

SUPREME COURT OF NIGERIA

30th MARCH, 2007 S.C. 273/2001

**CORAM:- I. L. KUTIGI CJN, G. A. OGUNTADE, A. M.
MUKHTAR, W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC**

1. YESUFU OGEDENGBE
2. CHIEF OWOLABI OMOTORIOGUN
3. MR. ALUGBO ABERE
4. MR. AUGUSTINE ATARI APPELLANTS
5. MR. AMOS ALARI
6. MR. OGIDI EZEKIEL
7. MR. ALABIOBE

AND

1. CHIEF J. B. BALOGUN
2. CHIEF SIMON OYEGBA
3. CHIEF ORILOYE AROKOBIEKUN RESPONDENTS
4. CHIEF MICHAEL ADUBIARO

[for and on behalf of Ekpesa Community]

LAND LAW - Title - Claim to - Must be to a defined area with certainty
- Test being whether a surveyor - Can produce an accurate plan from the
record (H1)

LAND LAW - Title - Boundaries - Onus is on plaintiff to prove the bounda-
ries - And failure would ground a dismissal of the claim (H2)

LAND LAW - Survey plan - Title - Where plaintiffs' evidence of identity
of the land - Was not challenged - And the identity of the land is known
to the parties - A plan is not necessary (H3)

EVIDENCE - Title - Witnesses - Inconsistency - Credibility - Where
there is no material contradiction - Assessment of credibility by trial court
- Will not be disturbed by appellate court (H4)

APPEALS - Retrial - Factors that necessitate order of retrial - Which include substantial irregularity - Do not apply to this case (H5)

FACTS

Before the then Bendel State High Court Igara (now Edo State), the plaintiffs/respondents filed an action against the defendants/appellants. Respondents claimed declaration of title to the land in dispute, damages for trespass, an order of forfeiture and injunction. At the close of trial, the court granted respondents' claim. Appellants' appeal to the Court of Appeal was dismissed.

Still dissatisfied, appellants have further appealed to the Supreme Court. The main thrust of their contention stems from an unwholesome assessment of a statement by the Court of Appeal. Appellants' failure to fully quote and comprehend all that the lower Court said is their basis for contending that there is contradiction in the respondents' evidence on the identity of the land in dispute.

ISSUES FOR DETERMINATION

"1. Was the Court below right to have held that the apparent contradiction in the Respondents (then Plaintiffs) (sic) evidence on the identity of the land in dispute was not fatal to the claims for declaration of title and injunction. (Ground 1),

2. Was the Court below right to have refused to order a retrial in view of the failure of the trial court to evaluate vital evidence (Grounds 2 and 3)".

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

Title - Claim to - Must be to a defined area

1. It is now firmly settled in a plethora of decided authorities, that land to which a declaration of title is sought, must be sufficiently identified. In other words, in a claim of title, it must be made to a defined area, with certainty.

It is also settled that before a declaration of title is given, the land which it relates, must be ascertained with certainty. The test being whether

a Surveyor, can from the record, produce an accurate plan. (p. 1400 D)

Onus is on plaintiff to prove the boundaries

2. Also firmly established, is that in a claim for declaration of title to land, (as in the instant case leading to this appeal), the onus is on the plaintiff to prove title to a defined area to which a declaration, can be attached.

It is also firmly settled, that where a plaintiff in an action for declaration of title, fails to prove the boundaries of the land he is claiming, he has failed by that omission, to prove his case and the proper order which the court should make in such circumstances, is usually one of dismissal of the claim. Indeed, it is also settled that inaccurate plan, will defeat a plaintiff's claim. This is also the case, if the description of the land in dispute, contradicts the plan. (p. 1400 G)

LAND LAW - Survey plan - Title

3. But in the instant case, not only did the Respondents, produce and tender a Survey Plan - Exhibit 7, they also called a Licensed Surveyor - PW. 7 who testified on oath and identified Exhibit 7 which was tendered, without any objection. The Records show that his evidence, was never challenged by the appellants in cross-examination. The boundary witnesses, also testified. The trial court, was satisfied that the identity of the land in dispute, was clearly established in evidence.

As a matter of fact and this is also settled, where the identity of the land in dispute, is known to the parties and not in dispute no plan is necessary. Absence of a plan is not fatal to a plaintiff's claim if proper description of the land is available in the proceedings. (p. 1401 D)

Title - Witnesses - Inconsistency

4. The court below, at page 326 of the records, stated inter alia, as follows:

“The inconsistency said to exist between Exhibit 7 and the evidence of PW7 and PW10 as to the boundaries lies only in the imagination of the appellants. I cannot see the contradiction in the evidence of 1st plaintiff and Exhibit 7 since it is not the whole of Ekpesa land that is

being disputed.....” [the underlining mine]

At pages 328 to 329, the court below stated inter alia, as follows:

“This piece of evidence (i.e., part of the evidence of the PW7) considered alongside that of DW3 (2nd defendant) will undoubtedly show that the plaintiffs were in possession of the disputed land and the denial by the defendants of the existence of Ekpesa land would be seen not to be true. The trial Judge had the singular advantage of seeing the witnesses testify. He watched their demeanor (sic) and the appeal court on the cold printed records cannot decide on the issue of credibility.....”.

I agree. This is because, it is now firmly settled, that the function of assessment of credibility of witnesses is essentially for the trial court and not that of the Appeal Court.

Thus, where the question(s) that falls/fall to be determined raises/raise the issue of credibility an appellate court will not interfere.
(p. 1403 E)

Factors that necessitate order of retrial

5. As regards the issue of retrial, it is now firmly established that it is only where a plaintiff has failed totally to prove his case and there is substantial irregularity apparent on the record or shown to the court that an order for retrial will be made. But this is not the case in the instant case leading to this appeal.

Again, it is only where a trial court fails to make findings of fact on specific issues of fact and thus fails to resolve the issues that arise in the pleadings of the parties that an appellate court should send the case back to the trial court for retrial. See the cases of Bamidele v. Adeyemi [1963] 1 ANLR 146 at 148; Shell B.P. v. Cole [1978] 3 S.C. 183. I find that none of the circumstances of these cases, is applicable in the instant case leading to this appeal. See also recently, the case of Alhaji Okomalu v. Chief Akinbode (supra) where this court - per Tobi, J.S.C. at pages 68-69 of the S.C.N.J. and 229-232 of the All F.W.L.R., listed eleven (11) instances when this court, pursuant to section 22 of Supreme Court Act and Order 8 rule 13(1) of its Rules, will order a retrial and six (6) instances, when it will not so order. This issue is also resolved against the

appellants. (p. 1404 F)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Not every inconsistency will ground a reversal

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I agree entirely with the conclusion of the court below in the passage reproduced earlier in this judgment and hold that it is not every inconsistency in evidence that would lead to a reversal of the decision of a lower court on a matter and that for the inconsistency to have the effect of reversal, it must be on a material fact relevant to the issue in controversy between the parties. In the instant case, Use Hill as a feature or boundary mark to which the inconsistency relates is not the only boundary mark relevant to that stretch of boundary and since the other features have been duly established in the evidence on record, their proof renders the inconsistency as regards Use Hill of no moment and consequently not fatal to the case of the respondents. (p. 1416 G)

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2. Order of retrial - Guiding principles

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On the second and last issue, it is important to note that the principles guiding the courts in making an order of retrial of an action have been stated in a number of decided cases as being dependent on the facts and circumstances of the particular case. It is agreed, however, that an appellate court will be reluctant to order a retrial where:-

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(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

G

(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 case. H

However, where a trial court failed in its primary duty of making findings of facts on issues joined in the pleadings and the evidence in 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. (p. 1417 D)

REPRESENTATION

B Fola Ajayi for the appellants.

Chief F. O. Orbih for the respondents with him are D. A. Alegbe Esq. and V. E. Ghomorai (Mrs.)

CASES REFERRED TO

C Ezeokeke & ors. v. Uga & ors. (1962) 1 ANLR (Pt.1) 482, 484

Kwadzo v. Adjei (1944) 10 WACA 274

Chief Aro v. Chief Obaloro (1968) NMLR 238

Arabe v. Asanlu (1980) 5-7 S.C 78 @ 90

D Udofia v. Afia (1980) 6 WACA 216

Okorie v. Udom (1959) 5 FSC. 162

Oke & ors. v. Eke & ors. (1982) 2 S.C. 218 @ 232

Odesanya v. Ewedemi (1962) ANLR (Pt.1) 318 & 320

E Okuoja v. Ishola (1982) 7 S.C. 314 @ 351

Baruwa v. Ogunshola (1938) 4 WACA 158

Elias v. Sulathan (1973) 1 ANLR 282

Omo-Bare v. Alhaji Elias (1978) 7 FCA 22

F Amala v. Maduku 14 WACA 580

Alade v. Dina 17 NLR 32

Epi & anor. v. Aigbedion (1975) (1) NMLR 31

LEAD JUDGMENT BY OGBUAGU JSC

G This is an appeal against the decision of the Court of Appeal, Benin Division, [hereinafter called “the court below”], delivered on 23rd April, 2001, dismissing the appeal to it and affirming the Judgment of the trial court delivered on 12th June, 1998 in favour of the Plaintiffs/Respondents. The Appellants have now appealed to this Court on three (3) grounds of appeal which without their particulars, read as follows:

“(i). *The Court below misdirected itself on the fact when it held that “this apparent contradiction cannot be used to discredit all the*

other features that define the boundaries of the disputed land. Afterall, there is still the long stone ground which forms the boundary between Ekpassa and Lampese. If Use Hill use the only crucial land mark then the argument..... will stand.....”,

(ii) The Court below erred in law when it declined to order a re-trial when the trial Court failed to evaluate vital evidence of traditional history, possession and boundary men adduced by the Defendant on ground that 2nd defendant lied and contradicted himself.

(iii) The Court below erred in law when it held that “the trial Judge was perfectly right to have accepted and acted on the evidence adduce (sic) by the Plaintiffs” without a consideration of the corresponding evidence of the defendants on traditional evidence of ownership and possession of the land in dispute inter-alia. (the underlining his).”

The Appellants, have formulated two (2) issues for determination, namely,

“1. Was the Court below right to have held that the apparent contradiction in the Respondents (then Plaintiffs) (sic) evidence on the identity of the land in dispute was not fatal to the claims for declaration of title and injunction. (Ground 1),

2. Was the Court below right to have refused to order a retrial in view of the failure of the trial court to evaluate vital evidence (Grounds 2 and 3)”.

I note that the Respondents, adopted the above issues. The issues of the parties, as far as I am concerned, have made the determination of this appeal, less cumbersome for me. This is because I note firstly, that the defendants/Appellants, joined issues, on the identity and features of the land in dispute. Secondly, the court below, refused to order a retrial because of an alleged failure of the trial court, to evaluate vital evidence. See Grounds 2 and 3 of the grounds of appeal.

On 8th January 2007, when this appeal came up for hearing, learned counsel for the Appellants - Ajayi, Esqr. in his oral submission, stated in respect of their Issue 1, that there was no certainty of the boundaries of the land in dispute. On Issue 2, he stated that credibility, was in issue and yet, the court below proceeded to evaluate. That the position therefore,

is for an order of retrial. He cited and referred to the case of *Okomalu v. Akinbode* (2006) 4 SCNJ. 53 (it is also reported in (2006) All FWLR (Pt.314) 211). He still urged the Court, to allow the appeal, set aside the Judgment of the court below and order a retrial.

B On his part, Chief Orbih, submitted that the parties know the land in dispute. That a Survey Plan, was filed and that the Surveyor, testified, that other witnesses also testified and that there is also concurrent findings of the two lower courts. That the boundary the Appellants say there was contradiction, is about the boundary with a third party who is not a party in the dispute. That it was not a boundary dispute. That no issue was joined on the identity of the land as the Surveyor, gave evidence and he was not challenged. On the issue of evaluation, Chief Orbih submitted that the court below, did not go ahead to evaluate the evidence, only that D it found as a fact, that the identity of the land, was not in issue. He finally urged the court to dismiss the appeal.

It is now firmly settled in a plethora of decided authorities, that land to which a declaration of title is sought, must be sufficiently identified. See the case of *Ezeokeke & ors. v. Uga & ors.* (1962) 1 ANLR (Pt.1) 482, 484. **In other words, in a claim of title, it must be made to a defined area, with certainty.** See the case of *Amodu Rufai v. Ricketts & 5 ors* (1934). 2 WACA 95.

F **It is also settled that before a declaration of title is given, the land which it relates, must be ascertained with certainty. The test being whether a Surveyor, can from the record, produce an accurate plan.** See the cases of *Kwadzo v. Adjei* (1944) 10 WACA 274; *Chief Aro v. Chief Obaloro* (1968) NMLR 238; *Arabe v. Asanlu* (1980) 5-7 S.C 78 @ 90; *Udofia v. Afia* (1980) 6 WACA 216; *Okorie v. Udom* (1959) 5 FSC. 162; cited also in the case of *Oke & ors. v. Eke & ors.* (1982) 2 S.C. 218 @ 232 and many others.

Also firmly established, is that in a claim for declaration of title to land, (as in the instant case leading to this appeal), the onus is on the plaintiff to prove title to a defined area to which a declaration, can be attached. See the cases of *Odesanya v. Ewedemi* (1962) ANLR (Pt.1) 318 & 320; *Okuoja v. Ishola* (1982) 7 S.C. 314 @ 351

citing *Udofia v. Afia* (supra); *Baruwa v. Ogunshola* (1938) 4 WACA 158; *Elias v. Sulathan* (1973) 1 ANLR 282; and *Omo-Bare v. Alhaji Elias* (1978) 7 FCA 22 just to mention but a few.

It is also firmly settled, that where a plaintiff in an action for declaration of title, fails to prove the boundaries of the land he is claiming, he has failed by that omission, to prove his case and the proper order which the court should make in such circumstances, is usually one of dismissal of the claim. See *Amala v. Maduku* 14 WACA 580; *Alade v. Dina* 17 NLR 32; *Epi & anor. v. Aigbedion* (1975) (1) NMLR 31; (1975) 5 U.I.LR. (Pt 11) 157; and *Ugbo v. Nwokeke* 6 ENLR 106. Indeed, it is also settled that inaccurate plan, will defeat a plaintiff's claim. This is also the case, if the description of the land in dispute, contradicts the plan.

I have gone this far, in order to let the Appellants know and appreciate, that these settled principles of law, are clear and unambiguous and no longer in doubt. **But in the instant case, not only did the Respondents, produce and tender a Survey Plan - Exhibit 7, they also called a Licensed Surveyor - PW. 7 who testified on oath and identified Exhibit 7 which was tendered, without any objection. The Records show that his evidence, was never challenged by the appellants in cross-examination. The boundary witnesses, also testified. The trial court, was satisfied that the identity of the land in dispute, was clearly established in evidence.**

As a matter of fact and this is also settled, where the identity of the land in dispute, is known to the parties and not in dispute no plan is necessary. Absence of a plan is not fatal to a plaintiff's claim if proper description of the land is available in the proceedings. See *Etiko v. Aroyewun* [1959] 4 FSC 129; *Arabe v. Asanlu* (supra); *Chief Sokpui II v. Chief Agbozo III* 13 WACA 241 at 242; *Atolagbe v. Shorun* [1985] 1 NWLR (pt. 2) 360; [1985] 4 S.C. 250 at 275 just to mention a few. Indeed, and this is also settled, where the identity of land is not clear to a defendant he could or should in fact apply for particulars.

As I stated earlier in this judgment, the production and tendering of a Survey Plan, is one of the ways in which evidence can be led, to

prove the boundaries of a land in dispute. See also the case of Chief Emiri & Ors. v. Chief Imieyeh & Anor. [1999] 4 N.W.L.R. (pt. 599) 442 at 463, 465, 468; [1999] 4 S.C.N.J. 1. But a plan is not a sine qua non. See the case of Akpagbue & Anor. v. Ogu & Ors. [1976] 6 S.C. 42 at 45-
 B 46. Some description, however, is necessary to make a disputed land ascertainable. See Chief Sokpui II v. Chief Agbozo (supra) at 242 and Ajadi B. Awere v. Suleman Lasaju [1975] NMLR 100 at 101. Both referred to in the case of Alli v. Aleshinloye [2000] 6 N.W.L.R. (pt. 660)
 C 177 at 215; [2000] 4 S.C.N.J. 16. See also Chief Emiri & Ors. v. Chief Imieyeh & Anor. (supra) wrongly cited in the respondent's briefs, (it is not Pt. 442) but at page 442).

Now, I note that the 1st plaintiff/respondent, at page 72 of the records, lines 25 to 35 on oath, described the boundaries of the land in
 D dispute. Therein, he stated as follows:

“..... Ekpesa common boundary with Lampese is Esia or Egba or big boulders. This Lampese/Ekpese boundary was demarcated in 1922 by one Mr. E.A. Williams who was the H.D.O. (Higher District Officer).....”
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Under cross-examination by P. Orifunmishe counsel for the defendants/appellants, the 1st plaintiff/respondent who stated that he is “the Deji of Ekpesa”, maintained that he knew all the boundaries of the land in
 F dispute.

P.W.5 - one Ibrahim Igbegeije, from Lampese and lives there, on oath, also testified that at page 59 of the records, inter alia, as follows:
 “..... *the While man settled the dispute for us (i.e., between Ekpesa and Lampese communities). He it was who demarcated the boundary. He*
 G *used a big rock to demarcate the boundary and drew a line from it to Use Hill. Use Hill is on our land. The boundary line followed up to river Izo near Ogugu.....”*

In fact, under cross-examination, PW5 further testified, that there
 H is a common boundary between his family land and that of Ekpesa of the plaintiffs/respondents. He was never discredited in cross-examination and his said evidence, was never challenged.

P.W. 7 - Francis O. Iyawo is the Licensed Surveyor. He produced

the Survey Plan of the land in dispute he surveyed and prepared which was tendered without objection from the defence and was marked Exhibit 7. I note that thirteen (13) witnesses including a Traditional Ruler - P.W. 10 - H.R.H. Oba Momodu Idaiye, testified as a boundary man for the plaintiffs/respondents. The trial court in its judgment, found in favour of the respondents. B

As rightly submitted in the respondents' brief, even where it is not reasonably possible to ascertain the location or identity or boundaries of the land in dispute the production of a Survey Plan may be an answer to provide a solution to the problem. The case of Salami v. Obodogun [1997] 49 LRCN 1020 at 1023 is cited and relied on. C

The learned trial Judge at page 203 of the records, stated inter alia, as follows:

"..... I find no substance in the submissions by the learned counsel for the defendants that the plaintiffs failed to prove (sic) (meaning prove) with certainty the area of land claimed. I find that the 1st plaintiff is a witness of truth so also are virtually all the witnesses of the plaintiffs. On the other hand I find the evidence of P.W.2 as most unreliable." E

The court below, at page 326 of the records, stated inter alia, as follows:

"The inconsistency said to exist between Exhibit 7 and the evidence of PW7 and PW10 as to the boundaries lies only in the imagination of the appellants. I cannot see the contradiction in the evidence of 1st plaintiff and Exhibit 7 since it is not the whole of Ekpesa land that is being disputed....." [the underlining mine] F

At pages 328 to 329, the court below stated inter alia, as follows: G

"This piece of evidence (i.e., part of the evidence of the PW7) considered alongside that of DW3 (2nd defendant) will undoubtedly show that the plaintiffs were in possession of the disputed land and the denial by the defendants of the existence of Ekpesa land would be seen not to be true. The trial Judge had the singular advantage of seeing the witnesses testify. He watched their demeanor (sic) and the appeal court H

on the cold printed records cannot decide on the issue of credibility.....”.

I agree. This is because, it is now firmly settled, that the function of assessment of credibility of witnesses is essentially for the trial court and not that of the Appeal Court. See the cases of Akpapuna & Ors. v. Nzeka & Ors. [1983] 2 SCNLR 1 at 14; Ebba v. Ogoto [1984] 4 S.C. 84 at 98; [1984] 1 SCNLR 372; Obodo & Anor. v. Ogba & Ors. [1987] 3 S.C. 459 at 460, 480-482, 485; [1987] 3 S.C.N.J. 82; Babatunde Ajayi v. Texaco Nig. Ltd. & Ors. [1987] 3 N.W.L.R. (pt. 62) 577; [1987] 9-11 S.C. 1 at 27 and many others. The respondents, cited and relied on the cases of Alize v. Umaru [2002] 14 N.W.L.R. (pt. 787) 369 at 390; Archibong v. Akpan [1992] 4 N.W.L.R. (pt. 238) 750 at 757, 760 C.A.; and Ibuluya v. Dikibo [2001] 8 N.W.L.R. (pt. 716) 678 at 680 C.A. I note that there are mix-ups in the citations in the respondents’ brief and in their legal/list of authorities.

Thus, where the question(s) that falls/fall to be determined raises/raise the issue of credibility an appellate court will not interfere. See also the cases of Ogunleye v. Oni [1990] 2 N.W.L.R. (pt. 135) 745; [1990] 4 S.C.N.J. 65; Ejabulor v. His Highness Osha [1990] 5 N.W.L.R. (pt. 148) 1; [1990] 7 S.C.N.J. 187; Ngillari v. NICON [1998] 8 N.W.L.R. (pt. 560) 1 at 20-21; [1998] 6 S.C.N.J. 16 - per Onu, J.S.C. and recently, Chief Okechi & 2 Ors. v. Chief Animkwai & 2 Ors. [2003] 18 N.W.L.R. 1 (pt. 851) 1; [2003] 2 S.C.N.J. 260 at 277 - per Tobi, J.S.C. Issue 1 fails and it is resolved against the appellants.

As regards the issue of retrial, it is now firmly established that it is only where a plaintiff has failed totally to prove his case and there is substantial irregularity apparent on the record or shown to the court that an order for retrial will be made. But this is not the case in the instant case leading to this appeal. See the case of Ayoola v. Adebayo [1969] 1 All NLR 159, 162 - per Coker, J.S.C.

Again, it is only where a trial court fails to make findings of fact on specific issues of fact and thus fails to resolve the issues that arise in the pleadings of the parties that an appellate court should send the case back to the trial court for retrial. See the

cases of Bamidele v. Adeyemi [1963] 1 ANLR 146 at 148; Shell B.P. v. Cole [1978] 3 S.C. 183; Adibu v. Binutu Karimu & Anor. [1988] 1 S.C. 136 at 139; [1988] 1 S.C.N.J. 70; Ezeoke & Ors. v. Nwagbo & Anor. [1988] 3 S.C.N.J. (pt. 1) 37 at 49; Chief Olufosoye v. Olorunfemi [1989] 1 N.W.L.R. (pt. 95) 27 and Sanni v. Dr. Ademiluyi [2003] 1 S.C.N.J. 197; just to mention but a few. I find that none of the circumstances of these cases, is applicable in the instant case leading to this appeal. See also recently, the case of Alhaji Okomalu v. Chief Akinbode (supra) where this court - per Tobi, J.S.C. at pages 68-69 of the S.C.N.J. and 229-232 of the All F.W.L.R., listed eleven (11) instances when this court, pursuant to section 22 of Supreme Court Act and Order 8 rule 13(1) of its Rules, will order a retrial and six (6) instances, when it will not so order. This issue is also resolved against the appellants.

Finally, there are concurrent findings of fact by the two lower courts. The appellants have failed to show why this court should interfere and the court has not seen any reason why it should interfere. See the cases of Njoku v. Erne [1973] 5 S.C. 293; Chikwendu v. Mbamali [1980] 3-4 S.C. 31 and Ibodo v. Enirofia [1980 5-7 S.C. 42 and many others. See also the cases of Abimbola v. Abatara [2001] 9 N.W.L.R. (pt. 717) 66 at 78-79 (it is also reported in [2001] 4 S.C.N.J. 73) and Chime & Ors. v. Chime [2000] 3 N.W.L.R. (pt. 701) 527 at 551 (it is also reported in [2001] 1 S.C.N.J. 1820 cited and relied on in the respondent's brief.

In the end result or final analysis, this appeal lacks substance and has failed abysmally. I have no hesitation in dismissing it and I so dismiss it. I hereby and accordingly, affirm the decision of the court below affirming the judgment of the trial court.

Costs follow the events. The respondents are entitled to costs fixed at N10,000.00 (ten thousand naira) payable to them by the appellants.

KUTIGI CJN

I have had the privilege of reading in advance the judgment just delivered by my learned brother Ogbuagu, J.S.C. I agree with the reasoning and conclusion that the appeal is clearly without merit and ought to be dismissed. It is hereby dismissed. I endorse the order for costs.

OGUNTADE JSC

The respondents were the plaintiffs at the Igarra High Court of the old Bendel State (now Edo State) and the appellants the defendants. The plaintiffs claimed against the defendants the following reliefs:

“(i) A DECLARATION that the Plaintiffs are entitled to Statutory Right of Occupancy to ALL THAT piece or parcel of farmland lying and situate between Rivers ALUA and IZO at Ekpesa Village, Akoko-Edo Local Government Area Bendel State within the jurisdiction of this Honourable Court and which said tend is verged PINK on Plan No. ISO/BD/ 1593/89 filed with this Statement of Claim.

(ii). N250,000.00 (Two Hundred and fifty thousand Naira) being damages for acts of trespass committed by 2nd to the 5th Defendants, their agents and/or servants or the said farmland and as tributes/rents due from the 1st and 7th Defendants and their agents and servants to the Plaintiffs for the use of their farmland.

(iii). AN ORDER of forfeiture of the farming interests or rights of the 1st and 7th Defendants on the said piece or parcel of land.

(iv). INJUNCTION restraining the Defendants jointly and severally, by themselves, their servants or agents from entering the land in dispute and doing thereon any farming in violation of the Plaintiffs’ Customary Rights or without the express permission of the Plaintiffs.”

The trial court, on 12-6-98 in its judgment, granted the plaintiffs’ claims. Dissatisfied, the defendants brought an appeal before the Court of Appeal, Benin (hereinafter referred to as ‘the court below’). On 23/04/2001, the court below in its unanimous judgment dismissed the appeal. Still dissatisfied, the defendants have brought a final appeal before this Court. The court below on 11-07-2001 granted the appellants the leave to

appeal to this Court on three grounds of appeal. From the said three grounds of appeal, the appellants formulated two issues for the determination of this Court. The issues are:

“1. *Was the court below right to have held that the apparent contradiction in the Respondents (then Plaintiffs) evidence on the identity of the land in dispute was not fatal to the claims for declaration of title and injunction. (Ground 1).*

2. *Was the court below right to have refused to order a retrial in view of the failure of the trial court to evaluate vital evidence. (Grounds 2 and 3).”*

It is apposite to observe that the success of the appellants’ second issue as framed above is dependent on their first issue. If I am able to hold as the two courts below did, that there were no contradictions in the evidence called by the plaintiffs (i.e. respondents) on the identity of the land in dispute, a consideration of the question whether or not the court below ought to have ordered a retrial would not arise.

Now, in paragraphs 6-8 of their statement of claim, the plaintiffs before the court of trial identified the land in dispute between the parties thus:

“6. *The land, the subject-matter of the present dispute is shown and verged pink in the survey plan No. ISo/BD/1593/89 dated 13/12/89 made and duly signed by a Licensed Surveyor, Mr. F. U. Iyawe. The said survey plan is hereby filed along with this Statement of Claim.*

7. *The Plaintiffs aver that the area verged pink represents the area in dispute in this case and the said area is within the area verged green which represents the Plaintiffs’ area of land which is not in dispute in this case.*

8. *The Plaintiffs aver that the said land referred to in paragraph 7 above is situate, lying and being at Ekpesa within the jurisdiction of this Honourable Court and is known and called Ekpesa land.”*

The defendants in their joint Statement of defence in paragraphs 8-15 H pleaded thus:

“8. *With regard to paragraph 6 of the Statement of claim, the Defendants aver that the said survey Plan No. ISo/BD/1593/89 filed by*

the Plaintiffs is a geographical and cadastal distortion of the area it purports to represent, and it clearly portrays the Plaintiffs lack of knowledge of the land they have set out to claim in this suit.

B 9. *The Defendants will contend at the trial that the said Plaintiffs survey plan is full of inaccuracies, omissions, distortions and misrepresentations and therefore cannot ground a claim for injunction.*

C 10. *With regard to paragraph 7 of the Statement of Claim, the Defendants repeat paragraphs 8 and 9 above and will further contend at the trial that the Plaintiffs survey plan is unreliable.*

11. *The Defendants deny paragraph 8 of the Plaintiffs Statement of Claim and will at the trial contend that there is no land known and called Ekpesa land to the knowledge of the Defendants.*

D 12. *The Defendants deny paragraphs 9, 10, 11, 12 and 13 of the Statement of Claim and will show at the trial that the land in dispute was first settled upon by the Ekuya people of Ibillo who migrated to the present site of Ekuya Quarters, Ibillo from Benin through Ilafe.*

E 13. *The Defendants avers (sic) that the land in dispute is owned by the Ibillo Community and was placed under the caretaker ship of Ekuya Quarters several centuries ago.*

F 14. *The Defendants aver that the Ibillo Community were the first people to settle and farm on the land in dispute and has been so settled several decades before the Ekpesa people arrived at a place called Ayunha and later at Onyaoase.*

G 15. *The Defendants will show at he trial that several decades after Ibillo had settled on the land in dispute, one Aigboje the then Ruler of Ekpesa who was being harassed by war, at Oyanose had sought for shelter and refuge with his maternal relations, his mother Ekecha being an Ibillo woman of Ilosia family in Ekuya Quarters.”*

H A comparison of the extracts from the parties’ pleadings reproduced above reveals that it was not the defendants’ case that they did not know the land in dispute. Rather, what was pleaded was that the plan pleaded by the plaintiffs was inaccurate and unreliable. The defendants nevertheless went on to plead that the “land in dispute” was first settled upon by the “Ekuya people of Ibillo”. In paragraph 14, the defendants

pleaded that their “Ibillo community were the people to first settle “on the land in dispute” before the “plaintiffs’ “Ekpesa people arrived at a place called Ayunha and later Oyaose.” It is thus apparent that parties were aware of the land in dispute between them and had pleaded conflicting traditional histories as to the origin of title each asserted. B

The parties called witnesses in support of the facts pleaded on their pleadings. Both parties also called their respective licensed land surveyors’ to testify for them. At page 202 of the record, the trial judge in his judgment expressed his views on the evidence of the two land surveyors thus: C

“Both parties commissioned licensed surveyors to survey the disputed land. These Surveyors were called and they testified on oath and tendered signed survey plans of the land in dispute. After a close and careful examination and comparison, I found by and large that Exhibits D 7 and 10 are by and large in respect of the land in dispute between both parties. Both plans showed a Tobacco farm belonging to one Alabi Adejumo, Adenuguebe Union farm, Egbi Cemetery, Ikpesa Primary School. Under cross-examination, D.W.1 the Surveyor who tendered Exhibit 10 admitted that there was a tobacco farm on the land but that the Defendants failed to give him the name of the owner hence he could not indicate this. With this and more in mind, I fail to understand what names mentioned by the Plaintiffs in their amended Statement of Claim are E ‘fictitious’ as averred in paragraph 25 of the joint Statement of Defence F”.

The court below, at pages 326-327 of the record gave a thorough consideration to the contention of the defendants that the plaintiffs had failed to properly identify the land in dispute. The court below said: G

“The inconsistency said to exist between Exhibit 7 and the evidence of PW7 and PW10 as to the boundaries lies only in the imagination of the appellants. I cannot see the contradiction in the evidence of 1st Plaintiff and Exhibit 7 since it is not the whole of Ekpesa land that is H being disputed. On page 72 of the records the 1st Plaintiff stated in examination in-chief that “Use Hill is well inside Ekpesa land” and under cross-examination he said:-

'I see Use Hill on the right side of Exhibit 7. Use Hill is outside the disputed area'

It is the area verged pink in Exhibit 7 that is being disputed but the boundaries of Ekpesa land are verged green and the location of Use Hill in Exhibit 7 is outside the disputed area. Learned Counsel for the Appellants has sought to make heavy weather of PW5's evidence when he stated at page 59 that, 'Ose Hill is on our land'. This has been taken out of context. The evidence of PW5 runs thus:

'I know as a fact that there was a land dispute between Ekpesa and Lampese. The White man settled the dispute for us. He it was who demarcated the boundary. He used a big rock to demarcate the boundary and drew a line from it to Ose Hill - Ose Hill is on our land.'

This apparent contradiction cannot be used to discredit all the other features that define the boundaries of the disputed land. After all there is still the long stone ground which forms the boundary between Ekpesa and Lampese. If Use Hill was the only crucial land mark on which the identity of the disputed land could be settled, then the argument of learned counsel that one of the boundaries of the disputed land was not proved will stand and the Plaintiffs should not be granted the declaration being sought and if granted must be set aside on appeal. I do not find merit in the argument in this issue and it is resolved against the Appellants in favour of the Respondents."

*It is by now apparent from the extracts of the judgments of the two courts below reproduced above that a most careful and reflective consideration was given to the defendants' contention that the plaintiffs failed to establish the identity of the land in dispute. The contradictions in the evidence of P.W.7 and P.W.10 cannot be regarded as substantial enough to affect the case broadly made by the plaintiffs at the trial as to the identity of the land in dispute. Before me in this Court, there are concurrent findings of the two courts below on the issue agitated by the defendants/appellants. The appellants have not shown why I should disturb the said findings. See *Ibodo v. Enirofia* [1980] 5-7 SC. 42. The conclusion to be arrived at, which is inevitable, is that the first issue raised by the appellants has not been sustained and the second issue necessarily*

fails also.

I agree with the lead judgment of my learned brother Ogbuagu JSC. that this appeal has no merit. I would also dismiss it with N10,000.00 costs in favour of the plaintiffs/respondents.

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MUKHTAR JSC

I have had the advantage of reading in advance, the lead judgment delivered by my learned brother Ogbuagu, JSC. The lead judgment has dealt thoroughly with the issues distilled from the grounds of appeal raised in this appeal, but I would like to briefly touch on one of them for the purpose of clarity and emphasis. The learned counsel for the appellants in dealing with the identity of the land in dispute made heavy weather of the excerpt of the judgment of the lower court on page 326 of the printed record of proceedings which reads :-

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“This apparent contradiction cannot be used to discredit all the other features that define the boundaries of the disputed land. After all there is still the long stone ground which forms the boundary between Ekpesa and Lampese.”

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I have added the underlined supra, which is the continuation of the excerpt attacked, as is contained on page 326 - 327. It seems that the learned counsel found it convenient to stop at the observation on the apparent contradiction rather than proceed to continue with the above underlined that further clarified the court’s reasoning on the issue of identity.

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Again, if one reads the earlier excerpt of the judgment of the lower court, still on page 326 of the printed record of proceedings, one will see that the learned Justice, as per the lead judgment thoroughly considered the contradiction alleged thus:-

G

“The inconsistency said to exist between Exhibit 7 and the evidence of PW 7 and PW 10 as to the boundaries lies only in the imagination of the appellants. I cannot see the contradiction in the evidence of 1st plaintiff and Exhibit 7 since it is not the whole Ekpesa land that is being disputed. On page 72 of the records the 1st plaintiff stated in ex-

H

1412 Ogedengbe v. Balogun (2007) 3 KLR Mukhtar JSC
amination in chief that “Use Hill is well inside Ekpesa land” and under cross-examination he said:-

‘I see Use Hill on the right side of Exhibit 7. Use Hill is outside the disputed Area.’

B It is the area verged green and the location of Use Hill in Exhibit 7 is outside the disputed area. Learned Counsel for the Appellants has sought to make heavy weather of PW 5’s evidence when he stated at page 59 that, “Ose Hill is on our land.” This has been taken out of context. The evidence of PW 5 runs thus:

C *“I know as a fact that there was a land dispute between Ekpesa and Lampese. The Whiteman settled the dispute for us. He it was who demarcated the boundary. He used a big rock to demarcate the boundary and drew a line from it to Ose Hill - Ose Hill is on our land.”*

D The later underlining is mine.

The lower court, to my mind, made a fine job of evaluating the evidence on the identity of the land in dispute, and I do not see any justified reason why this court will disturb its finding on the proof of identity as required by the law on the proof for declaration of title to land. My learned brother has stated the plethora of authorities on this principle of law. See also the recent case of Ezukwu v. Ukachukwu 2004 7 NWLR part 902 page 227 at 249, where Edozie JSC stated the requirement of the law, and on whom the onus is, thus:-

F *“In an action for declaration of title to land, the onus is on the plaintiff to establish with certainty the identity of the land in dispute to which his claim is related. This, he can do in one of two ways, viz, by oral evidence describing with such degrees of accuracy the said parcel of land*
G *in a manner that will guide a surveyor in producing a survey plan of the said land. See Baruwa v. Ogunshola (1988) 4 WACA 159. Another way and perhaps a better way of proving the identity and extent of the land claimed is by the claimant filing a survey plan reflecting all the features*
H *of the land showing clearly the boundaries. See Awote v. Owodunni (No. 2) (1987) 2 NWLR (pt. 57) 367.”*

Looking at the evidence before the trial judge I am satisfied that the respondents proved the identity of the land in controversy as required

and stated above and so discharged the onus placed on them, whatever anomaly (if at all any existed) have been ironed out by the learned Justices of the Court of Appeal in the reproduced excerpt of the judgment supra.

I will round up this contribution by reiterating the pronouncement of my learned brother in the lead judgment, that this is indeed an appeal on concurrent findings of fact of the two lower courts. In a situation like this, the position of the law is that such concurrent findings of fact of the two lower courts will not be disturbed unless they have been shown to be perverse or consist of substantial errors of law or procedure, that must have led to a miscarriage of justice. This court will interfere with such findings only if the above factors are present. In the present case the appellants have not convinced this court that the concurrent findings deserve to be disturbed. See the cases of Anthony Ibhafidon v. Sunday Igbinosun 2001 8 NWLR part 716 page 653, Ezendu v. Obiagwa 1986 2 NWLR part 21, page 208 and Balogun v. Akanji 2005 10 NWLR part 933 page 394.

In the light of the above and the fuller reasoning in the lead judgment I am in full agreement with my learned brother that the appeal is devoid of merit, and should be dismissed. I also dismiss the appeal, and abide by the consequential orders in the lead judgment.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Benin City in appeal No. CA/B/328/98 delivered on the 23rd day of April, 2001 dismissing the appeal of the appellants against the judgment of the then Bendel State High Court holden at Igarra Judicial Division in suit No. HIG/3/39.

In paragraph 23 of the Amended Statement of Claim the respondent's claimed against the appellants as follows:-

“23 WHEREOF the plaintiffs claim against the defendants jointly and severally as follows:-

(i). A DECLARATION that the plaintiffs are entitled to Statutory

Right of Occupancy to ALL THAT piece or parcel of farmland lying and situate between Rivers ALUA and IZO at EKPESA Village, AKOKO-EDO Local Government Area, Bendel State within the, jurisdiction of this Honourable Court and which said land is verged. PINK on Plan No.

B ISO/BD/1593/89.

(ii). N250,000.00 (Two hundred and fifty thousand Naira) being damages for acts of trespass committed, by 2nd to the 6th defendants, their agents and/or servants on the said farmland and as tributes/rents due from the 1st and. 7th defendants and their agents and servants to the plaintiffs for the use of their farmland.

(iii). AN ORDER of forfeiture of the farm interests or rights of the 1st and 7th defendants on the said piece of land.

D (iv). INJUNCTION restraining the defendants jointly and severally by themselves, their servants or agents from entering the land in dispute and doing thereon any farming in violation of the Plaintiffs' Customary Rights or without the express permission of the plaintiffs."

E Judgment was entered in favour of the plaintiffs on 12/6/98 resulting in an appeal to the Court of Appeal where the surviving issues for determination were:-

F "2. On the stale of the evidence was the trial court right to hold that the plaintiffs proved with certainty, the location, area and the boundaries of the land in dispute.

3. Whether the failure of the trial court to evaluate the evidence of DW1, DW3, DW4 and DW5 and make vital findings of facts thereon was not substantial enough to warrant an order of retrial."

G As stated earlier, in this judgment, the appellants lost resulting in the instant appeal where the issues formulated by learned counsel for the appellants FOLA AJAYI Esq. in the appellants' brief of argument filed on 18/2/03 are as follows:-

H "1. Was the court below right to have held that the apparent contradiction in the respondents (then plaintiffs) evidence on the identity of the land in dispute, was not fatal to the claims for declaration of title and injunction. (Ground.1).

2. Was the court below right to have refused to order a retrial in

view of the failure of the trial court to evaluate vital evidence. (Grounds 2 and 3)."

It is very clear from the issues reproduced supra before the lower court and this court that they are substantially the same and they involve issues of facts only. The appeal is therefore on concurrent findings of B facts by the lower courts.

In arguing issue No. 1 learned counsel for the appellants submitted that the lower court having conceded that there is an apparent contradiction in the evidence adduced the court was bound to hold that the boundary on Lampese side of the land in dispute had not been proved with certainty and cited and relied on the decision in the case of Amata vs Modekwe 14 WACA 580 at 582. C

At pages 326 and 327 of the record of appeal, the lower court made the following findings of facts:- D

"The inconsistency said to exist between exhibit 7 and the evidence of PW7 and PW10 as to the boundaries lies only in the imagination of the appellants. I cannot see the contradiction in the evidence of 1st plaintiff and exhibit 7 since it is not the whole of Ekpesa land that is being disputed. On page 72 of the records the 1st plaintiff stated in examination in chief that "Use Hill, is well inside Ekpesa land" and under cross-examination he said: E

"I see Use Hill on the right side of Exhibit 7. Use Hill is outside the disputed area." F

It is the area verged pink in Exhibit 7 that is being disputed but the boundaries of Ekpesa land are verged green and the location of Use Hill in Exhibit 7 is outside the disputed area. Learned counsel for the appellants has sought to make heavy weather of PW5's evidence, when he stated at page 59 that, "Ose Hill is on our land." This has been taken out of context. The evidence of PW5 runs thus: G

"I know as a fact that there was a land dispute between Ekpesa and Lampese. The. White man settled the dispute for us. He it was who demarcated the boundary. He used a big rock to demarcate the boundary and drew a line from it to Ose Hill - Ose Hill is on our land." H

This apparent contradiction, cannot be used to discredit all the

other features that define the boundaries of the disputed, land. After all there is still the long stone ground which forms the boundary between Ekpesa and Lampese. If Use Hill was the only crucial land mark on which the identity of the disputed land could be settled, then the argument of learned counsel that one of the boundaries' of the disputed land was not proved will stand and the plaintiffs should not be granted the declaration being sought and if granted must be set aside on appeal. I do not find merit in the argument in this issue and it is resolved against the Appellants in favour of the respondents."

It is settled law that for a plaintiff to succeed in a claim for declaration of title to land he must establish with certainty the identity of the land whose title he claims without which his claim must fail. It is also settled that the identity of the land in dispute is usually established by identifying the boundary features or marks and the people with whom the claimant shares the boundaries of the said land with. These features are usually established at the trial by calling evidence of the people who claim the land as theirs as well as evidence of those who share common boundaries with the said land not forgetting the tendering of a survey plan of the disputed land in which the features constituting the boundary marks are identified as well as the people who share common boundaries with the land not forgetting other land marks such as farms, ruins, trees, foot paths, juju shrines etc, etc in the land in issue.

From the passage reproduced supra from the judgment of the lower court, it is very clear that the court, though found the existence of apparent contradiction in the evidence, as regards a feature on the land, concluded that the said inconsistency is not such as would lead to a reversal of the finding of fact on the identity of the disputed land having regard to the fact that other features co-exist along the stretch of boundary in issue which have been properly established in evidence and can sustain the finding by the trial judge on the matter. I agree entirely with the conclusion of the court below in the passage reproduced earlier in this judgment and hold that it is not every inconsistency in evidence that would lead to a reversal of the decision of a lower court on a matter and that for the inconsistency to have the effect of reversal, it must be on a

material fact relevant to the issue in controversy between the parties. In the instant case, Use Hill as a feature or boundary mark to which the inconsistency relates is not the only boundary mark relevant to that stretch of boundary and since the other features have been duly established in the evidence on record, their proof renders the inconsistency as regards Use Hill of no moment and consequently not fatal to the case of the respondents.

It is settled law that where there is concurrent findings of facts by the trial and appellate courts and there is sufficient evidence on record in support of same, unless the findings are found to be perverse or are not supported by evidence or were reached as a result of wrong approach to the evidence or as a result of wrong application of a principle of substantive law or of procedure, the Supreme Court, even if disposed to a different conclusion upon the printed evidence, cannot do so. See *Abimbola vs Abatan* (2001) 9 NWLR (pt. 717) 66 at 78 - 79. I therefore resolve issue No. 1 against the appellants.

On the second and last issue, it is important to note that the principles guiding the courts in making an order of retrial of an action have been stated in a number of decided cases as being dependent on the facts and circumstances of the particular case. It is agreed, however, 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 case.

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 - see *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) (1978) 2 NWLR (pt. 52) 366; Adeyemo vs Arokopo (1988) 2 NWLR (pt. 79) 703; Osolu vs Oson (2003) 11 NWLR (pt. 832) 608.

B In the instant case, the trial, court did make a proper and detailed
evaluation of the evidence adduced by both parties at the trial and made
definite findings of facts on the issues joined by the parties to the action
which findings were affirmed by the lower court. This Court has not
C found anything wrong with the said findings and has consequently af-
firmed same. The confirmation of the judgment of the trial court by the
Court of Appeal and this Court means that the plaintiffs/respondents had
established their case against the appellants and it would be, in the cir-
cumstance, inequitable for this Court to order a retrial; In short, I hold
D the considered view that the circumstances in which the court can order
a retrial do not exist in the instant case, consequently issue No. 2 is also
resolved against the appellants.

I therefore agree with the reasoning and conclusion of my learned
E brother OGBUAGU, JSC that the appeal is clearly without merit and should
be dismissed. I order accordingly and abide by all consequential orders
contained in the said lead judgment including the order on costs.

Appeal dismissed.

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