

SUPREME COURT OF NIGERIA
27TH JANUARY, 2006. SC. 188/2001
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI
G. A. OGUNTADE, M. MOHAMMED, JJSC

THE DAGACI OF DERE & 9 ORS.

(Alhaji Musa Abdulkadir)

..... APPELLANTS

{Suing as Accredited Representatives

of DERE/ESHI/KUCHI/APATAKU

COMMUNITIES - for themselves and on

behalf of the said Communities}

AND

THE DAGACI OF EBWA & 9 ORS.

(Alh. Idirisu)

..... RESPONDENTS

(Sued as Accredited Representatives

of EBWA COMMUNITY)

EVIDENCE - Admissibility - Appeals - Leave - Where appellants raised no objection - To the tendering of exhibits before lower courts - They cannot raise the issue now - Without leave of the Supreme Court (H1)

LAND LAW - Res judicata - Proof - Appeals - Reliance on past cases - All the ingredients must be present - For the plea to succeed - Where past judgments relied on are denied - Burden of tendering those judgments lies on defendants (H2)

ESTOPPEL - Res judicata - Evidence - Admissibility - Past judgment of court - Tendered in proof of res judicata - Not being a certified copy under ss.54, 111 & 112 EA - Is not admissible (H3)

PLEADINGS - Evidence - Admissibility - Fact not pleaded by defendant - But was pleaded by plaintiff - Can be controverted - By lawfully admissible documents - Tendered by defendant (H4)

EVIDENCE - Documents - Admissibility - Exhibit that is inadmissible by law - But was admitted with consent of the other side - Should not be acted upon (H4)

APPEALS - Reversal - Evidence - Where wrongfully admitted evidence - Is discountenanced on appeal - The judgment will not be reversed - If sustainable by other available evidence (H5)

APPEALS - Concurrent findings - Land law - Where the findings are not unjust or erroneous - Supreme Court will not disturb them (H6)

COURTS - Land law - Evidence - Evaluation of - Is the trial court's primary duty - Expunging wrongfully admitted evidence on appeal - Does not provided a ground - For reversal of the judgment in this case (H7)

FACTS

Before the Niger State High Court, Minna, the plaintiffs/appellants filed an action against the defendants/respondents. Plaintiffs who are made up of 4 communities (Dere community being the 1st), claimed entitlement to Customary Right of Occupancy in respect of the Land, waters and fish ponds in dispute. They also inter alia, claimed damages for trespass and sought order of injunction restraining the defendants from committing further trespass on the property. The basis of their claim is that they have been in possession of the property in dispute from time immemorial. The parties had all been living together as one ward until 1993, when the defendants, Ebwa community was made a different ward. The plaintiffs were able to prove various fights and damages they suffered in the hands of the defendants, but did not prove any root of title to the property in dispute.

The defendants on the other hand denied the plaintiff's claim and filed a counter claim. The trial court awarded a total sum of N104,000.00 to the plaintiffs as damages for trespass. But found that the defendants established ownership of the property in dispute. Plaintiffs' appeal and defendants' cross appeal to the Court of Appeal were dismissed and struck

out, respectively. Being dissatisfied, the plaintiffs have further appealed to the Supreme Court. The apex court found that some documents tendered by the defendants towards proof of their plea of *res judicata* were inadmissible and discountenanced them. But found that there were still sufficient evidence to sustain the lower court's judgment.

ISSUES FOR DETERMINATIONS

“3.1. Whether the court below was right when it confirmed the decision of the trial court admitting exhibits 7, 10 and other relevant exhibits?”

3.2. Whether the appellants were under a legal duty to prove or establish more than one root of title or a specific root of title to succeed.?

3.3. Whether the decision of the trial court dismissing the appellants' claim for declaration and granting the respondents' counter-claim which was affirmed by the court below was against the weight of evidence adduced at the trial?

3.4. Whether or not the issue of the admissibility of Exhibits 8(a) - (g) was a fresh point for which the leave of court was required as held by the Court of Appeal?

3.5. Whether the Court of Appeal was correct when it held that exhibits 8(a) - (g) were evidence of the Respondents' ownership of the waters against the Appellants?”

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

Admissibility - Appeals - Leave

1. It seems to me that the plaintiffs/appellants not having raised objection to the tendering in evidence of exhibits 6 and 6A before the court of trial and not having appealed against the same before the court below could not raise the matter before this court unless leave was first sought and obtained to raise it as a fresh matter on appeal.

It is apparent that the counsel who appeared for the plaintiffs/appellants at the trial court had not opposed the tendering in evidence of exhibits 6 and 6A. Further, in their appeal before the court below, the plaintiffs had not complained about the admission in evidence of the exhibits. The plaintiffs/appellants are disabled from raising the matter

which is a fresh one before this Court without first seeking and obtaining the requisite leave. (p. 322 G)

Res judicata - Proof

B 2. I think, with respect to their Lordships of the court below that they were in palpable error in their conclusion that exhibit 7 was receivable in evidence. Exhibit 7 was tendered to support the plea of estoppel per res
C 1 of their reply and defence to the counter-claim that there were no binding cases previously decided between parties which settled the ownership of the waters and lands in dispute.

The defendants pleaded and relied on previous cases as having finally decided the ownership of the waters and land in dispute as between
D them and the plaintiffs. The plaintiffs denied that there were any such binding cases. Since estoppel per rem judicatam would only apply when parties, issues and subject-matter in the previous and the current case are the same, it is incontestible that a party who pleaded that there were no
E such binding case was in fact disputing the applicability of the doctrine. The doctrine is like a package. It is sufficient for a person resisting the applicability of the doctrine to raise the absence of just one of the ingredients; and the person raising it must in that event bear the burden
F that such a judgment in fact existed. It is my firm view that the plaintiffs having denied the existence of any binding judgment between them and the defendants had sufficiently raised a distinct issue as to the existence of such judgment. The defendants who raised the plea therefore bore the
G burden of tendering judgments wherein the issue of ownership of the water and land in dispute had been decided between the parties by a court of competent jurisdiction. (pp. 324 D & 326 A)

Admissibility - Past judgment of court

H 3. This then brings into consideration the question whether or not exhibit 7 in the form it was could be tendered in proof of a plea of estoppel per res judicata. Sections 54, 111(1) & (2) and 112 of the Evidence Act provide:

“54. Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court and appearing from the judgment itself to be ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.” B

111.(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. C D

(2) Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section. E

112. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.”

Exhibit 7, not being a certified copy ought not have been received in evidence. In *Ipinlaiye II v. Olukotun* [1996] 6 NWLR (Pt.453) 148, this Court per Iguh J.S.C. at 167 said: F

“If a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned counsel at the time did not object to its going into evidence. See Mallam Yaya v, Mogoga [1947] 12 W.A.C.A 132 at 133.” G

I must in the consideration of evidence in this appeal discountenance exhibit 7 which was wrongly received in evidence. (p. 326 E) H

PLEADINGS - Evidence - Admissibility

4. There is no doubt that the defendants had the right to call evidence in

order to deny the fact pleaded by plaintiffs in paragraph 5 of their amended Statement of Claim. Viewed from this perspective one readily sees that, exhibit 10 if it possessed the requisite quality as required by law, was admissible. However, Exhibit 10, which purported to be a court judgment, was not certified as it should be. It is by law inadmissible. In *Olukade v. Alade* [1976] 1 All N.L.R. 167 this Court said:

"2 It is however the duty of the opposite party or his counsel to object immediately to the admissibility of such evidence but if the opposite party fails to object:

(a) the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu; but

(b) On appeal, and provided the evidence is one which is, by law, admissible under certain conditions, then since the opposite party failed to object to its admissibility at the court of trial or by implication consented to its admissibility (although the conditions have not been shown to have occurred) he cannot be allowed to raise the objection in the appeal court.

(c) Where, however, evidence is by law inadmissible in any event, it ought never to be acted upon in court (whether of first instance or of appeal), and it is immaterial that its admission in evidence was as a result of consent of the opposite party or that party's default (in failing to make objection at the proper time". (Underlining mine)

I am satisfied that exhibits 7 and 10 ought not have been received in evidence by the trial court and that the court below was wrong not to have rejected them in evidence. In this Court, the two must and will be discountenanced. (p. 329 A)

APPEALS - Reversal - Evidence

5. Earlier in this judgment, I held that Exhibits 7 and 10 should not have been admitted in evidence. When evidence, which is inherently inadmissible, is improperly let into the proceedings, an appellate court will discountenance the evidence wrongly let into the proceedings. See *Olukade v. Alade* (supra).

In the instant case however, there was sufficient evidence on record to sustain the conclusions on evidence of the trial court and the

court (*sic lower court 's*) conclusion on the evidence. The result is that the judgments of the two courts will remain unaffected even when exhibits 7 and 10 are discountenanced, as they should be. (p. 331 C)

Concurrent findings - Land law

6. In this Court, I am confronted by the concurrent findings of fact by the two courts below. In Enang v. Adu [1981] 11-12 SC 25 t pp. 41-42, this Court per Nnamani J.S.C. said concerning concurrent findings of fact:

“The task of the appellants on this ground of appeal is made more difficult by the fact that there are before us concurrent findings of fact by both the learned trial Chief Judge and the learned Justices of the Court of Appeal. It is settled law that such concurrent findings where there is sufficient evidence to support them should not be disturbed. Kofi v. Kofi 1 W.A.C.A.. 284.”

This rule of practice can only be obviated if there is some miscarriage of justice and violation of some principle of law or procedure.

A close examination of the record and judgment of the court of trial abundantly reveals that it unquestionably evaluated the evidence and appraised the facts. The court below did the right thing by affirming such findings of the trial court. Before us in this Court, we are confronted with two concurrent findings by the two courts below. The plaintiffs/appellants have not directed my attention to any erroneous proposition of law or neglect of some principle of law by the two courts below which would lead me to disturb their concurrent findings. (p. 331 E)

Evidence - Evaluation of

7. A trial court before which parties to a dispute have led evidence has the duty to determine which of the versions to accept of the evidence called. Obviously, it does this based on the advantage which it has of seeing and hearing the witnesses testify. An appellate court has not that advantage. This explains why an appellate court does not and should not readily disturb the findings of fact made by the court of trial.

The plaintiffs/appellants and their counsel are justifiably displeased with the fact that the court of trial preferred the defendants case to theirs.

But that is in the nature of all adjudications whether formal or informal. It is immaterial in this case whether or not the trial court had been wrong in receiving in evidence exhibits 8(a)-(g). This is because, the final judgment of the court of trial was not based on the said exhibits. The court below
B made the same point explicitly when it reproduced the statement by Iguh JSC in Okoro v. The State [1998 14 NWLR Pt. 584) 181 at 219 that:

*“The law is well settled that the wrongful admission of evidence shall not of itself be a ground for the reversal of a decision where it appears
C on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.*

The reasoning of Iguh JSC above flows from the provisions of Section 227(1) of the Evidence Act, which reads:

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

The conclusion I arrive at is that exhibits 8(a) to (g) played no part in the conclusion arrived by the trial court. It is therefore immaterial that the court below had not considered whether or not exhibits 8(a) to (g) was
F wrongly received in evidence. (p. 334 A)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Ground of appeal - Value of
G A ground of appeal is the complaint the appellant has on the decision of the lower court. By the ground of appeal, the appellant tells the appellate court that he is not satisfied with the judgment of the trial or lower court and he spells out clearly the specific area he is not satisfied with. An issue raised
H in an appeal affecting the decision of the lower court must be backed by a ground of appeal. Where there is no ground of appeal supporting the issue raised, it will be discountenanced or rejected by the appellate court. Grounds of appeal are the taproots of the case on appeal as they lay the

foundation upon which the case grows in the appellate court to fruition. As there is no ground of appeal supporting or vindicating Exhibits 6 and 6A, the arguments on the exhibits by the appellants are to no issue and I so treat them. (p. 347 D)

B

2. Title - Proof of fracas - Is not proof of title

Certainly, a defendant fighting a plaintiff is not one of the way of proving title within the meaning of *Idundun v. Okumagba* (1976) 9-10 SC 227; and the appellants wasted so much of their time in tendering receipts and other papers of hospitalization in the Court, as if they are capable of proving title. Am I really correct in saying that the appellants wasted so much of their time by tendering receipts? I do not think so. After all, they got some damages in the bargain. I said so above. See Exhibits 3 and 4. What is more, the appellants devoted about six paragraphs of their pleadings to the fracas. Why?

I do not want to give the impression by the above extracts of the evidence of PW1 to PW6 that they only gave evidence of the fracas and did not give any evidence of ownership. The point I am making is that perhaps, apart from PW1, the other witnesses gave more evidence on the fracas than ownership, which was the real issue before the court.

The evidence on the fracas apart, there was some token of evidence of traditional history. I call it “token” because none of the witnesses was able to give an approximate period of their stay there. (p. 354 A)

3. Possession by customary tenant - Does not confer ownership

I think it is appropriate to take the issue of possession here. The appellants relied on evidence of possession as basis of ownership. It is their claim that having settled and in possession of the lands and waters in dispute from time immemorial, they are entitled to customary rights thereof. It is one thing to claim possession and quite another to prove the possession claimed.

Acts of possession may be taken as acts of ownership if the circumstances are such that the person in possession ought to be regarded as owner, but more is needed than is required to support a claim for

trespass. Where plaintiff proves sufficient acts of possession, the burden is thrown on the defendant under section 146 of the Evidence Act In order to obtain judgment, the defendant has the onus to rebut the evidence of the plaintiff.

B The learned trial Judge did not see a case of possession made by the appellants and made reference to the shaky evidence of PW5 which we have already dealt with. The Judge thereafter said and correctly too for that matter:

C *“Mere possession of land of customary tenant however long cannot mature to confer rights envisaged in the Act.”* (p. 354 H)

4. Ownership of land - Is not proved by proximity per se

D Evidence of proximity per se does not vest ownership of land to the party in proximity. The party has to prove that the land belongs to him by clear and unequivocal evidence. There could be situations where proximity is an accident of history which may not necessarily be of any use in determining the ownership of the land in favour of the party in proximity.

E Let me relate the issue to one of the ways this Court enumerated in Idundun v. Okumagba and it is the fifth. It reads:

F *“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.”*

I do not think the appellants went that far in their evidence. Even if they gave such evidence, the Court has a duty to take it into consideration with relevant evidence of the opposing party to arrive at a conclusion one way or the other. (p. 357 F)

G

5. Customary tenancy - Implications of payment of tribute

H Unlike the appellants, the respondents duly pleaded the payment of tributes in their Joint Statement of Defence in paragraph 4(d). And what is the status of the payment of tribute in customary land law? Under customary land law, the payment of tribute by the tenant is a recognition of the title of the overlord to the property. In other words, the tenant fully recognizes that the overlord he pays the tribute is the owner of the property and that

he holds the property for a definite period at the pleasure of the owner. In ancient days, tribute was regarded as protection money as it was paid by the tenant for the sole purpose of protecting the tenancy. It is my view that the payment of tribute by the appellants to the respondents is evidence of the recognition of ownership of the waters and the lands by the respondents, and I so hold. It cannot be otherwise. (p. 362 G)

REPRESENTATION

Mrs. O. O. Soyebó (Rotimi Olumeso Esq. and A. I. Aderogba Esq. with her) for the appellants. C

Ibrahim Isiyaku Esq. for the respondents.

CASES REFERRED TO

Uor v. Loko [1988] 2 NWLR (Pt. 77) 430 D

Ihenacho Nwaneri & Ors. v. Oriuwa & Ors. [1959] 4 F.S.C. 132

New Brunswick Rail Co. v. British and French Trust Corporation Ltd. [1939] A.C. at pp. 19-20

Dzungwe v. Gbise [1985] 2 NWLR (Pt.8) 528 at 539 E

Ipinlaiye II v. Olukotun [1996] 6 NWLR (Pt.453) 148

Mallam Yaya v. Mogoga [1947] 12 W.A.C.A 132 at 133

Olukade v. Alade [1976] 1 All N.L.R. 167

Enang v. Adu [1981] 11-12 SC 25 t pp. 41-42 F

Kofi v. Kofi 1 W.A.C.A. 284

Akinbiyi & Anor. V. Obaje & Anor. [1968] NMLR 242 at 247

Akintola v. Fatoyinbo Oluwo & Ors. [1962] 1 All NLR 224

Okoro v. The State [1998 14 NWLR Pt. 584) 181 at 219

Ezeoke v. Nwagbo [1990]1 NWLR (Part. 72) 616 at 630 G

Umeojiako v. Ezenamno [1990] 1 NWLR (Part 126) 253 at 270

Monier Construction Company Ltd. V. Azubuike [1990] 3 NWLR (Pt. 136) 74 at 88

H

STATUTES REFERRED TO

Evidence Act ss. 54, 109(a) (ii), 111, 112, 227(1)

LEAD JUDGMENT BY OGUNTADE JSC

The appellants were the plaintiffs at the Minna High Court of Niger State, where as the representatives of the Dere and Eshi communities, they
B claimed against the respondents as the representatives of the Ebwa community, for the following reliefs:

“(a) A Court Declaration that the DERE COMMUNITY is at all
material times hereto the lawful Occupier/ Possessor of ALL THAT piece
C or parcel of vast land lying, being and situate at DERE/her immediate
environs and its adjoining Waters/fish-ponds known as EPEMI-DERE
(Egbokongbo)/Emmatsa-Aba and is therefore entitled to Customary
Right of Occupancy thereto;

(b) A Court Declaration that the ESHI COMMUNITY is at all
D material times hereto the lawful Occupier/ Possessor of ALL THAT piece
or parcel of vast land lying, being and situate at ESHI/her immediate
environs, and its adjoining Waters/fish-ponds known as EMMATSA &
EBORO, and is therefore entitled to Customary Right of Occupancy
E thereto;

(c) A Court Declaration that the people of DERE WARD as
presently constituted are the people entitled to Rights of Occupancy over
ALL THOSE lands and Waters situate at DERE/ESHI/KUCHI/APATAKU
F and their immediate environs bounded in the North by Edonni; in the South
by River Niger; in the East by Gurara River and in the West by Jamma -
all these boundaries being natural boundaries;

(d) A Court Declaration that the KUCHI COMMUNITY is at all
material times hereto the lawful Occupier/ Possessor of ALL THAT piece
G or parcel of vast land lying, being and situate at KUCHI/her immediate
environs, and its adjoining Waters known as EPEMI-KUCHI, and is
therefore entitled to Customary Right of Occupancy thereto;

(e) A Court Declaration that APATAKU COMMUNITY is at all
H material times hereto the lawful Occupier/ Possessor of ALL THAT piece
or parcel of vast Land lying, being and situate at APATAKU/her
immediate environs, and its adjoining Waters known as EPEMI-KUCHI,
and is therefore entitled to Customary Right of Occupancy thereto;

(f) A Court Declaration that the Defendants' entry into and or invasion of DERE WARD'S afore-mentioned Lands and Waters in recent times, especially in 1995 and May 1996, amounted to trespass as it was wrongful, unauthorized & unconstitutional and that such acts of trespass ought to be abated forthwith;

(g) A Court Order compelling the Defendants, their servants, agents, assigns, privies etc. to vacate the said Plaintiffs' Lands and Waters and allow the Plaintiffs to remain in exclusive possession thereof forthwith and henceforth;

(h) An Order of Interlocutory Injunction restraining the Defendants, their servants, assigns, agents, privies and or any person(s) claiming by or through them in any other manner howsoever from committing further acts of trespass on the said DERE/ESHI/KUCHI/APATAKU's Lands and Waters pending the final determination of this suit and a perpetual Injunction in the same terms after delivery of judgment; The Plaintiffs also seek such other relief(s) as the justice of this case may demand;

(i) An Order awarding the sum of N280,000.00 against the Defendants as damages for the said Assault, Trespass acts, Wrongful seizure cum detention of Plaintiffs' Fishing Nets and Boats.

PARTICULARS OF DAMAGES

(j) Eshi's 2 Fishing Boats wrongfully seized and Currently being unlawfully detained by the Defendants. Each Boat costs at least N30,000.00 (Such moneys are to be paid to ESHI COMMUNITY).

= N60,000.00

(ii) Eshi's 4 Fishing Nets wrongfully seized and currently being unlawfully detained by the Defendants. Each Fishing Net costs at least N12,000.00 - (Such moneys are to be paid to ESHI).

= N48,000.00

(iii) Eshi's 2 Fishing Nets destroyed by the Defendants/their agents. Each Fishing Net costs at least N12,000.00 - (Such moneys are to be paid to ESHI COMMUNITY).

= N24,000.00

(iv) Damages to farm crops e.g. Maize worth N25,000.00 (i.e.

N12,500.00 is to be paid to ESHI and N12,500.00 is also payable to DERE COMMUNITY).

= N25,000.00

(v) Physical Assault to Plaintiffs' people resulting in serious bodily injuries. Some of the victims of the said Assault were hospitalized for a considerable period of time. (N50,000.00 - is payable to ESHI on this).

= N50,000.00

(vi) Damages to Plaintiffs' buildings, anguish, Psychological distress and feeling of insecurity. Now meted to the Plaintiffs' peoples. (DERE COMMUNITY claims N26,500.00; ESHI ; COMMUNITY claims N26,500.00; KUCHI COMMUNITY claims N10,000.00 whilst APATAKU COMMUNITY also claims N10,000.00 under this Head of Damages).

= N73,000.00

D GRAND TOTAL OF DAMAGES

= N280,000.00"

The respondents, who were the defendants filed a statement of defence to which was sub-joined a counter-claim which reads:

E "3. The defendants claim:

i) a declaration that the waters Gbokomgbo; Emmatsa and Emmatsa-Aba; Eboro; Egogyari and Epemi-Kuchi together with those admitted in paragraph 8 of the Statement of Claim are owned by Ebwa Community.

F ii) a declaration that all the lands around the said waters bounded in the North by Cigbaga and Ceku villages; in the South by river Niger; in the East by river Gurara and Azo (Kagbodo) and Muye village; in the North-east by Egba village, in the West by river Niger and Arah village; and in the North-West by Achiba and Sokun villages traditionally belong to Ebwa Community and who are entitled to the customary rights. AND specifically that the lands called Fokpo lying between Mambe and Gbade (to the east), Nku (to the south), Elogi (to the North) and Lugwa (to the west); the Fadama Areas of Batazi Zowu, Che Pan, Ekowasa, Chikangi and Zabe; and the uplands of Ningi, Langbata and Lukongogun belong to Ebwa.

H iii) an order of injunction restraining any further use by the plaintiffs (either by themselves or their agents or anyhow) from the use

of all the waters and lands without prior consent of Ebwa Community through the Etsu Ebwa.

iv) N280,000.00 as general damages from psychological distress, blocking of pond and unconventional fishing practice.”

After the pleadings had been settled, the suit was heard by Zukogi J. On 4-3-98, the trial judge gave judgment. At page 136 of the record, the trial judge in the judgment concluded that the plaintiffs were in possession of the land in dispute when the defendants invaded it and unlawfully detained plaintiffs’ properties. The court said:

“The evidence available before the court all make out convincing and clear case for award of trespass and assault; wrongful seizure and detention of plaintiffs’ properties. There is ample evidence before the court that the defendants invaded the plaintiffs’ communities and beat up their people and one had a miscarriage”.

On the basis of the above finding, the plaintiffs were awarded the sum of N50,000.00 as damages for the injuries which the defendants inflicted on them. Under various other heads, the plaintiffs were awarded additional damages totalling N104,000.00.

On the defendants’ counter-claim, the trial judge concluded:

“Finally, I find on the preponderance of evidence before the court the defendants have established ownership of the waters of Gbokongbo, Emmatsa, Egoari, Epemikuchi and all lands around the said waters, bounded to north by Cigbaga and Ceku villages, to the east by river Gurara and as well as Azo (Kagbogo) and Muye villages, to the west by River Niger and Arah village to the north-east by Egba village and to the north-west by Achiba and Soku villages are owned by the defendants’ community and the court hereby order any further use of the waters and lands should be with the defendants’ consent.”

Dissatisfied with the judgment of the trial court the plaintiffs brought an appeal before the Court of Appeal, Abuja Division (hereinafter referred to as ‘the court below’). The defendants were equally dissatisfied. They brought a cross-appeal. On 16-10-2000, the court below dismissed the plaintiffs’ appeal and struck out the defendants’ cross-appeal. The plaintiffs were dissatisfied with the judgment of the court below. They

have come on a further appeal before this court. In their appellants' brief, they have raised five issues which read thus:

B *“3.1. Whether the court below was right when it confirmed the decision of the trial court admitting exhibits 7, 10 and other relevant exhibits?”*

3.2. Whether the appellants were under a legal duty to prove or establish more than one root of title or a specific root of title to succeed.?

C *3.3. Whether the decision of the trial court dismissing the appellants' claim for declaration and granting the respondents' counter-claim which was affirmed by the court below was against the weight of evidence adduced at the trial?*

D *3.4. Whether or not the issue of the admissibility of Exhibits 8(a) - (g) was a fresh point for which the leave of court was required as held by the Court of Appeal?*

3.5. Whether the Court of Appeal was correct when it held that exhibits 8(a) - (g) were evidence of the Respondents' ownership of the waters against the Appellants?”

E *The issues which the respondents formulated for determination were:*

1. Whether exhibits 7 and 10 were wrongly admitted in evidence (Grounds 1 and 4).

F *2. Whether the Court of Appeal was right when it upheld the decision of the trial court that:*

(i) the plaintiffs failed to prove how and through whom title devolved to them; and

G *(ii) that the defendants/respondents had proved , better title (Grounds 2 and 3).*

3. Whether the Court of Appeal was right when it held:

1. that the complaint that exhibits 8(a) - (g) were registrable instruments raised a fresh issue; and

H *2. that exhibits 8(a) - (g) supported the defendants/ respondents counter-claim for ownership of the disputed waters (Grounds 5 and 6).”*

As the issues formulated by the respondents could be amply accommodated under appellants' issues, I shall be guided in this judgment

by the said appellants' issues. It needs be said here that the parties in their pleadings conveyed that what was in dispute between them were waters and land' have always understood that parties often dispute the ownership of land. I am not familiar with disputes about ownership of "waters and land". It is even more difficult to understand, as the parties have not given a description of the 'waters' in dispute. Were they disputing ownership of lakes, rivers or ponds? Were these waters man-made or natural? The position was not made clear on the pleadings. But as the parties have not made an issue of the matter in this appeal, I should allow the matter to rest. See Attorney-General of Anambra State v. C. N. Onuselogu Enterprises Ltd. [1987] All N.L.R. 579 at 595; chief Ebba v. Chief Ogodo & Anor. [1984] 4 S.C. 84; Ejowhomu v. Edok-Eter Mandilas Ltd. [1986] 5 N.W.L.R. (Pt.39) 1 at 3; Overseas Construction Ltd. v. Creek Enterprises Ltd. & Ors. [1985] 3 N.W.L.R. (Pt.13) 407. It suffices here to say that my approach to the matter is to treat reference to 'waters' as a reference to land. Before a discussion of the issues, it is necessary to examine carefully the case of the parties as put across in their respective pleadings before the trial court. The plaintiffs in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 21 and 22 of their Statement of Claim pleaded thus:

"5. The Plaintiffs aver that prior to 1993, the Dagaci of Dere was administering and exercising control over all the Communities in Dere Ward, including their Lands and Waters. Customarily/traditionally also, all the Zhitsus of all Communities in Dere Ward were being ordained by the Dagaci of Dere until 1993 when EBWA COMMUNITY was granted her own Ward and hence had a Dagaci of her own since then. Up to now, the Zhitsus of the remaining Communities under Dere Ward are still accountable to, and being ordained by the Dagaci of Dere.

6. The Plaintiffs assert that in those ancient days when the palace of Dagaci of Dere had a thatched roof, the Ebwa Community used to send representatives to Dere to re-roof or repair the Palace of Dagaci of Dere as and when the need arose.

7. From time immemorial, the Dagaci of Dere used to delegate any of his agents (including Ebwas) to fish in all Waters under Dere Ward annually and whenever the need arose and nobody would cross all such

Waters to the other side without the prior approval/permission of the Dagaci of Dere.

8. *Upon the excision of Ebwa Community from Dere Ward in 1993, Ebwa Ward had (and still has) the following 18 Waters surrounding/*

B *adjoining her Lands to her exclusive possession and use, to wit:-*

1. *TSAKANABI*; 2. *EPEREBU*; 3. *EDEH*;
4. *EDONI-MI-FUBO*; 5. *EDONI-MI-EGEKU*;
6. *EDOGBAYIN*; 7. *EPARABU*; 8. *ENWERE*;
9. *AKAH*; 10. *EPALA*; 11. *EPASHE*; 12. *EGBOH*;
- C 13. *IRIMI-ALHAJI SAIDU*; 14. *EGBARAH*;
15. *EMU-ABA*; 16. *OZEREH*; 17. *IWUGI*; &
18. *EPEZE*.

9. *On the other hand, with effect from 1993, Dere Ward was left*
D *with the following Waters for her own exclusive possession and use, viz:-*
(i) Egbokongbo/Emmatsa-Aba; (ii) Emmatsa; (iii) Eboro; (iv) Egogyari
& (v) Epemi-Kuchi.

10. *The Plaintiffs also aver that the Dere Community naturally and*
E *lawfully possesses the following Waters/Fish-ponds, namely- Egbokongbo*
(Epemidere) Emmatsa-Aba. Whilst Eshi Community naturally and law-
fully possesses the following Waters/Fish-ponds, i.e. (i) Emmatsa & (ii)
Eboro. Kuchi Community naturally and lawfully possesses Epemi-Kuchi
F *Waters whilst Apataku Community naturally and lawfully possesses*
Egogyari Waters. All these 4 Communities are now under DERE WARD
being administered by the 1st Plaintiff.

11. *With effect from 1993 when Ebwa was excised from Dere Ward,*
the natural boundries of DERE/ESHI/KUCHI/ APATAKU can now be
G *described thus:- ALL THOSE Lands and Waters situate at DERE/ESHI/*
KUCHI/ APATAKU and their immediate environs bounded in the North
by Edonni; in the South by River Niger; in the East by Gurara River and
in the West by Jamma.

H 12. *The Plaintiffs further state that ESHI is about 3 Kilometres*
away from DERE/KUCHI/APATAKU whilst EBWA is over 20 Kilometres
away from DERE. Both Dere and Ebwa wards are now accountable
locally to Lapai as their Local Government Headquarters and not to each

other. Hence, traditionally the Dagaci of Dere has never paid any tribute or traditional dues to Ebwa and nothing of such has ever been requested from Dere.

13. *The Plaintiffs equally state that the recent tortuous acts of the EBWA COMMUNITY which now culminate into this legal action are traceable to 1995 and especially May 1996 when some servants/agents/ INDIGENES of EBWA invaded DERE/SHI/KUCHI/APATAKU and viciously attacked/ damaged/injured some persons and properties belonging to the latter Communities. The Defendants' main bone of contention being that all lands and Waters (afore-said) now remaining under Dere Ward, are still vested in EBWA.*

14. *The Plaintiffs aver that both at Law and in Equity, in truth and Logic, the Lands and Waters (subject-matter of this action) naturally belong to Dere Ward and cannot by any stretch of human imagination be claimed by EBWA. For instance, Egbokongbo River runs across or passes in front of DERE COMMUNITY, Emmatsa River runs across or passes in front of ESHI COMMUNITY and River Gurara runs into River Niger just a few metres behind ESHI/DERE COMMUNITIES. Likewise Epemi-Kuchi and Egogyari Waters are naturally attached to Kuchi & Apataku Communities respectively. A visit to the Locus-in-quo will further elucidate matters. (The relevant Map or Sketch- Diagram is hereby pleaded and the Plaintiffs will found on same at the trial).*

XX

21. *The Plaintiffs will contend at the trial that in so far as all Lands and Waters (subject-matter of this suit) are situate in non-Urban areas of Lapai Local Government Area of Niger State, any Instrument which purports to transfer the said Lands and Waters from the Plaintiffs' communities (the natural Occupiers/Possessors) to the Defendants (EBWA COMMUNITY) without any compensation and without the prior consent and or approval of Lapai Local Government Council in accordance to the due process of Law, shall be null and void ab initio' and of no legal effect howsoever/ whatsoever.*

22. *It is part of the Plaintiffs' story that during the Colonial period, the Plaintiffs improved the Lands and Waters (subject-matter of this*

action) tremendously. E.g. (a) by cultivating the Lands and planting crops such as Rice/Maize thereon up to this date; (b) by constructing roads to make the Plaintiffs' Communities accessible to Motor Vehicles; (c) by charting a canal round the Plaintiffs' Communities through the natural Course thus cutting a hole through the afore-said Plaintiffs' Lands and Waters/Fish-ponds so as to form artificial fence/boundaries ('EBBAN') and forestall incessant invasions by the War-lords. The Plaintiffs will contend that all their afore-said efforts in this paragraph constitute improvement of the said Lands and Waters within the purview of the Land Use Act, 1978. The Plaintiffs also plead and will rely on the principle of "Quick quid platateus solo, solo cedit."

The defendants in paragraphs 4, 5, 6, 7, 8 and 9 of their joint Statement of Defence pleaded thus:

"4. In further answer to the paragraphs denied, the defendants aver that:

(a) the people of Ebwa from time immemorial, and before the arrival of all other communities, occupied 5 different areas, namely -

- i. Nza
- ii. Gyatufu
- iii. Kpokpomed
- iv. Atekpabma
- v. Equmibwa.

They owned all the lands and fish ponds around the areas.

(b) These areas are located at the south-eastern end Of Niger State and bounded to the north by Cigbaga And Ceku villages; to the south by river Niger; to the east by River Gurara, Azo (Kagbodo) and Muye; to the north-east by Egba; to the west by River Niger and Arah village; and to the north-west by Achiba and Sokun.

(c) The Ebwa people were later joined by other people who arrived in the following order -

- i) Reba
- ii) Kuchi
- iii) Apataku
- iv) Gbokungbo who later moved to present day Eshi)

v) *Eshi*

vi) *Dere (who arrived from Adabuke in Kogi State) all of whom were accepted by Ebwa people and given land. They have at all times recognized Ebwa as their landlords, oral tradition relates Dere to Ebwa - through intermarriage.*

B

(d) All the settlers paid annual tributes to Ebwa in the form of allowing a fish to be taken from each canoe on the first fishing day (but this was later changed to payment of N50.00. In respect of produce farmers a bag of rice was paid per farmer. In respect of Reba, only non-indigenes of Reba paid tributes.

C

5. The defendants aver that the EGBOKONGBO (variously referred to as Gbokongbo or Bokonbo or Gbongbo or Gbogbongbo or Gbokongbo or Epemidere) had been declared for Ebwa in the following cases:

D

a) Kwatun Ebwa v. Zhitsun Dere (decided on 7/3/50 before the Court of Etsu Lapai). This suit upheld the decision of the same on 1/10/37 which it held as amounting to Res Judicata. Same is pleaded.

b) Lapai Native Authority letter of 15/5/56 confirming the owner of Bokomgbo on Ebwa. Same is pleaded.

c) Idrisu Etsu-Ebwa v. Musa Etsu-Dere. (Suit No. 22/CV/72 decided on 16/3/72 before the Area Court and confirming Bokonbo. Same is pleaded.

F

6. The defendants aver that the Lapai Local Authority and Emirate Council severally wrote letters confirming inter alia the following Waters for Ebwa and appointing their overseers -

i) Gbongbon

ii) Amatsa (also called Ematsa or Emmatsa or Amatso)

G

iii) Aboro (also called Eboro).

iv) Kpatan Kuchi (also called Epemi Kuchi)

v) Gogyari (also called Egogyari) and also directing the number of times the waters shall be entered. Defendants plead the said letters dated 11/4/72; 13/2/96 and 28/5/96.

H

7. The defendants also aver that they have been paying to the Government, and receiving receipts therefore, rates in respect of among

others the following waters -

- a) Gbokomgbo*
- b) Amatso (including Amatsa-Aba)*
- c) Eboro*
- d) Egogyari*
- e) Epemi-Kuchi*

B

All the receipts are hereby pleaded and shall be relied upon.

8. *a) During the reign of Etsu Saba of Ebwa there was a pond dispute over Emmatsa which came before the Divisional Officer at Bara. The people of Dere and Kuchi swore on the Holy Qur'an that the pond belonged to Ebwa - while Apataku and Gbokungbo swore on chain.*

C

b) In the 1970s a dispute that ensued between Dere and Eshi communities went before the Divisional Secretary who invited the Sarkin Ebwa. The latter settled the two communities by showing the portion Ebwa borrowed to both sides.

D

9. The defendants shall contend that the plaintiffs are not entitled to reliefs claimed and that the suit be dismissed with; substantial costs."

E

The plaintiffs filed a reply and defence to the counter-claim wherein they denied that there had been any previous cases between parties which decided the ownership of the "waters and lands" in dispute between parties. They also denied that they were ever tenants to the defendants.

F

It is appropriate that I make some comments on the pleadings of parties. The plaintiffs' case on the pleadings is in essence that they were entitled to the certificate of a right of occupancy and that they had been the lawful occupier/possessor of land and waters in dispute. They relied on the eminence and paramountcy of the Dagaci of Dere and the fact that the said Dagaci was "administering and exercising authority" over all the communities in Dere ward which before 1993 included the defendants' Ebwa community. It was further pleaded that before 1993, the said Dagaci of Dere delegated his agents to fish in all the waters under Dere ward, which included the Ebwa community. It was also pleaded by the plaintiffs that following the excision of Ebwa community from Dere ward, Ebwa had under its control 18 waters surrounding her land area whereas Dere (after the excision) had six of such waters.

G

H

It would appear from plaintiffs' pleadings that the plank or cornerstone of their case was the fact that the administrative order or fiat by which the defendants' Ebwa community was excised from the old Dere ward left the lands and waters now in dispute in the hands of the plaintiffs. An extension of this approach is the reliance placed by the plaintiffs on the fact that the waters in dispute fell within the area apportioned to them under the administrative order, which excised Ebwa community from the old Dere ward. It is to be stressed here that the plaintiffs even on their pleadings did not rely on any traditional history in the form that they were the first settlers on the waters and land in dispute. It is necessary to stress this aspect of plaintiffs' pleadings as the plaintiffs were on their pleadings seeking a judgment in their favour on the fact that the Dagaci of Dere had once wielded administrative authority over the old Dere ward. It was not pleaded how the authority exercised by the Dagaci of Dere derived from the history concerning who first settled on the waters and land in dispute.

The defendants on the other hand pleaded that their Ebwa community was the first to settle on the waters and land in dispute and that other people including the plaintiffs who were said to have migrated from Adabuke in Kogi State later became their tenants and paid to them annual tributes. The defendants also relied on two judgments, which upheld their title and also a letter from Lapai Native Authority confirming their ownership of the land.

The suit was heard on this state of pleadings. The plaintiffs called six witnesses and tendered exhibits 1-4. The defendants called nine witnesses and tendered fifteen exhibits marked 5(a) - (c), 6, 6a, 7, 8(a) - (g), 9 and 10. Parties testified in substantial conformity with the averments on their respective pleadings.

The plaintiffs/appellants under their first issue argued that the court below was wrong to have confirmed the decision of the trial court admitting in evidence exhibits 6, 6A and 7. It was argued that the said exhibits were inadmissible as they purported to be court judgments. They were not certified as they should be as required by sections 109(a)(n), 111(1) and 112 of the Evidence Act. Counsel relied on *Ministry of Lands, Western Nigeria v. Azikiwe & Ors* [1969] N.S.C.C. (Vol. 6) 31 at 38;

Anatogu v. Iweka II [1995] 8 NWLR (Pt.415) 547 at 571. It was further argued that as exhibit 10 was not pleaded, it ought not have been admitted in evidence - Woluchen v. Gudi [1981] 5 SC.291 at 319-320; Ajide v. Kelani [1985] 3 N.W.L.R. (Pt.12) 248-261; Adimora v. Ajufo [1988] 3 N.W.L.R. (Pt.80) 1 at 4; N.I.P.C. v. Thompson Organization Ltd. [1969] N.M.L.R. 104 and Ipinlaiye II v. Olukotun [1996] 6 N.W.L.R. (Pt.453) 148 at 167.

The respondents' counsel in his reply on issue 1 argued that the plaintiffs/appellants had not raised any issue at the trial court and the court below as to the admissibility of exhibits 6 and 6A and that arguments on the documents could not be raised in this Court unless leave was first sought and obtained to raise the issue - Oforkire v. Maduiké [2003] 5 N.W.L.R. (Pt.812) 166 at 182. With respect to the admissibility of exhibit 7, it was counsel's argument that as the plaintiffs did not in their pleading deny that there had been three previous court decisions in favour of the defendants concerning Egbokongbo water, the fact was to be deemed as admitted and therefore not an issue in the current case. Counsel relied on Broadline Enterprises Ltd. V. Monterey [1995] 9 NWLR (Pt.417) 1 at 29; Lewis & Peat v. Akhimien [1976] All N.L.R. 365 at 369. It was submitted that the plaintiffs having admitted the existence of the said judgment had thereby relieved the defendants the burden of proving them - Yesuf v. Oyetunde [1998] 12 NWLR (Pt.579) 483 at 497. It was finally submitted that the plaintiffs bore the burden of proving that the court decisions were not binding on them - Ajao v. Alao [1986] 5 NWLR (Pt.45) 802 at 822; Onobruhere v. Esegine [1986] 1 NWLR (Pt.19) 799 at 806-807; Tsakwa & Sons Co. Ltd. V. U.B.N. Ltd. [1996] 10 N.W.L.R. (Pt.478) 281 at 299; and Nigeria Maritime Services Ltd. V. Afolabi [1978] 2 SC.79.

It seems to me that the plaintiffs/appellants not having raised objection to the tendering in evidence of exhibits 6 and 6A before the court of trial and not having appealed against the same before the court below could not raise the matter before this court unless leave was first sought and obtained to raise it as a fresh matter on appeal. See Uor v. Loko [1988] 2 NWLR (Pt. 77) 430.

Exhibits 6 and 6A were tendered in evidence by D.W.7 and the

relevant proceedings for 6/11/97 read:

“At the settlement in 1950, the water in question Egbokongbo was given back to us. In 1956, it was the same Egbokongbo and the same river was given us and this was when we put overseers there. For the settlement of 1950 and 1956, I have documents of settlement which are with my lawyer. If I see them, I can identify them from the stamp and signature of the Etsu. These are the two documents of 1950 and 1956.”

Mr. Isyaku: The documents are identified and I seek to tender them in evidence but they are in Hausa and my colleague might not be able to read them. We undertake to translate them into English language.

Mr. Olushola: No objection.

Court: Mark the 1950 document as exhibit 6 and the 1956 one as exhibit 6A”

It is apparent that the counsel who appeared for the plaintiffs/appellants at the trial court had not opposed the tendering in evidence of exhibits 6 and 6A. Further, in their appeal before the court below, the plaintiffs had not complained about the admission in evidence of the exhibits. The plaintiffs/appellants are disabled from raising the matter which is a fresh one before this Court without first seeking and obtaining the requisite leave.

The tendering in evidence of exhibit 7 is a different matter. Plaintiffs’ counsel opposed the tendering of exhibit 7 on the ground that only a certified copy of it was receivable in evidence since it was purported to be a court record. The trial court notwithstanding the objection received it in evidence. Before the court below, the plaintiffs/appellants raised the issue and the court below at page 255 of the record said:

“Learned counsel referred to the arguments of the Appellants’ counsel in paragraph 6.1 of his brief and conceded that Exhibit 7 supra is a public document but submits that since the facts that the case was decided between the present parties (or their privies) and that the decision over title was in Defendants’ favour were both not in dispute before the trial court, Exhibit 7 was therefore not tendered in proof of its existence or condition under section 97(1) of the Evidence Act. Rather what was sought to be established was that the parties (or their privies); the issues;

and the subject matter had been decided upon previously and not appealed against. Indeed Appellants are not denying that the trial took place. The trial high Court also confirmed that in his findings at p.131 lines 17-27 of the Record. It was clear as held by the trial court that EGHOKONGBO is therefore caught up by the doctrine of *Res judicata*. Again, learned counsel for the Respondents further contended, the above decision of the trial court did not deal with the admissibility or not of Exhibit 7 because that was not the issue as the fact of the decision of Ebbo Area Court was never disputed. The Appellants did not appeal against the findings of the trial high court and particularly against the finding that the Plaintiffs claim over EGBOKONGBO water is *Res judicata*. This Court cannot interfere with the decision of the trial court vis-a-vis Exhibit 7. It cannot be taken as an inadmissible exhibit as there was no cause for so holding.”

I think, with respect to their Lordships of the court below that they were in palpable error in their conclusion that exhibit 7 was receivable in evidence. Exhibit 7 was tendered to support the plea of estoppel per *res judicata*, which the defendants raised. The plaintiffs pleaded in paragraph 1 of their reply and defence to the counter-claim that there were no binding cases previously decided between parties which settled the ownership of the waters and lands in dispute. In Ihenacho Nwaneri & Ors. v. Oriuwa & Ors. [1959] 4 F.S.C. 132, the court considering the nature of the doctrine of estoppel per rem judicatam observed:

*“It is well known that before this doctrine can operate, it must be shown that the parties, issues and subject-matter were the same in the previous case as those in the action in which the plea of *res judicata* is raised.”*

In *New Brunswick Rail Co. v. British and French Trust Corporation Ltd.* [1939] A.C. at pp. 19-20, the court said:

“The doctrine of estoppel (per rem judicatam) is only founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in any action in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.”

In *Dzungwe v. Gbise* [1985] 2 NWLR (Pt.8) 528 at 539, this Court per Aniagolu JSC observed:

“The principle of res judicata decided in (1843) HENDERSON V. HENDERSON (1843)67 E.R. 313 at 319 was adopted in this country in FABUNMI V. DELEGAN (1965) N.M.L.R. 369 at 373 and was amplified by the pronouncement of Diplock, L.J., in MILS V. COOPER (1967) 2 All E.R. 100 at 104 who said -

‘The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though non the worse for that. Although Hoystead v. Taxation Commissioner did not purport to break new ground, it can be regarded as the starting point of the modern common law doctrine, the application of which to different kinds of civil actions is currently being worked out in the courts. This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his previous cause of action or defence, if the same assertion was an essential element in his cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceeding to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him.’

The sound reasoning behind this principle is that a litigant is not permitted to nibble at his claims - breaking them down and taking them piecemeal. He is expected to bring all his claims, belonging to the same subject matter, at one and the same time. If he chooses to bring them piecemeal he may be met by the doctrine of res judicata or where appropriate, issue estoppel, as happened in FIDELITAL SHIPPING CO. LET v. V/O EXPORTCHLEB (1966) 1 Q.B. 630 and also recently H McILKENNY V. CHIEF CONSTABLE OF THE WEST MIDLANDS AND ANOR, (1980) 2 W.L.R. 689. This Court in LAWAL V. CHIEF DAWODU AND ANOR. Adopted the reasoning in FIDELITAS SHIPPING CO.

LTD."

The defendants pleaded and relied on previous cases as having finally decided the ownership of the waters and land in dispute as between them and the plaintiffs. The plaintiffs denied that there were any such binding cases. Since estoppel per rem judicatam would only apply when parties, issues and subject-matter in the previous and the current case are the same, it is incontestible that a party who pleaded that there were no such binding case was in fact disputing the applicability of the doctrine. The doctrine is like a package. It is sufficient for a person resisting the applicability of the doctrine to raise the absence of just one of the ingredients; and the person raising it must in that event bear the burden that such a judgment in fact existed. It is my firm view that the plaintiffs having denied the existence of any binding judgment between them and the defendants had sufficiently raised a distinct issue as to the existence of such judgment. The defendants who raised the plea therefore bore the burden of tendering judgments wherein the issue of ownership of the water and land in dispute had been decided between the parties by a court of competent jurisdiction. This then brings into consideration the question whether or not exhibit 7 in the form it was could be tendered in proof of a plea of estoppel per res judicata. Sections 54, 111(1) & (2) and 112 of the Evidence Act provide:

"54. Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court and appearing from the judgment itself to be ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

111.(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his

official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

112. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

Exhibit 7, not being a certified copy ought not have been received in evidence. In *Ipinlaiye II v. Olukotun* [1996] 6 NWLR (Pt.453) 148, this Court per Iguh J.S.C. at 167 said:

"If a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned counsel at the time did not object to its going into evidence. See Mallam Yaya v. Mogoga [1947] 12 W.A.C.A 132 at 133."

I must in the consideration of evidence in this appeal discountenance exhibit 7 which was wrongly received in evidence.

I now consider the admissibility in evidence of Exhibit 10. This was tendered in evidence on 12-12-97 by D.W.9. The evidence relevant to the tendering of exhibit 10 is to be found on page 99 of the record and reads:

"The Zitsu of Ebwa was never turbaned in Dere. I am 41 years old and since I was born I have witnessed the turbaning of one Zitsu which took place at Muye and he was Etsu Isdris Cerba. The evidence I have of this turbaning of the Zitsu at Muye we have some documents on that from Muye and one paper too from case treated by former C.J. Muazu and those papers are with my counsel. If I see the decision of High Court 1 on that issue I can identify it.

Mr. Isyaku - We seek to tender the judgment of High Court 1 in evidence.

Mr. Olushola - We wish to observe on record that this document is nowhere pleaded but if document is deemed material, then we have no objection.

Mr. Isyaku - An issue has been made that the people of Ebwa are virtually subjects of Dere as their Zitsus were also turbaned in Dere. This issue we have denied in paragraph 3 of our Joint Statement of Defence and in furtherance of the denial we are tendering the judgment of High Court B 1 which found that the Zitsus of Ebwa were never turbaned in Dere. On question of not having pleaded the judgment, the S.C. (Supreme Court) has ruled in Mania Construction Company v. Azuibuki, part 136 Nigerian Weekly Law Report — that documents are evidence and evidences are not C to be pleaded in pleadings as long as they are tendered in proof of issues in controversy. Since this is an issue, we are tendering the document and we say the court should overrule the objection more so the counsel has said the court can admit if it's material to the case.

Court - The document no doubt is material to the case at hand and D since the plaintiffs' counsel has said they were not objection if it was material to the case at hand, the objection is hereby over-ruled and that document is accepted in evidence and should be marked as Exhibit 10.

Exhibit 10 taken as read."

E In this Court, plaintiffs/appellants' counsel has argued that the fact in support of which exhibit 10 was tendered was not pleaded and that therefore the exhibit was inadmissible. Respondents' counsel has argued that although the fact in support of which exhibit 10 was tendered was not F pleaded by the defendants, the exhibit was tendered to counter the averment in plaintiffs' Statement of claim that the turbaning of the chiefs from the Ebwa Community i.e. the Zitsus was always done by the Dagagi of Dere. Respondents' counsel relied on Monier Construction Co. Ltd. V. Azubuike [1990] 3 WLR (Pt.136) 74 at 88.

G In paragraph 5 of their amended Statement of Claim, the plaintiffs pleaded:

"The Plaintiffs aver that prior to 1993, the Degaci of Dere was administering and exercising control over all the Communities in Dere H Ward, including their Lands and Waters. Customarily/Traditionally also, all the Zhitsus of all Communities in Dere Ward were being ordained by the Dagaci of Dere until 1993 when EBWA COMMUNITY was granted her own Ward and hence had a Dagaci of her own since then. Up to now,

the Zhitsus of the remaining Communities under Dere Ward are still accountable to, and Being ordained by the Dagaci of Dere.”

There is no doubt that the defendants had the right to call evidence in order to deny the fact pleaded by plaintiffs in paragraph 5 of their amended Statement of Claim. Viewed from this perspective one readily sees that, exhibit 10 if it possessed the requisite quality as required by law, was admissible. However, Exhibit 10, which purported to be a court judgment, was not certified as it should be. It is by law inadmissible. In Olukade v. Alade [1976] 1 All N.L.R. 167 this Court said:

“2. It is however the duty of the opposite party or his counsel to object immediately to the admissibility of such evidence but if the opposite party fails to object:

(a) the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu; but

(b) On appeal, and provided the evidence is one which is, by law, admissible under certain conditions, then since the opposite party failed to object to its admissibility at the court of trial or by implication consented to its admissibility (although the conditions have not been shown to have occurred) he cannot be allowed to raise the objection in the appeal court.

(c) Where, however, evidence is by law inadmissible in any event, it ought never to be acted upon in court (whether of first instance or of appeal), and it is immaterial that its admission in evidence was as a result of consent of the opposite party or that party's default (in failing to make objection at the proper time". (Underlining mine)

I am satisfied that exhibits 7 and 10 ought not have been received in evidence by the trial court and that the court below was wrong not to have rejected them in evidence. In this Court, the two must and will be discountenanced.

I now consider together issues 2 and 3 raised by the plaintiffs/appellants. These issues boil down to whether or not there was enough reason for the decision by the Court below to uphold the conclusion on the evidence of the court of trial. The trial court at page 133 of the record

expressed views on the evidence called thus:

“The plaintiffs rest their claim on possession of these waters and use by proximity of the waters to their respective villages but could not state how they came into possession especially in view of paragraphs 4(a) (c) (d), 6 and 6 of Statement of Claim and counter-claim which states as Mr. Isyaku stated, that the defendants owned waters and allowed them use of the same in return for tribute. D.W. Nos. 3,4,5 and 6 from the neighbouring villages of Achiba, Egba, Azo and Arah said the Ebwas owned the waters and that they usually invited them to fish in them and remove 2 fish from them as tribute and this form of tribute was later changed to N50.00. These witnesses were not discredited. DW 7 corroborated these testimonies and tendered Exhibits 8A - Q and Exhibit 9 which are receipts and permits paid to Government by Ebwa over the Gbokongbo, Emmatsa, Emmatsa-Aba, Eboro, Egoyari, Kuchi Waters. An Exhibit 9 is a list of Waters and its overseers. From that Exhibit, waters in dispute are overseen by Ebwa the Gbokongbo, Emmatsa, Emmatsa-Aba, Eboro, Egoyari, Kuchi Waters. An Exhibit 9 is a list of Waters and its overseers. From that Exhibit, waters in dispute are overseen by Ebwa and those not in dispute are overseen by its owners. That Exhibit which is in Hausa language is translated to read ‘Land Area of the Village Head of Dere’ and it opens with ‘these are the names of Zitsu Ebwa’s waters and their respective caretakers, etc.’ From the list, it shows that the Ebwa own the first five waters in dispute on that list. These are Gbokoingbo, Amatsa, Aboro, Kpatan-Kuchi, Gogyari. From the bits of evidence shown above it’s clear therefore that these waters all belong to the Ebwas with the exception of Emmatsa-Aba, which they did not lead any evidence on.”

And in respect of the evidence called by the defendants in support of the defendants’ counterclaim the trial court said at page 138:

“Finally, I find on the preponderance of evidence before the court the defendants have established ownership of the waters of Gbokongbo, Emmatsa, Egoyari, Epemikuchi and all lands around the said waters, bounded to the North by Cigbaga and Ceku villages, to the East by river Gurara and as well Azo (Kagbogo) and Muye villages, to the West by River Niger and Arah village to the North-East by Egba Village and to the

North-West by Achiba and Soku villages, are owned by the defendants' community and the Court hereby order any further use of the Waters and Lands should be with Defendants' consent."

The court below in affirming the judgment of the trial court said at pages 253 to 254:

"Having considered the submissions of both counsel on this issue together with reply brief I am of the view that the findings and the position taken by the trial court cannot be faulted. The findings are never perverse and we cannot disturb the said findings. The evidence adduced was in line with the pleadings in the counterclaim the issue is hereby answered negatively."

Earlier in this judgment, I held that Exhibits 7 and 10 should not have been admitted in evidence. When evidence, which is inherently inadmissible, is improperly let into the proceedings, an appellate court will discountenance the evidence wrongly let into the proceedings. See Olukade v. Alade (supra).

In the instant case however, there was sufficient evidence on record to sustain the conclusions on evidence of the trial court and the court (*sic* lower court 's) conclusion on the evidence. The result is that the judgments of the two courts will remain unaffected even when exhibits 7 and 10 are discountenanced, as they should be.

In this Court, I am confronted by the concurrent findings of fact by the two courts below. In Enang v. Adu [1981] 11-12 SC 25 t pp. 41-42, this Court per Nnamani J.S.C. said concerning concurrent findings of fact:

"The task of the appellants on this ground of appeal is made more difficult by the fact that there are before us concurrent findings of fact by both the learned trial Chief Judge and the learned Justices of the Court of Appeal. It is settled law that such concurrent findings where there is sufficient evidence to support them should not be disturbed. Kofi v. Kofi 1 W.A.C.A.. 284."

This rule of practice can only be obviated if there is some miscarriage of justice and violation of some principle of law or procedure. The Privy Council in The Stool of Abinabina v. Chief Kojo

Enyimadu [1953] 12 W.A.C.A 171 at 173 quoted with approval a definition of the miscarriage of justice necessary for such a purpose previously given by Lord Thankerton in *Srimatti Devi v. Kumar Ramendre Narayan Roy* 62 F.L.R. 549. This is that

B *“The violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the findings cannot stand or it may be the neglect of some principle of law or procedure, whose application will have the same effect”*

C See also Chief Kweku Serbeh v. Ohene Kobina Karikari [1938] 5 W.A.C.A. 34; Chiwendu v. Mbamali [1980] 3-4 SC 31 and Ibodo v. Enarofia [1980] 5/7 S.C.42.

A close examination of the record and judgment of the court of trial abundantly reveals that it unquestionably evaluated the evidence and appraised the facts. The court below did the right thing by affirming such findings of the trial court. See *Akinbiyi & Anor. V. Obaje & Anor.* [1968] NMLR 242 at 247; *Akintola v. Fatoyinbo Oluwo & Ors.* [1962] 1 All NLR 224 and *Lawal Braimoh Fatoyinbo & Ors. V. Atake Williams* [1965] 1 F.S.C. 67). **Before us in this Court, we are confronted with two concurrent findings by the two courts below. The plaintiffs/appellants have not directed my attention to any erroneous proposition of law or neglect of some principle of law by the two courts below which would lead me to disturb their concurrent findings.**

I shall now consider the appellants issue 4. The court below at pages 256-257 of the record held that trial court did not rely in its judgment on exhibits 8(a) -(g) and that the attempt by the plaintiffs/appellants to raise an issue on the exhibits amounted to raising a fresh issue on appeal. The court below refused to consider the issue relying on *Akpene v. Barclays Bank of Nigeria* [1977] 15c. 47; *Ejiofodomi v. Okonkwo* [1982] 11 S.c.74 and *Attorney-General of Oyo State v. Fairlakes Hotels Ltd.* [198] 5 NWR H (Pt.92) 1 at 49.

I think with respect to the plaintiffs/appellants’ counsel that he did not sufficiently bear in mind that the trial court did not place any reliance on exhibits 8(a) to (g) in its judgment. The record of court at pages 91-

92 on 6/11/97 where D.W.7 tendered exhibits 8(a) to (g) read:

“Witness - I also referred to license and receipt. If I see the same I can identify them. There are the 17 papers.

Mr. Isyaku - We seek to tender the 17 papers in evidence.

Mr. Olushola - We are raising the following objection to the admissibility of these documents - First on the license the license - the licenses have not been duly signed and stamped by the officer deemed to have made them but rather somebody just inserted a signature for the officer supposed to have been signed. The person failed to write his name, his position and no stamp. The date the document was signed was not indicated. The witness not being the maker cannot explain how the document was made. A careful perusal shows various persons signing for the officer without the person's name. We say all these discrepancies of the documents render them valueless and of no evidential value and that being the case, it's of no use in the case. We urge the court to reject the document in evidence. On the receipts, we are not seriously objecting but will address the court as to weight.

Mr. Isyaku - I am surprised that the counsel is talking of witness not being a maker. When the learned friend sought to tender Exhibits 1 and 2, we raised the issue of witness not being a maker and he argued and the court sustained him but that objection on that ground will not hold water. In respect of all objection, they all go to the weight to be attached and not to the admissibility of the document. We urge the court to disregard the objection.

Court - The objections are baseless as they deal with weight and not admissibility. So, the documents are all accepted in evidence and should be marked as Exhibits 8A - G.”

Plaintiffs/appellants counsel objected to tendering of the licences Form F which formed parts of exhibits 8(a) to (g). Counsel did not however object to the tendering of the receipts which were a part of exhibits 8(a) to (g). All that the trial judge said concerning the exhibits is to be seen at pages 134-135 of the record. The court said:

“In addition to the above fact the defendants had licence and permit to fish in those waters (even though permit is not sufficient as evidence of

ownership). They had exhibit 9 too which was a document on their right to oversee waters. It sounds more logical for the owner of property to be asked to oversee it as others might not really have the interest of that property at heart.”

B A trial court before which parties to a dispute have led evidence has the duty to determine which of the versions to accept of the evidence called. Obviously, it does this based on the advantage which it has of seeing and hearing the witnesses testify. An appellate court has not that advantage. This explains why an appellate court does not and should not readily disturb the findings of fact made by the court of trial.

D The plaintiffs/appellants and their counsel are justifiably displeased with the fact that the court of trial preferred the defendants case to theirs. But that is in the nature of all adjudications whether formal or informal. It is immaterial in this case whether or not the trial court had been wrong in receiving in evidence exhibits 8(a)-(g). This is because, the final judgment of the court of trial was **E** not based on the said exhibits. The court below made the same point explicitly when it reproduced the statement by Iguh JSC in *Okoro v. The State* [1998 14 NWLR Pt. 584] 181 at 219 that:

F “The law is well settled that the wrongful admission of evidence shall not of itself be a ground for the reversal of a decision where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted. See *Ezeoke v. Nwagbo* [1990] 1 NWLR (Part. 72) 616 at 630; *Umeojiako v. Ezenamno* [1990] 1 NWLR (Part 126) 253 at 270 and *Monier Construction Company Ltd. V. Azubuike* [1990] 3 NWLR (Pt. 136) 74 at 88 “.

G The reasoning of Iguh JSC above flows from the provisions of Section 227(1) of the Evidence Act, which reads:

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

been the same if such evidence had not been admitted”.

The conclusion I arrive at is that exhibits 8(a) to (g) played no part in the conclusion arrived by the trial court. It is therefore immaterial that the court below had not considered whether or not exhibits 8(a) to (g) was wrongly received in evidence. B

Under issue No.5 appellants’ counsel argued that the court below was in error to have said at page 255 of the record as follows:

“On the issue of exhibit 8(a) - (g) the fact was that the defendants therein tendered through DW7 yearly fishing licenses issued to them by the Niger State Government upon payment of fees. The licences not only gave them right over the waters specified therein but supported their claim of ownership.” C

Counsel argued that at common law, a licensee has no estate in a property and that in a licence the owner does not part with possession of the property but merely allows the licensee the use of same for a certain purpose. Counsel relied on Akpiri v. WAAC (1952) W.A.C.A 195 and Chukwumah v. Shell Pet. Dev. Co. Nig. Ltd. 4 N.W.L.R. (Pt. 289) 512. D

I think that the court below was in error to have said that the licences supported the defendants’ claim of ownership of the land in dispute. The trial court knew enough to state at page 134 of the record that “permit (sic) is not sufficient as evidence of ownership”. The error of the court below on the point however is not enough a reason to reverse its conclusion in the case. I am satisfied that there was sufficient evidence before the court other than exhibits 8(a) to (g) which could sustain the conclusion arrived at. F

The respondents/cross-appellants did not put across any argument in support of their cross-appeal. At page 25 of the respondents/cross-appellants’ brief, counsel stated: G

“The question whether or not appellants’ counsel had been served with the Respondents cross-appeal had been laid to rest following the order of the lower court that he should be so served as evidenced by the fact that the said counsel thereafter filed his brief of argument in respect of the cross-appeal. At pp. 195-199 is respondents/cross-appellants brief and at pp.204-208 is the appellants/cross-respondents’ brief. The later H

brief displaced their earlier brief at pp.200-203".

Now at page 268 of the record of proceedings, the court below in its lead judgment concluded thus:

"It is surprising for this court to observe that the record of this court filed contains pages 1-3 as addendum. It is correct that the last page of the Record is p.149. None of the counsel in court not even the Appellants' counsel, raised this issue when the appeal was being argued on 30/5/2000 and last on 18/7/2000 when this court heard the counsel on issue of jurisdiction of the trial court. When I searched the courts file there was no indication that the Notice of Cross-Appeal has been duly served on the appellants or their counsel. The INDEX does not contain or refer to the said Notice of Cross-Appeal. Since the Appellants counsel was not duly served with the said Notice of Cross-Appeal he cannot be blamed for not responding to it. The said Notice stands struck out. On the whole the appeal is dismissed. The decisions of the trial court is affirmed. The Respondents are entitled to COSTS which I assessed at N5,000.00 (Five thousand Naira) against the Appellants."

The court below struck out the cross-appeal in the belief that it was not served on the plaintiffs/appellants. The respondents/cross-appellants' before the court below an application that the cross-appeal erroneously struck out be relisted for hearing. As the cross-appeal was never heard by the court below, it is not a right course to bring the cross-appeal before this Court. The said cross-appeal is accordingly struck out.

In the final conclusion, this appeal fails. It is dismissed with N10,000.0 costs in favour of the defendants/respondents.

G

ONU JSC

I have had the opportunity to read in draft the judgment of my learned brother Oguntade, JSC just delivered. I am in entire agreement with him that the decisions of the two courts below constitute concurrent findings of facts with which I will decline to disturb.

This is the moreso, as there has not been shown some miscarriage of justice or a violation of some principles of law or procedure in these

conclusions they have arrived at. See *Alhaji K.O.S Are & Anor v. Raji Ipaye & ors* (1990) 2 NWLR (Pi. 132) 298 at 317; *Enang v. Adu* (1983) SCNLR 25 at 42; *Ojoimu v. Ajao* (1983) 9 SC 22 at 53; (1983) SCNLR 156; *Western Steel Works v. Iron & Steel Workers Union* (1987) 1 NWLR (Pt.49) 284 and *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718, to mention but a few.

In consequence, I too dismiss this appeal and strike out the cross - appeal (both of which fail). I make similar consequential orders inclusive of those as to costs contained therein.

C

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Oguntade JSC. I agree with it and, for the reasons he has given I, too, dismiss the appeal with N10,000.00 costs to the Respondents.

E

TOBI JSC

This appeal concerns some communities in Niger State. The first set of communities number four: Dere, Eshi, Kuchi and Apataku. They are together, represented by ten persons. The second community is Ebwa. It stands alone but also represented by ten persons. And so both parties have in common ten representatives each, making a score in the case representing the two sets of communities. They seem to love the number, ten. That is about all they seem to love together. They were living together peacefully until the year, 1993 when things started falling apart. The quarrel has to do with waters and lands.

The appellants were the plaintiffs. Their case is that they having settled and been in possession of the land and waters in dispute from time immemorial are entitled to customary rights. It is their case that prior to 1993, the Dagaci of Dere was the person who exercised control over all communities in Dere Ward, which included the respondents who were the defendants in the High Court. It was not until 1993 that the Ebwa

community was granted their own ward. It is their case that upon the excision of Ebwa Community from Dere Ward in 1993, the respondents had and still have eighteen waters surrounding/adjoining her lands to her exclusive possession.

B After the excision of Ebwa Community from Dere Ward the appellants claimed that they left with the lands and waters in dispute. This is because from time immemorial, their communities have always been in possession of the lands and waters. They claimed that they have always lived on the lands and cultivated same and the waters have always been their source of livelihood, fishing, bathing, cooking and drinking among other things. The appellants also relied on their proximity to the lands and waters in dispute as another basis for their claim as against the respondents who are far from them. The appellants made several allegations against the respondents of violent attacks on their many properties and persons, thus causing damages to their properties and injuries to their persons.

The respondents, as expected, have quite a different story to tell. They denied the case of the appellants and claimed that they have been occupying the area in dispute from time immemorial and in consequence owned all the lands and fishing ponds around the area. It is their claim that all the people in the area accepted the overlordship of the Ebwas by paying tribute on the first fishing day. The respondents also relied on certain decisions in their favour and pleaded that they have been paying money to the government in respect of the disputed lands and waters.

The appellants filed an action seeking for nine reliefs. The respondents filed a counter-claim seeking for four reliefs. After hearing the evidence of witnesses from both sides and address of their counsel, the learned trial Judge held that the appellants did not prove their case in respect of title and dismissed the case. The learned trial Judge however awarded the sum of N154,000.00 to the appellants as damages in respect of two boats, two nets, injury and psychological distress. The appeal to the Court of Appeal was dismissed.

Dissatisfied, the appellants have come to the Supreme Court. Briefs were filed and duly exchanged. The appellants formulated the following issues for determination:

“3.1 Whether the court below was right when it confirmed the decision of the trial court admitting Exhibits 7, 10 and other relevant exhibits?”

3.2 Whether the Appellants were under a legal duty to prove or establish more than one root of title or a specific root of title to succeed? B

3.3 Whether the decision of the trial court dismissing the Appellants’ claim for declarations and granting the Respondents’ Counter-Claim which was affirmed by the court below was against the weight of evidence adduced at the trial?

3.4 Whether or not the issue of the admissibility of Exhibits 8(a)-(g) was a fresh point for which the leave of court was required as held by the Court of Appeal? C

3.5 Whether the Court of Appeal was correct when it held that Exhibits 8(a)-(g) were evidence of the Respondents’ ownership of the waters against the Appellants?” D

The respondents formulated the following issues for determination:

“1. Whether exhibits 7 and 10 were wrongly admitted in evidence. (Grounds 1 and 4) E

2. Whether the Court of Appeal was right when it upheld the decision of the trial Court that

(i) the Plaintiffs/Appellants failed to prove how and through whom title devolved to them, and

(ii) that the Defendants/respondents had proved better title. (Grounds 2 and 3) F

3. Whether the Court of Appeal was right when it held:

(1) that the complaint that exhs. 8(a)-(g) were registrable instruments raised a fresh issue; and G

(2) that exhs. 8(a)-(g) supported the Defendants/Respondents’ counterclaim for ownership of the disputed Waters. (Grounds 5 and 6).”

Learned counsel for the appellants, Mrs O. O. Soyebo, submitted on Issue No. 1 that the Court of Appeal was wrong when it confirmed the decision of the trial Court in admitting Exhibits 6, 6A and 7. She contended that the documents being public documents ought to have been certified under sections 111(1) and 112 of the Evidence Act. She relied on Minister H

of Lands, Western Nigeria v. Azikiwe (1969) NSCC (Vol. 6) 31 and Anatogu v. Iweka II (1995) 8 NWLR (Pt. 41 5) 547 and 571 and

Taking Exhibit 10, the judgment of the High Court of Justice No. 1, Minna, learned counsel pointed out that the exhibit was not pleaded and
B therefore inadvertently admitted by the trial Judge. She relied on Woluchem v. Gudi (1981) 5 SC 291 at 319 and 320; Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248 at 261; Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1 at 14 and NIPC v. Thompson Org. Ltd. (1969) NMLR 104.

Learned counsel submitted that a trial court must act on admissible
C evidence only. She relied on Ipinlaiye II v. Olukotun (1996) 6 NWLR (Pt.453) 148; and Minister of Lands, Western Nigeria v. Azikiwe (supra). Relating Exhibits 6, 6A and 7 to the finding of res judicata by the trial Judge, learned counsel argued that as the exhibits were inadmissible, the finding
D of res judicata automatically collapses. She called in aid section 227(1) of the Evidence Act.

On Issue No. 2, learned counsel submitted that on the authority of Idundun v. Okumagba (1976) 10 NSCC 445, both the trial court and the
E Court of Appeal were wrong in coming to the conclusion that in proving title to land, possession and traditional history must of necessity, go together. To learned counsel, a party can rely or base his case on one or more of the ways of proving title as given by this Court in Idundun v.
F Okumagba (supra) and he is not bound to plead and prove more than one root of title to succeed. She relied on Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301; Nwosu v. Udejaja (1990) 1 NWLR (Pt. 125) 188 at 218; Ige v. Ajoku (1994) 4 NWLR (Pt. 340) 535 at 545 and Biariko v. Edeh-Ogwuile (2001) 4 SC (Pt.111) 96 at 114.

Learned counsel submitted on Issue No. 3 that the decision of the trial Judge which was affirmed by the Court of Appeal dismissing the appellants claim and granting the respondents counter-claim is against the weight of evidence adduced at the trial. Counsel took pains to go through
G
H part of the evidence of PW1, which she said was corroborated by PW2, PW3, PW4, DW2, DW3 and DW6. She laid emphasis on the evidence of facts of proximity of the appellants of the disputed lands and waters. She described the evidence led by the respondents as “*vague and bogus*

traditional evidence". She reinforced her earlier argument on Exhibits 6, 6A and 7 and cited Nwosu v. Udeaja (supra) and Adomba v. Odiase (1990) 1 NWLR (Pt. 125) 169 at 181, 184 and 186. It was the submission of learned counsel that the exhibits were basically one-paged documents, extremely brief in content and could not properly or adequately ground a plea of res judicata. B

On the evaluation of the evidence of the appellants, learned counsel submitted that the learned trial Judge did not properly evaluate their evidence and the Court of Appeal was in error to have endorsed the findings of the trial Judge. While conceding that this Court does not normally disturb the concurrent findings of facts of the High Court and the Court of Appeal, counsel urged us to do just that on the ground that the findings are perverse. She referred to Incar (Nig.) Ltd. v. Adegboye (1985) 2 NWLR (Pt. 8) 453 at 455; Alakija v. Abdulai (1998) 6 NWLR (Pt. 566) 370 at 385; Odiba v. Azega (1998) 9 NWLR (Pt. 566) 370 at 385 and Agbomeji v. Bakere (1998) 9 NWLR (Pt. 564) 1 at 19. C D

Taking Issue No. 4, learned counsel submitted that the point whether Exhibits 8(a)-(g) are registrable instruments which were not registered and consequently inadmissible cannot be regarded as new issue for which leave of court is required before it can be properly raised. In the circumstances, the Court of Appeal was wrong to hold that the said point is a new issue for which the appellants required the leave of the court to raise. Learned counsel submitted that the Court of Appeal was wrong in holding that Exhibits 8(a)-(g) were evidence of the respondents ownership of the waters, as the exhibits were licences purportedly issued by the respondents which allowed them use of water for a specified period. Relying on Akpiri v. WAAC (1952) WACA 195 and Chukwumah v. Shell Pet. Dev. Co. Nig. Ltd. (1993) 4 NWLR (Pt. 289) 512, counsel submitted that at common law, a licensee has no estate in a property as in a licence, the owner does not part with possession of the property but merely allows licensee use of same for a certain purpose. She urged the Court to allow H the appeal. F G

Learned counsel for the respondents, Ibrahim Isiyaku, Esq. submitted on Issue No. 1 that as there was no ground of appeal on the

admissibility of Exhibits 6 and 6A, this Court should discountenance the complaint and arguments contained in the brief. He contended that the complaint against Exhibits 6 and 6A is a fresh one not having been raised in the Court of Appeal and no prior leave was sought to raise same in this Court. He referred to *Oforkire v. Maduike* (2003) 5 NWLR (Pt. 812) 166 at 182.

Although counsel conceded that Exhibits 6 and 6A are admissible subject to certification, he submitted that the appellants cannot raise the issue now as the appellants made no objection at the trial court when they were tendered. He referred to *Etim v. Ekpe* (1983) 1 SCNLR 120 at 132; *ULFIC Ltd. v. IBWA* (2001) 7 NWLR (Pt. 713) 610 at 626 and 627; *Oguma v. IBWA Ltd.* (1988) 1 NWLR (Pt. 73) 658 at 669-671

Dealing with Exhibit 7, learned counsel referred to paragraph 1 of the Reply and Defence to Counter-Claim and submitted that the averment did not amount to a denial of the existence of three previous decisions over the Egbokongbo Water. Accordingly, the fact that the three previous cases decided ownership in favour of the defendants was no longer the issue, counsel argued. He referred to *Broadline Ent. Ltd. v. Monterey* (1995) 9 NWLR (Pt. 417) 29 and *Lewis and Peat v. Akhimien* (1976) All NLR 365 at 369.

Learned counsel further argued that since the plaintiffs were the persons that averred that the three decisions were not binding, the burden of proving the assertion was on them. He referred to sections 135, 136 and 137(1) and (2) of the Evidence Act and the following cases: *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802 at 822; *Onobrichere v. Esegine* (1986) 1 NWLR (Pt. 19) 799 at 806 and 807; *Tsokwa and Sons Co. Ltd. v. UBN Ltd.* (1996) 10 NWLR (Pt. 478) 281 at 299; *Nigeria Maritime Services Ltd. v. Afolabi* (1978) 11 NSCC 80 at 83 and *Broadline Ent. Ltd. v. Monterey* (1995) 9 NWLR (Pt. 417) 46 and 47. Citing *Yesuf v. Oyetunde* (1998) 12 NWLR (Pt. 579) 483 at 497, learned counsel submitted that what has been admitted no longer requires proof.

Even if Exhibits 6, 6A and 7 (all relating to only Agokongbo water) are discountenanced, Exhibit 9 was clearly in favour of the fact that the property belonged to the respondents, counsel argued. He relied on

relevant findings of the trial Judge on the exhibit and said that the findings were not challenged by the plaintiffs in the Court of Appeal. He submitted that the findings of the learned trial Judge and the Court of Appeal which were not challenged by the plaintiffs can sustain the decision of the two courts in respect of the ownership of Egbokongbo water. He referred to *B Monier Construction Co. Ltd. v. Azubuike* (1990) 3 NWLR (Pt. 136) 74 at 88; *Umeojiako v. Ezenamuo* (1990) 1 NWLR (Pt. 126) 253 at 270; *Ezeoke v. Nwagbo* (1990) 1 NWLR (Pt. 72) 616 at 630 and section 227(1) of the Evidence Act.

On Exhibit 10, learned counsel conceded that the exhibit was not pleaded but facts in proof of which the exhibit was tendered by the defendants and admitted in evidence were pleaded by the plaintiffs in their Amended Statement of Claim. Counsel referred to paragraphs 4, 5 and 7 of the Amended Statement of Claim. Calling in aid the case of *D Dokubo v. Omoni* (1999) 8 NWLR (Pt. 616) 647 at 664 and 665, learned counsel submitted that although the rule is that a party may not lead evidence outside his pleadings, he can do so on a point raised in the pleadings of the other party. Counsel also said that Exhibit 10 was not objected to when it was tendered and was properly admitted.

On Issue No. 2, learned counsel submitted that the plaintiffs' claim that they owned the waters in dispute from time immemorial as basis of ownership by their ancestors was not pleaded nor was evidence led in proof thereof. Learned counsel dealt in some detail from pages 13 to 18 of the respondents brief the case of each of the four communities, including the evidence led by the witnesses and submitted that the courts correctly came to the conclusion that they did not prove ownership of the properties. He specifically dealt with some aspects of the evidence of PW1 to PW6. Relying on *Ugochukwu v. Unipetrol* (2002) 7 NWLR (Pt. 765) 1 at 16 and *Okhwarobo v. Aigbe* (2002) 9 NWLR (Pt. 771) 29 at 47, 60 and 62, learned counsel submitted that the evidence of PW1 on the payment of tribute to the Dagaci of Dere was not pleaded and therefore go to no issue.

Taking the case of the plaintiffs on administrative control or arrangement as basis of ownership, learned counsel submitted that it is not

one of the ways of proving title. He referred to *Morenikeji v. Adegbosin* (2003) 8 NWLR (Pt. 823) 612 at 661 and 662; *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511 and *Alli v. Alesinloye* (2000) 6 NWLR (Pt. 660) 177. Learned counsel also submitted that the plaintiffs spent time giving evidence on the fracas between them and the defendants and failed to prove how their possession was derived. Referring to the case of *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511 at 548 and 549, learned counsel submitted that possession can only be relied on as a shield not a sword; it is not a weapon of attack but of defence to a claim for title.

Counsel took the case of the defendants from pages 17 to 19, examining the evidence of almost all the witnesses. Counsel submitted that the plaintiffs who relied on ownership from time immemorial could not show how their ancestors derived title and person or persons through whom title devolved to them. He referred to *Ezewusim v. Okoro* (1993) 5 NWLR (Pt. 294) 478 at 499; *Kalio v. Woluchem* (1985) 1 NWLR (Pt. 4) 610 at 620, *Idundun v. Okumagba* (supra) and *Are v. Ipaye* (1986) 3 NWLR (Pt. 29) 416 at 425.

On Issue No. 3, learned counsel submitted that the Court of Appeal was right when it held that the complaint that Exhibits 8(a)-(g) were registrable instruments raised a fresh issue and that the exhibits supported the defendants' counter-claim of ownership of the disputed waters. He referred to paragraph 7 of the statement of defence, the evidence of DW 7 and the following cases: *Oforkire v. Maduiké* (supra); *Salami v. Mohammed* (2000) 9 NWLR (Pt. 673) 469 at 478 and 479 and *Okenwa v. Military Governor Imo State* (1996) 6 NWLR (Pt. 455) 394 and 407.

On the cross-appeal, learned counsel submitted that the refusal to hear the cross-appeal in view of the earlier order of the Court of Appeal dated 12th April, 2000 and to consider the appellants' reply on respondents' argument on Issues 6 and 7 was a breach of fair hearing in respect of the cross-appeal. He requested that the Court remit the cross-appeal to the Court of Appeal for a hearing. Counsel finally urged the Court to dismiss the appeal.

In the Reply Brief, learned counsel submitted that there was sufficient denial of the existence of the three previous decisions over

Egbokongbo water and reinforced his earlier argument that there was no binding case which had previously decided the issue of ownership of the waters and lands subject matter of the suit between the parties. Relying on the case of *Otaru v. Idris* (1999) 4 SC (Pt. II) 87 at 94, learned counsel submitted that the burden of proof remained on the respondents to show B that there were cases which had so decided.

On Exhibits 6 and 6A, learned counsel contended that even if there is no ground of appeal challenging the exhibits, the courts have still, always been cautious in relying on same. He attacked Exhibit 9 on similar ground C and dismissed the exhibit as “*merely a letter from Lapai Emirate Council showing that it had appointed Ebwa to oversee some waters...*”

Referring to paragraph 3 of the Defendants Joint Statement of Defence, learned counsel submitted that the paragraph was a general denial D which cannot be regarded as a proper traverse. He referred to *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 741 and *Odiba v. Muemue* (1999) 6 SC (Pt. 1) 157 at 161. Arising from paragraph 3, counsel submitted that issues were never joined by the parties, thus the respondents led evidence E outside their pleadings which must be jettisoned as such evidence goes to no issue. He referred to *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285 and 289; *George v. Dominion Flour Mills* (1963) 1 All NLR 71 and *NIPC v. Thompson Organization* (1981) 1 All NLR 138.

Learned counsel submitted that the respondents totally miscon- F strued the case of the appellants when they submitted that their case was predicated on administrative control. He also pointed out that the issuance of licences to the respondents cannot constitute one of the five ways of establishing title. He argued that a licence cannot convey any estate in the G land or area covered by the licence in the licensee; it only at best, in some cases, allows the licensee to carry away and dispose of products in certain circumstances. He referred to Megarry and Wade, *The Law of Real Property*, 4th edition at page 776.

Learned counsel did not agree with the submission in the H respondents brief that possession can only be relied on as a shield and not a sword. He referred to *Idundun v. Okumagba* (supra) and *Awara v. Alalibo* (2002) 12 SC (Pt. 1) 77.

Counsel also dealt with the submission of the respondents that the appellants' failure to state how their ancestors derived title and person through whom title devolved to them, was prejudicial to their case. While not conceding to the submission, counsel argued that it also applied to the counter-claim, which must fail. He referred to *Okhwarobo v. Egharevba* (2002) 5 SC (Pt.1) 141 at 153.

There are quite a number of issues to be sorted out in this appeal. I do hope I am able to do that. I will follow the trend provided in the appellants' brief, with right to dislocate it in relevant aspects. So much of the quarrel is on the admissibility of some of the exhibits and so I will pick the appeal from there.

The appellants started from Exhibit 7 and moved to Exhibits 6 and 6A and 10 under Issue No. 1. Let me follow that trend. Exhibit 7 is the judgment of Area Court, Ebbo. Exhibit 6 is the decision of the Lapai Native Court. Exhibit 6A is a decision of the Lapai Native Authority.

I entirely agree with the submission of learned counsel for the appellants that the above exhibits are public documents within the meaning of section 109 of the Evidence Act. As public documents, they ought to have been certified within the meaning of section 111 before they could be produced in proof of their original content, as required by section 112 of the Act. See *Ike v. Ibekundu* (1985) HCNLR 522; *Minister of Lands, Western Nigeria v. Azikiwe* (1969) 16 NSCC 31 at 38; *Anatogu v. Iweka II* (1995) 8 NWLR (Pt. 415) 547 at 571-572; *Oba Okiki II v. Jagun* (2000) 6 NWLR (Pt. 655) 19.

I should however recall here the submission of learned counsel for the respondents that nothing was raised in the Court of Appeal on the admissibility of Exhibits 6 and 6A and that this Court should discountenance the complaint and argument against their admissibility. To learned counsel, the complaint now made by the appellants against Exhibits 6 and 6A is a fresh issue where no prior leave was sought to raise it at this Court.

What is the reply of learned counsel for the appellants? There is no specific reply to the above by learned counsel for the appellants. Did she forget to respond to this important point? Why will she ever forget to do so? Instead of replying to the point, learned counsel got to another aspect

of the exhibits which learned counsel for the respondents touched at page 7 of the respondents brief on lack of ground of appeal challenging the admissibility of the two exhibits.

In her response to the above, learned counsel for the appellants begged the very serious and important issue when she said as follows: B

“Finally, even if there is no ground of appeal challenging Exhibits 6 and 6A which are decisions of Native Courts, the court have, still, always been cautious(sic) in rely(sic) on them.”

With respect, this is a very strange submission which is not backed by law, substantive or procedural; and I think it concerns procedural law. C
And what is more, counsel did not cite any case to substantiate the principle she introduced, particularly when she credited to the courts that they have been cautious in relying on decisions of Native Courts. I must confess that I know of no such adjectival law and I was prepared to learn but counsel D
did not release to me the benefit of her knowledge on this issue.

A ground of appeal is the complaint the appellant has on the decision of the lower court. By the ground of appeal, the appellant tells the appellate court that he is not satisfied with the judgment of the trial or lower court E
and he spells out clearly the specific area he is not satisfied with. An issue raised in an appeal affecting the decision of the lower court must be backed by a ground of appeal. Where there is no ground of appeal supporting the issue raised, it will be discountenanced or rejected by the appellate court. F
Grounds of appeal are the taproots of the case on appeal as they lay the foundation upon which the case grows in the appellate court to fruition. As there is no ground of appeal supporting or vindicating Exhibits 6 and 6A, the arguments on the exhibits by the appellants are to no issue and I G
so treat them.

I am almost forgetting the first issue raised on the two exhibits. Let me quickly return to it. It is the submission of learned counsel for the respondents that the issue of admissibility of the two exhibits was not raised at the Court of Appeal. This is the one that learned counsel for the H
appellants kept mute; certainly not for malice. I will speak or talk on it.

The appellants’ Brief at the Court of Appeal is at pages 165 to 175 of the Record. The issues for determination are at page 166. They are six.

Of the six issues, Issue No. (C) seems to be closest to the exhibits. Let me quickly read it:

“Whether the Lower Court erred in admitting and relying on inadmissible evidence and whether such error had occasioned a miscarriage of justice.”

In my hurried reading of the arguments in the 11-page brief, I did not see any argument raised on the admissibility of Exhibits 6 and 6A. If I did not see any argument in the two exhibits because I was in so much hurry, I cannot say that learned counsel for the respondents was in equal hurry. He must have read the brief properly to come out with the submission.

The law on raising fresh issue in an appellate court is trite and cannot be basis of controversial jurisprudence. A party to an appeal can raise a fresh issue on appeal but only with leave of the court. This is because the law does not want the party to take unnecessary advantage against the adverse party on appeal and that the party applying to raise the new issue must satisfy the court that it is proper to do so. Where the party fails to secure the permission of the court, which is the whole essence of the leave, he cannot raise the fresh issue. See generally *Abanabina v. Enyimadu* 12 WACA 171; *Ejifodomi v. Okonkwo* (1982) 11 SC 74; *Dweye v. Iyomahan* (1983) 8 SC 76; *Awote v. Owodunni* (1986) 5 NWLR (Pt. 46) 941; *Uor v. Loko* (1988) 2 NWLR (Pt. 77) 430.

And so in the twin submissions of learned counsel for the respondents, I agree that the appellants cannot be heard to destroy the exhibits in this Court. It is rather late, too late in the day to do so. I will not listen to the appellants because there is no legal basis to listen to them. And so Exhibits 6 and 6A stand and with all the strength in the judgment of the Court of Appeal. I will return to the two exhibits in the course of this judgment but for now, let me take Exhibit 7 further. I had earlier dealt with it. Let me say here at the expense of prolixity that Exhibit 7, being a public document ought to have been certified under sections 111 and 112 of the Evidence Act. What did counsel for the respondents say on the Exhibit? Although Issue No. 1 in the Respondents’ Brief was on whether Exhibits 7 and 10 were wrongly admitted in evidence, the submissions of counsel

merely danced around Exhibit 7 as they did not say much on the real issue of wrongful admission of the exhibit. There is not much beef, if there is any at all, in the submission of learned counsel on the admissibility of Exhibit 7.

What did the learned trial Judge say about the Exhibit? She made use of it together with Exhibits 6 and 6A at page 131 of the Record:

“DW7 also tendered Exhibits 6, 6A and 7 which are decisions in favour of Ebwa as regards ownership of river Gbokongbo.”

What did the Court of Appeal say about the exhibit? That Court did not see anything wrong in admitting the exhibit. The Court said at page 258 of the Record:

“Having thus analyzed and treated the submissions of both counsel on this particular issue and I hold that the lower court did not err in admitting exhibit 7 and other relevant exhibits as there was no admission by so doing of inadmissible document and certainly by so doing no miscarriage of justice had occurred.”

With respect, I do not agree with the Court of Appeal. Exhibit 7, being a public document, which was not certified under sections 111 and 112, was clearly inadmissible and the learned trial Judge was wrong in admitting it. This time around, counsel did not make the same case as he made in respect of Exhibits 6 and 6A and so I cannot go that distance as I did in respect of the two exhibits. The Court of Appeal made a point and it is in respect of miscarriage of justice. To the Court, there was no miscarriage of justice by the admissibility of the exhibit. I will examine this aspect later in the judgment when I will take the three exhibits - Exhibits 6, 6A and 7.

And that sequentially takes me to Exhibit 10. It is the judgment of the High Court of Justice No. 1, Minna, which nullified the turbaning of Zisu of Ebwa by the village Head of Dere. The case of the appellants is that the respondents did not plead any fact or facts relating to the exhibit. The case of the respondents is that the facts in proof of Exhibit 10 were pleaded by the appellants. He specifically referred to paragraphs 4, 5 and 7 of the Amended Statement of Claim. Let me read them:

“4. Since about 95 years ago up to 1993, the following COMMU-

NITIES formed DERE WARD in Lapai Local Government Area, that is (a) DERE; (b) ESHI; (c) EBWA; (d) KUCHI; &(e) APATAKU.

5. *The Plaintiffs aver that prior to 1993, the Dagaci of Dere was administering and exercising control over all the Communities in Dere Ward, including their Lands and Waters. Customarily/traditionally also, all the Zhitsus of all Communities in Dere Ward were being ordained by the Dagaci of Dere until 1993 when EBWA COMMUNITY was granted her own Ward and hence had a Dagaci of her own since then. Up to now, the Zhitsus of the remaining Communities under Dere Ward are still accountable to, and being ordained by the Dagaci of Dere.*

7. *From time immemorial, the Dagaci of Dere used to delegate any of his agents (including Ebwas) to fish in all Waters under Dere Ward annually and whenever the need ; arose and nobody would cross all such Waters to the other side without the prior approval/permission of the Dagaci of Dere.”*

I think learned counsel for the respondents is correct in submitting that the facts leading to Exhibit 10 were pleaded by the appellants and it is paragraph 5 of the Amended Statement of Claim. In the light of the above, the respondents could rely on the appellants’ pleadings and the trial Judge rightly admitted Exhibit 10.

In *Bamgboye v. Olanrewaju* (1991) 4 NWLR (Pt. 184) 132, this Court held that although the rule is that a party may not be allowed to lead evidence outside his pleadings, a plaintiff will be entitled to lead evidence on a point raised in the defendant’s pleadings. See also *Emegokwue v. Okadigbo* (1973) 4 SC 113; *Chief Dokubo v. Chief Omoni* (1999) 8 NWLR (Pt. 616) 647

Here, the aphorism or cliché which says that what is good for the goose is equally good for the gander applies in respect of the case law as the position relates to a defendant shopping from the plaintiff’s pleadings. I therefore hold that the learned trial Judge correctly admitted Exhibit 10 which has foundation in paragraph 5 of the Amended Statement of Claim. Again, I will return to Exhibit 10 later in this judgment.

I now move to Exhibits 8 (a) to (g). These are the licences tendered through DW7. Counsel for the appellants objected to their admissibility but

the learned trial Judge overruled her objection. The issue before this Court is whether the exhibits are registrable instruments which were not registered and consequently inadmissible is a new issue for which leave of court is required before it can be properly raised.

I have carefully gone through the proceedings in the High Court but I cannot see the issue raised on Exhibits 8 (a) to (g) by the appellants that they are registrable instruments which were not registered. In particular, I have carefully gone through the judgment of the learned trial Judge and I cannot find any submission on the part of counsel for the appellants attacking the exhibits on the ground of non-registration. At page 91 of the Record, Mr. Olushola, counsel for the plaintiffs in the High Court, who are the appellants here in his objection to the admissibility of Exhibits 8 (a) to (g) said:

“We are raising the following objection to the admissibility of these documents - First on the license - the licenses have not been duly signed and stamped by the officer deemed to have made them but rather somebody just inserted a signature for the officer supposed to have been signed. The person failed to write his name, his position and no stamp. The date the document was signed was not indicated. The witness not being the maker cannot explain how the document was made. A careful perusal shows various persons signing for the officer without the person’s name. We say all these discrepancies of the documents render them valueless and of no evidential value and that being the case, it’s of no use in the case. We urge the court to reject the document in evidence. On the receipts, we are not seriously objecting but will address the court as to weight.”

Clearly, the objection was not on the registration of the exhibits and so it becomes a fresh or new issue which needed the leave of court. The Court of Appeal was therefore correct when the Court held that licences were registrable issues as the issue of registration of the licences was not raised in the High Court, leave ought to have been obtained to raise the issue in the Court of Appeal being a new issue. Again, I will return to Exhibit 8 (a) to (g) later in this judgment.

Now that I have taken the exhibits that the appellants complained about, I should go to the issue of proof of ownership of the waters and the

lands. It is the case of the appellants that they proved their ownership of the properties. It is the case of the respondents that the appellants did not prove ownership of the properties and that they the respondents proved ownership. Who is correct? I need not pose the opposite question because
 B once I come out with an answer to the first question, the opposite question will be answered and that is, the person who is not correct was not able to prove ownership of the properties.

Let me start with first elementary but important principles. The
 C burden of proof is on the party who alleges the affirmative. The burden of proof is on the party who will fail if no evidence is led in the case. And in most cases, he is the plaintiff. And in this case they are certainly the plaintiffs who are the appellants to prove the main claim. Of course, the respondents as defendants have the burden to prove the counter-claim.

D Did the appellants prove their claim? They say so but did they really prove their claim? Apart from the common position that the parties were together before 1993, the parties did not agree on most other matters. Most of the evidence given by the appellants was in respect of the fights and
 E quarrels between themselves and the respondents. They gave evidence of how the respondents came to attack them and how they invited the police to effect arrests. They also gave evidence in respect of the wounds they sustained and how they were treated in the hospital. Perhaps, apart from
 F the evidence of PW1, which was more on ownership of the properties than the fights and quarrels, most of the evidence of the other witnesses tilted towards the fights and quarrels.

I should illustrate what I am saying by referring to the ipse dixit of the witnesses. After giving evidence of ownership of the properties in his
 G own way, PW1 zeroed on the fracas in his evidence in-chief at page 48 of the Record:

*“Between 1995 to May 1996, the Dere and Ebwa Communities fought themselves about a river. The fight was about river of Kuchi called
 H Epemi-Kuchi. The alfa of Kuchi went to the river to catch fish and the people of Ebwa village stopped and from there fight broke out.”*

PW2 in his evidence in-chief at page 50 of the Record said:

“In May 1996 people from Ebwa came to fight us; they came

because of water and they said we should not catch fish in that river anymore.”

PW3, in his evidence in-chief at page 58 of the Record said:

“In May 1996 I went to Egogyeri river belonging to Akpataku and we were many together with one Isa and we noticed there was a strange net in the river. So, Isa went to remove it and the people, the defendants, started to beat Isa.”

PW4, in his evidence in-chief at page 68 of the Record said:

“In May, 1996, we were sitting around 10 a.m. when we heard people shouting and we came out 1 - to see the Ebwas (defendants) and we asked : them what happened and they said they came in respect of their water and we asked what water and they said this water - the Egbokongbo river and we said it was false. As we said so, they started beating us; and one Idris Wall was the first person to beat us and they came with more than 20 people. From there, one Shabe Ndace came with a gun and he wore his hunting gown; he started shooting in the air and injured many people.”

PW5, in his evidence in-chief at page 70 of the Record said:

“In May, 1996 we were sitting in Kuchi when my son went to ease himself and 2 Ebwa people met him and held him and said my son went to steal. The boy shouted and people at home heard and another boy went out to meet them fighting. Then my son and we went there and we begged them to please forgive and the Ebwas went back to their village and told their people; then more than 10 Ebwas came out to our village and started fighting... The Ebwas arrested me and took me to Ebwa...”

Finally PW6, in his evidence in-chief at page 78 of the Record, said:

“Sometime in May 1996, we started sitting at home, we the Eshis, when the Ebwas came and met us. The Ebwas started fighting us when they came. They fought us because of our water.”

It is clear from the above that May and 1996 are the magic expressions. The impression is created that all the fracas took place in one month and in the year 1996. I will not go there because this Court has no jurisdiction to go there. After all, the evidence on the fracas earned the appellants some damages and both parties seem to be satisfied since there is no appeal on the issue of damages. But I ask, is the above really evidence

of ownership of the properties? Why the emphasis on the fracas as if it was a criminal case? Certainly, a defendant fighting a plaintiff is not one of the way of proving title within the meaning of *Idundun v. Okumagba* (1976) 9-10 SC 227; and the appellants wasted so much of their time in tendering
 B receipts and other papers of hospitalization in the Court, as if they are capable of proving title. Am I really correct in saying that the appellants wasted so much of their time by tendering receipts? I do not think so. After all, they got some damages in the bargain. I said so above. See Exhibits 3 and 4. What is more, the appellants devoted about six paragraphs of their
 C pleadings to the fracas. Why?

I do not want to give the impression by the above extracts of the evidence of PW1 to PW6 that they only gave evidence of the fracas and did not give any evidence of ownership. The point I am making is that
 D perhaps, apart from PW1, the other witnesses gave more evidence on the fracas than ownership, which was the real issue before the court.

The evidence on the fracas apart, there was some token of evidence of traditional history. I call it “token” because none of the witnesses was
 E able to give an approximate period of their stay there. The learned trial Judge touched the point when she said at page 135 of the Record:

*“The plaintiffs no doubt have settled in this area for many many years and made a case of possession of the waters from years of possession, but none could actually state how long they have been there and PW5
 F during cross-examination said they were first to settle there and later on a further question during cross-examination said only God knows who first settled among the Ebwas, Dere and Kuchi in the South of Lapai. They do not know how long ago and they came and added to this. They were
 G interruptions of disputes in 1950, 1956 and 1972.”*

It is sufficient to note that PW5 in his evidence at page 70 said that “only God knows who first settled in the South of Lapai among the Ebwas, Dere and Kuchis.” Considering the fact that the Deres and the Kuchis are
 H part of the appellants, the evidence of PW5 is not quite in their favour, putting the position mildly. I will not go that far to say that it is evidence against interest.

I think it is appropriate to take the issue of possession here. The

appellants relied on evidence of possession as basis of ownership. It is their claim that having settled and in possession of the lands and waters in dispute from time immemorial, they are entitled to customary rights thereof. It is one thing to claim possession and quite another to prove the possession claimed. B

Acts of possession may be taken as acts of ownership if the circumstances are such that the person in possession ought to be regarded as owner, but more is needed than is required to support a claim for trespass. Where plaintiff proves sufficient acts of possession, the burden C is thrown on the defendant under section 146 of the Evidence Act In order to obtain judgment, the defendant has the onus to rebut the evidence of the plaintiff. See *Onyekaonwu v. Ekumbiri* (1966) 1 All NLR 32; *Oyeyiola v. Adeoti* (1973) NNLR 10; *Adegbola v. Obalaja* (1978) 2 LRN 164.

The learned trial Judge did not see a case of possession made by the D appellants and made reference to the shaky evidence of PW5 which we have already dealt with. The Judge thereafter said and correctly too for that matter:

“Mere possession of land of customary tenant however long cannot E mature to confer rights envisaged in the Act.”

The Court of Appeal was more blunt on the issue:

“It is clear that the Appellants were claiming title through posses- F sion and enjoyment. However, I begin to part company with the Appellants when it was not stated by them as to how they themselves managed to be in possession of the land and the waters in dispute. It could be that their possession was derived from ownership from time immemorial, but then they must show how their ancestors derived title, the person or persons who G founded the land and exercised original acts of possession, and the person(s) through whom title devolved to them.”

In land matters, it is easy for a plaintiff to claim that he owned the land from time immemorial. But that is not the end of the story. The story must go further and paint a genealogical tree of the family ownership of H the land. It is usually a long story of the members of the family in ownership of the land from the past to the present. The plaintiff paints a picture of genealogical lines and names spreading like the branches of a tree, telling

a consistent and flowing story of undisturbed ownership or possession of the land. And the flowing story which should first be told in the pleadings should mention specific persons as ancestors before the witnesses give evidence in court to vindicate the averments in the pleadings.

B I have carefully examined the Amended Statement of Claim and I did not see such genealogical story. The story stopped mainly at the communities. Of course, paragraph 7 averred that *“from time immemorial, the Dagaci of Dere used to delegate any of his agents (including Ebwas) to fish in all waters under Dere Ward annually and whenever the*
C *need arose and nobody would cross all such waters to the other side without the prior approval/permission of the Dagaci of Dere.”*

A few troubling issues arise from the above. What is the name of the first Dagaci? What are the names of the succeeding Dagacis until the
D title came to the 1st appellant, Alhaji Musa Abdulkadir? What were the periods of their reign? I think I can leave the issue of possession now and here, but certainly not before I say that the claim of possession is lame and unattractive. It is not proved.

E Let me quickly pick one submission of learned counsel for the appellants here and it is that the appellants did not base *“their claim on traditional history.”* This is fairly flabbergasting. I do not think the submission of counsel took into consideration paragraphs 4, 5, 6 and 7 of the Amended Statement of Claim. In paragraph 4, the appellants said:
F *“Since about 95 years ago up to 1993...”*. In paragraph 5, the appellants averred that *“prior to 1993, the Dagaci of Dere was administering and exercising control over all the communities in Dere Ward”*. In paragraph 6, the appellants averred that *“in those ancient days when the Palace of*
G *Dagaci of Dere had a thatched roof the Ebwa community used to send representatives to Dere to re-roof or repair the Palace of Dagaci of Dere as and when the need arose”*. And finally in paragraph 7, the appellants averred that *“From time immemorial...”*

H Are the above paragraphs not on traditional history? If they are not, what then are they? Are they talking about English history? Traditional history is history of the tradition of a people. It is history of the customs, cultures, ethos and way of life of a people with a settled native life and

nativity. The expressions “since about 95 years ago”; “in those ancient days” and “from time immemorial” have strong tie with traditional history and are nostalgia of traditional history itself. In my humble view, the appellants cannot run away from a situation they created. PW1, their star witness, in his evidence in-chief also said: “since time immemorial...” B

One claim of ownership by the appellants is their proximity to the waters and lands in dispute. I think paragraph 14 of the Amended Statement of Claim is nearest to the claim of proximity. Learned counsel claimed that while the respondents are about 15 miles away from the disputed waters/lands, the appellants are about 1/2 a mile and 2 feet to the C
disputed water/land. It appears that learned counsel is like me. He is not quite familiar with the modern metre system. But that is not important. The important thing here is the law on proximity vis-a-vis title to property.

In his evidence in-chief, PW1 said at page 47: D

“Between Dere and Eshi is not up to 1/2 mile; between Akpataku and Dere is about 1 1/2 miles. And between Kuchi and Dere is about 2 miles. Between Ebwa and Dere is 15 miles.”

I do not see any clear cut evidence from the above that the appellants E
are in close proximity with the properties in dispute. The witness did not indicate the distance between the communities mentioned above and the properties in dispute. All he did was to mention the proximity amongst the appellants and understandably contrasted this with the respondents’ F
community. That does not, with respect, make so much meaning to me. I take the evidence of PW1 as one of convenience and that underlines my use of the expression understandably above.

There is yet another aspect to the matter. Evidence of proximity per G
se does not vest ownership of land to the party in proximity. The party has to prove that the land belongs to him by clear and unequivocal evidence. There could be situations where proximity is an accident of history which may not necessarily be of any use in determining the ownership of the land in favour of the party in proximity. H

Let me relate the issue to one of the ways this Court enumerated in *Idundun v. Okumagba* and it is the fifth. It reads:

“Proof of possession of connected or adjacent land in circum-

stances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.”

I do not think the appellants went that far in their evidence. Even if they gave such evidence, the Court has a duty to take it into consideration with relevant evidence of the opposing party to arrive at a conclusion one way or the other. The element of probability in Idundun is important, but we are not going there because there is no need to go there.

Now that I have touched Idundun, I should take it in respect of the submission of learned counsel for the appellants on the way the learned trial Judge interpreted the judgment in the context of the five ways of proving title.

The learned trial Judge, after setting out the five ways of proving title to land in Idundun said at page 134:

“*Possession and proximity which are the weapons of the plaintiffs will not come up for determination yet till we have settled the issue of traditional history, if there is any.*”

Learned counsel for the appellants, after quoting the above, also quoted the following dictum of the Court of Appeal:

“*It appears to me that in this matter the Appellants neither pleaded nor called evidence to show who were their ancestors who first they derived their title and through whom title devolved to them. The Appellants as Plaintiffs should be able to state facts and call evidence to support same, then leave everything to the court to draw conclusions of law from the facts pleaded.*”

To learned counsel, by the above, the two courts held that in proving title to land, possession and traditional history must of necessity go together. While I entirely agree with him that the learned trial Judge, with the greatest respect, was wrong in lumping the two together, I part ways with him as the matter relates to the Court of Appeal. That Court did not fall into the same error as the learned trial Judge. I do not see in the above dictum where the Court of Appeal held that in proving title to land, possession and traditional history must go together. No.

Let me take the issue of payment of tribute from the point of view of the case of the appellants. I will deal with the issue from the point of view

of the respondents later. The only paragraph which averred to payment of tribute is paragraph 12 of the Amended Statement of Claim. It reads in part:

“...Hence, traditionally the Dagaci of Dere has never paid any tribute or traditional dues to Ebwa and nothing of such has ever been requested from Dere.”

B

I should say at the expense of repetition that no paragraph averred that the respondents paid tribute to the appellants. PW1, the star witness, said in evidence in-chief at page 47 of the Record:

“The people who used to fish in the river used to pay tribute to the Dagaci of Dere. They used to divide the fish they catch into 3 places: to the person who catches the fish and to the Dagaci of Dere.”

C

Was the witness talking of dividing the fish into three parts as payment of tribute? I am at a loss knowing what he meant. Who got what in terms of the person who caught the fish and the Dagaci of Dere? But that is not important. I want to take the important point and it is that the above evidence was not pleaded. The only fact pleaded as seen from paragraph 12 of the Amended Statement of Claim is that the Dagaci of Dere never paid any tribute or traditional dues to Ebwa. Following the most elementary but vital principle of law that matters not pleaded go to no issue, I will discountenance that piece of evidence of PW1 on the payment of tribute to the Dagaci of Dere

D

Issue No. 3 of the appellants is on the counter-claim which necessitated taking the respondents' case. I do so now. Unlike the Amended Statement of Claim, the Joint Statement of Defence concentrated mainly on the ownership of the waters and the lands and not on the fracas between them and the appellants. The respondents consistently averred to their ownership of the waters and the lands in their Joint Statement of Defence.

F

G

DW7, the 2nd respondent, lucidly and clearly gave traditional evidence of how their forefathers came to settle in Ebwa from Egypt. He also gave evidence of how the appellants paid them tribute by way of fish in the early times but now the Deres pay the sum of N50.00. He also gave evidence that they gave the name Dere to the people. I think I can produce some extracts from the evidence of PW7.

H

On how the respondents came to Ebwa, witness who was 65 years when he gave evidence said at page 90 of the Record:

"I am from Ebwa and the Ebwa people came from Egypt to come and settle in five towns, they were five that came from Middle East then. They settled at Nza, the second one at Gytuko, third at Atekebum and the fourth at Eumipwa and the fifth at Kpopomedi. They were fishermen and farmers."

Witness also gave evidence of the origin of the Deres, what the appellants could not say in evidence, and the 1st and 2nd appellants are Deres. He said at page 90 of the Record:

"And the Deres I cannot remember when they came to settle there but there were other villages that settled there before them. These are Riba, Kuchi, Akpataku, Pukui and Eshi, these were the last settlers. Dere people came from Atabuke in Kogi State. Dere is Kakanda language and it means road base and narrow end - a triangle. We the Ebwas gave them the name - Dere. The Ebwa speak Kakanda language. The Ebwas gave these five communities land to settle when they came."

On the payment of tribute, witness said at page 90 of the Record:

"At the time these people came if they catch fish we use to collect two fish from them but now we only collect money from them; N50.00k each. We collect 1 bag of rice from each person that comes there too."

This is a clear evidence of payment of tribute, and I so hold.

Of the five communities that DW7 gave evidence on, three are represented in the action as 3rd to 10th plaintiffs/appellants. These are the communities that DW7 said they gave land to and who in turn paid them tribute. The evidence of DW7 also dealt with the 1st and 2nd plaintiffs/appellants, who are the Deres. He said in evidence that he could not remember when the Deres came to settle where they are but all he remembered is that they are from the Atabuke in the present Kogi State and that the respondents gave them the name of Dere, meaning road base and narrow end - a triangle in Kakanda language of Ebwa. Witness said in evidence that although he could not remember when the Deres came to settle, he was clear that the five communities first settled before the Deres.

I go to some of the other witnesses, who gave evidence of the

ownership of the properties by the respondents. It must be pointed out that apart from DW7, DW3, DW4, DW5 and DW6 seem to be independent witnesses who share common boundaries with the respondents.

Let us hear what they said in evidence. DW3, a native of Achibe, gave evidence on the disputed waters claimed by the appellants in paragraph 9 of the Amended Statement of Claim. He said at page 84 of the Record:

“I know the parties in the case. And I also know Eshi, Akpataku and Kuchi. Achibe is North-West of Ebwa and we share boundary with Ebwa. I know Emmatsa, Egbokongbo and Egogyari villages. Eshi village is near Emmatsa. Egbokongbo is near Dere village. Egogyari is near Akpataku village. The people of Ebwa, the defendants own these rivers. I know Ebwa own the rivers because we share boundary with Ebwa and when I was a child my father carried me in a boat to Emmatse, Egbokongbo and Egogyari. If Ebwa people invite people to come and catch fish I use to go to witness the fish catching and after catching from night to morning I use to see them remove fish; the Ebwas use to remove fishes from boats of Reba, Kuchi, Akpataku, Dere and Eshi but they do not use to remove fish from my father’s boat.”

Under cross-examination, witness said at page 85 of the Record.

“I was born to see these communities existing. I know the plaintiffs very well. We are not living in the same District with the plaintiffs. We are not in the same District with the Ebwas.”

I want to believe that what DW3 means by the expression “the Ebwas use to remove fishes from boats of Reba, Kuchi, Akpataku, Dere and Eshi”, is giving the fishes to the respondents by way of tribute.

DW4, from Egba community, in his evidence in-chief said at page 86 of the Record:

“Egba is to the east of Ebwa. I know the rivers called Emmatsa, Egbokongbo, Egogyari. The village near Emmatsa is Eshi. And near Egbokongbo is Dere and near Egogyari is Akpataku. These 3 waters belong to Ebwa people because it’s the Ebwas that normally invite us to come and fish there. After fishing the Ebwas normally take 2 fish from each person but Ebwas do not take from us Egbas. They do this because

we do have our own river and we do not take from them, so they do not take ours too.”

DW5, from Azo community, said in his evidence in-chief at page 87:

B *“I know the villages called Eshi, Dere and Akpataku. I know the waters called Emmatsa and Eshi village is near Emmatsa. I know Egbokongbo... These waters belong to Ebwa people. I know Ebwa own the waters as we share boundary with the Ebwas and Ebwas invite us when they are having their fishing festival. As we share boundary Ebwa people*
C *pick two fish but now they collect N50.00k from them.”*

DW6, from Arah village, said in his evidence in-chief at page 88 of the Record:

D *“I know Dere, Apatatu, Eshi and Ebwa. Arah is to the west of Ebwa. I know the water called Emmatsa. It is near Eshi. Egbokongbo is near Dere and Egogyari is near Akpataku. These waters are owned by the Ebwas. I know when I was of tender age when we use to attend a fishing festival at Emmatsa and during that time after fishing they use to collect fish from*
E *the non-indigenous people but they do not take any from my father. The Ebwa people are the ones collecting the fish. Between Arah and Ebwa there is no village between us; we share common boundaries.”*

It is clear from the above that DW3, DW4, DW5 and DW6 share
F common boundaries with the respondents. The witnesses confirmed the evidence of PW7 as follows: (1) The waters in dispute belong to the respondents. (2) Tributes either by way of fish, rice or money was paid by the appellants to the respondents whenever the appellants fished in the waters of the respondents.

G Unlike the appellants, the respondents duly pleaded the payment of tributes in their Joint Statement of Defence in paragraph 4(d). And what is the status of the payment of tribute in customary land law? Under customary land law, the payment of tribute by the tenant is a recognition
H of the title of the overlord to the property. In other words, the tenant fully recognizes that the overlord he pays the tribute is the owner of the property and that he holds the property for a definite period at the pleasure of the owner. In ancient days, tribute was regarded as protection money as it was

paid by the tenant for the sole purpose of protecting the tenancy. It is my view that the payment of tribute by the appellants to the respondents is evidence of the recognition of ownership of the waters and the lands by the respondents, and I so hold. It cannot be otherwise. There is yet another act of ownership by the respondents. It is Exhibit 9, a letter DW8 wrote as Secretary in Lapai Local Authority under the authority of Emir of Lapai, following a complaint by Ebwa Community. In his evidence in-chief, DW8 said at page 96 of the Record:

“I live at Lapai and I was the Secretary of the Emir of Lapai; but I am now the District Head, Hakimi of Para. I know Exhibit 9. It was signed by me. The Exhibit is titled ‘Kasan Dagachi Dere’. I wrote the Exhibit 9 because the people of Ebwa brought a complaint to the Emir of Lapai in respect of river and the Emir settled them as follows for peacefulness and the Emir asked me to sign the Exhibit on his behalf. From the Exhibit all the overseers of the water are from Ebwa. Those overseers selected from Ebwa because they are the owners of the waters; that was why they were selected from there.”

Can there be any evidence of ownership more than the evidence of DW8, an independent witness, the District Head or Hakimi of Para? What did the appellants say about Exhibit 9?

In his reply brief, learned counsel for the appellants submitted at paragraph 2.1.3 as follows:

“Same applied to Exhibit 9 which is merely a letter from Lapai Emirate Council showing that it had appointed Ebwa to oversee some water, but still under the Land Area of the Village Head of Dere”.

With the greatest respect to counsel, the above submission does not make any meaning in the light of the evidence of DW8 and Exhibit 9. I do not think it is available to learned counsel to describe Exhibit 9 as “merely a letter”, when as a matter of fact, it conveys much more than that, particularly when taken along with the unchallenged evidence of DW8. The witness said in evidence, and I quote him once again at the expense of prolixity:

“From the Exhibit all the overseers of the water are from Ebwa. Those overseers were selected from Ebwa because they are the owners of

the waters; that was why they were selected from there.”

Learned counsel tried to give a twist to the above very clear evidence when she introduced the following words: “*still under the land area of the Village Head of Dere.*” Certainly, DW8 did not say that and
B it will be unfair to credit the witness with that statement.

I promised returning to Exhibits 6, 6A, 7, 8(a)-(g) and 10 and I do so now by way of an alternative position. Assuming (without conceding) that I am wrong in the position I have taken above on the exhibits, what
C will be their legal effect on the decision of the trial Judge which was affirmed by the Court of Appeal?

Exhibits 6, 6A and 7 relate only to the Egekongbo waters; a point conceded by counsel for the appellants, in paragraph 5.1.2 of the brief. Even if they are expunged or discountenanced, it will only have effect or
D impact on the Egekongbo waters, all other things being equal. But they are not; and in virtue of Exhibit 9, the 1972 letter from DW8 clearly drowns Exhibits 6, 6A and 7 which were 1956 or earlier decisions and judgments, vis-a-vis Exhibit 9. The relevance here are the years 1972 and 1956; 1972
E later in time.

I take Exhibits 8(a)-(g). Even if I am wrong in my conclusion on the exhibits, I can still fall back on Exhibit 9 on the ownership of the waters and lands by the respondents. That takes me to Exhibit 10, which is the
F last bus stop, so to say. The exhibit is the judgment of the High Court of Justice No. 1 Minna which nullified the act of turbaning of Zitsu of Ebwa by the Village Head of Dere. On the exhibit, the learned trial Judge said at page 135 of the Record:

“*The issue of turbaning of Zitsu of Ebwa by the Village Head of
G Dere was put to rest by Exhibit 10 where the High Court 1 nullified that act.*”

I ask: Is Exhibit 10 really necessary in the determination of the main issue of ownership in this appeal? I think not. In my humble view,
H turbaning of a person without more does not prove ownership of the waters and lands the person turbaned lives, as property of the person who performs the turbaning ceremony. I do not think I have made myself clear. Perhaps I should make myself clearer by giving an example in modern

practice of chieftaincy in Nigeria. In Nigeria where there is so much craze for chieftaincy titles, recipients of such titles from the South are turbaned in the Northern Chieftaincy institutions and vice versa. Can any of the turbaning traditional rulers, either from the North or from the South legitimately claim ownership of the waters and lands of the persons they B turban? This is the issue placed or put nakedly. In other words, Exhibit 10 did not make any meaning to the issue of ownership and the learned trial Judge had no business to deal with it in the way she did.

I am inclined to invoking section 227(1) of the Evidence Act in C respect of the exhibits I have just examined, in the event that I am wrong in my earlier examination of the exhibits. The subsection provides:

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

As I have taken each of the exhibits in turn, I need not repeat myself here.

There is a cross-appeal. I should take it now and very briefly. E Learned counsel for the respondents submitted that the respondents were denied fair hearing. The Court of Appeal took pains to explain the circumstances which led the court to strike out the cross-appeal. I can hardly improve on the position of the Court of Appeal. The appellants were F not served with the cross-appeal and this clearly deprived the Court of Appeal of jurisdiction to hear it. In the circumstances, the appeal on the cross-appeal fails. I strike out the cross-appeal.

And that takes me finally to our adjectival law on concurrent G findings of two courts. In this appeal, both the High Court and the Court of Appeal came to virtually the same findings. Although learned counsel for the appellants submitted that the learned trial Judge did not properly evaluate the evidence before the court and that the Court of Appeal by H accepting the findings fell into the same error, I am of the firm view that the learned ‘trial Judge did a good job, which I cannot fault. So too the Court of Appeal.

It is the law that this Court has not the jurisdiction to reverse

concurrent findings of two courts, unless they are perverse and not borne out from the evidence before the trial court. I do not see any perversity or perverseness.

It is in the light of the above and the more detailed reasons given by my learned brother, Oguntade, JSC, that I too dismiss the appeal. I abide by the costs awarded in the lead judgment.

MOHAMMED JSC

I have had the advantage of reading in advance the judgment just delivered by my learned brother, Oguntade JSC, and I entirely agree with the opinions expressed therein on all the issues raised in this appeal for determination and that the appeal be dismissed. However, I wish to make the following contribution for emphasis.

From the complaints of the appellants arising from the grounds of appeal filed by them or on their behalf, the following five issues were distilled in the appellants' brief of argument for determination.

"1. Whether the court below was right when it confirmed the decision of the trial court admitting Exhibits 7 and 10 and other relevant exhibits?"

2. Whether the appellants were under a legal duty to prove or establish more than one root of title or a specific root of title to succeed?"

3. Whether the decision of the trial court dismissing the appellants' counter-claim which was affirmed by the court below was against the weight of evidence adduced at the trial?"

4. Whether or not the issue of admissibility of Exhibits 8(a)-(g) was a fresh point for which the leave of court was required as held by the Court of Appeal?"

5. Whether the Court of Appeal was correct when it held that Exhibits 8(a)-(g) were evidence of the Respondents' ownership, of the waters against the Appellants?"

The complaints of the appellants on the first issue for determination relate to the admission in evidence of Exhibits 7 and 10 respectively. Learned counsel to the appellants had argued that Exhibit 7 being the

judgment of the Area Court Ebbo is a public document by virtue of section 1 09(a)(ii) of the Evidence Act. The document must therefore satisfy the requirements of section 111(1) and 112 of the Evidence Act before it could be admitted in evidence. The principal requirement of the law in this respect is that such document must be a certified copy. Since Exhibit 7 is not a certified copy of the Area Court Judgment, the court below was indeed in error in confirming the decision of the trial court admitting the document in evidence. See *Ogbunyiya v. Okudo* (1979) 6-9 S.C. 32 at 43. For the same reasons applicable to Exhibit 7, and in addition to the fact that the facts in its support have not been pleaded, I find Exhibit 10, a judgment of the High Court of Justice of Niger State not duly certified, also inadmissible. The lower court was in error in affirming the decision of the trial High Court admitting the document in evidence not having satisfied the requirements of the law for its admission in evidence.

However, the success of the appellants in the determination of issue No.1, will have no bearing or effect whatsoever on the outcome of this appeal. This is because even in the absence of the evidence contained in Exhibits 7 and 10, there is still ample evidence on record to comfortably support the judgment of the trial court in favour of the respondents which was affirmed by the court below. Furthermore, this appeal being one against concurrent findings of facts by the trial Niger State High Court of Justice and the Court of Appeal, this court is loath to interfere or depart from such concurrent findings of facts except where it can be demonstrated in unequivocal terms that there has been any error of law or procedure perpetrated or in anyway that there had been any perverse findings occasioning a miscarriage of justice by those courts below to warrant such interference. See *Ezendu v. Obiagwu* (1986) 2 NWLR (pt.21) 208 at 212; *Onobruhere v. Esegine* (1986) 1 NWLR (pt.19) 799 at 804; *Chukwuogor v. Obiora* (1987) 3 NWLR (pt.61) 454 at 457; *Atuyeye v. Ashamu* (1987) 1 NWLR (pt.49) 267 and *Ude v. Ojechemi* (1995) 8 NWLR (pt.412) 152 at 175. As the appellants have failed to show why this court should interfere in the concurrent findings of facts by the two lower courts in this appeal, I agree that this appeal must fail. Accordingly, I also dismiss the appeal with N10,000.00 costs to the

respondents against the appellants.

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