

SUPREME COURT OF NIGERIA
23RD JANUARY, 2009. SC. 126/2002
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
I. F. OGBUAGU, P. O. ADEREMI,
S. MUNTAKA-COOMASSIE, JJSC

1. MARCUS UKAEGBU	
2. UKAEGBU NWADIKE DEFENDANTS/
3. GEORNERIUS ELESHI	APPELLANTS
UKAEGBU	
4. JOHN UKAEGBU	
AND	
MARK NWOLOLO PLAINTIFF/
(for himself and on behalf	APPELLANT/
of the Egbereuri family of	RESPONDENT
Umuezike-Umunagbo,	
Ihitte Mbaise)	

LAND LAW - Title - Claim for - Facts to plead - Where title is derived from a prior owner by whatever means - The pleading should aver facts as to the founding of the land - And the person who exercised original acts of possession thereon (H1)

LAND LAW - Title - Proof - Means of - Plaintiff must plead and prove root of title - Where he fails to do so - Acts of possession based on that root of title cannot sustain the claim for title (H2)

PLEADINGS - Averments - Binding effect - Purport of - From the pleading of both parties that they have no common boundary and the admission by PW2 - It is obvious that the land in dispute as claimed by respondent differ from that claimed by appellant (H3)

LAND LAW - Title - Proof - Rule in *Kojo v. Bonsie* - Where there is a conflict of traditional history - With both sides appearing honest in their story - Court should decide by testing the probability of each story - On the basis of experience and wisdom (H4)

LAND LAW - Title - Proof - Rule in *Kojo v. Bonsie* - Applicability -

The rule will only apply where the land in dispute - Is same portion of land from evidence before the court (H5)

LAND LAW - Title - Identity of land - Need to establish it - Plaintiff must show exactly & precisely - A defined and identifiable area to which the claim relates - Else the claim must fail (H6)

EVIDENCE - Locus in quo - Visit to - Purpose - Inspection of locus is only necessary - Where a judge has a clear doubt that he felt arose from the evidence - For the purpose of confirming what is already on the record with the actual physical inspection (H7)

ORDERS OF COURT - Retrial - Purpose - Appellate court orders a retrial - Where trial court made no finding of fact on conflicting evidence - On an issue the resolution of which is essential in the just determination of the case - Which is not the case herein (H8)

FACTS

The plaintiff/respondent sued the defendants/appellants at the Imo State High Court sitting at Aboh-Mbaise. Respondent's claim was for declaration of title, damages for trespass and injunction. Pleadings were filed by the parties with their respective survey plans purportedly showing the features, boundaries and extent of the land in dispute. At hearing, both parties relied on traditional history and acts of possession.

At the end of hearing, the learned trial judge found that both histories, though adverse to each other, appeared convincing. But he also found that the land purported to be in dispute by the parties were not the same piece of land. Moreover, respondent's plan contradicted his pleaded details. Accordingly he dismissed the claims of the respondent. Respondent appealed to the Court of Appeal, which allowed the appeal and ordered a retrial. Appellants have brought this appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

“(1) Whether the Court of Appeal, Port-Harcourt Division was right in its conclusion that the learned trial Judge was wrong in preferring the testimony of the Respondents herein Appellants to that of

the Plaintiff herein Respondent in view of the pleadings and evidence led and documents tendered before the High Court by the parties and their witnesses?

(2) Whether the Court of Appeal was right in holding that the Learned trial Judge was wrong in not visiting the locus in quo before delivering its Judgment in spite of the contradictions in the case of the plaintiffs/Appellants/Respondents.

(3) Whether the Court of Appeal was right in its conclusion that the learned trial judge did not evaluate the evidence of the parties before ordering a retrial of the case before another judge”.

HELD (Unanimously allowing the appeal per **OGBUAGU JSC**)
Where title is derived from a prior owner

1. If therefore, Egbereuri had a surname Agbugbuo, it is not averred how their said land in dispute, came to be originally owned by Egbereuri. Was it by inheritance from his father Agbugbuo or if not, was it by gift, conquest, sale, grant, deforestation etc. or how? I or one may ask. The said land could not have come from the blues to Egbereuri. I say this because, it is now settled that where title is derived by either grant, sale, conquest or inheritance, etc., the pleading, should aver facts relating to the founding of the land in dispute, the person or persons who founded the land and exercised original acts of possession.

I note that under cross-examination at page 81 of the Records, PW.1 stated that the land belongs to him and that it descended on through Egbereuri. I repeat, there is no evidence how the land came to be owned originally by Egbereuri or how it was founded by him. (p. 116 D/H)

Title - Proof - Means of

2. In the case of Chief S.A. Lawal & ors. v. Alhaji Olufowobi & ors. (1996) 12 SCNJ. 376 @ 384. Kutigi, JSC (as he then was, now CJN), stated that the plaintiffs were bound to have pleaded who founded the land, how it was founded and the particulars of the intervening owners through Whom they claim. In the case of Nkado & 2 ors. v. Obiano & anor. (1997) 5 SCNJ. 33 - per Onu, JSC, it is stated that where there is no such evidence, the plaintiff fails in his

action for declaration.

It seems to me that this crucial fact, did not occur to the learned counsel for the Appellants and the learned trial Judge or the court below. If it had, then it means that the Respondent, abandoned his said pleading or that his evidence was/is not supported by the pleading. Either way, since it is a long established principle of law, that a party is bound by his pleadings, the Respondent having failed to plead and/or give evidence of the root of title of Egbereuri and/or Agbugbuo, that should have been the end of his case.

Of course and this is also settled, when an attempt to prove a root of title fails, acts of possession based on that root of title, cannot, sustain a claim for title. (pp. 117 A/D/F/ 118A)

Averments - Binding effect - Purport of

3. From the said pleadings and the said admission, at least of the PW2 under cross-examination, I find as a fact and hold that the land claimed to be the land in dispute by the Respondent and the land the Appellants claimed to be the land in dispute, are different - i.e. they are not the same - they are not one of the same land. I have earlier herein-above, noted that the parties agree that they have no common boundary. In other words, there are two distinct pieces of land. It is not a case of the parties knowing the land in dispute although they call it different names. Of course, it is long settled that there cannot be concurrent possession by two persons claiming adversely to each other. (p. 121 A)

Rule in Kojo v. Bonsie - Conflict of traditional history

4. The court below, was of the view, that since the trial court found and held that there was conflicting evidence, it should, have applied the principle in the case of Kojo v. Bonsie (1951) 1 WLR 1223 @ 1226, but that it did not. With the greatest respect, this cannot be true because at pages 144 -145 and 148-149 of the Records, partly reproduced in this Judgment, the learned trial Judge, clearly and virtually dealt with the said principle when he was also dealing with or referring to Acts of possession and ownership. I will also deal with the case. It was held therein that where a plaintiff relies on traditional evidence for his root of title, it must be clearly established by clear

and reliable evidence. It was also held that where there is a conflict of traditional history, one side or the other, must be mistaken, yet both may be honest in their belief. That in such a case, demeanor is little guide to the truth. That the best way, is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. In other words, the trial court is entitled to see and hold which of the two competing stories/histories or evidence, is more probable. In other words, it has a discretion in the matter. In other words, the proof lies on balance of probabilities. This is so, because, civil cases, are decided on a preponderance of evidence. In other words, the weight to be attached to traditional evidence is a matter which is left to the experience and wisdom of the learned trial Judge/Court. (p. 126 F)

Title - Proof - Rule in Kojo v. Bonsie - Applicability

5. It is my respectful and firm view, that Kojo v. Bonsie (supra) will apply, where the land in dispute between the parties, is in respect of one and the same piece or portion of land. In that case, the identity of the said land in dispute, will be well known to the parties and by the court from the oral and/or documentary evidence such as a survey plan before it. It cannot be otherwise. In the instant case leading to this appeal, the evidence of the Respondent as PW1 and his late brother PW2 and as found as a fact and held by the trial court, is that the land claimed by the Respondent's family and the one claimed by the Appellants, are different, separate and distinct. The evidence of the parties, are as it were parallel. In other words, there is no conflict strictly speaking, in the instant case. (p. 128 C)

Title - Identity of land - Need to establish it

6. It is firmly settled that normally, the first duty of any claimant of title to land, is to show exactly and precisely, a defined and identifiable area to which the claim relates. That if a claimant, fails on the first hurdle, no further question need arise. That his case will stand dismissed.

Of course, and this is settled in a line of decided authorities, that a plaintiff failing to prove (how much more satisfactorily), the

boundaries of the land he asserts to be in dispute (as in the instant case leading to this appeal) and also, if a plaintiff did not properly and satisfactorily describe the land in dispute, and if the description contradicts the plan (as in the case leading to this appeal) he fails in the declaration of title that he seeks. (pp. 129 D/ 130 A)

B

Locus in quo - Visit to - Purpose

7. The question I or one may ask is, since the parties agree that they have no common boundary and the learned trial Judge found as a fact and held that the respective land of the parties declared to be in dispute, are separate and distinct, what will a/the new trial Judge, have to do with a visit to the locus in quo? A trial Judge who has a clear doubt that he felt arose from the evidence, either on the invitation of one of the parties or by both parties or suo motu, can visit a land in dispute, in order to confirm what is already on the record with the actual physical inspection in keeping with the adage that “seeing is believing”.

Finally, the law is established that the inspection of locus in quo may not generally be necessary where the area in dispute is clear to the court and the parties as the trial court should reach a judgment not on the impressions from the locus in quo, but from its impression from the evidence before the court, unless, of course, there is a special reason or a specific cause, for which an inspection has become necessary and desirable. (pp.134 F/ 135H)

F

Retrial - Purpose

8. In respect of Issue (3) of the Appellants and Issue (2) of the Respondent, it is now firmly settled that when there is no finding of a fact or facts made on conflicting evidence adduced by both parties in an issue, the resolution of which is essential in the just determination of the case, the proper course, is to order a retrial unless the circumstances of the case, do not warrant such an order. An order of a retrial, is not appropriate, when the plaintiff's case, has failed in toto (as in the instant case leading to the instant appeal).

H

In the case Of Musa Iyaji v. Sule Eyigebe (supra) @ page 534 - Oputa, JSC. stated that it is not in the interest of justice, that a plaintiff who has failed to prove his case (as in the instant case in this

appeal), should be given another chance to try again, for that will be unjust to the defendant. (p. 140 A/D/F)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Appeals - Court may suo motu consider a point of law raised on record B

I have also dealt with this point, because, it is now firmly established that an Appellate Court, will and can, on its own motion, consider a substantial point of law arising on the Record, even though it is/was not included as one of the grounds of appeal, nor referred to by the/ an Appellant at the hearing before a lower court. (p.118 H) C

2. A lying witness is unreliable and should be so treated

I have noted and reproduced above, the evidence of PW2 where he swore that the land of the defendants, share common boundary with the land of Daniel Ihuoma - (the late father of (PW3). The obvious fact, is that the PW3, apart from contradicting the said evidence of PW2, lied when he denied that his land shares a common boundary with the Appellants. Of course, the consequence is that he is an unreliable witness having regard to the fact that a page 97 of the Records, the DW1 maintained that they have common boundary with the land of late Daniel Ihuoma as confirmed by the PW2 at the Southern part of their own land which they assert, is the land in dispute as pleaded in paragraph 3 and called "Nkwo Alake Market Square". PW3, as double underlined by me above, stated that he lives opposite to the land declared by the Respondent to be in dispute. Thus, worsening the case of the Respondent as to boundary neighbours. (p.120 E) D

REPRESENTATION

Mr. C. U. Ekomaru for the appellants

Mr. M. O. Nlemedim for the respondents E

CASES REFERRED TO

Akinloye & anor. v. Eyiyoila (1968) NMLR 92: Olujinle v. Adeagbo (1988) 2 NWLR (Pt. 75) 238 F

H

- Adejumo & ors. v. Ayantegbe (1989) 3 NWLR (Pt.110) 47
 Anyanwu v. Mbara & anor. (1992) 5 NWLR (Pt.242) 386 @ 403;
 (1992) 23 NSCC (Pt.2) 107 @ 117; (1992) 6 SCNJ. (Pt.1) 22 @ 35
 Onwugbufor & 2 ors. v. Okoye & 3 ors. (1996) 1 NWLR (Pt.424)
 252; (1996) 1 SCNJ. 1; (1996) 34 LRCN 1
 B Amobi v. Amobi & 2 ors. (1996) 9-10 SCNJ. 207 @ 228
 Ezekiel Nnaji & 3 ors. v. Chief Chukwu & 7 ors. (1996) 12 SCNJ 388
 @ 397
 Anabaronye & 3 ors. v. Nwakaihe (1997) 1 SCNJ. 161 @ 168
 C Da Costa v. Ikani (1969) 1 All NLR 191
 Kalio v. Woluchem (1985) 1 NWLR (Pt.4) 610 @ 628
 Udeze & 2 ors. v. Paul Chidebe & 4 ors. (1990) 1 NWLR (Pt.125)
 141 @ 160

D **LEAD JUDGMENT BY OGBUAGU JSC**

This is an appeal by the Defendants/Appellants against the decision of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below”), allowing the appeal of the Plaintiff/Respondent and setting aside the Judgment of the Imo State High Court sitting at Aboh-Mbaise and delivered by Nsofor, J. (as he then was), dismissing the Plaintiffs/Respondent’s Suit No. HAM/19/82 in respect of a piece or parcel of land. The court below, ordered a retrial of the case before another Judge of the High Court of Imo State,

F *“who should visit the locus in quo to make it easy to resolve the conflict in the traditional histories of the parties in respect of the land in dispute and also to know the true position of the land in Exhibit 2”.*

[the underlining mine]

G Dissatisfied with the said decision, the Appellants have appealed to this Court on three (3) Grounds of Appeal. Without their particulars, they read as follows:

“GROUND ONE: Error in law:

H The learned Justices of the Court of Appeal erred in law when they held as follows:-

“In the present case, I have no iota of doubt in my mind that the learned trial judge erred in law and misdirected himself when in spite of the conflicts in the traditional evidence offered by the parties

he went ahead to prefer the testimony of the Respondents, oblivious of the test laid down in the case of KOJO Vs BONSIE”.

[the underlining that of the Learned counsel for the Appellants]

GROUND TWO: Error in law:

The learned Justices of the Court of Appeal erred in law when they held that the issue of whether the Land in dispute in this case is the same as that litigated upon in 1948 could only be resolved by a visit to the Locus in quo.

GROUND THREE: Error in law:

The Court of Appeal erred in law in not affirming the judgment of the High Court by holding that the learned trial judge did not evaluate the evidence of the parties before dismissing the case of the Plaintiff/Appellant/Respondent”.

The facts of the case briefly stated, are that in an Amended Statement of Claim, the Respondent who sued in a representative capacity, in paragraph 13 thereof at page 36 of the Records, claimed as follows:

“(a) Declaration of Title that the piece of land called “ORU UHU EGBEREURI” is the Property of the Plaintiff.

(b) N1,000.00 (one thousand naira) being damages for trespass.

(c) Perpetual Injunction restraining the Defendants and or their Agents from entering the said land”.

Pleadings were filed and exchanged by the parties together with their respective Survey Plan showing the features, boundaries and extent of the land stated to be in dispute. Exhibit 1 - is the plan of the Respondent while Exhibit 4, is the plan of the Appellants. At the hearing, both parties relied on traditional history of inheritance and acts of possession. The traditional history/evidence of the Respondent in-chief, are at pages 76 - 79 and that of the Appellants in-chief, are at pages, 92 - 95 of the Records. After the hearing and addresses of the learned counsel for the parties, the learned trial Judge in his Judgment, dismissed the Respondent’s case. The Respondent’s appeal to the court below, was successful, hence the instant appeal. When this appeal came up for hearing on 27th October, 2008, both learned counsel for the parties, adopted their respective Brief. While

Ekemaru, Esq., of counsel for the Appellants, adopted their Brief and urged the Court to allow the appeal, Nlamedim, Esq, of Counsel for the Respondent, urged the Court to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

The Appellants have formulated three (3) issues for determination, namely:

“(1) Whether the Court of Appeal, Port-Harcourt Division was right in its conclusion that the learned trial Judge was wrong in preferring the testimony of the Respondents herein Appellants to that of the Plaintiff herein Respondent in view of the pleadings and evidence led and documents tendered before the High Court by the parties and their witnesses?”

(2) Whether the Court of Appeal was right in holding that the Learned trial Judge was wrong in not visiting the locus in quo before delivering its Judgment in spite of the contradictions in the case of the plaintiffs/Appellants/Respondents.

(3) Whether the Court of Appeal was right in its conclusion that the learned trial judge did not evaluate the evidence of the parties before ordering a retrial of the case before another judge”.

On their part, the Respondent, has formulated two (2) issues for determination namely:

“(a) Whether the Court of Appeal was wrong in holding that the learned trial judge misdirected himself when in spite of the conflicts in the traditional evidence offered by the parties (that is, the two traditional histories did not agree) he went ahead to prefer the testimony of the Respondents (in the court below) oblivious of the test laid down in the case of KOJO V. BONSIE?”

(b) Whether the Court of Appeal was right in making an order of retrial of the suit before another judge in the High Court of Imo State who should visit the locus in quo?

I will deal with ISSUE (1) of the Appellants together with ISSUE (a) of the Respondent which are in substance, the same although differently couched. In dealing with the said issue, I consider in my respectful view, pertinent, to reproduce the material pleadings of the parties in their respective pleadings. In the Amended Statement of Claim, these are paragraphs 3, 6, 7, 8, 10 -13. They read as follows:

“3 The extent and dimensions of the land in dispute is clearly shown in Plan No. MEC.2712/77 filed together with this Statement of Claim.

4. The land in dispute belongs to the plaintiff. The plaintiff is in possession. The land devolved on the plaintiff by inheritance through his ancestors. B

5. The land originally belonged to Egbereuri - the great grand father of the plaintiff. After Egbereuri died, it devolved on Agbaere who farmed on the land without interruption. When Agbaere died, the land devolved on Nwololo - the father of the plaintiff. When Nwololo died, the land devolved on Mark Nwololo and his brother- the present plaintiff. C

6. Part of the land in dispute was given to the entire Umunagbo Community for a “juju shrine notably “Amadioha” by the great grand father of the plaintiff Egbereuri Agbugbuo. Ever since then in acknowledgment of the ownership of that land the various juju priests of “Amadioha” up to the present priest give to the plaintiff’s family the first part of any animal slaughtered in the shrine which first falls to the ground when the animal is killed. D

7. The plaintiff has as his neighbours on the land in dispute boundaries with Isaac Nwoko, Ukanwa Njoku, Louis Opara and Vincent Nwololo. The plaintiffs have no common boundary with the defendants - John Anyanwu Chukwu, and Daniel Ihuoma are those who have common boundary with the defendants. E

8. The plaintiff and members of his family have always exercised maximum acts of ownership over the land in dispute including harvesting the palm fruits, sawying timber on the land, selling several trees on the land without challenge either from the defendants or any one else. F

10. On 11/3/1948 when one Nwaimo Nwanguma who was then the “Juju Priest” of Amadioha felled an Iroko on this land. Egbereuri’s children took action against him in Itu Native Court. The Court found for Egbereuri’s children. Among those who took the action then, the only one alive now is Vincent Nwalolo. Ukaegbu Dike testified in that case for the plaintiff’s family. Ever since then the plaintiff and members of his family have continued to farm on the land and have exercised maximum acts of ownership over the said land without G H

the defendants or anyone challenging them. The Certified copy of the said Proceedings and Judgment in suit No. 128/48 shall be tendered and founded upon and the plaintiff shall extensively rely on this Judgment.

B 11. *On or around the 8th day of December 1975, the defendants without the plaintiff's consent or that of any member of his family entered the land in dispute and sawed an "Awo" tree belonging to the plaintiff and members of his family. The defendants removed the timber. This is the cause of the present action.*

C 12. *In the past, the plaintiff and members of his family have sold timber trees on the land in dispute to the following people without any challenge either from the defendants or any one else; Patrick Ugwo, Iheanakaram of Umuokeri Ihitte bought from the plaintiff "Akpuru trees", Uhi trees, and Akwakwa trees"..... John Anyanwu D Chukwu - the present juju priest of "Amadioha" previously bought "Amuma trees" from the plaintiffs family on the land in dispute.*

13. *The plaintiff and members of his family asked the defendants to return the Timber they removed from their land but they refused to do so.*

E *[the underlining mine]*

In the Statement of Defence, they are as follows:

F 3. *The defendants deny paragraph 3 of the Statement of claim and state that the extent and dimensions of the land in dispute is (sic) shown in Plan No. ECIS. 196/78 filed with this statement of defence, wherein it is verged red. The land in dispute is bounded on the East, West, North and South by the land of UMUDIKE FAMILY, the defendants' family. The defendants have no boundary with the plaintiff who comes from UMU EGBEREURI, people who have boundary G with UMUDIKE are:(I note that the names of the families having the said boundary, are pleaded)..*

The entire extent of the Umudike family land within which is the land in dispute is in the plan aforementioned verged Yellow.

H 4. *The defendants shall rely on all the features in their plan particularly and the position of the piece or parcel of land subject matter of a dispute between the Egbereuri family and Nwaimo Nwanguma in 1948.....*

5. *The defendants, deny paragraph (sic) 4,5,6, 7, 8, 9, 10,*

11,12, 13 of the statement of claim.

6. The land in dispute is the bona fide property of the defendants from time immemorial and as such they are deemed to be entitled to the customary right of occupancy thereof by virtue (sic) (meaning virtue) of the Land Use Decree No. 61978.

7. The land in dispute devolved on the defendants as herein-
after pleaded:- Okemkpere Olehie owned the land many genera-
tions ago, farmed on it and exercised maximum acts of ownership
thereon without any let or hinderance from the plaintiff or any one
else. After him his son Chinaka Okemkpere succeeded him in title.
Thereafter Ohakpo Chinaka inherited the land after whom came
Dike Ohakpo. When Dike Ohakpo died, Nwaelighobi Dike stepped
into his shoes and on his demise Ukaegbu Dike took over. Ukaegbu
Dike is the 2nd defendant in this suit. The 1st, 3rd and 4th defen-
dants are his children.

8. Ever since the land in dispute devolved on the 2nd defen-
dant he and his children and brothers have been farming on it and
harvesting all economic crops on the land and were at all material
times in the possession of the land in dispute and exercised maxi-
mum acts of ownership.....

9. Some time in December 1975 a branch of an Awo tree on
the land fell off. The 2nd defendant asked his son the 1st defendant
to arrange for its sawing and sale. In the process the forestry commis-
sion contravened him and he paid a fee of N5.

10. On Sunday morning the 2nd defendant saw people from
Umuegbereuri cutting down an Awo tree in the land in dispute and
challenged them. He later reported the matter to Aboh-Mbaise Po-
lice Station who latter (sic) referred the parties back to the Amalas for
civil settlement”.

[the underlining mine]

From paragraph 6 above of the Amended Statement of Claim,
it could be seen that the Respondent pleaded their root of title from
one AGBUGBUO who was most likely, the father of EGBEREURI -
the great grand father of the Respondent and members of his family.
But in his evidence in-chief at page 76 of the Records, PW.1 testified
inter alia, as follows:

“..... The land in dispute belonged originally to Egbereuri.

He is dead. On the death of Egbereuri, the land passed over to Agbaere who was the son Egbereuri. Agbaere is since dead. Consequent upon the death of Agbaere, the "Oru Uhu Egbereuri" land devolved on Nwololo who is my father. Nwoloto's father was Agbaere. My father (Nwololo) is since deceased. The land has descended on me and the other descendants of Egbereuri following the death of my father (Nwololo).

I am prosecuting this action for myself and on behalf of the other members of the family Egbereuri".

For purposes of emphasis, it is noted by me that in the said paragraph 6 (supra) the following appear inter alia:

"Part of the land in dispute was given to the entire Umunagbo Community for a "juju" shrine notably "Amadioha" by the great grand father of the Plaintiff Egbereuri Agbugbuo".

[the underlining mine]

If therefore, Egbereuri had a surname Agbugbuo, it is not averred how their said land in dispute, came to be originally owned by Egbereuri. Was it by inheritance from his father Agbugbuo or if not, was it by gift, conquest, sale, grant, deforestation etc. or how? I or one may ask. The said land could not have come from the blues to Egbereuri. I say this because, it is now settled that where title is derived by either grant, sale, conquest or inheritance, etc., the pleading, should aver facts relating to the founding of the land in dispute, the person or persons who founded the land and exercised original acts of possession. See the cases of *Piaro v. Chief Tenalo & ors.* (1976) 12 S.C. 31 @ 34; and *A. Ojo v. Primate E.O. Adejobi & ors.* (1978) 3 S.C. 65, just to mention but a few. Thus, if the pleaded root of title is not established by evidence, it will be a futile exercise to go to the issue of possession or acts of ownership. See the cases of *Fashoro & anor. v. Beyioku & 2 ors.* (1988) 2 NWLR (Pt. 76) 263 @ 271 (1988) 4 SCNJ. 23 and *Alhaji Are & anor. v. Ipaye & ors.* (1990) 2 NWLR (Pt. 132) 296 @ 301 (1990) 3 SCNJ. 181 and many others.

I note that under cross-examination at page 81 of the Records, P.W.1 stated that the land belongs to him and that it descended on through Egbereuri. I repeat, there is no evidence how the land came to be owned originally by Egbereuri or how

it was founded by him.

In the case of Chief S.A. Lawal & ors. v. Alhaji Olufowobi & ors. (1996) 12 SCNJ. 376 @ 384. Kutigi, JSC (as he then was, now CJN), stated that the plaintiffs were bound to have pleaded who founded the land, how it was founded and the particulars of the intervening owners through Whom they claim. B

The cases of Akinloye & anor. v. Eyiylola (1968) NMLR 92: Olujinle v. Adeagbo (1988) 2 NWLR (Pt. 75) 238, (it is also reported in (1988) 4 SCNJ. 1 and Adejumo & ors. v. Ayantegbe (1989) 3 NWLR (Pt.110) 47 (it is also reported in (1989) 6 SCNJ. 76 were cited or referred to. C See also the cases of Anyanwu v. Mbara & anor. (1992) 5 NWLR (Pt.242) 386 @ 403; (1992) 23 NSCC (Pt.2) 107 @ 117; (1992) 6 SCNJ. (Pt.1) 22 @ 35: Onwugbufor & 2 ors. v. Okoye & 3 ors. (1996) 1 NWLR (Pt.424) 252; (1996) 1 SCNJ. 1; (1996) 34 LRCN 1, per - Iguh, JSC; Amobi v. Amobi & 2 ors. (1996) 9-10 SCNJ. 207 D @ 228; Ezekiel Nnaji & 3 ors. v. Chief Chukwu & 7 ors. (1996) 12 SCNJ. 388 @ 397 - per Ogwuegbu, JSC and Anabaronye & 3 ors. v. Nwakaihe (1997) 1 SCNJ. 161 @ 168 - per Adio, JSC. and so many other decided authorities too many to mention. ***In the case of Nkado & 2 ors. v. Obiano & anor. (1997) 5 SCNJ. 33 - per Onu, JSC, it is stated that where there is no such evidence, the plaintiff fails in his action for declaration.*** E The cases of Da Costa v. Ikani (1969) 1 All NLR 191; Piaro v. Tenalo (supra) @ 41; Kalio v. Woluchem (1985) 1 NWLR (Pt.4) 610 @ 628 and Udeze & 2 ors. v. Paul Chidebe & 4 ors. (1990) 1 NWLR (Pt.125) 141 @ 160, F (it is also reported in (1990) 1 SCNJ. 104) were cited therein.

It seems to me that this crucial fact, did not occur to the learned counsel for the Appellants and the learned trial Judge or the court below. If it had, then it means that the Respondent, abandoned his said pleading or that his evidence was/is not supported by the pleading. Either way, since it is a long established principle of law, that a party is bound by his pleadings, the Respondent having failed to plead and/or give evidence of the root of title of Egbereuri and/or Agbugbuo, that should have been the end of his case. G See the cases of National Investment & Properties Co. Ltd. v. Thompson Organization Ltd. & ors. (1969) NMLR 99; Emesokwue v. Okadigbo (1972) (1) NMLR H

118 Ukaegbu v. Nwololo (2009) 1 KLR Ogbuagu JSC
192; (1973) 4 S.C. 113; (1973) 3 ECSLR 267; Chief Ibanga & ors.
v. Chief Usanga & ors. (1982) 1 ANLR (Pt.I) 88 @ 99; (1982) 5 S.C.
103 @ 124 & 125; Akpapuna & ors. v. Nzeka II & ors. (1983) 7 S.C.
1 @ 25 and two many others.

Of course and this is also settled, when an attempt to
B **prove a root of title fails, acts of possession based on that**
root of title, cannot, sustain a claim for title. See the cases of
Ayoola v. Odojin (1984) 2 S.C. 120; Ndukwe v. Acha (1985) 5 S.C.
28 @ 38 - 39 and Dodo Dabo v. Alhaji Abdullahi (2005) 2 SCNJ.
C 76: (2005) 2 S.C. (Pt.I) 75, just to mention but a few.

I am obliged to deal with the above point, because, I note in
the Respondent's Brief, in shifting the burden of proof of traditional
evidence on the Appellant's, at paragraph 3.05 the respondent, re-
ferred to the pleadings in the Statement of Defence and the evidence
D on traditional evidence and then in paragraph 3.08 thereof, it is stated
inter alia, as follows:

"Arising from the evidence of traditional history offered by the
DW1 on behalf of the Appellants, it can be seen that the Appellants
did not establish the name of the original owner of the land in dis-
E *pute (i.e. the land of the Defendants/Appellants) through whom they*
claimed..... The traditional evidence offered by the Appellants have
serious gaps and is illogical. The Appellants' case at the trial ought to
have been dismissed or discountenanced. Mogaji v. Cadbury (NIG.)
F *LTD. (1985) 2 NWLR (PT. 1) 393 at 395. In view Of the clear and*
strong evidence of traditional history offered by the Respondent at
the trial, the Appellants had the evidential burden to rebut same which
they failed to do as their traditional history was anything but satisfac-
tory or credible"

G [the underlining mine]

It can be seen from the above, that the learned counsel for the
Respondent, is aware and knows, about the requirement of the law
as regards the proof of traditional history, in a claim for declaration of
title to land.

H I have also dealt with this point, because, it is now firmly estab-
lished that an Appellate Court, will and can, on its own motion, con-
sider a substantial point of law arising on the Record, even though it
is/was not included as one of the grounds of appeal, nor referred to

by the/an Appellant at the hearing before a lower court. See the cases of Okokon Inua v. Eke E.N. Bassey Asuquo (1961) ANLR 576 @ 577 - per Idigbe, JSC. (of blessed memory); Ogbonna Nwangbo v. Nwojiji (Alo 1972) 2 ECSLR 359 C 361; Ex-Parte Markham (1969) 343 page 150 and Knight v. Haliwell (1974) L.R.9 OB. 416.

Now, the first question I will ask is, was the identity of the land claimed by the Respondent, clearly and satisfactorily established by him? Is the land stated to be the same as the Native Court Suit in Exhibit 2, the same as the land stated by the Appellants as the land in dispute?

The parties agree that they have no common boundary although they both come from the same Community of Umunagbo. At the expense of repetition but for purposes of emphasis, at the said paragraph 7 of his pleading, the Respondent averred as follows:

"The plaintiff has as his neighbours on the land in dispute boundaries with Isaac Nwoko, Ukanwa Njoku, Louis Opara and Vincent Nwololo. The plaintiffs have no common boundary with the defendants - John Anyanwu Chukwu and Daniel Ihuoma are those who have common boundary with the defendants".

[the underlining mine]

I note that Louis Opara and Vincent Nwololo, are members of the Respondent's family. I also note that the Respondent, did not call any of the alleged boundary men - i.e. Isaac Nwoko and Ukanwa Njoku and John Anyanwu Chukwu. It is only the P.W.3 they called. I also note that under cross-examination of Vincent Nwololo - (2nd defendant now deceased) at page 85 of the Records under cross-examination, on oath, stated inter alia:

"..... We do not share a common boundary with any lands of the defendants".

He had earlier at the same page, stated inter alia, as follows: "I know Daniel Ihuoma. The land of the Umu-egbereuri shares common boundary with the land of Daniel Ihuoma. The land of the defendants share common boundary with the land of Daniel Ihuoma on the Nkwo Ala land area"..

Incidentally, the P.W.1 had at page 80 of the Records, under cross-examination, stated inter alia, as follows:

"I know Daniel Ihuoma. I had a common boundary with him.

Daniel Ihuoma is dead. The land of Daniel Ihuoma which shares a common boundary with the land in dispute is not the land of the defendants on pledge to Daniel Ihuoma. I do not know whether Daniel Ihuoma and the defendants' family share common boundaries on their respective lands".

B [the underlining mine]

PW3 is the son of Daniel Ihuoma. He is Michael Ihuoma. At page 86 of the Records, he testified on oath inter alia, as follows:

C "I know the land in dispute between the parties. I live on my land opposite to the land in dispute. I succeeded to my land (sic) on the death of my father. Live and died on the land (sic).

It is the members of the Umunaegbeuri family whom I see (sic) farm the land in dispute since I was born.

D The defendants have no lands which share common boundaries with the land in dispute between the parties"

[the underlining mine]

Under cross-examination at page 87 of the Records, the following appear inter alia.

E "I do not own any land sharing a common boundary with any land of the defendants The defendants own their land at "Ishi Nwa Ala Ike".

[the underlining mine]

F I have noted and reproduced above, the evidence of PW2 where he swore that the land of the defendants, share common boundary with the land of Daniel Ihuoma - (the late father of (PW3). The obvious fact, is that the PW3, apart from contradicting the said evidence of PW2, lied when he denied that his land shares a common boundary with the Appellants. Of course, the consequence is that he is an unreliable witness having regard to the fact that at page 97 of the Records, the DW1 maintained that they have common boundary with the land of late Daniel Ihuoma as confirmed by the PW2 at the Southern part of their own land which they assert, is the land in dispute as pleaded in paragraph 3 and called "Nkwo Alake Market Square". PW3, as double underlined by me above, stated that he lives opposite to the land declared by the Respondent to be in dispute. Thus, worsening the case of the Respondent as to boundary neighbours.

So, ***from the said pleadings and the said admission, at least of the PW2 under cross-examination, I find as a fact and hold that the land claimed to be the land in dispute by the Respondent and the land the Appellants claimed to be the land in dispute, are different - i.e. they are not the same - they are not one of the same land. I have earlier herein-above, noted that the parties agree that they have no common boundary. In other words, there are two distinct pieces of land. It is not a case of the parties knowing the land in dispute although they call it different names. Of course, it is long settled that there cannot be concurrent possession by two persons claiming adversely to each other.*** See Amakor v. Obiefuna (1974) 1 All NLR (Pt.1) 119; (1974) 3 S.C. 67 and Jones v. Chapman (1847) 2 Exch, 805.

I will pause here and touch briefly on Exhibit 1 tendered and relied on by the Respondent. A close examination by me, shows that the land of the Appellants described as “UKAEGBU NWADIKE’S land” and stated as “Not in Dispute”, shares a common boundary with the land declared by the Respondent as the land in dispute. Apart from contradicting the evidence by and for the Respondent as partly reproduced by me above, I shall come to Exhibit 1 later in this Judgment when dealing with Exhibit 2 - the “famous” Native Court, case between one Nwaimo Nwanguma and the deceased 2nd Defendant in Suit No. 128/48.

His Lordship, had also reproduced as I have done earlier in this Judgment, some of the material averments or pleadings in the respective pleadings of the parties. In response/re-action to Mr. Okere - learned counsel for the Respondent that the identity of the land in dispute, was not made an issue on the pleadings and that it was a non-issue citing and relying on the case of Nwobodo Ezeudu vs. Isaac Obigwu (1986) 2 S.C. 1 @ 27 - per Oputa, JSC, stated at page 141 of the Records, inter alia as follows:

"But is it really an issue of the identity of the disputed land being made an issue on the pleadings? It seems to me to be a question of whether the plaintiffs could rely on the survey plan (Exhibit 1) describing the land differently and on the facts pleaded in paragraph 7 of the statement of claim also describing the same land differently.

Put in other words, is there a complete accord between the description in the pleading and the plan?”

His Lordship, proceeded to look also at the said paragraph 7 (supra) and reproduced the same at page 142 of the Records. After noting that the said paragraph 7 (supra) was denied in paragraph 5 of the Appellants’ Statement of Defence, he took a look at Exhibit 1 (as he was entitled in law to do) and noted that both plans of the parties - i.e. Exhibit 1 of the Respondent and Exhibit 4 of the Appellants, are/were drawn on the same scale. His Lordship, stated that he was looking at both the said pleadings in the said paragraph 7 (supra) and Exhibit 1, in order to see “whether or not the descriptions are in complete accord”.... Said he thereafter at pages 142-143 of the Records, inter alia as follows:

“A cursory look at Exhibit 1 shows that there is no land shown thereon as belonging to Isaac Nwoko and sharing a common boundary with the plaintiffs’ land in dispute. Neither is there a land shown on Exhibit 1 as belonging to Ukanwa Njoku and sharing a common boundary with the land in dispute verged Pink on Exhibit 1.”. Although paragraph 7 of the Statement of Claim (supra) pleaded that: “the plaintiffs have no common boundary with the defendants”.

Plan No. MEC/2712/77 (Exhibit 1) does show, ex facie, that the land in dispute shares a common boundary to the south with the “Ukaegbu Nwadike’s land” and “Daniel Ihuoma’s land” But the evidence by PW.3 is that the defendant have no land sharing a boundary with the land in dispute”.

[the underlining his]

I agree. I had earlier in this Judgment demonstrated some of these facts as appear in the said paragraph herein.

His Lordship, then continued thus:

“The “compounds of James and Abel Olekamma” are shown on Exhibit 1 as sharing a boundary with the plaintiffs. The evidence of James Olekamma called as D.W.2 was that the land in dispute belonged to the defendants and that his land is “near the land in dispute”.

The compounds of James and Abel Olekamma are reflected on both Exhibit 1 (Plaintiffs’ Plan) and Exhibit 4 (defendants’ Survey Plan) respectively. Based on the visual comparison made, the de-

scription of the land in dispute written in paragraph 7 of the statement is not in complete accord with the description of the land in Exhibit 1.

1. *There is some merit, therefore, in the submission by the learned defence counsel”.*

[the underlining mine]

I also respectfully agree. The above, are borne out from the said Exhibits and Records.

The learned trial Judge, had at page 124 of the Records, posed the question thus:

“Now, apply the principle above (i.e. effect of each party asserting possession of the land). What, then is the live issue, on the pleadings, calling for a decision? It is this. Which party has a better title to the land in dispute:

the Plaintiff OR

the Defendant?

The answer to the above holds the key to any other related side issue....”.

His Lordship, proceeded, to look at the evidence before him. He reviewed the evidence of the parties and their respective witnesses at pages 125 to 131 of the Records. On the evidence of D.W.2 - a 75 year old man, the learned trial Judge, noted at the end of the case of the parties and their witnesses, thus:

“The witness made a good impression on me while in the witness - box”.

He was entitled to say so.

At pages 146 to 147 of the Records, His Lordship inter alia, stated as follows:

“In the present case both Marcus Nwololo (PW1) and Vincent Nwololo (P.W.2) gave evidence of history tracing their root of title to their great grand ancestor Egbereuri. On the other hand, the defendants have equally given evidence of history tracing their root of title to the land in dispute to their great grand ancestor- Okempere Olebie.

“I have considered the two versions of the evidence on the issue. I have weighed the evidence together on that imaginary scale. I found the evidence by the plaintiffs as good as the evidence by the defendants. Put in other words, the scale is on the balance. There is

an equilibrium, an equal keel. If, therefore, the plaintiffs case rested here, I would hold decidedly that the plaintiffs ought to lose. Why? Because, surely, the evidence does not now preponderate in their favour.

But this is not the end of the matter. Looked at, yet from another angle, the plaintiffs have fought the case on the basis that the land being disputed in this Court was the parcel of land litigated in the Native Court, Itu, in 1948. See Exhibit 2. Their evidence of history therefore was related to and referable to that land which the Egbereuri family litigated and “won” in the native Court in 1948 (Exhibit 2).

But as found above by Court, based on the evidence which it accepted, the land litigated in Exhibit 2 and the land, the subject - matter of these proceedings before me, are two separate lands; not one land.

The plaintiffs evidence of tradition relating and referable to that land litigated in 1948 was not therefore related or referable to the land being disputed in this Court. In my view, so far therefore, the land being disputed in this Court is concerned, it is the evidence of tradition by the defendants that stands alone. Viewed from this angle, I would readily prefer the version the evidence (sic) by the defendants to the version of the evidence of tradition by the plaintiffs. I believed the defendants.

All I am trying to say for the avoidance of a doubt is. The plaintiffs’ claim to title to the land in dispute based, solely, on traditional evidence fails and on that account ought to be dismissed”.

I cannot fault the above. It is in accord or consonance with numerous decided authorities by this Court and even the Court of Appeal.

Finally, at part of page 148 and page 149, the learned trial Judge, concluded as follows:

“I now pass over to consider the way (No.2) - Acts of possession and ownership - on which the claim is also hoisted. On this issue there are also two versions of the evidence; one by the plaintiffs, the other by the defendants. Either party gave evidence of his exercise of various acts of ownership on the land. And Mr. Okere, had urged court to believe the P.W.4

Again, based on the evidence of the plaintiffs, their alleged various acts of ownership were exercised on the land which they asserted was previously litigated in the Native Court, Itu, in 1948. See Exh. 2. The PW4, according to the evidence had bought and cut the alleged economic trees on that land, Again, on the fact as found by court that land litigated in 1948 (Exh. 2) was quite a different and a separate land from the land being disputed in this Court, not the land in dispute on which the defendants say they had exercised their acts of ownership. Having exercised their alleged acts of ownership on the land litigated in 1948 in the Native Court, Itu, could the plaintiffs now turn round to say that those acts alleged were done on the land being disputed in this Court? My answer to the question above, would certainly be a Quick and an unhesitating capital. No. Based on my finding above, based on the evidence, I reject the evidence by the plaintiffs and the PW4. (Patrick Ihealokaram) that the economic trees sold to the PW4 were the economic trees on the land now being disputed with defendants in this Court. I did not believe the plaintiffs that they had exercised the alleged acts of possession or ownership on or over the land being now disputed in this Court. I accepted the version of the evidence by the defendants that they were in possession of the land in dispute and that they had exercised the various acts of ownership and possession on the land being disputed in the Court. The plaintiffs' claim to title to the land in dispute, based on the exercise of alleged acts of ownership, equally fails wholly and entirely. On the above findings the plaintiffs' claims to damages in trespass and injunction ex necessitate must fall and fail and be dismissed.

In the final result the plaintiffs' action fails.

It ought to be dismissed.

It is therefore dismissed".

[the underlining mine]

I also agree. These various findings of fact, are consistent with the laid down principles of law that have long been settled and are therefore trite.

I have taken pains to go this length or far, because of, with respect, the unjustified remarks, observations and final decision of the court below which I shall hereunder deal with.

Let me now deal with the firmly established law. It is no longer in doubt that a plaintiff must succeed on the strength of his own case and not on the weakness of the defence. See the much cited case of Kodilinye v. Odu (1935) 2 WACA 336 @ 337-358. See also Chief W.C. Olaiya & ors. v. Alli Balogun (1965) 2 ANLR 204; Ajagbe v. Akanni (1973) (1) NMLR 431 @. 441-442 and Clay Industries (Nig.) Ltd, v. Adeleye Aina & 3 ors. (1997) 8 NWLR (Pt.516) 208; (1997) 7 SCNJ. 491 @ 505 - per Iguh, JSC and many others. Where the evidence is unsatisfactory, the judgment should be in favour of the defendant on the ground that it is the plaintiff who seeks relief, but has failed to prove that he is entitled to what he claims. See the case of Frempons II v. Brempang 14 WACA 13. Where in a trial of an action, evidence has been adduced by both parties and the plaintiff fails to prove his case, the proper order is that of dismissal. See the cases of Gbajor v. Ogunbureguni (1961) ANLR 853; Eyiola v. Adeoti (1973) NMLR 10 and Madam Adele v. Aserifa (1986) 3 NWLR 375. In a claim for declaration for title to land, if the defendant is able to adduce evidence oral or documentary which has the effect of discrediting the plaintiffs evidence, such a declaration, should be refused. See the case of Ogundare & ors. v. Okanlawon & ors. (1963) 1 ANLR 358 @ 361. If evidence is conflicting and some what confused and there is little to choose between the rival traditional stones, the/a plaintiff, must fail in the decree he seeks and judgment must be for the defendant. See the case of Ekun & 3 ors. v. Baruwa & ors. (1966) 2 ANLR 211.

Now, in the instant case, ***the court below, was of the view, that since the trial court found and held that there was conflicting evidence, it should, have applied the principle in the case of Kojo v. Bonsie (1951) 1 WLR 1223 @ 1226, but that it did not. With the greatest respect, this cannot be true because at pages 144 -145 and 148-149 of the Records, partly reproduced in this Judgment, the learned trial Judge, clearly and virtually dealt with the said principle when he was also dealing with or referring to Acts of possession and ownership. I will also deal with the case. It was held therein that where a plaintiff relies on traditional evidence for his root of title, it must be clearly established by clear and reliable evi-***

dence. It was also held that where there is a conflict of traditional history, one side or the other, must be mistaken, yet both may be honest in their belief. That in such a case, demeanor is little guide to the truth. That the best way, is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. In other words, the trial court is entitled to see and hold which of the two competing stories/histories or evidence, is more probable. In other words, it has a discretion in the matter. In other words, the proof lies on balance of probabilities. See the cases of *Odulaja v. Haddard* (1973) 1 ANLR (Pt.2) 191 @ 197 and *Miller v. Minister of Pensions* (1974) 2 ALL E.R. 372 @ 374. **This is so, because, civil cases, are decided on a preponderance of evidence.** See also the cases of *Kayaoja & ors. v. Egunla & ors.* (1974) 12 S.C. 55 @ 61 and *Chief Mrs. Akintola v. Mrs. Solano* (1986) 4 S.C. 141 @ 160 just to mention a few. **In other words, the weight to be attached to traditional evidence is a matter which is left to the experience and wisdom of the learned trial Judge/Court.** See the case of *Akuru v. Olubadan Council* 14 WACA 523 @, 524; *Kojo v. Bonsie* (supra) was approved in the case *Of Alhaji Thanni & anor. v. Saibu & ors.* (1977) 2 S.C. 89 @ 110

At the said pages 144-145 of the Records, the learned trial Judge, stated inter alia, as follows:

*“Now, having disposed of the above, are the plaintiffs entitled to the declaration they seek?. As stated in the often cited and hallowed decision by the West African Court of Appeal in *Kodilinye Mbanefo Odu* (1935) 2 W.A.C.A. 336 at page 337 the onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to the declaration sought. The plaintiff in the case must rely on the strength of his case and not on the weakness of the defendant’s case. The plaintiff however discharges the burden on him provided the evidence preponderates in his, favour. See *Odofin v Mogaji* (1978) 3 S.C. 91 at pp. 94-95 - per *Fatayi-Williams JSC*, (as he then was).*

If, therefore, the totality of the evidence of or by the one party is put on one side that imaginary scale and the evidence of the other

party be put on the other side of the same scale and both weighed together, there is a balance, an equilibrium; if the story or evidence by the one party is as good as the evidence by the other, on equal keel then, the plaintiff on whom rests the onus must lose. Why, because, in that case, the evidence has not preponderated in his favour”,

B [the underlining mine}

The above is clear and unambiguous and I cannot fault it.

In the case Of Alade v. Lawrence Awo (1975) 4 S.C. 215 @ 229, it was held that where evidence of traditional history is not satisfactory, the need then arises for a plaintiff to prove numerous acts of ownership. **It is my respectful and firm view, that Kojo v. Bonsie (supra) will apply, where the land in dispute between the parties, is in respect of one and the same piece or portion of land. In that case, the identity of the said land in dispute, will be well known to the parties and by the court from the oral and/or documentary evidence such as a survey plan before it. It cannot be otherwise. In the instant case leading to this appeal, the evidence of the Respondent as PW1 and his late brother PW2 and as found as a fact and held by the trial court, is that the land claimed by the Respondent’s family and the one claimed by the Appellants, are different, separate and distinct. The evidence of the parties, are as it were parallel. In other words, there is no conflict strictly speaking, in the instant case.**

F Indeed, in the case of Obasi Ibenye & 3 ors v. Abraham Agwu & anor.. (1978) 7 SCNJ. 1 @ 30-3; - per Ogundare, JSC, stated inter alia, as follows:

G *“The dictum of Lord Denning in Kojo v. Bonsie does not mean that demeanour of witnesses is irrelevant in the resolution of conflicts in evidence of traditional history. What the noble and learned Lord was saying was that where witnesses honestly testify as to what has been handed down to them by word of mouth, acts in recent times should be aid to resolve the conflict in the evidence of traditional history given.*

H *But a witness may not be honestly telling what he heard from his ancestors. A trial court that sees and hears him must be in a position to determine whether or not he is honest about what he is nar-*

rating. This cannot be in the province of an appellate court. Where there is a conflict of evidence which the trial court failed to resolve, as in the case in hand, an appellate court cannot make any finding in such a situation — See Okoye v. Kpajie 1972 6 S.C. 176, 187. The proper course is to order a retrial before another Judge”,

[the underlining mine]

Can it be honestly said that there was/is conflict in the evidence of the parties where it is found as a fact that the land said to be in dispute, is separate and distinct from that claimed by the Appellants? I repeat that I think not.

I have demonstrated this fact earlier above in this Judgment. So, by no stretch of imagination, can the said principle in Kojo v. Bonsie (supra) relied upon by the court below, be applicable to the instant case now on appeal to this Court. I so held and still hold. I believe and this is also settled that each case, must be determined by the particular facts of the case. So be it in this instant case on appeal.

Now, ***it is firmly settled that normally, the first duty of any claimant of title to land, is to show exactly and precisely, a defined and identifiable area to which the claim relates.*** So said this Court in the case of Musa Iyaji v. Sule Ejigbe (1987) 3 NWLR (Pt.61) 523 @ 529; (1987) 7 SCNJ. 148 - per Oputa, JSC, citing the case of Akinola Baruwa v. Ogunshola (1938) 4 WACA 159. ***That if a claimant, fails on the first hurdle, no further question need arise. That his case will stand dismissed.***

The cases of Udofia & anor. v. Afia & ors. (1940) 6 WACA 216; Udekwe Amata v. Udosu Modekwe (1954) 14 WACA 580 and Vincent Okorie & ors. v. Philip v. Udom & ors. (1960) 5 FSC. 162 were also referred to.

In the case of Madam Salami & 3 ors. v. Oke (1987) 4 NWLR (Pt.63) 1 @ I7, (1987) 9-10 SCNJ. 27 also - per Oputa, JSC, in his concurring contribution, stated inter alia, as follows:

“..... It is important to note here that the written description of the land in the pleadings of the parties should be in complete accord with the Plan or Plans filed along with those pleadings. That was the point the learned trial Judge appeared to be making in his observation now being attacked. I dare say the learned trial Judge was right’.

I also in the instant case, say that as in the above case, the

learned trial Judge, made the same point of the Respondent's said plan not being in accord with his pleadings. I also say that he was quite right and correct. ***Of course, and this is settled in a line of decided authorities, that a plaintiff failing to prove (how much more satisfactorily), the boundaries of the land he asserts to be in dispute (as in the instant case leading to this appeal) and also, if a plaintiff did not properly and satisfactorily describe the land in dispute, and if the description contradicts the plan (as in the case leading to this appeal) he fails in the declaration of title that he seeks.*** See the cases Of Amodu Rufai v. Ricketts & ors. 2 WACA 95 & 96: Egbe Ugbo v. Enyeonu Nwokeke 6 ENLR 106 - per Aniagolu, J. (as he then was) and Carpenter & anor. v. Aduor & anor. 8 WACA 76. This is also because, an inaccurate plan, should and will, defeat a plaintiffs claim.

In the case of Salu v. Madam Egeibon (1994) 6 SCNJ. (Pt.II) 223, it was held that failure to establish boundaries of land in a claim for declaration of title or statutory right of occupancy, the proper order to make, is one of dismissal. The case Of Chief Imah & anor. v. Chief Okogbe & anor. (1993) 9 NWLR (Pt.316) 159, was referred to. (it is also reported in (1993) 12 SCNJ. 52). See also the cases of Okedare v. Adebara & 2 ors. (1974) 6 SCNJ. (Pt.II) 254 @ 265 - per Adio, JSC. (of blessed memory) and Olusanmi v. Oshasona (1992) NWLR (Pt.245) 22 @ 36 (1992) 6 SCNJ. 282.

In other words, land to which a declaration is to attach, must be sufficiently and satisfactorily identified. See the case of Ezeokeke & ors. v. Uga & ors. (1962) 1 ANLR (Pt.3) 482, 484. In the case of Alhaji Elias v. Chief Omo-Bare (1982) 1 ANLR (Pt.I) 70 @ 86. Obaseki, JSC, stated that before a declaration of title to land is granted, there must be credible evidence describing and identifying the land with certainty. See also the cases of Alade v. Ding (1943) 17 NLR 32. Banwa v. Ogunshola (1958) 4 WACA 159 cited and referred to in the cases of Awote & ors. v. Owodunni (1987) 5 S.C. 1 @ 15 - per Oputa, JSC and Ifie & ors. v. Gedi & ors. (1965) f NMLR 457. It must be borne in mind and this is also settled that a court, can compare plans in order to see the relationship between them. See the cases Latinwo v. Ajao (1973) 2 S.C. 99 @ 110 and Idundu v. Okkumagba (1976) 9-10 S.C. 227 @ 245.

I think I have “flogged” this question of identification of a land in dispute. From all these overwhelming plethora of decided authorities, could it be honestly said or asserted that the learned trial Judge, was wrong in his review, assessment of both the oral and documentary evidence before him and arriving at his said decision of dismissing the Respondent’s case or claims? I think not. My answer is in the negative. Also, could it in justice, be said by me or any one reading the Records, that the court below, was justified in its castigation of the learned trial Judge and making the said Order of re-trial? With profound humility and respect, my answer again, is in the negative.

In order to show the hopelessness of the case of the Respondent (which cannot be cured by any “magic”, I note that at the said paragraph 10 of the said Amended Statement of Claim of the Respondent, (for purposes of emphasis, I will reproduce it once again). It reads as follows:

“10 On 11/3/1948 when one Nwaimo Nwanguma who was then the “Juju Priest” of Amadioha felled an Iroko on this land. Egbereuri’s children took action against him in Itu Native Court. The Court found for Egbereuri’s children. Among those who took the action then, the only one alive now is Vincent Nwalolo. Ukaegbu Dike testified in that case for the plaintiffs family. Ever since then the plaintiff and members of his family have continued to farm on the land and have exercised maximum acts of ownership over the said land without the defendants or any one challenging them. The Certified copy of the said Proceedings and Judgment in suit No. 128/48 shall be tendered and founded upon and the plaintiff shall extensively rely on this Judgment”.

The above is clear and unambiguous. But in his evidence in-chief, he testified at page 77 of the Records inter alia, as follows:

“The Oru Uhu Egbereuri land had been a subject of a previous dispute or litigation, One Nwaimo Nwanguma once felled an Iroko tree at the Amadioha juju shrine location. My father (Nwololo) challenged him (Nwaimo Nwanguma). As a result. Nwaimo Nwanguma instituted an action against my father (Nwololo) in the Native Court, Itu. That was after the elders (Amalas) had decided the matter in my father’s favour. My father and Vincent Nwololo were sued in that action. The suit Number was in the Native Court “No.

128/48". The Native Court Itu gave a decision in my father's favour. This is the certified true copy of the Native Court Judgment in the matter"

[the underlining mine]

I note that even in the said paragraph 3.13 of the Respondent's
B Brief, it is cleverly couched inter alia, as follows:

*"The Respondent also tendered a certified true copy of the proceedings in the 1948 suit at the Native Court, Itu between his father Vincent Nwololo and one of the Respondent's brothers on
C one hand and one Nwaimo Nwanguma on the other hand which the respondent's family won "*

Exh.2 shows that the Plaintiff was Nwaimo Nwanguma who sued the deceased 2nd Plaintiff. The Respondent's family was never the Plaintiff. It is even stated that the DW2 testified for Nwaimo
D Nwanguma. But as shown at page 77 of the Records above, the said Pleading in paragraph 10 (supra), is completely at variance with Exh.2 and the evidence in court. This fact, should have been the end of the Respondent's case. But the learned trial Judge, in justice, relied on Exh.2 and the evidence in court, and proceeded to make his find-
E ings.

Coming again as to whether the view of the court below in respect of Bonsie 's case (supra), that it was not applied by the learned trial Judge, was right or justified, I will refer to the case of Odofin & ors. v. Mogaji & ors. (supra) (it is also reported in (1978) 1 LRN 212). This Court - per Fatayi-Williams, JSC (as he then was and of blessed memory), stated inter alia, that before a Judge in a civil case, comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he must put the totality of the testimony
G adduced by both parties on an imaginary scale. He shall weigh one side against the other and then decide upon the preponderance of credible evidence which weighs more, I have also shown above that the learned counsel for the Respondent agrees, with this fact or principle. From what I have reproduced earlier above in this Judgment,
H this is exactly what the learned trial Judge did in the case before him

In the case of Chief Onyia v. Oniah & ors. (1989) 2 SCNJ. 120, it was held that if a trial court heard two versions of an essential fact and

one looked more probable, then it will be bound to believe the more probable evidence. The court should neither create nor conjecture these probabilities. The trial Judge, should consider both carefully and decide on the balance of probabilities which of the assertions to accept - See the case of Chief Afolayan v. Oba Ogunrinde & ors. (1986) 3 NWLR (Pt.26) 29 C.A. B

In the case of Mogaji & ors, v. Madam Odofin (1978) 4 S.C. 91 @ 92-97 this Court - per Nnaemeka-Agu, JSC, stated that, when a Judge has to evaluate the evidence on every material issue in the case, he ought to put all the evidence called by each side on that issue on either side of the imaginary scale of justice and weigh them together, of course taking care that only the evidence of the same kind ought to be weighed together. That whichever side outweighs the other in probative value, ought to be accepted or believed. That not losing sight of the onus of proof, he should weigh them together to arrive at a decision, based on the facts as found as to which of the conflicting cases before him is the more probable in view of the law applicable to the case. Again, this is precisely, what the learned trial Judge did in the case leading to this appeal. D

This Court therefore, stated inter alia, as follows; E

"..... Applying the above principles to the instant appeal, it appears clear to me that the learned trial Judge made the correct approach both to the evaluation of evidence and the decision itself,"

After referring to one instance in the said Judgment of the trial Judge, His Lordship stated thus: F

"There can be no doubt that the learned Judge had the principle of Mogaji's case (supra) in mind on the above pronouncement and did apply them all through the case "

This Court then resolved the issue in favour of the Appellants. G I too hold that the principle in Mogaji's case, was adequately and correctly, applied by the learned trial Judge in the instant case leading to this appeal.

Before concluding the first issue of the parties, I will deal even briefly with Exhibits 1 and 2. I note that in the address of the learned counsel for the Respondent at page 114 of the Records, it reads inter alia, as follows: H

"3(6): On Acts of ownership counsel refers to Exh. 2. (Native

Court, itu Judgment). Admit that Exh.2 cannot operate as an estoppel per rem judicata in the present case. The parties are not the same. It was not pleaded or tendered as such. It (Exh. 2) was to prove previous acts of the plaintiff of his ownership and possession”.

[the underlining mine]

B The learned trial Judge had stated at page 134 of the Records, inter alia, thus:

C *“In reply, Mr. Okere (Respondents learned counsel) had submitted that Exhibit was tendered and received as evidence not as an estoppel/per rem judicatam but as some evidence of an act of ownership and possession of the land alone by the plaintiffs against a third party. Learned Counsel cited and relied on Ohene Appoh-Abio vs. Ohene Duku Kanga (1992) 1 W.A.C.A. 253 at page 257.”*

[the underlining mine]

D This fact, is repeated at paragraph 3.13 of the Respondent’s Brief citing, the case of Ohene Appoh-Abio v. Ohene Duku Kanga Kanga (supra) and the case of Ige & anor. v. Fagbohun & anor. (2002) FWLR (Pt.127) 1140 @ 1162 paragraph A.

E The effect of the above, is that the learned trial Judge, having found as a fact and held that the small or little piece or portion of land the subject matter of the said Native Court Suit Exh.2 is not the same as the land in dispute of the Appellants, and the said learned counsel for the Respondent, having conceded that Exh.2, cannot have effect of an Estoppel, but was only tendered in proof of acts of possession, then issue (2) of the Appellants and issue (b) of the respondent, will now be dealt with and determined by me.

H ***The question I or one may ask is, since the parties agree that they have no common boundary and the learned trial Judge found as a fact and held that the respective land of the parties declared to be in dispute, are separate and distinct, what will a/the new trial Judge, have to do with a visit to the locus in quo? A trial Judge who has a clear doubt that he felt arose from the evidence, either on the invitation of one of the parties or by both parties or suo motu, can visit a land in dispute, in order to confirm what is already on the record with the actual physical inspection in keeping with the adage that “seeing is believing”. He will then “substitute the eye for the ear”. See***

the case of Abigail Briggs v. Opufaa Briggs (1992) 3 SCNJ. 75 @ 84-85. But in the case of Olusanmi v. Oshasona (1992) NWLR (Pt....); (1992) 6 SCNJ. 282 @ 291, this Court, per Ogundare, JSC, held that the purpose of an inspection, is not to substitute “the eye for the ear” but rather, to clear ambiguity that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. The case of Chief Nwizuk & ors. v. Chief Enayok 14 WACA 354 @ 355. was referred to therein. B

It is not mandatory even if the visit be at the request of both parties, It depends on the state of the evidence. For instance, where the truth of the evidence about the existence or non-existence of the structure of an aspect of a particular place or immovable thing, cannot be properly resolved by the testimony of the witnesses or even from a plan or sketch, a trial Judge, will be acting in the interest of justice, to have a view of the place or thing. See the cases of Umar v. Bayero University (1988) 4 NWLR (Pt.86) 85; (1988) 7 SCNJ. 380 and Iwuno & 2 ors. vs. Ireti & 6 ors. (1990) 5 NWLR (Pt.149) 126. D

In the case of Anyanwu v. Mbara & anor. (1992) 6 SCNJ. (Pt.I) 22 @ 35, it was/is stated that the power of a Judge to visit the locus in quo in a land case, is derived from the provisions of Section 76(1) of the Evidence Act and the second provision in that Section. The case of Enigwe & ors. v. Akaigwe (1992) 2 NWLR (Pt.,) 505 @ 552; (1992) 2 SCNJ. (Pt.II) 316 @. 330-337 - per Nnaemeka-Agu, JSC, was referred to. It was further stated that it is regarded as part of the evidence called in the case. But that it is implicit in the adversary system of administration of justice which operate, that all material evidence, shall be called by the parties themselves. That the position of the trial Judge, is that of an impartial umpire and he lacks the power to call any witness or evidence without the consent of the parties. The case Of Eric Odor v. Nwosu (1974) 1 ANLR (Pt.II) 478 @ 484. was referred to. E F G

In fact or indeed, the general practice is stated to be that a visit to a locus in quo, normally is indicated at the discretion of the trial court and ‘ what it must do on the return from the inspection. After the visit, he cannot use his own observation on a point on which no witness testified. H

Finally, the law is established that the inspection of lo-

cus in quo may not generally be necessary where the area in dispute is clear to the court and the parties as the trial court should reach a judgment not on the impressions from the locus in quo, but from its impression from the evidence before the court, unless, of course, there is a special reason or a

specific cause, for which an inspection has become necessary and desirable. See the case of Eboade & anor. v. Alomesin & anor. (1997) 5 SCNJ. 13 citing the cases of Ejidike v. Obiora (1951) 13 WACA 230 @ 273; Dze v. Komla (1956) 1 WLR 145 @ 146 and London Council Omnibus Co. v. Laxeil (1901) 1 Ch. 135.

I had earlier at pages 15, 16-17 of this Judgment, partly reproduced the statements/views or the findings of fact by the learned trial Judge. Shorn of repetition, but by way of emphasis, I will reproduce what the court below - per Rowland, JCA, (who wrote the Lead Judgment) stated at pages 251 and 252 of the Records since it relates to this issue.

“At page 147 lines 5 to 15 of the record while considering the two versions of the traditional evidence offered by the parties, the learned trial Judge stated as follows:

“I have considered the two versions of the evidence on the issue. I have weighed the evidence together on that imaginary scale. I found the evidence by the plaintiffs as good as the evidence by the defendants. Put in other words, the scale is on the balance. There is an equilibrium, an equal keel”.

With due respect to the learned trial Judge his above quoted statement has no legal basis and he was therefore in grave error because of the decision in the case of Kojo vs. Bonsie (supra). See also the case of Oloriode vs. Oyebi (1984) 1 SCNLR 390 at 401. In the case in hand, the parties are agreed from their pleadings that the Native Court case Exhibit 2 concerned Uhu Egbereuri land. It is also common ground that it was decided in favour of the appellant’s father and brother and that the appellant’s family has been in possession of the land since after the judgment of 1948, The issue now is whether the land of the subject of the 1948 litigation is the same as Oru Uhu Egbereuri land (or part of it) that is now in dispute. It seems to me that a visit to the locus in quo by the learned trial Judge would have very easily and clearly resolved this central and crucial issue

between the parties. But the learned trial Judge as manifested by the record failed to visit the land but placed reliance on demeanour of witnesses which i consider to be of little or no guide whatsoever in resolving the issue or issues. A trial court should undertake a visit to the locus in quo where such visit will clear a doubt as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence as if is in the case in hand. See Seismograph Ltd, vs. Ogbeni (1976) 4 S.C. 85. B

His Lordship, reproduced at pages 252 - 253 part of the holding of this Court in the Criminal case of Samuel Bozin v. The State (1988) 2 NWLR (Pt.8) 465 about the expression “I believe”; “I dis-believe” or “I am satisfied” by a trial court, without evaluating the evidence of vital witnesses and continued inter alia, thus: C

"There is no doubt that in the present case the learned trial Judge is caught by the trap of the statements of the Supreme Court D in the cases of Bozin and Akibu (supra). Instead of the learned trial judge to visit the locus in quo and also apply the guide laid down in the case of Kojo vs. Bonsie (supra) to resolve conflicting traditional histories, he took refuge in those expressions in the cases of Bozin and Akibu (supra) that the Supreme Court frown at". E

[the underlining mine]

In the case of Nwankpu & anor. v. Ewulu & 2 ors. (1995) 7 SCNJ. 197 @ 221; (1995) 7 NWLR (Pt.407) 269 @ 296 cited also in the Appellant's Brief at page 14 paragraph 6.08, it was held that, it is the duty of a court to visit a locus in quo where there is conflict of evidence as to the existence or otherwise of something material to the case and such a visit would resolve the conflict in evidence or would clear a doubt as to the accuracy of any piece of evidence on the subject. See the cases of Seismograph Service Nig. Ltd. v. Akpor-ovo (1974) 6 SC. 119 @ 129; and Seismograph Services Nig. Ltd, v. Ogbeni (1976) 4 S.C. 85 @ 104-105. F G

However, it is clearly at the discretion of the trial Judge to determine whether in the light of the evidence before him, there is the need to resolve by a visit to the locus in quo, the conflict of evidence or clear a doubt as to the accuracy of a piece of evidence when there is such conflict of evidence. H

The court below in effect, reversed the decision of the trial

court, as it were, on the conclusion of the learned trial Judge based on credibility of witnesses. If the learned trial Judge did not use the words “I believe” or “I disbelieve”, I wonder, how he should have approached the matter. It is trite law that a Court of Appeal, should not lightly reverse or disturb the view or conclusions of a trial Judge, based on credibility of witnesses - See the cases Of Akinola v. Oluwa (1962) 1 All NLR (Pt.2) 224; Obodo & anor. (1987) 3 S.C. 459 @ 460-461, 466; Chief Egba v. Chief Ogodo & anor. (1984) 4 S.C. 84 @ 90, 98; (1984) 1 SCNLR 372 and Ngillari v. Nikon (1998) 8 NWLR (Pt.560) 1 @ 20-21; (1998) 6 SCNJ. 16 and many other numerous decided authorities in this regard. In support of the above, see also the classic pronouncement of Onu, JSC, in the case of Egbaran & 2 ors. v. Akpotor & 3 ors (1997) 7 NWLR (Pt.514) 559 @ 574 also cited and relied on in the Appellants’ Brief, (it is also reported in D (1997) 7 SCNJ. 39). Of course, credibility or non-credibility of a witness or witnesses, can only arise or be considered by a trial court, after the evaluation of the evidence before it.

I find as a fact and hold firstly, that the learned trial Judge properly adequately, eloquently and manifestly, analysed the pleadings, the evidence led by the parties and their witnesses and the Exhibits before he came to his decision which have support of the Records. Secondly, there was no iota of doubt in his mind from the said Records or proceedings, that should have compelled him, to visit the locus in quo. Thirdly, the court below, with respect, was in grave error based on complete misconception of the case of the Respondent in particular and the findings of the learned trial Judge, to have interfered with his exercise of discretion and when none of the parties, in fact, requested for such a visit which in any case in my view, could have been uncalled for and not necessary in all the circumstances and demonstrated by me in this Judgment.

It is pertinent to note that at paragraph 3.12 of the Respondent’s Brief, the following, Inter alia, appear: ,

“In view of the two sets of traditional evidence offered by the parties which did not agree with each other, did the trial court advert its mind to the evidence of recent acts of possession offered by the parties?

[the underlining mine]

Of course, this was/is because, the evidence in respect of the land declared to be in dispute, was, parallel as found by the trial court. Then, at paragraph 3.15 thereof, it is stated inter alia, as follows:

*“The learned trial Judge in his judgment held that the two sets of traditional history of the parties were at equilibrium. See page 147 of the record. He however went ahead to prefer the case of the Appellants and dismissed the suit. We had earlier pointed out some of the flaws in the Appellants’ evidence of traditional history which would have irresistibly led to its rejection. If the court had properly evaluated the evidence adduced on record it ought to have dismissed the Appellants’ case - *Piaro v. Tenalo* (1976) 12 S.C. 13. The Appellants’ case was based on traditional history which ought to have failed. Any claim which the Appellants based on possession cannot therefore succeed - *OBIOHA V. DURU* (1994) 8 NWLR (PT.365) 631; *NDUKWE ACHA* (1998) 6 NWLR (PT.552) 25; *REGISTERED TRUSTEES OF THE DIOCESE OF (sic)*”.*

(the underlining mine)

In other words, that the learned trial Judge, should have believed the evidence of the Respondent and his witnesses - i.e. that he should have preferred the evidence of the Respondent and his witnesses in respect of their traditional history and acts of ownership and possession. In other words, that he should have exercised his discretion in favour of the Respondent. It is therefore, in my respectful view, an admission by the learned counsel for the Respondent, that the learned trial Judge, could believe and/or disbelieve one of the parties and so, he had a discretion in the matter before him. On this ground, I rest this appeal and hold that, this appeal, has merit and succeeds.

At the expense of repetition, the parties themselves from the evidence and as found by the learned trial Judge, their respective piece or parcel of land, is separate, distinct and have no common boundary. The conclusion therefore, is that with the greatest respect, the court below, had no business ordering for a visit of the locus in quo by a new trial Judge in the circumstances. The order was, with profound humility, quite unnecessary. I so hold. My answer therefore, to issue (2) of the Appellants, is rendered in the Negative.

In respect of Issue (3) of the Appellants and Issue (2) of the Respondent, it is now firmly settled that when there is no finding of a fact or facts made on conflicting evidence adduced by both parties in an issue, the resolution of which is essential in the just determination of the case, the proper course, is to order a retrial unless the circumstances of the case, do not warrant such an order. See the cases of Atanda & ors. v. Ajani (1989) 6 SCNJ. (Pt.II) 193 @ 210; and Chief Olufosoye & 2 ors. v. Olorunfemi (1989) 1 NWLR (Pt.95) 27.

An Appellate court, will order a retrial, where the trial court, failed to determine vital or specific issues by appraising and evaluating the evidence before it. See the cases of Total v. Nwako (1978) 5 S.C. 1 @ 14 cited in the case of Ezeoke & 5 ors. v. Nwagbo & anor. (1988) 1 NWLR. (Pt. 72) 616 @ 629-630; (1988) 3 SCNJ. 37; Chief Olufosoye & 2 ors. v. Olorunfemi (supra) and Chief Odi & 5 ors. v. Chief Iyala & ors. v. Chief Offo & ors. (2004) 4 SCNJ. 35 @ 56 citing some other cases therein.

However, ***an order of a retrial, is not appropriate, when the plaintiff's case, has failed in toto (as in the instant case leading to the instant appeal)***. See the cases of Ayoola v. Adebayo (1961) 1 ANLR 159, 162 - per Coker, JSC., Abibu v. Binutu (1988) 1 NWLR (Pt.68) 57; (1988) 1 SCNJ. 70; and National Bank of Nig. Ltd. v. P.B. Olatunde & Co. Nig. Ltd. (1994) 4 SCNJ. (Pt.I) 65 @ 67 - per Ogwuegbu, JSC, Ogundare, JSC, where it was held that an order of retrial is made, where for instance, there has been a serious irregularity in the trial court.

In the case Of Musa Iyaji v. Sule Eyigebe (supra) @ page 534 - Oputa, JSC. stated that it is not in the interest of justice, that a plaintiff who has failed to prove his case (as in the instant case in this appeal), should be given another chance to try again, for that will be unjust to the defendant.

Although an Appellate Court, has a discretion whether or not to order a retrial, but where this Court, comes to the conclusion that the court below exercised its discretion on wrong principles - e.g. if the exercise on it, was manifestly wrong and contrary to justice (as I have demonstrated in this Judgment), it will interfere. See the case of Chief Imonikha & anor. v. The Attorney-General of Bendel State &

In any case, it seems to me that the learned counsel for the Respondent, did not and had not, adverted his mind, to the reason given by the court below for ordering a retrial of the case by another Judge. The Respondent has not appealed against that order if as submitted in his Brief, they established their case and are entitled to the declaration the Respondent sought. Rather, at paragraph 4.05 of the Brief, it is submitted that the court below was right in its order. B

Finally, a retrial is ordered inter alia, where a trial Judge fails to take advantage of his seeing and hearing the witnesses, notwithstanding that the Record, shows there was ample evidence before him. See the cases of Chief James Okpiri v. Chief Igoni Jona & ors. (1972) 1 ANLR 226 @ 131-132; (1961) ANLR 102 @ 105 - per Sir Ademola, CJF; Chief J.S. Ekpere & ors. v. Chief Odaka Aforije & ors. (1972) 1 ANLR (Pt.1) 220 and Ogbuokwetu & 10 ors. v. Umeanafunkwa & anor. (1994) 5 SCNJ. 24 @ 46 - per Onu, JSC. C
My answer to the said issue of the parties, is rendered in the Negative. D

In concluding this perhaps, lengthy Judgment, I note that the court below - per Rowland, JCA, (now deceased) at page 253 of the Records, stated inter alia, as follows: E

"..... As borne by the record, the mistakes of the learned trial Judge in this case are legion. I only highlighted the very crucial ones....."

With the greatest respect to His Lordship, the above to say the least, is unfortunate, uncomplimentary, unjustified and unfair. Apart from the learned counsel for the Appellants and the learned trial Judge, not advertng their minds to the said Pleading of the Respondent in the said paragraph 10 above, I see no mistakes to talk about their being legion. Rather, in my respectful and humble view, the learned trial Judge from pages 117 to 151 of the Records, admirably, painstakingly, thoroughly and meticulously, analysed and evaluated the pleadings of the parties at pages 118 to 124 of the Records, (except paragraph 10 of the Respondent) the evidence of the parties from pages 125 to 131 and the Exhibits tendered by the parties, before arriving at his said decision rightly in my view, dismissing the Respondent's case. From all that I have adumbrated and demon- F
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strated in this Judgment, I have no hesitation, in allowing the instant appeal which I hold is meritorious. I hereby and accordingly, set aside the said decision of the court below and in its place, I affirm the said Judgment of the trial court.

B Costs follow the event. The Appellants are entitled to costs in the court below which I assess at N5,000.00 (Five thousand Naira) and in this Court., I award N50,000.00 (Fifty thousand Naira) in favour of the Appellants payable to them by the Respondent.

C

MUSDAPHER JSC

I have read before now the judgment of my Lord Hon. Justice I. F. Ogbuagu, JSC just delivered with which I entirely agree. In the aforesaid judgment, his Lordship in his usual style has comprehensively dealt with all the issues submitted for the determination of the appeal. I respectfully adopt all the reasoning canvassed, as mine. I accordingly allow this appeal, and set aside the decision of the court of appeal and in its place I restore the decision of the trial court. I abide by the order for costs proposed in the aforesaid judgment.

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OGUNTADE JSC

F I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogbuagu J.S.C. I agree with him that the court below was in error to have set aside the judgment of the trial court on the ground that there was the need for the trial court to have visited the locus in quo. It was not open to the court below to substitute its views on the evidence for those of the trial court which had the advantage of seeing and hearing the witnesses testify: See *Akinloye & Anor. V. Eyiola & Ors.* [1968] N.M.L.R. 92 at 95 and *Chief Victor Woluchem & Ors. v. Chief Simon Gudi* [1981] 5 S.C. 291 at 326.

H I would also allow the appeal. I subscribe to the orders on costs made in the lead judgment.

ADEREMI JSC

I agree with my learned brother, Ogbuagu JSC whose reasons for judgment. I have been privileged with a preview. As I have nothing to add to the exhaustive judgment, I will also allow the appeal as being meritorious. I also set aside the judgment of the court below and, in its place, I restore the judgment of the trial Court which I hereby affirm. I abide by all the other consequential orders including orders as to costs contained in the lead judgment. B

MUNTAKA-COOMASSIE JSC

I have had a preview of the judgment just delivered by my learned brother Ogbuagu JSC and I agree with him that there is some merit in the appeal. I with respect, adopt his lordships reasoning and conclusions. Based on the reasoning of my learned brother I too will allow the appeal as meritorious. The judgment of court below cannot stand same is hereby set aside. The decision of the trial court is affirmed. I endorse the orders as to costs. C

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