

SUPREME COURT OF NIGERIA
18TH DECEMBER, 2009. SC. 266/2003
CORAM:- N. TOBI, A. M. MUKHTAR,
I. F. OGBUAGU,
C. M. CHUKWUMA-ENEH, J. O. OGEBE, JJSC

VINCENT U. EGHAREVBA APPELLANT/
CROSS-RESPONDENT

AND

DR. OROBOR OSAGIE RESPONDENT/
CROSS-APPELLANT

APPEALS - Issues - Nonpayment of consideration for land - Propriety - Court of Appeal was in error in raising the issue - As a basis for allowing the appeal - Since there was no such issue before it (H1)

LAND LAW - Payment of consideration - Proof - Exhibit F being an agreement with a clause acknowledging receipt of consideration - And signed by all the parties - Court of Appeal was wrong to say there was no evidence of payment (H2)

APPEALS - Judgment - Reversed on appeal - Effect on reliefs claimed - Where a judgment is reversed on appeal - Appellate court ought to make consequential orders - Granting any reliefs it considered to be supported by the evidence available (H3)

FACTS

Before the Benin High Court, plaintiff/respondent/cross appellant sued defendant/appellant/cross respondent claiming title to the land in dispute. It was respondent's case that he had agreed to transfer a portion, measuring 50 by 100 feet of the land to appellant. Subsequent to the agreement he had agreed that appellant prepare appropriate Deed of conveyance for their execution. When appellant brought the supposed Deed, respondent had signed a copy therefor before noticing that it read 100 by 100 feet instead of 50 by 100 feet whereupon he withheld the signed copy and told appellant to go and correct the error. But instead, appellant fraudulently pre-

pared an agreement for sale - Exhibit F - purporting to have paid the agreed consideration, and had same registered. It is on the basis of Exhibit F that appellant had not only moved into the land but has also built on a portion thereof.

On the other hand, appellant maintained that Exhibit F was what it professed to be and that it was duly executed between him and respondent following his purchase of the land from respondent. Trial court dismissed respondent's claim as unproved. Dissatisfied, respondent appealed to Court of Appeal. Appellant also cross appealed. That court allowed the appeal on the ground that there was no evidence of payment of the consideration for the land. It also dismissed the cross appeal without considering the issues therein. Aggrieved, appellant has brought this appeal against that judgment of Court of Appeal. Respondent has also cross appealed on the failure of Court of Appeal to grant the reliefs sought after allowing the appeal.

ISSUES FOR DETERMINATION

(a) Whether the Court of Appeal was right when it held that there is no oral or documentary evidence from the Appellant to show that he offered a clear and conclusive consideration for the purported land he said he purchased from the Respondent?

(b) Whether the Court of Appeal was right in not considering the substance of the Cross-Appeal of the Appellant before dismissing same?"

"Whether having allowed the Respondent's appeal, the learned Justice of the Court of Appeal ought to have granted the relief sought by the Respondent/Cross-Appellant in paragraph 53 of the further amended statement of claim No. 3 in exercise of their powers contained in Order 1 rule 19(3) and Order 3 Rule 23 of the Court of Appeal Rules, 2007?"

HELD (Unanimously allowing the appeal and dismissing the cross appeal per **OGEBE JSC**)

Issues - Nonpayment of consideration for land - Propriety

1. The issues canvassed before the Court of Appeal by the respondent who was the appellant in that court are contained at page 219 of the record.

It can be seen from the issues above that none of them raised

any question of non-payment of consideration for the purchased land.

Issue 3 before the Court of Appeal was on the validity of the deed of transfer which the appellant relied upon to claim part of the land. It follows therefore that the Court of Appeal was in gross error in raising the issue of non-payment of consideration for the purchased land which was not an issue before it as a basis for allowing the appeal. (pp. 2619 F & 2620 B)

Land law - Payment of consideration - Proof

2. In the face of exhibit “F” the Deed of Transfer which had a clause acknowledging receipt of consideration for the purchased land which was signed by all the parties including the respondent/cross-appellant, the Court of Appeal was wrong to say that there was no documentary evidence to prove payment of consideration for the purchased land. It is the law that once an agreement has been committed into writing and executed by the parties it is binding on them and you cannot use parole evidence to alter its terms.

The trial Court meticulously examined exhibit “F” and the respondent’s signature therein with his admitted signature in other documents before the court and came to the conclusion that there was no difference. (p. 2620 D)

Judgments - Reversed on appeal - Effect on reliefs claimed

3. On the cross-appeal it is the contention of the learned counsel for the respondent/cross-appellant that the Court of Appeal erred in law when it failed to grant the reliefs sought by him in paragraph 53 of the further amended statement of claim.

I agree with their submission. The respondent sought some reliefs from the High Court which were denied by the trial court. He went on appeal to the Court of Appeal which reversed that judgment. The respondent’s claim could not be left hanging in the air. The Court of Appeal ought to have made consequential orders granting him any reliefs which it considered were supported by the evidence before the trial court.

However, in view of the fact that I have in this judgment decided that the Court of Appeal was wrong in reversing the judgment of the trial court the cross-appeal before this court is now of no rel-

evance. (p. 2621 C/G)

NOTABLE POINTS OF INTEREST

OGEBE

1. *Courts should consider every issues properly before them*

B This Court has said it over and over again that any issue properly raised and canvassed before a trial court or an appellate court must be given a fair-hearing and considered. This is so in order to avoid a miscarriage of justice.

C The Court of Appeal ought to have considered the cross-ap-
peal and given reasons, for dismissing it. (p. 2621 A)

OGBUAGU

2. *Documentary evidence serve as hanger for oral evidence.*

D It is trite law that where there is oral as well as documentary evidence, the latter should be used as a hanger from which to assess the oral evidence. This is because, documentary evidence is said to be more reliable than oral evidence and it is used as a hanger to test the credibility of oral evidence. Exhibits ‘G’ and ‘F’ have debunked and
E rubbished any oral evidence by the Respondent to the contrary.
(p. 2637 B)

REPRESENTATION

F Mr. M. S. Tumba with Chief H.O. Ogbodu for Appellant/cross-re-
spondent
Mr. S. O. Eimiuhi for Respondent/cross-appellant.

CASES REFERRED TO

G Fashionu v. Adekoya (1974) ANLR 32 @ 37-38
Lawan v. Yama 2004 9 NWLR part 877 page 117
Akanni v. Ajuwon (1993) 9 NWLR (pt.316) 182
Adegbite v. Ogufeolu (1990) 4 NWLR (pt.184) 578
Balogun V. Akanji (1988) 1 NWLR (Pt. 70) P. 301
H Ugbodume v. Adiegbe (1991)8 NWLR (pt.209) 274
Bamgboye v. Olarenwaju (1991) 4 NWLR (pt. 184) 132
EZEMBA V. IBENEME (2004) 14 NWLR (Pt. 894) 617
B. Stabilini & Co. Ltd v. Nwabueze Obasi (1997) 9 NWLR (Pt.520)
293 @ 305

Kindey & 11 ors. v. The Military Governor of Gondola State & ors. (1988) 2 NWLR (Pt.77) 445
Attorney-General, Bendel State & 2 ors. v. United Bank for Africa Ltd. (1986) 4 NWLR (Pt.337) 547 @ 563

RULES REFERRED TO

Court of Appeal Rules, O. 1 r. 19 and O. 3 r. 23

LEAD JUDGMENT BY OGEBE JSC

The deceased John A. Osagie who has been replaced by his son Dr. Orobor Osagie sued the appellant in Benin High Court over a piece of land which he had sold to him. His case was that he was allocated a piece of land measuring one hundred feet by two hundred feet by the Oba of Benin in 1963.

In 1976 the appellant approached him for a transfer of a portion of the land measuring fifty by hundred feet. The appellant prepared a Deed of Conveyance for a portion of the land measuring a hundred by hundred feet which he mistakenly signed before noticing the discrepancy. He signed only a copy which he kept to himself and asked the appellant to go and correct the paper.

He claimed that the appellant never paid any money for the land. The appellant fraudulently-prepared an agreement for the sale of the land exhibit 'F' and registered it.

The appellant's case was that on the 24th of February 1976 the respondent transferred part of his land measuring a hundred feet by hundred feet to him. He negotiated the price and he was put in possession. They subsequently went to a lawyer's office and an agreement was prepared for them to sign. That agreement is exhibit 'F'.

He built a house on the land and was using part of the land for farming. He had erected a fence to demarcate his land from that of the respondent but in 1988 the respondent destroyed his fence and the matter eventually went to court.

The trial court after a careful evaluation of the evidence dismissed the respondent's claim on the 23rd of April, 1999. The respondent was dissatisfied with that judgment and appealed to the Court of Appeal. The Appellant also cross-appealed to the Court of Appeal. On the 27th of March 2003, the Court of Appeal allowed the appeal of the respondent without making any consequential or-

der granting the reliefs sought by the respondent before the trial court.

The only reason the court gave for allowing the appeal was that there was no oral or documentary evidence to show that the appellant paid, consideration for the land. The Court of Appeal dismissed the appellant's cross-appeal without considering the issues raised therein.

The appellant was aggrieved by the decision of the Court of Appeal and appealed to this Court. The respondent was also aggrieved and cross-appealed to this Court.

Both sides, exchanged briefs. The learned counsel for the appellant formulated 2 issues for determination as follows:

"(a) Whether the Court of Appeal was right when it held that there is no oral or documentary evidence from the Appellant to show that he offered a clear and conclusive consideration for the purported land he said he purchased from the Respondent?"

(b) Whether the Court of Appeal was right in not considering the substance of the Cross-Appeal of the Appellant before dismissing same?"

The learned counsel for the respondent formulated 2 issues for determination the main appeal as follows:

"1. Whether the learned Justices of the Court of Appeal were right when they held that the Appellant failed to discharge the burden of proof placed on him to show that he paid consideration for the land he purportedly purchased from the Respondent?"

2. Whether the non-consideration of the issues raised in the cross-appeal of the Appellant by the learned Justices of the Court of Appeal occasioned any miscarriage of Justice?"

For the Cross-Appeal he formulated one issue which reads as follows:

"Whether having allowed the Respondent's appeal, the learned Justice of the Court of Appeal ought to have granted the relief sought by the Respondent/Cross-Appellant in paragraph 53 of the further amended statement of claim No. 3 in exercise of their powers contained in Order 1 rule 19(3) and Order 3 Rule 23 of the Court of Appeal Rules, 2007?"

The learned counsel for the appellant filed what he called appellant's reply brief to the respondent's cross-appeal in which he

adopted the issue raised in the cross-appellant's brief. The correct
appellation should have been appellant/Cross-Respondent's brief.

The learned counsel for the appellant submitted that the Court
of Appeal was wrong when it took the position that there was no oral
or documentary evidence that the appellant offered consideration
for the land he purchased from the respondent. He said that exhibit B
F the registered conveyance between the parties contained the con-
sideration-which the appellant paid for the land.

The learned counsel pointed out that the issue before the Court
of Appeal was whether or not the appellant as respondent before C
that Court proved due execution and validity of the Deed of Transfer
he relied-upon and not whether or not there was consideration for
the sale of the land which was erroneously considered by the Court
of Appeal.

He relied on the cases of Bamgboye v. Olarenwaju (1991) 4 D
NWLR (pt. 184) 132 & Akanni v. Ajuwon (1993) 9 NWLR (pt.316)
182.

In reply to this the learned counsel for the respondent/cross-
appellant submitted that the pivot of appellant's defence was the
purchase and payment for a part of respondent's land but the appel- E
lant failed completely to lead any evidence in support of his aver-
ment relating to payment of consideration. He said that it is settled
law that mere averment without evidence in proof of the facts is no
proof of the facts unless they are admitted. He referred to the case of F
Adegbite v. Ogufeolu (1990) 4 NWLR (pt.184) 578. The learned
counsel submitted that the Court of Appeal was right in holding that
consideration was not proved.

***The issues canvassed before the Court of Appeal by the
respondent who was the appellant in that court are contained G
at page 219 of the record*** and are reproduced here-under.

*"1. Whether Plaintiff successfully proved his title to the entire
piece of land measuring about 100 feet by 200 feet referred to in
Exhibit 'C' and therefore entitled to the declaration sought?*

*2. Whether Exhibit 'G' and 'F' were caught by the plea or H
doctrine NON-EST-FACTUM and what is the effect of the plea or
doctrine on the entire transaction?*

*3. Whether the Defendant/Respondent proved due execution
and validity of the Deed of Transfer he relied upon to claim title to*

part of plaintiff/Appellant's large parcel of land?

4. Whether the learned trial Judge was right in holding that the cause of action arose in 1980 instead of 1988?

5. Whether the defence of estoppel due to customary arbitration, standing by, laches and acquiescence avail the Defendant/Respondent/Cross-Appellant in the circumstance of this case”?

It can be seen from the issues above that none of them raised any question of non-payment of consideration for the purchased land.

Issue 3 before the Court of Appeal was on the validity of the deed of transfer which the appellant relied upon to claim part of the land. It follows therefore that the Court of Appeal was in gross error in raising the issue of non-payment of consideration for the purchased land which- was not an issue before it as a basis for allowing the appeal. Moreover, in the face of exhibit “F” the Deed of Transfer which had a clause acknowledging receipt of consideration for the purchased land which was signed by all the parties including the respondent/cross-appellant, the Court of Appeal was wrong to say that there was no documentary evidence to prove payment of consideration for the purchased land. It is the law that once an agreement has been committed into writing and executed by the parties it is binding on them and you cannot use parole evidence to alter its terms. Vide EZEMBA V. IBENEME (2004) 14 NWLR (Pt. 894) 617

The trial Court meticulously examine exhibit “F” and ‘the respondent’s signature therein with his admitted signature in other documents before the court and came to the conclusion that there was no difference.

A pertinent-question to ask is why the respondent would allow the appellant to build a house on his land in 1980 without paying anything for it and live there until 1988 before he woke up to his rights. The answer is obvious that no reasonable person in his normal faculties would allow that to happen. It is therefore my view that first issue succeeds.

On the second issue of the main appeal the learned counsel for the appellant submitted that the Court of Appeal was wrong in not considering the substance of the issues raised in the cross-appeal

before dismissing the cross-appeal.

In reply the learned counsel for the respondent submitted that there was no substance in the cross-appeal and there was therefore no miscarriage of justice in the failure to consider it.

This Court has said it over and over again that any issue properly raised and canvassed before a trial court or an appellate court must be given a fair hearing and considered. This is so in order to avoid a miscarriage of justice. See *Ugbodume v. Adiegbe* (1991) 8 NWLR (pt.209) 274. B

The Court of Appeal ought to have considered the cross-appeal and given reasons, for dismissing it. However, since the first issue has been resolved in favour of the appellant this second issue is merely an academic exercise. C

On the cross-appeal it is the contention of the learned counsel for the respondent/cross-appellant that the Court of Appeal erred in law when it failed to grant the reliefs sought by him in paragraph 53 of the further amended statement of claim. D

I agree with their submission. The respondent sought some reliefs from the High Court which were denied by the trial court. He went on appeal to the Court of Appeal which reversed that judgment. The respondent's claim could not be left hanging in the air. The Court of Appeal ought to have made consequential orders granting him any reliefs which it considered were supported by the evidence before the trial court. E
F

It would appear that the Court of Appeal' did not give enough consideration to the issues before it in its rather hasty and sketchy judgment. ***However, in view of the fact that I have in this judgment decided that the Court of Appeal was wrong in reversing the judgment of the trial court the cross-appeal before this court is now of no relevance.*** In other words, it does not serve any useful purpose. G

Accordingly the appeal is allowed and the judgment of the Court, of Appeal is hereby set aside while the judgment of the trial court is restored. The cross-appeal having lost its significance is hereby dismissed. The respondent/cross-appellant shall pay costs of ₦50,000.00 to the appellant/cross-respondent. H

TOBI JSC

I agree entirely with the judgment of my learned brother, Ogebe, JSC that this appeal should be allowed. I add this bit of mine.

The respondent as plaintiff in the High Court asked for two declaratory reliefs, and reliefs, against the defendant/appellant for general damages and perpetual injunction. The case of the respondent is that the appellant approached him for the transfer of part of his land measuring 50 by 100 feet to him. Respondent asked appellant to pay the sum of N5,000. Although the money was not paid, respondent gave appellant the conveyance of the piece of land, Exhibit C, in trust. A month later, appellant came to the respondent with a prepared agreement respondent signed the first copy. On a close look at the agreement, respondent found that appellant had signed his portion and the portion for the witness was already signed. The agreement showed the portion of land being transferred as 100 x 100 feet as against 50 x 100 feet. Respondent thereafter removed the survey plan attached to the four copies of the agreement as well as the copy of the agreement he had already signed. The respondent later discovered that the, appellant had, fenced an additional 50 x 100 feet along or together with the, original 50 x 100 feet. When all efforts to settle the matter in the palace of the Oba of Benin failed, respondent filed the action.

Appellant has a different story. The case of the appellant is that he built a house on part of respondent's land measuring 50 by 100 feet in 1980 without any challenge by the respondent. Appellant summoned the respondent to the palace of the Oba of Benin for customary arbitration in 1988 when the respondent pulled down a wall fence made by the appellant. Appellant argued that the respondent's action was statute barred and estopped.

The learned trial Judge dismissed the case of the respondent. In dismissing the claims of the respondent, Idahosa J, said at pages 180 to 181 of the Record:

"On the whole and after due consideration of the available evidence, I am satisfied on the preponderance of evidence that the plaintiff actually transferred his interests in part of the land measuring 100 feet by 100 feet to the defendant out of the plaintiffs larger whole measuring 100 feet by 200 feet approximately. Consequently

I am satisfied that the plaintiff has not proved his claims as quoted above at the beginning of this judgment. In the circumstances all the claims are hereby dismissed."

He appealed to the Court of Appeal. Appellant also filed a cross appeal. The Court of Appeal set aside the judgment of the learned trial Judge the court also dismissed the cross appeal. B

In the penultimate paragraph of the judgment at page 315 of the Record, the Court of Appeal said:

"In the case in hand there is no oral or documentary evidence from the defendant/respondent/cross appellant to show that he offered a clear and conclusive consideration to the purported land he said he purchased from the appellant/cross respondent. That being so, the defendant/respondent/cross appellant had no case for the consideration of the lower court. I therefore hold that this appeal succeeds and it is allowed. From the above conclusion of mine, the consideration of the remaining issues in this appeal is a barren exercise. In the same token the cross Appeal fails and it is dismissed. I set aside the judgment of the lower Court dated 23/4/99 and the costs awarded therein." C

Dissatisfied, the appellant appealed to this Court. The respondent also filed a cross appeal. Appellant formulated two issues for determination: E

"(a) Whether the Court of Appeal was right when it held that there is no oral or documentary evidence from the Appellant to show that he offered a clear and conclusive consideration for the purported land he said he purchased from the Respondent?" F

(b) Whether the Court of Appeal was right in not considering the substance of the Cross Appeal of the Appellant before dismissing same?" G

The respondent also formulated two issues for determination on the main appeal:

"1. Whether the learned Justices of the Court of Appeal were right when they held that the Appellant failed to discharge the burden of proof placed on him to show that he paid consideration for the land he purportedly purchased from the Respondent?" H

2. Whether the non consideration of the issues raised in the cross appeal of the Appellant by the learned Justices of the Court of Appeal occasioned any miscarriage of justice?"

The respondent formulated the following single issue for determination of the cross appeal:

*“Whether having allowed the Respondent’s appeal, the learned Justices of the Court of Appeal ought to have granted the relief sought by the Respondent/Cross Appellant paragraph 53 of the further
B amended statement of claim No.3 in exercise of their powers contained in Order 1 rule 19(3) and Order 3 Rule 23 of the Court of Appeal Rules 2002?”*

The crux of the submission of learned counsel for the appellant is that there was enough oral and documentary evidence from
C the appellant that he offered consideration for the land he purchased from the respondent. Reliance was placed on Exhibit E. Counsel also contended that the Court of Appeal was wrong in not considering the substance of the cross appeal before dismissing it. Counsel urged
D the Court to allow the appeal.

The crux of the submission of counsel for the respondent is that once it is proved or admitted that the original ownership of land lies on one party the onus of proving that the party has divested himself of ownership of the land or part of it rest on the other party
E who asserts the contrary. The onus to prove that respondent/cross appellant divested himself of part of his parcel of land comprised in Exhibit C rested entirely on the appellant/cross respondent who asserted that he purchased part of respondent’s larger parcel of land. Learned counsel submitted that as the purported attesting witness to
F Exhibit E was not called to confirm payment of the consideration reflected in the exhibit, there was a total failure of consideration. Counsel saw a contradiction between the evidence that the appellant paid a total sum of N1,500 for the purported land sale and the N200
G consideration reflected in Exhibit E. Counsel therefore agreed with the Court of Appeal that there was no oral or documentary evidence from the appellant to show that he offered a clear and conclusive consideration for the land he said he purchased from the respondent.

H While conceding that the Court of Appeal did not consider the two issues raised in the cross appeal, counsel submitted that the non-consideration of the issues did not occasion any miscarriage of justice, as the court would still have arrived at the same decision had it considered the issues. Counsel examined the two issues raised in the

cross appeal and submitted that both issues were completely unmeritorious and were deemed to fail. Counsel also took the issue of estoppel by customary arbitration and submitted that the Court of Appeal would certainly have rejected the plea.

Learned counsel submitted that the Court of Appeal erred in law when the court failed to grant the relief sought by the respondent/cross appellant in paragraph 53 of the Further Amended Statement of Claim No.3 having held that the appellant/cross respondent failed to discharge the onus of proving that the respondent divested himself of ownership of part of his land comprised in Exhibit C.

Dealing with the cross appeal, learned counsel relied on Order 3 rule 23 of the Court of Appeal Rules and urged the court to allow the cross appeal and grant the relief sought in paragraph 53 of the Further Amended Statement of Claim No.3. He also, relied on section 22 of the Supreme Court Act Cap. 424, Laws of the Federation of Nigeria 1990.

The burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings, See section 137(1) of the Evidence Act. If such party adduces evidence which ought reasonably to satisfy the Judge that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced and so or successively, until all the issues in the pleadings have been dealt with.

The burden of first proving a fact is usually on the plaintiff who brought the action, though not invariably so. There are times when the burden is on the defendant, depending on the state of the pleadings. Therefore it is valid law that the state of the pleadings materially determines the party who has the burden of proof. And so I will look at the pleadings. Some of the relevant paragraphs of the Amended Statement of Claim read:

“4. The plaintiff became the owner and has been in peaceable possession since 25 September, 1965 of the piece or parcel of land which is the subject matter of this suit and which said parcel of land is situate and lying in ward A Oko Village, Benin City within the jurisdiction of this Honourable Court.

5. *The Plaintiff says that since 1965 he applied to Ward A Plot Allotment Committee for a Building Plot which was recommended for Oba's Approval after the bush pointers have traced out the place and shown same to him.*

B 6. *The Plaintiff says that after his Application for Building Plot has been recommended to the Oba of Benin for Approval and the same was duly approved in accordance with Bini Customary Law, copies of the Approved Application for Building were sent to him and has since 1965 been in his possession of same. At the Trial, the mode of acquisition of a piece of land under the Bini Customary Law shall be relied upon at the trial.*

D 7. *The plaintiff avers that after he has received a copy of the Application for Oba's approval, he applied for and got a direct grant of the same parcel of land from the Royal Highness, Akenzua II, Oba of Benin C.M.C. in 1970 vide a Deed of Conveyance No. ML 17690 dated 8th October, 1970 and duly registered as No.27 at page 27 in Volume 100 of the Lands Registry in the Office at Benin City.*

E 9. *The Plaintiff avers that since the parcel of land was allocated to him in 1965 he took immediate possession and has subsequently cultivated it for farming purposes.*

10. *The Plaintiff says that he has been in actual and physical possession over the past years without any let or hindrance.*

F 24. *The plaintiff says that consequent upon these anomalies in the Agreement, he rejected same, asked his witness not to sign it yet and return same to the Defendant for reparation*

G 41. *The plaintiff says that when he got to the Lands Registry on 10th October, 1988 he found that his entire parcel of land Registered as No.27 at page 27 Volume 100 as per C.T.C. 10/10/339 (B) showed that the plaintiff has transferred all his entire land and demarcated by Beacon Nos. MT. 541, MT. 542 and MT. 543 and MT. 544."*

Similarly, some of the paragraphs of the Further Amended Statement of Defence read:

H "2. *The Defendant in answer to paragraphs 3, 4, and 5 of the further amended statement of claim No. 3 says that as from February 1976 when the plaintiff sold 100 feet by 100 feet out of his piece or parcel of land to the Defendant, the plaintiff ceased to be in possession of the parcel of land sold to the Defendant.*

4. The Defendant in further answer to paragraph 5 avers that the plaintiff at the time of sale of 100 feet by 100 feet out of the plaintiffs said land to Defendant, the plaintiff kept the original copy of Oba's approval because he did not sell the entire land covered by the Oba's approval to the Defendant. The Plaintiff however gave to the Defendant Photostat copy of the Oba's approval. This copy will be founded upon at the trial of this action. ^B

6. The Defendant in answer to paragraph 8 of the further amended statement of claim avers that when the plaintiff sold 100 feet by 100 feet to him the plaintiff ceased to be in possession of the entire land allocated to plaintiff in 1965 and thereafter the plaintiff restricted his activities exclusively to the remaining portion of the land not sold to the Defendant. ^C

9. The Defendant further states that he continued to farm on the remaining undeveloped portion of his land up till the time of going to court and there exist now some cashew trees, palm trees, pear tree, plantain trees, yam and orange trees on the land. ^D

14. The Defendant paid a total sum of N1,500.00 (One thousand, five hundred Naira) to the Plaintiff. This includes N200 for the price of the land, N800.00 (eight hundred Naira) for the rubber trees, N400.00 (Four hundred Naira) for the Chairman and plot allotment committee members and N 100.00 (one hundred Naira) for the bush pointers. ^E

17. The Defendant states that after the said solicitor had prepared the Deed of Transfer dated 24th February, 1976 both plaintiff and Defendant went to the said solicitor's chamber and there in the presence of the solicitor Prince R. U. Eweka both signed the Deed of Transfer the plaintiff signing as the vendor and Defendant as the purchaser. Mr. George Eweka, the solicitor's clerk, signed as witness to the plaintiff while Mrs. Helen Ehigiator signed as witness to the Defendant. The Defendant paid the solicitor N50.00 and was issued with a receipt. The solicitor's receipt will be founded upon at the trial. ^F

19a. In further answer to paragraph 21 of the amended statement of claim, the Defendant avers that the plaintiff after reading the agreement signed it before his witness (George Eweka) the solicitor's clerk attested same. Thereafter the Defendant signed the agreement and his witness (Mrs. Helen Ehigiator) attested same. The Defendant avers that the agreement was not executed before the plaintiff signed ^H

same.

42. *The Defendant shall prove at the trial that since he took possession of the land on 24/2/76 he has exercised amongst other the following acts of ownership:*

B *a. (a) Built his residential house, a boys quarters and a pit toilet on part of the land.*

b. Deposited on the undeveloped portion heaps of sand and gravel.

C *c. Moulded cement blocks on and packed same in 3 places for building purposes.*

d. Planted some oranges, plantain, cashew, palm pear trees and pineapples amongst other economic crops on the land

D *e. Erected a wall fence to demarcate his land from the adjoining land of the plaintiff. The remains of the wall fence destroyed by the plaintiff is shown in Defendant's survey plan.*

f. He constructed a tap and tap stock to connect water to his building.

g. He has planted cassava, yams, vegetables and other annual crops on his land since 1976."

E In *Okhwarobo v Aigbe* (2002) WRN 3 cited by learned counsel for the respondent, Kutigi, JSC (as he then was) said at page 57:

F *"It is settled law that when a party pleads purchase or gift as his root of title as in this case, he either succeeds in proving the purchase or gift or he fails. Having failed to prove the title pleaded, it will be wrong to turn round to rely on acts of possession or acts of ownership which are acts in the nature of things derivable from and rooted in the radical title pleaded See Balogun V. Akanji (1988) 1 NWLR (Pt. 70) P. 301."*

G It is clear from the state of the pleadings that the appellant joined issues with the respondent which made it imperative for the respondent to prove the averments in the Amended Statement of Claim. Did the respondent satisfy the burden placed on him? I think not. The learned trial Judge in the course of evaluating the evidence, H before him asked why the respondent did not challenge the appellant when the appellant commenced building on the land, if the respondent did not give any part of the land to the appellant. I join the learned trial Judge in asking the same question and there is no adequate answer from the respondent and there cannot be one.

Although the respondent pleaded that in 1984, he wrote a letter to the appellant not to do anything on the land, the respondent did not tender the letter. The learned trial Judge rightly expected the letter to be tendered. He said at page 175 of the Record:

“A copy of the letter was not tendered and Defendant was not challenged during cross-examination about his testimony that he built his house on the land measuring 50 feet by 100 feet in 1986. Why was the house of the Defendant allowed to be built without challenge?”

On the issue of the alleged forgery of the signature of the respondent, the learned trial Judge said at page 176:

“I have also compared the signature, of the Plaintiff - Exhibit C and B, their attachments (i.e. the Oba’s approval) with the Plaintiffs signature on Exhibit F and I am unable to find any reasons to believe that it was forged. In the absence of an expert handwriting analyst report or testimony, the court has to examine the questioned document against previous writings that are not in dispute. My own examination in this report shows that the signature of plaintiff on Exhibit F seems normal. It is my view therefore, after due consideration that Exhibit F was duly executed and I so hold.”

On the totality of the evidence before the courts, I find it extremely difficult to believe the evidence of forgery and I entirely agree with the findings of the learned Trial Judge because they are clearly vindicated by the evidence before him.

In my view, the learned trial Judge did a good job. He properly evaluated the evidence before him and came to the correct conclusions. I am therefore not in a position to fault him. The Court of Appeal was not there. So too this court. Both courts therefore have to rely on the cold records before them. And the record did not in anyway support or vindicate the decision of the Court of Appeal. It is trite law that an appellate court has not the jurisdiction to go on its own to make findings which are not borne out from the record. Such findings will be perverse or and this court will not allow them to stand.

In the circumstances the appeal succeeds and it is allowed. The cross appeal fails and it is dismissed. I award N50,000.00 costs in favour of the appellant.

MUKHTAR JSC

In the High Court of Justice of the then Bendel State holden at Benin, the plaintiff who is now the appellant in this appeal, in a claim for a parcel of land raised the issue of fraud in his Statement of Claim as follows:-

“43. The Plaintiff says that the Defendant’s (sic) obtained total conveyance of all his parcel of land to him on his misrepresentation to the officials of land Registry Benin City.

44. Particulars of Fraud:

(a) The Plaintiff did not negotiate the entire land with the Defendant.

(b) The Defendant deliberately failed to survey his portion of land to enable the Plaintiff convey any piece of land if any.

(c) The Defendant failed to pay to the Plaintiff the sum of N5,000.00 being total consideration for a part of the parcel of land measuring 50 feet by 99.6 feet to the Defendant.

(d) The Defendant without the knowledge of the Plaintiff registered an Agreement which did not reflect the true dimensions of the land transferred, the correct purchase price and which was not witnessed by Plaintiff own person.

(e) The defendant while purporting in the registered agreement the LAND transferred to him (defendant) is 100 feet by 100 feet he was registering. 100 feet by 200 feet the entire land of the plaintiff.”

After pleadings have been exchanged and evidence have been adduced, the learned trial judge evaluated the evidence, considered the addresses of counsel and dismissed the plaintiff s suit as follows:-

“Consequently, I am satisfied that the Plaintiff has not proved his claims as quoted above at the beginning of this judgment. In the circumstances all the claims are hereby dismissed.”

The plaintiff appealed to the Court of Appeal, and he succeeded in the appeal. The defendant was dissatisfied with the decision, so he has appealed to this court on two grounds. The plaintiff also cross-appealed on two grounds. Parties’ learned counsel exchanged briefs of argument, as is the practice in this Court. In the appellant’s brief of argument are the following issues for determination:-

“(a) Whether the Court of Appeal was right when it held that there is no oral or documentary evidence from the Appellant to show that he offered a clear and conclusive consideration for the purported land he said he purchased from the Respondent?”

“(b) Whether the Court of Appeal was right in not considering the substance of the Cross-Appeal of the Appellant before dismissing same.” B

The issues formulated in the respondent’s brief of argument are in pari materia with the above issues. In dealing with issue (1) supra I will reproduce and consider the following salient averments in the further amended statement of defence. They read:- C

“2.a. The sale of the 100 feet x 100 feet was covered by a Deed of Transfer dated the 24th day of February 1976 which was duly executed by both the plaintiff and defendant before it was duly stamped and registered as No. 10 at page 10 in volume 339 of the Land Registry in the office at Benin City. D

13. In further answer to paragraph 15 and 16 (sic) of the Statement of Claim the Defendant avers that he approached the Plaintiff to sell to him, the Defendant, a piece or parcel of land measuring 100 feet x 100 feet and the Plaintiff agreed to sell and indeed sold 100 feet x 100 feet out of plaintiff’s land measuring 199.6 feet x 99.8 feet along Ogba Road Ward ‘A’ Benin City to him. E

14. The Defendant paid a total sum of N1,500.00 (one thousand, five hundred naira) to the Plaintiff. This includes N200.00 for the price of the land, N800.00 (eight hundred naira) for the rubber trees, N400.00 (four hundred naira) for the Chairman and plot allotment committee members (sic) and N 100.00 (one hundred naira) for the bush pointers. F

15. The Defendant denies paragraphs 17 and 18 of the Further Amended Statement of Claim and avers that he did not buy from the Plaintiff a plot measuring 50 feet x 100 feet for a consideration of N5000.00. The Defendant purchased from the Plaintiff a piece or parcel of land measuring 100 feet x 100 feet for a consideration of 200.00 which sum of money the defendant paid to the plaintiff. G
H

The Defendant purchased from the plaintiff a piece or parcel of land measuring 100 feet by 100 feet for a consideration of N200.00 which sum of money the Defendant paid to the plaintiff.”

In the course of examination in Chief the defendant/appellant testified inter alia thus:-

- “Plaintiff agreed that I pay (sic) him N1,500.00 This sum is made up of N200 for the land measuring 100 feet by 100 feet, N800 for the rubber trees; N400 for the chairman and members of the Plot Allotment Committee, N100 to the Bush Pointer. We then demarcated the land which he showed me and then we went to the lawyer’s chambers The lawyer’s name is Prince Robert Eweka, then at No. 6 Akenzua Street, Benin City. Plaintiff brought out the documents from which my own documents were prepared. Plaintiff had told me earlier that Prince Robert Eweka had been his lawyer. Before the agreement was signed the plaintiff saw it and the lawyer read it to our hearing. I see exhibit G, and I say it is the agreement I am referring to. Plaintiff read the agreement himself in the Lawyer’s Chambers, and signed it.*

.....
I see Exhibit F, it is the certified true copy of the agreement between Plaintiff and me. After Exhibits G & F, I took possession, farmed on the land.....”

- The Evidence was not debunked in the course of cross-examination of the defendant, hence the evidence was accepted and relied upon by the learned trial judge. The law is trite that evidence that is relevant to the flatter in controversy and which was neither discredited nor demolished remain credible evidence that ought to be relied upon by a trial judge. See *Lawan v. Yama* 2004 9 NWLR part 877 page 117, *Aikhionbare v. Omoregie* 1976 12 SC. 11, and *Alfotrin Ltd. v. Attorney-General of Federation* 1996 9 NWLR part 475 page 634.
- Indeed the learned trial judge was quite comfortable with the above evidence and rightly placed reliance on it, for in his judgment he found as follows:
- “If Plaintiff did not sign any document with Defendant and Defendant did not pay for any land whether 50 feet by 100 feet or 100 feet by 100 feet, surely he would have no right to build on the land.”*

Indeed, Exhibit ‘F’, the Deed of Transfer which is between the appellant as vendor and the respondent as the purchaser contains inter alia, the following vital clauses:-

“WHEREAS the Vendor has now agreed to sell and the Purchaser has agreed to purchase the said piece or parcel of land for a sum of N200.00 (two hundred naira).

NOW THIS DEED OF TRANSFER WITNESSES that in pursuance of the agreement hereinbefore mentioned and in consideration of the sum of N200.00 (two hundred Naira).

NOW THIS DEED OF TRANSFER WITNESSES that in pursuance of the agreement hereinbefore mentioned and in consideration of the sum of N200. 00 (two hundred Naira) now paid to the Vendor by the Purchaser (receipt whereof the Vendor hereby acknowledges) the Vendor, as fee simple owner, hereby transfers to the Purchaser

ALL THAT PIECE OR PARCEL of land measuring 100 feet wide by 100 feet long part of the land situate and lying at Ward ‘A’ Benin City

TO HOLD the same unto the Purchaser to the intent that the land hereby transferred be held henceforth an estate in fee simple absolute in possession freed and discharged from all incidents of customary tenure”

The above clauses and in fact the whole content of Exhibit ‘F’ supports the case of the appellant and his evidence. Again, the learned trial Judge accepted the veracity of the said Exhibit ‘F’ and so found it to be cogent and credible evidence to determine the dispute before him. On all the allegations attacking the genuineness of the deed of transfer, the learned trial Judge considered them all, (the alleged alteration etc.), and at the end of the day found the document worthy of consideration and placed reliance on it for the determination of the matter in controversy.

In spite of the above factors, the Court of Appeal per its lead judgment made the following observations and finding:-

“The burden of proof to show that there was consideration in the contract of sale is on the defendant/cross-Appellant. This he failed to satisfy. Even the N1,500.00 the defendant/cross appellant admitted was in bits and cannot be said to be the consideration for the contract of sale for the piece of land under reference. The Defendant/Cross-Appellant did not produce any authentic receipt before the court below to show that there was consideration for the sale. I want to say it laud that in law, consideration is a vital ingredient of a valid and enforceable contract. It is within the exclusive domain of

the parties and no other party outside can dictate or determine what consideration must be given in any particular contract. Once the consideration is of some value in the eyes of the law, even the courts have no jurisdiction to determine whether it is adequate or inadequate.”

B Clearly the lower court erred in holding as it did above.

The allegations of fraud contained in the further amended Statement of Claim, which I have reproduced in the earlier part of this judgment were countered and dislodged in the course of the proceedings before the trial court, and this was amply and correctly dealt with in the judgment, the relevant excerpt of which reads:-

C *“I have also compared the signatures of the Plaintiff in Exhibit C and B their attachments (i.e. the Oba’s approval) with the Plaintiffs signature on Exhibit ‘F’ and I am unable to find any reason to believe that it was forged. In the absence of an expert handwriting analyst’s report, or testimony, the Court has to examine the questioned documents, against previous handwriting that are not in dispute. My own examination in this respect shows that the signature of the Plaintiff on Exhibit F seems normal. It is my view therefore, after*
 D *due consideration that Exhibit F was duly executed and I so held”.*
 E

The court below had no business whatsoever to interfere with the above finding, for it was well supported by evidence, and caused miscarriage of justice. In the light of the foregoing, coupled with the more detailed treatment of the issue in the lead judgment, I resolve
 F this issue in favour of the appellant. On the second issue for determination which has been dealt with in the lead judgment, I believe I need not over emphasize the arguments in this contribution. I have
 G read carefully the lead Judgment of my learned brother Ogebe JSC, which I have had the advantage of reading in advance. I am in complete agreement that the appeal has merit and deserves to succeed. I hereby allow the appeal. I abide by the consequential orders made therein.

H

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Benin Division (hereinafter called “the court below”) delivered on 27th March, 2003 allowing the appeal of the Respondent and setting

aside, the Judgment of the trial court - per Idahosa, J. delivered on the 23rd April, 1999 and also dismissing the Cross-Appeal.

Dissatisfied with the said Judgment, the Appellant has appealed to this Court on two grounds of appeal. The Respondent also cross-appealed also on two grounds of appeal. The Appellant formulated two issues for determination, namely,

“(a) *Whether the Court of Appeal was right when it held that there is no oral or documentary evidence from the Appellant to show that he offered a dear and conclusive consideration for the purported land he said he purchased from the Respondent?*

(b) *Whether Court of Appeal was right in not considering the substance of the Cross Appeal of the Appellant before dismissing same?”*

The Cross-Appellant also formulated two issues for the main Appeal and a third or one issue for the cross-appeal. They read as follows:

1. *Whether learned Justices of the Court of Appeal were right when they held that the Appellant failed to discharge the burden of proof placed on him to show that he paid consideration for the land he purportedly purchased from the Respondent?”*

2. *Whether the non-consideration of the issues raised in the cross-appeal of the Appellant by the learned Justices of the Court of Appeal occasioned any miscarriage of justice?”*

For the Cross-Appeal, the following appear:

“3. *Whether having allowed the Respondent’s appeal, the learned Justices of the Court of Appeal ought to have granted the relief sought by the Respondent/Cross-Appellant in paragraph 53 of the further amended statement of claim No. 3 in exercise of their Powers contained in Order 1 Rule 19(3) and Order 3 Rule 23 of the Court of Rules, 2002?”*

I note that none of the parties stated under which ground of appeal the above issues were distilled from. The consequences are no longer in doubt. I note that the Respondent in his brief, abandoned ground one of his cross-appeal hence the three issues he formulated. I therefore, take it that all the issues of the parties, are related to or distilled from their respective grounds of appeal. Ground 1 of the cross-appeal, is accordingly struck out by me.

Speaking for myself, since the issues of the parties are substan-

tially, the same although differently couched, the important issue or question to be resolved is whether or not consideration for the purchase of the said land, was paid by the Respondent/Cross-Appellant. In other words, did the Appellant fail to prove the validity and due execution of the document of title - i.e. Exhibit F - the Deed of Transfer.
B

In Exhibit F, there is contained the acknowledgment of the receipt by the Respondent the sum of N200.00 (two hundred naira) as consideration for the purchase. I note that the document is duly registered in the Land Registry. It is dated 24th February, 1976 and registered as No. 10 at page 10 in volume 339 of the Lands Registry in the Office at Benin City. It is certified by one B.A. Iyoonbhe an Asst. Chief Deeds Registrar Lands Registry, Benin City on 11th October, 1988. The said Deed of Transfer was/is between the parties to it and duly signed by both parties in the presence of their witnesses. The following appear therein inter alia:
D

“WHEREAS the Vendor has now agreed to sell and the Purchaser has agreed to purchase the said piece or parcel of land for a sum of 200.00 (two hundred Naira).

NOW THIS DEED OF TRANSFER WITNESSES that in pursuance of the agreement herebefore mentioned and in consideration of the sum of N200.00 (two hundred Naira) now paid to the Vendor by the Purchaser (receipt whereof the Vendor hereby acknowledges), the Vendor as fee simple owner, hereby transfers to the Purchaser.
E

ALL THAT PIECE OR PARCEL of land measuring 100 feet wide by 100 feet long part of the land situate and lying at Ward ‘A’ Benin City demarcated by beacon numbers ”.
F
[the underlining mine]

I note that the Instrument or document, was prepared by a lawyer - Prince R.E.U. Eweka of 6 Akenzua Street, Benin City. It is now firmly settled that documentary evidence, is the Best evidence. It is the best proof of the contents of such document and no oral evidence, will be allowed to discredit or contradict the contents thereof except where fraud is pleaded. See the case of *The Attorney-General, Bendel State & 2 ors. v. United Bank for Africa Ltd. (1986) 4 NWLR (Pt.337) 547 @ 563* - per Oputa, JSC. Even in Exhibit ‘G’ which the Respondent stated he signed in error and kept and which was also prepared, by the same lawyer and also dated 24th Febru-
G

ary, 1976, and signed also by the parties and their witnesses, contains also the acknowledgment of the said purchase price by the Respondent. The denial of the Respondent of due receipt of the consideration, by the Respondent, is rather very unfortunate and made in very bad faith. I so hold.

It is trite law that where there is oral as well as documentary evidence, the latter should be used as a hanger from which to assess the oral evidence. See the cases of *Fashonu v. Adekoya* (1974) ANLR 32 @ 37-38; (1974) 6 S.C. 83; *Kindey & 11 ors. v. The Military Governor of Gondola State & ors.* (1988) 2 NWLR (Pt.77) 445; (1988) 5 SCNJ. 28 and *B. Stabilini & Co. Ltd v. Nwabueze Obasi* (1997) 9 NWLR (Pt.520) 293 @ 305 C.A. This is because, documentary evidence is said to be more reliable than oral evidence and it is used as a hanger to test the credibility of oral evidence. See the case of *Ezembi v. Ibeneme & anor.* (2004) 14 NWLR (Pt.894) 617; (2004) 7 SCNJ. 136 @ 157; (2004) 7 S.C. (pt.1) 45. Exhibits ‘G’ and ‘F’ have debunked and rubbished any oral evidence by the Respondent to the contrary. The said oral evidence is bogus, unreliable, fake and most hopelessly discredited by the said documentary evidence. I also so hold. Exhibits “F” and “G”, were tendered by the Respondent and admitted in evidence without objection - See page 103 of the Records. At page 176 of the Records, the learned trial Judge, examined, perused and compared the signatures in the two documents and other documents such as Exhibits “B” and “C” bearing the signature of the Respondent with those on Exhibits “F” and “G” and found as a fact, that they are the same and that the said signature of the Respondent on Exhibit F, was not forged. He stated thereafter as follows:

“..... In the absence of an expert handwriting analysis report, or testimony, the Court has to examine the questioned documents, against previous writing that are not in dispute. My own examination in this respect, shows that the signatures of Plaintiff (i.e. the Respondent) on Exhibit ‘F’ seems normal. It is my view therefore, after due consideration that Exhibit ‘F’ was duly executed and I so hold”.

[the underlining mine]

I cannot fault this finding and holding.

At pages 180 -181 of the Records, the learned trial Judge,

stated inter alia, as follows:

“On the whole and after due of the available evidence, I am satisfied on the preponderance of evidence that the plaintiff actually transferred his interest in part of his land measuring 100 feet by 100 feet, to the Defendant out of the. Plaintiff’s larger whole (sic) measuring 100 feet by 200 feet approximately.

Consequently, I am satisfied that the Plaintiff has not proved his claims as quoted above at the beginning of this judgment. In the circumstances all claims are here by dismissed.....“

I completely agree as these findings, are borne out by the Records.

It is from the foregoing and the fuller reasons and conclusions of my learned brother, Ogebe, JSC in his leading judgment just delivered and which I had the advantage of reading before now, that I too, allow the appeal and set aside in its entirety, the Judgment of the court below. I too, hereby restore the said judgment of the trial court. I too, dismiss the Cross-Appeal which is devoid of any merit in the circumstances of the true facts of this case leading to this appeal. The Respondent/Cross-Appellant should and ought not to have embarked on the suit unless he is not a gentleman who does not believe in truth. I leave the rest to His conscience. Afterwards, judgment must run down as waters and righteousness as mighty stream - *Amos. 5:24*. I abide by the consequential order in respect of costs.

CHUKWUMA-ENEH JSC

I have had the advantage of reading before now the judgment in this matter prepared by my learned brother Ogebe, JSC allowing the appeal. I agree with him that the appeal is meritorious and should be allowed. I also allow it and abide by the orders contained in the lead judgment.