

SUPREME COURT OF NIGERIA
4TH JUNE, 2010 SC. 272/2003
CORAM:- N. TOBI, W. S. N. ONNOGHEN,
I. F. OGBUAGU, I. T. MUHAMMAD, J. A. FABIYI, JJSC

1. WAHABI KOLAWOLE ISHOLA

2. FATAI ARANSI ADEOSUN

(for themselves and on behalf of

Akinpelu Ojo family)

DEFENDANTS/

3. ALHAJI YEKINI YISAU

..... APPELLANTS

4. AMUSA OGUNWANDE

5. RAUFU AJAGBE

(For themselves and on behalf

of Babasola Ogunwande family)

(2nd 3rd & 4th Applicants substituted

by Order of Court of 20/2/2006)

AND

1. ALHAJI KARIMU FOLORUNSO PLAINTIFF/RESPONDENT

for themselves and on behalf

of Jagun Ibagbe family)

2. STRABAG CONSTRUCTION

(NIG.) LTD.

.... DEFENDANT/RESPONDENT

APPEALS - Words & Phrases - "To allow an appeal" - Meaning - Where an appeal is allowed without conditions attached - It means judgment of lower court is set aside - And the reliefs it had refused are granted - Or vice versa (H1)

APPEALS - Judgments - Justice - Failure to make consequential orders - Effect - Though it is the ideal thing to make such order - Failure of a court to so do - Could not cause miscarriage of justice to the losing party (H2)

JUDGMENTS - Words & phrases - "Consequential order" - Nature of - It gives effect to the judgment already given - It does not grant fresh relief - But flows naturally from the main relief granted (H3)

EVIDENCE - Proof - Paternity of Ojo and Adeniran - From the evidence before trial court - It is established that neither of them is a son of Jagun Ibagbe (H4)

EVIDENCE - Appeals - Reevaluation - Justification - Where trial court fails to properly evaluate the evidence before it - Appellate court is entitled to evaluate same - Provided it does not involve credibility of witnesses (H5)

APPEALS - Issues - Compression of issues - Liberty of courts - A court is at liberty to compress issues presented by parties - Or even reformulate issues for the determination of the appeal (H6)

EVIDENCE - Partitioning - Burden of proof - Discharge - Appellants alleged partition and had the burden of proving same - Which burden they failed to discharge (H7)

APPEALS - Grounds - Existence - Before Court of Appeal - Contrary to appellants' contention - There was a ground of appeal before that court - Challenging the finding on proof made by trial court (H8)

JUDGMENTS - Basis - Extraneous matters - Whether relied on - The court merely regarded certain naked facts - The existence of which none of the parties could deny - And neither party was prejudiced by the step (H9)

FACTS

The plaintiff/respondent, together with one Yusufu Ajao Ibitokun, now deceased, sued the defendants/appellants, together with the defendant/respondent, before the High Court of Oyo State holden at Ibadan. The plaintiffs' suit was for themselves and on behalf of Jagun Ibagbe Family. The 1st and 2nd defendants/appellants were sued for themselves and on behalf of Akinpelu Ojo family, while the 3rd to 5th defendants/appellants were sued for themselves and on behalf of Babalola Ogunwande Family. Yusufu Ajao Ibitokun, who was the 1st plaintiff and head of Jagun Ibagbe family died before judgment was delivered at trial court and was not substituted thereby leaving only the plaintiff/respondent to continue with the case. The

plaintiffs' claim was for sundry declarations, injunction and damages by which they challenged the lease of the land in dispute by appellants to the defendant/respondent. It was common ground that the land was originally part of Jagun Ibagbe Family land. The case of defendants/appellants was however that Jagun Ibagbe had partitioned his land among his descendants before he died and that the land in dispute was inherited by 1st and 2nd appellants through the partitioning.

The allegation of partitioning was in conflict however, with Exhibit D - a deed of lease made in 1978, after the death of Jagun Ibagbe - by which the land was leased to defendant/respondent as Jagun Ibagbe Family land. Plaintiffs maintained, in line with Exhibit D, that Jagun Ibagbe's land was never partitioned at any time and that the lease by appellants to defendant/respondent, without the participation of 1st and 2nd plaintiffs, who were the undisputed head of and principal member of Jagun Ibagbe family at the material time, was voidable at their instance. Moreover, plaintiff alleged that Akinpelu Ojo family was not a direct branch of Jagun Ibagbe family as Ojo their forbear was not a direct son of Jagun Ibagbe. After hearing, the learned trial court found for defendants as it not only held that Ojo was a direct son of Jagun Ibagbe but also held that the land was partitioned to Akinpelu Ojo family. Aggrieved, plaintiffs appealed to Court of Appeal which reevaluated the evidence led and allowed the appeal having overturned the findings of trial court on many material points. Most importantly, it found that partition was not proved. However, the court did not expressly state that it was granting the claims of plaintiffs. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

- 1. Whether or not the Court of Appeal was right in failing to make consequential orders?*
- 2. Whether or not the Court of Appeal was right in interfering with the findings of the trial court on the identity of the children of Jagun Ibagbe?*
- 3. Whether or not the Court of Appeal was right in the consideration and treatment of issue two adopted by the lower court on page 196 in the judgment of the lower court?*
- 4. Whether or not the Court of Appeal was justified to dis-*

turb the trial court's findings on partitioning of the farmlands of Jagun Ibagbe?

5. Whether or not the Court of Appeal was right to consider or rely on any evidence which did not form part of the record before the trial court?

B 6. Whether or not the Court of Appeal was right in its conclusion that on the totality of the evidence tendered before the trial court, the High Court was not justified in dismissing the plaintiffs' claims?

C **HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)
Words & Phrases - "To allow an appeal" - Meaning

1. When an appeal is allowed by an appellate court without any Condition(s) attached, it means, simpliciter, that the judgment /decision/order of the lower court is effectively set aside. Where the appellate court exercises its general powers and steps into the shoes of the court below it, to do all that the court below ought to have done but which it failed to do, including re-evaluation of evidence, as in this case, the appellate court can make such valid decisions or orders which the court below it ought to have made. The interpretation of the judgment of the court below in allowing the appeal is that if the trial court in this case had properly evaluated the evidence placed before it, it would have granted all the reliefs prayed by the plaintiffs as found by the court below. (p. 2026 E)

F **Justice - Failure to make consequential orders - Effect**

2. Although I am in agreement with the learned counsel for the appellants in his submission that the Court of Appeal having gone whole length of re-evaluating the evidence, resulting in disturbing most of the findings of the trial court, it would have gone ahead to make pronouncement on the reliefs claimed. That certainly is the most ideal thing in drawing up a well written judgment. I do not however, think that the omission by the court below to set out seriatim, the plaintiffs' claims which were already captured in the statement of claim and in both the trial and appeal courts respective judgments, that such omission could cause any miscarriage of justice on the side of the losing party. (p. 2027 C)

Words & phrases - "Consequential order" - Nature of

3. In the light of the above, therefore, any consequential order (if at all) made by the trial court or the court below ought to have been incidental and flown directly and naturally from those reliefs. It is an offshoot of the main claim/relief sought which owes its existence to the said main claim/relief. It gives effect to the judgment already given, not by granting a fresh and unclaimed or unproven relief. B

It is thus, my understanding of the law from the authorities set out above that a consequential order is not an independent order of the main claim/relief.

Since it is the findings of the court below that based on the totality of the evidence tendered before the learned trial judge, which was reviewed by the court below, the learned trial judge was not justified in dismissing the plaintiff's claims and that there was merit in the appeal and it allowed same, the plaintiffs were entitled to all the claims as per paragraph 44 of the further Amended statement of claim and I so hold. (pp. 2029 F/H/2030 A) C D

Proof - Paternity of Ojo and Adeniran

4. From the evidence, it has been clearly and overwhelmingly established by the plaintiffs/respondents that Ojo was never a son (biological son) of Jagun Ibagbe. He was described as a "stepson" to Jagun Ibagbe. None of the defendants/appellants denied the fact that Ogunrinu, the mother of Ojo, came into marital tie to Jagun Ibagbe with her child, Ojo. F

Equally, Adeniran was said to be a brother to Jagun Ibagbe and not his direct son. This goes along the line of his children.

Accordingly, defendants/appellants claim to membership of Jagun Ibagbe's family (on blood relation) must fail as the direct legal lineage between Jagun Ibagbe and his blood descendants has broken. (pp. 2040 G/2041 A) G

EVIDENCE - Appeals - Reevaluation - Justification

5. The re-evaluation of evidence carried by the court below became necessary as the trial court glossed over the whole gamut of the evidence led before it which would certainly occasion some form of miscarriage of justice to the aggrieved party. It is trite law that it is the trial court that has the primary responsibility of evaluation of evi- H

dence. But where the trial court abdicates its responsibility or has not taken proper advantage of having seen and heard the witnesses testify, then the matter moves into the realm of the appellate court to evaluate the evidence provided the evaluation does not involve credibility of the witnesses.

B The court below is quite right in my view, to have interfered with the findings of the trial court on the identity of the children of Jagun Ibagbe. I resolve this issue in favour of the respondents. (p. 2041 D)

C ***Compression of issues - Liberty of courts***

6. A counsel may formulate as many issues as he thinks his grounds of appeal can permit but the court, in its own wisdom, may, either for convenience or in order to reduce unnecessary duplication/repetition of decisions which will appear seemingly identical in an appeal, decide to reduce the number of issues or stream-line like issues or “Compress” the issues presented by the parties for consideration. As a matter of fact the court has the power to go out of its own way to formulate or re-formulate issues for the determination of the appeal.

E In quite a recent case, I observed as follows:

“Further, the Court of Appeal and this court as well, can examine issues raised by either of the parties; condense them where they are verbose or reframe them entirely as long as they remain related to the grounds of appeal.

F In my view, what the court below did in relation to issue three, condensing of issues for determination, is not out of order. It is in line with the normal practice in the appeal courts. (p. 2042 C)

G ***Partitioning - Burden of proof - Discharge***

7. The attempt by the appellants to establish partitioning, as held by the court below failed. The court below stated inter alia:

“As regards issue No. 2 bordering on whether the learned trial judge was justifiable in holding that Jagun Ibagbe’s family land had been partitioned based on the contradictory evidence tendered by the defendants as to partitioning of the family land..... I have considered these submissions vis-a-vis the records and the prevailing law..... It is trite, that he who alleges must prove”
(page 199 of the record)

I am in agreement with the court below. By their claim as in paragraphs 23 and 32 of their further amended Statement of Defence, the appellants claimed partitioning of the land by Jagun Ibagbe. The law is very clear that it is he who would fail if no evidence is called who shoulders the burden of proving what he claims. (p. 2043 F)

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APPEALS - Grounds - Existence - Before Court of Appeal

8. Learned counsel for the appellants said that there was no ground of appeal before the Court of Appeal and the conclusion of the trial court was made after a thorough and proper evaluation of the evidence was done by the trial court. This cannot be the true position of things before the court below. The learned counsel for the respondents submitted that by ground three of the amended notice of appeal filed by the respondent at the court below [page 156-158], that ground dealt with this issue which reads (shorn of particulars)

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“The learned trial judge erred in law in dismissing the entire claims of the plaintiff when there was evidence on record before the court in proof of the claims.”

This, learned counsel for the respondents said, was covered by issue three before the Court of Appeal in respondent’s brief (page 159 - 172, page 163 - 166 of the record). I agree with the learned counsel for the respondents. The court below treated the issue and arrived at the conclusion that the learned trial judge was not justified in dismissing the respondents claim based on the evidence before her. (p. 2045 F)

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Extraneous matters - Whether relied on

9. I have gone through the facts and the proceedings of both the trial court and the court below. On the complaint of reliance by the court below on extraneous matters to arrive at its judgment, I think what the respondents did was merely to draw the attention of the court below that it would be dangerous for it to close its eyes to these naked facts, the existence of which none of the parties could deny. Mere mentioning of such facts cannot in my view, be said to have prejudiced any of the parties.

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As no miscarriage of justice was occasioned to any of the appellants by such reliance, I hold that the decision of the court below cannot be faulted. (p. 2046 F)

NOTABLE POINT OF INTEREST

MUHAMMAD JSC

1. Partition must be by consensus of all family members

Allotment in land matter transactions refers to the selection of specific land awarded to an individual allottee from a common holding. Partition on the other hand, is the division of real property held jointly or in common by two or more persons into individually owned interests. The effect of the latter is that it confers on each individual member of the family an absolute and exclusive right to deal with his portion of the partitioned land. And, this will then give rise to a new family ownership in as many places the property is divided each branch becoming the owner of the portion partitioned to it. The golden rule in that respect is that partition must be brought about by the consensus of all the members and branches of the family, otherwise it is void. (p. 2044 G)

REPRESENTATION

Emmanuel Abiodun, Esq., (with him M. O. Adebayo, Esq.) for the Appellant
J. O. A. Ajakaiye, Esq.) for the 1st Respondent.

CASES REFERRED TO

- F ODI V. OJAIFE (1987) 2 NWLR (part) 511
- GUDA V. KITTA [1999] 12 NWLR (pt. 629) 21
- DURU V. NWOSU (1989) 4 NWLR (part 113) 24
- OLUWOLE V. AINA (2001) 17 NWLR (pt. 741) 1
- OGUNBIYI V. ISHOLA [1999] 6 NWLR [Part 452] 12
- G LABIYE V. ANRETIDA [1992] 8 NWLR [Part 255] 13
- AMODU V. AMODU (1990) 5 NWLR (part 150) 356
- GBADAMOSI V. DAIRO (2007) All FWLR (part 357) 812
- LIMAN V. MOHAMMED (1999) 9 NWLR (part 617) 122
- MAYA V. OSHUNTOKUN (2001) 11 NWLR (part 723) 62
- H OLUFOSOYE V. OLURUNFEMI (1989) 4 NWLR (part 95) 26
- INCAR NIGERIA LTD. V. ADEGBOYE (1985) 2 NWLR (part 133) 24
- AKINBOBOLA V. PLISSON FISKONIG. LTD. (1991) 1 NWLR (part 167) 270

ODOFU & ANOR V. AGU & ANOR (1992) 3 NWLR (part 229) 350 at page 372

OLORUNFEMI & ORS. V. ASHO & ORS. (2000) 2 NWLR (part 643) 143 at page 157

STATUTE REFERRED TO

Evidence Act, ss. 135 to 137

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LEAD JUDGMENT BY MUHAMMAD JSC

At the High Court of Justice of Oyo State, holden at Ibadan (trial court), two plaintiffs in a representative capacity and on behalf of Jagun Ibagbe family, originally instituted the action which culminated into this appeal. The 1st plaintiff, the Mogaji or head of the family, took ill during the proceedings in the suit and died before judgment was delivered, leaving the 2nd plaintiff to continue with the case. The claims of the plaintiffs as indorsed on the amended Writ of Summons and in paragraph 44 of the Further Amended Statement of Claim Were as follows:

“1. A declaration that the land in dispute situate, lying and being at Jagun Village, Ife Road, Ibadan is a portion of Jagun Ibagbe family land.

2. A declaration that the purported lease or alienation of the said portion of the land in dispute by 2nd- 7th defendants to the 1st defendant is void and null not having been made by or with the knowledge, consent or authorization of plaintiffs and Jagun-Ibagbe family.

3. The plaintiffs claim as against the defendants the sum of ono [sic] hundred and fifty five thousand naira (N155,000.00) being special and general damages for trespass committed by the defendants on the land in dispute since 1979 which trespass is still continuing.

4. Injunction restraining the defendants, their servants, agents and/or privies from committing further acts of trespass on the land in dispute.

5. The plaintiffs also claim N20,000.00 per annum for use and occupation from the date of filing the Writ until possession is given up.”

The facts of the case as stated by the 2nd plaintiff is that the 2nd

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plaintiff became the Mogaji of Jagun Ibagbe family after the death of the 1st plaintiff who was the Mogaji of Jagun Ibagbe family who died during the pendency of the proceedings before the trial court. The plaintiffs instituted the action in this appeal for themselves and on behalf of the members of Jagun Ibagbe family, hence their claims as reproduced above. Plaintiffs' claims stemmed from the fact that the 2nd - 6th defendants purported to lease the land in dispute to the 1st defendant as their own Ojo family land and not as Jagun Ibagbe family land on the ground that Jagun Ibagbe had partitioned his land among his children during his life time even though Exhibit 'D' admitted in evidence shows that the land in dispute was purported to have been leased to the 1st defendant as Jagun Ibagbe family land in 1978, when Exhibit 'D' was made, which contradicted the oral evidence given on partition by the 2nd - 6th defendants. It is common ground between the parties that the land in dispute from time immemorial was Jagun Ibagbe family land. It is also clear that it is the 2nd - 6th defendants that are claiming that Jagun Ibagbe family land had been partitioned amongst his children and that because Ojo section farmed on the land, it had therefore, been partitioned to Ojo section. The defendants, thus, had the onus and the burden of establishing the partition of the land in dispute.

It is the contention of the plaintiffs that the Jagun Ibagbe family land has never been partitioned and that the 1st plaintiff being the Mogaji of the family then, did not take part in the alienation of the property to the 1st defendant. That the 2nd plaintiff who was shown to be an important and a principal member of the family did not also take part in the alienation. That the lease to the 1st defendant is therefore, void and or voidable at the instance of the 2nd plaintiff. The 1st defendant was shown to have entered the land in dispute and bulldozed it and commenced using the land which is evidence of trespass. Both sides accepted that the ancestor of the 1st plaintiff, one Ibitokun, was among the three children of Jagun Ibagbe. There is no dispute that Ibitokun family farms at Olopade and that the 1st plaintiff's ancestor and the 1st plaintiff had been heads of family at different times. The 2nd plaintiff claimed that the children of Jagun Ibagbe were:

1. Ogundeke
2. Somotan and
3. Ibitokun

The 2nd and 3rd defendants on the other hand, claimed on behalf of other defendants that the three children of the Jagun Ibagbe were:

1. Ojo
2. Adeniran and
3. Ibitokun

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They also claimed that the farmlands of Jagun Ibagbe were at:

(i) Feranjebe - which he gave to Ojo, ancestor of the 2nd and 3rd defendants,

(ii) Oke-Omi - which he gave to Adeniran as well as part of Olorunda because of the size of Olorunda farmland,

(iii) Olorunda which he gave to Ibitokun save the portion shared to Adeniran.

The 2nd and 3rd defendants claimed that the gift of the farm-lands was an outright grant, that is partition. They claimed that Ibitokun granted part of his land at Olorunda to Adenjinle, a relation of Ibitokun. Whilst Akinpelu, a descendant of Ojo, granted part of the land at Feranjebe to Babasola, the father of the 4th – 6th defendants. When the land in dispute was to be leased to the 1st defendant, the 4th - 6th defendants were not disturbed to lease the portion granted to their ancestor, Babasola to the 1st defendant.

The 2nd defendant who was the appellant at the court below, identified five heads of family after the demise of Jagun Ibagbe as follows:

- (i) Ogundele
- (ii) Adeniran
- (iii) Ibitokun
- (iv) Dahunsi
- (v) Salami Adigun Olopade

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The 2nd and 3rd defendants identified eight heads of family after the demise of Jagun Ibagbe:

- (i) Ojo
- (ii) Adeniran
- (iii) Akinpelu
- (iv) Ibitokun
- (v) Dahunsi
- (vi) Ogunfunmilayo

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(vii) Salami Olopade

(viii) Yesufu Ibitokun.

The 2nd defendant accepted the heads of family from Adeniran and Ibitokun lines of Jagun Ibagbe's children but disowned the three children of the family from the 1st plaintiff line whom both sides accepted as a son of Jagun Ibagbe. He did not call any witness as well from Adeniran's line notwithstanding that he accepted the three heads of family including Adeniran from that line. The 2nd and 3rd defendants called members of Adeniran's line of Jagun Ibagbe's family as witnesses. The 1st defendant also called a member of Adeniran's line to confirm what the then Mogaji, head of family from Adeniran's line said about the land in dispute.

At the end of trial and in a considered judgment, the trial court held that an issue was joined on the paternity of the 2nd and 3rd defendants wherein the 2nd plaintiff concluded that the mother of Ojo was a wife to Jagun Ibagbe who brought Ojo to the latter's house as a stepson. The trial court preferred the evidence of the defendants. It also held that the 2nd plaintiff is a relation of Jagun Ibagbe but not a grandson. The trial court believed the story and held that the farmlands of Jagun Ibagbe were partitioned and the land belonged to 2nd - 6th defendants of Ojo section of Jagun Ibagbe family excluding other members of that family. It further observed that it was the lease to the 1st defendant that aroused the interest of other members of Jagun Ibagbe's family. Dissatisfied with the trial court's judgment, the 2nd defendant appealed to the court below. At the end of its deliberation, the court below allowed the appeal.

The defendants (respondents at the court below) whom I shall henceforth refer to hereinafter as [the appellants], were dissatisfied with the decision of the court below and by an order of this court of 19/2/2007, they were granted leave and extension of time by 14 days within which to file their appeal. They filed a Notice of Appeal on the 23 of February, 2007, containing 12 grounds of appeal against the defendants who are the respondents in this appeal.

Briefs of arguments were later filed and exchanged by the parties to this appeal. Learned counsel for the appellants formulated six issues for this court's determination. They are as follows:

1. Whether or not the Court of Appeal was right in failing to make consequential orders?

2. *Whether or not the Court of Appeal was right in interfering with the findings of the trial court on the identity of the children of Jagun Ibagbe?*

3. *Whether or not the Court of Appeal was right in the consideration and treatment of issue two adopted by the lower court on page 196 in the judgment of the lower court?* B

4. *Whether or not the Court of Appeal was justified to disturb the trial court's findings on partitioning of the farmlands of Jagun Ibagbe?*

5. *Whether or not the Court of Appeal was right to consider or rely on any evidence which did not form part of the record before the trial court?* C

6. *Whether or not the Court of Appeal was right in its conclusion that on the totality of the evidence tendered before the trial court, the High Court was not justified in dismissing the plaintiffs' claims?* D

Learned counsel for the respondents in his brief of argument formulated five issues for determination as follows:

"1. *Whether or not the failure of Court of Appeal to make any pronouncement on the consequential reliefs on the respondent's claims at the High Court caused any miscarriage of justice to any of the parties (Ground 1).*

2. *Whether or not the learned Justices of Court of Appeal were justified in re-evaluating the evidence on record as to who were the children of Jagun Ibagbe family as they did (Grounds 2,3,4,5,6).* F

3. *Whether or not the learned Justices of Court of Appeal properly, fully and adequately considered issue two formulated by them for a decision in the appeal (Ground 7).*

4. *Whether or not the Court of Appeal was justified in holding that on the proper consideration of the totality of evidence tendered in the case, the learned trial judge was not justified in dismissing the plaintiff's claims (Ground 8,9,10,11).* G

5. *Whether or not the learned Justices of Court of Appeal were justified in taking judicial notice of matters in another appeal pending before them on matters relating to the same subject matter in this appeal, in doing substantial justice to the appeal before them. (Ground 12)"* H

In his submission on issue 1, learned counsel for the appel-

lants argued that the court below failed to make consequential order other than on the award of costs. He argued further that there is no doubt that the Court of Appeal, having gone the whole length of re-evaluating the evidence which resulted in disturbing most of the findings of the trial court, it would have gone ahead as well, to make pronouncement on the reliefs claimed. It was argued that as the judgment of the Court of Appeal stands, both sides could argue for or against the award of special and general damages. It was alleged that there is a lacuna in the judgment of the Court of Appeal and this court is urged to resolve issue one in favour of the appellants.

Appellants issue No. 2 which covers grounds 2-6 of the appeal deals mainly with the re-evaluation of evidence by the Court of Appeal. Learned counsel for the appellants argued that the trial court adequately performed its duty of evaluating and ascribing probative value to the evidence before it. He further stated the general law on re-evaluation of evidence by an appeal court. It was submitted that where a trial court clearly evaluated the evidence of the parties and justifiably appraised the fact, it is not the business of the Court of Appeal to substitute its own views for that of the trial court. Several cases were cited in support including: GUDA V. KITTA [1999] 12 NWLR (pt. 629) 21; OLUWOLE V. AINA (2001) 17 NWLR (pt. 741) 1 et cetera. Learned counsel submitted that the Court of Appeal did not approach the findings of the trial court with caution. He cited an instance where the trial court left out Ibitokun as a direct child of Jagun Ibagbe but the Court of Appeal in re-appraising the facts held that such holding was not borne out of the evidence before the trial court. The new findings of the Court of Appeal, it was argued further, cannot be supported from the judgment of the trial court as there was no dispute that Ibitokun was a direct child of Jagun Ibagbe as both sides did not join issue on that and accepted that Ibitokun was a direct child of Jagun Ibagbe. An issue was however, joined on whether the other two children of Jagun Ibagbe were Ogundele and Somotan or Ojo and Adeniran. The trial court resolved the issue after review of evidence and appraisal of facts that the evidence of the defendants on who the other two children of Jagun Ibagbe were. The lower court was wrong in its observation, it was argued further. Learned counsel posited that there are ample evidence on record to support the findings of the trial court on the identity of the children of Jagun

Ibagbe and the status of the 2nd plaintiff. It was wrong of the Court of Appeal to have interfered with such findings. He urged that issue two be resolved in appellants' favour.

While arguing issue No. 3, learned counsel for the appellants submitted that the Court of Appeal compressed the issues canvassed for determination by both sides into three. Learned counsel for the appellants stated that of all the issues considered by the trial court, the lower court singled out partitioning of the farmlands of Jagun Ibagbe for treatment under issue two whereas the totality of the evidence before the trial court covers more than partitioning. He cited examples of such issues such as whether the plaintiff knew the extent of the land originally owned by Jagun Ibagbe in the area of the land in dispute; the land of Eniayewu, the 7th defendant against whom the suit was dropped, was included; the land of Olugbodi which was eventually conceded not to be part of the land in dispute was included et cetera. Learned counsel for the appellants argued further that by restricting itself to the partitioning, the Court of Appeal has prevented itself and or deemed to consider all the issues covered in the totality of the evidence before the trial court and therefore, some of the reliefs claimed were not considered.

Learned counsel for the appellants submitted that issue one adopted by the court of Appeal dealt with the status of the 2nd plaintiff and no more and nothing like second part to issue one.

Learned counsel submitted that the lower court erred in law in the construction of issue two adopted by it for determination. This court is urged to resolve this issue in favour of the appellants.

Appellants' issue No. 4 is also on partitioning of the farmlands in dispute. Learned counsel stated that the trial court considered the totality of the evidence before coming to the decision that Jagun Ibagbe's farmlands were partitioned. He stated further that apart from the evidence on partitioning given by the defence as highlighted by the Court of Appeal, the defence gave other pieces of evidence compatible with partitioning. He cited the evidence of 1st defence witness - Yekini Olapade, the son of the Mogaji who died in 1977. Learned counsel chronicled some of the events that took place in recent times after the death of Jagun Ibagbe such as grant of part of the land by Ibitokun to Adejinle at Olomuda; Akinpelu the son of Ojo granted part of his own land to Babasola absolutely. The grand

children of Akinpelu never challenged the 4th- 6th defendants in dealing with the portion granted to Babasola, their grandfather. Again, neither Ibitokun nor any of his children gave evidence to contradict what Ojo and Adeniran sections of Jagun Ibagbe said about the land in dispute. He stated that it is clear from such events that what took
 B place during the lifetime of Jagun Ibagbe was more likely to be partition rather than allotment. More so, when Jagun Ibagbe's children have dealt with their various parcels of land on a manner inconsistent with family ownership.

C Learned counsel pointed out that Exhibit 'D' was tendered and admitted after the objection of the plaintiffs' counsel was overruled. Exhibit 'D' is an agreement for a lease. The Deed of lease was never tendered; the Lease Agreement too, was never tendered. Learned counsel, however, said that what was tendered was an agree-
 D ment for a lease and that all these were not pleaded by any of the parties. Learned counsel submitted that there is abundant evidence on record to support the findings of the trial court on partition. He urged this court to resolve issue No. 4 in favour of the appellants.

E Issue No. 5 challenges the holding of the Court of Appeal when it held that the plaintiffs have failed to discharge the onus on them on all their claims against the defendants and it went on to dismiss plaintiffs' claims in toto on all the five legs. Learned counsel argued that there was no ground of appeal against that holding be-
 F fore the Court of Appeal. He submitted that it was wrong for the Court of Appeal to so hold and urged this court to resolve issue No. 5 in favour of the appellants.

The learned counsel for the appellants argued in issue No. 6 that they raised a Preliminary Objection against the evidence that
 G was not available before the trial court which was in respect of an action instituted after the conclusion of this case before the High Court. It was therefore, a piece of evidence that was never considered by the trial court and the judgment of that court was never based on it. This, the Court of Appeal affirmed. The Court of Appeal declined to
 H make a pronouncement on the preliminary objection on facts occurring after the conclusion of the case. It then went ahead to rely on same in coming to a decision on this appeal. The court below, it was further submitted, fell into same error and it amounts to exceeding its jurisdiction. The Court of Appeal is not competent to consider any

matter outside what was placed before the trial court.

Learned counsel for the appellants urged that issue No. 6 be resolved in appellants' favour. He finally urged that this appeal be allowed, set aside the judgment of the Court of Appeal and restore the judgment of the trial court.

It is clear from the submission of learned counsel for the appellants that the appellants' main complaint in their issue No. 1 is that the court below, failed to make any consequential order apart from the award of costs. My understanding of a consequential order is that it is that order which gives effect to a judgment or order to which it is consequential. It is directly traceable to or flowing from that other judgment or order duly prayed for and made consequent upon the reliefs claimed by the plaintiff. See: ODOFU & ANOR V. AGU & ANOR (1992) 3 NWLR (part 229) 350 at page 372. The plaintiffs' claims, were, after the consideration of evidence by the learned trial judge, entirely dismissed. The court below, however, on reviewing the evidence placed before the trial court, found that the learned trial judge was not justified in dismissing the plaintiffs' claims, the court below found merit in the appeal and allowed same. In the words of OKUNOLA, JCA, (of blessed memory) who delivered the leading judgment, wherein he stated, inter alia:

"I hold that based on the totality of the evidence tendered before her at the lower court, reviewed supra, the learned trial judge was not justified in dismissing the plaintiff's claims. Consequently, the 2nd part of issue one is also resolved in favour of the appellant against the respondents. In sum, this appeal has merit and it is allowed with costs of N5,000.00 to the appellant."
(Underlining supplied for emphasis)

I am in agreement with the learned counsel for the respondents in his submission in the respondents' brief of argument under issue one thereof that the proper interpretation to be given to the above excerpt from the lead judgment is that the sum total of the judgment, based on the issues treated is that all the claims of the respondents succeeded and were granted. For the avoidance of any doubt, the plaintiffs'/respondents' claims at the trial court and which were also set out by the court below in its judgment read as follows:

(1) A declaration that the land in dispute situate, lying and being at Jagun Village, Ife Road, Ibadan is a portion of Jagun Ibagbe

family land.

(2) A declaration that the purported lease or alienation of the said portion of the land in dispute by 2nd - 7th defendants to the 1st defendant is void and null, not having been made by or with the knowledge, consent or authorization of plaintiffs and Jagun-Ibagbe family.

(3) The plaintiffs claims as against the defendants the sum of One Hundred and Fifty Five Thousand Naira (N155,000.00) being special and general damages for trespass committed by the defendants on the land in dispute since 1979 which trespass is still continuing.

(4) Injunction restraining the defendants, their servants, agents and/or privies from committing further acts of trespass on the land in dispute.

(5) The plaintiffs also claim N20,000.00 per annum for use and occupation from the date of filing the Writ until possession is given up.

These were the claims that were entirely dismissed by the trial court, and on appeal to the court below, the appeal succeeded and it was allowed.

When an appeal is allowed by an appellate court without any Condition(s) attached, it means, simpliciter, that the judgment /decision/order of the lower court is effectively set aside. Where the appellate court exercises its general powers and steps into the shoes of the court below it, to do all that the court below ought to have done but which it failed to do, including re-evaluation of evidence, as in this case, the appellate court can make such valid decisions or orders which the court below it ought to have made. The interpretation of the judgment of the court below in allowing the appeal is that if the trial court in this case had properly evaluated the evidence placed before it, it would have granted all the reliefs prayed by the plaintiffs as found by the court below. In dealing with this issue in its judgment, the trial court stated inter alia:

“The plaintiffs have failed to discharge the onus on them on all their claims against the defendants and I cannot but dismiss plaintiff’s claims in toto on all the 5 legs. Plaintiffs’ claims are dismissed against the defendants.” (Underlining for emphasis)

Reference to the dismissal of the plaintiffs' claims, with particular emphasis on the 5 legs, cannot be made in my view to any other claims apart from the ones placed by the plaintiffs before the learned trial judge (which I set out earlier in this judgment) which also correlate with the claims set out by both the trial and appeal courts in their respective judgments. B

While allowing the appeal before it, the court below held as follows:

"I hold that based on the totality of the evidence tendered before her at the lower court, reviewed Supra, the learned trial judge was not justified in dismissing the plaintiff's claims." (Underlining for emphasis). C

Although I am in agreement with the learned counsel for the appellants in his submission that the Court of Appeal having gone whole length of re-evaluating the evidence, resulting in disturbing most of the findings of the trial court, it would have gone ahead to make pronouncement on the reliefs claimed. That certainly is the most ideal thing in drawing up a well written judgment. I do not however, think that the omission by the court below to set out seriatim, the plaintiffs' claims which were already captured in the statement of claim and in both the trial and appeal courts respective judgments, that such omission could cause any miscarriage of justice on the side of the losing party. Although the fundamentals in writing a good judgment which a trial court is enjoined to adhere to comprise among other requirements, such as: F

- (a) making a brief statement of the type of action/ offence being adjudicated upon,
- (b) setting out the claim/offence in full or in part, G
- (c) a review of the evidence led,
- (d) appraisal/evaluation of such evidence,
- (e) making findings of fact therefrom,
- (f) consideration of the legal submissions made and/or arising, and findings of law on them and H
- (h) conclusion, that is verdict/final decision/order (s)

Yet, it is not infrequent that you find different judges with different styles of writing judgments. Some are so brief in nature, others are verbose and some may decide to take a middle course.

B Whichever style a judge adopts, what is important is clarity in the language in which the judgment is written and delivered and that justice should be seen by all to have been done to the parties in dispute. A retired Justice of this court had an opportunity to observe, while he was sitting as a Court of Appeal Judge, that a succinct or
 C concise judgment in this context must not be too brief. It should certainly not be long. It should be of average length and this involves covering all the required contents of, a good judgment in summary. UCHE OMO, JCA, (as he then was) in a paper titled "The Art and
 D Science of judging: (1) style and creativity (2) Maintenance of status quo", in 1989 Judicial Lectures: Continuing Education for the Judiciary. See: further: MOGAJI V. ODOFIN (1978) 4 SC 91 at page 93; WOLUCHEM V. GUDI (1981) 5 SC 291; OLUBODE V. SALAMI [1958]. INCARNIGERIA LTD. V. ADEGBOYE (1985) 2 NWLR (part
 E 133) 24; ODI V. OJAIFE (1987) 2 NWLR (part) 511. OLUFOSOYE V. OLURUNFEMI (1989) 4 NWLR (part 95) 26; DURU V. NWOSU (1989) 4 NWLR (part 113) 24. ISAAC STEPHENS V. THE STATE (1986) 5 NWLR (part. 46) 978 at page 1000. ONUOHA V. THE STATE (1988) 3 NWLR (part) 475 at page 476; ADEYEYE & ORS.
 F V. AJIBOYE & ORS. (1978) 3 NWLR (part 61) 432, at page 452 - 452.

Perhaps there is need for me to give a graphic form of how appeals are treated at the appellate bench. The High Court itself exercises, sometimes, appellate jurisdiction. It entertains appeals from
 F the Magistrate Courts and the Customary Courts. Appeals are brought before the High Court (appellate jurisdiction) by notice of appeal containing grounds of appeal setting out the complaints of the appellant. Arguments are taken from respective parties in relation to the
 G grounds of appeal and judgment is later delivered by either allowing or dismissing the appeal after having examined the decision of the trial court on the point in issue in the light of proper law ascertained by the appellate judges. In the Court of Appeal and this court, after the introduction of brief writing, grounds of appeal are tied to issues
 H which are considered while determining the appeal. Where the trial court's decision is erroneous, the appeal court reverses the decision and substitutes the proper decision. If the complaint or the issue is on facts, the appeal court examines the facts of the case and the findings of fact made by the trial court. If the conclusions or findings of fact

can opt reasonably be made or cannot flow from the evidence, the appeal court reverses the trial court's decision on the point and substitutes the proper findings. If such reversal of the findings of facts adversely affects the judgment of the trial court fatally, and makes it impossible for the judgment to stand, the appeal court sets aside the trial court's judgment/decision and substitutes the proper and correct judgment/decision. Similarly, if arguments on ground of law succeeds and makes the judgment of the trial court unsupportable and unjustified, the appeal court sets aside the judgment and enters the proper and correct judgment.

The proper judgment may be a dismissal of the claim or charge or an order of retrial. It may be that the claim is proved and succeeds and the defendants are responsible and liable on the claim. It may also be that the plaintiff is non-suited and that no party is entitled to judgment. It may be that the trial court has no jurisdiction and the claim is struck out. If it is a criminal charge, it may be that the offence is not proved and the appellant is discharged and acquitted. If the prosecutor appealed, it may be that the charge is proved and the proper judgment is of conviction of the respondent and sentence or one of retrial in a competent court.

The claims in this appeal which were litigated by the parties were dismissed by the trial court. On appeal, however, they were later restored and granted by the court below in favour of the plaintiffs/respondents. These claims were clearly set out by me earlier in this judgment ***In the light of the above, therefore, any consequential order (if at all) made by the trial court or the court below ought to have been incidental and flown directly and naturally from those reliefs. It is an offshoot of the main claim/relief sought which owes its existence to the said main claim/relief. It gives effect to the judgment already given, not by granting a fresh and unclaimed or unproven relief.*** See: LIMAN V. MOHAMMED (1999) 9 NWLR (part 617) 122; OBAYAGBONA V. OBAZEE (1999) 5 SC 245 -255; AKINBOBOLA V. PLISSON FISKONIG. LTD. (1991) 1 NWLR (part 167) 270. ***It is thus, my understanding of the law from the authorities set out above that a consequential order is not an independent order of the main claim/relief.*** Where a court of law omits or fails to make consequential order(s), that failure or omission, in my view, can only amount to

an irregularity which is incapable of causing a miscarriage of justice.

Since it is the findings of the court below that based on the totality of the evidence tendered before the learned trial judge, which was reviewed by the court below, the learned trial judge was not justified in dismissing the plaintiff's claims and that there was merit in the appeal and it allowed same, the plaintiffs were entitled to all the claims as per paragraph 44 of the further Amended statement of claim and I so hold.

Appellant issue No. 2 is on the interference of the court below with the findings made by the trial court on the identity of Jagun Ibagbe's children. In his submission, the learned counsel for the appellants stated that this issue deals mainly with re-evaluation of evidence by the court below. It is the submission of the learned counsel for the respondents that the Court of Appeal is always entitled to come to a right decision which the trial court judge failed to come to on printed record which does not involve the credibility of witnesses. He relied on several cases including: KINDEY V. THE MILITARY GOVERNOR OF GONGOLA STATE (1988) 5 SC 46 at page 84; OMOREGBE V. LAWANI (1980) 3-4 SC 108 at page 118; KASACHIKU V. ATOLAGBE (1973) 5 SC 195. It was argued further that the issue of the learned trial judge not properly treating the case of who are the children of Jagun Ibagbe came up at the Court of Appeal for a decision.

I have observed that the issue of who the children of Jagun Ibagbe are, gave some hard times and anxiety to the two courts below. In its attempt to ascertain this fact, the trial court held:

"The plaintiffs have averred in their pleadings and confirmed in their evidence that Jagun Ibagbe had 3 children namely Ogundele, Somotan and Ibitokun whereas the defendants said it is true that Jagun Ibagbe had 3 children but their names were - Ojo, Adeniran and Ibitokun. That is why the first question is posed in this case. Who are the children of Jagun Ibagbe?"

To be able to decide this issue the court has to look at the evidence offered by the plaintiffs and weigh it against that of the defendants and test it against recent happenings within living memory. The 2nd plaintiff said his own grandfather Ogundele was a son of Jagun Ibagbe and Ojo the grandfather of the defendants (2nd and 3^d) was Jagun Ibagbe's step son having born through a previous wedlock by

his wife Ogunrinu. 2nd plaintiff also later referred to Ojo and his siblings as Jagun Ibagbe's slaves. This in my view is most untenable and ridiculous. In Yoruba society you cannot marry a woman and regard her children as a slave just because you were not the father. The worst reference that could be made to the Child is that the child is a bastard if born by another man under your roof. But plaintiff's evidence says Ogunrinu had Ojo for another man before marrying Jagun Ibagbe. Another point that struck me in this contention of the plaintiff is that he and his witnesses never mentioned the names of other wives of Jagun Ibagbe who had issue for him. If he knew the name of a wife without issues for Jagun Ibagbe he should know and give at least one [omission] the names of the mothers of Jagun Ibagbe's children. I do not believe the evidence of the 2nd plaintiff and his witnesses especially 4th plaintiff witness on this issue. 2nd plaintiff said Ogundele was first born of Jagun Ibagbe, Somotan - 2nd child and Ibitokun, 3rd child. 4th plaintiff witness who said he was under 60 years old and younger than 2nd plaintiff first said the 3 children of Jagun Ibagbe were Ogundele - 1st born - Ibitokun 2nd born and then Somotan. Later on he said Ogundele was the son of Jagun Ibagbe. This is contradictory enough to suggest that neither of them is sure who were the exact sons of Jagun Ibagbe. Moreover, [omission] 4th plaintiff witness said he was told the history of Jagun Ibagbe family by his grandfather, Onajide. This is no doubt hearsay evidence. Both the plaintiffs and his (sic) witnesses said Adeniran was only a mere relation of Jagun Ibagbe and not his direct child, but from their own account of succeeding Mogaji's of Jagun Ibagbe family, Adeniran not only became a Mogaji but he produced 2 succeeding Mogaji's in the persons of Dahunsi and Salami Olopade. The plaintiffs did not call any relation or children of these Mogaji's who are directly connected with Jagun Ibagbe as witnesses. It is a pity 1st plaintiff died before the action was completed, he should have clarified the position as to whether or not 3 children of Jagun Ibagbe were Ogundele, Somotan and ibitokun as stated by plaintiffs or Ojo Adeniran and Ibitokun as postulated by the defendants. But his children are still alive and none of them was called to give evidence for plaintiffs. Instead plaintiffs called other Mogajis who are only boundary men and not blood relations. I am not saying the evidence of boundary men are irrelevant but I am of the view that they have not been helpful in estab-

lishing who are the direct children of Jagun Ibagbe. On the other hand the defendants and their witnesses have been very consistent in their account that Jagun Ibagbe's children were Ojo, Adeniran and ibitokun. To me, their story is more probable.

I believe their evidence and hold that the 3 children of Jagun Ibagbe were Ojo, Adeniran and Ibitokun the father of (omission) 1st plaintiff. I prefer the evidence of the defendants to that of the plaintiff on this issue. Whether or not the 2nd plaintiff is a grandson of Jagun Ibagbe is another issue. I believe from Exhibit 'C1' and other evidence in this case that (omission) 2nd plaintiff is also a relation of Jagun Ibagbe but not a grandson. I find as a fact that Ojo and Adeniran are direct issues of Jagun Ibagbe."

The court below, however, differed from the trial court. It made the following findings:

(i) that it was common to both parties that 2nd plaintiff, Ibitokun, was a direct child of Jagun Ibagbe

(ii) the learned trial judge left out Ibitokun as a direct child of Jagun Ibagbe. This finding of the trial court was not based on the evidence before the trial court.

(iii) the appellant has shown that 1st plaintiff was Mogaji of Jagun Ibagbe family, a fact which the defendants admitted and which needed no further proof.

(iv) the appellant has shown by evidence through exhibits 'C1 and G' that he was a principal member of the family but the trial court went on to hold that he was merely a relation of the family. This finding was not based on the evidence before the trial court.

It appears that there was no agreement between the two lower courts on who were the actual, or shall I say, biological children of JAGUN IBAGBE. The only common area of agreement on the children was, as it was agreed by all the parties and their witnesses, that IBITOKUN was a direct son of JAGUN IBAGBE. Where disagreement or non-concurrence occurred in the judgment of the trial court and that of the Court of Appeal, it is the duty of this court to resolve the conflict in line with what appears to this court to tally with the principles of justice or substantial justice as may be required by the totality of the case in question. This imposes on the court invariably, the review of the whole gamut of the pleadings, the evidence, the addresses by the parties, the rulings, judgments etc of the trial

court which were also considered by the court below. This is what appears to me to be the inevitable assignment laying before me. That is why I captured above, the findings and holdings of the two courts below on who the children of Jagun Ibagbe are. I perused the pleadings, the entire evidence of the parties. I read the addresses of the learned counsel for each of the parties. I read the trial court's judgment in contrast with that of the court below. I intend to adopt the following approach in my resolution of the issues:

A - A perusal at the pleadings.

(i) The plaintiffs averred to the following facts in their Further Amended Statement of Claim:

1. The 1st plaintiff of E1/447A, Jagun's compound, Odo Oshun, Ibadan is the Head of Jagun Ibagbe family of Ibadan.

2. The 2nd plaintiff also of E1/447A Jagun's compound, Odo Oshun, Ibadan is a principal member of Jagun Ibagbe family of Ibadan and son of Oguntade who was son of Jagun Ibagbe (sic) he and the 1st plaintiff bring (sic) this motion for themselves and on behalf of the Jagun/Ibagbe family.

4. The 2nd and 3rd defendants are not related to the plaintiffs, but are descendants of one Ojo who was brought along by Madam Ogunrinu (alias Iya Ologun) when she became married to Jagun Ibagbe. She died without any issues for Jagun Ibagbe.

5. The said Ojo was the father of Akinpelu who begat [sic]:

(a) Buraimoh Adeosun father of Arasi Adeosun Akinpelu, [3rd defendant], Moladun and Ogundapo.

(b) Oke Lawal father of Jimoh Lawal and

(c) Ogunfunmilayo father of Raimi Ajani Funmilayo (2nd defendant).

6. The 4th, 5th and 6th defendants are not related to the plaintiffs, but are descendants of one Babasola who came to stay with one Adejinlo one of the slaves/servants of Jagun Ibagbe.

8. The 7th defendant, Michael Eniaiyenwu is not a member of the plaintiffs' family and unknown to plaintiffs before this action.

13. Jagun/Ibagbe family consists of three sections namely: Ogundele, Somotan and Ibitokun all representing the three children of Jagun Ibagbe.

14. The children of Jagun and their children are:

(a) Ogundele, who begat (sic):

1. Arinade
2. Oguntade Akando
3. Ige, father of Ladoja Aremu
4. Ogunlowo Aremu

(b) Somotan who begat (sic)

B

1. Jojolola
2. Morinre (f) Onajide - Ogunlola - Dauda Lanlokun
3. Oyatola
4. Adebate

C

5. Aiku
 6. Yoranti
- (c) Ibitokun, who begat:

1. Emitotomo
2. Tosoa

D

3. Adosinyan
4. Yesufu Ajao (present Mogaji)
5. Adebunmi

15. Apart from these direct descendants, Jagun Ibagbe had relations (brothers) who came to settle and live with him (sic) they are Adeniran and Adesigbin.

(a) Children of Adeniran are:

1. Adekunbi
2. Dahunsi
3. Adetayo - father of Salami Olopade
4. Oyekade (f)
5. Akintola
6. Adegoke

F

16. After the death of Jagun the following people succeeded him as Bale (or Head) of Jagun Ibagbe

G

1. Ogundele
2. Adeniran
3. Ibitokun
4. Dahunsi

H

5. Salami Adigun Olapede.

19. Jagun/Ibagbe in his lifetime was a hunter and powerful warrior who took part in early wars and in each of the wars he used to capture many slaves who were brought home to serve him and such persons were:

(1) Fayomi with III (pele) tribal marks.

(2) Dopurnu with (Abaje) tribal marks

(3) Ajiboso III with (Gombo) tribal marks

(4) Fajento Akibon III (pele) tribal marks

(5) Abibu with III and tribal marks. He was the father of Karimu Arowasi. B

(6) Oguntoyibo with III (Mofa Owu) tribal marks. He was the Father of Toki and Ogunleye.

20. Jagun-Ibagbe had no tribal markings. He used the slaves in the farm to work for him and he placed Fayomi under him as Jagun village at Olorunda while he kept Akibon, Abibu and Oguntoyinbo with him on the land in dispute. C

21. When later, slavery was abolished, these people and their descendants were no longer referred to as slaves, but servants sons or members of their overlords household as if they had been integrated into the family. D

22. That was the case with the children of Babasola and Ojo who now claimed to be children of descendants of Jagun Ibagbe when in fact, they are not.

(ii) The defendants averred to the following facts: E

1. The defendants admit paragraph 1, 3 and 5 of the Amended Statement of Claim.

2. The defendants deny paragraph 2 of the Amended Statement of Claim and avers that Jagun Ibagbe had no issue or grand son called Oguntade as the three sons of Jagun Ibagbe are (1) Ojo, (2) Adeniran and (3) Ibitokun the descendants of whom are alive and living at Jagun Ibagbe's compound, Odo-Oshun, Ibadan. F
The 2nd and 3rd defendants are not related to the 2nd plaintiff but they are related to the 1st plaintiff as the 1st plaintiff, 2nd and 3rd defendants, G are descendants of Jagun Ibagbe of Odo-Oshun, Ibadan.

4. The defendants aver that Ojo was the first son of Jagun Ibagbe who was the first and the only husband of Ojo's mother.

5. Ojo became the 1st Mogaji of Jagun Ibagbe family succeeded by (ii) Adeniran (iii) Akinpelu (iv) Ibitokun (v) Dahunsi (vi) Ogunfunmilayo (vii) Salami Olopade and (viii) the 1st plaintiff. H

6. The 4th, 5th and 6th defendants are the relations of Akinpelu the grand father of the 2nd and 3rd defendants as Adejinle too is a relation of Ibitokun.

7. Ibitokun inherited the wife of Adejinle after the death of Adejinle and deny that Adejinle was ever (sic) a slave and or servant of Jagun Ibagbe.

8. Ibitokun granted land to Adejinle on his portion of land absolutely at olorunda.

B 9. The defendants deny paragraph 4 of the amended statement of claim and aver that Ojo was the 1st son of Jagun Ibagbe known to everyone.

C 13. With reference to paragraph 13 of the amended statement of claim, the defendants admit that Jagun Ibagbe consists of three sections but deny that Ogundele and Somotan are member of Jagun Ibagbe family of [sic] form any of the sections of Jagun Ibagbe.

D 14. The three sections are made up of the descendants of the three sons of Jagun Ibagbe namely (1) Ojo (2) Adeniran and Ibitokun.

15. The defendants deny paragraph 14 of the amended statement of claim to 'the extent that Ogundele and Somotan and their descendants are members of Jagun Ibagbe's family only. Only Ibitokun and his descendants are members of Jagun Ibagbe family.

E 16. The Defendants deny paragraph 15 of the amended statement of claim and aver that Adeniran is one of the children of Jagun Ibagbe and not a brother of Jagun Ibagbe. The Defendants agree with the children of Adeniran (sic) stated therein

F 17. With reference to paragraph 16 of the amended statement of claim the Defendants deny that Ogundele was (sic) at any time Mogaji of Ibagbe family. The Mogaji's after Jagun Ibagbe are:

(i) Ojo -, 1st son of Jagun Ibagbe

(ii) Adeniran - 2nd son of Jagun Ibagbe

G (iii) Akinpelu - son of Ojo

(iv) Dahunsi - Adeniran's son

(vi) Ogunfunmilayo - Akinpelu's son

(vii) Salami Olopade - Adeniran's grandson

(viii) Yesufu Ajao Ibitokun - Ibitokun's son.

H B - A perusal at the evidence.

The 1st plaintiff witness (PW1) was a licensed Surveyor who was commissioned by the plaintiffs to carry out survey. He has not said anything on who the children of Jagun Ibagbe were.

The 2nd plaintiff himself testified (PW2). Below is what he said in rela-

tion to Jagun Ibagbe's children:

"I know the 1st plaintiff. He is the of Jagun Ibagbe's family. Mogaji of Yesufu Ajao Ibitokun and members of our family mandated us to take this action. I know the 2nd to 6th defendants. They are not relations of those of us known as Jagun Ibagbe 2nd and 3rd defendants are grand sons of Ojo. One woman called alias Iya Ojogun came to marry Jagun Ibagbe with her son by name, Ojo. She had no issue for Jagun Ibagbe until she died. Ojo gave birth to Akinpelu. Akinpelu is the father of 2nd defendant's father (grandfather). Akinpelu is also grandfather of the 3rd defendant. His children are also called Moladun and Ogudapo Adusun's children. Akinpelu is the father of Oke Lawani who in turn gave birth to Jimoh. The 4th, 5th and 6th defendants are not our relations at all. They are children of one man called Babasola. Babasola came to stay with one Adejinlo who was a servant to Jagun Ibagbe. Jagun Ibagbe brought Adejinlo from the war front, Babasola had the following children. He had Ogunwando who in turn gave birth to Yisau - the 4th defendant - Amusa Ogunwando with Ajagbe Ogunwado. Jagun Ibagbe has 3 children namely - Ogundele his first born, then Somotan a female and Ibitokun as his third child. Ogundele gave birth to Arinade and Oguntade Akande who is my own father. He is also the father of Ige, father of Ladoja Aremu and Ogunlowo Aremu, Somotan's children are Jejolola and Marinre. Marinre beget Onajide, who in turn beget Dauda Lanlokun, Somotan is also the mother of Oyatola, Adopate Aiku and Yeranti. Ibitokun beget Emilotomo, Tesea, Adesiyun and Yesufu Ajao - the present 1st plaintiff and Adebunmi. Besides his children Jagun Ibagbe had relatives like Adeniran and Adesigbin. Adeniran and Adesigbin are brothers to Jagun They lived in Jagun's compound. Adeniran beget Adekunbi (female) Dahunsi Adetoyinbo (Salami G Olopado's father) Oyekade (female) Akintola and Adegoke I did not know Jagun Ibagbe personally. I understand he was a hunter and powerful warrior. He took part in many tribal wars. He brought home some slaves who were serving him. Some of his slaves were Fayomi with Polo marks, Depomu with 3 Abaja's -Dabulu - Ajiboso with Gombo marks, Fayenta with polo marks, Abibu Arowasi with 6 marks, Oguntoyinbo with 6 marks. Oguntoyinbo was the father of Toki and Ogunloyo. Jagun Ibagbe had no marks at all and all of us his children have no marks. There is no more slavery hence we do

not call them slaves. Outsiders regard them as our relatives. Others who live with us such as Ojo's children and Babasola are regarded as slaves too. "

B On cross-examination, PW 2 remained consistent that the 3 children of Jagun Ibagbe were: Ogundele, Somotan and Ibitokun and that Adeniran was a relation of Jagun and Ojo who was brought by his mother when she married Jagun. She had no issue for Jagun. Babasola was a brother to Akinpelu's wife - Fohintado who was the mother of Ogunfunmilayo, Akinbon and Oguntoyibo. Yesufu was a C child to Akinbon. Abibu was the houseboy of Jagun. Babasola never claimed to be a member of Jagun Ibagbe's family. PW 2 claimed to be a principal member of Jagun Ibagbe's family.

The 3rd PW was one Raji Oladotun Olabiyi. He was a farmer and a Customary Court Member for Ile Titun I. He testified on the D several attempts to hold meetings between the parties. It was only at cross - examination stage that he said that he did not know that the 2nd defendant was a member of Jagun Ibagbe family and he first I knew him on the 31st of August, 1980. He testified that Yesufu Ajao was the Mogaji of Jagun Ibagbe's family. He quoted the Mogaji saying that the 2nd plaintiff, his brother, should be his spokesman at the E meeting.

The 4th PW said he knew the plaintiffs as children of Jagun Ibagbe. He also said that he knew all the defendants. He further said F that he knew the 2nd and 3rd defendants. They were not members of Jagun Ibagbe's family. The sub nonagenarian testified further as follows:

Funmilayo is the father of the 2 Defendant. Adeosun is the father of Arasi and Oke is the father of Jimoh. Ojo was the father of Akinpelu. G Akinpelu has 6 tribal marks. Ojo also has 6 tribal marks. The 2 and 3rd defendants have no tribal marks. I do not know why they had no tribal marks but it is the fashion now not to have marks. Jagun Ibagbe's family have no tribal marks. I know 4th, 5th and 6th defendants. Ogunwande was the father of the 4th 5th and 6th Defendants. Babasola H was the father of Ogunwande. Babasola is not related to Jagun Ibagbe family. Babasola has 7 tribal marks on his face. He was 90 years then.

On cross examination, he said he was the Mogaji of Olugbodi and a boundary man to Jagun Ibagbe. He said he was not a member of Jagun Ibagbe's family but he grew up together with them hence

he knew members of Jagun Ibagbe family's. On further cross examination, 4th PW stated that Adeniran was Mogaji of Jagun Ibagbe's family. 1st plaintiff was the then Mogaji of Jagun Ibagbe's family. Jagun Ibagbe was the father of 1st plaintiff. Yesufu's father (1st plaintiff) was a Mogaji of Jagun Ibagbe's family. Dahunsi was a Mogaji in Jagun Ibagbe's family. Salami Adigun Olopade was a Mogaji of Jagun Ibagbe's family. The 5th PW testified to the effect that he knew the two plaintiffs in this case. They are both children of Jagun Ibagbe. He also knew the 2nd - 6th defendants. The 2nd and 3rd defendants are descendants of Ojo. Ogunrinu was the mother of Ojo and she married Jagun Ibagbe having no issue for him. Ojo was not Jagun Ibagbe's child. Jagun Ibagbe had three children namely: Ogundele, first born son, Ibitokun- 2nd son and Somotan (female). The 4th 5th and 6th defendants are descendants of Babasola. Babasola came to live with Adejunle. Adejunle was a slave of Jagun Ibagbe. 4th - 6th defendants are in no way related to Jagun Ibagbe. I am a descendant of Somotan - daughter of Jagun Ibagbe. 1st plaintiff's father was Ibitokun. 1st plaintiff is the Mogaji of Jagun Ibagbe. Jagun Ibagbe was the father of Ibitokun. 2nd plaintiff, Karimu Folorunsho's father was Oguntade Akande. Ogundele was Oguntade's father. Jagun Ibagbe was Ogundele's father. Ojo was brought by Ogunrinu when she married Jagun Ibagbe. Ojo begot Akinpelu. Akinpelu had children namely: Buraimoh Adosun, Oke Lawani, Ogunfunmilayo. Buraimoh is the father of Arasi Adoosu. Oke was the father of Jimoh Lawani. Jagun Ibagbe had no facial marks. Ojo had 6 facial marks. I know Babasola's children. He mentioned Ogunwande as one of them. Ogunwande was the father of the 4th, 5th and 6th defendants. This witness went on to mention the names of all the Mogaji's in succession of Jagun Ibagbe.

Under cross-examination, the 5th PW stated that it was his grandfather Onajide, who told him the history of Jagun Ibagbe's family. He told him that the 2nd plaintiff was a principal member of Jagun Ibagbe family having been born by Oguntade, the son of Jagun Ibagbe.

Witnesses for the defendants;

DW1:

Stated that he is a member of Jagun Ibagbe family. He knew Yusufu Ibitokun and the 2nd plaintiff They all belong to the same fam-

ily. He does not know the 2nd - 6th respondents. At cross - examination, he said the 2nd plaintiff, Ogundele and Somotan were not members of Jagun Ibagbe's family. Adeniran was the son of Jagun Ibagbe. He said he knew Babasola who lived with Akinpelu. Babasola was the father of Ogunwande. Yisau Ogunwande was the father of 4th, 5th and 6th defendants. He said he did not give evidence in proceedings in L30/730 before Ibadan city No. 3 Grade 'B' Customary Court, Oke - Are Ibadan, between Ibagbe family vs. Odunlami family.

DW2:

He did not say much on the children of Jagun Ibagbe. He said he knew when Ogunfunmilayo was Mogaji but did not know his father, but he often heard them call his father's name as Akinpelu. 4th - 6th defendants were children of Ogunwande. He did not know Dahunsi and never heard of him.

DW3:

He stated that he knew the deceased, 1st plaintiff. He met 2 plaintiff in the course of this case. He knew all the defendants - 2nd to 6th

DW4:

He said he did not know the plaintiffs but he knew the 1st defendant and few of the defendants. He prepared a survey plan which copies he gave to his client. Others who testified in favour of the defendants included some of the defendants themselves or their relations or cronies such as Alhaji Yekini Salami Olapede; Alhaji Raufu Akintunde Akano; Raufu Ogunfunmilayo and Yisau Ogunwande. Those who claimed any relationship to Jagun Ibagbe's family who claimed to know the family agreed that the children of Jagun Ibagbe were Ojo, Adeniran and Ibitokun. They gave much of their testimonies on the land belonging to Jagun Ibagbe.

From the evidence, it has been clearly and overwhelmingly established by the plaintiffs/respondents that Ojo was never a son (biological son) of Jagun Ibagbe. He was described as a "stepson" to Jagun Ibagbe. None of the defendants/appellants denied the fact that Ogunrinu, the mother of Ojo, came into marital tie to Jagun Ibagbe with her child, Ojo. The marriage between Ogunrinu and Jagun Ibagbe remained and ended with no issue between the spouses. So, Ojo's children or descendants cannot make a claim of such blood lineage between them and Jagun

Ibagbe or his blood related family. Thus, Akinpelu who gave birth to Buraimoh, Oke-Lawani, ogunfunmilayo, Raimi, Jimo Funmilayo and subsequent children were not members of Jagun Ibagbe family. **Equally, Adeniran was said to be a brother to Jagun Ibagbe and not his direct son. This goes along the line of his children;** Adetoyinbo, Adejinu, Adegoke, Akinsola, Oyekan Ade, Adedunyi, Adekunbi and Dahunsi. Babasola, too, was said to belong to another lineage. He was not a member of Jagun Ibagbe's family. His descendants cannot make such a claim. **Accordingly, defendants/appellants claim to membership of Jagun Ibagbe's family (on blood relation) must fail as the direct legal lineage between Jagun Ibagbe and his blood descendants has broken.**

It is also very clear that Ibitokun was accepted by all the parties as a direct child of Jagun Ibagbe. It was wrong of the trial court to omit his name from the children of Jagun Ibagbe. It is also beyond dispute that 2nd plaintiff as seen above is a grandson to Jagun Ibagbe and a principal member of Jagun Ibagbe's family.

The re-evaluation of evidence carried by the court below became necessary as the trial court glossed over the whole gamut of the evidence led before it which would certainly occasion some form of miscarriage of justice to the aggrieved party. It is trite law that it is the trial court that has the primary responsibility of evaluation of evidence. But where the trial court abdicates its responsibility or has not taken proper advantage of having seen and heard the witnesses testify, then the matter moves into the realm of the appellate court to evaluate the evidence provided the evaluation does not involve credibility of the witnesses. See; Anyegwu & Anor v. Onuche (2009)1 NMLR 1; GBADAMOSI V. DAIRO (2007) All FWLR (part 357) 812. **The court below is quite right in my view, to have interfered with the findings of the trial court on the identity of the children of Jagun Ibagbe. I resolve this issue in favour of the respondents.**

Appellants issue No. 3. This is where the learned counsel for the appellants submitted that the court below compressed the issues canvassed for determination by both sides into three and that the lower court singled out the issue of partitioning of the farmlands of Jagun Ibagbe for consideration whereas the totality of the evidence

before the trial court covered more than partitioning. But learned counsel for the respondents argued that the learned justices of the Court of Appeal fully dealt with the five issues formulated by the respondents and the three issues formulated by the appellants even as they compressed them into three issues [see page 196 of the record].

B The whole issues were fully treated by the Court of Appeal on page 200 – 204 of the record and held that Jagun Ibagbe family land had never been partitioned.

I am in agreement with the learned counsel for the respondent, in his argument as shown above. It is to be noted that in the modern system of adjudication in our appellate courts, formulation of issue is one different thing and the deciding of the issue is another thing. ***A counsel may formulate as many issues as he thinks his grounds of appeal can permit but the court, in its own wisdom, may, either for convenience or in order to reduce unnecessary duplication/repetition of decisions which will appear seemingly identical in an appeal, decide to reduce the number of issues or stream-line like issues or “Compress” the issues presented by the parties for consideration. As a matter of facts the court has the power to go out of its own way to formulate or re-formulate issues for the determination of the appeal. In quite a recent case, I observed as follows:***

“Further, the Court of Appeal and this court as well, can examine issues raised by either of the parties; condense them where they are verbose or reframe them entirely as long as they remain related to the grounds of appeal See: LABIYE V. ANRETIDA [1992] 8 NWLR [Part 255] 139; OGUNBIYI V. ISHOLA [1999] 6 NWLR [Part 452] 12”

G ***In my view, what the court below did in relation to issue three, condensing of issues for determination, is not out of order. It is in line with the normal practice in the appeal courts.*** I resolve issue 3 against the appellants. Appellants’ issue No. 4 is on partitioning of the farmlands of Jagun Ibagbe. The learned H counsel for the appellants’ arguments which I set out earlier, included the submission that Jagun Ibage owned the farmlands. He could make absolute grant to strangers as well as to his children. When he was getting old, he performed his heart’s desire by distributing his farmlands amongst his three children. Even if one was not sure about

what actually took place, one can look at events after the death of Jagun Ibagbe in recent times such as where Ibitokun granted part of his own land at Olorunda to Adejinle, his relation; Akinpelu the son of Ojo granted part of his own land on the land in dispute to Babasola absolutely.

The submission of the learned counsel for the respondents both at the court below and in this court is that the land belonging to Jagun Ibagbe was never partitioned by him. The trial court found in favour of the appellants that Jagun Ibagbe's farmlands were partitioned. The court below did not agree. It held that these farmlands were never partitioned.

Now, it is not in doubt by any of the parties that these farmlands in dispute were Jagun Ibagbe's land. The claim of partitioning stemmed from the appellants. It is they who claimed partition of the farmlands by Jagun Ibagbe. I refer to the following paragraphs of their further Amended Statement of Defence:

23. *"The defendants deny paragraph 18 of the amended statement of claim and aver that Jagun Ibagbe partitioned his land including part of the land now in dispute in his life time as stated in paragraph 19 above and each section has remained on the portion shared to it ever since without let or hindrance.*

32. *Since Jagun Ibagbe himself partitioned his land amongst his children in his life time, the descendants of such children have kept to the various portion shared to their ancestors without interference from other sections."*
(Underlining supplied)

The attempt by the appellants to establish partitioning, as held by the court below failed. The court below stated inter alia:

"As regards issue No. 2 bordering on whether the learned trial judge was justifiable in holding that Jagun Ibagbe's family land had been partitioned based on the contradictory evidence tendered by the defendants as to partitioning of the family land..... I have considered these submissions vis-a-vis the records and the prevailing law..... It is trite, that he who alleges must prove"
(page 199 of the record)

I am in agreement with the court below. By their claim

as in paragraphs 23 and 32 of their further amended Statement of Defence, the appellants claimed partitioning of the land by Jagun Ibagbe.

The law is very clear that it is he who would fail if no evidence is called who shoulders the burden of proving what he claims.

B Sections 135 - 137 of the Evidence Act. See: AMODU V. AMODU (1990) 5 NWLR (part 150) 356; FAMUROTU V. AGBEKE (1991) 5 NWLR (part 189) 1; KWASALBA (NIG.) LTD. V. OKONKWO (1992) 1 NWLR (part 218) 407.

C Further, in case where the dispute between the parties is on whether the land in dispute was allotted or partitioned, some general principles of the law, have to be complied with by the claimant of partition.

D It should be noted that all the evidence, including that of the appellant showed permission as to user of the land and not partition. This is part of the findings of the lower court, where it states:

E *“The law in this country today is that allotment of family land to its members for farming purposes as in the instant case confers only right of user on the member This was the decision of the Supreme Court in CHUKWUDUZIE ANYABUNSI V. EMMANUEL UGWUZE (1995) 7 SCNJ 55. The difference between allotment and partition lies in the fact that in the case of the former while right of use of the land belongs to the allottee and the family retains title to such land, the effect of partition is that title is transferred from family to individual grantees and the family is thereafter divested of right to alienate the land, What is more, whereas allotment can be made by the Head of family alone, partitioning must be by all or for and on behalf of all members of the family. In other words the Head and all principal members of the family must consent to partition. Thus until partition has taken place no individual co-owner can have a separate entitlement to right of occupancy.”*

H Allotment in land matter transactions refers to the selection of specific land awarded to an individual allottee from a common holding. Partition on the other hand, is the division of real property held jointly or in common by two or more persons into individually owned interests. The effect of the latter is that it confers on each individual member of the family an absolute and exclusive right to deal with his portion of the partitioned land. And, this will then give

rise to a new family ownership in as many places the property is divided each branch becoming the owner of the portion partitioned to it. The golden rule in that respect is that partition must be brought about by the consensus of all the members and branches of the family, otherwise it is void. See: BALOGUN V. BALOGUN (1943) 9 WACA 78; MAJEKODUNMI V. TIJANI 11 NLR; 74: ONISIWO V. GBAMGBOYE (1941) 7 WACA 69; OLORUNFEMI V. ASHO (2000) 2 NWLR (part 643) 143; MAYA V. OSHUNTOKUN (2001) 11 NWLR (part 723) 62.

In the case of OLORUNFEMI & ORS. V. ASHO & ORS. (2000) 2 NWLR (part 643) 143 at page 157, this court, per AYOOLA, JSC, stated as follows;

“..... partition is to be distinguished from allotment. Allotment does not determine the family ownership of the land so as to make the allottee an absolute owner. It can be affected by the head of the family alone. (See generally MAJEKODUNMI V. TIJANI NLR 74, ONISIWO & ORS. V. GBAMGBOYE & ORS. [1941] 7 WACA 69). Partition which does not make provision for all of the constituent branches of the family is void Whether there was partition or allotment is a question of fact. The mere use of the word “partitioned” may not settle the issue where there is an issue whether or ‘riot family property is determined.”

As there was failure in the case on hand to prove partition, I have no reason to disagree with the court below that partition did not take place during the life time of Jagun Ibagbe or thereafter. I hold that the farmlands in dispute remain unpartitioned. I resolved issue No. 4 in favour of the respondents.

Issue No. 5, by the appellants is on the discharge of onus of proof. ***Learned counsel for the appellants said that there was no ground of appeal before the Court of Appeal and the conclusion of the trial court was made after a thorough and proper evaluation of the evidence was done by the trial court. This cannot be the true position of things before the court below. The learned counsel for the respondents submitted that by ground three of the amended notice of appeal filed by the respondent at the court below [page 156-158], that ground dealt with this issue which reads (shorn of particulars)***

“The learned trial judge erred in law in dismissing the

entire claims of the plaintiff when there was evidence on record before the court in proof of the claims.”

This, learned counsel for the respondents said, was covered by issue three before the Court of Appeal in respondent’s brief (page 159 - 172, page 163 - 166 of the record). I agree with the learned counsel for the respondents. The court below treated the issue and arrived at the conclusion that the learned trial judge was not justified in dismissing the respondents claim based on the evidence before her. That of course, was why the court below re-evaluated the whole evidence and came to the conclusion in reversing the decision of the trial court. The court below was perfectly in order in doing so and in its conclusion. I cannot interfere with that decision. I resolve issue 5 against the appellants. Appellants issue No. six, that is on the reliance placed by the court below on evidence that was not available before it. That it was in respect of an action that was instituted after the conclusion of this case before the High Court. It was therefore a piece of evidence that was never considered by the trial court. The court below, submitted by the appellants’ counsel, relied on that piece of evidence in its and it exceeded its jurisdiction as it relied on extraneous matters.

Now, the extraneous matter referred to by the appellants’ counsel was an issue relating to the status of the respondents in Jagun Ibagbe’s family on appeal No. CA/1/57/97 between ALHAJI RAIMI FUNMILAYO & ORS. V. ALHAJI KARIMU FOLUNSO & ORS, which was, referred to by the respondents where the appellants were challenging the appointment of the respondents as the Mogaji of Jagun Ibagbe’s family after the demise of Ibitokun, who, together with the respondent, instituted on behalf of Jagun Ibagbe family, this appeal.

I have gone through the facts and the proceedings of both the trial court and the court below. On the complaint of reliance by the court below on extraneous matters to arrive at its judgment, I think what the respondents did was merely to draw the attention of the court below that it would be dangerous for it to close its eyes to these naked facts, the existence of which none of the parties could deny. Mere mentioning of such facts cannot in my view, be said to have prejudiced any of the parties. Moreover, it is part of the events or happenings in recent times which will complement the traditional history of the

respondent's case which the court below ought to give consideration. They did so only by taking a judicial notice of such -facts but their main reliance was on Exhibits C1 - G which the trial court itself admitted in evidence. As no miscarriage of justice was occasioned to any of the appellants by such reliance, I hold that the decision of the court below cannot be faulted. See: ONOJOBI V. OLANIPEKUN B (1995) 4 SC (part 11) 156 at page 162-163; OKERE V. FASAWA (2006)133 LRCN, 163 at 186 F-P.

In conclusion, I find no merit in this appeal and same is hereby dismissed by me. I affirm the judgment of the court below, I award C N50,000.00 costs to the 1st respondent.

TOBI JSC

I have read in draft the judgment just delivered by my learned D brother Muhammad, JSC and I agree that the judgment of Court of Appeal be accordingly affirmed and that of trial court be set aside. I also abide by all the consequential orders in the lead judgment including that relating to costs.

E

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, MUHAMMAD, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is F without merit should be dismissed.

I consequentially dismiss same with costs as assessed and fixed in the lead judgment and abide by other consequential orders made therein.

G

Appeal dismissed.

OGBUAGU JSC

This is an appeal by the 2nd, 3rd to 6th Defendants/Appellants H against the Judgment of the Court of Appeal, Ibadan Division (hereinafter called "the court below") delivered on 9th June, 2003 allowing the appeal of the Plaintiffs/Respondents against the Judgment of the High Court of Oyo State sitting at Ibadan - per Ige, J. delivered on

14th December, 1990.

Dissatisfied with the said Judgment, the 2nd to 6th defendants/ Respondents, have appealed to this Court with leave of the court below on twelve (12) Grounds of Appeal, They have formulated six (6) issues for determination. They read as follows:

B *“4.1 Whether or not the Court of Appeal was right in failing to make consequential orders?”*

4.2 Whether or not the Court of Appeal was right in interfering with the findings of the trial court on the identity of the children of Jagun Ibagbe?

C *4.3 Whether or not the Court of Appeal was right in the consideration and treatment of issue two adopted by the lower court on page 196 in the Judgment of the lower court?*

D *4.4 Whether or not the Court of Appeal was justified to disturb the trial court’s findings on partitioning of the farmlands of Jagun Ibagbe?*

4.5 Whether or not the Court of Appeal was right to consider or rely on any evidence which did not form part of the record before the trial court?

E *4.6 Whether or not the Court of Appeal was right in its conclusion that on the totality of the evidence tendered before (the trial court, the High Court was not justified in dismissing the plaintiffs’ claims?”*

F I observe that it is stated in the Appellants’ Brief that Issue 1 “covers” ground 1 of the appeal, issue two “covers” grounds 2,3,4,5 and 6; issue 3 “deals” with ground 7, issue 4 “deals” with grounds 8, 10 and 11, issue 5 “deals” with ground 9; while issue 6 “covers” ground 12.

G On the part of the Respondents, they formulated five (5) issues for determination, namely,

“3.01 Whether or not the failure of Court at Appeal to make any pronouncement on the consequential reliefs on the respondent’s (sic) claims at the High Court caused any miscarriage of justice to any of the parties (Ground I).

3.02 Whether or not the learned Justices of Court of Appeal were justified in re-evaluating the evidence on record as to who were the children of Jagun Ibagbe family as they did (Grounds 2,3,4,5,6).

3.3 Whether or not the learned Justices of Court of Appeal

properly, fully and adequately considered issue two formulated by them for a decision in the appeal (Ground 7).

3.4 Whether or not the Court of Appeal justified in holding that on the proper consideration of the totality of evidence tendered in the case, the learned trial judge was not justified in dismissing the plaintiff's (sic) claims (Grounds 8,9,10,11).

3.05 Whether or not the learned Justices of Court of Appeal were justified in taking judicial notice of matters in another appeal pending before them on matters relating to the same subject matter in this appeal, in doing substantial justice to the appeal before them. (Ground 12).

It is noted by me that in the Respondents' Brief it is pointed out or observed that the Appellants got their issues 4.5 treated as issue 4.6 while issue 4.6 was treated as issue 4.5. Secondly, that issues 4.1 and issue 4.5 as treated, should have been merged together under issue five as treated. The Appellants in their Reply Brief at their paragraph 1-7, concede the first observation in the Respondents' Brief and regret the mix-up, but add that "the Respondent was (sic) not misled in any way".

When this appeal came up for hearing on 8th March, 2010, leading learned Counsel for the surviving Appellant - Abiodun, Esq. adopted both their Brief of Argument and their Reply Brief. He urged the Court to allow the appeal. The learned counsel for the 1st Respondents Ajakaiye, Esq. adopted their Brief which he stated was filed within time and he urged the Court to dismiss the appeal- The 2nd Respondent and his Counsel if any, were absent - but served. Mr. Abiodun, Esq. however told the Court that the 2nd Respondent had left the Country. I hereafter, Judgment was reserved till to-day.

I will with respect dismiss *brevi manu*, the Preliminary Objection of the Respondents since no mention was made about it by any of the counsel for the parties during the hearing of appeal. In the circumstances, it is settled that the Objection is deemed as abandoned. See the cases of *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285 @ 296-297; (1990) 5 SCNJ. 174 - per Obaseki, JSC and *Oforikiere & anor. v. Maduiké & 5 ors.* (2003) 5 NWLR (Pt. 812) 166 @ 178-179; (2003) 1 SCNJ. 440 @ 449 - per Mohammed, JSC. However, it is noted by me that the court below, set aside all the claims of the Appellants. Secondly, a striking out of an appeal for being incompe-

tent, is never and cannot be regarded by the Court as amounting to a dismissal.

Now, in respect of the merits of this appeal, in my respectful view, all the issues of this Appellant except issues 4.1, and 4.3 deal with the evaluation or re-evaluation of the evidence on Record or before the trial court. Except Issues 3.01 and 3.03 of the Respondent, the other issues, deal also with the re-evaluation of the evidence on the Records by the court below.

From the Records, it is common ground or it is not in dispute that the land in dispute from time immemorial, is/was Jagun Ibagbe family land. It is therefore, the Appellants, who are claiming that Jagun Ibagbe family land, had been partitioned amongst his children and that because the Ojo section, farmed on the land, therefore, it had been partitioned to the said Section. So, in the circumstances the onus or burden of proof, was on the Appellants to establish their claim as to partition because he who asserts, must prove.

However, it is the case of the Respondents, that the land in dispute agreed upon by parties to be that of Jagun Ibagbe family, has never been partitioned. That the 1st Respondent, being the Mogaji - head of the family at the time, never participated in the alienation of the property to the 1st defendant. That the 2nd Respondent, who was shown to be an important and a principal member of the family, did not also take part in the said alienation. That in the circumstances, the purported lease to the 1st defendant, was therefore, void at the instance of the Respondent. The 1st defendant, was shown to have entered the land in dispute, bulldozed it and commenced using the land which was evidence of trespass.

It is not in dispute that the ancestor of the 1st plaintiff/respondent - one Ibitokun, was one of the children of Jagun Ibagbe. Also not in dispute is the fact that Ibitokun family farm at Olapade and that the 1st Respondents' ancestor and the 1st Respondent, had been the head of the family at different times. The Respondents claimed that the children of Jagun Ibagbe, were Ogundele, Somotan and Ibitokun. The Appellants claimed on the other hand that the children of Jagun Ibagbe, were Ojo, Adeniran and Ibitokun.

The learned trial Judge believed the evidence of the Appellants that the farmlands of Jagun Ibagbe, were partitioned and that the land in dispute, belonged to the 2nd to 6th Appellants of Ojo Sec-

tion of Jagun Ibagbe family to the exclusion of other members of Jagun Ibagbe family. In fact, he was of the view and held or observed that it was the said lease to the 1st defendant that aroused the interest of other members of Jagun Ibagbe family.

After re-evaluating all the evidence and the issues of the parties as appears in the Records, and the applicable law, the court below at page 198 of the Records, stated inter alia, as follows:

“..... Firstly, it is common ground by both parties in their evidence before the lower court that Ibitokun was a direct child of Jagun Ibagbe. Both parties accepted this fact yet the learned trial judge left out Ibitokun as a direct child of Jagun Ibagbe. I hold that this finding is not based on the evidence before the lower court. Secondly, the appellant (meaning the Respondents) has shown that 1st plaintiff was Mogaji of Jagun Ibagbe family (hereinafter referred to as the family) a fact which the defendants (meaning-Appellants) admitted and which needed no further proof. Similarly the appellant as shown by evidence through Exhibits CI & G that he was a principal member of the family, the court (i.e. trial court) went to hold that he was merely a relation of the family. This finding was not based on the evidence before the Court. In fact it amounted to making for the parties, a case not made by any of them. See ATOLAGBE v. SHOUN (1985) 4 S.C. 250 P. 256”. (the underlining mine)

I entirely agree. The above is borne out from the Records and the settled law.

Again, at the same page, after reviewing the pleadings of the Respondents in paragraph 15 of their Further Amended Statement of Claim and the evidence and; also the evidence of the Appellants, it stated inter alia, as follows:

“..... This is more so when the plaintiffs have established that the defendants did not actually know who were the children of Jagun Ibagbe family, having earlier given different names i.e. Ojo, Adeniran and Egbebi as the children of Jagun Ibagbe in Suit 1/420/81 I. Y. IBINU VS. FUNMILAYO. See page 118 lines (sic) 27 - page 119 LINES 1 - 24 and changed seat on the same issue before the learned trial judge. Whereas the defendants pleaded that the 2nd plaintiff was a stranger to Jagun Ibagbe family but the court found from Exhibit C1 that he is a relation of Jagun Ibagbe. See page 143 lines 19-21. Yet the court used quotations from Exhibit C1 for a different

purpose for which it was tendered when the court said.
(the underlining mine)

At page 199 of the Records, the following appear inter alia;
 “..... Exhibit C1 was tendered to discredit the case of the
 B defendants that the 2nd plaintiff is a stranger to Jagun Ibagbe family
but instead of the court using it for that purpose for which it was
tendered, the court was using it for other purposes not contem-
plated by the parties. This clearly showed that the learned trial judge
did not properly evaluate the evidence placed before her and which
 C is on record.....” [the underlining mine]

All the above, show or manifest and confirm that the court below, thoroughly exposed with respect, the failure of the learned trial Judge, to properly and effectively evaluate the material evidence before her.

D Also as regards whether the Appellants were able to prove evidence of the alleged partitioning of the lands of Jagun Ibagbe or that the evidence actually showed usage which amounted to an allotment, the court below, at pages 200 to 203 of the Records, painstakingly, dealt with the evidence and the law in respect thereof. As to the
 E poser raised which is whether such permission to use can be taken for partitioning, it stated at pages 201 - 202 inter alia as follows:

“The law in this country today is that allotment of family land
to its members for farming purposes as in the instant case confers
only right of user on the member. This was the decision of the Su-
 F preme Court in CHUKWUDOZIE ANYABUNSI V. EMMANUEL
UGWUZE (1995) 7 SCNJ. 55. The difference between allotment
and partition lies in the fact that in the case of the former while right
 G of use of land belongs to the allottee and the family retains title to
such land, the effect of partition is that title is transferred from family
to individual virtual grantees and the family is thereafter divested of
right to alienate the land. What it more, whereas allotment can be
made by the Head of family alone, partitioning must be by all or for
 H and or behalf of all members. In other words the Head and all prin-
cipal members of the family must consent to partition”.
 (the underlining mine)

It cited and relied on the cases of Lengbe v. Imate (1959) WRNLR 325; S.O. Bamgbose & ors. v. Oshoko & anor. 7 ANR. (sic) (1988) 5 S.C. 199 @ 200-206 (it is also reported in (1988) 5 SCNJ.

116); Aloa & ors. (1989) 6 SCNJ (Pt. II) 243; Nzekwu & ors. v. Nzekwu (Madam) (1989) 2 NWLR 373 @ 441 (it is also reported in (1989) 3 SCNJ. 167); Bisiri Agbomeji v. Liadi & ors. (1998) 7 SCNJ. 33; A. (sic) (it is N.) C. Odukwe v. Mrs. E.N. Ogunbiyi (1998) 6 SCNJ. 102 and Alhaji A.W. Odekilekun v. Mrs. O. Hassan & anor. (1997) 12 SCNJ. 114 and stated that thus, until partition has taken place, no individual co-owner can have a separate entitlement to right of occupancy. It cited and relied on the case of Sunday Obasohen (sic) (it is Obasohan) v. Thomas Omomdion & anor. (2001) 7 SCNJ. 168. B

In the case of Gbadamosi Sanusi Olorunfemi & 8 ors. v. Chief Asho & 2 ors. (2000) 2 NWLR (pt. 643) 143 @ 156, 157 - per Ayoola, JSC, 162 - per Achike, JSC and 164, - per Kalgo, JSC; (2000) 1 SCNJ. 122, this Court dealt with the same difference. It stated - per Achike, JSC, inter alia, as follows: C

"The term "partition" may be used in its technical and strict sense to mean where property formally belonging to a family is shared or divided among the constituent members of that family whereby each member of such family is conveyed with, and retains exclusive ownership of the portion of the family land granted to him. In this sense, family ownership of such is automatically brought to an end. On the other hand, a member of a family may be granted or "allotted" a portion of family property for limited or occupational use in the sense that the allottee qua user does not become an absolute owner of the portion allotted to him no matter the period of use. Invariably, while allotment can be made by the head of the family alone, partition on the other hand is brought about by the consensus of all the members of the family. See Kadiri Balogun v. Tijani Balogun (1943) 9 WACA 78 and Majekodunmi v. Tijani NLR 74". D E F G

Ayoola, JSC who wrote the lead judgment, stated at page 157 inter alia, as follows;

"..... Partition is to distinguished from allotment. Allotment does not determine the family ownership of the land so as to make the allottee an absolute owner. It can be effected by the head of family alone (See generally Majekodunmi v. Tijani II NLR 74, Onisiwo & ors. v. Gbangboye & ors. (1741) 7 WACA 69). Partition which does not make provision for all of the constituent branches of the family is void. Whether there was partition or allotment is a H

question of fact. The mere use of the word “partition” may not settle the issue where there is an issue whether or not family property is determined.....”.

The above supports the stance of the court below reproduced above by me.

B The court below, then reasoned and stated or held later at pages 202 thereof inter alia, as follows:

“The defendant said that Jagun Ibagbe partitioned the land to his children during his life time. They did not tell the court where Jagun Ibagbe himself was farming after the partitioning of the land. C The highest that can be ascribed to what happened then was allotment. The case of the Appellants (i.e. Respondents) is that the land of Jagun Ibagbe had never been partitioned. The fact that certain people farmed on a particular farm does not in anyway indicate that D Jagun Ibagbe family land had been partitioned amongst its members. The purported lease agreement, Exhibit D, executed in favour of the 1st defendant clearly show that the property at that lime was still Jagun Ibagbe family land, as it was so described”.

At page 102 thereof, it concluded inter alia, thus:

E “..... In the light of the foregoing, I hold that Jagun Ibagbe family land remained unpartitioned”.

The above, are all unimpeachable findings of fact and holdings and I agree. In the final analysis, I find as a fact and I hold that the court below, was unquestionably right in its Judgment.

F I hold and this is also settled that in the interest of justice, an Appellate Court can interfere, disturb, reverse or even set aside the findings of fact of a trial court in certain circumstances. These include, where the trial court fails to properly and effectively, evaluate (as in the instant case leading to this appeal), the material and admissible evidence before it, or the facts found by the trial court are wrongly applied as happened in this case, to the circumstances of the case or the findings of facts, are not reasonably justified or supported by the credible and admissible evidence given in the case as appears in the G Record book. So also, it is firmly established that an Appellate Court, is in the same position as the trial court, in relation to facts and inferences and conclusions from primary findings. There are two many decided authorities in this regard, but see the cases of Akinola & anor. Oluwa & 2 ors. (1962) SCNLR 352: Ezeafulukwu v. John Hold H

Ltd (1996) 2 NWLR (Pt. 432) 511; (1996) 2 SCNJ. 104 and Runsewe & ors. v. Alhaji Odutola (1996) 4 NWLR (Pt. 441) 143; (1996) 3 SCNJ 33 to mention but a few.

It is from the foregoing and the fuller Judgment of my learned brother, Muhammad, JSC just delivered and with which I agree with the reasoning and conclusion, that too, find no merit whatsoever with this appeal. The failure of the court below to make any consequential order or orders, I hold, is of no moment as it resolved all the issues of the Respondents in their favour. I too, hereby and accordingly affirm the said Judgment of the Court of Appeal and I add that the said Judgment of the trial court, is hereby and accordingly, set aside by me.

Costs follow the event. The 1st Respondent are entitled to costs of N50,000.00 (fifty thousand naira) all payable to them, by the Appellants.

FABIYI JSC

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

The crux of the matter at the trial High Court of Oyo State is that the appellants herein as defendants tried to say that Jagun Ibagbe partitioned the land to his children during his life time. The Court of Appeal found that they did not tell the court where Jagun Ibagbe himself was farming after the alleged partitioning of the land. It does not sound logical or in tandem with custom that a man would partition his land during his life time. The usual thing that happens is allotment. An allottee does not become an absolute owner of the portion allotted to him.

The Plaintiff/Respondent, as the 'Mogaji' (Head of the family) was right in challenging the lease transaction between the appellants and the 2nd Defendant/Respondent herein. Even then, the purported lease - Exhibit D shows that the land was not partitioned. Exhibit D depicts land as being Jagun Family land; not Ojo family land. It is always difficult to cover the truth. The appellants had a bad case. The court below rightly pronounced against them in clear terms.

For the above reasons and those well adumbrated in the lead judgment of my learned brother, I too, strongly feel that the appeal rests on shifting sand and should be dismissed. I order accordingly. I abide by all consequential orders therein contained; that relating to costs inclusive.

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