

**SUPREME COURT OF NIGERIA**  
18TH DECEMBER, 2009. SC. 18/2003  
**CORAM:- A. I. KATSINA-ALU, M. MOHAMMED,**  
**W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

1. LAMULATU SHASI  
2. AIRAT AROMIE ..... APPELLANTS  
AND  
1. MADAM SHADIA SMITH  
2. IBRAHIM GALUBI ..... RESPONDENTS  
3. FALILAT MUSTAPHA  
*(for themselves and on behalf of the  
descendants of the Aliu Erukunmi Family)*

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APPEALS - Issues - Raised and resolved suo motu - Effect - It amounts to a denial of fair hearing - Which occasioned miscarriage of justice to appellants - For Court of Appeal to have so raised and resolved the issue of admission (H1)

LAND LAW - Declaration of title - Proof - Effect of admission - Plaintiff has onus of proving title to satisfaction of the court - It is erroneous to grant a declaration of title - Based on admission in opponent's pleadings (H2)

**FACTS**

The plaintiffs/Respondents sued defendants/appellants for declaration of title to the property in dispute, orders of possession and for payment of rent and for any other order as may seem fit to the court. After hearing, the learned trial judge found no merit in respondents' case and so dismissed it. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal. In doing so, the court had raised the issue as to whether paragraph 3 of statement of defence, being evasive, amounted to an admission in law, and without calling on the parties to address it on the point, held that it did. Consequently, it held that what was admitted needed no further proof.

Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal contending inter alia, that declaration of title to property is not granted on the basis of admission. More-

over, appellants argue that Court of Appeal was wrong to have raised and resolved the issue of admission suo motu without reference to the parties.

**ISSUES FOR DETERMINATION**

*“(i) Whether the Court of Appeal was right to have suo motu raised and decided on an issue not submitted by parties for adjudication without first calling on parties to address on it.*

*(ii) Whether a court is not bound to consider and make findings on a fundamental issue properly formulated before it.*

(Etc. see p. 2300)

**HELD** (Unanimously allowing the appeal per **MUNTAKA-COOMASSIE JSC**)

***Issues - Raised and resolved suo motu - Effect***

1. The issue of whether the averment contained in paragraph 3 of the defence amounts to an admission of the paragraphs in the statement of claim, was not raised by any of the parties. The lower court raised it suo motu without calling the attention of the parties to address it on it. And subsequently based its judgment on it, with due respect, it is my humble view that this has occasioned a miscarriage of justice on the part of the appellants having been denied their rights of fair hearing. I therefore resolve this issue in favour of the appellants. (p. 2305 A)

***LAND LAW - Declaration of title - Proof***

2. Can an admission in the defendants pleadings/defence grant the plaintiffs claim for declaration of title to land? In view of the burden, of proof placed on the plaintiff, and the decision in *Kojo II v. Bonsie supra*. It is trite law that the burden of proof is always on the plaintiff in an action for declaration of title.

An evasive pleadings *or* averments such as “the defendants are not in a position to deny or admit paragraph ...” is of no moment at all in an action for declaration of title to land. The plaintiff must” discharge the burden of proof placed on him by proving its title to the satisfaction of the court.

I therefore hold that if the lower court had properly raised the issue of admission in the pleadings, it still amounts to an error in law to have granted the respondents’ claim for declaration of title based on

the said admission in the pleadings. (p. 2305 D/H)

### **CASES REFERRED TO**

Osafire V. Odi (1994) 2 NWLR (pt. 325) 125  
 Oro Vs Falade (1995) 5 NWLR (pt. 396) 385/402  
 Saliu V. Egbeibon (1994) 6 NWLR (pt. 348) 23 at 44  
 K.C.D.A Vs SULE (1994) 3 NWLR (pt 332) 256 at 352  
 Usman Vs Umaru (1992) 7 NWLR (pt. 254) 377 at 398  
 Adewuyi V. Odukwe (2005) 4 NWLR (pt. 945) 473 at 491  
 Akinfolarin Vs Akinola (1994) 3 NWLR (pt 335) 659 at 690  
 Carlen (Nig) Ltd V. Unijos (1994) 1 NWLR (pt. 323) 631 at 665  
 U.B (Nig) Ltd Vs SAY (Nig) Ltd (1994) 8 NWLR (pt 361) 150 at 165  
 Atuanya Vs. Onyejekwe & Anor. (1975) 1 ALL NLR (Pt. I) 62 at 67  
 FEANYI CHUKWU (OSONDU) LTD. V. SOLEH BONEH (NIG.) LTD.  
 (2000) 5 NWLR (Pt.656) 322 at 351

### **REPRESENTATION**

Mr. J. O. Odubela for the Appellants/Applicants with A. O. Chukwuma-Eneh (Miss) B. E. Njoku (Mrs.)  
 T. O. G. Aminashaun Esq., for the Respondents/Applicants.

### **LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

The Respondents, who were the Plaintiffs at the trial court, in their writ of summons and statement of claim claimed against the Appellants as follows:-

“(a) *DECLARATION* that the property situate at No 6 Bridge Street, as shown in the plan attached was the property of Aliyu Erukunmi and that the three branches of the Erukunmi Family - Williams - Galubi - Mustafa are entitled in equal shares to the said, property.

(b) *AN ORDER* of possession against the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendant to vacate and deliver up possession of rooms and appurtenances to the plaintiffs.

(C) *AN ORDER* that all accumulated rents and/or arrears of rent due and payable to the plaintiffs be paid.

(d) *AND* for such other Order/s as this Honourable Court, may deem fit to make.

Both parties filed and exchanged their respective pleadings and

called witnesses in support of same. At the close of the case the trial Judge found no merit in plaintiffs' case and dismissed it. In reaching its conclusion, the trial court held as follows: - (On page, 195 2<sup>nd</sup> paragraph): -

B *"Exhibit A showed that the plaintiffs' parents declared, that the property was the property of Sunmonu as averred by the defendants, that Sunmonu was the father of Amodu and Abudu Salami Sunmonu, and that, is not all. Exhibit A also showed that Amodu was in fact the father of the plaintiffs parents namely, Jarinatu Williams, Selia, Senabu, Mutairu and Mustafa, as asserted by the defendants. This is corroborated by the PW1 when she said that Falilat,*  
 C *Mustafa 3<sup>rd</sup> plaintiff was member of the same Idi igi Exhibit A was an instrument executed in 1926 and registered as No 15 at page 15 LR 24 vol. 409/34. I believe the contents of Exhibit A. that is no iota of*  
 D *truth in the evidence of the plaintiffs that Amodu was not the father of the plaintiffs' parents. In fact when construed properly Exhibit A showed that there were actually two Idi igi, i.e. that of Amodu and that of Abudu Salami Sunmonu.*

E *I also believe the evidence of the 2<sup>nd</sup> defendant that Amodu was also the father of Ramotu Amodu and also maternal great-grand father of the 1st defendant. Airatu Aromire.*

F *I found proved and I hold that it was as a result of the fact that the where about of Ramotu Amodu were unknown and that she was presumed dead that her name was not mentioned in Exhibit A. I also find that at the end of the proceedings in this action the defendants succeeded in establishing a better title than the plaintiffs, in the result the plaintiffs' claim totally fails and it is accordingly hereby dismissed."*

G Dissatisfied with the judgment of the trial court, the plaintiffs successfully appealed to the Court of Appeal Lagos Division herein-after called the lower court. The court heard the appeal and allowed it. In the lead judgment of Aderemi JCA as he then was held thus:- See pp 424 -434 of the record.

H *"I pause to say that on the state of the pleadings issue No 3 on the Appellants brief which relates to the correct application of the principle in Kojo II Vs Bonsie (1957) 1 WLR 1223 is non Sequitur. The defendants/Respondents have admitted being on the property indeed the 1st defendant/respondent admitted being on the property since 1945. They also by their paragraph 6 admitted that they*

*have not being paying rents. Issues No. 1/2,4,5,6 and 7 of the Appellants' brief of argument must be resolved in their-favour. And I so resolve than, (sic) I have said issue No. 3 is non sequitur. As a corollary all the seven issues raised by the respondents are already resolved against, them. For all the reasons I have stated, this appeal is adjudged to be meritorious. It is accordingly allowed".* B

This is a unanimous decision as Oguntade and Amiru Sunusi JJCA also concurred. The Plaintiffs won the battle before the court below. The defendants being dissatisfied with the above decision appealed to this court and filed a Notice of appeal containing five grounds of appeal and dated 4th February, 2002. They are reproduced hereunder as follows:- C

#### **GROUND OF APPEAL**

*"(i) The Learned Justices of the Court of Appeal erred in law when they held that paragraph 3 of the Appellants/Defendants statement of Defence was an admission of paragraphs 1,4,6,8,9,10,11 and 12, of the respondents/plaintiffs' statement of Claim when that issue was not one of points raised-in the appeal or canvassed by either of the parties to the appeal.* D

#### **PARTICULARS OF ERROR**

*The Issue of pleadings was not one of the Grounds raised in the Respondents' Notice of Appeal before the Court of Appeal. No issue was made out of it in the brief by both parties and the appeal was not focused, on that point.* E

*(ii) The Learned Justices of the Court of Appeal erred in Law by NOT determining whether or not there was a Tenant/Landlord Relationship between the Appellants and the Respondents and ordered that all accumulated rents due and payable to the Plaintiffs./ Respondents be paid.* F

#### **PARTICULARS OF ERROR**

*The Appellants in their issue No. (i) invited the Court of Appeal to determine whether or not there was at anytime a Tenant/ Landlord Relationship between Appellants and the Respondents. The Court of Appeal did NOT consider this issue or make any finding on it but proceeded and ordered that, accumulated rents due and payable be paid.* G

*(iii) The Learned Justices of the Court of Appeal erred in law by NOT considering all the seven (7) issues raised for determination* H

*in the Appellants. Brief of Argument and make specific findings on them and thereby came to a wrong conclusion.*

(iv) *The Learned Justices of the Court of Appeal erred in law in their construction and application of Exhibit “A”, the Deed of partition in the absence of any other evidence and thereby came to a wrong conclusion.*

(v) *The Learned Justices of the Court of Appeal erred in their omission to determine the relevance of the principle in Kojo .11 Vs. Bonsie (1957) 1 NWLR 1223 to this appeal.*

In accordance with the rules of this court both parties filed and exchanged their brief of argument. The Appellants in their brief dated 14/11/05 formulated four (4) issues for determination thus:-

“(i) *Whether the Court of Appeal was right to have suo motu raised and decided on an issue not submitted by parties for adjudication without first calling on parties to address on it.*

(ii) *Whether a court is not bound to consider and make findings on a fundamental issue properly formulated before it.*

(iii) *Whether Exhibit A (Deed of Partition) relates to the subject matter of the suit.*

(iv) *Whether the omission and or failure of the Court of Appeal to consider and determine the relevance of the principles in KOJO II Vs BONSIE (1957) 1 WLR 1223 to the appeal is fatal.”*

*The Respondents submitted two issues for our consideration of this appeal as follows:-*

“(a) *Whether the Court of Appeal was right in taking the issues formulated by the parties together where such issues are interwoven.*

(b) *Whether the Court of Appeal acted properly in re-evaluating the evidence before the trial Court”.*

At the hearing of the Appeal, the learned counsel for the Appellants adopted their brief of argument and urged this court to allow the appeal.

On the issue one formulated in this brief, learned counsel submitted that in all the issues submitted for determination before the lower court, there was no where the issue of admission i.e. whether the averment in paragraph 3 of the statement of defence amounted to an admission of the respondents statement of claim was raised by the parties before it. It was therefore the learned counsel submission that for the lower court to have based its judgment on the alleged

admission suo motu without affording the parties an opportunity to address the court on it; and as such this occasioned miscarriage of justice. Learned counsel relied on the following cases:-

- (i) *Usman Vs Umaru* (1992) 7 NWLR (pt. 254) 377 at 398;
- (ii) *Ojo Osagie Vs Adonri* (1994) 6 NWLR (part 349) 131;
- (iii) *Akinfolarin Vs Akinola* (1994) 3 NWLR (pt 335) 659 at 690".

On the other hand learned counsel submitted that even if the issue of an alleged admission has been properly raised, an action for declaration of title cannot be determined based on an alleged admission in the pleadings. The party claiming has the burden to prove his title and burden never shifted. Counsel cited the following cases in support:-

- (i) *Salu V. Egeibon* (1994) 6 NWLR (pt 348) 23 at 44.
- (ii) *Motunwase V. Surungbe* (1988) 5 NWLR (pt 92) 90/92.

On the issue No 2, the Appellants counsel submitted that the lower court was, wrong for not determining the fundamental issue of whether there was a "Landlord/Tenant relationship between the parties at any given time in respect of No 6 Bridge Street, Lagos. It was his submission that the lower court was bound to consider all the issues properly raised before it, except where the determination of sole issue could determine the appeal, for example' a thrash-hold issue of jurisdiction; cases of *Sapara Vs UCU Board* (1988) 4 NWLR (part 86 58/61; *Oro Vs Falade* (1995) 5 NWLR (pt. 396) 385/402; *F.C.D.A. Vs Sule* (1944) 3 NWLR (pt. 332) 257/270 were cited.

On the 3<sup>rd</sup> issue learned counsel submitted that the lower court was in error when it held that Exhibit A does not relate to the -subject matter in dispute in this case. Counsel referred to the findings of the trial court which was based on the- evidence in Record and it was wrong for the lower court to have reversed the findings and substituted its own. Learned counsel cited the case of:-

*Eloichin (Nig) Ltd Vs Mbadue* (1986) 1 NWLR (part. 14) 47 at 51. He then submitted that Exhibit A is clear and unambiguous and, the lower court ought to have given it simple and ordinary meaning. The cases of:-

*U.B (Nig) Ltd Vs SAY (Nig) Ltd* (1994) 8 NWLR (pt 361) 150 at 165; and *U.B.N Vs Ozigi* (1994) 3 NWLR (pt. 333) 386 at 403 were cited.

On the 4<sup>th</sup> issue learned counsel submitted that it was an error

on the part of the lower court for failing to consider the principles in *KOJO II Vs BONSIE* (supra) which rests the burden of proof in action for declaration of title on the plaintiffs. He cited the following cases:-

- (a) *Adewuyi V. Odukwe* (2005) 4 NWLR (pt. 945) 473 at 491;
- B (b) *Ojomo Vs Incar (Nig) Ltd* (1993) 7 NWLR (pt 307) 534/546.

The learned counsel for the Respondents adopted his brief of argument and urged this court to dismiss the appeal. On his first, issue it was the submission of the counsel that the lower court was right to have taken all the issues together as they were interwoven. It was right for the lower court to determine the appeal by considering one ground of appeal or issue formulated if that ground or issue will formally determine the matter between the parties and cited the case D of *K.C.D.A Vs SULE* (1994) 3 NWLR (pt 332) 256 at 352.

On the second issue, the learned counsel submits that the lower court has the power to upset the findings of facts made by a trial court to alter, reverse or set aside such findings of fact which are unsupported or drawn from the evidence or pleadings; he cited in support the case of :-

*Omoborinola II V. M. I. Gov. Ondo State* (1998) 14 NWLR (pt 584) 89. Learned counsel also submitted that by virtue of Section 16 of the Court of Appeal Act, the lower court can correct the findings of the trial court. It was therefore his submission that the lower court was right in its judgment that if the trial court had properly evaluated the pleadings by the parties it would have discovered that the appellants had admitted the title of the Respondents through paragraphs 1,4,6,8,9,10,11 and 12 of the Appellants statement of claim, the following cases were cited. *Beverages Ltd V. Pepsi. Cola International Ltd* (1994) 3 NWLR (pt. 330) 12 and *Ekpa V. Utong* (1991) 2 NSCC 278.

I have carefully perused and analysed the judgment of the lower court, it is apparent, that the said judgment was based on the alleged admission of the Respondents title by the Appellants in their statement of defence that formed the basis on which the lower court allowed the Respondent's appeal, it is therefore necessary to reproduce the affected paragraphs of the pleadings. In paragraphs 1,4,6,8,9,10,11 and 12 of the statement of claim, the Respondents



averred as follows:-

(1) The plaintiffs are descendants and member of the Alfa E nukunmi Family.

(4) The plaintiffs institute this action as representatives of Aliu E nukunmi Family and have obtained leave of the court to prosecute the matter in such capacity. B

(6) The said Aliu E nukunmi in his life time had 5 children namely Jarinatu, Seliasy, Senabu, Mutairu - and Mustafa.

(8) The 3 existing branches (Idi - Igi) of the E nukunmi family are;- C

(a) Williams - who descended from the jarinatu Williams branch.

(b) Galubi, who descended from Senabu branch.

(c) Mustafa who descended from the Mustafa branch.

(9) The plaintiffs aver that the Jarinatu Williams died intestate many years ago leaving behind Shadia Smith (nee Williams) (the 1<sup>st</sup> D plaintiff who is the head of the Williams Branch) as the head of the entire E nukunmi family.

(10) The plaintiff avers that the said Senabu died intestate many years ago leaving behind children and grand children one of who is Ibrahim Galubi (the 2<sup>nd</sup> plaintiff). E

(11) The plaintiffs aver that Mustafa died many years ago leaving behind children and grand children one of whom is Falilat Mustafa (the 3<sup>rd</sup> plaintiff).

(12) The plaintiffs aver that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not members of the Aliu E nukunmi not being, traceable to any of the 3 branches". F

The appellants, in paragraph 3 of their statement of defence averred as follows:

*"The defendants are not in a position to admit or deny paragraphs 1, 4, 6, 8, 9, 10, 11 and 12 of the statement of claim and' put the plain tills to the statement of claim and put the plaintiff to the strictest proof thereafter"*. G

In considering these averments i.e. paragraph 3 of the statement of claim the lower court held as follows:- H

*"Indeed the types of traverse has been held to amount to an admission see:-*

*(i) Lewis V. Peat (NRI) Ltd V. Akhimen (1976) 1 All NLR (pt.1)*

(ii) *Chief (Mrs) Akintola & Anr V. Mrs Salako (1986) 2 NWLR (pt. 24) 598; and*

(iii) *Osafile V. Odi (1994) 2 NWLR (pt. 325) 125, Perhaps 1 should add that what is admitted need no further prod”.*

It is on the basis of this that the lower court gave judgment to the respondents. However, the learned counsel, to the appellants have argued strenuously that the lower court was wrong on two grounds: -

(1) The issue that paragraph 3 of the statement of defence amounts to an admission was not raised by either party, and

(2) An action for declaration of title cannot be determined based on alleged admission in the pleadings the burden, is on the plaintiffs to establish their title on credible evidence.

I must point out here that the respondent’s-brief of argument is of no assistance in this respect, as it failed to address or reply the appellants’ brief on the legal issues put forward. Be that as it may, I have carefully gone through all the issues submitted to the lower, court for determination, nowhere was the issue of admission in the defence pleadings raised. No doubt the issue was raised and determined suo motu by the lower court without affording the parties the opportunity to address it on it. I quite agree therefore with the learned counsel to the appellants that the approach adopted by the lower court has in fact occasioned miscarriage of justice. This is particularly so, when the decision of the lower court was based solely on this issue of admission in the pleadings. This court in the case of *Ojo Osagie V. Adonri (1994) 6 NWLR (pt. 349) 131 at 154*, laid down the principles as follows:-

*“The duty of the court is to consider the case before it in the light of the parties complaints. It has no business setting up for the parties a case different from the one set up by the parties in their pleadings. To do so will result in the denial to one or the other of the parties of his right to fair hearing”.*

At p.155, this court concluded thus:

*“It is wrong for an appellate court to formulate or raise an issue suo motu no matter how clear it may appear to be, and proceeded to resolve it and to decide the matter before it on that issue without hearing the parties on such issue so formulated. If the court” must raise any new issue suo motu, it must draw the attention of the par-*

ties to it and give them the opportunity of addressing it on such issue”.

See also Carlen (Nig) Ltd V. Unijos (1994)1 NWLR (pt. 323) 631 at 665, and Irom V. Okimba (1998) 3 NWLR (pt. 540)15 at 25”

**The issue of whether the averment contained in paragraph 3 of the defence amounts to an admission of the paragraphs in the statement of claim, was not raised by any of the parties. The lower court raised it suo motu without calling the attention of the parties to address it on it. And subsequently based its judgment on it, with due respect, it is my humble view that this has occasioned a miscarriage of justice on the part of the appellants having been denied their rights of fair hearing. I therefore resolve this issue in favour of the appellants.**

In any case, and assuming the issue of admission was properly raised and determined, the question that is agitating my mind is, **can an admission in the defendants pleadings/defence grant the plaintiffs claim for declaration of title to land? In view of the burden, of proof placed on the plaintiff, and the decision in Kojo II V. Bonsie supra. It is trite law that the burden of proof is always on the plaintiff in an action for declaration of title.**

**An evasive pleadings or averments such as “the defendants are not in a position to deny or admit paragraph ...” is of no moment at all in an action for declaration of title to land. The plaintiff must discharge the burden of proof placed on him by proving its title to the satisfaction of the court.** This court has settled this legal issue in the case of Motunwase V. Sorungbe (1988)5 NWLR (pt. 92) 90/92 when it held as follows:-

*“A fact which is admitted by the other side need no proof. But in a case such as one for declaration for title where the onus is clearly on the plaintiff to lead a strong and positive evidence to establish his case for such a declaration, an evasive averment such as “the defendant is not in a position to deny or admit paragraphs.....”, and will put the plaintiffs to the strictest proof hereof does not remove the burden on the plaintiff...”*

See also Salu V. Egeibon (1994) 6 NWLR (pt. 348) 23 at 44. **I therefore hold that if the lower court had properly raised the issue of admission in the pleadings, it still amounts to an error**

***in law to have granted the respondents' claim for declaration of title based on the said admission in the pleadings.*** The onus of proof is always on the plaintiff-Kojo II V. Bonsie (supra).

My Lords, in the final analysis I hold that this particular appeal has merit and it is allowed by me. The judgment of the lower court dated. 4/2/02 is hereby set aside. While the judgment of the trial court dismissing the respondents claims is hereby restored and affirmed N50,000.00 costs to the appellants.

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***KATSINA-ALU JSC***

C I had read in draft the judgment delivered by Muntaka- Coomassie JSC in this appeal. I agree with the reasoning and conclusion. I also would and do hereby allow the appeal with N50,000.00 in favour of the appellant.

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***MOHAMMED JSC***

The judgment just delivered by my learned brother Coomassie, JSC was read by me in draft before today, I am fully with him in the manner he considered and resolved the issues arising in this appeal. Accordingly I also allow the appeal and abide by the orders made in the leading judgment including the order on costs.

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***ONNOGHEN JSC***

F I have had the benefit of reading in draft the lead judgment of my learned brother, MUNTAKA-COOMASSIE, JSC and I agree with his reasoning and conclusion that the appeal has merit and should be allowed.

It is settled law that though a court of law may raise an issue suo motu, it cannot base its determination of the appeal or case on the issue so raised except it calls on the parties or their counsel to address it on that issue. In other words a court of law has the vires to raise an issue necessary for the determination of the matter before it subject to its being addressed on that point/issue by counsel for both parties if the decision of the court is to be rooted or grounded on the issue so raised suo motu.

To raise an issue suo motu and proceed to decide the matter on the same without hearing counsel for the parties thereon is to deny the parties their right to fair hearing and an appellate court is

duty bound, in the circumstance, to set aside the determination so made.

I therefore hold that the appeal is meritorious and should be allowed.

The judgment of the lower court delivered on 4th February, 2002 is hereby set aside and that of the trial court delivered on the 14th day of November, 1996 is restored and affirmed.

Appeal allowed.

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### CHUKWUMA-ENEH JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division (lower Court) delivered on 4/2/2002 setting aside the decision, of the trial court and allowing the Appeal of the Plaintiffs/ Respondents. In the course of the judgment of the Lower Court it held at peace of the record from L7 et seq. as follows;

*“Thus -a fuel is deemed to have been admitted if it is neither specifically denied nor denied by implication having regard to other averments in the pleadings. See: OWOSHO V. BADA (1984) 7 SC. 149. In paragraph 3 of their Statement of Defence the Defendants/ Respondents have averred thus:*

*‘the defendants are not in position to admit or deny paragraphs 1,4, 6, 8,9, 10, 11 and 12 of the Statement of Claim and put the plaintiff’s to the strictest proof thereof.’*

*This type of averment in a defendant’s pleadings has been held not to be an answer to specific averments and allegations in the Statement of Claim of which are in the plaintiffs/appellants pleadings. It is not an efficacious traverse as to result into an issue being joined. Indeed this type of traverse has been held to amount to an admission. See: LEVIS PEAT (N.R.I.) LTD. VS. AKHIMIEN (1976) 1 ANLR G (Pt. 1) 460. (2) CHIEF (MRS) AKINTOLA & ANOR. VS. MRS. SALAMO (1986) 2 NWLR (Pt.24) 598 and (3) OSAFILE VS. ODI (1994) 2 NWLR (Pt. 325) 125. Perhaps I should add that what is admitted need no further proof.”*

This finding, in the lower court is one upon which the decision in this matter is predicated.

The Defendants who are the appellants in this court being totally dissatisfied with the decision of the Court of Appeal (Lower Court) have filed a Notice of Appeal dated 4/2/2002 containing five grounds

of Appeal. The parties in prosecuting the appeal have also tiled their respective briefs of argument. The Appellants (Defendants) in their brief of argument have raised the following issues for determination:

- B (i) “ *Whether the Court of Appeal was right to have suo motu raised and decided on an issue not submitted by parties for adjudication without first calling on parties to address on it.* ”
- (ii) *Whether a court is not bound to consider and make findings on a fundamental issue properly formulated before it.*
- (iii) *Whether Exhibit A (Deed of Partition) relates to the subject matter of the suit.*
- C (iv) *Whether the omission and or failure of the Court of Appeal to consider and determine the relevance of the principles in KOJO II VS. BONSIE (1957) 1 WLR 1223 to the appeal is fatal*”

The Respondents (Plaintiffs) have also raised the following issues for determination in their brief of argument:

- (a) *“Whether the Court of Appeal was right in taking the issues formulated by the parties together where such issues are interwoven.*
- (b) *Whether the Court of Appeal acted properly in re-evaluating the evidence before the Trial Court.”*

E This is perhaps the proper stage to set out the plaintiffs claim in this matter as per the Statement, of Claim dated 13/1/1992 as follows:

“whereof the plaintiffs claim jointly and severally against the 1st and 2nd Defendants;

F a. *A declaration that the property situate at No.6, Bridge Street, as shown in the plan attached was the property of Aliu Erukunmi and that the three branches of the Erukunmi Family - WILLIAMS-GALUB - MUSTAPHA are entitled in equal shares to the said Property.*

b. *An order of possession against the 1st and/or 2nd Defendants to vacate and deliver up possession of rooms and appurtenances to the Plaintiffs.*

H c. *An order that all accumulated rents and/or arrears of rent due and payable to the Plaintiffs be paid.*

d. *And for such other order(s) as this Honourable Court may deem fit to make.”*

Further facts of this matter can be gleaned from the averment in paragraphs 1 to 16 of the Statement of Claim. As the above find-

ing as per the foregoing abstract of the Lower Court's judgment has put paragraph 3 of the Statement of Defence on the spot; it is not only proper to put the said paragraph 3 in its relative perspective of the Defendants' other averments in the Statement of Defence but also side by side the plaintiffs' other averments in the Statement of claim which for ease of reference, I set them out as follows: B

*"1. The plaintiffs are descendants and members of the Aliu Enuunmi family.*

*2. The 1st defendant is a tenant of the plaintiffs residing at 6, Bridge Street, Lagos.*

*3. The 2nd defendant (alias Omo Baba Oloye) is a tenant of the plaintiffs residing at 6, Bridge Street, Lagos.* C

*4. The plaintiffs institute this action as representatives of Aliu Enuunmi family and have obtained leave of the court to prosecute the matter in such capacity.* D

*5. The said Aliu Enuunmi died intestate many years ago being fully possessed of the property at 6, Bridge Street, Lagos.*

*6. The said Aliu Enuunmi is his life time begot 5 children namely, Jarinatu, Selia, Senabu. Mutairu and Mustafa.*

*7. The said Selia and Mutairu died without issue leaving 3 branches of the Enuunmi family on whom the said property at 6, Bridge Street. Lagos devolved under native laws and custom.* E

*8. The 3 existing branches (Idi Igi) of the Enuunmi family are:-*

*(a) Williams - who descended from the Jarinatu Williams branch.* F

*(b) Galubi -who descended from the Senabu Branch.*

*(c) Mustafa who descended from the Mustafa Branch.*

*9. The said Jarinatu Williams died intestate many years ago leaving behind Shadia Smith (nee Williams), (the 1<sup>st</sup> Plaintiff), who is the head of the Williams branch as well as the head of the entire Enuunmi family.* G

*10. The Plaintiffs avers that the said Senabu died intestate many years ago leaving behind children and grand children one of whom is Ibrahim Galubi (the 2nd plaintiff).* H

*11. The plaintiffs aver that Mustafa died many years ago leaving behind children and grand children one of whom is Falilat Mustafa (the 3<sup>d</sup> plaintiff).*

12. *The plaintiffs aver that the 1st and 2nd defendants are not members of the Aliu Enuunmi family not being traceable to any of the 3 branches.*

13. *The plaintiffs aver that the 1st and 2nd defendants being monthly tenants and/or sub-defendants tenants were put into possession by the plaintiffs and paid rents in respect of the rooms they occupy.*

14. *The 1<sup>st</sup> and 2nd defendants have refused to pay rent and steps were taken by the plaintiffs to recover possession due to arrears of rent and for personal use.*

15. *The 1<sup>st</sup> defendant filed special defence in respect of the rooms claiming ownership and denied the landlord's title in an action in the Magistrate Court.*

16. *The annual rental value is N360.00 (Three hundred and Sixty Naira) per room."*

If I may repeal paragraph of the Statement of Defence is in the storm's eye, and it is also appropriate to situate it further within the context of the defendants other averments in the Statement of Defence.

In this regard the Defendants in their Statement of Defence have also averred as follows:

3. *"The Defendants are not in a position to admit or deny paragraphs 1,4,6,8,9, 10, 11, 12, 16 of the plaintiffs' Statement of Claim and put the plaintiffs to their strictest proof thereof.*

4. *That with further reference to paragraphs 2, 3, and 13 of the plaintiffs Statement of Claim the 1st Defendant, LAMLATUSASI is the mother of the 2<sup>nd</sup> Defendant, AIRAT AROMIRE residing at 6, Bridge Street, Lagos which is the property of the 1st Defendant and they have never at any time been tenant to the plaintiffs or to any one.*

5. *With further reference to paragraph 5, 7 of the Statement of Claim, ALIU ENUKUNMI was never in possession of the property at 6, Bridge Street. Lagos in his lifetime and had no claim on it or any part thereof.*

6. *The Defendants admit paragraphs 14 and 15 of the Plaintiffs following:-*

(a) *That 6, Bridge Street, Lagos forms a portion of a large tract of land at Bridge Street was originally owned to the LATE PA*



*SUNMONU in fee simple in possession until his death many years ago intestate.*

*(b) That the Late Pa Sunmonu was survived by two children namely, Amodu and Abudu Salami Sunmonu who went into possession of the, land exercising full right of ownership jointly and without any partition.* B

*(c) That the said Amodu died intestate at Lagos many years ago leaving him surviving many children among them, was one Ramotu Amodu, the mother of Lamiatu Sasi, the 1<sup>st</sup> Defendant.*

*(d) That the said Ramotu Amodu was married and she left the town with her husband and her whereabouts were unknown and she was presumed dead after years of fruitless search for her.* C

*(e) That the other surviving children of Amodu were (i) Jarinatu Williams (ii) Selia (iii) Senobu, (iv) Mutairu and (v) Mustafa.*

*(f) That 6, Bridge Street, Lagos now devolved by Native Law D and Custom on Abudu Salami Sunmonu and the five children who were known and found at time of Amodu death minus Ramotu Amodu who has been presumed death jointly.*

*(g) That sometime in November, 1926, Abudu Salami Sunmonu and Jarinatu Williams, Seila Senobu, Mutairu and Mustafa E decided among the family themselves to partition the said property at Bridge Street, Lagos.*

*(h) That by a Deed of Partition dated the 15th day of November, 1926 and registered as No.15 at page 15 in volume 209 kept at the Lagos Lands Registry and signed by Jarinatu Williams; Senobu; F Mutairu; Mustafa and Selia portion of the land now Known as 6. Bridge Street, Lagos was conveyed to Abudu Salami Sunmonu.*

*(i) That since November, 1926 Abudu Salami Sunmonu had been in possession without let or hindrance.* G

*(j) That a few years after the partition, Lamlat Sasi who is the daughter of Ramotu Amodu who was one of the children of Amosu presumed dead, emerged.*

*(k) That Abudu Salami Sunmonu and Mustafa gave Lamlat Sasi a rousing welcome and put her into possession of the three rooms H at 6, Bridge Street as her mother's share of the Estate which consist of three rooms and a shop since 1945 when the 1st Defendant has been in possession and she was joined by her daughter the 2nd Defendant in August. 1957.*

(l) *That since 1945 that the 1st Defendant has been in possession there was no interference or disturbance by any claimant.*

(m) *That sometime in July, 1960, one Jimoh Mustafa of 6-, Aromashedun Street, Lagos disturbed the 1st Defendant on the land, and by the Chief Magistrate letter of 25<sup>th</sup> day of July, 1966, he was invited by the Chief Magistrate, Sain Anna, Lagos copy of this letter was sent to the 1<sup>st</sup> Defendant and he was warned.*

(n) *That the Defendant will rely on the letter at the hearing of this suit.*

(o) *That since 1066, the 1<sup>st</sup> and 2nd Defendants later at the hearing of the suit, no disturbed in their possession of 6, Bridge Street, Lagos.*

(p) *That all Government Revenue Bills in respect of 6, Bridge Street, Lagos since 1960 were in the name of the 1st Defendant some of these documents were lost by fire outbreak, but few of them available will be relied upon at trial of this action.*”

The trial court having taken evidence of the parties and their witnesses, and listened to their counsel’s submissions on both the pleadings and evidence before it has made specific findings and has found at pp.192-195 of the record as follows:

1. *“That the claim of the plaintiffs to the family property 6, Bridge Street, Lagos is by no means better than the claim of the defendants to the property. The plaintiffs said that the property belonged to Aliu Enukunmi their great grand father but they did not produce or adduced any evidence showing how Aliu Enukunmi became seised of the property. On the other hand the defendant said that the property belonged to her maternal great grand father, Baba Sunmonu but she too did not produce or adduce any evidence showing how Baba Sunmonu became seised of the property.*

2. *It is trite to law that the onus lies squarely on the party who lays claim to family land to prove that he is the exclusive owner of the property: Atuanya Vs. Onyejekwe & Anor. (1975) 1 ALL NLR (Pt. 1) 62 at 67, and in Samuel Adenle, the Ataoja of Oshogbo Vs. Michael Oyegbade (1967) NMLR 136 the Supreme Court had held that the court statement of the law in general in a claim for a declaration of title, as the present case, is that the onus lies on the plaintiff who must succeed on the strength of his own case; however, in the instant case-the plaintiffs failed totally to discharge the onus lying on them.*

3. *The plaintiff as P.W.1 told the court that the 1st Defendant came to her looking for a room and that she was her tenant to whom she issued rent receipts but she did not know the time or date when the 1st Defendant came to her looking for a room and she did not know the time or date when the 1st Defendant came to her looking for a room and she was unable to show evidence of a tenancy agreement between her and the 1st Defendant.* B

4. *P.W.1 also said that she was an illiterate who issued receipts to the defendant with the help of people who wrote the receipts for her but she would not or could not give the names of such writers of the receipts she issued to the 1st defendant. Her son, Oladipo Adelekan, P.W.5 told the court that he saw the receipts' issued to the defendant by her mother and that the receipts were many in Exhibit P.12 but when Exhibit P.12 was tendered, there was no receipt therein issued to the 1st defendant and the only one counterfoil bearing the name of the 2nd defendant appeared to have been issued at the instance of Alhaji Yusuf Lambe and his son, the property developers who negotiating with the plaintiffs to develop the property went to lawyer Adewale Abiru (P.W.4) to requesting the Lawyer to assist them to eject the defendants from the property, No.6 Bridge Street, Lagos as if the defendants were tenants.* C D E

5. *Whereas the plaintiffs were unable to prove the tenancy of the Defendants they in their desperation tendered Exhibits P.I, P.2 and P.3 which merely proved the tenancy of P.W.3. Alhaji Mustafa Lasisi rather than the tenancy of the defendants. Exhibits P.I, P.2 and P.3 were absolutely irrelevant to the Plaintiffs' claim against the defendants.* F

6. *Exhibit 'A' was the deed of partition executed by, Jarinatu Williams, Selia Senobu, Mutairu and Mustafa parents of the plaintiffs, in 1926 in favour of Abudu Salami Sunmonu.* G

7. *The plaintiffs omitted to plead Exhibit A in their statement of claim but when the defendants pleaded the deed in their statement of defence (paragraph 1) and P.W.5 gave evidence that there was no partition. It is trite law that while it is permissible to give evidence of the acts done under a deed as guide to the intention of the parties, evidence of the acts done or not done cannot be admitted to contradict the clear meaning of the instrument: Molade Vs. Molade (1958) 3 F.S.C. 72. I do not believe the evidence of P.W.5 Oladipo* H

*Adelekan whom I found not to be it witness of truth.”*

Before going into the parties’ positions as per their respective briefs of argument before this court, it is only fair to observe that I find the foregoing findings as direct consequences sifted after a thorough scrutinizing of the totality of the evidence tendered before the trial court. Most critically it has put paid to the issue that the defendants are rent-paying, tenants of the plaintiffs.

Next is the case of each party as per their respective briefs of argument. The appellants have submitted as per their brief to the effect that none of the issues for determination as submitted before the lower court has raised the issue of admission *by* the defendants of the averments contained in paragraphs 1, 4, 6, 8, 9, 10, 11 and 12 of the Statement of Claim and so deciding that point has not arisen from the pleadings. And also that paragraph 3 of the Statement of Defence however construed cannot amount by itself to an admission of the aforesaid averments in the Statement of claim. Even then, that the averment in the paragraph 3 in the context of the pleaded facts in their Statement of Defence cannot constitute an admission of the aforesaid averments. The Lower Court is charged with having left all the issues raised before it to suo motu raise the issue of admission which it decided upon without giving a hearing to the instant appellants who in the last analysis would, otherwise be greatly disadvantaged by it thus denying the appellants fair hearing even although that issue has not been submitted for adjudication by the parties. See: USMAN V. UMORU (1992) 7 NWLR (Pt. 254) 377 at 398, OJO-OSAGIE V. ADONRI ( 1994) 6 NWLR (Pt. 349) 131 at 154 D-F.

AKINIFOLARIN V. AKINNOLA (1994) 3 NWLR (Pt. 335) 659 at 690, CARLEN (NIG.) LIMITED V. UNIJOS (1994) 1 NWLR (Pt. 323) 631 at 665 the appellants have therefore, alleged in the result of a miscarriage of justice in this matter. See: OKERE V. A MADE (2005 ) 14 NWLR (Pt. 945) 545 at 559. Even more so they have urged that an admission alone by pleading cannot in law form the basis for granting a declaration of title to land.

On issue 2: The appellant have contended that the lower court has failed in its duty to make a specific finding on an important issue of whether or not there has existed between the parties, a Landlord/ Tenant relationship in regard to No.6 Bridge Street Lagos; and that this finding should have preceded the order to pay all accumulated

rents disc and payable to the respondents by the appellants as tenants. The Lower Court they submit has erred in not treating all the issues submitted to it. See: SAPARA V. U.C.H. BOARD (1988) 4 NWLR (Pt.86) 58 at 61, ORO V. FALADE (1995) 5 appeal may not be obliged to deal with some other unresolved issues before it as observed in IFEANYI CHUKWU (OSONDU) LTD. V. SOLEH BONEH (NIG.) LTD. (2000) 5 NWLR (Pt.656) 322 at 351. B

On Issue 3: The appellants have denounced the Lower Court's failure to accept, that Exhibit A (a deed of partition) relates to No 6 Bridge Street Lagos. They make the point that the determination of findings of fact is for the trial court that has seen and heard the parties and their witnesses and that it is wrong for the lower court in this case to have reversed the trial court on the ascription of probative value to Exhibit A. C

On issue 4: On whether the Lower Court's failure to advert to the principles in KOJO II V. BONSIÉ (1957) 1 WLR 1223 is fatal; the appellants have submitted that the issue of the onus of proof is on the plaintiffs and not the defendants and that the trial court as against, the lower Court is eminently better positioned to ascribe value to the evidence before it. The plaintiffs they have posited have to succeed on the strength their ease and cannot rely on the weakness of the defendants' case in this matter. The Court is urged to allow the appeal and restore the decision of the trial court. D E

The respondents' in regard to the two issues they have formulated submit on issue one that the argument of the appellants on it is misconceived when it is considered against 14 issues raised by the parties in their briefs of argument before the Lower Court. They submit that the crux of the appeal before the lower court has been on the evaluation and construction of the documentary evidence, and so, that a determination of one issue from among many other issues and grounds will suffice where it has resolved the Appeal. See: F.C.D.A V. SULE (1994) 3 NWLR (Pt.332) 256 at 252 A-D ORO V. FALADE (supra) to the effect that one issue can determine an appeal without the necessity of considering the other issues. On issue 2: The defendants rely on OMO BORINOLA II V. M. I. GOVERNOR, ONDO STATE (1998) 14 NWLR (Pt.589) 89 to submit that the Lower Court has for to the Lower Court has the power to set aside findings of facts which are unsupported or all improper conclusions from the evi- F G H

dence and pleadings of the parties. They refer to the Lower Court's power in regard to documentary evidence which reading of paragraph 3 shows that it constitutes an admission of the respondents' title as per the aforesaid paragraphs in the Statement of Claim and that the Lower Court rightly intervened to avert a miscarriage of justice.

As a matter of fact and law this is the final court and one of its attributes arising from this privilege position is the power of deciding an appeal before it even on resolving one issue which is decisive-amongst other issues submitted before it for adjudication. This may not be the case with regard to the intermediate lower courts excepting if within the narrow exceptions as contemplated in the cases of F.C.D.A. V, SULE (supra) that the court it then becomes unnecessary to consider other issues once a decision has been taken on the issue of jurisdiction, also See: ORO V. FALADE (Supra) and IFEANYI CHUKWU (OSONDU) LTD. V. SOLEH BOUSH LTD. (2000) 5 NWLR (Pt.656) 322 at 352; and again, as rightly pointed out by this court in SAPARA VS. U.C.H. BOARD (1988) 4 NWLR (Pt.56) 58 at 61 to the effect that an appellant before an appellate court has a constitutional right to a determination by that court of all the issues submitted to it.

There can be no doubt therefore, that the Lower Court with respect, has erred to have suo motu raised the question of admission on the pleadings (that is to say even without this court deciding whether that issue has arisen from the state of the pleadings) and proceeded to decide the appeal upon it without calling upon the parties hereto to address the court on the question; thus denying the appellants their right to fair hearing. This is a fundamental error that goes to the roots of the case.

It is clear from the foregoing that the Lower Court has not confined itself within the confines of the issues submitted to it for adjudication by the parties. It is not seriously contested by the respondents that it has occasioned a miscarriage of justice. The decision therefore, cannot be allowed to stand. I find merit in the appeal.

From the above conclusions and a much fuller reasoning and conclusions in the lead judgment of my learned brother Muntaka-Coomassie JSC, I agree that the appeal should be allowed. I allow it and I abide by the orders contained in the lead judgment.