

SUPREME COURT OF NIGERIA
3RD FEBRUARY, 2006. SC. 194/2001
CORAM:- I. L. KUTIGI, D. MUSDAPHER, G. A. OGUNTADE,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC

1. ENAWAKPONMWHEMA AIGBOBAHI
2. AIGBOGUN OMONOYAN APPELLANTS
3. ENOGHABUNEKHORAGBON
4. OSAZUWA OMONOYAN

(For themselves and on behalf of Ikhuenbo
village)

AND

1. CHIEFEDOKPAYIAIFUWA
2. OMONUWA EREBOR
3. EVBARUESE UWUMONSE RESPONDENTS
4. IGBINOVIA AIYUDUBIE
5. OKHUOROBO OSABUOHIEN

(For themselves and on behalf of Iguomo
village)

LAND LAW - Appeals - Evidence - Concurrent findings thereon - Where
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APPEALS - Ground of appeal - Defect therein - May not warrant its being
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APPEALS - Grounds of appeal - Striking out - Where the lower court made
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JUSTICE - Miscarriage of justice - Definition - A finding that a different
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APPEALS - Grounds of appeal - Erroneous striking out of some grounds
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APPEALS - Issues - Preliminary objection - Against appellant's issue 2 - Is discountenanced for being misconceived - Courts now pursue doing substantial justice (H6)

APPEALS - Consideration - Issues are what the appellate court consider
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LAND LAW - Title - Proof - Identity of land - Must be shown with certainty - That an Exhibit suggests uncertainty of boundaries - Will not stop the court - From determining the issue of boundary (H8)

LAND LAW - Boundary - Pleadings - Exhibit 7 is of no help to appellants
- Since it did not state - That no boundary ever existed between the parties (H9)

ACTIONS - Courts - Duty of - Is to determine all disputes properly brought before them - Guided by rules of law and procedure - As done by the 2 lower courts in this case (H9)

FACTS

Before the Edo State High Court Abudu, the plaintiffs/respondents claimed declaration of title and perpetual injunction against the defendants/appellants. The defendants on their part filed a counter claim contending that they are customary owners of the land in dispute and sought an order of forfeiture against the respondents. Thus, the claims of the parties are based on traditional history. Respondents traced their title to one Imadegue who deforested and settled on the land from time immemorial. They stated that they had since been exercising acts of ownership over the entire land by letting out portions thereof to people including members of the appellants' community.

Appellants on their part claimed that the land was established by one Chief Ehenegha, their clan head during the reign of one Oba Eresoyan. That respondents' ancestors were palace slaves to their said Chief and the present respondents paid traditional homage to them but later stopped. Appellants insist that there is no boundary between them and the respondents. The trial court preferred the traditional history evidence of the respondents and gave judgment in their favour. Appellants' appeal to the Court of Appeal was dismissed, and that court also struck out some of the grounds of appeal filed before it for being vague. Still dissatisfied, appellants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the learned justices of the Court of Appeal were right in law in striking out grounds 2,4,5 of the appellants’ grounds of appeal before that court.” – the issue is said to have arisen from ground 4.

(2) Whether the learned justices of the Court of Appeal were right in law in failing to consider issue 5 raised in relation to exhibit 7 in appellants’ brief of argument.”

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

Appeals - Evidence - Concurrent findings thereon

1. Looking at the two issues formulated for determination, it is clear that none of them challenged the concurrent findings of facts of the courts particularly with respect to the traditional history or evidence of the parties. I hold the view that since there is no challenge to the findings, appellants are deemed to have accepted same and are bound by the said findings of facts. That being the case, it is very clear that the evidence of traditional history of the respondents as regards the acquisition and occupation of the land in dispute and the founding of Iguomo village which was accepted by the trial court and confirmed by the Court of Appeal remains unchallenged before this court and therefore taken as established. (p. 581 A)

Ground of appeal - Defect therein

2. The position, in my humble view, is that once it is possible to make sense out of a ground of appeal that complains both of error in law and

misdirection in fact, the ground of appeal is valid, the defect in its form notwithstanding. The rationale behind this lies in the shift in emphasis from technical justice to substantial justice - from form to substance. In other words, though a ground of appeal that complains of an error in law and misdirection in fact may be inelegant in drafting and thereby defective in form, that defect alone is not sufficient to have it struck out provided the complains therein are clear. (p. 582 C)

C Grounds of appeal - Striking out

3. By holding supra, the lower court clearly stated that it could and did understand what grounds 2,3,4,5, and 9 are complaining about; and concluded that while grounds 2, 3 and 9 are grounds of facts, grounds 4 and 5 are of mixed law and facts. I hold the view that by so holding the Court of Appeal meant that there was no ambiguity in the grounds of appeal complained of neither can they be said to be vague or imprecise, if the court had ended there, there would have been no problem. It went on at page 422 to hold thus:

E *"I find that grounds 2, 4, and 5 of the additional grounds of appeal are vague. The preliminary objection partially succeeds and I accordingly strike out grounds 2, 4 and 5 as well as issue No. 2 formulated from ground 4."*

F I agree with the submission of learned counsel for the appellants that above conclusion of the lower court is at variance with the earlier holding by that court that the affected grounds are of facts and mixed law and facts. I hold the view that the earlier holding could not have been possible if the lower court had found the impugned grounds to be imprecise, vague or ambiguous. I therefore hold that the lower court erred in striking out grounds 2, 4 and 5 in the circumstances of this case. (p. 584 B)

H Miscarriage of justice - Definition

4. From a long line of decisions of this court, miscarriage of justice can be said to be such a departure from the rules which permeate all judicial process as to make what happened not in the proper sense of the word

judicial procedure at all. What constitutes a miscarriage of justice vary, not only in relation to particular facts, but also with regard to the jurisdiction invoked by the proceedings in question. A finding that a different result necessarily would have been reached in the proceedings affected by the miscarriage is not required before one could reach the conclusion that there has been a miscarriage of justice in the proceedings. It is enough if what is done is not justice according to law. (p. 585 B)

Erroneous striking out of some grounds

5. Having regard to the findings by the lower court that the impugned grounds of appeal are of facts and mixed law and facts and the fact that the case was fought on the basis of traditional history which is a question of facts, I hold the view that the two issues formulated by the lower court and reproduced supra are very wide and enough to and did encompass the complaints in the impugned grounds of appeal, which were in reality variations of the complaints of facts in the grounds of appeal not struck out by the lower court, thereby leading to one issue for determination - which is simply: which evidence of traditional history should the court believe or is more probable. I therefore hold the view that no miscarriage of justice has been occasioned by the erroneous striking out of grounds 2, 4 and 5 of the grounds of appeal, as a result the invitation by learned counsel for the appellants to remit the case to the lower Court for “*decision on the substantive appeal*” is hereby declined for being inappropriate in the circumstances, issue one is therefore resolved against the appellants. (p. 586 B)

Issues - Preliminary objection

6. I hold the view that the ground and the issue 2 formulated therefrom and being presently under consideration are valid before this court; appellants do not need to question the validity of the issues formulated by the lower court before complaining against the non or adequate consideration of that issue by the lower court. The complaint of the appellants gives rise to the issue as to whether or not the appellants’ issue No. 5 dealing with exhibit 7 on boundaries of the land was considered or adequately

considered by the lower court. If it was, then that is the end of the matter. Counsel must always bear in mind that this is the court of last resort in some appeals in this country and that the attitude of this court has changed from doing technical justice to doing substantial justice. This attitude envisages the possibility of hearing everyone on any complaint so as to enthrone and sustain the rule of law. Parties are therefore encouraged to ventilate their grievances before the courts which are enjoined to do substantial justice in relation thereto without recourse to form or technicalities. This attitude does not, however, give licence to the parties, in the formulation of their cause or grounds of appeal or issues arising therefrom, to present to the court anything that is incapable of any meaningful interpretation or understanding in the name of cause of action, ground of appeal or issue formulated for determination, in the present appeal, I hold the view that the preliminary objection of the respondents' counsel is misconceived and is consequently discountenanced. (p. 588 E)

Issues are what the appellate court consider

7. It has to be noted that what an appellate court considers in its decision are the issues formulated for determination not the ground or grounds of appeal or every question that arises from the ground(s) of appeal -see *Ibori v. Agbi* (2004) 6 NWLR (pt. 868) 78 (pt. 111). (p. 590 C)

Title - Proof - Identity of land

8. It is trite law that a party seeking a declaration of title to land must show with certainty the land to which his claim relates, failing which his claim must fail.

Apart from the above holdings, I am of the firm view that exhibit 7 is of no moment in the determination of the issue as to whether the respondents established with certainty the area of land in relation to which they sought declaration of title. The fact that exhibit 7 seems to suggest that the exact point of the boundary between the parties was not certain as seen by the Oba of Benin, the author of that exhibit, does not mean that the parties to the dispute do not have exact points they claim as constituting their boundaries. These points are shown in the respective survey plans

filed along with the statements of claim and defence respectively. It is the features on these survey plans and the testimonies by the witnesses that the court evaluates before deciding the matter one way or the other.

In the present case, there is abundant evidence from which the trial court determined the issue of boundary between the parties notwithstanding exhibit 7. (pp. 590 D / 591 A)

LAND LAW - Boundary - Courts - Duty of

9. In our system of adjudication, it always takes two or more people to have a dispute in respect of anything or right which dispute has to be resolved by the courts. Experience, however, shows that in such a dispute both parties will always have different stories to tell the adjudicator as to the origin of the dispute, the party entitled to the subject matter of dispute, etc, etc. It is because both parties to this case claim different points as constituting the boundary or that there is no boundary between them in the land in dispute that is why the boundary is in dispute. From the respective cases put forward by the parties in their pleadings and evidence on record, it is very clear that exhibit 7 is of no assistance to the case of the appellants particularly as it never stated that no boundary ever existed between the two communities, which is the case put forward by the appellants.

That apart, it is the constitutional responsibility of the courts to try and determine disputes properly brought before them and in doing so be guided by rules of law and procedure. I hold the view that the trial court properly evaluated the totality of the evidence before it including the evidence on the issue of boundary and properly came to the right decision on the matter and that the lower court is right in confirming that decision. I therefore resolve issue No. 2 against the appellants. (p. 592 F)

NOTABLE POINT OF INTEREST

OGUNTADE JSC

1. Narrative and prolix grounds of appeal may not be vague

There is no doubt that the above grounds of appeal framed by the appellants before the court below are narrative in form and needlessly prolix. Such grounds of appeal impose an avoidable tedium on Justices whose duty it

is to make a meaning out of them. Counsel who drafted these grounds did not demonstrate that he saw the need for precision and clarity in the preparation of grounds of appeal. Neither did the counsel show that he had a familiarity with Order 3 rules 2(2), (3) and (4) of the Court of Appeal Rules which provide.

“(2) *If the grounds of appeal allege misdirection or error in law, the particulars or nature of the misdirection or error shall be clearly stated.*

(3) *The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.*

(4) *No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted save the general ground that the judgment is against the weight of evidence.....”*

It seems to me however that it is possible to make a meaning out of the appellant’s grounds of appeal reproduced above. They are mainly complaints against the manner in which the court of trial treated or evaluated the evidence. They are not vague or in general terms. Nor can they be regarded as not disclosing a reasonable ground of appeal. The court below regarded these grounds as vague but clearly in my view they are not. They convey a meaning, which could not have been lost to the respondents. (p. 600 C)

REPRESENTATION

K. S. Okeaya-Inneh Esq, SAN for the appellants with A. O. Okeaya-Inneh Esq.
A. O. Eghobamien Jnr. for the respondents

CASES REFERRED TO

Nnajifor v. Ukonu (1986) 4 NWLR (pt. 36) 505
Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 678
Okonkwo v. Udoh (1997) NWLR (pt. 519) 16
Ibori v. Agbi (2004) 6 NWLR (pt. 868) 78 (pt. 111)
Alhaji L. A. Onibado and Others v. Alhaji W. A. Akibu and Others (1982)

7 SC. 60 at 89

Olujeba of Ijebu v. Oso (1972) SC. 143 at Pg. 151

Obawole v. Coker (1994) 18B LRCN Pg. 168

Aderounmu v. Olowo [2000] 4 NWLR (Pt. 652) 253

Nteogwuija & Ors. v. Ikuru & Ors. (1988) 10 NWLR (pt. 569) page 267 B
at 310

Bello v. Fayose [1999] SC. (Part 11) 6 at 9

Arabe v. Asanlu [1980] 5-7 SC. 78. Epi v. Aigbedion [1972] 10 SC. 53

Chidiak v. Laguda (1964) NMLR 123 at 125

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718 at 744 C

Aderounmu v. Olowu (2000) 4 NWLR (pt. 652) 253 at 265-266

Okotie-Eboh v. Manager (2004) 18 NWLR (pt. 905) 242 at 270

STATUTE & RULES REFERRED TO

Supreme Court Act s. 22

Court of Appeal Rules O. 3 r. 2(2 - 4)

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the court of Appeal, Benin Division, in appeal No. CA/B/115/99 delivered on 14th December, 2000 in which it dismissed the appeal of the present appellants against the judgment of Edo State High Court holden at Abudu in suit No. HAB/11/87 delivered on 3rd October, 1997 in which it granted the reliefs claimed by the plaintiffs/respondents. F

The claims of the respondents as plaintiffs at the High Court are as follows:-

“ (a) A declaration that in accordance with Bini Customary Law and tradition, the plaintiffs the people of Iguomo village Uhunmwode Local Government Area of Edo State are persons vested with all existing right to the use and occupation of all that piece or parcel of land lying being and situated at Iguomo village, in Uhunmwode Local Government Area, verged pink in survey plan NO. ISO/BD/1358/87 of 14/10/ 87 filed in this action. G

(b) A declaration that the plaintiffs by virtue of their rights, H

particularly farming rights and occupation over the said land are entitled to the grant of customary rights of occupancy in respect of the said parcel of land verged pink in survey plan NO. ISO/BD/1358/87 of 14/10/87 filed in this action, the said land not being in an urban area.

B *(c) An order of perpetual injunction restraining the defendants whether by themselves, their servants, agents and or any person claiming through or under them or whosoever from entering or remaining upon the said piece or parcel of land in purported exercise of any right in relation to the possession, use and occupation of the land or any part thereof in*
 C *delegation of the plaintiffs' right or interest as vested from time immemorial."*

On the other hand and by way of counter claim, the defendants now appellants, claimed against the respondents in the following terms:-

D *" (a) That from time immemorial and prior to the Land Use Act the plaintiffs have been the customary owners of ALL that area as shown in the dispute Survey plan verged pink in survey plan NO. OSA/1952/89 filed with the Statement of Defence.*

E *(b) That notwithstanding the change in the radical title to land by reason of the Land Use Act, the plaintiffs' vested rights, interests and/or customary rights of use and occupation over the area in dispute remain in force and effective.*

F *(c) An order for forfeiture of the defendants' right over the entire land, in that the defendants being customary 'tenants, now claim title or ownership of the land against the plaintiffs (their overlords) and/or for failure to pay their usual or annual tributes or homage as customary tenants of the plaintiffs.*

G *(d) An order of perpetual injunction restraining the defendants their agents, servants or privies from further asserting their rights of ownership over the land in dispute or howsoever doing or continuing to do anything inconsistent with the vested rights of the plaintiffs over the*
 H *area in dispute."*

From the reliefs reproduced supra it is very clear that the claims of the parties to ownership of the land in dispute are based on traditional history as given effect to by the relevant customary law.

The case of the respondents who are natives of iguomo village is that they have been the original owners in possession of a large piece or parcel of land including the portion now in dispute between the parties, from time immemorial which land is situated and lying at iguomo village and founded by one Imadegue who deforested and settled therein; that the iguomo village was originally known as Imadequen but was later changed to iguomo by Oba Ozolua when he visited the village and met only women due to the fact that the male members of the community had committed suicide before his arrival; that they had since exercised acts of ownership over the entire land by letting out portions thereof to people including members of the appellants' community; that appellants later started to commit acts of trespass on the land resulting in the institution of the action.

On the other hand, the appellants who are from Ikhuenbo village, claim that Iguomo village was a settlement made up of Oba of Benin palace servants and slaves, which was established by one Chief Ehenegha; the Chief Priest and clan head of the appellant's community, during the reign of Oba Eresoyan; that it was the said Oba Eresoyan who sent the respondents' ancestors as palace servants and or slaves to the said Chief Priest Ehenegha to help the latter in farming and other chores; that respondents' ancestors and 'the present respondents paid traditional homage to the appellants' but later stopped.

It is important to note that though respondents claimed and testified to the existence of a boundary between the parties and other neighbouring communities, the appellants insist that there is no boundary between them because respondents live and occupy land belonging to the appellants.

As stated earlier in this judgment, the trial judge preferred the traditional history of the respondents to that of the appellants and decided the case against the appellants who thereafter appealed to the court of Appeal which dismissed their appeal resulting in this further appeal. Learned senior counsel for the appellants filed five grounds of appeal against the judgment of the Court of Appeal at pages 402-404 of the record.

However, looking at the Amended Appellant's Brief of argument filed on 22/06/05 and relied upon in argument of the appeal on 7/11/05, two issues are formulated for the determination of the appeal. The issues,

which are based on grounds 4 and 2 respectively of the grounds of appeal are as follows:-

B “(1) Whether the learned justices of the Court of Appeal were right in law in striking out grounds 2,4,5 of the appellants’ grounds of appeal before that court.” – the issue is said to have arisen from ground 4.

(2) Whether the learned justices of the Court of Appeal were right in law in failing to consider issue 5 raised in relation to exhibit 7 in appellants’ brief of argument.”

C The issue is said to have arisen from ground 2.

From the above, it is my view that no issue was formulated from grounds 1,3 and 5 of the grounds of appeal. The law is that in absence of any issue(s) being so formulated from the grounds, the said grounds of appeal are deemed abandoned and liable to be struck out. I therefore hold D that grounds 1,3 and 5 having been abandoned by the appellants are hereby struck out.

E The law recognizes five distinct ways in which title to or ownership of land in Nigeria could be proved as stated by the Supreme Court in the case of *Idundun v. Okumagba* (1976) 9 - 10 S.C 227. These are:-

(a) By traditional evidence

(b) By production of documents of title duly authenticated and executed.

F (c) By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership.

(d) By acts of long possession and enjoyment, and,
G (e) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

In an action for declaration of title to land, as in the instant case, a plaintiff need not prove all the five ways. Where the plaintiffs case is based H on traditional evidence of ownership as the legal basis of his claim, his duty is limited to proving such traditional title and no more. On the other hand, if a plaintiffs claim relies on conveyance as the legal basis of ownership, his duty is simply to produce the documents of the title or the title deeds.

The same thing applies where he claims through any of the other remaining three ways.

Looking at the two issues formulated for determination, it is clear that none of them challenged the concurrent findings of facts of the courts particularly with respect to the traditional history or evidence of the parties. I hold the view that since there is no challenge to the findings, appellants are deemed to have accepted same and are bound by the said findings of facts. That being the case, it is very clear that the evidence of traditional history of the respondents as regards the acquisition and occupation of the land in dispute and the founding of Iguomo village which was accepted by the trial court and confirmed by the Court of Appeal remains unchallenged before this court and therefore taken as established.

However, the strength of appellants case seems to reside in issue No. 2 which proffers that the respondents were unable to establish the essential ingredients of the relief of declaration of customary or statutory Right of Occupancy; to wit, ascertainment of the boundaries of the land in dispute. Having said these much I now proceed to consider the two issues for determination.

On issue No. 1, learned counsel for the appellants, A. O. OKEAYA - INNEH ESQ, in the appellants' amended brief of argument filed on 22/6/05 submitted that the learned justices of the Court of Appeal erred in striking out grounds 2, 4 and 5 of the grounds of appeal before that court contrary to the decision of this court in Aderounmu v. Olowu (2000) 4 NWLR (pt. 652) at 265 - 266; that the conclusion of the lower court that the grounds struck out were vague is at variance with the holding that "grounds 2, 3, 8 and 9 are grounds of facts while grounds 4 and 5 are at best grounds of mixed law and facts." Learned counsel then urged the court to resolve the issue in favour of the appellants and remit the appeal to the lower court "for decision on the substantive appeal"

On his part, learned counsel for the respondents', OSARO EGHOBAMIEN Esq, in the respondents' brief filed on 30/9/04, submitted that based on the decision of this court in the case of ADEROUNMU v. OLOWU (2000) 4 NWLR (pt. 652) 253 a ground of appeal that complains

of an “*error in law*” and a “*misdirection in fact*” will be struck out;-

(a) if it fails to show clearly what is complained of as misdirection or as the case may be error of fact;

(b) a ground of appeal will not be struck out simply because it is framed as an error in law and misdirection in fact;

(c) a ground of appeal that is framed as both error of law and error of fact may yet be successfully impugned if the error in law or fact is not clearly shown.

It is my view that there is no difference between respondents’ counsel’s principle (a) and (c) as contained in the argument. Both of them state that once the error in law and misdirection in fact complained of in the ground of appeal in issue are clearly shown, the ground of appeal so framed is valid and ought not to be struck out. In short, **the position, in my humble view, is that once it is possible to make sense out of a ground of appeal that complains both of error in law and misdirection in fact, the ground of appeal is valid, the defect in its form notwithstanding. The rationale behind this lies in the shift in emphasis from technical justice to substantial justice - from form to substance. In other words, though a ground of appeal that complains of an error in law and misdirection in fact may be inelegant in drafting and thereby defective in form, that defect alone is not sufficient to have it struck out provided the complains therein are clear** - see pages 265 - 266 of *Aderounmu v. Olowu* supra per AYOOLA, JSC.

Turning to the grounds of appeal in issue, learned counsel for the respondents submitted that the Court of Appeal adopted the right test before coming to the conclusion that the grounds of appeal are vague and thereby struck same out. Learned counsel reproduced the grounds of appeal in question and submitted that the grounds failed to satisfy the requirement of precision and clarity thereby leaving the court and respondent in doubt as to what the complaints are; that the fact that the lower court had to formulate issues for determination clearly shows that the grounds of appeal were vague, learned counsel further submitted.

Submitting in the alternative, learned counsel stated that appellants

have failed to show that there was miscarriage of justice resulting from the striking out of grounds 2, 4 and 5 and that in the absence of such a miscarriage, any alleged error is insufficient to remit the case to the lower court as contended by learned senior counsel for the appellants; that since the appeal was against the factual findings of the trial court and the lower court formulated two broad issues based on those findings, the striking out of the grounds in question have not occasioned a miscarriage of justice and urged the court to resolve the issue against the appellants. B

I have to note that learned counsel for the respondents has not addressed the argument of learned counsel for appellants to the effect that a ground of appeal cannot be found to be both vague and at the same time of mixed law and facts. That is the crux of the argument of learned counsel for the appellants in the issue under consideration. The principle to guide the court in deciding whether a ground of appeal is incompetent is as laid down in the case of Aderounmu v. Olowu Supra at pages 265 - 266 which has been cited and relied upon by both counsel in this appeal, in that case Ayoola, JSC stated the law, inter alia, as follows: C D

“..... what is important in a ground of appeal and the test the court should apply is whether or not the impugned grounds show clearly what is complained of as error in law and what is complained of as misdirection or as the case may be, error of fact. The view, with which I am inclined to agree, is expressed in the Court of Appeal. See case of: Nteogwuija & ors v. Ikuru & ors (1998) 10 NWLR (pt. 569) 267 at 310, that the mere fact that a ground of appeal is framed as an error and misdirection does not make it incompetent. In my view/ only general propositions can be made in a matter in which the question is not as to form ultimately, it is for the court before which the question is raised to decide whether viewed objectively, the ground satisfies the requirements of preciseness and clarity what makes a ground incompetent is not whether it is framed as an error and a misdirection but whether by so stating it, the other side is left in doubt and without adequate information as to what the complaint of the appellants actually is.” Emphasis supplied by me. E F G H

The court of Appeal did cite and rely on the principle of law stated supra in Aderounmu’s case in dealing with the issue. However, the court

in resolving the issue held at page 421, inter alia, as follows:-

“I have carefully examined the additional grounds of appeal in accordance with the principles laid down by the Supreme Court in OGBECHIE v. ONOCHIE (1986) 2 NWLR (pt. 23) 481 and I have come to the conclusion that grounds 2,3,8 and 9 are grounds of facts while grounds 4 and 5 are at best grounds of mixed law and fact.”

By holding supra, the lower court clearly stated that it could and did understand what grounds 2,3,4,5, and 9 are complaining about; and concluded that while grounds 2, 3 and 9 are grounds of facts, grounds 4 and 5 are of mixed law and facts. I hold the view that by so holding the Court of Appeal meant that there was no ambiguity in the grounds of appeal complained of neither can they be said to be vague or imprecise, if the court had ended there, there would have been no problem. It went on at page 422 to hold thus:

“I find that grounds 2, 4, and 5 of the additional grounds of appeal are vague. The preliminary objection partially succeeds and I accordingly strike out grounds 2, 4 and 5 as well as issue No. 2 formulated from ground 4.”

I agree with the submission of learned counsel for the appellants that above conclusion of the lower court is at variance with the earlier holding by that court that the affected grounds are of facts and mixed law and facts. I hold the view that the earlier holding could not have been possible if the lower court had found the impugned grounds to be imprecise, vague or ambiguous. I therefore hold that the lower court erred in striking out grounds 2, 4 and 5 in the circumstances of this case.

Learned counsel for the appellants has submitted that if this court finds and holds that the lower court erred in striking out the grounds of appeal complained of, it should remit the appeal to the lower court “for decision on the substantive appeal,” While Counsel for the respondents submitted that for this court to remit the appeal for rehearing, appellants must show that the decision of the lower court has occasioned a miscarriage of justice, which they have failed to do in this case, and that since the lower court formulated two broad issues to encompass the

complaints in the impugned grounds of appeal, the appellants were not denied their right to fair hearing.

I have gone through the appellants' brief and the oral submissions of learned counsel for the appellants and have not seen where learned counsel has argued that the error in the lower court striking out the impugned grounds without more resulted in any miscarriage of justice. B

From a long line of decisions of this court, miscarriage of justice can be said to be such a departure from the rules which permeate all judicial process as to make what happened not in the proper sense of the word judicial procedure at all. What constitutes a miscarriage of justice vary, not only in relation to particular facts, but also with regard to the jurisdiction invoked by the proceedings in question. A finding that a different result necessarily would have been reached in the proceedings affected by the miscarriage is not required before one could reach the conclusion that there has been a miscarriage of justice in the proceedings. It is enough if what is done is not justice according to law - see Nnaji for v. Ukonu (1986) 4 NWLR (pt. 36) 505. Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 678; Okonkwo v. Udoh (1997) NWLR (pt. 519) 16. C D E

Can it be said that the erroneous striking out of the impugned grounds of appeal resulted in a miscarriage of justice? I had earlier stated in this judgment that the case was fought and won on the traditional history of the parties as to how they came into ownership and possession of the disputed land. The appeal before the lower court was therefore on the findings of facts made by the trial court in relation, primarily, to the traditional evidence. At page 282, the learned trial judge found as follows:- F

"On the whole the plaintiffs have presented a more impressive case of their traditional history which the court finds as being credible cogent and compelling that sustain a claim of declaration of title to land." G

At page 383 the lower court reiterated the fact that the appeal raised mainly factual disputes by stating thus: H

"This case was fought on the basis of traditional history" and proceeded, after striking out the impugned grounds of appeal, to formulate two broad issues for the determination of the appeal. The issues are as

follows:-

“ (1) *Whether the evidence adduced by the defendants on traditional history is more probable than that of the plaintiffs as to entitle them, to judgment on the counter claim.*

B (2) *Whether the trial court adequately considered the evidence adduced and drew the proper inferences and conclusions.”*

Having regard to the findings by the lower court that the impugned grounds of appeal are of facts and mixed law and facts and the fact that the case was fought on the basis of traditional history
 C **which is a question of facts, I hold the view that the two issues formulated by the lower court and reproduced supra are very wide and enough to and did encompass the complaints in the impugned grounds of appeal, which were in reality variations of the complaints**
 D **of facts in the grounds of appeal not struck out by the lower court, thereby leading to one issue for determination - which is simply: which evidence of traditional history should the court believe or is more probable. I therefore hold the view that no miscarriage of**
 E **justice has been occasioned by the erroneous striking out of grounds 2, 4 and 5 of the grounds of appeal, as a result the invitation by learned counsel for the appellants to remit the case to the lower Court for “decision on the substantive appeal” is hereby declined for**
 F **being inappropriate in the circumstances, issue one is therefore resolved against the appellants.**

On issue 2 learned counsel for the appellants submitted that the lower court erred in failing to consider issue 5 in relation to exhibit 7 particularly as it is the law that a court must decide issues put properly
 G before it, relying on *Tunbi v. Opewole* (2000) 1 S.C. 1 at 8; *Osandu v. Sole Boneh* (2000) 5 NWLR (pt. 656) 322 at 357 -352. Learned counsel further submitted that by failing to consider the said issue No. 5, the lower court abdicated its constitutional duty and disregarded the rules of practice and
 H procedure, and urged this court to invoke its powers under section 22 of the supreme court Act and decide the issue on the evidence on record. Learned counsel stated that the purport of exhibit 7 was to get the police to maintain law and order in the area in dispute so as to enable the Surveyor

- General to properly ascertain the boundaries. That this piece of evidence shows that the parties themselves were not certain as to the exact point of the boundary between them. That for a party to have a declaration of title, he must, amongst others, be certain as to the exact area being claimed, relying on *Emiri v. Imiyeh* (1999) 4 S.C (pt. 1) at 13; *Bello v. Foyose* B (1999) 7 S.C (pt. 11). 6 at 9. Learned counsel then submitted that the lower court erred in failing to appreciate the purport of exhibit 7 and in doing so affirmed the error of the trial court in granting a declaration to the respondents when they failed to establish their boundary, and urged the court to resolve the issue in favour of the appellants and allow the appeal. C

On his part, learned counsel for the respondents submitted, firstly by way of preliminary objection that the issue cannot be canvassed in this court without a ground of appeal challenging the issues as formulated by the lower court; that the issue as formulated being wide enough to include D issue No. 5 and the appellants not haven complained against the formulation are estopped from contending that a particular issue was not considered. Learned counsel however concedes that by ground 7 of the grounds of appeal, appellants raised a complaint that the lower court failed E to consider exhibit 7 but that the complaint is different from the one to the effect that the court did not adequately cover all the issues.

Secondly, taking the issue on the merit, learned counsel submitted that appellants' issue No. 5 was considered by the lower court particularly F as the issues formulated by that court included the said issue No. 5 as can be seen at page 422 of the record; that failure by the lower court to mention exhibit 7 is not indicative that the issue of boundary was not considered; that granted that the lower court did not consider the issue, which G respondents' counsel did not concede, the non consideration has not led to any miscarriage of justice, learned counsel further submitted and urged the court to resolve the issue against the appellants and dismiss the appeal.

On the preliminary objection, I hold the view that it is misconceived, having regard to ground 2 of the grounds of appeal to be found at pages H 402 and 403 of the record. Ground 2 states thus:-

"2. The learned justices of the Court of Appeal erred in law in failing to consider and/or consider adequately and determine Ground 7

and the issue raised thereon in relation to exhibit 7 in the Appellants' Brief of Argument having held in the lead judgment as follows:-

'I hold that the remaining grounds 3, 6, 7, 8 and 9 are valid.'

PARTICULARS

B (i) *Ground 7 of the Appellants grounds of appeal was held to be valid by the Court of Appeal.*

(ii) *The ground was argued in Appellants' Brief and before the court.*

C (iii) *The ground and issue raised therefrom is fundamental in relation to the legal effect, inferences and I conclusions to be drawn from exhibit 7 regarding boundaries of the land in the area in dispute between the parties.*

D (iv) *The ground and issue raised therefrom was not considered and/ or adequately considered and determined by the Court of Appeal.*

(v) *In law, an appellate court is enjoined to adequately consider and clearly determine and resolve all matters and crucial issues specifically raised and argued before It."*

E From the above it is clear that appellants are not complaining about the formulation of issues by the lower court - their complaint being simply that the said court did not consider or adequately consider issue No. 5 based on ground 7 dealing with exhibit 7 on boundaries of the land in dispute. **I hold the view that the ground and the issue 2 formulated**

F **therefrom and being presently under consideration are valid before this court; appellants do not need to question the validity of the issues formulated by the lower court before complaining against the non or adequate consideration of that issue by the lower court. The**

G **complaint of the appellants gives rise to the issue as to whether or not the appellants' issue No. 5 dealing with exhibit 7 on boundaries of the land was considered or adequately considered by the lower court. If it was, then that is the end of the matter. Counsel must**

H **always bear in mind that this is the court of last resort in some appeals in this country and that the attitude of this court has changed from doing technical justice to doing substantial justice. This attitude envisages the possibility of hearing everyone on any complaint**

so as to enthrone and sustain the rule of law. Parties are therefore encouraged to ventilate their grievances before the courts which are enjoined to do substantial justice in relation thereto without recourse to form or technicalities. This attitude does not, however, give licence to the parties, in the formulation of their cause or grounds of appeal or issues arising therefrom, to present to the court anything that is incapable of any meaningful interpretation or understanding in the name of cause of action, ground of appeal or issue formulated for determination, in the present appeal, I hold the view that the preliminary objection of the respondents' counsel is misconceived and is consequently discountenanced.

Looking at the merits of the issue; it is very clear from the record that the lower court did consider issue No. 5 raised in appellants' brief of argument before that court, in its judgment now on appeal, it has earlier on been stated in this judgment that the learned justices of the Court of Appeal formulated two broad issues for determination; issue two of which dealt with evaluation of evidence including the evidence on boundaries by the trial court. At page 422 of the record, the Court of Appeal stated thus:

"A further consideration of the remaining issues reveals that issue No. 1 and 6 are the same while issue No. 5 is the same with issue No. 7. So in essence it can be said that the appellant formulated two issues for determination and they are as follows:-

1. Whether the evidence adduced by the defendant on traditional history is more probable than that of the plaintiffs as to entitle them to judgment on the counter claim.

2. Whether the trial court adequately considered the evidence adduced and drew the proper inferences and conclusions."

It is not disputed by the parties that the thrust of exhibit 7 and issue No. 5 pertains to the boundaries of the disputed land thereby making it part and parcel of issue No. 2 supra which deals with evaluation of evidence and appropriation of evidential values by the trial court. I hold the view that the trial court properly evaluated the evidence pertaining to boundaries and came to the right conclusion when it held at page 268 of the record thus:-

"In view of my preceding remarks, I am satisfied that the document

exhibit 5 categorically establishes the boundary between Iguomo and Ikhuenuro and in this regard I accept the testimony of the first and sixth plaintiffs witnesses that Iguomo community has a common boundary with Ikhuenuro as shown in exhibit 1 and I so hold."

B I further hold that the lower court is right in confirming the findings of the trial court supra by holding at page 431 inter alia,

"That it cannot therefore be said as Appellant's counsel has argued that the respondents as plaintiffs could only establish mere acts of possession or user of land which was based on undefined traditional boundaries."

It has to be noted that what an appellate court considers in its decision are the issues formulated for determination not the ground or grounds of appeal or every question that arises from the ground(s) of appeal -see Ibori v. Agbi (2004) 6 NWLR (pt. 868) 78 (pt. 111).

It is trite law that a party seeking a declaration of title to land must show with certainty the land to which his claim relates, failing which his claim must fail.

E Apart from the above holdings, I am of the firm view that exhibit 7 is of no moment in the determination of the issue as to whether the respondents established with certainty the area of land in relation to which they sought declaration of title. The fact that exhibit 7 seems to suggest that the exact point of the boundary F between the parties was not certain as seen by the Oba of Benin, the author of that exhibit, does not mean that the parties to the dispute do not have exact points they claim as constituting their boundaries. These points are shown in the respective survey plans filed along G with the statements of claim and defence respectively. It is the features on these survey plans and the testimonies by the witnesses that the court evaluates before deciding the matter one way or the other. Even before the Oba of Benin, the fact that there was a dispute as H to ownership of the land in dispute leading to the Oba appointing the Surveyor-General to carry out a survey of the land and determine the boundary does not mean that each party to that dispute did not state where their boundary was. The only issue to be determined where there is such

a dispute as to boundary is whose version of the boundary is more probable.

In the present case, there is abundant evidence from which the trial court determined the issue of boundary between the parties not withstanding exhibit 7. The first witness to the plaintiff, one Francis B Useghese Iyawe at page 83 of the record stated as follows:-

“The boundaries line to the house is defined by an ancient footpath which the plaintiff called Iro. The northern boundary is further determined by two prominent juju shrine The two prominent shrines are on the right hand side of the Iro on the way to Benin City. The footpath, i.e Iro forms the boundary between Ikhuenebo and Iguomo. To the east the boundary is defined by old Benin/ Asaba Road which constitute the boundary between Ikhueniro and Iguomo. To the west, the boundary between Amufi and Iguomo was defined originally by a moat, but by agreement the boundary has been shifted to a motorable road as shown in exhibit 1.....”

The first plaintiff stated at pages 106, 107, 109 & 110 of the record as follows:-

“I know the boundaries of Iguomo land. I know the neighbouring Iguomo land. We have boundaries with Ikhueniro, Ikhenbo, Amufi on one side, and other side Is river Okhuahe..... I know the Iro traditional boundary. It is the defendants who gave it the name Iro and it is one of the boundaries between us and the defendants”.....

“It is true that the Oba of Benin settled this matter and decided that our community should give the 1st defendant a plot of land and he should be allowed to stay in the house and a plot and half should be given to 1st defendant and this should be the boundary. It is true that the Oba send (sic) a Surveyor - General to demarcate the boundary between us, however when we got to the bush the Surveyor - General cut part of our land to the defendants land which was different from the manner the Oba settled the matter..... We thereafter run to the palace and informed the Oba of the attitude of the Surveyor - General, the Oba asked us to pay the Surveyor - General but we refused and filed the present action.”

On the other side of the imaginary scale of justice is the case of the

appellants regarding the issue of boundary; their case being that there is no boundary between the parties as evidenced by exhibit 6 - the survey plan tendered by DW1, DW4 stated thus at page 143 of the record:-

“I know Iguomo the plaintiffs village, - coming from Benin City
 B Iguomo village is to the left on the same side as Ikhiendo village (the village of the defendants) there is no common boundary between Iguomo and Ikhiendo because Iguomo has from time immemorial been on Ikhiendo land....”

The above is the state of facts as contained in the evidence before
 C the “trial court which that court considered and resolved in favour of the respondents. That court held at page 268 of the record that Iguomo community has a common boundary with Ikhiendo Community “as shown in exhibit 1”. The above finding was confirmed by the Court of
 D Appeal in the decision at page 431 of the record that.... “it cannot therefore be said as appellants’ counsel has argued that the respondents as plaintiffs could only establish mere acts of possession; or user of land which was based on undefined traditional boundaries....” and thereby confirming
 E the finding of the trial court on the issue of boundary.

It is clear that learned counsel for the appellants is relying on the statement in exhibit 7 to the effect that there was no visible boundary between the two villages to submit that the trial and lower courts were
 F wrong in holding that from the evidence, there exists such a boundary.

In our system of adjudication, it always takes two or more people to have a dispute in respect of anything or right which dispute has to be resolved by the courts. Experience, however, shows that in such a dispute both parties will always have different stories to tell
 G **the adjudicator as to the origin of the dispute, the party entitled to the subject matter of dispute, etc, etc. It is because both parties to this case claim different points as constituting the boundary or that there is no boundary between them in the land in dispute that is why**
 H **the boundary is in dispute. From the respective cases put forward by the parties in their pleadings and evidence on record, it is very clear that exhibit 7 is of no assistance to the case of the appellants particularly as it never stated that no boundary ever existed between**

the two communities, which is the case put forward by the appellants.

That apart, it is the constitutional responsibility of the courts to try and determine disputes properly brought before them and in doing so be guided by rules of law and procedure. I hold the view that the trial court properly evaluated the totality of the evidence before it including the evidence on the issue of boundary and properly came to the right decision on the matter and that the lower court is right in confirming that decision. I therefore resolve issue No. 2 against the appellants.

In conclusion I find no merit in the appeal which is accordingly dismissed with costs which I assess and fix at N10,000.00 in favour of the respondents and against the appellants.

Appeal dismissed.

KUTIGIJSC

I read before now the judgment just delivered by my learned brother Onnoghen, JSC. I agree with his reasoning and conclusions. The appeal is without merit and it is accordingly dismissed with N10,000.00 costs against the Appellant and in favour of the Respondents.

MUSDAPHERJSC

I have had the opportunity to read before now, the judgment of my Lord Onnoghen, JSC just delivered with which I entirely agree. In the aforesaid judgment, his Lordship has comprehensively and completely dealt with all the issues submitted for the determination of the appeal. I adopt his reasonings as mine and I accordingly dismiss the appeal as it is lacking in merit.

I abide by the order for costs contained in the aforesaid judgment.

OGUNTADEJSC

The respondents were the plaintiffs at the Abudu High Court of Edo State where they claimed for declaratory reliefs as to the ownership of a parcel of land, situate at Iguomo village in Uhumwode Local Government Area. The Appellants who were the defendants raised a counter-claim

against the respondents as to the ownership of the land.

The parties filed and exchanged pleadings after which the case was tried by Agun J. Both parties had relied in proof of their claim of ownership to the land in dispute mainly on traditional history. The trial judge in his judgment delivered on 3-10-97 appreciably evaluated the evidence of tradition called by the parties. He then came to the conclusion at pages 282-283 of the record that:

“Bearing in mind the warning of Coker JSC in Akintola and Another v. Solano (1986) 2 NWLR (Part 24) page 589 at page 611.

‘There is no concept which could be described as absolute title as between the parties and that what the court had to decide at the end of the trial is which of the parties on the preponderance of credible evidence was entitled to judgment. See Alhaji L. A. Onibado and Others v. Alhaji W. A. Akibu and Others (1982) 7 SC. 60 at 89.’

On the whole the plaintiffs have presented a more impressive case of their traditional history which the court finds as being credible, cogent and compelling, that case sustain a claim of declaration of title to land.

1. *F. M. Alade v. Lawrence Awo (1975) 4 SC. 215 at 216;*
2. *Olujebe of Ijebu v. Oso (1972) SC. 143 at Pg. 151;*
3. *Atanda v. Ajanee (1989) 3 NWLR (Pt.) 111) Pg 51;*
4. *Obawole v. Coker (1994) 18B LRCN Pg. 168;*
5. *Runsewe v. Odutola (1996) 36 LRCN Ratio 1 per Iguh JSC at Pg. 529.*

On the final analysis, I am satisfied that the plaintiffs have established their case on preponderance of evidence and their claim succeeds. In the same vein defendants counter claim must fail and it is hereby dismissed in its entirety. Accordingly judgment is hereby entered in favour of the plaintiffs in the following terms:

1. *That in accordance with Bini Customary Law and Tradition, the plaintiffs the people of Iguomo village, Uhunwode Local Government Area of Edo State are persons vested with all existing right to the use and occupation of all that piece or parcel of land lying, being and situate at Iguomo village in Uhunmwode Local Government Area of Edo State verged PINK in Survey Plan Number ISO/BD/1358/87 of 14th October,*

1987 filed in this action.

2. *An order of perpetual injunction restraining the defendants whether by themselves, their servants, agents and or any person claiming through or under them or whosoever from entering or remaining upon the said piece or parcel of land in purported exercise of any right in relation to the possession, use and occupation of the land or any part thereof in delegation of the plaintiffs' right or interests as vested from time immemorial.*" B

The appellants (i.e. defendants at the court of trial) were dissatisfied with the judgment of the court of trial. They brought an appeal against the judgment before the Court of Appeal sitting at Benin (hereinafter referred to as the 'court below'). The court below in its judgment on 14-12-2000 dismissed the appeal. In dismissing the appeal, the court below after discussing the evidence called by the parties before the trial court and the approach of the trial judge in the evaluation of the evidence concluded at page 393 of the record thus: C D

"In conclusion I find that this appeal has no merit and I accordingly dismiss it. The learned trial Judge's conclusion that the Plaintiffs presented a more impressive case of their traditional history which can sustain a claim of declaration of title to the land in dispute is unassailable. This is so despite the fact that the learned trial Judge fell into an error when he made findings of fact that the defendants did not deny the claim of the plaintiffs that their ancestors were the first to settle on the land in dispute and that there was no contradictory evidence on the plaintiffs assertion that their ancestor Imadegue founded the land in dispute." E F

Against the judgment of the court below, the defendants at the court of trial have now appealed to this Court. In their amended appellants' brief, the two issues formulated for determination are: G

"1. Whether the learned Justices of the Court of Appeal were right in law in striking out Grounds 2, 4, 5 of the appellants' grounds of appeal before that court." H

2. Whether the learned Justices of the Court of Appeal were right in law in failing to consider Issues 5 in relation to exhibit 7 in the Appellant's brief of argument."

My learned brother Onnoghen JSC has given consideration to the two issues. I agree with his treatment of the issues and the conclusion he arrived at on them. I only wish to emphasize some aspects of the judgment in my contribution.

B The court below took the view that the appellant's grounds of appeal Nos. 2,4 and 5 were vague and proceeded to strike them out. The said grounds of appeal read:

C *"5.2 It is against the above background in paragraph 5.1 & 5.2 that we now consider Ground 2 of the Appellant's ground of appeal at page 304 of record. Again for easy of reference the said ground is reproduced.*

a. The learned trial judge erred and misdirected himself in law and came to wrong conclusion that the defendant on the available evidence have been unable to establish the fact that the plaintiff ancestors are slave
D *after holding in that part of his judgment as follows:-*

(a) The Defendants are asserting that the plaintiffs are slaves, that is, the plaintiffs' community pay homage to them. The outstanding question is, does a slave pay traditional homage to his master with crops
E *and yams.*

(b) it is thus apparent that a slave is the property of his alleged master: his house, his wife, his children, his arm and crops belong to the master. On the basis of the foregoing, the status of a slave under the law
F *is very clear, to assert that a slave who is the chattel of his master which the defendants contended is the status of the Plaintiffs ancestors, pay homage to the Defendants, their master, it is saying the lest that such a situation is something that is more in the realm of fiction and it seems to me therefore that the Defendants on the available evidence have been*
G *unable to establish the fact that the Plaintiffs' ancestors are slaves?*

PARTICULARS

(c) There is evidence by 1st Defendant, D. W. 3 and D. W. 4 that their ancestors founded Plaintiffs' village with servants an slaves from
H *Oba's palace during the reign of Oba Eresoyen; and that Plaintiffs' ancestors paid Traditional homage with yams to the Defendants' ancestors.*

(d) It is common ground that the ancestors of either the Plaintiffs

or Defendants who originally settled on the land committed suicide leaving only women on the land, which was subsequently changed to Iguomo Village by the Oba Ozolua.

(e) In law, slavery and its incidence was part of our custom and practice and a master had power of life and death over his slaves and their property until the slavery Abolition Act, 1883.

(f) There is neither any specifically pleaded fact nor positive oral evidence by the plaintiffs and their -witness denying or controverting Defendant's pleaded fact and positive oral evidence that Plaintiffs' ancestors as slaves and servants from the Oba's Palace were settled on the land in dispute by the Defendants' ancestors

(g) There is evidence by 1st Plaintiff - (a) admitting that he knew that Oba Eresenya as a matter of gratitude sent slaves and Palace servants to assist 1st Defendant's ancestors to farm on the land; but does not know the slaves sent; and (b) that being descendants of the Oba's slaves does not deprive the Plaintiffs of the right to farm on the land.

(h) In law a fact/allegation not specifically denied is deemed admitted and what is admitted need no further proof as admission is greater than proof.

4. "A. The learned trial Judge erred and misdirected himself in law by considering irrelevant and extraneous matters based on his own view in preferring plaintiffs' traditional evidence to that of the defendants of the change of the name of the land in dispute to Iguomo, and came to a wrong decision after holding in that part of his judgment as follow:-

'Again the parties are agreed that during the reign of Oba Ozolua there was a war and the males at Iguomo in order to avoid going to war with the Oba jumped into a well and committed suicide. The version given by the Plaintiffs for the change of name from Imadegue to Iguomo is that when the Oba reached Imadegue he met only 'women and accordingly changed the name to Iguomo - land of women. First Plaintiff asserted that they are the Descendants of these women; on the Contrary the version given by the Defendants that when the Oba Reached Igue Ovien or Igue Ovien Oghomo, the Oba changed the name to iguomo after being aware that all the males in the village had committed suicide in order to avoid

going to war with the Oba, taking the Defendants ‘ story, it is common knowledge that any society or citizen who avoids conscription in time of war is in breach of a civil duty which invariably attracts serious consequence and some time punishment. That being so the fact that the males in Igue Ovien or Igue Ovien Oghomo, which ever the defence prefers the court to chose, by jumping into a well, has committed a cowardly action that deserves royal condemnation, so why the royal fiat and approval of the plaintiffs ancestors conduct by Oba Ozolua whom on the evidence both parties accepts is a no-nonsense Oba not given to compassion; for on any view it is a royal fiat of condemnation to change the status of slaves to that of free men by an Oba within Benin kingdom or is it the case for the defence that it was only the name of the settlement that was changed and not the status of the plaintiffs ancestors. To my mind rather than term the story of the defence as credible it is incapable of belief and certainly not in accord with human behaviour and reaction to a given situation. The story of the plaintiffs that Oba Ozolua because he met only women changed the name to Iguomo (land of women) is in my considered opinion more in consonance with the truth of the events that happened. "

PARTICULARS

a. The Defendants’ version that when the Oba reached Iguo-Ovien or Iguo Ovien Oghomo, the Oba changed the named to Iguomo after being aware that all the males in the village had committed suicide in order to avoid going to war with the Oba is not contrary to the fact agreed by the parties on the change of name of Iguomo village as shown in the first five lines of the passage quoted and underlined above.

b. There is no evidence that in Benin Kingdom at the time of Oba Ozolua persons were conscripted to war and those who avoided conscription were subjected to serious consequence and punishment.

c. In law, irrelevant and extraneous matters are not to be considered as a basis to induce belief.

d. Alternatively, even if the trial judge’s view is right, which is not conceded in law, it induces belief in the Defendants version than that of the Plaintiffs. “

5. A. The learned trial judge erred and misdirected himself in law

and came to a wrong conclusion that one of the Plaintiffs' Witnesses were cross-examined on Plaintiffs acts of possession on the land in dispute and in accepting Exhibits 2, 3 and 4 as authentic and in proof of acts of possession by holding in that part of his judgment as follows:-

'To my mind, the Defendants have taken a position of what is more admission than denial; in view of my preceding remarks throughout these proceedings none of the Plaintiffs' witnesses was cross-examined on Plaintiffs' acts of possession on the land in dispute. There are before this Court the Following-Oba approval of the Oba of Benin, Exhibits 2, 3 and 4, which are the highest authority (prior to 1978) under Bini Native Law and Custom which give title to any person in respect of any land in Benin Kingdom. These documents are authentic and oral evidence cannot vary their content. "

Ground 6

A. The learned trial Judge erred in law and misconceived Plaintiffs' evidence on the exercise of acts of possession pleaded in paragraphs 24(f), 24(g) and 24(i) of Plaintiffs' Further Amended Statement of Claim and came to a wrong conclusion that the facts so pleaded have been established by holding in that part of his judgment as follows:-

" 'Upon a consideration of the Plaintiffs' case and that of the Defendants given in rebuttal, I am satisfied that the Plaintiffs have established by credible evidence the facts pleaded in paragraphs 24(f), 24(g), 24(h) and 24 (i) of their Further Amended Statement of claim and I so hold".

PARTICULARS TO GROUNDS 5 AND 6 ABOVE

a. There is no documentary evidence showing the appointment of 6th P.W. as Secretary of Iguomo Plot Allotment Committee, Ward 28 as claimed by the witness, or of any of the persons who purportedly signed, Exhibits 2, 3 and 4 as Members of the Committee as required under Bini Customary Land Law before the Land use Act, 1978;

b. Notwithstanding the above, there is evidence by 6th P.W. under cross-examination, that:-

i) He had no document or instrument from the Oba defining the boundaries of Ward 28, Plot Allotment Committee of iguomo, which land

they purportedly allocated by Exhibits 2, 3 and 4.

ii) The boundaries of land allocated by the Committee to allottees are demarcated by Ikhinmwin sticks, but later by Ward beacons;; and

iii) No Ikhinmwin sticks or Ward beacons demarcating boundaries of the lots allegedly allocated are shown in Exhibits 2, 3 and 4;

c. In law, the above evidence of P.W.6 being inconsistent and conflicting with the Plaintiffs' facts pleaded in paragraphs 24(f), 24(g) and 24(h) of the 3rd Further Amended Statement of Claim, it renders the Plaintiffs pleaded survey Plan NO. ISO/BD/358/87 EXHIBITS I and the boundaries defined therein as unreliable and self-serving; and Exhibits 2, 3 and 4 not authentic.

There is no doubt that the above grounds of appeal framed by the appellants before the court below are narrative in form and needlessly prolix. Such grounds of appeal impose an avoidable tedium on Justices whose duty it is to make a meaning out of them. Counsel who drafted these grounds did not demonstrate that he saw the need for precision and clarity in the preparation of grounds of appeal. Neither did the counsel show that he had a familiarity with Order 3 rules 2(2), (3) and (4) of the Court of Appeal Rules which provide.

“(2) If the grounds of appeal allege misdirection or error in law, the particulars or nature of the misdirection or error shall be clearly stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

(4) No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted save the general ground that the judgment is against the weight of evidence

It seems to me however that it is possible to make a meaning out of the appellant's grounds of appeal reproduced above. They are mainly complaints against the manner in which the court of trial treated or evaluated the evidence. They are not vague or in general terms. Nor can they be regarded as not disclosing a reasonable ground of appeal. The court below regarded these grounds as vague but clearly in my view they are not.

They convey a meaning, which could not have been lost to the respondents. This was the essence of the decision of this court in Aderounmu v. Olowo [2000] 4 NWLR (Pt. 652) 253 where we said per Ayoola JSC at pg. 265-266.

"In my opinion, what is important in a ground of appeal and the test the court should apply is whether or not the impugned grounds show clearly what is complained of as error in law and what is complained of as misdirection or as the case may be, error of fact. The view, with which I am inclined to agree is expressed in the Court of Appeal. See case of Nteogwuija & Ors. v. Ikuru & Ors. (1988) 10 NWLR (pt. 569) page 267 at 310, that the mere fact that a ground of appeal is framed as an error and misdirection does not make it incompetent. In my view, only general propositions can be made in a matter in which the question is not as to form ultimately, it is for the court before which the question is raised to decide whether viewed objectively, the ground satisfied the requirements of preciseness and clarity' what makes a ground incompetent is not whether it is framed as an error and a misdirection but whether by so stating it, the other side is left in doubt and without adequate information as to what the complaint of the Appellants actually is"

It is my respectful view that the court below was in error in its conclusion that the grounds of appeal in question were vague. No doubt they were prolix, inelegant and narrative. But they could still pass the test as stated in Aderounmu v. Olowo (supra). It is my view however that the error of the court below in striking out the grounds of appeal did not occasion a miscarriage of justice. As I expressed earlier, the complaints made in the aforesaid grounds of appeal 2,4 and 5 boil down to the treatment or evaluation of evidence. At the end of the day, the question raised by these grounds boils down to whether or not there was sufficient evidence to sustain the conclusion arrived at by the trial court that the plaintiffs' case was to be preferred to that of the defendants on the evidence called.

What was the case all about? The court below neatly summarized the case pleaded by parties at pages 383 to 384 thus:

"This case was fought on the basis of traditional history. It is the

case of the Plaintiffs that they have been the owners and have been in possession and occupation from time immemorial of Iguomo village which was founded by one Imadegue around 900 A.D. It was originally called Imadeguen but was changed to IGUOMO by Oba Ozolua who reigned around 1481 A.D. They exercised acts of ownership and over lordship over the entire land by giving out some parcels of the land to some key members of the defendants' community and also put tenants on the land until the defendants started to commit acts of trespass on the land which led the Plaintiffs to institute the action against the defendants. The defendants on the other hand claimed that Iguomo was a settlement established by one Chief Ehenegha, the Chief Priest and Clan head of the Defendants' community during the reign of Oba Eresoya. It was Oba Eresoyan who sent the Plaintiffs' ancestors as palace servants/slaves to Chief Priest Ehenegha who settled then on the defendants' land. They paid traditional homage to the defendants but stopped the payment of the homage when they instituted the action. And so the defendants counter-claimed as the customary owners of the land and prayed for an order of forfeiture against the Plaintiffs and perpetual injunction to restrain the latter from further asserting their rights of ownership over the land in dispute."

The parties called evidence in support of the differing traditional histories pleaded. It was the duty of the trial judge to compare the two sets of traditional history and to express preference for one at the end of that exercise. The court below appropriately captured the essence of the duty of the trial court in that at page 383, it identified the issues calling for resolution before it thus:

"1. Whether the evidence adduced by the Defendants on traditional history is more Probable than that of the Plaintiffs as to entitle them to judgment on the counterclaim.

2. Whether the trial court adequately considered the evidence adduced and drew the proper inferences and conclusions."

The court below adequately considered these two issues. It had cause to reproach the trial court in the manner the evidence was considered. It nonetheless came to the conclusion that the trial court properly evaluated the evidence and came to the right conclusion. Before

us in this Court we have concurrent findings of fact as to who of the parties satisfactorily established their case and it is not our practice to reverse such concurrent findings of fact unless there has been a miscarriage of justice.

The second issue for consideration relates to whether or not the respondents by tendering exhibit 7 satisfactorily established the identity of the land they claimed. In paragraph 4 of their 3rd Further Amended Statement of claim, the respondents pleaded the identity of the land in dispute thus:

“4. The plaintiffs are the owners and have been in possession and occupation from time immemorial of all that parcel of land situate, lying and being at Iguomo and known as Iguomo community land and verged green in the survey plan NO. ISO/BD/1358/87 dated 14/10/87 made by a licensed surveyor, R. F. U. IYawe and filed with this statement of claim which plan shall be relied upon at the hearing.”

The appellants however in paragraphs 4 and 5 of their Amended Statement of defence pleaded thus:

“4. The defendants deny paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and the Relief of the plaintiffs’ statement of claim and will put the plaintiffs to the strictest proof thereof.

5. Further to paragraph 4 above, the defendants while denying any act of trespass on the Plaintiffs’ land will establish at the trial that the compromised boundary between the plaintiffs and defendants (arising from the recent decision of the Oba of Benin Omo N’Oba Eradiawu) is as shown on The Defendants’ dispute survey plan NO. OSA/1952/BD89 dated 18th April, 1989 drawn by a licensed surveyor Mr. Osaikhuwu and filed along with this statement of defence. Without the compromised or settlement boundary, the defendants aver that the plaintiffs’ community from time immemorial form part and parcel of the Defendants’ ancestral community land.”

Now on 13-12-93, Plaintiffs 1st Witness, Francis Useghese Iyame, a surveyor testified and tendered a plan of the land in dispute as Exhibit 1 P.W.1 gave detailed evidence identifying the features on the land in dispute and their boundaries. On 8-2-96, the defendants (appellants) called D.W.1 a surveyor to testify. He gave evidence as to the features of the land in

dispute. The plan produced by D.W.1 was tendered as exhibit 6. No attempts were made by the counsel who appeared for the parties to show that exhibits 1 tendered by the plaintiffs and 6 tendered by the defendants were different in material particulars. In a civil case, it is often the plaintiff who nominates the issues. In this case, it was the plaintiffs who brought a suit in respect of the land in dispute, which they claimed as their own. They produced a plan of the land and it was for the defendants to show that the land in respect of which the plaintiffs sued did not belong to the plaintiffs. It was not the province of the defendant to argue that some other land apart from the one claimed by the plaintiffs was the one in dispute. In *Bello v. Fayose* [1999] SC. (Part 11) 6 at 9 this Court per Ayoola JSC repeated the well established principle that a party seeking a declaration of title to land must show with certainty the land to which his claim relates. See also *Arabe v. Asanlu* [1980] 5-7 SC. 78. *Epi v. Aigbedion* [1972] 10 SC. 53.

I am satisfied that by tendering exhibit 1 and calling P.W.1 as a witness, the plaintiffs had shown with clarity the land to which their claims related. Exhibit 7 about which the appellants complained was a letter written by the Oba of Benin to the Police and the said letter certainly did not put into doubt the boundaries of the land claimed by the plaintiffs/respondents as depicted in exhibit 1. The defendants/appellants did not in my view raise on their amended Statement of defence an issue as to the land in dispute.

I would therefore agree with the lead judgment by my learned brother Onnoghen JSC and dismiss this appeal as unmeritorious. I would also award costs as in the lead judgment.

MOHAMMED JSC

This is an appeal against the judgment of the Court of Appeal Benin Division delivered on 14-12-2000 dismissing the appeal of the present appellants who were the defendants at the trial High Court of Justice of the then Bendel State in Abudu where the present respondents as the plaintiffs claimed in Writ of Summons as follows:-

“(a) A declaration that in accordance with Customary Law and

Tradition, the plaintiffs, the people of Iguomo village in Orhionwon Local Government Area of Bendel State are the persons vested with all existing rights to the use and occupation of all that piece or parcel of land lying and situated at Iguomo village Orhionwon Local Government Area of Bendel State and within the jurisdiction of this Honourable Court. The said land though very well known to the defendants, the true position and boundaries thereof will be shown and delineated in survey plan to be filed by the plaintiffs as litigation survey plan with their statement of claim in these proceedings.

(b) That the plaintiffs by virtue of the said rights, particularly farming rights and occupation are the persons entitled to the grant of Customary and or Statutory Right of Occupancy in respect of the said piece or parcel of land.

(c) An order of perpetual injunction restraining the defendants whether by themselves, their servants agents or any persons claiming through or under them or howsoever from purported exercise of any right in relation to the possession, use and occupation of the land or any part thereof in derogation of the plaintiffs' right or interest as vested from time immemorial."

The appellants as defendants in their reaction to the claims in their statement of defence raised a counterclaim against the plaintiffs jointly and severally in paragraph 26 of the Amended Statement of Defence and counterclaim as follows:-

"26. COUNTER CLAIM

AND BY WAY OF COUNTER CLAIM the defendants (now plaintiffs) claim against the plaintiffs (now defendants jointly and severally as follows-

(a) That from time immemorial and prior to the Land Use Act the plaintiffs have been the customary owners of ALL that Area as shown in the dispute survey plan verged pink in survey plan NO. OSA/1952/BD/89 filed with the statement of defence.

(b) That notwithstanding the chance (sic) in the Radical title to Land by reason of the Land Use Act; the plaintiffs' vested Rights, interests and/or Customary Rights of Use and Occupation over the Area in dispute

remain in force and effective.

(c) An order for forfeiture of the defendants' Right over the entire land, in that the defendants being customary tenants, now claim title or ownership of the land against the plaintiffs (their overlords) and/or for failure to pay their usual or annual tributes or homage as customary tenants of the plaintiffs.

(d) An order of perpetual injunction restraining the defendants, their Agents, servants or privies from further asserting their rights of ownership over the land in dispute or howsoever doing or continuing to do anything inconsistent with the vested Rights and Interests of the plaintiffs over the Area in dispute.

A reply to the counter-claim was duly filed before the matter went in for hearing before the trial court where the 1st plaintiff testified and called six other witnesses in support of the plaintiffs' claim. The 4th defendant on the other hand with three other witnesses gave evidence for the defence and the counterclaim. The learned trial judge after carefully reviewing the evidence adduced, landed with the following findings at E pages 282-283 of the record-

“On the whole the plaintiffs have presented a more impressive case of their traditional history which the court finds as being credible, cogent and compelling that can sustain a claim of declaration of title to land.

F On the final analysis, I am satisfied that the plaintiffs have established their case on preponderance of evidence and their claim succeeds. In the same vein the defendants' counter-claim must fail and it is hereby dismissed in its entirety. Accordingly judgment is hereby entered G in favour of the plaintiffs ..."

Unhappy with this decision against them, the defendants appealed to the Court of Appeal Benin which after striking out grounds 2, 4 and 5 of the defendants' grounds of appeal, in its judgment handed down on 14-12-2000, dismissed the appeal. Still not satisfied with the decision of the Court of Appeal, the defendants have now further appealed to this court and presented the following two issues for the determination of the appeal.

“1. Whether the learned justices of the Court of Appeal were right

in law in striking out Grounds 2, 4 and 5 of the appellants' Grounds of Appeal before that court.

2. Whether the learned justices of the Court of Appeal were right in law in failing to consider issue 5 raised in relation to Exhibit 7 in the appellants' brief of argument."

Taking on issue No. 1, the ground upon which the preliminary objection was raised against grounds 2, 4 and 5 of the appellants' grounds of appeal at the Court below can be seen at page 346 of the record of this appeal. I reads-

"Grounds 2, 4, 5 and 6 of additional grounds of appeal filed in this suit did raise or alleged error and misdirection in Law by the learned trial judge which grounds are incompetent for non compliance with Order 3 rule 2(2)(3) and (4) of the Court of Appeal Rules 1981 as amended."

The question of whether a ground of appeal alleging error and misdirection in law at the same time can be struck out for being incompetent had been thoroughly thrashed out in the recent decisions of this court in a number of cases. Admittedly, a ground of appeal alleging a misdirection is distinct from one described as error in law. In Black's Law E Dictionary, 6th Edition at page 999, a misdirection is defined as an error made by a judge in instructing the jury upon the trial of a cause. However, in a legal system such as ours in which the judge also plays the role or function of the jury, a misdirection occurs when the judge misconceives F the issues, whether of facts or of law, or summarizes the evidence inadequately or incorrectly. In this situation, the misdirection may take the form of a positive act or mere non direction: See Chidiak v. Laguda (1964) NMLR 123 at 125; Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718 at 744. A ground of appeal alleging error in law on the other hand relates to a G finding of the court as was explained in Chidiak v. Laguda (supra).

Although for quite some time doubts had been expressed about the validity of a ground of appeal alleging a misdirection of law and error in law, it is quite clear that the decision of this court in Nwadike v. Ibekwe most H often cited did not appear to have gone far enough to invalidate such ground of appeal as held by the court below with regard to the appellants' grounds of appeal 2, 4 and 5, the subject of the present issue for

determination. It must be emphasized that the whole purpose of a ground of appeal is to appraise or put the other side on notice of the nature of the complaint being raised therein and the overriding consideration is whether the ground is clearly stated or is vague. This was the outcome of the decision of this court in the case of *Aderounmu v. Olowu* (2000) 4 NWLR (pt. 652) 253 at 265-266 where Ayoola JSC clarified the position in the following words-

*“In my opinion, what is important in a ground of appeal, and the test the court should apply, is whether or not the impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection, or, as the case may be, error of fact. The view, with which I am inclined to agree, is expressed in the Court of Appeal case of *Nteogwuya & Ors v. Ikuru & Ors* (1998) 10 NWLR (pt. 569) 267, 310 that the mere fact that a ground of appeal is framed as an error and misdirection does not make it incompetent”*

See also the case of *Okotie-Eboh v. Manager* (2004) 18 NWLR (pt. 905) 242 at 270 where Edozie JSC re-emphasized the position of the law on the status of a ground of appeal framed as an error and misdirection in law as not being incompetent provided the ground shows clearly what the complaint of the appellant is, regarding the alleged error or misdirection. It is in line with the reasoning in these recent cases which the lower court failed to avert in its decision, that I entirely agree with my learned brother Onnoghen JSC in his judgment just delivered that the additional grounds 2, 4 and 5 filed by the appellants in support of their appeal at the lower court, are not incompetent and as such that court was in error in striking them out.

In spite of the success of the appellants in the resolution of their issue No. 1, having regard to the credible evidence on record in support of proof of title to the land in dispute, I still agree that on the whole, their appeal has no merit at all. Accordingly I also dismiss the appeal and abide by the orders in the judgment of my learned brother Onnoghen JSC, including the order on costs.