

SUPREME COURT OF NIGERIA
21ST JANUARY, 2005. SC. 257/2000
CORAM:- S. U. ONU, A. O. EJIWUNMI, N. TOBI, D.
MUSDAPHER, D. O. EDOZIE, JJSC

SAMSON OWIE APPELLANT
AND
SOLOMON E. IGHIWI RESPONDENT

LAND LAW - Title - Admission - The trial court properly evaluated the evidence - Of the parties root of title - In finding for the respondent (H1)

LAND LAW - Boundary - Survey plan - Tendered by the respondent - Was sufficient evidence - Of the boundary and features on the land (H2)

LAND LAW -Title - Priority of grant - Does not arise - As the documents of grant of title - Do not relate to same land (H3)

EVIDENCE - Witnesses - Credibility - A witness that has an interest to serve - Cannot be relied upon (H4)

EVIDENCE - Admission - Document tendered without objection - Was rightly admitted as an exhibit (H5)

EVIDENCE - Title - Document tendered as Exhibit E - Was not the only basis - For finding in favour of respondent (H6)

LAND LAW - Title - Identity of land in dispute - Appellant's evidence - That showed a different location of the land - Strengthened respondent's case (H7)

APPEALS - Ground of appeal - Fresh point - Where leave was not obtained - Argument on a fresh ground - Will be discountenanced (H8)

APPEALS - Interference - Title - Concurrent findings in respondent's favour - Will not be interfered with (H9)

ACTIONS - Limitation - Land matters - Present action - Was filed within the twelve years statutory limitation period (H10)

LAND LAW - Equity - Laches and quic quid plantatur - Where appellant continued building - In spite of warning - Quic quid plantatur - Operates against him (H11)

FACTS

Before the Benin-City High Court the plaintiff/respondent filed an action against the defendant/appellant. Respondent claimed entitlement to Customary Right of Occupancy, N500.00 damages for trespass and an order of perpetual injunction in respect of the land in dispute. The case relates to Bini Customary Law wherein a Plot Allotment Committee allots land to an interested person subject to the Oba's approval. The respondent's case is that the land in dispute was allotted to him by the only Plot Allotment Committee recognized by the Oba of Benin in the area. Appellant sort to establish that another Committee had earlier allotted the land to him. But his evidence as to the location of the land he is claiming shows it is on the opposite direction along Benin-Abraka Road.

The trial court found in favour of the respondent in respect of two of his claims. It did not grant his claim for damages for trespass. Appellant's appeal to the Court of Appeal was dismissed . Being aggrieved, he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding as it did that the respondent led credible evidence in support of his case to justify the conclusion reached by the learned trial Judge.
2. Whether the respondent's case was caught by the statute of limitation and or laches and acquiescence.

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

Title - Admission

1. Furthermore, the learned trial Judge after satisfying himself of the fact that there was actually bush inspection by Bush Inspectors as advanced by both parties, went further to properly evaluate the evidence relating to the root of title of the appellant and the respondent and the evidence led by the respondent was preferred. On the issue that it is only the Oba of Benin who can determine which of the plot allotment committees in the village is recognized, I agree with the respondent that there were two allotment committees in Egba village and that of the two, only the respondent's is recognized by the Oba of Benin. Before the trial Judge arrived at this finding the testimonies of P.W.3, P.W.8 and the respondent were properly evaluated before he arrived at his conclusion. Of utmost importance in this regard is the testimony of P.W.8 who stated amongst other things that the plot allotment committee in Egba recognized by the Oba was that which was chair-manned by the respondent. This is an admission against interest and the trial court, in my view, was right to rely on it. (p. 350 C)

Boundary - Survey plan

2. On the point that the respondent did not lead evidence on boundary and features on the land in dispute, I am satisfied that he did so through P.W.4, a licensed Surveyor through whom that witness tendered Exhibit A.

Thus, the trial court at page 70, line 30 to page 71, line 9 of the record, rightly evaluated the evidence led in support of the plaintiff's boundary showing the land in dispute and its boundaries. It has been held that the production of survey plan showing the extent and boundaries of the land in dispute is one of the ways in which evidence can be led to prove the boundaries of a person's land and this the plaintiff did in the case in hand. See *Emiri v. Imieyeh* (1999) 4 NWLR (Pt. 599) 442. It may be said that a plan of a land is not a sine qua non. See *Akpagbue v. Ogu* (1976) 6 S.C. 63. However, it is an established principle of law that some description is necessary to make a disputed land ascertainable. (p. 351 E)

Title - Priority of grant

3. On the issue that the appellant's predecessor, D.W.3, got a prior approval from the Oba of Benin before the respondent, I share the respondent's view that the trial Judge rightly evaluated the evidence as put forward by the parties and in his judgment at page 73 and more particularly at page 75, arrived at the right conclusion that since Exhibit "D" for the respondent and Exhibits 'H' and 'C' for the appellant, do not relate to the same parcel of land, the issue of priority does not arise. Indeed, where the issue of priority of interest arises and the grant relates to the same parcel of land, then the first in time takes priority. In the instant case the learned trial Judge in evaluating the evidence of the parties, rightly observed, in my view, that D.W.3 was a witness with an interest and purpose to serve. (p. 353 F)

Witnesses - Credibility

4. I therefore, agree with the respondent that D.W.3 is not a credible witness who should be relied upon as one who is out with an interest and purpose to serve as rightly held by the trial court - a decision affirmed by the lower court. Since the lower court affirmed these findings, I agree with the respondent's submission that authorities abound that when those findings relate to demeanour of witnesses and ascribing weight to them, it is within the exclusive preserve of the trial court, with which no appellate court can interfere. See *Ebba v. Ogodo* (1984) SCLNR. (pg. 354 B)

Admission - Document tendered without objection

5. Thus, on the appellant's contention, that Exhibit 'E' was wrongly admitted under Section 71 (3) of the Evidence Act Cap. 112 Laws of the Federation 1990," I am inclined to agree with the respondent's view that the point is misconceived." Exhibit 'E', it ought to be noted, is a letter dated 5th July, 1990, and having been tendered through respondent and admitted in evidence without any objection from the appellant he was estopped from so doing. The case of *N. C. Ekpe v. S. A. Fagbemi* (1978) ANLR 107 was relied upon. In any case, the said evidence was not at all events shown to be inadmissible in law vide *Alli v. Aleshinloye* (2000) 4

S.C. (Pt. I) 111; (2000) 6 NWLR (Pt. 660) 177 at page 215 paragraph E-F.

Assuming without conceding that Exhibit 'E' was wrongly admitted in evidence, I share the respondent's view that such wrongful admission did not occasion a miscarriage of justice to warrant any disturbing the concurrent decisions of the two courts below. (p. 354 E)

Title - Document tendered as Exhibit E

6. I am therefore in agreement with the respondent's submission that the purport of Exhibit 'E' at the trial was to establish that there was only one Plot Allotment Committee approved by the Oba of Benin and of which the respondent is the Chairman. The trial court's decision, as it turned out, was not wholly hinged on Exhibit 'E' but on the testimonies of the respondent, P.W.8 and P.W.3 which were more credible. Indeed, as the learned trial Judge rightly found -

"I am satisfied on the available evidence considered as a whole that there is only one Plot Allotment Committee at Egba Area Ward 34/F of which Plaintiff is the Chairman and who allotted the land in dispute to the plaintiff as per Exhibits 'D' and 'A'. In this regard, P.W.8 who is a signatory to Exhibit T, 'C' and 'H' - and P.W.3 - who to me on the evidence adduced, appear as reliable and consistent witnesses. There is symmetry in the testimony of these witnesses and indeed that of the plaintiff which has remained unshaken by the defence. I accept their testimony as it is more in consonance with the truth of this transaction."

As the above conclusion was rightly, in my view, affirmed by lower court, the appeal on this head ought also to be dismissed as lacking in merit. (p. 355 A)

Title - Identity of land in dispute

7. The learned trial Judge therefore found as a fact after comparing Exhibits 'C', 'J' and 'H' by holding that Exhibit D does not relate to the same parcel of land. This finding was affirmed by the lower court and rightly so, in my view.

The evidence which the appellant and his witnesses proffered

showed that the land the appellant was referring to was on the right hand side of the road behind a mechanic workshop and not on a tarred road while going from Benin City to Abraka but the land in dispute which the respondent led evidence to prove is situate on the left hand side of the road when travelling from Benin City to Abraka. Thus the respondent can take advantage of the weakness of appellant's case since it goes to strengthen his (respondent's) case. (p. 357 B)

Ground of appeal - Fresh point

8. As this court has also decided that an appellant's right of appeal does not confer unlimited right on him to argue any ground of appeal nor does it confer on him unlimited right to argue any ground filed in exercise of that right - See *Jov v. Dom* (1999) 7 S.C. (Pt. 111) 1; (1999) 9 NWLR (Pt. 620) 538 at 547 paras B - C and See *Ejodofomi v. Okonkwo* (2000) 9 NWLR (Pt. 673) 469, particularly at page 478 para D - G. Failure by the respondent to allow the appellant to proceed with the said ground without leave, the argument of the said ground at issue 2 hereof ought to be discountenanced as incompetent. Accordingly I strike out the ground. (p. 358 F)

APPEALS - Interference - Title

9. It is manifestly clear from the foregoing that what the appellant seeks before this court is an interference with the concurrent findings of facts by the two courts below. For such a situation to arise, the onus lies on the appellant to demonstrate to this court's satisfaction why it should interfere with the concurrent finding of fact. Since the appellant has woefully failed to show why such interference should be justified and the issue of bush inspectors, issue of plot allotment committee, credibility of witnesses, boundary and features on land, reliance on Benin native law and custom in proof of the title by the respondent, were all on current findings all in the respondent's favour, all these stand unshakably and solidly unchallenged by the appellant to warrant our interference. (p. 359 B)

ACTIONS - Limitation - Land matters

10. In the instant case, I agree with the respondent that until sometime in 1985 when the appellant, his servants and agents went onto the respondent's land and started digging foundation for a dwelling house, the respondent's cause of action had not arisen despite the assertion that the appellant claimed he purchased the said land in 1974. See also the case of *Adimora v. Ajufo* (1988) 1 NSCC 1005 at 1008, where this court held that the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin to maintain his cause of action. C

I agree with the respondent therefore that in 1985 when his cause of action arose and in February 1988 when his action was filed at the trial court is within the 12 - year period provided for in Section 6(2) of the Limitation Law of Bendel now (Edo) State as the applicable law. D
(p. 360 E)

Equity - Laches and quic quid plantatur

11. On the appellant's alternative submission that the respondent is caught by the doctrine of laches, acquiescence and standing by, I agree with the respondent that he promptly warned the appellant to stop his trespass but that the appellant ignored the warning and continued with his building on the land unabated. The trial court as well as the lower court, in my opinion, properly evaluated the evidence in this regard. I am therefore satisfied that the respondent is not caught by the doctrine of laches, acquiescence and standing by. Rather, I hold the view that it was the appellant who ignored the respondent's warning to stop his acts of trespass. The appellant cannot now be heard to take advantage of the doctrine of laches, acquiescence and or standing by. Rather, in my view, the doctrine of quic quid plantatur solo solo cedit operates against the appellant. My answer to this issue is accordingly rendered in the negative. (p. 361 B) E F G

H

NOTABLE POINTS OF INTEREST**TOBI JSC**

1. Issue of jurisdiction - Needs leave when fresh

It is trite law that the issue of jurisdiction being a threshold issue affecting the competence of the court to adjudicate, can be raised at anytime in the proceedings of the court. It can even be raised for the first time in the Supreme Court before judgment is given. Because of the significant role it plays in the judicial process, jurisdiction can be raised suo motu by the court, without any charge of bias from any of the parties.

A party can raise a fresh issue in this court, but he must seek the leave of court to do so. That was the decision in *Jov v. Dom* (supra). This court held that a question of law and jurisdiction can be raised at anytime in the proceedings, but it is not on a free for all procedure. Moreover courts may raise a matter of law and Constitution at any time, but in doing so, the parties must be afforded the opportunity of addressing on it.

This basically goes to the spirit of fair hearing. It is for this reason that a party to an appeal that intends to raise a new or fresh issue on appeal must seek leave to do so. (p. 363 B)

2. *Proof in a civil case - Role of the courts*

Proof in a civil case is on the balance of probability or on the preponderance of evidence. This means that where the parties give evidence as to the claim before the court, judgment will be given to the party that the evidence tilts in favour in the case. In determining either balance of probability or preponderance of evidence, the trial Judge is involved in some weighing by resorting to the imaginary scale of justice adumbrated in *Mogaji v. Odojin* (1978) 3 S.C. 91.

In arriving at the balance of probability or the preponderance of evidence, the trial Judge needs not search for an exact mathematical figure in the weighing machine because there is in fact no such machine and therefore no figure; talk less of mathematical exactness. On the contrary, the trial Judge relies on his judicial and judicious mind to arrive at when the imaginary scale preponderates and that is the standard, though oscillatory and at times nervous.

Where the findings of a trial Judge are clearly traceable to the evidence before the court and so traced, an appellate court has no juris-

diction to interfere. In other words, where the findings of a trial Judge are borne out from the evidence before him, an appellate court has no jurisdiction to interfere. After all, the person who saw it all and heard it all is the trial Judge, not the appellate Judge. The appellate Judge only sees the cold records before him and he cannot do much unless the findings are not borne out from the records before him. B

What is the position in this matter? Did the learned trial Judge come to perverse findings? Did the Court of Appeal adhere to such findings? I have carefully read the record and I am in grave difficulty to agree with the submissions of learned counsel for the appellant. As a matter of fact, the learned trial Judge, in my humble opinion, assiduously evaluated the evidence of the parties and arrived at findings which I am not able to fault. To me, he did a good job. (p. 364 D) C

3. Immaterial differences in evidence

For contradiction to change the fortunes of an appeal in favour of the appellant, they must be material and not peripheral or caricature.

Human being, being not machine, does not act with the characteristic automation of machines. There could be little differences here and there when they give evidence on the same matter or event. If human beings give evidence on the same matter or event to the exact minutest details, a Judge should seriously suspect such evidence because of a possibility of tutoring or a rehearsal developing into a recitation before the date of giving evidence. Where there are inarticulate or immaterial differences in evidence of witnesses here and there, that in itself shows their truthful testimonies and I should emphasize the expressions “*inarticulate*” and “*immaterial*.” (p. 365 C) F G

4. Documentary evidence in anticipation of court action is not admissible

That date shows that exhibit E was made when the proceedings were before the trial court and that is certainly against our law as it would appear to have been made by D.W.3 in anticipation of the proceedings pending at the material time. That is clearly against our adjectival law, and H

here Section 91(3) of the Evidence Act is relevant. The subsection reads:

“Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.” See *Are v. Ipaye* (1986) 3 NWLR (Pt. 29)

416.

It would appear that Exhibit E is further vindicated by Section 91(4) of the Evidence Act as it relates to D.W.3, its maker, and I so hold. (p. 366 G)

5. *Wrongful admission of evidence - Reversal*

I think learned counsel has a point that Exhibit E was wrongly admitted. Does that wrongful admission help the case of the appellant? I think not and Section 227 (1) of the Evidence Act comes to the aid of the respondent. The subsection provides:

“The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted”.

Did Exhibit E play a major role in the judgment of the learned trial Judge? I think not. (p. 367 B)

EDOZIE JSC

6. *When appellate court may allow a new issue*

An appellant will not as a matter of general principle be allowed to raise on appeal a question which was not raised, tried or considered by the court below, although where such question involves a substantial point of law, substantive or procedural, and it is plain that no further evidence needs to be adduced which will affect the decision, the court will allow the question to be raised to prevent obvious miscarriage of justice. In the instant case, as the Limitation Law was not pleaded nor otherwise raised by the appellant and pronounced upon by the courts below and no leave of this court was granted to raise it, there is merit in the respondent’s

preliminary objection. However, even on the consideration of the Limitation Law, the defence predicated on it is not sustainable. (p. 371 C)

7. Need to ensure valid title before building on any land

Similarly, the defences of laches and acquiescence do not avail the appellant as there was evidence accepted by the trial court that the appellant was duly warned when he commenced to dig the foundation for the erection of his building. This case underscores the need for any developer to satisfy himself with the validity of the title of the land on which he proposes to erect a building as the erection of a building on land based on defective title can lead to the disastrous consequence of the developer losing the building to the owner of the land on the principle expressed in Latin maxim as *quic quid plantatur solo solo cedit*, meaning whatever is affixed to the soil belongs to the soil. This is the unfortunate position in which the appellant has found himself. (p. 372 A)

REPRESENTATION

Appellant absent.

Dr. Alex Izinyon, SAN, (with him, S. T. Ologunorisa, H. Ibrahim (Ms) and J. B. Udobang,), for the Respondent.

CASES REFERRED TO

Adimora v. Ajufo (1988) 1 NSCC 1005 at 1008

Awoyegbe v. Ogbeide (1995) 1 NWLR (Pt. 73) 695

Are v. Ipaye (1986) 3 NWLR (Pt. 29) 416

N. C. Ekpe v. S. A. Fagbemi (1978) ANLR 107

Alli v. Aleshinloye (2000) 4 S.C. (Pt. I) 111; (2000) 6 NWLR (Pt. 660) G 177 at page 215

Ugbala v. Okorie & Ors. (1975) NSCC (Vol. 9) 429; (1975)

Jov v. Dom (1999) 7 S.C. (Pt. 111) 1; (1999) 9 NWLR (Pt. 620) 538 at 547 paras B - C

Oladele v. Anibi (1998) 9 NWLR (Pt. 567) 559

Okereke v. The State (1998) 3 NWLR (Pt. 540) 75

Ezekwesili v. Onwuagbu (1998) 3 NWLR (Pt. 541) 217

STATUTE REFERRED TO

Evidence Act Ss. 91(3) & 227(1)

LEAD JUDGMENT BY ONU JSC

B This appeal relates to a land dispute under Bini Customary Law measuring 200 feet by 500 feet and situate at Egba village along Benin/ Abraka Road.

C By his further amended Statement of Claim dated 2nd June, 1992 and filed on 9th October, 1992, the plaintiff/respondent claimed as against the defendant/appellant in the defunct Bendel State High Court (per Agun, J.), sitting at Benin as follows:

D 1. A Declaration that the Plaintiff is entitled to Customary Right of Occupancy in respect of the said piece or parcel of land measuring 9302.500sq metres verged pink on Survey Plan Number KP. 7139 dated 11th May, 1988.

E 2. N500.00 damages for trespass; and
3. An Order of perpetual injunction restraining the defendant, his servants and/or agents from further trespass on the said piece or parcel of land.

F The parties having filed and exchanged pleadings following which the case thereafter went for trial before the learned trial Judge, Agun, J, who delivered his reserved judgment on 24/6/94. In it, he held inter alia, that the respondent's case partially succeeded in that his claim for declaration of customary right of occupancy to the land in dispute was made out. In similar vein, the claim for perpetual injunction restraining the appellant, his servants and/or agents from further trespassing on the land was granted. However, the damages for trespass on the land was dismissed and the respondent was awarded N 1,000.00 as costs. Dissatisfied with the said decision, the appellant appealed to the court below
G where he also lost. He has further appealed to this court on four grounds of appeal which, with leave of this court, he raised two issues for our determination, to wit.
H

1. Whether the Court of Appeal was right in holding as it did that

the respondent led credible evidence in support of his case to justify the conclusion reached by the learned trial Judge.

2. Whether the respondent's case was caught by the statute of limitation and or laches and acquiescence.

The three issues distilled from the five grounds of appeal filed by the Respondent may be summarized as follows:

1. Whether the Court of Appeal was justified in affirming the judgment of the trial court in holding that the respondent had proved his case having regard to sufficient credible evidence led in support of same (Encompasses grounds 1, 2,3 and 5).

2. Whether there are sufficient grounds to warrant the interference with the concurrent findings of facts by the lower court. (Encompasses grounds 1,3, & 5 of Grounds of Appeal).

3. Whether the claim of the respondent was statute -barred. (Encompasses ground 4).

In my consideration of this appeal it is my view that the treatment of the appellant's two issues which overlap the three issues proffered at the instance of the respondent would adequately dispose of it as follows:

ISSUE ONE

This issue enquires whether the Court of Appeal was justified in affirming the judgment of the trial court in holding that the respondent had proved his case having regard to sufficient credible evidence led in support of same. I agree with the respondent that the Court of Appeal was right when it held:

"Finally, I believe that the Plaintiff led sufficient evidence in support of his case to justify the conclusion reached by the learned trial Judge."

The appellant and the respondent both claimed title to the said land in dispute. Whereas it is the respondent's submission that the learned trial Judge in considering who between the appellant and the respondent put up a better claim to title, made a thorough review of the evidence of the parties and their witnesses in the light of the prevailing Bini Native Law and Custom in relation to land acquisition. I agree with the respondent's submission that while he and the appellant gave evidence at the trial court

in relation to each party's root of title, the trial court considered the evidence of each party.

I agree with the respondent's further submission that it was in the course of this that the parties gave evidence of the fact that bush inspectors inspected their respective land as claimed by each., Thus, the submission by the appellant that the respondent made reference to two bush inspectors while P.W.3 made reference to 4 of them, is not material as the trial court found as a fact that there was indeed bush inspection as per the evidence advanced by the parties and I so hold.

Furthermore, the learned trial Judge after satisfying himself of the fact that there was actually bush inspection by Bush Inspectors as advanced by both parties, went further to properly evaluate the evidence relating to the root of title of the appellant and the respondent and the evidence led by the respondent was preferred. On the issue that it is only the Oba of Benin who can determine which of the plot allotment committees in the village is recognized, I agree with the respondent that there were two allotment committees in Egba village and that of the two, only the respondent's is recognized by the Oba of Benin. Before the trial Judge arrived at this finding the testimonies of P.W.3, P.W.8 and the respondent were properly evaluated before he arrived at his conclusion. Of utmost importance in this regard is the testimony of P.W.8 who stated amongst other things that the plot allotment committee in Egba recognized by the Oba was that which was chairmanned by the respondent. This is an admission against interest and the trial court, in my view, was right to rely on it. See the case of Kamalu v. Umunna (1975) 5 NWLR (Pt. 505) 321, particularly at 336 para. E - G; Joe Iga v. Chief Joseph Amakiri (1976) 11 S.C 1; Ojiegbe & Ors v. Okwaranyia (1962) 2 SCNLR 358 and Seismograph Services Nig. Ltd. v. Eyuafe (1976) Vol. 10 NSCC 434.

The other faction of the plot allotment committee comprising of P.W.8, the appellant, D.W.2 and D.W.5. was not recognized by the Oba of Benin. The pieces of evidence were not controverted. This is why there was no need to call for evidence from the Oba's Palace moreso,

that the evidence before the trial court was clear on the issue and the lower court affirmed the findings on them and which I unhesitatingly uphold. The trial court further found that by Exhibit “E” a letter which was written by D.W.3 James Igbinere, the said D.W.3, admitted in the said letter that there was only one plot allotment committee in Egba recognized by the Oba’s Palace and that plot allotment committee is the one chair-manned by the respondent. The trial Judge after satisfying himself by the pieces of evidence adduced before him on the authority of Exhibit E, concluded that Exhibit ‘E’ emanated from D.W.3 even though the witnesses denied the same.

The learned trial Judge rightly found as a fact too, that D.W.3 was not a credible witness to be relied upon because the same witness had testified in an earlier proceeding, viz Suit No.B/104/83 and charge No.B/25C/86 vide Exhibits “K” and “L”, that there was no plot allotment committee in Egba village. It is for this reason that I agree with the respondent’s submission that only one allotment committee was recognized in Egba village by the Oba of Benin, namely the one headed by the respondent as rightly found by the trial court and affirmed by the Court of Appeal.

On the point that the respondent did not lead evidence on boundary and features on the land in dispute, I am satisfied that he did so through P.W.4, a licensed Surveyor through whom that witness tendered Exhibit A.

Thus, the trial court at page 70, line 30 to page 71, line 9 of the record, rightly evaluated the evidence led in support of the plaintiff’s boundary showing the land in dispute and its boundaries. It has been held that the production of survey plan showing the extent and boundaries of the land in dispute is one of the ways in which evidence can be led to prove the boundaries of a person’s land and this the plaintiff did in the case in hand. See *Emiri v. Imieyeh* (1999) 4 NWLR (Pt. 599) 442. It may be said that a plan of a land is not a sine qua non. See *Akpagbue v. Ogu* (1976) 6 S.C. 63. However, it is an established principle of law that some description is necessary to make a disputed land ascertainable. See *Sokpoi II v. Agbozo III* 13 WACA 241 at 242; *Ajadi B. Awere v. Suleman Lasoja*

(1975) NMLR 100 at 101.

Thus, in the instant case, the appellant's contention that the respondent did not call one Nosa Samuel, to give evidence, goes to no issue and same should be discountenanced.

B When therefore the learned trial Judge held, inter alia, that:

"I am therefore satisfied from the available evidence considered as a whole that the testimony of the Plaintiff and his witnesses and the survey plan Exhibit A has sufficiently established the boundary of the land the Plaintiff is claiming vis a vis his approval for plot allotment Exhibit 'D' dated 6th November, 1975, the lower court affirmed these unassailable findings."

C I am therefore in agreement with the respondent that the trial Judge rightly evaluated the evidence of the parties on the boundaries of the land D in dispute and arrived at the right conclusion.

 The learned trial Judge evaluated the defendant's claim to the land in dispute vis a vis the testimony of P.W.7, D.W.3 and the defendant and found as a fact that aside from the Defendant, P.W.7 also acquired a E parcel of land within Egba Village of which D.W.3 is his predecessor. P.W.7 for his part, testified to the effect that he bought a piece of land from D.W.3 at Egba measuring 500 feet by 500 feet. That this land is situate on the right hand side and behind a Mechanic Workshop but that F it is not situated along the tarred portion of the road. The witness tendered Exhibit 'C' before the court, which is a copy of the original approval given to him by D.W.3. Thus, the trial Judge was right when he stated in his judgment that-

G *"As I had already observed in this judgment the documents Exhibits J, H and C were signed by the P.W.8 as a member of the Plot Allotment Committee who allotted land to D.W.3."*

 P.W.8 had testified that the land allotted to D.W.3 is situate when traveling from Benin to Abraka on the right hand side and though not on H the main road, is about three or four poles inside from the road. In confirming this piece of evidence D.W.3 in his testimony stated that he transferred a portion of land measuring 100 feet by 200 feet to the appellant, describing the land as being situate at Egba when traveling to Abraka

along Benin -Abraka road. He (D.W.3) further agreed that he sold a piece of land to P.W.7 on the right hand side when traveling from Abraka to Benin and at the back of a Mechanic Workshop. Even though D.W.3 denied that he gave P.W.7 Exhibit “C”, he agreed he gave the appellant Exhibit H (which is the application for allocation of building dated 5/9/79) B to which the appellant traced his title. However, under cross-examination, D.W.3 agreed that Exhibits “C” and “H” emanated from the same source.

Thus, the learned trial Judge was right in my opinion, when he C held as follows:-

“I regard the testimony of the D.W.3, that the land he sold to the defendant is behind a mechanic workshop a very material admission as it confirms the description of the land given to P.W.7 to which Exhibit “C” D a copy of Exhibit “J” relates.”

The lower court affirmed without equivocation on appeal this position. It is for this reason that I agree with the respondent’s submission that the learned trial Judge was right when he held that Exhibit “D” and Exhibits “C”, “H”, and “J” do not relate to the same piece of land, it being E that Exhibits “C”, “H”, and “J” are traceable to the same source as admitted by D.W.3 but Exhibit ‘D’ is not. It is for the same reason that I agree with the respondent that the land to which the appellant was making reference was not the land in dispute.

On the issue that the appellant’s predecessor, D.W.3, got a F prior approval from the Oba of Benin before the respondent, I share the respondent’s view that the trial Judge rightly evaluated the evidence as put forward by the parties and in his judgment at page G 73 and more particularly at page 75, arrived at the right conclusion that since Exhibit “D” for the respondent and Exhibits ‘H’ and ‘C’ for the appellant, do not relate to the same parcel of land, the issue of priority does not arise. Indeed, where the issue of priority of interest arises and the grant relates to the same parcel of land, H then the first in time takes priority. See *Awoyegbe v. Ogbeide* (1995) 1 NWLR (Pt. 73) 695; *Tewogbade v. Obadina* (1994) 4 SCNJ 161. In the instant case the learned trial Judge in evaluating the evidence

of the parties, rightly observed, in my view, that D.W.3 was a witness with an interest and purpose to serve.

This is because D.W.3 had testified in Exhibits K and L (certified true copies of record of proceedings of 18/6/84 in Suit No. B/104/83 and B 17/10/86 in Suit No.B/250/86 respectively) that he had no Oba's approval but Onogie's approval and that there is no time a Plot Allotment Committee was set up at Egba only to later deny the suggestion that he testified that no Plot Allotment Committee was set up at Egba during cross-examination. **I therefore, agree with the respondent that D.W.3 is not a credible witness who should be relied upon as one who is out with an interest and purpose to serve as rightly held by the trial court - a decision affirmed by the lower court, Since the lower court affirmed these findings. I agree with the respondent's submission D that authorities abound that when those findings relate to demeanour of witnesses and ascribing weight to them, it is within the exclusive preserve of the trial court, with which no appellate court can interfere. See Ebba v. Ogodo (1984) SCLNR and Kamalu v. Umunna (supra).**

Thus, on the appellant's contention, that Exhibit 'E' was wrongly admitted under Section 71 (3) of the Evidence Act Cap. 112 Laws of the Federation 1990," I am inclined to agree with the respondent's view that the point is misconceived." Exhibit 'E', it F ought to be noted, is a letter dated 5th July, 1990, and having been tendered through respondent and admitted in evidence without any objection from the appellant he was estopped from so doing. The case of N.C. Ekpe v. S. A. Fagbemi (1978) ANLR 107 was relied G upon. In any case, the said evidence was not at all events shown to be inadmissible in law vide Alli v. Aleshinloye (2000) 4 S.C. (Pt. I) 111; (2000) 6 NWLR (Pt. 660) 177 at page 215 paragraph E.F.

Assuming without conceding that Exhibit 'E' was wrongly admitted in evidence, I share the respondent's view that such wrongful admission did not occasion a miscarriage of justice to warrant any disturbing the concurrent decisions of the two courts below. See Uguala v. Okorie & Ors. (1975) NSCC (Vol. 9) 429; (1975) 12 S.C. 1 at

13 - 15. See also Egbaran v. Akpotor (1997) 7 NWLR (Pt. 514) 559 at 570, Para D-E and Anthony Akadile v. The State (1971) ANLR 19.

I am therefore in agreement with the respondent's submission that the purport of Exhibit 'E' at the trial was to establish that there was only one Plot Allotment Committee approved by the Oba of Benin and of which the respondent is the Chairman. The trial court's decision, as it turned out, was not wholly hinged on Exhibit 'E' but on the testimonies of the respondent, P.W.8 and P.W.3 which were more credible. Indeed, as the learned trial Judge rightly found

"I am satisfied on the available evidence considered as a whole that there is only one Plot Allotment Committee at Egba Area Ward 34/F of which Plaintiff is the Chairman and who allotted the land in dispute to the plaintiff as per Exhibits 'D' and 'A'. In this regard, P.W.8 who is a signatory to Exhibit T, 'C' and 'H' - and P.W.3 - who to me on the evidence adduced, appear as reliable and consistent witnesses. There is symmetry in the testimony of these witnesses and indeed that of the plaintiff which has remained unshaken by the defence. I accept their testimony as it is more in consonance with the truth of this transaction."

As the above conclusion was rightly, in my view, affirmed by lower court, the appeal on this head ought also to be dismissed as lacking in merit.

On the appellant's submission that the respondent's claim for declaration of title must succeed on the strength of his case, the respondent was able to call witnesses to establish the boundary of the land in dispute vis a vis his securing approval for plot allotment (See Exhibit D) of 6th November, 1975, which carried the Oba's approval.

From the foregoing, I agree with the respondent's submission that the evidence adduced by the Appellant as to his root of title, to wit, how he came by the same, is in consonance with the procedure for such acquisition under Bini Customary Law. See Madam Eunice Enabulele v. Madam Omoyevbese Agbonlahor (1999) 4 NWLR 166. In the latter case, the procedure for acquisition of such title to land under Bini customary

law is set out at page 172-173 of Report (supra) paras H - F as follows:-

(a) The Oba of Benin is the only authority competent under Bini customary law to make allocation or grant of Bini lands in or outside Benin City; for under the self same law, all Bini lands are communal property of the entire Bini people and the legal estate in such lands is vested and resides in the Oba as trustee for the Benin people.

(b) Application for such transfer is usually made to the appropriate Plot Allotment Committee having jurisdiction over the land in question.

(c) Recommendations of the application are then made by the relevant Plot Allotment Committee to the Oba of Benin.

(d) The endorsement of the Oba of his approval on the grantee's written application, duly recommended by the relevant and appropriate Plot Allotment Committee, immediately transfers to the purchaser or grantee the plot of land involved.

(e) An approval once given remains valid until set aside by the Oba of Benin when evidence is subsequently produced of a prior approval for the same land, the second approval being bona fide and in ignorance of the existence of an earlier one.

(f) It is contrary to Bini Customary law to unilaterally set aside an earlier approval. Therefore, to set aside an approval which is admittedly made in error, the two parties affected by the conflicting grants must be present before the Oba at the same time and his decision must be communicated to them and after an open hearing at the Oba's Palace, such decision must also be communicated to Ward Allocation Committee from which the two conflicting recommendations had emanated. See *Aigbe v. Edokpolo* (1977) 2 S.C. 1 at 3; *Arase v. Arase* (1981) 5 S.C. 33; *Okeaya v. Aguebor* (1970) 1 All 1332; (1971) UILR 131; *Akhionbare v. Omoregie* (1976) 12 S.C. 11 at 12; *Atiti Gold v. Osaseren* (1970) 1 All 132; *Bello v. Eweka* (1981) 1 S.C. 101 followed; *Awoyegbe v. Ogbeide* (1988) 1 NWLR (Pt. 73) 695.

In the trial court, the learned trial Judge found as a fact that D.W.3 who is the appellant's predecessor-in-title had sold a parcel of land measuring 500 feet by 500 feet to P.W.7. P.W.7, for his part asserted that the parcel of land sold to him by D.W.3 was situate on the right hand side

and behind a former mechanic workshop if one was going from Benin City to Abraka and that the place was not on the tarred road. P.W.7 produced in evidence to the trial court Exhibit 'C', which is a copy of the original approval given to him by D.W.3. As earlier pointed out, the learned trial Judge found as a fact that Exhibits 'C', 'J' and 'H' were signed by P.W.8 as a member of the Plot Allotment Committee who allotted land to D.W.3. As indeed transpired, D.W.3 had admitted he gave Exhibit H to the appellant though denying giving Exhibit 'C' to P.W.7. **The learned trial Judge therefore found as a fact after comparing Exhibits 'C', 'J' and 'H' by holding that Exhibit D does not relate to the same parcel of land. This finding was affirmed by the lower court and rightly so, in my view.**

The evidence which the appellant and his witnesses proffered showed that the land the appellant was referring to was on the right hand side of the road behind a mechanic workshop and not on a tarred road while going from Benin City to Abraka but the land in dispute which the respondent led evidence to prove is situate on the left hand side of the road when travelling from Benin City to Abraka. Thus the respondent can take advantage of the weakness of appellant's case since it goes to strengthen his (respondent's) case (Underlining is mine for emphasis). See Akinola & 1Ors. v. Fatoyinbo Oluwo & Ors. (1962) 1 SCNLR 352 and Chief BM. Korobotei & 3 Ors. v. R.W. Obubo & 3 Ors. (1999) 9 NW& (Pt. 620) 65S at 684.

My answer to this issue (Issue 1) is accordingly rendered in the affirmative.

Issue 2 asks whether there are sufficient grounds to warrant interference with the concurrent findings of facts by the lower court. As I had occasion to point out earlier in this judgment, the appeal before this court is one of concurrent findings by the trial High Court and the lower court. In other words, the trial court entered judgment in favour of the respondent, and rightly, in my opinion, on the basis that he (respondent's evidence) was more credible than that of the appellant. See page 78 lines 25-28 of the record. The Justices of the lower court also in their wisdom affirmed the trial court's decision when they held at page 124, lines 32-

34 thus:

“Finally, I believe that the plaintiff led sufficient credible evidence in support of his case to justify the conclusion reached by the learned trial Judge”.

B By a host of decided cases, this court has held that it will not interfere with the concurrent findings of fact of a trial High Court and the Court of Appeal except the appellant can show special circumstances that there is a special miscarriage of justice, a serious violation of some principles of law or procedure or that the findings are erroneous. See the cases of Okonkwo and Anor. v. Adigwu (1985) 1 NSCC 680; Coker v. Ogunlola (1985) 2 NSCC 869; Mogo Chinwendu v. Mbamali (1980) 3 S.C 31; Onobruhere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Ilodibia v. NCC Ltd. (1997) 7 NWLR (Pt. 512) 174 particularly at page 192 para B, D 203 (para. D-E and Ugochukwu v. Eri (1997) 7 NWLR (Pt. 514) 535 at page 558 para. D.

PRELIMINARY OBJECTION

A notice of preliminary objection was raised by the respondent as E a fresh point of law and couched in ground 4 of the grounds of appeal. On the fresh point of law which was being raised for the very first time, and it was argued that as the point was being raised for the first time, it was not canvassed by the appellant in the trial court or in the Court of F Appeal, it did not form part of the judgment of the lower court. Furthermore, that even though the said issue touches on the issue of jurisdiction which can be raised at any time even on appeal for the first time, this honourable court has held in several decided cases, that the party seeking to raise such new or novel issue on appeal must seek leave to do so. As G this **court has also decided that an appellant’s right of appeal does not confer unlimited right on him to argue any ground of appeal nor does it confer on him unlimited right to argue any ground filed in exercise of that right - See Jov v. Dom (1999) 7 S.C. (Pt. 111) 1; H (1999) 9 NWLR (Pt. 620) 538 at 547 paras B - C and See Ejodofomi v. Okonkwo (2000) 9 NWLR (Pt. 673) 469, particularly at page 478 para D - G. Failure by the respondent to allow the appellant to proceed with the said ground without leave, the argument of the said**

ground at issue 2 hereof ought to be discountenanced as incompetent. Accordingly I strike out the ground.

In the instant case, I am of the view that apart from my comments on the Notice of Preliminary Objection above, the appellant has not showed any special circumstance indicating obvious errors which have led to a miscarriage of justice to warrant the disturbance by this court of the concurrent findings of the trial High Court and the lower court. In the circumstance, the appeal stands dismissed on this ground.

It is manifestly clear from the foregoing that what the appellant seeks before this court is an interference with the concurrent findings of facts by the two courts below. For such a situation to arise, the onus lies on the appellant to demonstrate to this court's satisfaction why it should interfere with the concurrent finding of fact. Since the appellant has woefully failed to show why such interference should be justified and the issue of bush inspectors, issue of plot allotment committee, credibility of witnesses, boundary and features on land, reliance on Benin native law and custom in proof of the title by the respondent, were all on concurrent findings all in the respondent's favour, all these stand unshakably and solidly unchallenged by the appellant to warrant our interference. See this court's recent decisions in Kutse v. A. G. Plateau State (1999) 4 NWLR (Pt. 597) 1 and Oladele v. Anibi (1998) 9 NWLR (Pt. 567) 559. I will decline to disturb the concurrent decisions of the two court's below.

In the circumstances, I resolve this issue in the negative.

The appellant's grouse in Issue 2 is whether the claim of the respondent was statute barred.

Now, the action giving rise to the appeal herein was filed by the respondent against the appellant herein on 17th February, 1988. The respondent filed an amended statement of claim, paragraph 4 of which stated that he acquired title over the said piece of land on 6th November, 1975 when the application received approval of the Oba of Benin.

The respondent further submits that in paragraph 5 of his Further Amended Statement of Claim he pleaded the fact that he had been in possession, use, and ownership of the said piece of land since 1975

without let or hindrance until sometime in 1985 when the appellant, his servants and/or agents went on to the said piece or parcel of land and dug the foundation of a dwelling house thereon.

In order to determine when the cause of action arose for the filing of the said suit by the respondent, it is the respondent's further submission that to determine when the cause of action arose for the filing of the said suit by the respondent, the court would consider the Writ of Summons and the Statement of Claim; in this case, the Amended Statement of Claim of the respondent.

Respondent's submission was that the cause of action arose in 1985 when the appellant, his servants and/or agents went onto the said parcel of land and dug foundation of a dwelling house thereon.

This court has held in the case of *Fadare & Ors. v. A-G. of Oyo State* (1982) 4 S.C. (Reprint) 1; (1982) NSCC 52 at page 60 that time begins to run for the filing of an action when the cause of action arose, relying on the foreign case of *Board of Trade v. Cayner, Irvine and Co. Ltd.* (1927) A.C. 610.

Time therefore begins to run when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

In the instant case, I agree with the respondent that until Sometime in 1985 when the appellant, his servants and agents went onto the respondent's land and started digging foundation for a dwelling house, the respondent's cause of action had not arisen despite the assertion that the appellant claimed he purchased the said land in 1974. See also the case of *Adimora v. Ajufo* (1988) 1 NSCC 1005 at 1008, where this court held that the accrual of a cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin to maintain his cause of action.

I agree with the respondent therefore that in 1985 when his cause of action arose and in February 1988 when his action was filed at the trial court is within the 12 - year period provided for in

Section 6(2) of the Limitation Law of Bendel now (Edo) State as the applicable law. See *Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637. It is for this reason that I share the respondent's view that this appeal is grossly misconceived and ought to be dismissed.

On the appellant's alternative submission that the respondent is caught by the doctrine of laches, acquiescence and standing by, I agree with the respondent that he promptly warned the appellant to stop his trespass but that the appellant ignored the warning and continued with his building on the land unabated. The trial court as well as the lower court, in my opinion, properly evaluated the evidence in this regard. I am therefore satisfied that the respondent is not caught by the doctrine of laches, acquiescence and standing by. Rather, I hold the view that it was the appellant who ignored the respondent's warning to stop his acts of trespass. The appellant cannot now be heard to take advantage of the doctrine of laches, acquiescence and or standing by. See *Okpaloka & Ors. v. Umeh & Anor.* (1976) 10 NSCC 519, *Ogundiani v. Araba* (1978) 6-7 S.C. 55 and *Nnaeme v. Madaekwe & Ors.* (1987) 2 NWLR (Pt. 54) 1 at page 15. **Rather, in my view, the doctrine of quic quid plantatur solo solo cedit operates against the appellant. My answer to this issue is accordingly rendered in the negative.**

In the result, I dismiss this appeal and affirm the decision of the lower court with costs to the respondent assessed at N10,000.00.

EJIWUNMI JSC

Having had the privilege of reading the draft of the judgment just delivered by my learned brother, Onu, JSC., I will also dismiss the appeal for the various reasons given in the said judgment. Accordingly, the appeal is dismissed by me with costs in the sum of N 10,000.00 in favour of the respondent.

TOBI JSC

The respondent as plaintiff filed an action in the High Court in Benin City. He asked for three reliefs: (1) A declaration to the statutory right of occupancy of a piece or parcel of land verged pink on the survey plan. (2) N500 damages for trespass and (3) An order of perpetual injunction. The learned trial Judge gave judgment to the plaintiff/respondent. The appeal to the Court of Appeal was dismissed. That court affirmed the decision of the learned trial Judge.

Still dissatisfied, the appellant has come to this court. Briefs were filed and exchanged. The appellant formulated the following two issues for determination:

“ 1. *Whether the Court of Appeal was right in holding as it did that the respondent led credible evidence in support of his case to justify the conclusion reached by the learned trial Judge: See page 124 lines 33-40.*

2. *Whether the respondent’s case was caught by the statute of limitation and or laches and acquiescence.”*

The respondent formulated three issues for determination as follows:

“1. *Whether the Court of Appeal was justified in affirming the judgment of the trial court in holding that the respondent had proved its case having regard to sufficient credible evidence led in support of same. (Encompasses grounds 1,3, & 5)*

2. *Whether there are sufficient grounds to warrant the interference with the concurrent findings of facts by the lower court. (Encompasses grounds 1,3, & 5 of grounds of appeal).*

3. *Whether the claim of the respondent was statute barred. (Encompasses ground 4).”*

The respondent also raised a preliminary objection. It is in respect of Ground 4. It is the contention of the respondent that the ground is incompetent and should be struck out. It is the argument of counsel that ground 4 is a fresh point of law which the appellant is raising for the first time as it was not raised either in the Court of Appeal or in the High Court. To counsel, failure on the part of the appellant to seek leave of

court renders the ground incompetent, and the position does not change even if the issue raised touches on jurisdiction. He cited *Jov v. Dom* (1999) 7 S.C. (Pt.111) 1; (1999) 9 NWLR (Pt. 620) 538 at 547; *Ejifodomi v. Okonkwo* (1982) 11 S.C. (Reprint) 30; (1982) 13 NSCC 422 and *Salami v. Mohammed* (2000) 6 S.C. (Pt. II) 37 (2000) 9 NWLR (Pt. B 673) 469.

It is trite law that the issue of jurisdiction being a threshold issue affecting the competence of the court to adjudicate, can be raised at anytime in the proceedings of the court. It can even be raised for the first time in the Supreme Court before judgment is given. Because of the significant role it plays in the judicial process, jurisdiction can be raised suo motu by the court, without any charge of bias from any of the parties. C

A party can raise a fresh issue in this court, but he must seek the leave of court to do so. That was the decision in *Jov v. Dom* (supra). This court held that a question of law and jurisdiction can be raised at anytime in the proceedings, but it is not on a free for all procedure. Moreover courts may raise a matter of law and Constitution at any time, but in doing so, the parties must be afforded the opportunity of addressing on it. D E

This basically goes to the spirit of fair hearing. It is for this reason that a party to an appeal that intends to raise a new or fresh issue on appeal must seek leave to do so. F

Similar decision was reached in *Salami v. Mohammed* (supra). It was held by this court that where a party wishes to raise on appeal a new issue not canvassed previously, leave of the appellate court is necessary. It was also held that where grounds of appeal do not arise from the judgment appealed against and issues raised cannot be said to have been formulated from the incompetent grounds, a preliminary objection seeking to strike out such an appeal will be sustained. G

In the light of the above authorities, I have not the slightest difficulty in striking out ground 4 and I do so accordingly. As issue No.2 is formulated from ground 4, that issue is also struck out. See *Salami v. Mohammed* (supra). *Ojah v. Ogboni* (1996) 6 NWLR (Pt. 454) 272. H

I am left with only Issue No. 1 in the appellant's brief. Learned counsel for the appellant has seriously attacked the evaluation of the evidence of the patties by the trial Judge. It is his submission that the Court of Appeal was wrong in holding that respondent led credible evidence in support of his case. To him, the evidence of the respondent and his witnesses contradicted themselves on material facts. He dealt with the two Plot Allotment Committees of the parties and submitted that, that for the appellant was a better version. To counsel, Exhibit E was wrongly admitted under Section 91 (3) of the Evidence Act.

It is elementary law that the burden of proof in a civil matter is on the party who makes the assertion and in this case he is the plaintiff/respondent. He must satisfy the court that he is entitled to the declaration sought as it relates to the right of occupancy.

Proof in a civil case is on the balance of probability or on the preponderance of evidence. This means that where the parties give evidence as to the claim before the court, judgment will be given to the party that the evidence tilts in favour in the case. In determining either balance of probability or preponderance of evidence, the trial Judge is involved in some weighing by resorting to the imaginary scale of justice adumbrated in *Mogaji v. Odofin* (1978) 3 S.C. 91.

In arriving at the balance of probability or the preponderance of evidence, the trial Judge needs not search for an exact mathematical figure in the weighing machine because there is in fact no such machine and therefore no figure; talk less of mathematical exactness. On the contrary, the trial Judge relies on his judicial and judicious mind to arrive at when the imaginary scale preponderates and that is the standard, though oscillatory and at times nervous.

Where the findings of a trial Judge are clearly traceable to the evidence before the court and so traced, an appellate court has no jurisdiction to interfere. In other words, where the findings of a trial Judge are borne out from the evidence before him, an appellate court has no jurisdiction to interfere. After all, the person who saw it all and heard it all is the trial Judge, not the appellate Judge. The appellate Judge only sees the cold records before him and he cannot do much unless the findings

are not borne out from the records before him.

What is the position in this matter? Did the learned trial Judge come to perverse findings? Did the Court of Appeal adhere to such findings? I have carefully read the record and I am in grave difficulty to agree with the submissions of learned counsel for the appellant. As a matter of fact, the learned trial Judge, in my humble opinion, assiduously evaluated the evidence of the parties and arrived at findings which I am not able to fault. To me, he did a good job.

Learned counsel talks about contradictions. He submitted that the respondent and his witnesses contradicted themselves on material facts. He dramatized the evidence of the respondent and P.W.3 on the issue of the bush inspectors. With the greatest respect, I am not with him. For contradiction to change the fortunes of an appeal in favour of the appellant, they must be material and not peripheral or caricature. See generally Okereke v. The State (1998) 3 NWLR (Pt. 540) 75; Okonkwo v. The State (1998) 8 NWLR (Pt. 561) 210; Ezekwesili v. Onwuagbu (1998) 3 NWLR (Pt. 541) 217; v. Fakiyesi (1998) 3 NWLR (Pt. 543) 679.

Human being, being not machine, does not act with the characteristic automation of machines. There could be little differences here and there when they give evidence on the same matter or event. If human beings give evidence on the same matter or event to the exact minutest details, a Judge should seriously suspect such evidence because of a possibility of tutoring or a rehearsal developing into a recitation before the date of giving evidence. Where there are inarticulate or immaterial differences in evidence of witnesses here and there, that in itself shows their truthful testimonies and I should emphasize the expressions “*inarticulate*” and “*immaterial*.”

Counsel for the appellant tried to fault the findings of the learned trial Judge on the boundaries. To him, the respondent did not lead evidence as to the boundary and features on the land in dispute to deserve the judgment of the learned trial Judge, which the Court of Appeal affirmed. He tried to bring out contradictions between the evidence of P.W.7 and that of the respondent. With respect, I do not see any material con-

traditions to change the fortunes of this appeal in favour of the appellant.

On the issue of boundary of the land in dispute, the learned trial Judge said at page 73 of the Record:

B *"I am satisfied from the available evidence considered as a whole that the testimony of the plaintiff and his witnesses and the survey plan Exhibit A has sufficiently established the boundary of the land the plaintiff is claiming vis-a-vis his approval for Plot allotment Exhibit D dated 6th November, 1975".*

C On the same issue, the Court of Appeal said at page 124 of the Record"

D *"The two survey plans tendered by the parties clearly show that the plot which the defendant said he bought from James Igbinere (D.W.3) is part of the land claimed by the Plaintiff. The description of the said D.W.3 that the plot allocated to him was on the left hand side of the Benin to Abraka road was contradicted by the evidence of Daniel Eze-Iyamu (P.W.7) to whom the same D.W.3 said he sold part of the plot*
E *allocated to him. That witness said that the plot sold to him is on the right hand side of the Benin to Abraka road and behind a mechanic workshop."*

F And that clearly destroyed the case of the appellant on the boundary issue. Where a defendant gives evidence on boundary which cannot stand the evidence of the plaintiff, the (defendant must fail. In my view, the evidence of P.W.4 and Exhibit A clearly show the extent, features and boundaries of the respondent's land and both courts were right in giving him judgment.

G That takes me to Exhibit E. It is a letter dated 5th July, 1990. The claim is dated 10th February, 1983. Judgment was given on 6th July, 1999. That date shows that exhibit E was made when the proceedings were before the trial court and that is certainly against our law as it would
H appear to have been made by D.W.3 in anticipation of the proceedings pending at the material time. That is clearly against our adjectival law, and here Section 91(3) of the Evidence Act is relevant. The subsection reads:

"Nothing in this section shall render admissible as evidence any

statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.” See Are v. Ipaye (1986) 3 NWLR (Pt. 29) 416

It would appear that Exhibit E is further vindicated by Section B 91(4) of the Evidence Act as it relates to D.W.3, its maker, and I so hold.

I think learned counsel has a point that Exhibit E was wrongly admitted. Does that wrongful admission help the case of the appellant? I think not and Section 227 (1) of the Evidence Act comes to the aid of the C respondent. The subsection provides:

“The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held D to have affected the decision and that such decision would have been the same if such evidence had not been admitted”.

Did Exhibit E play a major role in the judgment of the learned trial Judge? I think not. At page 78 of the Record, the learned trial Judge came to the following conclusion: E

“I therefore entertain no doubt whatsoever that it was D.W.3 who signed the document Exhibit E, a comparison of D.W.3 signature in Exhibits J, H, and C buttresses this finding since Exhibit E is indicative of the fact that these document were signed by one and the same person.” F

Before the above conclusion, Exhibit E was not used in the determination of the rights of the respondent in respect of the claim. I therefore agree with learned Senior Advocate for the respondent, Dr. A. N. Izinyon that the admission of Exhibit E did not cause any miscarriage of justice. I also agree with learned Senior Advocate that the decision of the G trial Judge was not based on Exhibit E but on the testimonies of the respondent and his witnesses. Accordingly, I do not see the need for the storm raised by counsel for the appellant in respect of the admission of Exhibit E. H

In the penultimate paragraph at page 124 of the Record, Akintan, JCA., (as he then was), said:

“Finally, I believe that the plaintiff led sufficient credible evi-

dence in support of his case to justify the conclusion reached by the learned trial Judge. The law is trite that if there has been a proper appraisal of evidence by a trial' court, an appellate court ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. See Akinleye v. Eyiola (1968) NMLR 92; Nwankpu v. Ewulu (supra)."

I do not think I can improve on the above. That is a correct evaluation of the evidence before the trial Judge. That is also a correct statement of the conclusion reached by the learned trial Judge.

In sum, the appeal has no merit. It is for the above reasons and the mere comprehensive reasons given by my learned brother, Onu, JSC., that I too dismiss the appeal and award N10,000.00 costs in favour of the respondent.

MUSDAPHER JSC

I have read in advance the judgment of my learned brother, Onu, JSC., just delivered with which I entirely agree. For the same reasons contained in the aforesaid judgment, which I adopt as mine, I too dismiss the appeal and affirm the decision of the court below. I abide by the order for costs proposed in the aforesaid lead judgment.

EDOZIE JSC

Both parties to this appeal are of the Bini tribe in Edo State. The bone of contention between them is the title to a disputed piece of land measuring 200ft by 500ft situate at Egba village along Benin/Abraka Road. At the trial court, the respondent as plaintiff claimed against the appellant as defendant, a declaration that he is entitled to a customary right of occupancy of the land, N500 damages for trespass thereon and a perpetual injunction against future trespass.

From the pleadings exchanged between the parties and evidence called in support thereof each party claimed to have derived title to the land in dispute in accordance with the Bini customary Law.

The respondent's case was that by an application dated 1st April, 1975, he applied for the customary grant of the land in dispute verged pink in his survey plan No. KP7139 (Exhibit A). He applied through the appropriate Plot Allotment Committee for Egba Idogha Area Ward 34/F Benin City of which he, the respondent, was then the Chairman. The application was forwarded to the late Oba of Benin His Royal Highness Akenzua II who upon the recommendation of the said Plot Allotment Committee after bush inspectors had certified the land to be vacant and unencumbered gave approval for the grant of the land to him on 6th November 1975, vide Exhibit B. Thereafter, he was let into possession and has been in use and ownership of the land without let or hindrance until the year 1985 when the appellant and his agents trespassed unto the land to dig a foundation for the erection of a dwelling house in disregard of the respondent's warning. The respondent emphatically asserted that the Plot Allotment Committee of which he was the Chairman was the only Plot Allotment Committee for Egba village at the relevant time as borne out by a letter dated 5/7/90 (Exhibit E) written to him by James Igbinere (D.W.3) through whom the appellant claimed to have purportedly derived his title, but, who in fact, never had title of the land in dispute, his title to hind in another location having been transferred to one Ize-Iyamu (P.W.7).

By his defence, the appellant maintained that the land in dispute verged pink in his survey plan Exhibit F which lies along Benin/Abraka Road was sold to him by James Igbinere (D.W.3) for N1000.00 as evidenced by the purchase receipt of 6th January, 1976 (Exhibit G). As the root of his vendor's title, the appellant asserted that the land in dispute was part of a larger area of land granted to James Igbinere on 8/4/87 by the Oba of Benin as per the approval on an application dated 5/7/74, Exhibit J., on the recommendation of the appropriate and competent Plot Allotment Committee of Ward 34/F of which the late Enogie was the Chairman. The appellant confirmed through D.W.2 that James Igbinere (D.W.3) transferred to Daniel Ize-Iyamu (P.W.7) another portion of land on the light hand side along Benin/Abraka Road. It is the appellant's case that after acquiring the land in dispute, he was let into possession and in

exercise of his right of ownership thereof, he cleared the area, levelled it and in 1980 he commenced erecting a building on it which he completed in 1982 without let or hindrance.

B From the evidence adduced on both sides, it was common ground
that land was allocated to both the respondent and the appellant's vendor
(D.W.3) along the Benin/Abraka Road. The two courts below found as a
fact that the land allocated to the appellant's predecessor (D.W.3) and
part of which he sold to P.W.7 is situated on the right hand side and far
C from the tarred road. On the contrary, the land in dispute is situated on
the left hand side with abutments to the tarred road. The court below also
found that at the relevant time, there was only one recognized Plot Allot-
ment Committee for Egba village and that was the one of which the
respondent was the chairman and that the land in dispute was validly
D granted to the respondent in accordance with the Bini customary law. It
is not the practice of this court to interfere with the concurrent findings
of fact made by both the trial court and the Court of Appeal where there
is sufficient evidence in support of such findings and there is no substan-
E tial error apparent on the record of proceedings such as miscarriage of
justice or a violation of some principle of law or procedure: see *Chinwendu*
v. Mbamali (1980) 3-4 S.C. 31 at 35; *Lamal v. Orbih* (1980) 5-7 S.C. 28;
Woluchem v. Gudi (1981) 5 S.C. 291 at 326; *Ibrahim v. Shagari* (1983)
F 2 S.C. NLR 176; *Igwego v. Ezeugo* (1992) 6 NWLR (Pt. 249) 561 at
585.

I have myself carefully perused the record of proceedings and I
am satisfied that there is nothing useful canvassed in this appeal to per-
suade me to disturb the findings of the two lower courts in upholding the
G respondent's case. This disposes of the appellant's first and the
respondent's first and second issues for determination.

The appellant's second and respondent's third issues for determi-
nation raised the defence of Statute of Limitation, laches and acquies-
H cence. By a notice of preliminary objection, the respondent objected to
ground 4 of the grounds of appeal relating to the defence based on Stat-
ute of Limitation on the ground that it was not raised in the courts below
and therefore constitutes a fresh point for which the leave of court ought

to have been obtained but was not so obtained before it could be so raised. The defence of Limitation Law relates to the jurisdiction of court. It is trite law that the question of jurisdiction being radically fundamental can be raised at any stage of a proceeding and even for the first time in the court of last resort such as this court; See *Management Enterprises Ltd. and Anor, v. Jonathan Otusanya* (1987) 2 NWLR (Pt. 55) 179. Such an issue must however, be properly raised before the court can properly entertain the point. This is so because, an appellate court will not generally allow a fresh point to be taken before it if such a point was not pronounced upon by the court below. See *London Chartered Bank of Australia v. White* (1987) 4 AC 4136. Similarly, an appellant will not as a matter of general principle be allowed to raise on appeal a question which was not raised, tried or considered by the court below, although where such question involves a substantial point of law, substantive or procedural, and it is plain that no further evidence needs to be adduced which will affect the decision, the court will allow the question to be raised to prevent obvious miscarriage of justice, vide *Attorney-General of Oyo State v. Fairlakes Hotels Ltd.* (1988) 5 NWLR (Pt. 92) 1 at 29; *John Bankole and Anor v. Mojidu Pelu and Ors* (1991) 8 NWLR (Pt. 211) 523. In the instant case, as the Limitation Law was not pleaded nor otherwise raised by the appellant and pronounced upon by the courts below and no leave of this court was granted to raise it, there is merit in the respondent's preliminary objection. However, even on the consideration of the Limitation Law, the defence predicated on it is not sustainable. Time begins to run for the purpose of the Limitation Law when there is in existence a person who can sue and another who can be sued and when all happened which are material to be proved to entitle the plaintiff to succeed: see *Jallco Ltd. v. Owoniboy Tech Services Ltd.* (1995) 4 NWLR (Pt. 391) 534 at 547. In the case on hand, and according to the respondent's pleadings and evidence, it was the appellant's trespass on the land in dispute in 1985 that prompted the action against the appellant. The cause of action therefore accrued in that year and reckoning from that time to 17/2/88 when action was instituted is only a period of less than 12 years within which the action could have been commenced pursuant to Section 6 (2)

of the Limitation Law of Bendel State. Similarly, the defences of laches and acquiescence do not avail the appellant as there was evidence accepted by the trial court that the appellant was duly warned when he commenced to dig the foundation for the erection of his building. This
B case underscores the need for any developer to satisfy himself with the validity of the title of the land on which he proposes to erect a building as the erection of a building on land based on defective title can lead to the disastrous consequence of the developer losing the building to the owner of the land on the principle expressed in latin maxim *as quic quid plantatur*
C *solo solo cedit*, meaning whatever is affixed to the soil belongs to the soil. This is the unfortunate position in which the appellant has found himself.

For the foregoing reasons in addition to those fully discussed in the leading judgment of my learned brother, Onu, JSC, I also dismiss the
D appeal with the consequential orders made in the said judgment.

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