

**SUPREME COURT OF NIGERIA**

11TH JULY, 2008 SC. 72/2004

**CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,  
J. O. OGEBE, M. S. MUNTAKA-COOMASSIE, JJSC**

1. ALHAJI OYEBAMIJI
2. MR. LUCKY (Deceased)
3. ALHAJI BUSARI BASIRU ..... APPELLANTS
4. MR. LANRE LAOYE OGUNYEMI
5. ALHAJI GANIYU KOLA BALOGUN
6. MR. KAYODE OMOTOSHO

AND

1. IYABO AFUSAT LAWANSON
2. ISMAILA LAWANSON
3. KAZZIM LAWANSON ..... RESPONDENTS
4. (Next of Kin and Beneficiaries  
of the Estate of Bamidele  
Ayinla Lawanson (Deceased))

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CUSTOMARY LAW - Inheritance - Intestate - Letters of administration - Applicability - It is inapplicable to administration of property inherited under customary law - As was the case of the respondents herein (H1)

PLEADINGS - Statute of limitation - Failure to plead - Effect - Statute of limitation must be specifically pleaded to be relied on where it applies - But it does not apply in this case as claim is founded on continuing trespass (H2)

APPEALS - Concurrent findings of facts - Attitude of appellate court - Is not to interfere therewith - Unless there is miscarriage of justice or violation of some principles of law (H3)

***FACTS***

The Plaintiffs/Respondents sued the Defendants/Appellants before the Oyo State High Court sitting at Ibadan. Respondents' claims were for damages for trespass and injunction. Their case was that

their father purchased the land in 1959 from Olugbode family under customary law, and the transaction was subsequently converted into a conveyance and duly registered in the land registry. They had been in peaceable possession when the Appellants entered the land in 1984 and chased away all the tenants put on the land by the Respondents and assumed possession. Respondents suit was filed in 1991.

At the end of hearing, trial judge gave judgment to the Respondents. Appellants appealed to the Court of Appeal and raised for the first time the issue of limitation of action. The appeal was dismissed. He has brought the instant appeal against the judgment of the Court of Appeal and in addition to the issue of limitation of action, he has with leave raised another issue of letters of administration for the first time in the Supreme court.

### **ISSUES FOR DETERMINATION**

1. *“Whether the statute of Limitation or any statute for that matter, is one that the Appellants should specifically plead in their statement of defence or one to be merely inferred by the court from the Respondents’ Writ of Summons and statement of claim and no more as the appellants are contending in this appeal*

2. *Whether the Plaintiffs/Respondents have discharged the burden of proof placed on them to entitle them to the judgment of the court in this appeal.”*

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

### **CUSTOMARY LAW - Inheritance - Intestate**

1. The learned counsel further submitted that since respondents did not obtain letters of administration before suing, they had no locus standi to institute the action. It was also very clear from the pleadings that the Respondents inherited their deceased father’s property under Customary Law and so, the question of the application of the Administration of Estate Law or the application of English Law did not arise. (pp. 2996 F/2997 G)

### **Statute of limitation - Failure to plead**

2. Order 25 Rules 6(1) and (2) of the High Court (Civil Procedure) Rules of Oyo State reads as follows:-

*“Rule 6(1) - A party shall plead specifically any matter- for ex-*

*ample, performance, release, any relevant statute of limitation, fraud or any fact showing illegality- which, if not specifically pleaded might take the opposite party by surprise.*

*Rule 6(2) - Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the Plaintiff or the Defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the Plaintiff or the Defendant shall be implied in his pleading."*

These provisions are very clear that a party wishing to rely on a Statute of Limitation or the Administration of Estate Law must specifically plead same. It is not true therefore that such defences should be left to speculation or inference. Apart from that, the Respondents' claim was for present trespass as at the time of the action, and the Statute of Limitation could not possibly apply to it. (p. 2997 C)

### ***APPEALS - Concurrent findings of facts***

3. The facts of the case are relatively simple. The Respondents sued for trespass and injunction and were able to show that their father purchased the land in 1959 from Olugbode family under customary law, and the land was converted into a conveyance Exhibit 'B' on 20th April, 1961 which was duly registered in the Land Registry, Ibadan. The Appellants claimed to have bought the land by customary law as far back as 1956 but were unable to establish that fact. The trial court disbelieved them and gave judgment in favour of the Respondents. The Court of Appeal also evaluated the evidence thoroughly and dismissed the Appellants' appeal.

It is not the practice of this Court to interfere with concurrent findings of facts of both the trial court and Court of Appeal on essentially issues of fact unless there is established a miscarriage of justice or a violation of some principles of law or procedure. See: Nziwu V. Onuorah (2002) 4 NWLR (Pt. 756) 22. No such situation has arisen in this case. The judgments of the two lower courts cannot be faulted. (p. 2998 B)

### ***REPRESENTATION***

Appellants' counsel absent.

Chief A. O. Oriade, (with him; A. A. John), for the Respondents

**CASES REFERRED TO**

- Egbe V. Adefarasin 1987 1 NWLR (Pt. 47) 1  
Amata v. Omofuma (1997) 2 NWLR (Pt. 485) 93  
B FCDA v Naibi (1990) 5 SCNJ 186 at 194-195  
Adegbola v Obalaja (1978) 2 LRN 164 at 167  
Fadare v A.G. of Oyo State (1982) 4 SC 1 at 12-13  
Ojo v. Banjo (1979) 2 LRN 396 at 298  
C Onwuchekwa v NDIC (2002) 94 LRCN 232 at 239  
Texaco Panama v Shell Petroleum (2002) 94 LRCN 152  
Nziwu V. Onuorah (2002) 4 NWLR (Pt. 756) 22  
Thomas v Preston Holder (1946) 12 WACA 78  
Iheanocha v Elogu (1995) 4 NWLR (Pt.389) 324  
D Idundun v Okumagba (1976) 1 NWLR 200  
Alhaji A. Aliyu v Dr John Adewunmi Sodipo (1994) 5 NSLR (Part 342) 1 at 23  
Udza Uor & Ors v. Loko (1988) 5 S.C 25 at 28, 30, 33 - 35  
Ekpe v. Fagbemi (1978) 3 S.C. 209 at 213;(1978) 3 S.C  
E

**STATUTES & RULES REFERRED TO**

- Administration of Estates Law, Laws of Oyo State, 1978, s. 10  
Limitation Law, Cap 64, Laws of Oyo State, 1978 ss. 4 (1)(a) & 7(2)  
F High Court (Civil Procedure) Rules of Oyo State, O. 25 r. 6 (1) & (2)

**LEAD JUDGMENT BY OGEBE JSC**

The Respondents sued the Appellants before the High Court of Justice Ibadan claiming the following reliefs:-

- G “(a) *N10,000.00 General damages for trespass being presently committed by the defendants on the property of Bandele Ayinla Lawanson (deceased) the father of the plaintiffs lying and being at Orita Bashorun, Aba Road, Ibadan covered by Deed of conveyance registered as 50/50/458 of Lands Registry, Ibadan.*  
H (b) *Perpetual Injunction restraining the defendants by themselves, their agents, servants and privies from committing further trespass on the land.*”

Pleadings were exchanged by the parties and the trial court

after hearing evidence and listening to the addresses of the parties gave judgment in favour of the Respondents. Dissatisfied with the judgment, the appellants appealed to the Court of Appeal Ibadan and raised for the first time the issue of limitation of action. The Court of Appeal dismissed the appeal.

This is a further appeal to the Supreme Court and the learned counsel for the Appellants filed a brief on their behalf and formulated five issues for determination as follows:-

*“01. Whether the court has jurisdiction to entertain the Plaintiffs/Respondents’ claims having regard to (i) Section 7(2) of the Limitation Law Cap. 64, Laws of Western Region of Nigeria and (ii) Section 4(1)(a) of the Limitation Law Cap. 64, Laws of Oyo State of Nigeria, 1978.*

*02. Whether the defence of Limitation which relates to the issue of jurisdiction needs to be specifically pleaded in the Statement of Defence before it can be raised.*

*03. Whether the Plaintiffs/Respondents have discharged the onus of proof that Exhibit “B” and Exhibits ‘C’-C’3’ were duly executed by respective vendors mentioned in the said documents without calling any member of their family to testify on their behalf.*

*04. Whether the Plaintiffs/Respondents have proved a better title to entitle them to judgment against the Defendants/Appellants.*

*05. Whether the learned court has jurisdiction to entertain the action having regard to Section 10 of the Administration of Estates Law, Laws of Oyo State of Nigeria, 1978.”*

The learned counsel for the Respondents also filed a brief on their behalf and formulated two issues for determination as follows:-

*1. “Whether the statute of Limitation or any statute for that matter, is one that the Appellants should specifically plead in their statement of defence or one to be merely inferred by the court from the Respondents’ Writ of Summons and statement of claim and no more as the appellants are contending in this appeal*

*2. Whether the Plaintiffs/Respondents have discharged the burden of proof placed on them to entitle them to the judgment of the court in this appeal.”*

The two issues formulated by the Respondents encompass the five issues contained in the Appellants’ brief. I shall therefore adopt

the issues formulated by the Respondents in determining this appeal. The main argument of the learned counsel for the Appellants is that the trial court lacked the jurisdiction to try the case because, the action was statute barred by virtue of Section 7(2) of the Limitation Law Cap. 64, Laws of the Western Region of Nigeria and Section 4  
 B (1)(a) of the Limitation Law Cap. 64, Laws of Oyo State 1978. He also questioned the jurisdiction of the trial court to entertain the action having regard to Section 10 of the Administration of Estate Law, Laws of Oyo State of Nigeria 1978 because the Respondents did not  
 C obtain letters of administration before suing in respect of the estate of their deceased father.

It should be noted that these issues were not raised in the court of first instance. The issue of limitation was raised for the first time in the Court of Appeal and the Court of Appeal ruled against the Appellants. The issue is being repeated in this Court. The issue in respect of the Administration of Estate Law is being raised for the first time in this Court.  
 D

The learned counsel for the Appellants submitted that the cause of dispute arose in the year 1984 while the action was brought in  
 E 1991. It was therefore caught by the Limitation Law of Oyo State. He relied on the case of Egbe V. Adefarasin 1987 1 NWLR (Pt. 47) 1. He submitted that the defendants need not plead the statute of limitation before it is enforced since it touches on jurisdiction and can be raised at any stage. He relied on the case of Amata v. Omofuma  
 F (1997) 2 NWLR (Pt. 485) 93, which I find inapplicable to the facts of the present case.

***The learned counsel further submitted that since respondents did not obtain letters of administration before suing, they  
 G had no locus standi to institute the action.***

*In reply, the learned counsel for the respondents submitted that the action was not caught by the Limitation Law of Oyo State and that in any event if the Appellants intended to rely on the Limitation Law they should have pleaded it specifically as required by  
 H Order 25 Rule 6(1) and (2) of the High Court (Civil Procedure) Rules of Oyo State. He submitted that the Limitation Law and the Administration of Estate Law, Laws of Oyo State now being relied upon by the Appellants were not pleaded and facts upon which the*

*Appellants could rely to invoke the defences created by these Laws in their favour were not pleaded. He relied on the following cases: FCDA v Naibi (1990) 5 SCNJ 186 at 194-195, Adegbola v Obalaja (1978) 2 LRN 164 at 167, Fadare v A.G. of Oyo State (1982) 4 SC 1 at 12-13, where Limitation Law was pleaded by the defence.*

*Ojo v. Banjo (1979) 2 LRN 396 at 298 where the statute was pleaded. Onwuchekwa v NDIC (2002) 94 LRCN 232 at 239, Texaco Panama v Shell Petroleum (2002) 94 LRCN 152.*”

The learned counsel further argued that there is nothing from the pleadings to show that the action is statute barred.

**Order 25 Rules 6(1) and (2) of the High Court (Civil Procedure) Rules of Oyo State reads as follows:-**

***“Rule 6(1) - A party shall plead specifically any matter-for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality-which, if not specifically pleaded might take the opposite party by surprise.***

***Rule 6(2) - Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the Plaintiff or the Defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the Plaintiff or the Defendant shall be implied in his pleading.*”**

***These provisions are very clear that a party wishing to rely on a Statute of Limitation or the Administration of Estate Law must specifically plead same. It is not true therefore that such defences should be left to speculation or inference. Apart from that, the Respondents’ claim was for present trespass as at the time of the action, and the Statute of Limitation could not possibly apply to it. It was also very clear from the pleadings that the Respondents inherited their deceased father’s property under Customary Law and so, the question of the application of the Administration of Estate Law or the application of English Law did not arise.***

On the second issue as to whether the Respondents discharged the burden of proof to entitle them to judgment, the learned counsel for the Appellants submitted that the Respondents did not discharge

the onus of proof, they were never in possession of the disputed land and did not show a better title.

The learned counsel for the Respondents submitted otherwise and said that the judgment appealed against is based on the concurrent findings of facts of the High Court and Court of Appeal and the  
B Supreme Court should not disturb them.

***The facts of the case are relatively simple. The Respondents sued for trespass and injunction and were able to show that their father purchased the land in 1959 from Olugbode  
C family under customary law, and the land was converted into a conveyance Exhibit 'B' on 20th April, 1961 which was duly registered in the Land Registry, Ibadan. The Appellants claimed to have bought the land by customary law as far back as 1956 but were unable to establish that fact. The trial court disbe-  
D lied them and gave judgment in favour of the Respondents. The Court of Appeal also evaluated the evidence thoroughly and dismissed the Appellants' appeal.***

***It is not the practice of this Court to interfere with concurrent findings of facts of both the trial court and Court of  
E Appeal on essentially issues of fact unless there is established a miscarriage of justice or a violation of some principles of law or procedure. See: Nziwu V. Onuorah (2002) 4 NWLR (Pt. 756) 22. No such situation has arisen in this case. The judgments of the two lower courts cannot be faulted.***

F For all I have said in this judgment I see no merit whatsoever in this appeal and it is hereby dismissed with costs of N50,000.00 in favour of the Respondents.

G

### **TOBI JSC**

The main plank of this appeal is whether the action commenced by the plaintiffs/respondents was statute barred or not, having regard to section 7(2) of the Limitation Law, Cap. 64, Laws of Western Region of Nigeria and section 4(1) (a) of the Limitation Law, Cap. 64, Laws of Oyo State of Nigeria 1978.  
H

The facts are material to the determination of the issue as they relate to when the cause of action arose and when the action was



filed. And so, I take the facts. It is the case of the plaintiffs/respondents that the original owner of the land in dispute was the family of Olugbade. One Bamidele Ayinla Lawanson purchased the land from Olugbade family in 1959. A Deed of Conveyance dated 20th April, 1961 was executed in his favour. Bamidele Ayinla Lawanson (deceased) built a mud house on the land. He reared goats and sheep on the land. Part of the land was given to PW.6. 1st defendant entered the land in 1984 and chased away all the tenants put on the land. The plaintiffs/respondents, who claimed as the next of kin and beneficiaries of the estate of Bamidele Ayinla Lawanson, did not take any action until 1991.

The case of the 1st appellant is that he purchased the land in dispute from Olugbade family in 1956 during the visit of Queen Elizabeth II to Nigeria. He bought the land in the presence of witnesses for 150 British pounds. He was put into possession and he has remained in possession ever since. The case of the other appellants is that they purchased portion of land from the 1st defendant/appellant.

On 3<sup>rd</sup> April, 1991, the plaintiffs/respondents filed a writ of summons claiming as follows:

*“(a) N10,000.00 General damages for trespass being presently committed by the Defendants on the property of Bamidele Ayinla Lawanson (Deceased), the father of the Plaintiffs, lying and being at Orita Bashorun, Abasa Road, Ibadan covered by Deed of Conveyance registered as 50/50/548 of Lands Registry, Ibadan.*

*(b) Perpetual injunction, restraining the Defendants, by themselves, their agents, servants and privies from committing further trespass on the land”*

The learned trial Judge gave judgment to the plaintiffs/respondents. An appeal to the Court of Appeal was dismissed. Delivering the lead judgment, Tabai, JCA (as he then was) said in the final paragraph of his judgment at page 235 of the Record:

*“In the light of the foregoing consideration I resolve all the issues in favour of the Respondents. I have no strong reason to disturb the judgment of the learned trial Judge which is accordingly affirmed. The result is that the appeal is dismissed.”*

Dissatisfied, the appellants have come to the Supreme Court. Briefs were filed and exchanged. The appellants formulated five is-

sues as follows:

“1. *Whether the Court has jurisdiction to entertain the Plaintiffs/Respondents’ claims having regard to (i) Section 7(2) of the Limitation Law Cap. 64, Laws of Western Region of Nigeria and (ii) Section 4 (1)(a) of the Limitation Law Cap. 64, Laws of Oyo State of Nigeria, 1978.*

2. *Whether the defence of Limitation which relates to the issue of jurisdiction needs to be specifically pleaded in the Statement of Defence before it can be raised.*

3. *Whether the Plaintiffs/Respondents have discharged the onus of proof that Exhibit ‘B’ and Exhibits ‘C-C3’ were duly executed by respective vendors mentioned in the said documents without calling any member of their family to testify on their behalf.*

4. *Whether the Plaintiffs/Respondents have proved a better title to entitle them to judgment against the Defendants/Appellants.*

5. *Whether the learned court has jurisdiction to entertain the action having regard to Section 10 of the Administration of Estates Law, Laws of Oyo State of Nigeria, 1978.”*

The Respondents formulated two issues as follows:

“1. *Whether the Statute of Limitation or any statute for that matter, is one that the Appellants should specifically plead in their Statement of Defence or one to be merely inferred by the court from the Respondents. Writ of summons and Statement of Claim and no more as the Appellants are contending in this appeal.*

2. *Whether the Plaintiffs/Respondents have discharged the burden of proof placed on them to entitle them to the judgment of the court in this appeal”*

I do not know how the appellants managed five issues in their Brief. As I said, the appeal centres on whether the action was statute barred or not. And there is the ancillary issue of whether the statute of Limitation should be specifically pleaded. Can these give rise to five issues? I think not. The two issues formulated by the respondents is more likely appropriate.

Section 6 (2) of the Limitation Law Cap 64 of the Laws of Western Region of Nigeria provides:-

“No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which

*the right of action accrues to him”*

Section 7(2) of the same Law provides:

*“Where any person brings an action to recover any land of a deceased person, whether under a Will or an Intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession thereof, the right of action shall be deemed to have accrued on the date of his death.”*

As section 6(2) of the Limitation Law provides for a period of twelve years, the action is not statute barred. There is yet another valid aspect and it is on whether the Limitation Law was pleaded. Counsel for the appellants relying on sections 6(2) and 7(2) of the Limitation Law, submitted that the subsection did not provide for pleading of the law as a pre-condition. With respect, that is rather preposterous and intangible. The submission challenges the provision of Rule 6(1) of the High Court (Civil Procedure) Rule of Oyo State on the head. The sub-rule provides:

*“A party shall plead specifically any matter for example performance release, any relevant statute of Limitation which if not specifically pleaded might take the opposite party by surprise”*

Rule 6(1) justifies the position of the court that a defence of Limitation must be specifically pleaded. The correct way of pleading the defence is to raise distinctly the particular statutory provision relied upon.

In Iheanocha v Elogu (1995) 4 NWLR (Pt.389) 324, the Court of Appeal held that the defence of Limitation must be specifically pleaded. The same decision was reached in Allien v Odubeko (1977) 5 NWLR (Pt.506) 638. As the Limitation Law was not specifically pleaded, by the defendants/appellants, they cannot rely on it as a defence.

There is still one aspect and it is the concurrent findings of facts of the two courts. The law is trite that the court cannot interfere with the concurrent findings of the High Court and the Court of Appeal unless they are perverse. I do not see any perversity in their findings.

It is for the above reasons and the more detailed reasons given by my learned brother, Ogebe, JSC in his judgment that I also dismiss the appeal. I abide by his order as to costs.

**OGUNTADE JSC**

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogebe JSC. As is made apparent in the lead judgment, this is an appeal in which the two court below made concurrent findings of fact upon which the judgment in favour of the respondents was premised. This court would not readily disturb such a judgment. The reliance of the appellants upon the statute of limitation could not be upheld since they failed to plead the relevant facts upon which the trial court could come to the conclusion that the suit by the respondents was statute barred.

More importantly, the suit of the respondents was in trespass. For everyday the appellants remained on the land in dispute, which as the evidence revealed, belonged to the respondents, they committed a fresh act of trespass which was actionable. It would therefore not avail them to contend as they did that the cause of action arose on a particular date since they remained on the said land even at the time the suit was being heard.

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

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**MOHAMMED JSC**

This appeal arose from the decision of the Ibadan Division of the Court of Appeal which in its judgment delivered on 17th April, 2003, dismissed the Appellants' appeal. That appeal was against the decision of the trial High Court of Justice of Oyo State, Ibadan given on 14th July, 1999 in favour of the Respondents as Plaintiffs in their claims against the Appellants as Defendants for general damages for trespass and perpetual injunction.

I have the privilege before today of reading the judgment just delivered by my learned brother Ogebe JSC, in this appeal. I share the same view with him that there is no merit in this appeal. Accordingly, I also dismiss the appeal with N50,000.00 costs to the Respondents.

**MUNTAKA-COOMASSIE JSC**

I have had the advantage of reading in draft form the judgment delivered by my learned brother, Ogebe JSC in this appeal, I agree entirely with same. For the reasons so succinctly set out in the said judgment I will also dismiss the appeal. However, I shall make my own contribution by way of emphasis as follows :-

The respondents herein who were the plaintiffs in the trial court, claimed against the Appellants the Defendants in the trial court, in their joint statement of claim the following reliefs:-

*"Whereof the plaintiffs claim:-*

*(a) N10,000.00 general damages for trespass being presently committed by the Defendants on the property of Bamidele Ayinla Lawanson (deceased) the father of the plaintiffs lying and being at Orita Bashorun Aba Road, Ibadan covered by Deed of Conveyance registered as 50/50/458 of lands registry Ibadan.*

*(b) Perpetual injunction restraining the defendants by themselves, their agents servants and privies from committing further trespass on the land"*

Pleadings were duly filed and exchanged by the parties. Thereafter the plaintiffs called seven witnesses while the defence called four witnesses. The gist of the plaintiffs case was that the land in dispute was purchased by their late father Bamidele Lawanson from Olugbode family in 1961 and the land is situated at Orita Bashorun Ibadan. The purchase was evidenced by a Deed of Conveyance which was registered as No. 50 at page 50 in volume 458 of the land's registry in the office at Ibadan. The Deed of Conveyance was tendered and admitted as Exhibit B. The land was duly surveyed and the survey plan was also admitted as Exhibit A.

After the death of Bamidele Lawanson all title documents, including the one in dispute, were handed over to one Mr. Ofun, PW.5, to manage on behalf of the plaintiffs, who were then minors. These documents were returned to them in 1990.

On the other hand, the 1st defendant claimed to have purchased the land in dispute from Olugbode family in 1956 during the visit of Queen Elizabeth II to Nigeria. He bought the land in dispute

in the presence of witnesses for £150 and he was put into possession under the Native Law and Custom.

Learned trial judge heard the case in earnest and after hearing both parties and listened to the addresses on behalf of both parties in a well considered judgment found that Exhibit B was duly executed by the Mogaji of Olugbode family at the material time and thus held that Exhibit B legally conveyed the land in dispute to late Lawanson which the plaintiffs inherited. In his conclusion the learned trial judge held as follows on page 176 of the Record.

*“The facts of the present case disclose that both the plaintiffs and the Defendants are claiming to be in possession either actual or constructive. But by my earlier findings in that case the plaintiffs have proved better title to the land in dispute. Plaintiffs having proved actual possession through Lawanson the original purchaser and those put on the land farming thereon who were driven away from same, and P.W.6 Madam Asabe who has a building on the part sold to her by late Lawanson. There is overwhelming evidence from the plaintiffs on this. The result of the above is that the plaintiffs are entitled to the claim of trespass and they are entitled to damages for same. “See Pp 142 - 17 for the whole judgment”.*

(italics mine)

It is against this decision that the defendants appealed to Court of Appeal Ibadan Division. Briefs were filed and exchanged. Counsel expatiated on their respective Briefs, on behalf of their clients. After hearing counsel on behalf of both parties, the lower court dismissed the appeal and affirmed the judgment of the trial court. Tabai JCA, as he then was, read the lead judgment in which it was held thus: -

*“With respect to the ultimate question of who has a better title between the parties the strongest evidence of the Respondents is Exhibit B, the conveyance of 28/4/61 and the earlier sales transaction under Native Law and custom which culminated to its due execution. Their entire case is built on the conveyance Exhibit B and the sales transaction immediately proceeding it. The Defendants/Appellants source of title is a sale of land in 1956 by the Olugbode family for £150 to the 1st defendant/Appellant under Native Law and custom. The receipt which evidenced the sale transaction was reportedly lost in a flood at the 1st Appellant’s house at Oje Ibadan. The only*

*documentary evidence in support of their case is Exhibit F, the receipt dated 16/11/77 issued by the 1st Appellant to the 6th appellant for the sale of two plots in the land in dispute. There is strong evidence of their acts of ownership and possession through the several buildings and other structure on the land.*

*For the ultimate question of who has better title I would like to rely on two supreme court decisions which I consider apposite to the situation under consideration in this case. They are *Lion Buildings Ltd v Shodipe* (1976) 12 SC. 135 and the court's earlier un-reported case of 1/7/69 in SC 363/67 between *Akano Fashina Agboola v Abimbola* the supreme court, speaking of the burden and standard of proof where the contending parties claim to derive their title from a common source, had this to say: -*

*"To start with, if it is a common ground, as indeed it was, that the land Originally belonged to the Oloto Chieftaincy Family, then in order to establish his title to the land a party must trace his title to the family. See *Thomas v Preston Holder* (1946) 12 WACA 78. There can be no doubt whatsoever on the evidence before the Registrar that the appellant did so clearly by the conveyance Exhibit D executed in his favour by the Oloto Chieftaincy family. On the other hand, the Respondent (or her predecessor in title) has no conveyance from the Oloto Chieftaincy family and indeed except for the purchase receipt Exhibit "B" 2 they had no documents whatsoever evidencing any transfer to them or her of the absolute interests of the Oloto Chieftaincy Family".*

This statement was adopted and applied by the court in *Lion Buildings Ltd v Shadipe* (Supra) at page 159 in the following terms:

*"The root of title of the defendant Exhibit D8 having been destroyed, there was not a shred of evidence to support any claim by the defendant to any right or interest acquired through Mathew Adeyinka from the Onikoro Chieftaincy Family. The claims of the Plaintiffs are founded on their deed of conveyance Exhibit PI executed by the Onikoro Chieftaincy family -which conveyed to them the land in dispute. The conveyance now stands un-challenged. On the basis of the conveyance Exhibit PI the plaintiffs were entitled to judgment of the court".*

See also *Adelaja v Sonoiki* (1990) 2 NWLR (Part 131) 137 at

155. The above are also authorities for the proposition that a duly executed deed of conveyance is sufficient evidence to support the award of title to the land in dispute to the beneficiary of the deed of conveyance. See *Idundun v Okumagba* (1976) 1 NWLR 200 and *Alhaji A. Aliyu v Dr John Adewunmi Sodipo* (1994) 5 NSLR (Part B 342) 1 at 23.

On the above authorities I am of the view that Exhibit B entitled the Respondents to the judgment of the case. Tabai JCA as he then was further states, on the issue of acts of possession and purchase as canvassed by the appellants, the lower court found as follows: -

*"I hold in conclusion therefore that even if he purchased the land as alleged there is no evidence that Bamidele Ayinla Lawanson had notice of the 1st appellant's purchase and possession at the time he bought it from Olugbode Family. Thus Bamidele Ayinla Lawanson remained a purchaser for value without notice of the 1st appellant's prior equity. In the event I hold that the defence does not avail the appellants".*

(Underlining mine)

E See pp 232 -235 of the Record.

Consequently, the court below dismissed the appeal and affirmed the judgment of the trial lower court. It is also against this decision that the Appellants (defendants in the High Court Ibadan) have again appealed to this court. The Appellants in their Notice of appeal dated 15/7/2003 filed eight grounds of appeal, these grounds of appeal are reproduced on pp. 239 - 247 of the printed Record. On the 25th of April, 2005 this court granted the Appellants leave to raise and argue new and fresh point of law not canvassed in the court below. Hence the Appellants filed additional ground of appeal as follows: -

*"The lower court lacked jurisdiction to entertain the action as the plaintiffs are not competent parties to bring the action having failed to comply with section 10 Administration of Estate Law (cap) 1 Vol. 1 Laws of Oyo State of Nigeria, 1978".* This was not however pleaded.

In accordance with the rules of this court both parties filed and exchanged their respective Briefs of arguments. On the 21/4/08 when



this appeal was heard both parties adopted their written Briefs. The Appellants in their Brief of argument dated 13/4/05, and filed on 14/4/05, distilled five (5) issues for our determination of the appeal as follows: -

*"1. Whether the court has jurisdiction to entertain the Plaintiffs/Respondents' -claims having regard to (i) Section 7(2) of the Limitation Law Cap. 64, Laws of Western Region of Nigeria and (ii) Section 4(1) (a) of the Limitation Law Cap. 64, Laws of Oyo State of Nigeria, 1978.*

*2. Whether the defence of Limitation which relates to the issue of jurisdiction needs to be specifically pleaded in the Statement of Defence before it can be raised.*

*3. Whether the Plaintiffs/Respondents have discharged the onus of proof that Exhibit 'B' and Exhibit 'C-C3' were duly executed by respective vendors mentioned in the said documents without calling any member of their family to testify on their behalf.*

*4. Whether the plaintiffs/Respondents have proved a better title to entitle them to judgment against the Defendants/Appellants.*

*5. Whether the learned court has jurisdiction to entertain the action having regard to Section 10 of the Administration of Estates Law, Laws of Oyo State of Nigeria, 1978".*

Whilst the Respondents in their Brief of argument dated 3/6/05 formulated two issues to be found on page 5 of their Brief thus: -

*"1. Whether the statute of Limitation or any statute for that matter, is one that the Appellants should specifically plead in their statement of defence or one to be merely inferred by the court from the respondents' Writ of Summons and statement of claim and no more as the Appellants are contending in this appeal. Grounds 1, 2 & 10 of grounds of appeal.*

*2. Whether the Plaintiffs/Respondents have discharged the burden of proof placed on them to entitle them to the judgment of the court in this appeal".*

On the 1st issue formulated by the Appellants it was submitted that the plaintiffs cause of action was predicated on a tort of trespass and injunction as borne out of the writ of summons and statement of claim.

He referred to paragraphs 17 and 18 of the statement of claim

and submitted that the plaintiffs pleaded that the defendants entered the land in dispute in 1984 while this action was filed in 1991, which is 7 years after the cause of action has arisen. It was therefore submitted that by virtue of provisions of section 4(1)(9) of the Limitation Law Cap 64 Laws of Oyo State 1978 an action seeking redress or recovery of damages could only be brought within Six (6) years from the day the cause of action accrued. It was submitted that the provisions of the law is mandatory as the word used is shall which does not permit any discretion or variation. The case of UNTHMB v. Nnoli (1991) 8 NWLR (Part 363) 376 at 386; and Odua Investment Coy Ltd v. Talabi (1997) 10 NWLR (part 523) 1 at 6 were cited. The appellants submitted that the defence was not required to plead the defence of limitation in its pleadings, and the issue could only be determined based on writ of summons and statement of claim of the plaintiffs, the case of Fadare v. Attorney-General Of Oyo State (1982) 4 SC at 25, was cited in support. It was submitted that the plaintiffs action being statute barred the court does not have the jurisdiction to entertain it. See Emiator v Nigerian Army (1999) 9 S.C. 89; (1999) 12 NWLR (Pt 631) 363 at 364. Learned Counsel for the Appellants also cited the provisions of section 6(2) and 7(2) of Limitation Law Cap. 64 Laws of Western Nigeria, 1959 and submitted that since the Respondents father died on 23/2/66 the cause of action could be said to have accrued on that date i.e. 23/2/66, and since this action was filed in 1991 the period of twelve years provided in that section had elapsed. On the second issue, the learned counsel submitted that the defence of limitation relates to jurisdiction which can be raised at any stage of the proceedings, even for the first time in the Supreme Court, the case of Ovie v Ighiwi (2005) 1 S.C (Pt.II) 16;(2005) 5 NWLR (Pt. 917) 184 at 223 was relied upon.

It is therefore wrong for the lower court to have held that the failure of the Appellants to plead the issue of Limitation in their defence would prejudice the respondents if it allowed it on appeal to the Court of Appeal.

On issue 3 and 4 the learned counsel to the appellants submitted that it has been held in Idundun v Okumagba (1976) 9-10 S.C (Reprint) 140, (1976) NMLR 200, that ownership of Land may be proved by production of documents of title which must be duly au-

thenticated in the sense that their due execution must be proved and established, unless they are produced from proper custody in the circumstances giving rise to presumption in favour of due execution. It was therefore his submission that the respondents have not been able to prove the due execution of Exhibit B for their alleged failure to call any member of Olugbode family to authenticate it. B

It was again contended that the appellants' purchase was earlier in time and it ought to take priority over that of the respondents. On the 5th issue, it was contended that by virtue of the provisions of section 10 of the Administration of Estate Law, Laws of Oyo State the plaintiffs were not competent to institute this action as they have not obtained letters of Administration in respect of the Late Lawanson. As a result, the condition precedent having not been fulfilled the court therefore lacks jurisdiction to entertain the case as it was incompetent; as the plaintiffs lack locus standi to institute the case. The following cases were cited: - C D

(i) Yusuf v Dada (1990) 7 S.C. (Pt.II)18; (1990) 4 NWLR (Pt. 146) 657 at 679;

(ii) Lawal v. Younan & Sons & Co. (1961) All NLR 245 at 253: E

Learned Counsel for the appellants Ogunwole Esq. in all urged this court to allow the appeal. Learned Counsel for the Respondents Ajakaiye Esq, on the first issue, contended that by virtue of the provisions of Order 25 Rules 6 (1) & (2) of the High Court Civil procedure Rules of Oyo State it is mandatory for the Appellants to plead the Limitation Laws of Oyo State before they could enure for their benefits. It was further contended that the appellants are making a different case from the one presented before the lower court. He then submitted that points not canvassed at the hearing or trial will not be allowed to be canvassed on appeal as it would amount to making a different case at the appeal stage. F G

Cases of Udza Uor & Ors v. Loko (1988) 5 S.C 25 at 28, 30, 33 - 35; Ekpe v. Fagbemi (1978) 3 S.C. 209 at 213;(1978) 3 S.C. (Reprint) 143 were cited. This can only be allowed where it will prevent obvious miscarriage of justice - Skenconsult Nig. Ltd v. Ukey H (1981) 9 S.C 6 at 18; (1981) 1 S.C. (Reprint) 4.

It was the general contention of the Learned Counsel for the respondents that both the Limitation Laws and Administration of Estate

Laws where not pleaded by the Appellants and neither were the facts upon which the appellants can rely on to invoke the provisions of these Laws pleaded. The case of:

- B (a) FCDA Vs Naibi (1990) 5 SCNJ 186 at 194;  
(b) Adegbola v. Obalaja (1978) 2 LRN 164 at 167;  
(c) Ojo v. Banjo (1979) 2 LRN 396 at 298; were cited.

Alternatively, Learned Counsel submitted that, there is no where it could be deduced that the respondents' claims are statute barred. He referred to paragraphs 1 - 18 of the Respondents' statement of claim that up to 1989 the Respondents were under disabilities, PW5 was handed all the documents relating to the property of late Lawanson, the respondents' father. These documents were handed over to the respondents in 1990 after the respondents sought assistance from a popular Yoruba Radio programme "Se O Darabe".

D On the Administration of Estate Law, the learned counsel submitted that the Native Law and custom whereby a Yoruba person's children are entitled to succeed in Lagos to his property on his death intestate has been firmly established by numerous judicial authorities and this does not need to be proved by evidence. He cited in support the cases of: -

- E (i) Kareem v. Ogunde (1972) 1 All NLR (pt 1) 73/80;  
(ii) Toriola v. Williams (1982) 7 S.C 27 at 29; and  
(iii) Shuaibu v. Bakare (1984) 12 S.C 198 at 199. He there-  
F fore submits that the respondents need not obtain Letter of Administration before they can institute an action to protect their Late Fathers Estate.

On the second issue, he submits that the respondents have proved their title to the land in dispute. He referred to the concurrent  
G decisions of the two lower courts on the title of the Respondents to the land in dispute. These concurrent findings of the trial court and the Court of Appeal can not easily be disturbed by the appellate court especially when no mis-carriage of justice has been shown to have been occasioned. He cited the case of Nziwi v. Onuorah (2002)  
H 94 LRCN 119 at 121 where the Supreme Court states;

*"This Court will not interfere with the concurrent findings of both the trial Court and the Court of Appeal on essential issues of fact except there are established, a miscarriage of justice or a viola-*

*tion of some principles of law or procedure”.*

The above analysis and discussions are representing the positions taken by both Counsel on behalf of their respective Clients. They state the above positions so eloquently that one will be tempted to agree 50% with each and every ones submissions at the same time. It goes without saying therefore that both counsel undertook an in-depth research before now. Their efforts to assist this court in arriving at a just decision are highly commendable. That aside, this court, as usual, would do its possible best without fear or favour to do substantial justice to the parties in a calm but serious manner.

That being the case with all sense of responsibility and in my view the determination of this seemingly simple appeal, two issues call for consideration as follows:

*“(1) Whether the Appellants have proved that the provisions of the Limitation Laws and the Administration of Estate Law of Oyo State have robbed the trial court the jurisdiction to hear and determine this case, and*

*“(2) Whether the appellants have shown that the concurrent findings of facts by the two lower courts that the respondents have proved better title to the land in dispute had occasioned miscarriage of justice or a violation of some principles of law or procedure that will justify this court to interfere with the findings”.*

Having read the illuminating judgment of my learned brother in the lead judgment I hold that since the appellant did not plead the said statute of limitation law Cap 64 Laws of Western Region, Section 7(2) thereof, they cannot rely on same to defeat the claims of the respondents. The position taken by the Appellants therefore lacks the support of the law. The decisions of the lower court therefore cannot be faulted. If the defendants/appellants herein are serious about the issue of limitation they should have pleaded same in their defence. After all, Order 25 Rules 6 (i) and (2) of the High Court (Civil Procedure) Rules of Oyo State mandated the defendants now Appellants to specifically plead the limitation laws of Oyo State. Since they chose to keep mum the issue of limitation must therefore be taken as ruse, they cannot benefit from it under the English law, neither can they derive any advantage under the customary law since the administration of estate Law is not applicable in this type of inher-

itance under customary law.

That being the case, the law is behind the respondents since the two lower courts had concurrent findings of facts, and the appellants' counsel did not show that the two concurrent findings violated any principles of law or procedure, and since there is not established any miscarriage of justice it would be difficult for this court to fault their decisions - *Nziwu v. Onuorah* (2002) 4 NWLR (Pt. 756) 22 where Belgore JSC (as he then was), has this to say:-

*"There are concurrent findings of the High Court and Court of Appeal on the facts adduced in evidence. Despite the grounds of appeal alleging error in law, I find no law but only facts involved in this appeal. I have not found any special circumstance whereby I will interfere with findings of facts by trial court and Court of Appeal. I therefore find no substance in this appeal and I dismiss it..... ". See pages 27 of the report. See also the statement of Iguh, JSC, agreeing with the lead judgment on pages 27 — 28 thereof".*

For the above little but humble contribution and the fuller and more detailed reasons adumbrated in the lead judgment of my learned brother Ogebe JSC, I find no merit in this appeal. I dismiss it with N50,000.00 costs to the Respondents in this appeal.

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