

SUPREME COURT OF NIGERIA
FRIDAY 26TH SEPTEMBER, 2003. SC. 198/1999
CORAM:- M. L. UWAI S CJN, U. MOHAMMED,
U. A. KALGO, A. O. EJIWUNMI, D. MUSDAPHER, JJSC

JOHN OWHONDA APPELLANT
AND
ALPHONSO CHUKWUEMEKA RESPONDENT

LAND LAW - Title - Proof - Plaintiff must first prove valid root of title
- In order to claim title on acts of ownership - Or long possession
(H1)

LAND LAW - Trespass - Damages - A person may fail in his claim for
title - But may succeed in claim for trespass - Since both claims are
independent (H2)

LAND LAW - Title - Customary grant - Proof - Ogunleye v. Oni - If a
party bases his title on grant by a family - He must plead origin of title
of that family (H3)

LAND LAW - Identity of land - Proof - Before claim for title is granted
- The land to which it relates must be identified with certainty - Oth-
erwise the claim must fail (H4)

LAND LAW - Title - Connected land - Proof - By s.46 of Evidence
Act - Acts of possession over a piece of land - May be evidence of
ownership of other connected land (H5)

APPEALS - Issues - Not based on grounds - Fate - Where an issue is
not predicated on any ground of appeal - It becomes incompetent
and liable to be struck out (H6)

JUDGMENTS - Mistakes - Effect on appeal - It is not every mistake
that will result in an appeal being allowed - It is only such as has
occasioned a miscarriage of justice (H7)

LAND LAW - Title - Proof - Manner of - A party may plead and
prove his title - In any of the five recognized ways - As none of the

2310 *Owhonda v. Chukwuemeka* (2003) 9-10 KLR (pt. 166) 2309;
ways is superior to others (H8)

FACTS

In a consolidated action before the High Court of Rivers State, Port Harcourt, plaintiff/respondent sued defendant/appellant claiming declaration of title to the land in dispute, damages for trespass and injunction. At the hearing, respondent claimed to have purchased the land from one Chukwuma Nwobu and taken immediate possession thereof. Respondent claimed that he built a bungalow and a story building on portions of the land later re-designated as Nos. 32 and 34 Azikiwe Street respectively. It was upon his having started a building foundation in the last portion of the land (now No. 36 Azikiwe Street) that one Owhonda claimed ownership of the land. Nevertheless, respondent renegotiated with the said Owhonda and bought the land from him. A deed of conveyance (Exhibit P1) was duly executed in that respect.

While conceding the ownership of Nos. 32 and 34 Azikiwe Street to respondent, appellant claimed that No. 36 (the land in dispute) was not part of the land appellant purchased via Exhibit P1. Appellant claimed that the land in dispute formed part of the family property of Rumuenyika family granted to him. However, appellant did not establish the boundaries of the land granted to him. After trial, the court dismissed respondent's claim in its entirety and found for appellant. Aggrieved, respondent appealed to Court of Appeal, Port Harcourt. The appeal was partly allowed. Dissatisfied, appellant appealed to Supreme Court, while respondent cross-appealed.

ISSUES FOR DETERMINATION

"1. Whether the court below was right in finding in favour of the respondent (plaintiff) and awarding him damages and granting him an injunction in his favour notwithstanding the fact that he based his acts of possession on defective conveyance Exhibits P1 and P3, and the specific finding of that court that neither the appellant (plaintiff) nor the respondent (defendant) proved by acceptable evidence that he owned the land in dispute".

2. Having regard to the state of pleadings and the evidence led in the case, did the court below come to a proper decision when it concluded that:

(i) There was no proof of the identity of the land which was

granted by the Rumuenyika Family to the appellant (defendant).

(ii) That the respondent (plaintiff) had possession of the land in dispute, No. 36 Azikiwe Street Diobu, Mile 2, Port Harcourt.

3. Whether the judgment of the court below can be supported in view of the several findings made by the said court which were either not supported by evidence on record or based on improper assessment of evidence before the court.”

HELD (Unanimously dismissing the appeal and allowing the cross appeal per **MUSDAPHER JSC**)

LAND LAW - Title - Proof

1. There is no doubt that it is the law, that in action for declaration for title to land, where a plaintiff fails to discharge the burden of proving his root of title to the land as pleaded by him, he cannot be entitled to the declaration sought. He cannot also fall back on long possession and acts of ownership to prove title. He must first prove a valid root of title to be able to claim title on acts of ownership or long possession. Accordingly, where a party pleads root of title, he cannot talk of acts of ownership or long possession in order to establish title, he must first prove the root of title. (p. 2321 A)

LAND LAW - Trespass - Damages

2. It is now trite law that in one action there may be two independent claims of title and damages for trespass. A person may fail in his claim for title but may succeed in his claim for trespass, the issues or the incidents are separate and independent.

A person who is able to prove exclusive possession of a piece of land can maintain an action in trespass against any person, unless such a person can prove a better title to the land. A person in possession even without a valid title or with a defective title can sue in trespass.

The plaintiff/respondent in the instant case pleaded and gave evidence of exclusive possession and the court below was justified in awarding him damages for trespass and in granting

him the injunctive relief based on his proof of exclusive possession notwithstanding the fact that the Court of Appeal declared the conveyance to him to be defective. (pp. 2321 F & 2322 A)

B LAND LAW - Title - Customary grant - Proof

3. Now, on the pleadings and the evidence, the court below was clearly correct when it observed:-

C “But when a radical title is not agreed by the parties as common to them, a party seeking a declaration of title, who has pleaded and traced its root to a particular person or family MUST ESTABLISH HOW THAT PERSON OR FAMILY CAME TO HAVE TITLE IN HIM OR IT. The point was made by NNAEMEKA-AGU, JSC., in Ogunleye v. Oni (1990) 2 NWLR D (Pt. 175) 745 at 782 where he observed:-

E “But it would be wrong to assume, as the learned trial Judge obviously did in this case, that all that a person who resorts to a grant as a method of proving his title to land needs to do is to produce the document of grant and rest his case. This court has made it clear in several decisions that if a party bases his title on a grant according to custom by a particular family or community, that party must go further to plead and prove the origin of the title of that particular family or community.”

F In the instant case, it is manifestly clear that the defendant/appellant did not plead nor lead any evidence to prove how the RUMUENYIKA family came to be vested in the land in dispute. (p. 2324 D)

G Identity of land - Proof

H 4. Further to the above, the land granted by the Rumuenyika family, assuming for one moment, the root of tile has been pleaded and established, it has not been defined or ascertained, the land granted was indefinite and unidentifiable.

There must always be the identity of the land in dispute, proof of existence of a gift or grant must be backed up by credible evidence as to identity, extent and location.

Before a declaration of title to land is granted, the land to

which it relates must be identified with certainty. If it is not so ascertained, the claim must fail.

Under these circumstances, it is not enough to state that the parties know the land in dispute, the defendant had the duty to first establish how the family came to be vested in the land and secondly he had the duty to connect and relate the grant of the land to him in 1948 by the family to the land in dispute now known as No. 36, Azikiwe Road. (p. 2325 C)

LAND LAW - Title - Connected land - Proof

5. In my view, the plaintiff had pleaded and led credible evidence to show that he was in possession of all the land granted to him in the deed of conveyance, (Exhibit P1) at least from 1953 until 1968 when the Civil War forced him to leave Port Harcourt.

It is also the law, very well established, that by virtue of Section 46 of the Evidence Act, acts of possession and enjoyment of land may be evidence of ownership not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true to other piece of land. That is to say, what is true of No. 32 and 34 Azikiwe Street, (which is admitted by the defendant), is also true of No. 36 Azikiwe Street since the plaintiff acquired them under one deed of conveyance. (pp. 2326 F & 2327 B)

APPEALS - Issues - Not based on grounds - Fate

6. As mentioned above, this is the issue for which the plaintiff/respondent did not formulate or identify as arising from the 8 grounds of appeal. It is a complaint against the “several findings” of the court below “not borne by the evidence on record” or based “on improper assessment of the evidence”.

I have carefully examined grounds 3, 4 and 6 of the defendant’s grounds of appeal upon which this issue is said to be based, in my view none of these grounds have any connection with this issue. An issue for determination in an appeal must arise from the ground or grounds of appeal. Where an issue for determi-

nation is not predicated on any ground of appeal, the issue becomes incompetent and is liable to be struck out.
(p. 2327 E)

JUDGMENTS - Mistakes - Effect on appeal

- B ***7. The only complaint made against the court below on the issue of whether plot No. 36 was “abandoned property” or not which was said to be a speculative conjecture, it did not in fact form the basis of the decision of the court below in granting damages for trespass to the plaintiff and in awarding the injunctive relief. In other words the opinion is mere obiter dicta which do not affect the decision appealed against.***
C
D ***It is not every mistake or error in judgment that will result in an appeal 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. In the instant case, the issue whether No. 36, Azikiwe Street, was an “abandoned property” or not and the reason why it was not taken over by the authorities cannot in any way affect the reason for the decision of the court below to grant damages for trespass and grant injunctive relief.*** (p. 2328 A)
E

LAND LAW - Title - Proof - Manner of

- F ***8. The law is that a party to a land in dispute may plead and prove his title in any of the five recognised ways. All the modes of proof of title are independent and none is superior to the other.***
G ***So where traditional evidence fails, a party may still rely on any of the four other modes to prove title to land in dispute.***
(p. 2330 F)

REPRESENTATION

- H Chief N. Nwanodi with G.D. Gillis-Harry (Miss), for Appellant/Cross-Respondent
D.C. Denwigwe, for the Respondent/Cross-Appellant

CASES REFERRED TO

Akerele v. Atunrase (1969) 1 All NLR 201

Emenyonu v. Udoh (2000) 9 NWLR (Pt. 671) 25

Emegokwue v. Okadigbo (1973) 4 S.C. 113

Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1

Ogunleye v. Oni (1990) 2 NWLR (Pt. 175) 745

Nmoke v. Okere (1994) 5 NWLR (Pt. 343) 138

Balogun v. Akanji (1970) 1 NWLR (Pt. 70) 301

Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745

Fasoro v. Beyioku (1988) 2 NWLR (Pt. 76) 263

Emiri v. Imieyeh (1999) 4 S.C. (Pt. I) 1

Eze v. Atasie (2000) 6 S.C. (Pt. I) 214

Akpan v. Umoh (1999) 7 S.C. (Pt. II) 13

Adisa v. Oyinwola (2000) 6 S.C. (Pt. II) 47

Akinterinwa v. Oladunjoye (2000) 4 S.C. (Pt. 1) 19

Bakare v. Lagos State Civil Service (1992) 8 NWLR (Pt. 262) 641

STATUTE REFERRED TO

Evidence Act, s.46

LEAD JUDGMENT BY MUSDAPHER JSC

These are an appeal and a cross-appeal against the judgment of Court of Appeal, Port Harcourt Division, delivered on the 5th day of February, 1998, allowing the appeal of the respondent/cross-appellant herein against the judgment of the trial court delivered by Ndu, J., (as he then was), on the 10th of April, 1995, in a consolidated action wherein the respondent/cross-appellant was the plaintiff and the appellant/cross respondent was the defendant. In this judgment the parties will be described hereinafter as plaintiff and defendant just as they were described in the aforesaid consolidated suit.

Now, by the first suit No. PHC/275/76 filed by the plaintiff on the 22/7/1976 and in the Further Amended Statement of Claim thereof, the plaintiff prayed for the following reliefs against the defendant:-

“1. Declaration of title to all that piece or parcel of land being and forming part of the land locally called and known as “ONIMGBADA” land which is delineated and verged PINK in the plaintiff’s plan No. UN.D/02/87RS filed with this suit.

2. The sum of N1,000.00 (One Thousand Naira) damages for trespass.

3. An injunction restraining the defendant, his servants agents, and/or privies from further trespassing into the said piece or parcel of land without the plaintiff's prior consent."

The second suit No. PHC/75/77 which was filed by the defendant against the plaintiff on the 14/3/1977 claimed almost identical
B reliefs in respect of the same piece of land.

On the 10/4/1995, Ndu, J., (as he then was), who heard the consolidated suit, dismissed in its entirety the plaintiff's claims in suit No. PHC/275/76 and found for the defendant in suit No. PHC/75/
C 77. He found merit in the claim for declaration of title to the land in dispute and to the entitlement to a Statutory Right of Occupancy as claimed. He accordingly granted the prayer of the defendant in relation to the declaration of title to No. 36, Azikiwe Street, Diobu, Port Harcourt. The plaintiff felt unhappy with the turn of events and
D appealed against the dismissal of his suit No. PHC/275/76. He raised 12 grounds of appeal but formulated only the following issue for determination of the appeal by the Court of Appeal:-

*"Whether the land in dispute, No. 36 Azikiwe Street, Mile 2, Diobu, Port Harcourt, shown in the litigation plans of both parties as
E Exhibits P2 and D1 respectively was the part of the RUMUENYIKA family land granted to the respondent by the family in 1948 as claimed by the respondent or part of the said land granted by the said family to Chief Abel Owhonda and Lazarus Owhonda to either of them and
F which Chief Abel Owhonda and Lazarus Owhonda later conveyed as joint vendors to the appellant by the Deed of Conveyance, plaintiff's Exhibit P. 1"*

The defendant, as the respondent in the aforesaid appeal to the Court of Appeal simply put the issue for determination thus:-

G *"which party to this appeal proved by preponderance of acceptable evidence that he owned the land in dispute."*

Thus, the plaintiff prayed the Court of Appeal to set aside the declaratory relief granted the defendant and at the same to grant him the three reliefs claimed by him. In its determination of the issues
H submitted to it, the Court of Appeal, Katsina-Alu, Uwaifo, JJCA., (as they then were), and Nsofor JCA., allowed the plaintiff's appeal and reversed the decision of the trial court. The claims of the plaintiff, dismissed by the trial court, were partially granted in that the claims for damages and injunction were granted while the claim to a statu-

tory right of occupancy over the land in dispute was refused. The Court of Appeal also made a crucial finding in that the defendant's claims ought to be dismissed because he failed to prove the grant to him by the Rumuenyika family to any defined or ascertained area of land. It is against this decision that the defendant appealed and the plaintiff cross-appealed to this court. It is necessary at this stage to set out the facts of the case before the consideration of the grounds of the appeals and the issues formulated therefrom for determination by this court. B

The case of the plaintiff from the pleadings and the evidence, shows that in 1953, he purchased a piece of land from CHUKWUMA NWOBU who signed a purchase receipt for him (Exhibit P3). He took immediate possession of the land cultivating it unchallenged. In 1957 he commenced to build a bungalow on a portion of the land. He completed the building in 1958 and moved into it and lived therein and even put in tenants in part of the building without any challenge from anybody. The portion where the bungalow is erected is now designated as No. 32 Azikiwe Street. In or about 1964, he commenced a storey building on another part of the land now known as No. 34 Azikiwe Street. The building was completed in 1964, and the plaintiff moved and occupied a flat therein and let the other flats to tenants. He further claimed to have started foundation for the last portion now known as No. 36 Azikiwe Street, when or about 9/5/1967 one Chief Abel Ofonda (now spelt Owhonda) instructed his solicitor Dr. J.I.J. Otuka to write to the plaintiff warning the plaintiff about trespass to Chief Abel Ofonda's land which is the same land the plaintiff claimed to have purchased since 1953 from Nwobu. After due investigations, the plaintiff became convinced that the land in question did not belong to Nwobu but to Chief Abel Ofonda and his brother Lazarus Ofonda who claimed to be the true owners. The plaintiff renegotiated with Chief Abel Ofonda and his brother who subsequently sold the same land to him and executed in his favour a Deed of Conveyance, which was received in evidence at the trial as Exhibit P. 1. C D E F G

After the Nigerian Civil War, when the plaintiff returned to Port Harcourt, the buildings on Nos. 32 and 34 Azikiwe Street were returned to him by the new Rivers State Government and he immediately discovered that the defendant had trespassed into the remaining part of the land conveyed to him as per Exhibit P1. He then filed H

the action against the defendant in respect of that portion of land (Exhibit P2).

On his part, the defendant claimed that the land comprised in the defendant's litigation plan Exhibit D.1, now known as No. 36 Azikiwe Street, Mile 2 Diobu, Port Harcourt was not part of what was originally conveyed to the plaintiff by Chief Abel Ofonda and Lazarus Ofonda. That the land in dispute formed part of the family property of Rumuenyika Family. That the land in dispute was granted to him by the family in 1948. That he made a survey plan of what was granted to him in 1972 and that he commenced building on the land in 1972 and completed it in 1976. The defendant also pleaded that there was a deed of lease evidencing his grant by the family. It is necessary to emphasise that the defendant failed to produce the survey plan he claimed to have made in 1972 and the purported deed of lease granted to him by the family which he sought to tender was rejected as inadmissible.

It was on this state of the facts that the trial court dismissed the plaintiff's claims in suit No. PHC/275/76 for the reasons stated in the judgment aforesaid, and declared the defendant, (the plaintiff in suit No. PHC/75/77) entitled to a statutory right of occupancy to the land in dispute.

I have in this judgment alluded to the decision of the Court of Appeal which gave rise to these appeal and cross appeal. The Court of Appeal allowed the plaintiff's appeal by reversing the grant of title to the defendant by the trial court and dismissing in its entirety the defendant's claims because he did not prove any area of land granted him by the Rumuenyika family as he claimed. The plaintiff's claim was also dismissed except as regards the trespass. The Court of Appeal also held that the plaintiff was not entitled to a declaration of title to the land in dispute but was granted an order of injunction and damages for trespass.

Now, I shall deal with the appeal and the cross-appeal in that Order.

H The Appeal

Pursuant to an order of this court, made on the 25th January, 1999, the defendant filed his Notice of Appeal containing 8 grounds of appeal. The learned counsel for the defendant in compliance with the rules of this court has filed the appellant's brief. In the appellant's

brief, the learned counsel has formulated and submitted to this court three issues arising for the determination of the appeal. This issues are:-

“1. *Whether the court below was right in finding in favour of the respondent (plaintiff) and awarding him damages and granting him an injunction in his favour notwithstanding the fact that he based his acts of possession on defective conveyance Exhibits P1 and P3, and the specific finding of that court that neither the appellant (plaintiff) nor the respondent (defendant) proved by acceptable evidence that he owned the land in dispute*”.

2. *Having regard to the state of pleadings and the evidence led in the case, did the court below come to a proper decision when it concluded that:*

(i) *There was no proof of the identity of the land which was granted by the Rumuenyika Family to the appellant (defendant).*

(ii) *That the respondent (plaintiff) had possession of the land in dispute, No. 36 Azikiwe Street Diobu, Mile 2, Port Harcourt.*

3. *Whether the judgment of the court below can be supported in view of the several findings made by the said court which were either not supported by evidence on record or based on improper assessment of evidence before the court.”*

The plaintiff (respondent) on the other hand had identified and submitted the following issues for the determination of the appeal:-

“1. *Whether having regard to the state of the pleadings the evidence and the law, the Court of Appeal was justified when it granted the plaintiff’s claims for trespass and injunction in suit No. PHC/275/76, Ekpechi v. John Ofonda.*

2. *Whether having regard to the state of the pleadings, the evidence and the law, the Court of Appeal was justified when it dismissed the defendant’s claims for title in suit No. PHC/75/77 John Ofonda v. Alphonso Chukwuemeka Ekpechi.”*

It appears to me that except for the defendant’s third issue, the issues formulated by the parties are almost identical though worded differently. I shall in the determination of this appeal deal with the issues as formulated by the defendant, the appellant herein.

ISSUE NO I.

The complaint under this issue is concerned with the award of

damages for trespass and the grant of the injunctive relief in favour of the plaintiff. The main grouse is that the Court of Appeal having found that the plaintiff did not prove title yet proceeded to consider acts of possession and granted the prayers aforesaid. It is submitted that the court below found that neither party proved title to the land in dispute and accordingly the Court of Appeal was in error to have found for the plaintiff on acts of possession based on defective deeds of conveyance, Exhibits P1 and P 3. It is argued that in an action for declaration of title to land, as in the instant case, where the, plaintiff failed to prove root of title to the land in dispute, he cannot succeed in the claim for declaration of title to the land by reference and reliance on the acts of possession, Learned Counsel referred to the cases of *Adisa v. Oyinwola* (2000) 6 S.C. (Pt. II) 47; (2000) 6 SCNJ 290, 321, *Odofin v. Ayoola* (1984) NSCC 711-718; *Emenyonu v. Udoh* (2000) 9 NWLR (Pt. 671) 25, *Fasoro v. Beyioku* (1988) 2 NWLR (Pt. 76) 263 at 271; *Akerele v. Atunrase* (1969) 1 All NLR 201; *Balogun v. Akanji* (1970) 1 NWLR (Pt. 70) 301 at 322.

It is again argued that both parties in this case pleaded root of title and the Court of Appeal categorically found that neither party proved the root of title, and as such no reliance could legitimately be placed on mere possession or acts of ownership where the claim for title fails. Learned counsel further refers to *Ogbechie v. Onochie*, supra. *Ngene v. Igbo* (2000) 2 SCNJ 136; *Eze v. Atasie* (2000) 6 SC. (Pt. I) 214, (2000) 6 SCNJ 209 at 218; and strongly submits that the appeal should be allowed.

The learned counsel for the plaintiff/respondent however submitted that all the argument offered by the defendant/appellant in his brief and all the cases cited therein can only be relevant in a claim for title which the court below rejected, but the court found for the plaintiff/respondent only in trespass. It is further argued that failure to succeed in a claim of declaration of title to land does not render an independent claim of trespass in respect of the same land unobtainable. It is submitted that a claim for trespass is solely based on possession and a person without a valid title or with a defective title can maintain an action in trespass against every one else except any other person who has a better title. Vide *Adeshoye v. Shiwoniku* (1952) 4 WACA 86, *Oluwi v. Eniola* (1967) NMLR 339, *Udo v. Obot* (1989) 1 SC (Pt. I) 64, (1989) 1 NWLR (Pt. 95) 59.

There is no doubt that it is the law, that in action for declaration for title to land, where a plaintiff fails to discharge the burden of proving his root of title to the land as pleaded by him, he cannot be entitled to the declaration sought. He cannot also fall back on long possession and acts of ownership to prove title. He must first prove a valid root of title to be able to claim title on acts of ownership or long possession. B
See Kalio v. Woluchem (1985) 1 NWLR (Pt. 4) 610 at 628. Karibi-Whyte, JSC., observed as follows:-

“The averment in paragraph 8 of the Statement of Claim suggests unquestionably that respondents relied on their own customary title. In the circumstances they must give evidence of how that title was derived. See Ekpo v. Ita (1932) 11 NLR 68, Thomas v. Preston Holder 12 WACA 78, AC 207; Abinabina v. Chief Enyinmadu (1953) 12 WACA 171. Thus where title is derived by grant or inheritance, the traditional history or evidence of acts of continuous exclusive possession should be given to justify the grant.” C

Accordingly, where a party pleads root of title, he cannot talk of acts of ownership or long possession in order to establish title, he must first prove the root of title. See Fasoro v. Beyioku (supra) (1953). The learned counsel for the appellant would have been correct in his argument if the court below after holding that the plaintiff/respondent failed to prove title resorted to considering the acts of ownership and exclusive possession to grant the plaintiff/respondent title to the disputed land. It is very clear that the Court of Appeal did not grant the plaintiff title. What the lower court did was to consider the claims for trespass and injunction. F

It is now trite law that in one action there may be two independent claims of title and damages for trespass. A person may fail in his claim for title but may succeed in his claim for trespass, the issues or the incidents are separate and independent. See Oluwi v. Eniola (supra). ***A person who is able to prove exclusive possession of a piece of land can maintain an action in trespass against any person, unless such a person can prove a better title to the land. A person in possession even without a valid title or with a defective title can sue in trespass.*** See Udo v. Obot (supra), where this court again pointed out that trespass to land and declaration of title to land are two dis- G H

tinct and separate claims and these claims might arise from two distinct causes of action and that in a claim for trespass one need not necessarily be the owner of the land; what is required is that the claimant proves his exclusive possession and not title.

The plaintiff/respondent in the instant case pleaded and gave evidence of exclusive possession and the court below was justified in awarding him damages for trespass and in granting him the injunctive relief based on his proof of exclusive possession notwithstanding the fact that the Court of Appeal declared the conveyance to him to be defective. As mentioned above, a person may be granted damages for trespass and an injunctive relief even though there was no proof of ownership of the land; mere exclusive possession is enough. See *Ezeokonkwo v. Okeke* (2002) 5 S.C. (Pt.I) 44, (2002) 11 NWLR (Pt. 777) 1 at 26; *Olagbemiro v. Ajagungbade III* (1990) 3 NWLR (Pt. 136) 37; *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 66. In this circumstance, the answer to issue No. 1 as submitted by the defendant/appellant must be in the affirmative. In that the Court of Appeal was right in finding in favour of the plaintiff and awarding him damages for trespass and granting him an injunction notwithstanding the fact that “he based his acts of possession on defective conveyance” and also notwithstanding the fact that the Court of Appeal found that the plaintiff did not prove his ownership of the land. In *Oluwi v. Eniola* (supra), the plaintiff failed in his claim for declaration of title to land but this court per Lewis, JSC., at page 340 observed as follows:-

“The claim for trespass, however, is not in our view, dependent on the declaration of title as the issues to be determined on the claim for trespass were whether plaintiff had established his actual possession of the land and defendant’s trespass on it, which are quite separate independent issues to that on his claim for declaration of title.”

See also *Ajukwara v. Izuoji* (2002) 6 SC. (Pt. 11)116, (2002) Vol. 9 MJSC 128. I accordingly resolve the first issue against the defendant/appellant.

ISSUE NO. 2

The questions raised here by the defendant/appellant were concerned with the finding by the court below that the defendant/appellant did not prove the identity of the land granted to him by the

RUMUENYIKA family and that whether the court below was right in the finding that the plaintiff was in possession of the land in dispute, No. 36 Azikiwe Street, Mile 2 Diobu, Port Harcourt.

It is firstly submitted that on the basis of the pleadings, there was no dispute as to the identity of the land in dispute, what was in dispute was whether the Rumuenyika family had granted the disputed land to the defendant. It is further argued that based on the pleadings, the essential features of the land and the precise boundaries not being made an issue it was wrong for the court below to have set aside the declaration made by the trial court. It is again submitted that in land cases where the land in dispute is known by the parties, the proof of identity of the land does not arise. Learned counsel referred to *Akinterinwa v. Oladunjoye* (2000) 4 S.C. (Pt. 1)19; 4 SCNJ 149 at 172, *Akpan v. Umoh* (1999) 7 SC. (Pt. II) 13, (1999) 7 SCNJ 154 at 166, *Adebo v. Saki Estates Ltd* (1999) 5 S.C. (Pt. I) 77; (1999) 5 SCNJ 156, 164, *Osho v. Ape* (1998) 6 S.C. 121; (1998) 6 SCNJ 139, 154.

It is further argued that the issue of the identity of the land in dispute did not arise from the pleadings and any decision on issues not raised by the parties will not be allowed to stand, see *Adeleja v. Alade* (1999) 4 S.C. (Pt. I) 81, (1999) 4 SCNJ 225 at 240, *Adesanya v. Aderonmu* (2000) 6 S.C. (Pt. II) 18, (2000) 9 NWLR (Pt. 672) 370 at 390. It is again argued that it was not necessary to file a plan of the land in dispute when a clear description of the land makes the disputed land ascertainable. The parties by their pleadings and evidence had admitted the identity of the land, so a plan was not necessary vide *Emiri v. Imieyeh* (1999) 4 S.C. (Pt. I) 1, (1999) 4 SCNJ 1 at 18, *Omoregie v. Idugiemwanye* (1985) 2 NWLR (Pt. 5) 66; *Nmoke v. Okere* (1994) 5 NWLR (Pt. 343)138 at 174; *Agbanelo v. Union Bank* (2000) 4 S.C. (Pt.I) 233, (2000) 4 SCNJ 353, 356.

On the conclusion reached by the court below that the plaintiff was in possession of No. 36, Azikiwe Street, the land in dispute in this matter, the learned counsel argued that at the time Exhibit P4 was issued by the plaintiff's solicitor Dr. Otuka, building constructions were going on plots 32, and 34 Azikiwe Street. There was no evidence on the record showing that the plaintiff was in possession of plot 36 Azikiwe Street which was the finding of the trial court and the Court of Appeal was in error to have disturbed the finding made by the trial

court based on the evidence and pleadings before it.

The learned counsel for the plaintiff submitted that the Court of Appeal was right when it held that there was no agreement in the pleadings that the parties to this action claimed to have derived title to the land in dispute from a common root, namely the Rumuenyika family and accordingly, when the radical title is not agreed, a party seeking declaration of title to the land in dispute from a family grant or purchase, must first establish how the said family, in this case, Rumuenyika family, came to be in possession of the disputed land. It is argued that the defendant in this case woefully failed to do so. See *Mogaji v. Cadbury Nigeria Ltd.* (1985) 2 NWLR (Pt. 7) 393, *Ogunleye v. Oni* (1990) 2 NWLR (Pt. 135) 745 at 782; *Uche v. Eke* (1992) 2 NWLR (Pt. 224) 433.

It is further submitted that an alleged grant in 1948 of an undemarcated and un-described land in a bush, and the incidents of which were never pleaded or proved cannot by itself entitle the grant to a declaration of title to the land. See *Anyanwu v. Iwuchukwu* (2000)12 S.C. (Pt. II) 67, 15 NWLR (Pt. 692) 721.

Now, on the pleadings and the evidence, the court below was clearly correct when it observed:-

“But when a radical title is not agreed by the parties as common to them, a party seeking a declaration of title, who has pleaded and traced its root to a particular person or family MUST ESTABLISH HOW THAT PERSON OR FAMILY CAME TO HAVE TITLE IN HIM OR IT: See Mogaji v. Cadbury Nigeria Ltd. (1985) 2 NWLR (Pt. 7) 393. It would be inadequate without proving the radical title for a party seeking declaration as to title under circumstances where a common root title is not agreed by the parties simply to prove grant. The point was made by NNAEMEKA-AGU, JSC., in Ogunleye v. Oni (1990) 2 NWLR (Pt. 175) 745 at 782 where he observed:-

“But it would be wrong to assume, as the learned trial Judge obviously did in this case, that all that a person who resorts to a grant as a method of proving his title to land needs to do is to produce the document of grant and rest his case. This court has made it clear in several decisions that if a party bases his title on a grant according to custom by a particular family or community, that party must go further to plead and

prove the origin of the title of that particular family or community.”

In the instant case, it is manifestly clear that the defendant/appellant did not plead nor lead any evidence to prove how the RUMUENYIKA family came to be vested in the land in dispute. As the Court of Appeal put it, “*The plaintiff in suit No. PHC/ 75/77, i.e., the defendant (herein) failed woefully to plead and prove the root of title. On that basis alone, the Statutory Right of Occupancy, declared in the respondent (defendant) by the learned trial Judge is without foundation whatsoever*”.

Further to the above, the land granted by the Rumuenyika family, assuming for one moment, the root of tile has been pleaded and established, it has not been defined or ascertained, the land granted was indefinite and unidentifiable. The law is settled through a number of cases that in action for declaration of title to land the onus lies on the party claiming title, to satisfy the court that he is entitled on the evidence brought by him to declaration of the piece of land claimed.

There must always be the identity of the land in dispute, proof of existence of a gift or grant must be backed up by credible evidence as to identity, extent and location. See Temile v. Awani (2001) 6 SC 164, (2001) Vol. 5 MJSC 32. Mere mention of name, or that the parties know the extent of the large area of the land is not enough. See Babalota v. Alaworoko (2001) Vol. 5 MJSC 17. ***Before a declaration of title to land is granted, the land to which it relates must be identified with certainty. If it is not so ascertained, the claim must fail.*** See Epi v. Aigbedion (1972) 10 S.C. 53.

Under these circumstances, it is not enough to state that the parties know the land in dispute, the defendant had the duty to first establish how the family came to be vested in the land and secondly he had the duty to connect and relate the grant of the land to him in 1948 by the family to the land in dispute now known as No. 36, Azikiwe Road. The defendant had clearly woefully failed to prove these essential incidents to entitle him to succeed in his action for declaration of title to land. The Court of Appeal, per Uwaifo, JCA., (as he then was), put in this way:-

“But the respondent (defendant) has not been able to show

the identity of the land allegedly granted to him in 1948. He has not shown what identifies it with No. 36 Azikiwe Street. He has a duty to satisfy the tribunal that goes by evidence that identity by way of dimension and location and then go further to show the nexus between that land and No. 36 Azikiwe Street. He must show clearly how a piece of land granted in the bush 1948, without any description or indication of its size, ...has now become No. 36, Azikiwe Street of a given size and shape, ..."

In other words, it must be shown by pleadings and evidence, how the grant of 1948 became No. 36, Azikiwe Street. That has not been done, and clearly, the claim of declaration of title granted the defendant was not justified and the court below was right in setting aside the declaration. I accordingly find no merit in this complaint. The identity of the land in dispute was in issue and the defendant had failed to establish the identity of the land granted to him in 1948.

The other point on this issue was the finding by the Court of Appeal, that the plaintiff was in possession of the disputed land when the defendant broke in and committed trespass. By his pleading, the plaintiff claimed that the Deed of Conveyance granted him covered plot Nos. 32, 34 and 36 Azikiwe Street and that was evidenced by Exhibit P1. He also pleaded and led evidence that at least since the deed of conveyance, he was in possession of all the lands conveyed, including the land in dispute until he left the land during the Nigerian Civil War. All what the defendant pleaded was that plot No. 36 Azikiwe Street was not part of the land conveyed to the plaintiff by Abel and Lazarus Owhonda. But the plan attached to Exhibit P1 (Exhibit P2) clearly shows that plot No. 36 was part of the land conveyed to the plaintiff in the deed. ***In my view, the plaintiff had pleaded and led credible evidence to show that he was in possession of all the land granted to him in the deed of conveyance, (Exhibit P1) at least from 1953 until 1968 when the Civil War forced him to leave Port Harcourt.*** The trial Judge was clearly in error to have preferred the evidence of Chief Abel Owhonda as against Exhibit P1. Exhibit P1 is a properly executed document evidencing the land transaction and, oral evidence will not be accepted to contradict the documentary evidence. See *Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24. *Abiodun v. Adehin* (1962) All NLR 550. As a matter of fact the learned trial Judge had contradicted himself at page 125 of the printed

record when he said:-

“That document (Exhibit P1) covered the plots now known as Nos. 32, 34 and 36, Azikiwe Street.”

He also said at page 128, while reviewing Chief Abel Owhonda’s testimony that what “they transferred to the plaintiff did not contain No. 36 Azikiwe Street”. From all the circumstances of this case, the court below was clearly justified in holding that the plaintiff was in possession of plot No. 36 Azikiwe Street when the defendant broke and entered it.

It is also the law, very well established, that by virtue of Section 46 of the Evidence Act, acts of possession and enjoyment of land may be evidence of ownership not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true to other piece of land. That is to say, what is true of No. 32 and 34 Azikiwe Street, (which is admitted by the defendant), is also true of No. 36 Azikiwe Street since the plaintiff acquired them under one deed of conveyance. See *Idundun v. Okumagba* (1976) 9-10 S.C. 227; *Ekpo v. Ita* 11 NLR 68. I also resolve the second issue against the defendant.

ISSUE NO. 3

As mentioned above, this is the issue for which the plaintiff/respondent did not formulate or identify as arising from the 8 grounds of appeal. It is a complaint against the “several findings” of the court below “not borne by the evidence on record” or based “on improper assessment of the evidence”.

The point relevant to this complain is the issue of whether plot No. 36 was not taken over by the Rivers State Government under the provisions of Abandoned Property (Custody and Management) Edict 1969, because it was a vacant land and that only buildings on lands were taken over and considered as abandoned property. The court below opined that. ***I have carefully examined grounds 3, 4 and 6 of the defendant’s grounds of appeal upon which this issue is said to be based, in my view none of these grounds have any connection with this issue. An issue for determination in an appeal must arise from the ground or grounds of appeal.***

Where an issue for determination is not predicated on any ground of appeal, the issue becomes incompetent and is liable to be struck out. See *Osinupebi v. Saibu* (1982) 7 S.C. 104 at 110-111.

The only complaint made against the court below on the issue of whether plot No. 36 was “abandoned property” or not which was said to be a speculative conjecture, it did not in fact form the basis of the decision of the court below in granting damages for trespass to the plaintiff and in awarding the injunctive relief. In other words the opinion is mere obiter dicta which do not affect the decision appealed against. See *Akibu v. Oduntan* (2000) 13 NWLR (Pt. 685) 446; *Egbe v. Adefarasin* (1987) 1 NWLR (Pt.47) 1 at 24.

It is not every mistake or error in judgment that will result in an appeal 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. In the instant case, the issue whether No. 36, Azikiwe Street, was an “abandoned property” or not and the reason why it was not taken over by the authorities cannot in any way affect the reason for the decision of the court below to grant damages for trespass and grant injunctive relief. I cannot also find any other “finding” of the court below which was made without “evidence on record”. In any event, there is no ground or grounds of appeal upon which the issue can be predicated. I strike out the 3rd issue as incompetent. I also strike out grounds 3, 4 and 6 as abandoned.

In the result, this appeal fails and is dismissed by me. The decision of the court below in dismissing the defendant’s claims in Suit No. PHC/75/77 is affirmed. I also affirm the decision of the court below in finding for the plaintiff on his claim for trespass and injunction against the defendant in Suit No. PHC/275/76. I shall now discuss the cross-appeal.

CROSS-APPEAL

The plaintiff felt unhappy with the decision of the Court of Appeal in refusing to grant him declaration of title to the land in dispute No. 36, Azikiwe Street, filed a cross-appeal against the decision. The court below, per the judgment of Uwaifo, JCA., aforesaid stated in part:-

“I will answer the issue framed by the appellant by saying that there is no tenable evidence upon pleadings that No. 36 Azikiwe Street was owned by the Rumuenyika family neither is such evidence that it was granted to the respondent, nor to Chief Abel Owhonda and Lazarus Owhonda; but that the said Chief Abel Owhonda and Lazarus Owhonda conveyed the land to the appellant as per Exhibit P1 although the title to the land in dispute is defective having regard to all the surrounding circumstances.”

Thus the lower court refused to grant the plaintiff the declaration of title he sought for on the grounds of defective title. The plaintiff/cross-appellant has formulated this single issue for the determination of the appeal:-

“Whether the Court of Appeal was right when it decided in the circumstances of this case that the plaintiff/cross-appellant’s title vide Exhibit P1 “is defective having regard to all the circumstances.”

The learned counsel for the defendant has also adopted this issue. The learned counsel for the plaintiff argued that the court below gave no reason for the statement that Exhibit P1 was defective and that the issue of defect in Exhibit P1 never arose from the pleadings, evidence or addresses of counsel and was never taken up by any of the counsel in their briefs since the matter was never raised at the pleading, the court below was not entitled to raise it vide *Emegokwue v. Okadigbo* (1973) 4 S.C. 113 at 117. It is further argued, that the defendant agreed that by Exhibit P1. Chief Abel and Lazarus Owhonda properly conveyed plots 32 and 34 to the plaintiff, what the defendant refused to accept was that it also conveyed plot 36 to the plaintiff. But there was no issue of any defect raised by the defendant. It was not the case of the defendant that Exhibit P1 was defective see *Bakare v. Lagos State Civil Service* (1992) 8 NWLR (Pt. 262) 641 at 676, *Araka v. Ejeagwu* (2000) 12 S.C. (Pt. I) 99, (2000) 15 NWLR (Pt. 692) 684 at 700. Since the issue of the defect of Exhibit P1 never arose during the proceedings, the court below was wrong to raise and decide on it without affording the parties the opportunity to address the court on it.

The learned counsel for the defendant/cross respondent on the other hand argued that it is not enough for the plaintiff to prove the deed of conveyance to him, he has also to prove that those who conveyed the land to him are owners of the land, i.e., he must prove

their title. It is submitted that when the radical title to a land is not agreed, the person seeking a declaration of title to the land who has pleaded and traced his title to a particular person or a family, has also the duty to proceed to prove how that person or family came to be vested with the title vide *Mogaji v. Cadbury Nigeria Ltd*, supra;

^B *Ogunleye v. Oni* (1990) 2 NWLR (Pt. 135) 745.

Now, the Court of Appeal decided that title to the plaintiff to the land in dispute is defective in that, the plaintiff had a duty to prove how Chief Abel Owhonda and Lazarus Owhonda came to own the land in dispute, this is notwithstanding the fact that the defendant admitted the validity of the conveyance to the plaintiff of plot No. 32 and 34 Azikiwe Street. The lower court is not saying that Exhibit P. 1, the deed of conveyance is defective, but that title to the land in dispute cannot be presumed in favour of the plaintiff without the plaintiff proving the root title of the person or persons who granted him the deed of conveyance in respect of the disputed land. In my view, the Court of Appeal was in error to have ignored the admission of the defendant on the unquestionable title of the plaintiff in respect of the plots No. 32 and 34 in Exhibit P1. The defendant admitted the title of the plaintiff in respect of those plots, therefore the plaintiff is in the circumstances the probable owner of the adjacent land at No. 36 Azikiwe Street. This is more so when it is the same document Exhibit P1 that also conveyed the land in dispute to the plaintiff. I have alluded to Section 146 of the Evidence Act, while deciding the appeal.

^F ***The law is that a party to a land in dispute may plead and prove his title in any of the five recognised ways. All the modes of proof of title are independent and none is superior to the other.*** See *Idundun v. Okumagba* (supra); *Karimu v. Fajube* (1968) NMLR ^G 151. ***So where traditional evidence fails, a party may still rely on any of the four other modes to prove title to land in dispute.***

^H There is clearly no dispute that the plaintiff has the undoubted enjoyment of possession and title to Nos. 32 and 34 Azikiwe Street, there is also a very strong presumption that he also enjoys the same privileges over No. 36, by virtue of all the surrounding circumstances. I am of the opinion that the plaintiff has accordingly proved his title to No. 36 Azikiwe Street and the defendant did not prove otherwise. I accordingly allow the cross-appeal and declare the plaintiff as the

owner of No. 36 Azikiwe Street.

In the result, the appeal by the defendant fails and the plaintiffs' cross-appeal succeeds. For the avoidance of doubt, the claims of the plaintiff in suit No. PHC/275/76 are granted in their entirety, while the defendant's claims in suit No. PHC/75/77 are dismissed in their entirety. The plaintiff is entitled to costs assessed at N10,000.00 against the defendant. B

UWAIS CJN

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

Accordingly, I too dismiss the appeal by the appellant/cross-respondent and allow that by the respondent/cross-appellant with D N10,000.00 costs in favour of the respondent/cross-appellant against the appellant/cross-respondent.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Musdapher, JSC., in draft and I agree with him that the appeal filed by John Owhonda is without merit and ought to be dismissed. I also agree that the cross-appeal must succeed and for the reasons given by my learned brother in the lead judgment I allow it. E F

Consequently, I affirm the decision of the Court of Appeal dismissing the claim of John Owhonda. I however allow the cross-appeal of Alphonso Chukwuemeka Ekpechi and grant him title to No. 36 Azikiwe Street, the land in dispute, in this suit. I award N10,000.00 G costs in favour of the respondent/cross-appellant.

KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Musdapher, JSC., in this appeal. I entirely agree with his treatment of the issues involved both in the main appeal and in the cross-appeal and his reasoning and conclusions reached thereon. I adopt them as mine. H

The main contention of the appellant was that plot No. 36, Azikiwe Street, Diobu, Port-Harcourt which was the land in dispute was not conveyed to the respondent as per Exhibit P1.

There was however, sufficient evidence to show that the land in dispute (Exhibit P2) was part of Exhibit P1 and that the respondent was in possession of it since Exhibit P1 was executed and the land conveyed to him. Exhibit P1 was properly executed by the parties concerned before the Chief Magistrate and had no patent defect. There was no doubt that the respondent had been physically in possession of the land in dispute except during his absence as a result of the Civil War. The appellant has completely failed to prove any title or possession to the land in dispute as found by the Court of Appeal and I entirely agree with them. The possession of the respondent of the land in dispute as per Exhibit P1 must therefore be confirmed and I do so accordingly. The Court of Appeal was therefore right in granting his claim for trespass to the land and an injunction restraining the appellant and his agents and privies from further trespass on the disputed land. See *Oluwi v. Eniola* (1967) NMLR 339 at 340; *Udo v. Obot* (1989) 1 S.C. (Pt.1) 64; (1989) 1 NWLR (Pt. 96) 59; *Olaloye v. Balogun* (1990) 5 NWLR (Pt. 148) 24. The main appeal is therefore without merit and must be dismissed.

In the cross-appeal, I agree with Musdapher, JSC., in the leading judgment that issue of defect in Exhibit P1 was not pleaded nor raised at any stage of the proceedings at the trial and is therefore a non-issue. The Court of Appeal was therefore wrong to have raised it in its judgment. There was nothing on the record to show that the parties or their counsel were heard on the issue raised by that court. See *Eholor v. Osayande* (1992) 6 NWLR (Pt. 249) 524; *Orji v. Zaria Industries Ltd. & Anor.* (1992) 1 NWLR (Pt. 216) 124. The cross-appeal therefore, succeeds and is allowed.

In the circumstances I also dismiss the appeal and allow the cross-appeal. I abide by the order of costs made in the leading judgment.

H

EJIWUNMI JSC

I have had the privilege of reading before now the draft judgment of my learned brother, Musdapher, JSC. In this judgment which

arose from the appeal and cross-appeal against the judgment of the court below, my learned brother carefully set out the facts and the reasoning of the court below which led to the judgment of the court below.

The issues raised by the appellant in his appeal as can be gathered from the appellant's brief of argument are as follows:-

“Issue No. 1

Whether the court below was right in finding in favour of the respondent and awarding him damages and granting him an injunction in his favour notwithstanding the fact that he based his acts of possession on defective conveyances, Exhibits P1 and P3, and the specific finding of that court that neither the appellant nor the respondent proved by acceptable evidence that he owned the land in dispute. (Grounds 1 and 2)

Issue No. 2

Having regard to the state of the pleadings and the evidence led in the case, did the court below come to a proper decision when it concluded that:

(i) There was no proof of the identity of the land which was granted by the Rumuenyika family to the appellant; and

(ii) That the respondent had possession of the land in dispute; No. 36 Azikiwe Street Diobu, Mile 2, Port Harcourt. (Grounds 2 & 5)

Issue No. 3

Whether the judgment of the court below can be supported in view of the several findings made by the said court which were either not supported by evidence on record or based on improper assessment of evidence before the court. (Grounds 3, 4 and 6)”

It is manifest from the issues so raised that the central question is whether the court below was right to have concluded that the plaintiff was in possession of the land, when he commenced this action against the defendant and whether the claim in trespass ought to have succeeded. In answering this question, I do not need to set out the facts which had been adequately reviewed in the lead judgment. However, it suffices to say that the plaintiff by his pleadings and evidence led at the trial, had been in possession of at least plots 32 and 34 Azikiwe Street, part of the land in dispute, since 1953. There is evidence also that by 1957, he had commenced building operations on the land. It is also clear that in order to maintain his ownership of the

disputed land, plaintiff re-purchased the land from the Owhonda family who claimed to be owners of the disputed land.

The deed of conveyance which was executed in favour of the plaintiff was admitted at the trial as Exhibit P1. The deed of conveyance that was so executed included Plot 36, which defendant encroached upon. That encroachment by defendant led to this action.

On appeal, the contention made for the defendant appears to be that the court below was not right to have upheld the claim in trespass as the plaintiff did not prove his ownership of the disputed land. With due respect to learned counsel for the defendant, this argument did not take into cognisance the principles enshrined in the case of *Idundun v. Okumagba* (1976) 9-10 S.C 227; *Ekpo v. Ita* 11 NLR 68, in which it has been clearly laid as settled law, that the five ways for proving title to land is not subordinate to the other. Whereas in this case, the plaintiff had established that he acquired the pieces of land under one deed of conveyance, he need not seek to establish his title to the property by another of the ways identified for proving title to land.

However, having come to the above conclusion, what now remains to be considered is whether the court below was right to have held that the defendant was liable in trespass for entering the land of the plaintiff as contended for. In my humble view, having regard to the evidence of long possession established in favour of the plaintiff at the trial and upheld by the court below, there can be no doubt that the defendant was properly found liable in trespass. See *Oluwi v. Eniola* (1967) NMLR p. 339.

With regard to the cross-appeal, it is manifest that the question raised by the Court of Appeal about the alleged defect in Exhibit P1 was not an issue during the trial, and the court below was not right to have raised the question suo motu to resolve that question against the cross-appellant. See *Ojo Ogbemudia Eholor v. Felicia Osayande* (1992) 6 NWLR (Pt. 249) 524.

In the result, the main appeal is also dismissed by me and the cross-appeal is upheld for the above reasons and the fuller reasons given in the lead judgment of my brother, Musdapher, JSC. I also award costs to the plaintiff in the sum of N10,000.00 only.