

SUPREME COURT OF NIGERIA
2ND JULY, 2004. SC. 161/2000
CORAM:- U. MOHAMMED, S. U. ONU, A. I. IGUH,
U. A. KALGO, D. O. EDOZIE, JJSC

CHIEF E.W.J. WOHEREM JP APPELLANT
AND
JOEL EMEREUWA & 4 OTHERS RESPONDENTS

ACTIONS - Cause of action - Maturity of - Duration of - Is limited by the Statute of Limitation (H1)

ACTIONS - Limitation of - Computation of time - Is determined through the writ and claim in limine - But where issue is joined - The position is different (H2)

ACTIONS - Limitation of - Statute-bar - Courts - Reliance on the defence - In holding that the action is statute-barred - Is not justified (H3)

ACTIONS - Limitation of - Affidavit - Date cause of action arose - As alleged by the defence - Need not be contradicted - By filing a counter affidavit (H4)

ACTIONS - Limitation of - Preliminary objection in limine - That action is statute-barred - Implies admission of averments in the claim (H5)

ACTIONS - Limitation of - Courts - Facts to be relied on - Should not touch the merits of the suit - In a preliminary objection (H6)

FACTS

Before the High Court Port Harcourt, the plaintiff/appellant filed an action against the defendants/respondents. Plaintiff claimed declaration of ownership, 5 million Naira special and general damages for trespass, and perpetual injunction in respect of the land in dispute. Pleadings were ordered and were duly settled, filed and exchanged. Thereafter, defen-

dants filed an application for an order to dismiss the plaintiff's claim for being statute-barred by virtue of s. 1, Limitation Law of the Rivers State. At the hearing of the application the defendants relied copiously on the affidavit in support of the motion as well as several averments in their Statement of Defence, in seeking to establish when cause of action arose so as to show that the suit is statute-barred. They ignored plaintiff's averments in his Statement of Claim as to the date cause of action arose. Plaintiff filed no counter affidavit but relied on the averments in his writ of summons and Statement of Claim.

The trial court relying mainly on the depositions in the defendants' affidavit and their statement of Defence found in their favour by holding that plaintiff's action is statute-barred. His appeal to the court of appeal was dismissed as that court upheld the trial court's judgement. Being aggrieved, plaintiff has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the action is statute-barred.

2. Whether the court below was right in embarking on a trial and thereby assessing the pleadings of the appellant against the respondents".

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

Cause of action - Maturity of

1. It cannot be disputed that a cause of action matures or arises on a date or from the time when a breach of any duty or act occurs which warrants the person thereby injured or the victim who is adversely affected by such breach to take a court action in assertion or protection of his legal right that has been breached. The duration of a right or cause of action which is conferred on an injured party is necessarily limited and does not last till eternity. It lapses after the date the Statute of Limitation proclaims that no such legal action or proceedings may lawfully be taken or commenced by an injured party. It is therefore necessary when dealing with Statutes of Limitation to determine firstly the precise date the cause of action accrued because time will start to run from the moment the cause of action arose. See *Eboigbe v. N.N.P.C.* (1994) 5 NWLR (Pt.347) 649 at 663. (p. 1868 F)

ACTIONS - Limitation of - Computation of time

2. I think I ought to stress that the law is well established that it is not permissible, indeed it would be wrong, for a defendant relying on the defence of Limitation of Action to compute time from the date pleaded in his Statement of Defence as the date the cause of action arose unless such a date is admitted by the plaintiff in his Reply to the Statement of Defence. What needs be emphasized is that the determining factor is the averment in the plaintiff's Writ of Summons and Statement of Claim. This is the case, however, where at the end of settlement and exchange of pleadings or after the plaintiff has filed his Statement of Claim, the defendant is obliged at that stage to contest in limine by way of a preliminary objection that the plaintiff's action is statute-barred and ought to be struck out. The position is different where issue is joined by the parties in their pleadings as to the date the cause of action in a suit arose. In that case, such an issue must be proved by the parties in the course of the hearing of the suit by credible evidence to be determined by the court. (p. 1869 A)

Statute-bar - Courts - Reliance on the defence

3. The above averments notwithstanding, the majority decision of the Court of Appeal still went ahead to hold that the appellant's action was statute-barred relying on the averment in the Statement of Defence to the effect that the cause of action arose in 1967 in which year the 1st respondent allegedly purchased the land in dispute from the 3rd respondent. I think, with profound respect, that the Court of Appeal was clearly in error in this regard.

The respondents' application was for an order for the dismissal of the appellant's suit in limine on the ground that the action is statute-barred. The court below arrived at its finding from the depositions in the respondents' affidavit in support of the application and their averments in the Statement of Defence. This exercise, in my view, is totally unjustifiable as it offends all the well known settled principle of law on the subject. The Court of Appeal, with respect, ought to have confined itself to the averments in the appellant's Writ of Summons and Statement of Claim for the determination of when his cause of action arose in view of the fact that the date fixed by the respondents as when the same arose was not admitted by the appellant

and the point at that stage was yet to be determined by credible evidence at the hearing of the suit. (p. 1870 D)

Affidavit - Date cause of action arose

B 4. Again, with the greatest respect, there is no legal duty on the appellant to
 file a counter-affidavit or a Reply to the Statement of Defence to further
 deny or contradict the date on which the respondents in their affidavit or in
 their Statement of Defence alleged that the cause of action arose. Issues on
 C that fact had been joined in the pleadings of the parties and the respondents’
 Statement of Defence did not, on the established rules of pleadings, call
 for a reply from the appellant. In my view, what emerged at the close of
 pleadings was a triable issue on the question of the date the cause of action
 in respect of title to the property in dispute and the trespass complained of
 D by the appellant arose. With great respect, the trial court and the court
 below, having rightly found that the alleged trespass as pleaded by the
 appellant in his Statement of Claim was in 1992 were in grave error to have
 placed the cause of action outside the period pleaded in the Statement of
 E Claim. (p. 1871 E)

ACTIONS - Limitation of - Preliminary objection in limine

F 5. Another point that ought to be borne in mind is that the application of
 respondents, as defendants, before the trial court was by way of a prelimi-
 nary objection for the dismissal of the appellant’s suit in limine on the ground
 of Limitation of Action Law of Rivers State of Nigeria, 1988. The principle
 of law is well established that an application by way of a preliminary objec-
 G tion for the dismissal of a suit in limine may be made on points of law and
 where there are no facts in dispute for the purpose of determining such an
 objection. See *Bello Adegoke Foko & Ors. v. Oladokun Foko and Anor.*
 (1968) NWLR 441. The applicant relies only on the facts as stated by the
 plaintiff in his Writ of Summons and Statement of Claim. The facts stated
 H by the plaintiff in his Writ of Summons and Statement of Claim are for that
 purpose deemed to have been admitted by the defendant/applicant. See
Ayanboye v. Balogun (1990) 5 NWLR (Pt. 151) 392 at 407. Where, how-
 ever, disputes as to facts appear on the pleadings of the parties, as is the

case in the present application, it is only open to a defendant to raise a preliminary objection on the face of the plaintiff's Writ of Summons if the said defendant accepts the plaintiff's averments of fact either on the Writ of Summons or on his Statement of Claim but submits that even in those circumstances no cause of action would appear to have been disclosed or that the court had no jurisdiction to entertain the suit or that the action is statute-barred by virtue of some Limitation Law. But, if facts exist, which must first be adduced in or established by evidence to enable a point of law to be sustained, the preliminary objection may not properly be taken. (p. 1872 C)

ACTIONS - Limitation of - Courts - Facts to be relied on

6. In the present case, the facts relied upon by the respondents as to when the appellant's cause of action arose neither appeared in the Writ of Summons nor in the Statement of Claim. They are facts which may more properly be answered when evidence is adduced at the trial and therefore constitute issues for determination. I think learned counsel for the appellant is quite right in his submission that the court below, with respect, was in grave error in gratuitously going into the merits of the substantive suit in a preliminary objection when no evidence on the fact in issue had been led. In the final result, this appeal succeeds and it is hereby allowed. (p 1873 B)

REPRESENTATION

Chief N. Nwanodi, (with him, G.D. Gillis-Harry (Miss)), for the Appellant.
R.I. Nwosu Esq., for the Respondents.

CASES REFERRED TO

Eboigbe v. N.N.P.C. (1994) 5 NWLR (Pt.347) 649 at 663
Jimo Odubeko v. Victor Fowler & Anor. (1993) 1 NWLR (Pt.308) 637
Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1
Spasco Veh. and Hire Co. v. Alrairie Ltd. (1995) 8 NWLR (Pt. 615) 670
Alas v. A.C.B. Ltd. (1998) 3 NWLR (Pt. 543) 339 at 369-370
Oshodi v. Eyifunmi (2000) 7 S.C. (Pt.2) 145

Banjo and Ors. v. Cherubim and Seraphim (1975) 3 S.C. 37

Nwosu v. I.S.E.S.A. (1990) 2 NWLR (Pt.135) 688 at 701

STATUTES & RULES REFERRED TO

- B High Court (Civil Procedure) Rules of Rivers State O. 24 rr. 2 & 3
Limitation Law of Rivers State No. 7 of 1988 s. 1

LEAD JUDGMENT BY IGUH JSC

- C What calls for decision in this appeal is whether or not the plaintiff's claims against the defendants in the suit are statute-barred.

D The plaintiff had on the 12th day of November, 1992 in the Port Harcourt Judicial Division of the High Court of Rivers State of Nigeria instituted an action against the defendants jointly and severally claiming as follows -

- E “(i) A declaration that the plaintiff is the bona-fide owner of the piece and parcel of land known as and called “OHIA APAMINI” situate at Mgbuakara, Rumumini in Rumuokwuta measuring 3.126 Acres and more particularly described by Survey Plan No. ESP 6648 dated 30-10-66 and prepared by E. Eyo, Licensed Surveyor and counter-signed by Surveyor-General, Eastern Nigeria on the 13th of December, 1966.

- F (ii) 5 Million Naira being Special and General Damages for trespass.

- G (iii) Perpetual injunction against the defendants, their servants, agents, privies or successors-in-title restraining them from further acts of trespass or howsoever interfering with the interest of the plaintiff on the said land.”

H Pleadings were ordered in the suit and were duly settled, filed and exchanged. Thereafter the defendants on the 21st April, 1993 filed an application before the trial court pursuant to the provisions of Order 24 Rules 2 and 3 of the High Court (Civil Procedure) Rules of Rivers State of Nigeria, 1987 for an order to dismiss plaintiff's suit. The sole ground relied upon for this application was that the action is statute-barred by virtue of the provisions of Section 1 of the Limitation Law No.7 of 1988 of Rivers State of Nigeria.

At the hearing of the application, the defendants, as applicants, relied copiously on the affidavit in support of the motion as well as several averments in their Statement of Defence.

The plaintiff, as respondent, for his own part, confined himself to the averments in his Writ of Summons and Statement of Claim. B

The defendants, in particular, relied on the facts pleaded by them in their Statement of Defence and/or deposed to in the affidavit in support of their application to the effect that the land in dispute was purchased by the 1st defendant from the 3rd defendant in 1967 at the price of £370.00, that the land was later conveyed to the said 1st defendant by a Deed of Conveyance dated the 17th day of March, 1967 and that the conveyance was subsequently registered at the Lands Registry in the office at Enugu on the 8th June, 1967 as No. 18 at page 18 in Volume 462. They stated that the land, at the end of the civil war, was declared as Abandoned Property but that the Rivers State Government by an Extra-Ordinary Gazette No.22 of the 6th October, 1987 released the property to the 1st defendant. The defendants claimed that ownership and possession of the land in dispute were on the 1st defendant and contended that the cause of action in the dispute arose in 1967 when the land was sold to the 1st defendant by the 3rd defendant. C D E

The plaintiff filed no counter-affidavit to controvert the depositions in the affidavit of the defendants in support of their application but entirely relied, as already stated, on the averments in his Writ of Summons and Statement of Claim. F

In his Statement of Claim, the plaintiff averred that he purchased the land in dispute from the owners thereof on the 30th December, 1964 and that he immediately went into possession and occupation thereof. The averments in paragraphs 9-11 and 13-17 of the plaintiff's Statement of Claim are significant. These state as follows:- G

"9. The plaintiff has been in undisturbed possession of the property for over 20 years to the knowledge of all the defendants. H

10. Sometime in July 1992, a surveyor came onto the land to do some survey work and on inquiry by the plaintiff he claimed he was sent to the land in dispute by one Joel Emereuwa, the 1st defendant, who claimed

to be the owner of the land in dispute. Thereafter two men came to the land for clearing having not gotten the permission, consent, leave or licence of the plaintiff. The plaintiff sent the surveyor and the workers away.

B 11. *The Commissioner of Police invited the 1st defendant and the plaintiff, which invitation was honoured on the 31st of July, 1992 and discussion centered on the ownership of the land in dispute. The 1st defendant stated he “bought” the land from the 3rd, 4th and 5th defendants. After hearing 1st defendant and plaintiff, the Commissioner of Police advised*
 C *both parties to keep the peace and urged any aggrieved party to go to court.*

12.

13. *On the 2nd of August, 1992, the 1st defendant again broke into the land in dispute with a tractor, whereupon the plaintiff reported the matter*
 D *to the Miniokoro Police, who later said the Deputy Commissioner of Police was interested in the matter and wanted to see the plaintiff. The plaintiff honoured the invitation and was told by the Commissioner of Police to stay off the land.*

E 14. *On the 26th of October, 1992 the 1st defendant sent the 2nd defendant together with some workmen unto the land, who broke the concrete pillars, iron gate and the work formation with caterpillars and bulldozers. Tippers of sand, blocks and gravel were brought in with police protection.*
 F

15. *The 1st and 2nd defendants commenced work in earnest and bulldozed the plaintiff’s structure and increased the height of the fence already put up by the plaintiff and put up a new gate, ignoring the police report and public notices put up by the plaintiff. The plaintiff will rely on*
 G *the said public notices.*

16. *The defendants are bent on disturbing the plaintiff’s possession of this property unless restrained by this Honorable Court.*

17. *Whereof the plaintiff claims as per the Writ of Summons.”*

H At the conclusion of hearing, the learned trial Judge, Okor, J., relying mainly on the depositions in the affidavit in support of the motion and the averments in the Statement of Defence held that the plaintiff’s action was statute-barred by virtue of the provisions of Section 1 of the Limitation Law

No.7 of Rivers State, 1988. In the course of his ruling, the learned trial Judge rightly observed -

“What the court has to consider is when did the cause of action arise - was it in 1967 when 1st defendant bought the land from the 3rd defendant, or in 1992 when plaintiff alleged that defendants trespassed on the land? Once this is ascertained then the period of Limitation starts to run from that date.” B

He then proceeded to set out various depositions and averments in the affidavit in support of the defendants’ application and the Statement of Defence respectively and stated - C

“Having regard to the averments in the defendants/ applicants’ supporting affidavit, particularly paragraph 23 thereof, it is clear that the plaintiff/respondent was aware that the land he bought in 1964 was sold to an Ibo man. Carefully studying the affidavit of 1st defendant in support of this motion to dismiss, the Ibo man is no doubt the 1st defendant. Furthermore from the averments in the supporting affidavit and the Statement of Defence, the plaintiff was fully aware that in 1967, 3rd defendant sold the land in dispute to the 1st defendant who by the various exhibits annexed to the motion to dismiss gave notice to the whole world that he owned the land and not the plaintiff. The facts so deposed to in the supporting affidavit are deemed to be admitted by the plaintiff since he filed no counter-affidavit in rebuttal”. D E F

He added -

“It therefore follows that since the plaintiff became aware that his land was sold to the 1st defendant in 1967 as clearly shown by the supporting affidavit and Statement of Defence, he had ten years within which to institute this action against the defendants between 1967 and 1977”. G

He went on -

“In view of the foregoing, time started to run against plaintiff in 1967 and not in 1992. The Limitation Edict No.7 of 1988 therefore removes the plaintiff’s right of action, right of enforcement, right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce”. H

He concluded -

"Having regard to the foregoing, it is my view and I so hold that cause of action arose in 1967 and not 1992. This being so, the plaintiff is caught by Section 1 of the Limitation Edict No.7 of 1988. The plaintiff's action before the court against the defendants is therefore statute-barred. It should be dismissed and it is hereby dismissed accordingly".

Dissatisfied with this ruling of the trial court, the plaintiff lodged an appeal against the same to the Court of Appeal, Port Harcourt Division which court in a split decision dismissed the appeal on the 8th day of December, 1999. The Court of Appeal by a majority decision held that the plaintiff's action was statute-barred, relying mainly on the averments in the Statement of Defence and the depositions in the affidavit in support of the application to dismiss the suit. Indeed, the Court of Appeal in its majority judgment had cause to observe thus -

"Interestingly, the appellant as plaintiff in the main suit and as respondent to the motion to dismiss the suit filed no Counter Affidavit. It is difficult to understand why the appellant failed to challenge the motion by way of Counter Affidavit evidence, the averments contained in the affidavit in support of the motion to dismiss".

It concluded -

"..... I cannot but agree with the court below that the action is statute-barred and is covered by the provision of Section 1 of Limitation Law of Rivers State. Accordingly, the appeal fails and is hereby dismissed. The judgment of the court below is affirmed. The appellant shall pay costs assessed at N4,000.00".

Aggrieved by the above decision of the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the appellant and the respondents respectively.

Three grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument.

The two issues distilled from the appellant's grounds of appeal set out on his behalf for the determination of this appeal are as follows -

“1. Whether the action is statute-barred.

2. Whether the court below was right in embarking on a trial and thereby assessing the pleadings of the appellant against the respondents”.

The respondents, on the other hand, submitted that having regard to the appellant’s grounds of appeal, the two issues that arise for determination in this appeal are -

“1. Whether the action is statute-barred under Section 1 of the Limitation Law No.7 of 1988 of Rivers State.

2. Whether the Court of Appeal was wrong in assessing the relevant pleadings of the appellant and the respondents in arriving at its majority decision that the action was statute-barred”.

I have examined the two sets of issues identified in the respective briefs of the parties and it seems to me that they are practically identical and involve the same questions. The two issues, to a large extent, also overlap each other and I propose, in this judgment, to consider them together.

At the oral hearing of the appeal, the main argument of learned counsel for the appellant, Chief N. Nwanodi is that the determining factor for establishing when a cause of action arises is by a close study of the averments in both the plaintiff’s Writ of Summons and his Statement of Claim and nothing more. He pointed out that the trial court in its ruling expressly observed that the trespass complained of by the appellant was averred in his Statement of Claim to have been committed in 1992. He submitted that the Statute of Limitation only begins to run from the time a cause of action arises and not before then. He referred to the decisions of this court in Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping and Transport Agencies Ltd. (1987) 1 NWLR (Pt.49) 212 at 259 and Jimo Odubeko v. Victor Fowler and Anor. (1993) 1 NWLR (Pt.308) 637 and contended that both courts below should have confined themselves to the averments in the plaintiff’s Writ of Summons and Statement of Claim on the issue of when the cause of action in this case arose. He argued that both courts had no business making a voyage of discovery into the Statement of Defence with a view to picking the date on which the cause of action accrued. He submitted that the Court of Appeal was in error when it upheld the decision of the trial court to the effect that the action is statute-barred.

Learned counsel for the respondents, R.I. Nwosu, Esq., in his reply submitted that the cause of action in the present case accrued to the appellant either on the date the land in dispute was conveyed to him by the 3rd respondent in 1967 or on the registration of the Deed of Conveyance in respect of the land in 1967 or when the 1st respondent built upon the land and let it out in 1967 as pleaded in the Statement of Defence. He argued that from 1967 to 1992 is a period of 25 years and that the appellant should have sued the respondents before the year 1977 in accordance with the provisions of the Limitation Law of Rivers State, 1988. He denied that the appellant's cause of action accrued in 1992. He argued that the cause of action arose in 1967 and submitted that the action is clearly outside the Limitation period of ten years. He stressed that the appellant did not file a reply to the respondents' Statement of Defence to dispute the date on which they alleged that the cause of action accrued. He did not also file a counter-affidavit to challenge the date the respondents deposed that the cause of action arose. Learned counsel, relied on the decisions in *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt.135) 688 at 701 and *Wuraola Abeo and Anor. v. Toye Ogunyemi & Ors. Ex parte Bintu Ejide* (1990) 3 NWLR (Pt.141) 758 at 759 and submitted that the appellant cannot be heard to complain that the court below made use of the averments in the Statement of Defence and depositions in the affidavit in support of the application for the dismissal of the suit as failure to controvert the facts therein is deemed to establish the truth of such facts. He finally submitted that the appellant's cause of action accrued in 1967 and not in 1992 and that the suit is statute-barred. He urged the court to dismiss the appeal.

It cannot be disputed that a cause of action matures or arises on a date or from the time when a breach of any duty or act occurs which warrants the person thereby injured or the victim who is adversely affected by such breach to take a court action in assertion or protection of his legal right that has been breached. The duration of a right or cause of action which is conferred on an injured party is necessarily limited and does not last till eternity. It lapses after the date the Statute of Limitation proclaims that no such legal action or proceedings may lawfully be taken or commenced by an injured party.

It is therefore necessary when dealing with Statutes of Limitation to determine firstly the precise date the cause of action accrued because time will start to run from the moment the cause of action arose. See *Eboigbe v. N.N.P.C.* (1994) 5 NWLR (Pt.347) 649 at 663.

I think I ought to stress that the law is well established that B
it is not permissible, indeed it would be wrong, for a defendant rely-
ing on the defence of Limitation of Action to compute time from the
date pleaded in his Statement of Defence as the date the cause of
action arose unless such a date is admitted by the plaintiff in his C
Reply to the Statement of Defence. See *Savannah Bank of Nigeria Ltd. v.*
Pan Atlantic Shipping and Transport Agencies Ltd. (1987) 1 NWLR (Pt.49)
 212 at 259, *Jimo Odubeko v. Victor Fowler & Anor.* (1993) 1 NWLR (Pt.
 308) 637. The law is firmly settled that the period of limitation is deter-
 minable by looking at the Writ of Summons and the Statement of Claim only D
 to ascertain the alleged date the wrong in question which gave rise to the
 plaintiff's cause of action was committed and by comparing such date with
 the date on which the Writ of Summons was filed. If the time pleaded in the
 Writ of Summons or Statement of Claim is beyond the period allowed by E
 the Limitation Law, the action is statute-barred. See *Egbe v. Adefarasin*
 (1987) 1 NWLR (Pt.47) 1. **What needs be emphasized is that the deter-**
mining factor is the averment in the plaintiff's Writ of Summons and
Statement of Claim. This is the case, however, where at the end of F
settlement and exchange of pleadings or after the plaintiff has filed
his Statement of Claim, the defendant is obliged at that stage to con-
test in limine by way of a preliminary objection that the plaintiff's
action is statute-barred and ought to be struck out. The position is
different where issue is joined by the parties in their pleadings as to G
the date the cause of action in a suit arose. In that case, such an issue
must be proved by the parties in the course of the hearing of the suit
by credible evidence to be determined by the court. See *Savannah Bank*
of Nigeria Ltd. v. Pan Atlantic Shipping and Transport Agencies Ltd. (supra) H

Now Section 1 of the Limitation Law No.7 of Rivers State, of Nige-
 ria, 1988 provides as follows -

"No action shall be brought by any person to recover any land after

the expiration of ten years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

There is the unmistakable finding of the court of first instance that the trespass, the cause of action, relied upon by the plaintiff was pleaded as having occurred in 1992. Said the court -

“It is pertinent to observe that from the Statement of Claim, plaintiff contended that he bought the land in 1964 and the act of trespass was not committed by the defendants until 1992; whereas the defendants in the Statement of Defence maintained that the 1st defendant bought from the 3rd defendant in 1967”.

There are also the averments in paragraphs 9-11 and 13-16 of the appellant’s Statement of Claim which I have set out earlier on in this judgment. These paragraphs of the plaintiff’s Statement of Claim aver in the clearest possible terms that the cause of action against the respondents accrued to the appellant in 1992. The appellant’s suit was filed on the 12th November, 1992. **The above averments notwithstanding, the majority decision of the Court of Appeal still went ahead to hold that the appellant’s action was statute-barred relying on the averment in the Statement of Defence to the effect that the cause of action arose in 1967 in which year the 1st respondent allegedly purchased the land in dispute from the 3rd respondent. I think, with profound respect, that the Court of Appeal was clearly in error in this regard.**

The respondents’ application was for an order for the dismissal of the appellant’s suit in limine on the ground that the action is statute-barred. The court below arrived at its finding from the depositions in the respondents’ affidavit in support of the application and their averments in the Statement of Defence. This exercise, in my view, is totally unjustifiable as it offends all the well known settled principle of law on the subject. The Court of Appeal, with respect, ought to have confined itself to the averments in the appellant’s Writ of Summons and Statement of Claim for the determination of when his cause of action arose in view of the fact that the date fixed by the respondents as when the same arose was not admitted by the appellant and the

point at that stage was yet to be determined by credible evidence at the hearing of the suit.

In an attempt by the court below to justify its stand, it stated thus -

“The pleading of the appellant is vague and obscure making it difficult to know when he really legally bought the land..... I think the view expressed by the Supreme Court in the case of Egbe v. Adefarasin & Ors. (supra) that it will be wrong to rely on the date put forward by the defendant as the actual date is not to be understood to mean that where the pleading is vague as to the date or there is an averment which shows inconsistency the court may not look elsewhere.”

With profound respect to the court below, the law on the subject is not that if the Statement of Claim is vague or obscure, recourse should be had to the pleadings of the defendant for the determination of when the plaintiff’s cause of action arose. There is, at any rate, no vagueness or obscurity in the averments in the appellant’s Statement of Claim above reproduced which plainly fixed the date of his cause of action as in 1992.

The Court of Appeal further made adverse comments against the appellant’s failure to file a counter-affidavit in the application or a reply to the Statement of Defence to dispute the date fixed by the respondents on the issue of when the appellant’s cause of action arose.

Again, with the greatest respect, there is no legal duty on the appellant to file a counter-affidavit or a Reply to the Statement of Defence to further deny or contradict the date on which the respondents in their affidavit or in their Statement of Defence alleged that the cause of action arose. Issues on that fact had been joined in the pleadings of the parties and the respondents’ Statement of Defence did not, on the established rules of pleadings, call for a reply from the appellant. See *Spasco Vehicle and Plant Hire Co. v. Alraine Nig. Ltd.* (1995) 8 NWLR (Pt. 615) 670 - 671, *Alas v. A.C.B. Ltd.* (1998) 3 NWLR (Pt. 543) 339 at 369-370, *Oshodi v. Eyifunmi* (2000) 7 S.C. (Pt.2) 145 etc. In my view, what emerged at the close of pleadings was a triable issue on the question of the date the cause of action in respect of title to the property in dispute and the trespass complained of by the appellant arose. Without doubt, the date averred in the Statement of Claim as to when

the cause of action accrued was at variance with the respondents' Statement of Defence and the affidavit in support of the application to dismiss the suit. It seems to me that, the trial court ought, in the circumstances, to have tried the case on the merits rather than to embark on a voyage of discovery with a view to ascertaining which date is correct in the absence of viva voce evidence on the point. **With great respect, the trial court and the court below, having rightly found that the alleged trespass as pleaded by the appellant in his Statement of Claim was in 1992 were in grave error to have placed the cause of action outside the period pleaded in the Statement of Claim.**

Another point that ought to be borne in mind is that the application of respondents, as defendants, before the trial court was by way of a preliminary objection for the dismissal of the appellant's suit in limine on the ground of Limitation of Action Law of Rivers State of Nigeria, 1988. The principle of law is well established that an application by way of a preliminary objection for the dismissal of a suit in limine may be made on points of law and where there are no facts in dispute for the purpose of determining such an objection. See *Bello Adegoke Foko & Ors. v. Oladokun Foko and Anor.* (1968) NWLR 441. The applicant relies only on the facts as stated by the plaintiff in his Writ of Summons and Statement of Claim. The facts stated by the plaintiff in his Writ of Summons and Statement of Claim are for that purpose deemed to have been admitted by the defendant/applicant. See *Ayanboye v. Balogun* (1990) 5 NWLR (Pt. 151) 392 at 407. Where, however, disputes as to facts appear on the pleadings of the parties, as is the case in the present application, it is only open to a defendant to raise a preliminary objection on the face of the plaintiff's Writ of Summons if the said defendant accepts the plaintiff's averments of fact either on the Writ of Summons or on his Statement of Claim but submits that even in those circumstances no cause of action would appear to have been disclosed or that the court had no jurisdiction to entertain the suit or that the action is statute-barred by virtue of some Limitation Law. But, if facts exist, which must first be adduced in or established by evidence to enable a point of law to be

sustained, the preliminary objection may not properly be taken. See Banjo and Ors. v. Eternal Sacred Order of Cherubim and Seraphim (1975) 3 S.C. 37, Similarly, if the facts to sustain the preliminary point are obscure or at large, a preliminary objection may not properly be taken. A matter, therefore, which is raised by way of a preliminary point but which may be answered if evidence is adduced cannot be properly raised as a preliminary objection. Such a matter is more properly answered by evidence during the trial and shall constitute an issue for determination at the trial. B

In the present case, the facts relied upon by the respondents as to when the appellant's cause of action arose neither appeared in the Writ of Summons nor in the Statement of Claim. They are facts which may more properly be answered when evidence is adduced at the trial and therefore constitute issues for determination. I think learned counsel for the appellant is quite right in his submission that the court below, with respect, was in grave error in gratuitously going into the merits of the substantive suit in a preliminary objection when no evidence on the fact in issue had been led. C D

In the final result, this appeal succeeds and it is hereby allowed. The decisions of both courts below together with the order for costs therein made are hereby set aside and the case is remitted back to the High Court of Rivers State of Nigeria for trial on the merits before another judge other than Okor, J. There will be costs of this appeal to the appellant against the respondents which I assess and fix at N10,000.00 in this court, N4,000.00 in the court below and N2,500.00 in the trial court. E F

MOHAMMED JSC

I entirely agree with my learned brother, Iguh, JSC, that the majority decision of the court below was in error to affirm the opinion of the High Court that the action of the plaintiff/appellant is statute barred. It is plain from the facts of this case that the appellant averred in the Statement of Claim that he bought the land in dispute in 1964 and the act of trespass was committed by the defendants/respondents in 1992. The dispute about ownership of the land between the parties, as can be seen from the Statement of Claim started in July, 1992 when the 1st respondent sent a surveyor to G H

work on the land. He later sent in bulldozers, tippers of sand, blocks and gravel to erect a building in the land. This was the time when the possession of the appellant was disturbed and the act of trespass prompted the filing of this action in the High Court.

B I too therefore find merit in this appeal and it is allowed. The judgments of both the High Court and the majority decision of the Court of Appeal are hereby set aside. I remit the case back to the Rivers High Court for trial of the suit filed by the appellant before another judge. The appellant is entitled to the costs of this appeal and the costs of hearing before the two
C courts below. I therefore abide by the award of costs made by my learned brother in the lead judgment.

ONU JSC

D I have had the advantage of a preview of the judgment of my learned brother, Iguh, JSC., just read. I am in agreement with his reasoning and conclusions that the appeal be allowed; that the decisions of both courts below together with the order for costs therein made be hereby set aside and
E the case remitted to the High Court before another judge other than Okor, J., for trial de novo. I abide by the order for costs therein made.

KALGO JSC

F I agree entirely with the reasoning and conclusion reached by my learned brother, Iguh, JSC., in the judgment just delivered by him. I have nothing more to add.

I too allow the appeal and abide by the consequential orders made in the said judgment including the order as to costs.
G

EDOZIE JSC

I am in agreement with the reasoning and conclusion of my learned brother, Iguh, JSC., in the leading judgment just delivered wherein he dis-
H missed the appeal. I also dismiss the appeal and endorse the consequential orders contained in the said judgment.