

SUPREME COURT OF NIGERIA  
5TH MARCH, 2010. SC. 186/2003  
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,  
F. F. TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC

A. OLA YESUFU ..... APPELLANT  
AND  
ROBINSON OLUSEYI ADAMA ..... RESPONDENT

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LAND LAW - Family land - Partition - Proof - Where P.W. 5 gave evidence that there was partitioning of the land - Which appellant failed to contradict - Trial judge was entitled to believe and act on the evidence (H1)

EVIDENCE - Evaluation - Reliance on s. 129 of Evidence Act - Effect on judgment of trial court - Notwithstanding the reliance - Trial court still made correct findings of fact - Based on evidence of P. W. 4 and P.W. 5 (H2)

### FACTS

The plaintiff/respondent sued defendant/appellant before the High Court of Lagos State sitting at Ikeja claiming declaration of title to the land in dispute, damages for trespass and injunction. From the pleadings of the parties, it was common ground that the land in dispute was originally part of the estate of one Lawani Balogun who died intestate on 3<sup>rd</sup> September 1959, leaving behind eight surviving children and many grand children. It was also common ground that at all material time to the events leading to the suit resulting in this appeal, one Dende Balogun was the head of the Lawani Balogun family. It was respondent's case that subsequent to the death of Lawani Balogun, the family made a general partitioning of his landed property among his children and grand children. It was from three of the grand children, to whom were given the land in dispute during the partition, that he eventually bought the land.

On the other hand, appellant insisted that there was no such partition and that he had bought the land from the family head and principal members of the Lawani Balogun family. It was in evidence

through one Jelili Ajani Balogun (P.W.5) – that there was a partition consented to by all the members of the constituent branches of the family, though there was no deed of partition. The partition was also recited in the deed of conveyance executed by respondent and his vendors. After hearing, the trial court gave judgement to respondent as claimed. Aggrieved, appellant appealed to Court of Appeal but his appeal was dismissed. Still dissatisfied, appellant has come on a final appeal to the Supreme Court.

#### ISSUE FOR DETERMINATION

Whether or not the parcel of land which belonged originally to the late Lamidi Balogun was subsequent to his demise partitioned amongst his descendants to enable any of them have any alienable portion of the land.

HELD (Unanimously dismissing the appeal per OGUNTADE JSC)

#### ***Family land - Partition - Whether proved***

1. No evidence was called by the defendant/appellant to controvert the oral evidence of 5<sup>th</sup> P/W on the issue of partition. The witness had said that there was no deed of partition made in respect of the exercise carried out. His evidence on partition took care of every segment of the family - a partition which provides for all members of the constituent branches of the family can never be described as one that is void.

The fundamental rule of evidence is that the burden of proof rests on the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. Once the plaintiff, as in the instant case, has discharged the burden on him, the onus of proof, which is never static, shifted to the defendant/appellant in this case.

Again, as I have said the defendant/appellant has failed to challenge or contradict the testimony of the 5<sup>th</sup> P/W on this all-important issue. The trial judge, would under the law, be entitled to believe and act upon the uncontradicted evidence of the 5<sup>th</sup> P/W. (p. 1032 E/G)

#### ***Reliance on s. 129 of Evidence Act - Effect on judgment***

2. It is easy to observe that the trial court premised its reasoning on Section 129 of the Evidence Act but it still nevertheless made correct findings of fact on the evidence of P.W.4 and P. W. 5. As the defendant/appellant never called any evidence to challenge or contradict

the evidence of partition called, I am respectfully of the view that the court below was correct in its approach. I bear in mind that this appeal is against the judgment of the court below and not the trial court.

The result is that I must decide the solitary issue in this appeal against the defendant/appellant and in plaintiff/respondent's favour. (p. 1035 A)

#### NOTABLE POINT OF INTEREST

##### ADEKEYE JSC

1. Partition must be by consensus or it is void

Partition of a family property is one of the methods by which a family property can be determined in favour of the constituent members or family branches. Where the division is among constituent branches of the family, a new family ownership is created in as many places as the property is divided, each branch becoming the owner of the position partitioned to it. Partition must be brought about by the consensus of all members and branches of the family else it is void. (p. 1037 D)

##### REPRESENTATION

Mr. D. Oduwobi with him, Mr. A. Kazeem and Mr. M. T. Kura for the Appellant.

Chief Bisi Adegunle with him, Mr. S. Edward for the Respondent

##### CASES REFERRED TO

Maya v. Osuntokun (2001)11 NWLR pt. 723 pg. 62

Lemomu v. Alli Balogun [1975] 3 SC. 23 at 35-36

Olorunfemi v. Aso (2000) 2 NWLR pt. 643 pg. 143

Adeleke v. Aserifa [1986] 3 N. W .L. R. (Part 30) 575 at 582

Adeyori v. Adeniran (2001)10 N.W.L.R. (Part 720)151 at 163

Chief M. A. Okupe v. Ifemenubi (1974) 1 ALL NLR 375 at 376

Gbadamosi Ajayi & Ors. V. Gabriel Folaji Pabiekun & Ors. (1970) All N.L.R. 146 at 149

##### STATUTE REFERRED TO

Evidence Act, ss. 91 (1) & 129

LEAD JUDGMENT BY OGUNTADE JSC

The respondent was the Plaintiff at the High Court of Lagos State, Ikeja where in his Amended Statement of Claim dated 2-04-77, he claimed the following reliefs:

“1. Declaration of title in fee simple or alternatively under Yoruba Native Law and Custom to that piece or parcel of land situate at Balogun Street, Ikeja known as Plot 27 Balogun Layout.

2. N2,490.00 (Two thousand, Four hundred and ninety Naira) being special and general damages for trespass committed by the defendant and/or his agents.

3. Injunction restraining the defendant, his servants and/or agents from further trespass on the land”.

The parties filed and exchanged pleadings after which the case was heard by Balogun J. On 6-01-87, Balogun J. gave judgment in favour of the plaintiff/respondent in line with his claim. The defendant/appellant was dissatisfied with the judgment and brought an appeal against it before the Court of Appeal, Lagos (hereinafter referred to as ‘the court below’). The court below on 10-07-2002 in its judgment affirmed the judgment of the trial court. Still dissatisfied, the defendant has brought a final appeal before this court.

In the appellant’s brief filed on 4/1/04, the issue for determination in this appeal was stated to be thus:

“Whether the reliance by the learned trial judge as well as the Court of Appeal on the recitals contained in Exhibit PI is well founded in law. If not, whether there was in any event, sufficient material before the court to justify the conclusion that there had been a partition of the land according to Native Law and Custom.”

The respondent in his brief formulated the issue for determination differently thus:

Whether having regard to the pleadings and the totality of the evidence adduced in this matter the Court of Appeal is justified in affirming the finding of the trial court that there has been a partition of the family land according to Yoruba Native Law and Custom.”

In resolving the solitary issue for determination in the appeal, it is necessary to consider the relevant averments in the pleadings

of parties and the evidence called in support in order to, determine whether or not the plaintiff made a sufficient case on the partition of the land in dispute.

In paragraphs 3 to 12 of his Amended Statement of Claim, the plaintiff pleaded the source of his title thus:

“3. The land in dispute is the Plaintiff's land shown on Plan B number PET 343/64 attached to the Plaintiff's conveyance registered as number 3 at page 3 in Volume 1281 of the Lands Registry in the office at Lagos - known as plot 27, Balogun Layout.

4. The said piece of land formed a portion of a large area C of land which originally belonged in fee simple to one LAWANI BALOGUN Alias Lawani Alagba or Lawani Giwa which interest was confirmed by a Deed of Declaration dated the 28<sup>th</sup> day of April, 1955 and registered as number 27 at page 27 in Volume 532 of the Lands Registry in the office at Ibadan.

5. The said LAWANI BALOGUN died intestate on the 3<sup>rd</sup> D day of September 1959 leaving him surviving eight children namely: DENDE BALOGUN, TIAMIYU BALOGUN, SAMOTA ASHABI BALOGUN, AMUSA BALOGUN, SAWUDATU BALOGUN, DAWUDA BALOGUN, TIJANI BALOGUN, JELILI BALOGUN and many E grandchildren, some of which are:- MUDASIKU OFEGE, MUDASIRU OFEGE, TAUJDEEN OFEGE [children of SABITU OFEGE (deceased) nee BALOGUN) AYUBA AND AWANATU [children of ABUDU BALOGUN (deceased)].

6. The afore-mentioned DENDE BALOGUN was at all F material time the head of the LAW ANI BALOGUN Family.

7. The Plaintiff avers that the said children and grandchildren caused a Layout of the large parcel of land to be made and the land now in dispute is known as plot 27, Balogun Layout. G

8. On or before about the 1<sup>st</sup> day of August 1964, at a Family meeting the said LAW ANI BALOGUN Family made a general distribution of the landed and personal properties of the deceased LAWANI-BALOGUN between the children and the grandchildren.

9. After the said general distribution each member took H possession of his or her own share exercising maximum powers of ownership; some selling theirs and others dealing with it as he or she pleases. In support of this averment the Plaintiff will amongst others draw assistance from the following registered documents:

(a) Deed of Conveyance dated 27<sup>th</sup> July 1965 and registered as number 35 at page 35 in Volume 854 Ibadan.

(b) Deed of Conveyance dated 24<sup>th</sup> November 1965 and registered as number 30 at page 30 in Volume 899 of the land Registry at Ibadan now at Lagos.

B (c) Deed of Conveyance dated 24<sup>th</sup> November 1965 and registered as number 31 at page 31 in Volume 899 of the land Registry at Ibadan now at Lagos.

C (d) Deed of Conveyance dated 24<sup>th</sup> November 1965 and registered as number 25 at page 25 in Volume 899 of the land Registry at Ibadan now at Lagos.

(e) Deed of Conveyance dated 24<sup>th</sup> November 1965 and registered as number 32 at page 32 in Volume 899, of the land Registry at Ibadan now at Lagos.

D (f) Deed of Conveyance dated 19<sup>th</sup> March 1970 and registered as number 29 at page 29 in Volume 1317, Lagos.

(g) Deed of Conveyance dated 4<sup>th</sup> day April 1970 and registered as number 35 at page 35 in Volume 1351 Lagos.

E 10. On the said general distribution four plots in the said Layout one of such plots being the property in dispute were allotted to MUDASIKU OFEGE, MUDASIRU OFEGE and TAJUDEEN OFEGE three of the five grandchildren referred to in paragraph five above.

F 11. Under and by virtue of a Deed of Conveyance dated the 20<sup>th</sup> day of December 1968 and registered as number 3 at page 3 in Volume 1281 of the Lands Registry in the office at Lagos the said MUDASIKU OFEGE, MUDASIRU OFEGE and TAJUDEEN OFEGE conveyed the land now in dispute to the Plaintiff, which conveyance was witnessed by the aforementioned DENDE BALOGUN.

G 12. The Plaintiff was immediately after the purchase was put into, quiet and peaceable possession of the land by his said Vendors." The defendant in paragraphs 3 to 9 of his Amended Statement of Defence pleaded thus:

H "3. The Defendant admits paragraph 7 of the Plaintiff's Amended Statement of Claim only to the extent that the children of the late Lawani Balogun caused a layout of the large parcel of land to be made and that the land claimed by the Defendant is known as Plot No. 27, Balogun Layout but denies any other allegation therein contained and put the Plaintiff to the strict proof thereof.

4. Defendant admits paragraph 3 of the Plaintiff's Amended Statement of Claim only to the extent that the land in dispute is known as Plot 27, Balogun Layout and denies every other allegation of fact therein contained and puts the Plaintiff to the strict proof thereof.

5. The Defendant admits paragraph 5 of the Plaintiff's Amended Statement of Claim only to the extent that Lawani Balogun died intestate on the 3<sup>rd</sup> day of September 1959 but denies all the other allegations of fact therein contained and puts him to the strict proof thereof. B

6. With further reference to paragraph 8 of the Plaintiff's Amended Statement of Claim the Defendant avers that the late Lawani Balogun was survived by more than eight children amongst whom are Deinde Balogun - head of the family, Tihamiyu Balogun, Ganiyu Balogun, Wahabi Balogun etc. C

7. The Defendant denies paragraph 1 of the Plaintiff's Amended Statement of Claim and puts him to the strict proof thereof. D

8. The Defendant denies paragraphs 8, 9, 30, 11, 12, 13, 14, 15, 16 and 17 of the Plaintiff's Amended Statement of Claim and puts him to the strict proof thereof.

9. The Defendant will at the trial of this action contend: E

(a) that the land which is the subject matter of this action was sold to him by the accredited representatives of the family of the late Lawani Balogun including Deinde Balogun who at all times material to this case is the accredited head of the Lawani Balogun Family; F

(b) that after the purchase, he was given a purchase receipt signed by the head of the family - Deinde Balogun;

(c) that the said head of the family of the late Lawani Balogun along with the other representatives of the said family executed in his favour a Deed of Conveyance dated the 18th day of February 1976 and registered as No. 2 at Page 2 in Volume 1543 of the Register of Deeds kept at the Lands Registry in the Office at Lagos; G

(d) That when the land was sold to him in June 1975 the place was real bush and there was nobody in occupation or possession of same; H

(e) That he was put in possession by the family of Lawani Balogun after the sale to him in June 1975;

(f) That the Deed of Conveyance relied upon by the Plaintiff and referred to in paragraph 9 of his Statement of Claim is null and

void and of no effect;

(g) Since action commenced in this suit, Deinde Balogun, who at all material times was the head of Balogun Family swore to an affidavit in this Court denying taking any part in the purported sale of the land in dispute to the Plaintiff. The said affidavit sworn to on the 5<sup>th</sup> February 1976 and attached to the Counter Affidavit of the Defendant sworn to on the same date was filed in this suit. The Defendant, at the trial of this action, will rely on this counter affidavit and the affidavit of the said Deinde Balogun attached to same and marked EXHIBIT 'A'".

The averments from the parties' pleadings reproduced above show that whilst the plaintiff traced his title to the land in dispute to the partition of the land originally belonging to Lawani Balogun which said partition was done on or before 1/8/1964, the defendants/appellant's relied on a sale to him by the head of Lawani Balogun Family. The defendant's/appellant's pleading quite clearly repudiated a partition of the land originally belonging to Lawani Balogun since he claimed to have derived his interest from the head of the Lawani Balogun family. Issues were therefore clearly joined on the pleadings as to whether or not Lawani Balogun's land was at anytime partitioned.

In the appellant's brief, it was submitted that the two courts below fell into error when they relied heavily on the recitals in exhibit P1 tendered by the plaintiff/respondent. The two courts below counsel submitted should have approached the question of partition of the family land in dispute by recourse to the oral evidence called in support of such partition. It was submitted that the courts below failed to follow the requirements under section 91(1) of the Evidence Act. It was further submitted that rather than follow the provisions of Section 91(1), the courts below took umbrage under section 129 of the Evidence Act. Counsel relied on *Adeyori v. Adeniran* (2001)10 N.W.L.R. (Part 720)151 at 163 where the Court of Appeal held that what amounts to a valid partition is a matter of fact which must be established by credible evidence. Counsel faulted the reasoning of the trial judge where he said:

"But even if Deinde Balogun had not signed Exhibit P1, that would not make any difference to my specific findings and conclusion that Lawani Balogun Family Land had been partitioned as pleaded



in the Amended Statement of Claim was proved by cogent and satisfactory evidence."

Counsel finally submitted that there was no cogent evidence before the trial court in support of the averment that the land which both parties agreed belonged to Lawani Balogun had been partitioned such as to allow any of the heirs of the aforementioned Balogun validly convey the land in dispute to the Respondent. B

The Respondent's counsel on the other hand submitted that it is incorrect to say that the court below relied on the recitals in exhibit P1. Counsel referred to the evidence of P.W.4 and P. W. 5. Mudasiru Ofege and Deinde Balogun respectively on the question of partition. C  
Counsel also emphasized that the court below did not need to seek for any assistance under Section 91 (l) of the Evidence Act.

It needs be said here that the simple question to be determined by the two courts below was whether or not the parcel of land which belonged originally to the late Lamidi Balogun was subsequent to his demise partitioned amongst his descendants to enable any of them have any alienable portion of the land. There is no doubt that the trial court in its judgment placed a lot of reliance on Section 129 of the Evidence Act. The learned trial judge needlessly made the process of evaluating before him cumbersome by placing reliance on Section 129 of the Evidence Act. He started by relying on *Alhaji Etiko v. M. A. Aroyewun* [1950] 4 FSC 129 and then proceeded to say at pages 139-141 of the record: E

"Section 129 of the Evidence Act reads as follows: F

'129. Recitals, statements and descriptions of facts, matters and parties contained in deed, instruments, Acts of Parliaments, or statutory declarations, twenty years old at the date of the contract shall, unless and except so far as they may be proved to be inaccurate to be taken to be sufficient evidence of the truth of such facts; matters and descriptions.' G

In upholding the decision of the trial Judge on all those matters, Abbot Acting C. J. F. (as he then was) observed aptly, if I may respectfully say so, at page 131 as follows:- H

'It is quite obvious in my opinion that Section 90(1) deals with one set of circumstances, and Section 129 with another totally different. By virtue of the latter section, the facts stated in, for example, a recital in a document of the age specified, are presumed

to be true, except in so far as they may be proved to be inaccurate. In other words, a recital in such a document is prima facie evidence of the facts averred therein. The former section provides that oral evidence is required, plus other conditions to make admissible a statement made by a person in a document and lending to establish  
 B a fact whereof direct oral evidence would be admissible. To put the distinction another way, Section 129 raises a presumption as to the correctness of a recital in a document twenty years old, while Section 90(1) provides for the admissibility, on , certain conditions being  
 C fulfilled of a Statement in a recital no matter What the age of the document containing it.'

APPLIED TO THIS CASE

I shall apply the principles of *Etiko v. M. Aroyewun* (supra) to the facts of this case. In this case the 5<sup>th</sup> P.W., Jelili Balogun who is one of the Plaintiff's vendors, and who had personal knowledge  
 D of the land in dispute and the fact of partition of Lawani Balogun Family land, gave evidence at the trial. He gave detailed evidence of the partition of the Family Land amongst all the children and grand children of Lawani Balogun at a Family Meeting held on 1<sup>st</sup> August, 1964, at which Deinde Balogun (the then Head of the Family) was  
 E present, and that they all went to the family land, and thereat, the Head of the Family partitioned the land and showed what portion was partitioned to each person. He also gave cogent, satisfactory and detailed evidence of what each person got thereby. I have already  
 F set out his testimonies thereon in greater detail earlier on in this judgment I accept those testimonies in toto as true. I also accept all the 'statements' thereon contained in the recitals.

RECITALS: The Recitals in Exhibit PI which I treat as legally admissible evidence on all those matters arc very important.

The said recitals read:

G 'Whereas the land to be conveyed forms a portion of a large area of land seised in fee simple in possession of one Lawani Balogun alias Lawani Alagba or Lawani Giwa by Deed of Declaration dated the 28<sup>th</sup> day of April, 1955 and registered as No. 27 at page 27 in Volume 523 of the Lands Registry at Ibadan.

H An whereas the said Lawani Balogun died intestate on the 3<sup>rd</sup> day of September, 1959, having him surviving eight issues, namely - Dende Balogun, Tiamiyu Balogun, Samota Ashabi Balogun, Amusa/

Balogun, Dawuda Balogun, Tijani Balogun, Jelili Balogun, Sawudatu Balogun and grandchildren, including Mudasiku Ofeye, Mudashiru Ofeye, Tajudeen Ofeye, Ayuba and Awanotu.

And whereas the said children and grand children caused the said hereditaments to be laid out in plots which is known as Layout Plan No. TPA 0314. B

And whereas a on the 1<sup>st</sup> day of August, 1964, at a family meeting with the concurrence and approval of the accredited Head and representatives of the Family and the whole members of the said Lawani Balogun Family, PLOTS 27, 39. 53 and 68 were allocated to the said Vendors Mudasiku Ofeye, Mudisuru Ofeye and Tajudeen Ofeye (their mother, Sabitu Ofeye, Nee Balogun, having died), as their share in their grand-father's inheritance according to Native Law and Custom to HAVE and HOLD free from any encumbrances. C

And whereas the Vendors have agreed with the Purchaser for D an absolute sale to him of the said hereditaments and did sell same to him.”'

The court below for its part did not fall into the same error of the trial court. Rather it considered the question whether or not there was sufficient evidence of a partition of the land which had belonged to Lawani Balogun. At pages 278 to 281 of the record the court below without making any reference to sections 91(1) and 129 of the Evidence Act said: E

“The second witness called by the plaintiff was Miss Kuye, F a legal practitioner who was also not present at the family meeting where the partitioning of the family land took place. She said she was however instructed by Dende Balogun, the head of the family to prepare a deed of conveyance in respect of the land in dispute in favour of the plaintiff/respondent. She agreed, under cross-examination, that one Buraimoh Balogun was also head of the family since the death of Lawani Balogun. The 4<sup>th</sup> P.W -Mudasiru Ofeye claimed that he jointly with Mudasiku Ofeye and Tajudeen Ofeye sold the land in dispute to the plaintiff/respondent which sale was witnessed by a deed of conveyance tendered as Ex. P1 which they all signed. H Continuing his evidence under examination-in-chief he said:

‘Dende Balogun usually does not join us to execute conveyance of land which was distributed to us, as he had no share in such portion. He had his own lands which were distributed to him.’

Again, under cross-examination he said:

'Dende Balogun never signed Exhibit P1 which we executed in favour of the plaintiff.'

5<sup>th</sup> P.W. - Jelili Ajani Balogun, one of the direct children of Lawani Balogun who survived him testifying under examination-in-chief said:

B 'When my father died he had twelve children and his land was  
inherited by all the children. The land was later partitioned amongst  
all of us his children on 15<sup>th</sup> August 1964, at a meeting at which all  
the children assemble, and we all went to the farm-and and the head  
C of the family partitioned the land and showed what each child got.  
The head of the family then was Dende Balogun. Each child got four  
plots of land on his own. But of the twelve children eight were living  
at the time of the partitioning. Each of the eight children got four  
plots to himself, and the children of the dead got four for their side.  
Those who died amongst his (sic) children of my father, (die before  
D his death) got there (sic) shares. In the case of the dead children,  
their grandchildren took the share of their deceased parents. I know  
Mudashiru Ofege and Tajudeen Ofege. They are grandchildren of  
my father. Their mother was Sabitiu Ofege nee Balogun. They were  
E some of the beneficiaries of the land so partitioned amongst us. After  
my father's death, the land was laid into a layout.'

Under cross-examination he said although their family land  
was partitioned there was no Deed of partition in that behalf. No  
evidence was called by the defendant/appellant to controvert the oral  
F evidence of 5<sup>th</sup> P/W on the issue of partition. The witness had said  
that there was no deed of partition made in respect of the exercise  
carried out. His evidence on partition took care of every segment of  
the family - a partition which provides for all members of the constit-  
uent branches of the family can never be described as one that is void  
see (1) MAJEKODUNMI V. TIJANI 11 N.L.R. 74 and (2) ONISIWO  
G V. BAMGBOYE (1941) WACA 69. As I have said, the crucial issue  
in this case is whether partition, known to law, occurred. I have also  
said partition of family land is a matter of fact. The fundamental rule  
of evidence is that the burden of proof rests on the party, whether  
plaintiff or defendant, who substantially asserts the affirmative of  
the issue. Once the plaintiff, as in the instant case, has discharged  
H the burden on him, the onus of proof, which is never static, shifted  
to the defendant/appellant in this case. See NIGERIAN MARITIME

SERVICES LTD. V. AFOLABI (1978) 2 S.C. 79. Again, as I have said the defendant/appellant has failed to challenge or contradict the testimony of the 5<sup>th</sup> P. W. on this all-important issue. The trial judge, would under the law, be entitled to believe and act upon the uncontradicted evidence of the 5<sup>th</sup> P. W. The trial judge on his perception and evaluation of the evidence of 5<sup>th</sup> P. W. said and I quote: B

‘In this case the 5<sup>th</sup> P/W Jelili Balogun who is one of the plaintiff s vendors and who had personal knowledge of the land in dispute and the fact of partition of Lawani Balogun Family and gave evidence at the trial. He gave detailed evidence of the partition of the family land amongst all the children and grand-children of Lawani Balogun at a family meeting held on 1<sup>st</sup> August, 1964, at which Dende Balogun (the then Head of the Family) was present, and that they all went to the family land and showed what portion was partitioned to each person. He also gave cogent, satisfactory and detailed evidence D of what each person got thereby. I have already set out his testimonies thereon in greater detail earlier on in this judgment. I accept those testimonies in toto as true. I also, accept all the ‘statements’ thereon contained in the recitals.’ C

I cannot fault the findings of the learned trial judge on the crucial issue as to whether partition, known to law, took place. I do agree that there are some minor errors in those findings such as where the learned trial judge held that the 5<sup>th</sup> P.W. was one of the vendors of the plaintiff/respondent. The witness never said that he was one of the vendors, indeed, he did not belong to the (sic) that sold land to their own portion of partitioned land to the plaintiff/respondent. Again the witness said that the meeting took place on the 15<sup>th</sup> of August 1964 and not list of August 1964. As I have said I am in full agreement with the findings of the trial judge on the issue of partition. The result of all I have been saying is that issue No. 1 on the appellant’s brief must be resolved in favour of the respondent but against the appellant and I so resolve it. There was that uncontradicted evidence of partition staring the court in the face.” E F G

The simple question before this court is whether or not there was sufficient evidence before the trial court to enable it conclude that there was indeed a valid partition of the land of Lamidi Balogun The facts in this case would appear to be the reverse of those in Gbadamosi Ajayi & Ors. V. Gabriel Folaji Pabiekun & Ors. (1970) H

All N.L.R. 146 at 149 where this court per Coker JSC said:

“The present action concerns the radical title to the land and we much decide that question without reference to the interpleader proceedings and its consequences. The parties eventually agreed that the land in dispute falls within lands at one time owned by Lukugba  
 B their common ancestor. The plaintiffs say that the land is still part of his family land. The defendants allege that there was a partition as a result of which their own sub-branch took the land in dispute absolutely. Surely the burden of proving the partition is squarely on  
 C them. The defendants called no evidence at the trial and the provisions of section 136 of Evidence Act must apply. The result is that the judge was entitled to find as he did that the ownership of the land in dispute still remains in the Lukugba family which of course includes the Pabiekun sub-branch.”

In this appeal, it was the plaintiff/respondent made the case  
 D that the land of Lamidi Balogun had been partitioned. They called oral evidence through P.W.4 and P. W. 5. In addition they tendered exhibit P1. On the other hand the defendant/appellant whose case was that the land had not been partitioned did not call any evidence.  
 E None of the offspring of Lamidi Balogun was called to say that there was no such partition. This could not have been too onerous for the defendant/appellant to achieve since the plaintiff/Respondent’s case by its nature was to divest other members of the Lamidi Balogun family of their joint interest in the land which was sold by Some  
 F members of the family to the plaintiff.

In *Adeleke v. Aserifa* [1986] 3 N. W .L. R. (Part 30) 575 at 582, a member of a family had testified thus:

“The land in dispute is at Arolu Village on Iwo Road. I am from Akinlehin Branch. Defendant is from the same branch as me. Plaintiff owns the land in dispute. Arolu had 5 children. After Arolu’s  
 G death his land was partitioned into 5 parts. The one in dispute was given to Igbinbolu, plaintiff’s grandfather. A portion was given to my great grandfather at Adogba. Defendant uses the land at Adogba.”

In accepting the above evidence sufficient the Court of Appeal said:

“These are the evidence which the trial court accepted. They  
 H are in support of the pleadings particularly those under reference in appellant’s counsel’s argument. The evidence was unrebutted and the

submission of the appellant's counsel on the issue is therefore mis-conceived in my view; and indeed, as submitted by the respondent's counsel, the trial judge was correct in considering and accepting the respondent's evidence on the issue. Refer to Chief M. A. Okupe v. Ifemenubi (1974) 1 ALL NLR 375 at 376; Lemomu v. Alli Balogun [1975] 3 SC. 23 at 35-36" B

It is easy to observe that the trial court premised its reasoning on Section 129 of the Evidence Act but it still nevertheless made correct findings of fact on the evidence of P.W.4 and P. W. 5. As the defendant/appellant never called any evidence to challenge or contradict the evidence of partition called, I am respectfully of the view that the court below was correct in its approach. I bear in mind that this appeal is against the judgment of the court below and not the trial court. C

The result is that I must decide the solitary issue in this appeal D against the defendant/appellant and in plaintiff/respondent's favour. This appeal fails and is dismissed. I affirm the judgment of the court below and award N50,000.00 cost in favour of plaintiff/respondent against the defendant/appellant.

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#### MUSDAPHER JSC

I have read before now the judgment of my Lord Oguntade, F JSC just delivered in this matter. Besides the use of the Recitals in the deed of Conveyance, Exhibit P1 to arrive at the conclusion that the land was partitioned, the learned trial judge also accepted the evidence of P.W. 4 and P.W. 5 that the land was partitioned, clearly as pleaded by the respondent, the plaintiff at the trial court. The Court G of Appeal confirmed the finding that there was a valid partition. Thus, it is a concurrent finding of facts and this court will not ordinarily interfere with such findings unless it is shown to be perverse and the appellant has not convinced me H that the findings were perverse. That is why, I too, dismiss the appeal and affirm the decisions of the courts below. I abide by the order for costs proposed in the aforesaid judgment.

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## TABAI JSC

This action was commenced at the Ikeja Judicial Division of the High Court of Lagos State. The reliefs claimed contained in the Amended Statement of Claim are reproduced in the lead judgment of my learned brother OGUNTADE JSC and I need not reproduce them. At the end of the trial the learned trial judge allowed the claim and granted the relief claimed. The Defendant was aggrieved by the said judgment and proceeded on appeal to the Court below. By its judgment on the 10<sup>th</sup> of July 2002 the appeal therein was dismissed and the judgment of the trial court affirmed.

The Defendant/Appellant was still not satisfied with the judgment and has lodged his appeal before this Court. On behalf of the parties briefs of argument were filed and exchanged. Each of the parties submitted a single issue for determination. The issues as formulated by the parties though differently couched are, in substance, the same. This issue is whether having regard to the pleadings and the evidence before the court, the Court of Appeal was justified in affirming the finding of the trial court that there was a partition of the family land according to Yoruba native law and custom.

This appeal turns on evaluation. It is a common ground that the land in dispute originally belonged to one Lawani Balogun. The case of the Plaintiff/Respondent as pleaded is that they acquired title to the land by virtue of a partition on or about the 1<sup>st</sup> of August 1964. That of the Defendant/Appellant is that they acquired title to the land by virtue of a sale to him by the head of the Lawani Balogun family. A key witness in the case is the P W 5 Jelili Ajani Balogun who was one of the direct children of Lawani Balogun. He gave detailed evidence of partition. His evidence was not seriously controverted. The learned trial judge believed his testimony. The court below upheld the finding of the trial Court. I have examined the evidence and I have no doubt whatsoever that the concurrent findings are supported by the evidence on record. In such a situation this Court would not interfere with the finding.

On the whole it is my view that the appeal fails. And in view of the foregoing considerations and the fuller reasons very ably articulated in the lead judgment of my learned brother OGUNTADE JSC I also dismiss the appeal and affirm the judgment of the Court



below. I assess the costs of this appeal at N50,000.00 in favour of the Respondent.

MUHAMMAD JSC

I read before now the judgment of my learned brother, Ogun-  
tade, JSC, just delivered. I agree with his reasoning and conclusion  
that the appeal fails and it is dismissed by me. I abide by the order  
on costs made in the lead judgment.

ADEKEYE JSC

I had a preview of the judgment just delivered by my learned  
brother, G.A. Oguntade, JSC. I agree with his reasoning and con-  
clusion that the Court of Appeal adopted the proper approach to  
arrive at its findings that the family property of Lamidi Balogun had  
been partitioned at the time of the sale and transfer to the plaintiff/  
respondent. Partition of a family property is one of the methods by  
which a family property can be determined in favour of the constituent  
members or family branches. Where the division is among constituent  
branches of the family, a new family ownership is created in as many  
places as the property is divided, each branch becoming the owner  
of the position partitioned to it. Partition must be brought about by  
the consensus of all members and branches of the family else it is  
void.

Balogun v. Balogun (1993) 9 WACA 78

Majekodunmi v. Tijani 11 NLR 74

Onisiwo v. Bamgboye (1941) 7 WACA 69

Olorunfemi v. Aso (2000) 2 NWLR pt. 643 pg. 143

Maya v. Osuntokun (2001) 11 NWLR pt. 723 pg.62

Since what amounts to partitioning of a family land is a  
question of fact, there must be averments in the pleadings, supported  
by cogent and positive evidence to buttress the partitioning.

In the case at hand, partitioning of the land is a fundamental  
factor and there must be ample evidence before the court that par-  
titioning of the disputed land was already in place before the sale.

The Recitals of Exh. P1 talked about the partition of the large area of land between the children and grandchildren of Lawani Balogun covered by Layout Plan No. TPA 0314. Recitals of P<sup>2</sup>, P<sup>3</sup>, P<sup>4</sup> and P<sup>5</sup> talked about the family meeting where the land of Lawani Balogun was shared and plots allocated to his children since a partition of a family property to individual members confers on each individual member an absolute and exclusive right to deal with his partitioned portion of the land. The plaintiff/respondent established through the evidence of PW<sup>1</sup>, PW<sup>2</sup>, PW<sup>4</sup> and PW<sup>5</sup> in addition to tendering Exhibit P<sup>1</sup> that the land in dispute was properly partitioned, which the defendant/appellant did not challenge. Exh. P is the conveyance of the sale of the disputed land.

With fuller reasons given by my brother in the leading judgment, I agree that the appeal must fail and it is hereby dismissed. I adopt the consequential orders as mine.

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