

SUPREME COURT OF NIGERIA

2ND APRIL, 2004. SC. 67/1999

**CORAM:- S.M.A. BELGORE, A.I. IGUH, U.A. KALGO, N. TOBI,
I.C. PATS-ACHOLONU, JJSC**

CHIEF MAXWELL DAKIPIRI ODI & 5 ORS. APPELLANTS
AND

CHIEF HARRISON IYALA & ORS. 1ST SET OF RESPONDENTS
AND

CHIEF AARON F.D. OFFO & ORS. ... 2ND SET OF RESPONDENTS

ESTOPPEL - Res judicata - Where raised in the briefs of appeal - Instead of the pleadings - It will be disregarded (H1)

LAND LAW - Ownership - Where parties make opposing claims to land - Evidence of a third party ownership - Destroys the plaintiff's case (H2)

EVIDENCE - Witnesses - Hostile witness s. 207 E.A. - Plaintiffs' failure at trial - To treat PW3's contrary evidence as hostile - Cannot be corrected on appeal (H3)

COURTS - Evidence - Evaluation of - Scale of justice - Is where the trial judge will place an evidence - And give judgment in favour of the party - Where the evidence tilts favourably (H4)

PLEADINGS - Binding effect of - Reliance on plaintiff's contrary evidence - In finding against him - Does not destroy the principle of binding effect of pleadings (H5)

PLEADINGS - Value of - Land law - Traditional history - Failure to trace the original owner - In genealogical tree down to plaintiffs vide pleadings - Destroyed their case (H6)

PRACTICE & PROCEDURE - Non-suit order - Meaning of - Where

neither party will be entitled to judgment - Court can enter a non-suit (H7)

PRACTICE & PROCEDURE - Non-suit - Appeals - Burden is on plaintiff to prove - That trial judge ought to have entered a non-suit - Dismissal was rightly entered in the present case (H8)

LAND LAW - Title - Non-suit - Plaintiff that claims ownership of land - Must prove his title in any of the five ways - And he is not entitled to non-suit - To repair his original case (H9)

APPEALS - Retrial order - Will not be made by appellate court - Where plaintiff's case has completely failed (H10)

APPEALS - Concurrent findings - Borne out from the evidence - Will not be interfered with (H11)

FACTS

Before the Port Harcourt High Court, vide Suit No. PHC/97/71 the plaintiffs/appellants claimed against the 1st set of defendants/respondents declaration of title to the land in dispute. They also sought an injunction restraining the defendants from interfering with the plaintiffs' rights over the said land. The parties called witnesses and tendered their survey plans of the land in dispute.

The learned trial judge found against the appellants and dismissed their claim. In doing this, the trial court relied heavily on the evidence of PW3 which was a denial of appellants' claim to the land in dispute and the appellants did not discredit that evidence nor treat him as a hostile witness under s. 207 of the Evidence Act. Appellants' appeal to the Court of Appeal was dismissed as that court affirmed the decision of the trial court. Being dissatisfied, the appellants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Was the Court of Appeal right in dismissing Plaintiffs’ ap-

peal against the judgment of the High Court which relied on evidence of 3rd party interest in the land in dispute elicited from a witness in cross examination when the court of Appeal itself found that third party interest was not raised in the pleadings?

(ii) Was the Court of Appeal right in law in relying on evidence of third party interest when the issue was not raised in the pleadings of the parties in coming to its decision in the appeal?

(iii) In the circumstances of this case, was a dismissal order the appropriate order to make when:

(a) on the evidence of third party ownership allegedly established, none of the parties was entitled to judgment (in which case an order of a non-suit) would have been the proper or alternative order?

(b) As the respective case put forward before the court at the trial was not properly considered was this not a special feature warranting an order of a retrial”

HELD (Unanimously dismissing the appeal per land judgment of **TOBI JSC**)

ESTOPPEL - Res judicata

1. Is brief the forum to raise the special defence of estoppel per rem judicatam? I think not. The case must be made out in the pleadings before argument can be taken on it in the brief on appeal. The law is elementary that estoppel per rem judicatam is a special defence available to a defendant, which must be specifically pleaded in the statement of defence. See *Egbe v. Adefarasin* [1987] 1 N.W.L.R. (pt. 47) 1 (p. 757 H)

Ownership - Where parties make opposing claims to land

2. If the “*Amanyanabo of Kalabari and his Chiefs are the owners of all those swamp lands or mangrove lands*”, as stated by PW3 the case of ownership averred to by the appellants is punctured irredeemably. Their claim of ownership becomes moribund.

Where parties make opposing claims to land, and a witness gives evidence on a third party ownership of the land or interest in the land, the case of the plaintiff cannot stand, particularly when the witness is called

by the plaintiff. (p. 759 C)

Witnesses - Hostile witness s. 207 E.A.

3. If a witness called by party gives evidence against that party, the evidence will be regarded as one against interest. See General Ojiegbe v. Okwaranya [1962] All N.L.R. 605. Unless explanations are given which satisfy the court that the admissions should not be regarded, due weight should be given to them as such. See Okai v. Ayikai [1946] 12 W.A.C.A 31.

Where a witness called by a party gives evidence against his interest, our adjectival law requires the party to urge the court to declare him a hostile witness for purpose of cross-examination. This is to enable the party discredit the evidence of the witness and reject the evidence. See Ilouno v. Chiekwe [1991] 2 N.W.L.R. (pt. 173) 316. This was not done and the appellants are bound to accept the evidence of PW3 with all its “sweetness and bitterness” cum onere.

In my view, the appellants had all the opportunity to take advantage of section 207 of the Evidence Act. Since they did not take advantage of the provisions of the Evidence Act, they cannot repair the damage done at the trial in this court. This court has not the mechanical tools to effect any repairs. (pp. 759 E & 761 H)

Evidence - Evaluation of

4. A trial judge, in the judicial process, in his role, which is generally likened to the unbiased umpire, is not entitled to pick only evidence that vindicates the case of the plaintiffs and dump the evidence that is favourable to the defendant. A trial judge has the duty to place the evidence in the imaginary scale of justice and see where the pendulum tilts in the measuring process. By our evidential rules, the judge must give judgment in favour of the party where the evidence tilts favourably. The appellants wanted the trial Judge to pick and choose the evidence of PW 1 and probably PW2 and drop and dump the evidence of PW3 and PW4. With respect, that is rather a very tall ambition, which has no basis in law. (p. 760 F)

PLEADINGS - Binding effect of

5. It is elementary law that parties are bound by their pleadings.

It is pleaded in paragraph 4 of the statement of claim that the plaintiffs inherited the land in dispute from their ancestor, OKIO. This is the claim of the appellants to the ownership of the land in dispute and it is by traditional history. In my view, any evidence which is contrary to the averment in paragraph 4 against the ownership of the property by the appellants will destroy their case, which they erected in their statement of claim. And this conclusion, in my humble view, is not against the principle of law that parties are bound by their pleadings.

I cannot see better evidence against a party than one from a witness called by him, who gives evidence contrary to the case of that party.

(p. 761 A & F)

PLEADINGS - Value of

6. What is the correct version? I seem to know the problem and it is likely to be the fault of the pleadings, if all versions are in fact correct, and they could be correct. In pleading traditional history, the plaintiff is expected to narrate the genealogical tree from original owner, the ancestor, in generations appurtenant to him, down the line to the plaintiff or plaintiffs. In view of the fact that the original owner “OKIO” is not traced to the appellants, there is a clear missing link in the genealogical tree and a court of law has no jurisdiction to supply it. The point I am struggling to make is that if all the versions are correct, then the pleadings did not assist the case of the appellants. A case is made in the pleadings and not on appeal. If pleadings are badly rendered, a party cannot repair them on appeal to his advantage. (p. 763 D)

Non-suit order - Meaning of

7. A non-suit is a termination of an action which did not adjudicate all relevant issues on the merit, as where a plaintiff is unable to prove his whole case and it will be unjust to dismiss such case in its entirety or where there was a failure by the trial Judge to make proper and specific

findings and an appellate court can neither do the same on the printed evidence, a re-hearing or non-suit, depending on the circumstances of the particular case may be ordered. See *Awote v. Owodunni* (No. 2) [1987] 2 N.W.L.R. (pt.57) 375. Where on the evidence before the court neither party will be entitled to judgment, the court can enter a non-suit after giving the parties opportunity to address it on the issue. (p. 763 H)

Non-suit - Appeals

8. An appellate court cannot grant an order of non-suit merely because a party asks for it. See *Chikere v. Okegbe* [2000] 12 N.W.L.R. (pt. 681) 274. The court must be satisfied that the circumstances of the particular case deserve such order. This is because an order of non-suit will provide or give the plaintiff a second bite at the “cherry” by improving on the original case. Fortunately, there is no cherry in litigation.

The burden is on the plaintiff to prove that the trial judge ought to have entered a non-suit instead of dismissing the action. In that respect the plaintiff should satisfy the appellate court that it will be unjust to dismiss the case merely because the plaintiff was unable to prove the whole case or that there was failure on the part of the trial Judge to make proper and specific findings. The appellants have not satisfied this court why an order of non-suit should be entered in their favour. In my view, the case was not proved at all and the learned trial judge rightly came to that conclusion, which resulted in the dismissal of the case. And what is more, at the close of evidence, it was clear that the respondents were entitled to judgment. (p. 764 C & G)

Non-suit - Plaintiff that claims ownership of land

9. A plaintiff who claims ownership of land must prove his title in any of the five ways enumerated in *Idundun v. Okumagba* [1976] 9-10 S.C. 277; [1976] 1 N.M.L.R. 200. Where he fails to prove title, the case must be dismissed. He is not entitled to a non-suit to repair his original case. In *Gold v. Osaseren* [1970] 1 AII N.L.R. 125, this court held that if a party fails to establish his title to land, his action should be dismissed instead of entering a non-suit against him. (p. 764 E)

APPEALS - Retrial order

10. Learned Senior Advocate also canvassed that the trial judge ought to have ordered a retrial. Where a trial judge fails to make findings of facts on issues duly joined by the parties in their pleadings, an appellate court will order a retrial when the evidence is of such a nature that it cannot make its own findings, not having seen or heard the witnesses. See *Adeyemo v. Arokopo* [1988] 2 N.W.L.R., (pt.79) 703. An order of a retrial is not appropriate where the plaintiff's case has failed in *Toto*. See *Abibu v. Binutu* [1988] 1 N.W.L.R. (pt. 68) 57. C

In the instant case, the learned trial judge painstakingly and assiduously made findings of fact and came to the correct conclusion that the appellants did not prove their title to the land in dispute. In the circumstances, I cannot see my way clear in ordering a retrial, as that will only enable the appellants effect repairs in their case and meet the respondents the second time with their repaired case. That will be grave injustice to the respondents. After all, there should be an end to litigation. (p. 765 B) D E

APPEALS - Concurrent findings

11. The findings of the trial judge and the Court of Appeal are concurrent particularly on the evidence of PW 3 and this court cannot interfere with them because they are clearly borne out from the evidence before the trial court. Whichever angle this appeal is taken, the appellants are the losers. I think they have a very bad appeal which must fail. (p. 765 F) F

NOTABLE POINTS OF INTEREST

IGUHJSC

1. Evidence of plaintiffs was discredited and full of contradictions

The record of proceedings clearly reveals that the evidence of the plaintiffs/appellants in respect of their alleged title to the land in dispute was thoroughly discredited and full of contradictions. Where, as in the present case, the plaintiffs failed totally to establish by evidence their ownership of or title to the land in dispute, the appropriate order to make is that of dismissal of their claim and not a retrial as urged upon this court by H

learned counsel for the plaintiffs/appellants. See *Kodilinye v. Mbanefo Odu* [1935] 2 W.A.C.A. 336. (p. 766 G)

2. *Retrial will not be ordered where miscarriage of justice will be occasioned*

I think the point must be stressed that an order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given another opportunity to relitigate the same issues between the parties all over again. An appellate court before deciding to make such an order ought to satisfy itself that the other party, usually the defendant, is not thereby being wronged to such an extent that a miscarriage of justice would be occasioned. Clearly, an order for a retrial cannot be appropriate where it is manifest that the plaintiffs' case has totally failed and that no irregularity of a substantial nature is apparent on the records or shown to the court. See *Isaac Ayoola v. Jinadu Adebayo* [1969] 1 AII N.L.R. 159. (p. 767 A)

PATS-ACHOLONU JSC

3. *Doubt will be resolved against party that burden of proof rests upon*
Where two witnesses or more of a party have made irreconcilable and contradictory statements every item of evidence contained, which tends to corroborate or contradict either of them should be carefully weighed and considered in determining preponderance. Where an issue is left in doubt so as to make the court speculate, the party on whom the proof rests will ultimately loose when the essential fact he relies on becomes uncertain or in doubt as to its existence. Of course a party may not be punished at a slight mistake in proving his case by a strained construction of what he said. But where as in this case what we have is nothing but cacophony of voices of people who are supposed to sing the same song with the same rhythm and lyrics then the case is a lost cause. There was no rhythm but discordant, jarring and disagreeable words. (p. 770 A)

REPRESENTATION

T.J.O. OKPOKO (SAN), WITH HIM C.A. AJUYAH, ESQ. FOR THE APPELLANTS CHIEF DEBO AKANDE (SAN) WITH HIM DR. B.A.M.

AJIBADE FOR THE 1ST SET OF RESPONDENTS.

CHIEF R.O.A. AKINJIDE (SAN) WITH HIM L.O. FAGBEMI (SAN),
H.O. AFOLABI, ESQ. AND A.O. POPOOLA, ESQ. FOR THE 2ND SET
OF RESPONDENTS.

CASES REFERRED TO

- Egbe v. Adefarasin [1987] 1 N.W.L.R. (pt. 47) 1
- Sosan v. Ademuyiwa [1986] 3 N.W.L.R. (pt. 27) 241
- Oshodi v. Eyifunmi [2000] 13 N.W.L.R. (pt. 684) 298
- Ilouno v. Chiekwe [1991] 2 N.W.L.R. (pt. 173) 316
- Udoh v. The State [1994] 2 N.W.L.R. (pt. 329) 666
- Federal Housing Authority v. Sommer [1986] 1 N.W.L.R. (pt. 17) 533
- Ehimare v. Emhonyon [1985] 1 N.W.L.R. (pt. 2) 177
- Abaye v. Ofili [1986] 1 N.W.L.R. (pt. 15) 134
- Owoade v. Omitola [1986] 2 N.W.L.R. (pt. 77) 413
- Awote v. Owodunni (No. 2) [1987] 2 N.W.L.R. (pt. 57) 375
- Chief Olufosoye Basorun v. Olorunfemi [1989] 1 N.W.L.R. (pt. 95) 26
- Ikoro v. Satrap Nig. Ltd. [1977] 2 S.C. 123
- Craig v. Craig [1966] 1 All N.L.R. 173
- Chikere v. Okegbe [2000] 12 N.W.L.R. (pt. 681) 274
- Idundun v. Okumagba [1976] 9-10 S.C. 277; [1976] 1 N.M.L.R. 200.
- Gold v. Osaseren [1970] 1 All N.L.R. 125
- See Adeyemo v. Arokopo [1988] 2 N.W.L.R. (pt. 79) 703
- Abibu v. Binutu [1988] 1 N.W.L.R. (pt. 68) 57

LEAD JUDGMENT BY TOBI JSC

In Suit No. PHC/97/7D1 the appellants as plaintiffs (for themselves and on behalf of Idama Ekulama Community) claimed against the 1st set of defendants/respondents for themselves and on behalf of Soku Community two reliefs a declaratory relief and an injunctive relief, as follows:

“I A declaration of title to the piece or parcel of land known and called ‘EKUKAMA LOCATION’ situate and lying at Alagbon Iburu in Ababoko in the Rivers State.

2. *An injunction restraining the defendants, their servants, agents and all persons claiming through or under them from interfering with the plaintiffs' title, rights and interest in and over the said location.*"

The appellants called four witnesses. The two sets of defendants/ respondents called a total of thirteen witnesses. Both parties tendered their survey plans of the land in dispute.

The learned trial judge gave judgment against the appellants. He relied heavily on the evidence of PW3. He said at page 121 of the record:

"The other witness not of plaintiffs' village was PW 3 Chief Ibikiri Williams West. His evidence is in fact denial of plaintiffs' claim to ownership of the land Alagba Mburu. According to his evidence all these swamp lands including Alagba Mburu belong to Amanyanabo of Kalabari for who he collected rents and other settlement dues from non-Kalabari settlers of these fishing settlements and swamps. This is admitted by the defendants too in the evidence of their witnesses. Where a plaintiff, in his evidence, clearly and in unequivocal terms, admit third party ownership or interest in the subject matter of his claim, the court will not grant him the relief that he seeks unless he proves to the court that that third party had expressly or impliedly surrendered to him (plaintiff) his (third party's) interest in that subject matter."

Dissatisfied, the appellants went to the Court of appeal. That court dismissed the appeal and affirmed the decision of learned trial Judge. Katsina-Alu, JCA, (as he then was) said at page 193 of the record;

"Once it becomes clear on the evidence that third party interest was raised, the trial judge had a duty to consider the oral evidence in this regard vis-à-vis the party's pleadings. Clearly therefore the plaintiffs' contention that the learned trial judge determined the case upon an issue not raised on pleadings is a misconception of the law. In my judgment, the contention has no foundation."

Still dissatisfied, the appellants have appealed to this court. As usual, brief were filed and duly exchanged. The appellants formulated three issues for determination as follows:

"(i) Was the Court of Appeal right in dismissing Plaintiffs' appeal against the judgment of the High Court which relied on evidence of

3rd party interest in the land in dispute elicited from a witness in cross examination when the court of Appeal itself found that third party interest was not raised in the pleadings?

(ii) Was the Court of Appeal right in law in relying on evidence of third party interest when the issue was not raised in the pleadings of the parties in coming to its decision in the appeal? B

(iii) In the circumstances of this case, was a dismissal order the appropriate order to make when:

(a) on the evidence of third party ownership allegedly established, none of the parties was entitled to judgment (in which case an order of a non-suit) would have been the proper or alternative order? C

(b) As the respective case put forward before the court at the trial was not properly considered was this not a special feature warranting an order of a retrial?" D

The 1st set of respondents formulated the following issues for determination:

"(i) Was the Court of Appeal wrong in confirming the High Court judgment's holding that the evidence of PW3, that the land in issue belonged to the Amanyanabo of Kalabari and his Chiefs and that he collected dues for them from the settlers, elicited in cross examination even though the issue was not raised in the pleadings?" E

(ii) Were there other findings in addition to P.W. 3's evidence on ownership made by the High Court, which were also, uphold (sic) by the Court of Appeal? F

(iii) Did the Court of Appeal not find that the High Court held the traditional history of the Plaintiffs/Appellants not proved and confirmed same? G

(iv) Was the Court of Appeal wrong in dismissing the case of the appellants instead of ordering a New Trial when their ownership, title and their traditional evidence or even their possession were not proved in accordance with the cases of Mogaji v. Odofin [1978] 4 S.C. 91 Piare v. Tanale [1976] 12 S.C. 31, Idundun v. Okumagba [1976] N.M.L.R. 200." H

The 2nd set of respondents formulated the following issue for de-

termination:

“3.01. *Whether from the evidence on record the Court of Appeal was right in dismissing the Appellants’ appeal against the judgment of the High Court that the Appellants have not established their claim of ownership of the land in dispute.*”

Arguing Issues Nos. 1 and 2 together, learned Senior advocate for the appellants. Mr. T.J.O. Okpoko submitted that courts and parties are enjoined not to allow evidence of fact on issue not raised in the pleadings but if through inadvertence such evidence is allowed, the court must ignore it in arriving at a decision. This is to avoid surprise, for a party cannot be expected to prepare for the unknown. He cited *George v. Dominion Flour Mill Limited* [1963] All N.L.R. 71 at 77; *North-Western Salt Co. Limited v. Electrolyic Co. Limited* [1914] AC 461 at 481; *Emegokwe v. Okadigbo* [1973] 4 S.C. 113 at 117; *George v. UBA I & II NLR* (PT. 1) 347; *ACB Limited v. Gwagwada* [1994] 2 N.W.L.R. (pt. 329) 720 and *Akpapuna v. Nzeka II* [1983] N.S.C.C. (Vol. 4) 287 at 298.

It was the submission of learned Senior advocate that the Court of Appeal was wrong in not applying the principle of law stated in the above cases and that it is erroneous in law for that court to have relied on unpleaded fact of *jus terti* instead of expunging it in coming to the conclusion as established by long standing binding decisions of the Supreme Court. He submitted that the case of *Chief Dada v. Chief Ogunremi* [1967] N.M.L.R. 181 applied by the Court of Appeal was clearly not applicable on the facts in the case in hand. He called in aid portions of the evidence of PW3 and submitted that the Court of appeal was wrong in relying on the inadmissible evidence of the witness.

Dealing with the point of insufficiency of traditional evidence by the Court of Appeal, learned Senior Advocate pointed out that the finding of the trial Judge is not that traditional evidence led is not believed, rather it was said not to be sufficient. To learned Senior Advocate, the trial Judge did not say anything about the probative value of the evidence tendered by the PW1 and PW4; but it only referred to an “*numerical insufficiency*”

He further examined the evidence of PW 3 and PW4.

Once the learned trial Judge took a wrong view of the evidence of the Amanyanabo's interest in the land in dispute. His Lordship appeared to have totally overlooked the lawful and unchallenged evidence before him and the Court of appeal fell into the same mistake made by the learned trial Judge, learned Senior Advocate reasoned. B

It was the argument of learned Senior Advocate that if traditional evidence was in fact insufficient (which is not conceded) it is at the worst inconclusive and the law in that situation is that plaintiffs claim could still succeed if they could show sufficient act of possession. He cited Ekpo v. Ita [1932] II N.L.R. 68 and Odife v. Amemeki [1992] 7 N.W.L.R. (pt. 251) 25. In such case, both the learned trial Judge and the Court of appeal ought not to have resorted to recent act of ownership, counsel contended. He cited Kojo v. Bonsie [1957] I W.L.R. without the page number. C D

Learned Senior Advocate claimed that the appellants led credible evidence of positive acts of ownership stretching over a long period of time on the land in dispute. He relied on the evidence of PW1, PW2, PW3 and PW4. Counsel heavily criticized the decision of the Court of Appeal in respect of the defence of *jus tertii* at page 14 of appellants brief. He urged the court to resolve in the negative and in favour of the appellants Issues Nos. 1 and 2. E

Taking Issues No. 3, learned Senior Advocate submitted that the proper order to make upon allowing the appeal is one of retrial or alternatively a non-suit. He cited Okpala v. Ibeme [1989] 2 N.W.L.R. (pt. 102) 207 at 277. The third party interest, which the learned trial Judge held to have robbed the appellants of their claim must equally rob the respondents of their entitlement to the land, learned Senior Advocate argued. He relied on what the learned trial Judge said at page 119 of the Record and submitted that what the trial Judge said is that none of the respondents is entitled to the judgment of the court. F G

Still on a retrial, learned Senior Advocate contended that a rehearing order is a consequential order made after an appeal has been allowed and the appellate court cannot on the basis of the evidence on record or the legal implication of the success of the appeal, determine the appeal in H

favour of either party without further hearing of evidence. He cited *Sanusi v. Ameyogun* (1992) N.W.L.R. (pt. 237), again without the page number. It does not appear that learned Senior Advocate specifically dealt with the issue of non-suit. He urged the court to allow the appeal.

B Learned senior advocate for the 1st respondent, Chief Debo Akande, submitted on Issue No. 1 that there are five ways in which ownership of land could be proved. He related some of the ways to the evidence of the witnesses. Dealing with the cross examination of PW3 which resulted in the answer that the Amanyano of Kalabari and the Chiefs are the owners of all the swamp lands or mangrove lands, learned Senior Advocate submitted that the intention and purpose of cross-examination is to test the veracity of the witness in the box, and to discredit his evidence in the eyes of the court.

D On Issue No. 2, learned Senior Advocate called the attention of the court to pages 12 and 120 of the Record and submitted that the evidence of PW3 is in fact a denial of the appellants' claim of ownership of the land, Alagba Mburu. On Issue No 3 learned Senior Advocate submitted that the Court of Appeal was not wrong in confirming that the trial judge decided that the claim for the traditional history was not prove. He called the attention of the court to paragraphs 4 and 5 of the Statement of Claim of the appellants and the evidence of PW 1, PW2 and PW 4. He cited *Bamgboye v. University of Ilorin* [1999] 10 N.W.L.R.(pt. 622) 290 at 327.

G On Issue No. 4, learned Senior Advocate submitted that since the appellants failed totally to establish by evidence, their ownership of the land in issue and there is no irregularity of a substantial nature apparent on the record or shown to the court, the appropriate order to make is that of dismissal and not a re-trial where they will be given a chance to make up for the weakness of their evidence. He cited *Okino v. Obanebira* [1999] 13 N.W.L.R. (pt.636) 543; *Ayoola v. Adebayo* [1969] 1 AII N.L.R.159; *H Olaseinde v. ACB Ltd.* [1990] 7 N.W.L.R. (pt. 161) 80 at 190, *Sanusi v. Ameyogun* [1992] 4 N.W.L.R. (pt. 237) 527 *Briggs v. Briggs* [1992] 3 N.W.L.R. (pt. 228) 128 and *Oyovbiare v. Omamurhomu* [1999] 10 N.W.L.R. (pt. 621) 23 at 28.

Learned Senior Advocate in his supplementary brief said that the land in issue in this case is ABA-Boko, a land in which the two sets of respondents fought the issue of title and possession to this court in suit No. 162/97 in which judgment was given on 13th December 2002 in favour of the 1st set of respondents. As this court by a majority of 3-2 B awarded the title and possession of the ABA-Bako to the 1st set of respondents, it cannot reverse itself over the decision. He urged the court to dismiss the claims of the appellants and the 2nd set of respondents.

Chief R.O.A. Akinjide, SAN, for the 2nd set of respondents, submitted that the Supreme Court will not disturb concurrent findings of fact by the Courts below unless there is a substantial error apparent on the record of proceedings. He cited *Njoku v. Eme* [1973] 5 S.C. 293 at 306; *Ibodo v. Enarofia* [1980] 11 – 12 S.C 42 at 56-57; *Enang v. Adu* [1981] 11-12 S.C 25 at 41-42; *Igidi v. Chief Igba* [1999] 5 S.C. (part 1) 114 at 119; *Dr. Bamgboye v. University of Ilorin* [1999] 6. S.C. (part 2) 72 at 96 and *Wilson v. Oshin* [2000] 6. S.C (part 3) 1 at 22. He contended that since the appellants did not appeal against the findings of fact of the Court of Appeal, they stand admitted and undisturbed. He cited *Commerce Assurance Ltd. V. Ali* [1992] 3 N.W.L.R. (pt. 232) 710. D E

Relying on *Idundun v. Okumagba* [1976] N.M.L.R. 200 and *Piaro v. Tenalo* [1976] 12 S.C. 31 at 40 and 41, learned Senior Advocate submitted that there are five ways in which ownership of land may be proved. F He pointed out that only two of the five ways were adopted by the appellants. Viz :(a) Proof of traditional evidence; and (b) proof of acts of ownership. He examined paragraphs 4,5,13,14 and 16 of the Statement of Claim and the evidence of PW 1 PW 2 and PW 3 . G

On the issue of not raising third party interest in the pleadings, learned Senior Advocate quoted the pronouncement of the Court of Appeal in paragraph 4, 13, pages 7 and 8 of his brief and cited *Mogaji v. Cadbury Fry (Export) Nigeria Ltd.* [1985] 2 N.W.L.R. (pt. 7) 393 at 395 and *Adeyemo v. Popoola* [1987] (pt.66) 578 at 581. H

Once a decision is made that a witness relating traditional evidence is not worthy of any credibility there is nothing more to consider in respect of facts in recent years and that would be the end of the case,

learned Senior Advocate reasoned. He cited *Amajideogu v. Ononaku* [1988] 2 N.W.L.R. (pt. 78) 614 at 617. Counsel justified the reliance on the case of *Chief Dada v. Chief Ogunremi* [1967] N.M.L.R. 181 by Court of Appeal.

B It was the contention of learned Senior Advocate that the judgments of both the High Court and the Court of appeal were not based solely on the 3rd party interest, but also on other grounds. He dealt with that in paragraph 4, 17 of his brief.

C Learned Senior Advocate submitted that where a plaintiff in an action for declaration of title has failed to prove his title, the proper order is one of dismissal. He cited *Olayioye v. Oso* [1969] 1 AII N.L.R. 281 at 284; *Kodilinye v. Odu* [1935] 2 W.A.C.A. 336 *Okafor v. Idigo* [1984] 1 S.C.N.L.R. 481 at 483 and 484. A retrial, learned Senior Advocate argued, is not appropriate where it is manifest that the plaintiffs case has failed in toto and that no irregularity of a substantial nature is apparent on the records or shown to the court. He cited *Ayoola v. Adebayo* [1969] 1 AII N.L.R. 159.

E Relying on *Egiri v. Ukperi* [1973] 11 SC 299 at 310 and *Egonu v. Egonu* [1978] 11 – 12 SC 111 at 129, learned Senior Advocate submitted that once a finding of fact by a trial court is supported by evidence, an appellate court will not upset it. Citing further the case of *G. v. G* [1985] 2 AII ER 225 on the review by a Court of Appeal of exercise of discretion of a trial court, learned Senior Advocate urged the court to dismiss the appeal.

G Let me first take the issue of filing a supplementary brief. The issue was raised when the appeal was argued. Order 6 of the Supreme Court Rules does not provide for the filing of supplementary briefs but the case law seems to accept the process. In *Okpala v. Ibeme* [1989] 2 N.W.L.R. (pt. 102) 208, this court, per Nnaemeka-Agu, J.S.C said at page 220:

H “Quite apart from the fact that there does not appear to be any authority for filing any supplementary brief on 9th March, 1987, when the last date authorized by the rules for filing the appellants’ brief was 5th February, 1987, there is no provision in the rules for filing a supple-

mentary brief without a leave of court.”

It is clear from Okpala that although the rules do not provide for the filing of supplementary brief, this could be done with leave of the court.

In Chief Okenwa v. Military Governor, Imo State [1996] 6 B N.W.L.R. (pt. 455) 394; this court, per Iguh, JSC, said at page 412:

“The appellant had filed his appellants’ brief well within the time but before he obtained the leave of Court of Appeal to file additional grounds of appeal. He duly raised an issue from his additional ground of appeal and filed what he rightly called a supplementary brief in support of the new issue.”

The above is the position of the law in this court. Although the Court of appeal in Iwuaba v. Uwaosigwelem [1989] 5 N.W.L.R. (pt.123) 636 held a different view, this court is bound by its own decisions, until over-ruled by a properly constituted panel. Since that issue did not arise and was therefore not taken in this appeal, I will say no more on the competence of the 1st set of respondents filing a supplementary brief.

But I think I can take right away the merits of the supplementary brief. It would appear to raise the doctrine of estoppel per rem judicatam. Although that is not stated in the brief, I do not think I am wrong in coming to that conclusion in the light of the following statement in the supplementary brief:

“Secondly the two sets of respondents fought the issue of title and possession of ABA Boku to the Supreme Court in Suit SC. 162/97 in which judgment by 3-2 was given on the 13th December 2002 in favour of the 1st Set of Respondents. The Supreme Court by majority of 3-2 awarded the title and possession of ABA Boko to the 1st set of Respondents, and cannot in this suit reverse itself over the decision. It is my respectful submission in addition to our earlier BRIEF that the Appellants cannot lay claim to a portion of ABA Boko, the whole of which has been declared to the 1st Set of Respondents both in title and in possession.”

Is brief the forum to raise the special defence of estoppel per rem judicatam? I think not. The case must be made out in the pleadings before argument can be taken on it in the brief on ap-

peal. The law is elementary that estoppel per rem judicatam is a special defence available to a defendant, which must be specifically pleaded in the statement of defence. See *Egbe v. Adefarasin* [1987] 1 N.W.L.R. (pt. 47) 1; *Sosan v. Ademuyiwa* [1986] 3 N.W.L.R. (pt. 27) 241; *Oshodi v. Eyifunmi* [2000] 13 N.W.L.R. (pt. 684) 298. In the circumstances, I will not consider the supplementary brief in this appeal.

The fulcrum of this appeal is in respect of the evidence of PW3 on the ownership of the land in dispute. Learned Senior Advocate for the appellants attacked the decision of the two courts below on the ground that the evidence of PW3 relied upon was not pleaded by the parties.

Perhaps I can go to the pleadings of the appellants. Paragraphs 4,5, 7 and 8 deposed to the ownership of the land in dispute by the appellants as follows:

“4. The Plaintiffs inherited the land in dispute from their ancestor OKIO who founded the area in dispute and occupied it from time immemorial without any interruption whatsoever.

5. The plaintiff’s ancestor OKIO founded the land in dispute with other members of his family: Amaofori, Otobo, Datema, Boko, Debo.

7. Then from Okio-piri the founding fathers moved on to another site on the land in dispute and re-settled there calling the whole area AKULAMA. EKULAMA is the name of a village in Ekulame and also the name of the whole town.

8. The name Ekulame was derived from the name of a bird ‘EKULE’ which predominated the area, re-settled by the plaintiffs ancestors, in very large numbers.”

The above paragraphs clearly aver to the ownership of the land in dispute by the appellants. The paragraphs also pleaded traditional history.

The appellants will normally expect any of their witnesses to give evidence in vindication of the above paragraphs because their case of ownership is deposed to therein; and it is by inheritance from their ancestor, Okio, the founder of the area in dispute, as claimed by them.

But PW3, Ibikiri Williams West, at the material time, a Revenue Collector, told a different story, quite different from the averments in the above paragraphs. Under cross-examination, witness said:

“The Amanyabo of Kalabari and his Chiefs sent me to collect those dues... I had instruction from the Amanyabo and Chiefs to render accounts to these two men who in turn reported to the Amanyabo and Chiefs and also paid me my Commission... The Amanyabo of Kalabari and his Chiefs are the owners of all those swamp lands or mangrove lands and we collect dues from settlers.” B

This evidence, in my humble view, is diametrically opposed to the claim of ownership of the land in dispute by the appellants. Paragraph 4 of the statement of claim clearly averred that the appellants inherited the land in dispute from their ancestor, OKIO, who founded the area in dispute. **If the “Amanyabo of Kalabari and his Chiefs are the owners of all those swamp lands or mangrove lands”,** as stated by PW3 the case of ownership averred to by the appellants is punctured irredeemably. Their claim of ownership becomes moribund. D

Where parties make opposing claims to land, and a witness gives evidence on a third party ownership of the land or interest in the land, the case of the plaintiff cannot stand, particularly when the witness is called by the plaintiff. **If a witness called by party E gives evidence against that party, the evidence will be regarded as one against interest.** See General Ojiegbe v. Okwaranyia [1962] All N.L.R. 605. Unless explanations are given which satisfy the court that the admissions should not be regarded, due weight should be given to them as such. See Okai v. Ayikai [1946] 12 W.A.C.A 31. F

Where a witness called by a party gives evidence against his interest, our adjectival law requires the party to urge the court to declare him a hostile witness for purpose of cross-examination. This is to enable the party discredit the evidence of the witness and reject the evidence. See Ilouno v. Chiekwe [1991] 2 N.W.L.R. (pt. 173) 316; Udoh v. The State [1994] 2 N.W.L.R. (pt. 329) 666; Federal Housing Authority v. Sommer [1986] 1N.W.L.R.(pt. 17) 533. **This was not done and the appellants are bound to accept the evidence of PW3 with all its “sweetness and bitterness” cum onere.** G

The evidence of PW3 apart, it does not seem to me that the evidence of PW4 is helpful to the appellants. The witness said under cross-

examination at page 67 of the Record;

“Yes, *alagba mburu* is a mangrove swamp. Yes, mangrove, swamps are free for all Kalabari people to use or settle. There is no bush of dry land in *alagba mburu* where well could be dug for drinking water. Yes, many Ekuleama fishermen settle and fish at Okoroboko. Okoroboko and Willie Kiri are opposite each other on either bank of the river.”

PW1, in his evidence-in-chief, the key witness, said at page 52 of the Record:

“The Ekuleama people authorized us to bring this action and on that authority we filed this action. I know the land in dispute called *Alagba Mburu*. It is the property of Ekuleama people.”

I think I can stop here and make a point. Both PW1 and PW4 agree that the name of the land in dispute is “*Alagba Mburu*”. Perhaps that is the only point of agreement. The witnesses parted ways as to the ownership of *Alagba Mburu*. While PW1 said that *Alagba Mburu* belonged to Ekuleama people, PW4 said that *Alagba Mburu* is a mangrove swamp and mangrove swamps are free for all Kalabari people to use and settle. Of course, he went further to say the obvious, and it is that there is no bush of dry land in *alagba Mburu* where well could be dug for drinking water.

Again, like PW3, PW4 is a witness of the appellants. Was the trial Judge in a position to pick and choose the evidence of PW1 and drop the evidence of PW3 and PW4? I think not. **A trial judge, in the judicial process, in his role, which is generally likened to the unbiased umpire, is not entitled to pick only evidence that vindicates the case of the plaintiffs and dump the evidence that is favourable to the defendant. A trial judge has the duty to place the evidence in the imaginary scale of justice and see where the pendulum tilts in the measuring process. By our evidential rules, the judge must give judgment in favour of the party where the evidence tilts favourably.** The appellants wanted the trial Judge to pick and choose the evidence of PW 1 and probably PW2 and drop and dump the evidence of PW3 and PW4. With respect, that is rather a very tall ambition, which has no basis in law.

And that takes me to the point seriously canvassed by Learned Senior Advocate to the appellants that the evidence given by PW3 was not pleaded and therefore goes to no issue. **It is elementary law that parties are bound by their pleadings.** See *Ehimare v. Emhonyon* [1985] 1 N.W.L.R. (pt. 2) 177; *Abaye v. Ofili* [1986] 1 N.W.L.R. (pt. 15) 134; *Owoade v. Omitola* [1986] 2 N.W.L.R. (pt 77) 413. B

It is pleaded in paragraph 4 of the statement of claim that the plaintiffs inherited the land in dispute from their ancestor, OKIO. This is the claim of the appellants to the ownership of the land in dispute and it is by traditional history. In my view, any evidence which is contrary to the averment in paragraph 4 against the ownership of the property by the appellants will destroy their case, which they erected in their statement of claim. And this conclusion, in my humble view, is not against the principle of law that parties are bound by their pleadings. C D

Katsina-Alu. J.C.A., (as he then was) in my view, got the point when he said at page 193 of the Record:

“Once it becomes clear on the evidence that third party interest was raised, the trial Judge had a duty to consider the oral evidence in this regard vis-à-vis the party’s pleadings. Clearly therefore the plaintiffs’ contention that the learned trial Judge determined the case upon an issue not raised in the pleadings is a misconception of the law. In my judgment the contention has no foundation.” E F

I cannot see better evidence against a party than one from a witness called by him, who gives evidence contrary to the case of that party. This is because the party is calling the witness to testify in favour of his case as pleaded in his pleadings. If the party knows that the witness will not give evidence in his favour, he will never call him, as in the present case, as it relates to the evidence of PW3 and PW4. The Evidence Act anticipated this type of situation and made provision in the Act for a party to treat his own witness as hostile in relevant cases. I had earlier made the point. **In my view, the appellants had all the opportunity to take advantage of section 207 of the Evidence Act. Since they did not take advantage of the provisions of the Evidence Act,** G H

they cannot repair the damage done at the trial in this court. This court has not the mechanical tools to effect any repairs.

I do not think that is the only area of the case against the appellants. Let me look at the evidence of PW1 a bit more closely. PW1 was
 B the 3rd plaintiff. He said in his evidence in chief at pages 52 and 53:

*"I know the land in dispute called Alagba Mburu. It is the property of Ekuleama people ... Our father Owukio owned the land and his son founded a settlement there and lived there. The son was called Aba and the settlement or village was called Abama. We got the land through
 C Owukio and his descendants."*

Learned Senior Advocate for the appellants dealt in some considerable length in his brief that parties are bound by the pleadings. I do not see where the above evidence is pleaded in the statement of claim. I do
 D not where the above evidence is pleaded in the statement of claim. I do not see where the appellants pleaded that Owukio owned the land and his son founded a settlement there and lived there. All that was pleaded in paragraph 4 is the *"plaintiffs inherited the land in dispute from their
 E ancestor OKIO who founded the area in dispute and occupied it from time immemorial."*

Is this consistent with the evidence of PW1 that their father Owukio owned the land in dispute? I think OKIO is a different person from Owukio,
 F this is not contained in the pleadings and the learned trial Judge could not have speculated, as the law does not allow him to do so. I do not seem to see Owukio in the statement of claim. Assuming that the name is there, there will still be no nexus between the evidence of PW1 and the statement of claim, and I so hold.

G Let me also take the evidence of PW2. As the evidence in-chief is short, I will reproduce it here:

*"I know PW1. I know him at Willie Borikiri at Alagba Mburu fishing port. Willie was an Ekuleama man who owned the fishing port. I
 H started fishing there some twenty five years ago on the permission of Willie. I was at the fishing port when Ekuleama people came and called Willie away. They later returned with him and summoned us all to a meeting. They told us Shell BP had found oil there at the fishing port and*

would do operation there and we fishermen had to leave the place. Willie and one Gbobo ferried us to their other fishing port Okoroboko where we are now.”

I have searched in vain for the above evidence in the statement of claim. The Willie element is not just evidence but a fact, which must be pleaded. I say this because witness said that Willie was the owner of the fishing port. I think I will not be wrong to conclude that PW2 was referring to the Alagba Mburu fishing port. I think I am right.

And so we have three versions of ownership of the land in dispute. The first version is “OKIO”, the ancestor of the appellants. The second version is the appellants father “Owukio”, and that is the version from PW1. The third version is “Willie”, and that is the version from PW2.

What is the correct version? I seem to know the problem and it is likely to be the fault of the pleadings, if all versions are in fact correct, and they could be correct. In pleading traditional history, the plaintiff is expected to narrate the genealogical tree from original owner, the ancestor, in generations appurtenant to him, down the line to the plaintiff or plaintiffs. One word which ties the genealogy and generations appurtenant to the original owner is “*begat*”, which in modern context is “*begot*”, meaning, “*to become the father of*”. As modern pleadings no longer take the prototype of medieval language, the expression “*begat*” could be substituted for “*gave birth to*”. **In view of the fact that the original owner “OKIO” is not traced to the appellants, there is a clear missing link in the genealogical tree and a court of law has no jurisdiction to supply it. The point I am struggling to make is that if all the versions are correct, then the pleadings did not assist the case of the appellants. A case is made in the pleadings and not on appeal. If pleadings are badly rendered, a party cannot repair them on appeal to his advantage.**

Let me now take the submission of learned Senior Advocate for the appellant on an order of non-suit. **A non-suit is a termination of an action which did not adjudicate all relevant issues on the merit, as where a plaintiff is unable to prove his whole case and it will be**

unjust to dismiss such case in its entirety or where there was a failure by the trial Judge to make proper and specific findings and an appellate court can neither do the same on the printed evidence, a re-hearing or non-suit, depending on the circumstances of the particular case may be ordered. See *Awote v. Owodunni* (No. 2) [1987] 2 N.W.L.R. (pt.57) 375; *Chief Olufosoye Basorun v. Olorunfemi* [1989] 1N.W.L.R. (pt. 95) 26. Where on the evidence before the court neither party will be entitled to judgment, the court can enter a non-suit after giving the parties opportunity to address it on the issue. See *Ikoro v. Satrap Nig. Ltd.* [1977] 2 S.C. 123; *Craig v. Craig* [1966] 1 All N.L.R. 173

An appellate court cannot grant an order of non-suit merely because a party asks for it. See *Chikere v. Okegbe* [2000] 12 N.W.L.R. (pt. 681) 274. The court must be satisfied that the circumstances of the particular case deserve such order. This is because an order of non-suit will provide or give the plaintiff a second bite at the “cherry” by improving on the original case. Fortunately, there is no cherry in litigation.

A plaintiff who claims ownership of land must prove his title in any of the five ways enumerated in *Idundun v. Okumagba* [1976] 9-10 S.C. 277; [1976] 1 N.M.L.R. 200. Where he fails to prove title, the case must be dismissed. He is not entitled to a non-suit to repair his original case. In *Gold v. Osaseren* [1970] 1 All N.L.R. 125, this court held that if a party fails to establish his title to land, his action should be dismissed instead of entering a non-suit against him.

The burden is on the plaintiff to prove that the trial judge ought to have entered a non-suit instead of dismissing the action. In that respect the plaintiff should satisfy the appellate court that it will be unjust to dismiss the case merely because the plaintiff was unable to prove the whole case or that there was failure on the part of the trial Judge to make proper and specific findings. The appellants have not satisfied this court why an order of non-suit should be entered in their favour. In my view, the case was not proved at

all and the learned trial judge rightly came to that conclusion, which resulted in the dismissal of the case. And what is more, at the close of evidence, it was clear that the respondents were entitled to judgment.

Learned Senior Advocate also canvassed that the trial judge B ought to have ordered a retrial. Where a trial judge fails to make findings of facts on issues duly joined by the parties in their pleadings, an appellate court will order a retrial when the evidence is of such a nature that it cannot make its own findings, not having seen C or heard the witnesses. See Adeyemo v. Arokopo [1988] 2 N.W.L.R, (pt.79) 703; Okpiri v. Jonah [1961] AII N.L.R. 102; Armel's Transport Ltd. v. Martins [1970] AII N.L.R. 27, Okeowo v. Migliore [1979] II S.C 138. An order of a retrial is not appropriate where the plaintiff's case has failed in Toto. See Abibu v. Binutu [1988] 1 N.W.L.R. (pt. D 68) 57.

In the instant case, the learned trial judge painstakingly and assiduously made findings of fact and came to the correct conclusion that the appellants did not prove their title to the land in dispute. In the circumstances, I cannot see my way clear in ordering a retrial, as that will only enable the appellants effect repairs in their case and meet the respondents the second time with their repaired case. That will be grave injustice to the respondents. After all, there F should be an end to litigation.

The findings of the trial judge and the Court of Appeal are concurrent particularly on the evidence of PW 3 and this court cannot interfere with them because they are clearly borne out from the evidence before the trial court. Whichever angle this appeal is G taken, the appellants are the losers. I think they have a very bad appeal which must fail. In sum, the appeal fails and it is dismissed with N10,000.00 costs to each set of respondents.

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BELGORE JSC

The appeal has not raised any issue to law or facts that have not been adequately addressed by the trial High Court and the Court of Appeal. Simply put, this appeal attempt to overturn the concurrent findings of the two lower courts, but the attempt has failed. I agree with my learned brother, Tobi, J.S.C., that this appeal lacks merit, and I also for the full reasons in that judgment which I adopt as mine, dismiss it and make the same consequential orders as to costs.

C

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Tobi. JSC, and I am in complete agreement with him that this appeal lacks substance and should be dismissed.

In the first place, this appeal is essentially against the concurrent findings of fact of both the trial High Court and the Court of appeal in favour of the defendants/respondents. It is trite law that this court will not disturb concurrent findings of fact of both the trial court and the Court of appeal unless a substantial error apparent on the fact of the record of proceedings is shown or where such findings are perverse or unsupported by the evidence or were reached as a result of a wrong approach to the evidence or a wrong application of a principle of substantive law or procedure. See *Enang v. Au* [1981] 11 – 12 S.C. 25, *Nwadike v. Ibekwe* [1987] 4 N.W.L.R. (pt. 67) 718, *Igwego v. Ezeugo* [1992] 6 N.W.L.R. (pt. 149) 561 at 576, *Woluchem v. Gudi* [1981] 5 S.C. 291 at 326, *Chinwendu v. Mbamali* [1980] 3 – 4 S.C. 31 at 75. In the present appeal, none of the concurrent findings of fact of both courts below has been faulted in any way by the appellants. Accordingly, they must be accepted as fully established by this court.

In the second place, the record of proceedings clearly reveals that the evidence of the plaintiffs/appellants in respect of their alleged title to the land in dispute was thoroughly discredited and full of contradictions. Where, as in the present case, the plaintiffs failed totally to establish by evidence their ownership of or title to the land in dispute, the appropriate

order to make is that of dismissal of their claim and not a retrial as urged upon this court by learned counsel for the plaintiffs/appellants. See *Kodilinye v. Mbanefo Odu* [1935] 2 W.A.C.A. 336, *Olayiole v. Oso* [1969] AII N.L.R. 271.

I think the point must be stressed that an order for retrial inevitably implies that one of the parties, usually the plaintiff, is being given another opportunity to relitigate the same issues between the parties all over again. An appellate court before deciding to make such an order ought to satisfy itself that the other party, usually the defendant, is not thereby being wronged to such an extent that a miscarriage of justice would be occasioned. Clearly, an order for a retrial cannot be appropriate where it is manifest that the plaintiffs' case has totally failed and that no irregularity of a substantial nature is apparent on the records or shown to the court. See *Isaac Ayoola v. Jinadu Adebayo* [1969] 1 AII N.L.R. 159. D

In the present appeal, the plaintiffs/appellants' case before the trial court failed in toto. In a claim for a declaration of title, such as is the case in the present action; the onus is on the plaintiffs to satisfy the court on the evidence produced by them that they are entitled to the declaration sought. To this end they must rely on the strength of their own case and not on the weakness of the defendants' case and if this onus is not discharged, the weakness of the defendants' case will not help them and the proper judgment will be for the defendants. This general rule is subject to the important qualification that if the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely on, the plaintiff is fully entitled to make use of such evidence. See too *Okafor v. Idigo* [1984] 15 N.S.C.C. 360, *Frempong v. Brempong* 14 W.A.C.A. 13, *Akinola v. Oluwo* [1962] 1 AII N.L.R. (pt. 2) 224 at 225. F G

In this case, however, no aspect of the defendants' evidence in any way supports the plaintiffs' case. I think upon a close consideration of the evidence and the findings of both courts below in this matter that the proper order in this case must be a dismissal of the plaintiffs/appellants' claims. H

It is for the above and the more detailed reasons contained in the leading judgment that I, too, dismiss this appeal with costs as therein

KALGO JSC

B I have the privilege of reading in draft the judgment of my learned
brother Niki Tobi, J.S.C., in this appeal and I entirely agree with him that
there is no merit in the appeal. There were concurrent findings of fact by
the trial court and the Court of Appeal and no special circumstances or
reasons shown why this court should interfere with those findings. See
C Enang v. Adu [1981] 11 – 12 S.C. 25; Lokoye v. Oloja [1983] 8 S.C.
61 at 68 – 73; Ojomu v. Ajao [1983] 9 S.C. 22 at 53. Ogunbiyi v. Adewunmi
[1988] 5 N.W.L.R. (pt. 93) 217. This appeal therefore ought to be dis-
missed and I hereby dismiss it and abide by the order of costs made in
D the leading judgment.

PATS-ACHOLONU JSC

E I have read the judgment of my learned brother, Niki Tobi, J.S.C.,
in draft and I agree with him. The appellants' case is characterized by
various and varying degrees of inconsistencies, patently manifest igno-
rance of the historical devolution of the swamp land claimed and there
F are three poignant defects readily manifest in the appellants' case. I set
them down as follows:

(i) At paragraph 4 of the statement of claim the appellants as plain-
tiffs averred as follows:

G *"The plaintiffs inherited the land in dispute from their Ancestor
Okio who founded the area in dispute and occupied it from time imme-
morial without any interruption."*

Paragraph 6. *"The said Ancestor's first place of landing and settlement
on the land in dispute was called Okio Piri (i.e. Okio bush) there were
H no neighbours."*

In his evidence in court the 1st plaintiff testified as follows:

*"Our father Owokio owned the land and his son founded a settle-
ment and lived there. The son was called Aba."*

Obviously Aba was not Okio. Who is Owokio who was said to be the owner of the land. There is no evidence that Okio was Owokio. Even from the evidence of p.w. 1 the prime mover of the case he could not explain or tell the court who was the real founder of the land. Owokio or Okio or Aba. Such abysmal parade of ignorance bespeaks of insufficient knowledge of the proper founder of the land. Owokio, or Okio or Aba. Such abysmal parade of ignorance bespeaks of insufficient knowledge of the proper founder of the land. It is not the duty of the court to discern by conjecture who really founded the land.

(ii) As though this display of unsatisfactory evidence is not enough, p.w. 3 had to say that the land in question belongs to the King and all Kalabari people and he used to collect dues or fees for the King in respect of the land. If the land belongs to the appellants and the witness called by them to strengthen their case that the land belongs to them, but he turned round to say that the land really belongs to a third party and he was not contradicted, then the case of the appellants is badly dented as he and his witness are seen to be speaking with divers tongues so to speak. In other words, the witness called to shore up his case was saying *"No that land is not yours. It belongs to the King of Kalabari and all Kalabaris"*

(iii) Then p.w. 2 in his evidence had this to say "I know Opu Onongi and Kala Onongi. One cannot get to Willie Kiri from any of these two places. Yes fishing ports are named after their founders or heads. It was Willie who founded the fishing port *"Alagbo Mburu"* This time it is now one Willie who was supposed to have founded the land in dispute. We have Okio, Owokio, and finally Willie- each said to have been the original founder, and yet p.w. 3 had testified that the land belongs to the King of Kalabari and their people.

This parade of galaxy of inconsistent and contradictory testimonies dealt a telling and irrecoverable blow to the case of the appellants and smashed it to smithereens. The case of the appellants has no leg to stand. It is easy for the appellants to complain against the judgment of the Court of Appeal affirming the judgment of the High Court on the issue of the ownership of the land in dispute said to belong to a third party other than the appellants. They obviously failed to recognize the divergent accounts

about the founder of the land and who were their Ancestors. Where two witnesses or more of a party have made irreconcilable and contradictory statements every item of evidence contained, which tends to corroborate or contradict either of them should be carefully weighed and considered
B in determining preponderance. Where an issue is left in doubt so as to make the court speculate, the party on whom the proof rests will ultimately loose when the essential fact he relies on becomes uncertain or in doubt as to its existence. Of course a party may not be punished at a
C slight mistake in proving his case by a strained construction of what he said. But where as in this case what we have is nothing but cacophony of voices of people who are supposed to sing the same song with the same rhythm and lyrics then the case is a lost cause. There was no rhythm but discordant, jarring and disagreeable words.

D In the circumstances, the appeal fails and is hereby dismissed. I affirm the judgment of the court below and I abide by the consequential orders made in the lead judgment.

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