

**SUPREME COURT OF NIGERIA**  
10TH DECEMBER, 2010. SC. 294/2003  
**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,**  
**O. O. ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

CLEMENT ODUNUKWE

(for himself and on behalf of Anazodo ----- APPELLANTS  
Odunukwe family Nnewichi, Nnewi)

AND

1. DENNIS OFOMATA

2. OYIBOJIOBI OFOMATA ----- RESPONDENT

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APPEALS - Grounds - Nature - How determined - Appellation given by counsel is irrelevant - Ground and particulars must be examined - If it reveals a misunderstanding or misapplication of law - It is ground of law (H1)

APPEALS - Grounds - Nature - Mixed law and fact - Where a ground questions how conflicting evidence was resolved - It is a ground of mixed law and fact - So also where it questions exercise of discretion (H2)

JUDGMENTS - Basis - Rejection of appellant's case - Reason - Contrary to allegation of appellant - Court of Appeal rejected his case for lack of proof - And not for reason of being fair to trial judge (H3)

LAND LAW - Evidence - Evaluation - Traditional history - Credibility and demeanour are relevant but not strong points - Evidence of contemporary events supporting the history - Is more conclusive (H4)

EVIDENCE - Land law - Ownership of adjoining land - S. 46 of Evidence Act - Limits - The section creates a probability - Not conclusive proof of ownership of land - The presumption could be displaced by credible evidence (H5)

COURTS - Submissions - Rulings on - Failure to rule on - Effect - Though every submission should be ruled upon - Failure to so rule will not affect judgment - If such a ruling will not have made a differ-

ence to the outcome of the case (H6)

### ***FACTS***

The plaintiffs/appellants sued defendants/respondents before the High Court of Anambra State holden at Onitsha, in 1972, claiming declaration of title to the land in dispute, damages and injunction. At the end of trial, judgment was given to appellants in 1980 but the respondents successfully appealed against the judgment to the Court of Appeal. Court of Appeal ordered a retrial of the suit de-novo. The instant appeal arose from the said retrial. At the retrial, each side had led evidence which showed that they relied on traditional history and positive acts of possession. Both parties attributed original ownership of the land to one Dala Onyeogu, their common ancestor, but while respondents claim that the land eventually descended to them through Ezeagado, a descendant of Dala Onyeogu, appellants claim it descended to them through one Odunukwe, another descendant of Dala Onyeogu. Indeed it was part of appellants's case that respondents and their ancestor did not belong to Dala Onyeogu's lineage.

After hearing, the learned trial judge held among others that respondents were descendants of Dala Onyeogu. He eventually dismissed the case of appellants for lack of proof. Aggrieved, appellants appealed to Court of Appeal, Enugu, contending that the trial court had relied basically on demeanour and credibility of witnesses in its evaluation of the parties' evidence of traditional history. Court of Appeal dismissed the appeal as it held that appellants' counsel had unfairly misrepresented the trial court in his argument on appeal. Still dissatisfied, appellants have come on a further and final appeal to Supreme Court challenging, inter alia, Court of Appeal's reliance on section 46 of Evidence Act in upholding trial court's findings in favour of respondents. In reaction to appellants' instant appeal, counsel to respondents filed a preliminary objection challenging some of the grounds of appeal as incompetent in that they were raised without prior leave whereas they required a prior leave of court to be competent.

### ***ISSUES FOR DETERMINATION***

#### **ISSUE 2**

Was the Court of Appeal right in rejecting the Plaintiffs case for sole reason of being fair to the learned trial judge.

## ISSUE 3

Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirement of the said Section were satisfied.

***HELD*** (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

***APPEALS - Grounds - Nature - How determined***

1. To distinguish between a ground of law and a ground of fact the appellation given by counsel is irrelevant. The ground of appeal and the particulars must be comprehensively examined. If the ground of appeal reveals a misunderstanding by the court below of the Law or a misapplication of the Law to the facts admitted or proved it is a ground of Law. Where the ground of appeal questions evaluation of evidence before the application of the Law, it is a ground of mixed law and fact. A ground of appeal on a question of fact is obvious. (p. 2413 B)

***APPEALS - Grounds - Nature - Mixed law and fact***

2. Ground 1 questions the finding of the lower court that there was no real conflict in Traditional evidence. In the Particulars the appellant is of the view that there was conflict in the Traditional evidence. To determine if there were conflicts in Traditional evidence disputed facts must be considered. Consequently a ground which questions how conflicting evidence was resolved like ground 1 is one of mixed law and fact and it requires leave of the Court of Appeal or this court before it can be argued.

Ground 5 questions the dismissal of the appellants claim for declaration of title to land. The power to grant or not to grant a declaration is discretionary, and the exercise of courts discretion is an issue of fact and Law. Leave of the Court of Appeal or this Court must be obtained before it can be argued. (p. 2414 G)

***JUDGMENTS - Basis - Rejection of appellant's case - Reason***

3. In response learned counsel for the respondents observed ... that the statement of the Court of Appeal about being fair to the learned trial judge was taken out of context by the appellant. I com-

pletely agree with learned counsel for the respondents.

The learned justice of appeal was correct to say he had a duty to be fair to the learned trial judge, because instead of learned counsel for the appellant addressing the fundamental point by showing any contemporary event to lend support to the appellants traditional evidence of ownership of the land in dispute he was chasing shadows by blowing out of proportion demeanour and credibility of witnesses. In being fair to the learned trial judge the Court of Appeal reminded learned counsel for the appellant that his claims were rejected because he failed to show any contemporary event to lend support to the appellants traditional evidence of ownership to the land in dispute.(pp. 2420 D/E/2421 D)

***LAND LAW - Evidence - Evaluation - Traditional history***

D 4. In a long line of cases it has been said; that it would be wrong to resolve traditional history only by the demeanour of witnesses.

The learned trial judge did not reject the appellants case because he was not satisfied with the credibility and demeanour of witnesses. He rejected the appellants case because the appellant failed to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute.

Credibility and demeanour are relevant in tracing traditional history, but they are not strong points. The matter is settled when the plaintiff shows any contemporary event to lend support to his traditional evidence of ownership of the land in dispute. This the appellant failed to do. (pp. 2420 G/2421 A)

***EVIDENCE - Land law - Ownership of adjoining land***

G 5. Section 46 of the Evidence Act states that-

“Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land, but also of other land so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

This section creates a probability and not conclusive proof of ownership of land. This is so because evidence adduced, and if believed by the court, would render the presumption in Section 46 improbable. (pp. 2421 G/2422 B)

***COURTS - Submissions - Rulings on - Failure to rule on***

6. Submissions of learned counsel for the appellant on the provisions of Section 46 of the Evidence Act were not examined by the learned trial judge. No matter how trivial or irrelevant a submission of counsel may appear, the trial judge has a duty to examine it and rule upon it. In this case the Court of Appeal examined counsel submissions on the provisions of Section 46 of the Evidence Act extensively, and found no merit in it. Not commenting on the learned counsel's submission on Section 46 of the Evidence Act by the learned trial judge does not affect the judgment of the trial court. Section 46 of the Evidence Act is not applicable to this case as it makes no difference to the outcome of the case. B

Both courts below found and held that the appellants and the respondents have a common ancestor, named Dala Onyeogu. The appellant cannot succeed against any member of their common ancestors lineage solely on the basis of the section supra. (p. 2423 G) C

***NOTABLE POINTS OF INTEREST***  
***RHODES-VIVOUR JSC***

*1. Preliminary objections are filed in respect of fatal defects*

I will consider the Preliminary objection first. This is the correct procedure, because a preliminary objection is filed only when the respondent is satisfied that there is some fundamental defect in the appellants process. The sole purpose being to terminate the appeal usually on grounds of incompetence. E

Nowadays, Preliminary objections are filed once a respondent notices any error in the appellants processes. This is wrong. Where the respondent complains of the competency of a ground/s of appeal as in this appeal, and the other ground/s are in order, and can sustain the appeal the respondent ought to file a motion on Notice to strike out the incompetent grounds and not a Preliminary objection. (p. 2412 B) F

***CHUKWUMA-ENEH JSC***

*2. Issue 2 is based on an orbiter dictum*

I have thus by the above extracts positioned the crux of the contention arising under issue two and it has been clearly showed that the H

lower court's comment as captured under issue two is an obiter dicta notwithstanding concluding it thus: "*And I so reject it*"; and so cannot be a point appealable in the circumstances.

From the appellant's own showing as per the above extracts from his brief of argument the comment appears to have nothing to do with the issue before the court for adjudication. The appellant's contention as it stands has showed that the lower court's observation on his approach to the plaintiff's case is simply collateral to its (lower court's) upholding the trial court's finding on the traditional evidence of the parties and so at best an obiter dicta, in as much as it is no more than a comment made in passing by the lower court while deliberating on the question that the appellant has not given as much attention to the absence of any contemporary events in support of the plaintiff's traditional evidence.(pp. 2430 H/2431 B)

D

### **ADEKEYE JSC**

#### *3. Recent acts are irrelevant till root of title is proved*

Where a claimant for title to land who pleads traditional history fails to prove his root of title by that means, he cannot turn round to rely on acts of ownership and possession to prove his title to the land.

As a matter of course, there would be nothing on which to found acts of ownership. In such a case, the court is obliged to dismiss the claimant's claim. (p. 2434 D)

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### **REPRESENTATION**

Chief O. Ugolo, SAN for the Appellant, with him C. Ibemesi C. A. N. Nwokenkwu for the Respondent.

### **CASES REFERRED TO**

- Onwe v. Oke 2001 3 NWLR pt.700 p. 406
- Ifediorah v. Ume 1988 2 NWLR pt. 74 p.5
- Obasi v. Onwuka (1987) 3 NWLR (Pt.61) 364
- Chime v. Chime (1995) 6 NWLR (Pt.404) 734
- Nwadike v. Ibekwe 1987 4 NWLR pt.67 p.718
- Ogbechie v. Onochie 1986 2 NWLR pt.23 P. 484
- Ndigwe v. Nwude 1999 11 NWLR pt.626 p. 314
- Ibikunle v. Lawani (2007) 3 NWLR pt. 1022, Pg. 580
- Okoko v. Dakolo (2006) 14 NWLR pt. 1000, pg. 401

Omoriegie v. Idugiemwanye 1985 2 NWLR pt. 5 p. 41

Obatoyinbo v. Oshatoba 1996 5 NWLR pt.450 p.531

Mohammed Ojumu v. Salawu Ajao (1983) 9 S.C. 22 at 53

Abacha v. Fawehinmi (2000) 6 NWLR (Pt.660) 228 at 247

Metal Construction (W.A.) Ltd v. Migliore 1990 1 NWLR pt.126 p. 299

Attorney-General of Bendel State v. Aideyan (1989) 4 NWLR (Pt.118) 646

### **STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, S. 233

Evidence Act, s. 46

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

The Plaintiff for himself and on behalf of the Anazodo Odunukwe family of Nnewichi Nnewi, the Appellants in this appeal sued the Defendants, now Respondents, claiming jointly and severally as per paragraph 12 of their amended statement of claim as follows:-

*“(i) Declaration of title to all that piece or parcel of land situate at Obuofia Nnewichi Nnewi within the jurisdiction and more particularly delineated and verged Pink in the Survey Plan No.EC. 127/72 filed with this statement of claim.*

*(ii) £100 damages for wanton acts of trespass committed by the defendants on the said land.*

*(iii) Injunction to restrain the defendants, their servants, agents and privies from further entry on the said land.”*

Pleadings were filed and exchanged and, with leave of Court amended. The case accordingly proceeded to trial at which both sides led evidence in support of their respective case. Each side led evidence which showed that they relied on traditional history and positive acts of possession. At the conclusion of trial, and after closing speeches by learned counsel for both sides, the learned trial judge in a considered judgment delivered on the 7<sup>th</sup> of November 1994 dismissed the plaintiffs claims.

The Plaintiffs were displeased with this judgment and appealed to the Court of Appeal, Enugu Division. That Court dismissed the appeal. They have further appealed to this Court. Pursuant to Order

6 rules 5 (1) (a) and (2) of the Supreme Court Rules the appellants filed their briefs on the 12<sup>th</sup> day of January 2004 and a Reply brief on the 18<sup>th</sup> day of May 2009. An amended respondents brief was deemed duly filed on the 20<sup>th</sup> day of April, 2009.

The notice of appeal filed on the 1<sup>st</sup> of July 1999 contained  
 B five grounds of appeal from which the appellants counsel distilled four issues for determination of this appeal. Learned counsel for the respondent extensively argued in the respondents brief a Preliminary objection. I will consider the Preliminary objection first. This is the  
 C correct procedure, because a preliminary objection is filed only when the respondent is satisfied that there is some fundamental defect in the appellants process. The sole purpose being to terminate the appeal usually on grounds of incompetence. See *Ndigwe v. Nwude* 1999 11 NWLR pt.626 p. 314, *NEPA v. Ango* 2001 15 NWLR pt.737  
 D p.627.

Nowadays, Preliminary objections are filed once a respondent notices any error in the appellants processes. This is wrong. Where the respondent complains of the competency of a ground/s of appeal as in this appeal, and the other ground/s are in order, and  
 E can sustain the appeal the respondent ought to file a motion on Notice to strike out the incompetent grounds and not a Preliminary objection. See *Muhammed v. Military Administrator Plateau State* 2001 16 NWLR pt. 740 p. 524 *NDIC v. Oranu* 2001 18 NWLR pt. 744 p. 183  
 F

Finally and for emphasis, A preliminary objection is filed only against the hearing of the appeal and not against one or more grounds of appeal. I shall proceed to examine the objection wrongly couched as preliminary objection as I cannot brush it aside, it being  
 G fundamental, and in the absence of objection from learned counsel for the appellant. Learned counsel for the respondents observed that Grounds 1 and 5 in the Notice of Appeal are grounds of mixed Law and facts, contending that both grounds are incompetent because leave of the Court of Appeal or this Court was not obtained before  
 H they were filed. Reliance was placed on Section 233 (2) (a) of the Constitution. - *Ifediorah v. Ume* 1988 2 NWLR pt. 74 p.5 *Obijuru v. Ozims* 1985 2 NWLR pt. 6 p.167

He urged us to strike out both grounds of appeal. Responding, learned counsel for the appellant observed that ground 1 com-



plaints of misunderstanding of the Law and so it is a ground of Law. On ground 5 he argued that the complaint was that the learned trial judge was in error in dismissing the plaintiffs claim, contending that it is also a ground of law. Reference was made to *Ogbechie v. Onochie* 1986 2 NWLR pt.23 P484 *Nwadike v. Ibekwe* 1987 4 NWLR pt.67 p.718 B

He urged this court to dismiss the Preliminary objection as the said Grounds 1 and 5 of the Grounds of Appeal are Grounds of Law. ***To distinguish between a ground of law and a ground of fact the appellation given by counsel is irrelevant. The ground of appeal and the particulars must be comprehensively examined. If the ground of appeal reveals a misunderstanding by the court below of the Law or a misapplication of the Law to the facts admitted or proved it is a ground of Law. Where the ground of appeal questions evaluation of evidence before the application of the Law, it is a ground of mixed law and fact. A ground of appeal on a question of fact is obvious.*** See *Metal Construction (W.A.) Ltd v. Migliore* 1990 1 NWLR pt.126 p. 299 *Ogbechie v. Onochie* 1986 2 NWLR pt.23 p.484. C D

The grounds of appeal and their particulars that are in issue E are grounds 1 and 5 in the Notice of Appeal. They read thus:

GROUND 1

Their Lordships of the Court of Appeal erred in Law when on the issue of resolution of conflict in traditional evidence they held F as follows:-

*“Although learned Senior Advocate tried to show conflicts in traditional evidence of the respondents at pages 7 to 14 of his brief, I am in agreement with learned counsel for the respondents that there was no real conflict of traditional evidence found by the trial court or apparent from this case to warrant invocation of the principle in Kojo's case.”* G

PARTICULARS:

(i) Contrary to the above finding of the lower court the learned trial judge accepted that there was a material conflict in the traditional H evidence of the parties.

(ii) The learned trial judge held that it is for the court at the end of the day to decide on a balance of probabilities and the impressions of the parties and their witnesses which version to believe

as true or likely to be true.

(iii) In resolving the conflict in traditional evidence the learned trial judge resorted to demeanor and credibility of witnesses.

(iv) Such conflict in the traditional evidence under the rule laid down in *Kojo II v. Bonsie* 1957 1 WLR p.1223 can only be resolved by reference to acts of ownership and possession within recent times which the trial court failed to do.

(v) The lower court in resolving the above issue held that there was no real conflict of traditional evidence found by the trial court.

### GROUND 5

The learned Justices of the Court of Appeal erred in Law when in dismissing appellants claim for a declaration of title they held as follows:

“I now take the last issue and it is whether the learned trial judge was not in error in dismissing the plaintiffs claim. I should not waste anytime here. It is clear from the position I have taken above that the learned trial judge correctly dismissed the claim of the plaintiff who is the appellant. Accordingly, I dismiss the appeal and I do so by awarding N3,000.00 costs in favour of the respondents.

### PARTICULARS

(i) Their Lordships of the lower court failed to consider the issue of dismissal of the appellants claim by the learned trial judge which was properly raised by the appellant.

(ii) By the above quotation their Lordships of the lower court with the greatest respect approached the evidence called by the parties wrongly and the Supreme Court should intervene and allow this appeal.

***Ground 1 questions the finding of the lower court that there was no real conflict in Traditional evidence. In the Particulars the appellant is of the view that there was conflict in the Traditional evidence. To determine if there were conflicts in Traditional evidence disputed facts must be considered. Consequently a ground which questions how conflicting evidence was resolved like ground 1 is one of mixed law and fact and it requires leave of the Court of Appeal or this court before it can be argued.***

***Ground 5 questions the dismissal of the appellants***

**claim for declaration of title to land. The power to grant or not to grant a declaration is discretionary, and the exercise of courts discretion is an issue of fact and Law. Leave of the Court of Appeal or this Court must be obtained before it can be argued.**

Section 233 (2) (a) and 233 (3) of the Constitution are relevant provisions. They read:

*“233(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases.*

*(a) Where the ground of appeal involves questions of Law alone, decisions in any civil or criminal proceedings before the Court of Appeal.*

*(3) Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.”*

The interpretation and effect of the above is that where the grounds of appeal are on facts, mixed law and facts, and grounds that are not on Law, and the appellant did not obtain leave, this court would have no jurisdiction to entertain the appeal. There would only be a valid appeal if the appellant obtains leave from the Court of Appeal or this court under section 233 (3) of the Constitution. See *Obatoyinbo v. Oshatoba* 1996 5 NWLR pt.450 p.531. *Tilbury Construction v. Ogunniyi* 1988 2 NWLR pt.74 p.64.

In the absence of leave i.e. permission Grounds 1 and 5 in the Notice of Appeal are hereby struck out. Issues 1 and 4 formulated from Grounds 1 and 5 are accordingly struck out since the Grounds from which they were formulated no longer exist. Issue 2 is formulated from Grounds 2 and 3, while Issue 3 is formulated from Ground 4. They sustain the appeal.

Issues 2 and 3 in the appellants brief reads as follows:-

ISSUE 2

Was the Court of Appeal right in rejecting the Plaintiffs case for sole reason of being fair to the learned trial judge.

ISSUE 3

Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirement of the said Section were satisfied.

The respondents adopted the issues formulated by the appellant.

At the hearing of the appeal on the 11<sup>th</sup> of October 2010, learned counsel for the appellants, Chief O. Ugolo, SAN adopted Appellants brief and Reply brief and urged us to allow the appeal and set aside the High Court and Court of Appeal Judgments. C.A.N. Nwokaukwu, learned counsel for the respondents adopted Respondents amended brief deemed filed on the 20<sup>th</sup> of April, 2009 and urged us to dismiss the appeal and affirm concurrent judgments of the courts below. The appellants case is that the land in dispute is at Obiofia Nnewichi Nnewi which is Verged Pink in the Survey Plan, Exhibit A. The land in dispute is part of a large piece of land which belongs to the appellants ancestor, Dala Onyeogu. He had three children namely, Ezeuzo, Dim Umeanyo, Eze Nwajiaku. Ezeuzo's mother was different from the mother of the other two. Before his death Dala Onyeogu divided his land into two. He gave one portion including his Obi to Ezeuzo and the land in dispute with the surrounding land to Dim Umenanyo and Eze Nwajiaku. Dim Umeanyo and Eze Nwajiaku later subdivided their own portion. The land in dispute is part of Eze Nwajiaku's share of family land. On the death of Eze Nwajiaku his land and land in dispute was inherited by his son Ezenwegbu. He farmed on the land throughout his life. On the death of Ezenwegbu his son Nruama inherited the land in dispute and all adjoining lands. He farmed the land and exercised acts of ownership on the land and was not disturbed by the respondents or anyone else.

On his death the land was inherited by his son Odunukwe. He exercised acts of ownership by farming, planting economic trees and letting portions of the land out. Apart from the three sons Dala Onyeogu had a daughter named Mgbafor Nnuaku who married a husband from Isu-Obia, she returned with her children to Obiofia Nnewichi and brother Dim Umeogu gave her a piece of land at Dala Onyeogu's farmland at Eyeghepu in Edoji. Mgbafor Nnuaku lost her children mysteriously. One survived. He is Efoagui. He left and went to Dala Otikpo a descendant of Dim Umeanyo who gave him land at Obiofia Nnewichi. Efoagui had three sons, namely Ofomata, Anyaebosi and Henry. On the death of Efoagui his three sons lived on the land granted to their father. Efoagui's line has been paying

annual customary tribute to Anazodo Odunukwe the father of the appellant on adjoining land to the land in dispute.

The appellant averred that the respondents and their ancestors do not belong to Dala Onyeogu's lineage because the respondents and their ancestors were never chief priests of Ezemewi shrine; an office reserved for the oldest living member of Dala Onyeogu's descendants at any given time, Henry Efoagui is the uncle of the 1<sup>st</sup> respondent. In 1953 the 1<sup>st</sup> respondent broke and entered the portion verged yellow on Exhibit A (i.e. the adjoining land and the land in dispute) and started moulding cement block preparatory to building on the land. Anazodo Odunukwe, the overlord protested to Efoagui, his tenant. The 1<sup>st</sup> respondent stopped. Anazodo Odunukwe died in 1966, and Efoagui died in 1969. In 1971 the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered the land in dispute and the area verged yellow, cleared the bush and cut down economic trees, and commenced moulding blocks with a view to building on the land.

The respondents on the other hand said the land in dispute is in Obiofia Nnewichi which is verged Blue in the Survey plan, Exhibit B. That the appellants and respondents are from one ancestor, Dala Onyeogu who had four sons, namely Ezeuzo, Dim Umeanyo, Ezenwajiaku and Ezeagado. He had three wives. After his death his sons divided his land in accordance with Nnewi Customary Law. The land was divided into three portions representing the three homesteads (MKPUKES) of Dala Onyeogu's family. Dim Umeanyo and Ezenwajiaku from one homestead received one portion. The land in dispute was inherited by Ezeagado. He is the direct ancestor of the respondents. The respondents never paid tribute to the appellant or to anyone. Since the time of Ezeagado the 1<sup>st</sup> and 2<sup>nd</sup> respondents family have been in possession of the land without interference from the appellant or anyone else. Ezeagado was succeeded by Ezenwabachilli who was succeeded by Ezemiogbo and then Efoagui, the father of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was on the land in dispute that the 1<sup>st</sup> defendant buried his wife Patience Ofomata.

After reviewing evidence in detail the learned trial judge concluded thus:

*"On a totality of the evidence before me the plaintiff failed to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. He is seeking a decla-*

*ration of customary right of occupancy and failed to discharge the onus of proof on him. I accept the defendants case that the land in dispute was granted to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant as the “Diokpala” first son of Ofomata to establish a home-stead.....”*

B The learned trial judge continued:

*“I accept their evidence that apart from the land in dispute they have other land at Eheghepu which they inherited from their father Ofomata the son of Efoagui the son of Ezeogado, the son of Dala Onyeogu. After all, they, like the plaintiff and his witnesses are descendants of Dala Onyeogu.”*

Finally on the respondents ancestry the learned trial judge had this to say:

D “..... The defendants are not “Nwadianis” or returnees to their maternal town Nnewichi. They are not children of an elusive woman named Mgbafor Nnauku. I hold that the evidence on the said Mgbafor Nnauku crossed the firm Boundary between fantasy and reality. The plaintiff’s claim fails and it is dismissed with N5,000.00 costs to the defendants.

E Evidence accepted by both courts below is that both sides claim title through a common predecessor in title. The position of the law is that the predecessors title is good and not in issue. In this case both sides tendered Exhibits A and B, their respective Survey Plans. F In Exhibit A tendered by the appellant, the land in dispute is verged Pink while in Exhibit B tendered by the respondents the land in dispute is verged Blue. There is no dispute on the identity of the land in dispute. Ownership of land may be proved in any of the following five ways:

- G 1. by traditional evidence
2. by production of documents of title which are duly authenticated;
3. by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it;
- H 4. by acts of long possession and enjoyment of land; and
5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition be the owner of the land in dispute.

See *Piaro v. Tenalo* 1976 12 SC p.31 *Idundun v. Okumagba* 1976 9 - 10 SC p. 224 *Omorie v. Idugiemwanye* 1985 2 NWLR pt. 5 p. 41

A party relying on any of the above would only succeed on the strength of his case and not on the weakness of the defence. The standard of proof required is preponderance of evidence. That is to say one sides position outweighs the other. In this case the appellant relies on Traditional History/Evidence and positive acts of possession for their claim to the land in dispute. The starting point are the pleadings. Genealogy must be pleaded. Averments in the pleadings must show a chain of devolution right back to the original owner. Both sides did so in this case. It was then the duty of the trial judge to examine both sides recollection of traditional history which they rely on to see which is to be preferred. *Kojo II v. Bonsie and anor* 1957 1 WLR p. 1233 is only applicable where traditional history relied on by the parties is inconclusive to establish the plaintiffs title, then such traditional history must be tested by reference to the facts in recent years established by evidence. It is only then that the court can see which of the two competing histories is the more probable. Only two issues would be examined in this appeal in the light of my findings in the preliminary objection. I now address both issues seriatim.

1. Was the Court of Appeal right in rejecting the plaintiffs case for sole reason of being fair to the learned trial judge.

The above issue arose from the Leading Judgment of the Court of Appeal. Relevant extracts reads:

*"In attacking the evaluation of evidence by a trial judge, counsel has a duty to examine the totality of the evaluation and not pick pockets here and there to puncture or destroy the efforts of the Judge. With respect that is what Learned Senior Advocate for the Appellant has done.*

*That is not acceptable to this court because it is not the legal position. In my humble view, Learned Senior Advocate emphasized out of proportion the so-called reliance on demeanour and credibility of the witnesses by the learned trial judge. Much as I concede to learned Senior Advocate of his traditional sentiments to the case of his client, I expected him to recognize the finding of the learned trial judge that the appellant failed to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute. Curi-*

*ously learned counsel played down on this important finding and played up the so-called finding on demeanour and credibility of the witnesses. He is not fair to the learned trial judge. I have a duty to be fair to the learned trial judge and the only way to be fair to him is to reject the contention of the learned senior advocate on the issue.*

B *And I so reject it."*

Learned counsel for the appellant observed that the trial judge did not evaluate the two versions of traditional evidence, and instead of the Court of Appeal so finding, the court failed to consider the appellants case and took issues with appellants counsel on his approach to the case, concluding in the process that appellants counsel was not fair to the trial judge. He submitted that an appellate court has a duty to consider issues before it on their merits and when it fails to do so it is a miscarriage of justice. Reliance was placed on *Onwe v. Oke* 2001 3 NWLR pt.700 p. 406.

He urged this court to evaluate the traditional evidence of the parties and allow the appeal on this ground. ***In response learned counsel for the respondents observed*** that the courts rejection of the appellants case was not for the reason of being fair to the learned trial judge but based on specific findings borne out by the evidence before the trial court. Concluding he further observed ***that the statement of the Court of Appeal about being fair to the learned trial judge was taken out of context by the appellant. I completely agree with learned counsel for the respondents.*** The statement by the Court of Appeal runs as follows:

*"I have a duty to be fair to the learned trial judge and the only way to be fair to him is to reject the contention of the learned senior advocate on the issue. And I so reject it."*

G In attacking evaluation of evidence by the learned trial judge, learned counsel for the appellant is of the view that the learned trial judge rejected the appellants case because he relied too much on the demeanour and credibility of witnesses.

Credibility precedes demeanour. ***In a long line of cases it has been said; that it would be wrong to resolve traditional history only by the demeanour of witnesses.*** See *Thanni v Saibu* 1977 2 SC p. 89 *Ikpan v. Edoho* 1978 6-7 SC p.221.

The reason is simple. Traditional history is usually centuries old. It is passed down by word of mouth. Memories fade with time.



There are bound to be unintentional mistakes when a witness says what he was told by his father or grandfather. The witness believes he is telling the truth. Surely demeanor cannot be of much use in such a situation. **The learned trial judge did not reject the appellants case because he was not satisfied with the credibility and demeanour of witnesses. He rejected the appellants case because the appellant failed to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute.** B

**Credibility and demeanour are relevant in tracing traditional history, but they are not strong points. The matter is settled when the plaintiff shows any contemporary event to lend support to his traditional evidence of ownership of the land in dispute. This the appellant failed to do.** C

**The learned justice of appeal was correct to say he had a duty to be fair to the learned trial judge, because instead of learned counsel for the appellant addressing the fundamental point by showing any contemporary event to lend support to the appellants traditional evidence of ownership of the land in dispute he was chasing shadows by blowing out of proportion demeanor and credibility of witnesses. In being fair to the learned trial judge the Court of Appeal reminded learned counsel for the appellant that his claims were rejected because he failed to show any contemporary event to lend support to the appellants traditional evidence of ownership to the land in dispute.** D  
His case did not fail because the learned trial judge relied only on the demeanor and credibility of the witnesses, a point learned counsel for the appellant relied on heavily and which if believed is being unfair to the learned trial judge. E F G

2. Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirements of the said section was satisfied.

**Section 46 of the Evidence Act states that-** H

**“ Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land, but also of other land so situated or connected therewith by locality or similarity**

**that what is true as to the one piece of land is likely to be true of the other piece of land.**

In *Okechukwu v. Okafor* 1961 1 ALL N.L.R. P. 685. It was held that by virtue of Section 45 (now 46) of the Evidence Act, acts of possession and enjoyment of land may be evidence not only of the particular piece of land with reference to which the acts are done, but also of other lands so situated or connected therewith by locality or similarity that what is true as to one piece of land is likely to be true of the other piece of land. See also *Idudum v. Okumagba*, supra.

**This section creates a probability and not conclusive proof of ownership of land. This is so because evidence adduced, and if believed by the court, would render the presumption in Section 46 improbable.** Learned counsel for the appellant observed that the learned trial judge failed to consider and apply the provisions of Section 46 of the Evidence Act. Relying on *Karibo and others v. Grend and Anor* 1992 3 NWLR pt.230 p. 426 he submitted that the Court of Appeal ought to have allowed the appeal. The argument canvassed by learned counsel for the respondents is that consideration of Section 46 of the Evidence Act would have made no difference to the outcome of the case. His reasoning being that there is no appeal from concurrent findings of the court on the failure of the appellants to show any contemporary event to lend support to his traditional evidence of ownership of the land in dispute.

As rightly pointed out by learned counsel for the appellant the learned trial judge failed to examine his submissions on Section 46. The Court of Appeal proceeded to examine arguments of learned counsel on the section as follows: Relying on *Karibo and others v. Grend and anor* supra the Court of Appeal relied on an extract from the judgment. It reads:

*"I may observe, however, that sometimes the issues could be resolved on documentary evidence or other forms of evidence of such a permanent nature that the sense of hearing could be assisted by other senses. Such documents or other real evidence could be resorted to by an appellate court in order to resolve the issue by itself. In that case, there would be no need to order a retrial. Such is the situation also when there are conflicting oral testimonies as well as documentary evidence which supports one version of the conflict. Such a documentary evidence should, and ought to be used as hanger*

*from which to test the veracity of the oral testimonies.”*

The Court of Appeal then said-

Applying the above principle to this appeal, the relevant documentary evidence are the Survey Plans of the parties which are Exhibits A and B for the plaintiff and the defendants respectively. In this respect, the submission of learned counsel for the respondents in paragraph 37 of his brief, is most accurate. I should quote the submission for ease of reference. The Court of Appeal proceeded to quote learned counsel for the respondents submissions thus-

*“Now, the plaintiffs plan showed that one of the adjoining lands to the land in dispute belonged to Ezeagado and learned trial judge had held that the Defendants are from the lineage of Ezeagado, a direct descendant of Dala Onyeogu. This very clearly displaces any inference that all the lands surrounding the land in dispute are so situated or connected with the land in dispute that the land in dispute may be presumed to belong to Odunukwe family of the plaintiff”.*

The Court of Appeal agreed entirely with learned counsel for the respondents and examined further the submissions of learned counsel for the respondent when he said:

*“In the circumstances of this case, when the substratum of the plaintiffs claim has totally collapsed by a finding that both the plaintiff and the Defendants are from the same stock of Dala Onyeogu the original owner of the entire land, the plaintiff cannot hope to succeed against any other member of Dala Onyeogu lineage on the basis of Section 46 of the Evidence Act alone.*

The Court of Appeal agreed with learned counsel for the respondent and then said that in the light of the evidence in this case the submission of learned counsel for the appellant in respect of Section 46 fails.

***Submissions of learned counsel for the appellant on the provisions of Section 46 of the Evidence Act were not examined by the learned trial judge. No matter how trivial or irrelevant a submission of counsel may appear, the trial judge has a duty to examine it and rule upon it. In this case the Court of Appeal examined counsel submissions on the provisions of Section 46 of the Evidence Act extensively, and found no merit in it. Not commenting on the learned counsel’s submission on Section 46 of the Evidence Act by the learned trial judge does***

***not affect the judgment of the trial court. Section 46 of the Evidence Act is not applicable to this case as it makes no difference to the outcome of the case.***

***Both courts below found and held that the appellants and the respondents have a common ancestor, named Dala Onyeogu. The appellant cannot succeed against any member of their common ancestors lineage solely on the basis of the section supra.*** The appellant failed to prove his claims because he was unable to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. The evidence of the witnesses called by the appellants was rightly rejected by the learned trial judge for good and sufficient reasons.

The Supreme Court would set aside concurrent findings of fact if such findings are not supported by credible and reliable evidence. See *Enang. v Adu* 198111-12 SC p.25 *Sosanya v. Onadeko* 2005 8 NWLR pt. 926 p. 185 *Ibodo v. Enarofia* 1980 5 - 7 SC p. There is no appeal against the finding by the trial court, affirmed by the Court of Appeal, that the appellants failed to show any contemporary event to lend support to his traditional evidence of the ownership of the land in dispute. Concurrent findings of fact sustained on credible and compelling evidence are inviolate in the absence of an appeal.

In conclusion, this appeal lacks merit and the same is hereby dismissed. I make no order as to costs.

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### ***MOHAMMED JSC***

I have had the privilege of reading before today, the judgment just delivered by my learned brother Rhodes-Vivour, JSC. I agree with him that there is no merit at all in this appeal which has a chequered history. The land dispute between the parties started in 1972 at the Onitsha High Court of Anambra State where the Plaintiff filed their case on 17<sup>th</sup> April 1972 before Uyanna J. who after hearing the parties and their witnesses, found for the Plaintiffs in his judgment delivered on 14<sup>th</sup> July, 1980. The appeal by the aggrieved Defendants succeeded at the Court of Appeal which allowed the appeal on 18<sup>th</sup> June, 1984 and remitted the case for hearing de-novo by the Nnewi High Court of Justice. After giving the parties opportunity of

being heard afresh, the learned trial Judge of the High Court dismissed the Plaintiff's claims for declaration of title to a parcel of land situate at Obiofia Nnewechi Nnewi and ₦100 (100 pounds) as damages after finding the Plaintiff's traditional history evidence in support of these claims was incoherent. The Plaintiff's appeal against the decision of the High Court at the Court of Appeal Enugu was dismissed for the same reasons hence the present appeal to this Court in which the Appellant has raised the following four issues for determination.

*"(i.) Was there real conflict of traditional evidence found by the trial Court or apparent from this case to warrant the invocation of the principle laid down in Kojo II v. Bonsie (1957) 1 W.L.R. 1223.*

*(ii.) Was the Court of Appeal right in rejecting the Plaintiff's case for the SOLE reason of being fair to the learned trial Judge.*

*(iii) Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagado that the requirements of the said Section were satisfied.*

*(iv.) Was the Court of Appeal right in law when it failed to consider the issue of the dismissal of the Plaintiff's case by the learned trial Judge which was properly raised by the Plaintiff."*

With the striking out of grounds 1 and 5 of the Appellants ground of appeal which were grounds of mixed law and fact filed without leave of the Court of Appeal or this Court, I am also of the view that issues 1 and 4 above formulated from the grounds of appeal already struck-out, would have no legs to stand upon. Accordingly, the two issues 1 and 4 are hereby struck-out.

However close examination of issue 2 of the remaining two issues for determination in this appeal also reveals that the issue does not strictly arise from the decision of the Court of Appeal now on appeal. This is because it is certainly not true as posed in that issue that the Court of Appeal rejected the Appellant's case for sole reason of being fair to the learned trial Judge. The word 'sole' of course means one, Single or Without another or Others. The very fact that the learned Counsel to the Appellant whose conduct in the handling of the Appellant's case at the Court of Appeal was being castigated by that Court, saw as many as four issues for determination in this

appeal, shows that there were many other reasons given by the Court below for rejecting the Plaintiff/Appellant's case. Be that as it may, the only issue or real issue arising from this appeal is rooted on the question of fact. Therefore being an appeal against concurrent decisions on facts by the trial High Court and the Court of Appeal, the Appellant has to show exceptional circumstances to justify this Court interfering with such findings. See *Ometa v. Numa* (1934) II N.L.R. 18, *Serbah v. Karikari* (1939) 5 W.A.C.A. 34, *Akyin III v. Abaka II* (1939) 5 W.A.C.A. 49, *Kodilinye v. Anatogu* (1953) 1 W.L.R. 231; *Dawodu v. Danmole* (1962) I All N.L.R. 702 and *Mohammed Ojumu v. Salawu Ajao* (1983) 9 S.C. 22 at 53.

For the foregoing reasons and fuller reasons contain in the lead judgment, I also dismiss this appeal and abide by the order on costs in the lead judgment.

D

### **CHUKWUMA-ENEH JSC**

In the High Court of Onitsha Judicial Division the plaintiff has claimed against the defendants the reliefs as per paragraph 20 of the Amended Statement of Claim as follows:

*"(i) Declaration of title to all that piece or parcel of land Situate at Obiofia Nnewichi Nnewi within the jurisdiction and were particularly delineated and verged pink in the survey plan No.EC.127/72 filed with this statement of claim.*

*(ii) L100 (100 pounds) damages for wanton acts of trespass committed by the defendants in the said land.*

*(iii) Injunction to restrain the defendants, their servants, agents privies from further entry on the said land."*

Pleadings have been filed and exchanged between the parties. The plaintiff has called in all 3 witnesses while the defendants have called 4 witnesses on their part. The facts of the case, have revealed that the plaintiff has founded his case on traditional history, acts of long possession and ownership of adjoining or contiguous lands to the land in dispute which the plaintiff has alleged are situate at Obiofia Nnewichi Nnewi. The defendants have averred in response that the land in dispute is situated in Akubo Obiofia Nnewichi Nnewi and verged blue in the plan No.E/GA. 363/72. The parties admit descending from a common ancestor one - Dala Onyeogu. The plain-

tiff have further averred in their pleadings that their common ancestor has had three children, two of them of the same mother and the third son from a different mother. And that Dala Onyeogu has divided his lands into two according to the maternal lineages of his Children. However, the plaintiff's witness P.W.1 has in his evidence in chief said that Dala Onyeogu has had three males and a daughter B from his two wives and that Dala has partitioned his lands in his lifetime to his three male children. The first son Ezeuzo has gotten the Obi land, the 2<sup>nd</sup> son-Dim Umeayo has gotten a share and the third son also has gotten a share of his lands. The plaintiffs also has alleged C that their ancestor's only daughter known as Mgbafor Nnuaku has been married to one man from Isuobia and that defendants lineage is traceable to her as "Nwadianis". They have also alleged that after the death of her husband she has come back to be settled by her immediate family. The defendants on their part have alleged in their D pleadings and evidence that Dala Onyeogu has had four sons from three wives among whom have been divided Dala Onyeogu's lands after his death, that is, among the three maternal branches and that the land in dispute is the share of Ezeagodo, the 4<sup>th</sup> son of Dala E Onyeogu. The above resume of the traditional history of parties and the land in dispute has been set out above to show from where and how perhaps, the plaintiff's case has initially started to go awry and so place that issue as well as other issues that have been raised for determination in this appeal in their relative contexts.

F The trial court in its judgment has rejected the plaintiffs version of his traditional history. As regards Mgbafor Nnuaku the trial court also disbelieved the plaintiff's account of her marriage to a man from Isuobia who throughout the plaintiff's case has not been identified by name yet an in-law of the plaintiff. It has found that the G parties are direct descendants of Dala Onyeogu and that the defendants are no returnees as has been contended by the plaintiff and his witnesses. Also rejected by the trial court is the plaintiffs acts of ownership and possession; rather it has been found that the land in dispute has devolved on the defendants' people as their own share of H the lands they have inherited from their ancestor - Dala Onyeogu.

In sum the plaintiff's case has been dismissed and being dissatisfied with the trial court's decision, the plaintiff has appealed to the Court of Appeal, Enugu. On the appeal thereat having been

dismissed the plaintiff has now appealed to this court on his Notice of Appeal filed on 1/7/1999 containing five grounds of appeal.

In this court the plaintiff and defendants are appellant and respondents respectively. They have filed and exchanged their respective briefs of arguments in pursuance to the Rules of this Court and have at the oral hearing of the appeal before us have adopted and relied on their respective briefs of argument in support of their respective cases in this court. The respondents have raised and argued a preliminary objection against grounds 1 and 5 of the grounds of appeal in their brief of argument and I shall come to it anon. The appellant in his brief of argument has raised four issues for determination to wit:

*“(i) Was there real conflict of traditional evidence found by the trial court or apparent from this case to warrant the invocation of the principle laid down in Kojo II vs. Bonsie (1957) 1 WLR 1223.*

*(ii) Was the Court of Appeal right in rejecting the plaintiff’s case for the sole reason of being fair to the Learned Trial Judge.*

*(iii) Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the sole reason that since one of the adjoining lands to the land in dispute belonged to Ezeagodo that the requirements of the said Section were satisfied.*

*(iv) Was the Court of Appeal right in law when it failed to consider the issue of the dismissal of the plaintiff’s case by the Learned Trial Judge which was properly raised by plaintiff.”*

The Respondents have raised four issues for determination exactly identical to the issues raised by the appellant that I see no need replicating them all over here.

Before proceeding any further in discussing the matter, I think I should revert to the preliminary objection as raised by the respondents against grounds 1 and 5 of the appellant’s grounds of appeal as contained in their brief of argument, which grounds have been set out in extenso in the lead judgment.

I have read the said grounds 1 and 5 of the grounds of the appeal. I agree with the reasoning in the lead judgment of my learned brother that the objection is sustainable; and should be sustained as the two grounds are of mixed law and facts; and that the 1st and 5<sup>th</sup> grounds of appeal having been filed in contravention of the provisions of Section 233(2) (a) of the 1999 Constitution are incompetent



as the necessary pre-condition, that is, the leave of the court or of this court which ought to have been sought and obtained before filing them for their competency has not been complied with. The right of appeal being statutory the said grounds are not therefore, sustainable grounds of appeal. And so the said 1st and 5th grounds of appeal are hereby struck out. See: Ifediorah v. Ume (1988) 2 NWLR (Pt.74) 5, Obijuru v. Ozims (1985) 2 NWLR (Pt.6) 167. Metal Construction W/A Ltd. V. Migliore (1990) 1 NWLR (Pt.126) 297 at 311. B

Sequel to the foregoing findings, issues 1 and 4 raised from grounds 1 and 5 respectively are also incompetent and should be struck out as they cannot stand on nothing as every competent issue for determination must emanate from one or more grounds of appeal. See: Oje v. Babalola (1991) 4 NWLR (Pt.185) 267 at 276 also withdrawal, see Chime v. Chime (1995) 6 NWLR (Pt.404) 734, Obasi v. Onwuka (1987) 3 NWLR (Pt.61) 364, Attorney-General of Bendel State v. Aideyan (1989) 4 NWLR (Pt.118) 646 and Durugo v. The State (1902) 7 NWLR (Pt.255) 525. C

The necessary corollary to the above reasoning and findings is that the arguments and/or submissions of the appellant in his brief of argument anchored on issue one and four are incompetent and having been discountenanced should be struck out and I so hold. See: Niger Construction Ltd. V. Okugbeni (1989) 4 NWLR (Pt.67) 787. D

This leaves for determination of issues 2 and 3. With regard to issue two i.e. whether the lower court rightly has rejected the plaintiff's case on the sole reason of not being fair to the learned trial judge; to my mind respectfully the issue is totally misplaced. The lower court's obiter observation as I have found has to be seen for what it really represents and to highlight my point that it is an obiter dicta, firstly, I quote the relevant portion of the lower court's judgment as follows: E

*"Much as I concede to learned Senior Advocate of his traditional sentiments to the case of his client, I expect him to recognize the finding of the learned Trial Judge that the appellant failed to show any contemporary event to land support to his traditional evidence of ownership of the land in dispute. Curiously learned counsel played down on the important finding and played up the so-called finding on demeanor and credibility of the witnesses. He is not fair to the F*

*learned judge. He have a duty to be fair to the learned trial judge and the only way to be fair to him is to reject the contention of the learned senior advocate on the issue. And I so reject it.*" (underlining mine for emphasis).

The above quote is plain, unequivocal and not ambiguous.  
 B It cannot in the circumstances be put any higher than the lower court's expression of its mind on the question of the appellant's approach to his case. And incidentally the Learned Senior Counsel for the appellant in his submission on this issue has seen the above quote for what  
 C it is by contending that instead of the lower court considering the evaluation of the two versions of the traditional histories as having arisen as an issue to be resolved as per the briefs of the parties has launched itself into taking issues with appellant's counsel on his approach to the case, and so that the appellant's counsel hasn't been  
 D fair to the trial judge. He has referred to the case of *Onwe v. Oke* (2001) 3 NWLR (Pt.700) 400 again to contend that the appellate court having failed in its duty to consider the issues raised before it for adjudication has occasioned a miscarriage of justice. To put it in the appellant's own words as per his brief of argument at paragraph 43  
 E of page 12 and I quote:

*"The above decision is perverse because the lower court failed to consider the plaintiff's case because of its disgust with the approach of his Counsel to the appeal. The lower court was angry because  
 F plaintiff's Counsel was not fair to the Learned Trial Judge and the Court had a duty to be fair to the judge. And the only way to be fair to the learned Trial Judge was to reject the contention of plaintiff's Counsel 'and I so reject it'"*

At paragraph 45 at page 13 the appellant observation has come out  
 G more clearly when he submitted:

*"It is obvious from the above quotation in the judgment that the Lower Court left the case of the plaintiff and took issues with plaintiff's Counsel's approach to the case. And being dissatisfied with the way plaintiff's Counsel argued his case it vented its spleen on the  
 H plaintiff and refused to consider plaintiff's case on the merits."*

I have thus by the above extracts positioned the crux of the contention arising under issue two and it has been clearly showed that the lower court's comment as captured under issue two is an obiter dicta notwithstanding concluding it thus: *"And I so reject it"*,

and so cannot be a point appealable in the circumstances. This is even moreso as it is not a finding on the re-evaluation of the evidence of the parties' traditional histories nor even then has it arisen from the invocation of the principle as established in *Kojo II v. Bonsie & Anor.* (1957) 1 WLR 1233 or on the principles of proving title to land as per the case of *Idundun & Ors. v. Okumagba & Ors.* (1976) NSCC (vol.10) 445. From the appellant's own showing as per the above extracts from his brief of argument the comment appears to have nothing to do with the issue before the court for adjudication. The appellant's contention as it stands has showed that the lower court's observation on his approach to the plaintiff's case is simply collateral to its (lower court's) upholding the trial court's finding on the traditional evidence of the parties and so at best an obiter dicta, in as much as it is no more than a comment made in passing by the lower court while deliberating on the question that the appellant has not given as much attention to the absence of any contemporary events in support of the plaintiff's traditional evidence. What I have tried to show here is that the comment is not necessary for the decision arrived at by the lower court. See: *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt.660) 228 at 247.

It is my conclusion that the obiter observation has not been directly upon the question before the lower court and upon which the lower court has decided; and so not an appealable point. It, that is, issue two is totally misconceived.

As the issue on Section 46 of the Evidence Act has been comprehensively dealt with in the lead judgment I say no more on it.

For the above reasons and a much fuller reason contained in the lead judgment of my learned brother Rhodes-Vivour JSC, I agree with him that there is no merit in this appeal and that it should be dismissed. I also dismiss it and endorse the orders contained therein.

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### **ADEKEYE JSC**

I had read in draft the leading judgment of my Learned Brother Olabode Rhodes-Vivour JSC. The Respondents raised a preliminary objection that grounds I and 5 of the grounds of appeal from which Issues one and four for determination in this appeal were distilled, are incompetent and they must consequently be struck out.

The ground for the objection, is that both grounds I and 5 are grounds of mixed law and fact for which leave of this court is required to sustain an appeal on them.

The appellant failed to obtain the requisite leave. The court agrees with this objection. Since the issue of obtaining leave in such  
B circumstance is a condition precedent to adjudication first and foremost, before an appellant can exercise a right of appeal, this court is not competent to consider issues one and four of the issues for determination in the appellant's brief; they are hereby struck out. The  
C appeal shall be heard on issues 2, 3 and 4 as formulated by the appellant in the appellant's brief.

My Learned Brother had meticulously considered these two issues in the leading judgment; I only wish to pass a few remarks by way of emphasis. This case had come a long way as it was commenced at the High Court of Onitsha in 1972 where judgment was  
D delivered in 1980. The Court of Appeal in the former Eastern State ordered a retrial of the case in 1984. The case went back to the trial court and another judgment was delivered in November 1994. The appeal against the judgment went to the Court of Appeal, Enugu.  
E The judgment of the lower court was delivered on 14/4/99. This appeal now before this court is against that judgment.

The claim of the plaintiff/appellant in the amended statement of claim are:-

F 1) Declaration of title to all that piece or parcel of land situate at Obofia, Nnewichi, Nnewi, within the jurisdiction and more particularly delineated and verged pink in the survey plan No. EC/122/72 filed with this statement claim.

G 2) N100 damages for wanton acts of trespass committed by the defendants on the said land.

3) Injunction to restrain the defendants, their servants, agents and privies from further entry on the said land.

H The gravamen of this case is the resolution of the conflict in the traditional evidence of the parties as to whether the defendants now respondents, are direct descendants of Dala Onyeogu like the plaintiffs now appellants in this court.

Facts of the case were based on traditional history, Acts of long possession and section 46 of the Evidence Act - ownership of the land in dispute, as well as adjoining or contiguous lands, eloquently pleaded

by the plaintiff/appellant and witnesses testified on them. The plaintiff/ appellant contended that Dala Onyeogu, the undisputed ancestor of both parties had two wives, three sons and a daughter, Mgbafor Nnuaku - the defendants are the descendants of this daughter who married away from the family enclave but later returned with her children after the death of her husband and was settled into the family. B

It was the defendants/respondents' case however that Dala Onyeogu had three wives and four sons and no daughter. The defendants/respondents were direct descendants of the fourth son of Dala Onyeogu - Ezeogado. C

The learned trial judge rejected the plaintiff's version of traditional history, and further dismissed the evidence relating to acts of ownership and possession. The trial court held that the land in dispute devolved on the respondents' share of the lands of Dala Onyeogu. The court made specific findings on the credibility of the appellant based on traditional evidence before arriving at the conclusion that it was incredible. It is also when the court cannot find either of the two histories conclusive that it would proceed to declare both inconclusive and decide the case on the basis of numerous and positive acts of possession and ownership. The court found the traditional history of the defendants credible and relied on it. There is no doubt about it from the evidence before the court that parties inherited the land from a common ancestor, and the land belongs to both parties as a common heritage. Where an individual or a group claims exclusive ownership of land as against a community's claim, or is trying to dispossess a group of their claim, the onus is on the party or individual to prove exclusive ownership, E F

Olisa v. Asojo (2002) 1 NWLR pt. 747 pg. 13 Akanbi v. Raji G (1998) 12 NWLR pt. 578 pg.360 Shomefun v. Shade (1999) 12 NWLR pt. 632 pg. 531

Generally speaking, in a claim for declaration of title to land, the onus is on the plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the defendant. H

The plaintiff must therefore satisfy the court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought.

Gbadamosi v. Dairo (2007) 3 NWLR pt. 1021 pg. 282 Dada

v. Dosunmu (2006) 18 NWLR Pt. 1010 Pg. 134 Onissaodu v. Elewaju (2006) 13 NWLR pt. 998 pg. 517 Ajiboye v. Ishola (2006) 13 NWLR Pt. 998 Pg. 628

Where the plaintiff and the defendant anchor their case on traditional evidence in proving ownership of the land in dispute, the duty of the trial court in the circumstances is to weigh their evidence on the imaginary scale and determine which of the two is weightier.

Mogaji v. Odofin 1978 4 SC 91

Odofin v. Ayoola 1984 11 SC 32

Ibikunle v. Lawani (2007) 3 NWLR pt. 1022, Pg. 580

Okoko v. Dakolo (2006) 14 NWLR pt. 1000, pg. 401.

The learned trial judge performed this duty in respect of the traditional evidence led by the parties before the trial court, and the Court of Appeal saw no reason to disturb the findings of the trial court. There are five distinct ways of proving title to or ownership of land, and establishment of one of the five ways is sufficient proof of ownership. Where a claimant for title to land who pleads traditional history fails to prove his root of title by that means, he cannot turn round to rely on acts of ownership and possession to prove his title to the land.

As a matter of course, there would be nothing on which to found acts of ownership. In such a case, the court is obliged to dismiss the claimant's claim.

The lower court found the case of the appellants insupportable by upholding the various findings made by the trial court to that effect. The lower court did not make its findings for the reason of being fair to the learned trial judge. I must add that the appellant totally misconstrued the decision of the lower court and took the entire remarks in the lead judgment out of context. The Court of Appeal did not assume the position to be fair to the learned trial judge, while rejecting the plaintiff's case on the ground that the plaintiff's counsel was not fair to the learned trial judge. The lower court's remarks about the unnecessary attack by the learned Senior Advocate on the learned trial judge in the judgment, amounts to an obiter dictum which cannot form the basis for ground of appeal.

An obiter dictum is a statement made in passing which does not reflect the ratio decidendi, that is the reasoning or ground upon which a case is decided. An appeal is usually against a ratio decidendi

and generally not against an obiter.

U.T.C Nigeria Limited v. Pamotei (1989) 2 NWLR pt. 103 pg. 244 Saude v. Abdullahi (1989) 4 NWLR pt. 116 pg. 387 Ede v. Omeke (1992) 5 NWLR pt. 242 pg. 428 Dakar v. Dapal (1998) 10 NWLR pt. 571, pg. 573 Abacha v. Fawehinmi (2000) 6 NWLR pt. 571 pg. 573 B

As rightly observed, Section 46 of the Evidence Act raises a mere probability and not a presumption of ownership.

Where the appellant could not establish ownership by traditional evidence, the court cannot go ahead to rely solely on Section 46 of the Evidence Act to grant a declaration of title to the appellant. C

Finally, there are two concurrent findings of fact of the trial court and lower court in favour of the respondents. This court will not disturb such concurrent findings of fact - unless there is established a miscarriage of justice or violation of some principles of law or procedure or a substantial error apparent on the face of the record of proceedings as shown or where such findings are perverse. D

*Woluchem v. Gudi (1981) 5 SC 91*

*Mogaji v. Cadbury (1985) 2 NWLR pt. 7 pg. 343*

*Ayoola v. Odofoin (1984) 11 SC 72*

*Abusemwan v. Mercantile Bank of Nig. Ltd. (2002) (1987) 3 NWLR pt. 60 page. 196* E

*Layinka v. Makinde (2002) 10 NWLR pt. 775 pg. 358*

With fuller reasons given by my learned brother in the lead judgment, I also dismiss this appeal, and affirm the judgment of the Lower Court. I abide by the order as to costs. F

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### **GALADIMA JSC**

This case has a chequered history. I shall not bother myself to set in details all the facts of the case. They have been sufficiently exposed in the lead judgment of my Learned Brother RHODES-VIVOUR, JSC just delivered. In 1972, the Appellant as plaintiff filed their case at the Onitsha High Court of Anambra State for declaration of title to a parcel of land situate at Obiofia Nnewichi, Nnewi and £100 as damages for trespass. H

After all the preliminaries and settling of pleadings by the parties, witnesses testified and thereafter Uyanna J. on 14<sup>th</sup> July, 1980

found for the plaintiffs. On appeal, the Court of Appeal allowed the appeal and ordered a retrial which resulted in plaintiff's claim for declaration of title to the disputed land being dismissed. Aggrieved the plaintiffs again appealed against the decision of the High Court. The Court of appeal Enugu dismissed the appeal, hence the present appeal to this Court. From the 5 (five) grounds of appeal, 4 issues were formulated thus:

*“(i). Was there real conflict of traditional evidence found from this case to warrant the invocation of the principle laid down in Kojo II vs. Bonsie (1957) 1 WLR 1223*

*(ii). Was the Court of Appeal right in rejecting the plaintiff's case for the sole reason of being fair to the Learned Trial Judge.*

*(iii). Was the Court of Appeal right in resolving the issue on the applicability of Section 46 of the Evidence Act for the adjourning lands to the land in dispute belonged to Ezeagade that the requirements of the said Section were satisfied.*

*(iv). Was the Court of appeal right in law when it failed to consider the issue of the dismissal of the plaintiff's case by the Learned Trial Judge which was properly raised by the plaintiff.”*

The Respondents have adopted the four issues raised by the appellants for the determination of the appeal. Learned Counsel argued extensively in the Respondents' brief, the preliminary objection. He observed that grounds 1 and 5 of the Court of Appeal are grounds of mixed law and facts, contending that both grounds are incompetent because leave of the Court of Appeal or this Court was not obtained before they were filed. I have carefully gone through the grounds. They are of mixed law and fact requiring leave of this Court as provided by S.233 (2) of the 1999 constitution. In the absence of such leave, these grounds are incompetent and are struck out. Issued 1 and 4 having been formulated from grounds 1 and 5 respectively are accordingly struck out.

Issues 2 formulated from grounds 2 and 3 and issue 3 from ground 4 are competent. My learned brother in his lead judgment has closely examined the two issues and rightly concluded that they are of no moment and correctly came to the conclusion that this appeal lacks merit and must be dismissed. I agree with him entirely and I do not also make order as to costs.