

**SUPREME COURT OF NIGERIA**  
5TH DECEMBER, 2008. SC. 214/2003  
**CORAM:- N. TOBI, S. A. AKINTAN, W. S. N. ONNOGHEN,**  
**I. T. MUHAMMAD, J. O. OGBE, JJSC**

EDEANI NWAU & 11 OTHERS ..... APPELLANTS  
AND  
CHIEF PATRICK OKOYE & 19 OTHERS ..... RESPONDENTS

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LAND LAW - Title - Onus of proof - It is on the party claiming exclusive ownership of family land - To prove that he is entitled to it - As against all other members of the family (H1)

JUDGMENTS - Errors - Effect - It is not every error committed by a lower court that would lead to reversal of judgment - But the one resulting in a miscarriage of justice (H2)

ESTOPPEL - By conduct - Applicability - The facts of this case particularly as they relate to exhibit A - Does not fall within the purview of s. 151 Evidence Act - As to make estoppel applicable (H3)

***FACTS***

The plaintiff/appellants sued the defendant/respondents at the high court of Enugu State claiming declaration of title to land and perpetual injunction. The appellant's case was that the land in dispute was owned communally by both appellants and respondents being of a common descent and claiming through a common progenitor, one Oyiwode. This was the tenor of the declaration sought by the appellants. By way of purported defence, respondents alleged that they owned the land to the exclusion of the appellants, though they did not counter claim.

At the end of hearing, the learned trial judge found in favour of the appellants and granted them the reliefs claimed. Aggrieved, respondents appealed to the Court of Appeal which allowed the appeal and reversed the decision of the trial court. Dissatisfied, the appellants have brought this appeal against the judgment of the Court of Appeal.

***ISSUES FOR DETERMINATION***

*“3.01 Whether the Court of Appeal was right in setting aside the judgment of the trial court and dismissing the plaintiffs/appellant’s case.*

*3.02. Whether on the proper application of the reasoning/principle arising from the decision of the Supreme Court in Jonah Agbo & Ors vs George Ugwu & Anor (1977) 10 S.C page 77 or (1977) ANLR page 287 (facts of which are most identical to the instant case) the court below was right to have dismissed the plaintiffs/appellants case.*

*3.03. Whether the Court of Appeal was right in holding that estoppel does not apply in favour of the plaintiffs/appellants in this case.*

*3.04. Whether Section 39 of the 1979 Constitution of the Federal Republic of Nigeria applies in favour of the plaintiffs/appellants”*

**HELD** (Unanimously allowing the appeal per **ONNOGHEN JSC**)  
***Title - Onus of proof***

1. When one reads the judgment as a whole, it becomes clear that what the learned trial judge meant by onus of proof being on the respondents is actually with reference to their defence of exclusive ownership of the pieces of land in dispute vis - a -vis the appellants claim for communal ownership. The above becomes apparent when one looks at this passage:

*“The onus of proof is on the party claiming family land to prove that he is in fact entitled to the family land as against all other family members...”*

The above statement of the law is very correct and applies to the facts of this case where the appellants are claiming communal ownership as opposed to the respondents’ case that the land is exclusively owned by them. To defeat the claim of communal ownership put forward by the appellants, the duty or burden is clearly on the respondents to establish their defence of exclusive ownership as the presumption is in favour of communal ownership. This is settled law. (p. 3914 F)

***JUDGMENTS - Errors - Effect***

2. That apart, it is trite law that it is not every error committed by a lower court that would lead to a reversal of its judgment except it is

established that the said error resulted in a miscarriage of justice. It is my considered view that the misplacement of the onus of proof, if what happened may be properly so described, did not lead to a miscarriage of justice having regards to the pleadings of the parties, the defence of the respondents, the evidence before the Court and the applicable principles of law. (p. 3915 F)

### ***ESTOPPEL - By conduct - Applicability***

3. The question is whether the facts of the case particularly as they relate to the suit No. 11/52 (Exhibit A), fall within the purview of section 151 *supra*. I hold the view that they do not. I had earlier observed that the parties to this action were not the plaintiffs in exhibit A but defendants who were sued. From the totality of exhibit A, it is clear that the action was defended on behalf of Akpawfu community but that is not enough to ground a plea of estoppel as defined by section 51 of the Evidence Act. Exhibit A is however evidence of the parties acting in common in respect of the Akpawfu land but to stretch it to cover the principle of estoppel will be going too far. (p. 3917 D)

### **NOTABLE POINTS OF INTEREST**

#### **TOBI JSC**

##### ***1. The burden of proof is not always in the plaintiff***

The burden of proof is on the party who alleges the affirmative. The burden of proof lies on the party who will fail in the case where no evidence is given. Although the burden of proof is generally on the plaintiff, it is not invariably so. There are instances in our adjectival law where the burden of proof shifts to the defendant. It depends on the state of the pleadings. (p. 3920 H)

#### **MUHAMMAD JSC**

##### ***2. There may be separate burdens in a case with separate issues***

In respect of particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues. For instance, in a negligence action the burden of proof of duty, breach of duty and damage is upon the plaintiff and of contributory negligence upon the defendant. In an action for tres-

pass to land where the plaintiff's title is proved or admitted the burden is on the defendant to prove a right to possession consistent with that title. (p. 3929 A)

*3. Even without a counter claim the burden of proof may lie on a defendant*

Although, no counter - claim was filed by the respondents, an averment in a statement of defence which is capable of posing a new claim/assertion which will require its separate proof, must, in my view, compel its maker i.e. the defendants to assume the obligation of discharging the onus of proof which lies squarely on he who asserts. This is trite law and cannot be read as re-writing the law as held by the court below. (p. 3939 A)

**D REPRESENTATION**

Chief Chike Offodile, SAN; with him are; Messrs. Emeka Offodile, Esq., SAN; C. Atu, Esq., R. S. Ani, Esq., Gordy Uche, Esq., Onyinye Unogu (Miss.), Kanayo Okafor, Esq. and Tony Okeke, Esq., for the appellants.

Chief J. C. Ifebunandu with him; Sir Emma Nduka and C. J. Ewoh (Miss.) for the respondents.

**CASES REFERRED TO**

- F Olayioye vs Oso (1969) 1 ANLR 281
- Green vs Green (1987) 3 NWLR 481
- Iroto vs Uka (2002) 14 NWLR (Pt. 786) 195 at 221 - 240
- Eke vs Okwaranyia (2001) FWLR (Pt. 51) 1974 at 1996 - 1997
- Sorungbe vs Motunisage (1988) 12 SCNJ (Pt.1) 166 at 175
- G Olayioye v Oso (1969) 1 All NLR 281
- Green v. Green (1987) 3 NWLR 481
- Ezeoke v Nwagbo (1998) 1 NWLR (Pt. 72) 616 at 629
- Odukwe v. Bivi (1998) 8 NWLR (Pt.561) 339 at 350
- Irolo v. Uka (2002) 14 NWLR (Pt.786) 195
- H Eke v Okwaranyia (2001) FWLR (Pt.51) 1974
- Sorungbe v Motunwase (1988) 12 SCNJ (Pt.1) 166 at 175
- Archibong v Ita (2004) ALL FWLR (Pt.197) 930
- Fashanu v Adekoya (1974) 6 SC 83
- J. M Kodilinye vs M. Odu (1935) 1-3 W.A CA. 336

**STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979, s. 39

Evidence Act, ss. 35, 36, 37, 46, 135, 137, &151

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the decision of the Court of Appeal, holden at Enugu in Appeal NO.CA/E/190/1997 delivered on the 14th day of April, 2003 in which the court allowed the appeal of the present respondents and set aside the judgment of the High Court of Enugu State holden at Enugu in Suit NO. E/21/88 delivered on the 21st day of June, 1996 granting the reliefs of the appellants, then plaintiffs before that court.

The claim of the plaintiffs, as stated in the Amended Statement of Claim, paragraph 32, is as follows:-

“32. *WHEREFORE* the plaintiffs claim against the defendants jointly and severally as follows:-

(i) *A declaration that the plaintiffs and the defendants are jointly and communally entitled to the customary Right of Occupancy of the following pieces of land namely - Ukor, Ukpulikpo, Uzam Ani, Be Antunsi Awururu, Ubia and Agba , Ekpe lands situated in Akpawfu Nkanu, Local Government Area within jurisdiction.*

(ii) *Perpetual injunction restraining the defendants, their heirs, agents, servants, privies and all those claiming through them from further interference with the plaintiff's right of enjoyment as joint and communal users of the land-aforsaid”.*

The case of the plaintiffs/appellants is simply that they represent the people of Akpawfu Community, in Nkanu Local Government Area, excluding the defendants/respondents in the action; that both parties to the action descend from a common progenitor named Oyiwode who originally acquired the pieces of land now in dispute when they were virgin, which lands, after his demise have been owned and enjoyed in common with the defendants; that the parties jointly built and own a Maternity home, Elementary school and a Cassava farm on the lands in dispute. It is also the case of the appellants that the parties also defended an inter tribal boundary dispute jointly against a neighbouring town of Obunaw Akpugo when the latter sued Akpawfu for the determination of their common boundary i.e. be-

tween Obunaw Akpugo and Akpawfu communities which dispute was resolved by Mr. Hill, the then Assistant District Officer in favour of the Akpawfu community, which decision was confirmed by the Chief Commissioner, Eastern Provinces; that the demarcation of the boundary subsequently resulted in a suit by the said Obunaw Akpugo community against Ivurube Nwa, Nnamani and 53 others in their personal capacities for allegedly straying across the said boundary in the Native Court Suit NO. 11/52, which case was lost by the people of Obunaw Akpugo. The appellants also stated that both parties enjoyed the pieces of land in common until 1987 when the respondents destroyed their farms therein.

On the other hand, it is the case of the defendants/respondents that they do not share a common ancestor with the appellants and they denied being sued jointly with the appellants in Suit NO. 11/52, in a representative capacity. The respondents maintained that the appellants were immigrants from diverse places who were described as “*Awbias*” in local dialect and who constituted themselves into a community called “*Umuodenigbo*” and paid rents to the respondents for living and farming on the parcels of land now in dispute until 1987 when they refused to do so. The respondents did not counter-claim against the appellants.

As stated earlier in this judgment, at the conclusion of the trial, the learned trial judge found in favour of the plaintiffs/appellants and granted the reliefs, earlier reproduced.

The respondents were dissatisfied with the decision and consequently appealed to the Court of Appeal holden at Enugu in Appeal NO. CA/E/19/1997 which court reversed the decision of the trial court resulting in the instant appeal to this court.

In the amended appellants’ brief filed on the 9th day of November, 2004 and adopted and relied upon in argument by Learned Senior Counsel for the appellants Chief Chike Ofodile, SAN on the 20th day of October, 2008, the following issues have been identified for the determination of the appeal: -

“3.01 *Whether the Court of Appeal was right in setting aside the judgment of the trial court and dismissing the plaintiffs/appellant’s case,*

3.02. *Whether on the proper application of the reasoning/principle arising from the decision of the Supreme Court in Jonah Agbo*

*& Ors vs George Ugwu & Anor (1977) 10 S.C page 77 or (1977) ANLR page 287 (facts of which are most identical to the instant case) the court below was right to have dismissed the plaintiffs/appellants case.*

*3.03. Whether the Court of Appeal was right in holding that estoppel does not apply in favour of the plaintiffs/appellants in this case.* B

*3.04. Whether Section 39 of the 1979 Constitution of the Federal Republic of Nigeria applies in favour of the plaintiffs/appellants “*

On the other hand, the Learned Counsel for the respondents, C Chief J, C Ifebunandu in the respondents’ brief of argument deemed filed on 27th November, 2007 and adopted in argument on the 20th day October, 2008, the following issues have been identified for the determination of the appeal: -

*“(i) Whether the Court of Appeal was right in holding that there was a misplacement of the onus of proof by the trial court which occasioned a miscarriage of justice?”*

*(ii) Whether the Court of Appeal was right in dismissing the Appellants’ case having regard to the whole circumstances of the case and the evidence tendered at the trial”.* E

In arguing Issue 1 Learned Senior Counsel for the appellants referred the court to page 344, lines 19-22 of the record and submitted that the lower court erred in so holding as it is not the law that a plaintiffs case is to be dismissed because “*a judge badly handled*” F same but when a plaintiff fails to prove his case, relying on Olayioye vs Oso (1969) 1 ANLR 281; Green vs Green (1987) 3 NWLR 481; that it is not every error of a trial court that would vitiate the judgment on appeal and that the error of misplacement of the onus of proof [assuming this was the case] has not and cannot be shown to G occasion a miscarriage of justice; that the appellants proved their case as required by law particularly as the claim was that for declaration of communal/joint entitlement to customary Right of Occupancy. It is the further submission of Learned Senior Counsel that the appellants relied on traditional history and acts of possession as a mode of proving H their claim to title and produced evidence to prove same at the trial; that the trial court found that the appellants proved acts of possession and that the lower court was in error in setting aside the findings, relying on the case of Iroto vs Uka (2002) 14 NWLR (Pt. 786)

195 at 221 - 240, and submitted that the lower court ought not, in view of the findings on acts of possession, to have dismissed the case of the appellants and urged the court to resolve the issue in favour of the appellants.

In his reply, the Learned Counsel for the respondents submitted that the lower court was right, after a thorough consideration of the judgment of the trial court in holding that the findings of the trial court were based on wrong premise that the burden in law was on the defendants to prove their denials, particularly as the law is that in a case of declaration of Right of Occupancy the party claiming title must satisfy the court by evidence of the right he claims, relying on the case of *Eke vs Okwaranyia* (2001) FWLR (Pt. 51) 1974 at 1996 - 1997; *Sorungbe vs Motunisage* (1988) 12 SCNJ (Pt.1) 166 at 175; that the trial court misplaced the onus of proof on the respondents at pages 177 lines U-19, 177 line 24; 178 line 5 and submitted *"the [trial] court admitted that the plaintiff's case (now appellants) was weak but held that the defendant had the burden of proving their defence and that since they did not discharge the burden the plaintiffs weak case succeeded"*. The Learned Counsel further submitted that the misplacement of the onus of proof on the respondents occasioned a miscarriage of justice in that the respondents were saddled with the burden of proving their defence contrary to Section 35-37 of the Evidence Act.

On the sub-issue of dismissal of the action by the lower court, Learned Counsel submitted that the lower court was right in so doing particularly as it is the duty of the appellants to prove their case on the balance of probability which they failed to do; that the trial court rejected the traditional history of the appellants and that the appellants failed to discharge the burden placed on them to establish numerous positive acts of possession and ownership over a long period of time, as laid down in the case of *Archibong vs Ntoe Asim Ita* 14 WACA 520; that rather than discharge the burden, it was shifted wrongly by the trial court and placed on the respondents and urged the court to resolve the issue against the appellants and dismiss the appeal.

It is not in dispute that while the appellants claimed communal ownership of the pieces of land in dispute as residing in both parties, the respondents claim exclusive ownership of the said pieces of land.



Both parties, by their pleadings and evidence agree that the original owner of Akpawfu land including the parcels of land in dispute is Oyiwode. However, while the appellants' case is that the said Oyiwode was the progenitor of both parties, the respondents contend that Oyiwode was their exclusive progenitor as the appellants were stranger elements from different places of origin and were on the land as tenants of the respondents paying tribute or rents to the respondents for the use thereof. B

In paragraph 6 of the Amended Statement claim at page 55 of the records, the appellants pleaded as follows:-

*"6. The land in dispute is communally owned by the plaintiffs and the defendants who inherited same from a common ancestor called Oyiwode and have been exercising diverse acts of ownership thereon from time immemorial"* C

The acts of possession and ownership allegedly by both parties D include those pleaded in paragraphs 16, 17, 18 etc. of the Amended Statement of claim to wit:

*"16. As owners in possession, the plaintiffs and defendants cultivate the land in dispute during farming seasons without permission from anybody and plant thereon various economic crops. The plaintiffs and defendants enjoy the economic trees on the land in dispute together."* E

*17. There is a primary school and an uncompleted maternity project in Ukor portion of the land in dispute. The areas where the primary school and maternity project were sited were presented by the Akpawfu community. The maternity project is being financed by the Akpawfu community assisted by the Anambra State Government."* F

*18. The Akpawfu Community cassava farm is in Ukor portion of the land in dispute. Some of the plaintiffs and the defendants are in the committee that manages the farm "* G

In paragraphs 6 and 26 of the further Amended Statement of Defence, the respondents pleaded thus:

*"6. The defendants deny paragraph 6 of the Amended Statement of claim and state further that the said lands in dispute have never been communally owned by the plaintiffs and defendants instead the defendants had from time immemorial owned the lands in dispute and some other lands exclusively. The defendants only gave part of their communal lands to the Akpawfu community for devel-* H

*opment purposes in the areas south of the land in dispute - Aputi land. Further the plaintiffs are not descendants of Oyiwode of Akpawfu instead the plaintiffs who are called Umu Odenigbo migrated to Akpawfu from diverse places and do not have one ancestor by any name...*

B *"26. The defendants deny paragraph 31 of the Amended State-*  
*ment of claim and state further that the defendants owned the entire*  
*lands acquired by Oyiwode their ancestor exclusive of the plaintiffs*  
*and their Kith and Kin. Further, that the plaintiffs were given an area*  
C *called Ogbovu land some of the plaintiffs relatives bought lands from*  
*defendants, but the rest live as tenants in other areas to look after*  
*their farm lands which were let out to the plaintiffs upon condition*  
*that annual tribute be paid to the defendants "*

D In his evidence in-chief, PW1 stated, at pages 85 and 86 of the  
records, thus:

*" The land in dispute is owned by Akpawfu in general. We*  
*farm on the land. The plaintiffs and defendants enjoy the land in*  
*common. We farm on the land, we worship a shrine on the land, we*  
*have bad bush there, we have primary school on the land, and we*  
E *have a maternity under construction on the land. The Akpawfu com-*  
*munity contributed money together with the money from old An-*  
*ambra State was used in constructing the maternity. The defendants*  
*also contributed money in the construction of the maternity. We have*  
F *a community cassava farm in Ukor portion of the land. We have a*  
*committee that looks after the cassava farm. The 2nd defendant, 3rd*  
*defendant, 1st plaintiff' are some members of the committee,.. "*

At page 87, PW1 stated, inter alia:

G *"We started owing (SP) the land communally from time of our*  
*great ancestors; from time immemorial ...*  
*We have never paid any tribute or any rent to anybody in respect of*  
*the land in dispute... "*

The PW1 maintained the story under cross examination at pages  
88-89 of the record,

H Under cross examination, DW1 stated thus, at page 146 of the record:

*"We farm on parcels of the land in dispute. For purpose of*  
*farming the plaintiffs and defendants farm together. Both plaintiffs*  
*and defendants enjoy all facilities together - like maternity centre and*  
*primary school. The trial cassava farm belongs to the community*

*together, plaintiffs and defendants. The committee that controls the trial cassava farm are drawn from the plaintiffs and defendants. The proceeds from the cassava farm, go to the plaintiffs and defendants...*  
“

The above facts were confirmed by DW3, the *Igwe of Akpawfu* Community also under cross examination from the second to last line at page 151 to line 8 of page 152 of the records. B

The evidence in relation to the claim of exclusive ownership of the land in dispute includes the evidence in-chief of DW1 at page 127 of the records, where he stated thus:

*“The pieces of land in dispute are owned exclusively by Umuoyiwode, the defendants in this suit...”* C

At page 136 of the records, DW1 stated, under cross examination as follows:-<sup>1</sup>

*“The land in dispute belongs to the defendants as descendants of Oyiwode exclusively.”* D

From the pleadings and evidence of the parties as reproduced supra, the nature of the claims and defence of the parties are made very clear.

In determining the case, the trial court formulated the following issues at page 173 of the records. E

“ 1. Are the plaintiffs strangers as referred to as Awbias?”

2. Are those strangers as referred to as ‘Awbias’ entitled to own land in common with those who call themselves freeborn as referred to as ‘Amadis.’ F

3. What would be the attitude of the court where people live together and do everything together and suddenly the defendants started to claim everything exclusively to themselves and began to call the plaintiffs strangers or Awbias’... G

The trial court held that it is the duty of the defendants who averred that the plaintiffs were strangers to prove same - in relation to Issue 1 and held at page 174, *inter alia* as follows:-

*“No evidence was produced by the defendants who have asserted to prove that the plaintiffs are strangers,.. No evidence was shown that they paid fee or any homage to any person or group of persons in Akpawfu in recognition of their right to use the land except the evidence of DW3 and DW5 who gave evidence to prove payment of tributes but said that they never sued the plaintiffs for* H

*their failure to pay tributes and DW3 said that he never witnessed tributes being paid to the defendants by the plaintiffs. Therefore, I hold that the plaintiffs are not strangers in Akpawfu town “.*

The, trial judge treated Issues 2 and 3 together. Referring to the respective case of the parties, the Learned Trial Judge found at  
B page 176 - 177 of the records as follows:-

*“The averments in the plaintiffs’ Amended Statement of claim and the evidence adduced in support, showed clearly that the claim was based partly on traditional evidence and partly on acts of owner-  
C ship. The averments in the defendants’ Amended Statement of defence and evidence given by them in support, gave a completely different version of the traditional evidence. Considering first the tra-  
D ditional evidence in this case, my view of that aspect of the evidence in defendants’ case whereby defendants have sought to establish that  
E the land in dispute .... belong exclusively to them and that the plain-  
tiffs come from divers areas and settled in Akpawfu is unconvincing as the stories do not refer to acts or facts in recent years as established by evidence. There is also no evidence of the extent or area covered by the defendants’ Oyiwode family nor is there any evidence which  
F shows any act or acts in history which made the area exclusively their own... In the case at hand the defendants could not prove exclusive ownership since the numerous acts are performed jointly by the plain-  
tiffs and defendants...”*

It is very clear from the above passages that the trial court first  
F found as a fact that the plaintiffs were not stranger elements in Akpawfu community as claimed by the defendants before proceeding to consider and reject as unconvincing the defence of exclusive ownership of the pieces of land in dispute in view of the evidence of acts of joint  
G ownership and possession which the court held as proving communal ownership rather than exclusive ownership.

However, after making the above findings/holdings the trial court proceeded to hold thus- which is the crux of the decision of the lower court;

H *"I am further not assured as to the precise nature of title in respect of which a declaration is sought exclusively by the defendants. There is no conclusive evidence adduced by the defendants by which the court is satisfied that a title of this nature claimed by the defendants has been established..... The onus of proof is on the*

*party claiming family land to prove that he is in fact entitled to the family land against all other family members... And that being so, the onus of proof in this case rests not on the plaintiffs but on the defendants. In the case of J. M Kodilinye vs M. Odu (1935) 1-3 W.A CA. 336 cited by Learned Counsel for the defendants it was held that in a declaration of title to land, the plaintiff must rely on the strength of his own case and not on the weakness of the defence. In the instant case, since the onus which is on the defendant is not discharged, the weakness of the plaintiff's case (if any) will not help the defendants. The defendants pleaded and testified that the plaintiffs paid tributes to them but this averment was vehemently denied by the plaintiffs"*

It must be noted that the words "(if any)" appearing in the passage above between the words "case" and "will" were clearly omitted in the passage quoted in the judgment of the lower court at page 341 of the records. The unfortunate omission makes it appear that the trial court found as a fact that the case of the plaintiffs was weak, contrary to what the trial court actually stated.

In reacting to the above passage in the judgment of the trial court which was made an issue for determination, the lower court stated *inter alia* thus:

*"Her pronouncement seeks to base this obtuse and greatly erroneous interpretation of the law on the premise that either the defendant - now appellants were the plaintiffs or that they counter claimed. This attempt to give a new meaning to the age long accepted principle of law on where the onus (of) proof lies is standing the law on its head and metaphorically carried out or caricatured to look like the hideous medussa with a quizzically ugly and sickening head. In the instant case, it is a fact that the appellants did not counter-claim for reasons best known to them but the onus of proof that the land is jointly owned property is that of the plaintiffs - respondents and not the appellants..."*

In conclusion the lower court held thus at page 344 of the records

*"In my view the case was badly handled by the Learned Trial Judge in the court below. That being so I see merit in the appeal and it is allowed. The judgment of the High Court is hereby set aside. The suit itself is hereby dismissed"*.

It is not disputed that the respondents did not counter claim

against the appellants for declaration of title to the pieces of land in dispute from the record, the appellants were the only ones who sought declaration of communal ownership of the land in dispute and by law bear the burden of proving on the balance of probability the title they claimed, not the respondents. There was therefore an error by  
B the trial court when it appears to have placed the onus of proof on the respondents.

However, it must be noted that the trial court had made specific and far reaching findings of fact before committing the error in question. For instance, the court had found contrary to the pleading  
C of the respondents that the appellants were not strangers in Akpawfu community and that the defence of the respondents to the effect that the respondents exclusively owned the pieces of land in dispute “*is unconvincing as the stories do not refer to acts or facts in recent years*  
D *as established by evidence.* See pages 176 - 177 of the records and also the full passage earlier reproduced in this judgment.

The above findings were made before the error complained of.

The erroneous statement of the law, in view of the earlier findings by the trial court clearly refers to onus of proof of the defence of exclusive ownership put forward by the respondents in contradistinction to an onus of proof in claims for title. It is not in dispute that the defence of the respondents was that the appellants were strangers in  
F Akpawfu and as strangers they are by custom and tradition incapable of owning land; that the appellants do not share a common ancestor with the respondents as claimed by them and that the pieces of land in dispute exclusively belong to the respondents. ***When one reads the judgment as a whole, it becomes clear that what the learned trial judge meant by onus of proof being on the respondents is actually with reference to their defence of exclusive ownership of the pieces of land in dispute vis - a - vis the appellants claim for communal ownership. The above becomes apparent when one looks at this passage:***  
G

H ***“The onus of proof is on the party claiming family land to prove that he is in fact entitled to the family land as against all other family members... (See page 177 of the records) The above statement of the law is very correct and applies to the facts of this case***

**where the appellants are claiming communal ownership as opposed to the respondents' case that the land is exclusively owned by them. To defeat the claim of communal ownership put forward by the appellants, the duty or burden is clearly on the respondents to establish their defence of exclusive ownership as the presumption is in favour of communal ownership. This is settled law.** B

It should also be stated that the trial court did not end the judgment there and then but proceeded to make further findings of facts, which when taken together with the earlier findings make the position of the trial court very clear. With respect to the traditional history of the parties, the court held thus at page 178 of the records:- C

*"Since both sides rely on one common ancestor who died centuries ago, it becomes difficult to accept which traditional history that will be acceptable to the court. I find the plaintiffs and defendants properly settled on the land, as there is little to choose between the rival traditional stories; therefore both parties own the land communally."* D

At pages 180-181 the trial court found *inter alia* as follows:-

*"... it is beyond question that the plaintiffs whether they are from Umu, Oyiwode or not whether they are "Awbias" or strangers definitely own the land in dispute in this case jointly with the defendants. I find as a fact that the plaintiffs and the defendants are members of Oyiwode family although they might belong to a different section of that family. I also find as a fact that the parties communally own the land in dispute"* E F

***That apart, it is trite law that it is not every error committed by a lower court that would lead to a reversal of its judgment except it is established that the said error resulted in a miscarriage of justice. It is my considered view that the misplacement of the onus of proof, if what happened may be properly so described, did not lead to a miscarriage of justice having regards to the pleadings of the parties, the defence of the respondents, the evidence before the Court and the applicable principles of law.*** G H

It is also my considered view that the lower court was in error when it dismissed the case of the appellants without reviewing the case of the parties vis - a - vis the findings/holdings of the trial court.

I therefore resolve the issue under consideration in favour of the appellants.

Having regard to the resolution of the above Issue 1, I am of the view that Issue 2 of the appellants becomes very irrelevant to the determination of the appeal.

B On. Issue 3, it is the submission of Learned Senior Counsel for the appellants that the land in dispute being part of Akpawfu land which they and the respondents and other Akpawfu people jointly and communally contested against Abunaw Akpugo people, the respondents are estopped from saying that the appellants are mere  
C tenant settlers or strangers (Awbias) in Akpawfu and do not own the land in dispute in this case jointly or communally with them. Learned Senior Counsel referred to exhibit A, Suit NO.11/52, as constituting the estoppel. Much energy was expended on this issue, spanning  
D pages 22 - 35 of the Amended Appellants' Brief of argument.

I must state forth-with that exhibit A, (Suit NO. 11/52) was not instituted by the plaintiffs and defendants or the appellants and respondents as plaintiffs. The plaintiffs therein were the people of Akpugo while the present appellants and defendants were defendants. The  
E claim in Suit NO. 11/52 is as follows:-

"Declaration of title and ownership of lands known as - Egu Ishi (2) Ofia Ovu (3) Mgbeke (4) Egu Udene (5) Odo Okputa (6) Onu Eko (7) Ihu Agbana dispute arose 8 years ago " - See page 185  
F of the records.

The judgment of the native court is at page 199 of the record where the court stated thus:

*"Judgment: For the plaintiffs for 7 portions of lands in question. Costs - £3.51 - inspection fee to be paid to the plaintiff"*

G The result of the appeal against the above judgment is at page 202 of the record where it was stated *inter alia*.

*"... We don't see with the plaintiffs and therefore find for the defendants. No party should cross the established boundary "*

H The above decision was reviewed by Ado R. E Vacha on 1/7/52 at page 202 of record where he ordered thus:

*"I therefore order that the judgment of the lower courts be set aside and order a retrial by the Supreme Court. "*

From the pleadings the Akpugo people did institute the case at the Supreme Court but lost just as they lost an appeal to the West



African Court of Appeal. It is on the basis of the fact that the parties to this action were defendants in the old case and did defend that case on behalf of Akpawfu community that the appellants are contending that the respondents are “*estopped from excluding the appellants from joint and communal ownership of same including the land in dispute*”.

It is not in dispute that the appellants and the respondents were not the plaintiffs in suit No. 1/52, but defendants. They therefore defended the action as constituted by the plaintiffs therein.

Section 151 of the evidence Act provides as follows:-

" When one person had by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative in interest to deny the truth of that thing."

***The question is whether the facts of the case particularly as they relate to the suit No. 11/52 (Exhibit A), fall within the purview of section 151 supra. I hold the view that they do not. I had earlier observed that the parties to this action were not the plaintiffs in exhibit A but defendants who were sued. From the totality of exhibit A, it is clear that the action was defended on behalf of Akpawfu community but that is not enough to ground a plea of estoppel as defined by section 51 of the Evidence Act. Exhibit A is however evidence of the parties acting in common in respect of the Akpawfu land but to stretch it to cover the principle of estoppel will be going too far.***

I therefore hold the view that the lower court was right when it held that exhibit A does not constitute estoppel and consequently resolve the issue under consideration against the appellants.

On Issue 4, I hold the view that it is not relevant to the determination of the appeal as it is a matter that came by the way -it was not part of the complaints of the appellants as plaintiffs at the trial. In any event, having regards to the resolution of appellants' Issue 1 in favour of the appellants which included a confirmation of the findings of the trial court on relevant issues determined by that court, the present issue becomes of no moment is, consequently discountenanced by me.

In conclusion the appeal partially succeeds and is allowed by

me. The judgment of the lower court is hereby set aside while that of the trial court is restored except the finding/holding in respect of estoppel. I assess and award the sum of N50,000.00 (Fifty Thousand Naira) by way of costs against the respondents and in favour of the appellants as costs follow events.

B Appeal allowed.

### **NIKI TOBI JSC**

C The gravamen of the dispute between the parties is customary right of occupancy over seven parcels of land located in Nkanu Local Government Area of Enugu State. The appellants who were plaintiffs in the trial court pleaded that they owned the parcels of land in dispute in common with the respondents who were defendants in D that court. They pleaded that both descended from a common progenitor named Oyiwo Ode who acquired the parcels of land, originally virgin land, and that both parties had up to 1987 been enjoying the land in common. They also pleaded that they had such things as maternity home and elementary school in common on the land.

E The respondents denied in their pleadings having a common ancestor with the appellants. They pleaded that the appellants were immigrants from diverse places who were described as “awbia” in local dialect and who constituted themselves into a community called F “Uniodenigbo” and that they paid rents to the respondents for living and farming on parcels of the land in dispute until 1987 when they refused to do so.

The learned trial Judge, Edozie, J. gave judgment to the appellants. On appeal, the Court of Appeal allowed the appeal and G dismissed the suit of the appellants. This is an appeal from the decision of the Court of Appeal. Briefs were filed and exchanged. The appellants formulated the following issues for determination:

H *“3.01 Whether the Court of Appeal was right in setting aside the judgment of the trial court and dismissing the plaintiffs/appellants’ case.*

*3.02 whether on a proper application of the reasoning/principle arising from the decision of the Supreme Court in Jonah Agbo & Ors vs George Ugwu & Anor (1977) 10 SC. Page 77 or (1977) A.N.L.R Page 287 (Facts of which are most identical to the instant*

case) the court below was right to have dismissed the plaintiffs/appellants' case

*3.03 Whether the Court of Appeal was right in holding that estoppel does not apply in favour of the plaintiffs/appellants' in this case.*

*3.04 Whether Section 39 of the 1979 Constitution of the Federal Republic of Nigeria applies in favour of the plaintiffs/appellants."*

The respondents formulated the following issues for determination:

*"(1) Whether the Court of Appeal was right in holding that there was a misplacement of the onus of proof by the trial court which occasioned a miscarriage of justice?"*

*(2) Whether the Court of Appeal was right in dismissing the appellants case having regard to the whole circumstances of the case and the evidence tendered at the trial."*

Learned Senior Advocate for the appellant, Chief Chike Ofodile, submitted on Issue 1 that the Court of Appeal failed to resolve in its judgment fundamental issues and therefore wrongly dismissed the case of the appellants. He argued that a plaintiffs case is not without more to be dismissed just because "a judge badly handled" same and that the judgment of the Court of Appeal is a far cry from what the law expects of a good judgment. He urged the Court to find for the appellants on their acts of possession since the learned trial Judge found for them in clear words. He cited *Olayioye v Oso* (1969) 1 All NLR 281; *Green v. Green* (1987) 3 NWLR 481; *Ezeoke v Nwagbo* (1998) 1 NWLR (Pt. 72) 616 at 629; *Odukwe v. Bivi* (1998) 8 NWLR (Pt.561) 339 at 350 and *Irolo v. Uka* (2002) 14 NWLR (Pt.786) 195.

Learned Senior Advocate submitted on Issue 2 that on a proper application of the meaning and principles arising from the decision of the Supreme Court in *Agbo v Ugwu* (1977) 10 SC 77, facts of which are most identical to the instant case, the Court of Appeal was wrong to have dismissed the case of the appellants. Counsel examined the case of *Agbo v Ugwu* in great detail and urged the court to adopt and apply the reasoning and principles in the case.

Taking Issue 3, learned Senior Advocate submitted that the Court of Appeal was wrong in holding that estoppel did not apply in favour of the appellants. He contended that as the land in dispute

form part of Akpawfu land which they alongside the respondents and other Akpawfu people jointly and communally contested against Abunaw Akpugo people, the respondents are estopped from saying that the appellants are mere tenant settlers or strangers (Awbias) in Akpawfu and do not own the land in dispute in this case jointly or  
B communally with them. He relied on Exhibit A.

On Issue 4, learned Senior Advocate submitted that section 39 of the 1979 Constitution applies in favour of the appellants in the case. He argued that discriminatory practice against the appellants in  
C Akpwafu community make section 39(2) of the Constitution applicable. He relied on paragraph 25(a) and (b) of the further Amended Statement of Defence and the evidence of DW.1 and D.W.2. Counsel urged the court to allow the appeal.

Learned counsel for the respondents, Chief Ifebunandu, submitted that the onus is on the plaintiff who seeks a declaration of right of occupancy to prove the claim. Citing *Eke v Okwaranyia* (2001) FWLR (Pt.51) 1974, *Sorungbe v Motunwase* (1988) 12 SCNJ (Pt.I) 166 at 175, *Archibong v Ita* (2004) ALL FWLR (Pt.197) 930 and *Fashanu v Adekoya* (1974) 6 SC 83, counsel submitted that the appellants failed to discharge the burden and the Court of Appeal was therefore right in allowing the appeal. He argued that the appellants resort to section 39 of the 1979 Constitution is an attempt to becloud the issue in dispute. Counsel did not see any discrimination in the case. He also argued that the situation in *Agbo v Ugwu* is quite different from this case. He urged the court to dismiss the appeal. Learned  
F Senior Advocate in his reply brief, referring to paragraphs 1, 2, 3, 6, 14, 16, 17, 18, 28, 30 and 32 of the Amended Statement of Claim, paragraphs 3, 6, 8, 9, 11, 18, 26, 27 and 28 of the Further Amended  
G Statement of Defence and the evidence of DW.1, DW.4 and DW5, submitted that by section 137(1) of the Evidence Act, the onus of proof in the case lies on the respondents, regard being had to the presumption of ownership under section 46 of the Evidence Act,

The Crux of this appeal is in respect of the burden of proof.  
H The issue is on whom the burden of proof lies and whether that burden was discharged. The burden of proof is on the party who alleges the affirmative. The burden of proof lies on the party who will fail in the case where no evidence is given. Although the burden of proof is generally on the plaintiff, it is not invariably so. There are

instances in our adjectival law where the burden of proof shifts to the defendant. It depends on the state of the pleadings.

One important reason, if not the only important reason why the Court of Appeal dismissed the suit of the appellants is that “the case was badly handled by the learned Trial Judge” as the Judge “generally goofed to push the onus to the respondents”. Is the Court correct? The answer can be found by reference to the evaluation of the evidence by the learned trial Judge, Edozie J, in evaluating the evidence of the parties said, and I will quote the Judge in some detail.

*“They (the defendants) concede that the plaintiffs cultivate the land in dispute, live on portions of the land in dispute and cut palm trees on them. They concede that the plaintiffs and defendants enjoy schools and maternity hospitals together; they have a farm and have a committee made up of both plaintiffs and defendants who are empowered to sell and grant leases of portions of the land in dispute and that the proceeds from the community farm go to the plaintiffs and the defendants. These concessions notwithstanding, defendants state that the plots of land belong to them as owners in fee simply and that the plaintiffs as strangers were merely tenants allowed the right to use the land upon term..... The averments in the Plaintiffs Amended Statement of Claim and the evidence adduced in support showed clearly that the claim was based partly on traditional evidence and partly on acts of ownership. The averments in the Defendants Amended Statement of Defence and evidence given by them in support, gave a completely different version of the traditional evidence in this case. My view of that aspect of the evidence in Defendants’ case whereby Defendants have sought to establish that the land in dispute Uko, Ukpulikpo, Uzam Ani, Be Autusi, Awululu Ubia and Agba Ekpa land belong exclusively to them and that the plaintiffs come from diverse areas and settled in Akpawfu is unconvincing as the stories do not refer to act or acts in recent years as established by evidence. There is also no evidence of the extent or area covered by the Defendants’ Oyiwode family nor is there any evidence which shows any act or acts in history which made the area exclusively their own”*

The above findings are clearly borne out from the evidence before the court. I do not therefore see the justification for the castigation of the learned trial Judge by the Court of Appeal. In my view,

the castigation is misplaced, and I so hold.

Did the learned trial Judge goof “to push the onus to the respondents” The main and final burden to prove joint or communal ownership was on the appellants.

I hold the view that the appellants discharged that burden as in the pleadings. Thereafter, the burden of personal or private ownership shifts to the respondents. Did they prove that? I do not think so.

Learned Senior Advocate for the appellants took time and pains to examine and analyse the decision of the court in Agbo v Ugwu and submitted that the decision should be adopted. Learned counsel for the respondents submitted that the situation in this case is quite different from the facts of Agbo where both sides admitted that they are members of the same family.

I do not see any meaningful difference between Agbo and this case. Apart from the fact that both cases emanate from the same neighbourhood of Nkanu communities in Enugu State, they also relate to the issues of Awbia, strangers, free borns and the right to own land in the communities. The brief of the appellants comprehensively and adequately analysed the case and related it to this appeal at pages 10 to 21. The respondents brief did not fault the arguments of the appellants. It is not enough for them to say that the cases are different. I expected them to go into the details as dealt with by the appellants.

*“Even in times past the Awbias were strangers, there is no evidence that they are still regarded as such. There can be no better evidence of their interest in the land than the position accorded them in the control of not only the land but also the funds of the family. The appellants unsuccessfully tried to prove provisions of native law and custom, which deprives the Awbias of any right or interest in the land in dispute apart from those granted by the Awbias ... We observe that the appellants failed to establish their contention and we are therefore unable to agree with counsel’s contention that because the respondents were once regarded as Awbias, they cannot be members of Unuaniebo family and (as such cannot) own land jointly with the Amadis. The burden was clearly on them to establish this fact but they failed woefully.*

I do not see my way clear in departing from the above position taken by this court in Agbo. And what is more, learned counsel for

the respondents did not profer arguments to enable me depart from Agbo. I therefore agree with learned Senior Advocate for the appellants that this court should follow Agbo and I so follow the decision. I think: I can stop here. It is for the above reasons and the more detailed reasons given by my learned brother, Onnoghen, JSC that I too allow the appeal. I abide by his order as to costs.

### AKINTAN JSC

The dispute in this case arose over parcels of land in Akpawfu Nkanu Local Government area of Enugu State. The present appellants were the plaintiffs in the action they filed at Enugu High Court. Their claim, *inter alia*, was for (1) a declaration that the plaintiffs and the defendants are jointly and communally entitled to the customary right of occupancy of the pieces of the land; and (2) perpetual injunction restraining the defendants, their heirs, agents, servants, privies and all those claiming through them from further interference with the plaintiffs' right of enjoyment as joint and communal users of the land.

Pleadings were filed and exchanged and the parties led evidence in support of their respective pleadings. At the conclusion of the trial, the learned trial Judge gave judgment in favour of the plaintiffs (now appellants). The learned trial Judge, M. U. Edozie, J, said as follows in the concluding paragraph of his reserved judgment delivered on 21st June, 1996:

*"As I am satisfied that the plaintiffs are the joint owners of the land in dispute, there will be judgment for the plaintiffs as per their amended statement of claim. I therefore make the following orders -*

(i) *that the pieces and parcels of land known as and called G Ukor, Ukpolikpo, Uzam Ani, Be Autusi, Awululu, Libia and Agba Ekpa situate at Akpawfu clearly shown and delineated in the plaintiffs' plan No. MG/AN.30/88 is communal property of the plaintiffs and the defendants in this case.*

(ii) *The defendants, their agents and assigns, servants, privies, and all those claiming through them are hereby restrained from further interference with the plaintiffs' right of enjoyment as joint communal user of the land aforesaid."*

The defendants were not satisfied with the judgment and an

appeal was filed at the Court of Appeal against it. The court, in its reserved judgment delivered on 14th April, 2003, allowed the appeal and dismissed the plaintiffs' claim. Pats-Acholonu, JCA, as he then was, who wrote the lead judgment said as follows in the concluding paragraph;

B *"In my view the case was badly handled by the learned trial Judge in the court below. That being so, I see merit in the appeal and it is allowed. The Judgment of the High Court is hereby set aside. The suit itself is hereby dismissed."*

C The present appeal is from that judgment. The parties filed their respective briefs of argument in this Court. They also formulated issues for determination in their said briefs. The main issue raised and canvassed in this court, in my view is whether the Court of Appeal was right in setting aside the judgment of the trial court and D dismissing the plaintiffs' / appellants' case. The evidence led in support of the plaintiffs/appellants' case clearly established the plaintiffs' case that the pieces or parcels of land were communally owned and used by both the plaintiffs and the defendants. The trial court made specific findings of fact to that end. The respondents, as defendants, E did not satisfactorily controvert the evidence led on the very vital point in controversy viz: that the land was commonly owned and used by both parties. The learned trial Judge was therefore right in the decision he reached in the case.

F For the above reasons, and the fuller reasons given in the lead judgment prepared by my learned brother, Onnoghen, JSC, the draft of which I have read, I allow the appeal and make similar consequential orders as are made in the lead judgment, including that on costs.

G \_\_\_\_\_

### **MUHAMMAD JSC**

H My learned brother Onnoghen, JSC had afforded me an opportunity before now, to read in draft, the judgment he has just delivered. My learned brother has set out in his judgment, the salient facts giving rise to this appeal. Except where necessary, I shall avoid repeating the facts.

The issues formulated by the learned senior counsel for the appellant read as follows:



*“1. Whether the Court of Appeal was right in setting aside the judgment of the trial court and dismissing the plaintiffs/appellants’ case.*

*2. Whether on a proper application of the reasoning/principle arising from the decision of the Supreme Court in Jonah Agbo & Ors v. George Ugwu & Anor (1977) 10 SC page 77 or (1977) A .N.L.R. page 287 (Facts of which are most identical to the instant case; the court below was right to have dismissed the plaintiffs/appellants’ case.*

*3. Whether the Court of Appeal was right in holding that Estoppel does not apply in favour of the plaintiffs/appellant in this case.*

*4. Whether section 39 of the 1979 Constitution of the Federal Republic of Nigeria applies in favour of the plaintiffs/appellants.”*

Learned counsel for the respondent formulated the following questions for determination:

*(1) Whether the Court of Appeal was right in holding that there was a misplacement of the onus of proof by the trial court which occasioned a miscarriage of justice?*

*(2) Whether the Court of Appeal was right in dismissing the appellants case having regard to the whole circumstances of the case and the evidence tendered at the trial.”*

I think the general concept of BURDEN OF PROOF in civil proceedings postulates the obligation placed by law on a plaintiff to present evidence in proof of the fact in issue. In other words, the burden of proof is on the person who is expected to supply the evidence required in proof of his claim i.e. ONUS PROBANDI. Thus, the person who asserts a fact must prove it. See: Section 135 of the Evidence Act, Cap, 112 LFN, 1990; Are v. Adisa (1967) NMLR 304; Oluseyi v. Oyelusi (1986) 3 NWLR (Pt.31) 634. It is also he who would fail if no evidence at all is called. See: Section 136 of the Evidence Act; Ajide v. Kelana (1985) 3 NWLR (Pt.12) 248.

The claim of the plaintiffs as per paragraph 33 of their statement of claim reads:

*“33. WHEREOF the plaintiffs claim against the Defendants jointly and severally as follows:*

*I. A declaration that the plaintiffs and Defendants are jointly and communally entitled to the Customary right of occupancy of the following pieces of land namely -Ukor, Ukpolikpo, Uzam, Ani Be Atunsi, Awururu Usia and Agba Ekpe lands situate in Akpawfu, Nkanu*

*Local Government Area within jurisdiction.*

*II. Perpetual injunction restraining the Defendants, their heirs, agents, servants, privies and all those claiming through them from further interference with the plaintiffs' right of enjoyment as joint and communal users of the land aforesaid."*

B *(underlining supplied for emphasis)*

The requirement of the law will be satisfied in this case if the plaintiffs/appellants had discharged the onus placed on them i.e. to establish that the pieces of land are jointly and communally owned by the plaintiffs and defendants. There was a finding by the Learned trial judge to that effect and it is as follows:

C *"I find as a fact that the plaintiffs and the defendants are members of Oyiwodi family though they might belong to different section of that family. I also find as a fact that the parties communally own the land in dispute."*

D *(underlining for emphasis)*

The learned trial judge based his final judgment on the above findings in addition to many others and he entered judgment in favour of the plaintiffs as per their amended statement of claim. The first, ground of appeal before the court below reads as follows (though shorn of its particulars):

E *"1) The learned trial judge misdirected herself in law on the onus of proof which led her to a wrong decision in favour of the plaintiffs when she held:*

F *'The onus of proof is on the party claiming family land to prove that he is in fact entitled to the family land against all other family members. See: Atuanya v. Onyejekwe & Anor (1974-75) Vol. 9 NSCC page 89 and that being so, the onus of proof in this case rests not on the plaintiffs but on the defendants...'"*

G In his brief of argument before the court below the appellant in his first question for determination by the court below asked:

H (1) was the court below right in holding that the onus lay on the defendants to prove that the plaintiffs did not own the land communally with them?

The respondent before the court below put the same question as follows:

*"2. Whether going by the totality of the judgment, it can rightly be said that the trial judge misplaced the onus of proof which occa-*

*sioned a miscarriage of justice (Ground one). ”*

In resolving that same issue, the court below, per Pats-Acholonu, JCA (as he then was and of blessed memory) held among other things, as follows:

*‘I must candidly confess that to say that I am flabbergasted by this attempt to rewrite the law by the learned trial judge is to put it mildly. Her pronouncement seeks to base this obtuse- and greatly erroneous interpretation of the law on the premise that either the defendant - now appellants were the plaintiffs or that they counter-claimed. This attempt to give a new meaning to the age long accepted principle of law on where the onus of proof lies is like standing the law on its head and metaphorically carved out or caricatured to look like the hideous medussa with a quizzically ugly and sickening head. In this case, it is a fact that the appellants did not counter-claim for reasons best known to them but the onus of proof that the land is jointly owned property is that of the plaintiff-Respondents and not the Appellants. In the matter of civil cases generally and particularly in a land matter the onus is heavy on the proponent of the action to prove his case on the balance of probability and the weakness of the defendants’ case will not avail him. In other words, the defendant can fold his hands and dares the plaintiff to prove his case if he can. The dismissal of plaintiffs’ case in a land matter does not mean a decree of the ownership of the land in favour of the defendant who does not counter-claim, in this sort of case where the Respondents lay claim that the land the subject of the dispute is a communal property jointly owned by both parties and the appellants repudiate this claim stressing all along that there is no joint ownership and drawing attention of the court that the Respondents do not have their origin from Oyiwo Ode, the court generally goofed to push the onus to the appellants. Another gaffe committed by the learned trial judge is when she said in her judgment*

*I am further not assured as to the precise nature of title in respect of which a declaration is sought exclusively by the defendants. There is conclusive evidence adduced by the defendants by which the court is satisfied that a title of this nature claimed by the defendants have not been established.*

*The Appellants as defendants never laid any claim to any land. It is therefore with greatest respect to the learned trial judge that it is*

*apostasy to continue to harp erroneously and insistently that it is the Appellants who are claiming the title to the land."*

Before this court, the learned senior counsel for the appellant embedded the issue of onus of proof in issue No.1 and proffered argument thereon. Learned counsel for the respondent formulated  
B issue [i] on the onus of proof thus:

(I) *Whether the Court of Appeal was right in holding that there was a replacement of the onus of proof by the trial court which occasioned a miscarriage of justice."*

C From the excerpt of the judgment of the court below and as set out above, it is my understanding that the court below was saying that the learned trial judge shifted the onus of proof from the plaintiffs to the defendants when there was no counter - claim filed by the latter. I think it is helpful from the outset to understand very well, the  
D requirements placed by sections 135 and 136 of the Evidence Act on any claimant to an existing legal right or liability. The sections provides:

*"135 (1) whoever desires any court to give judgment as to any legal right or liability defendant on the existence of facts which he  
E asserts must prove that those facts exists.*

*(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

*136. The burden of proof in a suit or proceeding lies on that  
F person who would fail if no evidence at all were given on either side."*

The person who normally claims the existence of a thing which by the operation of law he claims to be his, is usually called the plaintiff/claimant. The person against whom the claim is made and who normally denies is called the defendant. The above definitions postulate at least two distinct senses in which 'burden of proof is used: the  
G legal burden and the evidential burden. The legal burden is the proof which remains constant throughout a trial. See: *Emanule v. Emanule* (1945) 2 All ER. 494 at page 496. It is the burden of establishing the facts and contentions which will support a party's case. If at the end  
H of trial he has failed to establish these to the appropriate standard, he will lose. *Young v. Rank* (1950) 2 KB. 510. The incidence of this burden is usually clear from the pleadings, it usually being incumbent upon the plaintiff to prove what he contends as the golden rule is that the onus of proof is on the plaintiff. See: *Chapman v. Oakleigh*

Animal Products Ltd. (1970) 8 KIR 1063 at 1072. Thus, the burden rests upon the party desiring the court to take action. He must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. See: Dickinson v. Minister of Pensions (1953) 1 Q.B. 228 at 232. In respect of particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case. See: Mills v. Barber (1836) 1 M & W 425 at 427. There may therefore be separate burdens in a case with separate issues. For instance, in a negligence action the burden of proof of duty, breach of duty and damage is upon the plaintiff and of contributory negligence upon the defendant. See: Dublin Wicklow and Wexford Ry Co. v. Slattery (1878) 3 App. Gas. 1155 In an action for trespass to land where the plaintiffs title is proved or admitted the burden is on the defendant to prove a right to possession consistent with that title.; See: Portland Management Ltd. v. Horte (1 D 976) 1 All E.R. 225.

The evidential burden, on the other hand, may shift from one party to another as the trial progresses according to the balance of evidence given at any particular stage. This burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side. This is the import of section 136 of the Evidence Act. Thus, the evidential burden rests initially upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See: Abrath v. North Eastern Ry Co. (1883) 11 QBD 440 at 456, C. A, per Bowen L. J.

There may, of course, be exceptions to the normal rules regarding incidence of a burden of proof. For instance, where there is a rebuttal presumption of law in favour of one party the burden of rebutting it lies upon the other, e.g. a party suing on a bill of exchange need not initially give any evidence of consideration, or that he is a holder in due course, since there are presumptions to this effect in his favour. Similarly, where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disapproving it often has upon the latter. See: R. V. Edwards (1975) Q. B. 27.

In general, when the onus of proof on all issues is on one

party, that party must ordinarily, when presenting his case, adduce all his evidence, and may not, after the close of his opponent's case seek to adduce additional evidence to strengthen his own case. But when the onus is partly upon the plaintiff and party upon the defendant, the plaintiff may in the first instance limit his evidence to proving those issues in respect of which the onus is upon him and then, after close of the defendant's case, adduce evidence in rebuttal upon those issues where the burden was upon the defendant. See: *Perm v. Jack* (1866) LR 2 Esq. 314.

Now coming back to the facts and evidence adduced by the parties in this case vis-a-vis the holdings of the two courts below, it is clear that the main claim of the plaintiffs/appellants as borne by their amended statement of claim is for:

*"a declaration that the plaintiffs and the defendants are jointly and communally entitled to the Customary Right of Occupancy of the following pieces of land namely- Ukor, Ukpulikpo, Uzam, Ani, Be Atunsi, Awururu, Ubis and Agba Ekpe lands situate in Akpawfu Nkanu Local Government Area within jurisdiction."*

*(underlining for emphasis)*

I earlier on referred to the findings of the learned trial judge on the above claim, more particularly where he said:

*"I also find as a fact that the parties communally own the land in dispute,"*

It is misleading, therefore, of counsel for the respondents to argue that the appellants made claims against the respondents for a Declaration of RIGHT OF OCCUPANCY as this has the tendency of portraying the appellants as laying claim for a right of occupancy of the pieces of land in dispute as their exclusive entitlement. The learned trial judge clarified this issue by his holding that the parties (i.e. the plaintiffs and the defendants) communally own the land in dispute.

In their further amended statement of Defence the defendants averred as follows:

*"3. That the defendants admit in part paragraph 4 of the Amended Statement of Claim only to the extent that there are 7 (seven) pieces or parcels of land in dispute in this suit but deny other material averments following and will at the trial put the plaintiffs to the strictest proof thereof. Further that Ubia is a shrine and not a piece of land instead the land on which Ubia shrine situates is called*

*Ukpata and that the proper features and delineations of the said land in dispute can be found in the Defendants Survey Plan No. TLS/AN/D210/88 which is hereby pleaded and not as shown in the Plaintiffs Survey Plan No. NG/AN/30/88.*

6. The Defendants deny paragraph 6 of the Amended State of Claim and state further that the said lands in dispute have never been communally owned by the plaintiffs and Defendants instead the defendants had from time immemorial owned the lands in dispute and some other lands exclusively.

The defendant only gave part of their communal lands to the Akpawfu community for development purposes in the areas south of the land in dispute - Aputi land. Further the plaintiffs are not descendants of Oyiwode of Akpawfu instead the plaintiffs who are called Umu Odenigbo migrated to Akpawfu from diverse places and do not have one ancestor by any name.

8. Further and in answer to the said paragraph the defendants deny that the plaintiffs were exercising acts of ownership over the land in dispute when they had been paying rents as tenants both for farming and for settling within and outside the lands in dispute in this suit.

The customary rents paid by the plaintiffs to defendants caretakers or overseers consisted of 4 tubers of yams and 2 gallons of palm wine. The defendants will at the trial of this suit lead evidence in respect of rents paid to Nnamani to Edeanioko, Owo Be Nwobodo and Ogbodo Nwannamani etc. of the defendants over Ukor land by the plaintiffs.

9 Further to the above paragraph the defendants state that with respect to Ukpulikpo land in dispute, rents were paid to Owo be Nnamoko Odu, Nwatu Be George and Andrew Nweke etc. of the defendants (Umu Oyiwode) by the plaintiffs:

a) In Uzamani land in dispute, rents were paid to Owo Be Nnamoko Be Eze, Joseph Okenwa and Michael Nwaneke etc. of the defendants (Umu Oyiwode) by the plaintiffs.

b) In Be Atunsi land in dispute owned by Ajame (Defendants descendant of Oyiwode) and Ohodo Uvuru village vide Suit No. 82/35- Amagunze Native Court.

c) In Awululu land in dispute rents were paid to Emmanuel Nnamani (Buga) Godwin Nnamani and Owo Be Nnaji etc. of the

*Defendants (Umu Oyiwode) by the plaintiffs.*

d) *Ubia is defendants shrine with its chief priest as Nwatu Obia Nwannaji and not Nwanama be Uzo.*

e) *in Agbaekpa land in dispute rents were paid to Ani Mba Nwannamani, Anthony Amushi Nnaji and Matthias Ejiofor Nnaji, etc.*  
 B *of the defendants (Umu Oyiwode) by the plaintiffs.*

11(a) *In further answer to paragraphs 8, 9 and 10 of the Amended Statement of Claim the defendants state that there are “Umu Awbia” (settlers) in Akpawfu town. Umu Awbia is made up of the following sub-families namely-Umu Iyovo, Umu Ogaa, Umu Ene-Agu, Umu Ode-arum, Umu-Ode-anagu, Umu Aneke and Umu Igwe*  
 C

11 (i) *The defendants will also rely on the intelligent report on Amagunze group written by S. P.L Beaumonth, Assistant District Officer, Udi Division, on 2nd October, 1933 to prove families in Akpawfu.*  
 D *The defendant shall rely on the records of the above-mentioned suits to prove that the plaintiffs are settlers (Awbias) in Akpawfu.*

18. *The defendants deny paragraph 16 of the Amended Statement of Claim and state that the defendants own the lands in dispute and the other lands of Oyiwode in Akpawfu exclusively and the plaintiffs are only tenant farmers who later settled amongst the defendants subject to payment of annual customary tributes. Further the defendants state that as the population of the plaintiffs grew in Akpawfu, the defendants allocated an area called Ogbovu land to the plaintiffs.*  
 E

26. *The defendants deny paragraph 31 of the Amended Statement of Claim and state further that the defendants owned the entire lands acquired by Oyiwode, their ancestor exclusive of the plaintiffs and their kith and kin. Further, that the plaintiffs were given an area called Ogbovu land, some of the plaintiffs relatives bought lands from defendants, but the rest live as tenants in other areas to look after their farm lands which where let out to the plaintiffs upon condition that annual tribute be paid to the defendants.*  
 F  
 G

27. *In further answer to paragraph 31 of the Amended Statement of Claim the plaintiffs had been paying rents and annual customary tributes to the defendants with respect to the areas where they live and farm. In 1987 the plaintiffs failed to pay the rents and tributes as demanded. The plaintiffs even though a heterogenous group were given Ogbovu land to settle but were also let into parts of Uzama land and Agudene lands as tenants. The defendants did not*  
 H



*destroy any crops belonging to the plaintiffs but demanded according to Akpawfu custom that the plaintiffs vacate all lands where they farm. The defendants farm in Akpawfu Agu, Aniechichi, Ebene, Uko and Okomkom lands in dispute.*

28. In further answer to paragraph 31 of the Amended Statement of Claim the defendants state that they occupy the lands in dispute exclusively except Uzamani where the plaintiffs were allowed to live as tenant farmers. In Akpakagu land falsely referred to as Ubia by the plaintiffs, Ede Mba Nwanama and Nnamani Nwanama of the defendants live and farm thereon. In Anachichi land falsely referred to as Ubia, Usuje Nwa George and Ede Nwani of the defendants live and farm thereon, Igwe P. 3. A. Okoye lives on the land directly adjacent the Uko land and Aputi land donated by the defendants Umuagu family of the defendants directly adjourns the Uko and Okorokoro lands.”

In view of the defendants’ averments as quoted above, and the evidence led by them, I consider it pertinent to quote in extenso the holdings of the learned trial judge. He held, inter alia, as follows

“The defendants say that the plaintiffs are strangers who have migrated from various places and settled in Akpawfu town where the defendants have always lived. They concede that they share the communal hospitals and schools together as members of the same community. They sell portions of the land together through a committee in which both representatives are members. Both that because they are free-borns and the plaintiffs are strangers, they do not have a claim to the plots of land in dispute. No evidence was produced by the defendants who have asserted to prove that the plaintiffs are strangers.

It is trite law that when the defendants assert that the plaintiffs are strangers they must satisfy the elements necessary to show that the plaintiffs are really strangers in a place they have lived all their lives peaceably and without interruption. For example, no expert witness was called to show when the plaintiffs first settled at Akpawfu. No evidence was shown that they paid fee or any homage to any person or group of persons in Akpawfu in recognition of their right to use the land except the evidence of DW3 and DW5 who gave evidence to prove payment of tributes but said that they never sued the plaintiffs for their failure to pay tributes and DW3, said that he never

witnessed tributes being paid to the defendants by the plaintiffs. Therefore, I hold that the plaintiffs are not strangers in Akpawfu town.

The averments in the plaintiffs' amended statement of claim and the evidence adduced in support, showed clearly that the claim was based partly on traditional evidence and partly on acts of ownership. The averments in the defendants' amended statement of defence and evidence given by them in support, gave a completely different version of the traditional evidence.

Considering first the traditional evidence in this case, my view of that aspect of the evidence in defendants' case whereby defendants have sought to establish that the land in dispute - Ukor, Ukpolikpo, Uzam Ani, Be Atunsi, Awululu Ubia, and Agba Ekpa land belong exclusively to them and that the plaintiffs come from diverse areas and settled in Akpawfu is unconvincing as the stones do not refer to acts or facts in recent years as established by evidence. There is also no evidence of the extent or area covered by the defendants' Oyiwode family nor is there any evidence which shows any act or acts in history which made the area exclusively their own. In the case of *The Stool of Abiualina v. Chief Kojo Eyimadu (Yimadu)* (1953) 12 W.A. C.A. 171 it was held-

*'Frequent and positive acts within living memory are essential to justify the inference of exclusive ownership.'*

See also *Ikegwuonu v. Ohawuchi* (1996) 3 NWLR (Pt.435) 146. In the case at hand the defendants could not prove exclusive ownership since such numerous acts are performed jointly by plaintiffs and defendants. I am further not assured as to the precise nature of title in respect of which a declaration is sought exclusively by the defendants. There is no conclusive evidence adduced by the defendants by which the court is satisfied that a title of this nature claimed by the defendants has been established. Defendants' Surveyor, DW2 tendered Exhibit J - defendants' plan and said that he did not see plaintiffs' plan Exhibit B before he made Exhibit J, He therefore, produced Exhibit J without knowing the cause of action and the area trespassed upon. The onus of proof is on the party claiming family land to prove that he is in fact entitled to the family land as against all other family members. See: *Atuanya v. Onyejekwe and Anor* (1974 - 75 Vol. 9 NSCC page 89. And that being so, the onus of proof in this case rested not on the plaintiffs but on the defendants. In the

case of *J. M. Kodilinye v. M. Odu* (1935) 1 - 3 WACA 336. Cited by learned counsel for the defendants it was held that in a declaration of title to land, the plaintiff must rely on the strength of his own case and not on the weakness of the defence. In the instant case, since the onus, which is on the defendant is not discharged, the weakness of the plaintiffs case (if any) will not help the defendants. Defendants pleaded and testified that plaintiffs pay tributes to them, but this averment was vehemently denied by the plaintiffs. B

Both sides claim that they are descendants of Oyiwode. How many years ago did Oyiwode settle in the land. Since both sides rely on one common ancestor who died centuries ago, it becomes difficult to accept which traditional history that will be acceptable to the court. I find the plaintiffs and defendants properly settled on the land, as there is little to choose between the rival traditional stories, therefore both parties own the land communally. C

The proof of the alleged customary law based on the testimony of the defendants themselves coupled with documentary exhibits as was referred in the case of *Kimdey v. Military Governor of Gongola* (1988) 2 NWLR (Pt. 77) 447, where it was held: D

‘Where there is oral as well as documentary evidence, documentary evidence should be used as a hanger from which to assess oral testimony.’ E

In the case at hand, the defendants tendered - Exhibit C - Judgment of Native Court in Suit No. 22/40. Exhibit D — Suit No. 44/48. Exhibit E - Intelligence Report of 1933 by SPL Beaumouth. Exhibit F - Suit No. 12/35 all in support of their contention of class distinction in Akpawfu known as ‘Amadis’ and ‘Awbias. The defendants said that an Awbia cannot own land jointly with an Amadi and for this proposition the defendants relied principally on an alleged native law and custom which they operates in Akpawfu. It is contented by the learned Senior Advocate for the plaintiffs on the other hand, that the documentary evidence were hearsay upon hearsay because they confirm what people told the Administrative Officer; that Mr. Beaumouth the then Administrative Officer was not sent to draw a line between the Amadis and the Awbias, but that the Report was aimed at judicial re-organisation on Amagunze group in Nkanu. Learned Senior Advocate of Nigeria further referred the court to section 14 of Evidence Law where it is provided that a custom is only F  
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admissible in evidence when that custom is either judicially noticed by a court of superior or co-ordinate jurisdiction in this area. They wiled on second arm of section 14 of Evidence Law, that is, proof by evidence. But the evidence before this court, was short of proof of the existence of such a custom in Akpawfu. It is noteworthy that the defendants have not led evidence of the custom but they have at some previous occasion acknowledged the plaintiffs on record as joint owner of the land in dispute even though they are alleged to be Awbias. See suit No, 11/52. The defendants cannot now be heard to deny this admission, in Exhibit A the people of Obuno in Akpugo sued the people of Akpawfu that a boundary should be created between them. The defendants in Exhibit A plaintiffs and defendants in the suit) did not represent to the court that there is a difference between the Awbias and the Amadis, they acted as one. The case went up to WACA in 1953 and the defendants won. Of the 54 defendants in Exhibit A twenty five of them were of plaintiffs group. Learned counsel for the defendants submitted that the defendants kept quiet in order to face an outward; that they could not see themselves divided at homefront as that would place them at a disadvantage. But I rather, agree with the submission of learned SAN for the plaintiffs, that the defendants, having represented to the Akpugo and the court that plaintiffs and defendants are one they cannot now escape the consequences of that representation - See Estoppel by Representation 3rd Edition by Spencer Bower & Turner page 4, 5 and 6. Furthermore, it is significant to note that in Exhibit A, not one of the defendants at the trial raised the issue of the land belonging exclusively to Amadis. The defendants are presented to the Akpugo people and to the court and secured a declaration that their communal land (land belonging to the present plaintiffs and defendants) lies on the other side of the boundary. The court has taken judicial notice that people contribute money to prosecute or defend their case. In-Exhibit A both plaintiffs and defendants contribute money and fought their case to ward off common enemy. The defendants and defendants cannot now be heard to say that the land belongs to them exclusively.

Summing up the case it is beyond question that the plaintiffs whether they are from Umu Oyiwode or not whether they are 'Awbias' or strangers definitely own the land in dispute in this case jointly with

*the defendants. I find as a fact that the plaintiffs and the defendants are members of Oyiwode family although they might belong to a different section of that family. I also find as a fact that the parties communally own the land in dispute. It is my view that the defendants are disputing this joint ownership purely on ground of greed as land in and around Enugu is becoming of very high commercial value."* <sup>B</sup>

It is thus clear to me from the portion of the learned trial judge's judgment quoted above that the learned trial judge found that the appellants as plaintiffs proved what they pleaded in relation to the communal land in question. He also found on the other hand, that the respondents as defendants made admissions that the disputed land were communally owned by both parties. Me however, found that the defendants could not prove what they asserted in respect of their exclusive ownership of the land in dispute especially the averments in paragraphs 3, 6, 8, 9(a) - (e), 11 (a), 11 (i), 18, 26, 27 and 28. <sup>C</sup>

The court below, per Pats Acholonu, JCA (as he then was and now late), made the following observations:

*"I must candidly confess that to say that I am flabbergasted by this attempt to rewrite the law by the learned trial judge is to put it mildly. Her pronouncement seeks to base this obtuse and greatly erroneous interpretation of the law on the premise that either the defendant - now appellants were the plaintiffs or that they counter-claimed. This attempt to give a new meaning to the age long accepted principle of law on where the onus of proof lies is like standing the law on its head and metaphorically carved out or caricatured to look like the hideous medusa with a quizzically ugly and sickening head. In this case, it is a fact that the appellants did not counter-claim for reasons best known to them but the onus of proof that the land is jointly owned property is that of the plaintiff-Respondents and not the Appellants, in the matter of civil cases generally and particularly in a land matter the onus is heavy on the proponent of the action to prove his case on the balance of probability and the weakness of the defendants' case will not avail him. In other words, the defendant can fold his hands and dares the plaintiff to prove his case if he can. The dismissal of plaintiffs' case in a land matter does not mean a decree of the ownership of the land in favour of the defendant who* <sup>E</sup> <sup>F</sup> <sup>G</sup> <sup>H</sup>

does not counter-claim. In this sort of case where the Respondents lay claim that the land the subject of the dispute is a communal property jointly owned by both parties and the appellants repudiate this claim stressing all along that there is no joint ownership and drawing attention of the court that the Respondents do not have their origin from Oyiwo Ode, the court generally goofed to push the onus to the appellants. Another gaffe committed by the learned trial judge is when she said in her judgment

I am further not assured as to the precise nature of title in respect of which a declaration is sought exclusively by the defendants. There is conclusive evidence adduced by the defendants by which the court is satisfied that a title of this nature claimed by the defendants have not been established.'

The Appellants as defendants never laid any claim to any land. It is therefore with greatest respect to the learned trial judge that it is apostasy to continue to harp erroneously and insistently that it is the Appellants who are claiming the title to the land."

That is the court's below's line of reasoning upon which it pivoted its decision. I hold a contrary opinion. I am in agreement with the decision of the learned trial judge, I have expounded the position of the law earlier on. It is not always and constant that a defendant shall maintain his position of defence. Where a defendant introduces in his pleadings issues that would convert him to be a claimant/plaintiff on such issues, it is his duty to prove the existence of such facts in order to support what he claims or asserts in his defence. Where he fails to do so, he will certainly be the loser on that issue. That of course is the tenor of sections 136 and 137 of the Evidence Act for instance, the defendants were claiming exclusive ownership of the land in dispute. There was nothing adduced from the defendants' side to justify that claim. That assertion is more than a defence. Further, the defendants in paragraph 8 of the amended statement of defence averred that the appellants/plaintiffs as tenants used to pay to their caretakers or overseers customary tributes or rents. All these, according to the learned trial judge were not proved by the respondents/defendants. Thus, if the learned trial judge could deprive the appellants of their efforts in proving their claim as required by the law and grant exclusive ownership of same to the defendants, who failed to lead credible evidence to substantiate the assertion, then, he would

have institutionalized naked injustice against the appellants.

Although, no counter - claim was filed by the respondents, an averment in a statement of defence which is capable of posing a new claim/assertion which will require its separate proof, must, in my view, compel its maker i.e. the defendants to assume the obligation of discharging the onus of proof which lies squarely on he who asserts. B This is trite law and cannot be read as re-writing the law as held by the court below.

But assuming for the sake of argument that a counter-claim was necessary in order to shift the burden of proof, I do not think that the 'error' if at all, committed by the trial court, would warrant the dismissal of the case. Thus, it was not the trial court that 'goofed' to push the onus to the defendants but it is in consonance with the settled principles of the law of proof. C

I am contented with my learned brother's detailed analysis of this issue and the remaining issues which he considered in his judgment. I too allow the appeal. I abide by orders made in the lead judgment including that of costs. D

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### **OGEBE JSC**

I had a preview of the lead judgment of my learned brother Onnoghen, JSC just delivered and I agree entirely with his reasoning and conclusion. There was overwhelming evidence before the trial court to prove that the appellants and respondents were jointly and communally enjoying the disputed land by numerous acts for possession exercised jointly by both sides. F

The respondents who claimed exclusive possession in their defence had a duty to prove it. That was the burden the trial court placed on them and which the lower court wrongly mistook as placing the burden of proving the claimants' claim on the defendants. My learned brother has captured that issue clearly in the lead judgment. G

I also allow the appeal, set aside the judgment of the lower court, and restore the judgment of the trial court with costs as assessed in the lead judgment. H