

**SUPREME COURT OF NIGERIA**  
FRIDAY 11TH APRIL, 2003. SC. 108/1998  
**CORAM:- M. L. UWAISS CJN, M. E. OGUNDARE,**  
**A. I. IGU, A. I. KATSINA-ALU, D. MUSDAPHER, JJSC**

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|---|-------------------|
| 1. CHIEF IGBOAMA EZEKWESILI   |                   |
| 2. PETER NWORA  | ..... APPELLANTS  |
| 3. DENNIS AZI & 10 Ors.   |                   |
| (For themselves and on behalf of members<br>of Abo Amawa Community in Ogbunike) |                   |
| AND   |                   |
| 1. CHIEF BENIAH AGBAPUONWU  |                   |
| 2. ONYEAMA IGWEAGU  | ..... RESPONDENTS |
| 3. JACOB OKAKPU   |                   |
| (For themselves and on behalf of<br>members of Azu Village of Ogbunike)         |                   |

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LAND LAW - Possession - Trespass - Plaintiff cannot maintain action both for trespass and recovery of possession of a piece of land - As both claims are contradictory and mutually divergent (H1)

APPEALS - Basis - Appeal that does not relate to the decision of court on issues arising from pleadings - Will be unrelated to facts of the case - And thus degenerate to academic exercise (H2)

LAND LAW - Title - Grant - Power of court to grant title to land is discretionary - And should be exercised with responsibility - As judicial pronouncements ought not to be made - Unless there are basis for making it (H3)

LAND LAW - Title - Traditional history - Weight - Where found to be cogent and accepted by trial court - It can support a declaration for title to land (H4)

LAND LAW - Appeal - Traditional history - Concurrent findings - The trial Judge rightly tested evidence of history pleaded by parties - By considering recent acts of possession - And CA also rightly affirmed the findings made (H5)

APPEALS - Judgment - Issue - Basis - Judgment was given for respondents on the basis of acceptance of their traditional history - And not on the issues as canvassed by appellants (H6)

LAND LAW - Title - Traditional history - Identity of land - The trial Judge accepted the identity as shown in exhibits 13 & 15 - And rightly found that respondents have proved by traditional history - Their entitlement to the land in dispute (H7)

LAND LAW - Title - Traditional history - Where in an action for declaration or claim for injunction - Plaintiff established title by such history - Onus is on defendant to show that his own possession can oust that of the owner (H8)

LAND LAW - Trespass - Equity - Appellants by their acts of trespass could not acquire legitimate possession - To entitle them to equitable defences of laches and acquiescence (H9)

LAND LAW - Title - Possession - Proof - Where there is dispute as to which of the parties is in possession - The presumption is that party having title is in lawful possession (H10)

LAND LAW - Possession - Conflicting claim - There cannot be concurrent possession by two parties claiming adversely - As one must be in lawful possession - And the other a trespasser (H11)

### ***FACTS***

Before the High Court of Anambra State, plaintiffs/respondents acting in a representative capacity claimed against defendants/appellants also in representative capacity, the following reliefs inter alia, declaration of title to and possession of the land in dispute, damages for trespass and perpetual injunction restraining appellants from further trespass on the land. Pleadings were filed and exchanged between the parties in the matter. Appellants gave evidence of traditional history to prove that they are owners in possession of the land in dispute. Appellants stated that respondents had watched them (appellants) build on the land without bringing up any action. Hence,

appellants raised the defences of laches and acquiescence for failure of respondents to bring the action on time.

Respondents on the other hand, claimed to also be the owners in possession of the same piece of land. They tendered several exhibits including exhibits 13 and 15 to show the area covered by the land in dispute. Respondents equally adduced evidence of traditional history to show entitlement to the land. At the end of hearing, the court preferred the traditional evidence of respondents to that of appellants. It held that respondents had properly described the area covered by the disputed land. The court further held that respondents did not lose any time in bringing the action and that the equitable defences cannot avail appellants in the circumstance. Judgment was therefore entered for respondents. Dissatisfied, appellants lodged appeal in the Court of Appeal, Enugu Division. The court dismissed the appeal and affirmed the judgment of the High Court. Aggrieved further, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal was right in upholding the decision of the trial court that the joinder of claim for recovery of possession and claim for damages for trespass was in order when the law is trite that the joinder of the two claims is contradictory and thus void.*

*2. Whether the court below has not misconceived the issue of admission, section 46 Evidence Act, and undue probative value to exhibits 1 - 12 put forward by the appellants and by default or erroneously affirmed the trial court’s determination of the location and boundaries of the land in dispute to the prejudice of the appellants.*

*3. Whether in failing to consider and determine the issues of laches and acquiescence put forward by the appellants, the Court of Appeal had not acted in breach of fair hearing to the detriment and prejudice of the appellants. Alternatively, is the defence of laches and acquiescence not available to the appellants having regard to the evidence before the trial court?”*

**HELD** (Unanimously dismissing the appeal per  
**MUSDAPHER JSC**)

*LAND LAW - Possession - Trespass*

**1. Now, there is no dispute and it is common sense that a claim for recovery of land cannot be joined with a claim for damages for trespass on the same land. A claim in trespass to land is rooted and or based on exclusive possession or right to possession, thus trespass is always against the person not in possession. A plaintiff cannot therefore maintain an action both for trespass to a particular piece of land and recovery of possession of the same land as both claims are contradictory, inconsistent and mutually divergent, one being based on the fact of the plaintiffs' possession and the other on the fact that the plaintiff is out of possession and then claiming recovery of possession.**

**The appellants' counsel has made heavy weather of the importation of the word "possession" under paragraph 20 of the further amended statement of claim of the respondents. In my view, the respondents did not claim recovery of possession of any portion of the land against the appellants. They proceeded all along on the basis that they were in physical and actual exclusive possession when the appellants forcibly broke and entered into their land. A trespasser does not acquire possession of land by his act of trespass. (p. 1044 D)**

*APPEALS - Basis*

**2. An appeal against the judgment of a court is tantamount to saying that having regard to the pleadings of the parties, to issues arising from the pleadings, to the evidence led, to the findings of fact made, and to the applicable law, the court was wrong in its determination. An appeal that ignores all these will be wholly unrelated to the facts of the case and will thus degenerate into a useless academic exercise. In the instant case neither the High Court nor the Court of Appeal ordered recovery of possession of any land to or in favour of the plaintiffs. Even if the respondents claimed recovery of possession of the land which was demonstrated to be incorrect, a court will normally discountenance the claim rather than strike out the entire claims. (p. 1045 D)**

*LAND LAW - Title - Grant*

**3. In the instant case both the trial court and the Court of Appeal had meticulously appraised all the evidence led and came to the inevitable conclusion that the respondents had proved their claims. It must be remembered, however, that the power of the court to grant a declaration of title to land being discretionary, should be exercised with proper sense of responsibility and a full realization that judicial pronouncements ought not to be made unless there are circumstances that call for its making. (p. 1046 F)**

*LAND LAW - Title - Traditional history - Weight*

**4. In my view, both the trial court and the Court of Appeal found for the respondents on the grounds of traditional history and where traditional history is found to be cogent and accepted by the trial court, it can support a declaration for title to land. (p. 1046 H)**

*Appeal - Traditional history - Concurrent findings*

**5. In the instant case, there is conflict between the traditional history of ownership of the land pleaded and led by both the appellants and the respondents. The learned trial Judge tested the evidence of traditional history claimed by each of the parties by the consideration of the recent acts of possession relied by the parties. The learned trial Judge thereafter came to prefer the evidence led by the respondents as more probable.**

**I have carefully considered the submission both in the written brief of the appellants and in oral argument and I have come to the conclusion that I cannot in any way fault the approach or the conclusion of the learned trial Judge in the way he resolved the issue of the traditional history. I am of the view that the court below was also correct in affirming the findings and fact made by the learned trial Judge. I have not been persuaded by the appellants' counsel to disturb the concurrent findings of fact of the two courts below. (p. 1047 A)**

*Judgment - Issue - Basis*

**6. The learned counsel for the appellants appeared to have**

**worked on the misapprehension that every slip by a court raises an issue. It must, however be borne in mind that an issue in an appeal must be a proposition of law or fact so cogent, weighty and compelling that a decision on it in favour of the party to the appeal will entitle him to the judgment of the appellate court. The fundamental issue is that both courts found in favour of the respondents by their acceptance of the traditional history led by the respondents. It was only on that basis that judgment was given and not on the issues the appellants herein are complaining about, the issue of section 46 of the Evidence Act, the suits filed by or against the respondents, the non registration of the grant of the land for the building of the Post Office all are irrelevant. (p. 1048 A)**

**LAND LAW - Title - Traditional history - Identity of land**  
**7. The question of the proof of identity of the land as has been demonstrated above, shows that the learned trial Judge properly appraised the evidence which included the admission of the appellants, that the parties knew the land in dispute and in any event, the learned trial Judge accepted the identity of the land as shown in exhibits 13 and 15 made by the parties. The learned trial Judge found that the respondents have proved by traditional evidence their entitlement to the land in dispute. The appellants' traditional history was rejected, that in my view knocks the bottom out of the appellants' case. I accordingly resolve the second issue in favour of the respondents. (p. 1048 D)**

**LAND LAW - Title - Traditional history**  
**8. It is settled law, that where in action for declaration of title to land and or a claim for injunction, the plaintiff has been able to establish his title by traditional history, the onus is on the defendant to show that his own possession can oust that of the owner and that by applying equitable rules the court would refuse declaration or injunction in favour of the owner. (p. 1049 H)**

*Trespass - Equity*

**9. In the instant case, the respondents have pleaded repeatedly that they were in possession of the entire land at all times, when the appellants broke and entered the land. The appellants by their acts of trespass could not acquire legitimate possession to entitle them to an equitable defence.**

**The learned trial Judge as mentioned above, after due consideration of the case of each party came to the conclusion that the appellants cannot avail themselves of the defences of laches, acquiescence and standing by. In my view, such a conclusion is correct. Now, it is submitted that the Court of Appeal did not make a determination on this issue when the appellants raised the question in Issue 6 submitted to that court.**

**In my view the lower court had properly considered the availability of the defences of laches, acquiescence and standing by in its judgment and came to the decision that the appellants were not entitled to it.**

**It was evident that the appellants broke and entered the respondents' land. In my view, the defences of laches, acquiescence and standing-by cannot avail the appellants in the circumstances of this case.** (p. 1050 B/E/1051 A)

*LAND LAW - Title - Possession - Proof*

**10. It is settled law that possession of land resides in the claimant who establishes a better title. Where there is dispute as to which of the two parties is in possession the presumption is that the party having title is in lawful possession.** (p. 1050 C)

*LAND LAW - Possession - Conflicting claim*

**11. If I may add, in an action such as this one, where the claims of each party disclose that each one is claiming to be in lawful possession of the land in dispute, the law is that there cannot be concurrent possession by two parties claiming adversely. One must be in lawful possession and the other a trespasser. In any event, the trial Judge and the court below determined the appellants to be trespassers since there cannot be adverse concurrent lawful possession of the same piece of land.** (p. 1050 G)

**REPRESENTATION**

Tochukwu Onwugbufor, SAN with Eke E. Orji, Esq., M. O. Onwugbufor, Esq., Ike Ugwoke, Esq., F. Gambari Mohammed [Mrs]),  
for the Appellants

B. C. Ogbuli, Esq. with J.E.O. Ogbuli, Esq., for the Respondents

B

**CASES REFERRED TO**

Woluchem v. Gudi (1981) 5 SC 291

Ibeziako v. Nwagbogu (1972) 1 All NLR (pt. 2) 200

C Oniah v. Onyia (1989) 1 NWLR (pt. 99) 514

Aromire v. Awoyemi (1972) ANLR 101

Akinterinwa v. Oladunjoye (2000) 6 NWLR (pt. 659) 92

Ayinla v. Sijuwola (1984) 1 SCNLR 410

Alli v. Alesinloye (2000) 6 NWLR (pt. 660) 177

D Abe v. Akaajime (1989) 4 NWLR (pt. 113) 95

Archibong v. Ita (1954) 14 WACA 520

Ibeneweka v. Egbuna (1964) 1 WLR 219

Alade v. Awo (1975) 4 SC 215

Olujebo of Ijebu v. Osho the Eleda of Eda (1972) 5 SC 143

E Onwugbufor v. Okoye (1996) 1 NWLR (pt. 424) 252

Okonji v. Njokanma (1991) 7 NWLR (pt. 202) 131

Onyemeh v. Egbuchulam (1996) 5 NWLR (pt. 488) 225

**STATUTE & RULES REFERRED TO**

F

Evidence Act, ss. 46

Anambra State High Court (Civil Procedure) Rules 1988, O. xxxiii r. 6, 7, 8, O. 9 r. 6

G

**LEAD JUDGMENT BY MUSDAPHER JSC**

This is an appeal against the judgment of the Court of Appeal Enugu, delivered on the 20/1/1998 dismissing the appellants' appeal against the judgment of High Court of Anambra State presided over by Amaizu J, (as he then was) on the 27/10/1994. Before the High Court, the respondents herein as the plaintiffs in representative capacity claimed against the defendants, the appellants herein also in representative capacity, the following reliefs:

H

*“(a) Declaration of title to, and possession of the land known and called “OKPUNO AZU” being and situate at Ogbunike town in*

*Anambra Division and shown on Survey Plan No. MEC/66/73 filed by the plaintiffs and thereon verged pink.*

*(b) N600.00 (Six Hundred Naira) or 300 Pounds (Three Hundred Pounds) damages for trespass committed by the defendants on the plaintiffs said Okpuno Azu land.*

*(c) Perpetual injunction restraining the defendants, their servants, agents, successors and assigns from continuing in possession or further trespassing on the said Okpuno Azu land.”*

Pleadings were filed, exchanged and amended and the case went to trial and after its conclusion and in his judgment the trial Judge gave judgment in favour of the plaintiffs and granted all the reliefs sought. The defendants felt dissatisfied with the judgment of the trial court and unsuccessfully appealed to the Court of Appeal, Enugu Division. With the leave of this court granted on the 26/3/2002, the defendants have further appealed to this court upon five grounds of appeal as contained in the amended notice of appeal filed with the aforesaid leave on 19/12/2002.

Before discussing the issues for the determination of the appeal, it is convenient at this stage to state the facts relied on as pleaded by the parties. In order to fully appreciate the case of the parties, the relevant portions of their pleadings would be set down. By the plaintiffs' further amended statement of claim they averred inter alia in paragraphs 3, 11, 12, 15 and 19 as follows:

*“3. The plaintiffs family are, and have been themselves and through their ancestors from time out of mind, owners in possession of a piece of land known as and called “OKPUNO AZU” being and situate at Ogbunike in Anambra Division of the Anambra State. The said “OKPUNO AZU” land is shown verged green on survey plan No. MEC/66/73 filed with this statement of claim.”*

*“11. The plaintiffs' ancestors and after them the plaintiffs family have been in uninterrupted ownership and possession of OKPUNO AZU LAND from time out of mind to the knowledge of the defendants and their ancestors of Aboh Amawa without let or hindrance from them or anyone whatsoever such acts include inter alia reaping economic fruits and cutting timber. Cultivating annual crops, granting portions in customary tenure for building and dwelling purposes to Ukalo people and to Amawa people (defendants) and their ancestors, and to Abatete tenants for farming and taping palm wine, mak-*

ing leases to C.M.S. School Authority and also to Ogbunike Community for siting a Post Office. The relics of ancestral juju shrines vacated by the plaintiffs for post office was registered as an instrument as No. 85 at page 85 in Volume 456 of the Lands Registry in the office at Enugu. Plaintiffs will rely on survey plan No. J01/29 tendered in those proceedings.

12. The plaintiffs' OKPUNO AZU LAND has been the subject of considerable litigation between the plaintiffs family and adjoining neighbours including the defendants.

(i) In the Ogidi Native Court Suit No. 384 of 1927 one Arinze of Azu Ogunike (plaintiffs' family) sited one Okeke and others of Ogidi for trespass on OKPUNO LAND. Judgment was for plaintiffs' family. The defendants and their ancestors knew about this case yet they did nothing. One Igboechieze, one Azodo and one Ikedinma (defendants' people of Amawa) gave evidence for the plaintiffs. The plaintiffs will found on this suit.

(ii) In the Supreme Court Suits Nos. 1 of 1930 and 2 of 1930 consolidated, which were later by order of the full court retried as Suit No.1 of 1930, one David Okoyo for Ogidi people sued one Timothy Ejiofo of Azu Ogbunike for "declaration that the boundary between Nkwelle-Ogidi land and the Ogbunike land is the old Awka-Onitsha Road."

Judgment was for the plaintiffs in that case. On appeal to the West African Court of Appeal, the judgment of the Supreme Court was upheld. The boundary thus made between Nkwelle-Ogidi and the plaintiffs' family forms the Southern limit of the plaintiffs' OKPUNO AZU LAND. While this case was going on the defendants and their ancestors stood by and in fact gave evidence for the plaintiffs' people. The plaintiffs will found on this suit and its appeal judgment and will plead that the defendants are estopped by it from relitigating the extent of plaintiffs OKPUNO AZU LAND. Plaintiffs will rely on survey plan No. J01/29 tendered in those proceedings.

"(iii) In Umuigwedo Native Court Suit No. 126 of 1949 one Nwankwo Otogbolu & Anor sued one Igbonasi Obike over a portion of OKPUNO AZU LAND claiming ejectment. Both sides to the dispute were Uruekwulum Amawa customary tenants of the plaintiffs family who lived on OKPUNO AZU LAND. Judgment was given for the plaintiffs in that case. On appeal to Umuigwedo Appeal Court

one Agbakoba Okwudi, Timothy Ejiofo and three others of the plaintiffs' family gave evidence claiming the portion of land then in dispute as OKPUNO AZULAND. The appeal was allowed plaintiffs' case was dismissed and plaintiffs in that case and Azu people (present plaintiffs) were advised by the court to take out a writ to determine the ownership of the land then in dispute. The judgment of the appeal court was upheld by the A.I. Osakwe Esq. A.D.O. on review of the appeal judgment. On a further appeal to S.P.L. Beaumont, Acting President for Onitsha province the decision of the A.D.O. was upheld.

(iv) Consequently after the decision of S.P.L. Beaumont, one Onyejekwe Epundu and Another (for Azu Ogbunike) sued Nwankwo Otogbolu and 3 others of Amawa (defendants) in Umuigwedo Native Suit No. 76/55 claiming declaration of title to Okpuno Azu land. damages for trespass, and injunction. Judgment was for the plaintiffs in that case. "

The plaintiffs in this case will found on that judgment a plan No. NC 37/55 used and marked exhibit 'A' in the proceedings. In that case the first defendant and three others of Abo Amawa (defendants) gave evidence to the effect that the land belonged to the defendants in that case and not to the plaintiffs. So did Uzochukwu Anikwendu, Onwuama Obodoechina and Mathias Ibeziako of Enugu Amawa (Uru-Ekwulum). The Native Court rejected their evidence and found for the plaintiffs. Some of these witnesses are now dead. It was the contention of the defendants people in that case that Amawa land was contiguous with EKE OLISA or that OBI OGBUNIKE but the Native Court rejected their contention. An appeal to F.P. Cobb Esq. Acting Chief Administrative Officer and a further appeal to O.P. Gunning Esq. C.M.S. Deputy Governor, Eastern Nigeria were dismissed. The plaintiffs will rely on those appeal proceedings the exhibits used therein and the estoppels created by the whole proceedings against the defendants in favour of the plaintiffs.

"15. In or about the year 1962 the said Amawa Council led by one Abodike Azodo and first and second defendants started to allot to 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th defendants portions of the land in dispute at a fee of 10 per allotment for building purposes. The plaintiffs at once protested and chased the said defendants out of the land in dispute. The plaintiffs planted "Omu"

*(palm leaves) on the land in dispute and warned the defendants not to build on the land. The defendants ignored the warning.*

*Next the plaintiffs in 1963 engaged counsel who wrote to the defendants against building on the land. The letter also fell on deaf ears. All along the defendants kept threatening the plaintiffs with injury to their persons if they should interfere with their building operation. All efforts to restrain the defendants including numerous reports to the Police failed until the out break of the Nigeria Civil War in 1967. Nonetheless the plaintiffs planted annual crops on the land in dispute without any interference from the defendants or anyone whatsoever. Since this action was filed in court several houses are being built by defendants' people who are not proceeded against in this action."*

*"19. All lawful means to restrain the defendants from their unlawful acts on the land in dispute, by reports to Ogbunike Progressive Union and "Umuada" (daughters) Union and by self help resorted to by plaintiffs have failed. By a letter dated 26/9/72 and written by the plaintiffs' counsel to the defendants, the plaintiffs' warned the defendants to keep off the land in dispute. The plaintiffs will found on this letter."*

The defendants denied the plaintiffs' claims. They also claimed to be owners in possession. They particularly averred in paragraphs 3, 3(a), 7, 7(i)(ii)(a)-(f), 8(a) - 8(g), 15 and 18 as follows:

*"3 The defendants deny paragraph 3 of the further amended statement of claim and will put the plaintiffs to the strictest proof of the allegations contained therein. In further answer thereto, the defendants state that the land in dispute is part of the defendants' piece of land called OWELLE ABOR which lies within the defendants' village of Abor Amawa.*

*3a. As owners in possession of the said Owelle Abor land from time beyond human memory the defendants and before them their ancestors live on the land in large numbers, farm thereon and cut therefrom such trees as Iroko and Akpalata without let or hindrance from the plaintiffs or anyone whomsoever. The defendants also cut palm fruits from numerous palm trees in the land. The defendants also have their juju shrines standing on the land to date. The defendants in addition to other diverse acts of possession also put seasonal farming tenants on the land in dispute who perform the customary*

*“Thu Ani” as part of their tenancy.”*

*“7. The defendants deny paragraph 7 of the further amended statement of claim and will put the plaintiffs to the strictest proof of the allegations contained therein. Originally the plaintiffs lived between Eze Ogidi and Nkwelle Ogidi villages of Ogidi in their Okpuno. This place extended to “Uzor Mgbadaligo” by Okwuoye shrine which forms a common meeting point of Amawa, Olisa and Azu Ogbunike lands. As a result of frequent fighting and killing of the plaintiffs by their Nkwelle Ogidi neighbours, the defendants were asked by the four remaining villages of Ogbunike to rescue the plaintiffs and accommodate them on their Ubulu land, lest they become extinct like Ezedim and Enugu Ngala of Ogbunike.*

*7i. The defendants went to the rescue of the plaintiffs and brought them out of their Okpuno. The plaintiffs were allowed portions of land on parts of the defendants Ubulu land outside the land in dispute. Parts of this Ubulu land allowed the plaintiffs to live following the difficulties afore-mentioned are verged YELLOW and BROWN (OUTSIDE THE AREA IN DISPUTE VERGED RED) in the defendants’ plan. Tribute was being paid but ceased after the plaintiffs became belligerent and instituted this action. The plaintiffs are now trying to claim ownership of these distinct portions. Ubulu and Owelle Abor lands in dispute are both ancient settlements of the defendants and their Amawa relations. The two lands are adjacent.*

*7ii. The defendants state that the plaintiffs vacated and lost their Okpuno land as stated in paragraph 5(c) and 7(i) above. The plaintiffs have ever since lived on lands such as Ubulu (as opposed to the land in dispute) land at the benevolence of other communities. Not as of right. The plaintiffs have not and do not exercise any act of ownership or possession over the defendants’ Owelle Abor land verged BROWN on the defendants’ survey plan.*

*7a. In suit No. M/93/49 - Native Court of Umu-Igwedo. Nwoye Emeson of Umuezekwe Abor sued one Charles Aroh of Umu-Ezekwe for selling a portion of Eze-Azu land in Owelle-Abor verged YELLOW to Justin Onunkwo of Azu (Plaintiff’s family) and got judgment.*

*7b. In Ogidi Native Court No. 210/30, one Okwuora of Abor Amawa (defendants family) sued Okonkwo Chiaku and others all of plaintiffs’ family for trespass in Owelle Ugbo in Owelle Abor and got*

judgment.

7c. *By agreements which were later written and dated 10th August 1967, and 3rd May, 1959, two members of the plaintiff's family were allowed the use of two portions of the land verged BROWN in the defendant's plan. Another agreement with Catholic Mission over a portion of the land of the defendants will be founded upon. The defendants also found on another agreement dated 28th April, 1966, between Gordian Onumba of plaintiffs, family and Gilbert Okoye of the defendants' family.*

C 7d. *In suit No. 194 of 1917, one Nwosu of defendants' family sued one Onyeaghana of plaintiff's family for recovery of land called Ubulu and got judgment.*

D 7e. *Another agreement in Owelle Abor land between Umu-Onwuadikije of Abor Amawa and Udemezue family of Azu Ogbunike will be founded upon.*

E 7f. *In 1955, the plaintiffs entered on the defendants' land called Eze-Onitsha. The defendants resisted them. The (O.P.U) Ogbunike Progressive Union looked into the matter and to achieve peace asked the defendants to allow plaintiffs some portions of the defendants' land on the plaintiffs paying 55.00 Pounds to the defendants in consideration thereof. This was done.*

F 8a. *The defendants deny paragraph 8 of the further amended statement of claim and will put the plaintiffs to the strictest proof of the allegations contained therein. Ogbunike was the original settler and founder of the large expanse of land today known as Ogbunike.*

G 8b. *Ogbunike begat six sons - Ukalor, Osile, Azu, Umueri, Ifite and Amawa. During his life time, Ogbunike lived on the land, farmed there raised/lived with his family there while exercising acts of ownership and possession there. Before his death, Ogbunike shared this lands to his six sons. Amawa his son got this land in dispute as his share of his father's land afore-mentioned.*

H 8c. *Amawa settled on the said land, lived there with his family, farmed there, built living huts, reaped economic trees, installed juju shrines amongst the acts of ownership and possession exercised by Amawa shared his lands to his two sons. The portion of the land in dispute verged BROWN within the portion verged RED is part of the land Aboh inherited from his father.*

8d. *Aboh had two sons - Umuegwu and Umuezekwe while*

*Enugu also had two sons Adaegbe (or Okpaloegwu) and Uruekwulum. All four sons Umuegwu, Umuezekwe, Adaegbe (or Okpalegwu) and Uruekwulum make up Amawa (or Awas) descendants.*

*8e. Aboh on inheriting the land entered into the said land. Aboh also lived there, farmed there as well as reaped all economic trees, and crops there. He did this with members of his family without let or hindrance from any body whatsoever.* B

*8f. The descendants of Aboh (i.e. Umuegwu and Umu Ezekwe) have continued to enjoy the land and exercise acts of possession ownership over the land as their forefathers before them. The land is still owned by the said descendants of Aboh.* C

*8g. The defendants are descendants of Aboh. The said land has descended through various male descendants of Aboh down to the present defendants."*

*"15. The defendants deny paragraphs 15 and 16 of the further amended statement of claim. In further reply thereto, the defendants state that many years ago some members of the defendants' family had dwelling houses on the land in dispute and have continued to erect such houses up to the present day without let or hindrance from the plaintiffs or anyone whomsoever."* D E

*"18. The defendants deny paragraph 18 of the further amended statement of claim and put the plaintiffs to the strictest proof of the allegations contained therein. In answer thereto, the defendants state that about the year 1971, in further exercise of their rights of ownership they (defendants) widened an existing foot path which leads from Oye Olisa across the land in dispute onto the public square into a motorable road."* F

At the conclusion of the hearing of the suit, it became manifest that the central issues for determination of the matter were whether the plaintiffs established their claims for declaration of title to land based on the evidence, and whether the plaintiffs were also entitled to the claims of trespass and injunction. The learned trial Judge then resolved the issues thus: G

*"It is obvious from the pleadings and the evidence adduced in support of the said pleadings that the plaintiffs claim is partly based on traditional history and partly on acts of possession.* H

*I observed earlier that it is common ground that the town Ogbunike was founded by a man called Ogbunike. It is also common*

ground that both the plaintiffs (Azu) and the defendants (Amawa) are descendants of Ogbunike and each side inherited parts of the lands of Ogbunike.

The point of disagreement in the evidence of the parties is whether the land in dispute is part of the share of Azu, the ancestors of the plaintiff's inherited from Ogbunike or as is claimed by DW1, Chief Gabriel Oguagu Ikpeuwani:

'a legacy handed over to the people of Umuegwu and Uru Ezekwe of Aboh Amawa by their Ancestors.'

There is therefore conflict in the traditional evidence given by the plaintiffs and the defendants. One side or the other must be mistaken. Unfortunately there are not enough facts to show which side is mistaken. In that case, in my view, the best way to test the traditional evidence is by reference to the facts in recent years as established by their evidence. This is hoped, would help the court to determine which of the two competing histories is more probable."

After discussing the evidence the learned trial Judge came to the conclusion:

"On the totality of the evidence, I hold that the plaintiffs have proved with certainty the area covered by the land in dispute.

The next question who owns its title, the evidence of the defendants' principal witness DW1, said that Okpuno land is the share of the plaintiffs' ancestor Azu from Ogbunike town. I accept that piece of evidence. I hold that the evidence considered with exhibits 2, 3, 4, 5, 6, 9, 9(1), 9(2), 11 and 12 and the evidence of PW2 and other plaintiffs' witnesses show that Okpuno land belongs to the plaintiffs."

After discussing the evidence led by both parties in relation to the defence of laches and acquiescence, the learned trial Judge continued in his judgment:

"... I do not believe the defendants and their witnesses that they built the houses on the land before the civil war. I am satisfied with the evidence of the plaintiffs and their witness.

... I hold in consequence, that the traditional evidence led by the plaintiffs appears more credible than that of the defendants. The plaintiffs have therefore amply proved their case on preponderance of evidence against the defendants. I hold that the defendants forcibly entered the land in dispute to build their houses. Further that the plaintiffs did not lose any time in bringing the present action."

Thereafter, as mentioned above, the learned trial Judge found for the plaintiffs and granted them all the reliefs they sought.

In the Court of Appeal the defendants/appellants canvassed 16 grounds of appeal in which the learned counsel formulated and submitted 9 issues for the determination of the appeal. In its judgment, the Court of Appeal discussed the 9 issues exhaustively and came to the conclusion, Per NIKI TOBI, JCA (as he then was, and concurred in by Salami and Ubaezenu JJCA):

*"I have obeyed learned counsel for the appellants by considering all the issues he has raised, tedious and tiring though, I now came to the conclusion and it is that the appeal fails and it is dismissed."*

The defendants as mentioned above further appealed to this court. I have also alluded above to the application to amend the notice of appeal which was granted by this court on the 26/3/2002.

Based on the amended notice of appeal, the learned counsel for the appellants has identified, formulated and submitted the following as the issues arising for the determination of the appeal:

*"1. Whether the Court of Appeal was right in upholding the decision of the trial court that the joinder of claim for recovery of possession and claim for damages for trespass was in order when the law is trite that the joinder of the two claims is contradictory and thus void."*

*2. Whether the court below has not misconceived the issue of admission, section 46 Evidence Act, and undue probative value to exhibits 1 - 12 put forward by the appellants and by default or erroneously affirmed the trial court's determination of the location and boundaries of the land in dispute to the prejudice of the appellants."*

*3. Whether in failing to consider and determine the issues of laches and acquiescence put forward by the appellants, the Court of Appeal had not acted in breach of fair hearing to the detriment and prejudice of the appellants. Alternatively, is the defence of laches and acquiescence not available to the appellants having regard to the evidence before the trial court?"*

The learned counsel for the plaintiffs/respondents on the other hand has identified, formulated and submitted the following as the issues arising for the determination of the appeal:

*"1. Whether there was a misjoinder of the plaintiff's claim for*

*possession with their claim for damages for trespass and injunction which vitiates the plaintiffs' entire claims as framed in the statement of claim.*

2. *Whether the Court of Appeal adequately evaluated the totality of evidence led by the parties pursuant to their cases, and in particular, whether*

*(a) the admission if any made by the plaintiffs on exhibits 2, 3, 4, 5, 6, 9, 9(i) 9(ii), 10, 11 and 12 tendered by them did not support the evidence led by the defence to warrant a dismissal of the plaintiffs' claims in their entirety.*

*(b) the Court of Appeal wrongly applied section 46 of the Evidence Act in assessing the evidence offered by the plaintiffs in proof of the location of OKPUNO AZU land in dispute.*

*(c) the case of adverse possession, made by the defendants over the land in dispute, by building houses and living in them over a long period of time, is sufficient to ground the plea of laches and acquiescence made by the defendants."*

The two sets of issues raised by the parties are in essence substantially the same except that they are worded differently. I shall in this judgment deal with the issues as formulated by the appellants.

In considering the first issue the learned counsel for the appellants argued that it is settled law that the joinder of a claim for the recovery of possession of land and a claim for trespass are contradictory and therefore wrong. The lower court overruled the appellants' contention on the grounds:

(1) The claim was framed in accordance with the format provided by the Anambra State High Court Rules. And that the word "and" in the rule being conjunctive and not disjunctive.

(2) The claim simply implies one of declaration of title to land and that "possession" is merely one of the modes of establishing title of land.

(3) That similar claim arose in *Woluchem v. Gudi* (1981) 5 SC 291 but was not challenged and the court did not even raise it *suo motu*.

2. The appellants did not raise the irregularity in their pleadings or raise the issue at the trial court, therefore it is too late to raise it.

It is submitted that the format relied upon by the court below

is paragraph 5 of the Second Schedule to Anambra State High Court (Civil Procedure) Rules, 1988 or paragraph 5 Second Schedule Cap. 62, Laws of Eastern Nigeria 1963, and these formats only relate to question of court fees payable by a would be litigant It is submitted further that claims in court are framed in accordance with the rules of pleadings under Order xxxiii Rules 6, 7 and 8 of the High Court (Civil Procedure) Rules or Order 9 rule 6 of the 1988 Rules of court  
B  
aforementioned. It is again submitted that even assuming by way of argumentum ad absurdo, but not conceding, the joinder of recovering of possession and a claim for trespass can not be justified even if a declaration of title to land may be joined with a claim for recovery of possession, the court below erroneously imported the word ‘trespass’ into the format which is clearly not mentioned. It is finally submitted that the joinder of the claim for recovery of possession of land with a claim for trespass even if the format in the schedule of fees  
C  
referred to above allowed the joinder of a claim for declaration of title with a claim for possession.  
D

The justification of the joinder of the claims for trespass and for recovery of possession as the court below has opined that the claim was not per se included merely because, possession, is one of the  
E  
modes upon which a person can establish title to land, is untenable, since the claim for possession in the instant case was clearly a substantive claim. It is further argued that the raising of issue of the incompetence of the joinder of the claim for recovery of possession and that of trespass needed not to be pleaded by the appellants in  
F  
their statement of defence, because it is a matter of law and matters of law are not pleaded. In any event, the respondents did not object to the raising of the issue both at the trial court and at court below.

The learned counsel for the respondents on the other hand, G submitted that the claim of the respondents did not raise any relief for the recovery of possession. In their pleadings, the respondents as the plaintiffs have averred in several paragraphs of the further amended statement of claim in paragraphs 3, 11, 12, 15 and 19, that they are “owners in possession of the ‘OKPUNO AZU’ land”.  
H  
Throughout the proceedings the respondents did not lead any evidence that they had been driven out of the land in dispute, they always maintained that they were in possession and they did not claim for recovery of possession. It IS further argued that the appel-

lants did not raise the issue that the respondents had been put out of possession of the “OKPUNO AZU” land. It is further submitted that the respondents led evidence, which was accepted by both the trial court and the court-below, showing their ownership and possession of the land in dispute by numerous court cases between them and  
B third party trespassers.

It is further submitted that the claim as framed in paragraph 20(1) of the statement of claim follows the form provided by the Rules of court. It is again added, that the respondents did not claim  
C for recovery of possession of the land, they merely claimed for declaration of title to the land in dispute based on their ownership and possession of the land. It is further argued, that even if there is a misjoinder, which is not conceded, the claim for possession should be struck out, leaving the claims for declaration of title, damages for  
D trespass and injunction. In the case of Ibeziako v. Nwagbogu (1972) 1 All NLR (Pt. 2) 200, this court struck out the claim for recovery of possession.

***Now, there is no dispute and it is common sense that a claim for recovery of land cannot be joined with a claim for  
E damages for trespass on the same land. A claim in trespass to land is rooted and or based on exclusive possession or right to possession, thus trespass is always against the person not in possession. A plaintiff cannot therefore maintain an action  
F both for trespass to a particular piece of land and recovery of possession of the same land as both claims are contradictory, inconsistent and mutually divergent, one being based on the fact of the plaintiffs’ possession and the other on the fact that the plaintiff is out of possession and then claiming recovery of  
G possession.*** See Oniah v. Onyia (1989) 1 NWLR (Pt. 99) 514; Aromire v. Awoyemi (1972) ANLR 101; Ibeziako v. Nwagbogu (supra).

***The appellants’ counsel has made heavy weather of the importation of the word “possession” under paragraph 20 of  
H the further amended statement of claim of the respondents. In my view, the respondents did not claim recovery of possession of any portion of the land against the appellants. They proceeded all along on the basis that they were in physical and actual exclusive possession when the appellants forcibly***

**broke and entered into their land. A trespasser does not acquire possession of land by his act of trespass.** See Akinterinwa v. Oladunjoye (2000) 6 NWLR (Pt. 659) 92; Ayinla v. Sijuwola (1984) 1 SCNLR 410; Aromire v. Awoyemi (supra); Alli v. Alesinloye (2000) 6 NWLR (Pt. 660) 177.

In the instant case, it is clear from the pleadings of the respondents and evidence in support that they were in exclusive possession of the land in dispute, when the appellants violated their possessory rights. And there are concurrent findings of fact by the Court of Appeal and the trial High Court to the effect that the respondents were in prior possession of the land in dispute and that the appellants came thereon to disturb the possessory rights of the respondents. In any event, there is no prayer in the reliefs sought by the respondents claiming for recovery of possession of the land in dispute or any part thereof. Having regard to the claims of the respondents as contained under paragraph 20 of the further amended statement of claim, there is no relief claimed for recovery of possession therefore all the arguments of the learned counsel for the appellants are irrelevant.

**An appeal against the judgment of a court is tantamount to saying that having regard to the pleadings of the parties, to issues arising from the pleadings, to the evidence led, to the findings of fact made, and to the applicable law, the court was wrong in its determination. An appeal that ignores all these will be wholly unrelated to the facts of the case and will thus degenerate into a useless academic exercise. In the instant case neither the High Court nor the Court of Appeal ordered recovery of possession of any land to or in favour of the plaintiffs. Even if the respondents claimed recovery of possession of the land which was demonstrated to be incorrect, a court will normally discountenance the claim rather than strike out the entire claims.** See for example Oniah v. Onyia (supra). Accordingly issue No.1 fails; it is in favour of the respondents.

On issue number 2, the appellants' complaints border on the concurrent findings of fact made by the two courts below in relation to the identity of the land in dispute and also in connection with the issue of whether the respondents led sufficient and credible evidence to entitle them to the declaration of title to the land in dispute granted them by the trial court and confirmed by the court below. It is sub-

mitted that the trial court in arriving at its decision had completely ignored the issue of admissions made by the respondents and reached its decision by relying on (a) the provisions of section 46 of the Evidence Act, (b) exhibits 1- 12 and (c) the evidence of DW1 and DW4. It is again submitted the court below was in error in upholding the decision of the trial court, the court below misconceived the issue raised by the appellants and had failed to give adequate consideration to the issues relating to the probative values of the exhibits 1 - 12 and had thus denied the appellants fair hearing. It is again argued that both courts were in error to have invoked the provisions of section 46 of the Evidence Act when the respondents did not lead any evidence to prove that they owned the surrounding lands. Learned counsel relied on *Abe v. Akaajime* (1989) 4 NWLR (Pt. 113) 95; and *Archibong v. Ita* (1954) 14 WACA 520. It is again submitted that both the court below and the trial court gave undue probative value to the exhibits 1 - 12 and erroneously came to the decision that the respondents not only proved the identity of the land but also that the respondents have proved their entitlement to a declaration of title to land.

As mentioned above, the appellants' grouse is with the concurrent findings of fact by the two courts. It is settled law that this court always has the competence to interfere or disturb the evaluation of the evidence and or findings of the lower court which are not based on proper and dispassionate appraisal of the evidence given in support of each party's case or where such findings are perverse in the nature of the evidence or where on the face of the record it is clear that justice has not been done in the case.

***In the instant case both the trial court and the Court of Appeal had meticulously appraised all the evidence led and came to the inevitable conclusion that the respondents had proved their claims. It must be remembered, however, that the power of the court to grant a declaration of title to land being discretionary, should be exercised with proper sense of responsibility and a full realization that judicial pronouncements ought not to be made unless there are circumstances that call for its making.*** See *Ibeneweka v. Egbuna* (1964) 1 WLR 219.

***In my view, both the trial court and the Court of Appeal***

**found for the respondents on the grounds of traditional history and where traditional history is found to be cogent and accepted by the trial court, it can support a declaration for title to land. In the instant case, there is conflict between the traditional history of ownership of the land pleaded and led by both the appellants and the respondents. The learned trial Judge tested the evidence of traditional history claimed by each of the parties by the consideration of the recent acts of possession relied by the parties. The learned trial Judge thereafter came to prefer the evidence led by the respondents as more probable.** See *Alli v. Alesinloye* (2000) 6 NWLR (Pt. 660) 177; *Alade v. Awo* (1975) 4 SC 215; *Olujebu of Ijebu v. Osho the Elede of Eda* (1972) 5 SC 143; and *Onwugbufor v. Okoye* (1996) 1 NWLR (Pt. 424) 252.

**I have carefully considered the submission both in the written brief of the appellants and in oral argument and I have come to the conclusion that I cannot in any way fault the approach or the conclusion of the learned trial Judge in the way he resolved the issue of the traditional history. I am of the view that the court below was also correct in affirming the findings and fact made by the learned trial Judge. I have not been persuaded by the appellants' counsel to disturb the concurrent findings of fact of the two courts below.**

I accordingly reject the complaints of the appellants and resolve the second issue against them. On the question of proving the identity of the land in dispute, the learned trial Judge held in part of his judgment thus:

*"In the present case, the defendants conceded in exhibit 15 that the Southern boundary belongs to the plaintiffs. The defendants also conceded that they are not laying claim to the area verged pink in exhibit 15. The plaintiffs from the exhibits tendered by them proved that they owned the land. PW2 gave evidence of their boundary neighbours. Their neighbours PW5 one UKALOR man, PW6, from OSILE supported his evidence as to the plaintiffs' boundaries as it relates to their respective lands. Even DW4 in his evidence quoted above supported in part the plaintiffs' case ..."*

*On the totality of the evidence, I hold that the plaintiffs have proved with certainty the area covered by the land in-dispute."*

The court below also reached the same conclusion thus:

*“The above are clear findings and conclusion of the learned trial Judge in respect of the boundaries. I have no reason to interfere with them. The respondents proved the boundaries.”*

**The learned counsel for the appellants appeared to have worked on the misapprehension that every slip by a court raises an issue. It must, however be borne in mind that an issue in an appeal must be a proposition of law or fact so cogent, weighty and compelling that a decision on it in favour of the party to the appeal will entitle him to the judgment of the appellate court. The fundamental issue is that both courts found in favour of the respondents by their acceptance of the traditional history led by the respondents. It was only on that basis that judgment was given and not on the issues the appellants herein are complaining about, the issue of section 46 of the Evidence Act, the suits filed by or against the respondents, the non registration of the grant of the land for the building of the Post Office all are irrelevant.**

**The question of the proof of identity of the land as has been demonstrated above, shows that the learned trial Judge properly appraised the evidence which included the admission of the appellants, that the parties knew the land in dispute and in any event, the learned trial Judge accepted the identity of the land as shown in exhibits 13 and 15 made by the parties. The learned trial Judge found that the respondents have proved by traditional evidence their entitlement to the land in dispute. The appellants’ traditional history was rejected, that in my view knocks the bottom out of the appellants’ case. I accordingly resolve the second issue in favour of the respondents.**

On the third issue, the appellants’ counsel contends that the court below failed to make a determination on the question of laches and acquiescence put before the court by the appellants. The failure to make a proper determination on the issue it was argued, has occasioned a miscarriage of justice. The learned counsel submitted that the respondents on the pleadings and the evidence ought to have been caught by the equitable defences of laches, acquiescence, and standing by and therefore the order of perpetual injunction granted

by the learned trial Judge ought not to have been made. Learned counsel made reference to the evidence of DW2, DW3 and exhibits 9, 13 and 15 and some judicial decisions. He argued further, that since the court below had failed to decide the issue, the matter should be sent back to it to make a proper determination. Learned counsel relied on Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131; Onyemeh v. Egbuchulam (1996) 5 NWLR (Pt. 488) 225, and Sapara v. UCH Board (1988) 4 NWLR (Pt. 86) 56. It is argued further that the issue is so radical and fundamental that the failure to make a decision on it has occasioned a miscarriage of justice vide Total Nig. Ltd. v. Nwako (1978) 5 SC 1 at 14. It is further argued that by virtue of section 233(2) of the Constitution, this court cannot make a determination on the questions raised but should remit the case back to the court below for its decision. Learned counsel referred to Onwe v. Oke (2001) 3 NWLR (Pt 700) 406; Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130.

The learned counsel for the respondents on the other hand argued and submitted that the court below made a determination of the appellants' issue No. 6 and came to the conclusion that the learned trial Judge had exhaustively dealt with it and came to right conclusion that the appellants could not avail themselves of the defences of laches, acquiescence and standing by.

There is no doubt that the trial Judge has considered these defences put forward by the appellants and after analysing the evidence, made the following findings:

*"...I do not believe the defendants and their witnesses that they built houses on the land before the civil war. I am satisfied with the evidence of the plaintiffs and their witnesses. I prefer their evidence where the same conflict with that of the defendants and their witnesses. I hold in consequence, that the traditional evidence led by the plaintiffs appears more credible than that of the defendants. The plaintiffs have therefore amply proved their case on preponderance of evidence against the defendants. I hold that the defendants forcibly entered the land in dispute to build their house. Further that the plaintiffs did not lose any time in bringing the present action."* (italics mine).

Thus the learned trial Judge came to the conclusion that the defences raised by the appellants do not avail them. ***It is settled***

*law, that where in action for declaration of title to land and or a claim for injunction, the plaintiff has been able to establish his title by traditional history, the onus is on the defendant to show that his own possession can oust that of the owner and that by applying equitable rules the court would refuse declaration or injunction in favour of the owner.* See *Elias v. Suleiman* (1973) 12 SC 113; *Thomas v. Preston Holder* (1946) 12 WACA 78.

*In the instant case, the respondents have pleaded repeatedly that they were in possession of the entire land at all times, when the appellants broke and entered the land. The appellants by their acts of trespass could not acquire legitimate possession to entitle them to an equitable defence.* See *Akinterinwa v. Oladunjoye* (supra). *It is settled law that possession of land resides in the claimant who establishes a better title. Where there is dispute as to which of the two parties is in possession the presumption is that the party having title is in lawful possession.* See *Aboyche Kponuglo v. Ada Kodaja* (1931) 12 WACA 24; *Amakor v. Obiefuna* (1974) 3 SC 67; *Ogunbiyi v. Adewunmi* (1988) 5 NWLR (Pt. 93) 215.

*The learned trial Judge as mentioned above, after due consideration of the case of each party came to the conclusion that the appellants cannot avail themselves of the defences of laches, acquiescence and standing by. In my view, such a conclusion is correct. Now, it is submitted that the Court of Appeal did not make a determination on this issue when the appellants raised the question in Issue 6 submitted to that court.*

*In my view the lower court had properly considered the availability of the defences of laches, acquiescence and standing by in its judgment and came to the decision that the appellants were not entitled to it. If I may add, in an action such as this one, where the claims of each party disclose that each one is claiming to be in lawful possession of the land in dispute, the law is that there cannot be concurrent possession by two parties claiming adversely. One must be in lawful possession and the other a trespasser.* See *Amakor v. Obiefuna* (supra), *Umeobi v. Otukoya* (1978) 4 SC 33.

There is no doubt that the appellants made references in their

pleadings to the defences of laches, acquiescence and standing by, but they did not plead nor establish by evidence the facts upon which such defences could be based. ***In any event, the trial Judge and the court below determined the appellants to be trespassers since there cannot be adverse concurrent lawful possession of the same piece of land. It was evident that the appellants broke and entered the respondents' land. In my view, the defences of laches, acquiescence and standing-by cannot avail the appellants in the circumstances of this case.*** See Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414; 1 SCNJ 77 at 114; Odife v. Aniameka (1992) 7 NWLR (Pt. 251) 25; 7 SCNJ 337. This issue is also resolved against the appellants. B C

In the result, the appeal fails and is dismissed by me. I affirm the decisions of the lower courts. The respondents are entitled to costs which I assess at N10, 000.000 against the appellants. D

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### UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother, Musdapher JSC. I agree with the judgment and have nothing to add. I too hereby dismiss the appeal with N10,000.00 costs to the respondents. E

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### OGUNDARE JSC

I have been privileged to read in advance the judgment of my learned brother, Musdapher JSC just delivered. I agree with him that there is no merit in this appeal. Accordingly, like him too, I dismiss the appeal with costs as ordered by him. I wish, however, to say a few words on the issues raised in this appeal. F

Issue (i):

*“Whether the Court of Appeal was right in upholding the decision of the trial court that the joinder of claim for recovery of possession and claim for damages for trespass was in order when the law is trite that the joinder of the two claims is contradictory and thus void.”* H

The defendants question the propriety of joining in one action a claim for possession of land and damages for trespass. This issue was raised in the court below, that is, the Court of Appeal and that

court per Tobi JCA, as he then was, had this to say:

B *“The first issue attacks the joining of a claim for possession with one of damages for trespass. If rules of court provide for a particular format for the commencement of an action, a plaintiff is bound to follow the format. Where he fails to do so, a court of law is entitled to hold that the action is incompetent. Where the required statutory format is used, a court of law is not entitled to declare the action incompetent.*

C *The second schedule to the High Court Rules provides for a claim for declaration of title to land in the following format ‘for a declaration of the title to land and for possession of land other than between landlord and tenant’.*

D *For our purpose, the word ‘and’ is significant. It is a conjunction connecting words or phrase which express the idea that the latter is to be added to or taken along with the first. The word further adds than subtracts. It includes than excludes. And it is that inclusionary expression that is contained in the form, which the respondents used.*

E *The above apart, I agree with the argument of learned counsel for the respondents that the claim simply implies now for declaration of title to land and that possession is one of the modus upon which a person can establish his title to land. See Idundun v. Okumagba (1976) 9-10 SC 227; Mogaji & others v. Cadbury (Nigeria) limited (1985) 2 NWLR (Pt. 7) 393; Omoregie and others v. Idugiemwanye and others (1985) 2 NWLR (Pt.5) 41; Ezeoke and others v. Nwagbo and Another (1988) 1 NWLR (Pt.72) 616; Okpuruwu and others v. Chief Okpokam and Another (1988) 4 NWLR (Pt.90) 554.” (Italics mine)*

The plaintiffs had claimed:

G *“(i) Declaration of title to and possession of land known as and called ‘OKPUNO AZU’ being and situate at Ogbunike Town in Anambra Division (now Oyi Local Government Area) and shown on survey plan No. MEC/66/72 filed by the plaintiffs and thereon verged green.*

H *(iii) Perpetual injunction restraining the defendants, their servants, agents, heirs, successors and assigns from continuing in possession or further trespassing on the said ‘OKPUNO AZU’ land.”*

In claim (i) they seemed to be claiming “declaration of title to and possession of land ...” and in claim (iii) they, seemed to be claim-

ing also an injunction “restraining the defendants... from continuing in possession ....” The contention of the defendants before us is that there has been a misjoinder of claims in that the plaintiffs having claimed for damages for trespass in claim (ii) it is not permissible of them to claim in the same action recovery of possession as postulated by their claims (i) and (iii). They complain that the court below was wrong in its view in respect of the same complaint brought by them before it. B

I have already set out the views of that court. I think the court below, with respect, failed to approach properly the complaints of the defendants. In my respectful view this is not a case of format but one of inelegant framing of claims. It is settled law that a claim for recovery of possession cannot be properly joined in the same action with the claim for damages for trespass as both claims appear self-contradictory. This is best explained by the dictum of Coker JSC in *Aromire & Ors. v. Awoyemi* (1972) 1 ANLR (Pt. 1) 101 at page 108 wherein the learned Justice of the Supreme Court delivering the judgment of this court, observed: C

*“We had already set out the claims of the plaintiff as on his writ-damages for trespass, recovery of possession and a perpetual injunction. It is pertinent at this juncture to observe that the claims as appearing on the summons are self-contradictory. A claim in trespass pre-supposes that the plaintiff is in possession of the land at the time of the trespass. A trespasser cannot claim to be in possession by the mere act of entry and clearly a plaintiff in lawful possession at the time still remains in possession despite a purported eviction by a trespasser.”* D

*On the other hand a claim for recovery of possession postulates that the plaintiff is not in possession at the time of the action, that he was once in possession but is at that time seeking to be restored to possession of the land. Hence, in the present case the claims for trespass and for recovery of possession should not have been put together as one postulates that the plaintiff was not in possession whilst the other suggests that he was. Part of the submission of learned counsel for the appellants before us is that the plaintiff’s writ postulates that he was not in possession at the time of the action as otherwise he would not be suing to recover possession. We think however that that is a matter which should be considered against the back-* E  
F  
G  
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*ground of the whole case for far more important is the consideration of the cases of the parties as reflected in their pleadings.” See also Ibeziako v. Nwagbogu & Anor. (1972) 1 ANLR (Pt. 2) 200.*

I must point out however, that in each of these two cases there was a specific claim “for recovery of possession”. That is not the case here. Going by the pleadings of the parties it cannot be said that the plaintiffs acknowledged that the defendants were at any time in lawful possession of the land in dispute. Their case throughout was that the defendants forcibly came on the land and disturbed the plaintiffs’ possession. The inclusion in claim (i) of the words “and possession of” and in claim (iii) of the words “from continuing in possession or” must be due to over zealousness on the part of counsel. Claim (i) is undoubtedly a claim for declaration of title to the land in dispute and claim (iii) is a claim for an injunction to restrain the defendants from further trespassing on the land. There is no specific claim for recovery of possession and if there had been one I would have struck it out, as it would not be borne out by the pleadings and evidence. I think the proper thing to do is to strike out the offensive words in claims (i) and (iii) and that I hereby order. The erroneous approach made by the court below is however of little import to the defendants as it has not occasioned any miscarriage of justice. I consequently resolve issue (i) against the defendants.

Issue (ii):

*“Whether the court below has not misconceived the issue of admission S46 Evidence Act, and undue probative value to exhibits 1 - 12 put forward by the appellants and by default or erroneously affirmed the trial court’s determination of the location and boundaries of the land in dispute to the prejudice of the appellants.”*

The learned trial Judge considered the different positions taken by the parties to the location of “Okpuno Azu” land. He reviewed the evidence led by each side and observed:

*“In view of the disagreement as to the location of ‘Okpuno Azu’ land, I consider it necessary, therefore, to determine first if the area verged green in exhibit 13 or red in exhibit 15 is the ‘Okpuno Azu’ land which both parties agree that the plaintiffs abandoned. For if I hold that it is not the area abandoned by the plaintiffs’ ancestors for ‘Ubulu’ land it is the end of the plaintiffs’ case.”*

He then went on:

*"I have referred to the averment of the plaintiffs in their paragraph 12 of their further amended statement of claim that 'Okpuno Azu' land has been the subject of considerable litigation between the plaintiffs' family and adjoining neighbours, including the defendants. In support of this averment, the plaintiffs tendered a number of court judgment, proceedings and agreements as exhibits. I hereunder consider the exhibits in detail."* B

He considered exhibits 2, 3, 4, 5, 6, 9, 9(i), 9(ii), 10, 11 and 12, and observed:

*"The above brings out clearly the interest of the plaintiffs and the defendants in the areas covered in the exhibits. The areas covered in these exhibits were super imposed on exhibits 13 and 15 respectively. There is no evidence before me that the judgment of O.P. Gunning as contained in exhibit 11 went on a further appeal. It is trite therefore that the judgment being the judgment of a court of competent jurisdiction remains valid and it might be for that reason that the learned Senior Advocate of Nigeria, conceded that 'the defendants do not even lay claim to the area covered by exhibit 9. This notwithstanding, the court has to determine the location of 'Okpuno Azu' land."* C  
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He next reviewed and evaluated the evidence of PW1 Chief Ikeguani and other evidence closely connected with the location of Okpuno land and came to the conclusion:

*"The above questions and answers confirm in my view, the evidence of PW2 that the descendants of Eziogu is Ukalor, Osile, Azu (the plaintiffs) and Eri lived around Obi Ogbunike (Okwu Oye). In my view also the questions and answers considered together with exhibits 2, 9(1), (9), 10, 11 & 12 bring out clearly the location of 'Okpuno' land as at the Northern side. On the other hand, the proceedings in exhibits 4, 5 & 6 bring out the area covered by 'Okpuno Azu' land in the Southern side. Exhibit 6 clearly demarcated the lands of Ogidi people and the plaintiffs along old Awka road. In other words, exhibit 6 only delimits 'Okpuno Azu' land south wards. A look at exhibit 1, in my opinion, confirms this also."* F  
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The learned Judge asked the question: what then is the area covered by Okpuno land? He referred to section 46 of the Evidence Act and considered its application to the case on hand when he said:

*"In the case of Abe v. Akaajime (1989) 4 NWLR (Pt. 113) p.95*

*it was held that for the above provisions to apply there must be proof or admission by the other party that the land in dispute is surrounded by other lands belonging to the person who claims the land in dispute as his. In the present case, the defendants conceded in exhibit 15 that the Southern boundary belongs to the plaintiffs. The defendants also conceded that they are not laying claim to the area verged pink in exhibit 15. The plaintiffs from the exhibits tendered by them proved that they own the land. PW2 gave evidence of their boundary neighbours. Their neighbours PW5 one Ukalor man, PW6, from Osile supported his evidence as to the plaintiffs' boundaries as it relates to their respective lands.' Even DW4 in his evidence quoted above supported in part the plaintiffs' case. In the Western side, the areas covered by 'Ajo Offia' and 'Ubulu' lands are not in dispute. The plaintiffs are owners and in possession. PW2's evidence as to their boundary with the defendants on the above Northern side is not controverted. I accept."*

He finally concluded:

*"On the totality of the evidence, I hold that the plaintiffs have proved with certainty the area covered by the land in dispute. I hold that exhibit 13 correctly reflects the location and size of 'Okpuno' land. I hold also that DW1 has no idea of the location of 'Okpuno Azu' land."*

The defendants questioned in the court below the manner the learned trial Judge came to this conclusion. Niki Tobi JCA in his lead judgment with which Salami and Ubaezonu JJCA concurred, rejected the complaint of the defendants. The learned Justice of the Court of Appeal observed:

*"Learned counsel for the appellants strenuously attacked the probative value the learned trial Judge attached to some of the exhibits, and the conclusions reached therein. They are exhibits 2, 3, 4, 5, 6, 9, 9(1), 9(2), 10, 11 and 12. Admissibility or non-admissibility of exhibits in proceedings is a function of the trial Judge. So too the attachment of probative value to the exhibits admitted in evidence. The criterion for the attachment of probative value to exhibits is relevancy, the heart beat, the centre pin and pivot of the law of evidence. If a party proves that a document is relevantly connected with his case or clearly forms part of the case so much so that it adds to the erection of a common evidential scale in the matter, a trial Judge will*

*certainly attach evidential value to it. And in the exercise, a trial Judge will take into consideration the totality of the exhibit and not bits or portions of it.*

*Once the entire exhibit has evidential value, probative value will be attached to it. As a matter of adjectival law, the two mean the same thing as both reflect the chain of proof in our law. While it is the duty of the trial Judge to admit document and attach probative value to it, like in what area in the trial process, he has not the last say on it.*

*An appellate Judge will certainly interfere if a trial Judge wrongly admits document and attaches probative value to it. There are many instances of interference. I will not go there. An appellate Judge however, can only interfere in deserving cases. He cannot do so merely to show appellate power. That is not the law, and an appellate Judge will like the trial Judge, follow the law."*

He added:

*"I have carefully examined the judgment of the trial Judge and I am in grave difficulty to come to the conclusion that the learned trial Judge wrongly attached probative value to the exhibits complained of or any other exhibits for that matter in the proceedings. Even if he did, I do not see any injustice that has been done to the appellants"*

I have considered the, submissions both in the written brief of the defendants and in oral arguments of their learned leading counsel and I have come to the conclusion that I cannot in any way fault the approach or the conclusion of the learned trial Judge in the way he resolved the issue of the location of Okpuno Azu land. I am of the view that the court below was right in affirming the decision of the learned trial Judge on this issue. I, therefore, resolve issue (ii) against the defendants.

Issue (iii):

*"Whether in failing to consider and determine the issue of lashes (sic) and acquiescence put forward by the appellant, the Court of Appeal had not acted in breach of fair hearing to the detriment and prejudice of the appellant. Alternatively is defence of lashes (sic) and acquiescence not available to the appellant having regard to evidence before the trial court."*

I think it is incorrect to say that the court below did not consider the issue of lashes and acquiescence raised before it. Indeed that issue was discussed in about three to four pages of the twenty-

four-page judgment of Tobi JCA. Thus the main complaint of the defendants in issue (iii) has no basis whatsoever. On the question whether the defence of laches and acquiescence was available to the defendants having regard to the evidence, I think the starting point should have been the pleadings of the defendants. Nowhere in their  
B further amended statement of defence did they plead facts upon which the defence or defences could be predicated. In paragraph (1) of their further amended statement of defence, the defendants pleaded as hereunder:

C *“Save as is herein expressly admitted, the defendants deny each and every allegation of fact contained in the further amended statement of claim appearing as if same were set out herein seriatim and traversed specifically. The defendants will plead and rely on all legally (sic) and equitable defences which may be open to them but  
D herein expressly pleaded. The defendants will particularly plead and rely upon:*

- (a) laches*
- (b) Acquiescence*
- (c) Estoppel by Conduct.”*

E Other than the above pleading they pleaded no facts in support of the defences raised in paragraph (1). In this circumstance, therefore, it will be right to say that the defences were not available to them. In the submissions on this issue, references have been made to evidence of witnesses but evidence given on facts not pleaded goes  
F to no issue and such evidence ought to have been disregarded. Consequently, I resolve issue (iii) against the defendants.

It is for the reasons I give above and the more detailed reasons contained in the judgment of my learned brother, Musdapher JSC  
G that I have no hesitation whatsoever in dismissing this appeal.

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### **IGUH JSC**

I have had the privilege of reading in draft the judgment just  
H delivered by my learned brother, Musdapher, J.S.C. and I entirely agree that this appeal is devoid of substance and ought to be dismissed.

Issue 1 poses the question whether the court below was right in upholding decision of the trial court that the joinder of claim for

recovery of the possession with damages for trespass was in order when the joinder of both claims is contradictory and vitiates the plaintiffs' suit.

The plaintiffs' claims against the defendants are as follows:

(i) Declaration of title to, and possession of the land known as and called "Okpuno Azu" being and situate at Ogbunike Town in Anambra Division (now Oyi Local Government Area) and shown on survey plan No. MEC/66/72 filed by the plaintiffs and thereon verged green. B

(ii) N600 (Six Hundred Naira) or 300 Pounds (Three Hundred Pounds) damages for trespass committed by the defendants on the plaintiffs' said "Okpuno Azu" land. C

(iii) Perpetual injunction restraining the defendants, their servants, agents, heirs, successors and assigns from continuing in possession or further trespassing on the said "Okpuno Azu" land." D

It is incontestable that claims in trespass combined with one for recovery of possession are clearly inconsistent and cannot, in law, be properly maintained or joined in one and the same action. See *Aromire and others v. Awoyemi* (1972) 1 All NLR (Pt. 1) 101 at 112; *Ibeziako v. Nwagbogu and Another* (1972) All NLR 639 at 654; (1972) 1 All NLR (Pt. 2) 200; and *Richard Obiekezie and others v. Thomas Nweke and others* (1972) 2 SC 41 at 42 etc. A close study of relief (i) of the plaintiffs' claims gives the impression that what was claimed comprised of 'title to and possession of' the land in dispute. However, the evidence of the plaintiffs, which is in line with the averments in their amended statement of claim, abundantly asserted that the defendants were at no time in possession of the land in dispute. The plaintiffs claimed that the defendants at all material times that they trespassed on the land in dispute were promptly warded off and chased away. Accordingly the plaintiffs made no claims in their viva voce evidence for the recovery of possession of the land in dispute. F G

The learned trial Judge, Amaizu J., as he then was, had no difficulty in holding that there was no claim for recovery of possession of the land in dispute before the court. Said he: H

*"I agree with the submission of Ogbuli Esq., of counsel, that the wording of relief 20(1) supra and the evidence adduced in support thereof do not show that the plaintiffs are seeking recovery of possession of the land in dispute as such. What the plaintiffs seek is a*

*declaration that they are entitled to title and consequently to the possession of the land in dispute.”*

He was satisfied that the plaintiffs had proved their case on preponderance of evidence against the defendants and he therefore decreed thus:

B *“Accordingly, I hereby grant the plaintiffs the reliefs they seek.*  
*The plaintiffs are entitled to the customary right of occupancy*  
*in respect of a piece or parcel of land known as “Okpuno Azu” at*  
*Ogbunike Town in OYI Local Government Area and shown on sur-*  
C *vey plan No. MEC/66/72, marked exhibit 13. I award N600 dam-*  
*ages for trespass against the defendants and further grant perpetual*  
*injunction against the defendants, their servants, agents, heirs, suc-*  
*cessors and assigns from further acts of trespass on the said “Okpuno*  
*Azu” land. The plaintiffs are entitled to the costs of these proceedings*  
D *which I assess at N5,000.00.”*

Of particular note is the fact that the trial court completely ignored the plaintiffs’ alleged claim for recovery of possession of the land in dispute and made no order in respect thereof.

E The court below, for its own part, was also of the view that no specific claim for recovery of possession of the land in dispute was made by the plaintiffs.

For my part, I have closely studied both the pleadings and viva  
 voce evidence of the plaintiffs with regard to their claims and it is  
 plain to me that at no time did they concede legal possession of the  
 F land in dispute in the defendants. I entertain no doubt that reliefs (i)  
 and (iii) of the plaintiffs’ claims are, to say the least, inelegantly drafted  
 as the initial impression created is that the plaintiffs were unwittingly  
 claiming damages for trespass to the land in dispute together with  
 G recovery of possession thereof in one and the same suit. It is, how-  
 ever, apparent that those two reliefs primarily concern claims in dec-  
 laration of title to the land and perpetual injunction to restrain the  
 defendants, their servants, agents, heirs, successors and assigns from  
 further trespassing on the land in dispute. Conscious of the fact that  
 H our courts have now deliberately shifted away from the narrow tech-  
 nical approach to justice which characterized some of their earlier  
 decisions but now pursue, instead, the course of substantial justice, I  
 am prepared in the interest of justice to strike out the words com-  
 plained of, to wit, “and possession of” in line 1 of claim (i) and the

words “from continuing in possession or” in line 3 of claim (iii) and it is hereby accordingly so ordered. See Consortium M.C. v. National Electric Power Authority (1992) 6 NWLR (Pt. 246) 132 at 142; Farid Khaham v. Fouad Michael Elias (1960) 5 FSC 224; (1960) SCNLR 516; Falobi v. Falobi (1976) 1 NMLR 169 (1976) 9-10 SC 1; Okonjo v. Dr. Odje (1985) 10 SC 267 etc. In my view, the complaint of the defendants on this issue of joinder cannot constitute any matter of great moment in this appeal. Issue 1 is accordingly resolved against the defendants.

There is next issue 2 which questions whether the court below did not erroneously affirm the trial court’s determination of the location and boundaries of the land in dispute to the prejudice of the defendants. The defendants’ main contention on the issue is that the trial court failed to evaluate adequately exhibits 1 - 12 tendered by the plaintiffs at the trial.

It is evident from the judgment of the learned trial Judge that he most carefully and meticulously evaluated the totality of the evidence led by both parties in the case and concluded as follows:

*“On the totality of the evidence, I hold that the plaintiffs have proved with certainty the area covered by the land in dispute. I hold that exhibit 13 correctly reflects the location and size of “Okpuno” land. I hold also that DW1 has no idea of the location of “Okpuno Azu” land. Having held that the area verged green in exhibit 13 is “Okpuno” land, the next question is who owns it? It is the evidence of the defendants’ principal witness DW1, that “Okpuno” land is the share of the plaintiffs’ ancestor Azu from Ogbunike, the father of Ogbunike town. I accept that piece of evidence. I hold that the evidence considered with exhibits 2, 3, 4, 5, 6, 9, 9(1), 9(2) 11 & 12 and the evidence of PW2 and other plaintiffs’ witnesses show that “Okpuno” land belongs to the plaintiffs.”*

In this regard, it cannot be disputed that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and duly assessed the witnesses. Where, as in the present case, a court of trial unquestionably evaluates the evidence and justifiably raises the facts, what the Court of Appeal ought to do is to find out whether there is evidence on record on which the trial court could have acted. Once there is sufficient evidence on record from which the trial court ar-

rived at its findings of fact, the appellate court cannot interfere. See Enang v. Adu (1981) 11 - 12 SC 25 at 39; Woluchem v. Gudi (1981) 5 SC 291 at 320; Akpagbue v. Ogu (1976) 6 SC 63; Amadi v. Nwosu (1992) 5 NWLR (Pt. 241) 273 at 280. It is in this wise that the above findings of fact of the learned trial Judge were affirmed by the Court of Appeal thus:

*"I have carefully examined the judgment of the trial Judge and I am in grave difficulty to come to the conclusion that the learned trial Judge wrongly attached probative value to the exhibits complained of or any other exhibits for that matter in the proceedings. Even if he did, I do not see any injustice that has been done to the appellants."*

The above are concurrent findings of fact of both the trial court and the Court of Appeal and may not therefore be disturbed by this court unless there is established a miscarriage of justice or violation of some principles of law or procedure. See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 14) 1 at 36; Nwagwu v. Okonkwo (1987) 3 NWLR (Pt. 60) 314 at 321; Iwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561 at 574. No such miscarriage of justice or violation of any principle of law or procedure was established by the defendants in this case. In my view, issue 2 must be and is hereby resolved against the defendants.

There is finally issue 3 which raises the question whether in failing to consider and determine the defence of laches and acquiescence put forward by the defendants, the Court of Appeal had not acted in breach of fair hearing to the detriment and prejudice of the defendants or, alternatively, whether the defence of laches and acquiescence was available to the defendants having regard to the evidence. A close study of the defendants' amended statement of defence reveals that, although laches and acquiescence were pleaded generally in paragraph 1 thereof, particulars of what constituted such laches or acquiescence were neither pleaded nor specified in the pleadings. The learned trial Judge, perhaps, *ex abundanti cautela*, considered these defences none-the-less. Said he:

*"It is clear that from the above that although DW3 had not completed his building when the present suit was instituted or exhibit 13 was prepared, his building was also shown in rectangular mark. I hold that from the evidence adduced by both the plaintiffs and the*

*defendants there is nothing to show that the rectangular marks in exhibit 13 indicate completed buildings.*

*Finally, I consider the defence of laches and acquiescence in the light of paragraph 12 of the statement of claim and the evidence adduced in support thereof."*

He then concluded

*"It is clear from the exhibits tendered that litigation over "Okpuno Azu" land dated as far back as 1927. I pause to think of any reason why the plaintiffs should not have taken action against the defendants when they entered the said land as was the case with other trespassers. I cannot think of any reason. And I add, none was adduced by the parties... I do not believe the defendants and their witnesses that they built houses on the land before the civil war. I am satisfied with the evidence of the plaintiffs and their witnesses. I prefer their evidence where the same conflicts with that of the defendants and their witnesses... I hold that the defendants forcibly entered the land in dispute to build their houses.*

*Further that the plaintiffs did not lose any time in bringing the present action. Accordingly, I hereby grant the plaintiffs the reliefs they seek."*

Thus the most likely evidence of the defendants which probably was intended to support their defence of laches and acquiescence to the effect that they erected houses on the land in dispute well before the commencement of the last Nigerian civil war without any interference by the plaintiffs was rejected as untrue by the trial court. The Court of Appeal, for its own part, also dealt extensively with the defence of laches and acquiescence which, clearly, the defendants were unable to raise properly in their pleadings for lack of particulars. In the end the court below concluded as follows: -

*"I have obeyed learned counsel for the appellants by considering all the issues he raised, tedious and tiring though. I now come to the conclusion and it is that the appeal fails and it is dismissed."*

It cannot be right, therefore, for the defendants to suggest that the Court of Appeal or, indeed, the trial court did not consider these defences. This is despite the fact that those defences could not in law be said to have been properly raised by the defendants, in their pleadings. Issue three must again be resolved against the defendants. It is for the above and the more detailed reasons contained in the judg-

ment of my learned brother, Musdapher, JSC that I, too, dismiss this appeal with costs to the plaintiffs/respondents against the defendants/appellants which I assess and fix at N10, 000.00.

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***KATSINA-ALU JSC***

I have had the advantage of reading in draft the judgment of my learned brother, Musdapher, JSC in this appeal. I entirely agree with it and, for the reasons given, I too dismiss the appeal. I abide by the order for costs made by my learned brother, Musdapher, JSC.

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Appeal dismissed.

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