

SUPREME COURT OF NIGERIA
24TH FEBRUARY, 2006. SC. 232/2001
CORAM:- I. L. KUTIGI, A. I KATSINA-ALU, U. A. KALGO,
G. A. OGUNTADE, W. S. N. ONNOGHEN, JJSC

KAMALDEEN TOYIN FAGBENRO APPELLANT
AND
1. GANYIYENWHE AROBADI
2. AHOTIN AROBADI
3. OKE AROBADI RESPONDENTS
4. CHIEF DEUMOHBALOGUN
TOWOLANI (For themselves
and on behalf of Aina Arobadi family)

LAND LAW - Sale - Evidence of - Where not controverted by the other side - It shows that the land in dispute - Was properly sold to appellant (H1)

LAND LAW - Sale - Document - Ambiguity - Exhibit D that witnessed the sale by respondents to appellant - Was not correctly construed by lower court - And it is not ambiguous (H2)

LAND LAW - Title - Burden of proof - On appellant to show how title was transferred to him - Was fully discharged vide uncontroverted evidence (H3)

FACTS

Before the Ikeja High Court, Lagos, the plaintiffs/respondents claimed against the defendant/appellant an order of declaration of right of occupancy in respect of the farm land in dispute, N500 damages for trespass and an order of perpetual injunction. Pleadings were ordered and exchanged between both parties who also called witnesses in support of their respective cases. The appellant admitted in his pleadings and evidence that the respondents are the radical owners of the land in dispute, but that they sold the land to him and put him in possession thereof. He produced

in evidence the survey plan of the land and the receipt witnessing payment for the land (Exhibit D), which receipt was thumb printed by all the respondents except the 4th. The respondents pleaded that the appellant trespassed on the land but failed to testify against Exhibit D.

The trial court after hearing addresses of counsel for the parties, held that the respondent's case failed in its entirety and dismissed it accordingly. Their appeal to the Court of Appeal was allowed as that court wrongly held that there was something "woolly" about Exhibit D. Being dissatisfied, the appellant has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal rightly interpreted and applied the evidence of the 2nd DW which was given in Yoruba Language and translated into English Language as meaning that the appellant bought the land in dispute from the “offsprings” of the respondents.

2. Whether the Court of Appeal was right in setting aside the finding of the trial court on Exhibit “D”.

3. Whether on the evidence before the court, the appellant discharged the burden of proof on him by preponderance of evidence.

4. Whether the Court of Appeal properly construed Exhibit “D” which they held to be “patently ambiguous”.

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

LAND LAW - Sale - Evidence of

1. The trial court accepted the evidence of both DW 1 and DW 2 as true, and putting together their evidence in the absence of any evidence of denial from the respondents, there is only one conclusion, and that is the land in dispute was properly sold to the appellant by the respondents, the radical owners of the land. He was put in possession since 1979 and was not disturbed until 1985 when this action was filed in the trial court.

(p. 499 F)

LAND LAW - Sale - Document - Ambiguity

2. Therefore Exhibit “D” is not ambiguous in anyway and there is nothing wrong with it as far as the sale transaction was concerned. From the

evidence mentioned above of the appellant and DW 2 at the trial as accepted by the trial judge, there is, with due respect to the Court of Appeal nothing “Woolly” about who thumb printed Exhibit “D”. On the totality of the evidence at the trial, and after examining Exhibit “D”, I find that Exhibit “D” was thumb printed by the three respondents witnessing the sale of the land in dispute to the appellant, I therefore agree with the submission of the appellant’s counsel in the brief that the Court of Appeal did not correctly construe Exhibit “D” in this case and that it was wrong in setting aside the proper findings of the trial court in respect of same. This means that issue 1, 2 and 4 are resolved in favour of the appellant. I so do. (p. 500 F)

Title - Burden of proof

3. Issue 3, asked whether the appellant has discharged the burden of proof on him on the preponderance of the evidence adduced at the trial. I think the answer to this is obviously positive having regard to what was considered and explained in respect of issues 1, 2 and 4 above. There was clear evidence of the appellant and his brother DW2, that the land in dispute which belonged to the respondents’ family, was sold to the appellant by the respondents and witnessed by the execution of Exhibit “D”, and was put in possession thereof. There was no reliable or acceptable evidence of the respondents to the contrary.

On this, the learned trial judge had this to say:-

“The next question is whether the defendant in this case had discharged the burden of proof placed upon him. In his pleading and evidence the defendant established that the 1st, 2nd and 3rd plaintiffs in this action sold the land in dispute to him. He tendered Exhibit “D” the receipt issued by the said 1st - 3rd plaintiffs. The said 1st - 3rd plaintiffs did not give evidence denying issuing the said receipt and infact they were not called as witnesses throughout the trial..... The defendant also proved that he had been on the land since 1976.

He surveyed it. The above evidence were not challenged by the plaintiffs in their evidence-in-chief nor was (sic) the witnesses of the defendant challenged nor discredited on those established facts.

I therefore accept these pieces of evidence of the defendant

which remained undiscredited by the plaintiffs”.

I cannot agree more with the learned trial judge’s assessment of the evidence of the appellant at the trial in view of the evidence before her. She saw and heard the witnesses and is fully entitled to her findings on the B evaluation of the evidence. (p. 501 D)

NOTABLE POINTS OF INTEREST

KALGO JSC

C *1. Need for court not to make a new case for parties*

Before considering issue 3, I wish to observe that in the pleadings of both parties, no question as to the validity or otherwise of the sale of the land was raised and when the appellant pleaded the sale of the land to him by the respondents, witnessed by Exhibit “D” no reply was filed by the D respondents. It was therefore wrong for the Court of Appeal to suo motu raise the issue of validity of the sale by imputing that the respondents were not the right persons in the Arobadi Family to sell the land in dispute. By doing this, the Court of Appeal is making a new case different from what E the respondents made for themselves and this is not acceptable in law. (p. 501 A)

ONNOGHEN JSC

F *2. Evaluation of evidence - Is the primary duty of trial court*

It is the primary responsibility of the trial court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. G However, before a court before which evidence is adduced by the parties in a civil case comes to a decision as to which evidence it believes or accepts and which evidence it rejects, it should first of all put the totality of the acceptable evidence adduced by both parties on either side of an H imaginary scale and weigh them together to see which is heavier, not by the number of witnesses called by each party but by the quality or probative value of the testimony of the witnesses - see *Sha jnr v. Kwan* (2000) 8 NWLR (pt. 670) 685.

It follows therefore that where a trial court unquestionably evaluates the evidence and appraises the facts of a case, it is not the business of an appellate court to substitute its own views for the views of the trial court. (p. 510 F)

B

3. Exhibit D was rightly relied upon

I therefore hold the view that exhibit D speaks for itself and that the trial court was right to have relied on the uncontradicted evidence of the appellant on the sale and purchase receipt and to have placed much weight on the said exhibit D. I find nothing “woolly” about the evidence as to who signed exhibit D which is very clear on the matter. It is trite law that the best evidence of the contents of a document is the production of that document in this case, exhibit D. Exhibit D has clearly stated those who thumb printed it and I hold the view that that statement is conclusive of the fact in issue, the law being that no oral evidence is admissible to add to or subtract from or vary the contents of a document. (p. 514 D)

C

D

REPRESENTATION

E

B. A. Lawal Esq. for the appellant.

Chief Kunle Oyewo for the respondent.

CASES REFERRED TO

F

Atanda v. Ajani (1989) 3 NWLR (pt. 111) 511

Ajero v. Ugorji (1999) 10 NWLR (pt. 621) 1

Okeke v. Agbodike (1999) 14 NWLR (pt. 638) 215

Shajin v. Kwan (2000) 8 NWLR (pt. 670) 685

Aseimo v. Amos (1975) 2 SC 57

G

Olatunji v. Adisa (1995) 2 NWLR (Pt. 376) 167

Mogaji v. Odofin (1979) Y.S.C. 91

Odofin v. Ayoola (1984) 11 S.C 72

Ezukwu v. Ukachukwu (2004) 17 NWLR (pt. 902) 227

H

Alhaji Otaru & Sons Ltd v. Idris (1999) 6 NWLR (Pt. 606) 330

Romaine v. Romaine (1992) 4 NWLR (pt. 238) 650

Akinola v. Oluwo (1952) 1 SCNL 352

Ebba v. Ogodo (1984) 1 SCNLR 372

Ochonna v. Unosi (1965) N.M.L.R. 321 at 323

O.K.O. Mogaji & Ors. v. Cadbury Nigeria Ltd. & Ors. (1985) 7 S.C. 59 at 159

B Mosalewa Thomas v. Preston Holder (1946) 12 W.A.C.A. 78 at 80

Akintoye & Anor. v. Eyiola & Ors. [1968] N.M.L.R. 92 at 95

Balogun & Ors. v. Agoola [1974] 1 All N.L.R. (Pt. 4) 61 at 73

Folorunso v. Adeyemi [1975] N.M.L.R. 128

C Chief Victor Woluchem & Ors. v. Chief Simon Gudi [1981] 5 S. C. 291 at 326

LEAD BY JUDGMENT BY KALGO JSC

D In the High Court of Lagos State, holden at Ikeja, the respondents as plaintiffs claimed against the appellant as defendant, the following reliefs as per paragraph 20 of their amended statement of claim:-

E “(a) *An order of Declaration of statutory right of occupancy ALTERNATIVELY customary right of occupancy in respect of the farmland situate lying and being at Itoje Road Village, Badagry Lagos, a survey plan of which will be filed hereafter i.e. plan No. SBS/442/84L.*

F (b) *N500.00 Damages for trespass on the said land described in 20 (a) above which act of trespass was committed by the Defendant his servants Agents and/or privies,*

(c) *An order of perpetual injunction restraining the Defendant by himself his servants agents and/or privies restraining them from further acts of trespass over the said land described in 20 (a) above”.*

G Pleadings were thereafter ordered, filed and exchanged between the parties. At the trial both parties called witnesses who gave evidence in support of their respective cases. The learned trial Judge Sotuminu J. (as she then was) after hearing the addresses of counsel for the parties, delivered her judgment on 29th June 1992 and concluded by saying: -

H “..... *the plaintiffs’ case fails in its entirety and it is dismissed accordingly”.*

Dissatisfied with this decision, the plaintiffs/respondents appealed to the Court of Appeal, which after hearing the appeal allowed the appeal,

set aside the decision of the trial court and ordered that the action of the plaintiffs/respondents succeeded in the trial court.

The appellant now appealed to this court against that decision of the Court of Appeal. He filed five grounds of appeal and in his brief of argument he raised four issues for the determination of this court in the appeal. The issues are:-

“1. Whether the Court of Appeal rightly interpreted and applied the evidence of the 2nd DW which was given in Yoruba Language and translated into English Language as meaning that the appellant bought the land in dispute from the “offsprings” of the respondents.

2. Whether the Court of Appeal was right in setting aside the finding of the trial court on Exhibit “D”.

3. Whether on the evidence before the court, the appellant discharged the burden of proof on him by preponderance of evidence.

4. Whether the Court of Appeal properly construed Exhibit “D” which they held to be “patently ambiguous”.

The respondents formulated three issues for determination in their joint brief which read:-

“1. Considering the admission made by the Defendant/Appellant that plaintiffs/respondents are the original/radical owners of the land in dispute, whether the appellant has succeeded in discharging the burden of proof that an absolute grant of same had been granted to the appellant.

ALTERNATIVELY

That the respondents have divested themselves of title in respect of the said land in dispute.

2. Can the said burden be discharged by contradictory and irreconcilable evidence adduced by the appellant and his only witness

3. Whether the Court of Appeal is not in a position as the trial court to make proper inferences as to the accurate interpretation of documentary evidence adduced by parties more so as question of credibility of witnesses is not called to question”.

The facts giving rise to this case are straight forward and not very much in dispute. It is a simple land dispute between the parties. The appellant admitted in his pleadings and evidence that the respondents are

the radical owners of the land in dispute but that they sold the land to him and put him in possession thereof. He produced in evidence the survey plan of the land in dispute and the receipt witnessing payment for the land which receipt was thumb printed by all the respondents except the 4th. The respondents pleaded that the appellant trespassed on the land in dispute.

I have carefully examined the grounds of appeal filed by the appellant in this appeal and I am of the clear view that the issues raised there-from by the appellant in his brief are apposite and I shall consider them accordingly.

On the four issues raised by the appellant, it is my considered view that issues 1, 2 and 4 should be taken together because they all danced around Exhibit “D”, the receipt witnessing the sale of the land in dispute.

I take these issues together. The evidence of DW 2 which is the subject of issue 2 is contained on pages 69 - 70 of the record and it reads :-

“Jimoh Fagbenro, sworn on the Koran and states in Yoruba language. I live at No 6 Posunko Street Badagry. I am a farmer I know the defendant, he is my full brother. I know all the plaintiffs. I have seen Exhibit “D” before. My names are on the Exhibit. I signed it. Apart from myself, the children of the land owners thumb printed Exhibit “D” I was present when they thumb printed. Before the paper Exhibit “D” was thumb printed, the defendant paid part of the money. The contents of Exhibit “D” was read to the children of the land owners before they thumb printed it. The owners of the land are the plaintiffs.”

Cross-examined by the plaintiffs counsel; I admit that I have a portion of land in dispute.

The portion owned by me was given to me by the defendant in 1972, after the land was sold. The survey of the land was carried out in 1979. It was survey (sic) after Exhibit “D”. I can read if I see ‘Arobadì Family’ I cannot see Arobadì Family on Exhibit “D”. Re-examined : None”.
 H (underlining mine)

This is all the evidence of the 2nd DW at the trial. From the evidence of DW 2, there is no doubt that all what the witness said was that the land in dispute was bought from “*the children of the land owners*” and that “

the owners of the land are the plaintiffs”. What he failed to say and was not re-examined on this was that the plaintiffs are the children of the land owners. So I am satisfied that the Court of Appeal will be perfectly justified in holding that :-

“From the evidence of this witness who is a brother to the respondent the land in dispute was sold by the offsprings of the plaintiffs or some of them”. B

But from the pleadings and evidence of the appellant who was DW 1 at the trial, it was not in dispute that the land in dispute was part of the land belonging to the Arobadi Family of Badagry as the radical owners. It was also not in dispute that the 1st, 2nd and 3rd respondents are the pregenators/descendants of the Arobadi Family entitled to the family land which was the reason why they instituted this action. It is important or crucial in this action to observe that no evidence, oral or documentary, was adduced or produced by any of the respondents to deny that the land in dispute did not belong to the Arobadi Family or that none of them is a member of that family. The appellant testified in his evidence that it was the 1st 2nd and 3rd respondents who sold the land in dispute to him after he was satisfied that the land belong to their family. He also testified that after making payment of the purchase price of the land in dispute in 1979, a receipt (Exhibit “D”) was executed by the 3 respondents and his own brother DW 2, and was given to him. He confirmed that the respondents thumb printed Exhibit “D”. He identified the receipt in court and both himself and his brother DW 2 identified the thumb prints of the respondents on Exhibit “D”. **The trial court accepted the evidence of both DW 1 and DW 2 as true, and putting together their evidence in the absence of any evidence of denial from the respondents, there is only one conclusion, and that is the land in dispute was properly sold to the appellant by the respondents, the radical owners of the land. He was put in possession since 1979 and was not disturbed until 1985 when this action was filed in the trial court.** D E F G H

In construing Exhibit “D”, the Court of Appeal on page 164 of the record examined the evidence of the appellant’s brother DW2 Jimoh Fagbenro, and said:-

"From the evidence of this witness who is a brother to the respondent, the land in dispute was sold by the offsprings of the plaintiffs or some of them. The respondent himself gave the impression in this evidence that lacks precision on this point that the plaintiffs themselves sold the land to him while his witness said it was sold by their children who thumb printed on the receipt. In other words the thumb prints on the receipt are not those of 1st - 3rd plaintiffs or any of the plaintiffs for that matter but their children".

I have already said that the evidence of DW2 was not specific on who the "children of the land owners" are. And although he was present when the "children" thumb printed Exhibit "D" and he identified the thumb prints in court, he did not say who the children were. But the evidence of the appellant read with that of DW 2, makes everything clear without any doubt. Appellant in his evidence identified the names and thumb prints of the respondents on Exhibit "D". The appellants' evidence that the respondents are members of the Arobadi Family was not denied or challenged. Therefore the mere reference to them as "children" by DW 2 in his evidence does not make them different persons. In fact the Court of Appeal further held on page 164 *ibid* that:-

"I have studied Exhibit D and I notice that the people whose names were written in it are the 1st - 3rd appellants who were equally described as having signed and thumb printed it".

I entirely agree with the Court of Appeal on this statement. This confirmed the evidence of the appellant at the trial and to a certain extent supported by that of DW2 his brother. **Therefore Exhibit "D" is not ambiguous in anyway and there is nothing wrong with it as far as the sale transaction was concerned. From the evidence mentioned above of the appellant and DW 2 at the trial as accepted by the trial judge, there is, with due respect to the Court of Appeal nothing "Woolly" about who thumb printed Exhibit "D". On the totality of the evidence at the trial, and after examining Exhibit "D", I find that Exhibit "D" was thumb printed by the three respondents witnessing the sale of the land in dispute to the appellant, I therefore agree with the submission of the appellant's counsel in the brief that the Court of**

Appeal did not correctly construe Exhibit “D” in this case and that it was wrong in setting aside the proper findings of the trial court in respect of same. This means that issue 1, 2 and 4 are resolved in favour of the appellant. I so do.

Before considering issue 3, I wish to observe that in the pleadings of both parties, no question as to the validity or otherwise of the sale of the land was raised and when the appellant pleaded the sale of the land to him by the respondents, witnessed by Exhibit “D” no reply was filed by the respondents. It was therefore wrong for the Court of Appeal to suo motu raise the issue of validity of the sale by imputing that the respondents were not the right persons in the Arobadi Family to sell the land in dispute. By doing this, the Court of Appeal is making a new case different from what the respondents made for themselves and this is not acceptable in law. See Aseimo v. Amos (1975) 2 SC 57; Olatunji v. Adisa (1995) 2 NWLR (Pt. D 376) 167; Alhaji Otaru & Sons Ltd v. Idris (1999) 6 NWLR (Pt. 606) 330.

Issue 3, asked whether the appellant has discharged the burden of proof on him on the preponderance of the evidence adduced at the trial. I think the answer to this is obviously positive having regard to what was considered and explained in respect of issues 1, 2 and 4 above. There was clear evidence of the appellant and his brother DW2, that the land in dispute which belonged to the respondents’ family, was sold to the appellant by the respondents and witnessed by the execution of Exhibit “D”, and was put in possession thereof. There was no reliable or acceptable evidence of the respondents to the contrary.

On this, the learned trial judge had this to say:-

“The next question is whether the defendant in this case had discharged the burden of proof placed upon him. In his pleading and evidence the defendant established that the 1, 2nd and 3rd plaintiffs in this action sold the land in dispute to him. He tendered Exhibit “D” the receipt issued by the said 1st - 3rd plaintiffs. The said 1st – 3rd plaintiffs did not give evidence denying issuing the said receipt and in-fact they were not called as witnesses throughout the trial..... The defendant also proved that he had been on the land since 1976.

He surveyed it. The above evidence were not challenged by the plaintiffs in their evidence-in-chief nor was (sic) the witnesses of the defendant challenged nor discredited on those established facts.

B *I therefore accept these pieces of evidence of the defendant which remained undiscredited by the plaintiffs”.*

C I cannot agree more with the learned trial judge’s assessment of the evidence of the appellant at the trial in view of the evidence before her. She saw and heard the witnesses and is fully entitled to her findings on the evaluation of the evidence. See Atanda v. Ajani (1989) 3 NWLR (pt. 111) 511; Ajero v. Ugorji (1999) 10 NWLR (pt. 621) 1; Okeke v. Agbodike (1999) 14 NWLR (pt. 638) 215. I see no reason to disagree with her. Issue 3 is therefore answered in the affirmative.

D From all what I said above, I find that there is merit in this appeal. I allow it and set aside the decision and order of the Court of Appeal and restore the decision of the trial court. I award the appellant N10,000,00 costs against the respondents jointly.

E _____

KUTIGI JSC

F I read in advance the judgment just delivered by my learned brother Kalgo, J.S.C. I agree with it. The appeal is meritorious and ought to be allowed. I allow it. The judgment of the Court of Appeal is set aside and that of the trial High Court is restored. I endorse the order for costs.

G **KATSINA-ALU JSC**

H I have had the advantage of reading in draft the judgment delivered by my learned brother Kalgo JSC in this appeal. I entirely agree with his reasoning and conclusion. I would also allow the appeal, set aside the decision of the Court of Appeal and restore the decision of the trial court. I abide by the order for costs.

OGUNTADE.JSC

The Respondents were the plaintiffs at the Ikeja High Court of Lagos State where they claimed against the appellant (as the defendant the following reliefs:

“(a) *An order of Declaration of statutory right of occupancy B
ALTERNATIVELY customary right of occupancy in respect of the
farmland situate lying and being at Itoge Road Village, Badagry Lagos,
a survey plan of which will be filed hereafter i.e. plan No. SBS/442/84L.*

(b) *N500.00 Damages for trespass on the said land described in C
20(a) above which act of trespass was committed by the Defendant his
servants, Agents and/or privies.*

(c) *An order of perpetual injunction restraining the Defendant by D
himself his servants, agents and/or privies restraining them from further
acts of trespass over the said land described in 20(a) above.”*

The parties filed and exchanged pleadings after which the suit was heard by Sotuminu J. (as she then was). On 29-6-92, the trial judge in a considered judgment dismissed plaintiffs’ suit. Dissatisfied, the plaintiffs brought before the Lagos Division of the Court of Appeal (i.e. the court E below) an appeal against the judgment of the trial court. On 8-4-97, the court below in a unanimous judgment allowed the appeal and set aside the judgment of the trial court. The defendant has come before this Court on a final appeal against the judgment of the court below. In the appellant’s F brief filed, the issues for determination in the appeal were identified as the following:

“1. *Whether the Court of Appeal rightly interpreted and applied the G
evidence of the 2nd DW which was given in Yoruba Language and
translated into English Language as meaning that the appellant bought
the land in dispute from the ‘offsprings’ of the respondents.*

2. *Whether the Court of Appeal was right in setting aside the finding
of the trial court on Exhibit ‘D’.*

3. *Whether on the evidence before the court, the appellant dis- H
charged the burden of prove on him by preponderance of evidence.*

4. *Whether the Court of Appeal properly construed Exhibit ‘D’
which they held to be ‘patently ambiguous.’*

I intend to consider these issues together. The plaintiffs had brought their suit as the owners of the land in dispute under native law and custom. They pleaded that they were the descendants of Ama Arobadi's who had first settled on the land over two hundred years ago.

B As for the acts of trespass ascribed to the defendant, the plaintiffs had in paragraphs 14-18 of their Amended Statement of Claim pleaded:

"14. In 1983 the Plaintiffs found that the Defendant had encroached on a portion of their said land and Defendant is parcelling same out for purposes of selling to strangers.

C *15. Plaintiffs challenged the Defendant and gave him oral and writing WARNINGS to desist from this tortuous act of trespass.*

16. Plaintiffs also cause 4 signboards to be erected on the land in dispute and to WARN Defendant and others like him from such reckless D adventure.

17. In spite of these WARNINGS the Defendant has refused to heed same and still on the said land in dispute with the aid of some hefty looking thugs.

E *18. Plaintiffs contend that the Defendant unless restrained on an Order of this Honourable Court intend to continue with their acts of trespass."*

The defendant in paragraphs 4-15 of his Statement of defence F acknowledged that the land in dispute had belonged to the plaintiffs' Arobadi family but that the said family sold the land to him. He pleaded thus:

"7. Contrary to the averments in paragraphs 14, 15, 16, 17 and 18 of the Statement of claim, the Defendant avers that the plaintiffs offered to the Defendant the sale of the land in dispute in 1978 when one Mr. Jimoh G Fagbenro a relation of the 1st, 2nd and 3rd plaintiffs an in-law to the 4th plaintiff and a brother to the Defendant) acting on behalf of the plaintiffs approached the Defendant for the purchase of the Plaintiffs' land.

8. The Defendant agreed to buy the land, but asked that his land H surveyor be allowed to survey the land so that he may see and know what area was being offered for sale.

9. The Plaintiffs agreed to this suggestion and consequently to their representatives in person of JIMOH AKAPPO, HANVIYEME, GEWATO

TALABI and JIMOH FAGBENRO took the Defendant and his surveyor to the land at Itogba Road, Badagry.

10. The Plaintiffs offered the sale of the whole land at Itoga to the Defendant but the Defendant could only buy 2.977 hectares due to financial constraint.

11. After showing the land to the Defendant and his surveyor, the said surveyor surveyed and produced plan No. T0555/78 dated 25th March, 1978 the Defendant pleads and shall rely on the said survey plan at the trial of this action.

12. The Defendant then produced and showed the plans to the plaintiffs who demanded money for the immediate repair of their family house at Badagry.

13. On or about the 4th January 1979, the Defendant paid to the Plaintiffs the agreed sum of N4,140.00 being the price of the land in dispute.

14. The 1st, 2nd and 3rd Plaintiffs as the Head and representatives of AROBADI FAMILY executed a purchase Receipt and agreement of the said date. The Defendant shall rely on the said agreement at the trial of this action.

15. The original purchase receipt has since been lost and all possible diligent search has been made but it cannot be recovered. The Defendant shall rely on a Photostat copy of the document which was made by the Defendant before the court at the trial of this case."

The plaintiffs then filed a Reply to the Statement of Defence. In the said Reply the plaintiffs pleaded in paragraphs 2 to 7 thus:

"2. The plaintiffs at no time offer for sale to the Defendant the land in dispute in this Action or any action thereof.

3. At no time have plaintiffs appointed or authorized any person or persons as agent to dispose to the land in dispute to the Defendant.

4. That the first time Plaintiffs became award of plan No. T9555/78 dated 23.3.1978 was when the said plan was //////////////? in paragraph 11 of the Statement of Defence.

5. That 1st to 4th plaintiffs are not aware of any receipt made on or about the 4th January, 1979 and the 1st to 3rd plaintiffs are not

signatories to the said receipt nor did they execute the same.

6. The plaintiff deny putting the Defendant in possession of the land in dispute or any portion thereof, no person or persons is authorized to put the Defendant in possession of the land in dispute as agent of the plaintiffs.

7. That plaintiffs became aware of defendant's presence on the land in dispute for the first time in 1983 and (sic) since have protested that defendant has no right to (sic) on the land in dispute."

It is clear from the state of pleadings upon which the suit was heard that the central issue to be decided upon by the trial court was not whether or not the plaintiffs' AROBADI family had owned the land in dispute but whether that family sold the same to the defendant as he pleaded. In *Ochonna v. Unosi* (1965) N.M.L.R. 321 at 323, this Court held that where a defendant in his pleading admitted that the plaintiff was the original owner of the land in dispute, the onus was on him to establish that the plaintiff had made an absolute grant of the land to him. See also *O.K.O. Mogaji & Ors. v. Cadbury Nigeria Ltd. & Ors.* (1985) 7 S.C. 59 at 159 and *Mosalewa Thomas v. Preston Holder* (1946) 12 W.A.C.A. 78 at 80.

At the trial, the defendant testified that the Arobadi family of the plaintiffs sold the land in dispute to him. He tendered in evidence as Exhibit 'D' the purchase receipt by which he bought the land. In exhibit 'D', the 1st, 2nd and 3rd plaintiffs signed as selling the 1 land to the defendant. Although the defendant had pleaded that the Arobadi family through the 1st, 2nd and 3rd plaintiffs sold the land to him and testified to that effect, the said 1st, 2nd and 3rd plaintiffs did not come into the witness box to deny on oath what the defendant said. Neither did any of them deny subscribing his signature or thumb-impression to Exhibit 'D' notwithstanding that the plaintiffs in their reply to the Statement of Defence denied selling the land to the defendant. The trial judge in her judgment made a finding of fact thus at pages 105-106:

"The Defendant also proved that he had been on the land since 1976. He surveyed it - Exhibit 'B' as identified employed a hired tractor who graded the roads that made the land now passable and that he cleared the land every six months. The above evidence were not challenged by the Plaintiffs in their evidence in chief nor was (sic) the witnesses of the

Defendant challenged nor discredited on those established facts.

I therefore accept these pieces of evidence of the defendant which remained undiscredited by the plaintiffs. In Kosile v. Folarin (1989) 3 NWLR (Pt. 107) page 1 at page 12, the Supreme Court held that ‘where evidence called by a party in a civil case is neither challenged nor contradicted the onus of proof on that party is discharged’. Also in the leading case of Buraimoh v. Bamgbose (1989) NWLR (Part 109) page 352 at page 363, the Supreme Court also held that ‘proof of issues in a civil case is on a balance of probabilities and where there is nothing to put on the side of the imaginary scale minimum evidence on the other satisfied the requirement of proof. I accept and so hold that the 1st, 2nd and 3rd plaintiffs sold the said land to the Defendants with the knowledge and consent of the plaintiffs.

I am therefore satisfied because of the reasons I have stated above that the onus of proof which I have earlier on placed on the Defendant in this case has been discharged by him.”

It is settled law that where a court of trial unquestionably evaluates the evidence and appraises the facts, it is not the business of a court of appeal to substitute its own views for the views of the trial court – see Akintoye & Anor. v. Eyiola & Ors. [1968] N.M.L.R. 92 at 95, Balogun & Ors. v. Agoola [1974] 1 All N.L.R. (Pt. 4) 61 at 73; Folorunso v. Adeyemi [1975] N.M.L.R. 128 and Chief Victor Woluchem & Ors. v. Chief Simon Gudi [1981] 5 S. C. 291 at 326.

In breach of the above approach, which must by now be regarded as sacrosanct, the court below embarked on a fresh appraisal of the evidence and ended up reversing the findings of fact made by the trial court. At pages 154-155 of the record, the court below said:

“From the evidence of this witness who is a brother to the respondent, the land in dispute was sold by the offspring of the plaintiffs or some of them. The respondent himself gave the impression in his evidence that lacks precision on this point that the plaintiff themselves sold the land to him while his witness said it was sold by their children who thumb printed on the receipt. In other words the thumbprints in the receipts are not those of 1st-3rd plaintiffs or any of the plaintiffs for that matter

but their children. The evidence of the respondent differs markedly from the evidence of the witness on the issues of who signed the receipt. I have studied Exhibit D and I notice that the people whose names were written in it are the 1st - 3rd appellants who were equally described as having signed and thumb printed. It must be admitted that Exhibit D is blurred and it is difficult to ascertain who thumb printed the document. If one accepts the evidence of the defence witness that it is the children of the appellant that thumb printed, then there is something wrong with Exhibit 'D.'

Exhibit 'D' is certainly not clear being in my opinion patently ambiguous. If as the respondent said that it was signed by the children of the appellant which I understand to mean that they were the vendors then that was not referred in Exhibit 'D' as a matter of fact, Exhibit 'D' is itself ambiguous as is not easily explainable as to who and who did what and as it cannot be explained by parol, evidence. If the court after placing itself in the situation in which the parties stood at the time of executing the document and with full understanding of the import of the contents cannot definitely ascertained the meaning and intent of the parties from that language of the document, it becomes a case of incurable and helpless uncertainty and the instrument shall be taken to be inoperative and of no determinate value if the only way it can be explained is by introduction of oral evidence. Who then executed Exhibit 'D'? As I said earlier from the face of it although the names of the 1st - 3rd plaintiffs appeared on that document as the vendors, even though it was difficult to discern the thumbprints of anyone of them as it appeared dry and blurred, the evidence of PW2 the brother of the respondent appears to be the testimony left for the court to believe. It seems to me that the vendors were the children of the 1st - 3rd plaintiffs. These people if they disposed of the land were not competent to do so. Were they acting as agents? There is no evidence that they were authorized to sell."

I think, with respect to the court below, that since the 1st, 2nd and 3rd plaintiffs who were alleged to have sold to the defendant were in court and had not testified that they did not sell the land to the defendant, or that they did not sign exhibit 'D', the purchase receipt, the court below ought not have reversed the findings of the trial court which were immensely

justified in the circumstances of this case. It seems to me that the court below clearly misunderstood the purport of the evidence of the defence witness Jimoh Fagbenro when he said:

“Apart from myself, the defendant paid part of the money. The content of Exhibit ‘D’ was read to the children of the landowners before they thumb printed it. The owners of the land are the plaintiffs.” B

The expression “children of the landowners” was taken by the court below as meaning the children of the plaintiffs in view of the evidence that the plaintiffs were the owners of the land. This led the court below to reason that if the children of the plaintiffs had sold to the defendant, they did so without the authority of the plaintiffs who had been acknowledged as the owners of the land. But with respect, that expression could only mean the representatives of the original landowners. C

I agree with the conclusion and reasoning of my brother Kalgo JSC D in the lead judgment. I would also allow this appeal with N10,000.00 costs in favour of the appellant against the respondents.

ONNOGHENJSC E

I have had the benefit of reading in advance the lead judgment of my learned brother, KALGO, JSC, just delivered. I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed. F

The respondents, as plaintiffs, instituted the action in the High Court of Lagos State on behalf of themselves and AINA AROBADI Family claiming against the appellant, as defendant, the following reliefs:-

(a) An order of declaration of Statutory Right of Occupancy alternatively Customary Right of Occupancy in respect of the farm land situated lying and being at Hoga Village, Badagry, Lagos State, a survey plan of which will be filed hereafter. G

(b) N500.00 (five hundred naira) damages for trespass on the said land described in 20 (a) above which act of trespass was committed by H the defendant, his servants or agents and or Privies.

(c) An order of perpetual injunction restraining the defendant by himself, his servants, agents and/or privies from further acts of trespass

over the said land described in 20 (a) above.

Appellant concedes that title to the aforesaid land resides in the respondents but contends that he purchased the piece or parcel of land from the 1st, 2nd and 3rd respondents who were the head and principal members of the Arobadi family that owns the land and tendered exhibit D, the purchase receipt to prove the transaction. With the issue of title or Right of Occupancy settled by the pleadings, the narrow issue that went to trial was therefore whether appellant was a trespasser and if so, the amount of damages recoverable for the trespass and whether injunction should issue as claimed. There is no dispute that appellant was in possession of the land in dispute neither is the identity of the land in issue in the case.

The trial court, after reviewing the evidence entered judgment against the plaintiffs who, being dissatisfied, appealed to the Court of Appeal, Lagos Division, which reversed the decision of the trial court, resulting in the present appeal.

Appellant has presented three issues for the determination of the appeal which is basically on the evaluation of the evidence before the trial court by the lower court. I hold the view that having regards to the state of the pleadings and evidence, as well as the grounds of appeal, a single issue is enough to determine the appeal. The issue is simply whether the lower court was right in reversing the findings of facts by the trial court having regards to the evidence.

It is the primary responsibility of the trial court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. However, before a court before which evidence is adduced by the parties in a civil case comes to a decision as to which evidence it believes or accepts and which evidence it rejects, it should first of all put the totality of the acceptable evidence adduced by both parties on either side of an imaginary scale and weigh them together to see which is heavier, not by the number of witnesses called by each party but by the quality or probative value of the testimony of the witnesses - see *Sha jnr v. Kwan* (2000) 8 NWLR (pt. 670) 685.

It follows therefore that where a trial court unquestionably evaluates the evidence and appraises the facts of a case, it is not the business of an appellate court to substitute its own views for the views of the trial court; Mogaji v. Odofin (1979) Y.S.C. 91; Odofin v. Ayoola (1984) 11S.C 72; Ezukwu v. Ukachukwu (2004) 17 NWLR (pt. 902) 227. B

The law is therefore settled that where a trial judge abdicates the sacred duty of evaluation of evidence an approbation of weight thereto, or when he demonstrates that he had not taken proper advantage of his having heard and seen a witness testify, the matter becomes at large for the appellate court or better put, in such a situation an appellate court is in as good a position as the trial court to evaluate the evidence provided the exercise does not involve credibility of the witnesses who testified at the trial; Romaine v. Romaine (1992) 4 NWLR (pt. 238) 650; Akinola v. Oluwo (1952) 1 SCNLR 352; Ebba v. Ogodo (1984) 1 SCNLR 372. C D

Looking at the judgment of the trial court, the learned trial judge, at page 105 found, on the issue as to whether or not appellant discharged the burden of prove of purchase of the land, found as follows:

“In his pleadings and evidence, the defendant established that the 1st, 2nd and 3rd plaintiffs in this action sold the land in dispute to him. He tendered exhibit “D”, the receipt issued by the 1st, 2nd and 3rd plaintiffs. The 1st, 2nd and 3rd plaintiffs did not give evidence denying issuing the said receipt and in fact they were not called as witnesses throughout the trial.” E F

At page 106, the learned trial judge held as follows:

“I am therefore satisfied because of the reasons I have stated above that the onus of proof which I have earlier on placed on the defendant in this case has been discharged by him.” G

The Court of Appeal set aside the above findings by referring to the testimony of Jimoh Fagbanro, a witness of the appellant at the trial to wit:

“Apart from myself, the children of the land owners thumb printed, the defendant paid part of the money. The content of exhibit D was read to the children of the land owners before they thumb printed it. The owners of the land are the plaintiffs.” H

The lower court then concluded thus at page 164:

“From the evidence of this witness who is a brother to the respondent, the land in dispute was sold by the offspring of the plaintiffs or some of them. The respondent himself gave the impression in his evidence that lacks precision on this point that the plaintiffs themselves sold the land to him while his witness said it was sold by their children who thumb printed on the receipt. In other words the thumb prints in the receipt are not those of 1st - 3rd plaintiffs or any of the plaintiffs for that matter but their children.....”

However, there is no evidence on record to show that the thumb prints on the purchase receipt; exhibit D; is those of the children of 1st - 3rd respondents as held by the Court of Appeal. Rather there is abundant evidence that the said exhibit D was thumb printed by 1st - 3rd respondents, who, despite the evidence, never testified before the trial court to deny the facts as given in evidence. There is also evidence of the fact that at the time exhibit D was made, 1st respondent was the head of the family concerned. That apart, the alleged fact that exhibit D was allegedly thumb printed by children of 1st - 3rd respondents themselves was never pleaded so that finding by the Court of Appeal, in law, grounds to no issue and I therefore hold the view that the court of Appeal was in error when it interfered with the findings of fact on the issue by the trial court; that finding not being perverse. It is trite law that parties and the court are bound by their pleadings and the issues joined therein. That being the case the courts must always be on its guard so as not to deviate from the case made by each party in the pleadings otherwise it will unwittingly be making for parties an entirely new case, as happens in the instant case as regards the persons who thumb printed exhibit D - see *Ojo v. Adejobi* (1978) 3S.C 65; *Ubanga v. Usanga* (1982) 5S.C 103; *Olatunji v. Adisa* (1995) 2 NWLR (pt.376) 167; *Okpala v. Sola* (1986) 4 S.C 141.

On the findings of the Court of Appeal on exhibit D as construed by that Court, I find nothing ambiguous or woolly about the exhibit. Exhibit D is very clear and unambiguous as evidenced at pages 108 - 109 of the record where it is reproduced. It states, inter alia as follows:

“PURCHASE RECEIPT

WEMESSRS GANYIYEWHE AROBADI, ASHOTIN AROBADI

ANDOKE AROBADIBOTH FROM POSUKOH QUARTERS BADAGRY in the LAGOS STATE OF NIGERIA received from the said purchaser Mr Kamaldeen Toyin Fagbenro Petty Trader of Posukoh Quarters Badagry in the Lagos State of Nigeria aforesaid the sum of four thousand one hundred and forty naira (N4,140.00) being purchase price of farm land and land B beneficially and absolutely owned by us, sold and delivered to the said purchaser Mr Kamaldeen Toyin Fagbenro Petty Trader of Posukoh quarters Badagry in the Lagos State of Nigeria. The farm land situated and lying at Hoga Road Badagry in the Lagos State. The portion of the farm land C is bounded as follows:-

On the East by Hundeyin's Family, on the West by Abole's Family, on the North by Toseh Family, on the South by Hoga Road.

We measured 367 by 900ft. to above purchaser Mr. Kamaldeen Toyin Fagbenro Petty Trader of Posukoh Quarters Badagry in the Lagos D state of Nigeria. Each plot measured 60 ft by 120ft per plot.

We do hereby undertake to execute a deed of conveyance when called upon to do so.

Dated 4th day of January, 1979 E

Signed by the within named vendors, Messrs:

Ganiyewhe Arobadi., Ahton Arobadi and Oke Arobadi both from Posukoh Quarters Badagry in Lagos State.

THEIR LEFT F

Ganviyewhe T.I.

Ahotin T.I

Oke T.I

Arobadi

1. SGD 2. SGD G

Witness Jimoh Akappo

Gowaton Talabi

3. SGD 4. SGD H

Witness Simi Fagbenro

Witness

The foregoing was read over and translated from English Language to illiterate signatories in Egun and Yoruba languages by me sgd.... Qualified interpreter when they seemed perfectly to understand the same

contents therein before they affixed their left thumb impression thereto and signing the document.

Sign _____

G. O. Odunlami

B

“ *Barrister - At - Law*

The document was assessed for stamp duty and the amount charged was duly paid”

From the above, it is very clear that exhibit D was prepared by a legal practitioner and it complied with the provisions of the illiterate Protection Law. On the face of it, the appropriate stamp duty was paid for exhibit D. The cross examination of the witness who tendered exhibit D or of any other witness of the appellant has no suggestion by learned counsel for the respondents that the said exhibit was never signed by the 1st - 3rd respondents but by others. In fact 1st - 3rd respondent did not even testify at the trial denying selling the land in dispute and/or issuing the said exhibit D.

I therefore hold the view that exhibit D speaks for itself and that the trial court was right to have relied on the uncontradicted evidence of the appellant on the sale and purchase receipt and to have placed much weight on the said exhibit D. I find nothing “*woolly*” about the evidence as to who signed exhibit D which is very clear on the matter. It is trite law that the best evidence of the contents of a document is the production of that document in this case, exhibit D. Exhibit D has clearly stated those who thumb printed it and I hold the view that that statement is conclusive of the fact in issue, the law being that no oral evidence is admissible to add to or subtract from or vary the contents of a document. In the present case the contents of exhibit D is reinforced by the testimony of the appellant when he stated thus:

“*When exhibit D was executed the representatives of the family were present as well as brother Jimoh and the writer of the receipt. That time the head of the family was a woman and she is the first plaintiff. Exhibit D showed the names of the 1st, 2nd and 3rd plaintiffs with their thumb impression.*”

In addition to the evidence of the appellant as reproduced supra, the

second defence witness (2 DW) also gave evidence to the effect that exhibit D was read over and interpreted to 1st - 3rd plaintiffs/respondents in Yoruba and Egun languages and that they thumb printed the said exhibit D, in his presence. That piece of evidence was never challenged by the respondents and I hold the view that it puts, to rest any controversy, if any B had existed, regarding the identity of those who thumb printed the said exhibit D.

As stated earlier in this judgment, the case of the appellant is very simple and straight forward. The land originally belonged to the family of the respondents who, through their accredited representatives, 1st - 3rd C respondent, sold the portion in dispute to the appellant and issued exhibit D in acknowledgment of the payment for same. He tendered the said exhibit D in evidence. I hold the view that with 1st - 3rd respondents not D testifying on oath to contradict the evidence of the appellant as to how he came by the land in dispute, the case of the appellant was thereby established and the trial court was right in finding in his favour and dismissing the case of the respondents. I also hold the view that the Court of Appeal has no legally acceptable reason to interfere with the findings of E the trial court in this case and thereby erred in law in setting same aside.

In conclusion therefore I too find merit in this appeal which is accordingly allowed. I abide by the consequential orders contained in the lead judgment of my learned brother, KALGO, JSC including the order as F to costs.

Appeal allowed.

G

H