

SUPREME COURT OF NIGERIA
FRIDAY 11TH APRIL, 2003. SC. 17/1999
CORAM:- M. L. UWAIJS CJN, M. E. OGUNDARE,
A. I. IGU, A. I. KATSINA-ALU, D. MUSDAPHER, JJSC

1. LASISI MORENIKEJI
2. LAMIDI MORENIKEJI
3. LAWANI MORENIKEJI APPELLANTS
4. RABIU MORENIKEJI
5. AKINADE ADEBIYI
- AND
1. LALEKE ADEGBOSIN
2. SALAMI ADEGBOSIN
3. BUSARI SALAMI RESPONDENTS
4. RAJI AKANMU LAJINFIN
5. TIJANI RAJI

LAND LAW - Trespass - Actions - Basis - Only person in possession of land in dispute - Can maintain action for damages for trespass thereon (H1)

LAND LAW - Trespass - Competing possession - Where possession is disputed - Trespass will lie at the suit of the person - Who can show that title to the land is in him (H2)

LAND LAW - Title - Trespass - Actions - Where title is in dispute - Plaintiff must establish his title and legal possession of the land - In addition to defendants' alleged acts of trespass on such land (H3)

LAND LAW - Title - Traditional history - Sustainability - Evidence of such history can sustain claim for title - Where the history is not contradicted - And is found by court to be cogent (H4)

LAND LAW - Evidence - Conflicting traditional histories - Test of such histories is by reference to facts in recent years as established by evidence - And not solely on demeanour of witnesses (H5)

COURTS - Appeals - Issues - Erroneous findings - Where trial court

approaches evidence of parties wrongly - Appellate court will have no alternative but to allow the appeal (H6)

APPEALS - Courts - Retrial order - Is made where there is an error in law - Which neither renders trial a nullity - Nor makes it impossible for appellate court to say - There has been no miscarriage of justice (H7)

FACTS

Plaintiffs/appellants instituted this action jointly and severally against defendants/respondent at the High Court of Oyo State, claiming title to a parcel of land and injunction restraining respondents from further trespassing on the land. At the hearing, appellants relied primarily on evidence of traditional history in proof of their claims to ownership and possession of the land in dispute. Respondents on their part denied the claim of appellants. They also relied on traditional history for their claim to title to and possession of the land in dispute and counterclaimed against appellants.

At the conclusion of hearing, the learned trial Judge found that there were conflicts in evidence of traditional history adduced by both parties. However, the Judge preferred some parts of traditional history of respondents to those of appellants. Hence, appellants' claims were dismissed. Respondents' counterclaim was granted to some extent. Being dissatisfied, appellants lodged an appeal at the Court of Appeal, Ibadan Division, while respondents cross-appealed. The court dismissed appellants' appeal and allowed respondents' cross-appeal in part. Aggrieved, appellants have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in affirming the decision of the learned trial Judge rejecting the traditional evidence of the plaintiffs and accepting that of the defendants without recourse to recent acts of possession."

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

Trespass - Actions - Basis

1. It is trite law that only a person who at all material times is in possession of land in dispute can maintain an action for damages for trespass thereon. (p. 1188 H)

Trespass - Competing possession

2. Where, however, as in the instant case, two parties are on a piece or parcel of land claiming possession, the possession being disputed, trespass will lie at the suit of that person who can show that title to the land is in him. (p. 1189 B)

Title - Trespass - Actions

3. Similarly, where in a trespass action, the real issue, as in the present action, is one of title to the land in dispute, the plaintiff, to succeed, must establish his title to and legal possession of such land in addition to the defendants' alleged acts of trespass on such land. (p. 1189 C)

Title - Traditional history - Sustainability

4. This is perfectly in order as evidence of traditional history, where this is not contradicted or in conflict and where it is found by the court to be cogent, plausible and/or conclusive can on its own support and/or sustain a claim for declaration of title to land. (p. 1189 H)

Evidence - Conflicting traditional histories - Test

5. Accordingly, the law is well settled that the best way to determine which of the competing traditional histories is more probable is to test them by reference to the facts and/or events in recent years as established by evidence. Equally well settled is that it is erroneous on point of law to determine the veracity or otherwise of such conflicting traditional histories solely on the demeanor of witnesses. (p. 1192 B)

Appeals - Issues - Erroneous findings

6. The law is settled that where a court of trial fails to make findings on material and important issues of fact or approaches the evidence called by the parties wrongly, the appellate court

will have no alternative but to allow the appeal. (p. 1198 A)

Courts - Retrial order

7. An appellate court will, however, order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to say there has been no miscarriage of justice and there are no special circumstances as would render it oppressive to put the parties on trial a second time.
 (p. 1198 B)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Ways to prove title to land

It is the law that title to land can be proved in five ways, that is:

1. by traditional evidence;
2. by production of documents of title which are duly authenticated;
3. by acts of selling, leasing, renting out all or part of the land, of farming on it or in a portion of it;
4. by acts of long possession and enjoyment of the land; and
5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute. (p. 1214 G)

2. Traditional evidence - When conclusive

This takes me to the questions: When is traditional evidence conclusive? When is it inconclusive? In my respectful view, traditional evidence is conclusive where the party raising it traced and proved his title directly to the original owner whose title has been established.
 (p. 1215 F)

REPRESENTATION

L. A. Owolabi, Esq. - for the Appellants
 Chief O. A. Ogundeji - for the Respondents

CASES REFERRED TO

Idundun v. Okumagba (1976) 1 NMLR 200

Kojo II v. Bonsie (1957) 1 WLR 1223

Biariko v. Edeh-Ogwuile (2001) 4 SCNJ 332

Olagbemiro v. Ajagungbade (1990) 3 NWLR (Pt. 136) 37

Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661

Renner v. Daboh (1934-1935) 2 WACA 258

Umeobi v. Otukoya (1978) 4 SC 33

Samuel Nelson v. Ammah 6 WACA 134

Aromire v. Awoyemi (1972) 1 All NLR 101

Okorie v. Udom (1960) SCNLR 326

Akintola v. Lasupo (1991) 3 NWLR (Pt. 180) 508

LEAD JUDGMENT BY IGUH JSC

By a writ of summons issued on the 14th day of January, 1985, D the plaintiffs, for themselves and on behalf of the Morenikeji family of Ibadan in Oyo State instituted an action jointly and severally against the defendants at the Ibadan Judicial Division of the High Court of Justice, Oyo State claiming as follows:

“(1) Fifteen Thousand Naira (N15,000.00) being damages for E trespass committed by the defendants, their servants and agents in that piece or parcel of land, situate, lying and being at Aladun Ile Titun village, Ife Road, Ibadan in Oyo State of Nigeria in 1984 which land is more particularly described and delineated on a plan to be F filed later in this case.

(2) Injunction restraining the defendants, their servants, agents, privies or anyone claiming through them, from committing any or further acts of trespass on the said piece or parcel of land.”

Pleadings were ordered in the suit and were duly settled, filed G and exchanged. At the subsequent trial, both parties testified on their own behalf and called witnesses. The plaintiffs relied primarily on evidence of traditional history in proof of their claims to ownership and possession of the land in dispute. They also relied on a previous judgment in suit No. 1/64/84 as issue estoppel and/or res judicata H against the defendants. In their traditional history, the plaintiffs claimed to be the direct descendants of one Delesolu to whom they traced their title to the land in dispute. They claimed that they were the descendants of the said Delesolu through his daughter, Iwolowa, the

mother of Morenikeji, their grandfather. They asserted that the land in dispute was originally settled upon by one Balogun Oderinlo, a great Ibadan warrior during the reign of Bashorun Oluyole. They claimed that the said Oderinlo made a grant of a large parcel of land including the land in dispute to Delesolu, another warrior from Abeokuta, who served under Oderinlo. Delesolu married Sikako and Sikako begat a daughter by name Iwolowa for Delesolu. Iwolowa married Lofintolu and they had a child called Morenikeji who was the progenitor of the plaintiffs. The farmland at Aladun Ile Titun village was granted by Delesolu in his life time to Iwolowa, his daughter. This farm land which includes the land in dispute was inherited by Morenikeji and the ownership and possession thereof have remained with the descendants of Morenikeji who are the plaintiffs in this case. It was Morenikeji who commenced the development of the village called Ile Titun after inheriting the land at Aladun from his mother. It is the plaintiffs' case that after the death of Delesolu, Ojuolape who was his military colleague and friend, appointed one Lajinfin as caretaker of all the personal property of Delesolu at Oje, Ibadan. As a result, Lajinfin moved into Delesolu's compound at Oje but seized virtually all belongings of Delesolu including his wives, slaves, goods etc. The plaintiffs stressed that Lajinfin was neither related to nor was he a descendant of Delesolu. He was only a caretaker of Delesolu's properties at Oje, Ibadan as all the children of Delesolu at the time of his death with the exception of Iwolowa, his daughter, had predeceased him.

The defendants, for their part, resisted the claim of the plaintiffs. They, in turn, also claimed to be the descendants of Delesolu from whom they asserted they derived title to the land in dispute. In this regard, they relied on traditional history for their claim to title to the land in dispute. They claimed to be in possession of the land in dispute. With regard to their traditional history, the defendants asserted that Delesolu and Lajinfin were brothers of full blood who came to Ibadan from Ogbomoso and jointly settled on the land in dispute when it was a virgin forest. They emphasised that Delesolu had no relationship with the plaintiffs or their ancestors. Both brothers adopted Delesolu as their common name because Delesolu was the elder brother of Lajinfin. After the death of Delesolu without any issue, his junior brother Lajinfin inherited all his properties which in-

cluded his land and wives. They claimed that the defendants' family is known as Delesolu as against the plaintiffs who are known as Morenikeji family. Exhibit J, report of an enquiry by the Secretary of Lagelu Local Government was tendered by the defendants. It was allegedly declared in it that the defendants were members of the Delesolu Family and that the plaintiffs were not. They asserted that the ownership and possession of the land at Aladun were in Delesolu and his descendants, the defendants, and not in the plaintiffs who are not descendants or members of the Delesolu family. The defendants testified as to how their ancestor, one Abioye, granted part of the land in dispute to Adeoye, one of the plaintiffs' ancestors to plant food crops and how the plaintiffs forfeited the land when their ancestors failed to pay their rent otherwise called Ishakole. However, during the time of Suara Layiwola as head of Delesolu family, defendants' family re-allocated the land back to the Morenikeji family for farming purposes by an agreement dated 27th April, 1968, exhibit M.

It is thus clear both from the pleadings of the parties and their evidence before the trial court that each side claimed ownership and possession of the land in dispute relying on their various traditional histories. Indeed, the defendants, for their own part, raised a counterclaim against the plaintiffs in which they claimed as follows:

"(a) A declaration that the 1st, 2nd & 4th defendants are members of Delesolu family.

(b) A declaration that the plaintiffs are not members of Delesolu family.

(c) A declaration that the land in dispute is beneficially in possession of Delesolu family except those portions granted to various families as indicated on the plan attached to the statement of defence and counter-claim.

(d) An order for possession of the area edged by dotted blue lines on defendants' plan and on which the plaintiffs planted food crops as caretakers for denying the defendants' title."

At the conclusion of hearing, the learned trial Judge, Alao, J. after a review of the evidence on the 11th day of September, 1987 was in no doubt that title to the land in dispute was seriously in issue between the parties. He also recognised that both parties, following the decision of this court in *Idundun and others v. Okumagba &*

others (1976) 1 NMLR 200, sought to prove their title to the land in dispute by evidence of traditional history. He found that the evidence of traditional history adduced by both parties was clearly conflicting. This conflict he proceeded to resolve by stating that he preferred the evidence of traditional history of the defendants to that of the plaintiffs. In the circumstance, the learned trial Judge dismissed the plaintiffs' claims. He, however, granted the defendants' counter-claim to the extent that the plaintiffs together with the 1st, 2nd and 4th defendants are members of the Delesolu family and that they were lawfully farming on the land. He held that suit No. 1/641/84 did not constitute issue estoppel or estoppel per rem judicatam. He concluded:

"In all, I make the following Orders:

(i) The plaintiffs' claim for damages in trespass and injunction fails and it is dismissed.

(ii) The first leg of the counter-claim succeeds and I hereby declare that the 1st, 2nd and 4th defendants are members of Delesolu family.

(iii) The second leg of the counter-claim that the plaintiffs are not members of Delesolu family fails and it is dismissed.

(iv) Declaration that Delesolu family except for portions of the land in dispute granted to various families has been in possession of the land in dispute.

(v) The defendants' claim for forfeiture of the plaintiffs' holding of the land in dispute fails and it is dismissed."

Being dissatisfied with this judgment of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Ibadan Division. The defendants were similarly dissatisfied with the judgment and they, too, cross-appealed against the same. At the conclusion of hearing of the appeals, the Court of Appeal on the 17th day of March, 1994 dismissed the plaintiffs' appeal. The defendants' cross-appeal succeeded in part to the extent that it was declared that the plaintiffs are not members of the Delesolu family. The Court of Appeal affirmed the decision of the trial court on the issue of the traditional evidence before the court although it observed that having rejected the plaintiffs' traditional history, the trial court was in error to proclaim the plaintiffs members of the Delesolu family. The Court of Appeal concluded thus:

"In the final conclusion, I make the following orders:

(1) *The main appeal fails and I dismiss it accordingly.*

(2) *The cross-appeal partially succeeds. The declaration by the lower court that the plaintiffs are members of Delesolu family is set aside. In its place I declare that the plaintiffs are not members of Delesolu family.*

(3) *I affirm the order of the lower court dismissing defendants' claim for possession on the ground that the plaintiffs have incurred forfeiture.*

(4) *I award in favour of the defendants costs assessed and fixed at N1, 200.00."*

Aggrieved by this decision of the Court of Appeal, the plaintiffs have further appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and respondents respectively.

The parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The one issue distilled from the appellants' grounds of appeal set out on their behalf for the determination of this appeal is as follows:

"Whether the Court of Appeal was right in affirming the decision of the learned trial Judge rejecting the traditional evidence of the plaintiffs and accepting that of the defendants without recourse to recent acts of possession."

The respondents in their brief of argument adopted the same issue formulated by the appellants for the determination of this appeal. I think the single issue formulated by the parties for resolution goes to the root of the main question between them and is enough for the determination of this appeal.

At the oral hearing of the appeal before us, learned counsel for the appellants, L. A. Owolabi, Esq. adopted the appellants' brief of argument. In it, the appellants argued that the Court of Appeal was in definite error by affirming the decision of the trial court which rejected the traditional evidence led by the appellants and accepted that of the respondents without having recourse to acts of recent possession and/or facts in recent years as established by evidence. In this regard, learned counsel placed reliance on the decision of Her Majesty's Privy Council in *Kojo II v. Bonsie & Another* (1957) 1 WLR 1223, a decision which received the approval of this court and has

since been applied in a number of subsequent other decisions of this court. He urged the court to allow this appeal. Learned counsel for the respondents, Chief O. A. Ogundeji, in his reply, also adopted the respondents' brief of argument. He submitted that this is a case where the two courts below accepted the traditional history of the respondents and rejected that of the appellants. He referred the court to the decision of this court in the case of *Biariko v. Edeh-Ogwuile* (2001) 4 SCNJ 332; (2001) 12 NWLR (Pt. 726) 235 and he contended that the concurrent findings of fact by both courts below automatically concluded the matter. He was of the view also that the case of *Kojo II v. Bonsie & Another* (supra) is inapplicable to the facts of this case. He therefore urged the court to dismiss the appeal.

Learned counsel for the appellants in his final submissions argued that this is a case where the traditional histories of both parties are clearly in conflict. He contended that on the showing of the learned trial Judge, the two traditional histories relied upon by the parties were not only conflicting but inconclusive. He submitted that the traditional evidence of the parties in controversy did not concern primary facts which the witnesses actually saw and/or observed themselves in their lifetime. He pointed out that the evidence in question concerned traditional history, pure and simple, of events that allegedly occurred well over a hundred years ago. Accordingly, he submitted, the matter could not be resolved by watching the demeanour of witnesses while they testified in the witness box or believing and disbelieving various areas of the traditional evidence as the trial court would appear to have done in this case. He argued that in a situation such as is the case in the present appeal, the trial court would be left with no option but to test the traditional histories of the parties by reference to facts in recent years as established by evidence with a view to identifying which of the two conflicting histories is the more probable. This, the trial court failed to do before it embarked upon its purported findings of fact. He submitted that the Court of Appeal was equally in error by affirming those findings of the trial court on the question of the traditional histories of the parties which were arrived at arbitrarily and without any regard to the appropriate applicable law. He therefore urged the court to allow this appeal.

I think the starting point in the resolution of the single issue for determination in this appeal is to observe that al-

though the appellants founded their claims in trespass and perpetual injunction, it is crystal clear that what was in issue, having regard to the pleadings of the parties and the evidence before the court, was title to the land in dispute. It is trite law that only a person who at all material times is in possession of land in dispute can maintain an action for damages for trespass thereon. See Olagbemiro v. Ajagungbade (1990) 3 NWLR (Pt. 136) 37; Adebajo v. Brown (1990) 3 NWLR (Pt. 141) 661. ***Where, however, as in the instant case, two parties are on a piece or parcel of land claiming possession, the possession being disputed, trespass will lie at the suit of that person who can show that title to the land is in him.*** See Awoonor Renner v. Annah Daboh (1934-1935) 2 WACA 258; Umeobi v. Otukoya (1978) 4 SC 33. ***Similarly, where in a trespass action, the real issue, as in the present action, is one of title to the land in dispute, the plaintiff, to succeed, must establish his title to and legal possession of such land in addition to the defendants' alleged acts of trespass on such land.*** See Samuel Nelson v. Ammah 6 WACA 134; Alhaji Aromire & others v. J. J. Awoyemi (1972) 1 All NLR 101; Vincent Okorie & others v. Philip Udom & others (1960) 5 FSC 162; (1960) SCNLR 326. ***So, too, whenever a claim for trespass is coupled with a claim for perpetual injunction, as in the present action, the title of the parties is automatically put in issue.*** See Akintola v. Lasupo (1991) 3 NWLR (Pt. 180) 508 at 515; Vincent Okorie & others v. Philip Udom & others (supra); Abotche Kponugbo v. Kodadja 2 WACA 24; The Registered Trustees of the Apostolic Church v. Olowolemi (1990) 6 NWLR (Pt. 158) 514 etc.

In the present action, not only is what is in issue between the parties title to the land in dispute, not only are both parties claiming to be in possession of the land, possession thereof being disputed, not only is the plaintiffs' claim in trespass coupled with a claim for perpetual injunction, it is clear to me that the courts below were right to have given due attention to the all important question of which of the two parties established its title to the land in dispute and was therefore in legal possession thereof. See too Ogunfaolu & Another v. Adegbite (1986) 5 NWLR (Pt. 43) 549.

As I have already stated, both parties in proof of their title to the land in dispute relied on evidence of traditional history. ***This is***

perfectly in order as evidence of traditional history, where this is not contradicted or in conflict and where it is found by the court to be cogent, plausible and/or conclusive can on its own support and/or sustain a claim for declaration of title to land.

See Alade v. Lawrence Awo (1975) 4 SC 215 at 228; Olujebo of Ijebu v. Oso (1972) 5 SC 143 at 151. See too Idundun & Others v. Okumagba & Others (1976) 9-10 SC 227 where this court set out the five methods of proving title to land and emphasised that each of those five methods will suffice, independently of the others, to prove title to land. See also Nwosu v. Udejaja (1990) 1 NWLR (Pt. 125) 188 and Okonkwo v. Okolo (1988) 2 NWLR (Pt. 79) 632 at 656.

In the present case, it is clear that the traditional histories relied upon by both the appellants, of the one part, and the respondents, of the other part, were patently in conflict and irreconcilable. No doubt, both parties claimed to be related to Delesolu from whom they derived their title to the land in dispute. But the appellants who claimed to be the direct descendants of the said Delesolu asserted that the land in dispute formed portion of the land originally settled upon by one Balogun Oderinlo, a great Ibadan warrior during the reign of Bashorun Oluyole. They claimed that the said Balogun Oderinlo subsequently granted the land in dispute to Delesolu, a trusted warrior under him. The appellants' case is that they are the descendants of Delesolu through his daughter, Iwolowa, the mother of Morenikeji, their grandfather and progenitor. They claimed that on the death of Delesolu, one Ojuolape, his friend, appointed one Lajinfin as caretaker of Delesolu's properties which appointment Lajinfin duly accepted. The appellants emphasised that the said Lajinfin was neither related to nor was he a descendant of Delesolu. He was only a caretaker of Delesolu's properties as the latter's children at the time of his death had all died with the exception of Iwolowa his daughter. The appellants claimed that Iwolowa begat Morenikeji and that after the death of the former, Morenikeji inherited the land in dispute from Iwolowa. It is their case that the ownership and possession of the land in dispute have till this day remained of Morenikeji who are the plaintiffs/appellants in this case. They also asserted that the respondents have no relationship or connection of whatever nature with the Delesolu family.

The defendants/respondents, on the other hand, also claimed

to have descended from the said Delesolu family. Whilst, however, the appellants maintained that Lajinfin was no blood relation of Delesolu, the respondents asserted that Lajinfin was the junior brother of full blood of Delesolu, and that Delesolu had no relationship whatsoever with the appellants or their ancestors. It is their case that Delesolu and Lajinfin were brothers who came to Ibadan from Ogbomosho and jointly settled on the dispute when it was still a virgin forest. The respondents asserted that Delesolu became seized of the land in dispute by settlement and not by grant as the appellants alleged. They claimed that after the death of Delesolu without any issue, his junior brother Lajinfin became the head of the Delesolu family and was in full control of the land in dispute. They asserted that at no time was Lajinfin a stranger to Delesolu family as the appellants stated. They asserted that the ownership and possession of the land in dispute were in Delesolu and his brother Lajinfin and that the respondents as their descendants are now the owners in possession of the land in dispute. They vehemently denied that the appellants are members of the Delesolu family.

It is apparent from the above accounts and from the judgment of the learned trial Judge that there was definite conflict in the traditional histories projected and relied upon by the parties. The learned trial Judge fully recognised this conflicting nature of the traditional histories presented before him by the parties at the trial. Having meticulously set out the two versions of the traditional histories relied upon by the parties, he queried as follows:

“Out of this conflicting traditional evidence, which one is true and acceptable to this court?”

He then proffered an answer thus:

“The court’s approach to resolving the conflict in traditional evidence is found in the opinion of their Lordships in the Privy Council in Kajo vs. Bonsie & Others. (1957) 1 WLR 12 at Pages 1226 - 7 as follows:

‘where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case a demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is more probable.’”

The crucial question now is whether this approach which the trial court expressly decided to adopt in the resolution of which of the two competing histories is more probable was right and, if so, whether such an approach was in fact followed by the court to resolve this vital issue before it.

- B ***It is plain to me that the approach enunciated by the trial court for the resolution of the conflict in the traditional histories of the parties before it and determining which of them is more probable is clearly without fault and is fully backed by the authorities. It is long established that where there is a conflict of traditional history, which has been handed down by word of mouth from the ancestors or forefathers of the parties, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, it is firmly recognized that the demeanour of witnesses is little guide to the truth of the matter as in the course of transmission from generation to generation of the traditional history, mistakes may occur without any dishonest motives. Accordingly, the law is well settled that the best way to determine which of the competing traditional***
- C ***histories is more probable is to test them by reference to the facts and/or events in recent years as established by evidence.***
- D See *Kojo II v. Bonsie & Another* (1957) 1 WLR 1223 at 1227 per Lord Denning. See too *Ikpan v. Edoho* (1978) 6 - 7 SC 221; *Adenle v. Oyegbade* (1967) NMLR 136 etc. ***Equally well settled is that it is erroneous on point of law to determine the veracity or otherwise of such conflicting traditional histories solely on the demeanour of witnesses.***
- E See too *Alhaji Adisa Thani & Another v. Saibu & others* (1977) 2 SC 89 at 110.
- F

- G In this regard a distinction must be drawn between the mode of assessment of the credibility of witnesses with regard to primary facts, that is to say, facts which the witnesses actually saw and/or observed with their own eyes or knew from their own personal knowledge as against evidence of traditional history which had been handed
- H down by word of mouth from generation to generation from the forefathers of the witnesses. With regard to the former, the bearing and demeanour of witnesses among other factors are clearly of relevance in the determination of the veracity of the witnesses that testified on such primary facts. In the case of the latter, however, the

demeanour of witnesses is little guide to the truth and the best way to resolve conflicting traditional histories is to test such histories by reference to facts in recent years as established by evidence to see which of the two competing histories is the more probable. See *Kojo II v. Bonsie & Another* (supra). A trial court may accept or reject part of the evidence of witnesses who testified on primary facts within their personal knowledge. It may not, however, accept part and reject part of a traditional history as traditional evidence cannot be treated as evidence of a witness given on matters within living memory. B

In the present case, the main dispute between the parties was as to their traditional histories which had been handed down by word of mouth from their forefathers. It is plain from the evidence that there was conflict between the traditional histories presented before the court by the parties in proof of, their respective claims of title to the land in dispute. Both traditional histories were *ex facie* plausible. D It did not also appear from the evidence before the court that either of them was inherently incredible and/or self contradicting. I think the learned trial Judge was right in the formulation of the approach he proposed to adopt in the case with a view to determining which of the two conflicting traditional histories relied upon by the parties was more probable. This, he stated and, quite rightly in my view, was to E test the traditional histories by reference to facts and/or events in recent years as established by evidence and to see which of the two competing histories is more probable.

The next question must be whether the learned trial Judge, in fact, applied this approach in his resolution of which of the two conflicting histories was more probable. F

It is indisputable from the judgment of the learned trial Judge he had stated that in the face of the conflicts in the traditional evidence of the parties, he would be obliged to test the two competing histories by reference to facts in recent years. He did not, however, consider any such facts or events in recent years before he purported to accept the traditional history put forward by the respondents and rejected that of the appellants. This point was also conceded by the court below when in its leading judgment per Ogunlade, J.C.A., it H was stated as follows:

“I pause here to make some observations about the above findings of the trial Judge.

It will be seen that although the trial Judge had said that if there was a conflict in traditional history, the court should test the history by reference to the facts in recent years. He did not in fact consider any events in recent years before he went on to accept the traditional history as told by the defendants. What the trial court did after setting out the correct position of the law was to enter into a litany of “I believe”, “I find as a fact”, “I accept”, “I do not accept”, “I prefer” in respect of the various factual aspects of the traditional histories presented by the parties. I think the trial court, with respect, was in grave error in this regard.

The Court of Appeal, for its own part, affirmed the said judgment of the trial court by stating, in the first place, that the trial court found the traditional history told by the appellants “incredible”. Said the Court of Appeal:

“The lower court clearly demonstrated in the judgment the reason why it found the traditional history told by the plaintiffs incredible. The plaintiffs had through 1st plaintiff said that Ojuolape, a friend of Delesolu, brought a stranger, Lajinfin to become caretaker of Delesolu’s properties and that as such caretaker:

‘Whatever Lajinfin saw in the place where he was asked to guide were seized as his own. These included men, women, slaves and goods.’

This was as against the evidence of DW13 which ascribed Lajinfin’s role to his position as the junior full blooded brother of Delesolu with whom he co-founded Aladun. I think the lower court had been mistaken in calling in aid the approach stated in *Kojo II v. Bonsie* (supra) when it was able to conclude that the defendants’ traditional history was conclusive. The error is in my view innocuous and did not occasion a miscarriage of justice.

With profound respect to the Court of Appeal, I have given a close study to the judgment of the learned trial Judge and can find no where that he described the traditional evidence presented by the appellants as incredible. What the learned trial Judge did, as I have earlier observed, was to state the applicable law correctly where two conflicting traditional histories are before the court. But, in spite of this, he did the opposite of what he rightly considered to be the correct thing to do in the circumstances. Without in fact considering any events in recent years, he went ahead to believe and disbelieve vari-

ous aspects of the conflicting of the parties. As I have stated, he was clearly in error in this regard.

In the second place, it is evident from the judgment of the court below that it faulted in a number of areas the decision of the trial court with regard to its treatment of the traditional histories of the parties. The Court of Appeal stated:

"I think the trial Judge exposed his judgment to a deserved attack because he failed to determine the case as the evidence called warranted. The plaintiffs called traditional evidence. The defendants similarly did. Each of the traditional histories called by the parties can be likened to a package. The court had to accept one package or the other. Once the court accepted a package, it also accepted fully the contents of the package. A court could not broach the package it had accepted and then reject some of its contents. The plaintiffs' traditional history incorporated the following facts:

That Oderinlo made a grant of the land in dispute to Delesolu, that Delesolu married Sikako who begat Iwolowa for him; that Iwolowa married Lofintolu; that Iwolowa had a son Morenikeji for Lofintolu, that Delesolu gave Iwolowa and Lofintolu the parcel of land at Aladun village.

In the same way the defendants' traditional history incorporated the following elements:

That Delesolu and Lajinfin first settled upon the land in dispute; That Delesolu married Igbayinnike;

That Igbayinnike did not have any issue; that Lajinfin inherited Igbayinnike and had two children by her; that Lajinfin had eight other children; that Morenikeji was not related to Delesolu and that the defendants are the descendants of Delesolu and Lajinfin.

The lower court rejected the traditional history of the plaintiffs. It held that the traditional history of the defendants was conclusive. Having rejected the traditional history of the plaintiffs, the lower court could not turn round to fragment the same traditional history and accept some of its component elements.. I am of the view that the lower court was in error to have made the finding that Iwolowa was the daughter of Delesolu and that the plaintiffs were members of Delesolu family when it had earlier rejected the whole of the traditional history called by the plaintiffs."

A little later in its judgment, the Court of Appeal launched a

further attack on the decision of the trial court with regard to the traditional histories in question. It said:

“The defendants traditional history which the lower court earlier accepted had elements which made it impossible to accommodate the finding that Iwolowa was a daughter of Delesolu... The findings that Iwolowa was the daughter of Delesolu and that the plaintiffs are members of Delesolu family are perverse in the circumstances. I accordingly set aside the findings.”

The point cannot be over emphasised that neither the trial court nor the court below can without legal justification turn round to fragment the traditional histories presented by the parties and accept or reject some of its component elements. I entirely agree that each of the traditional histories called by the parties may be likened to a package and that the court, having complied with the provisions of the law, was entitled to accept one package or the other. It may not however broach the package it had accepted and then reject some of its contents. This is another area both courts below erred in the matter of the traditional evidence of the parties in the present case. More importantly, however, the point must be stressed that the court below was equally in error when it affirmed the decision of the trial court on the issue of which of the two competing traditional histories was more probable when the said trial court did not test the traditional evidence in issue by reference to facts and/or events in recent years as established by evidence. See too *Aikhionbare & Others v. Omoregie & Others* (1976) 12 SC 11.

Attention must be drawn to the decision of the court below to the effect that the trial court was in error by calling in aid the principle of law enunciated in *Kojo II v. Bonsie & Another* (supra) in view of the conclusion of the said trial court to the effect that the defendants' traditional history was conclusive. It, however, held that the error it alluded to was innocuous as it did not occasion a miscarriage of justice. The Court of Appeal stated thus:

“I think the lower court had been mistaken in calling in aid the approach stated in Kojo v. Bonsie (supra) when it was able to conclude that the defendant's traditional history was conclusive. The error is in my view innocuous and did not occasion a miscarriage of justice.”

With profound respect to the Court of Appeal, I am unable to

accept that the principle of law enunciated in *Kojo II v. Bonsie & Another* (supra) did not apply to the facts of the present case. I should, perhaps, state for the avoidance of doubt that the test in *Kojo II v. Bonsie & Another* (supra) is applicable where, as in the present case, there are more than one set of traditional histories before the court and each is relied on by one party or the other to establish its title to the land in dispute and each of those sets of traditional histories is not only plausible and probable but conflicting. In such a case the conflict is resolved not by the demeanour of witnesses but by reference to facts and/or events in recent years as established by evidence to see which of those competing or conflicting histories is more probable. In this regard it ought to be noted that the emphasis on the principle in *Kojo II v. Bonsie & Another* is on the word “probable” and not on “conclusive” or “inconclusive”.

In the case on hand, there is no where in the judgment of the trial court that the term conclusive or inconclusive was employed to describe either of the two traditional histories that were presented to the court by the parties. It is plain that both traditional histories were plausible and probable. They were also conflicting. It seems to me clear in these circumstances that the best way to resolve the conflict, as the learned trial Judge rightly decided, was to test the traditional histories by reference to facts in recent years as established by evidence to see which of the two competing histories was more probable. In my view, the trial court was in error by failing to apply the acid test prescribed in the case of *Kojo II v. Bonsie & Another* (supra) in determining which of the two conflicting traditional histories was more probable. Similarly, the Court of Appeal, with respect, was equally in error by affirming the decision of the trial court rejecting the traditional evidence of the appellants and accepting that of the respondents without recourse to facts and/or events in recent years as established by evidence with a view to identifying which of the two competing histories was more probable. It is evident in all the circumstances of this case that it is impossible to say with any degree of certainty what the finding of the learned trial Judge would have been on the question of which of the two traditional histories before him was more probable had he applied the proper approach prescribed by law. Consequently his judgment together with that of the court below which affirmed the same cannot be allowed to stand. Accord-

ingly, the sole issue for determination in this appeal must be resolved in favour of the appellants. I will now consider the appropriate order to make in this appeal.

The law is settled that where a court of trial fails to make findings on material and important issues of fact or approaches the evidence called by the parties wrongly, the appellate court will have no alternative but to allow the appeal. See *Karibo & others v. Grend & Another* (1992) 3 NWLR (Pt. 230) 426 at 441. ***An appellate court will, however, order a retrial where there has been such an error in law or an irregularity in procedure which neither renders the trial a nullity nor makes it possible for the appellate court to say there has been no miscarriage of justice and there are no special circumstances as would render it oppressive to put the parties on trial a second time.***

See Bakare v. Apena & Others (1986) 4 NWLR (Pt. 33) 1 at 16 - 17; *Ayoola v. Adebayo* (1969) 1 All NLR 159; *Duru v. Nwosu* (1989) 7 SCNJ 154 at 159; (1989) 4 NWLR (Pt. 113) 24.

In the present case, it is plain that there has been such an error in law which neither renders the trial a nullity nor makes it possible for this court to say that there has been no miscarriage of justice. There are also no special circumstances as would render it oppressive to put the parties on trial a second time. I think the interest of justice demands an order of retrial of this case.

The conclusion I have therefore reached is that this appeal succeeds and it is hereby allowed. The judgment and orders of the trial court dated the 11th day of September, 1987 as affirmed by the Court of Appeal are hereby set aside and it is ordered that this case be remitted to the High Court of Ibadan Judicial Division for re-trial before another Judge of that court other than Abiodun Alao, J. There will be costs to the appellants against the respondents which I assess and fix at N10,000.00

H **UWAIS CJN**

I have had the advantage of reading in draft the judgment read by my learned brother, Iguh, JSC. I entirely agree with the judgment.

There is no doubt that both the courts below were in error in

failing to resolve the conflict in the traditional evidence adduced by the parties. In the circumstance of the case neither the demeanour of the parties nor the belief or disbelief by the courts in the testimony of any of the witnesses for either the parties would have sufficed in resolving the conflict - see Adenle v. Oyegbade (1967) NMLR 136 at 138; Aikhionbare v. Omoregie (1976) 12 SC 11; and Thanni v. Saibu (1977) 2 SC 89. The test laid down in Kojo II v. Bonsie & Anor. (1957) 1 WLR 1223 at pp. 1226-1227 of making reference to acts of recent possession by any of the parties to the case was not applied. This is why the courts below fell in error in giving judgment in favour of the respondents herein, who were the defendants before the trial court.

As this court is not in a position to unravel the conflict in the traditional evidence called by the parties, the inevitable order to be made is to remit the case to the trial court to do so. I accordingly will allow the appeal and adopt the order contained in the lead judgment read by my learned brother, Iguh, JSC.

OGUNDARE JSC

I read in advance the judgment of my learned brother, Iguh, JSC just delivered. I agree with him that this appeal deserves to succeed. I too allow it and set aside the judgment of the two courts below. I abide by the consequential order made by him that the case be remitted to the High Court of Oyo State, Ibadan Judicial Division to be heard de novo by a Judge of that court. I nevertheless wish to add a few words of my own on proof of title by traditional evidence and what a court makes of such evidence. This appeal falls within a narrow compass. Both the plaintiffs, who are appellants before us and the defendants, now respondents, relied on traditional history pleaded in support of their respective claim to title to the land in dispute. Plaintiffs claimed:

“(1) Fifteen thousand Naira (N15,000.00) being damages for trespass committed by the defendants, their servants and agents in that piece or parcel of land, situate, lying and being at Aladun Ile Titun village, Ife Road, Ibadan in Oyo State of Nigeria in 1984 which land is more particularly described and delineated on a plan to be filed later in this case.

(2) Injunction restraining the defendants, their servants, agents, privies or anyone claiming through them, from committing any or further acts of trespass on the said piece or parcel of land.”

and pleaded, inter alia, as follows:

B *“9. The land in dispute forms a portion of the land originally settled upon by Balogun Oderinlo of Ibadan, a great warrior and commander of the Ibadan Army during the reign of Bashorun Oluyole.”*

C *10. During the reign of the said Bashorun Oluyole the said Balogun Oderinlo granted absolutely to Delesolu, a warrior under him and living with him at Mapo, his seventy rooms and the remaining large parcel of farmland at Oje, Ibadan. Delesolu hailed from Abeokuta.*

D *11. Balogun Oderinlo did this because he was entreated and thereby prevented from moving into the new 70 roomed house for security purpose and to avoid a rebellion under Oderinlo’s leadership.*

E *12. The said Balogun Oderinlo also during the reign of Balogun Oluyole granted the large parcel of land at Aladun village including the land in dispute to Delesolu, a trusted warrior under him.*

13. Delesolu was married to Sikako, sister of Ibiogbe who is a war lord under Delesolu and keeper of his gun powder and armoury.

F *14. Sikako begat Iwolowa for Delesolu and Delesolu married Iwolowa to Lofintolu, son of Ibuola, hunter and a warrior at Eleta, Ibadan.*

15. As a pre-condition for the marriage of his only daughter to Lofintolu, Delesolu insisted that Lofintolu and his wife should live with him at Oje.

G *16. Delesolu during his lifetime granted absolutely to Iwolowa and his son-in-law, Lofintolu the parcel of land on which they built their matrimonial house at Oje, Ibadan.*

H *17. Delesolu also during his lifetime granted absolute to his daughter Iwolowa and his son-in-law, Lofintolu the said the large parcel of land including the land in dispute shown in the said survey plan filled with this statement of claim, showing all the boundaries of the said parcel of land. The place is called Aladun because yams and other crops grown on the land tastes like “Adun”.*

18. When Iwolowa died during the reign of Bale Olugbode,

Lofintolu having predeceased her, she was survived by her son Morenikeji who inherited the parcel of land granted by his maternal grandfather to his parents.

19. *Morenikeji when he grew up vacated the hut built by Delesolu near the boundary with Ogungbade and moved to the present site at the village now known and called to this day Aladun Ile Titun (after his new model of a village) replacing the hut of his maternal grandfather. The said name of the village of Ile Titun is shown on the map prepared by the government and obtainable by the public from Federal Surveys or Regional Survey Headquarters or at the Survey Division of the Ministry of Works, Lands and Housing Secretariat, Ibadan for sale to the public.*

20. *Lofintolu and Iwolowa after the gift inter vivos from Delesolu took over ownership and possession of the said parcel of land at Aladun and exercised positive and numerous acts of ownership without any challenge from any quarters, grew palm trees, kolanut trees, oranges and cocoa and other cash and economic crops thereon.*

21. *After the death of Lofintolu and Iwolowa, the said parcel of land at Aladun Ile Titun was inherited by their son, Morenikeji who cultivated, farmed, managed and exercised control over the said farmland without any challenge from any quarters.*

22. *Morenikeji also inherited the said parcel of land at Oje and built more houses. His descendants rebuilt and still live at the said area at Oje till this day.*

23. *Morenikeji had four wives called (1) Omileye, (2) Omidiji, (3) Adedubu and (4) Idowu.*

24. *Omileye begat for Morenikeji (1) Adeeye, his eldest son, (2) Fadeyemi and (3) Idowu.*

25. *Omidiji begat for him (1) Oyeboade, (2) Oje Babarinde, (3) Adesina, (4) Adebiyi and (5) Sangokanyi.*

26. *Adedubu begat for him (1) Aderinola, (2) Adedoyin and (3) Ademosango.*

27. *Idowu begat for him Isarumi.*

28. *All these children were born and bred at Aladun village and when they died, they were buried at Aladun Ile titun village. Only Iwolowa, Lofintolu and Morenikeji who lived and died at Aladun village were brought down for burial at their home at Oje, Ibadan.*

29. *When Morenikeji died all his eleven children comprising*

seven sons and four daughters inherited the parcel of land at Aladun Ile Titun and their houses at Oje, Ibadan and Ile Titun.

30. *After the death of Morenikeji, Adeeye, his eldest son, became the Head of Morenikeji Family and he undertook the management and control of the said family property at Aladun exercising numerous and positive acts of ownership without any disturbance to his possession.*

31. *Adeoye died during the reign of Olubadan Aleshinloye of Ibadan and Oyeboade became the Head of the family in control, of the said family property.*

32. *Oyeboade died during the reign of Bale Oyetunde and Oje Babarinde became the Head of the family.*

33. *Oje Babarinde died during the reign of Olubadan. Alli Iwo and Adesina became the Head of the family.*

34. *Adesina died during the reign of Olubadan Apete and Adebiyi became Head or Baale of the family.*

35. *Adebiyi died during the reign of Olubadan Adebimpe Lasisi. Morenikeji became the Head of the family and he was later installed in 1984 as the Bale of Aladun Ile Titun during the reign of the present Oba Olubadan Asanike.*

36. *All these past and present heads of the family took over, managed and exercised control over their family property at Aladun Ile Titun exercising numerous and positive acts of ownership and possession over the said farmland including the land in dispute.*

37. *During all this time, the family grew and reaped cocoa trees, palm trees, kolanuts, orange trees, osan Agbalumo and other cash and economic trees."*

The defendants, on the other hand, counter-claimed as hereunder:

"(a) The 1st, 2nd and 4th defendants are members of Delesolu family.

(b) The plaintiffs are not members of Delesolu family.

(c) The land in dispute is beneficially in possession of Delesolu family except those portion granted to various families as indicated in the plan attached to the statement of defence and counter-claim.

(d) Order for possession of the area edged by dotted (sic) blue lines on defendants plan and on which the plaintiffs planted food crops as caretakers for denying the defendant's title."

In their amended statement of defence and counter-claim, they pleaded, inter alia, thus:

“20. Delesolu and his brother Lajinfin founded Aladun village on the land in dispute. The village has twelve houses

21. There are also graves of dead members of Delesolu family at the village, and these include (a) Asiata Dairo (b) Babiu Salami^B and (c) Salawu.

22. Members of Delesolu family including the defendants farm on the remaining portion of the land in dispute.

23. The defendants deny paragraph 9 of the statement of claim^C and say the land in dispute did not form portion of any land, originally settled upon by Balogun Oderinlo of Ibadan during the reign of Bashorun Oluyole.

24. The defendants aver Balogun Oderinlo had no land in the vicinity (sic) of the land in dispute and no person shared common^D boundary with Balogun in the area.

25. Delesolu settled on the land in dispute when it was a virgin forest, and his boundarymen are as mentioned in paragraph 15 above and also as indicated on plan No.LW26/85.

26. Delesolu and his descendants which include the 1st 2nd,^E and 4th defendants have been in effective occupation of the land in dispute for over 150 years.

27. The plaintiffs are not members of Delesolu family.

28. The defendants say Balogun Oderinlo did not have a single^F room or house at Oje before Delesolu settled at Oje.

29. Bashorun Oluyole ordered to grant the premises at Oje on which Delesolu compound is situate today to Delesolu on behalf of himself (Iba Oluyole) and Ibadan community then.

30. At the time when Delesolu settled at Oje, Ibadan bound-^Gary was then at Odo Elegun, about two kilometers from Oje and one kilometer from Oderinlo’s compound on opposite directions. Oderinlo’s compound is about three kilometers from Delesolu’s compound.

31. Delesolu named the place where he was settled ‘Oje’ after^H his home town in Ogbomosho, and the place is called Oje up to the present moment.

32. The defendants say Delesolu became seized of the land in dispute by settlement and not by grant.

33. *Delesolu never married Sikako or any Ibiogbe's daughter.*

34. *The defendants say one Olofintolu begat Morenikeji the ancestor of the plaintiff.*

35. *Olofintolu was from Ibuola's compound, Eleta, Ibadan.*

B 36. *Olofintolu committed incest at his family's compound at Eleta when he sexed his sister; and because of this, the family of Olofintolu condemned him to death at the shrine of Orisa Nari.*

C 37. *Olofintolu ran away from Ibuola's compound Eleta to Ibiogbe for protection, and Ibiogbe accepted Olofintolu as a servant.*

38. *The defendants aver that at the request of Ibiogbe, Lajinfin who succeeded Delesolu, gave the said Ibiogbe a parcel of land at Aladun village as indicated on plan No. LW267/85, and Ibiogbe took Olofintolu with him to Aladun village as a servant.*

D 39. *At Aladun village, Olofintolu illegally sexed Sikako who was Ibiogbe's sister; and because of this Olofintolu ran away and has never been seen since.*

E 40. *Sikako begat a son and Ibiogbe named him Morenikeji because Olofintolu his father could not be found. This Morenikeji is the father of the plaintiffs.*

F 41. *In 1928 during the time of Abioye as Head of Delesolu family, Adeoye from Morenikeji family begged that a parcel of land be allotted to Morenikeji family to plant food crops and this was granted upon payment of Ishakole at Ogiyan and Egungun festivals.*

42. *The defendants deny Sikako begat Iwolowa for Delesolu, and Iwolowa never married Olofintolu whose whereabouts was unknown.*

G 43. *The defendants say Lofintolu never lived with Delesolu, and Delesolu never granted any land to Lofintolu.*

44. *Lofintolu had no connection with Delesolu, but with Ibiogbe.*

45. *The plaintiffs who are the descendants of Lofintolu and Morenikeji are still living in Ibiogbe's compound today.*

H 46. *The defendants deny Morenikeji inherited any land at Oje and Aladun village, but admit Morenikeji lived and died at Ibiogbe's compound Oje, Ibadan.*

47. *The defendants aver Delesolu did not grant Olofintolu of any piece of land either at Oje or Aladun village.*

48. *The defendants also deny paragraph 19 of the statement*

of claim and aver further that the site of Aladun village did not change since Delesolu founded it.

49. *The defendants assert Delesolu did not give land to Lofintolu and Iwolowa, and Lofintolu and Iwolowa never planted palm trees, kolanut trees, oranges, cocoa or any cash or economic crop on the land in dispute. The defendants' family and their customary tenants planted palm, kolanut, and other economic trees on their respective holdings as shown on their plan.* B

50. *Morenikeji did not inherit any part of the land in dispute, but Abioye a one time head of Delesolu family granted Adeoye a piece of land as indicated on the plan attached to the statement of defence for planting of food crops.* C

51. *The defendants deny that all the people mentioned paragraphs 23, 24, 25, 26 & 27 of the statement were born and buried at Aladun village. Iwolowa and Morenikeji were buried at Ibiogbe's compound, Lofintolu disappeared and nobody knows when he died or where he was buried. Lofintolu did not however die at Aladun village of Ibiogbe's compound.* D

52. *The defendants deny paragraphs 29 & 30 of the statement of claim and say further that the plaintiffs did not inherit or have any piece of land at Aladun save the one granted to Adeeye by Abioye to plant food crops on payment of Ishakole.* E

53. *The defendants admit that Oyeboade succeeded Adeeye on the land allotted to Adeeye to plant food crops, but say Oyeboade paid Ishakole to Delesolu family until Latunbosun took the land from Oyeboade when he failed to pay Ishakole for two years.* F

54. *Latunbosun the head of Delesolu family thereafter allotted the said piece of land to Bajji Ayinla who gave Ishakole to Delesolu family in respect of his holding* G

55. *During the time of Suara Layiwola as head of Delesolu family, Sanusi Adisa Morenikeji as head of Morenikeji family appealed to Delesolu family that Delesolu family should re-allot to Morenikeji family the land taken away from them, and that they would pay Ishakole.* H

56. *Delesolu family refused to re-allot the said piece or parcel of land back to Morenikeji family but gave Morenikeji family the status of caretakers with license to plant only food crops on the land by an agreement dated the 27th day of April, 1968. Delesolu family*

refused Morenikeji family the status of customary tenant over land they formerly granted to Adeeye as tenant. The defendant will rely on the said agreement.

63. Lofintolu, Iwolowa and Morenikeji had no connection with Delesolu family.

B *64. The 1st, 2nd and 4th defendants are the real descendants of Delesolu family.*

65. In suit FCA/I/119/82 between Amodu Latunde & Another and Delesolu family at the Court of Appeal Ibadan the 4th defendant appeared as Delesolu's descendant.

C *66. Delesolu and his brother Lajinfin came to Ibadan from Ogbomosho at the early part of the last century.*

67. Delesolu and Lajinfin had the same parents.

D *68. Delesolu and Lajinfin first settlement at Ibadan was in Oderinlo's compound.*

69. Delesolu and Lajinfin later settled at Oje, with the consent of Oba Oluyole, Oderinlo and the entire Ibadan community.

70. Delesolu married Igbayimike the daughter of Oderinlo, but Delesolu died without any surviving issue.

E *71. After Delesolu's death, Lajinfin inherited Delesolu's wife Igbayimike in accordance with Yoruba Native law and custom, and also became the second head of Delesolu family.*

F *72. The defendants say Igbayimike begat Abioye and Adewinsi for Lajinfin.*

73. Lajinfin had ten children who succeeded him and they were as follows: (a) Adeoye (b) Ajala (c) Oyewole (d) Abioye (e) Adegbosin (f) Olawoyin (g) Adeyemo (h) Okunade (i) Adewinsi and (j) Akingbala.

G *74. The first and second defendants belong to Adegbosin branch of Delesolu family.*

The third defendant is a descendant of Tanminu.

The fourth defendant is a descendant of Abioye branch of Delesolu family.

H *The first defendant is a descendant of Seselehinsango.*

75. Since Delesolu and his brother Lajinfin founded Delesolu family at Oje, the following were the head of "Delesolu family in succession:

76. The defendants say their family took the name Delesolu

because Delesolu was the older of the two brothers who founded the family."

Although both parties traced their roots of title to Delesolu, they, however, put forward conflicting traditional histories on the devolution of the land to either of them. The learned trial Judge faced with this situation observed:

"From the pleadings and the evidence adduced by both the plaintiffs and the defendants, it is certain that the title to the land in dispute is in issue. That being so, it is incumbent upon the court to decide that issue and make a specific finding on it. See Ogunfaolu & Anor. v. Adegbite & Ors. (1986) 5 NWLR (Pt. 43) at page 549; and Okorie v. Udom & Ors. (1960) 5 FSC 162; (1960) SCNLR 326. Both sides in accordance with Idundun & Ors. v. Okumagba & Ors. (1976) 1 NMLR 200 seek to prove their title to the land by traditional evidence."

He found that the identity of the land was not in dispute. He reviewed the evidence of traditional history adduced by each side and asked the question:

"Out of this conflicting traditional evidence, which one is true and acceptable to this court?"

He stated the test to be applied when he said:

"The court's approach to resolving the conflict in traditional evidence is found in the opinion of their Lordship in the Privy Council in Kojo v. Bonsie & Ors. (1957) 1 WLR 1223 at pages 1226-7: 'where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is more probable.'"

The test laid down by the Privy Council, per Lord Denning, has been adopted by the courts in this country and applied in numerous cases. In Ikpan v. Edoho (1978) 6-7 SC 221, 248-249, Aniagolu, JSC delivering the judgment of this court quoted from the dictum of Lord Denning in Kojo II v. Bonsie where the noble and learned Lord had said:

"So far as the first ground is concerned, their Lordships do not think it was the correct approach to this case. Their Lordships notice

that there was no dispute as to the primary facts, that is, the facts which the witnesses actually observed with their own eyes or knew of their own knowledge in their own lifetime. The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable.”

D And went on to add:

“The postulation, with which we entirely agree, is that a witness may well be truthfully telling the court, in traditional evidence, what his ancestors told him. His ancestors may in fact, have told him the story and the witness may well be reproducing accurately what they told him. But the story they told him may well be untrue. In other words, his ancestors may have told him lies. It is therefore for the trial court to determine:

(a) Did his ancestors in fact tell him that story?

F (b) Is the story true?” See also *Adenle v. Oyegbade* (1967) NMLR 136 where this court, per Lewis JSC, approved of the guideline laid down in *Kojo II v. Bonsie* (supra).

No doubt the learned trial Judge stated the correct test to be applied in this case. Going by the pleadings and evidence of the parties, the issue was not whether each traditional history was conclusive but which was more probable. Each party gave an account of its history in a plausible manner making the history probable. As each party was giving an account, not of what they knew of their own knowledge of past events but what was handed down to them by their ancestors by word of mouth, their evidence essentially was hearsay rendered relevant and therefore admissible by section 45 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria 1990 which provides:

“45. Where the title to or interest in family or communal land

is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant.”

But did the learned Judge follow the guideline laid down in *Kojo II v. Bonsie* and to which he adverted his mind? Unfortunately, he did not. For immediately after stating the guideline, he went on to find: B

“Applying the law to the facts of the instant case, I prefer the evidence of traditional history of the defendants to that of the plaintiffs. I find as a fact that both Lajinfin and Delesolu were brothers who settled on the land in dispute a long time ago. Delesolu was senior to Lajinfin and was therefore the first head of Delesolu family. Upon the death of Delesolu, Lajinfin became the head of Delesolu family and was in full control of the land in dispute. The 1st, 2nd and 4th defendants are the direct descendants of Lajinfin who succeeded to the land in dispute. I do not accept the evidence of the plaintiffs that Lajinfin became the caretaker of Delesolu’s properties including Delesolu’s wives. As a brother of Delesolu, he Lajinfin could inherit the properties of Delesolu in the absence of Delesolu’s children who could inherit them. Contrary to the evidence of the plaintiffs, Lajinfin was not a stranger to Delesolu. If he were a stranger, he would not be allowed to take Igboyin, the wife of Delesolu after Delesolu’s death. Apart from Iwolowa, the plaintiffs did not tell me the names of other children of Delesolu, the great Ibadan warrior. Iwolowa might be the female child of Delesolu but I do not accept the evidence that Delesolu during his life time, gave the land in dispute to her and her husband, Lafintolu. In fact, there was no evidence from the plaintiffs to that effect though an averment like that is in the amended statement of claim. Upon a calm view of all facts and surround circumstances of this case, I think the plaintiffs on account of their mother, Iwolowa, child of Delesolu, are related to the defendants. The plaintiffs, I find, do not live in Dele’s compound, Oje, Ibadan. On account of the relationship between the plaintiffs and the defendants, the plaintiffs too farm on the land in dispute as of right. D

I also accept as true the evidence of the defendants that Delesolu during his life time granted various portions of the land as shown in exhibit ‘F’ to the families named therein. I am satisfied on the preponderance of evidence before me that the 1st, 2nd and 4th defendants have a better title to the land in dispute than the plaintiffs.” E

Nowhere in his judgment did he test the traditional history of each side by reference to the facts in recent years as established by evidence. Indeed, the learned Judge fell back on the “I believe”, “I do not believe” etc. symphony. This is what the authorities say he should not do. In *Adenle v. Oyegbade* (supra) at pages 138-139 of the report Lewis, JSC said:

“The learned trial Judge further in his judgment said:

‘I prefer the evidence of the defendant, and I accept his testimony that the land was allotted to Oyegbade, and that it had always been in his exclusive possession.’

This case, however, was not a case where the defendant was speaking as to his own knowledge of past events but it was based on traditional evidence, in effect the hearsay evidence of his father. It was not, therefore, a case when the learned trial Judge said he preferred the evidence of the defendant where the demeanour of the witness was all important, as Mr. Lardner for the respondent urged us to hold. Lord Denning delivering the opinion of the Privy Council made this clear in Twimahene Adjeibi Kojo II v. Opanin Kwadwo Bonsie and Another.” See also *Aikhionbare v. Omoregie* (1976) 12 SC 11; *Thanni v. Saibu* (1977) 2 SC 89.

It is clear from the record that the approach of the learned trial Judge was wrong. Since it is impossible to say what his finding would have been as to which of the two conflicting traditional histories established before him was more probable, his judgment cannot be allowed to stand. On appeal to the Court of Appeal, however, the judgment of the trial court was affirmed. Oguntade, JCA who read the lead judgment of that court (and which Salami and Nsofor, JJCA concurred in) after a review of the evidence led at the trial, paused to observe:

“It will be seen that although the trial Judge had said that if there was a conflict in traditional history, the court should test the history by reference to the facts in recent years. He did not in fact consider any events in recent years before he went on to accept the traditional history as told by the defendants. I think that the trial Judge merely misunderstood the import of the decision in Kojo II v. Bonsie (supra). When each of two parties to a land in dispute sets up two different traditional histories, necessarily a conflict arises. Sometimes it is possible for the trial Judge to express a straight preference for

either of the two sets of traditional history. In such a situation the traditional history for which the court expresses a preference is said to be conclusive. In that situation it is not necessary at all to consider evidence of events in recent years to determine title. It is only when traditional histories told by the parties are found inconclusive that a recourse is found to the approach in Kojo v. Bonsie (supra)." B

With profound respect to their Lordships of the court below, I think they are grossly wrong in law in the passage above. Neither of the two authorities cited by Oguntade, JCA supports his exposition of the law. In Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 at 323 Oputa, JSC opined: C

"When a plaintiff has proved his title directly by traditional evidence there will be no need again for an inference to establish that which had been already directly proved. Acts of ownership become material only where the traditional evidence is inconclusive. In the case on appeal where the trial court held that the traditional evidence led was conclusive, there was no need whatsoever to require further proof. That will be increasing unnecessarily the burden of proof on the plaintiffs. That will be wrong. Cases like Ekpo v. Ita (supra) or Kojo v. Bonsie (1957) 1 WLR 1223; WAL 257 deal with cases where there is a conflict of traditional history. In such case the best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. Such a situation did not arise in this case since the trial court was satisfied with the plaintiffs' traditional evidence but not with that of the defendants'." D E F

In Iriri v. Erhurhobara (1991) 2 NWLR (Pt. 173) 252 at 269, Obaseki JSC had this to say -

"The law is that where the evidence of traditional history is inconclusive, the learned trial Judge is estopped from accepting one set of evidence against the other conflict set of evidence. If the evidence of traditional history is conclusive, a trial Judge is entitled to accept it as against evidence of traditional history which is in conflict and which is not supported by evidence of recent acts of possession. Kojo v. Bonsie (1957) 1 WLR 1223. The learned trial Judge is entitled to reject evidence of traditional history which is incredible." G H

It would appear that their Lordships of the court below, with respect to them, misunderstood the dicta of Oputa and Obaseki, JJSC.

In *Balogun v. Akanji* the parties put forward conflicting traditional histories as in the case on hand. The learned trial Judge found:

"The picture which has emerged from the totality of the evidence and which I find as of fact is that (1) Ojo Sango is reputed in the neighbourhood to own the land in dispute; (2) Ojo Sango used the land and built a hut thereon; (3) But Akinola the son of Bamimeke; and Madam Fehintola, the mother of the 3rd defendant, were also present on the land in circumstances which the plaintiffs have not pleaded and which I am constrained therefore to hold are not by grant of the plaintiff's family."

And concluded his judgment thus:

"The plaintiffs have not shown such exclusive possession as would lend aid to the evidence that Ojo Sango was the owner of the land. I do not find much to choose from between the rival and conflicting evidence of tradition led by the parties. I am however satisfied that the plaintiffs' ancestors owned some yet undefined part of the land in dispute. Since the plaintiffs have failed to prove exclusive possession of the entire land I cannot find trespass proved. Since, also, the plaintiffs are certainly not in possession of the entire land I do not think it fit to order an injunction which will cover the entire land."

... In view of the findings I have made above, I do not think an outright dismissal of the plaintiff's case will be appropriate.

... In the result, I dismiss the plaintiffs' claim for trespass and non-suit the plaintiffs on their claim for declaration and injunction."

On appeal by both sides to the Court of Appeal, that court found:

"1. That learned trial Judge was wrong when after the finding of fact in support of the appellants' (plaintiffs) traditional history, the trial Judge proceeded to consider as against the appellants traditional evidence and acts of possession, the acts of ownership alleged by the respondents (defendants); and in the process concluded that the appellants have not shown such exclusive possession as would aid to the evidence of boundary men to make him safely find on their evidence that Ojo Sango was the owner of the land, even after holding that the appellant can succeed on traditional evidence alone."

2. That 3rd defendant gave evidence concerning a piece of land which was not the same as the land in dispute and therefore the

testimony of 2nd plaintiff which learned trial Judge found to have 'tended to support' the case of the 3rd defendant did not do so.

3. *That the 1st and 3rd respondents (defendants) filed separate pleadings and presented distinct and separate defences to the action, and the trial Judge was wrong..... to have evaluated their evidence together. The appellants' (plaintiffs') case would have been better appreciated if he had considered the defences separately as indicated by the pleadings. By his failure to do so he had admitted and made use of inadmissible evidence and had misdirected himself in such a manner as to occasion a miscarriage of justice.*

4. *That the case of the 1st and 3rd defendants viciously conflict and are irreconcilable. The traditional evidence from both are either jointly or severally thus irreconcilable. The trial Judge made no effort to reconcile the contradiction, while the appellants' (plaintiffs') traditional evidence remained firm.*

5. *That the evidence adduced by the plaintiffs was clear as to the area they claimed and the area trespassed upon."*
and held:

"While it is the law that a plaintiff must rely on the strength of his own case and not the weakness of his opponent's case, the determination of the issues could have been preceded by a resolution of the conflicting evidence and issues on the basis of a proper evaluation of all the evidence; in which case the trial Judge would have experienced no difficulty in holding that the traditional evidence of the appellants (which is clear and cogent) is compelling and more probable. It can therefore be said that had he properly evaluated all the evidence before him and drawn the proper inferences he would have come to a different conclusion, as contended by the appellants' counsel."

The trial court's order of non-suit of plaintiffs' case was set aside and judgment was entered in their favour. On further appeal by the defendants to this court, the judgment of the Court of Appeal was affirmed on the ground that plaintiffs having established their title by traditional evidence, need not prove acts of possession on the land. As Uwais, JSC, as he then was, put it in his judgment in the case at p.314 G-H of the report:

"By the acceptance of their traditional evidence, it was enough eo ipso for their claim for declaration to be granted - see Idundun v.

Okumagba (1976) 1 NMLR 200 at 210; (1976) 10 SC 227 at 246. It was not therefore necessary for the trial Judge to look for evidence of exclusive possession of the land in dispute before the declaration sought by the plaintiffs could be granted."

B And this was the main issue in the case and not how conflict in traditional histories of the parties was to be resolved. The learned trial Judge apparently approached that aspect of the case correctly.

And on that main issue. Oputa, JSC observed, and correctly too I dare say at p.321 of the report:

C *"What is to be noted and re-emphasised is that the party claiming title to land is not bound to plead and prove more than one root of title to succeed. If he relies on more than one root, that is merely to make assurance doubly sure. He does that, ab abundatia cautella."*

D Oguntade, JCA quoted a passage from the judgment of Oputa, JSC. Had he averted his mind to what the learned Justice of the Supreme Court had said before the quoted passage, their Lordships of the court below would not have fallen into the error they fell. Oputa, JSC had on the same page 323 A-C said:

E *"Put in this way it is easier to appreciate that acts of possession will not arise where the root of title is known, and pleaded, and proved. In such a case title will be awarded on the strength of the title pleaded and proved. It is only where and when traditional evidence is inconclusive that the court will be obliged to look at the acts of possession of the parties and therefrom determine on whose side the presumption in section 145 Evidence Act will operate."*

F *Onus of Proof*

G *A careful consideration of the authorities and decided cases amply shows that there is no onus on a plaintiff who claims title by traditional evidence and who successfully establishes his title by such evidence to prove further acts of ownership numerous and positive enough to lead to the inference that he is exclusive owner."*

It is the law that title to land can be proved in five ways, that is:

- H
1. by traditional evidence;
 2. by production of documents of title which are duly authenticated;
 3. by acts of selling, leasing, renting out all or part of the land, of farming on it or in a portion of it;
 4. by acts of long possession and enjoyment of the land; and

5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute. See *Idundun v. Okumagba* (1976) 9-10 SC 227 at 246-250. Each one of these five ways will suffice. Where proof by traditional evidence is relied on, the traditional evidence must be conclusive, otherwise the plaintiff would not have discharged the onus on him. Where traditional evidence is inconclusive, the plaintiff to succeed, must prove acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that he is the exclusive owner - See *Karimu v. Fajube* (1968) NMLR 151; *Aderemi v. Adedire* (1966) NMLR 398 at 402-403 where Idigbe, JSC delivering the judgment of this court said:

“Learned counsel for appellant has argued that the principle of law enunciated in the well known case of Ekpo v. Ita 11 NLR 68 is inapplicable to the present case since, in his submission, the respondents can only succeed in this claim on a clear and satisfactory proof of a specific grant in their favour, of the communal land (i.e. the land in dispute). We are unable to accede to that submission and we take the view that, as decided in Ekpo’s case (supra), in a claim where as in the case in hand, the evidence of ‘traditional history’ given by plaintiffs in an attempt to establish their ownership of the land in dispute is inconclusive, a court may yet determine ownership of the disputed land in their favour if they succeed in establishing acts of ownership, numerous and positive enough to warrant the inference that their possession of the land is to the exclusion of the defendants.”

This takes me to the questions: When is traditional evidence conclusive? When is it inconclusive? In my respectful view, traditional evidence is conclusive where the party raising it traced and proved his title directly to the original owner whose title has been established See *Thomas v. Preston Holder* (1946) 12 WACA 78 at 80 where it was said:

“...Where, as in the present case, the plaintiff traces his title directly to one whose title to ownership has been established it is not necessary that he should prove such acts of ownership. If title has been so established, then the onus is upon the defendant to show that his own possession is of such a nature as to oust that of the

original owner.”See also: Elias v. Suleiman (1973) 12 SC 113 where Thomas v. Preston Holder was cited with approval; Okpaloka v. Umeh (1976) 9-10 SC 269. Where, however, the plaintiff is unable to trace his title directly to the original owner whose title has been established, his traditional evidence is said to be inconclusive. Such a plaintiff will
 B need the additional proof as laid down in Ekpo v. Ita (1932) 11 NLR 68 to sustain his claim to title - Karimu v. Fajube (supra); Aderemi v. Adedire (supra).

I may mention one other point. Traditional evidence is not
 C determined on demeanour of witnesses but on a consideration of the activities of the parties in the exercise of their rights and decide whether it accords with the evidence of traditional history - Piaro v. Tenalo (1976) 12 SC 31; Aikhionbare v. Omoregie (1976) 12 SC 11; Adenle v. Oyegbade (1967) NMLR 136.

D I now come to the dictum of Obaseki, JSC which the court below claimed to rely on. In Iriri v. Erhurhobara (supra), what Obaseki, JSC was saying is that where there are two conflicting traditional histories one of which is conclusive and the other inconclusive, there is
 E no need to apply the test in Kojo II v. Bonsie to determine which is more probable. Obaseki, JSC’s dictum accords with decided cases as discussed above. But that is not the case here, here the two conflicting traditional histories are probable, and could be said to be conclusive. The learned trial Judge recognised that he could not resolve the
 F conflict on demeanour of witnesses; hence his reference to the test in Kojo II v. Bonsie. I may add to what Obaseki, JSC said in Iriri v. Erhurhobara that where the court is faced with two conflicting traditional histories and the evidence in proof of one is contradictory, there will be no need to apply Kojo II v. Bonsie as that other one
 G cannot be probable or credible. For the test to apply, the two conflicting traditional histories must both be conclusive and probable. It is only then that the need to determine which is more probable arises.

I will refrain from delving into other parts of the judgment of the court below that have come under criticism in this appeal lest I
 H prejudice the retrial that is ordered. Suffice it to say that I resolve in favour of the plaintiffs the only issue canvassed in this appeal, that is, whether the Court of Appeal was right in affirming the decision of the learned trial Judge rejecting the traditional evidence of the plaintiffs and accepting that of the defendants without recourse to recent acts

of possession.

I abide by the order for costs made in the lead judgment of my learned brother, Iguh, JSC.

KATSINA-ALU JSC

B

I read before now in draft the judgment of my learned brother, Iguh, JSC. I agree with it and, for the reasons he gives I, too, would allow the appeal. I abide by the consequential order made by him that the case be remitted to the High Court of Oyo State, Ibadan Judicial Division to be heard de novo by a Judge of that court. I also abide by the order for costs made by my learned brother, Iguh, JSC.

MUSDAPHER JSC

D

I have had the preview of the judgment of my Lord Iguh, JSC with which I respectively agree. For the same reasons discussed in the aforesaid judgment, I too, do hereby allow the appeal and set aside both the decision of the court below and that of the trial court. In place of which, I order a trial de novo before another Judge. I abide by the order costs contained in the aforesaid leading judgment. Appeal allowed.

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