

SUPREME COURT OF NIGERIA
10TH JULY, 2009. SC. 390/2002
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. A. FABIYI, O. O. ADEKEYE, JJSC

CLIFFORD OSUJI PLAINTIFF/ APPELLANT
AND
NKEMJIKA EKEOCHA DEFENDANT/ RESPONDENT

APPEALS - Briefs - Reply brief - Necessity - It is necessary when new issue of law or argument - In respondent's brief - Not covered by appellant's brief - Calls for a reply (H1)

ORDERS OF COURT - Distribution of joint property - Order for - Propriety - Joint ownership was only canvassed by respondent as a defence - So court cannot predicate orders on it - In the absence of a counterclaim (H2)

ACTIONS - Reliefs - Grant - Relationship with claim - It is when a claim succeeds - That granting of reliefs go with the success - Trial court erred in granting reliefs - Where appellant failed to prove his claim (H3)

APPEALS - Party's case - Variation of on appeal - Propriety - It runs contrary to practice and procedure of our civil jurisprudence - Neither counsel nor litigant is permitted - To approbate and reprobate in the conduct of a case (H4)

LAND LAW - Declaration of title - Onus of proof - Discharge of - Plaintiff must establish his claim - With credible acceptable evidence - Based on strength of his case - Not on weakness of defendant's (H5)

ACTIONS - Reliefs - Claim in the alternative - Implications - An alternative award is not an additional award - It is one that can be made instead of another - Appellant's claims at trial did not envisage this (H6)

ACTIONS - Basis of decision - Title - Proof - Though civil suits are

decided on a balance of probabilities - A case for declaration of title - Must succeed on the strength of plaintiff's case - Not on weakness of defence (H7)

COURTS - Findings - Re-evaluation on appeal - Basis of - Where they are found to be perverse - It is the duty of appellate court - To re-evaluate same - As Court of Appeal did with the consequential orders (H8)

ACTIONS - Reliefs granted - Relation with findings - Though trial court properly evaluated - And made proper findings of fact - The relief granted thereafter did not flow from the findings (H9)

ORDERS OF COURT - Order not claimed - Making of - Proper steps - Court must hear the view of the parties - Before making such order - Since somebody's right must be affected - He should not be denied the right to be heard (H10)

ORDERS OF COURT - Consequential orders - Nature of - It is one flowing directly upon a judgment - It must give effect to a judgment already given - And not grant a fresh unclaimed relief (H11)

LAND LAW - Reliefs - Sharing order by court - Effect - Its effect is the partitioning or allotment of the property - Since both partition or allotment is strictly a family affair - The court cannot do so by stroke of pen (H12)

FACTS

The plaintiff/appellant sued defendant/respondent claiming declaration of title to the land in dispute, forfeiture and possession from the respondent, whom he alleged to be a customary tenant of his family. The kernel of appellant's case was that respondent was merely a child of a daughter of the Nwanyiri family to which appellant belonged and which family is the owner of the land in dispute. Accordingly, respondent could not claim property in the land under Owerri customary law. It was not in dispute that respondent's father had resided within the land in dispute before the respondent and had erected buildings on the land. In response to appellant's case,

respondent raised a defence of joint ownership of the disputed land. He claimed that his father was not only part of the Nwanyiri family but was at one time the head of the family.

After trial, the trial court found that appellant could not prove that respondent was their customary tenant. It went further to hold that the parties jointly owned the land as alleged by respondent in his defence. On the basis of its findings, the court ordered a sharing of the property between the parties. Aggrieved, respondent appealed to the Court of Appeal against the order for sharing of the property. The court allowed the appeal and set aside the order as unfounded. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

(1) *“Whether there is nothing in the pleadings and evidence of the Appellant and Respondent, to support the decision that the property in dispute is the joint family property of the Appellant and Respondent.*

(2) *Whether the Court below, was right in law, to hold that the Appellant’s Claim of exclusive ownership, was indeed the main claim of the appellant before the trial Court and once that failed, his whole case fails.*

(3) *Whether the Court below, was right in law, to reverse the findings of fact of the trial Court, that, the disputed property, is jointly owned family property of the Appellant and the Respondent, without the Court below, showing that the finding was perverse.*

(4) *Whether the Court below, misconceived the case and thereby arrived at a wrong conclusion, in its judgment.*

(5) *Whether the Court below, was right in law, to set aside the judgment of the trial court, which granted less and not more than the Appellant’s relief of exclusive ownership.*

(6) *Whether the Hon. (sic) Supreme Court, as a Court of last resort, is not competent in law, to resolve this dispute between members of the same family which may render any one of them homeless.”*

HELD (Unanimously dismissing the appeal per **ADEKEYE JSC**)
APPEALS - Briefs - Reply brief - Necessity

1. This leads to the question what is the essence of a reply brief? A

reply brief is necessary when a new issue of law or arguments raised in an objection in the Respondent's brief not covered in the Appellant's brief calls for a reply. An appellant in such peculiar situation ought to file a reply brief in the interest of his case. Argument is restricted to the new points arising. Where the Respondent has not introduced a new issue or point of law a reply brief is most unnecessary.

The Appellant used the Reply Brief in this case as an opportunity to elaborate on the issues already argued in the Appellant's Brief. A reply brief is not to afford the appellant another bite at the cherry. It is not proper to use the reply brief to extend the scope of argument and submission in the Appellant's brief. (pp. 2046 G / 2047 B)

Distribution of joint property - Order for

2. On gleaning through the findings and conclusion and the so called orders I find them to be contradictory to the reliefs sought by the Plaintiffs/Appellants. The orders do not flow from the conclusion of the Court as consequential orders. The Lower Court had rightly and properly interfered with the judgment to set it aside. By making the third order for distribution the Trial Court had obviously descended into the arena of conflict and granted a relief not asked for by any of the parties. The Issue of joint ownership was canvassed by the Respondent as a defence and not by the Appellants as Plaintiffs. The learned Trial Court cannot predicate orders in the judgment on it as the Respondent did not file a counter-claim. (p. 2051 A)

ACTIONS - Reliefs - Grant - Relationship with claim

3. The Appellant as Plaintiff referred to the Respondent as a customary tenant on the disputed land No. 17, Ekeonunwa Street, Owerri. According to the evidence Respondent is an Nwa-Nwa the child of a daughter who married out while it is unacceptable under Owerri Native Law and Custom for him to lay claim to the property of his maternal grandfather. It is only when a claim of the Appellant succeeds before the Trial Court, that the granting of the reliefs go along with the success.

The Trial court was in error in the nature of the reliefs made particularly following the pronouncement made by the learned Trial Judge that the Appellant failed to adduce evidence in support of his claim. (p. 2051 E)

APPEALS - Party's case - Variation of on appeal

4. By introducing and making an elaborate issue in respect of joint ownership the learned counsel has now made out a case different from the Plaintiff/appellants' case before the Trial court. This runs contrary to the practice and procedure of our civil jurisprudence that you cannot make a case on appeal different to your case before the Trial Court. Neither is a counsel or litigant permitted to approbate and reprobate in the conduct of a case. An appeal is a continuation of the case before the Trial Court. (p. 2051 G)

Declaration of title - Onus of proof - Discharge of

5. In a case for declaration of title to land, the onus is on the plaintiff to establish his claim with credible and acceptable evidence based on the strength of his own case and not upon the weakness of the case of the Defendant. The Plaintiff must therefore satisfy the court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought. The reasoning and conclusion of the Trial Court clearly show that the Appellant's case failed to meet up with this requirement.

The Court in the circumstance could not exercise its discretion to grant the declaratory reliefs in their favour. (p. 2052 D)

ACTIONS - Reliefs - Claim in the alternative - Implications

6. The scenario for alternative relief is that the claimant or party to an action will include in his pleadings two or more inconsistent sets of facts and claim relief thereunder in the alternative. An alternative award there from is one that can be made instead of another. It is not an additional award. Where a Plaintiff sets up two or more inconsistent sets of material facts and claims relief on each of them in the alternative, he will be granted such relief as the sets of facts he established would entitle him, so only two or more alternative relief will be granted.

The sum total of the claim of the Plaintiff/Appellant before the trial court envisaged a situation where the claim for title and more particularly for exclusive ownership of the disputed land succeeded, he could concede one of the storey buildings on the land to the Respondent as specified in the alternative claim. This issue is resolved

in favour of the Respondent. (p. 2054 G)

ACTIONS - Basis of decision - Title - Proof

7. As rightly observed by the learned counsel for the Appellant civil suits are decided on the balance of probabilities, on the preponderance of evidence. This connotes that the totality of the evidence of both parties is bound to be taken into account and appraised so as to determine which evidence has weight and which has none. The credible evidence led by both parties is thereafter weighed on an Imaginary judicial scale by the trial court in order to see which party's evidence has more weight or preponderates and it is that party who succeeds in the case. The instant case, is a case for declaration of title whereupon the Plaintiff/Appellant must succeed on the strength of his case and not rely on the weakness in the evidence of the Defendant/Respondent. The Plaintiff/Appellant has the onus of adducing credible and acceptable evidence in support of his case for declaration of title. (p. 2056 C)

COURTS - Findings - Re-evaluation on appeal - Basis of

8. Where a trial court has carried out satisfactorily its function of proper and dispassionate appraisal of evidence given in support of each party's case, an appeal court will be left with no option but to affirm such a decision. Where the findings and conclusions have been found to be perverse or where wrong inferences have been raised or drawn from accepted facts or wrong principle have been applied to facts, or as in the case when the consequential orders do not flow from the conclusion of the trial court in the judgment, it was the duty of the lower court to re-evaluate and re-assess the offensive order made by the trial court, unsupported by the evidence adduced by both parties.

The Court of Appeal had in the circumstance of this case rightly interfered with the judgment of the trial court. (p. 2057 F)

ACTIONS - Reliefs granted - Relation with findings

9. The judgment of the trial court demonstrated a dispassionate evaluation of the evidence of the parties based on their pleadings and oral evidence before the court. The trial court based his conclusion on the facts pleaded and the oral evidence of the parties in support of

the pleadings. The trial court rightly concluded that being claims for declaration of title to land the Plaintiffs/Appellants failed to succeed on the strength of their case by adducing cogent and acceptable evidence. The relief made thereafter did not flow from the pleadings the oral evidence in support by the parties and even the findings of the trial judge. They were simply based on the discretion of the learned trial judge. This issue is resolved in favour of the Respondent. (p. 2058 F/H) B

ORDERS OF COURT - Order not claimed - Making of C

10. It is trite that a Court is duty bound to adjudicate between the parties on the basis of the claim formulated by them. Neither of the parties requested for partition of the family property. The question of granting a relief not specifically claimed is not an issue which depends on the discretionary powers of a Trial Court. The Court must hear the view of the parties before making an order different from the one claimed, in this case the Court was wrong to have made the order for the sharing of the three buildings as the right of somebody must have been violated and he could not be denied the right to be heard in the circumstance and moreover none of the parties specifically requested for such order. (p. 2060 D) D

Consequential orders - Nature of

11. Where a claim succeeds the granting of the reliefs goes along with the success of the claim. Where a claim has not succeeded the only logical order is to dismiss the claim. It is only when the Respondent has counter claimed and the issue of joint ownership properly established by a party and counter claim succeeds that the trial can come with consequential order of sharing of the three buildings. A consequential order is one flowing directly and naturally and inevitably consequent upon a judgment. It must give effect to the judgment already given not by granting a fresh and unclaimed or unproven relief. Since the Orders of the trial Court did not give effect to the conclusion in the judgment which it followed it was rightly set aside by the Lower Court. (p. 2061 A) F

Reliefs - Sharing order by court - Effect

12. The effect of sharing the property as pronounced upon by the G

Trial Court will either amount to partitioning or making an allotment of the property. Partitioning is a means of automatically determining a family ownership of a property and sharing same within constituent members of that family to a person for limited or occupational use as he does not become absolute owner of the property allotted to him no matter the period of use. Allotment is made by the head of the family and partition is brought about by the consensus of all the members of the family. Since either partition or allotment is strictly a family affair the Court cannot make an order declaring a property a joint property and consequently make an order for sharing same by a stroke of the pen. (p. 2063 E)

NOTABLE POINTS OF INTEREST **TOBI JSC**

1. Plaintiff must not deviate from his claim

A claim, in our adjectival law, originates an action. It is the pivot or the cynosure of the case. It sets out the relief or reliefs sought by the plaintiff. A plaintiff is bound by his claim and must not deviate from it willy-nilly. A plaintiff cannot in law present a case different from his claim as the law regards such an unsolicited procedure completely outside the law.

It is clear from the claim that it is on “*declaration of title to a parcel of land which is the dwelling place of Umuoparanwanyi family of Amawom compound*” That is the first relief. The other reliefs are parasitic on the first relief. (p. 2066 C)

2. Facts must be precisely pleaded

It is an elementary principle of the law of pleadings that facts must be concisely, precisely and accurately pleaded. Pleadings should not give any room for doubt or speculation as to its real content. A Statement of Claim must clearly state the facts to be relied upon at the hearing and not embark on any rigmarole. Where facts in a Statement of Claim are not precisely stated, a defendant will be in some difficulty to respond accurately to the facts. (p. 2067 A)

OGBUAGU JSC

3. Plaintiff's case should be dismissed if he fails to prove it

I note from the Records, that the Plaintiffs, never asked for the shar-

ing or partitioning of the property in dispute. There was no counter-claim seeking for any partition of the property. From the said findings of facts and the holdings of the learned trial Judge, the obvious or inescapable conclusion, was/is that the plaintiffs, had woefully failed in their claim to exclusive ownership and possession of the property in dispute. It is now firmly settled firstly, that where, in the trial of an action, evidence has been adduced by both parties and the plaintiff fails to prove his case, the proper order, is that of dismissal and not even a non-suit. (p. 2077 E)

REPRESENTATION

Mr. E. C. Onumajuru, with him J. O. Nwosu, (Mrs.) and J. C. Anochiwa for the appellant. Mr. C. A. N. Nwokeukwu for the respondent.

CASES REFERRED TO

Woluchem v. Gudi (1981) 5 SC pg 291
Akinloye v. Eyiola (1968) NMLR pg 92
Ibekwendu V. Ike (1993) 8 NWLR 76 at pg. 78
Atolagbe v. Shorun (1988) 1 NWLR pt 2 pg 360
Igbokwe v. Udobi (1992) 3 NWLR pt 228 pg 214
Agidigbi v. Agidigbi (1997) 6 NWLR pt 454 pg 17
Umeji v. A-G Imo State (1995) 4 NWLR pt 391 552
Akinrinade v. Lawal (1996) 2 NWLR pt 429 pg 218
Azaatse v. Zegeot (1994) 3 NWLR pt 342 pg 76
Lagga v. Sakhuna (2009) All FWLR pt 455 pg 1617
Abbas v. Solomon (2001) 15 NWLR pt 736 pg 483
Thompson v. Arowolo (2003) 7 NWLR pt 818 pg 163
FRN v. Zebra Energy Ltd (2002) 3 NWLR pt 754 pg 471
Akapo v. Hakeem Habeeb (1992) 6 NWLR pt 248 pg 266
Ezoma v. AG. Bendel State (1986) 4 NWLR pt 36 pg 448 at Pg 462

STATUTE REFERRED TO

High Court Law (Amendment) Edict 1988, of Imo State, O. 47 r. 1

LEAD JUDGMENT BY ADEKEYE JSC

The Appellant, Clifford Osuji as the 2nd Plaintiff in the High Court of Imo State, Owerri Judicial Division, sued the deceased fa-

ther of the Respondent Ukachi Maxwell Ekeocha for the reliefs set out in paragraph 35 clauses (a-f) of the Further Amended Statement of claim as follows:-

(a) “Declaration of title to all that piece of land which is the home of Umuopara Nwanyiiri or Nwanyiiri family and called “*Uhe Umuopara Nwanyiiri*” and which lies at Ekeonunwa Street, Owerri Amawon Compound, Owerri in Owerri Judicial Division and shown in Plaintiffs’ plan No.E/GA/343/74.

(b) A declaration that the defendant is the customary tenant of the Plaintiffs in the said land.

(c) A declaration that by denying the plaintiffs’ title in respect of the said land and behaving in a manner inconsistent with the proprietary interest of the Plaintiffs, the defendant has forfeited the customary tenancy.

(d) An order of court for the defendant and members of his family to move out of the building they occupy in the said land and relinquish possession of same to the Plaintiff, (sic)

(e) Alternatively an order of Court restraining the defendant to the occupation only of the storey building in the land shown in the Plaintiffs plan as “*storey building by the defendant*”.

(f) N 1,000 (One Thousand Naira) being balance of the proceeds of the sale of the plaintiffs “*Isi-Ezi*” land and which the 2nd Plaintiff gave the for safe keep”

The suit which was filed in the High Court of Justice Owerri Judicial Division in 1973 had Macaulay Osuji and Clifford Osuji as Plaintiffs and Ukachi Maxwell Ekeocha as Defendant. By the time the Plaintiffs went on appeal against the decision of the Trial Court Macaulay Osuji died leaving Clifford Osuji as the sole Respondent.

Likewise Maxwell Ukachi Ekeocha was substituted with his son Nkemjika Ekeocha, the Respondent in the appeal on his death. Parties went to trial in the matter in 1992 on their further Amended Statement of claim and the Amended Statement of Defence. The Plaintiffs called four witnesses and the Defendant two witnesses. The case of the parties in brief is that the two Plaintiffs before the trial Court Macaulay and Clifford Osuji were the two male descendants of Umu Nwanyiiri family of Amawon in Owerri Nchise in Owerri town, while the Defendant Maxwell Ukeachi Ekeocha belonged to the family of Ekeocha from Naze Olohe. His mother was one Ngbafor

Nwanyiri a member of Umu Nwanyiri family of Amawon. She married Ekeocha from Naze and her offsprings by Owerri Native Law and Custom are referred to as Nwa-Nwa.

When her husband died, Ngbafor relocated to Owerri. When she died Maxwell Ekeocha now deceased and father of the present Respondent went to live with the family of Onyeneke Nkwocha Ekezie. B He later moved from there to live with the wife of Igwe Opara Nwanyiri. The two Plaintiffs/Appellants were then very young and at school when Igwe Opara Nwanyiri died without a male issue. They both were the only surviving male members of the Opara Nwanyiri family. They automatically inherited the "OHE Umunwanyiri, the area C now in dispute according to Owerri Native Law and Custom. The Respondent's father, - deceased Maxwell Ekeocha was then an adult, and he became the closest relation of the Appellants. The property in dispute the OHE UMUOPARA NWANYIRI had been the permanent D homestead of the Nwanyiri family since the village of Amawon settled in that part of Owerri for over one hundred years. No. 17 Ekeonunwa is the property now located on the land in dispute. Maxwell Ekeocha in his lifetime had access to the land through Igwe Nwanyiri, and when the Igwe died with no male issue surviving him he was still E living in the OHE NWANYIRI. He erected a storey house and a bungalow on the land. The grouse of the Appellant is that Maxwell Ekeocha is not a member of the Opara Nwanyiri family and cannot lay any claim to any property belonging to the family. His mother a F member of the Umu Nwanyiri family married outside. She decided to reside in the parents' house - but her children are Nwa-Nwa who are not entitled to the property of their maternal grandfather. Further more none of the brothers of Maxwell intermeddled with the Appellants' family property. They bought and developed their property outside the "OHE UMUOPARA NWANYIRI". The Appellants G contended that he took advantage of their tender age to Infiltrate and build on their family property. The Appellants claimed UMUOPARA NWANYIRI by way of inheritance to which they were H entitled to exclusive possession according to Owerri Native Law and Custom. They became the only surviving elders in the family. The Respondent claimed the disputed property through his father Maxwell. He claimed to be a part of the family. His father Maxwell developed the "Obi" of the family into a proper family house. He built on

the disputed land and did everything to prevent the Appellants from erecting their houses on the land. He sold the Isi-Ezi another area of the family property together with Clifford Osuji though he refused to return N1000 out of the proceeds of sale. He regarded the amount as his share. Maxwell also laid claim to exclusive ownership of OHE UMUOPARA NWANYIRI. He was selling and alienating landed properties of Opara Nwanyiri family. The Appellants referred the matter to a Native Arbitration. Maxwell, the Respondent's father made out a case of joint ownership of the family property before a Native arbitration headed by Eze Njemanze, He later accepted the decision of the Arbitration that he was to return the land in dispute to the Appellants, while he requested to be allowed to keep the storey building on the land in dispute. He later reneged on his words, adhered to his claim of joint family property and continued to manifest his bid to disinherit the Appellants and their section of the family. He expended money to reconstruct the family property. The Respondent claimed the three houses built on OHE UMUOPARANWANYIRI by his father. Maxwell was made an "OHA", he became head of the family. In the claim before the court, the Appellants described the Respondent's family as a customary tenant. Since all his activities on the disputed land were against the interests of the Appellants, he was to forfeit his right to occupy the disputed property. The place in dispute was No. 17, Ekeonunwa Street where the Respondent's father had already erected three buildings. The Respondent claimed that his father was buried there. The Respondent claimed to be a descendant of Umu Opara Nwanyiri like the Appellants. There was evidence that no other members of Ekeocha clan erected houses on "OHE OPARA NWANYIRI". They built their respective houses outside the area. Before the Trial Court, while the Plaintiffs/Appellants claimed exclusive ownership of the disputed property, the Defendant/Respondent claimed ownership of the property in common with the plaintiffs/appellants. In his considered judgment the learned trial judge made orders as follows that:-

(1) *"The property situate at 17, Ekuonunwa Street and known as Ohe Opara Nwanyiri is joint property of the defendant and the plaintiffs.*

(2) *The defendants is not a tenant of the Plaintiffs.*

(3) *As there are 3 buildings on the land erected by defendants*

ostensibly for himself, the court directs and orders that all the houses belong to the Plaintiff's and the Defendant Accordingly, they shall share the property into 3 with the defendant taking first as he represents the former head of the family".

Vide pages 119 - 121 of the record. Dissatisfied with the judgment of the Trial Court, the Defendant as Appellant appealed to the court of Appeal, Port Harcourt Division. In the judgment delivered on the 18th of January, 2001 the Court of Appeal held that:-

"The claim of exclusive ownership, was indeed the main claim of the respondents before the lower court and once that failed, the whole case must fail. The trial judge held 'specifically in his judgment as follows:-

"If the plaintiffs wish to assert and prove exclusive ownership, they must prove the declaration sought not (sic) by a mere flimsy evidence but a heightened and sustainable proof on the preponderance of evidence."

The Court found that there was merit in the appeal, allowed the appeal set aside the judgment of the Trial Court.

The Appellant was aggrieved by the judgment of the Lower Court, he subsequently filed an appeal in this Court. Briefs were filed and exchanged by the parties. At the hearing of the appeal on 27/4/09, the Appellant adopted and relied on the Appellant's brief filed on 8/2/07.

In this brief the appellant settled six issues for determination from the nine grounds of Appeal. They are:-

(1) *"Whether there is nothing in the pleadings and evidence of the Appellant and Respondent, to support the decision that the property in dispute is the joint family property of the Appellant and Respondent*

(2) *Whether the Court below, was right in law, to hold that the Appellant's Claim of exclusive ownership, was indeed the main claim of the appellant before the trial Court and once that failed, his whole case fails.*

(3) *Whether the Court below, was right in law, to reverse the findings of fact of the trial Court, that, the disputed property, is jointly owned family property of the Appellant and the Respondent, without the Court below, showing that the finding was perverse.*

(4) *Whether the Court below, misconceived the case and*

thereby arrived at a wrong conclusion, in its judgment.

(5) Whether the Court below, was right in law, to set aside the judgment of the trial court, which granted less and not more than the Appellant's relief of exclusive ownership.

B (6) Whether the Hon. (sic) Supreme Court, as a Court of last resort, is not competent in law, to resolve this dispute between members of the same family which may render any one of them homeless."

In the Respondent's brief filed on 20/10/08 which the Respondent adopted and relied upon for the purpose of this appeal, three issues were ably distilled for determination as follows:-

C (1) "Whether the Court of Appeal was wrong in holding that there was nothing in the pleadings of the Plaintiffs/Appellants to suggest joint ownership of the property in dispute.

D (2) Whether the Court of Appeal was wrong in setting aside the Order for the sharing of the three buildings belonging to the Defendant/Respondent there being no such relief before the trial Court.

E (3) Whether the Plaintiff/Appellants proved their case on the preponderance of evidence."

The Appellant filed a motion on 16/3/09 for an order enlarging the time for him to file a Reply Brief as time granted to him by the Rules of Court had since expired. The application was heard on 27/4/09, and this Court granted the order as prayed. The Reply Brief was equally filed and served that day.

On a close scrutiny of the Respondent's brief I observed that he did not file a Notice of Preliminary objection or raise any fresh issue of law for argument in the Respondent's brief. All the issues covered by the Reply Brief were already argued in the appellant's brief.

This leads to the question what is the essence of a reply brief? A reply brief is necessary when a new issue of law or arguments raised in an objection in the Respondent's brief not covered in the Appellant's brief calls for a reply. An appellant in such peculiar situation ought to file a reply brief in the interest of his case. Argument is restricted to the new points arising. Where the Respondent has not introduced a new issue or point of law a reply brief is most unnecessary. Failure to

file a reply brief can only be fatal to the case of the Appellant if the issues raised in the Respondent's Brief are weighty, substantial, competent and relevant in law. The Respondent in this appeal did not introduce any new issue of law in the respondent's brief while the issues formulated for argument by both parties were similar.

The Appellant used the Reply Brief in this case as an opportunity to elaborate on the issues already argued in the Appellant's Brief. A reply brief is not to afford the appellant another bite at the cherry. It is not proper to use the reply brief to extend the scope of argument and submission in the Appellant's brief.

Edjerode v. Ikine (2001) SCNJ 184

Okonji v. Njokanma (1999) 12 SCNJ 259

Akinrinade v. Lawal (1996) 2 NWLR pt 429 pg 218

Umeji v. A-G Imo State (1995) 4 NWLR pt 391 552

Nwali v. State (1991) 3 NWLR pt 182 pg 663

Popoola v. Adeyemi (1992) 8 NWLR pt 257 pg 1

Shuabu v. Muihodu (1993) 3 NWLR pt 254 pg 148 ACB PLC. V.

Apugo (1995) 6 NWLR pt 399 pg 65 FRN v. Obegolu (2006) 18 NWLR pt 1010

Issue one

It is the argument and submission of the learned counsel for the Appellant that the Appellant and Respondent pleaded enough facts and gave undiluted oral evidence upon which the Trial court predicated the above stated judgment, which was wrongly upturned by the court of Appeal. The Appellant pleaded facts of joint family ownership of the property in dispute in paragraphs 3, 7, 8, 9, 14, 18, 21, 24, 28, 30, 31, 33, 34 and 35 (e) of his Further Amended Statement of claim. The Defendant/Respondent in the amended statement of defence pleaded joint ownership of the family property in dispute in paragraphs 2, 3, 4, 6, 8, 9, 10, 11, 14, 15, and 18. The learned counsel came to the conclusion based on the summary of evidence from the foregoing paragraphs of the Further Amended Statement of Defence that

(a) Both the Appellant and defendant agreed that the "OHE UMUOPARA NWANYIRI" - The land in dispute belongs to members of Umuopara Nwanyiri family to which they are Members.

(b) By their pleadings both parties asserted that they reside at

No. 17, Ekeonunwa Street, Owerri otherwise known as “OHE UMUOPARA NWANYIRI”.

(c) The parties agreed that the land in dispute is No. 17 Ekeonunwa Street, Owerri otherwise called “*Ohe Opara Nwanyiri*”.

B (d) Both parties agreed that they have their respective buildings on the land in dispute i.e. No. 17, Ekeonunwa Street, Owerri, otherwise known as “Ohe Opara Nwanyiri”.

The judgment of Court was properly predicated in law upon the parties pleadings, evidence and admissions.

C The evidence and admissions of the parties are not at variance with their pleadings that the property in dispute is their joint family property. Any judgment of this Court which does not affirm the findings of the Trial Court will give away the buildings of the parties in their D jointly owned homestead as well as render one homeless. The Court of Appeal understood the relationship of the parties to the family property when it encouraged the parties to settle their differences amicably within the family circle- Even the alternative claim of the Appellant asking that the Respondent be restrained to the occupation only of a part of the land in dispute namely the storey building as E prayed in paragraph 35 (e) of the Further Amended Statement of claim the Appellants were conceding joint ownership of the land in dispute with the Respondent. The learned counsel further submitted F that the Appellants fought at the Trial Court on two planks namely:-

(a) Claim or Relief based on exclusive ownership of the land in dispute

(b) The Alternative claim or Relief based on joint ownership.

G The third arm of the order of the Lower Court was made in line with Order 47 rule 1 of the Miscellaneous provisions of Imo state of Nigeria, High Court Law (Amendment) Edict 1988. Moreover the Court is enjoined to grant in the exercise of its inherent power reliefs which in the circumstance of the case a party is entitled to. He made reference to the case of *FATB LTD. v. Ezegbu & Anor.* (1993) 7 NLR pg 1 H at pg 3 Ratio 2. The learned counsel finally contended that since the land in dispute are jointly owned by the Plaintiffs and the Defendant; the buildings on the land are equally jointly owned by the Plaintiffs under the doctrine of *Quid, quic Plantateur solo solo cedit*. He cited the cases:-

Francis v. Ibitoye (1936) 13 NLR 11 Ezeanirors v. Njidike (1965) NMLR 95

The learned Trial Judge has powers to make consequential orders backed up by the parties' pleadings evidence and admissions. He referred to the case of Odukwe v. Ogunbiyi (1998) 8 NWLR pt 561 pg 339 at 358 paras c-d and paras E-G Ratio 10. The learned counsel urged the Court to resolve issue No.1 in favour of the Appellant. B

The learned counsel for the Respondent by way of reply to the above submission explained that the pleadings and oral evidence of the Appellants are that they were descendants of Umuawanyiri family of Owerri Nchise, while the Respondent is the grandson of one Mgbafor who was married to a man from Naze. The Appellants saw the Respondent as a stranger who live with the family and as a customary tenant who had lost his right of possession by challenging his landlord on the disputed land. The Respondent maintained that he is a member of the Umuawanyiri family whose father had at a point in time been the head of the family before he died. C

The Appellants did not at anytime claim at the Trial court that the land in dispute was jointly owned by them and that the Respondent was from completely different village called Naze. The Respondent was seen as a Nwa-Nwa and a customary tenant whose continued stay in the family was subject to good behaviour. E

The Court of Appeal had rightly observed that the Lower Court had no jurisdiction to make a new case based on joint ownership of the family property for either of the parties outside their pleadings and evidence in Court. The learned counsel urged this Court to affirm the judgment of the lower Court and hold that the learned Trial Judge was wrong in holding that the family property was jointly owned by both parties, and resolve this issue in favour of the Respondent. F

A careful perusal of the argument and submission of the learned counsel for the appellant demonstrate a clear misunderstanding of the case of the Appellant as Plaintiff before the Trial Court and the reasoning and conclusion of the learned Trial Judge. The crux of the case of the Appellant before the Trial Court are for:- H

(a) Declaration of title to all that piece of land which is the home of the Umuopara Nwanyiri or Nwanyiri family and called "*Uhe Umuopara Nwanyiri*" and which lies at Ekeonunwa Street, Owerri in

Amawon compound, Owerri in Owerri Judicial Division and shown in Plaintiffs plan No. E/GA 343/74.

(b) Declaration that the Defendant/Respondent is the customary tenant of the Plaintiffs/Respondent in the disputed land.

(c) Declaration that by denying the Plaintiffs/Appellants title in respect of the disputed land and behaving in a manner inconsistent with the proprietary interest of the plaintiffs the Defendant has forfeited as the customary tenancy.

(d) An order of Court of the Defendant and members to move out of the building they occupy on the land and relinquish possession of same to the Plaintiffs. ALTERNATIVELY an order of Court restraining the Defendant to the occupation only of the storey building on the land shown in the plaintiffs plan as storey building by the Defendant.

(e) It is not in doubt from the evidence on printed record and particularly going by the judgment that the learned Trial Judge gave a critical analysis and proper appraisal to the case of each respective party. The pieces of evidence which he joined together to find joint ownership of the landed property proved are the one he used to conclude that the plaintiff/appellants claim to exclusive ownership of the disputed property was not established on the preponderance of evidence. The learned trial judge said in his judgment on pg 119 of the Record paragraphs 25-31 that-

"It would seem that a claim of exclusive ownership on the Plaintiffs part only arises when the Defendants father acted in a manner that tended to show that he alone had exclusive ownership of the place but when the Defendants father was in a right mood and regarded the Plaintiffs as younger close relations, all claims of exclusive rights are forgotten.

This description seems to be the hall mark of the nature of the case of the plaintiffs. I find as a fact that none of the parties is a landlord or tenant to the other. The orders this Court will make are that:-

(1) *The property situate at 17 Ekeonunwa Street and known as Ohe Opara Nwanyiri is joint property of the Defendant and the plaintiffs*

(2) *The Defendant is not a tenant of the Plaintiffs.*

(3) *As there are 3 buildings on the land created by Defendants ostensibly for himself, the Court directs and orders that all the houses*

belong to the Plaintiffs and the Defendant. Accordingly they shall share the property into 3 with the Defendant taking first as he represents the former head of family."

On gleaning through the findings and conclusion and the so called orders I find them to be contradictory to the reliefs sought by the Plaintiffs/Appellants. The orders do not flow from the conclusion of the Court as consequential orders. The Lower Court had rightly and properly interfered with the judgment to set it aside. By making the third order for distribution the Trial Court had obviously descended into the arena of conflict and granted a relief not asked for by any of the parties. The Issue of joint ownership was canvassed by the Respondent as a defence and not by the Appellants as Plaintiffs. The learned Trial Court cannot predicate orders in the judgment on it as the Respondent did not file a counter-claim.

The Appellants as Plaintiffs before the Trial Court regarded the claim of the Respondent to joint ownership as inconsistent with the proprietary interests of the Appellants and thereby requested the Trial court to forfeit his interest as a customary tenant.

The Appellant as Plaintiff referred to the Respondent as a customary tenant on the disputed land No. 17, Ekeonunwa Street, Owerri. According to the evidence Respondent is an Nwa-Nwa the child of a daughter who married out while it is unacceptable under Owerri Native Law and Custom for him to lay claim to the property of his maternal grandfather. It is only when a claim of the Appellant succeeds before the Trial Court, that the granting of the reliefs go along with the success.

The Trial court was in error in the nature of the reliefs made particularly following the pronouncement made by the learned Trial Judge that the Appellant failed to adduce evidence in support of his claim.

By introducing and making an elaborate issue in respect of joint ownership the learned counsel has now made out a case different from the Plaintiff/appellants' case before the Trial court. This runs contrary to the practice and procedure of our civil jurisprudence that you cannot make a case on appeal different to your case before the Trial Court. Neither is a coun-

sel or litigant permitted to approbate and reprobate in the conduct of a case-

Ezoma v. AG. Bendel State (1986) 4 NWLR pt 36 pg 448 at Pg 462
Kayode v. Odutola (2001) 11 NWLR pt 725 pg 659

An appeal is a continuation of the case before the Trial

B Court. I am equally duty bound to define the nature of declaratory reliefs particularly in relation to title to land. The purpose of a declaratory relief sought from Court is essentially an equitable relief, in which the Plaintiff prays the Court in exercise of its discretionary jurisdiction to pronounce an existing state of affairs in law in his favour as may be discernible from the averments in the statement of claim. A declaratory relief is not confined to cases where there is a complete or subsisting cause of action but may be employed in all cases where the Plaintiff conceives he has a right.

C Adigun v. A-G Oyo State (.....)(1987) 1 NWLR pt 53, pg 678,
Igbokwe v. Udobi (1992) 3 NWLR pt 228 pg 214
Dantata v. Mohammed (2007)7 NWLR pt 664 pg 176.

In a case for declaration of title to land, the onus is on the plaintiff to establish his claim with credible and acceptable evidence based on the strength of his own case and not upon the weakness of the case of the Defendant. The Plaintiff must therefore satisfy the court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought. The reasoning and conclusion of the Trial Court clearly show that the Appellant's case failed to meet up with this requirement.

The Court in the circumstance could not exercise its discretion to grant the declaratory reliefs in their favour.

G Adu v. Gbadamosi (2009) 6 NWLR pt 1136 pg 110 Ogun v. Akinyelu (2004) 18 NWLR pt 905 pg 362 Oluwi v. Eniola (1967) NMLR pg 339

H The learned counsel for the Appellant has failed to convince this Court that the evidence before Trial Court was predominantly in favour of joint ownership of the land in dispute. Issue one is resolved in favour of the Respondent.

Issue Two

“Whether the Court below was right in law to hold that the Appellants claim of exclusive ownership was indeed the main claim

of the Appellant before the Trial Court and once that failed, his whole case fails”.

The learned counsel submitted that it is trite law in civil actions, that where there is an alternative claim, the Plaintiff can rely either on the main claim or the alternative claim where the main claim fails. B
Whichever way the Court is not shut out but will consider the alternative claim and the Plaintiff can succeed thereon. By so doing it is proper for a party to an action to include in his pleadings two or more inconsistent sets of facts and claim reliefs there under in the alternative.

The learned counsel submitted that the Appeal Court misconceived the nature of the case before the Trial Court, and what it is called upon to decide, it had arrived at a wrong conclusion and this has occasioned a miscarriage of justice against the Appellant. He cited cases in support of his submission as follows:- C

Ibekwendu V. Ike (1993) 8 NWLR 76 at pg. 78 Ratio 5 D

SCE v. Odenewu (1965)2 All NLR pg. 135

U.B.A. V. Mustapha (2004) 1 NWLR pt 855 pg 443 at pg 455

U.B.N v. Penny-Mart Ltd. (1992)5 NWLR pt 240 pg 228

Nwangwa v. Ubani (1995) 10 NWLR pt 526 pg 559 E

Agidigbi v. Agidigbi (1997) 6 NWLR pt 454 pg 17.

Yesufu v. Kupper Int. N.V (1996)5 NWLR pt 446 pg 17

M.V. Caroline Maersk v. Nokoy Invest Lt. (2002) 12 NWLR pt 782 pg 472.

The learned counsel urged this Court to resolve this issue in favour of the Appellant and set aside the judgment of the Court of Appeal F

The learned counsel for the Respondent replied in his submission that the reliefs sought by the Plaintiffs/appellant in their further G amended statement of claim are those shown on page 53 of the Record, particularly paragraph 35 (a-f) therefore. In their oral testimony the Plaintiffs/Appellant never sought any relief in the nature of sharing the buildings into three and in any order at all. The learned Trial Judge was in error when he granted to the Plaintiffs/appellants H what they never claimed before the Court in their pleadings or oral evidence in support before the court. The decision of the Trial Court was therefore perverse and the Court of Appeal had jurisdiction to set it aside. The learned counsel canvassed that this issue be resolved

in favour of the Respondent.

This Court does not have to belabour this issue as the argument and submission of the learned counsel for the Appellant which is glaring on this issue is self defeating. I shall quote from two cases cited by the learned counsel as follows:-

B S.C.E.I v. Odunewu (1965) 2 All NLR 135
that

C “it is submitted that where a trial court is of the opinion that it may be wrong in its decision on the principal claim of a party, it is desirable that it considers the alternative claim of the party. The reason for such step is that the Court of Appeal will have on record the finding and opinion of the trial court on the alternative relief”

In the case of U.B.A PLC V. Mustapha (2004) 1 NWLR pt 855 pg 443. Ext. 455. Ratio 15 the learned counsel quoted.

D “it is trite law that where a Plaintiff on a set of facts asks for a relief and a second relief in the alternative to the first, it is for the court to decide on the facts and in principle whether the grant of the second relief as a further relief will not amount to double compensation for the compensation for the same cause of action, in which case
E the further or alternative relief should not be granted. In other words, it is only where the court finds that it could not for any reason grant the principal claim, that it would consider the alternative claim”

F The learned counsel concluded that the court granted the alternative claim because it did not grant the main claim. The learned trial judge did not give due consideration to the alternative claim anywhere in his judgment. His order for the sharing of the three buildings on the disputed land as being joint property of the family does not flow from the alternative claim of the Plaintiffs which reads.

G (e) “Alternatively an Order of Court restraining the Defendant to the occupation only of the storey building in the land shown in the Plaintiffs plan as storey building by the Defendant”

H The order made by the trial court did not coincide with the alternative order claimed by the Plaintiffs/Appellant. **The scenario for alternative relief is that the claimant or party to an action will include in his pleadings two or more inconsistent sets of facts and claim relief thereunder in the alternative. An alternative award there from is one that can be made instead of another. It is not an additional award. Where a Plaintiff sets up**

two or more inconsistent sets of material facts and claims relief on each of them in the alternative, he will be granted such relief as the sets of facts he established would entitle him, so only two or more alternative relief will be granted.

M.V. Caroline Marersk v. Nokoy Investment Ltd (2002) 12 NWLR (pt 782) pg 472. B

Yesufu v. Kupper Int. N.V (1992) 5 NWLR pt 446 pg 17. N.S.M Co Ltd v. N.B.C (1967) 1 NMLR 35.

Mercantile Bank of (Nig) Ltd v. Adalma Tanker & Bunkering Service Ltd (1990) 5 NWLR pt 153 pg 747. C

The sum total of the claim of the Plaintiff/Appellant before the trial court envisaged a situation where the claim for title and more particularly for exclusive ownership of the disputed land succeeded, he could concede one of the storey buildings on the land to the Respondent as specified in the alternative claim. This issue is resolved in favour of the Respondent. D

Issue Three

“Whether the court below was right in law, to reverse the findings of fact of the trial court, that the disputed property is jointly owned family property of the Appellant and the Respondent without the court below showing that the finding was perverse” E

The learned counsel for the Appellant submitted on this issue that parties are bound by their pleadings and the findings of fact of a trial court which are predicated on the parties pleadings and evidence as in the instant case, cannot be said he have been perversely made and cannot be highly disturbed, as was wrongly done by the Court of Appeal. The learned counsel stated that findings of fact will be perverse when:- F

(a) They are speculative and not based on any evidence G

(b) Where the court took into account matters which it ought not to have taken into account or where the court shut its eyes to the obvious.

The learned counsel cited cases in support of the foregoing H
 Atolagbe v. Shorun (1988) 1 NWLR pt 2 pg 360 Adimora v. Ajufo (1988) 1 NWLR pt 80 pg 1

The judgment of the lower court demonstrated proper understanding and consideration of the issues raised by the parties. This

court is urged to resolve issue three in favour of the Appellant. The learned counsel for the Respondent submitted that the onus is on the Appellant to prove his claims on the preponderance of evidence. The learned trial judge found that there was no sufficient evidence to establish exclusive ownership for the Plaintiffs/Appellants the proper
 B order would have been that of the dismissal of the case of the Plaintiffs/Appellants and not to make orders that were neither pleaded nor given in evidence. This court is urged to affirm the judgment of the lower court and set aside that of the trial court, and resolve this
 C issue in favour of the Respondent.

***As rightly observed by the learned counsel for the Appellant civil suits are decided on the balance of probabilities, on the preponderance of evidence. This connotes that the totality of the evidence of both parties is bound to be taken Into
 D account and appraised so as to determine which evidence has weight and which has none. The credible evidence led by both parties is thereafter weighed on an Imaginary judicial scale by the trial court in order to see which party's evidence has more weight or preponderates and it is that party who succeeds in
 E the case. The instant case, is a case for declaration of title whereupon the Plaintiff/Appellant must succeed on the strength of his case and not rely on the weakness in the evidence of the Defendant/Respondent. The Plaintiff/Appellant has the onus
 F of adducing credible and acceptable evidence in support of his case for declaration of title.***

Woluchem v. Gudi (1981) 5 SC pg 291 Odutola v. Aleru (1985) 1 NWLR pt 1 pg 92 Magaji v. Odofoin (1978) 4 SC 91 Balogun v. Akanji (1988) 1 NWLR pt 70 pg 301 Elias v. Omo Bare (1982) 5 SC 25
 G Odulaja v. Haddad (1973) 11 SC pg 357 Akibu v. Opaleye (1974) 11 SC pg 139

In this case further there are two competing claims before the trial court, the court had a duty to consider both assertions carefully and decide on the balance of probabilities which of the assertions the
 H court would accept. On a careful perusal and analysis, the judgment of the Trial Court, demonstrated a dispassionate appraisal of the evidence adduced in support of the claims, against the background of the pleadings of the parties. In his findings of fact and final determination he found that the Plaintiffs/Appellant failed to succeed in their

claim. After appraisal of facts and ascribing of probative value to them the court arrived at the right conclusion but proceeded thereafter to make a wrong order. In respect of the claim of the Plaintiffs/Appellant the learned trial judge held:-

"If the Plaintiffs wish to assert and prove exclusive ownership, they must prove the declaration sought not, but (sic) a mere flimsy evidence but a heightened and sustainable proof or the preponderance of evidence. Land case unlike most civil cases demands a fairly greater degree of proof in that what is involved is property to which people in this part of the world attach great importance". The learned trial judge supported this contention with the case of Alhaji Adebola Elias v. Chief T. Omo Bare (1982) 5 SC 25 at pg 47. The order made by the trial judge after finding that the Plaintiffs/Appellants did not prove the case on the preponderance of evidence went ahead to grant ownership of the disputed property jointly to the parties. The conclusion reached by the court in the circumstance is obviously perverse and a wrong exercise of judicial discretion. *A decision will be held to be perverse where*

- (a) it is speculative and not based on any evidence or
 - (b) the court took into account matters which it ought not to have taken into account or
 - (c) the court shut its eyes to the obvious Adimora v. Ajufo (1988) 3 NWLR pt 80 pg 1
- Makanjuola v. Balogun (1989) 3 NWLR pt 108 pg 192 Atolagbe v. Shorun (1985) 1 NWLR pt 2 pg 360 Duru v. Nwosu (1989) 4 NWLR pt 113 pg 24 Ihewuezi v. Ekeanya (1989) 1 NWLR pt 96 pg 239 Adeosun v. Jibesin (2001) NWLR pt 744 pg 290

Where a trial court has carried out satisfactorily its function of proper and dispassionate appraisal of evidence given in support of each party's case, an appeal court will be left with no option but to affirm such a decision. Where the findings and conclusions have been found to be perverse or where wrong inferences have been raised or drawn from accepted facts or wrong principle have been applied to facts, or as in the case when the consequential orders do not flow from the conclusion of the trial court in the judgment, it was the duty of the lower court to re-evaluate and re-assess the offensive order made by the trial court, unsupported by the evidence ad-

duced by both parties.

Woluchem v. Gudi (1981) 5 - 7 SC pg 291

Ebba v. Ogoto (1984) 1 SC NLR 372 Ibodo v. Enorofia (1980) 5

SC 42 Akinloye v. Eyiola (1968) NMLR pg 92

Thompson v. Arowolo (2003) 7 NWLR pt 818 pg 163

B Fatoyinbo v. Williams (1956) SC NLR pg 274

Balogun v. Agboola (1974) 10 SC pg 111

The Court of Appeal had in the circumstance of this case rightly interfered with the judgment of the trial court Issue three is resolved in favour of the Respondent.

C Issue Four

“Whether the court below, misconceived the case and thereby arrived at a wrong conclusion in its judgment.”

The learned counsel for the Appellant submitted in respect of D the issue that the Court of Appeal misconceived the case of the parties particularly the Appellants claim before the trial court and this has led to the wrong conclusion in the judgment now challenged before this court. The Appellant exercised the right to protect his interest in his family property before the trial court. He urged this court to resolve this issue in favour of the Appellant. The learned counsel for E the Respondent submitted that the Court of Appeal found that the lower court concluded that the Appellant did not prove their case before the trial court on the preponderance of evidence. Instead of F dismissing the suit, the trial judge proceeded without jurisdiction to grant reliefs that were neither pleaded nor prayed for in evidence. The court is urged to affirm the judgment of the Lower Court and set aside that of the trial court. This issue is a straight forward one as **the judgment of the trial court demonstrated a dispassionate evaluation of the evidence of the parties based on their pleadings and oral evidence before the court. The trial court based his conclusion on the facts pleaded and the oral evidence of the parties in support of the pleadings. The trial court rightly concluded that being claims for declaration of title to land the H Plaintiffs/Appellants failed to succeed on the strength of their case by adducing cogent and acceptable evidence.** The evidence of the Plaintiffs/Appellants was more in favour of or rather strengthened the case of the Defendant/Respondent to establish a joint family property. **The relief made thereafter did not flow from**

the pleadings the oral evidence in support by the parties and even the findings of the trial judge. They were simply based on the discretion of the learned trial judge. This issue is resolved in favour of the Respondent.

Issue Five

"Whether the court below was right in law, to set aside the judgment of the trial court, which granted less and not more than the Appellants relief of Exclusive Ownership."

In the consideration of the issue the learned counsel for the Plaintiff/Appellant asked the question whether the court below was right in law to set aside the judgment of the trial court, which granted less and not more than the Appellants relief of exclusive ownership. The Court of Appeal agreed that the lower court can grant less but not more referring to the decision of the trial court. What the trial court granted the Appellant his alternative claim in paragraph 35 (e) of his further Amended Statement of claim is far much than his claim for Exclusive Ownership in paragraph 35 (a) (b) (c) and (d) of his further Amended Statement of claim, which is proper in law.

Ekpenyong v. Nyong (1975) 2 SC 71

Awoslie v. Sotumbo (1992) 5 NWLR pt 243 pg 544

A.G Anambra State v. Okafor (1992) 2 NWLR pt 224 pg 514

The lower court was therefore wrong to disturb the learned trial judge's judgment predicated on the parties pleadings evidence and admissions. The Appellate Court will also not interfere for the sheer fancy of substituting its view for the view of the trial court, when that court has properly evaluated the evidence and made findings of fact. The learned counsel cited cases to buttress the foregoing submission as follows:-

Akinloye v. Eyiola 1968 NMLR pg 92

Awoyale v. Ogunbiyi (1986) 2 NWLR pt 24 pg 926

Agbabiaka v. Saibu (1988) 2 NWLR pt 24 pg 926

Ogbechie v Onochie (1988) 1 NWLR pt 70 pg 370 Kwajaffa v. B.O.N Ltd (1999) 1 NWLR pt 597 pg 423

Ademoiaju v. Adenipekun (1999) 1 NWLR pt 587 pg 440

The Court is urged to resolve the issue in favour of the Appellant. The learned counsel for the Respondent had replied to this issue under issue three.

On a careful perusal of the evidence on printed record there is

no doubt about it that the Lower Court was right in law to set aside the judgment of the Trial Court. On pg 197 of the Record, lines 9 - 11, the Lower Court found that the Trial Court having found that there was no sufficient evidence to establish exclusive ownership for the Plaintiffs/Respondents should have been courageous enough to dismiss the claim. Secondly the Lower Court found that the alternative relief of the Plaintiffs before the Trial Court is not a request by the Appellant for the partition of the property on the disputed land. The alternative relief requested for limiting the Defendant/Appellant to only one storey building. The Lower Court explained the position of law as aptly stated in the cases of Ekpeyong v. Nyong (1975) 2 SC pg 71 at pg 81 - 82

Awoside v. Sotumbo (1992) 5 NWLR pt 243 pg 544

A. G. Anambra State v. Okafor (1992) 2 NWLR pt 224 pg 514

"The position of the law is clear that a Court of Law can only grant reliefs claimed by a party and not more". It is trite that a Court is duty bound to adjudicate between the parties on the basis of the claim formulated by them. Neither of the parties requested for partition of the family property. The question of granting a relief not specifically claimed is not an issue which depends on the discretionary powers of a Trial Court. The Court must hear the view of the parties before making an order different from the one claimed, in this case the Court was wrong to have made the order for the sharing of the three buildings as the right of somebody must have been violated .and he could not be denied the right to be heard in the circumstance and moreover none of the parties specifically requested for such order.

Abbas v. Solomon (2001) 15 NWLR pt 736 pg 483

Korede v. Adedokun (2001) 15 NWLR pt 736 pg 483

It must also be borne in mind that for a judicial discretion to be exercised judicially and judiciously it is not exercisable on a mere figment of the person doing so but upon facts and circumstances necessary for the proper exercise of that discretion. Where a Court grants relief in the exercise of its inherent powers, it can only grant a relief which in the circumstance of the case that party is entitled to. Registered Trustees, Apostolic Church v. Olowoleni (1990) 6 NWLR pt 158 pg 516

George v. Dominion Flour Mills Ltd (1963) I SCNLR 117
 Kalio v. Kalio (1977) 2 SC pg 15 , Metalimpex v. A.G Leventis & Co.
 Ltd (1976) 2 SC pg 91

Where a claim succeeds the granting of the reliefs goes along with the success of the claim. Where a claim has not succeeded the only logical order is to dismiss the claim. It is only when the Respondent has counter claimed and the issue of joint ownership properly established by a party and counter claim succeeds that the trial can come with consequential order of sharing of the three buildings. A consequential order is one flowing directly and naturally and inevitably consequent upon a judgment. It must give effect to the judgment already given not by granting a fresh and unclaimed or unproven relief.

Akinbobola v. Plisson Fisko (1991) 1 NWLR pt 107 pg 270

Liman v. Mohammed (1999) NWLR pt 617 pg 116 Akapo v. Hakeem D
 Habeeb (1992) 6 NWLR pt 248 pg 266

Since the Orders of the trial Court did not give effect to the conclusion in the judgment which it followed it was rightly set aside by the Lower Court. Issue Five is resolved in favour of the Respondent.

Issue Six

“Whether the Hon. Supreme Court, as a court of last resort is not competent in law, to resolve this dispute between members of the same family which may render any of them homeless.”

The learned counsel in his submission urged this Court as the Court of last resort to tow the line of the Lower Court which stated in the leading judgment that:-

“Since the parties are related I award no costs in this appeal. I encourage them to settle their differences amicably within the family circle.”

This Court is also to uphold the judgment of the Trial Court, since the parties by their pleadings, evidence and admissions agree that they have buildings in their homestead No.17, Ekeonunwa Street Owerri which by their custom is in alienable. The resolution of this family dispute by this Court will grant constitutional rights to shelter and freedom from discrimination on any grounds or alternatively if the Court holds that the entire procedure is a nullity as contended by the Court below because the learned trial judge adjudicated on is-

sues not placed before it which breaches the parties constitutional right to their hearing, to non suit the Plaintiff/Appellant and make an order for retrial or rehearing. Finally the learned counsel urged the Court to allow the appeal and set aside the judgment and order of the Lower Court and affirm that of the Trial Court.

B The learned counsel for the Respondent prays this Court to dismiss the appeal and affirm the judgment of the Lower Court.

The request of the learned counsel in this issue is asking this Court to submerge itself in the mistake made by the Trial Court and C perpetrate the same error made by the Court which is glaring on printed record and subject of an appeal to the Lower Court. The Lower Court had rightly decided the appeal set aside the judgment of the Trial Court and dismissed the Respondent's claim. This court has no reason to interfere with the judgment of the Lower Court, D that is the Court of Appeal.

An appellate court has no jurisdiction to adjudicate on appeal and pronounce on an issue that was not raised by way of appeal before it. An appeal is a continuation of the matter before a Trial Court, and the proceedings in an appeal is by way of re-hearing to E enable the Appellate Court evaluate the evidence that has been adduced. The purpose of an appeal is to find out whether or not on the evidence and the applicable law the Trial Court came to a right decision Sabru Motors (Nig.) Ltd. V. Rajah Enterprises (Nig.) (2002) FWLR F pt 116 pg 841

B.A. Plc v. Mustapha (2004) 1 NWLR pt 855 pg 443

Lagga v. Sakhuna (2009) All FWLR pt 455 pg 1617

Ngige v. Obi (2005) NWLR pt 999 pg

The remarks in the leading judgment which reads as follows:-

G *"Since the parties are related, I award no costs in this appeal. I encourage them to settle their differences amicably within the family circle"* is an obiter dictum, a passing remark by the court. Whereas a ground of appeal must relate to the decision and should be a challenge to the validity of the ratio of the decision.

H Govt. of Akwa Ibom State v. Power corn (Nig) Ltd (2004) 6 NWLR pt 868 pg 202 Babalola v The State (1989) 4 NWLR pt 115 pg 264 Azaatse v. Zegeot (1994) 3 NWLR pt 342 pg 76

Since an appeal is a continuation of the case before the Trial Court, the Appellant cannot at this stage consider the issue of consti-

tutional rights to shelter and freedom from discrimination which were not taken before the Trial Court or the Lower Court. This is because this Court would not have had the benefit of the opinion of the lower court or the Trial Court on the issue.

FRN v. Zebra Energy Ltd (2002) 3 NWLR pt 754 pg 471

A. G. Oyo State v. Fair Lakes Hotel Ltd (1988) 5 NWLR pt 92 pg 1 ^B

This Court even a court of last resort, is subject to the qualification that the Court of last resort may refuse to entertain even a question of law sought to be raised for the first time, if it is satisfied that the Court below would have been in a more advantageous position to deal with the matter. Resolution of family dispute so as to guarantee Constitutional rights to shelter and freedom from discrimination cannot be entertained in vacuo without evidential backup. Such evidence is not a matter for an Appellate Court. ^C

Fadiora v. Gbadebo (1978) 3 SC pg 219 Adeyemi v. Opeyori (1976) D 9 - 10 SC pg 31

On the alternative request the viable order to make in the circumstance of this case which the Lower Court had rightly made is to dismiss the suit. It does not require any non-suiting the Plaintiff/Appellant or ordering a retrial or re-hearing of the matter. It is relevant to set aside the judgment of the Trial Court as to sharing of the three buildings on the disputed property. ***The effect of sharing the property as pronounced upon by the Trial Court will either amount to partitioning or making an allotment of the property. Partitioning is a means of automatically determining a family ownership of a property and sharing same within constituent members of that family to a person for limited or occupational use as he does not become absolute owner of the property allotted to him no matter the period of use. Allotment is made by the head of the family and partition is brought about by the consensus of all the members of the family. Since either partition or allotment is strictly a family affair the Court cannot make an order declaring a property a joint property and consequently make an order for sharing same by a stroke of the pen.*** ^F ^G ^H I cannot end this judgment without condemning the greed and avarice demonstrated by the Respondent's father in the acquisition of the family property. He built houses on the disputed family land and prevented members of the family from enjoying the

same privilege.

The young relations of yesterday are now adults and they are obviously entitled to their fair share of the family property. I am of the opinion that this matter should have been instituted before a Customary Court where the issue of the Native Law and Custom of the people of Owerri would have been properly addressed and interpreted in respect of the disputed land. Nevertheless I endorse the advice of the Lower Court that this matter be amicably settled within the family circle. The end result is that this appeal lacks merit and it is therefore dismissed.

Judgment of the Lower Court is affirmed. No order as to costs.

TOBI JSC

The land in dispute is commonly known by all the parties as OHE OPARA NWANYIRI. It is situate at No.17 Ekeonunwa Street, Owerri. The case of the appellant/plaintiff is that the defendant/respondent is a stranger to the Umuopara Nwanyi family and a customary tenant to him. The case of the defendant/respondent is that he was an indigene of the family and that Maxwell Ekeocha was at a time the head of the family.

The learned trial Judge rejected the claim of the appellant that the respondent was his tenant. He held as follows:

“(1) The property, situate at No.17 Ekeonunwa Street and known as the Ohe Opara Nwanyi is joint property of the defendant and plaintiffs.

(2) The defendant is not a tenant of the plaintiffs.

(3) As there are 3 buildings on the land, erected by the defendant ostensibly for himself, the court directs and orders that all the houses belong to the plaintiffs and defendant. Accordingly, they shall share the property into 3, with the defendant taking first, as he represents the former head of the family.”

On appeal, the Court of Appeal set aside the judgment of the High Court. Dissatisfied, the appellant has come to the Supreme Court. Briefs were filed and exchanged. Appellant has a reply brief. The appellant formulated six issues for determination;

“1. Whether there is nothing in the pleadings and evidence of the appellant and respondent, to support the decision, that the property in dispute is the joint family property of the appellant and re-

spondent.

2. Whether the court below, was right in law, to hold that the appellant's claim of exclusive ownership, was indeed the main claim of the appellant before the trial court and once that failed, his whole case fails.

3. Whether the court below, was right in law, to reverse the findings of fact of the trial court, that the disputed property, is jointly owned family property of the appellant and the respondent, without the below, (sic) court showing that the finding was perverse. ^B

4. Whether court below, misconceived the case and thereby arrived at a wrong conclusion, in its judgment ^C

5. Whether the court below, was right in law, to set aside the judgment of the trial court, which granted less and not more than the appellant's relief of Exclusive Ownership.

6. Whether the Hon. Supreme Court as a court of last resort, is not competent in law to resolve this dispute between members of the same family; which may render any one of them homeless." ^D

The respondent formulated three issues for determination.

"1. Whether the Court of Appeal was wrong in holding that there was nothing in the pleadings of the plaintiffs/appellants, to suggest joint ownership of the property in dispute. ^E

(2) Whether the Court of Appeal was wrong in setting aside the Order for the sharing of the three buildings belonging to the defendant/respondent there being no such relief before the trial court. ^F

(3) Whether the plaintiffs/appellants proved their case on the preponderance of evidence."

The Court of Appeal in setting aside the decision of the trial Judge said at page 197 of the Record:

"I have taken a close look at the respondents', 'Further Amended Statement of Claim and the evidence given by them and on their behalf. Their case before the court below was based entirely on exclusive ownership of the disputed property. There was nothing in their pleadings to suggest joint ownership. The trial court was therefore wrong in holding that the property was jointly owned. The court having found that there was no sufficient evidence to establish exclusive ownership for the respondents should have been courageous enough to dismiss the claim." ^G ^H

Is the Court of Appeal wrong in arriving at the above finding?

Appellant holds that view. Respondent did not agree with him. Who is correct? I think the proper place to start is the claim. It reads: The plaintiffs claim from the defendant as follows:

- “(a) Declaration of title to all that parcel of land which is the dwelling place of Umuoparanwanyi family of Amawom Compound, Owerri and which lies at Amawom in Owerri Town in Owerri Judicial Division with an annual value of less than N10.00 (Ten Naira).
 (b) Possession of the said land, and,
 (c) N1,000.00 (one thousand Naira) being the balance of money which the defendant received in respect of the sale of the plaintiffs’ land called “Isi Ezi” situate opposite the dwelling place of the said Umuoparanwanyi family”.

A claim, in our adjectival law, originates an action. It is the pivot or the cynosure of the case. It sets out the relief or reliefs sought by the plaintiff. A plaintiff is bound by his claim and must not deviate from it willy-nilly. A plaintiff cannot in law present a case different from his claim as the law regards such an unsolicited procedure completely outside the law.

It is clear from the claim that it is on “declaration of title to a parcel of land which is the dwelling place of Umuoparanwanyi family of Amawom compound” That is the first relief. The other reliefs are parasitic on the first relief. They are possession of the land for which declaration of title is sought and the refund of the balance of N1,000.00 by the respondent to the appellant.

Where is the claim for joint ownership? I ask. Joint ownership, as the name implies, presupposes ownership of property by more than one person or by a group of persons. In that regard, property owned by two or more families could be said to be joint property of the families, with attendant tenancy rights of effluxion and other appurtenant tenancy conditions. A claim based on exclusive ownership of property is antithetical to the incidents of joint ownership in our property law. They are in quite distinct and different apartments. Their waters never meet.

Learned counsel for the appellant relied extensively on paragraphs 3, 7, 8, 9, 14, 18, 21, 24, 28, 30, 31, 32 and 33 of the Further Amended Statement of Claim as well as paragraphs 2, 3, 4, 6, 8, 9, 10, 11, 14, 15 and 18 of the Amended Statement of Defence and argued that joint ownership of the property was pleaded. He seems

to argue by implication that the respondent admitted joint ownership in the Amended Statement of Defence. Is he correct? I think not. It is an elementary principle of the law of pleadings that facts must be concisely, precisely and accurately pleaded. Pleadings should not give any room for doubt or speculation as to its real content. A Statement of Claim must clearly state the facts to be relied upon at the hearing and not embark on any rigmarole. Where facts in a Statement of Claim are not precisely stated, a defendant will be in some difficulty to respond accurately to the facts. So too the Statement of Defence as it relates to a Reply.

Let me take paragraph 35 of the Further Amended Statement of Claim. The paragraph is in the following terms: *"The plaintiffs therefore had no choice but to institute the present action and therefore claim as follows:*

(a) *Declaration of title to all that piece of land which is the home of the Umyuopara Nwanyiri or Nwanyirui family and called, "Uho Umuopara Nwanyhiri" and which lies at Ekeonunwa Street, Owerri in Amawom Compound, Owerri in Owerri Judicial Division and shown in plaintiffs' plan No .E/GA 343/74.*

(b) *A declaration that the defendant is the customary tenant of the plaintiffs in the said land.*

(c) *A declaration that by denying the plaintiffs' title in respect of the said land and behaving in a manner inconsistent with the proprietary interest of the plaintiffs, the defendant has forfeited the customary tenancy.*

(d) *An order of court for the defendant and members of his family to move out of the building they occupy in the said land and relinquish possession of same to the plaintiffs.*

(e) *Alternatively an order of court restraining the defendant to the occupation only of the storey building in the land shown in the plaintiffs plan as "storey building by the defendant."*

(f) *N1,000.00 (one thousand Naira) being balance of the proceeds of the sale of the plaintiffs' :Nsi-Ezi" land and which the 2nd plaintiff gave defendant for safe keep."*

Going by the principle of law that a relief in the Statement of Claim supersedes the writ, I cannot question the additional relief contained in the paragraph. I will make use of the paragraph and see whether it supports the appellant's case of joint ownership. There

are six reliefs in the paragraph. I will take them *seriatim*.

Paragraph 35 (a) is claim for declaration to the piece of land. That claim is consistent with the one In the writ. As I have already taken it, I will not repeat the exercise.

B Paragraph 35 (b) deposed that the defendant who is the re-
spondent in this appeal is the customary tenant of the appellants. How can the incident of customary tenancy metamorphose to joint ownership in our property law? I know of no such law and there is no such law. A tenant, whether customary or one held in relation to fee simple title, is a stranger to the property. His rights are restricted only
C to the period of his tenancy and he can sue and he sued in the restricted tenancy.

Paragraph 35 (c) is asking for the punishment of forfeiture of the customary tenure enjoyed by the respondent. As it is, paragraph
D 3.5 (c) clearly vindicates paragraph 35 (a) on the relief of title to the land. I say this because it is the owner that sues for forfeiture of the property by the tenant. If the appellant on his own says that the respondent is a customary tenant, where lies his claim to joint ownership. How did the customary tenant graduate to the position of a
E joint ownership of the property with the appellant?

Paragraph 35 (d) again flows from paragraph 35 (a) on the claim of title to the land. How can a person who is regarded as a joint owner of a property be asked to move out of the building they occupy in the land in dispute? I am inclined to the view that such a relief
F is sought against a tenant and not against a joint owner of property, all things being equal. I do not see any evidence to the contrary that things were unequal in this case.

Paragraph 35 (e) asked in the alternative for a restraining order to restrict the respondent to the occupation only of the storey building in the land. How come? If the respondent is a joint owner of the property with the appellant, why the relief for restriction to only a building? In joint ownership, the owners have one and the same interest in the property. They enjoy the property together. They also
H suffer together if the property jointly owned is a subject of litigation. I do not agree with the submission of counsel that the learned trial Judge really found joint ownership relief 35 (e) In which way?

Paragraph 35 (f) is on the claim of the balance of N1, 000.00. I have already dealt with it above.

I see from the reliefs that the appellant tries to blow hot and cold air at the same time. The law does not allow him to do so. He cannot ask for reliefs in a matter before the court and take an opposite position at the trial. Our adjectival law does not allow or permit such a somersault.

Learned counsel for the appellant also relied on the evidence of PW. 4 on his argument on joint ownership. PW.4, the 2nd plaintiff, said at page 68 of the Record:

“I know the land in dispute. It is called Ohe Umuopara Nwanyiri. It is also called Ohe Nwanyiri. It is the living home - the homestead of Umuopara Nwanyiri. In Owerri Ohe denotes a permanent living place of the domicile and his tenants which may not be alienated. I made a survey plan of the land in dispute.”

Learned counsel for the appellant relied on the above evidence. How does the evidence help the case of the appellant? I do not know. Should the appellant be taken as giving evidence on joint ownership by the above? Certainly, not. I think t can ask a few more questions. Is a living room, *ipso facto* evidence of joint ownership of the room? Does the mere mention of homestead of Umuopara Nwanyiri qualify as property jointly owned by the parties in this appeal? I still have more questions but I can stop here, hoping that I have made the point. In the circumstance, I come to the inescapable conclusion that the appellant did not make a case of, joint ownership in the High Court and the learned trial Judge was clearly in error in so holding. The Court of Appeal was right in reversing the decision of the learned trial Judge. I do not agree with learned counsel for the appellant that the Court of Appeal misconceived the case of the appellant.

That takes me to the issue of the Court of Appeal setting aside the order of the trial Judge for the sharing of the three buildings belonging to the respondent. In arriving at the decision the learned trial Judge said at page 121 of the Record:

“As there are 3 buildings on the land erected by defendants ostensibly for himself, the court directs and orders that all the houses belong to the plaintiffs and the defendant, Accordingly, they shall share the property into 3 with the defendant taking first as he represents the former head of the family”

Where is the relief for the above order made by the learned

trial Judge? I do not see any and there is none. It is elementary law that a court of law cannot grant a relief not sought. A court of law can only grant a relief sought if the plaintiff proves his case on the preponderance of evidence or the balance of probabilities. As there was no relief predicated on the order made in respect of the three buildings, the order is a nullity. The first burden is on the plaintiff to prove his case. He has a duty to prove the averments in his Statement of Claim. Where he fails to do so his case crumbles and it will be dismissed. I expected the learned trial Judge to do just that. He failed to do so. The Court of Appeal rightly, in my view, allowed the appeal by setting aside the judgment of the learned trial Judge

In the circumstance, I agree with Adekeye, JSC that this appeal should be dismissed and I also dismiss it. I abide by the orders as to costs in the judgment of Adekeye, JSC

D

MUKHTAR JSC

This is an appeal against the judgment of the Port Harcourt Judicial Division of the Court of Appeal which reversed the judgment of the trial court. Originally there were two plaintiffs in the High Court, who in the further amended statement of claim sought the following reliefs:-

“(a) Declaration of title to all that piece of land which is the home of the Umuopara Nwanyiri or Nwonyiri family and called “Uhe Umuopara Nwanyiri” and which lies at Ekeonunwa street, Owerri in Amawom compound Owerri in Owerri Judicial Division and shown in plaintiffs’ plan No. E/GA343/74.

(b) A declaration that the defendant is the customary tenant of the plaintiffs in the said land.

(c) A declaration that by denying the plaintiffs’ title in respect of the said land and behaving in a manner inconsistent with the proprietary interest of the plaintiffs, the defendant has forfeited the customary tenancy.

(d) An order of court for the defendant and members of his family to move out of the building they occupy in the said land and relinquish possession of same to the plaintiff. (sic)

(e) Alternatively an order of court restraining the defendant (sic) to the occupation only of the storey building in the land shown in the plaintiffs’ plan as “storey building by the defendant”.

(f) N1, 000.00 (One thousand naira) being balance of the proceeds of the sale of the plaintiffs' "Isi - Ezi" land and which the 2nd plaintiff gave the defendant for safe keep."

The defendant denied most of the allegations in his pleadings, and after the exchange of pleadings evidence was advanced. The learned trial judge found for the plaintiffs/appellant. The defendant was not satisfied and he appealed to the Court of Appeal, which set aside the judgment of the trial court, as follows:-

"From all I have said in this judgment, I am satisfied that there is merit in this appeal. Accordingly I allow the appeal and set aside the judgment of the trial court and in its place, I dismiss the respondents' claim before that court."

Aggrieved by the lower court's decision, the 2nd plaintiff appealed to this court on nine grounds of appeal from which the 2nd plaintiff/appellant distilled six grounds of appeal in his brief of argument. It is pertinent to note at this juncture that even though the original notice of appeal to this court bears the name of the two plaintiffs, at the end of the notice, the persons directly affected by the appeal, bears only the 2nd plaintiff, Clifford Osuji as the appellant. I believe that explains why the briefs of argument bear the name of only one appellant. The briefs of argument were adopted at the hearing of the appeal, inclusive of the appellant's reply brief of argument. The respondent formulated three issues for determination, which I find more succinct. The issues are:-

"1. Whether the Court of Appeal was wrong in holding that there was nothing in the pleadings of the Plaintiffs/Appellants (sic) to suggest joint ownership of the property in dispute."

2. Whether the Court of Appeal was wrong in setting aside the Order for the sharing of the three buildings belonging to the Defendant/Respondent there being no such relief before the trial court."

3. Whether the Plaintiffs/Appellants (sic) proved their case on the preponderance of evidence."

I will merely highlight the issues.

Issue (1) supra is in pari materia with the appellant's issue (1). In dealing with this issue, the proper thing to do is to look at the relevant pleadings in the appellant's final statement of claim and reproduce them. They are:-

"3. The land in dispute is the dwelling place of the family of

Umunwanyiri or Umuoparanyanyiri in Ekeonunwa kindred in Amawom compound, Owerri. It is called “*The Umuopara Nwanyiri*”. It has been the home of Opara Nwanyiri family since the village of Amawom settled in that part of Owerri over one hundred years ago. The term “*Ohe*” in Owerri Ibo denotes more than mere residence. It B connotes the permanent home of a family

5. *The land in dispute verged pink is the home of the plaintiffs and they have inherited it exclusively according to Owerri native ; law and custom being the only direct male descendants of C Oparanwanyiri who made his home in the land at a time beyond living memory. Indeed the plaintiffs are the only elders of the family. Both have children who are of tender ages*

8. *Opara Nwanyiri had a daughter called Mgbafor who was married at Naze. She born (sic) a son at Naze who was called D Ekeocha. After the death of the husband Ngbafor came to settle in Owerri. She died at Owerri. After her death her son Ekeocha lived with the family of Onyeneke Nkwocha Ekezie of Amawom and did not go back to Naze. It was while living with Ekeocha Ekezie that the defendant was born. The father Ekeocha had three sons Viz: Ukonu, E Nwozuzu and Maxwell (the defendant).*

9. *The defendant’s father and mother died while he was a small boy. The wives of Sampson Ekeocha did not like him and he was always very badly treated. As a result he was taken by Igwe Opara F Nwanyiri’s wife called Agakpole in whose “kitchen” he lived.*

10. *Igwe Opara Nwanyiri grew to a ripe old age and cultivated his brothers Osuji and Ohale and indeed two sons of Osuji named Ike and Nuo the father of the 2nd and 1st plaintiffs respectively. Igwe died in 1953 without a male issue.*

14. *After three years after the death (sic) of Igwe the defen- G dant started to build what he described to the plaintiffs as a family house in the plaintiffs’ home. He demolished the ‘Obi’ (an out house) of the family and built the supposed family house*

20. *Some of them present were therefore very familiar with H the history of Umunwanyiri family. He reminded the defendant that his (i.e. defendant’s) elder brother Nwozuzu who was present did not approve of his behaviour. The Chief told the defendant that he could not inherit any of the lands of Nwanyiri family according to Owerri native law and custom and could only remain in the plaintiffs’*

home by their own sufferance and not of right. He therefore strongly advised the defendant that it was in his own interest to make peace with the plaintiffs. There and then the defendant asked for time to settle with the plaintiffs and the meeting dispersed on that note.

24. Following the letter, the 2nd Plaintiff and the defendant appeared before the late Chief Njemanze and the elders of Amawom. At the meeting the defendant told the gathering that the matter should be regarded as settled. That he was handing back the premises to the boys (i.e. the plaintiffs) and that all he would ask for is that he should be allowed the site where he was putting up a storey building.”

The defendant/respondent denied most of the above averments in his statement of defence, and did not counter-claim, save for the following averments :-

“4. The defendant admits paragraph 4 of the statement of claim D and further says that the Isi Ezi is that of Umunwayiri owned by both plaintiffs and the defendant.

6. The defendant denies paragraph 6 of the statement of claim and says that the defendant is the present head of family according to Owerri Customary law and further says that the land has been shared.”

The point I am trying to make here is that even if the above pleadings were proved, the fact that the defendant did not counter claim, did not warrant the making of the orders the learned trial judge made on the sharing of the properties on the land in dispute. The evidence adduced by the appellant in support of these pleadings will be reproduced here below. P.W. I testified as follows:-

“The plaintiffs came from Umunwanyiri family while the defendants came from Ekeocha family. Umunwanyiri came from Amawom in Owerri Nchise; while the defendant came from Umuosu Naze. Ekeocha is now dead. Ekeocha is son of Mgbafor begotten by Nwanyi Mgbafor was married to a man from Umuosu in Naze-Choke father of Ekeocha. I know Samson Nwozuzu Ekeocha, a policeman. I also know Maxwell. He was the son of Ekeocha. Sampson Nwozuzu lived in Onyeneke Nkwocha Ekezie's Compound in Owerri Nchise. When their mother brought them from Naze, they settled in Onyeneke's compound. In his life time, he initially lived with his brother at Onyeneke's compound. When trouble ensued, he left and

B
C
 went to live with Igwe Opara Nwanyi whom he served. The present defendant is a son of Maxwell. Until his death Maxwell lived in Ohe Nwanyiri compound. By virtue of the Custom of Owerri Nchise Maxwell cannot claim the ownership of that place, nor any of them as they are Nwanwa - i.e grand children of the woman but arc grand - children. Nwanwa is a son or daughter of a member of the family in another place. The children of the maternal person cannot have claim' to the property in her mother's home as he or she should claim in his or her father's property. Ekeocha while in Ohe Nwanyiri was Nwanwa. He cannot lay claim belonging to Ohe Nwanyiri. If Ekeocha and his descendants begin to lay claim to Umunwanyiri it will not be accepted".

D
E
F
 The above evidence in chief was not attacked or debunked by the respondent in the course of cross examination. As much as the evidence is material to the claim, it was as though the defendant/ respondent was avoiding the issue that was the fulcrum of the case. It is very clear that the appellant's claim as per his relief (a) reproduced supra was for a declaration of title to the land in dispute, but the averment and the evidence adduced do not support the claim. Authorities abound that in a claim for declaration of title to land, especially one hinged on traditional history, as in the instant case, the plaintiff must prove his title by satisfactory, clear, cogent, and uncontradicted evidence, which the appellant in this case has failed to do. See Aikhionbare v. Omoregie 1976 12 SC. 11, Onibudo v. Akibu 1982 7 SC. 60, and Obawole v. Coker 1994 5 NWLR part 345 page 416.

G
 It is however instructive to note that even though the defendant/respondent's evidence did not dislodge the case of the appellant, and in particular the evidence of the defendant in a way corroborated the evidence of the plaintiffs witnesses. The evidence of the defendant under cross examination, which I will reproduce below is an illustration of this. It reads:-

"DWI.xx.

Q Do you know Vidar Osuji

H
 A. I do

Q. Your father reported a case against her in the Magistrates Court during her life time.

A. Yes.

Q. In that proceeding your father stated that he came from

Naze. Look at page 1 of Exhibit "G".

A. I was not there. I do not know but he said so in his evidence."

Indeed a careful perusal of the pleadings of the respondent and the appellant as reproduced above do not support the notion that the appellants claim was predicated on joint ownership of the property in dispute. B

I will at this juncture reiterate the position of the law that parties are bound by their pleadings, and a court of law will confine itself to parties' pleadings and reliefs when making its findings and ultimate orders, and what is more it should not import matters not therein. C
See *Orizu v. Anyaeagbunam* 1978 5 SC. 21, *Adebisi v. Oke* 1967 N.M.L.R. 64, and *George v. Dominon Flour Mills* 1963 1 ANLR 71.

In this wise, I subscribe to the finding of the court below, which reads as follows:- D

"I have taken a close look at the respondents' further Amended Statement of claim and the evidence given by them and on their behalf. Their case before the court below was based entirely on exclusive ownership of the disputed property. There was nothing in their pleadings to suggest joint ownership. The trial court was therefore wrong in holding that the property was jointly owned. The court having found that there was no sufficient evidence to establish exclusive ownership for the respondents should have been courageous enough to dismiss the claim". E

Indeed the plaintiffs/appellant did not prove their case on the preponderance of evidence and balance of probability which the law requires them to do, as it is settled law that a case will succeed on these principles of law. See *Elias v. Omo-Bare* 1982 5 SC. 25, *Woluchem v. Gudi* 1981 5 SC. 29, and *Ehidimhen v. Musa* 2000 8 G NWLR part 669, page 540. F

It is my belief that the treatment of the above issue will suffice for my concurring judgment on this appeal, the issues having been dealt with thoroughly in the lead judgment of my learned brother Adekeye JSC. I am in full agreement with the said lead judgment and I abide by all the consequential orders made therein. H

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below” but called “Port Harcourt Judicial Division” in the Appellant’s Brief) delivered on 18th January, 2001 setting aside the Judgment of the High Court of Imo State sitting at Owerri delivered on 28th January, 1993 - per Pats-Acholonu, J. (‘as he then was and of blessed memory).

Dissatisfied with the said decision, the surviving 2nd Plaintiff now the Appellant, has appealed to this Court on six grounds of appeal. He has also formulated six issues for determination which are reproduced in the lead Judgment of my learned brother, Adekeye, JSC. On his part the Respondent formulated three issues for determination which are also reproduced in the said lead Judgment.

When this appeal came up for hearing on 27th April, 2009, the leading learned counsel for the Appellant - Onumajuru, Esq. adopted both their Appellant’s and Reply Briefs. He urged the Court, to allow the appeal. The learned counsel for the Respondent - Nwokeukwu, Esqr., adopted their Brief and he urged the Court, to dismiss the appeal. Thereafter, Judgment, was reserved till to-day.

I note that the Plaintiffs in the trial court, claimed in paragraph their Further Amended Statement of Claim at page 53 of the Records, three declarations which had nothing to do with joint ownership. In relief (d) they claimed as follows:

‘An order of court for the defendant and members of his family to move out of the building they occupy in the (sic) said land and relinquish possession of same to the plaintiff (sic)’.
[the underlining theirs]

Claim (e) is in the alternative - i.e.
‘Alternatively an order of court restraining the defendant to the occupation only of the storey building in the land shown in the plaintiffs’ plan as “storey building by the defendant”.
[the underlining theirs]

Claim (f) is for, “N’1,000.00 (one thousand naira) being balance of the proceeds of the sale of the plaintiffs’ “Isi-Ezi” land and which the 2nd plaintiff gave the defendant for safe-keep”.

The learned trial Judge after hearing the evidence of the parties, the witnesses and counsel addresses, in a considered Judgment,

stated at pages 120 and 121 of the Records inter alia, as follows:

"In this case having regard to the run of events, I am not satisfied that the defendant or his father is a customary tenant. I am of the view that due to the uncertain and not quite explicitly definitive situational premise that was obtained after the death of Igwe Opara Nwanyiri, with the defendant's father having lived there till full age, that both the plaintiffs and the defendant own the property jointly.

.....

I find as a fact that none of the parties is a landlord or tenant to the other

[the underlining mine]

Having made these findings of fact and holding, His Lordship, proceeded to share or partition the said property in the following orders:

"(1) The property situate at 17 Ekeonunwu Street and known as Ohe Opara Nwanyiri is joint property of the defendant and plaintiffs.

(2) The defendant is not a tenant of the plaintiff.

(3) As there are 3 buildings on the kind erected by defendants ostensibly for himself, the court directs and orders then all the houses belong to the plaintiffs and the defendant. Accordingly, they shall share the property into 3 with the defendant taking first as he represents the former head of the family"

I note from the Records, that the Plaintiffs, never asked for the sharing or partitioning of the property in dispute. There was no counter-claim seeking for any partition of the property. From the said findings of facts and the holdings of the learned trial Judge, the obvious or inescapable conclusion, was/is that the plaintiffs, had woefully failed in their claim to exclusive ownership and possession of the property in dispute. It is now firmly settled firstly, that where, in the trial of an action, evidence has been adduced by both parties and the plaintiff fails to prove his case, the proper order, is that of dismissal and not even a non-suit. See the cases of *Gbajor Ogunburegni. (1961) ANLR 853; Okeyi v. Aguebor (1970) 1 NLR Madam 1 Adekele v. Aserifa (1986) 3 NWLR (Pt.30) 575; His Highness Oha L.B. Omorinbola II v.. The Military Governor of Ondo State & 3 ors. (1998) 12 SCNJ. 192 and Chief Odi & Ors Chief Iyala & ors. v. Chief Offor & ors. (2004) 4 SCNJ. 35 @ 55 citing the case of Gold v. Osaseren (1970) 1 All NLR 125 S.C. just to mention but a few.*

Secondly, parties and I will add the court, are bound by the pleadings and when once the evidence differs materially from the averment (s) in the pleadings, the claim, must be dismissed. See the cases of *Oyediran family. Amoo Family (1970) (3) NMLR 47: Ekpenyong & 3 ors. v. Chief Ayi & anor. (1973) 5 S.C. 169*
 B *Emezokwue v. Okadigbo (1973) 4 S.C. 113* and *Ibangu & anor v Usanga & ors. (1982) 5 S.C. 103 @ 124- 125* just to mention but a few.

Thirdly, a plaintiff must and should, succeed on the strength of his own case *Kodilenye v. Odu 2 WACA 336 & 337* and not on the weakness of the defence. The effect of failure to discharge the onus of proof by a plaintiff, is that the case, stands to be dismissed. See the cases of *Cobblah .v. Gbeke ors 12 WACA 294 Babajide v. Arisa & anor. (1966) 1 ANLR 254 Akporue & anor. v. Okei (1973) 12 S.C. 137; (1973) 3 ECSLR 1010* and *Adesanya v Alhaji Aderonmu & 2 ors. (2000) 6 SCNJ. 242 @ 252-253* and many others.

Fourthly, a court, does not award what is not claimed or sought in a Claim or suit. *Kalio v. Daniel-Kalio (1975) 2 S.C. 15 @ 17-19: Ekpeyong v. Nyong (1975) 2 S.C. 71 @ 81 - 82: Makanjuola & anor. v. Chief Balogun (1983) 3 NWLR (pt. 108) 192 @. 206; (1989) 5 SCNJ. 42; Olurortimi v. Ige & anor. (1993) 8 NWLR (Pt. 311) 257 : 271; (1993) 10 SCNJ. 1 Engr. Akinterinwa & 4 ors. v. Oladunjoye (2000) 4 SCNJ. 149 @ 163 - per Katsina-Alu, JSC citing other cases therein and *Joe Golday Co. Ltd. & 5 ors. v. Co-operative Development Bank (2003) 2 SCNJ. 1 @ 20* just to mention but a few.*

Lastly, he who asserts, must prove. See the cases of *Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248* and *Iyere v. BFFM Ltd. (2001) FWLR (Pt. 137) 1166* and the recent cases of *Chief Archibong & 6 ors. v. Chief I to & 4 ors. (2004) 1 SCNJ. 141 @ 160 - per Niki Tobi, JSC, citing some other cases therein and referring to Section 137 (1) of the Evidence Act; Ibrahim v. (2004) 4 NWLR (Pt.862) 89 (2004) 1 SCNJ. 309 @ 323 - per Edozie, JSC Ezemba v. Ibeneme & anor. (2004) 7 SCNJ. 136 @ 158 - per Onu JSC and *Interantional Messengers (Nig.) Ltd v. Pegofor Industries Ltd (2005) 5 SCNJ. 120 @ 135 - per Onu, JSC, just to mention but a few.**

I note that at page 197 of the Records, the court below - per Ogebe, JCA (as he then was), stated inter alia, as follows:

"I have taken a close look at the respondents 'Further Amended

Statement of Claim and the evidence given by them and on their behalf. Their ease before the court below was based entirely on exclusive ownership of the disputed property. There was nothing in their pleadings to suggest joint ownership. The trial court was therefore wrong in holding that the property was jointly owned. The court having found that there was no sufficient evidence to establish exclusive ownership for the respondents should have been courageous enough to dismiss the claim. B
The claim of exclusive ownership was indeed the main claim of the respondents before the lower court and once that failed, the whole case must fail.....” C
‘ [the underlining mine]

I agree because, I cannot fault the above since they are borne out by the Records.

It is from the foregoing and the fuller reasons and conclusion D in the said lead Judgment of my learned brother, Adekeye, JSC just delivered and which I had the privilege of reading before now, and with which I entirely agree, that I too, find no merit whatsoever in this appeal which fails, I too, dismiss it I abide by the orders contained in the lead judgment including that in respect or costs. E

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Adekeye, JSC. I agree with the reasons therein advanced in arriving at the conclusion that the appeal Lacks merit and should be dismissed. F

The original plaintiffs in paragraph 35 of their further amended statement of claim at the trial court, claimed as follows:-

“35 (a) Declaration of title to all that piece of land which is G the home of the Umuopara Nwanyiri or Nwanyiri family and called the Umuopara Nwanyiri’ and which lies at Ekeommwa Street Owerri in Amawom compound, Owerri in Owerri Judicial Division and shown in plaintiffs’ plan No. E/GA 343/74. H

(b) A declaration that the defendant is a customary tenant of the plaintiffs in the said land.

(c) A declaration that by denying the plaintiffs’ title in respect of the said land and behaving in a manner inconsistent with the pro-

prietary interest of the plaintiffs, the defendant has forfeited the customary' tenancy.

(d) An order of court for the defendant and members of his family to move out of the building they occupy in the said land and relinquish possession- of same to the plaintiff.

B (e) Alternatively an order of court restraining the defendant to the occupation only of the storey building in the land shown in the plaintiffs' plan as 'storey building by the defendant'.

C (f) -N-1,000:00 (One Thousand Naira) being balance of the proceeds of the sale of the plaintiffs' 'Isi-Ezi land and which the 2nd plaintiff gave" the defendant for safe keep."

The plaintiffs in the said further amended statement of claim and in their oral evidence at the trial court maintained that the defendant was a stranger (a Nwanwa) to the family of Umuopara Nwanyiri D and that he was a customary tenant of the plaintiffs. They claimed further that since the defendant laid claim to the ownership of the land in dispute, he had challenged his overlord and in consequence, has' forfeited 'his right as a customary tenant.

, The defendant, in his amended statement of defence, denied E the plaintiffs allegations. He maintained that they were indigenous to the family and that Maxwell Ekeocha, the original defendant was at a time the head of the family during his life time.

The learned trial Judge, in his reserved judgment delivered on F 28/1/93 found that the plaintiffs did not prove exclusive title to the disputed property. He found that the defendant was not a tenant of the plaintiffs as alleged by them. He further found, that the property was jointly owned by the parties. The learned trial judge then ordered that the three buildings on the property should be shared into G three parts and that the defendant should make the first choice.

'The defendant felt irked by die stance of the trial judge in ordering unsolicited partition of the property and appealed to the Court of Appeal (court below). In its own judgment delivered on 38th January, 2001, the judgment of the trial court was set aside and H the plaintiffs' claim before that court was dismissed.

The plaintiff was not happy with the position taken by the court below and has appealed to this court. The real live issues in this appeal have been captured in the three issues formulated in the defendant/respondent's brief of argument. They read as follows:-

“1. *Whether the Court of Appeal was wrong in holding that there was nothing in the pleadings of the plaintiff/appellant to suggest joint ownership of the property in dispute.*

2. *Whether the Court of Appeal was wrong in setting aside the order for the sharing of the three buildings belonging to the defendant/respondent, there being no such relief before the trial court.* B

3. *Whether the, plaintiffs/appellants proved their case on the preponderance of evidence.”*

It is settled law that parties as well as the court are bound by the pleadings filed by the parties to set a stage for the hearing and determination of issues raised therein. Evidence at variance with pleadings must be disregarded by the court. Pleadings must contain claims that are well set out by the plaintiff. See *Kalio v. Daniel Kalio* (1975) 2 S.C. 15 at 21; *Emegokwe v. Okadigbo* (1973) All NLR 3/4 at 317; *N.I.P.C. v. Thompson Organisation* C D

It does not accord with the law to go out of the pleadings of the parties to invent a judgment just for the sake of attempting to satisfy both parties ostensibly for no good reason. See *U.B.A. Ltd. v. Achoru* (1990) 6 NWLR (Pt. 156) 254; *Jumo v. Shehu* (1992) NWLR (Pt. 258) 129; *Union Bank Nig. Ltd. v. Penny-Mart Ltd.* (1992) 5 E NWLR (Pt. 240) 220; *Adebisi v. Oke* (1967) NMLR 64.

On issue relating to joint ownership, the court below per , (as he then was) found as follows:-

“ *I have taken a close look at the respondents’ Further Amended Statement of Claim and the evidence given by them and on their behalf. The case before the court below was based entirely on exclusive ownership of the disputed property. There was nothing in their pleadings to suggest joint ownership. The trial court was therefore wrong in holding that the property was jointly owned. The court G having found that there was no sufficient evidence to establish exclusive ownership for the respondents should have been courageous enough to dismiss the claim.”* F

The plaintiffs at the trial court both in their pleadings and oral evidence, referred to the defendant as the grandson of one Mgbafor married to a man from NAZE. They maintained that the defendant was a stranger (a Nwa-nwa) who lived with them as a customary tenant and who in fact had lost his right of possession by challenging his overlords on the land. It was asserted that the defendant’s H

continued stay in the family was subject to good behaviour. It beats my own imagination- that the plaintiffs who described the defendant in such strong terms would then aim round and that they should be seen as joint owners of the property in dispute. Even in paragraph 35 (e) of their further amended statement of claim which they

B harped upon, the same derogatory stance was made. 'They asked for an order restraining the defendant to the occupation only of the storey building in the-land'.

C They did not talk about who should have the two other building on the land put up by the defendant.

To my mind, the order for partition as made by the trial judge, I is akin to a mirage as it was not supported by any shred of pleading or in tune with logic. The trial court tried to make a case of joint ownership for the plaintiff/appellant; to no avail. The court below, D rightly in my view, set aside the finding of joint ownership and the unsolicited partition erroneously ordered by the trial court.

The order for partition was unwarranted. I need to say it that a court should not award that which was not claimed by a party. This is because a court is not a charitable organisation and the judge who E personifies it is not a father Christmas. See *Egonu v. Egonu (1978) 11-12 SC 111 at 133*; *Babatunde Ajayi v. Texaco Nig Ltd, (1978) 9-10 SC 1 at 27*; *Etim Ekpenyong v. Inyang Nyong (1975) 2 S. C. 71 at 80*; *Edebiri v. Edebiri (1997) 4 SCNJ 177(1997) 4 NWLR (pt. 498) 165*; *A.G. Anambra State v. Okafor (1992) 2 NWLR (pt. 224) 514*; *Awosile v. Sotumbo (1992)5 NWLR (Pt. 243;) 544*.

F I affirm the order made by the court below and resolve all issues including that relating to unsolicited partition in favour of the respondent. The appellant totally failed to satisfy the requisite conditions for orders of declaration sought by him. G

It is for the above reasons and those, ably set out in the judgment of my learned brother that I feel strongly that the appeal lacks merit and should be dismissed. I order accordingly and endorse all consequential orders in the lead judgment; that relating to cost inclusive. H