

SUPREME COURT OF NIGERIA

13TH JUNE 2008 SC. 53/2002

**CORAM:- S. U. ONU, D. MUSDAPHER, A. M. MUKHTAR,
I. F. OGBUAGU, P. O. ADEREMI, JJSC**

1. MOMODU OLUBODUN
 2. KASALI OSHINDERO
 3. MADAM TOWURU EGBEIBON APPELLANTS
 4. MUSTAFA KARIMU
 5. ALHAJI RUFAI APELOGUN
- AND
1. OBA ADEYEMI LAWAL
 2. CHIEF OLATUNJI OGUNTUWO
- (For themselves and on behalf of RESPONDENTS
Ladoje/Agura Family of Sagamu)

EVIDENCE - Proof - Custom - Requirements - In relation to adjudication custom is question of fact - Which must be pleaded & proved - But plaintiffs failed to plead the dominion of Akarigbo over the land - Which custom they rely on (H1)

LAND LAW - Title - Customary grant - Proof - In relation to adjudication custom is question of fact - Which must be pleaded & proved - But plaintiffs failed to plead the dominion of Akarigbo over the land - Which custom they rely on (H1)

PLEADINGS - Reply to defence - Nature - It is defence of plaintiff to the case put forward by defendant - Plaintiff must not raise new ground of claim or allegation of fact therein - For such will be bad pleading in law - As in the instant case (H2)

DOCUMENTS - Native Law & Custom - Applicability - Documentary evidence such as Exhibit A herein - Is unknown to native law & custom - As such it has no legal value as evidence in this proceedings (H3)

PLEADINGS - Averments - Binding effect of - Parties are bound by their pleadings - Any evidence by a party contrary to his averments

goes to no issue - As does the evidence of grant led by plaintiffs herein (H4)

ACTIONS - Claims - Declaration of right - Entitlement thereto - Court does not grant declaration in default or on admissions - Without taking evidence and being satisfied as to credibility of such evidence (H5)

FAIR HEARING - Breach - Applicability - Ruling by trial court handed down without hearing plaintiffs' counsel - Was a breach of plaintiffs' right to fair hearing - Court of Appeal ought to have pronounced thus (H6)

FACTS

Plaintiffs/Respondents sued defendants/appellants in the Customary Court claiming a declaration of title over the land in dispute, damages for trespass and injunction. But the matter was subsequently transferred to the High Court to be tried on pleadings. The root of title of the respondents, as pleaded in their statement of claim, was founded on settlement. Appellants did not counterclaim. In response to the Statement of Defence, respondents had also filed a reply.

In the course of trial, respondents led no evidence in support of their averred settlement as the basis of title but rather led evidence in proof of customary grant purportedly pleaded in their reply. Learned trial court eventually gave judgments to respondents as per their claim. Dissatisfied, appellants appealed to the Court of Appeal which appeal was dismissed by that court. Still dissatisfied, appellants have brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the court below can rightly take judicial notice of an unpleaded custom and if not, whether its conclusion on such custom ought not to be set aside?”

“(2) Whether the plaintiffs proved their root of title, so as to entitle them to a declaration of title to land and whether a declaration can be granted on the basis of an admission (if any)?”

“(3) Whether plaintiffs have the locus standi to maintain this action and whether Exhibit A can be validly used to reach a conclu-

sion that plaintiffs have the requisite Locus?

(4) Whether a proper evaluation was given to the evidence adduced to warrant the conclusion that plaintiffs' case is proved, and if not, whether the decision that plaintiffs' had proved their case should be allowed to stand?

(5) Whether the decision to reject a Deed of Conveyance tendered by the defendant is not a nullity for breaching the constitutional rights to Fair Hearing of the defendants?"

HELD (Allowing the appeal per **ADEREMI JSC**, Ogbuagu JSC dissenting)

EVIDENCE - Proof - Title - Custom - Requirements

1. Where a party to a case or a land case places reliance on a statement that the dominion over a large parcel of land which includes the land he is claiming resides in a King and that it was the King that granted him his own land, he is relying on no more than a Custom or the Customary Law of that locality where the land is situate. Custom or Customary Law is a set of rules of conduct applying to persons and things in a particular locality. Let me say that it is of the characteristics of a custom or Customary Law that it must be in existence at the relevant time and must be recognised and adhered to by the inhabitants of the community to make it binding. In relation to adjudication, custom is a question of fact which must be pleaded and proved by independent witness or witnesses.

The plaintiffs/ respondents have forcefully in their Brief, argued that the custom was pleaded. I have carefully looked at the 2nd Further Amended Statement of Claim and plan filed by them, there is nothing suggestive of a plea of custom that the Akarigbo exercises dominion over the land. (pp. 2800 G/2801 H)

PLEADINGS - Reply to defence - Nature

2. Let it be noted that a Reply is the defence of the plaintiff to the case put forward by the defendant or even to the counter-claim of the defendant or to the new facts raised by the defendant in his defence to the plaintiffs' Statement of Claim. A plaintiff is not allowed, in law to introduce new issue, indeed fundamental issue as that in the

instant case. Without the leave of court. A plaintiff must not in his Reply make any allegation of fact or raise any new ground of claim different from what is contained in his Statement of Claim. If a plaintiff does, such a plea is irretrievably bad in law and no evidence will be admissible on its proof. I shall therefore not countenance that pleading. As I have said, it is an irretrievably bad pleading in law. (p. 2802 D/G)

DOCUMENTS - Native Law & Custom - Applicability

3. It was also argued by the respondents that Exhibit A the contents of which I reproduced supra, goes to support the overlordship of the Akarigbo over the land. I debunk the legal value of this exhibit by first saying that it was never properly pleaded. Secondly, it is a well established principle of law that documentary evidence is unknown to Native Law and Custom. (p. 2803 B)

PLEADINGS - Averments - Binding effect of

4. With due respect, I am of the clear view that the court below seriously erred in law in its above summation. In the first place, it is axiomatic that parties are bound by their pleadings. Therefore, any evidence led by any of the parties which does not accord with the averments or which is at variance with them goes to no issue and must be disregarded by the court.

In the instant case, I repeat, it is “*Settlement*” that was pleaded as their traditional history. Settlement in its legal term here means that nobody other than the person pleading it first settled on the land. There is no scintilla of evidence that Ladoje was the first person that settled on the land. All they gave in evidence was that the Akarigbo made a grant of the land to Ladoje. This is contrary to their pleadings. (pp. 2804 G/2805 B)

Claims - Declaration of right - Entitlement thereto

5. I read in the Brief of the plaintiffs/respondents that the defendants/appellants admitted the claim for declaration; therefore, there was no need to prove same. It is now totally settled in law that, a court does not grant declaration of right either in default or on admissions without taking evidence and being satisfied that the evidence led is

credible. (p. 2806 A)

FAIR HEARING - Breach - Applicability

6. The gravamen of the appellants' complaint in issue No. 5 is, whether the decision of the court to reject a Deed of Conveyance tendered by the defendants/appellants is not a nullity having regard to the fact that when objection was taken to its being tendered by the counsel for the plaintiffs/respondents, the counsel to the defendants/appellants was not heard on the issue before a ruling rejecting the document was handed down. I have examined the records of proceedings and I found that the counsel for the defendants/appellants was not called upon before the ruling on this matter was delivered. To this extent, the trial court breached the principles of Fair Hearing. For whatever it is worth, the court below could have made that pronouncement. The result is that I resolve, issue No. 5 on the appellants' Brief in their favour. (p. 2806 E)

NOTABLE POINTS OF INTEREST

ADEREMI JSC

1. *Land law - Reliefs - No perpetual injunction at instance of a limited owner*

On the face of the pleadings and if the root of title pleaded which is "*Settlement*" were maintained and proved, the afore-mentioned relief 3 would have been sustainable. But in their viva voce evidence, particularly that of P.W.2, it is clear that a case of Grant was instead put up. They gave evidence that the absolute ownership of the entire land resided in the Akarigbo. But, unfortunately the Akarigbo was not made a party to this case and yet, they are claiming perpetual injunction. This court in Chief Dada, The Lojaoke v. Chief Shittu G Ogunremi & 15 Ors. (1967) 1 NMLR 181, this court (Supreme Court) said and I quote:-

"It is improper to grant a perpetual injunction at the instance of a limited owner when the owners of the absolute interest is not made a party to the case."

Going by their evidence, were they to prove their case, they would have been limited owners and they would not be entitled to the third relief which is for perpetual injunction. (p. 2803 E)

2. *Land law - Title - Declarations - It is improper to declare title in favour of a 3rd party not joined*

Again, I have said, borne out of the state of the pleadings and the evidence adduced that the Akarigbo is obviously not a party to this case. Were there to be credible evidence laid before the trial court in support of the contention that the Akarigbo is the overlord of the entire land; would it have been proper in law, for the court to declare the Akarigbo the absolute owner of the entire land? I am in entire agreement with the submission of the appellants in their Brief of Argument that if a party whose title to land is affected is not joined in the suit as a party, a judgment declaring him the owner will not enure in his favour. I have read the case of *Atunrase v. Sunmola* (1985) 1 NWLR (Pt.1) 105, a decision of this court, it reinforces that submission. (p. 2803 H)

OGBUAGU JSC (Dissenting)

3. *Declaration of title could be made without the need of a plan where land is easily identifiable*

I note that this case started in the Customary Court of Ogun State Grade 2, holden at Sagamu and it was later transferred to the High Court, Sagamu. It need be stressed and this is also settled that first, where the land in dispute, is known to the parties, and there is no difficulty in identifying the land, a declaration of title may be made without it being based on a plan. So also an order for an injunction, could be made in respect of land which is easily identifiable without a plan. (p. 2818 H)

G 4. *Exhibit A is not a documentary evidence of transaction on land*

It need be stressed that Exhibit A, is not a documentary evidence of sale or transaction in respect of land under native law and custom where the principle that documentary evidence is unknown to native law and custom will apply. It is only a letter which is relevant to the issue in controversy between the parties. Period! (p. 2822 G)

5. *Court of Appeal was right in taking judicial notice of book on Yoruba custom*

Thirdly, that it cannot be disputed that Rev. Dr. Johnson's said Book on the History of the Yorubas, is an acknowledged book of reference on Yoruba Custom. I am satisfied that it is a book published many years ago and have been referred to and used both by legal practitioners and some lower courts. This is a 1995 suit and the book, can hardly be in circulation at the moment. The learned Justices of the court below who I take Judicial knowledge are Yorubas, cannot or could not refer to and rely in their said Judgment on a non-existent book. They were therefore, right and justified, in taking Judicial notice of the said reference book. (p. 2823 H)

REPRESENTATION

L. O. Fagbemi, SAN., (with him; Soji Olowolafe, H. O. Afolabi, and K. O. Fagbemi), for the Appellants.

O. O. Ojutalayo, (with him; R. A. Balogun), for the Respondents.

CASES REFERRED TO

Kode v. Yussuf (2001) 2 S.C. 85; (2001) 4 NWLR (Pt. 703) 392

Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301

Adesanya v. Aderounmu (2000) 9 NWLR (Pt.672) 370

Oyedeji v. Akinyele (2002) 3 NWLR (Pt.755) 586

Pasco Vehicle & Plant Hire Co. v. Alraine (Nig.) Ltd. (1995) 8 NWLR (Pt.416) 655

Bakare v. Ibrahim (1973) 6 S.C. 205; (1973) 6 S.C. (Reprint) 147

Oshodi v. Eyifunmi (2000) 13 NWLR (Pt. 684) 298

Adeniji v. Fetuga (1990) 5 NWLR (Pt. 150) 375

Akinsanya v. Soyemi (1998) 8 NWLR (Pt.560) 49

STATUTE REFERRED TO

Evidence Act, ss. 14 (1), (2), & (3), 74 (1), (2), & (3), 77, 99, 111 (1), 112, 116 & 117

BOOKS REFERRED TO

Halsbury Laws of England, 4th Edn, Re-issue, Vol. 36 (1)

Halsbury Laws of England, Vol. 38, Article 1214, page 744

Johnson, Samuel (Rev.), History of the Yoruba, 6th Edn, page 95

LEAD JUDGMENT BY ADEREMI JSC

This is an appeal against the judgment of the Court of Appeal (Ibadan Division) delivered on the 8th of May, 2001. Suffice it to say that by that judgment, the court below dismissed the appeal of the present appellants which they had lodged against the judgment of the trial court which was given against them. Before I go on, I will like to preface this judgment with the background facts leading to the present appeal under consideration.

The action leading to the present appeal was originally commenced in the Customary Court, Grade 2 No. 2, sitting at Sagamu, Ogun State on the 21st May, 1985. But by a letter dated 26th July, 1985, written by the Registrar, Ijebu Remo Grade 1 Customary Court, Sagamu, addressed to the Principal Registrar, High Court of Justice, Sagamu, the entire case was transferred to the High Court of Justice, Sagamu. In that court, pleadings were ordered and the parties filed and exchanged their respective pleadings.

With the leave of court, both parties effected several amendments to their respective pleadings. The final amended pleadings upon which the plaintiffs (hereinafter referred to as the respondents) predicated their case is the 2nd Further Amended Statement of Claim and plan dated 1st March, 1994, but filed on 15th March, 1994. Of course, an Amended Reply by the order of court dated 15th March, 1994 and filed the same date in response to the 4th Amended Statement of Defence of 1st to 6th defendants also constituted the basis on which the respondents/plaintiffs based their case. The defendants (hereinafter referred to as the appellants) predicated their defence on the process captioned 6th Amended Statement of Defence. By paragraph 37 of the 2nd Further Amended Statement of Claim and plan, the plaintiffs/ respondents claimed against the defendants/appellants as follows:-

“(1) Declaration that they are entitled to Certificate of Occupancy or Customary Right of Occupancy over the land in dispute more particularly described in Exhibit E tendered in this suit.

(2) N1,000.00 damages for trespass committed by the defendants, their agents and/or servants when they jointly and severally entered the disputed land in exclusive possession of the plaintiffs on

or about the 12th day of February, 1985, without the consent and/or authority of the plaintiffs; and

(3) *Perpetual injunction restraining the defendants, their agents, servants and/or privies from further entry into the said land.*"

The root of title of the plaintiffs/respondents to the land in dispute said, to be situated at Agura, a contraction of the word "Ago-Ora" originally given to the land because of its fertility, is founded on "Settlement." Paragraphs 3, 5 and 6a of the 2nd Further Amended Statement of Claim and plan, which are the foundation of this crucial averment, read:-

Paragraph 3

"One Ladoje (male) one of the children of late Oba Akarigbo Koyelu left Ofin homestead very many years ago to settle on and cultivate a parcel of farmland then known as "Ago-Ora" because of the fertility of the farmland."

Paragraph 5

"At about the time of this settlement by Ladoje, one Jumilu, then Chief Losi of Ofin homestead, also settled in another part of the land and used same for his own farming purposes."

Paragraph 6a

"This settlement by Ladoje has among its' boundaries the farmland of the Aroba Family from Ofin homestead who up till today are still in possession and are still cultivating their said farmland and are also exercising exclusive possessory rights over same."

(Underlining mine for emphasis)

The defendants/appellants did not counter-claim. At the trial court, both parties led evidence in support of their respective averments in their pleadings. In the course of leading evidence, the plaintiffs/respondents called as P.W.1., a Prince Adesoji Olusesi who held himself out as the Head of Personnel, Sagamu Local Government; tendered as Exhibit A, a letter dated 30/11/83, written by His Royal Highness, Oba Moses Awolesi, the Akarigbo of Remo land. The salient contents of Exhibit A are as follows:-

"It has long been established that the vast area of land between Okun-Owa, bounded by Egba Land and Ijebu-Ode stretching to the lagoon at Ipaomola belongs to the Akarigbo of Ijebu-Remo. The Treaty signed by the then Imperial Power; the British Govern-

ment with the Akarigbo, Oba Oyejajo and his Chiefs on 4th August, 1894 refers, Oladoje, son of Akarigbo Koyelu, first settled on the land (Ago Ora or Agura). He was put there by his father, Oba Akarigbo Koyelu for farming purpose, of which was then known and is still called Agura Community Land.”

B Another crucial witness called in support of the plaintiffs/ respondents’ case was PW.2 - Oba Adeyemi Lawal, a member of the plaintiffs’ family and indeed the first plaintiff in this case, he said in his evidence before the court inter alia: -

C *“I also know the land in dispute, it belongs to our father - Ladoje a direct descent (sic) of Akarigbo “Koyelu.”*

He (PW.2) in his evidence further told the court that the Akarigbos, past or present, exercise dominion over the Agura land and reserved the right to allocate land to anybody he wished. He D (PW.2) was even emphatic that Oba Akarigbo gave the land to Ladoje.

And after the respective addresses of counsel had been taken, the trial Judge, in a reserved judgment, held inter alia:

“PW.2 testified in a convincing manner how Ladoje his forefather first settled on the land..... and of course the land in dispute which he said belonged to their late father Ladoje, a direct descendant of Akarigbo “Koelu” and on which land Ladoje’s father put him Ladoje, when they were at the home- E stead of Offin (Offin stead) about 200 years ago..... tra- ditional evidence is one of the five ways of proving title to land and if F a party’s title is proved by traditional evidence, there is no need to refer to acts of possession and ownership I believe the traditional evidence of PW.2, PW.6 and PW.7

On the evidence, I am particularly more convinced by the G evidence of PW.2 - Oba Adeyemi Lawal- a Traditional Ruler, who by his status and position in the community, is not only in a position to know the true facts in the land dispute, especially in his domain, but would have no need to, and it will also be difficult for him to twist the truth. His evidence that his great ancestor Ladoje..... first settled H on the land which devolves now on, and now inherited by his chil- dren..... is traditional evidence, that of traditional history and tradition, which is not in conflict with any other evidence and so conclusive and same is found to be co-

gent and enough to support the claim for declaration of title..... On the whole, the plaintiffs have established by credible evidence, as required by law, to warrant the court make order for the reliefs sought, and there are also facts in the defendants' case, which support the plaintiffs' case. I believe and accept the evidence of the plaintiffs' witnesses." B

Dissatisfied with the judgment of the trial court, the defendants appealed to the court below (the Court of Appeal) which court after taking arguments of the counsel in the appeal, in a reserved judgment delivered on 8th May, 2001, unanimously dismissed the appeal while affirming the judgment of the trial court, in so doing the court below held inter alia: - C

"There is a letter Exhibit A before the court in respect of this acquisition. The letter indicated that Oladejo (sic) first settled on the land. He was there to cultivate the land. This read together with the evidence of P.W.2, Oba Adeyemi Lawal that his father Akarigbo Koyelu put him on the land called Agura - as a first settler. D

This was confirmed by the evidence of P.W.6 - Emmanuel Olubowale Olufotebi - that this family had been boundary men to Agura people from time immemorial. No other family has occupied the farmland before the Agura people. Finally, the myth in Yoruba land was that all land belongs to the King - who before the Land Use Act, held land in trust for his tribe. Land cannot pass directly to a holder without the permission of the King..... The respondent did not give evidence of grant I hold that the judgment of the lower court was not afflicted by any of the foregoing hence, this court as an appellate court has no business to interfere with or disturb the judgment of the trial court. The appeal shall be and is hereby dismissed for lacking in merit." E F G

It is against the judgment of the court below that the defendants/appellants have lodged an appeal to this court. The original Notice of Appeal dated 28th June, 2001, but filed on the 3rd of July, 2001, has incorporated into it seven grounds of appeal. With the leave of this court, the appellants added eight additional grounds. Hence, in the Amended Notice of Appeal dated 9th October, 2003, which was accorded the order of this court on the 14th of June, 2005, a total of fifteen grounds of appeal were incorporated. The H

appellants filed their Brief of Argument on the 22nd of October, 2003, and the appellants Reply Brief filed on 24th April, 2007. For their part, the respondents filed their Brief of Argument on the 5th March, 2007. The appellants, in their aforesaid Brief of Argument, identified five issues from the fifteen grounds and as set out in their Brief, they

B are in the following terms :-

“(1) Whether the court below can rightly take judicial notice of an unpleaded custom and if not, whether its conclusion on such custom ought not to be set aside?”

C *“(2) Whether the plaintiffs proved their root of title, so as to entitle them to a declaration of title to land and whether a declaration can be granted on the basis of an admission (if any)?”*

“(3) Whether plaintiffs have the locus standi to maintain this action and whether Exhibit A can be validly used to reach a conclusion that plaintiffs have the requisite Locus?”

D *“(4) Whether a proper evaluation was given to the evidence adduced to warrant the conclusion that plaintiffs’ case is proved, and if not, whether the decision that plaintiffs’ had proved their case should be allowed to stand?”*

E *“(5) Whether the decision to reject a Deed of Conveyance tendered by the defendant is not a nullity for breaching the constitutional rights to Fair Hearing of the defendants?”*

F The respondents, for their part, also raised five issues for determination which, as contained in their Brief of Argument, they are as follows:-

“(1) Whether the Court of Appeal was right in holding that the plaintiffs/respondents have locus standi to bring the action in the first instance?”

G *“(2) Whether the Court of Appeal correctly applied Section 74 (2) of the Evidence Act?”*

“(3) Whether the Court of Appeal was right in confirming the judgment of the High Court having regard to all the evidence on records?”

H *“(4) Whether there was any breach of the Rules of Natural Justice and/or miscarriage of justice?”*

“(5) Whether the Supreme Court will interfere with concurrent findings of fact by the lower of courts?”

I have examined very carefully the two sets of issues raised by the parties. It is my considered view that, issues Nos. 1, 2, 3 and 4 on the appellants' Brief are substantially similar to issues Nos. I, 2, 3 and 4 on the respondents' Brief; I shall therefore take the two of them together. I shall finally take issue No. 5 on the appellants' Brief and issue No. 5 on the respondents' Brief seriatim. B

As I have said above and supported by the relevant paragraphs of the 2nd Further Amended Statement of Claim, the root of title of the appellants as pleaded is Settlement. The appellants in arguing issue No. 1 on their Brief referred to paragraph 3 of the pleadings quoted above and submitted that the only root of title relied upon by them is settlement, the concept of which does not admit of any prior occupation of the land in dispute by another person other than the first settler. He again referred to the viva voce evidence of PW.2 - Oba Adeyemi Lawal who incidentally is the 1st plaintiff/respondent and submitted that it is contrary to their pleadings. The sum total of PW.2's evidence is that the Akarigbo of Remo Land exercises dominion over all Remo Land including the land in dispute and that it was the Akarigbo that made a grant of the land to Ladoje. The custom relating to the ownership of land, it was further submitted, was not pleaded. On this point, it was finally submitted that the custom of exercise of dominion by the Akarigbo was not pleaded but evidence of same was proffered and that evidence being inadmissible; ought not to have been acted upon by the trial Judge. It was finally submitted that it was wrong for the court below to have resorted to the Yoruba custom of all lands belonging to the King to give such evidence any legal efficacy; they prayed that the appeal be allowed on this point. On issue No. 2 therein, it was their submission that both courts fell into serious error of law when the trial court granted declaration of title to land in favour of the plaintiffs/respondents predicated on traditional history which was never pleaded nor even proved in law. It was also part of their submission that having pleaded "Settlement" in an unmitigated term it was wrong in law, to admit in evidence the testimony of P.W.2 which presents a case of Grant by Akarigbo. Having regard to the serious inconsistency in the evidence of respondents which the trial court admitted as correct in law and acted thereon, the court below (Court of Appeal) ought to have al- C
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lowed the appeal instead of affirming the judgment which is patently wrong in law. A number of cases such as Kode v. Yussuf (2001) 2 S.C. 85; (2001) 4 NWLR (Pt. 703) 392, Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301, Adesanya v. Aderounmu (2000) 6 S.C. (Pt. II) 18; (2000) 9 NWLR (Pt.672) 370 and Oyedeji v. Akinyele (2002) 3
 B NWLR (Pt.755) 586, were relied upon while urging that the appeal be allowed on the above arguments alone and a dismissal of the plaintiffs/respondents' case in toto be ordered.

The respondents on the other hand, through their Brief of
 C Argument, submitted that the custom relied upon by them was pleaded in paragraph 4 of their Further Amended Reply to the 4th Amended Statement of Defence and that P.W.2 gave evidence in support of it. Surprisingly, it was argued in their Brief that the case of the plaintiffs/respondents as could be gleaned "from the pleadings, is
 D that, Ladoje, their ancestor, a son of Akarigbo Koyelu left Offin Homestead and was put on a larger area of land by his father and he settled and farmed thereon. I wish to quickly say that this submission is totally contrary to the pleadings. Their case or their root of title as clearly pleaded is Settlement. They further opined that the contents of Exhibit A - the letter written by the Secretary of Ofin Local Government
 E - supports their case, adding that the appeal be dismissed. On issues Nos. 3 and 4, the respondents, through their Brief of Argument, reiterated their submissions on the issue of Settlement or Grant adding that the court below was right in affirming the decision of the trial
 F court, when according to them, the respondents pleaded their traditional history of genealogy through Ladoje and adduced evidence accordingly and that having succeeded on traditional evidence, the respondents need not rely on acts of possession. The evidence that
 G Ladoje first occupied the land for farming purposes is unassailable, it was submitted.

***Where a party to a case or a land case places reliance on a statement that the dominion over a large parcel of land which includes the land he is claiming resides in a King and
 H that it was the King that granted him his own land, he is relying on no more than a Custom or the Customary Law of that locality where the, land is situate. Custom or Customary Law is a set of rules of conduct applying to persons and things in a***

particular locality. Let me say that it is of the characteristics of a custom or Customary Law that it must be in existence at the relevant time and must be recognised and adhered to by the inhabitants of the community to make it binding. See *Lewis v. Bankole* (1908) 1 NLR 81. **In relation to adjudication, custom is a question of fact which must be pleaded and proved by independent witness or witnesses.** B

Section 14 (1) (2) and (3) of the Evidence Act, which is germane to this case provides: -

Section 14(1)

“A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist, by evidence; the burden of proving a custom shall lie upon the person alleging its existence.” C

Section 14 (2)

“A custom may be Judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.” D

Section 14(3)

“Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them: F

PROVIDED that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.” G

And see (1) *Giwa v. Erinmilokun* (1961) SCNLR 337, (2) *Olagbemiro v. Oba Ajagunbade III & Anor.* (1990) 5 S.C. (Pt. I) 61; (1990) 3 NWLR (Pt. 136) 37. **The plaintiffs/ respondents have forcefully in their Brief, argued that the custom was pleaded. I have carefully looked at the 2nd Further Amended Statement of Claim and plan filed by them, there is nothing suggestive of a plea of** H

custom that the Akarigbo exercises dominion over the land.

They later submitted that the custom was pleaded in the Further Amended Reply to the Statement of Defence of 1st - 6th defendants in paragraph 4 therein as follows: -

B *“The plaintiffs will contend at the hearing of this suit that the entire Agura land which Sabo Ofin Sagamu forms part of had been from time immemorial under the overall authority of the Akarigbo.....”*

C The above averment is so vital to the case of the plaintiffs/respondents, indeed, it is the foundation of their case given the viva voce evidence they led. Therefore, its permanent resting place is in the Statement of Claim of the plaintiffs or in the amended process with the leave of court. It cannot be raised afresh in a Reply or Amended Reply of the plaintiff to the defence already filed and served D on them. ***Let it be noted that a Reply is the defence of the plaintiff to the case put forward by the defendant or even to the counter-claim of the defendant or to the new facts raised by the defendant in his defence to the plaintiffs’ Statement of Claim. A plaintiff is not allowed, in law to introduce new issue, indeed***

E ***fundamental issue as that in the instant case. Without the leave of court. A plaintiff must not in his Reply make any allegation of fact or raise any new ground of claim different from what is contained in his Statement of Claim. If a plaintiff does, such a plea is irretrievably bad in law and no evidence will be admis-***

F ***sible on its proof.*** See (1) Pasco Vehicle & Plant Hire Co. v. Alraine (Nig.) Ltd. (1995) 8 NWLR (Pt.416) 655, (2) Bakare v. Ibrahim (1973) 6 S.C. 205; (1973) 6 S.C. (Reprint) 147, (3) Oshodi v. Eyifunmi (2000) 7 S.C. (Pt. II) 145; (2000) II WRN 86 or (2000) 13 NWLR G (Pt. 684) 298, (4) Adeniji v. Fetuga (1990) 5 NWLR (Pt. 150) 375 and (5) Akinsanya v. Soyemi (1998) 8 NWLR (Pt.560) 49. ***I shall therefore not countenance that pleading. As I have said, it is an irretrievably bad pleading in law.*** Were the custom to have been properly pleaded, another great hurdle to cross is whether it H had acquired such notoriety in its application and usage among the inhabitants of the community to be capable of being judicially noticed? There is no evidence in this regard to make the assertion that the Akarigbo of Remo Land is the overlord of all vast parcel of land

in that community; no decided case of a superior court was placed before the court of trial. The custom is not such a notorious one as to be judicially noticed. The only mere assertion on this point was that made by P.W.2 -Oba Adeyemi Lawal, the 1st plaintiff/respondent. Will this sustain the proof? I think not. See *Ojemen & Ors. v. H. H. Momodu II (The Ogirrua of Irrua) & Ors.* (1983) 3 S.C. 173. B

It was also argued by the respondents that Exhibit A the contents of which I reproduced supra, goes to support the overlordship of the Akarigbo over the land. I debunk the legal value of this exhibit by first saying that it was never properly pleaded. Secondly, it is a well established principle of law that documentary evidence is unknown to Native Law and Custom. See: (1) *Ajadi v. Olanrewaju* (1969) 1 ALL NLR 382 and (2) *Egwu v. Egwu* (1995) 5 NWLR (Pt.396) 351. One more point before I finish with the arguments of this point; the plaintiffs/respondents had in their relief No. 3 paragraph 37 of the 2nd Further Amended Statement of Claim and plan claimed as follows:- D

“Perpetual injunction restraining the defendants, their agents, servants and/or privies from further entry into the said land.”

On the face of the pleadings and if the root of title pleaded which is “*Settlement*” were maintained and proved, the afore-mentioned relief 3 would have been sustainable. But in their viva voce evidence, particularly that of P.W.2, it is clear that a case of Grant was instead put up. They gave evidence that the absolute ownership of the entire land resided in the Akarigbo. But, unfortunately the Akarigbo was not made a party to this case and yet, they are claiming perpetual injunction. This court in *Chief Dada, The Lojaoke v. Chief Shittu Ogunremi & 15 Ors.* (1967) 1 NMLR 181, this court (Supreme Court) said and I quote: F

“It is improper to grant a perpetual injunction at the instance of a limited owner when the owners of the absolute interest is not made a party to the case.” G

Going by their evidence, were they to prove their case, they would have been limited owners and they would not be entitled to the third relief which is for perpetual injunction. Perhaps, they would have been entitled to just an order of injunction. Again, I have said, borne out of the state of the pleadings and the evidence adduced H

that the Akarigbo is obviously not a party to this case. Were there to be credible evidence laid before the trial court in support of the contention that the Akarigbo is the overlord of the entire land; would it have been proper in law, for the court to declare the Akarigbo the absolute owner of the entire land? I am in entire agreement with the submission of the appellants in their Brief of Argument that if a party whose title to land is affected is not joined in the suit as a party, a judgment declaring him the owner will not enure in his favour. I have read the case of *Atunrase v. Sunmola* (1985) 1 NWLR (Pt.1) 105, a decision of this court, it reinforces that submission.

As I have shown above, the root of title pleaded by the respondents is simply Settlement but in the viva voce evidence it was shown in evidence that the Akarigbo whom they held out as the overlord made a grant of the land in dispute to Ladoje. The court below after affirming the findings of the trial court on this issue, held as follows: -

"There is a letter Exhibit A before the court in respect of this acquisition. The letter indicated that Oladejo (sic), first settled on the land. He was therefore to cultivate the land. This read together with the evidence of P.W.2, Oba Adeyemi Lawal that his father, Akarigbo Koyelu put him on the land called Agura - as a first settler. This was confirmed by the evidence of P.W.6, Emmanuel Olubowale Olufotebi - that his family had been boundarymen to Agura people from time immemorial. No other family had occupied the farmland before the Agura people. Finally, the myth in Yorubaland was that all land belongs (sic) to the King who before the Land Use Act, held land in trust for his tribe. Land cannot pass directly to a holder without the permission of the King. History of the Yoruba, Rev. Samuel Johnson 6th Edition page 95, the respondent did not give evidence on grant."

With due respect, I am of the clear view that the court below seriously erred in law in its above summation. In the first place, it is axiomatic that parties are bound by their pleadings. Therefore, any evidence led by any of the parties which does not accord with the averments or which is at variance with them goes to no issue and must be disregarded by the court. In the instant case, the plaintiffs/respondents claimed for declaration of title predicated on their averment of "*Settlement*." In

the recent case of Yusuf v. Adegoke & Ors. (2007) 4 S.C. (Pt. I) 126; (2007) II NWLR (Pt. 1045) 332,1 observed at page 358 thus:-

“Let me repeat here, the plea of the plaintiffs/respondents in paragraph 3 of the Statement of Claim is one of special Grant - Grant of land from Aleshinloye to Odetunde - no scintilla of evidence was led in support. That was grave to the case presented and it knocked the bottom out of the case which as at that state qualified for nothing but a dismissal order.” B

In the instant case, I repeat, it is “Settlement” that was pleaded as their traditional history. Settlement in its legal term here means that nobody other than the person pleading it first settled on the land. There is no scintilla of evidence that Ladoje was the first person that settled on the land. All they gave in evidence was that the Akarigbo made a grant of the land to Ladoje. This is contrary to their pleadings. In *Odofin v. Ayoola* D (1984) 15 NSCC 711, this court per the judgment of Karibi-Whyte, JSC., observed at page 720 thus-

“It is well settled that where a plaintiff relies on a grant or original settlement as title to claim the land in dispute, the burden is on him to establish such grant or original settlement - this he can do by cogent and acceptable evidence of tradition, whether or not accompanied by exercise of dominion which also may be sufficient to establish title . It follows therefore that where traditional evidence of that alleged from which the title is derived, is lacking or rejected, as was in this case, such evidence is not only merely inconclusive but also cannot be relied upon whether any other acts positive or numerous can support evidence of ownership.” E
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Going by the above dictum, the evidence led by the plaintiffs/respondents cannot be relied upon; it is totally lacking in legal efficacy. I have earlier again pointed out that the plaintiffs/respondents claimed for declaration of title. In the same case of Yusuf supra, which is materially similar in principle to the instant case except for the terminology used in relying on traditional history, I said at pages 359 - 360 thus- G
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“It should not be forgotten that in the instant case, the plaintiffs/respondents claimed a declaration of title based on grant from Aleshinloye to Odetunde under Yoruba Native Law and Custom.

Unless the origin of their title is valid, that it was established by credible evidence, even if there was copious evidence of possession the length of possession does not ripen invalid title to a valid ownership of title."

I read in the Brief of the plaintiffs/respondents that the defendants/appellants admitted the claim for declaration; therefore, there was no need to prove same. It is now totally settled in law that, a court does not grant declaration of right either in default or on admissions without taking evidence and being satisfied that the evidence led is credible. See (1) Motunwase v. Sorungbe (1988) 12 S.C. (Pt. I) 130; (1988) 5 NWLR (Pt.92) 90, (2) Udo v. CSNC (2001) 14 NWLR (Pt.732) 116 (3) Belle v. Eweka (1981) 1 S.C. 101; (1981) 1 S.C. (Reprint) 63 and (4) Ogunjumo v. Ademolu (1995) 4 NWLR (Pt. 389) 254.

Flowing from all I have been saying, the conclusion I reach with respect to the issues I have considered is that issues Nos. I, 2, 3 and 4 on the appellants' Brief are hereby answered in the negative. Similarly, I answer the corresponding issues Nos. I, 2, 3 and 4 on the respondents' Brief in the negative.

The gravamen of the appellants' complaint in issue No. 5 is, whether the decision of the court to reject a Deed of Conveyance tendered by the defendants/appellants is not a nullity having regard to the fact that when objection was taken to its being tendered by the counsel for the plaintiffs/respondents, the counsel to the defendants/appellants was not heard on the issue before a ruling rejecting the document was handed down. Before I answers this question, I wish quickly to say that the defendants/appellants did not counter-claim and no declaratory judgment can be made in their favour. ***I have examined the records of proceedings and I found that the counsel for the defendants/appellants was not called upon before the ruling on this matter was delivered. To this extent, the trial court breached the principles of Fair Hearing. For whatever it is worth, the court below could have made that pronouncement. The result is that I resolve, issue No. 5 on the appellants' Brief in their favour.*** Issue No. 5 on the respondents' Brief poses the question, whether this court (Supreme Court) can interfere with concurrent findings of

facts by the two lower courts? The general rule, as regards two concurrent findings of facts, is that such findings will not be disturbed by the appellate court (the like of this court) unless there is a substantial error apparent on the record of proceedings. See *Chinwendu v. Mbamali & Anor.* (1980) 3- 4 S.C 31; (1980) 3-4 S.C. (Reprint) 21. Where however, not to interfere with the concurrent findings of facts will occasion miscarriage of justice, an appellate court (again, the like of this court) will readily interfere. See *Coker v. Oguntola & Ors.* (1985) 6 S.C. 223. B

From the review of the evidence that I have undertaken, it is beyond argument that there is a substantial error on the face of the records. The evidence admitted and acted upon by the trial court has no legal support. The lower court (as an appellate court) endorsing the judgment of the trial court on such evidence also fell into serious legal error. Should this court fail to interfere with these findings, incalculable injustice would have been done. It is for this reason that I answer issue No. 5 on the respondents' Brief in the affirmative. C

Having answered all the issues raised in this appeal, the inevitable conclusion that I reach is that this appeal is meritorious. It is hereby allowed. The judgments of the two courts below are hereby set aside; in like manner, I set aside the costs of N1,000.00 awarded by the trial Judge in favour of the plaintiffs/respondents but against the defendants/appellants; I equally set aside the costs of N1,000.00 awarded by the court below in favour of the plaintiffs/respondents but against the defendants/appellants. I hereby award the sum of N1,000.00 as costs to which the defendants as appellants would have been entitled against the plaintiffs as respondents now before us; the sum of N10,000.00 is also awarded in favour of the appellants before the court below (now appellants before us) but against the respondents before that court who are presently the respondents before us. The claims of the plaintiffs/respondents as set out in paragraph 37 of the 2nd Further Amended Statement of Claim and plan are consequently dismissed in toto. I now assess and award the sum of N50,000.00 (Fifty Thousand Naira) as costs of this appeal in favour of the appellants but against the respondents. D
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ONU JSC

Having had the opportunity to read in draft the leading judgment of my learned brother, Aderemi, JSC. I am in entire agreement with him that the appeal is meritorious and it is hereby allowed by me. I similarly award costs as assessed in appellant's favour.

B

MUSDAPHER JSC

I have read before now the judgment of my Lord, Aderemi, JSC., just delivered with which I entirely agree. For the same reasons so eloquently discussed in the aforesaid judgment which I respectfully, adopt as mine, I too, find the appeal meritorious and I allow it. The judgments and orders of the two courts below in this matter are set aside by me. The claims of the respondents as plaintiffs at the trial court as set out in paragraph 37 of the Second Further Amended Statement of Claim be and are hereby dismissed. The appellants are entitled to the costs as proposed in the aforesaid judgment.

D

MUKHTAR JSC

This appeal is against the judgment of the Court of Appeal, Ibadan Division, which affirmed the decision of the High Court of Justice of Ogun State which granted the reliefs sought by the plaintiffs who are now the respondents in this appeal. The reliefs are as follows:-

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"1. Declaration that they are entitled to Certificate of Occupancy or Customary Right of Occupancy over the land in dispute, more particularly described in Exhibit EE tendered in this suit.

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2. N1,000.00 damages for trespass committed by the defendants, their agents and/or servants when they jointly and severally entered the disputed land in exclusive possession of the plaintiffs on or about the 12th day of February, 1985, without the consent and/or the authority of the plaintiffs; and

G

3. Perpetual injunction restraining the defendants, their agents, servants and/or privies from further entry into the said land."

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Dissatisfied with the decision of the Court of Appeal, the defendants have appealed to this court on fifteen grounds of appeal, from which five issues for determination were distilled in the appellants' Brief of Argument as follows:-

“(1) Whether the court below can rightly take judicial notice of an unpleaded custom and if not, whether its conclusion on such a custom ought not to be set aside? (Ground 2)

“(2) Whether the plaintiffs proved their root of title, so as to entitle them to a declaration of title to land and whether a declaration can be granted on the basis of an admission (if any)? (Grounds 6^B and 7).

“(3) Whether plaintiffs have the locus standi to maintain this action and whether Exhibit A can be validly used to reach a conclusion that plaintiffs have the requisite locus? (Grounds 1,3 and 4).^C

“(4) Whether a proper evaluation was given to the evidence adduced to warrant the conclusion that the plaintiffs’ case is proved, and if not, whether the decision that plaintiffs had proved their case should be allowed to stand? (Grounds 5, 8, 9, 10, 12, 13 and 15).

“(5) Whether the decision to reject a Deed of Conveyance tendered by the defendant is not a nullity for breaching the constitutional rights to Fair Hearing of the defendants? (Ground 14).”^D

In this judgment, I will highlight arguments on issues (1) (2) and (4) supra, which are in pari materia with some of the issues raised in the respondents’ Brief of Argument. Perhaps I need to examine the pleadings of the plaintiffs/respondents to be able to deal particularly with issues (1) and (2). Statement of Claim, Amended Statement of Claim and Further Amended Statements of Claim have been filed, likewise Statements of Defence and Reply to the Statements of Defence etc. In the Second Amended Statement of Claim can be found the following crucial and salient averment:^E
^F

“3. One Ladoje (male) one of the children of late Oba Akarigbo Koyelu, left Ofin homestead very many years ago to settle on and cultivate a parcel of farmland then known as: "Ago Ora" because of the fertility of the farmland.”^G

As far as this averment is concerned it goes without saying that the plaintiff pleaded and relied on the traditional history of settlement i.e. that their ancestors were the first to settle on the land in dispute Then in the Reply to the Fourth Amended Statement of Defence of 1st - 6th defendants:-^H

“4. The plaintiffs will contend at the hearing of this suit that the entire Agura land which Sabo Ofin Sagamu forms part of had from

time immemorial been under the overall authority of the Akarigbo and not any Olori-Illu of Ijoku so much so that after the settlement of the Hausas in Sabo Ofin Sagamu which settlement was on part of Agura land. Disputes between natives and non-natives were settled by the Sarkin Hausawa (Head of Hausa Community) and not by any Olori-Illu of Ijoku and appeal was made to the Akarigbo.....”

A different root of title of grant was brought into the case vide the evidence of PW.2 which reads inter alia thus:-

“I also know the land in dispute, it belongs to our father - Ladoje a direct descent (sic) of Akarigbo Koyelu”. About 200 years ago when we were at Offin Stead, his own father put him on the land.”

The above piece of evidence of course is at variance with the Statement of Claim, and it should have been ignored by the trial court. What I would like to do at this juncture is to consider the function and purport of pleadings, particularly, Statements of Claim, and Reply to Statement of Defence. The authors of Halsbury’s Laws of England Fourth Edition Re-issue Volume 36(1) have described a Statement of Claim thus on page 38:-

“A Statement of Claim is the pleadings which the plaintiff sets out the facts on which he relies as showing that he is entitled to the intervention of the court in his favour or against the defendant. The cause of action disclosed in the Statement of Claim should be the same as that in the writ. The Statement of Claim must set out in a summary form the material facts on which the plaintiff relies for his claim, and must state specifically and show the ground for the particular relief remedy claimed, although costs need not be specifically claimed.”

Then on Page 48, Reply to Statement of Defence:-

“The Reply is the plaintiffs answer to the defence. Where the plaintiff merely wishes to deny the allegations in the defence, no Reply is needed and none should be served, for if no Reply is served there is an implied joinder of issue on the defence. If however the plaintiff wishes to raise specifically any matter in answer such matters or facts must be specifically pleaded and a Reply is thus required.”

The above reproductions succinctly state the purport of the

said pleadings. The Statement of Claim is supposed to contain the facts of the cause of the action of a party or parties which it relies on, and on which he wants the court to intervene and give remedy on the wrong complained of. It must specifically contain the facts the party relies upon for the determination of the suit that has been instituted. The instant case which is one for declaration of title to land, one of the five ways of claim of ownership must be pleaded. In this case the root of title, it is traditional history which on the face of the Statement of Claim is that of settlement. Having predicated their title on settlement, the plaintiffs should have been consistent in their case. The Justices in my view erred when in the leading judgment it was stated thus:-

“There is a letter Exhibit A before the court in respect of this acquisition. The letter indicated that Oladejo first settled on the land. He was there to cultivate the land. This read together with the evidence of P.W.2, Oba Adeyemi Lawal that his father, Akarigbo Koyelu put him on the land called Agura as first settler. This was confirmed by the evidence of P.W.6, Emmanuel Olubowale Olufotebi that this family had been boundary men to the Agura people from time immemorial. No other family had occupied the farmland before the Agura Family. Finally, the myth in Yorubaland was that all land belongs to the King - who before the Land Use Act, held land in trust for his tribe. Land cannot pass directly to a holder without the permission of the King. History of the Yoruba Rev. Johnson 6th Edition page 95. The respondent did not give evidence of grant.”

The above is not in consonance with the pleading of the respondents. Moreover, it was akin to making findings on grant and settlement at the same time, when in fact there is a difference between the two. See *Dokubo v. Omoni* (1999) 6 S.C. (Pt. I) 94; (1999) NWLR (Pt. 616) 647. Perhaps I should at this juncture reiterate the position of the law on proof of a claim for the declaration of title to land. The settled law is that to succeed on such a claim, a party must plead and prove any of the five different ways of ownership to land, see *Idundun v. Okumagba* (1976) 9-10 S.C 227; (1976) 9-10 S.C. (Reprint) 140. The party after the pleading has been properly set out must adduce cogent and sufficient evidence to prove that he has good title to the piece of land in controversy, see *Adegboyega v. Igbinosun* (1969) 1 All NLR 1 and it will not be allowed to rely on the

weakness of its opponent, see *Elufisoye v. Alabetutu* (1968) NMLR 298, and *Oladimeji v. Oshode* (1968) 1 All NLR 417.

In the same vein, if it is relying on custom it must plead and prove it by direct and credible evidence right from the onset. All the above principles have not been met by the respondents, (as plain-
B tiffs) in the trial court, so they did not discharge the onus placed on them by law, and so the onus did not shift. Authorities abound that an action will only succeed on preponderance of evidence. See *Elias v. Omo-Bare* (1982) 7 S.C. 25; (1982) 5 S.C. (Reprint) 13.

C On the complaint of lack of proper evaluation of evidence, I have no doubt in my mind that this was not done by the trial Judge, as the principle laid down in the famous case of *Mogaji v. Odofin* (1978) 3 S.C. 91; (1978) 4 S.C (Reprint) 53, 66, was not met. In that case, *Fatayi-Williams, JSC.*, (as he then was) set out the principle
D thus:-

*“Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all the facts,
E must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it, if that law supports it bearing in mind
F the cause of action, he will then find for the plaintiff. If not, the plain- tiffs’ claim will be dismissed.”*

This inadequacy in proper evaluation was further compounded by the findings of the court below which I have reproduced supra. This court in the circumstances has no choice than to upset this judg-
G ment and set it aside. The appeal therefore is bound to succeed, and I agree with my learned brother, *Aderemi, JSC.*, that the appeal suc- ceeds and it is hereby allowed. I abide by the consequential orders made in the leading judgment.

H **OGBUAGU JSC (DISSENTING)**

This is an appeal against the unanimous decision of the Court of Appeal, Ibadan Division (hereinafter called “*the court below*”) but called by the appellants “*Ibadan Judicial Division*”. Coram: Akintan,

JCA., (as he then was), Onalaja and Adekeye JJCA., on 8th May, 2001, dismissing the appellants' appeal and affirming the judgment of the trial High Court, Abeokuta in the Abeokuta Judicial Division, by Bode Popoola, J., delivered on 1st August, 1996.

Dissatisfied with the said decision, the appellants, have appealed to this court originally on seven (7) grounds of appeal. With leave of this court, additional eight (8) grounds of appeal were added, making a total of fifteen (15) grounds of appeal. However, five (5) issues have been formulated by the appellants which read as follows:-

"(i) Whether the court below can rightly take judicial notice of an unpleaded custom and if not, whether its conclusion on such a custom ought not to be set aside? (Ground 2).

(2) Whether the plaintiffs proved their root of title, so as to entitle them to a declaration of title to land and whether a declaration can be granted on the basis of an admission (if any)? (Grounds 6 and 7).

(3) Whether plaintiffs have the locus standi to maintain this action and whether Exhibit A can be validly used to reach a conclusion that plaintiffs have the requisite locus? (Grounds 1,3 & 4).

(4) Whether a proper evaluation was given to the evidence adduced to warrant the conclusion that plaintiffs' case is proved, and if not, whether decision that plaintiffs had proved their case should be allowed to stand? (Grounds 5,8,9,10,12,13 and 15),

(5) Whether the decision to reject a Deed of Conveyance tendered by the defendant (sic) is not a nullity for breaching the constitutional rights to Fair Hearing of the defendants? (Ground 14)."

On their part, the respondents, have also formulated five (5) issues for determination, namely;

"1. Whether the Court of Appeal was right in holding that the plaintiffs/respondents have locus standi to bring the action in the first instance?"

2. Whether the Court of Appeal correctly applied Section 74 (2) of the Evidence Act?

3. Whether the Court of Appeal was right in affirming the judgment of the High Court having regard to all the evidence on records?

4. Whether there was any breach of the rules of natural justice and or miscarriage of justice?

5. Whether the Supreme Court will interfere with concurrent findings of fact by the lower courts?"

When this appeal came up for hearing on 7th April, 2008, the learned senior counsel for the appellants, Fagbemi, Esqr., (SAN.,) adopted both their Brief of Argument and their Reply Brief. He told the court that the plaintiffs/respondents, pleaded in their Further Statement of Claim, Settlement. He referred to paragraphs 3, 5 and 6 thereof at page 248 of the records and to the evidence of the P.W.2 which he said, was hearsay and which he stated, was relied on by the two lower courts at page 316. He submitted that when a person puts somebody on a land, that it amounts to a grant and that there should be a further plea of how the grantor, got the land. The learned SAN., then referred to Exhibit A and page 315 of the records where he stated that the person who tendered it, just tendered it and that nothing, was said about it. He made some references at pages 248, 315 and 316 of the records and stated that he had treated all these, in their said Briefs. He finally, urged the court to allow the appeal and to enter judgment for the appellants.

Ojitalayo, Esqr., - learned counsel for the respondents with him, Balogun (Miss), also adopted the respondents' Brief said to have been deemed duly filed on 29th March, 2007. He submitted that the respondents' pleaded and led evidence in support of Settlement and equally tendered Exhibit A which he said, confirmed the traditional history or title of the Akarigbo. He said that the appellants through the evidence of P.W.4, tendered Exhibit B which he stated, confirmed the custodian authority of the Akarigbo of Iyabo Land. He referred to page 11 of their Brief to the effect that the maker of Exhibit A, was dead and therefore, the said document, became admissible in evidence and that there could not be any cross-examination. He finally urged the court, to dismiss the appeal and affirm the judgments of the two lower courts. Questioned by my learned brother, Aderemi, JSC., thus:-

"You pleaded Settlement, where is the evidence in respect thereof?"

In answer, learned counsel referred the court to the evidence of P.W.2 to be read together with Exhibit A. Thereafter, judgment was reserved till today.

For purposes of emphasis, it is my respectful view, that the crucial issue, is whether the respondents who pleaded first settlement, preferred evidence in support or whether their pleadings and evidence including documentary evidence in respect thereof, related or relates to a Grant as to the root of their title in respect of the land in dispute. B

Since there are series of amendments in the pleadings of the parties, in order to put the records straight, I note that in paragraph 3 of the Further/Second Amended Statement of Claim, which appears at page 451 of the records, the respondents averred as follows:- C

“3. One Ladoje (male), one of the children of Late Oba Akarigbo Koyelu, left Ofin homestead very many years ago to settle on and cultivate a parcel of farm-land then known as “Ago-Ora” because of the fertility of the farmland.

4. As “Ago-Ora” was a very fertile land; the place, in the course D of time, because known (sic) (meaning became) as and called “Agura” which was the contraction of “Ago-Ora.”

5. At about the time of this settlement by Ladoje, one Tamilu, then Chief Losi of Ofin homestead also settled on another part of the land and used same for his own farming purposes.” E

I note also that the appellants, amended their Statement of Defence, six (6) times - the last one, was when hearing of the case had long started on 21st April, 1992. In fact, the D.W.4, was still testifying. It was filed on 3rd April, 1995. See pages 548 and 565 of the records - Vol. II. The motion to amend, is dated 29th March, 1995 and filed on 30th March, 1995 and was moved and granted on the said 3rd April, 1995. So, the 6th Amended Statement of Defence of the 1st to 5th defendants (no longer 1st to 6th defendants), took effect from the 3rd April, 1995. I note that the respondents, did not file any Reply in respect thereof. The legal effect, is that the respondents, had joined issues on the entire 6th Amended Statement of Defence. In my respectful view, the respondents having joined issues with the appellants, therefore, the Reply to the 4th Statement of Defence of the 1st to 6th defendants, became of no moment or effect. The pleadings that the trial court would have considered was/ is the said 6th Amended Statement of Defence. The consequence of the said pleading or averment in paragraph 4 of the respondents' F G H

Reply to the 4th Amended Statement of Defence, was no longer relevant or became of no moment. What stood before the trial court, in that or this regard, no longer had any effect.

Even assuming that the said pleading in the said Reply, subsisted, the said averment, in my humble and respectful view, must be considered in relation to or in the context of the facts in the said pleading. I say so, because, it must be appreciated that the suit leading to the instant appeal, is/was a land dispute or contest, between the respondents of the Agura Family or Community and the appellants of the Ijoku Community who also, later, settled on a part of the larger parcel of land known as and called Agura. I say so because, the appellants, had averred or pleaded inter alia, as follows;-

in Paragraph 2:

"With reference to paragraphs 3, 4,5,6, 7, 8, 9, 10, 20, 11 , D 12, 13 and 14 of the 2nd Further Amended Statement of Claim, these defendants aver that the land in dispute forms part of a large area of land owned by Ijoku Community to which these defendants belong from time immemorial."

in Paragraph 3;

"These defendants aver that the Ijoku Community was founded by Oba Layanmodu who migrated from Ile-Ife with his people and settled at Ijoku Homestead (now known as Sabo) very many years ago. Oba Layanmodu was the first Olori-Ilu of Ijoku and had been in existence long before Emuren was founded by Oba Ajalorun of Ijebu-Ife who even stayed with Oba Layanmodu on his way to founding Emuren. Oba Layanmodu had lived and reigned at Ijoku (now Sabo) before Oba Oyebajo became the Akarigbo of Ijebu Remo Oba Oyebajo could therefore never have granted refuge to Oba G Layanmodu."

(The underlining mine)

There are other averments/pleadings in the said 6th Amended Statement of Defence that positively and clearly show that material issues have been joined between the parties. This is why in paragraph 11 thereof, it is averred inter alia, as follows:-

"The defendants aver that the plaintiffs are the tenants of Ijoku Community who has (sic) long existed at their homestead (Orile) before Sagamu was founded in 1872."

(The underlining mine)

It was in reaction or response to the said averments, that respondents in paragraph 4 of the Reply to the 1st to 6th defendants, pleaded thus:-

"The plaintiffs will contend at the hearing of this suit that the entire Agura land which Sabo Ofin Sagamu forms a part of had from time immemorial been under the overall authority of the Akarigbo and not by Olori-Ilu of Ifoku so much so that after the settlement of the Hausas in Sabo Ofin Sagamu which settlement was on part of Agura land, disputes between natives and non-natives were settled by the Sarkin Hausawa (Head of Hausa Community) and not by any Olori-Ilu of Ifoku and appeal was made to the Akarigbo."

(The underlining mine).

The context or circumstances in which this pleading was made, will have to be appreciated, before one concludes that, it is a different root of title of grant that was now relied on. With respect, it is not so. From the pleadings of the parties, the root of title of each of them, was/is anchored on first settlement.

In my humble and respectful view, the learned trial Judge, did a thorough, painstaking and fine job in evaluating the evidence before him and thereafter, believed and preferred the evidence of the respondents as being more probable. He gave his reasons for so finding. The P.W.2, gave a cogent and credible evidence in support of the respondents' pleadings. Indeed, the court below at page 807 of the records, had these to say, inter alia, as follows: -

"In this case the respondents before the trial court, were able to adduce cogent traditional evidence in line with their pleadings by tracing their title to the disputed land to Ladoje - who first settled on the land (the underlining its) - which devolved on his children, grand children, great grand children to the present plaintiffs in this suit, whereas the appellants both in their pleadings and evidence before the trial court could not trace their ancestry down to Layanmodu mentioned - nor link the same Layanmodu with the appellants in this case. The respondents were rightly adjudged as owners of the disputed land, as title to land can be declared on traditional evidence led by them - whereas there was a devastating lacuna in the evidence of the appellants. The ancestor of the respondents Ladoje was sup-

posed to have settled on the wide expanse of land known as Agura. He came from Ofin homestead to settle in the area. He was a son of Akarigbo Koyelu - a traditional ruler of Remo - who settled him on the land. Anybody who interprets such acquisition of land as a grant has failed to understand Yoruba Customary land tenure - which vests all land in the traditional ruler - to hold in trust for his people. See *History of the Yorubas* Rev. Johnson at page 95. The traditional ruler does not own the land neither does he occupy the land. As at the time Ladoje moved to the land with the permission of his father - the traditional ruler, he was the first settler there - the forest being a virgin land - with Tamilu - the Losi of Ofin homestead - who settled on another area of the place - when Layanmodu the acclaimed ancestor of the appellants, (who are the instant appellants in this court). Ijomagbo people from Ikorodu and the Hausa Community came to the land. The disputed area is well known to the parties - as reflected on the Survey Plans Exhibits J, UU and EE."

(The underlining mine).

The above findings in my respectful view, are borne out from the records. The learned counsel for the respondents, rightly submitted in my humble and respectful view, that the respondents pleaded and led evidence in support of Settlement and their reliance on Exhibit A. Let me expatiate. Firstly, it must be borne in mind, that the appellants, never counter-claimed. This fact, is admitted or conceded in their said Brief. The consequence, will be dealt with by me later in this judgment. Secondly, a Survey Plan of the land in dispute, was tendered and admitted in evidence. But more importantly and as found by the court below, the area in dispute, is well known to the parties. Both parties, relied on first settlement. In paragraph 37 of the 2nd Amended Statement of Claim, one of the reliefs sought by the respondents, is,

"Declaration that they are entitled to Certificate of Occupancy or Customary Right of Occupancy over the land in dispute more particularly described in Exhibit EE tendered in this suit."

I note that this case started in the Customary Court of Ogun State Grade 2 holden at Sagamu and it was later transferred to the High Court, Sagamu. It need be stressed and this is also settled that first, where the land in dispute, is known to the parties, and there is

no difficulty in identifying the land, a declaration of title may be made without it being based on a plan. See the cases of Etiko v. Aroyewun (1959) 4 FSC 129, Arabe v. Asanlu (1980) 5-7 S.C. 78 at 90; (1980) 5-7 S.C. (Reprint) 52 and Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360. So also an order for an injunction, could be made in respect of land which is easily identifiable without a plan. See the case of Kufeji v. Kogbe (1961) 1 ANLR 113. This is by the way. B

Coming back to this case, the respondents' case, is that from time immemorial, the traditional custodian and authority on a vast area of land including Agura land of which Sabo, Sagamu forms a part, has always been and still is, the Akarigbo. There are two families or Communities - i.e. the plaintiffs/respondents' Family of Agura and the Ijoku Family or Community. Each of these families or communities, settled in separate parts of the vast area of Agura Land. Trouble started as far back as 1954, when the Ijoku Community, started to encroach/trespass on the area owned and occupied by the respondents' Community. A demarcation of boundary exercise between the two Communities, took place resulting in the permanent establishment of the boundaries between the two said Communities. The pleadings of the respondents, speak eloquently for themselves. D E

In the suit leading to this appeal, the trial and judgment, were based on the pleadings and evidence of the parties. I agree with the court below that any suggestion or "*interpretation*" that the acquisition or settlement of Ladoje by the said traditional ruler, as a grant, will be with respect, a misconception. I note that virtually or substantially, the arguments by the appellants in the court below appear to be the same as in this court. The question of locus standi, was raised for the first time in the court below which considered the issue and the evidence before the trial court and stated inter alia at page 791, G of the records, as follows:-

"In short the Akarigbo exercised traditional custodian and authority over the Agura Land where ownership of such land is vested in members of the Agura Family.. .."

Fortunately, the appellants in paragraph 5.1 at page 5 of their Brief under issue 1, concede that they did raise the issue of locus standi of the respondents in the court below. To say that the custom, was not pleaded therefore, with respect, is a misconception. I have H

no doubt in my mind and this is also settled, that native law and custom not judicially noticed, can be proved by evidence of witnesses belonging to the community to show that, that community in the particular area, regard the alleged Customary Law as binding on them. See the case of *Ojemen & Ors. v. Momodu II & Ors.* (1983) NSCC Vol. 14 p. 135 150; (1983) 3 S.C. 177- per Obaseki, JSC. It was also held that it is in the interest of a party who asserts the existence of a custom, to ensure that there is sufficient and cogent evidence adduced before the court in proof of the custom. These are exactly what happened in the instant case. It was also held that “common sense dictates that only persons who regard the custom as their own and binding on them are competent to adduce evidence in proof, be they parties or not.” Thus, in the case of *Alli & Anor. v. Chief Alesinloye* (infra) it was held that evidence of traditional history, may be given by a person who is not a member of the family. That it is credibility and reliability of means of knowledge of the witness only, that are the matters to be considered. That a party, is not required to call any particular person as a witness. That all he needs, is to furnish evidence in proof of his case. The case of *Chief T. Bello v. Kassim* (1969) NSCC 288, was referred to. I rest this judgment on the above principles as regards the issue, pleading and evidence of settlement by the respondents.

Firstly, I have already reproduced the pleading or averment of the respondents in paragraph 4 of the 2nd Amended Reply to the 4th Amended Statement of Defence. At the risk of repetition, I again reproduce it:-

“The plaintiffs will contend at the hearing of this suit that the entire Agura Land which Sabo Ofin Sagamu forms a part had from time immemorial been under the overall authority of the Akarigbo”

(the underlining mine)

Secondly, at page 453 of the records, in paragraph 16 of the 2nd Further Amended Statement of Claim and plan, the respondents averred or pleaded inter alia; as follows:-

“The Late Akarigbo, Oba Adedoyin in exercise of his powers as the custodian of the land formally granted part of the Agura Land to the Hausa Community for settlement in the early forties which

settlement was later extended in 1954 by Oba Awolesi, the then Akarigbo of Ijebu-Remo."

(the underlining mine).

The P.W.2, is a member of the Agura Community and indeed, a Traditional Ruler of his community and therefore, was competent to adduce the said evidence in proof of their said custom. The learned trial Judge, regarded and described him as a credible witness and believed his testimony.

The root of title of the respondents, is settlement, according to custom of their particular community. See the case of Ojemen & Ors v. Momodu II (supra).

Thirdly, in the same 2nd Further Amended Statement of Claim, in paragraph 33 thereof, the following, is pleaded or averred:-

"That a letter dated 30/11/83, addressed to the Secretary Ijebu Remo Local Government on an issue between Agura and Ijoku Communities the Akarigbo of Ijebu-Remo traced the root of title to the whole of Sabo Area and the plaintiffs will rely on the said letter. The letter was a Reply to a petition written by Lawyer Oladipe Ashiru on behalf of Ijoku Community."

(The underlining by the respondents").

I note that this averment, was not denied by the appellants. The respondents preferred evidence in this regard. An averment in pleadings, do not amount to evidence and can never be so construed. However, on the contrary, it has to be proved by evidence, (which was done in this regard) subject to admission by the other party. See the cases of Akinfosile v. Iyose (1960) SCNLR 447 and Muraina Akanmu v. Adigun & Anor. (1993) 7 NWLR (Pt. 304) 218 at 231 CA., just to mention but a few. I note as rightly submitted in the respondents' Brief at page 11, the appellants, neither in their Statement of Defence or as variously amended nor in their evidence or in the address of their learned counsel as the authenticity of Exhibit A denied. Exhibit A. was/is an admissible documentary evidence at least, on the ground of relevancy and it was pleaded. See the cases of Elias v. Disu (1962) 1 All NLR 214, Ogbuanyiya & 5 Ors. v. Obi Okudo (1979) 6-9 S.C. 32; (1979) 6-9 S.C. (Reprint) 24; (1979) ANLR 105 at 112; (1979) 1 MSLR 731. Oshunride v. Akande (1996) 6 SCNJ 193 at 199-200, Alli & Anor. Chief Alesinloye & 8 Ors. (2000)

4 S.C. (Pt. I) 111; (2000) 6 NWLR (Pt. 660) 177 at 213; (2000) 4 SCNJ 264, just to mention but a few. As a matter of fact, it is a public document in the custody of the said Local Government. P.W.I was/is an official of the Local Government. Having produced it from proper custody, and was on subpoena only to tender it, he could not or cannot be cross-examined. See the case of Agagu v. Dawodu (1990) 7 NWLR (Pt. 160) 55 at 66-69, cited in the respondents' Brief. The formalities for admissibility of Public documents, are lucidly and comprehensibly, laid down under Sections 111(1) and 112 of the Evidence Act. See also the case of Okonji & 2 Ors. v. Njokanma & 2 Ors. (1999) 12 S.C. (Pt. II) 150; (1999) 12 SCNJ. 259 at 273 - 275 - per Achiike, JSC., (of blessed memory), see also Sections 116 and 117 of the Evidence Act and the presumption of the genuineness of every document produced from proper custody, if produced by the person who by law kept it. It is also a truism that a document when admitted in evidence, speaks for itself.

For the avoidance of doubt, I will reproduce some of the contents of Exhibit A which read as follows:-

"It has long been established that the vast area of land between Okun-Owa, bounded by Egba Land and Ijebu-Ode stretching to the Lagoon at Ipaowola belongs to the Akarigbo of Ijebu-Remo. The Treaty signed by the then Imperial Power of the British Government with the Akarigbo Oba Oyebajo and his Chiefs on 4th August, 1894 refers.

Oladoje (sic) son of Akarigbo Koyelu (Ago Ora or Agura). He was put thereby his father Oba Akarigbo Koyelu for farming purposes."

(The underlining mine).

It need be stressed that Exhibit A, is not a documentary evidence of sale or transaction in respect of land under native law and custom where the principle that documentary evidence is unknown to native law and custom will apply. It is only a letter which is relevant to the issue in controversy between the parties. Period! I note that at page 315 of the records that, when Exhibit "A" was tendered by the P.W.1 - Prince Adesoji Olusesi, who was the Head of Personnel in Sagamu Local Government, and who was on subpoena to tender some documents numbering seven (7) of which Exhibit A was among,

there was no objection by the learned counsel for the appellants - Chief Bayo Kehinde, (SAN). Moreso, as it was pleaded in the said paragraph 33 of the Statement of Claim and as further amended. To therefore, suggest, assert or say by anybody or the appellants, that there is no evidence in this regard that the Akarigbo of Remo was the Overlord of all the vast parcel of land in that community, with respect, is unfortunate to say the least. Worse still, is the suggestion or assertion that the only mere assertion, was that of PW.2. This is contrary to the settled principle, that a party, can establish his case, based on the evidence of a sole credible witness. Indeed, the learned trial Judge, at page 656 of the records, stated inter alia, as follows:-

“Perhaps it may be mentioned in passing, that cases are never won on the number of witnesses called, but on the cogency and quality of the evidence of such witnesses, so, in effect, the defendants calling 13 witnesses (like the plaintiffs) the quality of which witnesses, is found to be inferior to that of the plaintiffs, could be discovered from this judgment.....”

On the whole, the plaintiffs have established by credible evidence, as required by law, to warrant the court make order for the reliefs sought, and there are also facts in the defendants’ case, which support the plaintiffs’ case. I believe and accept the evidence of the plaintiffs witnesses.”

(The underlining mine).

In Ojemen’s case (supra), it is stated at page 150, that “the emphasis is on evidence not number of witnesses.”

Let me pause here to add quickly, that I agree and accept the submissions in the respondents’ Brief at page 6 under paragraph 4.42, that firstly, the issue of the overall authority and possession/ custody of Akarigbo, was well and sufficiently pleaded and not denied by either in the pleadings of the appellants or in their evidence. PW.2 at page 370 of the records, testified, inter alia, as follows:-

“Our father Akarigbo had authority over Sabo land including Agura land... ..”

Secondly, that the custom was pleaded and given in evidence. I have said so and demonstrated so in this judgment. Thirdly, that it cannot be disputed that Rev. Dr. Johnson’s said Book on the History of the Yorubas, is an acknowledged book of reference on Yoruba

Custom. I am satisfied that it is a book published many years ago and have been referred to and used both by legal practitioners and some lower courts. This is a 1995 suit and the book, can hardly be in circulation at the moment. The learned Justices of the court below who I take Judicial knowledge are Yorubas, cannot or could not refer to and rely in their said Judgment on a non-existent book. They were therefore, right and justified, in taking Judicial notice of the said reference book. In the case of *Orugbo & Anor. v. Bulara Una & 10 Ors.* (2002) 9-10 S.C. 61 at 84 (also reported in (2002) 9 SCNJ. 12), cited and relied on by the respondents in their Brief, this court - per *Tobi, JSC.*, stated inter alia, as follows:-

“The subsection (i.e. Section 74(1)(L) empowers the court to unilaterally seek aid from appropriate books or documents. The court is under no duty to give notice to the parties that it intends to use a particular book, that will be a ridiculous situation.....”

I have demonstrated in this judgment, that from credible and documentary evidence such as Exhibits “A” and “G” that the said custom, belong to the respondents’ Community.

The learned trial Judge, at page 646 of the records, stated that *P.W.2* testified in a convincing manner, how *Ladoje* his forefather first settled on the land in dispute. At page 649 thereof, he stated inter alia, as follows:-

*“I have tested the traditional history of the defendants as well as that of the plaintiffs, by reference to the facts in recent years, as established by evidence in this case, and I have found and come to the conclusion, that the version given by the plaintiffs in their traditional history, is more probable and the true history and also come to the conclusion that same is conclusive. Plaintiffs have chosen proof by traditional evidence, contained in their paragraphs 3, 6, 7 and 8 - pleading the names and history of their ancestors, in a manner disclosing a continuous chain of devolution and also pleading genealogy, right from the founder (*Ladoje*), to the last person from whom they inherited the land, See *Akpan v. Udo Etuk* (1993) 3 NWLR (Pt.94) 101 - 102, and they have given evidence in line with that pleading. Their traditional evidence has made a consistent sense, and has linked them with the traditional history relied upon. There is therefore no need to proceed on the basis of numerous and positive acts*

of possession and ownership as evidence D.W.4 would want to impress upon the court. I also do not believe the evidence of D.W.4. See: Are v. Ipaye (1990) 3 S.C. (Pt. II) 109; (1990) 2 NWLR (Pt. 132) 298. 302, Holdings 10; Kojo v. Bonsie (1957) 1 NLR 1223.

D.W.12 did not impress me as one who knew their history.” It is the law which is firmly settled that where a court of trial unequivocally evaluates the evidence and justifiably appraises the facts (as was done by the trial court), it is not the business of an appellate court, to substitute its own views for the views of the trial court who saw and heard the witnesses. See the cases of Akinloye & Anor. v. Eyiola & Ors. (1968) NMLR 92 at 95, Woluchem v. Gudi (1981) 5 S.C. 291 at 320, Enang v. Ada (1981) 11-12 S.C 25 at 39; (1981) 11-12 S.C. (Reprint) 17, Insurance Brothers of Nig. v. Atlantic Textiles Manufacturing Co. Ltd. (1996) 9-10 SCNJ 171 at 184-85; (1996) LRCN 1523, Nnado & 2 Ors. v. Ohianor & Anor. (1997) 5 SCNJ 33 at 54 - 56, Haav v. Kundu (1997) 5 SCNJ. 274 at 278 - per Belgore, JSC., (as he then was) and page 380 - per Onu, JSC., citing several other cases, just to mention but a few.

It is very surprising to me when it is stated that Akarigbo, was not made a party in the case. Reliance is placed on the case of Lajaoke v. Chief Ogunremi (1967)(I) NMLR 181. I wonder how a dead man who settled Ladoje on the land in dispute above two hundred (200) years at the time P.W.2 testified, could have been made a party. Paragraph 3 of the Statement of Claim and subsequent averments show that Oba Akarigbo was late. See page 316 of the records. More worrisome, is the assertion that there is no scintilla of evidence that Ladoje was the first person that settled on the land. There is evidence found as a fact by the two lower courts, that “*no other family, had occupied the farmland before the Agura people.*”

Earlier in this judgment, I had stated that the crucial issue to be determined in this appeal, is whether settlement was proved by the respondents or whether their pleading and evidence, were predicated on a grant. I have also stated that Exhibit A, is not a transaction in respect of land between two parties under customary law. That it is only a letter produced from the custody of Sagamu Local Government which is relevant in the circumstances of this case. The court below after considering the pleadings and evidence, stated at page

798 inter alia, as follows:-

“There is a letter Exhibit “A” before the court in respect of the acquisition. The letter indicated that Oladoje (sic) first settled on the land. This read together with the evidence that his father, Akarigbo Koyelu put him on the land called Agura as a first settler. This was confirmed by the evidence of P.W.6, Emmanuel Olubowale Olufotebi that his family had been boundarymen to Agura people from time immemorial. No other family had occupied the farmland before Agura people”

(The underlining mine).

The above finding of fact, is borne out from the pleadings and evidence of the respondents. I had noted earlier in this judgment, that the learned trial Judge, stated that the evidence of the respondents, was/is supported by the defence. Now, at page 537 of the records, the D.W.I- Prince Rabiw Onalesi under cross-examination by Chief Fadayiro, learned counsel for the respondents, in the trial court, testified inter alia, as follows:

“Akarigbo is superior and consequently the Olori Ilu of Ijoku (of the appellants) is under the Akarigbo-Oba Keriye II was crowned by Oba Awolesi.” (Oba Awolesi is the Author of Exhibit “A” and he is deceased).” (The underlining mine).

He had at page 536, testified under cross-examination, inter alia, thus:-

“Oba Keriye is the present Olori Ilu..... Oba Obafemi Keriye was once suspended by Awolesi but later reinstated after making pledges.”

In Exhibit “V” as rightly stated in the respondents’ Brief, D.W.4 - Oba Obafemi Keriye, confirmed the authority of Akarigbo over Sagamu including Ijoku and the Olori-Ilu of Ijoku. The D.W.4 at page 563 of the records under cross-examination, swore inter alia, as follows:-

“All the defendants could be Olori Ilu of Ijoku..... Akarigbo of Remo is the prescribed authority over Olori-Ilu of Ijoku.”

(The underlining mine).

He admitted about his said suspension by the Akarigbo -Awolesi and his salary also being suspended. He identified Exhibit V and his signature thereon and read out its contents. He agreed that the Olori

Ilu, could issue death and building notifications on or by the authority of the Akarigbo. He recognized and identified the authority from Akarigbo to Olori Ilu of Ijoku dated 20th June, 1979, which was tendered without objection and marked Exhibit “LL.” It is settled that a statement made by a man on Oath, is binding on him.

In spite of these overwhelming evidence both oral and documentary, there is with respect, this unnecessary fuss about the settlement of the ancestor of the respondents amounting or being equivalent to a grant. It is very amazing to me. Can it be honestly and sincerely said by the appellants or anybody that the fact that Akarigbo as the admitted prescribed authority over land in Sagamu who had from time immemorial, had the said powers to settle persons, people, communities or families, on the Agura land, will derogate from the right of the respondents (his descendants) to maintain the present action for declaration etc? I think not. The court below stated at pages 797 to 798, the difference between a grant and a settlement thus:-

“A grant comes from a previous title holder to a subsequent one called a grantee, whereas a settlement does not recognise a previous title holder.”

The case of Chief Dakuba & Ors. v. Chief Omani & 9 Ors. (1999) 6 S.C. (Pt. I) 94; (1999) 6 NWLR (Pt.616) 647, was referred to (it is also reported in (1999) 6 SCNJ 168). It continued as follow:-

“An original acquisition of land by Settlement under customary law means no more than first occupation or original settlement on land for whatever purpose.”

It also referred to the case of Alli & Anor. v. Chief Alesinloye & 8 Ors. (2000) 4 S.C. (Pt. I) 111; (2000) 6 NWLR (Pt.660) 177, (it is also reported in (2000) 4 SCNJ. 264 @ 292) - per Iguh, JSC. It referred to the pleadings in paragraphs 3,5,6 and 33 of the respondents’ Statement of Claim as amended and made the findings of fact at page 798 reproduced by me in this judgment.

In the said Alli’s case (supra), Igoh, JSC at page 283 of the SCNJ, report referring to the five (5) ways of proving title and citing the case of Idundun & Ors. v. Okumagba (1976) 9 & 10 S.C. 217 @ 246, 250; (1976) 9-10 S.C. (Reprint) 140; and some other cases, stated that, proof of any of them is adequate whether or not, it is accompanied by exercise of dominion over the land in dispute. His

Lordship cited the case of Chief Odofoin v. Ayoola (1994) 11 S.C. 72 at 105 and Kuma v. Kuma 5 WACA 4, at page 292, thereof, and stated that:-

B “First settlement seems to be the oldest method of acquiring title to land. If the traditional evidence of such first settlement is accepted (i.e. by a trial court) title can be declared purely on such traditional evidence.”

C The cases of Stool of Abinabina v. Chief Koyo Enyimadu 12 WACA 171 at 174 (P.C) and Oluola v. Olafa (1968) NMLR 468, were referred to. Thus, that if traditional evidence, and this includes evidence of first settlement, is satisfactorily placed before the court and it is accepted, (as was done in the case leading to this appeal by the respondents in my respectful view), title to the land, can be declared on such evidence of tradition alone.

D I note that the eminent Jurist before making the above pronouncements, had posed the question thus:-

“.....and I ask myself what the original acquisition of land by settlement under Customary Law means?”

He answered it himself thus:-

E “This is my view means no more than first occupation or original settlement on land for whatever purpose.”

(The underlining mine).

F The evidence before the trial court which was believed, is that it was Ladoje the ancestor of the respondents, who first Occupied or settled on the land in dispute. In other words, the respondents’ root of title, as was rightly submitted in the respondents’ Brief, was/is from Ladoje a son of the acknowledged or admitted late Akarigbo. There is also the evidence even supported by the appellants and accepted G and believed by the learned trial Judge as have been shown in this judgment, settled some people such as the Ijokus of the appellants, Hausas and some others on part of Agura land. The Akarigbo who the D.W.1 agreed on oath, was/is superior to Olori Ilu of Ijoku in Exhibit A, confirmed the ownership of such lands as being in Agura H people of the respondents. The effect, in my respectful view, is that the right persons to institute the suit in respect thereof, is certainly the Agura people - the respondents. I so hold. To hold otherwise under the tenuous reasoning or suggestion that the pleadings is con-

tradictory and amounts to a grant, with profound humility and greatest respect, will amount to the greatest miscarriage of justice. It will be unjust and even perverse. It need be borne in mind, that what led to the suit the subject-matter of this appeal, is the trespass or encroachment of the appellants into the land in dispute.

I note that at page 18 under paragraph 7.5 of the appellants' Brief, it is stated, that "*Exhibit A*" was tendered through PW.2, who admitted that the document is not that of his family,"

With respect, nothing can be far from the truth. I have shown that at page 316 of the records which bind both the parties and this court - See the cases of Chief Fubara & Ors. v. Chief Minimah & Ors. (2003) 5 S.C. 141; (2003) 5 SCNJ 142 at 168, and recently, Gonzee Nig. Ltd. v. Nigerian Education Research & Development Council & 2 Ors. (2005) 6 S.C. (Pt. I) 25 at 31; (2005) ALL FWLR (Pt.274) 235 at 245, that it was the PW.I- Prince Olulesi - an official from the Sagamu Local Government, who appeared in court on a subpoena, who tendered Exhibit A that was admitted in evidence without any objection from the appellants' learned counsel - Chief Bayo Kehinde. See page 315 of the records. It is also stated in the said Brief that "*the document was made by the Akarigbo who incidentally was not called as a witness.*" I have already stated in this judgment that a dead man could not have been called to give evidence. I have also stated that Exhibit A is admissible in evidence having been produced from proper custody and it is relevant. Also, I have reproduced its contents at page 11 of this judgment. Having dealt with this issue or matter, I will not repeat it because it is unnecessary in the circumstance.

It is also submitted that "Exhibit A to all intents and purposes is nothing more than a documentary hearsay." This is a new one on me i.e. document being a hearsay in circumstances as the instant subject-matter. I am aware that a document can be Primary/Original or Secondary. I have never heard of a documentary hearsay, as there is no such provision under the Evidence Act. But see Sections 77 and 92 of the Act. What I know is that documentary evidence, is the best evidence. That a document tendered in court, is the best proof of the contents of such a document and that no oral evidence will be allowed to discredit or contradict the contents thereof except in cases where fraud is pleaded. See the case of The Attorney-General Bendel

State & 2 Ors. v. United Bank For Africa Ltd. (1986) 4 NWLR (Pt.337) 547 at 563, - per Oputa, JSC. It is also submitted that Exhibit A, “*did not relate to the subject matter of this action.*” If it does not relate to the controversy in the suit leading to this appeal, I wonder! I say no more on this Exhibit A the authenticity of which, was not denied by the appellants and the issue not having been canvassed at the court below.

Let me for purposes of emphasis, touch even briefly, on locus standi. In the case of Chief Egolum v. General Obasanjo & 3 Ors. (1999) 5 S.C (Pt. I) 1; (1999) 5 SCNJ 92 at 111-134 (full court) - Ogundare, JSC., (of blessed memory), stated that the fundamental aspect of locus standi, is that it focuses on the party seeking to get his complaint before the court not on the issues he wishes to have adjudicated. See also the cases of Senator Adesanya v. The President of the Federal Republic of Nigeria & Anor. (1981) 5 S.C. 112; (1981) 5 S.C. (Reprint) 69; (1981) 12 NSCC 146, 173; (1981) 2 NCLR 373, Attorney-General of Bendel State v. Attorney-General of the Federation & 22 Ors. (1981) 10 S.C 1; (1981) 10 S.C. (Reprint) 1, just to mention but a few. In the case of Oloriode & Ors. v. Oyebe & Ors. (1984) 5 S.C. 1 at 16, it was held that a party prosecuting an action, would have locus standi, where the reliefs claimed, would confer some benefit on such a party.

I note that the respondents, in paragraph 37 of their 2nd Further Amended Statement of Claim claimed, declaration of title, damages for trespass and perpetual injunction. The appellants in their Brief, conveniently, stated that it was only for declaration and injunction. The appellants admit that the respondents, are in possession of the land in dispute and gave various reasons of how they got in the land. They even claim as I noted before in this judgment, that the respondents, are their tenants. In the case of Arefunwon & Ors. v. Barber & Ors. (1961) ANLR 887, it was held that continuous possession and user of land for a period of twelve (12) years, is necessary to create title by possession.

Firstly, trespass is an injury to the right of possession and the proper plaintiff in any action for trespass, is generally, the person who is in actual or constructive possession at the time of the trespass. He can always maintain an action for trespass against anyone but the true

owner or anyone who can trace his title to the later. This is firmly settled. See the cases of Wuta-Ofei v. Danqua (1961) 1 WLR 1238, Adeniji v. Ogunbiyi (1965) NMLR 395, Will v. Will 5 NLR 76, Halsbury's Laws of England Vol. 38 Article 1214 page 744, Amako v. Obiefuna (1974) 3 S.C. 67; (1974) 3 S.C. (Reprint) 49, and Atunrase & Ors. v. Alhaji Sunmola Calius Bako & Anor. (1985) 1 NWLR (Pt. I) 105 at 110. Lord Kenyon, CJ., in the case of Graham v. Peat (1874) LR 19 EC 585; 105 ER 94 at 95, stated that "*any possession is a legal possession against a wrongdoer.*" Mere possession, is sufficient to maintain an action, because "*possession*" means, possession of that type of which the thing possessed is capable. See the case of Mogaji v. Cadbury Fry (Export) Ltd. (1972) 2 S.C 97 at 104; (1972) 2 S.C (Reprint) 136. B

Also settled is that in an action for trespass, once the plaintiff, can establish his possession even if he is a trespasser, a defendant, can only justify his entry on the land by showing a better title. See the cases of Adeshoye v. Shiwoniku (1952) 14 WACA 86 and Owe v. Oshinbajo (1965) 1 ANLR 72 @ 76. In the case of Onyekaonwu & Ors. v. Ekwubiri (1966) 1 ANLR 32, 24-35. Bairamian, JSC., stated that "There is a saying that possession is nine tenths of the law, and a great grand mother means three generations." In the case of Udo v. Obot & Ors. (1989) 1 S.C. (Pt. I) 64; (1989) 1 NWLR (Pt.95) 59, it was held that in a claim for trespass, one need not necessarily be an owner of the land. What is required, is that the claimant proves that he is in exclusive possession and not title. It is therefore, trite law that in order to succeed in the claim of trespass, a plaintiff must prove that he is in actual possession. This is because, the person who brings an action for trespass, is one whose possession, is disturbed. See the case of Ekwere & Ors. v. Iyiegbu & Ors. (1972) 6 S.C. (Reprint) 69; (1972) 2 ECSLR 835 S.C., Ekwu v. Ogunkehin (1971) 2 NMLR 1. In the cases of Akpan Owo v. Cookey Gam 2 NLR 100, Suleman & Anor. v. Hannibal 13 WACA 213 and Alhaji Akibu v. Okpaleye & Anor. (1974) 11 S.C. 189 at 202; (1974) 11 S.C. (Reprint) 141, it was held that in the exercise of its equitable jurisdiction, the court will not disturb long and undisturbed possession even in favour of the real owner by native law. It need be borne in mind and this if also settled, that a plaintiff in an action for trespass, is entitled to recover D
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damages even though he has sustained no actual loss. See the case of Yelloy v. Monley (1910) 27 TLR 20.

I note that at pages 653 to 655, the learned trial judge, dealt with this issue and stated inter alia as follows;-

B *"I accept the plaintiffs' case on this point of actual and physical possession and I conveniently come to the conclusion that any acts of possession, upon which the defendants may rely on-no matter for how long, would be tortuous trespass only."*

C Afterwards, It is settled that the weight to be attached to traditional evidence, is a matter which is left to the experience and wisdom of the trial Judge. See time case of Akuru v. Olubadan in Council 14 WACA 523 at 524. It is settled that in civil cases, the evidence is placed on an imaginary scale and Judgment is given for party in whose favour, there is a preponderance of evidence. See the case of D Mogaji & Ors. v. Odofoin & Ors. (1978) 4 S.C (Reprint) 65 and Owoade v. Omitola (1988) 2 NWLR (Pt. 77) 418.

It need be emphasized as this is settled that trespass, does not depend on declaration of title. Both are separate. See the cases of Kponulgo v. Kadadja 2 WACA 24; Oluwi v. Eniola (1967) NMLR E 339. Akano v. Okunade (1978) 4 S.C. 129 at 137; (1978) 3 S.C. (Reprint) 91 and Ekretsu & Anor. v. Oyabebare & 5 Ors. (1992) 11-12 SCNJ (Pt. II) 189 at 206, Just to mention but a few. From the foregoing, with profound humility and respect, it is my view that to F allow this appeal in toto, will amount to the greatest and grave injustice to the respondents whose possession of the land in dispute, is not disputed by the appellants.

In concluding this perhaps lengthy judgment, I wish to state that since on their own admission at page 8 paragraph 6.1 of the G appellants' Brief, that the appellants, never counter-claimed, even if the respondents' action had been or was dismissed, it will not automatically mean that the appellants, had won or been awarded title of the land in dispute, in the case of Obi Ezewani - The Obi of Ogwashiukwu v. Obi Onwordi & Ors. (1986) 4 NWLR (Pt. 33) 27, it H was held that a plaintiff's claim in a land dispute, was dismissed, does not automatically mean that the land in dispute, (without a counter-claim) belongs to the defendant. See also the cases of Ikoku & Ors. v. Ekeukwu v. Ors. (1995) 7 MWLR, (Pt. 410) 637; (1995) 7 SCNJ

190 and Chief Eyo Ogoni & 2 Ors. v. Chief Oja Ojeh & 5 Ors. (1996) 6 NWLR (Pt.454) 272 at 294; (1996) 6 SCNJ 140, just to mention but a few. In the case of Adone & 2 Ors. v. Ikebodu & 5 Ors. (2001) 7 S.C (Pt. II) 22; (2001) 7 SCNJ 513 @ 529- 530, This court - per Ayoola, JSC., (as he then was) held also that the dismissal of a plaintiff's claim for declaration of title, does not result in and it is not tantamount to any award to the defendant who did not file a counter-claim. B

In fact, even where there is a counter-claim or cross-action and the plaintiff in the main action fails, it does not necessarily follow, that the cross-action succeeds unless findings are made in favour of the plaintiff in the cross-action entitling him to succeed. See the case of Amadi & Co. v. Ohuru & Ors. (1978) 6-7 S.C. 217; (1978) 6-7 S.C. (Reprint) 152; (1978) 11 NSCC 436, cited in the case of Orianwo & 4 Ors. v. Okene & 2 Ors. (2002) 6 S.C. (Pt. II) 45; (2002) 6 SCNJ D 249 at 276, - per Ogundare, JSC. This is because, the cross-action, is an independent action by itself and the plaintiff therein, can only succeed on the strength of his own case and not on the weakness of the defence. C

In the case of Chief Odofin v. Ayoola (supra), (also reported in (1984) NSCC Vol. 15 p.711), it was held that where a court of trial which saw and heard witnesses, has come to specific findings of facts on the evidence in issues before it, an appellate court which had no similar opportunity, should refrain from coming to a different finding, unless it can show that the conclusion of the trial court was perverse or could not flow from the evidence before it. In the case of Chief Okochi & 2 Ors. v. Chief Animkwo & 2 Ors. (2003) 2-3 S.C. 65; (2003) 18 NWLR (Pt.851) 1; (2003) 2 SCNJ 260 at 277, this court - per Tobi, JSC., held that an appellate court, cannot reject the findings of a trial Judge on the evidence of witnesses, unless such findings, are perverse. Several other cases were cited in support of this holding. See also the lucid and succinct judgments of Musdapher, JSC., in the case of Chief Ezekwesili & 2 Ors. v. Chief Agbapuonwu & 2 Ors. (2003) 4 S.C. (Pt. I) 33; (2003) 4 SCNJ 174 at 194-197 and Edozie, JSC., (Rtd.) in the case of Okereke & Anor. v. Nwankwo & Anor. (2003) 4 S.C. (Pt. I) 16; (2003) 4 SCNJ 211 at 224, 225 & 226. In an earlier case of Madubuonwu & 7 Ors v. Nnalue & 3 Ors. E
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(1999) 9 S.C. 20; (1999) 9 SCNJ 38 at 49, Katsina-Alu, JSC., stated that once the evidence of traditional evidence is accepted by a trial court and the acceptance, is not faulted on appeal, that is the end of the matter. Speaking for myself, with profound humility, I am satisfied just as the court below, at page 805 of the records, that the learned trial Judge, stated the issue in controversy between the parties, thoroughly and painstakingly evaluated the evidence before him, and came to the right decision or verdict and made consequential orders. I commend him.

Finally, there are concurrent judgments or findings of facts by the two lower courts. On many decided authorities of this court, I cannot interfere or disturb the said findings as they are sound and not perverse. See the cases of *Madam Amadi v. Orisakwe & 2 Ors.* (2005)1 S.C. (Pt. I) 35; (2005) 1 SCNJ 20, *Ogbu v. Wokoma* (2005) 7 S.C. (Pt. 11) 123 at 136; (2005) 14 NWLR (Pt. 944) 118, *Daniel Holdings Ltd. v. United Bank for Africa Plc.* (2005) ALL FWLR (Pt. 277) 895 at 902, *Dodo Dabe v. Alhaji Abdullahi* (2005) 2 S.C. (Pt. I) 75; (2005) 2 SCNJ 76, and many others.

I have had the advantage of reading before now, the leading judgment of my learned brother, Aderemi, JSC., and I regret that I am unable to agree with his reasoning and conclusion therein. From what I have adumbrated or discussed above in this judgment, I hold that the arguments in the appellants' Brief are substantially the same as that in the court below that dismissed their appeal to that court. With respect, I have not and will not be persuaded by them. In the result, this appeal in my respectful view, is most unmeritorious. It fails and it is accordingly dismissed. I hereby affirm the decision of the court below affirming the judgment of the trial court.

Costs follow the events. The respondents are entitled to costs of N50.000.00 (Fifty Thousand Naira) payable to them by the appellants.

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