

SUPREME COURT OF NIGERIA
26TH JANUARY, 2007. SC.60/2002
CORAM:- U. A. KALGO, N. TOBI, G. A. OGUNTADE,
A. M. MUKHTAR, M. MOHAMMED, JJSC

CHIEF ADEFIOYE ADEDEJI APPELLANT
AND
1. J. O. OLOSO
2. JUSTICE JAYEOLA ABAYOMI RESPONDENTS
OLOWOFOYEKU (Rtd.)

PRACTICE & PROCEDURE - Pleadings - Issues - Emergence of - An issue in civil proceedings emerges - Where court upon comparison of the averments - Identifies the matters really in dispute - Evidence on undisputed matters is unnecessary (H1)

COURTS - Judgments - Mistake - Issues - Isolation of issues for determination by court - Cannot amount to a consent judgment - Referential mistake by lower court - Caused no miscarriage of justice (H2)

LAND LAW - Title - Pleadings - Admission - Where a defendant admitted that the land in dispute - Previously belonged to plaintiff - Onus of proof of transfer of title to him - Is cast upon that defendant (H3)

LAND LAW - Sale - Customary law - Requirements for a valid sale under customary law - Include actual handing over of the land - In the witnesses' presence (H4)

COURTS - Error - Title - Pleadings - Trial court wrongfully granted defendant a reprieve - For his failure to plead and prove his title - To the land in dispute (H5)

COURTS - Issues - Title - Status of disputed land - Finding on it was irrelevant - In view of defendant's admission (H6)

LAND LAW - Title - Customary tenancy - Nature of - Fact of not paying rents - Does not lead to conclusive fact - Of ownership of the land (H7)

LAND LAW - Title - Customary tenancy - Long possession of defendant - Cannot defeat his landlord's ownership - Plaintiff is entitled to declaration of title - In this case (H8)

LAND LAW - Customary tenancy - Forfeiture - Challenge to landlord's title - Grounds forfeiture - But considering the equity involved - Forfeiture may not be granted by the Supreme Court (H9)

FACTS

Before the Oyo State High Court Ilesa, plaintiff/appellant filed an action against the defendants/respondents. Plaintiff who was the Risawe (traditional ruler) of Ilesa claimed inter alia, declaration of title to the parcel of land in dispute and forfeiture of 2nd defendant's right of user or tenancy conferred under native law and custom. Plaintiff pleaded that 2nd defendant's father, Samuel Olowofoyeku was a licensee of his father, Chief Omole Adedeji in respect of an apartment containing the shops now in dispute. That the apartment was situate on a stool land belonging to the Risawe Chieftaincy family. Being a stool land, no member of the Risawe family could alienate it. That the 2nd defendant's senior brother continued to pay tribute to plaintiff's family until his death in 1972. The 1st defendant refused to acknowledge plaintiff as owner of the two shops but rather acknowledged 2nd defendant's family as his landlord.

The 2nd defendant pleaded that the land was granted to his father in perpetuity by plaintiff's grandfather about 1910, AD. 2nd defendant's father in thankful consideration gave 3,000 cowries and 2 bottles of gin to plaintiff's grandfather which was shared amongst members of the Risawe family. He finally pleaded laches, acquiescence and the limitation law. At the conclusion of evidence, trial Court in its judgment dismissed the plaintiff's suit on 26-6-1996. Plaintiff filed an appeal before the Court of Appeal, Ibadan. The court below on 3-4-2001, in unanimous decision

dismissed the appeal. Still dissatisfied, plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Whether the learned Justices of the Court of Appeal were right in affirming the findings of the Court of first instance that there was no settlement of issues at the proceedings of 6/2/90 amounting to a consent judgment in respect of the issue of ownership of the land-in-dispute.

(2) Whether the learned Justices of the Court of Appeal were right in affirming the judgment of the court of first instance that the transaction between the Appellant's grandfather and the 2nd Respondent's father amounted to a sale of the land-in-dispute.

(3) Whether the learned Justices of the Court of Appeal duly and sufficiently considered issues Numbers 3 and 4 submitted to the court for adjudication.

(4) Whether the learned Justices of the Court of Appeal were right in raising suo motu and deciding the issue of laches and acquiescence without the parties being heard on the issue, and if so, whether the Appellant was in fact guilty of laches and acquiescence."

HELD (Allowing the appeal in part per **OGUNTADE JSC, Tobi & Mukhtar JJSC** dissenting)

Pleadings - Issues - Emergence of

1. Oloko J. in the application of the provisions of Order 35 rules 1-4 above on 6-2-90 in the course of the proceedings before him isolated the issues for determination as made manifest in the parties' pleadings. By that process, he wanted to determine who of the parties bore the burden or onus of leading evidence first. An 'issue' in a civil proceedings conducted by pleadings in the High Court emerges where, the court upon a comparison of the averments in the statement of claim, and the statement of defence identifies the matters really in dispute between parties and upon which it is necessary to lead evidence. It is a well established principle of pleadings that there is no dispute between parties on matters which have been admitted on the pleadings and generally, evidence on such admitted matters is to be excluded. The isolation of issues, truly in dispute, from

those not in dispute, enables the court to save valuable time and cost. It is, by this process, that the court is enabled only to receive evidence on matters in respect of which the parties are in dispute. (p. 175 G)

B Judgments - Mistake - Issues

2. Having regard to what I have said above, it is clear that the isolation of issues for determination from the pleadings is not and cannot amount to a consent judgment as was argued by the plaintiff's counsel in his written brief before us. It is only one, of the ordinary methods, employed by the court in the resolution of issues between the parties to a dispute and to which attention must be directed in the judgment after the parties shall have led evidence. Even if the court below had mistakenly referred to another passage in the record of proceedings before the High Court instead of those of 6-2-90, I do not see how that could have caused a miscarriage of justice to any of the parties. The mistake in my view has no effect of any kind on the judgment of the lower court. I decide issue 1 against the plaintiff. (p. 176 D)

E Title - Pleadings - Admission

3. In the pleadings before the trial court, the 2nd defendant admitted that the land in dispute had previously belonged to plaintiff's family. Having so admitted, the onus of proof was cast upon the 2nd defendant to show that the title to the land in dispute which was previously in plaintiff's family had been transferred to (his) 2nd defendant's family.

How did the trial court approach this aspect of the case? It seems to me that the High Court in its judgment clearly demonstrated an awareness and understanding of the principles of law involved here. At pages 51 - 53 of the record of proceedings the trial judge stated that the 2nd defendant having admitted that the land in dispute previously belonged to the plaintiff's family bore the onus of showing that the plaintiff's grandfather sold the land to (his) the 2nd defendant's father. (p. 182 C)

Requirements for a valid sale under customary law

4. The trial judge in the above passage stated the applicable principles

governing the sale of land under customary law. He also cited the relevant judicial authorities. He also correctly stated the requirements for a valid sale under customary law as these:

1. There must be payment of money or agreed consideration.
2. The transaction must be witnessed by witnesses. B
3. The actual handing over of the land must be done in the presence of the same witnesses.

At page 2 of the judgment the trial judge said:

"It is, no doubt, the correct statement of the law that for a sale of land to transfer title to a purchaser, under customary law, the transaction must have been concluded in the presence of persons who also witnessed the actual handing over of the land sold. There is the requirement that the names of such witnesses and the facts of their having witnessed the sale transaction and the handing over of the land to the purchaser must be pleaded and evidence adduced thereon." C D

The 2nd defendant did not plead the names of persons who witnessed the transaction. Neither did he also plead the names of such persons who witnessed the handing over of the land. (p. 182 F) E

COURTS - Error - Title

5. The High Court having stated the applicable principle of law correctly did a somersault by finding an excuse that was wholly unsolicited and unnecessary for the 2nd defendant's inability to plead the names of the persons who witnessed the transaction and the handing over of the land. F

The trial court was clearly wrong in granting to 2nd defendant a reprieve for the consequences at law attending upon his failure to plead and testify as to the names of persons who witnessed the sale transaction and the handing over of the land. Even if such witnesses were dead and could not be called as witnesses, the obligation to plead their names and testify concerning them was not removed. It was the particularity with which their names and description were pleaded and given in evidence that would assist the court in determining whether the evidence was credible. It seems to me that in the circumstances, the inevitable conclusion to be arrived at is that the 2nd defendant failed to prove that G H

the land was sold to his father under customary law. (p. 184 D/ H)

COURTS - Issues - Title - Status of disputed land

6. The trial court later went on to consider whether the land in dispute was Risawe chieftaincy stool land or Risawe chieftaincy family land. The High Court concluded that it was Risawe Chieftaincy family land. I think that it was in the circumstance immaterial whether the land was a stool land or a family land. If it was a stool and, it meant that it could not be sold at all: See Apoeso v. Awodiya [1964] 1 All N.L.R. 48; Olusesi v. Oyewusi [1986] 3 NWLR (Pt.31) 634. The relevant fact is that the 2nd defendant having admitted that the land had belonged to Risawe Chieftaincy family, needed to show that the land was validly sold to his father. If the trial court had found on the evidence that the land was stool land it would only have concluded that the land could not be sold. The admission by the 2nd defendant that the land had once belonged to Risawe Chieftaincy family had dwarfed into insignificance the fact that the land was stool land. (p. 185 B)

Title - Customary tenancy - Nature of

7. Rather than consider this serious lacunae in the case of the 2nd defendant, the court below concerned itself with the fact that the 2nd D.W. testified that the previous holders of the Risawe title had not demanded nor collected customary rents or tributes from the Olowofoyeku family of the 2nd defendant; and that the 2nd defendant's family had been in possession of the land for a long time. It is apparent that the court below fell into that error because it did not sufficiently advert its mind to the nature of customary tenancy under native law and custom.

The 2nd defendant having admitted the previous overlordship of the Risawe family and having failed to establish a sale of the land under native law and custom could only have been on the land by the grace and permission of the Risawe family as a customary tenant.

The fact that the 2nd defendant's family had not been paying rents as pleaded and given in evidence by the 1st D.W. does not by itself lead conclusively to the fact of the 2nd defendant's family's ownership of the

land. Having failed to prove a sale to his family, the 2nd defendant has only exposed himself to the inference that his family had over the years been in default of their obligations as - customary tenant.

(p. 187 B/ H/ 188 D)

B

Customary tenancy - Long possession of defendant

8. In the circumstances of this case, the long possession of the 2nd defendant's family could not be adverse to the plaintiff's title since the case made by the plaintiff was that the 2nd defendant's came only on the land in dispute as a tenant to plaintiff's family. Adverse possession by a defendant is one which derogates from and is inconsistent with the ownership title of a person who claims to be true owner of the land. A tenant's possession cannot be adverse to the ownership of his landlord.

C

From what I have said above, it is manifest that the High Court erred in holding that the 2nd defendant's family had bought the land in dispute from plaintiff's family when clearly the requisite formalities of a valid sale under customary law were not established. The court below was also in error to have affirmed the judgment of the High Court.

D

E

The plaintiff had in his claim, asked for a declaration of title or entitlement to a statutory right of occupancy. The plaintiff is clearly entitled to this. (p. 189 F)

F

Customary tenancy - Forfeiture

9. The plaintiff on his 3rd claim asked for forfeiture of the rights of the 2nd defendant's family as customary tenant on the land. In Chief Majolagbe Ashogbon v. Saidu Oduntan 12 NLR 7, the court per Graham Paul J. stated the necessity to consider the particular circumstances of each case to see whether for failure or a suitable penalty would be the proper remedy to grant. The court said:

G

"I wish to make it clear that in my opinion where a native court is invoked in support of a forfeiture of a right, this Court will as a court of equity consider in the circumstances of each case whether forfeiture or a suitable penalty would be the proper course. I regard this Court in its equity jurisdiction as in some measure by virtue of the jurisdiction sec-

H

tions of the Supreme Court Ordinance ‘the keeper of the conscience’ of native communities in regard to the absolute enforcement of alleged nature customs.”

Undoubtedly, under customary law, a challenge by the tenant to his landlord’s title is regarded as a serious misbehaviour. In *Onisiwo v. Gbamgboye* [1941] 7 WACA 69 at 70, the Court said:

“The real foundation of the misbehaviour which involves forfeiture is the challenge to the overlord’s rights. This is commonly shown by some form of alienation and such alienation may take the form, as in this case, of leasing under a claim of ownership. But it is not difficult to imagine cases in which the granting of a lease e.g. for a short period would carry with it no challenge to the overlord’s right and consequently involve no misbehaviour or forfeiture. Every case must be considered on its own facts.”

Finally, the 2nd defendant’s family may stay on the land as customary tenant but must pay the customary rents to plaintiff’s family. I accordingly grant to 2nd defendant’s family a relief against forfeiture on these terms and conditions. They must go and sin no more.
(p. 190 D/ 191 B)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Root of title must be proved for acts of possession to be considered

It is quite clear that the root of title pleaded by the respondents is that of absolute grant or allotment of the land in dispute to Chief Olowofoyeku after payment of 3000 cowries and two bottles of gin to the ancestors of the appellant. The burden of proving this root of title of the 2nd respondent lies on him before any acts of possession can properly be considered by the court as proof of title. This is the decision of this court in *Fasoro v. Beyioku* (1988) 2 NWLR (pt.76) 263 at 271 where this court stated that -

“Where a party’s root of title is pleaded as say - a grant, or a sale or conquest etc, that root has to be established first, and any consequential acts following therefrom can then properly qualify as acts of owner-

ship, in other words, acts of ownership are done because of, and in pursuance to the ownership.” (p. 194 E)

TOBI JSC (Dissenting)

2. Appellant failed to prove that the shops were on the stool land B

I have carefully examined the evidence and I do not see any proof on the part of the appellant that the shops were on the stool land. And what is more, the appellant did not call any other witness to testify on this very important aspect of the case.

The learned trial Judge did not believe the evidence of the appellant that the shops were on stool land. He said at page 56 of the Record: C

“I do not think the succeeding Risawes after Chief Risawe Omole and the members of the family generally would have acquiesced to the sale for so long if the land in dispute had been part of the chieftaincy stool land. I therefore find as a fact that the land in dispute was part of the ordinary land of the Risawe chieftaincy family and not part of the family stool land. That being the case, I must hold and I do hold that the sale of the land in dispute to Samuel Olowofoyeku was quite valid.” D E

Like the learned trial Judge, I also hold from the evidence available that the shops are part of the ordinary land of the family and not part of the stool land. This is because appellant could not prove in evidence that the shops are part of the stool land as earlier averred to in paragraph 4 of the Amended Statement of Claim. (p. 202 H) F

3. Burden of proving title is on appellant

The appellant is a legal practitioner and I expected him to mention in his evidence that the 2nd defendant is a licensee. He did not. He also did not give evidence to enable this court infer that the 2nd defendant is a licensee. Do we say that the burden of proof that the 2nd defendant is not a licensee is on the 2nd defendant? It cannot be. It is clearly on the appellant. It is only when the appellant has proved that the 2nd defendant is a licensee that the probative burden of proving the contrary is on the 2nd defendant. G H

It is new to me that a plaintiff who claims title to land or property

turns around to say that the burden is on the person who says that he is not the owner of the property. I ask: who will fail in this case if no evidence is led? Is it the appellant or the respondents? Certainly the appellant is the person who will fail and he cannot, with the greatest respect, pass the burden to the respondents. (p. 203 H)

4. *Resting of burden of proof*

The above general burden on the plaintiff apart, the burden of proof of any issue rests before evidence is gone into, upon the party asserting the affirmative of the issue; but after all the evidence has been completed the burden rests on the party against whom the tribunal at the time in question would give judgment if no further evidences were adduced. See *Okechukwu and Sons v. Ndah* (1967) NMLR 368. The burden of proof on pleadings, rest upon the party, whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it; and never shifting in any circumstances whatsoever. See *Imana v. Robinson* (1979) 3-4 SC 1. Where a plaintiff fails to prove his case in respect of the reliefs sought, the action must fail. (p. 207 A)

5. *Customary Tenancy - Need for exact evidence of tribute paid*

While two witnesses gave evidence on the non-payment of tribute to the family of the appellant, only the appellant gave the contrary evidence. Payment of tribute is a very important evidence of ownership and I expected the appellant to mention his predecessors that received tributes from the J. A. Olowofoyeku. He specifically mentioned drinks and kola nuts. What are the other gifts he mentioned in his evidence? The payment of tribute is an exact matter and a party giving evidence should mention the specific tribute paid, not to put it generically as “other gifts”. (p. 209 E)

6. *Survey plan is unnecessary where identity of land is not in dispute*

It is clear from the above that the identity of the shops is not in dispute.

Both witnesses traced their identity to a corner piece as their common sign post. That apart, both witnesses also have in common, Ereja Street. I am of the view that there was no need for a survey plan, as the identity of the land in dispute was never in doubt. It is good law that a survey plan is not a desideratum if the identity of the land in dispute is clear and not in dispute. In *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) 360, this court held that as the identity of the land in dispute was known to the parties and not in dispute, no plan of the land was necessary; and that it is not always that a plan is necessary in a land case or that the absence of a plan is fatal to the plaintiff's claim if proper description of the land is available in the proceedings. (p. 210 C)

7. Proof of title - Fasoro case distinguished

When did it become the law that a plaintiff who claims title to land has not the burden to prove that title merely because the defendant says the land was sold to him. Let first things come first. The appellant should not jump the gun. I am in grave difficulty to agree that *Fasoro v. Beyioku* (1988) 2 NWLR (Pt. 76) 263 is authority for this case. The facts are very different from those of this case. In *Fasoro*, the plaintiffs were the persons who pleaded as their root of title, sale and conveyance of the land in dispute from the Olayabo family. This court held that when a plaintiff pleads sale and conveyance as his root of title, he either succeeds in proving the sale or conveyance or he fails. Having failed to prove the title pleaded, it will be wrong for him to turn round to rely on acts of ownership or acts of possession, which acts are in the nature of things derivable from and rooted in the radical title pleaded. (p. 213 C)

MUKHTAR JSC (Dissenting)

8. Title - When burden of proof will shift

The appellant clearly did not prove what he asserted in his claim, and in the circumstance the burden of proof cannot shift to the respondents. H

See section 137 (1) and (2) of the Evidence Act supra. It is only when a party has proved his assertion and discharged the burden placed on him by law that the burden shifts. Moreover a plaintiff can only rely

on the strength of his case, and not the weakness of the defendant's case, especially in a case for the declaration of title to land. (p. 215 C)

REPRESENTATION

- B Kola Olawoye for Appellant.
Hakim B. Abina for Respondents.

CASES REFERRED TO

- C The British India General Insurance Company and Nigeria Ltd. v. Thawardes [1978] 3 SC 143
Okparaoke v. Egbuonu & Ors. [1941] 7 WACA 53 at 55
Cole v. Folami [1956] 1 F.S.C. 66
Onisiwo v. Gbamgboye [1941] 7 WACA 69 at 70
D Okechukwu and Sons v. Ndah (1967) NMLR 368
Erinosho v. Owokonnam [1965] N.W.L.R. 479
Folarin v. Durojaiye [1988] 1 N.W.L.R. (Part 70) 351
Igbokwe v. Nlemchi [1967] 2 N.W.L.R. (Part 429) 185
E Apoeso v. Awodiya [1964] 1 All N.L.R. 48
Olusesi v. Oyewusi [1986] 3 NWLR (Pt.31) 634
Chief Maduku Waghoregho & Ors v. Josiah Aghenghen (1974) 1 S.C. 1
Asani Taiwo & Ors. v. Adamo Akinwunmi & Ors. [1975] All N.L.R. 202
at 227
F Chief Majolagbo Ashogbo v. Saidu Oduntan, 12 NLR 7
Okota & Ors. v. Oba Falolu 1 & Ors. (unprinted but see WACA 2879 1940)
G Fasoro v. Beyioku (1988) 2 NWLR (pt.76) 263 at 271

STATUTE & RULES REFERRED TO

Oyo State High Court (Civil Procedure) Rules O.35 rr. 1-4
Evidence Act ss. 74, 139, 135, 136.

H

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the plaintiff at the Ilesha High Court and the respondents were the defendants. The appellant (hereinafter referred to as

‘the plaintiff) in his Amended Statement of Claim dated 16/11/88 claimed against the respondents (hereinafter referred to as ‘the defendants’) the following reliefs:

(i) *A declaration that the Risawe of Ilesa by virtue of his office under Ijesa native law and custom and by the provisions of the Chiefs Law of Oyo State is the only person entitled to a statutory right of occupancy in respect of all the land situate within his palace or official residence called Akodi/Ereja Quarter, Ilesa.* B

(ii) *A declaration that the rooms occupied as shops by the Defendants at B. 18, Ereja Quarter, Ilesa are situate within Risawe chieftaincy palace (Akodi), Isida, Ilesa.* C

(iii) *Forfeiture of the 2nd Defendant’s right of user, licence or tenance conferred under native law and custom.*

(iv) *Ejectment of the Defendants from the aforesaid rooms or shops.* D

(v) *Account and payment to the plaintiff of all rents paid or payable in respect of the rooms or shops at the rate of N50 per shop per month as from 1st January 1973 until the final determination of this suit.”* E

The parties later filed and exchanged pleadings. The suit was heard by Ademakinwa J. On the state of pleadings upon which the suit was heard, the defendants called evidence first. They called two witnesses in addition to the 1st defendant. The plaintiff testified in support of his claims. On 26-06-96, the trial judge in his judgment dismissed the plaintiff’s suit. The plaintiff was dissatisfied with the judgment. He brought an appeal before the Court of Appeal, Ibadan (hereinafter referred to as ‘the court below’). The court below, on 3-4-2001 in a unanimous decision dismissed plaintiffs appeal. Still dissatisfied, the plaintiff has come on a final appeal before this Court. F G

In his appellant’s brief, plaintiff’s counsel formulated for determination in this appeal four issues which are:

(1) *Whether the learned Justices of the Court of Appeal were right in affirming the findings of the Court of first instance that there was no settlement of issues at the proceedings of 6/2/90 amounting to a consent judgment in respect of the issue of ownership of the land-in-dispute.* H

(2) *Whether the learned Justices of the Court of Appeal were right in affirming the judgment of the court of first instance that the transaction between the Appellant's grandfather and the 2nd Respondent's father amounted to a sale of the land-in-dispute.*

B (3) *Whether the learned Justices of the Court of Appeal duly and sufficiently considered issues Numbers 3 and 4 submitted to the court for adjudication.*

C (4) *Whether the learned Justices of the Court of Appeal were right in raising suo motu and deciding the issue of laches and acquiescence without the parties being heard on the issue, and if so, whether the Appellant was in fact guilty of laches and acquiescence."*

D The respondents, by their counsel adopted the four issues formulated by the appellant for determination. I intend to consider the issues serially. It is helpful to expose fully the facts pleaded by the parties in their pleadings for an appreciation of the issues as discussed in this judgment.

E The plaintiff pleaded that the 1st defendant was a tenant in two of the plaintiff's shops within Risawe Chieftaincy palace. He further pleaded that the 2nd defendant's father, Samuel Olowofoyeku was a licensee to his father, Chief Omole Adedeji in respect of an apartment containing the shops now in dispute. The apartment was situate on a stool land belonging to the Risawe Chieftaincy family. Being a stool land, no member of
F the Risawe family could alienate it. The stool land was identified as being at Isida/Ereja quarters, Ilesha. The plaintiff pleaded the history of the devolution of the land in the Risawe family. It was pleaded that the 2nd defendant's senior brother as head of the 2nd defendant's family continued to pay traditional tributes to the successors to plaintiff's grandfather as Risawe after the death of both plaintiffs' grandfather and the defendant's
G father. There arose a dispute within the Risawe Chieftaincy family as to succession to the stool. The dispute was the subject of court litigation which lasted between 1975 and 1985. The Risawe Chieftaincy stool as a
H result could not be filled. The 2nd defendant's senior brother continued to acknowledge the Risawe Family's ownership of the land until his death in 1972. The plaintiff succeeded to the Risawe stool in 1985. The 1st

defendant however refused to acknowledge the plaintiff as the owner of two shops in the apartment in respect of which the defendant's father had been a licensee to the Risawe family. Rather, he acknowledged the 2nd defendant's family as his landlord. The plaintiff caused letters to be sent to the 2nd defendant protesting the development and asking for his reaction. The 2nd defendant reacted claiming that the land belonged to his family. The plaintiff then brought his suit claiming as earlier stated above.

In his statement of defence, the 1st defendant pleaded that he became a tenant to 2nd defendant's family in 1963 and that he had since been paying rents to the family. The 2nd defendant pleaded that the shops in dispute were built by his father Samuel Olowofoyeku between 1910 and 1911 on a piece of land granted to him in perpetuity by a plaintiff's grandfather. The 2nd defendant's father in 'thankful consideration' gave 3,000 cowries and two bottles of gin to plaintiff's grandfather. These were shared amongst members of the RISAW family. The family of the 2nd defendant succeeded into the interest of Samuel Olowofoyeku at his death and had since remained on the land. They also put tenants in some of the shops. The 2nd defendant's family has since not paid any tribute or rent to the plaintiff's family. The 1st defendant was a tenant to the 2nd defendant's family in two shops now in dispute. The 2nd defendant pleaded that the shops in dispute belonged to his family. He finally pleaded laches, acquiescence and the limitation law.

The suit was tried on this state of pleadings. I now proceed to consider the issues for determination as identified by parties.

On the first issue, the plaintiff contended that the court below in the determination of the question whether or not the parties had in the course of proceedings before the High Court come to a settlement of issues, relied on a wrong and inappropriate part of the proceedings of the High Court and in the process denied itself the opportunity to fairly determine the matter. Counsel relied on *Bello & Ors. v. The State* [1994] 8 NWLR (Part 343) 177 at 186; *Maximum Insurance Co. Ltd. v. Awoniyi* [1994] 3 NWLR (Pt.331) 178 at 195. Counsel further referred to the proceedings of the High Court on 6/2/90 and Order 34 rules 1-4 of the

Oyo State High Court rules in order to support his contention that there was indeed a consent judgment submitted to by parties. In order to appreciate the contention of the plaintiff, it is necessary for me to reproduce the relevant proceedings of the High Court on 6/2/90 before Oloko

B J. The proceedings read:

“COURT:- Both sides agree that the land on which the shops stand is within Risawe Chieftaincy family land.

The main issue is whether the land on which the shops stands was granted to the grandfather of the 2nd Defendant by the then Risawe (Chief Omole) and as a subsidiary issue whether 2nd Defendant’s ancestor built the two shops in dispute or whether the two shops were built by the Plaintiff’s ancestor.

D *COURT: At this stage Chief Adefioye Adedeji says that on the pleadings, the defendants should first open their case - since they admitted on the pleadings that the plaintiff’s family is the original owner of the land on which the shop stands.*

Plaintiff refers to the case of G. Onobru & Anor. V. I. Esegine & Anor. [1986] 1 NWLR (Part 19) p. 799, 805 in support.

Refers to paras. 6, 7 and 8 of the 2nd defendant’s Statement of Defence.

F *Chief Olowofoyeku replies and says the legal citation has been misapplied. Refers to para. 4 and 15 of S/C.*

Refers to para. 5 of the Statement of Defence. Says the issue is ‘who built the shops’

RULING:

G *I have no doubt in my mind that where there is a straight forward case in which a defendant admits that the ownership of the land resides in the plaintiff, the onus will shift to the defendant to establish a change of ownership - See the cases (1) Onobruhere & Anor v. Esegine & Anor. [1986] 1 NWLR (Pt. 19) p. 799; (2) Bello Isiba & Ors. v. J. T. Hanson H & Anor. [1967] 1 All N.L.R. p. 8; (3) Thomas v. Holder 12 WACA 78.*

On a thorough reading of the pleadings filed by both parties and especially by par. 28 of the Statement of Claim which contains the relief being sought from the court, it is clear that the main issue to be decided

by this court is ‘who built the shops in dispute’? In the light of the above it is my view that the Plaintiff shall have to start to lead evidence as to who built the shops in issue.

I am also reinforced by this contention by the equitable defences which are averred by the defendants. In the circumstance asking the defendants to start, may deprive them of the application of the equitable defences so pleaded. B

In the peculiar nature of this case on the pleadings, I hope that the Plaintiff should start. I now call upon the Plaintiff to open his case.” C

Now order 35 rules 1-4 of the Oyo State High Court Rules provide:

1. At any time before or at the hearing, the Court may, if it thinks fit, on the application of any party, or of its own motion, proceed to ascertain and determine what are the material questions in controversy between the parties, and may reduce such questions into writing and settle them in the form of issues which issues when settled may state questions of law on admitted facts, or questions of disputed facts, or questions partly of the one kind and partly of the other. D E

2. The Court may, if it thinks fit, direct the parties to prepare such issues, and the same shall be settled by the Court.

3. The issues may be settled without any previous notice at any stage of the proceedings, at which all the parties are actually present, or at the hearing. If otherwise, notice shall be given to the parties to attend the settlement of the issue. F

4. At any time before the decision of the case, if it shall appear to the court necessary for the purpose of determining the real question or controversy between the parties, the Court may amend the issues or frame additional issues on such terms as it shall seem fit.” G

Oloko J. in the application of the provisions of Order 35 rules 1-4 above on 6-2-90 in the course of the proceedings before him isolated the issues for determination as made manifest in the parties’ pleadings. By that process, he wanted to determine who of the parties bore the burden or onus of leading evidence first. An ‘issue’ in a civil proceedings conducted by pleadings in the High H

Court emerges where, the court upon a comparison of the averments in the statement of claim, and the statement of defence identifies the matters really in dispute between parties and upon which it is necessary to lead evidence. It is a well established principle of pleadings that there is no dispute between parties on matters which have been admitted on the pleadings and generally, evidence on such admitted matters is to be excluded. See Section 74 of the Evidence Act; *The British India General Insurance Company and Nigeria. Ltd. v. Thawardes* [1978] 3 SC 143 and *Okparaoke v. Egbuonu & Ors.* [1941] 7 WACA 53 at 55. The isolation of issues, truly in dispute, from those not in dispute, enables the court to save valuable time and cost. It is, by this process, that the court is enabled only to receive evidence on matters in respect of which the parties are in dispute.

Having regard to what I have said above, it is clear that the isolation of issues for determination from the pleadings is not and cannot amount to a consent judgment as was argued by the plaintiff's counsel in his written brief before us. It is only one, of the ordinary methods, employed by the court in the resolution of issues between the parties to a dispute and to which attention must be directed in the judgment after the parties shall have led evidence. Even if the court below had mistakenly referred to another passage in the record of proceedings before the High Court instead of those of 6-2-90, I do not see how that could have caused a miscarriage of justice to any of the parties. The mistake in my view has no effect of any kind on the judgment of the lower court. I decide issue 1 against the plaintiff.

On issue 2, the complaint of the plaintiff is quite substantial and important for the determination of this appeal. It is, that the court below, was in error to have affirmed the judgment of the High Court and in particular, that part of it which held that the transaction between the plaintiff's grandfather and the 2nd defendant's father concerning the land in dispute amounted to a sale of the land in dispute to the 2nd defendant's father. In resolving the issue, it is necessary to give special attention to

the pleadings of parties. Paragraphs 3, 4, 5, 6 and 28(i) - (iii) of the plaintiff's statement of claim read:

"3. *The 2nd Defendant is a licensee by privy whose father, late Samuel Olowofoyeku was given a licence by the Plaintiff's grandfather, later Chief Omole Adedeji the then Risawe of Ilesa, to occupy some apartment within the Plaintiff's palace to enable the 2nd defendant's father carry on some trading at the time on a friendly basis and free of any charges except periodical traditional payment of tributes like kolanuts or drinks (schnapps or gin).*

4. *The Plaintiff avers that the apartment containing the shops the subject matter of this action are situated within Risawe Chieftaincy Compound (Akodi) Isida Quarter, Ilesa the official residence of the Plaintiff and not at Idasa ward which is some distance away from the Plaintiff's Compound.*

5. *The Plaintiff avers that no Risawe had ever owned or had anything to do with any land at Idasa ward which could have been acquired from him by anybody whomsoever.*

6. *The stool land herein-before-mentioned was first vested some 600 years ago in Chief Olubikin Ganfiran, the first Risawe of Ilesa by Owa Oyarere and has since remained in the exclusive and undisturbed possession of the descendants of the first Risawe of Ilesa till today.*

xx

28. *On receipt by the Plaintiff of the court order aforesaid the Plaintiff went to the High Court Registry and discovered that the 1st Defendant herein swore to an affidavit and exhibited the aforementioned exchange of correspondence between the Plaintiff and the 2nd Defendant regarding the title to the land in question.*

The Plaintiff shall contend at the trial of this action:-

(i) *That under Ijesa native law and custom and by virtue of the provisions of the Chiefs Law of Oyo State all land within Risawe traditional palace or official residence (known as Akodi Oloyo) is vested in the Risawe Chieftaincy title-holder for the time being, and the Plaintiff will rely on the provisions of Section 45 of the Evidence Act at the trial of this action.*

(ii) *That under Ijesa native law and custom no traditional titleholder can validly sell, mortgage or in any way whatsoever alienate the whole or any part of his palace or official residence as opposed to ordinary chieftaincy land outside his palace; the greatest he can give is a licence because the palace belongs to the past, present and the future.*

(iii) *That even if any part of the Plaintiff's palace was ever alienated to the 2nd Defendant's father (which the Plaintiff hereby denies) such alienation would be null and void ab initio and of no effect whatsoever."*

The 2nd defendant in paragraphs 6, 7, 8, 9, 13 and 25 of his amended statement of defence pleaded thus:

"6. *At the material time, the land was part of Isida under the control of the Risawe Chieftaincy family, and was allotted to Samuel Olowofoyeku by his personal friend, Chief Omole the then Risawe of Ilesa, with the knowledge and consent of members of his family and the Isida people. It was open bush land not far from the Risawe's thatched-roofed house, and surrounded by bush on three sides and market place in front.*

7. *On the occasion of the allotment which was, and intended to be, in perpetuity, Samuel Olowofoyeku gave in thankful consideration some 3,000 cowries and two bottles of gin to Chief Risawe Omole which the Chief shared with his family and the Isida people.*

8. *Samuel Olowofoyeku was duly let into possession of the land in the presence of Isida people and members of both Risawe and Olowofoyeku families; he built two shops thereon which he roofed with iron sheets and completed about 1911; he thereafter used the shops for his trade until he died in 1917 without paying rent or tribute to either the Risawe or to anybody else.*

9. *After the death of Samuel Olowofoyeku, his family succeeded to the shops, and they have been continuously occupying the same by themselves or their tenants until today without paying rent or tribute to anybody.*

xx

13. *Apart from the initial consideration given to Risawe Omole in*

1910/1911, neither Defendant's father nor his elder brother Joseph Olowofoyeku (who died in 1972) paid in their life time any tribute or rent to Risawe Omole or any other Risawe. If they gave any present to any Risawe, which is not admitted, it would be in token of the friendship existing between Risawe Omole and Samuel Olowofoyeku.

B

xx

25. The Defendant avers that it is contrary to Ijesha custom for the Risawe Chieftaincy family to seek to deprive Defendant's family of the building erected on a plot allotted to them since about 80 years, or proceed to do so without notice, He will counter the contention which plaintiff wishes to advocate at the end of this claim.

C

The plaintiff filed a Reply to the 2nd defendant's amended statement of defence. Paragraphs 1 and 2 of the Reply read:

"1. With reference to paragraph 6 and 7 of the 2nd Defendant's statement of defence the Plaintiff avers that the Plaintiff's grandfather never allotted to the defendant's father with the knowledge or consent of Plaintiff's family any land in perpetuity in consideration of some 3,000 cowries and 2 bottles of gin or for any other valuable consideration whatsoever.

D

2. With reference to paragraph 10 of the defendant's statement of defence, the Plaintiff avers that at no time since 1917 was any land or buildings within the Plaintiff's official residence or akodi allotted in perpetuity to anybody within or outside Plaintiff's family."

F

The summary of the averments pleaded in the plaintiff's statement of claim may be itemized thus:

1. That the plaintiff's grandfather granted a licence in respect of a portion of Risawe Chieftaincy stool land to the 2nd defendant's father on a friendly basis and the defendant's father was to make periodical traditional payment of tributes like kolanuts or drinks (i.e. schnapps or gin) on the land.

G

2. That under Ijesa native law and custom, the land within Risawe Chieftaincy palace (as the one in dispute in this case) is vested in the Risawe Chieftaincy title holder for the time being and that, being a stool land, is not alienable.

H

3. That the plaintiff's grandfather never sold the land in dispute to the 2nd defendant's father for a consideration of 3,000 cowries and 2 bottles of gin with the knowledge or consent of the plaintiff's family as pleaded by the 2nd defendant.

B 4. That the plaintiffs Risawe Chieftaincy stool land is not allotted in perpetuity to anybody outside the plaintiff's family.

The averments in the 2nd defendant's amended statement of defence may be distilled thus:

C 1. That the land in dispute was allotted to the 2nd defendant's father by plaintiff's grandfather (who was 2nd defendant's father) in perpetuity and this was done with the knowledge and consent of the members of the plaintiff's family.

D 2. That in consideration for the allotment, the 2nd defendant's father gave 3,000 cowries and two bottles of gin to plaintiff's grandfather and these were shared by members of plaintiff's family.

3. That the 2nd defendant's father later built two shops on the land around 1911.

E 4. That the 2nd defendant's family has since not paid any tribute or rent to plaintiff's family.

F 5. That it is contrary to Ijesa custom for plaintiff's family to take back from 2nd defendant's family a plot allotted to them 80 years ago without first giving a notice to that effect.

G It is clear, that, on the state of the pleadings, the contention of the 2nd defendant was that the land granted to his father although belonging to plaintiff's Risawe Chieftaincy family was not stool land. The 2nd defendant also made the case that the land was out rightly sold to his father around 1910 upon payment of 3,000 cowries and 2 bottles of gin.

H It is helpful to analyze the case of the plaintiff as pleaded. It is clear that the plaintiff clearly made the point that the land in dispute being stool land was never sold and could not be sold. In addition he pleaded that the land was never outrightly sold to the plaintiff. At the close of pleadings, and having particular regard to the 2nd defendant's case as pleaded, it was made manifest that the original owner of the land was Risawe family of the plaintiff. The central issue of the day emerging

from the pleadings was whether or not the said family outrightly sold the land to the 2nd defendant's father or merely granted him a licence to use the land upon payment of customary tributes.

Now, in *George Onobruchere & Anor. v. Esegine & Anor* [1986] 2 S.C. 385 at pp. 397-398, this Court per Oputa JSC restated the principles guiding the court in deciding the party that bears the onus or burden of proof in a civil case. The court said:

*"An onus of proof does not exist in vacuo. The onus or burden of proof is merely on onus to prove or establish an issue. There cannot be any burden of proof where there are no issues in dispute between the parties. For example, if the plaintiff's claim is admitted, that will be the end of the story. Similarly if a particular averment of the plaintiff is admitted, there will no longer be an onus to prove what has been admitted by the opposite party. Therefore to discover where the onus lies in any given case, the court has to look critically at the pleadings. Where for instance the plaintiff pleads possession of the land in dispute as his root of title and the defendant admits that possession but adds that the land was given to the plaintiff on pledge, then the onus shifts onto the defendant to prove that the plaintiff is not the owner of the land his possession of which has been admitted. Once the defendant admits the plaintiff's possession of the land in dispute in his statement of defence, then and there, the plaintiff has on the pleadings discharged the onus of proof cast on him and section 145 of the Evidence Act Cap. 62 of 1958 will impose a burden on the defendant to prove the negative - namely that the plaintiff is not the owner. See *Lawrence Onyekaonwu & Ors. v. Ekwubiri* (1966) 1 All N.L.R. 32 at p.35. In such a case, it is the defendant who will begin and if at the close of his case he fails to prove that the plaintiff is not the owner, the plaintiff's claim succeeds without even the plaintiff giving any further evidence."*

And at pages 400-401 of the same report Oputa JSC said:

"To hold otherwise will be to 'overlook the established rule that once it is proved (here it was admitted by the defendants and found by the trial court) that the original ownership of property is in a party the burden of proving that that party has been divested of the ownership rests

upon the other party' - per Coker, JSC in Bello Isiba & Ors. v. J. T. Hanson & Anor (1967) 1 All N.L.R. 8. The same principle was applied in the case of Samson Ochonma v. Asirim Unosi (1965) N.M.L.R. 321.

Once it is found that there had been misapprehension as to the onus of proof and a misdirection casting such onus on the wrong party, I think it will be reasonably fair to assume the likelihood of a miscarriage of justice. 'To go further would be to speculate. How can the appellate court determine, for instance, the part such a misdirection played in the trial judge's assessment and evaluation of evidence and on the witnesses who testified? Ground 1 of the additional grounds of appeal therefore succeeds."

In the pleadings before the trial court, the 2nd defendant admitted that the land in dispute had previously belonged to plaintiff's family. Having so admitted, the onus of proof was cast upon the 2nd defendant to show that the title to the land in dispute which was previously in plaintiff's family had been transferred to (his) 2nd defendant's family.

How did the trial court approach this aspect of the case? It seems to me that the High Court in its judgment clearly demonstrated an awareness and understanding of the principles of law involved here. At pages 51 - 53 of the record of proceedings the trial judge stated that the 2nd defendant having admitted that the land in dispute previously belonged to the plaintiff's family bore the onus of showing that the plaintiff's grandfather sold the land to (his) the 2nd defendant's father.

The trial judge in the above passage stated the applicable principles governing the sale of land under customary law. He also cited the relevant judicial authorities. He also correctly stated the requirements for a valid sale under customary law as these:

- 1. There must be payment of money or agreed consideration.**
- 2. The transaction must be witnessed by witnesses.**
- 3. The actual handing over of the land must be done in the presence of the same witnesses.**

At page 2 of the judgment the trial judge said:

“It is, no doubt, the correct statement of the law that for a sale of land to transfer title to a purchaser, under customary law, the transaction must have been concluded in the presence of persons who also witnessed the actual handing over of the land sold. (See Cole v. Folami [1956] 1 F.S.C. 66; Erinosh v. Owokonniam [1965] N.W.L.R. 479. There is the requirement that the names of such witnesses and the facts of their having witnessed the sale transaction and the handing over of the land to the purchaser must be pleaded and evidence adduced thereon. (See: Folarin v. Durojaiye [1988] 1 N.W.L.R. (Part 70) 351; Igbokwe v. Nlemchi [1967] 2 N.W.L.R. (Part 429) 185.”

The 2nd defendant did not plead the names of persons who witnessed the transaction. Neither did he also plead the names of such persons who witnessed the handing over of the land. At the trial the 1st Defence Witness Hon. Justice Jaiyeola Abayomi Olowofoyeku in a part of his evidence testified thus:

‘It was an out and out allotment that was made to my grandfather for which he paid some consideration of 3,000 cowries and two bottles of gin. The members of Risawe family were present at the allotment and shared the consideration among themselves. Members of my grandfather’s family were also present. After the consideration has been paid, my grandfather was put in possession in the presence of members of Risawe family and members of my grandfather’s family.

The question that necessarily arises is: if 1st D.W. knew so much about the transaction why could the 2nd defendant not plead and lead evidence as to the names of persons who witnessed the sale transaction and the handing over of the land in dispute. In Folarin v. Durojaiye [1988] 1 NWLR (Pt. 70) 351, this court said at page 366:

“Now the sale of the land in dispute to Ramota Adeoye, to qualify as a valid sale transferring title under the English law, there needed to be a Deed of Conveyance in English form. None was pleaded, nor was proved, as none was in fact executed. Now again, for the selfsame sale to transfer title to Ramota Adeoye under the customary law, the transaction needed to be concluded in the presence of witnesses who witnessed the ‘actual handing over of the property’. Lydia Erionsho v. Tunji

Owokoniran & Anor. [1965] N.M.L.R. 479. *This incident of customary law was neither pleaded nor proved. It is also a pre-requisite to a valid sale under the customary law that the purchaser be let into possession:- Cole v. Folami (1956) 1 FSC 66 at p. 69. It may well be argued that 'handing over of the property and 'being let into possession' imply one and the same thing. That may well be. But in this case there was no evidence that Ramota Adeoye was either let into possession or that the land in dispute was handed over to her. Being let into possession is under either law - Customary or English, Ramota Adeoye had no legal estate in the land in dispute. She was not the owner either under the English law nor was she the owner under the Customary law. This case demonstrates the necessity of accurate pleading in cases dealing with sale of land and the transfer of title by such sale to the purchase."*

D (underlining mine)

The High Court having stated the applicable principle of law correctly did a somersault by finding an excuse that was wholly unsolicited and unnecessary for the 2nd defendant's inability to plead the names of the persons who witnessed the transaction and the handing over of the land. The trial judge said at pages 52-53:

"It seems to me however that the foregoing principle is only applicable to cases involving recent purchase of land under customary law where the persons who witnessed the transaction would be available to give the required evidence. In a case like the present one which involves a sale transaction which was concluded over 30 years ago before any of the existing witnesses were born, it only stand to reason that the facts that could be honestly pleaded are as to the traditional history relating to the sale transaction. What the Court should be concerned with in such a situation is the well established principle that generally, the onus of proof on a party in civil proceedings is on the preponderance of evidence or on the balance of probabilities."

H **The trial court was clearly wrong in granting to 2nd defendant a reprieve for the consequences at law attending upon his failure to plead and testify as to the names of persons who witnessed the sale transaction and the handing over of the land. Even if such**

witnesses were dead and could not be called as witnesses, the obligation to plead their names and testify concerning them was not removed. It was the particularity with which their names and description were pleaded and given in evidence that would assist the court in determining whether the evidence was credible. It seems to me that in the circumstances, the inevitable conclusion to be arrived at is that the 2nd defendant failed to prove that the land was sold to his father under customary law. B

The trial court later went on to consider whether the land in dispute was Risawe chieftaincy stool land or Risawe chieftaincy family land. The High Court concluded that it was Risawe Chieftaincy family land. I think that it was in the circumstance immaterial whether the land was a stool land or a family land. If it was a stool and, it meant that it could not be sold at all: See *Apoeso v. Awodiya* [1964] 1 All N.L.R. 48; *Olusesi v. Oyewusi* [1986] 3 NWLR (Pt.31) 634. The relevant fact is that the 2nd defendant having admitted that the land had belonged to Risawe Chieftaincy family, needed to show that the land was validly sold to his father. If the trial court had found on the evidence that the land was stool land it would only have concluded that the land could not be sold. The admission by the 2nd defendant that the land had once belonged to Risawe Chieftaincy family had dwarfed into insignificance the fact that the land was stool land. C D E F

The court below in the lead judgment at pages 103 - 104 of the record said:

“The main questions raised under these issues deal with whether the respondents led sufficient evidence in support of the essential ingredients required in proving sale and transfer of land under customary law. The respondents, as defendants, pleaded and led evidence to the effect that Chief Risawe Omole made an outright grant of the land in which the shops in dispute were built to Samuel Olowofoyeku, the father of the 2nd respondent around 1910. That the said Samuel Olowofoyeku was duly let into possession of the land after the grant and the two shops now in dispute were built on the same land shortly after the grant and had been G H

under the control of the Olowofoyeku family ever since they were built. The 1st defendant/respondent gave evidence at the hearing. He told the court, inter alia, that he had rented and occupied the shops in question from the 2nd defendant/respondent for the past 33 years and that he had
 B *been paying rents to the Olowofoyeku family since then. He said further that none of the Chief Risawes before the plaintiff/appellant had ever disturbed him or challenged the title of the 2nd defendant/respondent until the present appellant's installation as the Risawe. He specifically*
 C *named three people who held the title of Risawe immediately before the appellant's installation. He told the court that none of them disturbed him in the shops or challenge the title of the 2nd respondent over the shops.*

Apart from the evidence given by the 2nd defendant/appellant, there was also the testimony of Michael Dupeolu Turton (D.W.2). The
 D witness told the court that he was a member of the Risawe chieftaincy family. He said further that the land on which the shops in dispute were built was allotted to the 2nd defendant's father by the Risawe family.

It is clear from the evidence placed before the court that the
 E Olowofoyeku family had been in possession of the land and the shops built thereon now in dispute for quite a long time unchallenged by any member of the appellant's family until the present appellant was recently installed as the Risawe. The appellant failed to lead any evidence as to
 F why none of his predecessors in office failed to challenge the title of the 2nd respondent. The law is long settled that the court, in the exercise of its equitable discretion, will not give effect to the rules of native law if invoked simply to support a claim to title as against possession which has been acquiesced in for an adequate period of time. A court may refuse to
 G enforce a claim based upon native law and custom where the passage of time has weakened that rule of native law: See *Awo v. Cookey Gam* (1913) 2 N.L.R. 100; *Eyamba v. Moore* (1924) 5 N.L.R. 85. Similarly where a party in a land dispute has successfully traced his title to a party
 H whom both parties admitted as holding the original title, he is entitled to be declared the owner of the land: See *Ekpo v. Ita* (1932) 11 N.L.R. 68; *Onobruhere v. Esegine* (1986) 1 NWLR (Pt.19) 799; and *Runsewe v. Odutola* (1996) 4 NWLR (Pt.441) 143".

I think with respect that the court below was in error not to have adverted its mind to the failure of the 2nd defendant to plead and establish in evidence the fact that the plaintiff's grandfather sold the land in dispute to the 2nd defendant's father. The requisite formalities for a valid sale under customary law were not established. See *Cole v. Folami* [1956] 1 B FSC. 66. **Rather than consider this serious lacunae in the case of the 2nd defendant, the court below concerned itself with the fact that the 2nd D.W. testified that the previous holders of the Risawe title had not demanded nor collected customary rents or tributes from the Olowofoyeku family of the 2nd defendant; and that the 2nd defendant's family had been in possession of the land for a long time. It is apparent that the court below fell into that error because it did not sufficiently advert its mind to the nature of customary tenancy under native law and custom.** In *Chief Maduku Waghoregho & Ors v. Josiah Aghenghen* (1974) 1 S.C. 1, this Court stated that a customary tenant in customary land law parlance is not 'gifted' the land. He is also not a 'borrower' or lessee. He is a grantee and holds a determinable interest which may be enjoyed in perpetuity subject to good E behaviour.

The court below should have borne in mind that the case of the plaintiff was that the 2nd defendant's father was a customary tenant to the Risawe family. It was the 2nd defendant who claimed that his family F had in fact bought the land in dispute. However, the 2nd defendant by not naming persons who witnessed the sale transaction and the handing over of the land had failed to prove a sale under customary law. In his evidence-in-chief, the plaintiff at page 27 of the record testified thus:

"The former head of the Olowofoyeku family late Mr. J. A. G Olowofoyeku and father of 1st D.W. was paying tributes in form of drinks, kolanuts and other gifts to all my predecessors in office including my own father. Some other persons who were allowed to occupy shops built by my grandfather on similar terms of paying tributes in the form of H drinks and other gifts were late Ariyo Abede, late Anjorin and late Omirin."

The 2nd defendant having admitted the previous overlordship

of the Risawe family and having failed to establish a sale of the land under native law and custom could only have been on the land by the grace and permission of the Risawe family as a customary tenant. In Sanni v. Oki [1971] 1 All N.L.R. 116 at 119-120, this Court B per Coker JSC stated the principle applicable where a defendant admits the overlordship of the plaintiff of the land in dispute thus:

“On that state of evidence, surely the learned trial judge should have directed himself on the lines indicated in the judgment of the West C African Court of Appeal in Thomas v. Preston Holder [1946] 12 WACA 78 where it was laid down that in a claim for title, as in the present case, when one of the parties had established a root of title emanating from an agreed original owner, the burden cast upon the other party is substantial and it is difficult if possible at all to find any instance in which that other D party can ever obtain a declaration of title.”

The fact that the 2nd defendant’s family had not been paying rents as pleaded and given in evidence by the 1st D.W. does not by itself lead conclusively to the fact of the 2nd defendant’s family’s E ownership of the land. Having failed to prove a sale to his family, the 2nd defendant has only exposed himself to the inference that his family had over the years been in default of their obligations as - customary tenant. See Okuojeror & Ors. v. Sagay & Ors. [1958] F W.R.N.L.R. 71. It did not establish ownership of the land.

The court below in the lead judgment stated that the 2nd defendant’s family had been in long possession of the land. But it failed to bear in mind that the said long possession could not on the state of pleadings be considered adverse to the plaintiff’s title. The concurring opinion of G Adekeye J.C.A. at pages 107-108 would appear to come close to the correct state of the law. She said:

“Occupation of the land for a long time may operate to oust the title of the real owner, where the occupation is adverse and the owner has H been guilty of laches and acquiescence. Akpan Awo v. Cookey Gam (1913) 2 NLR pg. 100; Oshodi v. Balogun (1936) 4 WACA 1.

It is noteworthy however that acquiescence may not bar a claim unless certain conditions are fulfilled -

1) *Adverse possession by the person in occupation, that is a possession inconsistent with that of the owner (MAJI V. Shaft 1965 NMLR pg. 33 at pg. 37). The appellant as the incumbent Risawe insisted that the respondent's family cannot possibly own shops within the 'Akodi' the official residence of Risawe.* B

2) *The possession must have lasted for a long time. The respondent came upon the land by a grant in 1910.*

3) *The real owner must have been guilty of acquiescence or laches, whereupon the person who relied on it must have altered his position.* C
Taiwo v. Taiwo (1958) 3 FS 80.

Acquiescence means conduct from which it can be interred that a person has agreed to a certain state of affairs affecting his legal right. If a person has agreed to his rights being taken away, he should not afterwards complain about it, he would be estopped by the fact of his having consented to the act complained of. Since acquiescence operates by way of estoppel it is a weapon of defence under which the respondents can take refuge. The appellant is estopped from challenging the rights of the respondents to a portion of his chieftaincy family property which members of his own family had by prior arrangement abandoned or relinquished as his family had delayed in putting up these claims against the respondents. The other three legs of the claim cannot stand as the respondents are not mere customary tenants." D E F

In the circumstances of this case, the long possession of the 2nd defendant's family could not be adverse to the plaintiff's title since the case made by the plaintiff was that the 2nd defendant's came only on the land in dispute as a tenant to plaintiff's family. Adverse possession by a defendant is one which derogates from and is inconsistent with the ownership title of a person who claims to be true owner of the land. A tenant's possession cannot be adverse to the ownership of his landlord. G

From what I have said above, it is manifest that the High Court erred in holding that the 2nd defendant's family had bought the land in dispute from plaintiff's family when clearly the requisite formalities of a valid sale under customary law were not estab- H

lished. The court below was also in error to have affirmed the judgment of the High Court.

The plaintiff had in his claim, asked for a declaration of title or entitlement to a statutory right of occupancy. The plaintiff is clearly entitled to this. Under the 2nd claim, the plaintiff asked for a declaration that the land in dispute with shops at B.18 Ereja quarter, Ilesa is within Risawe Chieftaincy palace (Akodi), Isida, Ilesa. It seems to me that this claim is inconsequential having regard to what I have said as to claim 1 above. Obviously, this claim was made to show that the land in dispute was the stool land of the Risawe Chieftaincy family. In the light of the fact that the suit was initiated and pursued by the plaintiff in his capacity as the Risawe of Ilesa, I have no need to declare that the land in dispute is a stool land. The important thing is that the 2nd defendant had agreed that the land belonged to Risawe family.

The plaintiff on his 3rd claim asked for forfeiture of the rights of the 2nd defendant's family as customary tenant on the land. In Chief Majolagbe Ashogbon v. Saidu Oduntan 12 NLR 7, the court per Graham Paul J. stated the necessity to consider the particular circumstances of each case to see whether for failure or a suitable penalty would be the proper remedy to grant. The court said:

"I wish to make it clear that in my opinion where a native court is invoked in support of a forfeiture of a right, this Court will as a court of equity consider in the circumstances of each case whether forfeiture or a suitable penalty would be the proper course. I regard this Court in its equity jurisdiction as in some measure by virtue of the jurisdiction sections of the Supreme Court Ordinance 'the keeper of the conscience' of native communities in regard to the absolute enforcement of alleged nature customs."

In Asani Taiwo & Ors. v. Adamo Akinwunmi & Ors. [1975] All N.L.R. 202 at 227 (Reprint) this Court said:

"Again in Okota & Ors. v. Oba Falolu 1 & Ors. (unprinted but see WACA 2879 delivered on 28th April, 1940), the court observed:

'As to whether an order of forfeiture of the defendants' rights as customary tenants should have been made, it was agreed that, under

native customary law as recognized by the courts, serious misconduct of various kinds by a tenant may to be a good ground for evicting him; though as was pointed out in Chief Majolagbo Ashogbo v. Saidu Oduntan, 12 NLR 7, the grant of an order of forfeiture is a matter for consideration in the circumstances of each particular case and it is not an invariable consequence of misconduct. It depends on the degree of misbehaviour'."

Undoubtedly, under customary law, a challenge by the tenant to his landlord's title is regarded as a serious misbehaviour. In Onisiwo v. Gbamgboye [1941] 7 WACA 69 at 70, the Court said:

"The real foundation of the misbehaviour which involves forfeiture is the challenge to the overlord's rights. This is commonly shown by some form of alienation and such alienation may take the form, as in this case, of leasing under a claim of ownership. But it is not difficult to imagine cases in which the granting of a lease e.g. for a short period would carry with it no challenge to the overlord's right and consequently involve no misbehaviour or forfeiture. Every case must be considered on its own facts."

Finally, the 2nd defendant's family may stay on the land as customary tenant but must pay the customary rents to plaintiff's family. I accordingly grant to 2nd defendant's family a relief against forfeiture on these terms and conditions. They must go and sin no more.

Under claim (iv) the plaintiff asks that the 2nd defendant's family be ejected from the land in dispute. In view of what I said above in relation to claim (iii), Claim (iv) which means the same thing must be and is refused.

And finally, under claim (v) the plaintiff claims for "account and payment to the plaintiff of all rents paid or payable in respect of the rooms or shops at the rate of N50.00 per month as from 1st January, 1973 until the final determination of this suit." This claim in my view is grossly untenable having regard to the basis on which the action was conceived and fought in court. It was an action predicated on plaintiff's right as a landlord under customary tenancy. The plaintiff himself pleaded

that the terms of the tenancy were that the 2nd defendant's family would make "periodical traditional payment of tributes like kolanuts or drinks (schnapps or gin). That is all that the plaintiff is entitled to. The 2nd defendant's family was not brought on the land as plaintiff's family's
B monthly tenant or debt collector. The 2nd defendant's family cannot therefore be made a person to account to the plaintiff's family for income derived from the land in dispute.

In the final conclusion, this appeal succeeds. The judgment of the trial court and the court below are set aside. Plaintiff's claim 1 succeeds.
C I accordingly grant it. Plaintiff's claims (ii) to (v) are refused. I award in favour of the plaintiff N2,500.00, N5,000.00 and N10,000.00 respectively for appearance in the High Court, court below and this Court. This makes a total amount of N17,500.00.
D

KALGO JSC

I have had the opportunity of reading before now, the judgment
E just delivered by Oguntade JSC in this appeal. I entirely agree with him that there is merit in this appeal and it ought to be allowed. He has, in my respectful view, comprehensively and painstakingly dealt with all the issues which are in controversy in the appeal, and I fully agree with the
F reasoning and conclusions reached thereon. I fully adopt them as mine in the circumstances. I therefore also find merit in this appeal.

Accordingly this appeal succeeds and it is allowed. The decisions of the trial court and the Court of Appeal are hereby set aside. I adopt as
G mine, all the consequential orders made in the leading judgment, including the order of costs.

MOHAMMED JSC

H This is an appeal against the concurrent decisions of the Oyo State High Court of Justice sitting at Ilesa and the Court of Appeal Ibadan Division. The judgment of the Court of Appeal dismissing an appeal against the judgment of the trial High Court was delivered on 3-4-2001.

In the appellant's brief of argument filed in this court in support of the appellant's appeal challenging the decision of the Court of Appeal, four issues were formulated. The issues which the respondents also adopted in their brief of argument are:

"(1) whether the learned Justices of the Court of Appeal were right in affirming the findings of the court of first instance that there was settlement of issues of the proceedings of 6-2-1990 amounting to a consent judgment in respect of the issue of ownership of the land in dispute.

(2) whether the learned Justices of the Court of Appeal were right in affirming the judgment of the Court of first instance that the transaction between the appellant's grandfather and the 2nd respondent's father amounted to a sale of the in dispute.

(3) whether the learned Justices of the Court of Appeal duly and sufficiently considered issues Numbers 3 and 4 submitted to the court for adjudication.

(4) whether the learned Justices of the Court of Appeal were right in raising suo motu and deciding the issue of laches and acquiescence without the parties being heard on the issue, and if so, whether the appellant was in fact guilty of laches and acquiescence."

Taking into consideration of the nature of the dispute between the parties in this case which involves declaration of title to parcel of land under customary law, the main issue for determination in this appeal in my view is issue 2. This is because the respondent's response to the appellant's claim for declaration of title to the land in dispute on pleadings was that the land in dispute originally belongs to the appellant's family which made an out and out allotment of it absolutely to the 2nd respondent's father after payment of 3000 cowries and two bottles of gin. The pleadings of the defendants now respondents with respect to the said absolute grant or sale of the said land in dispute, is contained in paragraphs 5, 6, 7, 8 and 9 of the amended statement of defence where it was pleaded thus-

"5. The shops subject matter of this action were built by the 2nd defendant's father, late Samuel Olowo Foyeku, between 1910 and 1911 on a piece of land at the angle of Ereja and Isida.

6. At the material time, the land was part of Isida under the con-

trol of the Risawe Chieftaincy family, and was allotted to Samuel Olowofoyeku by his personal friend, Chief Omole the then Risawe of Ilesa with the knowledge and consent of members of his family and the Isida people. It was open bush land not far from the Risawe's thatch-roofed house, and surrounded by bush on three sides and market place in front.

7. On the occasion of the allotment which was, and intended to be in perpetuity, Samuel Olowofoyeku gave in thankful consideration some 3,000 cowries and two bottles of gin to Chief Risawe Omole which the Chief shared with his family and the Isida people.

8. Samuel Olowofoyeku was duly let into possession of the land in the presence of Isida people and members of both Risawe and Olowofoyeku families; he built two shops thereon which he roofed with iron sheets and completed about 1911; he thereafter used the shops for his trade until he died in 1917 without paying rent or tribute to either the Risawe or to anybody else.

9. After the death of Samuel Olowofoyeku, his family succeeded to the shops, and they have been continuously occupying the same by themselves or their tenants until today without paying rent or tribute to anybody.”

From these paragraphs of the defendants/respondents’ amended statement of defence, it is quite clear that the root of title pleaded by the respondents is that of absolute grant or allotment of the land in dispute to Chief Olowofoyeku after payment of 3000 cowries and two bottles of gin to the ancestors of the appellant. The burden of proving this root of title of the 2nd respondent lies on him before any acts of possession can properly be considered by the court as proof of title. This is the decision of this court in *Fasoro v. Beyioku* (1988) 2 NWLR (pt.76) 263 at 271 where this court stated that -

“Where a party’s root of title is pleaded as say - a grant, or a sale or conquest etc, that root has to be established first, and any consequential acts following therefrom can then properly qualify as acts of ownership, in other words, acts of ownership are done because of, and in pursuance to the ownership.”

This state of the law was also earlier outlined in Folarin v. Durojaiye (1988) 1 NWLR (pt.70) 351 where hurdles to be scaled by a claimant of declaration of title rooted in absolute grant of land in dispute were listed at page 365-

“To transfer an absolute title under customary law, it ought to be pleaded and proved that the sale was concluded in the presence of witnesses and the names of those witnesses should also be pleaded as the fact they witnessed the actual delivery or handing over of the land to the purchaser.”

In the instant case, although the name of Chief Omole the then Risawe of Ilesa was pleaded as the person who made the grant or allotment or sale of the land in dispute to the father of the 2nd respondent, the names of the witnesses who were present and who actually witnessed the actual delivery or handing over of the land to Samuel Olowofoyeku were neither pleaded nor called by the respondents to testify in proof of the grant or sale. Instead of pleading the names of witnesses who witnessed the grant or sale and the putting of the 2nd respondent's father into possession of the land in dispute, what was pleaded were the Isida people and members of both Risawe and Olowofoyeku families as witnesses, which is certainly not enough to satisfy the requirements of the Law which stated clearly that specific names of the witness must be pleaded before being invited to testify in support of the sale or grant of land under customary law. See also the case of Cole v. Folami (1956) 1 NSCC 60 at 61-62 on the evidence required to prove sale of land under customary law.

In the resolution of this issue therefore, the 2nd respondent having admitted in the amended statement of defence and in evidence that the ownership of the land in dispute originally resided in the appellant's family, had the task of proving a change of ownership by grant or sale of the land in dispute in his favour. See Sogunle v. Akerele (1967) NMLR 58, Onobruhere & Anor. v. Esegine (1986) 1 NWLR (pt.19) 799 at 806, Obawole & Anor. v. Coker (1994) 5 NWLR (pt.345) 416 at 429 and Obawole v. Williams (1996) 10 NWLR (pt.477) 146 at 165. The 2nd respondent having failed to discharge this onus of proof, the trial court

was wrong to have found in his favour in this dispute for declaration of title to land under customary law that the land was sold to the 2nd respondent's father. The court below was equally in error in affirming that decision which was clearly not supported by evidence.

B Accordingly for the foregoing reasons and fuller reasons contained in the judgment of my learned brother Oguntade JSC, I am of the firm view that the court below was wrong in affirming the judgment of the trial court that the transaction between the appellant's grandfather Chief Omole the then Risawe of Ilesa and the 2nd respondent's father late C Samuel Olowofoyeku in 1910, amounted to a sale of the land in dispute under customary law. I therefore also see merit in this appeal which I hereby allow. The concurrent judgments of the two courts below are hereby set aside and replaced with a judgment in favour of the plaintiff/ D appellant in respect of the first relief claimed, while reliefs (ii) - (v) are refused. I abide by the order on costs.

E **TOBI JSC** (Dissenting)

This appeal involves ownership of rooms and shops. The appellant is the plaintiff. He is a traditional title holder of the Risawe of Ilesa. He resides at the Risawe Chieftaincy Palace, Akodi. He is also a legal F practitioner.

It is the case of the appellant that the rooms and shops occupied by the defendants/respondents are within his chieftaincy palace or official residence and owned by his chieftaincy family of Risawe of Ilesa. He therefore sought a declaration of a statutory right of occupancy in respect of the land in dispute, forfeiture, ejectment from the rooms and shops and account and payment in respect of them. The respondents G have quite a different case. In the nutshell, it is the case of the 2nd respondent that he owns the land by virtue of an out-and-out allotment by H the appellant's grandfather to his father in 1910 or thereabout. The appellant denied the claim.

At the trial in the High Court, the learned trial Judge did not believe the story of the appellant. He dismissed the case. An appeal to the Court

of Appeal was also dismissed by that court. In the final paragraph, Akintan, JCA (as he then was), said at page 105 of the Record:

“In the result, I hold that there is totally no merit in the entire appeal. I therefore dismiss it and hold that there was sufficient credible evidence on record in support of the conclusions reached by the learned trial Judge which I hereby affirm.”

Dissatisfied, the appellant has come to this court. Briefs were filed and duly exchanged. The appellant formulated four issues for determination:

“(1) Whether the learned Justices of the Court of Appeal were right in affirming the findings of the Court of first instance that there was no settlement of issues at the proceedings of 6/2/90 amounting to a consent judgment in respect of the issue of ownership of the land-in-dispute.

(2) Whether the learned Justices of the Court of Appeal were right in affirming the judgment of the court of first instance that the transaction between the Appellant’s grandfather and the 2nd Respondent’s father amounted to a sale of the land-in-dispute.

(3) Whether the learned Justices of the Court of Appeal duly and sufficiently considered issues Numbers 3 and 4 submitted to the court for adjudication.

(4) Whether the learned Justices of the Court of Appeal were right in raising suo motu and deciding the issue of laches and acquiescence without the parties being heard on the issue, and if so, whether the Appellant was in fact guilty of laches and acquiescence.”

The respondents adopted the issues formulated by the appellant.

Taking Issue No. 1, learned counsel for the appellant, Mr. Kola Olawoye, submitted that the Court of Appeal was wrong to have quoted and relied on a wrong portion of the record of proceedings in the High Court in affirming the finding of that court that there was no settlement of issues at the proceedings of 6th February, 1990. Counsel referred to page 19 of the Record which is the appropriate page. Relying on *Bello v. The State* (1994) 8 NWLR (Pt. 343) 177; *Maximum Insurance Company Ltd. v. Owoniyi* (1994) 3 NWLR (Pt. 331) 178 and Order 35 Rules 1 to

4 of the High Court (Civil Procedure) Rules, 1988, learned counsel submitted that the Court of Appeal was bound by the record of proceedings and the settlement of issues amounted to a consent judgment within the contemplation of section 220(2) of the 1979 Constitution.

- B Learned counsel submitted on Issue No. 2, without conceding Issue No. 1, that the 2nd respondent, having admitted in paragraphs 6, 7 and 8 of the Amended Statement of Defence that ownership of the land in dispute once resided in the appellant's ancestor, has the onus to prove a change of ownership of the land in his favour. He cited *Onobruhere v. Esegine* (1986) 1 NWLR (Pt. 10) 799 at 806 and *Obawole v. Coker* (1994) 5 NWLR (Pt. 345) 416. He submitted that the 2nd respondent failed to discharge the burden of proof placed on him to establish by credible evidence that there was a change of ownership in his favour. He
- D attacked the expression "out-and-out allotment" and submitted that it cannot amount to a sale under customary law and therefore should be struck out, being inelegant and not a legal term known to land law. He cited *Oba Omoboriola v. Military Governor of Ondo State* (1998) 14
- E NWLR (Pt. 584) 89 at 106. Attacking the judgment of the Court of Appeal of introducing evidence not pleaded by the parties, learned counsel cited *Animasaun v. University College Hospital* (1996) 10 NWLR (Pt. 477) 65 at 76; *University of Calabar v. Essien* (1996) 10 NWLR (Pt. 477) 225 at 260-261 and *Umukoro v. Nigerian Ports Authority* (1997) 4 NWLR
- F (Pt. 502) 656 at 666.

- Learned counsel contended that since the 2nd respondent disputed the identity of the land in dispute, he was obliged to describe in his pleadings the land in dispute or file a survey plan showing the correct identity.
- G He cited *Evbuomwan v. Elema* (1994) 6 NWLR (Pt. 353) 638; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 741; *Ugbo v. Abunwe* (1994) 8 NWLR (Pt. 360) 1 at 13; *Aboyegi v. Momoh* (1994) 4 NWLR (Pt. 341) 646 at 672 and *Salami v. Gbodoolu* (1997) 4 NWLR (Pt. 499) 277 at 285.
- H On Issue No. 3, learned counsel submitted that the Court of Appeal was wrong in shifting the burden of proof on the appellant instead of on the 2nd respondent, in accordance with the pleadings. While conceding that the failure on the part of the appellant to tender the survey plan

was inadvertent, the plan became relevant and the Court of Appeal ought to have made use of it in its findings to highlight the positioning or location of the land in dispute, particularly as the 2nd respondent referred to it in paragraph 10 of the Amended Statement of Defence and the trial Judge having referred to it. He cited *Agbaisi v. Ebikarefe* (1997) 4 NWLR (Pt. 502) 630. He disagreed with the finding of the court of first instance which was affirmed by the Court of Appeal that the land in dispute was ordinary chieftaincy family land and not stool land. Citing *Olusesi v. Oyelusi* (1986) 3 NWLR (Pt. 31) 634 at 639, learned counsel submitted that the land in dispute is stool land as it is the palace or official residence of the oba or traditional title holder in Yoruba land and Ijesa land in particular.

Taking the case of *Folarin v. Durojaiye* (1988) 1 NWLR (Pt. 70) 351 at 365, learned counsel argued that the Court of Appeal ought to have followed that decision in respect of the principles applicable in the sale of land under customary law in compliance with the doctrine of *stare decisis*. He cited *Adesokan v. Adefunji* (1994) 5 NWLR (Pt. 346) 540 at 577; *Nigerian Arab Bank Limited v. Baari Engineering Nigeria Ltd.* (1995) 8 NWLR (Pt. 413) 257 at 289 and *Afro Continental Nigeria Ltd. v. Ayantunji* (1995) NWLR (Pt. 420) 411 at 435.

Learned counsel submitted on Issue No. 4 that the Court of Appeal was wrong in raising the issue of laches and acquiescence *suo motu* without affording the parties an opportunity of being heard at all on the issue. For the Court of Appeal to have jurisdiction to properly adjudicate on the issue of equitable defence of laches and acquiescence, the issue must have been pleaded and proved to exist at the court of first instance before submission by way of appeal to the Court of Appeal. He cited *Dadi v. Garba* (1995) 8 NWLR (Pt. 411) 12 at 19. Assuming that the doctrine applies, counsel submitted that the Court of Appeal was wrong in holding that the occupation of the respondents of the land in dispute for a long time has been unchallenged by the appellant or his predecessors, thus resulting in laches and acquiescence. He urged the court to allow the appeal.

Learned counsel for the respondents, Mr. Hakim Abina, submitted

on Issue No. 1 that the proceedings of 6th February, 1990 did not amount to a settlement of issue which could be a consent judgment. For there to be a settlement of issue as contemplated by Order 34 rules 1 to 4 of the High Court (Civil Procedure) Rules of Oyo State (as applicable in Osun State), it must be apparent on the record that it was done consciously either by the court or the parties. He relied on *Maximum Insurance Company Limited v. Owoniyi* (supra) cited by the appellant.

Dealing with Issues Nos. 2 and 3 together, learned counsel dealt with the burden of proof in the matter. He relied heavily on the evidence of DW1 and submitted that as the identity of the land in dispute was clear, there was no need for the respondents to file a survey plan. He cited *Evbuomwan v. Eleina* (1994) 6 NWLR (Pt. 353) 636 at 651. He argued that the visit to the focus in quo was not to confirm dispute about the features of the land but to investigate conflicting evidence of whether the shops were differently roofed from the one built by the appellant's grandfather and whether there were two or four shops.

On payment of tribute by the 2nd respondent to the family of the appellant, learned counsel contended that the appellant could not prove such payment. He argued that the evidence of out-and-out means a sale of the land in dispute under native law and custom. Counsel questioned why the 2nd respondent's family was not challenged over their occupation and possession of the land from 1910 until 1986. He pointed out that the appellant did not give any evidence of that.

On whether the land in dispute was part of the appellant's palace, counsel argued that the onus was on the appellant to so prove, which he failed to prove. Counsel claimed that the appellant neither tendered the survey plan nor called the surveyor to give evidence at the trial.

Learned counsel submitted that the appellant seriously misconstrued the principle of law laid down by this court in *Onobruhere v. Esegine* (supra) by arguing that the principle relieves the appellant of his onus to prove his claim for declaration once the respondents admit that appellant's family are the original owners of the land. He quoted from page 807 of the judgment where this court held that the presumption in favour of the plaintiff in respect of the title to the land will continue "until

the contrary is proved". Counsel contended that the contrary was proved by the evidence of the allotment. In the circumstance, the onus was on the appellant to show that the possession of the respondents was via a licence granted by his grandfather to rebut the claim and evidence given by the respondents that it was an allotment in perpetuity. B

Still on the burden of proof, learned counsel submitted that the nature of proof in a given case must be dictated by the circumstances of the available evidence. Citing *Uka v. Chief Irolo* (1996) 4 NWLR (Pt. 441) 218 at 234, learned counsel submitted that the learned trial Judge's conclusion about the requirement to plead names of witnesses as laid C down in *Folarin v. Durojaiye* (supra) cannot be faulted.

On Issue No. 4, learned counsel relied on paragraphs 6, 7 and 26 of the Statement of Defence and submitted that the equitable defences of D laches and acquiescence were duly pleaded. In the exercise of its equitable jurisdiction, the court will not disturb long and undisturbed possession, even in favour of the real owner by native law and custom, counsel argued. He cited *Saidi v. Akinwunmi* (1956) NSCC Vol. 1 99; *Agboola v. Abimbola* 1969 NSCC 263 at 265 and *Majekodunmi v. Abina* (2002) 3 E NWLR (Pt. 755) 720 at 748-749. He urged the court to dismiss the appeal.

In his Reply Brief, learned counsel submitted that the argument of respondents in respect of the settlement of issues amounted to conces- F sion to the appellant's submissions in paragraphs 3.06 and 3.14 of his brief. He argued that the extension of the purpose of the visit to the locus in quo to include observations of the number of shops and other extraneous matters should be totally discountenanced as being without jurisdiction and amounting to speculating or conjecturing imaginary distraction. G

Let me first take what I regard as the largest area in this appeal and that area is whether the res is located in the stool land which is the palace or official residence of the appellant or in the ordinary family land. The case of the "appellant is that the res is located in the stool land. The case H of the respondents is that the res is located in the ordinary family land, not in the stool land, the palace or official residence of the appellant. The two courts below held for the respondents. Appellant wants this court to

reject that decision. Let me go into the evidence. First, the pleadings. In paragraph 4 of the Amended Statement of Claim, the appellant a plaintiff averred:

B *“The plaintiff avers that the apartment containing the shops the subject matter of this action are situated within Risawe Chieftaincy compound (Akedì) Isida Quarters, Ilesa the official residence of the plaintiff and not at Idasa ward which is some distance away from the Plaintiff’s compound.”*

C In paragraphs 5 and 6 of the Amended Statement of Defence, the 2nd respondent averred:

“5. The shops subject matter of this action were built by 2nd Defendant’s father, late Samuel Olowofoyeku, between 1910 and 1911 on a piece of land at the angle of Ereja and Isida.

D *6. At the material time, the land was part of Isida under the control of the Risawe Chieftaincy family, and was allotted to Samuel Olowofoyeku by his personal friend, Chief Omole the then Risawe if Ilesha, with the knowledge and consent of members of his family and*
 E *Isida people. It was open bush land not far from the Risawe’s thatched-roofed house, and surrounded by bush on three sides and market place in front.”*

F By the above state of the pleadings, the parties joined issues and the trial issue was whether the shops were located in the stool land or whether they were located in ordinary family land. From the state of the pleadings, the burden to prove that the shops were at the material time located in the stool land is on the appellant who was the plaintiff at the trial court. Did he discharge the burden?

G The evidence in-chief of the appellant is towards the end of page 26, the whole of page 27 and five lines at page 28. He did not say much. He mainly tendered letters he wrote to the respondents and the subsequent replies. He gave further evidence under cross-examination at pages
 H 28 and 29. I have carefully examined the evidence and I do not see any proof on the part of the appellant that the shops were on the stool land. And what is more, the appellant did not call any other witness to testify on this very important aspect of the case.

The learned trial Judge did not believe the evidence of the appellant that the shops were on stool land. He said at page 56 of the Record:

“I do not think the succeeding Risawes after Chief Risawe Omole and the members of the family generally would have acquiesced to the sale for so long if the land in dispute had been part of the chieftaincy stool land. I therefore find as a fact that the land in dispute was part of the ordinary land of the Risawe chieftaincy family and not part of the family stool land. That being the case, I must hold and I do hold that the sale of the land in dispute to Samuel Olowofoyeku was quite valid.”

Like the learned trial Judge, I also hold from the evidence available that the shops are part of the ordinary land of the family and not part of the stool land. This is because appellant could not prove in evidence that the shops are part of the stool land as earlier averred to in paragraph 4 of the Amended Statement of Claim.

I should also take paragraph 3 of the Amended Statement of Claim. It reads:

“The 2nd Defendant is a licensee by privy whose father, late Samuel Olowofoyeku was given a licence by the Plaintiff’s grandfather, late Chief Omole Adedeji the then Risawe of Ilesa, to occupy some apartment within the Plaintiff’s palace to enable the 2nd Defendant’s father carry on some trading at the time on a friendly basis and free of any charge except periodical traditional payment of tributes like kola nuts or drinks (Schnapps or gin).”

The above averments are on particular facts within the knowledge of the appellant. These are (1) the 2nd defendant is a licensee by privy, the licence given to his grandfather, (2) the licence was given to 2nd defendant’s grandfather on a friendly basis gratis, except periodical traditional payment of tributes.

Section 139 of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in his evidence. I have searched in vain evidence that the 2nd defendant’s father was given a licence which made the 2nd defendant a licensee. The appellant is a legal practitioner and I expected him to mention in his evidence that the 2nd defendant is a licensee. He did not. He

also did not give evidence to enable this court infer that the 2nd defendant is a licensee. Do we say that the burden of proof that the 2nd defendant is not a licensee is on the 2nd defendant? It cannot be. It is clearly on the appellant. It is only when the appellant has proved that the 2nd defendant is a licensee that the probative burden of proving the contrary is on the 2nd defendant.

It is new to me that a plaintiff who claims title to land or property turns around to say that the burden is on the person who says that he is not the owner of the property. I ask: who will fail in this case if no evidence is led? Is it the appellant or the respondents? Certainly the appellant is the person who will fail and he cannot, with the greatest respect, pass the burden to the respondents.

Normally, this should be the end of the appeal, but in the unlikely event that I am wrong, I shall take the other issues canvassed in the appeal. And that takes me to the issue of settlement of issues. At page 17 of the Record, the learned trial Judge said:

“Both parties agree that the land on which the shops stood is within Risawe Chieftaincy family land.”

It is the above sentence that learned counsel said amounts to settlement of issue and by extension a consent judgment. How come, I ask? The procedure of settlement of issues is a conscious and deliberate act of the parties, which is approved by the court to narrow down the issues before the court, with a view to expediting the proceedings thus quickening the litigation on hand. Although settlement of issues can be made by the Judge on his own motion at any time before or at the hearing of the case, our adversary system of adjudication mostly leaves the matter to the parties. See generally *Tilling v. Whiteman* (1980) AC 1; *Co-operative and Industrial Society Ltd. v. Norton Redstock UDA* (1968) Ch. 605; *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1.

Learned counsel for the appellant cited the case of *Maximum Insurance Co. Ltd. v. Owoniyi* (supra) on the issue. In that case, during the course of trial, the parties settled only one issue which was approved by the court as follows:

“We both counsel agree that the issue in dispute is mainly law i.e.

whether the exception clause in the insurance policy pleaded by the defence in paragraph 6 of the statement of defence covers armed robbery or not. There is no disagreement as to the fact that the vehicle registration No. OG 966 BA was insured under comprehensive cover for N18,000.00 and that insurance certificate No. 0154 was insured to cover 15th January, 1986 to 14th January, 1987 and that the said vehicle was stolen from the plaintiff at Imodi/Imosan Road, Ijebu-Ode by force on 20th day of April, 1986.” B

By the opening four operative words, “We both counsel agree”, it is clear that settlement of issue is not only initiated by the parties but arises directly from the parties. Is there any such or similar expression in the case before us? Did any of the counsel in this case or both counsel say or come to an agreement that the land on which the shops stood is within Risawe chieftaincy family land? There is no such evidence and I am bound by the evidence before the trial court. I cannot manufacture evidence here, as an appellate Judge. C D

I entirely agree with learned counsel for the respondents, that the statement is merely a record of the trial Judge’s understanding of the pleadings. The statement bears a unilateral connotation, clearly outside the purview of an agreement by the parties to justify settlement of issues. While I do not want to go into the issue whether the learned trial Judge’s statement is borne out from the evidence, I must say that the statement does not qualify as settlement of issue within Order 35 Rules 1 to 4 of the High Court (Civil Procedure) Rules 1988 of Oyo State (as applicable in Osun State). After all, whether or not issues have been settled under the above rules is not a matter of inference from the Record, but must appear thereon. See *Ohijuru v. Ozims* (1985) 4 SC (Pt. 1) 142. E F G

I realize that learned counsel for the appellant is drawing inference that the statement of the learned trial Judge amounted to settlement of issue. Inference, the act of inferring, is the judgment that one forms about the meaning of something done. It is not direct. In my view, an inference can be properly or correctly drawn in respect of two relatively proximate acts; an inference can hardly be drawn in respect of two remotely irreconcilable acts. As I said, I will not go into the issue whether

the statement of the learned trial Judge was borne out of the evidence, tempting though. That is not an issue before this court and let me confine myself only to the issue.

Learned counsel developed his argument to cover consent judgment. He specifically cited section 220(2) of the 1979 Constitution which is now section 241(2)(c) of the 1999 Constitution. How is that subsection applicable, I ask once again? Section 241 provides for appeal as of right from the Federal High Court or a High Court of a State to the Court of Appeal. Section 241(2)(c) restricts the right of appeal. It provides:

“Nothing in this section shall confer any right of appeal... without the leave of the Federal High Court or a High Court or of the Court of Appeal, from a decision of the Federal High Court or High Court made with the consent of the parties or as to costs only.”

Certainly, the subsection does not deal with consent judgment and that is the plank of the case of the appellant. The subsection deals with the procedure of leave in the appeal process and that cannot be in any way related to consent judgment.

It however appears that learned counsel equates his conception of settlement of issue to a consent judgment. While the two concepts in our civil procedure do not mean the same, I should say that there was no consent judgment in this matter. A consent judgment arises when the parties unequivocally agree to terms of settlement which they mutually refer to the court as basis for the court’s judgment. By their mutual agreement to settle the matter, they have given their consent to the end of the litigation. That makes it a consent judgment. See generally *R. Lauwers Import-Export v. Jozebson Industries Co. Limited* (1988) 3 NWLR (Pt. 83) 429; *Woluchem v. Wokoma* (1974) 3 SC 153; *NWRD v. Jaiyesimi* (1963) 1 All NLR 215.

I should now take the issue of burden of proof as contended by the appellant. It is the submission of learned counsel for the appellant that the burden of proof of change of ownership of the land in dispute was on the 2nd respondent. In civil matters, the burden of proof is generally on the plaintiff. He has a burden to prove his claim or relief before the court. See *Frempong II v. Brempong II* (1952) 14 WACA 13; *Olowu v. Olowu*

(1985) 3 NWLR (Pt. 13) 372; Fashanu v. Adekoya (1974) 6 SC 83; Commissioner of Police v. Oguntayo (1993) 6 NWLR (Pt. 299) 259; Kokoro-Owo v. Ogunbambi (1993) 6 NWLR (Pt. 313) 627.

The above general burden on the plaintiff apart, the burden of proof of any issue rests before evidence is gone into, upon the party asserting the affirmative of the issue; but after all the evidence has been completed the burden rests on the party against whom the tribunal at the time in question would give judgment if no further evidences were adduced. See Okechukwu and Sons v. Ndah (1967) NMLR 368. The burden of proof on pleadings, rest upon the party, whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it; and never shifting in any circumstances whatsoever. See Imana v. Robinson (1979) 3-4 SC 1. Where a plaintiff fails to prove his case in respect of the reliefs sought, the action must fail. See Fashanu v. Adekoya (1974) 6 SC 83.

The appellant averred in paragraph 4 of the Amended Statement of Claim that “the apartment containing the shops the subject matter of (the) action are situated within Risawe Chieftaincy compound (Akodi) Isida Quarter, Ilesa the official residence .of the plaintiff and not at Idasa ward which is some distance away from the plaintiff’s compound.” This, in my view, is the fulcrum of the case of the appellant and the burden was clearly on him to prove the averment. Why pass the buck?

What was the evidence adduced by the appellant in the High Court? The evidence in-chief of the appellant as plaintiff, is at page 26 to 28. He said at page 27 of the Record:

“The shops rented by the 2nd defendant to the 1st defendant and standing within the Risawe Chieftaincy Palace were built by my grandfather in 1913 or thereabout. There were twenty-three shops built by my grandfather at the same time in 1913 or thereabout. Four (4) out of the twenty-three (23) shops are the subject matter of the present dispute.”

The appellant did not say more in his evidence in-chief. Can this be taken as proof of the averment in paragraph 4 of the Amended State-

ment of Claim? Though this is not a case where the law requires corroboration, I expected the appellant to call some other evidence apart from his own on the issue.

Under cross-examination, appellant said at page 28 of the Record:

B *“I do not know whether the 1st DW took over the management of the shops in 1975. It is not correct to say that the four shops were built by Samuel Olowofoyeku in 1911. They were built by my grandfather Chief Omole Adedeji in 1913.”*

C The first sentence does not help the appellant. It was a sentence of doubt and not a dogmatic one. Interpretation of the sentence is that there is a possibility that 1st DW took over the management of the shops in 1975.

D DW1, the nephew of the 2nd respondent, in his evidence on the management of the shops said at page 23 of the Record:

E *“My father managed the shops from 1917 to about 1935 or 1936 when he handed over the management of the shops to his junior brother, my uncle who is the 2nd defendant. Throughout the period my father managed the shops, he did not pay any rent or tribute or isakole to anybody. My father died in 1971. After the 2nd defendant took over the management of the shops he too did not pay any rent or tribute to anybody. The 2nd defendant continued to manage the shops until 1975 when for family reasons he requested me to take over the management. I eventually took over the management in 1976. Ever since I took over I never paid any rent, tribute or isakole or gift to anyone.”*

G That is a flowing evidence which can hardly be disturbed by the evidence of doubt given by the appellant under cross-examination. In view of the fact that the evidence of management is tied up with the evidence of ownership of the shops, the case of the appellant remained doubtful with his doubting evidence under cross-examination.

H Let me take the evidence of payment of tribute. In his evidence in chief, appellant said at pages 27 and 28 of the Record:

“The former head of the Olowofoyeku family late Mr. J. A. Olowofoyeku and father of the 1st DW was paying tributes in form of drinks, kola nuts and other gifts to all my predecessors in office includ-

ing my own father. Some other persons who were allowed to occupy shops built by my grandfather on similar terms of paying tributes in form of drinks and other gifts were late Ariyo Adele, late Anjorin and late Omirun.”

Against the above, is the evidence of DW1 and DW2. DW1 said at page 23 of the Record: B

“Throughout the period my father managed the shops, he did not pay any rent or tribute or isakole to anybody... After the second Defendant took over the management of the shops he did not pay any rent or tribute to anybody... Even since I took over I never paid any rent, tribute or isakole or gift to anyone.” C

DW2, a tenant of 2nd respondent, said at page 25:

“I have been paying rents in respect of the shops to Olowofoyeku family since I rented the shops... About 8 years ago the plaintiff called D me and asked me to be paying rents to him in respect of the shops occupied by me. I explained to him that it was Olowofoyeku family who let out the shops to me and I have been paying rents to Olowofoyeku family and not to the Risawe family.” E

While two witnesses gave evidence on the non-payment of tribute to the family of the appellant, only the appellant gave the contrary evidence. Payment of tribute is a very important evidence of ownership and I expected the appellant to mention his predecessors that received tributes from the J. A. Olowofoyeku. He specifically mentioned drinks and kola nuts. What are the other gifts he mentioned in his evidence? The payment of tribute is an exact matter and a party giving evidence should mention the specific tribute paid, not to put it generically as “other gifts”. F

Let me take the issue of proof of boundary. It is the case of the appellant that the burden of proof of the boundary is on the 2nd respondent since, according to counsel; he disputes the identity of the land. To counsel, the 2nd respondent ought to prove the boundary by filing a survey plan. Counsel for the respondents relied on the evidence of DW1 G and that of the appellant and submitted that as the identity of the land in dispute is clear, filing of a survey plan was not necessary. H

DW1 in his evidence in-chief said at page 22 of the Record:

"I know the subject matter of the dispute. They are some shops in a building at the corner of Ereja and Isida streets. The building housing the shops is on a piece of land which was allotted to my grandfather Samuel Olowofoyeku by then Chief Risawa of Ilesa."

B Under cross-examination, the appellant confirmed the evidence of DW1 in the specific detail of the shops at the corner. He said at page 28 of the Record:

"The four shops now in dispute are at a corner piece. Two of them are among the twenty-one shops facing the Total Petrol Station while the remaining two are facing Ereja/Egba-Idi Street."

C It is clear from the above that the identity of the shops is not in dispute. Both witnesses traced their identity to a corner piece as their common sign post. That apart, both witnesses also have in common, D Ereja Street. I am of the view that there was no need for a survey plan, as the identity of the land in dispute was never in doubt. It is good law that a survey plan is not a desideratum if the identity of the land in dispute is clear and not in dispute. In *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) E 360, this court held that as the identity of the land in dispute was known to the parties and not in dispute, no plan of the land was necessary; and that it is not always that a plan is necessary in a land case or that the absence of a plan is fatal to the plaintiff's claim if proper description of the land is available in the proceedings. See also *Etiko v. Aroyewun* (1959) F 4 FSC 129.

There is some disagreement in respect of the roofing of the shops. While appellant said that the two shops facing the Total Petrol Station are not differently roofed from the others, but are roofed together, the respondents say they are roofed separately. What is the correct position G when the court visited the locus in quo? The learned trial Judge recorded his findings at pages 29 and 30 of the Record:

"The Court after rising yesterday the 20th of March 1996 visited H the locus inquo with the parties and their learned counsel and the following observations were made:

(1) There were two shops, but each shop had two doors.

(2) The roofing on the two shops was different from those or the

adjoining shops.

(3) *There was no marked difference between the level of the two shops in dispute and that of the adjoining shops.”*

Finding No. 2 is relevant for our purpose. It is against the evidence of the appellant and it is in favour of the evidence of the respondents. The piece of evidence buttressed the contention of the respondents that the two shops in dispute were not built at the same time, as the one built by appellant’s grandfather.

Learned counsel for the appellant relied on the case of Folarin v. Durojaiye (1988) 1 NWLR (Pt. 70) 351 in respect of the principles governing the sale of land. With respect, the case does apply in this matter. I see the submission as another smartness to pass the buck to the respondents.

And that takes me to the equitable defence of laches and acquiescence. Appellant took two contradictory positions in his Brief and Reply Brief. He submitted in his Brief that the equitable defences were not pleaded by the respondents. He relied on Dadi v. Garba (1995) 8 NWLR (Pt. 411) 12. After reading the Respondents Brief, he took another position and it is that the issue was pleaded but was not canvassed by the respondents in the High Court. Which of the Briefs should this court take or use? I will not answer the question; rather, I will refer to paragraph 26 of the Amended Statement of Defence of the 2nd respondent. It reads:

“The Defendant avers that if Plaintiff’s family had any right against the Olowofoyeku family in respect of land and shops subject matter of this action, which is denied, such right has become stale and cannot now be resuscitated, the plaintiff’s family having slept over it for almost eight years. And the Defendant will raise in support of a dismissal of the plaintiff’s case all equitable defences including laches, acquiescence and the provisions of the limitation law of Oyo State.”

DW1 gave evidence that his grandfather was put in possession of the land in dispute by the members of the Risawe family and the grandfather completed the building around 1911. It is clear from the totality of the evidence of DW1 that the defences of laches or acquiescence were available in the circumstances.

Both the learned trial Judge and the Court of Appeal decided against the appellant. Their findings are concurrent:

“On the issue as to who built the shops, it seems obvious that consequent upon the earlier finding that the land in dispute was validly sold to Samuel Olowofoyeku, the conclusion appears inescapable that he must have built the shops. It seems inconceivable that Chief Risawe Omole after selling the land in 1910 would turn round to build on the same land three years later in 1913. Besides the Plaintiff would appear to know very little about, the shops. He was emphatic in his testimony in Court that there were four shops involved. But an inspection of the locus-in-quo in the presence of the parties and their respective learned counsel revealed that there were only two shops each of which had two doors. It would appear that the Plaintiff had based his evidence on only what he saw outside the shops and not a knowledge of the true state of affairs.”

I entirely agree with the learned trial Judge who said that the appellant “would appear to know very little about the shops.” I should go further to say that he did not know about the sale of the land in dispute by Chief Risawe to Samuel Olowofoyeku in 1910. If he knew, he could not have instituted the action, the lawyer that he is. I expected him to throw in the towel the moment he knew of the 1910 sale but he refused and so he found himself in some mess.

This is a case where a plaintiff who goes to court and asks for specific reliefs wants the defendant to prove that he (the plaintiff) is not entitled to the reliefs sought. The appellant has made desperate efforts to place the burden of proof at the door steps of the defendant who was dragged to court by him. He took very minor points in the case, and tried to magnify them (though without a microscope) and drum to the ears of the court the wrong procedure that the burden of proof is on the defendant. How come? What type of law is that? Who will fail if no evidence in proof was given either way? Is that party the defendant? No. That party is the plaintiff.

While I agree that there are instances where the burden of first proof is on the defendant in the light of the state of the pleadings, I do not see such an instance here. In my humble view, since the case of the

appellant is that the shops were built on Risawe stool land which cannot be allotted, the burden was on him to prove that assertion. He failed to so prove and the learned trial Judge and the Court of Appeal could not help him. I cannot help him too. In my view, it is only when the appellant has led satisfactory evidence on his relief or claim that “the rooms occupied B as shops by the Defendants... are situate within Risawe chieftaincy palace... Ilesa” that the burden of proof will shift on the respondents to lead negative exculpatory evidence that the land on which the shops were built was sold to the grandfather of the 2nd respondent.

When did it become the law that a plaintiff who claims title to land C has not the burden to prove that title merely because the defendant says the land was sold to him. Let first things come first. The appellant should not jump the gun. I am in grave difficulty to agree that Fasoro v. Beyioku D (1988) 2 NWLR (Pt. 76) 263 is authority for this case. The facts are very different from those of this case. In Fasoro, the plaintiffs were the persons who pleaded as their root of title, sale and conveyance of the land in dispute from the Olayabo family. This court held that when a plaintiff pleads sale and conveyance as his root of title, he either suc- E ceeds in proving the sale or conveyance or he fails. Having failed to prove the title pleaded, it will be wrong for him to turn round to rely on acts of ownership or acts of possession, which acts are in the nature of things derivable from and rooted in the radical title pleaded. In this case, F it is the 2nd respondent who pleaded sale as the root of title. The two positions are quite different and must be kept differently. In my view, the decision of this court in Fasoro that a plaintiff who pleads sale or conveyance as his root of title must prove it to succeed, is in line with the G position I have taken in this appeal.

I am unable to agree with the majority decision that this appeal should be allowed. I therefore dissent by dismissing the appeal. I award N10,000.00 costs in favour of the respondents.

H

MUKHTAR JSC (Dissenting)

The basic complaint or quarrel in this appeal revolves around the

concept of proof i.e the requirements for the success or failure of a claim in civil suits. A fundamental principle of law, and which is well settled is that the burden of proof is on a party who alleges and asserts, and not the other way round, see Section 135 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 which read:-

“135(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

Then section 136 of the same law stipulates that, “*the burden of proof in suit or proceedings lies on that person who would fail if no evidence at all were given on either side*”

The appellant in his statement of claim in the court of first instance pleaded the following averments which he should have proved in line with the above provisions of the law reproduced supra, which he did not prove to the satisfaction of the court. The averments are :-

“3. *The 2nd Defendant is a licensee by privity whose father, late Samuel Olowofoyeku was given a license by the plaintiff’s grandfather, late Chief Omole Adedeji the then Risa of Ilesa, to occupy some apartment within the plaintiff’s palace to enable the 2nd Defendant’s father carry on some trading at the time on a friendly basis and free of any charges except period of traditional payment of tributes like kola nuts or drinks (schnapps or gin).*

14. *It was on the return of the plaintiff’s grandfather from England in 1913 or thereabout that the plaintiff’s grandfather embarked on the project of constructing several shops numbering over twenty within his palace or Akoli with a view to letting them out or giving some out free of charges to his people as cocoa or palm kernel produce stores or merchandise shops.*

15. *The plaintiff avers that the shops which are subject-matter of this action are just a part of over twenty others built in a row by the plaintiff’s grandfather and let out to trading firms- local and foreign - and to individuals such as the late Pa Anjorin, the patron of African*

Church Omofo Ilesa, late Pa Ariyo Abede, Loja of Ibala and the 2nd Defendant's father late Samuel Olowofoyeku, and none of them was ever unconscionable to dispute ownership during their lives with any of the plaintiff's predecessors-in-title."

The plaintiff gave evidence in proof of his pleadings, but funny B enough he did not deem it fit or necessary to call the descendants of the beneficiaries of the largess of his grandfather, to give evidence in accordance with the averment in paragraph (15) supra. I think this is where he fell short of proving his case, for such evidence of the descendants of C late Ariyo Abede and late Anjorin etc would have gone a long way to buttress the claim of the appellant that the ownership of the shops that are the subject matter in controversy were still vested in the appellant's family, (either as a family land or stool land). The appellant clearly did not D prove what he asserted in his claim, and in the circumstance the burden of proof cannot shift to the respondents.

See section 137 (1) and (2) of the Evidence Act supra. It is only when a party has proved his assertion and discharged the burden placed on him by law that the burden shifts. See *Elias v. Disu* 1962 1 All NLR E 214, *Arase v. Arase* 1981 5 SC 33, and *Co-Operative Development Bank PLC v. Joe Golday Co. Ltd.* 2004 14 NWLR part 688 page 506. Moreover a plaintiff can only rely on the strength of his case, and not the weakness of the defendant's case, especially in a case for the declaration F of title to land. See *Woluchem v. Gudi* 1981 5 SC. 291, and *Obisanya v. Nwoko & Anor* 1974 6 SC. 69.

I dismiss the appeal for it lacks merit.

G

H