

SUPREME COURT OF NIGERIA

2ND MARCH, 2007 SC. 250\2001

**CORAM:- A. I. KATSINA-ALU, U. A. KALGO, G. A. OGUNTADE,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC**

1. OKIUGBEDI EDJEKPO

2. EDIDI IDOGU

3. ITU AKPATABE

..... APPELLANTS

(Substituted by EJENAWO MOKEFE)

(For themselves and on behalf of

Iyede Community of Isoko)

Quarters of Enwhen Community of Isoko

AND

1. IBOYI ITHIBRI OSIA

2. EFEKODHA EFOMA

3. OJOJOKOJO IKEPOKPOBE

..... RESPONDENTS

4. GEORGE OHORE

(For themselves and on behalf of

Iyede Community of Isoko)

APPEALS - Grounds of appeal - Objection - Raised before Court of Appeal - Against the 2nd ground - As not being proper - Is of no consequence - Though lower court handled it erroneously (H1)

LAND LAW - Evidence - Incomplete court record - Testimony of some defence witnesses - Where not forwarded to appellate court - It cannot know whether trial court's evaluation - Was properly done (H2)

APPEALS - Retrial - Land law - Where the entire evidence called by a party - Is missing in the compiled record of appeal - Retrial is the proper order (H3)

FACTS

Before the Delta State High Court, plaintiffs/appellants filed an

action against the defendants/respondents. Appellants claimed declaration of title to Eto land, N600.00 damages for trespass and an order of perpetual injunction. Respondents as plaintiffs filed a cross action against the appellants for declaration of title to Uri land, N1,200.00 damages for trespass and perpetual injunction. The suits were consolidated. Appellants called 5 witnesses while respondents also called 5 witnesses in support of their respective claims. At the close of hearing, the trial judge found for the appellants.

Respondents appealed to the Court of Appeal upon 2 issues. They questioned inter alia, whether the Court of Appeal can properly determine the appeal in view of the absence of the testimonies of defence witnesses 1-4 following the reported loss of court records book in which they were recorded. The Court of Appeal upheld the appeal and ordered a retrial of the suit. Aggrieved, appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Were the learned Justices right in Law in dismissing the preliminary objection as to the validity and or competence of the second additional ground of appeal and the issue formulated there from?

2. Were the learned Justices right in setting aside the judgment of the trial court on the ground that evidence of DW1-4 were missing from the records when -

(a) Judgment was based on traditional evidence on record and on documentary evidence Exhibit D1.

(b) Judgment was not based on evidence of DW1-4.

(c) There was no appeal against any finding made by the learned trial Judge.

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

Grounds of appeal - Objection

1. In considering the objection the court below erroneously based its decision on the first additional ground of appeal to which there was no objection. This is not in dispute.

The second ground of appeal was indeed directed against the reported loss of the evidence of the Respondents' witnesses DW 1, DW 2,

DW 3, and DW4 from the Record of Appeal compiled. It was said that as a result of the loss of the evidence of the Defendants/Respondents' witnesses, there was therefore no material for the court below to have recourse to in evaluating the decision of the trial court in relation to the evidence placed before it.

My short answer to this is that, in my view, the objection is inconsequential. I say so because the issue of the loss of the evidence of Respondents' witnesses Nos. DW 1, DW 2, DW 3, and DW 4 is an issue that the court below and indeed this court could have raised *suo motu*. I think this is glaringly obvious. It is only when one set of evidence is put side by side with the other set of evidence that the court would be in a position to determine which outweighs the other. In a situation, as in the present case, where there is total loss of the evidence, called by a party, the court itself can raise the issue. (p.1298 B)

Evidence - Incomplete court record

2. Suffice it to say that DW3 and DW4 gave traditional evidence bearing in mind the submission of learned Senior Counsel for the Appellants that the Defendants/Respondents' witnesses did not give evidence of traditional history. This contention runs counter to the views of the learned trial Judge. This is so because with regard to Exhibit D1 tendered by DW4, the learned trial Judge said:

"What is more, Exhibit D1 tendered by the defendants created a big hole in their traditional evidence."

It can be seen clearly that the learned trial Judge held that the defendants, respondents herein gave traditional evidence. Indeed, the summarized evidence of DW2 and DW3 by the learned trial Judge shows that these witnesses gave evidence of traditional history of the land in question.

The question I am unable to answer is whether the summary made by the learned trial Judge is a correct and true reflection of the testimonies of DW1, DW2, DW3 and DW4. I think it is risky and presumptuous to assume that the evidence of these defence witnesses is irrelevant to the proper and just determination of this case. To come to a decision one

way or the other, it is vitally important for the court below and this court to see and read for us the evidence of these witnesses. (p. 1302 C)

APPEALS - Retrial - Land law

B 3. In the circumstance where the entire evidence called by a party is missing in the compiled Record of Appeal, it will be difficult if not impossible to say with certainty that there has been no miscarriage of justice. In the absence of such evidence, I am unable to hold that the trial Judge clearly comprehended the entire case and came to a conclusion, which is abundantly supported by the evidence. ‘In the circumstances, I find myself unable to support the judgment of the trial court. It is my view that this is a proper case for an order for retrial. See *Fadallah v. Arewa Textile Mill Ltd.* (1997) 8 NWLR (Part 578) 546.

D In the result, I hold that the Court below was right when it remitted the case to the Delta State High Court for another trial. This appeal therefore in my view has no merit. (p. 1302 H)

E NOTABLE POINTS OF INTEREST

ONNOGHEN.JSC

1. When retrial order will not be appropriate

F The principles guiding the court in ordering a retrial of a suit have been stated in a number of cases as being dependent on the facts and circumstances of the particular case Generally, it is agreed that an appellate court will be reluctant to order a retrial where:-

- (i) The plaintiff has established his case by raising the probabilities in his favour; or
- G (ii) The order of retrial will enable the defendant to improve his position during retrial to the prejudice of his opponent; or
- (iii) The litigation will be unnecessarily prolonged; or
- (iv) The proceedings are conducted by the trial court largely in conformity with rules of evidence and procedure; or
- H (v) There was no substantial irregularity in the conduct of the case.

It is settled that an order of retrial will not be made in any of the

above stated circumstances so as to avoid injustice. (p. 1324 G)

2. *When retrial will be ordered*

However where a trial court failed in its primary duty of making findings of facts on issues joined in the pleadings and the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, an order of retrial is the proper order the appellate court should make.

In the instant case the trial court did make some findings of facts, which cannot be appraised or evaluated by the Court of Appeal due to the missing record book containing the testimony of DW1 - DW4. That is a very serious handicap to an appellate court, which has to deal with the cold facts contained in the record to do justice to the parties before it. I hold the firm view that in the circumstance of this case, the proper order to make is that of retrial as made by the Court of Appeal to ensure that justice is done to the parties. (p. 1325 B)

REPRESENTATION

T. J. O. Okpoko SAN, with him C. A. Ajuyah for the appellants.
Dafe Akpedeye SAN with him S. I. Ameh for the respondent.

CASES REFERRED TO

Kareem vs. UBA Ltd (1996) 5 NWLR (pt. 451) 634
Okeowo vs Migliore (1979) 11 S.C 138
Bakare vs Apena (1986) 4 NWLR (pt. 33) 1
Awote vs Owodunni (No. 2) (1987) 2 NWLR (pt. 52) 366
Adeyemo vs Arokopo (1988) 2 NWLR (pt. 79) 703
Osolu vs Oson (2003) 11 NWLR (pt 832) 608.
Fadallah v. Arewa Textile Mill Ltd. (1997) 8 NWLR (Part 578) 546
Saraki v. Koloye [1992] NWLR (Pt. 262) 156
Uor v. Loko [1988] 2 NWLR (Pt.77) 430
Abaye v. Ofili [1986] 1 NWLR (Pt. 15) 134
Wami Akaide v. The State. (1996) 8 N.W.L.R. (PT. 468) 525
Akinloye v. Eyiyoala (1968) N.W.L.R. 92

Lawal v. Dawodu (1972) 1 ALL N.L.R. (PT. 11) 270

Obisanya V. Nwoko (1974) 1 ALL N.L.R. (PT. 1) 420

Ojibah vs Ojibah (1991) 5 NWLR (pt. 191) 296 at 309

B RULES REFERRED TO

Court of Appeal Rules O. 3 R. 2(1)-(4)

LEAD JUDGMENT BY KATSINA-ALU JSC

C This is an appeal against the judgment of the Court of Appeal, Benin Division, delivered on 4 April 2001 in which the Court of Appeal ordered that the suit be remitted to the Delta State High Court for retrial.

D This is a land matter. The Appellants as Plaintiffs in suit No. UHC/12/75 brought this action for themselves and on behalf of Uruthe Quarters Enwhe Town, for declaration of title to Eto Land, =N=600.00 damages for trespass and an order of perpetual injunction.

E The Respondent herein filed a cross action as Plaintiffs against the Appellants in suit NO. UHC/19/75 for declaration of title to Uri land of Uluthe Quarters of Enwhe =N=1,200.00 damages for trespass and perpetual injunction.

F The two suits were consolidated by an order of the trial court made on 12 November 1976. By the said order of consolidation; the Appellants became the Plaintiffs while the Respondents became Defendants.

G At the hearing the Appellants called five witnesses while the Respondents also called five witnesses in support of their respective claims. At the close of hearing, the learned trial Judge found for the Appellants. The Respondents appealed to the Court of Appeal upon the following two issues:

H *“(a) Whether the decision of the trial court can be supported in the face of the unresolved conflicts between the findings and the final decision of the Court?”*

“(b) Whether the absence of the testimonies of defence witnesses 1, 2, 3 and 4 following the reported loss of court Records book in which they were recorded will not deprive the Court of Appeal the privilege and

or opportunity of viewing the entire proceedings of the trial court as to be in a position to agree and or disagree with the findings and or subsequent decision of the trial court”.

The Court of Appeal upheld the appeal of the Respondents and ordered a re-trial of the suit. This appeal is from the decision of the Court of Appeal.

Both parties filed their respective briefs of argument. The Appellants raised five issues for determination. They read as follows:

1. Were the learned Justices right in Law in dismissing the preliminary objection as to the validity and or competence of the second additional ground of appeal and the issue formulated there from? C

2. Were the learned Justices right in holding that the learned trial Judge made an inconsistent finding when he found that defendant did not prove extent and boundary of the land claimed by them. D

3. Were the learned Justices right in holding that the principle that claimants to title to land are in duty bound to prove the extent and boundary of the land claimed by them for which three(3) cases were cited - was not an issue in the case? E

4. Were the learned Justices right in Law in setting aside the judgment of the learned trial Judge and ordering a rehearing - put in another way, is a rehearing an appropriate order to make in this case?

5. Were the learned Justices right in setting aside the judgment of the trial court on the ground that evidence of DW1-4 were missing from the records when - F

(a) Judgment was based on traditional evidence on record and on documentary evidence Exhibit D1.

(b) Judgment was not based on evidence of DW1-4. G

(c) There was no appeal against any finding made by the learned trial Judge.

The Respondents have adopted the five issues submitted by the Appellants. H

I think issue No. 5 is most crucial to the determination of this appeal. In my view, the failure or success of this appeal will depend on whether this issue succeeds or fails.

Before considering issue No. 5, I would like to dispose of Appellants' issue No. 1. It has been pointed out by Appellants' senior counsel that in the Court of Appeal, he took objection to the second additional ground of appeal and the issue has for determination formulated there from. It was contended that the objection was a material objection going to the root of the appeal. **In considering the objection the court below erroneously based its decision on the first additional ground of appeal to which there was no objection. This is not in dispute.**

The second ground of appeal was indeed directed against the reported loss of the evidence of the Respondents' witnesses DW 1, DW 2, DW 3, and DW4 from the Record of Appeal compiled. It was said that as a result of the loss of the evidence of the Defendants/ Respondents' witnesses, there was therefore no material for the court below to have recourse to in evaluating the decision of the trial court in relation to the evidence placed before it.

My short answer to this is that, in my view, the objection is inconsequential. I say so because the issue of the loss of the evidence of Respondents' witnesses Nos. DW 1, DW 2, DW 3, and DW 4 is an issue that the court below and indeed this court could have raised suo motu. I think this is glaringly obvious. It is only when one set of evidence is put side by side with the other set of evidence that the court would be in a position to determine which outweighs the other. In a situation, as in the present case, where there is total loss of the evidence, called by a party, the court itself can raise the issue.

I now turn to issue No. 5. As I has indicated earlier on in the course of this judgment, the Respondents' appeal to the Court of Appeal was upheld and a retrial ordered. It is not in dispute that the Record of Appeal does not contain the evidence of DW1, DW2, DW3, and DW4. These were witnesses called by the Respondents. The substance of the Appellants' contention in the court below and in this court is that since the judgment of the learned trial Judge was predicated on traditional evidence and since DW 1, DW2, DW3, and DW4 did not give evidence on traditional history, their evidence was not necessary and the court need

not go into them. In this regard the Court of Appeal said:

“Learned counsel pointed out that the record of appeal does not contain the evidence of DW1, DW2, DW3 and DW4. Learned Senior Advocate submitted that since the learned trial Judge gave his judgment on traditional evidence and none of the witnesses gave evidence on tradi- B
tional evidence, their evidence is not necessary and that this court need not go into them. Who is correct? I must go into the summary of the learned trial Judge to find out the nature of their evidence in court in obedience to the submission of learned Senior Advocate.

The learned trial Judge summarized the evidence of DW1 at page C
139 of the record as follows:

*‘The defendants’ 1st witness was Eduweye Gboruwa Arubay, a licensed Surveyor. He tendered plan Number A. R. /639 dated 12/9/75 as Exhibit C and stated that in 1975, the defendants commissioned him to D
prepare a survey plan of the land in dispute for them. They showed him all the features in Exhibit C’.*

In my humble view, this evidence of DW1 as summarized by the learned trial Judge is relevant to the findings of the learned trial Judge that E
the Appellants did not prove the boundaries and extent of the land in dispute. I do not agree with learned Senior Advocate that only traditional evidence is relevant.

On the same page, the learned trial Judge summarized the evi- F
dence of DW2 as follows:

*‘The defendants 2nd witness was Obatarhe Umukoro a descen- dant of Ekrusi. He stated that Uri, Ekrusi, Uvwie, Ediaigbon and Ukene Afia farm belong to Uluthe. He stated that he is a descendant of Ekrusi so also one Doctor Odje still under cross-examination; he stated G
that Iyede people drove away Ewvreni people from the camp and occu- pied it. He changed to say that he did not know whether Uri was a human being or not’*

The evidence of DW3 is summarized by the learned trial Judge at H
page 148 of the record:

“The defendants’ 3rd witness was Otomaga Isara, the spokesman of Uruabe quarters of Olomoro. The substance of his evidence was that

the land in dispute belongs to Ovioto, the ancestor of the defendants and that it shares common same boundary with Olomoro land. The boundary between Olomoro land and the land in dispute is Ogberadajuju in a thick forest and that Emewawa stream which is in the middle of the defendants' land does not form a boundary between Olomoro and Enwhe land. He also stated that Enwhe was fount fed before Elmore and that Elmore was founded, before Otor-Iyede. Under cross-examination, he stated that Olomoro has boundary between Otor-Iyede and that the people from Egbo quarters of Olomoro knew the boundary of the land. He denied that Emewawa stream flows into Ovu stream."

Learned trial Judge summaries the evidence of DW4 at page 140 as follows:

"The defendants' 4th witness was Anthony Onomufe Efekodhe and he tendered. Exhibits D and D1 (E.R. Chadwick intelligence Report of 1931 with receipt issued to him)."

With the greatest respect to learned Senior Advocate, I do not agree that none of the witnesses gave traditional evidence. Some did. DW 2 gave evidence as to the land in his capacity as a descendant of Ekrusi, and gave evidence of ownership of the land. DW3 gave traditional evidence when he said that the land in dispute belongs to Ovioto, the ancestor of the defendants. He also gave evidence of the boundary of the land; evidence which is necessary in the light of the decision of the learned trial Judge that the defendants could not prove the boundary, and extent of the land in dispute. His evidence of boundary needs to be examined by this court.

DW4 tendered Intelligence Report. Intelligence Report, in most cases dig out traditional history and an appellate Court ought to examine it against traditional history of witnesses for purpose of determining the authenticity and veracity of the Report.

I have examined the summary of the evidence of the witnesses of the learned trial Judge and I am of the opinion that the evidence are relevant for the purpose of determining ownership of the land in dispute. This is more so when the learned trial Judge made use of the evidence in his judgment and arrived at conclusions in favour of the respondents.

Let me give one or two examples. At page 147 of the record, the learned trial Judge reacted to Exhibit D1 tendered by DW4:

‘What is more, Exhibit D1 tendered by the Defendants created a big hole in their Traditional evidence. While they pleaded in paragraph 5 of their amended statement of claim in HCO/12x/82 that Ovioto, their ancestor, came from Benin and founded Uri land with his lieutenants but Exhibit D1 tendered by them belied what they pleaded in paragraph 5 of their amended statement of claim reproduced above.’ B

It is re-assuring that the learned trial Judge held that the appellants gave traditional evidence. That is the correct position. The position taken by the learned Senior Advocate is not correct. The trial Judge dealt in extenso with Exhibit D1 at pages 147 to 149 of the record. This Court is entitled not only to see and read Exhibit D1 but the evidence of the person who tendered it. It will be grave injustice to the appellants if an appellate court brushes aside evidence on intelligence report. C D

At page 149 of the record, the learned trial Judge said in his evaluation and conclusions on the evidence before him:

‘It is therefore clear from above that the traditional evidence of the defendants that their ancestor, Ovioto and his lieutenants came from Benin and founded Uri land is in violent conflict with Exhibit D1 which showed that Uruiche was a refugee from Jesse who ran away from his town during the war with Benu. There is nothing to show from Exhibit “D1” at page 7 paragraph 25(i) that at the time Ovioto went to Benin to obtain a mandate from the Oba of Benin as a (Priest King) Uluthe Quarters had not been in existence and as such it could not be true for the defendants to say that their ancestor, Ovioto founded Uluthe or any quarter in Enwheluthe let alone Uri land.’ E F G

At page 154 of the record, the learned trial Judge said: -

DW2, called by the defendants from Ewreni did not give evidence as to the boundary between Ewreni land and the land in dispute even though the 1st defendant gave evidence that they share a common boundary with Ewreni land. DW3 gave evidence to the effect that the boundary between their land and the defendants’ land is Ogberada jaju but it is not shown on Exhibit C as the boundary mark between their land H

and the defendants' land and to that extent, the boundary between the defendants and Olomoro land was not established by the defendants.'

The learned trial Judge may be right in his evaluation. He may be wrong. How else will this Court know the strength of his evaluation and conclusions without reading the evidence of DW2 and DW3. It is difficult to support the position taken by learned Senior Advocate without doing injustice to the appellants."

This decision cannot, in my view, be faulted. The portion of the judgment of the Court of Appeal quoted above has adequately dealt with every point in agitation. I do not intend to repeat here what the court below said. Suffice it to say that DW3 and DW4 gave traditional evidence bearing in mind the submission of learned Senior Counsel for the Appellants that the Defendants/Respondents' witnesses did not give evidence of traditional history. This contention runs counter to the views of the learned trial Judge. This is so because with regard to Exhibit D1 tendered by DW4, the learned trial Judge said:

"What is more, Exhibit D1 tendered by the defendants created a big hole in their traditional evidence."

It can be seen clearly that the learned trial Judge held that the defendants, respondents herein gave traditional evidence. Indeed, the summarized evidence of DW2 and DW3 by the learned trial Judge shows that these witnesses gave evidence of traditional history of the land in question.

The question I am unable to answer is whether the summary made by the learned trial Judge is a correct and true reflection of the testimonies of DW1, DW2, DW3 and DW4. I think it is risky and presumptuous to assume that the evidence of these defence witnesses is irrelevant to the proper and just determination of this case. To come to a decision one way or the other, it is vitally important for the court below and this court to see and read for us the evidence of these witnesses.

In the circumstance where the entire evidence called by a party is missing in the compiled Record of Appeal, it will be difficult

if not impossible to say with certainty that there has been no miscarriage of justice. In the absence of such evidence, I am unable to hold that the trial Judge clearly comprehended the entire case and came to a conclusion, which is abundantly supported by the evidence. ‘In the circumstances, I find myself unable to support the judgment of the trial court. It is my view that this is a proper case for an order for retrial. See *Fadallah v. Arewa Textile Mill Ltd.* (1997) 8 NWLR (Part 578) 546. B

In the result, I hold that the Court below was right when it remitted the case to the Delta State High Court for another trial. This appeal therefore in my view has no merit. I accordingly dismiss it and affirm the judgment of the Court of Appeal delivered on 4 April 2001. The Respondents are entitled to costs of ₦10,000.00 against the Appellants. C D

KALGO JSC

I have read in advance the judgment just delivered by my learned brother Katsina-Alu, JSC in this appeal. I entirely agree with the reasoning and conclusions reached therein. All the issues canvassed by the appellants in their joint brief have been fully considered and properly resolved, in my respectful view. I therefore agree that the order of retrial is the proper order to make in this appeal. I find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal with costs as assessed in the leading judgment E F

OGUNTADE JSC

The appellants and the respondents had initiated parallel suits each against the other at the High Court of Ughelli in the old Mid-Western State of Nigeria. The two suits were consolidated for hearing. Under the consolidation arrangements, the appellants were the plaintiffs and the respondents the defendants. The dispute arose in respect of the rival claims of ownership made by each of the parties to a parcel of land identified G H

differently as ‘Eto Land’ and “Uri Land”.

The case was heard by Akpiroroh J. (as he then was). At the trial, the plaintiffs called five witnesses. The defendants also called five witnesses.

B At the conclusion of hearing, Akpiroroh J. (as he then was) on 8/10/90 gave judgment in favour of the plaintiffs in these words:

“1. A declaration that the plaintiffs are entitled to a grant of a customary right of occupancy to that portion of Eto land, lying and situate at Iyede bush, Isoko, which said land, is shown, as parcels A and C B in survey plan No. ER 1246 and verged red.

2. #200.00 (Two hundred Naira) as damages for trespass.

3. Perpetual injunction restraining the defendants by themselves, their servants, agents and all other persons claiming through them from D entering into that part of the entire land verged ‘green’ in plaintiffs’ survey plan No. E.R .1246”.

The defendants were dissatisfied with the judgment of the trial court. They appealed against its before the Court of Appeal, Benin (hereinafter referred to as ‘the court below’). In their appellants’ brief before E the court below, they formulated two issues for adjudication, namely:

“(a.) Whether the decision of the trial court can be supported in the face of the unresolved conflicts between the findings and the final F decision of the court: Grounds 1 & 2 of the grounds of appeal.

(b) Whether the absence of the testimonies of defence witnesses 1, 2, 3 and 4 following the reported loss of the court’s record book in which they were recorded will not deprive the appeal court of the privilege and or opportunity of viewing and or reviewing the entire proceedings of the G trial court as to be in a position to agree or disagree with the findings and subsequent decision of the trial court: Ground 3 of the grounds of appeal.”

Before the court below, the plaintiffs in their respondents’ brief H raised a preliminary objection to the appeal brought by the defendants. The preliminary objection is on page 309 of the record of proceedings and reads:

“PRELIMINARY OBJECTION TO THE 2ND ADDITIONAL

GROUND OF APPEAL AND ISSUE NO.2 BASED ON IT

1.04 Respondents contend that the second additional ground of appeal is incurably defective, incompetent, and null and void in that:

“ (a) The purported second additional ground of appeal is not directed at and is not in any respect a complaint against the judgment of Akpiroro J. against which Appellant have appealed. B

(b) The purported ground did not state either an error of law or misdirection in law or on the facts; and no particulars of error or misdirection was given as required by Rules of this Honourable Court. C

Respondents shall at the hearing urge this Honourable court to strike out the second additional ground of appeal and with it the arguments advanced in respect thereof under Issue No. 2.”

Now, what had happened between the delivery of the judgment of the trial court and the appeal before the court below was that the record book of the trial court into which the evidence of witnesses who testified was recorded got missing. As a result, the transcript of the evidence of some of the witnesses who testified before the trial court i.e. DWS. 1, 2, 3 and 4 was not available to be transmitted to the court below for the purpose of the defendants’ appeal. It is apparent from the judgment of the trial court however that it had referred to the evidence of DWs. 1, 2, 3 and 4 in its judgment. D E

It needs be said that since the fact that the evidence of DWs. 1, 2, 3 and 4 was missing could not have formed a part of the proceedings of the trial court or the judgment of the said court, the defendants were clearly in error to have raised a ground of appeal on it and to have proceeded further to formulate an issue thereon. See *Saraki v. Koloye* [1992] NWLR (Pt. 262) 156. In the circumstances of this case, the question of the missing evidence of DWs. 1, 2, 3 and 4 would in the appeal of the defendants before the court below amount to a fresh issue on appeal, as the said issue never arose before the trial court. The defendants could only raise the matter by first seeking and obtaining the leave of the court below to raise the fresh matter on appeal. See *Uor v. Loko* [1988] 2 NWLR (Pt.77) 430; *Abaye v. Ofili* [1986] 1 NWLR (Pt. 15) 134. F G H

The court below, mistakenly in my view, did not fully understand

that the plaintiffs' preliminary objection was directed against the second additional ground of appeal filed by the defendants and the second issue for determination, which I reproduced earlier. The additional ground 2 from which the afore-mentioned 2nd issue for determination was formulated reads:

"The appeal is constituted and/or entered for hearing and determination in the Court of Appeal by the trial court in breach, of the Appellants' Constitutional Right of Appeal in THAT:

(1) Section 220(1)(a) of the Constitution of the Federal Republic of Nigeria 1979 (As Amended) confers oh the Appellants a Right of Appeal.

(2) The Record of Proceedings of the lower court are not fully compiled and transmitted to this Honourable Court by the Registrar of the Lower Court as mandatory required by Order 13 of the Court of Appeal (Amendments Rules, 1984).

(3) The evidence of DW1, DW2, DW3 and DW4 are recorded to be missing at Page 80, lines 16-21 of the Record of Appeal.

(4) The evidence of DW1, DW2, DW3 and DW4 are substantial and crucial for the prosecution and determination on the merits of the Appellants' appeal.

(5) The loss of part of the record is apparent on the face of the Record of Appeal."

Now at pages 344-345 of the record, the court below said:

"Let me now take the preliminary objection. It is directed against the second additional ground of appeal. That ground with particulars read in full:

'The learned trial Judge erred in law in dismissing the defendants' claim for declaration of title on the ground that the defendants failed to establish with definitive certainty the extent and the boundaries of the land they were claiming.

H PARTICULARS OF ERRORS

(a) At the beginning of the judgment (Page 145 lines18-28) of the Record of Appeal, the trial judge found that he was satisfied that the boundaries identity and extent of the land in dispute called by differ-

ent names by the plaintiffs and the defendants were not in issue in the case.

(b) Exhibits 'A', and 'C', the survey plan of the land tendered by the plaintiffs and the defendants respectively both showed the same land in dispute.

(c) The defendants had no onus of proving what was not in issue between the parties."

"I am in grave difficulty to agree with the preliminary objection. Learned Senior Advocate, with the greatest respect, is not correct that the additional ground of appeal is not directed at and is not in any respect a complaint against the judgment of the learned trial Judge. The ground of appeal clearly complains against the judgment of the learned trial Judge. Again, I do not, with the greatest respect, agree with learned Senior Advocate that the ground of appeal did not state either an error of law or misdirection in law or on the facts. The ground clearly contains the words 'erred in law' and that means an error of law or errors of law. The ground could not have been clearer. I also do not agree with learned Senior Advocate that no particulars of error were given as required by the rules of this Court. With the greatest respect, the additional ground of appeal contains three particulars of error. In the circumstances, the preliminary objection fails and it is dismissed."

It is apparent from the passage of the judgment of the court below reproduced above that the court below mistakenly considered the validity of the first additional ground of appeal and not the second additional ground of appeal against which the plaintiffs' preliminary objection was directed. The question before us in this Court is whether Or not the error should be taken as vitiating the judgment of the court below.

It is convenient for me at this stage to consider that question along with the 5th issue for determination raised before us in this appeal by the Plaintiffs' now appellants). The said issue reads:

"5. Were the learned Justices right in setting aside the judgment of the trial court on the ground that evidence of DWs. 1- 4 were missing from the records when-

(a) Judgment was based on traditional evidence on record and on

documentary evidence Exhibit D1.

(b) Judgment was not based on evidence of DWI-4.

(c) There was no appeal against any finding made by the learned trial judge.”

B I think with respect, that the submission of the appellants’ counsel, if upheld would trivialize the importance of a right of appeal conferred by the Constitution of Nigeria on parties to a dispute in a case. A right of appeal is not a matter of ‘tokenism’. It is an important and overriding right, which enables the appellate court to consider with gravity the issues, agitated in a particular appeal. It is not open to an appellate court to assume that the trial court would not have been influenced in the process of arriving at its conclusion by the totality of the evidence called by parties. And where, as in this case, an appellant raises the issue “*whether the decision of the trial court can be supported in the face of unresolved conflicts between the findings and the final decision of the court*”, as the defendants did in their appeal before the court below, there was a clear and sufficient invitation to the court below to consider the totality of the evidence before the trial court and to decide whether (1) there were unresolved conflicts in the evidence of witnesses and (2) the findings made by the trial court justified the final conclusion arrived at by the trial court. To be able to respond to such an issue, the court below would need to consider the totality of the evidence before the trial court.

F Order 3 rule 2(1) of the Court of Appeal Rules opens with the words “*All appeals shall be by way of rehearing.*” I take those opening words to mean a rehearing on the issues raised before the Court of Appeal.

G *It seems to me that there was no way the court below could have performed its constitutional duty of hearing the defendants’ appeal without insisting on seeing such part of the record of proceedings before the trial court as would enable it to decide whether or not conflicts in the evidence of witnesses were resolved and whether the findings made justified the final conclusion reached by the trial court.*

H My reasoning above brings me to a consideration of the point whether or not, the mistake of the court below in considering the defen-

dants' first additional ground of appeal rather than the second would vitiate the judgment of the court below. I do not think that the mistake could have such a major impact. This is because the failure to transmit to the court below the transcript of the evidence of DWs. 1, 2, 3 and 4 was a serious occurrence which on its own would have disabled the court below from exercising its jurisdiction to adjudicate on the appeal before it. The omission was so far reaching that the court below would have raised the matter itself even if the defendants had not raised it. It therefore matters but the trial court had not discussed little that the question of missing evidence. It was such an occurrence that the court of appeal would have been in duty bound to raise the matter. The result is that the mistake made by the Court of Appeal has not led to a miscarriage of justice affecting its decision to order that the case be re-heard.

I agree entirely with the lead judgment of my learned brother Katsina-Alu JSC. I would also dismiss this appeal with #10,000.00 costs against the plaintiffs/appellants in favour of the defendants/respondents.

MOHAMMED JSC

This appeal concerns rival claims of ownership to a parcel of land described as 'Eto land' or 'Uri land' made by each of the parties in consolidated suits heard by the High Court of Justice Ugheli in the then Mid-western State. At the end of the hearing, Akpiroroh J. (as he then was) in his judgment delivered on 8th October, 1990, found in favour of the Plaintiffs daring them as entitled to a grant of a customary right of occupancy to a portion of the land in dispute.

The Defendants who were dissatisfied with the judgment appealed against it to the Court of Appeal Benin, raising two issues for determination in their Appellant's brief of argument. However, while compiling the record of appeal, it turned out that part of the proceedings of the trail High Court containing the record of evidence of witnesses DW1, DW2, DW3 and DW4 called by the Defendants was missing. Consequently, the Defendants' appeal was heard on the incomplete record of appeal resulting in the Court of Appeal allowing the Defendants' appeal, setting aside

the judgment of the trial Court and sending the consolidated suits back to the trial Court for hearing de novo. Aggrieved by the decision of the Court of Appeal delivered on 4th April, 2001, the Plaintiffs have now appeal to this Court. In this Court, the plaintiffs are the Appellants while the

B Defendants are Respondents.

In the Appellants' brief of argument filed on their behalf by their learned senior Counsel, the following five issues were identified for determination of the appeal. These issues, which were adopted by the Respondents are-

C “ 1. *Were the learned Justices right in law in dismissing the preliminary objection as to the validity and/or competence of the second additional ground of appeal and the issue formulated there from?*

D 2. *Were the learned Justices right in holding that the learned trial judge made an inconsistent finding when he found that the Defendant did not prove extent and boundary of the land claimed by them.*

E 3. *Were the learned Justices right in holding that the principle that claimants to title to land are in duty bound to prove the extent and boundary of the land claimed by them for which three (3) cases were cited was not an issue in the case?*

F 4. *Were the learned Justices right in law in setting aside the judgment of the learned trial judge and ordering a rehearing - put in another way, is a rehearing an appropriate order to make in this case?*

5. *Were the learned Justices right in setting aside the judgment of the trial Court on the ground that the evidence of DW1 - 4 were missing from the record when -*

G (a.) *Judgment was based on traditional evidence on record and on documentary evidence Exhibit D1.*

(b.) *Judgment was not based on Evidence of DW1 - 4.*

(c.) *There was no appeal against any finding made by the learned trial judge.”*

H Taking into consideration that the final order made by the Court of Appeal after allowing the Respondents' appeal was an order setting aside the judgment of the trial Court and ordering the re-hearing of the case by another judge, I am of the view that the Appellants' issues 4 and 5 which

questioned the validity of the orders, are the real issues for determination in this appeal. Learned senior Counsel for the Plaintiffs/Appellants has submitted that the learned Justices of the Court below were wrong both in setting aside the judgment of the learned trial judge and in ordering a retrial in the case which started since 1975. Learned senior Counsel there- B
fore argued that since the judgment of the trial Court was based on tradi-
tional evidence on record and documentary evidence particularly Exhibit
D1, coupled with the fact that the judgment was not based on the evi-
dence of DW1 - DW4 contained in the missing part of the record of C
appeal, the court below was wrong in setting aside the judgment of the
trial Court and ordering a retrial.

Although the Respondents in their brief of argument adopted all the five issues formulated in the Appellants' brief of argument, their learned Counsel suddenly turn round to raise objection to the Appellants' issues 4 D
and 5 which are part and parcel of the five issues already adopted by him. The complaints of the Respondents that these two issues consist of ques-
tions and statements respectively in addition to being argumentative are
therefore baseless. In their arguments on the two issues however, the E
Respondents relying on the case of *Wami Akaide v. The State*. (1996) 8
N.W.L.R. (PT. 468) 525 placed the whole responsibility of the failure to
produce complete record of appeal in the Court below including the miss-
ing part thereof on the shoulders of the Registrar of the Court who com- F
piled the record. Learned Counsel concluded that the Court below was
right in its judgment ordering a re-trial, particularly when the case of
Fadallah v. Arewa Textiles Mills Ltd (1997) 8 N.W.L.R. (PT. 518) 546 is
taken into consideration.

It is relevant in the resolution of these two issues taken together, G
to examine what the Court below said in respect of the missing part of
the record of appeal containing the evidence of DW1 - DW4 at page 351
of the record where the Court said -

*"The moment evidence of witnesses given at the trial Court are H
not before an appellate Court, it will be premature to determine whether
the evidence is relevant to the appeal or not. What should be paramount
in the mind of the appellate Court is that failure to produce and present*

the evidence however irrelevant works in justice to the party who is denied the evidence. The basic rules of natural justice and fair hearing apply with equal force in this Court.

Let that day not come when this Court will hear an appeal which B has no complete record in the sense that evidence of some witnesses are not contained in-the record”.

I entirely agree with this view of the Court below. This is because the missing evidence of DW1 - DW4 is part and parcel of the case, made
C up the Defendants/Appellants in support of their claim for title to the land in dispute, to which both parties were laying at the trial Court. The trial Court had the benefit of considering and appraising the evidence adduced by the Plaintiffs and the Defendants in coming to the conclusion that in
D resolving the conflicting claims of title to the land in dispute before him, the Plaintiffs proved a better title to have been entitled to judgment. It was this same judgment of the trial Court that was under scrutiny on appeal before the Court below which in exercise of its appellate jurisdiction, must have the same opportunity like the trial Court of examining the
E entire evidence adduced by the parties including the missing part of the record of evidence of the Defendants/Appellants’ witnesses DW1 - DW4, before the Court could properly decide whether or not the trial Court properly appraised the evidence before it in coming to the conclusion that
F the Plaintiffs now Respondents had proved a better title. To deprive the Court below of that opportunity is to deny it the use of very relevant materials for consideration in arriving at a correct decision. The absence of the evidence of the four witnesses from the record of appeal will also
G have the effect of denying the Defendants/Appellants of the right to have the entire case they made up at the trial Court being considered by the Court below.

It is trite that an appellate Court will interfere with a trial Court’s appraisal of facts if it is unreasonable or perverse or if the trial Court did
H not properly appraise the evidence adduced before it in arriving at its conclusion. Where this cannot be done by an appellate Court which in the present case include the Court below and this Court, the proper order to make is to order a retrial in line with the judgment of the Court below

now on appeal. See *Akinloye v. Eyiola* (1968) N.W.L.R. 92; *Lawal v. Dawodu* (1972) 1 ALL N.L.R. (PT. 11) 270; *Obisanya V. Nwoko* (1974) 1 ALL N.L.R. (PT. 1) 420 and *Fadlallah v. Arena Textiles Ltd.* (1997) 8 N.W.L.R. (PT.518) 546 at 565.

For these and the fuller reasons contained in the lead judgment of my learned brother Katsina-Alu, JSC, I entirely agree that there is no merit in this appeal. The appeal is accordingly dismissed with #10,000.00 costs to the Respondents against the Appellants.

C

ONNOGHENJSC

This is an appeal against the judgment of the Court of Appeal, Holden at Benin City in appeal No.CA/B/294/96 delivered on the 4th day of April 2001 in which the Court ordered that the suit be remitted to the Delta State High Court of Justice for retrial. D

The appellants instituted suit No. UHC/12/75 for themselves and as representing IYEDE Community of Isoko claiming declaration of title to ETO land situate and lying at IYEDE BUSH, against the respondents for themselves and as representing URUSHE Quarters, Enwhe Town; N600.00 damages for trespass and injunction. E

On the other hand, the respondents instituted suit No. UHC/19/75 also in a representative capacity against the appellants claiming declaration of title to URI Land of Urushe Quarters in Enwhe together with N1,200.00 damages for trespass and injunction. Both suits were subsequently consolidated. When Oleh Judicial Division was created out of Ugheli Judicial Division the suits were renumbered HCO/12/82 and HCO/12/82. F G

On the 8th clay of October 1990, the trial court presided over by AKPIROROH J. (as he then was) delivered its judgment in which it found for the plaintiffs/appellants resulting in an appeal to the Court of Appeal that set aside the said judgment and ordered a retrial. The appellant is dissatisfied with that decision hence the appeal to this Court. In the amend appellants' brief of argument file on the 11th day of May 2004, learned counsel for the appellants T. J. O. OKPOKO Esq., SAN has formulated H

the following issues to the determination of the appeal:

1. *Were the learned Justices right in law in dismissing the preliminary objection as to the validity and/or competence of the second additional ground of appeal and the issue formulated there from?*

B 2. Were the learned Justices right in holding that the learned trial judge made an inconsistent finding when he found that defendant did not prove extent and boundary of the land claimed by them.

C 3. *Were the learned Justices right in holding that the principle that claimants to title to land are in duty bound to prove the extent and boundary of the land claimed by them for which three (3) cases were cited was not an issue in the case?*

D 4. *Were the learned Justices right in law in setting aside the judgment of the learned trial judge and ordering a rehearing put in another way, is a rehearing an appropriate order to make in this case?*

5. *Were the learned Justices right in setting aside the judgment of the trial court on the ground that evidence of DW1 - 4 were missing from the records when -*

E (a) *Judgment was based on traditional evidence on record and on documentary evidence Exhibit D1.*

(b) *Judgment was not based on evidence of DW1 - 4.*

F (c) *There was no appeal against any finding made by the learned trial judge."*

The above issues as formulated by learned Senior Advocate were adopted by learned counsel for the respondents in the respondents' brief of argument filed by DAFE AKPEDEYE Esq. on the 7th day of October 2003. However, learned counsel for the respondents raised a preliminary objection to appellants' issues 4 and 5 contending that the said issues are incompetent as they contain more than one issue in each of the issues concerned; that issue No. 4 in particular raised an alternative question while issue 5 contains many questions for determination. Learned counsel further submitted that the issues are also argumentative and urged the court to strike out the issues in contention, relying on the following cases: Chief J. A. Y Imonikhe vs The A-G of Bendel State (1992) 6 NWLR (pt. 248) 396 at 407; Onyesoh vs Nnebedum (1992) 3 NWLR (pt. 229) 315

at 343 and *Ojibah vs Ojibah* (1991) 5 NWLR (pt. 191) 296 at 309.

In the reply brief filed on 15/11/05 learned Senior Advocate for the appellants submitted that the objections were not tenable and urged the court to discountenance it particularly as issue No. 4 is not framed in the alternative neither were arguments thereon in the alternative. Learned B counsel then submitted that the cases cited and relied upon by learned counsel for the respondent are irrelevant. On issue 5 learned counsel submitted that the object of the subjects (a) (b) and (c) in issue 5 is to narrow the real issue in the case and guide the argument of the parties; C that appellants having adopted the issues as formulated and canvassed arguments thereon cannot rightly take the objection in that respondent cannot appropriate and reprobate, relying on the following cases: *Oladapo vs Bank of the North* (2001) 1 NWLR (pt. 694) 225 at 269; *Ude vs Nwora* (1993) 2 NWLR (pt. 278) 638 at 662 - 663. D

By taking a look at the issues complained of and reproduced earlier in this judgment, it is very clear that the objection of learned counsel for the respondent has no substance at all. Issue 4 is not raised in the alternative neither is the submission thereon made in the alternative. I also E agree with learned Senior Advocate for the appellants that the object of the subjects (a) (b) and (c) in issue 5 is simply to narrow down the real issue for determination in the case and, direct arguments thereon accordingly. That being the case, the objection is overruled for lacking in merit. F

Arguing the appeal on the merit, Learned Senior Advocate of Nigeria for the appellants submitted, by way of summary, that the learned justices gravely misdirected themselves in dismissing the objection to the validity and competence of the second additional ground of appeal as G their decision was based on a ground of appeal against which there was no objection and not the second ground of appeal on which the objection was directed.

Learned Senior Advocate further submitted that the observation of the learned trial judge at page 145 of the record was not a finding as to H the extent and boundaries of any land in dispute and that the learned justices were in error in their conclusion that the said observation rendered the finding of the trial judge on the failure of the defendants to

prove the extent and boundaries of the land in dispute by them as inconsistent; that the defendants who Claim declaration of title to land have the onus of establishing the portion of land claimed by them and that the observation of the learned trial judge did not relieve the defendants of
B that onus; that the Court of Appeal was in duty bound to consider and determine the appeal on the grounds of appeal directed against the judgment to show that the judgment was wrong which the court below failed to do that there is no legal justification for setting aside the Judgment of
C the trial court merely because evidence of some witnesses is missing from the records, when the judgment is not shown to have been based on the alleged missing evidence and that the judgment in favour of the plaintiffs was based on definite findings of fact in respect of which there was no appeal and that an order for rehearing was not appropriate as it
D was not established that the plaintiffs are not entitled to the judgment.

Learned Senior Advocate of Nigeria then urged the Court to resolve the issues in favour of the appellants and allow the appeal. On the other hand, learned counsel for the respondent submitted that the Court
E of Appeal was right in dismissing the objection to the validity and competence of the second additional ground of appeal; that the observation of the learned trial judge at page 145 of the records was clearly a finding of fact that the parties did not join issues as to the extent and boundaries of
F the land in dispute and that the learned justices were right in their conclusion that the said observation rendered the finding of the trial judge on the failure of the defendants to prove the extent and boundaries of the land claimed by them as inconsistent.

Learned counsel submitted further that the onus of establishing
G the portion of land claimed in this case did not rest on the defendants as claimants to title to land since the learned trial judge found as a fact that the extent and boundary were not in dispute between the parties; that the court of Appeal was deprived of the opportunity of seeing the entire
H records and to be in position to agree or disagree with the final decision of the learned trial judge as a result of the order of the evidence of four of the five witnesses of the defendants from the record book and that in the circumstance he learned justices were right to have made an order of

retrial. Finally learned counsel submitted that the appeal of the present respondents at the Court of Appeal was against the whole decision of the trial court and that an order for rehearing in the circumstance was most appropriate as it was not established before the Court of Appeal that the plaintiffs were entitled to the judgment and urged the court to resolve the B issues against the appellants and dismiss the appeal.

There is no dispute that the Court of Appeal in treating the objection raised by the present appellants with reference to ground 2 of the additional grounds of appeal erroneously determined the said objection C with reference to ground 1 instead of the said ground 2 of the additional grounds of appeal thereby, in effect, not determining the objection at all.

The question to be determined in this issue is whether having regard to the objection raised and the facts of the case the said objection is sustainable. I hold the view that the error of the court of Appeal in D mixing up the relevant additional ground of appeal objected to notwithstanding, the decision of the Court of Appeal would still have been the same i.e. dismissing the objection.

There is no doubt that the additional ground 2 of the grounds of E appeal complained of the missing evidence of DW1-DW4 which in effect is a fact which occurred after the delivery of the judgment no appeal and cannot therefore by any means be expected to form part and parcel of the decision of the court. However, one cannot run away from the F fact that the missing evidence of the said witnesses impacted one way or the other on the judgment of the trial court on appeal before the Court of Appeal and therefore very relevant for the consideration of that appeal having regard to the fact that the appellants whose evidence was missing G were also plaintiffs in one of the consolidated cases and one of the grounds of appeal that the judgment of the trial court was against the weight of evidence.

That apart, it is settled law that a new point not taken before the H trial court or lower court may be raised for the first time on appeal particularly if that point will make a difference between justice or its miscarriage - see A-G of Oyo State vs Fairlakes Hotel Ltd (1988) 5 NWLR (pt. 92) 1 at 52. That apart all the materials necessary for the determination of

the issue raised in the additional ground 2 of the grounds of appeal are present in the record before the court and indicate ex facie that the Court of Appeal was not in a good position to properly assess the decision of the trial court by way of rehearing as the greater part of evidence of the defendants' witnesses was missing from the records. Finally I hold the view that since the ground of appeal in issue contends that the lower court could not evaluate the judgment of the trial court by reason of the loss of the evidence of DW1, DW2, DW3 and DW4, it is very clear that the said additional ground 2 is directed against the said judgment of the trial court and consequently valid.

On the sub-issue as to whether the said additional ground 2 complies with the mandatory provision of Order 3 Rule 2 (2), (3) and (4) of the Court of Appeal Rules when it did not allege an error of law or a misdirection I agree with the submission of learned counsel for the respondent that a complaint that the trial court was in breach of the constitutional rights of the respondents is a complaint bordering on an error or misdirection in law by the trial court. When one looks at the said additional ground it is very clear that it is very comprehensive and therefore valid. I therefore resolve issue 1 against the appellants.

On issues 2 and 3 it is settled law that in a case tried on the pleadings issues are joined by the parties in their pleadings and that an issue for trial arises when a material averment by a party is positively denied by the other party see *Lewis and Peat (Nig) Ltd vs Akhigbe* (1976) All NLR 365 at 369.

What then are the pleadings of the parties relevant to the issue under consideration? In paragraphs 5, 6 and 7 of the Amended Statement of Claim, the plaintiffs in suit No. HCO/12/82 averred as follows: -

"5. The land in dispute as well as its boundaries and features is as shown on Survey Plan No. ER. 1246 filed with this Amended Statement of Claim. The land in dispute is part of Plaintiffs' and known and called H ETO land.

6. Eto land is bounded on the south by Ovu Creek/ Stream, which marks the boundary between Iyede to the north and Ewhen and Olomoro to the southeast respectively. The said Ovu Creek/ Stream has always

been and has always been known and acknowledged as the boundary between land of Iyede people to the north and Ewhen and Olomoro people to the south and south-east respectively.

7. In the south of Ovu creek/stream, the stream known as Emewawa stream marks the boundary between Ewhen and Olomoro. The stream Emewawa flows into Ovu Creek/Stream. In Isoko Division, the boundary between towns and or clans are marked by natural features and in the instant case, the boundary between the land of the plaintiffs and the defendants is the Ova Creek/Stream.”

The defendants responded to the above averments as’ follows in paragraphs 6, 7, 8, 9, 10, 16, 17 and 18 of the Amended Statement of Defence:

“6. With further reference to paragraph 5 of the Amended Statement of Claim, Defendants aver that the piece or parcel of land which Plaintiffs allege they (Plaintiffs) call ETO land is not owned by Plaintiffs at all. Rather the said piece or parcel of land which is given the factitious title of ETO land by Plaintiffs, lies within and is part of Defendants’ large piece of parcel of land known as and called URI indicated as PINK in the Survey Plan No. AR. 1639 prepared and signed by Chief E. G. Arubayi, a Licensed Surveyor, already filed by Defendants in this Honourable Court, in another Suit No. HCO/12x/82 [formerly UHC/19/75] instituted by Defendants against Plaintiffs herein. The aforesaid Survey Plan. No. AR. 1639 in Suit No. HCO/12x/82 [Formerly UHC/19/75] shall be founded on by Defendants at the trial.

7. With still further reference to paragraph 5 of the Amended Statement of Claim, Defendants shall at the trial challenge both in quality and content, Plaintiffs’ aforesaid Survey Plan No. ER. 1246.

8. With further reference to paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Amended Statement of Claim, Defendants aver that they have been the owners in possession of the said piece or parcel of land known as and called URI, lying and situate in Uluthe, Enwhe, which embraces the-relatively smaller piece or parcel of land fictitiously christened ETO land by Plaintiffs and claimed by them (Plaintiffs) herein.

9. *The said piece or parcel of land known as and called URI which is verged PINK in Defendants' aforesaid Survey Plan No. AR. 1639 in Suit No. HCO/12x/82 (formerly UHC/19/ 75) is bounded in the northwest by land of Evwreni people; in the South, by land of Defendants not in dispute; in the East by land of Olomoro people; and in the North-East by land of Plaintiffs not in dispute."*

10. *The said piece or parcel of land known as and called URI, which includes/engulfs/ encompasses the so-called ETO land the subject-matter of this action, is a segment of a vast expanse of Uluthe land founded from time immemorial by Oviota (a prominent member of the Benin Royal Family) and his lieutenants, Defendants' ancestors and/ or predecessors in-title who came from Benin and found it a virgin land/ forest without any settlers.*

16. *Defendants also established juju shrines on Defendants' said land, e.g. Ebri juju shrine, on or near the boundary between Defendants' said, URI piece or parcel of land and Plaintiffs' undisputed land in the Northeast.*

17. *The clear, firm and unmistakable boundary mark between Defendants and Plaintiffs to the North-East of Defendants' said URI piece or parcel of land is a MOAT dug by Defendants' ancestors ages ago. This MOAT is indicated in Defendants' aforesaid Survey Plan No. AR. 1639 in Suit No. HCO/12x/82 (formerly UHC/19/75) and still very visible till this day.*

18. *The MOAT as a boundary mark between Defendants and Plaintiffs was fortified by other boundary marks on the said North-Eastern sector of Defendants said URI piece or parcel of land by big tree like "Oghere" and Oil bean trees etc."*

From the pleadings it is clear that while the plaintiffs-call the entire land "ETO" land the defendants denied that and called it "URI" land. The question that follows the pleadings is whether the parties are claiming two separate pieces of land or the same piece or parcel of land known by different names.

Secondly, in paragraph 6 of the Amended Statement of Claim the Plaintiffs pleaded that Ovu Stream is the boundary mark, while the people

of ENWHEN and OLOMORO constitute their boundary men which facts were denied by the defendants in their paragraph 5. The defendants went on to plead in paragraphs 16, 17 and 18 of the Amended Statement of Defence that EVWRENI people and the plaintiffs constitute their boundary men and that the EBRI JUJU and a MOAT constitute the boundary marks of the land in dispute. From the pleadings the issue raised is as regard those sharing boundaries with the land in dispute and what constitutes the boundary marks.

Thirdly while the plaintiffs pleaded that the land in issue is in IYEDE BUSH, the defendants claimed that it is in ENWHEN BUSH. C

Fourthly is the land “ETO” or “URI” as claimed by the parties and what is the extent and boundary of the land. To me the above constitute the relevant issues for determination as joined by the parties in their pleadings. It is only when the above is borne in mind that the observation of the learned trial judge giving rise to the issue under consideration becomes very significant and “pointer to how the mind of his Lordship was working at the relevant point in time”. D

At page 145 of the record, the learned trial judge made the following observations: E

“Before considering the traditional evidence given in the whole case, I will first of all consider the names of the land as given by the parties in their evidence. While the Plaintiffs call it Eto land, the defendants call it Uri land. I must say straight away on the evidence led before me that although the land has been called different names by the plaintiffs and the defendants in court, it is my view that it is one and the same land referred to as Eto and Uri by ‘the plaintiffs and defendants respectively in this case. A close look at Exhibits “A” and “C” make it abundantly clear that it is one and the same land. It is therefore my view that it is a clear case of the parties calling the same land, different names which are not unusual in most land cases in this part of the State. There is no dispute whatsoever that the parties are talking about the same piece of land. It appears to me that they know the land in dispute between them. As the identity of the land is not made as issue in the case, I am quite satisfied on the evidence before me that Eto land showed, in Ex- F G H

hibit “A” is the same land as Uri land shown in Exhibit “C” by the plaintiffs and defendants and, defendants respectively. Having found that the identity of the land is well-known to the parties and it not made an issue in the case, I will now proceed to consider the traditional evidence led by the plaintiffs and the defendants in this.”

Next the learned trial judge considered the evidence in the case and at page 155 of the record the court particularly considered the evidence of the 1st defendant thus: -

C “The evidence of the 1st Defendant as to boundaries of the land they are claiming is most unreliable because in chief, he said that he took DW1 to the land with his people and showed him all the boundaries and its features but under cross-examination, he said that he did not follow DW1 to the land when he went to survey it. Suffice it to say that the D defendants failed woefully to establish the boundaries and the extent of the land for which they are seeking a declaration of title.”

It is the case of the respondents, which was accepted by the Court of Appeal, that by the observation at page 145 of the record the trial judge E had found the extent and boundaries of the land claimed by the defendants and as such it was no longer an issue and in consequence thereof the defendants as claimants to title to the land are no longer obliged to prove the extent and boundaries of the land claimed by them.

F It is not strange, in fact it is common feature in claims of title to land that parties to the dispute always call the land in dispute by different names and will always identify different land marks as constituting the Aromire vs Awoyemi (1972) All NLR 105 at 116. Despite boundary features of the land in dispute see the above tendency the courts have always seen through the contrivances and determined the real issue in G controversy between the parties which is, in reality, the actual person or party entitled to be declared the owner or entitled to the right of occupancy of the land in dispute.

H Looking closely at the observation of the learned trial judge and having regard to the issues joined in the pleadings, it is my considered view that the learned trial judge was simply considering the issue whether the parties were talking of the same land but calling it by different names

or whether they were talking of two separate and distinct pieces or parcels of land as the two names appear to suggest. I hold the further view that to say that the land though called by two different names by the parties is one and the same land or to state that the parties know the identity of the land in that context or that the parties are claiming the same piece or parcel of land is not to determine the extent and boundaries of the land in issue particularly as the parties joined issues as to the boundary marks and people with whom they shared boundaries with the said piece or parcel of land in dispute and those people and boundary marks are not identical. That being the case, it is clear that the subsequent finding of the trial judge as to the extent and identity of the land in dispute is not contradictory of the earlier finding which, as already demonstrated, related only to the name of the land in dispute. I will therefore resolve the issues in favour of the appellants. I know that if the order of retrial made by the lower court is sustained every finding of fact made by the trial court becomes of no consequence, yet it is very important to treat the issue properly as a guide for the future.

However the most important issue in this appeal has to do with the order of retrial made by the lower court. There is no disputing the fact that the record book containing the evidence of DW1, DW2, DW3 and DW4 could not be traced and therefore their evidence do not form part of the record of appeal before the lower court and this Court. Also not disputed is the fact that the respondents, were also plaintiffs in a sister case which sought declaration of title to the kind in dispute which suit was eventually consolidated with the suit of the appellants and accordingly tried together. It is therefore clear that the evidence of the defence witnesses which has gone missing are not only relevant to the defence of the action instituted by the appellants they are also very relevant to prove their claim for declaration of title. Also not in doubt is the fact that one of the grounds of appeal of the respondents as appellants before the lower court was that the judgment was against the weight of evidence. That being the case it is my considered view that for the Court of Appeal to determine the appeal in the circumstances of the case particularly the issue as to whether the trial court properly evaluated the evidence before

it and apportioned appropriate weight thereto, the Court of Appeal needed to take a considered look at the totality of the evidence adduced by the parties at the trial so as to do substantial justice between the parties.

It is settled law that evaluation of evidence and the ascription of probative value thereto reside within the province of the court of trial that saw heard and assessed the witnesses and that where a trial court unquestionably evaluates and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for the view of the trial court, however, the Court of Appeal can intervene where there is insufficient evidence to sustain the judgment, or where the trial court fails to make proper use of the opportunity of seeing, hearing and observing the witnesses or where the findings of fact of the trial court cannot be regarded as resulting from the evidence or where the trial court has drawn wrong conclusion from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings are perverse in the sense that they do not flow from accepted evidence or not supported by evidence before the court. See *Akinloye vs Eyiola* (1968) NMLR 92; *Enang vs Adu* (1981) 11-12 S.C 25; *Woluchem vs Gadi* (1981) 5 S.C 291; *Akpagbue vs Ogu* (1976) 6 S.C 63; *Odofoin vs Ayoola* (1984) 11 S.C 72; *Amadi vs Nwosu* (1992) 5 NWLR (pt. 241) 273; *Okpiri vs Jonah* (1961) 1 SCNLR 174; *Maja vs Stocco* (1968) 1 All NLR 141. With the law being as stated above the unavailability of the evidence of DW1 - DW4 to the Court of Appeal becomes very worrisome and clearly impeded the duty of that court to properly determine the appeal on the merit.

The question that follows is what are the circumstances in which an appellate court will order a retrial of a case?

The principles guiding the court in ordering a retrial of a suit have been stated in a number of cases as being dependent on the facts and circumstances of the particular case Generally, it is agreed that an appellate court will be reluctant to order a retrial where:-

- (i) The plaintiff has established his case by raising the probabilities in his favour; or
- (ii) The order of retrial will enable the defendant to improve his

position during retrial to the prejudice of his opponent; or

(iii) The litigation will be unnecessarily prolonged; or

(iv) The proceedings are conducted by the trial court largely in conformity with rules of evidence and procedure; or

(v) There was no substantial irregularity in the conduct of the B case.

It is settled that an order of retrial will not be made in any of the above stated circumstances so as to avoid injustice.

However where a trial court failed in its primary duty of making C findings of facts on issues joined in the pleadings and the evidence is such that an appellate court cannot make its findings and come to a decision on all the relevant issues, an order of retrial is the proper order the appellate court should make see Kareem vs. UBA Ltd (1996) 5 NWLR (pt. 451) 634; Okeowo vs Migliore (1979) 11 S.C 138; Bakare vs Apena (1986) 4 D NWLR (pt. 33) 1; Awote vs Owodunni (No. 2) (1987) 2 NWLR (pt. 52) 366; Adeyemo vs Arokopo (1988) 2 NWLR (pt. 79) 703; Osolu vs Oson (2003) 11 NWLR (pt 832) 608.

In the instant case the trial court did make some findings of facts, E which cannot be appraised or evaluated by the Court of Appeal due to the missing record book containing the testimony of DW1 - DW4. That is a very serious handicap to an appellate court, which has to deal with the cold facts contained in the record to do justice to the parties before it. I F hold the firm view that in the circumstance of this case, the proper order to make is that of retrial as made by the Court of Appeal to ensure that justice is done to the parties.

I therefore resolves the issue against the appellants and affirms the G order of retrial.

In conclusion I agree with the reasoning and conclusion of my learned brother KATSINA-ALU, JSC that the appeal has merit and should be allowed. I order accordingly and abide by the consequential order H made in the said lead judgment including the order as to costs.

Appeal allowed.