

SUPREME COURT OF NIGERIA
18TH JANUARY, 2008, SC.40/2003
CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, C. M. CHUKWUMA-ENEH, JJSC

1. CHIEF AMODU TIJANI DADA
 2. MUBEEN ADEYEMI TALABI
 3. MR. MOROOF AKANBI OBI APPELLANTS
(for themselves and on behalf of
Ikotun/Matori Families of Iyesi Otta,
Ogun State)
 - AND
 1. MR. JACOB BANKOLE
 2. MR. TAOFIK AKINDE
 3. MR. EZEKIEL BANKOLE RESPONDENTS
(for themselves and as representatives
of the Isidana Family of Iyesi, Ota,
Ogun State)
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EVIDENCE - Admissibility - Previous proceedings - Evidence therein
- Is only relevant as provided by s. 34(1) Evidence Act - Exhibit A
is inadmissible for non compliance with s. 34 (1) - And is expunged
though admitted without objection (H1)

COURTS - Duty - Issues formulated by parties - Are what courts
should be confined to - In performing its duty of granting fair hearing
to both parties (H2)

APPEALS - Issues - Mistake - Where Court of Appeal finds that trial
court relied on wrongful evidence - It rightfully considered whether
remaining evidence - Justifies trial court's finding - Though it did so
under a mistaken issue (H3)

APPEALS - Retrial - Pleadings - Error of trial court - Would have
led to retrial order in this case - But dismissal ordered by Court of
Appeal - Is justified by the pleadings (H4)

LAND LAW - Title - Proof - Customary tenancy - Failure to join other relevant defendants - And the totality of evidence in this case - Makes dismissal of the suit correct (H5)

FACTS

Before the Shagamu High Court of Ogun State, the plaintiffs/appellants filed an action against defendants/respondents in representative capacities. (As a result of death, substitution of parties on both sides was done before the Court of Appeal.) Appellants claimed entitlement to statutory right of occupancy, forfeiture of customary tenancy, possession and perpetual injunction against respondents in respect of the land in dispute. Appellants claimed that the land was first settled upon by their great grand father, a hunter who migrated from Ile-Ife. That a portion of the land was given by their ancestor to a man who brought respondents on the land as customary tenants. That respondents were paying tributes to them but stopped paying, claiming ownership of the land, hence the reason for this action. Respondents denied the claim and gave evidence of first settlement on the land by their own ancestor over two hundred years ago.

Appellant did not join certain parties who ought to be joined based on their pleadings. The trial court relied on evidence given in past proceedings (Exhibit A), which did not comply with s. 34(1) of the Evidence Act, in finding for the appellants. Respondents' appeal to the Court of Appeal was allowed after expunging the wrongfully admitted Exhibit A, though it was tendered by consent. Dissatisfied, appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"i. Whether the second issue formulated by the appellants (now Respondents) at the Lower court did not dovetail into a complaint against evaluation of evidence by the trial court thus empowering the learned Justices of the Court of Appeal to proceed to re-evaluate the evidence of both parties and make appropriate findings after their Lordships had discerned from the record of appeal that the trial judge had failed to avail himself of the opportunity to conduct a proper evaluation of the facts presented by parties at trial.

ii. Whether the learned Justices of the Court of Appeal were not right in holding that the leaned trial judge had made a wrong

use of evidence in previous proceedings in a gross manner which engendered a miscarriage of justice and thus vitiated the judgment of the learned trial judge."

HELD (Unanimously dismissing the appeal per OGUNTADE JSC)

EVIDENCE - Admissibility - Previous proceedings

1. Now exhibit 'A' in the current proceeding was tendered by consent. There was therefore no opportunity of testing if its reception in evidence complied with the requirements under section 34(1) above. It is settled law however that such evidence may be used for the purpose of cross-examining as to credit. It is wrong and improper to treat the evidence given by a witness in a previous proceeding as one of truth in a subsequent or later proceeding, in which he has not given evidence.

It is apparent from the passage I have reproduced above from the judgment of the trial judge that the court used the evidence given by Isaac Bankole, in a previous case as if he had given the evidence in the current case. The evidence given by Isaac Bankole in exhibit 'A' was used by the trial judge to assess the veracity of the defence witnesses in the current case. The evidence given in the current case which did not conform with that of Isaac Bankole, on the previous case was seen as untrue. This was a very erroneous approach. The court below in the lead judgment of Onalaja, J.C.A. (as he then was) (presiding) reacted to the occurrence in these words:

"Applying the cases of *Ayinde v. Salawu* (1989) 3 NWLR (Pt. 109) page 297 at 315; *Alade v. Aborisade* (1960) 5 FSC 167 at 172-173; *Owoyin v. Omotosho* (1961) 1 All NLR 304 at 308; *Ariku v. Ajiwogbo* (1962) 1 All NLR 629 at 631-2, all pointed to the rule that evidence given in a previous case can never be accepted as evidence by the court trying a later case except under Section 34(1) Evidence Act, which was not applied by the learned trial judge. Having not complied with Section 34 Evidence Act, Exhibit A, was inadmissible notwithstanding its admissibility without objection by appellant. As Exhibit A, was inadmissible this court has power to expunge it from the record of appeal as a trial court was only allowed to admit admissible evidence, so this Court should expunge Exhibit A, as decided in *Ariku v. Ajiwogbo* (supra)"

I agree with the reasoning and conclusion of the court below on the point. (p. 555 A)

COURTS - Duty - Issues formulated by parties

B 2. I have no doubt that appellant's counsel is correct in emphasizing that parties and the court alike must confine themselves to the issue formulated by the parties for determination in the matter before the court. It is only when the court confines itself to the issue submitted to it for determination that it can be said that it is engaged in an attempt to fulfill its constitutional duty of granting a fair hearing to parties engaged in a dispute. A court which goes outside the issues submitted to it for adjudication is in a true sense only engaged on a frolic of its own and not performing its constitutional role. I cannot therefore fault the argument of counsel on the principle espoused in his argument.

D But it would appear that counsel viewed the matter too narrowly.

Clearly therefore, this was not a case where the court below responded to an issue not raised before it. The court below was clearly responding to the defendant's issue 3. (p. 557 G)

Issues - Mistake

F 3. If as the court below found and I agree with it, that the trial court was in a gross error to have relied on the evidence of a witness who did not testify before it in the evaluation of evidence, surely there was a plenitude of power available to the court below to determine whether the evidence available or left on record after the testimony of Isaac Bankole in Exhibit 'A' has been excised would be sufficient to sustain the judgment given in favour of the plaintiff by the trial court. The court below made the mistake of arriving at the right decision whilst it purported to be considering the second leg of the 2nd issue whereas it could have come to the same conclusion by simply considering defendant's issue No. 3 which copiously raised the same matter. This was a patent mistake made by the court below which did not derogate from the soundness of the reasoning that a trial court could not in a current case rely on the testimony of a witness in a previous case who has not testified before it. (p. 559 A)

Retrial - Pleadings - Error of trial court

4. Ordinarily, the nature of the error made by the trial court would have warranted the court below making an order for a retrial not dismissal of the plaintiff's case. But it seems to me that the court below was right in its conclusion that the trial court completely failed to properly evaluate and assess the impact and effect on plaintiff's case of the findings which the trial court itself made. Indeed, it seems to me that on a close examination of the plaintiff's pleadings alone, his case would fail. B

At the highest, the defendant on the pleading would be no more than a sub-customary tenant since the Ikotun and Matori families did not directly grant him any land. The big question is, how could the plaintiff's Ikotun and Matori families bring an action to evict a sub-customary tenant without joining to the suit the Akilodi or Owolola family to whom the land was directly granted? For this reason alone, the plaintiff's suit was flawed. (p. 559 E/561 B) C D

Title - Proof - Customary tenancy

5. It seems to me that at the end of the day, the central question, is whether on the totality of the evidence available, the judgment given by the trial court could be sustained. I think not. In coming to this conclusion, I bear in mind that on plaintiff's own showing there are other persons interested in the land in dispute who were not made parties to the case. E

The evidence of 2nd P.W., above conveys that it was part of the land given to Akilodi/Owolola family that the Owolola family gave to the defendant as customary tenant. Remarkably Owolola family is not a party to this case. Further, the evidence suggests that Alfa Salisu Fatusi, owns a portion of the land being litigated upon in this case and he has not been made a party. If the plaintiff has not joined Owolola and Alfa Salisu Fatusi to the suit, how could a declaration of title be made in plaintiff's favour? F G

_____ On the whole I am satisfied that the court below was correct in its decision to dismiss plaintiff's suit. The plaintiffs woefully failed to establish by evidence the title which they asserted against the defendant. (p. 563 C/F) H

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Main function of appellate court is to re evaluate the evidence
 The main function of an appellate court (including the Court of Appeal) is to re-evaluate the evidence at the trial court. This, the court
 B does, by examining the cold record of appeal before it, As long as the
 court does not go outside the record in search for more inculpatory or
 exculpatory evidence, this court will not fault the Court of Appeal. It
 is the submission of learned counsel for the appellants that the Court
 C of Appeal, after coming to the conclusion that the argument of the
 respondents on inordinate delay was unmeritorious, was wrong in
 proceeding to re-evaluate the evidence of the parties. With respect, I
 do not agree with learned counsel. The issue of inordinate delay was
 not the only issue in the appeal and so the Court of Appeal could not
 have closed its eyes to the other issues. After all: it is good law that
 D an appellate court must examine and decide on all relevant issues
 in the appeal. That is what the Court of Appeal did and I cannot
 fault the court. This court cannot gag the Court of Appeal in the
 re-evaluation of evidence, as long as the court does that within the
 precinct or purview of the Record. (p. 567 E)
 E

TABAI JSC

2. Claim for customary tenancy - Implies that defendant is in exclu-
 sive possession
 F It is settled principle of law that a claim which seeks a declaration
 that the Defendants are customary tenants of the plaintiff and other
 consequential reliefs emanating there from postulates that the De-
 fendants are in exclusive possession of the land in dispute. And by
 the operation of Section 146 of the Evidence Act, Cap. E14 of the
 Laws of the Federation, there is presumption that the Defendants
 G in such exclusive possession are the owners of the land in dispute
 until the contrary is proved to rebut that presumption. The only way
 to rebut the presumption is by strict proof of the alleged customary
 tenancy. That is the danger of a plea founded on the allegation of
 customary tenancy.
 H Once a Plaintiff claims that a Defendant is his customary tenant
 on the land in dispute and claims relief based thereon, he admits

unequivocally that the Defendant is in exclusive possession of the land in dispute. It would be a contradiction in terms therefore for a Plaintiff whose claim is founded on customary tenancy to also assert that he is in exclusive possession. (p. 574 F)

3. Customary tenancy - Proof requires strong evidence B

In view of the pleadings and reliefs claimed in the 3rd further Amended Statement of Claim, the Plaintiff/Appellant had a duty to strictly establish the alleged customary tenancy to dislodge the presumption of ownership in favour of Defendants/Respondents. The Appellant C pleaded and tendered some evidence to prove the customary tenancy. The evidence is, in my view, not strong enough to rebut the presumption of ownership in favour of the Respondents. The Respondents pleaded that they have been in the exclusive possession of the land in dispute for over 200 years. This assertion is not contested by the D Appellants. I am strongly of the view therefore that it is not enough in such circumstances for the Appellant to merely assert that the Respondents paid customary tributes to them annually. There must be positive proof that the Defendants are customary tenants of the Plaintiff and that they in fact paid customary tributes. In my assessment the Plaintiff/Appellant's evidence fell far short of the standard E required to prove the alleged customary tenancy. (p. 576 A)

REPRESENTATION

F. O. Akerele, (with him O. J. Adeniyi), for the Appellants F
O. O. Ojitalayo, (with him A. O. Daudu), for the Respondents

CASES REFERRED TO

Alade v. Aborishade (1960) S.C.N.L.R 398 G
Shonekan v. Smith (1964) 1 All N.L.R. 33
Obawole & Anor. v. Coker (1994) 5 NWLR 416
Enang & Anor. v. Ukanem & Ors. (1962) 1 All.N.L.R
Ayinde v. Salawu (1989) 3 NWLR (Pt. 109) page 297 at 315
Alade v. Aborisade (1960) 5 FSC 167 at 172-173 H
Owoyin v. Omotosho (1961) 1 All NLR 304 at 308
Ariku v. Ajiwogbo (1962) 1 All NLR 629 at 631-2 30
F.B.N. (Nig.) Plc. v. M. O. Kanu & Company (1999) 9 NWLR (Pt.

619) at 496-497

Rotimi v. Faforiji (1999) 6 NWLR (Pt. 606) 305

Acme Builders Ltd v. KSWB (1999) 2 NWLR (Pt. 590) 288

Iguebe v. Ezuma (1999) 6 NWLR (Pt. 288) 205

Oduaran v. Asarah (1972) 5 S. C 272 at 285-286

B Sanyaolu v. Coker (1983) 1 S.C.N.L.R. 170 at 181

Oduola v. Gbadebo Coker (1981) 5 SC. 197 at 220

LEAD JUDGMENT BY OGUNTADE JSC

C The original plaintiff at the trial court was Alhaji Bisiriyu Sule. He died whilst the matter was before the court below on appeal. The present appellants were substituted for him by the court below. Similarly, the original defendants were three. The 2nd and 3rd of them died whilst the case was pending at the trial court. The subsisting 1st defendant prosecuted the case to conclusion at the High Court. He
D also died whilst the matter was before the court below. The present respondents were accordingly substituted for him.

The appellants, as the representatives of Ikotun and Maton families of Iyesi Otta, Ogun State, brought their suit against the respondent (as defendant) as the representative of Isidana Family of Iyesi Otta, Ogun State. In their 3rd Further Amended Statement of
E Claim, the appellants claimed against the respondents the following reliefs:

"1. A declaration that the plaintiff is entitled to a statutory
F right of occupancy over all that piece or parcel of land situate, lying and being at Iyesi village, Otta, Ogun State which is clearly delineated Blue on the survey Plan No. SEW/W/2496/4, dated 8th May, 1984. Annual rent of the said land being N100.00.

2. A declaration that by refusing to pay customary tribute and by claiming ownership of the piece of land which the defendants hold
G of the plaintiff as customary tenants of the plaintiff, the defendants have (sic) thereby forfeited their interest as customary tenants to the Plaintiff. Annual rent of said land being N100.00

3. Possession of the said parcel of land in dispute.

4. Perpetual injunction to restrain the defendants, their agents
H or assigns from encroaching on the said parcel of land."

The parties filed and exchanged pleadings which they amend-

ed a number of times. The suit was tried by Oduntan J. of the Ogun State High Court. The Plaintiffs called six witnesses. The defendants called seven witnesses. On 19-12-94, the trial judge in his judgment granted all the four reliefs sought by the plaintiff. The defendant was dissatisfied with the said judgment. He brought an appeal before the Court of Appeal, Ibadan (hereinafter referred to as 'the Court below'). On 9-7-2007, the Court below in its judgment allowed the appeal. The judgment of the trial court was set aside. Although the court below did not specifically say so, but the implication of the judgment was that the plaintiffs' claims in their entirety were dismissed.

On 26-11-2001, the court below substituted the present appellants for the original plaintiff who was dead. Similarly, the court on 21-2-02 substituted the present respondents for the original defendant who was also reported dead.

The appellants were dissatisfied with the judgment of the court below. They have brought this appeal. In their amended Notice of Appeal dated 22-03-05, they raised fifteen grounds of appeal. From these grounds of appeal, the appellants distilled two issues for determination. The issues are:

"1. Whether having regard to the manner in which the Respondents/appellants in the lower courts formulated their 2nd issue for determination and the Court of Appeal having held that their argument on inordinate delay was unmeritorious, the Court of Appeal was right in proceeding to re-evaluate the evidence of both parties at the trial court, set aside findings of fact and make findings of facts thereon and come to the conclusion that the Respondents/appellants in the lower court had failed to discharge the burden of proof on it on the basis that the 2nd issue for determination had a second limb and it dovetailed into whether the learned trial judge was right in giving judgment based on evidence adduced before him.

2. Whether the learned trial judge wrongly made use of evidence in previous proceeding and if so whether this was gross enough to vitiate the proceedings and overturn the judgment; whether the failure of the Court of appeal to make a pronouncement on whether or not the purported error of the trial judge in making use of evidence in a previous proceedings is gross enough to vitiate the judgment of the trial court is fatal to the judgment of the Court of Appeal."

The respondents in the appeal have also formulated two issues for determination. The respondents' issue for determination would appear to be a better presentation of the matter in contention between parties. The issues read:

"i. Whether the second issue formulated by the appellants
 B (now Respondents) at the Lower court did not dovetail into a complaint against evaluation of evidence by the trial court thus empowering the learned Justices of the Court of Appeal to proceed to re-evaluate the evidence of both parties and make appropriate
 C findings after their Lordships had discerned from the record of appeal that the trial judge had failed to avail himself of the opportunity to conduct a proper evaluation of the facts presented by parties at trial.

ii. Whether the learned Justices of the Court of Appeal were not right in holding that the leaned trial judge had made a wrong use of evidence in previous proceedings in a gross manner which
 D engendered a miscarriage of justice and thus vitiated the judgment of the learned trial judge."

I intend to consider together the two issues for determination because both closely inter-related. But it is helpful to expose briefly the nature of the dispute which was submitted to the trial court
 E for adjudication. The case made by the plaintiff in his 3rd Further Amended Statement of Claim may be summarized thus:

The land in dispute was first settled upon by the Plaintiff's great grandfather by name Olakoru a hunter who migrated from
 F Ile-Ife. Olakoru, named the land Ikotun. Following the death of Olakoru, his descendants known as Ikotun and Matori families have continuously exercised rights of ownership over his land. In exercise of such right, a portion of the land was given to one Akilodi. The said land was known as Isidana compound. At Akilodi's death, his land was inherited by his son Owolola. Owolola later brought on the
 G land other persons including the defendant's predecessor-in-interest as customary tenants. The defendant paid customary tributes in the form of yam and oil to Ikotun and Matori families. When the defendant felled trees on the land, he gave portions thereof to plaintiff's families. The defendant has since been felling trees without paying the due tributes to the plaintiff's families. He has also laid a claim of
 H ownership to the said Isidana land. The plaintiff therefore brought

this suit claiming as earlier stated in this judgment.

The defendant raised his own traditional history which contradicted the plaintiffs. The defendant pleaded that the land was first settled upon by his ancestor named Osidana who migrated from Ile-Ife over two hundred years ago. Osidana was a hunter. He also cultivated the land. He brought a shrine thereon which was worshipped as a deity. The shrine, known as 'Amoola' was still regularly worshipped. The descendants of Osidana have through the year's exercised acts of ownership over the land and granted portions thereof to diverse persons. The defendant denied that he and his forbears were plaintiff's customary tenants.

It was on this state of pleadings that the suit was tried by Oduntan J. at the Ogun State High Court. At the trial, the plaintiff tendered as exhibit 'A' a transcript of evidence given by one Isaac Bankole in suit No. OTB/172. CV.71 between Alhaji Bisiriyu Sule (the present plaintiff) and Michael Aina at Ota, Grade B Customary Court. The said Isaac Bankole did not testify before the trial court in the the current proceedings. Regrettably however, the trial judge, as I shall shortly demonstrate, erroneously made extensive use of the testimony of Isaac Bankole, in the earlier case. Indeed the testimony of Isaac Bankole, in exhibit 'A', was used as a benchmark for assessing the veracity of the evidence given by other defence witnesses in the current case.

At page 319-320 of the record of proceedings, the trial judge said:

"At page 6 of exhibit 'A', 1st D.W, stated under cross-examination thus-

'Ogunsi begat Aina Ota. Aina ota was the son of Osidana. Ogunsi was the son of Osidana'

It is obvious that 1st D.W. has prevaricated in respect of Ogunsi. In exhibit 'A' page 7, 1st Defendant's witness stated that Oyekanmi begat Ogunsi, Ogunsi begat Bankole and Aina Ota Bankole Ota is my own father.

(c) At page 7 of exhibit 'A', 1st D.W. stated thus-

'The road bears Osidana, I do not know whether land is allotted to anyone on Isidana land. I was not told by my great grand father. I did not know any person to whom land was allotted to on

the land of Isidana.'

1st Defendant's Witness Isaac Bankole at page 7 of exhibit A stated under cross examination thus -

'We have farm on the land in dispute;

We did not allot land to anybody on the land in dispute.'

B The evidence of 1st Defendant's Witness at page 7 of exhibit 'A' shows that the defendants are customary tenants of the plaintiffs and that they had no title to the land in dispute. The defendant's family could not have allotted land to the 3rd D.W. or his father.

C At page 7 of exhibit 'A', the 1st Defendant Witness. Isaac Bankole during cross-examination stated thus-

'..... The first farm my brother cultivated on the land in dispute was seized from him by the father of the Plaintiff. The second plaintiff is the one harvesting the Orogbo today because he has right of ownership..... Owolola, was the first person to cultivate farm on the land in dispute and he is the descendant of second Plaintiffs great grand father.'

It should be noted that Isaac Bankole's farm, is within the area edged green on exhibit 'G' claimed by the defendant."

Section 34(1) of the Evidence Act provides:

E "34(1) Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case the court considers unreasonable:

Provided-

G (a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceeding."

H Now exhibit 'A' in the current proceeding was tendered

by consent. There was therefore no opportunity of testing if its reception in evidence complied with the requirements under section 34(1) above. It is settled law however that such evidence may be used for the purpose of cross-examining as to credit: See Alade v. Aborishade(1960) S.C.N.L.R 398; Shonekan v. Smith (1964) 1 All N.L.R. 33. It is wrong and improper to treat the evidence given by a witness in a previous proceeding as one of truth in a subsequent or later proceeding, in which he has not given evidence. See Obawole & Anor. v. Coker (1994) 5 NWLR 416, Alade v. Aborishade (supra); Enang & Anor. v. Ukanem & Ors. (1962) 1 All.N.L.R. 530, and Ariku v. Ajiwogbo (1962) 2 S.C.N.L.R 369. B
C

It is apparent from the passage I have reproduced above from the judgment of the trial judge that the court used the evidence given by Isaac Bankole, in a previous case as if he had given the evidence in the current case. The evidence given by Isaac Bankole, in exhibit 'A' was used by the trial judge to assess the veracity of the defence witnesses in the current case. The evidence given in the current case which did not conform with that of Isaac Bankole, on the previous case was seen as untrue. This was a very erroneous approach. The court below in the leading judgment of Onalaja, J.C.A. (as he then was) (presiding) reacted to the occurrence in these words: D
E

"Applying the cases of Ayinde v. Salawu (1989) 3 NWLR (Pt. 109) page 297 at 315; Alade v. Aborisade (1960) 5 FSC 167 at 172-173; Owoyin v. Omotosho (1961) 1 All NLR 304 at 308; Ariku v. Ajiwogbo (1962) 1 All NLR 629 at 631-2, all pointed to the rule that evidence given in a previous case can never be accepted as evidence by the court trying a later case except under Section 34(1) Evidence Act, which was not applied by the learned trial judge. Having not complied with Section 34 Evidence Act, Exhibit A, was inadmissible notwithstanding its admissibility without objection by appellant. As Exhibit A, was inadmissible this court has power to expunge it from the record of appeal as a trial court was only allowed to admit admissible evidence, so this Court should expunge Exhibit A, as decided in Ariku v. Ajiwogbo (supra)" F
G
H

I agree with the reasoning and conclusion of the court below on the point. Now, the present respondent before us was the appellant

before the court below. It is more precise whilst discussing this aspect to refer to him as the defendant and the present appellant before us as the Plaintiff. The defendant in his appeal to the court below against the judgment of the trial court formulated as his 2nd and 3rd issues for determination in the appeal the following:

B "2. Whether the learned trial judge owing to the inordinate lapse of time between when hearing commenced and the delivery of judgment had not become a complete stranger to the facts of the case and was consequently not in a position to form a proper view
C of the credibility of the witnesses on the most vital and contested issues. This issue encompasses grounds B, D, E, F, G, 1 and K of the grounds of appeal.

3. Whether the learned trial judge was right in relying and making use of evidence in another proceeding to demolish the defendant's case other than as provided by law. This issue arises from
D ground C of the grounds of appeal."

In reacting to issue No. 2 above, the court below said at pages 469-470 of the record:

E "After a careful consideration of the arguments proffer by appellant and respondent on issue 2 in their respective briefs of arguments, notwithstanding that I resolved the issue in part on inordinate delay in favour of Respondent as there was strict compliance with the provision of Section 294(1) 1999 Constitution on the second limb of issue 2 as to evaluation, ascription and assessment of evidence
F leading to the burden of proof that as respondent sought declaratory and Injunctive orders after an appraisal of the, facts and law based on the pleadings I come to the irresistible conclusion that respondent on the balance of probability did not establish the grant of rights of occupancy to him, the grant by the lower court more especially that the burden on appellant who did not set up a counter claim was
G merely to defend, defended effectively. The judgment entered against appellant was not properly proved against him, his case is cogent and more convincing thereby the second limb of issue 2 is resolved in favour of appellant leading me to allow the appeal. The judgment of the lower court that granted Statutory Right of Occupancy in favour of respondent against appellant was a wrongful exercise of the
H judicial discretion of the learned trial Judge and thereby setting aside

the said grant of statutory right of occupancy relief one of the claims in paragraph 30 of the Statement of Claim is dismissed as the grant of statutory right of occupancy is refused by me."

(Underlining mine)

It would seem that the approach taken by the court below was to rely on what it described as the second limb of the 2nd issue for determination to arrive at the conclusion that the general evaluation of evidence by the trial court was faulty and unfair to the defendant. It is this aspect of the judgment of the court below that has come under attack and criticism by the plaintiff/appellant. Plaintiffs counsel has argued that it was an error on the part of the court below to have relied on a supposed 2nd part of issue No.2 to upset the judgment of the trial court wherein the evidence of witnesses had been fully considered and evaluated. Counsel submitted that the court below was bound to restrict itself to only the issues raised by parties by parties before it and that there was no jurisdiction to enlarge or expand the frontiers of the issues submitted to the court for adjudication. Counsel relied on *Olawosago v. Adebajo* (1998) 4 NWLR (Pt. 88) 283 where this court said:

"It is necessary to emphasize the purpose of formulating issues for determination in briefs. Like pleadings to litigation between parties the issues formulated are intended to accentuate the real issue for determination before the court."

Other cases referred to by appellant's counsel include *F.B.N. (Nig.) Plc. v. M. O. Kanu & Company* (1999) 9 NWLR (Pt. 619) at 496-497; *Rotimi v. Faforiji* (1999) 6 NWLR (Pt. 606) 305; *Acme Builders Ltd v. KSWB* (1999) 2 NWLR (Pt. 590) 288; *Iguebe v. Ezuma* (1999) 6 NWLR (Pt. 288) 205.

I have no doubt that appellant's counsel is correct in emphasizing that parties and the court alike must confine themselves to the issue formulated by the parties for determination in the matter before the court. It is only when the court confines itself to the issue submitted to it for determination that it can be said that it is engaged in an attempt to fulfill its constitutional duty of granting a fair hearing to parties engaged in a dispute. A court which goes outside the issues submitted to it for adjudication is in a true sense only engaged on a frolic of its own and not performing its constitutional role. I cannot therefore fault the argument of counsel on the principle espoused in

his argument.

But it would appear that counsel viewed the matter too narrowly. Counsel must have erroneously taken the view that the power exercised by the court below in evaluating the available evidence after the findings of the trial court based on the evidence of a witness in exhibit A, who did not testify before the trial court has been excluded was unavailable to it. I reproduced above the 3rd issue for determination raised by the defendant before the court below. In his ground 'C' of the Notice of Appeal, the defendant raised the complaint on the impropriety involved in a trial court basing its findings on the testimony of a witness in a previous case when evaluating evidence in the current case. The said ground of appeal reads:

"C. The learned trial Judge erred in law in relying on evidence of witnesses in abortive proceedings in ways other than those prescribed by law and thereby occasioned a miscarriage of justice.

Particulars of Error

(i) The evidence of one Isaac Bankole contained in Exhibit 'A' but who did not give evidence in these proceedings was used against the Defendant.

(ii) Evidence that were not used by Plaintiff's counsel to contradict DW1 were unilaterally employed by the Court to damage Defendant's case without the witness being given the opportunity of reacting thereto one way or the other.

(iii) Evidence in earlier or abortive proceedings are generally irrelevant to current proceedings except when deployed to test the veracity of a particular witness in a current case."

The defendant formulated his 3rd issue on the said ground of appeal 'C' at pages 361 to 366 of the record of appeal, the defendant's counsel copiously argued that the trial court was in error to have relied in the current case on evidence given in a previous case. The plaintiffs counsel similarly canvassed arguments at pages 394-397 of the record to counter the argument of the defendant's counsel. Clearly therefore, this was not a case where the court below responded to an issue not raised before it. The court below was clearly responding to the defendant's issue 3.

If as the court below found and I agree with it, that the trial court was in a gross error to have relied on the evidence of a witness who did not testify before it in the evaluation of evidence, surely there

was a plenitude of power available to the court below to determine whether the evidence available or left on record after the testimony of Isaac Bankole in Exhibit 'A' has been excised would be sufficient to sustain the judgment given in favour of the plaintiff by the trial court. The court below made the mistake of arriving at the right decision whilst it purported to be considering the second leg of the 2nd issue whereas it could have come to the same conclusion by simply considering defendant's issue No. 3 which copiously raised the same matter. This was a patent mistake made by the court below which did not derogate from the soundness of the reasoning that a trial court could not in a current case rely on the testimony of a witness in a previous case who has not testified before it. B C

I observed earlier that the court below by implication dismissed the plaintiff/appellant's case. Was the court below correct to have done so? Ordinarily, the nature of the error made by the trial court would have warranted the court below making an order for a retrial not dismissal of the plaintiff's case. But it seems to me that the court below was right in its conclusion that the trial court completely failed to properly evaluate and assess the impact and effect on plaintiff's case of the findings which the trial court itself made. Indeed, it seems to me that on a close examination of the plaintiff's pleadings alone, his case would fail. Let me start with a consideration of the pleadings. In paragraphs 14 to 24(b) of the 3rd Further Amended Statement of Claim, the plaintiff pleaded: D E F

"14. Iyanda the grandson of Olakoru exercising rights of ownership on behalf of the Ikotun and Matori Families also gave a portion of family land to one Akilodi, who came from Ijaliki

15. The land given to Akilodi was known as Isidana Compound. G

16. After Akilodi died, the land was inherited by his son, Owolola.

17. Owolola had four children namely: Oketoyinbo, Salami Akineyi, Suberu Elegbede and Sanni Oniyide.

18. Later three other strangers, Aina Ota, Bankile and Alakoye came to Iyesi and were allowed by Owolola to stay with him on the said land inherited by him from Akilodi, his father. H

19. The said Aina Ota, Bankole and Alakoye were only given

shelter by Owolola and they did menial jobs all over Iyesi.

20. When Owolola died, his piece of land was shared out amongst his four children who continued to farm the land as customary tenants.

21. However, after the sharing out of Owolola's land one of the sons, Suberu Elegbede committed an offence in the town and fled to Konifewo (his mother birth place) so as to avoid punishment, abandoning his piece land.

22. Suberu Elegbede's land was as a result given by the Ikotun and Matori Families to Jinadu Osaniyibi, brother to Isaac Bankole and one of the sons of Bankole (given shelter by Owolola, referred to in paragraphs 18 and 19 above) as customary tenant to farm after he approached the Family.

23. The Defendant, Isaac Bankole and Amusa Bamidele Aina assisted and helped to farm the said piece of land with Jinadu Osaniyibi till they latter died.

24. When Osaniyibi died the Defendants with Isaac Bankole and Amusa Bamidele Aina continued to farm the piece of land as customary tenants.

24b. The Plaintiff avers that the Ikotun and Matori Families gave the Defendants the land in dispute as customary tenants."

The averments reproduced above showed that the plaintiffs Ikotun and Matori families gave the Isidana land in dispute to one Akilodi. When Akilodi died, the land was inherited by his son Owolola. When Owolola died, he was succeeded in interest by his children. It was Owolola who according to Plaintiff's pleading gave Bankole, the defendant's predecessor-in-interest access to the land. The defendant with one Jinadu Osaniyibi farmed the land as customary tenants. It was the land shared out to Suberu Elegbede, one of Owolola's sons that was given to Jinadu Osaniyibi, a brother to Isaac Bankole. Isaac Bankole and Amusa Bamidele Aina only assisted Jinadu Osaniyibi to farm the land until they latter died. On these averments, the defendant was portrayed as no more than a farm land or labourer who did not belong to either the Akilodi or the Owolola Family. At the highest, the defendant on the pleading would be no more than a sub-customary tenant since the Ikotun and Matori families did not directly grant him any land. The big question is, how could the plaintiff's Ikotun

and Matori families bring an action to evict a sub-customary tenant without joining to the suit the Akilodi or Owolola family to whom the land was directly granted? For this reason alone, the plaintiff's suit was flawed. At page 68 of the record, the plaintiff who testified as 1st P.W. testified thus:

'My family has constituted this action against Isidana family. B
My family gave the Isidana Family the land in dispute as their customary tenants to farm it.

The Isidana family pay my family customary tributes over the land in dispute."

On the genealogy pleaded by the plaintiff, the defendant or his family was stated to be a member of the Isidana family. So where is the customary tenancy relationship between the defendant and the plaintiff's family. C

The defendant in paragraphs 9 and 14 of their Further D
Amended Statement of Defence pleaded thus:

"9. The land in dispute marked Green in the Survey Plan attached hereto was settled upon by the Defendant's ancestor Osidana when he migrated from Ile-Ife over 200 years ago

..... E

.....
14. Osidana also brought from Ile-Ife a deity known as 'Amoola' which is still worshipped at Iyesi."

The defendant gave evidence that the land was called F
Osidana after their ancestor who first settled on the land. The plaintiff agreed that the land was called Isidana which appears to be the corrupted version of Osidana. How did a parcel of land given out under customary law come to bear not the names of the landlords or owners but that of the tenant? The court below at page 466 of the G
record made a remark on this thus:

"The 2nd PW; in the underlining alone of his testimony stated that his ancestor did not give name to the land in dispute but the land is being called by the name given it by the appellant although the naming or calling of the land in dispute may be called H
by one party and named differently by the other party. It is unheard or preposterous to accept to name a land by a person alleged to be a customary tenant. Also though respondent alleged that appellant was a customary tenant yet 2nd PW; admitted that they built on the

land in dispute and farmed on land in dispute, it is into law that a customary tenant cannot name the land in his own name as against the landlord's name."

The trial judge at page 322 of the record appreciated that the defendant had been on the land for a long time when he observed:

B "There is no doubt that the defendant's family has been in long possession of the land possession of the land in dispute. As asserted, by him, this has been for 200 years. Evidence of long possession without more cannot confer title on them as they have not asserted C any right of ownership."

At page 313, the trial judge also found:

"Both parties to this action have denied the existence of certain facts and which this Court does not believe. For instance, some of the plaintiff's witnesses have denied the existence of idols on the land in dispute but from the evidence of the 7th D.W. and exhibit D 'G', it is without any doubt that there exist some idols on the land in dispute."

Section 146 of the evidence Act provides-

E "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

In *Veronica Graham & Ors. v. Ilona Esumai & Ors.* (1984) 11 SC 123 at 149, this Court said:

F "The presumption in Section 145 (now S. 146) of Evidence Act is a rebuttable presumption and it is rebutted if on the totality of the evidence led on both sides, the trial judge is not satisfied that the case in hand is a proper case for him to exercise his discretion to grant a declaration. It is perfectly legitimate for a trial judge to hold that the evidence taken as a whole (including any presumptions in favour of G the claimant) does not satisfy him that a case for a declaration has been made out."

Similarly in *Oduaran v. Asarah* (1972)5 S. C 272 at 285-286, this Court per Elias CJN said:

H "..... It is clear that, on the issue of title, where a plaintiff claims that a defendant is his customary tenant on a piece of land, while the defendant on the other hand also claims to own the land,

the question before the court is whether the defendant's possession was by the plaintiffs permission. It is for the plaintiff to show that they put the defendant there."

It seems to me that at the end of the day, the central question, is whether on plaintiffs own showing there are other persons interested in the land in dispute who were not made parties to the case. B

At page 78 of the record, the 2nd P.W. Rasaki Owolola testified thus:

"The Ikotun and Matori families gave Owolola family land at Iyesi village and part of this land is the one in dispute. I know the Farmland of Isidana. The defendant and Amusa Bamidele are Farming there. The Owolola family gave the defendant and his brother land to farm at Iyesi because they are strangers and this is part of the farm given by Ikotun and Matori families to Owolola to farm upon and it is known as Isidana farmland. I identify the said Isidana Farmland D to our Surveyor Seweje. I know the farmland of Alfa Salisu Fatusi which is part of the Ikotun and Matori families land. This is also part of the) and in dispute."

(Underlining mine)

The evidence of 2nd P.W., above conveys that it was part of the land given to Akilodi/Owolola family that the Owolola family gave to the defendant as customary tenant. Remarkably Owolola family is not a party to this case. Further, the evidence suggests that Alfa Salisu Fatusi, owns a portion of the land being litigated upon in this case F and he has not been made a party. If the plaintiff has not joined Owolola and Alfa Salisu Fatusi to the suit, how could a declaration of title be made in plaintiff's favour? See *Sanyaolu v. Coker* (1983) 1 S.C.N.L.R. 170 at 181 and *Oduola v. Gbadebo Coker* (1981) 5 SC. 197 at 220. G

On the whole I am satisfied that the court below was correct in its decision to dismiss plaintiff's suit. The plaintiffs woefully failed to establish by evidence the title which they asserted against the defendant. I would accordingly dismiss this appeal with N10, 000.00 costs against the plaintiffs/appellants in favour of the defendants/ H respondents.

TOBI JSC

This is a land dispute with the characteristic opposed or opposite claims of ownership. Both parties claim ownership of the land in dispute through their progenitor. The appellants, who are the plaintiffs, claim ownership through their progenitor, Olakoru. The respondents, who are the defendants, claim ownership through their progenitor, Osidana. It does not appear that the land in dispute has a specific name. The appellants described the land as situate at Iyesi Village, Otta.

The progenitor or genealogy of this case is zigzag. The case of the appellants is that Olakoru acquired the land by act of first settlement. A grandson of Olakoru, Iyanda in exercise of divest rights of ownership gave a portion of the land to Akinlodu who came from Ijaliki - the land thus given was known as Isidana compound. After the death of Akinlodu, the land was inherited by his son, Owolola. Owolola later allowed three strangers to stay with him on the land inherited by him from his father, Akinlodu. The three strangers were Aina Ota, Bankole and Alakoye. When Owolola died, his piece of land was shared out amongst his children, namely: Oketoyinbo, Salami, Akineyin, Suberu Elegbede and Sanni Oniyide. Suberu Elegbede committed an offence and had to flee, consequent upon which, his holding was given to Jinadu Osanyibi, after he had approached the family for that favour. Michael Aina (the original defendant). Isaac Bankole and Amusa Bamidele Aina joined Jinadu Osanyinbi to cultivate the land as customary tenants. The appellants therefore asserted that the respondents are their customary tenants who have violated the terms of their tenancy and have thus incurred forfeiture of their customary tenancy. And so they sued asking for two declaratory reliefs, one for possession and one for injunction.

The case of the respondents as defendants is that Osidana, their progenitor, acquired the land in dispute by settlement over a couple of centuries ago. Osidana established Iyesi Village. He built a compound which he named Osidana Compound where he and the members of his family lived. Osidana begat Olakitan who in turn begat Idowu. Idowu begat Ariwoola who in turn begat Odu-Abamo-Aose and Origbayi. Origbayi begat Odu Okiti and Obabiya,

who begat Bankole, Makoye and Aina Ota. Bankola begat Isaac and others; Aina Ota begat Amusa, Michael and others. According to the Defendants one Ekilodi ran to Iyesi from Ijaliki for protection accompanied by his servant one Owolola; Ekilodi and Owolola were not relations but master and servant. One lyanda a hunter migrated to Iyesi from Ilogbo. He was later joined at Iyesi by his brother Idowu Osake. It was Odu-Abamo-Ao.se a descendant of Osidana who granted a portion of Osidana land to both lyanda and his brother for farming and another piece in the village for building purposes. Idowu Osake, aforesaid, begat Ogisanyin Asani, Omotara and Sule. Sule begat the original Plaintiff. Gbadamosi the son of Owolola later married Omotara the daughter of Idowu Osake and begat one Nosiru. According to the Defendants, neither Ekilodi nor his servant was a member of Osidana family. The Defendant therefore asserted that the Plaintiff was a descendant of a grantee of Osidana family (Defendant's family).

The learned trial Judge gave judgment to the appellants in terms of the reliefs sought. On the issue of the delay in completing the case, and the award of costs, the learned trial Judge said at page 326 of the Record:

"The delay in hearing or completing the hearing of the matter was due mainly to the plaintiff's counsel who for one reason or the other asked for adjournments made by them. For these reason, they are not entitled to any costs for the delay."

On appeal, the Court of Appeal allowed the respondents appeal in part. The court allowed the appeal on Issues 2 and 3 of the five issues. Dissatisfied, the appellants have come to this court. Briefs were filed and duly exchanged. They formulated issues for determination. I prefer the issues formulated by the respondents. They are:

"I Whether the second issue formulated by the Appellants (now Respondents) at the Lower Court did not dovetail into a complaint against evaluation of evidence by the trial court thus empowering the learned Justices of the Court of Appeal to proceed to re-evaluate the evidence of both parties and make appropriate findings after their Lordships had discerned from the record of appeal that the trial Judge had failed to avail himself of the opportunity to conduct a proper evaluation of the facts presented by the parties at

trial.

II. Whether the learned Justices of the Court of Appeal were not right in holding that the learned trial Judge had made a wrong use of evidence in previous proceedings in a gross manner which engendered a miscarriage of justice and thus vitiated the judgment of the learned trial Judge."

As Issue No. 1 relates to Issue No. 2 formulated by the appellants in the Court of Appeal (now respondents) in this court, I should reproduce it here for ease of reference:

"Whether the learned trial judge owing to the inordinate lapse of time between when hearing commenced and the delivery of judgment had not become a complete stranger to the facts of the case and was consequently not in a position to form a proper view of the credibility of the witnesses on the most vital and contested issues."

Learned counsel for the appellants submitted that the above issue before the Court of Appeal was unambiguous and therefore did not have a second limb or dovetail into whether the learned trial Judge was right in giving judgment based on evidence adduced before him. He also submitted that even if the learned trial Judge wrongly made use of evidence in previous proceedings, it was not gross enough to vitiate the proceedings and overturn the judgment Learned counsel for the respondents submitted that the above issue before the Court of Appeal was not limited to, but included a complaint that owing to inordinate delay in the conduct of the proceedings, the trial Judge had become a stranger to the facts of the case and was consequently not in a position to form a proper view of the credibility of the witnesses on the most vital and contested issues. Counsel also submitted that the Court of Appeal was correct when it held that the trial Judge made a wrong use of evidence in previous proceedings in a gross manner and that the wrong use vitiated the proceedings of the trial Judge.

In its judgment, the Court of Appeal said at pages 463 and 464 of the Record;

"... the complaint on inordinate delay though unmeritorious dovetailed into whether the learned trial judge was right in giving judgment based on the evidence adduced before him is still without prejudice that the respondent has the burden to prove his case by

preponderance evidence of probability (sic), the discharge of burden of proof is the next port of call for the consideration by this court."

It is the above statement that learned counsel for the appellants is not happy with. I do not see the need for the storm. In my humble view, the statement is clearly borne out from the Record. The word "dovetail" means to fit together, to combine neatly. The Court of Appeal correctly used the word in the context of the issue of inordinate delay flowing into the learned trial Judge giving judgment based on the evidence before him. The Court of Appeal, in the context, was talking about the two issues in some combination; the first one having hegemony over the second. The court was right on the issue of proof and this is based on preponderance of evidence or the balance of probability. B
C

The main function of an appellate court (including the Court of Appeal) is to re-evaluate the evidence at the trial court. This, the court does, by examining the cold record of appeal before it. As long as the court does not go outside the record in search for more inculpatory or exculpatory evidence, this court will not fault the Court of Appeal. It is the submission of learned counsel for the appellants that the Court of Appeal, after coming to the conclusion that the argument of the respondents on inordinate delay was unmeritorious, was wrong in proceeding to re-evaluate the evidence of the parties. With respect, I do not agree with learned counsel. The issue of inordinate delay was not the only issue in the appeal and so the Court of Appeal could not have closed its eyes to the other issues. After all: it is good law that an appellate court must examine and decide on all relevant issues in the appeal. That is what the Court of Appeal did and I cannot fault the court. This court cannot gag the Court of Appeal in the re-evaluation of evidence, as long as the court does that within the precinct or purview of the Record. And that is exactly what the court did; and so, a full stop. E
F
G

And I move to the second issue. It is on the use of evidence in previous proceedings. The learned trial Judge admitted as Exhibit 'A' the proceedings of Suit No. AB/172CV/71 of Ota Grade B Customary Court. The learned trial Judge made use of the evidence of Isaac Bankole who did not testify before him. The Court of Appeal reacted thus at pages 425, 457 and 458 of the Record: H

"It is crystal clear that Exhibit A, a certified true copy of

public document was admitted by consent without objection under section 109, 111 and 112 of the Evidence Act without application under section 34(1) and 209 Evidence Act... The learned Trial Judge found as a fact from Exhibit 'A' page 7 the testimony of Isaac Bankole constituted an admission against the family so proceeded to hold that
B appellant was customary tenant of respondent... With respect to the learned trial Judge page 7 of Exhibit A was not covered by sections 20 and 21 of the Evidence Act supra as reflected and alluded to previously in this judgment at pages 319 and 320 of the judgment
C of the learned trial Judge. The finding of fact that by virtue of the testimony of the uncalled witness Isaac Bankole constituted that appellant's family was customary tenants was perverse, being perverse as an appellate court can interfere with the said finding of fact and disturb the finding... Applying the said cases, the learned trial judge's findings that appellant was customary tenant of the respondent was
D based on wrong principle of fact and law, it is therefore set aside by me."

I entirely agree with the Court of Appeal. That is the position of the law. As Exhibit A weighed heavily on the mind of the trial Judge, it is difficult to ignore the exhibit in the matter.

E It is in respect of the above reasons and the fuller reasons given by my learned brother, Oguntade, JSC, that I too dismiss the appeal. I award \$410, 000. 00 costs in favour of the respondents.

F _____

MOHAMMED JSC

This appeal involves a land dispute in which the action was Commenced in 1987 at the Ilaro High Court but concluded at the Sagamu High Court following an order of transfer of the matter by
G the Chief Judge of Ogun State. After the exchange of pleadings which also went through several amendments, me Plaintiffs in their 3rd further amended statement of claim in paragraph 30 thereof, claimed as follows:-

H "(1.) A declaration that the Plaintiffs (sic) is entitled to a Statutory Right of Occupancy over all that piece of land situate, lying and being at Iyesi Village, Ota, Ogun State which is clearly delineated

blue on the Survey Plan No. SXEW/W/2496/4 dated 8th May, 1984; Annual Rent of the said land being N100.00.

(2.) A Declaration that by refusing to pay customary tribute and by claiming ownership of the piece of land which the Defendants hold of the Plaintiffs as customary tenants of the Plaintiffs, the Defendants have thereby forfeited their interest as customary tenants to the Plaintiffs annual rent of the said land being N100.00. B

(3.) Possession of the said Parcel of land in dispute.

(4.) Perpetual injunction to restrain the Defendants, their agents or assigns from encroaching on the said parcel of land." C

In their reaction to the reliefs claimed against them, the Defendants in their Further Amended Statement of defence asserted that the Plaintiffs and their family have no right to the land in dispute, describing the claims of the Plaintiffs as being frivolous, speculative, vexatious and an abuse of the process of Court and urged the trial Court to dismiss the action. D

The Plaintiffs in support of their case against the Defendants called a total of six witnesses who gave evidence in the course of which a number of documents were received as exhibits. For the Defendants on the other hand a total of seven witnesses were called. A number of documents were also tendered and received in evidence in support of the Defendants case. In his judgment delivered on 19th December, 1994, the learned trial judge found for the Plaintiffs. The Defendants who were dissatisfied with that judgment lodged an appeal against it to the Court of Appeal which upon hearing the appeal, allowed it and set aside the judgment of the trial Court. The Defendants who lost in the Court of Appeal are now on final appeal to this Court raising the following two issues for determination in their Appellants' brief. The Defendants are the Appellants in this Court. The issues are:- E F G

"(1.) Whether having regard to the manner in which the Respondents Appellants in the lower Courts formulated their 2nd issue for determination and the Court of Appeal having held that their argument on inordinate delay was unmeritorious, the Court of Appeal was right in proceeding to re-evaluate the evidence of both parties at the trial Court set aside findings of fact and make findings of facts thereon and come to the conclusion that the Respondents/Appellants in the lower Court had failed to discharge the burden of H

proof on it on the basis that the 2nd issue for determination had a second limb and it dovetailed into whether the learned trial judge was right in giving judgment based on evidence adduced before him.

(2.) Whether the learned trial judge wrongly made use of evidence in previous proceeding and if so whether this was gross enough to vitiate the proceedings, and overturn the judgment; and whether the failure of the Court of Appeal to make pronouncement on whether or not the purported error of the trial judge in making use of evidence in a previous proceedings is gross enough to vitiate the judgment of the trial Court is fatal to the judgment of the Court of Appeal."

As for the Plaintiffs who are now the Respondents in this Court, they saw the following two issues as arising from the grounds of appeal filed by the Appellants.

"I. Whether the second issue formulated by the Appellants (now Respondents) at the lower Court did not dovetail into a complaint against evaluation of evidence by the trial Court thus empowering the learned Justices of the Court of Appeal to proceed to re-evaluate the evidence of both parties and make appropriate findings after their lordships had discerned from the record of appeal that the trial Judge had failed to avail himself of the opportunity to conduct a proper evaluation of the facts presented by the parties at trial.

II. Whether the learned Justices of the Court of Appeal were not right in holding that the learned trial Judge had made a wrong use of evidence in previous proceedings in a gross manner which engendered a miscarriage of justice and thus vitiate the judgment of the learned trial Judge."

It is quite clear from the record of this appeal particularly the Plaintiffs/Appellants further amended statement of claim, the Defendants/Respondents' further amended statement of defence and the evidence adduced by the parties, that the burden of proof of entitlement to the declarations sought by the Plaintiffs/Appellants, rested on them and I entirely agree with the Respondents argument that the burden was not discharged. This is because apart from the fact that the learned trial judge relied heavily on the evidence of a

witness in Exhibit 'A', who did not in fact testify before the court in finding for the Plaintiffs/Appellants, the learned trial judge also failed to realise that on the case of the Plaintiffs/Appellants as presented to the court, it was quite clear that there were other families whose interest in the land in dispute was disclosed and who were not made parties to the case. For example in the evidence of P.W. 6 Momodu Ogunsoro, the witness had asserted before the trial court that part of the land in dispute in the case was own by his Ogunsoro family. . This claim of ownership by P.W.6 to the land in dispute, no doubt had the effect of destroying the claim of the Appellants to the Statutory Right of Occupancy of the same land as rightly found by the court below in its judgment at page 468 of the record. B C

With these comments, I entirely agree with my learned brother Oguntade, JSC in his lead judgment just delivered that the court below was right in its decision. Accordingly, I also dismiss this appeal with \$410,000.00 costs to the Respondents. D

TABAI JSC

I was privileged to read in draft the leading judgment of my learned brother Oguntade JSC and I agree entirely with the reasoning and conclusion that the appeal be dismissed for lack of merit. I shall by way of emphasis make some comments on the key issue of proof. In the course of doing that, I shall make reference to only such facts or other materials as a necessary to make my comments comprehensible, the detailed facts having being so ably articulated in the leading judgment of my learned brother. E F

First is the issue of the trial court's heavy reliance in the evidence of Isaac Bankole who is recorded to have testified in a previous proceeding Exhibit 'A' as 1st Defence witness. In the judgment at page 313 lines 9-12 of the record the trial court said: G

"Although the defendant denied the Plaintiff's averments evidence in Exhibit 'A' shows that they were customary tenants of the Plaintiff s families and these will be referred to later." H

At page 319 lines 15-22 the trial court noted:

1st Defendant's witness Isaac Bankole at page 7

Of Exhibit 'A' stated under cross-examination thus:

"We have farm on the land in dispute. We did not allot land to anybody on the land in dispute."

And in the same page 319 lines 24-33 the Court continued:

B At page 7 of Exhibit 'A' the 1st Defendant's witness Isaac Bankole during cross-examination stated thus:

C "The first farm my brother cultivated on the land in dispute was seized from him by the father of the Plaintiff... The second Plaintiff is the one harvesting the Orogbo today because he has the right of ownership. Owolola was the first person to cultivate farm on the land in dispute and he is the descendant of second Plaintiffs great grandfather."

D The above shows the extent to which the trial court relied on the testimony of Isaac Bankole in the previous proceeding Exhibit 'A' in finding for the Plaintiffs/Appellants against the Defendants/Respondents. The Court treated the evidence of Isaac Bankole in Exh. 'A' as if it was his testimony in the current proceedings.

E Surely, that was wrong. It is settled law that evidence given in a previous case cannot be accepted as evidence in a subsequent proceedings except in conditions where the provisions of section 34(1) of the Evidence Act applies. Even where a witness who testified in a previous proceeding testifies again in a subsequent proceeding, the previous evidence has no greater value than its use in cross-examination of the witness as to his credit. *Romaine v. Romaine* (1972) F 4 NWLR (Part 238) 650 at 669; *Ayinde v. Salawu* (1989) 3 NWLR (Part 109) 297 at 315; *Alade v. Aborishade* (1960) 5 FSC 167; *Irenye v. Opune* (1985) 2 NWLR (Part 5) 1 at 6-8 *Sanyaolu v. Coker* (1983) 1 SCNLR 168.

G Based on the above principle of law, the Court below held the trial Court's finding of the Respondents being customary tenants to be perverse. I am not, with respect, persuaded by that reasoning of the Court below that by reason of the trial court's use of Exhibit 'A' without more the finding was perverse. I would prefer to discountenance the contents of Exhibit 'A' and examine the legal evidence on the printed record to see if there was enough evidence to sustain the claim.

H In this regard, paragraphs 5, 14-20(d) of the 3rd Further

Amended Statement of Claim are relevant. The said paragraphs are hereunder reproduced as follows:

5. The said land originally belonged to the Plaintiffs great grand father Olakoru, a hunter and warrior who came from Ikotun Household in Ile-Ife and first cultivated the land.

14. Iyanda the grandson of Olakoru exercising rights of ownership on behalf OF the Ikotun and Motori families also gave a portion of the family land to one Akilodi who came from Ijaliki. B

15. The land given to Akilodi was known as Isidana compound. C

16. After Akilodi died, the land was inherited by his son Owolola.

17. Owolola had four children namely; Oketoyinbo, Salami Akineyi, Suberu Elegbede and Sanni Oniyide.

18. Later three other strangers, Aina Ota, Bankole and Al- akoye came to Iyesi and were allowed by Owolola to stay with him on the said land inherited by him from Akilodi, his father D

29. The said Aina Ota, Bankole and Alakoye were only given shelter by Owolola and they did manual jobs all over Iyesi.

20. When Owolola died, his piece of land was shared out amongst his four children who continued to farm the land as customary tenants. E

21. However after the sharing out of Owolola's land one of Suberu Elegbede committed an offence in the town and fled F to Konifewo (his mother's birth place) so as to avoid punishment, abandoning his piece of land.

22. Suberu Elegbede's land was as a result given by the Ikofun and Matori Families to Jinadu Osanibiyi, brother to Isaac Bankole and one of the sons of Bankole (givenshelter by Owolola referred to in paragraph 18 and 19 above) as customary tenant to farm after he approached the family. G

23. The Defendant, Isaac Bankole and Amusa Bamidele Aina assisted and helped to farm the said piece of land with Jinadu Osanibiyi till he latter died. H

24(a) When Osanibiyi died the Defendants with Isaac Bankole and Amusa Bamidele Aina continued to farm the piece of land as customary tenants.

24(b) The Plaintiff avers that the Ikotun and Matori families gave the defendants the land in dispute as customary tenants.

24(c) The Plaintiff avers that the Owolola family is part of the Isidana family and the Ikotun and Matori families gave Owolola part of the land in dispute as customary tenant.

24(d) The Plaintiff avers that the Defendants pay customary tribute to the Ikotun and Matori families yearly to wit: the defendants give the Plaintiff's families yam and oil and when the Defendants fell trees on the land in dispute they give part of the felled trees to the Plaintiffs families.

And paragraph 30 of the Statement of Claim contains the reliefs claimed. The second relief claimed for;

"A Declaration that by refusing to pay customary tribute and by claiming ownership of the piece of land which the defendants held of the Plaintiff as customary tenants of the Plaintiff, the Dependents have therefore forfeited their interest as customary tenants to the Plaintiff. Annual rents of the said land being &100.00."

The Defendants/Respondents admitted paragraph 2 of the 3rd further amended Statement of Claim. They then went on to plead in paragraphs 9, 10, 11, 12, 13, and to the effect that the land in dispute is Osidana land same having been founded by their ancestor Osidana over 200 years ago.

Both sides adduced some evidence in support of their pleadings. Now before proceeding to analyse the evidence, let me restate the legal consequences on the issue of burden of proof when a claim is founded on customary tenancy. It is settled principle of law that a claim which seeks a declaration that the Defendants are customary tenants of the plaintiff and other consequential reliefs emanating there from postulates that the Defendants are in exclusive possession of the land in dispute. And by the operation of Section 146 of the Evidence Act, Cap. E14 of the Laws of the Federation, there is presumption that the Defendants in such exclusive possession are the owners of the land in dispute until the contrary is proved to rebut that presumption. The only way to rebut the presumption is by strict proof of the alleged customary tenancy. That is the danger of a plea founded on the allegation of customary tenancy.

In *Raphel Udeze & Ors v. Paul Chidebe & Ors* (1990) 1 NWLR

(Part 125) 141 at 160-161 this Court per Nnaemeka-Agu JSC stated:

"It is left for me to mention that the courts below also found that although the appellants pleaded that the respondents were their customary tenants who occupy the land in dispute on payment of tribute, they failed to prove such tenancy. It is significant to note that a customary tenant is in possession of his holding during good behaviour and until it is forfeited for misbehaviour. Once it is the case that such a person is a customary tenant and therefore in possession, then like any other person in possession of land, there is a presumption of ownership in his favour. Although the presumption is rebuttable by due proof of a tenancy, the onus is in the adversary to rebut it if he can. Where, as in this case, the customary tenancy is not proved, such a pleading may turn out to be a dangerous admission of possession in the opposite party upon which the trial court may base a presumption of ownership, unless, of course, it is rebutted."

Regrettably the learned trial court did not, with respect, appear to appreciate this legal principle of the heavy evidential burden placed on the Plaintiff/Appellant and proceeded as though the claim was one for a mere declaration of title and erroneously found against the Defendants/Respondents. Although the court accepted the Respondents' long possession of the land in dispute it nevertheless failed to appreciate the strong presumption of ownership which operated in their favour. See page 322 of the record. Rather it reasoned that Section 45 (now Section 46) of the Evidence Act operated in favour of the Plaintiff/Appellant.

Again at page 323 lines 9-13 the trial court concluded thus:

"It is the view of this Court that the Plaintiff has succeeded in proving numerous and positive acts of ownership spreading over a sufficient length of time numerous and positive enough to warrant an inference of ownership under the principle in *Ekpo v. Ita* 11 N.L.R. 68."

This is yet another misconception of the legal issue raised in the case. Once a Plaintiff claims that a Defendant is his customary tenant on the land in dispute and claims relief based thereon, he admits unequivocally that the Defendant is in exclusive possession of the land in dispute. It would be a contradiction in terms therefore for a Plaintiff whose claim is founded on customary tenancy to also assert that he

is in exclusive possession.

In view of the pleadings and reliefs claimed in the 3rd further Amended Statement of Claim, the Plaintiff/Appellant had a duty to strictly establish the alleged customary tenancy to dislodge the presumption of ownership in favour of Defendants/Respondents.

- B The Appellant pleaded and tendered some evidence to prove the customary tenancy. The evidence is, in my view, not strong enough to rebut the presumption of ownership in favour of the Respondents. The Respondents pleaded that they have been in the exclusive possession of the land in dispute for over 200 years. This assertion is not contested by the Appellants. I am strongly of the view therefore that it is not enough in such circumstances for the Appellant to merely assert that the Respondents paid customary tributes to them annually. There must be positive proof that the Defendants are customary tenants of the Plaintiff and that they in fact paid customary tributes.
- D In my assessment the Plaintiff/Appellant's evidence fell far short of the standard required to prove the alleged customary tenancy.

There is yet another curious aspect of the case as disclosed in the pleadings and evidence. In paragraph 2 of the statement of claim the Appellant pleaded:

- E "2. The Defendant resides at Isidana Quarters at Iyesi otta, Ogun State."

This paragraph was admitted by the Respondents in paragraph 1 of the Further Amended Statement of Defence. And in paragraph 15 of the Statement of Claim it was pleaded thus:-

- F "5. The land given to Okilodi was known as Isidana compound."

In the course of his testimony, the Plaintiff as PWI at page 77 lines 23-24 said:-

- G "At Iyesi village there is a compound called Osidana or Owolola."

And on the same page lines 30-31 he again said:

"My family gave the land to Owolola family who named the place Osidana and eventually call it Osidana,"

- H As I stated above the totality of the case of the Defendants/Respondents as pleaded in paragraphs 9, 10, 11, 12, 13 and 23 is that the land was founded by their ancestor Osidana after whom the land was

named. The Appellant led no evidence as to the origin of the name Osidana. Nor was it even suggested by way of cross-examination that the name Osidana Compound had nothing to do with the name of the founder of the land.

On the whole and in view of the foregoing considerations I hold that there is no legal evidence of the Plaintiff/Appellant strong enough to rebut the presumption of ownership in favour of the Respondents. In other words the Appellants failed to prove the customary tenancy which he claimed. The result is that the claim was liable to be dismissed.

For the foregoing and the fuller reasons contained in the leading judgment of my learned brother Oguntade J.S.C. I also endorse the judgment of the Court below. The result is that the appeal is liable to be dismissed and is accordingly dismissed by me also. I abide by the order on costs contained in the leading judgment.

CHUKWUMA-ENEH JSC

I have had the privilege of reading in advance the judgment of my learned brother Oguntade JSC just delivered with which I agree entirely. Respecting, I adopt it as mine. I find the appeal unmeritorious and accordingly dismiss it. I affirm the decision of the court below.