

SUPREME COURT OF NIGERIA
2ND JULY, 2004. SC. 160/2000
CORAM:- U. MOHAMMED, S. U. ONU, A. I. IGUH, U. A.
KALGO, D. O. EDOZIE, JJSC

COSMASEZUKWU PLAINTIFF/APPELLANT

(For himself as representing
members of the Ihitte Community
of Egbuoma in the
Ohaji/Egbema/Oguta L.G A.

AND

1. PETER UKACHUKWU DEFENDANTS/RESPONDENTS

2. JUDE UKACHUKWU

(For themselves and as representing
Nwokocha Ukachukwu family of
Obeagwa Oguta)

APPEALS - Briefs - Cross appeal - Respondent that did not file a cross appeal - Cannot raise a fresh issue - Save by way of preliminary objection (H1)

LAND LAW - Identity of the land in dispute - Where found not to be in doubt - Any issue raised on the matter of location of the land - Is not relevant (H2)

APPEALS - Issues - For purposes of a brief - Any issue that will not affect the result of the appeal - Is not a proper issue (H3)

LAND LAW - Identity of land in dispute - Can be proved by a clear oral evidence - Or by a survey plan (H4)

APPEALS - Fresh issue - Of visit to locus in quo - Raised without leave of court - Is incompetent (H5)

2002 Ezeukwu v. Ukachukwu (2004) 7 KLR (pts. 184-186) 2001; (2004)

LAND LAW - Title - Five methods of proving title to land - Where traditional history is in issue - When recent acts of ownership - Should be considered (H6)

LAND LAW - Title - Traditional history - Recent acts of possession - Being the basis for finding in respondents' favour - Issue of their place of migration - Cannot be a ground for rejecting their traditional history (H7)

EVIDENCE - Pleadings - Proof - A party is not bound to prove all averments - Proper evaluation of evidence by trial court - Will not be disturbed by appellate court (H8)

LAND LAW - Possession - Pleadings - Admission - De jure possession of the land in dispute - Was not admitted in favour of the respondents (H9)

LAND LAW - Title - Possession - Injunction - Where plaintiffs were not found - To be owners in possession - Their claim for perpetual injunction - Cannot be granted (H10)

FACTS

In a representative action in which the parties were subsequently substituted, plaintiffs/appellants filed a suit against the defendants/respondents. Appellants claimed declaration of title, general damages for trespass and perpetual injunction against the respondents. Both parties claimed that the land in dispute belonged to their original ancestors and gave evidence of how the land progressively descended to them. They tendered their various survey plans, called the land by different names and gave a varied description as to the location of the land in dispute.

The trial court found that the identity of the land is not doubt. As there were conflicting traditional histories, trial court relied on recent acts of possession and came to the conclusion that the traditional history of the respondents is more probable and held that the respondents are in effective possession of the land in dispute. The court found in favour of

the respondents and dismissed the appellants' claim. Appellants' appeal to the Court of Appeal was dismissed. Being dissatisfied, they have further appealed to the Supreme Court raising four issues. The apex court started with a consideration of the last of the issues raised by the respondents.

ISSUES FOR DETERMINATION

“(A) Whether the Court of Appeal was right in holding that the trial Judge made a proper evaluation of the evidence and came to a correct decision based on the evidence of the witnesses who testified before him?

(B) Was the lower court right in affirming the decision of the trial court that the land in dispute is located at Ose-Motor in Oguta in the Oguta L.G.A?

(C) When there is a concurrent judgment, is an appellant entitled to urge the Supreme Court to review the decision of the trial court instead of the judgment appealed against?”

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

Respondent that did not file a cross appeal

1. There is no corresponding issue by the appellant and no Reply brief was filed in response to the respondents' argument on the issue. It seems to me obvious that the respondents' issue under consideration is not predicated on any of the appellant's grounds of appeal. The respondent did not file a cross-appeal. The position of the law is that where a respondent has not filed a cross appeal, the role of the appellate court is limited to seeing whether or not the decision of the court below is correct. Such a respondent does not have an unrestrained or unbridled freedom of raising issues for determination which have no relevance to the grounds of appeal filed.

As stated above, the issue under consideration is not derived from the appellant's grounds of appeal. The issue is in the nature of a preliminary objection for determination before hearing the appeal in which issues for determination are raised. Learned counsel ought to have raised the issue by way of preliminary objection pursuant to Order 2 Rule 9(2) of the Supreme Court Rules. As an issue for determination in this appeal it is incompetent and is accordingly struck out. (p. 2013 B)

Identity of the land in dispute - Where found not to be in doubt

2. The implication of the above issue is that the trial court had found that the land in dispute is in Ose-Motor not Egbuoma and following from that, that the identity of the land in dispute was not proved hence the appellant's case B was dismissed. With due deference to learned counsel for the appellant, that view is rather misconceived and misleading. The finding on the location of the land in dispute was not the ratio decidendi for the dismissal of the appeal. I shall return to this later in this judgment. The parties in their pleadings C joined issues on several facts the resolutions of some of which were not necessary for the determination of the main issue in controversy, which is the ownership of the land in dispute. Having thus abandoned the complaint on jurisdiction predicated on whether the land in dispute is in Egbuoma, a non-urban area, or in Ose-Motor, Oguta, an urban area, one is at a loss to D appreciate the relevance of the issue being agitated here with respect to whether the land in dispute is in Egbuoma or Ose-Motor. It is no longer a live issue and its determination one way or the other cannot affect the result of the appeal. (pp. 2014 G / 2016 G)

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APPEALS - Issues - For purposes of a brief

3. It needs to be stressed that every point in controversy between the parties in an appeal is, in a loose sense, an issue. But for purposes of a brief, F an issue is one, which is so crucial that if it is decided in favour of a party, he is entitled to win the appeal. Any question which does not adequately raise a substantial issue which if resolved one way or the other will affect the result of the appeal is not a proper issue for a brief. See *Okoye v. Nigerian Construction & Furniture Co. Ltd* (1991) 6 NWLR (Pt.199) 501 at 542. G (p. 2017 A)

Identity of land in dispute - Can be proved by a clear oral evidence

4. In an action for declaration of title to land, the onus is on the plaintiff to H establish with certainty the identity of the land in dispute to which his claim related. This, he can do in one of two ways, viz, by oral evidence describing with such degree of accuracy the said parcel of land in a manner that will guide a surveyor in producing a survey plan of the said land. See *Baruwa v.*

Ogunsola (1938) 4 WACA 159. Another way and perhaps a better way of proving the identity and extent of the land claimed is by the claimant filing a survey plan reflecting all the features of the land and showing clearly the boundaries. See Awote v. Owodunni (No.2) (1987) 2 NWLR (Pt.57) 367. B

In the case in hand, both parties tendered by consent, the survey plan of the land in dispute. The appellant tendered Exhibit "A" while the respondents relied on Exhibit B. On p.110 lines 28 to 31, the learned trial Judge held as follows: -

"The identity of the land in dispute is not in doubt. Both parties agree that the land in dispute is a portion of a larger Ogbautu land." C

In my humble view, having found that the identity of the land in dispute was not in doubt, it is not necessary to determine whether the land is in Egbuoma or Ose-Motor. (p. 2017 C) D

APPEALS - Fresh issue

5. The appellant has canvassed the question of the learned trial Judge not visiting the locus in quo to ascertain the exact location of the land in dispute having regard to the conflicting evidence in that regard. That question was not canvassed in the two lower courts. It therefore constitutes a fresh issue before this court. It is the practice that a fresh issue cannot be entertained on appeal without the leave of this court. No such leave was sought and granted by this court and as a result that issue is incompetent. See the following cases - Obiakor v. The State (2002) 6 S.C. (Pt.II) 33; (2002) 10 NWLR (Pt.776) 612 at 262, London Chartered Bank of Australia v. White (1987) 4 AC 413. (p. 2017 G) F

Title - Five methods of proving title to land

6. It has long been established that there are five methods of proving title to land as was decided by this court in several cases including Idundun & Ors. v. Okumagba & Ors. (1976) NSCC 445, (1976) 9-10 S.C 227- 249 or 1976 H 1 NMLR 200; Piaro v. Tenalo (1976) 12 S.C. 31 at 33. A party seeking a declaration of title to land is not bound to plead and prove more than one root of title to succeed but he is entitled to rely on more than one root of title. G

However, where, as in this case, he relies on traditional history, and in addition acts of ownership and long possession predicated on the traditional history as pleaded, he is not entitled to a declaration of title based on the evidence of acts of ownership and possession where the evidence of traditional history is unavailing:

However, such evidence of acts of ownership and long possession becomes relevant where the traditional histories given by both sides though plausible are in conflict. In such a situation, it will not be open to the court simply to prefer one side to the other. To determine which of the histories is more probable the courts have called in aid the principle enunciated in the celebrated case of *Kojo II v. Bonsie* (1957) 1 NWLR 1223 which is to the effect that the preference of one history to the other as being more probable would depend on recent acts of ownership and possession shown by the parties that the court would need to consider to make up its mind.
(p. 2020 D)

Traditional history - Recent acts of possession

7. *From the totality of evidence before me, the traditional history of the plaintiff is inconclusive and that of the defendant appears to be more probable.*

Consequently, I hold that the plaintiff's community are not the owners in possession of the land in dispute. On the contrary, I hold that the defendants are in effective possession of the land in dispute....."

As can be gleaned from the above excerpts, the learned trial Judge having found that the evidence of recent acts of the respondents' people on the land in dispute preponderated over that of the appellant's community concluded that the traditional history of the respondents is more probable than that of the appellant and it is for those reasons that the appellant's case was dismissed and as I indicated earlier on, the dismissal did not turn on whether or not the identity of the land in dispute was established.

The judgment of the learned trial Judge was affirmed by the court below but learned counsel for the appellant has raised several points to fault that judgment. He argued that the respondents' traditional history ought to have been rejected as there was no explanation about how the respondents'

ancestor Ezike-Ose could have migrated from Obeagu to another town Ose-Motor to establish a settlement, and that if the respondents' traditional history had been so rejected it would have been unnecessary for the court to have recourse to recent acts of the parties on the land in dispute. My simple answer to this contention is that one does not need to be a historian or an anthropologist to know that over the years people have migrated from their original habitation to establish settlements hundreds and thousands of kilometers away. There was nothing strange about the respondents' ancestor migrating from Obeagu to Ose-Motor. That migration is not a valid ground for the rejection of the traditional history of the respondents. (p. 2023 C)

A party is not bound to prove all averments

8. Again, learned counsel for the appellant contended that the respondents did not lead evidence as pleaded, that Chief Udeze Anunihu, Nzimiro and Dr. Okafor were their customary tenants and Muogbaram Adibena their caretaker. In my view, a party is not bound to lead evidence in proof of all the averments in its pleadings provided he has led enough evidence to sustain his claim or defence. Civil cases are decided on balance of probabilities and if one party adduces credible evidence which outweighs the evidence of the other party, the former is entitled to judgment: see the case of Mogaji v. Odojin (1979) 4 S.C. 91. Besides it is settled law that where a trial court unquestionably evaluates the evidence and appraises the facts, it is not the business of an appellate court to substitute its own views for the views of the trial court.

As this court held in the case of Odojin v. Ayoola (1984) 11 S.C. 72 per Oputa, JSC.-

“If there is any evidence to support a particular conclusion of the trial court, an appellate court which could have come to a different conclusion should restrain itself and respect the conclusion of the trial court that saw and heard the witness.”

Since I take the view that the findings of the trial court are amply supported by the evidence on record, the contention that the respondents did not prove some assertions in their pleadings is not tenable. (p. 2024 B)

Possession - Pleadings - Admission

9. In those circumstances, it cannot be said that the respondents admitted the appellant's people were in exclusive de jure possession of the land in dispute. It is therefore my view that the provisions of Section 146 of the Evidence Act does not avail the appellant.

For the various reasons given, I hold that the issue under consideration must be resolved against the appellant. (p. 2026 H)

Title - Possession - Injunction

10. As I had pointed out in the consideration of the last preceding issue, the appellant's community were not in exclusive possession of the land in dispute. Indeed the learned trial Judge found as a fact that the appellant's Ihitte community were not owners in possession of the land in dispute. Secondly, the alleged act of trespass relied upon by the appellant which is to the effect that the respondents' people bulldozed the cassava farm of the appellant and his community was not established. At page 120 of the record, the ninth finding of fact made by the trial Judge reads:-

"(9) Nwokocha Ukachukwu never went into the land in dispute and bulldozed the cassava planted by the plaintiff's community."

Since the appellant's community were not in possession of the land in dispute and no act of trespass thereon was established against the respondents, there was no factual basis to sustain an order of injunction. I will similarly resolve this issue against the appellant. (p. 2027 G)

REPRESENTATION

G K. C. O. Njemanze, Esq., (with him, A. B. Asogu, Esq.), for the Appellants
Chika Ugwu, Esq., (with him Miss M. Belgore), for the Respondents.

CASES REFERRED TO

H Dr. J. M. Udom v. Micheletti and Sons (1982) 7 SCNJ 488 at 457; (1997) 8 NWLR (Pt.516) 187

Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141

Niger Progress Ltd, v. N.E.I. Corporation (1989) 4 S.C. (Pt. II) 164; (1989)

3 NWLR (pt. 107) 68 at 82

Attorney-General of Oyo State v. Fairlakes Hotels Ltd. & Ors. (1988) 5 NWLR (Pt.92) 1; (1988) 12 S.C.N.J. 1

Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (Pt.199) 501 at 542

B

Baruwa v. Ogunsola (1938) 4 WACA 159

Awote v. Owodunni (No.2) (1987) 2 NWLR (Pt.57) 367

Balogun v. Akanji (1988) 1 NWLR (Pt .70) 301 at 232

Eronini v. Iheuko (1989) 3 S.C. (Pt .1) 30; (1989) 2 NWLR (Pt. 101) 46 at 61

C

Odofin v. Ayoola (1984) 11 S.C. 72

STATUTES & RULES REFERRED TO

Supreme Court Rules O. 2 r. 9 (2)

D

Land Use Act, 1978 s. 30 (1)

Constitution of Nigeria 1979 s. 236

Evidence Act 1990 s. 146

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LEAD JUDGMENT BY EDOZIE JSC

This appeal arose from a land dispute between the three original plaintiffs who in a representative capacity sued as representing members of Ihitte Community of Egbuoma in the Ohaji/Egbema/Oguta L. G. A. There was only one original defendant who was sued in his personal capacity. Proceedings were commenced in the High Court of Imo State sitting in Oguta where pleadings were ordered, filed, exchanged and subsequently amended with the plaintiffs' Further Amended Statement of Claim and the defendant's Amended Statement of Defence as the terminal pleadings on which the case was contested. As formulated in paragraph 17 of their pleadings, the reliefs sought by the plaintiffs against the defendant are: -

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“(1) A declaration that the plaintiffs are entitled to the customary right of occupancy to a piece or parcel of land known as and called “ALA OGBUTU” situate at Egbuoma in the Ohaji/Egbema/Oguta Local Government Area within the Oguta Judicial Division with an annual

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value of N10.00 (Ten Naira).

(2) N20,000.00 (Twenty Thousand Naira) being general damages for trespass to the said land.

(3) Perpetual injunction restraining the defendant, his servants or agents from entering the said land again.”

As the case progressed, the original parties were substituted by the present parties on record, to wit, Cosmos Ezukwu as plaintiff and Peter Ukachukwu and Jude Ukachukwu as defendants in the respective representative capacities stated. At the trial, each party led evidence to substantiate its claim or defence. In the main, each party anchored its case on traditional evidence.

For the plaintiff, the land in dispute which is verged pink in his survey plan Exhibit ‘A’ forms part of a larger parcel of land called ‘Ogbutu’ land and has been from time immemorial the property of his community. It is situated in Egbuoma in the Ohaji/Egbema/Oguta L.G.A. The original founder of the land was his great ancestor Obaji, a renowned hunter who together with his brothers deforested the virgin land and exercised thereon maximum acts of ownership. After the death of Obaji, the land devolved on the named successive heads of the family until it passed over to the original 2nd plaintiff without any interference or hindrance from anybody. The ‘Ogbutu’ land derived the name from the ‘utu’, that is, the fruits growing on it much of which has now disappeared due to farming activities on the land. It is the plaintiff’s case that as owners of the land in dispute his people and before them their ancestors had been farming the land, reaping the economic crops thereon. During each farming season, the land is apportioned among the villagers, who in turn apportion their shares to their members for cultivation. The plaintiff further alleged that some years ago, the defendants’ father Nwokocha Ukachukwu was introduced to the plaintiff’s people by one Chief Udeze Anunihu from Muojinta as a prospective tenant on the land for the purpose of harvesting palm fruits on annual rental of £10.00 (N20.00). With the permission of the plaintiff’s people, the defendants’ father was allowed to build huts for harvesting the palm fruits but he was not permitted to build permanent buildings. The defendants’ father continued to pay the yearly rent till sometime in 1982 when it

was discovered that he had clandestinely brought in some strangers as tenants on the land on the pretext that he was the landlord. On account of that, the plaintiff's people chased out the defendants' father and those he put on the land. Sometime in 1983, the Defendants' father broke into the land in dispute and bulldozed the cassava plantation of the plaintiff's people and in addition started asserting ownership of the land in dispute. The matter was reported to the police who advised the plaintiff's people to seek civil remedy hence the proceedings leading to this appeal. B

The case for the defendants is that the land in dispute also verged pink in their survey plan Exhibit B is situated at Ose-motor known as Oguta III in Ohaji/Egbema/Oguta L.G.A. and is called "*Ogbautu*" land. The original founder of the land was their ancestor Ezeike-Ose from Obeagwa in Oguta who first settled and lived on the land and cultivated it with his brother. The land subsequently devolved on the defendants' father through the descendants of the original founder. It is the defendants' case that the land in dispute is not "*Ogbutu*" but "*Ogbautu*" because of the termites and insects, which infested and ate up the crops planted on the land. Because of the menace of termites (utu), it became the custom of the defendants' people to perform some sacrifice on the land so as to appease the gods for a rich harvest. The defendants asserted that since the land devolved on their father, he had been in exclusive possession thereof farming on portions of the land and letting and leasing other portions to tenants including the plaintiff's people who paid customary tributes to the defendants' father. The defendants denied that Udeze Anunibu introduced their father to the plaintiff's people as a tenant and asserted on the contrary that the said Udeze Anunibu was their tenant. The defendants' further alleged that their father built five houses on the land in dispute. One of the houses was a permanent structure of four rooms and a palour built in 1974. Some of these houses were destroyed when the plaintiff's people invaded the defendants' tenants in an attempt to deprive the defendants' people of the land in dispute. Finally, the defendants maintained that the plaintiff is not entitled to his claim. H

After reviewing the evidence adduced on both sides and the addresses of learned counsel made on their behalf, the learned trial Judge, Ihekire, J., upheld the case for the defendants and accordingly dismissed

the plaintiff's claims. His appeal to the Court of Appeal, Port-Harcourt Division, was similarly dismissed hence he has further appealed to this court against the judgment of the Court of Appeal, which upheld the decision of the trial court.

B The plaintiff and defendants hereinafter referred to respectively as appellant and respondents have through their respective counsel filed and exchanged briefs of argument and at the hearing of the appeal, learned counsel adopted the briefs with oral submissions to highlight some issues therein.

C In the appellant's brief, the following four issues were identified for determination-

D "D1 Whether considering the pleadings and evidence of the parties given at the trial, plaintiff discharged the burden required in law to entitle him to be adjudged the owner of the land in dispute?"

E D2 Whether the lower court was right in holding that the land in dispute is situate at Ose-Motor and not Egbuoma, and thereby holding as per judgment of the trial court that the boundaries were not proved and consequently dismissed the appellant's case."

D3 Whether there was proof of trespass as to entitle the plaintiff to the relief of injunction against the defendants.

F D4 Whether the Court of Appeal was correct in holding that the trial court considered and resolved specific and material issues raised in the pleadings and evidence at the trial?

In their own brief, the respondents raised three issues, to wit: -

G "(A) Whether the Court of Appeal was right in holding that the trial Judge made a proper evaluation of the evidence and came to a correct decision based on the evidence of the witnesses who testified before him?"

(B) Was the lower court right in affirming the decision of the trial court that the land in dispute is located at Ose-Motor in Oguta in the Oguta L.G.A?

H (C) When there is a concurrent judgment, is an appellant entitled to urge the Supreme Court to review the decision of the trial court instead of the judgment appealed against?

It is convenient to start the consideration of the above issues in the

reverse order as set out in the respondents' brief. I will therefore take the last issue therein which at the risk of repetition reads thus: -

“When there is a concurrent judgment, is an appellant entitled to urge the Supreme Court to review the decision of the trial court instead of the judgment appealed against?”

There is no corresponding issue by the appellant and no Reply brief was filed in response to the respondents' argument on the issue. It seems to me obvious that the respondents' issue under consideration is not predicated on any of the appellant's grounds of appeal. The respondent did not file a cross-appeal. The position of the law is that where a respondent has not filed a cross appeal, the role of the appellate court is limited to seeing whether or not the decision of the court below is correct. Such a respondent does not have an unrestrained or unbridled freedom of raising issues for determination which have no relevance to the grounds of appeal filed: See the case of Dr. J. M. Udom v. Micheletti and Sons (1982) 7 SCNJ 488 at 457; (1997) 8 NWLR (Pt.516) 187.

As stated above, the issue under consideration is not derived from the appellant's grounds of appeal. The issue is in the nature of a preliminary objection for determination before hearing the appeal in which issues for determination are raised: see Niger Progress Ltd, v. N.E.I. Corporation (1989) 4 S.C. (Pt. II) 164; (1989) 3 NWLR (pt. 107) 68 at 82. Learned counsel ought to have raised the issue by way of preliminary objection pursuant to Order 2 Rule 9(2) of the Supreme Court Rules. As an issue for determination in this appeal it is incompetent and is accordingly struck out.

The respondents' second issue for determination which is covered by the appellant's second issue relates to the finding of the two courts below on the location of the land in dispute, that is whether it is in Ose-Motor or Egbuoma. The contention of learned counsel for the appellant is that the appellant had established the identity of the land in dispute; that the parties' survey plans Exhibits A and B show clearly that the land in dispute is in Egbuoma and not Ose-motor as erroneously held by the trial court and affirmed by the court below and that since oral evidence of the

parties on the location of the land in dispute was conflicting, the trial court ought to have visited the locus in quo to resolve the conflict; vide the following cases:- Olubode v. Salami (1985) 2 NWLR (Pt.7) 282; Olusanmi v. Oshosona (1992) 6 NWLR (Pt. 245) 22, Seismograph Services Nig. Ltd v. Akporuvo (1974) 6 S.C, 119 at 128 Seismograph Services Nig. Ltd v. Ogbeni (1976) 4 S.C. 85 at 104, 105, Nwizuk v. Eneyoh (1953) 4 WACA 354 at 355. The failure of the trial court to visit the locus in quo, it was contended, had substantially affected the appellant's case and thus resulted in a miscarriage of justice.

Responding to the above submissions, learned counsel for the respondent pointed out that the duty of the trial court is to adequately evaluate the evidence adduced in the case and make appropriate findings of fact in respect of all issues arising in the case and material in the determination thereof. He then submitted that in the instant case both the trial High Court and the Court of Appeal adequately considered and resolved the issues material to the determination of the case. He further submitted that as there were concurrent findings of the two lower courts, the appellant has not advanced any cogent reasons for the findings to be disturbed citing in support of the contention the following cases: Adimora v. Ajufo (1988) 3 NWLR (Pt. 80), Idundun v. Okumagba (1976) 1 NMLR 200; Ezeudu v. Obiagwu (1986) 2 NWLR (Pt. 21) 708.

For better appreciation of my observation on this issue, let me at the risk of repetition but for ease of reference, reproduce hereunder the appellant's issue under consideration. It reads: -

"D2 Whether the lower court was right in holding that the land in dispute is situate at Ose-Motor and not Egbuoma, and thereby holding as per judgment of trial court that the boundaries were not proved and consequently dismissed the appellant's case."

The implication of the above issue is that the trial court had found that the land in dispute is in Ose-Motor not Egbuoma and following from that, that the identity of the land in dispute was not proved hence the appellant's case was dismissed. With due deference to learned counsel for the appellant, that view is rather misconceived and misleading. The finding on the location of the land in dispute was not the

ratio decidendi for the dismissal of the appeal. I shall return to this later in this judgment. The parties in their pleadings joined issues on several facts the resolutions of some of which were not necessary for the determination of the main issue in controversy, which is the ownership of the land in dispute. For instance, the parties joined issues on the name and etymology of the name of the land in dispute. For the appellant, the name of the land in dispute is Ogbutu (a three syllable-word) derived from termites (utu) growing on the land but the respondents call the land in dispute Ogbautu (a four syllable word) derived from termites (utu) that ate up the crops grown on the land. The trial court found in favour of the respondents but that finding if neither here nor there, because the name or etymology of the name of a piece of land is not necessarily indicative of the ownership thereof. In the case of Alhaji Aromire & 2 Ors. v. J. S. Awoyemi (1972) 1 ANLR (Pt. 1) 101 at 113, this court, per Cotter, JSC., held that no reliance can be placed on the differences in the names ascribed to the same portion of land in the vicinity. The difference in names will be immaterial if the identity of the land in dispute is otherwise not in dispute. In the same vein, the Court of Appeal, per Nnaemeka-Agu, JCA., as he then was, in the case of Onwumere v. Agwunedu (1987) 3 NWLR (Pt.62) 673 expressed the following opinions

“Now it has been decided by a long line of decided cases both by this court and the Supreme Court that when parties base their claims to land upon evidence of tradition and the evidence of tradition called by both sides to the suit is in conflict, the best way to decide which of the conflicting stories is the more probable is to test them from the background of facts within living memory. See on this Agedegudu v. Ajenifuja (1963) 1 All NLR 109 at p.115 to 117. Ogboide Akhionbare and Ors. v. Omoregie and Ors. (1976) 2 S.C. It is not a matter, which can be resolved on the credibility of witnesses or as the learned Judge has done by mere etymological approach when the names themselves and the ownership of the surrounding lands and some of the features on the land in dispute are parts of the conflict....”

Again the trial court had to consider the issue of the location of the land in dispute, that is, whether it is in Egbuoma as stated by the appellant

or Ose-Motor according to the respondents. The resolution was in favour of the latter. At the court below where the jurisdiction of the trial court to entertain the suit was for the first time raised, the bone of contention was whether the land in dispute was in Egbuoma, a non urban area subject to the jurisdiction of the Customary Court, or in Ose-Motor, Oguta, an urban area subject to exclusive jurisdiction of the High Court. At page 214, lines 35 to 38, the court below resolved the issue thus:-

"As I discussed above, by the 'Designation of Urban Areas Order 1979', Section 2 thereof, Oguta is an Urban Area. The land in dispute being in Oguta, it is a land over which the High Court Oguta has 'exclusive jurisdiction' see Section 30(1) of the Land Use Act, 1978."

In the recent case of Adisa v. Oyinwola¹ (2000) 6 S.C. (Pt. II) 47; (2000) 10 NWLR (Pt.674) 116, this court considered the provisions of Sections 39(1) and 41 of the Land Use Act, 1978, along with the unlimited jurisdiction of the High Court as provided for in Section 236 of the 1979 Constitution and held that the jurisdiction of the High Court of a State is not limited to land in urban area but extended over land in rural areas thus departing from its earlier decision in the case of Oyeniran v. Egbetola² (1997) 5 NWLR (Pt.504) 122. Apparently on account of the present state of the law, the appellant in this case did not consider it necessary to pursue the jurisdictional issue, which was decided against it by the court below. The appellant's Ground 1 of the Grounds of Appeal at p. 232 of the record of appeal which challenged the decision of the Court of Appeal on the jurisdictional issue was abandoned as is evident from page 4 paragraph C1 of the Appellant's brief where it is stated thus: -

"C1 Ground one of the Notice of Appeal is hereby abandoned in view of the fact that the issue raised therein is no longer the true position of the law."

Having thus abandoned the complaint on jurisdiction predicated on whether the land in dispute is in Egbuoma, a non-urban area, or in Ose-Motor, Oguta, an urban area, one is at a loss to appreciate the relevance of the issue being agitated here with respect to whether the land in dispute is in Egbuoma or Ose-Motor. It is no longer a live issue and its determination one way or the other cannot affect the

result of the appeal.

It needs to be stressed that every point in controversy between the parties in an appeal is, in a loose sense, an issue. But for purposes of a brief, an issue is one, which is so crucial that if it is decided in favour of a party, he is entitled to win the appeal. Any question which does not adequately raise a substantial issue which if resolved one way or the other will affect the result of the appeal is not a proper issue for a brief. See Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (Pt.199) 501 at 542.

In an action for declaration of title to land, the onus is on the plaintiff to establish with certainty the identity of the land in dispute to which his claim related. This, he can do in one of two ways, viz, by oral evidence describing with such degree of accuracy the said parcel of land in a manner that will guide a surveyor in producing a survey plan of the said land. See Baruwa v. Ogunsola (1938) 4 WACA 159. Another way and perhaps a better way of proving the identity and extent of the land claimed is by the claimant filing a survey plan reflecting all the features of the land and showing clearly the boundaries. See Awote v. Owodunni (No.2) (1987) 2 NWLR (Pt.57) 367.

In the case in hand, both parties tendered by consent, the survey plan of the land in dispute. The appellant tendered Exhibit “A” while the respondents relied on Exhibit B. On p.110 lines 28 to 31, the learned trial Judge held as follows: -

“The identity of the land in dispute is not in doubt. Both parties agree that the land in dispute is a portion of a larger Ogbautu land.”

In my humble view, having found that the identity of the land in dispute was not in doubt, it is not necessary to determine whether the land is in Egbuoma or Ose-Motor. The appellant has canvassed the question of the learned trial Judge not visiting the locus in quo to ascertain the exact location of the land in dispute having regard to the conflicting evidence in that regard. That question was not canvassed in the two lower courts. It therefore constitutes a fresh issue before this court. It is the practice that a fresh issue cannot be enter-

tained on appeal without the leave of this court. No such leave was sought and granted by this court and as a result that issue is incompetent. See the following cases - **Obiakor v. The State (2002), 6 S.C. (Pt.II) 33; (2002) 10 NWLR (Pt.776) 612 at 262, London Chartered Bank of Australia v. White (1987) 4 AC 413**, Kabaka's Government and Anor. v. Attorney- General of Uganda & Anor (1965) 3 NWLR 512 or (1966) AC 1 Attorney-General of Oyo State v. Fairlakes Hotels Ltd. & Ors. (1988) 12 S.C. (Pt.I) 1; (1988) 5 NWLR (Pt.92) 1 at 29; (1989) 12 S.C. 1; (1989) 5 NWLR (Pt. 121) 255. It is my considered view that the issue under consideration does not avail the appellant.

The respondents' first issue for determination is covered by the appellant's first and fourth issues which were argued together and relate to the discharge of the burden of proof by the appellant and the evaluation of evidence and resolution of material issues raised in the pleadings of the parties. In this regard, the contention of learned counsel for the appellant is that the appellant has established his case by traditional evidence since the line of succession to the land in dispute has no gaps, mysterious linkages or nexus to warrant the rejection of the traditional history. The cases of **Mogaji v. Cadbury Nig. Ltd (1985) 2 NWLR (Pt.7) 393** and **Eze v. Atasie (2000) 6 S.C. (Pt.I) 214; (2000) 10 NWLR (Pt. 676) 470 at 482** were alluded to. Referring to the cases of **Fasoro v. Beyioku (1988) 2 NWLR (Pt.76) 263**, **Balogun v. Akanji (1988) 1 NWLR (Pt.70) 301**, **Ekpo v. Ita 11 NWLR 86** and **Kojo v. Bonsie (1957) 1 NWLR 1223**, learned senior counsel for the appellant argued forcefully in his brief that it was not necessary for the trial court to have had recourse to the evidence on the parties' recent acts of ownership on the land in dispute to determine the ownership thereof. It was further contended that since the respondents had in paragraphs 11 and 13 of their Amended Statement of Defence admitted that the appellant's people were on the land in dispute, though as the respondents' tenants, that was an admission by the respondents that the appellant's people were in possession thereof and that had given rise to the presumption of ownership in favour of the appellants' people under Section 146 of the Evidence Act, 1990, thereby shifting the burden of proof on the respondents to rebut by showing how and when the appellant's people attained

tenants, a burden which the respondents were unable to discharge.

The following cases were cited and relied upon:

Onyekeonwu v Ekwubiri (1966) 1 All NLR 32;

Oke v. Atoloye (1986) 1 NWLR (Pt.15) 241;

Buraimoh v. Bamgbose (1989) 6 S.C. (Pt. I) 1; (1989) 3 NWLR B
(Pt.109) 352.

On the question of the resolution of issues raised on the pleadings, learned counsel canvassed in his brief that there was no averment or evidence connecting the respondents' town Obeagu with Ose-Motor, another town, and wondered how the respondents' ancestors Ezike-Ose could have migrated from Obeagu to another town Ose-Motor to found and deforest the land in dispute. It was pointed out that if the evidence relating to the founding of the land in dispute by Ezike-Ose, is discountenanced, the respondents' pleading in that regard would have stood unsupported. Relying on a host of authorities including Ezeudu v. Obiagwu (1986) 2 NWLR (Pt.21) 208; Nneji v. Chukwu (1996) 10 NWLR (Pt.478) 265, learned counsel submitted that the appellant's people had established acts of ownership both on the land in dispute and on surrounding portions of land thereof. The respondents, learned counsel stressed, did not prove the allegations in paragraphs, 14 and 15 of their defence to the effect that Chief Udeze Anunihu was their customary tenant at Ogbatu land and that Mmuogbaram Adibena (brother of first original plaintiff) was one of their caretakers on Ogbutu land. Nor, it was further stressed, did the respondents call on Mrs. M. A. Nzimiro and Dr. Okafor to testify and confirm that they were tenants of the respondents as the latter's plan Exhibit B portrayed them to be.

In response, it was submitted on behalf of the respondents that the learned trial Judge after hearing the parties and their witnesses as well as submissions of their counsel embarked on an elaborate evaluation of the evidence in line with the decisions in the cases of Mogaji v. Odofin (1978) 4 S.C. 91 at 93, and Bello v. Eweka (1981) 1 S.C. 101. Thereafter, the trial Judge made important findings of fact which were affirmed by the court below and which findings have not been faulted in this appeal. Referring to paragraph 8 of the Further Amended Statement of Claim and the evidence of P.W.I and P.W.2 thereon to the effect that the land in dispute

belongs to Ihitte community, learned counsel submitted that that averment and evidence were clearly at variance with the pleadings in paragraphs 6 and 6(a) of the said Further Amended Statement of Claim and contradicted the evidence of traditional history that the appellant’s ancestor founded the land in dispute. Citing the case of Emegokwe v. Okadigbo (1973) 4 S.C. 113, learned counsel submitted, in his brief, that a party must rely on the traditional history he pleaded and that in the instant case, “How Ohaji’s (sic) relations who were alleged to have Ohaji’s (sic) land came to own land after they constituted themselves into Ihitte community is not explained especially when Ohaji (sic) was pleaded as being owner in possession.”

The cardinal issue germane to this appeal is whether the appellant proved his case to entitle him to the relief he sought for a declaration of the customary right of occupancy over the land in dispute. Both parties laid claim of the ownership of the land in dispute and in proof thereof, each party relied on traditional history and various acts of ownership exercised over that land and long possession thereof. **It has long been established that there are five methods of proving title to land as was decided by this court in several cases including Idundun & Ors. v. Okumagba & Ors. (1976) NSCC 445, (1976) 9-10 S.C 227- 249 or 1976 1 NMLR 200; Piaro v. Tenalo (1976) 12 S.C. 31 at 33. A party seeking a declaration of title to land is not bound to plead and prove more than one root of title to succeed but he is entitled to rely on more than one root of title. However, where, as in this case, he relies on traditional history, and in addition acts of ownership and long possession predicated on the traditional history as pleaded, he is not entitled to a declaration of title based on the evidence of acts of ownership and possession where the evidence of traditional history is unavailing:** See Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 at 232; Eronini v. Iheuko (1989) 3 S.C. (Pt. 1) 30; (1989) 2 NWLR (Pt. 101) 46 at 61.

However, such evidence of acts of ownership and long possession becomes relevant where the traditional histories given by both sides though plausible are in conflict. In such a situation, it will not be open to the court simply to prefer one side to the other. To determine which of the histories is more probable the courts have called in aid

the principle enunciated in the celebrated case of *Kojo II v. Bonsie* (1957) 1 NWLR 1223 which is to the effect that the preference of one history to the other as being more probable would depend on recent acts of ownership and possession shown by the parties that the court would need to consider to make up its mind.

See *Ohiaeri v. Akabeze* (1992) 2 NWLR (Pt.221) 1 at 19 *Ekpo v. Ita* (1932-34) 11 NLR 68 *Mogaji v. Cadbury (Nig). Ltd* (1985) 2 NWLR (Pt.7) 393.

I had earlier stated that the dismissal of the appellant's case was not due to failure to prove the identity of the land in dispute as alleged by the appellant's counsel and that I would later consider the reason for the dismissal. I now wish to highlight portions of the judgment of the trial court on the basis of which the claim was dismissed. The learned trial Judge in coming to the conclusion as to which of the traditional histories of the parties was to be preferred examined the evidence of boundary witnesses called by the parties as well as the evidence of witnesses on the parties' activities on the land in dispute.

With respect to the former, the learned Judge disbelieved the evidence of P.W.2 called as the owner of a boundary land to the land in dispute and who testified that his father had farmed on the land. The evidence was disbelieved because according to the learned Judge, it was at variance with the evidence of P.W. 1 who testified that the land in dispute and the larger Ogbautu land were during farming season apportioned to individual families who in turn apportioned their shares to individual members. On the other hand the trial court accepted the evidence of D.W.4 called by the respondents who testified that his father's land called Enekeocha share common boundary with the land in dispute and that it was the father of the respondents who gave the said Enekeocha land to his father.

Dealing with the parties' activities on the land in dispute, the learned trial Judge at page 116 from line 18 to page 119 line 1 to 23 had this to say inter alia-

"I shall now consider the evidence of the parties as it affects their activities inside the land in dispute. P. W. 1 told the court that both the land in dispute and the surrounding lands were farm lands and that his commu-

nity farmed on the lands and reaped the crops therein.....
 Plaintiff did not call any members of these families to come and give evidence. P.W.2 did not do anything inside the land in dispute

On the other hand, the D.W.I told this court that from the time the
 B land in dispute was founded, until when the plaintiffs' community took out
 the action, his ancestors down to his family had been farming on the land in
 dispute; that his family built houses on the land and granted parcels of the
 land to outsiders for farming and harvesting of palm fruits. Witness testified
 C that his family worshipped a shrine called Ihu Ala Obeagwa which was on
 the land in dispute. This shrine is shown in defendants' plan Exhibit 'B'.
 Plaintiff never testified that his community had any shrine inside the land in
 dispute and none was shown in his plan Exhibit 'A'. D.W.3 was a native of
 Obeakpo in Egbuoma. He told the court that the father of the defendants
 D granted land to him on the land in dispute for farming and that he was also
 allowed to set up traps for animals in the land in dispute. This witness
 testified that he farmed on the land in dispute for 5 years and after the
 Nigeria civil war, he came back and farmed on the land up till 1975. He was
 E 60 years old.

P.W.I had mentioned that while Nwokocha Ukachukwu was har-
 vesting palm fruits on the land in dispute, he never put up any permanent
 structures. It will be recalled that according to P. W. 1 Nwokocha Ukachukwu
 F was driven away in 1982. But in plaintiff's plan Exhibit 'A' which was
 dated 19th December, 1986, a spot is shown "hut of defendant under con-
 struction cause of action". Since plaintiff had earlier told this court that
 Nwokocha Ukachukwu never built any permanent structure on the land in
 dispute and that the shelters he was allowed to set up had been blown away
 G by wind, this hut under construction cannot be anything else than one of
 the buildings of Nwokocha Ukachukwu and this corroborates the evidence
 of D.W.I and D.W.3 that Nwokocha Ukachukwu built houses on the land
 in dispute and I so hold.

H In the plaintiffs' plan, Exhibit 'A' inside the land in dispute, on the
 western side, close to the Enyinja stream, there are indications of ruined
 huts. These ruined huts are shown to belong to Emos Omenichakwa, Jesuwa,
 Amechi and three others all from (Isu). The plaintiff did not explain in his

plan who these persons were. It has to be recalled that the plaintiff had told this court that Nwokocha Ukachukwu brought in tenants into the land in dispute and when he was driven from the land, these tenants were also driven away with him. But the defendants had maintained that their father was never a tenant on the land in dispute and that he farmed the land and granted portions of the land to outsiders for farming and harvesting of palm fruits. B

In a corresponding area with plaintiff's plan, the defendants' plan showed "the ruined house of Joshua on land granted to him by the defendants". It therefore follows that these ruined huts shown in plaintiff's plan whose owners the plaintiff failed to explain who they were, were the huts belonging to the tenants of Nwokocha Ukachukwu. C

From the totality of evidence before me, the traditional history of the plaintiff is inconclusive and that of the defendant appears to be more probable. D

Consequently, I hold that the plaintiff's community are not the owners in possession of the land in dispute. On the contrary, I hold that the defendants are in effective possession of the land in dispute....." E

As can be gleaned from the above excerpts, the learned trial Judge having found that the evidence of recent acts of the respondents' people on the land in dispute preponderated over that of the appellant's community concluded that the traditional history of the respondents is more probable than that of the appellant and it is for those reasons that the appellant's case was dismissed and as I indicated earlier on, the dismissal did not turn on whether or not the identity of the land in dispute was established. F

The judgment of the learned trial Judge was affirmed by the court below but learned counsel for the appellant has raised several points to fault that judgment. He argued that the respondents' traditional history ought to have been rejected as there was no explanation about how the respondents' ancestor Ezike-Ose could have migrated from Obeagu to another town Ose-Motor to establish a settlement, and that if the respondents' traditional history had been so rejected it would have been unnecessary for the court to have recourse to re- G H

cent acts of the parties on the land in dispute. My simple answer to this contention is that one does not need to be a historian or an anthropologist to know that over the years people have migrated from their original habitation to establish settlements hundreds and thousands of kilometers away. There was nothing strange about the respondents' ancestor migrating from Obeagu to Ose-Motor. That migration is not a valid ground for the rejection of the traditional history of the respondents.

Again, learned counsel for the appellant contended that the respondents did not lead evidence as pleaded, that Chief Udeze Anunihu, Nzimiro and Dr. Okafor were their customary tenants and Muogbaram Adibena their caretaker. In my view, a party is not bound to lead evidence in proof of all the averments in its pleadings provided he has led enough evidence to sustain his claim or defence. Civil cases are decided on balance of probabilities and if one party adduces credible evidence which outweighs the evidence of the other party, the former is entitled to judgment: see the case of Mogaji v. Odofin (1979) 4 S.C. 91. Besides it is settled law that where a trial court unquestionably evaluates the evidence and appraises the facts, it is not the business of an appellate court to substitute its own views for the views of the trial court.

As this court held in the case of Odofin v. Ayoola (1984) 11 S.C. 72 per Oputa, JSC.-

“If there is any evidence to support a particular conclusion of the trial court, an appellate court which could have come to a different conclusion should restrain itself and respect the conclusion of the trial court that saw and heard the witness.”

Since I take the view that the findings of the trial court are amply supported by the evidence on record, the contention that the respondents did not prove some assertions in their pleadings is not tenable.

Finally, the appellant contended that as the respondents admitted that the appellant's people were in possession of the land in dispute as the tenants of the respondents' people Section 146 of the Evidence Act ought to be

invoked to raise the presumption that the land in dispute belongs to the appellant's community. With much respect to counsel, this contention is not well founded.

Section 146 Evidence Act, 1990 (formerly 145) reads-

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

This section was judicially considered by this court in the case of Udeze v. Chidebe (1990) 1 NWLR (Pt.125) 141 where at pages 160-162, Nnaemeka-Agu JSC., with some erudition, expressed the following opinion-

“It is left for me to mention that the courts below also found that although the appellants pleaded that the respondents were their customary tenants who occupy the land in dispute on payment of tribute, they failed to prove such a tenancy. It is significant to note that a customary tenant is in possession of his holding during good behaviour, and until it is forfeited for misbehaviour. Once it is the case that such a person is a customary tenant, and, therefore, in possession, then, like any other persons in possession of land, there is a presumption of ownership in his favour. Although that presumption is rebuttable, by due proof of a tenancy, the onus is on his adversary to rebut it if he can. Where, as in this case, the customary tenancy is not proved, such a pleading may turn out to be a dangerous admission of possession in the opposite party, upon which the trial court may have a presumption of ownership, unless, of course, it is rebutted.

It is true that, as a general proposition, where a party is admitted to be in possession of land in litigation between the parties, the onus is on the other side which is asserting the contrary to prove that he is not the owner of the land: See Section 145 of the evidence Act; also Onobruchere v. Esegine and Anor. (1986) 2 S.C 385, (1986) 1 NWLR (Pt.19) 799. But the real problem of such cases is that quite often, as in this case, there is tendency to confuse possession with mere occupation. ‘Occupation’ as used in relation to land entails mere physical control of the land in the time being. It is a matter of fact. Such a control may have originated from permission from the true owner; it may have been by stealth; or it may be a

tortuous trespass. Possession of land, on the other hand, may, sometimes entail or even coincide with occupation of it; but is not necessarily always synonymous or coterminous with it. A man, such as a landlord who collects rents from his tenants, may be in legal possession of the land even though he does not set his feet on it. This is why distinction is often made between de facto possession, which is mere occupation and de jure possession which entails possession animo possidendi with that amount of occupation, control or even, sometimes, the right to occupy at will sufficient to exclude other persons from interfering. See Lasisi Akanni Buraimoh v. Rebecca Ayinke Bamgbose (1989) NWLR (Pt. 109)352 at p. 361.

Within the meaning of this concept of possession, a man ordinarily living in Maiduguri may be in possession of a vacant house in Lagos if he is in possession of the keys. But in my opinion, that possession admission of which is capable of raising a presumption of ownership of land under Section 145 of the evidence Act must be that which amounts to de jure exclusive possession not mere occupation.” (Underlining for emphasis)

From the above illuminating judgment, particularly the underlined portion, it is clear that, that possession the admission of which is capable of raising a presumption of ownership of land under Section 145 now 146 of the Evidence Act must be that which amounts to de jure exclusive possession not mere occupation. Applying this principle to the facts of this case, it becomes necessary to examine the respondents’ pleadings to determine the nature of possession they admitted the appellant’s community had on the land in dispute. In this regard, paragraphs 9, 11, 13, 14, 15, 16 and 20 of the respondents’ Amended Statement of Defence are relevant.

The averments in those paragraphs show clearly that the respondents’ people have been farming on portions of the land in dispute; the respondents’ father built houses, both permanent houses and huts on the land; the respondents’ people granted portions of the land to tenants from other places including the appellant’s community for farming purposes. The implication is that both the respondents, as well as the members of the appellants’ community and others were farming on the various portions of the land in dispute. **In those circumstances, it cannot be said that the respondents admitted the appellant’s people were in exclu-**

sive de jure possession of the land in dispute. It is therefore my view that the provisions of Section 146 of the Evidence Act does not avail the appellant.

For the various reasons given, I hold that the issue under consideration must be resolved against the appellant. B

It remains to consider the appellant's 2nd - issue, labelled issue D3, which I again reproduce as follows:-

“D3 Whether there was proof of trespass as to entitle the plaintiff to the relief of injunction against the defendants.”

On the issue, the contention of learned counsel for the appellant is that respondents admitted in paragraph 17 of their defence that the appellant's people were in possession of the land in dispute in 1982 (lawfully or otherwise) when the respondents' father and his tenants were chased out therefrom. It was then submitted that since the respondents had not established a better title to the land in dispute, the claim for injunction ought to succeed in respect of the respondents' act of trespass in bulldozing the cassava farm of the appellant and his community in 1983. The cases of Amakor v. Obiefuna (1974) 3 S.C. 67 and Bamgboye v. E Olusoga (1996) 4 NWLR (Pt.444) 520 were cited and relied upon for the contention. In my view, the submission of learned counsel is based on false premises. Firstly, the appellant and his community were not in exclusive possession of the land in dispute. It is a correct statement of law that a claim in trespass is not dependent on proof of title to land. A plaintiff who fails to prove title may not necessarily fail in his action for trespass. If he establishes by evidence acts of exclusive possession, his claims for damages for trespass and an order of injunction may be granted: see Oluwi v. Eniola (1967) NMLR 339 at 340; Olaloye v. Balogun (1990) 5 NWLR (Pt. 148) 24 at 39-40, Ajero v. Ugorji (1999) 10 NWLR (Pt. 621) 1 at 11, Amakor v. Obiefuna (1974) 1 All NLR 119 at 126. **As I had pointed out in the consideration of the last preceding issue, the appellant's community were not in exclusive possession of the land in dispute. Indeed the learned trial Judge found as a fact that the appellant's Ihitte community were not owners in possession of the land in dispute. Secondly, the alleged act of trespass relied upon by the appellant which is to the** F G H

effect that the respondents' people bulldozed the cassava farm of the appellant and his community was not established. At page 120 of the record, the ninth finding of fact made by the trial Judge reads:-

“(9) *Nwokocha Ukachukwu never went into the land in dispute and bulldozed the cassava planted by the plaintiff's community.*”

Since the appellant's community were not in possession of the land in dispute and no act of trespass thereon was established against the respondents, there was no factual basis to sustain an order of injunction. I will similarly resolve this issue against the appellant.

In sum, this appeal lacks substance. It is accordingly dismissed. I affirm the judgment of the lower courts. I award the sum of N10,000.00 costs to the respondents against the appellant.

D

MOHAMMED JSC

I had before now read in draft the judgment just delivered by my learned brother, Edozie, JSC., and I agree entirely with him that this appeal has failed. The appeal is from concurrent findings of facts by the two courts and the appellants have failed to establish grounds which will show that the decisions are perverse which will invite interference with those findings. The appeal is dismissed. The judgments of the two courts below are hereby affirmed. I award N10,000.00 costs in favour of the respondents.

F

ONU JSC

I have read in draft the judgment of my learned brother, Edozie, JSC., just delivered. I am in complete agreement with him that the appeal lacks substance and it accordingly fails.

I, too, will dismiss the appeal and affirm the decisions of the two courts below with N10,000.00 costs to the respondents against the appellant.

H

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Edozie, JSC., and I entirely agree that this appeal is without substance and should be dismissed.

B

Accordingly, for the same reasons as are contained in the leading judgment, I, too, dismiss the appeal and I affirm the judgment of the court below.

I abide by the order for costs made in the leading judgment.

C

KALGO JSC

I have read in advance the judgment of my learned brother, Edozie, JSC which has been delivered this morning and I entirely agree with his treatment of the issue raised in the appeal and his reasoning and conclusions reached therein. He has so ably and pains-takingly considered the said issues in my view, that I have nothing useful to add thereto. I agree with him that there is no merit in the appeal and I dismiss it and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondents against the appellants.

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1 (2000) 6 KLR (Pt 106) 1915

2 (1997) 5 KLR (Pt 51) 936

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