

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2003. SC. 158/1999
CORAM:- U. MOHAMMED, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, D. O. EDOZIE, JJSC

EDWIN CHUKUDULUE UDENGWU APPELLANT
AND
1. SIMON UZUEGBU
2. JOSIAH UZUEGBU
3. JAMES UZUEGBU RESPONDENTS
4. CYRIL UZUEGBU
5. MRS. ONYEDIMMA ORUCHALU

JUDGMENTS - Basis of - Judgment must demonstrate that court considered issues - Properly raised by parties in their pleadings - As supported by evidence (H1)

COURTS - Judgments - Perversity - Hallmark - It is a hallmark of a JUDGMENTS - Perverse decision - Instance - Such decision arises inter alia where court ignored evidence - Or misconceived the thrust of case presented to it (H2)

APPEALS - Retrial order - Justification - Retrial is ordered inter alia where there has been error in substantive law - Or where trial court made no finding on conflicting material evidence - Adduced by parties in an issue (H3)

FACTS

Plaintiff/appellant sued defendants/respondents before the High Court of Anambra State sitting at Awka. Appellant's claims were for damages for trespass and injunction restraining respondents from committing further acts of trespass on the land in dispute. Appellant contended that one Ezeonwuka was the common ancestor of himself and 1st to 4th respondents and that he belonged to Anozie line of Ezeonwuka's descendants while 1st to 4th respondents belonged to Ezegaraku line. Appellant therefore traced how the land devolved from the said Ezeonwuka and eventually to one Dominic Udeonu by inheritance. He alleged that it was the Dominic who sold the land

2274 *Udengwu v. Uzuegbu* (2003) 7 KLR (pt. 165) 2273; (2003) 13 to him.

On the other hand, 1st to 4th respondents denied the contention of appellant. They argued that from history, the said Dominic cannot give out a valid title to appellant as he had no such title in the land. Notwithstanding the pleadings of the parties, the learned trial judge in his judgment assumed that the land belonged to Dominic's family, of which 1st to 4th respondents were members, and was sold by Dominic without the necessary consent of family heads and members. Accordingly he invalidated the sale on that basis. Aggrieved, appellant appealed to Court of Appeal, Enugu. The court upheld the decision of trial court and dismissed the appeal. Still dissatisfied, appellant filed appeal at Supreme Court.

HELD (Unanimously allowing the appeal and ordering a retrial per **UWAIFO JSC**)
JUDGMENTS - Basis of

1. A judgment of the court must demonstrate that the court understood the case before it and elicit an open and full consideration of the issues properly raised by the parties on their pleadings as supported by evidence. The conclusions reached ought to reflect and justify such an exercise.

Once a court has misapprehended the nature of the case in respect of which it is required to give a dispassionate and rational decision, the chances are that the decision otherwise reached will be perverse. This is because when an adjudicator fails to discern the real question which he is to consider and decide or answer, his reasoning will inevitably be addressed to a collateral matter which is irrelevant, or to an aspect which is beside the point in issue. Such an adjudicator is said to suffer from *ignoratio elenchi*. (p. 2281 A)

JUDGMENTS - Perverse decision - Instance

2. A perverse decision of a court can arise in several ways. It could be because the court ignored the facts or evidence; or that it misconceived the thrust of the case presented; or took irrelevant matters into account which substantially formed the

basis of its decision; or went outside the issues canvassed by the parties to the extent of jeopardizing the merit of the case; or committed various errors that faulted the case beyond redemption. The hallmark is invariably, in all this, a miscarriage of justice and the decision must be set aside on appeal.

The learned trial Judge failed to consider, evaluate and make findings on the evidence in regard to the adverse and divergent claims, and to highlight the issues joined on the pleadings by the parties. (p. 2281 E)

APPEALS - Retrial order - Justification

3. An appellate court may order a retrial in a civil case when, among other conditions, (1) there has been such an error in substantive law or an irregularity in procedure by the trial court which neither renders the trial a nullity nor makes it possible for the Court of Appeal to say there has been no miscarriage of Justice.

Or (2) the trial court made no finding of fact on conflicting material evidence adduced on an issue by both parties to the action, the resolution of which is essential to the just determination of the case and the Appeal Court in the exercise of its appellate jurisdiction cannot resolve that conflict on issue of credibility in order to bring the litigation to an end:

Or (3) there has been a substantial misdirection by the court or some other substantial error like wrong placing of burden of proof by the court such that cannot be corrected by the Appeal Court:

And the justice of the case, looked at in all its special circumstances, justifies an order of retrial.

In the result, I allow this appeal, set aside the judgments of the two courts below and order a retrial of the suit by the Anambra State High Court as may be directed by the Chief Judge. (p. 2284 A)

NOTABLE POINT OF INTEREST

EDOZIE JSC

1. Courts are bound by pleadings of parties

It is a fundamental principle that parties are bound by their pleadings. It is not only the parties but also the courts are bound by the pleadings of the parties. In the case of *African Continental Seaways Ltd. v. Nigeria Dredging Road and General Works Ltd.* (1972) 5 S.C. 235 at 250, this court held:-

- B “*The court itself is as much bound by the pleadings of the parties as they are by themselves. It is no part of the duty or function of the court to enter upon any inquiry with the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties.*”
- C

A court cannot and ought not evolve a case for either party and proceed to give judgment thereon contrary to the case of the D parties before it. (p. 2285 F)

REPRESENTATION

P. C. Okorie, Esq., for the Appellant

P. I. N. Ikwueto, Esq., for the Respondents

E

CASES REFERRED TO

- Manko v. Bonsu (1936) 3 WACA 62
 Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1
 Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360
 F Yesufu Esan v. Bakare Fan (1947) 12 WACA 135
 Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392
 Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 610
 Ezeoke v. Nwagbo (1988) 1 NWLR (Pt. 72) 616
 G Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527
 Abusomwan v. Aiwerioba (1996) 4 NWLR (Pt. 441) 130
 Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130
 Polycarp Ojogbue v. Ajie Nnubia (1972) 1 All NLR (Pt. 2) 226
 Okpala v. Ibeme (1989) 3 S.C. (Pt. I) 61
 H Odiba v. Azege (1998) 7 S.C. (Pt. I) 79
 Eke v. Okwaranyia (2001) 4 S.C. (Pt. II) 71

LEAD JUDGMENT BY UWAIFO JSC

This is an appeal from a judgment of the Court of Appeal,

Enugu Division, given on 14th June, 1994. It upheld the decision of the High Court at Awka in which the suit of the appellant (as plaintiff) was dismissed on 8th June, 1992. The appellant had sued the five respondents (as defendants) for (a) N500.00 as general damages for trespass to the land in question and (b) perpetual injunction against further trespass. As a result of the issues joined on the pleadings, it became apparent that ownership of the land was what was really in dispute.

In regard to the judgment of the Court of Appeal, the appellant has set down three issues for determination of the appeal he has brought against it. The issues read:

“(1) Whether the Court of Appeal was right in dismissing the appeal of the appellant after it had held that the fact of Okpalauzuegbu farming the land in dispute jointly with Okpalansofo, the admitted owner of the land, did not confer title on the children of Okpalauzuegbu?”

“(2) Whether the respondents’ defence which rested on the title of Okpalansofo’s family to the land in dispute defeated the case of the appellant?”

“(3) Whether the Court of Appeal was right in dismissing the appellant’s appeal in its entirety when it had not considered all the issues in his case?”

The respondents in their brief of argument raised one issue as follows:

“Whether the court below was right in dismissing the appellant’s appeal when it held that the sale of Okpalansofo’s family land by Dominic as his own to the appellant is void.”

An essential argument canvassed by the appellant’s counsel, particularly under issues 1 and 2, is that the two courts below did not advert their minds to the evidence and failed to evaluate the same, but decided the case on an issue not raised by the parties. In reference to the plaintiff/appellant’s case, learned counsel contended thus in the appellant’s brief of argument:

“It was a straightforward case worthy of credence. But the learned trial Judge disbelieved him. Not because he evaluated his case and found it wanting, he did not do so, but because he suddenly went off on a tangent and began to examine whether Dominic had the capacity to sell to the appellant the land in dispute, and

whether a person can sell family land. He lost sight of the case of respondents completely, which he should have weighed with the case made by the appellant; and he gave judgment based on the new issue raised by himself. He said nothing more about the rights and liabilities of the respondents in the case. He left the decision on their rights hanging in the air. The Court of Appeal, unfortunately, followed this mistaken lead. Instead of deciding the case between the parties before it, it also went off on a tangent and gave a decision on an issue between Dominic and Michael, who were not before the court.....

With reference to issue No. 2 both the judgment of the trial court and the judgment of the Court of Appeal rested on the basis that Dominic Okpalanso sold land that belonged to his family without the consent of a principal member of the family. They held the sale was void and the appellant got no title.”

The main argument put forward in the respondent’s brief of argument prepared by Mr. G. E. Ezeuko, SAN, to meet the above submission is as follows:

“Our courts have by their decisions recognised three categories of dealing with family land as well as their legal effects. In *Ekpendu & Ors. v. Erica* (1959) 4 FSC 79, the Federal Supreme Court held that a sale or lease of family land by the family head without the consent or participation by principal members of the family is voidable. A sale or lease of such land by the principal members of the family without the concurrence of the head of the family is void ab initio.

A third category is a sale of the family land by the head of the family as his own. The Supreme Court has held that such a sale is void ab initio. See *Solomon & Ors. v. Mogaji & Ors.* (1982) 11 S.C.; *Kalio & Anor. v. Woluchem & Anor.* (1985) 1 NWLR (Pt. 4) 610.

These categories were exhaustively dealt with and the decisions thereon re-affirmed by the Court of Appeal per the (concurring) judgment of Niki Tobi, JCA.”

It seems to me the crux of this appeal is the propriety of the course taken by the two courts below in this case. Once that is decided and it leads to allowing the appeal, the focus would appear to be the proper order to make as a result. I shall now begin with the relevant facts of the case going by the issues joined by the parties.

The appellant and the respondents are all natives of Achina. They reside in Umuezeiyi Village of Achina. Achina is in Aguata Local Government Area within Amawbia-Awka Judicial Division, Anambra State. The land in dispute is situate in the said Umuezeiyi Village. Both parties, from the pleadings, call the land Kpokokwa.

The appellant claims that one Ezeonwuka was the common ancestor of himself and the 1st - 4th respondents and that he belongs to Anozie line of Ezeonwuka's descendants. He also claims that the 1st - 4th respondents belong to Ezegaraku line of that ancestry. According to him, Ezeonwuka shared his lands among his sons, including Ezegaraku. Ezegaraku also shared his land among his sons including Okpalansofor. The land in dispute formed Okpalansofor's share. Okpalansofor shared his lot between his two sons, Dominic Udeonu and Michael Umeohanefo, but Dominic got the land in dispute. In 1976, Dominic Udeonu sold the said land to the appellant. D

The 1st - 4th respondents, however, have presented a completely different version of claims to ownership. First, they allege that the land originated from their great-great ancestor called Eze-Ehido, the father of Ezeamaka who begat Ezeonwuka. More adversarial is the averment that Anozie, whom the appellant claims to be one of the sons of Ezeonwuka, and through whose pedigree this land devolved, was not such a son. They say that Anozie, not being the son of Ezeonwuka, was not entitled to a share of Ezeonwuka's lands. Further, their case is that Okpalansofor was accordingly not entitled to the land in dispute. Nor did he share any land to his sons, Dominic and Umeohanefo, but rather alleging that, in fact, Dominic was at large up to the time his father died. E F

Another angle was also introduced into the situation between Dominic and Umeohanefo in the 1st - 4th respondents' pleading. It is in respect of an alleged dispute between them which led Dominic to file an action in the High Court against Umeohanefo seeking to have a partition of their father's property. Nothing is alleged as to the outcome of that case. But it is averred that in 1970, Dominic began to contest ownership of the land in dispute with the 1st-4th respondents. This led to arbitration by the Elders of Eleke and Ezeiyi Villages between Dominic and Umeohanefo of the one part and the 1st - 4th respondents of the other part. The decision of the arbitrators was, as alleged, in favour of the said respondents. It was said that that deci- G H

sion was arrived at because Dominic and Umeohanefo failed to show that the land belonged to their family and also that the arbitrators held that Dominic Udeonu, whom the appellant claimed sold the land in dispute to him, “could not validly alienate land that does not belong to him.” It was not an issue on the pleadings at any stage, as

B I understand the position of the 1st - 4th respondents, that Dominic sold family property as his own or without the necessary consent of family members. It is simply that neither he nor his family had title to the land in dispute.

C But the learned trial Judge, in a clear misapprehension of the actual case presented by the parties, with due respect to him, observed in his judgment inter alia:

*“There is no rule of customary law that is more firmly established than that no member of land owning community or family has
D a separate individual title of ownership to the whole or part of communal land A grant or sale of land must be made with the consent of the principle (sic) members of the family and one not made with such consent may be defeated Where the consent has been obtained and customary ceremonies performed added to the publicity
E accompanying same, it may be inferred that members had consented.... Under our customary law, once the purchaser pays the purchase money and the land handed over to him in (the) presence of witnesses with the necessary ceremony, the entire interest of the vendor passes to him One may now ask why no member of
F vendor’s family was present as a witness when the land in question was sold? Such action in view of observations above raises doubt as to vendor’s title to the land when it is not shown that vendor owns the land in question personally or as an individual.....*

G *Furthermore, in the absence of plaintiff establishing that he alone owned the land, the inference will rightly be drawn that it is family land that was sold without the consent of an important member of the family.....*

H *Coming to the issues for determination set out in the early part of this judgment, the defendants have established to my utmost satisfaction that plaintiff never purchased the land in accordance with the existing customary law as the purported vendor had no valid authority to sell same to him.”*

It is obvious that the learned trial Judge completely went wrong,

with due respect, in his approach to the resolution of the dispute placed before him by the parties. This is because he seemed to have misconceived the issues joined. The result was that he did not consider and make relevant findings on the evidence throughout the judgment. This led to a miscarriage of justice. **A judgment of the court must demonstrate that the court understood the case before it and elicit an open and full consideration of the issues properly raised by the parties on their pleadings as supported by evidence. The conclusions reached ought to reflect and justify such an exercise:** see Polycarp Ojogbue v. Ajie Nnubia (1972) 1 All NLR (Pt. 2) 226 at 231; Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 610 at 622. B
C

Once a court has misapprehended the nature of the case in respect of which it is required to give a dispassionate and rational decision, the chances are that the decision otherwise reached will be perverse. This is because when an adjudicator fails to discern the real question which he is to consider and decide or answer, his reasoning will inevitably be addressed to a collateral matter which is irrelevant, or to an aspect which is beside the point in issue. Such an adjudicator is said to suffer from ignoratio elenchi. A perverse decision of a court can arise in several ways. It could be because the court ignored the facts or evidence; or that it misconceived the thrust of the case presented; or took irrelevant matters into account which substantially formed the basis of its decision; or went outside the issues canvassed by the parties to the extent of jeopardizing the merit of the case; or committed various errors that faulted the case beyond redemption. The hallmark is invariably, in all this, a miscarriage of justice and the decision must be set aside on appeal: see Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360; Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1; Agbomeji v. Bakare (1998) 7 S.C. (Pt.I) 10; (1998) 9 NWLR (Pt. 564) 1; Odiba v. Azege (1998) 7 S.C. (Pt. I) 79; (1998) 9 NWLR (Pt. 566) 370. D
E
F
G
H

The learned trial Judge failed to consider, evaluate and make findings on the evidence in regard to the adverse and divergent claims, and to highlight the issues joined on the pleadings by the parties. To recap, the appellant's case is that his

vendor claimed personal ownership through devolution of title and family lineage separate and different from those of the 1st - 4th respondents. The question that the appellant's vendor sold without due consent of his family did not arise for consideration. The 1st - 4th respondents did not also raise the issue of family consent and could not possibly have done so since their case was that the appellant's vendor's ancestor, known as Anozie, was not a son of Ezeonwuka and could not share from his lands, part of which is the land in dispute. And further, when the said vendor, Dominic Udeonu, asserted ownership to the land, he was allegedly defeated in a so-called arbitration conducted by some Elders.

But in a unanimous decision, the Court of Appeal, instead of setting aside the judgment, affirmed it. It did so mainly on the basis that the appellant's vendor sold family land without the consent of the family. It was the same misconception made by the trial court. In his leading judgment, Akintan, JCA., observed inter alia:

"The land in dispute was part of the landed properties of Okpalansofor inherited from the said Okpalansofor's father. Okpalansofor had two male issues, Dominic and Michael. Dominic was the person who sold the land in dispute to the appellant..... Michael contended that their father's landed properties were not shared before the death of their father and as at the time of the purported sale by Dominic to the appellant. The trial court accepted this evidence.

.... It is settled that where the land in dispute is accepted by the parties or found by the court to be originally a family land, the person who claims exclusive ownership thereof must fail unless he asserts by his pleadings and proves by evidence how that exclusive ownership devolves on him Thus, in the instant case, the court accepted the evidence that Okpalansofor's land was not shared among his two sons in his life-time. The trial court also found as a fact that the land had not been partitioned as at the time when Dominic, the elder of Okpalansofor's two sons, made the sale to the appellant.

The onus is on the person who claims to be exclusively entitled to family property to prove it. Thus a sale of family land by the head of the family as his own without the knowledge and consent of the other members of the family is void..... As the position in the instant case is that the sale to the appellant was made by Dominic as the

owner of the family land, the sale is therefore void.”

In his concurring judgment, Tobi, JCA., followed the same path when he also said inter alia:

“There is evidence that the purported sale of Ezegaraku (sic) family land by Dominic Udeonu, the appellant’s vendor so to say, was done outside established principles of customary law. Dominic Udeonu sold his family property purporting it as his own, offending the established principles of customary law. It was in the circumstances that the learned trial Judge dismissed the case of the appellant... Since Dominic Udeonu had no authority to sell the family property, the purported sale is void ab initio. This means that title did not pass to the appellant.”

With due respect to the Justices of Appeal, it was a misdirection to have made the above-stated observations as if the action had been brought by a member of Okpalansofor family to challenge the sale by Dominic. It was not such an action. The pleadings are quite plain on this. As I have already said, it was not an issue on the pleadings. Although Michael, the brother of the said vendor, was called as D.W.2 to say that their father’s land (their father being Okpalansofor) was not shared before he died, that fact was not pleaded by the defendants. The evidence was therefore inadmissible. But even if it had been pleaded, the fact that the said land might not have been shared could not be a defence for the defendants, and therefore clearly irrelevant to the dispute between the parties. It could give a cause of action to the family if aggrieved by that sale. It is only a member of a family whose land has been alienated without the necessary consent that can, in an appropriate action, contest that sale or that can bring an action to protect the interest of the family: see *Kwesi Manko v. Bonsu* (1936) 3 WACA 62; *Yesufu Esan v. Bakare Fan* (1947) 12 WACA 135; *Ayanboye v. Balogun* (1990) 5 NWLR (Pt. 151) 392. See also *Olowosago v. Adebajo & 2 Ors.* (1988) 9 S.C. 87; (1988) 4 NWLR (Pt. 88) 275; *Okpala v. Ibeme* (1989) 3 S.C. (Pt. I) 61; (1989) 2 NWLR (Pt. 102) 208. It is not open to a stranger to do so. In the present case, the extraneous issue as to the validity of the sale by Dominic was not a fact which the two courts below should have entertained, let alone introduce into this case by themselves.

It was due to the fundamental misdirection in which the two courts below engaged themselves that they did not realize that the

case of the parties as pleaded and supported by evidence was not considered on its merits. It is obvious that the judgments they gave upon that default on their part cannot be allowed to stand. The case must, in fairness to the parties, be heard de novo. **An appellate court may order a retrial in a civil case when, among other conditions, (1) there has been such an error in substantive law or an irregularity in procedure by the trial court which neither renders the trial a nullity nor makes it possible for the Court of Appeal to say there has been no miscarriage of Justice:** see Ezeoke v. Nwagbo (1988) 1 NWLR (Pt. 72) 616 at 629; Duru v. Nwosu (1989) 7 S.C. (Pt. I) 1; (1989) 4 NWLR (Pt. 113) 24 at 43; **or (2) the trial court made no finding of fact on conflicting material evidence adduced on an issue by both parties to the action, the resolution of which is essential to the just determination of the case and the Appeal Court in the exercise of its appellate jurisdiction cannot resolve that conflict on issue of credibility in order to bring the litigation to an end:** see Atanda v. Ajani (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. 111) 511 at 536; Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527 at 556; **or (3) there has been a substantial misdirection by the court or some other substantial error like wrong placing of burden of proof by the court such that cannot be corrected by the Appeal Court:** see Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130 at 161, 167; **and the justice of the case, looked at in all its special circumstances, justifies an order of retrial:** see Abusomwan v. Aiwerioba (1996) 4 NWLR (Pt. 441) 130 at 141. See also Eke v. Okwaranyia (2001) 4 S.C. (Pt. II) 71; (2001) 12 NWLR (Pt. 726) 181 at 210.

In the result, I allow this appeal, set aside the judgments of the two courts below and order a retrial of the suit by the Anambra State High Court as may be directed by the Chief Judge. I award the appellant N10,000.00 costs against the respondents.

MOHAMMED JSC

I have had a preview of the judgment written by my learned

brother, Uwaifo, JSC., in respect of this appeal and I agree with him that there is merit in the arguments put forward by the appellants. I therefore allow the appeal, set aside the judgments of the two courts below and order for retrial of the case by Anambra State High Court before another judge, I also award N10,000.00 costs in favour of the appellant. B

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Uwaifo, JSC. I entirely agree with it and for the reasons which he has given, I also allow the appeal and order a retrial. I abide by the order for costs. C

EDOZIE JSC

I had read before now the draft of the lead judgment of my learned brother. Uwaifo, JSC., and I agree entirely with the opinion and conclusions expressed therein. D

The judgments of the two lower courts proceeded on the footing that the Plaintiff/Appellant's vendor, Dominic Udeonu, sold to him his family land without the consent of a principal member of that family thereby vitiating the sale. With much respect to their Lordships of the two lower courts, the validity of sale of family land was not an issue joined by the parties in their pleadings. E F

It is a fundamental principle that parties are bound by their pleadings. It is not only the parties but also the courts are bound by the pleadings of the parties. In the case of African Continental Seaways Ltd. v. Nigeria Dredging Road and General Works Ltd. (1972) 5 S.C. 235 at 250, this court held:- G

"The court itself is as much bound by the pleadings of the parties as they are by themselves. It is no part of the duty or function of the court to enter upon any inquiry with the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties." H

A court cannot and ought not evolve a case for either party

and proceed to give judgment thereon contrary to the case of the parties before it: See *Commissioner for Works, Benue State & Anor. v. Devcon Development Consultants Ltd. and Anor* (1988) 7 S.C. (Pt. I) 29; (1988) 3 NWLR (Pt. 83) 407; *Ochonma v. Ashiri Unosi* (1965) NMLR 322 at 323, *Nigerian Housing Development Society Ltd. & Anor v. Yaya Mumuni* (1977) 2 S.C. 57, *A.C.B. Ltd. v. A-G of Northern Nigeria* (1967) NMLR 231.

In the case on hand, since the trial court had misapprehended the case presented by the parties to adjudicate on an issue not placed before it and the Court of Appeal had fallen into the same error by affirming the decision of the trial court, the inevitable order to make is one of retrial.

It is for the foregoing reasons in addition to those comprehensively discussed in the lead judgment that I also allow the appeal with the consequential orders made in the lead judgment.

E

F

G

H