

SUPREME COURT OF NIGERIA
11TH JULY, 2008 SC. 417/2001
CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
J. O. OGEBE, M. S. MUNTAKA-COOMASSIE, JJSC

1. BELLO SALAMI
2. LIASU SALAMI APPELLANTS
AND
ALHAJI ADETORO LAWAL RESPONDENT

TORTS - Trespass - Ingredients - Action for trespass is sustained by proof of possession and defendant's trespass - It is not dependent on a successful claim of title by plaintiff - As rightly held by trial judge herein (H1)

TORTS - Trespass - Trespasser in possession - Status of - He is entitled to keep his possession against the whole world - Except a person who can show a better title than himself (H2)

CUSTOMARY LAW - Customary tenant - Possessory rights of - He is entitled to possession of the land in perpetuity subject to his good behaviour - Even upon misbehaviour he can only be dispossessed by an action in forfeiture (H3)

FACTS

The Plaintiffs/Appellants sued Defendant/Respondent at the High Court of Osun State claiming declaration of title to land, damages for trespass and injunction. Appellants' case was that the land was granted to their ancestor, Bamigbola by the Olofa of Ofatedo over two hundred years ago and subsequently they had inherited the land upon Bamigbola's death and had exercised rights of ownership thereon without let or hinderance until Respondent interfered in 1982. Respondent's case was that Olofa of Ofatedo was a customary tenant of Timi of Ede and could not grant land without the consent of Timi of Ede; and that it was the Timi of Ede who had sold the land in dispute to him in 1975, ever since, he had exercised ownership rights over it.

At the end of trial, the learned trial judge held that the land originally belonged to Timi of Ede but that the Olofa of Ofatedo, and by extension the Appellants, were customary tenants thereon. He also held that though the Respondent may have bought the radical title from Timi, the title was subject to the rights of Appellants as customary tenants. Accordingly, he dismissed the Appellants claim for title and granted them damages for trespass and injunction. Respondent successfully appealed to the Court of Appeal leading to a setting aside of the judgment. Hence, Appellant has brought this appeal to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right to have set aside the finding of the trial Court on possession and the status of the Plaintiffs which entitled them to be in possession and to maintain an action for trespass against the defendant.”

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)
Trespass - Ingredients

1. Was the Court below right in its approach to the matter? I think not. There is no doubt that on the pleadings, the appellants had pleaded that their ancestor BAMIGBOLA had been granted the land in dispute by the Olubadan of Ibadan and that they were in possession of the land in dispute as the descendants of Bamigbola, their ancestor. The respondent on the other hand relied on the title of the TIMI OF EDE from whom he claimed to have purchased the land in 1975. He claimed to be in possession of the land. The trial court in its judgment came to the conclusion that the land in dispute belonged to the Timi of Ede but that the appellants as well as all the people of Ofatedo had from several years back been the customary tenants of the Timi of Ede. As a result of these findings, the appellants’ claim for declaration of title was dismissed. In addition to the appellants’ claim for declaration of title however, they had sued in trespass for damages and an injunction. Now in *Oluwi V. Eniola* (1967) N.M.L.R. 339 at 340 - 341, the Supreme Court per Lewis JSC discussed the approach of the court to a situation where a plaintiff who has sued for declaration of title and trespass fails to sustain his claim for declaration of title. He said:

“The claim for trespass, however is not in our view dependent on the declaration of title as the issues to be determined on the claim for trespass were whether the plaintiff had established his actual possession of the land and the defendant’s trespass on it, which are quite separate and independent issues to that on his claim for a declaration of title.”

In this case the trial court having dismissed the appellants’ claim for title was right to have proceeded to consider the claims for trespass and injunction. (p. 3027 C)

Trespass - Trespasser in possession - Status of

2. It seems to me that the court below by dwelling so much on the failure of the appellants to rely on a customary tenancy with Timi of Ede as their overlord failed to detach the claim for declaration of title from the claim for trespass and injunction. It is the law that even a trespasser in possession can successfully maintain an action in trespass against all the world except the true owner. See *Amakor v. Obiefuna* (1974) 3 SC 49 at 56 (Reprint) where this court per Fatayi Williams JSC (as he then was) said:

*“..... a trespasser in possession of land, as against everyone but the true owner, can devise or convey his interest in the land or transmit it by inheritance (see *Asher v. Whitlock* (1865) L.R 1 Q.B. page 1). In this connection, we refer, with approval, to the statement of Cockburn, C.J., at page 5 of the judgment in the *Asher case*. It reads -”*

*“But I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine. *Doe v. Dyeball* Mood and M 346, one year’s possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor; and were to say to him, ‘you have no more title than I have, my possession is as good as yours, surely ejectment could have been maintained by the original possessor against the defendant.”*

“It only remains for us to add that, on the authority above an original trespasser, as against every one but the true owner, can, if he is in exclusive possession of the land, maintain an action in trespass against a later trespasser whose possession, whether taken by force or not, would be clearly adverse to that of the original trespasser. Therefore, assuming, without deciding, that the plaintiff/appellant in the case in hand is also an original trespasser, it seems to us that he can maintain an action for trespass against the defendant/respondent who has disturbed his possession.”

It is to be emphasized here that the trial court found that the appellants were in possession of the land. Even if the appellants were not able to show a good title to the land, they were still entitled to remain thereon unless and until someone with a better title challenged their possession.

The court below was in error to have set aside the judgment of the trial court. The only way the respondent could have acquired a valid title was to have got the Timi of Ede to first revoke the customary tenancy of the appellants’ Ofatedo people. This is a case which clearly demonstrates the logic of the principle that a trespasser in possession of land is entitled to keep his possession against the whole world except a person who can show a better title than himself (i.e. trespasser -in-possession). (pp. 3028 B/3031 G)

Customary tenant - Possessory rights of

3. The said Timi of Ede as found by the two courts below had the radical title to the land. But the land as found by the trial court had been granted to the Ofatedo people of which the appellants formed a part under a customary tenancy. There was no evidence before the trial court to suggest that the customary tenancy of the appellants’ Ofatedo people had been forfeited or brought to an end. It seems to me in the circumstances that the respondent had not adverted his mind to the nature of a customary tenancy under customary law before he bought the land in 1975. This case falls on all fours with *Lasisi v. Tubi* (1974) 12 S.C. 62 (Reprint) at pages 64-66, where this Court per Dan Ibekwe JSC stated the position of the law on customary tenancy as follows:

“We wish to begin by emphasizing the fact that, under our law,

the customary tenant enjoys a most enviable position. Once in possession, he is always in possession; for, time does not run against him. It is settled law that the possessory right of a customary tenant goes on and on, in perpetuity, unless and until the tenancy is forfeited. Be it noted also that the courts in this country are very slow in granting forfeiture. Indeed, it will be more correct to say that, in so far as customary tenancy is concerned, our courts have always been willing and ready to grant a relief against forfeiture, except in an extreme case, where the refusal to grant it would tend to defeat the ends of justice. But such cases are few and far between. They are, therefore, very difficult to come by in our law reports.

The theory behind the concept of our customary tenancy is that where strangers or immigrants have been granted land for occupation and user, they are entitled to continue in peaceable enjoyment until they forfeit their rights on such grounds as, e.g. alienating a portion of the land to others without the prior consent of the grantors, or by putting the land to uses other than those originally agreed upon, or by failure to pay the customary tribute, or by denying the title of the overlord. The list is not exhaustive, though it is important to observe that it is also well-established that customary tenants should not suffer forfeiture for minor acts of misbehaviour, and that the courts are loath to order forfeiture except in the most exceptional circumstances.

It is therefore obvious that, neither the overlord, nor his successor-in-title, could dispossess a customary tenant, except it be by means of an action for forfeiture. It is, of course, always open to the customary tenant to abandon his tenancy if he so desires, but that is another matter.

We think that we should point out here that customary tenancy has no equivalent in English law. It is neither a leasehold interest nor a tenancy at will, nor a yearly tenancy. The main incident of such tenure is the payment of tribute, not rents, by the customary tenant to the overlord.

It is no longer in doubt that a customary tenant remains in possession in perpetuity, provided that he is of good behaviour see Ejeanalonye & Ors. v. Omabuike & Ors. (1974) 2 S.C. 33, at 39 where this court put the law succinctly as follows:-

‘..... .The customary tenant pays tribute and enjoys perpetuity of tenure subject to good behaviour, which means in practice that he may forfeit his holding only as a result of an order of court for forfeiture at the instance of the customary landlords.’

B It therefore follows that, whoever deludes himself into purchasing the overlord’s radical title will soon discover that he has to take the land as he finds it. Such purchaser might have acquired titled, but never in the least, possession which, at all times, is reposed in the customary tenant until forfeited.”

C And at page 67, the learned JSC added:

“We think that we should also draw attention to the fact, that as far as the customary tenant is concerned, the question of title seems to be academic. As a matter of fact, the customary tenant is concerned only with possession simpliciter which, in the absence of any D misbehaviour on his part, is indefeasible. (pp. 3029D/3030 E)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Sub-issues are not proper in briefs

E The first comment I want to make is on the Brief of the appellants. It is a Brief of one issue made up of what counsel calls sub-issues. They are four in number. I do not know sub-issue in a Brief. I know issue; not sub-issue. There is no provision in Order 6 of the Supreme Court F Rules for sub-issues. I shall therefore take the sub-issues as part of the main Issue. I do hope that counsel will not involve himself in such an innovation that is not known to our Rules of Court. I have no objection for counsel introducing innovations in our system if they are consistent with our rules of court. I certainly have objection if innova- G tions are not consistent with our rules of court. And this one learned counsel tried is not in our Rules. So let it go. (p. 3037 A)

2. Title could be inferred from possession

H There are five ways of proving title to or ownership of land. They are: (1) By traditional evidence. (2) By production of documents of title duly authenticated and executed. (3) By acts of ownership, extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership. (4) By acts of long

possession and enjoyment. (5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

Of the five ways enumerated in Idundun v. Okumagba, supra, two ways deal with possession. One way is acts of long possession and enjoyment of the land in dispute. The other is proof of possession of connected or adjacent land. Possession per se may not be proof of ownership. The possession must be long and the length of the period will be determined in the light of the facts of each case. Apart from the long possession, a plaintiff can prove ownership of the land in dispute if he proves possession of land connected or adjacent to the land in dispute. The plaintiff must prove proximity of the two pieces of land. He must prove some nexus or contiguity. Where the pieces of land are kilometers apart or away, a trial Judge will not give judgment to the plaintiff. Again, the connection or adjacent nature of the two pieces of land will be determined by the facts of each case. Plaintiff must prove that the two pieces of land are very close; they touch or almost touch each other. They must join or in relation substantially or materially; not necessarily like Siamese twins.

The prominent place given to possession in Idundun v. Okumagba (two of the five ways or factors) justifies in some way the maxim of the 17th Century that possession is nine-tenths of the law. (p. 3037 D)

REPRESENTATION

M. O. Agboola (Issac Adeniyi with him) for the appellants.

N. O. O. Oke, SAN., (Mrs. Olawunmi Lali and Mr. A. O. Olori-Aje with him) for the respondent.

CASES REFERRED TO

Owoade v. Omitola (1985) N.W.L.R. 1 at page 9

Nwawuba and Othoera V. Eremuo and Ors. (1988) 5 S.C.N.J. 154 at page 168

Aromolaran V. Waddel (1958) S.C.N.L.R. 267

Abioye V. Yakubu (1991) 5 N.W.L.R. (Part 190) 130 at pages 245 - 246

- Aromire V. Awoyemi (1972) 2 S.C. (Reprint) 1; (1972) 1 All N.L.R. 101 at 112
 Fabunmi V. Agbe (1985) 1 N.W.L.R. 299
 Mogaji V. Cadbury (1986) 2 N.W.L.R. 9 Part 7) 393 at page 432
 Ashagbon v. Oduntan 12 NLR 7
 B Ogbakumanwu & Ors. v. Chiabolo, 19 NLR 107
 Ojomu v. Ajao (1983) 2 FNR 258
 Siesmograph Services Nig. Ltd, v. Eyeafu (1976) 9-10 SC 135
 Narindex Ltd, v. NIMB Ltd. (2001) 4 S.C. (Pt. II) 25 FWLR (Pt. 49) 1046
 C Nwiziqha v. Okosisi (1958) SCLR 292
 Sha v. Kwan (2000) 5 S.C. 178;(2000) FWLR (Pt. 11) 1790
 Oshatoba v. Chief Oluiitan (2000) 6 SCNJ 159
 D **STATUTE REFERRED TO**
 Evidence Act, Cap 112, LFN 1990, ss. 135, 136 & 137

LEAD JUDGMENT BY OGUNTADE JSC

- The appellants were the plaintiffs at the Oshogbo High Court of Osun State where they claimed against the respondent as the defendant the following reliefs:
- “*(i) A declaration that the Plaintiffs are the persons entitled to a statutory Right of Occupancy to the piece or parcel of land consisting of an area approximately 9.865 hectares, verged Blue and shown on plan No. OMS/OS/MISC/08/91 drawn by E.G. Omisola & Associates, Licensed Surveyor and bounded as follows:*
- (a) *On the front side or Northern side by Osogbo to Iwo Road*
 (b) *On the Eastern side by Adegoke Family landed property*
 (c) *On the Southern side by Onifade Family land and*
 (d) *On the Western side by Yemoja Stream*
 (ii) *Five thousand naira (N5,000.00) General damages for trespass committed by the defendant on Plaintiff family land at Yemoja area, Ofatedo.*
- (iii) *Perpetual Injunction restraining the defendant, his servants, agents or privies from committing any further acts of trespass on the said piece or parcel of land. The rentable value of the said land is (N100.00) (one hundred Naira)”*

Parties filed and exchanged pleadings after which the case was heard by Ademakinwa J. The appellants called five witnesses including the 2nd appellant. Similarly, five witnesses including the defendant testified in support of the defence case. In a well-written judgment delivered on 17-03-74, the trial judge concluded as follows:

*“The conclusion I have therefore reached in this case is that by B
Entering the land in dispute to erect a signboard thereon, the defendant has committed an act of trespass against the Plaintiffs’ exclusive possession of the said land.*

*The Plaintiffs have however claimed N5,000.00 as general damages C
for the trespass committed by the defendant. It is well known that in the absence of any special damages arising from the trespass committed only nominal damages could be awarded in the form of general damages. I would therefore allow N5,000.00 as general damages. D*

Since the Plaintiffs are entitled as customary tenants to remain in possession, I think there is a need to protect their possession, of the land in dispute until their customary tenancy is properly determined. I would therefore grant the order of injunction sought.

*In the result, the Plaintiffs’ claims succeed in part and they are E
hereby granted N5,000.00 as general damages for the trespass committed by the defendant on the land in dispute and an order of injunction restraining the defendant, his servants, or agents from further acts of trespass on the land in dispute while the customary tenancy of the plaintiffs subsists. F”*

The respondent was dissatisfied with the judgment of the trial court. He brought an appeal against it before the Court of Appeal, Ibadan (hereinafter referred to as ‘the Court below’). Before the court below, the three issues submitted by both parties to the court for G determination are:

“(1) Whether the trial (sic) judge was not wrong in holding that the plaintiffs action for declaration of title to statutory right of occupancy in respect of the parcel of land in dispute;

*2) Whether the Learned trial Judge had not committed error H
of law in holding that the previous decision by the Supreme Court in respect of the same parcel of land between the same parties did not constitute estoppel.*

3) *Whether learned trial judge was not wrong in holding that the Plaintiffs had locus standi to institute the suit against the defendant."*

The Court below in its judgment on 14-06-01 held:

B *"As Respondents failed to establish lawful and cogent evidence of possession, the finding of fact of possession was perverse and hereby set aside. As damages for trespass is rooted in possession which Respondents failed to establish, the Order for damages for trespass for the sum of 145,000.00 as general damages is hereby set aside, so also the order of injunction which is granted at the discretion of the Court acting judicially and judiciously."*

D The Court below in effect allowed the respondent's appeal and set aside the judgment in favour of the appellants. The appellants were dissatisfied with the judgment of the court below. They have come before this court on a final appeal against the said judgment. In their appellants' brief, the solitary issue for determination in this appeal was identified to be:

E *"Whether the Court of Appeal was right to have set aside the finding of the trial Court on possession and the status of the Plaintiffs which entitled them to be in possession and to maintain an action for trespass against the defendant."*

The respondent in his brief formulated the issue for determination in the appeal differently thus:

F *"Whether the learned Justices of the Court of Appeal were not right in upholding the Respondent (sic) appeal before it when the appellants evidence of possession on which the claims for damages and Injunction were granted by the trial Court were found not to be rooted in the traditional history of title as pleaded."*

G In the consideration of the single issue for determination in this appeal, I intend to consider preliminarily the pleadings upon which the case was tried.

H The appellants pleaded in their Further Amended Statement of claim that the land in dispute was granted to their ancestor BAMIGBOLA by OBA ADEGBOYE ATOLOYE, the Olofa of Ofatedo over two hundred years ago. It was pleaded that the descendants of BAMIGBOLA including the appellants had from their generation to generation exercised acts of possession and ownership over the said

land. In paragraphs 21-23 of the Further Amended Statement of claim, the appellants pleaded thus:

“(21) The Plaintiffs and members of their family are still farming on the land in dispute, planting cocoa, kola nuts, oranges and other crops like yams, cassava, sweet potatoes without any hindrance or disturbance from anyone until 1982.” B

(22) The Plaintiffs are the descendants of their ancestors called Bamigbola and they derived their respective inheritance titles under Native Law and Custom.

(23) Sometime in 1982 the Defendant visited the land in dispute and started erection of sign posts on the land, the 2nd plaintiff uprooted the sign posts and 2nd Plaintiff together with others were charged to the Senior Magistrate’s Court, Ede. In charge Number MED/6C/83 the 2nd plaintiff pleaded not guilty and after the trial he was fined a sum of N100.00 which fine was paid by the 2nd Plaintiff.” C D

The Respondent in paragraphs 6, 9, 10, a and b, 22 and 24 of his Further Amended Statement of defence, pleaded thus:

“(6) With further reference to paragraph 7 of the Amended statement of claim, the Defendant states that the Olofa of Ofatedo is a Tenant of the Timi of Ede and has got no right to grant land without the knowledge and consent of the Timi of Ede.” E

(9) With further reference to paragraphs 9, 10, and 11 of the Amended Statement of claim the Defendant avers that the land in dispute forms part of a larger area of land acquired by conquest by Timi Ajeniju about 200 years ago. F

10(a) That since the conquest referred to above, the Timi of Ede (Timi Ajeniju) and all other succeeding Timis became owners of all parcel of land in Ede and District or what is now known as Ede and Egbedore Local Government Areas; G

10(b) Timi Ajeniju settled many people as customary tenants parts of the conquered Areas such as Awo, Iwoye, Ara, Oloki, Iddo-Osun, Ofatedo, Okinni, etc.

(22) With reference to paragraph 28 of the statement of claim, the Defendant avers that he had been the owner long before 1982 and that the Plaintiffs are duly aware of the Defendant’s ownership of the land in dispute. H

(24) *With reference to paragraph 30 of the Statement of claim the Defendant states that he had been in possession since he bought the land in dispute from Oba John Laoye in 1975 or thereabout. ”*

It is apparent from the extracts of the parties’ pleadings above that the appellants traced their title to their ancestor BAMIGBOLA B who was said to have been granted the land in dispute by Oba Adegboye Atoloye, the Olofa of Ofatedo who himself received the grant of the land from the then Olubadan of Ibadan. The appellants claimed to be in possession of the land in dispute and that the respondent came to disturb their possession when in 1982 he came on C the land and erected sign posts thereon. The respondent on the other hand claimed that he had been in possession of the land since 1975 when he purchased it from Oba John Laoye, the Timi of Ede whose ancestor Oba Timi Ajeniju acquired the land by conquest 200 years D ago. It was pleaded that the Olofa of Ofatedo whose title the appellants relied upon was in fact a tenant to the Timi of Ede.

On this state of pleadings, the trial court needed to determine the party whose traditional history was superior to the other, and the tangential question as to who of the parties was in possession of the E land. It must be stated here that the respondent did not file a counter-claim. He merely came to defend the appellants’ suit.

The trial judge in his judgment came to the conclusion that the appellants did not call satisfactory evidence in support of the traditional history they pleaded. He dismissed the 1st leg of their claims F which was for a declaration of title. As to the person who was in possession of the land in dispute, the trial judge at pages 61 - 62 of the record found as follows:

“The Clear evidence before the Court which I accept (and this G much was admitted in the document Exhibit ‘H’ and recognized in the Judgments Exhibits ‘E’ and ‘T’) is that the Ofatedo people (including the plaintiffs) have all along been in exclusive possession of a much larger area of land (of which the land in dispute forms part) as customary tenants of the Timi of Ede.

H *Indeed this was the case made out for the Defendant in his pleadings. That being the case the Plaintiffs family were lawfully in exclusive possession of the land in dispute as customary tenants, although the title to the reversion remained vested in the Timi of Ede*

as their customary landlord. It is trite law that customary tenants are, subject to good behaviour entitle to enjoy their use and possession of the land in perpetuity until forfeited by order of Court, (see Owoade v. Omitola (1985) N.W.L.R. 1 at page 9 Nwawuba and Othoera V. Eremuo and Ors. (1988) 5 S.C.N.J. 154 at page 168 and Abioye V. Yakubu (1991) 6S.C. 72; (1991) 5 N.W.L.R. (part 190) 130 at pages 201 - 202. It is pertinent to emphasis that even where a customary tenant is alleged to have committed an act amounting to misbehaviour it does not necessarily follow that his tenancy would automatically be forfeited. There is the need for the customary landlord to institute appropriate proceedings in Court for that purpose, (see Aromolaran V. Waddel (1958) S.C.N.L.R. 267; Abioye V. Yakubu (1991) 5 N.W.L.R. (Part 190) 130 at pages 245 - 246.

There is no evidence that before the Timi of Ede (3rd D.W.) executed the deed of conveyance transferring the title to the land in dispute to the Defendant the customary tenancy of the plaintiffs thereon had been properly terminated by order of Court. It follows therefore that all that the Defendant had been able to obtain from the Timi of Ede by virtue of the deed of conveyance Exhibit 'D' was the reversionary title to the land in dispute, while the possessory title still remains vested in the Plaintiffs as customary tenants. It is therefore clear that as at the time the Defendant entered the land for the purpose erecting signboard thereon, the Plaintiffs were in exclusive possession thereof.

The principle has always been stated that a trespasser in possession of land can maintain an action in trespass against all persons except the true owner or someone claiming through the true owner (see: Aromire V. Awoyemi (1972) 2 S.C. (Reprint) 1; (1972) 1 All N.L.R. 101 at 112; Fabunmi V. Agbe (1985) 1 N.W.L.R. 299; Mogaji V. Cadbury (1986) 2 N.W.L.R. 9 Part 7) 393 at page 432). The exception created with regard to the inability to maintain an action in trespass against the true owner or someone claiming through the true owner is, of course predicated on the finding that the person seeking to maintain the action is himself a trespasser. It has, nevertheless been long recognized that a tenant lawfully in possession, could in certain instances maintain an action in trespass against his landlord. As stated by the Learned author of Halsbury's Laws of England

it is trespass for a landlord to levy an illegal distress or having right-fully entered on the land for the purpose of distress to remain there when the distress has become wrongful, (see: Halsbury's, Laws of England (3rd Edition) Vol. 38 page 741 paragraph 1206. A fortiori, a person claiming through a customary landlord, who unlawfully pur-ported to have terminated or forfeited the interests of the customary tenant in the land and proceeded to enforce the illegal forfeiture or termination by seeking to take possession of the land and erecting signboards thereon, has committed an act of trespass. The conclu-sion I have therefore reached in this case is that by entering the land in dispute to erect a signboard thereon, the defendant has commit-ted an act of trespass against the Plaintiffs' exclusive possession of the said land."

In the extract from the passage of the trial court's judgment reproduced above, the trial judge stated that the appellants were in possession of the land in dispute when the respondent entered thereon; and further, that there was evidence which he accepted that the appellants' family had been on the land as customary tenants of the Timi of Ede and further that such customary tenancy was not determined before the land was sold to the respondent.

The Court below in its judgment on 14-06-01 overturned the judgment of the trial court on the ground that the appellants had not in the case they made before the trial court admitted that they were customary tenants of the Timi of Ede. The court below in its judg-ment said:

"Applying *Woluchem V. Gudi* 1981 5 SC 291 the finding of possession in favour of Respondents who never agreed being cus-tomary tenants of TIMI OF EDE was perverse and as an appellate court I set aside and disturb the finding of possession in favour of Respondents and state that applying section 135, 136 and 137 EVI-DENCE ACT Cap 112, Laws of the Federation of Nigeria 1990 that plaintiffs/respondents failed to establish exclusive possession as the court below found that contrary to their case to be customary ten-ants with reversionary interest vested in TIMI OF EDE. As Respon-dents failed to establish lawful and cogent evidence of possession the finding of fact of possession was perverse and hereby set aside. As damages for trespass is rooted in possession which Respondents failed

to establish the order for damages for trespass for the sum of N5,000.00 as general damages is hereby set aside, so also the order of injunction which is granted at the discretion of the court acting judicially and judiciously.

The attitude of appellate court is well settled as the rule in University of Lagos & Anor v. M.I. Aigoro (1985) 1 NWLR pt.1 page 143 SC. As the grant of injunction to Respondents was based on wrong principle of law in exercise of judicial discretion an appeal court can set aside the grant based on wrong principle of law. The order of injunction granted by the lower court is set aside and the prayer refused."

Was the Court below right in its approach to the matter? I think not. There is no doubt that on the pleadings, the appellants had pleaded that their ancestor BAMIGBOLA had been granted the land in dispute by the Olubadan of Ibadan and that they were in possession of the land in dispute as the descendants of Bamigbola, their ancestor. The respondent on the other hand relied on the title of the TIMI OF EDE from whom he claimed to have purchased the land in 1975. He claimed to be in possession of the land. The trial court in its judgment came to the conclusion that the land in dispute belonged to the Timi of Ede but that the appellants as well as all the people of Ofatedo had from several years back been the customary tenants of the Timi of Ede. As a result of these findings, the appellants' claim for declaration of title was dismissed. In addition to the appellants' claim for declaration of title however, they had sued in trespass for damages and an injunction. Now in Oluwi V. Eniola (1967) N.M.L.R. 339 at 340 - 341, the Supreme Court per Lewis JSC discussed the approach of the court to a situation where a plaintiff who has sued for declaration of title and trespass fails to sustain his claim for declaration of title. He said:

"The claim for trespass, however is not in our view dependent on the declaration of title as the issues to be determined on the claim for trespass were whether the plaintiff had established his actual possession of the land and the defendant's trespass on it, which are quite separate and inde-

pendent issues to that on his claim for a declaration of title.”

In this case the trial court having dismissed the appellants’ claim for title was right to have proceeded to consider the claims for trespass and injunction. The grouse of the court below was that the appellants had not in their Further Amended Statement of claim relied on the title of the Timi of Ede for their possession. *It seems to me that the court below by dwelling so much on the failure of the appellants to rely on a customary tenancy with Timi of Ede as their overlord failed to detach the claim for declaration of title from the claim for trespass and injunction.* *It is the law that even a trespasser in possession can successfully maintain an action in trespass against all the world except the true owner. See Amakor v. Obiefuna (1974) 3 SC 49 at 56 (Reprint) where this court per Fatayi Williams JSC (as he then was) said:*

“..... a trespasser in possession of land, as against everyone but the true owner, can devise or convey his interest in the land or transmit it by inheritance (see Asher v. Whitlock (1865) L.R 1 Q.B. page 1). In this connection, we refer, with approval, to the statement of Cockburn, C.J., at page 5 of the judgment in the Asher case. It reads -”

“But I take it as clearly established, that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine. Doe v. Dyeball Mood and M 346, one year’s possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect. Suppose the person who originally inclosed the land had been expelled by the defendant, or the defendant had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, ‘you have no more title than I have, my possession is as good as yours,’ surely ejectment could have been maintained by the original possessor against the defendant.”

“It only remains for us to add that, on the authority above an original trespasser, against every one but the true owner,

can, if he is in exclusive possession of the land, maintain an action in trespass against a later trespasser whose possession, whether taken by force or not, would be clearly adverse to that of the original trespasser. Therefore, assuming, without deciding, that the plaintiff/appellant in the case in hand is also an original trespasser, it seems to us that he can maintain an action for trespass against the defendant/respondent who has disturbed his possession.” B

It is to be emphasized here that the trial court found that the appellants were in possession of the land. Even if the appellants were not able to show a good title to the land, they were still entitled to remain thereon unless and until someone with a better title challenged their possession. The question that the trial court had to decide is -Did the respondents show a better title? It is the answer to this question that spelt the death knell to the respondent's case. The respondent claimed to have purchased the land in dispute from the Timi of Ede in 1975. **The said Timi of Ede as found by the two courts below had the radical title to the land. But the land as found by the trial court had been granted to the Ofatedo people of which the appellants formed a part under a customary tenancy. There was no evidence before the trial court to suggest that the customary tenancy of the appellants' Ofatedo people had been forfeited or brought to an end. It seems to me in the circumstances that the respondent had not adverted his mind to the nature of a customary tenancy under customary law before he bought the land in 1975. This case falls on all fours with Lasisi v. Tubi (1974) 12 S.C. 62 (Reprint) 62 at pages 64-66, where this Court per Dan Ibekwe JSC stated the position of the law on customary tenancy as follows:** D E F G

“We wish to begin by emphasizing the fact that, under our law, the customary tenant enjoys a most enviable position. Once in possession, he is always in possession; for, time does not run against him.” H

It is settled law that the possessory right of a customary tenant goes on and on, in perpetuity, unless and until the tenancy is forfeited. Be it noted also that the courts in this country are

very slow in granting forfeiture. Indeed, it will be more correct to say that, in so far as customary tenancy is concerned, our courts have always been willing and ready to grant a relief against forfeiture, except in an extreme case, where the refusal to grant it would tend to defeat the ends of justice. But
 B *such cases are few and far between. They are, therefore, very difficult to come by in our law reports.*

The theory behind the concept of our customary tenancy is that where strangers or immigrants have been granted land for occupation and user, they are entitled to continue in
 C *peaceable enjoyment until they forfeit their rights on such grounds as, e.g. alienating a portion of the land to others without the prior consent of the grantors, or by putting the land to uses other than those originally agreed upon, or by failure to*
 D *pay the customary tribute, or by denying the title of the overlord. The list is not exhaustive, though it is important to observe that it is also well-established that customary tenants should not suffer forfeiture for minor acts of misbehaviour, and that the courts are loath to order forfeiture except in the most*
 E *exceptional circumstances. See Ashagbon v. Oduntan 12 NLR 7, and Ogbakumanwu & Ors. v. Chiabolo, 19 NLR 107*

It is therefore obvious that, neither the overlord, nor his successor-in-title, could dispossess a customary tenant, except it be by means of an action for forfeiture. It is, of course,
 F *always open to the customary tenant to abandon his tenancy if he so desires, but that is another matter.*

We think that we should point out here that customary tenancy has no equivalent in English law. It is neither a leasehold interest nor a tenancy at will, nor a yearly tenancy. The main incident of such tenure is the payment of tribute, not rents, by the customary tenant to the overlord.
 G

It is no longer in doubt that a customary tenant remains in possession in perpetuity, provided that he is of good
 H *behaviour see Ejeanalonye & Ors. v. Omabuike & Ors. (1974) 2 S.C. 33, at 39 where this court put the law succinctly as follows:-*

‘..... The customary tenant pays tribute and enjoys

perpetuity of tenure subject to good behaviour, which means in practice that he may forfeit his holding only as a result of an order of court for forfeiture at the instance of the customary landlords.'

It therefore follows that, whoever deludes himself into purchasing the overlord's radical title will soon discover that he has to take the land as he finds it. Such purchaser might have acquired titled, but never in the least, possession which, at all times, is reposed in the customary tenant until forfeited."

And at page 67, the learned JSC added:

"We think that we should also draw attention to the fact, that as far as the customary tenant is concerned, the question of title seems to be academic. As a matter of fact, the customary tenant is concerned only with possession simpliciter which, in the absence of any misbehaviour on his part, is indefeasible."

It is also pertinent to stress the fact that a purchaser from the overlord will simply step into the shoes of the vendor. The rule is "Nemo dat quod non habet" - "no one gives what he does not have" in other words, a purchaser can never get what the vendor himself did not possess. We accordingly take the view that just as the overlords, the Oloto Chieftaincy Family, are without power to dispossess the customary tenants in the present case so also their successors-in-title (the respondents) are completely devoid of any such right. In short, we are of the view that the respondents in the present case bought the disputed land, subject to the unextinguished possessory title of the appellants — the customary tenants."

It is this point that the trial court eloquently made in the passage of its judgment reproduced earlier in this judgment that since the Timi of Ede, the overlord of the land in dispute had not determined the customary tenancy of the appellants' Ofatedo people, the land could not have been validly sold to the respondent.

The court below was in error to have set aside the judgment of the trial court. The only way the respondent could have acquired a valid title was to have got the Timi of Ede to first revoke the customary tenancy of the appellants' Ofatedo people. This is a case which clearly demonstrates the logic of

the principle that a trespasser in possession of land is entitled to keep his possession against the whole world except a person who can show a better title than himself (i.e. trespasser -in-possession).

In concluding its judgment, the Court below said:

B “as it has been a pyrrhic victory for the parties, each party should bear his or their own costs in the court as no order of costs is made in favour of any of the parties. “

C It is patent that the respondent could not have had anything but a ‘pyrrhic victory.’ The judgment of the court below which on its face was in favour of the respondent could not have conferred any advantage on the respondent since the said judgment still left the appellants in possession of the land in dispute, a situation which makes it inevitable for the respondent to first get his overlord to bring the D appellants’ customary tenancy to an end before the appellants could be evicted from the land. This was what the High Court did by protecting through the grant of an injunction the possessory rights of the appellants.

E This appeal is meritorious. It is allowed. The judgment of the Court below is set aside and the judgment of the High Court is restored. The appellants are entitled to costs in the Court below and this court which I fix at N25,000.00 and N50,000.00 respectively.

F

TOBI JSC

The appellants were the plaintiffs in the High Court. The respondent was the defendant. The appellants as plaintiffs claimed three reliefs in the High Court: (i) Declaration that they are entitled to a G statutory right of occupancy to the piece or parcel of land indicated in the claim, (ii) N5,000.00 general damages for trespass and (iii) Perpetual injunction against the respondent and his servants, agents or privies.

H The learned trial Judge dismissed the relief for declaration of title. He however granted the relief for trespass. He awarded nominal damages and granted injunction in favour of the appellants. An appeal to the Court of Appeal was allowed. That court set aside the award of damages for trespass and injunction granted in favour of

the appellants. The Court of Appeal said at page 128 of the Record:

“As Respondents did not cross-appeal from the dismissal of the grant of declaration for statutory right of occupancy that order of dismissal stands and the claims for trespass and general damages for the sum of N5000.00 is set aside, so also the grant of injunction in consequence of the setting aside the judgment of the High Court of Osogbo all claims of the Respondents against appellant are dismissed. B

The appeal is dismissed in respect of issues 2 and 3 of issues for determination for the reasons given above in this judgment. Issue 1 succeeds and the appeal is allowed on this ground.” C

Dissatisfied, the appellants have appealed to this court. Briefs were filed and exchanged. The appellants formulated the following issue for determination:

“Whether the Court of Appeal was right to have set aside the finding of the trial court on possession and the status of the plaintiffs D which entitled them to be in possession and to maintain an action for trespass against the defendant?”

The respondent formulated the following issue for determination:

“Whether the learned Justices of the Court of Appeal were not right in upholding the Respondent appeal before it when the Appellants’ evidence of possession on which the claims for damages and injunction were granted by the trial court were found not to be rooted in the traditional history of title as pleaded.” E

Learned counsel for the appellants, Mr. M. O. Agboola, submitted that the claim by D.W.3 is an admission against interest as far as the right of the plaintiffs to remain in possession is concerned. He cited sections 20 to 22 of the Evidence Act, 1990 and Olatunji v. Adisa (1992) 2 SCNJ 90. He also submitted that the allegation that he paid for plaintiffs crops on the land is an admission by the plaintiffs that as at the time he entered the land the plaintiffs were in possession; and since the defendants’ grantor had conceded that the plaintiffs were lawfully in possession, the onus is on him to prove that the right to possession has been terminated before he made the sale to the defendant; otherwise the defendant takes subject to the earlier encumbrance. He cited Ojomu v. Ajao (1983) 2 FNR 258. As the defendant conceded that the plaintiffs were in possession of the land F G H

ahead of him, they need not prove possession, as what is admitted needs no proof. He cited Siesmograph Services Nig. Ltd. v. Eyeafu (1976) 9-10 SC 135 (1976) 9-10 S.C (Reprint) 86. Counsel argued that what a claimant in trespass needs to prove is possession or right to possession and if that is admitted by the defendant, a claim for trespass should succeed. He cited Narindex Ltd. v. NIMB Ltd. (2001) 4 S.C. (Pt. II) 25 FWLR (Pt. 49) 1046.

Citing the case of Melifinwu v. Eghuji (1983) 3 FNR 262, learned counsel wondered why the Court of Appeal held that the finding of the trial Judge on possession was perverse. He urged the court to hold that the Court of Appeal's attack on the finding of the trial Judge on possession is erroneous as possession was not in contention at the trial court.

Learned counsel submitted that as there was no appeal on the finding of the trial court on the status of the plaintiffs as customary tenants in possession, the Court of Appeal was wrong to suo motu attack a finding not appealed against. He cited Olusanya v. Olusanya (1983) 3 SC 41 and Alli v. Aleshinloye (2000) FWLR (Pt. 15) 2610.

Learned counsel argued that forfeiture is not automatic as any misbehaviour by the customary tenant is not enough; rather there must be a court order forfeiting the tenant's interest. He cited Aromolarin v. Waddel (1958) SCNLR 267.

Dealing with the findings of the Court of Appeal, learned counsel submitted that that court cannot be excused for disturbing what he called primary findings of the trial Judge based on demeanour. He cited Nwiziqha v. Okosisi (1958) SCLR 292; Sha v. Kwan (2000) 5 S.C. 178; (2000) FWLR (Pt. 11) 1790; Oshatoba v. Chief Oluiitan (2000) 6 SCNJ 159. Counsel urged the court to allow the appeal.

Learned counsel for the respondent, Mr. N. O. O. Oke (SAN) relying on Idundun v. Okumagba (1976) 10 SC 227 submitted that there are five ways of establishing ownership of land. He argued that possession was never a separately canvassed means of acquisition of the land in dispute and having failed on traditional evidence of title, the appellants could not justifiably in law fall back on possession.

Learned Senior Advocate pointed out that the appellants did not in their claims as formulated for trial solely claim for damages and injunction which claims could have well been grounded in possession

alone; rather they tied the two and ancillary reliefs to their main claim for declaration of title of the land in dispute. Except the defence of acquiescence and laches are made out as a defence, issue of possession will fizzle out upon the appearance of someone with a better title or someone who is privy to someone with a better title, counsel contended. He cited Amakor v. Obiefuna (1974) 1 All NLR (Pt. 1) 119. B

Relying on Ebba v. Ogodo (1984) 4-5 SC 84, learned counsel submitted that a finding of possession in favour of the appellants, who have not made out their claim on title as pleaded, is perverse, as the appellants must establish the pleaded title before their acts thereon C can be seen as acts of ownership or rightful possession. It would have been another matter if the appellants had pleaded that they had no title but wished that their acts of long possession be taken as evidence of their exclusive possession, learned Senior Advocate argued. He cited Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 333. D

Learned Senior Advocate contended that as the appellants did not plead possession and establish it, they cannot be granted the relief. He cited Mogaji v. Cadbury (1985) 2 NWLR (Pt. 7) 393; Kuti v. Attorney-General of the Federation (1985) 2 NWLR (Pt. 6) 211 and Chukwueke v. Nwankwo (1985) 2 NWLR (Pt. 6) 6. He justified the interference by the Court of Appeal on the findings of the trial Judge which he regarded as perverse. He cited Lawal v. Daodu (1972) 1 All NLR (Pt. 2) 270 and Solomon v. Mogaji (1982) 11 SC (Reprint) 1. He disagreed with the submission of counsel for the appellants F that the respondents as appellants in the Court of Appeal did not appeal against the finding of the trial court that the appellants were customary tenants of Timi of Ede. He called in aid Ground 2 of the Grounds of Appeal and the particulars therein. He also disagreed with the submission of counsel for the appellants that the appellants G as customary tenants have the right to remain in possession until such a possessory right is forfeited by a court order. To learned Senior Advocate, such argument could have been valid if the appellants have originally conceded the fact of their being customary tenants of Timi of Ede both by pleadings and evidence. H

Learned Senior Advocate submitted that the issue of forfeiture does not arise at all in this case because the appellants did not predicate their case of possession on customary tenancy and landlord re-

lationship. The appellants failed to establish cohesive, logical, lawful and cogent evidence of possession, counsel argued. He submitted that a plaintiff should succeed by the strength of his own case and not by the weakness of the defendant's case, except where the evidence in the defendant's case eventually supports the case of the plaintiff to
 B give it conditional strength. Citing Onwugbufor v. Okoye (1996) 1 NWLR (Pt. 424) 252, learned Senior Advocate contended that such is not the position in this appeal. Also citing Lawal v. Olufowobi (1996) 10 NWLR (Pt. 477) 109, learned Senior Advocate urged the court to
 C dismiss the appeal as the appellant did not prove title, it is totally unnecessary to consider acts of possession.

In his Reply Brief, learned counsel for the appellants submitted that the respondent's issue for determination is warped by the intricate confusion of the legal requirements by a claim of trespass with
 D those of a claim of title. He submitted that the appellants exclusive possession and right to possession which are the basis of the claim in trespass were clearly manifested by (a) The fact as found by the trial court that the plaintiffs' people who have become settled in an identified community called Offatedo have been in exclusive possession
 E for a long time, (b) The plaintiffs' exclusive possession was testified upon by four witnesses including the plaintiffs' boundary men for decades who were not cross-examined at all on the point, (c) Exhibit F (Supreme Court Judgment) which the defendant produced in which
 F the plaintiffs' people were established as having been in exclusive possession, (d) The defendant's testimony that he paid compensation for the plaintiffs' crops. (e) The evidence of the defendant's grantor who further strengthened the plaintiffs' case by asserting that the plaintiffs were his customary tenants without going on to show that the
 G plaintiffs possessory rights as tenants were determined before the defendant's entry.

The above, learned counsel submitted, show that the appellants claim in possession was not based on their traditional history alone, but also on recent acts of possession which the respondent
 H conceded, thus proving or providing a useful support to the appellants case. He submitted that Ebba v. Ogodo, supra; Mogaji v. Cadbury, supra and Lawal v. Olufowobi, supra cited by learned Senior Advocate are inapplicable. He also submitted that Ground 2 in the Notice

of Appeal cannot withstand the argument of learned Senior Advocate. As the rest of the Reply Brief is a repetition of the appellants brief, I will not take the arguments here.

The first comment I want to make is on the Brief of the appellants. It is a Brief of one issue made up of what counsel calls sub-issues. They are four in number. I do not know sub-issue in a Brief. I know issue; not sub-issue. There is no provision in Order 6 of the Supreme Court Rules for sub-issues. I shall therefore take the sub-issues as part of the main Issue. I do hope that counsel will not involve himself in such an innovation that is not known to our Rules of Court. I have no objection for counsel introducing innovations in our system if they are consistent with our rules of court. I certainly have objection if innovations are not consistent with our rules of court. And this one learned counsel tried is not in our Rules. So let it go.

There are five ways of proving title to or ownership of land. They are: (1) By traditional evidence. (2) By production of documents of title duly authenticated and executed. (3) By acts of ownership, extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership. (4) By acts of long possession and enjoyment. (5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute. See *Idundun v. Okumagba* (1976) 9-10 SC 227; (1976) NMLR 200. See also *Omoregbe v. Idugiemwanye* (1985) 2 NWLR (Pt. 5) 41; *Mogaji v. Cadbury (Nigeria) Ltd.* (1985) 2 NWLR (Pt. 7) 393; *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt. 72) 616; *Fasaro v. Beyioku* (1988) 2 NWLR (Pt. 76) 263; *Okpuruwu v. Chief Okpokam* (1988) 4 NWLR (Pt. 90) 554.

Of the five ways enumerated in *Idundun v. Okumagba*, supra, two ways deal with possession. One way is acts of long possession and enjoyment of the land in dispute. The other is proof of possession of connected or adjacent land. Possession per se may not be proof of ownership. The possession must be long and the length of the period will be determined in the light of the facts of each case. Apart from the long possession, a plaintiff can prove ownership of the land in dispute if he proves possession of land connected or adjacent to the land in dispute. The plaintiff must prove proximity of the two pieces of land. He must prove some nexus or contiguity. Where

the pieces of land are kilometers apart or away, a trial Judge will not give judgment to the plaintiff. Again, the connection or adjacent nature of the two pieces of land will be determined by the facts of each case. Plaintiff must prove that the two pieces of land are very close; they touch or almost touch each other. They must join or in relation
 B substantially or materially; not necessarily like Siamese twins.

The prominent place given to possession in Idundun v. Okumagba (two of the five ways or factors) justifies in some way the maxim of the 17th Century that possession is nine-tenths of the law.
 C Possession of property or parcel of land means the occupation or physical control of the property or parcel of land either personally or through an agent or servant of the claimant. See Etaluku v. NHC Plc (2004) 15 NWLR (Pt. 896) 370; Aminu v. Ogunyebi (2004) 10 NWLR (Pt. 882) 457; Anyabusi v. Ugwunze (1995) 6 NWLR (Pt. 401) 255.

D A person in possession can bring an action against a person in trespass. This is because the act of trespass physically injures the rights of the person in possession. Therefore a plaintiff who is in possession has a legal right to commence an action against a defendant who is in trespass of the land. In other words, a person in possession can com-
 E mence or maintain an action in trespass against any person other than the person who can establish better title. Am I repeating myself? I think not. See Onyeakaoru v. Ekwubiri (1966) 1 NLR 32; Amakor v. Obiefuna (1974) NMLR 311. Section 146 of the Evidence Act
 F 1990 compels a defendant who admits that the plaintiff is in possession of the land in dispute to establish that the plaintiff is not the owner of the land. See Onubruchere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Ezeudu v. Obiagwu (1986) 2 NWLR (Pt. 21) 208; Ebueku v. Amola (1988) 2 NWLR (Pt. 75) 128.

G Dealing with the issue of the claim of trespass, the learned trial Judge said in his judgment:

*"It is well known that the claim for trespass is based on the exclusive possession of the land., the clear evidence before the court which I accept (and this much was admitted in the document Exhibit
 H Hand recognized in the judgment Exhibits E and F) is that the Offatedo people including the plaintiffs have all along been in exclusive possession of a much larger area of land (of which the land in dispute forms part) as customary tenants of the Timi of Ede. Indeed this was*

the case made out for the defendant in this case. That being the case the plaintiffs' family were lawfully in exclusive possession of the land in dispute as customary tenants, although title to the reversion remain vested in the Timi of Ede as their customary landlord. It is trite law that customary tenants are entitled to enjoy their use and possession of the land in perpetuity until forfeited by order of court (authorities cited). It is pertinent to emphasise that even where a customary tenant is alleged to have committed an act amounting to misbehaviour, it does not necessarily follow that his tenancy will be forfeited."

As Exhibit H features prominently in the judgment of the learned trial Judge, I will read it here:

"THIS AGREEMENT is made this 19th day of April, 1982, BETWEEN (1) MR. Salawu Ajayi (2) Monisola Ajayi (3) Awero Ajayi all of Offatedo via Ede representing Ajayi Onida Family Offatede Oshun central Division Oyo State of Nigeria, (1) Mr. Bello Ojo, (2) Liasu Adeyi (3) Lamidi Asunmo all of Offatedo via Ede representing Gbenga Family Offatedo via Ede Osun central Division Oyo State of Nigeria for themselves and acting on behalf of Onida and Gbenga families Offatedo hereinafter referred to as the Vendors) which expression shall where the content permits shall under their heirs, assigns, executors, successors in title on the one part and Chief Alhaji Raheem Adetoro Lawal of opposite District Hospital Ede Oshun central Division Oyo State of Nigeria hereinafter called the Purchaser) on the other part.

WHEREAS:-

- 1. The vendors are customary tenants and are farming on the land to be hereinafter described and intended to be sold to the purchaser.*
- 2. The Timi of Ede who is the paramount Natural Ruler of Ede and District is the overlord of all parcels of land in Ede and District.*
- 3. By virtue of this position the Timi of Ede under customary law and usage of Ede he is the only person saddled with the authority to sell, lease, assign or deal with all parcels of land in Ede and District.*
- 4. The said parcel of land to the hereinafter described forms part of Ede Community land.*

5. *The vendors have been farming on the said land with the consent, authority and approval of Timi of Ede.*

6. *UNDER AND BY VIRTUE OF A Deed of conveyance dated 11th day of November, 1977 and registered as No. 28 in volume 2199 of the Lands Registry the said hereditaments shown on Plan No. MAY 861/77 COVERING AN AREA OF 52.916 Hectares and attached to the Deed of conveyance recited above and thereon Edged RED was sold to the purchaser by the said Timi of Ede for a consideration therein stated.*

7. *AFTER the said sale to the purchaser he went into possession to discover that the vendors, their agents, and servants are farming on the said land.*

WHEREBY IT IS AGREED AS FOLLOWS: 1. The vendors have agreed to assign all their interest on the said land situate, lying and being at Offa, Oshogbo Road, Ede Oyo State of Nigeria shown on Plan No. MAY 861/77, ATTACHED TO THE Deed of conveyance dated 11th day of November, 1977 recited above to the purchaser for a sum of EIGHT HUNDRED NAIRA (N800.00)."

I entirely agree with the learned trial Judge that the Conveyance, Exhibit H is to the effect that the "*Offatede people, the vendors, including the plaintiffs have all along been in exclusive possession of a much larger area of land (which the land in dispute forms part) as customary tenants of the Timi of Ede.*" I also agree with the learned trial Judge that Exhibit E and F are judgments which are admissions of the overlordship of the Timi of Ede. In Exhibits E (Suit No. HOS/48664) which was delivered on 14th February, 1968, Fakayode, J. made the following declaration in the last paragraph of the judgment:

"Therefore I hereby declare that the land in dispute belongs to the plaintiffs under native law and custom. I hereby restrain the Defendant from selling or alienating any portion of the land in dispute without Plaintiff's previous approval or consent. The existing farming and occupational rights of the people now on the land in dispute shall not be affected in any way by this declaration."

In Exhibit F (Appeal No. SC. 47/1970) delivered on 15th October, 1970, Udo Udoma, JSC, said at pages 11 and 12 of the judgment:

“It follows therefore that this appeal succeeds. The judgment of the Western State Court of Appeal in Case No. CAW/48/68 is hereby set aside including the order for costs in the High Court and in the Western State Court of Appeal. The judgment and order of the High Court granting the plaintiff a declaration of title to the land in dispute and injunction is restored with costs. B

Accordingly, the order of this court is that the plaintiff be and is hereby granted a declaration of title to all that piece or parcel of land, the subject matter of this action, lying and being at Ede described in his Survey Plan No. AB.1900 and therein verged green. The plaintiff is also granted injunction to restrain the defendant, his agents, servants, assigns and executors from committing further acts of trespass on the said land.” C

In both Exhibits D and F, the Timi of Ede, Oba J. O. Laoye, was the plaintiff and plaintiff/appellant, respectively. D

In the light of the above exhibits and the evidence of the appellants, I do not see my way clear in supporting the decision of the Court of Appeal that the findings of fact by the learned trial Judge on possession were perverse. The court, with all respect, is wrong. There is no perversity in the findings of the learned trial Judge. E

A person who has possession of a thing has the support and strength of the law to protect that thing; subject to the rights of a person with better proof of title. And that is the position of the appellants who, in the 17th Century maxim, has nine points as against the respondent who has only one point. On the lighter side, one can say that one point out of ten is a failure. In the teachers language, it is a very big failure, next to zero, ignoring the quarter, the half and the three-quarters. I can still say on the lighter side that the one point scored by the respondent will not win the case for him. He will fail and he fails. The appellants who scored nine points will win the case and they have won. F

In sum, it is for the above reasons and the more detailed reasons given by my learned brother, Oguntade, JSC, that I too allow the appeal. I abide by my learned brother’s order as to costs. G H

MOHAMMED JSC

The Appellants in this appeal were the Plaintiffs at the trial High Court of Justice, Osogbo where they sued the Respondent as Defendant claiming declaration of title to the parcel of land in dispute, N 5, 000.00 damages for trespass and perpetual injunction restraining the Respondent/Defendant from committing further trespass. The case was heard on pleadings and after hearing the witnesses called by the parties and the final addresses of learned Counsel, the learned trial Judge in his judgment dismissed the Appellants/Plaintiffs’ claim for declaration of title, However, having found the Appellants/Plaintiffs in possession of the land in dispute as customary tenants for many years, the learned trial Judge granted their reliefs of damages for trespass and injunction against the Respondent/Defendant whose appeal o the Court of Appeal Ibadan against that decision of the trial Court on the damages awarded for trespass and perpetual injunction was successful. The Appellants/Plaintiffs who were apparently satisfied with the reliefs granted, did not appeal to the Court of Appeal against the dismissal of their claim for declaration of title. However, when they lost at the Court of Appeal, the Appellants decided to come to this Court on appeal against the setting aside of the reliefs granted them by trial court at the Court of Appeal in its judgment delivered on 14th June, 2001. Perhaps this is why even in this Court the Appellants in their appeal, have not put in issue, any question on the dismissal of their claim for declaration of title to the land in dispute, at the trial court. They were contended by raising only one issue on possession, seeking support for their claims of damages for trespass and perpetual injunction as follows -

“Whether the Court of Appeal was right to have set aside the finding of the trial court on possession and the status of the Plaintiffs which entitled them to be in possession and to maintain an action for trespass against the Defendant.”

Now what was the findings of the trial court on possession of the land in dispute between the parties? This can be seen at pages 61 - 62 of the record where the learned trial Judge said -

“The clear evidence before the Court which I accept (and this

much was admitted in the document Exhibit 'H' and recognised in the judgments Exhibits 'E' and 'F') is that the Offatedo people (including the Plaintiffs) have all along been in exclusive possession of a much larger area off land (of which the land in dispute forms part) as customary tenants of the Timi of Ede. Indeed this was the case made out for the Defendant in his pleadings. That being the case the Plaintiffs family were lawfully in exclusive possession of the land in dispute as customary tenants although the title to the reversion remained vested in the Timi of Ede as their customary landlord. It is trite law that customary tenants are, subject to good behaviour entitle to enjoy their use and possession of the land in perpetuity until forfeited by order of Court."

The findings of the trial court that the Appellants have been in exclusive possession of the land in dispute as customary tenants before the purchase of the same by the Respondent, is fully supported by evidence, most especially when right from pleadings, this fact was admitted by the Respondent. The action of the Respondent in entering the land in dispute which was in exclusive possession of the appellants, certainly constituted trespass as rightly found by the trial court thereby entitling the Appellants to the reliefs granted. The Court below was therefore wrong in setting aside this finding of fact which clearly supported the reliefs granted the Appellants by the trial court.

It is for these reasons and fuller reasons given by my learned brother Oguntade JSC in his leading judgment that I agree with him that there is merit in this appeal which I hereby allow. I abide by the orders in the lead judgment including orders on costs.

OGEBE JSC

I had a preview of the lead Judgment of my learned brother Oguntade, JSC just delivered and I agree entirely with his reasoning and conclusion. He has resolved thoroughly the sole issue raised in the appeal and I have nothing useful to add. Accordingly, I also allow the appeal, set aside the judgment of the Court of Appeal and restore the Judgment of the trial court with costs as assessed in the lead Judgment.

MUNTAKA-COOMASSIE JSC

I have had the advantage of reading in a draft form the judgment of my learned Lord Oguntade JSC and I agree with the reasoning and conclusions reached by his Lordship which I adopt as mine. I think my Lord Oguntade JSC has (exhaustively and comprehensively dealt with the relevant live issues submitted to this court for the determination of the appeal.

For the reasons he adumbrated in the lead judgment, I so found that the appeal is clearly meritorious. It is allowed. I abide by all the consequential orders he made including the orders as to costs.

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