

SUPREME COURT OF NIGERIA

8TH APRIL, 2005. SC. 84/1993

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, A. I.
KATSINA-ALU, U.A. KALGO, G.A. OGUNTADE, JJSC**

1. CHIEF LASISI OYELAKIN BALOGUN

2. ADENIRANA AIKORE

3. LASISI TIJANI OLAOPA

..... APPELLANTS

4. GANIYU RAJI OPAYEMI

AND

1. ONAOLAPO AKANJI

(Head of Family)

2. LAYIWOLAAJAO

3. MARIA AMOPE

..... RESPONDENTS

4. SADIJU ODEE

(On behalf of Oni Family)

5. MADAM FEHINTOLA

6. ALHAJA SALAMOTU TAIWO

LAND LAW - Title - Origin of - Reliance on acts of ownership for several years - Without showing origin of one's title - May amount to proof of ownership (H1)

LAND LAW - Title - Traditional history - And acts of ownership - Are separate and parallel - One can rely on either of them -To prove his title (H2)

LAND LAW - Title - Trespass - Where root of title is not established - Proof of possession - Can support a claim in trespass (H3)

LAND LAW - Title - Concurrent findings - That appellants are not owners - Respondents being in possession - Cannot be ejected save by one with better title (H4)

LAND LAW - Possession - Where properly found to exist - Claim for trespass will succeed - Though claim of title fails (H5)

FACTS

Before the High Court Ibadan, the plaintiffs/respondents filed an action against the defendants/appellants. Respondents claimed declaration of title to the piece of land in dispute together with the building thereon. They also claimed N10,000 special and general damages for trespass, perpetual injunction and an order of account against 2nd defendant for rents collected. Plaintiffs claimed that the land belonged to their ancestor, Obe, who was the first settler thereon over the years. The land descended in Obe's family until it came into the possession of the generation of the present plaintiffs. It was pleaded that in 1984, defendants removed the roof of the plaintiffs' family house on the land, destroyed a portion of the house and carried away some building materials. 2nd defendant filed a separate Statement of Defence. The other defendants pleaded that the land in dispute was first settled upon by their ancestor, Ago, from whom it descended unto them. That they exercised various acts of ownership and allowed 2nd defendant's father to erect the building on the land.

The trial court found non of the traditional history evidence presented by the parties reliable. It accepted the evidence of the plaintiffs and rejected that of the defendants on acts of possession exercised upon the land. It found in favour of the plaintiffs in part granting nominal damages for trespass. The trial court non-suited plaintiffs in respect of their claim for declaration of title. The defendants' appeal to the Court of Appeal succeeded in part as the non-suit order was set aside and plaintiffs' claim for declaration of title as well as order of injunction against some of the defendants were set aside. Being dissatisfied, defendants have further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether or not the plaintiffs (respondents) claims in trespass and injunction were entitled to succeed on the available evidence in support thereof.

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

Title - Origin of

1. Indeed, a plaintiff who relies on acts of ownership spanning several years as his root of title is in fact saying or confessing that he does not know the historical origin of his title but that his family had openly and without resistance from anybody been exercising dominion as the owner of the land for several years. The court may infer from such evidence that even if the plaintiff has not shown the origin of his title, he may be accepted as the owner from such acts of open and unchallenged ownership. (p. 964 F)

Traditional history - And acts of ownership

2. It is to be borne in mind that proof of title by evidence of traditional history and acts of ownership are separate and parallel. One is also to be distinguished from the other. Whilst the evidence in proof of either in a claim for declaration of title may overlap, the recognition of each as different to the other helps to remove the error and confusion to which parties and counsel alike are prone. A plaintiff may by his Statement of Claim rely solely for the title he asserts in a claim for declaration of title on traditional history. On the other hand, since it is permissible to plead in the alternative, he may rely on both methods i.e., traditional history and acts of ownership. Where he fails on the former, he may well succeed on the latter because in their nature both are different. (p. 965 B)

Title - Trespass

3. I think that the standpoint and arguments of appellant's counsel before us conveyed that he laboured under the notion that the same evidence called by the plaintiffs in support of their claim for declaration of title which the court rejected was the same evidence relied upon by the trial court to grant the claims for damages in trespass and injunction. A finding that the plaintiffs did not establish their root of title founded on first settlement certainly did not imply that the plaintiffs were not in possession of the land in dispute. Indeed the 1st defendant under cross-exami-

nation before the trial court said at page 97 of the record:

“I know the father of the 1st plaintiff but I knew him as Ojo Olodi. I never saw Ojo in the house but I saw his children living there through the 2nd defendant”

B The above piece of evidence shows that 1st defendant at least knew that members of the plaintiffs’ family, that is, the children of the father of 1st plaintiff lived in the house in dispute. (p. 968 B)

C ***Title - Concurrent findings***

4. The defendants in the above paragraph of their Statement of Defence admitted they went on the land in dispute in a perceived exercise of their right as owners of the land in dispute. The trial court found as a fact however that the land in dispute did not belong to the defendants. That finding was affirmed by the court below. By a long line of authorities which include Omoboriowo v. Ajasin (1984) 1 SCNLR 108; Ojomu v. Ajao (1983) 2 SCNLR 156 and Lokoyi v. Olopo (1983) 2 SCNLR 127, this court will not interfere with concurrent findings of fact by the two lower courts unless there is a clear error either in procedure or substantive law and such error will occasion a miscarriage of justice. There is no such error in this appeal.

F Taking the findings as correctly made, it seems clear to me that the judgment of the court below is sound and impregnable. Even if the plaintiffs had no title and were mere trespassers on the land in dispute, they could not, based on the finding that they were in possession of the said land be ejected therefrom except at the suit of someone with a better title. (p. 968 H)

G ***Possession - Where properly found to exist***

5. The contention of the appellants to the effect the plaintiffs did not show that they were in possessions overlooks the finding by the trial Judge which has not been challenged before us that the plaintiffs and the defendant’s ONI family jointly owned the building and the fact that the 1st defendant himself admitted that the children of plaintiffs’ father lived in the house.

It only remains for me to emphasise that the claim for trespass is not dependent on the success of a claim for declaration of title. Both are quite separate and independent of each other. See *Oluwi v. Eniola* (1967) NMLR 339. In *Ude v. Chimbo* (1998) 9-10 S.C. 97; (1998) 13 (Pt. 577) 172 at 187, this court, per Iguh, JSC., discussed the position of the law on the point thus:-

“Turning now to the main question for determination, it is beyond dispute that the court below in allowing the respondents’ appeal before it and dismissing the appellants’ claims in their entirety was mainly concerned with proof in respect of their claim for declaration of title to the land in dispute and never, for one moment, gave any consideration whatsoever to the appellants’ claims for damages for trespass and perpetual injunction. It is trite law that trespass is essentially a tort against possession and only a person in possession of a land in dispute at all material times can maintain an action in damages for trespass. (p. 970 B)

REPRESENTATION

O. A. Abiose, Esq., for the Appellant.

N. O. O. Oke, for the Respondents.

CASES REFERRED TO

Amakor v. Obiefuna (1974) 3 S.C (Reprint) 49; (1974) 3 S.C. 67 at 75-76

Omoboriowo v. Ajasin (1984) 1 SCNLR 108

Ojomu v. Ajao (1983) 2 SCNLR 156

Lokoyi v. Olopo (1983) 2 SCNLR 127

Olagbemi v. Ajagungbade III (1990) 3 NWLR (Pt. 136) 37

Adebanjo v. Brown (1990) 3 NWLR (Pt. 141) 661

Adegbite v. Ogunfaolu & Anor. (1990) 21 NSCC (Pt. 65), (1990) 4 NWLR (Pt. 146) 578

George Oluwi v. Daniel Eniola (1967) NSCC 248

Osafire v. Odi (1994) 2 NWLR (Pt. 325) 125

Alhaji Adeshoye v. Shiwoniku (1952) 12 WACA 86

LEAD JUDGMENT BY OGUNTADE JSC

The respondents in this appeal were the plaintiffs before the Ibadan High Court; where they claimed as the representatives of the ONI Family against the appellants, as the defendants, the following reliefs:

B “(a) *Declaration of title and/or the right to occupy the piece of land together with the building thereon consisting of twelve rooms situate at SW2/276 Obe’s compound, Isalejebu, Ibadan.*

 (b) *The sum of N10,000.00 (Ten Thousand Naira) being special and general damages for trespass committed by the defendants on the plaintiffs’ landed property made up as follows:-*

SPECIAL DAMAGES

| | | | |
|---|---|---|-------------------|
| | (i) 9 bundles of iron sheets removed at 160.00 each | - | 1,440.00 |
| D | (ii) costs of planks destroyed | - | 492.00 |
| | (iii) Carpenter’s workmanship | - | 150.00 |
| | (iv) 15 tons of cement at 200.00 per ton | - | 3,000.00 |
| | (v) 500 cement blocks at 2.00 each | - | 1,000.00 |
| E | (vi) 15 loads of sand at 30.00 each | - | 450.00 |
| | (vii) 45 wooden frames 3"4"x 12" at 5.00 each | - | 225.00 |
| F | (viii) 8 wooden doors at 50.00 each | - | 400.00 |
| | (ix) 8 windows at 40.00 each | - | 320.00 |
| | (x) Chairs and Tables | - | 400.00 |
| | (xi) Dresses and wearing apparels | - | 800.00 |
| G | (xii) Cost of walled fence destroyed | - | 400.00 |
| | (xiii) 4 beds at N100.00 each | - | 400.00 |
| | (xiv) 4 cupboards at N100.00 each | - | <u>400.00</u> |
| | | | 9,877.00 |
| H | General damages | - | <u>123.00</u> |
| | | | <u>N10,000.00</u> |

(c) *An order of perpetual injunction restraining the defendants, their servants, agents and/or privies from further trespassing on the said*

landed property.

(d) An order of account of the acts done and money being had and received (including proceeds of rents collected from tenants) by the 2nd defendant without the permission of the plaintiffs in respect of the shops let on the promises from February, 1984, to the day of judgment.” B

The parties filed and exchanged pleadings. It is, however, worthy of note that whilst the 2nd defendant filed separately her own Statement of Defence, the other defendants jointly filed their Statement of Defence. The case was heard by Aboderin, J., who on 26th February, 1988, delivered judgment thereon. In the said judgment, the plaintiffs were (1) non-suited as against all the five defendants on the claim for declaration of title and as against only the 2nd defendant on the other reliefs claimed. Further, the 1st, 3rd, 4th and 5th defendants had awarded against them jointly the sum of N100.00 as damages for trespass. They were also restrained from committing further acts of trespass on the land in dispute. D

Dissatisfied with the judgment, the 1st, 3rd, 4th and 5th defendants (hereinafter described as the ‘defendants,’ which expression excludes the 2nd defendant) brought an appeal against it at Court of Appeal, Ibadan Division (hereinafter referred to as the ‘court below’). On 27th January, 1992, the court below in its judgment partially allowed the defendants’ appeal. The orders of non-suit made by the trial court were set aside. The plaintiffs’ claim for declaration of title was set aside as well as the order of injunction against the 3rd, 4th and 5th defendants.” E F

The defendants have come before this court on a further appeal against the judgment of the court below. In their appellants’ brief, they have formulated for determination one solitary issue, which reads: G

“.....whether or not the plaintiffs’ claims in trespass and injunction were entitled to succeed?”

The respondents formulated two issues for determination. I think however, that the appellants’ one issue is sufficient to determine the appeal in the light of the grounds of appeal raised. The issue is in an area of the land law which cannot be regarded as *recondite*. The relevant facts are these: H

The plaintiffs had at the trial court claimed for a declaration of title over a parcel of land at the Isalejebu area of Ibadan in Oyo State. They pleaded that the land belonged to their ancestor named OBE, a warrior who hailed from a place called Erin. It was said that the said OBE had acquired the land by being the first settler thereon and that over the years the land had descended in OBE's family until it came into the possession of the generation of the present plaintiffs. It was further pleaded that the defendants, without plaintiffs' consent or permission came on the land in 1984 and removed the roof of the plaintiffs' family house on the land. The defendants were also alleged to have destroyed a portion of the said house and to have earned away some building materials.

The 2nd defendant filed her separate Statement of Defence whilst the defendants (i.e. the present appellants) filed a joint Statement of Defence. It is not necessary to examine the contents of the 2nd defendants's Statement of Defence, as they do not feature much in the consideration of the issue in this appeal. The other defendants pleaded that the land in dispute was first settled upon by their ancestor named AGO who was said to be a warrior and hunter. It was further pleaded that AGO had possession of the land and exercised various acts of ownership thereon. The land, at the demise of AGO, descended down in AGO's family until it ultimately came into the hands of the present defendants. The defendants pleaded that their family had allowed the father of the 2nd defendant to erect the building, which the plaintiffs alleged that the defendant demolished. The condition under which the 2nd defendant's father was allowed to erect the building was that he would give up possession of the parcel of land "*whenever any occasion demanded,*" a kind of tenancy by will. The defendants found cause to require the said land. They then asked the 2nd defendant to give up possession of the land upon which her father had erected the building. The defendants, after the intervention of the elders of AGO's family then took possession of one-half of the building erected on their land by 2nd defendant's father. They removed the iron sheets and demolished the walls of the building in preparation for the erection of the defendants' own building.

The trial Judge heard the case on this state of pleadings. Both

parties called evidence in support of the averments contained in their respective pleadings. The trial Judge in his judgment made some findings of fact, which included the following:

1. That as the evidence called by the plaintiffs in support of the traditional history which they pleaded conflicted with the averment in B their Statement of Claim, no reliance could be placed on the evidence as to the ownership the plaintiffs claimed.

2. That the evidence called by the defendants in support of the traditional history pleaded was unreliable as to when their ancestor AGO C first settled on the land in dispute.

3. That there was therefore little to choose between the case of both parties as to the evidence called on original settlement as pleaded by both.

4. As to acts of possession over the land in dispute, the court D accepted the evidence of the plaintiffs whilst rejecting the evidence called by the defendants. Rather pointedly, the court said:

“I do not believe that the land belonged to AGO or any of his descendants or that they have had any interest in the land in dis- E pute.....”

It was on the basis of the above findings that the trial Judge gave the judgment as earlier stated in this judgment. Following the appeal brought against the judgment before the court below, Salami, JCA., in his lead F judgment said at page 223 of the record of proceedings:

“The learned trial Judge after a painstaking review of the evidence preferred the respondents’ acts of possession of the house to that of the appellants. He therefore found that the respondents’ claim that the house was built by Oni and that children of Oni and other members of this family lived in the house. The house, which was formerly a hut with thatched roof was inherited by Oni and Osu from Ajala their father. But Oni rebuilt it into twelve rooms and re-roofed it with corrugated iron sheets. The 1st appellant although he did not know the appellants’ father H as Ojo Ajani, he knew the house through 2nd defendant. Since trespass is an act against possession and the 1st appellant has not only admitted that they (respondents) are in possession of the house but has woefully

failed to show better title he is damnifiable in damages for trespass. A trespasser can even bring an action against another trespasser as in the case of Amakor v. Obiefuna (1974) 3 S.C. (Reprint) 49; (1974) 3 S.C. 67. The learned trial Judge also found that there is no dispute between the parties as to the identity of the land. The land in dispute is clearly defined and the respondents have established their actual possession of the land and the 1st appellant had trespassed on the said land.”

In the above passage, the court below affirmed the findings of fact made by the trial court on the point that the plaintiffs’ evidence as to acts of possession was to be preferred to the defendants. It was highlighted that the 1st defendant admitted in his evidence that he knew that the “sons of the plaintiffs’ father lived in the house which the defendants in the Statement of Defence admitted that they demolished.

Before us in this court, the appellants’ counsel, O. A. Abiose, Esq., referred to Amakor v. Obiefuna (1974) 3 S.C. (Reprint) 49; (1974) 1 ANLR (Pt. 1) 119 and Kojo v. Bonsie (1957) 1 WLR 1226-7 in support of his submission that since the trial court and the court below both found that the plaintiffs had by the evidence they called failed to establish their title, both courts were wrong to have relied on the same evidence to sustain plaintiffs’ claims for trespass and injunction. Counsel submitted that where the root of title was known, and not lost in historical oblivion, the circumstances for any inference of title created by acts of possession would not arise - Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR (Pt. 7) 393; Odojin v. Ayoola (1984) 11 S.C. 72 at 116-117 and Adeyemi v. Arowopoko (1988) 2 NWLR (Pt. 79) 703 at 720. Counsel further submitted that there was a great distinction between acquisition by settlement and acquisition by conquest. He relied on Kolapo v. Alade (1985) 3 NWLR (Pt. 12) 252. Counsel said that court below should have discounted the evidence called by the plaintiffs as to their acts of possession.

Finally, appellants’ counsel submitted that the plaintiffs failed to establish by the evidence they called that they had possession of the land in dispute at the time of the acts of trespass complained of. He relied on Ubijuru v. Uzims (1985) 2 NWLR (Pt. 6) 167; Nzekwu v. Nzekwu (1989)

3 S.C. (Pt. II) 76; (1989) 2 NWLR (Pt. 104) 373; Ogundipe v. Awe (1988) 1 NWLR (Pt. 68) 118 and Aromire v. Awoyemi (1972) 2 S.C. (Reprint) 21; (1972) 2 S.C. 1 at 7.

The respondents' counsel, N. O. O. Oke, Esq., in his brief, submitted that as the trial Judge had held that both parties failed to prove their roots of title on the traditional history pleaded, he was right to rely on acts of possession in recent times when considering plaintiffs' claim for trespass and injunction - *Odofin v. Ayoola* (1984) 11 S.C. 72 at 105-106. It was submitted that a plaintiff could succeed in his claim for damages in trespass even where his claim for declaration of title failed - *Oluwi v. Eniola* (1967) NMLR 339; *Adeghite v. Ogunfolu* (1990) 4 NWLR (Pt. 146) 578 at 597; *Ojibah v. Ojibah* (1991) 5 NWLR (Pt. 191) 296 at 314 and *Ude v. Chimbo* (1998) 9-10 S.C. 97; (1998) 12 NWLR (Pt. 577) 172 at 188. Counsel said that trespass was an injury against possession and that anyone who had exclusive possession could maintain an action in trespass against another - *Olagbemiro v. Ajagungbade III* (1990) 3 NWLR (Pt. 136) 37 and *Adebanjo v. Brown* (1990) 3 NWLR (Pt. 141) 661. It was argued further that there was nothing like concurrent possession by two persons claiming adversely to each other. Counsel finally submitted that what would amount to an act of possession in law varied from case to case and depended on the facts called in each: *Mogaji v. Cadbury* (1972) 2 S.C. (Reprint) 136; (1972) 2 S.C. 97; *Alatishe v. Sanyaolu* (1964) 1 All NLR 398; *Okechukwu v. Okafor* (1961) 2 SCNLR 369 and *Udeh v. Chimbo* (supra)

Earlier in this judgment, I observed that the principle of law involved in the issue raised for determination cannot be described as difficult or recondite. It is however, one principle which can prove slippery and confusing. Now in *Idundun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) 9/10 S.C. 27, this court per Fatayi-Williams JSC., (as he then was), stated the five methods by which ownership of land may be established under the Nigerian jurisprudence. The methods are:

1. Traditional evidence.
2. Production of documents of title which are duly authenticated.
3. Acts of selling, leasing, renting out all or part of the land or

farming on it or farming on it or on a portion of it.

4. Acts of long possession and enjoyment of the land; 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.

In *Kojo II v. Bonsie & Anor.* (1957) 1 WLR 1223 at 1226, their Lordships of the Privy Council said concerning traditional history in these words:

“The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard, it must be recognized that in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatsoever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and seeing which of two competing histories is more probable.”

The above passage offers a useful guideline when a court is evaluating the evidence on as to which of the versions of the evidence on two conflicting histories is the more probable in a case for declaration of title where both parties have pleaded traditional history as their sources of title. The passage is not of any assistance in a case where a plaintiff relies on acts of ownership spanning several years as his root of title. **Indeed, a plaintiff who relies on acts of ownership spanning several years as his root of title is in fact saying or confessing that he does not know the historical origin of his title but that his family had openly and without resistance from anybody been exercising dominion as the owner of the land for several years. The court may infer from such evidence that even if the plaintiff has not shown the origin of his title, he may be accepted as the owner from such acts of open and unchallenged ownership.** See *Ekpo v. Ita* 11 NLR 68. This approach is in line with the third method recognized by this court in *Idundun*

v. Okunmagba (Supra). In expatiating on this method Fatayi-Williams, JSC, (as he then was), said:

“Thirdly, acts of the person (or persons) claiming the land, such as selling, leasing or renting out all or part of the land or farming on it or on a portion of it, are also evidence of ownership. Provided the acts extend over a sufficient length of time and are numerous and positive enough as to warrant the inference that the person is the true owner (See Ekpo v. Ita 11 NLR p. 68).”

It is to be borne in mind that proof of title by evidence of traditional history and acts of ownership are separate and parallel. One is also to be distinguished from the other. Whilst the evidence in proof of either in a claim for declaration of title may overlap, the recognition of each as different to the other helps to remove the error and confusion to which parties and counsel alike are prone. A plaintiff may by his Statement of Claim rely solely for the title he asserts in a claim for declaration of title on traditional history. On the other hand, since it is permissible to plead in the alternative, he may rely on both methods i.e., traditional history and acts of ownership. Where he fails on the former, he may well succeed on the latter because in their nature both are different.

In Balogun v. Akanji (1988) All NLR 188 at 211- 212, this court per Oputa, JSC., observed:

“One final word on Ekpo v. Ita supra. Anyone who pleads Acts of Possession as his Root of Title is really relying on the presumption that possession is 9/10 of the law and that he who is in possession is presumed by Section 145 of the Evidence Act Cap. 62 of 1958 to be the owner and that the onus of proving that he is not the owner is on the person who affirms that he is not the owner. Looked at logically and critically a person pleading Acts of Possession as his root of title is simply saying - ‘I do not know how I got the land. All I know is that I have been in possession and have exercised various positive acts of possession. Now you prove that I am not the owner. Put in this way it is easier to appreciate that acts of possession will not arise where the root of title is known, and pleaded, and proved. In such a case title will be awarded on the strength

of the title pleaded and proved. It is only where and when traditional evidence is inconclusive that the court will be obliged to look at the acts of possession of the parties and therefrom determine on whose side the presumption in Section 145 Evidence Act will operate.

B Onus of Proof

A careful consideration of the authorities and decided cases amply shows that there is no onus on a plaintiff who claims title by traditional evidence and who successfully establishes his title by such evidence to prove further acts of ownership numerous and positive enough to lead to the inference that he is exclusive owner. When a plaintiff has proved his title directly by traditional evidence there will be no need again for an inference to establish that which had been already directly proved. Acts of ownership become material only where the traditional evidence is inconclusive. In the case on appeal where the trial court held that the traditional evidence led was conclusive, there was no need whatsoever to require further proof. That will be increasing unnecessarily the burden of proof on the plaintiffs. That will be wrong. Cases like *Ekpo v. Ita* (supra) or *Kojo v. Bonsie* (1957) 1 WLR 1223; WAL 257 deal with cases where there is a conflict of traditional history. In such cases the best way is to test the traditional history by inference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. Such a situation did not arise in this case since the trial court was satisfied with the plaintiffs' traditional evidence but with that of the defendants'."

In the same case, Uwais, JSC., (as he then was), said at page 204:

"As my learned brother has rightly referred to, traditional evidence is certainly one of the 5 ways by which title to land can be established. (See *Idundun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) 9 and 10 S.C. 227). The principle established in *Ekpo v. Ita* 11 NLR 68 (that is exclusive possession and acts of possession for so long that an inference can be drawn that one is owner) is indeed a different and separate method of establishing title. Of course, if the evidence of tradition led by both sides is inconclusive, then the court will have recourse to recent acts of possession and ownership. See *Kojo v. Bonsie* (1957) 1

In the instant case, the plaintiffs pleaded that their ancestor OBE, a powerful warrior who hailed from Erin acquired by settlement a parcel of land incorporating the land in dispute over 100 years ago. They then pleaded how the land has devolved by inheritance over the years on OBE’s descendants. They further pleaded that they were in undisturbed possession. The trial Judge held that the evidence of traditional history called by plaintiffs in support of their claim for declaration of title was unreliable. He therefore refused to grant the claim for declaration of title.

In addition to their claim for declaration of title, the plaintiffs also claimed damages for trespass and injunction. The claim for trespass and injunction made by the plaintiffs was founded on the averments in their pleading that they were in possession of the land. In paragraphs 21 to 27 of their Statement of Claim, the plaintiffs pleaded:

“21. *Ojo Ajani and the plaintiffs had since been in undisturbed possession of the said house.*

22. *Sometimes in 1975, when Madam Sangobunmi Atinuke Taiwo and Alhaja Salamotu Taiwo (living on a portion of the plaintiffs’ house with Ojo Ajani’s permission) and other children of Taiwo were claiming the said house, Ojo Ajani caused his solicitor to write them to quit and deliver possession of the said house.*

23. *When Sangobunmi Atinuke Taiwo and Alhaja Salamotu Taiwo received the said solicitor’s letter, they gave up possession. The plaintiffs will at the trial rely on the said letter. Alhaja Salamotu Taiwo also accounted to Ojo Ajani for rents collected from tenants to Ojo Ajani.*

24. *Ojo Ajani (the plaintiffs’ father) also let a portion to some tenants who paid rents to him until he died.*

25. *Sometimes in 1984 the 2nd defendant without the knowledge and consent of the plaintiffs caused the plaintiffs’ family land together with the house to be surveyed and planted survey pillars thereon. The matter was reported to the police who advised the plaintiffs to take a civil action.*

26. *Also in 1984 without the knowledge and consent of the plaintiffs, the 2nd defendant caused three rooms in the plaintiffs’ family house*

to be converted into three shops let out to tenants. She had since been collecting rents from the tenants and has not accounted to the plaintiffs.

27. Sometimes in July, 1985, without the plaintiffs' permission, the 1st, 2nd, 3rd, 4th and 5th defendants went to the said plaintiffs' family house, removed the roof, destroyed portion of the said house and carried away the building materials and other goods."

I think that the standpoint and arguments of appellant's counsel before us conveyed that he laboured under the notion that the same evidence called by the plaintiffs in support of their claim for declaration of title which the court rejected was the same evidence relied upon by the trial court to grant the claims for damages in trespass and injunction. A finding that the plaintiffs did not establish their root of title founded on first settlement certainly did not imply that the plaintiffs were not in possession of the land in dispute. Indeed the 1st defendant under cross-examination before the trial court said at page 97 of the record:

"I know the father of the 1st plaintiff but I knew him as Ojo Olodi. I never saw Ojo in the house but I saw his children living there through the 2nd defendant"

The above piece of evidence shows that 1st defendant at least knew that members of the plaintiffs' family, that is, the children of the father of 1st plaintiff lived in the house in dispute.

In paragraph 32 of their Statement of Defence, the defendants pleaded:

"32. Subsequently, the 1st, 6th and 7th defendants in exercise of acts of ownership, removed the iron sheets, demolished the wall, in preparation for the reconstruction of their property. The 2nd defendant collected the iron sheets without any protest and prior to the said demolition, the 2nd defendant and her family built a wall to demarcate the portion left for them."

The defendants in the above paragraph of their Statement of Defence admitted they went on the land in dispute in a perceived exercise of their right as owners of the land in dispute. The trial court found as a fact however that the land in dispute did not be-

long to the defendants. That finding was affirmed by the court below. By a long line of authorities which include *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; *Ojomu v. Ajao* (1983) 2 SCNLR 156 and *Lokoyi v. Olopo* (1983) 2 SCNLR 127, this court will not interfere with concurrent findings of fact by the two lower courts unless there is a clear error either in procedure or substantive law and such error will occasion a miscarriage of justice. There is no such error in this appeal.

Taking the findings as correctly made, it seems clear to me that the judgment of the court below is sound and impregnable. Even if the plaintiffs had no title and were mere trespassers on the land in dispute, they could not, based on the finding that they were in possession of the said land be ejected therefrom except at the suit of someone with a better title. In *Amakor v. Obiefuna* (1974) 3 S.C (Reprint) 49; (1974) 3 S.C. 67 at 75-76 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 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 to the defendant to show, (as the defendant/respondent had sought to show in paragraph 7 of his Statement of Defence, although he gave no evidence in support of this averment), that title to the land is in another person.”

And similarly in *Oduola v. Coker* (1981) 5 S.C. (Reprint) 120; (1981) 5 S.C. 197 at pages 214-215, this court per Irikefe, JSC., (as he then was) said:

“At common law, the rule was that anyone who was out of possession must recover the land by the strength of his own title and not by reason of any defect in the title of the person in possession. See Martin v. Strachan 101 ER 61 N. Even when it is clear that the person in possession has no right to be there, still the claimant in ejectment cannot turn

him out unless he can show in himself a title which is prima facie, good against all the world.

If some third person has a better title than the claimant, the action would fail, even though such third person did not place the defendant in possession (see also Bullen and Leake - Precedents of Pleadings - 12 edition - p. 67.)”

The contention of the appellants to the effect the plaintiffs did not show that they were in possessions overlooks the finding by the trial Judge which has not been challenged before us that the plaintiffs and the defendant’s ONI family jointly owned the building and the fact that the 1st defendant himself admitted that the children of plaintiffs’ father lived in the house.

It only remains for me to emphasise that the claim for trespass is not dependent on the success of a claim for declaration of title. Both are quite separate and independent of each other. See Oluwi v. Eniola (1967) NMLR 339. In Ude v. Chimbo (1998) 9-10 S.C. 97; (1998) 13 (Pt. 577) 172 at 187, this court, per Iguh, JSC., discussed the position of the law on the point thus:-

“Turning now to the main question for determination, it is beyond dispute that the court below in allowing the respondents’ appeal before it and dismissing the appellants’ claims in their entirety was mainly concerned with proof in respect of their claim for declaration of title to the land in dispute and never, for one moment, gave any consideration whatsoever to the appellants’ claims for damages for trespass and perpetual injunction. It is trite law that trespass is essentially a tort against possession and only a person in possession of a land in dispute at all material times can maintain an action in damages for trespass. See Olagbemiro v. Ajagunbade III (1990) 3 NWLR (Pt. 136) 37; Adebajo v. Brown (1990) 3 NWLR (Pt. 141) 661 et. Accordingly, possession alone is sufficient to maintain an action in trespass although for such possession to found an action in trespass, it must be clear and exclusive.; and even where a plaintiff has established sufficient acts of exclusive possession, the mere fact that his claim for title has failed does not mean that his claim for trespass to the same land must necessarily

fail. See Adegbite v. Ogunfaolu & Anor. (1990) 21 NSCC (Pt. 65), (1990) 4 NWLR (Pt. 146) 578; George Oluwi v. Daniel Eniola (1967) NSCC 248 etc. This was lucidly explained in the judgment of this court in Osafire v. Odi (1994) 2 NWLR (Pt. 325) 125 where Uwais, JSC., as he then was, stated the principle as follows-

It is settled law that a plaintiff can succeed in a claim for damages for trespass and injunction even where his claim for a declaration of title fails.

So long as a claim in damages for trespass is quite separate and independent of the claim for declaration of title, the incidents of which may be entirely different, and the plaintiff establishes not only his actual possession of the land in dispute but that the defendant is neither the owner of nor has he a better title to the said land than the plaintiff, and that the said defendant trespassed on the land, failure of the claim for declaration of title will not necessarily lead to the dismissal of the claims in respect of trespass and injunction. In such circumstances, the plaintiff will be entitled to succeed in his claim in trespass and/or perpetual injunction depending on the essential ingredients of those reliefs he has established. Even where a plaintiff's title is defective and the defendant's title is also defective but the plaintiff is in possession of the land, he can still maintain an action in trespass against the defendant. See Alhaji Adeshoye v. Shiwoniku (1952) 12 WACA 86.

On the whole, I see no merit in this appeal. I would accordingly dismiss it and affirm the judgment of the court below. I award N10,000.00 costs in favour of the plaintiffs/respondents against the defendants/appellants.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Oguntade, JSC., I entirely agree that this appeal is devoid of merit.

Accordingly, I too hereby dismiss it with N10,000.00 costs in favour of the respondents against the appellants.

BELGORE JSC

I also find no merit in this appeal. For the reasons elaborately set out in the judgment of my learned brother, Oguntade, JSC., with which I am in full agreement, I dismiss this appeal with N10,000.00 costs to respondents.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Oguntade, JSC., in this appeal. I agree with it and, for the reasons he gives, I also dismiss the appeal with N10,000.00 costs in favour of the respondents.

KALGO JSC

In their Amended Statement of Claim, the respondents as plaintiffs in the trial court, claimed against the appellants the following reliefs:-

- “(a) *Declaration of title and/or the right to occupy the piece of land together with the building thereon consisting of twelve rooms situate at SW2/276 Obe’s compound, Isalejebu, Ibadan.*
- “(b) *The sum of N10,000.00 (Ten Thousand Naira) Being special and general damages for trespass committed by the defendants on the plaintiffs’ landed property.*
- “(c) *An order of perpetual injunction restraining the defendants, their servants, agents and/or privies from further trespassing on the said landed property;*
- “(d) *An order of account of the acts done and money being had and received by the 2nd defendants without the permission of the plaintiffs in respect of the shops let on the premises from February, 1984, to the day of judgment.*”

At the end of the trial in the High Court, the respondents were non-suited on their claim (a) for declaration but succeeded on their claims (b) for trespass against the 1st appellant only who was ordered to pay

damages. The court also restrained 1st, 3rd, 4th and 5th appellants from further trespassing on the land in dispute. On appeal to the Court of Appeal by the 1st, 3rd, 4th and 5th appellants, the claim for declaration was struck out, and the order of injunction against the 3rd, 4th and 5th appellants was set aside. The award for damages for trespass against the 1st appellant was confirmed. The appellants further appealed to this court on three grounds. B

In the appellants' brief, there was only one issue which the appellants raised as the principal issue for determination in the appeal and it is this:- C

“Whether or not the plaintiffs (respondents) claims in trespass and injunction were entitled to succeed on the available evidence in support thereof.

The respondents in their joint brief formulated two issues but looking at the grounds of appeal, I am of the view that the only one issue raised by the appellants is apt and I shall consider it in this appeal.” D

It is not in dispute that according to the evidence at trial, the traditional evidence adduced by the parties in support of their cases was contradictory in each case and could not be relied upon. The trial court was therefore right to reject them both and so none of the parties was entitled to judgment on the claim for declaration of title or right of occupancy to the land in dispute. But he was wrong to non-suit the parties without hearing from them as was settled in *Craig v. Craig* (1967) NMLR 53 and so the Court of Appeal was perfectly right to strike out the order of non-suit as incompetent. F

It is also well settled that where proof on traditional evidence fails or was defective in a claim for title to land, a court is entitled to consider or to have recourse to acts of possession in recent times. See *Odofin v. Ayoola* (1984) 11 S.C. 72. It is also well settled that where the claim of title of the parties to a case fails or is defective, the court can still maintain and uphold an action or claim of trespass and injunction if in the same case possession is established. See *Kareem v. Ogunde* (1972) 1 S.C. (Reprint) 126; (1972) 1 All NLR 73; *Ogunbiyi v. Adewunmi* (1988) 12 S.C. (Pt. III) 144; (1988) 5 NWLR (Pt. 93) 215. In this case, there G H

was evidence of possession of the land in dispute by the respondents on the admission and testimony of the 1st appellant himself. And as trespass is a wrong against possession only, it is also settled that even a trespasser in possession, can maintain an action of trespass on any body except a true owner of the land. See Ude v. Chimbo (1998) 9-10 S.C. 97; (1998) 12 NWLR (Pt. 577) 172 at 188; Osuji v. Isiocha (1989) 6 S.C. (Pt. II) 158; (1989) 3 NWLR (Pt. 111) 623 at 631-632. In this case, there was no true owner on the evidence adduced at the trial. Therefore, the Court of Appeal was correct in confirming the decision of the trial court to the effect that the 1st appellant was a trespasser and was properly restrained and ordered to pay N100.00 as damages. I resolve this only issue against the appellants.

For the above and more detailed reasons given by my learned brother, Oguntade, JSC., in the leading judgment, I find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal with N10,000.00 costs in favour of the respondents.

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