

SUPREME COURT OF NIGERIA
7TH JANUARY, 2005 SC. 228/2000
CORAM:- I. L. KUTIGI, S. O. UWAIFO, N. TOBI, D.
MUSDAPHER, S.A.AKINTAN, JJSC

YEKINIADEDOKUN OYADARE PLAINTIFF/APPELLANT
(For himself and on behalf of Apete
family of Oke-Foko, Ibadan)

AND

1. CHIEF OLAJIRE KEJI DEFENDANTS/RESPONDENTS
2. OLALEKAN OGUNBILEJE
(For themselves and on behalf
of Ogunbileje family)

LAND LAW - Title - Traditional history - Where plaintiff's reliance thereon failed - Court cannot rely on acts of possession - To grant his claim for title (H1)

LAND LAW - Title - Root of title as pleaded - Where not proved - Plaintiff cannot rely on acts of possession to prove title (H2)

LAND LAW - Trespass - Injunction - Person in possession - Can succeed in trespass against non true owner - And obtain an injunction - Though he be not the owner (H3)

LAND LAW - Title - Trespass - Where the title of both parties are defective - The court can find trespass in favour of a plaintiff - Who proves possession (H4)

FACTS

In the High Court of Justice holden at Ibadan plaintiff/appellant filed an action against the defendants/respondents. Plaintiff claimed entitlement to certificate of occupancy, N20,000 general damages for trespass and perpetual injunction against the defendants in respect of the land

in dispute. The parties pleaded and relied on different versions of tradition histories as their root of title to the land. They gave evidence and called witnesses. At the end of the trial the trial Judge extensively reviewed and considered the traditional evidence led by both sides. He came to the conclusion that the parties had adduced irreconcilable stories and consequently disbelieved and rejected their traditional evidence. Thereafter, he considered acts of ownership and possession sufficient to hold that the land in dispute belonged to plaintiff and gave judgment in his favour. He granted all the claims but reduced the damages to the sum of N200.00.

The defendants appealed to the Court of Appeal. It held that the trial court having disbelieved and rejected plaintiff's traditional history evidence, it should not have considered acts of ownership and possession. It set aside the trial court's judgment and dismissed the plaintiff's claims in their entirety. Being dissatisfied, plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether a plaintiff who failed to establish his root of title can in law fall back on acts of ownership and acts of possession to prove his title;
2. Whether failure of a claim for a declaration of title also means failure of claims for trespass and injunction.

HELD (Unanimously allowing the appeal in part per **KUTIGI JSC**)

Title - Traditional history

1. *"In the light of the foregoing authority, I hold that the learned trial Judge was in error when he entered judgment for the plaintiff who failed to establish his root of title through traditional evidence by falling back on acts of ownership and or acts of possession to prove his title. This is more so when it is trite that the five (5) ways of proving title to land are independent of one another (see Umennadozie Ogbuokwelu & Ors. v. James Umuenafunkwa & Anor. (1994) 5 SCNJ 24."*

The Court of Appeal I think was right.

It is clear from the above extract of the judgment that the learned

trial Judge rejected the plaintiff's traditional history which he pleaded as his root of title but never-the-less proceeded to enter judgment in his favour by falling back on acts of ownership and acts of possession. All the three (3) reliefs claimed by the plaintiff, to wit, declaration of title to the land in dispute, damages for trespass and injunction were all granted by the High Court. That was wrong to the extent that title to the land was awarded to the plaintiff. (p. 381 B)

Title - Root of title as pleaded

2. I think the Court of Appeal was right when it stated that having failed to prove his root of title as pleaded, the plaintiff was no longer entitled to rely on acts of ownership and possession to prove the same title to the land claimed. But the Court of Appeal proceeded to apply the principle wrongly when it extended it to cover claims for trespass and injunction. It is settled by a chain of authorities that where the pleaded title to land has not been proved as in this case, it will be unnecessary to consider acts of ownership and possession which acts are no longer acts of possession but acts of trespass (see for example *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301; *Fasoro & Anor. v. Beyioku & Ors.* (1988) 2 NWLR (Pt. 76) 263). But the law and the authorities are clear in respect of a claim for a declaration of title to land only. It does not in my view cover claims for trespass and injunction in respect of the land claimed which are governed by different considerations. (p. 381 H)

Person in possession - Can succeed in trespass

3. Trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. It is also trite that possession in law means exclusive possession, and where it is not exclusive the law will not protect it. Therefore, anyone other than the true owner, who disturbs somebody else's possession on the land, can be sued in trespass and it is no answer for a defendant to say that title to the land is in another person. Once a claim for trespass succeeds, a consequential relief or order for an injunction will follow to protect possession. (p. 382 C)

Where the title of both parties are defective

4. The law is that where the title of both parties are defective as in this case, the court can still find for a plaintiff in an action for trespass if he establishes possession as in the present case. The trial High Court found that the plaintiff was in possession of the land in dispute and that finding was not faulted by the Court of Appeal. The High Court ought to have granted reliefs (2) & (3) only and refusing relief (1). So, what the Court of Appeal should have done, was to have set aside the order for a declaration of title of entitlement to a Certificate of Occupancy only, and affirm the orders in respect of trespass and injunction. (p. 382 G)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Acts of possession of land - Can ground proof of ownership

It is good law that a plaintiff who succeeds in proving acts of possession can obtain judgment claiming trespass. Acts of possession and enjoyment of land could be evidence of ownership or of right of occupancy. See Okechukwu v. Okafor (1961) All NLR 685. Where a plaintiff proves sufficient acts of possession, the burden is thrown on the defendant under Section 145 of the Evidence Act to prove the contrary. In order to get judgment, the defendant has the onus to rebut the evidence of the plaintiff. Acts of long possession and enjoyment of land can be prima facie evidence of ownership of the particular piece of land within reference to which such acts are done. (p. 387 G)

AKINTAN JSC

2. Traditional history - Effect of failure to prove it as pleaded root of title

It is trite law that a party relying on evidence of traditional history must plead his root of title. He is required to show in his pleadings and evidence who those ancestors of his are and how they came to own and possess the land and eventually passed it to him.

In the instant case, the plaintiff copiously pleaded in paragraphs 4

to 16 of his Statement of Claim and relied on traditional history as his source of title. Similarly, the defendants also pleaded and relied on traditional history as their root of title in paragraphs 8 to 19 of their Statement of Defence. The court however rejected the evidence of traditional history presented by both the plaintiff and the defendants. It is settled law that evidence of traditional history is one of the accepted methods of establishing title to land. However, where a plaintiff fails to prove the root of title he pleaded and relied on, as in the instant case, his claim must be dismissed. If he is the defendant, as also in this case, he would have made out no defence against the traditional history of the plaintiff. (p. 390 A)

3. Traditional histories - When trial court can rely on acts of possession

As the learned trial Judge rejected the traditional history presented by both parties in the instant case, the question of resolving the two conflicting traditional histories presented by the parties does not arise. This is because it is only where there are two competing traditional histories with respect to the title to land in dispute and the two are credible, not when both are rejected as in this case, that the court could rely on acts of recent possession within living memory on the part of the parties as a test of which of the stories is more probable. The application of this test is only predicated on the existence of competing credible traditional history with respect to the land and not on rejected history as in the instant case. (p. 390 F)

REPRESENTATION

Plaintiff/Appellant absent, not represented.

R. A. Ogunwole, for the Defendants/Respondents.

CASES REFERRED TO

Odi v. Osafire (1987) 2 NWLR (Pt. 57) 510

Okechukwu v. Okafor (1961) All NLR 685

Onyekanonwu v. Ekumbiri (1966) 1 All NLR 32

Oyeyiola v. Adeoti (1973) NNLR 10

Adegbola v. Obalaja (1978) 2 LRN 164

Akinyole v. Eyiola (1968) NWLR

Ohiaeri v. Akabeze (1992) 2 NWLR (Pt. 221) 1

B Alade v. Awo (1975) 4 S.C 215 (Reprint) 150

Idundun v. Okumagba (1976) NMLR 200; (1976) 9-10 S.C. (Reprint) 140

Agedegudu v. Ajenifuja (1963) 1 SCNLR 205

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LEAD JUDGMENT BY KUTIGI JSC

In the High Court of Justice, holden at Ibadan, the plaintiff sued the defendants for the following reliefs -

(i) Declaration that the plaintiff and other members of the Apete
D family are entitled to apply for a Certificate of Occupancy in respect of the land in dispute which is at Aba Ayinde, Off Challenge, near Liberty Academy, near Odo-Ona, Elewe, Ibadan measuring 91.55 acres in area and more particularly shown on Plan No. O.B. 5136 of 22/10/1984 prepared by O. Bangbose Esq., Licensed Surveyor.
E

(ii) N20,000 general damages suffered by the plaintiff when the defendants unlawfully entered the plaintiff's said land by themselves and thugs and destroyed plaintiffs' survey pillars and crops thereon some-
F time in August 1984.

(iii) Perpetual injunction restraining the defendants, their servants, agents, privies, anyone claiming through or under them from -

(a) Further going into the plaintiff's said land, that is the land in
G dispute.

(b) Further committing any other acts of trespass thereon.

(c) Further terrorizing the plaintiff and members of his family on the said land.

After the exchange of pleadings the case proceeded to trial. At the
H trial the plaintiff gave evidence and called witnesses. The defendants also testified and called witnesses. Thereafter counsel on both sides addressed the court.

At the end of the trial and in his judgment the learned Judge exten-

sively reviewed and considered the traditional evidence led by both sides and came to the conclusion, rightly in my view, that the parties had adduced irreconcilable stories in form of traditional evidence and consequently disbelieved them and rejected same. Thereafter the learned trial Judge proceeded to consider acts of ownership and of possession on B each side. He came to the conclusion that the plaintiff had successfully established numerous and positive acts of ownership and possession sufficient to hold that the land in dispute belonged to him. He therefore, gave judgment in favour of the plaintiff in the following terms-

“(i) *It is hereby declared that the plaintiff and other members of Apete family are entitled to apply for Certificate of Occupancy in respect of the land in dispute which is at Ajinde, Off Challenge, near Liberty Academy, near Odo-Ona, Elewa, Ibadan, measuring 91.55 acres in area and more particularly shown in Plan No. O. B. 5136 of 22/10/84 prepared by Bamgbose Esq., Licensed Surveyor.* D

(ii) *It is hereby ordered that the defendants pay to the plaintiff the sum of N200.00 general damages for trespass on the said land, and*

(iii) *An order of perpetual injunction is hereby granted in favour E of the plaintiff restraining the defendants, their servants and or agents and privies from any further trespass on the land or terrorizing the plaintiff and members of his family thereon. N700 costs to the plaintiff.”*

Dissatisfied with the judgment of trial court, the defendants lodged F an appeal in the Court of Appeal holden at Ibadan. The main or principal issue for determination in that court was -

“*whether a plaintiff who failed to establish his root of title can in law fall back on acts of ownership and or acts of possession to prove his title.*” G

In its judgment the Court of Appeal held that the learned trial Judge having disbelieved and rejected the traditional evidence or history given by the plaintiff, he ought to have dismissed the claims of the plaintiff and should not have resorted to consider acts of ownership and possession H to prove title. The Court of Appeal therefore proceeded to set aside the judgment of the trial court and dismissed plaintiff’s claims in their entirety.

Aggrieved by the decision of the Court of Appeal, the plaintiff has now appealed to this court. The parties filed and exchanged their briefs of argument. In the plaintiff's brief three (3) issues have been identified for resolution. I do not need to reproduce them here as I intend to frame my own issues.

I have read the judgments of the trial High Court and that of the Court of Appeal. I have also read the briefs filed by the parties in this appeal. It is clear to me from all these that just as in the Court of Appeal, the principal issue for determination in this appeal is -

Whether a plaintiff who failed to establish his root of title can in law fall back on acts of ownership and acts of possession to prove his title;

While the subsidiary issue flowing from the principal issue is -
Whether failure of a claim for a declaration of title also means failure of claims for trespass and injunction.

I intend to consider both the principal and subsidiary issues together.

The Court of Appeal in the lead judgment of Okunola, JCA., which was concurred in by Mukhtar and Adamu, JJCA., had this to say on page 184 of the record -

In the instant case, after a comprehensive review of the inconsistencies between the plaintiff's pleadings and the evidence adduced in support of same, the learned trial Judge disbelieved the traditional evidence proffered by the plaintiff to establish his root of title. The learned trial Judge also disbelieved the traditional history proffered by the defence. This is why at page 80 lines 40-45 of the records, the learned Judge recorded his findings on the traditional evidence adduced by both parties thus:

"In my finding in the instant case, neither party succeeds in proving the case by traditional history, nor by production of any document of title thereto, I am however satisfied that the plaintiff succeeds in proving his title by acts of renting out and acts of long possession and enjoyment of the land and farming thereon....."

The court entered judgment in favour of the plaintiff as per his

claim. The court having found that the plaintiff has failed to prove his case by traditional evidence of that alleged from which his title is derived, can he go ahead to enter judgment to the plaintiff on proof of title by acts of possession etc? This poser has been resolved in the negative by the Supreme Court in *Odofin v. Ayoola* (1984) NSCC 711 p . 720 to the effect that

“The basic foundation that is traditional evidence, having been rejected, there is nothing on which to found acts of ownership.”

*“In the light of the foregoing authority, **I hold that the learned trial Judge was in error when he entered judgment for the plaintiff who failed to establish his root of title through traditional evidence by falling back on acts of ownership and or acts of possession to prove his title. This is more so when it is trite that the five (5) ways of proving title to land are independent of one another (see Umennadozie Ogbuokwelu & Ors. v. James Umuenafunkwa & Anor. (1994) 5 SCNJ 24.**”*

The Court of Appeal I think was right.

It is clear from the above extract of the judgment that the learned trial Judge rejected the plaintiff’s traditional history which he pleaded as his root of title but never-the-less proceeded to enter judgment in his favour by falling back on acts of ownership and acts of possession. All the three (3) reliefs claimed by the plaintiff, to wit, declaration of title to the land in dispute, damages for trespass and injunction were all granted by the High Court. That was wrong to the extent that title to the land was awarded to the plaintiff.

It is also clear from its judgment that the Court of Appeal set aside the entire judgment of the trial High Court on the sole ground that the trial court was not entitled to rely on acts of ownership and possession to give judgment for the plaintiff who has failed to prove his pleaded root of title to the land in dispute relying on the authority of *Odofin v. Ayoola* (supra) also reported in (1984) 11 B.C. 72.

I think the Court of Appeal was right when it stated that having failed to prove his root of title as pleaded, the plaintiff was

no longer entitled to rely on acts of ownership and possession to prove the same title to the land claimed. But the Court of Appeal proceeded to apply the principle wrongly when it extended it to cover claims for trespass and injunction. It is settled by a chain of authorities that where the pleaded title to land has not been proved as in this case, it will be unnecessary to consider acts of ownership and possession which acts are no longer acts of possession but acts of trespass (see for example *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301; *Fasoro & Anor. v. Beyioku & Ors.* (1988) 2 NWLR (Pt. 76) 263). But the law and the authorities are clear in respect of a claim for a declaration of title to land only. It does not in my view cover claims for trespass and injunction in respect of the land claimed which are governed by different considerations. Trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. It is also trite that possession in law means exclusive possession, and where it is not exclusive the law will not protect it. Therefore, anyone other than the true owner, who disturbs somebody else's possession on the land, can be sued in trespass and it is no answer for a defendant to say that title to the land is in another person (see for example *Amakor v. Obiefuna* (1974) 3 S.C. 67; (Reprint) 49; *Mogajin v. Cadbury* (1972) 2 S.C. 97; *Ayinla v. Sijuwola* (1984) 5 S.C. 44). Once a claim for trespass succeeds, a consequential relief or order for an injunction will follow to protect possession.

The Court of Appeal was therefore clearly in error when it proceeded to set aside the entire judgment of the trial High Court not only in respect of relief (1) for a claim for a declaration of title to the land, but also in respect of claims (2) & (3) which are for trespass and injunction respectively. The law is that where the title of both parties are defective as in this case, the court can still find for a plaintiff in an action for trespass if he establishes possession as in the present case. The trial High Court found that the plaintiff was in possession of the land in dispute and that finding was not faulted by the Court of

Appeal. The High Court ought to have granted reliefs (2) & (3) only and refusing relief (1). So, what the Court of Appeal should have done, was to have set aside the order for a declaration of title of entitlement to a Certificate of Occupancy only, and affirm the orders in respect of trespass and injunction.

I therefore answer both the principal and subsidiary issues above in the negative. The appeal consequently succeeds in part only. The judgment of the Court of Appeal setting aside the judgment of the trial court is amended to read that the orders contained in the judgment of the High Court delivered on 27th April, 1987 are affirmed in respect of claims (2) & (3) for trespass and perpetual injunction respectively; while the order in respect of claim (1) for a declaration of title or entitlement to a Certificate of Occupancy in respect of the land in dispute is refused as it failed.

The plaintiff is awarded N 10,000.00 costs against the defendants.

UWAIFO JSC

I entirely agree.

TOBI JSC

The appellant was the plaintiff in the High Court. The respondents were the defendants. The appellant filed an action in the High Court seeking a declaration that he and other members of the Apete family are entitled to apply for Certificate of Occupancy in respect of the land in dispute at Aba Ajinde. He also asked for N20,000.00 general damages and perpetual injunction restraining the defendants, their servants, agents and privies from entering the land.

At the end of the trial, the learned trial Judge, Ajileye, J., disbelieved the part of the plaintiff's traditional evidence dealing with the origin of the name "*Ajinde Village*" but believed the evidence of their long possession and other acts of ownership. The judgment rejected in its entirety the defendants's traditional evidence and held that they were never at anytime in possession of the land. He accordingly gave judgment to the

appellant the plaintiff.

Dissatisfied, the respondents appealed to the Court of Appeal. That court allowed the appeal. The court said at pages 184 and 185 of the record:

B *“The court entered judgment, in favour of the plaintiff as per their claims. The court having found that the plaintiff has failed to prove his case by traditional evidence of that alleged from which his title is derived, can he go ahead to enter judgment to the plaintiffs on proof of title by acts of possession etc? This poser had been resolved in the negative by the Supreme Court in Odofin v. Ayoola supra, at page 720.....*
 C *In the light of the foregoing authority, I hold that the learned trial Judge was in error when he awarded judgment to the plaintiff/respondent who failed to establish his root of title through traditional evidence by falling*
 D *back to acts of ownership/or acts of possession to prove his title.”*

Aggrieved by the decision, the appellant filed an appeal in this court. As is the practice, briefs were duly filed and exchanged. The parties formulated issues for determination.

E The main issue before us is whether the Court of Appeal was right in holding that as the plaintiff failed to prove ownership by traditional evidence, it was wrong for the trial Judge to give him judgment as per his claims.

F Evaluating the case of the appellant, the learned trial Judge said at page 78 of the record:

“After giving careful consideration to the story of Ajinde’ and other extra-terrestrial beings, as deposed to by the plaintiff and his witnesses, I am of the opinion that’ Ajinde’ and the other extra-terrestrial
 G *beings are a figment of their own imagination. The story is incomprehensible and unbelievable. Evidence of their existence is incoherent and unbelievable..... In my view, the witnesses do not know how the name Ajinde village’ came about. They only tried to weave a story they*
 H *believe will explain it.”*

The learned trial Judge also evaluated the evidence of the respondents. He said at the same page of the record:

“D.W.2 explained the name thus..... The same version

is repeated by D.W.4. Here again, I was being told that it was a stranger, Iya Egbe, who gave the name to the village and not Mofala or other members of the family. It seems abstruse to me how, being cured from leprosy, gives rise to naming a village 'Resurrection' when she never died. I regard the story as concocted."

B

Taking the evidence of both the plaintiff and the defendants together, the judge said again at the same page of the record:

"In the circumstances, there is nothing to choose between the plaintiff's version and the defendants. I reject the two versions completely. Neither side knows precisely how the name 'Ajinde' came about. This conclusion is apparent from both the pleadings and the evidence as hereinafter highlighted."

C

Finding for the plaintiff, the learned trial Judge said at page 80 of the record:

D

"It appears to me, and I so find, that the plaintiffs successfully established numerous and positive acts of ownership and possession sufficient in my view to hold that the land in dispute belongs to them."

The learned trial Judge cited the case of *Idundun v. Okumagba* E (1976) 1 NMLR 2000; (1976) 9-10 S.C (Reprint) 140, where this court held that there are five ways of proving title. These are (1) By traditional evidence (2) By production of documents of title duly authenticated and executed. (3) By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership. (4) By acts of long possession and enjoyment; and (5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

F

The decision has been followed in subsequent cases. See for example, *Mogaji v. Cadbury (Nigeria) Ltd.* (1985) 2 NWLR (Pt. 7) 393; *Omogbe v. Idugiemwanye* (1985) 2 NWLR (Pt. 5) 41; *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt. 72) 616; *Fasaro v. Beyioku* (1988) 2 NWLR (Pt. 76) 263; *Okpuruwu v. Chief Okpokam* (1988) 4 NWLR (Pt. 90) 554.

It is clear from the decision in *Idundun v. Okumagba* (supra) that there are four other ways of proving title to land, other than by traditional

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evidence. Let me go to the record to find out what were the findings of the learned trial Judge before giving judgment to the appellant.

I will quote the learned trial Judge in extenso. He said at page 79 of the record:

B ‘Not being satisfied with the traditional history proved by either sides, I now want to examine what acts of ownership each side had shown on the land.....

C The plaintiff claims that Adegbola is a member of their own family who lived and died on the land. The defendants admitted the existence of Adegbola on the land but said he was there only as tenant of their own ancestor, Mofala, who settled on the virgin land after fighting Gbanamu war and Egba war. The plaintiff claims that Lasisi Ogunnanyi (P.W.8).
D Yesufu Ige, his 2 children Raimi Ige and Lamidi Ige are their own tenants on the land. They said Tinuade (alias Iya Egbe) is Adegbola’s wife. The existence of Adegbola, the Iges, Lasisi Ogunniyi and Iya Egbe on the land is admitted by the defendants who said they are their own tenants who paid tributes to Mofala. Neither in their pleadings nor in their evidence do
E the defendants mention members of their own family who are not tenants and who farm on the land.

On the other acts of ownership by the appellant, the learned trial Judge said at page 80:

F “On other acts of ownership, the plaintiff’s family surveyed the land in 1973. I take it that they surveyed what they claimed to belong to them. They produced Exhibit ‘B’ as the Plan resulting from the survey..... it appears to me, and I so find, that the plaintiff successfully
G established numerous and positive acts of ownership and possession sufficient in my view to hold that the land in dispute belongs to them.”

The above apart, the learned trial Judge thoroughly evaluated the evidence of the respondents. He said at pages 79 and 80 of the record:

H “*The defendants surveyed the land in 1985 for this case. They claimed that the area surveyed and claimed by them is larger than the area in Exhibit ‘B’. In addition they said the plaintiff surveyed the land surreptitiously in 1973. In my view, what they called surreptitious survey arose because their family members do not farm on the land. If they did,*

they would have seen the suveyors. It confirms my findings that they have no member of their family actually farming on the land. They might have their family members on the remaining area of Exhibit 'C' not contained by Exhibit 'B' and not claimed by the plaintiff..... The defendants, by themselves, failed to prove that they are farming on the land." B

It is trite law that where findings of a trial Judge are not perverse, an appellate Judge cannot interfere with the findings. See. Ajuwa v. Odili (1985) 2 NWLR (Pt. 9) 710; Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 195; Nzekwu v. Nzekwu (1989) NWLR (Pt. 104) 373; (1989) 3 S.C. (Pt. II) 76. C

In Chief Nteogwuile v. Chief Otuio (2001) 16 NWLR (Pt. 738) 58; (2001) 6 S.C. 200, this court held that an appellate court has the same right to come to decisions on issues of fact as well as law as the trial court. Therefore in considering the decision of the trial court, an appellate court must (a) recognize the onus on the appellant to satisfy it that the decision of the trial court is wrong; (b) recognize the essential advantage enjoyed by the trial court in seeing the witnesses and watching their demeanours; and (c) bear in mind that in cases which turn on the conflicting testimony of witnesses and belief to be reposed on them, an appellate court can never recapture the initial advantage of the trial court which saw and believed them. D E F

From the record, I do not think the respondents as appellants in the Court of Appeal were able to discharge the onus in (a) above, to warrant that court giving them judgment. That apart, it does not appear to me that the Court of Appeal took into consideration (b) and (c) in the above case before allowing the appeal of the respondents who were the appellants in that court. G

It is good law that a plaintiff who succeeds in proving acts of possession can obtain judgment claiming trespass. Acts of possession and enjoyment of land could be evidence of ownership or of right of H occupancy. See Okechukwu v. Okafor (1961) All NLR 685. Where a plaintiff proves sufficient acts of possession, the burden is thrown on the defendant under Section 145 of the Evidence Act to prove the contrary.

In order to get judgment, the defendant has the onus to rebut the evidence of the plaintiff. See *Onyekanonwu v. Ekumbiri* (1966) 1 All NLR 32. See also *Oyeyiola v. Adeoti* (1973) NNLR 10; *Adegbola v. Obalaja* (1978) 2 LRN 164. Acts of long possession and enjoyment of land can be prima facie evidence of ownership of the particular piece of land within reference to which such acts are done. See *Odi v. Osafire* (1987) 2 NWLR (Pt. 57) 510.

The significant aspect of this appeal is that apart from acts of possession, the learned trial Judge found other acts of ownership. One of such acts is Exhibit B.

The Court of Appeal relied on the case of *Odofin v. Ayoola* (1984) NSCC 711 at 720. The court cited the following passage from the judgment.

“The basic foundation is that traditional evidence, having been rejected, there is nothing on which to found acts of ownership.”

The rationale for the above is that in view of the fact that the learned trial Judge held that the appellant did not prove traditional history which he relied upon; there was no proof of ownership. Odofin did not say that a party can only prove title or ownership by traditional history. In the light of *Okumagba* a party is entitled to prove title to land by any of four other ways. As I indicated above, the learned trial Judge found evidence of possession outside traditional history. In view of the fact that the plaintiff pleaded acts of possession, the trial Judge rightly gave judgment against the appellant for trespass. He was however wrong in giving the plaintiff judgment ‘as per their claims.

The above is Issue No. 1 formulated by the appellant. There is not much left in Issue No. 2 in the light of the above. I can deal with it briefly. There is a clear dichotomy or cleavage in our property law between the claim of declaration of title and that of trespass to land. In the case of declaration of title, the plaintiff must prove ownership of the land. It is not so in the case of trespass to land, which is based or predicated on exclusive possession. In the often cited case of *Amakor v. Obiefuna* (1974) 3 S.C. 67 at 75-76 (Reprint) 49, this court said:

“It is trite law that trespass to land is actionable at the suit of the

person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong doers except a person who could establish a better title. Therefore anyone other than the true owner, who disturbs his possession of the land, can be sued in trespass and in such an action, it is no answer for the defendant to show..... that the title to the land is in another person. To resist the plaintiff's claim, a defendant must show either that he is the one in actual possession or that he has a right to possession."

It is for the above reasons and the more comprehensive reasons given by my learned brother, Kutigi, JSC, in the leading judgment that I also allow the appeal in part. I abide by his order as to costs.

MUSDAPHER JSC

I have had the honour to read in advance the judgment of my Lord Kutigi, JSC., just delivered with which I entirely agree. For the same reasons contained in the aforesaid judgment which I respectfully adopt as mine, I too allow this appeal in part only. The judgment of the Court of Appeal setting aside the judgment of the trial court is varied to read that the orders contained in the judgment of the trial court delivered on the 27th April, 1987 are affirmed in respect of claims (2) and (3) that is for trespass and perpetual injunction respectively, while the Order in respect of claim (1) for a declaration of title or entitlement to a Certificate of Occupancy in respect of the land in dispute fails and is refused. The appellant is awarded costs of N 10,000.00 against the respondents.

AKINTAN JSC

I have had the privilege of reading the draft of the leading judgment just delivered by my learned brother, Kutigi, JSC. I agree with his reasoning and conclusion expressed therein. I will however like to add by way emphasis that one of the questions to be resolved in this appeal is

whether a plaintiff who pleaded traditional history as his root of title could successful fall on other source of title such as long possession upon failure to prove the traditional history pleaded. It is trite law that a party relying on evidence of traditional history must plead his root of title.

B He is required to show in his pleadings and evidence who those ancestors of his are and how they came to own and possess the land and eventually passed it to him. See *Akinyole v. Eyiola* (1968) NWLR; and *Ohaeri v. Akabeze* (1992) 2 NWLR (Pt. 221) 1.

C In the instant case, the plaintiff copiously pleaded in paragraphs 4 to 16 of his Statement of Claim and relied on traditional history as his source of title. Similarly, the defendants also pleaded and relied on traditional history as their root of title in paragraphs 8 to 19 of their Statement of Defence. The court however rejected the evidence of traditional history presented by both the plaintiff and the defendants. It is settled law that evidence of traditional history is one of the accepted methods of establishing title to land (see *Alade v. Awo* (1975) 4 S.C 215 (Reprint) 150; *Idundun v. Okumagba* (1976) NMLR 200; (1976) 9-10 S.C. (Reprint) 140 and *Ohaeri v. Akabeze*, supra). However, where a plaintiff fails to prove the root of title he pleaded and relied on, as in the instant case, his claim must be dismissed. If he is the defendant, as also in this case, he would have made out no defence against the traditional history of the plaintiff (see *Ohaeri v. Akabeze* - (supra)).

F As the learned trial Judge rejected the traditional history presented by both parties in the instant case, the question of resolving the two conflicting traditional histories presented by the parties does not arise. This is because it is only where there are two competing traditional histories with respect to the title to land in dispute and the two are credible, not when both are rejected as in this case, that the court could rely on acts of recent possession within living memory on the part of the parties as a test of which of the stories is more probable. The application of this test is only predicated on the existence of competing credible traditional history with respect to the land and not on rejected history as in the instant case (see *Agedegudu v. Ajenifuja* (1963) 1 SCNLR 205; *Kojo II v. Bonsie* (1975) 1 WLR 1223; *Ekpo v. Ita* (1932-34) 11 NLR 68; and

Ohiaeri v. Akabeze, (Supra). The learned trial Judge was therefore in error when, after rejecting the traditional histories presented by the parties in the case, went ahead to give judgment for the plaintiff based on possession.

Similarly, I agree with the view expressed in the lead judgment that although the plaintiff failed to prove his claim for declaration, he could still successfully maintain an action for trespass and damages for trespass since he was in possession. For the above reasons and the fuller reasons given in the lead judgment which I hereby adopt. I also set aside the order for declaration of title or entitle to a Certificate of Occupancy only and affirm the orders in respect of trespass and injunction. I too award N10,000 costs to the plaintiff against the defendants.

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