

SUPREME COURT OF NIGERIA
27TH JUNE 2008 SC. 133/2002
CORAM:- N. TOBI, G. A. OGUNTADE, I. F. OGBUAGU,
F. F. TABAI, I. T. MUHAMMAD, JJSC

ILIYA AKWAI LAGGA APPELLANT
AND
AUDU YUSUF SARHUNA RESPONDENT
(Substituted for Umaru
Yusuf Sarhuna Deceased)

APPEALS - Issues - Validity - Where predicated on omnibus ground of appeal - An omnibus ground postulates that there is no evidence to sustain the finding of a trial court - It is a competent ground of appeal - So are issues raised therefrom (H1)

APPEALS - Grounds - Vagueness - Meaning of - Purpose of ground of appeal - Is to give sufficient notice & information to respondent of the nature of appellant's complaint - A ground is considered vague only if it fails to achieve this (H2)

EVIDENCE - Evaluation - Involvement - It entails assessment of evidence & assigning value thereto - It involves a reasoned acceptance or rejection of the evidence adduced by the parties - This is lacking in the judgment of the trial court (H3)

APPEALS - Concurrent findings of fact - Attitude of appellate courts - Appellate courts do not generally interfere with concurrent findings - Unless they are, inter alia, shown to be perverse - Which is the case with the findings challenged herein (H4)

COURTS - High Courts - Appellate jurisdiction - Constitution of - The Constitution is clear that one judge could form required quorum - Whether the High Court is sitting in first instance or in appellate jurisdiction - Appellate High Court was therefore properly constituted (H5)

FACTS

Appellant, as plaintiff, had sued the original defendant, now deceased and substituted by the present defendant/respondent, at the Upper Area Court claiming ownership of the land in dispute. The case of the appellant was that the land belonged to his grand father originally. But the land was loaned out to the grandfather of the respondent for farming purposes. Appellant states that the respondent subsequently added an acre to what was loaned out without his consent. Hence he brought the instant action.

At the end of hearing, the trial Upper Area Court purported to have accepted the evidence of two witnesses out of the four called by appellant while accepting the evidence of one witness out of the respondent's four witnesses. Nonetheless, instead of evaluating the evidence before it, the court went on to administer oaths on the parties, one of them a non-Muslim, on the basis of which it proceeded to split the land in dispute in two halves between the parties, as its judgment in the matter. Both parties appealed to the High Court, the respondent as a cross-appellant. The High Court dismissed both the appeal and the cross-appeal. Respondent appealed to Court of Appeal against the appellate High Court's judgment, which appeal was successful, and the appellant's claims were dismissed in entirety. Appellant has brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

"ISSUE ONE:

Whether the dismissal of the appellant's case after setting aside the judgments of the trial court and that of the High Court sitting on appeal was proper and did not occasion a miscarriage of justice in the circumstance?

ISSUE TWO:

Whether the incomplete re-evaluation of the evidence by the lower court under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, 1981, amended after holding that the lower courts failed to evaluate the evidence before them was proper in law and did not occasion a miscarriage of justice in the circumstance of this appeal?

ISSUE THREE

Whether or not the lower court's proceedings and judgment are right in law and not a nullity in entertaining an appeal from the final decision of the High Court sitting in an appellate jurisdiction which failed to comply with the mandatory Section 40 of Kaduna State High Court Law, Cap. 67 of 1991, in its jurisdiction, composition and whose proceedings and judgment were incompetent, null and void in law?"

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)
APPEALS - Issues - Validity

1. Now the first point raised in the Preliminary Objection is issue one of the appellant's issues which according to learned counsel for respondent, did not arise from ground one of the grounds of appeal.

This ground of appeal is what is called the "omnibus ground." An omnibus ground is a general ground of appeal in either civil or criminal appeal. In a civil appeal, it postulates that there was no evidence which if accepted would support the finding of the trial court or in the inference which is made. It always has to do with evidence led and evaluation thereof by the trial court.

I think that ground is competent. Any issue for determination which is properly related to that issue, is in my view, competent and well founded. (pp. 2749 F, H /2752 D)

Grounds - Vagueness - Meaning of

2. On grounds 3,4,5 and 6 which I prefer to take together, I think, I should state that I find none of these grounds of appeal to be vague or general in terms. A vague ground of appeal is that which is imprecise, not cogent, not concise. It is inaccurate, verbose, large, rigma-role, vague, which is capable of making the appeal court or the respondent to the appeal not to understand what it exactly connotes. The whole purpose of a ground of appeal is to give sufficient notice and information to the respondent of the precise nature of the appellant's complaint against the Judgment appealed against. All the rules relating to formulation or drafting of grounds of appeal are primarily designed to ensure fairness to the other side. No court should rely on mere technicalities to shut out an intending appellant. That is

the practice. (p. 2752 F)

EVIDENCE - Evaluation - Involvement

3. Now in evaluating any piece of evidence placed before it by parties, a court of law is duty bound to consider the totality of the evidence led by each of the parties. It shall then place it on the imaginary scale of justice to see which of the two sides weighs more creditably than the other. Thus, evaluation of evidence entails the assessment of same so as to give value or quality to it. Evaluation of evidence by a trial court should necessarily involve a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. In the instant appeal, there is on record, no indication of how the trial Upper Area Court arrived at its' conclusion in "*accepting*" two out of the four witnesses called by the plaintiff or one out of the four, called by defendant. In the circumstance, there was total failure of evaluation. The High Court as well, fell into the same mistake. (p. 2757 A)

Concurrent findings of fact

4. The law, as is clear from the above authorities and several others, is that an appellate court does not ordinarily interfere with the findings of fact made by a trial court except in the following circumstances:-

- (a) *Where the trial court has not made proper use of the opportunity of seeing and hearing of the witnesses at the trial, or*
- (b) *Where the trial court has drawn erroneous conclusions from accepted instance or has taken erroneous view of the evidence adduced before it/ or*
- (c) *Where findings of fact are perverse in the sense that they do not flow from the evidence accepted by it "*

In this appeal, it is clear that the judgment of the trial Upper Area Court as affirmed by the High Court, did not flow from the evidence adduced by the parties before that trial court. This is what makes it perverse. This is what made the court below to exercise all powers conferred upon it to interfere in order to save the situation. (p. 2758 B/F)

High Courts - Appellate jurisdiction

5. The appeal was filed to the High Court on 22nd March, 1990. Proceedings on the appeal started on 7th May, 1992, and judgment was delivered on 11th December, 1995. Thus, the principal law which provided for the Constitution for that court was the 1979 Constitution. Section 238 of that Constitution provided:-

"For the purpose of exercising Any jurisdiction conferred on it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court."

(Underlining and emphasis mine.)

Subsection 2 of Section 236 of that Constitution conferred on the court jurisdiction to entertain proceedings brought before it to be dealt within the exercise of its appellate or supervisory jurisdiction. Thus, the Constitution is very clear that one Judge could form the required quorum for the purposes of determining a matter brought before the High Court as a first instance court or as appellate court which entertains appeals from subordinate courts. To request for two Judges to form a quorum under that dispensation was a surplusage. Section 40 of the High Court Law (supra), could do no more than support the constitutional provision. I hold that the Kaduna State High Court was properly constituted in its appellate jurisdiction when it consisted of not less than one Judge when it heard and determined the appeal in question. Issue three is resolved in favour of the respondent. (p. 2761 A)

NOTABLE POINTS OF INTEREST***MUHAMMAD JSC******1. Islamic law should not be applied to non-Muslims***

No doubt, Oath taking is one of the proof systems in Islamic law since the inception of Sharia Legal System which confers title on a party. Although there is no law which prohibits the trial Upper Area Court Judge from applying the principles of Islamic law in a land matter which is situated within an area where one of the laws governing landed properties is Islamic law, yet the trial Upper Area Court Judge should have been cautious enough not to extend the application of Islamic law principles to non-Muslims, more particularly in this case where sufficient evidence was called by the parties. (p. 2759 A)

TOBI JSC

2. Evaluation of evidence is not exclusively for trial judge

The evaluation of trial evidence is not the exclusive preserve of the trial Judge. Although the trial Judge has the exclusive benefit of watching the demeanour of the witnesses and therefore expected to come out with accurate evaluation of the evidence, that is not always the case. It is in that respect that appellate Judges are vested with the power to re-evaluate evidence of witnesses at the appellate level. As an appellate Judge does not have the benefit of watching the demeanour of the witnesses, he has to rely on the evidence on record. As physically seeing the witnesses in the witness box and the cold records are not the same, an appellate Judge is restricted to interfere with the findings of a trial Judge only in the event that the findings are perverse. (p. 2771 B)

REPRESENTATION

M. Y. Saleh, SAN., (with him; E. Y. Kurah and A. A. Ibrahim), for the Appellant.
 E U. A. Mohammed, for the Respondent.

CASES REFERRED TO

Ibrahim v. Mohammed (2003) 6 NWLR (Pt. 817) 615 at 647
 F Central Bank of Nigeria & Anor v. Okojie & Ors. (2002) 3 S.C. 99 (2002) 8 NWLR (Pt.768) 48 at 61
 Mogaji v. Odofin (1978) 4 S.C. 91; (1978) 4 S.C.
 Ogundulu v. Phillips (1973) 1 NWLR 267
 Musa v. Yerima (1997) 7 NWLR (Pt. 511) 27
 G Odiete and Ors. v. Okotie and Ors. (1972) 6 S.C. (Reprint) 49; (1973) 2 NMLR 175
 Owoade and Anor. v. Omitola & Ors. (1988) 2 NWLR (Pt.77) 413
 Idehen v. Osemwekhae (1997) 10 NWLR (Pt.252) 317
 Omoregbe v. Edo (1971) All NLR 282
 H Fabuiyi and Anor. v. Obejeu and Anor. (1968) NMLR 243 at 246
 Aderanmu v. Glowa (2000) 4 NWLR (Pt.652) 253
 Hambe v. Hueze (2001) 2 S.C 26; (2001) 4 NWLR (Pt.703) 372
 Okpiri V. Jonah (1961) 1 SCNLR 174

Maja v. Stacco (1968) 1 All NLR 141 at 149

Ezenwa v. Okeke (1995) 4 NWLR (Pt.388) 142 at 169

STATUTES & RULES REFERRED TO

Area Courts Law, Cap. 10, Laws of Kaduna State of Nigeria, 1990 s. 21 (2) B

Constitution of the Federal Republic of Nigeria, 1979 ss. 33(1), 238

Constitution of the Federal Republic of Nigeria, 1999 s. 233(1)

Court of Appeal Act, 1976

Court of Appeal Act, 1981, s. 16 C

High Court Law, Cap 67, Laws of Kaduna State, 1991 s. 40

High Court Law, Laws of Northern Nigeria, Cap. 49, 1991 ss. 40, 62 & 63

Kaduna State High Court Law, Cap. 67, Vol. 2 of 1991, ss. 37, 40

Court of Appeal Rules, 1981 O. 1 r. 20, O. 8 r. 2(3), (4), D

Supreme Court Rules O. 8 r. 2(3), (4)

LEAD JUDGMENT BY MUHAMMAD JSC

Iliya Akwai Lagga, the appellant herein, was the plaintiff at the Upper Area Court, Saminaka, Kaduna State, (trial court). The original defendant was one Mallam Umaru Yusuf Sarhuna who died and was substituted by Audu Yusuf Sarhuna, the respondent. The claim of the plaintiff against the defendant reads as follows:- E

“Statement of Claim - Alhaji Akwai said I sued Mallam Umaru because originally the farmland is for my grandfather Dogara which the grandfather of Umaru Magogori has nowhere to farm he went to one of my grandfather’s friend called Namata he complained to him that he should find a farming place for him then Namata said he is on the base of a hill he has no enough farming place then Namata told G him there is a friend of him Dogara (sic) has a place for one to stay I will ask him for you, when he came to my grandfather Dogara, he asked him that he has a stranger who wants to be given a place so that he (sic) work, Dogara agreed that he wants people then he gave this place to Namata so that he gives his friend Magogari, but he gave H him on loan and this was done for many years ago I cannot remember, (sic) but all of them that did this they don’t know the man Magogori that was given the loan, Namata that mediate (sic) with Dogara he

gave the loan, then this year I heard Umaru have (sic) added an acre of the farmland and I did not agree I came to sue so that (sic) know the farmland is my own or his own. That is all my suit."

In response to the above claim, the respondent stated as follows:-

B *"I heard the statement I understood I did not agree with what he said, what I know my grandfather Moh. Magogori and my father Hassaini (sic) I grew up and met then (sic) working in the place originally my getting the place was my grandfather Magogori asked the*
C *Chief of here (sic) Mijinyawa to give him and he gave him the place even before I was born."*

The plaintiff called four witnesses. The defendant called four witnesses as well. At the end of his evaluation of the evidence, the trial Upper Area Court Judge "accepted" the evidence of two witnesses out of the four called by the plaintiff and "received" the evidence of one of the witnesses called by the defendant. Based on the number of witnesses each of the parties had and whose evidence the trial court admitted, the trial court went on to administer Oath to both parties. After the Oath taking procedures were completed, the trial Judge divided the land in dispute into two with each party taking half of it.

The plaintiff was dissatisfied with the trial court's decision. He filed his Notice of Appeal to the High Court of Justice, Kaduna State (High Court). The Notice of Appeal contained the omnibus ground. Four additional grounds of appeal were, with the leave of the High Court, later filed and argued. The defendant was also aggrieved and he cross-appealed. After taking submissions from learned counsel for the respective parties, the High Court dismissed both the appeal and the cross-appeal.

The defendant/respondent/cross-appellant was not happy with the High Court's decision. He filed a Notice of Appeal to the Court of Appeal, Kaduna Division (court below). The Notice of Appeal contained nine (9) grounds of appeal. He prayed the court below to set aside the decision of the High Court which affirmed the trial court's judgment and that an order dismissing the plaintiff's/appellant's/cross-respondent's claim be entered by the court below. After hearing the parties, the court below allowed the appeal by setting aside the judg-

ment of the High Court. In its' place a judgment was entered dismissing the plaintiffs/ respondents' claims.

The plaintiff/respondent and appellant before us now, felt aggrieved and he appealed to this court. His Notice of Appeal (pages 112-116 of the record) contained six (6) grounds of appeal. He prayed this court to set aside the decision of the court below including the order of dismissal of the appellant's claims and that judgment be entered in his favour or an appropriate order be made in the alternative.

Briefs were filed and exchanged by the parties including a Reply Brief in compliance with our Rules.

In his Brief of Argument, learned counsel for the appellant M. Y. Saleh, Esq., (now SAN.), formulated the following issues:-

"ISSUE ONE:

Whether the dismissal of the appellant's case after setting aside the judgments of the trial court and that of the High Court sitting on appeal was proper and did not occasion a miscarriage of justice in the circumstance? (Grounds One and Two).

ISSUE TWO:

Whether the incomplete re-evaluation of the evidence by the lower court under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, 1981, amended after holding that the lower courts failed to evaluate the evidence before them was proper in law and did not occasion a miscarriage of justice in the circumstance of this appeal? (Grounds Three, Four and Five).

ISSUE THREE

Whether or not the lower court's proceedings and judgment are right in law and not a nullity in entertaining an appeal from the final decision of the High Court sitting in an appellate jurisdiction which failed to comply with the mandatory Section 40 of Kaduna State High Court Law, Cap. 67 of 1991, in its jurisdiction, composition and whose proceedings and judgment were incompetent, null and void in law? (Ground Six)."

Learned counsel for the respondent, U. A. Mohammed, Esq., raised a Preliminary Objection which he argued together in his Brief (pages 2-5 of the Brief). He then proceeded to formulate three issues as follows:-

"ISSUE ONE:

Whether the Court of Appeal was right in law in setting aside judgments of the trial Upper Area Court and High Court sitting on appeal and dismissing appellant's claims? Ground 2.

ISSUE TWO:

- B *Whether the Court of Appeal properly evaluated all the evidence proffered at the trial court and made correct findings - Grounds 1,3, 4 and 5.*

ISSUE THREE:

- C *Whether the proceedings of the High Court sitting on appeal was null and void for failure to be constituted by two Judges and whether one Judge presiding is in compliance with Section 40 of the High Court of Law of Kaduna State? Ground 6."*

Respondent's Preliminary Objection:

- D Learned counsel for the respondent objected in his Preliminary Objection to the competence of issue number one, grounds two, three, four, five and six.

E On issue number one, learned counsel argued that it did not emanate from ground one but from ground two and that ground one is deemed to have been abandoned by the appellant. He referred to the case of Ibrahim v. Mohammed (2003) 2 S.C. 127; (2003) 6 NWLR (Pt. 817) 615 at 647 B-C.

- F On ground two, learned counsel submitted that if read together with its particulars, ground two is misleading, vague and or in general terms, uncertain and not susceptible to being understood. He cited the case of Central Bank of Nigeria & Anor v. Okojie & Ors. (2002) 3 S.C. 99; (2002) 8 NWLR (Pt.768) 48 at 61 C-F. With reference to particular (iii) which complained against the trial court's resort to Oath taking and sharing of the land, is not appealable to this court as it lacks jurisdiction to entertain appeal directly from the decision of Upper Area Court or High Court. He relied on Section 233(1) of the 1999 Constitution; African Reinsurance Corporation v. JDP Construction Nig. Ltd. (2003) 2-3 S.C. 47; (2003) 13 NWLR (Pt.3) 609 at 636 A-H C

On ground three, learned counsel argued that when ground three is read together with the 6 particulars, it is certainly vague or general in terms. All the particulars thereto, he argued, clearly offend

Order 8 Rules 2(3) and (4) of the Supreme Court Rules.

Ground four, is also vague and uncertain. The particulars of error did not help matters either. This ground breached the provisions of Order 8 and Rules 2(3) and (4) of the Supreme Court Rules. Learned counsel cited and relied on the case of Central Bank of Nigeria v. Okojie (supra).

On ground five, the part of the judgment specified is not a finding of facts. The 3 particulars of error in support of the ground are not relevant to the ground. The ground is thus vague. Order 8 Rule 2(4) of the Supreme Court Rules was cited in support.

Ground six of the Notice of Appeal is also vague or general in terms. It offends Order 8 Rule 2(3) and (4) of the Supreme Court Rules. Learned counsel for the respondent urged this court to strike out grounds 2, 3, 4, 5 and 6 of the grounds of appeal for being incompetent.

Thus, from the submission of learned counsel for the respondent, none of the grounds of appeal was competent to sustain the appeal. But learned counsel for the appellant on the other hand, argued in his Reply Brief that ground one of the grounds of appeal relates to appellant's issue number 1. The said ground was never abandoned. The case of Ibrahim v. Mohammed (supra), does not apply in the circumstance. Learned counsel urged us not to strike out the said ground as canvassed by the respondent's counsel.

Now the first point raised in the Preliminary Objection is issue one of the appellant's issues which according to learned counsel for respondent, did not arise from ground one of the grounds of appeal. I consider it pertinent to quote both the ground of appeal and the issue for determination in question. Ground one of the appellant's Notice and Grounds of Appeal reads as for determination in question. Ground one of the appellant's Notice and Grounds of Appeal reads as follows:-

"The judgment of the learned Justices of the Court of Appeal is against the weight of evidence."

This ground of appeal is what is called the "omnibus ground." An omnibus ground is a general ground of appeal in either civil or criminal appeal. In a civil appeal, it postulates that there was no evidence which if accepted would support

the finding of the trial court or in the inference which is made. It always has to do with evidence led and evaluation thereof by the trial court. The findings of the court below on the evidence placed before the trial court is as follows:-

B *“At the end of the evidence of the witnesses called by both parties and a visit to the farmland in dispute, the trial Upper Area Court reviewed the evidence adduced by the parties before it and concluded that while the plaintiff had two acceptable witnesses, the defendant had only one. However, without considering the acceptable evidence called by the parties to determine the probative value thereof in support of the parties respective conflicting claims of title, the trial Upper Area Court resorted to giving the parties who were a Moslem and a pegan Oaths to prove their respective claims. Thus, on the basis of the Oaths administered, the trial Upper Area Court shared the farmland in dispute equally between the parties as its’ judgment.....*

E *Very unfortunately, instead of appraising and ascribing probative value to the evidence of the four witnesses each called by the appellant and the respondent respectively in support of their adverse claims, the trial Upper Area Court resorted to Oath taking specifically administered on the parties as a means of discharging the burden of proof and consequently shared the disputed farmland between the parties.*

F *The fact that the judgment of the trial court was based entirely on the terms of the Oath administered as a means of discharging the burden of proof and not on the evidence adduced by the parties was clearly stated by that court in its judgment at pages 33 - 34 of the record of this appeal.....*

G *This glaring irregularity committed by the trial Upper Area Court of completely abdicating its’ responsibility of deciding the case before it on the evidence adduced by the parties and opted to adopt - a very strange procedure by giving the parties the relief they did not ask for based on the terms of Oath it virtually forced on the parties, H was specifically noted by the lower court as being contrary to our laws.....*

Definitely with this statement of the correct position of the law, it is indeed baffling how the lower court proceeded to affirm the

judgment of the trial Upper Area Court based entirely on the terms of Oaths administered between a Moslem and a non-Moslem resulting in the division of the farmland in dispute equally between the two parties. What the lower court should have done in the circumstances of this case was to have set aside the judgment of the trial Upper Area Court and proceed to determine the respective adverse claims of the parties for title to the farmland in dispute based on the evidence adduced by the respective parties in support of their respective claims.

Thus, the lower court having failed in its responsibility to do so, this court as an appellate court, having heard this appeal and in the determination thereof has power under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, to appraise the evidence on record provided the credibility of the witnesses is not in issue and arrive at the correct decision. See. Ajayi v. Military Administrator of Ondo State (1997)5 NWLR (Pt.50) 237 at 275-276.”

And the court below went ahead to evaluate the evidence placed by the parties before the trial court and ascribed probative value to the evidence accordingly. I think the court below was quite correct. My only reason for quoting the leading judgment in extenso is for the following reasons:-

“That there was enough evidence laid before the trial court. That the trial court did not evaluate the evidence placed before it as required by law.

That the trial court went out of its way to administer Oaths on the parties when that was very uncalled for.

Although the High Court deprecated this procedural irregularity which is fatal to the decision of the trial court, but it nonetheless proceeded to affirm the decision of the trial court despite the irregularity.

The High Court too, abdicated its responsibility by omitting to correct the irregularity by appraising the evidence made available to the trial court and contained in the record of appeal before it.

It is beyond dispute that the court below did the right thing by exercising powers conferred upon it by the Court of Appeal Act, 1976 and the Court of Appeal Rules, 1981 (as amended).”

So, the court below rightly exercised its powers of evaluation

of evidence. There is a finding by the court below that the fact that the judgment of the trial lower court as affirmed by the High Court does not flow from the evidence adduced by the parties, is quite obvious to earn that judgment the name of a perverse judgment (page 95 of the record). The law is trite that although evaluation of evidence and findings of facts are within the exclusive preserve of the trial court, an appellate court will interfere where such evaluation or findings are perverse See: Mogaji v. Odofoin (1978) 4 S.C. 91; (1978) 4 S.C. (Reprint) 65, Ogundulu v. Phillips (1973) 2 S.C. (Reprint) 55; (1973) 1 NWLR 267, Musa v. Yerima (1997) 7 NWLR (Pt. 511) 27.

In the present appeal, no such evaluation was done by the trial Upper Area Court nor by the High Court.

The above explanation, I think, explains the rationale behind the court below's exercising its powers of re-evaluation of evidence and fact-finding. Thus, if there is any ground of appeal based upon that exercise, which ground one of the appellant's grounds of appeal seeks to do, ***I think that ground is competent. Any issue for determination which is properly related to that issue, is in my view, competent and well founded.*** Thus, the case of Ibrahim v. Mohammed (supra), cited by learned counsel for the respondent is quite inapplicable in situations such as the one on hand. On the remaining aspects of the challenge on issue one, i.e; incompetence of ground two of the grounds of appeal, I have read ground two and its particulars and I find it to be a competent ground as set out in the Notice of Appeal. Thus, issue one is competently formulated by the appellant and I so hold.

On grounds 3,4,5 and 6 which I prefer to take together, I think, I should state that I find none of these grounds of appeal to be vague or general in terms. A vague ground of appeal is that which is imprecise, not cogent, not concise. It is inaccurate, verbose, large, rigmarole, vague, which is capable of making the appeal court or the respondent to the appeal not to understand what it exactly connotes. Although Order 8 Rule 2(3) and (4) of the Supreme Court Rules, require a ground of appeal to be precise and accurate, that does not mean that any slight non-compliance thereof shall render the ground incompetent. ***The whole purpose of a ground of appeal is to give***

sufficient notice and information to the respondent of the precise nature of the appellant's complaint against the Judgment appealed against. All the rules relating to formulation or drafting of grounds of appeal are primarily designed to ensure fairness to the other side. No court should rely on mere technicalities to shut out an intending appellant. That is the practice. See: Aderanmu v. Glowa (2000) 4 NWLR (Pt.652) 253, Hambe v. Hueze (2001) 2 S.C 26; (2001) 4 NWLR (Pt.703) 372. The Preliminary Objection lacks merit and it is hereby dismissed.

Permit me my Lords, to now consider the issues formulated by the appellant for the determination of this appeal.

In his submissions on issue one, the learned counsel for the appellant stated that the dismissal of the appellant's claim after setting aside the judgments of the lower courts occasioned a miscarriage of justice after setting aside the finding of facts made by the two lower courts. Learned counsel stated the position of the law that an appeal court will not ordinarily or lightly interfere with the findings of a trial Judge who had the singular opportunity of hearing and watching the witnesses when testifying before him. He cited in support several cases including Omoregbe v. Edo (1971) All NLR 282, Fabuiyi and Anor. v. Obejeu and Anor. (1968) NMLR 243 at 246. It is learned counsel's submission again that the trial Upper Area Court made some findings of facts on the evidence of all the witnesses called by both parties before it erroneously resorted to the Oath taking. He stated further that the High Court on appeal equally made some evaluation of the evidence called by the parties before affirming the decision of the trial Upper Area Court. The trial Upper Area Court and the High Court ought to have entered judgment in favour of the appellant.

On issue one, I find myself convinced by the arguments put forward by learned counsel for the respondent as well as the holding of the court below that the judgment of the trial Upper Area Court was based entirely on the terms of the Oaths administered to the parties as a means of discharging the burden of proof and not on the evidence adduced by the parties. It is beyond dispute that both parties, each called four witnesses. Below is what the trial Upper Area Court said on the witnesses called:-

"On this case, the plaintiff, Alhaji Akwai brought 4 witnesses

but two (sic) the court saw that their evidence is proper because they are the one (sic) that witness (sic) his grandfather gave the grandfather of Umaru on loan but Umaru the defendant challenged their evidence, that they had a case with one of them and one had a case with his father. Because of that the court did not agree with their evidence. Then the defendant, Umaru he too brought 4 witnesses among then (sic) only one of them gave evidence correctly with what Umaru said himself he said the Chief gave the grandfather of Umaru this place he cleared, but the other 3 witnesses only saw Umaru and his father farming there, but they don't know where they found it because of that the court did not agree with their evidence. It only received the evidence of one witness. The court saw that on this case since the plaintiff got two witnesses even though the defendant challenged them and he the defendant Umaru got one witness what the court see (sic) is that the plaintiff will swear and the defendant too will swear on what he used for or on what he is having. After they took Oath then the court went and divided the place into two parts, the plaintiff was given one half and the defendant was also given the other half, but the defendant. Umaru there is (sic) place he took Oath between him and Ukissa this will not be combined with that the (sic) place on loan."

(Underlining supplied for emphasis)

The trial Upper Area Court went ahead to administer Oaths to the parties. The plaintiff, who the court identified as a Moslem, did perform the ablution and swore by the Quran. The defendant who the court identified as being a non-moslem swore with bow and quiver and black knife like that of Kurama fetish. The trial Judge then delivered his judgment wherein he divided the farmland in dispute into two with each of the parties taking half of it. Below is the full text of the very short but disturbing judgment: -

"JUDGMENT:

The court passed its judgment, this farmland which the plaintiff sworn on it and Umaru, the defendant also sworn on it. The court passed the judgment it (sic) divided into two, every one should take one half but the place Umaru had a case with Ukissa which is at the Eastern side this is not his own it is for Umaru the division will not include that."

On appeal to the High Court of Justice, the High Court held:-

"From the printed record, the trial Upper Area Court rejected the evidence of three out of the four witnesses called by the plaintiff. Nevertheless, it went on to say that the plaintiff had two witnesses while defendant had one witness. The trial Upper Area Court could not reject the evidence of a witness and turn round to place any weight on such evidence. We too, have taken a careful evaluation of the evidence adduced by the parties."

The High Court went ahead to recast what plaintiff's witnesses, PW1 and PW2 said before the trial Upper Area Court. It did not consider the evidence given by other witnesses which it rejected. Apart from the response given by the defendant, nothing was said of his evidence or the evidence of the witnesses called by him. My Lords will agree with me that the method followed by the High Court cannot be said to amount to evaluation of evidence. It is known as summation or restatement of evidence. The trial Upper Area Court deprecated by the High Court on appeal, yet that court affirmed the trial court's decision. The court below reviewed all the steps taken and corrected all the omissions and blunders made by the trial Upper Area Court which was affirmed by the High Court. What the court below did, in my view, was a right step taken and cannot be faulted. It can never occasion a miscarriage of justice. I resolve issue one in favour of the respondent.

In his submission on issue two, the learned counsel for the appellant argued that the Justices of the Court of Appeal failed to comply with the provisions Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, 1981, as amended. He stated further that apart from the fact that the application of Section 16 of the Court of Appeal Act, 1981, as amended, was unnecessary in the circumstances of this appeal. Thus, he argued further is because the trial Upper Area Court evaluated and ascribed probative value or credibility to the evidence called by all the witnesses at the trial Upper Area Court including the records of inspection at the locus in quo and the High Court found the appellant's case on evidence adduced at the trial court, to be more probable. The trial court and the High Court ought to have entered judgment for the appellant as per his claim against the respondent.

On the issue of Oath taking by the parties, the learned counsel stated that this was erroneous. The High Court ought to have set aside the Oath taken by each of the parties and judgment for the appellant on his claim of title against the respondent ought to have been entered in full. The burden of proof, he argued, was discharged by the appellant on balance of probabilities. He cited and relied on the cases of *Odieta and Ors. v. Okotie and Ors.* (1972) 6 S.C. (Reprint) 49; (1973) 2 NMLR 175, *Owoade and Anor. v. Omitola & Ors.* (1988) 2 NWLR (Pt.77) 413, *Idehen v. Osemwekhae* (1997) 10 NWLR (Pt.252) 317. Learned counsel went on to argue that the appellant proved his claim and did not rely on the application of the Oath taking alone as proof of his claim, title and rights over the said land which the court of trial and appellate court (High Court) accepted. Learned counsel said that he conceded that Oath taking is a feature of our legal system pre-eminent under Islamic system of adjudication in certain circumstances and the said Oath taking was inapplicable to the circumstance of this case on appeal before this court.

On the evaluation of evidence, the learned counsel continued to submit that, generally, when the evaluation of evidence does not involve the credibility of witnesses but the complaint is against non-evaluation or improper evaluation of evidence by the trial court, an appellate court is in as good a position as the trial court. He referred to the case of *Adeyeri II v. Atanda* (1995) 5 NWLR (Pt.397) 512. He submitted that the evaluation by the court below was unnecessary in the circumstances of this case and it was not within the contemplation of Section 16 of the Court of Appeal Act or Order 1 Rule 20 of the Court of Appeal Rules. He urged us to resolve this issue in favour of the appellant.

Learned counsel for the respondent submitted that the Court of Appeal properly invoked the provisions of Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules by appraising the evidence on record. The evidence of the appellant's witnesses at the trial court which were not acceptable to that court cannot amount to proof of title by the appellant and it will be perverse to enter judgment in favour of the appellant as urged by learned counsel for the appellant. The Court of Appeal, he argued further properly dismissed the appellant's claims after appraising evidence

on record. Learned counsel urged us to so hold.

Now in evaluating any piece of evidence placed before it by parties, a court of law is duty bound to consider the totality of the evidence led by each of the parties. It shall then place it on the imaginary scale of justice to see which of the two sides weighs more creditably than the other. Thus, evaluation of evidence entails the assessment of same so as to give value or quality to it. Evaluation of evidence by a trial court should necessarily involve a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. In the instant appeal, there is on record, no indication of how the trial Upper Area Court arrived at its' conclusion in "accepting" two out of the four witnesses called by the plaintiff or one out of the four, called by defendant. In the circumstance, there was total failure of evaluation. The High Court as well, fell into the same mistake.

Just not quite long ago, this court stated the law succinctly, in relation to evaluation of evidence. In the case of Basil v. Fajebe (2001) 4 S.C. (Pt.II) 119; (2001) 11 NWLR (Pt.725) 592 at pages 608 - 609, Ayoola, JSC., stated:

"Evaluation of evidence involves reviewing and criticizing the evidence given and estimating it. That any decision arrived at without a proper or adequate evaluation of the evidence cannot stand is now a truism. Evaluating evidence does not stop with assessing the credibility of witnesses, although that in appropriate cases, is part of the exercise. It extends to a consideration of the totality of the evidence on any issue of fact in the circumstances of each case in order to determine whether the totality of the evidence supports a finding of fact which the party adducing the evidence seeks that the trial court should make. After giving due concession to the advantageous position which the trial court is in regard to credibility of witnesses, the responsibility of the appellate court to consider the finding of the fact and ensure that it is arrived at after an adequate consideration of the totality of the evidence or whether a reasonable tribunal, properly adverted to the evidence, would make such finding remains where the findings of fact are challenged. When the appellate court comes

to a conclusion that the trial Judge did not properly advert to the evidence or give necessary consequence to the evidence given, the appellate court will itself perform that exercise. To do so is not a usurpation of the province of the trial Judge. To fail to do so is an abdication of responsibility.”

B See further: Imah v. Okogbe (1993) 9 NWLR (Pt.316) 159, Onwuka v. Ediaka (1989) 1 S.C (Pt.II) 1; (1989) 1 NWLR (Pt.96) 182, Akintola v. Balogun (2000) NWLR (Pt.642) 532.

The law, as is clear from the above authorities and several others, is that an appellate court does not ordinarily interfere with the findings of fact made by a trial court except in the following circumstances:-

“(a) Where the trial court has not made proper use of the opportunity of seeing and hearing of the witnesses at the trial, or

(b) Where the trial court has drawn erroneous conclusions from accepted instance or has taken erroneous view of the evidence adduced before it/ or

(c) Where findings of fact are perverse in the sense that they do not flow from the evidence accepted by it “

E See: Okpiri V. Jonah (1961) 1 SCNLR 174, Maja v. Stacco (1968) 1 All NLR 141 at 149, Woluchem v. Gudi (1981) 5 S.C 291 at 295-296; (1981) 5 S.C (Reprint) 178, Ezenwa v. Okeke (1995) 4 F NWLR (Pt.388) 142 at 169.

In this appeal, it is clear that the judgment of the trial Upper Area Court as affirmed by the High Court, did not flow from the evidence adduced by the parties before that trial court. This is what makes it perverse. This is what made the court below to exercise all powers conferred upon it to interfere in order to save the situation.

H Now, what appears to be most disturbing from the trial Upper Area Court’s proceedings and indeed that of the High Court is the abandonments of the evidence of the parties as contained in the Record of Proceedings in preference to Oath taking by the parties which was also affirmed, though condemned, by the High Court. We have seen how it all happened. I must observe that although an Upper Area Court has Jurisdiction to try land matters by applying the

Customary Law in force in relation to land in the place where the land is situated. (See: Section 21(2) of Area Courts Law, Cap. 10, Laws of Kaduna State of Nigeria, 1990. No doubt, Oath taking is one of the proof systems in Islamic law since the inception of Sharia Legal System which confers title on a party. Although there is no law which prohibits the trial Upper Area Court Judge from applying the principles of Islamic law in a land matter which is situated within an area where one of the laws governing landed properties is Islamic law, yet the trial Upper Area Court Judge should have been cautious enough not to extend the application of Islamic law principles to non-Muslims, more particularly in this case where sufficient evidence was called by the parties. The court below, in my view was quite right in exercising its powers as conferred upon it by the Court of Appeal Act, 1976 and the Court of Appeal Rules, 1981 (as amended). This is in order to fill in the gap which was created by the abdication of responsibility by the trial Upper Area Court and by the High Court. Appellant's issue two is hereby resolved in favour of the respondent.

Appellants issue three challenges the jurisdiction of the High Court sitting as an appellate court. It also challenges the court below's competence to adjudicate over the said proceedings and judgment of the High Court sitting on appeal. The competence of the Notice and Grounds of Appeal have also been put to question.

Learned counsel for the appellant submitted that the proceedings of the High Court sitting on appeal was entertained, conducted and recorded by one Honourable Justice of the High Court on 7th May, 1992. The proceeding of the day was signed by a single Judge and thereafter the matter was adjourned for judgment. Learned counsel said that pages 40 - 44 of the compiled record of this appeal is the joint judgment of the High Court prepared, signed and delivered on 11th December, 1995, "*dramatically*" by two Justices of the High Court on the same appeal which was heard by one Justice of that court. Learned counsel asked whether any rules of procedure of the High Court have permitted this kind of situation. Reference was made to some decided cases in support and Sections 37 and 40 of the High Court Law, Cap. 67, Vol. 2 of 1991 of Part iv special provision relating to appellate jurisdiction, which learned counsel submitted, is the only special provision of the law governing the Constitution of the

High Court sitting on an appellate jurisdiction in Kaduna State. Learned counsel urged this court to declare that proceedings and judgment null and void as they offended the 1979 Constitution, Section 33(1) and the Kaduna State High Court Law, Cap. 67 of 1991.

B On the notice and grounds of appeal, the learned counsel for the appellant argued that the notice and grounds of appeal showed clearly that it was against the decision of the two learned Justices of the High Court (sitting on appellate jurisdiction). All the grounds of appeal on the said Notice of Appeal to the Court of Appeal referred C to the judgment of the two learned Justices of the High Court. The notice and grounds of appeal emanating from the said null and void decision of the High Court, are also null and void for want of competence or jurisdiction particularly having not been covered by any provision, law or rule of legal procedure. By the same token, learned D counsel argued that the proceedings, arguments and all the judgment of the Court of Appeal are equally null and void and a complete nullity. Several authorities, which included: *International Bank for West Africa Ltd. v. Pavex International Company Nig. Ltd.* (2000) 4 S.C. (P. II) 196; (2000) 4 SCNJ 200, *Maaji Galadima v. Adamu Tambai & Ors.* (2000) 6 S.C. (Pt.I) 196; (2000) 6 SCNJ 190, were E cited. This court is urged to resolve this issue in favour of the appellant.

Learned counsel for the respondent submitted that Section 238 of the 1979 Constitution provides that the High Court is duly F constituted, if it consists of at least one Judge of that court. Section 40 of the High Court Law, Cap. 67, Laws of Kaduna State, 1991, provides that in exercise of its appellate jurisdiction, the High Court shall consist of not less than one Judge and the Chief Judge shall, where G practicable, preside at each sitting of the court. Learned counsel however, concluded that Sections 40, 62 and 63 of the High Court Law, Laws of Northern Nigeria, Cap. 49, provided for at least two Judges when the High Court sits on appeal. This position however, changed with the enactment of Section 40 of Cap. 67 of the Kaduna State H High Court Law (supra). Learned counsel argued further that the judgment of the High Court at its appellate jurisdiction delivered by not less than one Judge is a valid judgment. He cited and relied on the cases of *Madukolu v. Nkemdilim* (1962) All NLR 597 and *Tukur*

v. The Government of Taraba State and Ors. (1997) 6 NWLR (Pt.501) 549 at 477. Learned counsel urged this court to dismiss the appeal.

This issue is within a narrow compass of what the law had provided for a quorum when the High Court sat on appeal when the matter was heard by the Kaduna State High Court on appeal. **The appeal was filed to the High Court on 22nd March, 1990. Proceedings on the appeal started on 7th May, 1992, and judgment was delivered on 11th December, 1995. Thus, the principal law which provided for the Constitution for that court was the 1979 Constitution. Section 238 of that Constitution provided:-**

"For the purpose of exercising Any jurisdiction conferred on it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court."

(Underlining and emphasis mine.)

Subsection 2 of Section 236 of that Constitution conferred on the court jurisdiction to entertain proceedings brought before it to be dealt within the exercise of its appellate or supervisory jurisdiction. Thus, the Constitution is very clear that one Judge could form the required quorum for the purposes of determining a matter brought before the High Court as a first instance court or as appellate court which entertains appeals from subordinate courts. To request for two Judges to form a quorum under that dispensation was a surplusage. Section 40 of the High Court Law (supra), could do no more than support the constitutional provision. I hold that the Kaduna State High Court was properly constituted in its appellate jurisdiction when it consisted of not less than one Judge when it heard and determined the appeal in question. Issue three is resolved in favour of the respondent.

In conclusion, I find no merit in this appeal and I dismiss it. The respondent is entitled to Fifty Thousand Naira (N50, 20 000.00) costs from the appellant.

TOBI JSC

This matter started from the Upper Area Court, Saminaka,

where the plaintiff/appellant, Iliya Akwai Lagga sued the defendant, Late Umaru Yusuf Sarhuna claiming title to a farmland loaned to the grandfather of Umaru Nagori by the grandfather of the plaintiff/appellant, Dogara. The defendant ‘disputed the claim of the plaintiff/appellant. He claimed that the farmland was given to his grandfather, Mohammed Nagogori by the Chief of Lere, Mijinyawa, even before the defendant was born. On the death of the defendant, Umaru Yusuf Sarhuna, Audu Yusuf Sarhuna was substituted as defendant. He is the respondent in this appeal.

The Upper Area Court administered Oath on both parties, notwithstanding the fact that the appellant is not a Muslim. The court divided the disputed farmland into two and gave one portion to each of the parties. Both parties were dissatisfied and they appealed to the High Court. The High Court held that the Oath administered on the appellant who is not a Muslim, was wrong. The court however affirmed the judgment of the Upper Area Court.

Dissatisfied, the respondent as appellant appealed to the Court of Appeal. That court set aside the judgment of the Upper Area Court and the High Court and entered judgment in favour of the respondent. Delivering the leading judgment of the court, Mahmud Mohammed, JCA., (as he then was), said at pages 101 and 102 of the record:

“In the result, this appeal succeeds and the same is hereby allowed. The judgment of the lower court of 11/12/95, affirming the judgment of trial Saminaka Upper Area Court sharing the farmland in dispute equally between the appellant and the respondent based entirely on the terms of Oaths subscribed by the parties is hereby set aside. In place of that judgment there shall be entered a judgment dismissing the plaintiff/respondent’s claims.

Dissatisfied, the plaintiff/appellant has appealed to this court. Briefs were filed and exchanged. The appellant also filed a Reply Brief. The appellant formulated three issues for determination:-

"Issue One:

Whether the dismissal of the appellant’s case after setting aside the judgments of the trial court and that of the High Court sitting on appeal was proper and did not occasion a miscarriage of justice in the circumstance?

Issue Two:

Whether the incomplete re-evaluation of the evidence by the lower court under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, 1981, as amended after holding that the lower courts failed to evaluate the evidence before them was proper in law and did not occasion a miscarriage of justice in the circumstance of this appeal? B

Issue Three:

Whether or not the lower court's proceedings and judgments are right in law and not a nullity in entertaining an appeal from the final decision of the High Court sitting in an appellate jurisdiction which failed to comply with the mandatory Section 40 of Kaduna State High Court Law, Cap 67 of 1991, in its jurisdictional composition and whose proceedings and judgments were incompetent, null and void in law?" C D

The respondent also formulated three issues for determination:-

"Issue one:

Whether the Court of Appeal was right in law in setting aside judgments of the trial Upper Area Court and High Court sitting on appeal and dismissing appellant's claims? E

Issue Two:

Whether the Court of Appeal properly evaluated all the evidence proffered at the trial court and made correct findings? F

Issue Three:

Whether the proceedings of the High Court sitting on appeal was null and void for failure to be constituted by two Judges and whether one Judge presiding is in compliance with Section 40 of the High Court Law of Kaduna State?" G

Respondent also raised a Preliminary Objection.

Learned Senior Advocate for the appellant, Mr. M. Y. Saleh, on issue No. 1, submitted that the dismissal of the appellant's claim after setting aside the judgments of the lower courts occasioned a miscarriage of justice after setting aside the finding of fact made by the two courts. Citing *Ebba v. Ogodo* (1984) 4 S.C. 84, *Atolagbe v. Shorun* (1985) 9 NWLR 360 and *Enang v. Adu* (1981) 11-12 S.C. 25; (1981) 11-12 S.C. (Reprint) 17, learned counsel urged this court to set aside the judgments of the Court of Appeal, High Court and

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the Upper Area Court and enter judgment for the appellant.

On issue No.2, learned Senior Advocate submitted that the learned Justices of the Court of Appeal failed to comply with the provision of Section 16 of the Court of Appeal Act and Order Rule 20 of the Court of Appeal Rules, 1981, as amended as the court
B wrongly applied the provisions in the circumstances of the appeal. This is because the Upper Area Court evaluated and ascribed probative value and or credibility to the evidence called by all the witnesses at the trial; an exercise the High Court accepted. To learned Senior
C Advocate, there was no use resorting to the Oath taking by the appellant and the respondent at the lower court before erroneously sharing the land in dispute into two to confer title on each of the parties.

Learned Senior Advocate submitted that the burden of proof
D was discharged by the appellant on balance of probabilities and it is not the case that the appellant's burden of proof discharged was weighed against the respondent and found to be even on the sides of justice as alluded by the Court of Appeal and as envisaged in the decided cases of *Odieta v. Okotie* (1972) 6 S.C. (Reprint) 49; (1973)
E 1 NMLR 175, *Owoade v. Omitola* (1988) 2 NWLR (Pt.77) 413, *Idehen v. Osemwekhae* (1997) 10 NWLR (Pt.525) 317 and *Arase v. Arase* (1981) 5 S.C. 33; (1981) 5 S.C. (Reprint) 21.

The glaring irregularity committed by the trial Upper Area Court
F completely abdicating its responsibility of deciding the case before it on the evidence adduced by the parties and opted to adopt a very strange procedure by giving the parties the relief they did not ask for based on the terms of Oath it virtually forced on the parties, was specifically noted by the Court of Appeal as being contrary to our
G laws, learned counsel pointed out. After the Court of Appeal had come to the conclusion that the procedure of Oath taking to discharge the onus of proof applies where the dispute is between Muslims, it is indeed baffling how the court proceeded to affirm the judgment of the trial Upper Area Court, learned Senior Advocate argued.
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On issue No. 3, learned Senior Advocate submitted that the proceedings of the Court of Appeal and judgment are a nullity as they entertained an appeal from the final decision of the High Court

sitting in an appellate jurisdiction which failed to comply with the mandatory Section 40 of the Kaduna State High Court Law, Cap 67 of 1991. He cited Calabar East Co-operative Thrift and Credit Society Ltd. v. Ikot (1999) 14 NWLR (Pt.638) 225, Madukolu v. Nkemdilim (1962) 1 All NLR (Pt.4) 587, Babale v. Abdulkadir (1993) 3 NWLR (Pt. 281) 253, Galadima v. Tambai (2000) 6 S.C. (Pt.I) 196; (2000) 6 SCNJ 190, NDIC v. CBN (2002) 3 S.C. 1; (2002) 3 SCNJ 75 and Matari v. Dangaladima (1993) 2 SCNJ 122 and Sections 37 and 40 of the High Court Law, 1991. Citing Adeigbe v. Kusimo (1965) NMLR 284, Oloyede v. Ajiboye (1994) 7-8 SCNJ (Pt.I) 1, learned Senior Advocate submitted that the joint deliberation, sitting and delivering the joint judgment by the two Justices, when only one of them sat, and heard arguments on the appeal offended appellant's Right to Fair Hearing under Section 33(1) of the 1979 Constitution.

Where there is no proper constitution of the court or tribunal all the processes issued, the trial and or hearing and the judgment that may be delivered by such improperly constituted court or tribunal are a nullity for lack of competence and jurisdiction in law, learned Senior Advocate argued. He submitted that the Notice and Grounds of Appeal to the Court of Appeal were also null and void as they were based on proceedings and judgment which are a nullity. He cited International Bank for West Africa Ltd. v. Pavex International Company (Nigeria) Ltd. (2000) 4 S.C. (Pt. II) 196; (2000) 2 SCNJ 200, Galadima v. Tambai (2000) 6 S.C. (Pt.I) 196; (2000) 4 SCNJ 190, The Shell Petroleum Development Company (Nig.) Ltd. v. Isaiah (2001) 5 S.C. (Pt.II) 1; (2001) 5 SCNJ 218 and Achiakpa v. Nduka (2001) 7 S.C. (Pt. III) 125; (2001) 7 SCNJ 585. He urged the court to allow the appeal.

Learned counsel for the respondent, Umaru Mohammed, Esq., raised a Preliminary Objection on grounds 1, 2, 3, 4, 5 and 6. submitted on ground 1 that issue No. 1 formulated by the appellant does not relate to ground 1 but only relates to ground 2, and so the appellant is deemed to have abandoned ground 1 as contained in the Notice and Grounds of Appeal. He cited Ibrahim v. Dr. Mohammed (2003) 2 S.C. 127; (2003) 6 NWLR (Pt.817) 615.

Learned counsel submitted that ground 2 read together with its particulars is manifestly misleading, vague and/or general in arms;

uncertain and not susceptible to being understood. He cited CBN v. Okojie (2002) 3 S.C. 99; (2002) 8 NWLR (Pt.768) 48, Atuyeye v. Ashamu (1987) 1 NWLR (Pt.49) 267 and Federal Republic of Nigeria and African Reinsurance Corporation v. JDP Construction Nigeria Ltd. (2003) 2-3 S.C. 47; (2003) 13 NWLR (Pt.38) 609.

B On ground 3, counsel submitted that the ground read together with the particulars is certainly vague or general in terms. Counsel itemized what he regarded as vague particulars. He cited Order 8 Rule 2(3) and (4) of the Supreme Court Rules. Counsel also submitted that ground 4, even without the particulars, is vague. It is uncertain and cannot be understood he said. He cited once again CBN v. Okojie, *supra*.

C On ground 5, learned counsel pointed out that the complaint in the ground is that the Court of Appeal “*erred in their finding of facts*” but the part of the judgment specified is not a finding of fact or facts. He said that the three particulars of error in support of ground 5 are not relevant to the ground. Ground 5 is patently vague, counsel submitted. He cited Order 8 Rule 2(4) of the Supreme Court Rules. Taking ground 6, learned counsel again submitted that the ground read together with the particulars is vague and/or general in terms, thereby offending the mandatory provision of Order 8 Rule 2(3) of the Supreme Court Rules. He urged the court to strike out grounds 2, 3, 4, 5 and 6.

F Taking the merits of the appeal, learned counsel submitted on issue No.1 that in a claim for declaration of title to land, the onus is on the plaintiff to prove his title and must rely on the strength of his own case and not on the weakness of the defence, except to take advantage of favourable evidence of the defence which supports the plaintiff’s case. He cited Kodilinye v. Odu (1935) 7 WACA 336, Okpala v. Ibeme (1989) 3 S.C. (Pt.I) 61; (1989) 2 NWLR (Pt.102) 222 and Arase v. Arase (1981) 5 S.C. 33; (1981) 5 S.C. (Reprint) 21. Counsel argued that as the appellant did not appeal or cross-appeal against the decision of the High Court that the Oath taking was erroneous; a decision affirmed by the Court of Appeal, the judgment of the Upper Area Court was therefore properly set aside. In the circumstances, the Court of Appeal properly invoked the provisions of Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal

Rules to approve the evidence on record, counsel argued.

Learned counsel urged the court to discountenance the prayers of the appellant in paragraph 3, page 13 of the appellant's Brief, as the appellant did not appeal or cross-appeal against the judgment of the High Court. He cited *Amusa v. State* (2003) 1 S.C. (Pt.III) 14; (2003) 4 NWLR (Pt.811) 595, *Ilona v. Idakwo* 10 (2003) 5 S.C. 216; (2003) 11 NWLR (Pt.830) 53, *Lebile v. Registered Trustees of Cherubim and Seraphim Church of Zion of Nigeria* (2003) 1 S.C. (Pt.I) 25; (2003) 2 NWLR (Pt. 804) 399. B

Dealing with issue No. 2, learned counsel submitted that the Court of Appeal properly invoked the provisions of Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules by appraising the evidence on record. He examined the evidence of P.W.I, P.W.2, P.W.3 and P.W.4. C

On issue No.3, learned counsel argued that while the High Court is properly constituted in Sections 40, 62 and 63 of the High Court Law, Laws of Northern Nigeria, Cap 49, the position changed with the enactment of Section 40 of the High Court Law, Cap 67, Laws of Kaduna State, 1991, which reduced the Constitution of the High Court in its appellate jurisdiction from two Judges to not less than one Judge and the Chief Judge where practicable to preside at each sitting of the court. He cited *Madukolu v. Nkemdilim* (1962) All NLR 579 and *Tukur v. The Government of Taraba State* (1997) 6 NWLR (Pt.510) 549. He urged the court to dismiss the appeal. D E

Learned Senior Advocate in his Reply Brief submitted that ground 1 also relates to issue No. 1. He also submitted that grounds 2,3,4,5 and 6 are neither vague nor general in terms and therefore competent. In an apparent Reply on issue No. 3 of the respondent's Brief, learned Senior Advocate merely repeated his arguments in the main Brief. As the function of a Reply Brief is not to repeat the arguments in the main Brief, I shall not deal with the repeated arguments in the Reply Brief. F G

Let me take the objections first and I will do so by first reproducing the grounds of appeal without the particulars:- H

"1. The judgment of the learned Justices of the Court of Appeal is against the weight of evidence.

2. The learned Justices of the Court of Appeal erred in law and

on their finding of facts when they set aside the judgments of the lower courts and dismissed the appellants claim which occasioned a miscarriage of justice.

3. The learned Justices of the Court of Appeal (in the leading judgment) erred in law and on their findings of fact when they held -
 B *'The lower court having failed in its responsibility to do so this court as an appellate court, having heard this appeal and in the determination thereof has power under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, to appraise*
 C *the evidence on record provided the credibility of the witnesses is not in issue and arrive at the correct decision. See Ajayi v. Military Administrator Ondo State (1997) 5 NWLR (Pt.504) at 275-276.'*

4. The learned Justices erred in law when they dismissed the
 D *appellant's claims in favour of the respondent based on incomplete evaluation and findings on the evidence adduced at the trial court which the High Court on appeal found as having been evaluated which occasioned a miscarriage of justice when the lower court only after setting aside the two lower courts judgment held as follows:-*

'In place of that judgment dismissing the plaintiffs/respondents'
 E *claims.'*

5. The learned Justices of the Court of Appeal (in the leading judgment) erred in their finding of facts when they held *inter alia:-*

'What the lower court should have done in the circumstances
 F *of this case was to have set aside the judgment of the trial Upper Area Court and proceed to determine the respective adverse claims of the parties for title to the farmland in dispute based on the evidence adduced by the respective parties in support of their claims which occasioned a miscarriage of justice.'*

6. The learned Justices of the Court of Appeal erred in law in
 G *entertaining the appeal from the High Court (sitting on appellate jurisdiction) whose proceedings and judgment are null and void offending the mandatory Section 40 of the High Court Law, Cap. 67 of 1991, Kaduna State and without jurisdiction which occasioned a*
 H *miscarriage of justice."*

Learned counsel for the respondent attacked grounds 2, 3, 4, 5 and 6 as vague and or in general terms. A ground of appeal is vague if it is allusive, ambiguous, broad, debatable, disputable, eva-

sive and inexact. A ground of appeal which is precise, concise, exact and unequivocal cannot be said to be vague. A ground of appeal which clearly complains about the decision of the court in terms of live issues cannot be said to be vague; but one which complains about matters peripheral to the live issues are.

I have carefully examined grounds 2, 3, 4, 5 and 6 and I do not see any vagueness in them. I also do not see in them couched in general terms. On the contrary, I see in them couched in specific terms. It is the submission of counsel that issue No.1 in the appellant's Brief relates only to ground 2 and not ground 1. While I concede that the issue relates more to ground 2, the issue also covers the blanket complaint of ground 1 on weight of evidence. The expression "*weight of evidence*", occupying a large place in the evaluation process of evidence by the trial Judge, is also covered by issue No.1, an issue which deals with the findings of the trial Judge. This is clear from the arguments at pages 11 to 16 of the appellant's Brief. Like my learned brother, Muhammad, JSC., I also do not see any substance in the Preliminary Objection and it fails.

I do not think I should take the objection raised in the Reply Brief at page 6 of the Brief in respect of issue No. 3 in the respondent's Brief. I will rather take it along with issue No. 3 of the appellant's Brief as they coalesce in some material particular.

As issue No. 3 is on jurisdiction, I will take it first. Learned Senior Advocate for the appellant relied on Section 40 of the High Court Law, Cap. 67, Volume 2 of 1991 of Kaduna State. The section reads:-

"The High Court in the exercise of its appellate jurisdiction shall, subject to the provision of Part 4, be constituted by not less than one Judge and the Chief Judge shall where practicable preside at each sitting of a court.

The determination of any question before a court constituted under this section shall be according to the opinion of the majority of the members of the court hearing the appeal.

Where in any appeal heard by a court constituted of two Judges only the members of the court fail to agree upon any matter for decision on the appeal then if one of the members agrees with the

judgment of the court or authority from which the appeal is brought, that judgment shall be deemed to be the judgment of the court and in any other event and subject to the provisions of subsection (4), the appeal shall be reserved for hearing before a court constituted of an uneven number of Judges not being less than three.

B *Where a court is constituted of two Judges only and at any stage of the hearing of an appeal before judgment is delivered either or both of such Judges are of the opinion that the appeal should be reserved for hearing before a court consisting of an uneven number of Judges not being less than three it shall be so reserved.*

C *The provisions of this section shall be in addition to and not in derogation of the provisions of any other written law prescribing the Constitution of the High Court in its appellate jurisdiction in any particular class of case."*

D By Section 40, a single Judge and the Chief Judge where practicable can constitute the court. The Chief Judge will preside at each sitting of the court. That is the minimum. The number of Judges can be more than one in addition to the Chief Judge. That is the essence of the expression "*not less than*" in the section.

E Section 40 should be read along with Section 238 of the 1979 Constitution. It provides as follows:-

"For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court."

F Section 238 of the Constitution is not similarly worded as Section 40 of the 1991. The introduction of the Chief Judge into the panel by Section 40 is not in the Constitution. Both provisions will be the same if it is not practicable for the Chief Judge to preside over the sitting of the court.

G The complaint of learned Senior Advocate for the appellant is that only one Judge heard the appeal and two Judges delivered what he called a joint judgment. Learned counsel did not tell this court whether there was a miscarriage of justice arising from the two Judges delivering a joint judgment. That to me is the crux of the issue. This court cannot isolate itself from doing substantial justice to involving itself in arid legalism in the way learned Senior Advocate has submitted. Most importantly, the issue raised by learned Senior Advocate

sounds academic, as the Court of Appeal set aside the judgment of the High Court. As the judgment of the High Court was set aside by the Court of Appeal, there is nothing for the appellant to complain. issue No.3 therefore fails.

I will take the two issues together as they coalesce in some material particular. The evaluation of trial evidence is not the exclusive preserve of the trial Judge. Although the trial Judge has the exclusive benefit of watching the demeanour of the witnesses and therefore expected to come out with accurate evaluation of the evidence, that is not always the case. It is in that respect that appellate Judges are vested with the power to re-evaluate evidence of witnesses at the appellate level. As an appellate Judge does not have the benefit of watching the demeanour of the witnesses, he has to rely on the evidence on record. As physically seeing the witnesses in the witness box and the cold records are not the same, an appellate Judge is restricted to interfere with the findings of a trial Judge only in the event that the findings are perverse.

A perverse finding is one which ignores the facts or evidence led before the court and when considered as a whole amounts to a miscarriage of justice. See *Odiba v. Azege* (1998) 7 S.C. (Pt.I) 79; (1998) 9 NWLR (Pt.566) 370, *Edoho v. State* (2004) 5 NWLR (Pt. 865) 17. A finding is perverse if it is not borne out of the evidence before the court. A perverse finding is a finding which is not only against the weight of evidence but is altogether against the evidence itself. It is a finding which no reasonable tribunal should have arrived at in the light of the evidence before it.

And who says that an appellate Judge has not the competence to deduce or better, abduct such perversity from the record? While demeanour, the way of acting, conduct, or behaviour of a witness in the witness box materially assists the trial Judge in coming to a decision as to the authenticity or veracity of the evidence, the cold record also materially assists the appellate Judge. In the game of football, there are many routes to the goal post and the goal. I think they are ten. Once the goal is scored, the referee does not query the route the player used, if the goal satisfies the rules of the game. He blows the whistle to herald or announce the goal and the spectators jubilate or coil in anger and disappointment, depending on the side the person

is. And here, the referee is this court, the routes to the goal post and the goal are counsel and the goal is the judgment.

Learned Senior Advocate for the appellant referred to the re-evaluation of the evidence of the witnesses by the Court of Appeal as incomplete. Is he right? Is he correct? That takes me to the re-evaluation of the evidence by the Court of Appeal. I will quote the court in extenso. Dealing with the decision of the Upper Area Court, Mohammed, JCA., (as he then was), said at page 91 of the record:-

"In the determination of this issue, I must emphasis that in a claim for declaration of title to land as in the present case, the rather crude concept of "no-victor" "no-vanquished" approach adopted by the trial Upper Area Court, confirmed by the lower court on appeal and now cleverly adopted by the learned counsel for the respondent in support of the judgment of the lower court now on appeal in this court, has no place whatsoever in our Judicial Procedural Laws and Substantive Laws regulating the administration of justice in our courts in this country. In fact, quite contrary to that position being enunciated by the learned counsel to the respondent, it is the established law that in a declaration of title to land case, the burden which the plaintiff has to discharge is not considered so discharged even where the scales of justice are evenly weighed between him and the defendant."

Examining the evidence as to title of the land in dispute, the learned Justice said at page 92 of the record:-

"Applying this principle to the present appeal it appears clear to me that the dispute between the appellant and the respondent both of whom were claiming title to the farmland in dispute, ought to have been determined by comparing the competing claims to title to the farmland in dispute between the appellant who was in possession and claiming to have inherited the same from his father and grandfather who was given the same as virgin land by their Chief, and the respondent who also based his claim of title on inheritance from his father and grandfather who only allowed the respondent's grandfather to use the farmland in dispute on loan. Very unfortunately, instead of appraising and ascribing probative value to the evidence of the 4 witnesses each called by the appellant and the respondent respectively in support of their adverse claims, the trial Upper Area

Court resorted to Oath taking specifically administered on the parties as a means of discharging the burden of proof and consequently shared the disputed farmland equally between the parties."

Taking the issue of Oath taking which was the centre of the judgments of both the Upper Area Court and the High Court, the learned Justice said at pages 93 and 94:- B

"The fact that the judgment of the trial court was based entirely on the terms of the Oath administered as a means of discharging the burden of proof and not on the evidence adduced by the parties was clearly stated by that court in its judgment at pages 33-34 of the record of this appeal where the court said - C

'The court directed Umaru to swear by the Quran he went and did ablution. The court administered the Oath to him using the Holy Quran that this place it was Chief of Lere Mijinyawa is the one that gave his grandfather Nagogori this place he cleared. He farmed there until he died. Usaini inherited and I got it from father Usaini and not Dogara the grandfather of Alhaji Akwai that gave Nagogori my grandfather this loan. D

And Alhaji Akwai the court directed him to swear with their home shrine. That is bow and quiver and black knife. Alhaji Akwai swore that his grandfather Dogara is the one that gave Nagogori the grandfather of Umaru this farmland on loan not the Chief of Lere Mijinyawa that gave Nagogori the bush he cleared. Both plaintiff and the defendant took Oath in the court room. E

This glaring irregularity committed by the trial Upper Area Court of completely abdicating its responsibility of deciding the case before it on the evidence adduced by the parties and opted to adopt a very strange procedure by giving the parties the relief they did not ask for based on the terms of Oath it virtually forced on the parties, was specifically noted by the lower court as being contrary to our laws when that court stated at page 41 of the record as follows:- F

'We too agree with both counsel that the procedure of Oath taking to discharge the onus of proof applies where the dispute is between Moslems. See Shiga v. Umaru (1986) 3 NWLR (Pt.29) 46. If one of the parties is not a Moslem Oath cannot be administered in order to discharge the onus of proof.' H

Definitely with this statement of the correct position of the law,

it is indeed baffling how the lower court proceeded to affirm the judgment of the trial Upper Area Court based entirely on the terms of Oaths administered between a moslem and a non-Moslem resulting in the division of the farmland in dispute equally between the two parties. What the lower court should have done in the circumstances of this case was to have set aside the judgment of the trial Upper Court and proceed to determine the respective adverse claims of the parties for title to the farmland in dispute based on the evidence adduced by the respective parties in support of their respective claims.”

Dealing with the perverse nature of the judgment of the Upper Area Court, the learned Justice said at page 95 of the record:-

“In the present case, the fact that the judgment of the trial court as affirmed by the lower court does not flow from the evidence adduced by the parties, is quite obvious to earn that judgment the name of a perverse judgment.”

Thereafter the learned Justice specifically dealt with the evidence of some of the witnesses. He did that admirably from pages 96 to 99 and properly evaluated their evidence towards the end of page 90.

I have taken the pains to produce the findings of the Court of Appeal because of the submission of learned Senior Advocate that the findings were incomplete. With respect, counsel is wrong, very wrong indeed. The findings of the Court of Appeal, in my humble view, are more than complete, if there is such a language at all.

It is the submission of counsel for the respondent that the appellant cannot raise the issue of Oath taking since he did not appeal on that. In his Reply Brief, learned Senior Advocate submitted that *“the issues on the grounds of appeal filed in the Notice of Appeal are complaints against proceedings and judgment of the court below...”*

That is not an adequate answer to the point raised by counsel for the respondent. Oath taking was a major issue in the matter, if not the fulcrum of it at the trial court. I therefore expected counsel, if he grudged the decision of the court below, to specifically appeal on it and that he should have done by a ground of appeal. The essence of appeal is to complain on disagreement with the judgment. What is not appealed is deemed to be agreed by the appellant. I therefore entirely agree with learned counsel for the respondent. The appel-

lant cannot eat his cake and still have it intact in his hands. That is a physical impossibility.

I think I can stop here. It is for the above reasons and the more detailed reasons given by my learned brother, Muhammad, JSC., in his judgment that I too dismiss the appeal. I also award N50,000.00 costs to the respondent. B

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the leading judgment by my learned brother, Muhammad, JSC. I agree with his reasoning and conclusion. I am also of the view that the Kaduna State High Court which heard the suit on appeal on 7/05/92 and gave judgment on 11/12/95, had the requisite jurisdiction to hear and determine the appeal pursuant to Section 239 of the 1979 Constitution. D

I would dismiss this appeal as unmeritorious. I subscribe to the order on costs made in the leading judgment.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Kaduna Division (hereinafter called "*the court below*") delivered on 31st October, 2001, setting aside the judgment of the High Court of Kaduna State sitting in its appellate jurisdiction delivered on 17th December, 1995, confirming the decision of the Upper Area Court, Saminaka in Kaduna State delivered on 21st March, 1990, partitioning the land in dispute, between the parties not based on any evaluation of the acceptable evidence before it, but on administering Oaths to the parties who were a Moslem and a pagan respectively to prove their respective claims. The court below finally dismissed the plaintiff's/appellant's claims. F

Dissatisfied with the said decision, the appellant who was the plaintiff in the said Upper Area Court and a respondent in the court below, has appealed to this court on six (6) grounds of appeal. In the appellant's Brief, three issues have been formulated for determination, namely; H

“2.1 ISSUE ONE:

Whether the dismissal of the appellant’s case after setting aside the judgments of the trial court and that of the High Court sitting on appeal was proper and did not occasion a miscarriage of justice in the circumstance? (Grounds One and Two) !

B 2.2. ISSUE TWO:

Whether the incomplete re-evaluation of the evidence by the lower court under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, 1981, amended after holding that the lower courts failed to evaluate the evidence before them was proper in law and did not occasion a miscarriage of justice in the circumstance of this appeal? (Grounds Three, Four and Five).

C 2.3. ISSUE THREE:

Whether or not the lower court’s proceedings and judgment are right in law and not a nullity in entertaining an appeal from the final decision of the High Court sitting in an appellate jurisdiction which failed to comply with the mandatory Section 40 of Kaduna State High Court Law, Cap. 67 of 1991, in its jurisdictional composition and whose proceedings and judgment were incompetent, null and void in law? (Ground Six).”

On his part, the respondent, in his Brief of Argument has also formulated three (3) issues for determination. They read as follows:-

“ISSUE ONE:

F *Whether the Court of Appeal was right in law in setting aside judgments of the trial Upper Court and High Court sitting on appeal and dismissing appellant’s claims? Ground 2.*

ISSUE TWO:

G *Whether the Court of Appeal properly evaluated all the evidence proffered at the trial court and made correct findings? Grounds 1, 3, 4 and 5.*

ISSUE THREE:

H *Whether the proceedings of the High Court sitting on appeal was null and void for failure to be constituted by two Judges and whether one Judge presiding is in compliance with Section 40 of the High Court Law of Kaduna State? Ground 6.”*

I note that the respondent did not file any Notice of Preliminary Objection. Even in the said Brief, it is not a Notice of Preliminary

Objection stating the grounds relied on for such objection pursuant to Order 2 Rule 9 of the Rules of this court. Sub-rule 2 states that if a respondent fails to comply with this rule, the court may refuse to entertain the objection or adjourn the hearing with costs or make such other order it thinks fit. In the respondent's Brief, it is just headed "3 or PRELIMINARY OBJECTION." I am aware firstly, that in the case of Chief Agbaka 3 Ors. v. Chief Amadi & Anor. (1998) 7 S.C. (Pt.II) 18; (1998) 11 NWLR (Pt.72) 16 at 25; (1998) 7 SCNJ 367 at 375, it was held that the notice given in the respondent's Brief, does not dispense with the need to file such notice, but that it does not deprive the court of doing certain things like the court drawing the attention of the appellant's counsel to the incompetent ground of appeal. Secondly, I am also aware that the purpose of giving Notice of Preliminary Objection, is to give the adversary, an opportunity of reacting to the objection and to avoid any element of surprise. See also Agbaka's case (supra) and the case of Auto Import Export v. Adebayo & 2 Ors. (2002) 12 S.C. (Pt.I) 158; (2002) 18 NWLR (Pt.799) 554; (2002) 12 SCNJ. 124 at 139; (2002) 103 LRCN 2397. Thirdly, I am also aware as this is settled, that the failure to bring the notice in accordance with the above Order, does not render such notice ineffective. This underscores the fact that it is a notice that must be filed or raised in a respondent's Brief. See the case of Alhaji Maigoro v. Alhaji Garba (1999) 7 S.C. (Pt.III) 11; (1999) 7 SCNJ 270 at 282. Fourthly, a Notice of Preliminary Objection, can be given in the respondent's Brief. But a party filing it in the Brief, must ask the court for leave to move the Notice, before the oral hearing of the appeal commences otherwise, it will be deemed to have been waived and therefore, abandoned - See the case of Oforkire & Anor. v. Maduka & 5 Ors. (2003) 1 S.C. (Pt.III) 74; (2003) 5 NWLR (Pt.812) 166 at 178-179; (2003) 1 SCNJ 440, 448. Now, since it was the learned counsel for the appellant who first raised it, at the hearing of this appeal, I will briefly deal with it.

It need be stressed that an appeal, deals with the complaints of the appellant against the judgment. A consideration whether a ground of appeal is of error in law, in fact and in substance, is a complaint that it is against evaluation, assessment, weight of evidence, findings of fact or a complaint of misdirection on the facts or mixed law and

fact. See the cases of Board Customs & Excise v. Barau (1982) 10 S.C. 48 at 143; (982) 10 S.C. (Reprint) 23 and Yusuf v. UBN (1996) 6 NWLR (Pt. 457) 632 just to mention but a few. Afterwards, the appellant's ground 1 of the grounds of appeal, is the omnibus ground. In the case of Engr. Emmanuel Osolu v. Engr. Uzodinma Osolu & 6
 B Ors. (2003) 6 S.C. (Pt.I) 1; (2003) NWLR (Pt.832) 608 at 631-632, 645; (2003) 6 SCNJ 162 at 186 - per Musdapher, JSC., it was held that:-

"An omnibus ground implies that the judgment of the trial court cannot be supported by the weight of the evidence adduced by the successful party, or the trial Judge either wrongly accepted evidence or the interference he drew, or conclusion he reached based on the accepted evidence cannot be justified."

That, it implies also that there is no evidence which if accepted, D would support the finding of the trial court.

In the case of Lion Building Ltd. v. Shadipe (1976) 12 S.C. 135 at 139; (1976) 12 S.C. (Reprint) 88, in respect of a judgment appealed as being against weight of evidence, this court - per Sir Udo Udoma, JSC., referred to the case of Macaulay v. Tukuru (1881-
 E 1911) 1 NLR 35, in which the principle was enunciated to the effect that:-

"When a judgment is appealed from as being against the weight of evidence, the appeal court must make up its own mind on the evidence, not disregarding the Judgment appealed from but carefully weighing and considering it and not shirking from over-ruling It, if, on full consideration, it comes to the conclusion that the judgment is wrong."

That if, however, the appeal court is in doubt, the appeal must G be dismissed since the burden of proof is on the appellant. It was stated that:-

"It is a principle we believe has been rendered sacrosanct by age and from which no venture to suggest no court should depart."

It must be borne in mind that an omnibus ground of appeal, H can sustain an appeal or Notice of Appeal. As regards the other grounds 2 to 6, on the decided authorities, the objections in my respectful view, are misconceived. Without much ado, I am of the firm view that all the grounds of appeal, are competent. I therefore, dismiss the

said objections.

I will take issues 1 and 2 of the parties together. It is now settled that an appeal is in the nature of a re-hearing in respect of all the issues raised in respect of the case. See the cases of Comptoir Commercial & Industries. S.P.R. Ltd. v. Ogun State Water Corporation & Anor. (2002) 4 S.C. (Pt.II) 86; (2002) 4 SCNJ 342 at 352-353 - per Ayoola, JSC., and Sabru Motors Nig. Ltd. v. Rajab Enterprises Nig. Ltd. (2002) 2 S.C. (Pt.II) 67; (2002) 4 SCNJ 370 and 382 - per Ogwuegbu, JSC. Section 16 of the Court of Appeal Act, gives the Court of Appeal full jurisdiction over the whole proceedings as if the proceedings had been initiated in the Court of Appeal as the court of first instance, or in part or may remit it to the court below for the purpose of re-hearing. The effect of the provision, has been stated and restated in a number of decided cases. See the cases of S. Okoye Okonkwo & Ors. v. Chief A. Kpajie & Ors. (1992) 2 NWLR (Pt.226) 633 at 656; (1992) 2 SCNJ. 290 - per Nnaemeka-Agu, JSC., cited in the case of Anyim Mba & 2 Ors. v. Agbafo Agu & 6 Ors. (1999) 9 S.C. 73; (1999) 9 SCNJ 84, Attorney-General Anambra State & 5 Ors. v. Okeke & 4 Ors. (2002) 5 S.C. (Pt.II) 58; (2002) 5 SCNJ 318 at 333, Cappa and D'Alberto Ltd. v. Akintola (2003) 4 S.C. (Pt.II) 1; (2003) 4 SCNJ. 328 at 343 - per Tobi, JSC., and many others. See also Order 1 Rule 20(1), (3) & (4) of the Court of Appeal Rules.

It need be emphasized that the general powers of the Court of Appeal under Section 16 of the Act and Order 1 Rule 20 (5) to ensure the determination on the merits of the real question in controversy, were designed to enable that court, to clear whatever technical mistake or obstacle that may be in the way of a fair determination of the appeal on its merits or of determining the real question in controversy in the appeal. See Comptoir Commercial & Industries. S.P.R. Ltd. v. Ogun State Water Corporation & Anor. (supra) at 253. For the avoidance of doubt, the Court of Appeal, has all the powers and duties as to amendment and otherwise as the High Court - Rule 20(1); to receive further evidence on question of fact - Rule 20(3); to draw inference of fact and to give any judgment or make any Order which ought to have been given or made - Rule 20(4). I will add quickly that firstly, the incontestable limit, is that such first instance jurisdiction exercised by the Court of Appeal, does not include what

the trial court could not have done. See the cases of *The State v. Dr. Onogoruwa* (1992) 2 NWLR (Pt.221) 33 at 46, 56 58; (1992) 2 SCNJ I. Secondly, nothing in Order 1 Rules 20(1), (3), (4) or 20(5) of the said Rules, empowers the Court of Appeal, to descend into the arena so to say and thereby, take over the conduct of the appeal from the parties. Far from it.

So, inspite of the clear and unambiguous provision of Section 16 of the Act and Order 1 Rule 20(1) (3) & (4) of the said Rules, the appellant in his said issue 2, is posing the said question. I wonder! Both Section 16 of the Act and Order 1 Rule 20(1) , (3), (4) of the Rules, need no interpretation. It is even stated that the “re-valuation”, was/is “incomplete.” Such assertion or allegation, is bound to raise an eye brow and suggests that the learned SAN for the appellant, with respect, may not have read thoroughly the said judgment of the court below - per Mohammed, JCA., (as he then was).

For instance, at pages 84 and 85 of the records, the following appear inter alia:

“.....*The appeal and the cross-appeal were heard together and in its judgment delivered on 11/ 12/95, the Kaduna State High Court after correctly stating the position of the law that Oath taking to discharge the onus of proof is not applicable in a dispute between a Moslem and a non-Moslem as in the present case, all the same proceeded and affirmed the judgment of the trial Upper Area Court sharing the farmland in dispute between the parties equally based solely on the Oaths administered to the parties in support of their respective claims. It is against this decision that the appellant who was the defendant at the trial Saminaka Upper Area Court and the appellant at the lower court and in this court has now appealed to this court.....*”

If I or one may ask the appellant and his learned counsel, are the above excerpts or facts, not borne out by the records? Is this fact not the crux of the appeal before the said High Court and the court below? I again wonder. After appraising the evidence before it, the issues and submissions of the learned counsel for the parties at page 91 of the records, the court below stated inter alia, as follows:-

“In the determination of this issue, (i. e. issue 1 of the appellant in that court) I must emphasise that in a claim for declaration of title

to land in the present case, the rather crude concept of “no-victor” no-vanquished” approach adopted by the trial Upper Area Court, confirmed by the lower court on appeal and now cleverly adopted by the learned counsel for the respondent in support of the judgment of the lower court now on appeal in this court, has no place whatsoever in our Judicial Procedural Laws and Substantive Laws regulating the administration of justice in our courts in this country. In fact quite contrary to that position being enunciated by the learned counsel to the by respondent, it is the established law that in a declaration of title to land case, the burden which the plaintiff has to discharge is not considered so discharged even where the scales of justice are evenly weighed between him and the defendant. See Odiete & Ors. v. Okotie & Ors. (1972) 6 S.C. (Reprint) 49; (1973) 1 NMLR 175, Owoade & Anor. v. Onitola & Ors. (1988) 2 NWLR (Pt. 77) 413; and Idehen v. Osenwenkhae (1997) 10 NWLR (Pt. 525) 358 at 371.”

If I or one may ask the learned counsel for the appellant, is the above not a statement of fact and well firmly established principles or statement of the law in the above decided authorities?

After referring to and dealing with some decided authorities, His - Lordship stated at pages 92 and 93 of the records, inter alia, as follows:-

“Applying this principle to the present appeal it appears clear to me that the dispute between the appellant and the respondent both of whom were claiming title to the farmland in dispute, ought to have been determined by comparing the competing claims to title to the farmland in dispute between the appellant who was in possession and claiming to have inherited the same from his father and grandfather who was given the same as virgin land by their Chief and the respondent who also based his claim of title on inheritance from his father and grandfather who only allowed the respondent’s grandfather to use the farmland in dispute on loan. Unfortunately instead of appraising and ascribing probative value to the evidence of the 4 witnesses each called by the appellant and the respondent respectively in support of their adverse claims, the trial Upper Area Court resorted to Oath taking specifically administered on the parties as a means of discharging the burden of proof and consequently shared

the disputed farmland equally between the parties."

(The underlining mine)

I cannot fault the above and surely, no reasonable court, with respect, can fault the same. The underlined by me, is the crux of the matter and this fact, in my respectful view, cannot be honestly disputed by the learned counsel for the appellant.

Still at page 94 of the records, His Lordship further stated inter alia, as follows:-

"This glaring irregularity committed by the trial Upper Area Court of completely abdicating its responsibility of deciding the case before it on the evidence adduced by the parties and opted to adopt a very strange procedure by granting the parties the relief they did not ask for based on the terms of Oath it virtually forced on the parties, was specifically noted by the lower court as being contrary to our laws when that court stated at page 41 of the record as follows:-

"We too agree with both counsel that the procedure of Oath taking to discharge the onus of proof applies where the dispute is between Moslems. See Shiga v. Umaru (1986) 3 NWLR (Pt.29) 46. If one of the parties is not a Moslem. Oath cannot be administered in order to discharge the onus of proof."

(The underlining mine)

The underlined, is part of the finding of fact and holding by the said High Court sitting in its appellate jurisdiction. Yet, the appellant and his learned counsel, are challenging the setting aside of the said decision of the trial Upper Area Court and that of the High Court sitting on appeal. Wonders it is said, shall never end. I suppose that learned counsel appearing for parties, are regarded as officers in the Temple of Justice. His Lordship, then concluded or repeated inter alia, thus:-

"Definitely with this statement of the correct position of the law, it is indeed baffling (I am also baffled) how the lower court proceeded to affirm the judgment of the trial Upper Area Court based entirely on the terms of Oaths administered between a Moslem and a non-Moslem resulting in the division of the farmland in dispute equally between the two parties. What the lower court should have done in the circumstances of this case was to have set aside the judgment of the trial Upper Court (sic) and proceed to determine the respective

adverse claims of the parties for title to the farmland in dispute based on the evidence adduced by the respective parties in support of their respective claims. Thus, the lower court having failed in its responsibility to do so, this court as an appellate court, having heard this appeal and in the determination thereof has power under Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Court of Appeal Rules, to appraise the evidence on record provided the credibility of the witnesses is not in issue and arrive at the correct decision. See Ajayi v. Military Administrator Ondo State (1977) 5 NWLR (Pt. 504) 237 at 275 - 276.

I cannot agree more. I have earlier in this judgment, dealt with the provisions of the said Section 16 of the Court of Appeal Act and Order 1 Rule 20 of the Rules of the Court of Appeal. His Lordship, thereafter, stated that:-

“.....the fact that the judgment of the trial court as affirmed by the lower court does not flow from the evidence adduced by the parties, is quite obvious to earn that judgment the name of a perverse judgment.”

I also completely agree. Surprisingly and significantly, I note that under issue 2, at page 17 of the appellant's Brief, the learned SAN., conceded that there was no use resorting to the Oath taking by the appellant and the respondent at the “lower court” (sic) - (i.e. the trial Upper Area Court) before according to him, *“erroneously sharing the land in dispute into two to confer title on each of the parties.”*

Then at page 21 thereof, the following appear, inter alia:-

“.....It is conceded that Oath taking, is a feature of our legal system pre-eminent under Islamic system of adjudication in certain circumstances, and that the said “Oath taking” was inapplicable to the circumstances of this case on appeal before this court. The High Court had held that application of the “Oath taking” was not proper between the parties and as also held by the Court of Appeal in this matter.”

In fact, earlier in the appellant's Brief at page 5, it is stated inter alia, as follows:-

“The trial Upper Area Court has jurisdiction to apply Customary Law and Islamic law and or Islamic Legal System in adjudication,

but unfortunately, the trial court did not state which of the legal system it was applying to the dispute between the appellant and the respondent under the Area Court Law, 1968 or any other relevant applicable law/rules of procedure.”

B So, with the above concessions, why this appeal? I or one may ask. This basing of the decision of the Upper Area Court on Oath taking which was faulted by the said High Court, was also faulted by the court below. In the face of this fact, admitted or conceded by the learned SAN, in my respectful view, it is an admission by him, of the C worthlessness of this appeal. I suppose with these concessions, this appeal in my respectful view, is not only an academic exercise, but also, a complete waste of the time of the court and an exercise in futility.

D I have in some of my judgments in this court as regards the duty of learned counsel to his client, stated that it is settled that where the chances of an appeal succeeding, are extremely remote (as in the instant appeal), it behoves learned counsel in the case, to advise his client of the uselessness of pursuing such an appeal which patently, lacks merit. I will add, however attractive, the fee may be. See the E case of K.R. Textile Allied Products Ltd. v. Henry Stephens Shipping Co. Ltd. & 2 Ors. (1989) 1 NWLR (Pt.95) 115 CA., per Achike, JCA., (as he then was and of blessed memory). In fact, in the case of Chief Titus Ofo v. Chief Bode Phillips (1993) 5 NWLR (Pt.296) 751 F at 764 CA., Kolawole, JCA., (of blessed memory), stated inter alia, as follows:-

“It is no credit to any counsel who takes a Brief knowing fully well that there is not a slim chance of success to blindly prosecute the case.”

G His Lordship further dealt with the need for learned counsel, to have confidence in the success of a case before accepting it.

This is why I had, with respect, wondered if the learned SAN., for the appellant, thoroughly read the records of this appeal before agreeing to prosecute it. I have no hesitation in rendering my answer H in respect of issue one of the appellant, in the negative and rendering my answer to issue 1 of the respondent, in the affirmative/positive.

I note that ironically and strangely, in the Brief of the appellant at page 33, this court is urged to set aside the judgments of the Court

of Appeal and the High Court and to enter judgment for the appellant. The question that I or one may ask is, if this court accedes to the request of the learned, SAN., for the appellant, what type of judgment will this court enter for the appellant having conceded that the Upper Area Court, was wrong in respect of its decision on Oath taking and especially, when the appellant did not appeal against the said decision? I ask this question, because with respect, I do not know what judgment, this court will enter *“for the appellant”* if the judgments of the two lower courts, are set aside as urged on it by the learned, SAN. In any case, in all the circumstances, the justice of this appeal, is to dismiss the appeal and affirm the said judgment of the court below.

In conclusion, I had the privilege of reading before now, the leading judgment of my learned brother, Muhammad, JSC., delivered. It is from the foregoing and the more detailed leading judgment of my said learned brother, that I agree with the conclusion that this appeal lacks merit. I too, dismiss it. I too, affirm the said judgment of the court below. Costs follow events. The respondent is awarded N50,000.00 (Fifty Thousand Naira) costs payable to him, by the appellant.

TABAI JSC

I have had the advantage of reading in draft, the leading judgment of my learned brother, Muhammad, JSC. I also agree that the appeal lacks merit and should be dismissed.

This appeal turns largely on the evaluation of evidence and the authority of an appellate court to embark upon evaluation of evidence and make findings thereupon. The settled principle of law is that evaluation of evidence is a duty which falls almost exclusively within the domain of the trial court which alone has the unique advantage of seeing and hearing the witnesses in the course of their testimonies.

Ordinarily therefore, evaluation of evidence is not the business of the appellate court.

Where however there is failure of evaluation or adequate evaluation by the trial court despite its unique opportunities of seeing and

hearing the witnesses, the findings would not be supported by the evidence on record and would therefore be perverse. In such a case, the appellate court has a duty to intervene by embarking on its own evaluation of the evidence, accord probative value thereto and make its own findings if the evaluation would not entail the determination of the credibility of witnesses. These are the principles in cases like *Makanjuola v. Balogun* (1989) 5 S.C. 82; (1989) 3 NWLR (Pt. 108) 192 at 218, *Ramonu Atolagbe v. Korede Olayemi Shohun* (1985) 1 NWLR (Pt.2) 360, *Duru v Nwosu* (1989) 7 S.C. (Pt.1) 1; (1989) 4 NWLR (Pt.113) 24 at 39. Where the evaluation would necessarily entail the determination of the credibility of witnesses, the appellate court cannot, evaluate. The only option in such a situation is an order retrial.

There is no doubt that there was no proper evaluation of the evidence both at the court of trial and the appellate High Court. The Court of Appeal was therefore perfectly in order, when it intervened by its re-evaluation of the evidence. It was therefore idle for learned counsel for the appellant to engage on his sustained attack on the Court of Appeal for its evaluation exercise. I have also examined the evidence and I am satisfied that the character of the evidence is not such that entailed the determination of credibility of witnesses. The Court of Appeal was therefore in as vantage a position as the trial court to evaluate the evidence on the record. And in my assessment, the findings of the Court of Appeal are supported by the evidence on record. There is therefore no basis whatsoever for any interference.

For the foregoing, and the fuller reasons contained in the leading judgment, I also dismiss the appeal. I abide by the costs as awarded in the leading judgment.

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