

SUPREME COURT OF NIGERIA
26TH JANUARY, 2007. SC. 167/2001
CORAM:- S. U. ONU, N. TOBI, D. MUSDAPHER,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC

ALHAJI RAUFU GBADAMOSI APPELLANT
AND
1. OLAITAN DAIRO
2. ALHAJI RAIMI AFOLABI RESPONDENT

LAND LAW - Title - Identity of the land - Burden of proof is on plaintiff
- And failure to prove exact identity of the land being claimed - Will
ground dismissal of the action (H1)

LAND LAW - Issues - Identity of the land - Where not made an issue by
the defendant - Court will not make it a triable issue (H2)

EVIDENCE - Evaluation - Title to land - Where trial court properly evalu-
ated the evidence - Appellate court will not substitute its own views - For
that of trial court (H3)

APPEALS - Interference - Concurrent findings - That are not perverse
or erroneous - Will not be interfered with by the Supreme Court (H4)

LAND LAW - Title - Location of the land in dispute - Finding of trial
court - As confirmed by the Court of Appeal - Is correct (H5)

APPEALS - Issues - Jurisdiction - Where an issue was not determined
by the Court of Appeal - And no leave was obtained - Supreme Court
lacks Jurisdiction to entertain it (H6)

APPEALS - Reversal - Mistake in a judgment - That did not occasion
miscarriage of justice - Will not warrant a reversal of that decision (H7)

FACTS

Before the Ibadan High Court, the plaintiff/respondent filed an action against the defendant/appellant. Respondent claimed declaration of title to the land in dispute, N15,000 special and general damages for trespass and an order of perpetual injunction. Appellant on his part filed a counter claim claiming inter alia, N10,000 being special and general damages. Respondent testified and called 8 witnesses while appellant also testified and called 4 witnesses. The identity of the land in question is not in dispute as it is well known to both parties. Both parties agreed that the radical title to the entire 137 acres of land originally belonged to the Aleshinloye family who sold 117 acres thereof to one Chief Adewumi and retained 20 acres. Whereas respondent's title is traced to the portion retained by Aleshinloye Family, appellant derived his title from Chief Adewumi's portion.

At the conclusion of hearing, the trial court found that the land in dispute was part of the portion retained by the Aleshinloye Family and gave judgment in favour of the respondent. Appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. *"Whether the defendant/appellant at the trial and at Court of Appeal proved its Counter-claim to warrant the setting aside of the concurrent findings of fact that the land in dispute fell within the 20 acres of land reserved for the Aleshinloye family.*

2. *Whether in the light of the Court of Appeal Rules, Order 6 Rule 9(5) and having filed his brief of argument and being absent and unrepresented without cause, the appellant can complain for a denial of fair hearing.*

3. *Whether the defendant/appellant can be heard to complain that an issue generally traversed on the pleadings but admitted in evidence amounts to a fresh point of law taken suo motu.*

4. *Whether the reply brief filed in answer to the Intervener's brief of argument can be said to result in a miscarriage of justice or perverse*

findings by the Court of Appeal having been distilled from the appellant's additional ground of Appeal"

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

Identity of the land - Burden of proof is on plaintiff

1. The issue of identity of the land in an action for declaration of title to land is very fundamental. The onus is on the plaintiff seeking the declaration to establish the precise identity of the land he is seeking the declaration. See for example **EZUKWU VS. UKACHUKWU** [2004] 17 NWLR (Pt. 902) 227 2137. But where the area of land in dispute is well known to the parties, the question of proof of the identity of the land does not arise. In such a situation, it cannot be contended that the area claimed of the land in dispute is uncertain. See **AKINTERINWA VS. OLADUNJOYE** [2000] 6 NWLR (Pt 659) 92. It must be emphasized that in an action where the plaintiff claims a declaration of title to land and fails to give the exact extent and identity of the land he is claiming, his action should be dismissed. (p. 275 H)

Identity of the land - Where not made an issue

2. In the instant case from the pleadings and the evidence, it is very clear that the parties in this case know the land in dispute. Therefore the identity of the land is not an issue.

In his Statement of Defence and Counter-Claim, the appellant merely made a general denial of all the averments contained in the statement of claim, he did not make any specific denial of the averment relating to the identity of the land. The other pieces of evidence clearly in my view make it clear that the parties are aware of the land in dispute i.e. it was because he bulldozed the land the respondent was claiming, the appellant was arrested at the instance of the respondent.

It is also now settled law that requires no citation of any authority, that the identity of land in a land dispute will only be in issue if and only if the defendant in his statement of defence makes it one. If he disputes specifically either the area or the location or the features shown in the plaintiff's plan, then the identity of the land becomes an issue to be tried.

In my view both the trial court and the Court of Appeal were right in their decision that the identity of the land in dispute was not an issue joined in the pleadings to be tried.

In the result, these issues 1 and 3 dealing with the question whether the identity of the land in dispute is joined on the pleadings by the parties for proof, in my view does not arise, the parties knew the land in dispute and as such the respondent had no need to prove the identity or the location of the land in dispute. (p. 276 D/ 278 G)

C EVIDENCE - Evaluation - Title to land

3. What was an issue was clearly whether the land in dispute form part of the land reserved for Aleshinloye family or whether it formed part of the land purchased by Chief Adewumi. The trial court as affirmed by the Court of Appeal considered the entire evidence adduced before it and came to the conclusion on the evidence accepted by it, that the land in dispute fell within the Aleshinloye family land. The learned trial judge fully evaluated and appraised the entire evidence led before him.

It is now settled law, that it is the primary responsibility of the trial court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. It follows therefore that when a trial court unquestionably evaluates the evidence and appraises the facts of a case, it is not the business of the appellate court to substitute its own views for the views of the trial court.

It is only where the trial judge abdicates his sacred duty of evaluation of the evidence and the approbation of weight thereto, or when he demonstrates that he had not taken proper advantage of his having heard and seen the witnesses testify, the matter becomes at large for the appellate court to evaluate the evidence provided the exercise does not involve credibility. (p. 277 B/ H)

APPEALS - Interference - Concurrent findings

4. In the instant case, the Court of Appeal also affirmed the decision of

the trial court. It is a policy of the Supreme Court for a longtime not to disturb concurrent findings of two lower courts unless special circumstances exist to warrant interference. Such special circumstances included:-

- (a) perverse findings; B
- (b) error in procedural or substantive law occasioning a miscarriage of justice.

In this case the concurrent finding of High Court and the Court of Appeal were not perverse and will not be interfered with by me.

(p. 278 D) C

Title - Location of the land in dispute

5. The other issue is whether the land in dispute is situated within the land of the Aleshinloye family or the land bought by Chief Adewumi. As shown above, the learned trial judge and the Court of Appeal made concurrent findings of fact that the land in dispute fell within the Aleshinloye family land. The other point raised by the appellant such as fresh issues raised suo motu by the Court of Appeal is of no moment at all. The crucial issue is that the trial court found as a fact and the Court of Appeal affirmed the finding that the land in dispute was part of the land of 20 acres reserved by the Aleshinloye family. In the result, I resolve issues 1 and 3 in favour of the respondent. (p. 278 H) D E F

APPEALS - Issues - Jurisdiction

6. There was no specific complaint against evidence of P.W 1 before the lower court. The issue of the contradictory nature of the evidence of P.W 1 with (1) the pleadings, (2) the contents of Exhibits E and F did not arise in the court below. It is a fresh issue for which no leave of either this court or the court below was sought and obtained. It is not legitimate for the appellant to complain on an issue decided by the trial court without first appealing to the Court of Appeal for determination. It is elementary law that this court has no jurisdiction to consider the issue which was only decided by the trial court. It was the trial court that accepted the evidence of P.W 1 and all the Court of Appeal did was to affirm the G H

decision of the trial court. I decline to discuss the issue 2 since this court has no jurisdiction to entertain an appeal from the decision of the trial court. Issue 2 is struck out. (p. 280 A)

B *Reversal - Mistake in a judgment*

7. I cannot see how and in what manner has the decision to deem the brief filed by the respondent in answer to intervener’s appeal occasioned any miscarriage of justice or how and in what manner was the rights of fair hearing of the appellant’s appeal affected. It is now settled law, that it is not every mistake in a judgment or decision that can warrant the reversal of a decision. To justify a reversal of a decision, the error complained of must be of such a nature to cause real miscarriage of justice. In the instant case, the fact that a brief was considered, even if erroneously, in appeal which does not concern the appellant, cannot be a basis for the appellant to complain. I also resolve this issue against the appellant.

In the result, all the issues herein been resolved against the appellant. This appeal deserves to fail, and I hereby dismiss it. (p. 281 E)

NOTABLE POINTS OF INTEREST

TOBIJSC

F 1. *What miscarriage of justice connotes*

Miscarriage of justice connotes decision or outcome of legal proceeding that is prejudicial or inconsistent with the substantial rights of the party. Miscarriage of justice means a reasonable probability of more favourable outcome of the case for the party alleging it. Miscarriage of justice is injustice done to the party alleging it. The burden of proof is on the party alleging that the justice has been miscarried. (p. 282 F)

H 2. *What amounts to a fresh point of law*

An appellate court can draw conclusion or make inference from the Record before it. Conclusion or inference borne out of /from the Record cannot be branded as raising fresh point of law. A fresh point of law is a new point of law which was not raised by any of the parties at the trial of

the case. A point of law which was raised by the parties at the trial cannot be a fresh point of law. (p. 282 H)

3. Breach of fair hearing is a factual matter

Fair hearing is not an expression of mere rhetoric or empty verbalism but a fundamental right of the individual guaranteed in the Constitution, the breach of which will nullify the proceedings in favour of the victim. The constitutional guarantee is construed in the light of the facts of the case and the facts alone. It cannot be construed outside the facts. Accordingly, a party alleging the breach must show clearly from the facts of the case that the right is violated or breached. With respect, the appellant has not demonstrated in his brief that the right was violated or breached. (p. 283 B)

CASES REFERRED TO

EZUKWU VS. UKACHUKWU [2004] 17 NWLR (Pt. 902) 227 2137

IORDYE VS. IHYAMBE [2000] 15 NWLR (Pt. 692) 675.

AKINTERINWA VS. OLADUNJOYE [2000] 6 NWLR (Pt 659) 92

RUFAI VS. RIKETT 2 WACA 95

UDOFIA VS. AFIA 6 WACA 216

ARABE VS. ANSALU [1980] 5 - 7 SC 78

ABBA VS. OGODO [1984] 1 SCNLR 372

MOGAJI VS. ODOFIN [1979] 1 SC 91

ODOFIN VS. AYOOLA [1984] 11 SC 72

OKULATE VS. AWOSANYA [2000] 2 NWLR (Pt 646) 530

CHINWENDU VS. MBAMALI [1980] 3 - 4 SC 31

BIARIKO VS. EDEH OGWUILE [2001] 12 NWLR (Pt. 726) p. 235

LEAD JUDGMENT BY MUSDAPHER JSC

In the High Court of Justice of Oyo State, in the Ibadan Judicial Division and in suit No. 1/344/83, and in his Writ of Summons, the plaintiff claimed against the defendant the following reliefs:-

“(i) *Declaration of title to a Certificate of Occupancy in respect of the piece or parcel of land situate, lying and being at Olojuoro Road,*

Ibadan.

(ii) *The sum of 15.000 [Fifteen Thousand Naira] being special and General damages suffered by the plaintiff in consequence of continuing acts of trespass being committed by the defendant on the said land.*

(iii) *An Order of perpetual injunction restraining the defendant, his servants or agents or any person claiming through or under him from committing any further acts of trespass on the land.”*

Pleadings were ordered, filed and exchanged. By paragraph 24 of the Statement of Claim the following particulars of damages claimed were stated thus:-

“Particulars of Damages	
(a) Cost of building demolished	N5,800.00
(b) Cost of 6000 cement blocks removed and/or destroyed at 70 kobo per block	N4,200.00
(c) General Damages	<u>N5,000.00</u>
Total	<u>N15,000.00</u>

The defendant also filed a Counter-Claim against the plaintiff. Paragraph 30 of the Amended Statement of Defence and Counter-claim provided:-

“(1) *A declaration that the defendant is entitled to a statutory Right of Occupancy over all that piece or parcel of land situate, lying and being at Oloro Olojuoro Road, Ibadan, a place within 5 Kilometers to Mapo Hall, Ibadan, which is particularly shown on survey plan No. MAK/240/84 of 29th December, 1984.*

(2) *The sum of N10,000.00 being special and general damages for trespass committed by the plaintiff between March 1978 and March 1980 on the said land in dispute.”*

(3) *An Order of perpetual injunction restraining the plaintiff his servants, agents or any person claiming through or under him from committing further trespass on the land.*

<u>Particulars of Damages Special Damages</u>	
1500 blocks at 50k Each	N750.00
2 lorry loads of sand at N25 each	N50.00

1 lorry load of gravels at N50 each	N450.00
1 signboard	N10.00
Workmanship and cost of cement paid to bricklayer	<u>N200.00</u>
Total:	N1,060.00
General damages	<u>N8,940.00</u>
Grand total	<u>N10,000.00</u>

B

At the trial before the High Court, the plaintiff testified and called 8 witnesses through whom a number of documents including survey plans were tendered. The defendant in answer to the plaintiff's case and in order to prove the counter-claim called 4 witnesses including himself. After the conclusion of the trial and in his judgment delivered the 4th of July 1986, the learned trial judge found for the plaintiff and dismissed the defendant's counter-claim. The defendant felt unhappy with the decision and appealed to the Court of Appeal. One ALHAJI LAMIDI AFOLABI successfully sought leave of the Court of Appeal to appeal as an INTERVENER. After the consideration and the determination of all the issues submitted to it, the Court of Appeal dismissed the appeals of both the defendant and the Intervener and affirmed the decision of the trial court in both the plaintiff's claims which was granted, and the defendant's counter-claim which was dismissed see (p. 705) GBADAMOSI VS. DAIRO [2001] 6 NWLR 737. It is against the dismissal of his appeal that the defendant hereinafter referred to as the appellant [and the plaintiff, the respondent] has now further appealed to this court with the leave of the Court of Appeal. The Notice of Appeal contains 3 grounds of appeal and with the leave of this court an additional ground of appeal was allowed to be argued on behalf of the appellant. The Intervener, ALHAJI LAMIDI AFOLABI has also filed a Notice of Appeal against the decision of the Court of Appeal, but has failed to appear or file any brief in this court. I deem the Notice of Appeal filed by the Intervener as abandoned and I accordingly strike it out. But before the examination of the grounds of appeal filed by the appellant and the distilled issues for determination submitted in the briefs by counsel for the determination of the appeal, it shall be necessary to set out the back ground facts of the case.

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The respondent's case on the pleadings and the evidence is that the land in dispute is a portion of a larger tract of land at Olojuoro area of Ibadan belonging to the ALESHINLOYE FAMILY, The respondent purchased the land in dispute from one DORCAS AJIRINNIBI AMOA under native law and custom. The land was handed over to him in the presence of witnesses and eventually the vendor executed a deed of conveyance in his favour which was registered as No. 50 at page 50 in volume 2278 of Ibadan Land's Registry. As mentioned above, the land claimed by the respondent was part of a larger tract of land which was the subject matter of a court action in suit No. 1/228/64 between the ALESHINLOYE FAMILY as the plaintiffs and one CHIEF S. B. ADEWUMI as the defendant. The aforesaid suit was resolved by a compromise between the parties, by which Exhibit "A" in these proceedings conveys the position of the parties.

The plaintiffs in the action withdrew it. The terms of settlement were that in consideration of payment made by Adewumi of N15,000.00 117 acres out of the total land in dispute measuring 137 acres were to go to him whilst 20 acres were to be retained by Aleshinloye family. P.W 1 was one of the members of Aleshinloye family who shared out of the twenty acres and he sold his portion of it to diverse purchasers including Dorcas Ajirinnibi who sold the land in dispute to the respondent. That part of the land bought by the respondent is at the northern end of the land in dispute in Suit No. 1/228/64 and is the land in dispute in this action. It was the case of the respondent that the parcel of land he purchased from Dorcas Ajirinnibi consisted of two plots, he made the purchase in 1977 and a deed of conveyance was granted to him in 1978. He immediately cleared the land and let his friend a motor mechanic into one of the plots and commenced building on one of the plots. He engaged P.W 3., who was also one of the purchasers of the Aleshinloye family land in the area, as a contractor to erect buildings for him. He stopped the building operation sometimes later 1978 due to financial constraint. The building reached lintel level and there was 6000 blocks on the land when he suspended the building operation. The respondent claimed that it was in 1980 when the appellant came and destroyed the respondent's building

and carted away or destroyed the blocks.

For the appellant, his case was that he bought the land in dispute from Adewumi and after completing payment he caused a wall fence two feet high to be built round the land. The land consisted of plots 16 and 17 of the ADEWUMI LAY OUT and that he sold plot 16 to Alhaji Afolabi [the intervener]. In 1980 when he wanted to commence building, he found the land overgrown with weeds and on clearing, he found that his 2ft wall fence had been pulled down. He then had the land bulldozed and commenced building on the land.

The learned trial judge rightly in my view settled the issue properly when at the beginning of his judgment he stated:-

“The issue to be decided is relatively simple. It is whether the land in dispute in this case properly belong to the Aleshinloye family or to Chief Adewumi arising from the terms of settlement reported in Exhibit “A” before the same was sold to the different purchasers who are the disputants in this action.”

As mentioned above, the learned trial judge found for the respondent. He particularly found the parties were referring to the same piece of land as the land in dispute and that the land in dispute fell on the northern end of the land in the suit No. 1/224/64 and that the land in dispute belonged to the Aleshinloye family. Having found the Aleshinloye family as the radical owners of the land in dispute, the learned trial judge found for the respondent.

The Court of Appeal affirmed the decision and clearly stated that the issue of the identity of the land in dispute was not an issue since the parties by their evidence and pleadings were referring to the same piece of land, the Court of Appeal also made a concurrent finding on the fact as to who was the radical owner of the land in dispute, was it, the Aleshinloye family or Chief S. B. Adewumi? The Court of Appeal also found the Aleshinloye family is the radical owner of the land in dispute and accordingly also found for the respondent.

Now, the learned counsel for the appellant has identified and submitted 4 issues arising for the determination of the appeal:-

“ 1. Whether the court below has not erred in law and came to the

wrong decision when without giving any hearing on the point to the appellant, it based the dismissal of the appeal on the fresh point of law taken suo motu to wit: non joinder of issue on the location of the 20 acres of land Aleshinloye family allegedly reserved for itself and therefore the correct location of the identity of the plots in dispute alleged have fallen within it the 20 acres.

2. Whether the court below has not erred in law and came to a wrong decision when it relied and based its decision on the evidence of P.W. 1 which was not only at variance with the Statement of Claim but which also contradicted Exhibit “A”, “E” and “F” including the finding of the trial court to the effect that the 20 acres Aleshinloye family reserved for itself is at the northern tip of the whole land.”

3. Whether the court below was not wrong in law when it held that since the parties knew the land, identity of the land was not an issue.

4. Whether the decision of the court below based on fresh points of law raised and argued in the respondent’s reply brief in answer to the Intervener’s was filed not only out of time and without leave of court, but also after the appeal had been heard and adjourned for judgment, was not perverse, erroneous in law, and has occasioned miscarriage of justice.”

The issues formulated by the appellant above lack clarity. They are obscure and difficult to comprehend. The issues formulated by the respondent appear to be clearer. They read as follows:-

1. “Whether the defendant/appellant at the trial and at Court of Appeal proved its Counter-claim to warrant the setting aside of the concurrent findings of fact that the land in dispute fell within the 20 acres of land reserved for the Aleshinloye family.

2. Whether in the light of the Court of Appeal Rules, Order 6 Rule 9(5) and having filed his brief of argument and being absent and unrepresented without cause, the appellant can complain for a denial of fair hearing.

3. Whether the defendant/appellant can be heard to complain that an issue generally traversed on the pleadings but admitted in evidence amounts to a fresh point of law taken suo motu.

4. Whether the reply brief filed in answer to the Intervener's brief of argument can be said to result in a miscarriage of justice or perverse findings by the Court of Appeal having been distilled from the appellant's additional ground of Appeal"

But I shall nevertheless deal with this appeal on the basis of the appellant's brief. B

Issues 1 And 3

The learned counsel for the appellant discussed issues 1 and 3 together. The two issues arise from the question of the proper location and therefore the identity of the two plots of land in dispute between the parties. It is argued that the court below was in error to have held that the appellant did not join issues with the respondent on the location and identity of the 20 acres Aleshinloye family reserved for itself under Exhibit A and therefore the location and identity of the 2 plots in dispute and claimed by the respondent was not in issue. It is submitted further that the court below introduced the issue of the identity and location of the 20 acres suo motu without giving opportunity to the parties to address the court on the issue. It is submitted that the court below misconstrued the case of the appellant, when the appellant argued that the two plots the respondent claimed had not been properly and rightly located on the respondent's survey plan, Exhibit G. It is submitted that the identity of the land and its location i.e. whether it fell within the 20 acres of the Aleshinloye family or within the 117 acres of Chief Adewumi was the fundamental matter to be tried, so the question of joining issues on the location of the two plots was clearly recognized by the trial judge. D E F

It is further contented that the Court of Appeal was in error to have raised the issue suo motu without affording the parties the opportunity of addressing the court on the point. Learned counsel referred to and relied on the case of CHIEF EJOWHOME VS. EDEK-ELER MANDELAS LTD [1986] 5 NWLR (Pt. 39) 1. The court was wrong to raise issue of the identity and location of the land without affording the appellant the opportunity to address on it. G H

The issue of identity of the land in an action for declaration of title to land is very fundamental. The onus is on the plaintiff

seeking the declaration to establish the precise identity of the land he is seeking the declaration. See for example EZUKWU VS. UKACHUKWU [2004] 17 NWLR (Pt. 902) 227 2137, IORDYE VS. IHYAMBE [2000] 15 NWLR (Pt. 692) 675. But where the area of land in dispute is well known to the parties, the question of proof of the identity of the land does not arise. In such a situation, it cannot be contended that the area claimed of the land in dispute is uncertain. See AKINTERINWA VS. OLADUNJOYE [2000] 6 NWLR (Pt 659) 92. It must be emphasized that in an action where the plaintiff claims a declaration of title to land and fails to give the exact extent and identity of the land he is claiming, his action should be dismissed, see RUFAl VS. RIKETT 2 WACA 95, UDOFIA VS. AFIA 6 WACA 216. See also ARABE VS. ANSALU [1980] 5 - 7 SC 78.

In the instant case from the pleadings and the evidence, it is very clear that the parties in this case know the land in dispute. Therefore the identity of the land is not an issue. The respondent in his Statement of Claim pleaded as paragraph 3 thereof:-

"The land in dispute is situate, lying and being at OLOJUORO road, Ibadan and is more particularly described and delineated on survey Plan No. KESH/Y/17506 dated 27th August, 1984 drawn by Alhaji Y. O. Keshinro License Surveyor."

In his Statement of Defence and Counter-Claim, the appellant merely made a general denial of all the averments contained in the statement of claim, he did not make any specific denial of the averment relating to the identity of the land. The other pieces of evidence clearly in my view make it clear that the parties are aware of the land in dispute i.e. it was because he bulldozed the land the respondent was claiming, the appellant was arrested at the instance of the respondent. In any event, the 2nd D.W in his evidence before the trial court stated. [see from page 53 of the printed record]:-

"I first knew the plaintiff when he caused the Police to arrest the defendant. I know the land in dispute at Olojuoro Road xxxxxx"

It is also now settled law that requires no citation of any authority, that the identity of land in a land dispute will only be in

issue if and only if the defendant in his statement of defence makes it one. If he disputes specifically either the area or the location or the features shown in the plaintiff's plan, then the identity of the land becomes an issue to be tried. In my view both the trial court and the Court of Appeal were right in their decision that the identity of the land in dispute was not an issue joined in the pleadings to be tried. B

What was an issue was clearly whether the land in dispute form part of the land reserved for Aleshinloye family or whether it formed part of the land purchased by Chief Adewumi. The trial court as affirmed by the Court of Appeal considered the entire evidence adduced before it and came to the conclusion on the evidence accepted by it, that the land in dispute fell within the Aleshinloye family land. The learned trial judge fully evaluated and appraised the entire evidence led before him. See from pages 67 - 70, when he held at page 70:- C D

"It would therefore appear that what Chief Adewumi did was to constrict the northern part of the land in dispute in suit 1/228/64 as shown in Exhibit "F" and thereafter excise from the constricted land the area eaten up by the Express Way and then came up with the story that when he wanted to take his 117 acres the total land he found there was only 117 acres and he took all. xxxxxxxxxxxxxxxxxxxxxx The result I reach is that the plans used by Adewumi, that is exhibits "G" and "H" by which He appropriated the whole land in dispute in suit 1/228/64 to himself have no relevance to the area in that dispute and so not relevant to the terms of settlement recorded in Exhibit "A". E F

The learned trial judge concluded:- G

"I find that which ever way one interprets the Agreement in Exhibit "A" having regard to the evidence concerning Owode Market and the evidence that Adewumi was to take his own 117 acres from the south of the land in dispute upwards and the Aleshinloye family to take their 20 H acres at the northern tip, the land in dispute in this case is clearly within the area reserved for Aleshinloye family."

It is now settled law, that it is the primary responsibility of

the trial court which saw and heard witnesses to evaluate the evidence and pronounce on their credibility or probative value and not the appellate court which neither heard the witnesses nor saw them to observe their demeanors in the witness box. It follows therefore that when a trial court unquestionably evaluates the evidence and appraises the facts of a case, it is not the business of the appellate court to substitute its own views for the views of the trial court. See MOGAJI VS. ODOFIN [1979] 1 SC 91; ODOFIN VS. AYoola [1984] 11 SC 72; EZUKWU VS. OKACHUKWU *supra*.

It is only where the trial judge abdicates his sacred duty of evaluation of the evidence and the approbation of weight thereto, or when he demonstrates that he had not taken proper advantage of his having heard and seen the witnesses testify, the matter becomes at large for the appellate court to evaluate the evidence provided the exercise does not involve credibility. See ABBA VS. OGODO [1984] 1 SCNLR 372.

In the instant case, the Court of Appeal also affirmed the decision of the trial court. It is a policy of the Supreme Court for a longtime not to disturb concurrent findings of two lower courts unless special circumstances exist to warrant interference. Such special circumstances included:-

- (a) perverse findings;
- (b) error in procedural or substantive law occasioning a miscarriage of justice.

In this case the concurrent finding of High Court and the Court of Appeal were not perverse and will not be interfered with by me. See OKULATE VS. AWOSANYA [2000] 2 NWLR (Pt 646) 530. CHINWENDU VS. MBAMALI [1980] 3 - 4 SC 31; BIARIKO VS. EDEH OGWUILE [2001] 12 NWLR (Pt. 726) p. 235.

In the result, these issues 1 and 3 dealing with the question whether the identity of the land in dispute is joined on the pleadings by the parties for proof, in my view does not arise, the parties knew the land in dispute and as such the respondent had no need to prove the identity or the location of the land in dispute. The other

issue is whether the land in dispute is situated within the land of the Aleshinloye family or the land bought by Chief Adewumi. As shown above, the learned trial judge and the Court of Appeal made concurrent findings of fact that the land in dispute fell within the Aleshinloye family land. The other point raised by the appellant B such as fresh issues raised suo motu by the Court of Appeal is of no moment at all. The crucial issue is that the trial court found as a fact and the Court of Appeal affirmed the finding that the land in dispute was part of the land of 20 acres reserved by the Aleshinloye C family. In the result, I resolve issues 1 and 3 in favour of the respondent.

Issue No. 2

This is concerned with the evidence of P.W 1 which is alleged to be not only at variance with the statement of claim but also contradicted D the contents of Exhibits “A” “E” and “F”. It is also argued that the evidence of P.W 1 contradicts the finding of the trial court that the 20 acres of the Aleshinloye family is at the northern tip of the whole land.

In his appeal before the Court of Appeal in this matter, the appellant E did not complain against the trial judge’s acceptance or belief of the testimony of P.W. 1. The issues arising for the determination of the appellant’s appeal before the Court of Appeal were:-

“1. Did the respondent discharge the burden of proving with certainty F the exact location or situation of the 20 acres of land out of which he claimed to have bought the land in dispute?

2. Was there any legally admissible evidence in support of the conclusion that Exhibit “G” and “H” contains a total of 119.5 acres. G

3. Did the lower court not contradict itself on the facts and on the evidence, when it held that by Exhibit “G” “H” Chief Adewumi had appropriated to himself the whole of the land in dispute in suit No. 1/ 228/64?

4. Did the respondent establish as required by law his claim to H N5,870.00 special damages?

5. Whether the appellant was not entitled to judgment on his counter-claim.”

As can be seen from the above, there was no specific complaint against evidence of P.W 1 before the lower court. The issue of the contradictory nature of the evidence of P.W 1 with (1) the pleadings, (2) the contents of Exhibits E and F did not arise in the court below. It is a fresh issue for which no leave of either this court or the court below was sought and obtained. It is not legitimate for the appellant to complain on an issue decided by the trial court without first appealing to the Court of Appeal for determination. It is elementary law that this court has no jurisdiction to consider the issue which was only decided by the trial court. It was the trial court that accepted the evidence of P.W 1 and all the Court of Appeal did was to affirm the decision of the trial court. I decline to discuss the issue 2 since this court has no jurisdiction to entertain an appeal from the decision of the trial court. Issue 2 is struck out.

Issue No. 4

“In his brief for the appellant the learned counsel states at page 15 that:-

“The appeal was heard in the 18th of September, 2000 and adjourned for judgment to be delivered on the 23/11/2000. The purported respondent’s reply in answer to the Intervener’s brief was not before the court on the 18/9/2000. On the 19/9/2000, when delivery of judgment was pending, respondent filed a motion asking for extension of time to file brief in answer to the Intervener’s brief, the motion was not heard by the court below. The reply brief in answer to the intervener’s brief was however attached to the affidavit in support of the Motion which was unheard at all throughout.”

It is argued that when judgment was however delivered on the 23/11/2000 the lower court made the following statement.

- “1. The respondent on the 19/9/2000 filed answer to Intervener’s brief of argument. (see page 10).
2. “I invoke Order 6 Rule 9(c), Court of Appeal Rules in respect of the answer to the Intervener’s brief of argument filed by the respondent in this appeal.”

It is argued that when the appeal was heard on the 18/9/2000, the

respondent's brief in reply to the intervener's brief was not filed, it was filed only on the 19/9/2000 after the appeal was heard, the respondent filed an application for extension of time to file the brief. The court, therefore acted erroneously in invoking the provisions of Order 6 Rule 9(c) of the Court of Appeal Rules, to deem the brief as duly filed. It is submitted further that the appellant did not receive fair hearing because he was not consulted nor was he also allowed to file his own reaction to the fresh issue of privity of contract, therein raised by the respondent. It is submitted that that occasioned a miscarriage of justice.

Now, both the appellant herein and Alhaji Raimi Afolabi, the intervener, had their appeals considered separately by the Court of Appeal. The issue raised by the appellant in this issue has no bearing whatsoever with his appeal. The appellant's appeal was dealt with at first see page 230 of the printed record, where it was stated:-

"For the reasons adumbrated above as all the five issues raised by the appellant in appellant's brief are unmeritorious the appeal is therefore dismissed."

It was thereafter that the Court of Appeal began to consider the appeal of the intervener Alhaji Afolabi. The Court dealt with only the issue of whether the said intervener was a necessary party to these proceedings. The Court of Appeal having held he was not a necessary party to the proceedings, his appeal was dismissed. **I cannot see how and in what manner has the decision to deem the brief filed by the respondent in answer to intervener's appeal occasioned any miscarriage of justice or how and in what manner was the rights of fair hearing of the appellant's appeal affected. It is now settled law, that it is not every mistake in a judgment or decision that can warrant the reversal of a decision. To justify a reversal of a decision, the error complained of must be of such a nature to cause real miscarriage of justice. In the instant case, the fact that a brief was considered, even if erroneously, in appeal which does not concern the appellant, cannot be a basis for the appellant to complain. I also resolve this issue against the appellant.**

In the result, all the issues herein been resolved against the

appellant. This appeal deserves to fail, and I hereby dismiss it. The respondent is entitled to costs assessed at N10,000.00.

ONU JSC

B I have had the opportunity of reading the judgment of my learned brother Musdapher, JSC just delivered. I agree with him that the appeal fails it is hereby dismissed

C

TOBI JSC

The first issue canvassed by learned counsel for the appellant is that the Court of Appeal took a fresh point of law suo motu without giving any hearing to the appellant. And the fresh point of law is non
D joinder of issue by the appellant on the location of the 20 acres of land. This relates to the identity of the land in dispute. The appellant has specifically complained against the following finding by the Court of Appeal at page 218 of the Record:

E *“The appellant did not join issue on the identity of the land in dispute the issue now been (sic) canvassed on appeal that the Respondent did not establish clearly the identity of the land in dispute is misconceived and should be rejected with dismissal of appeal.”*

F It is the submission of learned counsel that the above finding of the Court of Appeal has caused a miscarriage of justice in that it did not give a fair hearing to the appellant. He cited section 33 of the 1979 Constitution.

Miscarriage of justice connotes decision or outcome of legal proceeding that is prejudicial or inconsistent with the substantial rights of the party. Miscarriage of justice means a reasonable probability of more favourable outcome of the case for the party alleging it. Miscarriage of justice is injustice done to the party alleging it. The burden of proof is on
G the party alleging that the justice has been miscarried.
H

An appellate court can draw conclusion or make inference from the Record before it. Conclusion or inference borne out of /from the Record cannot be branded as raising fresh point of law. A fresh point of

law is a new point of law which was not raised by any of the parties at the trial of the case. A point of law which was raised by the parties at the trial cannot be a fresh point of law.

Learned counsel related the issue to fair hearing. The case of the appellant is that as the Court of Appeal did not give an opportunity to the appellant to react to the so-called fresh point of law on joinder of issue on the identity of the land in dispute, the constitutional right of fair hearing of the appellant was breached. Fair hearing is not an expression of mere rhetoric or empty verbalism but a fundamental right of the individual guaranteed in the Constitution, the breach of which will nullify the proceedings in favour of the victim. The constitutional guarantee is construed in the light of the facts of the case and the facts alone. It cannot be construed outside the facts. Accordingly, a party alleging the breach must show clearly from the facts of the case that the right is violated or breached. With respect, the appellant has not demonstrated in his brief that the right was violated or breached.

It is the general principle of law that a plaintiff who claims title to land must prove the identity of the land in dispute. This is to enable the court know the exact area or acreage of the land in dispute to give him judgment if he is able to prove title. However, where the identity of the land is not in dispute or where there is enough evidence for the court to infer the identity of the land, proof is not necessary. In such a situation, the plaintiff has no burden to prove the identity of the land. Of the two ways, the easier one is when the parties agree as to the identity of the land or they do not put the identity of the land in issue. The more difficult one is the second where the court infers from the generality of the evidence that the identity of the land is not in dispute. In either way, the court must thoroughly examine the pleadings before it. I do not see my way clear in faulting the Court of Appeal.

The other issue I should take is Issue No.4. Learned counsel for the appellant submitted that there was a miscarriage of justice when the appellant was not allowed to react to the Reply Brief in answer to the Intervener's Brief, and especially to the new point of law raised by it on the privity of contract. He submitted once again that the Court of Appeal

breached the appellant's right of fair hearing. With respect, I do not see or find any miscarriage of justice to the extent that the fair hearing constitutional provision is violated or breached.

In the light of the above and the more detailed reasons given by my learned brother, Musdapher, JSC I too dismiss the appeal.

MOHAMMED JSC

The judgment of my learned brother Musdapher JSC, just delivered was read by me in draft before today: I completely agree with him in the manner the four issues arising for determination in this appeal were considered and resolved. On the facts pleaded in the respondent's statement of claim filed as the plaintiff at the trial court and the appellant's statement of defence and counter-claim filed as the defendant and the evidence adduced by the parties in support of their respective claim and counter-claim, the trial court was right in finding that the land in dispute forms part of the land reserved for the Aleshinloye family following the terms of settlement agreed between Aleshinloye family and Chief Adewumi. I am therefore of the view that the court below was right in affirming the decision of the trial court.

Accordingly, I am in full agreement with my learned brother Musdapher JSC that this appeal must fail. I also dismiss the appeal with N10,000.00 costs to the respondent.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Ibadan in appeal No.CA/1/7/92 delivered on the 23rd day of November 2000 in which it dismissed the appeal of the appellant and affirmed the decision of the trial court in favour of the respondent in suit H No. 1/344/83 delivered on 4/7/1986.

In paragraph 25 of the statement of claim, the respondent as plaintiff in the trial court claimed the following reliefs against the appellant:

“(25) whereof the plaintiff sues for;

(i) a declaration of title to a certificate of occupancy in respect of the piece or parcel of land now in dispute situate, lying and being at Olojuoro Road Ibadan and,

(ii) the sum of N15,000.00 (Fifteen Thousand Naira) being special and general damages suffered by the plaintiff in consequence of acts of trespass committed by the defendant on the said land.

(iii) an order of perpetual Injunction restraining the defendant his servants or agents and anybody claiming through or under him from committing any further acts of trespass on the land”.

On the other hand, the defendant counter claimed in paragraph 30 of the amended Statement of Defence and Counter Claim as follows:-

“1. A declaration that the defendant is entitled to a Statutory Right of Occupancy over all that piece or parcel of land situate, lying and being at Oloro Olojuoro Road, Ibadan a place within 5 kilometers to Mapo Hill, Ibadan and which is particularly shown verged orange on survey plan No.MAK/240/84 of 29th December 1984.

2. The sum of N10,000.00 being special and general damages for trespass committed by the plaintiff between March, 1978 and March, 1980 on the said land in dispute.

3. An order of perpetual injunction restraining the plaintiff, his servants, agents or any person claiming through or under him from committing further trespass on the said land”.

The facts of the case include the following. The land in dispute forms part and parcel of a large piece of land originally belonging to Aleshinloye family of Ibadan and which was subject matter of suit No. 1/228/64 between the said family and one Chief S. B. Adewunmi, a legal practitioner. The action was resolved out of court as evidenced in exhibit “A” which gave 117 acres of the land to Adewunmi from the south of the land in dispute upwards and 20 acres to the said Aleshinloye family at the Northern tip thereof.

Following Exhibit “A” the Aleshinloye family partitioned their 20 acres among members of the family and sold a portion to one Dorcas Ajinnibi Amao who in turn sold to the respondent under native law and custom and put the respondent in possession thereof in the presence of

witnesses on or about 27th March 1978. A deed of conveyance was subsequently executed by the vendor to the respondent which conveyance is registered as No.50 at page 50 in volume 2278 of the Ibadan Lands Registry.

B The respondent upon taking possession cleared the land and commenced building construction thereon up to lintel level in 1978 but abandoned same due to financial constraints leaving thereon 6,000 cement blocks. The land was subsequently trespassed upon by the appellant resulting in the action.

C On the other hand, appellant claimed that the land formed part of the land sold by the Aleshinloye family to Chief S. B. Adewunmi who, after taking his portion of land as settled in suit No. 1/228/64 divided same into building plots which he sold to various people including the D appellant who bought plots 16 and 17 thereof. Appellant then sold plot 16 to Alhaji Raimi Afolabi who later became the intervener in the action while leaving plot 17 to himself. Appellant claimed he erected a signpost on the land in February 1980 to ward off trespassers though he admitted finding E an abandoned building foundation on the disputed land which was at the time overgrown with thick bush. Appellant had no conveyance of the land. He counter claimed against the respondent for trespass etc as earlier reproduced in this judgment.

F Judgment was entered in favor of the respondent as plaintiff in the trial court. Appellant was dissatisfied with that judgment and appealed to the Court of Appeal holden at Ibadan which dismissed the appeal and affirmed the decision of the trial court. Upon further appeal to this court, the issues formulated by learned counsel for the appellant in the appellant's G brief of argument filed on 25/11/02 by ALHAJIA. ISOLA - GBENIA are as follows;

H *"1. whether the court below has not erred in law and come to a wrong decision when without giving any hearing on the point to the Appellant it based the dismissal of the appeal on the fresh point of law taken suo motu, to wit. Non joinder of issue by the Appellant on the location of the 20 acres of land Aleshinloye Family allegedly reserved for itself and therefore the correct location and the identity of the plot in*

dispute alleged to have fallen within it (the 20 acres).

2. *Whether the court below has not erred in law and come to a wrong decision when it relied and based its decision on the evidence of the first plaintiff's witness which was not only at variance with the statement of claim but which also contradicted the contents of Exhibit "A" "E" and "F" including the findings of the trial court to the effect that the 20 acres Aleshinloye Family allegedly reserved for itself is at the "Northern Tip" of the whole land.*

3. *Whether the court below was not wrong in law when it held that since the parties knew the land the identity of the land was not in issue.*

4. *Whether the decision of the court below based on fresh points of law raised and argued in the Respondent's Reply in Answer to the Intervener's brief of Argument which said Reply was filed not only out of time without leave of court but also after the appeal had been heard and adjourned for judgment was not perverse, erroneous in law and has not occasioned a miscarriage of justice".*

On the other hand learned counsel for the respondent, PRINCE ADESEGUN AJIBOLA Esq. in the respondent's brief filed on 7/10/03 identified the following four issues for determination:-

"3.1 whether the Defendant/Appellant at the trial Court and Court of Appeal proved its counter claim to warrant the setting aside of concurrent findings of fact that the land in dispute fell within 20 acres of land reserved for Aleshinloye Family.

3.2 whether in the right of provisions of the Court of Appeal Rules Order 6 Rule 9(5) and having filed his brief of argument and being absent and unrepresented without cause the Appellant can be heard to complain of a denial of fair hearing.

3.3 whether the Defendant/Appellant can be heard to complain that an issue generally traversed on the pleadings but admitted in evidence amounts to a fresh point of law taken suo motu.

3.4 whether the reply filed in answer to the interveners brief of argument can be said to result in a miscarriage of justice or perverse findings by the Court of Appeal having been distilled from the Appellant's additional ground of appeal."

In order to fully appreciate the issue dealing with fair hearing with regard to the filing and use of the Respondent's Reply in Answer to the Intervener's Brief of Argument, that is appellant's issue No.4, it is necessary to state that the said intervener was the man that appellant sold the B plot in dispute to and who applied for and was granted leave by the Court of Appeal to appeal against the decision of the trial court obviously as an interested party, though described in the proceedings as an intervener. There were therefore two appeals before the Court of Appeal arising C from the decision of the trial judge - one by the appellant who was the only defendant in the action and another by the intervener. It must be noted that the Court of Appeal dealt with and treated the two appeals separately in its judgment now on appeal before this court and entered D separate decisions in respect of each of them. Also of importance is the fact that there is no appeal before this court by the intervener in respect of the decision of the Court of Appeal in his appeal and there is no evidence before this court that the instant appeal is in respect of the two appeals particularly as there is no evidence that learned counsel for the E appellant also appears in this court for the intervener. In any event the intervener on record is not described in this proceedings or the processes filed therein as an appellant. I therefore hold the view that any ground of appeal arising from or based on the decision of the Court of Appeal in F respect of the appeal of the intervener and any issue, particularly issue No.4 of the present appellant who is not the intervener, arising therefrom are very irrelevant to the determination of the instant appeal and are therefore discountenanced. This court is not a busy body or knight in shining G armour riding about and looking for any lady in distress to be rescued.

At page 230 of the record, the Court of Appeal clearly came to a definite conclusion as regard appellant's appeal before the court before proceeding further to deal with the appeal of the intervene in the following way:-

H *"For the reasons adumbrated above as all the five issues raised by the appellant in appellant's brief are unmeritorious the appeal is therefore dismissed.*

The next consideration is the appeal of the intervener and the 3

issues raised in intervenor's brief of argument and the Respondent's brief to the intervenor's brief of argument."

Whether the respondent's brief to the intervenor's brief of argument was filed after arguments in the appeal of the intervenor was heard and the appeal adjourned for judgment without application for extension of time and the Court of Appeal relied on the said respondent's brief in considering the relevant issues raised in that appeal, is not the business of the appellant who is not a party against whom the judgment was entered neither has he appealed against the judgment of the court dismissing the intervenor's appeal. It is very clear that without an appeal by the intervenor against the said judgment the intervenor is deemed to have accepted that judgment which remains binding on him. The appellant cannot legally be allowed to appeal against that judgment through the back door or under the guise of appealing against the decision given in his own appeal which was separate and independent of the appeal by the intervenor. In the circumstance it is very clear that issue No.4 formulated by learned counsel for the appellant does not arise from the decision appealed against and is consequently irrelevant and incompetent and liable to be struck out. I order accordingly.

Going to the merits of the appeal, the main issue before the trial court, the Court of Appeal and even before this court is simply as identified by the learned trial judge:-

"....whether the land in dispute in this case properly belonged to the Aleshinloye Family or Chief S. B. Adewumi arising from the terms of settlement reported in Exhibit 'A' before the same was sold to different purchasers who are the disputants in this action" - see page 66.

It is clear that a resolution of the issue either way solves the problems in contention between the parties particularly as both parties agree that the land in dispute forms part of a large piece of land originally belonging to Aleshinloye Family which sold 117 acres thereof to one Chief S. B. Adewumi leaving 20 acres to the said family. The question was therefore whether the particular piece of land in dispute falls within the 117 acres sold to Chief S. B. Adewumi who in turn sold to the appellant or falls within the 20 acres belonging to Aleshinloye Family who is

admitted to be the family that sold the piece of land to the vendor of the respondent. If it is determined that the land in dispute falls within the land of Chief Adewumi then the sale to the appellant would be valid and proper whereas if it falls within the land of the Aleshinloye family then Chief
B Adewumi has no authority or power to sell what does not belong to him to the appellant.

It is significant to note that in both the trial court and Court of Appeal, the issue was resolved against the appellant. That means that
C there are concurrent findings of fact in that respect in the instant appeal and the law on the issue is that this court does not make a practice of interfering with the concurrent finding of fact by the lower courts except the appellant is able to prove that the said finding is perverse or not supported by the evidence on record or was contrary to either procedural or
D substantive law or has led to a miscarriage of justice.

In the instant appeal, learned counsel for the appellant has failed to discharge that onus and I therefore find no reason why this court should interfere with the concurrent finding of fact by the lower courts.

E That apart, it is settled law that in an action for declaration the plaintiff must succeed on the strength of his case and not on the weakness of the defence except, of course where, from the pleadings and evidence in support thereof the defendant's case supports that of the
F plaintiff. In the instant case the lower courts have come to the conclusion that appellant had failed to establish his counter claim while the respondent established his claim and made award accordingly. I am of the firm view that the lower courts are right in so holding.

I therefore agree with the conclusion of my learned brother
G MUSDAPHER JSC in the lead judgment that this appeal is devoid of any merit and should be dismissed.

I accordingly dismiss same with costs as assessed and fixed in the said lead judgment.

H Appeal dismissed.