

SUPREME COURT OF NIGERIA
25TH MARCH, 2011. SC. 86/2003
CORAM:- A. M. MUKHTAR, F. F. TABAI, I. T.
MUHAMMAD, O. O. ADEKEYE, S. GALADIMA, JJSC

MRS. OLUWASEUN AGBOOLA APPELLANT
AND

1. UNITED BANK FOR AFRICA

PLC & 2 ORS. RESPONDENTS

PLEADINGS - Averments - Documents relied on - How pleaded - Pleadings are meant to be specific - So such documents must be specifically pleaded - Which was not the case with exhibit 1 herein (H1)

EVIDENCE - Admissibility - Facts not pleaded - Fate of - Such facts go to no issue - And should not be admitted in evidence - As such exhibit 1 is inadmissible (H2)

PLEADINGS - Land law - Averments - Scope - Though parties are not expected to plead evidence - Every fact touching on the root of claim of title - Must be pleaded specifically (H3)

APPEALS - Fresh issues - Raised without leave - Fate of - Where a party raises fresh issue on appeal - Without prior leave sought and obtained - The court will not accommodate it (H4)

EVIDENCE - Land law - Burden of proof - Balance of probability - How discharged - It is discharged only by adducing cogent and credible evidence - That has direct relevance to the matter in controversy - Which has not been done in this case (H5)

LAND LAW - Evidence - Unregistered registrable instrument - When admissible - Though such document be inadmissible in proof of title - It is nevertheless admissible to prove there was a transaction between the parties thereto (H6)

LAND LAW - Proof - Weakness of defence - Effect - Plaintiff cannot

rely on weakness of defendant's case - But on the strength of his own case - To succeed in his case (H7)

FACTS

The present appellant is a substitute for the original plaintiff/appellant, (hereafter referred to as appellant). Appellant sued the defendants before the High Court of Kwara State holden in Ilorin. The suit was challenging the sale of a two storey building known as WO15 Sadiku Road, Kulendu, Ilorin, which property was sold by auction by 2nd respondent, acting for 1st respondent. It is not dispute that the property was mortgage by 3rd respondent to 1st respondent and it was as a result of 3rd respondent's inability to redeem the mortgage that the property was sold. Appellant's case was that the property actually belonged to her and that she had bought the land from one Alhaji Sule Tahiru before she erected the building thereon. According to her, the sale agreement was in her name but was witnessed by 3rd respondent, who was her brother. It was without her knowledge that 3rd respondent had used the documents, which she had kept in his possession, to mortgage the property to 1st respondent.

At the trial, though appellant had pleaded that there was an agreement evidencing her purchase of the land from Alhaji Tahiru, in which agreement 3rd respondent merely signed as a witness, she did not tender any such agreement. The only sale agreement tendered in the trial was tendered by the defendants and had the 3rd respondent as the purchaser of the land from Alhaji Tahiru, i.e. Exhibit D2 which was unregistered. Moreover, though appellant in her oral evidence said she had a receipt given to her by Alhaji Tahiru in respect of the transaction, the receipt which she tendered was actually given to Alhaji Tahiru and had nothing connecting it to either appellant or the property. Nonetheless, the learned trial judge eventually gave judgment to appellant. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal and dismissed appellant's suit as unproven. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

- "(i) Whether the Appellant's exhibit is inadmissible....."*
- "(ii) Whether the learned Court of Appeal Justices were right, in*

reversing the judgment of the learned trial judge on the ground that the appellant failed to prove her title to the property in dispute.....

(iii) Whether exhibit D2 (the Respondents deed of conveyance) is admissible in proof of payment of money in the absence of any averment in the statement of defence that money was paid or acknowledged.....

(iv) If question 2 is answered in the affirmative, whether the admission of Exhibit D2 without any evidence that the Respondent was put in possession is enough to confer title to the property on the respondents.....

(v) Assuming that the appellant failed to prove her title to the disputed property, was the Court of Appeal right in dismissing the Appellant's claim on damages and injunction for the unlawful act committed against the property regards being had to the fact that the Appellant's possession of the property is not disputed.... "

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

Averments - Documents relied on - How pleaded

1. Exhibit 1, has the following incorporated therein.

"Received from Alh. Tahiru Sule, Kulende Area Ilorin, ten naira Nil kobo on account of alienation of land vide Form B No. 24 75 of 7/2/77"

The receipt has nothing that connects the appellant, and it is neither a purchase receipt nor an agreement as claimed in paragraph (7) of the reproduced pleading above. The name of the appellant is not reflected on it, nor is the identity or description of the land in controversy mentioned. Even though the name of Alhaji Tahiru Sule is on the receipt, the remaining content of Exh. 1 does not correspond with the averments in paragraphs 6 and 7 of the statement of claim supra.

They are not reconcilable. Pleadings are meant to be specific and documents sought to be relied upon must be specifically pleaded, but in the instant case, exhibit 1 was not pleaded. (pp. 734 E/735 A)

Admissibility - Facts not pleaded - Fate of

2. On the objection of the learned counsel that Exhibit 1 was not pleaded, the learned trial judge should have rejected it, in view of the

averments, for it was definitely not pleaded. It is an elementary principle of law that parties are bound by their pleadings, as the main aim of pleadings is to put the other party on notice of what to meet at a trial, so that it would also be well prepared and not taken by surprise.

Anything outside the pleadings that is sought to form part of the trial must be ignored as it goes to no issue.

The Court of Appeal was therefore right when it pronounced as follows in its judgment:-

It is trite that a party is bound by the pleadings and shall not be permitted to put up an entirely new case. It has always been held that matters not pleaded go to no issue and should not be admitted in evidence and, if admitted should be ignored or discountenanced in the absence of amendment of the pleadings."

I endorse the above finding for I am of the firm view that Exhibit 1 should not have been admitted or relied upon. In this light I hold that Exhibit 1 is inadmissible and answer issue (1) supra in the negative. (p. 735 B/G)

PLEADINGS - Land law - Averments - Scope

3. I have examined the statement of claim, and nowhere in it have I seen any averment that stated that the transaction between the appellant and the said Alhaji Tahiru was under customary law, nor was it so alluded. I find the suggestion of learned counsel for the appellant that because the transaction was between two natives, and so it was governed by customary law ridiculous and incomprehensible, because nowhere in the statement of claim was it stated that the parties are natives. Consequently I fail to see the basis of this claim. I am mindful that a party is not expected to plead evidence.

But nevertheless such important and serious matter that touches on the root of the claim of title to land, must be or ought to be pleaded specifically. (p. 737 D)

APPEALS - Fresh issues - Raised without leave - Fate of

4. At this stage of the proceedings she is raising this issue freshly, without the leave of court. This practice is not allowed by the law, and the court will not accommodate it, for the law is trite that to raise a fresh issue on appeal a party must seek and obtain leave from the court. A party cannot at random stray into an argument that did not

form part of the case in the lower court, and in the process seek to formulate a new and different case other than the one originally instituted.

In the instant case, since the appellant's claim was not based on sale under customary law, the learned court couldn't have adverted its mind to it and find on it. In this respect I will discountenance the argument on this aspect of the effort of the appellant to convince this court that there was valid evidence of the purchase of the land in dispute, in a bid to prove one of the five ways of proving title to land. (pp. 737 G/738 B)

Land law - Burden of proof - Balance of probability

5. It is settled law that civil suits are decided on preponderance evidence, and balance of probability.

By virtue of Section 135 of the Evidence Act supra, he who asserts must prove. To discharge this burden a party must adduce cogent and credible evidence that has direct relevance to the matter in controversy, and it is only when he does that that he discharges the burden.

Just as she did not consider it necessary to call the said Alhaji Sule Tahiru from whom she purportedly bought the land she eventually built on. Again, I am not satisfied that the said Exhibits 4 - 22 have proved ownership and long possession. The three ways under which the appellant predicated her claim for title have definitely not been established, and so her claim to the ownership of the property has not been proved. The learned Court of Appeal was therefore right in reversing the judgment of the learned trial judge, so my answer to this issue is in the affirmative. (p. 739 G)

LAND LAW - Evidence - Unregistered registrable instrument

6. Could it be a coincidence that it was the same vendor that the appellant claimed sold her own property to her, that was also the vendor to the 3rd respondent? I think not, for when one considers her evidence against the backdrop of the totality of the evidence adduced, one will be convinced that the property was the 3rd respondent's property, otherwise why would Exhibit D2 bear the 3rd respondent's name, and why would he use it to secure overdraft facilities?

It is definitely fishy. I am satisfied that even though the document was not registered, and was so not admissible in view of the provision of Sections (2) and (15) of the Land Instrument Registration Law, it was admissible for the purpose of establishing the transaction between the vendor and the purchaser.

B In this respect, I endorse the finding of the learned Court of Appeal (*sic*) which reads thus:-

“It is my considered view that exhibit D2 is admissible evidence to prove the fact that some money exchanged hands between the parties in Exhibit D2 - in this case N1,000.00 on account of the land transaction testified thereto.” (p. 743 C)

LAND LAW - Proof - Weakness of defence - Effect

D 7. At any rate, as I have posited earlier, the burden of proving the appellant's claim of the ownership of the property rests on the appellant, and it did not ordinarily shift until she had proved her title with cogent and credible evidence. What is more, the plaintiff cannot rely on the weakness of the defendants' case for the success of his case. It is a cardinal principle of the law that a party must rely on the strength
E of his case and not on the weakness of his opponent.

In the light of the foregoing I resolve these issues in favour of the respondents, and dismiss grounds (5) and (6) of appeal that cover the issues. (p. 744 A)

NOTABLE POINT OF INTEREST ***ADEKEYE JSC***

1. *Land law - A purchaser in possession acquires equitable interest*
G Exhibit D² a Deed of Conveyance - though a registrable instrument was not registered. It is however trite law that a purchaser of land who has paid and taken possession of the land by virtue of a registrable instrument which has not been registered has thereby acquired an equitable interest which is as good as legal estate. (p. 752 E)

REPRESENTATION

Mr. M. I. Hanafi, with him D. T. Nwachukwu for the appellant.
Mr. Olalekan Yusuf, with him Adedayo Adediji for the respondents.

CASES REFERRED TO

- Idundun v. Okumagba 1979 9-10 SC. 140
 Aboyade Cole v. Folami 1956 SCNLR 180
 Ebosie v. Phil-Ebosie 1976 7 SC page 119
 Odumosu v. A.C.B. Ltd 1976 11 SC page 261
 Organisation and ors 1969 1 A.N.L.R. page 138
 Akaose v. Nwosu 1971 1 NWLR part 487 page 47 B
 Odusoga v. Ricketts 1997 7 NWLR part 511 page 1
 Ojeh v. Kamalu 2005 18 NWLR part 958 page 523
 Wadukwe v. Acha 1998 6 NWLR part 552 page 25
 Abimbola v. Abatan 2001 9 NWLR part 717 page 78 C
 Mandilas and Karaberis Ltd v. Otokiti 1963 1 ALL NLR 22
 National Investment and Properties Co. Ltd v. The Thompson
 Monier Construction Co. Ltd. v. Azubike 1990 3 NWLR pt 136 p. 74

STATUTES REFERRED TO

- Evidence Act, s. 135 D
 Land Instrument Registration Law of Kwara State, ss. 2 & 15

LEAD JUDGMENT BY MUKHTAR JSC

This is an appeal against the judgment of the Court of Appeal, E Ilorin, Division which allowed the appeal of the defendants from the court of first instance. The plaintiff's case in the High Court of Kwara State is in respect of a two storey building known as No.15 Sadiku Road, Kulende, Ilorin, which the 1st defendant/respondent sold by auction. The plaintiff bought the land upon which she built 30 rooms, F from one Alhaji Sule Tahiru. The sale agreement was in the name of the appellant and was witnessed by her brother, the 3rd defendant who mortgaged the property to the 1st defendant, without her knowledge and consent since the documents were in his possession. She G claimed the following reliefs against the defendants:-

“(i) A declaration that the purported sale of the plaintiffs house lying and situate at Kulende, behind Goodwill Hotel on 28/11/94 by the 2nd Defendant acting on behalf of the 1st Defendant is illegal unconstitutional, null and void. H

(ii) An order setting aside the sale of the said house.

(iii) A declaration that the purported mortgage of the plaintiffs house by the 3rd Defendant to the 1st Defendant without her knowledge or consent is illegal unconstitutional null and void.

(iv) *A perpetual injunction restraining the Defendants by themselves their agent or any other person howsoever in respect of the said building.*

(v) *Damages of Fifty Thousand Naira (N50,000.00) for the unlawful act and embarrassment caused to the plaintiff's person."*

B The 1st and 2nd defendants denied the case of the plaintiff. At the close of pleadings, the parties adduced evidence which were evaluated by the learned trial judge, who at the end of the day gave judgment in favour of the plaintiff, and granted the reliefs sought.

C The defendants appealed to the Court of Appeal, Ilorin Division, which allowed the appeal thus:-

"On the whole it is my considered view that this appeal succeeds and is hereby allowed. The judgment of the Kwara State High Court of Justice in suit No. KWS/299/94 delivered on 17th February, D 1998 by Hon. justice J. A. Ibiwoye is hereby set aside. In its place there shall be substituted the order dismissing suit No. KWS/299/94."

The plaintiff is dissatisfied with the decision, and she has appealed to this court, originally on three grounds of appeal in the notice of appeal, which was amended twice with the leave of court. E Along the line the original appellant/plaintiff who became deceased was substituted with one Mrs. Oluwaseun Agboola, who is now the appellant, with the leave of court. In compliance with the rules of this court the learned counsel for both parties exchanged briefs of argument, which were adopted at the hearing of the appeal, after they F had been amended. The appellant also adopted her reply to the amended respondent's brief of argument. In the 1st amended brief of the appellants, which learned counsel adopted at the hearing of the appeal, was raised the following issues for determination:-

G *"(i) Whether the Appellant's exhibit is inadmissible....."*

(ii) Whether the learned Court of Appeal Justices were right, in reversing the judgment of the learned trial judge on the ground that the appellant failed to prove her title to the property in dispute....."

H *(iii) Whether exhibit D2 (the Respondents deed of conveyance) is admissible in proof of payment of money in the absence of any averment in the statement of defence that money was paid or acknowledged....."*

(iv) If question 2 is answered in the affirmative, whether the

admission of Exhibit D2 without any evidence that the Respondent was put in possession is enough to confer title to the property on the respondents.....

(v) Assuming that the appellant failed to prove her title to the disputed property, was the Court of Appeal right in dismissing the Appellant's claim on damages and injunction for the unlawful act committed against the property regards being had to the fact that the Appellant's possession of the property is not disputed..... “

In the respondent's amended brief of argument, the following issues were formulated for determination:-

(i) Whether having regard to the pleading and evidence, the court below was right in holding that the Appellant failed to establish before the Trial court her claim to ownership of the property in dispute.....

(ii) Whether any miscarriage of justice was occasioned by the decision of the court below that the Deed of conveyance (Exhibit D2) though inadmissible for non - registration, is admissible the Appellant's claim for perpetual injunction and damages, when the Appellant was unable to establish a better title.....”

I adopt the issues raised in the 1st amended appellant's brief of argument for the treatment of this appeal, beginning with issue (1) supra. The argument of the learned counsel for the appellant under this issue is that the Court of Appeal was wrong in holding that exhibit 1 was not pleaded and hence it was inadmissible in law. Learned counsel referred to paragraph 6 of the statement of claim, and quoted the content of the said exhibit 1. He further submitted that the rules of pleading do not require a party to plead a document, but to plead facts relating to the document, and placed reliance on the case of *Monier Construction Co. Ltd. v. Azubike* 1990 3 NWLR part 136 page 74.

It is also the argument of the learned counsel that the finding of the court below that exhibit 1 is inadmissible led the court below to hold that the appellant has no root of title and thereby occasioned miscarriage of justice in the consideration of the appellant's case.

The learned counsel for the respondents has argued that the facts pleaded did not relate to the document tendered, and so the court below was correct in holding that the document ought not to

have been admitted in evidence, as parties are bound by their pleadings. He referred to the cases of National Investment and Properties Co. Ltd v. The Thompson Organisation and ors 1969 1 A.N.L.R. page 138, Abimbola v. Abatan 2001 9 NWLR part 717 page 78, and Wadukwe v. Acha 1998 6 NWLR part 552 page 25.

B At this juncture I will reproduce the relevant pleading to this discussion. In the appellant's statement of claim can be found the following averments:-

C *"6. The Plaintiff avers that sometime in 1977, the 3rd Defendant advised her to use the proceed kept with him to buy another land. Evidence will be led on how she purchased a piece of land from one Alhaji Sule Tahiru.*

D *7. The Plaintiff states that in furtherance of the sale, an agreement was made in the name of the Plaintiff and the 3rd defendant witnessed the agreement."*

In a bid to prove the above averments plaintiff gave the following evidence:-

E *"I then bought a parcel of land at Kulende. I knew one Alhaji Sule Tahiru from whom I purchased the land. He gave me a receipt. This is the receipt"*.

There was objection to the tendering of the receipt by the learned counsel for the defendants/respondents, but, the objection was overruled and the receipt admitted in evidence as Exhibit 1.

F **Exhibit 1, has the following incorporated therein.**

"Received from Alh. Tahiru Sule, Kulende Area Ilorin, ten naira Nil kobo on account of alienation of land vide Form B No. 24 75 of 7/2/77"

G ***The receipt has nothing that connects the appellant, and it is neither a purchase receipt nor an agreement as claimed in paragraph (7) of the reproduced pleading above. The name of the appellant is not reflected on it, nor is the identity or description of the land in controversy mentioned. Even though the name of Alhaji Tahiru Sule is on the receipt, the remaining***
 H ***content of Exh. 1 does not correspond with the averments in paragraphs 6 and 7 of the statement of claim supra.*** Exhibit 1 is not an agreement and does not fall within the description of it, nor does the evidence of the plaintiff which I have reproduced above.

I will now go back to the argument on the purported pleading

of the said Exhibit 1. The averments reproduced above are not in tandem with what was produced as an evidence of purchase. **They are not reconcilable. Pleadings are meant to be specific and documents sought to be relied upon must be specifically pleaded, but in the instant case, exhibit 1 was not pleaded.** See Mandilas and Karaberis Ltd v. Otokiti 1963 1 ALL NLR 22. B

On the objection of the learned counsel that Exhibit 1 was not pleaded, the learned trial judge should have rejected it, in view of the averments, for it was definitely not pleaded. It is an elementary principle of law that parties are bound by their pleadings, as the main aim of pleadings is to put the other party on notice of what to meet at a trial, so that it would also be well prepared and not taken by surprise. Anything outside the pleadings that is sought to form part of the trial must be ignored as it goes to no issue. See Odumosu v. A.C.B. Ltd 1976 D 11 SC page 261, Ebosie v. Phil-Ebosie 1976 7 SC page 119, and Ojeh v. Kamalu 2005 18 NWLR part 958 page 523. **The Court of Appeal was therefore right when it pronounced as follows in its judgment:-** C

“unfortunately exhibit 1 which she tendered is not the evidence of the alleged transaction. Exhibit 1 rather states that Alhaji Tahiru Sule paid N10.00 on account of alienation of land. It does not state the person to whom the alleged land was alienated. Exhibit 1 is also not a receipt issued by Alhaji Tahiru Sule to the respondent on account of the alleged alienation of land. In short Exhibit 1 is evidence of Alhaji Tahiru Sule’s intention to alienate land but not proof of the fact of the alienation let alone alienation to the respondent.....” E

It is trite that a party is bound by the pleadings and shall not be permitted to put up an entirely new case. It has always been held that matters not pleaded go to no issue and should not be admitted in evidence and, if admitted should be ignored or discountenanced in the absence of amendment of the pleadings.” F G

I endorse the above finding for I am of the firm view that Exhibit 1 should not have been admitted or relied upon. In this light I hold that Exhibit 1 is inadmissible and answer issue (1) supra in the negative. Ground (4) of appeal to which it is related is H

bound to fail and it is dismissed.

In arguing issue (2) *supra*, learned counsel for the appellant explored the five ways of proving title to land as enunciated in the cases of *Idundun v. Okumagba* 1979 9-10 SC. 140 and *Akaose v. Nwosu* 1971 1 NWLR part 487 page 47. He posited that the transaction between the vendor Alhaji Tahiru Sule and the appellant was a transaction between two natives and therefore governed by customary law, and submitted that for a sale of land to be valid under native law and customs the essential ingredients are:-

- (i) payment of the purchase price;
- (ii) the purchaser is let into possession;
- (iii) in the presence of witnesses, as is stated in *Oduşoga v. Ricketts* 1997 7 NWLR part 511 page 1 .

The learned counsel further submitted that under the customary law there is no necessity to obtain a purchase receipt of the land, and the fact that exhibit 1 is not evidence of the purchase, is not sufficient for the court of appeal to hold that the appellant did not prove her title to the land, as she did under customary law. He placed reliance on *Aboyade Cole v. Folami* 1956 SCNLR 180. It is also the contention of learned counsel that the appellant proved her title by acts of ownership and possession, which she pleaded, and which the respondents did not join issue on, but merely denied as a general traverse. He referred to *Messrs Lewis Peat (N.L.R.) Ltd v. Akhimien* 1976 7 SC. 159, and *Overseas Construction Ltd v. Creek Enterprises Ltd* 1985 3 NWLR part 13 page 418. The learned counsel also made submissions on the evidence on the numerous acts of ownership and long possession of the appellant, citing in the process the cases of *Ekpo v. Ita* 1932 11 WLR 68, *Onwugbufor v. Okoye* 1996 1 NWLR part 42 4, *Akpan v. Otong* 1996 10 NWLR part 476 and *Ishola v. Abalaka* 1972 5 SC. 203.

In reply to the above argument, the learned counsel for the respondents has argued that a party cannot be allowed to set up a case different from that which was made out at the court below, more so as the court below was never afforded an opportunity to make a pronouncement on the issue. This submission is in respect of the submission on the customary law issue raised by the learned appellant counsel's submission above. See *Enigbokan v. AILCO (Nig.) Ltd* 1994 6 NWLR part 2348 1, and *Kuusu v. Odom* 1990 21 NSCC

part 128 page 253. On the appellant's averments on act of ownership and possession, which the appellant has argued were not properly traversed, learned counsel for the respondents has argued that in a claim for title to land, the plaintiff can only succeed on the strength of his case and not the weakness of the case of the defendant. He cited the cases of *Eboade v. Eafomesin* 1997 5 SCNJ 13, and *Adeniran V. Alao and Anor* 2001 12 SCNJ 337. According to learned counsel, pleadings and evidence of the appellant, be it on production of documents of title or acts of ownership and possession are not up to scratch, and so the appellant never as much as established a prima facie case, hence there was no compelling necessity for the respondents to establish any facts in rebuttal. Rather, the respondent proved a more cogent and credible case by oral and/or documentary evidence. B
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I will start with the treatment of the learned counsel argument on the nature of the sale/acquisition of the land in dispute i.e. whether the land in dispute was bought under customary law. ***I have examined the statement of claim, and nowhere in it have I seen any averment that stated that the transaction between the appellant and the said Alhaji Tahiru was under customary law, nor was it so alluded. I find the suggestion of learned counsel for the appellant that because the transaction was between two natives, and so it was governed by customary law ridiculous and incomprehensible, because nowhere in the statement of claim was it stated that the parties are natives. Consequently I fail to see the basis of this claim. I am mindful that a party is not expected to plead evidence*** (see *Obimianmi Brick and Stone (Nig.) Ltd v. ACB* 1992 3 NWLR part 229 page 260, and *Adegbite v. Ogunfaolu* 1990 4 NWLR part 146 page 578), ***but nevertheless such important and serious matter that touches on the root of the claim of title to land, must be or ought to be pleaded specifically.*** This, the plaintiff failed to do, and ***at this stage of the proceedings she is raising this issue freshly, without the leave of court. This practice is not allowed by the law, and the court will not accommodate it, for the law is trite that to raise a fresh issue on appeal a party must seek and obtain leave from the court. A party cannot at random stray into an argument that did not form part of the case in the lower court, and in the process seek to formulate a new and different case other than*** D
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the one originally instituted. (See *Dweye v. Iyomahan* 1983 8 SC 76, *University of Ibadan v. Adetoro* 2000 9 NWLR part 673 page 631, and *Oshatoba v. Olujtan* 2000 5 NWLR part 655 page 159.

At any rate, as I have already stated above, parties are bound by their pleadings, and the law expects that they should confine themselves within the periphery of their pleadings.

In the instant case, since the appellant's claim was not based on sale under customary law, the learned court couldn't have adverted its mind to it and find on it. In this respect I will discountenance the argument on this aspect of the effort of the appellant to convince this court that there was valid evidence of the purchase of the land in dispute, in a bid to prove one of the five ways of proving title to land. The five ways of proving title to land, as stated in the *Idundun* case supra are:-

1. By traditional evidence.
2. By production of documents of title.
3. By proving acts of ownership numerous and positive enough to warrant an inference that the person is the true owner (such as selling, renting out or farming on all or part of the land).
4. By proving acts of long possession and enjoyment of the land under Section 145.
5. By proof of possession of connected or adjacent land (the contiguity rule).

It is clear that the appellant has failed in way (2) supra, which she sought to prove vide Exhibit 1, which I have already found inadmissible. On way (3) supra, the appellant produced Exhibit 3 which is described as structural details of proposed building for Madam Olatohun Ayinke at Kulende Along Jebba Road, Ilorin, and Exhibit 2, which is described as Site plan for Madam, Olatohun Ayinke along Jebba Road Kulende Area, Ilorin, Kwara State. It is instructive to note that the name of the appellant was inserted with ink in both exhibits. One wonders why this should be so. It is also instructive to note that Exhibit '2' bears the date of 2/2/11 the same date as the date in Exhibit 1, (purported receipt of purchase). I find it difficult to reconcile the two exhibits in view of their antecedents. For clarification I will reproduce the evidence of the appellant as can be found on pages 33 and 34 of the printed record of proceedings. It reads:-

"I then bought a parcel of land at the (sic) land. He gave me a

receipt. This is the receipt

Court: The receipt No. IL53286 dated 7/2/77 is admitted and marked exhibit 1. Plaintiff: I caused a site plan of the land to be made. This is the site plan.....

Court: Site plan for Madam Olatohun Ayinke along Jebba Road, Kulende Area, Ilorin is marked exhibit 2.”

The problem I seem to have here is how the site plan could have been drawn and submitted to the Superintendent of Works, Ilorin on the same date the land was purchased. The speed at which this was done is questionable. As a result of this, I have my doubt that these exhibits have lent credence to the establishment of the acts of ownership and possession claimed by the appellant. Exhibits 4-22 that are rent receipts purportedly written and given to the tenants in the building on the land in dispute by the appellant are neither here nor there. None of them bears anything to link it to the address of the house in dispute. There is no nexus to this case other than that they bear the name of the appellant. Another point that is worthy of note is the fact that the receipts bear different addresses of the appellant, that are in the same Kulende Area of Ilorin, as the property in dispute. It seems the appellant has other various properties in the area, and the receipts may well be in respect of these various other properties, apart from the said Sadiku Street. In one exhibit the appellant's address is No. 2, Olorunsogo Street, i.e. Onire, Kulende, Ilorin, and in another one it is No. 2, Alagbon Street, Kulende, Ilorin. The exhibits are to my mind not cogent and reliable to establish the ownership of the property in dispute. I am at a loss as to why the appellant did not call any of the tenants as witness, to prove the identity of the house for which he was issued any of Exhibits 4 - 22.

It is settled law that civil suits are decided on preponderance evidence, and balance of probability. See Elias v. Omobare 1982 5 SC. 25, and Woluchem v. Gudi 1981 5 S.C. page 291. ***By virtue of Section 135 of the Evidence Act supra, he who asserts must prove. To discharge this burden a party must adduce cogent and credible evidence that has direct relevance to the matter in controversy, and it is only when he does that that he discharges the burden.*** See Imana v. Robinson 1979 3 - 4 SC 1, Are v. Adisa 1967 1 All N.L.R. 148 and Elias v. Disu 1962 1 All N.L.R. 214. ***Just as she did not consider it necessary to call the***

said Alhaji Sule Tahiru from whom she purportedly bought the land she eventually built on. Again, I am not satisfied that the said Exhibits 4 - 22 have proved ownership and long possession. The three ways under which the appellant predicated her claim for title have definitely not been established, and so
her claim to the ownership of the property has not been proved. The learned Court of Appeal was therefore right in reversing the judgment of the learned trial judge, so my answer to this issue is in the affirmative. Ground of appeal No. 1 to which the issue is related fails and it is hereby dismissed.

I will now proceed to the treatment of issues 3 and 4 which the learned counsel for the appellant has lumped together in his argument. The learned counsel for the appellant commenced the argument on this issue by submitting that Exhibit D is, on the fact of this case, inadmissible, and that the court below did not direct itself properly in the consideration of the admissibility of Exhibit D2. He submitted that in the statement of defence tiled by the respondent Exhibit D was pleaded as a title document. The learned counsel argued that the court below after holding that Exhibit D2 is an instrument which ought to be registered, somersaulted in its position to hold that though Exhibit D2 is not admissible for non-registration, it is admissible in evidence to prove the fact that some money exchanged hands between the parties to Exhibit D2. The appellant's counsel further submitted that the court misconstrued the cases of *Ogunbambi v. Aboaba* 13 W.A.C.A. 22 and *Adesanya v. Otuewa* 1993 1 SCNJ 7 in admitting Exhibit D2 as evidence of acknowledgment of purchase money. It is the argument of learned counsel that Exhibit D having been pleaded and tendered as evidence of title is inadmissible and ineffectual to confer anything on the respondents. See the case of *Oredola Okeya Trading Co. v. Attorney General of Kwara State* 1992 7 NWLR part 254 page 412. Finally, the learned counsel contended that even if Exhibit D2 is admissible as evidence of purchase money, the mere admission of Exhibit D2 will not confer title on the respondents unless the respondents can show that Exhibit D2 is coupled with possession for a reasonable length of time and the respondents neither pleaded possession nor that they remained in possession for any length of time. He placed reliance on *Orasanmi v. Idowu* 1959 NSCC 33.

In his reply to the above submissions the learned counsel for the respondents submitted that no miscarriage of justice was occasioned by the decision of the learned justices of the Court of Appeal that the deed of conveyance Exhibit D2 though inadmissible for non registration, is admissible as evidence of payment of money. According to learned counsel, the appellant stands or falls in this case on the strength of her own case and not any weakness on the part of the respondents, hence whether or not Exhibit D2 was admitted in evidence, the appellant was still obliged to establish her case. B

Indeed, the dust raised by the appellant on the admissibility or otherwise of Exhibit D2 is inconsequential to this case. Now, the main thrust of this argument is that the said Exhibit 2 was not pleaded and so should not have been admitted. I will now examine the relevant averments in the respondents statement of defence. They are:- C

“4(b) That the third defendant enjoys credit facilities with the first defendant and which facilities was granted and always renewed and/or increased on the application of the third defendant. The third defendant’s application for loan dated 20/8/82; and his applications for renewal and increase of overdraft facility CA S21 dated 4/10/83 and 29/10/84 respectively and the first I defendant’s letters of approval of the said applications dated 10/11/82, 28/11/83 and 19/8/85 respectively are pleaded. E

(c) That the third defendant executed a deed of mortgage in favour of the first defendant over his property covered by Statutory Right of Occupancy No. 5194 to secure the said facilities. The said Deed of Mortgage is pleaded. F

(d) That the third defendant is the lawful holder of a Certificate of Occupancy No: KW 5194 issued by the Kwara State Government over the said mortgage property now is (sic) issue. The said documents are pleaded. G

6. The first defendant avers that several demand notices were sent to the third defendant but the third defendant refused to settle his indebtedness to the first defendant. The said demand notices are pleaded. H

7. The first defendant avers that it made arrangements to exercise her right of sale under the said Deed of mortgage by advertising in the Punch Newspaper of Friday 26th February, 1993 and by printing and Distribution of Hand bills. The said publication and hand

bill are pleaded.

8. The first defendant avers that the third defendant has still refused to pay the said indebtedness of the sum of N340,432.79 as at 7/2/96 to the first defendant despite the said repeated demands.”

B Oluwatosin Lukuman Aworekun, a credit officer of the 1st respondent gave the following evidence in support of the above averments.

C “I know the property involved in this case at behind Good Will Hotel, Kulende, Ilorin. It is a two story building having 30 rooms. The property belongs to the 3rd defendant who has the deed of conveyance with which he bought the land on which the building stands. The 3rd defendant also has a customary Right of Occupancy and Certificate of Occupancy (C. of O.). The 3rd defendant deposited the documents to the 1st defendant and the 3rd defendant bank. D The 3rd defendant also executed a deed of legal mortgage in respect of the credit facilities granted him by the 1st defendant bank.”

Under cross-examination DW1 gave the following testimony interalia:-

E “The vendor in Exh. D2 is Alhaji Sule Tahiru. It was sold to the 3rd defendant.”

F The witness was however not cross examined on the credit facilities obtained by the 3rd defendant and the deposit of the property in dispute as security for the mortgage which is the crux of this argument and the pleading reproduced above, and the purpose for which Exhibit D was pleaded. It is on record that the admissibility of Exhibit D2 was objected to by the appellant at the Court of first instance. The cases of Ogunbambi and Adesanya on which the court below took solace in its finding on the exhibit, and the reliance on the G cases by lower the court is appropriate. Now, what is the content of Exhibit D2? Exhibit D2 which is a conveyance, has as its preamble the following:-

“This conveyance is made the 25th day of May 1976 -

H BETWEEN ALHAJI SULE TAHIRU of Kulende Area, Ilorin, Kwara State of Nigeria (hereinafter called the “VENDOR” which expression shall where the context so admits include the person or persons deriving title under him) of the one part and MR. ISAAC DUROSINMI of Olomo - Oba’s compound Faji District via Ikirun, Oyo State of Nigeria (hereinafter called the “PURCHASER” which

expression shall where the context so admits include the person deriving title under him) of the other part.

WITNESSES:

1. In pursuance of the agreement and in consideration of the sum of one Thousand Naira (N1,000.00) paid by the purchaser to the vendor (the receipt whereof the Vendor hereby acknowledges) ^B the Vendor hereby conveys to the Purchaser ALL, THAT parcel of land measuring 100ft by 50ft situate lying and being in Inalende Area, Ilorin - Jebba Road, Ilorin Kwara State of Nigeria which is more particularly described and alienated on the survey plan annexed and ^C edged.....”

The conveyance was signed by the purchaser and the vendor. **Could it be a coincidence that it was the same vendor that the appellant claimed sold her own property to her, that was also the vendor to the 3rd respondent? I think not, for when one considers her evidence against the backdrop of the totality of the evidence adduced, one will be convinced that the property was the 3rd respondent's property, otherwise why would Exhibit D2 bear the 3rd respondent's name, and why would he use it to secure overdraft facilities?** I bear in mind the evidence ^E of the appellant that the 3rd respondent apologized to her that he mortgaged the property in dispute because he was in need of the money. But then again, a pertinent question to be asked here, is if the property was the appellant's what was the document of title (which ^F did not bear her name) doing in possession of the third defendant, who held on to it to the extent of having the audacity to use it to obtain overdraft facilities from the 1st defendant. **It is definitely fishy. I am satisfied that even though the document was not registered, and was so not admissible in view of the provision of Sections (2) and (15) of the Land Instrument Registration Law, it was admissible for the purpose of establishing the transaction between the vendor and the purchaser.** ^G

In this respect, I endorse the finding of the learned Court of Appeal (sic) which reads thus:- ^H

“It is my considered view that exhibit D2 is admissible evidence to prove the fact that some money exchanged hands between the parties in Exhibit D2 - in this case N1,000.00 on account of the land transaction testified thereto.”

At any rate, as I have posited earlier, the burden of proving the appellant's claim of the ownership of the property rests on the appellant, and it did not ordinarily shift until she had proved her title with cogent and credible evidence. What is more, the plaintiff cannot rely on the weakness of the defendants' case for the success of his case. It is a cardinal principle of the law that a party must rely on the strength of his case and not on the weakness of his opponent. See *Ituama v. Akpe-Ime* 2000 12 NWLR part 680 page 156, *Ihekoronye v. Hart* 2000 15 NWLR part 692 page 840

In the light of the foregoing I resolve these issues in favour of the respondents, and dismiss grounds (5) and (6) of appeal that cover the issues.

The argument of the learned counsel for the appellant under issue (5) is predicated on possession. The issue and argument will to my mind be necessary only if the appellant proved exclusive possession to the property in dispute. It has been decided in this judgment that the appellant has failed not only to prove title to the property, but also she has failed to establish exclusive possession which is a sinequo of success in a claim of trespass. The argument by the learned counsel for the appellant and the cases of *Adegbite Ogunfoolu* 1990 4 NWLR part 146 page 578, and *Eketresu v. Oyebebere* 1992 9 NWLR part 266 page 438 cited by learned counsel for the appellant are of no relevance and assistance to the appellant.

In the circumstances, this issue is resolved in favour of the respondents, and ground of appeal No (7) from which the issue is distilled fails and it is dismissed.

The end result is that the appeal fails in its entirety and it is dismissed. I affirm the judgment of the lower court. I assess costs of this appeal at N50,000.00 in favour of the respondents against the appellant.

H **TABAI JSC**

I had the benefit of reading in advance, the lead judgment of my learned brother, Mukhtar, JSC and I agree entirely with the reasoning and conclusion the; vat that the appeal has no merit.

The Plaintiff who is the Appellant traced her title to one Alhaji

Tahiru Sule. She has no other documents of title. Yet the said Alhaji Tahiru Sule was not called. There is no report that he was dead.

For the 3rd Defendant who is respondent herein there is Exhibit D2 a Deed of Conveyance which though stamped, was not registered. Having regard to the fact that it was not registered, it was inadmissible as evidence of title. It was however admissible in proof of the transaction between the within named parties in which the sum of N1,000.00 was paid for the land.

Besides Exhibit D2, there are two Certificates of Occupancy both in favour of the Defendant/Respondent. It is settled law that a Certificate of Occupancy regularly issued by competent authority raises the presumption that the holder is the owner in exclusive possession of the land in respect thereof. The presumption is however rebuttable. But there is no evidence from the Appellant to rebut the presumption. As a matter of fact, the Appellants did not attack the Certificate of Occupancy.

On the whole, I have seen no basis for disturbing the decision of the court below setting aside the decision of the trial Court and substituting therewith an order dismissing the suit. For the above reasons and the fuller reasons contained in the lead judgment, I also dismiss the appeal for lack of merit. I also assess the costs of this appeal at N50,000.00 in favour of the Respondent.

MUHAMMAD JSC

I read the leading judgment of my learned brother, Mukhtar, JSC, just delivered. I agree with my Lord that the appeal fails. I, too, dismiss this appeal and affirm the judgment of the Court of Appeal, Ilorin division. I adopt order on costs as contained in the leading judgment.

ADEKEYE JSC

I had read before now the judgment just delivered by my learned brother Aloma Mariam Mukhtar JSC.

My Lord had meticulously considered all the issues raised for determination in this appeal. I shall only add a few words by way of emphasis.

The claim of the appellant as plaintiff before the High Court of Justice Ilorin according to the writ of summons dated 29/5/1995 reads as follows:-

i. A declaration that the purported sale of the plaintiffs house lying and situate at Kulende, behind Goodwill Hotel on 28/11/94 by the 2nd defendant acting on behalf of the 1st Defendant is illegal, unconstitutional, null and void.

ii. An order setting aside the sale of the house.

iii. A declaration that the purported mortgage of the plaintiff's house by the 3rd defendant to the 1st defendant without her knowledge or consent is illegal, unconstitutional, null and void.

iv. A perpetual injunction restraining the defendants by themselves their agents or any other person however from doing anything whatsoever in respect of the said building.

v. Damages of fifty Thousand Naira for the unlawful act and embarrassment caused to the plaintiffs person.

The appellant supported her case with evidence that she purchased the land from one Alhaji Tahiru Sule in 1977 and developed it by erecting a two storey building of thirty rooms thereupon. The premises now known as No. 5 Sadiku Road, Kulende, Ilorin was rented out to tenants. When she learnt about the sale of the house by auction through one of the tenants, a follow up investigation revealed that her elder brother - the 3rd defendant before the trial court, Mr. Isaac Durosinmi now deceased, had mortgaged the property without her knowledge. She left the documents of the property in his custody. The brother then explained that he mortgaged the house to the 1st appellant, the United Bank for Africa when he had financial difficulty by securing another document. He gave her the assurance that he would redeem the mortgaged security and the house would not be sold. She called one witness and tendered documents as follows:

- (a) Exhibit 1 - A Receipt
- (b) Exhibit 2 - A Site Plan
- (c) Exhibit 3 - Building Plan
- (d) Exhibits 4-22 - Rent Receipts
- (e) Exhibit 23 - The Auction Notice

It was the respondent's joint defence that the 3rd defendant - now deceased took credit facilities from the bank and mortgaged the

property as collateral. The 3rd defendant defaulted in his repayment programme. The 1st Respondent exercised its right of sale of the property under the mortgage agreement through the 2nd respondent, an auctioneer. The respondents tendered the undermentioned documents: -

- (a) Exhibit D¹₂ - A Certificate of Occupancy (Statutory) B
- (b) Exhibit D²₃ - A deed of conveyance dated
- (c) Exhibit D³₄ - A deed of Legal Mortgage
- (d) Exhibit D⁴ - A Certificate of Occupancy (Customary)

It is noteworthy that the 3rd defendant who secured a loan from the bank and executed the mortgage deed died before the trial in the High Court commenced and he was not substituted. The trial court relied on the documents tendered by the parties to find in favour of the appellant. C

The Court of Appeal however reversed the judgment on the following grounds: - D

1) That the appellant did not prove her title to the property in dispute by purchase from Alhaji Tahiru Syle.

2) That the respondent's exhibit D² - the deed of conveyance though inadmissible for lack of registration is admissible in evidence to prove that some money exchanged hands between the parties in Exhibit D² relying on E

Ogunbambi v. Abowaba 13 WACA 22,

Adesanya v. Otuewu (1993) 1 SCNJ 7.

3) Exhibits 4-22 are not conclusive proof of ownership and exclusive long possession of the property in dispute as the trial court held. F

The appellant raised five issues in the appeal to this court. It is noteworthy that the appellant challenged the mortgage security for the mortgage deed executed between the 3rd defendant and the 1st defendant/ respondent, a banking institution. The 3rd defendant used the property to secure credit facilities from the 1st defendant. G

Facts in common and not disputed are that:-

(a) The 1st defendant/respondent granted the loan based on the disputed property - a land and the building known and referred to in this suit as No. 5, Sadiku Street, Kulende Ilorin. H

(b) That the 3rd defendant defaulted in his repayment of the loan.

(c) That the 1st defendant/respondent exercised its power of sale in respect of the mortgaged property in accordance with the terms of the mortgage deed.

(d) The 1st defendant/respondent exercised the power of sale through the 2nd defendant/respondent- an auctioneer Alhaji R. B Kafaru.

(e) That the auction sale was in accordance with Section 19 of the Auctioneers Law of Kwara State.

(f) The appellant tendered an Auction Notice as Exhibit 23.

C The appellant prayed the court to declare the purported sale of the house at No. 5 Sadiku Street by public auction as illegal unconstitutional, null and void as the property belongs to her - which makes the purported mortgage of the property without her consent illegal. The reliefs before the court are for declaration as to ownership D of the property, damages for embarrassment caused to her by the illegal sale, and perpetual injunction to prevent the respondents from taking further steps in respect of the building. It is trite that where a plaintiff has claimed for declaration, damages and perpetual injunction - title is obviously put in issue between the parties.

E The act of vesting legal title in respect of land in a person is a matter of law to be deduced from the facts and evidence admitted Nasiru v. Abubakar (1997) 4 NWLR pt. 497, pg. 32.

The court will also be wary to set aside an auction sale where the scenario indicates that the under mentioned facts are shown to the F satisfaction of the court: -

1) That the mortgagor did mortgage the property in dispute to the mortgagee.

2) The loan or any installment has become payable.

G 3) Notice of demand of repayment of loan from the mortgagee to the mortgagor.

4) The power of sale under the mortgage agreement has arisen.

5) Pre-condition of notice of sale is given to the mortgagor by the mortgagee or his agent.

H 6) The power of sale was exercised and the title in the property passed to the purchaser.

Gbadamosi v. Kabo Travel Limited (2000) 8 NWLR pt. 668, pg. 243.

Oguchi v. F.M.B. (Nig.) Limited (1990) 6 NWLR pt. 156, pg.

330.

Bank of the North V. Alhaji Mumuni Muri (1998) 2 NWLR pt. 536, pg. 153

Akande v. F. B. N (2004) 8 NWLR pt. 875, pg. 318

The purchaser ought to have been made a party to this suit in view of the reliefs of the plaintiff to declare the sale null and void and consequently to set it aside. Any order made in favour of the plaintiff will adversely affect the purchaser. It is also pertinent that where there is prayer to set aside an auction sale, the court must remember that it is settled law that a mortgagee is not a trustee of a power of sale for the mortgagor except for the balance of the purchase money. It is a power given to him for his own benefit, enabling him to protect the mortgage debt.

A purchaser who bought a property sold by a legal mortgage in exercise of his power of sale under a mortgage upon a default and repayment of a loan by the mortgagor is not a trespasser.

All State Trust Bank v. Nsofor (2004) All FWLR pt. 201, pg. 1719

Union Bank of Nigeria v. Ozigi (1991) 2 NWLR pt. 176, pg. 677.

For the purpose of this appeal, it must be emphasized that a building erected on a mortgaged land form part of the mortgaged property by virtue of the maxim *quic quid plantatur solo solo cedit* - meaning "*he who owns the land owns what is on it*".

Adepate v. Babatunde (2002) 4 NWLR pt. 756, pg. 99

The appropriate remedy for a third party who is challenging an auction on sale of land sold on the ground that a defendant has no title to the property sold and that valid title is vested in the said third party is by bringing an action for declaration, which the plaintiff/ appellant adopted.

Both parties anchor their case on production of documents of title duly authenticated in the sense that their due execution must be proved, which is one of the five ways of proving or establishing title to ownership. The duty of the trial Judge is to weigh their evidence on the imaginary scale and determine which evidence of the two is weightier.

Ibikunle v. Lawani (2007) 3 NWLR, pt. 1022, pg. 580. Okoko v. Dakolo (2006) pt. 1000, pg.401

The Court of Appeal reviewed the findings of the trial court and reversed its judgment of the lower court. The documents relied upon to prove ownership of the land and the building in No. 5, Sadiku Street, Kulende are principally a purchase receipt Exhibit¹ and rent receipt Exhibits 4-22.

B Mere production of a deed of conveyance or document of title does not automatically entitle a party to a claim in declaration. Before the production of document of Title is admitted as sufficient proof of ownership, the court must satisfy itself that:-

C (a) The document is genuine or valid
 (b) It has been duly executed, stamped and registered.
 (c) The grantor has the authority and capacity to make the grant.

(d) That the grantor has in fact what he proposes to grant.

D (e) That the grant has the effect claimed by the holder of the instrument.

Ayorinde v. Kuforiji (2007) 4 NWLR, pt. 1024, pg. 341

Dosunmu v. Dada (2002) 13 NWLR pt. 783, pg. 1

Romaine v. Romaine (1992) 4 NWLR pt. 238, pg. 650

E Kyari v. Alkali (2001) FWLR, pt 60, pg. 1481

Dabor v. Abdullahi (2005) 29 WRM II SC 7 NWLR pt. 923, pg. 181

F The plaintiff/appellant traced the source of her title to the land through purchase from one Alhaji Tahiru Sule. The Receipt Exhibit 1 however reads: -

“Received from Alhaji Tahiru Sule, Kulende Area Ilorin, Ten Naira, Nil Kobo an account of alienation of land vide term 13 No. 2475 of 7th February, 1977”.

G The foregoing receipt is at variance with her evidence. If she purchased from Alhaji Tahiru Sule - the receipt must conspicuously be issued in her name to confirm the sale by the vendor. The receipt Exhibit¹ is a departmental receipt. She failed to produce evidence in support of her assertion that she bought from Alhaji Tahiru Sule.

H Alhaji Tahiru Sule was a vital witness to her case as her vendor but she failed to call him. She also attempted to establish her acts of ownership and possession by the fact that she built a house on the land and let same out to tenants. Unfortunately her evidence about ownership of the property through the receipt Exhibits 4-22 issued

to her tenants in the storey buildings erected on the land. None of the receipts contain the address of the premises on which the rents were payable -No. 5 Sadiku Street Kulende - They reflected two totally different addresses. The appellant failed to call any of her tenants to confirm the tenancy. Exhibits 2 and 3 the site plan and proposed building plan did not establish that they relate to the property in dispute. It is trite law that in a claim for declaration of title to land, the onus is on the plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the defendant.

The plaintiff must therefore satisfy the court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought. The plaintiff/appellant had indeed failed to prove her title to the mortgaged property to entitle her to the declaration and the reliefs of damages and perpetual injunction sought.

Otamna v. Yondubaghu (2006) 2 NWLR pt. 964, pg. 337

Onisaodu v. Elewaju (2006) 13 NWLR pt.988, pg. 517

Dike v. Okoloedo (1999) 10 NWLR pt. 623, pg. 359

Eze v. Atasie (2000) 6 SC pt. 1 pg. 214

Elema v. Akenzua (2000) 6 SC pt. III, pg. 26

The appellant's learned counsel attempted in his address to canvass that the transaction between Alhaji Tahiru Sule and the appellant was based on customary law. A counsel cannot make out a case not pleaded by a litigant in his address before the court. Where the appellant did not predicate her case on customary law before the lower court, she cannot raise same here afresh before this court. The simple answer is that an appeal is not a new action but a continuation of the matter which is the subject -mater of the appeal. Hence an appellant cannot be allowed to set up a case different to that which was made out at the court below. This is because the appellate court would not have had the benefit of the opinion of the lower court on the issue.

Eze v. A-G Rivers State (2001) 18 NWLR pt. 746, pg. 524

Ejiofodomi v. Okonkwo (1982) II SC 74

Dweye v. Iyamahan (1983) 8 SC 76

A-G Oyo State v. Fairlakes Hotels Limited (1988) 5 NWLR pt. 92, pg. 1

FRN v. Zebra Energy Limited (2002) 3 NWLR pt. 754, pg.

471.

Under Native law and Custom the requirements for a valid sale are:-

- (a) Payment of purchase price
- (b) Purchaser is let into possession by the vendor
- B (c) In the presence of witnesses.

It is not necessary to have a written contract or conveyance as under English law.

Adesanya v. Aderounmu (2000) 6 SC pt.2, pg.18

- C Elema v. Akeuzua (2000) 6 SC pt. 3, pg. 26.

The appellant's case did not satisfy the foregoing requirements. The attempt made by her to shift goal post in the presentation of her case before this court is untenable. The respondents equally hinged their defence on documents of title as follows: -

- D Exhibit D¹ - Certificate of Occupancy issued by kwara State Government

Exhibit D² - A deed of conveyance

Exhibit D³ - A deed of Legal Mortgage

Exhibit D⁴ - Customary Right of Occupancy issued by Ilorin

- E Local Government.

Exhibit D⁵ - Application for loan.

The appellant did not challenge the validity of the two documents of title Exhibit D¹ a Certificate of Occupancy and Exhibit D⁴ a Right of Occupancy. Exhibit D² a Deed of Conveyance - though a

- F registerable instrument was not registered. It is however trite law that a purchaser of land who has paid and taken possession of the land by virtue of a registrable instrument which has not been registered has thereby acquired an equitable interest which is as good as legal
- G estate.

This equitable interest can only be defeated by a purchaser of the land for value without notice of the prior equity.

Nsiegbé v. Mgbemena (2007) 10 NWLR pt. 1042, pg. 364

Okoye v. Dumez (Nig.) Limited (1985) 1 NWLR, pt. 4, pg.

- H 783.

The lower court rightly accepted Exhibit D² as evidence of payment of purchase price by the 3rd defendant (deceased).

Finally, there is no title to land that is better and stronger than the title 'granted to the holder by a statute. Once the words of the

statute granting the title are clear and unambiguous, the duty of the court is to give effect to the unambiguous intention of the legislature.

Din. v. A-G Federation (2004) 12 NWLR (pt. 888), 459

Both Exhibits D¹ and D⁴ confer superior title in respect of the land on the respondents.

With fuller reasons given in the lead judgment, I also agree B that this appeal lacks merit. The judgment of the lower court is affirmed. I abide by the consequential orders including the order as to costs.

C

GALADIMA JSC

My learned brother MUKHTAR, JSC has afforded me the privilege of reading before now, his lead judgment just delivered. I agree that this appeal is devoid of merit and should be dismissed. I also D dismiss it. I abide by orders as to costs.

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