

SUPREME COURT OF NIGERIA
5TH MARCH 2010 SC. 38/2003
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. O. OGBE, J. A. FABIYI, JJSC

1. SKY BANK PLC
2. ALHAJI A. L. AJIBOLA APPELLANTS
AND
CHIEF MOSES BOLANLE AKINPELU RESPONDENT

APPEALS - Findings of fact - Finding of constructive possession - Propriety - In view of the contrary finding by trial court - Which was not cross-appealed by respondent - Court of Appeal was wrong to have made that finding (H1)

ACTIONS - Trespass - Order of injunction - Propriety - Since respondent said he had disposed of the property in question - There was no justification for the order of injunction - Granted in his favour (H2)

TORTS - Libel - Content of publication - Need to prove - Even where defendant admits making a publication - Plaintiff has a duty to prove the alleged defamatory content thereof - Failure to do so is fatal (H3)

TORTS - Libel - Defamation - Publication - Where the offensive publication does not refer to plaintiff at all - It cannot possibly be defamatory of him (H4)

FACTS

The plaintiff/respondent sued defendants/appellants before the High Court of Oyo State sitting at Ibadan claiming sundry reliefs by which it was sought to restrain appellants from selling respondent's property at Ibadan in satisfaction of a mortgage allegedly taken by one Mr. S. A. Oshinowo. Respondent also claimed N20,000 damages for trespass and N100,000 damages for defamation of character. It was undisputed that appellants pasted an auction notice on the property announcing their intention to sell the same to satisfy the mortgage debt of the said Mr. Oshinowo. But while admitting that they pasted the notice, appellants said it was done in error. Moreover, not only

did the notice not bear the name of respondent but also respondent admitted in his pleadings that he had already sold the property to a third party at the material time and had given possession to the said third party.

However, respondent's case was that his buyer had, upon seeing the auction notice, caused his solicitor to write respondent demanding a refund of the purchase price as he was no longer interested in the transaction. At the end of hearing, the learned trial judge found for respondent on libel while dismissing the claim for trespass on the basis that he was not in possession. He awarded the sum of N20,000 to respondent as damages and made an order of perpetual injunction restraining appellants from further violation of respondent's rights to property. Aggrieved, appellants appealed to Court of Appeal but their appeal was dismissed. Moreover the court held that respondent was still in constructive possession of the property at the material time and so appellants were also liable to him in trespass. Still dissatisfied, appellants brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

"i. Whether the lower court was right in holding that the respondent was still the owner who was presumed to be in possession of the uncompleted building on which the alleged Auction Notice was pasted after admitting during the trial that he had sold it to one Mr. Olu Adeyeri.

ii. Whether the lower court was right in holding that the Respondent was entitled to both damages for trespass and injunction after the dismissal of the claim for trespass by trial court.

iii. Whether the lower court was right in holding that the appellants did not proffer arguments on submissions on issues No. 1 and 2 (sic) formulated for determination And therefore deemed same abandoned.

iv. Having regard to the pleadings, the evidence led in support and documents tendered from the record, whether or not the lower court was right in dismissing the appellants (sic) appeal."

HELD (Allowing the appeal by a majority decision per **OGE BE JSC**, Ogbuagu JSC dissenting)

Finding of constructive possession - Propriety

1. In his evidence at page 38 lines 8 and 9 of the printed record the

respondent said:

"I resolved to dispose it, I did dispose it to Mr. Adeyeri of Exid Battery"

Since he had disposed of the property what was the basis of his action for trespass or any other relief? The trial court rightly dismissed the respondent's claim for trespass based on his pleadings and evidence; and the Court of Appeal was wrong in holding that the respondent was still the owner of the property in question and was in constructive possession thereof. This is no more as the respondent did not cross-appeal to challenge the finding of the trial court that he was not in possession of the land. (p. 987 D/F)

Trespass - Order of injunction - Propriety

2. The learned counsel for the appellants submitted that since the trial court dismissed the claim for trespass the evidence showed that the respondent had disposed of the property in dispute, there was no basis for the order of injunction.

I agree with this submission since the respondent with his own mouth said he had disposed of the property in question, there was no justification for granting any order of injunction in his favour. (p. 988 A)

Libel - Content of publication - Need to prove

3. It is not in dispute that the respondent did not tender the Auction Notice which he claimed was defamatory of him. The fact that the appellant admitted pasting an Auction Notice is not proof of its contents. It was the duty of the respondent to prove the content of the defamatory statement and failure to do so was fatal to his claim for libel. (p. 989 A)

Libel - Where publication does not refer to plaintiff

4. From the plaintiff's own showing the offensive publication did not refer to him at all. It could not therefore possibly be defamatory of him.

For all I have said in this judgment I see a lot of merit in this appeal. The two lower courts were wrong in their judgments in favour of the respondent. Consequently I set aside the judgments of the two lower courts and in their place I dismiss the respondent's claim at the

court of first instance and the court of Appeal. (p. 989 D)

NOTABLE POINTS OF INTEREST

MUKHTAR JSC

1. *Arguments however concise should be founded upon by court*

- B The position of the law is that arguments canvassed in respect of a validly formulated issue for determination must be considered by an appellate court and found on, the argument being concise notwithstanding. On the contrary, a brief that contains concise arguments deserves commendation. As stated by Achike J.S.C. (of blessed memory) in the case of *F. S. B. Int. Bank Ltd v. Imano (Nig.) Ltd* 2000 11 NWLR part 679, page 620:-

C *"A brief submitted on behalf of each party to an appeal, as the term readily suggests is a precis or an abridgment of the relevant*
D *submissions a disciplined counsel would wish to put across for consideration by the court demonstrating lucidly and succinctly why his contentions should be preferred rather than those of the opposing counsel. Counsel should caution oneself and be reminded that good advocacy, like writing a good brief, does not accommodate unnecessary repetition since it has long been established that repetition does*
E *not improve an argument."* (p. 993 E)

OGBUAGU JSC (DISSENTING)

2. *Finding that respondent was not in possession is perverse*

- F The finding and holding of the learned trial Judge that the Respondent was not in possession of the property, with the greatest respect, is grossly perverse in view of the documentary evidence, before him which were admitted in evidence, without objection. It is now firmly
G settled that documentary evidence, is the best evidence.

In fact, the document being the best proof of its contents, no oral evidence, will be allowed to discredit or contradict the said contents except in cases where fraud is pleaded. (p. 1000 B)

- H 3. *Respondent as owner was entitled to damages for trespass*

I have even noted earlier in this Judgment, that the learned trial Judge, found as a fact and held that the Respondent, is the owner of the property. Since the Respondent claimed damages for trespass and injunction, which raised issue of title, he was definitely entitled to

be awarded as the owner, damages for trespass and injunction. I so hold.

The court below, also noted this fact at page 93 of the Records.

The court below - per Adamu, JCA, with respect, captured so to speak, correctly and appreciated the evidence before the trial court. At page 94 of the Records, it stated inter alia, as follows: B

"..... The respondent in the present case who claim and prove that he is the owner of the land in issue (the fact which has been admitted and is undisputed) is therefore in my humble view entitled to both damages for trespass and an injunction". C

I completely agree. (p. 1000 E/G)

4. Libel - Proof - What is important is reaction of third parties

It must be stressed and this is also settled that in defamation or libel cases, what is important, is the re-action of a third party to the publication complained of. It is not what the plaintiff thinks about himself, but what a third party thinks of the plaintiff as regards his reputation. D

In other words, a person's reputation, is not based on the good opinion he has of himself, but the estimation in which others hold him. E The evidence of the Respondent about the trauma he suffered at the instigation of Mr. Adeyeri and the evidence of the PW2 of how he reacted towards the Respondent, were never controverted by the Appellants. The trial court believed the said evidence as reproduced by F me above in this judgment. The two lower courts, found in favour of the Respondent. I cannot fault the said findings as the Records speak eloquently about the said findings. (p. 1003 B)

REPRESENTATION

A. Olawoye Esq. For the Appellants
Dr. J. Nwobike For the Respondent G

CASES REFERRED TO

Ajuwa V Odili (1985) 2 NWLR Pt. 9,710 H
Amakor v. Obiefuna (1974) 3 SC 67 at 75
Onu V Agbese (1985) 1 NWLR Pt. 4, 704
Onu v. Agbese .(1985) 1 NWLR (pt. 4) 704 at 712
Katto v. C. B. N. 1999 6 NWLR part 607 page 390

- Iheanacho V. Chigero (2004) 17 NWLR (Pt. 901) 130
 Okafor & 3 ors. v. Nnaife (1987) 4 NWLR (Pt. 64) 129
 Sketch v. Ajagbemokeferi (1989) 1 NWLR (Pt. 100) 678 at 706
 Ejowhomu v. Chief Edok-Eter Mandilas Ltd. (1986) 9 S.C. 41 @ 47
 Dr. Alakija & 2 ors. v. Alhaji Abdullahi (1998) NWLR (Pt. 552) 1 @
 B 24
 John Holt Ventures Ltd. v. Oputa (1996) 9 NWLR (Pt. 470) 101 @
 112
 F. S. B. Int. Bank Ltd v. Imano (Nig.) Ltd 2000 11 NWLR part 679,
 C page 620
 Nnorodim & anor. V. Seam & 6 ors. (2001) FWLR (Pt. 140) 1696
 @ 1700 - 1701
 Dabo v. Alhaji Abdullahi (2005) 7 NWLR (Pt. 923) 181; (2005) 2
 SCNJ. 76 @ 95
 D Adepade vs. Babatunde 2002 4 NWLR (Pt. 756) 99 at 111, 2002)
 Vol. 8 WRN 128 at 134

STATUTES REFERRED TO

- Constitution of the Federal Republic of Nigeria 1999, s. 36
 E Supreme Court Act, Cap 424, L.FN., 1990, s. 22

LEAD JUDGMENT BY OGEBE JSC

- The respondent who was the plaintiff at the High Court sued
 F the appellants as the defendants before the High Court of Justice
 Ibadan on the 31st of July 1999 seeking the following reliefs:

- G “1. *The Plaintiff's claim is for perpetual injunction restraining
 the Defendants by themselves or their Agents, Servants and Privies
 or otherwise howsoever from taking any steps or further steps to-
 wards or in pursuance of the decision by the 1st Defendant, through
 the 2nd Defendant or anybody whatsoever to sell the Plaintiff's prop-
 erty situate, lying and being at Ijebu-Ode/Ibadan Motor Road, Ibadan
 in Oluyole Local Government Area, Ibadan in Oyo State of Nigeria
 and as described in the Lands Registry as Instrument No. 56 at page
 H 56 in Volume 434 and Certificate of Occupancy Registered as In-
 strument No. 1 at page 1 in Volume 2974 in the Lands Registry in
 the Office at Ibadan in satisfaction on the mortgage allegedly taken
 by one Mr. S. A. Oshinowo who does not own the property.*
 2. *Declaration that the purported threat by the 1st Defendant*

through the 2nd Defendant to sell the property on or about 5/9/91 in consequence of the Auction Notice dated 6/7/91 pasted on the property by the 2nd Defendant is null, void, illegal and of no effect as the property belongs to the Plaintiff and not Mr. S. A. Oshinowo.

3. Damages of N20,000 for trespass committed on the Plaintiff's land by the Defendants. B

4. Damages of N100,000 for defamation of character resulting from the action of the Defendants who presented the plaintiff to the public as a debtor and thereby cause him embarrassment whereby he sustains disaffection and spite by well meaning members of the public." C

The case of the respondent at the trial court was that the appellants pasted an Auction Notice on his property when he was in no way indebted to the 1st appellant. It was his contention that the action of the appellant amounted not only to trespass but also to defamation of his character. He gave evidence on his own behalf and called a witness, Ayodele Akinbiyi who gave evidence that he saw the Auction Notice which did not have the name of the respondent but had the name of one Oshinowo as the debtor. He said that as a result of the notice he avoided contact with the respondent. D E

The 1st appellant gave evidence through the 2nd appellant that they mistakenly pasted the Auction Notice on the property in question.

The learned trial Judge in his judgment found as a fact that the respondent was not in possession of the property in question at the time the Auction Notice was pasted but one Mr. Adeyeri who had bought the property. He therefore dismissed the claim for trespass. He however found the libel proved and awarded N20,000 damages against the appellants in favour of the respondent. He also made an order of perpetual injunction restraining the appellants from future violation of the respondent's rights to the property and publication of offensive material. F G

The appellants were dissatisfied with the judgment and appealed to the Court of Appeal, Ibadan Division which granted the appellants leave to argue the appeal on their brief alone as the respondent failed to file a brief. The Court of Appeal dismissed their appeal on the 23rd May 2002. H

The appellants still dissatisfied further appealed to this Court

and the learned counsel for them filed an amended brief and identified 4 issues for determination as follows:

i. Whether the lower court was right in holding that the respondent was still the owner who was presumed to be in possession of the uncompleted building on which the alleged Auction Notice was pasted after admitting during the trial that he had sold it to one Mr. Olu Adeyeri.

(Covers grounds 1&3).

ii. Whether the lower court was right in holding that the Respondent was entitled to both damages for trespass and injunction after the dismissal of the claim for trespass by trial court. (Covers ground 2.)

iii. Whether the lower court was right in holding that the appellants did not proffer arguments on submissions on issues No. 1 and 2 (sic) formulated for determination And therefore deemed same abandoned. (covers ground 6)

iv. Having regard to the pleadings, the evidence led in support and documents tendered from the record, whether or not the lower court was right in dismissing the appellants (sic) appeal."

The learned counsel for the respondent filed a brief in which he adopted the issues formulated by the appellants. The appellants filed a reply brief.

On the first issue the learned counsel for the appellants submitted that the respondent pleaded that he had sold the property in question and given possession to one Mr. Adeyeri when the offensive Auction Notice was pasted on the land. It was on that basis that the trial court dismiss the claim for trespass. He argued that the Court of Appeal was wrong to hold that the respondent was still in actual or physical possession of the property since the process of transfer to Mr. Adeyeri had not been completed.

He accused the lower court of making a case of its own outside the evidence on record, and relied on the case of *Adeniji V Adeniji (1972)4 SC 10* in which Udo Udoma JSC at page 17 said:

"It will not be competent for the court to make a case of its own or to formulate its own case from the evidence before it and thereafter to proceed to give a decision based upon its own postulate quite contrary to the case of the parties before him".

In reply to this issue the learned counsel for the respondent

submitted that the trial Judge found as a fact that the respondent as still the owner of the house at the time the offensive Auction Notice was pasted. The appellant did not appeal against this finding of fact, which in his submission still stands as affirmed by the Court of Appeal. He submitted that there is nothing perverse in this finding.

This issue turns entirely on pleadings and evidence. All parties and the courts are bound by the pleadings and evidence. See *Iheanacho V. Chigero* (2004) 17 NWLR (Pt. 901) 130 and *Akanni V. Odejide* (2004) 9 NWLR (Pt. 879) 575. The respondent's case in the court of first instance is primarily for trespass. In paragraph 15 of Statement of Claim the respondent averred as follows:

"That the plot and the development thereon was eventually sold to one Mr. Isaac Adeyeri of S7/467C Felele Rab Challenge, Ibadan."

In his evidence at page 38 lines 8 and 9 of the printed record the respondent said:

"I resolved to dispose it, I did dispose it to Mr. Adeyeri of Exid Battery"

Under cross-examination, he stated as follows:

"I gave Mr. Adeyeri copies of Exhibits 'A' and 'A1' in the course of the search he conducted in the Ministry that he paid me N55,000.00. I thereafter took him to the land. I gave him possession. He then instructed a gardener to clear the land. It was while he was in possession that the offensive notice was pasted on the land."

His evidence tallied with the pleadings that he had disposed of the property. ***Since he had disposed of the property what was the basis of his action for trespass or any other relief? The trial court rightly dismissed the respondent's claim for trespass based on his pleadings and evidence; and the Court of Appeal was wrong in holding that the respondent was still the owner of the property in question and was in constructive possession thereof. This is no more as the respondent did not cross-appeal to challenge the finding of the trial court that he was not in possession of the land.***

Further more as that was not the case made out before the trial court, it was not the duty of the lower court to make out its own case outside the evidence and pleadings of the parties. See the cases of *Adeniji V Adeniji* (1972) 4 SC 10; *Dipcharima V Alli* (1974) 1 SC 45; *Over-*

seas Construction Company Limited V Greek Nigeria Limited & Another (1985) 3 NWLR Pt. 13, 407. I resolve this issue in favour of the appellants.

On the 2nd issue, ***the learned counsel for the appellants submitted that since the trial court dismissed the claim for trespass and the evidence showed that the respondent had disposed of the property in dispute, there was no basis for the order of injunction.*** He relied on the case of Udo V Obot (1989) 1 SC 64.

I agree with this submission since the respondent with his own mouth said he had disposed of the property in question, there was no justification for granting any order of injunction in his favour. See Nwosu V Otunola (1974) 4. SC 21; Ajuwa V Odili (1985) 2 NWLR Pt. 9,710.

On the 3rd issue, regarding the failure of the lower court to consider issues 1 & 2 in their brief, I am of the view that that issue is now academic having regard to my view on issues 1 & 2 before this court. It will be a wasteful exercise to delve into it.

On the 4th issue, it is the contention of the appellants' counsel that the Notice of Auction which was the basis for the claim in libel was never proved and the respondent also admitted under cross-examination that the Auction Notice did not bear his name but the name of one Mr. Oshinowo. It followed therefore, that the lower courts were wrong in finding defamation proved and awarding damages of N20,000 in favour of the respondent. He relied on the case of Onu V Agbese (1985) 1 NWLR Pt. 4, 704.

In reply, the learned counsel for the respondent submitted that the appellants admitted pasting the Auction Notice on the respondent's property and there was therefore no need to tender the Auction Notice or plead the exact words used in it in proof of defamation.

The law is trite that to succeed in an action of libel the plaintiff must prove 3 fundamental elements of defamation constructively:

1. That there is the publication of the material complained of by the defendant;

2. That the publication refers to no other person but the plaintiff conclusively;

3. That the publication is defamatory of the plaintiff. See the cases of Sketch V Ajagbemokeferi (1989) 1 NWLR Pt. 100 678; Onu V

Agbese (1985) 1 NWLR Pt. 4, 704 and Service Press Limited V Nnamdi Azikiwe 13 WACA 301.

Applying the principles to the facts of this case ***it is not in dispute that the respondent did not tender the Auction Notice which he claimed was defamatory of him. The fact that the appellant admitted pasting an Auction Notice is not proof of its contents. It was the duty of the respondent to prove the content of the defamatory statement and failure to do so was fatal to his claim for libel.*** In addition to this, PW2 Mr. Ayodele Akinbiyi who was called by the respondent to testify about the defamatory words stated at page 41 of the printed record as follows:

“when I saw the Auction Notice I moved near it to see its content, I saw the name of Oshinowo as mortgagor and the 1st defendant as mortgagee, as well the 2nd defendant as auctioneer. The plaintiff’s name did not appear hence my surprise.”

From the plaintiff’s own showing the offensive publication did not refer to him at all. It could not therefore possibly be defamatory of him.

For all I have said in this judgment I see a lot of merit in this appeal. The two lower courts were wrong in their judgments in favour of the respondent. Consequently I set aside the judgments of the two lower courts and in their place I dismiss the respondent’s claim at the court of first instance and the court of Appeal. The respondent shall pay costs of N50,000 in favour of the appellants.

TOBI JSC

I have read the judgment of my learned brother, Ogebe, JSC and I agree with him that this appeal should be allowed.

The respondent as plaintiff in the High Court asked for four reliefs which my learned brother, has set out in his judgment. Although the learned trial Judge dismissed the claim for trespass, he awarded N20,000.00 damages for libel. An appeal to the court of Appeal was dismissed.

This is a further appeal to this court. Briefs were filed and duly exchanged. Four issues were formulated by the appellants, which were adopted by the respondent. I entirely agree with my learned brother, Ogebe,

JSC that the burden of proof of defamation is on the plaintiff, the respondent in this appeal. Did the respondent prove his case on the balance of probability? That is the crucial question. Dealing with the issue, Ogebe, JSC said at page 11 of his draft judgment:

B *"Applying the principles to the facts of this case it is not in dispute that the respondent did not tender the Auction Notice which he claimed as defamatory of him. The fact that the appellant admitted pasting an Auction Notice is not proof of its contents. It was the duty of the respondent to prove the content of the defamatory statement and failure to do so was fatal to his claim for libel"*

C My learned brother has got it properly. It is one thing to claim a relief and it is another to prove it. Libel is a tort which must be proved by the plaintiff. That is the position of our adjectival law.

D In the light of the above, I too allow the appeal and I award N50,000.00 costs against the respondent in favour of the appellant.

MUKHTAR JSC

E This appeal emanated from the decision of the Court of Appeal, Ibadan division, which dismissed the appellants' appeal to it. The appellants in the lower court still appealed to this court on six grounds of appeal, from which they distilled the following issues for determination, which were also adopted by the respondent in his brief of argument.

F *"(i) Whether the lower court was right in holding that the Respondent was still the owner who was presumed to be in possession of the uncompleted building on which the alleged Auction Notice was pasted after admitting during the trial that he had sold it to one Mr. Olu Adeyeri.*

(ii) Whether the lower court was right in holding that the Respondent was entitled to both damages for trespass and injunction after the dismissal of the claim for trespass by the trial court.

H *(iii) Whether the lower court was right in holding that the Appellants did not proffer arguments on submissions on issues No. 1 and 2 formulated for determination and therefore deemed same abandoned.*

(iv) Having regard to the pleadings, the evidence led in support and documents tendered from the record, whether or not the

lower court was right in dismissing the Appellants appeal.”

Issue (1) supra revolves around who was in possession of the property lying at Ijebu Ode/Ibadan Motor Road, Ibadan at the time of the offensive action complained of. First and foremost I will like to consider and comment on the plaintiff/respondent’s pleadings. In doing so I have observed that the plaintiff has in his statement of claim approbated and reprobated, which the law does not allow. An instance is his averment in paragraph (8) of the statement of claim which reads thus:-

“8. The Plaintiff immediately took possession of the land and has since been exercising undisturbed or unchallenged by anybody whatsoever his right of ownership regularly clearing the weeds to the knowledge of neighbours.”

Then in paragraphs (15) and (16) the following averments were made:-

“15. That the plot and the development thereon was eventually sold to one Mr. Isaac Olu Adeyeri of S 7/4670 Felele Rab Challenge, Ibadan.

16. That the Plaintiff was shocked, disturbed and very much embarrassed when his purchaser Mr. Adeyeri came sometime in July 1991 to inform him that the second defendant acting on the instruction of the first defendant had pasted an Auction notice on the property threatening to sell the property on 5th August, 1991.”

The pertinent question to ask, on the position of these averments is, how could the plaintiff have still been in possession of the property if he had already sold it to some one else. It is to be noted that the plaintiff either advertently or inadvertently did not state the date he sold the property. At any rate, bearing in mind the position of the law that pleadings is not tantamount to evidence, and so it must be supported by evidence, (See *Hutchful v. Biney* 1971 1 All NLR 268), I will reproduce the relevant evidence to the averments here below. They read:-

“P. W. 1..... At a stage I resolved to dispose of it. I did dispose of it to Mr. Adeyeri of Exide Battery. This was in 1991. I prepared a deed of assignment in his favour. As he was processing this deed in the secretariat he approached me that he was no longer interested in the sale because he saw an auction notice in respect of the property. He then wrote me a letter for a refund of the purchase price.”

In his evidence under cross examination PW1 said inter alia thus:-

"I gave Mr. Adeyeri copies of Exhibits A and A1 in the course of the transaction between us. It was on conclusion of the search he conducted in the Ministry that he paid me N55,000.00. I thereafter took him to the land. I gave him possession. He then instructed a gardener to clear the land. It was while he was in possession that the offensive notice was pasted on the land."

It is obvious from the above pieces of evidence that the plaintiff quickly retraced his steps when he was cross examined on the issue of who was in possession of the property at the time of the alleged trespass. It is clear from the evidence under cross examination that possession had already passed to a Mr. Adeyeri as at the time the auction notice was pasted on the property. That the evidence of the plaintiff was demolished and discredited in the course of cross examination is undoubtable, and so the learned trial judge was at liberty not to accept and rely on the evidence Under examination in Chief. The learned trial judge was therefore in order when in his judgment he found thus:-

"One of my findings above is that at the time of entry and pasting of the auction notice, Adeyeri was in possession. As the plaintiff was not in possession, he cannot maintain an action in trespass. This head of claim will be refused."

These findings are based on facts and are not perverse, hence in my opinion the lower court was in error when it interfered with the above finding and substituted its finding which reads:-

"Under the circumstances, I find it difficult to accept or agree with the finding of the learned trial judge in his judgment (at page 52 of the record), that the respondent was not in possession of the land at the time of pasting the auction notice. This finding is contrary to the pleadings and evidence of the said respondent as PW1 where it is categorically stated that even though he had disposed of the land to Mr. Adeyeri, the transaction was not complete as the deed of assignment in favour of the said Mr. Adeyeri had not been processed or was at the processing stage at the time of the pasting of the auction notice (see page 38 of the record),"

I disagree with the Court of Appeal on the above, and in the circumstance, resolve issue (1) supra in favour of the appellants. In the same token, I resolve issue ii) in the appellants' favour for where

exclusive possession and trespass have not been proved, then the entitlement of damages does not arise.

The complaint under issue (3) is against the treatment of issues (1) and (2) in the appellants' brief of argument by the lower court. It is on record that Adamu J. C. A in his lead judgment, observed and found thus:-

".....it is clear that as they have not canvassed any arguments or submissions on other issues (i.e. issue 1 and 2) as formulated in their brief, they have or should be treated or deemed as abandoning the said other issues which have not been argued at all in their brief. See *Adepade vs. Babatunde* 2002 4 NWLR (Pt. 756) 99 at 111, 2002) Vol. 8 WRN 128 at 134. Consequently I will, in this judgment, deal with the only issue argued in the appellants brief (i.e. issues 3) while disregarding the other two issues which are only formulated in the said appellants brief without proffering any arguments or submissions to buttress them (i.e. issues 1 and 2).

Now, what did these issues read? They read:-

"1. Whether from the state of the pleadings the plaintiff made a case for determination.

2. Whether there was publication of the alleged libel."

The crucial question here is, were there arguments proffered to cover the issues? Of course there were, as can be seen on pages 69-70, scanty as they may have been. The position of the law is that arguments canvassed in respect of a validly formulated issue for determination must be considered by an appellate court and found on, the argument being concise notwithstanding. On the contrary, a brief that contains concise arguments deserves commendation. As stated by Achike J. S. C. (of blessed memory) in the case of *F. S. B. Int. Bank Ltd v. Imano (Nig.) Ltd.* 2000 11 NWLR part 679, page 620:-

"A brief submitted on behalf of each party to an appeal, as the term readily suggests is a precis or an abridgment of the relevant submissions a disciplined counsel would wish to put across for consideration by the court demonstrating lucidly and succinctly why his contentions should be preferred rather than those of the opposing counsel. Counsel should caution oneself and be reminded that good advocacy, like writing a good brief, does not accommodate unnecessary repetition since it has long been established that repetition does not improve an argument."

If the lower court had borne the above in mind it would not have considered issues (1) and (2) before it abandoned.

The lower court in my view failed in its duty to deal with the argument proffered by the appellants' counsel in their brief of argument and it was in error in this respect. However, the Supreme Court Act, Cap. 424 Law of the Federation of Nigeria 1990 permits this court to treat the arguments and find on them, and as it is not on record that the issues were specifically abandoned by the learned appellants' counsel, I will do so in this judgment. See *Bamaiyi v. State* 2001 4 S.C. (pt 1) 18, and *Katto v. C.B.N.* 1999 6 NWLR part 607 page 390 relied upon by learned counsel. Learned counsel for the appellants further submitted that the failure of the lower court to consider the said issues is a breach of the fundamental right of the appellants to fair-hearing provided in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria, and it has occasioned a miscarriage of justice.

The learned counsel for the respondent has argued that the lower court was not bound to consider portions of the appellants' brief of argument which were filed but not before it. I am not sure I know exactly what he means. However, he conceded that Section 22 of the Supreme Court Act supra allows this court to consider the arguments covering the said issues (1) and (2) supra. At this juncture, I will reproduce the pleadings that are pertinent to this argument. They read:-

"16. That the plaintiff was shocked, disturbed and very much embarrassed when his purchaser Mr. Adeyeri came sometime in July 1991 to inform him that the second defendant, acting on the instruction of the first defendant had pasted an auction notice on the property threatening to sell the property on 5th August, 1991.

22. The argument advanced by the first defendant to counter the claim of the plaintiff was based on a false and mistaken identity that by a Deed of Mortgage dated 17th January, 1991 and registered as Instrument No. 14 at page 14 in Volume 3012 one Mr. S. A. Oshinowo mortgaged the property to them.

25. That since the action of the first and second defendants the Plaintiff was looked upon by other residents and landlords in the Area, friends and admirers as a fraud, a cheat, and a highly dishonest person thereby making him an object of ridicule by well thinking

person who have decided not to have any dealing with him any longer so that they may not fall victim to his fraudulent and deceitful attitude.

26. *The action led to Plaintiff being ostracized and avoided by well and right thinking men in the society thus affecting him psychologically (sic) and rending (sic) him seriously upset and miserable leading to his being attended to by Doctor for treatment of hypentension (sic) and mental disturbance.*

27. *That the Plaintiff cannot move freely any more in the society where he had previously been enjoying the highest respect, affection and admiration.”*

The primary requirement in a claim of libel is that the plaintiff must plead the alleged libel and the precise words of libel alleged, and thereafter tender it in evidence. In the instant case, no such requirement was met by the plaintiff/respondent. The learned counsel for the appellants has submitted that since the text of the publication was neither pleaded nor proved in evidence the plaintiff has failed to prove defamation. I endorse the submission. See Professor O. Adeniji v. Professor B. L. A. Fetuga 1990 5 NWLR part 150 page 375, Chief Ogunbadejo v. Otunba Omoyemi 1993 1 NWLR part 271 page 517, Chief O. L. Okafor v. D. O. Ikeanyi & Ors 1990 3/4 SC 99, and Benue Printing and Publishing Company Ltd. v. Gwawada 1989 4 NWLR part 116 page 439. In the same vein, none of the allegations pleaded in the reproduced averments above were proved by the respondent. Besides, it is on record that the said publication neither bore the name of the respondent nor referred to it. It has also been held that the respondent was not in exclusive possession of the property where the alleged offensive publication was pasted, so the content of the alleged publication could not have been alluded to the respondent. I therefore fail to fathom how readers of the alleged publication would deduce that it was targeted at the respondent. To my mind it is a matter of making a mountain of a mole hill. In this light I resolve the issues raised in the appellants’ brief of argument in the lower court in their favour, and allow the related grounds of appeal. These three issues are the issues I wish to highlight.

In totality I find substance in this appeal and allow it. For the foregoing and the more detailed reasoning in the lead judgment, I am in full agreement with my learned brother Ogebe JSC. I abide by

the consequential orders made in the lead judgment.

OGBUAGU JSC (DISSENTING)

B This is an appeal against the Judgment of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 23rd May 2002, affirming the Judgment of the Oyo State High Court sitting at Ibadan - per Lajide, J. (of blessed memory) in respect of the claim relating to libel and injunction.

C Dissatisfied with the said Judgment, the Appellants, have appealed to this Court. They have formulated four (4) issues for determination, namely,

“(i) *Whether the lower court was right in holding that the Respondent was still the owner who was presumed to be in possession of the uncompleted building on which the alleged Auction Notice was pasted after admitting during the trial that he had sold it one Mr. Olu Adeyeri. (sic) (Covers grounds 1 & 3).*

“(ii) *Whether the lower court was right in holding that the Respondent was entitled to both damages for trespass and injunction after the dismissal of the claim for trespass by the trial court. (Covers ground 2).*

“(iii) *Whether the lower court was right in holding that the Appellants did not proffer arguments on submissions on issues No. 1 and 2 formulated for determination and therefore deemed same abandoned. (covers ground 6).*

“(iv) *Having regard to the pleadings, the evidence led in support and documents tendered from the record, whether or not the lower court was right in dismissing the Appellants appeal”.*

G The said issues, have been adopted by the Respondent.

H On 8th December, 2009, when this appeal came up for hearing, both learned counsel for the parties, adopted their respective Brief. While Olawoye, Esq. - learned counsel for the Appellants, urged the Court to allow the appeal, Dr. Nwobike - the learned counsel for the Respondent, urged the Court, to dismiss the appeal. Thereafter, Judgment was reserved till to-day.

I will deal with Issues 1, 2 and 4 together as I consider them, the real issues for determination. I note that the learned trial Judge, after reproducing the claims of the Respondent, and found as a fact

that after pleadings had been filed and exchanged by the parties, that from the Appellants' Statement of Defence, they admit paragraphs 1, 2, 4, 5 to 15, 17, 22, 23 and 24 of the Respondent's Statement of Claim. Therefore, he held at page 50 of the Records, inter alia as follows:

It is now trite law that facts admitted by a party in the pleading of his adversary requires no proof. Based on this principle of law I accept the facts contained in the paragraphs of the statement of claim reproduced above as proved".

I also note that page 51 of the Records, His Lordship stated inter alia, as follows:

"..... The facts in this case appear not to be in dispute. On the facts earlier accepted by me as proved and the evidence led in this case is would (sic) seem to me that the following facts are incontrovertible.

1. That the building on which the auction notice was placed belonged to the Plaintiff.

2. That at the time the notice was put thereon the house had been sold to one Adeyeri who took possession though legal transfer of ownership had not taken place.

3. That arising from the auction notice Mr. Adeyeri demanded the refund of the purchase price.

4. That the auction notice was in relation to the property of one Oshinowo and that it was his house that was threatened to be sold.

5. That Adeyeri instigated some members of the armed forces to harass the Plaintiff and two of his children and also caused their detention by law enforcement agents.

6. That on account of the acts of the defendants who placed auction notice on his uncompleted building he was shunned despised and ostricised by his friends and associates.

7. That resulting from the last aforementioned fact, he developed hypertension.....".

I also note that at page 52 of the Records, the learned trial Judge stated inter alia, as follows:

"I have earlier found that the plaintiff is the owner of the property.....".

I note that the Appellants, did not challenge or appeal against

these findings of facts in the court below. The effect in law, is that the said finding stands or subsist. See the cases of *Okuoja v. Ishola* (1982) 7 S.C. 314; (1987) 7 S.C. 147 (Reprint); *Ejowhomu v. Chief Edok-Eter Mandilas Ltd.* (1986) 9 S.C. 41 @ 47; *Adejumo & 2 ors. v. Ayanteqbe* (1989) 3 NWLR (Pt. 110) 417; *Iseru v. Catholic Bishop of Warri Diocese* (1997) 4 SCNJ. 102 @ 115; *Dr. Alakija & 2 ors. v. Alhaji Abdullahi* (1998) 6 NWLR (Pt. 552) 1 @ 24; *Leventis Technical v. Petrojessica Enterprises Ltd.* (1999) 4 SCNJ. 121 @ 127 (1999) 4 S.C. (Pt. 1) 66 and *Dabo v. Alhaji Abdullahi* (2005) 7 NWLR (Pt. 923) 181; (2005) 2 SCNJ. 76 @ 95; (2005) 2 S.C. (Pt. 1) 75 @ 92 just to mention but a few.

The learned counsel for the Respondent also cited and relied in their Brief among others, the cases of *Chief Ebenezer Awote & ors. v. Owodunnis & anor.* (1986) 12 S.C. 294 @ 309 (it is also reported in (1986) 5 NWLR (Pt. 46) 941) and *Nnorodim & anor. V. Seam & 6 ors.* (2001) FWLR (Pt. 140) 1696 @ 1700 - 1701 (it is also reported in (2001) 2 SCNJ. 1 @ 5). The attitude of an Appellate court, is not to delve into the issue or disturb it. See the case of *Alhaji Adeyemi & anor. v. Chief Olakunri & 10 ors.* 1299 14 NWLR (Pt. 638) 204 @ 211, 212, 213-214; (1999) 12 SCNJ. 234. This is because, such findings are the exclusive business of a trial court. See the case of *Alhaji Usman v. Garke* (2003) 7 SCNJ. 38 @ 50-51. As it stands, this is also concurrent findings by the two lower courts. The Respondent had testified that in respect of the said sale to Mr. Adeyeri, he prepared a Deed of Assignment in his favour. That as Mr. Adeyeri, was processing this Deed in the Secretariat, he Adeyeri, approached him and told him that he Mr. Adeyeri, was no longer interested in the sale as he saw an auction notice in respect of the property. That Mr. Adeyeri wrote him a letter for a refund of the purchase price. He tendered the said letter which was admitted in evidence, without objection and it was marked Exhibit B. The letter was endorsed or copied to the Commissioner For Lands, Oyo State and the Solicitor of the Respondent. For the avoidance of doubt, the last three paragraphs of exhibit B, read as follows:

“That on 16th of July 1991 while my agent was clearing the property, an agent from Alhaji L.A. Ajibola (Professional Government Licensed Auctioneer -(i.e. 2nd Appellant) acting on an Instruction from Co-operative Bank Limited at Ibadan (i.e. now the 1st Appellant) pasted notice of auction on the property. By this action my

interest in the property was permanently killed.

By the copy of this letter all proceedings or processing on deed of assignment are hereby withdraw.

In accordance with paragraph 3 Page 2 of deed of assignment agreement between me and Chief Akinpelu, (i.e. the Respondent) a complete refund of Fifty Five Thousand Naira (N55,000.00) paid to Chief Akinpelu for the property is demanded on receiving this letter.

Thanks.

(Sgnd. ISAAC OLU ADEYERI”.

The above, is clear and unambiguous. The contract of sale, had been completely repudiated by Mr. Adeyeri.

At page 38 of the Records, the Respondent further testified that on receipt of Exhibit B, he was embarrassed as he never owed or pledged his property to any bank. That he instructed his lawyer to write to the 1st Appellant and he did so. A copy of the letter was tendered, admitted in evidence without objection and marked Exhibit C. For the avoidance of doubt, the said letter, reads as follows:

“We are Solicitors acting on behalf of Chief M. B. Akinpelu on whose property at Ijebu-Ode-Ibadan Motor Road, Ibadan your Agent, Auctioneer Alhaji L.A. Ajibola has pasted an Auction Notice threatening to sell his property on 5th day of August, 1991.

We hereby advise you that the property covered by Deed of Conveyance is the bona fide property of our client. By your action, you have caused serious embarrassment to our client.

PLEASE NOTE that if within 24 hours from the date hereof we do not receive a written apology from you plus the removal of your notice on the property, we have our client’s instruction to seek legal remedy in Court and the repercussion of this may be unpalatable to you and your agent.

*Sgd Chief R. M. A. Akinde
for Chief E. M. A. Akinde & Co.
Solicitors & Advocates”.*

Again, the above is clear and unambiguous. The Respondent gave evidence that there was no reply to Exhibit C. See also his further evidence at the same page 39. His evidence under cross-examination which has been capitalized on in the Appellant’s Brief, is of no

moment in my respectful view. The evidence was not contradictory to either his pleadings nor his evidence in-chief. The said cross-examination, did not demolish or destroy his evidence at all. It in fact, rather supported and confirmed as true, his pleadings and evidence in-chief. But as found as a fact by the court below, subsequent events as evidenced also by the Exhibits, did not justify the holding of the trial court that the Respondent, was not in possession. The finding and holding of the learned trial Judge that the Respondent was not in possession of the property, with the greatest respect, is grossly perverse in view of the documentary evidence before him which were admitted in evidence, without objection. It is now firmly settled that documentary evidence, is the Best evidence. See the case of *The Attorney-General, Bendel State & 2 ors. V. United Bank for Africa Ltd. (1986) 4 NWLR (Pt. 337) 547 @ 563* - per Oputa, JSC. In fact, the document being the best proof of its contents, no oral evidence, will be allowed to discredit or contradict the said contents except in cases where fraud is pleaded. See also the case of *B. Stabilini & Co. Ltd. V. Nwabueze Obasi (1997) 9 NWLR (Pt. 520) 293 @ 305* C. A. - per Salami, JCA (now President).

I have even noted earlier in this Judgment, that the learned trial Judge, found as a fact and held that the Respondent, is the owner of the property. Since the Respondent claimed damages for trespass and injunction, which raised issue of title, he was definitely entitled to be awarded as the owner, damages for trespass and injunction. I so hold. In the evaluation of evidence, a trial court has a duty to evaluate all the evidence before it and not just, some of them. I note that in paragraph 4 of the Statement of Defence of the Appellants, the Appellants admitted the said pasting of the Notice on the wall of the Respondent's property, but they said it was a mistake. After all, it is or was this pasting, that is the cause of the action or complaint of the Respondent.

The court below, also noted this fact at page 93 of the Records.

The court below - per Adamu, JCA, with respect, captured so to speak, correctly and appreciated the evidence before the trial court. At page 94 of the Records, it stated inter alia, as follows:

“..... *The respondent in the present case who claimed and prove that he is the owner of the land in issue (the fact which has been admitted and is undisputed) is therefore in my humble view*

entitled to both damages for trespass and an injunction”.

I completely agree.

It thus held that the Respondent, is entitled to damages for trespass and injunction since it is settled that an action for trespass and injunction raises or involves, issue of title. It noted that the Appellants, did not plead *jus terti*. B

It continued *inter alia*, at page 95 as follows:

“In any case, as stated earlier, the appellants in both their pleadings and evidence did not dispute and have in fact admitted that the respondent is the owner of the land in issue and they cannot be allowed to defeat his right to sue them in trespass by asserting that the land was in the possession of someone else under a transaction that was not complete and was in fact rescinded by Mr. Adeyeri as a result of their action in representing that the land was to be auctioned under a mortgage transaction. Thus the finding of the learned trial judge that the respondent was not in possession of the land because it was in the possession of a third party (Mr. Adeyeri) was erroneous and perverse as it was not based on the appellants admission and the evidence adduced by the respondent in the case”. C D

“It concluded as follows: E

“In the present case under the circumstances where it is admitted that the appellants acted under a mistake and pasted an auction notice on the respondents property instead of that of their debtor which was close-by and after the respondents complain (sic) against their action they still insisted to go ahead with their proposed auction of his property, I think it is just and fair if they are restrained from taking further steps in the auctioning of the respondents (sic) property. See UGBE VS. EDIGBU (unreported) xxxxxxxx SC. 736/66 judgment of the supreme court delivered on 27th February, 1970 reported in Digest of Supreme Court Cases by Chief Gani Fawehinmi, at page 310-311. If the appellants were not restrained by the order of injunction as done by the trial court and they proceeded to auction the respondent’s land, that would cause a grave injustice to the said respondent who was not their debtor and did not obtain any mortgage loan from them. It would also amount to upholding the appellants mistake in pasting their auction notice on a wrong property not subject of their mortgage loan transaction”. F G H

I cannot agree more.

However, in respect of the libel, it is submitted or contended in effect, that the failure of the Respondent to plead and tender the publication is fatal to the Respondent's case. That the Respondent admitted under cross-examination that the alleged Auction Notice, did not bear his name but the name of the 1st Appellant's debtor one
B Mr. Oshinowo. I note that at page 54 of the Records, the learned trial Judge found as a fact and stated inter alia, as follows:

*"On the incontrovertible evidence which I regard as proved, the defendants caused to be displayed on the plaintiff's uncompleted
C building, an auction notice which however does not contain his name. A casual observer, that is, one who does not care to read the whole notice will go away with the impression that he is a debtor. Someone who it reads the notice will however go away with the impression that he is not the owner, if he knows him and has been seeing him
D there his impression is likely to be that he is not the owner and that he is a false claimant or tender. Eitherway libel has been committed against him.*

*In his unchallenged evidence, the plaintiff told me that he is a business-man cum contractor. There is evidence that on account of
E the publication his friends and associates shun him and he lost the bargain to sell the land to Adeyeri who also caused him and two of his sons to be harassed and detained by the army and the police. After a careful consideration of all the materials before me, I will award the sum of N20,000.00 as a Damages for libel committed against
F the plaintiff's.*

With respect, much fuss or heavy weather has been made that the said publication was not produced or tendered in the trial court. Surely, one cannot produce or tender what one does not have. There
G is the evidence of the 2nd Appellant at pages 41 and 42 of the Records, that he received Exhibit C,

"stating that the house on which the auction notice was pasted belonged to the plaintiff. The name of the plaintiff was not In The auction notice.....".

H This witness swore that the said auction had been removed. He did not say who removed it. The Respondent saw the notice and so did the PW2. But as I had noted in this Judgment, the Appellants in paragraph 4 of their Statement of Defence, admitted the pasting of the auction Notice, but said it was by mistake. I have stated that it

is now firmly settled that what is admitted need no further proof. I repeat that the cause of action, arose or was based, on the said pasting of that notice on the wall of the house/property of the Respondent. It is now settled that it is not necessary for a plaintiff to prove publication where the defendant has admitted it. See the case of Economides v. Thomopoulos & Co. Ltd. (1956) 1 FSC. 7. What is more, it is also settled that a claim for damages is deemed traversed or to be in issue unless specifically admitted. See the case of Hon. Osuji & anor. v. Isiocha (1989) 3 NWLR (Pt. 111) 623; (1989) 6 SCNJ. 227. B

It must be stressed and this is also settled that in defamation or libel cases, what is important, is the re-action of a third party to the publication complained of. It is not what the plaintiff thinks about himself, but what a third party thinks of the plaintiff as regards his reputation. See the case of Chief Nsirim v Nsirim (1990) 3 NWLR (Pt. 138) 285 @ 289; (1990) 5 SCNJ. 174 @ 184-per Belgore, JSC. (as he then was but later CJN). In other words, a person's reputation, is not based on the good opinion he has of himself, but the estimation in which others hold him. The evidence of the Respondent about the trauma he suffered at the instigation of Mr. Adeyeri and the evidence of the PW2 of how he re-acted towards the Respondent, were never controverted by the Appellants. The trial court believed the said evidence as reproduced by me above in this judgment. The two lower courts, found in favour of the Respondent. I cannot fault the said findings as the Records speak eloquently about the said findings. Even in the case of Mr. Justice S. Onu v. Egbese & anor. (1985) 1 NWLR (Pt. 4) 704 cited and relied on by the Appellants, it was held that the test of determining whether an article or publications is defamatory, is based upon what a reasonable man or person would think or thinks upon reading the publication. This is in line with the holding in Chief Nsirim v. Nsirim (supra). The attitude of this Court in respect of concurrent findings is firmly settled. See the cases of Fashanu v. Adekoya (1974) 6 S.C 83; (1974) 6 S.C. 72 (Reprint); Enang v. Adu (1981) 11-12 S.C. 25; (1981) 11-12 S.C. 17 (Reprint) and Alhaji Gbadamosi & anor. v. The Governor of Oyo State & 8 ors. (2007) 2 JNSC (Pt. 33) 505 @ 514, 516. In the case of The Sketch Publishing Co. Ltd. & anor. v. Alhaji A. A. Ajagbemokeferi (1989) 1 NWLR (Pt. 100) 678; cited and relied on by the Appellants (it is also reported in (1989) 2 SCNJ. 151) and (1989) 2 S.C. (Pt. 2) 73 @ 95; it was held (from the Editor's report or ratio) that the C D E F G H

basis of the tort of defamation, is that every person has a right to the protection of his good name, reputation and the estimation in which he stands in the society of his fellow citizens. See also the reasoning of the learned trial Judge reproduced by me above.

Before concluding this appeal, it must be borne in mind always, B that each case must be considered on its own particular or peculiar facts or circumstances. No one case is identical with the other or another. They may be similar, but never identical. So it is with the instant case leading to this appeal. This must be so, as it is settled that a decision is C only an authority for what it decides and nothing more. See the cases of *Western Steel Workers Ltd. & anor. v. Iron & Steel Workers Union of Nigeria & anor.* (1987) 1 NWLR (Pt. 49) 284; (1987) 6 SCNJ. and *Okafor & 3 ors. v. Nnaife* (1987) 4 NWLR (Pt. 64) 129; (1987) 9-10 SCNJ. 63.

D Finally, or in conclusion I note that at page 96 of the Records, the court below, did not even award any money to the Respondent for the said trespass because of the reason appearing therein. But I must add quickly as this is firmly established, that failure to file a Respondent's E Brief, is immaterial as an Appellant, must succeed or fail, on the strength of his own Brief or case. See the cases of *Management Enterprises Ltd. & anor. v. Otusanya* (1987) 4 S.C. 367; (1987) 4 SCNJ. 110; *John Holt Ventures Ltd. v. Oputa* (1996) 9 NWLR (Pt. 470) 101 @ 112 and *Onyejekwe v. The Nigeria Police Council & anor* (1996) 7 NWLR F (Pt. 463) 704 @ 710; just to mention but a few. It however, affirmed the findings of the trial court in respect of the defamation or libel. That being the case, the decisions of the two courts below, are therefore, concurrent and this Court, cannot interfere or disturb the same in all the circumstances of this case. I have already in this Judgment, G referred to some decided authorities in this regard.

It is from all that I have stated in this Judgment, that with profound humility and respect, I am unable to agree and do not agree, with the reasoning and conclusion of my learned brother, Ogebe, JSC in his leading Judgment and the concurring Judgments of my H other colleagues all just delivered. I have no hesitation in dismissing this appeal which is absolutely unmeritorious. I hereby and accordingly, affirm the Judgment of the court below affirming in part, the said Judgment of the trial Court.

Cost follow the event. The Respondent is entitled to costs fixed

at N50,000.00 (Fifty Thousand Naira) payable to him by the Appellants.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Ogebe, JSC. I agree with the reasons therein contained, leading to the conclusion that this appeal should be allowed. B

The respondent's case at the trial court is, *inter alia*, for trespass. In paragraph 15 of the Statement of Claim, he averred that he sold the land to one Mr. Isaac Adeyeri. Further, in his evidence, he said that he disposed of it (the land) to Mr. Adeyeri of Exid Battery and thereafter gave him possession. C

The learned trial judge dismissed the claim for trespass. That was properly done. A person who is not in possession has no right to claim for trespass. Trespass to land is actionable at the suit of the person in possession of the land. The person can sue for trespass even if he is neither the owner nor a privy of the owner. This is so since exclusive possession of land gives the one 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. See: *Amakor v. Obiefuna (1974) 3 SC 67 at 75*. E

I am at one with the view that it was wrong for the lower court to have held, as it did, that the respondent was in constructive possession of the property. This is so since the respondent, as earlier pointed out, pleaded and testified that he transferred possession to Adeyeri. He cannot be allowed to blow hot and cold at the same time. F

I now move to the issue relating to libel which is a defamatory statement expressed in a fixed medium especially by writing; to defame someone in a permanent medium especially in writing. G

In this matter, the appellants wrongly pasted an Auction Notice on the property sold by the respondent to Adeyeri. The respondent Sued to claim, *inter alia*, for libel. He did not tender the alleged Auction Notice. It is in evidence that the name of the respondent was not stated in the Auction Notice. He admitted under cross-examination that the alleged Auction Notice did not bear his own name but the name of the 1st appellant's debtor to wit: one Mr. Oshinowo. H

To succeed in his claim for libel, the respondent must prove

Conjunctively the following three (3) elements of defamation:-

1. That there is publication of the material complained of by the defendant.
2. That the publication refers conclusively to the plaintiff.
3. That the publication is defamatory of the plaintiff.

B For the above principle of law of defamation the following cases cited by the learned counsel of the appellants are of moment-*Sketch v. Ajagbemokeferi* (1989) 1 NWLR (Pt. 100) 678 at 706, 713 and 716; *Onu v. Agbese* (1985) 1 NWLR (pt. 4) 704 at 712. *Services Press Ltd. v. Nnamdi Azikiwe* 13 WACA 301. *Williams v. West African Pilot Ltd.* (1961) WNLR 330, 338; *Knupffer v. London Exp. Newspaper Ltd.* (1944) A. C 116.

C It is clear to me that the respondent failed to prove that a defamatory statement was expressed in a fixed medium in writing to defame him. The name in the Auction Notice is that of one Mr. Oshinowo. So that publication did not refer conclusively to the respondent. Worse still, he failed to tender the Auction Notice. The contents of the said Auction Notice were never proved. The sum of N20,000.00 wrongly awarded to the respondent for unproved libel was an undeserved bonus. It should be wiped out without much ado.

E For the above reasons and the fuller ones ably adumbrated in the lead judgment, I strongly feel that the appeal is very meritorious and should be allowed. I order accordingly. I endorse all the consequential orders made by my learned brother; that relating to costs inclusive.

G

H