

SUPREME COURT OF NIGERIA

11TH MAY, 2007. SC. 387/2001

**CORAM:- U.A. KALGO, G. A. OGUNTADE, A. M. MUKHTAR,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH, JJSC**

1. MICHAEL ODUNZE

2. ONYEAJU ODUNZE

3. OGBUEHI ODUNZE

..... APPELLANTS

4. UKACHIAMU

5. JULIUS ODUNZE

6. OKWUCHIAMUZIE

AND

1. NWOSU NWOSU

2. BENEDITH IHU

3. COLUMBUS AKPELU

..... RESPONDENTS

4. AMBROSE ONYEZE

5. CLETUS AJOKU

APPEALS - Notice of appeal - Preliminary objection - Purport of preliminary objection and issues for determination - Preliminary objection is not raised vide issues for determination - As wrongfully done by respondents (H1)

APPEALS - Preliminary objection - To notice of appeal - That is totally misconceived and not properly initiated - Will be struck out (H2)

LAND LAW - Title - Identity of the land - Plaintiff has the onus of showing identity of the land with certainty - Vide oral description or survey plan - Save where parties know the land (H3)

COURTS - Issues in dispute - Customary Court - As its proceedings are not handled vide pleadings - Trial and appellate courts have to discern the issues in dispute - By examining the claim and parties' evidence (H4)

2444 Odunze v. Nwosu (2007) 5 KLR (pt. 238) 2443; (2007) 13 NWLR

LAND LAW - Issues - Misconception - Boundary dispute - Relates to issue of ownership - Burden of proving identity of land and boundaries rests on plaintiff - Court of Appeal misconceived the issues unto error (H5)

LAND LAW - Title - Identity of the land - Boundaries - Proof of boundaries - Is plaintiff's first duty - Before delving into other elements of proof of ownership (H6)

LAND LAW - Boundaries - Two methods of proof - Are filing a plan or oral description a surveyor can rely on to make a plan - Plaintiff's case must collapse - As boundaries were not proved (H7)

LAND LAW - Title - Proof - Any of the five methods of proof outlined in Idundun case - Were not complied with - As plaintiffs failed to satisfy the first hurdle - Of proving identity of land and its boundaries (H8)

FACTS

Before an Imo State Customary Court, the plaintiffs/respondents filed an action against the defendants/appellants. They claimed declaration for customary right of occupancy, general damages and injunction against defendants in respect of the land in dispute. The parties and their witnesses gave evidence. The trial Court undertook a visit to the locus in quo. Evidence was taken at the locus. Counsel for both parties addressed the Court. In a reserved judgment, the trial court dismissed the plaintiffs' claim, and awarded the land in dispute to defendants who filed no counter claim.

Plaintiffs appealed to the Imo State Customary Court of Appeal which found in their favour. Defendants' appeal to the Court of Appeal was dismissed. Still dissatisfied, defendants have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Was the lower court right to have excused the proof of root of title by the plaintiffs for the reasons which it gave in the judgment?"

2. *Was the lower court correct to have concluded that it was for the purpose of establishing the location of the boundary that oath was administered?*

3. *Was the presence or otherwise of Nwite shrine on the land in dispute not an issue before the Customary Court of Appeal of Imo State and did the lower Court Act rightly by allowing an interference of a finding of fact by the trial court in this action?*

4. *Was the lower court right when it held that the trial court did not properly evaluate the evidence led at the trial?*

HELD (Unanimously allowing the appeal per **CHUKWUMA-ENEH JSC**)

Purport of preliminary objection and issues for determination

1. I do not see how the contention being put forward here by the respondents has remotely affected the validity of the Notice of Appeal in this case.

To raise an objection by way of issue for determination as in this instance is not only novel in that issue for determination and preliminary objection under our Rules do not have a common meeting ground. How to initiate an objection against an appeal is fully covered in the Rules. Preliminary objection strictly speaking runs counter to the intendment of issues for determination in the claims before the courts in the sense that it aborts, indeed forecloses the hearing of the case in limine and if upheld terminates the case; it automatically puts an end to the case without determining the rights of the parties thereto, while issue for determination presupposes that the case is, all things being equal, on course for hearing. An issue for determination is a combination of facts and the law on a particular point which when decided affects the fate of the appeal. It must relate to the grounds of appeal. The two are more or less strange bedfellows; and so, for a preliminary objection to be dressed in the garb given to it here is strange and improper. (p. 2462 E/H)

Preliminary objection - To notice of appeal

2. The instant objection is not an objection in any sense of the term as what and what the respondents are objecting to here are still at large and

may be contended in the main appeal. A notice of appeal being an initiating process in every appeal process is so crucial in the appeal process as a writ of summons is in ordinary civil actions that a party's complaints against a decision by way of grounds of appeal not forming part of the Notice of Appeal cannot be entertained. Furthermore once the Notice of Appeal is vitiated in anyway the appeal becomes incompetent and liable to be struck out. See Kolawole v. Alberto (1989) 2 SC (pt. 111) 187. The point being taken here is that where a notice of appeal as the instant one is defective or incompetent in any respect for any reason, there is no valid appeal and the court would have no jurisdiction to deal with the purported appeal but to strike it out. Even then what the respondents seem to be contending here is want of consistency in the appellants' case both here and the lower courts and it cannot be dealt with under the compass of preliminary objection as it is non sequitur. The preliminary objection is totally misconceived and it is hereby struck out. (p. 2463 D)

Title - Identity of the land

3. As can be seen, resolving the question of the identity and location of the land in dispute with its boundaries is the key to this case. As decided in Baruwa v. Ogunsola (1938) 4 WACA 159 a plaintiff seeking a declaration of title has the onus of showing with certainty excepting where parties know the land, the identity and location of the land in dispute showing clearly its boundaries and features on them failing which his claim as to declaration of title must fail. In the cited case it has been showed that this can be done by oral description of the boundaries and the features of the land or by plan.

No plan has been tendered in this case. Since the parties here have a common boundary it follows that once the identity of the land in dispute and its boundaries with the features are showed and proved the issue of the boundary of the land between the parties would have been ascertained. (p. 2466 B)

Issues in dispute - Customary Court

4. The foregoing clearly brings to the fore the question of what really the

parties are contesting in this case: that is to say, what are the issues in dispute between them. It is my view that where as here the case has started from the Customary Court with no pleadings to contend with before it (the trial court), and as settled that an appellate Court as this court, as well as the appellate lower courts have to discern the issues in dispute between the parties by examining the claim, the evidence of the parties at the trial Court and so get to the matter in controversy between the parties. This age long principle is as embedded in the decision in Chukwunta & Ors. (supra) Nkwo & Ors v. Uchendu & Anor (Supra). I must emphasis that this ought to be the attitude of the lower appellate courts to this matter. Both have in this regard floundered. (p. 2467 B)

LAND LAW - Issues - Misconception

5. I think the court below with respect, has completely misconceived the nature of the issues upon which this case has been fought hence it has walked into a grave error of judgment. Much as the parties have been disputing the boundary where their respective parcels of land abut each other it is an aspect of the larger issue in the case as to the ownership of the land in dispute its identity and location. It is fundamental that where the parties own land on either side of a common boundary, the boundary features along it must be clearly shown and proved. In this case in other words, it is necessary to show very clearly the identity of the land and where the boundary between the parties is and what the features on it are. This is done within the context of proving the identity and the boundaries of the land in dispute and the burden in this respect on the authorities rests squarely on the respondents' (plaintiffs) to be discharged if they have to succeed in the claim. It is in this light that I see the findings of the trial court that "the parties are disputing boundary." The boundary being disputed does not hang in the air. So, it has to be discussed in the context of proving the identity and boundaries of the land the parties are disputing, after all, the plaintiffs have in their claim alleged trespass into their land - meaning that the defendants have crossed their common boundary into the plaintiffs land. (p. 2469 A)

Proof of boundaries - Is plaintiff's first duty

6. Clearly fixing of boundaries between the parties is definitely relevant in the context of establishing the identity of the area of the land in dispute and its location between the parties. In this case the onus on the respondents' (plaintiffs) is to show by evidence as respondents' (plaintiffs) that the identity and boundaries of the land in dispute are certain. This has to precede any attempt at delving into other issues in proving the respondents' (plaintiffs) entitlement/ ownership of the land in dispute. So held the Supreme Court in the case of Udeze v. Chidebe (1990) 1 NWLR (pt. 125) 141 at 159 per Nnaemeka-Agu, JSC as follows:

"It has of course been stated in a number of decided cases beginning from Baruwa v. Ogunsola (1938) 4. WACA 159 that the first duty of a person who comes to court for a declaration of title is to prove the area over which he claims with certainty. I believe the law should be regarded as settled that although a plan may not be necessary in cases where the identity and precise boundaries of the piece or parcel of land in dispute are known to the parties to the dispute. Where as in this case there is a dispute as to the boundary or identity or both, such must be proved with certainty, so on this finding alone the appellants failed to prove their claim for title"

I have no illusions that by, the plaintiffs' account, the boundary or identity or both of the land in dispute in the instant case cannot be said to have attained the criterion set-forth in Udeze's case.

Without any doubt whatsoever from the above findings and decision of the trial court the identity of the land in dispute and the boundaries still remain a mirage even though they are the issues the respondents' (plaintiffs) have the duty to satisfy the trial court firstly. On this ground alone the plaintiffs' case is bound to fail in that before a court trying a land case goes into the facts of the case it must firstly satisfy itself of the certainty of the land in dispute and its boundaries. (pp. 2469 G/2472 D)

Boundaries - Two methods of proof

7. The two methods of identifying the land in dispute with its boundaries as in the decisions of Kwadzo v. Ajei (1944)10 WACA 274 and Udofia &

Anor v. Afia & Ors (1940) 6 WACA 24, are by -

“1. *The plaintiff adducing oral description of the land in dispute that a surveyor acting on the strength of the description can make a plan of the land.*

2. *The plaintiff filing a plan showing the land in dispute with its boundaries.*” B

As no plans of the land in dispute have been tendered by both sides in this case the obvious way out in this case is to find out whether the plaintiffs have by oral description of the land in dispute adduced enough material to enable a surveyor readily produce a plan of the said land with its boundaries clearly defined. In this regard if I may repeat, I have perused the plaintiffs’ evidence including their witnesses and the claim filed as per the record. The burden in this regard is on the respondents’ (plaintiffs). There are no materials to assist a surveyor to produce such a plan; not even from the finding of the trial court at the locus. Strangely enough the trial court could not be shown the Nwite Shrine, the fulcrum of the respondents’ (plaintiffs) case. Thus making nonsense of the claim of Nwite Shrine as the exact spot where the oath of 1973 was administered and Nwite Shrine as a positive boundary feature. What I have endeavoured to show above is that the plaintiffs on whom lies the onus in this regard have not testified as to the identity and boundaries of the land in dispute with that degree of certainty to enable a surveyor to produce a plan of it. Their case must collapse on this ground. (p. 2470 E) C D E F

Title - Five methods of proof outlined in Idundun case

8. Another angle from which to examine the respondents’ (plaintiffs) claim for a declaration of title, in this case lies in the settled principle that a plaintiff in the circumstances must prove by his evidence his entitlement/ownership of the land in dispute so as to be entitled to the declaration he claims. The plaintiffs have claimed declaration of title of ownership to the land in dispute. Again, it is settled that where as the plaintiffs here so claims they must prove their title to the land in dispute by one of the five ways listed in the case of Idundun v. Okumagba (1976) 10 SC 227 which I have listed below. In this case therefore, the plaintiffs have G H

by their claim for a declaration of title put their title in issue and they must prove their title by one of the five ways that is

- “1. by traditional evidence*
- 2. by production of document of title*

B *3. by acts at ownership over sufficient length of time numerous and positive enough to warrant the inference that the person is the true owner.*

- 4. long possession*

C *5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would be the true owner of the land.”*

The respondents’ (plaintiffs) case on any of these ways of proving their case did not take off the ground. I must recount that to get to this stage of examining the plaintiffs’ case presupposes that they have crossed the first hurdle of satisfying the court on the identity of the land in dispute and its boundaries. The plaintiffs’ have not discharged that burden. A heavy burden is on the respondents’ (plaintiffs) to satisfy the court by their evidence that they are entitled to the declaration of title to the land and in so doing they must rely on the strength of their case not on the weakness of the defendants’ case. (p. 2472 F)

F **NOTABLE POINTS OF INTEREST**
OGUNTADE JSC

1. Difference between land dispute and mere boundary dispute

When the particulars above are read along with the claims made by the plaintiffs, it is manifest that this simply was a land dispute not just a boundary dispute as the two courts below would appear to have described the plaintiffs’ case. In the nature of the evidence called by parties, there is no doubt that the parties were neighbours who shared a boundary line. Notwithstanding that the dispute was as to where the boundary line lay, it was still necessary for the plaintiffs to show the origin of their title and explain in the process how the boundary line came to be at the point where the plaintiffs claimed it was. I am not in any doubt that a case may raise exhaustively for determination the exact loca-

tion of the boundary line between two adjoining landowners. This arises where the two adjoining landowners had in the past known their boundary line and where one of them is making an attempt to relocate or shift the boundary line which had previously been acknowledged by parties. That was not the position here. The plaintiffs who sued asking for declaration of title bore the burden of establishing his title and in that process needed to lead evidence to establish or identify the quantum of the land in dispute. (p. 2476 H)

MUKHTAR JSC

2. Court cannot grant title to defendant without a counter claim

Where a plaintiff's claim is not proved to the satisfaction of the court then the right order to make is a dismissal of the claim by the court. But in this case rather than merely dismiss the plaintiffs' claims, the learned trial court proceeded to turn the table of claim to the defendants' side by granting them what the plaintiffs sought. This was wrong for in so far the defendants did not counter-claim on the land in dispute, it was not entitled to such grant of customary right of occupancy and order of injunction and should not have been granted the orders. The cardinal principles of the law that is well settled is that a court is not a charitable institution that would grant reliefs that are not claimed by a party. It must restrict and confine itself within the walls of the reliefs a party approaches it for, and not to undertake its own generous acts of awarding reliefs not sought. (p. 2482 E)

ONNOGHEN JSC

3. Claim to title - Primary issue to prove

I hold the considered view that the issue of identity of the land in dispute in a claim for declaration of title only becomes relevant after the plaintiff must have cleared the primary hurdle which is proof of his root of title. However, it is settled law that for the plaintiff to succeed in a claim of title to land, he must establish, with certainty, the identity of the land he claims. This is usually done by calling, as witnesses, those with whom the plaintiff shares common boundaries as well as witnesses to trace the bound-

ary marks .along the boundary, of the land in dispute in addition to tracing his root of title to the said disputed land. Where the plaintiff fails to do so his action must fail. (p. 2489 B)

B *4. Trespass claim puts title in issue*

Apart from the unambiguous claim of the respondents for declaration of title, it is settled law that where a plaintiff claims for damages for trespass, as in the instant case, his title to the land allegedly trespassed upon is thereby put in issue. In other words for the plaintiff in such a case to succeed, he must first establish his title to the land in dispute before proceeding to establish possession thereof. (p. 2490 A)

REPRESENTATION

D Chief Eze Duru-Iheoma for the appellants

D.C. Denwigwe Esq. with him M.A. Denwigwe Esq. for the respondents.

E **CASES REFERRED TO**

Chukwunta v. Chukwu & Ors. 14 WACA 341

Nkwo & Ors v. Uchendu & Anor. (1996) 3 NWLR

Idundun v. Okumagba (1976) 9/10 SC 227

Kodlinye v. Odu (1935) 2 WACA 331

F Bello v. Eweka (1981) 1 SC 101 & Eleme v. Akenzua (2000) 13 NWLR (pt.683) 92

Cooperative Development Bank Plc v. Joe Golday Co. Ltd. (2000) 14 NWLR (pt.688) 506, 534-535

G Ekpa & Ors v. Utong & Ors (1991) 6 NWLR (pt. 197) 218

Ogunleye v. Oyewole (2000) 14 NWLR (pt.687) 290 at 302

Agu v. Ikembe (1991) 3 NWLR (pt.180) 385 at 408

Onwuanumkpe v. Onwuanumkpe (1993) 8 NWLR (pt.186)

H Oparaji v. Ohanu (1999) 9 NWLR (pt.618) 290 @ 304

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

In this case the appellants before this Court were the defendants at

the trial Customary Court. The plaintiffs (the respondents here) in their claim at the trial Customary Court have claimed as follows:

“(1) Declaration of Customary Right of Occupancy to the piece or parcel of land known as and Called ‘Ukwu Wite’ lying and situate along Ihie and Obitti Road in Ohaji.

(2) Two thousand Naira (N2,000.00) general damage for trespass.

(3) An injunction restraining the defendants their agents and or servants from any further acts of trespass or interferences with the said plaintiffs land.”

At the trial the parties and their witnesses gave evidence and the trial Court undertook a visit to the locus in quo. Evidence was taken at the locus. Both counsel to the parties addressed the trial court and in a reserved judgment the trial court dismissed the plaintiffs’ case. Dissatisfied with the decision the plaintiffs appealed to the Imo State Customary Court of Appeal. It heard the appeal and set aside the decision of the trial Customary Court given in favour of the defendants. Dissatisfied with the decision the defendants have appealed to the Port Harcourt Division of the Court of Appeal that is, the Court below which unanimously dismissed their appeal. The court below in the concluding part of its judgment from page 20 last paragraph to page 22 LL 1 - 12 held thus:

“The main issue concerns the complaint that the court below erroneously gave judgment for the respondent when the latter had failed to prove their root of title. With respect, there is a misconception here. It has been seen that the real issue before the Court was the location of the boundary between the parties. Each party agreed that the land beyond the boundary claimed by it belonged to its opponent. The question of root of title did not, therefore, arise. All that the plaintiffs were obliged to do to establish that the boundary was where they claimed it to be The evidence before the Court showed that the appellants made the respondents swear that the boundary was where they claimed it was. The evidence was also more consistent with the claim by the respondents that the swearers survived than the contrary claim by the appellants. The law is that were traditional arbitration is resorted to and the parties agree to be bound by the decision and on the basis of the understanding one side makes the

other take an oath, the side that made the other take the oath will not be allowed to resile from the understanding. Iguh, J.S.C. The Court below clearly stated the correct position of the law when it said that once the Oath is taken and won or lost the issue at stake is *res judicata* and binds the parties.”

On the whole, subject to what I have said with regard to the order fixing boundary between communities the appeal fails as it lacks merit. The decision of the Court below allowing the appeal by the respondents before us is affirmed.

The order fixing boundary between the Ihie and Obitti communities is set aside. In its place I make the order that Nwite, the spot where the respondents took the oath, shall be the boundary between the appellants and the respondents.”

The defendants (appellants) still dissatisfied with the decision have finally appealed to this Court by a Notice of Appeal filed on 22/01/2006. Seven grounds of appeal have been raised therein. The parties in compliance with the Rules of this Court have filed and exchanged briefs of argument. The (defendants) appellants have filed the appellants’ brief of argument on 3/12/2001. With the leave of court they filed and served an amended appellants’ brief of argument, deemed properly so filed and served on 1/11/2005. From the seven grounds of appeal the appellants have formulated five issues for determination and they are as follows:

“1. Was the lower court right to have excused the proof of root of title by the plaintiffs for the reasons which it gave in the judgment?

2. Was the lower court correct to have concluded that it was for the purpose of establishing the location of the boundary that oath was administered?

3. Was the presence or otherwise of Nwite shrine on the land in dispute not an issue before the Customary Court of Appeal of Imo State and did the lower Court Act rightly by allowing an interference of a finding of fact by the trial court in this action?

4. Was the lower court right when it held that the trial court did not properly evaluate the evidence led at the trial?

5. Was the lower court right to have struck out an issue properly

submitted to it for determination and did that not amount to a denial of fair hearing?”

Two issues for determination have been formulated by the respondents (plaintiffs) in the respondents’ brief of argument. They read as follows:

“(a) Whether there is a valid appeal in the instant case

(b) Whether the lower Court was right to have excused the proof of title in a matter in which the main issue between the parties was the exact location of the exact point on the boundary land where the respondents took the Oath.”

The pleaded facts and evidence of the plaintiffs (respondents) and their witnesses have shown that the defendants (appellants) the people of Obitti town trespassed into the plaintiffs’ community land situate at Obitti/Ihie Road, known and called “Ukwu Nwite” belonging to plaintiffs of Umudegwe Umuoka Ihie. According to their story they used to give out to the defendants (appellants) farm lands on the land in dispute and they would present a goat and wine to the plaintiffs yearly until 1972 when it became known that the defendants’ people attempted to sell a portion of the land and had to be restrained and consequently they had to be asked to quit the land. From then the plaintiffs (respondents) have refused to grant farm lands to the defendants any more. The plaintiffs had all the same to complain to the police (when the defendants refused to quit the land) who handed the matter to one Chief Amadi Nwugha and others for settlement. The arbitrators recommended Oath taking for the Ihie people, that is, the plaintiffs and the defendants people produced the juju sworn by the plaintiffs and survived their oath for the traditional one year, that is, 1973 to 1974 which incident was duly celebrated. The plaintiffs have stated in their evidence that the Oath was taken at Nwite shrine for the purpose of fixing the boundary between the parties. The defendants according to the plaintiffs eventually left the land but some time in 1986 they re-entered the land again hence this action and the reliefs as claimed above.

The 1st defendant (appellant) - Michael Odunze of Umuanyanwu Obitti stated the facts on the part of the defendants. The land in dispute

he stated is known as “Okwu-Ogwu-ala” belonging to Umuanyanwu from their ancestors who deforested it. Their boundary neighbours included Umugwaa and Umuadom. They have common Boundary with the plaintiffs at Ovu. The plaintiffs entry of the land about 1973 he contended B was resisted hence they (the plaintiffs) complained to the police. The dispute was referred to native tribunal to settle. In the event Oath taking was recommended; the plaintiffs took the oath produced by the defendants. Four of the plaintiffs’ people who took the oath none of them C survived the traditional one year - 1973 to 1974. And the defendants had to remove the beacons planted in the land by the plaintiffs because of that they commenced this action. (Further facts will come out in the body of the judgment).

The appellants arguing issues 1 and 2 in their brief of argument D have submitted that since this suit originated from a Customary Court that there is need to examine the evidence of the parties at the trial particularly, PW 1, PW2 and DW1 in this case to ascertain the issues and the nature of the dispute between the parties. See Chukwunta v. Chukwu & E Ors. 14 WACA 341; Nkwo & Ors v. Uchendu & Anor. (1996) 3 NWLR (pt.434) 1 at 10. It is submitted on the evidence of PW1, PW2 and DW1 that the parties have been disputing over ownership of land and not on the narrow issue of the location of their boundary per se. Even then, it is F also contended that fixing of boundary as such between communities is not a matter within the jurisdiction of Customary Courts and in this respect they have submitted that nothing is to be presumed in favour of the jurisdiction of an inferior Court. And have relied on Edict No.7 of 1984 or Section 14, 3rd Schedule to the Customary Court (Amended) Edict No.10 G of 1986 - the Sources of the instant Customary Court’s Jurisdiction and Attorney General Lagos State v. Dosumu (1989) 3 NWLR (pt. 111) 552, to submit that no such jurisdiction to fix boundary between communities is vested in the instant Customary Court.

H On the relevance of proving boundary in land dispute, firstly, it is contended that in proving ownership of land that a plaintiff must prove as a matter of sine qua non his entitlement to the land by one of the five ways listed in the case of Idundun v. Okumagba (1976) 9/10 SC 227;

Kodlinye v. Odu (1935) 2 AVACA 331, Bello v. Eweka (1981) 1 SC 101 & Eleme v. Akenzua (2000) 13 NWLR (pt.683) 92. The point is taken that in so doing that the plaintiffs must establish the boundaries of the land being claimed with certainty as they are seeking a declaration of title to the land in dispute; if they are to succeed. See Oladipupo v. Olanyan B (2000) 1 NWLR (pt.642) 536.

In the instant case it is contended that it is wrong for the lower court to hold that it is to establish the boundary line between the parties that the Oath was taken in this case at Nwite. This conclusion they have submitted is perverse as it has not been supported by evidence rather that it was administered in the claim and counter-claim of the parties as to the ownership of the land in dispute and not as a positive evidence as to boundary fixture. The appellants have contended even then that the Respondents have failed to establish a defined and recognized boundary between the parties on the preponderance of evidence in their favour if they have to succeed on the strength of their case, that is, in discharge of the onus of proof cast on them on the issue of establishing their boundary. In other words the appellants have failed to prove their case even on the narrow issue of establishing their boundary. D

On issue 3, the appellants have alluded to a misunderstanding of the questions on which the parties have fought the case leading to a misdirection of the court below that is, as to whether firstly, Nwite as the place where the oath was administered and secondly, Nwite as a boundary feature as both questions have not been proved in so far as these questions have been raised as issues before the Imo State Customary Court of Appeal. The appellants have therefore argued that the misunderstanding of the questions on which the parties have fought the case has occasioned a miscarriage of justice, to warrant the appellants asking the court to examine the issues under section 22 of the Supreme Court Act with a view to resolving them. F

The appellants have suggested that it is therefore wrong for the Imo Customary Court of Appeal to have reversed the findings of fact of the trial court that Nwite as boundary feature must exist on the ground and as much talked about spot, where the said Oath was taken. It is G H

posited that the trial court after having visited the locus rightly dismissed the appellants' case on those questions. On The Imo State Customary Court of Appeal having upturned these findings of fact of the trial Court the appellants have denounced the same, as it has not been shown that
 B the findings of the trial court are perverse in any way. See Cooperative Development Bank Plc v. Joe Golday Co. Ltd. (2000) 14 NWLR (pt.688) 506, 534-535. On the question that the lower court has even found with-
 C out evidence that Nwite shrine no longer existed, it is submitted that the lower court having so found it should have interfered and restored the findings of fact by the trial court which has been wrongly and improperly reversed by the Customary Court of Appeal as it has occasioned a miscarriage of justice.

Issue 4 is on non-evaluation of evidence by the trial court vis-à-vis
 D the Customary Court of Appeal intervening to perform that duty. This follows from issue 3 above. It is submitted that the intervention has been made without adverting to the implications of cases like Ekpa & Ors v. Utong & Ors (1991) 6 NWLR (pt. 197) 218 as the principle is trite that
 E the decisions of Customary Courts must be rationalized on the basis of common sense and not on failure to comply with some technical Rules.

The trial court has been charged to have made adverse findings of fact on Nwite as a Shrine and where oath was taken without evaluating
 F the evidence that is, by ascribing probative value to the evidence and placing the same in the imaginary scale to determine in whose favour the balance of probability has tilted see Ogunleye v. Oyewole (2000) 14 NWLR (pt.687) 290 at 302.

Issue 5 is whether a miscarriage of justice has been occasioned
 G where an issue submitted for determination has been erroneously deemed abandoned when no such thing ever happened as the appellants have relied on all the issues identified for determination in their brief of argument. They have not withdrawn Issue 2(b). However, the lower court at
 H p.214 of the record observed thus:

“Chief Eze Duru Iheoma He however, informed us orally that he was withdrawing Issue (b) and all the arguments based on it. They were accordingly struck out.”

And so, it is submitted that that issue has not been considered. The appellants framed issues 2(a), (b) and (c) as at p. 163 of the record. The appellants have contended that as a condition for recognizing arbitrations at Customary law it must be shown that the parties voluntarily submitted their disputes to the non judicial body as laid down by the Supreme Court in *Agu v. Ikembe* (1991) 3 NWLR (pt.180) 385 at 408 also in *Onwuanumkpe v. Onwuanumkpe* (1993) 8 NWLR (pt.186).

In this instance, it is opined that the instant arbitration panel being obligated to report its decision to the Police, the appointor of the panel that such an arbitration panel is not cognizable at customary law. They also posit that the lower court having been misdirected on this issue has failed to appreciate the error in the Imo State Customary Court of Appeal taking the stance it took in reversing the trial court's findings on this issue.

The appellants have finally urged the Court to allow the appeal, set aside the decision of the lower Court and restore the judgment of the trial Customary Court. I now proceed to look at the respondents case in their brief.

On Issue one of the respondents' brief of argument they have raised the question of a valid appeal in his case. Under this heading the respondents have contended by way of preliminary objection without filing any notice to that effect that by virtue of the admission In paragraph 2 of the Notice of Appeal at p.225-LL2-5 of the record that on the pronouncement by the lower Court as to the exact spot where the boundary between the parties lies, that the instant grounds of appeal filed by the defendants/appellants as well as the argument proffered thereon have thus become invalid. This admission it is further contended is as encompassed in ground 7 of the additional grounds of appeal as at page 160 of the record under the heading: "ERROR in Law" and it reads:

"The lower appellate Court exceeded its jurisdiction when it ordered that the boundary between Ihie Community and Obitti Community is the place where the oath was taken called Nwite and thereby caused a miscarriage of justice."

It is the respondents' case that in the circumstances the lower

Court having answered the foregoing ground 7 in the words as at p.221 of the record thus:

“The order fixing boundary between the Ihie and Obitti Communities is set aside. In its place I make the order .that Nwite, the spot where
B the respondents took the oath, shall be the boundary between the appellants and the respondents”

that is, the foregoing order of the lower Court having pulled the Rug from underneath the complaint as per ground 7 which otherwise is
C the crux of the appeal, there is no longer any live issue in contention in the appeal in this court. They however, have admonished that on Ajide v. Kelani (1985) 3 NWLR (pt. 12) 248 that the appellants have to maintain a consistent case and prove it. The respondents have therefore, posited
D the exact boundary spot between their respective parcels of land where the oath was taken. To further buttress the submission in this regard the respondents have referred to and relied on the appellants’ submission at p. 134 LL 8-10 of the record where it is submitted that:

E “*Since the dispute was as to boundary there was duty on appellants (now respondents) to prove boundary conclusively.*”

Again, it is argued that having so admitted that the question contested by the parties has been narrowed down to whether the parties own
F the land up to the boundary point called “Nwite” in accordance with the oath of 1973 taken by the respondents as per the foregoing abstract that the appellants cannot now resile therefrom. See Esangbedo & the State (1989) 4 NWLR (pt.113) 57 at 67 also see Queen v. Ohaka (1962) 1 ANLR505.

G It is upon this note that the respondents have urged the Court to uphold the preliminary objection and dismiss the appeal. Before I come to the alternative arguments submitted on the Issues raised in the appeal in the event of overruling the foregoing objection I think I should dispose of
H this objection; at first, I thought of doing so pre-remptorily as it has no merit whatsoever.

I now go on to examine the preliminary objection which the respondents have taken in this case by contending that the notice of appeal

filed in this case by the appellants is invalid ab initio and so, that there is no competent appeal before this Court. The precise terms of the objection as set in paragraph 4.01 of their brief of argument reads as thus:

“It is our contention that there is no appeal before this Court or simply put by virtue of the admission in paragraph 2 of the Notice of Appeal at page 225 line 2 - 5 of the record of Appeal accepting the decision of the lower Court as to the exact spot where the boundary line between the parties, the grounds of appeal and the argument thereon are invalid.”

The foregoing to say the least is anything but a properly constituted objection in any sense of the term. All one can make out of the respondents’ submissions on the objection is that the appellants cannot be permitted to change their case on appeal, which otherwise is a continuation of the case put forward in the Court below. In other words, the appellants have not been consistent in their case both in the lower courts and here. It is concluded that the main issue contested by the parties in this case all along is that each party owns the land up to the “boundary point called Nwite” where the oath of 1973 was alleged to have been taken by the respondents, howbeit, that the dispute between the parties in this case has been as to the boundary between them and not over ownership of land as is now being contended by the appellants. To amplify the point the respondents have zeroed in on ground 7 of the additional grounds of Appeal at p. 160 of the record to show concisely that the appellants’ complaint therein has been as to delimiting the boundary between the parties; the said ground 7 reads:

“The lower Appellate Court exceeded its jurisdiction when it ordered that the boundary between Ihie community and Obitti community is the place where the oath was taken called Nwite’, and thereby caused a miscarriage of justice”

I must subjoin here that the two communities of Ihie and Obitti communities mentioned in the foregoing extract not having been parties to the suit at any stage of the proceeding and whereas the parties have not pretended to be their respective representatives in the instant suit, the two communities have otherwise been wrongly, indeed irregularly co-

opted into the suit hence the appellants' complaint as in ground 7 before the Court below that the Customary Court of Appeal has acted outside its jurisdiction. I do not see how this can amount to an admission on the issue of boundary in this case.

B The respondents have however, referred to p. 221 of the record to contend that the pronouncement by the Court below therein has resolved the appellants' complaint as per ground 7 thus putting the issue of boundary between the parties to rest and beyond contention and I quote:

C *"the order fixing boundary between the Ihie and Obitti communities is set aside. In its place I make the order that Nwite, the spot where the respondents took the oath, shall be the boundary".*

In this wise, it is argued by the respondents that the complaint encompassed in ground 7 of the additional grounds of Appeal having thus
D been resolved in favour of the appellants, they cannot now shift their grounds by contending that it is ownership of land that has been the gist of the dispute between them, not delimitation of the boundary between them. It is on this premise that the respondents have taken the instant
E objection to the Notice of Appeal and have urged that the appeal be struck out in limine. With respect, the respondents have in the process appealed to have argued their case in the appeal under the guise of preliminary objection. **I do not see how the contention being put forward here by
F the respondents has remotely affected the validity of the Notice of Appeal in this case.**

The appellants have not reacted to the objection in any way not even by filing a reply brief for what is worth nor have they adverted their attention to the objection not even in their Amended Appellants' brief of
G argument filed latter in time to the instant respondents' brief of argument. However, that default on the appellants' part does not ipso facto imply that the objection has to be sustained without mere. Nor is the Court precluded from considering the merit and demerit of the objection, for
H overruling the purpose for it or sustaining it. See Olawuyi v. Adeyemi (1990) 4 NWLR (pt.147) at 746

To raise an objection by way of issue for determination as in this instance is not only novel in that issue for determination and

preliminary objection under our Rules do not have a common meeting ground. How to initiate an objection against an appeal is fully covered in the Rules. Preliminary objection strictly speaking runs counter to the intendment of issues for determination in the claims before the courts in the sense that it aborts, indeed forecloses the hearing of the case in limine and if upheld terminates the case; it automatically puts an end to the case without determining the rights of the parties thereto, while issue for determination presupposes that the case is, all things being equal, on course for hearing. An issue for determination is a combination of facts and the law on a particular point which when decided affects the fate of the appeal. Onifade v. Olayiwole (1990) 7 NWLR (pt.161) 130 SC. It must relate to the grounds of appeal. See Momodu v. Momoh (1991) 1 NWLR (pt.169) 608 SC. The two are more or less strange bedfellows; and so, for a preliminary objection to be dressed in the garb given to it here is strange and improper.

The instant objection is not an objection in any sense of the term as what and what the respondents are objecting to here are still at large and may be contended in the main appeal. A notice of appeal being an initiating process in every appeal process is so crucial in the appeal process as a writ of summons is in ordinary civil actions that a party's complaints against a decision by way of grounds of appeal not forming part of the Notice of Appeal cannot be entertained. Furthermore once the Notice of Appeal is vitiated in anyway the appeal becomes incompetent and liable to be struck out. See Kolawole v. Alberto (1989) 2 SC (pt. 111) 187. The point being taken here is that where a notice of appeal as the instant one is defective or incompetent in any respect for any reason, there is no valid appeal and the court would have no jurisdiction to deal with the purported appeal but to strike it out. Even then what the respondents seem to be contending here is want of consistency in the appellants' case both here and the lower courts and it cannot be dealt with under the compass of preliminary objection as it is non sequitur. The preliminary objection is totally misconceived and it is

hereby struck out.

The respondents have however argued the issues raised in the appeal in the alternative as follows:

On the appellants' issue 1&2 they have opined that apart from
 B issue 4 as raised in the appellants' brief of argument that the rest of the
 issues relate to the question of boundary. They therefore submit that
 there had been no question as to the ownership of land but as to the exact
 boundary, line North to South between the parties along the point where
 C the oath was taken and survived by the respondents. And that it is mis-
 leading to state against the evidence that abound on the Record that the
 main issue is not as to boundary between the parties.

In this regard that the case of Chukwunta v. Chukwu (supra) does
 not apply so also the case Attorney General Lagos State v. Dosumu (su-
 D pra) as to oust the jurisdiction of the Customary Court on questions of
 fixing boundary between communities. It is submitted that apart from
 calling the land in dispute "Okwu-Oguala" or "Okwu-Oruru" there is no
 evidence on either side as to any of the principle laid down in Idudun v.
 E Okumagba (1976) 9-10, 56, 227.

On issue 3, it is argued that the parties have not contested the
 existence nor the significance of Nwite shrine but the exact boundary
 line between the parties on which the respondents took the oath. It is
 F denied that this issue has arisen before the lower court although the only
 iota of evidence in this regard has come from PW 2's evidence, the
 chairman of the native arbitration panel that prescribed path taking for
 the respondents on 3 kinds of juju produced by Obitti people at the boundary
 called "Nwite". And that none of those who took the oath died after one
 G year.

On issue 4 on this heading it is submitted that the non-evaluation
 of evidence by the trial court has been held to be perverse hence the
 intervention of the Imo State Customary Court of Appeal and the lower
 H court has upheld the intervention as proper. On the question of having
 abandoned Issue 2(b) by the appellants before the court below, the re-
 spondents have contended that it was so abandoned even though the
 record has not so reflected the incident. Even then the respondents have

insisted that the court below has otherwise considered the Issue as it has been encapsulated under Issue 4.

The respondents from the summation of the foregoing have urged the court to dismiss the appeal and to uphold the judgment of the Court below which has entered judgment for the plaintiffs/ respondents accordingly.

I have at great pains set-out in detail the case of the parties on either side of the divide as the respondents with respect have not spared any effort to complicate this case otherwise simple by their convoluted manner of reasoning and presenting of their case.

The issues for determination raised by both parties in this case have been listed above. Having compared the two sets of issues as formulated by the parties side by side each other and against the particular nature of the instant case as per the claim and the instant decision of the Court below on appeal before this Court as well as the appellants' complaint against that decision as per the grounds of appeal filed in this appeal, I am satisfied that the issues as raised by the appellants having arisen directly from the grounds of appeal filed here will aptly resolve the questions in controversy in the appeal. The respondents two issues for determination have been described by them as a summary of the issues raised by the appellants in this case. This claim with respect, is not sustainable as I have pursued their two issue over and over again. I am of the firm view that the respondents must identify their issues based on the appellants' grounds of appeal. For instance, Issue One in the respondents' brief of argument has posed the question of:

"Whether there is a valid appeal in the instant case".

This poser cannot remotely be said to have its root in any of the grounds of appeal filed in this case. The respondents Issue 2 is quite apposite. In fact, it is under the umbrella of Issue one that the respondents have taken refuge to raise the instant preliminary objection to the appeal, which I have disposed of above. I have therefore to embark on my discussion of the questions raised in this appeal guided by the issues formulated by the parties particularly the appellants taken as whole.

I have taken pains to deal with this case; and in the process I have

endeavoured to isolate the questions at issue between the parties in order to simplify the matters which the respondents by their arguments and submissions have complicated.

Having dealt with the objection as it were, in this case I have now
 B come to the main appeal itself. The appellants' claim in this matter is as I
 have set out in extenso above. The appellants' and their boundary
 neighbours, the respondents are disputing of land in or around their bound-
 ary. **As can be seen, resolving the question of the identity and loca-**
 C **tion of the land in dispute with its boundaries is the key to this**
case. As decided in Baruwa v. Ogunsola (1938) 4 WACA 159 a plain-
tiff seeking a declaration of title has the onus of showing with cer-
tainty excepting where parties know the land, the identity and loca-
 D **tion of the land in dispute showing clearly its boundaries and fea-**
tures on them failing which his claim as to declaration of title must
fail. In the cited case it has been showed that this can be done by
oral description of the boundaries and the features of the land or by
plan. See Udekwo Amata v. Udogu & Anor (1954) 14 WACA 580. No
 E **plan has been tendered in this case. Since the parties here have a**
common boundary it follows that once the identity of the land in
dispute and its boundaries with the features are showed and proved
the issue of the boundary of the land between the parties would
 F **have been ascertained.** In view of the primacy of this question on land
 cases I have to confine myself to this question vis-à-vis this case. In
 setting out the facts of this case I have shown how the case has finally
 ended up in this Court. The Court of Appeal has reacted to this question
 in the last pages of its judgment thus:

G *"The main issue concerns the complaint that the Court below erro-*
neously gave judgment for the respondent when the latter had failed to
prove their root of title. With respect, there is a misconception here. It
has been seen that the real issue before the court was the location of the
 H *boundary between the parties. Each party agreed that the land beyond*
the boundary claimed by it belonged to its opponent. The question of root
of title did not therefore arise"

Further down in the judgment it also held that

“The evidence before the Court showed that the Appellants made the respondents swear that the boundary was where they claimed it was”

And it had gone on to postulate at page 221, LL7-12 of the record where it finally held:

“On the whole, subject to what I have said with regard to the order fixing boundary between communities the appeal fails as it lacks merit. The decision of the Court below allowing the Appeal by the respondents before us is affirmed”

The foregoing clearly brings to the fore the question of what really the parties are contesting in this case: that is to say, what are the issues in dispute between them. It is my view that where as here the case has started from the Customary Court with no pleadings to contend with before it (the trial court), and as settled that an appellate Court as this court, as well as the appellate lower courts have to discern the issues in dispute between the parties by examining the claim, the evidence of the parties at the trial Court and so get to the matter in controversy between the parties. This age long principle is as embedded in the decision in Chukwunta & Ors. (supra) Nkwo & Ors v. Uchendu & Anor (Supra). I must emphasis that this ought to be the attitude of the lower appellate courts to this matter. Both have in this regard floundered.

In that vein one must necessarily turn to the record for the testimonies of the parties and the claim. The evidence of PW1 of the appellants’ people (Cletus Ajoku the 5th appellant) on this question is as p. 31 LL 8-9 where he said and I quote:

“The land is a community land belonging to Umudegwe Umuoka Ihie. I suit (sic) on behalf of the Umudegwe Umuoka Ihie. Our boundary neighbours include Umuanyanwu Obitti. We have a common boundary with them. Whenever they lack farm land we supply them. This method continued till the end of the Civil War..... when we found out that one Michael Udunze from their kindred wanted to sell the land we used to give them and we stopped him. In 1973 when they came to farm on that land we refused giving lands any more. They refused to go out of the land saying that the land was their own..... We want the Court to order

the Defendant to go away from the land for it is not their own land. And pay N2000.00 for special and general damages done on the land”

DW1 and Michael Odunze (1 respondent) at p. 37 LL. LL 3 - 36 and p. 38 LL 1-8 when testified as follows:

B *“I know the plaintiff. They are my boundary Neighbour. I am representing the Umuanyanwu kindred. I am here on land dispute. I know the land in dispute called Okwu-Ogwu-ala. It is owned by Umuanyanwu. We inherited this land from our ancestor who also deforested it. Our boundary neighbours include Ihie people with Ovu at the boundary, Umugwaa,*
 C *Umuadom. In 1973 after the war we saw Ihie people on our land which they have never entered before, we intervened and met the leader called Igwu Chukwu who asked to go till he contain with his people but on the next day they invited police.”*

D An overview of the foregoing evidence of P.W.I and D.W 1 has showed clearly that the parties have been litigating over ownership of the land with particular reference to its identity and location of its boundaries. This is also borne out by the claim.

E The trial court who heard and saw the witnesses on its part believed the defendants’ (appellants) case and so awarded to the defendants the land in dispute known and called Okwu-Ogwu-ala situate at Obitti/Ihie notwithstanding the obvious discrepancies in the evidence of the witnesses for the defendants as to the name by which the land is known.
 F I shall return to this holding in the final paragraph of this judgment. For what it is worth this pronouncement is in conformity with the respondents’ (plaintiffs) contention that the parties have been litigating over the ownership of the land in dispute.

G On the other hand, the position taken on this issue in this case by The Customary Court of Appeal and the court below is as I have already stated above, simply put, it is that the real issue in the case is one of fixing the boundary between the parties per se. The court below has made this
 H clear when it pronounced that it was to establish the boundary between the parties that the oath of 1973 was taken. In the foregoing abstract from its judgment it has not minced words in rebuking the trial court for misconceiving the issues in the case and has in the same breath declared

that the question of proving “root of title” did not arise as the evidence showed that the respondents have been made “*to swear that the boundary was where they claimed it was*”.

I think the court below with respect, has completely misconceived the nature of the issues upon which this case has been fought B hence it has walked into a grave error of judgment. Much as the parties have been disputing the boundary where their respective parcels of land abut each other it is an aspect of the larger issue in the case as to the ownership of the land in dispute its identity and C location. It is fundamental that where the parties own land on either side of a common boundary, the boundary features along it must be clearly shown and proved. In this case in other words, it is necessary to show very clearly the identity of the land and where D the boundary between the parties is and what the features on it are. This is done within the context of proving the identity and the boundaries of the land in dispute and the burden in this respect on the authorities rests squarely on the respondents’ (plaintiffs) to be E discharged if they have to succeed in the claim. It is in this light that I see the findings of the trial court that “the parties are disputing boundary.” The boundary being disputed does not hang in the air. So, it has to be discussed in the context of proving the F identity and boundaries of the land the parties are disputing, after all, the plaintiffs have in their claim alleged trespass into their land - meaning that the defendants have crossed their common boundary into the plaintiffs land.

Looking closer into the respondents’ (plaintiffs) case which is G hinged on a claim for declaration of ownership of the land in dispute, it is settled principle that the starting point is satisfying the court that the plaintiff by his evidence has established with certainty the land in dispute and its boundaries. **Clearly fixing of boundaries between the parties** H is definitely relevant in the context of establishing the identity of the area of the land in dispute and its location between the parties. In this case the onus on the respondents’ (plaintiffs) is to show by evidence as respondents’ (plaintiffs) that the identity and bound-

aries of the land in dispute are certain. This has to precede any attempt at delving into other issues in proving the respondents' (plaintiffs) entitlement/ ownership of the land in dispute. So held the Supreme Court in the case of *Udeze v. Chidebe* (1990) 1 NWLR B (pt. 125) 141 at 159 per Nnaemeka-Agu, JSC as follows:

"It has of course been stated in a number of decided cases beginning from Baruwa v. Ogunsola (1938) 4. WACA 159 that the first duty of a person who comes to court for a declaration of title is to prove the area over which he claims with certainty. I believe the law should be regarded as settled that although a plan may not be necessary in cases where the identity and precise boundaries of the piece or parcel of land in dispute are known to the parties to the dispute (for which See: Chief Daniel Allison Ibuluya & Ors v. Tom Benebo Dikibo & Ors (1976) 6 SC 97 at 107 also Chief Sopa v. Chief Agbozo (1951) 13 WACA 241 at 242 where as in this case there is a dispute as to the boundary or identity or both, such must be proved with certainty, so on this finding alone the appellants failed to prove their claim for title"

I have no illusions that by, the plaintiffs' account, the boundary or identity or both of the land in dispute in the instant case cannot be said to have attained the criterion set-forth in *Udeze's* case. The two methods of identifying the land in dispute with its boundaries as in the decisions of *Kwadzo v. Ajei* (1944)10 WACA 274 and *Udofia & Anor v. Afia & Ors* (1940) 6 WACA 24, are by -

"1. The plaintiff adducing oral description of the land in dispute that a surveyor acting on the strength of the description can make a plan of the land.

2. The plaintiff filing a plan showing the land in dispute with its boundaries."

As no plans of the land in dispute have been tendered by both sides in this case the obvious way out in this case is to find out whether the plaintiffs have by oral description of the land in dispute adduced enough material to enable a surveyor readily produce a plan of the said land with its boundaries clearly defined. In this regard if I may repeat, I have perused the plaintiffs' evidence in-

cluding their witnesses and the claim filed as per the record. The burden in this regard is on the respondents' (plaintiffs). There are no materials to assist a surveyor to produce such a plan; not even from the finding of the trial court at the locus. Strangely enough the trial court could not be shown the Nwite Shrine, the fulcrum of the respondents' (plaintiffs) case. Thus making nonsense of the claim of Nwite Shrine as the exact spot where the oath of 1973 was administered and Nwite Shrine as a positive boundary feature. What I have endeavoured to show above is that the plaintiffs on whom lies the onus in this regard have not testified as to the identity and boundaries of the land in dispute with that degree of certainty to enable a surveyor to produce a plan of it. Their case must collapse on this ground. The trial court's finding and decision from the visit to the locus in quo at p. 66 LL 13 et seq speak for themselves particularly as to a total lack of certainty of the identity of the land in dispute and its boundaries as well as the finding on Nwite Shrine and I quote the finding as follows:

“(1) The parties are disputing boundary

(2) The plaintiffs call the land Okwu-Nwite while the defendants call it Okwu-Ogwuala.

(3) The plaintiffs claim that Nwite was the central place for the oath taking and a shrine where small pots are planted with water in the pots.

(4) The court did not see any significance of a shrine at the point shown. There were no small pots nor pieces of pots there.

(5) The defendants' claim Okpo OVU which the court noticed.

(6) The Plaintiff did not tender the document for the payment of compensation by the Shell Company. While the defendants tendered their own documents on the uncontroverted Okwu-Ogwu-ala Obitti.

(7) The plaintiff did not prove that they survived the oath and celebrated it.

(8) It is customary to inform the juju priest that surviving an oath before celebration.

Under the heading 'decisions' the trial court held as follows:

(1) *The court believes that the land in dispute is called Okwu-Ogwu-ala bounded at the OVU and not Okwu-Nwite.*

(2) *The defendants have defended their case from the preponderance of evidence.*

B (3) *The Court is not satisfied with the evidence of the plaintiffs on the question of the position of Nwite shrine observed during locus.*

(4) *Sequel to this proof credited to the defendants the land in dispute known as and called Okwu-Ogwu-ala situate at Obitti/Thie road is hereby awarded to the defendants with a grant of Customary Right of Occupancy aver the said land*

C (5) *The plaintiffs are hereby perpetually restrained from entering the said Okwu-Ogwu-ala of the Umuanyanwu people of Obitti, with effect from the date of this judgment.”*

D **Without any doubt whatsoever from the above findings and decision of the trial court the identity of the land in dispute and the boundaries still remain a mirage even though they are the issues the respondents’ (plaintiffs) have the duty to satisfy the trial court**

E **firstly. On this ground alone the plaintiffs’ case is bound to fail in that before a court trying a land case goes into the facts of the case it must firstly satisfy itself of the certainty of the land in dispute and its boundaries.**

F **Another angle from which to examine the respondents’ (plaintiffs) claim for a declaration of title, in this case lies in the settled principle that a plaintiff in the circumstances must prove by his evidence his entitlement/ownership of the land in dispute so as to be entitled to the declaration he claims. The plaintiffs have claimed**

G **declaration of title of ownership to the land in dispute. Again, it is settled that where as the plaintiffs here so claims they must prove their title to the land in dispute by one of the five ways listed in the case of Idundun v. Okumagba (1976) 10 SC 227 which I have listed**

H **below. In this case therefore, the plaintiffs have by their claim for a declaration of title put their title in issue and they must prove their title by one of the five ways that is**

“1. by traditional evidence

2. by production of document of title

3. by acts at ownership over sufficient length of time numerous and positive enough to warrant the inference that the person is the true owner.

4. long possession

B

5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would be the true owner of the land.”

The respondents’ (plaintiffs) case on any of these ways of proving their case did not take off the ground. I must recount that to get to this stage of examining the plaintiffs’ case presupposes that they have crossed the first hurdle of satisfying the court on the identity of the land in dispute and its boundaries. The plaintiffs’ have not discharged that burden. A heavy burden is on the respondents’ (plaintiffs) to satisfy the court by their evidence that they are entitled to the declaration of title to the land and in so doing they must rely on the strength of their case not on the weakness of the defendants’ case. See Kodilinye v. Odu (1935) 2 WACA 356; although there are occasions when the defendant’s case will strengthen the plaintiffs case but not in cases as here. See Akinola & Anor v. Oduwo & Ors. (1962) WNLR 113. In this case there is no iota of evidence whatsoever to justify discussing any of this case, in a way to prove ownership in relation to the plaintiffs’ case. The respondents’ (plaintiffs) have not discharged the burden on them. It will be purely speculative. Excepting to say that the lower court acted in error when it held that the root of title is not in issue where it is very much in issue as I have shown above.

D

E

F

G

In the face of the claim before the court, the plaintiffs having failed to discharged the heavy burden on them as per Elias v Omo-Bare (1982) 5 SC, have failed woefully to establish their claim to a declaration of title and so, the claim is liable to be dismissed.

My conclusions above have rendered any consideration of the matters of the arbitration panel and its decision obviously otiose and speculative and so also the issue 2(b) of the issues for determination. In the light of my reasoning above I must observe there can be no doubt that

H

the appellate lower courts must have acted in error severally in having to set aside the judgment of the trial court.

In sum, I find that the appeal is meritorious and I allow it and set aside the respective decisions of the appellate lower courts in their entirety. I restore the decision of the trial Customary Court. I also set aside that part of the trial Customary Court awarding the land in dispute and granting the order of perpetual injunction to the respondents (defendants in the case) who have not counter-claimed. Also I set aside the finding by the trial Customary Court to the effect that “the parties are disputing boundaries” for having no basis in the context of my judgment. The appellants are granted N10,000.00 as costs in this appeal.

D

KALGO JSC

I have read in draft the leading judgment just delivered by my learned brother Chukwuma-Eneh JSC. I agree with his treatment and consideration of the issues raised by the, appellants and the conclusions reached therein, which I fully adopt as mine. I have nothing useful to add. In the circumstances, I also allow the appeal, set aside the decisions of the Customary Court of Appeal and the Court of Appeal and affirm the decision of the trial Customary Court. I abide by the order of costs made in the leading judgment.

OGUNTADE JSC

This suit out of which this appeal arose originated from the Customary Court of Ohaji at Umuapu, Imo State on 20-4-90. The present respondents were the plaintiffs and the appellants were the defendants. I shall hereafter refer to parties as ‘plaintiffs’ and ‘defendants’. The plaintiffs filed a suit for and on behalf of the Umuekgwe Umuka family and the defendants were sued as the representatives of Umuanyanwu family, Ibitti. The dispute was in respect of the ownership of a parcel of land, which the plaintiffs described as “Ukwu Wite” lying between Ihie and Abitti road in Ohaji Egherru Oguta Local Government Area. The plaintiffs

sought the following reliefs:

“1. Declaration of Customary Right of occupancy to the piece or parcel of land known as and called ‘Ukwu Wite’ lying and situate along Ihie and Obitti road in Ohaji.

2. Two thousand Naira (₦2, 000.00) General damages for trespass.

3. An Injunction restraining the defendants their agents and or servants from any further acts of trespass or interference with the said plaintiffs’ land.”

The Customary Court heard the suit. Each of the parties called three witnesses. On 7/11/94, the court gave judgment in favour of the defendants. The plaintiffs were dissatisfied. They brought an appeal before the Customary Court of Appeal, Owerri, Imo State. The court on 1-11-96 allowed the appeal. It set aside the judgment of the trial court and gave judgment in favour of the plaintiffs. The defendants were dissatisfied. They brought an appeal before the Court of Appeal, Port-Harcourt (hereinafter referred to as ‘the court below’). The court below on 13-7-2000 affirmed the judgment of the Customary Court of Appeal and dismissed the defendants’ appeal. Still dissatisfied the defendants have come before this Court on a final appeal. In their appellants’ brief, the defendant identified the issues for determination in the appeal as the following:

“2.01. Was the Lower Court right to have excused the proof of root of title by the Plaintiffs for the reasons which it gave in the Judgment?

2.02. Was the Lower Court correct to have concluded that it was for the purpose of establishing the location of the boundary that oath was administered?

2.03 Was the presence or otherwise of Nwite shrine on the land in dispute not an issue before the Customary Court of Appeal of Imo State and did the Lower Court act rightly by allowing an interference with a finding of fact by the Trial Court in this case?

2.04. Was the Lower Court right when it held that the Trial Court did not properly evaluate the evidence led at the trial?

2.05. Was the Lower Court right to have struck out an issue prop-

erly submitted to it for determination and did that not amount to a denial of fair-hearing?"

The respondents for their own part, formulated two issues for determination. The issues read:

- B “(a) *Whether there is a valid appeal in the instant case.*
 “(b) *Whether the lower court was right to have excused the proof of title in a matter in which the main issue between the parties was the exact location of the exact point on the boundary land where the respondents took oath.*”

C I shall be guided in this appeal by the appellants’ issues. Let me say here that I have had the advantage of reading in draft the lead judgment by my learned brother, Chukwuma-Eneh, J.S.C. I agree with the said judgment and I have only sought by this judgment to expatiate further on the points
 D ably made by him.

Earlier in this judgment I reproduced the claims made before the trial court by the plaintiffs. The plaintiffs in paragraphs 4 to 7 in the particulars of the claim which they filed had asserted thus:

E “4. *The Plaintiffs are owners in possession of the land in dispute from time immemorial and which they inherited from their ancestors Umu Degwe. The Plaintiffs have farmed on this land for a very long time within interruption from the Defendants or any one else.*

F 5. *In or around 1973 the Defendants their servants and or agents without the leave or licence of the plaintiff unlawfully broke and entered into the land in dispute, portioned it out to themselves for farming.*

G 6. *And because of this unlawful trespass we the plaintiffs took the case to the elders of Ihie and Obitti presided over by councillor Clifford Ogbuehi of Umuapu, who looked into the case and ordered we (sic) the plaintiffs to swear for defendant which we did and it ended in our favour.*

H 7. *In or about April 1986 again the Defendants, their servants and or agents without the leave or licence of the plaintiff entered into the land in dispute, portioned it out to themselves for farming. Also they damage some of the economic trees therein.”*

When the particulars above are read along with the claims made

by the plaintiffs, it is manifest that this simply was a land dispute not just a boundary dispute as the two courts below would appear to have described the plaintiffs' case. In the nature of the evidence called by parties, there is no doubt that the parties were neighbours who shared a boundary line. Notwithstanding that the dispute was as to where the boundary line lay, it was still necessary for the plaintiffs to show the origin of their title and explain in the process how the boundary line came to be at the point where the plaintiffs claimed it was. I am not in any doubt that a case may raise exhaustively for determination the exact location of the boundary line between two adjoining landowners. This arises where the two adjoining landowners had in the past known their boundary line and where one of them is making an attempt to relocate or shift the boundary line which had previously been acknowledged by parties. That was not the position here. The plaintiffs who sued asking for declaration of title bore the burden of establishing his title and in that process needed to lead evidence to establish or identify the quantum of the land in dispute. Now in *Etim v. Oyo* [1978] 6-7 SC. 91 at 97-98, this Court per Irikefe JSC (as he then was) observed:

"This court has consistently held that in an action for title to land, the onus is always on the plaintiff to establish an entitlement to a land mass ascertainable boundaries. See Udofia v. Afia - 6 W.A.C.A. P.216; Saikkapku v. Ahiaku 8 W.A. C.A. p. 76; Rwandso v. Adjei 10 W.A.C.A.274 and Anata v. Modekwu 14 W.A.C.A. 580. "

Now in his evidence before the trial court, P.W.I testified thus:

"The land is a community land belonging to Umudegwe Umuoka Ihie. Isuit (sic) on behalf of Umudegwe Umuoka Ihie. Our neighbours includUmuanwu Obitti. We have a common boundever they lack farm land we supply them. This method continued till the end of the civil war in Nigeria in 1972 when we found out that one Michael Odunze from their kindred wanted to sell the land we used to give them and stopped him. In 1973 when they came to farm on that land we refused giving lands anymore. They refused to go out of the land saying that the land was their own."

The plaintiffs called two other witnesses. None of them however

gave evidence as to how the plaintiffs became the owners of the land in dispute. As against the evidence of P.W.I, the D.W.I testified thus:

"I come from Umuanyanwu Obitti. I am a farmer. I know the plaintiff. They are my boundary neighbour, I am representing the Umuanyanwu kindred. I am here on land dispute. I know the land in dispute called Okwu-Ogwu-ala. It is owned by Umuanyanwu. We inherited this land from our ancestor who also deforested it. Our boundary neighbours include Ihie people with Ovu at the boundary, Umugwaa, Umuadom."

None of the parties had called or given evidence as to the origin of the titles each asserted. For the plaintiffs, it was calamitous. This is because it is well established that a plaintiff must succeed on the strength of his case and not on the weakness of the defence case. The defendants in this case had not made any claim against the plaintiff. They had only come to defend the case against them. They could therefore afford not to say a word in defence of the suit and thus dare the plaintiffs to prove their case. The trial court at pages 62-64 of the record concluded the case thus:

"Finding

1. *The parties are disputing boundary.*
2. *The plaintiffs call the land Okwu-Nwite while the Defendants call it Okwu-Ogwuala.*
3. *The plaintiffs claim that Nwite was the central place for the oath taking and a shrine where small pots are planted with water in the pots.*
4. *The court did not see any significance of a shrine at the point shown. There were no small pots not pieces of pots there.*
5. *The Defendants claim Okpo-Ovu, which the Court noticed.*
6. *The plaintiff did not tender the document for the payment of compensation by the Shell Company, while the Defendants tendered their own documents on the uncontroverted Okwuogu-ala Obitti.*
7. *The plaintiff is (sic) not prove that they survived the oath and celebrated it.*
8. *It is customary to inform the juju priest after surviving an oath*

before celebration.

Food for Thought

1. Did this matter ever go through a local arbitration? If so, what was their decision?
2. Was the oath taking performed? If so, was there oath survival. B
3. What is the custom of celebrating the survival of an oath?
4. Were the juju priests who brought the jujus for swearing informed and present during the ceremony?
5. When did the Nwite stop to be a shrine? C
6. Is it customary in Igbo land to use Ovu as an artificial boundary? C
7. Can a man from Obitti make Ovu on the land of Ihie people without a challenge?

Decision

After a careful, articulated and artificial analysis of the issues in this matter, this honourable Court hereby decides as follows: -

1. The court believes that the land in dispute is called Okwu-Ogwu-ala bounded at the Ovu and not Okwu-Nwite. E
2. The Defendants have defended their case from the preponderance of evidence.
3. The Court is not satisfied with the evidence of the plaintiffs on the question of the position of Nwite shrine observed during locus. F
4. Sequel to this proof credited to the Defendants the land in dispute known as and called Okwu-Ogwu-Ala situate at Obitli/Ihie road is hereby awarded to the Defendants with a grant of Customary Right of Occupancy over the said land.
5. The plaintiffs are hereby perpetually restrained from entering the said Okwu-Ogwu-ala of the Umuanyanwu people of Obitti, with effect from the date of this judgment.” G

From the approach of the trial court in the passage reproduced above, it would appear that the court came to its conclusion by stating that it preferred the evidence of the defendants as to the boundary line separating the parties' lines. The appellate customary court however, which had not seen or heard the witnesses testify overrode the conclusion of H

the trial court on the ground that the evidence was not properly evaluated. The court below in affirming the judgement of the appellate Court of Appeal observed at pages 220-221:

“The main issue concerns the complaint that the court below erroneously gave judgment for the respondent when the later had failed to prove their root of title. With respect, there is a misconception here. It has been seen that the real issue before the Court was the location of the boundary between the parties. Each party agreed that the land beyond the boundary claimed by it belonged to its opponent. The question of root of title did not, therefore, arise. All that the plaintiffs were obliged to do to establish that the boundary was where they claimed it to be. The evidence before the Court showed that the appellants made the respondents swear that the boundary was where they claimed it was. The evidence was also more consistent with the claim by the respondent that the swearers survived than the contrary claim by the appellants. The law is that where traditional arbitration is resorted to and the parties agree to be bound by the decision and on the basis of the understanding one side makes the other take an oath, the side that made the other take the oath will not be allowed to resile from the understanding. See Oparaji v. Ohanu (1999) 9 N.W.L.R. (Pt. 618) 290, at 304, per Iguh, J.S.C. The Court below clearly stated the correct position of the law when it said that “once the oath is taken and won or lost the issue at stake is res judicata and binds the parties.”

With respect I think that the two courts below and the appellate Customary Court were wrong for failing to accord respect to the findings of fact made by the trial court. They also failed to bear in mind that the onus was on the plaintiffs who sued to establish their case. This Court has had occasion to warn in the past that appellate courts must pay the due regard and respect to the findings of native tribunals. In *Emarieru v. Ovirie* [1997] 2 S.C. 31 at 42-43, this Court *per* Udo Udoma, JSC observed:

“Suffice it to say that in our view the Customary Court showed proper and sufficient appreciation of the issues in controversy between the parties which issues may be accurately described as peculiarly within

its knowledge and its judgment in such matters should not be disturbed. Indeed that was the view long ago expressed by the Privy Council in Abakah Nthah v. Bennieh, 2 W.A.C.A. 1 when their Lordships said at p.3:

"It appears to their Lordships that decisions of Native Tribunals on such matters which are peculiarly within their knowledge, arrived at after fair hearing of relevant evidence should not be disturbed without very clearproof that they are wrong."

The trial court in this case had had the special advantage of hearing and seeing the witnesses testify. It had preference for the case of the defendants. I am unimpressed by the sophistry introduced into a matter as simple as this by the two appellate courts below which had in its result swept aside the meticulous approach of the trial court which had visited the *locus in quo* to assess the worth of the oral evidence given in court.

I would allow the appeal as in the lead judgment of my learned brother, Chukwuma-Eneh, J.S.C. I subscribe to the order on costs.

MUKHTAR JSC

In the Customary Court of Imo State of Ohaji District, the plaintiffs who sued the defendants for themselves and on behalf of the Umudegwe Umuka family sought the following reliefs against the defendants who are now the appellants in this appeal:-

"1. Declaration of Customary Right of Occupancy to the piece or parcel of land known as and called "Ukwu Wite" lying and situate along Ihie and Obitti road in Ohaji.

2. Two thousand Naira (N2,000.00) General damages for trespass.

3. An injunction restraining the Defendants their agents and or servants from any further acts of trespass or interference with the said plaintiffs land."

The Customary Court's decision was, in favour of the defendants, and it granted them customary Right of Occupancy over the land. The plaintiffs were not satisfied, so they appealed to the Customary Court of

Appeal, which allowed the appeal. The defendants appealed to the Court of Appeal, where they lost, and thus appealed to this court.

The claim before the Customary Court of first instance was predicated on a claim for declaration of title to land as is contained in the particulars of claim which read inter alia as follows:-

“3. That land subject matter (hereafter called the land in dispute) is known as and called “Ukwu Wite” lying and situate along Ihie and Obitti road in Ohaji Egbema Oguta L.G.A. with (sic) jurisdiction.

4. The plaintiffs are owners in possession of the land in dispute from time immemorial and which they inherited from their ancestors Umu Degwe. The plaintiffs had farmed on this land for a very long time within (sic) interruption from the Defendants or any one else.

5. In or around 1973 the Defendants their servants and or agents without the leave or licence of the plaintiff unlawfully broke and entered into the land in dispute, portioned it out to themselves for farming.”

It is clear from the above averments that the plaintiffs based their claim on traditional history, which is one of the five ways of proving title to land. See *Idundun v. Okumagba* 1976 9/10 S.C. 227.

The plaintiffs however did not support their averments with cogent evidence as to entitle them to title to the land and the order of injunction sought. Where a plaintiff’s claim is not proved to the satisfaction of the court then the right order to make is a dismissal of the claim by the court. See *J. M. Kodilinye v. Mbanefo Odu* 2 WACA 336, *Olujebu of Ijebu v. Eleda of Eda* 1972 5 S.C. page 143, and *Elias v. Omo-Bare* 1982 5 S.C. 25. But in this case rather than merely dismiss the plaintiffs’ claims, the learned trial court proceeded to turn the table of claim to the defendants’ side by granting them what the plaintiffs sought. This was wrong for in so far the defendants did not counter-claim on the land in dispute, it was not entitled to such grant of customary right of occupancy and order of injunction and should not have been granted the orders. The cardinal principles of the law that is well settled is that a court is not a charitable institution that would grant reliefs that are not claimed by a party. It must restrict and confine itself within the walls of the reliefs a party approaches it for, and not to undertake its own generous acts of

awarding reliefs not sought. See *Kalio v. Kalio* 1975 2 S.C. 15, *Okeowo v. Migliore* 1979 11 S.C. 138, and *Omoboriowo v. Ajasin* 1984 1 SCNL 108.

The granting of title to the land in controversy was the only error the trial court committed in its judgment.

Otherwise the judgment was in order and did not deserve to be set aside by the lower courts. In this respect the courts below did err by dismissing the appellants' appeal. This appeal before us succeeds, as I find merit in it, in view of the errors in the judgment of the two lower courts of appeal. My judgment is that the judgment of the court of first instance is hereby affirmed, but without the order in favour of the defendants/respondents. The judgments of the lower courts are set aside. In view of the above reasoning and the fuller ones given in the lead judgment of my learned brother Chukwuma-Eneh, JSC, I also allow the appeal. I abide by the order as to costs.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Port Harcourt in appeal No. CA/PH/132/96 delivered on the 13th day of July 2000 in which the court affirmed the decision, of the Imo State Customary Court of Appeal in appeal No. CCA/OW/A/22/95 delivered on the 1st day of February, 1996 in which it set aside the decision of the Imo State Customary Court in suit No. CC/HJ/61/90 delivered on the 7th day of November, 1994 dismissing the case of the present respondents who were then plaintiffs before that court.

From the record, the appellants and the respondents are boundary neighbours disputing ownership of land along or around their boundary. It is the case of the respondents that an arbitration panel which was set up by the police following a complaint concerning trespass to the land in dispute, recommended the traditional oath-taking to determine the ownership of the land which was done and that the respondents survived the exercise and traditionally became entitled to the disputed piece or parcel of land; that the oath taking exercise took place at a place called Nwite

Shrine.

On the other hand, the appellant's case is that the piece of land belongs to them and that some of the respondents who took the oath in fact died during the period of one year in which the oath was supposed to be effective and led evidence on the ownership, possession, and boundaries of the disputed land.

The particulars of claim of the plaintiffs/respondents at the Customary Court reads as follows:-

C . *"1. The plaintiffs are natives of Umuoka Ihie in Ohaji/Egbema/Oguta Local Government Area of Imo State within jurisdiction.*

2. The Defendants are natives of Umuanyanwu Obitti in Ohaji/Egbema/Oguta Local Government Area within the jurisdiction of this Honourable Court.

D *3. The land subject matter (hereinafter called the land in dispute) is known as and called "Ukwu Wite" lying and situate along Ihie and Obitti road in Ohaji/Egbema/Oguta L.G.A. within jurisdiction.*

E *4. The Plaintiffs are owners in possession of the land in dispute from time immemorial and which they inherited from their ancestors Umu Degwe. The Plaintiffs have farmed on this land for a very long time within (sic) interruption from the Defendants or any one else.*

F *5. In or around 1973 the Defendants their servants and or agents without the leave or licence of the plaintiffs unlawfully broke and entered into the land in dispute, portioned it out to themselves for farming.*

G *6. And because of this unlawful trespass we the plaintiffs took a case to the elders of Ihie and Obitti presided over by Councillor Clifford Ogbuehi of Umuapu who looked into the case and ordered we the plaintiffs to swear for defendant which we did and it ended in our favour.*

H *7. In or about April 1986 again the Defendants their servants and or agents without the leave or licence of the Plaintiffs entered into the land in dispute, portioned it out to themselves for farming. Also they damage (sic) some of the economic trees therein.*

Therefore the plaintiff (sic) have suffered damages and claim as follows:

1. Declaration of Customary Right of Occupancy to the piece of

parcel of land known as and called "Ukwu Wite" lying and situate along Ihie and Obitti road in Ohaji

2. Two Thousand naira (N2,000.00) General damages for trespass.

3. An injunction restraining the Defendants their agents and or servants from any farther acts of trespass or interference with the said plaintiffs land."

The Customary Court, at the conclusion of the hearing of evidence conducted a visit to the locus in quo and thereafter made the following findings of fact. C

"1. The parties are disputing boundary

2. The Plaintiffs called the land Okwu-Nwite while the Defendants call it Okwu-Ogwuala

3. The Plaintiffs claim that Nwite was the central place for the oath taking and a shrine where small pots are planted with water in the pots. D

4. The court did not see any significance of a shrine at the point shown. There were no small pots nor pieces of pots there. E

5. The Defendants claim Okpo-Ovu which the court noticed.

6. The Plaintiff (sic) did not tender the document for the payment of compensation by the Shell Company, while the Defendants tendered their own documents on the uncontroverted Okwu-Ogwu-ala Obitti. F

7. The plaintiff (sic) is (sic) not prove that they survived the oath and celebrated it.

8. It is customary to inform the juju priest after surviving an oath before celebration." G

Based on the above findings of fact, the trial customary Court reached the following decision:

"After a careful, articulated and artificial analysis of the issues in this matter, this Honourable Court hereby decides, as follows:-

1. The court believe that the land in dispute is called Okwu-Ogwu-ala bounded at the OVU and not Okwu-Nwite. H

2. The Defendants have defended their case from the preponderance of evidence.

3. *The court is not satisfied with the evidence of the plaintiffs on the question of the position of Nwite shrine observed during locus.*

4. *Sequel to this proof credited to the Defendants the land in dispute known as and called Okwu-Ogwu-Ala situate at Obitti/ Ihie road is hereby awarded to the Defendants with a grant of customary Right of Occupancy over the said land.*

5. *The Plaintiffs are hereby perpetually restrained from entering the said Okwu-Ogwu-Ala of the Umuanyanwu people of Obitti, with effect from the date of this judgment.”*

It should be noted that the defendants did not counter claim against the plaintiffs in the action neither did they file a separate action which was subsequently consolidated with the instant action. There was, therefore, no basis for the award in decisions 4 and 5 supra since it is trite law that the court does not make a practice of awarding to a party what he did not claim.

As stated earlier in this judgment, the above decision of the Customary Court was set aside by the Customary Court of Appeal whose decision was subsequently affirmed by the Court of Appeal resulting in the instant further appeal.

The issues for determination as identified by learned counsel for the appellants, CHIEF EZE DURUIHEOMA in the amended appellants’ brief of argument deemed filed on the 27th day of March 2006 and adopted in argument of the appeal on the 19th day of February, 2007 are as follows:-

“2.01: *Was the lower court right to have excused the proof of root of title by the plaintiffs for the reason which it gave in the judgment?*”

2.02: *Was the lower court correct to have concluded that it was for the purpose of establishing the location of the boundary that oath was administered?*

2.03: *Was the presence or otherwise of Nwite shrine on the land in dispute not an issue before the Customary Court of Appeal of Imo State and did the lower court act rightly by allowing an interference of a finding of fact by the Trial Court in this case?*

2.04: *Was the Lower Court right when it held that the Trial Court*

did not properly evaluate the evidence led at the Trial?

2.05: Was the Lower Court right to have struck out an issue properly submitted to it for determination and did that not amount to a denial of fair-hearing.”

Looking closely at the appellants’ issues 1 & 2, it is very clear that they can be conveniently taken together since they relate to the issue of title to the land and its identity. That apart, it is my considered view that the primary issue to be determined in the instant appeal is whether the respondents did prove their case on the preponderance of evidence on record, which in effect, is a combination of appellants’ issues 1 & 2. On the other hand, learned counsel for the respondents’ CHIEF UGOCHUKWU DIM, in the respondents’ brief of argument filed on 26/9/02 identified two issues for determination. These are:

“(a) *Whether there is a valid appeal in the instant case,*
 (b) *Whether the lower court was right to have excused the proof of title in a matter in which the main issue between the parties was the exact location of the exact point on the boundary land where the respondents took the oath.”*

Respondents’ issue (b) supports my view that the issue in the appeal is as stated earlier in this judgment.

There is no doubt that from the Particulars of Claim earlier reproduced in this judgment, the action, as constituted before the trial customary court, is simply for declaration of title to land, damages for trespass and perpetual injunction against the appellants restraining them etc from further acts of trespass on the disputed land. The particulars of claim speaks for itself and it is immaterial that the parties share common boundary between them, and the fact that one may have to determine the boundary between them in the process of determining the ownership of the land does not derogate from the essential nature of the dispute between the parties and as presented before the court for resolution, which is declaration of title to the disputed land as claimed in the Particulars of Claim.

Apart from the claim before the court, the evidence adduced by both parties clearly support the fact that the dispute between the parties is as to ownership of or title to the land in dispute. There is nothing in the

evidence on record to show or indicate that the parties were disputing only the boundary between them and not the land that falls within the portion claimed by either party as constituting the boundary between the parties. What I am trying to say is simply that when A claims that the boundary between him and B is at point X while B claims that it is at point Y, it follows that the parties i.e. A & B are disputing the ownership or title to the piece of land lying between points X and Y period!! If at the conclusion of the trial the court comes to the conclusion that the version of the story as to how A came to own the land and the identity of the said land i.e. the landmarks constituting the boundary marks or boundary neighbours, the court will then declare A as being entitled to judgment and by extension entitled to the right of occupancy of the land in dispute up to point X as claimed. On the other hand if the court comes to the conclusion that A has not proved title to the land in dispute, the court will normally dismiss the claim, except where B has counter claimed, in which case B would be declared the owner of the disputed land as claimed and proved by B, up to point Y.

It is settled law that in an action for declaration of title or right of occupancy to a piece or parcel of land, the plaintiff must succeed on the strength of his case and not on the weakness of the defence though in an appropriate case where the case of the defence supports that of the plaintiff, the plaintiff is entitled to take advantage of same in establishing his claim.

It is also settled law that the five methods of proving title to land are: -

(a) by traditional evidence of the history of the land which includes mode of acquisition of same by deforestation of the virgin forest by the first settler, conquest of the original owners through acts of war, gifts etc

(b) by production of documents of title to the land

(c) acts of possession

(d) acts of selling or leasing of portions of the land.

(e) proof of possession of connected and adjacent land.

In the instant case, there is no evidence by the respondents as to

their root of title or how they came to own the land in dispute. The appellate lower courts have also not pointed out the evidence adduced by the respondents in support of their claim of title, to the land in dispute. In fact I hold, the view that it is the glaring absence of any evidence in support of that claim that made the lower appellate courts to hold that the dispute between the parties is not on title to land but the boundary between the parties. I hold the considered view that the issue of identity of the land in dispute in a claim for declaration of title only becomes relevant after the plaintiff must have cleared the primary hurdle which is proof of his root of title. However, it is settled law that for the plaintiff to succeed in a claim of title to land, he must establish, with certainty, the identity of the land he claims. This is usually done by calling, as witnesses, those with whom the plaintiff shares common boundaries as well as witnesses to trace the boundary marks .along the boundary, of the land in dispute in addition to tracing his root of title to the said disputed land. Where the plaintiff fails to do so his action must fail particularly as there would be no land to which the/a declared title could relate or be attached to with any degree of certainty. In the instant case, there is no evidence from the respondents of what constitutes the boundary marks between the respondents and the appellants. There is much argument as to whether “Nwite” constitutes the boundary, mark between the parties or it is simply where the oath taking took place. In either way, I hold the view that it does not prove that it constitutes the boundary between the parties particularly as the respondents never said so and even if they did, they never stated any other boundary mark so as to give the direction of the said boundary either to the East or West, North or South. The respondents’ case on record is hopelessly without any supporting evidence.

Going through the judgment of the lower court, it is clear that that court held that it was for the purpose of establishing the boundary between the parties that the juju oath was taken or administered. This holding by the lower court is not supported by the evidence on record which is overwhelmingly in support of the fact that the said oath was administered in furtherance of the claims between the parties as to the ownership of the land in dispute. That is also more in accord with traditional prac-

tices acceptable by customary law as a traditional means of establishing or proving ownership of a piece of land in dispute in relevant communities.

Apart from the unambiguous claim of the respondents for declaration of title, it is settled law that where a plaintiff claims for damages for trespass, as in the instant case, his title to the land allegedly trespassed upon is thereby put in issue. In other words for the plaintiff in such a case to succeed, he must first establish his title to the land in dispute, before proceeding to establish possession thereof.

I therefore hold the view that the appellate lower courts were in error in setting aside the decision of the trial customary court as regard the dismissal of the claim of the respondents. I will however set aside the part of the decision of the trial customary court awarding title to the disputed land to the appellants who never counter claimed neither are they entitled to the order of perpetual injunction granted by that court in their favour. It is settled law that the court cannot legally award to a party what he did not claim. In addition, the finding by that court that the dispute between the parties in the case is a boundary dispute is not supported by the facts on record and therefore liable to be set aside. I therefore accordingly.

It should be noted that it is the principle of substantial justice that has been applied in deciding this appeal having regard to the fact that the matter originated from a customary court. Even with that low standard, the case as put forward by the respondents woefully fell below expectation.

In conclusion I agree with the reasoning and conclusion of my learned brother CHUKWUMA-ENEH, JSC in his lead judgment; the draft of which I had the privilege of reading before now; that the appeal is meritorious and should be allowed. I therefore order accordingly and abide by other consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed.