

SUPREME COURT OF NIGERIA
16TH JULY, 2004. SC. 175/2000
CORAM:- I. L. KUTIGI, U. MOHAMMED, S. U. ONU,
U. KALGO, N. TOBI, JJSC

1. CHIEF ADEOYE ADIO FAGUNWA

(Baale Yaku)

2. MOSES AMAO OGUNWALE PLAINTIFFS/APPELLANTS

(For themselves and on behalf of

Baale Yaaku Family, Ogbomoso)

AND

1. CHIEF NATHANIEL ADIBI

2. ABRAHAM AJIBOYE DEFENDANTS/RESPONDENTS

3. DANIEL OLAWUYI OLATUNDE

(For themselves and on behalf of

Osi Agoro Family)

APPEALS - Grounds of appeal - Leave of court - Where not secured - Additional grounds argued in the brief - Will be discountenanced (H1)

JUDGMENTS - Appeals - Setting aside trial court's judgment by appellate court - Means that the judgment is dismissed - Supreme Court frowns - At move to use technicalities to overshadow justice (H2)

LAND LAW - Exhibits - Survey plan - Admission - Survey plan Exhibit C - Tendered by the plaintiffs - Admitted defendants' claim to the land (H3)

COURTS - Evaluation of exhibits - Trial court is duty bound - To consider relevant exhibits - And oral evidence tendered before it (H4)

LAND LAW - Title - Proof - Appellant did not prove title - Which presupposes exclusive right - As they admitted respondents title (H5)

LAND LAW - Trespass - Possession - Where a plaintiff fails to prove exclusive possession - Or right to possession - His action for trespass will fail (H6)

LAND LAW - Trespass - Injunction - Failure to prove trespass - Makes claim for perpetual injunction to fail automatically (H7)

INJUNCTIONS - Trespass - Failure to prove the case - Leads to dismissal of a plaintiff's case - And retrial will not be ordered (H8)

FACTS

Before the High Court, plaintiffs/appellants filed an action against the defendants/respondents claiming declaration of title to land, damages for trespass and perpetual injunction. Both parties relied on traditional history in seeking to establish their cases. While appellants told a story of how the land was originally founded by their ancestor, upon whose death the land kept devolving till it became the inheritance of the appellants, respondents told a different line of story as to how they inherited the land from their original ancestor. They contended that the area claimed by the appellants forms part of their family land together with other families, who have for many years been exercising right of ownership over the land in dispute.

The trial court found in favour of the appellants. In doing so, it failed to evaluate survey plans, which were tendered by the parties as exhibits. Respondents' appeal to the Court of Appeal was allowed in part. Being dissatisfied, the appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the Court of Appeal in the exercise of its appellate jurisdiction can merely set aside a judgment without making further order on the case.

(ii) Whether Exhibit C was properly held by the lower court to be defendant's family land and if the court was right whether that alone

would justify allowing grounds 6 and 15.

(iii) *Whether the lower court was right in its holding that the trial court did not give proper consideration to the case of the parties and wrongly put the onus of proof on the defendants.* Etc. see p. 2213

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

Grounds of appeal - Leave of court

1. The law is elementary that where a party seeks to make use of additional grounds, he must seek leave of court. See Order 8 rule 4 of the Supreme Court Rules. Where he fails to do so, the additional grounds are incompetent and the court will so treat them. I have searched in vain in the case file and I cannot see where this court granted leave to the appellants to file additional grounds. And what is more, counsel for the appellants did not call our attention to where this court granted the appellants leave to file additional grounds. In the circumstances, I will discountenance the additional grounds 6 to 11 purportedly argued in the brief. I know of the procedure where counsel, in anticipation of seeking leave of court to use additional grounds, take them in their brief, and at the hearing seek leave. I do not know of a procedure where a party uses additional grounds in his brief without leave of court. (p. 2218 C)

Setting aside trial court's judgment by appellate court

2. What is the legal effect of an appellate court setting aside the Judgment of a trial court? If a Judgment is set aside, it means that the Judgment is not legally valid. In my view, the expression “*set aside*” as used by the Court of Appeal means dismissal. A Judgment which is set aside has not the legal capacity to resurface for a retrial. By the order of setting aside, the issues canvassed in that court are dead as far as the court is concerned; and only an appellate court can resuscitate the judgment.

This court has always frowned upon technicalities. This court is not prepared to kowtow to technical issues which merely pursue the shadow of the matter and leave the substance. This court is prepared to do justice at all costs and where the road to doing justice is confronted with or edged out by technicalities, this court will carefully remove the brakes or hurdles on the

way to justice and do justice to the parties. Accordingly, I refuse Issue No. 1 as it fails in toto. (p. 2219 B)

LAND LAW - Exhibits - Survey plan

B 3. *In fact if one puts Exhibit C on Exhibit A one will see Osi Agoro family land formed boundary with Agboro family land, which in turn formed boundary with Agboro family land. In short the whole of these lands are in the land covered by Exhibit A which the plaintiffs were claiming declaration of title over. There is no doubt in my mind that Exhibit C contradicts Exhibit A.*"

D I am firmly of the view that the above very brilliant finding is clearly borne out from the evidence before the trial court. Exhibit C which was tendered by the plaintiffs/appellants clearly admitted the claim of the defendants/respondents to the land in dispute. And this is clearly an admission against interest, which is admissible evidence in our procedural law. (p. 2222 C)

E

COURTS - Evaluation of exhibits

F 4. The most startling aspect of the decision of the learned trial Judge is that he was curiously silent on the evaluation of the exhibits tendered in the case. Why was he silent? Has he the competence not to consider the exhibits tendered and admitted in the matter before him? I think not. A trial Judge must consider relevant exhibits tendered before him along with oral evidence. He cannot take only the oral evidence under Section 94(1) of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990.

G While I concede to the learned trial Judge that the law does not foist on him the duty to consider all the exhibits tendered before him, he must consider the relevant exhibits. In this case, Exhibits B, C, particularly, and to some extent Exhibits E and F are relevant in the determination of the strengths of the case in favour of either party. He ought not to have ignored them at all. It is because he failed to examine the exhibits that the Court of Appeal came to the conclusion that he did not properly consider the case of the defendants/respondents. If he had done so, the decision should have

been different, as it could have been in favour of the respondent.
(p. 2223 C)

Title - Proof - Appellant did not prove title

5. In my view, the appellants did not succeed in proving title to land, particularly in the light of Exhibits B, C and F. How can the appellants claim proving title to land when they made clear admissions of the title of the respondents in Exhibits B and C; exhibits which the learned trial Judge failed or should I say, forgot to consider.

Title to land presupposes exclusive right to the land in the sense that the party does not share the allodial right of ownership with any other person. Ownership generally connotes the totality of or the bundle of the rights of the owner over and above every other person on a thing. It connotes a complete and total right over property. The property begins with the owner and also ends with him. Unless he transfers his ownership of the property to a third party he remains the allodial owner. (p. 2224 B)

Where a plaintiff fails to prove exclusive possession

6. Trespass to land in law constitutes the slightest disturbance to the possession of land by a person who cannot show a better right to possession.

Any form of possession so long as it is clear and exclusive and exercised with the intention to possess is sufficient to support an action for trespass. Even a trespasser can maintain action on trespass against the world except the true owner. See *Graham v. Esumai* (1984) 11 S.C 123 at 150. It must be emphasized that for a plaintiff to institute or commence action on trespass, he must show that he is in exclusive possession; exclusive in the sense that he does not share his right of possession with any other person. A plaintiff needs not show ownership of the land; proof of actual possession can sustain an action on trespass. To resist the plaintiffs' claim, a defendant must show either that he is the one in actual possession or that he has a right to possession.

Did the plaintiffs/appellants prove exclusive possession? I think not.

It is clear to me that by their evidence they admitted that Agboro, Akinyo and Osi Agoro families were also in possession. The above apart, the evidence of the defendants/respondents, clearly support the admission of the plaintiff/appellants. And this destroys the claim to exclusive possession by the appellants. (p. 2225 B/E)

Injunction - Failure to prove trespass

7. The last relief is that of perpetual Injunction to restrain the defendants/respondents from committing further acts of trespass on the land. I do not think I will take any time here. The injunctive relief is parasitic on the other reliefs, particularly relief (c) on trespass. As the plaintiffs/appellants failed to prove trespass to the land, their claim for injunction automatically fails, particularly in the light of the decision of the Court of Appeal that the boundaries of the land in dispute were not clearly demarcated and therefore identified. (p. 2226 B)

Trespass - Failure to prove the case

8. Learned counsel for the appellants tried a possible luck for his clients by trying his hand at an order for a retrial. This to me is a big joke because there is no legal basis for such an order. It is trite law that where a plaintiff fails to prove his relief or reliefs, the action stands dismissed and it is dismissed. An order of a retrial gives the plaintiff a second chance to repair his case and return with his repaired case to fight the defendant. While the barman may allow the customer have a second taste or bite at the cherry, there is no such bar in the court and so the appellants will not be allowed' another chance to relitigate this actions. (p. 2226 E)

NOTABLE POINTS OF INTEREST

TOBI JSC

H 1. *Grounds of appeal are not named within the brief*

A brief is not a forum for enumerating or naming grounds of appeal, original or additional. Grounds of appeal are named and articulated in the Notice of Appeal and their Journey ends there. Although counsel is free in the formu-

lation of issues to state which grounds are dealt with in an issue, he has not the freedom to enumerate grounds of appeal in the brief. In the way learned counsel has freely done in the brief. (p. 2217 F)

B

2. Appellate court deals with issues not grounds

There is yet another related issue and it is the regular use of the expression “*the Court of Appeal ought to have allowed ground....*” “What does this really mean? In the brief system, neither the Court of Appeal nor the Supreme Court allows or disallows a ground of appeal in an appeal. As a matter of strict law and particularly in the area of adjectival law, grounds of appeal are not before the court and so the issue of allowing or disallowing them does not arise. As issues are formulated from the grounds of appeal, what is before the court are the issues and not the grounds. And so the courts deal with the issues before them and not with the grounds not before them. (p. 2217 H)

D

3. Briefs of appeal - Need for index to indicate evidence of witnesses E

I want to make a brief comment on the index of reference in the fairly voluminous record of appeal. It identified all the proceedings of the court, including hearing of motions, court notes, submissions of counsel. The court notes contain the evidence of the witnesses. While this is the practice adopted by some courts, others adopt another method which gives less problems to appellate courts. And this is the method where the index clearly indicates evidence of witnesses, for example, Evidence of P.W.1, Evidence of D.W.1 and so on. I prefer the latter method as it is easier for appellate judges to identify evidence of witnesses. A situation where evidence of witnesses is mixed up in maze of other court processes, particularly as in this record of appeal, is most unsatisfactory. It took me almost a whole day of search to locate the evidence of P.W 1 in this case and I do not think I enjoyed the exercise. I experienced not only so much difficulty in getting what I wanted in the record but also so much boredom. I will say no more. (p. 2226 G)

E

F

G

H

REPRESENTATION

Alhaji Lasu Sanusi, for the Appellants.

Chief A. O. Ogundeji, for the Respondents.

B

CASES REFERRED TO

Idika v. Erisi (1988) 2 NWLR (Pt.78) 563

Mbachu v. Oshodi (1977) NCAR 326 at 343

Gaametac Engineering Ltd. v. FCDA (1988) 4 NWLR (Pt 88) 296

C

Osolu v. Osolu (1998) 1 NWLR (Pt.535) 532

Solomon v. Magaji (1982) 11 S.C. 1 at 37

NBC v. Adeyemi (1956-84) 10 SSND 39

Ojiegbe v. Okwarayia (1962) All NLR 605

D

Salamatu v. Biba (1975) NNLR 176

Kodilinye v. Odu (1935) 2 WACA 336 pg 337 and 338

Eze v. Obiefuna (1995) 6 NWLR (Pt .404) 639

E **STATUTES & RULES REFERRED TO**

Court of Appeal Act s. 16

Supreme Court Rules 0.8 r. 4

Evidence Act Cap. 112 LFN 1990 s. 94 (1)

F

LEAD JUDGMENT BY TOBI JSC

The appellants as plaintiffs in the High Court claimed for declaration of title to land, damages for trespass and injunction restraining the defendants, their servants, agents, privies and workmen from committing further acts of trespass on the land in dispute. Both parties relied on traditional history.

G

The case of the appellants can be briefly stated. The founder of Yaaku chieftaincy family was Larinso who came from Ile-Igbon, Saaki near Old Oyo. Larinso farmed on the land. Upon his death, the farm devolved on his children. The successors to Larinso were Olusoji, Ojo H Areomi, Akinjebo, Mafoye, Ajao, Ige Taiwo and 1st plaintiff, Chief Adeoye Adio Fagunwa.

The respondents, as defendants told a different story, Osi Agoro, Akinyo, Ajadiagbon, Agbooro, Isapa, Alajagbon, Eleuji, Ajoo and Yaaku Idi-Ose families are all members of Yaaku Chieftaincy Family of Ogbomo. The ancestors of the 1st defendant, Chief Nathaniel Agboola Adibi, had to move in groups to Ogbomoso during the Fulani wars at different times. B Olukunle founded Osi Agoro family at Ogbomoso. Fasunle founded Akinyo family. Ajo founded Ajo family. While Olayale founded Agbooro, Bayewuwon founded Isapa family. Oladokun founded Elujuji family, Ajadiagbon founded Ajadiagbon family. Kolajo founded Yaaku Idi-Ose C family. Olatunde and Fagbemi Adibi are children of Oyelakun Fagunwa who begot the 1st defendant. Olatunde begot the 3rd defendant.

It is also the case of the respondents that the area claimed by the appellants at Atta and Igbo Sai Areas, Ogbomoso, forms part of their family land as well as the families of Agbooro and Akinyo and that the D said families have for many years been exercising rights of possession and ownership over the land in dispute.

Both parties led evidence at the trial. The learned trial Judge gave judgment to the plaintiffs/appellants in terms of their reliefs. Dissatisfied, E the defendants as appellants went to the Court of Appeal. That court allowed the appeal in part. It set aside the judgment of the High Court.

Dissatisfied, the appellants have come to this court. As usual, briefs were filed and exchanged. The appellants formulated the following issues F for determination:

“(i) Whether the Court of Appeal in the exercise of its appellate jurisdiction can merely set aside a judgment without making further order on the case.

(ii) Whether Exhibit C was properly held by the lower court to be G defendant’s family land and if the court was right whether that alone would justify allowing grounds 6 and 15.

(iii) Whether the lower court was right in its holding that the trial court did not give proper consideration to the case of the parties and H wrongly put the onus of proof on the defendants.

(iv) Whether the consideration of the complaints of the respondents in relation to the claim for declaration of title to a statutory right

of occupancy would justify setting aside the judgment of the trial court without considering whether the other reliefs were on the printed records properly granted by the trial court.

B (v) *Whether the lower court was right in allowing ground of appeal it did not consider or consider properly.”*

The respondents formulated two issues for determination:

“(i) *Whether judgment under appellant’s attack occasioned miscarriage of justice especially when the said judgment was sacrosanct in the circumstances.*

C (ii) *Whether an order of retrial is justified especially when plaintiffs/appellants (a) failed to prove their case and (b) led evidence which admitted defendants were in possession of the land along with others as of right.”*

D Learned counsel for the appellants, Alhaji Lasu Sanusi, submitted on Issue No.1 that the Court of Appeal was wrong in setting aside the judgment of the High Court without saying more, either a retrial or dismissal of the case. Relying on Section 16 of the Court of Appeal Act, E learned counsel contended that the Court of Appeal can give any judgment or make any order which ought to have been made or given and to make further order as the case may require including remitting the case to the trial court to be re-heard.

F Conceding that the Court of Appeal allowed the relief sought in the brief of the appellant in that court, counsel contended that it cannot be an excuse for the court to merely set aside the judgment without more. He cited *Kato v. Central Bank of Nigeria* (1991) 9 NWLR (Pt. 214) 126 at 147.

G It was the argument of counsel that the grounds of appeal allowed by the Court of Appeal would have justified an order for a retrial if the court adverted its mind to the points. He contended that since the learned trial Judge failed to give proper consideration to the case of the defendant H as the court did not put the parties, case on an imaginary scale to decide on which side the scale tilts, he ought to have ordered a retrial. He cited *Agbonifo v. Aiwero Oba* (1988) 1 NWLR (Pt.70) 325 at 348; *Okonji v. Njokanma* (1991) 7 NWLR (Pt.202) 131; *Solomon v. Mogaji* (1982) S.C.

I at 25; Olufosove v. Olorunfemi (1989) 1 S.C. (Pt. I) 29; (1989) 1 NWLR (Pt.95) 26, 36, 40 and Ude v. Agu (1961) NMLR 70 at 74. Counsel urged the court to uphold Issue No.1 and allow grounds 4 and 6.

On Issue No.2, learned counsel pointed out that contrary to the findings of the Court of Appeal, Exhibit C in fact is headed Agboro family land, which is the same thing as the heading of Exhibit B. He also pointed out that Agboro family is quite different and distinct from Agboro family, i.e. the defendant's family. I must say right away that this submission does not make any meaning to me because I do not seem to see the distinction as the names are exactly the same. Or can one be Agbooro family? He called in aid the learned trial Judge's review of the evidence at pages 146 and 147 of the record, to show that Agoro and Agbooro are two different names. This contention makes meaning because Agoro and Agbooro are different names. Accordingly, for the Court of Appeal to hold that Exhibit C was by the plaintiffs' admission part of the defendants' family land is clearly erroneous, learned counsel submitted. To counsel, where there is no evidence in support of a finding, such finding will not be allowed to stand. He relied on Odotun v. Ayoola (1984) 11 S.C. 72 at 86.

It was the submission of counsel that ground 6 did not seek to show that Exhibit C was by plaintiffs' admission part of defendants' family land, rather the contention in ground 6 as shown at pages 460A of the record, is that on the northern boundary of Exhibit C are written words: "*Osi Agoro family land.*" The Court of Appeal could only have allowed ground 6 if it found the case made therein established, counsel contended. But having made a finding contrary to the complaint in the ground, the court ought not to have allowed ground 6. Citing NIPC v. Thomson Organisation (1969) NMLR 99 and Ejokwhomu v. Edok-Eter Ltd. (1986) 5 NWLR (Pt.39) 1 at 16, learned counsel submitted that parties are bound by the grounds of appeal. Learned counsel made the same submission in respect of ground 15 and urged the court to allow Issue No.2 and grounds one and seven relating thereto.

Taking Issues 3 and 4 together, learned counsel submitted that the Court of Appeal was wrong in holding that the failure of the trial Judge to evaluate Exhibits B and C resulted in not giving the defendants' case the

treatment it deserved, and that the Judge failed to put the parties' case on the imaginary scale of justice to see where the pendulum tilts. He enumerated six reasons at pages 10 to 11 of the appellants' brief, faulting the findings of the Court of Appeal. Counsel cited *Odukwe v. Ogunbiyi* (1998) 6 S.C. 72: B (1998) 8 NWLR (Pt.561) 339 at 352; *Dawodu v. NNPC* (1998) 1-2 S.C. 95; (1998) 2 NWLR (Pt 538) 355 at 369; *Anyaduba v. NRTC Ltd.* (1992) 5 NWLR (Pt.243) 535; *Nwabueze v. Okoye* (1988) 10-11 S.C. 77; (1988) 4 NWLR (Pt.91) 644 at 679; *Alakija v. Abdulai* (1998) 5 S.C. 1; (1998) 6 NWLR (Pt.552) 1; *Ngene v. Igbo* (2000) 4 NWLR (Pt.651) 131 at 143 and C *Oduanya v. Osinowo* (2000) 2 NWLR (Pt.646) 574 at 582. He urged the court to allow Issue 3 and grounds 2, 3, 5, 8, 9, and 10.

On Issue 5, learned counsel took time to enumerate the contents of grounds 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13 and 14 and submitted that the D judgment of a court must demonstrate in full a dispassionate consideration of the issue properly raised and heard and must reflect the result of such an exercise. He cited *Ojogbue v. Nnubia* (1972) All NLR 644 at 669 and *Okonji v. Njokanma* (1991) 7 NWLR (Pt.202) at 131. The non-consideration of E Exhibits B and C by the trial court as held by the Court of Appeal cannot be an answer to each of the complaints of the appellants in their thirteen grounds before the courts, learned counsel argued.

He submitted that since grounds 10 and 15 had earlier been considered under the appellants Issues 3 and 4, they cannot be properly raised and F reconsidered under Issue six again. The Court of Appeal, counsel contended, ought to have held that the raising of the same ground under different issues is in fact an abuse of court process and the court ought to have dismissed the two grounds. He cited *Harriman v. Harriman* (1989) 5 NWLR (Pt. G 119) 6 at 16 and *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156 at 188. He urged the court to allow Issue 5 and the related ground 11.

Learned counsel for the respondents, Chief O. A. Ogundeji, would appear to have raised a preliminary objection (without saying so) in respect of the H appellants arguing additional grounds in their brief without leave of court. Citing *Nkpuma v. The State* (1995) 12 SCNJ 48; *Adeni v. Atega* (1995) 6 SCNJ 44 and *Agbaka v. Amadi* (1998) 7 S.C. (Pt 11) 18; (1998) 7 SCNJ 367, learned counsel submitted that the additional grounds of appeal argued

in the appellants' brief without leave of this court are incompetent.

Arguing the two issues together, learned counsel submitted that by Exhibit C tendered by the appellants, they admitted that the Akinyo family, Agoro family and Osi Agoro family were land owners within Exhibit A. Counsel also claimed that the facts contained in Exhibit C agreed with those in Exhibit F which supported defendants/respondents' case that they were legitimate owners within the land in dispute. He cited Paul v. Ozokpo (1995) 4 SCNJ 119; Ezeafukwe v. John Holt Ltd. (1996) 2 SCNJ 104 and Adeyeri v. Okobi (1997) 6 SCNJ 67.

It was the submission of learned counsel that since trespass is an action based on exclusive possession, the claim must fail as the appellants were not in exclusive possession of the land in dispute, in view of their admission that Agbooro, Akinyo and Osi Agoro families were also in possession of the land. He cited once again Paul v. Ozokpo (supra).

On the burden of proof, learned counsel pointed out that the learned trial Judge rested the burden on the defendants instead of on the plaintiffs; and the Court of Appeal rightly reversed the decision. Relying on Daodu v. NNPC (1998) 1-2 S.C. 95; (1998) 1 SCNJ 95, learned counsel submitted that the burden in civil cases lies on the party who asserted the affirmative. On the issue of retrial, learned counsel submitted that the case is not fit for retrial as the plaintiffs failed to prove their case. He cited Udih v. Idemudia (1998) 3 S.C. 50; (1998) 8 SCNJ 36. Counsel urged the court to dismiss the appeal and not order a retrial.

Let me take the preliminary objection first. It is in respect of additional grounds 6 to 11 which learned counsel for the appellants enumerated at pages 3 to 5. A brief is not a forum for enumerating or naming grounds of appeal, original or additional. Grounds of appeal are named and articulated in the Notice of Appeal and their Journey ends there. Although counsel is free in the formulation of issues to state which grounds are dealt with in an issue, he has not the freedom to enumerate grounds of appeal in the brief In the way learned counsel has freely done in the brief.

There is yet another related issue and it is the regular use of the expression "*the Court of Appeal ought to have allowed ground.....*" "What does this really mean? In the brief system, neither the Court Appeal nor the

Supreme Court allows or disallows a ground of appeal in an appeal. As a matter of strict law and particularly in the area of adjectival law, grounds of appeal are not before the court and so the issue of allowing or disallowing them does not arise. As issues are formulated from the grounds of appeal, what is before the court are the issues and not the grounds. And so the courts deal with the issues before them and not with the grounds not before them. See generally *Idika v. Erisi* (1988) 2 NWLR (Pt.78) 563; *Madumere v. Okafor* (1996) 4 NWLR (Pt 445) 637; *Gaametac Engineering Ltd, v. FCDA* (1988) 4 NWLR (Pt 88) 296; *Osolu v. Osolu* (1998) 1 NWLR (Pt.535) 532; and *Shie v. Lokoja* (1998) 3 NWLR (Pt.540) 56.

The law is elementary that where a party seeks to make use of additional grounds, he must seek leave of court. See Order 8 rule 4 of the Supreme Court Rules. Where he fails to do so, the additional grounds are incompetent and the court will so treat them. I have searched in vain in the case file and I cannot see where this court granted leave to the appellants to file additional grounds. And what is more, counsel for the appellants did not call our attention to where this court granted the appellants leave to file additional grounds. In the circumstances, I will discountenance the additional grounds 6 to 11 purportedly argued in the brief. I know of the procedure where counsel, in anticipation of seeking leave of court to use additional grounds, take them in their brief, and at the hearing seek leave. I do not know of a procedure where a party uses additional grounds in his brief without leave of court.

I have carefully examined the original grounds of appeal and I am of the opinion that Issues 1 to 4 are formulated from the original grounds. Although the issues are not elegantly formulated from the grounds, I am prepared to use them in this appeal. I realize that only Issue 5 which is formulated from the additional ground 11 is not covered by the original grounds of appeal. I shall therefore discountenance the issue.

Let me now take Issues 1, 2, 3 and 4 seriatim. Issue No.1 as stated above, questions the order of the Court of Appeal of merely setting aside the judgment of the High Court without further order on the case. Counsel expected the Court of Appeal either to add that the appeal was

dismissed or it was sent back to the trial Judge for a retrial. The final order of the court is at page 521 of the Record. It reads:

“In the final analysis the appeal succeeds in part. The Judgment of the lower court is hereby set aside. I award N1000 costs in favour of the appellants against the respondents.”

What is the legal effect of an appellate court setting aside the Judgment of a trial court? If a Judgment is set aside, it means that the Judgment is not legally valid. In my view, the expression “set aside” as used by the Court of Appeal means dismissal. A Judgment which is set aside has not the legal capacity to resurface for a retrial. By the order of setting aside, the issues canvassed in that court are dead as far as the court is concerned; and only an appellate court can resuscitate the judgment.

This court has always frowned upon technicalities. This court is not prepared to kowtow to technical issues which merely pursue the shadow of the matter and leave the substance. This court is prepared to do justice at all costs and where the road to doing justice is confronted with or edged out by technicalities, this court will carefully remove the brakes or hurdles on the way to justice and do justice to the parties. Accordingly, I refuse Issue No.1 as it fails in toto. I do not think the case of Ude v. Agu (supra) cited by learned counsel for the appellants is helpful to his clients.

That takes me to Issue No.2. Although that issue is formulated vis-a-vis grounds 6 and 15, I realize that it also covers the original grounds of appeal. As a matter of fact, it is almost the fulcrum of this appeal. It is on Exhibit C And what is Exhibit C? It is a survey plan prepared by the plaintiffs/appellants on 23/9/88. It was tendered by the plaintiffs/appellants. There is evidence that it was carved out of Exhibit A, another survey plan prepared by the plaintiffs/appellants on 26/6/88. Exhibit C, for short, showed that the Akinyo family, Agoro family and Osi Agoro family were land owners within Exhibit A. This was clearly an admission against interest on the part of the appellants.

The 1st plaintiff under cross-examination said at page 96:

“The description I had earlier given covered the entire Yaaku family

land. Both Areago Oyeyida and Osi Agoro families own the land known and called Igbon Aladorin land..... The connection of Osi Agoro family with Igba Aladorin land is through their maternal side being related to Areago family. I do not know the existence of Yaaku Idi Ose family in Ogbomoso, but I am aware of the existence of Osi Agoro, Akinyo, Ajo, Agboro, Isapa, Elinji and Ajadiagbon in Ogbomoso, and not Yaku Idi Ose family.”

Let me pause here and reproduce paragraphs 6, 21 and 22 of the Amended Statement of Defence:

“6. The defendants are principal members of the Osi Agoro family or branch of the Yaaku Chieftaincy family. The 1st defendant is the Head of the Osi Agoro family and holds the title Osi Agoro of Ogbomoso.

21. The area claimed by the plaintiffs at Atta and Igbo Sai Areas, Ogbomoso, forms part of the defendants’ family land and part of the land of the families of Agbooro and Akinyo, bounded by the land of following families, Osi Agoro, Agboro Akinyo Okolo, Adegbite, Ladoke, Otukoko, Ekarun and Ikose.

22. The said families have for many years been exercising rights of possession and ownership over their respective lands including grants to members of their families, tenants, and other grantees (Some of whom have huts and villages on the land) used for farming, sand gravel digging and other purposes.”

Both the evidence of the 1st plaintiff and paragraphs 6 and 21 of the Amended Statement of Defence mention one family in common, and it is the Osi Agoro family, the family of the defendants/respondents.

D.W.I, in his evidence in-chief, said at page 102:

“Exhibit B represents the dealing between my family and the plaintiff’s family. Exhibits A and C are the survey plans I referred to in Exhibit D. The land described in Exhibit C is my family land. The plaintiffs’ family did not grant the land in Exhibit C to my family. They are not our grantors at all. My family, the Agboro family, have blood relationship with Yaaku family. It is not true as contended by the 1st plaintiff, that my great grandfather was slave to Yaaku family and neither was my great grandfather a priest to any family. I have heard of Osi Agoro, Akinyo, Ajadiagbon, Isapa, Alajagbon, Elinji, Ajoo and Yaaku Idi Ose families; all these fami-

lies constitute a chieftaincy family known as Yaaku Chieftaincy Family. Things that are common to us all are Yaaku farmland and the cognomen called Ilo.”

The last two sentences of the witness are most germane and relevant. Again the name of, the respondents family, Osi Agoro comes out in the evidence. B

Learned counsel for the appellants invited this court to pages 146 and 147 on his contention that the learned trial Judge in his review of the evidence said that Agoro and Agbooro are two different names as they relate to Exhibits C and B which are headed Agboro family land and Agboro family. I have in obedience to counsel examined pages 146 and 147 of the record, and I do not, with respect, see where the learned trial Judge said what counsel credited to him. Perhaps, I do not sound that clear. I think I can sound clearer if I quote the relevant portions on pages 146 and 147: D

“There is only one Baale Yaaku family compound in Ogbomoso. Osi Agoro, Akinyo, Ajadiagbon, Agboro, Elenji, Ajo and Yaaku Idi-Ose are not members of Yaaku family..... None of Osi Agoro, Akinyo, Ajadiagbon, Agboro, Isapa, Ilajagbon, Elenji, Ajo and Yaaku Idi-Ose ever became Baale Yaaku.” E

I think the point I made is now clear. It does not support or evindicate the submission of learned counsel for the appellants. Yes, I agree with the point that the above passage supports the case of the appellants. Of course, that was why the learned trial Judge gave them judgment which the Court of Appeal set aside. It is that judgment that the Court of Appeal set aside that I am examining. I do not think the above findings of the learned trial Judge should be the basis of giving judgment to the plaintiffs/appellants. F

I think I should still continue with Exhibit C, particularly what the Court of Appeal said about the exhibit. Delivering the leading judgment of the court, Mukhtar, JGA., said sit pages 509, 510 and 518 and I will quote her in extenso: G

“It is on record that the plaintiffs tendered Survey Plans -marked H Exhibits A and C and the Defendants tendered one marked Exhibit F. I agree with learned counsel’s contention in the appellants’ brief of argument that Exhibit C showed that the plaintiffs admitted that Akinye and

Osi Agoro family are land owners within Exhibit A which is an overall plan of the land claimed by Yaaku family land whereas Exhibit C was carved out of the land in Exhibit A to show Agboro family land.....’

Looking carefully at Exhibits A and C it is very clear that the area of
B land in dispute is the same as the one on Exhibit C..... In the instance
case the plaintiffs tendered Exhibits A, B and C. Exhibit A from which
Exhibit C was carved out did not disclose the names of Akinyo, Osi Agoro
and Bale Ekarun as boundary families of the plaintiffs, whereas Exhibit
*C C which was signed by the plaintiffs discloses such information. **Infact if***
one puts Exhibit C on Exhibit A one will see Osi Agoro family land
formed boundary with Agboro family land, which in turn formed bound-
ary with Agboro family land. In short the whole of these lands are in the
D land covered by Exhibit A which the plaintiffs were claiming declaration
of title over. There is no doubt in my mind that Exhibit C contradicts
Exhibit A.”

I am firmly of the view that the above very brilliant finding is
clearly borne out from the evidence before the trial court. Exhibit C
E which was tendered by the plaintiffs/appellants clearly admitted the
claim of the defendants/respondents to the land in dispute. And this is
clearly an admission against interest, which is admissible evidence
in our procedural law. See NBC v. Adeyemi (1956-84) 10 SSND 39:
F Ojiegbe v. Okwarayia (1962) All NLR 605; Salamatu v. Biba (1975) NNLR
176; Okai v. Ayikai (1946) 12 WACA 31.

That takes me to Issue 3. It is on the burden of proof. The Court of Appeal said at pages 519 and 520 of the record:

G “This notwithstanding, in the light of the foregoing discussion, I
don’t think the plaintiffs proved their case to have warranted the shifting of
the onus of proof on the defendants. As such the answer to the issue is in the
negative..... It is correct to say that the plaintiffs admitted per Exhibits B
and C that the land on the right hand side of Ogbomoso Water Works, was
H bona fide Osi Agoro family land, as such the admission having been made
later in time supersedes the plaintiffs’ claim as contained in Exhibit A.
The lack of evaluation and consideration of Exhibits B and C has resulted
in the learned trial Judge not having the case for the defendants’ family and

other families had land within the land they were claiming and on which they allege the defendants trespassed upon. The said Exhibit C speaks for itself. To continue with the arguments preferred on this issue in the appellants' brief will be tantamount to repeating what has already been discussed. The sum total is that the learned trial Judge did not put the evidence of both plaintiffs and defendants on the imaginary scale of justice to see where the pendulum tilts, for if he had done so, he would have found it tilting more to the side of the defendants' case." B

I entirely agree with the above findings of the Court of Appeal. It could not have been otherwise. **The most startling aspect of the decision of the learned trial Judge is that he was curiously silent on the evaluation of the exhibits tendered in the case. Why was he silent? Has he the competence not to consider the exhibits tendered and admitted in the matter before him? I think not. A trial Judge must consider relevant exhibits tendered before him along with oral evidence. He cannot take only the oral evidence under Section 94(1) of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990.** C D E

While I concede to the learned trial Judge that the law does not foist on him the duty to consider all the exhibits tendered before him, he must consider the relevant exhibits. In this case, Exhibits B, C, particularly, and to some extent Exhibits E and F are relevant in the determination of the strengths of the case in favour of either party. He ought not to have ignored them at all. It is because he failed to examine the exhibits that the Court of Appeal came to the conclusion that he did not properly consider the case of the defendants/respondents. If he had done so, the decision should have been different, as it could have been in favour of the respondent. F G

The million naira question is whether the appellants proved their case? The first claim is declaration of title to land. As it is, both parties relied on traditional history. The celebrated case authority on this is the case of *Idundun v. Okumagba* (1976) 1NMLR 200. Dealing with the case, the Court of Appeal said at pages 517 and 518: H

"One of the five ways of which a party wanting the above relief

must prove have (sic) been stated in the case of *Idundun v. Okumagba* (1976) 1 NMLR 200 . One of such ways, upon which the plaintiffs have predicated their claim on, is traditional evidence. One of the prerequisites of succeeding in the claim, in whatever of the five ways the claim is hinged on is that the party claiming must ascertain the size of the parcel of land he is claiming, i.e. its size and its boundaries, where he fails to do so the claim will fail.”

In my view, the appellants did not succeed in proving title to land, particularly in the light of Exhibits B, C and F. How can the appellants claim proving title to land when they made clear admissions of the title of the respondents in Exhibits B and C; exhibits which the learned trial Judge failed or should I say, forgot to consider.

Title to land presupposes exclusive right to the land in the sense that the party does not share the allodial right of ownership with any other person. Ownership generally connotes the totality of or the bundle of the rights of the owner over and above every other person on a thing. It connotes a complete and total right over property. The property begins with the owner and also ends with him. Unless he transfers his ownership of the property to a third party he remains the allodial owner.

In *Kodilinye v. Odu* (1935) 2 WACA 336, Webber, CJ., said at pages 337 and 338:

“The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendants’s case. If this onus is not discharged, the weakness of the defendant’s case will not help him and the proper judgment is for the defendant.”

The learned trial Judge devoted so much of his judgment in pointing out contradictions in the evidence of the respondents and did not see the contradictions in the case of the appellants vide Exhibits B and C. The position he took is clearly contrary to *Kodilinye v. Odu* and I have no difficulty

in coming to the conclusion that his evaluation of the evidence was perverse.

Can the appellants claim ownership to the land in dispute in the light of Exhibits B, C and F? Since the appellants made concessions in Exhibits B and C, it is my view that the appellants did not prove their claim of title to land. B

The next claim is damages for trespass. **Trespass to land in law constitutes the slightest disturbance to the possession of land by a person who cannot show a better right to possession.** See Solomon v. Magaji (1982) 11 S.C. 1 at 37. In Renner v. Annan (1934) 2 WACA 258, the West African Court of Appeal said: C

“A trespass to land is an entry upon land or any direct and Immediate interference with the possession of land. The comprehensive way of describing trespass is to say that the defendant broke and entered the plaintiff’s close and did damage, and it follows that in order to maintain an action for trespass the plaintiff must have a present possessory title - an owner of land who is legally entitled not being competent to maintain an action for trespass, before entry (Wallis v. Hands (1893) 2 Ch. 75).” D E

See also Mbachu v. Oshodi (1977) NCAR 326 at 343.

Any form of possession so long as it is clear and exclusive and exercised with the intention to possess is sufficient to support an action for trespass. Even a trespasser can maintain action on trespass against the world except the true owner. See Graham v. Esumai (1984) 11 S.C 123 at 150. It must be emphasized that for a plaintiff to institute or commence action on trespass, he must show that he is in exclusive possession; exclusive in the sense that he does not share his right of possession with any other person. A plaintiff needs not show ownership of the land; proof of actual possession can sustain an action on trespass. To resist the plaintiffs’ claim, a defendant must show either that he is the one in actual possession or that he has a right to possession. See Amakor v. Obiefuna (1974) 3 S.C. 67 at pages 75-76. See also Ekwere v. Iyiegbu (1972) 6 S.C. 116; Obijuru v. Ozims (1985) 4 S.C. (Pt.1) 142 at 200; Ngene v. Igbo (2000) 4 NWLR (pt .651) 131 at 143. F G H

Did the plaintiffs/appellants prove exclusive possession? I think not. It is clear to me that by their evidence they admitted that Agboro, Akinyo and Osi Agoro families were also in possession. The above apart, the evidence of the defendants/respondents, clearly support the admission of the plaintiff/appellants. And this destroys the claim to exclusive possession by the appellants

The last relief is that of perpetual Injunction to restrain the defendants/respondents from committing further acts of trespass on the land. I do not think I will take any time here. The injunctive relief is parasitic on the other reliefs, particularly relief (c) on trespass. As the plaintiffs/appellants failed to prove trespass to the land, their claim for injunction automatically fails, particularly in the light of the decision of the Court of Appeal that the boundaries of the land in dispute were not clearly demarcated and therefore identified. See Oluwi v. Eniola (1967) NMLR 339; Eze v. Obiefuna (1995) 6 NWLR (Pt. 404) 639; Anibire v. Waniloju (1993) 5 NWLR (Pt.295) 623; Obanor v. Obanor (1976) NMLR 39.

Learned counsel for the appellants tried a possible luck for his clients by trying his hand at an order for a retrial. This to me is a big joke because there is no legal basis for such an order. It is trite law that where a plaintiff fails to prove his relief or reliefs, the action stands dismissed and it is dismissed. An order of a retrial gives the plaintiff a second chance to repair his case and return with his repaired case to fight the defendant. While the barman may allow the customer have a second taste or bite at the cherry, there is no such bar in the court and so the appellants will not be allowed' another chance to relitigate this actions.

I want to make a brief comment on the index of reference in the fairly voluminous record of appeal. It identified all the proceedings of the court, including hearing of motions, court notes, submissions of counsel. The court notes contain the evidence of the witnesses. While this is the practice adopted by some courts, others adopt another method which gives less problems to appellate courts. And this is the method where the index clearly indicates evidence of witnesses, for example, Evidence of P.W.1,

Evidence of D.W.1 and so on. I prefer the latter method as it is easier for appellate judges to identify evidence of witnesses. A situation where evidence of witnesses is mixed up in maze of other court processes, particularly as in this record of appeal, is most unsatisfactory. It took me almost a whole day of search to locate the evidence of P.W 1 in this case and I do not think I enjoyed the exercise. I experienced not only so much difficulty in getting what I wanted in the record but also so much boredom. I will say no more.

In sum, this appeal lack; merit and it is dismissed. I award N10,000.00 costs to the defendants/respondents.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Niki Tobi, JSC, I agree with his reasoning and conclusion to dismiss the appeal. The appeal is therefore dismissed with costs as assessed.

MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Niki Tobi, JSC., in draft and I agree with him that the judgment of the Court of Appeal is unimpeachable. I also agree that no ground has been established by the appellants to warrant sending the case back to the High Court for a retrial. Accordingly, the appeal is dismissed. I affirm the judgment of the Court of Appeal. I too award N10,000.00 costs in favour of the respondents.

ONU JSC

Having been privileged to read in draft the judgment of my learned brother, Niki Tobi, JSC., I am in entire agreement with him that the appeal lacks substance and it accordingly fails.

In consequence, I too dismiss the appeal and award N10,000.00 costs to the defendants/respondents.

KALGO JSC

I have read in draft the judgment just delivered by my learned brother, B Tobi, JSC., in this appeal. I agree entirely with his reasoning and conclusions therein. I agree that there is no merit in the appeal. I therefore dismiss it with costs as assessed in the leading judgment.

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