

SUPREME COURT OF NIGERIA
3RD DECEMBER, 2010. SC. 115/2005
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F.
TABAI, S. GALADIMA, B. RHODES-VIVOUR, JJSC

DANJUMA TANKO	APPELLANT
AND		
OSITA ECHENDU	RESPONDENT

APPEALS - Judgments - Title & boundary dispute - Whether different - Court of Appeal was wrong in holding that only boundary dispute was in issue - And there is no distinction - Between boundary and land dispute (H1)

LAND LAW - Title - Claim for - Where both parties claim ownership and possession of the land - Title is a decider in the case - The absence of which makes the party in default a trespasser (H2)

LAND LAW - Title - Competing claims by the parties - Where in issue - Plaintiff succeeds on the strength of his case - Which the court is bound to consider first (H3)

LAND LAW - Title - Pleadings & evidence - Appellant's root of title - Was not specifically traversed by the respondent (H4)

EVIDENCE - Title - Self defeating evidence - Where evidence of respondent shows that - The person whom appellant allegedly sold to - Merely granted a sub lease to another - Such evidence is self defeating (H5)

LAND LAW - Title - Pleadings - Root of title - Where not pleaded by defendant - Evidence of when and who he bought the land from - Should be rejected for going to no issue (H6)

EVIDENCE - Probative value - Title - Pleadings - Where a party fails to disclose necessary information in his evidence - Such evidence has no probative value - And goes to no issue (H7)

LAND LAW - Title - Proof - Where respondent claims to having certificate of occupancy - Of the land in dispute - And did not plead same in his defence - Such evidence goes to no issue (H8)

APPEALS - Title - Possession - Leases - Where lower court found that appellant leased the land to tenants - The act amounts to effective possession - And contrary holding is perverse (H9)

LAND LAW - Identity of the land - Trespass - Survey plan - Where respondent knows the land in dispute - Filing survey plan is not an absolute necessity - To prove identity of the land in dispute (H10)

FACTS

Plaintiff/Appellant claimed against defendant/respondent before the Niger State High Court, for a declaration of title to the encroached portion of the land in dispute among other sundry reliefs. It was the case of appellant that he is the owner of Customary Right of Occupancy over a piece of land situate along Kaduna - Lokoja Road near Zuma Rock, close to Ashaka cement depot, Suleja. He said that he got title to the said parcel of land by virtue of inheritance through his forefathers and has been in possession of same for many years without any disturbance. Appellant also averred that he shared common boundary with respondent who had now encroached into his land by way of moulding blocks thereon. In the circumstance, appellant had earlier sued respondent at Upper Area Court Suleja, where he alleged they settled out of court on agreement that respondent would compensate him to the extent of the encroachment. However, it was the case of respondent that appellant had sold off his interest in the land since 1980 and no longer share common boundary with him.

At the trial, appellant adduced evidence to prove his claim to the land and boundary but respondent did not tender any proof of same rather, he admitted under cross examination that appellant shared same boundary with him. Trial court gave judgment in favour of appellant. Dissatisfied, respondent went on appeal to Court of Appeal which upturned the judgment, holding that the dispute between the parties was not about ownership of land but of boundary. It also held that appellant was not in possession of the land at the

time he brought the suit and he did not lead evidence to the identity of the land trespassed upon by respondent. Appellant being dissatisfied, has come to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the judgment of the Court of Appeal dismissing the Appellant's suit is sustainable having regard to the Evidence before the trial court.

(ii) Whether the finding and conclusion of the Court of Appeal that the Appellant's claim before the trial court was not proved as required by law amounts to substitution of the Appellant's claim.

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

Judgments - Title & boundary dispute - Whether different

1. In the portions of the judgement of the Court of Appeal which I have reproduced above, the court per Oguntade JCA (as he then was) reasoned and found that the dispute between the parties was not the title or ownership of the land in dispute and that it was simply a boundary dispute. And although the court did not expressly say so, it was by implication saying that a claim for declaration of title was therefore unnecessary or even inappropriate, the dispute being only a boundary dispute. And apparently because of this notion held by the court, it failed to deliberate upon the parties conflicting claims of Title over the land.

I am not, with respect, persuaded by the reasoning and finding of the Court of Appeal. Even if it is accepted that it is boundary dispute, it is in my considered opinion, one and the same thing as a dispute over title or ownership of the land in dispute. I am unable to ?? find the distinction which the court below tried to make. After all, the case of the Respondent is simply that his concrete block making industry and his other activities on the land complained of are carried out on that piece of land which, according to him, he bought from a "brother of the Emir." In other words, he carried out the acts complained of on the land because he claims title to it in the context of this case, therefore, I do not fancy any distinction between boundary dispute and land dispute. In my consideration therefore, title was definitely in issue and the Appellant was perfectly in order when he claimed for declaration of title.

(p. 3220A)

LAND LAW - Title - Claim for

2. There is yet another reason for my view that the claim for declaration of title is quite appropriate. The Appellant asserts that he is the owner of the land and has been in possession of same for many years. And for the 8 years immediately before the filing of the Action, B he had rented it to tenants who are farming therein. By this assertion he claims to be, at least, in constructive possession. On the other hand, the Respondent having established on the land a concrete block making industry is admittedly either rightly or wrongly in possession. C It is a case where both parties are claiming title and possession adversely against each other.

The settled principle of law is that where, as in this case, both parties claim to be in possession, the law ascribes possession to the Party who has title or better title.

D On this question therefore, whether the dispute is described as boundary dispute or land dispute, title is clearly in issue. It is the decider issue in this case for once the Appellant succeeds in establishing his title to the land in dispute, the law would ascribe possession to him and the Respondent would automatically be liable in trespass, E his concrete block making industry on the land notwithstanding. (pp. 3220 G/3221C)

Title - Competing claims by the parties - Where in issue

F 3. In cases of competing claims of title by the parties, one basic principle is that the Plaintiff succeeds on the strength of his case and not on the weakness of the case of the defence. The result is that the court is bound to first consider and decide upon the case of the Plaintiff.

G Let me therefore first consider the case of the Appellant on his claim of title over the land in dispute. (p. 3221 E)

LAND LAW - Title - Pleadings & evidence

H 4. The Appellant's root of title is pleaded in paragraph 4 of the Statement of Claim which I have already reproduced above. It is simply that he got the title to the land through inheritance from his forefathers. His evidence in court was substantially as pleaded.

On this issue of title to the land in dispute, let me now examine the case of the Respondent as pleaded.

It is clear from the 7 paragraph Statement of Defence that apart from the general traverse in paragraphs 1 and 2 thereof, the Respondent did not specifically deny the Appellant's assertion of his title to the land by inheritance. In paragraph 3 of the Statement of Defence, the Respondent, in purported specific response to paragraph 3, 4, 5 and 6 of the Statement of Claim, merely asserted that the Appellant has since sold off whatever interest, customary or statutory, which he had on any land near the Zuma Rock. He did not plead the person to whom the Appellant allegedly sold the land and who thus became his subsequent boundary neighbour. At the trial, all that the Respondent said about the Appellant's alleged sale of his land is contained at page 19 lines 16-17 of the Record, Where he said:-

"The Plaintiff sold his own land to another person who in turn sub-leased it to another person."(pp. 3221 G/3222 B/G)

EVIDENCE - Title - Self defeating evidence

5. And more importantly, the evidence itself is self-defeating. If the person to whom the Appellant allegedly sold the land merely granted a sub-lease of the land to a third party then the transaction between the sub-lessor or vendor of the sub-lease and the Appellant could not have been an outright sale but merely a lease. It means that the sub-lessor is a tenant of the Appellant. I say so because in law a sub-lease simply means the lease of a property by a tenant or lessee. Having regard to the meaning of the word sublease therefore the evidence of the Respondent is not only self-defeating. It is a Statement or evidence which terms are mutually contradictory. And more significantly the evidence also supports the case of the Appellant, the substance of which is that he never sold the land; that as owner in possession he had been using the land for farming and that for the 8 years before filing this suit, he had rented it to tenants who are farming on it. (p. 3223 B/E)

LAND LAW - Title - Pleadings - Root of title

6. There was yet another fundamental defect in the case of the Respondent. In the entire 7 paragraph Statement of Defence, he never pleaded his root of title. The Issue in focus in his pleading is that the Respondent has sold off whatever interest he had on any land near

the Zuma Rock. Therefore, his evidence in court to the effect that “he bought the land in 1976 from the brother of the Emir” is not in support of any pleading in the Statement of Defence and therefore goes to no Issue and ought to have been rejected. (p. 3224 A)

B EVIDENCE - Probative value - Title - Pleadings

7. Assuming, without conceding that the piece of evidence was in support of a fact pleaded, it is my view that it had no probative value. The trial court accorded no probative value to the piece of evidence.

C At page 28 of the Record the trial court reacted:

“The Defendant in his evidence before the court stated that he bought the said land in 1976 from the brother of the Emir. The Defendant did not however disclose the name of the Emir’s brother from whom he bought the land. This piece of evidence raised so many questions and left them unanswered e.g. What is the name of that person? Has that person any title to that piece of land, if so how? Is that person alive? If he is alive why was he not called as a witness? In the presence of who did that person sell the land to him? Whether that contract of sale was evidenced in writing and if so where is the document of sale. All these questions remain throughout the Evidence of the Defendant unanswered.”

The trial court relied on the principle in *Agu v. Ikewibe* (1991) 4 SC 1; (1991) 4 SCNJ 56 at 74 and concluded:

F *“In the light of this, I hold that the piece of Evidence led by the Defendant namely that he bought the said land from the Emir’s brother goes to no Issue.”* (p. 3224 C/H)

LAND LAW - Title - Proof

G 8. Still on the Respondent’s proof of title, the trial court at the same page 28 proceeded to examine Respondent’s purported Certificate of Occupancy. The trial court proceeded thus:

H *“The Defendant in his Evidence further stated that he was given a Right of Occupancy of the farm in question. The Certificate of Occupancy was according to him signed by the then Military Governor of Niger State, David Mark. The Defendant also stated that he fenced that piece of land with pillars and barbed wires. These facts were similarly not pleaded and it goes to no Issue and I accordingly so hold.”*

On this Issue of the Respondent's proof of title, I agree entirely with the foregoing reasoning and findings. If the Respondent considered his purported Certificate of Occupancy to be his root of title he had a duty to plead facts in respect thereto and found upon it at the trial. This he failed to do. (p. 3225 A)

B

APPEALS - Title - Possession - Leases

9. A person who has title over a piece of land and, in the exercise of his right as such owner, leases the land to tenants is, in law, in effective possession and can sue anybody in the world for trespass except his lawful lessee or tenant.

C

The lower court having found that the Appellant had leased the land to third parties was not justified in holding that he was not in possession. Going by the unchallenged evidence of the Appellant's lease of the land to 3rd parties and the evidence of the Respondent supporting the Appellant's lease of the land, the Appellant was at least in constructive possession.

D

The finding of the court below on this question of the Appellant's possession of the land in dispute is clearly perverse and ought to be set aside. (p. 3226 B/E)

E

LAND LAW - Identity of the land - Trespass - Survey plan

10. The lower court also found that the Plaintiff/Appellant did not in his pleading and evidence identify the portion of his land which was allegedly trespassed upon by the Defendant/Respondent.

F

In the first place, the identity of the land was not made an Issue. It is settled law that filing a survey plan is not always an absolute necessity in land matters where, from the description of the land given in evidence, a surveyor will be able to produce an accurate plan of the land.

G

The Defendant/Respondent has never claimed not to know the land in dispute. It is the land on which he has established his concrete block making industry and which act constitutes the immediate cause of action.

H

The Appellant described one of the features of the boundary as a drainage or a natural waterway. The Appellant also said that his father planted a mango tree at the boundary. At page 29 of the record the trial court after extensive appraisal of the evidence con-

cluded thus:-

“The testimonies of the Plaintiff and his witnesses left no one in doubt as to the identity of the farm land in question. I found the evidence of the Plaintiff on this overwhelming.”

I have no basis for faulting this finding of the trial court particularly having regard to the fact that, it is the land in which the Respondent has his concrete block making industry. (p. 3226 G)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. The best proof of land boundaries is survey plan

The best proof of the boundaries of the land trespassed on is a surveyor’s plan, but where a surveyor’s plan is not produced the land in dispute must be ascertained with certainty. (p. 3233 F)

REPRESENTATION

H. O. Afolabi Esq. with him, B. A. Oyun Esq. for the Appellant
E. C. Chukwu Esq. with him, Adeniyi Adebayo Esq. for the Respondent

CASES REFERRED TO

Kwadzo v. Uga (1962) 1 ANLR 482 at 484

Maberi v. Alade (1987) 2 NWLR (Pt. 55) 101

Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 299

Ighodo v. Owulo (1999) 5 NWLR (pt. 601) 70

Omoregbe v. Lawani (1980) 3-4 S.C. 108 at 117

Owoade v. Omitola (1998) 2 NWLR (Pt. 77) 423

Ojo Osagie v. Adonri (1994) 6 NWLR (Pt. 349) 131 at 154

G Anyabusi v. Ugwunze (1995) 6 NWLR (Pt. 401) 255 at 268

Odebunmi v. Abdullahi (1997) 2 NWLR (Pt. 489) 526 at 540

Buhari v. Obasanjo (2005) 7 SC (Pt. I) 1; (2005) 13 NWLR (Pt. 941)

1

H Agbeje v. Ajibola (2002) 1 S.C. 1; (2002) 2 NWLR (Pt. 750) 127 at 135

Salawu v. Yusuf (2007) 5 S.C. 35; (2007) 12 NWLR (Pt. 1049) 707 at 729

Overseas Construction Ltd. v. Creek Ent. Ltd. (1985) 3 NWLR (pt. 13) 407

Buraimoh v. Bamgbose (1989) 6 S.C. (Pt. I) 1; (1989) 3 NWLR (Pt. 109) 352

LEAD JUDGMENT BY TABAI JSC

This Action was commenced at Suleja Judicial Division of the High Court of Niger State on or about the 10th of April, 1995 with the Appellant herein being the Plaintiff and the Respondent herein being the Defendant. B

The Appellant as Plaintiff claimed against the Respondent as Defendant the following Reliefs:-

“(a) A Declaration of title to the said farm land to the extent of encroachment into same only.” C

“(b) An Order of Perpetual Injunction restraining the Defendant, his agents, privies, servants or whosoever claiming through him from further trespassing and/or encroachment into the Plaintiff’s farm land.” D

“(c) The sum of N20,000.00 (Twenty Thousand Naira) only as general damages for trespass into the Plaintiffs farm land.”

Pleadings were duly filed and exchanged.

The actual trial commenced on the 29th of April, 1997 with the testimony of the Plaintiff Appellant as the PW1. Two other witnesses also testified in support of the Plaintiff’s case. All the three witnesses testified in the absence of the Defendant/Respondent or his Counsel. On the 22nd of April, 1998, however the PW1. was with the leave of Court, recalled and was extensively cross-examined. Further leave was also granted for the recall and Cross-Examination of the PW2 and PW3. On the 17th of March, 1999 however, the Defendant/Respondent decided to dispense with the intended Cross-Examination of the PW2 and PW3 and opened his defence. The Defendant/Respondent was the only witness for the defence. E
F
G

In its judgment on the 26th of June, 2000, the Trial Court allowed the Claim and granted all the Reliefs as claimed.

The Defendant was not satisfied with the decision of the Trial Court and thus proceeded on Appeal to the Court below. H

The Notice of Appeal filed on the 20th of June, 2003 raised three Grounds of Appeal. The Grounds of Appeal without their particulars are:-

1. The Honourable Justices of the Court of Appeal erred in

law when they held that the suit was a boundary dispute.

2. The Honourable Justices of the Court of Appeal erred in law when they held that the Plaintiff (now Appellant) was not in possession of the land in dispute: and

3. The Honourable Justices of the Court of Appeal erred in facts and in law when they held that Plaintiff did not in his Pleading and Evidence lead Evidence to identify the portion of his land which was allegedly trespassed upon by the Defendant.

The parties, through their Counsel, filed and exchanged their respective Briefs of Argument. The Appellant's Brief was prepared by Kamal O. Fagbemi of Lateef O. Fagbemi. SAN., & Co. It was filed on the 13th of October, 2007, but deemed properly filed on the 16th of April, 2008. While the Respondent's Briefs was prepared by E. C. Chukwu. It was filed on the 23rd of September, 2008 but deemed properly filed and served on 23rd of April, 2009.

In the Appellant's Brief Mr. Fagbemi formulated two Issues for Determination which he couched as follows:

(i) Whether the Appellant has not proved his case to entitle him to Judgement in the Trial Court; and

(ii) Whether the Court below can rightly substitute a new cause for the parties as opposed to the Claim before the Trial Court. Mr. E. C. Chukwu also formulated two Issues for Determination in the Respondent's Brief. He framed the two Issues in the following terms :-

(i) Whether the judgement of the Court of Appeal dismissing the Appellant's suit is sustainable having regard to the Evidence before the Trial Court.

(ii) Whether the finding and conclusion of the Court of Appeal that the Appellant's Claim before the Trial Court was not proved as required by law amounts to substitution of the Appellant's Claim.

In my consideration the two Issues proposed on the Appellant are in substance the same as the two formulated by the Respondent and I shall treat them as such. Let me begin by restating the substance of the Argument of Counsel for the parties on the two Issues.

On the first Issue of whether or not the Plaintiff/Appellant proved his case to entitle him to the judgement. Mr. Fagbemi argued as follows: He referred to the settled principle of law that in Claims

for declaration of title to land, the onus is always on the Plaintiff to establish the area claimed and submitted that in this case the Plaintiff/Appellant pleaded with certainty the area claimed and proved same by his Evidence corroborated by that of the PW2 and PW3. It was his further argument that the Defendant/Respondent both in the Pleadings and in Evidence failed to join Issues with the Plaintiff/Appellant on this Issue of the identity of the land and merely contended that the Appellant had since divested himself of title to the land in dispute. It was further contended that the Respondent both in his Pleadings and in Evidence never denied knowledge of the land and even admitted under Cross-Examination of sharing a common boundary with the Plaintiff. He referred to the conclusion of the Court below to the effect that a plan ought to have been filed showing the common boundary between the parties and submitted that it is not in every land dispute that filing a plan is necessary. For this submission he relied on Ojibah v. Ojibah (1991) 6 S.C. 182; (1991) 22 NSCC (Pt. 2) 130 at 140; Olujingle v. Ademeagbo (1988) 2 NWLR (Pt. 75) 238; Atolagbe v. Shorun (1985) 1 NWLR (Pt. 2) 360 at 373; Ibuluya v. Dikibo (1976) 6 S.C. 97; (1976) 6 S.C. (Reprint) 61. Still on this question of identity of the land in dispute Learned Counsel further relied on the Evidence of the Defendant/Respondent that he was carrying on block moulding work on the land in dispute.

With respect to the question of whether the Plaintiff/Appellant was in possession of the land in dispute to entitle him to sue, it was the submission of Appellant's Counsel that he, Appellant did not need to be in direct physical possession to be entitled to sue. He referred to the case of Ude v. Chimbo (1998) 9-10 S.C. 97; (1998) 12 NWLR (Pt. 577) 169 at 194, and submitted that a person can, in law, be deemed to be in possession through a third Party such as a servant, agent or tenant and also that a possession by a predecessor-in-title is deemed to be continued by the successor-in-title. Learned Counsel contended that from all the available Evidence the Appellant was, at all times relevant to this case, in possession of the land in dispute and urged this Court to so hold.

As regards the ultimate and crucial question of preponderance of Evidence Learned Counsel referred to the Appellant's Evidence of title through inheritance, his uninterrupted possession and user of the land for 30 years supported by the Evidence of the PW2

and PW3 who were not cross-examined and submitted that the case of the Appellant remained unchallenged and therefore established; He relied on Odebunmi v. Abdullahi (1997) 2 NWLR (Pt. 489) 526 at 540; Omogbe v. Lawani (1980) 3-4 SC 108 at 117; (1980) 3-4 S.C. (Reprint) 70 and Buraimoh v. Bamgbose (1989) 6 SC (Pt. I) 1; B (1989) 2 NWLR (Pt. 109) 352.

Learned Counsel further referred to the case of the Defendant/Respondent to the effect that the Plaintiff/Appellant had divested himself of any title either to the land in dispute or to any land in the vicinity and contended that apart from the Ipse 'dixit' of the Respondent, there was no other Evidence to support the assertion. Worse still, Learned Counsel continued, the purported Certificate of Occupancy on which the Respondent tried to rely was not tendered. Learned Counsel further pointed out that the Respondent's alleged D vendor whom he casually referred to as "brother of the Emir" was not called and nor was any other witness to the transaction called.

It was the further submission of Counsel that once the Plaintiff/Appellant has by preponderance of Evidence established his title to the land in dispute he is in law also entitled to possession and can E sue for damages for trespass. In support of this submission, Counsel relied on Dantata v. Mohammed (2000) 5 SC 1; (2000) 7 NWLR (Pt. 664) 176 at 213.

On the second Issue of whether the finding by the Court below that the dispute was not one over title to the land in dispute F but rather one of boundary dispute amounted to a substitution of a cause different from that submitted to the Court for adjudication, Counsel submitted that the finding was a substitution of a cause prepared by the Court below for that submitted by the parties for adjudication. It was submitted that the Courts as well as the parties are G bound by the case put forward by the parties. Reliance was on Ojo Osagie v. Adonri (1994) 6 NWLR (Pt. 349) 131 at 154.

And even where the Court felt constrained to raise an Issue - upon which to determine the case, the parties ought to have been H heard on it. Counsel argued. He relied on State v. Oladimeji (2003) 7 SC 108 at 112. In conclusion Learned Counsel urged that the Appeal be allowed.

In the Respondent's Brief. Mr. E. C. Chukwu argued as follows:-

On the first Issue for Determination Learned Counsel referred to the Claim for Declaration of Title to the extent of encroachment and submitted that the Claim itself is ambiguous, tautologous and meaningless. It is a common ground that the parties are land owning neighbours and therefore the burden was on the Appellant to prove the encroachment and the extent thereof. Learned Counsel argued. B It was further argued that the Appellant only 'viva voce' said that the Respondent entered onto his land and moulded blocks thereon without giving a vivid description of the extent of encroachment. He pointed out that the Trial Court was not invited to visit the "locus in C quo" nor was a plan presented to describe the land encroached upon. It was submitted that the burden was on the Appellant to prove the identity and boundaries of the land with certainty. For this argument, Learned Counsel relied on Odunze v. Nwosu (2007) 5-6 SC 40; (2007) 13 NWLR (Pt. 1050) 1 at 34 and Useze v. Chidebe (1990) 1 D NWLR (Pt. 125) 141 at 159. Learned Counsel also referred to the Evidence of the Appellant to the effect that he had not been in possession of the land for eight years before the commencement of the suit and submitted that the Appellant failed to prove direct physical possession of the land, non possession through a servant or a tenant E and was not therefore entitled to sue in trespass. He relied on Alhaji Fasasi Adesoye v. J. O. Siwonku (1952) 14 WACA 86 and Owe v. Osibanjo (1965) 1 ANLR 72.

Learned Counsel again referred to the finding of the Court F below that the Appellant was, at the time of the alleged trespass, not in possession and submitted that since there was no Appeal against that finding of fact it ought not to be disturbed. For this submission, Learned Counsel relied on Florence Olusanya v. Olufemi Olusanya (1983) 3 S.C. 41 at 56 and 59 and Union Bank Of Nigeria Plc. v. G Ishola (2002) FWLR (Pt. 100) 1253 at 1273.

With respect to the 2nd Issue, Mr. Chukwu repeated much of the argument he had proffered on the 1st Issue. A Claim for "Declaration of Title to the extent of the encroachment." Counsel argued, cannot be the same as a claim for declaration of title especially where H there is no dispute over title or ownership of a particular piece of land. It was Counsel's contention that the Trial Court erred and the judgement was perverse and that in the circumstances the Court below was right to intervene. In support of this contention. Counsel

cited Salawu v. Yusuf (2007) 5 SC 35; (2007) 12 NWLR (Pt. 1049) 707 at 729. Learned Counsel further submitted that although survey plan is not necessary where the identity or boundaries of land are not in dispute the onus of proof of the identity or boundaries of the land still lies squarely on the Appellant. Reliance was placed on Agbeje v. Ajibola (2002) 1 S.C. 1; (2002) 2 NWLR (Pt. 750) 127 at 135.

On the question of whether by its finding of there being only boundary dispute the Court below made a fresh case for the parties. Learned Counsel insisted that the case for the parties was fought on the question of boundary mark and that the Court below was right to reach that finding from the record. He relied on Gbadamosi v. Dairo (2007) 1 S.C. (Pt. II) 151; (2007) 3 NWLR (Pt. 1021) 306. In conclusion Learned Counsel urged that the Appeal be dismissed.

I have carefully examined the Pleadings of the parties, their Evidence in support thereof, the conflicting judgements of the two Courts below and the address of Counsel for the parties as contained in their respective Briefs of Argument. With respect to the first and main Issue for Determination, my view is first to settle the question of whether in the circumstances of the dispute between the parties, the Plaintiff/Appellant rightly claimed for a Declaration of Title.... over the land in dispute and the two other ancillary Reliefs?

In its judgement, the Court below made reference to parts of the Pleadings of the parties and at page 66 of the Record found as follows :-

*“A comparison of the parties Pleadings reveals that this was not a dispute about ownership of land. Rather it was a boundary dispute. The case of the Plaintiff was that the Defendant was his boundary man; and that the Defendant came across the boundary and set up on the Plaintiff’s land a block moulding business. The Defendant’s case on the other and was that the Plaintiff had ceased to be his boundary man arising from the fact he sold the parcel of land both-
ering the Defendant’s and transferred the title and possession therein to third ‘ parties.’”*

The lower Court continued:-

“From the state of the Pleadings the Issue in dispute would appear to be very narrow. It was simply whether or not the Defendant crossed the boundary into Plaintiff’s land and whether the Plaintiff was in possession of the said land.”

And after making some references to parts of the Evidence of the parties the Court at page 67 of the Record concluded:-

“It is clear from the Evidence of the Plaintiff that at the time he brought his Suit, he was not in possession of the land in dispute. The Plaintiff did not also in his Pleading and Evidence led identify the land which was allegedly trespassed upon by the Defendant.” B

The foregoing formed the core reasons for the decision of the lower Court dismissing the Plaintiff/Appellant’s Claim. Was this decision supported by the Pleadings and Evidence on Record? In an attempt to answer this question it is necessary to highlight the factual situation which prompted the institution of the Action. This is contained in paragraphs 4, 5, 6, 7 and 10 of the Statement of Claim. The said paragraphs run as follows:- C

“4. The Plaintiff states that he got title to the said piece or parcel of land by virtue of inheritance through his forefathers.” D

5. The Plaintiff further avers that he has been in possession and use of same for Farming Agricultural purposes for over 30 years now without interruption or intervention whatsoever from anybody.

6. The Plaintiff avers that they share common boundaries with the Defendant whereas the Defendant encroached into the Plaintiff’s portion of land by way of moulding cement blocks therein. Evidence will be led to establish this fact. E

7. The Plaintiff states that he has contacted the Defendant about that act of encroachment, but the Defendant could not offer any meaningful explanation in respect thereto. F

10. The Plaintiff avers that the Defendant has planted some kinds of trees thereon in disregard to the warning and advises of the Plaintiff with a view to stopping him from such act....”

In his testimony, the Plaintiff/Appellant led Evidence substantially as G pleaded. He said he inherited the land from his forefathers, his immediate predecessor being his late father, Audu. He had been farming on the land and for about 8 years he had rented it to tenants who are farming on it. The Defendant/Respondent was a boundary neighbour and had been such a boundary neighbour for about 12- H 18 years. Their boundary marks are a drainage which is a natural waterway and a mango tree planted by his late father.

According to him, the Respondent encroached on his said land by establishing thereon a concrete block making business and

planting some kinds of trees. In addition, he also got reports that the Respondent had plans to sell the land.

In the portions of the judgement of the Court of Appeal which I have reproduced above, the court per Oguntade, JCA., (as he then was) reasoned and found that the dispute between the parties was not the title or ownership of the land in dispute and that it was simply a boundary dispute. And although the court did not expressly say so, it was by implication saying that a claim for declaration of title was therefore unnecessary or even inappropriate, the dispute being only a boundary dispute. And apparently because of this notion held by the court it failed to deliberate upon the parties conflicting claims of title over the land.

I am not, with respect, persuaded by the reasoning and finding of the Court of Appeal. Even if it is accepted that it is boundary dispute, it is in my considered opinion, one and the same thing as a dispute over title or ownership of the land in dispute. I am unable to find the distinction which the court below tried to make. After all, the case of the Respondent is simply that his concrete block making industry and his other activities on the land complained of are carried out on that piece of land which, according to him, he bought from a "brother of the Emir." In other words he carried out the acts complained of on the land because he claims title to it in the context of this case, therefore, I do not fancy any distinction between boundary dispute and land dispute. In my consideration therefore, title was definitely in issue and the Appellant was perfectly in order when he claims for declaration of title.

There is yet another reason for my view that the claim for declaration of title is quite appropriate. The Appellant asserts that he is the owner of the land and has been in possession of same for many years. And for the 8 years immediately before the filing of the Action, he had rented it to tenants who are farming therein. By this assertion he claims to be, at least, in constructive possession. On the other hand, the Respondent having established on the land a concrete block making industry is admittedly either rightly or wrongly in possession. It is a case where both parties are claiming title and posses-

sion adversely against each other.

The settled principle of law is that where, as in this case, both parties claim to be in possession the law ascribes possession to the party who has title or better title. See: Kareem & Ors. v. Ogunde & Anor. (1972) 1 S.C. 182; (1972) 1 S.C. (Reprint) 126; (1972) 7 NSCC 60 at 63; Kasunmu & Anor. v. Abeo (1972) 2 S.C. 69; (1972) 2 S.C. (Reprint) 63; (1972) MSCC 145 at 152; Mogaji v. Odojin (1978) 4 S.C. 91 at 96-97; (1978) 4 S.C. (Reprint) 53; Ayinla v. Sijuwola (1984) 1 SCNLR 410; Amakor v. Obiefuna (1974) 3 S.C. 67; (1974) 3 S.C. (Reprint) 49; (1974) 1 ALL NLR (Pt. 1) 119. **On this question therefore whether the dispute is described as boundary dispute or land dispute, title is clearly in Issue. It is the decider Issue in this case for once the Appellant succeeds in establishing his title to the land in dispute the law would ascribe possession to him and the Respondent would automatically be liable in trespass, his concrete block making industry on the land notwithstanding.**

As I said earlier in this judgement, the ultimate decider Issue in this case is the question of who has title to the land in dispute. Regrettably, the Court of Appeal failed to appreciate this fact and so failed to deliberate upon it. Now what is the relative strength of the parties' competing Claims of title to the land in dispute?

In cases of competing claims of title by the parties one basic principle is that the Plaintiff succeeds on the strength of his case and not on the weakness of the case of the defence. The result is that the court is bound to first consider and decide upon the case of the Plaintiff. This principle was articulated in the case of Owoade v. Omitola (1998) 2 NWLR (Pt. 77) 423; Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 299; Buraimoh v. Bamgbose (1989) 6 S.C. (Pt. I) 1; (1989) 3 NWLR (Pt. 109) 352. **Let me therefore first consider the case of the Appellant on his claim of title over the land in dispute.**

The Appellant's root of title is pleaded in paragraph 4 of the Statement of Claim which I have already reproduced above. It is simply that he got the title to the land through inheritance from his forefathers. His evidence in court was substantially as pleaded. He said he inherited it, his immediate predecessor being Audu, his late father. The P. W. 2 testified to the

effect that the Appellant inherited the land from his father who died almost 35 years ago. The Evidence of P. W. 3 was substantially to the same effect. He said that over 50 years ago his father and Appellant's father shared a common boundary and that the Appellant had been on the land since the death of his father in 1966/67.

B On this Issue of title to the land in dispute let me now examine the case of the Respondent as pleaded. In his Statement of Defence he pleaded as follows:-

C "1. *Save as hereinafter admitted the Defendant denies every allegation of fact herein contained in the Statement of Claim as if same were set out and denied seriatim.*

2. The Defendant admits paragraph 1 & 2 only of the Claim and denies paragraphs 3,4, 5, 6,7, 8, 9, 10 and 11 of the Claim.

D *3. By way of specific response to paragraphs 3,4, 5, and 6 of the Claim the Defendant shall say the Plaintiff has ceased to have any interest, Customary and Statutory in any piece of land anywhere near the Zuma Rock since 1980 or thereabout when he sold off whatever interest in land he might have had.*

E *4. The complaint of the Plaintiff on encroachment came when he had disposed off his last property in the vicinity and when he no longer shares any common boundary with the Defendant.*

F *5. This complaint was found to lack merit when settled out of Court by a Former Area Court Judge in Suleja acting as Arbitrator. And no Issue as to payment of any compensation ever arose.*

6. The Plaintiff has no title nor possession to any farmland or piece of land that is worth encroaching into by the Defendant.

7. The Defendant urges this Honourable Court to dismiss the Plaintiff's Claim with costs for the Defendant."

G ***It is clear from the 7 paragraph Statement of Defence that apart from the general traverse in paragraphs 1 and 2 thereof, the Respondent did not specifically deny the Appellant's assertion of his title to the land by inheritance. In paragraph 3 of the Statement of Defence, the Respondent, in***
H ***purported specific response to paragraph 3, 4, 5 and 6 of the Statement of Claim, merely asserted that the Appellant has since sold off whatever interest, Customary or Statutory, which he had on any land near the Zuma Rock. He did not plead the person to whom the Appellant allegedly sold the land and who***

thus became his subsequent boundary neighbour. At the trial, all that the Respondent said about the Appellant's alleged sale of his land is contained at page 19 lines 16-17 of the Record, Where he said:-

"The Plaintiff sold his own land to another person who in turn sub-leased it to another person." B

The person to whom the Appellant allegedly sold the land in dispute is again not named. **And more importantly, the evidence itself is self-defeating. If the person to whom the Appellant allegedly sold the land merely granted a sub-lease of the land to a third party then the transaction between the sub-lessor or vendor of the sub-lease and the Appellant could not have been an outright sale but merely a lease. It means that the sub-lessor is a tenant of the Appellant. I say so because in law a sub-lease simply means the lease of a property by a tenant or lessee.** Black's law Dictionary 6th Edition at page 1425 describes a sublease as "a lease executed by the lessee of land or premises to a third person conveying the same interest which the lessee enjoys but for a shorter term than that which the lessee holds' or a transaction whereby a tenant grants interest in leased premises less than his own." E
Having regard to the meaning of the word sublease therefore the evidence of the Respondent is not only self-defeating. It is a statement or evidence which terms are mutually contradictory. And more significantly the evidence also supports the case of the Appellant the substance of which is that he never sold the land; that as owner in possession he had been using the land for farming and that for the 8 years before filing this suit, he had rented it to tenants who are farming on it. In part of his Evidence under Cross-Examination at page 15 lines 14-18 of the Record the Appellant said:- G

"I have been farming on the land. I inherited it from my father for over 20 years. It is one large piece of land. I did not measure my land. I never sold that piece of land. I hired it to some people for farming. I have been farming on the land since 1980. Those hiring it have been farming there for 8 years now presently, those people are farming on it." H

(Underlining mine)

The above clearly shows that the Plaintiff/Appellant neither

in his Pleading nor in his Evidence in Court asserted any sale of his property to any person. He only leased it to some persons for farming purposes.

There was yet another fundamental defect in the case of the Respondent. In the entire 7 paragraph Statement of Defence, he never pleaded his root of title. The Issue in focus in his pleading is that the Respondent has sold off whatever interest he had on any land near the Zuma Rock. Therefore, his evidence in court to the effect that “he bought the land in 1976 from the brother of the Emir” is not in support of any pleading in the Statement of Defence and therefore goes to no Issue and ought to have been rejected.

Assuming, without conceding, that the piece of Evidence was in support of a fact pleaded it is my view that it had no probative value. The Trial Court accorded no probative value to the piece of Evidence. At page 28 of the Record the Trial Court reacted:

“The Defendant in his Evidence before the court stated that he bought the said land in 1976 from the brother of the Emir. The Defendant did not however disclose the name of the Emir’s brother from whom he bought the land. This piece of Evidence raised so many questions and left them unanswered e.g. What is the name of that person? Has that person any title to that piece of land, if so how? Is that person alive? If he is alive why was he not called as a witness? In the presence of who did that person sell the land to him? Whether that contract of sale was evidenced in writing and if so where is the document of sale. All these questions remain throughout the Evidence of the Defendant unanswered.”

Continuing, the Trial Court proceeded to consider the Fundamental Issue of the Respondent’s failure to plead his root of title. He said:-

“To crown it all, that piece of Evidence was never pleaded by the Defendant in his Statement of Defence. Evidence led on facts not pleaded goes to no Issue and ought to be expunged. In fact Evidence on facts not pleaded must be disregarded by the Court...”

The trial-court relied on the principle in Agu v. Ikewibe (1991) 4 SC 1; (1991) 4 SCNJ 56 at 74 and concluded:

“In the light of this, I hold that the piece of Evidence led

by the Defendant namely that he bought the said land from the Emir's brother goes to no Issue."

Still on the Respondent's proof of title, the trial court at the same page 28 proceeded to examine Respondent's purported Certificate of Occupancy. The Trial Court proceeded thus:

"The Defendant in his evidence further stated that he was given a Right of Occupancy of the farm in question. The Certificate of Occupancy was according to him signed by the then Military Governor of Niger State, David Mark. The Defendant also stated that he fenced that piece of land with pillars and barbed wires. These facts were similarly not pleaded and it goes to no Issue and I accordingly so hold."

On this Issue of the Respondent's proof of title, I agree entirely with the foregoing reasoning and findings. If the Respondent considered his purported Certificate of Occupancy to be his root of title he had a duty to plead facts in respect thereto and found upon it at the trial. This he failed to do.

On this Issue of title to the land in dispute the Defendant's Respondent has no case to compete with that of the Appellant. His Evidence that he bought the land in 1976 from a brother of the Emir was not in support of any paragraph of the Statement of Defence. And as the Trial Court highlighted, the Evidence itself 'was manifestly unreliable. It had no probative value. With respect to the Certificate of Occupancy apart from the fact that matters in respect thereto were not pleaded, it was not tendered in Evidence. On the whole, the Defendant/Respondent adduced no Evidence of title to the land in dispute. I am persuaded by and agree with the submission of Learned Counsel for the Appellant that on this Issue of Title to the land in dispute the case of the Plaintiff/Appellant remains unchallenged. This Appeal therefore ought to succeed on this sole Issue of proof of title of the land in dispute.

Before the conclusion, let me briefly comment on the finding by the Court of Appeal on the question of whether the Appellant was in possession of the land in dispute at the time of the filing of the Suit. In its Judgment at page 68 of the Record, the Court of Appeal Per Oguntade, JCA., (as he then was) opined:

"In the instant case the Defendant pleaded Evidence that the

Plaintiff was not in possession of the land at the time of the alleged trespass. The Plaintiff himself admitted that he had leased out the land to 3rd parties some 8 years before he brought the Suit. Clearly therefore, the Plaintiff's case ought to have failed unless he was able to show that the nature of the Defendant's trespass would cause a diminution of his reversionary interest in the land. This certainly was not the case of the Plaintiff. I think that the lower Court ought to have refused the Claim for trespass."

I do not, with respect, agree with the above reasoning and finding of the court below. A person who has title over a piece of land and, in the exercise of his right as such owner, leases the land to tenants is, in law, in effective possession and can sue anybody in the world for trespass except his lawful lessee or tenant. This principle was restated in the case of Anyabusi v. Ugwunze (1995) 6 NWLR (Pt. 401) 255 at 268, where this Court per Iguh, JSC restated the principle thus:

"A landlord who collects rents from his tenants in respect of a piece or a parcel of land is clearly 'dejure' possession of such land even though he is not in physical occupation or 'defacto' possession thereof."

The lower court having found that the Appellant had leased the land to third parties was not justified in holding that he was not in possession. Going by the unchallenged evidence of the Appellant's lease of the land to 3rd parties and the evidence of the Respondent supporting the Appellant's lease of the land, the Appellant was at least in constructive possession.

The finding of the court below on this question of the Appellant's possession of the land in dispute is clearly perverse and ought to be set aside.

The lower court also found that the Plaintiff/Appellant did not in his pleading and evidence identify the portion of his land which was allegedly trespassed upon by the Defendant/Respondent.

In the first place, the identity of the land was not made an Issue. It is settled law that filing a survey plan is not always an absolute necessity in land matters where, from the description of the land given in Evidence, a surveyor will be able to

produce an accurate plan of the land. See: *Kwadzo v. Uga* (1962) 1 ANLR 482 at 484; *Maberi v. Alade* (1987) 2 NWLR (Pt. 55) 101.

The Defendant/Respondent has never claimed not to know the land in dispute. It is the land on which he has established his concrete block making industry and which act constitutes the immediate cause of action.

The Appellant described one of the features of the boundary as a drainage or a natural waterway. The Appellant also said that his father planted a mango tree at the boundary. At page 29 of the record the trial court after extensive appraisal of the Evidence concluded thus:-

“The testimonies of the Plaintiff and his witnesses left no one in doubt as to the identity of the farm land in question. I found the Evidence of the Plaintiff on this overwhelming.”

I have no basis for faulting this finding of the trial court particularly having regard to the fact that it is the land in which the Respondent has his concrete block making industry.

In conclusion I hold that this Appeal has merit. The judgement of the Court of Appeal dated the 9th of June, 2003 be and is hereby set aside. And the judgement of the Trial Court dated the 26th of June, 2000 is hereby restored.

There shall be costs which I assess at N50,000.00 (Fifty Thousand Naira) only in favour of the Appellant.

MUKHTAR JSC

I have had the privilege of reading in draft of the judgment of my learned brother, Tabai JSC. I would by way of emphasis make the following contribution. The crux of the plaintiff's claim is as contained in the following averments in the Statement of Claim:-

“3. The Plaintiff aver that he is the deemed customary owner/holder of Right of Occupancy over a piece of farmland situate and being at along Kaduna-Lokoja Road, near Zuma Rock, also close to Ashaka Cement Deport, Suleja, by North-Western part thereof.

4. The Plaintiff state he got title to the said piece or parcel of land by virtue of inheritance through his fore fathers.

5. The Plaintiff further aver that he has been in possession and use of same for farming/Agricultural purposes for over 30 years now without interruption or intervention whatsoever from anybody.

6. *The Plaintiff aver that they share common boundaries with the defendant whereas the Defendant encroached into the Plaintiff's portion of land by way of moulding cement blocks thereon. Evidence will be lead (sic) to establish this fact.*

B 8. *The Plaintiff avers that the Defendant had agreed to compensate him to the extent of encroachment only when the Plaintiff sued him before the Civil Upper Area Court, Suleja, by way of settlement out of court.*

C 11. *WHEREOF the Plaintiff claim against the Defendant as follows:*

(a) *A Declaration of Title to the said land to the extent of encroachment into the same only.*

D (b) *An order of perpetual injunction restraining the Defendant, his Agents, privies, servants or and/or encroachment into the Plaintiffs farm land.*

(c) *The sum of N20,000.00 as general damages for trespass into the Plaintiffs farmland."*

The defendant in his statement of defence denied the above averments thus:-

E "3. *By way of specific response to paragraphs 3, 4, 5, and 6, of the claim the defendant shall say the plaintiff has ceased to have any interest, customary or statutory in any piece of land any where near the Zuma Rock since 1980 or thereabout when he sold off whatever interest in land he might have had.*

F 4. *The complaint of the Plaintiff on encroachment came when he had disposed of his last property in the vicinity and when he no longer shares any common boundary with the defendant.*

G *The plaintiff adduced evidence to prove his claim to the land and the boundaries. In the course of cross examination, the plaintiff testified inter alia as follows:-*

H "It is one large piece of land. I did not measure my land. I never sold that piece of land. I hired it to some people for farming. I have been farming on the land since 1980. Those hiring it have been farming there for 8 years now, presently, those people are farming on it. The defendant trespassed on the land. There is a demarcation and that is why I knew that he has trespassed on the land. There is a drainage and a mango tree planted by my father. They form our boundary. I know it. I did not measure how much he trespassed."

The defendant under cross-examination admitted that he shared boundary with the plaintiff. Although he said he was given a certificate of Occupancy for his own land which he said he had purchased, he did not tender it in evidence. The learned trial judge on a proper evaluation of the evidence before him found in favour of the plaintiff as follows:- B

“The testimonies of the Plaintiff and his witness left no one in doubt as to the identity of the farm in question. I found the evidence of the Plaintiff on this overwhelming and I resolve the first issue in favour of the Plaintiff who must be entitled to a declaration as it is evident that he is the rightful owner of the land in question having inherited the same from his forefather.” C

I endorse the above finding and hold that there was no error in it, contrary to the finding and pronouncement of the lower court, which set aside the judgment of the learned trial court. The lower court in its judgment was in tandem with the trial court that the appellant adduced some evidence in support of his claim. D

It is not in dispute that the land of the appellant and the respondent share common border, for evidence abound on this. The respondent in his evidence stated inter alia thus: E

“My pillar is the boundary between the Plaintiff's land and my land.”

The identity of the land in dispute was therefore not an issue, for both parties were conversant with the land. F

In the circumstance I find the interference of the lower court unwarranted. See Buhari v. Obasanjo (2005) 7 SC (Pt. I) 1; (2005) 13 NWLR (Pt. 941) 1, Overseas Construction Ltd. v. Creek Ent. Ltd. (1985) 3 NWLR (pt. 13) 407, and Ighodo v. Owulo (1999) 5 NWLR (pt. 601) 70. I agree entirely with the judgment of my learned brother that the appeal is meritorious and I also allow the appeal, and set aside the judgment of the Court of Appeal, Abuja Division. I abide by the consequential orders made in the Leading Judgment. G

ONNOGHEN JSC

I have had the benefit of reading in draft, the Leading Judgment of my Learned Brother, Tabai, JSC just delivered. I agree with his reasoning and conclusion that the Appeal is meritorious and should be allowed. H

The Claim before the Court as disclosed in the Statement of Claim is simply that of title to land, damages for trespass and injunction, even though not elegantly crafted. The lower Court was clearly in error when it held that the Claim was a dispute over boundary, which is clearly not the case put forward by the Appellant in the Statement of Claim and the reliefs claimed before the Trial Court.

From the Evidence and the argument of the Respondent before this Court it is very clear that the Respondent concedes title to the land in dispute to the Appellant. In paragraph 3.5 of the Respondent's Brief lines 3 to 5 thereof, Learned Counsel stated thus:

"The Claim of the Appellant is, we submit, ambiguous and tautologous and therefore meaningless; as he already has title in his land; and there is no dispute about this."

Emphasis supplied by me.

It is also not disputed by the parties and as found by the lower courts, that the parties are neighbours; that is they share a common boundary. This fact is confirmed by the learned Counsel for the respondent at page 3 of the respondent's brief paragraph 3.7 where he concedes as follows:-

"There is no dispute, and there is a common understanding by both parties, and the Court of Appeal found from the Record and agreed that both appellant and respondent are land owning NEIGHBOURS."

However, it is the case of the respondent as argued in the brief of argument that appellant did not prove the identity or extent of his land trespassed upon as appellant tendered no survey plan and, secondly, that appellant was not "in direct physical possession of the land for which he claims in trespass." These points were the basis for the lower court holding that appellant failed to prove his case before the trial court.

I hold the considered view that the above is not supported by the evidence on record and the law applicable thereto.

In the first place respondent and the lower courts conceded title to the land which includes the area trespassed upon to the appellant which means that the respondent and the appellant know clearly the land they are talking about so the issue of identity does not arise. It would have been relevant if respondent was to have been claiming the land as his own, particularly the portion allegedly trespassed upon.

Once ownership of the land is conceded to the appellant, it means he is the owner and in possession of the land in question except the respondent can show, to the satisfaction of the court, that some other person has a superior title to that of the appellant.

What the respondent contends is that appellant is not in possession because he had sold the portion along their common boundary to someone else which appellant denies as he insists that the land had been let out to tenants for farming purposes. It is settled law that the act of letting out portions of the land to farmers or tenants is evidence of ownership and possession of the land and that singular act cannot derogate from the title of the appellant to the land. In any event it is never the case of the respondent going by the pleadings.

On the issue of possession of the land in issue, the trial court, which heard the parties believed the evidence or testimony of the appellant as against that of the respondent. It was thus a case of oath against oath and once the trial court believed the testimony of the appellant on the point, that is the end of the matter as to which of the party's version is true or correct. The lower court cannot, in the circumstance, substitute its own finding for that of the trial court on the facts, which finding was based on the belief of the trial court.

On the identity of the land or extent of the trespass, the appellant maintains that the area trespassed upon is where the respondent has set up his block moulding business. That area is clearly known to the parties and since the respondent has conceded title to the land in question to the appellant, which land includes the portion trespassed upon, he cannot be heard to say that the identity or extent of the trespass has not been established.

It is appreciated that in land matters such as this a survey plan is very helpful in determining the extent to which the claim is made but that does not apply in all cases particularly where the identity of the land is not disputed and the respondent has conceded title to the appellant, being common "*neighbours*" or people who share a common boundary.

Once the respondent crossed the common boundary he shares with the appellant to the appellant's land without the authority or consent of the appellant, he is, in law known as haven trespassed into the land of the appellant and the extent of that trespass is irrelevant in establishing the wrong. The extent of the land becomes

relevant when the claim is for the title which in the instant case has been clearly conceded as residing in the appellant.

It is for the above reasons and the more detailed ones contained in the lead judgment of my learned brother TABAI, JSC that I too allow the appeal and abide by the consequential orders contained therein including the order as to costs.

Appeal allowed.

GALADIMA JSC

I have had a preview of the judgment just delivered by Learned Brother F. F. TABAI, JSC. He has dealt in admirable detail all the points raised in this appeal.

I do not consider it necessary for me to add anything. Consequently, I too, allow this appeal in its entirety and abide by the D consequential orders made in the lead judgment.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment prepared by Tabai, JSC. I am in full agreement with his reasoning and conclusions. I would allow the appeal.

I propose, though to add a few observations. The appellant pleaded that he is the owner of a piece of land situated along Kaduna-Lokoja Road, near Zuma Rock. That he inherited it from his father and has been farming on the land for over thirty years. That he shares a common boundary with the respondent. The boundary is a natural waterway and a mango tree. In proof of his pleadings the appellant and his witnesses led unchallenged evidence.

Paragraph 3 of the respondents pleadings run as follows:

“3. By way of specific response to paragraphs 3,4,5 and 6 of the claim the defendant shall say the plaintiff has ceased to have any interest, customary or statutory in any piece of land anywhere near the Zuma Rock since 1980 or thereabout when he sold off whatever interest in land he might have had.”

On the state of the pleadings and evidence it is not in dispute that the respondent does not dispute the appellant’s root of title. What the respondent is saying is that the appellant sold the land since 1980. The position of the law is that the Court acts on unchallenged evidence. See: *Odulaja v Hadded 1973 11 SC p. 35; Nwabuoku v*

Ottih 1961 2 SCNLR p. 232.

Both lower courts were satisfied that the appellant successfully proved his root of title. I agree with both courts.

Now, the central issue is whether the respondent encroached on the appellant's land. This is what the trial judge said:

"...The plaintiff during cross examination stated that the Defendant trespassed on his farmland. He said that there is a waterway which demarcate his farmland from that of the Defendant. His father also planted some mangos trees by the said boundary and that is why he knew that the defendant had trespassed into his farm. That waterway according to him is a natural waterway. The defendant crossed the waterway and undertook a block making business on his land.

The learned trial judge then concluded:

"I have no reason to disbelieve this piece of evidence which has been corroborated with PW 3's evidence".

And with that the learned trial judge found that the respondent trespassed on to the appellant's land and set up a block making business thereon. The Court of Appeal was of a different view. It held that the appellant ought to have tendered a plan to show the boundary between his land and the respondent's land and indicated the extent of the trespass. The Court also held that since the appellant was not in possession he could not maintain an action in trespass. On those points the Court of Appeal reversed the judgment of the trial court and dismissed the appellant's claims.

The best proof of the boundaries of the land trespassed on is a surveyor's plan, but where a surveyor's plan is not produced the land in dispute must be ascertained with certainty.

See: Arabe v. Asanlu 1980 5-7 SC p. 78

The identity of the land the appellant says the respondent trespassed on, to establish his block making business was never made an issue, and so a surveyor's plan is unnecessary.

Where two parties claim title to land (in this case the land trespassed on) the Law ascribes title to the party with the better title and the claim is decided on the balance of probabilities. The respondent says absolutely nothing about title to land he claims to own. Paragraph 4 to 6 of his seven paragraph pleadings reads thus:

4. The complaint of the Plaintiff on encroachment came when

he had disposed off his last property in the vicinity and when he no longer shares any common boundary with the defendant.

5. This complaints was found to lack merit when settle out of court, by a former Area Court Judge in Suleja acting as Arbitrator; and no issue as to payment of any compensation ever arose.

B 6. The Plaintiff has no title nor possession to any farm land or piece of land that is worth encroaching into by the defendant.

C There is nothing in the pleadings to show even remotely the respondents root of title. The respondent testified that he bought the land in 1976 from an unnamed brother of an unnamed Emir. He also said he has a certificate of Occupancy for the land but failed to tender it. It is clear that evidence led by the appellant in proof of his claim to title to the land is credible and thus unassailable in the light of the respondents worthless evidence on the same issue. Surely the D appellants unchallenged evidence on his root of title which covers the land trespassed outweighs the evidence led by the respondent on the same issue.

E The aim of pleadings is to narrow the field of controversy between the parties thereby producing in the end live issue/s for determination by the trial court. The respondent's pleadings fell painfully short of this elementary requirement. The issue in this case is whether the respondent trespassed on the appellant's farmland to set up a block making business. The appellant pleaded his root of title F and led evidence in proof thereof. Instead of the respondent pleading his own root of title and leading evidence in support, he pleaded irrelevant "facts" and led evidence on unpleaded facts and in the process was unable to lead a shred of evidence to entitle him to any claim to the land. The respondent's pleadings were on irrelevant G matters, evasive and served no useful purpose.

For this and the much fuller reasoning in the leading judgment I would allow the appeal, restore the judgment of the trial court with costs proposed by Hon. Justice F. F. Tabai, JSC.

H