st appellant is also the owner in fee simple free from encumbrances of that portion of it that was apportioned to the 2nd appellant. (p. 999 A)

DOCUMENTS - Authentication - Proof

10. With regard to the question about whether exhibit 'B' was duly authenticated, the answer to that lies in s.123 of the Evidence Act which reads:

"Where any document, purporting or proved to be twenty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested." (p. 999 C)

LAND LAW - Title - Possession

11. Earlier in this judgment reference was made to the sale of the disputed land by the 1st appellant to the 2nd appellant. The Purchase Receipt Agreement, exhibit E made on the 22nd day of January, 1978 was executed between the two parties. With that agreement, the 2nd appellant entered into possession on the disputed land. In exercising his right of possession, the 4th P.W., the Managing Director of the 2nd appellant commissioned the Surveyor, P.W.2 to survey the land. Having regard of the sale to the 2nd appellant and the consequent possession of the disputed land as being clearly made out in the printed record, the 2nd appellant therefore acquired an equitable interest in the property capable of being converted to a legal estate by specific performance. (p. 999 E)

Trespass - Proof

12. As a claim of trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he has exclusive possession. (p. 1001 C)

LAND LAW - Possession - Determination

13. The question that must now be considered is what could amount to exclusive possession to enable a plaintiff claim in trespass to land against a defendant.

Flowing from the authoritative pronouncements of this court referred to above, it is not in doubt that in order to found exclusive possession of land in favour of a plaintiff, this court is not bound by any particular mode of exercising the right to be in possession or to show that a plaintiff had been in exclusive possession of the disputed land. This is because each case must be considered upon its own facts. (p. 1001 C/1002 B)

LAND LAW - Title - Possession - Proof

14. In the instant appeal as I have said earlier, the claim of the 1st appellant as pleaded in paragraph 14(a) of the statement of claim is for a declaration that she is the owner of a statutory right of occupancy to that piece or parcel of land lying and situate at Iju Railway Station, Iju “known and referred to as plot No. 14 in the estate of Frederick Ephraim Williams.” In order to prove this claim, she pleaded the Deed of Conveyance, exhibit ‘B’, with which the entire land including her own plot 14 was conveyed to her late father and testator, Frederick Ephraim Williams by the following people, Dada Agunwa, woodcarver, Ige Egun Oniye, farmer and Osiyomi Balogun, farmer.

In my humble view, the argument of the learned counsel for the respondent is misconceived that the 1st appellant could not be entitled to a declaration of title. This is because as argued above, the 1st appellant had only sold an equitable interest in the property to the 2nd appellant. The 1st appellant is still the owner of the legal estate in the property. Having regard to what I have said above, I am of the clear view that issue 3 must be resolved in favour of the appellants to the extent that they have succeeded in establishing exclusive possession to the disputed land. In the result, this appeal succeeds in its entirety and it is allowed accordingly.

The 1st appellant is granted the relief sought in paragraph 14(a) of the statement of claim. The 2nd appellant having succeeded with regard to the claim in paragraph 14(b) of the statement of claim is hereby awarded damages in the sum of N25, 000.00. With regard to 14(c) of the statement of claim, an order of perpetual injunction is hereby made against the

respondent, his agents and privies from entering into the disputed land, that is plot No. 14 lying and situate at Iju Railway Station in the Ikeja Division, Lagos State. (p. 1002 H)

REPRESENTATION

P. O. Jimoh-Lasisi, SAN with J. K. Adeyi Odumbaku and S. I. Lawal, B
for the Appellants

H. O. M. Lewis (Miss), for the Respondent

CASES REFERRED TO

Ajadi v. Olanrewaju (1969) 1 All NLR 382

Okeowo v. Migliore (1979) 11 SC 138

Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1

Nwosu v. Udejaja (1990) 1 NWLR (Pt. 125) 188

Tewogbade v. Obadina (1994) 4 NWLR (Pt. 338) 326

Awote v. Owodunni (No.2) (1987) 2 NWLR (pt. 57) 366

Adeyemo v. Arokopo (1988) 2 NWLR (pt. 79) 703

Oko v. Ntukidem (1993) 2 NWLR (pt. 274) 124

Ebba v. Ogodo (1984) 1 SCNLR 372

Ayoola v. Adebayo (1969) 1 All NLR 159

Elias v. Suleiman (1974) NMLR 193

Kwadzo v. Adjei (1944) 10 WACA 274

Arabe v. Asanlu (1980) 5-7 SC 78

Okedare v. Adebara (1994) 6 NWLR (pt. 349) 157

Alade v. Olukade (1976) 2 SC 183

STATUTE REFERRED TO

Evidence Act Cap. 112 LFN 1990, s. 130

LEAD JUDGMENT BY EJIWUNMI JSC

The action that culminated in this appeal was commenced by the appellants when they took out a writ of summons against the respondent on the 10th day of June, 1983. Following the order that pleadings be filed, the parties duly filed and exchanged their pleadings. The appellants also filed with the leave of the trial court an amended reply to the statement of defence filed by the respondent. The case was therefore heard on the issues as joined by the parties in their pleadings. The appellants by their statement of claim pleaded

thus at pages 4-6 of the printed record: -

"1. The 1st plaintiff is the daughter of one Frederick Ephraim Williams who died testate at Palm Church Street, Lagos on the 12th day of November, 1918 and probate of his will was granted to the two Executors and Trustees named in his will.

B *2. The 2nd plaintiff is a private limited liability company incorporated under the Laws of Nigeria and having offices at NO.3 Tonode Street, Ikeja, Lagos State.*

C *3. The defendant is the head and represents the Olarokun Family of Orile, Agege.*

4. The said Frederick Ephraim Williams (deceased) owned tracts of farm lands along Iju Railway Station, Iju and this formed part of his estate when he died in 1918.

D *5. Under and by virtue of the Supreme Court Order dated 11th day of March, 1947 in suit No. P21/1918. The Trustees of the said Frederick Ephraim Williams were released from administering the estate and the task was transferred to the Public Trustee appointed for that purpose.*

E *6. By an Order of court dated the 29th day of May, 1961 made in suit No. M/18/61 (after protracted litigation between the Public Trustee and the beneficiaries of the will of the said Frederick Ephraim Williams) the High Court at Lagos ordered that the property of Frederick Ephraim Williams (deceased) be apportioned or partitioned amongst the beneficiaries.*

F *7. Pursuant to the said Order of the High Court and the ensuing apportionment made thereunder a piece of landed property known as plot No. 14 part of the estate of Frederick Ephraim Williams (deceased) situate at Iju Railway Station, Iju in the Ikeja Division G of Lagos State was apportioned to the 1st plaintiff.*

H *8. Under and by virtue of a Deed of Assent dated the 5th day of July, 1977 and registered as No. 85 at page 75 in volume 1638 of the Lands Registry in the office at Lagos, the Public Trustee as the legal personal representative of Frederick Ephraim Williams (deceased) vested in the 1st plaintiff all that piece or parcel of farm land measuring approximately 12.85 acres (being the said plot No. 14 in the estate of Frederick Ephraim Williams (deceased) situate, lying and being at Iju Railway Station in the Ikeja Division of Lagos State in fee simple in possession free from all encumbrances.*

9. *The late Frederick Ephraim Williams was throughout his life in uninterrupted possession and ownership of the farmland of which the land the subject matter of this suit formed a part and so were the Trustees of his estate including the Public Trustee appointed under the Order of court.*

10. *By a Purchase Receipt Agreement made on 22nd day of January, 1978 the 1st plaintiff transferred her interest in the said plot No. 14 of the estate of Frederick Ephraim Williams at Iju Railway Station, Iju to the 2nd plaintiff (Kosemani Enterprises Limited) in consideration of the sum of N44,000,00.*

11. *The 2nd plaintiffs (sic) were thereupon immediately put in possession.*

12. *The defendant and/or his agents on or around went on the said plot No. 14 at Iju Railway Station and committed various acts of trespass on the land by removing the beacons erected by the 2nd plaintiff's surveyor, divided the land into plots, have sold and continued to sell to various persons who have been erecting buildings on the said land.*

13. *That despite repeated warnings from the plaintiffs to desist from the said acts, the defendant failed to stop and has continued his act of trespass on the land, the subject matter of this suit.*

14. *WHEREUPON the plaintiffs claim against the defendant as follows: -*

(a) *In favour of the 1st plaintiff, a declaration that the plaintiff is the owner of a statutory right of occupancy to that piece or parcel of land lying and situate at Iju Railway Station, Iju in the Ikeja Division of Lagos State known and referred to as plot No. 14 in the estate of Frederick Ephraim Williams which land is more particularly marked and delineated on a survey plan drawn by one E. A. Ogunbiyi, Esq. a licensed Surveyor, and annexed to a registered conveyance No. 75 at page 75 in volume 1638 in the Lands Registry in the office at Lagos.*

(b) *In favour of the 2nd plaintiff the sum of N50,000.00 (Fifty Thousand Naira) being damages for trespass when the defendant by himself and by his agents, servants and workmen and privies went on the said land and removed the 2nd plaintiff's beacons, divided the land into plots sold and continue to sell to various persons who have erected buildings on the said land.*

(c) Order of perpetual injunction restraining the defendant his servants and/or agents and privies from entering upon or interfering any further with the land the subject matter of the suit. ”

The appellants also filed an amended reply to the statement of defence of the respondent thus: -

- B “1. *The plaintiffs join issue with the defendant on his defence.*
 2. *The plaintiffs deny each and every allegation contained in paragraphs 2 - 8, 10 and 12 - 15 of the statement of defence and put the defendant to proof thereof.*
- C 3. *In particular denial of the averments contained in paragraphs 2 - 8, 10 and 11 of the statement of defence the plaintiffs state that the land, the subject matter of this suit, originally belonged to Dada Agunwa, Ige Egun Oniye and Oriyomi Balogun who conveyed same to one Frederick Ephraim Williams the father of the 1st plaintiff in this*
 D *suit by a Deed of Conveyance and the said Deed of Conveyance together with the attached plan will be relied upon at the trial of this suit.*
4. *The plaintiff will inter alia further rely at the trial of this suit and in proof of their claims in this suit upon a composite plan No. JO/*
 E *21/85 dated 21st June, 1985 drawn by one J. Olushola Ogunsanya, Esq., licensed Surveyor showing inter alia the extent of the plaintiffs’ said predecessor in title and also the area now being trespassed upon by the defendant.*
- F 5. *The 2nd plaintiffs further in answer to the averments of the defendants in paragraphs 12 & 13, state that soon after their purchase of the portion of the 1st plaintiff’s land, the subject of this suit, they were put in possession until the intervention and trespass of the defendant the subject of this claim.*
- G 6. *The plaintiffs thereupon repeat the averments as set out in their statement of claim. ”*

The statement of defence of the respondent is as follows:

- H “1. *The defendant denies paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the statement of claim specifically and puts the plaintiffs to the strictest proof thereof.*
2. *The defendant admits paragraph 3 of the statement of claim only to the extent that he is the head of Olarokun family of Orile Agege but denies that he is the sale representative of the family.*
3. *The defendant avers that he is just one of the four Attorneys*

of the family with regard to the management, control and alienation of the family land, part of which is now in dispute.

4. The defendant avers that his family i.e. the Olarokun family of Orile Agege is the owner of a parcel of land stretching from Irefu stream in Orile Agege to Abule Egba and Oko-Oba with the Lagos/Abeokuta Railway line as their boundary with Ibari family of Otta. B

5. The defendant avers that he has always been on his family land as head of family and not on any other person's land.

6. The defendant avers that he does not know the plaintiffs' land talkless of going on their land. And that the plaintiffs have not filed any plan in this case to show their land in relation to the defendant's land. C

7. The defendant avers that his great grandfather Olarokun who migrated from Iga-Iloti in Otta, settled on this land very many years, cultivated and superintended (sic) the land throughout his life time without let or hindrance until his death when he left him (sic) surviving to the estate his five children: Osholesi, Agbaosi, Adejiyan, Aiyelabi and Onumi, who inherited the vast area of land by Yoruba native law and custom. They cultivated, managed and superintended (sic) the land without any hindrance from any source whatsoever until they all died leaving the land to their children who inherited same. E

8. The defendant avers that the Olarokun family land is bonded on the four sides by Akinlabi family land of Orile Agege, Ikudoro and Ibari family land on Iju Station, Obawole and Iyanru families on other sides. F

9. The defendant avers that his family never sold or leased any portion of his land to the first or second plaintiffs; and the alleged vendors of the plaintiffs are no members of Olarokun family. G

10. The defendant avers that his ancestors who succeeded Olarokun to the estate had many customary tenants on the land such as, Gboyiki family, Sedimu Adeyemi family, Ogundele Samuel Ogunjobi and Faleti families who paid and still pays tribute to Olaroku family annually; for the use of the land. H

11. The defendant avers with specific reference to paragraphs 4, 5, 6, 7, 8, 9 and 10 that the said F. E. Williams had no sanguinary affinity with the defendant family. And that he was a Sierra Leonean who settled and lived in Lagos and had nothing to do with the

defendant's family land in his lifetime.

12. *The defendant avers that neither the 1st nor the 2nd plaintiff was in possession of any part of his family land to his knowledge at any time and hitherto .*

13. *The defendant avers that paragraphs 11, 12, 13 and 14 denied specifically as false and mere fabrications from the plaintiffs' imagination.*

14. *The defendant states that his family's hold on the family land which has endured for over a century has never been challenged by the plaintiffs or their predecessors-in-title before now.*

15. *The defendant avers that he is not liable to the plaintiffs in the sum of N50,000.00 or in any sum at all, as he was never on his land.*

16. *WHEREFORE the defendants stated that the plaintiffs claim is speculative, frivolous and vexatious and should be dismissed with costs."*

The appellants called four witnesses in support of their claim, while the respondent gave evidence as DW1 and called eight other witnesses to establish his defence to the action. The trial court dismissed all the claims of the appellants. As the appellants were dissatisfied with the judgment of that court, they appealed to the court below. In that court, their appeal was allowed, but an order was made that the case be heard de novo, by another Judge of the High Court of Lagos State sitting at its High Court at Ikeja. After a review of the evidence and the submissions of counsel, the reasons given for arriving at this conclusion per the judgment of Kalgo, JCA (as he then was) and with which, M. M. Akanbi, JCA (as he then was) and Coomassie, JCA concurred, read thus: -

"There is amply (sic) evidence produced at the trial by both parties but the learned trial Judge has failed to make specific findings of facts on the vital issues involved. In the circumstances, I am of the view that the appeal must be allowed on this score, I so do. But the facts and circumstances of this case are such, that in my respectful view, this court cannot proceed to decide the case on the evidence before the trial court. It is also my considered view, that if the parties are given the opportunity to re-litigate on the matter, none of them will be wronged or prejudiced and no miscarriage of justice will be occasioned thereby. See Ayoola v. Adebayo (1969) 1 ANLR 154 at

162.”

As the appellants were again dissatisfied with the judgment and orders of the court below, they lodged a further appeal to this court. Pursuant thereto, they filed a notice of appeal containing five grounds of appeal which, without their particulars, are as follows:

“1. *The Court of Appeal misdirected themselves in law when they failed to make findings on the documentary and unchallenged oral evidence presented by the parties in this case.* B

2. *The Court of Appeal misdirected themselves in law in failing to observe that exhibit B a Deed of conveyance made in 1911 and the possession of the land by the 1st plaintiff’s family as shown by the unchallenged evidence of 2nd PW. confers title to the land in dispute on the plaintiffs.* C

3. *The learned Justices of the Court of Appeal misdirected themselves in failing to observe that they were in good position to determine this case on the documentary evidence namely exhibits A, B, C, D, E, F, G, H and the traditional evidence of the defendant without remitting the case to the High Court for trial de novo.* D

4. *The Court of Appeal after holding that the finding of the High Court that the evidence of possession of the land in dispute as coming from the defendant is stronger than that of the plaintiffs is perverse, misdirected themselves in law when they failed to hold that evidence of possession adduced by the plaintiffs is stronger in view of the unchallenged evidence of 2nd PW. and exhibits F, G & H.* E

5. *The learned Justices of the Court of Appeal erred in law when they directed this case to be remitted to the High Court for trial de novo by another Judge.”* F

Subsequently, briefs of argument were filed and exchanged by the parties. The appellants filed a reply brief upon being served G with the brief filed on behalf of the respondent. At the hearing before us, learned counsel for the parties adopted and placed reliance upon their respective briefs for the determination of this appeal. Both counsel also made oral submissions in support of the arguments in their briefs.

For the appellants, the issues identified for the determination H in the appellants’ brief are:

“1. *Whether the retrial order made in the circumstances of this case was right.*

2. *Whether the Court of Appeal was in a good position to*

determine the case on the evidence on record.

3. Whether the plaintiffs proved their case?"

As the issues identified in the respondent's brief filed on his behalf by his learned counsel are similar to those set down in the appellants' brief, I do not consider it necessary to set them down in this judgment. I have also considered these issues in the light of the grounds of appeal filed by the appellants and found that they do properly arise from the grounds of appeal so filed. The merits of this appeal would therefore be considered on the basis of the issues re-produced above from the appellants' brief. Before doing so, it is I think desirable to review the facts briefly.

The 1st appellant gave evidence to the effect that Frederick Ephraim Williams was her father and that he died testate leaving a will. The certified true copy of the probate of the last will and testament of the said Frederick Ephraim Williams, who died on the 12th November, 1918 was admitted as exhibit "A". She stated that though at the time of the death of her father she was very young, she later learnt that she inherited a landed property under the will. This landed property which is situated at Iju is part of his landed property covered by a Deed of Conveyance dated 10-3-1911, registered as No. 40 page 128 volume 72 in the Registry of Lands at Lagos, and was admitted and marked exhibit 'B'. By virtue of this exhibit 'B', it is evident that the land of which the land in dispute forms part was by the indenture conveyed to the testator, of Palm Church Street in the town of Lagos on the tenth day of March, 1911 by Dada Agunwa Wood Carver, Ige Egun Oniye, farmer all of Otta Road in the then British Colony of Southern Nigeria. It was stated also in exhibit 'B' that the vendors were seised of the property in fee simple and in possession free from encumbrances. It is this property which is more particularly described in the plan attached to the indenture and distinguished with the colour red that was conveyed to the purchaser, namely, Frederick Ephraim Williams in fee simple. The 1st appellant further testified that as the trustees and executors who were appointed to administer the property left by the testator were removed from acting in that capacity, the administration of the property was thereafter handed over to the Administrator-General and Public Trustee. Then by an Order of court made on the 29th day of May, 1961, the Administrator-General and Public Trustee apportioned the property

amongst the children of the testator, Frederick Ephraim Williams. After the 1st appellant became vested with the property identified as plot No. 14 in the Deed of Assent, exhibit 'D', she directed her nephew, 3rd PW. to look for a buyer. The said plot No. 14 was eventually sold to the 2nd appellant.

The respondent also, in presenting his case, gave evidence in his own behalf and in addition, called eight other witnesses. Now in his own evidence, he started by asserting that he did not know the 1st appellant before this action was commenced against him. It is however his case that the entire land beginning from the stream of Erefu Orile Agege to Oko Ogbengbe, now known as Oko Oba belonged to his father. He however, said that he does not know the exact acreage of the land, but also referred to a plan No. J061A/76. This plan was not tendered during the trial and was therefore not admitted as an exhibit. DWI, continued with his evidence by stating who his boundary men were with regard to the disputed land. His evidence and extent of the disputed land, which included its description, reads inter alia, thus: -

"My boundarymen are from Erefu Akinlabi family, little after that, there is Ikudoro family, going further, there is the Ibari family very near the railway line along Ifako. Going further, there is Oba Wole family near Ojokoro, there is Iyanru family, coming back from there along Abeokuta Lagos Road, we get Irolo Ilan Opa family, after Ilari Opa family we will get to Ekoru and then to Odo Erefu."

The respondent then went to give evidence of how the land, presumably the disputed land, came to be in possession of his family and for which he is claiming its ownership. It is his case that his father who was a farmer and also a hunter in 1834 while on a hunting expedition came to a forest where no one had ever been. As he found no one there, he decided to settle there. He therefore built a hut there. His father, it is claimed lived there for many years without any trouble. It was whilst there that Olarokun married two wives, namely Efuntan and Shogegbemi. Efuntan had five children for him namely Osholesi, Agbaosi, Aiyelabi, Adesiyani and Onuni. But Shogegbemi did not have any issue. The respondent further stated that Agbaosi begat his own father, named Abudu Orowolo. He added that Osholesi had children and one of them named Lamidi Kosoko was also in court. It is also his evidence that all the descendants of

Olarokun are living in the land founded by their grandfather and had built their own houses thereon. Their grandfather who also lived and died there, brought two idols from Otta, named Ale and Ogun which he worshipped and are still being worshipped to this date. His grandfather who died in 1870 was buried in the said land, which is in
B contention.

The respondent also called as witnesses the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendant witnesses respectively. The 2nd, [3rd, 4th and 5th, defence witnesses gave evidence that they are bound-
C ary men to the land they claimed belonged to the family of the respondent. The 6th, 7th, 8th and 9th defence witnesses gave evidence that they are customary tenants of the respondent. Usman Kasali, in the course of his evidence stated that he was born on the disputed land in the house built by his grandfather, who was a tenant
D of the respondent's family through their grandfather. And under cross-examination, he said that about 12 years ago when he gave evidence, he was also given a piece of land by Chief Lemonu of Orile Agege who was then, the head of the Olarokun family.

In arguing the appeal, issues (1) and (2) were argued together.
E These are, whether the retrial order made by the court below was right in the circumstances, and whether the court below was in a good position to determine the case on the evidence on record. The thrust of the argument is the submission of their learned counsel in their brief and in his oral argument before us is that the Court of
F Appeal was in a good position to determine the appeal on the evidence on the printed record and the exhibits in court. In this respect, learned counsel asked the court to note that the appellants' case rested
G mainly on documents, which were supported by evidence of possession. In addition, it is submitted that the trial court and the court below accepted the evidence of the appellants given through the P.W.2, the surveyor who tendered exhibit 'F', the survey plan that the identity of the land was established. It is also the contention of
H learned counsel for the appellants that the respondent failed entirely to lead evidence, which could have led the court to uphold his case at the trial. The evidence given by the respondent consisted of a description of a vast area of land, which he claimed belonged to him by inheritance. Though he claimed that his grandfather founded the land in 1834, yet he admitted in his own evidence that he did not

know the total acreage of the land. He had admitted that he had commissioned a survey plan and also what he referred to as a composite plan, none of these plans was tendered at the trial. The evidence of the boundary men he argued, cannot be of much assistance to him also. This is because their evidence would be relevant if the land to which they are boundary men is ascertainable. It is therefore the contention of learned counsel for the appellants that having regard to the evidence in the printed record and the documentary exhibits admitted, the court below could have determined the appeal. The order of retrial made by the court below, it is argued, is not apposite in the circumstances. In support of his submissions, he referred to the following cases in the two briefs filed for the appellants; *Ajadi v. Olanrewaju* (1969) 1 All NLR 382 at 389; *Okeowo v. Migliore* (1979) 11 SC 138 at 201; *Ogbuokwuelu v. Umeanafunkwa* (1994) 4 NWLR (Pt. 341) 676 at 713.

In the brief prepared for the respondent by his learned counsel, Miss O. M. Lewis, the 1st and 2nd issues were similarly argued together as did the learned counsel for the appellants. The contention made for the respondent is to the effect that the order of retrial made by the court below was made by that court in the exercise of the discretionary power vested in the court. This court, it is therefore submitted, should not interfere with the exercise of the discretion of the court below unless this court is satisfied that the exercise of that discretionary power was manifestly wrong, arbitrary reckless, injurious or contrary to justice. For this submission, the following cases were cited: *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1) 156; *Imonikhe & Anor v. A-G Bendel State & Ors.* (1992) 6 NWLR (Pt. 248) 396 at 408. It is also argued for the respondent that this is a proper case for an order of retrial to be made. This is because the trial Judge failed in his primary duty to make findings on issues joined on the pleadings. It is therefore argued for the respondent that the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues. For this submission, the following cases were brought to our attention: *Awote v. Owodunni* (No.2) (1987) 2 NWLR (Pt. 57) 366; *Adeyemo v. Arokopo* (1988) 2 NWLR (Pt. 79) 703; *Oko v. Ntukidem* (1993) 2 NWLR (Pt. 274) 124 at 136-137.

Having regard to the argument of counsel and the issues un-

der consideration, I think that, the question that must first be determined is whether the court below could properly have determined the appeal before it on the printed record and the other documentary exhibits tendered in the course of the trial. Learned counsel for the appellants says yes, while learned counsel for the respondent has argued to the contrary. For the determination of who is right or wrong, I will refer first to the settled authorities on when an appellate court could determine a matter as had occurred in the instant appeal. Thereafter I will refer to the pleadings and the evidence which I have taken the precaution to refer to copiously earlier in this judgment. There can be no doubt that learned counsel for the respondent has submitted that it is trite principle of law that a Court of Appeal should be loathe to interfere with or reverse findings of fact made by a court of trial unless such findings are perverse. The principles for which a Court of Appeal must be chary of interfering with the findings of a trial court have received full consideration in this court in *Ebba v. Ogodo* (1984) 1 SCNLR 372, where Eso, JSC in the course of his judgment said at page 378, referring with approval to the English case of *Watt or Thomas v. Thomas* (1947) AC 484, continued thus: -

“ Indeed, it is the duty of the trial court to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the court forms of them. That is one good reason why the trial court is named a ‘trial court’ (and hence a Court of Appeal should attach the greatest weight to the opinion of the trial Judge) that has the duty to see and indeed, in this case, has seen the witnesses and also heard their evidence...”

Unless the trial court has failed to make use of this singular advantage, and for that reason thereof the Court of Appeal finds that the decision is perverse, the Court of Appeal, whose opportunity is confined to printed record is obliged to, and must accord to the finding of fact, by the trial court the greatest weight and due respect. That indeed is the division of labour, and a sensible one at that, between trial court and the appellate courts.”

At page 379, His Lordship continued thus: -

“But this division ends or rather does not exist, where the question does not affect the issue of credibility of witnesses; in other words, the Court of Appeal itself will obviously be in as good a position as the trial court, for in such a case, the trial court has no advan-

tage really over the Court of Appeal. For the Court of Appeal will be in a proper position to evaluate, as the trial court, the evidence which has been given in the case, for in such cases the matter in dispute has been completely narrowed down to inference that could be drawn from proved facts, without going through the rigour of credibility of witnesses. When we have this type of case, the Court of Appeal should not shrink from the task of such evaluation or be inhibited therefrom, just because it is a Court of Appeal See Benmax v. Austin Motor Co. Ltd. (1955) AC 370. See also Lion Buildings Ltd. v. M. M. Shadipe (1976) 12 SC 135 as per Sir Udo Udoma, JSC at page 153."

It is clear from the above quoted statement of principle with regard to when a Court of Appeal should in an appeal before it consider itself to be in as good a position as the trial court to evaluate and resolve the questions raised in the appeal. It seems to me that in order to arrive at its decision, the Court of Appeal ought to ask itself primarily whether the questions raised in the appeal affected the issue of credibility of witnesses. It seems, having regard to the principles adumbrated above, that where the questions that fall to be determined do not raise the issue of credibility of witnesses, then the Court of Appeal has the duty to interfere with the discretion of the trial court in order to determine the justice of the case between the parties. For further guidance on this, it is apposite to refer to page 381 of *Ebba v. Ogodu* (supra) where Kayode Eso, JSC analysed the different situations that may confront an Appeal Court in the course of the determination of an appeal. It reads:-

"An Appeal Court in applying these principles should, I venture to suggest:-

(a) start with an attitude to the trial court, as the only court which has principally, the duty to make findings of fact from the evidence - oral and or documentary - before it, also that the trial court is the court that has been specially suited, by its peculiar constitutional set-up and rules so to do. (The trial Judge sees the witnesses and has the exclusive advantage to observe their demeanor);

(b) then find out whether the conclusion which has been arrived at by the trial court is justifiable when it is re-examined against the very premise and or the controversy vel non which formed the basis of the conclusion arrived at by the trial court;

(c) *where the conclusion is arrived at without any real controversy, e.g. in the case of documentary evidence, or where it does involve a controversy, the controversy is limited only to number, complexity or contradiction or interpretation of the document or further where there is oral evidence but it involves merely an admission by the adversary or there is an unchallenged piece of oral evidence, the Court of Appeal should consider itself to be in as good a position as the trial court, in so far as the evaluation of such evidence as afore-said in this paragraph is concerned;*

(d) *where the decision is arrived at, after there has been an examination of a controversy (and this is the commonest aspect) as where the opposing parties produce witnesses in the case to contradict each other by oral evidence, then the Court of Appeal should appreciate that the following will be relevant:*

(i) *Credibility of witnesses based on demeanors of the witnesses only:- Here, the trial court is the sole Judge as the observation of the demeanor of the witnesses has to be peculiar and exclusive to the trial court which advantage is not and can never be available to the appellate court.*

(ii) *Credibility of witnesses based on factors other than demeanor:-*

The Court of Appeal should examine those factors which the trial court examined as a result of which it made the inference which led to its finding and determine whether that trial court has made use of its singular advantage of seeing and hearing the witnesses before making its finding especially having regard to the inference that could reasonably be made by a just and reasonable tribunal from the same factors."

In the instant case, learned counsel for the appellants has submitted that the question before the Court of Appeal is resolvable upon the documentary exhibits tendered and accepted by the trial court by the appellants to prove the 1st appellant's claim to the disputed land. In this respect, it must be borne in mind that the claim of the 1st appellant to the disputed land rests mainly on documentary exhibit. Although I have quoted them earlier in this judgment, it is not inimical to refer to them briefly thus:

(1) Exhibit 'A' - the Will of the Testator Frederick Ephraim Williams executed in 1918 wherein 1st appellant was named as a ben-

eficiary of a portion of the estate owned by the Testator.

(2) Exhibit 'B' the Deed of Conveyance by which the owners of the land conveyed to the Testator the totality of the land purchased from the owners named in the said Deed of Conveyance.

(3) Exhibit 'C' - judgment of the High Court of Lagos dated 13th December, 1965. B

(4) Exhibit 'D' - the Deed of Assent wherein 1st appellant was vested with all that piece of land measuring approximately 12.85 acres and being plot 14 in the estate of the Testator situate lying at Iju Railway Station, Iju, Ikeja Division following the partition of the estate by virtue of the High Court dated 29th of May, 1961 in suit No. M/18/61. C

(5) Exhibit 'E' - Purchase Receipt Agreement made between the 1st appellant, Lydia Omoware Thompson (nee Williams) and the 2nd appellant, for the sale of plot 14 owned by the 1st appellant to the 2nd appellant. D

(6) Exhibit 'F' - Survey Plan of the disputed land. (Plot 14)

(7) Exhibit 'G' - Survey Plan of Layout of the disputed land.

(8) Exhibit 'H' - Composite Plan.

The appellant gave evidence that related to the above documents and how they came into existence. This was followed by the evidence of 2nd P.W., the licensed surveyor who tendered exhibits 'F', 'G' and 'H' and that he was commissioned by the 2nd appellant to carry out the survey of the disputed land. The 3rd witness who introduced the 4th, P.W., the Chief Executive of the 2nd appellant, and who purchased the disputed land on behalf of the 2nd appellant. E
F

With regard to the case revealed on the printed record for the respondent, I have earlier in this judgment referred to the evidence given by the respondent in support of his case. It is not in dispute that the evidence of the respondent is to the effect that he was the inheritor of a vast area of land, allegedly founded by his grandfather in 1834. But he had no idea of the extent of the land and he did not tender a survey plan to show the extent of the land. G
H

The question raised in respect of this issue in my view, falls for determination as per paragraph (c) of the principles set out at page 381 of *Ebba v. Ogodo* (supra) by Kayode Eso, JSC. I have already noted that the oral evidence on the printed record in support of the

case for the 2nd appellant is mainly to explain the documentary exhibits accepted by the trial court. Any controversy arising therefrom can be resolved in the course of the consideration of the judgment of the court. In respect of the evidence of the respondent, it is clear that the case of the respondent cannot really be said to be a complete
 B negation of that of the appellants when he failed totally to give substantive evidence to prove the identity of the land he owned as it affects the disputed land. ***I must therefore hold from what I have said above that the Court of Appeal was in a position to have interfered and determined the questions in issue in the appeal***
 C ***before it.***

The next question is whether the order made by the Court of Appeal that the case be heard de novo by another Judge of the High Court of Lagos State was proper in the circumstances.
 D ***On this point, there are certainly wealth of judicial authorities wherein the principles that should guide an Appeal Court when considering whether to order a retrial or not. In the case of Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt. 341) 676 where at pages 712-713 Ogundare, JSC, stated the applicable principles thus: -***
 E

“Where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made.”
 F *Okeowo v. Migliore (1979) 11 SC 138, 201 (per Idigbe, JSC): the court should where the circumstances of the case permit, correct the decision appealed against. Nader v. Customs and Excise (1965) 1 All NLR 33, 37 (per Bairamian, JSC). Where however, a finding depends so much on the credibility or reliability of witnesses an appellate court should order a retrial” - Shell BP v. Cole (1978) 3 SC 183, 194-195 (per Bello, JSC (as he then was); Total v. Nwako (1978) 5 SC 1, 14 where Obaseki, JSC observed:*
 G

“Where it is established before a Court of Appeal that vital issues which depend much on the appraisal and evaluation of the evidence are left undermined, a case for a retrial is made out for such a failure has occasioned a miscarriage of justice, i.e. miscarriage of justice which in this context means (as ably defined by Lord Thankerton in the case of Bibhabati Devi v. Kumar Ramendra Narayan-Roy (1946) AC 508 at page 521 such a departure from the
 H

rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all."

See also Okpiri v. Jonah (1961) All NLR 102, 105 where Sir Ademola, CJF (as he then was) said:

"Throughout his judgment the learned trial Judge avoided^B making specific findings of facts on issues before him, nor did he made attempt to draw inferences from facts before him. I am satisfied from the whole record that he has not taken proper advantage of having seen and heard the witnesses in the case, and in my view,^C this is a proper case to be sent back for a rehearing.

Where the plaintiff has failed totally to prove his case and there is no substantial irregularity apparent on the record or shown to the court, an order of retrial should not be made."

As Coker, JSC put it in Ayoola v. Adebayo (1969) 1 All NLR D 159, 162: *"An order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given another opportunity to re-litigate the same matter and certainly before deciding to make such an order we think that an appellate tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would be a miscarriage of justice... an order for a retrial is not appropriate where it is manifest that the plaintiffs' case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court."*

Returning to the case in hand, it is manifest from what I^F have said above that the appellants who have the burden of establishing their claim had shown by the several documentary exhibits admitted at the trial and the evidence thereon, their rights to the land in dispute. On the other hand, apart^G from the evidence of the respondent that he owned a vast area of land which he inherited from his ancestors, and which allegedly included the land claimed by the appellants, there is no evidence whatsoever to show the identity, extent and scope of the land of the respondent. It is manifest from the printed record that during his evidence at the trial, he alluded to a survey plan J061A/76 and a composite plan J030/86, which he claimed that he had commissioned a licensed surveyor to prepare for him. Though the case at trial was adjourned for^H

him to produce these documents, yet he failed to make them available to the court before the trial was concluded with the delivery of the judgment of the trial Judge.

The respondent, though only a defendant has no burden to prove anything as required of the appellants who were the plaintiffs at the trial, yet where as in this case he is alleging that he is the owner of a vast area of land allegedly in the same area as the land in dispute, then he ought to establish the identity of the land by a survey plan of the land he is claiming. See A. W. Elias v. Alhaji B. A. Suleiman (1974) NMLR 193; (1973) 1 All NLR (Pt. 2) 282; (1973) 12 SC 113. Now, though there is no law or practice which established that a plan is a sine qua non to identify land being claimed, yet there must be some clear description to make a disputed land ascertainable. The acid test on the sufficiency of such proof is whether a surveyor taking the record of proceedings, can produce a plan showing accurately the land to which title has been given. See Ate Kwadzo v. Kwasi Adjei (1944) 10WACA 274; Arabe v. Asanlu (1980) 5-7 SC 78; Okedare v. Adebara (1994) 6 NWLR (Pt. 349) 157. In the case in hand, the evidence on record given by the respondent at page 141 of the printed records reads: -

"I do not know the acreage of the land of Olarokon family all I can say is that it is a large track of land."

Having regard to the observation made above with regard to the acid test required in such circumstances, it is my considered view that a licensed surveyor cannot be expected to draw a plan of the respondent's land upon such evidence as above. It follows that I must hold that the respondent did not prove the identity of the land that he is claiming as his in this action.

Apart from the failure of the respondent to prove the identity of the land he is contending as his own, it is also necessary to consider whether he properly pleaded in his statement of defence how the land devolved on him from his ancestors. Moreso, as the court below had in passage of its judgment quoted earlier, observed that the 'learned trial Judge failed to make specific findings of facts upon the ample evidence produced at the trial by both parties. True enough, the respon-

dent gave some evidence at the trial with regard to how he inherited the disputed land from his ancestors. But the question is, whether by his pleadings in his statement of defence, it can be said that he can properly give such evidence in support of his case that he became the owner by inheritance from his ancestors. It is in this context that reference must be made to paragraph 7 of the respondent's statement of defence, where the respondent pleaded thus:

"The defendant avers that his great grandfather Olarokun who migrated from Iga-Iloti in Otta, settled on this land very many years, cultivated and superintended (sic) the land throughout his life time without let or hindrance until his death when he left him surviving to the estate his five children: Osholesi, Agbaosi, Adejiyan, Aiyelabi and Onumi, who inherited the vast area of land by Yoruba native law and custom. They cultivated managed and superintended (sic) the land without any hindrance from any source whatsoever until they all died leaving the land to their children who inherited same."

It is no doubt a settled principle of our law that parties are bound by their pleadings. It is also the duty of counsel to object to inadmissible evidence, but if despite this, evidence is still, through an oversight or otherwise admitted, then it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted. The court must also not admit evidence which is contrary to the pleadings of the party who adduced such evidence. And where such evidence escapes the scrutiny of the courts below, then an appellate court seised of the case must reject such evidence and decide the case of the appeal on legal evidence. See James v. Mid-Motors (Nig.) Co. Ltd. (1978) 11-12 SC 31; Alade v. Olukade (1976) 2 SC 183; National Investment and Properties Ltd. v. Thompson Organisation Ltd. & Ors. (1969) 1 NMLR 99 at p. 104; Emegokwue v. Okadigbo (1973) 4 SC 113.

Having regard to the principles set out above, the question then is whether the evidence the respondent gave with regard to how the land devolved upon him from his ancestors could be considered as legal evidence to determine the case.

Paragraph 7 of respondent's statement of defence, which showed the averments of the respondent on this point, has been set

out above. I have also reviewed the evidence of the respondent wherein the respondent stated inter alia that the land was founded by his great grandfather in 1834 and went on to relate how the land devolved on him through one Abudu Orowolo who he described as his own father.

B A careful perusal of paragraph 7 of the respondent's statement of claim referred to above show that the evidence given by the respondent was not pleaded. That is apart from the fact that the averments made in the said paragraph did not trace how the property devolved on the respondent as claimed. C The effect then of this defective pleading having regard to the settled principles that evidence at variance with the pleading is that the evidence of the respondent in relation to how the property devolved on him must be rejected. In my humble view, D if the court below considered the evidence of the respondent in this light, it would have concluded that the evidence of the respondent is not legal evidence for the purpose of deciding the case.

E From what I have said above, the conclusion that must be reached is that at the trial, the respondent did not make out a case to challenge the claim of the appellants. This is because he failed entirely to prove the identity of the land, which he is claiming as against that of the appellants, nor did F he lead legal evidence in support of how he became seised of the land. It is therefore my view that it would not be proper and indeed it will amount to allowing the respondent to have a most undeserving second chance to reconstruct his case with a better defence. The justice of this case demands that an order G of retrial was not proper in the circumstances. The court below having allowed the appeal, the proper order should have been one upholding in its entirety claims of the appellants. I will therefore hold that the court below fell into error in ordering that the case be re-heard de novo. The justice of his H case demands that an order of retrial was not proper in the circumstances. I will therefore hold that the court below fell into error in ordering that the case be re-heard de novo. In the result, issues (1) and (2) are resolved in favour of the appellants.

On issue 3, it seems clear from the argument set out in the brief of the respondent that the thrust of the contention of learned counsel for the respondent is that the 1st appellant cannot be granted title to the disputed land as she failed to lead evidence to prove how the vendors in exhibit B became seized of the disputed land. It is also argued that as the 1st appellant had passed her title to the 2nd appellant more than five years before the commencement of the action, the 1st appellant cannot be granted her claim to the title of the land. And as there is no claim for declaratory title to the land in favour of the 2nd appellant, such a grant cannot also be made in favour of the 2nd appellant. In support of her contention, two cases were specifically cited. They are Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745 at pages 753-754 and Bamgboye v. Olusoga (1996) 4 NWLR (Pt. 444) 520. These two cases would be examined briefly if only to show whether they are distinguishable from the instant case as argued by learned counsel for the appellants. In Ogunleye v. Oni (supra) the appellant as plaintiff in the High Court of Oyo State, took out a writ claiming the sum of N25,000.00 from the defendant/respondent for the act of trespass on a piece of land at Osu by the defendant. The appellant based his claim on two premises, to wit, native law and custom and on statutory Certificate of Occupancy granted him by the Governor of Oyo State on the 27th day of June, 1983. The defendant/respondent in his pleading resisted the appellant's claim. And pleaded inter alia, that the land belonged to him as he had inherited it following the death of his father on November 15, 1947. At the conclusion of the trial, the learned Judge upheld the claims of the plaintiff/appellant. The defendant/respondent appealed successfully to the Court of Appeal. The plaintiff/appellant then appealed to this court and lost. In the judgment delivered by this court in that case per Belgore, JSC he quoted with approval the following passage from the judgment of Ogundare, JCA (as he then was) at pp. 768-769. It reads: -

“What was required to be resolved, said he, was not who had a better grant but who had a better title. The plaintiff it was held, had failed to establish a better title than that of the defendant, the main burden that rested on him as complainant. The judgment of this court by Fatayi-Williams, JSC (as he then was) in Amakor v. Obiefuna (1974) 1 All NLR (Pt.1) at page 128 saying:

Generally speaking as a claim of trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he has exclusive possession, of the land in dispute. But once a defendant claims to be the owner of the land in dispute, title to it is put in issue, and, in order to succeed, the plaintiff must show a better title than that of the
 B *defendant was relied upon by the Court of Appeal."*

In Bamgboye v. Olusoga's case (supra) the appellant commenced action for a declaration of title on a piece of land. He also claimed for trespass in the alternative. The appellant's case was that
 C he purchased the land in dispute from Ajao family whose ancestor, Ajetola Ajao, had earlier purchased same land from the Alago-Asalu family. A deed of conveyance was executed in favour of Ojetola Ajao. Appellant claimed that he went into possession in 1955 and in 1957 fenced the land in dispute and farmed thereon. The land was con-
 D veyed to him in 1957. In 1974, he granted permission to Mr. Onitiri to erect a mechanic workshop there. Mr. Onitiri was on the land until 1976 when the respondent came on the land, destroyed Onitiri 's structures thereon and appellant's fence.

The case of the respondent was that the land belonged origi-
 E nally to the Otemniya family and was sold to the respondent by the family in 1976. As trial Judge found that the appellant did not prove due execution of the Deed of Conveyance from Alayo Asalu family to Ojetola Ajao, the appellant's title to the land in dispute was not
 F established. He appealed unsuccessfully to the Court of Appeal. But on further appeal to this court, he succeeded in part. This court per Belgore, JSC, who delivered the leading judgment, upheld the claim of the appellant that he was in possession of the disputed land at least since 1955.

G But in rejecting his claim for declaratory title to the land held at pages 530-531 of his judgment said thus:-

"...the plaintiff must first prove his case as to title. However, whenever title is claimed through a grant or inheritance there must be clear traditional history of how the family or community came on
 H *the land and this must be done through clear pleadings and evidence in support of genealogy as continuous exclusive possession. Without this stating just simply that a grant is from a family without more may not be enough Alade v. Awo (1975) 4 SC 215; Piaro v. Tenalo and Ors. (1976) 12 SC 21, 41."*

Though learned counsel for the appellants has asked that the above cases are distinguishable from the instant appeal, yet he has not in his brief suggested what factors distinguished them. But what is manifest in the two cases whose facts and the decisions of this court I have reviewed above have in my view a bearing upon the case on appeal. But it is my view that the two cases serve to emphasize that where two parties are contending for a piece of land, the court have the duty to determine the party that has established a better title to the land. B

From the argument of learned counsel for the respondent, it seems clear that it is conceded that the 1st appellant's claim for a declaration as the owner of the statutory right of occupancy to the disputed land rests mainly on the documentary exhibits. These are exhibits 'A', 'B', 'C', 'D', 'F', 'G', 'H' that were admitted at the trial. Hence the submission that the 1st appellant must go further to prove how the original party who made the grant came to be in possession of the property. C D

Earlier in this judgment, I have made reference to exhibit 'B', the deed of conveyance dated 10/3/11 with which the entire land of which the disputed land forms a part, was conveyed to the testator, late Mr. Frederick Ephraim Williams and father of the 1st appellant. It is also in evidence that a Deed of Assent was made on the 5th day of July, 1977 between the Public Trustee Lagos State as the trustee of the estate of Frederick Ephraim Williams of the one part and Mrs. (hereinafter called "The Trustee") by which the property in dispute was conveyed to the 1st appellant. This Deed of Assent dated 5th day of July, 1977 pursuant to an order of the High Court dated 29th day of May, 1961 in suit No. M/18/61 where it was ordered that the said property be apportioned amongst the beneficiaries. Thus the 1st appellant was vested as the owner of the disputed property described as plot No. 14 in the estate of the testator at Iju Railway Station, Iju, Ikeja Division in Lagos State. E F G

Now it is settled law that the production of documents of title is one of the five recognised ways by which a plaintiff may prove ownership of land. See Idundun v. Okumagba (1976) 1 NMLR 200. Such documents of title must be duly authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circum- H

stances giving rise to the presumption in favour of due execution in the case of documents 20 years old or more at the date of contract.

As the above statement on the proof of ownership of land is more fully set out in s. 130 (formerly s. 129), Cap. 90, Laws of Nigeria Evidence Act, the provisions of said section will be set out hereunder: -

“Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of the National Assembly, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.”

The applicability of the above provisions appeared unsettled until the case of John Kobina Seys Johnson & Ors. v. Irene Ayinke Lawanson & Anor (1971) 1 All NLR 56, Coker, JSC delivering the judgment of this court held at page 67, thus:-

“We hold therefore that a deed to be competent for the presumption contemplated by section 129 of the Evidence Act must be 20 years old “at the date of the contract” and not 20 years old at the date of the proceedings at which such a deed is being offered in evidence.”

Turning to the case in hand, it is manifest that exhibit B was executed on the 10th day of March, 1913. It is also clear that the property in dispute was apportioned to the 1st appellant by the Order of court dated 29th day of May, 1961 and the Deed of Assent, exhibit was executed on the 5th day of July, 1977. It is evident that either of the two dates referred to above could be the dates of the contract which vested the 1st appellant with the ownership of the disputed land. This is because, on the 29th of May, 1961, the Order of court for partitioning the property of the testator was made. The Deed of Assent made on 5th July, 1977 between the Lagos State Public Trustee and the 1st appellant being the contract, which vested the 1st appellant with the disputed property. Now, exhibit B, the Deed of conveyance which was executed in 1913 is certainly more than 20 years old at the date of the contract.

It follows that the presumption contemplated by section 130 (formerly s.129) of the Evidence Act is applicable to exhibit B. And as the respondent did not in any way challenge in rebuttal of the recitals in exhibit B, I must hold that the 1st appellant proved that her father, Mr. Frederick Ephraim Williams was the owner in fee simple free from encumbrances of the total land he bought from his vendors. I also hold that the 1st appellant is also the owner in fee simple free from encumbrances of that portion of it that was apportioned to the 2nd appellant.

With regard to the question about whether exhibit 'B' was duly authenticated, the answer to that lies in s.123 of the Evidence Act which reads:

"Where any document, purporting or proved to be twenty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested." See *Cardoso v. Daniel* (1986) 2 NWLR (Pt. 20) 1 at page 20.

Earlier in this judgment reference was made to the sale of the disputed land by the 1st appellant to the 2nd appellant. The Purchase Receipt Agreement, exhibit E made on the 22nd day of January, 1978 was executed between the two parties. With that agreement, the 2nd appellant entered into possession on the disputed land. In exercising his right of possession, the 4th PW., the Managing Director of the 2nd appellant commissioned the Surveyor, PW.2 to survey the land. Having regard of the sale to the 2nd appellant and the consequent possession of the disputed land as being clearly made out in the printed record, the 2nd appellant therefore acquired an equitable interest in the property capable of being converted to a legal estate by specific performance. See *Ogubambi v. Abowaba* (1951) 13 WACA 222 at 224; *Owoshe v. Idowu* (1959) SCNLR 529; *Fakoya v. St. Paul's Church, Sagamu* (1966) 1 All NLR

74; Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1; Tewogbade v. Obadina (1994) 4 NWLR (Pt. 338) 326 at 356.

The next question that must be considered is whether it was established that the appellants had exclusive possession of the disputed land. In the course of his judgment, the learned trial Judge reviewed the evidence as it affected the appellants thus: -

"In the plaintiffs case Frederick Williams died in 1918 appointing 2 executors and trustees of his last will and testament. The 2 trustees did not agree between themselves and after a protracted litigation in suit No. P21/1918 the court made an order on the 11.3.47 to transfer this estate to the Public Trustees a period of almost 29 years. In 1961 the Public Trustees by an Order of court in suit No. M/18/61 was made to partition the estate among the beneficiaries. See Order of 29.5.61. This is another period of 14 years of which no evidence as to possession and use. The plaintiff only visit (sic) the land in dispute only once or twice in 1933 and he had recognised the present (sic) of a village on the land when she first visited this land although under re-examined (sic) she called the people she found there as caretaker and found hurts (sic) built on the land and she said nothing more. Can this be called exclusive possession."

But in the review of the evidence above, the learned trial Judge failed to include the evidence of the 2nd PW, the licensed surveyor who deposed thus:-

"I know the 2nd plaintiff in this case. Sometimes in 1981 the Managing Director 2nd plaintiff gave me an instruction to re-establish some beacons of parcel of land which he gave an existing survey plan attached to a Deed of conveyance. The Managing Director also instructed me to prepare the survey plan of the parcel land which has been re-established in the name of the 2nd plaintiff's co. I carried out his instruction. I produced a survey plan to that effect. This is the survey plan I prepared on the instruction of the Managing Director of the 2nd plaintiff's co in the 2nd plaintiff's co name survey plan identified I AM exhibit "F" Mr. Ajibola no objection. In 1982, I was also instructed by the Managing Director of the 2nd plaintiff to divide the parcel of land into building plots which I carried out and prepared survey plan. This is the plan I put up in accordance with the instructions of the Managing Director of the 2nd plaintiff in 1982, tendered, admitted and marked exhibit 'G', Mr. Ajibola no objection. Some-

time in 1984 the Managing Director of the 2nd plaintiff also informed me of the dispute arising over the parcel of land which I surveyed for the plaintiff and instructed to prepare a composite plan of the land in dispute having given me some Deeds of... ”

And under cross-examination at page 51 he said:

“On the 1st occasion in 1981, I saw no one on the land. I did not see anything on the parcel of land now in dispute. There was a road motorable near the site but not very motorable. I do not know who made the road. There are some scattered crops, palmtrees not really nucle (sic). No building on the land in 1981.”

As a claim of trespass to land is rooted in exclusive possession, all a plaintiff need to prove is that he has exclusive possession. See Amakor v. Obiefuna (supra). **The question that must now be considered is what could amount to exclusive possession to enable a plaintiff claim in trespass to land against a defendant.** This is best illustrated by reference to some decided cases. In Murana Ajadi v. Madam Dorcas Olanrewaju (1969) All NLR 374 at 381, this court per Fatayi Williams, JSC (as he then was) quoted with approval the dictum of Lord Guest in Wuta-Ofei v. Mavel Danquah (1961) WLR 1238 (PC at p. 1243) which reads:-

“Their Lordships do not consider that in order to establish possession it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient.”

And then went on to give reasons for holding that the plaintiff/respondent in Murana v. Madam Dorcas (supra) was in possession of the disputed land thus:-

“In the instant case, quite apart from the question of whether Lajide (2nd d/w) was the plaintiff/respondent’s caretaker or not, there is the evidence as to the location of the disputed land and the testimony of the plaintiff/respondent that she was not disturbed on the land until 1962 when she herself discovered the three survey pillars

inside it. The totality of these pieces of evidence, to our mind, is indicative of possession of the disputed land by the plaintiff/respondent at the material time. Since the defendant/appellant who had no title to it had himself admitted being on the land with a surveyor, apparently without the authority of the plaintiff/respondent, the learned Acting Chief Justice was in order in finding him liable in trespass and also in making the order of injunction."

Flowing from the authoritative pronouncements of this court referred to above, it is not in doubt that in order to found exclusive possession of land in favour of a plaintiff, this court is not bound by any particular mode of exercising the right to be in possession or to show that a plaintiff had been in exclusive possession of the disputed land. This is because each case must be considered upon its own facts.

In the instant case, there is evidence that the 1st appellant went on the land as soon as plot 14 was apportioned to her. As part of her exercise by her to the possession of the land, she directed her nephew, the 3rd P.W. to source for a buyer for the land. The unchallenged evidence of this witness was that there was no one on the land when he went on the land on behalf of the 1st appellant. The 3rd P.W. also took the 4th P.W. to the land and that witness went on the land and satisfied himself that the land was vacant. Following his investigation, he duly purchased the land from the 1st appellant for the 2nd appellant. After the land was purchased by the 4th appellant, he as was given in evidence, which remained unchallenged, instructed the 2nd P.W., the licensed surveyor to survey the land. Here again his evidence was that he went on the land from as far back as 1981 and found no one on the disputed land. The survey plan of the disputed land, which was admitted as exhibit 'F' also remained as the unchallenged evidence of the identity of the land, claimed by the appellants. In response to all the pieces of evidence led on behalf of the appellants, the totality of evidence given by the respondent and which have been reviewed already, is that he became the inheritor of a vast area of land, the extent of which he did not know. And he did not assist his case by giving a coherent description of where this vast area of land is situate and lying. Moreover, he did not tender a survey plan for which he was granted adjournments by the trial court.

In the instant appeal as I have said earlier, the claim of

the 1st appellant as pleaded in paragraph 14(a) of the statement of claim is for a declaration that she is the owner of a statutory right of occupancy to that piece or parcel of land lying and situate at Iju Railway Station, Iju “known and referred to as plot No. 14 in the estate of Fredrick Ephraim Williams.” In order to prove this claim, she pleaded the Deed of Conveyance, exhibit ‘B’, with which the entire land including her own plot 14 was conveyed to her late father and testator, Fredrick Ephraim Williams by the following people, Dada Agunwa, woodcarver, Ige Egun Oniye, farmer and Osiyomi Balogun, farmer.

In my humble view, the argument of the learned counsel for the respondent is misconceived that the 1st appellant could not be entitled to a declaration of title. This is because as argued above, the 1st appellant had only sold an equitable interest in the property to the 2nd appellant. The 1st appellant is still the owner of the legal estate in the property. Having regard to what I have said above, I am of the clear view that issue 3 must be resolved in favour of the appellants to the extent that they have succeeded in establishing exclusive possession to the disputed land. In the result, this appeal succeeds in its entirety and it is allowed accordingly.

The 1st appellant is granted the relief sought in paragraph 14(a) of the statement of claim. The 2nd appellant having succeeded with regard to the claim in paragraph 14(b) of the statement of claim is hereby awarded damages in the sum of N25, 000.00. With regard to 14(c) of the statement of claim, an order of perpetual injunction is hereby made against the respondent, his agents and privies from entering into the disputed land, that is plot No. 14 lying and situate at Iju Railway Station in the Ikeja Division, Lagos State.

The judgment and orders of the court below are hereby set aside including the order that the case be remitted to the High Court of Lagos for retrial. The appeal having succeeded, they are entitled to their costs which I hereby fix as follows: N1,000.00 costs of trial in the High Court and N10,000.00 costs of this appeal. The order made by Court of Appeal for N1,500.00 as costs is also affirmed.

BELGORE JSC

I also allow this appeal for the well set out reasons in the lead judgment of my learned brother, Ejiwunmi, JSC. I make the same order as to costs.

B

OGUNDARE JSC

The plaintiffs (who are appellants before us) by a writ of summons issued on 10/6/83, sued the defendant (now respondent) claiming, as per paragraph 14 of their statement of claim:

C “(a) In favour of the 1st plaintiff a declaration that the plaintiff is the owner of a statutory right of occupancy to that piece or parcel of land lying and situate at Iju Railway Station, Iju in the Ikeja Division of Lagos State known and referred to as plot No. 14 in the estate of D Fredrick Ephraim Williams which land is more particularly marked and delineated on a survey plan drawn by one E. A. Ogunbiyi, Esq. a licensed Surveyor, and annexed to a registered conveyance No. 75 at page 75 in volume 1638 in the Lands Registry in the office at Lagos.

E (b) In favour of the 2nd plaintiff the sum of N50,000.00 (Fifty thousand Naira) being damages for trespass when the defendant by himself and by his agents, servants and workmen and privies went on the said land and removed the 2nd plaintiffs’ beacons, divided F the land into plots sold and continue to sell to various persons who have erected buildings on the said land.

(c) Order of perpetual injunction restraining the defendant his servants and/or agents and privies from entering upon or interfering any further with the land the subject matter of the suit.”

G In their statement of claim filed along with the writ of summons they pleaded as follows:

H “1. The 1st plaintiff is the daughter of one Fredrick Ephraim Williams who died testate at Palm Church Street, Lagos on the 12 day of November, 1918 and probate of his Will was granted to the two Executors and Trustees named in his Will.

2. The 2nd plaintiff is a private Limited liability company incorporated under the Laws of Nigeria and having offices at No.3 Tonode Street, Ikeja, Lagos State.

3. The defendant is the head and represents the Olarokun

Family of Orile, Agege.

4. *The said Fredrick Ephraim Williams (deceased) owned tracts of farm lands along Iju Railways Station, Iju and this formed part of his estate when he died in 1918.*

5. *Under and by virtue of the Supreme Court Order dated 11th day of March, 1947 in suit No. P.21/1918.* B

6. *The Trustees of the said Fredrick Ephraim Williams were released from administering the estate and the task was transferred to the Public Trustee appointed for that purpose.*

7. *By an Order of Court dated the 29th day of May, 1961 made in suit No. M/18/61 (after protracted litigation between the Public Trustee and the beneficiaries of the Will of the said Fredrick Ephraim Williams) the High Court at Lagos ordered that the property of Fredrick Ephraim Williams (deceased) be apportioned or partitioned amongst the beneficiaries.* C D

8. *Pursuant to the said Order of the High Court and the ensuing apportionment made thereunder a piece of landed property known as plot No. 14 part of the estate of Fredrick Ephraim Williams (deceased) situate at Iju Railway Station, Iju in the Ikeja Division of Lagos State was apportioned to the 1st plaintiff.* E

9. *Under and by virtue of a Deed of Assent dated the 5th day of July, 1977 and registered as No. 75 at page 75 in volume 1638 of the Lands Registry in the office at Lagos the Public Trustee as the Legal Personal Representative of Fredrick Ephraim Williams (deceased) vested in the 1st plaintiff all that piece or parcel of farm land measuring approximately 12.85 acres (being the said plot No. 14 in the estate of Fredrick Ephraim Williams (deceased) situate lying and being at Iju Railway Station in the Ikeja Division of Lagos State in fee simple in possession free from all encumbrances.* F G

10. *The late Fredrick Ephraim Williams was throughout his life in uninterrupted possession and ownership of the farmland of which the land the subject matter of this suit formed a part and so were the trustees of his estate including the Public Trustee appointed under the Order of Court.* H

11. *By a Purchase Receipt and Agreement made on 22nd day of January, 1978 the 1st plaintiff transferred her interest in the said plot No. 14 of the estate of Fredrick Ephraim Williams at Iju Railway Station, Iju to the 2nd plaintiffs (Kosemani Enterprises Limited) in*

consideration of the sum of N44,000.00.

12. The 2nd plaintiffs were thereupon immediately put in possession.

13. The defendant and/or his agents on or around went on the said plot No. 14 at Iju Railway Station and committed various acts of trespass on the land by removing the beacons erected by the 2nd plaintiffs' Surveyor, divided the land into plots, have sold and continued 10 sell to various persons who have been erecting buildings on the said land."

In his statement of defence, the defendant pleaded:

"4. The defendant avers that his family i.e. the Olarokun family of Orile Agege is the owner of a parcel of land stretching from Iretu stream in Orile Agege to Abule Egba and Oko-Oba with the Lagos/Abeokuta Railway line as their boundary with Ibari family of Otta.

5. The defendant avers that he has always been on his family land as head of family and not on any other person's land.

6. The defendant avers that he does not know the plaintiffs' land talk less of going on their land. And that the plaintiffs have not filed any plan in this case to show their land in relation to the defendant's land.

7. The defendant avers that his great grandfather Olarokun who migrated from Iga-Iloti in Otta, settled on this land very many years, cultivated and superintended the land throughout his life time without let or hindrance until his death when he left him surviving to the estate his five children: Osholesi, Agbaosi, Adejiyan, Aiyelabi and Onumi, who inherited the vast area of land by Yoruba native law and custom. They cultivated, managed and superintended the land without any hindrance from any source whatsoever until they all died leaving the land to their children who inherited same.

8. The defendant avers that the Olarokun family land is bounded on the four sides by Akinlabi family land of Orile Agege, Ikudoro and Ibari family land on Iju station, Obawole and Iyanru families on other sides.

9. The defendant avers that his family never sold or leased any portion of his land to the first or second plaintiffs; and the alleged vendors of the plaintiffs are no members of Olarokun family."

In an amended reply to the statement of defence, the plaintiffs

averred thus:

“3. In particular denial of the averments contained in paragraphs 2-8, 10 and 11 of the statement of defence the plaintiffs state that the land, the subject matter of this suit, originally belonged to Dada Agunwa, Ige Egun Oniye and Oriyomi Balogun who conveyed same to one Frederick Ephraim Williams the father of the 1st plaintiff in this suit by a Deed of Conveyance and the said Deed of Conveyance together with the attached plan will be relied upon at the trial of this suit.

4. The plaintiff will inter alia further rely at the trial of this suit and in proof of their claims in this suit upon a composite plan No. JO 21/85 dated 21st June, 1985 drawn by one J. Olushola Ogunsanya, Esq., licensed surveyor showing inter alia, the extent of the plaintiffs’ land, the area originally conveyed to the 1st plaintiffs said predecessor in title and also the area now being trespassed upon by the defendant.

5. The 2nd plaintiffs further in answer to the averments of the defendants in paragraphs 12 & 13, state that soon after their purchase of the portion of the 1st plaintiffs land, the subject of this suit, they were put in possession of the land and have thereon been in the said possession until the intervention and trespass of the defendants the subject of this claim.”

The case proceeded to trial on the plaintiffs’ statement of claim, the defendant’s statement of defence and the plaintiffs’ amended reply to the statement of defence. The attempt by the defendant to amend his statement of defence and raise a counter-claim failed as the application for that purpose was refused by the trial court. There was no appeal against the refusal.

At the trial, the parties called evidence in support of their respective case. In a reserved judgment, after addresses by learned counsel for the parties, the learned trial Judge dismissed plaintiffs claims. He amended the capacity in which the defendant was sued and ruled that:

“On the question of suing in representative capacity paragraph 3 of the statement of claim described the defendant as the head of Olaoroku family. Likewise paragraph 3 of the defendant’s statement of defence described this defendant as one of the four attorneys evidence adduced in this court show that the defendant was the head of

Olaoroku family and this has never been faulted. I am of the view that that defendant in this suit is defending this action in a representative capacity and I do agree with the' learned counsel for the defendant that the case of *Ayeni v. Sowemimo* (1982) 5 SC page 60 at page 100 was lightly cited in support of this application. The suit shall now read *Lydia Thompson and Anor. v. Chief Jimoh Arowolo* defending the suit on behalf of himself and the Olaoroku family. Accordingly I so rule."

The learned Judge made a specific finding of fact in relation to the identity of the land in dispute. He found:

"The land in dispute is only one parcel of land measuring 12.95 acres and which is very well known to the parties. The plaintiffs say the land is situated and lying at Iju whilst the defendant says the land is situated and lying at Oko-Oba. In my view the identity of the land in dispute is clear and unambiguous irrespective of how it was described by each of the parties. The surveyor also made the identity of the land clear."

He adjudged thus:

"From the evidence which I have received and the above cases cited by both counsel and the legal authorities referred to by me, I find it difficult to accede to the request of the 1st plaintiff her prayer under paragraph 14(a) of the statement of claim dated 10.6.83 is hereby refused for reasons stated above in the like manner prayers 14(b) and (c) cannot also be sustained in the light of the evidence before this court and it is also hereby refused."

The plaintiffs were displeased with the judgment of the trial High Court and appealed to the Court of Appeal. That court, per Kalgo JCA, as he then was, after considering the arguments of learned counsel for the parties and the record of appeal, observed:

"But in his (learned trial Judge's) review of (the) and assessment of the evidence presented by the parties, the learned trial Judge concentrated only on possession. He did not seem to evaluate or consider properly or at all, the effect of the appellants' documents consisting of conveyances, survey plan and composite plan admitted at the trial, in respect of the land in dispute. Although the learned trial Judge quite properly stated in his judgment the burden placed on a plaintiff seeking declaration of title to land, he failed to consider the relevant evidence presented by the appellants in this case in proof of

the declaration. It has long been established by the Supreme Court on the celebrated case of D. O. Idundun & Ors. v. Daniel Okumagba & Ors. (1976) 9-10 SC 227 at Pp. 246-250 that there are five ways of proving title to land. These are:

1. *By traditional evidence (Adedibu v. Adewoyin 13 WACA 191);* B
2. *By production of a document of grant or title Johnson v. Lawanson (1971) 1 All NLR 56;*
3. *By proving acts of possession and ownership extending over a sufficient length of time and are numerous and positive enough to warrant the inference that the plaintiff is an exclusive owner Ekpo v. Ita (1932) 11 NLR 68;* C
4. *By proving acts of long possession and enjoyment of the land; but this only raises a presumption of ownership Da Costa v. Ikomi (1968) 1 All NLR 394 at p.398;* D
5. *By proof of possession of connected or adjacent land in circumstances which make it probable that the owner of such adjacent or connected land is probably the owner of the land in dispute. Okechukwu v. Okafor (1961) 1 All NLR 685."*

It is now well settled that each of the five ways of proving title to land enunciated above, is independent of the other. See E
Ogbuokwelu v. Umeanafunkwa (1994) 4 NWLR (Pt. 341) 676 at 692; Nwosu v. Udejaja (1990) 1 NWLR (Pt. 125) 188 at 218.

The learned trial Judge, by his findings on page 210-212 of the record, appeared to lay on the appellants the burden of proving F
'exclusive possession' of the land in dispute before they could succeed. He found in the end that they have not proved exclusive position (sic) and he said on p. 210 of the record that -

*'The evidence as to possession of land in dispute as coming G
from the defendant in my view is stronger than that of the plaintiff.'*

It appears to me that this finding would be perverse in the circumstances of this case, where the appellants have produced documents in support of their title to the land in dispute. It is therefore, incumbent upon the learned trial Judge to consider the effect of those documents in the light of the whole evidence before him. This, he did not do, and instead, he insisted that the appellants must prove exclusive possession in addition to the documents they have produced. This obviously contradicts the settled principles enunciated by H

the Supreme Court in the Okumagba case (supra) and other later case. The learned trial Judge himself said that the case of the appellants was based on documents and that of the respondents, on traditional history. So, it is clearly wrong in law for him, under the circumstances to insist upon the appellant to prove, in addition to their documents, evidence of exclusive possession. This will take it out of the settled principles of law laid down on declaration of title and place on the appellants a higher standard of proof than their case truly demands.”

The learned Justice of the Court of Appeal who wrote the lead judgment with which Akanbi, P. and Coomassie, JCA agreed, further observed that -

“But the facts and circumstances of this case are such that in my respectful view, this court cannot proceed to decide the case on the evidence before the trial court. It is also my considered view, that if the parties are given the opportunity to re-litigate on the matter, none of them will be wronged or prejudiced and no miscarriage of justice will be occasioned thereby. See Ayoola v. Adebayo (1969) 11 All NLR 159 at 162.”

On the strength of the above observations, the court below allowed the appeal of the plaintiffs, set aside the judgment of the trial court and ordered a retrial of the matter before another Judge of the High Court of Lagos State.

The plaintiffs being still dissatisfied with the order of retrial, have further appealed to this court upon 5 grounds of appeal. The defendant did not appeal; he was obviously satisfied with the order of retrial made by the Court of Appeal.

Pursuant to the rules of this court, the parties filed and exchanged their respective written briefs of argument. The plaintiffs, in addition, filed a reply brief. In their appellants’ brief, the plaintiffs have formulated 3 issues as calling for determination in this appeal, to wit:

“1. Whether the retrial order made in the circumstances of this case was right.

2. Whether the Court of Appeal was in a good position to determine the case on the evidence on record.

3. Whether the plaintiffs proved their case.”

The defendant in his respondent’s brief adopted the above 3

issues. As the three issues dovetail into one another, I shall, however, consider them together.

The case of each party is as pleaded in their respective pleadings. Plaintiffs' claim to title to the land in dispute is based primarily on documents, that is, (1) the Deed of Conveyance exh. B, executed in March, 1911 between Dada Agunwa, Ige Egun and Oriyomi Balogun on the one hand as vendors and Frederick Ephraim Williams, the father of the 1st plaintiff, as purchaser; (2) the Will of Frederick Ephraim Williams, exhibit A, made in July, 1917; Williams died in 1918, (3) Order of the High Court of Lagos made on 13th December, 1965 in suit No. Mil 8/6 1, exhibit C and Deed of Assent, exhibit, dated 5th July, 1977 by which the Public Trustee vested the land in dispute in the 1st plaintiff. In January, 1978, the 1st plaintiff sold the land to the 2nd plaintiff and issued a purchase receipt, exhibit as evidence of the sale; no Deed of Conveyance was, however, executed by 1st plaintiff in favour of the 2nd plaintiff. D

The defendant's case is based primarily on traditional evidence of the settlement on a vast area of land by his great grandfather Olaroku and devolution from Olaroku to him. It is his case that the land in dispute is part of the land his great grandfather settled on and which devolved on Olaroku family. E

The observation of Kalgo, JCA on the failure of the learned trial Judge to consider the 1st plaintiffs claim to title was well taken. I agree with that observation. None of the parties in this appeal is questioning the correctness of the observation. What the plaintiffs are quarrelling with in this appeal is the second observation of the learned Justice of the Court of Appeal, his rationale for ordering a retrial. It is the submission of learned counsel for the plaintiffs that as their case was based essentially on documents of title, the Court of Appeal was in a good position to determine the issue who of the 1st plaintiff and the defendant proved a better title to the land. This is more so, learned counsel argued, that the defendant failed to prove the extent of the land his ancestor settled upon. It is submitted that in the circumstances of this case, the order of retrial would occasion a miscarriage of justice to the plaintiffs. F G H

For the defendant, his learned counsel submitted that the discretion as to whether or not to order a retrial was that of the court below which this court would not interfere with, even if this court

would have exercised the discretion differently unless it could be shown that the exercise of discretion was manifestly wrong, arbitrary, reckless, injurious or contrary to justice. It is counsel's submission that the exercise of discretion to order a retrial in this case was not manifestly wrong, arbitrary, reckless, injurious or contrary to justice. Rather, B learned counsel argued, the discretion was exercised after a due consideration of the facts of the case and the circumstances thereof and the possible injury to either party. It is further submitted that as the trial Judge in this case failed to evaluate and make findings of fact on C the totality of the documentary evidence presented by the plaintiffs and the traditional evidence presented by the defendant, the Court of Appeal properly exercised its discretion in ordering a retrial, more so as it could not make findings and come to a decision on all the relevant issues joined on the pleadings, based, as it were, on credibility D of witnesses.

I have considered the arguments of learned counsel for the parties. I once had cause to state the law relating to when an order of retrial may be made. In *Ogbuokwelu & Ors. v. Umeanafunkwa & Anor.* (1994) 4 NWLR (Pt. 341) 676, at Pp. 712-713, I did say:

E "Where an appellate court is in a position, after considering the evidence, to do complete justice between the parties an order for a new trial should not be made - *Okeowo v. Migliore* (1979) 11 SC 138, 201 the court should where the circumstances of the case permit, correct the decision appealed against - *Nader v. Customs and Excise* (1965) 1 All NLR 33, 37 (per Bairamian, JSC). Where however, a finding depends so much on the credibility or reliability of witnesses an appellate court should order a retrial - *Shell BP v. Cole* (1978) 3 SC, 183, 194-195 (per Bello, JSC (as he then was); *Total v. G Nwako* (1978) 5 SC 1, 14.... Where the plaintiff has failed totally to prove his case and there is no substantial irregularity apparent on the record or shown to the court, an order of retrial should not be made."

And in *Ayoola v. Adebayo* (1969) ANLR 154 at p. 157, Coker, JSC delivering the judgment of this court said:

H "An order for re-trial inevitably implies that one of the parties, usually the plaintiff, is being given another opportunity to re-litigate the same matter and certainly before deciding to make such an order we think that an appellate tribunal should satisfy itself that the other party is not thereby being wronged to such an extent that there would

be a miscarriage of justice. We do not propose, as the matter had not been fully argued before us, to lay down any hard and fast rule as to the circumstances that would justify the exercise of the power to order a retrial but we must and do point out that an order for a retrial is not appropriate where it is manifest that the plaintiffs' case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court." B

I have earlier observed that 1st plaintiffs' case to title to the land in dispute is based on production of documents of title. I do not see any difficulty the court below would have in appraising the documentary evidence on record to decide whether or not 1st plaintiff's title was proved. No question of credibility of witnesses is involved in such an exercise. C

The defendant, on the other hand, based his case on the traditional history of his great grand father's settlement on a large tract of land, of which the land in dispute forms a part. It may be said that such a case raises the question of credibility of witnesses and that, therefore, an appellate court who had not seen the witnesses testify, would not be in a position to appraise such evidence and ascribe credit. In such a case, an order of retrial would be desirable. D E

Defendant's case, however, suffers from two fundamental vices which will make it inequitable to grant him an order of retrial. First, the defendant failed to prove the identity of the land his ancestor settled upon and part of which was the land in dispute. In his evidence in chief, he deposed: F

"My father land starts from the stream of EREFU Orile Agege and strenthens to Oko Origbenge now known as Oko Oba. My boundarymen are from Erefu Akinlabi family little after that there is Ikudoro family going further there is the Ibari family very near the Railway line along Ifako. Going further there is Oba Wole family near Ojokoro there is Iyanru family coming back from there along Abeokuta Lagos road we get IROLO ILARI Opa family after Ilari Opa family we will get to Ekoro and then to Odo Erefu. We took off from Erefu." G

He went on to say: H

"I am a trader and I am an illiterate. I do not know exactly how many acres in the land but I know it is a large area of land."

He commissioned a surveyor (PW2) to survey the land and prepare a plan of it showing its boundaries. Strangely, however, he

did not produce the plan in evidence nor the composite plan he commissioned the surveyor to make for him.

I am not unaware of the finding of the learned trial Judge on the identity of the land in dispute. The learned trial Judge had asked the question: is the identity of the land in dispute known to both sides
B on the ground? He answered:

*“The land in dispute is only one parcel of land measuring 12.95 acres and which is very well known to the parties. The plaintiffs say the land is situated and lying at Iju whilst the defendant says the land
C is situated and lying at Oko Oba. In my view the identity of the land in dispute is clear and unambiguous irrespective of how it was described by each of the parties. The surveyor also made the identity of the land clear.”*

But the defendant’s case is not confined to the land in dispute
D of 12.95 acres but a vast area of land of which the land 1st plaintiff claims title to is but a small portion. If one does not know the identity of the vast land defendant’s ancestor settled upon, how can one say that the land in dispute is part of it? This is a question the learned trial Judge did not advert his mind to. And it is a question that cannot be
E answered on the evidence proffered by the defendant. For the defendant to establish a better title to the land in dispute he must be able to prove the identity of the vast land he claimed his ancestor settled upon and must go on from there to prove that the land in
F dispute is part of that land. That he has failed to do in this case.

Secondly, the defendant pleaded the traditional history he relied on for his claim to title. I have set out earlier in this judgment paragraph 7 of his statement of defence. It is contended by learned Senior Advocate for the plaintiffs that the averments in paragraph 7
G are insufficient to prove title by traditional evidence. Learned counsel for the defendant concedes it that paragraph 7 of the statement of defence was not sufficient pleading of traditional history.

I agree with both learned counsel. If Olarokun settled on the land and, on his death, his five sons named in paragraph 7 succeeded him, how did the land devolve on the defendant and his
H Olarokun family? There is no averment in the statement of defence to link the present generation of Olarokun family whom the defendant represents to the Olarokun that founded the land. This lacuna is a very serious defect in defendant’s case. Defendant has therefore,

failed to prove that he has better title than the 1st plaintiff to the land in dispute. It is within the province of the court below to make this finding on the evidence on record which does not raise any issue of credibility of witnesses. In the circumstance, I must hold that it is improper to order a retrial. The court below ought to have determined the case before it. Consequently, I resolve issues (1) and (2) against the respondent. On the question whether the plaintiffs proved their case on the evidence on record, I must point out that it is well settled that title to land can be proved in one or more of five ways - see *Idundun v. Okumagba* (1976) 9-10 SC 227 where this court laid down the five ways. They are:

1. By traditional evidence;
2. By production of documents of title which are duly authenticated;
3. By acts of selling, leasing, renting out all or part of the land or farming on it or on a portion of it;
4. By acts of long possession and enjoyment of the land; and
5. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

It is obvious on the plaintiffs' pleadings and evidence that the 1st plaintiffs relied on the second method above in sustaining her claim to title to the land in dispute.

In the face of exhibits B and D, it cannot be denied that she succeeded in establishing her title to the land. And by exhibits F and H, the plan of the land in dispute and composite plan, she established the identity of the land she is claiming. It has been argued, however, that as she failed to plead and testify how her father's predecessors in title came to own the land she could not be said to have traced her title to the original owner of the land and therefore, has failed to prove her claim to title. *Bamgboye v. Olusoga* (1996) 4 NWLR (Pt.444) 520 is cited in support.

True enough, it is settled law that where in a claim for declaration of title to interest in land a party bases its title on a grant according to custom by a particular person, family or community, that party must go further to plead and prove the origin of the title of that particular person, family or community unless that title has been ad-

mitted. Consequently, mere production of a deed of grant as being equivalent to proof of title when the root of title of the grantor was neither admitted nor established, is not sufficient - see: Bamgboye v. Olusoga (supra); Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745; Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 610; Piaro v. Tenalo (1976) 12 SC 31. 1st plaintiff claims by virtue of exhibit B, the Deed of Conveyance made in favour of her father. That deed was executed on 10th March, 1911 and it contains recitals to the effect-

"Whereas the vendors are seised in the (fee?) simple in possession free from encumbrances of the hereditaments hereinafter expressed to be hereby conveyed and whereas since the year 1897 the purchasers (sic) has from time to time made and given many and several valuable gifts and presents to the vendors with hispect (sic) to his occupation and line of the said hired dimensions and whereas the vendors have agreed with Where any document, purporting or proved to be twenty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such the purchasers (sic) for the sate who (sic) him of the said hereditaments for the sum of Fifteen pounds sterling in addition to the hereinbefore recited gitst (sic) and presents."

There is a presumption of the truth of the recitals in exhibit B, judging by its age and the time this dispute arose which is well over 20 years. Section 130 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 provides:

"130. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of the National Assembly, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."

This presumption enures to the benefit of the 1st plaintiff and the onus is on the defendant to prove the contrary of the facts contained in the recitals in exhibit B. See: Williams v. Akinwunmi (1966) ANLR 115; Maurice Goualin Ltd. & Anor. v. Wahabi Atanda Antinu Privy Council Appeal No. 17 of 1957 decided on 24th July, 1958; Johnson v. Lawanson (1971) ANLR 56, 58; Owode v. Omitola (1988) 2 NWLR (Pt. 77) 413. He set up an inconclusive traditional

history in his pleadings. In his evidence, he testified:

“I do not know Dada Agunwa Ige Egun Aaiye Oriyomi and Balogun.

I will be surprised that Dada Agunwa (ii) Ige Egun Aaiye Oriyomi and Balogun were the boundary men of Frederick Williams and that they all joined in the conveyance of the land in dispute to Frederick Williams in 1911.” B

This piece of evidence cannot, in my respectful view, be sufficient to discharge the onus on the defendant to rebut the presumption of truth of the facts recited in exhibit B. C

The due authentication of Exhibit B as required in *Idundun v. Okumagba* is taken care of by section 123 of the Evidence Act which provides:

“123. Where any document which purports to be in the handwriting of any particular person is in that person’s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.” D

There is yet another angle to exhibit B. In it, the vendors, Dada Agunwa, Ige Egun Oniye and Oriyomi Balogun conveyed the fee simple estate to the purchaser Frederick Ephraim Williams (1st plaintiff’s father). In *Ocean Estates Ltd. v. Pinder* (1969) 2 AC 19, where the root of title of a plaintiff was traced to a conveyance in fee simple of the land in dispute, the Privy Council granted him title as against the defendant who made no attempt to prove any documentary title in himself, or in any third party, by which authority he was in occupation of the land. *Ocean Estates Ltd.* was referred to with approval by this court, per Aniagolu, JSC, in *Sanyaolu v. Coker* (1983) 1 SCNLR 168; (1983) ANLR 157. E F G

From all I have been saying above, it would appear that *Bamgboye v. Olusoga* (supra) does not apply to the facts of the present case.

It is also submitted on behalf of the defendant that on the pleadings and evidence, the 1st plaintiff, having sold the land in dispute to the 2nd plaintiff, would not be entitled to a declaration of title. It is noted that 2nd plaintiff is not claiming such a declaration. I find no merit in this submission. It is true 1st plaintiff claimed that she sold the land to the 2nd plaintiff but the legal title is still in her as she H

did not convey her title to the 2nd plaintiff but only gave the latter a purchase receipt to evidence payment of the purchase price and putting them in possession. All that the 2nd plaintiff acquired is the equitable title to the land. On the coming into operation of the Land Use Act, the 1st plaintiff would be deemed to be the holder of a statutory right of occupancy in respect of the land. It is this she would need to assign to the 2nd plaintiff with the Governor's consent. On the facts and circumstances of this case, I hold that 1st plaintiff is not precluded from claiming title to the land - See: *Sanyaolu v. Coker* (supra).

From all I have said above, I hold that on the evidence on record claim (a) succeeds and the 1st plaintiff is entitled to the declaration sought.

On claim (b) for damages for trespass, there is evidence -
 (1) that the land was uncultivated;
 (2) that the land was surveyed in 1911 and beacon pillars erected;

(3) that Frederick Ephraim Williams occupied it until his death in 1918;

(4) that 1st plaintiff was visiting the land from time to time and caused a surveyor (PW2) to survey it for her;

(5) that 2nd plaintiff was put in possession after the sale of the land to it;

(6) that 2nd plaintiff through its managing director instructed PW2 to re-establish some beacons on the land and to lay the land out into building plots; PW2 carried out these instructions;

(7) that the defendant went on the land in a manner inconsistent with 2nd plaintiffs possession of it.

All these facts, in my respectful view, are sufficient to sustain 2nd plaintiffs claim for damages for trespass - see: *Ajadi v. Olarewaju* (1969) 1 All NLR 382; *Ocean Estates Ltd. v. Pinder* (supra). Moreover, as the 2nd plaintiff proved better title to the land in dispute as against the defendant who failed in his bid to prove title, it is entitled to succeed in trespass - see: *Amakor v. Obiefuna* (1974) 3 SC 67.

Consequently I enter judgment for the 2nd plaintiff for damages for trespass and award N25,000.00 damages in its favour. On the facts of this case both 1st and 2nd plaintiffs are entitled to an injunction to protect their rights to the land. I, therefore, award to

the 1st and 2nd plaintiffs an injunction against the defendant in the terms as claimed.

In conclusion for the reasons given herein I agree with my learned brother Ejiwunmi, JSC that this appeal succeeds and it is hereby allowed by me. I set aside the order of retrial made by the court below and enter judgment for the plaintiffs as hereinbefore contained. I award to the plaintiffs N1,000.00 costs of the trial in the High Court and N10,000.00 costs of this appeal. I affirm the order for N1,500.00 costs made by the court below in respect of the appeal in the Court of Appeal.

ONU JSC

I have been privileged to read before now the judgment of my learned brother Ejiwunmi, JSC just delivered. I am in entire agreement with him that this appeal must perforce succeed. In expatiation thereof, I wish to add the following words of mine by first arguing issues ONE and TWO together and then issue THREE separately last.

Issues one and two

The court below on appeal before it from the trial court observed (per Kalgo, JCA, as he then was) inter alia as follows: Firstly,

“The appellants have clearly established the identity of the land in dispute by oral evidence and the survey plan exhibit F which was unchallenged...”

Secondly,

“The learned trial Judge by his findings on pages 210, 212 of the record, appeared to lay on the appellants the burden of proving “exclusive possession” of the land in dispute before they could succeed. He found in the end that they had not proved exclusive position (sic) and he said on page 210 of the record that “The evidence as to possession of the land in dispute as coming from the defendant in my view is stronger than that of the plaintiffs.”

From the above findings, it would appear clear to me that these findings of the court below wherein it held concerning the trial court to the effect that:

“He made no clear findings on the traditional evidence pre-

sented to him by the respondents in accordance with settled principles of law nor did he make any efforts to assess or evaluate the value of the documentary evidence produced at the trial court by the appellants. By this he had failed to appraise and evaluate the evidence before him leaving very vital issues undetermined which this court in my view, cannot properly consider and decide.”

meant that the learned trial Judge failed to consider the documentary evidence produced by the appellants namely, the Will of Frederick Ephraim Williams dated 13th July, 1917 (exhibit A), Deed of Conveyance dated 10th March, 1911 (exhibit B), Order of Court dated 13th December, 1965 (exhibit C), Deed of Assent dated 5th July, 1977 (exhibit D), Purchase Receipt (exhibit E), Composite Plans (exhibits F and G) and Layout Plan (exhibit H).

The respondent who was the defendant, in his statement of defence pleaded traditional history and plan No. JO61A/76 to claim ownership of a vast land including the land in dispute. It is worth remarking that the respondent failed to tender in evidence plan No. JO.61A/76 mentioned above despite several adjournments granted him to produce it. Further, the respondent declined - indeed failed to put Plan No. JO.61A/76 to 2nd PW. (J.O. Ogunsanya) who as surveyor, testified before the trial court, that he made the plan for the appellants and to whose credit he re-established the beacons of the plan attached to exhibit B, a 1911 Deed of Conveyance on the ground and depicted same as exhibits F, G and H. I am therefore of the firm view that the failure of the respondent to tender in evidence plan No. JO.16A/76 coupled with his failure to cross-examine 2nd PW. (J.O. Ogunsanya), the surveyor who prepared same, he has failed to prove the identity to the vast land he is claiming. Indeed, the respondent's failure to tender any plan at all to identify the vast land he alleged belongs to his family, is fatal to his case. In a situation arising such as in the instant case, the Court of Appeal was in a good position to evaluate the documentary evidence the plaintiffs appellants had placed before the trial court coupled with the unchallenged evidence of the 2nd PW as well as to hold that the appellants proved a better title than the respondent to the land in dispute moreso, that he (respondent) had failed to prove the identity of the vast land including the land in dispute. See *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132); *Amokomowo v. Andu* (1985) 1 NWLR (Pt. 3) 530; (1985) 5

SC 28 at 44; *A. R. Mogaji i & Ors. v. Madam Rabiatu Odofin & Ors.* (1978) 4 SC 91 at 94 and *Chief Victor Woluchem & Ors. v. Chief S. Gudi & Ors.* (1981) 5 SC 291 at 633-634.

The respondent had sought adjournment to call a surveyor at page 144 of the record, which was granted at page 145 thereof. Similarly, at page 199 the respondent sought an adjournment to tender a plan. The plan was never tendered. The appellants as plaintiffs in this case relied on documents supported by acts of possession to establish ownership of the land in dispute. See *Idundun v. Okumagba* (1976) 1 NMLR 200; (1976) 9 -10 SC 227; *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 137 at 155.

The appellants' surveyor (2nd PW), J. O. Ogunsanya, testified to the effect that he re-established the beacons of the 1911 conveyance (exhibit B) on the ground, which he showed in exhibits F, G and H and was not challenged. The discovery of these beacons in 1978 could establish ownership of land since it is trite law that survey beacons constitute an act of possession, which could be relied on to prove title to land. See *Ajadi v. Olanrewaju* (1969) 1 All NLR 382 at 389. In *Okeowo v. Migliore* (1979) 11 SC 138 at 201, it was held that where an appellate court is in a position after considering the evidence to do complete justice between the parties, an order for a new trial should not be made; rather the court should, where the circumstances of the case permit, correct the decision appealed against. See also *NBN Ltd. v. P. B. Olatunde & Co. Ltd.* (1994) 3 NWLR (Pt. 334) 512 and *Ogbuokwelu v. Umeanafunkwa* (1994) 4 NWLR (Pt. 341) 676.

In the instant case, since the respondent failed to prove the identity of the vast land including the land in dispute, he would now have an opportunity to repair his case for ownership, which would otherwise have been rejected at the earlier trial. In those circumstances, I hold the view that the order for retrial made by the court below would occasion a miscarriage of justice to the appellants. Thus, in *Ogbuokwelu v. Umeanafunkwa* (supra) this court, following its earlier decision in *Ayoola v. Adebayo* (1969) 1 All NLR 159 at 162, held that in deciding to order a retrial, the Court of Appeal should satisfy itself the other party is not thereby wronged to such an extent that there would be a miscarriage of justice.

The respondent has contended in his brief of argument that the appellants cannot be said to have proved their case because they

(appellants) did not go further to prove how the vendors in exhibit B (a 1911 Deed of Conveyance) became seized of the land, relying on the two cases of Ogunleye v. Oni (1990) 2 NWLR (pt. 135) at 753-754 and Bamgboye v. Olusoga (1996) 4 NWLR (Pt. 444) 520. A careful reading of the facts of the two cases cited above clearly shows B that they are distinguishable from the facts of the instant appeal. Thus, what the learned trial Judge said that:

“*The evidence as to possession coming from the defendant in my view is stronger than that of the plaintiffs*” is perverse in the face C of the overwhelming documentary evidence the appellants relied on, to wit: exhibits A, C, D, E, F, and G. On the basis of these documents and the unchallenged evidence of 2nd PW. (J. O. Ogunsanya) to the effect that he established the beacons of 1911 Deed of Conveyance on the ground, the appellants proved title or better right of posses- D sion to the land in dispute. Furthermore, the defence of the respondent that he owned the land in dispute collapsed when he failed to prove the identity of the land in dispute. He did not even call a boundary man. Rather, the evidence forthcoming from him which was amorphous and inconclusive, was to the effect that:

E “*My father was a farmer. I am a trader and I am an illiterate. I do not know exactly how many acres in the land but I know it is a large area of land and I know the plan No. off head. Plan No. JO.61A/1976. I know that the land belong (sic) to my father’s family as a whole.*” F

In the instant appeal, the appellants by their documentary exhibits proved possession to the land in dispute.

Accordingly, I resolve issues one and two in favour of the appellants.

G Issue three

This issue queries whether the appellants proved their case. I am satisfied with the appellants’ contention that they proved their ownership of the land in dispute by virtue of the documentary evidence they tendered at the trial, vide exhibits A, C, D, E, F, G and H coupled with the unchallenged evidence of the surveyor (2nd PW), J. O. Ogunsanya. The facts in the cases of Ogunleye v. Oni (supra) and Bamgboye v. Olusoga (supra) being distinguishable from the facts in the instant case, do not, in my view, avail the respondent.

In Nwosu v. Udeaja (1990) 1 NWLR (Pt. 125) 188 at 218, a

case whose facts are similar to those in the instant case, however, Nnaemeka-Agu, JSC said:

“For in the case of Idundun v. Okumagba (1976) 9 - 10 SC 227 at pages 246 - 250 this court made it clear that there are five ways of proving title... (Each of the five ways) above will suffice independent of the others to prove title. So in a case like this in which the appellants’ case was based on ownership by grant, it is a misdirection to insist additionally that we had also to prove acts of ownership extending over a long time and positive enough to warrant the inference that he was an exclusive owner.”

1st appellant claimed by virtue of exhibit B, the deed executed in 1911 containing recitals in favour of her father. There is a presumption of the truth of these recitals judging by its age, which is well over 20 years at the time the dispute arose. See section 130 of Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. While the presumption ensures to the 1st appellant’s benefit, the onus is on the respondent to prove the contrary of the facts contained in the said recitals. See Johnson v. Lawanson (1971) ANLR 58 and Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413. As the respondent was unable to call a surveyor and failed to tender a plan of the vast land he pleaded at the trial, the traditional history he relied upon in proof of his case failed. Thus, when he testified to the effect that:

“I do not know Dada Agunwa IgeEgun Aaiye Oriyomi and Balogun. I will be surprised that Dada Agunwa (ii) Ige Egun Aiye Oriyomi and Balogun were boundary men of Frederick Williams and that they all joined in the conveyance of the land in dispute to Frederick Williams in 1911” this piece of evidence cannot, in my opinion, be sufficient to discharge the onus on him to rebut the presumption of the truth of the facts recited in exhibit B.

As in the instant case the 1st appellant pleaded and testified to the effect that she sold the land in dispute to the 2nd appellant after acquiring same from her father (Fredrick Ephraim Williams) and the respondent made no attempt to prove any documentary title in himself or in any third party, only the equitable title to the land resided in her after she sold it to the 2nd Appellant by giving only a receipt to him for the sale, she was not precluded from claiming title to the land as she did. And as 1st Appellant having at the sale of the land put the 2nd appellant in possession, the latter through its managing director

was right, in my opinion, to layout plots by instructing PW2 to do so. Besides, as the 2nd appellant proved a better title to the land in dispute vis-à-vis the respondent, who could not, it was entitled to succeed in trespass. See *Amakor v. Obiefuna* (1974) 3 SC 67. Moreover, both 1st and 2nd appellants were, in my firm view, entitled to an injunction in the terms claimed to protect their rights to the land. See *Eunice Okolo v. Uzoka* (1978) 4 SC 77.

For the above reasons and those more elaborately set out in the leading judgment of my learned brother Ejiwunmi, JSC, too allow the appeal of both appellants. I make similar consequential orders inclusive of those as to costs contained therein.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, JSC and I am in full agreement that there is substance in this appeal and that the same ought to be allowed. It is for the reasons that he has set out in his said judgment, and with which I fully agree that I, too, allow this appeal. I set aside the order of retrial made by the court below and hereby enter judgment for the plaintiffs as decreed in the leading judgment. I abide by the order as to costs made in the leading judgment. Appeal allowed.

F

G

H