

SUPREME COURT OF NIGERIA

11TH JUNE, 2010 SC. 296/2003

**CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN, F. F.
TABAI, I. T. MUHAMMAD, O. O. ADEKEYE, JJSC**

1. PETER OKONKWO
2. VINCENT OKAFOR
3. NWOYE OKEKE APPELLANTS
4. CHIEF OGBOGU OSUINYI
5. CLEMENT ENEDAH

(For themselves and as representing
Oramideke in Idemili Local Government Area)

AND

1. BERNARD OKONKWO
2. PIUS OKOYE
3. GABRIEL OKEKE RESPONDENTS
4. OKAFOR OMENU
5. CLEMENT OKOYE
6. LAWRENCE OKOYE

(For themselves and on behalf of
members of Ire Village in Umuoji
Town in Idemili Local Government Area)

EVIDENCE - Evaluation - Trial court - Duty of - Trial court enjoys the singular benefit - Of evaluating evidence - And appellate court can not interfere with findings - Except where same do not march with evidence or record (H1)

EVIDENCE - Records - Evaluation of - Propriety - Where trial court properly evaluated evidence - On record as in this case - Appellate court need not interfere with concurrent findings (H2)

FACTS

The plaintiffs/respondents instituted an action at Onitsha High Court, Anambra State, claiming against defendants/appellants jointly and severally, for a declaration that they are entitled to the grant of customary right of occupancy in respect of a piece or parcel of land known as and called "Mkpu Ocha Owelle Ire" which is situate at Ire

village, Umuoji in Idemili Local Government Area, Anambra State. Respondents also sought for other sundry reliefs. At the trial, both parties based their evidence in support of the claim and defence on traditional history. Parties called witnesses in support of their case and exhibits 'A', 'B' and 'D' were tendered. The learned trial judge in his considered judgment preferred the traditional evidence of respondents and gave judgment in their favour. Dissatisfied, appellants proceeded on appeal to the Court of Appeal which unanimously dismissed the appeal.

Appellants have come on a further and final appeal to the Supreme Court. They argued that since respondents' case was built on traditional history, judgment of trial court was not founded on traditional evidence and their case ought to have been dismissed. Also that respondents tendered unregistered survey plan Exhibit 'B' which being inadmissible ought to have been expunged. Finally, that respondents gave contradicting evidence at the trial court, which court ipso facto lacks jurisdiction to entertain the suit. However, respondents submitted that trial court adequately considered evidence adduced before it, in giving decision, appellants having failed to discredit same. And that the concurrent findings of the two courts below cannot be interfered with, unless they are shown to be perverse.

ISSUE FOR DETERMINATION

1. Whether the concurrent findings of facts by the two courts below, are supported by the evidence on record.

HELD (Unanimously dismissing the appeal per **TABAI JSC**)

EVIDENCE - Evaluation - Trial court - Duty of

1. The evaluation of evidence is pre-eminently the duty of the trial court which alone has the singular benefit of seeing and hearing witnesses.

An appellate court which does not enjoy this singular opportunity of seeing and hearing witness, would not therefore ordinarily interfere with findings of facts of the trial court. An appellate court will therefore only interfere with findings of fact of the trial court, if it is established that the findings are not supported by the totality of evidence on record. The principle has been pronounced upon and applied in numerous cases.

This principle of non-interference with findings of a trial court by an

appellate court is even more stringently applied when the findings are based on credibility or veracity of witnesses. (p. 3277 C)

EVIDENCE - Records - Evaluation of - Propriety

2. I examined the evidence of the parties, the address of their counsel and the judgment of the learned trial judge G. U. Ononiba, C. J., especially from page 146 to page 155 and I am satisfied that he thoroughly evaluated the evidence on record. I cannot therefore fault the finding by the court below to the effect that the trial court properly evaluated the evidence. The Appellants did not point out a single finding of fact that is not supported by the evidence on record. There is nothing to impeach the concurrent findings of the two courts below and this court has therefore no duty whatsoever to interfere with the decision of the two courts below.

In the circumstances, I have no alternative but to affirm the concurrent decisions of the two courts below. In the event, I hold that there is no merit in the appeal which is accordingly dismissed.
(p. 3278 D)

NOTABLE POINT OF INTEREST

ADEKEYE JSC

1. In a declaratory action plaintiff must always prove his case.

It is also pertinent that in a declaratory action, the Plaintiff must prove his case, not minding any admissions or default or pleading by the Defendant. Going by the record in the judgment of the trial court, the learned trial judge in applying the necessary law to the traditional history of the parties, referred to the case of *Obioha v. Duro* (1994) 10 SCNJ and particularly attempted to invoke the principle in *Kojo v. Bonsie* (1957) 1 WLR 1223. As observed by the lower court, the learned trial judge did not actually invoke or rely on the principle, in resolving the conflict in the traditional history of the parties. He failed to put the traditional history/evidence of both parties under any imaginary scale, whereas the learned trial judge claimed that he did.
(p. 3286 A)

REPRESENTATION

A. M. Aliyu, (with him; C. Ubogu, Audu Sani, Salisu Umar, S. O. Alhassan), for the Appellants.

Chief J. B. Daudu, SAN., (with him; C. Maberama) for the Respondents.

CASES REFERRED TO

- Alao v. Akano (1988) 1 NWLR (Pt. 71) 431
- B Salati v. Shehu (1986) 1 NWLR (Pt. 15) 198
- Okonji v. State (1987) 2 NWLR (Pt. 53) 659
- Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360
- Emenimeya v. Okorji (1987) 3 NWLR (Pt. 59) 6
- C Abisi v. Ekwealor (1993) 6 NWLR (Pt. 302) 643
- Elah v. Anyadike (1999) 5 NWLR (Pt. 603) 454
- Omobu v. Anekwe (1997) 5 NWLR (Pt. 506) 618
- Eholor v. Osayande (1992) 6 NWLR (Pt. 249) 524
- Chukwu v. Nneji (1990) 6 NWLR (Pt. 156) 363 at 375
- D Agwuna v. A-G Federation (1995) 5 NWLR (Pt. 396) 418
- Gov. of Oyo State v. Folayan (1995) 8 NWLR (Pt. 413) 292
- Oloba v. Akereja (1988) 7 S. C. (P. I) 1; (1988) 3 NWLR (Pt. 84) 508
- Funduk Engineering Ltd. v. McArthur (1995) 4 NWLR (Pt. 392) 640
- Akeredolu v. Akinremi (1989) 5 S.C. 102; (1989) 3 NWLR (Pt. 108)
- E 164

STATUTES REFERRED TO

- Evidence Act, 1990, s. 91 (3)
- Land Use Act, 1978, s. 39 (1), s. 41
- F Constitution of Federal Republic of Nigeria 1979, s. 236 (1) now s. 272 (1) of 1999
- Customary Court Law No. 6 1984, s. 12 (1)

LEAD JUDGMENT BY TABAI JSC

- G This Action was commenced at the Onitsha judicial division of the High Court of Anambra State by a writ of summons dated the 26th of April, 1989 and filed on 2nd of May, 1989. The Plaintiffs were the Respondents at the court below and also the Respondents
- H herein. The Appellants who were also the Appellants at the court below were the Defendants. In paragraph 36 of the amended statement of claim, the Plaintiffs/Respondents claimed against the Defendants/ Appellants as follows:-

1. A declaration that the Plaintiffs are entitled to the grant of

Customary Right of Occupancy in respect of the piece or parcel of land known as and called “Nkpu Ocha Owelle land” which is situate in Ire village Umuoji, the annual rental value of which is about N50.00 (Fifty Naira) only.

2. N2,000.00 (Two Thousand Naira) only, general damages for trespass on the said land. B

3. Perpetual injunction restraining the Defendants, their servants, agents, privies or workers from committing any further acts on the said Plaintiffs Nkpu Ocha Owelle Ire land.

The trial invoked the testimony of four witnesses for the Plaintiffs’ case and three witnesses for the Defendants’ case. In his Judgment on the 27th day of July, 2000, C. U. Ononiba, C.J., granted the claim in its entirety. C

Dissatisfied, the Defendants proceeded on appeal to the Court of Appeal. In its unanimous judgment on the 24th of July, 2003 the appeal was dismissed. D

They are still not satisfied and have therefore come on Appeal to this court.

The parties have through their counsel filed and exchanged their briefs of argument. The Appellants’ brief was prepared by C. O. Anah and it was filed on the 5th of December, 2006. And the Appellants’ reply brief was prepared by G. C. Igbokwe. The brief of the Respondents was prepared by Chief M. O. C. Okoye and it was filed on the 9th October, 2007. E

In the Appellants’ Brief, Mr. C. O. Anah formulated the following four Issues for Determination: F

1. Whether from the Judgment of the High Court it was right for the Court of Appeal to say that the Plaintiffs/Respondents proved their case on their traditional history upon which they solidly based their case? G

2. Whether or not Exhibit “B” the survey plan of the Plaintiffs/Respondents was properly admitted having not been registered at the time it was supposed to and in view of section 91 (3) of the Evidence Act, 1990. If not properly admitted what is its effect in law and on the Judgment. H

3. Whether the contradictions both in the plan and evidence of the Plaintiffs/Respondents were not enough for their case to be dismissed.

4. Whether or not the Court of Appeal having inadvertently struck out an issue on the group that it was not based on any ground of appeal could then turn round to write a judgment based on the fact that there was such a ground of appeal. And if the answer is in the affirmative was the Court of Appeal right in its view that the High Court had Jurisdiction to entertain and determine this case.

In the Respondents' brief however, Chief M. O. C. Okoye (formulated a single issue for determination. The issue is whether the Court of Appeal was not right to hold that the trial adequately considered the evidence and drew proper inferences and conclusions, the Defendants/Appellants having fail to discredit any particular piece of evidence by the Respondent on any of the five factors posited by *Mogaji v. Odojin* (1978) 4 SC 91 at 94-95; (1978) 4 SC. (Reprint) 53 at 65.

In the alternative to this single Issue, he formulated another issue which is whether having regard to the concurrent findings of facts by the two courts below, the Appellants have shown such special circumstances of perverse findings to warrant interference by Supreme Court?

In my consideration the whole appeal revolves round the single question of proper evaluation under which all other question of the admissibility of Exhibit 'B' and the effect of the contradictions can be adequately accommodated. I would therefore adopt the Appellants' 1st issue and the Respondents' only issue as the issue that effectually determines the appeal.

The single question is whether the concurrent findings of facts by the two courts below, are supported by the evidence on record.

It was the submission of learned counsel for the Appellants that since the Appellants'/Respondents' case was built on traditional history and the judgment of the trial court was not founded on traditional evidence their case ought to have been and should be dismissed. It was further argued that the evidence especially that of their star witness P.W.2 was one within his living memory and therefore that the principle in *Kojo v. Bonsie* did not apply. Since the case of the Respondents was based on traditional history they cannot switch over to evidence of recent memories, counsel argued.

With respect to Exhibit 'B' it was the submission of learned counsel for the Appellants that the document ought to have been

registered and that same not having been registered it was inadmissible and ought to have been expunged. It was further contended that the use of the document adversely affected the Appellants and thereby occasioned a Miscarriage of Justice.

On alleged contradictions in the case of the Plaintiffs/ Respondents, learned counsel for the Appellants referred to Exhibits 'A', 'B' and 'D' all plans made by the Respondents and contended that they established the contradictions in their case as to the identity and extent of the land in dispute. It was specifically pointed out that Exhibit 'D' though made by the Respondents was tendered in evidence by the Appellants to contradict their case.

Still on contradictions, it was the contention of learned counsel for the Appellants that all the evidence for the Respondents about a 1934 war and the boundary altered or expanded were a contradiction to their case founded on traditional history.

With respect to issue one of the issues formulated before the court below, learned counsel for the Appellants launched a two-pronged attack on the judgment.

He argued firstly that there was a ground of appeal from which the said issue one was distilled and it was wrong therefore for the court below at Page 233 to strike out the said issue for incompetence.

It was counsel's further argument that having struck out the issue for incompetence, the court was 'functus officio' and it was therefore wrong for the court to deliberate upon and resolve the issue in its judgment.

Learned counsel again referred to the fact about the commencement of the action at the Onitsha High Court of Anambra State in 1989 and the fact that the land in dispute is situated in Umuoji in Idemili Local Government Area of Anambra State, a non-urban area, and submitted that by virtue of the state of the law at that time as decided in *Salati v. Shehu* (1986) 1 NWLR (Pt. 15) 198; *Sadikwu v. Dolori* (1996) 5 NWLR (Pt. 447) 151; *Oyeniran v. Egbotola* (1987) 5 NWLR (Pt. 504) 122 and *Nelson v. Eftanga* (1998) 8 NWLR (Pt. 563) 701, the Onitsha High Court had no jurisdiction to entertain the suit, the later position of the law as decided in *Adisa v. Oyinwola* (2000) 6 S.C. (Pt. II) 47, notwithstanding. Learned counsel submitted that a court which had no jurisdiction in 1989 cannot turn round to acquire jurisdiction in October, 2000 when the trial High Court

delivered its Judgment. For these submissions Counsel relied on *Alao v. Akano* (1988) 1 NWLR (Pt. 71) 431 and *Emenimeya v. Okorji* (1987) 3 NWLR (Pt. 59) 6.

The substance of the arguments of Chief M. O. C. Okoye in the Respondents' brief is as follows: On the question of evaluation it was the submission of learned counsel that the Court of Appeal was right in holding that the trial court adequately considered the evidence adduced and drew proper references and conclusions, the Appellants having failed to discredit any particular evidence of the Respondents on any of the five factors enunciated in *Mogaji v. Odofin* (1978) 4 S.C. 91 at 94-95; (1978) 4 S.C. (Reprint) 53 at 65. Learned counsel quoted copiously from the Judgment of the Court of Appeal and submitted that the findings are supported by the evidence on record. It was further submitted that the findings, being the concurrent findings of the two courts below, cannot be interfered with by this court unless it is shown that they are perverse. This perversity, counsel contended, the Appellants have failed to establish. For this submission, learned counsel relied on *Alhaji Abdulkadir Dan Mainagge v. Alhaji Abdulkadir Ishaku Gwamna* (2004) 7 SC (pt. II) 86 at 95-96 and *Durosaro v. Ayorinde* (2005) 3-4 SC 14; (2005) 8 NWLR (Pt. 927) 407. Learned counsel urged finally that the appeal be dismissed.

In the Appellants' reply brief, G. C. Igbokwe argued firstly that the issues formulated by the Respondents were not based on the grounds of appeal and were therefore incompetent and urged that they should be struck out. For this submission he relied on *Patrick D. Magit v. University of Agriculture Makurdi* (2005) 12 S.C. (Pt. 1) 122; (2006) 4 WRN 86; *Adah v. Adah* (2001) 2 SC 1; (2001) WRN 74; *Achai Kokoro-Owo v. Lagos State Government* (2001) 5 S.C. (Pt. II) 50; (2001) 24 WRN 61 and *A. M. Adeleke v. Alhaia Raji* (2002) 6 SC (pt. II) 126; (2003) 2 WRN 43. Learned counsel submitted further that the principles in *Mogaji v. Odofin* (1978) 4 SC 91 at 94-95; (1978) 4 SC (Reprint) 53 at 65, do not apply to this case.

It was further contended that since both parties relied on aspects of traditional history within living memory, the principle in *Kojo II v. Bonsie* (supra) does not apply.

Learned counsel referred to the statement of the court below at Page 253 and argued that the mere assertion of the court's prefer-

ence of the Respondents' traditional evidence to that of the Appellants was no evidence of proper evaluation. In support of this submission, Learned counsel cited Chukwu v. Nneji (1990) 6 NWLR (Pt. 156) 363 at 375 and Ezennah v. Atta (2004) 2 SC (Pt. II) 75; (2004) 17 WRN 33 at 34. It was finally urged that the appeal be allowed.

The foregoing represents the substance of the arguments of the counsel for the parties. As I indicated earlier on in this judgment, the entire case revolves round the Issue of whether or not there was proper evaluation. In other words, the single question is whether the judgment of the trial court and affirmed by the court below is supported by the totality of evidence on record? The Respondents answered this question in the affirmative.

The evaluation of evidence is pre-eminently the duty of the trial court which alone has the singular benefit of seeing and hearing witnesses.

An appellate court which does not enjoy this singular opportunity of seeing and hearing witness would not therefore ordinarily interfere with findings of facts of the trial court. An appellate court will therefore only interfere with findings of fact of the trial court if it is established that the findings are not supported by the totality of Evidence on Record. The principle has been pronounced upon and applied in numerous cases. See *Obodo v. Ogba* (1987) 2 NWLR (Pt. 54) 1; *Ogbechie v. Onochie* (1988) 1 NWLR (Pt. 70) 370; *Nnaji for v. Uranu* (1985) 2 NWLR (Pt. 9) 686. ***This principle of non-interference with findings of a trial court by an appellate court is even more stringently applied when the findings are based on credibility or veracity of witnesses.*** See: *Okonji v. State* (1987) 2 NWLR (Pt. 53) 659; *Onuoha v. State* (1989) 2 SC (Pt. II) 115; (1989) 2 NWLR (Pt. 101) 23. On this issue the statement of Akintan, JSC., (as he then was) in *Alhaji Abdulkadir Dan Mainagge v. Alhaji Abdulkadir Ishaku Gwamna* (2004) 7 SC (Pt. II) 80, relied upon by the Respondents is quite apposite. This court, per Akintan, JSC., (as he then was) at Page 97 stated:

“As already stated above the trial court accepted the evidence presented by the Plaintiff (now Respondent) at the trial. The Court of Appeal also did the same. The law is settled that evaluation of evidence is primarily the function of the trial judge. Interference by an

Appellate Court could only occur where and when he fails to evaluate such evidence at all or he fails to do so properly. Where therefore the court has satisfactorily performed its primary function of evaluating the evidence and correctly ascribing probative value to it, an appellate court has no business interfering with its finding on such evidence, see *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643; *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) 360; *Obodo v. Ogba* (1987) 2 NWLR (Pt. 54) 1. Similarly the Supreme Court will not ordinarily disturb concurrent findings of fact made by the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when such findings are perverse.....”

As I said, the above statement is apposite to the facts and circumstances of this case and I think I should adopt same in its entirety.

I examined the evidence of the parties, the address of their counsel and the judgment of the learned trial judge G. U. Ononiba, C.J., especially from page 146 to page 155 and I am satisfied that he thoroughly evaluated the evidence on record. I cannot therefore fault the finding by the court below to the effect that the trial court properly evaluated the evidence. The Appellants did not point out a single finding of fact that is not supported by the evidence on record. There is nothing to impeach the concurrent findings of the two courts below and this court has therefore no duty whatsoever to interfere with the decision of the two courts below.

In the circumstances, I have no alternative but to affirm the concurrent decisions of the two courts below. In the event, I hold that there is no merit in the appeal which is accordingly dismissed.

I assess the costs of this appeal at N50, 000.00 (Fifty Thousand Naira) only against the Appellants in favour of the Respondents.

H

MUSDAPHER JSC

I have read before now the judgment of my Lord, Tabai, JSC., just delivered in this matter with which I entirely agree. I have nothing more to add other than that I too, find the appeal unmeritorious

and I accordingly dismiss it. I abide by the order for costs contained in the aforesaid leading judgment.

ONNOGHEN JSC

I have had the opportunity of reading in draft, the leading judgment of my learned brother, Tabai, JSC., just delivered. B

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

I also abide by the consequential orders made in the said judgment including the order as to costs. C

MUHAMMAD JSC

I have had the privilege of reading the judgment of my learned brother, Tabai, JSC. I agree with him that the appeal lacks merit and it should be dismissed. I hereby dismiss the appeal. I abide by the consequential orders made in the leading judgment including order as to costs. E

ADEKEYE JSC

I had a preview of the judgment just delivered by my learned brother, F. F. Tabai, JSC. This is an appeal against the judgment of the Court of Appeal, Port Harcourt delivered on the 24th day of July, 2003. The brief facts of the case are that the Plaintiffs who are now Respondents before this court instituted an action in a representative capacity for themselves and on behalf of the Oramadike family of Ogidiani, Etiti Ogidi in Idemili Local Government Area at the Onitsha High Court in Suit No. O/103/89 claiming against the Defendants now Appellants for themselves and on behalf of members of Ire Village in Umuoji Town in Idemili Local Government Area jointly and severally as follows - F

(1) A declaration that the Plaintiffs are entitled to the grant of a Customary Right of Occupancy in respect of a piece or parcel of land known as and called “Mkpu Ocha Owelle Ire” which is situate in Ire Village, Umuoji, the annual rental value of which is about N50.00 H

(2) N2,000 general damages for trespass on the said land.

(3) Perpetual injunction restraining the Defendants, their servants, agents, privies or workers from committing any further acts of trespass on the said Plaintiffs' "Mkpu Ocha Owelle Ire" land.

Both parties based their evidence in support of the claim and defence on traditional history.

B The learned trial judge in his considered judgment preferred the traditional evidence of the Plaintiffs to that of the Defendants and consequently gave judgment to the Plaintiffs. The Defendants were dissatisfied with the judgment and appealed to the Court of Appeal, Port Harcourt Division.

C In the penultimate paragraph of the judgment delivered on the 24th of July, 2003, the court held as follows -

"In the final analysis, this appeal fails on all issues canvassed including the one imposed by the operation of law. In the sequel, the decision of Ononiba, J., of the Onitsha Judicial Division of the Anambra State High Court delivered on 27/7/2000 is affirmed and I dismiss the Appeal. I award N5000 costs against the Appellants jointly and severally. Appeal dismissed."

E The Appellants have now further appealed to this court. The Appellants distilled four issues for determination as follows-

(1) The first issue for determination is whether from the Judgment of the High Court it was right for the Court of Appeal to say that the Plaintiffs/Respondents proved their case on their traditional history upon which they solidly based their case.

(2) The 2nd issue for determination is whether or not Exhibit "B" the survey plan of the Plaintiffs/Respondents was properly admitted having not been registered at the time it was supposed to and in view of Section 91(3) of the Evidence Act, 1990 and if it was not properly admitted what is its effect on the Judgment.

(3) The 3rd issue for determination is on the contradictions both in the plan and evidence of the Plaintiffs/Respondents and whether those contradictions were not enough for their case to be dismissed.

(4) The fourth issue for determination is whether or not the Court of Appeal having inadvertently struck out an issue on the basis that it was not based on any ground of appeal could then turn round to write a Judgment based on the fact that there was such a ground

of appeal. And if the answer is in the affirmative, was the Court of Appeal right in its view that the High Court had Jurisdiction to entertain and determine this case.

The Respondents settled two questions for the determination of this court in this Appeal.

(1) Is the Court of Appeal not right to hold that in the circumstances of the case that the trial court adequately considered the evidence adduced and drew the proper inference and conclusions, the Appellants having failed to discredit any particular piece of evidence by the Respondent on any of the five factors posited in *Mogaji v. Odofin* (1978) 4 S.C. 91 at 94 - 95; (1974) 4 S.C. (Reprint) 53.

Alternatively

Having regard to the issue of findings of facts by the (2) lower courts, whether the Appellants have shown that those findings were perverse, moreso special circumstances shown to that effect for them to succeed and for the Supreme Court to intervene.

The Appellants' learned counsel was fast to observe that the issues settled for the determination of this court by the Respondents in the main, and in the alternative are not distilled from the Appellants' ground of appeal.

The first issue raised by the Respondent challenged the assessment of the findings of fact of the learned trial judge by the lower court as to whether they are in line with the five factors enunciated in the case of *Mogaji v. Odofin* (1978) 4 SC 91; (1978) 4 SC (Reprint) 53. In the alternative, whether the Appellants have shown that the concurrent findings of facts of the two lower courts were perverse as a result of which the Supreme Court must intervene.

These issues arise from the grounds of appeal as they are based on the findings of fact of the learned trial judge consequent to which he preferred the traditional evidence of the Plaintiffs/Respondents to that of the Defendants/Appellants in granting them title to the disputed land. They are distilled from grounds One, two and five of the additional grounds of appeal.

The Appellants raised the issue of the jurisdiction of the High Court of Onitsha to hear and determine this suit when it was filed before it in 1989. Usually when a court's jurisdiction is challenged in a suit, it is far pertinent to settle that issue of jurisdiction one way or the other before proceeding to hearing of the case on the merits. In

short, the court in that situation must first assume jurisdiction to consider whether it has jurisdiction or lacks such. Jurisdiction is a radical and crucial question of competence, and once there is a defect in competence, it is fatal and the proceedings are a nullity, however well conducted and decided. A court is competent to exercise jurisdiction

B in respect of the matter before it when –

(a) It is properly constituted as regards numbers and qualification of the members of the bench and no members is disqualified for one reason or the other.

C (b) The subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and

(c) The case comes by due process of law upon fulfillment of any condition precedent to the exercise of jurisdiction.

D Madukolu v. Nkemdilim (1962) 2 SCNLR (Pt. 302) 692.

Barclays Bank v. CBN (1976) 6 SC 175; (1976) 6 SC (Re-print) 115; (1976) 1 All NLR (Pt. 1) 409.

Funduk Engineering Ltd. v. McArthur (1995) 4 NWLR (Pt. 392) 640.

E Agwuna v. A-G Federation (1995) 5 NWLR (Pt. 396) 418.

Omobu v. Anekwe (1997) 5 NWLR (Pt. 506) 618.

Osadebay v. A.G. Bendel State (1991) 1 SC (Pt. II) 73; (1991) 1 NWLR (Pt. 169) 525.

F A.G. Lagos State v. Dosunmu (1989) 6 SC (Pt. II) 1; (1989) 3 NWLR (Pt. 111) 552.

Ajao v. Alao (1986) 5 NWLR (Pt. 45) 805.

Asore v. Lemonu (1994) 7 NWLR (Pt. 356) 284,

Udene v. Ugwu (1997) 3 NWLR (Pt. 491) 57.

G The Plaintiffs/Respondents are from Ire Village in Umuoji Town in Idemili Local Government Area. The land in dispute called “Mkpu Ocha Owelle Ire” is situate in Ire Village, Umuoji. The Defendants/Appellants are from Ogidiani Etiti Ogidi in Idemili Local Government Area. That was the scenario when this suit was first instituted in 1989, at the Onitsha High Court in Suit No. O/103/89. The land in dispute is situated at a non-urban area. *It is of high significance under the Land Use Act, 1978 to determine jurisdiction by identifying the location of the land - whether it is in an urban or non-urban area.*

Section 39 (1) of the Land Use Act, 1978 vests “original and

exclusive Jurisdiction on the State High Court in respect of all causes or matters relating to land the subject-matter of a Statutory Right of Occupancy granted by State Governor or deemed to have been granted by him under that Act.”

Section 41 of the Land Use Act, 1978 “confers Jurisdiction on the Area Courts, the Customary Courts, or other courts of equivalent jurisdiction in a State to entertain actions relating to disputes over land dispute subject to a Customary Right of Occupancy granted by a Local Government under the Act or for a declaration of title to a Customary Right of Occupancy to such land.”

The question for determination is whether at the time this Action was filed on the 2nd of May, 1989, there is a Customary Court or any other court of equivalent jurisdiction that had jurisdiction in the area over the parties and the land in dispute. The suit was apparently filed before the Onitsha High Court by the Plaintiffs/ Respondents - was that a wrong process in the circumstance of the case? As on that date Section 236(1) of the 1979 (now in pari materia with Section 272(1) of the 1999) Constitution in regard to this civil suits reads -

“Subject to the provisions of this Constitution and in addition to such other Jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited Jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue.”

The foregoing section obviously gives unlimited jurisdiction to the High Court of a State to hear and determine any civil matter including land matters wherever the land may be situated in the State. By Anambra State Legal Notice Number 62 of 1985, Umuoji Customary Court was established and its territorial jurisdiction covered the towns of Umuoji, Uke, Abatete and Nkpor. By virtue of the provisions of section 12 (1) of the Customary Court Law, No. 6 of 1984, Umuoji Customary Court had jurisdiction over all persons and classes of persons within the territorial limits of its jurisdiction. Consequently, the Defendants from Ogidi were persons outside the territorial jurisdiction of Umuoji Customary Court. By the Anambra Legal Notice No. 65 of 1985, the Ogidi Customary Court was established with territorial jurisdiction covering Ogidi, Umudioka and Umunachi. The

two towns must therefore come within the same territorial limits of the Umuoji Customary Court for it to have jurisdiction. Since there was no Customary Court that could entertain the suit in that area at the time it was filed and both parties were under Onitsha Judicial Division, the learned trial judge sitting at the Onitsha High Court assumed jurisdiction in the matter. As at that time by virtue of section 236 (1) of the 1979 Constitution, the Onitsha High Court had jurisdiction to entertain any suit relating to land situate within the judicial division. The trial court used the case of *Adisa v. Oyinwola* (2000) 6 SC (Pt. II) 47; (2000) 10 NWLR (Pt. 674) 116, delivered on the 23rd of June, 2000, as fortress. The climax of the decision in *Adisa v. Oyinwola* (supra) is that section 41 of the Land Use Act, 1978 vesting jurisdiction of land in non-urban areas on Customary Courts, Area Courts or other courts of equivalent jurisdiction did not make it exclusive. It did not oust the unlimited Jurisdiction of the State High Court as provided by section 236 (1) of the 1979 Constitution. Section 41 redefines the jurisdiction of the courts mentioned therein so as to ensure that courts such as the Customary Courts in the southern states of Nigeria which had previously been exercising concurrent jurisdiction with the High Court without distinction by classification of law, have their jurisdiction limited as stated therein. The unlimited jurisdiction of the High Courts as enshrined in section 236 (1) of the 1979 Constitution was subject only to the provisions of the Constitution itself, that is to say, it was limited by any provisions of the Constitution to the contrary but not by any other legislations.

Okulate v. Awosanya (2000) 1 S.C. 107; (2000) 2 NWLR (Pt. 646) 530.

Savannah Bank of Nig. Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd. (1987) 1 NWLR (Pt. 96) 212.

Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 1 SCNLR 296.

Oloba v. Akereja (1988) 7 S. C. (Pt. I) 1; (1988) 3 NWLR (Pt. 84) 508.

The provisions of the Anambra State Legal Notice No. 62 of 1985 creating Umuoji Customary Court and the Customary Court Law, No. 6 1984 cannot limit the unlimited Jurisdiction of the High Court of the State to entertain any suit relating to land in Anambra State. This suit was filed on the 2nd of May, 1989, but judgment was

not delivered in the matter until the 27th of July, 2000. As at that time of filing of the suit and the decision of the Supreme Court in the case of Adisa v. Oyinwola delivered on the 23rd of June, 2000, the position of the law as to the jurisdiction of the High Court in respect of the land in non-urban areas by virtue of section 236 (1) of the 1979 Constitution and sections 39 and 41 of the Land Use Act was as pronounced by the Supreme Court in the cases of Salati v. Shehu (1986) 1 NWLR (Pt. 15) 198; Sadikwu v. Dalori (1996) 5 NWLR (Pt. 447) 151 and Oyeniran v. Egbetola (1997) 5 NWLR (Pt. 504) 122. The case of Adisa v. Oyinwola laid to rest the discrepancies in the decisions in those cases. The learned trial judge relied on the case of Adisa v. Oyinwola to reinforce his stand that the Onitsha High Court could exercise jurisdiction on land in non-urban areas of the State. The stand of the learned trial judge was appropriate as he could take judicial notice under section 73 of the Evidence Act of the latest decision of the Supreme Court on the controversial issue of land situate in non-urban areas of the State. The judgment came into force before the court delivered its judgment in this case at the end of July, 2000. The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose and the law relating to jurisdiction is the prevailing law when the action was instituted and heard. The law in both situations may not co-exist.

Adah v. NYSC (2004) 7 SC (Pt. II) 139; (2004) 13 NWLR (Pt. 891) 639.

Utih v. Onoyjvwe (1991) 1 S.C. (Pt. I) 61; (1991) 11 NWLR (Pt. 166) 166.

Uwaifo v. A.G. Bendel State (1982) 7 SC 224; (1982) 7 SC (Reprint) 58.

Sossa v. Fokpo (2001) 1 NWLR (Pt. 693) 16.

Gov. of Oyo State v. Folayan (1995) 8 NWLR (Pt. 413) 292

I.G. P. v. Aigberemolen (1999) 13 NWLR (Pt. 635) 443.

In this matter the Appellant challenged the lower court for affirming the judgment of the High Court which concluded that the Plaintiffs/Respondents had proved their case on their Traditional History. It was the contention of the Appellants that Issues were joined between the parties on the inheritance of the land in dispute from time immemorial. The issues therefore require proof based on traditional history in accordance with section 45 of the Evidence Act, 1990.

It is also pertinent that in a declaratory action, the Plaintiff must prove his case not minding any admissions or default or pleading by the Defendant. Going by the record in the judgment of the trial court, the learned trial judge in applying the necessary law to the traditional history of the parties referred to the case of *Obioha v. Duro* (1994) 10 SCNJ and particularly attempted to invoke the principle in *Kojo v. Bonsie* (1957) 1 WLR 1223. As observed by the lower court, the learned trial judge did not actually invoke or rely on the principle in resolving the conflict in the traditional history of the parties. He failed to put the traditional history/evidence of both parties under any imaginary scale, whereas the learned trial judge claimed that he did. In the case *Kojo v. Bonsie* (1957) 1 WLR 1223, a Privy Council decision, Lord Denning outlined the principle which is that witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred years or more ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is of little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is the more probable. The principle in *Kojo v. Bonsie* (1957) 1 WLR 1223, relates to facts which the court should advert to in coming to a conclusion on the probability of evidence of tradition. Whereas in this case the Plaintiffs/Respondents rely on acquisition of title by inheritance, proof of such grant by traditional history arises only where the fact of inheritance was so ancient as to be beyond the memory of living witnesses. Facts which are within living memory are properly to be proved by evidence of living witnesses to the event and not by evidence of tradition permitted by section 45 of the Evidence Act.

The learned trial judge came under the hammer of the lower court for not properly applying the principle in *Kojo v. Bonsie* (supra) as he failed to evaluate the evidence in support of the competing rights of the parties to title and ascribe probative value to such historical evidence. The Appellants are adamant on the fact that he failed to apply the five factors in the case of *Mogaji v. Odojin* (1978) 4 S.C. 91; (1978) 4 S.C. (Reprint) 53, and never showed any traditional evidence. The learned trial judge relied heavily on the evidence of one Gabriel Okeke, P.W.2 who was 76 years old at the time and only

gave evidence of happenings during his lifetime since 1934. The Appellants submitted that the witnesses for the Respondents contradicted themselves in their evidence on questions like the identity of the land in dispute, the admissibility of Exhibit B in view of lack of survey being deposited as required by law and whether there was the 1934 settlement by the parties with respect to their boundaries. B

In a claim for ownership of land, the Plaintiff must prove the identity of a disputed land failing which his claim must collapse. The Issue of identity of a disputed land must be ascertained with certainty.

Dike v. Okoloedo (1999) 7 SC (Pt. III) 35; (1999) 10 NWLR (Pt. 623) 359. C

Ogun v. Akinyelu (2004) 11-12 SC 4; (2004) 18 NWLR (Pt. 905) 362.

Elah v. Anyadike (1999) 5 NWLR (Pt. 603) 454

In the instant case, the identity of the disputed land was properly ascertained by the two surveyors who prepared the survey plans of the land on behalf of the parties. The parties know the identity of the disputed land though they called it different names. The Appellants refer to it as NNEBO and the Respondents “*Mkpu Ocha Owelle Ire.*” Furthermore, in discharging the burden of identity of the land in a Claim for declaration of title to land, the Claimant must prove the identity of the land and boundaries of the land in dispute. The burden can be discharged by oral description of the land or by a survey plan showing clearly the area to which the claim relates. In this Appeal, the parties know the boundary of the land. The boundary was shifted with the consent of the parties in 1934, from the old boundary at Ofia Mgbu to Ezi Anaekwe where parties planted survey pillars. D E F

Where parties know the identity of the disputed land, the question of inadmissibility of the survey plan on the ground that it was not properly and timely deposited for the Surveyor-General’s validation is a non-issue. It has no adverse effect on the claim of the Appellants to the disputed land. Right now, there are two concurrent findings of the trial court and lower court in favour of the Plaintiffs/Appellants in their claim for declaration of title. It is trite law that the Supreme Court will not ordinarily disturb concurrent findings of fact made by the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or when G H

such findings are perverse.

Akeredolu v. Akinremi (1989) 5 S.C. 102; (1989) 3 NWLR (Pt. 108) 164.

Ibodo v. Enarofia (1980) 5-7 S.C. 42; (1980) 5-7 S.C. (Re-print) 29.

B Eholor v. Osayande (1992) 6 NWLR (Pt. 249) 524.

Ige v. Olunloyo (1984) 1 SCNLR 158

Durosaro v. Ayorinde (2005) 3-4 SC 14; (2005) 8 NWLR (Pt. 927) 407.

C The learned trial judge on the overall evidence before him preferred the traditional evidence of the Respondents to that of the Appellants, I must restate here that evaluation of evidence and ascription of probative value is primarily the function of the learned trial judge. An Appellate Court can only interfere where and when D he fails to do so properly. When the trial court has satisfactorily performed its primary function of evaluating the evidence and ascribing probative value to it, an Appellate Court has no business interfering with its finding on such evidence.

Abisi v. Ekwealor (1993) 6 NWLR (Pt.302) 643,

E *Atolaabe v. Shorun (1985) 1 NWLR (Pt.2) 360.*

Obodo v. Ogba (1987) 2 NWLR (Pt. 54) 1

The Court of Appeal affirmed the judgment of the trial court given in favour of the Plaintiffs/Respondents. This court cannot find any reason to justify any interference with the two concurrent decisions of the two lower courts.

F With the fuller reasons given by my learned brother in the leading judgment, I also dismiss this appeal and affirm the judgment of the lower court in favour of the Plaintiffs/ Respondents. I abide by G the consequential orders made in the leading judgment.

H