

SUPREME COURT OF NIGERIA
25TH MARCH, 2011, SC. 251/2003
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,
F. F. TABAI, O. O. ADEKEYE, JJSC

MICHAEL EYO APPELLANT
AND

1. EMEKA COLLINS ONUORA

2. IKENNA COLLINS ONUORA RESPONDENTS

(for themselves and on behalf of the

Estate of late Chief Collins Onuora

Substituted by order of the

Supreme Court)

EVIDENCE - Betrothal custom - Cogency of - All things considered the evidence adduced by appellant - On the custom as pleaded by him - Is neither cogent nor credible (H1)

WORDS & PHRASES - Evidence - Cogency and credibility - Meaning - For evidence to be cogent and credible - It must be strong and uncontroverted - And must not be self-contradicting (H2)

EVIDENCE - Proof - Reliance on inadmissible evidence - Effect on appeal - Where there remains other piece of evidence - As may sustain the finding outside that complained of - Such finding will not be reversed on appeal (H3)

ACTIONS - Proof - Weakness of defence - Effect - Plaintiff cannot rely on the weakness of defendant's case - But on the strength of his own case - To succeed in his action (H4)

LAND LAW - Evidence - Rule in *Kojo v. Bonsie* - Applicability - It applies where there is conflict in traditional histories - Presented by opposing parties - But not where the conflict is in a party's presentation of his own traditional history (H5)

APPEALS - Concurrent findings - Attitude of appellate courts - Such findings are not ordinarily disturbed - Unless shown to be perverse -

Or unsupported by evidence (H6)

FACTS

The plaintiff/appellant sued the original defendant (now substituted by the respondents on record) before the High Court of Akwa Ibom State, sitting in Uyo. Appellant's claim was for sundry reliefs by which he asserted ownership of the land in dispute. Appellant's case was that his grand father, Udo Udo Akpaetim, had paid bethrothal fees to the wife of one Udo Ekpo Ikpa of Aduak family, in respect of Udo Ekpo Ikpa's then infant daughter. When the child became of age, Udo Ekpo Ikpa objected to her marriage to Udo Udo Akpaetim. According to appellant Udo Ekpo Ikpa only became aware of the bethrothal when the girl became of age as the bethrothal transaction was only done with the girl's mother. Appellant also claimed that it was their custom that such bethrothal transaction could be done with either of a girl's parents. So upon the objection by Udo Ekpo Ikpa, he was obligated to refund to appellant's grand father the bethrothal fees paid to his wife. It was due to Udo Ekpo Ikpa's inability to refund the fees that he gave eight pieces of land to appellant's grand father. The land in dispute, which is one of the eight pieces of land, eventually devolved on appellant.

During trial, one of appellant's witnesses, pw2 contradicted appellant's testimony to the effect that the property of appellant's grand father had been shared. Pw2 testified that it had not been shared save for the portion shown to appellant's father on which he built a house. Moreover, PW2's account of the number and names of the sons of appellant's great grand father was more in tandem with the account of the respondents on the point. It was respondent's case that the land in dispute originally belonged to appellant's great grand father, from whom it devolved on appellant's uncle who then sold same to respondents. Trial court eventually relied on all the foregoing to dismiss appellant's suit as unproven. Aggrieved, appellant appealed to Court of Appeal which court dismissed his appeal. Still dissatisfied appellant has come on a further and final appeal to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in confirming the dismissal of the appellant's case on the ground that the custom by

which the land in dispute was acquired by Udo Udo Akpaetim from Udo Ekpo Ikpa, the man who first deforested the land, was not proved by the appellant in accordance with the law.

2. Whether the Court of Appeal was right in confirming the dismissal of the plaintiff's case as to who first deforested or settled on the land in dispute without the resolution of important issues in the case of the parties, by adoption of the principle distilled in MOGAJI VS. ODOFIN.

3. Whether the Court of Appeal was right in using evidence held as going to no issue, as evidence of contradiction of the evidence of PW.2.

4. Whether the Court of Appeal was right in using evidence held as going to no issue, as evidence of contradiction of the evidence of PW.2. (sic, same as 3.)

5. Whether the appellant has discharged the onus of proof on him, to be entitled to the declaration sought.

6. Whether the lower Court was right in confirming the dismissal of the appellants' claims in its entirety.

7. Whether the Court of Appeal was right in holding, in spite of conflicting evidence of the parties on Traditional History of the land in dispute, that the principle in KODJO VS. BONSIE did not apply to the consideration of the case."

HELD (Unanimously dismissing the appeal per **MUKHTAR JSC**)
EVIDENCE - Betrothal custom - Cogency of

1. The pertinent question I will ask at this juncture is, was the evidence adduced by the plaintiff/appellant cogent and reliable, and does it fall within the principle enunciated in the Prince Yahaya Adigun case supra?

I will now consider the evidence I have reproduced above on the custom pleaded by the plaintiff/appellant. In the first place, the evidence of the plaintiff that their custom was that a suitor would pay a betrothal fees (*sic, fee*) to either of the parents, and that the father of the would be bride in this case became aware of the plaintiffs grandfather's intention at the time the would be bride became of age, is inconceivable. More inconceivable is the fact that the plaintiff's grandfather discovered that they were related and cousins after he had declared his intention to marry Udo Ekpo Ikpa's daughter and

payment of manila bundles.

On the evidence of the refund of the betrothal fees, is it possible for the father of the would be bride to be compelled to refund fees that he did not receive and was not a party to the act that culminated into the betrothal fees, to the extent that he would divest himself of his land? I doubt it. Towards this I fail to see that the evidence adduced by the appellant on the custom he has pleaded in paragraphs (6) and (7) of the statement of claim, are cogent and credible. I do not subscribe to the submissions and contentions of the learned counsel for the appellant. (p. 792 H/793 B/G)

Evidence - Cogency and credibility - Meaning

2. For an evidence to be accepted as cogent and credible it must be strong and uncontroverted by the opponent who may in the process of cross examination attack and debunk it. This may be done by the witness reneging from the testimony he had given or contradicting himself by falsifying his earlier evidence. On the other hand, this evidence of one witness being contradicted by the evidence of another witness from the same divide may weaken the overall effect of the evidence. (p. 794 A)

Proof - Reliance on inadmissible evidence

3. It may well be that this point on the names and number of Udo Akpaetim's children was relied upon by the learned trial judge to support the respondent's case. I however don't think it was uppermost in the learned judge's mind in determining the probability of the traditional history of the appellant. It is instructive to note that the conflict in the evidence of the plaintiff and PW2 which the learned trial judge based his finding on the traditional history on, was more importantly on how the land devolved on the plaintiff/appellant. I believe that aspect of the evidence gave the finding a teeth, and it is manifestly clear there was indeed a contradiction in the evidence adduced by the appellant on this.

So, succinctly put, even after the lower court had discountenanced that evidence that had not been pleaded, it still found some material contradictions in the evidence adduced by the appellant. (pp. 797 H/798 G)

ACTIONS - Proof - Weakness of defence - Effect

4. It is also trite that he who asserts must prove, for without the cogent and credible evidence of the party asserting, he will not succeed in his suit and obtain judgment in his favour.

The law is well settled that a party must first prove his case with credible evidence before the burden placed on him by the law can shift to his opponent. B

Here, it seems the appellant is relying and taking advantage of the weakness of the respondent's case, if at all there is any. Moreover, the learned trial judge believed the evidence adduced by the respondents in defence of the case put up by the appellant and he was at liberty to do so. C

For the foregoing reasonings, I resolve all the above issues dealt with above in favour of the respondents and dismiss all the grounds of appeal to which they are related. (p. 799 A) D

LAND LAW - Evidence - Rule in Kojo v. Bonsie

5. In the Kojo and Bonsie's case supra, the court in dealing with conflict of traditional history had the following to say:-

"Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanor is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence by seeing which of two competing histories is the more probable." E F

I am guided and strengthened by the above principle. Underlining above is mine.

It is instructive in this case to note that in the case at hand, the conflict in the traditional history is not only in the two sides of the divide, but in the evidence of the appellant and his witness. The case of Kojo and Bonsie is to my mind not applicable, and it will not be appropriate to invoke the principle propounded therein. (p. 799 H) G

Concurrent findings - Attitude of appellate courts H

6. This is an appeal against the concurrent findings of fact by the two lower courts, which the law is settled should not be disturbed or interfered with, in view of the fact that two courts, one of trial, and the other a superior court has thoroughly considered the veracity or oth-

erwise of the evidence before them. Ordinarily this court will not interfere with the decisions unless the findings are perverse and not supported by credible evidence, or that evidence was not properly evaluated and this failure has occasioned miscarriage of justice.

My opinion is that the present appeal is not the case, so I find
 B no plausible reason to overturn the judgments of the lower courts.
 (p. 800 H)

NOTABLE POINTS OF INTEREST

TABAI JSC

C 1. *Evaluation of evidence is preeminently a duty of trial court*

It is settled principle of law that the duty of evaluation of evidence is pre-eminently that of the trial Court which alone has the benefit of seeing and hearing witnesses in the course of their testimonies; it is
 D the trial court that has the singular benefit of watching the demeanour of witnesses in the course of their testimonies.

As a general rule therefore, an appellate Court would not disturb the findings of a trial court unless it is proved that the findings are not supported by the evidence on record and therefore perverse. This is
 E because of the appellate court's disadvantage of not having seen or heard the witnesses in the course of their testimonies. And in particular, where the appraisal of evidence entails the assessment of the credibility of witnesses, an appellate Court has exceptionally limited
 F room for interference. (p. 811 B)

2. *How Udo Udo Akpaitim got title was irrelevant*

In these circumstances, can the Appellant be held to have established that the findings are perverse? I shall answer this question in the negative. The findings are amply supported by the evidence on record.
 G There is therefore no basis whatsoever for any interference with the decision of the two Courts below. All the sustained arguments about the custom by which Udo Udo Akpaitim got title to the property are irrelevant since both the Appellant and the DW3 are in agreement
 H that they acquired their title from their grandfather Udo Udo Akpaitim.
 (p. 812 A)

ADEKEYE JSC

3. *Kojo v. Bonsie is inapplicable where plaintiff relies on long posses-*

sion

According to decided authorities, for the principle in *Kojo v. Bonsie* (supra) to be resorted to, there should be presented to the court two competing histories, one by either party which on their own look credible thereby making a conclusive finding as to which to prefer unrealistic. In the traditional history one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is not the guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and see which of the two competing histories is more probable. The principle cannot be applied if the plaintiff relies on acts of ownership spanning several years as his root of title. (p. 818 F)

REPRESENTATION

Mr. Aderemi Bashua for the appellant.

Mr. Essien E. Udom for the Respondent.

CASES REFERRED TO

Odunsi v. Pereira 1972 1 SC 52

Elias v. Omo-Bare 1982 5 SC. 25

Kojo v. Bonsie 1957 1 WLR 1223

Odulaja v. Haddad 1973 11 SC. 357

Elias v. Disu 1962 1 ALL N.L.R. 214

Emegokwe v. Okadigbo 1973 4 SC 113

George v. U.B.A. Ltd 1972 8 -9 SC. 264

Elynjya v. Ozuoule 11 1962 1 SCNLR 423

Eho v. Ahi 2004 3 NWLR part 861 page 610

Achibong v. Ita 2004 2 NWLR part 858 page 590

Obiaso v. Okoye 1989 5 NWLR part 119 page 80

Ihenacho v. Chigere 2004 17 NWLR part 901 page 130

Ihekoronye v. Hart 2000 15 NWLR part 692, page 840

STATUTE REFERRED TO

Evidence Act, Cap 112, L.F.N., 1990, ss. 14(3) & 135

LEAD JUDGMENT BY MUKHTAR JSC

In the High Court of Akwa Ibom State, sitting in Uyo, the plaintiff

who is the appellant in this appeal instituted an action against the respondents seeking the follow reliefs:-

“1. *SPECIAL DAMAGE: (sic)*

(a) *Six orange trees destroyed.....*

General damages	<i>N491,700.00</i>
B TOTAL	<i>N500,000.00</i>

2. *A declaration that the plaintiff is entitled to the certificate of occupancy in respect of the land being and situate beside the building at No.221 Oron Road, Itiam Ikot Ebia, Uyo, and which said land is more particularly described in Survey Plan No: AS/K146/92LD dated 18th December, 1992.*

3. *Perpetual injunction to restrain the defendant his agents, servants and privies or otherwise from further trespassing or entering upon the land being and situate beside the building at No. 221 Oron Road, Itiam Ikot Ebia, Uyo, and which said land is more particularly described in Survey Plan NO: AS/AK146/92LD dated 18th December 1992.”*

The plaintiff traced the traditional history of the land to Udo Ekpo Ikpa of Nung Aduak family more than 200 years ago. As a result of the inability to refund a betrothal fees already paid by Udo Ekpo Ikpa to Udo Udo Akpaetim, who was the great grand father of the plaintiff, Udo Ekpo Ikpa surrendered eight pieces of his land to Udo Udo Akpaetim, who exercised maximum acts of ownership. On his death, the plaintiffs father inherited the land and erected a house on a portion, and the land in dispute is part of the land, on which the plaintiff also erected his own building. The defendant sometime in April 1992 broke and entered the land without the consent of the plaintiff and started constructing a building thereon, and in the process destroyed some economic trees on the land.

The case of the defendant is that the land in dispute originally belonged to Obot Bassey Udoh of Aduak family, and Obot Bassey Udoh conveyed the piece of land to him by a conveyance dated 14th March 1978. According to the defendant, the house purportedly built by the plaintiff was not built by him, but his brothers for their mother, and it is situated outside the land in dispute. The defendant denied that he ever entered into a land belonging to the plaintiff and did not destroy any economic crop or roof of the plaintiffs house.

After the exchange of pleadings parties adduced evidence, which was appraised by the learned trial judge who dismissed the plaintiffs claims thus:-

“.....I find that the plaintiff has not discharged the burden of proof to make for a finding in his favour.”

Aggrieved by the decision the plaintiff appealed to the Court of Appeal. The Court of Appeal found no substance and merit in the appeal, so it dismissed the appeal. Aggrieved again by the judgment the plaintiff has appealed to this court originally on two grounds of appeal, which were increased to seven grounds of appeal with the leave of this court. In compliance with the rules of the court both parties exchanged briefs of argument to wit a reply brief was also filed by the learned counsel for the appellant. The briefs were adopted by the learned counsel for the parties at the hearing of the appeal. The following issues for determination were raised in the appellant's brief of argument:-

“1. Whether the Court of Appeal was right in confirming the dismissal of the appellant's case on the ground that the custom by which the land in dispute was acquired by Udo Udo Akpaetim from Udo Ekpo Ikpa, the man who first deforested the land, was not proved by the appellant in accordance with the law.

2. Whether the Court of Appeal was right in confirming the dismissal of the plaintiffs case as to who first deforested or settled on the land in dispute without the resolution of important issues in the case of the parties, by adoption of the principle distilled in MOGAJI VS. ODOFIN.

3. Whether the Court of Appeal was right in using evidence held as going to no issue, as evidence of contradiction of the evidence of PW.2.

4. Whether the Court of Appeal was right in using evidence held as going to no issue, as evidence of contradiction of the evidence of PW.2. (sic, same as 3.)

5. Whether the appellant has discharged the onus of proof on him, to be entitled to the declaration sought.

6. Whether the lower Court was right in confirming the dismissal of the appellants' claims in its entirety.

7. Whether the Court of Appeal was right in holding, in spite of conflicting evidence of the parties on Traditional History of the

land in dispute, that the principle in *KODJO VS. BONISIE* did not apply to the consideration of the case.”

The Respondent's sole issue for determination is:-

“Whether From The Totality Of The Evidence Before The Trial Court, The Court Of Appeal Was Right In Affirming The Judgment Of The Trial Court Dismissing The Appellant's Claim In It's Entirety”.

The gravamen of this appeal revolves around the traditional history of the land in dispute and the appellant's failure to prove it, having predicated his case on that particular mode of proving title to land. In his amended statement of claim the plaintiff/appellant made the following averments:-

“6. The land in dispute was deforested by Udo Ekpo Ikpa of Nung Aduak family in Itiam Ikot Ebia, more than 200 years ago. The said Udo Ekpo Ikpa had a daughter whom Udo Udo Akpaetim had wanted to marry. It was the custom in the plaintiffs village for would be suitors to pay betrothal fees to either of the parents of the would be bride. Udo Udo Akpaetim had paid the said fee of 8 bundles of manilas in respect of the daughter of Udo Ekpo Ikpa to the girl's mother. Udo Ekpo Ikpa objected to the said marriage on the grounds that Udo Udo Akpaetim was his close cousin as they all were from the same family of Nung Aduak.

7. Udo Udo Akpaetim thereafter demanded for a refund by his money. As Udo Ekpa Ikpa could not do so, he instead surrendered 8 pieces of his lands to Udo Udo Akpaetim.”

The defendant denied the above averments in their amended statement of defence as follows:-

“9. The defendant denies the averment in paragraphs 6, 7 and 8 of the statement of claim and adds that the plaintiff have by his averments not only distorted his family history but have also exhibited his ignorance of the Traditional History of the origin of the land in dispute. The defendant states that the land in dispute was a portion of the five pieces of land deforested by the plaintiff's great grandfather Akpaetim Udo Utuk.”

The evidence of the plaintiff in support of his supra averments read thus:-

“I got to be the owner of the land in dispute which situates besides a building known as number 221 Oron Road, Itiam Ikot Ebia, Uyo. It was deforested by Udo Ekpo Ikpa of Nung Aduak family in

Itiam Ikot Ebia about 200 years ago. Udo Ekpa Ikpa had a daughter whom Udo Akpaetim wanted to marry. Udo Udo Akpaetim was my grandfather. It was the custom in my village that a would be suitor had to pay the betrothal fees to either of the parents of would be bride. Udo Akpaetim paid the said fee of 8 bundles of manilla to the girl's mother. When the girl became of age, Udo Ekpo Ikpa and Udo Udo Akpaetim were cousins from the same Nung Aduak family. Udo Udo Akpaetim then demanded for a refund of his eight bundles of manilla. As Udo Ekpo Ikpa could not refund the fee he transferred eight piece of his land to Udo Udo Akpaetim in place of his money. Udo Udo Akpaetim took possession of the land and exercised maximum acts of ownership. When Udo Udo Akpaetim passed on his interest on the land devolved on Eyo Udo Udo. Eyo Udo Udo was my late father. During the lifetime of Eyo Udo Udo he also exercises maximum acts of ownership on the land."

Under cross-examination the plaintiff testified inter alia as follows:-

"I said in my evidence in chief Udo Ekpo Ikpa had a daughter whom Udo Udo Akpaetim wanted to marry. I do not know the name of the girl. Udo Ekpo Ikpa was a cousin to Udo Udo Akpaetim. The marriage was opposed on the grounds of that relationship. They were from the same Nung Aduak family. The relationship was discovered after the declaration (sic) intention to enter into the marriage. The relationship happened."

The 2nd plaintiff witness in his evidence in chief gave the following evidence in support of the plaintiff's pleadings:-

"I know how the plaintiff got the land. One of our family members called Udo Ekpo Ikpa married a wife called Kufre Umana Akpabio. He had a daughter. When the daughter was young, the custom permitted that someone could declare an intention to marry the girl. A symbolic raffia would be tied on the girl to signify that she has been betrothed. Since Udo Ekpo Ikpa had no money. Udo Udo Akpaetim gave the wife of Udo Ekpo Ikpa eight bundles of manilla without the knowledge of the husband, Udo Ekpo Ikpa. The money was given to Kufre to signify that he would marry the daughter. It was betrothal fees. When the girl grew up Udo Udo Akpaetim went for marriage. Udo Ekpo Ikpa the father of this girl was surprised and told him that a member of a family should not marry from the same family. He said it was unusual. He objected to the marriage. Udo Udo Akpaetim

asked Udo Ekpo Ikpa to return his money Udo Ekpo Ikpa was an old man and had no money. Udo Ekpo Ikpa then gave eight parcels of land to Udo Udo Akpaetim in place of this money. Since then the land belonged to Udo Udo Akpaetim. Udo Udo Akpaetim has full relationship with the plaintiff. Eyo Udo Udo Akpaetim is the father of the plaintiff who built on that land. This Eyo Udo Udo was the first son of Udo Udo Akpaetim.”

In the course of cross-examination PW2 testified as follows on the evidence of the custom he had earlier given:-

“I am versed with the custom and practices of Ibibio land. Everything concerning marriage is done in the presence of the families of the would be bride. It is also the practice concerning betrothal. The betrothal of Kufre was not done in accordance with the normal practice. Since it was wrong for someone from the same family to marry from the same family that was why it was done in secret. Kufre knew about the relationship but it was because of her greed that she collected the money. The betrothal took place but there was no marriage. The raffia was not tied on Kufre’s daughter. It was merely pronounced.”

The learned counsel for the appellant has submitted that the trial court and the Court of Appeal erred in law in holding that the appellant had not proved the custom propounded with more than one witness in accordance with the law, as there is uncontroversial evidence before the courts that the appellant proved the custom by calling more than one witness. Reliance was placed on the case of Elynjya v. Ozuoule 11 1962 1 SCNLR 423. The learned counsel for the respondents has submitted that both the trial court and the Court of Appeal were right in their rejection of the evidence of the appellant and PW2, as the evidence of custom must be cogent and reliable, the veracity of the testimony must not be in dispute, the credibility of the witness must be accepted by the court and there must be no other evidence to the contrary. He referred to the case of Adigun v. Attorney General of Oyo State 1987 1 NWLR part 53, page 687.

The pertinent question I will ask at this juncture is, was the evidence adduced by the plaintiff/appellant cogent and reliable, and does it fall within the principle enunciated in the Prince Yahaya Adigun case supra?

I will here below re-echo the words of Obaseki JSC in the said

Adigun's case *supra*, which is encapsulated thus:-

"If there is a registered declaration of the customary law regulating the appointment, the evidence is straight forward and would consist in the production of the Registered Declaration in which case a single witness would suffice. If there is no registered declaration, cogent evidence of the custom must be adduced through credible witnesses in which case prudence demands that more than one witness be called."

Applying the above, **I will now consider the evidence I have reproduced above on the custom pleaded by the plaintiff/appellant. In the first place, the evidence of the plaintiff that their custom was that a suitor would pay a betrothal fees to either of the parents, and that the father of the would be bride in this case became aware of the plaintiff's grandfather's intention at the time the would be bride became of age, is inconceivable. More inconceivable is the fact that the plaintiffs grandfather discovered that they were related and cousins after he had declared his intention to marry Udo Ekpo Ikpa's daughter and payment of manila bundles.** Is it possible for the marriage proposal to be without the father's knowledge, and is it possible for the suitor to be ignorant of this biological relationship with the would be bride? I think not. As a matter of fact if one gleans this evidence against that of his witness (PW2) that the betrothal in the case at hand was not in accordance with the normal practice of the Ibibio land to which they all belong one would see that that custom was not proved. PW2 also contradicted the evidence of the plaintiff that the mother of the would be bride knew of the biological relationship between them. So if she did how come she proceeded to accept the declaration of intention, without her husbands knowledge. That she was greedy is not convincing. **On the evidence of the refund of the betrothal fees, is it possible for the father of the would be bride to be compelled to refund fees that he did not receive and was not a party to the act that culminated into the betrothal fees, to the extent that he would divest himself of his land? I doubt it. Towards this I fail to see that the evidence adduced by the appellant on the custom he has pleaded in paragraphs (6) and (7) of the statement of claim, are cogent and credible. I do not subscribe to the submissions and contentions of the learned counsel for**

the appellant. For an evidence to be accepted as cogent and credible it must be strong and uncontroverted by the opponent who may in the process of cross examination attack and debunk it. This may be done by the witness reneging from the testimony he had given or contradicting himself by falsifying his earlier evidence. On the other hand, this evidence of one witness being contradicted by the evidence of another witness from the same divide may weaken the overall effect of the evidence.

C The learned trial judge in his judgment, on the question of custom posited thus:-

“It was of crucial essence to prove the custom therefore which vested the land in dispute in the lands (sic) of Udo Udo Akpaetim the man who deforested the land having regard to the competing history set up by the defendant. Such a custom was to be proved by evidence to show that persons in the plaintiff’s village regard the alleged custom as binding on them, and that the land in dispute or any portion thereof was acquired in consonance with the said custom as stated in Section 14(3) of Evidence Act. See Prince Yahaya Adigun v. Attorney-General of Oyo (1987) 3 SCNLR 118, Olugbemiro v. Ajagunbade III (1990) 3 NWLR part 136) 37. In this wise the custom relied upon must be established by evidence as a question of fact.....”

F *The absence of this proof thus makes the traditional history of the land given by the defendants through D.W.1 and DW3 more probable. In endorsing the above excerpt of the learned trial judge’s judgment, Edozie JSC (as he then was) in the lead judgment of the Court of Appeal found thus:-*

G *“The position of the law therefore is that though customary law may be established by evidence of a lone witness, it is unsafe to rely on such evidence and desirable that there should be evidence and desirable that there should be evidence of more than one witness. I am therefore in agreement with learned trial judge on his observation with respect to proof of customary law.”*

H In the light of the above treatment of this issue I answer the issue in the affirmative and consequently dismiss the ground of appeal to which it is married.

Issues 2, 3, 4 and 5 were dealt with together in the appellant’s

brief of argument. I will commence the treatment of this issue by reproducing the pertinent averments in the statement of claim here below. They are:-

"8. Udo Udo Akpaetim took possession of these parcels of land and exercised maximum acts of ownership thereon. On his demise, the land transmitted to his son Eyo Udo Udo, who was the father of the plaintiff. Eyo Udo Udo, in his life time exercised maximum acts of ownership over same. He erected his permanent house on a portion of the said parcels of land. The plaintiff's father had in his life time shown the plaintiff the remaining parts or parcels of the land, now the land in dispute, for him to build his permanent house in the village and to farm thereon; but on the warning that on no account must the said land be alienated to non-members of his family.

9. The plaintiff had erected a small concrete building on a corner of the land in dispute. The said building was erected while the plaintiff's father was still alive. It was the intention of the plaintiff to erect a bigger and a more permanent family house on the portion of the land in dispute now trespassed unto by the defendant.

10. The plaintiff had been in undisturbed and exclusive possession of the land in dispute since 1970. The plaintiff has been most of the time in Lagos, only visiting his village occasionally.

The plaintiff's evidence in support of the above averments read inter alia as follows:-

"When Udo Udo Akpaetim passed on his interest on the land devolved on Eyo Udo Udo. Eyo Udo Udo was my late father. During the life time of Eyo Udo Udo he also exercised maximum acts of ownership on the land. During the life time of Eyo Udo he built his permanent house on a portion of this land. The also showed me the remaining portion of this land so that I could build my own house to live in.....I have a building in a corner of the land in dispute. I intend building a permanent house for myself and members of my household in the said land."

Under cross-examination, the plaintiff testified thus:-

"I am the third son. Our senior brother died. I know Ene Eyo Udo Udo. He is my elder brother, (my immediate senior) The said Ene is not in the good book of me (sic) father..... My father had eight male sons. Not all of them were alive at my father's death. My most senior brother died in Europe in 1979. Seven

male sons survived my father. My father died October, 1990. My father's properties have not been shared but I have been given a place to build a house.....

My father inherited 8 pieces of land from his father. At the time my father came to build the whole place was put into one and the whole land became one portion.

Other pieces of evidence adduced in support of his pleadings vide PW2 are as follows:-

"Since then the land belonged to Udo Udo Akpaetim. Udo Udo Akpaetim was full relationship with the plaintiff. Eyo Udo Udo Akpaetim (sic) is the father of the plaintiff who built on that land. This Eyo Udo Udo was the first son of Udo Udo Akpaetim. When Eyo Udo Udo was alive he gave his son, Michael the plaintiff this land to build on. Eyo Udo Udo was the owner of the whole land, including the portion given to the plaintiff. He had built on part of the land."

The 53 years old witness in the course of cross-examination testified thus:-

"The property of Udo Udo Akpaetim had not been shared. It is only his first son who received something from him when he was alive, and that was his place of building. The first son was Eyo Udo Udo. Udo Udo Akpaetim had eight sons. They were Ibanga (first son), Udo Akpaetim, Udoidiong Akpaetim, Udo Udo Akpaetim (plaintiff's father) was the fourth son, Udofia Akpaetim, the sixth was Abasiekong Akpaetim, and Ikpoto Akpaetim was the 7th, and the last was Ndiyo Akpaetim. There is none of the sons that is alive. Eyo Udo Udo, was the father of the plaintiff. The grandfather of the plaintiff was Udo Udo Akpaetim and not the father.....

Akpaetim did not have only one son called Udo Udo Akpaetim. He had eight sons. Akpaetim did not have one son. Udo Udo Akpaetim had four sons that I know. I now say that they were five sons. Those were the ones I said alive. I do not know whether they were more than that. They were Eyo Udo Udo, John Udo Udo, Bassey Udo Udo, Ikpisang Udo Udo, Akan Udo Udo."

It is the contention of the learned counsellor the appellant that apart from the evidence of PW2 on the eight sons of Udo Udo Akpaetim, the appellant proved his case in accordance with the pleadings. According to learned counsel that piece of evidence was not pleaded, and therefore went to no issue, but it was the evidence the

High Court and the court below accepted and used as evidence to decide that the evidence of PW2 was contradictory. It is learned counsel's argument that the said evidence should have been discountenanced, and he referred to the cases of Emegokwe v. Okadigbo 1973 4 SC 113, National Investment Production Co. Ltd v. Thompson Organisation 1969 NMLR 99, and George v. U.B.A. Ltd 1972 8 B -9 SC. 264.

The learned counsel for the respondents has in his reply contented that there was conflict in the evidence of PW1 and PW2 in that PW2 testified that the property of Udo Udo Akpaetim had not been shared as against the evidence of Plaintiff that it had been shared. C On the evidence of PW2 on the names of children of Udo Udo Akpaetim that was not pleaded, the learned counsel submitted that the evidence of contradiction went beyond the names of the eight sons of Udo Udo Akpaetim, as it was not used as evidence of contradiction not having been pleaded. Perhaps I should reproduce hereunder the pertinent excerpt of the judgment of the learned trial judge on this aspect of the evidence. This excerpt of the judgment reads as follows:- D

"To a greater extent it is easier to believe the DW1 and DW3 E when they said the land originally belonged to Akpaetim Udo Etuk, whom the plaintiff also acknowledge as his great grandfather, and who he said had eight sons including Udo Udo Akpaetim. The other sons named by him included Ibanga, Udo Udoidiong, Udofia, F Abasiokong, Ikpeto and Ndiyo. These also happened to be the names given by the PW2 as the names of the children of the children of Udo Udo Akpaetim. The PW2 also said the property of Udo Akpaetim had not been shared save for the portion showed by him to the father of the plaintiff for building. This was against the evidence of G the plaintiff himself which was to the effect that after Udo Akpaetim had taken possession of the land he exercised maximum acts of ownership, and when Udo Udo Akpaetim passed on this interest on the land devolved on Eyo Udo Udo. Eyo Udo Udo was the plaintiff's H father. There was this conflict in the traditional history evidence of the land as adduced by the plaintiff and his witness. I am inclined to hold that the story of the devolution of the land as given by the defendants witnesses, particularly DW1 and DW3 is more probable."

It may well be that this point on the names and number

of Udo Akpaetim's children was relied upon by the learned trial judge to support the respondent's case. I however don't think it was uppermost in the learned judge's mind in determining the probability of the traditional history of the appellant. It is instructive to note that the conflict in the evidence of the plaintiff and PW2 which the learned trial judge based his finding on the traditional history on, was more importantly on how the land devolved on the plaintiff/appellant. I believe that aspect of the evidence gave the finding a teeth, and it is manifestly clear there was indeed a contradiction in the evidence adduced by the appellant on this. Edozie JCA (as he then was) gave thorough consideration to the argument and complaint on the evidence of the sons of Udo Udo Akpaetim in his judgment. The learned JCA after reviewing the evidence of PW2 observed thus:-

"Parties are bound by their pleadings and evidence of facts not pleaded goes to no issue. See Emegokwe v. Okadigbo (1973) 4 SC.113, 117; George and others v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117..... African Continental Bank Ltd v. Nigerian Dredging Roads General Works Ltd. (1977) 5 SC 235; N.L.P.C. Ltd v. Thompson Organisation (1969) N.M.L.R. 99. Apart from the fact that the names of the eight sons of Udo Udo Akpaetim given -in evidence above were not pleaded and therefore the evidence goes to no issue, the evidence testified to cannot be reconciled. In one breath the witness stated that the first son of Udo Udo Akpaetim was Eyo Udo Udo. In another breath the witness testified that the 1st son was Ibanga and yet that the plaintiff's father was the forth son. It is settled law that traditional evidence which is not contradictory or in conflict and found by the court to be cogent, can support a claim for declaration of title....."

So, succinctly put, even after the lower court had discountenanced that evidence that had not been pleaded, it still found some material contradictions in the evidence adduced by the appellant.

In this vein I endorse the lower court's finding, for I am satisfied that indeed the appellant did not prove his case which was predicated on traditional history with cogent evidence, adduced. See Aikhionbare v. Omoregie 1976 12 SC. 11, Obiaso v. Okoye 1989 5 NWLR part 119 page 80, and Eho v. Ahi 2004 3 NWLR part 861

page 610.

It is trite that civil cases are determined on preponderance of evidence, and the balance of probability. See *Odunsi v. Pereira* 1972 1 SC 52, *Elias v. Omo-Bare* 1982 5 SC. 25, and *Odulaja v. Haddad* 1973 11 SC. 357. ***It is also trite that he who asserts must prove, for without the cogent and credible evidence of the party asserting, he will not succeed in his suit and obtain judgment in his favour.*** See Section 135 of the Evidence Act Cap 112 Laws of the Federation of Nigerian 1990, *Imana v. Robinson* 1979 3 - 4 SC. I and *Achibong v. Ita* 2004 2 NWLR part 858 page 590.

The law is well settled that a party must first prove his case with credible evidence before the burden placed on him by the law can shift to his opponent. See *Elias v. Disu* 1962 1 ALL N.L.R. 214, and *Ihenacho v. Chigere* 2004 17 NWLR part 901 page 130. The position of the law is that a plaintiff cannot rely on the weakness of the case put up in defence by the defendant. See *Akinola v. Oluwo* 1962 1 A.N.L.R. 224, *Ihekoronye v. Hart* 2000 15 NWLR part 692, page 840.

Here, it seems the appellant is relying and taking advantage of the weakness of the respondent's case, if at all there is any. Moreover, the learned trial judge believed the evidence adduced by the respondents in defence of the case put up by the appellant and he was at liberty to do so.

For the foregoing reasonings, I resolve all the above issues dealt with above in favour of the respondents and dismiss all the grounds of appeal to which they are related.

In canvassing argument under issue (6) *supra*, the learned counsel for the appellant has hammered on the applicability of the principle of *Kojo v. Bonsie* 1957 1 WLR 1223 which the learned trial judge failed to apply. It is the argument of the learned counsel for the respondents that the learned trial judge was not bound to apply the principle in *Kojo v. Bonsie* *supra*, having found the evidence of traditional history of the plaintiff/appellant and his witness not to be cogent and plausible. ***In the Kojo and Bonsie's case supra, the court in dealing with conflict of traditional history had the following to say:-***

"Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their

belief. In such a case demeanor is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence by seeing which of two competing histories is the more probable.”

I am guided and strengthened by the above principle. Underlining above is mine.

It is instructive in this case to note that in the case at hand, the conflict in the traditional history is not only in the two sides of the divide, but in the evidence of the appellant and his witness. The case of Kojo and Bonsie is to my mind not applicable, and it will not be appropriate to invoke the principle propounded therein. To this end, I entirely subscribe to the lower court’s finding below which reads thus:-

“For the principle to apply, there must exist side by side two stories of tradition one by each party which are themselves credible and plausible but are in conflict with the other such that the court is unable realistically and justifiably prefer one to the other. In such a situation, either of the two stories may rightly be regarded as likely to be true or that they are probable. It follows that none of the stories in that situation is arbitrarily rejected but each one is tested against recent acts of possession or ownership to determine which of the two stories is more probable. Once it is ascertained, the story that is less probable is rejected. See Mogaji v. Cadbury Nig. Ltd (1985) 2 NWLR (part 7) page 395, Ogbuekwelu v. Umeonejukwe (1994) 4 NWLR part (314) 676 at 698; Okeranowebi v. Mbadugha (1999) 7 NWLR (pt. 558) 471 at 481, Ene v. Atasie (2000) 10 NWLR (pt.676) 470 at 492.....

In the instant case where the traditional history of the Appellant is not cogent and is contradictory, conflicting and not probable whereas that of the Respondent is cogent and probable, the invocation of the principle under consideration does not arise.”

The learned justice couldn’t have put it better. In view of the above answer issue (6) supra in the affirmative, and dismiss the ground of appeal which covers it, as being unmeritorious.

This is an appeal against the concurrent findings of fact by the two lower courts, which the law is settled should not be disturbed or interfered with, in view of the fact that two courts, one of trial, and the other a superior court has thoroughly

considered the veracity or otherwise of the evidence before them. Ordinarily this court will not interfere with the decisions unless the findings are perverse and not supported by credible evidence, or that evidence was not properly evaluated and this failure has occasioned miscarriage of justice. See Aroyewun v. Adediran 2004 13 NWLR part 891 page 628 Are v. Ipaye 1990 2 NWLR part 132 page 298, and Dibiamaka v. Osakwe 1989 3 NWLR part 107 page 101. B

My opinion is that the present appeal is not the case, so I find no plausible reason to overturn the judgments of the lower courts. C

The end result is that I dismiss the appeal in its entirety. I ward N50,000.00 costs to the respondents against the appellant.

ONNOGHEN JSC D

I have had the benefit of reading in draft the lead judgment of my learned brother MUKHTAR, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. E

The appeal is mainly on the concurrent findings of fact by the lower courts after proper evaluation of evidence adduced before the court on the pleadings. All the seven issues formulated by learned counsel for the appellant are basically on evaluation of evidence - on the facts. F

It is settled law that this court does not make a practice of interfering with the concurrent findings of fact by the lower courts except in very exceptional circumstances such as perversity of the finding, none of which has been established to exist in this case. G

From the record, it is clear and I hereby hold that the lower courts were right in their findings, the evidence of the appellant and PW2 on the custom and traditional history of the land in dispute is contradictory and consequently unreliable.

I therefore agree that the appeal be and is hereby dismissed H for lacking in merit with costs as assessed and fixed in the lead judgment of my learned brother. I abide by the other consequential orders made in the said lead judgment.

Appeal dismissed.

TABAI JSC

This appeal is against the judgment of the Court of Appeal, Calabar Division delivered on the 17th of May, 2001 in which it affirmed the judgment of the trial High Court on the 28th of April, 1998. The Plaintiff was the Appellant at the Court below and also the Appellant herein. The original sole Defendant, Chief Collins Onuoha was the Respondent at the Court below and was also the sole Respondent in this Court. He died and has been substituted by his two sons Emeka Collins Onuoha and Ikenna Collins Onuoha as the Respondents.

The action itself was commenced on the 15th of December, 1992 when the writ of summons was issued. In it, the Appellant claimed simply for damages for trespass and perpetual injunction. In paragraph 15 of the statement of claim dated 29th January, 1993 however, the Appellant claimed as follows:

1. SPECIAL DAMAGES:

(a) Six orange trees destroyed N4,000.00

(b) Five plantain stands destroyed N300.00

(c) Cost of replacing the damaged Zinc and rafters of the Plaintiffs home
N2,500.00

(d) 20 stands of Cocoyam destroyed N300.00

(e) 30 stands of Cassava destroyed N500.00

General Damages N491,700.00

TOTAL N500,000.00

2. A declaration that the Plaintiff is entitled to the Certificate of Occupancy in respect of the land being and situate beside the building at No. 221 Oron Road, Itiam Ikot Ebia Uyo and which said land is more particularly described in survey plan No. AS/AK146/92 LD dated 18th December, 1992.

3. Perpetual injunction to restrain the Defendant, his agents servants and privies or otherwise from further trespassing or entering upon the land being and situate beside the building at No. 221 Oron Road, Itiam Ikot Ebia Uyo and which said land is more particularly described in survey plan No. AS/AK146/92 LD dated 18th December, 1992.

The Defendant filed his Statement of Defence on the 16th of

July, 1993 and which was amended on the 23rd of November, 1995. In support of his case, the Appellant and two other witnesses gave evidence. For the defence the deceased Defendant/Respondent and five others gave evidence. At the close of evidence learned counsel for the parties addressed the Court. In Its judgment on the 28th of April, 1998, the trial Court dismissed the claim in its entirety. As I said, B the appeal to the Court below was dismissed.

In the appeal before us the parties have, through their counsel, filed and exchanged their briefs of argument. The Appellant's brief was prepared by A. J. Bashua. It is dated the 16th of January, 2006 filed on the 15th of March, 2006 but was deemed properly C filed on the 12th of May, 2009. He also prepared the Appellant's reply Brief dated 6th January, 2010 but was deemed filed on the 19th October, 2010. The Respondents' Brief was settled by Essien E. Udom. It was filed on the 30/06/2009. D

In the Appellant's brief, A. J. Bashua formulated the following seven issues:

1. Whether the Court of Appeal was right in confirming the dismissal of the Appellant's case on the ground that the custom by which the land in dispute was acquired by Udo Udo Akpaetim from E Udo Ekpo Ikpa, the man who first deforested the land in dispute was not proved by the Appellant in accordance with the law.

2. Whether the Court of Appeal was right in confirming the dismissal of the Plaintiffs case as to who first deforested or settled on F the land in dispute without the resolution of the important issues in the case of the parties by adopting the principle distilled in MOGAJI Vs ODOFIN

3. Whether the Court of Appeal was right when it held that the Appellant had failed to prove how the land in dispute devolved G on them because the evidence of PW2 was contradictory.

4. Whether the Court of Appeal was right in using evidence held as going to no issue as evidence of contradiction of the evidence of the PW2.

5. Whether the Appellant has discharged the onus of proof on H him to be entitled to the declaration sought.

6. Whether the lower Court was right in confirming the dismissal of the Appellant's claim in its entirety.

7. Whether the Court of Appeal was right in holding in spite of

conflicting evidence of the parties on traditional history of the land in dispute, that the principle in KODJO Vs BONSIE did not apply to the consideration of the case.

In the Respondents' Brief learned counsel Essien E. Udom argued that in view of the grounds of appeal the formulation of seven issues amounted to a mere proliferation of issues. He argued that from the seven grounds of appeal only one issue sufficed. And the issue is:-

"Whether from the totality of the evidence before the Trial Court, the Court of Appeal was right on affirming the judgment of the trial Court dismissing the Appellant's claim in its entirety."

From the seven grounds of appeal in the amended notice of appeal 11/05/09 it is clear that the complaints of the Appellant all revolve around the question of proper evaluation. The all pervading issue therefore is whether having regard to the matters pleaded in the statement of claim and Restatement of defence and the evidence in support thereof the Court of Appeal was right to uphold the trial court's dismissal of the claim in its entirety. I am therefore in agreement with learned counsel for Respondent that the seven issues proposed by the Appellant are nothing other than unnecessary proliferation. A single issue suffices to accommodate the complaints in the seven grounds of appeal. And the issue is:

"Whether having regard to the pleadings and the totality of the evidence before the Court, the Court of Appeal was right to affirm the trial Court's dismissal of the Appellant's claim."

In this judgment however, I shall set out the substance of the Appellant's arguments as learned counsel has presented them in the Appellant's brief.

Under the Appellant's issue one, learned counsel for the Appellant A. J. Bashua referred to the pleadings' and the evidence on record and submitted that the concurrent findings about the Appellant's failure to prove the custom relied upon is perverse. He referred in particular to paragraphs 6 and 7 of the Statement of Claim, paragraph 9 of the statement of defence, the evidence of the Appellant who testified as PW1 and the evidence of the PW2 and submitted that the concurrent findings of the two courts below are perverse. He referred to the principle with respect to proof of custom laid down in RICHARD EZEANYA & Ors Vs GABRIEL & Ors (1995) 4 NWLR

(part 388) 142 at 167 and submitted further that the Plaintiff/Appellant met the standard of proof required, cogent and credible evidence of custom having been given. Still with respect to the custom pleaded in paragraphs 6 and 7 of the Statement of Claim, it was the submission of learned counsel that the pleading paragraph 9 of the Statement of Defence did not amount to an express denial of the custom and by the general denial therein the Respondents did not join issues with the Appellant as to the custom. It was his further submission that the lower court erred in rejecting the traditional history of the Appellant as to who deforested the land in dispute. B

With respect to issues two, three, four and five learned counsel was at pains to fault the finding by the trial court that the land devolved on Udo Udo Akpaetim from Akpaetim Udo Etuk. It was his contention that the land could not possibly have devolved as Udo Udo Akpaetim who was the third son of Akpaetim Udo Etuk and that under the tradition the devolution ought to be on the first son. On this issue of devolution, learned counsel referred to the pleadings in paragraphs 8, 9 and 10 of the Statement of Claim and the evidence of the PW1 and PW2, and contended that the consistent evidence that the land in dispute originally belonged to Udo Ekpo Ikpa who later gave eight parcels of the land to Udo Udo Akpaitim in refund of customary dowry which he had paid for the marriage of the former's daughter which marriage did not after all take place, be preferred. According to learned counsel the evidence that in his life time Udo Udo Akpaetim gave the eight pieces of land to Michael Eyo, the Appellant is more credible and should be believed. Counsel further argued that it was the evidence which was rejected as going to no issue pleaded that was used to as contradictory of the evidence of the PW2. It was counsel's submission therefore that a court cannot use evidence that went to no issue to contradict the evidence of a witness. For this submission, learned counsel placed reliance on EMEGOKWE Vs OKADIGBO (1973) 4 SC 113. C D E F G

On the Appellants sixth issue, it was the submission of learned counsel for the Appellant that in view of the finding by the trial court about the existence of two versions of traditional history the principle in KODJO Vs BONSIE (1957) 1 WLR 1223 at 1227 ought to have been applied to test which of the versions is more probable. And having regard to the use made of the land by Eyo Udo Udo until he H

died and the Appellant's house erected on part of the land in 1970 and his farms on which the Respondent built his house the version of the Appellant is more probable.

The substance of the argument of Essien E. Udom is as follows:

B He referred to the concurrent findings of the two courts below about the failure of the Appellant to prove the custom alleged in the Statement of Claim, and submitted that the findings are supported by the evidence and ought not to be disturbed. He argued that the evidence of the PW1 and PW2 failed the test of cogency and reliability
C and that the concurrent findings ought not to be disturbed. He argued that since both sides traced their title to a common ancestor Udo Udo Akpaitim, the manner by which the said common ancestor acquired title to the land is not really material. What is material is
D the devolution from Udo Udo Akpaitim to his successors, he argued.

With respect to whether the evidence of the PW2 about the eight sons of Udo Udo Akpaitim which was ruled upon as going to no issue was used as contradiction of the evidence of the PW2, it was argued that the said evidence was never used as evidence of contradiction. According to counsel, the contradiction went beyond the evidence about eight sons of Akpaitim as found in the trial court. Learned counsel also relied on the judgment of the court below at page 299 of the record. Learned counsel argued that not every passing remark or observation of a court is appealable, contending that
E to be appealable the remarks or observation must relate to the decision appealed against. He cited OGUNYADE Vs OSHUTIKYE (2001) 15 NWLR (part 1057) 218 at 240. On the issue of contradictions between the evidence of the PW1 and PW2, learned counsel referred to part of the evidence of the PW2 reproduced at paragraph 11.7 at page 14 of the Appellant's brief and urged that the argument be discountenanced.
F
G

On whether the principle in KODJO Vs BONSIE ought to have been applied in view of the finding by the trial court of there being
H two versions of traditional history as to the original founder of the land, it was the submission of learned counsel for the Respondent that the principle was not applicable since the trial court as well as the court below found the evidence of traditional history of the Appellant and PW2 incredible. Learned counsel noted the opinion of the

court below at pages 302 and 304 of the record and submitted that opinion cannot be faulted.

With respect to ground seven in the Amended Notice of Appeal, it was the submission of Learned counsel for the Respondent that the Appellant's possession and his claim for trespass and injunction was not made one of the seven issues formulated in the Appellant's brief. It was further submitted that arguments in a brief must relate to the issues formulated and the grounds of appeal from which they are derived for this submission, he relied on CSS BOOKSHOPS LTD Vs THE REGISTERED TRUSTEES OF MUSLIM COMMUNITY IN RIVERS STATE (2006) 11 NWLR (part 992) 530 at 563 and OKOTIE-EBOH Vs MANAGER (2004) 18 NWLR (part 905) 243 and 283.

Learned counsel further argued that by the pleadings in the Statement of Claim the Appellant had shown that it is the respondent that was in actual possession of the land in dispute at the time material to this action. It is a fundamental principle of law that in order to maintain an action for trespass to land, the plaintiff must have a present possessory right, counsel argued. For this submission, he relied on BULLEN LEAKE AND JACOBS PRECEDENTS OF PLEADING 12th EDITION page 879 BLACK'S LAW DICTIONARY 6th EDITION page 1165, DANTSOHO Vs MOHAMMED (2003) 6 NWLR (part 817) 457 at 488-489 and UFOMA Vs AHUCHAOGU (2002) 8 NWLR (part 821) 130 at 148 - 149. Finally, it was urged that the appeal be dismissed.

The pith of the arguments of A. J. Bashua in the Appellant's Reply Brief is as follows: He articulated the principle that the Supreme Court would not normally disturb the concurrent findings of lower courts. He submitted however that where the concurrent finding is shown to be perverse and occasioned a miscarriage of justice, the Supreme Court can intervene. He relied on OMOBORIOLA Vs MILITARY GOVERNOR OF ONDO STATE (1998) 14 NWLR (part 584) 89, BALOGUN Vs AGBOOLA (1974) 1 AWL 66; ANTHONY IBHAFIDON Vs SUNDAY IGBINOSUN (2001) 8 NWLR (part 716) 653 at 6621 OLALOYE Vs BALOGUN (1990) 7 SCNJ 205; JOLAYEMI Vs ALAOYE (2004) AFWLR (part 207) 584 at 613 and OLUJINLE Vs ADEAGBO (1988) 4 SCNJ 1 at 14. It was counsel's submission that the concurrent findings of the two courts below are

perverse in that they were not supported by the evidence on record. Reliance was further placed on *IKE Vs UGBOAJA* (1993) 6 NWLR (part 301); *OGUNBIYI Vs ADEWUNMI* (1988) 5 NWLR (part 93) 217; *AKEREDOLU Vs AKINREMI* (1989) 3 NWLR (part 108) 164 and *JOLAYEMI Vs ALAOYE* (2004) AFWLR (part 217) 584 at 607
 B and 613. Learned counsel pointed out that the evidence of the PW2 which was held to have contradicted the evidence the PW1 was elicited under cross-examination and in respect of matter not pleaded and which therefore goes to no issue. He relied on *SLEC TRANSPORT Vs OLUWALEGUN* (1971) 8 NSCC 470 at 476-477;
 C *NWAWUBA Vs ENEMOO* (1988) 19 NSCC (part 1) 930 at 940. According to learned counsel for the Appellant there were several instances of grave miscarriage of justice committed by the trial court and affirmed by the Court below to warrant the intervention of this
 D Court.

As regards the sale of the land, learned counsel referred to paragraphs 5 and 10 of the Amended Statement of Defence with respect to the sales agreement dated 14th March, 1978 and the ultimate finding by the trial court at page 214 of the record that the sales
 E was validly done under native law and custom and submitted that the finding was perverse.

Learned counsel referred to the finding of the trial Court at page 213 of the record to the effect that the DW1, DW2 and DW4
 F were not witnesses of truth and whose evidence about the date of the sale of the property it disbelieved and submitted that these same witnesses cannot thereafter be regarded as credible witnesses. In conclusion, learned counsel urged that the appeal be allowed.

I have considered the pleadings of the parties, the evidence in
 G support of the pleadings, the judgments of the two Courts below and the address of counsel for the parties in their respective briefs of argument. The single but all encompassing issue is whether from the totality of the evidence on record the Court of Appeal was right to affirm the judgment of the trial court dismissing the Appellant's claim
 H in its entirety.

At the trial Court, the first issue which fell for determination was the identity of the land. That however is not an issue before this Court. The 2nd issue there was whether the Plaintiff/Appellant established a better title to the land than the Defendant. This issue pre-

occupied the bulk of the trial courts appraisal of the evidence. From the pleadings and evidence both sides agree that Udo Udo Akpaitim was one of the ancestors through whom the land devolved on them. He was the grandfather of the Plaintiff (PW1) the DW1 and DW3. The DW2 was at the time of his testimony the family head. After evaluating the evidence, the trial court at page 212 of the record B said:-

"I am inclined to hold that the story of the devolution of the land as given by the Defendants witnesses particularly the DW1 and DW3 is more the probable"

The trial court restated the substance of the evidence of the DW1, DW3 and DW5 and concluded as at page 213 of the record as follows:- C

"In the face of the competing traditional evidence, I find it more comfortable to believe the story as set up by the DW1, DW3 and DW5" D

The Court below endorsed all these findings of the trial Court. The question therefore is whether there is such credible evidence particularly of the DW1, DW3 and DW5 to support the concurrent findings.

The DW1 Ene Eyo Udo Udo Akpaitim said:- he was the elder brother of the Plaintiff/Appellant and he was the head of the Eyo Udo Udo sub-family. He gave evidence of how the land in dispute devolved from Udo Udo Akpaitim to Bassey Udo Udo Akpaitim the father of Obot Bassey who sold the land to the Defendant/Respon- E F dent.

The DW3 Obot Bassey Udo inherited the land from his father Bassey Udo Udo who was a son of Udo Udo Akpaitim. At page 136 of the record, he said:

"I know the land in dispute. The land belongs to Chief Collins Onuoha the Defendant. I sold the land to him. The land belonged to my father. After his death, I inherited the land. My father was Bassey Udo Udo. My grandfather was called Udo Udo Akpaitim." G

And continuing his evidence at page 137, the witness said:

"I sold the land to the Defendant in 1978. After selling the land, he allowed my mother to keep farming on the land until when he would be ready to work on the land." H

The DW5 was Atim Eyo Udo Udo. She was the mother of seven children amongst whom are the Plaintiff/Appellant and the DW1.

The name of her husband and father of the seven children was Eyo Udo Udo. With respect to the devolution of the land in dispute she stated at page 153 of the record as follows:

"I know the land in dispute. The land shares a common boundary with my land. Bassey Udo Udo owns the land. The son of Bassey Udo Udo sold off his land. Bassey Udo Udo has died. Obot is the name of the son that sold the land. He sold the land to the Defendant. I am married to Eyo Udo Udo the father of my children. My husband is no longer alive. I did not see my husband exercise any right over the land. The land was owned by his brother, Bassey Udo Udo. My husband did not give the land to Michael Eyo during his life time."

She was extensively cross-examined. Her testimony under cross-examination spanned pages 153 to 156 of the record.

The DW2 was Chief Enefiok Udosen. Although he was not a direct descendant of Udo Udo Akpaitim, he claimed that he was the family head of the Plaintiff. With respect to the devolution of the land from Udo Udo Akpaitim to Bessey Udo Udo and thence to Obot Bessey Udo (DW3) who sold to the Respondent his evidence was substantially to the same effect as that of the DW1, DW3 and DW5.

Both sides agree that, the land in dispute originally belonged to Akpaitim Udo Etuk. It is also a common ground that title over the land subsequently became vested in Udo Udo Akpaitim. I agree entirely with the reasoning of the Court below, therefore, that the mode by which the land became vested in Udo Udo Akpaitim does not really matter. The crucial issue is the person on whom the land became vested upon the death of Udo Udo Akpaitim. The case of the Plaintiff/Appellant is that it became vested in his father Eyo Udo Udo. At page 74 of the record he said:

"The land in dispute was given to me by my father. The Defendant build the wall. My father inherited the land at the death of his father"

He denied that the land was ever given to his uncle Bassey Udo Udo. Under cross-examination, he asserted at page 75 lines 22-25:

"Bassey Udo Udo was my father's junior brother. He was my uncle. He is now deceased having passed on in 1956. The land in dispute had never belonged to Bassey Udo Udo."

The case of the defence, on the other hand, is that the land was given

by Udo Udo Akpaitim to one of his sons Bassey Udo Udo.

The trial Court examined the two competing versions and concluded that it was more comfortable to believe the version presented by the defence especially the evidence of the DW1, DW3 and DW5. As I said, this finding was endorsed by the Court below. The pertinent question is whether there exists in the totality of the case on record such credible evidence to warrant the concurrent findings. The issue is that of evaluation and/or re-evaluation. B

It is settled principle of law that the duty of evaluation of evidence is pre-eminently that of the trial Court which alone has the benefit of seeing and hearing witnesses in the course of their testimonies; it is the trial court that has the singular benefit of watching the demeanour of witnesses in the course of their testimonies. See A. G. OYO STATE Vs. FAIRLAKES HOTELS (No. 2) (1989) 5 NWLR (part 121) 255 at 292; ARE Vs IPAYE (1990) 2 NWLR (part 132) 298, As a general rule therefore, an appellate Court would not disturb the findings of a trial court unless it is proved that the findings are not supported by the evidence on record and therefore perverse. This is because of the appellate court's disadvantage of not having seen or heard the witnesses in the course of their testimonies. And in particular, where the appraisal of evidence entails the assessment of the credibility of witnesses, an appellate court has exceptionally limited room for interference. See ONWUKA Vs EDIALA (1989) 1 NWLR (part 96) 182, IMAH Vs OKOGBE (1993) 9 NWLR (part 316) 159 ANAEZE Vs ANYASO (1993) 5 NWLR (part 291) 1; ABISI Vs EKWEALOR (1993) 6 NWLR (part 302) 643. C
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In this instant case, the Appellant, the DW1 and DW5 are members of the same Eyo Udo Udo family. The DW1 is the elder brother of the appellant; while the DW5 is his mother. I have reproduced some relevant aspects of their evidence. The DW1 and DW5 were each categorical about the land in dispute being that inherited by the father of the DW3, Bessey Udo Udo. As I said earlier, they were each vigorously cross-examined and each was steadfast in his or her testimony. The trial court considered their evidence to be credible and which it therefore believed. The Court also believed the evidence of the DW3 who said he inherited the land from his father, Bassey Udo Udo. He sold the land to the Defendants/Respondents. All these findings were affirmed by the Court below. H

In these circumstances, can the Appellant be held to have established that the findings are perverse? I shall answer this question in the negative. The findings are amply supported by the evidence on record. There is therefore no basis whatsoever for any interference with the decision of the two Courts below. All the sustained arguments about the custom by which Udo Udo Akpaitim got title to the property are irrelevant since both the Appellant and the DW3 are in agreement that they acquired their title from their grandfather Udo Udo Akpaitim. The Appellant also raised the issue of contradictions in the evidence of the DW2 and DW4. The Court below considered this issue and came to the conclusion that the contradiction related to the document of the sale of the property which is not quite material to the question of the person in whom title was vested at the time of the sale to the Respondent. I entirely agree with that reasoning and conclusion of the Court below. The crucial question was whether it was the Appellant or the DW3 that had title to the land in dispute at the time it was sold to the Defendant/Respondent.

Learned counsel for the Appellant also referred to the trial Court's observation about the existence of two competing versions of traditional evidence and submitted that in such circumstance, the Court ought to have invoked the principle in KODJO Vs BONSIE to determine which version is more probable. It was counsel's further contention that in view of the house of the Appellant and other acts of ownership carried out by him on the land in dispute, the Court ought to and should prefer the Appellant's version to that of the Respondent. This issue was raised at the Court below. In its judgment, the Court below articulated the legal effect of the principle in KODJO Vs BONSIE and at page 303 of the record concluded as follows:

"In the instant case where the traditional history of the Appellant is not cogent and is contradictory conflicting and not probable whereas that of the Respondent is cogent and probable, the invocation of the principle under consideration does not arise. It is my judgment that the findings of the Court below are without reproach."

I agree with the above reasoning and conclusion. It is not the law that whenever there are competing versions of traditional evidence recourse must be had to the principle in KODJO Vs BONSIE. If from the totality of the evidence the court is capable of ascertaining

which version is more probable, it can proceed to make its findings and draw the necessary conclusion without invoking the principle in KODJO Vs BONSIE. The competing versions in this case related to the devolution of the property from the Udo Udo Akpaitim the grandfather of both the Appellant and the DW3. As I have stated above the DW1, who is the elder brother of the Appellant testified against him. His mother DW5 also testified against him. None of them was discredited under cross-examination. The DW5 asserted categorically that her late husband and father of the Appellant, Eyo Udo Udo in his life time, never exercised any act of ownership over the land in dispute. The PW2, Effiong Etim Umoh who testified for the Appellant was not a direct descendant of Udo Udo Akpaitim. In my assessment, the trial Court satisfactorily evaluated the evidence and had good cause to prefer the evidence of the DW1, DW3 and DW5 to that of the Plaintiff/Appellant and the PW2. He had no reason to invoke the principle in KODJO Vs BONSIE and so I hold.

On the whole, it is my view and I hold that from the totality of the evidence on record, the Court of Appeal was right to affirm the judgment of the trial court, dismissing the Plaintiff/Appellant's claim in its entirety. The single issue is thus resolved in favour of the Respondents.

For the foregoing and the fuller reasons contained in the lead judgment of my learned brother Mukhtar. JSC, I also dismiss the appeal for lack of merit. I abide by the order on costs as assessed in the lead judgment.

MUHAMMAD JSC

I have had the advantage of reading the judgment just delivered by my learned brother, Mukhtar, JSC. I agree with her reasoning and conclusions. I adopt the consequential orders including one on costs made in the leading judgment.

ADEKEYE JSC

I had a preview of the lead judgment just delivered by my learned brother, A.M. Mukhtar JSC. I agree with the reasoning and conclusion that the appeal be dismissed.

H

The claim of the appellant as plaintiffs before the High Court of Akwa Ibom State, Uyo Judicial Divisions reads -

1. Special Damage

a. Six orange trees destroyed - N4,000.00

b. five plantain stands destroyed - N1,000.00

B c. Cost for replacing the damaged zinc
and rafters of the plaintiffs house - N2,500.00

d. 20 stands of cocoyam destroyed - N300.00

e. 30 stands of cassava destroyed - N500.00

C General Damages - N491,700.00

Total - N500,000.00

2. A declaration that the plaintiff is entitled to the certificate of occupancy in respect of the land being and situate beside the building at No. 221 Oron Road, Itiam Ikot Ebia, Uyo and which said land D is more particularly described in survey plan No. AS/K146/92LD dated 18th December 1992.

3. Perpetual Injunction to restrain the defendant, his agents, servants and privies or otherwise from further trespassing or entering upon the land being and situate beside the building at N.221 Oron E Road, Itiam, Ikot Ebia, Uyo and which said land is more particularly described in survey plan No. AS/AK146/92LD dated 18th December 1992.

The plaintiff averred in his statement of claim as follows -

F Paragraph 6

"The land in dispute was deforested by Udo Ekpo Ikpa of Nung Aduak family in Itiam Ikot Ebia, more than 200 years ago. The said Udo Ekpo Ikpa had a daughter whom Udo Udo Akpaetim had wanted to marry. Udo Udo Akpaetim is a great grandfather of the plaintiff. It G was the custom in the plaintiffs village for would be suitors to pay betrothal fees to either of the parents of the would be bride. Udo Udo Akpaetim had paid the said fee of 8 bundles of manillas in respect of the daughter of Udo Ekpo Ikpa to the girl's mother. Udo Ekpo Ikpa objected to the said marriage being celebrated on the H grounds that Udo Udo Akpaetim was his close cousin as they all were from the same family of Nung Aduak.

7. Udo Udo Akpaetim thereafter demanded for a refund of his money as Udo Ekpo Ikpa could not do so, he instead surrendered 8 pieces of his lands to Udo udo Akpaetim,

8. Udo Udo Akpaetim took possession of these parcels of land and exercised maximum acts of ownership thereon. On his demise the land transmitted to his son Uyo Udo Udo who was the father of the plaintiff. Eyo Udo Udo in his lifetime exercised maximum acts of ownership over same. He erected his permanent house on a portion of the said parcels of land. The plaintiffs father had in his lifetime shown the plaintiff the remaining parts or parcels of land, now the land in dispute for him to build his permanent house in the village and to farm thereon, but on the warning that on no account must the said land be alienated to non-members of his family.

9. The plaintiff had erected a small concrete building on a corner of the land in dispute. The said building was erected while the plaintiff's father was still alive. It was the intention of the plaintiff to erect a bigger and a more permanent family house on the portion of the land in dispute now trespassed into by the defendant.

10. The plaintiff had been in undisturbed and exclusive possession of the land in dispute since 1970."

Statement of Defence

1. "Save as hereinafter expressly admitted, the defendant denies each and every material allegation of fact contained in the plaintiff's statement of claim as if same were herein set out seriatim and if in like manner expressly traversed.

2. The defendant admits paragraph 1 of the statement of claim only to the extent that the plaintiff is a member of Eyo Udo Udo sub family of Nung Aduak in Itiam Ikot Ebia village, Uyo. The defendant added that Ene Eyo Udo is the family head of Eyo Udo Udo sub family.

3. Paragraph 2 of the statement of claim is admitted.

4. Paragraph 3 of the statement of claim is admitted only to the extent that the land, the subject matter of this suit (thereinafter referred to as the land in dispute) is situate beside the building at No.221 Oron Road Uyo. The defendant denies the other averments therein contained. The defendant adds that the plan filed by the plaintiff is inaccurate as it neither represents nor reflects the time and correct description and features of the land in dispute. Some of the features and indications shown on the plan are a fiction of the plaintiffs imagination as they are purported fake and imaginary because the land in dispute has never been in possession of nor the property of

the plaintiff or at all.”

The claim for declaration, damages for trespass and injunction of the plaintiff/appellant and the foregoing averments in the pleadings of both parties undoubtedly put the radical title in the land in dispute in issue, and consequently the exclusive possession of the land. This implies that the court has to determine who has a better title and it follows that the general onus of proving a better title is on the appellant.

Okorie v. Udom (1960) SCNLR 326.

Kareem v. Ogunde & Anor (1972) 1 SC 182.

Elias v. chief Omo-Bare (1982) 5 SC 25.

Adegbite v. Ogunsolu (1990) 4 NWLR pt.146 pg.578.

Adesanya v. Otuewu & ore (1993) 1 SCNJ 77 (1993) NWLR pt.270 pg.414.

Abdul Hamid Ojo v. Primate Adejobi (1978) 3 xxx SC 65.

Talabi v. Adeseye (1973) NMLR 8.

Ekenma v. Nkpakara (1997) 5 NWLR pt.504 pg.152.

Ogunbiyi v. Adewunmi (1988) 5 NWLR pt.93 pg.215.

Ogunkeye v. Oni (1990) 2 NWLR pt.135 pg.745.

Kponugbo v. Kodajja (1945) 2 WACA 24.

Oladunjoye v. Akinterinwa & anor (2000) 4 SC pt.1 pg.19 (2000) 6 NWLR pt.659 pg.92.

The claim of the appellant postulates that he is either the owner or prior to the trespass of the respondents, he complained that he had exclusive possession of the disputed land. In proving a better title to that of the respondent - the appellant relied on traditional evidence to establish his radical root of title.

The proper approach and duty of the court is to consider the activities of the parties in the exercise of their rights and decide whether it accords with the evidence of traditional history as the law ascribes possession to the one of them with the better title based on balance of probabilities.

Aromire v. Awoyemi (1972) 7 NSCC pg.113.

The act of vesting legal title in respect of a piece 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.

A plaintiff who seeks declaration of title to land must prove his root of title to the land. Where he traces his title to a particular person, he

must further prove how that person got his own title or came to have the title vested in him, including where necessary, the family that originally owns the land. The onus is not discharged even where the scales are evenly weighed between them.

Archibong v. Edak (2006) 7 NWLR pt.980,

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

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

Otanma v. Youdubagha (2006) 2 NWLR pg.969 pg.33 7 .

Mogaji v. Cadbury (Nig.) Ltd & ors (1985) 2 NWLR pt.7 pg.393.

Odofin v. Ayoola (1984) 11 SC pg.72

Owoade v. Omitola (1988) 2 NWLR pt.77 pg.413. C

Ndukwe v. Acha (1998) 6 NWLR pt.553 pg.25.

The principal characters in establishing the root of title to this land by traditional history belong to the same extended family. This makes the duty of the court in getting to the root of the matter easier D to discover which side offers more credible evidence. The evidence of the appellant as to how the land in dispute devolved on him from his ancestor Udo Udo Akpaitim is conflicting and contradictory as to whether the land is still intact as a family land or it has been partitioned and shared amongst his children. Even if it is agreed that only E the first son of Udo Udo Akpaitim had taken a portion of the land, there is conflicting evidence as to the identity of this first son as between Eyo Udo Udo the plaintiff's father and one Ibanga. If the land remains a family property no individual can claim exclusive ownership F of any portion of the land.

The number of children of Udo Udo Akpaetim is also a victim of this conflicting evidence of the appellant and his witness. Curiously a brother of the appellant gave evidence for the defence - he made the picture clearer in his evidence that the conflicting traditional evidence G of the plaintiff not only distorted his family history but also exhibited his ignorance of the traditional history of the origin of the land in dispute. The case of the defence exposed that the ancestor of the plaintiff was Akpaitim Udo Etuk -whose son was Udo Udo Akpaitim, the father of Eyo Udo Udo - the plaintiff's father. Udo Udo Akpaitim H had six sons. When he died the land was shared amongst his children. One of them who could not get out of the five pieces of land was given a piece of land somewhere else. The land in dispute was inherited by Bassey Udo Udo who conveyed the land to the defen-

dant.

Obviously one who gave a conflicting evidence to establish a root of title cannot have a pronouncement as to title in his favour. Whereas in a claim for declaration of title to land, a plaintiff has the burden of proving his case upon his own cogent and credible evidence and cannot rely on the weakness of the defendant's case. However, a plaintiff can take advantage of evidence by the defence which supports his case. The evidence of the defence in the instant case only cleared the conflicting evidence as to the root of title of the land given by the appellant.

Otanma v. Youdugha (2006) 2 NWLR pt.964 pg. 337.

Onisaodu v. Elewaju (2008) 13 NWLR pt.998 pg.517.

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

Akinola v. Oluwo (1962) 1 All NLR 224.

Madubuonwu v. Nnalue (1999) 11 NWLR pt.628 pg.673.

Elema v. Akenzua (2006) SC pt.111 pg.26.

Kodilinye v. Odu (1935) 2 WACA 336.

The trial court concluded that the case of the appellant remained unestablished having failed to discharge the onus to prove that he had any title to the land in dispute. I must emphasise here that the conflict in the traditional evidence of the parties was only in respect of the plaintiff/appellant's case - the question of a conflict between the two traditional histories given by the parties did not arise at all. In this case, it was the evidence of the witness called by the appellant that conflicted with his own. The necessity to resolve conflict in traditional histories by reference to recent acts of possession in recent times as enjoined by *Kojo V. Bonsie* (1957) 1 WLR 1223 did not arise before the trial court. According to decided authorities, for the principle in *Kojo v. Bonsie* (supra) to be resorted to, there should be presented to the court two competing histories, one by either party which on their own look credible thereby making a conclusive finding as to which to prefer unrealistic. In the traditional history one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is not the guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and see which of the two competing histories is more probable. The principle cannot be applied if the plaintiff relies on acts of ownership spanning several years

as his root of title.

Balogun v. Akanji (2005) 10 NWLR pt.933 pg.394.

Odofin v. Ayoola (1984) 11 SC 72.

Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR pt.7 393.

Are v. Ipaye (1990) 2 NWLR pt.132 pg.298.

Ohiaeri v. Akabeze (1992) 2 NWLR pt.221 pg.1.

Odife v. Aniemeku (1992) 7 NWLR pt.251 pg.25.

Izooji v. Ajukwara (1998) 1 NWLR pt.533 pg.255.

The Court of Appeal rightly affirmed the judgment of the trial court. In this court, it is our finding also that the plaintiff/appellant failed to establish his claim to the land in dispute by not sufficiently giving evidence of traditional history to the satisfaction of the court. The trial court and lower court rightly dismissed the claim. We now have before us the concurrent findings of fact by a trial court and the court of appeal. Generally speaking, the concurrent findings of fact by a trial court and the court of appeal should not be easily disturbed by the Supreme Court where there is sufficient evidence to support them unless there is a miscarriage of justice and violation of some principles of law and procedure by the two lower courts which are glaring on the face of the Records. In the instant case, the concurrent findings of the lower courts did not occasion a miscarriage of justice; therefore this court will not interfere with them.

With fuller reasons given by my learned brother in the lead judgment, I also dismiss the appeal for lacking in merit. I abide the consequential orders made therein including the order as to costs.

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