

SUPREME COURT OF NIGERIA
20TH MAY, 2011. SC.168/2001
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F. TABAI,
I. T. MUHAMMAD, B. RHODES-VIVOUR, JJSC

1. OMODELE ASHABI EYA
 2. TOKE EYA APPELLANTS
 3. KASALI AREMU
- AND
1. ALHAJA RISIKATU OLOPADE
 2. ALHAJA KUDIRATU SIKIRU RESPONDENTS
-

PRACTICE & PROCEDURE - Statement of claim - Essentials of -
It supersedes writ of summons - Relief claimed in the writ but not
claimed in the statement of claim- Is deemed abandoned (H1)

LAND LAW - Title - Proof - Plaintiff must succeed on the strength of
his case - And not on the weakness of the defence - Except where
the case of the defence supports that of plaintiff (H2)

PLEADINGS - Fraud - Allegation of - The particulars of alleged fraud
must be specifically pleaded - Before a party can rely on fraud (H3)

EVIDENCE - Civil proceedings - Allegation of crime - Standard of
proof - Where directly in issue - It must be specifically pleaded and
proved beyond reasonable doubt (H4)

FACTS

By a writ of summons filed before the High Court of Ogun State, Holden at Abeokuta plaintiffs/appellants claimed against defendants/respondents the following reliefs, inter alia: Declaration that appellants are entitled to apply for the Certificate of Occupancy over the piece or parcel of land situate, lying and being at Idi-Araba quarters of Abeokuta, Ogun State of Nigeria. Appellants contend that the land in dispute was granted to KEHINDE EYA after the death of SOLANKE who inherited same from ODEBI, one of the children of IKUOLOKO, the original owner in possession of a vast expanse of

land as his share. At all time material to the action, the entire land was not partitioned among descendants of KEHINDE EYA; that Kehinde Eya's family gave permission to LOLADE (one of the descendants of KEHINDE EYA and its head at the material time) to sell an acre of the family land to Alhaji Bello Qudus, original 1st respondent to settle some financial indebtedness as shown in Exhibit A, while the remaining land was intact. It is the contention of appellants that three days after the death of LOLADE, original 1st respondent approached appellants and informed them that late LOLADE had sold the land in dispute, which is eleven acres to him and wanted appellants to sign an agreement to that effect which they refused to do.

Later on, appellants found two building foundations on the land constructed by original 1st respondent which resulted in the institution of this action. It is however the case of respondents that original 1st respondent bought two parcels of land from appellants' family at different times, the first being directly from Lolade at about 1965 which was for twenty acres as evidenced in Exhibit G while the other was in 1972 of eleven acres after the death of Lolade; that the 2nd purchase was from appellants as evidenced in Exhibit F. Lolade is said to have died in 1970. It is the contention of respondents that 1st and 2nd appellants witnessed the sale of 1972 by thumb printing the agreement after all formalities were duly complied with. It is also the contention of respondents that original 1st respondent was led into possession immediately after the sale and had remained in same letting and selling plots of the land to tenants thereof. At the conclusion of the trial, the learned trial judge dismissed the case of appellants. Dissatisfied, appellants appealed to the Ibadan division of Court of Appeal. The Court dismissed the appeal. The present appeal is a further appeal by appellants.

ISSUE FOR DETERMINATION

Whether the court below was on preponderance of evidence, correct in affirming the judgment of the trial court.

HELD (Unanimously dismissing the appeal per ONNOGHEN JSC)

PRACTICE & PROCEDURE - Statement of claim - Essentials

1. It should always be noted that the law is settled that the statement of claim supersedes the writ of summons and that any relief claimed in the writ of summons but not mentioned/claimed in the statement

of claim is deemed abandoned and can therefore not be granted at the conclusion of trial if the plaintiff succeeds. Learned counsel should therefore be careful when drafting the reliefs in the statement of claim. (p. 1276 F)

LAND LAW - Title - Proof

2. It should be constantly borne in mind that appellants were the plaintiffs who instituted the action for the reliefs earlier stated in this judgment and therefore have the burden of proving their entitlement to the said reliefs on the balance of probabilities/generally. The duty of the respondents, as defendants, where there is no counter claim, as in the instant case, is simply to defend the action as framed by the plaintiffs.

It is therefore the duty of the appellants to prove by evidence the fact that only one acre of land was sold by Lolade to the 1st respondent and that any claim to more than one acre in any document allegedly evidencing the sale is a forgery particularly as the appellants allegedly NEVER sold any eleven acres of land to the original 1st respondent. The appellants assert the sale of only one acre of land instead of eleven acres and therefore bear the burden of proving their assertion in accordance within the provisions of section 137 of the Evidence Act.

It is my considered view that if it is found that appellants failed to prove the assertion, then their claim must of necessity fail as their success cannot depend on the inability of the respondents to adduce evidence in satisfaction of the court that eleven acres of the land was actually sold. The above principles is so because in an action for declaration of title, the law is long settled that a plaintiff must succeed on the strength of his case and not on the weakness of the defence except where the case of the defence supports that of the plaintiff.

(p. 1284 H)

PLEADINGS - Fraud - Allegation of

3. The next issue is whether Exhibit F is a forgery. To begin with it is settled law that before a party can legally rely on fraud or forgery, the fact must not only be pleaded but particulars thereof must be provided in the pleadings. I have already reproduced the relevant

averments in the statement of claim in which forgery was pleaded and it is very clear that the particulars of the alleged forgery have not been pleaded. In any event the respondents pleaded that the document, Exhibit F was validly and properly executed and testified to that effect, as the same complied with the provisions of Illiterates
B Protection Law. (p. 1288 H)

Civil proceedings - Allegation of crime - Standard of proof

4. The above notwithstanding, it is settled law that where the com-
C mission of a crime is directly in issue in any proceeding whether civil or criminal, in this case, forgery, the alleged crime must be proved beyond reasonable doubt and it is the appellants in this case who assert the commission of forgery who have the burden of proving, by adducing sufficient evidence to establish same - see section 138(1) & (2) of the Evidence Act, Cap E14, Laws of the Federation of Ni-
D geria, 2004, which they failed to do. That apart, the appellants by not adducing evidence on the issue of forgery are deemed to have abandoned their pleading on that fact. (p. 1289 B)

NOTABLE POINTS OF INTEREST

E ONNOGHEN JSC

1. Duty of Court on non-filing of reply brief

I have gone through the record of appeal including the process filed in this appeal and have been unable to find any reply brief filed by
F the appellants in which they presented any argument in rebuttal of the objection stated supra. The non-filing of reply brief notwithstanding, it is the duty of this court, in the circumstance, to examine the grounds of objection to determine its substance despite the absence of a reply brief. (p. 1278 C)

G MUKHTAR JSC

2. Supreme Court may not to interfere with concurrent findings

This is an appeal against concurrent findings of facts of two courts which the law says will not ordinarily be interfered with unless the findings are not supported with credible evidence and are perverse
H and have occasioned miscarriage of justice. (p. 1292 F)

RHODES-VIVOUR JSC

3. Findings on credibility and on evaluation of evidence - Difference
There is a distinction between findings of fact based on credibility of witnesses and findings based on evaluation of evidence. It is only in the latter case that an appeal court is in as good a position as the trial court to evaluate the evidence. In the former case it was the trial judge who saw the witnesses testified. He watched their demeanour and so is in the best position to comment on their credibility. A Court of Appeal must be very reluctant to differ from findings of the trial judge on facts based on the credibility of the witnesses.

After reviewing the entire circumstances of the case, the pleadings, evidence led in support, I am firmly of the view that the learned trial judge and the Court of Appeal were correct. (p. 1293 H)

REPRESENTATION

A. Bakare Esq with O. Omotosho & S. Suleiman for Appellants

A. A. Adedeji Esq with C.V. Aliogo Esq. for Respondents

CASES REFERRED TO

Egbe vs Alhaji (1990) 1 NWLR (Pt.128) 546

Saude vs Abdullahi (1989) 4 NWLR (Pt.116) 387

Folarin vs Durojaiye (1998) 1 NWLR (Pt. 70) 351

Ogbe vs Asade (2009.) 18 NWLR (Pt. 1172) 106

Onifade vs. Olayiwola (1990) 7 NWLR (Pt.161) 130

Adesunoye vs Adewole (2000) 9 NWLR (Pt. 671) 127

Aseimo v. Abraham 2001 16 NWLR part 738 page 20

Bamgboye vs. Unilorin (1990) 10 NWLR (Pt. 622) 290

Jiaza vs. Bamgbose (1999) 7 NWLR (Pt. 609) 182 at 192

R.C.C. (Nig) Ltd vs. R.P.C. Ltd (2005) 10 NWLR (Pt. 934)615

STATUTES REFERRED TO

Evidence Act Cap. E14 LFN 2004, ss. 137, 138(1) (2)

Illiterates Protection Law

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Ibadan in Appeal No. CA/I/75/93 delivered on the 22nd day of March, 2001 in which the court affirmed the judgment of the High Court of Ogun State, Holden at Abeokuta in Suit NO. AB/22/84

delivered on the 27th day of November, 1985.

By a writ of summons at pages 1 and 2 of the record of appeal, the appellants, then plaintiffs claimed against the respondent defendant the following reliefs:-

B “(i) Declaration that the plaintiffs are entitled to apply for the Certificate of Occupancy over the piece or parcel of land situate, lying and being at Idi-Aba quarters of Abeokuta Ogun State of Nigeria.

C (ii) N500.00 (five hundred naira) damages against the defendants for the trespass committed on the land when the defendant without the permission or consent of the plaintiffs entered the land and together with their servants and agents cleared it and started erecting the foundation of some building structures on the land.

(iii) Injunction to restrain the defendants their servants and/or agents from further acts of trespass on the said land”.

D However, in paragraph 31 of the Statement of Claim particularly at page 10 of the record of appeal, the reliefs claimed in the writ of summons and reproduced supra are paraphrased thus:-

E “31. The plaintiffs therefore wish this Honourable Court to grant them leave to apply for certificate of statutory Right of Occupancy on the land in dispute, to find the defendants liable in trespass and to make an order for perpetual injunction against the defendant.”

It can be noted from the final claims of the plaintiffs that the relief of damages for trespass has been abandoned while the terms of the perpetual injunction are very uncertain.

F It should always be noted that the law is settled that the statement of claim supersedes the writ of summons and that any relief claimed in the writ of summons but not mentioned/claimed in the statement of claim is deemed abandoned and can therefore not be granted at the conclusion of trial if the plaintiff succeeds. Learned counsel should therefore be careful when drafting the reliefs in the statement of claim.

G However, it is the case of the plaintiffs/appellants that the land in dispute was granted to KEHINDE EYA after the death of SOLANKE who inherited same from ODEBI, one of the children of IKUOLOKO, the original owner in possession of a vast expanse of land as his share. At all time material to the action, the entire land was not partitioned among the descendants of KEHINDE EYA; that Kehinde Eya’s family gave permission to LOLADE (one of the descendants

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of KEHINDE EYA and its head at the material time) to sell an acre of the family land to Alhaji Bello Qudus, the original 1st respondent to settle some financial indebtedness as shown in Exhibit A, while the remaining land was intact. It is the contention of the appellants that three days after the death of LOLADE, the original 1st respondent approached the appellants and informed them that late LOLADE had sold the land in dispute, which is eleven acres to him and wanted the appellants to sign an agreement to that effect which they refused to do. Later on, the appellants found two building foundations on the land constructed by the original 1st respondent which resulted in the institution of the action. B
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It is however the case of the respondents that the original 1st respondent bought two parcels of land from the appellants' family at different times, the first being directly from Lolade at about 1965 which was for twenty acres as evidenced in Exhibit G while the other was in 1972 of eleven acres after the death of Lolade ; that the 2nd purchase was from the plaintiffs as evidence in Exhibit F. Lolade is said to have died in 1970. It is the contention of the respondents that the 1st and 2nd appellants witnessed the sale of 1972 by thumb printing the agreement after all formalities were duly complied with. It is also the contention of the respondents that the original 1st respondent was led into possession immediately after the sale and had remained in same letting and selling plots of the land to tenants thereof. D
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At the conclusion of the trial, the learned trial judge dismissed the case of the appellants which resulted in an appeal before the Ibadan Division of the Court of Appeal in appeal No. CA/I/75/93 which was dismissed by the court. The present appeal is therefore a further appeal by the appellants, the issues for the determination of which are listed by learned counsel for the appellants, DEMOLA BAKARE ESQ in the Amended Appellant Brief filed on 19/2/2010 as follows:- F
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“1. Whether the court below was right in refusing to set aside the judgment of the trial court when there was no evidential or legal basis for the latter's finding that appellants' family had earlier sold twenty acres of their land to the respondents (Ground). H

2. Whether the court below was, on preponderance of evidence, correct in affirming the judgment of the trial court. (Ground 2)”. However, learned counsel for the respondents ADERIBIGBE

ADEDEJI Esq in the respondents' brief deemed filed on 7th February, 2011 argued a preliminary objection attacking ground 1 of the grounds of appeal from which issue 1 is formulated. His contention is that ground 1 of the grounds of appeal is incompetent as it does not relate to the decision of the court as the court never awarded 31 acres of the appellants' land to the respondents in the alleged judgment; that the trial court merely dismissed the claim of the appellants without making any order in favour of the respondents in respect of the land in dispute; that it is settled law that a ground of appeal must challenge the ratio decidendi in the judgment on appeal, relying on *Egbe vs Alhaji* (1990) 1 NWLR (Pt.128) 546: *Saude vs Abdullahi* (1989) 4 NWLR (Pt.116) 387. Learned Counsel then urged the court to strike out ground 1 of the grounds of appeal and with it issue 1 formulated therefrom.

I have gone through the record of appeal including the process filed in this appeal and have been unable to find any reply brief filed by the appellants in which they presented any argument in rebuttal of the objection stated supra.

The non-filing of reply brief notwithstanding, it is the duty of this court, in the circumstance, to examine the grounds of objection to determine its substance despite the absence of a reply brief.

I had earlier in this judgment reproduced the relief claimed in the writ of summons by the appellants which included a declaration of a right of occupancy over the land in dispute. In respect of that claim the trial court, at pages 91 - 92 of the record held as follows:-

"In the circumstances with the equitable interest of the defendant on the twenty acres of land to the knowledge of the plaintiffs this court cannot grant the declaration that the plaintiffs are entitled to certificate of occupancy in respect of the land and therefore the 1st leg of plaintiffs' claims fails. Moreover, the 2nd and 3rd legs of the claim, i.e. claim of N500 damages for trespassed and injunctions which are contingent on the success of the 1st leg must fail.

On the whole the plaintiffs' claims are dismissed".

Now, ground 1 of the grounds of appeal of the appellants complained as follows:-

"(i) the lower court erred in law in refusing to re-evaluate the High Court's award of thirty-one acres of the appellants' land to the defendants/respondents when there was a claim of eleven acres

before the High Court.

PARTICULARS

The case before the High Court was on eleven acres over which pleadings and survey plans were filed and it was irregular for the High Court to have given judgment for thirty-one acres, which was not a claim before the High Court.” B

From the above, it is very clear that the ground of appeal complained of does not arise from the decision of the court let alone from the ratio decidendi of the judgment. In the first place, the respondents did not counter claim for any declaration of title to any piece or parcel of land neither was any issue joined on such a claim. It is also very clear that the trial court and the lower court never awarded thirty-one acres of appellants’ land to the respondents neither was any award of any piece or parcel of the appellants’ land made in favour of the respondents. D

From the above passage in the judgment of the trial court, the court is simply saying that having found as a fact that the respondents had an equitable interest in twenty acres of land in the land in dispute to the knowledge of the appellants the court cannot grant the appellants a declaration that appellants are entitled to a certificate of occupancy over the land which includes the said twenty acres in which the respondents have equitable interest. The court made a finding of fact that the respondents had equitable interest over twenty acres of the land in dispute and that is all. The court did not award the said twenty acres to the respondents let alone thirty-one acres as claimed in the ground of appeal in question. E F

I therefore agree with the submission of learned counsel for the respondents that ground 1 of the grounds of appeal is incompetent in law thereby rendering issue 1 formulated therefrom incompetent and subject to being struck out and consequently ordered accordingly. Ground 1 and issue 1 are therefore struck out. G

I will therefore consider the appeal on the surviving issue 2 which in effect attacks the decision on weight of evidence. Actually the question before the lower courts is simply whether appellants sold eleven acres of land to the respondents as claimed by the respondents or only one acre as claimed by the appellants? Both in the pleadings and evidence appellants contend that they gave permission to Lolade, their then head of family, to sell one acre of land to the original 1st H

respondent for which an agreement was entered into between the parties. It is the contention of learned counsel for the appellants that since Kehinde Eya's land had not been partitioned the consent of the family is required before any sale by Lolade to the original 1st respondent or anybody for that matter can be valid; that appellants
 B never sold the eleven acres of land to the original 1st respondent and that it was the duty of the respondents to prove the alleged sale which they failed to do; that for the respondents to succeed they must plead and prove the following:-

- C 1. Valid payment of money;
2. Payment made in the presence of witness, and
3. possession delivered to the purchaser also in the presence of witnesses, relying on *Folarin vs Durojaiye* (1998) 1 NWLR (Pt. 70) 351; *Odufoye vs. Fatoke* (1977) 4 SC 11 etc;
4. That the consent of the family was obtained, relying on
 D *Jiaza vs. Bamgbose* (1999) 7 NWLR (Pt. 609) 182 at 192: that by virtue of the provisions of section 4 and 5 of the Land Instrument Preparation Law, Cap. 52 Laws of Ogun State 1978, the burden is on the respondent to show that the agreement was prepared by a legal practitioner, that DW1 did not say that he prepared Exhibit
 E F; that DW1 said he took instructions from the parties and directed his clerk to prepare Exhibit F, which contravenes sections 4 and 5 of Cap. 52, Laws of Ogun State 1978, supra; that the lower court was in error in holding that Exhibit F complied within section 4 and 5 of
 F Cap 52 supra and that it is not a forgery and the issue of the alleged forgery was neither pleaded with particular nor evidence adduced in proof of same".

It is the further contention of learned counsel that the application of the doctrine of equity whereby the unregistered instrument, Exhibit F is treated as a receipt, which when coupled with possession
 G confers equitable interest in land is wrongful in law because equity follows the law and since Exhibit F was not prepared by DW1 but his clerk, it did not comply with the provisions of section 4 and 5 of Cap 52 supra; that the second requirement of payment being made in the presence of witnesses was satisfied by the respondents but; that the fulfilment of this requirement does not help the respondents in view
 H of our submission above"; that there is no reliable evidence that the respondents were put into possession after the alleged purchase;

that by not traversing the averment that Exhibit F is a forgery, the respondents are deemed to have admitted same by virtue of which no further proof was required, relying on section 75 of the Evidence Act and the case of R.C.C. (Nig) Ltd vs. R.P.C. Ltd (2005) 10 NWLR (Pt. 934) 615; Adesunoye vs Adewole (2000) 9 NWLR (Pt. 671) 127; that with the said admission the appellants needed not to plead particulars of the fraud nor do they need to prove same beyond reasonable doubt. B

It is the further contention of learned counsel for the appellants that the trial judge did not give due weight to relevant matters which he ought to have considered; that the courts below gave consideration or weight to irrelevant and unproved matters; and that the appellant had thereby suffered miscarriage of justice; that the instant case is not one where it can be said that the lower court made concurrent findings with the trial court because it was a case of endorsement of the findings made by the trial court by the Court of Appeal “without going into the merit of the case and arriving at the same findings”. In the alternative learned counsel submitted that the concurrent findings are perverse and should be set aside and urged the court to allow the appeal. C
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On his part learned counsel for the respondents submitted that issues that usually go to trial are as settled in the pleadings of the parties, relying on Imana vs Robinson (1979) 3 - S.C. 1 at 9; Balogun vs Amubikahun (1989) 3 NWLR (Pt. 107) 18; that averments in pleadings need to be proved by evidence at the trial and that where no evidence is adduced in support of facts pleaded the pleadings are deemed abandoned; that appellants failed to lead evidence on sale of the one acre of land they claimed Lolade sold to the original 1st respondent by claiming that a copy of the sale agreement evidencing the sale was not given to them; that in the circumstance, appellants’ claim must be deemed abandoned, relying on Idesoh vs Ordia (1997) 3 NWLR (Pt.491) 17; Odebunmi vs Abdullahi (1997) 2 NWLR (Pt.489) 526; that the burden of proving the sale of only one acre of land to the respondents instead of eleven lies squarely on the appellants which burden they failed to discharge particularly as there is nothing on record to show that the respondents admitted the claim of the appellants. F
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It is the further submission of learned counsel that the court

should invoke the provisions of section 149 (d) of the Evidence Act against the appellants for failure to tender the agreement for the sale of one acre to the respondents; that the evidence which the trial court believed is that 1st and 2nd appellants sold the land in dispute to the 1st respondent and executed Exhibit F; that appellants pleaded in
B paragraph 23 of the Statement of claim that Exhibit F was a forgery while the respondent pleaded compliance with the provisions of illiterates Protection Law in paragraphs 13 and 15 of the Amended Statement of Defence thereby joining issues on the authenticity of
C Exhibit F; that the burden of proving that Exhibit F is a forgery lies on the appellants which burden they failed to discharge.

It is the further submission of learned counsel that the findings of the lower courts are not perverse as same are supported by the pleadings and evidence on record, and urged the court not to disturb the said findings, relying on *Ogbe vs Asade* (2009.) 18 NWLR (Pt. 1172) 106; *Onifade vs. Olayiwola* (1990) 7 NWLR (Pt.161) 130; *Bamgboye vs. Unilorin* (1990) 10 NWLR (Pt. 622) 290.
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Finally, learned counsel urged the court to resolve the issue against the appellants and dismiss the appeal.

The dispute in this case centres on the issue as to whether
E what was sold to the original 1st respondent was one acre of land as claimed by the appellants or eleven acres of land as claimed by the respondents. There is no dispute that the original owner of the large piece or parcel of land which includes, the portion in dispute in this
F action is the Kehinde Eya family of the appellants. This clearly shows that there is no dispute as to the original ownership of the land in dispute.

In paragraphs 16, 20, 22 and 23 of the Statement of Claim, the appellants, as plaintiffs pleaded as follows:-

“16. The plaintiffs would say that Lolade died about fifteen
G (15) years ago and before she died, she got permission to sell only about one acre of Kehinde Eya’s family land from the plaintiffs for the purpose of settling some financial indebtedness into which one (sic) was at the time.

The plaintiffs gave her consent to sell about one acre of the
H land and this was sold to Alhaji Bello Qudus and the agreement was witnessed by Toke and Omodele Ashubi Eya (See Exhibit A attached).
20. The plaintiffs would say that the one

acre of land sold to the defendant by Lolade with the consent of the plaintiffs (the other members of Kehinde Eya family) is not part of the land in dispute, and this one acre of land is in possession of the defendant up till now.

22. The plaintiffs would say that they are illiterates who cannot read or write in any language and so the agreement of sale of land between the defendant and Lolade (deceased) in respect of the one acre of land referred to supra was thumb printed by the Plaintiffs. B

23. The plaintiffs would say that any document of sale of the land in dispute which might indicate that the plaintiff has (sic) sold it to the 1st defendant outside the sale of one acre of land already stated is a forgery". C

The reaction of the respondents, then defendants, to the above pleaded facts is as contained in paragraphs 5, 7, 8, 9, 10, 12, 13, 15 and 16 of the Amended Statement of claim as follows:- D

"5. The defendants admit paragraph 16 of the Statement of Claim to the extent that Lolade died about fifteen (15) years ago (1970) but deny every other averment in that paragraph.

7. The defendants deny paragraphs 17, 18, 19, 20, 21, 22, 23, 28 and 31 of the Statement of Claim and out (sic) the plaintiff to the strictest proof of the averments therein contained in the paragraphs. E

8. The 1st defendant states that he bought two parcels of land (including the land in dispute) in 1965 and 1972 respectively separated by a stream from the plaintiffs' family.... approximately 20 F and 11 acres respectively.

9. The 1st defendant states that late Madam Lolade who was the head of the plaintiff family sold the 1st parcel of land to the 1st defendant for 200.00 pounds (now N400.00) with the knowledge and consent of the plaintiffs family in 1965. A receipt was issued to G cover the sale.

10. The 1st defendant states that Lolade led him into possession in the presence of witnesses including late Siyanbola and he has been in effective possession of the land since then exercising numerous and positive acts of ownership on it such as selling, leasing and farming without disturbance from anybody including the plaintiffs. H

12. The 1st defendant states that in 1972, after the death of late Madam Lolade, the 2nd parcel of land now in dispute measuring approximately eleven acres was sold to the 1st defendant by the 1st

and 2nd plaintiffs for the sum of 165.00 pounds (now N330.00) with the knowledge and consent of the plaintiffs' family, the 1st plaintiff being the new head of the plaintiffs' family after the death of Madam Lolade.

B 13. The 1st defendant states that the sale of the land in dispute to him was witnessed in writing and the sale agreement was prepared in (sic) A. O. Rahaman Esq, Solicitor and Advocate.

C 15. The 1st defendant states that the sale agreement in respect of the land in dispute dated the 21st day of December, 1972 was read over and explained to the 1st and 2nd plaintiff and witness (sic) by a former clerk of A.O. Rahaman Esq in the presence of the 1st defendant before it was thumb printed by both the 1st and 2nd plaintiff and their witness Amos Olopade who is the 1st cousin of the plaintiff, Samuel Bello, son of the 1st defendant witnessed the sale agreement for the 1st defendant. The 1st defendant will rely on this D agreement at the hearing of this suit. The 1st defendant therefore states that the sale agreement is not a forgery as pleaded in paragraph 23 of the Statement of Claim.

E 16. The 1st defendant states that immediately after the sale of the land in dispute to him, he was led into possession of the land in dispute by the 1st and 2nd plaintiffs in the presence of witnesses among whom were Amos Olapade, Yesufu Oyebola Alhaji Amusa and Madam Ramotu Ebu, wife of Yesufu Oyebola”.

F From the above pleadings, it is clear that issues were joined by the parties on the following

(a) The number of acres of land allegedly sold to the 1st defendant and the person(s) who, allegedly sold same and,

(b) Whether the document evidencing the alleged sale is a forgery.

G While appellants contend that the piece or parcel of land sold to the 1st defendant was one acre, the defendants contend that it was eleven acres, and whereas appellants aver that the said one acre of land was sold by the former head of family Madam Lolade, the respondents maintain that the eleven acres was sold after the death of Madam Lolade and by the 1st and 2nd appellants who had succeeded late Lolade.

H From the pleadings of the appellants it is also very clear that no particulars of the alleged forgery was pleaded by the appellants.

It should be constantly borne in mind that appellants were the plaintiffs who instituted the action for the reliefs earlier stated in this judgment and therefore have the burden of proving their entitlement to the said reliefs on the balance of probabilities/generally. The duty of the respondents, as defendants, where there is no counter claim, as in the instant case, is simply to defend the action as framed by the plaintiffs. B

It is therefore the duty of the appellants to prove by evidence the fact that only one acre of land was sold by Lolade to the 1st respondent and that any claim to more than one acre in any document allegedly evidencing the sale is a forgery particularly as the appellants allegedly NEVER sold any eleven acres of land to the original 1st respondent. It is the appellants who assert the sale of only one acre of land instead of eleven acres and therefore bear the burden of proving their assertion in accordance within the provisions of section 137 of the Evidence Act. C D

It is my considered view that if it is found that appellants failed to prove the assertion, then their claim must of necessity fail as their success cannot depend on the inability of the respondents to adduce evidence in satisfaction of the court that eleven acres of the land was actually sold. The above principles is so because in an action for declaration of title, the law is long settled that a plaintiff must succeed on the strength of his case and not on the weakness of the defence except where the case of the defence supports that of the plaintiff. In the instant case, the case of the defence is not said to be remotely in support of that of the appellants. E F

What is the evidence in support of the claim of the appellants?

At pages 51 - 52 of the record, the 2nd plaintiff TOKE EYA, testified inter alia: G

“.....Before Lolade died, she asked for permission of the family to sell an acre of this land and she was granted (sic). She wanted to use the money in settling her debt. Madam Ashabi Eya, Omotunde Ashabi Eya and Toke were those who granted her permission. She sold the land to Alhaji Bello Qudus and the agreement was witnessed by me and Omodele Eya. I thumb printed the document We did not sell any land to 1st defendant apart from the one acre sold to him in the lifetime of Lolade about (20) twenty years ago. We did not sell land to him in 1972 or at any other time apart from the one H

acre.

The agreement in respect of the acre was prepared in the solicitor's office. We did not sell eleven acres of land to 1st defendant in 1972 for N330.00".

B Under cross examination, 2nd plaintiff stated as follows:-We executed the document for 1st defendant when he bought the land in the lifetime of Lolade. No copy of the agreement was given to us. I did not thumb print any other document apart from the one in which an acre of land was sold to 1st defendant.

C I am also called Agbeke Omodele also thumb printed the document I thumb printed the agreement of sale..... I don't know lawyer Rahman. His clerk prepared the paper and it was executed before him".

1st PW - KASALI OLOGURO stated at pages 53 - 54 of the record thus:

D ".....I know the 1st defendant Lolade sold an acre of land Lolade told us when she wanted to sell the land to him so that we may not drive him away if one saw him on the land."

E The above are the testimonies of the appellants for purpose of establishing the facts pleaded - that only one acre of the land was sold, not eleven acres.

On the other hand, 1st defendant - AYINLA O. RAHMAN, the legal practitioner who prepared the agreement, Exhibit F stated at page 71 of the record as follows:-

F "Omodele Ashabi, Omitoke Agbeke were vendors and Alhaji Bello Olatunji Qudus was the purchaser. Exhibit F was prepared on 21st December, 1972 in my chambers. Sanusi Bello and Amos Olapade witnessed the document. I saw the parties - vendors and purchaser and they gave me instructions. It is not correct that only one acre of land was sold but eleven acres for 165 pounds or N330.00.
G Madam Lolade was not one of the vendors. The document was read to the parties and there is jurat to this effect, which was signed by clerk Ogunfalukey after he had read it over to the parties who confirmed the contents to be correct.... Exhibit F is not forged. I also prepared some other documents for the purchaser on that same day

H Under cross examination, he stated, inter alia:

"I don't know the land. The 1st plaintiff told me the land was eleven acres. The survey plan of the land was not brought to me at

the time..... I took instructions from the parties. The 1st plaintiff has been coming to my chambers for other business before the day that Exhibit F was executed.

” The 1st defendant, at pages 72 - 73 of the record testified, inter alia, as follows:-

“...I know Madam Lolade. She is now dead. About 20 years ago she sold a land to me for 200 pounds or N400 it was 20 acres. This Exhibit G is the receipt she gave me. I bought another piece of land in 1972 from plaintiffs’ family. Amos Olopade was a witness to the sale. My son Shamson Bello was also a witness. Omodele Ashabi Eya, Onitoke Agbeke Eya were the vendors. I bought the land for N300. It was about eleven acres. Lolade was the 1st daughter of the plaintiff’s father.... The plaintiff took me to 1st defendant’s witness where a document was executed Exhibit “F” is the document. The plaintiff told Rahman that they sold eleven acres of land to me for 115.00 pounds and I confirmed later Exhibit “F” was prepared and read over to us before those who could sign signed and those who could not, thumb printed it. The following day we went to the site and I was shown the land and it was handed to me in the presence of Kasali Ologuro, Omodele Yesufu Oyebola, Ramotu Ebu and others were present. I have since taken possession of the land and put people on it to farm ...”

The above testimony was not shaken under cross examination.

The 4th DW, RAMOTU A. AKA stated at page 78 of the record inter alia, as follows:-

The land in dispute was sold to 1st defendant by Lolade. The land hired from Lolade is adjacent to the land in dispute. 1st defendant purchased land from Lolade on 2 occasions. Lolade sold the land on which I was blasting stone to 1st defendant and she told me I should be paying rent to him. I was paying 10 pounds to 1st defendant until I left the land. 1st defendant bought a piece of land from Lolade and another from Lolade’s relations. I saw when they were showing the boundary of the land to 1st defendant but I did not know the amount he paid to them...”

The above is the evidence on record in support of the contentions of the parties to the issue as to whether it was one acre or eleven acres that was sold to the 1st defendant. The duty of the trial court is to decide between the two versions. It was basically a matter

of an oath against an oath - the oath of the plaintiffs against that of the defendants. At the end, the learned trial judge preferred the version of events narrated by the defendants and dismissed the claim of the plaintiffs. It should also be noted that the lower court affirmed the position of the trial court on the matter. The question is whether the lower courts are right.

I answer the question in the affirmative. Even though appellants admitted signing an agreement for the sale of one acre of the land to the 1st defendant, none was tendered in evidence. The reason for their not tendering the agreement is said to be due to the fact that no copy of same was given to them after execution.

On the other hand, the respondents tendered Exhibit F which is an agreement in respect of the sale of the alleged eleven acres of land duly thumb printed by the appellants. It should be noted that Exhibit F was prepared by a legal practitioner who also testified in the case as to his instructions leading to the preparation of the document, the jurat etc. It was clear that Exhibit F has given an edge to the case of the respondents over that of the appellants as it clearly supports their contention that eleven acres rather than an acre was sold to the 1st defendant. In the circumstance it is very clear that appellants failed to discharge the burden placed on them by law to prove the assertion that only an acre of their land was sold to the 1st defendant on the balance of possibilities.

Without Exhibit F, the trial court could still have relied on the testimonies of the parties and their witnesses to decide which version of the events is preferred, the matter being a question of the oath of the appellants against that of the respondents particularly as it was the trial judge who heard the witnesses testify, watched their demeanour, and can therefore better assess their credibility. In the instant case, both Exhibits F & G show that at no point in time did the appellants or Lolade sell an acre of land to the 1st defendant. Both Exhibits F & G show clearly that the story of the respondents is more probable as the same is very much in accord with their pleadings.

The next issue is whether Exhibit F is a forgery. To begin with it is settled law that before a party can legally rely on fraud or forgery, the fact must not only be pleaded but particulars thereof must be provided in the pleadings. I have already reproduced the relevant averments in the statement of claim in which forgery was pleaded

and it is very clear that the particulars of the alleged forgery have not been pleaded. In any event the respondents pleaded that the document, Exhibit F was validly and properly executed and testified to that effect, as the same complied with the provisions of Illiterates Protection Law.

The above notwithstanding, it is settled law that where the commission of a crime is directly in issue in any proceeding whether civil or criminal, in this case, forgery, the alleged crime must be proved beyond reasonable doubt and it is the appellants in this case who assert the commission of forgery who have the burden of proving, by adducing sufficient evidence to establish same - see section 138(1) & (2) of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004, which they failed to do. That apart, the appellants by not adducing evidence on the issue of forgery are deemed to have abandoned their pleading on that fact.

In the final analysis I find no reason whatsoever to interfere with the concurrent findings of fact by the lower courts in this case. I therefore come to the conclusion that the issue under consideration is without merit and is accordingly resolved against the appellants.

I therefore hold that the appeal is without merit and is accordingly dismissed with N50,000.00 costs in favour of the respondents.

Appeal dismissed.

MUKHTAR JSC

This claim for land was instituted in the High Court of Justice of Ogun State, holden in Abeokuta by the appellants, who were the plaintiffs and claimed the following reliefs:-

“The plaintiffs therefore wish this Honourable court to grant them leave to apply for Certificate of Statutory Right of Occupancy on the land in dispute, to find the defendants liable in trespass and to make an order for perpetual injunctions against the defendants.”

The learned trial judge found no merit in the plaintiffs'/ appellants' claim and dismissed the case. Dissatisfied with the judgment, the plaintiff appealed to the Court of Appeal, which affirmed the decision of the learned trial court, and dismissed the appeal. Again, the plaintiffs have appealed to this court on three grounds of appeal. As is the practice in this court learned counsel for both sides

exchanged briefs of argument, which were adopted at the hearing of this appeal on 1/3/2001. In the appellants' brief of argument the following issues were raised for determination: -

B "1. Whether the court below was right in refusing to set aside the judgment of the trial court when there was no evidential or legal basis for the latter's finding that appellants' family had earlier sold 20 acres of their land to the Respondents.

2. Whether the court below was, on preponderance of evidence, correct in affirming the judgment of the trial court."

C The third ground of appeal in the notice of appeal was abandoned by the appellants in their brief of argument. The above issues were adopted by the respondents in their brief of argument. The appellants traced their root of title to their ancestor Ikuoloko and gave the traditional history of the land and how it was partitioned amongst his successors vide their pleadings and evidence. The respondents D traced their own to title to Kehinde Eya to whom a partitioned part of the larger land of Ikuoloko was allocated. Of great relevance and importance to the crux of the case are the following pleadings.

E "15. The children of Kehinde Eya had not partitioned the land in dispute up till now, and they put tenants unto the land who are fanning on it such as Alhaji Tomori and Kasali Ologuro.

16. The plaintiffs would say that Lolade died about fifteen years ago and before she died, she got permission to sell only about one acre of Kehinde Eya's family land from the plaintiffs for the F purpose of settling some financial indebtedness into which she was at the time. The plaintiffs gave her consent to sell about one acre of the land and this was sold to Alhaji Bello Qudus and the agreement was witnessed by Toke and Omodele Ashabi Eya.

G 17. Apart from this sale of about one acre by Lolade, the remaining parcel of land of Kehinde Eya remained unpartitioned and the remaining members of Kehinde Eya, which are the plaintiffs, were using the land jointly.

H 18. The third day after the death of Lolade the 1st defendant approached the plaintiffs to inform them that Lolade has (sic) sold the land in dispute to him again and that he would wish the plaintiffs to sign an agreement between him and Lolade as witnessed. The plaintiffs refused to accede to the wish and advice of the defendant and so he the defendant went away.

19. Plaintiffs refused to acknowledge this sale of the land in dispute by Lolade (deceased) to the defendant because Kehinde Eya's land was not yet partitioned and that Lolade (deceased) did not inform the members of the family about the sale before she died.

20. The plaintiffs would say that, the 1 acre of land sold to the defendant by Lolade with the consent of the plaintiffs (the other members of Kehinde Eya family) is not part of the land in dispute and this 1 acre of land is in possession of the defendant up till now."

The defendants met (sic) the above pleadings in their amended statement of defence as follows:-

"9. The 1st defendant states that late Madam Lolade who was the head of the plaintiffs' family sold the 1st parcel of land to the 1st defendant for N200.00 (now N400.00) with the knowledge and consent of the plaintiffs' family in 1965. The sale was witnessed in writing.

11. The 1st defendant states that among his tenants on the land are Yesufu Oyebola and Madam Ramotu Ebu who were blasting stones on the land paying N1.00 per month and Kasali Ologuro who was tapping palm trees on the two parcels of land purchased by the 1st defendant from the plaintiffs' family paying 50k per palm tree.

12. The 1st defendant states that in 1972, after the death of Late Madam Lolade, the 2nd parcel of land now in dispute measuring approximately 11 acres was sold to the 1st defendant by the 1st and 2nd plaintiff for the sum of 165.00 (now N330.00) with the knowledge and consent of the plaintiffs' family, the 1st plaintiff being the new head of the plaintiffs' family after the death of Madam Lolade.

13. The 1st defendant states that the sale of the land in dispute to him was witnessed in writing and the sale agreement was prepared by A. O. Rahaman Esq., Solicitor and Advocate.

16. The 1st defendant states that immediately after the sale of the land in dispute to him, he was led into possession of the land in dispute by the 1st and 2nd plaintiffs in the presence of witnesses among whom were Amos Olapade, Yesufu Oyebola, Alhaji Amusa and Madam Ramotu Ebu, wife of Yesufu Oyebola.

17. The 1st defendant states that immediately he was put in possession of the land in dispute in December, 1972, he started exercising acts of ownership by leasing parts of the land to various people among who are:- Biliaminu Olori, Gbadamosi Songoyiku ,

Late Chief Adewale, Ex. Local Government Police Officer for farming purposes. Kasali Ologuro who gave evidence in AB/42/81 as 3rd plaintiffs' witness named Biliaminu Olori and Gbadamosi Sangoyiku among others as those who had farmlands on the land in dispute."

A careful perusal of the evidence of the witnesses reveals that
 B the plaintiffs did not prove their case. Perhaps I should emphasize
 here that by the time the plaintiffs' witnesses testified they were al-
 ready aware of the averments in the amended statement of defence,
 hence they should have made efforts to adduce cogent and credible
 C evidence in support of their claim. The law is trite that civil suits are
 decided on preponderance of evidence and balance of probabilities.
 (See Elias v. Omo-Bare 1982 5 SC. 25, Odulaja v. Haddad 1973 11
 SC. 357, and Woluchem v. Gudi 1981 5 SC. 291.)

On the other hand the defendants adduced evidence in sup-
 port of their averments, which the learned trial court relied upon, and
 D consequently dismissed the plaintiffs' case after a proper evaluation
 of the evidence before it. In this vein, I am satisfied that the lower
 court was right; in affirming the judgment of the learned trial court,
 as its findings of fact were based on the credible evidence before the
 court, and it was not within its jurisdiction to interfere. The learned
 E trial judge had the singular advantage of listening and watching the
 demeanour of the witnesses who testified before him, and it is he who
 would determine which witness to believe. (See Lawal v. Dawodu
 1972 8 - 9 SC. 83.)

F This is an appeal against concurrent findings of facts of two
 courts which the law says will not ordinarily be interfered with unless
 the findings are not supported with credible evidence and are per-
 verse and have occasioned miscarriage of justice. (See Chinwendu
 v. Mbamali 1980 3 - 4 SC.31, Ibedo v. Enarofia 1980 5 -7 5C.42,
 and Aseimo v. Abraham 2001 16 NWLR part 738 page 20.)

G I have read in advance the lead judgment delivered by my
 learned brother Onnoghen JSC, and I am in full agreement with the
 reasoning and conclusion reached therein that the appeal lacks merit
 and substance and should be dismissed. I hereby dismiss the appeal
 and abide by the consequential orders made in the lead judgment.

MUHAMMAD JSC

H I have had the privilege of reading in advance the judgment
 just delivered by my learned brother, Onnoghen, JSC. I am in agree-

ment with his reasoning and conclusion which I adopt as mine. I too dismiss the appeal with N50,000.00 costs to the respondents.

RHODES-VIVOUR JSC

I am in complete agreement with the reasoning and conclusions in the leading judgment just delivered by my learned brother, Onnoghen, JSC which I was privileged to read in draft. I would, though make a few observations. B

The issue is whether the appellants sold one or eleven acres of land to the respondents. C

Both courts below found that the appellants sold eleven acres of land to the respondents and not one acre as argued by the appellants.

In proof of their case the appellants relied on their pleadings and oral testimony, while in addition to their pleadings and oral testimony the respondents relied on Exhibit 'F'. Exhibit 'F' is documentary evidence which shows that the 1st and 2nd appellants sold eleven acres of land to the 1st respondent. Both sides executed Exhibit 'F'. D

The law is well settled that when documentary evidence supports oral evidence, oral evidence led becomes more credible. This is so because documentary evidence serves as a hanger from which to assess oral testimony. See *Kindley v M.G. Gongola State* 1988 2 NWLR Pt 77 p.473 *Omogbe v Lawani* 1980 3 - 4 SC p.117 E

Evidence led by the appellants was not supported by any relevant document to show that it was one acre of land they sold to the respondents. On the other side the respondents led oral evidence and supported it with Exhibit F. The totality of the evidence led by the respondents show beyond doubt that it was eleven acres that the appellants sold to the respondents and not one acre. Exhibit F lends more credence to the case and evidence of the respondents which I accept. F

There is a distinction between findings of fact based on credibility of witnesses and findings based on evaluation of evidence. It is only in the latter case that an appeal court is in as good a position as the trial court to evaluate the evidence. In the former case it was the trial judge who saw the witnesses testify. He watched their demeanour and so is in the best position to comment on their credibility. G

Court of Appeal must be very reluctant to differ from findings of the trial judge on facts based on the credibility of the witnesses.

After reviewing the entire circumstances of the case, the pleadings, evidence led in support, I am firmly of the view that the learned trial judge and the Court of Appeal were correct.

B In paragraph 23 of the statement of claim it is averred that Exhibit F is a forgery.

C The law is very well crystallized that where a plaintiff (appellant avers in his pleadings that a document (Exhibit F) is a forgery, to succeed he must plead and provide particulars of forgery in his pleadings. Then proceed at trial to establish that Exhibit F is a forgery and the standard required is proof beyond reasonable doubt.

D The appellants' did not provide particulars of forgery and did not lead evidence in proof of forgery. The pleading that Exhibit F is a forgery must be discountenanced as there was/is nothing before the court to show that Exhibit F is a forgery.

E This court rarely interferes with concurrent findings of fact made by the courts below except in exceptional circumstances such as, where the findings are perverse or cannot be supported by evidence. See *Iroegbu v Okwordu* 1990 6 NWLR Pt.159 p.643
Okonkwo 1998 10 NWLR Pt.571 P 554

F The findings of fact by the two courts below that the appellants sold eleven acres to the respondents and Exhibit F was executed to support that fact is supported by the pleadings and evidence led by the respondents. The findings are in the circumstances not perverse and this court will not disturb them, for they are true.

G In civil cases the standard required for success is preponderance of evidence. That is to say one side's evidence outweighs the other. The onus rests on the party who would fail if no credible evidence is adduced. I am in the circumstances satisfied with the judgment of the trial court, endorsed by the court of Appeal that the appellants did not sell one acre of land to the respondents. They sold eleven acres of land to the respondents. For this and the much fuller reasoning in the leading judgment delivered by my learned brother Onnoghen, JSC, I dismiss this appeal with costs of N50,000.00 in
H favour of the respondents.