

**SUPREME COURT OF NIGERIA**  
10TH DECEMBER, 2004. SC. 207/1999  
**CORAM:- S. M. A. BELGORE, A. I. IGUH, S. A. UWAIFO, D.**  
**MUSDAPHER, S. A. AKINTAN, JJSC**

MR. TAIWO ILARI OGUN ..... APPELLANT  
AND

1. MR. MOLIKIAKINYELU

2. MR. AMINU OREOBA ..... RESPONDENTS

3. MR. LATIFU ATOLAGBE

(For themselves and on behalf of  
Osata Adasin Family of Ijana  
Quarters, Otta, Ogun State)

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LAND LAW - Customary tenancy - Forfeiture - Long possession - Denial of overlord's title - Is a serious misbehaviour - That grounds forfeiture of possession (H1)

COURTS - Judgments - Decisions - Allegation of inconsistent decision against Court of Appeal - Is not correct (H2)

LAND LAW - Title - Survey plan - Identity of land in dispute - Onus is on plaintiff - Two ways to establish identity of the land - Survey plans tendered showed identity of the land (H3)

LAND LAW - Title - Boundary - Burden of proof - Lies on plaintiff initially - But will not arise where identity of the land is not in issue (H4)

LAND LAW - Title - Traditional history evidence - Can solely support a claim for declaration of title (H5)

LAND LAW - Title - Traditional history - Conflict in histories - Is resolved vide facts - Or recent acts of ownership (H6)

LAND LAW - Title - Traditional histories - Where trial court weighs both parties' stories - And finds one more probable - Recent acts of ownership - Need not be considered (H7)

### **FACTS**

The plaintiffs/respondents initially filed this action in a representative capacity at a Grade One Customary Court in Ogun State against the defendant/appellant. They claimed declaration of ownership in respect of the land in dispute which was about 105 hectares. Immediately hearing commenced, for reasons not clearly apparent, the defendant successfully petitioned the Chief Judge of Ogun State and the matter was transferred to the Otta Judicial Division of the High Court. Plaintiffs called seven witnesses while the defendant called eight witnesses. The parties relied mainly on their different versions of traditional histories.

Respondents pleaded how they inherited the land from the original founder and how they granted parcels of the land to many customary tenants including the appellant's grandfather. Appellant on his part denied all the respondent's claims. He denied never being respondents' customary tenant. He sought to establish that respondents were his customary tenants. The trial court found the respondents' traditional history more probable and granted their claim, without considering the parties' recent acts of ownership on the land in dispute. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

(1) Whether the final conclusion of the Court of Appeal that the appellant has forfeited his customary tenancy was justified having regard to the case presented to it and the earlier findings of the court.

(2) Whether the learned Justices of the Court of Appeal were right in holding that the respondents established the identity of the land in dispute with certainty as to entitle them to the declaration sought.

(3) Whether the learned Justices of the Court of Appeal were right in holding that the trial court adopted the correct approach in resolving the conflict in evidence of traditional histories preferred by the parties.

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

***Customary tenancy - Forfeiture***

1. Denial of an overlord's title by a customary tenant is one of the greatest breaches that a customary tenant can commit. See *Akpagbue v. Ogo* (1976) 6 S.C 63. See also *Taiwo v. Akinwunmi* Supra. A misbehaviour by a customary tenant may attract forfeiture depending on the seriousness and repetitive nature of the acts constituting such misbehaviour and the peculiar facts and circumstances of each case. It is indeed a most serious act of misbehaviour by a customary tenant to deny the title of the true overlord to the land of which he is a tenant. In the instant case, there is no dispute whatever, the appellant by his pleadings and evidence denied the ownership of the respondents and went even to the extent of claiming that the respondents were his tenants. From all the circumstances of this case, it does not lie on the appellant to claim that the respondent claimed forfeiture for non-payment of rent alone. In land cases, such as this one, where a customary tenant turns round not only to dispute the ownership of the title holder but goes out of his way to claim title, he forfeits his rights as a tenant and his possession of the land.

The issue of the long possession of the appellant and his predecessor to the land cannot under the circumstances vest title. See *Dacosta v. Ikomi* (1968) 1 All NLR 394. (p. 2375 B / 2376 A))

***Allegation of inconsistent decision against Court of Appeal***

2. The other point worthy of consideration is the issue whether the court below had actually made inconsistent decisions on the issue of forfeiture of the customary tenancy. I have very carefully read the relevant portions of the lead judgment of Onalaja, JCA. The learned Justice was not expressing his opinion or decision on the matter, he was merely referring to the submissions of the learned counsel for the appellant. This is borne out clearly because at the next preceding paragraph (i.e. paragraph 4 of page 143) the learned Justice continued to refer to the submissions made by the learned counsel for the respondent on the same issue, (that is Issue No 2 before the court below). The learned Justice could not obviously make a decision before considering the submissions of the respondents' counsel. In my view,

the complaint of the appellant that the court below made inconsistent and irreconcilable decisions is not correct and is not justified. (p. 2376 B)

***Title - Survey plan - Identity of land in dispute***

B 3. In an action for declaration of title to land, the onus is on the plaintiff to establish with certainty the identity of the land to which his claim relates. 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 in producing a survey plan of the said land. See *Baruwa v. Ogunsola* (1938) 4 C WACA 159.

Another way and perhaps a better way of proving the identity and extent of the land claimed is by the plaintiff filing a survey plan reflecting all the features of the land and showing clearly the boundaries. See *Awoye v. Owodunni* (No. 2) (1987) 2 NWLR (Pt. 57) 367. In the case at hand D both parties tendered the survey plan of the land in dispute. The appellant tendered Exhibit B, while the respondents tendered Exhibit A.

Thus the survey plans tendered by both the appellant and the re- E spondents show clearly the disputed land and the witness called by the appellant testified that the land claimed by the appellant formed a portion of the land claimed by the respondents. (p. 2377 H / 2378 E)

F ***Title - Boundary - Burden of proof***

4. The law is settled that a plaintiff seeking a declaration of title to land has the initial and the primary burden of proving clearly and unequivocally the precise area to which the claim relates. But this burden will not exist where the identity of the land in dispute was never a question in Issue. The ques- G tion of the identity of the land as an issue will only arise where the defendant raises it in his statement of defence or in his testimony. In the instant case, throughout the trial the identity of the land in dispute was clearly not in issue. The pleadings of the parties and the evidence made it obvious that the parties H knew the land they were disputing about. The parties knew themselves and each of the parties claimed the other to be his customary tenant. A plan may not be an absolute necessity in the instant case, but may be desirable where witnesses may and often give the same locations different names.

In my view, it is of no moment where different witnesses gave different names to the boundary men or different names to pieces of surrounding lands, unless it is shown that the witnesses are not referring to same land. The appellant has failed to clearly raise the issue of the identity of the land in his pleading, evidence or cross-examination. B  
(p. 2378 E)

***Traditional history - Can solely support a claim for declaration of title***

5. Now, there is no doubt in the instant case both the appellant and the respondents claimed ownership of the land. Title or ownership of the land for this purpose presupposes exclusive or immediate exclusive right to land, i.e. total allodial right of ownership unless the owner voluntarily transfers his rights to another person. See Adeoye Adio Fagunwa & Anor. v. Adibi and Ors. (2004) 7 S.C. (Pt. II) 99;(2004) 7 SCNJ 322 at 340. D

In proof of their contention both parties relied solely on traditional history, and the law is that evidence of traditional history and tradition where such evidence is plausible and is not contradicted or in conflict and found by the court to be cogent can support a claim for declaration of title. (p. 2380 E)

***Conflict in histories - Is resolved vide facts***

6. It is also settled law that the demeanour of witnesses is not a proper guide in deciding the truth of traditional history. But where there is conflict or contradiction in the evidence of traditional history offered by the competing parties before the court, the court had the duty to decide among the competing parties whose evidence is more cogent or plausible or probable. F

Thus the court is bound to first decide which of the stories is more plausible or probable by reference to all surrounding facts and the circumstances and if both are equally plausible and probable then by reference to recent acts of ownership as established by evidence. (p. 2381 A) G

H

***Traditional histories - Where trial court weighs both parties' stories***

7. In the instant case, the learned trial Judge adopted the proper proce-

He held rightly in part of his judgment:-

*“I must place the traditional history of the ownership of the land as told by the defendant side by side with the above story (told by the plaintiff) to see which of them is believable and for what reasons”.*

The learned trial Judge proceeded to do exactly that, and in my view came to the right conclusion, that the history given by the respondents is more cogent, compelling, overwhelming and more probable and under the circumstances, it is not necessary to resort to acts of recent ownership to determine whose history to believe.

It is only after the histories offered by both sides are placed side by side and weighed and when they are found to be equally plausible or when there is difficulty of resolving which is correct then the question of recent acts of ownership shall become relevant. But in the instant case where the learned trial Judge has rightly in my view found that *“the traditional evidence of the defendant is more consistent with that of a stranger who was settled and later tried to oust the host,”* makes it unnecessary to refer to the acts to determine whose history was proved. The learned trial Judge had found as a fact that the traditional evidence given by the respondents is cogent, compelling plausible and probable. While that of the appellant is unbelievable and improbable. (p. 2381 G)

**NOTABLE POINTS OF INTEREST**

**UWAIFO.JSC**

*1. Failure to apply Kojo v. Bonsie faithfully - Why appeal cannot succeed*

I do not think that the two courts below faithfully applied the rule in Kojo II v. Bonsie (1957) 1 NWLR 1223. They did not test each traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable. What the learned trial Judge did was that he was able to see the unsatisfactory nature of the appellant’s history when he said: *“I have shown that the traditional evidence of the defendant is more consistent with that of a stranger who was settled and later tried to oust the host.”* He had earlier said: *“I also find as a fact that the ancestors of the defendant came from Ife*

*and that they stayed in Iyanmu place in Otta. That they are not related to Iyanmu family or to any family home in Otta as admitted by the defendant.”* It was this, among others, that led him to conclude that the appellant was a mere customary tenant no matter how long he had been on the land in dispute. The appellant has not been able to demonstrate that the conclusion B so reached by the trial court and affirmed by the court below was clearly erroneous.

It is the law that the onus is on an appellant to satisfy the appellate court that the decision on appeal was wrong. If he fails to do this, the C decision will be allowed to stand. (p. 2384 G)

### **AKINTANJSC**

#### *2. Witnesses - Immaterial contradictions could be ignored*

The position in law is that in normal course of events, it is to be expected D that witnesses may not always speak of the same facts or events with equal and regimented accuracy. This is particularly so in a situation when they speak from fairly faded memory in respect of a matter they consider from E lightly different perspectives. As passage of time fades human memory on matters of details, human observations tend to differ. Absence of any contradiction will therefore be totally unnatural. But the principle, as recognized by the courts, is that the contradictions by witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole F by the party or as to the reliability of such witnesses. As the contradictions which the appellant relied on in the instant case fail to meet the standard prescribed by law as declared above, I hold that they could rightly be ignored. (p. 2387 C)

### **REPRESENTATION**

Afolabi Fashanu, SAN., (with him, N. O. O. Oke and Dotun Sowemimo), for the Appellant.

J. Akanike, for the Respondent.

### **CASES REFERRED TO**

Ezeudo v. Obiagwu (1986) 2 NWLR (Pt. 21) 208

H “x x x x All other methods of proving title in a declaration to land do not appear to have been pressed by the plaintiffs the only proof they depended upon was traditional evidence, there is no doubt that the defendant also gave a conflicting traditional evidence. I have during the course of

*this judgment shown stage by stage my reasons for finding the evidence of the plaintiff more probable and acceptable in my view xxxxxxxxxxxx.*

*Apart from the relations of the plaintiffs, the evidence of the tenants by inheritance coupled with those of their boundary men are more reliable. I have shown that the traditional evidence for the defendant is more consistent with that of a stranger who was settled and later tried to oust the host. On the balance of probability I prefer the traditional evidence of the plaintiffs and I hold that they have proved their title to the land by traditional evidence.”*

Thereafter the learned trial Judge granted the plaintiffs the prayers and the reliefs they claimed as per paragraph 58 for the Statement of Claim.

The defendant felt unhappy with the aforesaid judgment and filed an appeal to the Court of Appeal. In the Court of Appeal, the defendant as the appellant therein submitted the following issues for determination:-

“(i) *Having regard to the contradictory evidence led by the plaintiffs on boundary whether they established the identity of the land with certainty as to entitle them to the declaration sought.*

(ii) *Did the evidence led at the trial justify the conclusion of the learned trial Judge namely that the defendant has forfeited his customary right of tenancy on Osata land?*

(i) *Whether the learned trial Judge evaluated the evidence before him properly and adopted the correct procedure in resolving the evidence of the traditional history led by the parties.”*

The Court of Appeal in the lead judgment of Onalaja, JCA., concurred to by Adamu and Adekeye, JJCA., delivered on the 29/6/1999 dismissed the defendant’s appeal. It should be mentioned that Oloko Ilari Ogun, the original defendant, died after filing the appeal in the Court of Appeal and was substituted by his son, Taiwo Ilari Ogun, the appellant now on record.

Taiwo Ilari Ogun felt disgruntled with the decision of the Court of Appeal and has now further appealed to this court. In this judgment, the defendant shall henceforth be referred to as the appellant while the plaintiffs as the respondents.

Distilled from the Notice of Appeal, the appellant has identified, for-

mulated and submitted to this court for the determination of this appeal, the following issues:-

(1) Whether the final conclusion of the Court of Appeal that the appellant has forfeited his customary tenancy was justified having regard to the case presented to it and the earlier findings of the court.

(2) Whether the learned Justices of the Court of Appeal were right in holding that the respondents established the identity of the land in dispute with certainty as to entitle them to the declaration sought.

(3) Whether the learned Justices of the Court of Appeal were right in holding that the trial court adopted the correct approach in resolving the conflict in evidence of traditional histories preferred by the parties.

The learned counsel for the respondents in his brief has identified more or less the same issues. I shall in this judgment deal with the issues as formulated by the learned counsel for the appellant in the appellant's brief.

But before dealing with the issues, it is convenient at this stage to set out the facts: The respondents as plaintiffs averred in their Statement of Claim as follows in the paragraphs following:-

"5. *The land in dispute is situate, lying and being at Obere Village via Atan-Ota, in the Ogun State of Nigeria.*

*6. The land in dispute is bounded as follows :-*

*(a) On the right side by Obere Village.*

*(b) On the left side by Ajayi Egan Village.*

*(c) On front side by Obere Village*

*(d) On the backside by Odo Obere.*

*7. And more particularly verged Red in Survey Plan No. GCS 160/09/89 dated 23/1/89 drawn by Bode Adeaga, a licensed Surveyor and attached to our Statement of Claim.*

*8. 'The plaintiffs state that the land in dispute is part of a large area of land which Osata Adasin settled.'*

The respondents thereafter pleaded and averred how they inherited the land from the original founder Osata Adasin and also how they granted parcels of the land to many customary tenants including the appellant's grandfather. The respondents further averred:-

*"36. The plaintiffs state that they have two shrines on the land in*

Thereafter the appellant pleaded how his grandfather came to settle on the land and how he came to inherit the land in dispute. The appellant

further pleaded his family's occupation and the granting of the portion of the land to many customary tenants including the respondents' father "Akinyelu".

The appellant's pleading concluded thus:-; -

B "44. The defendant states that neither the plaintiffs nor their ancestors are entitled to the declaration of title as now being claimed in their Writ of Summons and Statement of Claim.

C 45. The defendant was never at any time a customary tenant of any one including Osata family. Whereof the defendant states that the plaintiffs claim is frivolous, speculative, misconceived in law and in fact and should be dismissed with substantial costs".

I shall now deal with the issues submitted to this court for the determination of the appeal.

#### ISSUE NO 1.

D This issue deals with the question of the forfeiture of the customary tenancy. It is submitted for the appellant that by paragraphs 40 and 41 of the Statement of Claim, it was only the non-payment of customary tributes (Ishakole) by the appellant that made the respondents to take the action, E and the learned trial Judge made it clear that the refusal to pay rent "is an infinitesimal issue" as non-payment of rent by itself, by no means necessarily showed a challenge to the title of the landlord. It was submitted further that there was no pleading nor any reference made of any other act of F misbehaviour on the part of the appellant so grave as to deprive him of his customary tenancy. It is further submitted that the learned trial Judge made a crucial finding that the defendant had been long on the land and that the respondents "could not say much about how he got to the land." This finding has rendered perverse the finding that the appellant was the custom- G ary tenant of the respondents.

It is again argued that the Court of Appeal had adjudged the finding of the learned trial Judge that the appellant had forfeited his customary tenancy to be erroneous, yet the court proceeded to hold in contradiction to its H earlier decision that the appellant has lost his customary tenancy. It is argued that the Court of Appeal should be consistent in its findings vide Agbomeji v. Bakare (1989) 9 NWLR (Pt. 564) 326, Olale v. Ekwelendo (1980) 4 NWLR (Pt. 115) 326, Incar Nig. Ltd, v. Adegboye (No reference given) Oyeyemi v.

Irewole Local Government (1993) 1 NWLR (Pt. 270) 462 at 476.

It is again argued in the alternative that even if the conclusion of the Court of Appeal is correct, the finding ran against the case submitted to the courts. It is argued that by paragraphs 40 and 41, the respondents pleaded only the non-payment of rent as the reason for the action and reliance cannot be placed on other facts or acts of misbehaviour. Learned counsel referred to the case of *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248. It is argued that the act complained of which is capable of incurring forfeiture must be specifically pleaded and if not pleaded judgment based on it must be set aside vide *Makinde v. Akinwale* (2000) 1 S.C. 89 at 105.

The learned counsel also argued that the 1st respondent as per Exhibit C in his evidence at the aborted trial in Suit IF/OT/133/85 at the Customary Court, between the same parties, and earlier referred to in this judgment, that the respondents were customary tenants of the appellant. It was submitted that the court below acted erroneously by referring to the cases *Folarin v. Durojaiye* (1988) 1 NWLR (Pt. 70) 315 at 369, *Alade v. Aborisade* (1960) 5 S.C. 167 and holding that since the previous evidence of the 1st respondent in the said customary court Suit IF/OT/133/85 was not used to cross examine him, it was of no evidential value. The learned counsel argued further that Exhibit C was tendered as evidence in proof of the averments contained in paragraphs 41 and 42 of the Statement of Defence filed by the appellant, vide *Egbaran v. Akpotor* (1997) 7 NWLR (Pt. 514) 559 at 570. It is again submitted that though the appellant concedes that the principle enunciated in *Alade v. Aborisade* supra is good law in relation to Exhibit C, evidence in a previous trial, however the 1st respondent should be regarded as having given inconsistent previous evidence and the whole evidence on customary tenancy should have been rejected vide *Ayanwale v. Atanda* (1988) 1 NWLR (Pt. 69) 1 at 35.

The learned counsel for the respondent, on the other hand submitted that, it is not correct that the only ground relied upon by the Court of Appeal in holding that the appellant had incurred forfeiture was only the issue of the non-payment of rent (or *Ishakole*) but also the challenge to the ownership of the land of the respondents. Even though the appellant and his predecessor had been in possession of the land, title by prescription is not known to

Yoruba customary law and the long possession of the appellant and his father before him since they stopped paying tributes and asserted adverse title to the land to the respondent, the appellant and his father had both committed acts of forfeiture of the customary tenancy. See *Akinyole v. Ayiyola* (1968) NMLR 92 at 95. It is further added that the alienating of land held under customary tenancy by customary tenant without the consent or prior approval of the landlord attracts forfeiture of the customary tenancy see *Sagay v. New Independence Rubber Ltd.* (1977) 5 S.C. (Reprint) 86; (1977) 5 S.C. 143 at 158. *Anyadiba v. R.T.C. Ltd.* (1992) 5 NWLR (Pt. 243) 535 at 539 - 540. It is again argued that the long possession of the appellant and his predecessors-in-title could not bar a claim for declaration by the landlord. *Oduola v. I.C.C.* (1978) 11-12 S.C. (Reprint) 68; (1978) S.C. 59. *Agboola v. Abimbola* (1969) 1 All NLR 287.

D The learned counsel for the respondent finally submitted that the respondent did not limit the claim for forfeiture only on the grounds of refusal to pay the customary tribute but on other offences serious enough to justify the claim of forfeiture. It is argued, that the appellant not only consistently denied and challenged the title of the respondent, but manifestly wanted to “oust” them from the land See *Taiwo. v. Akinwunmi* (1975) 4 S.C. 143 at 183.

Now, the appellant’s argument that it was the issue of the non-payment of the customary rent by the appellant that was presented as the only reason for the demand of the forfeiture of the customary tenancy cannot stand. The appellant through out has been consistent in his pleadings and evidence that he and his predecessors-in-title owned the land in dispute. Thus the appellant never recognized the respondents as his landlords. He pleaded as per paragraph 44 and 45 of the Statement of Defence thus:-

“44. *The defendant states that neither the plaintiffs nor their ancestors are entitled to the declaration of title as now claimed in their Writ of Summons and Statement of Claim.*

45. *The defendant was never at any time a customar tenant of any one including Osata family.”*

It was rather the case of the appellant that the respondents were

his tenants. These, in my view, amount to a gross denial of the title of the respondents to the disputed land. I have also alluded in this judgment to pleadings of the respondent that the appellant not only sold part of the land to various people but was “harassing the plaintiffs” and members of their family and their tenants.

Accordingly it is not correct to say that the respondents only presented to the court the issue of non-payment of the rent as the reason for the claim of the forfeiture. **Denial of an overlord’s title by a customary tenant is one of the greatest breaches that a customary tenant can commit.** See Akpagbue v. Ogo (1976) 6 S.C 63. See also Taiwo v. Akinwunmi Supra. **A misbehaviour by a customary tenant may attract forfeiture depending on the seriousness and repetitive nature of the acts constituting such misbehaviour and the peculiar facts and circumstances of each case. It is indeed a most serious act of misbehaviour by a customary tenant to deny the title of the true overlord to the land of which he is a tenant. In the instant case, there is no dispute whatever, the appellant by his pleadings and evidence denied the ownership of the respondents and went even to the extent of claiming that the respondents were his tenants. From all the circumstances of this case, it does not lie on the appellant to claim that the, respondent claimed forfeiture for non-payment of rent alone.** (See Makinde v. Akinwale (2000) 1 S.C. 89 (2000) 2 NWLR (Pt. 645) 435 at 452. Dokubo v. Bob-Manuel (1967) 1 All NLR 113, Erinle v. Adelaia (1969) 1 NWLR 132. **In land cases, such as this one, where a customary tenant turns round not only to dispute the ownership of the title holder but goes out of his way to claim title, he forfeits his rights as a tenant and his possession of the land.** The learned trial Judge had found as a fact in part of his judgment thus: -

*“xxxx I have shown that the traditional evidence of the defendant is more consistent with that of a stranger who was settled and later tried to oust the host.”*

This finding of fact was affirmed by the Court of Appeal. The case of the appellant in his pleadings and evidence is not only to challenge the title of the respondents but also went to the extent of claiming that the respon-

dents are his tenants. The complaint of the appellant, that the respondents relied on non-payment of rent to constitute action cannot be justified.

**The issue of the long possession of the appellant and his predecessor to the land cannot under the circumstances vest title. See *Dacosta v. Ikomi* (1968) 1 All NLR 394, *Sanya v. Johnson* (1974) 11 S.C. (Reprint) 154; (1974) 11 S.C. 207.**

**The other point worthy of consideration is the issue whether the court below had actually made inconsistent decisions on the issue of forfeiture of the customary tenancy. I have very carefully read the relevant portions of the lead judgment of Onalaja, JCA. The learned Justice was not expressing his opinion or decision on the matter, he was merely referring to the submissions of the learned counsel for the appellant. This is borne out clearly because at the next preceding paragraph (i.e. paragraph 4 of page 143) the learned Justice continued to refer to the submissions made by the learned counsel for the respondent on the same issue, (that is Issue No 2 before the court below). The learned Justice could not obviously make a decision before considering the submissions of the respondents' counsel. In my view, the complaint of the appellant that the court below made inconsistent and irreconcilable decisions is not correct and is not justified.**

The issue of Exhibit C as argued by the appellant cannot legitimately arise from the ground of appeal and this issue. It is not relevant to this issue. In the end, I find no merit in the complaints under issue No 1 and I accordingly resolve issue No 1 against the appellant.

**ISSUE NO 2.**

This is concerned with the identity of the land in dispute. It is submitted by the learned counsel for the appellants, that a plaintiff who seeks declaration of title to land must first establish with certainty and precision the area of land to which his claim relates and where he fails to prove the boundaries or identity of the land, the claim must fail. Learned counsel referred to and relied on *Imah & Anor. v. Okogbe & Anor.* (1993) 9 NWLR (Pt. 316) 159, *Olusanmi v. Oshasona* (1992) 6 NWLR 2 at 28.

It is submitted that in the instant case, the pleading and the evidence

led as to the identity of the land was contradictory. The plaintiff's witnesses did not also give evidence on the identity of the land with the precision required by law. The names of the boundary men are often not the same. It was submitted that the learned trial Judge was in error to have held that the parties know the land in dispute. It is submitted further from the pleadings to the parties have joined issues on the boundary, size and location of the land in dispute. Therefore there was no agreement as to identity of the land. The learned counsel further argued that because of the contradictions in the evidence of their witnesses the respondents could not be said to have proved the identity of the land and accordingly no declaration could have been made in their favour. Learned counsel referred to and relied on the following cases:-

Salami v. Gbodoolu (1997) 4 NWLR (Pt. 499) 227, Kwadzo v. Adjei (1944) 10 WACA 274. Odojin v. Ayoola (1984) NSCC 711, Olalere v. Ige (1994) 1 NWLR (Pt 340) 535 at 543. Odiche v. Chibogwu (1994) 1 NWLR (Pt. 354) 78. Udekwo Amata v. Modekwe and Ors. 14 WACA 580.

It is finally argued that the decision of the Court of Appeal is perverse and the court was wrong to have introduced the issue of discretion in the matter by invoking the principles of discretion set out in the case of University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143.

The learned counsel for the respondents on the other hand argued that, an identity of a land in dispute may be proved by a number of ways vide Idundun v. Okumagba (1976) NMLR 200. It is submitted that the respondents pleaded facts establishing their title to the land and proved these facts by traditional evidence, acts of ownership and the respondents led credible evidence accepted by both the trial court and the Court of Appeal. The learned counsel further argued that the land was known to both parties from the pleadings and the learned trial Judge was correct to have so held that the land is known to both sides. See Olusanmi v. Oshasona supra. It is further argued that the calling of the land in dispute by different names by the parties or witness was not fatal to the respondents' case. See Makanjuola H v. Balogun (1989) 3 NWLR (Pt. 108) 192.

Now, **in an action for declaration of title to land, the onus is on the plaintiff to establish with certainty the identity of the land to which**

his claim relates. 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 in producing a survey plan of the said land. See *Baruwa v. Ogunsola* (1938) 4 WACA 159.

B Another way and perhaps a better way of proving the identity and extent of the land claimed is by the plaintiff filing a survey plan reflecting all the features of the land and showing clearly the boundaries. See *Awoye v. Owodunni* (No. 2) (1987) 2 NWLR (Pt. 57) 367.  
 C In the case at hand both parties tendered the survey plan of the land in dispute. The appellant tendered Exhibit B, while the respondents tendered Exhibit A. The appellant's witness D.W.3 said in part of his evidence before the trial court:-

D *"The area verged red in Exhibit "A" and the area verged Red Exhibit B are not identical. The area verged red in Exhibit A is bigger than the area verged red in Exhibit B.*

*In effect the area verged red in Exhibit B is a portion of the area verged red in Exhibit A."*

E Thus the survey plans tendered by both the appellant and the respondents show clearly the disputed land and the witness called by the appellant testified that the land claimed by the appellant formed a portion of the land claimed by the respondents.

F The law is settled that a plaintiff seeking a declaration of title to land has the initial and the primary burden of proving clearly and unequivocally the precise area to which the claim relates. But this burden will not exist where the identity of the land in dispute was never a question in Issue. The question of the identity of the land as  
 G an issue will only arise where the defendant raises it in his statement of defence or in his testimony. See *Ezeudo v. Obiagwu* (1986) 2 NWLR (Pt. 21) 208; *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132) 322. In  
 H the instant case, throughout the trial the identity of the land in dispute was clearly not in issue. The pleadings of the parties and the evidence made it obvious that the parties knew the land they were disputing about. The parties knew themselves and each of the parties claimed the other to be his customary tenant. A plan may not be an

**absolute necessity in the instant case, but may be desirable where witnesses may and often give the same locations different names.** See Garba v. Akacha (1966) NMLR 62, Banjo v. Aiyekoti (1973) 1 NMLR 210. Olusanmi v. Oshasona (Supra)

**In my view, it is of no moment where different witnesses gave different names to the boundary men or different names to pieces of surrounding lands, unless it is shown that the witnesses are not referring to same land. The appellant has failed to clearly raise the issue of the identity of the land in his pleading, evidence or cross-examination** and indeed by the evidence of his witness D.W. 3 the surveyor, referred for above clinches the question of the identity of the land. See Uzukwu v. Ukachukwu (2004) 7 SCNJ 189 at 204  
In my view the finding of the learned trial Judge as to the identity of the land and as confirmed by the Court of Appeal is fully justified. I find no merit in the complaint under this issue and I accordingly resolve the second issue against the appellant.

### ISSUE NO. 3

This issue is concerned with the resolution of the conflict in the evidence of traditional histories relied by the parties at the trial. The learned trial Judge found the evidence led by the respondents and the appellant to be contradictory but he concluded that on the balance of probability he preferred the evidence led by the respondents and the learned trial Judge referred to the case of Kojo v. Bonsie (1957) 1 NWLR 1223 at 1227.

The learned counsel for the appellant submitted that having found conflict in the traditional evidence led by the parties, he should have taken recourse to acts of ownership in recent times. The lower court was in error merely because, it observed that the trial court did not use the demeanour of the witnesses to find for the respondents, that the trial court adopted the correct approach. The trial court did not refer or give any consideration to any acts of ownership adduced by the parties in order to resolve the conflict in the evidence of traditional history which was found to be conflicting. Learned counsel referred to the cases of Buraimoh Oloriode and Ors. v. Simeon Oyebi (1984) 5 S.C. 1 at 17. Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 24) 626. Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301 at 316. Mogaji

v. Cadbury (Nig) Ltd. (1985) 2 NWLR (Pt. 7) 393.

It is submitted by the learned counsel for the appellant, that the appellant had pleaded acts of recent ownership and possession by having tenants on the land and had led evidence in proof of that. It is further submitted that even the evidence led by the respondents' witnesses supported the contention of the appellant, that he has been in long possession of the land and that he was occupying the middle of the land in dispute. It is argued that the evidence of recent acts of ownership led by the respondents was supplied only by P.W.I at page 13 of the printed record. It is finally submitted that if the evidence of acts of ownership and possession adduced by the appellant is placed side by side with that of the respondents, it would show that the traditional evidence of the appellant was overwhelming and more probable.

The learned counsel for the respondents on the other hand argued that the trial court was right in its approach to the evaluation of the entire evidence and the trial court was fully and properly guided by the principle laid down in *Mogaji v. Odofin* (1978) 4 S.C. (Reprint) 53; (1978) 4 S.C. 91 and *Kojo v. Bonsie* (supra). The court is fully justified in affirming the decision of the trial court.

**Now, there is no doubt in the instant case both the appellant and the respondents claimed ownership of the land. Title or ownership of the land for this purpose presupposes exclusive or immediate exclusive right to land, i.e. total allodial right of ownership unless the owner voluntarily transfers his rights to another person. See Adeoye Adio Fagunwa & Anor. v. Adibi and Ors. (2004) 7 S.C. (Pt. II) 99; (2004) 7 SCNJ 322 at 340.**

**In proof of their contention both parties relied solely on traditional history, and the law is that evidence of traditional history and tradition where such evidence is plausible and is not contradicted or in conflict and found by the court to be cogent can support a claim for declaration of title.** See *Fol. Alade v. Lawrence Awo* (1975) 4 S.C. (Reprint) 150; (1975) 4 S.C. 215 at 228, *Olujebo of Ijebu v. Osa, The Eleda of Eda* (1972) 5 S.C. (Reprint) 94; (1972) 5 S.C. 143; *Aikhionbare v. Omoregie* (1976) 12 S.C. (Reprint) 6; (1976) 12 S.C. 11.

**It is also settled law that the demeanour of witnesses is not a proper guide in deciding the truth of traditional history. But where there is conflict or contradiction in the evidence of traditional history offered by the competing parties before the court, the court had the duty to decide among the competing parties whose evidence is more cogent or plausible or probable.** See Jegede v. Gbajumo (1974) 10 S.C. (Reprint) 128; (1974) 10 S.C. In Thanni v. Saibu (1977) 2 S.C. (Reprint) 46; (1977) 2 S.C. 89 it held was that the best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing witness is more probable. In Ikang v. Edoho (1978) 6-7 S.C. (Reprint) 155; (1978) 6/7 S.C. 221, this court per Aniagolu, JSC., at 249 put it thus:-

*"x x x x x is that witness may well be truthfully telling the court, in traditional evidence, what his ancestors told him. His ancestors may in fact have told him the story and the witness may well be reproducing accurately what they told him. But the story they told him may well be untrue.*

*x x x x x It is therefore for the trial court to determine:*

*(a) Did the ancestors tell him the story?*

*(b) Is the story true?"*

**Thus the court is bound to first decide which of the stories is more plausible or probable by reference to all surrounding facts and the circumstances and if both are equally plausible and probable then by reference to recent acts of ownership as established by evidence** see Cosmos Ezekwo v. Peter Ukachukwu & Anor. Supra. See also Ezekweseli v. Onwuegbu (1998) 3 NWLR (Pt. 541) 2I 7. Morenikeji v. Adegbosin (2002) 4 S.C. (Pt.1) 107; (2003) 8 NWLR (Pt. 823) 612.

**In the instant case, the learned trial Judge adopted the proper procedure in his treatment of the conflict of the traditional histories given by the parties. He held rightly in part of his judgment:-**

*"I must place the traditional history of the ownership of the land as told by the defendant side by side with the above story (told by the plaintiff) to see which of them is believable and for what reasons".*

The learned trial Judge proceeded to do exactly that, and in my view came to the right conclusion, that the history given by the re-

**spondents is more cogent, compelling, overwhelming and more probable and under the circumstances, it is not necessary to resort to acts of recent ownership to determine whose history to believe.** See Umennadozie Ogbuokwelu & 10 Ors. v. James Umeana Funkwa & Anor. B (1994) 4 NWLR (Pt. 341) 676 at 694.

**It is only after the histories offered by both sides are placed side by side and weighed and when they are found to be equally plausible or when there is difficulty of resolving which is correct then the question of recent acts of ownership shall become relevant. But in the instant case where the teamed trial Judge has rightly in my view found that “the traditional evidence of the defendant is more consistent with that of a stranger who was settled and later tried to oust the host,” makes it unnecessary to refer to the acts to determine whose history was proved. The learned trial Judge had found as a fact that the traditional evidence given by the respondents is cogent, compelling plausible and probable While that of the appellant is unbelievable and improbable.** I find no merit in these complaints and the issue is resolved E against the appellant.

In the result all the issues as canvassed by the appellant are resolved against him, this appeal deserves to fail. It is not surprising, these are same issues argued before the court below and they are all essentially complaints F against concurrent findings of facts by the two lower courts. The appellant has not been able to show that the findings are perverse. The appeal is dismissed by me. The respondents are entitled to costs assessed at N 10,000.00.

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### BELGORE JSC

This is an appeal entirely based on concurrent findings of facts by the two lower courts. There is no evidence of any issue vitiating the findings. In the absence of miscarriage of justice or failure to consider vital evidence or admission of inadmissible evidence I find no reason to disturb the findings of the lower court.

Therefore, for the cogent reasons adumbrated in the judgment of my

learned brother, Musdapher, JSC. I also dismiss this appeal with N  
10,000.00 costs to respondents.

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**IGUHJSC**

B

I have had the privilege of reading in draft the judgment of my teamed  
brother, Musdapher, JSC., just delivered and I entirely agree that this appeal  
is without substance and ought to be dismissed.

Accordingly, I, too, dismiss it with costs as assessed in the leading C  
judgment.

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**UWAIFO JSC**

I read in advance the judgment of my learned brother, Musdapher, D  
JSC., with which I agree that the appeal lacks merit.

The three issues canvassed before this court by the appellant lend  
themselves to easy resolution having regard to the law and the facts as  
found by the two courts below. The first issue is whether the forfeiture of E  
the appellant's customary tenancy was justified. The evidence is clear that  
the appellant persistently denied the overlordship of the respondents and  
seriously contested it. In law, that gives rise to a claim for forfeiture of a  
customary tenancy. In *Dokubo v. BobManuel* (1967) 1 All NLR 113, this F  
court said at page 121 that "*a denial of the title of the true overlord is a  
ground for forfeiture in every system of jurisprudence known to us.*" See  
also *Akpogbue v. Ogu* (1976) 6 S.C (Reprint) (1976) 6 S.C 63.

In the present case, the respondents clearly averred facts in their G  
statement of claim and gave evidence in support of their relief for forfeiture  
but the appellant in his statement of defence did not seek relief against forfei-  
ture. It has been held in *Ladega v. Akinliyi* (1975) 2 S.C. (Reprint) 83 (1975)  
2 S.C. 91 that where a defendant fails to ask in his pleading, even in the  
alternative, for relief against forfeiture, the plaintiff having averred and H  
proved facts supporting forfeiture, such a defendant could not at a later  
stage ask for relief against forfeiture. It seems to me that, in the circum-  
stances of this case, the forfeiture of the appellant's customary tenancy

was fully justified.

The second issue is whether the identity of the land in dispute was established with certainty by the respondents. Both parties tendered survey plans. The respondents' plan was admitted as Exhibit A while the appellant's plan was admitted as Exhibit B. The land in dispute is delineated blue in Exhibit A while it is delineated red in Exhibit B. There are obvious common landmarks in both plans which tend to establish the identity of the land. First, there is the road from Obere to Mesan village traversing about one-third of the northerly side of the land in both plans. Second, there are the following common survey pillars strategically located in both plans, namely GAG 16247, GAG 16255 and GAG 16257. Third, Obere and Ajayi Egan Farm are shown on the eastern and western sides of both plans. Fourth, the road from Idi-Roko to Otta or Sango Otta is shown on the western side of both plans. Although Exhibit A is drawn on a scale of 1:5,000 and Exhibit B, 1:2,000, the shapes of the land in dispute on both plans look reasonably identical. It seems clear that the respondents (as plaintiffs) have shown by their survey plan the area to which their said plan relates: see *Aro v. Obaloro* (1968) NMLR (Pt. 2) 238; *Okosun Ebi v. Aigbedion* (1973) NMLR 31. It was open to the appellant (as defendant) to contradict the respondents' plan with his own plan. Indeed a defendant who puts the identity of land in dispute in issue must successfully take that course otherwise he fails on that issue: see *Idugiemwanye v. Omoregie* (1985) 2 NWLR (Pt. 5) 41. The appellant did not succeed in that direction. Rather he supported the respondents as to identity by his own plan. He cannot be heard to complain that the identity of the land in issue was not established by the respondents.

The final issue is whether the conflict in the evidence of traditional histories of the parties was correctly resolved. I do not think that the two courts below faithfully applied the rule in *Kojo II v. Bonsie* (1957) 1 NWLR 1223. They did not test each traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable. What the learned trial Judge did was that he was able to see the unsatisfactory nature of the appellant's history when he said: "*I have shown that the traditional evidence*

*of the defendant is more consistent with that of a stranger who was settled and later tried to oust the host.” He had earlier said: “I also find as a fact that the ancestors of the defendant came from Ife and that they stayed in Iyanmu place in Otta. That they are not related to Iyanmu family or to any family home in Otta as admitted by the defendant.”* It was this, among others, that led him to conclude that the appellant was a mere customary tenant no matter how long he had been on the land in dispute) The appellant has not been able to demonstrate that the conclusion so reached by the trial court and affirmed by the court below was clearly erroneous.

It is the law that the onus is on an appellant to satisfy the appellate court that the decision on appeal was wrong. If he fails to do this, the decision will be allowed to stand: see *Macaulay v. Tukuru* (1881 - 1911) 1 NLR 35 at 40; *Akinloye v Eyiola* (1968) NMLR 92 at 95; *Obisanya v. Nwoko* (1974) 6 S.C. (Reprint) 61; (1974) 6 S.C. 69 at 80; *Woluchem v. Gudi* (1981) 5 S.C. (Reprint) 178; (1981) 5 S.C. 291 at 326-330; *Obodo v. Ogba* (1987) 1 NSCC (Vol. 18) 416 at 421.

I have also come to the conclusion that this appeal fails. I accordingly dismiss it with N10,000.00 costs to the respondents.

### AKINTAN JSC

The appellant as plaintiff commenced this action at the Ifo/Otta Grade I Customary Court against the respondents as defendants. But the matter was transferred to the High Court on the direction of the Ogun State Chief Judge. The plaintiff’s claim was for declaration of title to the parcel of land at Obere Village via Atan-Ota in Ogun State. Pleadings were filed and exchanged and evidence was led by the parties in support of their respective pleadings.

The plaintiff based his claim on traditional history that his ancestors settled on the entire land and got some tenants on some portions of the land among whom were the defendants’ ancestors. The defendants also based their claim on traditional history. They too led evidence to the effect that their ancestors also settled on the land and put some tenants on portions of the land. The plaintiff is said to be among the tenants they put on the land.

The learned trial Judge, (Ademola Bakare, J.), in his judgment, preferred the traditional evidence led by the plaintiff to that of the defendants. He found as a fact from the evidence led that (a) the defendant was not a native of the place but that he came from Ife; and (b) that the defendant's surveyor told the court that the purpose of the two survey plans tendered by the parties in the case (Exhibit A tendered by the plaintiff and Exhibit B for the defendants) is that the land in Exhibit B is a portion of the land in Exhibit A. Judgment was accordingly entered for the plaintiff as per his claim.

The defendant was dissatisfied and he filed an appeal against the judgment at the Court of Appeal. At the Court of Appeal, three issues were raised and canvassed. These are (i) having regard to the contradictory evidence led by the plaintiff/respondent on the boundary, whether the identity of the land was proved with certainty to entitle him to the declaration sought; (ii) whether from the evidence led, the verdict was justifiable, and (iii) whether the learned trial Judge properly evaluated the evidence led at the trial and adopted correct procedure in resolving the evidence of traditional history led by the parties. The Court of Appeal dismissed the appeal as lacking in merit and the present appeal is against the judgment of that court.

Again the appellant formulated and canvassed three issues in this court. The issues are: (a) whether the conclusion of the Court of Appeal that the appellant has forfeited his customary tenancy was justifiable having regard to the case presented and the findings of the court; (b) whether the Court of Appeal was right in holding that the respondents established the identity of the land in dispute with certainty; and (c) whether the Court of Appeal was right in holding that the trial court adopted the correct approach in resolving the conflicts in the evidence of traditional history.

The appellant's main attack is premised principally on the findings of fact made by the learned trial Judge and which the Court of Appeal also affirmed. The evidence of traditional history led by the plaintiff was preferred and accepted by the court. There was credible evidence led before the court in support of that finding of fact by the court. The

question of an appellate court reversing that finding of the court therefore does not arise: See *Odiba v. Muemue* (1999) 6 S.C. (Pt. 1) 157; (1999) 10 NWLR (Pt. 622) 174; *Olorunfemi v. Asho* (1999) 1 S.C. 55; (1999) 1 NWLR (Pt. 585) 1 and *Alli v. Alesinloye* (2000) 4 S.C. (Pt 1) 111; (2000) 6 NWLR (Pt. 660)177.

Also, the question whether the Court of Appeal was right in holding that the trial court adopted the correct approach in resolving the conflicts in the evidence of traditional history does not arise. This is because no material contradiction was established by the appellant. All what the appellant claimed to be material contradictions are what are expected in the normal course of events associated with giving evidence in courts. The position in law is that in normal course of events, it is to be expected that witnesses may not always speak of the same facts or events with equal and regimented accuracy. This is particularly so in a situation when they speak from fairly faded memory in respect of a matter they consider from lightly different perspectives. As passage of time fades human memory on matters of details, human observations tend to differ. Absence of any contradiction will therefore be totally unnatural. But the principle, as recognized by the courts, is that the contradictions by witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole by the party or as to the reliability of such witnesses: (See *Nwokoro v. Onuma* (1999) 9 S.C. 59; (1999) 12 NWLR (Pt. 631) 342; *Ehahoro v. The Queen* (1965) NMLR 265 and *Emiator v. The State* (1975) 9-11 S.C. (Reprint) 67; (1975) 9-11 S.C. (Reprint) 107. As the contradictions which the appellant relied on in the instant case fail to meet the standard prescribed by law as declared above, I hold that they could rightly be ignored.

For the above reasons and the fuller reasons given in the lead judgment just delivered by my learned brother, Musdapher, JSC., which I had read before now and which I hereby adopt, I also dismiss the appeal with costs as assessed in the lead judgment

H