

SUPREME COURT OF NIGERIA
19TH MAY, 2006. SC. 367/2002
CORAM:- S. M. A. BELGORE, A. I. KATSINA-ALU, U. A.
KALGO, N. TOBI, I. F. OGBUAGU, JJSC

1. BISIRIYU AKINLAGUN

2. SALAMIRUFAI

3. BISIRIYU EGBELEYE APPELLANTS

4. MOMOH DISU

(For themselves and on behalf
of Laigbo-Osu family)

AND

1. TAIWO OSHOBOJA

(For himself and as representative RESPONDENTS
of the Oshoboja family)

2. RAUFU DADA

APPEALS - Issues - Must be distilled from the grounds of appeal - Not from anywhere - The issue of customary tenancy - Does not derive from any ground of appeal in this case (H1)

APPEALS - Issues - May be re-framed or even formulated by court - But the issues must be derived from the grounds of appeal filed by the parties (H2)

APPEALS - Ground of - Omnibus ground - Being a general ground of fact - Cannot be used to raise issue of law or error in law - Yet it may be used to raise an issue of fact (H3)

WORD & PHRASES - Omnibus ground of appeal - Meaning - Implies that judgment of trial court can not be supported - By the net weight of evidence - Given at the trial (H4)

PLEADINGS - Admission - Averment in a party's pleadings - Where it

amounts to admission by that party - No further proof is needed (H5)

CUSTOMARY LAW - Appeals - Issues - Customary tenancy - Being an issue of fact - Supportable by an omnibus ground of appeal - Gave Court of Appeal jurisdiction - To entertain issue of customary tenancy (H6)

APPEALS - Briefs - Issues - Properly distilled from grounds of appeal - Court need only consider these - Not the grounds themselves (H7)

COURTS - Jurisdiction - Appeals - Supreme Court - Does not entertain direct complaints - Against the decision of the High Court (H8)

LAND LAW - Title - Customary tenancy - Injunction - It is wrong to issue an injunction restraining the landlords - From dealing with the disputed land - As they cannot be trespassers on their own land (H9)

FACTS

In the High Court of Lagos State holden at Ikeja the 1st Plaintiff/Respondent claimed against the Appellants and the 2nd Respondent as defendants as follows:-

- i. Declaration of title to a customary right of occupancy to a piece of agricultural land.
- ii. Declaration that the said defendants were their customary tenants on the said land.
- iii. Declaration that the defendants have forfeited the customary right of occupancy in that they wrongfully claimed title to the land.
- iv. Possession of the land in dispute.

Pleadings were ordered, filed and exchanged. The appellants counter-claimed for

- (1) And order of injunction restraining the 1st plaintiff and/or his agents from trespassing on the land.
- (2) If the claim for forfeiture is proved by the plaintiff, an order relieving them from forfeiture, on terms.

The trial judge granted relief (i) of the 1st Respondent but dis-

missed all others against the Appellants. His Lordship also dismissed the claims of the 1st Respondent against the 2nd Respondents in its entirety. Finally, he granted item (i) of the Appellants' counterclaim. The 1st Respondent appealed to the Court of Appeal against the dismissal of his reliefs (ii), (iii) and (iv) against the Appellants and all his claim against the 2nd Respondent. Appellants appealed to the Court of Appeal against the grant of relief (i) of the 1st Respondent. That Court dismissed the Appellants' appeal, dismissed 1st Respondent's appeal against refusal of his claim against 2nd Respondent, but allowed 1st Respondent's appeal against the dismissal of his reliefs (ii) and (iii) against the Appellants. Appellants have further brought this appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal had jurisdiction to determine the existence of customary tenancy between the plaintiff (Oshoboja family) 1st respondent herein and the 2nd-5th defendants (Laigbo-Osu family) appellants herein and reverse the findings of High Court on the point when there is no substantive ground of appeal complaining against the specific issue namely “that the Laigbo-Osu family are not customary tenants of the plaintiff’s family (Oshoboja family) and the claim for forfeiture and possession were not established.

2. Whether the failure of the Court of Appeal to consider the grounds of appeal contained in 2nd -5th defendants’ notice of appeal (cross-appeal) occasioned a miscarriage of justice.

3. Whether the plaintiff proved title in the High Court to warrant a declaration of title to the land made in his favour by the High Court.

4. Whether the 2nd - 5th defendants (Laigbo - Osu family) appellants herein were entitled to an order of injunction restraining the plaintiff, his servants and/or agents from trespassing on the land, subject matter of this action.”

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

Issues - Must be distilled from the grounds of appeal

1. It is now well settled that issues for determination in an appeal must be formulated or distilled from the grounds of appeal themselves and not

from anywhere. In the grounds of appeal filed by the respondent in the Court of Appeal on 12/10/98, no specific complaint was made on customary tenancy, forfeiture or possession of the land in dispute thereof for determination by the Court of Appeal. In the grounds of appeal filed B by the appellants in the Court of Appeal on 13/ 8/90, there were 7 grounds including the omnibus ground. They complained of:

1. declaration of title to customary right of occupancy;
2. traditional evidence on declaration of title;
- C 3. application of doctrine of issue estoppel and res judicata;
4. same as in (3) above;
5. traditional evidence at variance with pleading;
6. omnibus ground of appeal;
7. grant of the injunction pending determination of relationship.

D I have earlier in this judgment set out the grounds of appeal and the issues formulated therefrom. I have carefully examined them and I find that none of the grounds of appeal filed by the appellants in the Court of Appeal touched on the declaration of customary tenancy. (p. 1639 F)

E

Issues - May be re-framed or even formulated by court

2. It is trite law that a court has no powers to set up a case different from that which the parties have brought before it. It is also well established F that although the appeal court has the discretionary power to reframe or formulate issues for determination in an appeal different from those raised by the parties in their briefs, the reframed or formulated issues must be derived from or culled from the grounds of appeal filed by the parties. In this case, no issues were framed by the Court of Appeal and the court G only considered together the issues raised by the parties in the appeals of the appellants and the respondent herein.

It is very clear to me therefore that none of the grounds of appeal filed in the main appeal or the cross-appeal in the Court of Appeal com- H plained directly against the trial court order on customary tenancy, forfeiture and possession which reads:-

“The claim for declaration that the defendants are customary tenants, forfeiture of the customary right of occupancy and possession are

hereby dismissed". (p. 1641 A / F)

APPEALS - Ground of

3. However ground 2 of the main appeal and ground 6 of the cross-appeal contained the omnibus ground namely "judgment is against the weight of evidence". Can this be relied upon to enable a party to raise an issue of law or of fact against a specific finding in the case appealed against? What then is an omnibus ground of appeal and what is its scope in civil proceedings.

An omnibus ground of appeal is a general ground of fact complaining against the totality of the evidence adduced at the trial. It is not against a specific finding of fact or any document. It cannot be used to raise any issue of law or error in law. See *Ajibana v. Kolawole* (1996) 10 NWLR (Pt. 476)22. It therefore follows that for a complaint on a finding of fact on a specific issue, substantive ground of appeal must be raised challenging that finding. It cannot be covered by an omnibus ground. (pp. 1641 H / 1642 D)

Omnibus ground of appeal - Meaning

4. In *Mogaji v. Odofin* (1978) 4 S.C. (Reprint) 53; (1978) 4 S.C 91, this court per Fatayi-Williams JSC, (as he then was) held:-

"When an appellant complains that a judgment is against the weight of evidence, all he means is that when the evidence adduced by him is balanced against that adduced by the respondent the judgment given in favour of the respondent is against the weight which should have been given to the totality of the evidence before him". (Underlining mine)

And on the implication or effect of an omnibus ground of appeal, this court per Uwais, JSC., (as he then was) in *Anyaoke v. Adi* (1986)3 NWLR (Pt. 31) 731 also held that:-

"..... An omnibus ground of appeal implies that the judgment of the trial court cannot be supported by the weight of evidence adduced by the successful party which the trial court either wrongly accepted or that the inference drawn or conclusion reached by the trial judge based on the accepted evidence cannot be justified". (Underlining mine)

In both decisions quoted above, the emphasis is on “evidence” before the trial court. This, in my respectful view, could be either evidence given by the successful party or given in his favour. (p. 1642 G)

B PLEADINGS - Admission

5. The respondent as plaintiff at the trial pleaded in Paragraph 14 of their further Amended Statement of Claim that:-

“14. *The plaintiff further avers that the defendants are now selling and leasing portions of the said land inconsistent to their right as customary tenants of the plaintiffs family*”.

In reply, the appellants as defendants, in their Further Amended Statement of Defence and counter-claim pleaded in Paragraph 7 that:-

“7. *With further reference to the said paragraph, these defendants aver that since the judgment in suit IK5/70, they have not sold or leased any land in Ijegin Isheri Oshun or otherwise challenged the overlordship of the plaintiff’s family*”. (Underlining mine)

In suit No. IK/5/70 referred to in Paragraph 7 above, the claim of the appellants as plaintiffs as to the title of the land in dispute was dismissed. They now pleaded that since the case, they never disputed or challenged the “overlordship” of the respondent’s family over the land in dispute. This is an unequivocal admission in the pleadings which needs no proof. (p. 1643 D)

CUSTOMARY LAW - Appeals - Issues

6. It is also evident that the appellants in their cross-appeal in the Court of Appeal, at page 631 also filed an omnibus ground of appeal that the judgment is against the weight of evidence. They thereafter raised issue (iii) on page 641 of the record dealing specifically with the question of customary tenancy. This means that both the appellants and the respondent filed an omnibus ground in their notices of appeal, and both raised the issue of customary tenancy and argued it in their respective briefs. All this border on issues of fact to determine the customary tenancy and each party was saying that the evidence it adduced was more cogent and acceptable than that of the other. Therefore in my view, and in line with

the decision of this court in Mogaji v. Odofin (supra) and Anyaoke v. Adi (supra), the Court of Appeal has jurisdiction to entertain the contention of the parties in respect of the issue of customary tenancy based on the evidence adduced by the parties at the trial on the omnibus grounds filed by them and the relevant issues raised thereon. There was no specific finding of fact upon which a substantive ground of appeal should be raised. (p. 1644 A)

APPEALS - Briefs - Issues

7. Issue 2 is alleging that the Court of Appeal has failed to consider the grounds of appeal contained in the notice of appeal filed by the 2nd-5th defendants i.e. the appellants and this occasioned a miscarriage of justice. Let me say straight away that since the introduction of brief writing in our civil trial procedures, this court has stopped considering grounds of appeal filed by the parties in their notices of appeal. What the court considers since then and now, are issues for determination which are properly distilled from those grounds and no more. The Court of Appeal in its judgment, set out fully all the issues raised by the parties and said that as the issues are inter-twined and interlocking, they would be considered together. This is what it did before coming to its final decision, and the appellants have not shown what miscarriage of justice they suffered as a result. (p. 1644 E)

COURTS - Jurisdiction - Appeals

8. Issue 3 is questioning whether the plaintiff (now respondent) proved title in the High Court to warrant a declaration of title made in his favour by the High Court. Looking at the issue itself as framed, it is complaining about proof of title by evidence in the High Court and the declaration of title by the High Court. It is absolutely clear that the issue is talking about what has happened solely in the High Court and not in the Court of Appeal. Since the promulgation of the 1979 Constitution, this court has ceased to have any jurisdiction to entertain any complaint or appeal from the decision of the High Court directly whether civil or criminal, final or interlocutory. Therefore, in my respectful view, this issue is not properly

before this court and cannot properly arise from the grounds of appeal filed by the appellants on pages 841-845 of the record. Accordingly I strike it out as being irrelevant. (p. 1645 B)

B Title - Customary tenancy - Injunction

9. The Court of Appeal after having carefully examined the whole evidence before the trial court came to the conclusion that even if the admission of over lordship of Oshoboja family by the appellants was ignored, the evidence of traditional history adduced by the plaintiff (respondent) was strong enough to entitle them to a declaration of title. In other words, it confirmed that decision of the trial court. I have also carefully examined the evidence on this issue, and I entirely agree that the declaration of title to the respondent was fully justified. It is also not in doubt that the Court of Appeal has found properly in my view as discussed earlier in this judgment that the appellants are customary tenants of the respondents. Therefore, since the plaintiff (respondent) was entitled to declaration of title to the land in dispute and the appellants are customary tenants of the respondents, it is improper and wrong to issue an injunction restraining the respondents from dealing with the land in dispute as they cannot be and are not trespassers on the land. I therefore answer this issue in the negative and resolve same against the appellants. (p. 1646 A)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Customary Tenancy - Payment of tribute is not always a necessity

G While payment of tribute is a recognised condition of customary tenancy, it is not always so and for all times. There are situations where tribute is not paid to the overlord and yet customary tenancy exists. For instance, where the tenant unequivocally recognises the position of the overlord, customary tenancy exists. In other words, where the tenant unequivocally recognises the position of overlord of the landlord, a customary tenancy exists, whether tribute is paid or not. After all, payment of tribute could be overlooked by the landlord who has milk of kindness

in him and a flowing charity. There are also instances where the landlord asks the tenant to stop payment of tribute because of very long association and the good behaviour of the tenant. The point I am making is that the Court of Appeal is correct in coming to the conclusion that payment of tribute by way of Ishakole is not an invariable practice. The most important condition, if I may say so, is for the tenant to agree that the landlord is his overlord, and there is a plethora of evidence on that by the 2nd to 5th defendants. That settles the issue of customary tenancy. (p. 1648 D)

2. Forfeiture - Its purpose is to punish illegal acts of the Customary tenant

A customary tenancy is determined by forfeiture. Forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner's land, tenements or hereditaments, whereby he loses all his interest therein, as a recompense for the wrong which either he alone, or the public together with himself, has sustained. See Motley and Whitecley's Law Dictionary, page 151. The punishment of forfeiture attaches to an act or acts of misbehaviour on the part of the tenant. The act or acts include, (i) refusal to pay rent or tribute; (ii) refusal to provide the customary services stipulated; (iii) use of the land for quite a different purpose and (iv) denial of the title of the overlord. Of the above, I think the most serious is (iv). The moment the tenant denies the title of the overlord, then the whole romance of landlord and tenant is gone. The next action is that of forfeiture. And that was what happened in this case. (p. 1649 D)

OGBUAGU JSC

3. Issues not related to the grounds of appeal are to be struck out

The appellants filed eleven (11) grounds of appeal and formulated four (4) issues for determination, but regrettably, their learned counsel in the Brief of Argument, did not identify any of the said issues with any of the grounds of appeal. The consequence of failure to so relate/distil/identify such issue or issues with the ground or grounds of appeal, is that such issue or issues, is or are liable to be struck out. (p. 1650 C)

4. It is not every misconduct that warrants forfeiture

In the case of *Chief Onyia v. Oniah & Ors.* (1989) 2 S.C. (Pt. 1) 69; (1989) 2 SCNJ 120, this court- per Obaseki, JSC, held that the grant of the remedy for forfeiture, is not discretionary. That it follows on the breach of the customary tenancy. Let me add quickly, that it is settled that it is not all cases of misconduct, or misbehaviour, that result in a guilty party becoming liable to forfeiture. It is said that the best known of such a situation, is where the overlord, fails to take the necessary steps to enforce his rights of forfeiture for the misconduct, in the court. This is why, despite the established misconduct of the customary tenant, forfeiture is not automatic as the overlord must take the necessary steps to enforce his right of forfeiture as was done in the instant suit leading to this appeal. (p. 1654 F)

5. Land Use Act did not abolish the remedy of forfeiture

Can the courts now grant forfeiture of holdings - i.e. customary right of occupancy, tenancy except as provided for under the Land Use Act, 1978 which deals with revocation of rights of occupancy?

My answer is in the affirmative. This is because, in the case of *Madam Salami & Ors. v. Eniola Oke & Ors.* (1987) 9-11 S.C. 43 at 49; (1987) 9-11 SCNJ 27, it was held again -per Obaseki, JSC., that it is a misstatement of law, to say that the Land Use Act, abolished the remedies or reliefs of forfeiture and injunctions. That forfeiture, is available, whenever a tenant (like the appellants), disputes the title of the overlord or landlord or alienates, without the landlords' consent, the whole or part of the parcel of land, let out to him by the landlord under customary law. That the remedy of injunction in respect of land, is primarily available, to restrain acts of trespass which are a wrong to possession. I note that even the court below at page 788 of vol. 3 of the Records, held that the reliance by the trial court on Section 36 of the Land Use Act, was erroneous. That the purpose of the Act, was not to destroy customary tenancy and its incidents. (p. 1655 E)

REPRESENTATION

P. O. Jimoh-Lasisi, SAN., (with him, S. A. Mustapha and A. S. Gobir),
for the Appellants.

Alhaja R .O. Ayoola for the 1st Respondents.

B

CASES REFERRED TO

Akpagbue v. Ogu Ors. (1976) 6 S.C. (Reprint) 42; (1976) 6 S.C. 63, 74
Alhaji Are & Anor. v. Ipaye & Ors. (1990) 3 S.C. (Pt. II) 109; (1990) 2
NWLR (Pt. 132) 298; (1990) 3 SCNJ 181

Coker v. Jinadu (1958) LLR 77 and Lawani v. Tadeyo (1944) 10 WACA
37

Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129

Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523

Ajibade v. Pedro (1992) 5 NWLR 257, Are v. Ipaye (1986) 3 NWLR (Pt. D
29) 416

Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 127 at 139-140

Sapara v. U.C.H Board (1988) 7 S.C. (Pt. II) 82; (1988) 4 NWLR (Pt.
86) 58 at 82

E

Anyaoke v. Adi (1986) 3 NWLR (Pt. 31) 731 at 742-743

Nwobosi v. ACB (1995) 7 SCNJ 92 at 95

Mogaji v. Odofin (1978) 4 S.C. (Reprint) 53; (1978) 4 S.C 91

Amadi v. N.N.P.C. (2000) 6 S.C. (Pt. I) 66; (2000) 10 NWLR (Pt. 674)
76; (2000) 6 SCNJ 1; (2000) FWLR (Pt. 9) 1527; (2000) WRN 47

F

Archibishop of Jatau v. Alhaji Ahmed & 4 Ors. (2003) 1 S.C. (Pt. II)
118; (2003) 1 SCNJ 382 at 388

Madumere v. Okafor (1996) 4 NWLR (Pt. 145) 637

Adelusola & 4 Ors. v. Akinde & 3 Ors, (2004) 5 S.C. (Pt. II) 71; (2004) G
12 NWLR (Pt. 887) 295 at 311; (2004) 5 SCNJ 235 at 246

BOOK REFERRED TO

Mozley and Whitecley's Law Dictionary, p.151

H

LEAD JUDGMENT BY KALGO JSC

In the High Court of Lagos State holden at Ikeja, the 1st respon-

dent who was the plaintiff claimed against the appellants and the 2nd respondent as defendants, the following reliefs:-

“(i) *Declaration of title to a customary right of occupancy to all that piece or parcel of agricultural land situate, lying and being at Isheri Oshun via Agege, Ikeja Division.*

(ii) *Declaration that the said defendants are customary tenants of the plaintiff on the said land.*

(iii) *Declaration that the said defendants have forfeited the customary right of occupancy in that they claimed wrongfully to be the owners of the land and have been dealing with the land inconsistent with the plaintiff’s claim by selling and leasing without the plaintiff’s permission.*

(iv) *Possession of the land in dispute”.*

Pleadings were ordered, filed and exchanged in the trial court and the appellants in their Amended Statement of Defence counter-claimed for:-

“(1) *An order of injunction restraining the 1st respondent (plaintiff), his servants and/or agents from trespassing on the land subject matter of the action.*

(2) *If the claim for forfeiture is proved by the 1st respondent, an order relieving them from forfeiture of the customary tenancy of the land in dispute on such terms, if any as the court may impose”.*

At the trial, the 1st respondent called 8 witnesses to prove the case of the Oshoboja family and the appellants called only one witness. The 2nd respondent (who was 1st defendant) gave evidence and called one witness in his defence. At the end of the trial, learned counsel for the parties addressed the court and on the 14th of May, 1990, the learned trial Judge, Oshodi, J., delivered a considered judgment as follows (page 508 of the record):

“(i) *In respect of the plaintiff’s claim, entitled to a declaration of title to a customary right of occupancy in respect of the parcel of land shown in plan No. AL 19/1979 made on 17/9/79 in the area verged red in Exhibit H as against Laigbo Osu family including the 2nd to 5th defendants.*

(ii) *The claim for declaration that the defendants are customary*

tenants, forfeiture of the customary right of occupancy and possession are hereby dismissed.

(iii) The plaintiff's claims against the 1st defendant are wholly dismissed.

(iv) In respect of the counter-claim since there is no forfeiture ordered, the plaintiffs are hereby restrained from disturbing the defendants, the Laigbo Osu family until the relationship between the parties are hereby determined."

The 1st respondent (plaintiff) appealed to the Court of Appeal for the dismissal of:

- (a) his claims against the 2nd respondent (as 1st defendant); and
- (b) his claim for declaration that the appellants and the 2nd respondent (as defendants) were their customary tenants; and
- (c) his claim for forfeiture of the land in dispute against the appellants and the 1st respondent.

The appellants also appealed to the Court of Appeal against the order of declaration of customary right of occupancy of the land in dispute in favour of the 1st respondent (plaintiff).

The Court of Appeal heard the appeal and it dismissed the appeal of the 1st respondent against the dismissal of his claim against the 2nd respondent. It also dismissed the appeal of the appellants in respect of the declaration of title to customary right of occupancy to the 1st respondent. But the 1st respondent's appeal against the refusal of the trial court to declare the 1st respondent and the appellants (2nd-5th defendants) as their customary tenants, was allowed and forfeiture of the land was ordered within 12 months after the judgment. The appellants now further appealed to this court.

In this court the parties filed and exchanged their respective briefs according to the court rules. The appellants formulated the following issues for the determination of the appeal :-

"1. Whether the Court of Appeal had jurisdiction to determine the existence of customary tenancy between the plaintiff (Oshoboja family) 1st respondent herein and the 2nd-5th defendants (Laigbo-Osu family) appellants herein and reverse the findings of High Court on the point

when there is no substantive ground of appeal complaining against the specific issue namely “that the Laigbo-Osu family are not customary tenants of the plaintiff’s family (Oshoboja family) and the claim for forfeiture and possession were not established.

B 2. *Whether the failure of the Court of Appeal to consider the grounds of appeal contained in 2nd -5th defendants’ notice of appeal (cross-appeal) occasioned a miscarriage of justice.*

3. *Whether the plaintiff proved title in the High Court to warrant a declaration of title to the land made in his favour by the High Court.*

C 4. *Whether the 2nd - 5th defendants (Laigbo - Osu family) appellants herein were entitled to an order of injunction restraining the plaintiff, his servants and/or agents from trespassing on the land, subject matter of this action.”*

D The 1st respondent has adopted and agreed that the above issues arose for determination in the appeal. The 2nd respondent did not file any brief, and on the 20/02/06 when the appeal came up for hearing, it was reported that he died in 2003. He was not substituted or represented by
E any body. That was the end of the matter as far as he was concerned. The 1st respondent shall from now on in this judgment, be referred to as “the respondent” simpliciter.

I shall now consider issue 1. This issue is challenging the jurisdiction of the Court of Appeal in determining the existence or otherwise of
F customary tenancy between the appellants and the respondents family (Oshoboja family) when there was no ground of appeal complaining against it from the decision of the trial court. In order to look into this complaint properly, it is essential to set out the grounds of appeal and the
G issues for determination raised therefrom by the appellants and the respondent in the Court of Appeal against the decision of the trial court. In the Amended Notice of Appeal filed by the respondent as appellant on 12/10/98 (pages 701-703 of the record) the grounds read:-

H (i) The learned trial Judge erred in law when he decided that the 1st defendant is not a member of Laigbo Osu family because of his ruling on the subject and because there is no appeal on it.

PARTICULARS

“(a) The learned trial Judge failed to evaluate the Power of Attorney made by the 1st defendant as the Head of Laigbo Osu family and all relevant registered leases made by the 1st defendant as head of the said Laigbo Osu family.

(b) The learned trial Judge failed to consider the admission of the 1st defendant/respondent that he is a very important member of the Laigbo Osu family contrary to his pleadings.

(c) That the judgment is against weight of evidence”.

The respondent formulated the following issues from the above grounds of appeal thus:-
(page 659 of the record)

“(a) Are the Laigbo Osu family the customary tenants of the Oshoboja family on the land in dispute?

(b) Was the claim of the Oshoboja family for forfeiture and possession rightly dismissed?

(c) Should the action against the 1st defendant have been dismissed?”

In the notice of appeal filed by the 2nd-5th respondents on 13/8/90 as cross-appellants in the Court of Appeal, the following grounds of appeal, without particulars were filed:

“(1) The learned trial Judge misdirected himself on the law and on the facts when he held that the plaintiff is entitled to a declaration of title to a customary light of occupancy in respect of the parcel of land in plan No. AL 19/1979 made on 17th September, 1979 in the area verged red in Exhibit H as against the Laigbo Osu family including the 2nd-5th defendants.

(2) The learned trial Judge having held that the traditional history was incomplete erred in law when he failed to dismiss the plaintiff's claims for declaration of title as per Exhibit H.

(3) The learned trial Judge erred in law when he held that the plaintiff cannot be bound by Exhibits K, K1 and K2 on the doctrine of res judicata and issue estoppel for the parties are not the same.

(4) The learned trial Judge erred in law when he failed to observe that Exhibit D, judgment in Suit No. IK/5/70 stops the plaintiff and the

2nd-5th defendants from claiming title to the land in dispute or pressing the present claims against the 2nd-5th defendants on the doctrine of issue estoppel and res judicata.

B (5) *The learned trial Judge misdirected himself in law in failing to observe that the traditional evidence given by the plaintiff was at variance with his pleadings and cannot support the plaintiff's claims.*

(6) *The judgment is against weight of evidence.*

C (7) *The learned trial Judge erred in law when he granted injunction against the plaintiff on the conditions that until the relationship between the Laigbo Osu family and the plaintiff was determined”.*

The issues for determination raised by the appellants from these grounds of appeal are:-

D (i) *Whether the learned trial Judge was right when he made an order declaring the plaintiff as entitled to a declaration of title to a customary right of occupancy in respect of the parcel of I and shown in plan No. AL/19/1979 made on 17/9/79 of the area verged RED in Exhibit H as against the Laigbo Osu family including the 2nd - 5th defendants/appellants.*

(ii) *Did the plaintiff prove the traditional history of his family, the basis of his claim for declaration of title to the land in dispute.*

F (iii) *Whether the dismissal of the plaintiff's claim for declaration that the defendants are customary tenants, forfeiture of the customary right of occupancy and possession was right in law.*

G (iv) *Whether the plaintiff can canvass or claim for declaration of title to a customary right of occupancy to the land, subject matter of this case when the plaintiff in suit No. IK/5/70 Exhibit D as defendant did not counterclaim for title.*

H (v) *Whether the doctrine of issue estoppel or resjudicata arising from suit No. IK/5/70 Exhibit D, precludes the present plaintiff and the 2nd-5th defendants (sic) the Laigbo Osu Family from claiming title to the land in dispute.*

(vi) *Whether the 2nd-5th defendants were not entitled to an order dismissing the plaintiff's claim in its entirety.*

(vii) *Whether the 2nd-5th defendants were not entitled loan un-*

conditional order for in junction restraining the plaintiff and his servants and or agents from trespassing on the land subject matter of this action as shown in plan No. AL/19/1979 of the Area verged RED in Exhibit H”.

I have taken the trouble to set out in detail the grounds of appeal in the notices of appeal filed by the appellants and the respondents here in B the Court of Appeal and the issue for determination raised by each of them in their respective briefs. This is with a view to seeing clearly what was before the Court of Appeal.

The Court of Appeal in its judgment delivered on 14th July, 1999, C allowed the appeal of the respondent and declared that the Laigbo Osu family, the appellants herein, are customary tenants of the respondent, Oshoboja family. The learned counsel for the appellants submitted in his brief that there was no ground of appeal filed by the appellants before D them to support that decision and that issues (iii) and (iv) purportedly raised by the appellants to that effect in the Court of Appeal should have been struck out. The Court of Appeal, counsel submitted, had therefore no jurisdiction to determine the issue of the existence of customary ten- E ancy, forfeiture and possession in this case since there was no substan- tive ground of appeal raising those issues. These issues, counsel further contended cannot be formulated or distilled from the omnibus ground of appeal filed by the appellants. He cited in support the cases of Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 127 at 139-140; Sapara v. U.C.H F Board (1988) 7 S.C. (Pt. II) 82; (1988) 4 NWLR (Pt. 86) 58 at 82; Anyaoke v. Adi (1986) 3 NWLR (Pt. 31) 731 at 742-743 and Nwobosi v. ACB (1995) 7 SCNJ 92 at 95.

It is now well settled that issues for determination in an ap- G peal must be formulated or distilled from the grounds of appeal themselves and not from anywhere.’ In the grounds of appeal filed by the respondent in the Court of Appeal on 12/10/98, no specific complaint was made on customary tenancy, forfeiture or posses- H sion of the land in dispute thereof for determination by the Court of Appeal. In the grounds of appeal filed by the appellants in the Court of Appeal on 13/ 8/90, there were 7 grounds including the omnibus ground. They complained of:

1. declaration of title to customary right of occupancy;
2. traditional evidence on declaration of title;
3. application of doctrine of issue estoppel ana res judicata;
4. same as in (3) above;
5. traditional evidence at variance with pleading;
6. omnibus ground of appeal;
7. grant of the injunction pending determination of relation-

ship.

I have earlier in this judgment set out the grounds of appeal and the issues formulated therefrom. I have carefully examined them and I find that none of the grounds of appeal filed by the appellants in the Court of Appeal touched on the declaration of customary tenancy.

I now examine the grounds of appeal against the issues formulated by the respondent (p. 659 of the record) in the Court of Appeal. The respondent as appellant in the Court of Appeal filed two grounds in his notice of appeal on 12/9/98 pp. 701-703 of the record) which I repeat here for purpose of clarity thus:-

“(1) The learned trial Judge erred in law when he decided that the 1st defendant is not a member of Laigbo -Osu family because of his ruling on the subject and because there is no appeal Oh it.

(2) That the judgment is against weight of evidence”. (Underlining mine)

He formulated the following issues for determination in his brier:-

“(i) Are the Laigbo Osu family the customary tenants of the Oshoboja family on the land in dispute?

(ii) Was the claim of the Oshoboja family for forfeiture and possession rightly dismissed?

(iii) Should the action against the 1st defendant have been dismissed?” (Underlining mine)

From the above, it is abundantly clear that the issue of customary tenancy, forfeiture or possession was not mentioned and cannot properly be raised in ground of appeal (i) of the respondent in the Court of Appeal. The second ground is an omnibus ground, the scope of which I shall

consider later in this judgment.

It is trite law that a court has no powers to set up a case different from that which the parties have brought before it. It is also well established that although the appeal court has the discretionary power to reframe or formulate issues for determination in an appeal different from those raised by the parties in their briefs, the reframed or formulated issues must be derived from or culled from the grounds of appeal filed by the parties. In this case, no issues were framed by the Court of Appeal and the court only considered together the issues raised by the parties in the appeals of the appellants and the respondent herein. I think that the Court of Appeal was right to classify the appeal of the respondent as the main appeal and that of the appellants as the cross-appeal. I shall refer to them as such in this judgment.

In the brief filed by the respondent herein in the appeal, in the Court of Appeal in response to the cross-appeal of the appellants, he raised two issues for determination, thus:-

“(i) Whether the court below was correct in arriving at the conclusion that the plaintiff is the holder of a customary right of occupancy over the land in dispute.

(ii) Is the order for injunction made by the court below correct?”

Looking at the grounds of appeal in the cross-appeal in the Court of Appeal, these 2 issues are no doubt relevant, but none of them touched on the issue of customary tenancy.

It is very clear to me therefore that none of the grounds of appeal filed in the main appeal or the cross-appeal in the Court of Appeal complained directly against the trial court order on customary tenancy, forfeiture and possession which reads:-

“The claim for declaration that the defendants are customary tenants, forfeiture of the customary right of occupancy and possession are hereby dismissed”. (underlining mine)

However ground 2 of the main appeal and ground 6 of the cross-appeal contained the omnibus ground namely “judgment is against the weight of evidence”. Can this be relied upon to enable a

party to raise an issue of law or of fact against a specific finding in the case appealed against? What then is an omnibus ground of appeal and what is its scope in civil proceedings.

The main argument of the appellants' counsel in the brief is that since no issue was raised from the omnibus ground, the ground is deemed abandoned. He further argued that even if it is assumed that the appellants have raised issues therefrom, those issues cannot be accepted as they complained against trial court, i.e. customary tenancy, forfeiture and possession. For the respondent, it was simply argued in the brief that the omnibus ground is of necessity a complaint against the totality of evidence adduced before the trial court and not on a finding of fact on any specific issue, and that the question of customary tenancy, forfeiture and possession arose from the facts pleaded and evidence adduced by the parties at the trial.

An omnibus ground of appeal is a general ground of fact complaining against the totality of the evidence adduced at the trial. It is not against a specific finding of fact or any document. It cannot be used to raise any issue of law or error in law. See Ajibana v. Kolawole (1996) 10 NWLR (Pt. 476)22. It therefore follows that for a complaint on a finding of fact on a specific issue, substantive ground of appeal must be raised challenging that finding. It cannot be covered by an omnibus ground. Where however, no issue is raised in respect of a ground of appeal, the ground of appeal is deemed abandoned and it should be struck out. See Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129; Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523; Ajibade v. Pedro (1992) 5 NWLR 257, Are v. Ipaye (1986) 3 NWLR (Pt. 29) 416.

In Mogaji v. Odofin (1978) 4 S.C. (Reprint) 53; (1978) 4 S.C 91, this court per Fatayi-Williams JSC, (as he then was) held:-

“When an appellant complains that a judgment is against the weight of evidence, all he means is that when the evidence adduced by him is balanced against that adduced by the respondent the judgment given in favour of the respondent is against the weight which should have been given to the totality of the evidence before him”. (Underlining mine)

And on the implication or effect of an omnibus ground of appeal, this court per Uwais, JSC., (as he then was) in Anyaoke v. Adi (1986)3 NWLR (Pt. 31) 731 also held that:-

“..... An omnibus ground of appeal implies that the judgment of the trial court cannot be supported by the weight of evidence adduced by the successful party which the trial court either wrongly accepted or that the inference drawn or conclusion reached by the trial judge based on the accepted evidence cannot be justified”. (Underlining mine)

In both decisions quoted above, the emphasis is on “evidence” before the trial court. This, in my respectful view, could be either evidence given by the successful party or given in his favour.

In the instant case, there is no doubt that the respondent at the trial did not call any material evidence to prove customary tenancy but there was some evidence to by D.W.3 as confirmed by P.W.1 to prove that the portions of the land in dispute were sold by the appellants family to one J.K. Adewunmi.

The respondent as plaintiff at the trial pleaded in Paragraph 14 of their further Amended Statement of Claim that:-

“14. The plaintiff further avers that the defendants are now selling and leasing portions of the said land inconsistent to their right as customary tenants of the plaintiffs family”.

In reply, the appellants as defendants, in their Further Amended Statement of Defence and counter-claim pleaded in Paragraph 7 that:-

“7. With further reference to the said paragraph, these defendants aver that since the judgment in suit IK5/70, they have not sold or leased any land in Ijegan Isheri Oshun or otherwise challenged the overlordship of the plaintiff's family”. (Underlining mine)

In suit No. IK/5/70 referred to in Paragraph 7 above, the claim of the appellants as plaintiffs as to the title of the land in dispute was dismissed. They now pleaded that since the case, they never disputed or challenged the “overlordship” of the respondent’s family over the land in dispute. This is an unequivocal admission in the

pleadings which needs no proof.

It is also evident that the appellants in their cross-appeal in the Court of Appeal, at page 631 also filed an omnibus ground of appeal that the judgment is against the weight of evidence. They thereafter raised issue (iii) on page 641 of the record dealing specifically with the question of customary tenancy. This means that both the appellants and the respondent filed an omnibus ground in their notices of appeal, and both raised the issue of customary tenancy and argued it in their respective briefs. All this border on issues of fact to determine the customary tenancy and each party was saying that the evidence it adduced was more cogent and acceptable than that of the other. Therefore in my view, and in line with the decision of this court in Mogaji v. Odojin (supra) and Anyaoku v. Adi (supra), the Court of Appeal has jurisdiction to entertain the contention of the parties in respect of the issue of customary tenancy based on the evidence adduced by the parties at the trial on the omnibus grounds filed by them and the relevant issues raised thereon. There was no specific finding of fact upon which a substantive ground of appeal should be raised. I therefore resolve this issue against the appellant.

Issue 2 is alleging that the Court of Appeal has failed to consider the grounds of appeal contained in the notice of appeal filed by the 2nd-5th defendants i.e. the appellants and this occasioned a miscarriage of justice. Let me say straight away that since the introduction of brief writing in our civil trial procedures, this court has stopped considering grounds of appeal filed by the parties in their notices of appeal. What the court considers since then and now, are issues for determination which are properly distilled from those grounds and no more. The Court of Appeal in its judgment, set out fully all the issues raised by the parties and said that as the issues are inter-twined and interlocking, they would be considered together. This is what it did before coming to its final decision, and the appellants have not shown what miscarriage of justice they suffered as a result.

Learned counsel for the appellants has cited a number of cases in support of his contention in this issue. I have carefully examined all of them and I found them to be irrelevant to the point in issue. I agree with the submission of the learned counsel for the respondent that all the issues raised by the appellants in their briefs were properly and dully considered in the judgment of the Court of Appeal. In the circumstances, I answer this issue in the negative.

Issue 3 is questioning whether the plaintiff (now respondent) proved title in the High Court to warrant a declaration of title made in his favour by the High Court. Looking at the issue itself as framed, it is complaining about proof of title by evidence in the High Court and the declaration of title by the High Court. It is absolutely clear that the issue is talking about what has happened solely in the High Court and not in the Court of Appeal. Since the promulgation of the 1979 Constitution, this court has ceased to have any jurisdiction to entertain any complaint or appeal from the decision of the High Court directly whether civil or criminal, final or interlocutory. Therefore, in my respectful view, this issue is not properly before this court and cannot properly arise from the grounds of appeal filed by the appellants on pages 841-845 of the record. Accordingly I strike it out as being irrelevant.

Issue 4 is the last of the issues raised in this appeal by the appellants. It asked whether the appellants were entitled to an order of injunction restraining the respondent, his servants and or agents from trespassing on the land in dispute.

On page 506 of the record, the learned trial Judge held in his judgment that:-

“On ownership, the plaintiff relies more on traditional evidence and Exhibits A, B, and D..... The fact remains that he established the history up to Oshoboja family on whose behalf he is claiming. This traditional evidence remains uncontroverted and it is supported by Exhibits A and B..... Also by Exhibit D, the claim of title of Laigbo Osu has been dismissed as against the Oshoboja family although the court did not confirm the ownership on the Oshoboja family as there was no counter

claim.

I am therefore entitled to hold that the plaintiffs are entitled to the declaration of title as per Exhibit H”.

And **the Court of Appeal** after having carefully examined the whole evidence before the trial court came to the conclusion that even if the admission of over lordship of Oshoboja family by the appellants was ignored, the evidence of traditional history adduced by the plaintiff (respondent) was strong enough to entitle them to a declaration of title. In other words, it confirmed that decision of the trial court. I have also carefully examined the evidence on this issue, and I entirely agree that the declaration of title to the respondent was fully justified. It is also not in doubt that the Court of Appeal has found properly in my view as discussed earlier in this judgment that the appellants are customary tenants of the respondents. Therefore, since the plaintiff (respondent) was entitled to declaration of title to the land in dispute and the appellants are customary tenants of the respondents, it is improper and wrong to issue an injunction restraining the respondents from dealing with the land in dispute as they cannot be and are not trespassers on the land. I therefore answer this issue in the negative and resolve same against the appellants.

From all what I have said above, I find that there is no merit in this appeal. I accordingly dismiss it and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondent against the appellants.

G

BELGORE JSC

It is clear on the evidence at the trial court and upon the pleadings that the appellants abused the right of their overlords, the Oshoboja family. By claiming outright title when they were all along customary tenants, the appellants obviously abused their privilege to remain on the disputed land. I therefore agree with my learned brother, Kalgo, JSC., that this appeal lacks merit. I also dismiss it with the same orders as to costs.

KATSINA-ALU JSC

I also dismiss the appeal with N10,000.00 costs to the respondents.

B

TOBI JSC

I have read in draft the judgment delivered by my learned brother, Kalgo, JSC., and I agree with him. I want to take briefly the issues of customary tenancy and forfeiture. C

On customary tenancy, the Court of Appeal said at pages 733 and 734 of the Record:

“With respect to the learned judge, I think that notwithstanding that the plaintiff failed to lead evidence as to the incidents of customary tenancy between the plaintiff and the Laigbo Osu Family of the defendants, I think that the circumstances of this case and the admission of the 2nd to 5th defendants that the Oshoboja Family was their overlord was enough a basis from which to infer customary tenancy. In Yoruba customary law, a grant is always made in perpetuity subject to good behaviour. D

There are occasions where a grantor secures under a customary grant, an arrangement which enables the grantee to pay tributes by way of Ishakole, but this is not an invariable practice. In this case, the trial Judge rightly made a declaration of title in favour of the plaintiff. So, if the 2nd and 5th defendants were on plaintiff’s land, it was for the 2nd to 5th defendants to establish the right by which they were on plaintiff’s land. The position would have been otherwise if the lower court had not made a declaration of title in favour of the plaintiff. If the 2nd to 5th defendants were on land adjudged to belong to the plaintiff, by what licence or authority were they on the land? Had the land been given to them as gift? Were they pledgees or mortgagees of the land? The circumstances in my view call for the invocation of the principle in Thomas v. Holder (1946) 1 NWLR (Pt. 70) 301. This is the more so in this case where the plaintiff was only stating that the Laigbo Osu Family of the 2nd to 5th defendants was his family’s customary tenants. It has to be F G H

borne in mind that customary tenancy in Yoruba land which allows the tenants to remain on the land in perpetuity subject to good behaviour is the least onerous tenure that a person who is not the owner of land can enjoy. In this case, the 2nd to 5th defendants admitted that the plaintiff's family was their overlords. Even if this admission could not be made the basis of the grant of declaration of title, it seems sufficient in my view as a basis to hold that a customary tenancy was in existence."

I cannot fault the above conclusion of the Court of Appeal because it is a clear exposition of the position of the law. The concept of customary tenancy, which creates a relationship of landlord and tenant, is peculiar to customary law and has no equivalent in English law. The concept connotes a situation where strangers or immigrants are granted land by the overlord to be in occupation and continue in peaceable enjoyment, subject to forfeiture of the right on certain grounds, including alienation of the land without the consent of the overlord, denial of the title of the overlord or refusal or failure to pay tribute.

While payment of tribute is a recognised condition of customary tenancy, it is not always so and for all times. There are situations where tribute is not paid to the overlord and yet customary tenancy exists. For instance, where the tenant unequivocally recognises the position of the overlord, customary tenancy exists. In other words, where the tenant unequivocally recognises the position of overlord of the landlord, a customary tenancy exists, whether tribute is paid or not. After all, payment of tribute could be overlooked by the landlord who has milk of kindness in him and a flowing charity. There are also instances where the landlord asks the tenant to stop payment of tribute because of very long association and the good behaviour of the tenant. The point I am making is that the Court of Appeal is correct in coming to the conclusion that payment of tribute by way of Ishakole is not an invariable practice. The most important condition, if I may say so, is for the tenant to agree that the landlord is his overlord, and there is a plethora of evidence on that by the 2nd to 5th defendants. That settles the issue of customary tenancy.

The final issue I want to take, flowing from the customary tenancy, is the act of forfeiture. On the issue of forfeiture, the Court of

Appeal said at pages 737:

“It is apparent from the evidence of the 3rd D.W. that although the 2nd to 5th defendants pleaded for a relief against forfeiture they did not show any remorse or penitence in their evidence before the lower court. To the end of the trial, they maintained that the land belonged to their family.” B

After examining the case law in admirable detail, the Court of Appeal finally ordered forfeiture:-

“The plaintiffs/appellants’ appeal against the refusal of the lower court to make an order of forfeiture of customary tenancy against the Laigbo Osu Family of the 2nd to 5th defendants succeeds and is allowed. I accordingly make an order that the customary tenancy of the Laigbo Osu Family of 2nd to 5th defendants be forfeited with effect from 12 months from the date of this judgment.” C D

A customary tenancy is determined by forfeiture. Forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner’s land, tenements or hereditaments, whereby he loses all his interest therein, as a recompense for the wrong which either he alone, or the public together with himself, has sustained. See Motley and Whitecley’s Law Dictionary, page 151. The punishment of forfeiture attaches to an act or acts of misbehaviour on the part of the tenant. The act or acts include, (i) refusal to pay rent or tribute; (ii) refusal to provide the customary services stipulated; (iii) use of the land for quite a different purpose and (iv) denial of the title of the overlord. Of the above, I think the most serious is (iv). The moment the tenant denies the title of the overlord, then the whole romance of landlord and tenant is gone. The next action is that of forfeiture. And that was what happened in this case. E F G

It is for the above reasons and the more detailed reasons given by my learned brother, Kalgo, JSC., that I too dismiss the appeal. I abide by his orders as to costs.

OGBUAGU JSC

I have had the privilege of reading before now, the lead judgment

of my learned brother, Kalgo, JSC, just delivered by him. He has meticulously and carefully dealt with all the issues raised and canvassed in this appeal. I also entirely agree with his conclusion that there is no merit in the appeal. For purposes of emphasis, I will make my own contribution.

B On 20th February, 2006, when this appeal came up for hearing, I noted that the 2nd respondent, was reported dead on 21st November, 2003. I also noted that there is an affidavit of “Non-Retention of Counsel by the 2nd Respondent” sworn to by Adewale O. Ade-Makanju, Esq, who stated that he was the former counsel for the 2nd respondent. Un-
C known to him, I believe, at the time he deposed to the said affidavit, the 2nd respondent had died.

The appellants filed eleven (11) grounds of appeal and formulated four (4) issues for determination, but regrettably, their learned counsel in
D the Brief of Argument, did not identify any of the said issues with any of the grounds of appeal. It has been stated and re-stated in a legion of decided authorities both in the Court of Appeal and in this court, that for an issue for determination to be competent. It must be based or related to
E or distilled from an identified competent ground of appeal. See *Amadi v. N.N.P.C.* (2000) 6 S.C. (Pt. I) 66; (2000) 10 NWLR (Pt. 674) 76; (2000) 6 SCNJ 1; (2000) FWLR (Pt. 9) 1527; (2000) WRN 47 and *Archibishop of Jatau v. Alhaji Ahmed & 4 Ors.* (2003) 1 S.C. (Pt. II) 118; (2003) 1
F SCNJ 382 at 388 and many others. The consequence of failure to so relate/distil/identify such issue or issues with the ground or grounds of appeal, is that such issue or issues, is or are liable to be struck out.

I note that in the respondent’s Brief of Argument, the appellant issues, have been adopted. But conscious of the fact that a respondent’s
G issue or issues, (where the respondent did not cross-appeal), must also arise or relate and must be based on and correlate with the said ground or grounds of appeal of the appellants, the learned counsel for the respondent, has commendably, done this in the following manner:

- H “(i) *Issue one is based on grounds 3,4,5 and 10 of the appeal.*
(ii) *Issue two is based on ground 6.*
(iii) *Issue three is based on grounds 1,2 and 9.*
(iv) *Issue four is based on grounds (sic) 7”.*

See Animashaun v. University College Hospital (1996) 10 NWLR (Pt. 476) 65; Alhaji Arowolo v. Akapo & 2 Ors. (2003) 8 NWLR (Pt. 823) 451 at 500 C.A.; and Padawa & 8 Ors. v. Jatau (2003) 5 NWLR (Pt. 813) 247 at 264 C.A.

It is submitted that there are no issues raised on grounds 8 and 11 B of the appeal and therefore, the court is urged to strike them out. The appellants, only on 10th February, 2006, filed a Reply Brief which included this submission. It is settled however, that any issue not distilled from any ground of appeal, is incompetent and must be discountenanced C together with the argument advanced there under in the consideration of the appeal. See Madumere v. Okafor (1996) 4 NWLR (Pt. 145) 637 and recently, Adelusola & 4 Ors. v. Akinde & 3 Ors, (2004) 5 S.C. (Pt. II) 71; (2004) 12 NWLR (Pt. 887) 295 at 311; (2004) 5 SCNJ 235 at 246.

I note that the learned counsel for the appellants, appreciating what D consequences should have befallen his clients through his own fault, in the said appellants' Reply Brief, identified the issues with the grounds of appeal. But instead of acknowledging his said omission to so identify, has preferred to use the words that the appellants said issues, "were argued E in the brief in the following manner":

Issue No. 1 is based on grounds 3,4 and 5.

Issue No. 2 is based on grounds 6, Sand 10.

Issue No. 3 is based on grounds 1,2, 9 and 11.

Issue No. 4 is based on ground 7.

I do not like a counsel trying to show or pretend that he is clever.

Now to the merits of the appeal. The 2nd-5th defendants/cross-appellants at the trial court, admitted that the plain tiffs/respondents' family, was their overlords. In effect, they admitted that they were customary G tenants in respect of the subject matter of the suit. Firstly, in the claim No. 2 of the Writ of Summons, the plaintiff/respondent claimed for a declaration that:

"..... the defendants have forfeited the customary right of H occupancy in that the defendants claim wrongfully to be owners of the land and have been dealing with the land inconsistent with the plaintiff's claim by selling and leasing without the plaintiff's permission".

In paragraph 7 of the Further Amended Statement of Defence at page 420 of Vol. 2 of the Records, the appellants averred as follows:

“7. With further reference to the said paragraph, these defendants aver that since the judgment in suit IK/5/70, they have not sold or leased any land in Ijegun-Isheri Oshun or otherwise challenged the overlordship of .the plaintiff’s family”. (the underlining mine)

I note that in paragraph 4 of the said Further Amended Statement of Defence, the appellants averred that the traditional history they pleaded and narrated by them in the said action, was rejected by the court and the claim dismissed. That action or suit is IK/5/70. The appellants were the plaintiffs and they sued the respondent and prayed for a declaration of title to an area of land at Ijegun-Isheri Oshun. Their said suit, as admitted by them, was dismissed.

Remarkably again, in their counter-claim in the suit leading to this appeal, they claimed in the alternative, as follows:

“If the averments in Paragraphs 12 to 14 of the Statement of Claim (which are denied by the defendants) are proved and a ease for forfeiture is made out, an Order relieving them from forfeiture of the customary tenancy of the land in dispute on such terms if any as the court may impose”. (the underlining mine)

Indeed, in Ground (v) of the application, in respect of the counter-claim, it is averred as follows:-

“(v) The plaintiff has condoned the alleged acts of misconduct”.

See page 423 of Vol. 2 of the Records.

I suppose it is now firmly settled, that what is admitted, need no farther proof. There are too many decided authorities in respect thereof. But see Akpan Obong Udofia & Anor. v. Okon Akpan Udo Afia (1940) 6 WACA 216 at 218, 219; Phoenix Motors Ltd. v. Mr. Ojewunmi & 2 Ors. (1992) 6 NWLR (Pt. 348) 501 at 508 C.A.; Ogbunike v. A.C.B. Ltd. (1995) 3 NWLR (Pt. 376) 34 at 53; (1995) 9 SCNJ 58 and recently, Alhaji Ndayako v. Alhaji Dantoro & 6 Ors. (2004) 5 S.C. (Pt. II) 1; (3004) 5 SCNJ 153 at 173. See ‘also Section 75 of the Evidence Act which is clear and unambiguous.

It therefore, in my respectful view, becomes idle, for the appel-

lants who expressly and clearly admitted that they are customary tenants of the respondent's family, to now argue or submit, (perhaps with their tongue in their cheek), that the incident of customary tenancy, was not proved by the respondent. There is no evidence by the appellants, that they appealed against the judgment dismissing their said suit. So, as it stands, that said judgment still subsists. However, as noted by me above, the appellants themselves, say or admit that since the judgments in the said action which they lost, they have not otherwise, challenged the overlordship of the plaintiff's/respondent's family. In any case, the trial court, rightly, in my view, had no option, than to grant the said declaration sought by the plaintiff's family. See also Exhibit "H". Honestly, this should have been the end of this appeal.

For the avoidance of doubt, there is Exhibit "A". It is a 1912 judgment which supports the claim of the respondent's family that they had a land adjoining a named boundary neighbour - Kudehinbo. See page 506 of vol. 2 of the Records. The trial court held that the traditional evidence of the plaintiff/respondent, remains or remained uncontroverted and that it is supported by Exhibits "A" and "B". Indeed, in Paragraph 9(a) of the Further Amended Statement of Defence at page 421 of vol. 2 of the Records, the appellants averred as follows:

"9(a) These defendants admit paragraphs 1 and 4(a) - (f) of the Further Amended Statement of Claim".

In the said Paragraphs 4(a) -(f), the plaintiff/respondent traced the root of title as pleaded by him up to Oshoboja's family who are now the owners in possession of the land in dispute. However, since the appellants are not now claiming ownership of the land in dispute, I need not go further as it would amount to my repeating myself in respect of the same issue.

I note that the issues raised in the appellants' brief under Issue 9 in Paragraphs 5.13, 5.14 and 5.15 at pages 12 and 13 of the Brief, were not raised in the court below. Therefore, I hold that on the decided authorities, they cannot raise them now without the leave of this court. This is because, the appeal is not from the judgment of the trial High Court. It is now settled that this court will only consider the findings of the Court of

Appeal that are appealed against and not those of the trial court. See Chief Olatunde & Anor. v. Abidogun & Anor (2001) 12 S.C. (Pt. 1) 123; (2001) 12 SCNJ 225 at 234; Bako & 2 Ors. v. Laniyan & 2 Ors. (2002) 7 S.C. (Pt 1) 159; (2002) 7 SCNJ 129 and Engr. Agbi v. Barrister Alabi (2004) 6 NWLR (Pt. 868) 78; (2004) 2 SCNJ 1 at 52. See also Section 233 (2) of the Constitution of the Federal Republic of Nigeria, 1999.

As to the issues of customary tenancy and forfeiture, they were before the court below as canvassed by the parties in their respective briefs. The court below determined the two issues together. The appellants have not pinpointed the issues they claim were not considered by the court below.

I will pause here to state that although the appellants were blowing hot and cold at the same time so to speak by first pleading for a relief from forfeiture, and yet, according to them they did not concede that they are customary tenants of the plaintiffs' family. They maintained that the land in dispute, belonged to their family. It is now firmly established that the denial of a landlord's title is a very serious affair or thing' Such a denial, is treated or regarded by the courts, as a gross misconduct, and results automatically, in forfeiture. See the cases of Alhaji Suleman & Anor. v. Johnson 13 WACA 213 at 215; Bello Isiba & Ors. v. J.T. Hanson (1968) NMLR 76 at 78; Erinle v. Adelaja & 7 Ors. (1969) NMLR 132 at 136; Taiwo and 3 Ors. v. Akinwunmi 6 2 Ors. (1975) 4 S.C. (Reprint) 102; (1975) 4 S.C. 143 at 171 to 173; (1975) 1 ANLR (Pt. 1) 202; Chief Oloto v. Dawuda (1911) 1 NLR 57 at 60; and Onokpasi v. Onokpasi & Anor. (1991) 12 S.C. 19 at 57 just to mention but a few.

In the case of Chief Onyia v. Oniah & Ors. (1989) 2 S.C. (Pt. 1) 69; (1989) 2 SCNJ 120, this court- per Obaseki, JSC, held that the grant of the remedy for forfeiture, is not discretionary. That it follows on the breach of the customary tenancy. Let me add quickly, that it is settled that it is not all cases of misconduct, or misbehaviour, that result in a guilty party becoming liable to forfeiture. See Alhaji Are & Anor. v. Ipaye & Ors. (1990) 3 S.C. (Pt. II) 109; (1990) 2 NWLR (Pt. 132) 298; (1990) 3 SCNJ 181. It is said that the best known of such a situation, is where the overlord, fails to take the necessary steps to enforce his rights of

forfeiture for the misconduct, in the court. This is why, despite the established misconduct of the customary tenant, forfeiture is not automatic as the overlord must take the necessary steps to enforce his right of forfeiture as was done in the instant suit leading to this appeal. See *Coker v. Jinadu* (1958) LLR 77 and *Lawani v. Tadeyo* (1944) 10 WACA B 37.

It need be stressed and this is settled, that the alienation of land by a customary tenant as was the case in this case and as stated in claim (Hi) of the plaintiff/ respondent, without the consent of the landlord, will result in forfeiture. See *Caulcrick v. Harding & Anor.*; *Idewu Inasa & Ors. v. Chief Oshodi* (1930) 10 NLR 4 at 6. Indeed, in the case of *Are & Anor. v. Ipaye & Ors.* (1986) 3 NWLR 416, it was held that the court will not grant forfeiture, if undue hardship will be occasioned. See also *Ogbakumanwu & Ors. v. Chiabolo & Ors.* 19 NLR 107 where forfeiture, was refused on equitable grounds. But see and compare the case of *Oduaran & Ors. v. Asarah & Ors.* (1972) 5 S.C. (Reprint) 173; (1972) 5 S.C. 272 where forfeiture was confirmed.

Can the courts now grant forfeiture of holdings - i.e. customary E right of occupancy, tenancy except as provided for under the Land Use Act, 1978 which deals with revocation of rights of occupancy?

My answer is in the affirmative. This is because, in the case of *Madam Salami & Ors. v. Eniola Oke & Ors.* (1987) 9-11 S.C. 43 at 49; (1987) 9-11 SCNJ 27, it was held again -per *Obaseki, JSC.*, that it is a misstatement of law, to say that the Land Use Act, abolished the remedies or reliefs of forfeiture and injunctions. That forfeiture, is available, whenever a tenant (like the appellants), disputes the title of the overlord or landlord or alienates, without the landlords' consent, the whole or part of the parcel of land, let out to him by the landlord under customary law. See also the cases of *Akpagbue v. Ogu Ors.* (1976) 6 S.C. (Reprint) 42; (1976) 6 S.C. 63, 74 and *Taiwo & Ors. v. Akinwunmi* (supra) also referred to. That the remedy of injunction in respect of land, is primarily H available, to restrain acts of trespass which are a wrong to possession. I note that even the court below at page 788 of vol. 3 of the Records, held that the reliance by the trial court on Section 36 of the Land Use Act, was

erroneous. That the purpose of the Act, was not to destroy customary tenancy and its incidents.

I can go on and on. I have gone this far, in order to underscore the point or make it abundantly clear to the appellants, about the uselessness or futility of their Issue 1 and all the arguments in respect thereof. If the trial court, found, as claimed by the appellants, that Laigbo Osu family of the appellants, are not the customary tenants of the plaintiff's/respondent's family (Oshoboja family), surely and certainly, such finding and holding, will be perverse. This must be so, in the face of the said admissions of the appellants, as I have demonstrated above, that the plaintiffs said family, is/ are their overlords and as found by a court of competent jurisdiction in the said Suit IK/5/70 instituted by the appellants themselves which they lost.

Afterwards, an appeal before an Appellate Court, is by way of rehearing. Where the findings of a trial court, do not depend on credibility or demeanor of witnesses, it is now settled, that an Appellate Court, has the duty to interfere and is entitled, to draw its own inferences as it is in good a position as the trial court. See the cases of Dr. Ladipo Maja v. Dr. Stacco (1968) NMLR 373; Akpapuna & Ors. v. Njeka & Ors. (1983) 2 SCNLR 1 at 14; Okafor v. Idigo III (1984) 6 S.C. 1; Olade v. Ekwelendu (1989) 7 S.C. (Pt. II) 62; (1989) 4 NWLR (Pt. 115) 326 at 347; (1989) 7 SCNJ 181; and recently, Mrs. Lydia Thompson & Anor. v. Alhaji Arowolo (2003) 4 S.C. (Pt. II) 108; (2003) 4 SCNJ 20 at 43 - per Ejiunmi, JSC., just to mention but a few.

The court below at page 779 of vol. 3 of the records, stated inter alia, as follows:

“..... *I think that the circumstances of this case and the admission of the 2nd to 5th defendants that the Oshoboja Family was their overlord was enough a basis from which to infer customary tenancy.....*”.

H (underlining mine)

At page 780 thereof, the court below - per Oguntade, JCA, (as he then was), further stated inter alia, as follows:

“In any case, the 2nd to 5th defendants admitted that the plaintiff's

family was their overlords. Even if this admission could not be made the basis of the grant of declaration of title, it seems sufficient in my view as a basis to hold that a customary tenancy was in existence.....”.

(underlining mine)

I cannot fault the above findings and holding. I therefore, have no B
hesitation, in rendering answers to Issues 1 to 3, in the affirmative.

As regards Issue 4, it seems very odd to me, that the very trial
court that held thus:

“..... I am therefore entitled to hold that the plaintiffs are en- C
titled to the declaration of title as per Exhibit “H”, -(See page 506 of the
records), i.e. entitled to a declaration of a customary right of occupancy
in respect of the land in dispute and who was also faced with the said
admission of the appellants in their pleadings that the respondent’s fam-
ily, is their overlords or landlords, will at the same time, find and hold that D
on the question of tenancy, besides Exhibit “B”, that there is no evidence
whatsoever, to determine the relationship between the plaintiffs and ap-
pellants and their Laigbo-Osu family.

One of the complaints of the respondent in both the Writ of Sum- E
mons and in Paragraph 14 of the Further Amended Statement of Claim at
page 391 of vol. 2 of the Records, is that the appellants, were selling and
leasing portions of the said land inconsistent with their right, as custom-
ary tenants of the respondent’s family, - i.e. without the consent of the F
respondent’s family. In Paragraph 5 of the Further Amended Reply to the
Statement of Defence and counter-claim of the appellants, at page 397 of
vol. 2 of the Records, it is averred that after the dismissal of the appel-
lants’ said Suit No. IK/5/70, that the appellants, with the active support G
of the 1st defendant, had resorted to selling and leasing of their farmland
and that the people, were building day and night, on the respondent’s
farmland without the approval of the respondent’s family.

Now, in his evidence, D.W.3 Alhaji B. Sadiku at page 440 lines 13 H
to 17 of the Record swore as follows:

*“The judgment in Exhibit D was against our family..... It was
alleged that some members of our family sold land to J.K. Adewunmi. I
am not one of those who sold to Adewunmi. Oshoboja family did nothing*

when they knew of the sale. In suit No. AB/24/55, the Oshoboja family sued members of our family”.

D.W.2 - Head of Laigbo Osu family of the appellants, by Exhibit E, - Power of Attorney, confirmed the sale, lease or alienation of portions of the land in dispute. He admitted under cross-examination at page 437 of vol. 2 of the Records, of executing Exhibit E and claimed that he was a relation of Laigbo family.

The court below, having found that the respondent was entitled to an order of forfeiture of customary tenancy against the appellants' family and having dismissed the appeal of the appellants, what must and ought to have followed, as a consequential order, in my respectful view, was/is an order of injunction in favour of the respondent. The appellants in all the circumstances, certainly and surely, were not entitled to judgment for trespass and injunction in respect of the land in dispute. My answer therefore, in respect of this issue, is in the negative. An injunction, cannot be made against a person adjudged by a court of competent jurisdiction to be the landlord of a land in dispute and who is entitled to an order of forfeiture in respect thereof. He can also not be a trespasser of the land he has possession of which has been forfeited. I so hold.

It is from the foregoing and the reasoning and conclusion in the lead judgment of my learned brother, Kalgo, JSC, that I too, dismiss the appeal and affirm the judgment of the court below. I abide by the consequential order in respect of costs.

G

H