

**SUPREME COURT OF NIGERIA**  
14TH JULY, 2006. SC. 409/2001  
**CORAM:- S. U. ONU, U. A. KALGO, N. TOBI,**  
**D. MUSDAPHER, A. M. MUKHTAR, JJSC**

**CHIEF N. T. OKOKO**

(For himself and on behalf of ..... APPELLANT  
Tarapa Family of Obunagha)

**AND**

**MARK DAKOLO**

(For himself and on behalf of ..... RESPONDENT  
Ayainbiri Family of Gbarantoru)

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EVIDENCE - Proof - Facts not pleaded - Evidence on facts not pleaded  
- Go to no issue and should be discountenanced - Court of Appeal was  
therefore wrong - To have relied on evidence of facts not pleaded (H1)

EVIDENCE - Evaluation - Rule in Kojo v. Bonsie - For the rule to apply  
- There must be evidence of traditional history - From both parties -  
Equally persuasive - Such that the Court cannot justifiably - Prefer one  
to the other (H2)

EVIDENCE - Contradictions - Testimony of witnesses - There are mate-  
rial contradictions - In testimonies of defence witnesses - To justify trial  
judge's refusal - To apply the rule in Kojo v. Bonsie (H3)

LAND LAW - Title - Traditional histories - It is not in every case of  
conflict therein - That the court resorts to recent acts - It first tests each  
history - Against other evidence adduced before it (H4)

LAND LAW - Title - Proof of exclusive possession ss. 46 & 146 E A -  
Once plaintiff proves title by traditional history - Lawful and exclusive  
possession - Is presumed in his favour - And ss. 46 & 146 E A - Cannot  
operate against him (H5)

APPEALS - Issues - Cross-appeal - Issues in the cross-appeal - Did not depend on the issues in the main appeal - So failure of Court of Appeal - To determine the issues in the cross-appeal - Amounts to denial of fair hearing (H6)

APPEALS - Issues - Failure to pronounce - On all material issues - Effect - Where it results in miscarriage of justice - Consequential order should be one for retrial - But where issues not considered - Affected a cross-appeal - They should be resolved by appellate court (H7)

DAMAGES - General damages - Quantum of - Though in awarding general damages - Courts have discretion in assessing the quantum - Such exercise however must be related to the evidence - In the instant case - Amount awarded is manifestly too low (H8)

### **FACTS**

The plaintiff/Appellant sued the Defendant/Respondent for Declaration of title, Damages for trespass and injunction. The Appellant's case was that the land in dispute situate at Obunagha, was founded by Obunagha, after whom it was named. The story of the Appellant was that the land descended patrilineally from Obunagha to Tarapa, Umgbou, Olobiriwei, Ekpeku, Okoni to himself. Appellant testified that as owners in possession, members of his family farm on the land, fish in the ponds and lakes as well as carve canoe and collect firewood therefrom without let or hinderance. They tendered two judgments of native courts in respect of the land. One of the judgments, over a lake within the land, was however said to have been lost during the Nigerian Civil War. Appellant also testified that in the olden days, there were wild crocodiles in the lake. And that a member of the Respondent's family who had medicine to scare away crocodiles was called to scare them away and in return, was given the right to declare a day of general fishing.

After close of Appellant's case, Respondent applied to further amend his statement of Defence and by that amendment, set up an ad-

verse claim to the land in dispute. According to the Respondent, the land was known as "Amaran Asa" and not Obunagha. During trial they gave evidence that the founder of the land was Amaran though they did not plead this fact. Also not pleaded was the links between Amaran and Ayainbiri and between Ayainbiri and the Respondent himself. It was their evidence that their ancestors originally settled in a place within the disputed land and that a Big Shrine of Agburuku was near the old settlement. Further, that this shrine still exists there, represented by a basket of feathers, a big chain, a glass, a bottle and a saucer. However D.W.4, Respondent's surveyor who testified, contradicted this piece of evidence when he said that what was shown to him as representing Agburuku shrine was "a big cotton tree". At end of trial, trial High Court gave judgment to Appellant but awarded to the Respondent the Egwebara lake within the land in dispute. Dissatisfied, Respondent appealed to the Court of Appeal. Appellant cross-appealed in respect of the lake. The Court of Appeal allowed the main-appeal and dismissed the cross-appeal. Hence, Appellant has now brought this appeal to the Supreme Court. He contends inter alia, that the Court of Appeal relied on evidence of unpleaded facts in its judgment.

### **ISSUES FOR DETERMINATION**

1. Was it proper in law for the court below to rely on evidence of traditional history given by the respondent on facts not pleaded in the Further Amended Statement of Defence and in the absence of such evidence, would the court below be right in holding that the evidence of both parties was on the balance and ought to have been subjected to the Rule in *Kojo II v. Bonsie* (1957) 1 WLR 1223?

2. Was the court below right in upsetting the findings of the trial court on the basis of failure to apply the Rule in *Kojo v. Bonsie* (supra), without taking into consideration the credibility of the respondent's evidence of traditional history and acts of recent possession?

3. Whether the court below was right in its application of the provisions of Sections 46 and 146 of the Evidence Act, 1990, as a basis for setting aside the award of damages and injunction when the appellant had proved title through traditional history.

4. Did the decision by the court below on the main appeal resolve the issues in the cross-appeal? If not, was the court below right in dismissing the Cross-Appeal without a determination of the issues there from.

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

***EVIDENCE - Proof - Facts not pleaded***

C 1. The question then is, was the court below right in relying on the evidence based on unpleaded facts as highlighted above, or putting it differently, was the learned trial Judge wrong in his finding and conclusion regarding the state of the defendant's pleading and evidence? The answer to be proffered, in my opinion, is that the court below was wrong when D it relied on the evidence on the facts not pleaded in the Further Amended Statement of Defence. I am also of the view that the decision of the learned trial Judge cannot be faulted. It was correct in law for the learned trial Judge to hold that the defendant's evidence on the unpleaded facts E ought to be discountenanced as it is inadmissible. In *Eze & 6 Ors. v. Atasié & 3 Ors.* (2000) 6 S.C (Pt. I) 214; (2000) FWLR (Pt. 13) 2180. And at page 2195, paragraphs B - C, Ejiwunmi, JSC, put it clearly, as follows:

F “It must be remembered that once pleadings are ordered, filed and exchanged, the parties and the courts are bound by the pleadings so filed, it therefore follows remorsefully that evidence must be led in accordance with the pleadings. Evidence led not in conformity with the pleadings and/or upon facts not pleaded went to no issue.” (p. 3116 A/G)

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***EVIDENCE - Evaluation - Rule in *Kojo v. Bonsie****

H 2. With due respect to the learned Justices of the court below, it was a wrong decision to hold that the evidence of both parties was on the balance and ought to have been subjected to the rule in *Kojo II v. Bonsie* (supra). Simply put, the Rule is to the effect that “where there is conflict of traditional history, the best way to test the traditional history is by reference to facts in recent years as established by evidence and by see-

ing which of the two competing histories is more probable.” (supra) per Lord Denning at page 1226.

Thus, for the Rule to apply, there must be evidence of traditional history from both parties which are in conflict, one with the other, such that the court cannot justifiably prefer one to the other. This was the decision in *Eze & 6 Ors v. Atasi & 3 Ors* (supra) at 2190, Paragraphs D – E. The contention there is that as material parts of the evidence of traditional history put forward by the defendants were not pleaded, the evidence of both parties cannot be said to be in conflict so as to necessitate the application of the rule. It is for the above reasons that I agree with the appellants that Issue I be and is hereby resolved in their favour. (p. 3117 F)

### ***EVIDENCE - Contradictions - Testimony of witnesses***

3. In Paragraph 7(f) of the Further Amended Statement of Defence, the defendants pleaded as follows:

“The ancestors of the 1st and 2nd defendants originally settled in a place within the land in dispute. The place is shown on the plan. “Near this old settlement is the Big shrine of Agburuku.” In evidence, the D.W.I said the juju belonged to Amaran and the shrine is located on the land in dispute and it still exists.....”

..... He said further that the shrine was represented by a basket of feathers, a big chain, a glass, a bottle and a saucer. He testified also that 20 members of the defendants’ family went with the surveyor when he surveyed the land in dispute.

His evidence was contradicted in two material areas: i) the D.W.4 (the surveyor) testified contradicting him (D.W.1) that what was shown to him as representing the Agburuku shrine was “a big cotton tree” and same was indicated on the survey plan he produced (Exhibit “G”).

The old settlement where the defendants’ family lived which was said to be close to the Agburuku shrine was also shown in the survey plan Exhibit “G”. But contrary to the evidence of the D.W.1, the so-called old settlement is very far from the Agburuku shrine.

In my view, this further erodes the potency of the evidence of

traditional history of the defence.

I am of the firm view therefore that with such contradiction and inconsistency in the evidence of the defence, the learned trial judge was right to reject the traditional history relied on by the defence and was

???

B right to refuse to apply the rule in *Kojo II v. Bonsie* (supra). He was in my opinion equally right to have decided that “the plaintiffs’ evidence of traditional history appears ..... to be stronger than that of the defendants.” (p. 3120 H)

C ***Title - Traditional histories***

4. I agree with the appellant’s submission that the learned justices of the Court below were wrong in law when they held that “the learned trial Judge was in error in resorting to the “comparisons” to determine which D of the competing histories was more probable in order (sic) declare title to the land in dispute in the respondents.” In fact, it has been held in *Biariko v. Edeh-Ogwuile* (supra) at page 114 lines 20 - 39 that:

E “*It is not the law that once there are conflicts in the traditional histories adduced, the court must promptly declare them inconclusive and thereupon proceed to consider recent acts.*

What indeed happens is that the case being one fought on hearsay upon hearsay, the trial court has a duty to find which of the two F histories is more probable by testing it against other evidence in the case. It is when it can neither find any of the two histories probable nor conclusive that he will declare both inconclusive and proceed to decide the case on the basis of numerous and positive acts of possession and “ownership.” (p. 3122 E)

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***Title - Proof of exclusive possession ss. 46 & 146 E A***

5. In a case such as the instant case, in which the plaintiff has proved title by traditional history, there is no additional burden on such plaintiff H to also prove exclusive possession because the presumption is that the person having title to the land is in lawful possession. In *Makinde v. Akinwale* (2000) 1 S.C. 89; (2000) FWLR (Pt. 25) 1562, it was decided thus

*“If the traditional history had truly broken down, the appellants’ case would have been destroyed. But in the circumstances of the present case. Section 145 is wholly inapplicable, in my view, because the appellants have indeed succeeded in proving their title through traditional history which was sufficiently supported by the evidence accepted by the lower court. The inference the respondents’ possession of the land in dispute would be that it is trespassory. The appellants would securely rely on their title and regard the respondents as trespassers.”*

Per Uwaifo, JSC, at page 1582 Paragraphs E-F.

Thus, once title has been proved, the person having title to the land is presumed to be in lawful possession and the other does not acquire possession by his act of trespass. Once the plaintiff in a case proves title by one of the five methods by which ownership of land may be proved, the provisions of Sections 46 and 146 of the Evidence Act cannot operate against them. (p. 3124 H)

### ***Issues - Cross-appeal***

6. Be it noted that Issue No. 5 in the appeal before the court below was on Sections 46 and 146 of the Evidence Act. That issue, and indeed none of the other issues, flowed from the issues in the cross-appeal. Put differently and as can be seen, the issues in the cross-appeal did not depend on the issues in the main appeal.

In this wise, I am in agreement with the appellant that in the circumstances, the failure of the court below to determine the issues in the cross-appeal amounted to a denial of fair hearing and resulted in a miscarriage of justice.

This conclusion is inevitable in the sense that the cross-appeal challenges the award of the Egwebara Lake by the trial court to the respondent and by allowing the appeal and dismissing the cross-appeal (without considering the issues), the court below has unwittingly granted free ingress and egress to the respondent through the land in dispute to the Lake irrespective of any right of possession in the appellants which is unaffected by the judgment of the court below, dismissing the claim. (p. 3126 G)

***Issues - Failure to pronounce***

7. Although it has been held that the result of a Court of Appeal failing to pronounce on all material issues raised before it depends on the facts and circumstances of each case, for which see the case of *The State v. Ajie* (2000) 7 S.C. (Pt. I) 24; (2000) 11 NWLR (Pt. 678) 434 at page 448, I had occasion in this court to point out in that case it was a proper case to hold without hesitation that the failure of Court of Appeal to consider the issues in the cross-appeal amounted to a denial of fair hearing resulting in a miscarriage of justice.

Where the ultimate conclusion is that of miscarriage of justice, the consequential order has been held to be one for a retrial. However, in a case such as the instant appeal where the issues not considered affected a cross-appeal and the subject of the cross-appeal is a lake, said to be tiny inside a vast parcel of land, instead of an order for a retrial, judgment should be entered for the appellant once it is decided that the Court of Appeal was wrong and the issues ought to be resolved in favour of the appellant. (p. 3127 D)

***General damages - Quantum of***

8. On the fifth (v) issue above, I agree with the appellants' submission that the award of N100.00 for general damages by the trial court ought also to have been reviewed by the court below. This is the more so that the award was not based on any evidence or any principle of law. Thus, while it is appreciated that in awarding general damages, it is within the discretion of a court to make its own assessment albeit that such an exercise must be related to the evidence. The contention in the case in hand is that the award of N100.00 as general damages by the trial court was manifestly too low in a case where the defendant admitted using the land, lakes and ponds and making money therefrom. He also admitted that there are many lakes and ponds on the land in dispute.

The trial court did not make any assessment and the court below did not consider this issue at all. Where as, in this case, the award of general damages has been shown to be manifestly too low, on appeal,



such general damages will be altered. (p. 3129 G)

## NOTABLE POINTS OF INTEREST

### ONU JSC

*1. For s. 46 E A to apply there must be admission by the adverse party* B

The law is that for Section 46 of the Evidence Act to apply in favour of the party pleading it, there must be proof or admission by the other party that the land in dispute is surrounded by other lands belonging to the party craving its aid. (p. 3125 G)

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*2. Legal effect of tampering with document differ from that of forgery*

To tamper with a document has the effect of rendering it unreliable but to forge or falsify it would nullify it completely. The learned trial Judge's decision was, therefore, contrary to the decision in *Agbonifo v. Aiwereoba* D (1988) 1 NWLR (Pt. 70) 325 at page 341 Paragraphs B-F. In the latter case, the trial court found that a cello-tape was put over the name of the allottee and held that the documents were unreliable. But the Court of Appeal set aside the finding on the ground that the appellant did not plead E and prove fraud. On appeal to the Supreme Court, the finding of the trial court was upheld because fraud was not in issue. It was further held that the trial court was "perfectly entitled to infer from what is obvious on the face of it that they had been tampered with." With respect, the learned F trial Judge in the instant case herein on appeal, was wrong to hold that there was allegation of fraudulent procurement and the court below was equally wrong to have failed to consider the issue in the cross-appeal. From the circumstances, the correct decision would be to hold that exhibit "E" had no probative value. This, the court below failed to hold. Had G this point been considered, the cross-appeal would have been upheld. (p. 3128 F)

### TOBI JSC

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*3. Unpleaded facts go to no issue, so that surprise may be avoided*

The law is not only trite but most elementary that facts not pleaded go to no issue. The rationale behind this principle of law is that by our adver-

sary system of civil procedure in the High Court, facts are first erected in the pleadings before the trial of the case. This is to enable the parties not to spring surprise at the trial and to narrow down the areas of disagreement so that parties will not think the sky is the limit in the production of facts in the matter before the court. Subject to the fairly liberal rules of amendment of pleadings, parties are bound by their pleadings. While a party is free to apply for the amendment of his pleadings, once the amendments find themselves in the last state of pleadings, the party is bound by them and he cannot move out of them in search of greener facts completely outside the ones duly pleaded. (p. 3132 B)

4. *Speculation implies guessing and trial judge did not do so*  
I think the Judge did the correct thing although the Court of Appeal said that he speculated on what ought to be the history of the root of title of the appellant requiring to be pleaded. I do not think the Court of Appeal was right in describing what the learned trial Judge did as “speculative”. The word speculation genetically conveys some element of cogitation or guess and a trial Judge who goes into his Record to gather what witnesses said cannot be said to be in speculation. If the learned trial Judge wanted to speculate, all he needed to do was to test his memory of remembrance and use whatever he remembers in writing the judgment. And because the human being that he is, memory could fail, in certain instances, he is bound to speculate. But he did not do that. He went straight to the Record and arrived at the conclusion. That cannot be speculation. (p. 3134 B)

5. *"Recent years" being vague concept - Takes meaning from factual context*  
In Kojo II, Lord Denning used the words “recent years”, words which do not convey an exact time limit; the word “recent”, being vague and amorphous. The word “recent” means something that happened or came into existence only a short time ago, as one can talk of recent history, as one can also talk of “the most exciting celebrations of recent years”. The word recent should be taken contextually and here I mean, in the light of

the events that give rise to the recentness. In this respect, the court will first take as the base event, the traditional history of the parties, which could be without date in the sense of being immemorial and therefore lost in ancient history or ancient times. Tracing the events from that period which may not be within the competence of human memory, to later events could qualify such later events as events of recent years, depending on the facts of the case. B

Applying the above to the evidence of P.W.1 and P.W.4, give the impression and beyond impression to believe that the events recounted by the witnesses qualify as “facts in recent years” in Kojo II. To be precise, the dispute between Ekpeku and Indole which resulted in victory for the plaintiffs’ family qualify as “facts in recent years”. So too the case between Oloibiriavei v. Agedai. And more recently, the evidence that the plaintiffs farmed and fished on the land in dispute. These are certainly events of recent years. (p. 3136 D) C

### **REPRESENTATION**

Appellant absent. E

L. E. Nwosu, SAN., (with him, J. T. Ugbo-duma), for the Respondent.

### **CASES REFERRED TO**

Dumez (Nig.) Ltd. v. Patrick Nwaka Ogboli (1972) 3 S.C. (Reprint) 188; (1972) 3 S.C. 196 at 204 to 205 F

The State v. Ajie (2000) 7 S.C. (Pt. I) 24; (2000) 11 NWLR (Pt. 678) 434  
Disciplinary Committee v. Mobolaji Alakija 4 FSC 38

Mora v. Nwalusi (1962) 1 All NLR 681 at 687

Stool of Abinabina v. Enyimadu 12 WACA 171 at 173 G

Akinterinwa v. Oladunjoye (2000) 4 B.C. (Pt. I) 19; (2000) FWLR (Pt. 10) 1690

Ayinla v. Sijuwola (1984) 1 SCNLR 410

Makinde v. Akinwale (2000) 1 S.C. 89; (2000) FWLR (Pt. 25) 1562 H

Alii v. Alesinloye (3000) 4 S.C. (Pt. I) 111 f (2000) FWLR (Pt. 15) 2610

Obulor v. Oboro (2001) 4 S.C. (Pt. 1) 77

Eze & 6 Ors. v. Atasie & 3 Ors. (2000) 6 5.C (Pt. I) 214; (2000) FWLR

**STATUTE REFERRED TO**

Evidence Act, L.F.N. 1990; ss. 46 and 146

B

**LEAD JUDGMENT BY ONU JSC**

This appeal is against the judgment of the Court of Appeal, Port Harcourt Division presided over by Tabai, JCA (as he then was). Judgment was entered for the plaintiff, now respondent in the High Court for declaration of title, damages for trespass and injunction on 28th August, 1992. Being dissatisfied, the defendant now appellant, appealed to the Court of Appeal sitting at Port Harcourt, before which he filed a total of seven grounds of appeal. In the judgment earlier delivered by the High Court, a lake within the land in dispute was awarded to the defendant who did not counter-claim. On that basis, the plaintiff filed a Cross-Appeal challenging that part of the judgment. Briefs of argument were later filed and exchanged including a respondent's cross-appeal. In its considered judgment earlier referred to, the court below allowed the appeal, set aside the decision of the High Court and dismissed the claim. The cross-appeal was also dismissed with costs assessed at N5,000 to the appellant.

F

**STATEMENT OF FACTS**

The appellant's claim in the High Court was for -

- (i) a declaration for title to a piece of land known as Opubou Land near Obungha, Gbarain Clan Yanegoa Division;
- (ii) N4,000.00 damages for trespass; and
- (iii) perpetual injunction.

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The case of the appellant briefly stated, was that the land in dispute is situate at Obunagha (see paragraph 9 of the Re-Amended Statement of Claim); that Obunagha was founded by Obunagha after whom it was named vide paragraph 2 Re-amended Statement of Claim as per the evidence of P.W.1 who also traced the history of his descent from Obunagha to Tarapa, Umgbou, Olobiriowei, Ekpeku, Okoni to himself. The P.W.1 was the plaintiff on record who died while the case was on appeal in the

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court below. P.W.1 further testified that as owners in possession, members of his family farm on the land, fish in the ponds and lakes and carve canoe and collect firewood therefrom. They exercised these rights without interruption. These acts of possession and others were pleaded in Paragraph II (vi) and (vii). Judgments of native courts were also pleaded; B two such judgments were tendered and admitted as Exhibits 'A' and 'B' (not copied) while the cases were between Olobiriwei of appellant's family against Agedai of respondent's family. One of the judgments over a lake within the land (Egwebara Lake) which was pleaded at Paragraph C II (v) was said to have been lost during the Nigerian Civil War.

The P.W.1 said that it was in 1966 and 1967 that members of the respondent's family were seen carving canoe with kuru tree on the land and fishing in Egwebara Lake. They were warned but they did not stop. Boundary witnesses also testified for the appellants. Their Surveyor testified as P.W.5 and tendered their survey plan (Exhibit "C") which is not copied. In all, five witnesses testified for the appellant apart from the P.W.1. The P.W.3 under cross-examination said "It is the Gbarantoru people that fish on the Egwebara Lake". However, the P.W.1 had testified E that the Egwebara Lake belonged to the appellant. He said further that in the olden days, there were wild crocodiles in the lake. A member of the respondent's family who had a medicine to scare away the crocodiles was called to scare them away and in return, was given the right to F declare a day of general fishing. At the close of the case for the appellant, the defendant (respondent) applied to further amend his Amended Statement of Defence. This was strenuously opposed albeit that it was eventually granted with the respondent ultimately filing the Further Amended G Statement of Defence in which they set up an adverse claim to the land in dispute by averring through D.W.1 that the land was rather known as "Amaran Asa" as disclosed in the pleading in paragraph 2 of the Further Amended Statement of Defence. In paragraph 3, the respondent did not specifically deny paragraphs 3 to 7 of the appellant's pleading. They pleaded H inter alia ..... "the defendants are in no position to admit or deny the averments contained in these paragraphs....." It was the evidence of the respondent that "Amaran was founder of the land in dispute." But

this was not pleaded. Also not pleaded was the link between Amaran and Ayainbiri and between Ayainbiri and the D.W.1, the defendant on record.

It is also the case of the respondent that their ancestors originally settled in a place within the land in dispute. Near the old settlement is the Big Shrine of Agburuku as pleaded in Paragraph 7(f) of their pleadings. D.W.1 further testified that the juju shrine belonged to the respondent and still exists; concluding that the position of the Agburuku Shrine had never shifted.

The respondent's Surveyor testified as D.W.4 and agreed under cross-examination that the land of Chief Patani Kemidise is the land having boundary in the North with the land verged yellow which is the "Opubou bush." D.W.2, respondent's boundary witness who said he is from Tunama family of Obunagha, later said under cross-examination that he is also from the appellant's family. He testified, strengthening appellant's case, that "the founder of Obunagha was Obunagha." Tunama family is the family of Chief Patani Kemidise. But D.W.2 contradicted both the pleadings in paragraph 5(a) of the Further Amended Statement of Defence and the evidence of D.W.4, the surveyor. Whereas the D.W.4 who tendered the respondent's Survey Plan (Exhibit 'G') said, "the northern boundary in Exhibit "G" is the Opubou bush", D.W.2 who said he was a retired Senior Registrar of the Judiciary, contradicted the evidence of D.W.4 and the respondent's pleadings by saying "I do not know the Opubou bush ..... our land is bounded..... on the South by the Ayainbiri family of Gbarantoru, the defendant's - we do not share a boundary with the plaintiffs."

D.W.3 who was also called by the respondent as a boundary witness further contradicted the case of the respondents when he said: "The land in which Gbarantoru settles, is owned by Kalaigoni family" contrary to Paragraph 6(ii) of the Further Amended Statement of Defence.

It is the further case of the respondent that they "have been occupying it and making use of it by farming and cutting timbers therefrom." The D.W.1 agreed under cross-examination that they have been making money from the lakes and ponds. The respondents tendered native court

judgments vide Exhibits “D”, “E” and “F”. While Exhibit E was in respect of the Egwebara Lake, these Exhibits were shown to have been tampered with, having been painted with tipex in some parts. The evidence of both parties was thoroughly evaluated by the learned trial Judge before he made his findings except that part concerning the Egwebara Lake and Exhibit “E” in respect of which a cross-appeal was filed. B

The court below upset the findings of the learned trial Judge and dismissed the claim, upheld the appeal and dismissed the Cross-Appeal, hence this appeal premised on the four grounds contained in the original Notice and Grounds as well as an additional ground of appeal in reply to the respondent’s Statement of Defence. The appellant then filed a Reply and with it, issues were joined. C

The parties filed and mutually exchanged briefs of arguments. While for the appellant, four issues were formulated as arising for determination, for the respondent, three issues were submitted as arising for determination. The four issues proffered by the appellant are: D

#### ISSUE NO. 1

Was it proper in law for the court below to rely on evidence of traditional history given by the respondent on facts not pleaded in the Further Amended Statement of Defence and in the absence of such evidence, would the court below be right in holding that the evidence of both parties was on the balance and ought to have been subjected to the Rule in *Kojo II v. Bonsie* (1957) 1 WLR 1223? E F

#### ISSUE NO. 2

Was the court below right in upsetting the findings of the trial court on the basis of failure to apply the Rule in *Kojo v. Bonsie* (supra), without taking into consideration the credibility of the respondent’s evidence of traditional history and acts of recent possession? G

#### ISSUE NO. 3

Whether the court below was right in its application of the provisions of Sections 46 and 146 of the Evidence Act, 1990, as a basis for setting aside the award of damages and injunction when the appellant had proved title through traditional history. H

#### ISSUE NO. 4

Did the decision by the court below on the main appeal resolve the issues in the cross-appeal? If not, was the court below right in dismissing the Cross-Appeal without a determination of the issues there from.

B The respondents disagreed with the issues proffered by the appellants. In their opinion, and based on the grounds of appeal filed by the appellants, the following issues arise for determination in this appeal.

#### ISSUE 1

C Whether the Court of Appeal was right in holding that the traditional evidence given by the parties was on the balance and ought to have been subjected to the test laid down in *Kojo v. Bonsie* (1957) 1 WLR 1223 (Grounds 1,2 and 3 of the grounds of appeal).

#### ISSUE 2

D Whether the Court of Appeal was right in applying the provisions of Section 146 of the Evidence Act and to have set aside the award of damages and injunction (grounds 4 and 5 of the grounds of appeal).

#### ISSUE 3

E Whether the Court of Appeal dealt with the issues raised in the cross-appeal in the main appeal as to justify the dismissal of the cross-appeal (ground 6 of the grounds of appeal).

F After a careful consideration of the issues hereinbefore submitted on either side, I prefer and wish to adopt the appellant's issues in resolving the appeal as follows:

#### Argument (Issue No. 1).

G In the first place, the question one may ask is, was it proper in law for the court below to rely on evidence of traditional history given by the respondent on facts not pleaded in the Further Amended Statement of Defence and in the absence of such evidence, would the court below be right in holding that the evidence of both parties was on the balance and ought to have been subjected to the Rule in *Kojo v. Bonsie* (1957) 1 WLR H 1223? (This issue is covered by Grounds 1 and 2 of the Grounds of Appeal).

In its judgment, the court below quoted from the evidence of D.W.1 as to who founded the land in dispute the following extract: "On the other



hand Earnest Mark Ejebu (D.W.1) testifying to appellant's root of title in line with their pleading stated at page 128 lines 25 - 27 of the Record as follows: "The said land is called Amara-Asa. The defendant's Anyaibiri family own the said Amara-Asa".

Testifying further at page 129, lines 24 to 27 of the record, he B stated:-

Amaran was the founder of the land in dispute. Amaran was the grandson of Gbarantoruiwei. Amaran had other lands apart from the one in dispute.

Part of the D.W.I testimony at page 130 lines 12 to 16 of the C Record read:-

*"Once the land was founded by Amaran, we have been occupying it and making use of it by farming and cutting timbers therefrom. After Amaran, the land deluded (sic) on Agedai."* D

After listing the names from Obunagha, the founder, to Olobiriwei and his son, Ekpeku, the learned trial Judge cited the relevant paragraphs of the plaintiff's pleading and concluded that "Although the evidence is short, it does not, in my assessment, leave area that call (sic) for further E explanations." Thereafter, the learned trial Judge shifted his focus on the defendant's evidence of traditional history and remarked thus: "for the defence however, the evidence of traditional history seems to leave some gaps that make it incomplete." The unpleaded facts of the traditional F history of the defence were then highlighted with the conclusion that "if the evidence about Ayainbiriwei is discountenanced, it leaves a gap in the traditional history of the defendant's line of succession." It is obvious that the court failed to consider the effect of these gaps on the evidence of traditional history offered by the defence. When the court below con- G cluded that the learned trial Judge went on to speculate on what ought to be the history of the root of title of the appellant..... "And that the learned trial Judge ..... ought to confine himself to the history as H pleaded" they did so (with due respect to the learned Justices of the court below) without considering the earlier findings of the learned trial Judge as regards the missing links in the evidence of the defendant. The conclusion of the learned trial Judge concerning the defendant's evidence on

the unpleaded facts is that the facts were “vital” and “material” and “ought to have been pleaded.” The learned trial Judge then stated that principle of law that”..... evidence in support of facts not pleaded goes to no issue and ought to be discountenanced.” **The question then is, was the**

**B court below right in relying on the evidence based on unpleaded facts as highlighted above, or putting it differently, was the learned trial Judge wrong in his finding and conclusion regarding the state of the defendant’s pleading and evidence? The answer to be proffered, in my opinion, is that the court below was wrong when it**  
**C relied on the evidence on the facts not pleaded in the Further Amended Statement of Defence. I am also of the view that the decision of the learned trial Judge cannot be faulted. It was correct in law for the learned trial Judge to hold that the defendant’s evidence**  
**D on the unpleaded facts ought to be discountenanced as it is inadmissible. In Eze & 6 Ors. v. Atasie & 3 Ors. (2000) 6 5.C (Pt. I) 214; (2000) FWLR (Pt. 13) 2180 at page 2189, it was stated emphatically thus:**

**E** *“If the evidence is at variance with the 20 pleading, such evidence will have no value. It will be discountenanced because it is contrary to the issues joined and, therefore goes to no issue worthy of consideration.”*

**F** At page 2193 Paragraphs £ -F, Katsina-Alu, JSC., put it succinctly thus:

*“So, a party relying on evidence of traditional history must plead his root of title. Not only that, he must show in his pleading who those ancestors of his were and how they came to own and possess the land and*  
**G eventually past it (sic) him.”**

And at page 2195, paragraphs B - C, Ejiwunmi, JSC, put it clearly, as follows:

**H** *“It must be remembered that once pleadings are ordered, filed and exchanged, the parties and the courts are bound by the pleadings so*  
*filed, it therefore follows remorsefully that evidence must be led in accordance with the pleadings. Evidence led not in conformity with the plead-*

**ings and/or upon facts not pleaded went to no issue.**” (Underlining mine).

The principle of law is the same whether the pleadings and evidence are those of the plaintiff or the defendant. There is a plethora of decided cases on this issue but it will not be out of place to call in aid especially on Akinloye v. Eyiola (1968) NMLR 92 in which Coker, JSC., B at page 95 thereof held as follows:

*“The defendants did not plead the names or histories of the several ancestors mentioned by them or on their behalf in evidence. Such evidence should not have been allowed without an amendment of the pleadings.”* C

That decision was cited and followed in Alii v. Alesinloye (3000) 4 S.C. (Pt. I) 111 f (2000) FWLR (Pt. 15) 2610 at page 2653 Paragraphs D - H. See also Obulor v. Oboro (2001) 4 S.C. (Pt. 1) 77 at Pg 79 - 80.

Realising these gaps and missing links in their case, they sought to D amend the Further Amended Statement of Defence in the court below by a motion filed on 11th April, 1995 to introduce some of the facts that were not pleaded. Prayer 2 containing the amendment was withdrawn by the defendant’s counsel and consequently struck out. E

The next question is, if the evidence of the defendant as regards the unpleaded facts that Gbarantoruwei had two sons, Anyairiwei and Obabiriwei and Amaran, the son of Anyabiriwei, founded the land in dispute, is expunged from the records, would it be right to hold (as the F court below did) that the evidence of both parties was on the balance and ought to have been subjected to the test laid down in Kojo II v. Bonsie (1957) 1 WLR 1223

**With due respect to the learned Justices of the court below, it was a wrong decision to hold that the evidence of both parties was on the balance and ought to have been subjected to the rule in kojo II v. Bonsie (supra). Simply put, the Rule is to the effect that “where there is conflict of traditional history, the best way to test the traditional history is by reference to facts in recent years as established by evidence and by seeing which of the two competing histories is more probable.” (supra) per Lord Denning at page 1226.** G H

Thus, for the Rule to apply, there must be evidence of tradi-

tional history from both parties which are in conflict, one with the other, such that the court cannot justifiably prefer one to the other. This was the decision in *Eze & 6 Ors v. Atasie & 3 Ors* (supra) at 2190, Paragraphs D – E. The contention there is that as material parts of the evidence of traditional history put forward by the defendants were not pleaded, the evidence of both parties cannot be said to be in conflict so as to necessitate the application of the rule. It is for the above reasons that I agree with the appellants that Issue I be and is hereby resolved in their favour.

ON ISSUE NO. 2

Issue No. 2 asks whether the court below was right in upsetting the findings of the trial court on the basis of failure to apply the Rule in *Kojo II v. Bonsie* (supra), without taking into consideration the credibility of the respondent's evidence of traditional history and acts of recent possession.

The learned trial Judge found that “for the plaintiff the evidence of traditional history is quite consistent with the facts pleaded.” All the names in the line of descent..... were pleaded..... ”for the plaintiff’s evidence, the learned trial Judge continued in his assessment that “Although the evidence is short, it does not, in my assessment, leave areas that call for further explanations. As against that, for the defence, the learned trial Judge found some “gaps” that made it incomplete. After noting the material facts that were not pleaded, the learned trial Judge brought out the areas in the evidence for the defence that robbed it of its probative value.

He summarised the defence case and noted that “it is rather curious that the land in dispute was neither founded by Ekpeti, by Gbarantoruiwei nor by Ayanbiriwei.” He continued that “..... this evidence also renders the traditional history of the defence suspect.” With respect, it was the assessment of the evidence of both parties that the learned Justices of the court below erroneously regarded as speculation “on what ought to be the history.” Further still, it was also erroneous for them to observe that “the learned trial Judge ..... ought to confine himself to the history as pleaded.” The record shows that the learned trial Judge perfectly understood the history given by both parties. He gave a

vivid summary of the evidence of traditional history by both parties before expressing his preference for the plaintiff's claim as to why the plaintiffs were the earlier settlers. Yet, the learned Justices of the court below condemned the judgment, rather wrongly, in the following words:

*"..... the learned trial Judge had departed all well known principles and decided cases of superior courts and adopted a rather inappropriate method to test the competing versions of traditional history or evidence to ascertain which was more probable than the other."* B

What indeed the learned trial Judge did was to show that before Amaran, who the defendant claimed to be their ancestor, Gbarain, the founder of Gbarain Clan, settled in the area of Gbarain Clan, Ekpeti, the founder of Ekpetiama Clan and Gbarantoru Village had been founded by Gbarantoruwei. Yet Amaran was Gbarantoruwei's grandson. That was why the learned trial Judge termed it as "curious that the land in dispute was neither founded by Ekpeti nor by Gbarantoruwei nor by Ayanbionwei." When the learned trial Judge wrote that "there is no explanation why the land in dispute which is contiguous to the land on which Gbarantoru village is situated was not founded by the earlier settlers in the defendant's line of descent until comparatively much later time of Amaran", he was not, with due respect, supplying a different history to the defendants as the learned Justices of the court below wrongly concluded. C D E

Obviously, and as I have come to agree, it was not credible evidence to say that after Gbarain had founded Gbarain clan, Ekpeti had founded Ekpetiama and Gbarantoruwei had founded Gbaratoru village, Amaran, the grandson of Gbarantoruwei, could still have founded the land in dispute, which is contiguous to Gbarantoru village and which is said to be in ^0 Ekpetiama clan where Amaran was said to "own" various land, including the land in dispute. See Paragraph 6(iii) of the Further Amended Statement of Defence. Comparing the pleadings in Paragraph 6(ii) and 6(iii) of the Further Amended Statement of Defence and the evidence thereon, it is clear that the history of the defence is inconsistent, Ekpeti had founded Ekpetiama clan including the land in dispute. F G H

Furthermore, after testifying that Gbarantoru village was founded

by Gbarantoruwei, the D.W.1 contradicted himself on the traditional history when he said as follows: “We showed the surveyor the area called Gbarantoru village. The area we live was verged in our plan. It is not true that the said area we occupy was granted to us by the plaintiff’s ancestors. But it belongs to the Kala Igoni Family of Gbarantoru village. Even when we want to build a house we obtain permission from them.” (underlining is mine for emphasis).

With such contradiction, the evidence of the defendants on the traditional history was so manifestly discredited that no reasonable tribunal can rely on it. That was what the learned trial Judge was clearly saying which was misconstrued by the learned Justice of the court below as departure from all well known principles and decided cases of superior courts.

In assessing the credibility “of the evidence of traditional history and facts of recent possession given by the defence,” the learned trial Judge gave areas “which tend to undermine its probative value.” He now assessed the evidence of the defence as pleaded in Paragraph 7(a) and (b) of the Amended Statement of Defence (sic) concerning Toloke, a daughter of Amaran, who got married to Isere of Obunagha. The defence evidence was that Amaran gave Toloke a portion of land to farm. Members of plaintiff’s family who are relations of Toloke’s children joined Toloke to farm on the land given to her by Amaran. That land which was part of the land in dispute did not revert back to the defendants. The learned trial Judge found that this evidence supported the claim of the plaintiffs that they were in possession of the land in dispute, adding that the area was not shown to the trial court. This aspect of the evidence was not considered by the court below.

Also not considered is yet another aspect of the evidence of the defence concerning their acts of recent possession where D.W.4 (the surveyor) contradicted D.W.1 (the defendant on record).

**In Paragraph 7(f) of the Further Amended Statement of Defence, the defendants pleaded as follows: “The ancestors of the 1st and 2nd defendants originally settled in a place within the land in dispute. The place is shown on the plan. “Near this old settlement is**

the Big shrine of Agburuku.” In evidence, the D.W.I said the juju belonged to Amaran and the shrine is located on the land in dispute and it still exists.....”

..... He said further that the shrine was represented by a basket of feathers, a big chain, a glass, a bottle and a saucer. He testified also that 20 members of the defendants’ family went with the surveyor when he surveyed the land in dispute.

His evidence was contradicted in two material areas: i) the D.W.4 (the surveyor) testified contradicting him (D.W.1) that what was shown to him as representing the Agburuku shrine was “a big cotton tree” and same was indicated on the survey plan he produced (Exhibit “G”).

As to the first area of contradiction, the learned trial Judge decided by stating:

*‘I agree with the contention of the plaintiffs’ counsel that there is an inconsistency here.’*

The old settlement where the defendants’ family lived which was said to be close to the Agburuku shrine was also shown in the survey plan Exhibit “G”. But contrary to the evidence of the D.W.1, the so-called old settlement is very far from the Agburuku shrine. To this, the learned trial Judge remarked:

*“Therefore, it cannot be said in any conceivable sense that the old settlement and the Agburuku juju shrine are in one and the same place or close to each other as alleged in Paragraph 7(f) of the Statement of Defence.”*

In my view, this further erodes the potency of the evidence of traditional history of the defence.

I am of the firm view therefore that with such contradiction and inconsistency in the evidence of the defence, the learned trial judge was right to reject the traditional history relied on by the defence and was right to refuse to apply the rule in *Kojo II v. Bonsie* (supra). He was in my opinion equally right to have decided that “the plaintiffs’ evidence of traditional history appears ..... to be stronger than that of the defendants.”

See Obioha v. Duru (1994) 8 NWLR (Pt. 365) 631 at 641 Paragraphs B - F where Ogundare, JSC, made the following emphatic pronouncement:

B *"This is the approach to resolution of conflict in traditional his-*  
*tories as enunciated in Kojo v. Bonsie (1957) WLR 1223, traditional*  
*history is applicable where both histories are plausible and capable of*  
*credibility. Where, however, the traditional history put out by one of the*  
C *parties is so intrinsically conflicting that a reasonable tribunal would not*  
*place credence on it, there is no room for the application of the approach.*  
*Thus, where witnesses of one party, as the witnesses for the defence in the*  
*instant case, contradict each other on the traditional history relied on for*  
*the defence, the trial court will be right to reject the traditional history*  
*relied on by the defence.*

D *Similarly where there are evidence adduced by one side support-*  
*ive of the traditional history relied on by the other side, the trial court*  
*will be right in accepting the latter traditional history."*

The decision in Obioha v. Duru (supra) was followed recently in  
E Biariko v. Edeh-Ogwuile (2001) 4 S.C (Pt. 11) 96 at pages 11 4-115 lines  
20-28.

From the foregoing, **I agree with the appellant's submission**  
**that the learned justices of the Court below were wrong in law when**  
F **they held that "the learned trial Judge was in error in resorting to**  
**the "comparisons" to determine which of the competing histories**  
**was more probable in order (sic) declare title to the land in dispute**  
**in the respondents."** In fact, it has been held in Biariko v. Edeh-  
Ogwuile (supra) at page 114 lines 20 - 39 that:

G *"It is not the law that once there are conflicts in the traditional*  
*histories adduced, the court must promptly declare them inconclusive*  
*and thereupon proceed to consider recent acts.*

H *What indeed happens is that the case being one fought on hear-*  
*say upon hearsay, the trial court has a duty to find which of the two*  
*histories is more probable by testing it against other evidence in the*  
*case. It is when it can neither find any of the two histories probable nor*  
*conclusive that he will declare both inconclusive and proceed to decide*



*the case on the basis of numerous and positive acts of possession and “ownership.”*

(Underlining is mine for emphasis).

With respect, I see no basis for upsetting the findings of the trial court and I accordingly resolve this issue in favour of the appellants. B

### ISSUE NO. 3

This issue questions whether the court below was right in its application of the provisions of Sections 46 and 146 of the Evidence Act, 1990 as a basis for setting aside the award of damages and injunction when the C appellant had proved title through traditional history.

In treating the issue, it will be necessary to reproduce the said sections of the Evidence Act thus:

#### SECTION 46

*“Act of possession and enjoyment of land may be evidence of D ownership or a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other E piece of land.”*

#### SECTION 146

*“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not F the owner is on the person who affirms that he is not the owner.”*

After citing the above section, the court below went ahead to ask: “Applying the above principle to the evidence, were the respondents in the exclusive possession of the disputed land? The answer proffered G was as follows:

*“The answer is a capital No.” The damages for trespass and order of injunction were then held to have been granted by the trial court in error. This was what the trial court said in respect of Section 46 to justify this comment: H*

*“And in the peculiar circumstances of this case and particularly having regard to the vast land involved in the dispute as compared to the relatively tiny Egwebara Lake. I cannot, in any conceivable sense, prop-*

*erly invoke the provisions of Section 45 (now Section 46) of the Evidence Act to hold that the owners of the said Egwebara Lake also own the vast (sic) and in dispute.*" (words and figures in brackets supplied). See Okechukwu v. Okafor (1961) 1 All NLR 685 at 686; Okafor v. Obiwo B (1987) 9-10 S.C. 145.

This issue was extensively argued by both parties in the court below.

In the argument of Issues 1 and 2 above, it has been demonstrated that appellants proved title by traditional history. It has also been shown C that respondents' evidence of traditional history and acts of possession was contradictory and inconsistent and so unreliable. Reference has been made in the argument on issue 2 above to the trial court's findings concerning the contradictions and inconsistencies. The evidence of acts of D possession so loudly orchestrated by the respondents is fraught with material contradictions and inconsistencies, leading the trial court to reject same as suspect.

However, it is contended that even if the respondents' evidence of E acts of possession had not been impugned, the provisions of Sections 46 and 146 of the Evidence Act could not be properly applied to defeat the evidence of traditional history accepted by the trial court. With respect, the court below is therefore wrong in law, in its application of Sections F 46 and 146 of the Evidence Act and that the cases cited, vide Pius Amakor v. Benedict Obiefuna (1974) 3 S.C. (Reprint) 49; (1974) 3 S.C. 67; (also reported in (1974) ANLR 109), were not properly applied. For instance in Amakor's case, (*supra*) it was decided as follows:

*"Generally speaking, as a claim for trespass to land is rooted in G exclusive possession, all plaintiff need to prove is that he has exclusive possession, or he has the right to such possession of the land in dispute, but once a defendant claims to be the owner of the land in dispute, title to it is put in issue, and, in order to succeed, the plaintiff must show a H better titled (sic) than that of the defendant."*)

Per Fatayi Williams, JSC, (as he then was) at page 116.

**In a case such as the instant case, in which the plaintiff has proved title by traditional history, there is no additional burden on**

such plaintiff to also prove exclusive possession because the presumption is that the person having title to the land is in lawful possession. In *Makinde v. Akinwale* (2000) 1 S.C. 89; (2000) FWLR (Pt. 25) 1562, it was decided thus

*"If the traditional history had truly broken down, the appellants' case would have been destroyed. But in the circumstances of the present case. Section 145 is wholly inapplicable, in my view, because the appellants have indeed succeeded in proving their title through traditional history which was sufficiently supported by the evidence accepted by the lower court. The inference the respondents' possession of the land in dispute would be that it is trespassory. The appellants would securely rely on their title and regard the respondents as trespassers."* Per Uwaifo, JSC, at page 1582 Paragraphs E-F. B  
C

And in *Okafor v. Idigo* (1984) 1 SCNLR 481, it was held that: D

*"Frequent and positive numerous acts within living memory are not essential to justify the inference of exclusive ownership of land under native law and custom where there is conclusive traditional evidence of ownership."* Per Obaseki JSC at page 496 Paragraph A. E

**Thus, once title has been proved, the person having title to the land is presumed to be in lawful possession and the other does not acquire possession by his act of trespass vide *Akinterinwa v. Oladunjoye* (2000) 4 B.C. (Pt. I) 19; (2000) FWLR (Pt. 10) 1690 at 1711 Paragraphs C - D; *Ayinla v. Sijuwola* (1984) 1 SCNLR 410 at 426 Paragraph C. Once the plaintiff in a case proves title by one of the five methods by which ownership of land may be proved, the provisions of Sections 46 and 146 of the Evidence Act cannot operate against them.** F  
G

See *Idudun v. Okumagba* (1976) 9-10 S.C. (Reprint) 140; (1976) 9-10 S.C (Pt. II) 192 at 201 lines 12 to 30. Moreover, the law is that for Section 46 of the Evidence Act to apply in favour of the party pleading it, there must be proof or admission by the other party that the land in dispute is surrounded by other lands belonging to the party craving its aid. See *Onwuka v. Ediala* (supra) at page 182, 199 - 200 Paragraphs H - C. From the foregoing, I hold that it is obvious that the setting aside of

the award of damages and order of injunction by the court below was palpably wrong in law. A fortiori, I accordingly proceed without equivocation to resolve the issue herein in favour of the appellant.

ISSUE NO. 4

B The issue asks whether the decision by the court below on the main appeal resolve the issues in the cross-appeal. If not, was the court below right in dismissing the Cross - Appeal without a determination of the issues therefrom?

C The issues involved in the Cross - Appeal were:

(i) the failure of the learned trial Judge to consider evidence of alterations on Exhibit “E” which were visible on its face;

D (ii) wrong apportionment of burden of proof by the learned trial Judge as it concerns the ownership of Egwebara Lake;

(iii) the failure of the learned trial Judge to determine the probative value of Exhibit “E”.

E (iv) the propriety of the decision of the learned trial Judge in awarding the Egwebara Lake to the respondent who did not counter-claim; and

(v) whether it was a proper decision by the trial Judge to award only N1,000 as damages for trespass.

F None of the above issues was determined by the court below yet the learned Justice who delivered the judgment of the court said as follows “What I have been trying to say above, perhaps imperfectly, in my view, takes care of and covers the issue No. 5, determines the appeal and disposes of the cross-appeal. In sum, based on my resolution of the issues, the appeal ought to be allowed and the cross appeal be dismissed. The cross-appeal is dismissed accordingly.”

**Be it noted that Issue No. 5 in the appeal before the court below was on Sections 46 and 146 of the Evidence Act. That issue, and indeed none of the other issues, flowed from the issues in the cross-appeal. Put differently and as can be seen, the issues in the cross-appeal did not depend on the issues in the main appeal.**

**In this wise, I am in agreement with the appellant that in**

the circumstances, the failure of the court below to determine the issues in the cross-appeal amounted to a denial of fair hearing and resulted in a miscarriage of justice. See *Disciplinary Committee v. Mobolaji Alakija* 4 FSC 38; *Mora v. Nwalusi* (1962) 1 All NLR 681 at 687 and *Stool of Abinabina v. Enyimadu* 12 WACA 171 at 173. B

This conclusion is inevitable in the sense that the cross-appeal challenges the award of the Egwebara Lake by the trial court to the respondent and by allowing the appeal and dismissing the cross-appeal (without considering the issues), the court below has unwittingly granted free ingress and egress to the respondent through the land in dispute to the Lake irrespective of any right of possession in the appellants which is unaffected by the judgment of the court below, dismissing the claim. C

Although it has been held that the result of a Court of Appeal failing to pronounce on all material issues raised before it depends on the facts and circumstances of each case, for which see the case of *The State v. Ajie* (2000) 7 S.C. (Pt. I) 24; (2000) 11 NWLR (Pt. 678) 434 at page 448, I had occasion in this court to point out in that case it was a proper case to hold without hesitation that the failure of Court of Appeal to consider the issues in the cross-appeal amounted to a denial of fair hearing resulting in a miscarriage of justice. D

Where the ultimate conclusion is that of miscarriage of justice, the consequential order has been held to be one for a retrial. However, in a case such as the instant appeal where the issues not considered affected a cross-appeal and the subject of the cross-appeal is a lake, said to be tiny inside a vast parcel of land, instead of an order for a retrial, judgment should be entered for the appellant once it is decided that the Court of Appeal was wrong and the issues ought to be resolved in favour of the appellant as in *Onwuka v. Ediala* (1989) 1 S.C. (Pt. II) 1; (1989) 1 NWLR (Pt. 96) 182 at page 200 Paragraphs B -C. E

It now remains to see if there was a miscarriage of justice by the failure to consider the issues - (i) - (v) set out above, for which brief F

arguments will now be proffered as summarized earlier.

The first constituting (i), (ii) and (iii) was the failure of the learned trial Judge to consider evidence of alterations on Exhibit “E” which were visible on its face.

B The Exhibit is not copied but along with Exhibits “D” and “F”,  
were shown to have been tampered with as corrections were made with  
the aid of “tipp-ex”. Even the suit number was corrected with the aid of  
tipp-ex. It was also shown that the characters in Exhibits “D”, “E” and  
C “F” are the same as those in the Amended Statement of Defence. The  
defendant (D.W.I) admitted these facts under cross-examination. The  
point being made there is that on the face of it, it was obvious that the  
exhibit had been tampered with and the learned trial Judge ought to have  
considered the weight to be attached to it particularly as the same judg-  
D ment was pleaded by the plaintiffs but was lost.

Instead of deciding that those Exhibits were unreliable, the learned  
trial Judge held that they were “allegations of falsification or fraudulent  
pronouncement” and so “allegations of crime” which ought to have been  
E specifically pleaded “and since they were not pleaded, all evidence ex-  
tracted under such line of cross-examination should be discountenanced.”  
The learned trial Judge then decided that the onus was on the plaintiff to  
prove the allegation beyond reasonable doubt, citing Section 138(1) of  
F Evidence Act. By so holding, the learned trial Judge failed to draw a  
distinction between “to tamper” with a document and “to forge” or “to  
falsify” it. To tamper with a document has the effect of rendering it  
unreliable but to forge or falsify it would nullify it completely. The learned  
trial Judge’s decision was, therefore, contrary to the decision in Agbonifo  
G v. Aiwereoba (1988) 1 NWLR (Pt. 70) 325 at page 341 Paragraphs B-F.  
In the latter case, the trial court found that a cello-tape was put over the  
name of the allottee and held that the documents were unreliable. But the  
Court of Appeal set aside the finding on the ground that the appellant did  
H not plead and prove fraud. On appeal to the Supreme Court, the finding  
of the trial court was upheld because fraud was not in issue. It was  
further held that the trial court was “perfectly entitled to infer from what  
is obvious on the face of it that they had been tampered with.” With

respect, the learned trial Judge in the instant case herein on appeal, was wrong to hold that there was allegation of fraudulent procurement and the court below was equally wrong to have failed to consider the issue in the cross-appeal. From the circumstances, the correct decision would be to hold that exhibit “E” had no probative value. This, the court below B failed to hold. Had this point been considered, the cross-appeal would have been upheld. In *Rockonoh Property Ltd. v. Nigerian Telecommunications Plc & Anor.* (2001) 7 S.C. (Pt. III) 154, it was held that “the law does not permit evidence which is of no probative value to be relied upon C by a party, nor to be acted upon by a party, nor to be acted upon by the court.....” Page 176, lines 5 to 96 per Uwaifo, JSC.

As regards issue (iv), the principle of law applicable is that a court has no jurisdiction to grant to a party that which he does 35 not claim vide *Ayanboye v. Balogun* (1990) 9-10 S.C. 1; (1990) 5 NWLR (Pt. 151) D 393, 413 Paragraph I; *Akinterinwa v. Oladunjoye* (supra) at page 1703 Paragraph C, *Ige v. Olunloyo* (1984) ANLR 150 at pages 158 to 159; (1984) 1 SCNLR 158 at pages 168 to 169 B-A.

Indeed, it is settled law that a court has no vires to grant a relief E not sought by the parties vide *Atser v. Gachi* (1997) 6 NWLR (Pt. 500) 609 at 630; *Ladoke v. Olobayo* (1992) 8 NWLR (Pi. 261) 605 at 619-630 and *Agbanelo v. UBN Ltd.* (2000) 4 S.C. (Pt. I) 233; (2000) 7 NWLR (Pt. 666) 534 at 559.

What in effect it means is that, the learned trial Judge in the F instant case on appeal herein, was wrong to have awarded the Egwebara Lake to the defendants who did not counter-claim and the court below ought to have reversed that decision.

**On the fifth (v) issue above, I agree with the appellants’ G submission that the award of N100.00 for general damages by the trial court ought also to have been reviewed by the court below. This is the more so that the award was not based on any evidence or any principle of law. Thus, while it is appreciated that in awarding H general damages, it is within the discretion of a court to make its own assessment albeit that such an exercise must be related to the evidence. The contention in the case in hand is that the award of**

**N100.00 as general damages by the trial court was manifestly too low in a case where the defendant admitted using the land, lakes and ponds and making money therefrom. He also admitted that there are many lakes and ponds on the land in dispute.**

**B The trial court did not make any assessment and the court below did not consider this issue at all. Where as, in this case, the award of general damages has been shown to be manifestly too low, on appeal, such general damages will be altered** as decided in *Dumez (Nig.) Ltd. v. Patrick Nwaka Ogboli* (1972) 3 S.C. (Reprint) 188; (1972) 3 S.C. 196 at 204 to 205.

In sum, the decision of the court below should be set aside and the appeal allowed in its entirety while the judgment of the trial court should be restored except the award of the Egwebara Lake to the respondent which should be set aside. **APPEAL ALLOWED** with costs assessed at N10,000 to the appellant.

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**E KALGO JSC**

I have had a preview of the judgment just delivered by Onu, JSC., in this appeal. I agree with his reasoning and conclusions reached therein. I find therefore no merit in this appeal and is hereby allowed. I abide by the order of costs made in the said judgment.

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**TOBI JSC**

**G** The appellant who was one of the plaintiffs in the High Court, along with other plaintiffs, claimed a declaration of title to a piece of land known as “Opubou land”, N4,000.00 damages for trespass and perpetual injunction. After hearing evidence, the learned trial Judge gave judgment to the plaintiffs. In the penultimate paragraph of the judgment at page 209 **H** of the Record, the learned trial Judge said:

*“In conclusion, I hold that after a careful consideration of the evidence of traditional history supplied by evidence of boundary witnesses, the balance of probability is in favour of the plaintiff’s Tarapa*



*family being the owners of the land in dispute except the Egwebare Lake. Accordingly, I enter judgment for the plaintiffs and grant the following reliefs.....”*

Apart from the damages for trespass which the learned trial Judge reduced from N4,000.00 to N1,000.00, he granted the 1st and 3rd reliefs as claimed by the plaintiffs. B

On appeal, the Court of Appeal set aside the judgment of the learned trial Judge. That court gave judgment for the defendants, who are the respondents in this court. The Court of Appeal in the final paragraph of the judgment said at page 417 of the Record: C

*“In sum, based on my resolution of the issues, the appeal ought to be allowed and the cross-appeal be dismissed accordingly. I do allow the appeal, set aside the decision of the lower court on the 20th August, 1992, and enter a judgment dismissing the claim.”* D

Dissatisfied, the appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated four issues for determination, while the respondents formulated three issues for determination. As the issues have been reproduced in the judgment of my learned brother, Onu, JSC., I need not repeat them here. The first issue raised the reliance by the Court of Appeal on facts not pleaded in the Further Amended Statement of Defence. Counsel picked the evidence of D.W.I to justify his contention. What is the evidence of D.W.I that the Court of Appeal relied upon which learned counsel said was not pleaded?. He quoted the evidence at pages 10 and 11 of his brief: F

*“The said land is called Amara-Asa. The defendants Anyainbiri family own the said Amara-Asa... Amaran was the grand-son of Gbarantoruiwei. Amaran had other lands apart from the one in dispute... Once the land was founded by Amaran we have been occupying it and making use of it by farming and cutting timbers therefrom. After Amaran, the land deluded on Agedai.”* G

Learned counsel submitted that the Court of Appeal was wrong in coming to the conclusion that the last two sentences on the respondents’ root of title were in line with their pleadings. To learned counsel, they were not pleaded. H

What is the reaction of learned counsel for the respondents? He agrees with learned counsel for the appellant that the relevant evidence referred to by counsel for the appellant was not pleaded. He said at page 7 of his brief:

B *“However, we must concede straightaway that the evidence of D.W.1 to the effect that the land devolved on Agedai from Amaran was not pleaded.”*

And that vindicates the position of counsel for the appellant. The law is not only trite but most elementary that facts not pleaded go to no issue. The rationale behind this principle of law is that by our adversary system of civil procedure in the High Court, facts are first erected in the pleadings before the trial of the case. This is to enable the parties not to spring surprise at the trial and to narrow down the areas of disagreement so that parties will not think the sky is the limit in the production of facts in the matter before the court. Subject to the fairly liberal rules of amendment of pleadings, parties are bound by their pleadings. While a party is free to apply for the amendment of his pleadings, once the amendments find themselves in the last state of pleadings, the party is bound by them and he cannot move out of them in search of greener facts completely outside the ones duly pleaded.

I realise that the Court of Appeal made reference to the evidence of D.W.1 at page 410 of the Record. Thereafter, the court moved to “the trial Judge’s handling of the evidence of history or traditional evidence of the parties.” The court quoted what the learned trial Judge said at page 196 of the Record as follows:

G *“The evidence of traditional history of both parties is short. That notwithstanding, I shall now examine the two competing evidence of traditional history to see which of them is more probable.”*

The Court of Appeal reacted to the above finding at pages 410 and 411 and I will quote the court in extenso:

H *“The learned trial Judge’s finding that the traditional evidence as led on both sides was “competing” was tantamount to saying that the evidence by either party was “inconclusive”. It is “conflicting”. Nothing more and nothing less! Stopping here and without more, it meant that the*

evidence, if put on that imaginary scale of justice, was on the balance, at an equilibrium or, of equal knell. The consequence at that stage would be that the plaintiffs would lose. Why? Because the evidence did not propound in their favour. See *Mogaji v. Odofin* (1978) 4 S.C. (Reprint) 53; (1978) 3 S.C. 78 at pp. 98/99. But it did not stop at that. The learned trial Judge said, and rightly in my view, that he had to “see which of them is more probable”.

The vital and crucial question is: what is the best way or proper test “to see which of them, (i.e. the two versions of the traditional history) is more probable”? How did the trial Judge get about doing this? I shall pause here again to remind myself of the onus on the plaintiffs/respondents, as observed by Webber, C.J. Sierra Leone, in *J. M. Kodilinye v. Mbanefo Odu* 2 WACA 336 at 337:

The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant’s case.

Now, to what the trial Judge did!. He proceeded, surprisingly as the Record demonstrates, from page 196 lines to 34 page 198 lines 1 to 24, to compare the version of the respondents’ evidence with the version of the appellant’s. And in the course of the exercise, he went on, with due respect, to speculate on which ought to be the history of the root of title of the appellants requiring to be pleaded.”

The Court of Appeal got it right in the first four sentences, ending with the word, “knell”. The court, with the greatest respect, got it wrong when it said that the consequences at that stage would be that the plaintiffs would lose. I do not think the Court of Appeal was right in coming to the conclusion that the word “competing” is tantamount to “inconclusive” or “conflicting”. That is certainly not the dictionary meaning of the word “competing”, the noun variant of “competition”.

Black’s Law Dictionary, 6th edition, defines competition at page 284 as “contest between two rivals”. Etymologically, the word means rivalry, contest or match. Where parties give competing traditional evidence (and that is the general trend and position), the Judge, the umpire

that he generally is, has to examine the evidence and come to the conclusion which is more probable in the circumstances of the case. That is the adjectival function of a trial Judge, which an appellate court cannot take away from him.

B What the learned trial Judge did by comparing the versions of the competing evidence did not surprise me although it surprised the Court of Appeal. What could the trial Judge have done in the circumstances, than going into the Record to resolve the competing evidence in favour of one of the parties? I think the Judge did the correct thing although the  
C Court of Appeal said that he speculated on what ought to be the history of the root of title of the appellant requiring to be pleaded. I do not think the Court of Appeal was right in describing what the learned trial Judge did as “speculative”. The word speculation genetically conveys some  
D element of cogitation or guess and a trial Judge who goes into his Record to gather what witnesses said cannot be said to be in speculation. If the learned trial Judge wanted to speculate, all he needed to do was to test his  
E judgment. And because the human being that he is, memory could fail, in certain instances, he is bound to speculate. But he did not do that. He went straight to the Record and arrived at the conclusion. That cannot be speculation.

F The Court of Appeal in driving home its attack on the trial Judge of speculation, said at page 411:

*“The learned trial Judge, with respect, ought to confine himself to the history as pleaded. Must the trial Judge, suggest or supply to the appellants a history not theirs and not told to them by their ancestors?”*

G Dealing with the preference of the learned trial Judge for the plaintiffs’ evidence on traditional history, the Court of Appeal said at page 412:

*“With respect, the learned trial Judge had departed from all well known principles and decided cases of superior courts and adopted a rather inappropriate method to test the competing versions of traditional history or evidence to ascertain which was more probable than the other.*

*The traditional evidence or history by the P.W.1 ought to have*

*been subjected to the veritable test laid down by the Privy Council in Kojo II v. Bonsie (1957) 1 WLR 1223 at page 1227.”*

And that takes me to Issue No. 2 in the appellant’s brief. What is the Rule in Kojo II v. Bonsie and a related question is whether the rule was followed by the learned trial Judge. The rule in the case is as follows: B

*“Where there is a conflict of traditional history, which has been handed down by word of mouth, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, the demeanour of witnesses is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable.”* C

The above is the Rule. I go to the second question. Before I answer the second question, let me rehearse the facts. In a suit concerning land in the Kumasi district of Ashanti, traditional evidence was given by each side in support of its claim that the land in dispute had been awarded to his ancestor as a reward for the part played by him in a war. The Supreme Court of the Gold Coast (Land Court) affirmed by the West African Court of Appeal, reversed the decision of the Asantehene’s A Court and upheld the decision of the lower Asantehene’s B Court in favour of the defendant on the ground, inter alia, that it was a decision of fact depending on the demeanour of the witnesses and almost inviolable on that account. D E F

The Privy Council held that when as in this case, native courts differ, the Supreme Court must review the evidence and draw its own inferences. It should not start with presumption that the lower native court (the B Court) is correct because it saw and heard the witnesses, but should rather give weight to the views of the native appeal court (the A court). In the end, however, it must reach its own conclusion on inferences of fact. G

The learned trial Judge, in my humble view, carefully and tenaciously examined the evidence of the witnesses and he did so in some respects to facts in recent years as in Kojo II. In evidence-in-chief, P.W.1, after giving evidence of the boundaries, continued as follows: H

“I know one Ekpeku. I knew him when I was very small. There was a dispute between Ekpeku representing Tarapan and Indole of the defendant’s family, that is Anyainbiri of Gbarantor. The dispute was before the Sabagriea Native Court which gave judgment in favour of Chief Ekpeku of the plaintiff’s family.... Olobiriavei v. Agedai had cases over the land in dispute. The said suits were decided in favour of Olobiriavei who represented plaintiffs’ family. As owners in possession, we farm on the land, fish in the fish ponds and lakes, carve canoes and collect firewood on the land. We exercised our rights over the land without let or hindrance.”

P.W.4 said in his evidence-in-chief:

“I know the parties. I know the land in dispute. The land in dispute belong to the Tarapa family of plaintiffs. I once obtained permission from the plaintiffs to farm on the land. I was granted the permission and I farmed on the land. I paid the sum of £1,45 to the plaintiffs Tarapa family for use of the land. I was allowed for one farming season.”

In Kojo II, Lord Denning used the words “recent years”, words which do not convey an exact time limit; the word “recent”, being vague and amorphous. The word “recent” means something that happened or came into existence only a short time ago, as one can talk of recent history, as one can also talk of “the most exciting celebrations of recent years”. The word recent should be taken contextually and here I mean, in the light of the events that give rise to the recentness. In this respect, the court will first take as the base event, the traditional history of the parties, which could be without date in the sense of being immemorial and therefore lost in ancient history or ancient times. Tracing the events from that period which may not be within the competence of human memory, to later events could qualify such later events as events of recent years, depending on the facts of the case.

Applying the above to the evidence of P.W.1 and P.W.4, give the impression and beyond impression to believe that the events recounted by the witnesses qualify as “facts in recent years” in Kojo II. To be precise, the dispute between Ekpeku and Indole which resulted in victory for the plaintiffs’ family qualify as “facts in recent years”. So too the

case between Oloibiriavei v. Agedai. And more recently, the evidence that the plaintiffs farmed and fished on the land in dispute. These are certainly events of recent years.

I go to the evidence of P.W.4. He said in evidence-in-chief that he obtained permission from the plaintiffs to farm on the land in dispute and he paid money in recognition of the ownership of the land by the plaintiffs. Again, this evidence clearly qualifies as facts in “recent years”.

And so, when the learned trial Judge held that the plaintiffs’ evidence of traditional history appears to (me) stronger than that of the defendant, he should be taken as evaluating the evidence of P.W.1 and P.W.4 amongst others. Therefore, the learned trial Judge did not depart from Kojo II as held by the Court of Appeal. I do not think the Judge had a duty to, specifically mention in his judgment that he followed Kojo II. No. That will be expecting too much from a trial Judge.

Assuming he did not follow Kojo II, should his judgment be penalised on appeal by way of rejecting his findings? I think not. After all, Kojo II is 2C of persuasive authority and a Judge has the freedom of the air not to follow an authority which is not binding on him.

It is elementary law that oral evidence must be consistent with the pleadings, whether it is the Statement of Claim or the Statement of Defence. This is because the case of the parties is erected by the pleadings and parties do not have the freedom to move out of the pleadings in search of a better case. Evidence which is at variance with the pleadings will go to no issue. See generally *Adimora v. Afufo*, (1988) 3 NWLR (Pt. 80) 1; *Atanda v. Ajani* (1989) 6 S.C. (Pt. II) 87; (1989) 3 NWLR (Pt. 111) 511; *Uredi v. Dada* (1988) 1 NWLR (Pt. 69) 237; *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802.

The learned trial Judge took pains to bring out in his judgment inconsistencies or contradictions of some of the evidence of the witnesses of the defendants, particularly D.W.2, with the pleadings. I want to refer only to two such situations. At page 205 of the Record, the learned trial Judge said:

*“The defence called a boundary witness, Mr. Newstyle Diegha Ayafa. According to him, the land in dispute belongs to the defendant’s*

Ayainbiri family. He said that the land of Chief Patani Kemedise's section of Tunama family shares a common boundary with the defendant's land now in dispute. This evidence of the D.W.2 is inconsistent with the pleadings in Paragraph 5(a) of the Statement of Defence and the evidence of Chief Mark Ejeku is to the effect that the defendant's land, which is now being disputed in this suit, is bounded in the north by the plaintiff's land which they referred to as Opobou bush" and beyond which is the land of Chief Patani Kemedise of Tunama family of Obunagha. Therefore, the case of the defence as pleaded in Paragraph 5(a) of the Statement of Defence and supported by the oral evidence of D.W.1 and Exhibit "G" is that the land which lies immediately north of the defendant's Amara-Asa land being disputed in this case is the plaintiff's Opubou land. This is contradicted by the position taken by the D.W.2 that the land which lies immediately north of the land in dispute is the land of Chief Patani Kemedise of Tunama family of Obunagha."

The learned trial Judge still continued with the evidence of D.W.2. He still said at page 206:

"If the defendants themselves both in their pleadings and evidence admitted the existence of the plaintiff's Opubou land immediately south of the land Chief Patani Kemedise of Tunama family, it is surprising that the D.W.2 denied the existence of any such land. The "impression he conveyed to me was that he had an interest to serve and there is no basis therefore to believe him. Because of this is conflict between his evidence on the one hand and the pleadings and evidence of the D.W.1 on the other hand, the impression which he conveyed to me, I would not like to rely on his evidence."

I expected the court of Appeal to examine the above but unfortunately that was not the position. And that is bad. D.W.2 gave evidence on boundary. He sounded confident and dogmatic as he traced his knowledge of the ownership of the land as a kid. The trial Judge, in his summary of the evidence, said at page 178:

"According to him, the land in dispute belongs to the defendants and that he knew this because when he was a kid, he stayed with his maternal grandmother who always took him to farm on a piece of land



*that shares a common boundary with the land in dispute. According to him, he did not know the Opubou land and that it is the defendant Ayainbiri family land that shares a common boundary with their land.”*

How old was the witness as a kid is not in evidence. The dictionary j defines a kid as a child or young person. Although he would claim B to have the tenacious memory of a Winston Churchill, a former British Prime Minister, the learned trial Judge rejected his evidence which he nursed and petted from the age of a kid. I cannot fault the learned trial Judge in his rejection of the evidence of D.W.2.

Evidence of boundary is very important in land disputes because C it is really the center of the dispute. Once the boundary is known, the court is in a good position to determine ownership, with the aid of other relevant evidence. As the learned trial Judge went into the evidence of D.W.2 and rejected it on grounds of contradiction or inconsistency with D the pleadings, the Court of Appeal ought to have taken the evaluation of the evidence by the Judge seriously. But that was not the situation. It is bad that was not the situation.

I think I can stop here. It is for the above reasons and the fuller E reasons in the judgment of my learned brother, Onu, JSC that I too make the same orders as in the judgment.

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### MUSDAPHER JSC

I have had the honour to before now, the judgment of my Lord, Onu, JSC., just delivered with which I entirely agree. For the same reasons son comprehensively set out in the aforesaid judgment, which I G respectfully adopt as mine, I too find this appeal meritorious. I accordingly allow the appeal and set aside in its entirety the judgment of the Court of Appeal. I restore the decision f the trial court same as to the award of the grant of declaration of the Egwebara lake to the defendant, the respondent herein. The appellant is entitled to the costs of this appeal H assessed at N10,000.00.

**MUKHTAR JSC**

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother, Onu, JSC. I am in complete agreement with the reasoning and conclusion that the appeal is meritorious and ought to be allowed. I hereby allow the appeal, and abide by the consequential orders in the lead judgment.

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