

SUPREME COURT OF NIGERIA
29TH MAY, 2009. SC. 128/2002
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
W. S. N. ONNOGHEN, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

BENJAMIN NWAKUBA IROAGBARA APPELLANT
AND

DAVID UFOMADU RESPONDENT

JUDGMENTS - Issues - Errors - Effect - Though Court of Appeal erroneously stated that the issues outnumbered grounds of appeal filed - It nevertheless considered all the issues in its judgment (H1)

EVIDENCE - Civil cases - Burden of proof - Incidence - It rests on the party - Whether plaintiff or defendant - Who substantially asserts the affirmative of the issue (H2)

EVIDENCE - Onus of proof - Shifting of - Meaning - It means that burden of proof may shift - Depending on how scale of evidence preponderates - To rest on party who would fail - If no more evidence were given (H3)

LAND LAW - Title - Pleadings - Sufficiency of averments - Where title is said to derive from grant or inheritance - Facts relating to the founding of the land must be averred to - As well as the successive owners thereof (H4)

CUSTOMARY LAW - Customary tenancy - Forfeiture - Applicability - There is no evidence of customary tenancy - Between appellant and respondent - So the question of forfeiture does not arise (H5)

FACTS

The plaintiff/appellant sued the defendant/respondent claiming declaration of title to the land in dispute, damages for trespass and perpetual injunction. Pleadings were filed and exchanged. Though appellant pleaded the name of the alleged original owner of the land through whom it eventually descended to him, he failed to plead how

that original owner came to own the land. Moreover, though appellant averred that respondent's predecessor-in-title was put on the land by the appellants as tribute-paying tenant, PW2 testified that the land was given to respondent's predecessor-in-title as an outright gift.

After hearing, the learned trial judge dismissed the suit in toto, having held that appellant failed to prove his case. Dissatisfied, appellant appealed to the Court of Appeal. The Notice of Appeal contained four grounds of appeal from which four issues were raised for determination by the appellant. But in its judgment, dismissing the appeal, the Court of Appeal erroneously stated that there were two grounds of appeal and that the issues raised by appellant outnumbered the grounds. Aggrieved, appellant has now appealed to the Supreme Court. He contends that the said statement by the Court of Appeal was a misconception by that court which occasioned a miscarriage of justice.

ISSUES FOR DETERMINATION

"(1) Whether or not there were 2 (two) grounds of appeal filed by the appellant against the judgment of D.E. NJIRIBEA KO J. of the Umuahia High Court and whether this factual error (if any) has not occasioned a miscarriage of justice in this case?

(2) Whether the failure of the Justices of the Court of Appeal, Port Harcourt Division to consider the issues for determination in the appeal agreed upon by the parties to the appeal did not vitiate their judgment?

(3) Whether payment of tribute is a condition precedent under Customary Land Law for the existence of a pledge?

(4) Whether the Court of Appeal sufficiently gave thought to the complaint of the appellant in issue one (1) of his issues for determination of the appellant (sic) and whether the combined effect of the procedures adopted by the trial court and the court below does not occasioned (sic) a miscarriage of justice?

(5) Whether the Court of Appeal was right in not considering issue (sic) 2 (two) and 4 (four) agreed upon by the parties in the court below and whether these did not occasioned (sic) a miscarriage of justice?"

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

JUDGMENTS - Issues - Errors - Effect

1. At page 148 of the records of proceedings, the court below held inter alia: -

“The plaintiff then appealed and filed two grounds of appeal from which the learned counsel for the appellant distilled four issues for determination while the respondent relied and adopted the issue formulated by the appellant. It cannot be over-emphasised that there should never be more issues than the grounds of appeal.”

The above quotation is erroneous having regard to what is contained in the Notice of Appeal filed. But a careful reading of the whole proceedings leaves one in no doubt that all the issues raised by the appellant were duly considered in the judgment. (p. 1290 E)

EVIDENCE - Civil cases - Burden of proof - Incidence

2. In civil cases, the like of the one under consideration, on the burden of proof on the pleadings, the rule is that the burden of proof rests on the party (whether plaintiff or defendant), who substantially asserts the Affirmative of the issue. (p. 1291 D)

Onus of proof - Shifting of - Meaning

3. When it is said that onus of proof shifts from plaintiff to defendant and vice versa from time to time as the case progresses, it means no more than the burden of proof may shift depending on how the scale of evidence preponderates. However, subject to the scale of evidence preponderating, the burden of proof rests squarely on the party who would fail if no evidence at all, or no more evidence as the case may be, were given on either side. (p. 1291 E)

Title - Pleadings - Sufficiency of averments

4. The law is sacrosanct that where title to land is said to have been derived by grant or inheritance, the pleadings must aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original acts of possession and persons on whom title in respect of the land has devolved since the first founding. I have looked at the pleadings of plaintiffs, it is bereft of these essential averments. (p. 1292 D)

Customary tenancy - Forfeiture - Applicability

5. The appellant has woefully failed to establish his ownership of the land in dispute. There is no evidence of customary tenancy between the appellant and the respondent; therefore the question for forfeiture does not arise. Again, from all I have said above, it is my view
B that the court below painstakingly examined the case of the appellant in all its ramifications and rightly came to the conclusion that the appeal before it had no merit. (p. 1293 F)

REPRESENTATION

C E.T.O. Njoku Esq. for the appellant
Chief J. N. Obonwa for the respondent with him is Chief M. I. Uchehi

CASES REFERRED TO

D PIARO V. TENALO & ORS (1976) 12 S.C. 31.
Aseimo v. Abraham 2001 16 NWLR part 73 8, page 20
Ibodo v. Enarofia 5 - 7 SC page 42
KODILINYE V. ODU (1935) 2 WACA 396
ATUANYA V. ONYEJEKWE & ANOR. (1975), NSCC (Vol.9) 89
E LAWSON V, AJIBULU (1997) 6 NWLR (Pt.507) 14 at 17
ELIAS V. OMO-BARE (1982) 5 SC. 25
BELLO V. EWEKA (1981) 11 SC. 101

LEAD JUDGMENT BY ADEREMI JSC

F This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division delivered on the 17th of January 2001 in Appeal No. CA/PH/202/96: Mark A. Iroagbara (for himself and on behalf of Iroagbara Family) and David Ufomadu. The Court of Ap-
G peal Port Harcourt (hereinafter referred to as the court below) had dismissed the appeal brought by the appellant against the judgment of the High Court of Justice, Umuahia Judicial Division of the then Imo State where he (the appellant) was the plaintiff in Suit No. HU/14/77: Mark A. Iroagbara and David Ufomadu (the defendant). The
H plaintiff/appellant had claimed against the defendant/respondent in the trial court the following reliefs: -

“(a) Declaration of title to all that piece or parcel of land situate at Amamba, Umuobasi, Ugba-Ibeku, Umuahia within the jurisdiction of this court and whose annual value is N10.00 and which is

clearly shown on the plaintiffs plan aforesaid,

(a) N500,00 general damages for the trespass committed by the defendant in 1966 when he made the said purported grant to Benjamin Nwoko, without the consent of the plaintiffs family.

(b) N500.00 general damages for the trespass by the defendant as to the portion he purported to grant to the said Madam Bessy about 1970.

(c) Order for forfeiture of the portion granted to the defendant's said late half brother now in the possession of the defendant.

(d) Perpetual Injunction restraining the defendant, his servants, agents and/or workmen from further entry or interference in any manner whatsoever upon the land in dispute."

Pleadings were filed and exchanged between the parties. Evidence was called at the trial court by the parties to prove the averments in their respective pleadings. After taking the final addresses of counsel to the parties, and in a reserved judgment delivered on the 16th of March 1990, the learned trial judge dismissed the suit, in toto. Being dissatisfied with the said judgment, the plaintiff appealed to the court below which, after taking the oral submissions of their respective counsel and upon reading the respective briefs of the parties filed in the Registry of the court below, in a reserved judgment delivered, as I have said, on the 17th of January 2001, dismissed the appeal with cost. Again, being dissatisfied with the judgment of the court below, the appellant has appealed to this court by a Notice of Appeal filed on the 10th of April 2001 which contains five grounds of appeal. Distilled from the said grounds of appeal for determination by this court are five issues, which, as set out in the brief of the appellant are as follows:

- *"(1) Whether or not there were 2 (two) grounds of appeal filed by the appellant against the judgment of D.E. NJIRIBEA KO J. of the Umuahia High Court and whether this factual error (if any) has not occasioned a miscarriage of justice in this case?*

(2) Whether the failure of the Justices of the Court of Appeal, Port Harcourt Division to consider the issues for determination in the appeal agreed upon by the parties to the appeal did not vitiate their judgment?

(3) Whether payment of tribute is a condition precedent under Customary Land Law for the existence of a pledge?

(4) Whether the Court of Appeal sufficiently gave thought to the complaint of the appellant in issue one (1) of his issues for determination of the appellant (sic) and whether the combined effect of the procedures adopted by the trial court and the court below does not occasioned (sic) a miscarriage of justice?

B *(5) Whether the Court of Appeal was right in not considering issue (sic) 2 (two) and 4 (four) agreed upon by the parties in the court below and whether these did not occasioned (sic) a miscarriage of justice?"*

C However, the respondent raised three issues for determination by this court; and as set out in the brief of argument of the respondent, they are in the following terms: -

D *"(1) Was there really any ground of appeal not considered by the court below in view of the four issues distilled from the four grounds of appeal by the appellant which the court below duly considered?"*

E *(2) As the court below duly considered the four issues distilled from the four grounds of appeal, would it be correct to contend that the court below did not consider any of the grounds of appeal already distilled into the issues merely because the court below incorrectly stated the number of the grounds of appeal which it had in fact considered?*

F *(3) Was there any miscarriage of justice by the court below or did the proceedings on appeal became vitiated as imputed in the 1st and 2nd issues of the appellant in this appeal?"*

G When this appeal came before us on the 2nd of March 2009 for argument, Mr. Njoku, learned counsel for the appellant referred to, adopted and relied on his client's brief filed on 29th April 2002 and the reply brief filed on 30th August 2002 and urged us to allow the appeal. Mr. Obonna, learned counsel for the respondent, for his part referred to, adopted and relied on his client's brief filed on the 15th of August 2002 and urged that the appeal be dismissed.

H Before I proceed with this appeal, I wish to state here what the case of each party is as evinced from their respective pleadings. In his statement of claim, the plaintiff/appellant's case is that the land in dispute situate at Amamba, Umuobasi, Ugba-Ibeku was originally owned by Mba Okereke, his ancestor who had two children namely: Anyaogu and Ogube; Anyaogu begat Ibeso and Ekwuruke; Ibeso begat Iroagbara, Aguwa and Ezeocha; while Ekwuruke begat Nwoko

and Uluocha. The land now in dispute devolved to the children of Anyaogu. On the death of Ezeocha who had no male issue, his (Ezeocha) property was inherited by Iroagbara, the plaintiffs father, under the native law and custom of Ugba people which is part of the land in dispute. On the death of Iroagbara, his children including the plaintiff inherited his (Iroagbara) land and that of Ezeocha earlier B inherited by Iroagbara. He claimed that they exercised acts of ownership and possession thereon. The defendant according to him is a native of Umundugbe and not a native of Amamba; that no person from Umundugbe owns land within the land in dispute or even at C Amamba. One Ogumka, the half brother of the defendant was granted permission to farm on a portion of the land in dispute. On the death of Ogumka, the defendant's mother took him to live in Ogumka's house on the land. On the death of his mother, the defendant built his own house thereon. When asked to perform customary token of D farming for the plaintiffs family, he (defendant) refused and even asserted his ownership of the land in dispute, hence this suit.

The defendant, on the other hand challenged the right of the plaintiff to bring the suit as according to him one branch of Iroagbara family (there are two branches) did not authorise this action. He also E averred that the land at Ibeso was never partitioned. The defendant avers that he is from Umundugbe Amamba Umuobasi Ugba Ibeku. Amamba, according to him is made up of two sections namely Umundugbe and Umu-Ituru. Plaintiff is from Umu-Ituru's section F while the defendant is from Umundugbe's section. He went further to aver that both sections own the land in dispute which now belongs to him by way of inheritance from his ancestors. He denied being a tenant to the plaintiff and that indeed the defendant's section deformed the land in dispute before it devolved on him. G

I have read the two sets of issues identified by the parties for determination by this court, it is my humble view that Issues Nos. 1, 2 and 5 raised in the appellant's brief can jointly be taken together with Issues Nos. 1 and 2 in the respondent's brief of argument. While H Issues Nos. 3 and 4 in the appellant's brief shall both be taken together with Issue No. 3 in the respondent's brief. Arguing Issues Nos. 1, 2 and 5 in his brief, the appellant referred to the quotation from the judgment of the court below where it was said that he filed only two grounds of appeal but that he went to distill four issues for deter-

mination by the court below and argued that from the record of proceedings, it was clear that he filed four grounds of appeal. Consequently, two issues were not considered having wrongly held that only two grounds of appeal were filed and only two issues must be distilled therefrom. This negates the principle of FAIR HEARING, he argued while urging that the appeal be allowed on Issues Nos. 1 and 2. The arguments in Issues Nos. 1 and 2 dovetail into Issue No. 5 where it was submitted that having so held that only two grounds of appeal were filed and only two issues should have been distilled therefrom and having consequently failed to consider Issues Nos. 2 and 4 as a result of its holding that only two grounds were filed, this occasioned a miscarriage of justice, he finally urged that the appeal be allowed.

The respondent on Issues Nos. 1 and 2 which are in pari materia with Issues Nos. 1, 2 and 5 in the appellant's brief, made copious references to the records and submitted that although the court below erroneously held that only two grounds were filed, it in fact and in truth considered all the issues predicated on those four grounds which the appellant filed and it was therefore urged that their Issues Nos. 1 and 2 be resolved in their favour.

At page 148 of the records of proceedings, the court below held inter alia: -

"The plaintiff then appealed and filed two grounds of appeal from which the learned counsel for the appellant distilled four issues for determination while the respondent relied and adopted the issue formulated by the appellant. It cannot be over-emphasised that there should never be more issues than the grounds of appeal."

The above quotation is erroneous having regard to what is contained in the Notice of Appeal filed. But a careful reading of the whole proceedings leaves one in no doubt that all the issues raised by the appellant were duly considered in the judgment. Indeed, Issues Nos. 1 and 4 which were alleged as having not been considered were copiously considered in the judgment. If I may point out, in the said judgment, it was again said inter alia: -

"I believe the issue in this case revolves around the question as to who the land in dispute belongs."

The above is the all-embracing question which ought to be

answered in seeing to it that justice was done in this case and as I have said, a careful reading of the whole judgment leaves me in no doubt that it was painstakingly considered. Issues Nos. 1, 2 and 5 on the appellant's brief are hereby resolved against the appellant while I resolve Issues Nos. 1 and 2 in favour of the respondent. Issues Nos. 3 and 4 raised by the appellant and Issue No. 3 identified by the respondent are all subsumed in that poser by the court below, which again, for purposes of emphasis reads; -

"I believe the issue in this case revolves around the question as to who the land in dispute belongs."

As I have pointed out above, the plaintiff/appellant's claims against the defendant/respondent are for (a) declaration of title, (b) damages for trespass committed by grants made to some people, (c) forfeiture of the portion of land granted to the defendant's half brother now in possession of the defendant and (d) an order of perpetual injunction, I hasten to say that the defendant/respondent did not counter-claim. ***In civil cases, the like of the one under consideration, on the burden of proof on the pleadings, the rule is that the burden of proof rests on the party (whether plaintiff or defendant), who substantially asserts the Affirmative of the issue.***

When it is said that onus of proof shifts from plaintiff to defendant and vice versa from time to time as the case progresses, it means no more than the burden of proof may shift depending on how the scale of evidence preponderates. However, subject to the scale of evidence preponderating, the burden of proof rests squarely on the party who would fail if no evidence at all, or no more evidence as the case may be, were given on either side. However, let me quickly say that if a plaintiff on whom always rests the onus of proving that affirmative of what he asserts, no burden shifts to the defendant unless he has counter-claimed. For the umpteenth time, I wish to say that the plaintiff's case was that the land in dispute originally belonged to his ancestor one Mba Okereke through whom it devolved on him that the father of the plaintiff settled one Ogubunka Ufomadu, a member of the defendant's family on the land as a customary tenant. PW1 - who incidentally was the original plaintiff in this case -

Mark Amakwe Iroagbara - while testifying in proof of his case said

inter alia: -

"I know the land in dispute. It lies at Amamba Umuobasi Ibeku Umuahia. I am from Amamba Village in Umuobasi. The defendant is from Umundugbe Village Umuobasi. The land in dispute lies in the lands of Amamba people. No member of Umundugbe Village has

B *any land there as of right*

The land in dispute belonged to Mbah Okeleke. He was my great grand-father. He had two sons - Anyaogu and Oguibe. Anyaogu also had two sons -Ibeso and Ekwuruke. Ibesi was my grand-father. He had three sons viz: Iroagbara my father, Aguwa and Ezeocha. When

C *Mbah Okeleke died, his two sons inherited all his land and partitioned same. The land in dispute was the share of Anyaogu. When Anyaogu died Iroagbara and Ekwuruke shared Anyaogu's land. Iroagbara got this portion now in dispute. Iroagbara was my father.*

D *When he died I and my two brothers - Benson and Stephen inherited the land."*

The above is the terse evidence given by the plaintiff/appellant himself in support of his claim to the ownership of the land in dispute. **The law is sacrosanct that where title to land is said to**

E **have been derived by grant or inheritance, the pleadings must aver facts relating to the founding of the land in dispute, the persons who founded the land and exercised original acts of possession and persons on whom title in respect of the land has devolved since the first founding.** See PIARO V. TENALO &

F ORS (1976) 12 S.C. 31. **I have looked at the pleadings of plaintiffs, it is bereft of these essential averments.** Again, the plaintiff/

appellant had averred that his father once employed Ogumka Ufomadu a relation of the defendant to cut palm fruits for him, later

G Ogumka Ufomadu was allowed by his said late father to remain on a portion of the land as a tenant paying tributes for the use of the land and that it was when the defendant/respondent refused to continue to pay the tributes that he took this action claiming the afore-mentioned reliefs. But his own witness PW2 -one Nwakeoma Akingbu,

H when giving evidence in chief said inter alia: -

"I know the land in dispute The land was owned by one Iroagbara now late. Late Ndumele Ufomadu lived in the land. The land was granted to Ogubunka by Iroagbara."

When cross-examined, the witness said inter alia: -

“Ogubumka begged Iroagbara for land and he granted this land to him. He did not pay any money for it. It was an outright gift.”

The trial judge, while evaluating the evidence of PW2 said: -

“After summarising the evidence of PW2 I asked myself why there was so much demand for land inspection in this case. Plaintiffs witness said that the grant of the land in dispute was outright. This evidence knocked off the bottom from the plaintiffs case and destroyed it completely. So the question of any form of tribute did not at all arise.”

The court below, in reacting to the evidence adduced by PW1 and PW2 said inter alia” -

“The plaintiff and his witness testified divergently on the issue of tributes and the nature of the grant. If the grant was outright, there cannot be a tribute. Moreover, it is important to state that the only witness for the appellant did not even make any mention of a payment of tribute

The court below premised his judgment on the strength of the appellant’s case and came to the conclusion that the case of the appellant in the court below is frauth (sic) with inconsistencies and improbabilities.

It is difficult to rationalise the basis for the averment and testimony that the respondent is a tenant whose father paid a tribute when there is contradictory evidence to that. It is on this basis that the court below dismissed the case as it amounted to a waste of time.”

These are concurrent findings of facts. They are not perverse. I cannot agree more with the two concurrent findings. ***The appellant has woefully failed to establish his ownership of the land in dispute. There is no evidence of customary tenancy between the appellant and the respondent; therefore the question for forfeiture does not arise. Again, from all I have said above, it is my view that the court below painstakingly examined the case of the appellant in all its ramifications and rightly came to the conclusion that the appeal before it had no merit.*** Issues Nos. 3 and 4 in the appellant’s brief of argument are therefore resolved against him.

In conclusion, having regard to all I have said above, it is my judgment that this appeal is unmeritorious. It must be dismissed and it is hereby dismissed. Judgment of the court below and that of the

trial court are consequently upheld. The respondent is entitled to the costs of this appeal which I assess in his favour at N50,000.00 against the appellant.

B ***KATSINA-ALU JSC.***

I have had the privilege of reading in draft, the judgment of my learned brother Aderemi JSC. I agree with his reasoning and conclusion that the appeal lacks merit and ought to be dismissed. For the reasons he has given, I too dismiss the appeal. I abide by the consequential order including the order as to costs.

MUKHTAR JSC

D I have had the advantage of reading in advance the lead judgment delivered by my learned brother Aderemi JSC. I am in complete agreement with the reasoning and conclusion reached by him in the lead judgment, that the appellant did not prove his case as required by law. The lower court was therefore right to dismiss his appeal, and so his appeal to this court is unmeritorious. I also dismiss the appeal. I also add that this is an appeal against the concurrent findings of the lower courts, which this court will not ordinarily interfere with. See the cases of Aseimo v. Abraham 2001 16 NWLR part 73 8, page 20 and Ibodo v. Enarofia 5 - 7 SC page 42.

F I abide by the consequential orders made in the lead judgment.

G ***ONNOGHEN JSC***

I have had the privilege of reading in draft, the lead judgment of my learned brother ADEREMI, JSC, just delivered and I agree with his reasoning and conclusion that the appeal lacks merit and ought to be dismissed. The claim of the appellant at the trial court is for declaration of title to land, damages for trespass, order of forfeiture and perpetual injunction against the respondent who was then the defendant.

It is settled law that where a plaintiff claims declaration of title or right of occupancy to land, he must succeed on the strength of the

case he professes and not on the weakness of defence, though in an appropriate case, where the case of the defence-supports that of the plaintiff, the plaintiff can rely on same in proof of his right to the declaration sought. In the instant case the appellant failed to call sufficient evidence to establish his root of title and the case of the respondent does not support that of the plaintiff. To make matters worse, PW2 who was called by the appellant to support his case specifically testified to the fact that the defendant was not a customary tenant of the appellant and never paid tribute thereon; that the respondent was given the land in dispute as a gift by the predecessor in title of the appellant. It is important to note that the case of the appellant both on the pleadings and the evidence produced at the trial is that the respondent was a customary tenant of the appellant paying tribute for the use and occupation of the land in dispute; that it was the failure of the respondent to pay further tribute that resulted in the institution of the action for the reliefs earlier reproduced in this judgment. The bottom was therefore knocked off the case of the appellant when his witness stated on oath that the relationship between the appellant and the respondent is not that of customary tenant and landlord but that of two independent owners of the respective pieces of land.

It is very important to note that the lower courts concurrently found as a fact that the appellant failed to establish his ownership of the land in dispute having regards to the evidence. It is settled law that this court does not make a practice of interfering with the concurrent findings of facts by the lower courts except in certain exceptional circumstances including where the findings of facts are proved to have been perverse. In the instant case, the appellant has neither alleged nor proved that the concurrent finding of facts by the lower courts is perverse. I therefore, have no alternative than to affirm the said findings as the same are supported by the evidence on record.

The question as to whether the appellant filed two or more grounds of appeal before the lower court is of no moment as the error committed by the lower court in holding that appellant filed two grounds of appeal when in actual fact he filed four grounds did not result in miscarriage of justice as the court painstakingly examined the evidence before the court relating to the primary issue before the court, to wit, whether the appellant proved his entitlement

to the declaration sought, and found, as did the trial court that he did not. The resolution of the issue completely disposed of the case or appeal in question.

The learned counsel for the appellant in this case, left the main issue in the appeal to chase shadows particularly as he did not realize the need to address the fundamental issue of concurrent findings of facts by the lower courts that concerns the issue of proof of title to the land in dispute.

In conclusion, I agree that the appeal lacks merit and should be dismissed and order accordingly. I abide by the consequential order contained in the lead judgment of my learned brother ADER-EMI, JSC, including the order as to costs.

Appeal dismissed.

D

CHUKWUMA-ENEH JSC

This action has been started in the High Court of Umuahia Judicial Division wherefore the plaintiff (for himself and on behalf of Iroagbara family) has claimed against the defendant as per paragraph 14 of the Statement of Claim thus:

(a) *“A declaration of title to all that piece or parcel of land situate at Amamba, Umuobasi, Ugba-Ibeku, Umuahia within jurisdiction of this court and whose annual value is N10.00 and which is clearly shown on the plaintiffs plan aforesaid.*

(b) *N500.00 general damages for trespass committed by the Defendant in 1966 when he made the said purported granted to Benjamin Nwoko, without the consent of the plaintiffs family.*

(c) *N500.00 general damages for trespass by the Defendant as to the portion he purported to grant to the said Madam Bassy about 1970.*

(d) *Order for forfeiture of the portion granted to the Defendant’s said late half brother now in the possession of the Defendant.*

(e) *Perpetual injunction restraining the defendant his servant’s agents and/or workmen from entry or interference in any manner whatsoever upon the land in dispute.”*

Parties have filed and exchanged their respective pleadings. Two witnesses testified for the plaintiff i.e. PW1 (plaintiff) and PW2

and five witnesses for the defendant, i.e. DW1 to DW5.

In the course of the proceeding at the invitation of the parties and their counsel the court, the parties and their counsel visited the locus-in-quo. The trial court has found in favour of the defendant. At page 95 of the Record the trial court has made the following findings of fact, and has prefaced its judgment thus: B

“After summarizing the evidence of PW2 I asked myself why there was so much demand for land inspection in this case. Plaintiffs witness said that the grant of the land in dispute was outright. This evidence knocked off the bottom from the plaintiffs case and destroyed it completely. So the question of any form of tribute did not at all arise. The plaintiff himself under cross-examination by Mr. Obonna agreed that Ogumuka was alive in the early sixties but he did not at any time see him pay any tributes or perform any services for his family. He said that it was his father who died before 1929 that told him about services rendered by Ogumuka. He claimed to be an adult when his father died, but he did not witness the payment of any tributes. C

Nobody has come forward to support the story of tribute and to worsen it, PW2 under cross-examination by Mr. Obonna destroyed the question of tribute and was positive that the grant was outright. There is a conflict in a material aspect of the plaintiffs case between PW1 and PW2. So, where does the conflict lead to? First, there is no basis at all to make any finding that anyone from the defendant’s family rendered any services to the plaintiffs family in respect of this land or paid any manner of tribute for this land. D

Secondly, since there can be no finding of a tribute, there can be no basis for any finding that there was a failure to perform what did not exist and the plaintiffs reason for suing is completely destroyed. E

Thirdly, the acts exercised by the defendant’s family in the land including grants made long ago an unchallenged support the view that the plaintiffs family did not exercise any manner of right over the area after Ogumuka established his presence in the land with members of his family. Even if the plaintiffs father made an outright grant of the land to him, as I am inclined to believe from the evidence of PW2, the plaintiff cannot now go back there. He has no right to make any demand of any tribute from defendant’s family. F

It is not at all necessary to examine the evidence of the G

defendant's witnesses. It is a waste of valuable time. Based on the evidence of PW1 and PW2, the plaintiff has no chance of success. This action must therefore fail and it is dismissed with costs."

Earlier on at p.90 the trial court has in sum set out the case of the plaintiff thus:-

- B (a) *"That the land in dispute lies at Amamba, Umuobasi, Ugba-Ibeku.*
- (b) *That part of land was granted to the defendant's half brother called Ogumuka for his dwelling and farming but not as an outright gift. He was also allowed to reap economic and fruit trees on the*
- C *land.*
- (c) *That the defendant was invited to perform what the Plaintiff calls 'customary token of farming' but he refused and claimed the land as belonging to his family. That the 'customary token of farming' were performed by Ogumuka."*
- D

The plaintiff has failed woefully to discharge the burden on him on the issues joined on the pleadings and with particular reference to the issues set forth in the immediate foregoing abstract of the trial court. The plaintiffs claim therefore is rightly dismissed.

- E The plaintiff is dissatisfied with the decision hence he has appealed to the Court of Appeal (court below) upon a Notice of Appeal dated 14/5/90 containing four grounds of appeal. Parties have filed and exchanged their respective briefs of argument. The court below at p. 151 of the record has found that:
- F

"The court below premised his judgment on the strength of the appellant's case and came to the conclusion that the case of the appellant in this court below is fraught with inconsistencies and improbabilities.

- G *It is difficult to rationalize the basis for the averment and testimony that the respondent is a tenant whose father paid a tribute where there is contradictory evidence of that. It is on this basis that the court below dismissed the case. The case of the plaintiff in any given matter must preponderate so sufficiently as to satisfy a finding*
- H *in his favour. The court below has dismissed the appeal as utterly without merit."*

The plaintiff/appellant is dissatisfied with the decision and has eventually appealed the matter to this court upon a Notice of Appeal dated 23/1/2001 containing 5 grounds of appeal. In his brief of ar-

gument filed in this matter the appellant has distilled five issues for determination. They are as follows:

“(1) Whether or not there were 2 (two) grounds of appeal filed by the appellant against the judgment of D.E. NJIRIBEAKE J. of the Umuahia High Court and whether this factual error (if any) has not occasioned a miscarriage of justice in this case?” B

“(2) Whether the failure of the Justices of the Court of Appeal, Port Harcourt Division to consider the issues for determination in the appeal agreed upon by the parties to the appeal did not vitiate their judgment?” C

“(3) Whether payment of tribute is a condition precedent Under Customary Land Law for the existence of a Pledge?”

“(4) Whether the Court of Appeal sufficiently gave thought to the complaint of the appellant in issue one (1) of his issues for determination of the appellant (sic) and whether the combined effect of the procedures adopted by the trial court and the court below does not occasioned (sic) a miscarriage of justice?”

“(5) Whether the Court of Appeal was right in not considering issue (sic) 2 (two) and 4 (four) agreed upon by the parties in the court below and whether these did not occasioned (sic) a miscarriage of justice?” E

The Defendant/Respondent in his brief of argument has distilled 3 issues as follows:

“(1) Was there really any ground of appeal not considered by the court below in view of the four issues distilled from the four grounds of appeal by the appellant which the court below duly considered?” F

“(2) As the court below duly considered the four issues distilled from the four grounds of appeal, would it be correct to contend that the court below did not consider any of the grounds of appeal already distilled into the issues merely because the court below incorrectly stated the number of the grounds of appeal which it had in fact considered?” G

“(3) Was there any miscarriage of justice by the court below or did the proceedings on appeal became vitiated as imputed in the 1st and 2nd issues of the appellant in this appeal.” H

The Appellant and the Respondent have each argued their respective cases based on the briefs of argument filed and adopted at the oral hearing of the appeal. The lead judgment has expatiated on

the briefs and their submissions thereat and I respectfully adopt the same for purposes of this contribution.

The appellant has made heavy weather of his contention that on the observation of the court below to the effect that:

B *“The plaintiff then appealed and filed two grounds of appeal from which the learned counsel for the appellant has distilled four issues for determination while the respondent relied and adopted the issue formulated by the appellant. It cannot be overemphasized that there should never be more issues than the grounds of appeal.”*

C He has argued vigorously that this misapprehension of his case has occasioned a miscarriage of justice; as the two of the issues for determination distilled by him in the appeal have been jettisoned without being considered.

D The furore raised by the appellant against this aspect of the appeal has been decisively dealt with in the lead judgment of my learned brother, Aderemi JSC, and I need not flog the same point any further save to say that the court below further down in the record has set out the task before it thus:

E *“I believe the issue in this case revolves around to the question as to who the land in dispute belongs”* By this finding it has captured in one fell swoop the issue for determination in the appeal as per the issues for determination raised by the parties in this appeal. And it has gone out in its judgment to deal with the appeal on this basis.

F By this the parties on their pleadings have joined issues on their respective claims of ownership and acts ownership and user in recent times of the land in dispute. The law is trite that the onus of proof is on the plaintiff throughout in an action of this nature; it never shifts except in a few cases e.g. where the defendant’s case has strengthened his case and the IV plaintiff is not to rely on the mistake of the defendant to succeed. Where as here the land in dispute has devolved on the plaintiff by inheritance as is being contended he must plead and prove who founded the land, how it was founded and the devolution of the land by unbroken chain of succession down to him. See: KODILINYE V. ODU (1935) 2 WACA 396, ATUANYA V. ONYEJEKWE & ANOR. (1975), NSCC (Vol.9) 89; LAWSON V. AJIBULU (1997) 6 NWLR (Pt.507) 14 at 17, ELIAS V. OMO-BARE (1982) 5 SC. 25. and BELLO V. EWEKA (1981) 11 SC. 101. The plaintiffs pleadings and evidence in this regard are completely not

useful on this issue as they are at sixes and sevens that is utterly in a disorganized and confused state. The plaintiff has failed to elicit a case to support his claim of this nature. The above abstracts of the trial court's findings are in support of my conclusion.

The plaintiff has not proved the user nor possession of the land in dispute by credible evidence. The evidence of PW2 on their customary tenant one OGUMUKA has done incalculable damage to the very basis of the plaintiffs case in this matter. This is evident from the passage of the trial court's decision quoted above. And it is the law that the plaintiffs title must first be decided upon before the defendant's. See: BELLO V. EWEKA (1981) 1 SC. 101, LAWSON V. AJIBULU (supra). The trial court having found that the PW2 has mocked the plaintiffs case by alleging of outright grant to Ogumuka has rightly decided that there is no chances of the plaintiffs success in the case and indeed no need to consider the defendant's case particularly as he has not counter-claimed,

More importantly, there is a concurrent findings of fact and law in the decisions of the two lower courts. The appellant has not showed in this court in any respect of exceptional circumstances to justify this court interfering with the concurrent finding in this matter as evidenced by the above abstracts of the two lower courts. His case has woefully collapsed and it has been rightly dismissed.

It is for the above reasoning and conclusion and much fuller expatiation on the issues for determination as contained in the lead judgment of my learned brother, Aderemi JSC that I agree with him that there is no merit whatsoever in this appeal.

I also dismiss it and affirm the judgment of the court below. I endorse all the orders contained in the said judgment.

G

H