

SUPREME COURT OF NIGERIA

5TH MAY, 2006. SC. 323/2001

CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, D. MUSDAPHER, I. C. PATS-ACHOLONU, M.A. MUKHTAR, JJSC

OSAYEMWENRE AMAYO

..... APPELLANT

AND

OSAYENDE ERINMWINGBOVO

..... RESPONDENT

LAND LAW - Title - Proof of ownership - Traditional history evidence - Where not contradicted - It can support a claim for declaration of title (H1)

LAND LAW - Title - Bini customary law - That vests land in the Oba of Benin - Is not the issue - As making out a good title is what matters (H2)

LAND LAW - Trespass - Evidence - Exclusive possession - Plaintiff must show a better title - Coupled with evidence - In order to succeed (H3)

APPEALS - Concurrent findings - Where not shown to be perverse - Supreme Court will not interfere (H4)

FACTS

Before the trial High Court plaintiff/respondent filed an action against the defendant/appellant. Plaintiff claimed declaration of title to the land in dispute, N1,000 damages for trespass and an order of perpetual injunction. Plaintiff in his pleadings and evidence traced how his grandfather deforested the land and settled on it. That his own father inherited the land, farmed thereon by planting economic trees. Upon the death of his father in 1950, plaintiff inherited the land after performing the traditional burial rights and farmed thereon till defendant trespassed on the land in 1979. Plaintiff called 4 witnesses including the surveyor who surveyed the land in 1956 in proof of his claim.

The defendant did not testify. He called his mother who testified and tendered exhibit OE4 (Record of proceedings) in proof of his claim. The trial court gave judgment in the plaintiff's favour and granted all the reliefs claimed. Defendant's appeal to the Court of Appeal was unanimously dismissed. Being dissatisfied, he has further appealed to the Supreme Court raising 5 issues. But the apex Court preferred the 2 issues raised by the plaintiff as germane to the resolution of the case.

ISSUES FOR DETERMINATION

“1. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that the respondent had established his claim to possessory title to the land in dispute.

2. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge's finding of trespass against the appellant in view of the evidence on record.”

HELD (Unanimously dismissing the appeal per **KATSINA-ALU JSC**)

Title - Proof of ownership

1. In a claim for title to land, the plaintiff may adopt one or more of the ways of proving ownership, for example, traditional evidence or by means of evidence of acts of ownership or possession. The one or two of them may be sufficient to sustain the claim: See *Akunyili v. Ejidike* (1996) 5 NWLR (Pt.449) 381; *Idundun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) 9-10 S.C 227. Where traditional evidence is not contradicted or in conflict it can support a claim for declaration of title. See *Aikhionbare & Ors. v. Omoregie & Ors.* (1976) 13 S.C. (Reprint) 6; (1976) 12 S.C. 11. As I have already pointed out, the plaintiff gave evidence of traditional history as to how his family land in question was established. The defendant, on the other hand, gave no evidence of traditional history.

The Court of Appeal as I have already stated, affirmed the judgment of the trial court. That court per Ba'aba, JCA., said:

“It is a case where the case of one party has weight while the other has no weight at all. In my view, the learned trial Judge was right in his conclusion as the only witness, the mother of the appellant was unable to give any credible evidence particularly regarding the source of ownership

of the land in dispute.....” (p. 1881 F)

Title - Bini customary law

2. Land in Benin is vested in the Oba of Benin under customary law. This however was not the law before 1950. In any event, the question in land claims has always been which of the parties had made a good title to the land and not which of them obtained the Oba's title. See *Atiti Gold v. Beatrice Osaseren* (1990) 1 All NLR 125. This observation is particularly more relevant in the present case where neither of the parties is possessed of Oba's approval. (p. 1882 C)

Trespass - Evidence - Exclusive possession

3. Generally speaking, a claim to trespass to land is rooted in exclusive possession. The onus on the plaintiff is to prove by credible evidence that he has exclusive possession, or he has the right to such possession of the land in dispute. Where however a defendant claims to be the owner of the land in question, title to it is put in issue. In order to succeed therefore, the plaintiff must show a better title than that of the defendant.

The question to answer now is whether the defendant trespassed unto the plaintiff's land. The plaintiff testified that the defendant with his servants and agents entered the land in 1979 and while therein drove away the plaintiff's workers on the land. This was in line with his paragraph 12 and 13 of the Amended Statement of Claim. This piece of evidence was not challenged. The trial court accepted this evidence of trespass by the defendant to the land in dispute. The Court of Appeal was equally right in affirming it. (p. 1882 E)

APPEALS - Concurrent findings

4. One last thing. This appeal is on concurrent findings by the trial court and the Court of Appeal. The attitude of this court where there are concurrent findings of fact by the lower courts is that it will not disturb such findings unless they are shown to be perverse. The defendant has not shown before this court that the findings on original settlement and inheritance by the plaintiff's grandfather and father as well as the finding

on trespass are perverse. Clearly therefore, this court has no reason whatsoever to interfere with the findings. (p. 1883 D)

NOTABLE POINTS OF INTEREST

B MUKHTARJSC

1. Title - Unchallenged evidence should be acted upon

The pieces of evidence were not debunked by the defendant/appellant. The plaintiff/respondent proved his claim with cogent and reliable evidence that the land belongs to him through inheritance, and the learned trial Judge was right when he held as follows:-

“In this suit, the plaintiff’s claim to the root of title relates back to 1950s (sic) it is not in dispute that the claim is made prior to the introduction of ward system in Benin. It may be the practice to plant Ikhimwin tree to identify the area of land claimed by the ancestor of the plaintiff; there is no contradiction of the evidence that the plaintiff’s ancestor deforested the Area of Ekoken Orio where the land resides. I therefore accept the testimony of the plaintiff as it is unchallenged.

The position of the law as regards unchallenged evidence is as stated above, for any such evidence that is neither attacked nor discredited, and is relevant to the issues joined ought to be relied upon by a Judge. (p. 1887 A)

F 2 . Error in admissibility of document - Will not ground reversal in all cases

It is patently clear from the above that apart from Exhibits OE1 and OE4, there were other cogent and credible evidence which the learned trial Judge relied upon in finding for the plaintiff/respondent. So although Section 34 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990 and the conditions prescribed therein have not been met, no miscarriage of justice has been occasioned. It is well settled law that it is not every error or mistake in a judgment that will lead to a judgment being reversed or set aside. An appellate court will do so only where the error or mistake has led to a miscarriage of justice, and without the error, a different decision would have been arrived at by the trial court.

REPRESENTATION

A. O. Eghobamien, Jnr., for the Appellant.

P. O. Osemwenkha, Esq., for the Respondent.

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CASES REFERRED TO

Bankole v. Pelu (1991) 8 NWLR 211

Mora v. Nwalusi (1962) 2 SCNLR 73

Ali v. Aleshinloye (2000) 4 S.C. (Pt.I) 111; (2000) 6 NWLR (Pt.660) C
page 177

Adejumo v. Ayantegbe (1989) 6 S.C. (Pt.1) 76; (1989) 3 NWLR (Pt.110)
page 417

Okeke v. Aondoakan (2000) 9 NWLR (Pt.673) page 501

D

Ayorinde v. A-G Oyo State (1996) 3 NWLR (Pt.434) 20

Lawal v. Olufowobi (1996) 10 NWLR (Pt.477) 177

Amakor v. Obiefuna (1974) 3 S.C. (Reprint) 49; (1974) 1 All NLR (Pt.
1) 119

E

Akunyili v. Ejidike (1996) 5 NWLR (Pt.449) 381

Idundun v. Okumagba (1976) 9-10 S.C. (Reprint) 140; (1976) 9-10 S.C
227

Aikhionbare & Ors. v. Omoregie & Ors. (1976) 13 S.C. (Reprint) 6; F
(1976) 12 S.C. 11

LEAD JUDGMENT LEAD BY KATSINA-ALU JSC

This is an appeal by the defendant, Osayemwenre Amayo against
the judgment of the Court of Appeal given on 27 July, 1995. Before the
trial court the plaintiff, Osayande Erinmwingbovo, claimed against the
defendant the following reliefs: G

*“(1) Declaration that the plaintiff has possessory title to that piece
of land situate at Orio Village, Benin City within the Benin Judicial H
Division and therefore the plaintiff is entitled to obtain a Certificate of
Occupancy in respect of the said land shown in Plan No.BEC34.*

(2) N1,000.00 (One Thousand Naira) damages for trespass on the

said land in that in January, 1979, the defendant broke into the said land and started farming thereon without the plaintiff's consent.

(3) *An order of perpetual injunction restraining the defendant, his servants or agents from entering the said land without the plaintiff's authority."*

The plaintiff in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 12 and 13 of his Amended Statement of Claim pleaded as follows:

(3) The plaintiff's father was until his death in 1950 the owner of a large farm situate at Ekoken in Orio Village in Benin within Benin Judicial Division. The plaintiff's grand father Osagie was the original founder and settler on the land in dispute and the plaintiff's father inherited the land from the grandfather after his father's performance of the Bini customary burial rites. His father farmed on this land and planted rubber trees thereupon.

(4) The plaintiff's father had 4 surviving children and the plaintiff was the eldest son.

(5) The said farm was mainly rubber plantation with scattered cash crops like kolanut and pear trees.

(6) When the plaintiff's father died in 1950, the farm land together with the plantation was inherited by the plaintiff after performing the burial customary rites and ceremonies according to Bini Custom and he continued to farm on the land.

(7) In 1956, the plaintiff caused the plantation to be surveyed. The area is verged Pink on Plan No.BEC 34 attached herewith. The said plan will be founded upon at the hearing of this suit.

(8) The plaintiff continued to farm on the land without disturbance until sometime in 1959 when the defendant's father one David Amayo encroached on the rubber plantation and trespassed on the land.

(9) The plaintiff immediately filed an action against the defendant's father in the Grade 'A' Customary Court holden at Benin City and the plaintiff obtained judgment against the defendant's father.

(10) The plaintiff avers that the defendant's father died sometime in 1978.

(11) In 1979, the defendant purportedly claiming through his fa-

ther broke into the farm land clearing part of it and commenced farming thereon.

(12) The defendant by himself, his servants and agents drove the plaintiff's workers out of the plantation and farm land.

For his part, the defendant pleaded in paragraphs 4, 5, 6 in the B Amended Statement of Defence thus:

“(4) The defendant admits paragraph 9 of the Amended Statement of Claim only to the extent that the plaintiff obtained judgment in Grade “A” Customary Court in Suit No.30/59 delivered on 2nd March, 1960 C against the defendant’s father in respect of the land in dispute. When the defendant was not satisfied with the said judgment, he appealed to Benin City High Court in Suit No.8/68A/63 and the judgment of Grade ‘A’ Customary Court in Suit No.30/59 was set aside on the 16th March, 1964. D The said judgment No.8/68A/63 dated 16th March, 1963 will be relied upon at the hearing.

5. The defendant as the eldest surviving son of his father buried the father in accordance with the Benin Native Law and Custom. He then inherited the land in dispute. E

6. The plaintiff having sued and lost in Suit No.8/64A/63 in the subject matter in this suit by a court of competent jurisdiction is estopped from bringing any action for declaration, trespass and injunction against the defendant who is the representative and or privy of David Amayo F who was the appellant in Suit No.8/68A/63. The matter therefore is res-judicata.

7. The defendant reported this matter to the Oba of Benin some-time in 1980 when the plaintiff trespassed on the land in dispute. And in the presence of his chiefs and other persons, the Oba after seeing the court’s judgment No.8/68A/63 found for the defendant on the 29th October, 1980. G

At the trial, the plaintiff led evidence in line with his pleadings. In his evidence, he traced how his grandfather deforested the land and settled thereon. He testified that his own father inherited the land on the death of his grandfather. It was also in evidence that the plaintiff’s father farmed on the land in dispute by planting rubber, coconut, kolanut and pear trees H

thereon. He led evidence that he inherited the land in question in 1950 on the death of his father after performing the traditional burial rites and farmed thereon till the defendant trespassed on the said land in 1979. The plaintiff called four witnesses including the Surveyor who surveyed the land in 1956 in proof of his claim.

The defendant did not testify. He called his mother who tendered Exhibit OE4, Record of Proceedings in proof of his claim.

In a considered judgment, the learned trial Judge gave judgment in favour of the plaintiff. He granted all the reliefs claimed by the plaintiff.

The defendant's appeal to the Court of Appeal was unanimously dismissed. This further appeal to this court is against that judgment.

The defendant as appellant, raised five issues for determination. These are:

"1. Whether from the available evidence, the plaintiff has proved title to land under Bini Native law and custom.

2. Whether the learned Justices of the Court of Appeal failed to make a pronouncement on a canvassed issue (the admissibility of Exhibit OE1) and thereby occasioned a miscarriage of justice.

3. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that relied on evidence in a previous judicial proceedings (Exhibits OE1 and OE4) when the conditions prescribed by Section 34 of the Evidence Act, 1990, do not apply.

4. Whether the Justices of the Court of Appeal were right in affirming the learned trial Judge's findings of trespass against the defendant.

5. Whether the identity of the land was established."

For his part, the plaintiff submitted two issues for determination which read as follows:

"1. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that the respondent had established his claim to possessory title to the land in dispute.

2. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge's finding of trespass

against the appellant in view of the evidence on record.”

This case is not as complicated as the learned counsel for the appellant would want to make it. I have earlier on in the judgment set out the relevant paragraphs of the parties’ pleading to show on what basis the case was fought. That being so, I would determine this appeal on the two issues submitted by the respondent which I find more germane to the resolution of the dispute. B

The first issue to be resolved is whether the plaintiff established his claim to possessory title to the land in dispute. I have earlier on laid out the relevant paragraphs of the pleadings of the parties and the evidence in support thereof. Now in the course of his judgment, the learned trial Judge stated as follows: C

1. The defendant’s counsel has submitted that the testimony of the plaintiff as to the inheritance and acquisition of the land does not conform with known procedure for acquisition of land in Benin outskirts before 1960. He said the correct procedure is to plant an Ikhimwin tree after obtaining approval or right to the land from the Oba of Benin. In this suit, the plaintiff’s claim to the root of title relates back to 1950s, it is not in dispute that the claim is made prior to the introduction of ward system in Benin. It may be the practice to plant an Ikhimwin tree to identify the area of land claimed by the ancestor of the plaintiff; there is no contradiction of the evidence that the plaintiff’s ancestor deforested the Area of Ekoken, Orio where the land resides. I therefore accept the testimony of the plaintiff as it is unchallenged. See Ikuomola v. Oniwaya & Ors. (1990) 7 S.C. (Pt.II) 1; (1990) 4 NWLR (Pt.144) 617; from the testimony of Osagiede in Exhibit O.B.1, the predecessor in title of the defendant had made a claim to a wrong plantation. Evidence shows that the plaintiff through his predecessors in title had been in long continuous uninterrupted succession to the parcel of land now in dispute, the onus is on the defendant to dislodge the claim of the plaintiff by cogent evidence. See Ricketts v. Shote (1960) LLR 201 and Makinmi v. Ladejobi (1960) LLR H 233. In this case, no cogent evidence has been adduced by the defendant to dislodge the claim of the plaintiff to the land. D E F G H

Specifically on Benin land tenure, the plaintiff has shown a better

title to the land than the defendant. This claim is better than that of the defendant. In *Atiti Gold v. Beatrice Osaseren* (1990) 1 All NLR 125 at 134, Coker, JSC., observed as follows: which observation I respectively adopt.

B *“The question at all times was which of the parties had made a good title to the land and certainly not which of them obtained the Oba’s approval.”*

In the instant case neither of the parties is possessed of Oba’s approval. By the testimony of the plaintiff, he has proved a long continuous uninterrupted succession to the land through the plantation derived from the root of the plaintiff’s claim to the land. In many respects the facts of this case are not dissimilar to those in *Arose v. Arose*, reported in 1981 5, Supreme Court, where Idigbe, JSC., as he then was adopted the reasoning in *Gold v. Osarerren supra*, and held that the proof of a better title to the land in dispute is sufficient to ground a right to a declaration to possessory title over the land. This is so inspite of the fact that the particular procedure for grant of the land by the Oba of Benin had not been followed by the plaintiff. In the instant case, evidence shows that the plaintiff predecessor in title deforested the land in dispute and was the Enogie of the Area in Orio where the land resides. No evidence was given that he planted Ikhiwmwin tree, or that he obtained the consent of the Oba of Benin in 1953, before he surveyed the land. Evidence however shows that at no time was the predecessor in title of plaintiff challenged on the ownership of the plantation or the land. The defendant has produced no evidence of continuous use of the land, and such evidence or claim to plantation that he tendered derived its root from the ancestor of the plaintiff: even the identity of the plantation is uncertain. I have no hesitation in holding therefore that the plaintiff has produced a better evidence of long continuous uninterrupted possession to the land in dispute, and I have no hesitation in awarding to him a right to possessory title to that land situate at Orio Village Benin.

This was clearly based on a sound appraisal and proper evaluation of the evidence before the learned trial Judge.

The Court of Appeal rightly, in my view, affirmed the decision of

the learned trial Judge. That court held inter alia thus:

“..... *the learned trial Judge in my humble opinion properly considered the case of the parties. It is a case where the case of one party has weight while the other has no weight at all. In my view, the learned trial Judge was right in his conclusion as the only witness, the mother of the appellant was unable to give any credible evidence particularly regarding the source of ownership of the land in dispute.....*”

The plaintiff, it must be remembered pleaded traditional history. He led evidence in line with his pleadings. Particularly, it was in evidence that his grandfather, Osagie, was the original founder and settler on the land in question and that he deforested same. It was also his evidence that the said land devolved on his father on the death of his own father. His father, he said, planted rubber, coconut, pears and kolanut trees on the land. The plaintiff's father died in 1950 and thereafter the plaintiff inherited the land. Soon thereafter he caused a survey plan to be made of the said land which was admitted in evidence without any objection as Exhibit D.E.2. This evidence was not challenged by the defendant.

The trial court rightly, in my view, accepted the plaintiff's evidence of original settlement and inheritance by his grandfather and father. There was really no contest. Plaintiff clearly established his claim to possessory title. It is plain to me that from the evidence on record, the plaintiff established by traditional evidence numerous acts of ownership and long possession by his ancestors and himself.

In a claim for title to land, the plaintiff may adopt one or more of the ways of proving ownership, for example, traditional evidence or by means of evidence of acts of ownership or possession. The one or two of them may be sufficient to sustain the claim: See *Akunyili v. Ejidike* (1996) 5 NWLR (Pt.449) 381; *Idundun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) 9-10 S.C 227. Where traditional evidence is not contradicted or in conflict it can support a claim for declaration of title. See *Aikhionbare & Ors. v. Omoregie & Ors.* (1976) 13 S.C. (Reprint) 6; (1976) 12 S.C. 11. As I have already pointed out, the plaintiff gave evidence of tradi-

tional history as to how his family land in question was established. The defendant, on the other hand, gave no evidence of traditional history.

The Court of Appeal as I have already stated, affirmed the judgment of the trial court. That court per Ba'aba, JCA., said:

"It is a case where the case of one party has weight while the other has no weight at all. In my view, the learned trial Judge was right in his conclusion as the only witness, the mother of the appellant was unable to give any credible evidence particularly regarding the source of ownership of the land in dispute....."

Land in Benin is vested in the Oba of Benin under customary law. This however was not the law before 1950. In any event, the question in land claims has always been which of the parties had made a good title to the land and not which of them obtained the Oba's title. See *Atiti Gold v. Beatrice Osaseren* (1990) All NLR 125. This observation is particularly more relevant in the present case where neither of the parties is possessed of Oba's approval. I answer Issue No.1 in the affirmative.

I go now to issue No.2 which deals with the finding of trespass. Generally speaking, a claim to trespass to land is rooted in exclusive possession. The onus on the plaintiff is to prove by credible evidence that he has exclusive possession, or he has the right to such possession of the land in dispute. Where however a defendant claims to be the owner of the land in question, title to it is put in issue. In order to succeed therefore, the plaintiff must show a better title than that of the defendant. See *Amakor v. Obiefuna* (1974) 3 S.C. (Reprint) 49; (1974) 1 All NLR (Pt. 1) 119; *Akunyili v. Ejidike* (supra).

I have already shown that the plaintiff had adduced uncontroverted evidence as regards his root of title. The trial Judge found that:

"Plaintiff's claim to the root of title relates back to 1950's. It is not in dispute that the claim is made prior to the introduction of Ward Systems in Benin..... there is no contradiction of the evidence that the plaintiff's ancestor deforested the area of Ekoken - Orio where

the land resides. I therefore accept the testimony of the plaintiff as unchallenged.”

The Court of Appeal affirmed this finding. It said:

“It should be noted that the title of the respondent’s grandfather and father was never challenged by anybody. I therefore resolve the sole issue against the appellant.” B

The question to answer now is whether the defendant trespassed unto the plaintiff’s land. The plaintiff testified that the defendant with his servants and agents entered the land in 1979 and while therein drove away the plaintiff’s workers on the land. This was in line with his paragraph 12 and 13 of the Amended Statement of Claim. This piece of evidence was not challenged. The trial court accepted this evidence of trespass by the defendant to the land in dispute. The Court of Appeal was equally right in affirming it. C D

One last thing. This appeal is on concurrent findings by the trial court and the Court of Appeal. The attitude of this court where there are concurrent findings of fact by the lower courts is that it will not disturb such findings unless they are shown to be perverse. The defendant has not shown before this court that the findings on original settlement and inheritance by the plaintiff’s grandfather and father as well as the finding on trespass are perverse - See Ayorinde v. A-G Oyo State (1996) 3 NWLR (Pt.434) 20; Lawal v. Olufowobi (1996) 10 NWLR (Pt.477) 177. Clearly therefore, this court has no reason whatsoever to interfere with the findings. E F

This appeal is devoid of merit. In the result, I dismiss it with N10,000.00 costs in favour of the plaintiff/appellant against the defendant. G

KUTIGIJSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Katsina-Alu, JSC. He has identified and thoroughly treated the real issues in the appeal which were rightly resolved against the appellant. The appeal is clearly without merit. It is H

dismissed with N10,000.00 costs against the appellant in favour of the respondent.

B MUSDAPHER JSC

I have had the honour to read in advance, the judgment of my Lord, Katsina-Alu, JSC., just delivered with which I entirely agree. For the same reasons so adequately and comprehensively set out in the judgment which I respectfully adopt as mine, I too, find this appeal as lacking in merit and I accordingly dismiss it. I abide by the order for costs contained in the judgment.

D PATS-ACHOLONU JSC

I have read the judgment in draft of my noble and learned Lord, Katsina-Alu, JSC., and I agree with him. I have nothing more to add.

E MUKHTAR JSC

This is an appeal against the concurrent findings of two courts. In the court of first instance, the learned trial Judge found the defendant/appellant liable for trespass, and granted the plaintiff/ respondent an order of perpetual injunction. These orders were affirmed by the court below when the defendant appealed to the court against the decision. Dissatisfied with the decision of the lower court, the defendant appealed to this court on eight grounds of appeal. As is the practice in this court, learned counsel exchanged briefs of argument which were adopted at the hearing of the appeal. The appellant in his brief of argument formulated five issues for determination, and the issues are as follows:-

“A. Whether from the available evidence, the plaintiff has proved title to land under the Bini Native law and custom.

B. Whether the learned Justices of the Court of Appeal failed to make a pronouncement on a canvassed issue (the admissibility of Exhibit OE1) and thereby occasioned a miscarriage of justice.

C. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that relied on evidence in a previous judicial proceedings (Exhibits OE1 and OE4) when the conditions prescribed by Section 34 of the Evidence Act, 1990, do not apply.

B

D. Whether the Justices of the Court of Appeal were right in affirming the learned trial Judge's findings of trespass against the defendant.

E. Whether the identity of the land was established."

C

In this judgment, I will touch only a few issues, starting with issue (1) above. The reliefs sought by the defendant, who is now the appellant in this court are as follows:-

(1) Declaration that the plaintiff has possessory title to that piece of land situate at Orio Village Benin, within Benin Judicial Division and therefore the plaintiff is entitled to obtain a Certificate of Occupancy in respect of the said land, shown in Plan No.BEC34.

D

(2) N1,000.00 (One Thousand Naira) damages for trespass on the said land in that in January 1979, the defendant broke into the said land and stated (sic) farming thereon without the plaintiff's consent.

E

(3) An order of perpetual injunction restraining the defendant, his servants or agents from entering the said land without the plaintiff's authority.

F

The following salient averments were made by the plaintiff in his amended Statement of Claim:-

3. The plaintiff's father was until his death in 1950 the owner of a large farm situate at Ekoken in Orio Village in Benin within Benin Judicial Division. The plaintiff's grand father Osagie was the original founder and settler on the land in dispute and the plaintiff's father inherited the land from the grandfather after his father's performance of the Bini customary burial rites. His father farmed on this land and planted rubber trees thereupon.

G

4. The plaintiff's father had 4 surviving children and the plaintiff was the eldest son.

H

5. The said farm was mainly rubber plantation with scattered cash

crops like kolanut and pear trees.

6. When the plaintiff's father died in 1950, the farmland together with the plantation was inherited by the plaintiff after performing the burial customary rites and ceremonies according to Bini Custom and he continued to farm on the land.

7. In 1956, the plaintiff caused the plantation to be surveyed. The area is verged pink on Plan No.BEC 34 attached herewith.

8. The plaintiff continued to farm on the land without disturbance until sometime in 1959 when the defendant's father one David Amayo encroached on the rubber plantation and trespassed on the land.

9. The plaintiff immediately filed an action against the defendant's father in the Grade 'A' Customary Court holden at Benin City and the plaintiff obtained judgment against the defendant's father.

14. The defendant alleged falsely that his father David Amayo bought a small portion of the rubber plantation from the plaintiff's junior brother, one Osagiede Erinmwingbovo.

15. The plaintiff avers that his said junior brother did not perform the second burial ceremony of his father and did not inherit any rubber plantation of his father by Bini Native Law and Custom and did not sell any land to the defendant's father.

16. The plaintiff avers that on 28/2/08, (sic) his said junior brother in charge No.MB/1113C/67 at the Magistrate Court Benin City for the first time in any court denied selling the plaintiff's rubber plantation to David Amayo, defendant's father when the plaintiff was charged to court for stealing rubber latex of this plantation belonging to the said defendant's father. The certified true copy of this proceedings will be founded upon at trial."

The defendant denied most of the above averments and did not provide any concrete defence in his amended Statement of Defence. To prove his claim, the plaintiff/respondent traced his root of title to the land in dispute by giving evidence of traditional history from his grand father, to his father, through the Benin Custom of inheritance and the rites that go with it. He gave evidence of continuous possession until the defendant/appellant's encroachment on the land, and series of past litigations

that ensued thereafter. The pieces of evidence were not debunked by the defendant/appellant. The plaintiff/respondent proved his claim with cogent and reliable evidence that the land belongs to him through inheritance, and the learned trial Judge was right when he held as follows:-

“In this suit, the plaintiff’s claim to the root of title relates back to 1950s (sic) it is not in dispute that the claim is made prior to the introduction of ward system in Benin. It may be the practice to plant Ikhimwin tree to identify the area of land claimed by the ancestor of the plaintiff; there is no contradiction of the evidence that the plaintiff’s ancestor deforested the Area of Ekoken Orio where the land resides. I therefore accept the testimony of the plaintiff as it is unchallenged. See Ikuomola v. Oniwaya & Ors. (1990) 7 S.C. (Pt.II) 1; (1990) 4 NWLR (Pt.146) page 617”.

The position of the law as regards unchallenged evidence is as stated above, for any such evidence that is neither attacked nor discredited, and is relevant to the issues joined ought to be relied upon by a Judge. See Adejumo v. Ayantegbe (1989) 6 S.C. (Pt.1) 76; (1989) 3 NWLR (Pt.110) page 417; Okeke v. Aondoakan (2000) 9 NWLR (Pt.673) page 501, and Nwabuoko v. Ottih (1961) 2 SCNLR 232.

The evidence adduced by the defendant/appellant are so insufficient and not cogent that they can not dislodge the case of the plaintiff/respondent. I am in complete agreement with Ba’aba, JCA., when in the judgment of the court below, he said inter alia:-

“Evidence shows that the plaintiff through his predecessors in title had been in long continuous uninterrupted succession to the parcel of land now in dispute, the onus is on the defendant to dislodge the claim of the plaintiff by cogent evidence. See Rickets v. Shote (1960) LLR 201 and Makinmi v. Ladejobi (1960) LLR 233. In this case, no cogent evidence has been adduced by the defendant to dislodge the claim of the plaintiff to the land.”

The arguments under issues (b) and (c) supra are predicated on the reliance on Exhibits OE1 and OE4 and on the omission of the court below to pronounce on the exhibits as canvassed in the appellant’s brief of argument.

It is on record that in the court below the appellant formulated the following issue inter alia for determination. The issue is:-

B *“Whether the learned trial Judge was right in making use of Exhibit OE1 Record of proceedings in a criminal proceeding in charge No.MB/1113C/67.”*

Ba’aba, JCA., in the lead judgment of the court adopted the single issue raised in the respondent’s brief of argument, which reads:-

C *“Whether the learned trial Judge was right in giving judgment to the plaintiff/respondent.”*

This the learned Justice is at liberty to do. Having adopted the said issue, the learned Justice confined himself to the substance of the issue even though he reproduced the argument canvassed by learned counsel. In his judgment, in adopting the said respondent’s sole issue, the learned Justice said:-

E *“Having studied all the issues formulated by the parties in this appeal, it appears to me that the sole issue formulated by the respondent has adequately encompassed all the issues and it is for that reason that I intend to determine the appeal on the said issue herein reproduced.”*

F It is a fact that the learned Justices did not make pronouncement on the canvassed issue of the admissibility of Exhibit OE1, but the vital question to be asked is, did that failure occasion a miscarriage of justice? I will come back to this question, after I would have looked at issue (3) supra. It is on record that the learned trial Judge referred to the content of Exhibits OE1 and OE4 in his judgment, but it is doubtful that he relied on them solely for his findings on the claim. The learned trial Judge relied upon other evidence before him for in his judgment he stated and found thus:-

H *“In the instant case, evidence shows that the plaintiff predecessor in title deforested the land in dispute and was the Enogie of the area in Orio where the land resides. No evidence was given that he planted Ikhimwin tree, or that he obtained the consent of the Oba of Benin in 1953, before he surveyed the land. Evidence however shows that at no time was the predecessor in title of the plaintiff challenged on the ownership of the plantation or the land. The defendant had introduced no*

evidence of continuous use of the land, and such evidence of claim to the plantation that he derived its root from the ancestor of the plaintiff even the identity of the plantation is uncertain. I have no hesitation of awarding to him a right to possessory title to the land situate at Orio Village Benin: as contained in Exhibit OE1 tendered in this proceedings”. B

In the judgment of the court below the learned Justice resolved the sole issue he formulated thus:-

“It should be noted that the title of the respondent’s grandfather and father was never challenged by anybody. I therefore resolve the sole issue against the appellant.” C

It is patently clear from the above that apart from Exhibits OE1 and OE4, there were other cogent and credible evidence which the learned trial Judge relied upon in finding for the plaintiff/respondent. So although Section 34 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990 and the conditions prescribed therein have not been met, no miscarriage of justice has been occasioned. It is well settled law that it is not every error or mistake in a judgment that will lead to a judgment being reversed or set aside. An appellate court will do so only where the error or mistake has led to a miscarriage of justice, and without the error, a different decision would have been arrived at by the trial court. See Bankole v. Pelu (1991) 8 NWLR 211; Mora v. Nwalusi (1962) 2 SCNLR 73, and Ali v. Aleshinloye (2000) 4 S.C. (Pt.I) 111; (2000) 6 NWLR (Pt.660) page 177. D E F

In the light of the above emphasis on some of the issues raised, and in addition to the more detailed treatment of the issues in the lead judgment, I also dismiss the appeal. The appeal is against concurrent findings of fact of the lower courts which this court is at liberty to dismiss in view of the findings of fact which are supported by unchallenged and credible evidence. The law is trite on when a judgment of this nature can be disturbed. See Koronye v. Hart (2000) 15 NWLR (Pt.692) page 840; Lokoyi v. Olojo (1983) 2 SCNLR 127 and Salami v. Gbodoolu (1997) H 4 NWLR (Pt.499) page 277. G

I am thus in complete agreement with my learned brother, Kat-sina-Alu, JSC., that the appeal is devoid of merit and should be dismissed.

I hereby dismiss it, and abide by all the consequential orders made in the lead judgment.

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