

**SUPREME COURT OF NIGERIA**

17TH JULY, 2009. SC. 196/2004

**CORAM:- G. A. OGUNTADE, M. MOHAMMED,  
F F. TABAI, J. A. FABIYI, O. O. ADEKEYE, JJSC**

JOSEPH OYEWOLE ..... PLAINTIFF/APPELLANT  
AND

1. KARIMU AKANDE

2. MONISOLA AKANDE ..... DEFENDANTS/RESPONDENTS

---

CUSTOMARY LAW - Family membership - Matrilineal descent - Applicability - No customary law forbids a Yoruba man - From tracing his family membership along his maternal line - Trial court was wrong to have discounted that possibility (H1)

PRACTICE & PROCEDURE - Affidavits - Reliance on affidavits - Not referred to by parties - Propriety - Where the contents appear damaging to a party's case - Trial court should give him opportunity to react thereto - Before relying on it (H2)

APPEALS - Findings of fact - Interference with - Duty of appellate court - It has a duty in the interest of justice - To disturb such findings - If they cannot be supported on printed evidence (H3)

**FACTS**

The plaintiff/appellant sued defendants/respondents claiming possession of the property in dispute. Appellant had brought the suit as the representative of Agbedegbede family. Their case was that the property, consisting of 8 shops and one living room, which is in the possession of the respondents, got in to the possession of the respondents' predecessor-in-title as a licensee of Agbedegbede family. The original respondent had died in the course of the suit whereupon he was substituted by the present respondents. It was the case of the respondents that they were in possession as members of the family and that the property was built by the original respondent on the portion of the family land which belonged to the respondents. They denied being strangers to the family as alleged by appellant.

In his evidence in chief, respondent maintained that he was

from Agbedegbede family. But under cross-examination he stated that the mother of his father was from Agbedegbede family. The trial judge held that the two pieces of evidence were contradictory in that both respondents father and his father's mother cannot be from Agbedegbede family. Accordingly, he preferred appellant's story that respondent was a stranger to the family and a mere licensee; and so gave judgment to the appellant. Aggrieved, respondents appealed to the Court of Appeal which allowed their appeal and set aside the judgment of trial court. Court of Appeal was of the view that those pieces of evidence were not necessarily contradictory in that a man could trace his membership of a family along his maternal line. Appellant has brought this appeal against the judgment of the Court of Appeal.

**ISSUE FOR DETERMINATION**

Whether or not the court below correctly set aside the findings of fact made by the trial court.

***HELD*** (Unanimously dismissing the appeal per **OGUNTADE JSC**)  
***Family membership - Matrilineal descent - Applicability***

1. I am respectfully unable to agree with the submission of the appellant's counsel. The court below faulted the reasoning of the trial court on two grounds. The trial court had reasoned that since it was the defendant's grandmother (the mother of his father) and not his father that hailed from the Agbedegbede family, the defendant/respondent could not be regarded as coming from the family. In other words, the trial court discounted the descent of the defendant/respondent from his maternal line. This clearly was a mistake of law. There is no customary law which forbids a Yoruba man from tracing his membership of a family along his maternal line. This is the point which the court below made in its judgment. (p. 2130 E)

***Reliance on affidavits - Not referred to by parties - Propriety***

2. Further the trial court stated that it had on its own discovered in the processes filed in court an affidavit sworn to by the defendant/respondent wherein he stated that the property in dispute was his mother's. The trial court saw it as contradictory to the case made by the defendant/respondent on the pleadings. The court below, rightly in my view, was of the opinion that if it was thought that the contents

of an affidavit to which none of the parties had made reference would impair or damage the defendant/respondent's case, the trial court should have given him the opportunity to react to it before relying on same to destroy his case. It is possible in my view that the defendant/respondent a Yoruba man was in the tradition of his tribe only making reference to his paternal grandmother as his mother.  
(p. 2130 H)

***Findings of fact - Interference with - Duty of appellate court***

3. In *Kuforiji v. V.Y.B. Ltd* (1981) 6-7 S.C. 25 page 46 (Reprint), this Court per Obaseki J.S.C. observed:

*“Appeal court do not normally disturb findings of facts arrived at by the courts below especially facts found by trial courts. Indeed they are reluctant and slow to do so unless compelled to do so by the errors apparent from the printed record of proceedings.*

*The appeal court will however rise to the call of duty in the interest of justice and disturb, alter, reverse or set aside the lower court's findings of facts if on the printed evidence such findings cannot be supported or are not the proper conclusions and Inferences to be drawn from the evidence.” (Underlining mine)*

It is my view that the trial court's approach to the evidence before it was erroneous and the court below was right to interfere with the exercise. There was undisputed evidence that the defendant/respondent with his own resources erected the shops and room now claimed by the plaintiff/appellant. I am satisfied that the court below came to the right conclusion. (p. 2132 A)

**REPRESENTATION**

Mrs. Funmi Quadri, (Mr. E.G. Nwolo with her) for the appellant.  
Dr. Joseph Nwobike for the respondents.

**CASES REFERRED TO**

*Bella v. Eweka* (1981) 1 SC 101  
*Nabham v. Nabham* (1967) NMLR 192  
*Dakat V Dashe* (1997) 12 NWLR (pt.521) 46.  
*Adeyemi v. Arokopo* (1988) 2 NWLR (pt 77) 703  
*Balogun v. Agboola* (1974) 1 ALL NLR (Pt. 2) 66  
*Nneji v. Chukwu* (1996) 10 NWLR (Pt. 378) 265

Ogbechie v. Onochie (1998) 1 NWLR (Pt. 470) 370

Owonikoko V Arowosaiye (1997) 10 NWLR pt.523) 61

A.M. Akinloye V. Bello Eyiola & Ors. 1968 NMLR 92 at page 95

Lucy Onowan & Anor v. JJ. I. Iserhien (1976) NMLR 263 at 265

Nwosu v. Board of Customs & Excise (1988) 5 NWLR (Pt. 93) 225

B Chief Victor Woluchem & Ors Vs Chief Simon Gudu & ors (1981) 5 S.C 178 at 197-198

### **STATUTE REFERRED TO**

C Constitution of the Federal Republic of Nigeria, 1999, s. 36

### **LEAD JUDGMENT BY OGUNTADE JSC**

The appellant was the plaintiff at the ILA High Court of Osun State. He had brought the suit as the representative of

D Agbedegbede family against the respondent as the defendant. He claimed the following relief:

*“Possession of the 8 shops and one living room occupied by the defendant as a license of the plaintiff’s family which occupation had been determined ex-gratia by notices on 29/12/88 and 31/1/89 respectively. The defendant is still holding out in the said 8 shops and one living room despite the said notices.”*

The parties filed and exchanged pleadings after which the case was tried by Bada J (as he then was). On 6/05/96, the trial Judge gave judgment in favour of the plaintiff/appellant as in line with his claim. The present respondent was dissatisfied with the said judgment. He brought an appeal against it before the Court of Appeal, Ibadan (hereinafter referred to as 'the Court below'). On 19/11/02, the Court below allowed the appeal. It dismissed the plaintiff/appellant's claim. The plaintiff has now come before this court on a final appeal against the judgment of the court below. In the appellant's brief filed, the issues for determination in the appeal were identified as these:

*“i) whether the lower court was right in overturning the findings and decision of the trial court, when such findings and decisions are products of evaluation of evidence by the trial court after hearing and watching demeanour of the witnesses or*

**ALTERNATIVELY:**

*Whether the Justices of the lower court were right in substituting their views or evaluations for those of the trial court.*

*ii) whether the lower court is right in reversing the judgment on the basis of its assumption which have (sic) no support from the evidence on record.*

*iii) whether the lower court was justified in revising the judgment of the trial court simply because the trial court referred to his (sic) record when indeed there are other materials, evidence supporting the finding/decision of the trial court aside the facts contained in the affidavit referred to in the record”*

The respondent, in his brief adopted the issues for determination as formulated by the appellant. It is appropriate to point out that following the death of the original defendant, the present respondents were substituted for him.

I intend to discuss the pleadings of the parties upon which the case was heard by the trial court in order to expose the true issues in contest in this appeal. The plaintiff/appellant in paragraphs 3 to 17 of his amended statement of claim pleaded the nature of the dispute between the parties thus:

*“3. The Defendant is a farmer and resides at Agbedegbede’s Compound, Ila-Orangun.*

*4. The Defendant is the son of one Abatan (now dead) whose family house is at Ojabobe’s compound, Ila-Orangun whilst the Defendant family house is at Ododo’s compound, Ila-Orangun.*

*5. During his lifetime Abatan seduced some one’s wife from his father’s compound (Ojabebe’s compound) and fled with the woman to take refuge at Agbedegbede’s compound.*

*6. He was offered refuge within the Plaintiff family house where he lived until he died about 22 years ago, at which time the Defendant was a passenger tout at the Ondo Motor garage.*

*7. The Defendant came from Ondo to perform the burial ritual of his late father Abatan but thereafter asked one Adeniran then head of the plaintiff’s family to be allowed to remain temporarily in his room hitherto occupied by his late father, (in the plaintiff’s compound) but Adeniran turned down the request that was about 15 years ago.*

*8. The Defendant then enlisted the assistance of the incumbent Orangun of Ila Oba William Ayeni to prevail on Adeniran allow him to occupy the room where his father died until his personal house then under construction at Odode’s compound (Defendant’s moth-*

ers compound).

9. *The Orangun of Ila Oba William Ayeni pleaded with Adeniran to allow the Defendant live in the room thereupon the defendant was allowed to live in the room until he completed his said house.*

B 10. *The defendant completed his own house but instead of moving into it rented it out.*

C 11. *The defendant about 13 years ago advised the plaintiff to allow prospective tenants to convert some apartments in the plaintiff's compound into shops in order to raise funds to repair the family compound which funds shall begin to accrue from rent collected after such tenants have used up the sum expended on building the shops.*

D 12. *The Plaintiff confronted the Defendant about the deceit and demanded the payment to him of all monies hitherto realized by the Defendant by way of rent from the shops.*

13. *The Defendant retorted by concocting unfounded allegations against some outspoken members of the Plaintiffs family and getting the Police to arrest them.*

E 14. *The Plaintiff thereafter demanded vacant possession of the shops and the room occupied by the Defendant as Licensee of the plaintiff's family but the Defendant used all sorts of tactics (e.g. use of charms, harassment physical threats, etc.) to remain in occupation of the shops and room.*

F 15. *Agbedegbede's compound was built by Igbonibi the founder of Ila for his son Agbedegbede.*

16. *Agbedegbede family is a ruling house at Ila and the members are princes and princesses of Ila-Orangun.*

G 17. *The defendant has long completed his own house at Ododo's compound (defendant's mother's family compound) but instead of moving into the house as promised, he sat tight in Agbedegbede's compound terrorising the family and exploiting their resources.*

H The defendant in paragraphs 2 to 21 of his statement of defence pleaded thus:

*"2. The defendant admits paragraph 4, of the statement of claim only to the extent that he was Abatan's son, but denies every other averment contained therein.*

3. *The defendant says that Odode's compound In Ila-Orangun is his mother's house.*

4. *The defendant denies paragraph 5, 6, 7 8, 9, 11, 13, 14, 15 and 16 of the plaintiff's statement of claim and shall require strict proof thereof at the hearing of this suit.*

5. *In regard to paragraphs 5, the defendant says that Abatan (his father) married from Ejemu Compound, but did not seduce anybody's wife.* B

6. *Further Agbedegbede's compound was known and still known as the defendant's family house.*

7. *The defendant avers that he grew up at Ila-Orangun in Agbedegbede's house without anybody indicating to him that he did not belong to the family until recently when due to disagreement between the plaintiff and the defendant over the defendant's cocoa farm land.* C

8. *The defendant shall provide evidence at the hearing of this suit in poof of the assertion above.* D

9. *Contrary to plaintiff's claim in paragraph 6, the defendant avers that Abatan (his father) lived, died and buried at Agbedegbede's compound around 1961.* E

10. *Furthermore, Abatan (the defendants father) died at Agbedegbede's compound as the Baale (Head of family).*

11. *Abatan reigned as Baale Agbedegbede (head of family) for 13 years before his death, and burial at Agbedegbede compound.* F

12. *The defendant further avers that at the material time he was a business man at Ondo, but not a tout as alleged by the plaintiff or at all.*

13. *In answer to paragraph 7 of the statement of claim, the defendant avers that the he did not ask Adeniran or anybody for that matter for permission to stay in his father's house.* G

14. *The defendant vehemently denies paragraph 8 of the statement of claim. Further the defendant's house at Odode had long been completed before Abatan's death. Evidence shall be shown to ascertain this fact.* H

15. *The defendant did not instruct anybody including Orangun of Ila to plead with Adeniran or at all.*

16. *The defendant's house was long completed, but it was not Agbedegbede family house.*

17. *In answer to paragraph II, of the statement of claim, the defendant avers that Abatan built Agbedegbede family house to the modern stage in which it is now, cutting it into shops and living apartments.*

B 18. *The house and the shops were built during the life-time of Abatan, well over 13 years ago.*

19. *Evidence of the carpenters, bricklayers, who worked on the house and the shops shall be given at the trail of this suit.*

C 20. *Further evidence of some of the tenants put in the shops By Abatan himself will be supplied at the hearing of this suit.*

D 21. *Because of the greed and selfishness of the plaintiff, the plaintiff attempted to wrestle Ada farm which is the property of the defendant's father. The defendant challenged the plaintiff and reported the matter to the Ila-Orangun Police station. This was the basis of quarrel between the plaintiff and the defendant."*

It seems to me that the issues formulated by the appellant boil down to one issue which is whether or not the court below correctly set aside the findings of fact made by the trial court.

E A comparison of the averments in the parties' pleadings reveals that the issue submitted to the trial court for determination falls within a narrow compass. Whereas it was the plaintiff/appellant's case that the defendant/respondent was only a licensee of the Agbedegbede family of ILA in respect of the 8 shops and 1 room in dispute, the defendant/respondent contended that he was a member of the said family and not a licensee of the Agbedegbede family as pleaded by the plaintiff/respondent and further that his right over the shops and 1 room in dispute derives from his membership of the Agbedegbede family. He pleaded further that his deceased father Abatan was in fact the Baale of the Agbedegbede compound and head of the said family.

In his evaluation of the evidence, the trial judge at pages 35 - 36 of the record in his judgment said:

H *The defendant on the other hand denied that he went to Agbedegbede family to take refuge. He testified that he is from Agbedegbede compound, Ila-Orangun. He traced his root of title as follows that Orangun Agbedegbede who came from Oke-Ila had the following children.*

*(1) Aroko*



(2) *Molomo*

(3) *Odofin Agaraoladami*

(4) *Adejo*

(5) *Adekami*

*The defendant went further in his testimony that Molomo gave birth to his own father.* B

*Under cross examination the defendant said that the mother of his father is from Agbedegbede compound, Ila-Orangun.*

*The piece of evidence given by the defendant under cross examination that mother of his father is from Agbedegbede compound is contradictory to the evidence of the defendant under examination in chief when he stated that he is from Agbedegbede compound, Ila-Orangun meaning that his father is from that compound.* C

*In my own view it cannot be correct to say that the mother of his father came from Agbedegbede compound, Ila-Orangun and also that the father of his father is from Agbedegbede compound, Ila-Orangun. In view of the contradiction, the entire evidence of the defendant and that of the 3rd D.W. are hereby rejected in that regard. I accept the evidence of the plaintiff that the father of the defendant is from Ojabebe compound, Ila-Orangun and that his mother is from Ododo compound, Ila-Orangun.* D E

*Consequently, the following are my findings of facts:-*

*1) The defendant is not a member of Agbedegbede compound, Ila-Orangun.*

*2) The defendant - hails from Ojabebe compound, Ila-Orangun and his mother hails from Ododo compound, Ila-Orangun.* F

*3) It was as a result of the intervention of P.W.I i.e. Oba William Ayeni, the Orangun of Ila that made the plaintiff's family to allow the defendant stay in Agbedegbede compound.* G

*In view of the evidence and my findings above, I therefore hold that the defendant is a licensee in Agbedegbede compound, Ila-Orangun.*

And at pages 36 - 37, the Judge further said:

*In order to get to the root of this case, I went through the case file and it was discovered that before the defendant filed the statement of defence used in this case he had sworn to an affidavit putting up a defence different from that in the statement of defence. For instance, in the affidavit sworn to by the defendant in an application* H

dated 2/7/93 and filed on 5/9/93, it was stated thus:-

Paragraph 3. That the eight shops and one living room, The subject matter of the plaintiff's suit are my properties". Paragraph 4. That I single handily built the shops and the living house without any assistance from the plaintiff. Paragraph 5. That the shops were built  
B by me more than twenty years ago.

Paragraph 14. That the portion of the house which I built over twenty years belonged to my mother."

C When the entire affidavit was read together it was clear that the defence which was put up in the affidavit referred to above is contrary to the defence put forward in paragraph 16, 17, 18, 22 & 23 of the statement of defence and the evidence which the defendant gave before the court.

D The entire defence put forward by the defendant are contradictory to each other because at one breath the defendant stated that he single handedly built the shops and the living house and at another breath he said that Abatan his father built the shops and the living house. In the circumstance the defence put forward by the defendant are hereby rejected."

E The court below in reacting to the approach of the trial court which led it to the conclusion that the defendant/respondent's father was not a member of Agbedegbede family said at pages 72 - 73:

F It is clear from the findings of fact made by the learned trial Judge that the main reason why he rejected the case put up by the defendant is that the appellant's father could not claim to be a member of Agbedegbede family. The learned trial Judge's conclusion in that respect was not based on any evidence led to show that inheritance through female issue was not permissible under the relevant  
G customary law. The law is long settle that rights of daughters in property held under native law and custom are well recognised and protected and that the court has jurisdiction to make orders to protect a female's rights, even to the extent of ordering partition: see *LOPEZ V. LOPEZ* (1924) 5 NLR 50.

H It follows therefore that if Molomo, a daughter of Orangun Agbedegbede, was the mother of Abatan, the defendant's father was from the Agbedegbede compound and her said son, Abatan built on a portion of the Agbedegbede family land allotted to his mother, Molomo, it could not be out of place if the appellant succeeded his

*father on the same Agbedegbede family land. The learned trial Judge was therefore wrong in rejecting the defence put up by the defendant at the trial. By doing that he failed to consider the rights of the female children vis-a-vis family property.”*

On the finding by the trial court that the defendant/respondent had at an earlier stage of the proceedings deposed to an affidavit which implied that the portion of the house upon which he built, belonged to his mother. The court below at pages 73 - 75 of the record said:

*The question whether the learned trial Judge was right in taking into consideration the contents of an affidavit deposed to by the appellant in support of an interlocutory application will now be considered. The position of the law is that it is lawful for the court to use such document provided such evidence is relevant. But in the instant case, the matter was raised suo motu for the first time by the learned Judge in his judgment. It was therefore not possible for any of the parties, particularly the appellant, to make any input. Secondly, it must be dearly shown that the alleged contradiction must be of such a nature that it would to the root of the case for the defence before it could lead to the very serious result of rendering the entire case for the defence useless.*

*Thus in the instant case, the facts discovered by the learned Judge from the contents of the affidavit filed at an earlier stage of the proceedings were that the appellant claimed that:*

- 1) the eight shops and one living room are his property;*
- 2) that the appellant single handedly built the shops and the living house without any assistance from the plaintiff;*
- 3) that he built the shops more than 20 years ago, and*
- 4) that the portion of the house which he “built over 20 years ago belonged to my mother”.*

*It is the purported averment that the land on which the disputed house was built belonged to the appellant’s mother that the learned Judge relied on in holding that Abatan, the appellant’s father could not have been a member of Agbedegbede family.*

*As already stated, the appellant was never confronted with the alleged conflict in his defence. His case was that the land was the portion of Agbedegbede family land given to his father’s mother, Molomo, who was a daughter of Agbedegbede. Had the appellant*

been confronted with the alleged conflict, he would have at least been given an opportunity of an explanation. It is therefore very wrong of the learned trial Judge to have relied on that single point in throwing out the entire appellant's defence. The need to confront the appellant is even more appropriate in the instant case because it was possible that the sentence: "the portion of the house which I built over 20 years ago belonged to my mother" could be that there was a typographical error or omission by which the word "father's" was omitted before the word "mother". This is because from the pleadings and evidence led in support, it was the defendant's case that the portion was that of "his father's mother".

Was the court below wrong in its approach to the evaluation of evidence as done by the trial court? The appellant's counsel has submitted to us in his brief of argument that the court below was in error to have reversed the finding of fact made by the trial court which said finding was the result of the trial judge's view as to the credibility of the witnesses before it. Counsel relied on *Owonikoko V Arowosaiye* (1997) 10 NWLR pt.523) 61 and *Dakat V Dashe* (1997) 12 NWLR (pt.521) 46. It was further submitted that the court below being an appellate court could not take upon itself the duty to evaluate the evidence of witnesses which turned on the credibility of such witnesses. *Adeyemi v. Arokopo* (1988) 2 NWLR (pt 77) 703.

***I am respectfully unable to agree with the submission of the appellant's counsel. The court below faulted the reasoning of the trial court on two grounds. The trial court had reasoned that since it was the defendant's grandmother (the mother of his father) and not his father that hailed from the Agbedegbede family, the defendant/respondent could not be regarded as coming from the family. In other words, the trial court discounted the descent of the defendant/respondent from his maternal line. This clearly was a mistake of law. There is no customary law which forbids a Yoruba man from tracing his membership of a family along his maternal line. This is the point which the court below made in its judgment.***

***Further the trial court stated that it had on its own discovered in the processes filed in court an affidavit sworn to by the defendant/respondent wherein he stated that the property in dispute was his mother's. The trial court saw it as contra-***

**dictory to the case made by the defendant/respondent on the pleadings. The court below, rightly in my view, was of the opinion that if it was thought that the contents of an affidavit to which none of the parties had made reference would impair or damage the defendant/respondent's case, the trial court should have given him the opportunity to react to it before relying on same to destroy his case. It is possible in my view that the defendant/respondent a Yoruba man was in the tradition of his tribe only making reference to his paternal grandmother as his mother.**

In *Chief Victor Woluchem & Ors Vs Chief Simon Gudu & ors* (1981) 5 S.C. 178 at 197 - 198 (Reprint), this court per Nnamani JSC said:

*The principles under which an appeal court would interfere with the findings of a lower court have been laid down by several authorities of this court and court in common law jurisdictions. It is now settled law that if there has been a proper appraisal of evidence by a trial court, a court of appeal ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. Furthermore, if a court of trial unquestionably evaluates the evidence then it is not the business of Court of Appeal to substitute its own views for the views of the trial court. See *Folorunsho v. Adeyemi* (1975) NMLR 128 CAW; *A.M. Akinloye V. Bello Eyiola & Ors.* 1968 NMLR 92 at page 95; *UBalogun v. Agboola* (1974) 10 S.C. 111. That of course does not mean that an appellate court is completely shut out. Certainly not, for if it were so the appeal itself would be pointless. The interference must, however, be in accordance with the principles that have been laid down over the years. If the judgment of the trial court can be demonstrated to be affected or full of material inconsistencies and inaccuracies or if the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has gone completely wrong, the Court of Appeal will interfere. Also if the trial court takes a decision which is clearly perverse it will be open to the Court of Appeal to set aside such a decision. See *Lucy Onowan & Anor v. J.J. I. Iserhien* (1976) NMLR 263 at 265; See also *Nabham v. Nabham* (1967) NMLR 192. These principles are based on sound common sense.*

(Underlining mine)

Similarly, **in Kuforiji v. V.Y.B. Ltd (1981) 6 - 7 S.C. 25 page 46 (Reprint), this Court per Obaseki J.S.C. observed:**

***“Appeal court do not normally disturb findings of facts arrived at by the courts below especially facts found by trial courts. Indeed they are reluctant and slow to do so unless compelled to do so by the errors apparent from the printed record of proceedings.***

***The appeal court will however rise to the call of duty in the interest of justice and disturb, alter, reverse or set aside the lower court’s findings of facts if on the printed evidence such findings cannot be supported or are not the proper conclusions and inferences to be drawn from the evidence.”***

(Underlining mine)

***It is my view that the trial court’s approach to the evidence before it was erroneous and the court below was right to interfere with the exercise. There was undisputed evidence that the defendant/respondent with his own resources erected the shops and room now claimed by the plaintiff/appellant. I am satisfied that the court below came to the right conclusion.***

This appeal fails. It is dismissed with N50,000.00 cost against the appellant in favour of the defendant/respondent.

F

### MOHAMMED JSC

I have been privileged before today of reading in draft the judgment just delivered by my learned brother Oguntade, JSC. I am entirely with him that this appeal deserves to fail thereby justifying its dismissal.

The appeal is against the decision of the Ibadan Division of the Court of Appeal given on 19th November, 2002, reversing the decision of the trial High Court of Oyo State sitting at Ila Orangun, which on 6th May, 1996 granted possession of one room and eight shops built at Agbedegbede Compound Ila Orangun to the Plaintiff/Appellant. In allowing the appeal, the Court below returned possession of the disputed room and eight shops to the Respondents whose father was responsible for putting up the structures not only as a member of

the Agbedegbede Compound but also as the Head of the family. The evidence on record in support of this position between the parties is quite clear. The trial Court having ignored this evidence in the determination of the dispute between the parties in its judgment, the Court below was duty bound to interfere as it correctly did in its judgment now on appeal. Indeed there is no merit at all in this appeal which I also hereby dismiss with N50,000.00 costs to the Respondents.

---

### **TABAI JSC**

I have read, before now, the lead judgment prepared by my learned brother OGUNTADE JSC and I entirely agree with his reasoning and conclusion that the appeal lacks merit.

The entire appeal pertains to the evaluation of evidence. The substance of the case of the Plaintiff/Appellant is that the father of the Defendant/Respondent, Abatan, was from the Ojabebe's compound, Ila-Orangun. During his life time Abatan seduced the mother of the Respondent who was the wife of somebody in the father's Ojabebe compound and fled with her to take refuge in their Agbedegbede compound. He lived and died at the said Agbedegbede compound and was even buried there.

After Abatan's death Adeniran his elder brother who was also the Baale of the Agbedegbede compound refused to allow the Defendant/Respondent to stay in the compound. It was also their case that it was at the intervention of the Orangun of Ila-Orangun, Oba Ayeni that the (Defendant/Respondent) was allowed to stay at the premises he occupied at the Agbedegbede compound. Under cross-examination the PW1 said that the Defendant was in possession of the shops and rooms in the house. The PW2 Oba William Adeona Ayeni also testified to the effect that he persuaded the members of the Agbedegbede compound to allow the Respondent's stay in the compound after his father's death.

The case of the Respondent was that his father was not only a member of the Agbedegbede family but that he was even head of the family for 13 years. It was also his case that when his father died he was buried even before he returned from Ondo where he lived. He even listed those who succeeded his father as head of the

Agbedegbede family. He gave the children of Orangun Agbedegbede as (1) Aroko (2) Molomo (3) Odofin Agaraoladami (4) Adeojo and (5) Adekomi and that Molomo gave birth to his father. According to him, his father built the house in dispute.

B There was no strong evidence from the Plaintiff/Appellant to  
 controvert the evidence of the Respondent. According to the PWI,  
 the Defendant advised a conversion of certain rooms of the property  
 into shops and it was so converted. He did not say who carried out  
 the conversion but admitted that the Respondent was collecting rents  
 C from tenants. The evidence points irresistibly to the conclusion that  
 the Respondent could not have been a stranger in the Agbedegbede  
 compound. There is overwhelming evidence that the Appellant's father  
 Abatan was a member of the Agbedegbede family through his mother  
 Molomo and that he built the house in dispute.

D On the evaluation of the evidence, it is necessary to point out  
 that the evidence does not involve the credibility of witnesses and the  
 Court of Appeal was in as vantage a position as the trial Court to  
 appraise the evidence and make its own findings of facts and conclusions.  
 At page 74-75 of the record the Court below found as follows:

E *"In conclusion therefore, I hold that it is clear from the evidence  
 placed before the trial court that the house in dispute was built on  
 Agbedegbede family land. The appellant's father, Abatan built the house  
 on a portion of the Agbedegbede family land and that the man lived therein  
 for many years before he died in 1961. The said*  
 F *Abatan was related to the Agbedegbede family through his mother,  
 Molomo - who was a daughter of Agbedegbede and that the portion of the  
 Agbedegbede land on which he built was the one allotted to his mother,  
 Molomo. The Appellant inherited the house from his late*  
 G *father, Abatan, upon the man's death in 1961 and has been in possession  
 since then. After the appellant took over the house he converted a portion  
 of the house into the eight shops and rented them out. There was therefore  
 abundant credible evidence before the learned trial Judge which show  
 that the land in dispute was*  
 H *Agbedegbede family land and the portion now in dispute was the one  
 allotted to the Abatan's mother - who was a member of the Agbedegbede  
 family. The Appellant is therefore entitled to be on the land having  
 inherited it from Abatan, his late father."*

I have no reason to disturb these findings of the Court below



as they are amply supported by the evidence on record. On the whole it is my view that the appeal has no substance and is accordingly also dismissed by me. I also assess the costs of this appeal at N50,000.00 in favour of the Respondent.

B

### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, Oguntade, JSC. I agree with the reasons therein contained and the conclusion reached that the appeal lacks merit and should be dismissed. C

The appellant, as plaintiff at the trial court, tried to establish a case of licensor/licensee relationship with Abatan, the respondents' father. On the other hand, the respondents pleaded and established the fact that Malomo, their grand mother is a daughter of Agbedegbede, the founder of the compound. The evidence in this regard was not challenged and should be accepted as correct. See *Bello v. Eweka (1981) 1 SC 101*. D

The learned trial judge jettisoned the unchallenged evidence of the respondents. Curiously, the trial judge fished for a former affidavit sworn to by the respondent and used it to find against him without being heard on same. The respondents' appeal to the court below was allowed. The court below found that the respondents established their root with Agbedegbede family via the maternal line and that it was not correct to employ the contents of a former affidavit against the respondents without affording them a hearing on same. In short, the court below felt that it was not a case of licensor/licensee relationship as painted by the appellant. E F

I wish to briefly state it that an appellate court should not ordinarily substitute its own views of fact for those of the trial court. See *Ebba v. Ogodo (1984) 1 SCNLR 372*; *Balogun v. Agboola (1974) 1 ALL NLR (Pt. 2) 66*. An appellate court will not interfere with findings of fact made by the trial court except where wrongly applied to the circumstance of the case or conclusion reached was perverse or wrong. See *Nwosu v. Board of Customs & Excise (1988) 5 NWLR (Pt. 93) 225*; *Nneji v. Chukwu (1996) 10 NWLR (Pt. 378) 265*. G H

Certainly, ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and

heard the witnesses. An appeal court will not lightly interfere with same unless for compelling reasons. See *Ogbechie v. Onochie (1998) 1 NWLR (Pt. 470) 370*. It must be stated without equivocation that where the trial court jettisoned vital and unchallenged evidence as in the matter herein, the appellate court should not abdicate its function of appraising such facts.

In my considered opinion, the court below was right in appraising the vital evidence which the trial court brushed aside. The evidence established the fact that the respondents are members of Agbedegbede family through the maternal line which accords with Yoruba Customary Law. See *Lopez v. Lopez (1924) 5 NLR 50*.

As a follow up to the above, the manner in which the trial court fetched from the record and employed a former affidavit sworn to by the respondent, to his detriment, without being heard on it, was not proper. I am at one with the stance posed by the court below.

For the above reasons and the fuller ones set out in the lead judgment, the appeal should fail. And it is hereby dismissed with N50,000 costs in favour of the respondents.

### **ADEKEYE JSC**

I read before now the judgment just delivered by my learned brother G.A. Oguntade JSC. This action was instituted before the High Court of Osun State, Ila-Orangun Judicial Division in a representative capacity by the Head of the family Joseph of Oyewole on behalf of the Agbedegbede family of Ila-Orangun. The original Defendant - Raji Akande was sued for:-

*“Possession of eight shops and one living room occupied by the Defendant as a licence (sic) of the Plaintiffs family which occupation had been determined ex-gratia by notice on 29/12/88 and 31/1/89 respectively. The Defendant is still holding out in the said eight shops and one living room despite the said Notice.”*

The Plaintiff before the Trial court conducted this case for his family along the pleadings in the amended statement of claim as follows:

(1) Agbedegbede’s family is a ruling house at Ila and the members are princes and princesses.

(2) The Defendant has no affinity with the Plaintiffs family, he hails from an entirely different family, he does nothing in common with the family, he is a commoner and a stranger constituting himself a thorn in the flesh of the plaintiff's family.

(3) The defendant is the son of one Abatan (now dead) whose family house is at Ojabebe's Compound- Ila-Orangun whilst the Defendant's family house is at Odode's Compound- ila-Orangun. B

(4) He was offered refuge within the Plaintiffs family house where he lived until he died about 22 years ago at which time the defendant was a tout at the Ondo Motor Garage.

(5) The Defendant came from Ondo to perform the burial rites of his late father Abatan, but thereafter asked one Adeniran then Head of the Plaintiffs family to be allowed to remain temporarily in the room hitherto occupied by his late father, (in the Plaintiff's Compound) but Adeniran turned down the request that was about 17 years ago. C D

(6) The Orangun of Ile Oba William Ayeni pleaded with Adeniran to allow the Defendant to live in the room there upon, the Defendant was allowed to live in the room until he completed his said house. E

(7) The Defendant completed his own house but instead of moving into it rented it out, he sat tight in Agbedegbede' Compound.

(8) The Defendant about 13 years ago advised the Plaintiff to allow prospective tenants to convert some apartments in the Plaintiffs compound into shops in order to raise funds to repair the family compound which shops shall begin to accrue from rent collected after such tenants have used up the sum expended on building the shops. F

In the Statement of defence the Defendant relied on the G undermentioned averments:-

(1) Agbedegbede's Compound were known and is still known as the Defendants family house.

(2) The Defendant avers that he grew up at Ila-Orangun in Agbedegbede's Compound without anybody indicating to him that he did not belong to the family until recently when due to disagreement over the Defendant's Cocoa farm land. H

(3) Contrary to the Plaintiffs claims in paragraph b, the defendant avers that Abatan (his father) lived, died and buried at

Agbedegbede' Compound around 1961.

(4) Furthermore, Abatan (the defendant' father died and buried at Agbedegbede's Compound as the Baale (Head of family).

(5) Abatan reigned as Baale Agbedegbede (Head of family) for 13 years before his death and burial at Agbedegbede's Compound.

(6) In answer to paragraph 11 of the Statement of claim, the Defendant avers that Abatan built Agbedegbede family house to the modern stage in which it is now cutting it into shops and living apartments.

(7) The houses and the shops were built during the lifetime of Abatan, well over 13 years ago.

(8) In answer to paragraph 15 of the Statement of Claim, the Defendant says that he occupies and in possession of the house from Abatan the defendant's father

(9) Abatan as Head of family was the custodian of Ifa-Olojo, the symbol of worship for Agbedegbede sons and daughters

(10) In answer to Plaintiff's Claim in paragraphs 18 and 19 the Defendant's root of origin was Orangun Agbedegbede who begot Adeoti. Adeoti begot Malomo. Malomo begot Abatan the father of the Defendant herein.

Both parties testified orally to substantiate their averments. In his considered judgment the learned Trial Judge found as follows:-

*"Finally having regards to all circumstances of this case, it is my view that the evidence before the Court and my findings in this case it is my view that the Plaintiff has proved his case and I hold that the Plaintiff is entitled to possession of the 8 shops and one living room occupied by the Defendant as a licensee of the Plaintiff's family at Agbedegbede Compound, Ila-Orangun."*

The vital issue for determination was who owned the property, subject of dispute in Agbedegbede Compound now that the Court had concluded that the Defendant was a licensee? In answering the question the learned Trial Judge waded through the case file before the Court where he discovered that before the defendant filed the statement of Defence used in this case he had sworn to an affidavit putting up a defence different from that in the Statement of Defence. In the affidavit filed on 5/7/93 the Defendant claimed ownership of the eight shops and one living room that the property was single

handedly built by him without assistance from the Plaintiffs. The shops were built twenty years ago, and where he built upon belonged to his mother. The Trial Court found that this portion of the affidavit evidence contradicted the averments in his pleadings before the Court.

On the one hand the Defendant claimed that he single handedly built the shops and living room, on the other hand he claimed that they were built by his father Abatan. The Court rejected his evidence about the shops and declared that they belonged to the Agbedegbede family. The Defendants lodged an Appeal against the decision of the Trial Court.

The Court of Appeal found in favour of the Defendants as Appellants. They were substituted for their father who died but had so far prosecuted the case. The Lower Court allowed the appeal having found that there was credible evidence before the learned Trial Judge that the house in dispute was built on the portion of Agbedegbede family land allotted to Malomo who was a daughter of Agbedegbede. The appellant inherited the house after the death of his father, Abatan who was a son of Malomo. The Lower Court held that there was material contractions in the evidence of the Appellant in their defence before the Lower court. The learned trial Judge did not draw their attention to the alleged conflicts which he raised suo motu for the first time in the course of writing his judgment and relied on same to reject the case of the defendant. The Respondent came to this Court on further appeal. Both parties adopted and relied on three issues identified for determination by this court. My lord had aptly considered the three issues for determination in the leading judgment. The summary of the grouse of the Appellant in this appeal affects the role of evaluation and appraisal of evidence by the Trial Court and the attitude of the Appellate court to such evaluation. A Trial court has a primary duty after hearing evidence from witnesses and watching their demeanour to evaluate relevant and material evidence adduced by both parties having regard to the pleadings of the parties. The Court must thereafter show how and why he came to its findings of fact and final determination of the issue before him. In the process of evaluation the court must have regard to certain guidelines like -

- (a) Admissibility of the evidence
- (b) Relevancy of the Evidence

(c) Credibility of the evidence

(d) Conclusiveness of the Evidence

(e) Probability of the evidence of one party more than that of the other.

The Trial Court having satisfied itself that the foregoing have been complied with, it shall now apply the law to the situation presented in the case before it so as to arrive at a conclusion one way or the other-

Mogaji v. Odofin (1978) 4 SC 91

Akibu v. Olaleye (1974) 11 SC 139

The learned Trial Judge in the course of writing his judgment in the instant case delved into the case file and suo motu picked an affidavit sworn to by the Respondent in support of an application, to contradict his oral evidence and the averments in his pleadings. He came out with contradictions in his defence which he regarded as material. Such conclusion is bound to affect the credibility of the Defendant, render his evidence inconclusive, and on the balance of probabilities, less probable than that of the Plaintiff. The poser at that stage is whether a trial judge can suo motu, in writing his judgment eke out evidence which is not only detrimental but also devastating to the defence of a party before him.

It is not disputed that a court is entitled to look at a document in its file while writing its judgment or ruling despite the fact that the document was not tendered and admitted as an exhibit at the trial.

Agbaisi v. Ebikerefe (1997) 4 NWLR pt 502 pg 630

Agbahomoro v. Eduyegbe (1999) 3 NWLR pt 594 pg 170

This is an exercise of judicial discretion which must be exercised not only judicially but also judiciously. A judicial exercise of discretion by a learned trial judge demands that when an issue is raised suo motu by the court parties must be given adequate opportunity to address on it so that justice will be done to all parties.

African Continental Bank Ltd v. Crestline Ltd (1991) 6 NWLR pt 197 pg 301

Oje v. Babalola (1991) 4 NWLR pt 185 pg 267

Shehu v. Bonifield Justices (1964) 2 OB 573

Ojo Osagie v. Adoni (1994) 6 NWLR pt 349 pg 131

Udogu v. Egwatu (1994) 3 NWLR pt 330 pg 120

Adejumo v. David Hughes and Co. Ltd (1989) 5 NWLR pt

120 pg 146

The Trial Court's failure to hear both parties on his mission to get to the root of the case by comparing the affidavit evidence to the averments in the statement of defence on the issue of the ownership of the eight shops and one living room, amounted to a denial of justice calling for the judgment to be set aside, which the Lower Court had rightly done. The situation has brought into prominence the doctrine of fair hearing. The right to fair hearing is a fundamental constitutional right guaranteed by the Constitution in Section 36 (1) of the 1999 Constitution. The attributes of fair hearing include

(a) That the court or tribunal hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudicial to any party in the case. It envisages giving parties the opportunity of presenting their respective cases without let or hindrance from the beginning to the end. Fair hearing is all about fairness, which is the determining factor for the application of natural justice.

Adigun v. A.G Oyo State (1987) 1 NWLR pt 53 pg 678

Deduwa v. Okorodudu (1976) 9 - 10 SC 329

News Watch comm. Ltd v. Attah (2006) 12 NWLR pt 993 pg 144

A. G Rivers State v. Ude (2006) 17 NWLR pt 1008 pg 436

When a Trial Court has carried out proper assessment and evaluation of the evidence it is not the duty of an Appellate Court to re-evaluate and re-assess what had already been evaluated. An Appeal Court shall be left with no option but to affirm such a decision. An Appeal Court will re-evaluate evidence in an appeal where the Trial Court fails to do so in a proper way particularly where:-

(a) There has been a wrong exercise of judicial discretion.

(b) The Trial Court drew wrong inferences from the totality of the evidence.

The Lower Court had rightly re-evaluated the evidence before the Trial Court and came to the conclusion that there was abundant credible evidence that the land in dispute was allotted to Abatan's mother who was a member of Agbedegbede family, and that the Respondents inherited the land through Abatan. With fuller reasons given in the leading judgment. I also dismiss the appeal for lacking in merit. I adopt the consequential orders as mine.