

SUPREME COURT OF NIGERIA
20TH MAY, 2005. SC. 93/1999
CORAM:- M. L. UWAIS CJN, A. I. KATSINA-ALU,
U. A. KALGO, G. A. OGUNTADE, JJSC

EJIKE E. UGOJI DEFENDANT/APPELLANT
(Substituted for Innocent
E. Ugoji (deceased), by Order
of court made on 20/10/2003)

AND

EZE (DR.) A. I. ONUKOGU PLAINTIFF/RESPONDENT

PRACTICE & PROCEDURE - Pleadings - Averment - Where evidence is at variance with averment - Then it goes to no issue - And should be disregarded (H1)

LAND LAW - Title - Proof - Where a party relies on a grant - Origin of the grant - Must not only be averred in pleadings - But also proved by evidence (H2)

ACTIONS - Claims - Proof - Where plaintiff fails to establish a prima facie case - The claims cannot succeed (H3)

LAND LAW - Possession - Title - Eviction - Unless plaintiff shows a better title - He cannot evict the defendant (H4)

FACTS

Before the Owerri High Court of Imo State, The plaintiff/respondent made claims against the defendant/appellant in respect of a parcel of land. The respondent pleaded that the land was allocated to him in 1920 after he had paid the requisite fees. In 1981 the appellant came on the land and erected thereon a batcher. The respondent later brought a suit claiming for a declaration of right to statutory certificate of occupancy, N10,000 as general and special damages for trespass and an injunction. The appel-

lant on the other hand pleaded that he acquired the land in 1901 and in 1981 the respondent trespassed thereon. The Court granted the reliefs claimed by the respondent. The appellant not satisfied with the judgment brought an appeal to the Court of Appeal which was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the respondent discharged the onus of proof on him as a plaintiff seeking a declaration of title to the land in view of the pleadings, facts and evidence led in the case.

4. Whether having regard to the pleading and evidence led, it was right to hold that Exhibit “P” was fraudulent and spurious.

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

Pleadings - Averment

1. In the above passage, the plaintiff clearly testified in a manner inconsistent with his pleading in that the plaintiff therein acknowledged that the original owners of the land in Ikenegbu layout were Umu-Ikenegbu. He also acknowledged that the Owerri Town Planning Authority had no ownership interest in the land in dispute. Rather, it had only planned the layout.

Now, it is now well settled that in civil proceeding commenced at the High Court, parties are bound by their pleadings and any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. (p. 1273 C)

Title - Proof - Where a party relies on a grant

2. The trial Judge, by holding that the Umuororonjo and Amawon kindreds of Owerri town were plaintiff’s vendor unwittingly took the case out of the realm contemplated by the pleadings. In *Orizu v. Anyaegbunam* (1978) 5 S.C. 21 at 36, this court per Idigbe, JSC., observed:

“In our view, it is patent that the learned Judge took the case completely out of the realm contemplated by the pleading in these proceedings and decided it on points not raised in the said pleadings. At no time, not even during the address by learned counsel in the lower court

did the plaintiff base his case on “customary title.” This court has stated times without number that it is not within the province and competence of a Judge to evolve a case for the parties. In this case, it is not possible to say that the conclusions of the learned trial Judge would have been the same had he not departed from the case placed before him and considered the issues that were not matters of contest between the parties.”

The finding of the trial Judge that the land in dispute originally belonged to Umuororonjo and Amawon kindred of Owerri town would appear to give the lie to the averment in plaintiff’s pleading that he derived his title to the land in dispute from the Owerri Town Planning Authority. This must have a devastating effect on plaintiff’s case because whilst the evidence as to the title of Umuororonjo and Amawon kindred must be rejected as unpleaded fact, the evidence that title was in Owerri Town Planning Authority must also be rejected as untrue. The result is that the plaintiff did not at the hearing plead or lead evidence as to the source or origin of his title to the land in dispute. (p. 1274 D)

Where plaintiff fails to establish a prima facie case

3. In the pursuit of the trend of destroying the case of the defendant before considering whether or not the plaintiff established a prima facie case, the trial Judge poured strictures on the defence case in the most trenchant language. With respect to the trial Judge, I think he demonstrated an unlimited prepossession with the case of the plaintiff and in that process misplaced the burden of proof. In *Ngene v. Egbo* (2000) 4 NWLR (Pt.651) 131 at 142, this court, per Ogundare, JSC., said:

“A long line of cases beginning with Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 has laid it down that in a claim for declaration of title the onus is on the plaintiff to prove his case. He must rely on the strength of his own case and not on the weakness of the defence.

In the instant case, the defendant did not file a counterclaim. He had only come to defend the plaintiff’s suit. The result is that a consideration of the weakness of the defence should not have been embarked upon by the trial Judge until the plaintiff’s evidence had been found to establish a prima facie case. In *Aromire & Ors. v. Awoyemi* (1972) 2 S.C (Reprint)

1; (1972) All NLR 105 at 115, this court, per Coker, JSC., referred to its views in Godwin Egwuh v. Duro Ogunkehin SC. 529/66 decided on the 28th February, 1969, where it said:

“We are in no doubt that on the pleadings the case of the plaintiff postulates that she had a better title to the land than the defendant who admittedly was at the time of the institution of the proceedings rightly or wrongly in possession of the land..... The learned trial Judge rejected the defendant’s case and passed severe strictures on the defendant’s witnesses and their conduct; but with respect, a consideration of the defendant’s case did not arise until the plaintiff had led evidence showing, prima facie, that she had a title to the land. She had failed to do this and it is inconceivable that she should be allowed to succeed on her claims when, as indeed it is, the defendant is in possession and maintains that he is entitled so to remain. If it be alleged that someone in possession of land is a trespasser the person so alleging has the onus of showing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat the rival party. Such is the case here and we are of the view that the plaintiff’s case had failed and it should be dismissed.” (p. 1276 A)

Possession - Title - Eviction

4. From the evidence of the plaintiff himself, it is clear that the question of who was in possession at the time the suit of the plaintiff was initiated was a ding-dung affair. The plaintiff said that when he at first saw the defendant’s batcher on the land, he destroyed it. The criminal part of the case was still pending in court at the time plaintiff testified. Later the defendant erected a concrete wall fence on the land. The plaintiff has finally come to court in an attempt to establish that the defendant committed trespass on his (the plaintiff’s land). The law in that situation is that the plaintiff must show a title better than the defendant’s in order to evict the defendant

The position is that unless and until the plaintiff shows a title superior to the defendant’s, the defendant must continue to keep possession of the land even if he is a trespasser. (p. 1278D & 1279 D)

REPRESENTATION

Mr. K. C. O. Njemanze, (with him, A. B. A. Asogu Esq.), for the Appellant.
Mr. N. A. Nnawuchi, for the Respondent.

CASES REFERRED TO

- Ngene v. Egbo (2000) 4 NWLR (Pt.651) 131
- Aromire & Ors. v. Awoyemi (1972) 2 S.C (Reprint) 1; (1972) All NLR 105 at 115
- Orizu v. Anyaegbunam (1978) 5 S.C. 21 at 36, this court per Idigbe
- Godwin Egwuh v. Duro Ogunkehin SC. 529/66
- Uche v. Eke (1998) 9 NWLR (Pt.564) 24 at 35
- Nwosu v. J. Otunola (1974) 4 S.C. (Reprint) 14; (1974) 4 S.C. 21 at 29/30
- Pius Amakor v. Benedict Obiefuna (1974) 3 S.C (Reprint) 49; (1974) 3 S.C. 67
- Kodilinye v. Mbanefo Odu (1935) 2 WACA 336*
- Jules v. Ajani (1980) 5-7 S.C. 96; (1980) 5-7 S.C. (Reprint) 64*
- Nwagbogu v. Ibeziako (1972) Vol. 2 (Pt.I) ECSLR 335, 338 SC*
- Akinola v. Oluwo (1962) 1 SCNLR 352 (1962) 1 All NLR 224 (1962) (Pt.I) ALLR 225*

LEAD JUDGMENT BY OGUNTADE, JSC

At the Owerri High Court of Imo State, the respondent as the plaintiff, claimed against the appellant, as the defendant, for (a) Declaration of right to statutory certificate of occupancy; (b) Ten Thousand Naira as general and special damages for trespass and (c) A perpetual injunction. The claims were in respect of a parcel of land described as Plot No. 287 Ikenegbu Layout, Owerri.

The parties filed and exchanged pleadings after which the suit was tried by Chianakwalam, J., who, on 20th November, 1985, granted the reliefs claimed by the plaintiff save that Two Thousand Naira was awarded as damages instead of the Ten Thousand Naira claimed. The defendant was dissatisfied with the judgment. He brought an appeal against it before

the Court of Appeal sitting at Port-Harcourt (hereinafter referred to as ‘the court below’). The court below on 16/3/93 in its judgment affirmed the judgment of the trial court. Still dissatisfied, the defendant has brought a further appeal before this court. In the appellant’s brief filed on behalf of the defendant, the issues for determination in the appeal were identified as the following:

“1. *Whether the respondent discharged the onus of proof on him as a plaintiff seeking a declaration of title to the land in view of the pleadings, facts and evidence led in the case.*

2. *Whether the respondent established that Exhibits “L” and “N” related to the land in dispute.*

3. *Whether by virtue of the provisions of the Land Use Act and having regard to Exhibit “P” the respondent could in law be declared the owner of the land in dispute.*

4. *Whether having regard to the pleading and evidence led, it was right to hold that Exhibit “P” was fraudulent and spurious.*

5. *Whether the Court of Appeal was right to have failed or neglected to consider the issue of the decision of the trial court to exclude from evidence the document relating to the lease between the appellant and Gordon A. Njemanze.*

6. *Whether the document relating to the lease between the appellant and Gordon A. Njemanze is admissible in law.*

7. *Whether the Court of Appeal was right in enhancing (sic) the damages for trespass awarded against the appellant.”*

The respondent in his brief of argument adopted the issues for determination as formulated by the appellant. It is necessary that I examine briefly the facts leading to the dispute from which this appeal arose, as pleaded by parties before the trial court.

As the claims of the plaintiff convey, this was a land dispute. It is in respect of a plot of land at Ikenegbu layout along Whetheral Road, Owerri described as Plot No.287. The plaintiff pleaded that the land was allocated to him in 1970 after he had paid the requisite fees. It was pleaded that two plots of land in the same Ikenegbu Layout, that is, plots 287 and 288 were also allocated to plaintiff. At a time the Military Governor of Imo

State had directed that no one should be allocated more than one plot in the layout, one of the plaintiff's two plots, that is, plot 288, was withdrawn from him. The policy was later reversed and the plaintiff got back the aforesaid plot 288. The plaintiff had a lease agreement in respect of the land and had been in possession of the land. In 1977, the plaintiff commenced the development of Plot 288, which is adjacent to the plot in dispute. In 1981, the defendant came on the land and erected thereon a 'batcher'. The plaintiff challenged the defendant. The defendant later commenced the erection of a concrete fence on the land in an attempt to enclose it. The plaintiff destroyed a part of the concrete fence. He later brought his suit claiming as earlier stated in this judgment. C

The defendant's case in his Statement of Defence was that he obtained a certificate of occupancy on 24/11/81 over the land in dispute. The defendant described the land as Plot 288 and not 287 as the plaintiff described it. The defendant stated that the confusion in the manner the plots of land in the layout were numbered, could have been the result of a mistake by the officials of the State Ministry of Lands and Survey. The defendant pleaded that ownership of land in the Ikenegbu layout was vested in individual land owners, who upon a sale of the land to people executed deeds in their (the people's) favour. It was pleaded that the Owerri Town Planning Authority, through whom the plaintiff claimed, did not own any land in the layout. The defendant further pleaded that he acquired the land in dispute in 1961 from one Gordon A. Njemanze. The land was then known as 'Nwankwuosa'. The said Gordon A. Njemanze confirmed in writing the transfer of the land to the defendant. The defendant had since been in possession of the land. In 1981, the plaintiff trespassed thereon. The defendant resisted this but the plaintiff begged the defendant to allow him (the plaintiff) keep the building materials, which he needed in developing a structure on the adjoining Plot 288, on defendant's land. The defendant reluctantly agreed. The defendant pleaded that he had erected the 'batcher' on the land in dispute about 12 years before the plaintiff came on the land in 1981. D E F G H

It was on this state of pleadings that the suit was tried. A few observations may be made on the parties' pleadings. Although the plaintiff

pleaded that the land was allocated to him by Owerri Town Planning Authority, nothing was pleaded as to how the Owerri Town Planning Authority became entitled to allocate the land to the plaintiff. The defendant in his pleading did not fare much better. He pleaded that he had a certificate
 B of occupancy from the Imo State Government and that a landowner, Gordon A. Njemanze, who testified before the trial court as D.W.2, had sold the land to him. The defendant however did not plead how Gordon A. Njemanze derived his title to the land in dispute.

C I now consider together appellant's issues one and four. In paragraph 7 of his Statement of Claim, the plaintiff pleaded:

"7. The plot in dispute was originally allocated to the plaintiff following the advertisement sometime in 1970 by the Owerri Town Planning Authority, (predecessor in title to the present Owerri Capital
 D Development Authority) to allocate plots at Ikenegbu Layout area to successful applicants."

The defendant in paragraphs 6 and 10(a) of his Statement of Defence pleaded:

E "6. *The defendant denies as false and misleading paragraphs 7, 8, 9, 10b, 11, 12 and 13 of the Statement of Claim which paragraphs have been cleverly and mischievously dressed to suit the plaintiff's purpose. The land in dispute was never allocated to the plaintiff but to the defendant.*
 F *The defendant further states that if at all payments were made by the plaintiff, it was for one Plot only and not two. The Owerri Town Planning Authority and the Owerri Capital Development Authority each has no title in the Ikenegbu Layout. The layout belongs to the Ikenegbu Land Owners of Owerri who allocated and signed the deeds of transfer, save in the case*
 G *of existing leases of original owners in possession before the inception of the layout whose leases are left untouched and unharmed. The defendant comes under this exception.*

H 10 (a) *The defendant denies as false the assertion in paragraph 16. The defendant further states that Owerri Capital Development Authority is not in any lawful position to release any plot to anybody, save as transferred by the Ikenegbu Land Owners.*" (Underlining mine)

It is to be observed here that parties plainly joined issues as to the

origin of title upon which each relied. While plaintiff relied on Owerri Town Planning Authority, the defendant relied on title acquired from a land owner Gordon A. Njemanze. It is to be noted that the plaintiff did not throughout the trial amend his pleadings.

In his evidence at the trial, the plaintiff at page 28 of the record of proceedings testified:

“The original owners of the land before it was laid out as plots were Umu Ekenegbu in Owerri. Owerri Town Planning Authority was the allocating authority which planned, allocated and managed the layout for and on behalf of the original owners.”

In the above passage, the plaintiff clearly testified in a manner inconsistent with his pleading in that the plaintiff therein acknowledged that the original owners of the land in Ikenegbu layout were Umu-Ikenegbu. He also acknowledged that the Owerri Town Planning Authority had no ownership interest in the land in dispute. Rather, it had only planned the layout.

Now, it is now well settled that in civil proceeding commenced at the High Court, parties are bound by their pleadings and any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the court. See *George & Ors. v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71 at 77; *Emegokwue v. Okadigbo* (1973) 4 S.C. (Reprint) 47; (1973) 4 S.C. 113 and *Orizu v. Anyaebunam* (1978) 5 S.C. 21.

Rather than discountenance the unpleaded evidence as to the original owners of the land at Ikenegbu layout, the trial Judge made the evidence the cornerstone or lynchpin of the judgment given in favour of the plaintiff. At page 94 of the record, the trial Judge reasoned thus:

“There is evidence the land at the material time was private land, not state land. Exhibit “L” which is crucial to plaintiff’s root of title shows that on 20th April, 1976, the land in dispute was leased to him by the Umuoronjo and Amawon kindreds of Owerri town, described as ‘land-owners’ for 99 years at yearly rent of N29.22 (Twenty-Nine Naira, Twenty-Two kobo). The terms of the lease are explicit. Plot No. 287 was cited in it as the subject-matter of the lease. This document, in my opinion, proves

conclusively that the right of occupancy of the land in dispute vested and still vests on the plaintiff. Neither in his pleadings nor in his evidence did the defendant offer an answer or challenge to the effectiveness and import of the Exhibits. The comments made earlier on the fate of insufficient pleadings apply to paragraphs 6, 8 and 17 of the defence vis-a-vis the claim relevant to them. I am not in doubt whatsoever about this finding. Plaintiff is the person entitled to the right of occupancy of the land in dispute namely Plot 287 which the defendant said is No.288 situate within Ikenegbu Layout in Owerri Urban Area."

His not only that the plaintiff did not plead that he derived title to the land in dispute from Umuoronjo and Amawon kindred of Owerri Town, nobody from the two kindreds came forward to testify that they originally owned the land in dispute or that it was sold to the plaintiff. It needs be stated boldly here that the defendant never admitted in his pleadings or oral evidence in court that the land in dispute originally belonged to Umuoronjo and Amawon kindred of Owerri Town, so as to remove from the plaintiff the burden of calling evidence as to the root or source of his title.

The trial Judge, by holding that the Umuororonjo and Amawon kindreds of Owerri town were plaintiff's vendor unwittingly took the case out of the realm contemplated by the pleadings. In Orizu v. Anyaegbunam (1978) 5 S.C. 21 at 36, this court per Idigbe, JSC., observed:

"In our view, it is patent that the learned Judge took the case completely out of the realm contemplated by the pleading in these proceedings and decided it on points not raised in the said pleadings. At no time, not even during the address by learned counsel in the lower court did the plaintiff base his case on "customary title." This court has stated times without number that it is not within the province and competence of a Judge to evolve a case for the parties. In this case, it is not possible to say that the conclusions of the learned trial Judge would have been the same had he not departed from the case placed before him and considered the issues that were not matters of contest between the parties."

The finding of the trial Judge that the land in dispute

originally belonged to Umuororonjo and Amawon kindred of Owerri town would appear to give the lie to the averment in plaintiff's pleading that he derived his title to the land in dispute from the Owerri Town Planning Authority. This must have a devastating effect on plaintiff's case because whilst the evidence as to the title of Umuororonjo and Amawon kindred must be rejected as unpleaded fact, the evidence that title was in Owerri Town Planning Authority must also be rejected as untrue. The result is that the plaintiff did not at the hearing plead or lead evidence as to the source or origin of his title to the land in dispute. In Uche v. Eke (1998) 9 NWLR (Pt.564) 24 at 35, this court, per Iguh, JSC., observed:

"In the first place, it has been stressed times without number that it would be wrong to assume that all a person who resorts to a grant as a method of proving his title to land needs is simply to produce his deed of title and rest his case thereon. Without doubt, the mere tendering of such document of title may be sufficient to prove such grant where the title of the grantor to such land is either admitted or not in dispute. Where however, as in the present case, an issue has been seriously raised as to the title of such a grantor to the land in dispute, the origin or root of title of such a grantor must not only be clearly averred in the pleadings, it must also be proved by evidence: See also Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745 at 782-783; Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (Pt.7) 393."

In the manner the plaintiff pleaded his case on declaration, it was inevitable that the case come to grief. The trial Judge started his judgment by highlighting the weakness of the defendant's case even before considering the case of the plaintiff. At pages 78-80 of the record, he said that the defendant did not know whether the certificate of occupancy upon which he relied and which was tendered as Exhibit 'P' related to the land in dispute. Although the plaintiff did not ascribe fraud or dishonesty to the defendant's Certificate of Occupancy, the trial Judge said concerning it:

"In my view, having regard to the evidence before me and the circumstances of the case, Exhibit 'P' the backbone with which the defendant is fighting this case is spurious. It was obtained either

fraudulently or was issued by mistake. It is advisable that the authority which issued it should call it back for cancellation."

In the pursuit of the trend of destroying the case of the defendant before considering whether or not the plaintiff established a prima facie case, the trial Judge poured strictures on the defence case in the most trenchant language. With respect to the trial Judge, I think he demonstrated an unlimited prepossession with the case of the plaintiff and in that process misplaced the burden of proof. In *Ngene v. Egbo* (2000) 4 NWLR (Pt.651) 131 at 142, this court, per Ogundare, JSC., said:

"A long line of cases beginning with Kodilinye v. Mbanefo Odu (1935) 2 WACA 336 has laid it down that in a claim for declaration of title the onus is on the plaintiff to prove his case. He must rely on the strength of his own case and not on the weakness of the defence - Jules v. Ajani (1980) 5-7 S.C. 96; (1980) 5-7 S.C. (Reprint) 64 except where the weakness of the defendant's case tends to strengthen plaintiff's case - Nwagbogu v. Ibeziako (1972) Vol. 2 (Pt.I) ECSLR 335, 338 SC or where the defendant's case supports his case - Akinola v. Oluwo (1962) 1 SCNLR 352 (1962) 1 AII NLR 224 (1962) (Pt.I) ALLR 225 all of which is not the case here."

In the instant case, the defendant did not file a counterclaim. He had only come to defend the plaintiff's suit. The result is that a consideration of the weakness of the defence should not have been embarked upon by the trial Judge until the plaintiff's evidence had been found to establish a prima facie case. In *Aromire & Ors. v. Awoyemi* (1972) 2 S.C (Reprint) 1; (1972) All NLR 105 at 115, this court, per Coker, JSC., referred to its views in *Godwin Egwuh v. Duro Ogunkehin SC. 529/66* decided on the 28th February, 1969, where it said:

"We are in no doubt that on the pleadings the case of the plaintiff postulates that she had a better title to the land than the defendant who admittedly was at the time of the institution of the proceedings rightly or wrongly in possession of the land..... The learned trial Judge rejected the defendant's case and passed severe strictures on the

defendant's witnesses and their conduct; but with respect, a consideration of the defendant's case did not arise until the plaintiff had led evidence showing, prima facie, that she had a title to the land. She had failed to do this and it is inconceivable that she should be allowed to succeed on her claims when, as indeed it is, the defendant is in possession and maintains that he is entitled so to remain. If it be alleged that someone in possession of land is a trespasser the person so alleging has the onus of showing that he has a better right to the possession which was disturbed and unless that onus is discharged, the person so alleging cannot defeat the rival party. Such is the case here and we are of the view that the plaintiff's case had failed and it should be dismissed."

It seems to me that the error made by the trial Judge in upholding the claim of the plaintiff on declaration was also projected into the conclusion reached on the claims for trespass and injunction. The plaintiff in paragraphs 19-21 of his Statement of Claim pleaded:

"19. Some time in December, 1981 the defendant stealthily put up a batcher on the land in dispute without the knowledge of the plaintiff. When this was discovered the plaintiff challenged the defendant's act to no avail. The plaintiff in protest to this act of the defendant destroyed the said batcher.

20. The defendant countered by prosecuting the plaintiff for wilful and unlawful damage to structure in case No.OW/711C/82 still pending as at this time in Magistrate's Court No.3 Owerri.

21. Thereafter the defendant commenced concrete fence in an effort to enclose the plot in dispute and as a means of separating same from the plaintiff's adjacent plot 288 not in dispute.

The plaintiff promptly countered this move by the defendant by destroying part of the concrete wall fence, removed and locked up in part of his adjacent developed Plot 288 not in dispute, some building materials of the defendant deposited on the plot in dispute.

Here again, the defendant quickly commenced another criminal action against the plaintiff for stealing in case No.OW/1029C/82 which case was tried in the Chief Magistrate's Court 2, Owerri where the plaintiff was discharged and acquitted and thereafter the parties were bound over

to keep the peace.

The plaintiff will found on a copy of the said proceeding.”

At the trial the plaintiff testified at pages 26-27 of the record of proceedings:

B *“When I was using the land Plot 287 no one including the defendant challenged my use of the plot except sometime in December 1981 when on returning from a trip to Lagos I found a batcher on Plot 287. I traced the batcher to the defendant. I appealed to him to remove it. When the appeal failed. I destroyed it. Defendant got me charged to court for malicious damage. The matter is still pending in the Magistrate’s court. Subsequently, I saw a concrete wall being erected around Plot 287. I damaged part of the wall and removed his building material on to plot 288 which I had developed.”*

D **From the evidence of the plaintiff himself, it is clear that the question of who was in possession at the time the suit of the plaintiff was initiated was a ding-dung affair. The plaintiff said that when he at first saw the defendant’s batcher on the land, he destroyed it. The criminal part of the case was still pending in court at the time plaintiff testified. Later the defendant erected a concrete wall fence on the land. The plaintiff has finally come to court in an attempt to establish that the defendant committed trespass on his (the plaintiff’s land). The law in that situation is that the plaintiff must show a title better than the defendant’s in order to evict the defendant.** See K. Nwosu v. J. Otunola (1974) 4 S.C. (Reprint) 14; (1974) 4 S.C. 21 at 29/30 and Pius Amakor v. Benedict Obiefuna (1974) 3 S.C (Reprint) 49; (1974) 3 S.C. 67.

G At pages 99-100 of the record, the trial Judge held:

H *“I do not believe the batcher or temporary building was on the land before plaintiff acquired it. Notwithstanding that the plaintiff started negotiating for the land on 6/8/70 (see Exhibit B). he was definitely in possession of the land on 20th day of April, 1976 under and by virtue of Exhibit L, the lease registered as No.36 at page 36 in Volume 30 of the Land Registry in Owerri. Therefore, plaintiff was in exclusive possession of the land in dispute prior to 1981 when the acts of trespass were*

committed. Defendant, at that time, had no legal right to the land in dispute. The batcher (temporary building) and the concrete wall and the building materials he deposited on the land constituted actionable trespass to the land. The structures etc., were illegal on the land and being a nuisance, the plaintiff had a right to remove them. From the pleaded facts and the evidence before me, I find that the defendant committed the acts of trespass which gave rise to these proceedings. I find the defendant liable to trespass on land in exclusive possession of the plaintiff at the time he trespassed on it, that is, Plot 287.” B

In coming to the conclusion that the plaintiff was in possession of the land as at 20/4/76, the trial Judge relied on Exhibit “L” to the effect that the Umuororongo and Amawon kindred leased the land to the plaintiff. But as I observed earlier in this judgment, the title of the said Umuorongo and Amawon kindred was not pleaded. Neither was evidence called on the point. Exhibit “L” was simply irrelevant to the case made on the pleadings by the plaintiff/respondent. C D

The position is that unless and until the plaintiff shows a title superior to the defendant’s, the defendant must continue to keep possession of the land even if he is a trespasser. In Pius Amakor v. Benedict Obiefuna (supra) this court, per Fatayi-Williams, JSC, (as he then was), observed: E

“Generally speaking, as a claim for trespass to land in rooted in exclusive possession, all a plaintiff needs to prove is that he has exclusive possession, or he has the right to such possession of the land in dispute. But once a defendant claims to be the owner of the land in dispute, title to it is put in issue, and in order to succeed, the plaintiff must show a better title than the defendant.” F G

At the court below, notwithstanding the compelling argument canvassed on behalf of the defendant/appellant, the judgment of the trial court was affirmed. At page 248 of the record of proceedings, the court below said: H

“Indeed, the onus was on the plaintiff/respondent to prove his case by preponderance of evidence. It does not remain ‘fixed’ on him. It shifts from side to side. The rebuttal of the issues raised and proved by the

plaintiff/respondent were not disproved by the defendant/appellant in this case. See the decisions N.M.S.L. v. Afolabi (1978) 2 S.C. (Reprint) 53; (1978) 2 S.C. 79; Osawaru v. Ezeiruka (1978) 6-7 S.C. (Reprint) 91; (1978) 6-7 S.C. 135 and Kate Enterprises Ltd. v. Daewoo (Nigeria) Ltd. B (1985) 2 NWLR (Pt.5) page 116.

Customary right of occupancy is, usually in right of applicant's membership of the community, kindred or family owning the land or of prior customary tenancy off it. The defendant/appellant on whom the shifting or evidential burden lay, did not successfully refute the plaintiff/ C respondent's assertion that he, defendant/appellant, was not entitled to Exhibit 'P'".

The reasoning of the court below in the above passage would appear to show that the court below accepted that the plaintiff had shown D a prima facie case and that the evidential onus shifted to the defendant. But, with respect to their Lordships of the court below, it was an error to accept that the plaintiff could be granted a declaration of title to land when the plaintiff did not even plead the root of his title. There was therefore no duty E on the defendant to meet the case of the plaintiff, which was so patently weak and unsustainable. I think that the court below should have seen that the plaintiff who had pleaded that he derived his title to the land in dispute from Owerri Town Planning Authority could not depart from his pleading F to rely on a title from Umuoronjo and Amawon kindred. The plaintiff's claims ought to have been dismissed.

The appeal succeeds on the two issues discussed above. The appeal is allowed. The judgments of the court below and the trial court are hereby set aside. In their place I substitute an order dismissing plaintiff/respondent's G suit. The defendant/appellant is entitled to costs in the two courts below, which I fix at N2,500.00 and N4,500.00 respectively. And as for appearance in this court, I award N10,000.00 costs in favour of the defendant/appellant.

H

UWAIS CJN

I have had the advantage of reading in draft the judgment read by

my learned brother, Oguntade, JSC. I agree with his reasoning and conclusion. I too find merit in the appeal.

Accordingly, it is hereby allowed. I adopt the consequential order contained in the said judgment.

B

KATSINA-ALUJSC

I have had the advantage of reading in draft the judgment of my learned brother, Oguntade, JSC. I agree with it and, for the reasons which he has given, I too, allow the appeal and set aside the decision of the court below. I enter judgment dismissing the plaintiff's claim. I abide by the order for costs.

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D

KALGOJSC

I have read in draft the judgment of my learned brother, Oguntade, JSC., just delivered and I agree with him that there is merit in the appeal and it ought to be allowed. I adopt his reasoning and conclusions reached therein.

The land in dispute is located at the Ikenegbu Layout in Owerri Town, and although the plaintiff/respondent called it Plot No.287 and the defendant/appellant called it Plot No.288, it was properly identified and acknowledged by each party. See Chukwueke v. Okonkwo (1999) 1 S.C. 71; (1999) 1 NWLR (Pt.587) 410. They both knew what parcel of land they were talking about, and that the land was owned by Umuikenegbu people of Owerri, which comprised of Umuororonjo and Amawun kindreds of Owerri.

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G

The appellant pleaded his root of title, as per paragraph 6 of the Statement of Defence, and the fact that the land in dispute has been in his possession since 1961 when one Gordon Njemanze (owner of the land) leased the land to him and he had been exercising acts of possession without any let or hindrance from any body until 1981 when the respondent trespassed into the land in dispute. He also had a Certificate of Occupancy in respect of

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the land.

B He testified that the Owerri Town Planning Authority has no title to any land in the Ikenegbu Layout, Owerri. In fact, the Ikenegbu Layout (Variation of Planning Scheme) Order, 1971, (hereinafter referred to as “Layout Variation Order”), clearly stated that ownership of land in the said layout “rests with the individual land owners and owners and to such individuals or bodies to whom parcel or plots may have been leased or sold”.

C The respondent on the other hand testified that the land in dispute was leased to him by the Owerri Town Planning Authority and he executed the deed of lease Exhibit “L” with the said Authority, which gave him a Certificate of Occupancy in 1970.

D It is very clear from the evidence of both parties at the trial that the land in dispute is owned by the Umuororonjo and Amawun kindreds of Owerri and by the Layout Variation Order, the land in dispute remained with the said owners or such persons to whom the land is leased or sold. Mr. Njemanze, D.W.2, confirmed in his evidence that he leased the land E in dispute to the appellant as a member of the Umuikenegbu family which comprised Umuororonjo and Amawun kindreds of Owerri. This is in line with the averment of the appellant in paragraph 6 of the Statement of Defence at the trial.

F The respondent’s root of title was the Owerri Town Planning Authority and later the Owerri Capital Development Authority neither of which was proved to be the original owner of the land in dispute. Therefore the respondent has failed to prove his root of title or that he has a better title to that of the appellant, which he has a duty to do, if he is to succeed G in this action. See *Okhuarobo v. Aigbe* (2002) 9 NWLR (Pt.771) 29; *Nwadiagbu v. Nnodozie* (2001) 6 S.C. 107; (2001) 12 NWLR (Pt.727) 315. And since the appellant was put in possession of the land in dispute by D.W.2, a member of the family that originally owned the land since H 1961, his possession cannot be successfully challenged by the respondent. See *Ajuwa v. Odili* (1985) 2 NWLR (Pt.9) 710; *Registered Trustees of Apostolic Faith Mission v. James* (1987) 3 NWLR (Pt.61) 556.

For the above and the detailed reasons advanced in the leading

judgment which I fully adopt as mine, I find that there is merit in this appeal. I accordingly allow it and set aside the decisions of the trial court and the Court of Appeal and dismiss the respondent's action in the trial court. I abide by the order of costs made in the said judgment.

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MUSDAPHERJSC

I have had the honour to read before now, the judgment of my Lord Oguntade, JSC., just delivered with which I entirely agree. For the same reasons which I hereby adopt as mine. I too, allow the appeal and set aside the decision of the court below. I enter judgment dismissing the plaintiff/respondent's claim. I abide by the order for costs contained in the aforesaid judgment.

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