

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 2011. SC. 212/2003
CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN,
J. A. FABIYI, O. O. ADEKEYE, S. GALADIMA, JJSC

1. BARTHOLOMEW ONWUBUARIRI
2. RUFUS UZODIOKPU
3. LEVI AGUJIOKE APPELLANTS
4. ROWLAND ONWUBUARIRI
(Substituted by order of court
on 8/11/2010)
AND
1. ISAAC IGBOASOYI
2. IHENYIRIMADU ONYEBOSI
3. OBIDIKA ONYEBOSI RESPONDENTS
4. TIMOTHY IGBOASOYI
5. NELSON OZURUOKE
(For themselves and as representing
Umuokpara Kindred, Amadehi, Ubulu)

APPEALS - Issues - Need to arise from grounds - Where there is no ground of appeal on which an issue is based - Such issue is invalid (H1)

APPEALS - Interlocutory decision - Within a final decision - Appellant can appeal against it - In an appeal against the final decision of a court - Without filing separate notice of appeal (H2)

EVIDENCE - Documents - Pleaded but not tendered - Effect - Non-tendering of such document at trial - Means that paragraphs of the pleadings in which it was pleaded - Have been abandoned (H3)

APPEALS - Additional evidence - Appellate court can admit such evidence - On pleaded fact - Though such facts had earlier been deemed abandoned - For not being supported by evidence (H4)

APPEALS - Fresh evidence - Admission of - Grounds - It must be such that could not have been obtained - With reasonable care at

time of trial - And must be material (H5)

EVIDENCE - Appeals - Documents - Exhibit - Status - It was obvious that it could have been obtained - With reasonable care and diligence - For use at the time of trial - If formerly briefed counsel went to archives for it (H6)

EVIDENCE - Documents - Record of earlier proceedings - Admissibility - It ought to be shown that the party against whom it is sought to be admitted - Was a party to that earlier proceedings (H7)

EVIDENCE - Documents - Exhibit - Materiality - In view of findings of facts by the trial court - To which Court of Appeal agreed - In respect of traditional history and acts of ownership - The Exhibit is not material (H8)

EVIDENCE - Documents - Exhibit - Admissibility - Being evidence in a previous proceedings - Which can only be admissible under the provisions of s. 34 (1) of Evidence Act - Having not met the requirements - It was wrongly admitted (H9)

EVIDENCE - Evaluation - Duty of trial court - Where parties rely on different versions of traditional history - The duty of the trial court is to determine the preferred version - In view of the evidence led in proof (H10)

APPEALS - Concurrent findings - Attitude of Supreme Court - It will not disturb such findings - Unless they are shown to be perverse - Or not supported by evidence on record (H11)

LAND LAW - Title - Proof - Duty on claimant - There are five methods of proving title to land - And a claimant is not required to prove more than one of the methods - To succeed in his claim (H12)

FACTS

The plaintiffs/appellants sued the defendants/respondents, jointly and severally, before the High Court of Imo State, holden at Oguta, claiming declaration of title, damages for trespass and injunction in

respect of a piece of land they called "Ohia Owerri Land", as well as declaration of title and forfeiture in respect of another piece of land referred to as "Ala Ogwugwu Iyiala". It is a common ground that the two pieces of land now in dispute used to form part of a large piece of land originally belonging to one Amadehi of Ubulu. However, it was the case of either side that while they were descendants of the said Amadehi, the other side had no such relationship with Amadehi. Accordingly, appellants made a case that respondents were originally from Umuokpara kindred and were only related to appellants by reasons of marriage. Appellants' position was that respondents had migrated from Umuokpara and came to dwell with appellants following a communal disturbance at Umuokpara and that appellants had given "Ala Ogwugwu Iyiala" to respondents to dwell on as their customary tenants. Further, that respondents were paying tributes for the land until recent times when they stopped paying and rather challenged appellants' title to the land.

On the other hand, respondents alleged that they and not appellants, were the descendants of Amadehi from whom they had inherited the land in dispute from time immemorial. Respondents alleged that appellants were originally from Obakpu but had fled therefrom and been granted portions of the land to dwell on by respondents. Respondents pleaded the proceedings in the Native Court suit No. 397/16, Emene of Ubulu v. Chief Ewerem of Ubulu as evidence in proof of the fact that appellants were from Obakpu. Both parties relied on different versions of traditional history in which they respectively traced their root of title to Amadehi. Moreover, respondents failed to tender the earlier proceedings as pleaded. At the end of trial, the learned trial judge preferred the traditional history of appellants on a balance of probability and gave judgment accordingly. Aggrieved, respondents appealed to Court of Appeal. With leave of Court, they tendered the judgment in the earlier proceedings which they failed to tender at the trial. Despite opposition by appellants, the Appeal Court admitted same as Exhibit 1 and went on to rely on it to reverse the judgment of the trial court. This was notwithstanding that in its judgment the traditional history and genealogical background of appellants were held to be sufficiently good. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal. Respondents have also cross-appealed, challenging the finding

that appellants traditional history was sufficiently good.

ISSUES FOR DETERMINATION

APPEAL

"The 1st issue for determination is whether the Court of Appeal rightly admitted Exhibit 1, and if it so rightly admitted it, was the said exhibit necessary and/or important for the determination of the plaintiffs/Appellants' case.

The 2nd issue for determination is whether the Court of Appeal was right, stating as it did in its judgment thereby relying on it that the High Court failed to consider sufficiently the recent acts of possession by the parties and the inconclusiveness of the evidence of tradition by the two parties.

The 3^d issue for determination is whether on the preponderance of evidence based on the balance of probabilities, the plaintiffs/Appellants would have failed in their case".

CROSS APPEAL

"Whether the court below was right by concluding that the traditional history and the genealogical background of the plaintiffs is sufficiently good."

HELD (Unanimously allowing the appeal while dismissing the cross-appeal per **ONNOGHEN JSC**)

APPEALS - Issues - Need to arise from grounds

1. To begin with, learned Senior Counsel for the respondents has submitted that appellants did not appeal against the admissibility of Exhibit 1 to which learned Counsel for the appellants referred the court to ground 1 of the original grounds of appeal. This sub issue is very fundamental to the consideration of the merit or otherwise of issue 1 under consideration, since it is trite that where there is no ground of appeal from which an issue is raised for determination, the issue in question is invalid as an issue must be based on a ground of appeal. (p. 462 B)

Interlocutory decisions - Within a final decision

2. I have gone through the original ground 1 of the grounds of appeal and I hereby confirm that the ground attacks the admissibility of exhibit 1 by the lower court. It is true that no separate notice of appeal was filed with respect to the ruling of the lower court admit-

ting exhibit 1 but it is settled law that an appellant can appeal against an interlocutory decision of a lower court in an appeal against the final decision of the court, as in the instant case. (p. 462D)

Documents - Pleaded but not tendered - Effect

3. It is clear from the record and, both parties agreed that the proceedings in the native court case pleaded supra was not tendered in evidence at the trial of the case and as such the trial judge said nothing on it; B

In the circumstance of this case, it is clear that the non tendering of the said proceeding at the trial means that the paragraphs 3 and 4 of the 2nd Amended Statement of Defence, as far as they relate to the native court case proceedings, were abandoned and the trial court could not have made any findings relating thereto, as to do so would have amounted to the court speculating on evidence not before it, D which act is frowned upon by law. Since the pleading in question was abandoned, it means in law, no issue was joined between the parties for consideration by the trial court. So, at the time the trial court entered the judgment after considering the case presented by the parties, the relevant pleading was deemed abandoned as decided by E this Court in a long line of cases including Oba Oyediran of Igbonla vs. Oba Alebiosu II (1992) 6 NWLR (pt. 249) 550 at 556. (p. 463 E/H)

APPEALS - Additional evidence

4. It is however settled law that an appellate court has the power to admit additional evidence on appeal if certain pre-conditions are present. In other words, an admission of additional evidence on appeal in support of a pleaded fact which was deemed abandoned by G the lower court is the only way by which the principle of abandoned pleading following the non tendering of a pleaded document can be circumvented by law. (p. 464 C)

Courts - Admission of fresh evidence - Grounds for

5. I had earlier stated that the lower court has the power to receive further of ?? **or** additional evidence on questions of facts but such further or additional evidence is receivable only on special circumstance. H

The special grounds/circumstances under which the Court of Appeal or appellate court can exercise its power to receive further/additional/fresh evidence on appeal include the following:-

- (a) the evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial;
- (b) If the fresh evidence is admitted, it will have an impact but not necessarily crucial effect on the whole case;
- (c) If the evidence sought to be adduced is such that it is apparently credible in the sense that, it is capable of being believed even if it may not be incontrovertible.
- (d) If the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicant, if it had been available at the trial court.
- (e) the evidence must be material and weighty even if not conclusive. (p. 464 E/G)

EVIDENCE - Documents - Exhibit - Status

6. It is not in dispute that exhibit 1 was duly pleaded with the express intention of its being relied upon at the trial which presupposes that it was available. However, it was never tendered as exhibit. Can it be said that the said exhibit 1 could not have been obtained with reasonable care and diligence for use at the trial as required by condition (a) supra? I do not think so. It is very clear that the document was available in the National Archives where a copy was obtained after the trial and upon advice by the new counsel for the present respondents.

The fact that the former counsel did not think of searching for the document in the National Archives affects his competence in the conduct of the case which does not mean that the document was not available with diligent search. He was in total control of the proceedings having been duly briefed. (p. 465 C)

H Documents - Record of earlier proceedings - Admissibility

7. It has not been shown from the pleadings whether the present appellants were parties to the proceedings in exhibit 1 neither is there admissible evidence on record to establish that fact, yet the document was admitted and used against them. It should be noted that

the document was not pleaded as estoppel neither was the relationship between the parties to the earlier proceedings linked with the parties in the instant proceedings, let alone the issues determined therein. (p. 465 G)

EVIDENCE - Documents - Exhibit - Materiality

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8. Would exhibit 1 have influenced the judgment of the trial court in favour of the respondents if it had been available at the trial? The answer, in my considered opinion, is in the negative. In the first place and as I had earlier stated in this judgment, the pleadings did not link exhibit 1 with the appellants. Secondly, even the lower court agreed with findings of facts by the trial court with respect to the traditional history and acts of ownership testified to by the appellants in support of their pleadings. It should be remembered that the case of the respondents is that the appellants are not descendants of Amadehi. (p.466 A)

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EVIDENCE - Documents - Exhibit - Admissibility

9. It should be noted that exhibit 1 as pleaded is evidence in a previous proceedings which can only be admissible in a subsequent proceeding under the provisions of section 34 (1) of the Evidence Act, 1990, supra, which conditions have not been satisfied in the instant case. If the intention was to contradict the appellants with regards to their traditional history, then they ought to have been confronted with the facts under cross examination before exhibit 1 could be admissible.

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It is very clear that the lower court was not only in error in admitting exhibit 1 as additional evidence on appeal but also in relying on it in coming to its decision in the appeal. It is settled law that a court cannot rely on inadmissible evidence to determine a matter before it. (p. 466 G)

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EVIDENCE - Evaluation - Duty of trial court

10. It should be noted that evaluation of evidence and ascription of probative value or weight to be attached thereto remains the primary duty of the trial judge who heard the witnesses testify and saw them in action so as to be better placed in accessing their credibility. As stated earlier, both parties relied on traditional history which in

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effect pitches the version of traditional history presented by the plaintiffs against that by the respondents. The duty of the trial court in the circumstance is to determine the preferred version having regards to the evidence presented in proof of same, the court being faced with the oath of the parties against each other in the instant case, the trial court clearly preferred the version of the plaintiffs/appellants against that of the defendants/respondents. That preference is based primarily on credibility of the witnesses in the absence of documentary evidence relevant to the issue. (p. 468 H)

C Appeals - Concurrent findings - Attitude of Supreme Court

11. At page 284 of the record, the lower court found/held as follows, inter alia:-

“Honestly, the traditional history and the genealogical background traced by the plaintiffs is sufficiently good. They traced their ancestry to Amadehi and slipped their various acts of ownership and possession on the land in dispute including acts of farming, collection of rents and tributes as well as ownership of huts and shrines....” Emphasis supplied by me.

The above constituted concurrent findings of facts by the lower courts on the issue of traditional history and acts of ownership of the two pieces of land in dispute. It is settled law that this court does not make a practice of disturbing concurrent findings of facts except in very exceptional circumstances such as where the findings are perverse or not supported by the evidence on record or against procedural or substantive law, etc. To me, by the lower court confirming the findings of facts of the trial court on the issue, the matter ended there as the findings are adequately supported by evidence on record. (p. 469 D)

LAND LAW - Proof of title - Duty on claimant

12. As stated earlier in this judgment, there are five methods or ways of proving title to land and that one is not required to prove more than one method to succeed in his claim of title to land.

In the instant case, both courts agreed that the two methods were proved though the lower court went on to hold that the trial court *“failed to consider sufficiently the recent acts of possession by the parties....”* The lower court is clearly in error in holding as above

because having held that the traditional history as to acquisition and ownership of the land by the appellant was “*sufficiently good*”, that was the end of the matter as possession of the land goes with ownership thereof particularly where the party in possession has been shown to have been put thereon by the claimant, as in the instant case.
(p. 470 A)

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REPRESENTATION

J. B. Daudu Esq. SAN, with him are K. B. Ottah Esq. and E. Yalwa (Miss) for the Appellants/Cross-Respondents.
Alh. F. A. Oso SAN, with him P. O. Nwobiri Esq. for the Respondents/
Cross-Appellants.

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CASES REFERRED TO

Dekeke vs. Williams 10 WACA 164
Fashanu vs. Adekoya (1974) 6 SC 83
Sanyaolu vs Oker (1983) 15. CNLR 168
Idudun vs. Okumagba (1976) 9-10 SC 227
Owomiyi vs. Omotosho (1961) All NLR 304
Eze vs. Atasie (2000) 6 S.C (pt. 1) 214 at 220
Igbodin vs. Obianke (1976) NWLR 121 at 219
Owata vs Anyigo (1993) 2 NWLR (pt. 276) 380
Balogun vs. Akanji (1988) 1 NWLR (pt. 70) 301
Atanda vs Ajani (1989) 3 NWLR (pt. 111) 511 at 535
Oba Alebiosu II (1992) 6 NWLR (pt. 249) 550 at 556
Olawolagba vs. Bakare (1995) 4 NWLR (pt. 387) 116 at 124
Onwugbufo vs. Okoye (1996) 1 NWLR (pt. 424) 252 at 280

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STATUTE REFERRED TO

Evidence Act, L.F.N. 1990, s. 34

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LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Port Harcourt in appeal NO. CA/PH/97/95 delivered on the 24th day of March, 2003, in which the court allowed the appeal of the present respondents against the judgment of the High Court of Imo State, Holden at Oguta in suit NO. HOG/55/86 delivered on the 29th day of July, 1994.

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The present appellants, as plaintiffs at the trial court instituted the action against the respondents jointly and severally claiming the following reliefs:

- (a) Declaration that plaintiffs are entitled to customary right of occupancy to the pieces or parcels of land known and called “Ohia Owerre and “Ala Ogwugwu Iyiala Amaechi” situate at Amadehi Ubulu in Oru Local Government Area within Oguta Judicial Division.
- (b) Perpetual injunction restraining the defendants by themselves, their agents and or servants from trespassing into the said “Ohia Owerre Land.
- (c) N1, 000.00 (one thousand naira) damages for trespass on the said “Ohia Owerre land”.
- (d) An order against the defendants for forfeiture of “Ala Ogwugwu Iyiala Land.”

The facts of the case include the following. It is the case of the plaintiffs/appellants that the two pieces of land supra form part of a large piece of land originally deforested by their ancestor, Amadehi who farmed thereon and reaped the economic trees in it; that Amadehi had three sons viz: Ezeala, Ezike and Amama; that the plaintiffs are the descendants of Ezeala that is why they are called Umu-Ezeala; that the two portions of land in dispute were given to Ezeale as his share of their father’s land; that they have been exercising maximum acts of ownership over the two portions of land by farming, reaping economic trees and have Juju shrine called “Ogwugwu Iyiala” thereon.

It is also the case of the plaintiffs that the defendants/respondents originally were of Umuokpara kindred who had a dispute with Dinwoke of Umuanna in Ubulu resulting in the disintegration of Umuokpara people as a result of which some of them who had marriage relationship with the plaintiffs fled their land and were given the land in dispute by the plaintiffs, their in-laws to settle for which they paid tribute that later on the defendants failed or stopped paying the tributes resulting in a strained relationship between the parties; that there was an arbitration between the parties before their traditional ruler, Ute Eze Ben Obi following acts of trespass by the defendants; that the defendants challenged the title of the plaintiffs to the land hence the action.

On the other hand, it is the case of the defendants that they are of Umuokpara kindred of Amadehi not Ubaha. They referred to

the two pieces of land as “Okpulo Umezum and “Ohia Oweri Okpulo”; they denied the traditional history of the plaintiffs as regards the two pieces of land in dispute and state that the plaintiffs are not descendants of Amadehi as claimed; that it is the defendants who rather inherited the land from Amadehi from time immemorial as they farm and live therein; that they granted portions of the land to the fore fathers of the plaintiffs who fled from Obakpu, their original home and pleaded the proceedings in the native court suit NO. 397/16, Emene of Ubulu vs. Chief Ewerem of Ubulu to show that the plaintiffs are from Obakpu, not Ubulu.

In the version of the defendants, Amadehi had three sons, Opara, Ezum and Dara, and that the defendants are the descendants of Opara hence their being called Umuopara of Amadehi; that Ezeala, Ezeke and Amama, are stranger elements who came from Obakpu; that the defendants never paid tribute to the plaintiffs; the defendants denied trespassing on the land in dispute.

At the conclusion of the trial, the learned Trial Judge preferred the traditional history of the plaintiffs to that of the defendants and consequently entered judgment for the plaintiffs.

However, upon appeal to the Court of Appeal holden at Port Harcourt, the decision of the trial court was reversed giving rise to the instant further appeal, the issues for the determination of which have been formulated by the learned Counsel for the appellants, C. O. ANAH, ESQ. in the appellants’ brief of argument filed on 10/9/03 as follows:-

“The 1st issue for determination is whether the Court of Appeal rightly admitted Exhibit 1, and if it so rightly admitted it, was the said exhibit necessary and/or important for the determination of the plaintiffs/Appellants’ case.

The 2nd issue for determination is whether the Court of Appeal was right, stating as it did in its judgment thereby relying on it that the High Court failed to consider sufficiently the recent acts of possession by the parties and the inconclusiveness of the evidence of tradition by the two parties.

The 3^d issue for determination is whether on the preponderance of evidence based on the balance of probabilities, the plaintiffs/Appellants would have failed in their case.

On the other hand, learned Senior Counsel for the respon-

dents F. A. OSO ESQ. SAN formulated two issues for determination in the Respondents/Cross-Appellants brief of argument filed on 11/11/03. The issues are as follows:-

B “1) *Whether Exhibit 1 was properly admitted as additional evidence on appeal and made use of by the court below on arriving at its decision.*

2) *Whether in view of Exhibit 1, the case of the plaintiffs/appellants was properly decided by the court below.* “

C It should be noted at this stage, that the respondents did file a cross appeal, the issue for the determination of which has been formulated in the Cross Appellants’ brief filed on 11/11/03 as follows: -

“*Whether the court below was right by concluding that the traditional history and the genealogical background of the plaintiffs is sufficiently good.*”

D From the issues submitted for determination by both parties, it is very clear that the pivot of the appeal is the admission of exhibit 1 by the lower court as an additional evidence on appeal on the basis of which the court set aside the findings and decision of the trial court in the matter. It is also to be noted that despite the admission and E reliance on exhibit 1, the lower court still agreed with the trial court that the version of the traditional history and genealogical tree of the plaintiffs/appellants is sufficiently good for the purpose of the case they presented. It is due to the above finding/holding that the respondents have cross appealed. The cross appeal is therefore on a F concurrent finding of facts.

It is on the basis of the above understanding of the case before this Court that I intend to consider the appeal in this judgment.

G In arguing issue 1, learned Counsel for the appellants submitted that the lower court was in error in admitting exhibit 1 in the circumstance in which it did and that having admitted the exhibit, the proper thing the lower court ought to have done was to have expunged it relying on the case of Obasi vs. Onwuka (1989) 3 NWLR (pt. 61) 364 at 373 particularly as the document admitted as exhibit H 1, the proceedings in native court case NO. 387/16 was not only pleaded but was in existence at the time of trial but not tendered in evidence; that the failure to tender the said document at the trial means the paragraph of the Statement of Defence in which it was pleaded had been abandoned, relying on the case of Oba Oyediran

of Igbonia vs. Oba Alebiosu II (1992) 6 NWLR (pt. 230) 550 at 556; that with the abandonment of the paragraph in question, it means no issue was joined by the parties worthy of submission to trial.

It is the further submission of learned Counsel that exhibit 1, being evidence in a previous proceeding is hearsay evidence admissible only on the provisions of section 34 (1) of the Evidence Act, 1990; that the conditions under which exhibit 1 could have been admitted by the trial court - such as for the purpose of cross examination - has not been established to exist in this case, and urged the court to resolve the issue in favour of the appellants. B

On his part, learned Counsel for the respondents stated that exhibit 1 was admitted upon application and proceeded to reproduce some paragraphs of the affidavit in support of the application and those of the counter affidavit and submitted that the lower court properly admitted the document as an additional evidence on appeal and that it was proper for the court to have made use of it in its judgment; that there is no appeal against the ruling of the lower court admitting exhibit 1 as additional evidence and as such the ruling stands unchallenged; that exhibit 1 was used by the lower court to test the veracity of the traditional history of the parties relying on Fashanu vs. Adekoya (1974) 6 SC 83; that the lower court did not contravene the provisions of section 34 (1) of the Evidence Act, 1990, as contended by counsel for the appellants and that the said section is irrelevant to the determination of the issue in contention; that the lower court was right in relying on exhibit 1 as the power of the court to expunge evidence at the judgment stage is limited to legally inadmissible evidence and not legally admissible evidence on facts pleaded - relying on Igbodin vs. Obianke (1976) NWLR 121 at 219; that there is a difference admissibility of additional evidence on appeal and admissibility of evidence under section 34 (1) of the Evidence Act, 1990. C
On admissibility of additional evidence Senior Counsel cited and relied on Owata vs Anyigo (1993) 2 NWLR (pt. 276) 380 while the case of Sanyaolu vs Oker (1983) 15. CNLR 168 is cited to illustrate applicability of section 34(1) of the Evidence Act, 1990 and urged the court to resolve the issue against the appellants. D
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In the reply brief filed on the 11/3/04, learned Counsel for the appellants submitted that appellants appealed against admissibility of exhibit 1 in ground 1 of the original grounds of appeal; that what the

respondents pleaded was the proceedings in the native court not the judgment of court which is what exhibit 1 is; that exhibit 1 was not pleaded as *res judicata* and as such cannot now be raised, either at the court below or in this court, relying on *Owomiyi vs. Omotosho* (1961) All NLR 304; *Dekeke vs. Williams* 10 WACA 164; that the parties and other conditions needed for the operation of estoppel do not exist in the instant case.

To begin with, learned Senior Counsel for the respondents has submitted that appellants did not appeal against the admissibility of Exhibit 1 to which learned Counsel for the appellants referred the court to ground 1 of the original grounds of appeal. This sub-issue is very fundamental to the consideration of the merit or otherwise of issue 1 under consideration, since it is trite that where there is no ground of appeal from which an issue is raised for determination, the issue in question is invalid as an issue must be based on a ground of appeal. I have gone through the original ground 1 of the grounds of appeal and I hereby confirm that the ground attacks the admissibility of exhibit 1 by the lower court. It is true that no separate notice of appeal was filed with respect to the ruling of the lower court admitting exhibit 1 but it is settled law that an appellant can appeal against an interlocutory decision of a lower court in an appeal against the final decision of the court, as in the instant case.

Now, to the admissibility of exhibit 1 and the use it was put to, by the lower court.

The attack on this issue is on two fronts.

(a) that the admissibility offends against the provisions of 34 (1) of the Evidence Act, 1990, and

(b) that it offends against the principles guiding admissibility of additional evidence on appeal.

The question then is: What does section 34 (1) of the Evidence Act, 1990, provide? The said section provide thus:-

“34 (1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable

of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable:

Provided-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) that the questions in issue were substantially the same in the first as in the second proceedings”

The above provision comes under the heading of “Statements By Persons Who Cannot Be Called As Witnesses. “

What is exhibit I?

In paragraphs 3 and 4 of the 2nd Amended Statement of Defence, the respondents pleaded, inter alia, as follows:-

“3. The defendants deny the averments in paragraphs 4 and 5 of the 2nd amended Statement of Claim and will at the hearing put the plaintiffs to strict proof.....

The defendants specifically deny the claim of the plaintiffs, that they are the descendants of Amadehi from whom the defendants inherited the area of land verged green.

4. In further answer to the said paragraphs the defendants aver that at the hearing, they will rely on proceedings in native court case NO. 397/16 between Emene of Ubulu vs Chief Ewerem of Ubulu,.....”

It is clear from the record and, both parties agreed that the proceedings in the native court case pleaded supra was not tendered in evidence at the trial of the case and as such the trial judge said nothing on it; it is, also true that the said proceedings in the native court case is what was tendered and admitted as exhibit 1 or exhibit CA1 by the lower court as additional evidence and on the basis of which the lower court set aside the decision of the trial court on the ground that if that court had had the advantage of considering the said exhibit 1, it would not have come to the same conclusion it did.

In the circumstance of this case, it is clear that the non tendering of the said proceeding at the trial means that the

paragraphs 3 and 4 of the 2nd Amended Statement of Defence, as far as they relate to the native court case proceedings, were abandoned and the trial court could not have made any findings relating thereto, as to do so would have amounted to the court speculating on evidence not before it, which act is frowned upon by law. Since the pleading in question was abandoned, it means in law, no issue was joined between the parties for consideration by the trial court. So, at the time the trial court entered the judgment after considering the case presented by the parties, the relevant pleading was deemed abandoned as decided by this Court in a long line of cases including Oba Oyediran of Igbonla vs. Oba Alebiosu II (1992) 6 NWLR (pt. 249) 550 at 556.

It is however settled law that an appellate court has the power to admit additional evidence on appeal if certain pre-conditions are present. In other words, an admission of additional evidence on appeal in support of a pleaded fact which was deemed abandoned by the lower court is the only way by which the principle of abandoned pleading following the non tendering of a pleaded document can be circumvented by law.

I had earlier stated that the lower court has the power to receive further of additional evidence on questions of facts but such further or additional evidence is receivable only on special circumstance. It is also settled law that the power so conferred on the Court of Appeal is generally exercised reluctantly sparingly, and with great circumspection since the law is reluctant in allowing a party to re-open an issue after it had been duly determined/decided by a court of competent jurisdiction, on the excuse that new facts, which could have been discovered and used at the trial are now found.

The special grounds/circumstances under which the Court of Appeal or appellate court can exercise its power to receive further/additional/fresh evidence on appeal include the following:-

- (a) the evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial;**
- (b) If the fresh evidence is admitted, it will have an im-**

fact but not necessarily crucial effect on the whole case;

(c) If the evidence sought to be adduced is such that it is apparently credible in the sense that, it is capable of being believed even if it may not be incontrovertible.

(d) If the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicant, if it had been available at the trial court. B

(e) the evidence must be material and weighty even if not conclusive. see Owata vs. Anyigo (1993) 2 NWLR (pt. 276) 380.

Applying the above principles to the facts of this case, can it be said that exhibit 1 should have been admitted? Learned Senior Counsel for the respondents has submitted that exhibit 1 met the requirements for admission as additional evidence. In the first place, **it is not in dispute that exhibit 1 was duly pleaded with the express intention of its being relied upon at the trial which presupposes that it was available. However, it was never tendered as exhibit. Can it be said that the said exhibit 1 could not have been obtained with reasonable care and diligence for use at the trial as required by condition (a) supra? I do not think so. It is very clear that the document was available in the National Archives where a copy was obtained after the trial and upon advice by the new counsel for the present respondents.** C
A court exists to balance the scale of justice between parties before it in the determination of disputes and will always ensure that none of them is placed at an advantage over the other in the balancing of that scale so as to ensure that no miscarriage of justice occurs. **The fact that the former counsel did not think of searching for the document in the National Archives affects his competence in the conduct of the case which does not mean that the document was not available with diligent search. He was in total control of the proceedings having been duly briefed.** D
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That apart, **it has not been shown from the pleadings whether the present appellants were parties to the proceedings in exhibit 1 neither is there admissible evidence on record to establish that fact, yet the document was admitted and used against them. It should be noted that the document was not pleaded as estoppel neither was the relationship between the** H

parties to the earlier proceedings linked with the parties in the instant proceedings, let alone the issues determined therein.

Would exhibit 1 have influenced the judgment of the trial court in favour of the respondents if it had been available at the trial? The answer, in my considered opinion, is in the negative. In the first place and as I had earlier stated in this judgment, the pleadings did not link exhibit 1 with the appellants. Secondly, even the lower court agreed with findings of facts by the trial court with respect to the traditional history and acts of ownership testified to by the appellants in support of their pleadings. It should be remembered that the case of the respondents is that the appellants are not descendants of Amadehi. The lower court at page 284 of the record affirmed the finding of fact by the trial court on traditional history etc. as follows:-

"Counsel went on to show that there was proof of original settlement and the evidence led in support of same by the respondents was strong. He believed the respondents had discharged the onus placed on them in law.

In my view, this particular part of the appeal is very significant for upon it depends the success or otherwise of the appeal. In that regard, the evidence of traditional history given and the genealogy trees are very fundamental factors. Honestly, the traditional history and the genealogical background traced by the plaintiffs is sufficiently good. They traced their ancestry to Amadehi and showed their various acts of ownership and possession on the land in dispute including farming, collection of rents and tributes as well as ownership of huts and shrines. "

The above finding as to the genealogy of the appellants is even supported by testimonies of the defence witnesses - see the evidence of DW1, DW2, and DW3. The above clearly shows that exhibit 1, if available to the trial court would not have influenced the judgment of that court in favour of the respondents.

That apart, **it should be noted that exhibit 1 as pleaded is evidence in a previous proceedings which can only be admissible in a subsequent proceeding under the provisions of section 34 (1) of the Evidence Act, 1990, supra, which conditions have not been satisfied in the instant case. If the intention was to contradict the appellants with regards to their tra-**

ditional history, then they ought to have been confronted with the facts under cross examination before exhibit 1 could be admissible.

It is very clear that the lower court was not only in error in admitting exhibit 1 as additional evidence on appeal but also in relying on it in coming to its decision in the appeal. It is settled law that a court cannot rely on inadmissible evidence to determine a matter before it. B

On issue 2, dealing with finding of the lower court on the effect that the trial court failed to consider sufficiently the recent acts of possession etc., learned Counsel for the appellants submitted that the lower court was in error in so holding; that both courts - trial and lower court-agreed that the case as put forward by the parties is based on traditional history and that a declaration of title can be made on traditional history and that both courts agreed that the appellants traced their ancestry to Amadehi as well as their acts of ownership and urged the court to resolve the issue in favour of the appellants. C D

On the other hand, learned Senior Counsel for the respondents submitted that appellants did not prove the facts pleaded in paragraphs 4, 5, 6, 7 and 14 of the 2nd Amended Statement of Claim; that where a party in an action for declaration of title to land relies on genealogical proof of history and fails to accurately trace the genealogical history of succession to the land claimed, his claim should be dismissed, relying on *Onwugbufor vs. Okoye* (1996) 1 NWLR (pt. 424) 252 at 280; *Eze vs. Atasie* (2000) 6 S.C (pt. 1) 214 at 220; that a total number of 21 names were pleaded in paragraph 14 of the amended statement of claim whereas five names only were given in evidence; that apart from Ezeala said to be the eldest son of Amadehi, there is nothing to show the relationship of one ancestor to the other - such as parental etc.; that the lower courts were in error when they held that the appellants proved their traditional history and urged the court to resolve the issue against the appellants. E F G

The issue under consideration arose from the decision of the lower court to be found at page 291 of the record where the court held, inter alia, thus: H

“.....The lower court failed to consider sufficiently the recent acts of possession by the parties and the inconclusiveness of the evidence of tradition by the two parties. “

It is settled law that in an action for declaration of title to land, the onus is on the claimant to satisfy the court that he is entitled to the declaration sought on the pleadings and evidence thereon. Where the onus is not discharged, the weakness of the defendant's case will not be of any help to the claimant. It has also been settled that title to land can be established/proved by five different ways and that a claimant need not rely on more than one way/method in proving his title to succeed in the effort - see *Olawolagba vs. Bakare* (1995) 4 NWLR (pt. 387) 116 at 124; *Idudun vs. Okumagba* (1976) 9-10 SC 227; *Atanda vs Ajani* (1989) 3 NWLR (pt. 111) 511 at 535; *Balogun vs. Akanji* (1988) 1 NWLR (pt. 70) 301.

In the instant case, both parties rooted their case in traditional history in which their root of title is traced to a common ancestor, AMADEHI though they differ as to the names of the alleged three sons of AMADEHI. What is the finding of facts by the lower courts on the traditional history of the parties and their acts of ownership?

At page 122 of the record, the trial judge made the following findings.

"I accept as true the unchallenged testimony of PW1 that Amadehi was the ancestor of the plaintiffs and that he had three sons viz, Ezeala, Ezike and Anama. I also accept as true the evidence that plaintiffs are descendants of Ezeala the first son of Amadehi.... Who deforested the land in dispute? It was remarkable that DW1's evidence was silent on this very pertinent basis of any worthwhile traditional history of a dispute, of the nature.... I therefore accept the evidence as true that indeed Amadehi the plaintiff's ancestor deforested this land. I also accept the evidence that it was inherited by Ezeala the ancestor of Umuezeala kindred i. e. the plaintiffs."

The Court followed it up at page 123 with the following:-

"By reasons of this findings I have no difficulty at all that the plaintiffs have amply discharged the burden of proving the traditional history of the land in dispute on the balance of probabilities based on preponderance of evidence. I find that the two portions of the land in dispute belong to the plaintiffs.... It follows that the defendants' case as put forward in their pleadings cannot stand. It collapsed completely."

It should be noted that evaluation of evidence and ascription of probative value or weight to be attached thereto

remains the primary duty of the trial judge who heard the witnesses testified and saw them in action so as to be better placed in accessing their credibility. As stated earlier, both parties relied on traditional history which in effect pitches the version of traditional history presented by the plaintiffs against that by the respondents. The duty of the trial court in the circumstance is to determine the preferred version having regards to the evidence presented in proof of same, the court being faced with the oath of the parties against each other in the instant case, the trial court clearly preferred the version of the plaintiffs/appellants against that of the defendants/respondents. That preference is based primarily on credibility of the witnesses in the absence of documentary evidence relevant to the issue. What is the reaction of the lower court to the above findings of facts and holdings.

At page 284 of the record, the lower court found/held as follows, inter alia:-

*"In my view, this particular part of the appeal is very significant for upon it depends the success or otherwise of the appeal. In that regard, the evidence of traditional history given and the genealogy trees are very fundamental facts. **Honestly, the traditional history and the genealogical background traced by the plaintiffs is sufficiently good. They traced their ancestry to Amadehi and slipped their various acts of ownership and possession on the land in dispute including acts of farming, collection of rents and tributes as well as ownership of huts and shrines....**"* Emphasis supplied by me.

The above constituted concurrent findings of facts by the lower courts on the issue of traditional history and acts of ownership of the two pieces of land in dispute. It is settled law that this Court does not make a practice of disturbing concurrent findings of facts except in very exceptional circumstances such as where the findings are perverse or not supported by the evidence on record or against procedural or substantive law, etc. To me, by the lower court confirming the findings of facts of the trial court on the issue, the matter ended there as the findings are adequately supported by evidence on record.

The question however is, whether the lower court having af-

firmed the findings of facts by the trial court supra was right to have proceeded to hold as at page 291, supra, the substance of the complaint in the issue under consideration. The answer is in the negative.

As stated earlier in this judgment, there are five methods or ways of proving title to land and that one is not required to prove more than one method to succeed in his claim of title to land. One of the methods is by way of traditional history of acquisition of the land by the original owner and how the land descended to the plaintiffs, as in the instant case. Another method is by proving of acts of ownership or possession by the claimant over the land in dispute extending over time. **In the instant case, both courts agreed that the two methods were proved though the lower court went on to hold that the trial court “failed consider sufficiently the recent acts of possession by the parties....”**

The lower court is clearly in error in holding as above because having held that the traditional history as to acquisition and ownership of the land by the appellant was “sufficiently good”, that was the end of the matter as possession of the land goes with ownership thereof particularly where the party in possession has been shown to have been put thereon by the claimant, as in the instant case. In the circumstances of this case, a consideration of acts of possession and ownership becomes superfluous since such acts are performed in recognition of the rights of ownership. However in the instant case, the courts did find acts of ownership and possession in the appellants which include acts of farming, collection of rents and tributes and ownership of huts and shrines on the land in dispute. The issue is therefore resolved in favour of the appellants.

On issue 3 which is whether on the preponderance of evidence based, on the balance of probabilities the appellants would have failed in their case, I hold the considered view that in view of the resolution of the two issues earlier considered in this judgment, issue 3 has become spent as a consideration of same will involve going over the matters earlier considered and resolved in favour of the appellants. That being the case, it is my view that issue 3 be and is hereby discountenanced by me.

That brings us to a consideration of the one issue formulated for determination in the cross appeal which has substantially been

dealt with in the consideration of the issues in the main appeal. The most important thing to note about the cross appeal is the fact that it is based on the concurrent findings of fact by the lower courts on the traditional, history and genealogical trees presented by the appellants. Learned Senior Counsel for the cross appellants has not demonstrated to the satisfaction of this Court, why this Court should interfere with the said concurrent findings of facts. In fact Learned Senior Counsel did not avert his mind to the fact that the findings attacked constitute concurrent findings by the lower courts.

In the circumstance, I find no merit in the cross appeal.

In conclusion, I hold the considered view that the main appeal has merit and ought to be allowed while the cross appeal lacks merit and should be dismissed. I hereby order accordingly.

I assess and fix the costs of N50,000.00 in favour of the appellants against the respondents in the main appeal and N50,000.00 in favour of respondents against the cross appellants in the cross appeal.

Main appeal allowed, while the cross appeal is dismissed.

MOHAMMED JSC

The judgment just delivered by my learned brother Onnoghen, JSC was read by me in draft before today. I completely agree with the reasoning and the conclusions arrived, that the appeal is meritorious and deserves to succeed while the cross appeal lacks merit and ought to be dismissed. The fact that the Court below agreed with the finding of the trial court on the traditional history and genealogical background of the Plaintiffs claims as proved, including various acts of ownership and possession of the land in dispute, it is rather baffling how that Court could turn round and rely on abandoned pleaded facts to dismiss the case of the Plaintiffs/Appellants.

Accordingly, I also allow the appeal, dismiss the cross-appeal and abide by the orders in the lead judgment including the order on costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my

learned brother - Onnoghen, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal is meritorious and should be allowed while the cross-appeal is devoid of merit and deserves to be dismissed.

The plaintiffs claimed, inter alia, ownership of title to the pieces of land in dispute. They relied on proof through traditional history by tracing their root of title to Amadehi who deforested the pieces of land. DW 2, under cross-examination, confirmed that Amadehi deforested the land in dispute. D.W. 3, on his part, agreed that the plaintiffs are indigenes of Amadehi. The trial court found that the plaintiffs proved their case.

The defendants appealed to the Court of Appeal (the court below; for short). At page 284 of the record, the court below found as follows:-

"Honestly, traditional history and genealogical background traced by the plaintiffs is sufficiently good. They traced their ancestry to Amadehi and showed their various acts of ownership and possession on the land in dispute including acts of farming, collection of rents and tributes as well as ownership of huts and shrines."

I am of the considered view that with the above stance of the Court below, it should have dismissed the appeal filed by the defendants/appellants thereat. But that was not done to my dismay. The court below admitted a former proceedings pleaded by the defendants with a promise to tender same as exhibit before the trial court but which they failed to so do as Exhibit CA1, The defendants who could have tendered the former proceedings at the trial court, with due diligence and ingenuity, failed to so do to their own chagrin. This is because the paragraphs relating to the former proceedings are deemed to have been abandoned. See: Oba Oyediran of Igbonla v. Oba Alebiosu 11 (1992) 6 NWLR (Pt. 249) 550 at page 556. This principle was commendably followed by the Court of Appeal in Bank of the North v. Julius Babatunde (2002) 7 NWLR (pt. 766) 389.

In effect, the court below wrongly employed Exhibit CA1 to tilt the scale in favour of the defendants whose own traditional history had flaws.

The plaintiffs' appeal before this court rests on a firm ground and is hereby allowed. I adopt my brother's stance in respect of the cross-appeal.

For the above reasons and the fuller ones ably adumbrated in the lead judgment, I too, feel that the main appeal should be allowed while the cross-appeal is dismissed. I order accordingly. I endorse all consequential orders therein contained; that relating to costs inclusive.

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ADEKEYE JSC

I was opported to read in draft the judgment just delivered by my Learned Brother Walter Samuel N. Onnoghen JSC.

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I agree with his reasoning and conclusion that the main appeal has merit and should be allowed. I set aside the judgment of the court below and accordingly restore the judgment of the trial court.

I agree also that the cross-appeal is devoid of merit, it is therefore dismissed.

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I adopt all the consequential orders contained in the lead judgment including the order as to costs.

GALADIMA JSC

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I was privileged to read before now the judgment just delivered by my learned brother Onnoghen, JSC. I only wish to make some comments briefly.

The dispute between the parties is on their claim to customary right of occupancy to the pieces or parcels of land known and called OHIA OWERRE and ALA OGWUGWU IYIALA AMAECHI, situated at Amadehi Ubulu in Oru Local Government Area of Imo State.

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From the issues submitted for determination by both parties, the pivot of the appeal is the admission of Exhibit 1 by the lower court as additional evidence on appeal on the basis of which the court set aside the findings and decision of the trial court. This apart, the lower court further agreed with the trial court that the version of the traditional history and genealogical tree of the Appellants is sufficiently good for the purpose of the case they presented. This finding has prompted the respondents to also cross-appeal.

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The two fronts attack on the admissibility of Exhibit 1 and its consideration by the lower Court run thus: firstly, its admissibility as it offends Section 34 (1) of the evidence Act, 1990, and secondly as

Principle guiding admissibility of additional evidence on appeal.

It is clear from the record that Exhibit 1 or Exhibit “CA1” is the proceedings in the native court in favour of the Respondents’ case. It was pleaded in paragraphs 3 and 4 of the Respondents’ 2nd Amended statement of Defence, with clear intention of its being relied upon at the trial. It presupposes that the Exhibit was available but never tendered in evidence. In the circumstance, the Exhibit does not meet the requirements of Section 34 (1) (Supra) for admission as additional evidence.

The fact that the former Counsel handling the matter was indolent or did not think it necessary to search for the document in the National Archives, this affects his competence to conduct the case. This does not mean that the document was not available having been duly briefed, he was in control of the proceedings.

This apart, would Exhibit 1 have influenced the decision or / conclusion of the trial Court in favour of the respondents if it had been available at the trial. The answer is in the negative. Besides, the pleadings did not link Exhibit 1, with the Appellants. The case of the Respondents is that the appellants are not descendants of Amadehi. At page 284 of the record, the lower Court affirmed the finding of fact by the trial court on traditional and the genealogical background. This finding is supported by testimonies of DW1, DW2 and DW3. Exhibit 1 as an inadmissible evidence cannot be used or relied upon to determine this matter before it.

Briefly on issue 2, which arose from the decision of the lower court, it held that the court failed to consider sufficiently recent acts of possession by the parties and the inconclusiveness of the evidence of tradition by the two parties.

Both parties rooted their case in traditional history, tracing their root to a common ancestor, AMADEHI. They differ though as to the names of the three sons of AMADEHI. The findings of the Lower Court, after careful evaluation of evidence of the parties, preferred and ascribed probative value and weight to the version of the Appellants against that of the Respondents. The preference is based primarily on credibility of the witnesses in the absence of documentary evidence relevant to the issue.

At paged 384 of the records, the lower court found and held, inter alia, thus:-

"Honestly' the traditional history and the genealogical background traced by the plaintiffs is sufficiently good. They traced their ancestry to Amadehi, showed their various acts of ownership and possession on the land in dispute including acts of farming, collection of rents and tributes as well as ownership of huts and shines....."

These are finding of facts by the two lower courts on the issue of traditional history and acts of ownership and possession of the two pieces of Land in dispute.

This court does not make a practice of disturbing concurrent findings of facts except in very exceptional circumstances, such as where the findings are perverse or cannot be supported by the evidence on record or against procedural or substantive law. Both courts hold that two out of the five methods of proving title to land have been established by the appellants. These are traditional history and act of ownership and/or possession. The lower court is therefore in error to have held that the trial court failed to consider sufficiently the recent acts of possession by the parties. I cannot fathom out the reason for this conclusion by the lower court. It clearly erred in so holding because it had already found that the traditional history as to acquisition and ownership of the land by the appellants was *"sufficiently good."* I share the same view that the consideration of acts of possession and ownership, in the circumstances of this case becomes superfluous and unnecessary since such acts are performed in recognition of the rights of ownership. In this case, both courts had found in favour of the Appellants the acts of ownership and possession which include acts of farming, collection of rents and tributes and ownership of huts and shrines etc. on the land in dispute.

It is needless considering the third issue having resolved the first and second issues in favour of the Appellants.

I am also of the view that the sole issue raised for determination in the cross-appeal has been sufficiently dealt with in the consideration of the issues in the main appeal of the Appellants.

One of these is the fact that the findings of the lower courts are concurrent on the traditional history and genealogical trees. These are fundamental facts. Learned Senior Counsel for the Respondents/Cross Appellants has not satisfied this court why it should interfere with the concurrent findings of the two lower courts.

It is for this reason, I hold that there is no merit in the Cross-

Appeal.

It is in view of the foregoing that I agree with my learned brother ONNOGHEN JSC, that the main appeal is meritorious and it is allowed, while the Cross-Appeal is lacking in merit and should be dismissed.

B I abide by the order as to costs in favour of the appellants against the Respondents in the main appeal and in favour of the Cross-respondents against the Cross-appellants in the Cross-appeal.

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