

SUPREME COURT OF NIGERIA
13TH JUNE, 2008. SC. 20/2002
CORAM:- S. U. ONU, D. MUSDAPHER, A. M. MUKHTAR,
I. F. OGBUAGU, F. F. TABAI, JJSC

1. MRS. FLORENCE O. CARRENA APPELLANTS
2. MR. PAULINUS CARRENA
AND
CHIEF AKINLASE & 11 ORS. RESPONDENTS

JUDGMENTS - Nature - Declaratory or executory - Judgment is executory where it not only declares rights - But also enjoins defendant to act in a certain way - As was the case with the second and third reliefs in the instant judgment (H1)

WORDS & PHRASES - Executory judgments - Meaning of - Judgment is executory where it not only declares rights - But also enjoins defendant to act in a certain way - As was the case with the second and third reliefs in the instant judgment (H1)

PARTIES - Joinder - Effect - Having been joined as parties by intervention & having prosecuted the case to finality - Chief Arowolo & those substituted for him are bound by the out come of the case (H2)

TORTS - Trespass - Possession - Incidence - The law attaches possession to title - Trespasser in possession of a land which title vests in another - Cannot acquire any possession recognised at law - By his own wrongful act (H3)

PRACTICE & PROCEDURE - Writ of possession - Issuance - Propriety - In view of the subsisting judgment vesting title over the land in the plaintiffs - They were free to apply for writ of possession to give effect thereto - Court of Appeal was therefore wrong to set aside the writ (H4)

JUDGMENTS - Stay of enforcement - Without an appeal - Propriety

of - Later High Court suit does not purport to question earlier judgment of the Supreme Court - It cannot therefore be a basis for a stay of enforcement of the Supreme Court judgment (H5)

FACTS

The original plaintiff, now deceased and substituted with the present plaintiffs/appellants had sued one chief Akinlase and 11 others at Lagos State High Court claiming a declaration of title over the property in dispute, damages for trespass and perpetual injunction. At the end of trial, the learned trial court granted all the reliefs claimed. One chief Jimoh Arowolo (now deceased) who was not a party was aggrieved by the judgment, acting for himself and as head representative of the respondents appealed to the Court of Appeal where he sought for and obtained an order joining him as a party and granting him leave to prosecute the appeal. The appeal was eventually dismissed and he filed a further appeal to the Supreme Court.

While the further appeal was pending, the 2nd set of respondents instituted a fresh action against the appellants over the same property for identical reliefs as were claimed by the appellants in the prior action. Subsequently the pending appeal at the Supreme Court was dismissed for want of diligent prosecution, whereupon appellants obtained a writ of possession in execution of the judgment in the prior action. Respondents brought an application for an order for a stay of execution of the judgment pending the determination of their fresh action, and setting aside the writ of possession. The learned trial Judge dismissed the application of the respondents. Respondents' appeal against this ruling of the trial court was allowed and the writ of possession was set aside by the Court of Appeal. Consequently, appellants have brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the appellants have no enforceable judgment against the respondents?"

2. Whether a trial court can issue a writ of possession where same was not claimed nor granted by the court?"

3. Whether the Court of Appeal was right in holding that the lower court in Suit No. LD/1093/80, should have stayed proceedings

pending judgment in Suit ID/3131/94?"

HELD (Unanimously allowing the appeal per **TABAI JSC**)

JUDGMENTS - Nature - Declaratory or executory

1. In *Akunnia v. A.G. Anambra State* (supra) at 262, this court per Idigbe, JSC., spoke of the meaning and distinction between executory and declaratory judgments in the following terms:- *It is executory where the order declares the rights of the party before the court and then proceeds to enjoin the defendant to act in a certain way. It is declaratory where it merely proclaims the existence of a legal relationship, but contains no specific order to be carried out by or enforced against the defendant....."*

I have at the introductory part of this judgment, reproduced the three reliefs claimed. The first relief is clearly declaratory and there is no dispute about that. But what about the second and third reliefs? In the second and third reliefs the plaintiffs/appellants sought orders of the court directing the defendants/respondents to pay damages for trespass and a perpetual injunction restraining them from any further acts of trespass. The court granted these reliefs in the judgment. There was the specific order for the payment of damages for trespass to be carried out by or enforced against the defendants/appellants/respondents. Similarly, there is the order of injunction to be carried out by or enforced against them. In my consideration, the judgment of Fernandez, J., (as he then was), on the 13th of November, 1987, is not just declaratory but also executory. (p. 2711 C)

PARTIES - Joinder - Effect

2. Chief Jimoh Arowolo, (now deceased) was aggrieved by the decision and in reaction thereto sought and obtained the leave of the court to be joined as a party for the purpose of prosecuting the appeal, acting for himself and as Head/Representative of the Olarokun Family of Oko-Oba, Orile-Agege, Lagos.

It is settled principle of law that an application by a third party or intervener for joinder can only be granted if the applicant satisfies the court (i) that his presence is necessary for the effectual adjudication of the matter; (ii) that the plaintiffs' claim against the existing defendants also affects him and/or (iii) that his interest is the same as

or identical with that of the existing defendants.

Chief Jimoh Arowolo and those who were substituted for him, for themselves and as representing the Olarokun Family of Oko-Oba, Orile-Agege, elected to be made a set of the defendants/appellants and prosecuted the case as such to its finality at the Supreme Court. They are, in the light of the principles which I have discussed above, bound by the final judgment of the case. The court below was therefore in error when it held that the plaintiffs/respondents therein had no judgment which is enforceable against them.
(pp. 2712 F, H /2713 D)

TORTS - Trespass - Possession - Incidence

3. It is my view, with respect, that the Court of Appeal erred. The opinion above is premised on its misconception of the legal incidents of a trespasser in possession of a land which title vests in another. A person who has title over a piece of land, though not in de facto physical possession, is deemed, in the eyes of the law, to be the person in possession. This is because the law attaches possession to title and ascribed it to the person who has title. Such a possession is the legal possession which is sometimes also called constructive possession. Conversely, a trespasser, though in actual physical possession of the land, is regarded in law not to be in any possession since he cannot, by his own wrongful act of trespass, acquire any possession recognised at law. This gives credence to the principle that where there are rival claimants to possession of a piece of land, the law ascribes possession to the party who has title or better title.
(p. 2714 B)

G Writ of possession - Issuance - Propriety

4. By the judgment of the trial court on the 13th of November, 1987, affirmed and confirmed by the Court of Appeal and the Supreme Court, title over the land, subject matter of this appeal, has been finally determined to vest in the plaintiffs/appellants. And because the law ascribes possession to the person who has title, the plaintiffs/appellants are, in the eyes of the law, deemed to be in possession, actual or constructive. They alone are in lawful possession and the possession is exclusive since the law does not recognise any concur-

rent possession by rival claimants.

In the face of the foregoing considerations, it sounds to me preposterous to suggest the filing of another action for possession. For the purpose of giving effect to the subsisting judgment over the land in dispute, the plaintiffs/appellants were at liberty to approach the court for issuance of a writ of possession. The Court of Appeal was therefore wrong to hold that by not setting aside the writ of possession, the learned trial Judge was merely granting a relief not claimed. The learned trial Judge Momi Fafiade, J., (as he then was), in dismissing the application held that the plaintiffs/appellants were entitled to possession and were therefore at liberty to enforce the judgment. I endorse that opinion of the trial court in its entirety. (p. 2716 A/E)

JUDGMENTS - Stay of enforcement - Without an appeal

5. On the specific issue of whether the suit should operate to stay the enforcement of the subsisting judgment in Suit No. LD/1093/80, my reaction is that there is no basis for that proposition. Suit No. LD/1093/80, has been finally determined with the rights and obligations of the parties clearly defined therein. Suit No. ID/3131/94, does not purport to question the validity of Suit No. LD/1093/80. It follows therefore, that the execution of Suit No. LD/1093/80, cannot be contingent upon the determination of Suit No. ID/3131/94. I am not aware of any case law authority and none was cited to us in support of the proposition that a subsisting judgment in a case that has been finally determined at the Supreme Court cannot be enforced because of another suit pending at the High Court. Section 14 of the Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990, on which the court below and learned counsel for the respondents relied provides:-

“14. Whether any proceeding shall be pending in the court against the holder of a previous judgment of the court by the persons against whom the judgment was given, the court may, if it appear just and reasonable to do so, stay execution of the judgment either absolutely or on such terms as it may think just until a judgment shall be given in the pending proceedings.”

It is clear from this provision that for the court to exercise its

discretion to grant the stay, it must appear just and reasonable to do so. I do not fancy anything that appears just and reasonable to warrant the trial court's exercise of its discretion to grant the stay. The trial court therefore, rightly refused to grant the stay. I do not also see any conceivable reason for the interference of the Court of Appeal with the discretion of the trial court. (p. 2717 B)

NOTABLE POINTS OF INTEREST

TABAI JSC

An action for trespass presupposes plaintiff in actual or constructive possession

1. A claim in an action for trespass to land presupposes that the plaintiff is in possession, actual or constructive, of the land in dispute at the time of the trespass and that the trespasser defendant cannot by the mere fact of his entry unto the land secure lawful possession. On the other hand, a claim for recovery of possession postulates that the plaintiff is not in possession at the time of the action and that he was once in possession but is at the time of the action seeking to be restored to possession of the land. Thus, where a plaintiff claims that he has title over the land in dispute and which has always been in his possession, actual or constructive, he does not agree that the defendant has any possession cognisable in law. In such case, his action lies in trespass, damages for the trespass and injunction restraining the trespass. (p. 2714 G)

OGBUAGU JSC

2. Court of Appeal can not reverse itself

As a matter of fact, in the case of Usman v. Umaru (1992) 7 NWLR (Pt.254) 377 at 399; (1992) 7 SCNJ 388, it was held inter alia by this court, that the Court of Appeal, cannot reverse its earlier decision or order simply because another Panel of that court subsequently thought differently about the earlier decision or order. At page 400 of the NWLR, it referred to Order 5 Rule 3 of the Court of Appeal Rules, 1981, (as amended in 1984) and stated that the said order contemplates correction of an error in the judgment of the court differently constituted. Thus, that a panel of the court, cannot, acting under the said order, alter the judgment of another panel. So be it.

The court below under the doctrine of stare decisis, is bound by the above decision of this court. (p. 2726 B)

REPRESENTATION

R. O. Ayoola, for the Appellants.

Prof. A.B. Kasunmu, for the 1st to 3rd Respondents.

B

CASES REFERRED TO

Okoya & Ors. v. Santili & Ors. (1990) 3 S.C. (Pt.II); (1990) 2 NWLR (Pt. 131) 172

C

Govt. of Gongola State v. Tukur (1989) 4 NWLR (Pt.117) 597

NV Scheep v. MV'S Araz (2001) FWLR (Pt.34) 543

Amaefule v. State (1988) 2 NWLR (Pt.75) 156 at 177

Okafor v. A.G. Anambra State (1991) 7 S.C. (Pt.II) 138; (1991) 6 NWLR (Pt.200) 659 at 681

D

Aromire v. Awoyemi (1972) 2 S.C. 1; (1972) 2 S.C. (Reprint) 1; (1972) 1 All NLR (Pt.1) 101

Kareem v. Ogunde (1972) 1 S.C. 182; (1972) 1 S.C. (Reprint) 126

Ayinla v. Sijuwola (1984) 1 S.C. NLR 410

Ekretsu v. Oyobebere (1992) 9 NWLR (Pt.266) 438

E

Bassey v. Sama (1996) 6 NWLR (Pt. 457) 737 at 746

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, s. 222 (a)

F

Court of Appeal Rules, 1981 (as amended in 1984), O. 5 r. 3

LEAD JUDGMENT BY TABAI JSC

This action was commenced at the Lagos Division of the High Court of Lagos State in Suit No. LD/1093/80 by the Writ of Summons dated 28th of August, 1980. The plaintiff was Mr. E. A. Carrena. He died and was, by order of court, substituted with the present plaintiffs/appellants. The claim was against Chief Akinlase and 11 others. The reliefs claimed were:-

“(i) A declaration that they are entitled to the property situate at Ojokoro Mile (16 1/2 Abule Egba) Agege-Abeokuta Road in the Lagos State and covered by a Deed of Conveyance known as No. 38 in Volume 987 in the Lagos State Registry of Land.

H

(ii) N2,041.50k (Two Thousand and Forty-One Naira, Fifty Kobo), damages for trespass.

(iii) Perpetual injunction against the defendant, his agents and servants with respect to the said land.”

Pleadings were settled and the matter eventually set down for hearing on the 24th of September, 1987.

On the 24th September, 1987, both the defendants and their counsel were absent. No explanation was offered for their absence. The plaintiffs/appellants commenced their case. One of the plaintiffs and two other witnesses testified for the plaintiffs’ case. The evidence includes Exhibit “A,” the plaintiffs’ plan and Exhibit “B,” a Deed of Conveyance. In his judgment on the 13/11/89, the learned trial Judge, Fernandez, J., (as he then was), granted all the reliefs claimed. Chief Jimoh Arowolo (now deceased) who was not a party was aggrieved by the judgment and acting for himself and as head /representative of Olarokun Family of Oko-Oba, Orile-Agege appealed to the Court of Appeal. He sought and was granted leave to be joined as a party and to prosecute the appeal as an interested party. The parties, through their counsel, filed and exchanged their Briefs of Argument. The appeal was heard. In its judgment on the 24th of November, 1994, the appeal was dismissed.

Chief Jimoh Arowolo was not satisfied and went on further appeal to this court in Appeal No. SC. 65/1995.

While the appeal to the Supreme Court was still pending, Chief Jimoh Arowolo in Suit No. ID/3131/94, instituted a fresh action against the plaintiffs/respondents over the same land claiming the following reliefs :-

“(i) Declaration that the plaintiff is entitled to the Customary Right of Occupancy to all that piece or parcel of land, lying and situate at Oko-Oba/Abule Egba in Orile Agege in Ikeja Division of Lagos State particularly delineated and verged Green which land forms a portion of vast area of land owned by Olarokun Family and covered by Plan No. JO/23/94, drawn by Olushola Ogunsanya and dated 28/12/94.

(ii) N50,000.00 from the defendants being damages for trespass on the said land.

(iii) An order of perpetual injunction restraining the defendants

and their agents, privies and servants from committing further acts of trespass on the plaintiffs' land particulars of which are set out in claim 1 above.

(iv) A declaration that the plaintiff is entitled to possession of the land verged Green with Plan No. JO/23/94 dated 28/12/94."

On the 22nd of September, 1995, the plaintiffs/appellants herein who were the plaintiffs/respondents in SC. 65/1995, brought an application in this court for an order dismissing the appeal for want of diligent prosecution. This motion was taken and granted on the 7th of March, 1996. The appeal was accordingly struck out. Thus, Suit No. LD/1093/80 which was initiated on the 28th of August, 1980, came to its end on the 6th of March, 1996, in SC. 65/1995. The rights and a fortiori liabilities of the parties therein over the land in dispute were thus, finally determined.

However, by his motion dated 25th of January, 1999, Chief Jimoh Arowolo brought an application praying for:-

"1. An order staying execution of the judgment of Fernandez, J., delivered on 13th of November, 1987.

2. An order restraining the plaintiffs/respondents from taking possession of the land in dispute pursuant to the judgment of Fernandez, J., (as he then was), dated 13th November, 1987, pending the determination of Suit No. ID/ 3131/94.

3. An order setting aside the Writ of Execution and Writ of Fifa against the appellants in this suit."

The application was supported by a 12 paragraph affidavit. In response, the plaintiffs/appellants as respondents therein filed a 29 paragraph counter-affidavit. On the 2nd of March, 2000, in a considered ruling, the learned trial Judge, Moni Fafiade, J., dismissed the application in its entirety, concluding that the plaintiffs/respondents were at liberty to enforce their judgment.

He was aggrieved by that ruling and went on appeal to the court below. By its judgment on the 16th of July, 2001, the court below allowed the appeal. The court per Galadima, JCA., concluded in the following terms:-

"In the result, this appeal, in my view, is meritorious, it succeeds. The Writ of Possession and Fifa issued against the appellants and also ruling of the lower court of 2/3/2000, are hereby set

aside.....”

The plaintiffs were dissatisfied with this judgment and have come on appeal to this court. The parties filed and exchanged their Briefs of Argument. The appellants’ Brief was prepared by Alhaja R.O. Ayoola (Mrs.). And the 1st-3rd respondents’ Brief was prepared by
B Babatunde Kasunmu, Esq.

The appellants formulated two issues for determination namely:-

“1. *Whether the Court of Appeal was correct in holding that the appellants “have no judgment” which is enforceable against the respondents, the judgment being declaratory?*

C “2. *Whether the Court of Appeal was correct in holding that the proceedings in Suit No. ID/3131/94, by the appellant/respondent/cross-appellant before Justice Akande were pending against the respondents, 1 plaintiffs/appellants and therefore justified to stay the enforcement of the judgment in LD/1093/80 ?”*

D On their part the 1st - 3rd respondents formulated the following three issues:-

“1. *Whether the Court of Appeal was right in holding that the appellants have no enforceable judgment against the respondents?*

E “2. *Whether a trial court can issue a writ of possession where same was not claimed nor granted by the court?*

“3. *Whether the Court of Appeal was right in holding that the lower court in Suit No. LD/1093/80, should have stayed proceedings pending judgment in Suit ID/3131/94?”*

F In the appellants’ Brief of Argument, learned counsel, Mrs. R.O. Ayoola, made the following submissions. On the first issue, it was her submission that in view of the three reliefs sought and granted, the judgment is not merely declaratory but also executory. Learned
G counsel referred to *Okoya & Ors. v. Santili & Ors.* (1990) 3 S.C. (Pt.II); (1990) 2 NWLR (Pt. 131) 172 and *Govt. of Gongola State v. Tukur* (1989) 9 S.C. 105; (1989) 4 NWLR (Pt.117) 597, for the definition of executory and declaratory judgments. She referred to the various steps taken by the defendants/appellants/respondents to
H stay execution of the judgment of the trial court and argued that they, by the steps taken, demonstrated their concession that the judgment is not just declaratory but also executory. It was counsel’s further submission that although possession was not specifically claimed,

the trial court had the right to order same.

On the second issue of whether in view of the pending proceedings in Suit No. ID/3131/94, the Court of Appeal was justified to stay the enforcement of the judgment in this suit, learned counsel referred to the insistence of the respondents of their not being bound by the judgment in Suit LD/1093/80 and argued that they cannot be allowed to blow hot and cold at the same time. She referred to the finding of the learned trial Judge to the effect that there was no proceeding pending between the parties in this appeal and urged that the finding be affirmed. In her view, it would be unjust and unreasonable to stay the execution of the judgment in LD/1093/80, pending the determination of Suit No. ID/3131/94, contending that the latter is a re-litigation of the case decided in the former suit and therefore an abuse of the judicial process. On the contention that Suit No. ID/3131/94, constitutes an abuse of the court's process, learned counsel referred to *NV Scheep v. MV'S Araz* (2001) FWLR (Pt.34) 543, *Amaefule v. State* (1988) 2 NWLR (Pt.75) 156 at 177 and *Okafor v. A.G. Anambra State* (1991) 7 S.C. (Pt.II) 138; (1991) 6 NWLR (Pt.200) 659 at 681. Counsel urged in conclusion that the appeal be allowed.

For the defendants/respondents, Babatunde Kasunmu, Esq., proffered the following arguments in the respondents' Brief. With respect to their first issue, learned counsel submitted that the judgment of Fernandez, J., of the 13th November, 1987, was merely declaratory and cannot be enforced by the issuance of a writ of possession. In support of this submission learned counsel cited *Akunnia v. A.G. Anambra State & Ors.* (1977) 5 S.C. 99; (1977) 5 S.C. (Reprint) 99; (1977) NSCC 256 at 262, *Okoya v. Santili* (supra). It was his submission that the only executory part of the judgment is the damages for trespass awarded and that the injunction granted can only be enforced by an order of committal.

As regards the respondents' second issue, counsel argued that there was no claim for possession and none granted and by granting the issuance of writ of possession, the trial court was only granting a relief not covered by the claim. According to counsel, the respondents did not at any time give an undertaking to give up possession of the land in dispute to the appellants. It was his submission that by

granting leave to issue a writ of possession, the High Court was combining the course of action for possession and one for trespass which combination, he argued, was wrong in law.

On the respondents' third issue learned counsel relying on Order 2 Rule 14 of the Sheriff and Civil Process Act, Cap. 407, Laws of the Federation, 1990, submitted that the judgment in Suit No. LD/1093/80, ought to be stayed pending the determination of Suit No. ID/3131/94. The decision of the court below is therefore right, counsel argued, and urged that it be affirmed.

I have given a careful consideration to the issues raised and the arguments proffered by counsel for the parties. To start with, it is, I think, necessary to point out that Suit No. ID/3131/94, though between the same parties and over the same parcel of land as that in Suit No. LD/1093/80, is a separate action which appeal is not before us. I wish therefore to warn myself not to make pronouncements that would amount to a decision of that suit. I take this stance because learned counsel for the appellant has, by implication invited us, in the course of her submissions, to hold that Suit No. ID/3131/94, is frivolous, vexacious and instituted mala fide. Only the trial High Court now has the jurisdiction to make its own assessment of the suit and make pronouncements thereupon.

Let me now deliberate on the issues presented to us for determination. The first issue is whether the judgment of Fernandez, J., (as he then was), delivered on the 13th November, 1987, is a declaratory judgment incapable of being enforced by the issuance of a writ of possession for the plaintiffs. On this issue, the court below made references to the reliefs claimed and those granted, and at page 121 of the records opined:-

"Clearly this judgment is declaratory. It only declares the rights of the plaintiffs/respondents. It merely proclaims the existence of a legal relationship. It does not seem to me to contain any specific order to be carried out by or enforced against the defendant.

The order a party seeks may be declaratory or executory. It is said to be executory where the order merely declares the rights of the parties before the court and then proceeds to enjoin the defendant to act in certain way. It is said to be declaratory where it merely proclaims the existence of a legal relationship, but contains no spe-

cific order to be carried out by or enforced against the defendant. See Akunnia v. A.G. Anambra State & Ors. (1977) 5 S.C. 99; (1977) 5 S.C. (Reprint) 99; (1977) NSCC p. 256 at 262.....”

Was the Court of Appeal right in the opinion expressed above in the face of the reliefs claimed and granted? On the meaning of a declaratory judgment, the court relied on *Akunnia v. A.G. Anambra State* (supra) and *Bassey v. Sama* (1996) 6 NWLR (Pt. 457) 737 at 746. As respects the meaning and distinction between declaratory judgment and executory judgment, the Court of Appeal, quite rightly, in my view, referred to and adopted the two cases. ***In Akunnia v. A.G. Anambra State (supra) at 262, this court per Idigbe, JSC., spoke of the meaning and distinction between executory and declaratory judgments in the following terms:-***

“The end result of an action, whatever its nature and no matter how framed, is that the party who approaches the court obtains the order he seeks; the order he seeks may be declaratory or executory. It is executory where the order declares the rights of the party before the court and then proceeds to enjoin the defendant to act in a certain way. It is declaratory where it merely proclaims the existence of a legal relationship, but contains no specific order to be carried out by or enforced against the defendant.....”

I have at the introductory part of this judgment, reproduced the three reliefs claimed. The first relief is clearly declaratory and there is no dispute about that. But what about the second and third reliefs? In the second and third reliefs the plaintiffs/appellants sought orders of the court directing the defendants/respondents to pay damages for trespass and a perpetual injunction restraining them from any further acts of trespass. The court granted these reliefs in the judgment. There was the specific order for the payment of damages for trespass to be carried out by or enforced against the defendants/appellants/respondents. Similarly, there is the order of injunction to be carried out by or enforced against them. In my consideration, the judgment of Fernandez, J., (as he then was), on the 13th of November, 1987, is not just declaratory but also executory. The court below, was, with respect therefore

clearly in error when it held that the judgment was merely declaratory, containing no specific orders to be carried out by or enforced against the defendant. It was, in addition to being declaratory also executory containing orders against the defendants.

On this issue of whether the judgment is executory, it is also to be noted that Chief Jimoh Arowolo and those substituted for him, have, in the course of the proceedings, taken various steps to confirm that the judgment was not only declaratory but also executory. By their motion dated the 25th of January, 1999, they sought orders (1) staying the execution of the judgment (2) restraining the plaintiffs/respondent from taking possession of the land in dispute pursuant to the judgment and (3) setting aside the Writ of Execution and Writ of Fida against them. See also the earlier order of the Court of Appeal on the 5th of June, 1990, at pages 115-116 of the record. I hold in conclusion therefore that the judgment is not only declaratory but also executory and enforceable against the named defendants therein.

This takes me to the next question of whether the judgment of the trial court in Suit No. LD/1093/80, is enforceable against the respondents through the issuance of a writ of possession. On this issue, it is necessary to recall, at the risk of repetition, that Chief Jimoh Arowolo was not a defendant in the case at its inception and up to the judgment of the trial court on the 13th of November, 1987. There is nothing on the record to show that the original defendants, Chief W.O. Akinlase and 11 others appealed against the judgment. May be they did. But **Chief Jimoh Arowolo, (now deceased) was aggrieved by the decision and in reaction thereto sought and obtained the leave of the court to be joined as a party for the purpose of prosecuting the appeal, acting for himself and as Head/Representative of the Olarokun Family of Oko-Oba, Orile-Agege, Lagos.** Although the application sequel to which he was joined is not in the record, it is only reasonable to presume that he was so joined upon proof through affidavit evidence in the application that he and the Olarokun Family would be directly affected and bound by the final outcome of the case.

It is settled principle of law that an application by a third party or intervener for joinder can only be granted if the ap-

plicant satisfies the court (i) that his presence is necessary for the effectual adjudication of the matter; (ii) that the plaintiffs' claim against the existing defendants also affects him and/or (iii) that his interest is the same as or identical with that of the existing defendants. See Okafor & Ors. v. Nnaife & Ors. (1973) 3 S.C. (Reprint) 60; (1973) 11 NMLR 245; Oyedeleji Akanbi (Mogaji) & Anor. v. Okunlola Ishola Fabunmi & Anor. In Re: Yesufu faleke (1986) 2 S.C. 431 at 480-481. On the reasons necessitating the joinder of a party to an action, the statement of Devhin, J., in the English case of Amon v. Raohel Tuck and Sons Ltd. (1956) 1 All ER 273, is instructive. He said:-

"The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party."

Chief Jimoh Arowolo and those who were substituted for him, for themselves and as representing the Olarokun Family of Oko-Oba, Orile-Agege, elected to be made a set of the defendants/appellants and prosecuted the case as such to its finality at the Supreme Court. They are, in the light of the principles which I have discussed above, bound by the final judgment of the case. The court below was therefore in error when it held that the plaintiffs/respondents therein had no judgment which is enforceable against them.

With respect to the specific question of whether the judgment of the trial court is enforceable against the respondents through the issuance of a writ of possession, the opinion of the Court of Appeal is expressed at page 121 of the record as follows:-

"The plaintiffs/respondents in the instant case have no judgment which is enforceable against the appellant. They failed to take steps to obtain judgment against the appellants upon a writ of possession issued against them in the lower court. If they successfully canvassed that in the lower court, they would, be able to have an enforceable judgment against them. The plaintiffs did not have a claim for possession and the judgment of the lower court did not contain same. The learned trial Judge should have therefore set aside the

writ of possession as claimed by the appellants in their motion of 25/1/99. By not setting aside the writ of possession, the learned trial Judge was merely granting the plaintiffs/respondents a relief not claimed."

B Learned counsel for the respondents proffered sustained arguments in support of the opinion of the court below.

Here again, ***it is my view, with respect, that the Court of Appeal erred. The opinion above is premised on its misconception of the legal incidents of a trespasser in possession of a land which title vests in another. A person who has title over a piece of land, though not in de facto physical possession, is deemed, in the eyes of the law, to be the person in possession. This is because the law attaches possession to title and ascribed it to the person who has title. Such a possession is the legal possession which is sometimes also called constructive possession. Conversely, a trespasser, though in actual physical possession of the land, is regarded in law not to be in any possession since he cannot, by his own wrongful act of trespass, acquire any possession recognised at law. This gives credence to the principle that where there are rival claimants to possession of a piece of land, the law ascribes possession to the party who has title or better title.*** See *Aromire v. Awoyemi* (1972) 2 S.C. 1; (1972) 2 S.C. (Reprint) 1; (1972) 1 All NLR (Pt.1) 101, *Kareem v. Ogunde* (1972) 1 S.C. 182; (1972) 1 S.C. (Reprint) 126, *Ayinla v. Sijuwola* (1984) 1 S.C. NLR 410, *Ekretsu v. Oyobebere* (1992) 9 NWLR (Pt.266) 438.

H It is at this juncture necessary to draw the distinction between an action for trespass to land and one for possession. The Court of Appeal did not, with respect, appreciate the fine distinction and that accounted for its error of judgment. A claim in an action for trespass to land presupposes that the plaintiff is in possession, actual or constructive, of the land in dispute at the time of the trespass and that the trespasser defendant cannot by the mere fact of his entry unto the land secure lawful possession. On the other hand, a claim for recovery of possession postulates that the plaintiff is not in possession at the time of the action and that he was once in possession but is at the time of the action seeking to be restored to possession of the land.

See *Aromire v. Awoyemi* (supra), *Tijani v. Akinwunmi* (1990) 1 NWLR (Pt.125) 237 at 247, *Ernest Nzekwu & Ors. v. Madam Christiana Nzekwu & Ors.* (1989) 3 S.C. (Pt. II) 76; (1989) 2 NWLR (Pt.104) 373 at 391. Thus, where a plaintiff claims that he has title over the land in dispute and which has always been in his possession, actual or constructive, he does not agree that the defendant has any possession cognisable in law. In such case, his action lies in trespass, damages for the trespass and injunction restraining the trespass. B

In *Jimoh Adebakin v. Sabitiyu Odujebu* (1972) 6 S.C 116 at 121; (1972) 6 S.C. (Reprint) 116, this court per Coker, JSC., highlighted and applied this distinction. He said:- C

“Thus, it seems that the evidence accepted by the learned trial Judge was that the plaintiff was always in possession before the defendant entered on the land vi et armis. If that is so, a claim for recovery of possession is inappropriate for a trespasser does not by the act of trespass secure possession in law. If the plaintiff was always so in possession then the defendant can only be liable for damages in trespass and to an order of injunction.” D

The above pronouncement was cited by this court with approval in *Banjo & Anor. v. Aiyekoti & Anor.* (1973) 4 S.C. (Reprint) 63; (1973) NSCC 184 at 192-193. The court per Fatayi-Williams, JSC., (as he then was), at page 193 added:- E

“The order for possession made by the learned trial Judge is therefore irregular and is accordingly set aside. However if, the defendants/appellants are, in fact, still in possession of the land in dispute and the buildings therein, their possession being that of a trespasser, is unlawful and is also in breach of the order for an injunction herein confirmed.” F

In my consideration, the distinction between claims for damages for trespass and claims for possession highlighted in the cases above applied with equal force in this case. Although the Statement of Claim is not in the record, it is clear from the judgment of Fernandez, J., (as he then was), that the claim was founded in title evidenced in the Deed of Conveyance, Exhibit “B” dated 13th of March, 1954. H

These two cases bring to the fore, the importance of the distinction between claims for damages for trespass and claims for possession. In my view, the principle in the two cases is also applicable to

the instant case. ***By the judgment of the trial court on the 13th of November, 1987, affirmed and confirmed by the Court of Appeal and the Supreme Court, title over the land, subject matter of this appeal, has been finally determined to vest in the plaintiffs/appellants. And because the law ascribes possession to the person who has title, the plaintiffs/appellants are, in the eyes of the law, deemed to be in possession, actual or constructive. They alone are in lawful possession and the possession is exclusive since the law does not recognise any concurrent possession by rival claimants.***

For the protection of the plaintiffs/appellants' title and possession of the land in dispute, there is in place a perpetual injunction against the defendants/respondents who have been adjudged to be trespassers. Even if they are in actual physical possession of the land in dispute, it is a possession not recognised by law. Thus, if the defendants/respondents are still found to be in possession, they are there in continuation of the acts of trespass and for which prevention there subsists the perpetual injunction. The plaintiffs/appellants no longer have any duty to initiate action for possession.

In the face of the foregoing considerations, it sounds to me preposterous to suggest the filing of another action for possession. For the purpose of giving effect to the subsisting judgment over the land in dispute, the plaintiffs/appellants were at liberty to approach the court for issuance of a writ of possession. The Court of Appeal was therefore wrong to hold that by not setting aside the writ of possession, the learned trial Judge was merely granting a relief not claimed. The learned trial Judge Momi Fafiade, J., (as he then was), in dismissing the application held that the plaintiffs/appellants were entitled to possession and were therefore at liberty to enforce the judgment. I endorse that opinion of the trial court in its entirety.

The result is that I also resolve the respondents' 2nd issue in favour of the appellants.

The last issue is whether the Court of Appeal was right in holding that Suit No.ID/3131/94 was a pending proceeding between the parties and that pending the determination of that suit, enforcement of the judgment in LD/1093/80 should be stayed. I have earlier cau-

tioned myself against making pronouncements that would amount to a decision of Suit No. ID/ 3131/94. It is a separate suit pending at the High Court and there is no appeal pertaining thereto before us. I do not therefore think that I can make the plaintiff therein to decide what he wants to achieve by that suit.

On the specific issue of whether the suit should operate to stay the enforcement of the subsisting judgment in Suit No. LD/1093/80, my reaction is that there is no basis for that proposition. Suit No. LD/1093/80, has been finally determined with the rights and obligations of the parties clearly defined therein. Suit No. ID/3131/ 94, does not purport to question the validity of Suit No. LD/1093/80. It follows therefore, that the execution of Suit No. LD/1093/80, cannot be contingent upon the determination of Suit No. ID/3131/94. I am not aware of any case law authority and none was cited to us in support of the proposition that a subsisting judgment in a case that has been finally determined at the Supreme Court cannot be enforced because of another suit pending at the High Court. Section 14 of the Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990, on which the court below and learned counsel for the respondents relied provides:-

“14. Whether any proceeding shall be pending in the court against the holder of a previous judgment of the court by the persons against whom the judgment was given, the court may, if it appear just and reasonable to do so, stay execution of the judgment either absolutely or on such terms as it may think just until a judgment shall be given in the pending proceedings.”

It is clear from this provision that for the court to exercise its discretion to grant the stay, it must appear just and reasonable to do so. I do not fancy anything that appears just and reasonable to warrant the trial court’s exercise of its discretion to grant the stay. The trial court therefore, rightly refused to grant the stay. I do not also see any conceivable reason for the interference of the Court of Appeal with the discretion of the trial court.

For the foregoing reasons, I also resolve this issue in favour of the appellants. In conclusion, this appeal succeeds and is hereby allowed. The judgment of the Court of Appeal on the 16/7/2001, be and is hereby set aside. The ruling of Fafiade, J., (as he then was), of the 2nd of March, 2000, be and is hereby restored.

B I assess the costs of this appeal at N50,000.00 in favour of the appellants.

ONU JSC

C Having been privileged to read before now the judgment of my learned brother, Tabai, JSC., just delivered, I agree with his reasoning and conclusion that this appeal is meritorious and must perforce succeed. I allow the appeal and I make similar consequential
D order as to costs as contained in the leading judgment.

MUSDAPHER JSC

E I have had the preview of the judgment of my Lord, Tabai, JSC., just delivered with which I entirely agree. For the same considerations contained therein, I too, find the appeal meritorious. I allow it and set aside the decision of the court below and restore the decision of the High Court. I abide by the order for costs proposed in the
F said judgment.

MUKHTAR JSC

I have read in advance the leading judgment delivered by my learned
G brother, Tabai, JSC. I have no doubt whatsoever in my mind that the appeal is meritorious and deserves to succeed. It is in this vein that I am in full agreement with the reasoning and conclusion reached in the leading judgment and also allow the appeal. I abide by the consequential orders made in the leading judgment.

H

OGBUAGU JSC

In 1980 in Suit No. LD/1093/80, the late Mr. E.A. Carrena

who was the 1st plaintiff's/appellant's husband and the father of the 2nd plaintiff/appellant respectively, instituted an action in the said suit against Chief Akinlase and eleven (11) others and sought the following reliefs:-

"(i) *A declaration that he is entitled to the property situate at Ojokoro Mile (164 (not 1/2 as reproduced in the appellants' Brief) Abule Egba) sic Agege - Abeokuta Road in the Lagos State and covered by a Deed of Conveyance known as No. 38 page 38 in Volume 987 in the Lagos State Registry of Land.*

(ii) *N2,041.50k (Two Thousand and Forty-One Naira Fifty Kobo) damages for trespass.*

(iii) *Perpetual injunction against the defendant, his agent and servants with respect to the said land."*

From the judgment of the trial Judge - Akin Fernandez, J., (as he then was), delivered on 13th November, 1987, I note that the said original plaintiff, was substituted with that of the present appellants on 8th June, 1987 by the order of Oluwa, J., who handled the suit earlier. On the application of the appellants for joinder before Oluwa, J., the defendants became twelve (12). On 24th September, 1987, when the matter came up for hearing, all the defendants and their learned counsel, were absent without any reason. There was proof of service of the amended writ and Statement of Claim on them and so, the court proceeded to hear the case. The appellants called three witnesses which included the 2nd appellant. Judgment was thereafter entered in their favour.

Oba Jimoh Arowolo now deceased, dissatisfied with the said judgment, appealed against it to the Court of Appeal, Lagos Division. He had sought and was granted leave by the court to be joined as an interested party representing the Olarokun Family. It should be noted that Oba Arowolo, was not a party at the trial court and therefore, did not take part in the proceedings. In a considered judgment delivered on 24th November, 1994, the Court of Appeal, Coram: Sulu Gambari, Uwaifo and Ayoola, JJCA., (as the two were) dismissed his said appeal. His further appeal to this court, was struck out for want of diligent prosecution.

Whilst the appeal to this court was still pending, late Oba Arowolo, instituted an action, against the appellants in Suit No. ID /

3131/94 in respect of the same land the subject-matter in the trial High Court. The suit was before Akande, J. He claimed for declaration of title, damages for trespass, perpetual injunction and a declaration that he is entitled to possession of the said land. While proceedings were pending, the appellants, applied for a renewal of the Writ of Fifa and possession against late Oba Arowolo in respect of the said High Court Suit No. LD/ 1093/80. Late Oba Arowolo in opposition, applied for a stay of execution of the said judgment of the said trial court. He also applied for an order restraining the appellants from taking possession of the said land the subject-matter of the said High Court suit and also sought for an order setting aside the said Writ of Fifa and possession which had been already issued. The High Court now presided over by Moni Fafiade, J., after hearing arguments from the learned counsel for the parties, in its Ruling of 2nd March, 2000, dismissed late Oba Arowolo's application. Dissatisfied with the said Ruling, he appealed against the said Ruling to the court below.- Coram: Oguntade, (now JSC.), Galadima and Aderemi, (now JSC). In its judgment of 16th July, 2001, it held that his said appeal is/was meritorious. It therefore, set aside the said Writ of Fifa and possession together with the said Ruling of Fafiade, J. Dissatisfied with the said decision of the court below, the appellants, have appealed to this court on three grounds of appeal. Without their particulars, they read as follows:-

"GROUND ONE:

The Court of Appeal erred in law by holding that there was nothing to execute or enforce in the judgment sought to be executed upon by the appellants and that the said judgment was merely declaratory.

GROUND TWO:

The Court of Appeal erred in law by holding that there was justification for stay in the enforcement of the writ of possession pending the determination of the Suit ID/3131/94 before Akande, J.

GROUND THREE:

The Court of Appeal erred in law by holding that the suit before Akande, J., would go on when it had held that the respondent was a party and was bound by judgment in the earlier suit."

The appellants, have formulated two issues for determination,

namely:-

“1. Whether the Court of Appeal was correct in holding that the appellants “have no judgment which is enforceable against the respondent” the judgment being “declaratory?” Ground One.

2. Whether the Court of Appeal was correct in holding that the proceedings in Suit No. ID/3131/94, by the appellant/respondent/ cross-appellant) before Justice Akande were pending against the respondents (plaintiffs/appellants) and therefore justified to stay the enforcement of the judgment in LD/1093/ (sic) it is /80)? Grounds Two and Three.”

On their part, the respondents have formulated three issues for determination, which they amended on 7th April, 2008, when the appeal came up for hearing. They read as follows:-

“(1) Whether the Court of Appeal was right in holding that the appellants have no enforceable judgment against the respondent? - Ground 1.

(2) Whether a trial court can issue a writ of possession where same was not claimed nor granted by the court? - Ground 2.

(3) Whether the Court of Appeal was right in holding that the lower court in Suit No. LD/1093/80, should have stayed proceedings pending judgment in Suit ID/31/31/94 (sic)? - Ground 3.”

On the said 7th April, 2008, I noted that both learned counsel for the parties, informed the court that Chief Akinlase & 11 Ors., did not appeal to the Court of Appeal and that it was the 1st, 2nd and 3rd respondents, who substituted Oba Jimoh Arowolo who died. However, both learned counsel adopted their respective Briefs. While Mrs. Ayoola - learned counsel for the appellants, urged the court, to allow the appeal. Kasunmu, Esqr., - learned counsel for the respondents, urged the court, to dismiss the appeal, judgment was thereafter, reserved till today.

I see in the court's case file, a copy of the Notice of Appeal where the respondents are stated to be respondents/cross-appellants, but I see no Brief in respect thereof and no mention was made of it by Mr. Kasunmu.

From the facts of the case briefly stated above, it is beyond doubt that when late Oba Arowolo applied and was granted leave to join as an *“interested party”* in the appeal lodged by him in respect of

the subject-matter of Suit No. LD/1093/80, on the decided authorities and even by virtue of the provisions of Section 222(a) of the 1979 Constitution, he became an intervener or an aggrieved party. See the case of *Alhaji Gwando & Anor. v. Alhaji Maidoya & 2 Ors.* (1990) 4 NWLR (Pt. 147) 805 at 812, citing *Ubagu v. Okochi* (1964) 1 ANLR 36 and *Ikonne v. Commissioner of Police Imo State* (1986) 4 NWLR (Pt.36) 473 at 503, see also the cases of *Lagos State Development Property Corporation v. Josephine Dakour & Ors. - In Re: Alhaji Ijebu & 6 Ors.* (1992) 11-12 SCNJ (Pt.II) 217 at 224, *Funduk Engineering Ltd. v. James MC arthur & 4 Ors.* (1996) 7 SCNJ 64, and many others. That being the case, he was entitled to file an appeal though he was not a party to the suit the subject-matter of the appeal. See the cases of *The Government of Kwara State & Anor. v. Mr. Eytayo & 2 Ors.* In *Re Alhaji Aribara* (1996) 5 NWLR (Pt. 451) 693 at 700, 701-744 CA and *H. R. H. Ogana II & Anor. v. Awulor & 2 Ors.* (1997) 9 NWLR (Pt.522) 668 at 682, 684 CA. Late Oba Arowolo in his affidavit in support of the said application, gave reasons why he wanted to be joined as a party in the said suit. As soon as he was joined, the Court of Appeal was then enabled to completely adjudicate over the matter and to settle all the issues raised in the said suit once and for all and make all the parties bound by the result of the appeal or action. This fact is beyond controversy. In any case, there is no dispute about his being joined as an interested party at his own instance. So, when the Court of Appeal, dismissed his said appeal, the effect, is/was that the said judgment of Fernandez J., (as he then was) was affirmed and subsisted and that late Oba Arowolo, was bound by the same. Period! I so hold. The respondents, having substituted late Oba Arowolo, were also bound by the decision of the Court of Appeal. Even when this court struck out the appeal of late Oba Arowolo, the effect in my respectful view, is that the said decision of the Court of Appeal, subsisted.

Now, coming to issue 1 of the respective parties which in substance, is similar, the claim of the plaintiffs/appellants were for declaration of title, damages for trespass and perpetual injunction. All these, were sustained in their favour. Indeed and this is also settled, where there is a claim for trespass and injunction, title is involved. See the cases *Kponuglo v. Kadadja* (1931) 2 WACA 24, *Archibong v. Ita* 14

WACA 520, Ogunle v. Ojumu (1992) 4 S.C. 105 at 106, Mogaji & 2 Ors. v. Cadbury Nig. Ltd. & Ors. (1985) 7 S.C. 59 at 60, 91, Ogbuokwelu & 10 Ors. v. Umeanufunkira & Anor. (1994) 5 SCNJ 34, Amobi v. Amobi & 2 Ors. (1996) 9-10 SCNJ 207 and Odukwe v. Mrs. Ethel Ogunbiyi (1998) 6 S.C. 72; (1998) 8 NWLR (Pt.561) 339 at 358; (1998) 6 SCNJ 102, just to mention but a few. Yes, the trial court declared that the appellants are entitled to the said property the subject-matter of the said suit. But it also awarded a definite sum of money for trespass and which decision, on the decided authorities, is executory. To therefore, hold as it did by the Court of Appeal that the said judgment of 1987, was “*declaratory*,” is with profound respect, a gross error.

I had noted earlier in this judgment, that late Oba Arowolo had, while the appeal to this court, was pending, instituted an action against the appellants in Suit ID/3131/94 in respect of the same land the subject-matter in the trial court claiming declaration of title, damages for trespass and perpetual injunction and that he is entitled, to possession of the said land. The said suit before Akande, J., with respect, from all intents and purposes and from all the circumstances of the said facts of this case leading to the instant appeal, was/is a gross abuse of the process of the court. I will not, bother myself going into what amounts to or constitutes an abuse of the court’s process, the term of which is generally applied to a proceeding which is lacking in bona fides. But for its concept and meaning, see the cases of Okorodudu v. Okoromadu (1977) 3 S.C. 21; (1977) 3 S.C. (Reprint) 13, Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt.16) 264, Jimoh v. Starco (Nig.) Ltd. (1988) 7 NWLR (Pt.558) 523 at 535 C.A. and Miss Ifeyinwa Ogoejofo v. Daniel Ogoejofo (2002) 12 NWLR (Pt.780) 171 at 185, just to mention but a few.

I have also stated in this judgment, that the appellants, had applied for a renewal of a Writ of Fida and possession against late Oba Arowolo. That in response, late Oba Arowolo filed, a motion seeking among other reliefs, for an order staying execution of the said judgment of the trial court. I or one may ask, if the said judgment of Fernandez, J., was/is “*declaratory*.” on the decided authorities, can a court stay a judgment that is declaratory? Perhaps, to late Oba Arowolo and his learned counsel, the said judgment was not declaratory when that said application was made. However, the said

application, was rightly in my respectful view, dismissed by Fafiade, J. Without much ado, I hold that the judgment of the learned trial Judge, included one of executory. This was why the appellants, who were in possession, succeeded on their claims for damages for trespass and injunction. Oba Arowolo having been adjudged to be a trespasser, B could not and was not entitled to ask for or be granted a stay of execution, or even an injunction. See the cases of *Aromire v. Awoyemi* (1972) 2 S.C. 1; (1972) 2 S.C. (Reprint) 1 and *Ajomale v. Yaduat & Anor.* (1991) 5 S.C. 194; (1991) 5 NWLR (Pt.191) 260; (1991) 5 C SCNJ 172/178.

It need be borne in mind and this is also settled that Declaratory Judgments or orders, merely proclaim or declare the existence of a legal relationship and do not contain any order which may be enforced against the defendant. So said this court in the case of Chief D Okoya & 2 Ors. v. Santili & 2 Ors. (1990) 3 S.C. (Pt.II) 1; (1990) 2 NWLR (Pt. I31) 172 at 196, 213 (not (1990) 2 NLR as appears in the appellants' Brief) (it is also reported in (1990) 3 SCNJ 83). It was also held in this case at page 101 of the SCNJ, that there cannot be a stay of execution of a declaratory judgment. That a defendant who E has filed an appeal against a declaratory judgment or Order, is not entitled to apply for a stay of execution of that judgment or Order. That such an action, will be misconceived. It was further held at pages 196, 201 and 224, of the NWLR, that Executory Judgments or Orders, are those which declare the respective rights of the parties and F then proceed to order the defendant to act in a particular way; for example to pay damages or refrain from interfering with the plaintiff's rights and that such order is enforceable by execution if disobeyed. As I noted earlier in this judgment, the learned trial Judge, ordered G the defendants to pay damages and to refrain from further trespass. See also the cases of *Alhaji Akibu & Ors. v. Alhaji Oduntan & 4 Ors.* (1991) 2 S.C. 77; (1991) 2 SCNJ 30 and *Ogunlade v. Adeleye*; (1992) 10 SCNJ 58 at 65-67; (1992) 4 NWLR (Pt.235) 278 at 288. Thus, a trespasser, does not by the act of his trespass, secure possession of the land in law. See the cases of *Akpan v. Chief Uyo & Anor.* (1986) 3 NWLR (Pt.26) 63 S.C. and *Ogunbiyi v. Adewunmi* (1988) 12 S.C. (Pt.III) 144; (1988) 12 SCNJ (Pt.2) 183.

Issue 1 of the respondent, is therefore, resolved in favour of

the appellants and against the respondents. In clear words, the court below, was not correct or right in holding that there was no enforceable judgment against the respondent/respondents.

From what I have said earlier in this judgment, having held that the said Suit No. ID/3131/94 before Akande, J., was/is an abuse of the process of the court, the court below, was therefore, not justified to have stayed the enforcement of the said judgment of the trial court. Let me give my reasons for saying so.

Firstly, I have held that the said judgment of the trial court, was binding on late Oba Arowolo and also on the respondents. Secondly, the appellants, having been granted all the reliefs they sought, the Late Oba Arowolo refused to obey the said judgment and thus, was in contempt of that court. The appellants' evidence that they are in possession of the said property, was not controverted. Having been adjudged to be in possession of the property, they had no business suing for possession. Oba Arowolo having been adjudged a trespasser, the appellants were entitled to enforce the said judgment by a writ of possession instead of taking the laws into their hands by self help which has been deprecated by this court. See the case of Ojukwu v. Government of Lagos State (1986) 2 S.C. 277 at 281. Ownership of property, can be deducted from possession. See the case of Chief Igiehon & 2 Ors. v. Omorogie & Anor. (1993) 2 NWLR (Pt.276) 398 at 408 C. A.

In concluding this judgment, in my respectful view, the appellants have a right to enjoy the fruits of the judgment in their favour in the trial court. They have been denied unjustly by the delay tactics and gimmicks of late Oba Arowolo and the respondents the right to so enjoy the fruits of the said judgment for a period of about twenty (20) years now. The Court of Appeal is One court. By the said judgment of the same Court of Appeal this time around by a different panel, it was, with respect, sitting on appeal against its own judgment of 24th November, 1994 and setting aside as it were, its own judgment which at pages 122 and 123 it stated inter alia as follows (per Galadima, JCA.)::-

“What appears to be a turning point in this case is the sudden change of the position of the appellants. (i.e. the respondents). They were not parties originally named. But they now become parties on

their own self intervention upon an application they brought to this court. To my mind they are estopped from saying that the judgment of the lower court did not bind them. See Okozi v. Ojiakor (1997) 1 NWLR (Pt.479) 48; Ogana II v. Awulor (1997) 9 NWLR (Pt. 522) p. 668."

B I do not think that this is right and healthy in the administration of justice for which this court has been widely commended. As a matter of fact, in the case of Usman v. Umaru (1992) 7 NWLR (Pt.254) 377 at 399; (1992) 7 SCNJ 388, it was held inter alia by this court, C that the Court of Appeal, cannot reverse its earlier decision or order simply because another Panel of that court subsequently thought differently about the earlier decision or order. At page 400 of the NWLR, it referred to Order 5 Rule 3 of the Court of Appeal Rules, 1981, (as amended in 1984) and stated that the said order contemplates cor- D rection of an error in the judgment of the court differently constituted. Thus, that a panel of the court, cannot, acting under the said order, alter the judgment of another panel. So be it. The court below under the doctrine of stare decisis. is bound by the above decision of this court. I rest my case on this said decision in finding as a fact and E holding that the court below, was certainly not right or correct in holding that the proceedings in Suit No. ID/3131/94 before Akande, J., were pending against the appellants and were therefore, not justified to stay the enforcement of the judgment in Suit LD/1093/80. In F other words, the court below, was certainly not right in holding that the lower court in Suit No. LD/1093/80 should have stayed proceedings pending the judgment in Suit No. ID/3131/94. Issue 2 of the appellants and issue 3 of the respondents are answered both in the negative.

G It is from the foregoing and the more detailed leading judgment of my learned brother, Tabai, JSC., which I had the privilege of reading before now and I agree with his reasoning and conclusion, that I too, find and hold that this appeal is meritorious and I also allow it. I abide by all the consequential orders in the said leading H judgment including that in respect of costs.