

SUPREME COURT OF NIGERIA

3RD JULY, 2009. SC. 167/2005

**CORAM:- G. A. OGUNTADE, F. F. TABAI,
I. T. MUHAMMAD, S. M. MUNTAKA-COOMASSIE,
O. O. ADEKEYE, JJSC**

MR. IGNATIUS ANYANWU & ORS APPELLANTS
(for themselves and as representing the
Sand and Gravel Dealers Union, Mile 3 Dump)

AND

MR. ALOYSIUS UZOWUAKA & ORS RESPONDENTS
(for themselves and as representing Drivers
and Loaders at Mile 3 Sand and Gravel Dump)

EVIDENCE - Evaluation - Role of trial court - It has the primary function of evaluating evidence - And evaluation is not the same thing as summary of the evidence - Presented by parties (H1)

EVIDENCE - Evaluation - Role of appellate court - Where trial court has failed in its duty of properly evaluating evidence - Resulting in perverse finding - Appellate court has to intervene by reevaluating the evidence (H2)

EVIDENCE - Documents - Contents - Proof of - A document is the best proof of its contents - No oral evidence will be allowed to contradict the contents - Except where fraud is pleaded (H3)

EVIDENCE - Documents - Licences issued - Effect - It shows overwhelming evidence in favour of appellants - Oral evidence cannot be allowed to contradict them - As no fraud was alleged (H4)

EVIDENCE - Cross examination - Effect - Appellants' suit against Rebisi Youths - Though this fact which was extracted while cross examining a defence witness - Was not pleaded in the statement of claim - It tends to support appellants' claim (H5)

EVIDENCE - Evaluation - Purport - It should entail assessment of evidence of both parties - By placing same on that imaginary scale -

To determine the party in whose favour the balance tilts (H6)

EVIDENCE - Documents - Effect - Exhibit S - Though it supports respondents' claim of existence of a joint union in 1975 - It is a mere application for a Tipper park - Not shown to be same as the land in dispute (H7)

LANDLORD & TENANT - Trespass - Subsequent act - By lawful entrant - Where a person having entered upon land under lawful authority - Abuses that authority - He becomes a trespasser ab initio - And plaintiff can claim in trespass without issuing quit notice (H8)

TORTS - Trespass - Loss - Damages without proof of loss - Propriety - Because trespass is actionable per se - successful plaintiff is entitled to damages - Though he has sustained no loss (H9)

DAMAGES - Special damages - Involving allegation of crime - Standard of proof - Applicable standard is proof beyond reasonable doubt - Having failed to so prove it - Claim for special damages was rightly refused (H10)

LAND LAW - Identity of land - Issue of - When said to be raised - It is raised when defendants dispute the area - Or the size or other features - Shown on plaintiffs' plan - In their statement of defence (H11)

FACTS

The plaintiffs/appellants sued defendants/respondents jointly and severally claiming special and general damages for trespass and wilful damage to building materials kept by appellants at the land in dispute - sand and gravel dump, mile 3. Appellants' case was that they were exclusive Temporary Occupation Licensees of the land but had invited respondents to share the land with them as respondents' services were necessary for appellants' trade. It was on the understanding that respondents will each pay a daily fee as determined by appellants. Initially respondents complied with the condition but stopped complying after some time. Consequently, appellants sought to evict them from the land by issuing them with notices to quit.

Respondents reacted by asserting that they were joint Licensees with appellants and on that basis they allegedly destroyed some building materials appellants had wanted to build with on the land.

In their statement of defence, respondents counterclaimed for an account of all rents that have so far been collected by appellants from squatters on the land. It was in evidence that of the twelve annual temporary occupation licences issued in respect of the land, only three were issued in the joint name of the parties, the other nine, which covered the first year and the immediate past eight years, were exclusively in the name of appellants. After trial, trial court gave judgment to appellants. Respondents appealed successfully to Court of Appeal, as that court, *inter alia*, held that the parties were joint licensees. Aggrieved, Appellants have brought this appeal against the judgment of Court of Appeal.

ISSUE FOR DETERMINATION

Whether from the pleadings and evidence led at the trial the Appellants' claim for trespass and injunction ought not to succeed.

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

EVIDENCE - Evaluation - Role of trial court

1. It is settled principle of law that it is the trial court, which alone has the unique privilege of seeing and hearing the witnesses testify, that has the primary function of appraising and ascribing probative value to the evidence presented by the parties, put the evidence on the imaginary scale of justice to determine the party in whose favour the balance tilts, make necessary findings of facts, apply the relevant law to those facts and come to the logical conclusion. It is to be noted that the summary or restatement of the evidence presented by the parties is not the same thing as evaluation of evidence. (p. 1839 G)

EVIDENCE - Evaluation - Role of appellate court

2. Where the trial court has failed in its duty of properly evaluating the evidence before it resulting in findings not supported by the evidence, such findings are perverse and the appellate court then has a duty to intervene by evaluating the evidence so as to make its own findings and draw its own conclusions.

However the appellate court can only exercise that role of evaluation or re-evaluation if the exercise would not entail the assessment

of credibility of witnesses and will be confined to making findings and drawing inferences and conclusions from admitted, proved or established facts. (p. 1840 C)

EVIDENCE - Documents - Contents - Proof of

- B 3. A document tendered in court is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except in cases where fraud is pleaded. As I said earlier every material assertion in the oral testimony of witnesses was supported by some documentary evidence. The mass of documentary evidence includes applications, payment receipts and invoices and Temporary Occupation Licences. In my view the Temporary Occupation Licence is the best proof of who was the licensee of the land in dispute in any particular year. (p. 1843 C/E)

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EVIDENCE - Documents - Licences issued - Effect

4. From the point of view of licences issued, the evidence is overwhelming in favour of the Appellants. On this issue part of the evidence of the DW1 from the Lands and Housing Bureau under cross-examination is illuminating. The DW1 tried to explain away this overwhelming evidence in favour of the Plaintiffs' Sand and Gravel Dealers Union by asserting that although the licenses were issued in favour of the Plaintiffs Sand and Gravel Dealers Union, they were in fact issued for the joint Tipper Drivers and Sand and Gravel Dealers Union.

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- It is my respectful view that that piece of the evidence ought not to have been admitted and acted upon as it goes to no issue, the settled principle of law being that oral evidence cannot be allowed to add to, vary or contradict the contents of a document except where fraud in the making of the document is alleged. And no fraud was alleged in the preparation of Exhibits "B" - "B8". (pp. 1843 H & 1844 E/H)

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EVIDENCE - Cross examination - Effect

- H 5. Besides the documentary evidence which I have analysed and commented upon there is a piece of the oral evidence of the DW4 Boniface Nwala under cross-examination which tends to support the case of the Plaintiffs/Appellants. At page 149 of the record he said as follows:

“I know that Rebisi Youths have broken into part of the land, subject matter of this action. The youths did not succeed. I know that the Plaintiffs sued them in the High Court, I know that the Plaintiffs obtained an injunction against the Rebisi Youths and that kept them out. We did not allow the Rebisi Youths to build anything.”

It was not explained by way of re-examination how the Plaintiffs/ Appellants alone filed the suit and prosecuted it successfully against the Rebisi Youths. Although this fact was not specifically pleaded in the Statement of Claim, it goes to the main issue of their claim to being the exclusive Temporary Occupation Licensees of the land in dispute. (p. 1845 D) B
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EVIDENCE - Evaluation - Purport

6. Evaluation should of necessity entail an assessment of the evidence of both parties by placing same on that imaginary scale of justice and determine the party in whose favour the balance tilts. And it must be manifest on the face of the record that it was the evidence of both parties that was tested on the imaginary scale. In coming to its conclusion, the Court below made no reference whatsoever to the many documentary Exhibits including the all important nine Temporary Occupation Licences Exhibits “B” - “B8” in favour of the Appellants. The Court of Appeal cannot be said to have embarked on a proper appraisal of the evidence on record in these circumstances. The evaluation was patently one sided. Clearly, the Court below failed to place the evidence of both parties on the imaginary scale of justice and certainly there was a likelihood of a miscarriage of justice. (pp. 1846 E / 1847 D) D
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EVIDENCE - Documents - Exhibit “S” - Effect

7. Let me comment briefly on Exhibit “S” dated 28th May 1975. It represents an application by the Tipper Drivers and Gravel Dealers Union. No doubt the document supports the Respondents assertion that as at 1975 there existed a joint Tipper Drivers and Gravel Dealers Union. But the document, is, strictly speaking, an Application for Temporary Tipper Park. There is nothing in it to show that it was in respect of the Mile 3 Sand and Gravel Dump, the subject matter of this suit or that the Temporary Tipper Park is one and the same thing as the land in dispute. (p. 1847 H) G
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Trespass - Subsequent act - By lawful entrant

8. The settled principle of law is that where a person having entered upon land under an authority given by law or by a person who has title or exclusive possession thereto abuses that authority, he becomes a trespasser *ab initio*.

In this case, therefore, although the Defendants/Respondents' initial entry onto the land was lawful its being on the authority of the Plaintiffs, by their subsequent assertion of their being co-licensees of the land in dispute coupled with other acts which amounted to abuses of their authority on the land, they become trespassers *ab initio* entitling the Plaintiffs to claim in trespass without the issuance of a quit notice. (p. 1849 B/F)

Trespass - Damages without proof of loss - Propriety

9. Having regard to the legal principle that trespass is actionable *per se i.e.* that a plaintiff who claims in trespass is entitled to recover damages even though he has sustained no actual loss, the Plaintiffs are entitled to damages. The trial court awarded N100,000. 00 general damages and I think I should restore that award. (p. 1849 G)

Special damages - Involving allegation of crime - Proof

10. The Plaintiffs alleged malicious damage of some of the properties and even alleged that some of the properties were either carried away or stolen by the Defendants. Thus this is a civil suit in which the commission of crime is alleged. The settled principle of law is that where the commission of crime is alleged in a civil proceeding, the person alleging (in this case the Plaintiffs) must prove same beyond reasonable doubt. The Plaintiffs/Appellants had a duty to prove beyond reasonable doubt the damages on or theft of their properties alleged in the Statement of Claim. This they failed to do. For these reasons I hold that the claim for special damages or damages to properties was rightly refused by the trial court. (p. 1850 D)

Identity of land - Issue of - When said to be raised

11. In NWOBODO EZEUDU & ORS v ISAAC OBIAGWU (1986) 2 NWLR (Part 21) 208 at 220 this Court, Per Oputa JSC, spoke of the circumstances when an issue of identity of land can appropriately be

said to be raised. The Court said:

“The identity of land in dispute will be in issue, if, and only if, the Defendants in their Statement of Defence made it one — that is if they disputed specifically either the area or the size or the location or the features shown on the Plaintiffs’ plan. When such is the case then the identity of the land becomes an issue. We have in our courts almost tacitly accepted that it is a ritual in land cases for the Plaintiff to prove the features on the boundary and call all boundary men before it can be held that he has established the identity of the land in dispute. This erroneous belief accounts for a good deal of delays in land cases. The onus on the Plaintiff is an onus to prove an issue. Where therefore the identity of the land is not an issue, there, I will make bold to say that the mere production of the Plaintiffs’ plan is enough to establish the identity of the land. In fact in such cases the plan can and should be tendered by consent.”

Now can the Defendants/Respondents be said to have made the identity of the land in dispute an issue in this case?. Certainly not. It is clear from the pleadings that both parties know the land in dispute. (p. 1851 A)

NOTABLE POINTS OF INTEREST

ADEKEYE JSC

1. Any slight interference amounts to trespass

Trespass to land is a wrongful entry into land in actual or constructive possession of another. Trespass is therefore rooted in exclusive possession, therefore all plaintiff needs to prove is that he has exclusive possession or that he has the right to such possession of the land in dispute. As such any unlawful interference with possession however slight amounts to trespass. (p. 1863 H)

2. The law ascribes possession to holder of better title

The licence is issued annually and it vests use and occupation only on the holder for a period of one year subject to renewal. As at the period of the alleged trespass, it was the Appellants who have valid Temporary Occupation licence to back up their possession of the Dump. Where the issue turns out to be which of the two competing claimants has a better right to possession or occupation of a piece of land in dispute, the law will ascribe such possession or occupation to

the person who proves a better title thereto. (p. 1864 F)

3. Upon proof of trespass an injunction follows

A perpetual injunction is based on final determination of the right of parties and it is intended to prevent permanent infringement of those rights and obviate the necessity of bringing action after action in respect of every such infringement. Once there is a finding for trespass an injunction must be granted so as to protect the possession in a party. (p. 1865 D)

C REPRESENTATION

Mr. D. O. Ezega for the Appellant.

Mr. G. I. Abibo with P.O. Otiotio for the Respondent.

D CASES REFERRED TO

EDUEKU v AMOLA (1988) 2 NWLR (Part 75) 128

ONWUKA v EDIALA (1989) 1 NWLR (Part 96) 182

CHUKWU v NNEJI (1990) 6 NWLR (Part 156) 363

IMAH v OKOGBE (1993) 9 NWLR (Part 316) 159 at 177

E FAMUROTU v AGBEKE (1991) 5 NWLR (Part 189) 1 at 13

OKUNZUA v AMOSU (1992) 6 NWLR (Part 248) 416 at 432

OLUFOSOYE v OLORUNFEMI (1989) 1 NWLR (Part 95) 26

BAMMGBOYE v OLAREWAJU (1991) 4 NWLR (Part 184) 132

F H.M.S. LTD v FIRST BANK (1991) 1 NWLR (Part 167) 290 at 302

A.G. OYO STATE v FAIRLAKES HOTELS LTD (No.2) (1989) 5 NWLR (Part 121) 255

GURARA SCURITIES AND FINANCE LTD v T.I.C. LTD (1999) 2 NWLR (Part 589) 29 at 47-48

G N.I.D.B. v De-EASY LIFE ELECTRONICS (1999) 4 NWLR (Part 597) 8 at 7

OTANMA v YODUBAGHA (2006) 2 N.W.L.R. (Part 964) 337 at 354

OTANMA v YODUBAGHA (2006) 2 N.W.L.R. (Part 964) 337

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LEAD JUDGMENT BY TABAI JSC

This action was commenced at the Port-Harcourt Judicial Division of the High Court of Rivers State on the 17 of January 1996 when the writ of summons was issued. The Plaintiffs sued for them-

selves and as representing the SAND AND GRAVEL DEALERS UNION (Mile 3) Dump). They were the Respondents at the Court below and are the Appellants herein. The Defendants were sued for themselves and as representing Drivers and loaders at Mile 3 Sand and Gravel Dump. They were the Appellants at the Court below and are the Respondents herein.

In their Statement of Claim dated and filed on the 12/3/96 the Plaintiffs claimed against the Defendants jointly and severally N700,000.00 (seven hundred thousand naira) being and representing special and general damages for trespass and wilful and unlawful damage to building materials owned by the Plaintiffs left at their Dump in Mile 3 and which Dump the Respondents invaded. Particulars of special damages were given amounting to N454,000.00 and general damages amounting to N246,000.00. They also claimed perpetual injunction restraining the Defendants either by themselves, their servants, agents, privies or personal representatives from continuing to stay at the Mile 3 Dump of Sand and Gravel Dealers Union and or building, constructing or planning to build stores and shades at the Plaintiffs' Dump at Mile 3.

The Statement of Defence and counter-claim was dated and filed on the 23/5/1996. In paragraph 9 of the counter-claim the Defendants claimed:

(a) That they are joint owners of the parcel of land allocated by the Bureau of Lands upon TOL, Temporary Occupation Licence.

(b) An amount of all rents collected from over 250 sheds at a rentage of N21, 000.00 per month.

(c) Perpetual injunction restraining the Plaintiffs from alienating or developing the site without the approval of the other parties (Defendants).

There was no reply to the counter-claim,

The 1st Plaintiff was the sole witness for the Plaintiffs' case at the trial. Four witnesses including the 3rd Plaintiff testified for the Defence. In its judgment on the 19/7/2000 the Plaintiffs' claim was allowed and N100,000.00 damages awarded against the Defendants for trespass. The claim for special damages was however refused on the ground that it was not specifically proved. Perpetual injunction was also granted. The Court held that the counter-claim failed woefully and it was dismissed. .

The appeal to the Court below was allowed and the judgment of the trial court set aside. The counter-claim for the joint ownership of the land was allowed. The claim for rents in respect of the 250 sheds was however refused.

The Plaintiffs/Appellants have therefore come on appeal to this Court. Briefs of arguments have been filed and exchanged. The Appellants' Brief was prepared by D.O. Ezaga and it was filed on the 4/10/06. He also prepared the Appellants' Reply Brief which was filed on the 5/11/07. The Respondents' Brief prepared by H. E. Wabara (of blessed memory) was filed on the 15/12/06. Each of the parties identified only one issue for determination. The issue is *Whether from the pleadings and evidence led at the trial the Appellants' claim for trespass and injunction ought not to succeed.*

On behalf of the Plaintiffs/Appellants learned counsel proffered the following arguments. Counsel referred to the evidence of the DW1 Godwin Rufus Allison from the Rivers State Lands and Housing Bureau and DW3 Chief Ferdinand Ucheoma and argued that their evidence is the best source of determining whether the initial licence in 1980 was in favour of the sole Appellants' Sand and Gravel Dealers Union or jointly in favour of Tipper Drivers Loaders and Sand and Gravel Dealers Union. Learned counsel referred to the Temporary Occupation Licences from 1982-1996 a period of 14 years and pointed out that apart from those of 1983-1985 in the joint name, all others were in the name of the Sole Appellants' Sand and Gravel Dealers Union. It was contended specifically that the DW1 admitted under cross-examination that all the receipts and licences from 1986-1996 were in the sole name of the Appellants' union. Learned counsel referred to the evidence of the DW3 as damaging to the case of the Respondents and pointed out that he was not treated as a hostile witness. Counsel pointed out that the issuance of receipts and licences in favour of the Respondents joint Tipper Drivers and Sand and Gravel Dealers Union started in 1983 and ended in 1985. He referred to the oral evidence of the DW1 in favour of the Respondents and submitted that documentary evidence is in law to be preferred to oral evidence. Learned counsel referred to the evidence of the DW4 under cross-examination about the suit filed by the Appellants against the Rebisi Youths and the injunction obtained thereat and submitted that the evidence further buttressed the case of the Plaintiffs' exclu-

sive licence to the land in dispute.

On the question of the identity of the land counsel referred to the pleading in paragraph 5 of the Statement of Defence and the Sketch Exhibit “Q” and submitted that there was no issue about the identity of the land and relied on OTANMA v YODUBAGHA (2006) 2 N.W.L.R. (Part 964) 337 at 354. B

On behalf of the Defendants/Respondents learned counsel submitted firstly that the Appellants as Plaintiffs woefully failed to prove that they were in exclusive possession or occupation of the land in dispute at the time of the alleged trespass and having failed to prove exclusive possession the law cannot protect it. He relied on OYADERE v KEJI (2005) 1 SCNJ 35 at 42 and UMESIE v ONUAGULUCHI (1995) 12 SCNJ 140. He drew our attention to Exhibit “S” copied at page 32 of the record in respect of the joint application for the land and submitted that no evidence was adduced to contradict it. It was his submission that from the totality of the evidence both parties were in joint occupation of the land. The dimensions of the land allegedly trespassed upon was undefined and uncertain and for which therefore an injunction cannot lie, learned counsel submitted. Reliance was placed on ADELUSOLA v AKINDE (2004) 5 SCNJ 235 at 253. Learned counsel also referred to OTANMA v YAOUDUBAGHA (supra) and submitted that the issue of the identity of the land was also raised in paragraph 5 of the pleadings of both parties. On the same issue of undefined and uncertain boundaries learned counsel further referred to FAGUNWA v ADIBI (2004) 7 SCNJ 322 at 342 and EZUKWU v UKACHUKWU (2004) 7 SCNJ 189 at 216. He urged in conclusion that the appeal be dismissed. C
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The above represents, in substance, the address of counsel for the parties on the single issue raised. Let me now deliberate on this issue which is all about evaluation. As a starting point, it is necessary to restate some basic principles governing the evaluation of evidence,)
It is settled principle of law that the trial court, which alone has the unique privilege of seeing and hearing the witnesses testify, that has the primary function of appraising and ascribing probative value to the evidence presented by the parties, put the evidence on the imaginary scale of justice to determine the party in whose favour the balance tilts, make necessary findings of facts, apply the relevant law to those facts and G
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come to the logical conclusion. It is to be noted that the summary or restatement of the evidence presented by the parties is not the same thing as evaluation of evidence. See ONWUKA v EDIALA (1989) 1 NWLR (Part 96) 182, IMAH v OKOGBE (1993) 9 NWLR (Part 316) 159 at 177; OLADEHIN v CONTINENTAL TEXTILE MILLS LTD (1978) 2 SC 28; CHUKWU v NNEJI (1990) 6 NWLR (Part 156) 363, A.G. OYO STATE v FAIRLAKES HOTELS LTD (No.2) (1989) 5 NWLR (Part 121) 255.

It is also settled principle of law that an appellate court has no business in the evaluation of evidence because of its limitations of not seeing and hearing witnesses and would not therefore ordinarily interfere with findings and conclusion of a trial court. But **where the trial court has failed in its duty of properly evaluating the evidence before it resulting in findings not supported by the evidence, such findings are perverse and the appellate court then has a duty to intervene by evaluating the evidence so as to make its own findings and draw its own conclusions.**

However the appellate court can only exercise that role of evaluation or re-evaluation if the exercise would not entail the assessment of credibility of witnesses and will be confined to making findings and drawing inferences and conclusions from admitted, proved or established facts. See WOLUCHEM v GUDI (1981) 5 SC 291; ODOFIN v AYOOLA (1984) 11 SC 72; IMAH v OKOGBE (supra); OGUNLEYE v ONI (1990) 2 NWLR (Part 135) 745.

I am satisfied that the trial court's assessment of the evidence did not entail credibility of witnesses. The result is that this Court, like the Court below, is in as vantage a position as the trial court to assess the totality of the oral and documentary evidence, make findings of facts and draw necessary inferences and conclusions. Although the Plaintiffs/Appellants did not claim a declaration, their claim in trespass and injunction is founded on their assertion that their Sand and Gravel Dealers Union are the exclusive owners of the Temporary Occupation Licences over the land in dispute. The Defendants/Respondent, on the other hand, claim that both themselves and the Plaintiffs/Appellants jointly belong to the umbrella Tipper Drivers and Gravel Dealers Union and which joint body are the owners of the Temporary Occupation Licences over the land in dispute. They denied that

a separate Sand and Gravel Dealers Union or a Tipper Drivers and Loaders Union ever existed.

The first and main question for determination therefore is who is or has been the Temporary Occupation Licensee of the land in dispute. The evidence is oral and documentary. It is however clear from the general flow of evidence that almost every material assertion in the oral testimony of witnesses on this issue of the licensee of the land in dispute was supported by documentary evidence. I have earlier above made reference to the findings and conclusions of the two courts below after their respective evaluation exercises. Let me also embark upon an evaluation of the oral and mass of documentary evidence, as I am entitled to do, to ascertain the party in whose favour it preponderates.

The 1st Plaintiff testifying as the only witness for the Plaintiffs' case was, as at the 18/7/97 when he testified, the Chairman of the Plaintiffs' Sand and Gravel Dealers Union, Mile 3 Diobu Port-Harcourt. According to him the land was given to them in 1980 for temporary occupation by the Rivers State Land and Housing Ministry and they have since been paying to the Government of Rivers State temporary occupation fees on the land evidenced in receipts of payments. He tendered 11 of such receipts which were admitted as Exhibits "A" to "A10". And for such payments they were also issued Temporary Occupation Licences. 9 of such licences were admitted in evidence as Exhibits "B" to "B8". According to him, the Defendant/Respondents belong to the Drivers and Loaders Union at the Mile 3 Sand and Gravel Dump and that they (Defendants) belong to their parent Road Transport Workers Union and that they were given a piece of land opposite the goat sellers in Mile 3. The Defendants realising that the Plaintiffs' site was better than theirs decided to use the site with them upon payment of N10 per tipper driver and N5 per loader. After sometime they (Defendants) refused to pay any more. They sued the Defendants/Respondents before the Rebisi Council of Chiefs who decided in favour of Plaintiffs/Appellants. The decision, according to the witness was in writing and it was admitted as Exhibit "C".

The Defendants/Respondents did not comply with the decision in Exhibit "C". The witness tendered receipts of other statutory payments which were evidenced in Exhibits "D" - D2 and "E" - "E3". According to the witness the Defendants/Respondents applied to the

Port-Harcourt City Local Government to build temporary structures and Exhibit “F” was the reply. They eventually issue the Defendants with a Notice to Quit Exhibit “G”. Upon receipt of the Notice to Quit the Defendants/Respondents became violent in the wake of which properties were destroyed and some stolen. Receipts for the purchase of some of the properties allegedly destroyed and/or stolen were admitted as Exhibit “H” - “HI5”. They Plaintiffs/Appellants then filed this action. He also gave some evidence of special and general damages for trespass and unlawful damage. He denied the existence of a Joint Tippers Drivers and Sand and Gravel Dealers Union. He denied any knowledge of an application in 1975 encompassing both the Plaintiffs and Defendants. He admitted that Chief F.S. Ucheoma was once their Chairman. He said the Defendants had stayed with them from 1983 to the time he gave his testimony.

The DW1 was Godwin Rufus Allison from the Lands and Housing Bureau of the Governor’s office. He said the Temporary Occupation Licences were issued in respect of the land in dispute to the Tipper Drivers and Sand and Gravel Dealers Union. He tendered the receipt for payment of Temporary Occupation Licence for 1983 and same was admitted as Exhibit “K” while the Temporary Occupation Licence for the same year was admitted as Exhibit “L”. He also tendered the receipts for 1984 as Exhibit “M”. He tendered Exhibit “O” being the receipt for 1985 and Exhibit “P” the licence for 1985. According to him, he was the coordinator of all Temporary Occupation Licences. He admitted under cross-examination that all payments for licences by and receipts issued for the years 1986 to 1996 were made to the Plaintiffs’ Sand and Gravel Dealers Union but insisted that all licences were issued to the joint Tipper Drivers and Sand and Gravel Dealers Union.

The DW2 Princewill Umezuruike Iwu Nwakanma was the City Engineer working for the Port-Harcourt City Local Government Council. He too referred to the land in dispute as that over which the Tipper Drivers and Sand and Gravel Dealers Dump are joint licensees. The DW3 was Chief F. S. Ucheoma. He testified to the effect that the Plaintiffs’ Sand and Gravel Dealers Union are the exclusive licensees to the land in dispute. They brought in the Defendants to the land who were paying rents to them. He said he was Chairman of the Sand and Gravel Dealers Union. He denied that the Tipper Drivers

ers ever formed the same union with them. Boniface Nwala was the DW4. He said the Plaintiffs and themselves are co-members of the Tipper Drivers and Sand and Gravel Dealers Union and that Chief F.S. Ucheoma was their Chairman in 1975. He tendered Exhibit "S" signed by Chief F. S. Ucheoma for the Tipper Drivers and Gravel Dealers Union. Under cross-examination he admitted knowledge about the suit filed by the Plaintiffs against Rebisi Youths who broke into part of the land and against whom they obtained an injunction. B

The above represents, the substance of the evidence in support of the cases of the parties. In assessing their evidence I should be guided by the principle restated in ATTORNEY-GENERAL BENDEL STATE v U.S.A. LTD (1986) 4 NWLR (Part 37) 547; (1986) 2 N.S.C.C. 954 at 965 that **a document tendered in court is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except in cases where fraud is pleaded. As I said earlier every material assertion in the oral testimony of witnesses was supported by some documentary evidence.** Having regard to its rating as the best evidence, let me examine, in some details, the documentary evidence before the Court on this issue of whether it is the Tipper Drivers and Sand and Gravel Dealers Union that has been the licensee of the land in dispute. **The mass of documentary evidence includes applications, payment receipts and invoices and Temporary Occupation Licences. In my view the Temporary Occupation Licence is the best proof of who was the licensee of the land in dispute in any particular year.** D E F

In support of the Plaintiffs/Appellants were tendered and admitted 9 Temporary Occupation Licences. These were Exhibit "B" for 1982; "B1" for 1986; "B2" for 1987; "B3" for 1988; "B4" for 1989; "B5" for 1990; "B6" for 1992; "B7" for 1993; and "B8" for 1996. G

For the Defendants/Respondents 3 Temporary Occupation Licences were tendered and admitted in evidence. These were Exhibit "L" for 1983; "M" for 1984; and "P" for 1985. It is clear from the licences that the very first one for 1982 was in favour of the Appellants, the three following years i.e. 1983, 1984 and 1985 were in favour of the Respondents and the rest eight covering the period 1986 to 1996 when this action was filed in favour of the Appellants.- Thus, **from** H

the point of view of licences issued, the evidence is overwhelming in favour of the Appellants. On this issue part of the evidence of the DW1 from the Lands and Housing Bureau under cross-examination is illuminating. At page 140 of the record he said:-

B “Payment was made by them in 1982,It was the Sand and Gravel Dealers Union that made the payment in 1982 Counsel for the Plaintiff applies to tender it No objection. Admitted as Exhibit “Q”. In 1986 payment was made by the Sand and Gravel Dealers
C Union. In 1987 there was payment made by Sand and Gravel Dealers Union. In 1988 payment was made by Sand and Gravel Dealers Union. In 1989 payment was equally made by the Sand and Gravel Dealers Union and in 1990 the same was done. 1992 the same was done. 1993 Sand and Gravel Dealers Union made payment The
D same in 1994 and also in 1996. As I issued the receipts, I issue corresponding licences. These licences emanate from our office and they cover from 1986 to 1996. When we issue a licence we include the dimensions of the land affected.”

E The learned trial Judge while recording the above testimony noted thus: “(The witness checks through the records of his file in answering all the questions above)”. The Temporary Occupation Licences covered in the above testimony are those evidenced in Exhibits “B” - “B8”.
F ***The DW1 tried to explain away this overwhelming evidence in favour of the Plaintiffs’ Sand and Gravel Dealers Union by asserting that although the licenses were issued in favour of the Plaintiffs Sand and Gravel Dealers Union, they were in fact issued for the joint Tipper Drivers and Sand and Gravel Dealers Union.***

G ***It is my respectful view that that piece of the evidence ought not to have been admitted and acted upon as it goes to no issue, the settled principle of law being that oral evidence cannot be allowed to add to, vary or contradict the contents of a document except where fraud in the making of the document is alleged.*** See EDUEKU v AMOLA (1988) 2 NWLR (Part 75) 128; GURARA SECURITIES AND FINANCE LTD v T.I.C. LTD (1999) 2 NWLR (Part 589) 29 at 47-48; N.I.D.B. v De-EASY LIFE ELECTRONICS (1999) 4 NWLR (Part 597) 8 at 7. ***And no fraud was alleged in the preparation of Exhibits “B” - “B8”.*** On the au-

thority of ATTORNEY-GENERAL BENDEL STATE v U.B.A. LTD (supra) Exhibits “B” - “B8” remain the best proof of their contents and no oral evidence should be allowed to add to, vary or contradict their contents. The result is that the oral evidence of the DW1 to the effect that although the licences, Exhibit “B” - “B8” were issued to the Plaintiffs’ Sand and Gravel Dealers Union, they were in fact issue to and for the joint Tipper Drivers and Sand and Gravel Dealers Union is not a legal evidence and ought not to be acted upon. B

Besides, licences were issued over the land in dispute in the joint names of Tipper Drivers and Sand and Gravel Dealers Union for only three years, that is, 1983, 1984 and 1985. Beyond this period and for over ten years before the filing of this action the licences were consistently issued to the Plaintiffs’ Sand and Gravel Dealers Union. No explanation was given for this consistent trend in favour of the Plaintiffs/Appellants. C

Besides the documentary evidence which I have analysed and commented upon there is a piece of the oral evidence of the DW4 Boniface Nwala under cross-examination which tends to support the case of the Plaintiffs/Appellants. At page 149 of the record he said as follows: D

“I know that Rebisi Youths have broken into part of the land, subject matter of this action. The youths did not succeed. I know that the Plaintiffs sued them in the High Court, I know that the Plaintiffs obtained an injunction against the Rebisi Youths and that kept them out. We did not allow the Rebisi Youths to build anything.” E

It was not explained by way of re-examination how the Plaintiffs/ Appellants alone filed the suit and prosecuted it successfully against the Rebisi Youths. Although this fact was not specifically pleaded in the Statement of Claim, it goes to the main issue of their claim to being the exclusive Temporary Occupation Licensees of the land in dispute. It is settled law that the Court will presume the existence of a fact from the existence of one or more proved facts if such a presumption is irresistible or that there is no other reasonable presumption which fits the proved or admitted facts. See the case of HIGH GRADE MARITIME SERVICES LTD v FIRST BANK LTD (1991) 1 NWLR (Part 167) 290 at 308; R v IREGBU (1938) 4 WACA 32. The only reasonable presumption from F G H

the trend of the Temporary Occupation Licences issued is that the Plaintiffs' Sand and Gravel Dealers are the exclusive licensees of the land in dispute. ,

Despite the above the Court below went to a conclusion which, with respect is not supported by the totality of legal evidence on record,

B At page 227-228 of the record the Court said:

C “In their testimony, the 1st 2nd and 4th Defendants witnesses through Exhibits F, S, K, L, M, N, O, P tendered at the proceedings have shown that the claim of the Plaintiffs to excessive possession of the land in dispute is untrue. An objective appraisal of the testimony of all the parties before the Court below show that the land obtained by the Union known as dealers in sand and gravel was granted by the Bureau of Lands Port-Hat ‘court to the union who at the terms operated as one union prior to 1980. Despite the provocation of D DW3, the testimony of the Bureau of Lands office DW4 is explicit and unassailable as to the true position of the plaintiffs and defendants before a dispute arose between the two parties.”

E I do not think, with respect, that the findings and conclusion in the above text of the Court of Appeal is sustainable having regard to the totality of the evidence on record. As I stated earlier in this judgment the Court below, just as this Court, is in as vantage a position as the trial court to evaluate the evidence, draw its own inferences make such findings as are supported by the evidence and go to the logical conclusion. And the ***evaluation should of necessity entail*** F ***an assessment of the evidence of both parties by placing same on that imaginary scale of justice and determine the party in whose favour the balance tilts. And it must be manifest on the face of the record that it was the evidence of both parties that*** G ***was tested on the imaginary scale.*** In A. R. MOGAJI & ORS v MADAM RABIATU ODOFIN & ORS (1978) 4 SC 91 at 93 this Court per Fatayi-Williams, JSC (as he than was) laid down the principles governing evaluation as follows:

H “... Therefore in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of the facts, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which

weighs more, accept it in preference to the other, and then apply appropriate law to it."

See also GILBERT ONWUKA & ORS v MICHEAL EDIALA (1989) 1 NWLR (Part 96) 182 at 208.

Can the Court of Appeal be said to have embarked upon any proper evaluation of the evidence contained in the record on the principles enunciated in MOGAJI v ODOFIN (supra)? I am afraid it did not and this I say for the following reasons. Firstly, the Court of Appeal per Omu JCA referred to the testimony of the 1st, 2nd and 4th Defendants' witnesses. It made no reference to the testimony of the 3rd Defendants' witness whose evidence was a direct contradiction of the case of the defence. Secondly, as if that was not bad enough, he referred to and heavily relied on Exhibits "F", "S", "K", "L", "M", "N", "O" and "P" (Exhibits "L" "M" and "P" being Temporary Occupation Licences) tendered by the Defendants in support of their case and held that the Plaintiffs/Appellants claim to being the exclusive licensees of the land in dispute was untrue. Thus ***in coming to its conclusion, the Court below made no reference whatsoever to the many documentary Exhibits including the all important nine Temporary Occupation Licences Exhibits "B" - "B8" in favour of the Appellants. The Court of Appeal cannot be said to have embarked on a proper appraisal of the evidence on record in these circumstances. The evaluation was patently one sided. Clearly, the Court below failed to place the evidence of both parties on the imaginary scale of justice and certainly there was a likelihood of a miscarriage of justice.***

There was yet another error committed by the Court below and about which I have already expressed my opinion elsewhere in this judgment. The Court relied heavily on the evidence of the DW1 from the Lands and Housing Bureau to the effect that although Exhibits "B" - "B8" were issued in favour of the Plaintiffs it was in fact issued for the joint Tipper Drivers and Sand and Gravel Dealers Union, describing it as explicit and unassailable. As I have pointed out, this evidence is not a legal evidence on the ground that it was intended to vary or even contradict the contents of the documentary evidence Exhibit "B" - "B8" which is the best evidence. Yet the Court below was evidently swayed by it.

Before going to the conclusion on this issue ***let me comment***

briefly on Exhibit “S” dated 28th May 1975. It represents an application by the Tipper Drivers and Gravel Dealers Union. No doubt the document supports the Respondents assertion that as at 1975 there existed a joint Tipper Drivers and Gravel Dealers Union. But the document, is, strictly speaking, an Application for Temporary Tipper Park. There is nothing in it to show that it was in respect of the Mile 3 Sand and Gravel Dump, the subject matter of this suit or that the Temporary Tipper Park is one and the same thing as the land in dispute.

On this issue of whether or not the Plaintiffs’ Sand and Gravel Dealers Union is the exclusive licensee of the Mile 3 Sand and Gravel Dump, I fancy that the Court of Appeal proceeded on the wrong assumption that because there was some evidence, oral and documentary, in favour of the Defendants/Respondents, their counter-claim succeeded. I have no doubt that there exists some evidence in favour of both sides in the dispute. But justice can only be seen to be done by placing the entire evidence on the imaginary scale of justice and decide the case on the preponderance of evidence.

Finally on this issue therefore, in view of the totality of the evidence and particularly having regard to the fact that nine out of the twelve Temporary Occupation Licences including the very first one issued in 1982 Exhibit “B” were in favour of the Appellants, and the three in favour of the Respondents were for the limited period of 1983, 1984 and 1985 and that thereafter all other licences have been consistently issued for the Appellants and that the suit against the Rebisi Youths over part of the land was single handedly filed and prosecuted to its conclusion by the Appellants, I hold, on the preponderance of evidence, that the Plaintiffs/Appellants are the exclusive licensees of the Mile 3 Sand and Gravel Dump in dispute. And having come to this conclusion, I hold that the counter-claim fails in its entirety. The result is that the judgment of the Court below allowing the counter-claim is hereby set aside. In its place I restore the judgment of the trial court dismissing the counterclaim.

Having come to the above conclusion that the Plaintiffs/Appellants were the exclusive licensees of the land in dispute, the next question is whether or not they are entitled to the damages for trespass and injunction claimed. The case of the Plaintiffs which I have accepted is that by virtue of their being the exclusive licensees of the

land in dispute they granted the Defendants the authority to enter into and use the land jointly with them. That after the Defendants' joint use of the land with them for some time, they (Defendants) started asserting rights as co-licensees of the land and stopped any further payments of rents. In other words the Defendants abused the authority granted them by the Plaintiffs ***The settled principle of law is that where a person having entered upon land under an authority given by law or by a person who has title or exclusive possession thereto abuses that authority, he becomes a trespasser ab initio.*** 'See AJIBADE v PEDRO (1992) 5 NWLR (Part 241) 257 at 272, where this Court Per Nnaemeka-Agu JSC explained the principle thus:

"Blackstone in his Commentaries put it this way:

"Where a man misdemeans himself or makes an ill use with the authority with which the law entrusts him, he shall be accounted a trespasser ab initio."

The rationale behind this is that the law adjudges his initial intent on entry by his subsequent conduct. See SIX CARPENTERS CASE (1610) 8 Rep 146a, 146b OXLEY WATTS (1985) 1 T.R. 12. In the instant case, the moment the first defendant refused to quit the premises which she had entered lawfully, she become a trespasser ab initio. The 2nd defendant was also a trespasser by her conduct upon entering the premises. So if the Courts below erred at all, it was in their thinking that the 1st defendant's liability dated from the date of refusal to quit rather than that of the initial entry.

In this case, therefore, although the Defendants/Respondents' initial entry onto the land was lawful its being on the authority of the Plaintiffs, by their subsequent assertion of their being co-licensees of the land in dispute coupled with other acts which amounted to abuses of their authority on the land, they become trespassers ab initio entitling the Plaintiff to claim in trespass without the issuance of a quit notice. And having regard to the legal principle that trespass is actionable per se i.e. that a plaintiff who claims in trespass is entitled to recover damages even though he has sustained no actual loss, the Plaintiffs are entitled to damages. The trial court awarded N100,000. 00 general damages and I think I should restore that award.

With respect to the special damages claimed the settled principle of law is that special damages must be specifically pleaded and strictly proved. See SHELL B.P. v COLE (1978) 3 SC 183; DUMEZ v OGBOLI (1977) 2 SC 45; SOMMER v FEDERAL HOUSING AUTHORITY (1992) 1 NWLR (Part 219) 548 at 560; OKUNZUA v AMOSU (1992) 6 NWLR (Part 248) 416 at 432; OSHUNJIRIN v ELIAS (1970) 1 ALL NLR 153 at 156; A.G. OYO STATE v FAIRLAKES HOTELS (No.2) (1989) 5 NWLR (Part 121) 255 at 278-279. In an attempt to prove special damages the only witness for the Plaintiffs at page 132 of the record gave details of some items allegedly damaged and their monetary values. Some receipts were admitted in evidence but it cannot be ascertained from them the actual quantity damaged and/or stolen and their monetary values. In my view the evidence falls short of the strict proof required in special damages.

Furthermore, ***the Plaintiffs alleged malicious damage of some of the properties and even alleged that some of the properties were either carried away or stolen by the Defendants. Thus this is a civil suit in which the commission of crime is alleged. The settled principle of law is that where the commission of crime is alleged in a civil proceeding, the person alleging (in this case the Plaintiffs) must prove same beyond reasonable doubt.*** In support of this principle see H.M.S. LTD v FIRST BANK (1991) 1 NWLR (Part 167) 290 at 302; IKOKU v ORI (1962) 1 SCNLR 307; FAMUROTOI v AGBEKE (1991) 5 NWLR (Part 189) 1 at 13. ***The Plaintiffs/Appellants had a duty to prove beyond reasonable doubt the damages on or theft of their properties alleged in the Statement of Claim. This they failed to do. For these reasons I hold that the claim for special damages or damages to properties was rightly refused by the trial court.***

Still on the Plaintiffs/Appellants' claim for trespass and injunction. It was the submission of the Respondents that the land in dispute was undefined and uncertain and for which therefore the reliefs for trespass and injunction cannot lie. This argument was also submitted at the Court i below which was apparently persuaded by it. At page 276 the Court below in its judgment had this to say: ‘

“An order for injunction is applicable to a defined area of land. In the Instant case in the court below, the Plaintiffs failed to give any precise or any definite dimensions of the land on which they seek an

injunction, its prayers and relief sought must fail. “

In NWOBODO EZEUDU & ORS v ISAAC OBIAGWU (1986) 2 NWLR (Part 21) 208 at 220 this Court, Per Oputa JSC, spoke of the circumstances when an issue of identity of land can appropriately be said to be raised. The Court said:

“The identity of land in dispute will be in issue, if, and only if, the Defendants in their Statement of Defence made it one — that is if they disputed specifically either the area or the size or the location or the features shown on the Plaintiffs’ plan. When such is the case then the identity of the land becomes an issue. We have in our courts almost tacitly accepted that it is a ritual in land cases for the Plaintiff to prove the features on the boundary and call all boundary men before it can be held that he has established the identity of the land in dispute. This erroneous belief accounts for a good deal of delays in land cases. The onus on the Plaintiff is an onus to prove an issue. Where therefore the identity of the land is not an issue, there, I will make bold to say that the mere production of the Plaintiffs’ plan is enough to establish the identity of the land. In fact in such cases the plan can and should be tendered by consent. “

Now can the Defendants/Respondents be said to have made the identity of the land in dispute an issue in this case? Certainly not. It is clear from the pleadings that both parties know the land in dispute.

In paragraph 5 of the Statement of Defence the Defendants asserted that “there was no need for a plan as the temporary occupation licence does not convey title but dimensions”. They pleaded in paragraph 4 of the counter-claim that they, in conjunction with the Plaintiffs, developed the site together including the construction and provision of tap water. Can the Defendants, in the face of the pleadings, be held to have had any doubt about the land in dispute. I hold that they certainly have no doubt about the land in dispute. Further more it is my firm view that Defendants in a land matter, as in this case, who counter-claim and therein seek the reliefs of joint ownership of the selfsame land and an injunction restraining the Plaintiffs from doing certain things thereon without their concurrence, cannot turn round to argue that the identity of the land was not established. In

my view the very argument is a contradiction to their counter-claim, because they cannot counter-claim over a piece of land which identity they do not know. The court below was clearly in error when it raised the issue of the identity of the land in dispute when such an issue was not raised in the pleadings. Parties as well as the courts are bound by the issues raised by the parties in the pleadings. See *OLUFOSOYE v OLORUNFEMI* (1989) 1 NWLR (Part 95) 26, *OGIDA v OLIHA* (1986) 1 NWLR (Part 19) 786; *LATUNDE v LAJINFIN* (1989) 2 NWLR (Part 108) 177; *BAMMGBOYE v OLAREWAJU* (1991) 4 NWLR (Part 184) 132.

In view of the foregoing considerations the appeal substantially succeeds and same is allowed. The judgment of the Court below be and is hereby set aside. The judgment of the trial court for general damages and injunction be and is hereby restored. The counter-claim was liable to be dismissed and was rightly dismissed by the trial Court. I assess the costs of this appeal at N50,000.00 in favour of the Plaintiffs/Appellants.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai JSC. I agree with his reasoning and conclusion. I would also allow this appeal with N50,000.00 costs in favour of the plaintiffs/appellants. I affirm the order of the court below dismissing the counter-claim of the respondents.

MUHAMMAD JSC

I have had the advantage of reading in draft, the judgment just delivered by my learned brother, Tabai, JSC. I am in agreement with him that the appeal be allowed for the reasons he proffered in the judgment. I, too, allow the appeal. I abide by all the consequential orders made in the judgment of my learned brother, Tabai, JSC, including order as to costs.

MUNTAKA-COOMASSIE JSC

The Plaintiffs/Appellants, in their joint statement of claim dated

13/3/96 claimed against the defendants, now Respondents the sum of N700,000:00 as special and general damages for trespass and willful damages to building materials, and perpetual injunction restraining them from continuing to stay at the Mile 3 Dump of Sand and Gravel Dealers Union

The Defendants, now Respondents, on the other hand counter claimed against the plaintiffs for a declaration that they are joint owners of the property in dispute and on account of rents collected from over 250 sheds at a rentage of N21,000:00 per month and for perpetual injunction restraining the plaintiffs from alienating any part of the land in dispute.

At the hearing, the plaintiffs called only one witness, i.e. the 1st Appellant, who is the Chairman of the Sand and Gravel Union; he identified the Defendants as members of the Road Transport Union, Tipper Chapel in Mile 3. He told the court that the Rivers State Government gave the Defendants piece of land to pack, which is opposite the land in dispute. The Sand and Gravel Dump Mile 3 were allocated to them in 1980 by the Rivers State Government and since then they have been using it. He tendered receipts for the payment of Government Temporary Occupation fee as Exhibits A - 10; and the temporary occupation licenses as Exhibits B to B8. He testified that the Defendants approached them for the use of part of the land which they agreed with the payment of N10 and Five Naira for settlement and loader respectively. After staying for some time they refused to pay and the matter was taken to Rebisi, Council of Chiefs who decided in their favour. The Council of Chiefs decision was tendered as Exhibit C. They failed to comply with Council of Chiefs judgment, as a result of which a quit Notice was served on them, the quit Notice was admitted as exhibit D. The witness further stated that the Defendants destroyed some of their building materials like Cement, Plywood, Facing - board and planks. The receipts for the purchase of some of the materials were tendered and admitted as exhibits 11-15. The witness denied knowing any union called "Tipper Drivers and Gravel Dealers Union" Plaintiffs and defendants do not belong to one union. He also denied knowing that Chief T. C. Ucheoma made an application, on behalf of the plaintiffs and Defendants, for the allocation of land in dispute. There was a plan given to them by the Government showing the area of the land

Under cross - examination, the witness admitted that Chief F. S. Ucheoma was their Chairman in the 70^s, but he did not know that in 1975, Chief Ucheoma applied for land allocation from the Ministry of Land., He admitted that the land in question had nothing to do with Rebisi Council of Chiefs. Most of the receipts he tendered were
 B issued in 1990. He explained that the Defendants have been paying them for the land but he had no receipts of any payment. He confirmed to say that the Defendants have stayed together with them since 1983 till now, and by 1975 he did not know anything about
 C the land. He finally stated that the Port-Harcourt City Council gave the Defendants permission to build temporary structure on the land, and on hearing that they reported the defendants to Rebisi Council of Chiefs.

The Defendants in turn called Godwin Rufus Allison, a Civil
 D Servant in the Lands and Housing Bureau as DW1. He was subpoenaed and the subpoena was admitted as Exhibit J. He knew the land in dispute which is being used by Tipper Drivers, Sand and Gravel Dealers Union at Mile 3, and the document covering the land is Temporary Occupation Licence, he tendered certified true copies of the
 E receipts of payment of Temporary Occupation Licence, issued in 1983 as Exhibits K and L respectively. This payment was made in the name of Tipper Drivers and Gravel Dealers Union.

Under cross-examination, he further-testified that payment was
 F made in 1982 and it was made by the gravel Dealers Union and admitted as Exhibit. Payments were also made in 1986, 1987, 1988, 1989 and .1990 - 1996. Licences were issued yearly from 1986 - 1996. He stated that Tipper Drivers is not separate Union but part of Sand and Gravel Union, he did not know of any 'Tipper Drivers
 G Park, he stated that in the instant case, the two groups were joined together and it is to them that the Licence was issued.

DW4 is Boniface Nwala, the 2nd plaintiff, the 2nd plaintiff who gave evidence for the Defendants. He knows the plaintiffs as co-members of the Union with Tipper Drivers and gravel Dealers Union. He
 H has been a member since 1975. He knows Chief F. S. Ucheoma who was the Chairman in 1975. He also knows the present site at Mile 3 Tipper Dump. He stated that the land was allocated to them by the Ministry of Lands and Housing. It was Chief F. S. Ucheoma who applied for the land on behalf of the Union, The letter was admitted

as Exhibit S. The application was granted, and they were given "Temporary Occupation Licence." They have been paying the fees up to date. He states that it was not the plaintiffs who allocated the land to the Defendants and that the Defendants have not been paying rents. He denied that a quit Notice was served on the defendants. The Defendants did not remove the plaintiffs' properties. That it was the authority who gave them contravention Notice to remove sheds at the centre which they did by themselves. He stated also that the problem started when the defendants asked the plaintiffs to account for the 250 sheds owned by the Union. He also stated that the ownership of the Dump site is joint between us i.e. the Tipper Drivers and Gravel Dealers'. That before the Union split it was common as tipper Drivers and Gravel Dealer Union. B C

Under cross-examination, he testified that his union is "Tipper Drivers and Gravel Dealers Union". He was part of the application, Exhibit S, which was made in 1975. "It was in 1980 that we entered the present site where the plaintiffs are now claiming", he added. He finally stated that he knows that the Port-Harcourt city Council does not alienate land; the Defendants only went there for approval to construct temporary structures. D E

After hearing the witnesses and the oral submissions of the counsel to the parties, the trial High Court Judge delivered her judgment in which she granted the plaintiffs claims. The learned trial Judge Mary Odili as She then was has this to say on p, 169 of the record thus:- F

"In line with the case of Udoh (supra) the plaintiff case has succeeded and considering the counter-claim on its merit I would say it was still born (sic) as there was no effort on the part of the defence to prove their counter-claim which cannot be granted in the air. I am satisfied on the totality of the evidence and documents before the court that the plaintiffs have proved their case and I grant them judgment. The counter-claim failed woefully..... However the special damages were not sufficiently proved and so I would not award in that regard even-though I am satisfied that the Defendants trespassed onto the land the plaintiffs were in possession of for which I award them N100,000 damages for trespass" perpetual injunction was also granted restraining the defendants from further trespass". H
The Defendants being dissatisfied with the judgment above success-

fully appealed to the Court of Appeal Port-Harcourt Division, herein-after called the lower court. In its judgment, the lower court unanimously held against the plaintiffs. Omage JCA has this to say on pp 278 - 279 of the record thus:-

B *“In my judgment the plaintiffs failed to prove acts of trespass against the defendants. By the testimonies of plaintiffs' witness, and the testimonies of DW1DW2 and DW4, the facts which emerge in the court below is that the plaintiffs and Defendants were in joint occupation of the land in dispute; as the grants made by the Bureau of Lands Port-Harcourt did not differentiate between the two bodies, who at the time before dispute were one.*

C *The first areas of the plaintiffs claim fails, and it is dismissed. The Order for injunction is applicable to defined areas of land. In the instant case in the court below, the plaintiff (sic) failed to give any D precise or any definite dimension of the land on which they seek an injunction; its prayers and relief sought must fail. See Adesanya vs. Aderommu (2000) 6 SCNJ 242/257.*

E *The plaintiffs' claim in the court below is dismissed. The appeal has merit, it is allowed”. The defendants /respondent (sic) filed a counter-claim in which they seek a declaration that they are joint owners of the parcel of land allocated by the Bureau of Lands upon temporary Occupation Licence there is merit in the claim, which F seeks the Order of Court that the land in dispute Is in joint ownership and it is allowed"*

The plaintiffs were dissatisfied with the decision of the lower court, hence this appeal before this Honourable Court. In the Notice of appeal dated 8/6/06, the appellants filed three (3) grounds of ap-
G peal. Both parties filed and exchanged Brief of Argument.

The appellants, in their Brief of argument formulated sole issue for determination as follows:-

H *“Whether Appellants claim for trespass and injunction against the Respondents ought not to succeed”*

The respondents, in their Brief of argument also formulated only one issue for determination, thus:

“Whether upon a calm view of the pleadings and evidence led at the trial, the Court of Appeal was wrong when it allowed the respondents' appeal and held that both appellants and respondents

were joint licenses of the land in dispute”.

At the hearing of the appeal, the learned counsel to the Appellants adopted his Brief of argument and urged this court to allow the appeal. The Appellants in their Brief of argument referred to the evidence of DW1 and DW3 and submits that there evidence is vital to the determination of the appeal since the DW1 was the representative of the Bureau of Lands and Housing who allocated the land, while Chief F. S. Ucheoma was the one who applied for the land. It was submitted that the Appellants were in exclusive possession and the fact that the Respondents were on the same land does not make them joint owners even if they were not paying rents to the appellants. The mere fact that the respondents denied being tenants to appellants makes them trespassers. The Respondents claim to be in possession is only relevant if their possession is legal and consistent. The case of Fagunwa vs. Adibi (2004) 7 NWLR (part 903) 554 at p 569; was cited.

On the Identity of the land, he referred to the evidence of DW1 where the said Licenses issued shows the dimension of the land affected.

It was further submitted that the identity of the land in issue was not an issue in the pleadings before the court as no party ever claimed ignorance of the dimension of the land in question. He cited the case of Otanma vs. Youdugbagha (2006) NWLR (part 964) 337 at 354.

The learned counsel to the Respondents also adopted his Brief of argument and urged this court to dismiss the appeal. It was his submission that the appellants have failed to prove that they are on exclusive possession of the land in question at the time of the alleged trespass. He contended that trespass is only actionable at the instance of person in possession. He therefore submitted that possession means exclusive possession, and where it is not exclusive, as in the instant case, the law will not protect it. He cited the case of Oyadare Vs. Keji (2005) 1 SCNJ 35/42. ...

It was submitted that the totality of the case points, in excusably to joint occupation by the appellants and respondents. He referred to Exhibits S, the application under the joint umbrella of Union of Tipper Drivers and Gravel Dealers Union. He submitted that the lower court was right in re-evaluating the evidence adduced at the

trial as the findings of the trial court was erroneous, he cited the cases of:-

1. Shell B. P. V. H/H Pere Cole (1978) SC 113
2. Royal Ade (Nig) Ltd V. National Oil Chemical Nig. Co. Plc (2004) 4 SCNJ 69 at 84.

B On the Identity of the land, he referred to the evidence of DW 1 and Submitted that the dimension of the land vary from year to year based on the payment of fees, hence the evidence could not be said to have established the land claimed by the appellants. The plan C that would have assisted the appellants' case was withdrawn and never tendered, hence there was nothing before the court to show the identity of the land claimed. He therefore submitted that injunction can only be granted when the boundaries of the land claimed is ascertainable.

D The appellants, in their reply brief, submitted that Exhibit 5 is not credible as the alleged writer admitted that he could not Write. It was also his submission that since exhibit S has been sent to the Bureau for land and Housing it becomes a public document and under Section 119 (B) of the Evidence Act only a certified true copy is admissible. It was also his submission that the failure of the appellants E to tender their application for the land is of no moment since licence has been granted to them, and what shows the ownership of the land in this matter is the relevant Licenses granted by the Bureau for Lands and Housing.

F I have read in draft form the leading judgment rendered by my learned brother Tabai JSC, I agree entirely with his reasoning and conclusion that the appeal has merit and same is allowed. I agree that in the early years that licences were issued over the land in dispute in the joint names of Tipper Drivers and Sand and Gravel Dealers Union G i.e. 1983-1985. Subsequently and for over ten years before the filing of this action the licences were consistently issued to the plaintiffs/Appellants. This goes without saying that they the Appellants were the exclusive Temporary Occupation Licenses of the land in dispute. The counter claim therefore cannot reasonably stand. No cogent H evidence to sustain it and same is dismissed. The judgment of the lower court is hereby set aside. The judgment of the trial court Odili J as she then was with the exception of her decision on the identity of the land, is restored and affirmed. Consistently with the above I hold as held by my learned brother Tabai JSC that the judgment of the

trial court for general damages and injunction are hereby respectfully affirmed. I endorse the order of costs made in the lead judgment.

ADEKEYE JSC

I had a preview of the judgment just delivered by my learned brother F.F Tabai JSC. The Appellants as plaintiffs before the Trial Court, the High Court of Rivers State Port Harcourt Judicial Division, claimed against the Respondents a sum of N700, 000 being special and general Damages for trespass committed by the Respondents at their Dump in Mile 3 Diobu Port Harcourt and perpetual injunction. The Plaintiffs now Appellants before this court sued for themselves and as representatives of the Sand and Gravel Dealers Union, while the defendants now Respondents prosecuted the suit for themselves and as representatives of the Tipper Drivers and Loaders at Mile 3 Sand and Gravel Dump. The Respondents equally filed a counter-claim. The substance of the counter-claim challenged the claim of the Appellants to exclusive possession, and declared joint possession of the Dump allocated at Mile 3 by the Bureau of lands, rents collected from the 250 sheds let out by the Appellants at the rate of N21,000 per month as joint owners and perpetual injunction to restrain the appellants from further developing the Dump. While presenting their respective cases before the Trial Court the undermention salient facts emerged as evidence. The Appellants through a lone witness gave evidence as follows:-

(1) That the Dump at Mile 3 was allocated to the Sand and Gravel Dealers union in 1980 by the Rivers State Bureau of land and Housing.

(2) Temporary Occupation licences issued to the Appellants on annual basis on the payment of the requisite fees such licences and Receipts were tendered as, Exhibits A-A10 and B-B8 to cover the period 1982, 1986,1987, 1989, 1990,1992,1993 and 1996.

(3) That Tipper Drivers and Loaders were invited to share the Dump as their duties were interwoven. While the Gravel Dealers sold Gravel, the Loaders and Tippers assisted in evacuating the gravel from the dump. The Tipper Drivers were charged N10 for the use of the Dump and the loaders N5. Evidence of such payments were tendered.

(4) The Respondents engaged in acts which were prejudicial to the interests of the Appellants at the Dump and more important they refused to pay the agreed rent.

(5) The Appellants invited the Rebisi council of Chiefs to intervene and stop the unco-operative behaviour of the Respondents on their land particularly as they have refused to assist in the payment of dues to maintain the Dump. The Native Arbitrative found for the Appellants.

(6) The Appellants decided to serve the Respondents through a legal practitioner when they persisted in their act of aggression with Quit Notice issued on the 1st of May, 1995.

(7) The Respondents thereafter became violent, attacked customers of the Appellants and destroyed the temporary sheds erected at the Dump by the Appellants. Receipts of purchase and costs of erecting the structures were tendered to establish a claim for special damages.

(8) The Appellants deemed that both parties belong to one Union referred to as Tipper Drivers, Sand and Gravel Dealers Union, while the Dump is not jointly owned by them.

The Respondents through four witnesses testified to the effect that:-

a) DW 1 an official of the Bureau of Land and Housing gave evidence that he had been the co-ordinator of all Temporary Occupation licences in the Ministry since 1974. He issued all the TOL for Tipper Drivers, Sand and Gravel Dealers Union in 1983 - 1985 and the Sand and Gravel Union 1982, 1982, 1986, 1987, 1989, 1990, 1992, 1993, 1994, 1996. He identified all the TOLs tendered and the receipt issued to cover the licences and fees. He explained in his evidence on oath that while issuing T.O.L. in the Bureau the Tipper Drivers and Loaders, Sand and Gravel Dealers were assumed to be one body.

b) DW2 an official of the Port-Harcourt City Council claimed that the area where the Dump locates has been under the Port-Harcourt City Council since 1987, The Dump is now under the City Council. Any activities on the land must pass through the City Council and no longer the Bureau of lands.

c) Chief Ucheoma the current chairman of the Sand and Gravel Union denied knowledge of applying for land for the two unions to carry on their activities in 1975. He denied his signature on the letter.

He became actively involved in Sand and Gravel business in 1978. He testified that there is no Union known as Tipper Drivers, Sand and Gravel Dealers Union- Both unions were never one.

d) The Respondents denied payment of rents to the Appellants and that they occupied the land jointly.

e) The explanation given to the fact that T.O.L.s were issued in the name of the Gravel and Sand Dealers was that the Gravel and Sand Dealers were appointed as members of the executive of the union due to the itinerant nature of the duties of the Respondents, while the Appellants were more at the Dump to attend to customers.

After considering the foregoing evidence of both parties the learned trial judge in his considered judgment found the evidence of the Appellants more acceptable and gave judgment to the Appellants in the claims for trespass and injunction but refused the claim for special damages in trespass. The Respondents were aggrieved by the judgment lodged an appeal at the Court of Appeal Port-Harcourt. The honourable Lower Court found joint ownership in favour of the Respondents, and that the claim for trespass cannot be established from the evidence on printed Records. Invoked section 16 to reverse the decision of the Trial Court as perverse. Appellants reacted to the judgment of the Court of Appeal by finding their way to this court. The sole issue for determination reads as follows :

"Whether Appellants claim for trespass and injunction against the Respondents ought not to succeed."

The foregoing issue enjoins this court to deliberate on the evaluation of the evidence adduced by the parties by the trial court, vis-a-vis the findings and conclusion of the two Courts both the trial and Lower Court. It is the primary role of a Trial Court in a trial to listen to," and watch the Demeanour of witnesses. After trial the duty of evaluating and appraising the evidence based on the pleadings, the oral testimony of witnesses, and documents tendered, couple with his advantage of having seen and heard the witnesses belongs also to the trial court. This duty being of no mean task, the learned trial court has to be guided by factors such as:-

- (1) Admissibility of the evidence at its disposal
- (2) Relevancy of the evidence
- (3) Credibility of the witnesses
- (4) Conclusiveness of the evidence

(5) Probability of the evidence, in the sense that it is more probable than the evidence of the other party

(6) After due consideration of the foregoing, the court shall now apply the law to the situation presented in the case before it, so as to arrive at a conclusion in one way or the other.

B The foregoing steps still fall within the exclusive preserve of the Trial Court. The exercise of evaluation and ascription of probative value to such evidence must entail the trial court in placing the totality of evidence of both parties on an imaginary judicial scale, the testimony of Plaintiff on one side, and that of the defendant on the other side and weigh them together the court has to watch where it preponderates. The court must take care not to be influenced by the number of witnesses or the enormosity of the documents but must rely heavily on the quality of the testimony at its disposal.

D Mogaji v. Odojin (1978) 4 SC 91

Adeyeye v. Ajiboye (1987) 3 NWLR pt 61 page 432

Onwuka v. Ediala (1989) 1 NWLR pt 96 pg 182

Akintola v. Balogun (2000) 1 NWLR pt 642 pg 532

Basil v. Fajebi (2001) 11 NWLR pt 725

E Pg 592 at pages 608 - 609

Akibu v. Opaleye (1974) 11 SC pg 139

F The Appellants now questions the evaluation of evidence of the lower court before arriving at the decision to find in favour of the Plaintiffs now Appellants. In the Judgment of the trial court from pages 153 - 170 of the record, the learned trial judge reviewed, evaluated and ascribed probative value to the evidence before her before arriving at the conclusion as follows:-

G *"I am satisfied On the totality of the evidence and documents before the court that the Plaintiffs have proved their case and I grant them judgment. The counter claim failed woefully. However, the special damages were not specifically proved and so I would not award in that regard even though I am satisfied that Defendants trespassed onto the land the Plaintiffs were in possession for which I award them N100,000 damages for trespass. I also, grant a perpetual injunction restraining the Defendant either by themselves, their servants, agents, privies or personal representatives from continuing to stay at Mile 3 Dump of the Sand and Gravel Union or building, constructing or planning to build stores and sheds at the Plaintiffs*

Dump at Mile 3'

The Lower Court set aside this judgment of the Trial Court. Where a Trial court has carried out the essential duty satisfactorily, an Appeal Court shall left with no option but to affirm such a decision. An -Appeal Court will pave the liberty of re-assessing or re-evaluating evidence before it in situations:-

- (1) Where the findings of the Trial Court are perverse.
- (2) Where the findings have not been arrived at as a result of a proper exercise of judicial discretion.
- (3) The Trial Court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial.
- (4) The findings were reached as a result of wrong application of some principle of substantive law or procedure.

The Appeal Court in the instant case matched the evidence before the Trial Court with the claims of the parties and concluded that the Trial Court made an error in the conclusion which should emanate from the facts presented. The Lower Court in the circumstance held as follows:-

"It is evident that the Trial Court made an error in the conclusion which should emanate from the facts presented. The conclusions arrived at by the Trial Court would lead clearly to a miscarriage of justice. When the Trial Court found trespass proved in the face of glaring failure of the Plaintiff to prove the tort of trespass. The Court of Appeal generally has no business to upset the findings of fact unless such findings do not comply with departure of the law, which lead to a perversion of justice".

The learned counsel for the Appellants emphasized in the Brief that the substance of the appeal requires pronouncement on what constitutes trespass the grounds for granting a corresponding injunction. He gave a microscopic analysis of the evidence before the court in support of trespass perpetual injunction. He emphasized that the dimension of the land was never an issue between the parties as this was specified on the Temporary Occupation licence. There was no evidence to support the counter claim. The learned counsel argued in support of joint occupation of the Dump by the two parties as a union. The question of the Respondents being in trespass did not arise.

Trespass to land is a wrongful entry into land in actual or con-

structive possession of another. Trespass is therefore rooted in exclusive possession, therefore all plaintiff needs to prove is that he has exclusive possession or that he has the right to such possession of the land in dispute. As such any unlawful interference with possession however slight amounts to trespass.

B Oyebamiji v. Fabiyi (2003) 12 NWLR pt 834 pg 271 .

Olaniyan v. Fatola (2003) 13 NWLR pt 837 pg 273

Unakamba v. Nze (2002) 28 NWLR pg 53

Amakor v. Obiefuna (1974) NWLR pg 331

C Dantsoho v. Mohammed (2003) 6 NWLR pt 817 pg 457

So extricably tied to possession is the tort of trespass. In an action where the claim is for trespass, two separate and independent issues must be considered and they are:-

(a) Whether the Plaintiff established his actual possession of
D the land and

(b) Whether the Defendant trespassed on it.

Adewole v. Dada (2003) 4 NWLR pt 801 pg 869

Nwadiogbu v. Nnadozie (2001) 12 NWLR pt 727 pg 315

In proving trespass the Appellants tendered before the Trial
E Court Temporary Occupation Licences issued by the Bureau of Land & Housing Port-Harcourt and the receipts of payment to cover the years 1982, 1986, 1987, 1989, 1990, 1992, 1993, 1994, 1995, 1996 Exh. A-A¹⁰, 13 - 13⁸.

The Respondents tendered Temporary Occupation licences for
F 1983 -1985. The right to possession of the Mile 3 Dump is premised on the Temporary Occupation licence issued by the appropriate Authority. The licence is issued annually and it vests use and occupation only on the holder for a period of one year subject to renewal. As at
G the period of the alleged trespass, it was the Appellants who have valid Temporary Occupation licence to back up their possession of the Dump. Where the issue turns out to be which of the two competing claimants has a better right to possession or occupation of a piece of land in dispute, the law will ascribe such possession or occupation
H to the person who proves a better title thereto.

Aromire v. Awoyemi (1972) 1 All NLR pt 1 pg 101

Fasoro v. Beyioku (1988) 2 NWLR pt 76 pg 263

Olohunde v. Adeyoju (2000) 10 NWLR pt 676 pg 562

A Trial Court will ascribe probative value after evaluation of

evidence based on the quality of the evidence. Going by the quality of the contradictory evidence adduced by the Respondents, the Appellants are entitled to judgment.

This calls for a re-examination of the judgment of the Lower Court. The Inclusion of the Lower Court was that the decision arrived at by the Trial Court would lead clearly to a miscarriage of justice, when the Trial Court found trespass proved in the face of glaring failure of the Plaintiffs to prove the tort of trespass was manifestly wrong. The sum total of the evidence adduced by the Plaintiffs have established the tort of trespass. In respect of the claim for perpetual injunction the Lower Court found that an order for injunction is applicable to a defined area of land, and that the Plaintiffs failed to give any precise or definite dimension of the land, on which they seek -injunction. The Temporary Occupation Licence issued annually specify the dimension of land to which it relates. The evidence of DW1 the co-ordinator from the Bureau of Lands and Housing confirmed this. A perpetual injunction is based on final determination of the right of parties and it is intended to prevent permanent infringement of those rights and obviate the necessity of bringing action after action in respect of every such infringement. Once there is a finding for trespass an injunction must be granted so as to protect the possession in a party.

Adegbite v. Ogunfaolu (1990) 4 NWLR pt 146 pg 578 Babatola v. Aladejana (2001) 12 NWLR pt 728 pg 597 Udeze v. Chidebe (1990) 1 NWLR pt 125 pg 141 Baruwa v. Ogunsola (1938) 4 WACA pg 158

The conclusion of the Lower Court on the claim for perpetual injunction cannot be matched with the evidence at the disposal of the court on printed Record. The findings of the Lower Court being patently wrong, it is hereby set aside.

This court affirms the findings of the Trial Court that the claims for special damages were not specifically proved. On the issue of the counterclaim of the Respondents, the claims were predicated on the Respondent's evidence canvassed to support joint ownership of the Dump and equal status with the Appellants in its use and occupation. The findings of trespass and the grant of injunction against them have put the wind out of their sail. The counterclaim and all the reliefs consequential there upon must accordingly fail. With fuller reasons given in the leading judgment I also hold that the appeal succeeds, I

1866 Anyanwu v. Uzowuaka (2009) 7 KLR Adekeye JSC
adopt the consequential orders as mine.

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