

SUPREME COURT OF NIGERIA
FRIDAY 4TH JULY, 2003. SC. 141/1999
CORAM:- I. L. KUTIGI, M. E. OGUNDARE,
S. U. ONU, A. O. EJIWUNMI, N. TOBI, JJSC

ALHAJI BUBA USMAN APPELLANT
AND
MOHAMMED TAMINU GARKE RESPONDENT

APPEALS - Hearing - Manner of - Appellate court is not bound to consider appeal before it as a trial court - But determines whether trial court considered dispute between parties (H1)

APPEALS - Hearing - Miscarriage of justice - Proof - Appellant must show that he suffered miscarriage of justice - As a result of the approach adopted by court - In consideration of his case (H2)

APPEALS - Land law - Title - Possession - Grant - Court of Appeal rightly resolved the right to possession of the land - In favour of respondent (H3)

ACTIONS - Counter-claim - Failure to defend - Effect - Since the counter-claim was not established by appellant - Failure of respondent to file defence thereto - Is of no moment (H4)

FACTS

Plaintiff/respondent alleged that during one of his visits to his land (i.e. the land in dispute), he noticed that defendant/appellant had trespassed on the land. His effort to amicably settle with appellant was fruitless. Hence, he instituted this action at the High Court of Taraba State Jalingo, seeking for a declaration of title to the land, injunction and damages for trespass.

On the other hand, appellant counterclaimed that he had bought the land from one Ali Abubakar Gadal in 1981, who claimed to have derived title from Jalingo Local Government. Though appellant claimed that his transaction with the said Ali was reduced into writing, the document was rejected as inadmissible as it was not registered. Trial court gave judgment to respondent, dismissing appellant's counterclaim. Dissatisfied, appellant appealed to Court of Appeal,

Jos Division. The appeal was dismissed. Still aggrieved, appellant filed appeal at Supreme Court, contending that the procedure adopted by Court of Appeal in considering his case was fatal to the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right when it first considered and dismissed the case of the defendant before it proceeded to consider the case for the plaintiff?

2. Whether the Court of Appeal was right when it held that Exhibit MB1 was not issued by the Land Use and Allocation Committee as found by the trial court without an appeal on the issue before it?

3. Whether Exhibit MB1 can confer title of the piece of land in dispute on the plaintiff?

4. Whether the failure of the plaintiff to file a reply or defence to the counter-claim is fatal to the plaintiff’s case?

5. Having regard to the circumstances of the case, was the Court of Appeal right when it held that the defendant failed to establish his case.”

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

APPEALS - Hearing - Manner of

1. Basing himself on the undisputed fact that the learned Justice of the Court of Appeal did consider first the case of the appellant as set out above, learned counsel for the appellant has therefore argued in the appellant’s brief that the court below was totally wrong by considering the case of the appellant before that of the respondent. In support of this contention, he referred to the case of Chief Victor Woluchem & Ors. v. Chief Simon Gudi and Ors. (1981) 5 SCNJ 291 at 306 and 316; (1981) 12 NSCC 214 at 220/221 and referred specifically to the passage in the judgment of Nnamani, JSC.

Now, I have quoted in extenso the above pronouncements from the judgment of Nnamani, JSC., to show that the principle enunciated in that case and the other cases to which

reference was made, were laid down for the benefit of trial judges.

It follows from what I have said above that an appellate court is not bound to consider the appeal before it as a trial court. The duty of an appellate court is to determine whether the trial court considered the dispute between the parties as laid down in the case of *Chief Woluchem & Ors. v. Chief Simon Gudi & Ors.* (pp. 2296 E/ 2298 F/ 2299 C)

APPEALS - Hearing - Miscarriage of justice - Proof

2. It must be said further that it is not good enough to argue that the case of the appellant was considered by the court below before that of the respondent. In my respectful view, It must be shown that the appellant suffered a miscarriage of justice as a result of the approach adopted by the court below in its consideration of the case of the appellant. As this has not been shown in respect of this issue, I must resolve this question against the appellant. (p. 2299 E)

Land law - Title - Possession - Grant

3. The learned counsel for the appellant appears, and with due respect to him, to have missed the purport of the judgment of the lower court on the question raised before it as to whom between the two parties established a case for the right to be in possession of the disputed land.

As the court below was only concerned with the competing claims of the parties having regard to the documents presented by the parties, the court below, per Edozie, JCA., (as he then was), said as follows:-

"It is settled law that where two parties claim to be in possession of land, the law ascribes possession to the one with better title.

By the letter Exh 'MB1' from the Ministry of Lands and Survey approving the grant of the statutory right of occupancy over the said land in dispute to the Respondent, he has on the principle of *Arase v. Arase* (supra) proved a better title than the appellant. Accordingly, the possession of the land in dispute is ascribed to him and by reason of that he is entitled to main-

tain an action against the appellant whose alleged possession on the land is trespassory.”

It is my respectful view that in coming to the conclusion reached above, there is nothing to suggest that the respondent was granted possession of the disputed land because Exhibit MB1 gave him title to the disputed land. All that was decided by the court below is that the respondent established a better title to the land. Having also considered the evidence adduced by the appellant in support of his right to the possession of the disputed land, I must hold that the court below was right to have resolved the right to the possession of the disputed land in favour of the respondent. (p. 2302 E)

ACTIONS - Counter-claim - Failure to defend - Effect

4. In the case of Ogbonna v. A-G Imo State (supra), this court upheld the counter-claim, not only because the plaintiff did not file a reply in defence of the counter-claim, but on the evidence before the court, the counter-claim was duly established. Now, it seems to me therefore that while a plaintiff who failed to file a reply in defence of a defendant's counter-claim may have the counter-claim resolved against him, the court on the premise that his failure so to do meant that he had no defence to the counterclaim, yet it seems to me that the counter-claim may not succeed if the defendant did not establish the counter-claim he pleaded.

It is therefore my humble view that in the instant case, as the court below was satisfied that the counter-claim was not duly established by the appellant, hence that court held that the failure of the respondent to file a reply in defence of the counter-claim was of no moment. I have also considered the evidence led by the appellant in support of the counter-claim and I am of the clear view that the court below was right in its conclusion in respect of this complaint by the appellant on this issue. (p. 2304 H)

NOTABLE POINTS OF INTEREST
EJIWUNMI JSC

1. Finding not appealed against stands

It is pertinent to observe that the appellate jurisdiction of the court is a creation of the Constitution and it is to hear and determine appeals from the trial court. It follows that if a finding is not challenged in an appeal from the High Court to the Court of Appeal, that finding stands rightly or wrongly for the purpose of the appeal in question regardless of the merit of what the trial court might have said on the same point. (p. 2300 E)

TOBI JSC

2. Considering and dismissing a case - Difference

I have read the judgment of the court below and I do not, with the greatest respect, agree with learned counsel for the appellant that the court below considered and dismissed the case of the appellant before it considered the case of the respondent. There is a clear difference between consideration of a case of a party and dismissal of the case. A court of law, trial or appellate, has the right to consider the case of either the plaintiff or the defendant first.

It is entirely a different matter when a court of law, trial or appellate, dismisses the case of one of the parties early in the judgment ever before considering the case of the other party. In that situation, there is clear miscarriage of justice because the parties have not been given equal chance in the evaluation process before decision is given. But where the cases of the parties have been considered equally before the case of one of the parties is dismissed and the other is allowed, a party whose case was duly dismissed cannot complain because his case was equally considered. (p. 2306 G)

3. Court has discretion as to which of the parties' case to consider first

The discretion of whose case to start with is that of the judge, trial or appellate. It depends so much on the state of the pleadings and the particular facts before the court. Basically, however, the trial judge could first consider the case of the party on whom the burden of proof lies, that is to say, the party who will fail, if the live issues in the matter were not proved. This could be slightly different in the appellate court, where the court is concerned with the decision of the trial court. So much will depend upon the issues formulated by the par-

ties, in the determination of which of the parties the appellate court can consider the case presented to it. There cannot be any technical rule and the courts cannot lay down a rigid procedure as to whether the appellate court must start the consideration of either the case of the appellant or the respondent first. (p. 2307 B)

4. A reply is unnecessary if counter claim raises no fresh issue

The appellant as defendant filed a counter-claim. The respondent as plaintiff did not file a Reply. It is the argument of counsel for the appellant that the failure of the respondent to file a Reply is fatal to his case. Learned counsel cited the case of *Ogbonna v. Attorney-General Imo State* (1992) 1 NWLR (Pt. 220) 647 in support of his contention. This court held in that case that where a defendant pleads certain facts in his pleading in support of his counter-claim, with the necessary particulars, but the plaintiff fails to reply to them, no issue is raised on such defendant's pleading and so the court can proceed to give judgment on it without much ado.

A reply to a counter-claim becomes necessary if the counter-claim raises a fresh or new issue. Where the counter-claim has not raised a fresh or new issue, a reply is not necessary. In other words, where the issues raised in the counter-claim are already covered by the statement of claim, a reply is otiose. (p. 2307 D)

REPRESENTATION

Charles Obishai, with C. Amuzor, for the Appellant
Respondent absent, not represented

CASES REFERRED TO

- Akinsanya v. UBA Ltd. (1986) 4 NWLR (Pt. 35) 273
- Adelaja v. Fanoiki (1990) 2 NWLR (Pt. 131) 166
- F.C.D.A. v. Sule (1994) 3 NWLR (Pt. 332) 257
- Moss v. Kenrow (1992) 9 NWLR (Pt. 264) 207
- Olujinle v. Adeagbo (1986) 2 NWLR (Pt. 75) 238
- Ubodume v. Abiegbe (1991) 8 NWLR (Pt. 209) 261
- Buraimoh v. Esa (1990) 2 NWLR (Pt. 133) 406
- Wilson v. A-G Bendel State (1985) 1 NWLR (Pt. 4) 572
- Nwabueze v. Okoye (1988) 10-11 S.C. 77

Management Enterprises Ltd. v. Otusanya (1987) 2 NWLR (Pt. 55) 179

STATUTES REFERRED TO

Land Use Act Cap 202 LFN 1990, ss.2, 5, 9 & 45

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LEAD JUDGMENT BY EJIWUNMI JSC

This appeal is against the judgment of the court below, Jos Division, (Coram, Oguntade, JCA., Edozie, JCA., (as he then was), and Muhammad, JCA.), delivered on the 8th day of December, 1998. By the said judgment, that court dismissed the appeal of the appellant from the judgment of the trial court sitting in Jalingo in the Taraba State High Court, in suit No. TRSJ/30/93. In that case, which was tried on pleadings, the respondent by paragraph 17 of his Statement of Claim, claimed as follows:-

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“17. Whereof *the Plaintiff claims against the Defendant*

(a) *A declaration of title over the parcel of land described as Plot No. 19A (sic) road lying and situate at the Jalingo old air strip measuring about 1110 square meters based on MISCJP3, Jalingo, Taraba State.*

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(b) *An order of perpetual injunction against the, defendant and his privies or servants from committing further acts of trespass on the above parcel of land.*

(c) *The sum of Twenty Thousand Naira damages for the unauthorised utilization of the plaintiff's cement blocks and sand.*

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(d) *The sum of Ten Thousand Naira general damages for trespass.*

(e) *Any further order or orders this Honourable Court may deem fit to make.”*

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The appellant by his pleadings denied in its entirety the claims of the respondent. In addition, the appellant also filed a counter-claim, which he subjoined to his Statement of Defence.

By paragraph 2 of the counter-claim, the appellant pleaded thus:-

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“2. Whereof, the defendant in this cross-action seeks the following reliefs:-

(i) *A declaration of title over the parcel or plot of land, lying and situate at old air strip, Jalingo, Taraba State; correctly described*

as Plot No. 19A along SPORTS Council Road, (MISC GSJP3). Covered by a Certificate of Occupancy No. 20 of 29/6/82 issued by the Jalingo Local Government Council.

(ii) A permanent injunction restraining the plaintiff, his agents, privies by whatsoever name called, from committing any further acts of trespass on the said land.

(iii) The sum of Twenty Thousand Naira (N20,000.00) as general damages for trespass.

(iv) Eight Thousand Naira (N8,000.00) special damages as follows: -

(a) 40 trips of sand used by the plaintiff for moulding 2,500 blocks at the current market rate of Two Hundred Naira (N200.00) per trip thereby giving rise to a return of N8,000.00.

(v) The plaintiff to pay for the cost of filing and prosecuting this cross-action.

(vi) Any further order or other orders this Honourable Court may see just to make in the circumstances.”

At the trial, the parties gave evidence in support of their respective cases. The trial court upheld the claims of the respondent that included the award of N3,000.00 damages for trespass and order of perpetual injunction against the appellant. The trial court dismissed the counter-claims of the appellant. The appeal to the court below by the appellant was also dismissed. As he was still dissatisfied with the judgment and orders of that court, he has appealed further to this court. Pursuant thereto, six grounds of appeal were filed against the judgment of the court below. In accordance with the Rules of this Court, the appellant filed his brief timeously on the 8th December 1999. The respondent who should have filed the respondent’s brief by the 7th of January, 2000, did not do so. The respondent did not also file his brief thereafter, or at any time before the date of the hearing of this appeal on the 7th of April, 2003. As a result, this appeal was heard on the brief filed by the appellant and without the respondent’s brief. See Order 6 Rule 9 of the Rules of Supreme court (as amended in 1999).

In the appellant’s brief, the following are the issues identified for the determination of the appeal:-

“1. Whether the Court of Appeal was right when it first considered and dismissed the case of the defendant before it proceeded to

consider the case for the plaintiff?

2. *Whether the Court of Appeal was right when it held that Exhibit MB1 was not issued by the Land Use and Allocation Committee as found by the trial court without an appeal on the issue before it?*

3. *Whether Exhibit MB1 can confer title of the piece of land in dispute on the plaintiff?* B

4. *Whether the failure of the plaintiff to file a reply or defence to the counter-claim is fatal to the plaintiff's case?*

5. *Having regard to the circumstances of the case, was the Court of Appeal right when it held that the defendant failed to establish his case.*" C

Before considering the issues raised in this appeal, it is necessary to be reminded of the bare facts that led to this action. It is clear from the pleadings and the evidence led that the respondent who initiated the action claimed that in 1988, he applied to the Land and Survey Department, Jalingo, for the allocation to him of the plot in dispute. The application which was granted was conveyed to him by a letter Ref. No. GS/MLS/LAN/13060/1 of 18/5/90 (Ex. MB1). Thereafter, he deposited on the plot eight tipper trips of sharp sand from which he moulded 2,500 blocks preparatory to developing the plot. He afterwards submitted a building plan of his proposed building to the Taraba State Urban Planning Authority. Following the inspection of the plot, the Authority drew the site plan of the disputed land. Subsequently, the Authority approved the building plan in Exhibit MB2; and was also given approved building permit, Exhibit MB3. Later, he was given a Certificate of Occupancy No. 03/10097 dated 29/9/93 which was admitted as Exhibit MB4. During one of the visits to the site by the respondent, he noticed that somebody had entered his land. His enquiries then led him to the appellant. As it was impossible to reach an accord with the appellant through the intervention of his parents and mutual friends, the respondent commenced this action by a writ of summons on the 19th of August, 1993. E

The appellant, on the other hand, claimed that he bought the land in dispute in 1981 from one Ali Abubakar Gadai for the sum of N1,700.00. This transaction was reduced into writing and was dated 22/9/81. It was rejected during the trial though, as it was not registered. As his vendor, Ali Abubakar claimed that he derived title to the F

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land from the Jalingo Local Government, the appellant applied for and was issued with a Certificate of Occupancy No. 20 of 29/6/82, Exhibit MB5 by the Jalingo Local Government. The appellant also claimed that he deposited 150 trips of sharp sand on the disputed land, and that the respondent allegedly moulded 2,500 cement blocks
B from the sharp sand.

Issue 1

The first issue raised by the appellant in his brief will be considered now. By this issue, the appellant is questioning whether the Court
C of Appeal was right to have first considered and dismissed the case of the appellant before it proceeded to consider the case for the respondent. For the purpose of this question, learned counsel for the appellant referred to the passage of the judgment of the Court of Appeal per Edozie, JCA., (as he then was), where the learned Justice
D said thus:-

“With the foregoing in mind, it is necessary to advert to the pleadings and evidence relied upon by the parties in assertion of this claim. I will deal first with the case of the appellant.”

The learned Justice, then referred to sub-paragraphs (1) and
E (2) of paragraph 16 of the Statement of Defence and the evidence of D.W.1 and D.W.2, who gave evidence for the appellant before reaching the conclusion that having regard to the evidence of D.W.1 and D.W.2 and the averments made in the pleadings considered, the appellant failed abysmally to establish his claim. ***Basing himself on the***
F ***undisputed fact that the learned Justice of the Court of Appeal did consider first the case of the appellant as set out above, learned counsel for the appellant has therefore argued in the appellant’s brief that the court below was totally wrong***
G ***by considering the case of the appellant before that of the respondent. In support of this contention, he referred to the case of Chief Victor Woluchem & Ors. v. Chief Simon Gudi and Ors. (1981) 5 SCNJ 291 at 306 and 316; (1981) 12 NSCC 214 at 220/221 and referred specifically to the pas-***
H ***sage in the judgment of Nnamani, JSC., where his Lordship at pages 220-221 of (1981) 12 NSCC said thus:-***

“Beginning with ground 2 of the additional grounds of appeal argued in this court, it seems to me that the proper procedure or approach in considering the evidence is first that the trial Judge ought

to start (against the background of the issues between the parties) by considering the evidence led by the plaintiff and then proceed to consider that led by the defendants. Unless the evidence led by the plaintiffs is so patently unsatisfactory, in which case he does not have to consider the case of the defence at all, he will take the evidence led by both sides and put it in that imaginary scale, weigh it and decide upon the preponderance of credible evidence which has more weight. If the Judge decides the issue after considering the evidence led by the plaintiffs and before proceeding to examine the evidence led by the defence, he would clearly be in error. He would have prejudged the issues before he ever considers the case of the defence. His decision must be based on his consideration of the totality of the evidence put before him.”

His Lordship then said further at pages 221-222 thus:-

“This procedure was set down in extenso in the judgment of this court, (per Fatayi-Williams, JSC., as he then was), in A. R. Mogaji & Ors. v. Madam Rabiātu Odofin & Ors. (1978) 3 S.C. 91. In that case, the learned trial Judge had observed (and with all respect, almost as the Court of Appeal observed in this Appeal):

Before a consideration of the title of the defendants can be considered at all, on the strength of the authorities, the plaintiffs’ title must first be considered and decided upon. See the case of Aromire & Ors. v. Awoyemi (1972) All NLR 101.

So I propose to examine first the case of the plaintiffs. The learned trial Judge in that case in fact considered the case of the plaintiffs and made findings of fact before he proceeded to consider the case for the defendants. He had therefore clearly considered, believed and accepted plaintiff’s case before considering that of the defendants. This court ordered a new trial. At p. 93 et seq it observed as follows on the procedure the learned Judge ought to have followed:

In other words, the totality of evidence should be considered in order to determine which has weight and which has no weight at all. Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all the facts, must put the two sets of facts in an imaginary scale, weigh one against the

other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it; if that law supports it; bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiff's claim will be dismissed."

B And later the Court concluded:

"In short, before a judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality of the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore in determining which is heavier, the Judge will naturally have regard to the following:

- (a) *whether the evidence is admissible;*
- E (b) *whether it is relevant;*
- (c) *whether it is credible;*
- (d) *whether it is conclusive; and*
- (e) *whether it is more probable than that given by the other party."*

F **Now, I have quoted in extenso the above pronouncements from the judgment of Nnamani, JSC., to show that the principle enunciated in that case and the other cases to which reference was made** in the said pronouncement of Nnamani, JSC., namely, A. R. Mogaji & Ors. v. Madam Rabiātu Odofin & Ors. (supra) and Aromire & Ors. v. Awoyemi (supra), **were laid down for the benefit of trial judges.** There can be no doubt that by that approach though, a trial judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier

not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses. The thrust therefore in this approach is to enable the trial court to determine the dispute upon the principle that in civil cases, dispute between parties ought to be properly decided on the balance of probabilities. This is why it has long been settled that it is the province of the trial court who has heard the evidence of witnesses and seen them to make findings of fact upon the evidence of such witnesses. The appellate court, not being in the position of a trial court will not easily interfere with such findings made by the trial court. See Ebba v. Ogodo & Anor. (1984) 1 SCNR 372.

It follows from what I have said above that an appellate court is not bound to consider the appeal before it as a trial court. The duty of an appellate court is to determine whether the trial court considered the dispute between the parties as laid down in the case of Chief Woluchem & Ors. v. Chief Simon Gudi & Ors. (supra). It is therefore my considered view and with due respect to learned counsel for the appellant that he completely misconceived the purport of the decision of this court in Chief Woluchem & Ors. v. Gudi & Ors. (supra). ***It must be said further that it is not good enough to argue that the case of the appellant was considered by the court below before that of the respondent. In my respectful view, It must be shown that the appellant suffered a miscarriage of justice as a result of the approach adopted by the court below in its consideration of the case of the appellant. As this has not been shown in respect of this issue, I must resolve this question against the appellant.***

Issue 2

In respect of this issue, the point taken by the learned counsel for the appellant is as to whether the Court of Appeal was right to have determined a question not raised by a ground of appeal thereon. On this point, the learned counsel for the appellant referred to the following passage from the judgment of the trial Judge, which reads:

“Exhibit 1 on the other hand is the approved letter for grant of title. It was issued by the Land Use and Allocation Committee. That Committee was created by Section 2 subsection 2 of the Land Use Act, Cap. 202 of the Laws of the Federation, 1990. The Committee

is vested with the power to advise the Governor as the case may be, the Administrator on matters connected with or pertaining to management of land within urban areas.”

Now, it is the contention of learned counsel for the appellant that on that finding of the learned trial Judge, the question that came
 B up for consideration before the court below was whether the Land Use and Allocation Committee has the right to issue a document conferring title to a person i.e., Exhibit MB1 and not who issued it. Hence, learned counsel argued that the Court of Appeal fell into
 C error by deciding that Exhibit MB1 was issued by the Ministry of Lands and Survey, Gongola State, and not the Land Use and Allocation Committee. In support of his contention, he referred to the following cases: - *Management Enterprises Ltd. v. Otusanya* (1987) 2 NWLR (Pt. 55) 179 at 193; *Nwabueze v. Okoye* (1988) 10-11 S.C.
 D 77; (1988) 4 NWLR (Pt. 91) 664 at 679; *Ubodume v. Abiegbe* (1991) 8 NWLR (Pt. 209) 261 at 274.

Learned counsel for the appellant is no doubt right in his submission that there was no complaint against the decision of the trial court that held that Exhibit 1 (MB1) was issued by the Land Use and
 E Allocation Committee. On this point, it is pertinent to observe that the appellate jurisdiction of the court is a creation of the Constitution and it is to hear and determine appeals from the trial court. It follows that if a finding is not challenged in an appeal from the High Court to
 F the Court of Appeal, that finding stands rightly or wrongly for the purpose of the appeal in question regardless of the merit of what the trial court might have said on the same point. What then is the position in respect of this appeal. Upon a perusal of the appellant's brief
 G filed in the Court of Appeal, pursuant to the hearing of the appeal in that court, it is manifest that the appellant in that brief, the question raised therein as Issue 4, is as to whether Exhibit MB1 is a grant. On that question, the argument of the learned counsel for the appellant and who is also the counsel in this case, reads in part as follows:-

H *“Exhibit 1 on the other hand is the approval letter for grant of title. It was issued by the Land Use and Allocation Committee. That Committee was created by Section 2 subsection 2 of the Land Use Act, Cap. 202 of the Laws of the Federation, 1990. The Committee is vested with the power to advise the Governor, or as the case may be, the Administrator on matters connected with or pertaining to*

management of land within urban areas. Any approval of a grant of title issued by the Committee, is deemed to be a grant by the Governor. Microscopic eyes are not required in order to unearthing the inconsistency in the above judgment. From the above:

- (a) *Exhibit 1 is the approval letter for grant of title,*
- (b) *Exhibit 1 is deemed to be a grant,*
- (c) *The Committee is to advise the Governor,*
- (d) *The Committee's advice now turn out to be the Governor's grant.*

The above cannot by any stretch of the imagination be the law. It is illogical. There is no provision of the Land Use Act delegating the powers of the Governor to the Committee. By the provisions of Section 45 of the Land Use Act the Governor can only delegate a commissioner to act on his behalf but certainly not the Land Use Allocation Committee. It is a cardinal principle of the construction of statutes that statutes which confer powers on statutory bodies are construed such as to prevent abuse of power. See the case of Wilson v. A-G Bendel State (1985) 1 NWLR (Pt. 4) 572 at 591."

From the above, it seems to me inconceivable for counsel to argue that no question was raised challenging the decision of the trial court on Exhibit MB1. Now, having raised the question before the lower court and an answer which was considered erroneous was given by the Court of Appeal, then what the appellant ought to have done was to appeal directly against the decision of the Court of Appeal. It is not for the appellant to portray that the Court of Appeal went on a mission of its own to decide an issue which was not raised before it. As it is clear to me that the question, which the court below considered, arose from the issue posed before it, I do not find any merit in the question as now raised on the matter by the appellant. This issue is therefore resolved against the appellant.

Issue 3

In respect of this issue, it is contended for the appellant by his learned counsel that the court below wrongfully held that Exhibit MB1 is a valid title document and upon which the respondent was adjudged as the rightful owner of the property in dispute. In support of this submission, learned counsel for the appellant argued in the appellant's brief that as Exhibit MB1 was issued by the Land Use and Allocation Committee, it cannot validly confer title to land. He fur-

ther argued that the Committee had no duty, function or power to issue any instrument conveying any manner of interest or title in Land. He derived support for this contention from the provisions of Sections 2, 5, 9 and 45 of the Land Use Act Cap. 202, Laws of the Federation of Nigeria, 1990. The essence of all his contention is clearly aimed at showing that the Land Use and Allocation Committee is only an advisory body to the Governor of the State, and that it is only the Governor who can issue any instrument conveying title or interest in land. It is further argued for the appellant that though the Governor of a State may delegate his function with regard to allocation of land to the Commissioner in his executive council, he cannot delegate such functions to the Land Use and Allocation Committee nor to a Permanent Secretary. In support of this submission, he referred to a number of cases including the following: *Awobulu v. State* (1976) All NLR 237 at 255; *F.C.D.A. v. Sule* (1994) 3 NWLR (Pt. 332) 257 at 286; *Adelaja v. Fanoiki* (1990) 2 NWLR (Pt. 131) 166-167; *Moss v. Kenrow* (1992) 9 NWLR (Pt. 264) 207 at 222.

Now, the argument of learned counsel for the appellant is no doubt right with regard to who by the provisions of the Land Use Act (supra) is empowered to allocate and or issue a certificate of occupancy in respect of land within the jurisdiction of the Governor. But ***the learned counsel for the appellant appears, and with due respect to him, to have missed the purport of the judgment of the lower court on the question raised before it as to whom between the two parties established a case for the right to be in possession of the disputed land.*** In my humble view, the Court below clearly recognised that Exhibit MB1, the letter approving the grant of a Statutory Right of Occupancy that emanated from the Ministry of Lands and Survey, did not convey the Statutory Right of Occupancy to the respondent. That letter when read carefully only served as notice to the Respondent that he would be entitled to a Certificate of Occupancy provided the conditions stipulated in the letter, Exhibit MB1, are fulfilled. ***As the court below was only concerned with the competing claims of the parties having regard to the documents presented by the parties, the court below, per Edozie, JCA., (as he then was), said as follows:-***

“It is settled law that where two parties claim to be in possession of land, the law ascribes possession to the one

with better title: see *Alhaji J. Aromire v. J. J. Awoyemi* (1972) 1 All. NLR 1-7 at 112, *Jones v. Chapman* (1847) 2 Ex Ch 83. Furthermore, it ought to be borne in mind that where questions of title to land arise in litigation, the court is concerned only with the relative strength of the title proved by the rival claimants. See case of *Madam J. Arase v. Peter U. Arase* (1981) 5 S.C. 33 at 35. In the case in hand, it has been amply demonstrated that the appellant has no colour of right over the property in dispute, having failed to prove the title of his vendor, and, coupled with that, his Certificate of Occupancy, Exhibit 'MB5', is a rather spurious document conveying no identifiable piece of land to the appellant. On the other hand, the respondent's Certificate of Occupancy Exhibit 'MB4' is equally defective by reason of its having been issued when the suit the subject-matter of the land relating to it was pending in court. **By the letter Exh 'MB1' from the Ministry of Lands and Survey approving the grant of the statutory right of occupancy over the said land in dispute to the Respondent, he has on the principle of Arase v. Arase (supra) proved a better title than the appellant. Accordingly, the possession of the land in dispute is ascribed to him and by reason of that he is entitled to maintain an action against the appellant whose alleged possession on the land is trespassory.**

It is my respectful view that in coming to the conclusion reached above, there is nothing to suggest that the respondent was granted possession of the disputed land because Exhibit MB1 gave him title to the disputed land. All that was decided by the court below is that the respondent established a better title to the land. Having also considered the evidence adduced by the appellant in support of his right to the possession of the disputed land, I must hold that the court below was right to have resolved the right to the possession of the disputed land in favour of the respondent. This issue is therefore resolved against the appellant.

Issue 4

In respect of this issue, it is contended for the appellant that the failure of the respondent to file a reply to the counter-claim is fatal to the respondent's case. It is obviously unarguable that the respondent did not file a reply to the counter-claim of the appellant. But the

question is whether the failure to file a reply to the counter-claim of the appellant should necessarily be fatal to the case of the respondent. Before the determination of this question, it is useful to refer to the case which was brought to our attention in the appellant's brief, namely *Ogbonna v. A-G Imo State* (1992) 1 NWLR (Pt. 220) 647
 B where at page 675 Nnaemeka-Agu, JSC, said thus:-

*"I believe it has been settled by several decided cases that a counter-claim is to all intents and purposes a separate action, although the defendant, for convenience and speed, usually joins it with his defence where a court so grants leave. Indeed, not only can a defend-
 C ant apply for summary judgment on his counter-claim but also a plaintiff may counter-claim on defendant's counter-claim (see Renton Gibbs & Co. v. Neville (1990) 2 QB 818). So, where a defendant counterclaims against the plaintiff, the latter is duty bound to file a
 D reply in defence to the counter-claim, otherwise the court is entitled, in fact obliged, to assume that the plaintiff has no defence to the counter-claim and may enter judgment for the defendant accordingly. See as an example on this: Nigerian Housing Development Society Ltd. v. Mumuni (1977) 2 S.C. 57. This is because where a
 E defendant pleads certain facts in his pleading in support of his counter-claim, with all the necessary particulars, but the plaintiff fails to reply to them, no issue is raised on such defendant's pleading. So the court can proceed to give judgment on it without much ado. The Court of
 F Appeal was therefore right to have so held in this case."*

It is thus clear from the above that where a counter-claim was filed in an action, a plaintiff ought to file a reply in defence to the counter-claim. And if the plaintiff failed to take such a step, the court is entitled, and in fact obliged to assume that the plaintiff has no
 G defence to the counter-claim and may enter judgment for the defendant accordingly. In *Nigerian Housing Development Society Ltd. v. Mumuni* (supra), this court held that the counter-claim of the 2nd defendant must succeed as there was no defence filed thereto. In that case, 2nd defendant was the purchaser of the property sold to him
 H by the 1st defendant and the court found that the mortgagee of the property properly sold the property to the 2nd defendant in the exercise of the right of the 1st defendant over the mortgaged property. Also **in the case of *Ogbonna v. A-G Imo State* (supra), this court upheld the counter-claim, not only because the plaintiff did**

not file a reply in defence of the counter-claim, but on the evidence before the court, the counter-claim was duly established. Now, it seems to me therefore that while a plaintiff who failed to file a reply in defence of a defendant's counter-claim may have the counter-claim resolved against him, the court on the premise that his failure so to do meant that he had no defence to the counterclaim, yet it seems to me that the counter-claim may not succeed if the defendant did not establish the counter-claim he pleaded.

It is therefore my humble view that in the instant case, as the court below was satisfied that the counter-claim was not duly established by the appellant, hence that court held that the failure of the respondent to file a reply in defence of the counter-claim was of no moment. I have also considered the evidence led by the appellant in support of the counter-claim and I am of the clear view that the court below was right in its conclusion in respect of this complaint by the appellant on this issue.

Issue 5

On this issue, it is my respectful view that the question as to whether the court below was right to have held that the appellant failed to establish his case must be resolved against the appellant. I have earlier in the course of this judgment considered the issues raised in this appeal. In the course of their consideration, it became quite clear to me that the case made out for the appellant lacked merit. In this regard I must also bear in mind that this appeal is upon concurrent findings of fact by the two lower courts and the court ought not to interfere on the principle established by many cases including *Olujinle v. Adeagbo* (1986) 2 NWLR (Pt. 75) 238, p. 255; *Enang v. Adu* (1981) 11-12 S.C. 25 p. 42; *Akinsanya v. UBA Ltd.* (1986) 4 NWLR (Pt. 35) 273; *Buraimoh v. Esa & Ors.* (1990) 2 NWLR (Pt. 133) 406, p. 419. The appellant has not also been able to show any reason why the appeal should be resolved in his favour.

In the result, this appeal is dismissed by me and I affirm the judgment of the court below and the orders made thereon. As the respondent did not take part in this appeal, I make no order as to costs.

KUTIGI JSC

I have had the advantage of reading in advance the judgment just read my learned brother, Ejiwunmi, JSC. I agree with the conclusion to dismiss the appeal which has no merit.

B

OGUNDARE JSC

I agree with the judgment of my learned brother, Ejiwunmi, JSC., just delivered. For the reasons given by him which I agree with and adopt as mine, I too, dismiss the appeal and make no order as to costs.

ONU JSC

D Having had the opportunity to read before now the judgment of my learned brother, Ejiwunmi, JSC, just delivered, I am in complete agreement with him that the appellant's appeal lacks merit and ought therefore to fail.

E I adopt the same as mine and have nothing further to add thereto.

TOBI JSC

F I have read in draft the judgment of my learned brother, Ejiwunmi, JSC, and I agree that this appeal should be dismissed. I want to add a bit to Issues 1 and 4 clearly examined by my learned brother.

G The complaint of the appellant on Issue No. 1 is that the court below considered and dismissed the case of the appellant before it proceeded to consider the case of the respondent. He cited the case of Chief Woluchem v. Chief Gudi (1981) 5 SCNJ 291 at 306 and 316.

H I have read the judgment of the court below and I do not, with the greatest respect, agree with learned counsel for the appellant that the court below considered and dismissed the case of the appellant before it considered the case of the respondent. There is a clear difference between consideration of a case of a party and dismissal of the case. A court of law, trial or appellate, has the right to consider

the case of either the plaintiff or the defendant first. This is so because it is impossible to consider the case of the parties at the same time and together. The case of the parties could be considered one after the other, but certainly not together at the same time. That is an impossibility.

The discretion of whose case to start with is that of the judge, trial or appellate. It depends so much on the state of the pleadings and the particular facts before the court. Basically, however, the trial judge could first consider the case of the party on whom the burden of proof lies, that is to say, the party who will fail, if the live issues in the matter were not proved. This could be slightly different in the appellate court, where the court is concerned with the decision of the trial court. So much will depend upon the issues formulated by the parties, in the determination of which of the parties the appellate court can consider the case presented to it. There cannot be any technical rule and the courts cannot lay down a rigid procedure as to whether the appellate court must start the consideration of either the case of the appellant or the respondent first.

It is entirely a different matter when a court of law, trial or appellate, dismisses the case of one of the parties early in the judgment ever before considering the case of the other party. In that situation, there is clear miscarriage of justice because the parties have not been given equal chance in the evaluation process before decision is given. But where the cases of the parties have been considered equally before the case of one of the parties is dismissed and the other is allowed, a party whose case was duly dismissed cannot complain because his case was equally considered. I will like to think that that was what Nnamani, JSC., had in mind in the case of Chief Woluchem v. Chief Gudi (supra) when he said that the trial Judge must “take the evidence led by both sides and put it in (an) imaginary scale, weigh it and decide upon the preponderance of credible evidence which has more weight.”

I do not see from the judgment of the court below that the case of the appellant was first dismissed before the case of the respondent was considered. No, that was not the position. The Court considered both cases and came to the final conclusion where it dismissed the case of the appellant. In my humble view, the court was entitled to do that. The issue therefore fails.

The next issue is in respect of a Reply to the counter-claim. The appellant as defendant filed a counter-claim. The respondent as plaintiff did not file a Reply. It is the argument of counsel for the appellant that the failure of the respondent to file a Reply is fatal to his case. Learned counsel cited the case of *Ogbonna v. Attorney-General Imo State* (1992) 1 NWLR (Pt. 220) 647 in support of his contention. This court held in that case that where a defendant pleads certain facts in his pleading in support of his counter-claim, with the necessary particulars, but the plaintiff fails to reply to them, no issue is raised on such defendant's pleading and so the court can proceed to give judgment on it without much ado.

A reply to a counter-claim becomes necessary if the counter-claim raises a fresh or new issue. Where the counter-claim has not raised a fresh or new issue, a reply is not necessary. In other words, where the issues raised in the counter-claim are already covered by the statement of claim, a reply is otiose. See *Egesimba v. Onuzuruike* (2002) 15 NWLR (Pt. 791) 466.

There is still another aspect to the issue. It is this. A counter-claim does not automatically succeed merely because a reply was not filed. A counter-claim like the main claim or the plaintiff's claim, must be proved on the balance of probability as any other civil matter. Where the defendant fails to prove his counter-claim, his action stands dismissed and will be dismissed.

It is for the above reasons and the more detailed reasons given by my learned brother, Ejiwunmi, JSC., that I too dismiss the appeal and I do so by awarding N10,000.00 costs in favour of the respondent.

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