

SUPREME COURT OF NIGERIA
FRIDAY 11TH APRIL, 2003. SC. 11/1999
CORAM:- I. L. KUTIGI, M. E. OGUNDARE,
U. MOHAMMED, N. TOBI, D. O. EDOZIE, JJSC

1. LINUS OKEREKE
2. OGBONNA OKEREKE APPELLANTS
AND
1. CHINYERE NWANKWO
2. MGBEKEOCHA NWANKWO RESPONDENTS

ARBITRATION - Customary arbitration - Ingredients - Preconditions for such arbitration are inter alia - That there is voluntary submission of issue - And that parties agreed that decision therein will be binding (H1)

LAND LAW - Title - Proof - By s.46 Evidence Act - Title can be proved by possession of connected or adjacent land - In circumstances that owner of such land - Is owner of the disputed land (H2)

LAND LAW - Root of title - Proof - Party relying on traditional evidence to prove title - Must plead his root of title - And the names as well as history of his ancestors (H3)

LAND LAW - Competing titles - Proof - Onus of - Once plaintiff traces his title to an established owner - Onus shifts to defendant to show that - His possession ousts that of original owner (H4)

LAND LAW - Laches & acquiescence - Defence of - Basis - It must be established that party against whom the defences are set up - Had notice of what was being done - And did nothing to prevent it (H5)

LAND LAW - Title - Arising from faulty inheritance - Nothing entitles appellants to the disputed land - Since the person who gave them the land - Had no valid inheritance over same (H6)

FACTS

Before the Customary Court Ideato, sitting at Urualla Imo State,

plaintiffs/respondents filed this action against defendants/appellants, claiming inter alia that respondents are entitled to customary right of occupancy of the land in dispute. Respondents gave traditional evidence to prove their root of title. Appellants equally gave traditional evidence of their root of title to the disputed land.

They (appellants) further stated that a panel of arbitrators comprising council of elders deliberated over the matter and in its decision (Exhibit B), the land in dispute was adjudged to belong to appellants. However according to appellants, respondents rejected the decision and rather instituted the present action. In its judgment, the court found that appellants' root of title based on one Rev. Egbuonu is faulty, as the said person did not validly inherit the land in dispute. The court therefore held that the land belongs to respondents who have proved a better root of title thereof. Dissatisfied, appellants appealed to the Customary Court of Appeal Owerri. The appeal was dismissed. Appellants' subsequent appeal to the Court of Appeal Port-Harcourt division was equally dismissed. Aggrieved further, appellants filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether exhibit ‘B’ in the circumstance of this case is a binding customary arbitration on the parties creating an estoppel?”

“(ii) Was the Court of Appeal right in holding that the provisions of section 46 of the Evidence Act did not apply to this case?”

“(iii) Whether the Court of Appeal was right in affirming the decisions of the two lower courts that the respondents are entitled to the customary right of occupancy of the ‘Ofemmiri land in dispute?’”

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

Customary arbitration - Ingredients

1. From the principles enunciated in these decisions, the ingredients or preconditions for a valid customary arbitration may be stated to be as follows:

1. that there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;

2. that it was agreed by the parties either expressly or

by implication that the decision of the arbitrators will be accepted as final and binding;

3. that the arbitration was in accordance with the custom of the parties or of their trade or business;

4. that the arbitrators reached a decision and published their award and;

5. that the decision or award was accepted at the time it was made.” (p. 1091 G)

LAND LAW - Title - Proof

2. One of the recognised methods of proving title to land is 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. This is statutorily provided for in section 46 of the Evidence Act, 1990. (p. 1094 B)

LAND LAW - Root of title - Proof

3. The next point raised was that the respondents did not give evidence of the traditional history of the land in dispute. It is trite law that a party who seeks title to land and relies on traditional evidence must, in order to succeed plead the root of his title and the names and history of his ancestors and lead evidence to show the root of his title and before him that of his ancestors. (p. 1095 A)

LAND LAW - Competing titles - Proof - Onus of

4. It is part of the general law that in a case of competing titles, once a plaintiff succeeds in tracing his title to a person whose title to ownership has been established, then the onus shifts upon the defendant to show that his own possession is of such a nature as to oust that of an original owner. (p. 1095 D)

LAND LAW - Laches & acquiescence - Defence of - Basis

5. The position of the law is that a party who sets up the defences of acquiescence, laches and standing-by must establish that the party against whom those defences are set up

had notice of what was being done, that he did nothing to prevent it and that the position of the opposite party was being altered to his prejudice, or detriment or that he had been induced by the other party's inaction to spend money.

B *In the instant case, there was no evidence that the 2nd appellant had built on the land in dispute. The trial court found that where the appellants live was not on the land in dispute but close to it. It is on record that when the appellants trespassed into the land in dispute, the respondents did not merely stand-by, rather they made a report to Nwankwo Mgbochi (P.W.4) the head of their family. They also complained to the elders and in addition made a report to the police. Evidence also revealed that occasionally the 1st respondent went and collected palm fruits harvested by the appellants. In those circumstances, it cannot be said that the respondents slept over their rights. I agree with the court below that the defence of acquiescence was not made out. (p. 1096 A)*

LAND LAW - Title - Arising from faulty inheritance

E *6. The logical conclusion is that since Rev. Egbuonu did not perform the funeral rites of Onyeji, which could have entitled him to inherit Onyeji's estate, he could not have handed over to the appellants what he did not have. It is for this reason that the respondents were adjudged to be entitled to the land in dispute. The finding of the trial court cannot be faulted and was upheld by the Imo Customary Court of Appeal and the Court of Appeal.*

G *Having regard to my conclusions on the various issues canvassed in this appeal, it is patent that the appellants had not made out a case to warrant the reversal of the concurrent findings of the lower courts. In the event, this appeal is groundless. It is hereby dismissed. (p. 1097 G)*

H REPRESENTATION

Chris Uche, Esq. with Chuks Nnadi, Esq., for the Appellants
Z. O. E. Nwosu (Jnr.) Esq., for the Respondents

CASES REFERRED TO

- Thomas v. Preston Holder (1946) 12 WACA 78
Folami v. Cole (1986) 2 NWLR (Pt. 22) 367
Kayode v. Odutola (2001) 11 NWLR (Pt. 725) 659
Abbey v. Ollenu (1954) 14 WACA 564
Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561 B
Agu v Ikewibe (1991) 3 NWLR (Pt. 180) 385 at 424
Ohiaeri v Akabeze (1992) 2 NWLR (Pt. 221) 1
Raphael Agu v Christian Ikewibe (1991) 3 NWLR (Pt. 180) 385
Awosile v. Sotunbo (1992) 5 NWLR (Pt. 243) 514 C
Oparaji v. Ohanu (1999) 9 NWLR (Pt. 618) 290
Odonigi v. Oyeleke (2001) 6 NWLR (Pt. 708) 12
Awara v. Alalibo (2002) 18 NWLR (Pt. 799) 484
Alade v. Aborishade (1960) SCNLR 398
Ezeudu v. Obiagwu (1986) 2 NWLR (Pt. 21) 208 D
Idundun v. Okumagba (1976) 9 - 10 SC 227

STATUTES REFERRED TO

- Evidence Act, s. 46
Constitution of Federal Republic of Nigeria 1999, s. 6 E
Constitution of Federal Republic of Nigeria 1979, s. 224(1)

LEAD JUDGMENT BY EDOZIE JSC

Before the Customary Court, Ideato, sitting at Urualla Imo State, F
the respondents on record as Plaintiffs in suit No CC/ID/4/87 filed on
6th February, 1987 claimed against the present appellants as defend-
dants the following reliefs:

*“(1) DECLARATION that the plaintiffs are entitled to the cus-
tomary right of occupancy of a piece or parcel of land called G
“Ofemmiri” situate at Ndimoko Arondizuogu in Ideato Local Gov-
ernment Area.*

*(2) N400.00 being cost for palm fruits harvested on the said
land by the defendants without the permission of the plaintiffs.*

*(3) INJUNCTION restraining the defendants, their servants or H
agents from further entry into the said land.”*

The defendants denied liability for the claim whereupon both
parties testified and called witnesses to substantiate their claims or
defences.

For the plaintiffs, a resume of their case is that the land in dispute belonged to the 1st plaintiff's father Wilson Nwankwo who inherited it from his father Nwankwo Mgbemena. The 1st plaintiff was retained in her father's house to procreate for her father who had no surviving male offspring in accordance with the custom of their people of Ndimoko known as "Ihanwanyi" by which custom she is entitled to inherit the estate of her father. The 2nd plaintiff now deceased was the mother of the 1st plaintiff and as the then surviving widow of late Wilson Nwankwo was equally entitled to his estate. It is the plaintiffs' case that Okereke the father of the two defendants and one Onyeji were visitors who came to live with Wilson Nwankwo the 1st plaintiff's father at Ofemmiri land. Wilson Nwankwo later showed them a portion of Ofemmiri land not in dispute where they erected buildings and occupied.

Following persistent misunderstanding between them, Wilson Nwankwo moved out. Onyeji and put him in his abandoned uncle's house on the portion of the Ofemmiri land now in dispute. Onyeji occupied that house while Wilson Nwankwo harvested all the economic trees within the land in dispute. Onyeji was blessed with a daughter called Mgebeke or Christiana but he had no male child. On the demise of Onyeji, Okereke his brother or closest adult relation and the father of the defendants was called upon to undertake the arrangements for his funeral ceremony but Okereke bluntly declined to do so. In the circumstance, Wilson Nwankwo bore the expenses of the funeral ceremony and thereafter took over the house where Onyeji lived and also assumed responsibility for the upkeep of Onyeji's daughter whose bride price he subsequently received without objection from Okereke the defendants' father.

The plaintiffs further stated that Wilson Nwankwo died on 4th November, 1971 and a day after, the 2nd defendant without the consent of the plaintiffs started rebuilding the house on the land in dispute where Onyeji lived while at the same time reaping the economic fruits on the land. The plaintiffs reported the matter to the extended members of the family - Umunna known as Akajiofor whose attempt at settlement was aborted by the 2nd defendant who failed to show up when the matter was slated for settlement. On account of that, the plaintiffs commenced the action leading to the instant appeal.

For the defendants who called four witnesses, their case is that the land in dispute belonged to their uncle Onyeji who bought it from someone they could not tell. At the time of their father's death, they were minors and Wilson Nwankwo held their father's estate in trust for them. As they grew up, they requested Wilson Nwankwo to show them their father's estate as well as the estate of Onyeji their uncle. Wilson Nwankwo showed them their father's property at Alaobi-Uno but as regards Onyeji's land, Wilson Nwankwo told them that it had passed to Reverend Egbuonu who performed the funeral ceremony of Onyeji. On being contacted, Reverend Egbuonu handed over to them the land in dispute upon the refund to him of the sum of 5 pounds (five pounds) being the amount of the expenses incurred by Reverend Egbuonu with respect to the funeral ceremony of Onyeji. Thereupon, the defendants took possession of the land in dispute and remained in possession thereof until 1986 when the 1st plaintiff cleared it in preparation for cultivation. In the dispute that subsequently ensued, a panel of arbitrators comprising of council of elders known as "Umunna Okolobi Imoko" deliberated over the matter and in its decision reduced into writing, exhibit B, the land in dispute was adjudged to belong to the defendants, but the plaintiffs rejected the decision hence the present action.

At the conclusion of the proceedings in court, a visit to the locus in quo was undertaken by the trial court and at the end, the Customary Court, Ideato upheld the plaintiffs' claims in a judgment delivered on 12th July, 1988 in which it encapsulated its findings thus:

"The D.W. 1 admitted at the locus that Okereke died before Onyeji and yet claimed that Okereke is the direct heir to Onyeji who died after him - another contradiction.

From the above, the court therefore believes that the plaintiffs Chinyere Nwankwo and Mgbekocha Nwankwo have the customary right of occupancy on the disputed land exhibit 'A'. The defendants have to pay N200 costs to the plaintiffs. The defendants should no longer make incursions into the said land. However, as the second defendant (D.W.I), Ogbonaya Okereke is living near the said land, the court orders the plaintiffs to concede thirty feet extent of land to the second defendant's compound wall..."

Dissatisfied by that decision, the defendant appealed to the

Customary Court of Appeal, Imo State holding at Owerri and in its judgment delivered on 21st March, 1990 in appeal No. CCA/A/CO/88, the defendants' appeal was dismissed. Their subsequent appeal to the Court of Appeal, Port-Harcourt division in appeal No. CA/PH/208/82 was equally dismissed on 28th March, 1996. This is a further
 B appeal by the defendants now appellants from the judgment of Court of Appeal in favour of the plaintiffs hereinafter referred to as the respondents. This appeal is predicated on seven grounds of appeal from which the appellants in their brief of argument distilled the following three issues for determination:

- C “(i) *Whether exhibit ‘B’ in the circumstance of this case is a binding customary arbitration on the parties creating an estoppel?*
 (ii) *Was the Court of Appeal right in holding that the provisions of section 46 of the Evidence Act did not apply to this case?*
 D (iii) *Whether the Court of Appeal was right in affirming the decisions of the two lower courts that the respondents are entitled to the customary right of occupancy of the ‘Ofemmiri land in dispute?’*

No brief was filed on behalf of the respondents. On 13th January, 2003 when the appeal came up for hearing, learned counsel for
 E the appellants adopted their brief of argument and drew attention to a list of additional authorities filed and urged this court to allow the appeal. The respondents were represented by counsel who did no more than announce his appearance.

F The focus of the appellants' first issue for determination is on exhibit ‘B’ which is a document captioned “settlement of land dispute by Okolobi Imoko Family members” containing the record of proceedings and the decision of the arbitrators on the dispute between the parties which document was admitted in evidence at the trial
 G Customary Court, Ideato. The contention of the appellants is that the said exhibit ‘B’ is a legally binding customary arbitration creating estoppel and that the Court of Appeal was in error to have held otherwise. It was contended that both parties to the dispute the appellants and the respondents voluntarily submitted to the arbitration, agreed
 H to be bound by and accepted its award or decision. In those circumstances it was submitted, the decision of the customary arbitration was legally binding on the parties and it was not open to any of them to later resile from the decision. The following cases were cited and relied upon for the proposition:- Philip Njoku v Felix Ekeocha & Anor.

(1972) 2 ECSLR (Pt.1) 199 at 205; Agu v Ikewibe (1991) 3 NWLR (Pt. 180) 385 at 424; Ohiaeri v Akabeze (1992) 2 NWLR (Pt. 221) 1 at 24. Counsel argued that the lower court, that is, the Court of Appeal had misapplied the decision in Awosile v Sotunbo (1992) 5 NWLR (Pt. 243) 514, leading to its erroneous view that both the trial customary Court and the Customary Court of Appeal were right in failing to appraise exhibit 'B'. It was stressed that exhibit 'B' disclosed facts favourable to the appellants which if the trial court had adverted to, it would have arrived at a different decision. Counsel submitted that there were inconsistencies between the evidence of P.W.3 and P.W.4 in the trial court and their evidence in exhibit 'B' on the question about Reverend Egbuonu handing over the land in dispute to the appellants and further that while it was recorded in exhibit 'B' that P.W.4 participated in the customary arbitration proceedings, he denied doing so before the trial customary court.

The main question under consideration is the validity or binding effect of exhibit "B" which is the proceedings and decision of a non-judicial body, that is a body not vested with judicial powers by virtue of section 6 of the 1979 or 1999 Constitution. It is a body known as customary arbitrators. Speaking on the subject in Raphael Agu v Christian Ikewibe (1991) 3 NWLR (Pt. 180) 385 at 407, Karibi-Whyte, JSC defined customary arbitration as an arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community and the agreement to be bound by such decision or freedom to resile where unfavourable. A decision by a court of competent jurisdiction creates an estoppel per rem judicatam but an award by a customary arbitration will have the same consequence if certain pre-conditions are satisfied. These are distilled in a plethora of decisions of this court, see Ohiaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1 at 23-24; Awosile v. Sotunbo (1992) 5 NWLR (Pt. 243) 514 at 532; Oparaji v. Ohanu (1999) 9 NWLR (Pt. 618) 290 at 308; Odonigi v. Oyeleke (2001) 6 NWLR (Pt. 708) 12 at 28. ***From the principles enunciated in these decisions, the ingredients or preconditions for a valid customary arbitration may be stated to be as follows:***

1. that there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;

2. that it was agreed by the parties either expressly or by implication that the decision of the arbitrators will be accepted as final and binding;

3. that the arbitration was in accordance with the custom of the parties or of their trade or business;

B 4. that the arbitrators reached a decision and published their award and;

5. that the decision or award was accepted at the time it was made.” See Ohiaeri v. Akabeze (supra).

C Bearing the above conditions in mind, it is easy to determine the validity or otherwise of exhibit ‘B’ with respect to whether the respondents accepted the decision of the arbitrators. In this regard, it is relevant to quote in part, the evidence-in-chief of Ogbonnaya Okereke the 2nd appellant where at p. 30 line 26 et seq of the record **D** he stated thus:

*“At last our Umunna Okolobi Imoko approached Eze Dike, (sic) took the matter and settled the matter for us (the plaintiff and the defendants) and in their decision the Umanna said that the land is ours (defendants) and that the plaintiffs should stay (sic) clear. This **E** is the settlement document.”*

Court: The settlement document of Okolo-Obi Imoko Family is hereby labeled exhibit B (numbers 1-9 pages).

*“Again the plaintiffs refused the verdict of Umunna and sued **F** us to court”*

G By the above excerpt the appellants are saying that the respondents did not accept the arbitral award as per exhibit ‘B’ the legal implication being that exhibit ‘B’ is not binding on the parties. The court below was right when on page 253 of the record of appeal **G** it observed thus:-

*“Exhibit ‘B’, as far as I see it is no more than an attempt by the Okolobi Imoko Family members at a settlement of the dispute between the respondents and the appellants. The attempt failed because the respondents rejected the decision handed down and headed **H** for the courts. By instituting this action, the respondents have demonstrated that they were not bound by that decision. See Awosile v. Sotunbo (supra) when the Supreme Court per Nnaemeka observed thus:*

‘...His filing of a writ of summons was a positive demonstra-

tion that he never believes there was a binding arbitration and of his abandonment of the gentlemen's agreement reached between them."

In the above statement, the court below did not misapply but correctly applied the decision in *Awosile v. Sotunbo* (supra). I am therefore unable to agree with the appellants' counsel that the lower court was in error to hold that exhibit 'B' was not legally binding on the parties. B

With respect to the contention that exhibit 'B' discloses some facts favourable to the appellants, which if properly evaluated would have tilted the case in favour of the appellants, I have carefully gone through the document. It is to be noted that the evidence of witnesses in exhibit 'B' is no evidence before the trial customary court and therefore the trial court was not expected to have evaluated that evidence. See *Awara v. Alalibo* (2002) 18 NWLR (Pt.799) 484; (2002) 12 SC (Pt. 1) 77 at 116; *Alade v. Aborishade* (1960) SCNLR 398; 5 D FSC 167. At any rate, the case of the appellants in exhibit 'B' is not different from their case before the trial court. Since the evidence of the witnesses before the trial court was duly evaluated, that of the witnesses in exhibit 'B' had been indirectly considered as well. C

On the alleged inconsistency in the evidence of PW.3 and PW.4, E it does not appear to me that there is any such inconsistency as neither of the two witnesses gave evidence either before the arbitration or at the trial court with respect to whether Rev. Egbuonu handed over the land in dispute to the appellants. I am however aware that PW.4 was recorded in exhibit 'B' as having taken part in the arbitration proceedings but when cross-examined on that at the trial court, he denied it. He might have told a lie on that but the trial court did not consider it serious enough to destroy the respondents' case. After all, decisions in civil cases are based on balance of probabilities. F Being of the view that exhibit 'B' was not binding on the parties and the evidence of witnesses and findings of fact recorded therein are not admissible evidence before the trial customary court, I will resolve the first issue against the appellants. G

The second issue poses the question whether the Court of H Appeal was right in holding that the provisions of section 46 of the Evidence Act did not apply to the case. Learned counsel to the appellants after quoting the provisions of the section drew attention to the finding by the trial court that the 2nd appellant was living near

the land in dispute and from that platform he submitted that there was a probability that the appellants own the land in dispute. He called in aid the cases of *Nwobodo Ezeudu v. Isaac Obiagwu* (1986) 2 NWLR (Pt. 21) 208; (1986) 3 SC 1 at 8; *Idundun v. Okumagba* (1976) 9 - 10 SC 227; (1976) 9-10 SC 277; *Okechukwu v. Okafor* B (1961) 1 All NLR 685; (1961) 2 SCNLR 369.

One of the recognised methods of proving title to land is 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. This is statutorily provided for in section 46 of the Evidence Act, 1990. See *Idundun & Ors. v. Okumagba* (1976) NSCC 445; *Piaro v. Tenalo* (1976) 12 SC 31 at 33. In my humble view this method of proof does not avail the appellants from the D circumstances of this case. The facts clearly show that the appellants derived title to the portion of the land where they now live through their father Okereke who was put on that land by Wilson Nwankwo the father of 1st respondent. It is also on record that it was Wilson Nwankwo who put Onyeji on the land in dispute and that on the E death of Onyeji the land in dispute reverted to Wilson Nwankwo after he had performed the funeral rites of Onyeji. In the face of these pieces of evidence, which were accepted by the trial court, it is inconceivable that the appellants can now rely on their possession of their land not in dispute to lay claim over the adjoining land in dis- F pute. The circumstances are such as to make it less probable that they own the land in dispute. I will resolve this issue against the ap- pellants.

The 3rd and last issue relates to the question whether the Court G of Appeal was right in affirming the decisions of the two lower courts adjudging the respondents to be entitled to the customary right of occupancy of the land in dispute. The points canvassed on this issue are legion. Some of them are inconsequential and will only be men- tioned in passing. The first point canvassed was whether Okereke H and Onyeji were visitors or indigenes. I can hardly conceive of the bearing which its determination has on the crucial issue as to which of the parties owns the land in dispute. When the determination of an issue in favour of the party who raised it will not affect the result of an appeal, the issue is of no value; see *Ifeanyi Chukwu (Osondu) Co.*

Ltd. v. Soleh Boneh (Nig.) Ltd. (2000) 5 NWLR (Pt. 656) 322; Agu v. Nnadi (2002) 18 NWLR (Pt. 798) 103 at 117. I will therefore regard the issue as irrelevant.

The next point raised was that the respondents did not give evidence of the traditional history of the land in dispute. It is trite law that a party who seeks title to land and relies on traditional evidence must, in order to succeed plead the root of his title and the names and history of his ancestors and lead evidence to show the root of his title and before him that of his ancestors. See Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (Pt. 7) 393; Anyanwu v. Mbara (1992) 5 NWLR (Pt. 242) 386; Akinloye v. Eyiola (1968) NMLR 92. In the instant case proceedings were conducted in the trial customary court. The respondents did not seem to have based their claim on traditional history. Their root of title was simply family property of Wilson Nwankwo. The appellants did not challenge that title. **It is part of the general law that in a case of competing titles, once a plaintiff succeeds in tracing his title to a person whose title to ownership has been established, then the onus shifts upon the defendant to show that his own possession is of such a nature as to oust that of an original owner.** Thomas v. Preston Holder (1946) 12 WACA 78; Samuel Agbanifo v. Madam Irohere Aiwereoba & Anor. (1988) 1 NWLR (Pt. 70) 325; (1988) 2 SC (Pt. 11) 64 at 98. The respondents having traced their root to the Nwankwo family the burden was upon the appellants to show how they came to own the land in dispute and this they could not prove. They were not born or at best were minors when their uncle Onyeji entered the land. They claimed he bought it but could not say from whom. They were not present when Rev. Egbuonu purportedly performed the funeral rites of Onyeji and the trial court did not believe their account.

The next point canvassed was the defence of the equitable doctrine of acquiescence. It was contended that the lower court was in grave error in holding that the defence of acquiescence did not avail the appellants so as to estop the respondents from claiming the land in dispute having regard to the evidence by the respondents that appellant had built a house on the disputed land and had been reaping economic fruits on that land for 16 years, that is, from 1971 when Wilson Nwankwo died to 1987 when the respondents insti-

tuted their action. Counsel reasoned that the respondents are estopped from claiming the land in dispute having slept over their rights. He cited and relied on the cases of *Morayo v. Okiade* (1940) 13 NLR 131; and *Awo v. Cookey-Gam* (1913) 2 NLR 100.

The position of the law is that a party who sets up the defences of acquiescence, laches and standing-by must establish that the party against whom those defences are set up had notice of what was being done, that he did nothing to prevent it and that the position of the opposite party was being altered to his prejudice, or detriment or that he had been induced by the other party's inaction to spend money. See *Folami v. Cole* (1986) 2 NWLR (Pt. 22) 367; *Kayode v. Odutola* (2001) 11 NWLR (Pt. 725) 659. In *Abbey v. Ollenu* (1954) 14 WACA 564 at 568, the West African Court of Appeal quoted with approval and adopted the dictum of Fry, J., in *Willmoth v. Barber* (1890) 15 Ch. D 96 at 105, which reads thus,

"It has been said that the acquiescence which will deprive a man of his legal right must amount to fraud and in my view that is an abbreviated statement of a very true position. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights"

In the instant case, there was no evidence that the 2nd appellant had built on the land in dispute. The trial court found that where the appellants live was not on the land in dispute but close to it. It is on record that when the appellants trespassed into the land in dispute, the respondents did not merely stand-by, rather they made a report to Nwankwo Mgbochi (P.W.4) the head of their family. They also complained to the elders and in addition made a report to the police. Evidence also revealed that occasionally the 1st respondent went and collected palm fruits harvested by the appellants. In those circumstances, it cannot be said that the respondents slept over their rights. I agree with the court below that the defence of acquiescence was not made out.

There was also the complaint that the Court of Appeal fell into the error of the two lower courts in wrongly placing the onus of proof on the appellants. Counsel did not expatiate to indicate the passage in the Judgment of the lower court where the misdirection had oc-

curred. I am unable to find any misdirection on the burden of proof in the judgments of the lower courts. The complaint is groundless.

Finally, learned counsel to the appellant urged this court to set aside the findings of the lower court notwithstanding that they are concurrent findings. It is an age-long practice of this court not to interfere with the concurrent findings of fact made by both the trial court and Court of Appeal where there is sufficient evidence in support of such findings and when there is no substantial error apparent on the record of proceedings such as some miscarriage of justice or a violation of some principle of law or procedure. Where, however, such findings are shown to be perverse or patently erroneous and that miscarriage of justice will thus result if they are allowed to remain, this court will not hesitate to intervene to reverse such findings. See *Chiwendu v. Mbamali* (1980) 3-4 SC 31 at 75; *Woluchem v. Gudi* (1981) 5 SC 291 at 326; *Igwego v. Ezeugo* (1992) 6 NWLR D (Pt. 249) 561 at 518. There is nothing in the record of proceedings or the brief filed on behalf of the appellants that persuades me to interfere with the judgment of the court below upholding the decisions of the trial customary court and the Imo State Customary Court of Appeal. The vital issue upon which the case of the both parties rested was whether it was Wilson Nwankwo who performed the funeral rites of Onyeji as asserted by the respondents or Rev. Egbuonu according to the appellants' version. The trial customary court appreciated this point when at p. 55 line 9 to 21, it reasoned thus:-

"In reply to cross-examination by the P.W.1, the D.W.1 admitted that Rev. Egbuonu is the grandson of Wilson, PW1's father and not Onyeji. Wilson trained the only daughter of Onyeji, collected her bride-price without any contestant. If Egbuonu performed the funeral ceremony of late Onyeji as claimed by D.W.1, he should be the person to own the bride-price".

The logical conclusion is that since Rev. Egbuonu did not perform the funeral rites of Onyeji, which could have entitled him to inherit Onyeji's estate, he could not have handed over to the appellants what he did not have. It is for this reason that the respondents were adjudged to be entitled to the land in dispute. The finding of the trial court cannot be faulted and was upheld by the Imo Customary Court of Appeal and the Court of Appeal.

Having regard to my conclusions on the various issues canvassed in this appeal, it is patent that the appellants had not made out a case to warrant the reversal of the concurrent findings of the lower courts. In the event, this appeal is groundless. It is hereby dismissed. I make no order as to costs, as the
 B respondents did not file brief nor took part in the hearing of the appeal even though represented by counsel.

KUTIGI JSC

C I have had a preview of the judgment just delivered by my learned brother, Edozie, JSC. I agree with his reasoning and conclusions. The appellants have woefully failed to make out a case to warrant the reversal of the concurrent findings of the lower courts. The
 D appeal therefore fails and it is hereby dismissed with no order as to costs.

OGUNDARE JSC

E I read in advance the judgment of my learned brother, Edozie, JSC. I agree entirely with him that this appeal lacks merit. I need to observe some anomalies in this case. The case emanated from Customary Court Ideato, from where an appeal went to the Customary
 F Court of Appeal of Imo State. I have examined the grounds of appeal. It is highly doubtful that the Customary Court of Appeal had any jurisdiction to entertain the appeal as issues raised by the appellants' grounds of appeal were not issues involving cases of Customary Law. See section 247(1) of the 1979 Constitution.

G This apart the Customary Court of Appeal was constituted by a single Judge of that court when hearing and determining the appeal. It is doubtful if the court was properly constituted by a single Judge when hearing and determining an appeal to it. I also observe that the grounds of appeal from the Customary Court of Appeal to
 H the Court of Appeal appear not to relate to issue of customary law and this would put into doubt the competence of the appeal to the Court of Appeal. See section 224(1) of the 1979 Constitution.

These are issues that could have been taken up by the respondents at each stage, firstly in the Customary Court of Appeal and

secondly in the Court of Appeal. The respondents did not do that nor has the competence of the appeal to the Court of Appeal been raised before us, I therefore, say no more on it.

For the reasons given by my learned brother, Edozie, JSC, which reasons I hereby adopt as mine I too dismiss the appeal. And as the respondents filed no brief nor take part in the hearing of the appeal even though represented at the oral hearing by counsel who took no part in the hearing, I make no order as to costs.

C

MOHAMMED JSC

I entirely agree. This appeal is from concurrent findings of the lower courts on questions of fact. Such findings can only be disturbed when they are clearly erroneous or perverse against the great weight of the evidence, depending on the standard of review made by the court. The particular circumstances dictating the need to disturb concurrent judgments from the courts below is the detection of substantial error apparent from the record of proceedings. See Mogo Chinwendu v. Nwanegbo Mbamali (1980) 3/4 SC.31. No such grounds have been established by the appellants.

My learned brother, Edozie, JSC, has made a considerable finding in his judgment in this appeal. For those reasons I will dismiss this appeal. It is dismissed. Since the respondents have failed to file a respondents' brief. I agree that they are not entitled to costs. I therefore make no order for costs.

TOBI JSC

I have read the judgment of my learned brother, Edozie, JSC, and I agree that this appeal should be dismissed.

The fulcrum of this appeal is whether exhibit B, the customary law arbitration is binding on the parties. The law requires that for a customary law arbitration to be binding, certain ingredients must be present. In the often cited case of Njoku v. Ekeocha (1972) 2 ECSLR H 199, Ikpeazu, J. said:

“Where a body of men, be they Chiefs or otherwise, act as arbitrators over a dispute between two parties, their decision should have binding effect; if it is shown firstly that both parties submitted to

the arbitration. Secondly that the parties accepted the terms of the arbitration and thirdly that they agreed to be bound by the decision. Such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel."

The above case was followed by this court in the case of Agu v. B lkewibe (1991) 3 NWLR (Pt. 180) 385. This court held that Nigerian law recognises arbitrations at customary law, if the following conditions are satisfied:

(a) If parties voluntarily submit their dispute to a non-judicial C body to wit their elders or chiefs as the case may be for determination.

(b) The indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied.

(c) That neither of the parties has resiled from the decision so D pronounced. See also Assampong v. Amuaku (1932) 1 WACA 192; Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563; Okere v. Nwoke (1991) 8 NWLR (Pt. 209) 317.

In Ohiaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1, the Supreme E Court relied on its earlier decision in Agu v. lkewibe (supra) and held that before a party to a case in the High Court, which has unlimited jurisdiction under the Constitution, can defeat the right of his adversary to have his case adjudicated upon by the court on the F ground that there has been a previous binding arbitration which raises an estoppel between them, five ingredients must be pleaded and established by the party relying on the decision. These are

(a) that there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;

(b) that it was agreed by the parties either, expressly or by G implication that the decision of the arbitration will be accepted as final and binding;

(c) that the said arbitration was in accordance with the custom of the parties or their trade or business; (d) that the arbitrators reached H a decision and published their award; (e) that the decision or award was accepted at the time it was made.

There is evidence that exhibit B was not accepted by the plaintiffs/respondents hence the action in the High Court.

D.W.1, Ogonnaya Okereke, said in his evidence-in-chief at

pages 30 and 31:

“... and before the case could be settled the first plaintiff arrested us with a police at Ndizuogu Police Station who referred the matter to Eze Dike of Arondizuogu to settle. But the first plaintiff refused to answer Eze’s call. At last our Umunna Okaro-Obi Imoko approached Eze Dike took the matter and settled the matter far us (the plaintiff and the defendants) and in their decision the Umunna said that the land is ours (defendants) and that the plaintiffs should stay clear ... again the plaintiffs refused the verdict of Umunna and sued us for (sic) court.”

In the light of the above evidence, one vital ingredient of customary law arbitration, which is acceptance by the parties, is absent. Accordingly, exhibit B is to no avail to the appellants. That takes me to the equitable defence of acquiescence. Before a party can avail himself of the defence of laches and acquiescence, the following elements must be shown to be present by the defendant, that is:

(a) That the defendant was in fact mistaken as to his own rights over the land;

(b) That the defendant had in reliance as to his mistake expended money on the land;

(c) That the plaintiff knew of the existence of his own right which is inconsistent with the right claimed by the defendant over the land;

(d) That the plaintiff knew of the mistaken belief by the defendant of his right;

(e) That the plaintiff encouraged the defendant in the defendant’s expenditure of money. See *Moss v. Kenrow (Nigeria) Limited* (1992) 9 NWLR (Pt. 264) 207.

In the case of *Inspector Kayode v. Achaji Odutola* (2001) 11 NWLR (Pt. 725) 659, this court dealt exhaustively with the defence of acquiescence. This court defined acquiescence as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the laws of estoppel by word or conduct; the principle of estoppel by representation applying both at law and equity, although the application to acquiescence is equitable. The court held that (a) a high degree of acquiescence is required to obliterate the original owner’s reversionary right in land in favour of an occupier, (b) although there may be acquiescence without undue

delay acquiescence which will deprive a man of his legal rights must amount to fraud.

The burden is on the party who erects the defence of acquiescence to prove it, and that party in the instant case are the appellants. I do not see any iota of evidence in proof of the alleged quiescent
B conduct, which is a conduct or a state of inactivity on the part of the
plaintiffs/respondents.

It is for the above reasons and the fuller reasons given by my learned brother, Edozie, JSC, in his judgment, that I too dismiss the
C appeal. Appeal dismissed.

D

E

F

G

H