

SUPREME COURT OF NIGERIA
FRIDAY 13TH JUNE, 2003. SC. 57/1998
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU,
E. O. AYOOLA, D. MUSDAPHER, D. O. EDOZIE, JJSC

ENGINEER EMMANUEL OSOLU APPELLANT
AND
1. ENGINEER UZODINMA OSOLU
2. UGWUMBA OSOLU
3. EZIKWU OSOLU
4. OBODOCHIE OSOLU RESPONDENTS
5. IGWEGBE OSOLU
6. PATRICK OSOLU
7. PETER OKEKE EJIKA

APPEALS - Courts - Judgments - Issues - Binding nature of - In determination of disputes between parties - Decision must be confined to issues properly raised by them (H1)

APPEALS - Evidence - Evaluation - Appellate Court does not interfere with findings of trial court - Save when such findings are perverse - Or wrong because of violation of some principles of law (H2)

APPEALS - Courts - Evidence - Evaluation - Ascription of probative value is the duty of trial court - And when issue involves credibility of witnesses - Opinion of trial court must be respected (H3)

CUSTOMARY LAW - Evidence - Pleadings - Ancestral home (Obi) Extent of - Appellant was not bound to prove what the home consisted of - As same have been pleaded - And were not specifically denied by respondents (H4)

APPEALS - Retrial order - Principle - Where appellate court decides to order retrial - It should desist from making statements - That may tend to prejudice the new trial (H5)

PLEADINGS - Fact in issue - Meaning - It is a matter of fact affirmed on one side and denied on the other - As may be ascertained from

2018 Osolu v. Osolu (2003) 6 KLR (pt. 164) 2017; (2003) 11 NWLR
the pleadings of parties (H6)

APPEALS - Grounds - Omnibus ground - Implication of - The ground implies that judgment of trial court - Cannot be supported by weight of evidence (H7)

APPEALS - Retrial Order - Basis - Retrial is ordered where trial court failed to consider material pieces of evidence - Which Court of Appeal is not in a position to evaluate (H8)

FACTS

Plaintiff/appellant sued defendants/respondents at the High Court of Anambra State Newi, claiming inter alia, declarations that as the eldest son of their father (Reverend Jeremiah Osolu), he is entitled to possess and occupy the Obi compound (ancestral home), to the exclusion of respondents, subject to certain defined obligations under the customary law of Amichi town. Evidence were led on both sides. After trial, the learned trial judge gave judgment partly for appellant. He held that appellant was entitled to the possession and occupation of the Obi compound as claimed, which included all the structures within the walls of the compound, and that it was at the discretion of appellant to decide when to move into the compound.

Aggrieved, respondents appealed to Court of Appeal, Enugu Division on three grounds of appeal. But following a preliminary objection by appellant in respect of two of the grounds, the court struck out same as incompetent leaving only the omnibus ground as the surviving ground of appeal. The court allowed the appeal and made a retrial order on that sole ground. It further held inter alia that appellant did not prove the extent of the Obi compound. Dissatisfied, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the learned Justices of the Court of Appeal were right in setting aside the findings of fact made by the trial court in this case.

2. Whether the court below was right to have held that the appellant’s conduct seems to lend credence to the allegation that he is not interested in performing the second burial ceremony of his late father.

3. *Was the Court of Appeal right when it held that the learned trial Judge failed to make specific findings of facts in respect of important issues raised in this case.*

4. *On the facts and circumstances of this case, was the Court of Appeal right in setting aside the judgment of the trial court and remitting the case back to Anambra State High Court (sitting at Nnewi) for trial de novo”*

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

Courts - Judgments - Issues - Binding nature of

1. The only issue that arose for determination in the court below was limited to an attack that the judgment of the trial court was against the weight of evidence. So any issue outside the consideration of the evidence did not fall within the competence of the Court of Appeal to determine or deal with.

It is trite law that in the determination of disputes between the parties in a court, the decision must be confined to the issues properly raised by the parties. It is not competent for a court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it. (p. 2027 E)

APPEALS - Evidence - Evaluation

2. It is settled law that an appellate court does not embark on revaluation of the evidence of witnesses in order to use it as an excuse for interfering with the findings of the trial court.

An appellate court may only interfere with a finding of fact by a trial court only when such finding is perverse or wrong because of violation of some principles of law or procedure. In the instant case, the learned trial Judge had properly and adequately appraised all the evidence led before he came to the conclusion that the appellant is entitled to the immediate occupation of the Obi Compound. (p. 2032 A)

Courts - Evidence - Evaluation

3. The appraisal of evidence and ascription of probative value is the primary duty of a trial court and where the issue turns on credibility of witnesses, the opinion of the trial court must be respected. There was evidence which the learned trial Judge accepted that the appellant may immediately enter and occupy the Obi, there are also other facts that clearly warranted the finding. On the issues of the time when the appellant is to occupy the Obi, I am of the view that the learned trial judge was right and the Court of Appeal was not justified in reversing such a finding.

It is now settled law beyond any dispute that where a trial court makes a finding of fact by analysing and appraising all the evidence led and came to the conclusion to prefer one version against the other, an appellate court is not permitted to reverse the finding merely because it would have reached a different conclusion if it were dealing with the matter as a court of first instance. (p. 2032 C)

EVIDENCE - Proof - Burden - Incidence of

4. In my view, the appellant was not even bound to prove what the Obi compound consisted of. The pleading on this issue is contained under paragraphs 5 and 11 of the Statement of Claim, which clearly set out what the appellant was claiming, i.e., the Obi compound comprising of the ancestral home and the structures within the surrounding wall. These averments were not specifically denied by the respondents.

I am accordingly of the view that the opinion of the court below that “there was no iota of evidence adduced before the court below (trial court) showing that the Obi of an Amichi man goes beyond the main buildings as well as the Mbuba,” cannot be justified.

I accordingly reverse the finding of the court below on the extent of the Obi compound. The appellant as the eldest son is entitled to inherit all the structures within the wall surrounding the Obi compound. (p. 2034 C/ F/ H)

APPEALS - Retrial order - Principle

5. By their pleadings, the parties never joined issues with one another on the issue whether the appellant was to be blamed for not fixing the date for the second burial. The castigation of the appellant on this issue was clearly uncalled for and unnecessary and was clearly irrelevant to the issues that came for determination in the appeal. I do not accept the appellant's assertion that the observation really affected the decision reached by the court below. B

But, where an appeal court decides to make an order for retrial as in the present case, the appellate court should desist from making statements that may tend to prejudice the new trial. (p. 2038 D) C

PLEADINGS - Fact in issue - Meaning D

6. In my view these were issues joined by the parties and the learned trial Judge dealt adequately with each one of them. A fact in issue is usually the assertion made by the plaintiff in his pleadings and not what the defendant says in his Statement of Defence especially in a situation such as in the case where there is no counter-claim or cross-action. Fact in issue is arrived at when parties to an action have answered one another's pleadings in such a manner that they have arrived at same material point or matter of fact affirmed on one side and denied on the other. (p. 2039 F) E
F

APPEALS - Grounds - Omnibus ground - Implication of

7. It should also be noted that the sole ground of appeal before the court below was the omnibus ground of appeal and it is trite law that where an appeal court deals with such a ground of appeal, the legitimate complaint is limited to the appraisal of the evidence and not on finding or non-finding of a specific fact or issue. In the latter cases the matter can only be raised by a substantive ground of appeal. G
H

An omnibus ground of appeal implies that the judgment of the trial court cannot be supported by the weight of the evidence adduced by the successful party, or the trial Judge either wrongly accepted evidence, or the inference he drew, or con-

clusion he reached based on the accepted evidence cannot be justified. An omnibus ground also implies that there is no evidence which if accepted would support the finding of the trial court. (p. 2040 B)

B APPEALS - Retrial Order - Basis

8. I am of the view that the court below was not justified in reversing the decisions of the trial court and in remitting the case back to the High Court for a retrial de novo. In the instant case, the court below ordered a retrial because the learned trial Judge, according to it, did not consider some issues raised by the parties. It is not in all cases where the trial court failed or omitted to consider some aspects of the evidence led before it, that the Court of Appeal will order a retrial. Where however, the trial court did not consider important and material pieces of evidence which the Court of Appeal is not in a position to consider and evaluate, an order for retrial will be made. (p. 2041 C)

E REPRESENTATION

Chief Chimezie Ikeazor, SAN with T. O. Ogoji, for the Appellant
Mrs. A. J. Offiah, for the Respondent

F CASES REFERRED TO

- Nta v. Anigbo (1972) All NLR 510
- Dabup v. Kolo (1993) 9 NWLR (Pt. 317) 254
- Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539
- Adeniji v. Adeniji (1972) 1 All NLR (Pt. 1) 278
- G Ogbodu v. Adelugba (1971) 1 All NLR 69
- Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410
- Oko v. Ntukidem (1993) 2 NWLR (Pt. 274) 124
- Anyanwu v. Mbara (1992) 5 NWLR (Pt. 242) 386
- Adeyemo v. Arokoya (1988) 2 NWLR (Pt. 79) 703
- H Obatoyinbo v. Oshatoba (1996) 5 NWLR (Pt. 450) 531
- Ajibona v. Kolawole (1996) 7 NWLR (Pt. 476) 22
- Ehimare v. Emhonyon (1985) 1 NWLR (Pt.2) 177
- Kareem v. U.B.A. Ltd. (1996) 5 NWLR (Pt. 451) 634
- Alli v. Alesinloye (2000) 4 S.C. (Pt. 1) 111

Ogbodo v. Adulugbe (1971) All NLR 70

LEAD JUDGMENT BY MUSDAPHER JSC

This is an appeal by the plaintiff against the decision of the Court of Appeal, Enugu Division, whereby on the 20th day of November, 1997, the judgment of Offiah, J., (as he then was), sitting at Nnewi High Court of Anambra State was set aside. The plaintiffs claim before the aforesaid High Court as per paragraph 29 of the Statement of Claim reads:-

“29. Wherefore (sic) plaintiff claims:

(i) Against the 1st - 5th defendants jointly and severally as follows:-

(a) A declaration that the plaintiff is the eldest son or the “Okpala” of the late Reverend Jeremiah Osolu.

(b) A declaration that as the eldest son or Okpala of late Rev. Jeremiah Osolu, the plaintiff is entitled in accordance with the customary law of Amichi town to possess and occupy the Obi compound of late Rev. Jeremiah Osolu.

(c) A perpetual injunction to restrain the defendants, their servants, agents and/or privies from disturbing the plaintiff’s quiet enjoyment of the Obi compound or in any way or manner whatsoever interfering with the plaintiff’s possession and occupation of the said Obi including the plaintiff’s father’s house built inside the compound.

(d) A further declaration that in accordance with the Amichi customary law any male son of late Rev. Jeremiah Osolu who is sui juris and has built a house of his own outside the Obi Compound is no longer entitled to continue to keep a house in the Obi Compound.

(e) A declaration that on the demise of the plaintiff’s father, the plaintiff according to Amichi customary law takes over the control and management of the estate of the father in trust for the beneficiary children.

(ii) Against the 1st defendant only:-

(f) A mandatory order of the court compelling him to vacate his house in the Obi compound.

(iii) Against the 6th defendant only

(g) A mandatory order to compel him to vacate his House inside the Obi compound.

(h) A further mandatory order to compel the 6th defendant to move the prayer house/ the church out of the Obi compound and clear the worshippers including patients from the said Obi compound, **OR ALTERNATIVELY AN INJUNCTION** to restrain the 6th defendant, his servants, agents and/or privies from continuing to use the
B batcher in the compound or any part thereof for their worship and/or prayers.

(iv) Against the 7th defendant only:

(i) An account of all monies collected from the plaintiff's father's
C transport business and all other businesses the 7th defendant was appointed by the plaintiff's father to manage and payment of what is due to the estate to the plaintiff to hold in trust for the beneficiary children of late Rev. Jeremiah Osolu."

After the close of pleadings evidence was led by both sides and
D in his judgment, the trial court found partially for the plaintiff. The learned trial Judge at the end of his judgment said:-

"Having carefully considered the evidence before me, I am constrained to enter judgment in favour of the plaintiff as follows:-

1. As against 1st - 5th defendants jointly and severally -

E (a) A declaration of this court that the plaintiff is the eldest son or the Okpala of the late Jeremiah Osolu;

(b) A declaration that as the eldest son or Okpala of the late Jeremiah Osolu, the plaintiff is entitled in accordance with customary
F law of Amichi town to possess and occupy the Obi compound of Jeremiah Osolu. It is at his discretion entirely to decide when to move to the Obi Compound.

(c) A declaration of the court that in accordance with Amichi Customary Law, any male son of Jeremiah Osolu who is sui juris and
G has built a house of his own outside the Obi compound is not entitled to continue to keep a house in the Obi Compound without the consent of the eldest surviving son of Jeremiah Osolu now the plaintiff.

(d) A declaration that on the demise of the plaintiff's father, the plaintiff according to Amichi Customary Law takes over the control and management of the estate of his father in trust for the children of Jeremiah Osolu.

(e) A declaration that any allocation of land, the property of Jeremiah Osolu, to children of the said Jeremiah Osolu to the utter disregard of the plaintiff's rights over such properties are declared

void.

(f) The defendants, their agents or privies are hereby restrained from disturbing the plaintiff's right or in any way interfering with the plaintiff's possession or occupation of the Obi Compound.

(g) The 6th defendant and his agents or privies are hereby restrained from continuing to use any part of Obi Compound for their worship and/or prayers;

(h) Paragraph 29(ii)(f) i.e. the claim against the 1st defendant is hereby dismissed.

(i) Paragraph 29(iii) against the 6th defendant for an order compelling him to move out of the Obi Compound is hereby dismissed.

(j) Paragraph 29(iv) against the 7th defendant fails and is accordingly dismissed."

The learned trial Judge made further four consequential orders which have little or no relevance to the appeal. The defendants felt unhappy with the aforesaid judgment and appealed to the Court of Appeal, Enugu Division. At the Court of Appeal and having regard to the grounds of appeal, the respondents herein as the appellants identified 8 issues arising for the determination of the appeal. The learned counsel for the appellant herein, the respondent at court below, filed preliminary objections against some of the issues formulated and also against Ground of Appeal No. 3. In its ruling on the preliminary objection, the Court of Appeal disallowed two of the three grounds of appeal and consequently struck them out and the issues formulated on them. The appeal was allowed on the sole issue that the judgment was against the weight of evidence. It therefore set aside the High Court judgment and made an order returning the case to Anambra State High Court, Nnewi Judicial Division for trial de novo.

The plaintiff hereinafter called the appellant (and the defendants/respondents) felt unhappy with the decision of the Court of Appeal, hence this appeal.

Before the consideration of the Notice of Appeal and the issues for determination, it is convenient at this stage to set out the facts of the case. The appellant and the 1st to 5th respondents are half brothers, i.e., the sons of one Reverend Jeremiah Osolu from different mothers. Reverend Jeremiah Osolu had many wives and other

children. The 6th respondent is a full blood brother of the said Jeremiah Osolu. The 7th respondent is alleged by the appellant to be the Manager of the transport business of the said Reverend Jeremiah Osolu. The parties are all natives of Amichi town, Nnewi in Anambra State and are all subject to the native law and customs of the said Amichi town. Reverend Jeremiah Osolu died intestate on the 17th day of May, 1990, and was buried on the 18.5.1990 and his estate fell for devolution under Amichi native law and custom. It is not disputed that as the “OKPALA” or the eldest son, the appellant was entitled to inherit under the said native law and custom, the “Obi” or ancestral home of the deceased. It is also common ground that the Obi compound contains other buildings and structures including a church or prayer house called National Council of Sabbath Churches. The wives and other children and the 6th respondent are residing within the vicinity of the “Obi”. It is also evident that the “Obi” and all the other structures are situated in one walled premises having a single common entrance. It is also not disputed that there are patients and staff of the church living inside the walled premises.

According to the pleadings and the evidence, the issues joined for trial relevant to the appeal were:-

1. Has the “Obi” in the instant case an “Mbuba” that is, is it surrounded by a farm - which becomes an integral part of the “Obi”?
2. Does an “Okpala” under the native law and custom take over the Obi immediately on the death of his father? Or he takes over one year after the burial ceremony?
3. Does he alone control and manage the estate in trust until they are shared or he does so along with the other children.
4. Whether the Obi land can be allotted to other children without the consent of the Okpala.

I have shown above, how the learned trial Judge dealt with each of these claims. Four issues for the determination of this appeal are identified, formulated and submitted to this court by the appellant. The issues are:-

- “1. Whether the learned Justices of the Court of Appeal were right in setting aside the findings of fact made by the trial court in this case.
2. Whether the court below was right to have held that the appellant’s conduct seems to lend credence to the allegation that he

is not interested in performing the second burial ceremony of his late father.

3. Was the Court of Appeal right when it held that the learned trial Judge failed to make specific findings of facts in respect of important issues raised in this case.

4. On the facts and circumstances of this case, was the Court of Appeal right in setting aside the judgment of the trial court and remitting the case back to Anambra State High Court (sitting at Nnewi) for trial de novo”

The respondents also caused to be submitted to this court for the determination of the appeal, the following issues:-

“1. Did the plaintiff/appellant discharge the onus and standard of proof laid on him to entitle him to judgment and was the Court of Appeal right in setting aside some of the findings of fact of the trial court.

2. Was the Court of Appeal right in remitting the case back to the High Court for retrial on ground of the failure of the trial Judge to make specific findings on vital issues arising at the trial.

3. Is the comment of the Court of Appeal on the appellant’s conduct justified by the pleadings and the evidence in the case.”

The issues formulated by the parties are more or less the same though differently worded. But before I deal with the issues, I think it is important to remember, that **the only issue that arose for determination in the court below was limited to an attack that the judgment of the trial court was against the weight of evidence. So any issue outside the consideration of the evidence did not fall within the competence of the Court of Appeal to determine ordeal with.** See *Alli v. Alesinloye* (2000) 4 S.C. (Pt. 1) 111; (2000) 6 NWLR (Pt. 660) 177. **It is trite law that in the determination of disputes between the parties in a court, the decision must be confined to the issues properly raised by the parties. It is not competent for a court suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before it.** See for example, *Adeniji v. Adeniji* (1972) 1 All NLR (Pt. 1) 278; *Adegoke v. Adibi* (1992) 5 NWLR (Pt. 242) 410. When an issue is not properly placed before the court, the court has no business whatsoever to deal with it. See *Olusanya v. Olusanya*

(1983) 3 S.C. 41; Ebba v. Ogodo (1984) 1 SCNLR 372. Accordingly, in the instant case, where the judgment in the Court of Appeal was attacked only on the ground of being against the weight of evidence, the Court of Appeal in its primary role in considering the judgment of the trial court on appeal would have sought to find out:-

- B (a) The evidence before the trial court;
- (b) Whether it has accepted or rejected any evidence upon the correct perception and approach;
- (c) Whether it correctly made the assessment of the value on it;
- C (d) Whether it used the imaginary scale of justice to weigh the evidence on both sides; and
- (e) Whether it appreciated, upon the preponderance of evidence, which side of the scale weighed having regard to the burden D of proof.

See Egonu v. Egonu (1978) 11-12 S.C. 111. To put it another way, this court in Ogbodu v. Adelugba (1971) 1 All NLR 69 at 71 observed:-

E *“Manifestly, such a ground of appeal must endeavour to show either the trial Judge wrongly accepted evidence which he should not legally have accepted or that the decision or inference drawn from the evidence so accepted are unjustified.”*

It is also noteworthy that when a complaint is against the weight of evidence, the complaint must be against the totality of the evidence adduced before the trial court and not against any specific issue. The complaint is only concerned with the appraisal and evaluation of all the evidence and not the weight to be attached to any particular piece of evidence. See Leyland (Nig.) Ltd. v. Dizengoff (1990) F G 2 NWLR (Pt. 134) 610.

Now, I shall deal with the issues as contained in the appellant’s Brief of Argument. As mentioned above the issues settled by the respondents’ counsel are more or less the same.

Issue No. 1

H This is concerned with whether the Court of Appeal is justified in reversing the findings of facts of the learned trial Judge. The first point was when and in what condition, the appellant as the Okpala would inherit his father’s Obi compound. It should be understood, that there is no dispute whatever, that both parties are agreed, that

the appellant as the Okpala was entitled to inherit his father's Obi Compound. The point of dispute is only when he will occupy the compound and what is the extent of the compound. The learned trial Judge on the question of when the Okpala is to occupy the Obi Compound stated in his judgment, thus:-

“xxxx my view is that it is entirely at the discretion of an eldest Amichi son to determine when he should move into the Obi. Indeed this view appears to be in line with the evidence of D.W.1, the 7th defendant who under cross-examination admitted that he takes over immediately xxxx It is not true that he has to wait for one year after the 2nd burial.”

It is submitted that this finding is supported by the evidence of D.W.4, who agreed that the Okpala as chief mourner will receive the sympathizers in the Obi. He also testified that it was not possible for the Obi to remain unoccupied when the deceased had living children. D.W.3, D.W.1 and the appellant as P.W. 2. also testified to the same effect. Against these pieces of evidence, the learned counsel for the appellant submitted that the Court of Appeal was influenced in its decision by holding that the “respondent has decided to delay his occupation of the Obi by engaging in a futile and intercedent litigation.” It is submitted further that the function of an appellate court is to decide whether the decision of the trial court is right or wrong and not whether the reasons were right so long as there was no miscarriage of justice. See *Uzochukwu v. Eri* (1997) 7 NWLR (Pt. 514) 535; *Ukejianya v. Uchendo* 14 WACA 45, *Ayeni v. Sowemimo* (1987) 5 S.C. 60. It is finally urged on this court to reverse the findings of the court below on this point.

The learned counsel for the respondents after discussing the onus of proving custom on the respondents, however, conceded that by the Amichi Native Law and Custom, the appellant was entitled “to take over, subject to customary incidents, the Obi of his late father after one year of the burial ceremonies of the deceased.” It was also submitted that the appellant as the Okpala, has the obligation to provide alternative accommodation for the wives and members of the family of the deceased resident at the Obi. It is submitted that P.W.1 stated that the Okpala moves into the Obi after the burial ceremony. It is submitted that the finding that the Okpala takes over immediately upon the death of his father was not supported by the evidence

of D.W.1, D.W.2, D.W.3 and D.W.4. The evidence of P.W.1, the appellant herein on the occupation of the Obi was only temporary, it was only for him to receive sympathizers and for the purposes of the burial ceremony and not the inheritance. It is submitted that the learned trial Judge was clearly in error to have reached the conclusion that the Okpala takes over the Obi immediately his father dies. It is submitted that this conclusion is against the weight of the evidence. The Court of Appeal was right in setting aside the finding because of the overwhelming evidence that the Okpala can only move into the Obi one year after the burial ceremony. It is submitted therefore that the learned trial Judge was wrong when he concluded that the appellant has the “*discretion to decide when to move into the Obi*”; the Court of Appeal was right to have reversed the finding.

Now, although by paragraph 6 of the Statement of Claim, the appellant claimed the right as the eldest son to the immediate occupation of the Obi compound, yet in the reliefs he sought before the trial court as per paragraph 29(1)(6) he merely asked for a declaration from the court that as the eldest son, he is entitled to possess and occupy the Obi compound. In other words, there was no time frame prayed. So clearly the finding by the learned trial Judge that the appellant be put into possession immediately was not, strictly speaking, the claim of the appellant. It was only a declaration that under the customary law, the eldest son is entitled to inherit the Obi. The respondents did not contradict the appellant on this question. The respondents indeed pleaded and led evidence that the Okpala can only take over the Obi one year after the burial ceremony, but yet under paragraph 29 of the Statement of Defence, the respondents pleaded that the appellant has the right to choose as between the Obi and the “Ana-Obi”. Even if it is after the burial ceremony that the appellant was to take over the Obi, by the evidence accepted by the learned trial Judge, it was the respondents who sabotaged the meeting to set the date for second burial. His finding was clearly justified since the respondents did not want the appellant to have anything to do with the second burial. Paragraphs 15 and 16 of the Statement of Defence provide:-

“15. *The plaintiff has no power under the Native Law and Custom of Amichi or under any other law to cancel the date fixed by the sons of the late Rev. Jeremiah Osolu for the burial ceremonies of*

their father xxx. From 1964 the mother of the plaintiff and her children were not in good focus with Reverend Jeremiah Osolu and the situation continued up to the death of John Osolu in 1979, and up to the death of the plaintiff's mother in 1987, and the plaintiff and Peter Osolu and Mrs. Lucy Egwuonwu continued their animosity against Reverend Jeremiah Osolu until his death. B

16. The burial ceremonies of Rev. Jeremiah Osolu will be performed in accordance with the rites of New African Church Sabbath and the plaintiff has no special ceremonies to perform therein. Even in the burial ceremonies of non-Christians of Amichi, the Okpala of the deceased does not perform any special ceremonies.” C

Thus, the respondents not only prevented the appellant from conducting the meeting to fix the burial ceremony on two occasions, but were determined to do it alone without the appellant. Even if it is the customary law that the appellant was to take over the Obi compound a year after the burial ceremony, it was the conduct of the respondents that has caused the delay and under the circumstances, the respondents will not be allowed to eat their cake and still have it. The Court of Appeal was clearly in error to put the blame on the appellant when it held in its judgment at page 331 of the record:- D E

“xxx They (the respondents) insinuate that the respondent (appellant) is anxious to inherit the Obi because he is not interested in performing the second burial ceremony. Respondent's conduct seems to lend some credence to this allegation. How else can one explain his refusal to fix a date for the burial ceremony, a matter exclusively within his competence.” F

This finding by the Court of Appeal seems to contradict the evidence led by the appellant who claimed on two occasions that as the eldest son, he called a meeting in order to fix the date for the burial ceremony but the respondents attacked him and his sister and the meeting ended up in a fiasco without fixing the date for the burial ceremony. This evidence, coupled with the attitude of the respondents as shown in their pleadings as reproduced above, clearly shows that it was the respondents who did not want the appellant to take over the Obi Compound by frustrating the burial ceremony. H

In any event, the learned trial Judge appraised the evidence led on this matter and came to accept the evidence led by the appellant. He did so from page 188 to 191 of the records.

It is settled law that an appellate court does not embark on revaluation of the evidence of witnesses in order to use it as an excuse for interfering with the findings of the trial court. See Onyia v. Ozougwu (1999) 11 SCNJ 1. An appellate court may only interfere with a finding of fact by a trial court only when such finding is perverse or wrong because of violation of some principles of law or procedure. In the instant case, the learned trial Judge had properly and adequately appraised all the evidence led before he came to the conclusion that the appellant is entitled to the immediate occupation of the Obi Compound. The appraisal of evidence and ascription of probative value is the primary duty of a trial court and where the issue turns on credibility of witnesses, the opinion of the trial court must be respected. There was evidence which the learned trial Judge accepted that the appellant may immediately enter and occupy the Obi, there are also other facts that clearly warranted the finding. On the issues of the time when the appellant is to occupy the Obi, I am of the view that the learned trial judge was right and the Court of Appeal was not justified in reversing such a finding.

It is now settled law beyond any dispute that where a trial court makes a finding of fact by analysing and appraising all the evidence led and came to the conclusion to prefer one version against the other, an appellate court is not permitted to reverse the finding merely because it would have reached a different conclusion if it were dealing with the matter as a court of first instance.

The next finding which the Court of Appeal declared to be perverse was the finding of the learned trial Judge on what the Obi Compound consists of. The learned trial Judge in his judgment on this point decided:-

“xxx My view is that the entire complex constitutes the Obi so long as it is used as one unit xxx. It follows therefore in my humble view that the Obi does not necessarily mean the particular room or structure building where the head or the Okpala resides. On the totality of evidence on the issue I am of the view that the entire complex, i.e., the Church, teachers’ quarters, main house and whatever falls within the walled compound constitutes the Obi of Jeremiah

Osolu.”

It is submitted for the appellant that before the learned trial Judge came to the conclusion above, he was so persuaded by the evidence of the experts called by both parties, i.e., PW. 1, Julius Dike and D.W.1, Lawrence Nzewi. It is submitted that the learned Judge accepted the evidence of these witnesses who testified as to what the Obi Compound consisted of. It is submitted that the court below was in error to have reversed the finding when it ruled that there was no “*iota of evidence.*”

It is further submitted that the appellant pleaded as per paragraphs 5 and 11 of the Statement of Claim that the Obi compound consisted of the Church, other buildings and the main house. It is argued further that the respondents did not categorically deny the averments in their Statement of Defence. See paragraph 4 thereof. The learned counsel added that, in answer to a question during cross-examination D.W.2, Patrick Osolu said:-

“Question: This Obi comprises a walled compound, and the land surrounding it called Mbuko?”

Answer: There is no Mbuko.

Question: Are you suggesting that there is no adjoining land to the Obi Compound?”

Answer: There is some land adjoining the Obi Compound.”

It is again submitted that the appellant’s claim was that the Obi compound or the ancestral house of his father is not merely the house in which his father lived. The appellant gave categorical evidence of what he was claiming. It is added that D.W.4 corroborated the appellant’s evidence on what the Obi compound consisted of.

The learned Counsel for the respondents on the other hand argued that the appellant used the terms Obi and Obi compound interchangeably in his pleadings as if they refer to the same property and that it was only in his evidence that he made the distinction. It is submitted further that on the totality of the evidence adduced by PW.1, PW.2 (appellant), D.W.1, D.W.2, D.W.3 and D.W.4 shows that the Obi is limited to the private house in which the deceased was living with his family. It is argued that the finding of the learned trial Judge that the Obi comprises of all the structures within the surrounding wall was not justified having regard to the evidence led and consequently, the Court of Appeal was right to reverse the finding.

Now, the appellant as P.W. 2 said in his evidence:-

“It is our custom in Amichi, that on the death of a father the eldest surviving son takes over the Obi and the Obi compound.”

Similarly, D.W.4 while answering question during cross-examination stated categorically that the Obi of the deceased included the main house, other buildings and the Mbubo. And again D.W.3 in answer to a question on whether the appellant was entitled to inherit the Obi of his father stated:-

“Yes, but that would be 1 year after the burial ceremony and he has to make a choice between the Obi compound and the place where he built his house.”

In my view, the appellant was not even bound to prove what the Obi compound consisted of. The pleading on this issue is contained under paragraphs 5 and 11 of the Statement of Claim, which clearly set out what the appellant was claiming, i.e., the Obi compound comprising of the ancestral home and the structures within the surrounding wall. These averments were not specifically denied by the respondents.

Significantly, it cannot be true to say as claimed by the respondents that Rev. Jeremiah Osolu and his brother, 6th defendant jointly gave the land to the church since it was evident when the church was established, the 6th defendant was only 12 years old. This clearly reinforces the appellant’s claim that Jeremiah established his church alone in the Obi compound.

I am accordingly of the view that the opinion of the court below that “there was no iota of evidence adduced before the court below (trial court) showing that the Obi of an Amichi man goes beyond the main buildings as well as the Mbuba,” cannot be justified because D.W.4, for example, gave such evidence:-

“Question: Do you know the Obi of Jeremiah Osolu?”

Answer: Yes.

Question: What are we going to find if we go there.

Answer: The Obi and other buildings

Question: Has the Obi of Jeremiah Osolu any Mbubo

Answer: Yes.”

I accordingly reverse the finding of the court below on the extent of the Obi compound. The appellant as the eldest

son is entitled to inherit all the structures within the wall surrounding the Obi compound.

The third finding of fact by the learned trial Judge reversed by the court below is concerned with the order of injunction restraining the 6th respondent from worshipping in the compound. It is claimed by the court below that there was no evidence whatsoever to entitle the appellant to the claim of injunction. It is submitted by the appellant's counsel, that the appellant as P.W.2 gave evidence and appellant was not cross-examined on it and no contrary evidence was adduced by the respondents and the trial court legitimately accepted it and granted the order sought having accepted the uncontradicted evidence. Learned counsel referred to *Adejumo v. Ayantegbe* (1989) 6 S.C. (Pt. I) 76; (1989) 3 NWLR (Pt.110) 417. It is finally argued that the learned trial Judge acted on the evidence adduced when he restrained the 6th respondent, his agents and or privies from continuing to use part of the Obi compound for their worship and treating patients.

As pointed out above, the learned trial Judge was justified in finding that the church premises was part of Obi compound and since the appellant was, as it was common ground, entitled to the Obi compound, he was also entitled to enjoy undisturbed quiet possession thereof. In my view and having regard to my finding on the extent of the Obi compound, the learned trial Judge was right in granting the injunctive relief and the court below was in error to have reversed the decision of the learned trial Judge.

The fourth finding of fact reversed by the court below is about the rights of the appellant concerning the grant of land within the Obi compound. The learned trial Judge in part of his judgment held:-

“Any dealing with the said Obi compound in utter disregard to the eldest son's right to it is void. My view in the light of the evidence that apart from the grant to the 1st defendant Uzodimma Osolu of land within the Obi compound, any other sharing of portions of land within or outside the Obi compound being property of Jeremiah Osolu is null and void and of no effect if the act was done after his death. I hold therefore in the light of the evidence that all allocations to the defendants (other than the 1st defendant) purported to have been made after the death of Jeremiah Osolu in utter disregard to the plaintiff's right of control and management of the properties are

hereby declared null and void.”

There is hardly any dispute that the appellant led evidence to show that the respondents moved to the Obi compound and started sharing and allocating pieces of land to themselves and other members of the family without the consent of the appellant who under the Amichi Native Law and Custom became the custodian of all lands left by his father after his death as the eldest surviving male son. The learned trial Judge found as a fact that the allocation of lands made to the respondents was made in 1992 after the death of Jeremiah Osolu and were made without the consent and or knowledge of the appellant. In view of what I said above, on the entitlement of the appellant to inherit the entire Obi compound including the right of the appellant to be the custodian of all the assets of the estate of late Jeremiah Osolu, it goes without saying that any allotment of any land without his consent is obviously null and void.

From what I have shown above, the learned trial Judge made these specific findings by accepting the evidence led by the appellant and disbelieving the evidence led by the respondents. It cannot be correct to say that the learned trial Judge made these findings without analysing all the evidence led by both parties and preferring the evidence led by the appellant. An appellate court such as the Court of Appeal can only come to the conclusion that there is a miscarriage of justice and that injustice has been caused to the party who lost the case, if the trial court could be faulted in the exercise of its judicial function of evaluating the evidence and attaching probative value thereto, including issue of credibility of witnesses. The evaluation of evidence is the primary responsibility of the trial court, and an appellate court will only interfere with a finding of fact made by a trial Judge where such finding is not supported by evidence led before the trial Judge. See *Mogaji v. Odofin* (1978) 4 S.C. 91. It is not every error or mistake that will result in an appeal against a judgment in a suit being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an appellate court is bound to interfere. See *Onajobi v. Olanipekun* (1985) 4 S.C. (Pt. 2) 156, *Ukejianya v. Uchendo* (1950) 13 WACA 5, *Anyanwu v. Mbara* (1992) 5 NWLR (Pt. 242) 386; *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301) 539.

Where a trial court makes a finding of fact and there is suffi-

cient evidence in support thereof, then unless these findings are found to be perverse or are not supported by evidence or were reached as a result of a wrong approach to the evidence or as a result of a wrong application of a principle of substantive law or procedure, an appellate court even if disposed to come to a different conclusion upon the printed evidence cannot reverse the finding. In the instant case the findings of the trial court discussed above are supported by the evidence led and accepted by the trial Judge and the approach of the learned trial Judge to the evidence cannot be faulted. See *Chinwedu v. Mbamali* (1980) 3-4 S.C. 31, *Abimbola v. Abatan* (2001) 4 S.C. (Pt. I) 64; (2001) 9 NWLR (Pt. 717) 66. Bearing all the above authorities in mind, I am of the view that the learned trial Judge reached his decision in making these specific findings of fact based on the evidence adduced by the appellant, which he accepted and preferred rather than the evidence led by the respondents. The court below was accordingly wrong in reversing or setting aside these findings. I accordingly resolve this issue in favour of the appellant.

Issue No. 2

This is concerned with the observation made by the court below that there was credence to the allegation that the appellant failed to fix a date for the second burial of his late father and that had given room to the protracted and useless litigation. It is claimed that this observation has influenced the court below in its approach and consideration of the issues raised. It is also submitted that the observation also created the impression that the court below was displeased with the appellant for going to court, otherwise why the blame for “engaging in futile xxx litigation.”

It is argued that the observation or finding was not only contrary to the pleadings and the evidence led but it was perverse and had occasioned miscarriage of justice. It is submitted that the appellant pleaded his genuine efforts to fix a date for the burial at a family meeting on two occasions vide paragraphs 16 and 17 of the Statement of Claim and on each occasion it was the respondents who frustrated the appellant. The appellant as P.W.2 gave evidence of the averment as contained in his pleadings on this issue.

The learned counsel for respondent on the other hand argued that, the comment made by the court below was justified having regard to the pleadings and the evidence and the appellant’s com-

plaints are unfounded. It is also submitted that the observation made by the Court of Appeal did not amount to a decision on any issue arising in the appeal before it as such it is not an appealable issue. See *Obatoyinbo v. Oshatoba* (1996) 5 NWLR (Pt. 450) 531. It is finally argued that the observation has no bearing whatsoever on the main decision reached.

I am of the view that the statement made by the court below pointing at the appellant as the one who failed to fix a date for the second burial ceremony is clearly contrary to the evidence and the pleadings. I have shown above that the respondents by their pleadings did not even want the appellant to have anything to do with the second burial. Indeed on the two occasions he called a family meeting to fix the date, the respondents frustrated him. The observation was clearly unjustified. I note also that the matter for the determination of the appeal in the court below was limited to decision of the trial court in relation to the evidence led. ***By their pleadings, the parties never joined issues with one another on the issue whether the appellant was to be blamed for not fixing the date for the second burial. The castigation of the appellant on this issue was clearly uncalled for and unnecessary and was clearly irrelevant to the issues that came for determination in the appeal. I do not accept the appellant's assertion that the observation really affected the decision reached by the court below.***

But, where an appeal court decides to make an order for retrial as in the present case, the appellate court should desist from making statements that may tend to prejudice the new trial. See *Dabup v. Kolo* (1993) 9 NWLR (Pt. 317) 254. In any event I have dealt with this issue while I was considering the first issue. Suffice it for me to observe that it was the respondents rather than the appellant who were to blame for not doing the second burial for the obvious motive that it was only after one year of the second burial that the appellant could enter and occupy the Obi compound as proposed by them.

Issue No. 3

This is concerned with whether, as held by the court below, the learned trial Judge failed to make specific findings of fact in respect of important issues raised in this matter. It is first submitted that there was no valid ground of appeal before the court below challenging

the alleged failure of the learned trial Judge to make findings of fact on the issues before it.

It is further submitted that the learned trial Judge after identifying the issues in which both parties were in agreement, in accordance with the pleadings, he thereafter summarized the points of difference between the parties and resolved the differences by accepting the evidence led by the appellant. It is again submitted that the learned trial Judge made findings on all the issues raised by the parties at the trial and as such the court below was without jurisdiction to raise fresh issues and claim that these issues were not decided by the learned trial Judge. It is again submitted that the only issue before the court below was concerned with the evaluation of evidence and not the failure of the trial court to make “findings on important issues.” Learned Counsel referred to *Saude v. Abdullahi* (1989) 7 S.C. (Pt. II) 116; (1989) 4 NWLR (Pt. 116) 387. *Overseas Construction Company (Nig.) Ltd. v. Creek Ent. Ltd.* (1985) 3 NWLR (Pt. 13) 407. B C D

It is further argued that the trial court dealt with all the issues raised by the parties in their pleadings and made findings on all the relevant issues. E

As shown above, the issues that called for determination of the trial court are those issues mentioned above i.e., whether the appellant was entitled to enter and occupy the Obi compound immediately on the death of his father, what is the extent of the Obi compound, whether the appellant is entitled to have a quiet enjoyment of the premises and whether the respondents could deal with the properties of the estate without the knowledge or consent of the appellant. ***In my view these were issues joined by the parties and the learned trial Judge dealt adequately with each one of them. A fact in issue is usually the assertion made by the plaintiff in his pleadings and not what the defendant says in his Statement of Defence especially in a situation such as in the case where there is no counter-claim or cross-action. Fact in issue is arrived at when parties to an action have answered one another’s pleadings in such a manner that they have arrived at same material point or matter of fact affirmed on one side and denied on the other.*** See *Ehimare v. Emhonyon* (1985) 1 NWLR (Pt.2) 177 at 183. Accordingly, the issues that arose in this matter F G H

were whether the appellant as the Okpala was entitled to occupy the Obi compound and all its structures and whether the appellant was entitled to be the custodian of the estate of his father and keep the same for the benefit of the beneficiary children and wives of the deceased. All other issues not falling within these parameters amount to irrelevance and are in the realm of the academic. For example, the issue of the “grant of land” to the church was not pleaded and there was no claim by the church and indeed the church was not a party to the proceedings.

It should also be noted that the sole ground of appeal before the court below was the omnibus ground of appeal and it is trite law that where an appeal court deals with such a ground of appeal, the legitimate complaint is limited to the appraisal of the evidence and not on finding or non-finding of a specific fact or issue. In the latter cases the matter can only be raised by a substantive ground of appeal. See *Ajibona v. Kolawole* (1996) 7 NWLR (Pt. 476) 22 at 30.

An omnibus ground of appeal implies that the judgment of the trial court cannot be supported by the weight of the evidence adduced by the successful party, or the trial Judge either wrongly accepted evidence, or the inference he drew, or conclusion he reached based on the accepted evidence cannot be justified. An omnibus ground also implies that there is no evidence which if accepted would support the finding of the trial court. The important issues or facts arising in this matter were adequately dealt with by the trial Judge and the Court of Appeal reversed them and the issues which the court below alleged were not discussed, were not the issues that the parties have joined by their pleadings. Even if these issues arose, they are merely subsidiary to the crucial and fundamental issues and the failure of the learned trial Judge to make a finding or to resolve them did not occasion any miscarriage of justice. As mentioned earlier in this judgment, it is not every mistake or slip in a judgment that must merit the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court should interfere. In the instant case the failure to resolve these subsidiary issues did not occasion any miscarriage of justice. I accordingly resolve this issue in favour of the appellant.

Issue No. 4

This is concerned with the setting aside of the entire decision and remitting the case back to the High Court for a trial de novo. It is submitted that on the sole ground the judgment was against the weight of evidence, the court below was wrong to have reversed the decision and ordered a new trial. It is submitted that the trial Judge had carefully appraised and analysed all the evidence before he made his decision of the points raised for the determination of the matter before him. He thereafter resolved the issues arising for the determination of the case. In the instant case an order for retrial will be unjust, vide Akpan v. Otong (1996) 10 NWLR (Pt. 476) 108. Ayoola v. Adebayo (1969) 1 All NLR 159. B
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From what I have discussed earlier in this judgment, ***I am of the view that the court below was not justified in reversing the decisions of the trial court and in remitting the case back to the High Court for a retrial de novo. In the instant case, the court below ordered a retrial because the learned trial Judge, according to it, did not consider some issues raised by the parties. It is not in all cases where the trial court failed or omitted to consider some aspects of the evidence led before it, that the Court of Appeal will order a retrial. Where however, the trial court did not consider important and material pieces of evidence which the Court of Appeal is not in a position to consider and evaluate, an order for retrial will be made.*** See Oko v. Ntukidem (1993) 2 NWLR (Pt. 274) 124. D
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The question whether an order for retrial will be made by an appellate court must depend on the circumstances as justice of a particular case may dictate. Thus, an appellate court will be reluctant to order a retrial where:- G

(a) The plaintiff has established his case by raising the probabilities in his favour; or

(b) The order of retrial will enable the defendant to improve his position during retrial to the prejudice of his opponent; or

(c) The litigation will be unnecessarily prolonged; or H

(d) The proceedings are conducted by the trial court largely in conformity with the rules of evidence and procedure; or

(e) There was no substantial irregularity in the conduct of the case.

An order for retrial in any of the above instances would occasion injustice on the appellant in the instant case. See *Okeowo v. Migliore* (1979) 11 S.C. 138. *Nader v. Custom and Excise* (1965) 1 All NLR 33.

The fundamental and crucial issues were properly and adequately resolved in favour of the appellant by the trial court. The Court of Appeal was in error to have reversed the findings. If at all the appellant has failed to prove his claims, the proper order for the court to make was to order the dismissal of the plaintiff's claims. There is merit in this issue and I resolve it in favour of the appellant.

All the issues having been resolved in favour of the appellant, this appeal is, accordingly, meritorious and I allow it. I set aside the decision of the court below including the order for costs. I restore the decision of the trial court. The appellant is entitled to costs both in the court below and in this court which I assess at N3,000.00 and N10,000.00 respectively against the Respondents.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Musdapher, JSC. I agree with him that the appeal has merit and ought to be allowed. The appeal is accordingly allowed. The judgment of the Court of Appeal is set aside while that delivered by the trial High Court on 29th September, 1994, is restored. I endorse the order for costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Dahiru Musdapher, JSC. I agree with it and for the reasons he has given, I would also allow the appeal with costs as assessed in the leading judgment.

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AYOOLA JSC

For the reasons stated in the leading judgment just delivered by my learned brother, Musdapher, JSC., I too allow the appeal and set aside the decision of the court below. I also restore the decision of

the trial court. The appellant is entitled to costs both in the court below and in this court which I assess at N3,000.00 and N10,000.00 respectively against the respondents.

EDOZIE JSC

I was privileged to have read before now the draft of the lead judgment just delivered by my learned brother, Musdapher, JSC. I agree with his reasoning in allowing the appeal.

The consideration of the appeal before the lower court was predicated on the issue distilled from the omnibus ground of appeal or complaint against the weight of evidence. This postulates that the complaint is against the totality of the evidence adduced and not on a finding of fact on a specific issue or document as the case may be. Where the complaint is against a finding or non-finding on a specific issue, that finding or non-finding should be raised as a substantive ground of appeal: See *Ajibona v. Kolawole* (1996) 10 NWLR (Pt. 476) 22 at p. 30, *Mogaji v. Odofin* (1978) 4 S.C. 91, *Anyaoke v. Adi* (No. 2) (1986) 3 NWLR (Pt. 31) 731, *Ogbodo v. Adulugbe* (1971) All NLR 70; *Nta v. Anigbo* (1972) All NLR 510 at 516.

The court below, with respect, was in grave error when it proceeded on the omnibus ground of appeal to fault the judgment of the trial court on the ground that it failed to make certain findings and thereby ordered a retrial. It is settled law that where a trial Judge has failed in his primary duty to make findings of fact on issues joined on the pleadings and the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, a retrial is the proper order: *Kareem v. U.B.A. Ltd.* (1996) 5 NWLR (Pt. 451) 634 at 648, *Okeowo v. Migliore* (1979) 11 S.C. 138, *Bakare v. Apena* (1986) 4 NWLR (Pt. 33) 1, *Awote v. Owodunni* (No.2) (1987) 2 NWLR (Pt. 52) 367, *Adeyemo v. Arokoya* (1988) 2 NWLR (Pt. 79) 703. As noted earlier, the court below could not on the sole ground that judgment is against the weight of evidence deal with the question about the failure of the trial court to make findings on specific issues. Besides, the fundamental and crucial issues raised in the pleadings of the parties had been adequately considered by the trial court. There was therefore no justification for an order of retrial.

It is for the foregoing and the more detailed reasons set out in the lead judgment that I too allow the appeal, with all the consequential orders made in the lead judgment.

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