

SUPREME COURT OF NIGERIA  
22ND JANUARY, 2010. SC. 213/2002  
CORAM:- G. A. OGUNTADE, A. M. MUKHTAR,  
I. T. MUHAMMAD, J. O. OGEBE, J. A. FABIYI, JJSC

KOPEK CONSTRUCTION LTD. .... APPELLANT  
AND  
JOHNSON KOLEOLA EKISOLA ..... RESPONDENT

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LAND LAW - Trespass - Actions - Basis - In a claim for trespass what is primarily in issue - Is possession of the land - The possessor has a right of action against all wrong doers - Except a person with a better title (H1)

LAND LAW - Trespass - Proof of better title - Implications - Once plaintiff shows proof of prior possession of the land - The onus shifts to defendant - To show that he has a better title (H2)

DAMAGES - General and special - Distinction - General damages are natural consequences of the act complained of - But special damages do not follow in the ordinary course (H3)

EVIDENCE - Proof - Special damages - Whether proved - Evidence of PW4 which was not challenged by defendant - Clearly established the plaintiff's claim for over N11.4m - Which is special damages - Though called general damages by trial court (H4)

DAMAGES - General - Quantum - Propriety - N500,000.00 awarded by Court of Appeal is excessive - As plaintiff has been adequately compensated - By the sum awarded as special damages (H4)

### FACTS

The plaintiff/respondent sued defendant/appellant at the Ibadan High Court claiming the sum of N20m as special and general damages for trespass as well as an injunction to restrain appellant from further acts of trespass to the land in dispute. The case of respondent was that he bought the land in 1976, from one Salu

Salako under native law and custom, was promptly put in possession in the presence of one witness and had remained in undisturbed possession thereof until 1992. It was in June 1992 that respondent observed that appellant had broken into the land and was excavating laterite and carrying them away without the consent of respondent. Respondent repeatedly warned appellant to desist from the act to no avail, hence he instituted this action. At trial, respondent inter alia, called an expert witness (PW4) who assessed and valued the quantity of laterite already carted away by appellant and put the sum at N11,453,293.66k which respondent claimed as special damages. The difference between this sum and the sum of N20m was what respondent claimed as general damages.

After hearing, the learned trial judge found for respondent and granted his claims in their entirety. Aggrieved, appellant appealed against the judgment to Court of Appeal which partially allowed the appeal by reducing the quantum of damages to N2m as special damages and N500,000.00 as general damages. It was the view of that court that though the evidence of PW4 - the expert witness called by respondent - was virtually unchallenged, it did not sufficiently establish the basis for the sum claimed as special damages. Still dissatisfied, appellant has brought a further appeal against the finding on liability for trespass. Also aggrieved, respondent has cross-appealed on reduction of the quantum of damages.

#### ISSUES FOR DETERMINATION

“1) whether the transfer of title and or possession to the Plaintiff/Respondent in the presence of only one witness constitutes a valid transfer of title to him under native Law and custom.

2) whether there was a valid transfer of title from the Respondent’s predecessor in title to the Respondent himself.

3) whether the court of Appeal was right to hold that on the state of pleadings the parties were clear as to the identity of the land in dispute.

4) whether the court of Appeal was right in awarding damages in the sum of N2,000,000.00 as special damages against the defendant.

5) whether the Court of Appeal ought not to have awarded nominal damages as general damages (if any) against the defendant.”

HELD (Unanimously dismissing the appeal while allowing the cross-appeal in part per OGUNTADE JSC)

***Trespass - Actions - Basis***

1. The evidence before the trial court amply shows that whereas the plaintiff had bought and been handed possession of the land in dispute since 1975, the defendant did not come on the land to excavate laterite until 1992.

In a claim for trespass, what is primarily in issue is the possession of the land in dispute.

This Court in *Amakor v. Obiefuna* [1974] 3S. C. 67 at 75-76 said:

“It is trite law that trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong-doers except a person who could establish a better title.

(pp. 259 G/260 B)

***Trespass - Proof of better title - Implications***

2. The plaintiff pleaded that he was in possession of the land in dispute at the time when the defendant entered thereon to excavate laterite. The plaintiff went further to call evidence of his possession. The two courts below accepted the evidence of the plaintiff on his possession. The argument of the defendant that the plaintiff did not call satisfactory evidence of his title overlooks the fact that the plaintiff having shown his prior possession of the land in dispute, the onus shifted to the defendant to show that it had a better title. This, the defendant failed to do. The two courts below were therefore correct to hold the defendant liable in trespass. (p. 260 H)

***DAMAGES - General and special - Distinction***

3. In *Odulaja v. Haddad* [1973] 11 SC.351 this Court discussed the nature of the distinction between special and general damages thus:

“We are in no doubt that the distinction between proof of general damages as opposed to special damage is a matter of law. This distinction is manifest from the following two English decisions

Stroms Bruks/Aktie/ Bolag v. Hutschinson [1905] A. C. p. 515.

Lord Macnaghteen at pages 525-526 after stating that he thought the division into General and Special damages was more appropriate to tort than to contract said:

General damages ..... are such as the law will presume to be the direct natural probable consequence of the act complained of. Special damages on the other hand are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore they must be claimed specially and proved strictly. (p. 264 E)

***EVIDENCE - Proof - Special damages - Whether proved***

4. The court below was unduly parsimonious and in the process unwittingly found itself reconstructing the unchallenged evidence of loss given by the plaintiff and accepted by the trial court. This error the court below fell into in the attempt to find a justification for reducing the total amount awarded as damages by the trial court. The evidence of P.W.4, which was not appreciably challenged by the defendant clearly reveals the basis of his loss. It quantified the amount of laterite excavated from the land by the defendant and how much this would cost in the open market. Clearly therefore, the plaintiff established his claim for N11,453,293.66 awarded as 'general damages.' The trial court should have described that award as special damages and not general damages as it did. (p. 265 E)

***DAMAGES - General - Quantum - Propriety***

5. On general damages of N500,000.00 awarded by the court below, I consider this as excessive having regard to the fact that the plaintiff has been adequately compensated by the sum awarded as special damages. In the award of damages, a court must be mindful of the necessity to ensure that a party is not doubly compensated for the same injury. It seems to me that an award of N50,000.00 as general damages would meet the justice of this case.

In the final conclusion, the appeal fails and is dismissed. The cross-appeal succeeds and is allowed. (p. 265 H)

NOTABLE POINTS OF INTEREST  
MUHAMMAD JSC

1. Evidence - Proof - One cogent witness suffices

Under the repugnancy test, any native law and customs which is in conflict with any Nigerian legislation such as the Evidence Act, the latter will prevail. Admittedly, Nigeria is blessed with so many tribes, customs, languages and legal cultures, it is not that easy for one to dismiss by mere waive of hand the proposition that under some native laws and customs, the minimum requirement for a transaction to be valid is that there must be at least two witnesses. B

Be that as it may, however, what is primary in our adjectival system of adjudication is that where the evidence of one witness is cogent, credible and convincing, a trial court is entitled to act on it in favour of the party that calls the witness. (p. 277 B) C

2. Damages are paid for damage suffered

‘Damage’, in law generally, refers to a disadvantage which is suffered by a person as a result of the act or default of another for which a legal right to recompense accrues. Damages are thus, the pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him. (p. 281 H) D

E

3. Special damages arise from special circumstances

Special damages are those damages which are the actual but not the necessary result of the injury complained of, and which in fact, follow as a natural and proximate consequence in the particular case, that is, by reason of special circumstances and conditions. Special damages are such as the law will not infer from the nature of the fact. They do not follow in ordinary cause. They are exceptional in their character and they must be claimed specifically and proved strictly. (p. 282 D) F

G

4. Court should accept unchallenged evidence

Why I am uncomfortable with the lower court’s reassessment is because of its finding on the evidence leading to the award of the special damages which it said was virtually unchallenged. If it was so unchallenged before the trial court, what was the necessity for the re-evaluation? I think the law is certain that where evidence before a trial court is unchallenged, it is the duty of that court to accept and act on it as it constitutes sufficient proof of a party’s claim in proper H

cases. The trial court accepted and acted upon the evidence by PW4 in respect of the special damages which stood at N11,453,293.00. This should have been upheld by the court below.  
(pp. 284 H/285 B)

B REPRESENTATION

Mr. Olayode Delano Esq. (Mrs. Kemi Makun with him) for the Appellant.

C Alhaja R. Ayoola (Mr. Olumide Ekisola and Mrs. Saidat Abimbola with him) for the Respondent/Cross-Appellant.

CASES REFERRED TO

Okolo v. Uzoka [1978] 4 SC. 77 at 87

Akano v. Okunade [1978] 3 SC. 129 at 137

Chukkwendu v. Mbamali [1980] 3-4 SC. 31 at 75

D Folarin V. Durojaiye [1988] 1 NWLR (Part 70) 357

Chewendu v. Mbamali (1980) 3-4 SC 31 at page 75

Soetan & Anor V. Ogenwo [1975] 6 SC 67 at page 72

Nwosu v. Otunola [1974] 1 All N.L.R. (Part 1) page 533

Abimbola v. Abatan [2001] FWLR (Part 46) 989 at 1001

E Ibhafidon v. Igbinosun 2001 8 NWLR part 716 page 653

Oshinderin V. Ellas [1970] 1 ALNR page 153 at page 156

Texaco (Nig.) PLC v. Kehinde 2001 6 NWLR part 708 page 224

AROMIRE V. AWOYEMI [1972] 1 All NLR (Part 1) 101 at 112-115

F Oyewole V. Standard Bank of West Africa [1968] 2 ANLR 32 at page 39

Umunna V. Okwuraiwe [1978] NSCC Vol. 11 at page 319 at page 326

LOUIS ONIAH & OTHERS V. Chief Obi J. I. G. Onyia [1989] 1 NWLR (Part 99) 514 at 529

G LEAD JUDGMENT BY OGUNTADE JSC

The respondent in this appeal was the plaintiff at the Ibadan High Court of Oyo State, where on 2/12/1992 he issued a writ of summons against the appellant as the defendant claiming two reliefs which were set out in his 'Further and Further amended statement of claim' filed on 1/12/96 thus:

H "1) The sum of twenty million Naira being special and general damages for continuing trespass starting roughly from June, 1992

committed by the defendants (sic) on plaintiff's land at Ibadan/Lagos expressway.

2) Injunction to restrain the defendants (sic), their agents, servants and assignees from continuing the said trespass."

The parties filed and exchanged pleadings after which the suit was heard by Adeniran J. In the judgment delivered by the trial judge on 30/5/96, the claims of the plaintiff were granted in their totality. The defendant before the trial court and now appellant in this court brought an appeal against the judgment of the trial court before the court of Appeal sitting at Ibadan (hereinafter referred to as 'the court below'). On 25/1/2002, the court below in its unanimous judgment affirmed the judgment of the trial court as to the claim for trespass and injunction. It however reduced the damages awarded by the trial court from twenty million naira to two million, five hundred thousand naira.

The defendant was still dissatisfied with the judgment of the court below and has come before this court on a final appeal. The plaintiff also was dissatisfied with the judgment of the court below as to the reduction of the damages awarded him by the trial court. He has also brought a cross-appeal before this court. It is convenient to refer to the parties by the description they bore before the trial court i.e. plaintiff and defendant. I shall hereafter refer to them as such. In the appellant's brief filed on behalf of the defendant, the issues identified as arising for determination in this appeal are:

"1) whether the transfer of title and or possession to the Plaintiff/Respondent in the presence of only one witness constitutes a valid transfer of title to him under native Law and custom.

2) whether there was a valid transfer of title from the Respondent's predecessor in title to the Respondent himself.

3) whether the court of Appeal was right to hold that on the state of pleadings the parties were clear as to the identity of the land in dispute.

4) whether the court of Appeal was right in awarding damages in the sum of N2,000,000.00 as special damages against the defendant.

5) whether the Court of Appeal ought not to have awarded nominal damages as general damages (if any) against the defendant."

In the cross-appellant's brief filed on behalf of the plaintiff,

the issues for determination in the cross-appeal were formulated thus:

“1) whether the Court of Appeal was justified to have interfered with the award of special and general damages;

2) whether the award made by the trial court amount (sic) to double compensation;

B 3) whether the award made by the Court of Appeal was not unreasonably low in view of the evidence on record.”

C It is helpful to consider the pleadings of parties in order to have a clear understanding of the nature of the dispute between the parties to this appeal and how the two courts below approached the issues. The plaintiff in his Further and Further amended statement of claim pleaded clearly his source of title and how the said title devolved on him. The said title was traced to the Akobi Elemu family which was said to have sold the land in dispute to one Saliu Adeola Salako vide a Deed of Conveyance dated 9/4/76 and registered as D No. 9 page 9 in volume 1929 of the Lands Registry, Ibadan. It was pleaded further that the aforementioned Saliu Adeola Salako sold the land to the plaintiff vide a purchase receipt dated 27/10/76; and that the plaintiff has since then been in possession of the land. The plaintiff in paragraphs 12 to 18 of his pleadings pleaded the acts of E trespass which led to the dispute thus:

“12) in June, 1992 the Plaintiff observed that the Defendant and its agents and servants broke into the land marked red on Exhibit ‘A’ excavated the laterite and carried them away without the consent F of the plaintiff, and had refused neglected and failed to discontinue the trespass despite repeated warning.

13) The Defendant disfigured the said land by making big holes into it and carrying away commercially valuable laterite and also depreciated the value of the land by their activities; and trespass.

G 14) Plaintiff avers that the volume of excavation is about 63,631m while allowing for bulking is 21,208.2m. Thus the total compacted volume of excavation done on the Plaintiff’s land by the defendant is 84,839.2m.

15) Plaintiff avers that the cost of laterite is N135/m<sup>3</sup>.

H 16) The Plaintiff suffered special damage in the form of depreciation in the value of the land and in form of loss by the Defendant’s carrying away of valuable laterite and earth, estimated at N11,453,293.66k which sum the plaintiff claims as special damages.

17) Plaintiff avers that he had wanted to use the land to build a warehouse and office complex on it.

18) Plaintiff avers that to put the land into use, he would require not less than N20,000,000.00 (twenty million Naira) and he claims this amount from the Defendants.”

In the amended statement filed by the Defendant, it was pleaded in paragraphs 3-11 thus: B

“3) As regards paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the statement of claim the 1<sup>st</sup> defendant in denying says that the plaintiff was not in possession of the land in question and that the land did not belong to the plaintiff. C

4) The 1<sup>st</sup> defendant denies paragraph 12 of the statement of claim and states that it did not enter the land in June 1992 as averred by the plaintiff.

5) The defendant states further in regard to paragraph 12 of the statement of claim that it did not excavate soil gravel or granite from the land in question and that it did not receive any warning to discontinue my alleged trespass.

6) The 1<sup>st</sup> Defendant denies paragraph 13 of the statement of claim and states that the land in question was already heavily exploited of laterite and was abandoned. The 1<sup>st</sup> defendant states further that the land could not be excavated manually and it was only able to excavate a small amount of laterite by use of adequate equipment. E

7) The 1<sup>st</sup> defendant avers that they visited the site for barely two months and that they vacated the land in 1992. F

8) The 1<sup>st</sup> defendant was lawfully licensed to excavate laterite from the said piece of land.

9) The 1<sup>st</sup> Defendant will contend that the Plaintiff had no title to the land from which the 1<sup>st</sup> Defendant took some laterite. G

10) As regards paragraphs 12, 13, 14, 15, 16, 17, 18 and 19 of the statement of claim the Defendant in denying say that they did not excavate, gravel and granite of the amounts pleaded thereof or any at all. H

11) The defendants say that they have not been on the land at the back of Mobil petrol station just before the toll gate on Ibadan and of Ibadan/Lagos express road.”

It is apparent from the averments contained in the defendant’s

pleadings above that the defendant was clearly evasive and inconsistent to a level that one could say that it had not set out to seriously defend the plaintiff's suit. The defendant pleaded that the land did not belong to the plaintiff but failed to say that the land belonged to it. In one breadth it alleged that it did not commit any act of trespass on the land in dispute but alleged in another breadth that it removed some laterite from the land by "the use of adequate equipment." Was that the defendant's way of saying that incursion on another person's land would not constitute trespass if an "adequate equipment" was used in the process?

At the conclusion of hearing, the trial court in its judgment discussed the issue of the ownership of the land in these words.

"It is trite that where two persons claim possession at the same time over the same piece of land possession reside in the party who has a better title. This is a common place authority that it is unnecessary to cite decided cases on it. They are so many. We will now examine the title of each party to decide which of them has a better title. The plaintiff in his pleading i.e. amended statement of claim in paragraphs 7, 8, 9, 10 and 11 to support his title. Plaintiff has also called P.W. 2 to support his claim. Plaintiff also tendered the purchase receipt Exhibit E. All these plaintiff has done to prove sale to him by his vendor, the late Saliu Salako. The Plaintiff has thus proved that he paid the purchase price he was let into possession and the sale took place in the presence of at least a witness, 2<sup>nd</sup> P.W. I therefore hold that the plaintiff has led evidence to prove ingredients of sale under native law and custom.

I believe his pieces of evidence verbal though and witness (P.W.2) and documentary (Exhibit E) and therefore hold that Plaintiff's title to the land in dispute is under native law and custom and is valid."

And at page 203 of the record of proceedings, the trial judge said:

"In the circumstances therefore I come to the irresistible conclusion that from evidence proffered by both sides, the plaintiff had proved better title i.e. if the defendant has proved any title either in Oyerinde or his brother Adedibu, it has not. In effect therefore exclusive possession is at all material times in the plaintiff. Mrs. Ayoola submitted that surveying of land and buying of land and buying

pillars thereon is a very strong evidence of coming into possession. I agree with her. Plaintiff being the owner of the land in dispute and also being in exclusive possession has the right to sue the defendant who has no justification whatsoever to be on the land in dispute for trespass. What then does trespass mean? At page 461 (D - F) in *Onabanjo vs Ewetuga* (1993) 4 N.W.L.R. (part 288) *Ubaezonu J.C.A.* said “trespass is essentially a wrong or injury to possession and consists of any direct interference with possession. In regard to immovable property such as land, an action for trespass will be for any unauthorised disturbances of such property of which the plaintiff is in possession, whether the nature of the disturbance is stepping on the land or going on it and doing a more substantial damage.”

(Underlining mine)

Now, how did the court below react to the above findings of fact by the trial court? At page 366 of its judgment, the court below per *Tabai J.C.A.* (as he then was) observed:

“It is settled that where two persons claim to be in possession of the same piece of land, the persons with the superior title is ascribed by law to be in possession. See *LOUIS ONIAH & OTHERS V. Chief Obi J. I. G. Onyia* [1989] 1 NWLR (Part 99) 514 at 529; *JIMOH ADEKOYA ODUBEKO V. VICTOR OLADIPO FOWLER & ANOR* [1993] 1 NWLR (Part 308) 637 at 657; *MOGAJI V. ODOFIN* [1978] 4 SC.91 AT 96 and *AROMIRE V. AWOYEMI* [1972] 1 All NLR (Part 1) 101 at 112-115. In this case both parties claim to be in possession of the land in dispute. As I said above the appellant led practically no evidence about title of that person who granted it the licence. On the other hand, the Respondents proof of title to the land in dispute was substantially as plead.”

And at page 367 of the record, the court below said:

“I agree that all the authorities relied upon by the Appellant used the word witnesses and not ‘a witness’ or ‘at least one witness’. But in the absence of a clear categorical statement on the point, I am reluctant to construe that texts in the various Supreme Court authorities to have laid down a principle that any sale of land transaction under native law and custom in the presence of only one witness is invalid. Such a narrow interpretation is, in my view, capable of according to the texts a meaning never intended by the Supreme Court. After all it not infrequently happens that one witness of a

particular transaction has a greater weight and credibility than two or more, depending on the circumstances. In the absence of a direct pronouncement by the Supreme Court on the point therefore, I am inclined to the view of the learned trial judge that land sale transaction under native law and custom concluded in the present of only one witness is a one. On the whole I am of the view that the learned trial judge was right in his conclusion that the Respondent has a better title to the land in dispute and is by law ascribed to be in possession. This is a particularly so as there was practically no evidence of title by the person who allegedly granted the Appellant the licence to excavate laterite on the land in dispute. The first issue is accordingly resolved in favour of the Respondent.”

Before this Court, appellant’s counsel has submitted that in order to acquire a valid title to land under customary law, a party must show that there was compliance with the necessary formalities under customary law. It was contended that in this case, the plaintiff did not show that there was payment of purchase price for the land and the delivery of possession in the presence of witnesses. Counsel relied on *Folarin V. Durojaiye* [1988] 1 NWLR (Part 70) 357; *Erinosho v. Owokoniran* [1965] NMLR 479; *Okiji v. Adejobi* [1960] 5 F.S.C. 44. Counsel said that the plaintiff could not be said to have established his title to the land in dispute since he did not call the evidence of such customary “handing over” of the land in the presence of witnesses.

Respondent’s counsel in her brief argued that this Court should not disturb the concurrent findings of fact made by the two courts below. Counsel relied on *Abimbola v. Abatan* [2001] FWLR (Part 46) 989 at 1001; *Obayuwana v. Ede & Ors.* [2003] (2002) FWLR (Part 136) 1027; *Enang v. Adu* [1981] 11-12 SC.25 at 42; *Nwadike v. Ibekwe* [1987] 4 NWLR (Part 67) 718; *Igwegu v. Ezengo* [1992] 6 NWLR (Part 247) 561 and *Chukkwendu v. Mbamali* [1980] 3-4 SC.31 at 75.

It is indisputable that the plaintiff’s suit was founded in trespass. In paragraphs 10, 11 and 12 of his Further and Further Amended Statement of Claim, the plaintiff pleaded thus:

“10. The land sold to the plaintiff by Saliu Adeola Salako was surveyed in December, 1975 to enable the identity of the land being sold to be clear, before payment of consideration.

11. After the payment Saliu Adeola Salako put the plaintiff

in possession of the said land shown on Exhibit 'A', and plaintiff has since remained in possession thereof.

12. In June, 1992 the Plaintiff observed that the Defendant and its agents and servants broke into the land marked red on Exhibit A excavated the laterite and carried them away without the consent of the plaintiff, and had refused, neglected and failed to discontinue the trespass despite repeated warning.” B

The relevant survey plan of the land in dispute made by the surveyor A. O. Adebogun in 1975 was tendered in evidence as Exhibit 'A'. The plaintiff testified as to when he bought the land in 1975. The son of plaintiff's vendor Olukayode Sulaimo Salako testified as 2<sup>nd</sup> P.W. He stated that he took the plaintiff to the land in dispute on the instruction of his father who died in 1982. As against the evidence called for the plaintiff, the 1<sup>st</sup> D.W Alhaji Fatai Oyerinde testified 27/02/76. He said: C

“I know the land behind Mobil Petrol Station Toll Gate Ibadan and the subject matter of this case. I am the caretaker of the land in dispute for my brother Lamidi Adedibu. In 1992 I gave part of the land for some mechanics to work thereon. Femi Olajide came to me and told me that the defendant approached him that they needed some laterite on the land in dispute. I then requested Femi to tell the defendant that its representative should meet me on the land. They came. Defendant's representative said the defendant needed some of the laterite I dig from the land and they also wanted to dig their own. The defendant and I agreed on an agreement. Defendant prepared the agreement which we executed. One Jimoh Agboola Femi's apprentice witnessed the document. I collected the agreed charge from the defendant. I identify this as the licence I gave the defendant counsel applies to tender same.” D

The evidence before the trial court amply shows that whereas the plaintiff had bought and been handed possession of the land in dispute since 1975, the defendant did not come on the land to excavate laterite until 1992. E

In a claim for trespass, what is primarily in issue is the possession of the land in dispute. In *Akano v. Okunade* [1978] 3 SC. 129 at 137 this Court per Obaseki JSC discussing the nature of possession in a case for trespass observed: F

“The issue of possession is separable from the issue of radi- G

cal title - (See *Oluwi v. Eniola* [1963] NMLR 339 at 340) and in our opinion there is great merit in the submission. Any form of possession, so long as it is clear and exclusive and exercised with, intention to possess is sufficient to support an action of trespass against a wrong-doer. A mere trespasser who goes into occupation cannot, however, by the very act of trespass and without acquiescence give himself possession against the person whom he has ejected. (See Halsbury Laws of England 3<sup>rd</sup> Edition Vol. 38 paragraph 1213 page 743)”

Similarly, this Court in *Amakor v. Obiefuna* [1974] 3 S.C. 67 at 75-76 said:

***“It is trite law that trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong-doers except a person who could establish a better title.”*** Therefore anyone other than the true owner, who disturbed this possession of the land can be sued in trespass and in such an action it is no answer for the defendant to show, (as the defendant/respondent had sought to show in paragraph 7 of his Statement of defence, although he gave no evidence in support of the averment) that the title to the land is in another person.”

And finally on the point in *Okolo v. Uzoka* [1978] 4 SC.77 at 87 where this Court said:

***“It is the law and this Court has so held times without number that trespass to land is actionable at the suit of the possessor in possession of the land. (Amakor v. Obiefuna [1974] 1 All N.L.R. (Part 1, para. 119; Adeshoye v. Shiwoniku 14 W.A.C.A. 347; Emegwara & Ors. V. Nwaimo and Others 14 W.A.C.A. 347; Tongi v. Kalil 14 W.A.C.A. 331).***

The slightest possession in the plaintiff enables him to maintain trespass if the defendant cannot show a better title (*Whittingdom v. Box all* [1943] 12 LJ. OB 318; *Nwosu v. Otunola* [1974] 1 All N.L.R. (Part 1) page 533.”

The plaintiff pleaded that he was in possession of the land in dispute at the time when the defendant entered thereon to excavate laterite. The plaintiff went further to call evidence of his possession.

The two courts below accepted the evidence of the plaintiff on his possession. This court does not make a practice of interfering with the concurrent findings of fact made by the two courts below. The argument of the defendant that the plaintiff did not call satisfactory evidence of his title overlooks the fact that the plaintiff having shown his prior possession of the land in dispute, the onus shifted to the defendant to show that it had a better title. This, the defendant failed to do. The two courts below were therefore correct to hold the defendant liable in trespass. B

As for the 3<sup>rd</sup> question which the defendant raised concerning the identity of the land in dispute, the short answer in my view is that no issue arose on the pleadings of the parties as to the identity of the land in dispute. In paragraphs 7, 8, 9 of its Amended Statement of Defence, the defendant pleaded thus: C

“7. The 1<sup>st</sup> defendant avers that they visited the site for barely two months and that they vacated the land in 1992. D

8. The 1<sup>st</sup> defendant was lawfully licensed to excavate laterite from the said piece of land.

9. The 1<sup>st</sup> defendant will contend that the plaintiff had no title to the land from which the 1<sup>st</sup> defendant took some laterite.” E

The issue of the identity of the land is not and cannot therefore be an issue in this appeal.

Under its issues 4 and 5, the defendant contends that the court below followed the wrong approach in the assessment of damages. The plaintiff for his part also contends that the court below wrongly interfered with the damages awarded by the trial court. At the trial, plaintiff called as his witness P.W.4 who testified as to the special damages suffered by the plaintiff at pages 103-104 of the record of proceedings thus: F

“I visited the scene. The Plaintiff took me to the place and gave me a survey plan of the area. I met on my visit a mechanical excavator and pail loader into which materials can be loaded: I visited the land on 21/1/93. I noticed some damage on the land. The property before excavation was a hill. It was even piece of land. But after excavation it was no more even as a result of the excavation from the survey plan it was obvious that the excavation has taken up almost all the area of the land. I assessed the damage. The soil in the area of the land is laterite this type of soil is used in road construction G H

and it is an important item as it does not allow water to pass through easily i.e. semi permeable. The depth/height of the excavation was taken. (Height if from below & depth if from above the excavation). My team also took spot heights along the profile and average depth by height multiplied by the area gives volume of excavation. Along  
B 33 1/3% for bulking. The 331/3 add to the volume of excavation. After the exercise I wrote a report of my activities. I have it with me.

Mrs. Ayoola applies that the witness be allowed to refresh his memory from the report he wrote.

C             Defence does not object.

Court:-             Witness is allowed to refresh his memory from his report

(Sgd.) T. O. ADED-

IRAN

JUDGE

27/2/96

D

The total volume of excavated and compacted laterite was 84,839 cubic meters. The cost of laterite as on that day per meter cube was N135,000. This multiplied by the volume excavated and compacted is N11,453,293.66 (Eleven million four hundred and fifty  
E three thousand two hundred and ninety three Naira sixty six kobo) To bring the area back to its previous position the plaintiff has to make use of a land retaining wall the length of the profile is 102 metre and height 14.4 m. Thickness of the retaining wall would be 9 metre.”

F             The trial court at page 208 of the record of proceedings in its judgment reasoned thus:

“Mrs. Ayoola learned counsel for the plaintiff in her final addresses submitted general damages are presumed in law. It needs no proof, and is awarded having regard to all circumstances of the case Amount of General Damages is N8,546,706.34. Court to  
G put into consideration the seriousness of inconvenience the act of trespass by the defendant on plaintiff. P.W.4 said the land cannot be reclaimed and used until after 10 years. P.W.4 also said from the survey plan it was obvious that the excavation has taken up almost all the area of the land. According to Exhibit A the area of the land in  
H dispute is 2.006 acres. The 4<sup>th</sup> P.W. who in my considered view from the evidence in court is an expert Quantity Surveyor by profession. He gave evidence of how much excavation the plaintiff made and

he gave evidence of how he arrived at it. He also told the court that the type of soil excavated by the defendant is laterite, a type of soil used in road construction and it is an important item which does not allow water to pass through easily, i.e. semi permeable.; From his calculation the evidence of which he gave, the volume of laterite excavated to be 84,839.2 cubic meters and according to him at the time of his calculations the price of laterite was N135.00 per cubic metre, making a grant total of N11,453,293.66. He therefore said that was the damage the plaintiff has suffered as a result of defendant's trespass on the land in dispute. I agree with him and I so hold, i.e. for general damages" B C

(underlining mine) .

The trial court went further in its judgment to award a sum of N48,546,700.34 as special damages thus bringing the total damages awarded to the sum of N20,000,000.00. D

The court below considered the award on damages made by the trial court excessive. In reducing the award to N2,500,000.00 the court below at pages 375-376 of the record reasoned thus:

"Having set aside the awards of damages and in view of the finding that the Appellant is liable to the Respondent in trespass the next question is the amount to be awarded in damages. On this issue I am conscious of the fact that an appellate court is not normally justified in substituting a figure of its own for damages awarded by the trial court simply because it would have awarded a different figure if it had tried the case in the first instance. In this case however I have to intervene because of the wrong principles of law applied by the learned trial judge. I cannot allow the double compensation to stand. Nor can I allow the order of two special damages and no general damages to stand. I have accordingly set aside the two awards. And having regard to the fact that the Appellant is clearly liable to the Respondent in trespass I have to substitute for that of the learned trial judge. E F G

For the special damages it is clear that the second award of N8,546,706.34 was not in support of any pleadings in the Statement of Claim and therefore went to no issues. That award should accordingly be discountenanced and it is hereby discountenanced. But facts in respect of the N11,453,293.66 were pleaded in paragraphs 14, 15, 16 of the Statement of Claim and so that could form H

the basis of my reassessment. The amount represents the value of the laterite removed by the Appellant. The evidence in respect was virtually unchallenged and so the learned trial judge awarded the full amount. Upon examination however it is not clear how PW4 came to the figure of 84,839 square metres for the laterite excavated. It is also  
 B not clear about the basis for the N135.00 per cubic metre. Although the evidence as to the value of the laterite was virtually unchallenged, the learned trial judge ought to have taken the surrounding circumstances into consideration. These surrounding circumstances in my  
 C view include the price of N6,000.00 at which the land was purchased, the fact that there was no development thereon at the time of the trespass and the fact that the initial claim was for N2,000,000.00 and the fact that the entire N20,000,000.00 subsequently claimed was awarded. After taking these into consideration, I am of the view that the amount of N20,000,000.00 awarded was unreasonably too  
 D high. In the circumstances I award the sum of N2,000,000.00 special damages for the laterite removed.

The Respondent is also entitled to general damages for the trespass and I assess this at the rate of N500,000.00"

Now in ***Odulaja v. Haddad [1973] 11 SC.351*** this Court  
 E discussed the nature of the distinction between special and general damages thus:

"We are in no doubt that the distinction between proof of general damages as opposed to special damage is a matter of law.  
 F This distinction is manifest from the following two English decisions ***Stroms Bruks/Aktie/ Bolag v. Hutschinson [1905] A. C. p. 515*** and (b) *British Transport Commission V. Gourley [1956] A.C. p.185.*"

In *Stroms v. Bruks Aktie Bolag v. Hutchinson*, Lord Macnaghten at pages 525-526 after stating that he thought the division into  
 G General and Special damages was more appropriate to tort than to contract said:

General damages ..... are such as the law will presume to be the direct natural probable consequence of the act complained of. Special damages on the other hand are such as the law will not infer from the nature of the act. They do not follow in the ordinary  
 H course. They are exceptional in their character and therefore they must be claimed specially and proved strictly.'

British Transport Commission v. Gourley, Lord Goddard had this to say at page 206:

‘In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not generally pleaded. This includes compensation for pain and suffering and the like and if the injuries suffered are such as to lead to continuing of permanent disability compensation of earning power in the future.’

There is no doubt that the trial court did not appreciate the distinction between general and special damages. Presumably, this led it to award damages which are patently excessive and amount to double compensation. In other words the trial court was over-generous to the plaintiff in the awards it made on general and special damages. It should not have awarded a further sum of N8,546,706.34 as special damages in addition to the N11,453,293.66 it awarded as general damages. On the other hand, the court below was unduly parsimonious and in the process unwittingly found itself reconstructing the unchallenged evidence of loss given by the plaintiff and accepted by the trial court. This error the court below fell into in the attempt to find a justification for reducing the total amount awarded as damages by the trial court. The evidence of P.W.4, which was not appreciably challenged by the defendant clearly reveals the basis of his loss. It quantified the amount of laterite excavated from the land by the defendant and how much this would cost in the open market. Clearly therefore, the plaintiff established his claim for N11,453,293.66 awarded as ‘general damages.’ The trial court should have described that award as special damages and not general damages as it did.

On general damages of N500,000.00 awarded by the court below, I consider this as excessive having regard to the fact that the plaintiff has been adequately compensated by the sum awarded as special damages. In the award of damages, a court must be mindful of the necessity to ensure that a party is not doubly compensated for the same injury. See Ogaba v. Otubusin [1961] All N.L.R. 299; Ekpe v. Fagbemi [1978] 3 S.C. 209. It seems to me that an award of N50,000.00 as general damages would meet the justice of this case.

In the final conclusion, the appeal fails and is dismissed. The cross-appeal succeeds and is allowed. I award in favour of the plaintiff the sum of N11,453,293.66 as special damages and N50,000.00 as general damages. I award in favour of the Plaintiff/Respondent/Cross-appellant costs assessed and fixed at N50,000.00

B

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MUKHTAR JSC

C        I have had the opportunity of reading in advance, the lead judgment delivered by my learned brother Oguntade JSC.

There are two appeals in this matter i.e a main and cross-appeal, for which parties exchanged briefs of argument. In the appellant's brief of argument are the following issues raised for determination:-

D        "1. Whether the transfer of title and or possession to the Plaintiff/Respondent in the presence of only one witness constitutes a valid transfer of title to him under native law and custom.

2. Whether there was a valid transfer of title from the Respondent's predecessor in title to the Respondent himself.

E        3. Whether the Court of Appeal was right to hold that on the State of the pleadings the parties were clear as to the identity of the land in dispute.

F        4. Whether the Court of Appeal was right in awarding damages in the sum of N2,000,000.00 as special damages against the Defendant.

5. Whether the Court of Appeal ought not to have awarded nominal damages as general damages (if any) against the Defendant."

G        Married to the above issues are seven grounds of appeal, as per the appellant's amended notice of appeal. Although the respondent's counsel did not specifically adopt the above issues in her brief of argument, she did so by implication for she preferred arguments in respect of each of the issues.

H        The detailed facts of the claim in the trial court have been adequately set out in the lead judgment, so I will not repeat it in this contribution. I will however reproduce the reliefs sought by the plaintiff hereunder. They are:-

"20(1) The sum of twenty million Naira being special and

general damages for continuing trespass starting roughly from June 1992 committed by the Defendants on Plaintiffs land at Ibadan/Lagos Expressway.

(2) Injunction to restrain the Defendants their agents, servants and assigns from continuing the said trespass.”

In arguing issue (1) *supra*, the learned counsel for the appellant attacked the following excerpt of the judgment of the lower court which reads thus:-

“On the whole I am of the view that the learned trial judge was right in his conclusion that the Respondent has better title to the land in dispute and is by law ascribed to be in possession. This is particularly so as there was practically no evidence of title by the person who allegedly granted the Appellant the license to excavate laterite on the land in dispute.”

The learned counsel for the appellant has stated the position of the law in a claim of land like this when he submitted that in a case such as this, which turns on the title of the parties, the law is that the onus is on the plaintiff/respondent to establish title on the strength of his own case and not on the weakness of the defendant’s case. Learned counsel placed reliance on the cases of Kodilinye v. Mbanefo Odu 1935 2 WACA page 336, and Aromire v. Awoyemi 1972 1 All N.L.R. (part 1) page 101.

The position of the law is that it is incumbent on a party in a claim for title to land to plead and prove his title to the land he is claiming, and the burden of proof does not shift until he has satisfactorily proved what he has in his pleading, and cannot rely on the weakness of the case of the defendant. It is after the plaintiff has proved his claim satisfactorily that the onus shifts. See Atuanva v. Onyejekwe 1975 3 S.C. 161, Orosanye v. Osula 1976 6 S.C. 21, and Nkanu v. Ohun 1977 5 S.C. 13.

I will now reproduce the pertinent pleadings in the plaintiff/respondent’s further and further amended state of claim, which are as follows:-

“4. Sometimes in 1975 one Saliu Adeola Salako approached the AKOBI ELEMU FAMILY for purchase of part of their land, which included the land shown on Exhibit ‘A’.

5. The family agreed and sold in accordance with native law and custom a portion of their land, to the said Saliu Adeola SALAKO.

Pursuant to the sale a Conveyance dated April 9, 1976 was made and registered as No. 9 Page 9 Volume 1929 at the Lands Registry, Ibadan.

6. Pursuant to the purchase, the said Salako was put in possession of the land shown and verged red in the said Conveyance No. 9 Page 9 in Volume 1929 and remained in possession thereof without let or hindrance.....

7. Sometimes in 1975, the plaintiff approached Saliu SALAKO for the purchase according to native law and custom of part of his land as shown on the instrument No. 9 Page 9 Volume 1929.

8. Saliu Salako agreed to the sale, and in Consequence of the agreement, Saliu Salako sold the land shown on Exhibit 'A' to the Plaintiff in accordance with native law and custom.

9. Saliu Salako received a sum of N6,000 (Six thousand Naira) as consideration for the sale and issued a receipt dated 27<sup>th</sup> October, 1976.

10. The land sold to the Plaintiff by Saliu Salako was surveyed in December 1975 to enable the identity of the land being sold to be clear, before payment of consideration.

11. After the payment Saliu Salako put the Plaintiff in possession of the said land shown on Exhibit 'A', and Plaintiff has since remained in possession thereof."

The plaintiff gave the following evidence in proof of the above averments:-

"I bought the parcel of land in 1975 from one Saliu Adeola Salako who merely showed me the survey plan and conveyance he obtained from his vendor the Akobi Elemu family. Salako gave me a certified true copy of his conveyance I produced it.....

Salako also gave me a purchase receipt."

The second plaintiff witness gave the following testimony:-

"I knew plaintiff very well. I knew one Saliu Adeola Salako who is my father who is now dead. He died in 1982 the plaintiff used to be my father's good friend when my father was alive around October 27 1976. Plaintiff paid my father a visit at his Oke Ado residence. My father called me and asked me to check the money plaintiff brought. It was a sum of N6,000.00. My father told are (sic) it was purchase price of land at express road by Ekisola. The land

originally belonged to my father who also bought from Akobi Elemu family who gave my father a deed of conveyance. I identify 'x' as the document given to my father. My father took plaintiff to the place and showed him in my presence (sic) plaintiff bought and (sic) part of the land my father bought from Akobi Elemu family”

The learned counsel for the appellant argued extensively B on the requirements in law for the validity of the sale of land and its transfer under native law and custom relying on the cases of Folarin v. Durojaiye 1988 1 NWLR part 70 page 357, Okiji v. Adejobi 1960 5 F.S.C 44, and Cole v. Folami 1961 1 FSC 66, to wit the learned C counsel for the respondent submitted that in all the above cases there was dispute on whether the purchaser bought or the vendor sold. The dispute was usually between either the vendor and purchaser or two purchasers purporting to have bought from a vendor and the issue would then be who had a better or valid title or sale between D the two. The learned counsel for the respondent referred to section 179(1) of the Evidence Act Cap. 62 1990 Laws of the Federation of Nigeria on number of witnesses to prove a case.

The evidence adduced for the proof of the plaintiffs case in support of his claim have been reproduced above, they are in con- E sonance with the pleadings. All the submissions by the appellant's counsel on the shortcoming of the evidence and other factors are to my mind of no consequence, because the complaint is not about the cogency or veracity of the evidence, but that certain gaps have F not been filled. It is instructive, however to note that the learned trial judge evaluated the above pieces of evidence adjudged them credible and found on them thus:-

“The plaintiff has thus proved that he paid the purchase price he was let into possession and the sale took place in the presence of G at least a witness, 2<sup>nd</sup> P. W I therefore hold that the plaintiff has led evidence to prove ingredients of sale under native law and custom. I believe his pieces of evidence verbal though and witness (P.W.2) and documentary (Exhibit E) and therefore hold that plain- H tiffs title to the land in dispute is under native law and custom and is valid.” In agreement with the above finding, the Court of Appeal reiterated this stance in its judgment, an excerpt of which reads:-

“I am inclined to the view of the learned trial judge that a land sale transaction under native law and custom concluded, in the

present (sic) of only one witness is a one. On the whole I am of the view that the learned trial judge was right in his conclusion that the Respondent has a better title to the land in dispute and is by law ascribed to be in possession.”

B These findings supported by evidence, and in particular that of the learned trial judge who had the singular advantage of watching the demeanour of the witnesses, and listening to their evidence. The law is trite that such findings that are based on credible and uncontradicted evidence cannot be disturbed by an appellate court which did not have the opportunity the learned trial judge had, in the realm of the witnesses. See Orisakwe v. State 2004 12 NWLR part 887, page 258, Ibhaifidon v. Igbinosun 2001 8 NWLR part 716 page 653, and Mogaji v. Odofin 1978 4 SC page 91.

D I subscribe to these findings and state categorically that the plaintiff/respondent discharged the burden of proof placed on him by law. Having done so, the burden shifted to the appellant who was obliged to prove that it had better title, which it did not. The learned trial judge so found, and the lower court also agreed that it did not prove better title to the land in dispute.

E For the foregoing reasoning, the issue is resolved in favour of the respondent, and its related ground of appeal fails as it lacks merit.

F Other issues I would like to highlight are the fourth and fifth issues for determination. The learned counsel for the appellant made heavy weather of the damages awarded by the court’s below, by making various submissions on the substantiality of the damages awarded, placing reliance On Halsburys Law of England 4<sup>th</sup> Edition pages 458, and the case of Umunna v. Okwuraiwe 1978 NSCC Vol. 11 page 319. In reply the learned counsel for the respondent has submitted that learned counsel for the appellant’s submission was a clear case of setting up a defence of justertii which is not allowed in our legal system. The learned counsel for the appellant has argued that the laterite excavated from the land in dispute was mineral under the control of the Federal Government of Nigeria as it had title to it by virtue of Section 40(3) of the 1979 Constitution of Nigeria. Again, in reply the learned counsel for the respondent has submitted that even if that is the position, the appellant had the duty of establishing that

it came on the land on the Federal Government's authority or acted on its behalf. She placed reliance on the case of Nichells v. Elly Beck Sugar Factory 1931 2 Ch. 84.

The plaintiff adduced evidence on the damage to the land in dispute vide the evidence of P.W. 4, which reads inter alia thus:-

"The total volume of excavated and compacted laterite was 84,839 cubic meters. The cost of laterite as on that day per meter cube was N135,00. This multiplied by the volume excavated and compacted is N11,453,293.66 (Eleven million four hundred and fifty three thousand two hundred and ninety three naira sixty kobo).

To bring the area back to its previous position the plaintiff has to make use of hard retaining wall. The length of the profile is 102 metres and height 14.4 metres. Thickness of the remaining wall would be 9 metre, The volume of reinforced concrete to rehabilitate the area is 1298 cubic metres. Going by today's price (i.e. 27.2.96) the cost of reinforced concrete per cubic metre is N7,500.00 making a total of N9,735,000.00".

The position of the law is that for a relief of special damages to succeed a plaintiff must specifically plead and prove it and support it with credible evidence. See Odulaja v. Haddad 1973 1 SC page 357.

By the above evidence of P.W. 4, the respondent has met the requirement of the law. The learned trial judge believed and accepted the evidence, which he was at liberty to do, having watched and seen the witness. In the end he held as follows:

"In the circumstances I accept the P.W. 4's evidence as to the detailed uncontradicted and irrefutable procedure he has proved the special damages."

The Court of Appeal was wrong to have interfered with the trial judge's award of damages, and substituting its own figure as damage's. On the second award I think even if that head of damage was pleaded in the pleadings awarding it was tantamount to double compensation to the respondent. See Texaco (Nig.) PLC v. Kehinde 2001 6 NWLR part 708 page 224.

The lead judgment of my learned brother Oguntade JSC, has adequately taken care of these issues. In the circumstance, I agree entirely with the conclusion reached in the judgment and also dismiss the appeal. The cross-appeal being predicated on the award of the

damages assessed by the lower court is allowed. I abide by all the consequential orders made in the lead judgment.

B MUHAMMAD JSC

The facts which gave rise to this appeal were clearly stated in the leading judgment of my learned brother Oguntade, JSC, who graciously permitted me to read it before now. In agreeing with C Oguntade, JSC, I will only want to make brief comments on issues 1, 4 and 5 of the appellant’s brief and the issues formulated by the cross-appellant. These issues deal with award of damages, both general and special as made by the trial court.

Appellant’s issue No.1 is couched as follows:

D “Whether the transfer of title and or possession to the plaintiff/ respondent in the presence of only one witness constitutes a valid transfer of title to him under native law and custom.”

From the records, the issue of transfer of title and possession of the land in dispute were clearly and unambiguously pleaded by the respondent in his “Further and Further Amended Statement of Claim and Plan.” E These were averred to in the following paragraphs thereof:

“4. Sometimes in 1975 one Salisu Adeola Salako approached the AKOBI ELEMU family for purchase of part of their land, which F include the land shown on Exhibit 'A'.

5. The family agreed and sold in accordance with the native law and custom a portion of their land, to the said Salisu Adeola Salako. Pursuant to the sale a Conveyance dated April 9, 1976 was made and registered as No. 9 page 9 volume 1929 at the Lands Registry, Ibadan.

G 6. Pursuant to the purchase, the said Salisu Adeola Salako was put in possession of the land shown and verged red in the said conveyance No. 9 page 9 volume 1929 and remained in possession thereof without let or hindrance. The said Conveyance will be relied upon at the trial.

H 7. Sometimes in 1975, the Plaintiff approached Salisu Adeola Salako for the purchase according to native law and custom of part of his land as shown on the instrument No. 9 page 9 volume 1929.

8. Saliu Adeola Salako agreed to the sale, and in consequence of the agreement, Saliu Adeola Salako sold the land shown on Exhibit 'A' to the Plaintiff in accordance with native law and custom.

9. Saliu Adeola Salako received a sum of N6,000.00 (Six Thousand Naira) as considerable for the sale and issued a receipt dated 27<sup>th</sup> October, 1976. B

10. The land sold to the plaintiff by Saliu Adeola Salako was surveyed in December, 1975 to enable the identity of the land being sold to be clear, before payment of consideration.

11. After the payment Saliu Adeola Salako put the plaintiff in possession of the said land shown on Exhibit 'A', and plaintiff has since remained in possession thereof. C

2<sup>nd</sup> PW, one Sulaiman Salako who was a son to Saliu Adeola Salako, from whom the respondent purchased the land in dispute gave his testimony and he stated among others, as follows: D

"I know the plaintiff very well. I know one Saliu Adeola Salako who is my father who is now dead. He died in 1982 the plaintiff used to be my father's good friend when my father was alive around October 27 1976 plaintiff paid my father a visit at Oke Ado residence. E

My father called me and asked me to check the money plaintiff brought. It was a sum of N6,000.00. My father told are (sic) it was purchase price of land at express road by Ekisola. The land originally belonged to my father who also bought from Akobiemu family who gave my father a deed of conveyance. I identify i.e. "x" (sic) as the document given to my father, my father took plaintiff to the place and showed him in my presence plaintiff bought and part of the land my father bought from Akobielemu family. F

(Underlining supplied)

While on cross-examination by learned counsel for the appellant, 2<sup>nd</sup> PW stated: G

"I still confirm that I accompanied my father to the land with the plaintiff."

After having considered the evidence of both parties on the issue of transfer of title and possession, the learned trial judge made the following findings: H

"From the evidence on both sides it will appear both parties are claiming possession. It is trite that where two persons claim possession at the same time over the same piece of land possession resides

in the party who has a better title. This is a common place authority that it is unnecessary to cite decided cases on it. They are so many. We will now examine the title of each party to decide which of them has a better title. The plaintiff in his pleading i.e. amended statement of claim in paragraphs 7, 8, 9, 10 and 11 to support his title. Plaintiff  
 B has also called PW2 to support his claim. Plaintiff also tendered the purchase receipt Exhibit E. all these plaintiff has done to prove sale to him by his vendor, the late Saliu Salako. The plaintiff has thus proved that he paid the purchase price he was let into possession  
 C and the sale took place in the presence of at least a witness, 2<sup>nd</sup> PW. I therefore hold that the plaintiff has led evidence to prove ingredients of sale under native law and custom. I believe his pieces of evidence verbal though and witness (PW2) and documentary (Exhibit E) and therefore hold that plaintiff's title to the land in dispute is under native law and custom and is valid."

D In agreeing with the learned trial judge, the court below, per Tabai, JCA (as he then was) held:

"it is settled law that where two persons claim to be in possession of the same piece of land, the person with the superior title is ascribed by law to be in possession. See LOUIS ONIAH &  
 E OTHERS v. CHIEF OBI J.I.G. ONYIA (1989) 1 NWLR (Pt.99) 514 at 529; JIMOH ADEKOYA ODUBEKO v. VICTOR OLADIPO FOWLER & ANOR (1993) 1 MOGAJI V. ODOFIN [1978]4 SC 91 at 96 and AROMIRE v. AWOYEMI (1972) 1 ALL NLR (part 1) 101  
 F at 112-115. In this case both parties claim to be in possession of the land in dispute. As I said above the Appellant led practically no evidence about the title of that person who granted it the license. On the other hand the Respondent's proof of title to the land in dispute was substantially as pleaded. The question now is whether, barring the issue of identity of the land in dispute which I shall deliberate  
 G upon shortly hereafter, the Respondent's proof of his title to the land is sufficient to found an action in tort.

The appellant contended rather strenuously that the respondent's proof of purchase of the land in dispute did not meet the pre-requisites of the transaction being completed in the presence of witnesses..... I am inclined to the view of the learned trial judge  
 H that a land sale transaction under native law and custom concluded in the present of only one witness is a one (sic) on the whole I am

of the view that the learned trial judge was right in his conclusion that the Respondent has a better title to the land in dispute and is by law ascribed to be in possession. This is particularly so as there was practically no evidence of title by the person who allegedly granted the Appellant the license to excavate laterite on the land in dispute.”  
 These are concurrent decisions of the two courts below. The trite position of the law is that where there are concurrent findings or decisions of two lower courts, a higher court of appeal does not interfere with such findings or decisions except where they are shown to be based on insufficient evidence or they are punctuated by perversity as a result of wrong application of the substantive or procedural law. See: Chewendu v. Mbamali (1980) 3-4 SC 31 at page 75; Enang v. Adu (1981) 11-12 SC 25 at p. 42.

Although the issue of better or superior title had been finally settled satisfactorily, I would say, by the two courts below in favour of the respondent, I think there is need for me to say a word on the submission made by the learned counsel for the appellant on what he believes to be the general practice under customary law relating to the number of witnesses that must witness the handing over of a piece of land that had been sold under native law and custom.

Under item (iii) of his issue 1, the learned counsel for the appellant submitted that for a transaction on sale of land to be valid under customary law it must be witnessed by more than one witness (at least two witnesses). Learned counsel cited in support comments made by some authors on land law textbooks and some Supreme Court authorities such as Folarin v. Durojaiye (1988) 1 NWLR (Pt. 70) 70 at p. 357; Erinosho v. Owokoniran (1965) NWLR 479; Okiji v. Adejobi (1960) 5 FSC 44 and Cole v. Folami (1961) 1 FSC 66 at p.68. He submitted further that the Court of Appeal erred when it refused to follow the clear and binding authorities of this court. He stressed that at least two witnesses must be present at the conclusion of a sale of land under native law and custom.

From the records, it is clear that learned counsel for the appellant made almost same submission on same issue at the court below. The court below gave its views on that submission as follows:

“I agree that all the authorities relied upon by the appellant used the word witnesses not “a witness” or “at least one witness.” But in the absence of a clear categorical statement on the point, I am

reluctant to construe the texts in the various Supreme Court authorities to have laid down a principle that any sale of land transaction under native law and custom in the presence of only one witness is invalid. Such a narrow interpretation is, in my view, capable of according to the texts a meaning never intended by the Supreme Court. After all it not infrequently happens that one witness of a particular transaction has greater weight and credibility than two or more, depending on the circumstances. In the absence of a direct pronouncement by the Supreme Court on the point therefore, I am inclined to the view of the learned trial judge that a land sale transaction under native law and custom concluded in the present of (sic) only one witness is one (sic)”.

I completely agree with my learned brother, Tabai JCA, (as he-then was) on his above dictum. Permit me to observe further my Lords, that in all the cases cited by learned counsel for the appellant in support of his submission in favour of validating a sale of land transaction under native law and custom with more than a witness, in none of the cases has the law categorically invalidated a transaction of land under native law and custom witnessed by a witness. In fact, in Adeniji V. Onagoruwa [2000] 1 NWLR [pt.639] 5, it was held that a sale of land witnessed by only one witness but having taken other elements of native law and custom into consideration will create an equitable interest in the land which can be converted into a legal estate by specific performance. Further, section 179 [1] of the Evidence Act, Cap 112 LFN, 1990, provides that no particular number of witnesses shall in any case, except as may be provided in the section, be required for the proof of any fact. See: Adewuyi V. Odukire [2005] All FWLR [pt 278] 1102; Nwabuoko V. Ottih (1961) 2 SCNLR 232. Again, I have noted that various enactments direct the courts to enforce applicable customary law which is not incompatible with some law, for example, High Court Law, Lagos Laws, 1973 Cap 52 provided that the customary law to be enforced must not be incompatible with any law for the time being in force. Others provide that it must not be incompatible with “any written law.” See: Western Region of Nigeria Laws 1959, Cap 44. The expression “written law” is defined in section 3 of the interpretation Law in force in Ondo, Oyo states to mean:

“Written law includes all ordinances and Laws and all orders,

proclamations and letters patent and all regulations and rules of court made by any person or body having authority under any statutory or other enactment to make the same in and for Nigeria or any part thereof.”

Thus, under the repugnancy test, any native law and customs which is in conflict with any Nigerian legislation such as the Evidence Act, the latter will prevail. Admittedly, Nigeria is blessed with so many tribes, customs, languages and legal cultures, it is not that easy for one to dismiss by mere waive of hand the proposition that under some native laws and customs, the minimum requirement for a transaction to be valid is that there must be at least two witnesses.

Be that as it may, however, what is primary in our adjectival system of adjudication is that where the evidence of one witness is cogent, credible and convincing, a trial court is entitled to act on it in favour of the party that calls the witness. Although preponderance of evidence is a strong factor in influencing the mind of the trial judge to afford him tilt his pendulum to the side that preponderates, yet the number [quantity] of witnesses is not of much significance over and above the quality of evidence adduced from a minimum number. The Evidence Act, Cap 112 LFN 1990, has provided as follows:

“179 [1] Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact.”

The exceptions given under this section, understandably, are treason and treasonable offences, evidence on charge of perjury, exceeding speed limit, sedition and sexual offence. It is to be noted that native law and custom has not featured within the exceptions.

Issues 4 and 5 are on damages; general, special and nominal. Learned counsel for the appellant treated these issues together. From the record of appeal, the plaintiff in paragraph 20 of his Further and Further Amended Statement of Claim and Plan; claimed, among others, as follows:

“(1) The sum of Twenty Million Naira being special and general damages for continuing trespass starting roughly from June, 1992 committed by the defendants on plaintiff’s land at Ibadan/Lagos Express way.”

In the concluding part of his judgment, the learned trial judge, held, inter alia:

“I have found too that by defendant’s trespass on the land in dispute the plaintiff has suffered some injuries/damages. I also found that the Quantum of damages - general and special - is as I have decided herein. Therefore, the plaintiff’s case succeeds. I award a grand total of N20,000,000.00 [Twenty Million Naira] made up as follows:

General Damages	N 11,453,293.66
And special Damages	N 8,546,700.34
Total	N20,000,000.00"

The court below found the award of N20,000,000.00 to be based on wrong principles of law and that it found it also to be excessively high having regard to the circumstances of the case. It set that award aside and substituted it with N2,500,000.00 as special and general damages. Both the appellant and the respondent were not satisfied with the decision as handed down by the court below. The appellant appealed further to this court. The respondent cross-appealed.

It is the submission of learned counsel for the appellant that on the particular facts of this appeal, the plaintiff [respondent] was not entitled to receive substantial damages and ought to have been awarded nominal damages. He cited the case of Umunna V. Okwurawe [1978] NSCC Vol. 11 at page 319 at page 326. Learned counsel set out the principles of the law in that respect as stated in the case cited and also as contained in the Halsbury’s Laws of England. He submitted further that where a plaintiff has a limited interest in land his recoverable damages are confined to the extent of his interest. He argued that the damages recoverable by the plaintiff in respect of the laterite excavated is limited by the extent of his interest in the laterite. Where he has no title to the laterite, he has no interest and he has suffered no injury and no damages lies at all. It is his argument that to permit the plaintiff to claim the full value of the laterite taken would mean that the defendant could find himself subjected to double liability by having to pay the full value of the goods to more than one claimants, that is, the Federal Government who is the rightful owner of the laterite. Learned counsel submitted that laterites of commercial value excavated from the disputed land were minerals as defined by section 40[3] of the 1979 Constitution and property therein is vested

in the Federal Government and also under section 3 of the Minerals Act, Cap 226 as incorporated in section 39[1] of the Quarries Act, Cap 385. The plaintiff, he contended, had no title whatsoever, in the laterite. Learned counsel for the appellant made lengthy submissions on laterite and minerals which I consider unnecessary to reproduce here. B

On the award of special damages by the court below, learned counsel for the appellant submitted that the court below ought not to have awarded any special damages whatsoever, as the law is that special damages must strictly be proved. He cited the case of Oshinderin V. Ellas [1970] 1 ALNR page 153 at page 156. He stated further that in measuring the quantum of damages suffered by the plaintiff the onus was on the plaintiff to put forward credible evidence which lends itself readily to quantification. He cited in support, the case of Odulaja V. Haddard [1973] 1 All NLR 191 at 196. Learned D counsel argued that in view of the lack of credible evidence as to the quantity of laterite excavated from the land, the court below should not have awarded any special damages.

Learned counsel for the respondent made his submissions as follows: that the value of the laterite taken away by the appellant was proved to be N11,453,293.66. That was for the special damage - use of the land. The appellant did not deny this fact. So, on the authority of Umunna V. Okwurawe's case [supra], the respondent was entitled to claim for the use of his land. He submitted that the lower court F did not err in law in awarding damages for the value of the laterite excavated by the appellant and that the Court of Appeal was right in awarding special damages for the laterite to the respondent though the respondent has cross-appealed on the reduction of the damages as awarded by the trial court. The damages awarded represented G the amount by which the value of the land was diminished by the wrongful act of the appellant.

On the title to the laterite, the learned counsel submitted that since the appellant was not claiming to have gone on the respondent's land pursuant to the authority of the Federal Government of Nigeria, H it cannot contend that the laterite it excavated unlawfully from the respondent's land belongs to the Federal Government. The defence of Jus tertij does not exist under our law. He further stated that the title to the laterite does not arise in this case. The respondent's claim

was not based on the laterite but in trespass to his land and the consequences therefrom. Contending on the mineral aspect, learned counsel for the respondent stated that assuming that the laterite under reference had fallen within the meaning given by section 40[3] of the 1979 Constitution; Mineral Act and the Quarries Act, the appellant had to establish that it came on the land in dispute on the Federal Government's authority or acted on behalf of the Federal Government. He cited the case of *Nicholls V. Elly Back Sugar Factory* (1931) 2 chapter 84.

Since we decided to take the main appeal and the cross-appeal together and moreso, that the issues formulated by the cross-appellant are on the award of the damages by the two courts below, it is desirable to consider the submissions of the respective parties on these issues together. Learned counsel for the cross-appellant formulated the following three issues:

"1 Was there any justification for the Court of Appeal for interfering with the awards of special and general damages which the trial court awarded? Grounds one, three and four.

2 Did the awards made by the trial court amount to double compensation? [Ground 2].

3 Were the awards substituted by the Court of Appeal in place of the awards made by the trial court not unreasonably too low having regard to the evidence before the trial court [Ground five]."

Learned counsel for the cross-respondent agreed with the issues formulated by the cross-appellant. In his submissions, the learned counsel for the cross- appellant stated that having regard to the evidence before the learned trial judge, the accumulated award of N20,000,000.00 was not based on any wrong principle of law. There was specific and sufficient pleading of the special damages claimed by the cross-appellant as the Court of Appeal pointed out in its judgment. The 'surrounding circumstances' the Court of Appeal relied upon in interfering with the awards made by the trial judge were irrelevant, arbitrary and unrelated to the issue of assessment of damages. The trespass committed on the cross-appellant's land, learned counsel submitted, was not mere trespass. It was a trespass involving; not only an injury, albeit a severe one, but also the carrying away of the soil that supported the land.

On the award made by the trial court, learned counsel for the

cross-appellant argued that the award was not a double compensation as held by the court below. The amount of N9,735,000.00 which the learned trial judge reduced to N8,456,706.34 was awarded as general damages and the learned trial judge arrived at the amount by taking into consideration the nature of damages done to the land by the cross-respondent's act of trespass excavation of laterite with heavy machines. The award was for the natural consequence of the injury the cross-appellant suffered. B

On the order of substitution made by the court below in respect of the awards made by the learned trial judge, learned counsel submitted that the amount substituted by the court below was unreasonably too low having regard to the evidence before the trial court. The circumstances enumerated by the court were irrelevant, arbitrary and unrelated to the issue of assessment of damages. He submitted finally that the award of N2,000,000.00 special damages for the laterite removed and assessed as general damages was unreasonably too low, arbitrary and unsupportable. The Court of Appeal did not state how it arrived at the figure of N2,000,000.00 as special damages. C D

Learned counsel for the cross-respondent submitted that once an appellate court holds that the lower court has awarded double compensation to the plaintiff it behoves on it to interfere in the award of damages and set aside the award. He cited the cases of *Oshinijiren V. Elias* [1970] 1 All NLR 153 at 148; *Armels Transport V. Transco* [1974] 11 SC 237 at 241- 242. Learned counsel's further submissions are that the learned trial judge was in breach of the principles laid down by this court against award of double compensation to a plaintiff. The learned trial judge made wrong application of the guiding principles which clearly resulted in an erroneous estimate of the damages to which the plaintiff was entitled. The court below was right to interfere and set aside the erroneous award. He argued further, that the award by the trial judge was unreasonably too high and there was no cogent evidence to support such a finding and the Court of Appeal was right to interfere and reduce the award and that nominal damages ought to have been awarded by the court. E F G H

'Damage', in law generally, refers to a disadvantage which is suffered by a person as a result of the act or default of another for which a legal right to recompense accrues. Damages are thus, the

pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him. See: Umudje & Anor V. Shell BP Petroleum Development Company Nig. , Ltd. [1975] 9 -11 SC 155 at page 162; Soetan & Anor V. Ogenwo [1975] 6 SC 67 at page 72. They have been differently classified such as “liquidated and unliquidated, ‘pecuniary’ and ‘non-pecuniary’, ‘prospective’, ‘aggravated’, ‘exemplary’; ‘general’ ‘special; nominal damages et cetera.

My immediate concern is with the “general”, ‘special’, as well as the nominal damages as they relate to the appeal on hand.” General damages” are such that the law will presume to be direct natural or probable consequence of the act complained of. See: Kalu & Anor V. Mbuko [1988] 3 NWLR [pt. 80] 86 at page 98; Shell Petroleum Development Company Nig. Ltd. V. Teibo & Ors. [1996] 4 NWLR [pt. 445] 657 at 682. “Special damages are those damages which are the actual but not the necessary result of the injury complained of and which in fact, follow as a natural and proximate consequence in the particular case, that is, by reason of special circumstances and conditions. See: Shell Petroleum Development Company Nig. Ltd V. Teibo & Ors. [supra]. In the case of Kalu & Anor V. Mbuko [supra], special damages are such as the law will not infer from the nature of the fact. They do not follow in ordinary cause. They are exceptional in their character and they must be claimed specifically and proved strictly. ‘Nominal damages’ are small and unspecified sums of money which have no peg on which to hang costs. See. Oyewole V. Standard Bank of West Africa [1968] 2 ANLR 32 at page 39. Thus/by considering the various definitions given to the categories of damages referred to in the judgments of the two courts below, I appreciate the difficulty encountered by the learned trial judge in differentiating between “general” and “special” damages. The learned trial judge put the amount of N11,453,293.66 as the general damages and the amount of N8,546,706.34 as the special damages. I believe this might be an accidental slip by the learned trial judge. The reverse should have been the case. In considering these damages granted by the trial court, the court below viewed such awards as excessive. It set aside both awards. It reduced them to N2,000,000.00 and N500.000.00 in respect of the special and the general damages. In so doing, the lower court reasoned as follows:

“For the special damages it is clear that the second award of N8,546,706.34 was not in support of any pleadings in the statement of claim and therefore went to no issues. That award should accordingly be discountenanced and it is hereby discountenanced. But facts in respect of the N11,453,293.66 were pleaded in ; paragraphs 14, 15 and 16 of the statement of claim and so that could form the basis of my reassessment. The amount represents the value of the laterite removed by the appellant. The evidence in respect was virtually unchallenged and so the learned trial judge awarded the full amount. Upon examination however, it is not clear how PW4 came to the figure of 84,839 square metres for the laterite excavated. It is also not clear about the basis for the N135.00 per cubic metre. Although the evidence as to the value of the laterite was virtually unchallenged, the learned trial judge ought to have taken the surrounding circumstances into consideration. These surrounding circumstances in my view include the price of N6,000.00 at which the land was purchased, the fact that there was no development thereon at the time of the trespass and the fact that the initial claim was for N2,000,000.00 subsequently claimed was awarded.”

Although I am in agreement with the court below’s reasoning that both awards as made by the trial court amounted to “double compensation” and it could not allow both to stand, I am at a loss when the same court, stated, inter alia; that:

“But facts in respect of the N11,453,293.66 were pleaded in paragraphs 14, 15, 16 of the statement of claim and so that could form the basis of my reassessment. The amount represents the value of the laterite removed by the appellant. The evidence in respect was virtually unchallenged and so the learned trial judge awarded the full amount. Upon examination however, it is not clear how PW4 came to the figure of 84,839 square metres for he laterite excavated. It is also not clear about the basis for the N135.00 per cubic metre. Although the evidence as to the value of the laterite was virtually unchallenged, the learned trial judge ought to have taken the surrounding circumstances into consideration. These surrounding circumstances in my view, include the price of N6,000.00 at which the land was purchased, the fact that there was no development thereon at the time of the trespass and the fact that the initial claim was for N2.000,000.00 and the fact that the entire N20,000,000.00

subsequently claimed was awarded."

[Underlining for emphasis].

As it is clear from the above excerpt, this is a re-evaluation or reassessment by the court below of the evidence in respect of the award of special damages made by the trial court. I have had a glimpse at what transpired at the court below. While making submissions on his issue No. 6 [which was married to ground viii] the learned counsel for the appellant before that court stated his brief of argument as follows:

"9.3 To start with, the learned trial judge failed completely to evaluate the evidence of the so -called expert witness. He simply accepted the evidence given by the witness without in any way examining it..... Having said that it is our humble submission that the learned trial judge could not be excused from carrying out evaluation of evidence merely because it is not uncontradicted.

..... In our submission the law is quite clear: where there is ample evidence and the trial judge failed to evaluate that evidence and make correct findings as in this case, this court is always at liberty to carry out such an evaluation and make proper findings unless of course the matter rests on the credibility of witnesses, which is not applicable in this case".

The court below, itself, re-stated the trite principle of the law on matters of reassessment or re-evaluation of evidence placed before a trial court by an appeal court:

" On this issue I am conscious of the fact that an appellate court is not normally justified in substituting a figure of its own for damages awarded by the trial court simply because it would have awarded a different figure if it had tried the case in the first instance. In this case, however, I have to intervene because of the wrong principles of law applied by the learned trial judge. I cannot allow the double compensation to stand. Nor can I allow the order of two special damages and no general damages to stand. I have accordingly set aside the two awards."

From the point, the learned Justice of the Court of Appeal, went into the re-evaluation or reassessment of the evidence in respect of the damages. But why I am uncomfortable with the lower court's reassessment is because of its finding on the evidence leading to the award of the special damages which it said was virtually

unchallenged. If it was so unchallenged before the trial court, what was the necessity for the re-evaluation? I think the law is certain that where evidence before a trial court is unchallenged, it is the duty of that court to accept and act on it as it constitutes sufficient proof of a party's claim in proper cases. See: G. S. Pascutto V. Adecentro Nig. Ltd. [1997]12 SCNJ 1; Alfotrin Ltd. V. The Attorney General of the Federation and Anor. [1996] 12 SCNJ 236; Otuedan & Anor. V. Olughor & Ors. [1997] 7 SCNJ 411; Artra Industries Nig. Ltd. V. The Nigerian Bank for Commerce And Industry [1988] 3 SCNJ 97. The trial court accepted and acted upon the evidence by PW4 in respect of the special damages which stood at N11,453,293.00. This should have been upheld by the court below.

On the general damages, I agree with my learned brother, Oguntade, JSC. that an assessment thereof in the sum of N50,000.00 is quite adequate in view of the award of special damages in the sum of N11,453,293.00.

In the final result, I too dismiss the main appeal as lacking in merit. I allow the cross appeal. I abide by order of costs as assessed by my learned brother, Oguntade, JSC.

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OGEBE JSC

I had a preview of the lead judgment of my learned brother Oguntade, JSC just delivered and I agree entirely with his reasoning and conclusion. I adopt the judgment as mine.

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FABIYI JSC

I have read before now the judgment of my learned brother, Oguntade, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal lacks merit and should be dismissed while the cross-appeal savours of merit and is allowed. I abide by all consequential orders therein contained