

SUPREME COURT OF NIGERIA
16TH JANUARY, 2004. SC. 103/1995
CORAM:- I. L. KUTIGI, S. U. ONU, S. O. UWAIFO,
N. TOBI, I. C. PATS-ACHOLONU, JJSC.

CHIEF AQUA EDEM

ARCHIBONG & 5 ORS. APPELLANTS/APPLICANTS

(For themselves and as

representing Ifiang Nsung and Ifiang

Oyong community, Akpabuyo, Calabar)

7. CROSS RIVER STATE MINISTRY

OF AGRICULTURE

AND

CHIEF ASUQUO ITONG ITA

& 4 ORS.

..... RESPONDENTS

(For themselves and as representing Ikot

Iwang community, Akpabuyo, Calabar Division)

ACTIONS - Claims - Land dispute - Where the claim on which other claims rest fails - Supreme Court need not say more about those other claims (H11)

COURTS - Speculation - Documents - Where a document is speculative - Court should not rely on it (H4)

EVIDENCE - Admissions - Usefulness of - Exhibits - Purported admission in an exhibit is useless - As it does not relate to live issues in the matter (H6)

EVIDENCE - Proof - Burden of proof lies on the person that asserts - Or the party that judgment will be against - If no evidence were produced on either side (H1)

EVIDENCE - Proof - Pleadings - Land matters - Burden of proof in this case rests on the respondents - On the issue of common use but not title

(H3)

EVIDENCE - Proof - Speculation - Burden of proof usually rests on plaintiff - He must prove what he asserts - Speculative observation cannot be a substitute to proof (H2)

LAND LAW - Common use - Boundary - Survey plan - Burden on respondents to prove certainty of land claimed - Was not discharged (H8)

LAND LAW - Landlord and tenant - Common use claim by tenants - Is against our land tenure system - As a tenant does not share equal rights with the landlord (H10)

LAND LAW - Survey plan - Counter plan - Where no plan was filed - An adverse party need not file a counter plan (H9)

LAND LAW - Survey plan - Need for certainty of land in dispute - Makes survey plan necessary in this case - Though it is not a case for declaration of title (H7)

PLEADINGS - Proof - General denial - Exhibits - Land dispute - As the denial here is specific - Respondents failed to prove the land in dispute (H5)

FACTS

Before the Cross River State High Court, Calabar, the plaintiffs/respondents filed an action against the defendants/appellants. They claimed inter alia, right to be made a party in any formal deed of agreement touching any part of the forest or palm plantation lands which they alleged they have traditionally enjoyed together in common with the appellants from time immemorial. Respondents relied on various exhibits in seeking to establish their claim, Exhibits 9 and 10 being past judgments of court in respect of land disputes between the parties. Their case is not founded

on declaration of title, but one in which they claim common use of the land with the appellants from time immemorial.

Respondents filed no survey plan based on the presumption that the land in dispute is known to both parties. They were customary tenants of the plaintiffs who misconstrued the import of the past two judgments and other exhibits they relied upon. The appellants denied the respondents' claims. The trial court dismissed the claims holding that they were speculative and not supported by credible evidence. Respondents' appeal to the Court of Appeal was successful. Being dissatisfied, appellants have now appealed to the Supreme Court which determined the appeal based on 3 issues as other issues were abandoned by the parties and were struck out.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in granting the declaratory relief on the basis of the Judgments in Exhibit 2 and 9?

2. Whether the Land affected by the declaration has been satisfactorily prove?

4. Whether Exhibit 9, 2, and 4 established the identity of the land dispute?"

HELD (Unanimously allowing the appeal per lead judgment of **TOBI JSC**)

Burden of proof lies on the person that asserts

1. By section 135(1) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Subsection (2) of section 135 completes section 135 (1) by providing that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard

being had to any presumption that may arise on the pleadings. This is the language of section 137 (1) of the Evidence Act. (p. 91 E & G)

Evidence - Proof - Speculation

B 2. In most cases, the burden of proof lies with or rests on the plaintiff because he is the person who is making the claim.

As a matter of law, the plaintiff has the onus of proving his case and where he fails to get the appropriate findings relevant to the reliefs he had sought, he must fail. See Fashanu v. Adekoy (1974) 6 SC 83. A C plaintiff who asserts the truth or existence of a fact must prove it. A mere speculative observation cannot be a substitute to proof of fact asserted. See George v. UBA (1972) 8-9 SC 264. (p. 92 C)

D ***Burden of proof in this case rests on the respondents***

3. In this appeal, the burden of proof is clearly on the respondents and that burden does not shift. It is as constant as the sun rising from the east and setting in the west; and that is the position fixed by the pleadings. I E should mention here that since the claim is not on title to land, the plaintiffs have no burden to prove title and therefore the decision in Idudun v. Okumaagba (1976) 9-10 SC 227 will not apply. The issue before this court is that of common use and enjoyment of forest or palm plantation F lands. (p. 92 F)

Courts - Speculation - Documents

4. Could it be that the plan is in respect of Danish Nigerian Agricultural Company A/S Estate and the two parties in this appeal, that is, Ifiang and G Iwang? It is dangerous for this court to so speculate in the absence of evidence. After all, a court of law cannot speculate or conjecture. See Ogunye v. The State (1999) 68 LRCN 699. Where a document is speculative in content, the court is entitled not to rely on it to make an award or H order. See Olalomi Industries Ltd. v. NDIC (2002) FWLR (pt. 131) 1984. (pp. 97 F)

Pleadings - Proof - General denial

5. With the greatest respect, the Court of Appeal was in error in coming to the conclusion that the above is general denial. In my humble view, paragraph 7 is a specific denial. The defendants who are the appellants clearly joined issues with the plaintiffs who are the respondents on the issue of the latter's entitlement to an account. The appellants did not stop B there. They went further in the paragraph to prove at the trial the leases which gave the respondents the right to ask for an account. I have searched in vain in the wording of Exhibit 4 and I do not find such a condition for account. I am of the view that respondents failed to prove that the land in C dispute was clearly indicated in Exhibit 4. (p. 99 E)

Admissions - Usefulness of Exhibits

6. What is the admission, the Court of Appeal is relying upon? Is it the one that the appellants were about to receive payment from the Danish D Company? If so, (and it is so) from the above statement of the court, how does that help the respondents in this appeal? An admission, in order to be useful to the adverse party, must relate or affect the live issues in the matter. E

In my view, Exhibit 5, is a little bit above a gentle man's agreement as it affects or relates to the payment of some money to the respondents by the appellants as and when the appellants receive payments from the Danish Company. In the circumstance, the Court of Appeal, with re- F spect, was wrong in placing a status of admission on Exhibit 5. Exhibit 5 has no such status in respect of the live issues in this appeal. (p. 234 A) (p. 100 H & 101 F)

Need for certainty of land in dispute - Makes survey plan necessary G

7. It is trite law that where a land in dispute is not identifiable by one of the parties and therefore not identified, a survey plan is a desideratum. A survey plan is not only necessary in an action for declaration of title to land; it is also necessary in the situation and circumstance of this appeal H where the identity of the land is in dispute. I am not creating the impression that the production in evidence of a survey plan of the land, the subject of the dispute is a sine qua non in all land cases. What is neces-

sary is that the land the subject of the award must be ascertained with definitive certainty. The acid test, in Kwadzo Adjie (1944) 10 WACA 274 is whether a surveyor, taking the record of the proceedings in the case can produce a plan showing accurately the land in which the dispute has arisen. The principle that the land, the subject of the litigation must be certain, is of universal application in the context of land disputes, as it applied to this case where the certainty of the land is in dispute. See Arabe v. Asanlu (1980) 5-7 SC 78 and Ibenye v. Agwu (1998) 9-10 SC 18. (p. 102 A)

Boundary - Survey plan - Burden on respondents

8. In Omorie v. Idugiemwanye (1985) 2 NWLR (pt. 5) 41, the Supreme Court held that one of the ways of showing the specific area of land claimed is to file a plan of the area; such plan being properly orientated, drawn to scale and accurate and reflecting the boundary features. The burden is on the respondents to prove the boundary of the land in dispute. See Ekwealor v. Obasi (1990) 2 NWLR (pt. 131) 231; The respondents have not discharged the burden of proving with definitive certainty the land which they claim they are entitled to be made a party in any deed of agreement and account therefrom. (p. 102 E)

Survey plan - Counter plan

9. Learned Senior Advocate for the respondents dealt with the failure of the appellants to file a counter plan. An adverse party can only file a counter plan where there is an existing plan. The main purpose of a counter plan is to counter or counteract an existing plan to expose it as incorrect or inaccurate. Accordingly, where there is no existing plan, as in this appeal, there is no need for a counter plan as there is nothing to oppose, challenge or counter. (p. 102 H)

H Landlord and tenant - Common use claim by tenants

10. The claim does not only look funny but ridiculous and wears the tallest ambition. The claim is precipitate. I say this because the claim is clearly against all know canons of our land tenure system both in cus-

tomary law and under the Land Use Act. When did a tenant claim to share common and equal rights over property with landlord or overlord, the owner of the property? This is against the allodial rights of the owner of the property. It is also against the tenorial duty of the tenant to pay rent for the purposes of enjoying a peaceable right to the property, for the period of the tenancy, subject to good behaviour. See generally Pan Asian Ltd. v. NICON Ltd. (1982) 9 SC 1. (p. 103 H)

Where the claim on which other claims rest fails

11. It is my view that the respondents did not prove claim 1, and I so hold. Since all the other claims rest on claim 1 for survival, I need not say more on them.

I think Webber, J. dealt with this matter adequately. Let me reproduce part of the order he gave which I quoted at the beginning of this judgment:

"The Defendant and his people shall be permitted to occupy the beach land, the occupation of which according to their own evidence extended 200 yards along the bank of the river, and 3/4 mile inland."

In the light of the above, the respondents are only entitled to the portion of land given to them by the appellants. They do not have any legal right to go beyond what was given to them by the appellants.

(p. 104 C)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Where survey plan does not address claim - Counter plan may not be filed

Where a party has filed a plan, which the adverse party feels does not adequately address the claim before the court, he need not file a counter plan. After all the burden is on the party relying on the identity of the land to succeed in his case to prove such identity. (p. 103 B)

UWAIFO JSC

2. *Customary tenancy - Limitations - Ownership is never acquired by long tenancy*

The law clearly is that, once a customary tenant always such a tenant is entitled to the occupation and use of the land but the tenancy is subject to the landlord's right of reversion in an appropriate event, such as the denial of the title of the overlord, or the failure to comply with the terms of the tenancy thereby leading to forfeiture: see *Dokubo v. Bob-Manuel* (1967) 1 All NLR 113 at 121; It is also recognized that although a customary tenant can hold in perpetuity subject to good behaviour, he is presumed to be a tenant from year to year: see *Agheghen v. Waghoreghor* (1974) 9 NSCC 1 at 24. No matter how long he is on the land, a customary tenant does not and cannot acquire ownership, that is to say, divest the radical owners of their title, merely by virtue of such long tenancy in possession: see *Isiba v. Hanson* (1967) 1 ALL NLR 8 at page 11. (p. 117 A)

3. *Customary tenant under Land Use Act - Limitations*

The tenant cannot take over the land, even under the Land Use Act, in place of the landlord as if he was the holder under the Act by virtue of a subsisting tenancy notwithstanding that the said tenancy keeps his landlord out of possession because a holder of land under the Act is the true owner entitled to or having a right of occupancy as the overlord; and the tenant's possession is subject to the overlord's right of reversion exercisable when an occasion for forfeiture of the tenancy arises, or when in an appropriate case the tenancy expires: see *Abioye v. Yakubu* (1991) 5 NWLR (pt. 190) 130 at 217. (p. 117 G)

4. *Customary tenant cannot become co-landlord vide long possession*

There can, therefore, be no question of co-ownership by a tenant with a landlord as a result of a long tenancy in possession. The radical title always remains in the landlord. The landlord may alienate part of his land to a tenant absolutely and when that happens, the landlordship of that part belongs to the former tenant. He ceases to be a tenant thereto; but he does not thereby become a co-landlord with his grantor. That will be contradictory in terms, unless, in the unlikely event, the terms of aliena-

tion are intended to create a tenancy in common or joint tenancy. I do not think anything of the sort took place in this case. To contend, therefore that the respondents, by virtue of exhibit 2, can claim co-ownership, even impliedly, with the appellants is not only a misconception of the ambit of the said exhibit 2 but, in my view, an attempt to give a new meaning to the concept of the relationship between an overlord and a customary tenant. (p. 118 E)

PATS-ACHOLONU JSC

5. Survey plan is necessary in this case

It is my view that this is a case where the Respondents should definitely have procured survey plan having regard to the geographical location to help to ascertain the truth of the matter in controversy. I do not share the view espoused by the Court of Appeal and supported by the Respondents' Counsel that the plan of the area is not necessary on the erroneous belief that the two parties know the land in dispute. (p. 125 E)

REPRESENTATION

Professor S. A. Adesanya (SAN), with him W. Kasali Esq for appellants. Chief Adetunji Fadayiro (SAN) with him Chief M. D. Onasanya for respondents.

CASES REFERRED TO

Ogunye v. The State (1999) 68 LRCN 699, (1999) 12 KLR (pt93) 3109

Obomhense v. Erhahon (1993) 7 NWLR (pt.303) 1, (1993) 10 KLR 78

Ajuwon v. Akanni (1993) 12 SCNJ 32 at 47, (1994) 1 KLR 129

University Press Ltd. v. I. k. Martins Nig. Ltd. (2000) 4 NWLR (pt. 654) 584 (2000) 2 KLR (Pt 97) 519

Odukwe v. Ogunbiyi (1998) 6 SC 72, (1998) 1 KLR (pt.67) 1523

Udih v. Idemudia (1998) 3 SC 50, (1998) 1 KLR (pt.59) 423

Metal Construction (WA) Ltd. v. Aboderin (1998) 6SC 105, (1998) 1 KLR (pt.67) 1599

Okegbe v. Chikere (2000) 7 SC (part 1) 106, (2000) 7 KLR (pt.108) 2597

Ajuwon v. Akanni (1993) 12 SCNJ 32 at 47, (1994) 1 KLR 129

Ibenye v. Agwu (1998) 9-10 SC 18, (1998) KLR (pt.71) 2191

B

STATUTE REFERRED TO

Evidence Act cap. 112 LFN 1990 SS. 135 (1) & (2) 137 (1)

LEAD JUDGMENT BY TOBI JSC

C

This is a representative action. It is between two communities in Cross River State. Ikot Iwang is one. The other is Ifiang Nsung and Ifiang Oyong. They share one name in common. It is Akpabuyo. The two communities have been in Litigation for over eighty-eight years.

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This would appear to be the third case on record. The first one was decided in 1915. The trial judge was Webber J. The judgment of the court is Exhibit 9. It was delivered on 22nd February, 1915. The second one was decided on 3rd November, 1941. The trial Judge was Martindale,

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J. The judgment of the court is Exhibit 2.

In Exhibit 9, representatives of the appellants filed an action against representatives of the respondents for a declaration of title to Isung Ifiang or Aqua Ubom. Webber, J, in his judgment, held thus:

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"In this case I find from the evidence that the land in dispute called Ifiang Nsung or Aqua Ubom and including the beach land called Esuk Okon has always been and is the property of the Plaintiff and the people of Ifiang Nsung who are entitled to the declaration claimed. The land has however been occupied by the Defendants for a considerable

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period. The Plaintiff states that the Defendant's people were permitted to farm on the main land to reside on the beach land. This action was brought about principally on account of encroachments made by the Defendant's people at the beach. It is impossible to state definitely what was

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the extent of trespass committed by the Defendants, if any at all was committed. The court therefore refuses to award any damages for trespass. The Defendant and his people shall be permitted to occupy the beach land, the occupation of which according to their own evidence

extended 200 yards along the bank of the river, and 3/4 mile inland. As to the main land, the Defendants having disputed the ownership of the land will not be permitted to farm on the land in future without the permission of the Plaintiffs."

In Exhibit 2, Suits Nos. C/1/1940, C/15/1940, C/6/1940 and C/30/1940 were consolidated. In the consolidated case, the plaintiffs, the respondents in this appeal, claimed two declarations as tenants to continue to occupy Ikot Iwang land, rendering of account in respect of moneys collected from strangers, damages for trespass and injunction to restrain the defendants, the appellants in this appeal, their agents and servants from interfering with the plaintiffs in the exercise of their rights as tenants and occupants of the said land. B
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Martindale, J. gave the following judgment:

"Judgment therefore in C/1/1940 is entered for the plaintiffs for the injunction they seek against the 1st defendants to restrain the 1st defendants, their agents and servants from interfering with the plaintiffs in the exercise of their rights as tenants and occupants of the land known as Ikot Iwang and for a declaration that as tenants of the 1st defendants under Native Law and Custom they, the plaintiffs are entitled to continue to occupy the said land and together with the 1st defendants to cut palm nuts on the land without let or hindrance from the 1st defendants, and for an account from the defendants of all moneys received by the 1st defendants from 2nd defendant by way of rents, presents and/or tributes for cutting palm nuts on the said land; payment over to the plaintiffs of one half of such rents, presents or tributes. The 1st defendants counterclaim in Suit. No C/5/1940 fails.... The plaintiffs counterclaim against 2nd defendant succeeds...." D
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In Suit, No. C/81/77, the present suit filed at the High Court of Cross River State, Calabar, the respondents in this appeal, as plaintiffs, claimed the following reliefs:

"1. A declaration that the plaintiffs are traditionally and legally entitled as of right to be made a party in any formal Deed of Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village and Ikot Iwang village which Ifiang community and

Ikot Iwang community respectively have traditionally enjoyed together in common from time immemorial.

OR ALTERNATIVELY:

A declaration that any purported Deed of Agreement to alienate the communal forest or palm plantation lands at Ifiang or Ikot Iwang by the defendants unilaterally without the participation of the plaintiffs is invalid and against the plaintiffs who have a common right of enjoyment thereof with the defendants from time immemorial.

2. An Order directing the first defendant to pay over to the plaintiffs the sum of N1.500 being money held in trust by the first defendant for the benefit of the plaintiffs since 1959 and being the plaintiff's share of the N3000 which the first defendant received for and on behalf of both Ifiang community and Ikot Iwang community as rent from the Danish Company which operated under a lease of part of the forest land at Ifiang belonging in common to Ifiang and Ikot Iwang respectively from time immemorial covered by survey plan No. EY/SP/72 dated 21/9/57 prepared by Okon E. Eyo, Esq. Licensed Surveyor.

3. An Order directing the defendants, in particular the first defendant, to account for all rents and incomes received for leases or sales of any part of the common forest or palm plantation lands or economic trees at Ifiang and or Ikot Iwang by the defendants without the knowledge and consent of the plaintiffs with effect from 1st January 1959 up to date.

4. An Order for perpetual injunction restraining the defendants or their agents from further acts of unilateral alienation of any part of the common forest or plantation lands or sale of economic trees at Ifiang or Ikot Iwang to which the plaintiffs are lawfully entitled to enjoy in common with defendants without first obtaining the consent of the plaintiffs to do so."

After hearing evidence, the learned trial Judge, Effanga, J, dismissed the plaintiffs' claim. He said in the concluding paragraphs of his judgment:

"I am satisfied that the plaintiffs failed to adduce any credible evidence to support their claims and I am convinced that the claim of the

plaintiffs is speculative, misconceived, and lacks merit. On the other hand I prefer the evidence of the defendants which is credible, and more probable than that given by the plaintiffs, and when put on the imaginary scale completely outweighs the evidence of the plaintiffs. See Mogaji and ors. v. Odofin and ors. (1978) 4 SC 91 at 94 and 95. On the whole the plaintiffs' case must fail. I hereby dismiss all their claims in this case." B

Dissatisfied, the respondents as appellants filed appeal at the Court of Appeal. That court gave them judgment. In his leading judgment, Akintan, JCA, declared: C

"It is accordingly declared that the plaintiffs in this case are traditionally and legally entitled to be made a party in any formal deed of agreement touching and concerning any part of the forest or palm plantation lands at Ifian village and Ikot Inwang village which Ifiang community and Ikot Inwang village have traditionally enjoyed together in common from time immemorial. The alternative claim for an order directing the 1st defendant/appellant to pay over to the appellants the sum of ₦1,500 being appellants' share out of the rent collected by the respondents in 1959 in respect of the lease jointly executed by the parties in favour of the Danish Agricultural Company cannot be granted as the claim is statute barred. An order for perpetual injunction restraining the respondents from unilateral alienation of any part of the aforementioned common forest at Ifiang or Ikot Inwang is unnecessary having regard to the declaratory order already granted to the appellants above." D E F

Dissatisfied with the judgment, the appellants have come to this court. As usual, briefs were filed and duly exchanged. The appellants formulated four issues for determination as follows: G

1. *Whether the Court of Appeal was right in granting the declaratory relief on the basis of the Judgments in Exhibit 2 and 9?*

2. *Whether the Land affected by the declaration has been satisfactorily prove?* H

3. *Whether the Court of Appeal was right in considering the appeal on the basis of the arguments in the Respondent's brief alone*

4. *Whether Exhibit 9, 2, and 4 established the identity of the land*

dispute?"

The respondents agreed with Issue Nos. 1 and 2 formulated by the appellants. They formulated their Issue No. 3 as follows:

"(a) *Whether the Court of Appeal considered the Appeal only in B (sic) the basis of the Arguments in Respondents' Brief.*

(b) *Whether the approach of the Court of Appeal has occasioned any miscarriage of Justice."*

At the hearing, learned counsel for the appellants applied to abandon issue No. 3. There being no objection from counsel for the respondent, issue No. 3 was struck out. Accordingly the arguments on the issue at pages 9 and 10 will not be considered in this judgment. So too, the arguments on the respondents' issue 3, as it was formulated along similar line with the abandoned issue 3 of the appellants' brief. As a matter of fact, learned counsel formally withdrew the arguments on the issue. Accordingly, the arguments on the issue at pages 10,11, 12 and 13 will not be considered in this judgment.

Learned Senior Advocate for the appellants, Professor S.A. E Adesanya, conceded in issue 1 that it is perfectly right for a party in a land suit to use a previous judgment in his favour as a foundation for a subsequent suit. He cited Ajuwon v. Adeoti (1990) 2 NWLR (pt. 132) 271. He argued that since the respondents were the defendants in Exhibit 9 and did make any counterclaim, there was no decision granting any relief to them in terms of claim 1 of the present suit.

Learned Senior Advocate submitted that the decision in Exhibit 2 is presumed right unless it has been overturned on appeal and this has not happened. He however pointed out that Exhibit 2 did not decide that the respondents "should be made parties to any dealing ", in particular the alienation of the land. To learned Senior Advocate, there is a world of deference between the need to obtain the permission of a third-party to a transaction and the making of such a third-party and executing party to the alienation. He submitted finally on issue No. 1 that the Court of Appeal was wrong to have entered judgment in term of claim 1 of the respondents' claim.

Learned Senior Advocate submitted on issue No. 2 that one of the

primary duties of a party who seeks a declaration of title to land is to establish the identity of the land, and where there is doubt as to the identity of the land, it behoves the claimant to file a plan. He cited Agbonifo v. Aiwereoba (1998) 1 NWLR (pt. 70) 3 25; Baruwa v. Ogunshola (1938) 4 WACA 159 and Makanjuola v. Balogun (1989) 3 NWLR (pt. 108) 192. B However, the acid test whether a plan is necessary is whether a surveyor, taking a record could produce a plan showing accurately the land in respect of which a declaration is being sought, counsel contended. He cited Kwadzo v. Adju 10 WACA 274.

The issue in this case, counsel pointed out, is not whether the same land or an agreed or identified land is being referred to in different names, but the true or correct issue is whether Ikot Iwang land extends to Ifiang village. He called the attention of the court to the admission in the respondent's claim and acknowledgement that there are different communities by the names of Ikot Iwang community and *the* Ifiang community. Counsel claimed that Exhibit 9, the 1915 suit, relied upon by the respondents, shows that the identity of the land in dispute in that case was uncertain. He quoted a portion of the judgment to support his claim. C D E

Learned Senior Advocate argued that the need to file a survey plan becomes more compelling since the respondent's claim was that the land in dispute extended from Ikot Iwang to the Ifiang village, while at the same time admitting that there were intervening villages which the respondents described and admitted in their own evidence as autonomous villages. He referred to the evidence of PW4 and DW1. F

Still insisting on the need for a survey plan, learned Senior Advocate contended, without conceding, that even if the respondents, evidence on the description or ascertainment of the land in dispute was unchallenged, there was no means or machinery for ascertaining the land as claimed by the respondents without a survey plan, bearing in mind that the respondents admitted the existence of some autonomous villages between Ikot Iwang and the Ifiang village and appurtenances are exclusive of the land as claimed by the respondents. G H

Learned Senior Advocate submitted that in view of the uncertainty of the land as claimed by the respondents, coupled with the fact that the

land was disputed by the appellants, with the further fact that the judgment in Exhibits 2 and 9 did not contain any survey plan, it was wrong to have granted a declaration on an imprecise piece or parcel of land. Citing Mbamaenyi v. Abose (1995) 7 NWLR (pt.405) 54 at 56, counsel submitted that in so far as the judgment in Exhibits 2 and 9 did not purport to define the land in dispute by reference to any plan, they are of little or no utility and ought to have been relied upon by the Court of Appeal in giving judgment for the respondents.

On Issue No. 4, learned Senior Advocate said that in reaching its conclusion that the identity of the land has been established, the Court of Appeal relied on Exhibits 9, 2 and 4. He submitted that non of the exhibits established the identity of the land in dispute. He contented that no survey plan was filed in Exhibits 9 and 2, and although a survey plan was filed in Exhibit 4, the survey plan relates to only part of the land being claimed in the instant case.

Counsel submitted that Exhibit 9 cannot be of any assistance to the respondents in establishing the identity of the land in dispute, as the court found that the identity of even the smaller portion, which was the subject matter of the claim for trespass, was not established. While Exhibit 9 was concerned with the land called Affiong Nsung otherwise called Aqua Ubom, the relief sought in paragraph 1 of the Amended Statement of Claim is for a declaration that the plaintiffs are entitled to be made a party in any formal Deed of "Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village or Ikot Iwang village which Ifiang community and Ikot Iwang community respectively have traditionally enjoyed together in common from time immemorial." Counsel pointed out that Ifiang and Ikot Iwang are distinct and separate communities. He referred to paragraph 1 of relief claimed. Still on Exhibit 9, learned Senior Advocate contended that there was no finding and in fact there was no evidence or even suggestion in the exhibit that Afiang Nsung is co-terminus with Ikot Iwang. He referred Exhibit 5 as showing that Afiang Ayong and Afiang Nsung are two separate communities. Relying on lordye v. Ihhambe (2000) 15 NWLR (pt. 692) 675, counsel submitted that the burden of proof of the identity of the land in dispute is

on the plaintiff.

Taking Exhibit 4 further, learned Senior Advocate referred to paragraph 2 of the claim and submitted that the exhibit related only to a lease of part of the forest land. On Exhibit 5, learned Senior Advocate contended that the exhibit never indicated which of the Afiang communities the claim of the plaintiffs related to, that is, whether it is Afiang Ayong or Afiang Nsung. On Exhibit 2, learned Senior Advocate submitted once again that the exhibit is equally of no assistance to the plaintiffs/respondents in establishing the identity of the land claimed.

It was the argument of learned Senior Advocate that the conclusion of the Court of Appeal on Exhibits 9 and 2 is not supported either by the fact or by the earlier judgments. In view of the fact that Ifiang and Ikot Iwang are separate villages, the Court of Appeal, learned Senior Advocate submitted, was wrong to have departed from the case pleaded and made by the plaintiffs/respondents. He cited Obomhense v. Erhahon [1993] 7 NWLR (pt. 303) 1. He urged the court to allow the appeal.

Learned Senior Advocate for the respondents, Chief Adetunji Fadayiro, pointed out on Issue No. 1 that Exhibit 2 was a decision in Suits C/1/40, C/5/40/C/6/40, C/30/40, which were consolidated into one and that it was the defendants/appellants in C/1/40 who raised the issue of res judicata in their defence.

Learned Senior Advocate quoted findings from Exhibit 2 and submitted that the issue of common user and the necessity of the concurrence of respondents in any transaction involving the said land has been settled in Exhibit 2. It was the submission of counsel that the passage quoted at page 4 of the appellants brief was taken out of context. Relying on UTC v. Pamotel (1989) 2 NWLR (pt. 103) 244 at 293, learned Senior Advocate submitted that the expression of a Judge in a judgment must be taken with reference to the facts of the case which he is deciding, the issues calling for decision and the answers to these issues, and that any judgment should be read as a whole.

It was the submission of learned Senior Advocate that reading Exhibit 2 as a whole the rights claimed by the respondents have been decided therein and the Court of Appeal was right to have granted them in

claim 1. To learned Senior Advocate, Exhibit 2 did not decide that the respondents should be made a party to any dealing regarding alienation of land and that the exhibit has spelt out the rights of common user by the parties and in that respect, the respondents cannot be regarded as third parties. He pointed out that the respondents used Exhibit 2 as an issue estopped and not as estoppel per rem judicatam. He cited sections 54 and 55 of the Evidence Act and Odjewedje v. Echanokpe (1986) 4 NWLR (pt. 57) 633 at 644; Chukwundi v. Mbamali (1981) 3-4 SC 31 at 48.

On issue No. 2, learned senior Advocate claimed that this is not a case of declaration of title to land but a case of common user. He submitted that the land is very certain. Counsel quoted extracts from Exhibit 9 to substantiate his submission. He rejected the argument of the appellant's counsel that because PW1 AND PW2 gave evidence that there are other villages in Ifiang apart from the villages of the parties that makes the identity of the land uncertain. Counsel contented that the claim before the High Court was not in respect of villages but in respect of forest lands or palm plantations. He called in aid the evidence of PW2 at page 29 of the record.

Relying on the pronouncement of the of the Court of Appeal on Exhibits 2 and 9, learned Senior Advocate pointed out that the position taken by the appellants at the High Court was that the two exhibits were restricted only to Ikot Iwang village, but admitted signing Exhibit 4 with the plaintiffs. He claimed that Exhibit 4 had a plan which the appellants did not impugn neither did they file a counter plan. Citing Adepoju v. Oke (1999) 3 SCNJ 46 at 57, leaned Senior Advocate submitted that the appellants having failed to file a counter plan cannot be heard to contend that the land is not certain.

Justifying the judgment of the Court of Appeal, learned Senior Advocate cited relevant pages on exhibits 4 and 5 at pages 291 and 292 of the Record and submitted that the findings are very much in line with the evidence before the court. He cited Adimora v. Ajufo (1988) 3 NWLR (pt. 80) 1 and Ajuwon v. Akanni (1993) 12 SCNJ 32 at 47. Counsel submitted in support of the finding of the Court Appeal that the land is very much certain and know to both parties, as it is the land, the subject

matter of Exhibits 2 and 9; a land described in the survey plan measuring 22,900 acres attached to Exhibit 4; a land in respect of which the parties litigated in 1915, 1924 and 1940 called Akiral Ubom by the 1st defendants' witness.

On issue No 4, learned Senior Advocate adopted his submission on issue No 2. He repeated his earlier argument that the claim of the respondents is that of co-user and enjoyment of plantations in both Ikot Iwang and Ifiang Usung and not ownership of land. He called in aid Exhibit 3 and the evidence of DW1 under cross-examination.

I think I can stop here in summarizing the arguments of learned Senior Advocate as they essentially repeat the earlier arguments on the identity of the land. The same story of Exhibits 2, 4 and 9 vis-a-vis the evidence of witnesses is repeated in the rest of the brief and no useful purposes will be served by respecting the stuff. Learned Senior Advocate finally urged the court to dismiss the appeal.

I think I should first deal with the burden of proof in this matter. **By section 135(1) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Subsection (2) of section 135 completes section 135 (1) by providing that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.** See generally Elias v. Disu (1962) 1 All NLR 214; Abiodun v. Adehin (1962) 1 All NLR 550; University Press Ltd. v. I. k. Martins Nig. Ltd. (2000) 4 NWLR (pt. 654) 584; Odukwe v. Ogunbiyi (1998) 6 SC 72.

In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. This is the language of section 137 (1) of the Evidence Act. See Are v. Adisa (1967) NMLR 304; Elemo v. Omolade (1968) NMLR 359; N. M. S.L. v. Afolabi (1978) 2 SC 79; Kate Enterprises Limited V. Daewoo Nigeria Limited (1985) 2 NWLR (pt.5) 116; Duru v.

92 Archibong v. Ita (2004) 1 KLR Tobi JSC
Nwose (1989) 7 SC (pt. 1) 1; Okaiya v. Olaiya (2002) FWLR (pt. 109)
1588; Udih v. Idemudia (1998) 3 SC 50.

Although the burden of proof under section 137(1) generally remains with the plaintiff, it is not invariably so. As provided in the subsection, the burden of proof will be determined by the pleadings. It will therefore not be wrong to say that the burden of proof under the subsection fluctuates with the state of the pleadings and the level of fluctuation may at times go to the defendant, if he has asserted the positive fact therein. See Akinfosile v. Ijose (1960) 6 FSC 192; Noibi v. Fikolati (1987) 1 NWLR (pt. 52) 619.

In most cases, the burden of proof lies with or rests on the plaintiff because he is the person who is making the claim. See Osawani v. Ezeiruka (1978) 6-7 SC 135; Attorney-General, Anambra State v. Onuselogu (1987) 4 NWLR (pt. 66) 547; Agu v. Nnadi (2002) 12 NSCQR 128; Oredoyin v. Arowolo (1998) 7 SC (pt. 11) 1.

As a matter of law, the plaintiff has the onus of proving his case and where he fails to get the appropriate findings relevant to the reliefs he had sought, he must fail. See Fashanu v. Adekoy (1974) 6 SC 83. A plaintiff who asserts the truth or existence of a fact must prove it. A mere speculative observation cannot be a substitute to proof of fact asserted. See George v. UBA (1972) 8-9 SC 264.

In this appeal, the burden of proof is clearly on the respondents and that burden does not shift. It is as constant as the sun rising from the east and setting in the west; and that is the position fixed by pleadings. See paragraphs 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. I should mention here that since the claim is not on title to land, the plaintiffs have no burden to prove title and therefore the decision in Idudun v. Okumaagba (1976) 9-10 SC 227 will not apply. The issue before this court is that of common use and enjoyment of forest or palm plantation lands.

Professor Adesanya has attacked claim 1 in his brief as not vindicating Exhibit 2. Claim 1 reads:

"A declaration that the plaintiffs are traditionally and legally en-

titled as of right to be made a party in any formal Deed of Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village and Ikot Iwang which Ifiang community and Ikot community respectively have traditionally enjoyed in common from time immemorial."

What did the witnesses say in respect of claim 1, which to me, is the "mother" of all the claims. I give claim 1 that nomenclature because apart from the alternative claim, the other claims on refund of money, account of rents to the plaintiffs and an injunctive order are parasitic on claim 1. In other words, all the three other claims will seek for survival on the basis that claim 1 succeeds. pw1, in his evidence-in-chief, said:

"Ikot Iwang village and Ifiang village have everything in common. Both land and what are on it belong to the two villages in common. I know a company by name Danish Nigeria Agricultural Company A/S. The above company had dealing with Ikot Iwang and Ifiang villages. The dealing with the company was in respect of land. The company made agreement with us concerning land. I was one of the parties in the said agreement. The 1st defendant was also one of the parties... We insisted that the money should be share equally but the defendant refused to share it equally and the defendant took all the N3,000.00... up till today, the 1st defendant had not paid us anything and he did not even want to see us. The land we are talking about is the same piece of land as the one we made an agreement with the Danish Company. There was a survey plan to identify the land before the agreement was made. It is in respect of that piece of land."

The agreement was admitted through pw1 as Exhibit 4.

Dw1, in his evidence-in-chief, said at page 124:

"The place where the plaintiffs are living were given to them by the father of the 1st to 6th defendants. Apart from where the plaintiffs are living, Our father did not give the plaintiffs any other piece of land. The relationship between the plaintiffs and the 1st to 6th defendants is with respect to the land in dispute. Anything we want to do concerning the land in dispute is done after consultation between the plaintiffs and the defendants. The plaintiffs are the tenants of the 1st to 6th defendants"

with regard to the land in dispute. Apart from the plaintiffs we have other tenants on other portions of Ifiang land which are separate from the one now in dispute... The land which is in Exhibit C which we gave to the Danish Company was the land belonging to Ifiang Nsung and Ifiang oyong. It is a different land from the land in Exhibit B... The plaintiffs are not entitled to any account in respect of dealings with Ifiang land. They are entitled to account with respect to the land where they are living. The plaintiffs are not entitled to be parties to any Agreement made with respect to Ifiang land. The plaintiffs are not also entitled to an account with respect to any dealings concerning the land in Exhibit C, that is, the land which was given to the Danish Community."

Understandably the evidence of PW1 and DW1 are in opposing camps. I should at this stage take Exhibits 9, 2, 4 and 5, exhibits which are relevant for the resolution of the live issues in this appeal.

First Exhibit 9. As indicated earlier, Exhibit 9 is the judgment of Webber, J. It was an action filed by the appellants qua plaintiffs against the respondents qua defendants. I have reproduced the ipsissima verba of what Webber, J. said. I should not repeat myself. But I can analyse the judgment. The learned trial Judge held that the land in disputes called Ifiang Nsum or Aqua Ubom and including the beach land called Esuk Okon is the property of the plaintiffs and the people of Ifiang Nsung who are entitled to the declaration claimed. For the avoidance of doubt, the plaintiffs in Exhibit 9 are the appellants in this appeal.

Webber, J. could not award any damages for trespass because "it is impossible to state definitely what was the extent of trespass committed by the defendants", who are the respondents in this appeal. The implication of the above conclusion by Webber, J. is that there was no survey plan to indicate the extent of the trespass. And that is the "song" the Appellants have been singing in this appeal.

Webber, J., ordered that the defendants should continue to occupy "the beach land, the occupation of which according to their evidence extended 200 yards along the bank of the river and 3/4 mile inland" Here, Webber, J. was clear and precise in his order. He confined the present respondents to an identified area or portion of the land and it was

200 yards along the bank of the river and 3/4 mile inland."

Webber, J. did not stop there. He made a specific order on the ownership of the land when he said that "the Defendants having disputed the ownership of the land will not be permitted to farm on the land in future without the permission of the plaintiffs". This order, in my view, B clearly reflects and brings out the relationship between a landlord and a tenant vis-a-vis the right of ownership and the payment of rent or tribute respectively. The tenant is entitled to use and occupy the land subject to payment of rent and good behaviour. See generally Metal Construction C (WA) Ltd. v. Aboderin (1998) 6SC 105; Olale v. Ekwelendu (1989) 7SC (pt. 11) 62; Okegbe v. Chikere (2000) 7 SC (part 1) 106; Bosah v. Oji (2002) 3 SC 16.

Let me take Exhibit 2, the judgment of Martindale, J. The suit, this time around, was instituted by the present respondents as plaintiffs. Of D course, the present appellants also filed suit as plaintiffs. All the suits (four in number) were consolidated. I had earlier said so.

What was the decision of Martindale, J.? The learned Judge gave judgment in favour of the present respondents. He granted them an in- E junction against the appellants restraining them from interfering with the respondents in the exercise of their rights as tenants and occupants of the land known as Ikot Iwang. The learned Judge also granted them a declaration to continue to occupy the said land and together with the 1st F defendants to cut palm nuts on the land without hindrance. The trial Judge also made an order for an account from the 1st defendant of all money by the 1st defendant from the 2nd defendant by way of rents, and all that.

It is important to note that Martindale, J. was very clear that the G present respondents are tenants of the present appellants. This was also the position in the judgment of webber, J. There is however difference between the two judgments. Webber, J. in the true tenurial system of land law and tenant, held that the present respondents should only farm H on the land in dispute with the permission of the appellants. He came to this conclusion because the respondents were disputing the ownership rights of the appellants.

Martindale, J, thought differently. He did not advert his mind to the issue of ownership. Although he recognized the respondents as tenants, he ordered that the tenants should continue to occupy the land together with the appellants, and cut palm nuts on the land without hindrance. He also made an order for an account flowing from the communities of the appellants to communities of the respondents. The true interpretation of Martindale, J.'s judgment is that the legal rights of the tenants were raised almost to the same status with the landlords. Since there is no appeal before us on the judgment of Martindale, J., I will stop here.

What did the Court of Appeal say on the two exhibits. The court took them together hence I waited to do Exhibit 2 before taking the decision of the Court of Appeal on the two exhibits. Akintan, JCA, in his leading judgment said at page 288:

"It is clear from the 1915 judgment (Exh. 9) and that of 1941 (Exh. 2) that the present appellants had long been in occupation of the land variously described as Ifiang Nsun, Akwa Ubom, or Ikot Iwang land. They were let in through grant made to them by Nsun Anem, an ancestor of the present respondents. Although it was decided in the earlier case (Exh. 9) that the defendants (now appellants) should not be permitted to farm on the land in future without the permission of the plaintiffs (now respondents) it is clear from the latter case (Exh 2) that they subsequently got the permission to continue their farming activities on the land."

It should be noted and emphasized that like Exhibit 9, there was no survey plan in Exhibit 2, the point leaned Senior Advocate for the appellants consistently repeated when the appeal was heard.

I move to Exhibit 4. Exhibit 4, in the way I see it, is a lease dated 24th day of November, 1956 between Chief Okon Edem Asibong for and on behalf of the people of Ifiang Nsung and Akpabuyo Rural District. While Chief Okon Edem Asibong and the Ifiang Nsung community were the lessors, Akpabuyo and Rural District were the lessees. The lease (Exhibit 4) provided that in consideration of the rent, covenants and conditions on the part of the lessees the lessors demised to the lessees "all that piece of ground situate at Ifiang Nsung Akpabuyo in the Calabar

Division." Exhibit 4 contained the usual provisions in a lease, including the lessees' right to peaceable and quiet enjoyment of the land subject to the lessees performing and observing the covenant and conditions of the lease.

There is a plan attached to Exhibit 4. The plan is titled "Plan showing the Leaseholder Property of the Danish Nigerian Agricultural Company A/S Estate at Ifiang Akpabuyo, Calabar Division". Immediately following the plan is a document titled "FIRST SCHEDULE" showing the leaseholder property of the Danish Nigerian Agricultural Company A/S Estate at Ifiang, Akpabuyo, Calabar Division, Nigeria. Attached to the plan is also a document showing by way of a sketch Ifiang Nsung School Site. And that ends Exhibit 4.

The lease (Exhibit 4) between the people of the appellants and the respondents did not making any reference to the survey plan attached to it. In other words, there is no nexus between the lease and the survey plan. This does not surprise me because the two documents in the way I see them, deal with two different situations: one a lease agreement between the people of the appellants and the respondents and the other showing the leasehold property of appellants and the respondents and the other showing the leaseholder property of the Danish Nigerian Agricultural Company A/S Estate and Ifiang, Akpabuyo, Calabar Division, Nigeria.

Could it be that the plan is in respect of Danish Nigerian Agricultural Company A/S Estate and the two parties in this appeal, that is, Ifiang and Iwang? It is dangerous for this court to so speculate in the absence of evidence. After all, a court of law cannot speculate or conjecture. See Ogunye v. The State (1999) 68 LRCN 699; Okonji v. Njokanma (1999) 73 LRCN 3632; See Nwachukwu v. The State (2002) 2 NWLR (pt. 751) 366; Onyirimba v. The State (2002) 11 NWLR (pt. 777) 83; ABC Plc v. Emostrade Ltd. (2002) 8 NWLR (pt. 770) 501. Where a document is speculative in content, the court is entitled not to rely on it to make an award or order. See Olalomi Industries Ltd. v. NDIC (2002) FWLR (pt. 131) 1984.

Exhibit 4 was tendered by PW1. What did the witness say? He

said at page 74 of the Record:

"The land we are talking about is the same piece of land as the one we made an agreement with the Danish Company. There was a survey plan to identify the land before the agreement was made. It is in respect of that piece of land that we brought this action. I was one of the signatories to that agreement representing Ikot Inwang Community. The 1st defendant was a party to that agreement and he and others were representing Ifiang Community."

Learned Senior Advocate for the respondents described the survey plan as measuring 22,900 acres. I have two major problems. The first one is that by the evidence of PW1 the land in dispute is not before the court by way of a plan. I come to this conclusion because PW1 said:

"The land we are talking about is the same piece of land as the one we made an agreement with the Danish Company."

Considering the fact that the plan annexed to Exhibit 4 is the plan showing the leasehold property of the Danish Company, it is clear to me that the order one between the parties was not tendered in court. That is the first problem.

The second problem is the signatories to Exhibit 4. PW1 claimed that he was a signatory to Exhibit 4. The name of PW1 is Edet Abianga. I do not see such a name in Exhibit 4. One name I see in Exhibit 4 Chief Okon Edem Asibong, who had his right hand thumb print in the second page of the Exhibit. This is followed by the illiterate jurat showing the name of the interpreter as Mr. E. B Edion, who duly signed as witnessing the interpretation and the thumb print. Exhibit 4 ended with the signatures of the Chairman and Secretary of Akpabuyo District Council.

The Court of Appeal, on Exhibit 4, said at page 249:

"The plaintiff led evidence in support of their aforementioned pleadings and tendered the two documents. The attitude of the defence to the averment in paragraph 7 was to make a general denial. In the circumstances, it was admitted, the pleading and evidence of the plaintiffs on Exh. 4 remained unchallenged. The defendants were therefore estopped from denying the fact of co-user and enjoyment of the land covered by Exh. 4 with the Plaintiffs."

In order to come to a conclusion whether the Court of Appeal was right or not, in the above statement, there is need to reproduce the relevant paragraphs of the two pleadings. Paragraph 6 of the Amended Statement of Claim reads:

"By letter dated 6th July 1976 the Plaintiffs had requested the first defendant to render an account of all leases entered into by the first defendant on behalf of Ifiang village without the knowledge and consent of the plaintiffs concerning the communal forest lands which the two villages of Ifiang and Ikot Inwang have rights to common enjoyment pursuant to the High Court Suit No. C/1/40 but without avail. The plaintiffs intend to rely on the said letter at the trial."

In their reply, the appellants averred in paragraph 7 of their Further Amended Statement Defence:

"In answer to paragraph 6 of the statement of claim, the defendants deny that the plaintiffs are entitled to the account sought. Plaintiffs will at the trial be required to give strict proof of leases for which they want an account and which pertain to Ikot Inwang land."

With the greatest respect, the Court of Appeal was in error in coming to the conclusion that the above is general denial. In my humble view, paragraph 7 is a specific denial. The defendants who are the appellants clearly joined issues with the plaintiffs who are the respondents on the issue of the latter's entitlement to an account. The appellants did not stop there. They went further in the paragraph to prove at the trial the leases which gave the respondents the right to ask for an account. I have searched in vain in the wording of Exhibit 4 and I do not find such a condition for account. I am of the view that respondents failed to prove that the land in dispute was clearly indicated in Exhibit 4.

Let me take Exhibit 5. Exhibit 5 would appear to be letter from the appellants to the respondents. The latter reads in part:

"We are unable to concede to your fantastic demand of a half share of the rents for the following reasons:

(a) The area of the land leased to the Danish Company does not include any land within your area of settlement and or occupation, as

could be seen from the plan.

(b) Your interest in the land is merely nominal as compared with our bona fide rights and title.

(c) You had already drawn from the company the sum of N1.000 B which you shared with Ifiang Nsung people for Road construction.

Under the above circumstances therefore you will agree with us that you ought not to have demanded any share of the rents, but out of our desire to co-operate with you as good neighbours we have agreed to C give you a fair share that my be due to you from the rents received by us . Anyhow since you do not wish to co-operate, we are referring your attitude in this matter to the District Officer who had advised our joint consent and agreement over this matter.

In our reference to the C.O. we shall inform him that since you D don't want to co-operate with us, we are now receiving our rents direct from the Danish Company upon the following grounds:-

i. That Ifiang Ayong and Ifiang Nsung are the real owners of the land leased and for which payment of rents is to be received.

E ii That we are responsible to you as far as the payment of your share of rents is concerned.

iii. That you are at liberty to demand the said share from us at any time after receipt from the company."

F On Exhibit 5, the Curt of Appeal said at page 291:

"Similarly the learned trial Judge was also wrong to have concluded that the letter (Exh. 5) was of no help to the plaintiffs case but rather goes against it. This is because from the admissions made therein by the writer, it was clear that the respondents were at least about to G receive the rent due on the lease to the Danish Agricultural Company. The appellants were also requested in the letter to contact the writer for their share later after they (respondents) must have received the money. There is therefore merit in the appeal in respect of the 5th issue."

**H What is the admission, the Court of Appeal is relying upon?
Is it the one that the appellants were about to receive payment from the Danish Company? If so, (and it is so) from the above statement of the court, how does that help the respondents in this**

appeal? An admission, in order to be useful to the adverse party, must relate or affect the live issues in the matter. One of the live issues in this appeal, if not the only live issue, is that the respondents are in the language of claim 1 "entitled as of right to be made a party in any formal Deed of Agreement touching and concerning any part of the forest which Ifiang community and Ikot Iwang community have traditionally enjoyed in common from time immemorial." In other words, both the respondents and the appellants were equally entitled to the share of rents and other goodies.

It is not my understanding of Exhibit 5 that the appellants so admitted. On the contrary, Exhibit 5 was firm when it said: "(a) *The area of the land leased to the Danish Company does not include any land within your area of settlement and or occupation as could be seen from the plan.* (b) *Your interest on the land is merely nominal as compared with our bona fide rights and title.* (c) *You had already draw (sic) from the company the sum of N1,000 which you share (sic) with Ifiang Nsung people for Road Construction.*"

Exhibit 5 was so clear as to the ownership of the land dispute when it said:

"(1) That Ifiang Ayong and Ifiang Nsung are the owners of the land leased...."

In my view, Exhibit 5, is a little bit above a gentle man's agreement as it affects or relates to the payment of some money to the respondents by the appellants as and when the appellants receive payments from the Danish Company. In the circumstance, the Court of Appeal, with respect, was wrong in placing a status of admission on Exhibit 5. Exhibit 5 has no such status in respect of the live issues in this appeal.

I should now take the issue of survey plan. While Professor Adesanya submitted that there was need for a survey plan as the land in dispute was not identifiable, Chief Fadayiro help a contrary view. To him, there is no need for a survey plan as the land in dispute was known to the parties. He relied heavily on some of the exhibits I have already dealt with.

It is trite law that where a land in dispute is not identifiable by one of the parties and therefore not identified, a survey plan is a desideratum. A survey plan is not only necessary in an action for declaration of title to land; it is also necessary in the situation and circumstance of this appeal where the identity of the land is in dispute. I am not creating the impression that the production in evidence of a survey plan of the land, the subject of the dispute is a sine qua non in all land cases. What is necessary is that the land the subject of the award must be ascertained with definitive certainty. The acid test, in Kwadzo Adjie (1944) 10 WACA 274 is whether a survey, taking the record of the proceedings in the case can produce a plan showing accurately the land in which the dispute has arisen. The principle that the land, the subject of the litigation must be certain, is of universal application in the context of land disputes, as it applied to this case where the certainty of the land is in dispute. See Arabe v. Asanlu (1980) 5-7 SC 78 and Ibenye v. Agwu (1998) 9-10 SC 18.

In Omorieg v. Idugiemwanye (1985) 2 NWLR (pt. 5) 41, the Supreme Court held that one of the ways of showing the specific area of land claimed is to file a plan of the area; such plan being properly orientated, drawn to scale and accurate and reflecting the boundary features. See also Lawson v. Afani Continental Co. (Nig) Ltd. (2002) FWLR (pt. 109) 1736.

The burden is on the respondents to prove the boundary of the land in dispute. See Ekwealor v. Obasi (1990) 2 NWLR (pt. 131) 231; Onuwaje v. Ogbeide (1991) 3 NWLR (pt. 178) 147; Reg. Trustees M.M.H.C. v. Adeagbo (1992) 2 NWLR (pt. 226) 633; Onwuka v. Ediala (1989) 1 SC (pt. 11) 1; Akulaku v. Yongo (2002) FWLR (pt. 100) 1228. The respondents have not discharged the burden of proving with definitive certainty the land which they claim they are entitled to be made a party in any deed of agreement and account therefrom.

Learned Senior Advocate for the respondents dealt with the failure of the appellants to file a counter plan. An adverse party can only file a counter plan where there is an existing plan. The main

purpose of a counter plan is to counter or counteract an existing plan to expose it as incorrect or inaccurate. Accordingly, where there is no existing plan, as in this appeal, there is no need for a counter plan as there is nothing to oppose, challenge or counter. I can still take the issue one step further and this is obiter. Where a party has filed a plan, which the adverse party feels does not adequately address the claim before the court, he need not file a counter plan. After all the burden is on the party relying on the identity of the land to succeed in his case to prove such identity.

Let me take claim 1 for what it is worth. The claim is that the respondents are traditionally and legally entitled to any formal deed of agreement in respect of any part of the forest or plan plantation land which the two communities have traditionally enjoyed in common from time immemorial.

The burden of proving the above claim is on the respondents. And in this respect, they have to prove their traditional and legal entitlements beyond the portion of land given to them. The claim talks about "time Immemorial". This has to do with going back to ancient times. It also means beyond human memory.

Did the respondents prove the claim? I think not. I have taken time to examine Exhibits 9,2,4 and 5 relied upon in this case and I do not see any Justification for claim 1. If anything, there is plethora of evidence that the respondents are tenants of the appellants. Even Exhibit 2 which is most complimentary to their case, Martindale, J. recognized the status of the respondents as tenants. Let me quote the judge at the expense of prolixity:

"Judgment therefore in C/1/1940 is entered for the plaintiffs for the injunction they seek against the 1st defendants, their agents and servants from interfering with the plaintiffs in the exercise of their rights as tenants....."

I think I can stop here in the quotation. The learned Judge said quite clearly the rights of the respondents as tenants.

The claim does not only look funny but ridiculous and wears the tallest ambition. The claim is precipitate. I say this because the

claim is clearly against all know canons of our land tenure system both in customary law and under the Land Use Act. When did a tenant claim to share common and equal rights over property with landlord or overlord, the owner of the property? This is against the
 B allodial rights of the owner of the property. It is also against the tenorial duty of the tenant to pay rent for the purposes of enjoying a peaceable right to the property, for the period of the tenancy, subject to good behaviour. See generally Pan Asian Ltd. v. NICON Ltd. (1982) 9 SC 1; Yusuf v. Kode (2002) FWLR (pt. 66) 464; Onyia v. Oniah (1989) 2 SC (pt. 1) 69; Olale v. Ekwelendu (1989) 7 SC (pt 11) 62.
 C

It is my view that the respondents did not prove claim 1, and I so hold. Since all the other claims rest on claim 1 for survival, I need not say more on them.

D **I think Webber, J. Dealt with this matter adequately. Let me reproduce part of the order he gave which I quoted at the beginning of this judgment:**

*"The Defendant and his people shall be permitted to occupy the
 E beach land, the occupation of which according to their own evidence extended 200 yards along the bank of the river, and 3/4 mile inland."*

**In the light of the above, the respondents are only entitled to the portion of land given to them by the appellants. They do not
 F have any legal right to go beyond what was given to them by the appellants.**

The appeal is allowed. I hereby set aside the judgment of the Court of Appeal and restore that of the trial court dismissing all the claims. I
 G award N10,000.00 costs against the respondents in favour of the appellants.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother
 H Niki Tobi, J.S.C. I agree with the conclusion that in view of the fact that the Respondents are tenants of the Appellants, they (respondents) cannot claim to share common and equal rights over the property with their landlord or overlord. The Plaintiffs' claims must therefore fail. They are

accordingly dismissed. Consequently this appeal succeeds. The judgment of the Court of Appeal is set aside while the one delivered by the trial High Court on 30th January 1989 is affirmed and restored. I award N10,000.00 costs against the Respondents in favour of the Appellants.

ONU JSC

I have been privileged to read in draft the judgment of my learned brother Tobi, JSC just delivered. I agree with him that the respondents and the Ikot Iwang community, Akpabuyo occupy the beach land which extends 200 yards or its equivalent in kilometres, along the bank of the river and 3/4 mile or its equivalent in kilometres inland with N10,000.00 costs to the Appellants.

In further elaboration of the leading judgment of my learned brother Tobi, JSC, I wish to emphasise that the judgment of Webber, J. of 1915 (Exhibit 9), the judgment of Martindale, J. of 1941 (Exhibit 2), Exhibit 4 (a plan tendered by PW1 and to which he claimed to be a signatory by showing the lease hold property of the Danish Company but whose name was not found thereon) and Exhibit 5 which would appear to be a letter from the appellants to the respondents rejecting the latter's demand for a half share of the rents derived from the land leased to the said Danish Company, their (respondents') interest was merely nominal as compared with the (appellants') bona fide rights and lastly that they (respondents) had already drawn from the company the sum of N1,000 which they (respondents) shared with Ifiang Nsung people for road construction.

The Appellants in an expression of dissatisfaction with the decision of the court of Appeal, which upturned the decision of the trial court that dismissed the case, submitted the following four issues as arising for determination.

1. *"Whether the Court of Appeal was right in granting the declaratory relief on the basis of the judgment in Exhibits 2 and 9?"*
2. *Whether the land affected by the declaration has been satisfactorily proved?*
3. *Whether the Court of Appeal was right in considering the appeal on the basis of the arguments in the Respondents' brief alone.*

4. *Whether Exhibits 9, 2 and 4 established the identity of the land in dispute?"*

As at the hearing of this appeal learned counsel for the appellants applied to abandon issue No.3 and the learned counsel for the respondents did not object thereto, it was accordingly struck out. The respondents' issue No.3 framed in identical terms, which learned counsel for them equally withdrew, was therefore not agitated.

I wish to consider hereunder issue Nos. 1, 2 and 4 (the facts the case having been admirably stated in the leading judgment to need repeating).

ISSUE NO.1

It is perfectly legitimate or right, for example in a land suit, for a person who has had a previous suit in his favour, either to use it as a foundation for an action in trespass or to go to court again to add something new to what he already got in the previous judgment in his favour. See Adomba v. Odiese (1990) 1 NWLR (pt.125) 165; (1990) 1 SCNJ 135; Mobil Oil (Nig) Ltd v. Coker (1975) 3 S.C.; Ojiako v. Ogueze (1962) 1 All NLR 58 and Ajuwon v. Adeoti (1990) 2 NWLR (part 132) 271.

However, where a particular relief is sought or shown unequivocally that the particular relief was part of the judgment relied upon as in the instant case, the Respondent relied upon the judgment in suit No. C/1/40 (Exhibit 2) to found estoppel per rem judicatam. In that judgment the trial court held:

"The only right remaining in the grantor is that of reversion, should the grantee deny or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission any right in respect of the land. The grantor must share the proceeds of rents occurring from strangers keeping one third only as his share."

In exhibit 9 which is Webber, J.'s judgment delivered on the 22nd February, 1915 in the Supreme Court of Nigeria holden in Calabar between Chief Nyok Effiong Nsun Antigha and Okon Offiong Akan, the respondents who were defendants did not make any counter - claim, therefore there was no decision granting any relief to them in terms of Claim 1 of the suit herein on appeal.

In the present suit the respondents claimed as plaintiffs, among others as follows:

"A declaration that the plaintiffs are traditionally and legally entitled as of right to be make (sic) a party in any formal Deed of Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village and Ikot Iwang community respectively have traditionally enjoyed together in common from time immemorial." B

I agree with learned senior counsel for the appellant that Exhibit 2 is presumed right unless it has been overturned from the decision of lower court; it is presumed on appeal to be correct until the contrary is shown. See Odiase & Anor. v. Agho & Ors (1972) 1 All NLR 170 at 176; Harrison Welli v. Charles Okechukwu (1985) 6 S.C 113 at 142 and this has not happened. Exhibit 2 did not decide that the respondents should be made a party to any dealing, in particular the alienation of land. This is the more so, when it is known that there is a world of difference between the need to obtain the permission of a third party to a transaction and the making of such a third party and executing party to the alienation. In the result, I agree with the submission of learned senior counsel for the appellants that the court below was wrong to have entered judgment in terms of claim 1 of the Respondent's claims. D E

ISSUE 2

In his oral submission, learned appellants' senior counsel harped on the identity of the land as being what was in issue. He referred us to Exhibit 4 and submitted that looking at the issues the whole matter boils down to the identity of the land, which in turn was in issue. We were referred to exhibits 9, 4 and 2 submission was made that some of these plans are vital to the case. I share the views of learned counsel for the appellants that the land the respondents are laying claim to is very much in issue. At page 170 of the Record, it is recorded as follows: F G

"Ref. Exhibit 9-p.1 -4 where one Nyok Effiong Nsung predecessor to the defendant gave evidence Exhibit 2 - confirming the grant and description. pp.2 - 15. The question of the identity of the land is not in dispute." H

From the foregoing I agree with the learned senior counsel for the

appellants that one of the primary duties of a party who seeks declaration of title to land is to establish the identity of the land. See Agbonifo v. Aiwereoba (1988) 1 NWLR (pt.70) 325; Baruwa v. Ogunshola 4 WACA 159 where it was held that where there is a doubt as to identity of the land, it behoves the claimant to file a plan see also Makanjuola v. Balogun (1989) 3 NWLR (pt.108) 192. Moreover, the acid test, it is trite to say, is whether a plan is necessary and whether a surveyor taking a record could produce a plan showing accurately the land in respect of which a declaration is being sought vide Kwadzo v. Adjei 10 W.A.C.A 274. This issue in this case is not whether the same land or an agreed or identified land is being referred to in different names. The true or correct issue is whether Ikot Iwang land extends to Ifiang village. Indeed, the respondents in their claim admitted and clearly acknowledged that there are different communities by the names of Ikot Iwang Community and Ifiang Community. Exhibit 9, the 1915 suit relied upon by the respondent's shows that the identity of the land in dispute in that case was uncertain, hence the court held inter alia:

"It is impossible to state definitely what was the extent of the trespass committed by the Defendants, if any at all was committed. The court therefore refuses to award any damage for trespass. The Defendants and his (sic) people shall be permitted to occupy the beach land, the occupation of which according to their own evidence extended 200 yards along the bank of the river and 3/4 miles....."

From the foregoing, the need to file a survey plan, in my view, becomes more compelling since the respondents' claim was that the land in dispute extend from Ikot Iwang to the Ifiang village but they at the same time admitted that there were intervening villages which the respondents described and admitted in their own evidence as autonomous villages. PW2 testified in part in this regard as follows:

"The land I am talking about starts from Ikot Iwang passes through Ifiang to Edik Okon Idem...."

He testified further thus:

"There are several main villages at Ifiang. There is Esuk Okon - Edik Okon Idem - Ikot Edem Oku - The small villages did not join in

signing the agreement. They are autonomous villages."

The controversy over the land in issue was further compounded by the testimony of D.W1 who said:

"I knew the land in this case as well as the defendants. The plaintiffs live at Ikot Iwang a place granted them by our grand father. They were not given any other land. The plaintiffs are our tenants - others are Edik Okon Idem, Esuk Okon and Ikot Edem Oku."

In the light of the above, even if the respondents' evidence on the description of the land in dispute was unchallenged (which is not the case here) there was no means or machinery for ascertaining the land as claimed by the appellants without a survey plan bearing in mind that the respondents admitted the existence of some autonomous villages between Ikot - Iwang and the Ifiang village and appurtenances are exclusive of the land as claim by the appellants.

I am therefore of the firm view that in view of the uncertainty of the land even as claimed by the appellants, added to the fact that that land was disputed by the respondents, with the further facts that the judgment in Exhibits 2 and 9 relied upon did not contain any survey plans, it was wrong to have granted a declaration on any imprecise piece or parcel of land. Relying on the decision of this Court in Opara v. Echue suit No.SC.396/64 (unreported), to the effect that a previous judgment in respect of a piece of land, which is not tied to a plan, cannot operate as an estoppel. See also the Court of Appeal decision in Mabmaenyi v. Abose (1995) 7 NWLR (part 405) 54 at 65 where Edozie, J.C.A as he then was reading the judgment of the Court said:

"Indeed, it has been decided that a previous judgment in favour of a party in respect of a piece of land which is not tied to any plan cannot amount to an act of possession and I should add relied upon to raise a plea of res judicata. See Opara v. Echue (unreported S.C. 396/64) decided on 19/12/66. As this vital ingredient necessary to sustain a plea of res judicata is lacking, it is futile to inquire if other conditions, that is, sameness of parties and issues exist."

From the foregoing, I agree with learned Senior Advocate for the appellants that the judgment in Exhibits 2 and 9 in so far as they do not

purport to define the land in dispute by reference to any plan, is of little or no utility and ought not to have been relied upon by the court below in giving judgment for the respondents.

ISSUE 4

B In the resolution of this issue, the court below relied on Exhibits 9, 2 and
4 when it held:

"There is also no doubt that it was the same land which was in dispute in the 1915 case (Exhibit 9) that later formed the subject matter in the 1941 case (Exhibit 2). The same land is also the subject matter in the instant case. The Appellants (as the plaintiffs in the instant case) pleaded and relied on the deed of lease (Exhibit 4) to which a survey plan was attached. The defence did not deny that averment or file a counter - plan."

D In consequence, I agree with learned senior counsel for the appellants' that in none of Exhibit 9, 2 and 4 did the respondents establish the identity of the land in dispute in the instant case. Firstly, in neither Exhibit 9 nor in Exhibit 2 was a survey plan displayed. Secondly, although a
E survey plan was filed in Exhibit 4, that survey plan relates to only of the land being claimed in the instant case.

By way of further emphasis, Exhibit 9 (i.e. the judgment of Webber, J. in 1915) cannot be of any assistance to the respondents in establishing
F as the plaintiffs in the trial court, the identity of the land in dispute. By way of further illustration in Exhibit 9, the trial judge found as follows:

*"This action was brought about principally on account of encroachments made by the Defendants' people at the beach. It is impossible to state definitely what the extent of trespass committed by the Defendants
G if any at all. The court therefore refuses to award any damages for trespass."*

(Emphasis is supplied by me.)

H Exhibit 9, as can be seen, is of little assistance to the respondents when it comes to the identification of the land in dispute. Thus, while Exhibit 9 was concerned with the land called Affiang Nsung otherwise Aqua Ubom, wherein the relief sought in paragraph 1 of the Amended statement of Claim is for a declaration that the respondents are entitled to

be made a party in any formal Deed of *"Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village or Ikot Iwang village which Ifiang Community and Ikot Community respectively have traditionally enjoyed together in common from time immemorial."* In effect, what the pleading showed in paragraph 1 of the reliefs claimed is that Ifiang Community and Ikot Iwang Village are distinct and separate Communities. Nor was there a finding - in fact, no evidence or suggestion in Exhibit 9, that Afiang Nsung is co-terminus with Ikot Iwang. Moreover, the evidence given by the respondents as plaintiffs through p.w2 in this case and in which they tendered Exhibit 5 showed that there are two Afiangs to wit: Afiang Ayoung and Afiang Nsung and no survey plan was tendered showing the two Afiangs. In fact, the evidence of P.w.2 through Exhibit 5 showed that Afiang Ayoung and Afiang Nsun are two separate communities. In any event, the burden of proof of the identity of the land in dispute is on the plaintiff - in the instant case - the respondents. See *Lordye v. Ihuambe* (2000) 15 NWLR (pt.692) 675. See also *Tyogbide Akulaku & Ors v. Ikyume Yongo* (2002) FWLR (pt.100) 1228 at 1248 where agreeing to dismiss the appeal by treading the beaten path of my learned brother, Ogundare JSC, I held *inter alia* thus:

*"The trite law and settled law on identity of land in dispute, it was contended, is that there must be evidence on the record such that a surveyor looking at it, will draw up the plan of the said land without necessarily going to the site. After citing with approval a string of cases in support thereof, the case of *Joseph Olusanmi v. Dayo Oshasona* (1992) 6 SCNJ page 282 at 283 where it was held "..... that the onus lies on the plaintiff who seeks a declaration of title to show clearly the area of land to which his claim relates that the plaintiff can discharge this onus by such oral description of the land that any surveyor acting on such description could produce a plan of the land in dispute....." was relied upon. See also the case of *Joseph Ekwere v. Nakmakosi Iyiegbu & ors* (1972) vol 2ECSLR 835; (1972) 6 S.C 116, 138 and *Aromire v. Awoyemi* (1972) 1 All NLR 101, where it was held that where title to or possession of land is in issue, the identity of the land and where it is located must be*

clearly given in evidence, otherwise it would be impossible to give effective judgment in relation to the land. See to the cases of Baruwa v. Ogunshola 4 WACA 159 and Awote v. Owodunni No.2 (1987) 2 NWLR (pt.57) 367"

B In the instant case the respondents could not establish the identity of the land in dispute. The court below albeit relied on exhibit 4 in the instant case in making a finding of the identity of the land in dispute in favour of the respondents. It is curious that it could have done so in view of the fact that Exhibit 4 is the Deed of lease of a smaller portion of land to that of the Danish Company. Be it noted that in paragraph 2 of the endorsements of their claims in the Amended Statement of Claim they sought the following reliefs.

D *"An Order directing the first defendant to pay over to the plain-*
tiffs the sum of N1,500.00 being money held in trust by the first defendant for the benefit of the plaintiffs' share of N3,000 which the first defendant received for and on behalf of both Ifang community as rent from the Danish Company which operated a lease of part of the forest land at
E Ifang belonging in common to Ifang and Ikot Iwang respectively from time immemorial conveyed by survey plan No. EY/SP72 dated 21st September, 1957 prepared by E. Eyo Esq. Licensed Surveyor."

F From the above, it is clear that the claim in Exhibit 4, a fortiori the survey plan therein, related only to *"a lease of the forest land ."*

In as much as the appellants have demonstrated that in none of exhibit 9,4 and 2 relied upon by the Court below in concluding that the identity of the land has been proved, it is in fact a correct statement. This is because Exhibit 9 was concerned with the land called Afiang Nsung, otherwise called Aqua Ubom, Exhibit 4 tendered by the respondents had only a survey plan of part of the land, whilst Exhibit 2 in suit No. C/1/40 relates to land in Ikot Iwang. The respondents' claim in the present suit is as regards lands in Afiang Village and Ikot Iwang village, namely two
H villages in relation to which no survey plans have been produced.

It is for the above reasons that in my opinion, the conclusion arrived at by the court below to the effect that *"it is clear from the 1915 judgment (Exhibit 9) and that of 1941 (Exhibit 2) the present appellants*

had long been in occupation of the land variously described as Afiang Nsung or Akwa Ubom or Ikot Iwang land, " is neither supported by the facts nor by the earlier judgments. There is no where the court treated Afiang Nsung as co-terminus with Ikot Iwang. The respondents in their claim made it clear that Afiang and Ikot Iwang are separate villages. Therefore the court below was wrong to have departed from the cases pleaded and made by the respondents. See Obomhense v. Erhahon (1993) 7 NWLR (pt. 303) 22 : Metal Impex v. A.G Leventis & Co. (Nig) Ltd (1976) 2 S.C 91 and George & ors v. Dominion Flour Mills Ltd (1963) 1 All NLR 71 at 77. B C

The court below concluded that the appellants as plaintiffs in the instant case pleaded and relied on the deed of lease (Exhibit 4) to which a survey plan was attached and the defence did not deny that averment or file a counter plan. I agree with learned Senior Advocate for the appellants that that conclusion was wrong because no plan of the lands between Afiang village and Ikot Iwang village was ever tendered or filed by the respondents: therefore the issue of filing a counter - plan did not arise. Moreover, the appellants in paragraph 8 of their Amended Statement of Defence averred clearly and unequivocally that paragraph 7 of the Amended Statement of claim is denied. D E

It is for the above reasons and the fuller and more comprehensive ones set out in the leading judgment of my learned brother Niki Tobi J.S.C, that I too allow the appeal and make similar award as to costs contained therein against the respondents in favour of the appellants. F

UWAIFO JSC

I read in advance the judgment of my learned brother Tobi JSC and agree with him that there is merit in this appeal and that it should be allowed. G

The plaintiffs, relying on exhibit 2 essentially, have claimed against the defendants for reliefs, which appear to place both of them at par as regards ownership of the land in question, as follow: H

"1. A declaration that the plaintiffs are traditionally and legally entitled as of right to be made a party in any formal Deed of Agreement

touching and concerning any part of the forest or palm plantation lands at Ifiang village and Ikot Iwang village which Ifiang community and Ikot Iwang respectively have traditionally enjoyed together in common from time immemorial.

B OR ALTERNATIVELY:

A declaration that any purported Deed of Agreement to alienate the communal forest or palm plantation lands at Ifiang or Ikot Iwang by the defendants unilaterally without the participation of the plaintiffs is invalid and void against the plaintiffs who have a common right of
C *enjoyment thereof with the defendants from time immemorial.*

2. An Order directing the first defendant to pay over to the plaintiffs the sum of N2000 being money held in trust by the first defendant for the benefit of the plaintiffs since 1959 and being the plaintiffs share
D *of the N1000 which the first defendant received for and on behalf of both Ifiang Community and Ikot Iwang Community as rent from the Danish Company which operated under a lease of part of the forest land at Ifiang belonging in common to Ifiang and Ikot Iwang respectively from*
E *time immemorial.*

3. An Order directing the defendants, in particular the first defendant, to account for all rents and incomes received for leases or sales of any part of the common forest or palm plantation lands or economic
F *trees at Ifiang and or Ikot Iwang entered into unilaterally by the defendants without the knowledge and consent of the plaintiffs with effect from 1st January 1959 up to date.*

4. An Order for perpetual Injunction restraining the defendants or their agents from further acts of unilateral alienation of any part of the
G *common forest or palm plantation lands or sale of economic trees at Ifiang or Ikot Iwang to which the plaintiffs are lawfully entitled to enjoy in common with the defendants without first obtaining the consent of the plaintiffs to do so."*

H *It is common ground that the respondents/plaintiffs are tenants of the appellants/defendants. In a judgment given on 22 February, 1915 between the same parties in this appeal in the case of Nsun v. Antigha (exhibit 9), Webber J., made it abundantly clear that the present appel-*

lants are the landlords. He gave them the declaration of title they sought. He said:

"In this case I find from the evidence that the land in dispute called Ifiang Nsum or Aqua Ubom and including the beach land called Esuk Okon has always been and is the property of the plaintiff and people of Ifiang Nsum who are entitled to the declaration claimed." B

The learned trial judge went further to say:

"The defendant and his people shall be permitted to occupy the beach land, the occupation of which according to their own evidence extended 200 yards along the bank of the river, and 3/4 mile inland. As to the main land, the defendants having disputed the ownership of the land will not be permitted to farm on the land in future without the permission plaintiffs." C

Much later, on 3 November, 1941, Martindale J., in his judgment D in four consolidated suits one of which being between the same parties in this appeal (exhibit 2), recognized the present respondents as tenants of the appellants thus:

"Judgment therefore in C/1/1940 is entered for the plaintiffs E [present respondents] for the injunction they seek against the 1st defendants [present appellants] to restrain the 1st defendants, their agents and servants from interfering with the plaintiffs in the exercise of their rights as tenants and occupants of the land known as Ikot Iwang and for a F declaration that as tenants of the 1st defendants under Native Law and Custom they, the plaintiffs are entitled to continue to occupy the said land and together with the 1st defendants to cut palm nuts on the land without let or hindrance from the 1st defendants, and for an account G from the defendants of all moneys received by the 1st defendants from the 2nd defendant by way of rents, presents and/ or tributes for cutting palm nuts on the said land; payment over to the plaintiffs of one half of such rents, presents or tributes."

[Square bracket and parenthesis supplied] H

It must be stated that the decision in exhibit 2 was in regard to a given portion of land as well as in connection with rents paid by a particular party who was the 2nd defendant in that case. If the present

respondents rely on that judgment as having given them more grant and peculiar rights as customary tenants than the judgment in exhibit 9 gave them other than right of use and occupation of, and part rents, presents and tributes from, a give portion of land, then they have the burden of B proving this. The judgment in exhibit 9 confined them to an area of "200 yards along the bank of the river, and 3/4 mile inland. This portion was ordered by Webber J to be demarcated by planting pillars. It would appear up till now (that) that was not done. The evidence of d.w.l, Akwa C Edem Archibong, who was the sole witness for the defendants (appellants), supports the position that the respondents' right of customary tenancy are confined by that judgment and this was in fact accepted by Effanga J in the present case. After quoting the passage from Martindale J's judgment, Effanga J observed:

D *"It is Ikot Iwang land on the claim and Ikot Iwang land on the judgment. To interpret Ikot Iwang to include defendants' other villages or all Ifiang lands which from the evidence will include about four (4) other villages, is too ambiguous and speculative. Therefore, having ex-*
E *amined carefully the pleadings and the evidence adduced by both parties I hereby make the following findings of fact:*

1. *"That the plaintiffs are not entitled to enjoy all Ifiang lands communally with the defendants but are only entitled to enjoy the land at*
F *Ikot Iwang communally with the defendants as decided in exhibit 2.*

2. *"That the plaintiffs are the customary tenants of the defendants.*

3. *"That the plaintiffs have failed to prove precisely the area over*
G *which they seek a declaration and injunction.*

4. *"That the plaintiffs cannot claim any interest beyond Ikot Iwang village the area granted their predecessors by the defendants' predecessors, especially when such claim is being vigorously resisted by the defendants-landlords."*

H These findings of fact are consistent with the evidence as a whole including the judgments as per exhibits 9 and 2. The undeniably bottom line of the situation is that the respondents are customary tenants of the appellants. I must point out that even that tenancy is not total. The appel-

lants as their landlords are, according to the judgment in exhibit 2, entitled to share with them half of whatever rent, presents and tributes that are got from the area covered by the tenancy. The law clearly is that, once a customary tenant always such a tenant is entitled to the occupation and use of the land but the tenancy is subject to the landlord's right of reversion in an appropriate event, such as the denial of the title of the overlord, or the failure to comply with the terms of the tenancy thereby leading to forfeiture: see Dokubo v. Bob-Manuel (1967) 1 All NLR 113 at 121; Dzugwe v. Gbishe (1985) 2 NWLR (PT.8) 520 at 540; Salami v. Oke (1987) 4 NWLR (pt. 63) 1 at 14; Oguneleye v. Oni (1990) 4 NWLR (pt 135) 745 at 783-784. It is also recognized that although a customary tenant can hold in perpetuity subject to good behaviour, he is presumed to be a tenant from year to year: see Agheghen v. Waghoreghor (1974) 9 NSCC 1 at 24. No matter how long he is on the land, a customary tenant does not and cannot acquire ownership, that is to say, divest the radical owners of their title, merely by virtue of such long tenancy in possession: see Isiba v. Hanson (1967) 1 ALL NLR 8 at page 11 where this court observed per Coker JSC:

"The learned trial judge did not consider that where land is given to a customary tenant under native law and custom it is of the essence of his tenure that he should be in possession of such land and we are unable to agree with him that the mere fact of possession without any other overt acts unequivocally pointing to the assertion of absolute ownership to the knowledge of the plaintiffs was sufficient of divest the plaintiffs of their radical ownership of this property."

See also Akinloyem v Eyilola (1968) NMLR 92.

The tenant cannot take over the land, even under the Land Use Act, in place of the landlord as if he was the holder under the Act by virtue of a subsisting tenancy notwithstanding that the said tenancy keeps his landlord out of possession because a holder of land under the Act is the true owner entitled to or having a right of occupancy as the overlord; and the tenant's possession is subject to the overlord's right of reversion exercisable when an occasion for forfeiture of the tenancy arises, or where in an appropriate case the tenancy expires: see Abioye v. Yakubu

(1991) 5 NWLR (pt. 190) 130 at 217; 225, 244-245; Akkintola v. Oyelade (1993) 3 NWLR (pt. 282) 379 at 386. The rationale for this well recognized principle was stated long ago in Suleman v. Hannibal Johnson (1951) 13 WACA 213 by Verity, Acting President, at page 215 in his observation B as follows:

"The essence of a reversionary interest is that the owner has parted with an estate less than absolute ownership and that upon the termination of that estate it reverts to the owner It' is clear that when C the original owners have granted rights of occupation to another, the possession of the other is not adverse possession and the owner's acquiescence therein is part and parcel of the grant and cannot affect the owner's reversionary rights. It is only, therefore, when it comes to the D owner's knowledge that the tenant has alienated or is attempting to alienate the land that the question of acquiescence can arise. The owner is not in possession, and has indeed no right to possession and is not concerned, therefore, with the acts of the tenant unless and until he becomes aware that those acts are inconsistent with and, therefore, a denial of the E overlord's rights."

There can, therefore, be no question of co-ownership by a tenant with a landlord as a result of a long tenancy in possession. The radical title always remains in the landlord. The landlord may alienate part of his F land to a tenant absolutely and when that happens, the landlordship of that part belongs to the former tenant. He ceases to be a tenant thereto; but he does not thereby become a co-landlord with his grantor. That will be contradictory in terms, unless, in the unlikely event, the terms of G alienation are intended to create a tenancy in common or joint tenancy. I do not think anything of the sort took place in this case. To contend, therefore, that the respondents, by virtue of exhibit 2, can claim co-ownership, even impliedly, with the appellants is not only a misconception of the ambit of the said exhibit 2 but, in my view, an attempt to give H a new meaning to the concept of the relationship between an overlord and a customary tenant.

The customary tenancy of the respondents in this case does not entitle them to the reliefs they have sought as though they were co-

landlords with the appellants. There is nothing in exhibit 2 which gives them the right to demand that they be made to execute together with the appellants any document relating to land under the appellants' overlordship even when it is for the purposes of any rents, presents or tributes coming from the portion of land subject to the customary tenancy. Apart from B exhibits 2 and 9 relied on by the respondents, no other evidence was led to the effect that they have such a right. The failure so far to plant pillars to identify the portion considered by Webber J. as to where the respondents' right of customary tenancy covers has the tendency to put the put C the respondents at even greater disadvantage. It is on that portion of land mentioned in exhibit 9 that their right under exhibit 2 can be exercised from time to time so long as its actual location and abutments are ascertained accurately.

The court below, per Akintan JCA, appeared to have fairly focused D on the land in question in exhibits 9 and 2 in the following observation:

"It is clear from the 1915 judgment (exh.9) and that of 1941 (exh.2) that the present appellants has long been in occupation of the land variously described as Ifiang Nsum, Akwa Ubom, or Ikot Iwang E land. They were let in through grant made to them by Nsun Anein, an ancestor of the present respondents. Although it was decided in the earlier case (exh.9) that the defendants [in the 1915 case, appellants before the court below] should not be permitted to farm on the land, in future F without the permission of the plaintiffs [in the 1915 case, respondents before the court below] it is clear from the latter case (exh.2) that they subsequently got that permission to continue their farming activities on the land There is no doubt that it was the same land which was in G dispute in the 1915 case (exh.9) that later formed the subject-matter in the 1941 case (exh.2).

[Square brackets and parenthesis supplied by me]

But the learned Justice of Appeal went wrong when he said that it was the same (portion of) land in the 1915 case (exhibit 9) that formed H the subject-matter of the present case. It was on that erroneous premise, with due respect, that he thought that exhibit 4, to which a plan is attached, evidencing a agreement between the present appellants and a

Danish Company, fell within the land granted to the respondents as customary tenants. That is quite misleading.

The said survey plan covers an area of 22,900 acres. There is no evidence to show where exactly it is located in relation to the land in exhibit 9 or exhibit 2. The appellants contend that it is completely outside that land and the respondents (as plaintiffs) who had the burden to prove otherwise failed to do so. This is important because, although exhibit 2 gives the respondents a right to half of the rents from within the portion of land stated in exhibit 9, they have no such right outside that portion. Not to appreciate this can lead to the unreasonable assumption that the respondents as customary tenants on a limited area of land may claim to be entitled to half of the rents from any part of their overlords' vast land. It must be established by the respondents that there is a clear nexus between exhibit 4 and exhibit 9 before they will be entitled to one-half of the rents agreed in exhibit 4. That was not established. Even if that had been established, it would still not have entitled the respondents to insist that they have to join with the appellants in executing any relevant documents. It is only half of the proceeds from executing such documents that they are entitled to and can insist on being paid.

The learned trial judge rightly pointed out the deficiency in the evidence produced by respondents in connection with their claim in this suit. I am satisfied that the court below was in grave error in holding that the respondents succeeded in proving their claim. I agree with my learned brother Tobi JSC in allowing the appeal. I too allow it and set aside the judgment of the Court of Appeal, Enugu Division, given on 21 February, 1995. In consequence, I restore the judgment of the High Court, Calabar, given on 30 January, 1989 which dismissed the action of the respondents, being without merit. I award N10,000.00 costs to the appellants

PATS-ACHOLONU JSC

This case which is by and large a land matter involves as usual in our society a claim for a declaration of some rights and interests in the land as well as other reliefs. Indeed the history of the land cannot be complete without the controversies over certain rights and possessions

between the combatants which have in the course of time found their way in our Courts for one form of adjudication or the other. I would say that the main cornerstone of this case really centres on the 1st arm of the claim made in the Court of first instance, that is to say.

1. *“A declaration that the Plaintiffs are traditionally and legally entitled as of right to be made a party in any formal Deed of Agreement touching and concerning any part of the forest or palm plantation lands at Ifiang village and Ikot Iwang village which Ifiang community and Ikot Iwang community respectively have traditionally enjoyed together in common from time immemorial.”*

2. *“A declaration that any purported deed of agreement to alienate the communal forest or palm plantation lands at Ifiang or Ikot Iwang by the Defendants unilaterally without the participation of the Plaintiffs is invalid and void against the Plaintiffs who have a common right of enjoyment therefore with the Defendants from time immemorial”*

The story of the plaintiffs now the Respondents is that from time immemorial they have always enjoyed the benefits of the economic trees and the plantation on the land along with the defendants i.e. Appellants relying on by two previous judgments viz suits No. C./1/40 and No. 34/64. They state that the Appellants had without their consent and approval entered into an agreement to alienate the land to the 7th Appellant. In furtherance of what the Respondents conceive as a violation or infractions of their rights and interest over the land, they demanded for an account of all leases made. They further state that in the years gone by the two parties had granted certain leases to a Danish Agricultural company for which a sum of N2000 was paid to the parties but that since 1959, the 1st Appellant had retained the money meant for both parties. They also state that they have no objection to any alienation by way of leases provided they are made parties to any agreement that touches on the land.

The main defence of the Appellants is that Respondents are not in anyway entitled to the claims made being no more than tenants to the land, and relied on the judgments of the form Nigeria Supreme Court in 1915 and 1924 adding that the only land which the Respondents as cus-

tomary tenants and the Appellants as overlords have a common interest is the place where Ikot Iwang is situate. In the High Court, the action of the Respondents was dismissed as the Respondents failed even to tender a plan to show the dimensions of the land and the Court confined the interest of the Respondents to the place where they now occupy.

The Respondents as Plaintiffs appealed to the Court of Appeal which allowed the appeal and set aside the judgment and orders made by the High Court. Whereupon, the present Appellants who lost in the Court below appealed to this Court. In their brief of argument, the Appellants formulated four issues for determination (They later abandoned the third issue). Those issue retained are.

1. Whether the Court of Appeal was right in granting the declaratory relief on the basis of the judgments in Exhibits 2 and 9.
2. Whether the land affected by the Declaration has been satisfactory proved.
3. Whether Exhibits 9, 2 and 4 established the identity of the land in dispute.

The Respondents on the other hand while adopting the first 2 issues formulated by the Appellants framed a different 3rd issue which runs thus:

3(a) Whether the Court of Appeal considered the Appeal only on the basis of the arguments in Respondents brief.

(b) Whether the approach of the Court of Appeal has occasioned any miscarriage of justice.

In the argument relating to the first issue as adumbrated by the Appellants, they argued with verve that there is a big difference between the need to obtain the permission of a third party or approval and making that party also a party to the agreement for the purpose of disposing the land. Now in the course of the proceedings in this case, several references were made to various judgments given in respect of several suits instituted by either of the parties prior to the present suit which has given rise to this appeal. Exhibit 2 is the judgment of Aba High Court by Martindale J. while Exhibit 9 is the judgment of the High Court delivered by Webber J. The facts of the case in Exhibit 9 did not tend to show that the parties

clearly knew the land over which the original action was brought. In course of time several suits sprang up from the relation, between the parties. In the 1940 judgment wherein Martindale restated the numerous disputes over the land, there obviously was no reference as to the existence of any plan or not. In fact the learned trial Judge held as follows:- B

“Judgment therefore in C/1/1940 is entered for the Plaintiff for the injunction they seek against the 1st defendants to restrain the 1st defendants, their agents and servants from interfering with the Plaintiffs in the exercise of their rights as tenants..... As tenants of the first C defendants under native law and customs.....:”

There was no reference to any surveyed area over which that Court made that injunction. To my mind the issue or point of Res judicata does not arise. The doctrine of Res judicata is to be used as a defence, a shield and not a sword and for the Respondent in this case is to rely on the judgments of Martindale J. in their claim is to say the lease absurd. Besides what were claimed in Exhibits 2 and Exhibit 9 are different from what is the subject matter of the suit in the case. There is no way Exhibit 2 and 9 could be relied upon to show that the matter at hand had long E been settled.

On the 2nd issue it is the contention of the Appellants that the land the subject of the dispute is not easily identifiable as there is no survey plan to graphically show the area in dispute. For it has long been F settled that where both parties in a civil duel do not agree as to the identity of the land in dispute it becomes the bounded duty of the initiator of the action to produce a survey plan. Counsel for the Appellant cited Agbonifo V. Aidwereoba (1988) 1 N.W.L.R. (Pt. 70) 325, Baruwa V. Ogunshola G (1938) 4 W.A.C.A. 159, Makanjuola V. Balogun (1989). The Appellants pointed out that even the Respondents admit and acknowledge that there are different communities which go by the names of Ikot Iwang Community and Ifiang Community. They further contend that since the Respondents maintained that the land in dispute extends from Ikot Iwang to Ifiang village and admit that there are other villages; it is difficult to H determine with any degree of certainty the limits of the land in dispute without the benefit of a plan. In reply to the above issue the Respondents argue

that the land in dispute is very clear. The Respondents however admit in their brief that what was not clear was the area of the alleged trespass as the beach. Ingeniously the Respondents extended their argument further that the Appellants not having filed a plan themselves cannot be heard to complain of a no plan by the Respondents. They cited *Adepoju v. Oke* (1999) 3 SCNJ 46 at 57 and also *Adimora v. Ajuo* (1988) 3 N.W.L.R.. I. It is important to point out that in Exhibit 2 which is the judgment of Martindale J. comprising of four cases, id est, suits C/1/1940, C/5/940, C/6/1940 and C/30/1940, that judge made references to a good number of other cases arising out of the disputes over the area affecting the land in dispute. In all those suits it was readily acknowledged that the Respondents in the case had at all times been mere tenants allowed to cut trees and enjoy the fruits of the economic trees on the land given to them by the predecessors of the Appellants. It was not canvassed perhaps that the parties were not adidem as to the situate or the identity of the land in dispute as what was primarily in issue was the question of rights or interests recognized by the ancestors of the Appellants for the Respondents to cut the trees in the forest. In such a case perhaps it was not thought necessary to have plans particularly as that point was not canvassed by the parties. It is important to refer to the judgment of Effanga J, when he said among other things.

“(3) *That the Plaintiffs have failed to prove precisely the area over which they seek a declaration and injunction*”.

Further down that Court held as per its findings; “

There is also undisputed evidence that there are other villages on Ifiang like Esork Okon, Ikot Edem Oku, Edik Okon Idem. These communities are not parties to the present action. It will therefore be inequitable to grant the declarations and injunction sought over land whose occupants are not parties and which is not properly defined”.

I find it odd as to how the Respondents could have in all seriousness asked for an injunctive order in respect of an area of land not defined and over which the Court would not be certain of its proper limitations due to the latent short coming of the land not having been surveyed and a proper plan of the area exhibited before the Court. In *Salami v.*

Gbodolu (1997) 4 N.W.L.R. (PT. 499) P.277 at 285, it was held that;

"The burden on the Plaintiff in the circumstances includes the requirement that it is for him to prove the identity of the land claimed by him if the parties are not ad idem on the identity of the land. See Makanjola v. Balogun (1989) 3 N.W.L.R. (Pt.108) 192. If the Plaintiff fails to B fulfil the requirement that is to prove or establish the identity of the land in dispute his claim for a declaration of statutory right of occupancy will be dismissed".

Although in this case the claim is not for a statutory right of C occupancy but for an interest and right as co-beneficiaries which the Respondents admit they had been sharing the benefits in the land with the Appellants from time immemorial, it behoves of the Respondents to make a survey plan delineating the land in dispute for the purpose of ascertain- D ing the true nature of the land over which some form of interests are being claimed and which will enable the Court to determine the specific area of land it has to impose an order of restraints. It is my view that this is a case where the Respondents should definitely have procured survey plan having regard to the geographical location to help to ascertain the E truth of the matter in controversy. I do not share the view espoused by the Court of Appeal and supported by the Respondents' Counsel that the plan of the area is not necessary on the erroneous belief that the two parties know the land in dispute. F

The last issue is as to whether Exhibits 9, 2, and 4 jointly by themselves have the combined effect of demonstrating unmistakably the identity of the land in dispute. Actually this issue is an offshoot of the last issue and ought generally to be taken together. The Appellants' Counsel G submits that neither Exhibits 9, 2 nor Exhibit 4 established the identity of the land in dispute. It is equally their contention that while no survey plan featured in Exhibits 9 and 2 the survey plan in Exhibit 4 related to only a portion of the land in dispute in that case, and reliance on the judgments of Webber J. in 1915 is misleading, arguing stoutly that the judge in that H case had stated that;

"This action was brought about principally on account of en- croachments made by the defendants people at the beach. It is impossible

to state definitely what was the extent of trespass committed by the defendants, if any at all was committed the court therefore refuses to award any damages for trespass”.

Furthermore the Appellants submit that Exhibit 9 was concerned with the land called Affiang Nsung otherwise called Aqua Ubom and in actual fact the complaint that gave rise to the present action was that the Respondents’ claim that they are entitled to be made a party to an agreement from which they hope to realize some benefits. The Appellants had referred to the evidence of the Respondents that there are 2 Afiangs. They submit further the Respondents have not variously been in occupation of the land described as Afiang Nsan as Akwa Ubom or Ikot Iwang as held by the Court of Appeal. To this issue the Respondents continue to insist that there was no need for a plan on the land in dispute stressing that there is no misunderstanding between the parties as to the exact land being disputed. The Respondents argue that it is not the case of the Appellants that they do not know the land in dispute but that the area which Exhibits “2” and “9” enjoin the Appellants and Respondents to enjoy in common does not include the land in Exhibit “4”.

A proper consideration and careful examination of the issue under consideration show that none of the exhibits referred to above can be said to have brought out clearly the identity of the land. One has to look at the nature of the actions filed in those earlier suits and the present case. Because of the nature of the claims made by the respondents, there is no way in the present time that an action which seeks a declaration from the court can be sufficiently understood and the court seized with proceedings make a realistic and credible binding order without the benefit of a survey plan. I do not share the view that there was no need for a plan. For once the appellants indicate or show that there is a difference between the land on which the Respondents are making a claim of declaration and the land enjoyed in common, then the Respondents have indirectly been given notice of the necessity to produce a plan. To my mind, the Court of Appeal erred in granting the declaratory reliefs sought. It is unrealistic to use the judgment of Webber J. and Exhibit 4 to show that the parties are aware of the extent of the land. I say this because of the

evidence of D.W.I. Chief Akwa Edem Archibong. In his testimony to the court he said;

“The whole land in dispute including where the plaintiffs are living belongs to Ifiang Nsung and Ifiang Ayong. The land has mainland and waterside. The land which we gave to the Danish Company comprised of the mainland and waterside. The waterside consists of several beaches and fishing ports. The plaintiffs use some of the beaches and fishing ports to go out into the sea and land back while we use some of the fishing ports and beaches to do likewise. We do not collect any rent from other people using Ifiang beaches and fishing ports. One of the beaches is Esuk Okon and it is the plaintiffs who collect rent from that beach and not our people of Ifiang. They do not share the rent with us. There is another beach called Esuk Okon used by the plaintiffs. There is another beach called Edik Okon Idem used by the people who live there. The people living there are called Edik Okon idem”.

These show that the Respondents should have made a plan to show the true identity of the land in dispute. As an aside I must confess candidly that it beats my imagination how and why the Respondents are laying claim to what I describe as strange rights. They are mere tenants who now wish to put themselves in the position of the landlords. That to me that is an atrophy and flagitiousness. It is inconceivable that some one who was asked to partake in sharing of one’s food is now laying claims to the whole food, declaring that the food owner cannot do what he likes with his food without consulting him. That would have sounded impish if they are not serious. In my view the appeal should succeed and is hereby allowed. I agree with the detail analysis as contained in the lead judgment of my learned brother Niki Tobi. Judgment of Court of Appeal is set aside and that of trial High Court is restored. I also award N10, 000 costs against the Respondents.