

**SUPREME COURT OF NIGERIA**

7TH MAY, 2010, S.C. 314/2001

**CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,  
C. M. CHUKWUMA-ENEH, J. A. FABIYI, JJSC**

1. WAHAB ALAMU SAPO

2. SULE ADEMOLA SAPO ..... APPELLANTS  
*(for themselves and on behalf  
of Sapo family of Ido-Osun)*

AND

ALHAJA BINTU SUNMONU ..... RESPONDENTS  
*(for herself and on behalf of  
other members of Sunmonu  
family of Ofatedo)*

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APPEALS - Issues - Fresh issue of jurisdiction - Raised for the first time - Propriety - Though such issue can be raised at any stage - Being a point of law - It requires prior leave of court to be so raised (H1)

APPEALS - Records of proceedings - Binding effect - It is settled law that the contents of such records - Are binding on both the court and the parties (H2)

APPEALS - Parties - Death of a party - Failure of counsel to inform court - Effect - It is the duty of a counsel whose client is dead - To inform the court - If he fails to do so - What judgment is delivered eventually - Is valid and binding (H3)

ACTIONS - Parties - Judgment in representative capacity - Liberty of courts - Once the pleadings and evidence show a matter was fought in that capacity - Judgment may be given in that capacity by the court suo motu (H4)

ACTIONS - Parties - Nonjoinder - Whether fatal - No cause shall be defeated by reason of nonjoinder - As the court may in every cause - Deal with the matter as regards the rights - Of parties actually before it (H5)

COURTS - Appeals - Finding of facts - Contrary to those by trial court - Propriety - The evidence on the records - Shows that the findings by trial court were perverse - And justifies the contrary findings by Court of Appeal (H6)

### **FACTS**

The plaintiff/respondent had sued the original defendant - one Alhaji Bello Ajani Sapo - personally for a declaration that respondent was entitled to a statutory right of occupancy over the land in dispute. The suit was before the High Court of Osun State sitting at Osogbo. Pleadings were filed and exchanged. In his statement of defence, Alhaji Sapo averred that he was defending the suit for himself and on behalf of the appellant-family on record. Though in his reply to the statement of defence, respondent had pleaded that he would raise objection to Alhaji Sapo defending the suit in a representative capacity, he never did. After hearing, the learned trial judge dismissed the suit for want of proof. Aggrieved, respondent appealed to Court of Appeal which eventually allowed the appeal, set aside the judgment of trial court and gave judgment to respondent on his claims.

Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal. It is their contention inter alia that Alhaji Sapo, who was the sole respondent on record at the Court of Appeal had actually died during the pendency of the appeal thereat and was not substituted until the appeal thereat was heard and determined. Consequently they contend that the judgment of Court of Appeal was given without jurisdiction and was a nullity as such.

### **ISSUES FOR DETERMINATION**

*“3.01 Whether the death of the only Respondent to the appeal before the lower court on 23/10/1999 and failure to substitute a living person in his place did not deprive the lower court the jurisdiction to entertain the appeal pending before it and thereby render the judgment delivered on 25/1/01 a nullity.*

*3.02 Whether the action filed and the appeal prosecuted by the Respondent was properly constituted having regard to the fact that the Defendant’s family was not made a party to the suit and the appeal.*

*3.03 Whether the court below made a correct approach to the evidence led by the parties before the trial court.*

*3.04 Whether having regard to the pleadings and the evidence led, the judgment of the Court of Appeal made in favour of the Respondent is not against the weight of evidence as to who proved a better title to the land in dispute.*

***HELD*** (Unanimously dismissing the appeal per **OGBUAGU JSC**)  
***Issues - Jurisdiction - Raised for the first time - Propriety***

1. On the facts, it is submitted that the question is when did the Respondent in the court below die? is a question of fact that according to the Appellant (sic), the death occurred while the suit was still before the court below. But that the fact was never raised before the court below.

I agree with the submission in the Appellants' Reply Brief in paragraph 1.02 to the effect that the issue is on jurisdiction or competence of the court below and being a point of law, it can be raised at any stage and even by this Court but I will add that provided, leave of either the lower or this Court, is sought and granted.

(p. 1827 C/G)

***APPEALS - Records of proceedings - Binding effect***

2. I agree with the Respondent's learned counsel firstly, that from the Records, physical appearance of the learned counsel for the parties, are/were recorded by the court below. In other words, although the Respondent was duly represented by his counsel on the two occasions, there was no mention to the court below, of the alleged "death" of the defendant/Respondent on 23<sup>rd</sup> October, 1999, to the court below.

Thirdly, at pages 139-140 of the Records, on 25<sup>th</sup> April, 2001, a motion dated 23<sup>rd</sup> April, 2001 for leave to appeal against the said Judgment of the court below and for an order for stay of execution of the said Judgment, was filed on behalf of the alleged dead Respondent. It was/is signed by one Lekan Ojo, Esq., in the Chambers of Chief Afe Babalola, SAN & Co. The affidavit in support of the application was sworn to by one Phillip Ojo - a Litigation Officer in the said Chambers. In paragraphs 2,6,7 and 8 thereof, he swore as follows:

*"2. I am duly authorised by the Appellant/Applicant i.e. Alhaji Bello Ajani Sapo (the alleged dead Respondent) to swear to this affi-*

davit.

I note that at page 144 of the Records, in the Notice of Appeal filed on the said 3<sup>rd</sup> April, 2001, the Appellant is stated as Alhaji Bello Ajani Sapo (the alleged dead Respondent). The Notice of Appeal at page 148 thereof also dated 23<sup>rd</sup> April, 2001, is signed by Lekan Ojo, Esq., as Appellant's Counsel. It is now settled that the contents of Record of proceedings, are binding both on the court and the parties. (pp. 1828 B/1829 H/F)

***Death of a party - Failure of counsel to inform court - Effect***

3. Order 3 Rule 30(1) of the Court of Appeal Rules, 2002 now Order 15(1) Court of Appeal Rules (with Practice Direction) (2007), places the duty or burden of informing the court of the death of a party, on the counsel representing the party. For the avoidance of doubt, it provides as follows:

*"It shall be the duty of Counsel representing a party to an appeal to give immediate notice of the death of that party to the Registrar of the court below or to the Registrar of the Court (as the case may require) and to all other parties affected by the appeal as soon as he becomes aware of the fact".*

The above provision is clear and unambiguous. I see no such notice in the Records. Since the dispute is in respect of land and from the said pleadings in the defendant/Respondent's Statement of Defence, the Judgment of the court below, subsists and is binding on the Appellants. (p. 1829 G/D)

***Judgments in representative capacity - Liberty of courts***

4. A court including an Appellate Court, can make the order of representation, when once the pleadings and evidence, establish conclusively, a representative capacity and the case has been fought throughout, in that capacity even if an amendment to reflect that capacity, had not been applied for or obtained. It will be otherwise, if the case is not made out or defended, in a representative capacity. There had never been any unqualified rule of practice that forbade the making of a declaration, even when some of the persons interested in the subject-matter, were not before the court. Judgment will be binding on the family or Community, where a case is brought or defended in a representative capacity. (p. 1833 E)

***Parties - Nonjoinder - Whether fatal***

5. It need to be borne in mind always and this is also settled that no cause or matter, shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter, deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. It is the undisputed right of a plaintiff, to choose the person or persons against whom he wishes to proceed against. B

My answer to the Appellants Issue 3.02 as couched, is rendered in the Affirmative or Positive, while my answer to the Respondent's Issue 2, is in the Negative. (p. 1834 A/C/H) C

***Finding of facts - Contrary to those by trial court - Propriety***

6. All the above, cannot be faulted by me. This is because, the said findings of facts, manifests a holistic approach of credible evidence which clearly preponderates in favour of the Respondent. They are evidence of a painstaking evaluation of the evidence in the Records which bind both the parties and the court. I have deliberately gone this far, in order to debunk and deprecate with respect, the unjustified submission in the Appellants' Brief that the decision of the court below, is against the weight of evidence led at the trial. If anything, the findings and holdings of the court below, show without any equivocation, that the said findings of facts and holdings of the learned trial Judge, were/are with respect, perverse. My answer to Issue 3.03 of the Appellants, is rendered in the Affirmative/Positive. In respect of their Issue 3.04 as couched, my answer, is that the Judgment of the court below, is supported by the evidence in the Records. In fact, the weight of evidence, is in favour of the Respondent in the trial court. (pp. 1841 G/1843 A) D E F G

***REPRESENTATION***

Adekola Olawoye, Esq., for the Appellants with him, I. L. Alabi, Esq. Respondent and Counsel - absent - served. H

***CASES REFERRED TO***

Ndiwe v. Okocha (1992) 7 NWLR (Pt.252) 129

Adeleke Iyanda (2001) 13 NWLR (Pt.725) 1 @ 20

Fabumiyi & ors. v. Obaje & ors. (1968) NMLR 242 @ 247

- Agu v. Ikewibe (1991) 13 NWLR (Pt.180) 385 @ 403-407  
 Alhaji Gegele v. Alhaji Layinka & 6 ors. (1993) 3 SCNJ. 39 @ 45;  
 (1993) 4 KLR 51  
 Animashawun v. Osuma & 2 ors. (1972) 4 S.C. 200 @ 214  
 Ajakaiye v. Ideahi (1994) 8 NWLR (pt.364) 504 @ 533 C.A.  
 B Mba Nta & ors. v. Anigbo & ors. (1972) 5 S.C 156 @ 174-175  
 Alhaji Gegele v. Alhaji Layinka & 6 ors. (1993) 3 SCNJ. 39 @ 45  
 Bintumi v. Fantami (1998) 13 NWLR (Pt. 581) 264 @ 271-272 C.A.  
 Obiakor & anor. v. The State (2002) 10 NWLR (pt.776) 612 @ 626  
 C Fubara & ors. v. Chief Minimah & or s. (2003) 5 SCNJ. 142 @168  
*Kimship Ltd. v. Exquisite Ind. Nig. Ltd. (2003) 1 S.C. (Pt. II) 94 @ 114*  
 Karibo & ors. v. Grand & anor. (1992) 3 NWLR (Pt.230) 426 @ 441  
 D Sabrue Motors Nig. Ltd. V. Rajab Enterprises Nig. Ltd. (2002) 4 SCNJ. 370 @ 382  
 Maersk Line & anor. v. Addide Investment Ltd. & anor. (2002) 4 SCNJ. 433 @ 472

E **RULES REFERRED TO**

Court of Appeal Rules, 2002, O. 3 r. 30  
 Supreme Court Rules, O. 6 r. 8

**LEAD JUDGMENT BY OGBUAGU JSC**

- F This is an appeal against the Judgment of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 25<sup>th</sup> January, 2001 allowing the appeal of the Respondent and setting aside the judgment of the High Court of Osun State sitting at  
 G Osogbo Judicial Division (stated in the Appellant’s Brief as “decision”) per Falade, J. delivered on 16<sup>th</sup> May, 1995.

Dissatisfied with the said Judgment, the Appellants have appealed to this Court on eleven (11) grounds of appeal. They formulated four (4) issues for determination, namely,

- H “3.01 *Whether the death of the only Respondent to the appeal before the lower court on 23/10/1999 and failure to substitute a living person in his place did not deprive the lower court the jurisdiction to entertain the appeal pending before it and thereby render the judgment delivered on 25/1/01 a nullity. Ground 1.*

*3.02 Whether the action filed and the appeal prosecuted by the Respondent was properly constituted having regard to the fact that the Defendant's family was not made a party to the suit and the appeal. Ground 3.*

*3.03 Whether the court below made a correct approach to the evidence led by the parties before the trial court. Grounds 4 and 6.* B

*3.04 Whether having regard to the pleadings and the evidence led, the judgment of the Court of Appeal made in favour of the Respondent is not against the weight of evidence as to who proved a better title to the land in dispute. Grounds 5, 7, 8, 9, 10 and 11".* C

From the above issues, I note and in fact, it is obvious that no issue has been raised, formulated or distilled from Ground 2 of the Grounds of Appeal. The consequence is now firmly settled. A ground of appeal in respect of which no issue has been formulated, is deemed to have been abandoned and such a ground, must be struck out. D See the cases of Onafide v. Olayiwola (1990) 7 NWLR (Pt.161) 130; (1990) 11 SCNJ. 10; Ndiwe v. Okocha (1992) 7 NWLR (Pt.252) 129; (1992) 7 SCNJ. 355; Adomolaran v. Kupoloyi (1994) 2 NWLR (Pt.325) 221 CA and Ngilari v. Mothercat Ltd. (1995) 8 NWLR (Pt.311) 377 C.A. just to mention but a few. Ground 2, is accord- E ingly struck out as urged by the Respondent.

On the part of the Respondent, three (3) issues have been formulated for determination, namely,

*"1. Whether the issue of the alleged death of the Respondent was before the Court of Appeal and whether the issue is competent before this Court?"* F

*2. Whether the non joinder of the Defendant/Respondent's family was fatal to the Plaintiffs' case?"*

*3. Whether the Court of Appeal was justified to have re-evaluated the evidence before it and came to the conclusion it did having regard to the evidence on record?"* G

It is submitted that issue 1 above covers the first ground of appeal while Issues 2 and 3 cover the other grounds of appeal except ground 2 that has no issue raised against it and in respect of which the Court has been urged to strike it out. H

The facts of this case leading to the instant appeal briefly stated, are that the Respondent who was the Plaintiff in the trial court, claimed personally against the defendant - Alhaji Bello Ajani Sapo, a declara-

tion that the plaintiff is entitled to a Statutory Right of Occupancy over or in respect of the land that was the subject-matter of dispute. She also claimed N10,000.00 (ten thousand naira) as damages for trespass and for perpetual injunction. Pleadings were filed and exchanged. At the trial, the Respondent testified and called six witnesses. B The defendant also testified and called three witnesses. After addresses, the learned trial Judge, dismissed the suit or claims of the Respondent who appealed successfully, to the court below that allowed the appeal and set aside the judgment of the trial court, hence the instant C appeal.

When this appeal came up for hearing on 16<sup>th</sup> February, 2010, the leading learned counsel for the Appellants - Olawoye, Esqr., adopted their Brief. He urged the Court to allow the appeal. There is/was evidence of service of the Hearing Notice on the Respondent D and/or Counsel. Judgment was reserved till to-day pursuant to Order 6 Rule 8(6) of the Rules of this Court.

Although, I was minded to treat or deal with Issues 3.03 and 3.04 of the Appellants and Issue 3 of the Respondent as the material issues for determination, but since Issue 3.01 of the Appellants and E Issue 1 of the Respondent, touches on the competence or jurisdiction of the court below to in fact deliver its Judgment, I will deal with the same. The Appellants assert that the defendant/Respondent, died on 23<sup>rd</sup> October, 1999 and that there was no substitution as at the date of the Judgment of the court below. That the implication is that F the orders made in the Judgment, ipso facto, are null and void. That this is because, the Judgment, was given against a non-existing party as the only Respondent to the appeal, had died before the appeal "was argued". That the position would be the same even if the ap- G peal had been prosecuted against the deceased defendant in a representative capacity as according to the learned counsel, a dead person can neither sue nor be sued either personally or in a representative capacity as according to him, the personality of a human being is extinguished by his death. He has cited and relied on the cases of H *Alhaji Abdulsalam & anor. v. Alhaji Salawu* (2002) 13 NWLR (Pt.785) 505, 522 - per Uwais, CJN (it is also reported in (2002) 6 SCNJ. 388); *Osagunna v. The Military Governor of Ekiti State & ors.* In *Re Ayoola Adeosun* (2001) 8 NWLR (Pt.714) 200 @ 221 (it is also reported in (2001) 4 SCNJ. 30); *Ajakaiye v. Ideahi* (1994) 8 NWLR

(pt.364) 504 @ 533 C.A. and Bintumi v. Fantami (1998) 13 NWLR (Pt. 581) 264 @ 271-272 C.A.

It is submitted in the Respondent's Brief that the issue of the death of the Respondent, is hollow and "much furry without wind". That the issue never arose before the court below. On the competence of the issue, it is submitted that although issue of jurisdiction can be raised "at any time" that the rule must not be oversimplified ad absurdum to accommodate an issue of fact which would require this Court to examine further evidence and decide on the admissibility and probative value of documents and thus assume an original jurisdiction to determine basic facts on which the Court of Appeal had made no pronouncement and that this Court, has no such original jurisdiction of a court of trial.

Whatever the above means, **on the facts, it is submitted that the question is when did the Respondent in the court below die? is a question of fact that according to the Appellant (sic), the death occurred while the suit was still before the court below. But that the fact was never raised before the court below.** The observation of Uwaifo, JSC in the case of Ibori v. Agbi (2004) FWLR (Pt.202) 1799 @ 1855 is reproduced thus:

*"The Supreme Court cannot function outside it's normal constitutional role as an appellate court which is to consider whether issues raised in the trial court have been completely decided there and therefore properly examined on appeal by Court of Appeal".* (sic).

Reliance is also placed on the case of Joy v. Dom (2001) FWLR (pt.82) (sic) (it is part 62) 2026. I note that it is a Judgment on 19<sup>th</sup> July, 1999 and it is also reported in (1999) 7 SCNJ. 27) - per Belgore, JSC (as he then was later CJN) as to when new issue or issues can be raised. **I agree with the submission in the Appellants' Reply Brief in paragraph 1.02 to the effect that the issue is on jurisdiction or competence of the court below and being a point of law, it can be raised at any stage and even by this Court but I will add that provided, leave of either the lower or this Court, is sought and granted.** See the cases of Ezekude v. Odogwu & ors. (2002) 13 NWLR (Pt. 784) 366; (2002) 7 SCNJ. 280; Obiakor & anor. v. The State (2002) 10 NWLR (pt.776) 612 @ 626; (2002) 6 SCNJ. 193 and Joy v. Dom (supra). This Court deprecated also the

raising of the point of law in this Court without leave in the case of Obiode & ors. v. Orewere & ors. (1982) 1 ANLR (Pt. 12) @ 16 - per Uwais, JSC. (as he then was later CJN). The rationale for this rule, is that an Appellate Court, deals with or hears complaints and grievances against the decisions of the lower court and thus has the duty, B to correct the error or errors of the lower court. See the case of Agu v. Ikewibe (1991) 13 NWLR (Pt.180) 385 @ 403-407; (1991) 4 SCNJ. 56. However, ***Lagree with the Respondent's learned counsel firstly, that from the Records, physical appearance of the learned counsel for the parties, are/were recorded by the court below.*** C At page 116, on 16<sup>th</sup> October, 1997, the following appear inter alia:

*Mr. M. O. Agboola for the Applicant (i.e. Plaintiff/Appellant).*

*Mr. A. Areoye for the Respondent, (i.e. defendant/Respondent).*

D The application for extension of time to file the Appellant's Brief of Argument and leave to amend the Applicant's Notice of Appeal and a deeming order, were granted with costs of N500.00 in favour of the Respondent.

Secondly, at page 119 thereof, on 31<sup>st</sup> October, 2000; the E date for the hearing of the appeal, the Appellant (i.e. the Plaintiff) was recorded as being present. Mr. M. O. Agboola appeared for the Appellant while B.A. Akande (holding Mr. A. Areoye's Brief) appeared for the Respondent (i.e. the alleged "dead" Respondent). Both learned F counsel for the parties, adopted their respective Brief. While Mr. Agboola urged the court to allow the appeal, Mr. Akande, urged the court to dismiss the appeal. The court below thereafter, adjourned the appeal/case for Judgment to 7<sup>th</sup> December, 2000. The proceedings of 31<sup>st</sup> October, 2000 was signed by Akintan, JCA (as he then G was) in the Panel that included Tabai and Adekeye, JJCA.

At page 119A, the proceedings on 25<sup>th</sup> January, 2001 - Co-ram: Onalaja, Adamu and Adekeye JJCA, the appearances of the Appellant and counsel for the parties, are/were recorded and appear as follows:

H "Appellant is present in Court. Biodun Olaide for the Appellant.

Chief Oladiti Akande for Mr. A. Areoye for the Respondent".

The Judgment was read and delivered by Onalaja JCA.

***In other words, although the Respondent was duly represented***

**by his counsel on the two occasions, there was no mention to the court below, of the alleged “death” of the defendant/Respondent on 23<sup>rd</sup> October, 1999, to the court below.**

**Thirdly, at pages 139-140 of the Records, on 25<sup>th</sup> April, 2001, a motion dated 23<sup>rd</sup> April, 2001 for leave to appeal against the said Judgment of the court below and for an order for stay of execution of the said Judgment, was filed on behalf of the alleged dead Respondent. It was/is signed by one Lekan Ojo, Esq., in the Chambers of Chief Afe Babalola, SAN & Co. The affidavit in support of the application was sworn to by one Phillip Ojo - a Litigation Officer in the said Chambers. In paragraphs 2,6,7 and 8 thereof, he swore as follows:**

**“2. I am duly authorised by the Appellant/Applicant i.e. Alhaji Bello Ajani Sapo (the alleged dead Respondent) to swear to this affidavit.**

*6. That the Applicant is dissatisfied with the Judgment of this Court delivered on 25/01/2001 and is desirous of appealing against it to the Supreme Court.*

*7. That I know that the Applicant decided to change his counsel for the purpose of prosecuting his proposed appeal against the said judgment.*

*8. That I know as a fact that the applicant briefed our chambers to prosecute his appeal against the judgment of this Court in early March, 2001”*

**I note that at page 144 of the Records, in the Notice of Appeal filed on the said 3<sup>rd</sup> April, 2001, the Appellant is stated as Alhaji Bello Ajani Sapo (the alleged dead Respondent). The Notice of Appeal at page 148 thereof also dated 23<sup>rd</sup> April, 2001, is signed by Lekan Ojo, Esq., as Appellant’s Counsel. It is now settled that the contents of Record of proceedings, are binding both on the court and the parties. See the case of Chief Fubara & ors. v. Chief Minimah & or s. (2003) 5 SCNJ. 142 @168. Order 3 Rule 30(1) of the Court of Appeal Rules, 2002 now Order 15(1) Court of Appeal Rules (with Practice Direction) (2007), places the duty or burden of informing the court of the death of a party, on the counsel representing the party. For the avoidance of doubt, it provides as follows:**

**“It shall be the duty of Counsel representing a party to**

***an appeal to give immediate notice of the death of that party to the Registrar of the court below or to the Registrar of the Court (as the case may require) and to all other parties affected by the appeal as soon as he becomes aware of the fact”.***

**The above provision is clear and unambiguous. I see no**  
**B such notice in the Records.** In fact, Rule (2) of the above order, provides as follows:

*“If/where it is necessary to add or substitute a new party for the deceased, an application shall, subject to the provisions of Order I Rule 21, be made in that behalf to court below or to the court, either*  
**C** *by any existing party to the appeal or by any person who wishes to be added or substituted”.*

The above is also clear and unambiguous. If it is true (not conceded) that the Respondent, died since 23<sup>rd</sup> October, 1999, I also  
**D** have not seen any such application for substitution in the court below either by the Appellants or any other member of their family.  
**Since the dispute is in respect of land and from the said pleadings in the defendant/Respondent’s Statement of Defence, the Judgment of the court below, subsists and is binding on the**  
**E Appellants.**

The learned counsel for the Appellants with respect, at page 2 paragraphs 2.01 and 2.02, surprisingly and with respect, erroneously, submitted as follows:

**F** *“2.01 that the parties in this case cannot by consent or acquiescence or failure to inform the lower court of the death of the sole Respondent before the date of judgment confer jurisdiction on the court. In other words, they cannot by their failure to inform the lower court of the death of the Respondent before the date of judgment*  
**G** *nullify the effect of the principle of law which made it mandatory that both parties to a case must be living persons at the date when judgment is delivered. See Yassim vs. Barclays Bank, C.D.O. (1968) 1 ANLR 171 at 178; Abdulsalam vs. Salawa (2002) 13 NWLR (pt. 785) 522 paragraphs E-R.”.*

**H** *“2.02 We further submit that the issue of the death of the Respondent was not raised at the lower court before delivering its judgment is a non-starter since it is a jurisdictional point of law, it can be dealt with by this Court by virtue of Sec. 22 of the Supreme Court Act. See Kimship Ltd. v. Exquisite Ind. Nig. Ltd. (2003) 1 S.C. (Pt. II)*

94 @ 114”.

See also the further submission in paragraph 2.03 which shows with respect, a gross misconception by the learned counsel of the mandatory provision of Order 3 Rule 30 (1) of the Court of Appeal Rules 2002 now Order 15 Rule 1 of Court of Appeal Rules 2007.

I note that at page 2 paragraph 2.03 of the Appellants’ Brief, it is submitted inter alia:

*“It is the law that since proceedings conducted without jurisdiction are null and void as per Odutola vs. Kayode (1994) 2 NWLR (Pt.324) 1, no act of waiver or act that may be seen to have that effect, can confer jurisdiction to validate such proceedings, no matter how reprehensible and/or condemnable the conduct of the Appellants that omitted to inform the lower court of the death of the Respondent (which is regrettable) may be viewed by this Court.*

*See: Ishola vs. Ajiboye (1994) 6 NWLR (Pt.352) 506.*

*The above cases were cited with approval by this Court in FRN vs. Ifeawu (sic) (meaning Ifegwu) (2003) 5 S.C. 252 and 299”.*

*[the underlining mine]*

In other words or in effect, the Appellants and their learned counsel, now concede, that the court below, was not informed by them, of the purported death of the Respondent at any time and even on the date the Judgment of that court was delivered. So, I or one may ask, why all the unnecessary fuss which in the Respondents’ Brief is stated to be “with pontifical certainty and exactitude” and therefore, submitted that “the issue of the death of the Respondent, is hollow and much fury without wind”? If the Appellants in spite of the mandatory provision in the said Order 3(1) of the Court of Appeal Rules 2002, did not bring to the notice or even orally, inform the court below of the purported death of the Respondent as far back as 31<sup>st</sup> October, 1999 up to and including the 25<sup>th</sup> January, 2001 when its Judgment was delivered, how can or could the court below, be accused of delivering a Judgment that is tagged by the Appellants as “null and void”? I or one may again ask. The whole thing in my respectful view, is absurd to the extreme. Any wonder, the learned counsel for the Respondent, described the issue as academic to say the least. Let me slop here.

From the foregoing, it is amazing to me that notwithstanding the above observations, this issue has surfaced in this appeal. With

respect, it is a pity, unfortunate and bogus to say the least. However, since the issue is raised without leave, it is incompetent and it is accordingly, struck out.

### Issue 2 of the Parties

I note from the Records, in the “Statement of Defence with B Plan”, in paragraphs 1, 2 and 4 thereof, it is averred as follows:

*“1. The Defendant defends this suit on behalf or himself and on behalf of his family - Sapo family*

*2. The defendant defends this in a representative capacity - C that he represents Sapo family of which he is the head.*

*4. The defendant avers that the land in dispute and all the land surrounding it, front and back, left and right belong to Sapo family including himself”.*

See also paragraphs 8, 13, 14, 15, 16, 18, 20, 22, 26, 38, 40, D 42 and 47 which talk of or state about the said family in respect of the subject matter of the dispute.

In the Appellants’ Reply Brief in paragraph 2.06, it is stated that the Respondent “strenuously” objected to the defendant, defending the suit in a representative capacity and pleaded in paragraph 1 of her Reply to the Statement of Defence as follows:

*“In reply to paragraphs 1 and 2 of the Defendant’s Statement of defence, the Plaintiff says that she will raise Preliminary Objection to the capacity in which the Defendant seeks to defend at the trial of the suit”.*

But if I or one may ask, did she afterwards object? She never did and in any case, her case or stance, is that it was the defendant/Respondent who she saw committing the act of trespass she described in her pleadings and evidence. It was only an intention. In any case, G the defendant pleaded at paragraphs 49 and 50 of his Statement of defence as follows:

*“49. The plaintiff and her family are relatives (sic) are not related to Sapo family or to the ancestor of the defendant.*

*50. The defendant says that he has been farming personally H on the land in dispute and the land surrounding it on all sides over 65 years ago without any challenge from anybody until recently by the plaintiff.*

However, the law is settled that a head of a family, can take action to protect family property or defend an action in respect of

family property, even without the prior authority of other members of the family. So also, any member of a family, may take steps, to protect or defend family property or his own interest in it. See the cases of Sogunle v. Okerele & ors. (1967) NMLR 58, 60; Animashawun v. Osuma & 2 ors. (1972) 4 S.C. 200 @ 214; (1972) 4 S.C. (Reprint) 180; Njoku & ors. v. Eme & 4 ors. (1973) 5 S.C. 293; (1973) 5 S.C. (Reprint) 211; Coker v. Oguntola & ors. (1985) 1 ANLR 278; Ugwu & anor. v. Agbo & 5 ors. (1977) 10 S.C. 27 @ 40; (1977) 10 S.C. (Reprint) 18; Melifonwu & ors. v. Egbuji & ors. (1982) 9 S.C. 145 @ 159; (1982) 9 S.C. (Reprint) 73; and Alhaji Gegele v. Alhaji Layinka & 6 ors. (1993) 3 SCNJ. 39 @ 45; (1993) 4 KLR 51 just to mention but a few. I have already in this Judgment, reproduced the pleading of the Respondent in paragraph 2 of his Statement of Defence.

Secondly, failure by a Plaintiff or party to obtain leave to sue in a representative capacity, does not vitiate the validity of the action. See the cases of Anabaraonye & 3 ors. v. Nwakaike (1997) 1 NWLR (Pt.482) 374 @ 382; (1997) 1 SCNJ. 161 and Chief Okapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587.

Thirdly, ***a court including an Appellate Court, can make the order of representation, when once the pleadings and evidence, establish conclusively, a representative capacity and the case has been fought throughout, in that capacity even if an amendment to reflect that capacity, had not been applied for or obtained. It will be otherwise, if the case is not made out or defended, in a representative capacity.*** See the case of Ajomogun & 5 ors. (1992) 6 NWLR (Pt.246) 156; (1992) 7 SCNJ. (Pt.1) 79 @ 114 -115; ***There had never been any unqualified rule of practice that forbade the making of a declaration, even when some of the persons interested in the subject-matter, were not before the court. Judgment will be binding on the family or Community, where a case is brought or defended in a representative capacity.*** See the cases of Ibeneweka & ors. v. Egbuna & anor. (1964) 1 WLR 219; Sowemimo v. Alhaji Somisi & ors. (1982) 1 ANLR (Pt. 1) 49; Dokubo & anor. v. Chief Bob Manuel & ors. (1967) 1 ANLR 113; Mba Nta & ors. v. Anigbo & ors. (1972) 5 S.C 156 @ 174-175; (1972) 1 ANLR (Pt.2) 74; Mba Orie & anor. v. Okpan Ogba & anor. (1976) 10 S.C. 123 and Taiwo Ayeni & ors.

v. Sowemimo (1982) 5 S.C. 60 @ 90 – 92 - all the above cases, are also cited or referred to in the case of Oba Oseni & 14 ors. v. Dawodu & 2 ors, (1994) 4 NWLR (Pt.339) 390 (pt. 405 - 406; (1994) 4 SCNJ. (Pt.II) 197.

***It need to be borne in mind always and this is also settled that no cause or matter, shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter, deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.*** See the cases of Chief Onwuka Kalu v. Chief Odili - In Re: Chief Nwoja & 2 ors. (1992) SCNJ. (Pt. 1) 76 @ 115; Osunrinde & 7 ors. v. Ajamogun & 5 ors. (1992) 6 NWLR (Pt.246) 156 @ 183-184; (1992) 7 SCNJ. (Pt.1) 79 (supra); Sheehan v. Great Eastern Railway Co. (1880) 16 Ch. 55 @ 64. ***It is the undisputed right of a plaintiff, to choose the person or persons against whom he wishes to proceed against.***

In the Respondent's Brief at page 10, the case of Alhaji R. Ayorinde & 4 ors. v. Alhaji Oni A. (2000) FWLR (Pt.3) 448 @ 464 - per Karibi-Whyte, JSC is cited and relied on (it is also reported in (2000) 2 SCNJ. 1.) where it is stated inter alia, as follows:

***"It is a correct proposition of law that when an action is properly constituted with a Plaintiff with legal capacity to bring the action, a Defendant with capacity to defend, and a claim with cause of action against the Defendant, and the action has satisfied all preconditions for instituting the action, the fact that a necessary party to the action has not been joined, is not fatal to the action and will not render the action a nullity - see Oladehinde (sic) & Awo v. Oduwole 1962 WNLR 41".***

Learned counsel thereafter, submitted that it is hard to see how the Appellants want the Supreme Court to hold that a suit is incompetent just because, the Plaintiff chose to sue the individual who injured her family's proprietary interest. That the issue is academic and should be answered in the negative and resolved against the appeal (sic) (i.e. Appellants). He so urged the court. From what I have stated or discussed above, ***my answer to the Appellants Issue 3.02 as couched, is rendered in the Affirmative or Positive, while my answer to the Respondent's Issue 2, is in the Negative.*** As regards Oladeinde (not hinde) & anor. v. Oduwole's case (supra) which

was referred to in Chief Kalu v. Chief Odili's case (*supra*), dealt with mis-description resulting in non-description of a party, it was held that it was not necessarily fatal. However, it was held that an action, cannot be defeated on the grounds of non-joinder or misjoinder and Karibi-Whyte, JSC's pronouncement was quoted or referred to thus:

*"It is well settled law and practice in all our courts that where an action has not been properly constituted, whether as regards joinder of the causes of action or as to parties, it has always been procedurally beneficial and prudent to raise objection to the defect in the action before or at the hearing of the action - See Martins v. Federal Administrative — General (1962) 1 ANLR 120.....".* [the underlining mine]

In the Obiode & ors v. Orewere & ors. case (*supra*), it was/is stated that the rule as to representative action, is a rule which ought not to be treated as rigid but as a flexible tool of convenience in the administration of justice.

I will deal with Issues 3.03 and 3.04 of the Appellants and Issue 3 of the Respondent together. Order 3 Rule 2(1) of the Court of Appeal Rules, 2002, provides that all appeals shall be by way of rehearing. In other words, appeals are in the nature of rehearing in respect of all issues raised in respect of the case. See the cases of Sabrue Motors Nig. Ltd. V. Rajab Enterprises Nig. Ltd. (2002) 4 SCNJ. 370 @ 382, - per Ogwuegbu, JSC and Maersk Line & anor. v. Addide Investment Ltd. & anor. (2002) 4 SCNJ. 433 @ 472 - per Ayoola, JSC. See also Section 16 of the Court of Appeal Act and Order 3 Rule 23(1) of the Court of Appeal Rules 2002.

I note that at page 19 paragraph 7.10, of the Appellants' Brief it is conceded,

*"that there are some inaccuracies in the findings of facts made by the lower court but his main finding that the Plaintiff's claim lacked credibility is justified by the numerous contradictions in the evidence given by the Plaintiff and her other witnesses".* [the underlining mine]

I also note that some of the inaccuracies or even one or any of them, were or even was even stated in the Appellants Brief. In my respectful view, this concession, by simple inference by me, means in effect, that the trial court, failed to and did not adequately evaluate the evidence before it. But at page 126 of the Records, the attention of the court below was drawn to several instances to show or illus-

trate that the decision of the learned trial judge, was premised on some specified findings of facts which were either not pleaded or not given in evidence at the trial. The court below, thoroughly in my respectful but firm view, in its re-valuation of the evidence before the trial court, highlighted them. Before doing so, it reproduced the material pleadings of the parties at pages 121 to 123 of the Records and the material evidence of the parties and their witnesses. It reproduced the issues of the Appellant/Respondent for determination at page 126 thereof and noted that the Respondent, raised five issues which it stated, were/are mere repetitions of the three issues formulated by them in the Appellant's/Respondent's Brief hence it did not consider it necessary, to reproduce the five issues of the Respondent in his Brief. It proceeded to consider the appeal based on the issues formulated in the Appellants'/Respondents' Brief. It noted or identified the decisions of the learned trial Judge which was premised on some specific findings of facts which were either not pleaded or not given in evidence at the trial as submitted by the learned counsel for the Appellant/Respondent in respect of Issue 1. Seven of such wrong or faulty findings of facts were or are;

E *"1. the court's observation that the defendant debunked the plaintiffs case by his comprehensive plan - Exhibit D1 which subsumed the Plaintiffs land;*

F *2. that the defendant's case was more probable because three of the plaintiff's witnesses were either mercilessly crushed to submission under cross-examination;*

*3. that the traditional history produced by the plaintiff appeared to be self-contradictory and fell short of credibility;*

G *4. that the court was more convinced by recent acts of ownership of the defendant on the land in dispute e.g. by the sales made to purchasers out of the land in dispute who had peacefully built on the land;*

H *5. that the defendant had successfully challenged the plaintiff's attempt to show that there were economic trees on the land in dispute.*

*6. that the plaintiff had failed to establish by credible evidence her grip on the land in recent times; and*

*7. that the defendant had shown how the plaintiffs father got the land - i.e. as a tenant through D.W. 2".*

See pages 126 to 127 of the Records.

The arguments in support of these faulty findings, appear at pages 127 to 129 of the Records. The reply of the learned counsel for the defendant/Respondent at page 129 thereof, is to the effect that the learned trial Judge, properly evaluated the evidence placed before him and that he in fact, came to a right decision. Reference was made to the defendant's survey plan Exhibit D1 and it was submitted that the learned trial Judge, was right in holding that the said survey plan was more comprehensive. B

I will add one more faulty finding of fact as also shown in the Respondent's Brief. The learned trial Judge, held that the Defendant consistently and successfully, resisted encroachments on the land in dispute. From the Records, evidence of resistance on encroachment mistakenly and wrongfully credited to the Defendant by the learned trial Judge, was in fact, the Respondent's case and were pleaded in paragraphs 22, 23 and 27 of the Statement of Claim and given in evidence by her at pages 17 and 18 of the Records. C

At page 130 thereof, the court below stated as follows:

*"The main issues raised in the appeal are whether the findings of facts made by the learned trial Judge are supported by the evidence placed before the court and whether the conclusions reached by him can be justified having regard to the admissible evidence placed before the court. The law is settled that although it is no business of an appeal court to substitute its view of the evidence for that of the trial Judge who has the singular opportunity of listening to the witnesses and watching them, the appeal court could however, in the interest of justice, disturb, alter, reverse or set aside the lower court's findings of facts under certain circumstances. Among such circumstances are:* E

*(1) where the trial court fails to evaluate the evidence adduced before it; or* F

*(2) the trial court has drawn wrong inferences from the primary facts found; or*

*(3) the facts found by the trial court are wrongfully applied to the circumstances of the case or the findings of facts are not reasonably justified or supported by the credible evidence given in the case. See Akinola v. Oluwa (1962) SC NLR 352; Federal Commissioner for Works & Housing v. Lababebi (1977) 11-12 S.C. 15; Kuforiji v. G*

*V.Y.B. Nig. Ltd. (1981) 6-7 S.C. 40; and Ezeafulukwe v. John Holt Ltd. (1996) 2 NWLR (Pt.432) 511.*

Similarly, the law is settled that an appellate court is in the same position as the trial court in relation to what conclusion or inference to draw from primary findings once any of the conditions for such interference, as already enunciated above exists: See *Ehimare v. Emhonyon (1985) 1 NWLR (Pt. 2) 177; Metalimpex v. A.G. Leventis (1976) 2 S.C. 91; and Runsewe v. Odutola (1996) 4 NWLR (Pt.441) 143.*

Applying the law as decided above to the facts of the instant case, it is clear from the findings of facts made by the learned trial Judge that he did not properly evaluate the evidence placed before him and that some of the findings of facts he made were wrongfully applied to the case before him. Such omissions have therefore created an avenue for this court to interfere with the findings of facts and application of the facts to the case". [the underlining mine]  
See also the concurring contribution of Adekeye, JCA (as he/she then was) at page 137 of the Records. I agree.

The court below, at pages 131 to 133, as it was entitled and justified to do, re-evaluated the evidence in the Records bearing in mind also the above principles which it applied. See the cases of *Fatoyinbo v. Williams 1 FSC 87; Karibo & ors. v. Grand & anor. (1992) 3 NWLR (Pt.230) 426 @ 441; (1992) 4 SCNJ. 12; Adeleke Iyanda (2001) 13 NWLR (Pt.725) 1 @ 20; (2001) 6 SCNJ. 101; Abey & 5 ors. v. Chief A.I.F. Alex & 2 ors. (1999) 12 SCNJ. 234; Iwuoha & anor. v. Nigerian Postal Services Ltd. & anor. (2003) 4 SCNJ. 258 @ 278 and Morenikeji & 4 ors. v. Adegbasin & 4 ors. (2003) 4 SCNJ. 105 @ 125 126 - per Iguh, JSC just to mention but a few.*

For example, let me for the avoidance of doubt, reproduce some of the findings and holdings by the court below at pages 131 to 133.

At pages 131, it stated as follows:

"To begin with his findings of facts made in respect of the plaintiff's survey plan (Exh. P1) where the learned Judge found as a fact that the defendant debunked the plaintiff's case by his comprehensive survey plan (Exhibit D1) which subsumed the plaintiff's land, there was totally no evidence to support or justify such a finding of

*fact or conclusion from the evidence tendered before the court. The true, position was that the plaintiff produced and tendered a survey plan of his (sic) land in the area and marked out the area in dispute between her and the defendant. She also showed the surrounding landed properties of her boundary men around her entire land. The defendant, on the other hand, produced and tendered his own survey plan (Exh.D1) In it, apart from showing the land in dispute, it also shows a larger area which was described in the plaintiff's plan (Exh.P1) as those belonging to her boundary men. The plan (Exh.D1) also contain names of boundary men to the land claimed by the defendant.*

*The defendant's land as shown on his survey plan (Exh.D1) shares boundary with the plaintiff's land on three sides.*

*But while each of the boundary men named on the plaintiff's survey plan (Exh.P1) testified at the trial and confirmed sharing common boundary with the plaintiff's land claiming to have been on the land for over 80 years, and denying (sic) being tenants of the defendant, none of the people shown on the defendant's survey plan (Exh.D1) as sharing boundary with the defendant was called as witness to confirm the said defendant's claim. No reason was given for the failure to call any of the said boundary men. It is therefore ridiculous for the court to find as a fact that the defendant, had made out a better case than that of the plaintiff in this regard".*

*[the underlining mine]*

I agree.

It continued thus:

*"Again the finding of fact that the defendant's case was more probable because three of the plaintiff's witnesses were "mercilessly crushed to submission under cross-examination is also not supported by the printed record. As I have already mentioned above, the four plaintiff's boundary men that gave evidence at the trial are P. W. 2, P. W. 3, P. W. 4 and P. W. 5. None of them was subjected to any serious cross-examination. There is nothing on the printed record to show that their claim to have been on their respective portion of the land which spanned over three generations of that each of them shared a common root of title, were seriously challenged (sic) under cross-examination. It follows therefore that the court's finding that the witnesses were mercilessly crushed to submission under cross-examina-*

*tion was totally baseless” [the underlining mine]*

I also agree.

At page 132, it stated inter alia, as follows:

*“The court’s view about the traditional history produced by the plaintiff was self-contradictory and fell short of credibility was also based on wrong premise. The learned Judge based his said finding of fact on the wrong premise that it was Balogun Osungbekun that made the grant of the land to the plaintiff’s ancestors. But the fact pleaded and given in evidence was that Olubadan of Ibadan sent Balogun Osungbekun to go and carve out a place where Oba Adegbeye Atoloye could settle along with his people after the said Oba had approached the Olubadan for such a grant from the land which was then under the control of Olubadan of Ibadan. No contrary evidence was led to the effect that the area was at the material time not under the control of the. Olubadan of Ibadan.*

*Oba Abudulai Ogunlaye (PW.6), the Olofa of Ofatedo confirmed the plaintiff’s story in this respect. In fact Oba Jimo Oyeyomi (D. W.3) the Oluda of Ido-Oshun told the court that Ido-Osun’s land and Igbo Ifa are contiguous. There is therefore totally no basis for the rejection by the court of the traditional evidence tendered by the plaintiff”. [the underlining mine]*

I also agree.

At page 132, it stated thus:

*“Similarly, the finding of fact made by the learned trial Judge to the effect that “the court was more convinced by recent acts of ownership of the defendant on the land in dispute, e.g. by the sales made to purchasers out of the land in dispute who had peacefully built on the land” was also not supported by the evidence placed before the court. The evidence tendered at the trial was that the plaintiff and each of the four boundary men on the land had been on the land for over 80 years without any disturbance until the defendant came to disturb them about six years before they gave their evidence and that his said act formed the basis of the present action. Similarly although the defendant told the court that he made sales of plots out of the land to such people who had ‘built on it, that story was not supported by the survey plan he tendered (Exh.D1) because no building was shown as existing on any part of the land shown on its said survey plan (Exh.P1). The defendant also failed to*

*call any of such purchasers to give evidence and no reason was given for failure to do so. There is therefore totally no basis for the Judge coming to the conclusion he reached in this respect”.*

*[the underlining mine]*

I also agree.

At page 133, the following appear inter alia:

*“The finding of fact by the learned trial Judge to the effect that the defendant had shown how she plaintiffs father got to the land, i.e. as a tenant through Lamidi Adeyi Abifarin (D.W.2) is also unfounded and baseless. The defendant had pleaded in paragraphs 24 and 25 of his statement of defence that it was one Fadipe that his family allocated land for farming purposes only out of their land and that it was the same Fadipe that brought the plaintiff’s father on to the portion of the land as a tenant. No where in the defendant’s pleadings was the name Lamidi Adeyi Abifarin (D.W.2) was mentioned. (sic) Again when the plaintiff and each of his four boundary men aforementioned gave evidence, the name of D.W.2 was never suggested to any of them as the person who invited the plaintiff or any of the boundary men to the land as tenant. It is trite law that evidence not pleaded is inadmissible and goes to no issue. Such evidence, if mistakenly taken, ought to and should in fact be ignored by the Judge in coming to his conclusion in the matter before him: See National Investment and Properties Co. Ltd. v. Thompson Organisation Ltd. (1969) NMLR 99; Woluchem v. Gudi (1981) 5 S.C. 291; and Adenuga v. LT.C. (1950) 3 WACA 125. It follows therefore that the learned Judge came to a wrong conclusion when he found that it was D.W.2 that brought the plaintiffs father to the land as a tenant since such finding of fact was based on unpleaded evidence”.*

*[the underlining mine]*

**All the above, cannot be faulted by me. This is because, the said findings of facts, manifests a holistic approach of credible evidence which clearly preponderates in favour of the Respondent. They are evidence of a painstaking evaluation of the evidence in the Records which bind both the parties and the court. I have deliberately gone this far, in order to debunk and deprecate with respect, the unjustified submission in the Appellants’ Brief that the decision of the court below, is against**

***the weight of evidence led at the trial. If anything, the findings and holdings of the court below, show without any equivocation, that the said findings of facts and holdings of the learned trial Judge, were/are with respect, perverse.*** At page 23 paragraph 8.06 of the Appellants' Brief, it is submitted that;

B *"even where there is conflict of evidence which the trial court fails to resolve the proper course is for the Appellate Court to order a retrial before another judge as the court cannot make any findings in such a situation".*

C He later submitted that the court below, was wrong in resolving the traditional histories of the parties when according to him, it had no opportunity of seeing and hearing the witnesses. Amazingly, this submission, is in spite of the overwhelming findings of facts and holdings by the court below and his earlier admission or concession  
D that there were/are some inaccuracies in the findings of fact made by the trial court. This is also in spite of the fact that an appeal as earlier stated by me, is in the nature of a rehearing. The court below, did not have to see and hear the is witnesses since, the Records speak for themselves. At page 134 of the Records, the below, made the following finding inter alia;

E *"The appellant as Plaintiff has led sufficient credible evidence at the trial to prove three of the five ways set out above. The three are proof by traditional evidence, proof by acts of ownership and  
F proof by acts of long possession".*

I agree. In the first place, as now firmly settled, proof of ownership, is prima facie, proof of possession, the presumption being that the person having title to the land in dispute, is in possession. See the case of *Jones v. Chapman & ors. (1847) 2 Ex. 803.*

G Secondly, an Appellate Court, as even noted by the court below at page 130 of the Records (reproduced in this Judgment), is in as much a good position as the trial court, to deal with facts. See also the cases of *Fabumiyi & ors. v. Obaje & ors. (1968) NMLR 242 @ 247; Woluchem & ors. v. Chief Gudi & ors. (supra)* and also reported in (1981) 12 NSCC 214; *Ogbechie & ors. v. Onochie & ors. (1986) 2 NWLR (Pt.23) 484* just to mention but a few. In fact, in the case of *Ehimua v. National Oil & Chemical Marketing Oil Co. Ltd. (1996) 5 SCNJ. 88 @95;*, this Court - per Kutigi, JSC (as he then was and later CJN), re -visited by way of emphasis so to speak or say,

the circumstances or when an Appellate Court, can interfere with the findings of fact or facts of a trial court. Several other cases were cited with approval therein. I rest this Judgment also on these decided authorities.

**My answer to Issue 3.03 of the Appellants, is rendered in the Affirmative/Positive. In respect of their Issue 3.04 as couched, my answer, is that the Judgment of the court below, is supported by the evidence in the Records. In fact, the weight of evidence, is in favour of the Respondent in the trial court.** As regards Issue 3 of the Respondent, my answer without hesitation, is rendered in the Affirmative/Positive.

In the final analysis or end result, I find as a fact and hold that this appeal with respect, is hopelessly unmeritorious. It fails and it is accordingly dismissed. I hereby and accordingly, affirm the said Judgment of the court below setting aside the judgment of the trial court.

Costs follow the event. The Respondent is entitled to costs fixed at N50, 000.00 (Fifty thousand naira) payable to her by the Appellants.

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### TOBI JSC

I have read the judgment of my learned brother, Ogbuagu, JSC, and I agree with his reasoning and conclusion that this appeal lacks merit and should be dismissed. I accordingly dismiss the appeal. I adopt all the consequential orders contained in the lead judgment including that relating to costs.

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### MUKHTAR JSC

The issues raised in the appellants' brief of argument, and which were distilled from the appellants grounds of appeal in this appeal are:-

*"1. Whether the death of the only Respondent to the appeal before the lower court on 23/10/1999 and failure to substitute a living person in his place did not deprive the lower court the Jurisdiction to entertain the appeal pending before it and thereby render the judgment delivered on 25/1/01 a nullity.*

*2. Whether the action filed and the appeal prosecuted by the*

*Respondent was properly constituted having regard to the fact that the Defendant's family was not made a party to the suit and the appeal.*

3. *Whether the court below made a correct approach to the evidence led by the parties before the trial court.*

B 4. *Whether having regard to the pleadings and the evidence led, the judgment of the Court of Appeal made in favour of the Respondent is not against the weight of evidence as to who proved a better title to the land in dispute."*

C The appeal from the Court of Appeal Ibadan Division is against its decision giving judgment to the plaintiff, whereas, the trial court had dismissed the claims of the plaintiff, as follows:-

*"As it has been stated above, it is the plaintiff who should prove in law her title to any disputed land though preponderantly, notwithstanding the weakness of the defence. In the instant case, the plaintiff fails of the standard of proof required of her in law. As such her claim must fail.*

*The Court of Appeal however granted the reliefs sought by the plaintiff, (who is now the respondent) and those reliefs sought by the plaintiff in the high court are:-*

(i) *A Declaration that the plaintiff is the person entitled to a statutory right of occupancy over a piece or parcel of farmland situate, lying and being at Igbo-Ife area, Ofatedo and verged RED on survey Plan No. OS/D/0579/93/001 consisting of an area of approximately 16.135 Hectares and bounded as follows:-*

.....  
.....  
.....

G (ii) *Ten thousand naira (N10,000.00) as damages for trespass (which trespass still continues) committed by the defendant, his servants, agents and privies.*

(iii) *Perpetual injunction restraining the defendant, his agents, servants, privies from further trespass on the said parcel of land."*

H Dissatisfied with the judgment of the Court of Appeal, the defendant appealed to this court on eleven grounds of appeal. Learned counsel for the parties exchanged briefs of argument, which were adopted at the hearing of the appeal. At the time of the hearing of the appeal in the lower court the only respondent there is said or

alleged had died and had not been substituted, the circumstance of which, according to the learned counsel for the appellant made the court to lack jurisdiction, as there was no competent respondent. On this, the learned counsel for the appellant has argued that the implication of the death of the only respondent is that the orders made in the judgment was null and void, and the judgment was against a non-existent party. B

In reply, the learned counsel for the respondent has argued that the issue of the death of the respondent in the court below was a question of fact which never arose in the said court. The law requires that in a situation as this, leave of the Supreme Court must be sought and obtained before the issue can be raised and argued on. C The appellants in their reply brief of argument are contending that this is an issue of law that can be raised for the first time in this court without leave *viva voce* or the court can raise it *suo motu*, because D the court had no jurisdiction to adjudicate over the case.

Now, I will look at the Notice of Appeal in the Court of Appeal, which bears the name of Alhaji Bello Ajani, Sapo both in the heading on the notice of Appeal and at the end of it, where we have Alhaji Bello Ajani Sapo as one of the persons directly affected by the appeal. E In the proceedings in the lower court right to the date of hearing of the appeal, a counsel appeared for the respondent, and it is clear from the proceedings in that court that no one raised the issue of the death of the respondent, not even the counsel for the appellant, who also appeared for the appellant throughout the proceedings. F In short, the matter of the demise of the respondent in the lower court did not come to the notice of the court until after the judgment was delivered and the case concluded. It was in fact at the stage of appealing to this court that the issue of the death of the defendant arose, when it was deposed in an affidavit that the defendant died on 23/10/99. The Court of Appeal was therefore ignorant G of the death of the defendant/respondent before it and had no idea that he was already deceased when it delivered its judgment. In the circumstance could it be said that the court was in error in concluding H the appeal, when it was not notified of the correct situation on the ground? I think not, for the Justices were no seers or super human beings who had supernatural power to be ceased of a fact they have not been informed of by parties.

The record of proceedings as per the defendant's statement of defence say the defendant intended to defend the action in a representative capacity as is disclosed in the following paragraphs of the statement of defence:-

B *"1. The defendant defends this action on behalf of himself and on behalf of his family, Sapo family.*

*2. The defendant defends this suit in a representative capacity - that he represents Sapo family of which he is the head.*

C *8. The defendant says that he and his family own the land in dispute which the plaintiff is claiming in paragraph (sic) 4, 5, 6, 7 and 8 of her statement of claim.*

*In her reply to the statement of defence, the plaintiff averred thus:*

D *"1. In reply to paragraphs 1 and 2 of the defendant's statement of defence, the plaintiff says that she sues the defendant personally, in which the defendant seeks to defend at the trial of this suit."*

E No preliminary objection as stated in this last averment was raised and argued, as no record of such exists in the record before this court. In the circumstance, the said averment is deemed abandoned, and I so find it abandoned.

F The fact that the defendant intended to defend the suit on behalf of his family was well grounded as it was supported by the evidence of the defendant, but this does substantially affect the merit or otherwise of the appeal.

G In short I am on the view that it has not caused or led to substantial miscarriage of justice. The law is settled that it is not every slip that will lead to the success of an appeal. To result in the success of an appeal the mistake or slip must be substantial enough to have influenced the decision appealed against, which is not the case in the instant appeal. See *Okeshola v. The Military Governor of Oyo State & ors* (2000) 13 NWLR part 685 page 494, *Onwuka v. Omogui* (1992) 3 NWLR part 230 page 393, and *Adejumo v. Ayantegbe* H (1989) 3 NWLR part 110 page 417.

The finding of the court below reversing the findings of fact made by the trial court was attacked. This finding reads:-

*"The court view about the traditional history produced by the plaintiff was self contradictory and fell short of credibility was also*

*based on wrong premise”.*

The pertinent question here is, was the above finding justifiably arrived at? To answer this question the relevant pleadings and the supporting evidence must be looked at and considered carefully. To do this, I will reproduce these aspects of the proceedings here below. They are:

“10. During the inter tribal wars between Ibadan and Ilorin, Oba Adegboye Atoloye, who was then the Olafa of Offa in Kwara State led his people from Offa (Kwara State) and settled at a place known as Ita-Olokan area, Osogbo (Osun State. When Ita-Olokan became congested Oba Adegboye Atoloye requested the then Olubadan who was the over lord to (sic) found a new settlement for the Oba and his subjects.

11. The then Olubadan dispatched Balogun Osungbekun from Ibadan to allocate a new settlement for the Oba and his people from Offa (Kwara State).

12. The said Balogun Osungbekun allocated to Oba Adegboye Atoloye a new settlement for himself and his people who migrated with him from Offa. Thus the present site of Olatedo in Osun State was allocated the Oba for settlement which include the land claimed by the plaintiff verged RED. Oba Adegboye Atoloye in turn allocated lands for farming and building purposes to all his followers from Offa including the ancestor of the plaintiff.

13. The Land in dispute verged GREEN and the entire land claimed by the plaintiff verged RED was the portion of land allocated to the plaintiff s ancestor called Fadairo.

14. The said Fadairo took possession of the land and started to cultivate it planting economic trees such as cocoa trees, palm trees, and kolanut trees and subsistent crops like yams, coco yams, maize and cassava.

In her testimony, the plaintiff gave inter alia the following pieces of evidence:-

*“The disputed land originally belonged to Fadairo who had died many years ago. We inherited it from our father Fadairo. We are in physical possession and planted economic food trees such as coco, kolanuts, palm fruits and food crops. Members of my family farming on the land are Yaya Akanmu and others Fadairo migrated from Offa now in Kwara State. He left Offa because of the then Fulani war.*

*On their way they stopped at Ikirun. Three days after they sojourned at Ila Olokan, Osogbo. Oba Atoloye sent for Balogun Osungbekun because they had no sufficient space. Chief Osungbekun approached the then Olubadan who directed Osungbekun to settle Oba Atoloye and his entourage on the parcel of land between Ede and Osogbo.*

*B The place is now known and called Ofatedo. Oba Atoloye then settled his followers and recipients of the land. The land allocated to my father Fadairo was called Igbo Ifa. I am quarrelling on the land allocated to me. Fadairo in his life time planted coco, kolanut and palm trees on the land. He was continuously farming on the land for a long time until he died. Fadairo begat Taiwo, Osannike Taiwo inherited the land after the death of his father. He was also in effective possession of the disputed land. Taiwo begat Osunnike and Osunkunle. My father was Osunmonu. His father was Taiwo. After D the death of Taiwo, sunmonu inherited the land. He also farmed and planted coco and kolanuts on the land. Nobody challenged him on the land. Sunmonu begat Bintu (plaintiff) and Yaya. I grew up on the land. I inherited the land and I have been reaping the crops on the land.....”*

*E The above evidence is in proof of the plaintiffs traditional history as stated in the statement of claim. Then P.W.6 in his testimony said inter alia thus:-*

*F “It was during the inter tribal wars we were driven away from Ofa-Ile. We then migrated and settled at Olorunda at Osogbo. It was then Adegboye Atoloye who went to Ibadan and pleaded with Balogun Oshungbekun for a more convenient (sic) for us to have. Atoloye was a friend to Osungbekun Ibadan was the headquarters to Osogbo at the material time. Osungbekun then settled Adegboye G Atoloye (sic) thereafter settled all the families who followed him on the land. This was about 200 years ago. Nobody, disturbed any of us on our different holdings.”*

*H The above evidence equally supported and proved the plaintiff's averments and pleadings on the traditional history on which she based her claim. I do not see any palpable contradiction in the pleading and evidence adduced by the plaintiff to prove the traditional history on her root of title and even if there is any contradiction, which I doubt, it is not of any moment or significance as to affect the merit of the case of the plaintiff for a declaration of title to the land claimed.*

The position of the law is that in a claim for declaration of title to land premised on traditional history, for a plaintiff to succeed he must adduce credible, cogent and uncontradicted traditional evidence in support of the traditional history to prove his title. See *Aikhionbare v. Omoregie*, 1976 12 SC 11, *Olujebu of Ijebu v. Oso*, the *Eleda of Eda* 1972 5 SC. 143, and *Thomas v. Preston Holder* (1946) 12 W.A.C.A. 78. B

As far as I am concerned the plaintiff proved her claim in accordance to the laid down principle of law governing the claim for land under one of the five ways laid down for such claim i.e. traditional history. The plaintiff/respondent abundantly proved her case vide the credible evidence of her root of title. C

In the light of the above contribution which is in tandem with the reasonings in the lead judgment, I would say that the appeal is unmeritorious and cannot succeed. I have read in advance the lead judgment of my learned brother Ogbuagu JSC, and I agree entirely with the conclusion reached. I also dismiss the appeal in its entirety, and affirm the decision of the lower court. I abide by the order as to costs made in the lead judgment. D

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### **CHUKWMA-ENEH JSC**

I have read before now the judgment prepared and delivered in this matter by my learned brother Ogbuagu, JSC. And if I may comment on one crucial aspect of this appeal, thus standing on the facts and circumstances of this case as clearly stated in the lead judgment; it is settled law that among other supervening events which may cause a pending suit to become defective is death (i.e. of a sole plaintiff or defendant or both to the suit, in this matter with regard to the instant sole respondent). The simple reason being as in this case that the sole respondent cannot be or appear before the court as there is in law no longer such respondent as a legal person as he, as contended by the appellants, has died before the judgment of the court below. His counsel, all the same, has pressed on with the proceedings in this matter regardless of the said supervening event; he has not inform the court below as so provided in Order 3 rule 30(1) of the Court of Appeal Rules, 2002 and even then he has not applied formally to substitute living persons i.e. the appellants to con- F  
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tinue the case before the said judgment as the cause of action survives and continues after the death of the sole respondent. Otherwise, a court must in the event of death of a sole defendant or plaintiff or both refuse to treat the proceedings as other than a nullity. That is to say, a judgment obtained against a dead person is a nullity.

<sup>B</sup> See: *Akumaju v. Mosadolorun* (1991) 9 NWLR (Pt.214)236 at 242. In my opinion, this is so at any stage when a court becomes aware of a dead party. See: *Daimler Co. v. Continental Tyre & Co.* (1916) 2 AC 307 at 337, and *Lazard Brothers & Co. v. Midland Bank* (1933) A C. 289 at 296.

<sup>C</sup> In the context of death having supervened as alleged in this case, that is to say, on the death of the sole respondent, ordinarily an application for change of parties ought to have been made before the said judgment in compliance with Order 3 rule 30(1) of the Court of Appeal Rules, 2002. Vide; *Kaduna Textiles Ltd. v. Obi* (1999) 10 NWLR (Pt.621) 138, *C.C.B. (Nig.) Plc v. O' Silvawax International Ltd.* (1999) 7 NWLR (Pt.609) 97 and *Bintumi v. Fantami* (1998) 13 NWLR (Pt.581) 264. This has not happened here before the delivery of the said judgment and the appellants are now seeking to set it aside as a nullity.

<sup>E</sup> However, the court below has been unaware of the alleged death of the sole respondent in this case before its judgment. Moreover, it must be stated the court below thus has become functus officio.

<sup>F</sup> The important question that has arisen on the peculiar facts of this matter is the confusion surrounding the sole respondent's alleged death on 23rd October, 1999. Let me say that I do not buy the assertion of the sole respondent's death as is being contended by the appellants. This is because, while the appellants say it is before the judgment of the court below given on 25/1/2001, their affidavit in support of their application which inter alia is to inform the court of change of counsel in this matter dated 23/4/2001 sworn to by one Philip Ojo has deposed to the effect that the sole respondent has authorized the deponent to make the depositions on his behalf as contained in the said supporting affidavit; meaning that the sole respondent has been alive as at 23/4/2001. This piece of deposition is monstrous to say the least. This is a clear attempt to mislead the court and it is their undoing in this appeal and I cannot see any justification

in exercising their Option of seeking to set aside the said judgment on the ground that the same is defective as having been given after the sole respondent's death and therefore a nullity. It does not lie in their mouth to so contend; as it cannot, on the peculiar facts of this case avail them. The court below has rightly refused their application and I agree. B

For the above reasons and much more in the lead judgment, I agree there is no merit in the appeal and that it should be dismissed with costs as stated in the lead judgment.

C

### ***FABIYI JSC***

I have had a preview of the judgment just delivered by my learned brother, Ogbuagu, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed. D

The facts relating to this appeal have been well set out in the lead judgment. I only wish to chip in a few words of my own.

The appellants allege that the sole respondent, their man at the court below, died. They did not apply to substitute him thereat. Facts relating to the death of the man was not raised at the Court of Appeal before judgment was delivered thereat. They desire to rely on a spurious medical certificate by an unnamed Medical Officer to prop their case. One Phillip Ojo deposed to an affidavit that he met the 'dead' respondent in March, 2001. Curiously, he was said to have died in October, 1999. The appellants, no doubt embarked upon a farce or ruse. No court of record can take them seriously in this respect. E F

The plaintiff sued the defendant at the trial court as a tort-feasor. It was left for his family to make necessary application if it desired to be joined. I cannot fathom how the plaintiff's suit is incompetent in the prevailing circumstance. G

It seems as if the appellants were not happy with the way and manner the court below re-evaluated the evidence garnered by the trial judge. Generally, an appellate court should not ordinarily substitute its own views of fact for those of the trial court. See: Ebba v. Ogodo (1984) 1 SCNLR 372; Balogun v. Agboola (1974) 1 All NLR (Pt. 2) 66. H

An appellate court will not interfere with findings of fact except where wrongly applied to the circumstance of the case or the conclusion reached was perverse or wrong. See: *Nwosu v. Board of Customs & Excise* (1988) 5 NWLR (Pt.93) 225, *Nneji v. Chukwu* (1996) 10 NWLR (Pt. 578) 265.

B Certainly, ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard witnesses. An appellate court will not lightly interfere with same unless for compelling reasons. See: *Ebba v. Ogodo Supra*.

C The court below rightly re-evaluated the evidence and found for the plaintiff/respondent Perverse findings of fact made by the trial court which had nothing to do with credibility of witnesses were rightly set aside by the court below. There was concession by the appellants that there were some inaccuracies in the findings of fact made by the trial court. Such concession clinches any argument to the contrary.

D For the above reasons and the fuller ones set out by my learned brother, I too find that the appeal lacks merit and should be dismissed. I order accordingly. I endorse all the consequential orders contained in the lead judgment; that relating to costs inclusive.

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