

**SUPREME COURT OF NIGERIA**

27TH MARCH, 2009. SC. 35/2000

**CORAM:- D. MUSDAPHER, G. A. OGUNTADE, I. F. OGBUAGU, F. F. TABAI, M. S. MUNTAKA-COOMASSIE, JJSC**

1. CHIEF THOMAS EKPEMUPOLO
2. MR. THOMPSON GBAMINIDO
3. MR. BENSON LAWEI ..... APPELLANTS
4. CHIEF GOVERNOR EKPEMUPOLO
5. MR. PETER LAWEI

*(For themselves and on behalf of Kere  
Family of Egwa, Gbaramatu Clan, Warri)*

AND

1. GODWIN EDREMODA
2. ORITSEJE EDEKI
3. THOMAS E. UGBAMETA ..... RESPONDENTS
4. EMMANUEL A. IWETAN
5. OMASAN D. EDUKUGHO

*(For themselves and on behalf  
of Omadino Community, Warri)*

6. SHELL B.P. PETROLEUM  
DEVELOPMENT COMPANY LTD.

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APPEALS - Briefs - Badly written - Duty of courts - Flaws in a brief notwithstanding - Appellate court has a duty to examine the arguments contained therein - And decide the case on its merits (H1)

FAIR HEARING - Breach - Applicability - Dismissal of appeal on the ground that appellant's brief did not accord with the rules - Is tantamount to a denial of fair hearing (H2)

APPEALS - Dismissal - Basis of - In addition to dismissing the appeal for the Appellant's noncompliance with the rules of brief writing - The Court of Appeal also dismissed the appeal on the merits (H3)

PLEADINGS - Statement of claim - Claim "as per writ of summons" - Effect - It incorporates the writ of summons in the statement of claim - Making the writ a part of the statement of claim (H4)

PRACTICE & PROCEDURE - Mistake of counsel - Effect on client's case - If the claim is dismissed for improper settling of Appellant's pleadings - It would be punishing the respondents for the mistake of counsel - Which should not be (H5)

EVIDENCE - Evaluation - Exhibits - Not before the court - Propriety of evaluation - A court must see the exhibits before taking any decision on them - Court of Appeal was therefore wrong to accept the finding on Exhibit A - Without seeing it (H6)

JUDGMENTS - Validity - Issues - Where crucial issues are not considered - It occasions miscarriage of justice - Which renders the judgment a nullity (H7)

### **FACTS**

The 1st to 5th respondents, as plaintiffs, had sued the 6th respondent as defendant in Suit No. W/132/70 claiming certain sums for the use of the land in dispute by the 6th respondent. Subsequently, appellants intervened in the suit and were joined as co-defendants. Appellants also filed an independent suit in suit No. W/62/71 against the 1st to 5th respondents claiming declaration of title to the land in dispute. Both suits were consolidated and heard. The claim of the respondents, as plaintiffs, was simply stated to be 'as per the writ of summons'. Moreover, though the plan of the land in dispute was pleaded by the respondents, they did not tender the plan before the trial court.

After hearing, the court allowed the claim in suit No. W/132/70 and dismissed the claim of the appellants in suit No. W/62/71. Aggrieved, appellants appealed to the Court of Appeal which dismissed the appeal. Appellants have come on a further appeal to the Supreme Court contending inter alia, that the Court of Appeal erred in law when it affirmed the judgment of the trial court without evaluating exhibit 'A'.

### **ISSUES FOR DETERMINATION**

*"1. Whether or not dismissing an appeal on account of an inelegantly or defectively written brief amounts to the court abdicating its duty of doing substantial justice.*

*2. Whether the Court of Appeal, Benin Division was right in affirming the declaratory reliefs granted in favour of the 1st-5th Respondents (i.e. the Plaintiffs in Suit No. W/132/70) in spite of the fact that Exhibit "A" (i.e. Plan No. M/GA/71/72) to which the High Court tied the relief was not placed before it for evaluation.*

*3. Whether or not the Plaintiffs/Respondents pleaded any reliefs in or by their Amended Statement of Claim dated 2nd February, 1973 to warrant the Court of Appeal affirming the reliefs granted by the trial court."*

***HELD*** (Unanimously allowing the appeal per **TABAI JSC**)

***APPEALS - Briefs - Badly written***

1. Admittedly there were substantial flaws in the Appellants' brief before the court below and the Court highlighted them. But was the Court right to dismiss the appeal because of those flaws? It is my firm view, with respect, that the Court of Appeal erred. There are numerous authorities on the principle that the inelegance or flaws in a party's brief of argument notwithstanding, an appellate court has a duty to examine the arguments contained therein and decide the case on its merits. (p. 599 D)

***FAIR HEARING - Breach - Applicability***

2. The dismissal of the appeal on the ground that it was not argued in the Appellants' Brief in accordance with the rules and principles governing the writing of briefs as stated in the judgment is tantamount to the determination of the appeal without giving the Appellant a fair hearing. (p. 599 F)

***APPEALS - Dismissal - Basis of***

3. The above shows that in addition to dismissing the appeal for the Appellants' non compliance with the rules and principles of brief writing, it also dismissed it on the merits. I do not think we are in a position to impugn that assertion of having also dismissed the appeal on the merits. It is an assertion of what the court said it did. Whether or not the assertion is right in the light of the materials before the Court is completely another thing. The Court of Appeal should be taken to mean what it said. (p. 600 A)

***Statement of claim - Claim "as per writ of summons"***

4. There this Court, per Uwaifo J.S.C, while restating the principle had this to say:

“..... I think reference in a statement of claim to the writ for the reliefs claimed in the writ of summons makes the statement of claim complete as it incorporates the writ. It is accepted that the synonym of the word “incorporate” includes roll into one, merge, link with, join together, fuse, assimilate: see *Barlett’s Rogef’s Thesaurus, 1st Edition* paragraph 753.15 at page 663 and paragraph 757.9 at page 668. I am satisfied that Ubaezonu, JCA was right in his observation in *OWENA BANK* case (*supra*) at pp.714-715 that “where the Statement of claim states that the Plaintiff claims “as per writ of summons” the claim in the writ of summons is incorporated in the statement of claim and becomes part of it.” Once there is such incorporation, the statement of claim is taken to contain the relief stated in the writ which statement of claim would otherwise have been defective and contrary to the requirements of Ord. 13 Rule 7...”

I adopt the above opinion in its entirety. (p. 600 F)

***Mistake of counsel - Effect on client's case***

5. The skill of formulating pleadings is a highly technical one that can only be properly handled by lawyers with the appropriate skills. If we accede to the request of learned counsel for the appellants to dismiss the claim then the Plaintiffs/Respondents would be punished for the mistakes or inadvertence of their counsel and inflict injustice. This we should avoid. (p. 601 C)

***EVIDENCE - Evaluation - Exhibits***

6. In *MOBIL PRODUCING (NIG) UNLIMITED v MONOKPO* (2003) 18 NWLR (Part 852) 346 at 437-438 this Court was confronted with circumstances similar to those in this case, and this Court per Tobi, JSC reacted as follows:

*A trial court or appellate must see the exhibits before taking any decision on them. A trial court or appellate must see the exhibits before probing into their veracity or authenticity. A trial court or appellate cannot and must come to the conclusion one way or the other, on exhibits which it did not see. Where a court does that there is a clear miscarriage of justice and the judgment must be declared a nul-*

*lity...*”

As I stated earlier, without seeing Exhibit “A” which vitality or materiality is not contested, the Court below could not have been in any position to assert, as it did, that the trial court properly and meticulously evaluated all the evidence before it, before it arrived at its decision. The assertion or finding was merely presumptuous and cannot stand.(p. 604 F/605 A/D) B

### ***JUDGMENTS - Validity - Issues***

7. It is a judgment without a consideration of the crucial issue two wherein the question of Exhibit “A” was raised. There was therefore a clear miscarriage of justice which renders the judgment of the court below a nullity. The result is that this issue is resolved in favour of the Appellants. C

The 2nd issue having been resolved in favour of the Appellants, this appeal succeeds on this ground alone. The appeal is accordingly allowed. The judgment of the court below be and is hereby set aside its being a nullity. The appeal be and is hereby remitted back to the Benin Division of the Court of Appeal for rehearing by another panel of that court.(p. 605 E) D

### ***REPRESENTATION***

Larry, S. Esq., for the Appellants

John Alele, Esq., for the 1st - 5th Respondents E

### ***CASES REFERRED TO***

OBIORA v OSELE (1989) 1 NWLR (Part 97) 279

GBAFE v GBAFE (1996) 6 NWLR (Part 455) 417

AKPAN v THE STATE (1992) 6 NWLR (Part 248) 439 G

ORJI v ZARIA INDUSTRIES NWLR (1992) 1 NWLR (Part 216) 124

WEIDE & CO NIG. LTD. v WEIDE CO. HAMBURG (1992) 6 NWLR (Part 249) 627

ECHO ENTERPRISES LTD. v. STANDARD BANK OF NIGERIA LTD. (1989) 4 NWLR (Part 116) 509 H

MOBIL PRODUCING NIGERIA UNLIMITED v MONOKPO (2004)

ALL FWLR (Part 1975) 575

EDJEKPO v OSIA (2007) ALL FWLR (Part 361) 1617

OKOMU OIL PALM CO. LTD. v ISERHIENHEN (2001) 6 NWLR

**STATUTES & RULES REFERRED TO**

Court of Appeal Act, s.16

Court of Appeal Rules, O. 1 r. 20(4)

B

**LEAD JUDGEMENT BY TABAI JSC**

The two suits culminating in this appeal were commenced at the Warri Judicial Division of the High Court of the then Mid-West State of Nigeria. The first Suit No. W/132/70 was filed on the 2<sup>nd</sup> of December, 1970. The Plaintiffs are the Respondents before this Court. The sole Defendant, Shell B.P. Petroleum Development Company of Nigeria is the 6 Respondent herein. By an application dated 17/12/70 and an order of court pursuant thereto dated 12/1/71 the Appellants D were joined as Co-Defendants.

The 2nd Suit No.W/62/71 was filed on the 6/5/71. The Plaintiffs therein are the Appellants and the Defendants therein, the 1st - 5th Respondents herein. The two suits were by an order of Court on the 11/6/73 consolidated and tried. By its judgment on the 4/12/ E 1980 the trial Court allowed the claim in Suit No. W/132/70 and dismissed the claim in Suit No.W/62/71. In allowing the claim the learned trial judge E.E. Akpata J (as he then was) stated at page 149 of the record:

F *“In sum therefore in respect of Suit No. W/132/70, the Plaintiffs are hereby granted a declaration of title to all the piece of land verged RED in survey Plan No. M/GA. 71/72, Exhibit ‘A’ in these proceedings. They are also entitled to the total sum of N9,500.00 which the company has deposited in the Government Treasury in G Benin City. The company is to pay this amount or see to it that the amount is paid by the Treasury to the Plaintiffs. The company, Shell B.P. Development Company of Nigeria Limited is hereby restrained from paying any money in respect of all the land verged RED in Exhibit ‘A’ to any person or persons other than the Plaintiff.”*

H The Defendants/Appellants were aggrieved by the said judgment and proceeded on appeal to the Court below. By its judgment dated the 7<sup>th</sup> January 1994 the Court below dismissed the appeal.

And still dissatisfied with the said judgment the Defendants/Appellants have come on further appeal to this Court. The original

Notice of Appeal dated and filed on the 23/2/1994 raised two grounds of appeal. The Amended Notice of Appeal was dated the 28/6/2006 and same was filed on the 29/6/2006. The Notice raised three grounds of appeal. The grounds without their particulars were;

GROUND 1

The Court of Appeal Benin erred in law when it dismissed the Appellants' appeal on the ground that the appeal has not been argued according to the rules of court. B

GROUND 2

The learned Justices of the Court of Appeal erred in law when they affirmed the judgment of the High Court having regard to the fact that they did not evaluate exhibit "A" (i.e. Plan No. M/GA71/72 to which the declaration was tied thereby occasioning miscarriage of justice. C

GROUND 3

The Court of Appeal erred in law when it affirmed the judgment of the trial Court which entered judgment in favour of the Plaintiffs/Respondents and granted reliefs not contained in their amended Statement of Claim. D

Briefs were duly filed and exchanged. The Appellants' Amended Brief was prepared by Larry S and same was filed on the 13/10/07. He also prepared the Appellants' Reply Brief which was filed on the 5/11/08. The 1st-5th Respondents' Brief was prepared by John Alele and it was filed on the 8/7/08. In the Appellants' Brief learned counsel, Larry S. formulated three issues for determination. E F

In the 1st - 5th Respondents' Brief learned counsel John Alele seems to have adopted the issues formulated by the Appellants without expressly saying so. In sum therefore the parties are in agreement as to the issues for determination in this appeal. The issues are: G

*"1. Whether or not dismissing an appeal on account of an inelegantly or defectively written brief amounts to the court abdicating its duty of doing substantial justice.*

*2. Whether the Court of Appeal, Benin Division was right in affirming the declaratory reliefs granted in favour of the 1st-5th Respondents (i.e. the Plaintiffs in Suit No. W/132/70) in spite of the fact that Exhibit "A" (i.e. Plan No. M/GA/71/72) to which the High Court tied the relief was not placed before it for evaluation,*

*3. Whether or not the Plaintiffs/Respondents pleaded any re-*

*liefs in or by their Amended Statement of Claim dated 2<sup>nd</sup> February 1973 to warrant the Court of Appeal affirming the reliefs granted by the trial court."*

In the Appellants' Amended Brief and the Appellants' Reply Brief, Barrister Larry made the following submissions. On the first issue, learned counsel conceded that the Appellants' Brief before the court below was bad, defective, faulty and inelegant. It was his submission however that the inelegance or defect of a brief notwithstanding the court still had a duty to do substantial justice by considering same in its determination of the appeal. He relied on a number of authorities amongst them are *OBIORA v OSELE* (1989) 1 NWLR (Part 97) 279 *GBAFE v GBAFE* (1996) 6 NWLR (Part 455) 417, *AKPAN v THE STATE* (1992) 6 NWLR (Part 248) 439; *ORJI v ZARIA INDUSTRIES* NWLR (1992) 1 NWLR (Part 216) 124, *WEIDE & CO NIG. LTD. v WEIDE CO. HAMBURG* (1992) 6 NWLR (Part 249) 627; *ECHO ENTERPRISES LTD. v. STANDARD BANK OF NIGERIA LTD.* (1989) 4 NWLR (Part 116) 509 and *IN RE OLAFISOYE* (2004) ALL FWLR (Part 198) 1106. Counsel submitted that it was therefore wrong for the Court of Appeal to dismiss the appeal in the manner it did.

With respect to the second issue of whether it was right for the Court of Appeal to affirm the judgment of the trial court when it did not see Exhibit 'A' to which the declaration sought and granted was tied, learned counsel referred copiously to the reliefs claimed, various texts of the judgment of the trial court, the crucial nature of Exhibit "A" and the undisputed fact that the said Exhibit 'A' did not form part of the record before the Court and submitted that it was wrong in the circumstance for the Court of Appeal to assert that the trial court properly evaluated all the evidence presented to it before its decision. Learned counsel referred to the fact identified by the trial court at page 143-144 of the record that "in the previous cases the Plaintiffs did not specifically assert that the place called Egwa was founded by their adventurous ancestors", the fact that the plan used in Exhibit "C" was not tendered along with it and the copious references made to Exhibit "A" by the trial court and submitted that the Court of Appeal had a duty to examine Exhibit 'A' in its assessment of the printed evidence. For the submission that consideration of Exhibit 'A' along with other evidence on record was *sine qua non* of a



valid judgment of the court below, counsel relied on the following: MOBIL PRODUCING NIGERIA UNLIMITED v MONOKPO (2004) ALL FWLR (Part 1975) 575; EDJEKPO v OSIA (2007) ALL FWLR (Part 361) 1617.

In the 3rd issue for determination learned counsel submitted that a relief not claimed in the Statement of Claim is deemed abandoned and that where no relief is claimed in the Statement of Claim there is no issue joined. He relied on ATANIOKU v MUSTAFA (1977) 11-12 S.C. 9; STOWE V STOWE (2000) FWLR (Part 24) 1425; ENIGBOKAN v AMERICAN INTERNATIONAL INSURANCE CO. NIG. LTD. (1994) 6 NWLR (Part 348) 15-16; LAHAN v LAJOYETAN (1972) 6 S.C. 190 at 192; A.C.B. v. EAGLE SUPER PARK (NIG) LTD. (1995) 2 NWLR (Part 379) 590 at 600; FATUNMI v. ONILUDE (2004) ALL FWLR (PT.219) 1053; PRACTICE AND PROCEDURE OF SUPREME COURT, COURT OF APPEAL AND HIGH COURT. By T.A. Aguda 2nd Edition.

In the Appellants' Reply Brief learned counsel was at great pains to further demonstrate that the two previous cases of SILLO v ADURUMOKUMOR and ULUBA v SILLO (1973) 8 N.S.C.C. 47 which is Exhibit C on which the trial court relied had no relationship whatsoever with the Egwa land in dispute in this case and that no reference whatsoever was indeed made in the previous cases to the land in dispute in this case. In conclusion learned counsel for the Appellants urged that the decisions of the two courts below be set aside, and in their place dismiss Suit No. W/132/70 and enter judgment for the Appellants in Suit No. W/62/71 or in the alternative order a retrial of both suits.

In the 1st- 5th Respondents' Brief John Alele proffered the following arguments. With respect to the first issue learned counsel referred to the order of this Court on the 26th day of March 2007 and the resultant hearing of this appeal on the merits and submitted that the complaint about the non-hearing of the appeal no longer remains an issue. Learned counsel made some references to parts of the judgment of the lower court and submitted that the appeal was in fact considered and decided on the merits.

On the second issue learned counsel argued firstly that in view of the trial court's preference of the traditional evidence of the 1st - 5th Respondents to that of the Appellants and the host of Exhibits

put together the lower court rightly affirmed the decision of the trial court. With respect to the identity of the land, counsel referred to Exhibit “B” by which the Appellants’ claimed compensation from the 6th Respondent over the land in dispute and submitted that there was therefore no dispute as to the identity of the land. He referred  
 B further to Exhibits L8 - L15 by which the 6th Respondent negotiated with and paid compensation in respect of Egwa 2 to the 1st to 5th Respondents and the contiguity of Egwa 1 and Egwa 2, their separation being only a creek and submitted that the identity of the land was not in issue and that Exhibit ‘A’ was therefore not necessary.  
 C Apart from Exhibit “A”, counsel argued, Chief Sillo’s evidence before Obaseki J (as he then was) in Exhibit C’ had paved the way for dismantling the Appellants’ claim to the ownership of Egwa.

As respects the third issue learned counsel agreed that Order  
 D 13 Rule 7 of the 1976 Bendel State High Court Rules applicable in Delta State insists on due compliance. It was his contention however that since clients do not prepare court processes and having regard to the principle of not punishing a client for the mistake of his counsel the court should lean towards the doctrine of incorporation as was  
 E applied in OKOMU OIL PALM CO. LTD. v ISERHIENHEN (2001) 6 NWLR (Part 710) 660 at 681. It was counsel’s submission that since in the Statement of Claim the Respondents claim as per writ of summons, the Statement of Claim is complete as it has incorporated the writ of summons. In support of this contention learned counsel relied  
 F on UDECHUKWU v ONWUKA (1956) S.C. NLR 189; OWENA BANK (NIG) LTD. v N.S.C.C. LTD. (1993) 4 N.W.L.R. (Part 290) 698 at 714-715 and KESHINRO v BAKARE (1967) 1 All N.L.R. 280, Learned counsel urged in conclusion that in view of the tradi-  
 G tional evidence and other oral evidence accepted by the trial court who heard and watched the demeanour of witnesses who testified together with the operation of Section 46 of the Evidence Act, the concurrent judgments of the two courts below be affirmed.

I have taken a careful look at the record of proceedings and  
 H the submissions of counsel for the parties in their respective briefs. With respect to the 1st issue it is clear from the judgment of the court below that the appeal was dismissed for two reasons. The first was that the appeal was argued in breach of the Rules of Court and principles governing the writing of briefs. The court per Ogebe, JCA (as

he then was) at page 344 of the record highlighted some flaws in the Appellants' brief and the 1st - 5th Respondents' brief and concluded in the following terms:

*"From all I have said above based on the principles governing the writing of briefs, it is clear that this appeal has not been argued according to the rules of court. Consequently the appeal must be dismissed and it is hereby dismissed."* B

Mr. Larry for the Appellants referred to the above conclusion of the court below and submitted that dismissing the appeal as it did on the ground that the Appellants' brief was not written in strict compliance with rules and principles governing brief writing amounted to the Court's abdication of its duty to do substantial justice. Mr. John Alele for the 1st-5th Respondents appeared to have conceded this argument of the Appellants. There is substance in the complaints of the Appellants. ***Admittedly there were substantial flaws in the Appellants' brief before the court below and the Court highlighted them. But was the Court right to dismiss the appeal because of those flaws?. It is my firm view, with respect, that the Court of Appeal erred. There are numerous authorities on the principle that the inelegance or flaws in a party's brief of argument notwithstanding, an appellate court has a duty to examine the arguments contained therein and decide the case on its merits.*** *OBIORA v OSELE* (1989) 1 NWLR (Part 97) 279 cited in the Appellants' Amended Brief of Argument is very apposite on the point. ***The dismissal of the appeal on the ground that it was not argued in the Appellants' Brief in accordance with the rules and principles governing the writing of briefs as stated in the judgment is tantamount to the determination of the appeal without giving the Appellant a fair hearing.*** Therefore if this were the only ground for the dismissal of the appeal at the court below this appeal would have been allowed on that ground alone. C  
D  
E  
F  
G

But that was not so. After dismissing the appeal on the ground of the inelegantly drafted brief, the Court below also proceeded on to dismiss the appeal on the merits. In this regard the court below in its concluding paragraph of the judgment had this to say; H

*"I have carefully read the judgment of the trial court and I am satisfied that it properly appraised all the evidence placed before it meticulously before arriving at its decision, I see no cause whatsoever*

*to interfere with the judgment. Accordingly even on the merit the appeal lacks substance and it is hereby dismissed. I affirm the decision of the trial court.....,”*

**The above shows that in addition to dismissing the appeal for the Appellants’ non compliance with the rules and principles of brief writing, it also dismissed it on the merits. I do not think we are in a position to impugn that assertion of having also dismissed the appeal on the merits. It is an assertion of what the court said it did. Whether or not the assertion is right in the light of the materials before the Court is completely another thing. The Court of Appeal should be taken to mean what it said.** Thus while there is substance in the Appellants’ complaint about the dismissal of the appeal on the grounds of the inelegant Appellants’ Brief, there is no substance in their complaint about the Court’s assertion of having also dismissed the appeal on the merits.

For convenience I take the 3rd issue before the 2nd. The question posed there is whether the Plaintiffs/Respondents pleaded any relief in their Statement of Claim. The writ of summons issued on the 2nd December 1970 contained four reliefs. In paragraph 19 of the Statement of Claim dated 2/2/1973 and filed on the 3/2/1993 the Respondents claimed as follows: “19 whereof the Plaintiffs claim as per their writ of summons” I have considered the arguments very ably agitated by counsel for the parties with the authorities cited. On this issue *OKOMU OIL PALM CO. LTD. v ISERHIENHEN* (2001) 6 NWLR (Part 710) 660 at 681 is quite apposite. ***There this Court, per Uwaifo J.S.C, while restating the principle had this to say:***

***“..... I think reference in a statement of claim to the writ for the reliefs claimed in the writ of summons makes the statement of claim complete as it incorporates the writ. It is accepted that the synonym of the word “incorporate” includes roll into one, merge, link with, join together, fuse, assimilate: see Barlett’s Rogef’s Thesaurus, 1st Edition paragraph 753.15 at page 663 and paragraph 757.9 at page 668. I am satisfied that Ubaezonu, JCA was right in his observation in OWENA BANK case (supra) at pp.714-715 that “where the Statement of claim states that the Plaintiff claims “as per writ of summons” the claim in the writ of summons is incorporated in the***

***statement of claim and becomes part of it. "Once there is such incorporation, the statement of claim is taken to contain the relief stated in the writ which statement of claim would otherwise have been defective and contrary to the requirements of Ord. 13 Rule 7...."***

***I adopt the above opinion in its entirety.*** The invitation to B  
dismiss the claim on the ground that in the Statement of claim the  
Plaintiffs/Respondent merely claimed "as per their writ of summons"  
is an invitation to give credence to technical justice. The Courts have  
been advised to avoid technicalities in the administration of justice. C  
See BELLO v A.G. OYO STATE (1986) 5 NWLR (Part 45) 828 at  
885-886; NNEJI v CHUKWU (1988) 3 NWLR (Part 81) 186 at 188.

***The skill of formulating pleadings is a highly technical one that can only be properly handled by lawyers with the appropriate skills. If we accede to the request of learned counsel for the appellants to dismiss the claim then the Plaintiffs/ Respondents would be punished for the mistakes or inadvertence of their counsel and inflict injustice. This we should avoid.*** D  
See IBODO v ENEROFIA (1980) 5 S.C. 42; NNEJI v CHUKWU  
(supra). ADEPOJU v ADEPOJU (1968) 2 ALL NLR 141. For the E  
foregoing considerations this issue is resolved against the Appellants.

I now come to the 2nd issue. The uncontroverted fact is that  
Exhibit 'A' was not before the court below as it is not before us. The  
crucial question is whether the Court below was right to dismiss the  
appeal without the benefit of also examining Exhibit 'A'. In the first F  
place how crucial was this Exhibit? In the 1st relief the Respondents  
claimed:

***"A declaration of title to all that piece or parcel of land known as "Egwa-tie" which piece or parcel of land is lying and situate within the jurisdiction of this Honourable Court the boundaries of which piece or parcel of land will be shown in plan to be filed in this Honourable Court."*** G

The settled principle of law is that a declaration of title to a  
piece or parcel of land can only be granted if the definite precise, and H  
accurate boundaries of it are established. And the onus of proof lies  
on the Plaintiff who seeks a declaration of title to land and for an  
injunction to establish with certainty and precision the area of land to  
which the claim relates. See OKEDARE V ADEBARA (1994) 6 NWLR

(Part 349) 157; AGBONIFO V AIWERIOBA (1988) 1 NWLR (Part 70) 325; ONWUKA V EDIALA (1989) 1 NWLR (Part 96) 182; KWADZO V ADJEI (1944) WACA 274; ARABA V ASANLU (1980) 5-7 SC 78. And there is no gainsaying the fact that it was for the purpose of establishing the precise boundaries of the Egwa-tie claimed that Exhibit 'A' was filed. And in granting the relief claimed the trial court stated at page 149 of the record thus:

*"In sum therefore, in respect of Suit No. W/132/70, the Plaintiffs are hereby granted a declaration of title to all the piece of land verged red in survey plan No. M/GA. 71/72. Exhibit 'A' in these proceedings."*

Right from the trial Court and up to the Court of Appeal, the Defendants/Appellants were at pains to demonstrate that the Plaintiffs/Respondents failed to establish the precise boundaries of the land in respect of which the declaration was sought and granted and urged that the claim ought to have been or should be dismissed.

What are the circumstances surrounding the Exhibit "A"? On the 22/3/1979 learned counsel for the Plaintiffs/Respondents John Alele informed the court at the very opening of their case that the surveyor who prepared it was late. Counsel for the three sets of defendants i.e. Siakpere, Dr. Odje and Dr. Mowoe each expressed no objection to its admission in evidence and so it was admitted and marked Exhibit 'A'. The DW1 was one Josiphus Theophilus John a licensed surveyor who prepared the Appellants' Plan Exhibit 'F'. In the course of his evidence he tried to discredit Exhibit "A" when at pages 89-90 of the record of proceedings he said:

*"I see Exhibit A. Exhibit "A" and "F" are incomparable because the scales are different. Scale A is 1250 to an inch. The scale of Exhibit "F" is 2083.6ft to an inch. I cannot follow Exhibit A. The pipe of Exhibit "F" is running North-North-West. It forms the western boundary of the land claimed by the defendant. In Exhibit A it runs North-West and lies in the middle of the land claimed by the Plaintiffs. The positions of the wells and the shapes of the rivers differ greatly..... Egwu-tie creek in Exhibit A is not of the same shape with Egwa creek in Exhibit "F".*

It is clear from the above that the parties plan description of the land in dispute is greatly at variance. Part of the address of counsel for the Defendants/Appellants O.V. Siakpere before the trial Court

is at pages 118-119 of the record. At page 118 lines 22-24 he pointed out what he considered to be flaws in Exhibit 'A' when he submitted:

*"Their plan Exhibit 'A' is barren. Nothing to show they owned it. There is not a single juju shrine planted. They have only Enyeogbe camp. This is far from Egwa and it is not in dispute."*

There are other attacks on the Plaintiffs/Respondents' proof of the boundaries at page 119 lines 4-11 of the record. B

The address of learned counsel for the Plaintiffs/Respondents John Alele is at pages 123-126 of the record. At page 125 lines 20-22 he seemed to have conceded some deficiencies in their plan Exhibit "A" when he said:- C

*"The Plaintiffs' plan shows no features because the first defendant had acquired the land. Hence the failure to show features in Exhibit 'A' cannot be held against us..."*

Despite the foregoing, the trial court in its judgment tried to D  
trivialise the alleged failure of the Plaintiffs/Respondents' to establish the precise boundaries of the land claimed holding, as he did, that whatever description of the land by them accorded with their earlier description of same in previous cases. See page 144 of the record.

The Appellants herein were the Appellants at the Court below. E  
Their brief of argument is at pages 245-270. Therein their counsel O.V. Siakpere submitted again and again, that in view of the facts disclosed in Exhibit "A" the Respondents claim ought to have been dismissed. It was further contended that Exhibit "A" apart from failing F  
to help the case of the Respondents, established the Appellants' possession over the Egwa land in dispute. At page 257 learned counsel for the Appellants submitted as follows:

*"In Exhibits 'A' (Respondents' Plan) the situations and positions of Okenrenghigho and Omadinor villages are clearly shown. G  
On the opposite side of the Escravos Rivers are shown two Egwa camps. There are no suit numbers to show that there had been litigations over them and that such litigations ended in favour of the Respondents,"*

Again at page 260 learned counsel made the following sub- H  
mission:-

*"The Plaintiffs/Respondents have not established at all any sufficient numerous, positive and/or convincing acts of possession and enjoyment over Egwa land which is in dispute."*

(a) *In Exhibit 'A' (Respondents' Survey Plan) there is nothing to show the presence of the Respondents, or that they have ever been there.*

(b) *There is abundant evidence that the Appellant has his permanent home at Egwa. This is accepted by the Respondents and his two camps are clearly shown on Exhibit "A".*

There were still other references to Exhibit 'A' in the Appellants' brief. And from the totality of the submissions therein Exhibit 'A' was crucial and the Court below was called upon and indeed had a duty to examine Exhibit 'A' to see how and the extent to which it affected the respective cases of the parties. It cannot just be wished away.

Surprisingly the said Exhibit 'A' disappeared and so was not placed before the Court below. The Court never bothered to see this Exhibit A which was capable of turning the scale of justice one way or the other. And it nevertheless went ahead to dismiss the appeal and affirm the decision of the trial court without seeing Exhibit 'A'. The question is was the Court of Appeal right when it stated that it had carefully read the judgment of the trial court and was satisfied that it properly appraised all the evidence, placed before it meticulously before arriving at its decision? It is my firm view that the finding or assertion was rather presumptuous and I have no doubt that it was wrong. Given the crucial nature of Exhibit 'A' and the heavy reliance placed on it by the Appellants the court below could not have been in any position to know whether or not the trial court properly and meticulously evaluated the totality of the evidence before it in arriving at its decision.

***In MOBIL PRODUCING (NIG) UNLIMITED v MONOKPO (2003) 18 NWLR (Part 852) 346 at 437-438 this Court was confronted with circumstances similar to those in this case, and this Court per Tobi, JSC reacted as follows:***

*"An appellate Court must and I repeat must come to the conclusion such as above if that court has seen the exhibits. What an appellate court cannot see is the evidence given by the witnesses and so he goes by the record to see whether the evaluation and conclusion reached by the trial judge are vindicated on the record. Even here if the conclusions are not borne out from the record an appellate court can reject them on grounds of perversity.*



*There is no procedural law known to me which allows an appellate court to accept the evaluation of exhibits by the trial court which are not before that court .....*

***A trial court or appellate must see the exhibits before taking any decision on them. A court trial or appellate must see the exhibits before probing into their veracity or authenticity. A court trial or appellate cannot and must come to the conclusion one way or the other, on exhibits which it did not see. Where a court does that there is a clear miscarriage of justice and the judgment must be declared a nullity..”***

EDJEKPO v OSIA (2007) 8 NWLR (Part 1037) 635 is another strong authority that an appellate court has a duty to examine the totality of the evidence presented at the court below in order to ascertain whether the decision is supported by the evidence placed before it.

***As I stated earlier, without seeing Exhibit “A” which vitality or materiality is not contested, the Court below could not have been in any position to assert, as it did, that the trial court properly and meticulously evaluated all the evidence before it before it arrived at its decision. The assertion or finding was merely presumptuous and cannot stand.***

***It is a judgment without a consideration of the crucial issue two wherein the question of Exhibit “A” was raised. There was therefore a clear miscarriage of justice which renders the judgment of the court below a nullity. The result is that this issue is resolved in favour of the Appellants.***

***The 2nd issue having been resolved in favour of the Appellants, this appeal succeeds on this ground alone. The appeal is accordingly allowed. The judgment of the court below be and is hereby set aside its being a nullity. The appeal be and is hereby remitted back to the Benin Division of the Court of Appeal for rehearing by another panel of that court.***

I assess the costs of this appeal at N50,000.00 in favour of the Appellants.

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**MUSDAPHER JSC**

I was honoured with the copy of the judgment just delivered

by my Lord, Hon. Justice Francis Fedode Tabai, JSC. I entirely agree with the reasonings and the conclusions arrived thereafter. I accordingly allow the appeal and set aside the judgment of the Court of Appeal. In its place, I remit the matter back to the Court of Appeal Benin Division and for the appeal to be heard de novo before a different panel of justices. I abide by the order for costs proposed in the said judgment.

### **OGUNTADE JSC**

- C I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai JSC. I agree with him that the Court of Appeal could not have given a fair and exhaustive consideration to this appeal before it when the vital exhibit was not before it.
- D It seems to me that an appellate court ought to have before it the same exhibits which the trial court relied upon in coming to its decision. The judgment given by the court below could not be regarded as well premised when the plan upon which the respondents based their claim for declaration of title was not before it.
- E I would also allow this appeal and order that the case be heard *de novo* by the court below. I subscribe to the order on costs made in the lead judgment.

### **OGBUAGU JSC**

- This is an appeal against the decision of the Court of Appeal, Benin Division (hereinafter called “the court below”) delivered on 7th January, 1994, affirming the Judgment of the High Court of former Bendel State sitting at Warri Judicial Division, - per Akpata, J, (as he then was) delivered on 4th December, 1980.

- Dissatisfied with the said decision, the Appellants have appealed to this Court. They have formulated in their Brief of Argument, three (3) issues for determination, namely,
- H “3.01 *Whether or not dismissing an appeal on account of an inelegantly or defectively written brief amounts to the court abdicating its duty of doing substantial justice*  
*(Distilled from Ground 1)*  
 3.02 *Whether the Court of Appeal, Benin Division was right in*

*affirming the declaratory relief granted in favour of the 1st to 5th respondents (i.e. the plaintiffs in suit No. W/J 32/70 in spite of the fact that Exhibit "A" (i.e. Plan No. M/GA/71/72) to which the High Court tied the relief was not placed before it for evaluation. Distilled from the Additional Ground Numbered 2).*

3.03 *Whether or not the plaintiffs/respondents pleaded any reliefs in or by their amended statement of claim dated 2nd February, 1973 to warrant the Court of Appeal affirming the reliefs granted by the trial court. (Distilled from Additional ground Numbered 3) ".*

On their part, the Respondents have also formulated three issues for determination, namely,

*"(a) Whether or not dismissing an appeal on account of an inelegantly or defectively written brief amounts to the court abdicating its duty of doing substantial justice. (Distilled from Ground 1)*

*(b) Whether the Court of Appeal, Benin Division was right in affirming the declaratory relief granted in favour of the 1st to 5th Respondents (i.e. the plaintiff in suit No. M/GA/71/72) to which the High Court tied the relief was not placed before it for evaluation .(Distilled from the Additional Ground Numbered 2).*

*(c) Whether or not the Plaintiff/Respondents pleaded any reliefs in or by their amended statement of claim dated 2nd February, 1973 to warrant the Court of Appeal affirming the reliefs granted by the trial Court. (Distilled from Additional Ground numbered 3)."*

Ekpoko, Esqr., - learned counsel for the 1st to 5th Respondents, also adopted their Brief and he urged the Court, to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

The Defendants are the Appellants, while the Respondent are/were the Plaintiffs. There are two consolidated suites - i.e. NOS W/ 132/70 and W/62/7: respectively. The parties in both suits, claimed respectively, a declaration of title compensation from the 6th Respondent and an injunction. After the hearing of the suits as consolidated, the trial court, found in favour of the 1st to 5th Respondents and ordered the 6th Respondent, to pay compensation due to them. As noted by me earlier in this Judgment, the Appellants' appeal to the court below, was unsuccessful hence the instant appeal.

I will deal with issue 3.02 of the Appellants and issue (2) of the 1st to 5th Respondents which are similar although differently couched.

In my respectful view the grouse or the complaint of the Appellants, is that the Plaintiffs, failed to prove their case by their failure, to file a Survey Plan identifying clearly and properly, the area or portion to which the declaration and injunction orders were based. In other words, that the court below, did not see any plan whatsoever to show, which land the decision affirming the Judgment of the trial court, was based. From the Records, in my humble but firm view, I think that the complaint is justified. I say so because, a number of decided cases by the West African Court of Appeal and this Court, it is now firmly established firstly, that a plan is part of the pleadings of a Plaintiff or party claiming a declaration of title. See the case of Day v. William Hill (Park Land) (1949) 1 K.B. 632.

Secondly, land to which a declaration is to attach, must be sufficiently identified. See the cases of Odesanya v. Ewedemi (1962) 1 ANLR (Pt.2) 320 @ 321 and Ezeoke & ors. v. Uga & ors. (1962) 1 ANLR (Pt.3) 429 @ 484. In other words before a declaration of title is given, the land which it relates, must be ascertained with certainty the test being whether a surveyor, can, from the Record, produce an accurate plan of such land i.e. the need for a plan. See the cases of Udofia v. Afia (1940) 6 WACA 216; Kwadzo v. Adjei (1944) 10 WACA 274; Udekwu Amata v. Modekwu (1954) 14 WACA 58; Chief Aro v. Chief Aboluro (1968) NMLR 23 Okorie v. Udom (1960) 5 FSC 162; (1960) SCNLR 326; also cited is the case of Oke & ors. v. Eke & ors. (1982) 12 S.C. 218 @ 232; (1982) NSCC 547; Adelesola & ors. v. Akinde & 3 ors. (2004) 12 NWLR (Pt.887) 295: (2004) 5 SCN.J. 235 @ 250 citing the Cases of Ezeudu v. Obiagwu (1986) 2 NWLR (Pt.26) 208 @ 602 and Fatunde v. Onwoamanam (1990) 2 NWLR (Pt 132) 332: (1990) 3 SCN.J. 200 and Ugbo & ors. v. Aburime (1994) 9 SCN.J. 23 @ 34 - per Iguh, JSC, just to mention but a few.

Thirdly, another and perhaps a better way of proving the identity and extent the land claimed, is by filing a plan, reflecting all the features of the land and show clearly, the boundaries. See the cases of Awote & ors. v. Owodunni & anor. (1987) 3 SCN.J. 1 @ 8 and Atanda & ors. v. Ajani & ors. (1989) 6 SCN.J. (Pt.II) 193 @ 209.

This is why, where an Injunction is also claimed, it can only be granted or binding, when the boundaries of the area to be affected, are ascertained, well known and properly described. A Plan becomes necessary (although not mandatory). See cases of Baruwa v.

Ogunshola & ors. 4 WACA 159; Epi v. Aigbedion (1972) 10 53; (1972) 1 All NLR. (Pt.2) 370; Omoregie v. Idugiemwenye (1985) 2 NWLR C 41; and Idesola & anor. v. Chief Ordia (1997) 3 NWLR (Pt.491) 17 @ 29: (191 SCNJ. 175 and Adelesola & ors. v. Akinde & ors. (supra) at 253 and many others.

It need be stressed and this is also settled that where a piece of land in dispute is not unascertainable, e.g. where all the parties, are agreed as to its area or location or boundaries on the ground, it will not be necessary to have a plan filed. See the cases of Akpagbue v. Ogu (1976) 6 S.C. 63 and Epi. v. Aigbedion and Ezeudu v. Obiagwu (supra). In other words, a plan of a land in dispute, is not a sine qua non, although some descriptions, will be necessary to make the said land ascertainable. See the cases of Chief Sokpui v. Chief v Chief Agbazo III WACA 241 @ 242: Ayoolav. Ogunjimi (1964) 1 All NLR 188; Awere v. Lasoja (1975) NMLR 100 and Odesanya v. Ewe (supra) and many others. This fact, is conceded in the 1st to 5th Respondents from pages 11 to 17 - paragraph 4.07 to 6.00.

I have gone this far because firstly, on the reliance of the Respondents on case of Solo v. Uluba (1973) 8 NSCC 47 which with respect, is distinguishable the instant case leading to this appeal. It is Exhibit "C" — the Judgment in W/30/62 - Judgment of Obaseki, I. (as he then was). In that case, the plaintiff therein, only sought for a declaration of their "possessory right of ownership" not a declaration of title as was sought in this case. I note that the trial court, referred copiously, to the said plan in its Judgment. See pages 144 to 150 of the Records referring to Exhibit "A" of the Respondents. Exhibit "F" of the Appellants, was referred to at pages 135 and 145 of the Records.

It seems therefore, to me that there is a dispute as to the identity, area or extent of or boundaries of the land in dispute both in the pleadings and evidence in court the Appellants through the DW1 - a civil engineer and a licensed surveyor, at pages 90 and 91 of the Records. It seems to me as rightly submitted in the Appellants Reply Brief at pages 5 and 6 - paragraphs 2.05 and 206, that the court below -Ogebe, JCA (as he then was) who wrote the lead Judgment, never saw Exhibit "A" even though Exhibit "F" of the Appellants, was before the court below, to enable it make some comparisons. The learned Jurist, conceded that an appeal, is by way of re-hearing. See

Order 3 rule 2(1) of the Court of Appeal Rules and the recent case of Edjekpo & ors. v. Osia & ors. (infra) at page 658 of the NWLR and page 23 of the S.C. (Pt.1) 23 - per Ogunlade, JSC..

I say so, i.e. that Exhibit “A”, was not before the court below, because in the Amended Brief of the 1st to 5th Respondents at pages B 9 in paragraphs 4.06, the following appear inter alia;

“It is submitted that the Lower Court’s affirmation of the decision arrived at by the Trial Court cannot be faulted because the lower court was deprived of the opportunity of seeing Exhibit “A”. It was C arrived at despite/without seeing Exhibit “A” “or without the necessity to evaluate Exhibit “A”.

At page 11 in paragraph 4.07, the following appear inter alia:  
“..... The Lower Court in fact had no need to rely on Exhibit “A”  
“: it was not before it.....”.

D [the underlining mine]

It is now settled that what is admitted, need no further proof. See the cases of Udofia & anor. v. Ajia (supra) @ 218. 219: Egbunike v. A.C.B. Ltd. (1995) 2 NWLR (Pt.376) 34 @ 53; (1995) 2 SCN.J. 58; Phoenix Motors Ltd., v. Mr. Ojewunmi & 1 (1992) 6 NWLR (Pt. E 248) 501 @ 508 C.A. and Edosomwen v. Ogbey-fun (1996) SCN.J. 21; (1996) 36 LRCN 432 @ 450 and too many others.

On the above admission of the 1st to 5th Respondents, it is crystal clear to me the court below, heard the appeal, on an incomplete Records. It is now firmly settled that it is the duty of an Appellate F Court, not to hear an appeal on incomplete Records. See the case of Chief Okochi & 2 ors. v. Chief Animkwoi & 2 ors. (2003) 18 NWLR (Pt.251) 1; (2003) 2 SCN.J.260 (3), 271. This is because, the Records of proceedings, bind the parties and the court until the contrary is G proved. See the cases of Sommer v Federal Housing Authority (1992) 1 NWLR (Pt 219) 548 (1992) 1 SCN.J. 73; Orugbo & anor. v. Bulari Uma & 10 ors. (2002) 9 SCN.J. 12; (2002) 9 - 10 S.C. 61; Chief Fubara & ors. v. Chief Minimah & ors. (2003) 5 SCN.J. 142 @168. It. This is again because, there is a presumption of genuineness which H of course, is not absolute but is rebuttable. See the case of Alhaji Nuhu v. Alhaji Ogele (2003) 18 NWLR (Pt.852) 251 @ 272; (2003) 12 SCN.J. 158 @ 772. This again is because court, is entitled to look at and refer to the contents of the Records in consideration any matter before it. See the cases of Funduk Engineering Ltd., v. Mc Arthur

(1995) 2 NWLR (Pt. 392) 640 @ 652; (1995) 4 SCNJ, 240 and Texaco Panama Incorporation, (Owners of the Vessel "M.V." Star Tulsa) v. Shell Petroleum Development Corporation of Nig. Ltd. (2002) 2 SCNJ. 102 @. 118 - per Kalgo, JSC.

Yet, in spite of this state of affairs or omission or unavailability of a very relevant and material documentary evidence, such as "Exhibit "A", His Lordship concluded at page 345 of the Records, thus:

*" I have carefully read the judgment of the trial court, I am satisfied that it properly appraised all the evidence placed before it meticulously before arriving at its decision, I see no cause whatsoever to interfere with the judgment. Accordingly, even on the merit the appeal lacks substance and it is hereby dismissed. I affirm the decision of the trial court. The appellant shall pay costs of N750.00 to that 7th to 5th Respondents".*

I note that the said Exhibit "A", was nowhere stated by the 1st to 5th Respondents, to be missing and that all diligent efforts to procure it, had failed. In case, this Court, should have the painful decision of ordering as a last resort, a retrial especially, as I have found as a fact and hold that the said exhibit "A", is a mate and relevant documentary evidence that the court below, should and ought to have looked at along with Exhibit "F" of the Appellants before concluding that the trial court properly appraised all the evidence which per force, must include documentary evidence of all the exhibits tendered and relied on by the parties, the observation of this Court in the case of Chief Okochi & ors, v. Chief Animkwo, ors. (supra),

I note that the trial court, made copious references in its said judgment, to plan - Exhibit "A". I agree with the Appellants that the court below, should ought to have insisted on seeing Exhibit "A". As a matter of fact, in the case of Mobil Producing Nig. Unlimited & anor. v. Chief Monokpo & anor. (2004) All FWLR (Pt.195) 575 @ 660 cited and relied on in the Appellants' Amended Brief (it is also reported in (2003) 12 SCNJ. 206) and (2003) 18 NWLR (Pt.852) 346 @ 437-438 this Court - per Niki Tobi, JSC stated inter alia, as follows:

*" ,..... An appellate court must and I repeat must come to the conclusion such as above if that court has seen the exhibits. What an appellate court cannot see is the evidence given by the witness and so he goes by the record to see whether the evaluation and conclu-*

*sion reached by the trial judge are vindicated in the record, an appellate court can reject them on grounds of perversity. There is no procedural law known to me which allows an appellate court to accept the evaluation of exhibits by the trial court, which are not before that court..... Where a court does that, there is clear miscarriage of justice “.* [the underlining mine]

I also agree with the submission in the Appellants’ Amended Brief that the consequences of the court below, not seeing Exhibit “A” before reaching its conclusion to affirm the said declaration of title of the trial court and I will add, before being satisfied that it appraised all the evidence before it, amounts with respect, to a miscarriage of justice and such finding in my humble but firm view, is a nullity. I so hold. As to missing portions of Record of proceedings, see also the observations of this Court in the case of Edjekpo & 2 ors. v. Osia & 3 ors. (2007) All FWLR (Pt.361) 1617 @ 1631: - per Katsina-Alu, JSC, Mohammed, JSC @ 1639 - 1640 and Onnoghen, JSC @ 1648 - 1649. (it is also reported in (2007) 8 NWLR (Pt.1037) 635 @ 652-653. 658-659: (2007) 3 S.C 1 @ 8-9, 27-29. My answer to the said issue, is definitely rendered in the Negative.

I will deal very briefly with issue 3.01 of the Appellants and Issue (a) later numbered as Issue 1 of the 1st to 5th Respondents which are again similar.

At page 344 of the Records, the court below, stated inter alia, as follows:

*“From all I have said above based on the principles governing the writing of brief, it is clear that this appeal has not been argued according to the rules of court. Consequently the appeal must be dismissed and it is hereby dismissed”.*

It has been stated and restated by the two Appellate Courts and held by them in a line of decided authorities, that an inelegant or bad or defective Brief, need not be struck out (how much more dismissing an appeal on that ground). That the court should make the best that it can out of it. See the cases of Chinweze & 2 ors. v. Mrs. Veronica Masi & anor. (1989) 1 NWLR (Pt.97) 245; (1989) 1 SCN.J. 148; Gbafe v. Prince Gbafe & 3 ors. (1996) 6 NWLR (Pt.455) 417- . (1996) 6 S.C.N.J. 167 @ 178 - per Adio, JSC, citing the case of Obiora v. Osale (1989) 1 NWLR (Pt.97) 278, @ 296, 302, 303; (1989) 1 SCN.J. 213 (the last two also cited and relied on in the



Appellants' Amended Brief); Benue Cement Co. PLC v. Sky Inspection & anor. (2002) 17 NWLR (Pt. 795) 86 @ 104 C.A. citing some other cases therein; Sofolahan & 5 ors. v. Chief Folakan & 12 ors. (1999) 10 NWLR (Pt.621) 86 (5) 96 C.A. citing the case of Akpan v. Uyo (1986) 3 NWLR (Pt.26) 63; Tukur v. Government of Taraba State (1997) 6 NWLR (Pt.510) 549 @ 569; (1997) 6 SCNJ. 81 B  
citing other cases including Obiora v. Osele (supra) and Akpan v. The State (1992) 6 NWLR (Pt.248) 439 C.A. (also cited and relied on in the Appellants' Amended Brief) just to mention but a few and some other cases cited and relied on in the Appellants' Amended Brief. In fact, in Obiora v. Osele (supra), Oputa, JSC @ 302 and 303 of the NWLR Report, stated inter alia, as follows: C

"..... The aim of the whole exercise is to do justice between the parties by hearing their appeals on the merits in spite of any mistake made by counsel in the preparation and prosecution of the appeal..... D

The mere fact that a brief filed by an appellant did not comply with the rules made under Order 6 of the Court of Appeal Rules does not mean that the appellant has filed no brief. The Court cannot in these circumstances deem a brief filed as no brief. I have held that a court cannot dismiss an appeal simply because an appellant's brief is faulty". [the underlining mine] E

See also the observation of Obaseki's JSC at page 296 of the NWLR. I cannot agree more. The court below, on the above authority, with respect, was wrong and not justified, to have dismissed the appeal on the said ground stated by it. The court below in the hierarchy of the courts, is bound by the said authority of this Court and that of that Court itself. In fact, in the above authority, at the said page 296, His Lordship stated inter alia, as follows: F

"If counsel lacks the necessary skill in the formulation of the appellant's brief, the appellant's case should be judged by the merits of the brief. The brief should not be thrown out to enable the appellant suffer the sanction of failing to file a brief " G

In the light of all the above, I have no hesitation whatsoever, in rendering my answer to the said issue of the parties, by stating that by dismissing an appeal on the ground or account of an inelegantly or defectively written brief, with respect, amounts to a grave and substantial injustice or a miscarriage of justice. H

In conclusion, it is from the foregoing and the more detailed lead Judgment of my learned brother, Tabai, JSC which I had the privilege of reading before now, and which reasoning and conclusion I agree with, that I too, allow the appeal which is meritorious and succeeds. This is a typical case, where this Court, in the circumstances, will order a re-hearing of the appeal

Costs follow the event. For the 1st to 5th Respondents not conceding in their Brief, this obvious and unquestionable decisions of this Court and as even held by the Court of Appeal and stating at page 6 paragraph 3.03 of their Brief, thus:

*“The wrong impression created by the Appellants in this, issue is that the lower court dismissed the appeal because of the defective brief of the Appellants. Nothing can be farther from the truth “and this is in spite of the fact, that the statement of the court below above reproduced, is clear and unambiguous and needs no interpretation or cosmetics by the learned counsel for the 1st to 5th Respondents, I was minded to award costs to the Appellants in the court below. However, I abide by the orders in the said lead judgment including that in respect of costs.*

### **MUNTAKA-COOMASSIE JSC**

This is an appeal against the decision of the Court of Appeal Benin Division which upheld the judgment of the trial court. The learned trial Judge Akpata J. (as he then was) in the two consolidated cases in suit Nos. W/132/70 and W/62/70 in the Warri Judicial Division of the defunct Bendel State; on 17/1/94. The plaintiffs claims in suit W/62/71 against the defendants i.e. respondents in this appeal as contained in the Statement of Claim are as follows:-

*“1) As against the 1st and 2nd defendants, a declaration of title to all that piece or parcel of land lying and situate at Egwa. Gbaramatu clan in Warri Division within the jurisdiction of this Honorable Court. The Exact area and extent of the said land will be shown in survey plan to be filed in this action.*

*2) As against the 3rd defendant, an Order of court that the 3rd defendant to pay to the plaintiff the sum of £150,000.00 being compensation for damage done to plaintiffs land, economic trees and structure in course of 3rd defendant’s mining operations on the said*

*plaintiffs parcel of land.*

*3) As against all the defendants, an Order of perpetual injunction restraining the 3rd defendant their servants or agents from paying any monies or compensation for damage to the said plaintiffs' parcel of land to the 1st and 2nd defendants"*

While in suit no. W/132/70, the plaintiffs (respondents in this appeal) claimed against the defendants (the appellants in this appeal) in their statement of claim dated 2/2/73 as follows:-

*1) A declaration of title to all that piece or parcel of land known as "Egwa-tie" which piece or parcel of land is lying and situate within the jurisdiction of this honourable court, the boundaries of which piece or parcel of land will be shown in plan to be filed in this honourable court.*

*2) The Sum of £110,000.12'.3<sup>d</sup> (one hundred and ten thousand pounds, twelve shillings and three pence) or any sum as the valued compensation for user and or occupation, destruction of fishes economic crops, loss of fishing rights and disturbances following the defendants entry to the said plaintiffs land and carry on oil prospecting and mining operations in the land described in paragraph (1) and (2) above.*

*3) A perpetual injunction restraining the defendants, their servants and or agents from paying any monies in respect of the land to any person or persons other than the plaintiffs"*

After hearing the parties and their witnesses, the learned trial judge delivered his judgment on the consolidated suits on the 4/2/80 wherein the trial judge dismissed the claims in suit No. W/62/70 and granted that in suit No. W/132/70. The trial learned judge concluded thus:-

*"In sum, therefore, in respect of suit No. W/132/70 the plaintiffs are hereby granted a declaration of title to all the piece of land verged red on survey plan No. N/G.A. 7/1/72 Exhibit A in these proceedings. They are also entitled to the total sum of N9,510: 92 which the company has deposited in the Government Treasury in Benin City. The company is to pay this amount or see to it that the amount is paid by the Treasury to the plaintiffs. The company Shell B. P. Development Company of Nigeria Ltd, is hereby restrained from paying any money in respect of all the land verged red in Exhibit A to any person or persons other than the plaintiffs. In respect of suit No.*

*W/132/70 the plaintiffs are awarded sum of N500.00 as costs against the 2nd defendant. No Order as to cost in respect of the 1st defendant, the company in regard to suit No. W/62/70, the 1st to the 3rd defendants that is Gordine Community, are awarded N500.00 costs against the plaintiffs in that case, that is Gbaminido Kpomkpolo Community”*

The appellants being dissatisfied with this judgment appealed to the Court of Appeal, Benin Division, hereinafter called the lower court. The lower court in its judgment dated 7/1/94 dismissed the appeal on two main grounds firstly on the defective brief of argument filed by both parties and secondly on the ground that the appeal on the merit is frivolous. On the first ground, the lower court, per Ogebe JCA (as he then was) held as follows:-

*“Applying all these principles to the present appeal it can be seen that the appellant’s counsel filed 6 grounds (sic) of appeal and abandoned 3 leaving only 3 out of these 3 grounds earlier quoted in this judgment, he formulated 9 issues for determination. Further more, he did not argue any of the issues formulated by him. Instead he argued the grounds of appeal.*

From all I have said above based on the principles governing the writing of briefs, it is clear that this appeal has not been argued according to the rules of court. Consequently the appeal must be dismissed and it is hereby dismissed”. See p. 344 of the record.

On the second ground, the lower court held as follows:-  
*.....”Even on the merit there is no substance in any complaints of the appellant. The main complaint was that the judge used the principles of res-judicature to award the disputed land to the respondents. This is not borne-out of the record. The judge said over and over again in his judgment that the Egura land which was being disputed before him, even though it was included by description in the land earlier litigated upon by the ancestors of the parties it was never disputed before the present case”. Consequently, the lower court concluded in its judgment as follows:-”I have carefully read the judgment of the trial court and I am satisfied that it properly appraised all the evidence placed before it meticulously before arriving on its decision. I see no cause whatsoever to interfere with the judgment. Accordingly, even on merit the appeal lacks substance and it is hereby dismissed. I confirm the decision of the trial court”.*

It is against this decision of the lower court that the appellants have appealed to this court. In the amended notice of appeal, the appellants filed three (3) grounds of appeal. The 3 grounds of appeal without their particulars are herewith reproduced as follows:-

*“1) The Court of Appeal, Benin erred in law when it dismissed the appellants’ appeal on the ground that the appeal has not been argued according to the rules of court.*

*2) The learned Justices of the Court of Appeal erred in law when they affirmed the judgment of the High Court having regard to the fact that they did not evaluate exhibit ‘A’ the plan No. M/GA71/72 to which the declaration is tied thereby occasioning miscarriage of justice.*

*3) The Court of Appeal erred in law when it affirmed the judgment of the trial court which entered judgment in favour of the plaintiffs/respondents and granted reliefs not contained in their amended statement of claim ”.*

In compliance with the rules of this court, both parties filed and exchanged their respective brief of argument- The appellants, in their amended brief of argument dated 13/06/2007 and filed on the same date formulated three (3) issues for determination from three (3) grounds of appeal as follows:-

*“1) Whether or not dismissing an appeal on account of an inelegantly or defectively written brief amount to the court abdicating its duty of doing substantial justice (distilled from ground 1)*

*2) Whether the Court of Appeal, Benin Division was right in affirming the declaratory relief granted in favour of the 1st to 5th respondents (i.e. the plaintiffs in suit No. W/132/70) in spite of the fact that Exhibit ‘A’ (i.e. plan No. M/GA/71/72) to which the High Court tied the relief was not placed before it for evaluation, (distilled from the additional ground numbered 2).*

*3) Whether or not the plaintiffs/respondents pleaded any reliefs in or by their amended statement of claim dated 2<sup>nd</sup> February 1973 to warrant the Court of Appeal affirming the reliefs granted by the trial court, (distilled from additional ground numbered 3)*

The 1st to 5th respondents adopted these issues for determination in their joint respondents brief of argument dated 7/07/08 and filed on 8/07/08. At the hearing both parties adopted their respective brief of arguments.

At the hearing proper learned counsel for the appellants after adopting their briefs urged this court to allow the appeal. In respect of the issue No. 1 for determination he conceded that the appellants brief of argument was defective having not complied with the rules of the lower court. However, it was not enough reasons for the lower court to dismiss the appeal. That in order for the lower court to do substantial justice to the appellants' case, the lower court ought to consider the case on its merit and determine the appeal notwithstanding the irregular nature of the appellants brief. The learned counsel relied on the following cases:-

- i) Obiora V. Oselle (1989) 1 NWLR (Pt.97) 279
- ii) Gbafe V. Gbafe (1996) 6 NWLR (Pt.456) 417
- iii) Akpan V. The State (1992) 6 NWLR (Pt.248) 439
- iv) Orji V. Zaria Industries Ltd (1992) 1 NWLR (Pt.216) 124.
- v) Weide and Co. (Nig.) Ltd Vs. Weide and Co. Hamburg (1991) 6 NWLR (Pt. 249) 627
- vi) Echo Enterprises Limited Vs. Standard Bank of Nigeria Ltd (1989) 4 NWLR (Pt.116) 509; and
- vii) IN RE: Olafisoye (2004) All FWLR (Pt. 198) 1106

On the issue No. 2, the learned counsel submits that Exhibit A (i.e. the plan No. M/GA/71/72) to which the High Court tied its declaratory relief it granted was not available to the lower court for evaluation and as such the lower court was not given the opportunity to evaluate the evidence in order to determine whether the trial court was correct in its decision. Exhibit F tendered by the appellants was not considered by the trial court and same too was made available to the lower court, the said Exhibit which was supplied by the appellants orally was also not considered by the lower court. It is therefore submitted by the learned counsel that the failure of the lower court to see these exhibits and evaluate them has occasioned mis-carriage of justice. The case of Mobil Producing Nig. Unltd V. Monokpo (2004) All FWLR (pt. 195) 575; Ejekpo V. Osia (2007) All FWLR (Pt. 361) 1617 were cited.

On issue No. 3, the learned counsel submits that the respondents only claimed in their statement of claim, with this expression.....” Wherefore the plaintiff claim as per writ of summons” that this amounts to no claim. He referred to the provisions of Order

13 Rules 7 of the Bendel State High Court (Civil Procedure) Rules and submitted that statement of claim supercedes writ of summons and whatsoever is not contained in the statement of claim cannot amount to claim and to the court would have no jurisdiction to grant same. Learned counsel then cited the cases of :-

- 1) Ajayi Vs. Texaco (1987) All NLR 471 B
- 2) Chinda V. Amadi (2003) FWLR (pt. 148) 696
- 3) Stowe V. Stowe (2000) FWLR (pt. 24) 1425
- 4) (Nwaga V. Regd. Trustees. Recreation Club (2004) FWLR (pt. 190) 1360; and C
- 5) Cargil Vs. Bower 10 Ch.D. 502.

The learned counsel to the 1st to 5th respondents submits on issue No. 1 that the lower court did not dismiss the appeal before it without considering the merit of the case. That the conclusion of the lower court in which the court held that in considering the appeal on its merit, the appellants appeal is unmeritorious has overtaken the argument of the learned counsel for the appellants. D

On the issue No. 2, it was the submission of the learned counsel that before both the trial court and the lower court was divided based on the traditional evidence adduced by the parties. This non inclusion of Exhibit A does not affect the judgment of the lower court. She conceded that Exhibit A was not before the lower court, but the lower court has no need of it, as it based its judgment on the Exhibits before it. He distinguished the case of Mobil Production V. Monokpo (2004) All FWLR (pt. 195) 575 cited by the appellant and submits that the case did not decide that where there is evidence on the record where the court can base its judgment, the absence of an exhibit could still invalidate the judgment. Hence the lower court's affirmation of the judgment of the trial court without Exhibit A being placed before him was not fatal to the judgment of the lower court. E

On issue No 3, the learned counsel concedes that the statement of claim did not set out the reliefs claimed by the respondents but claimed as per writ of summons, but submits that even though statement of claim supercedes the writ of summons, but where a party claimed "as per writ of summons" it is still necessary to refer to the writ of summons in so far as it completely sets out the claims of the party; the case of Keshinro V. Bakare (1976) 1 All NLR 280 was cited. F

H

Finally the learned counsel urged the court to dismiss the appeal. I have carefully gone through the submissions of the learned counsel to the parties and the judgment of the lower court. As I have stated above, the appeal before the lower court was dismissed on the two grounds i.e. the defective nature of the appellants' brief of argument and on the ground that the appeal lacks merit. With due respect, I agree with the learned counsel to the appellants that the lower court, i.e. Court of Appeal, was in error to have dismissed the appeal because it was defective. This does not only occasion miscarriage of justice but also visit the sins of counsel on the preparation of the brief. Brief is the submission of counsel before the Appeal Court, even if the brief is defective it does not erase or render irrelevant the evidence contained in the record of proceedings. Appeal connotes re-hearing by an appellate court, an appellate court does not decide on appeal solely on the briefs of arguments filed by counsel to the parties. They primarily assist the appellate court in arriving at its decision. Whether a brief or argument is filed or not an appellate court when deciding an appeal is expected to peruse thoroughly the record of proceedings by way of re-hearing the matter before him. An appeal will succeed or fail based on the facts contained in the records and not primarily on the submissions of counsels as contained in the briefs of argument. This court had held in the case of Obiora V. Oselle (1989) 1 NWLR (Pt.97) 279 at 344 as regards a defective brief as follows:-

*"the mere fact that a brief filed by an appellant did not comply with the rules under Order 6 of the Court of Appeal Rules does not mean that the appellants has filed no brief. The court cannot in these circumstances deem a brief filed as no brief. I have held that a court cannot dismiss an appeal simply because an appellant's brief is faulty"* per Oputa JSC.

At page 296 of the report, his Lordship Obaseki JSC emphatically held as follows :-

*"If counsel lacks the necessary skill in the formulation of the appellant's brief, the appellant's case should be judged by the merit of the brief. The brief should not be thrown out to enable the appellant suffer the sanction of failing to file a brief"*

(Under-linings mine for emphasis)

I entirely agree with their Lordships and adopt these reasoning



as mine, with respect. Consequently I resolve the 1st issue in favour of the appellants.

On the 2nd issue, both counsel agreed that both Exhibits A and F were not produced before the lower court and thus not considered by the lower court before it arrived at its decision. The learned counsel to the respondents have argued that the absence of these exhibits does not affect the judgment of the lower court since the judgment was based on the traditional evidence. It should be noted that the appeal before the lower court was against the whole decision of the trial court. The question that call for determination is could the lower court entertain the appeal against the whole judgment of the trial court when part of the evidence that formed the record before the said court was not before it?

With tremendous respect to the learned justices of the court below, it is unpractically impossible to determine the correctness or other wise of the judgment of the trial court when part of the evidence that formed the record before the lower court was not placed before it. Order 6 Rule 2 (1) of the Court of Appeal rules 2007 is very clear. It provides:-

*"2 (1) All appeals shall be by way of re-hearing and shall be brought by notice", (hereinafter called "the notice of appeal"....."*

The provisions of Order 4 Rule 1 of the Court of Appeal Rules, 2007, states clearly the power of the Court of Appeal as it relates to appeal before it. It provides thus:-

*"In relation to an appeal, the court shall have all the powers and duties as to amendment and otherwise of the high Court, including without prejudice to the generality of the foregoing words in civil appeals, the powers of the High Court in Civil matters to refer any question or issue of facts arising on appeal for retrial before inquiry and report by an official or special reference",*

These rules are meant to ensure that the lower court has the power to examine all the records before it, before arriving at its decision. Particularly Section 17 of the Court of Appeal (as amended) Act gives the lower court all the powers as may be exercised by a trial court in the determination of an appeal. These power of the lower court have been ably stated by the court in the case of Cappa and D'Alberto Ltd V. Akintilo (2003) 3 SCNJ 328 at 343 - 343 where his

Lordship Niki Tobi JSC held as follows:-

*“The Court of Appeal correctly held that the trial judge was wrong in making use of documents marked for identification. The Court of Appeal instead made use of oral evidence of the respondent.....”*.

B In my view, the court is entitled to do that. The authorities of the court having power to do that are legion. Order 1 Rule 20 (4) of the Court of Appeal Rules is one authority. Section 16 of the Court of Appeal is another. The case law is in great proliferation. In Oshoboja V. Amuda (1992) 6 NWLR (pt. 250) 690, Uwais JSC (as he then was) said at page 708:

*“There is no doubt that Section 16 has given the Court of Appeal amplitude of power to deal with any case before it on appeal. The power includes the jurisdiction of a court of first instance and in D the present case the jurisdiction of the High Court”*. See pp 343-344.

Section 16 is now Section 17 of the Court of Appeal Act (as amended) as I have said before in exercising its powers under the statutory provisions cited above there was no way the lower court could have exercised its powers fairly and judiciously if all the evidence and exhibits presented before the trial court were not made available at the lower court before arriving at its decision. It is inappropriate to speculate on what might have been the decision of the lower court if those exhibits have been made available to the learned justices of the lower court. In the circumstances I am of the view that the absence of those exhibits are fatal to the lower court’s decision.

I have had a preview of the lead judgment just delivered by my learned brother Tabai JSC which reasoning and conclusion tally with my understanding of the law. For the above reason of mine and more detailed analysis by my learned brother Tabai JSC I too found that there is merit in the appeal and same is hereby allowed.

For the avoidance of any possible doubt, the appeal is pregnant with merits and I allow it. I abide by the consequential orders made by my learned brother Tabai, JSC. I endorse the order as to costs.