

**SUPREME COURT OF NIGERIA**

20TH MAY, 2011. SC.87/2001

**CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD, B. RHODES-VIVOUR, JJSC**

1. ANUONYE WACHUKWU

2. SUNDAY WACHUKWU ..... APPELLANTS

AND

1. AMADIKE OWUNWANNE

2. NWONYI ONWULI ..... RESPONDENTS

(For themselves & as representatives  
of Umuarapara family of Uratta  
Okpu Umuobo)

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EVIDENCE - Evaluation - Appeals - It is the duty of trial court to evaluate evidence - And not that of an appellate court - Except where an appellate court is called upon to re-evaluate (H1)

APPEALS - Issues - Basis - Issues not distilled from any ground of appeal - Are incompetent and liable to be struck out (H2)

LAND LAW - Title - Proof - Plaintiff seeking a declaration of title to land - Is to establish his case on preponderance of evidence - Whereupon the court weighs evidence of the parties in imaginary scale - In order to make its finding (H3)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save where the findings are perverse - The findings in this instance are not perverse (H4)

EVIDENCE - Contradiction in - Effect - It is not all contradictions that result in rejection of evidence - It is only the contradiction that results in miscarriage of justice - That would warrant a rejection (H5)

***FACTS***

Before the High Court of Abia State, Holden at Aba, plaintiffs/respondents by a writ of summons claimed, inter alia, against defendants/appellants the following relief: Declaration of title to all that

piece or parcel of land known as IKEOHA UMUARAPARA/OKPULOR UMUARAPARA situate at Uratta - Okpu-Umuobo in Aba urban division valued at N20.00 annually. Respondents sued appellants for themselves and as representatives of Umuarapa family in Uratta Community-Okpu Umuobo in Aba Division.

Appellants are members of Umuaduru family in the same Uratta community and were sued personally. Respondents traced their traditional history of the land in dispute by way of grant from Mgboko led by Afaraukwa, the original customary owners of the vast area of land including the land in dispute. Appellants' case is total denial of respondents' claim over the land in dispute which respondents claimed was deforested by their own ancestors who were in possession as owners until it devolved on them. The Court in its judgment ruled in favour of respondents and granted the reliefs sought by them. Dissatisfied, appellants appealed to Court of Appeal, Port Harcourt division. The Court affirmed judgment of the High Court. Dissatisfied further, appellants have appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

1. *Whether in affirming the decision of the trial court, the court below was not in violation of the well settled principle that in a claim for declaration of title, the onus is on the plaintiff (not the defendant) to prove his title by satisfactory, clear, cogent uncontroverted evidence.*
2. *Whether the contradictions apparent in the respondents' account of title by traditional history/evidence were not material, and if they were, whether the court of appeal's affirmation of the title of the respondents based on such contradictory account was not perverse and occasioning miscarriage of justice.*

**HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)  
***EVIDENCE - Appeals - Evaluation - Duty of trial court***

1. Thus, ground 4 as set out above is primarily on failure of the court below to evaluate the appellants' appeal properly. Granted that what this ground and its particulars are alleging is correct, non-evaluation of evidence (I believe, and not evaluate the whole appeal) that of course, is the primary role of the trial court and not that of the court below. Except where there is a call on an appeal court to re-evaluate evidence led before a trial court, the appeal court does not enter into that arena.

Again, taking a look at ground 4 and its particulars, there is nothing in relation to possession, trespass and general damages as posited by the respondents. Thus, appellants' issue 3 and ground 4 of the Grounds of Appeal are not in agreement. Further, I fail to see any other ground[s] of appeal from all the grounds of appeal contained in the Notice of Appeal that deals with the issue of possession, trespass and general damages. (p. 1592 B)

***APPEALS – Issues must be distilled from grounds of appeal***

2. The trite position of the law is that an issue for determination must arise from a ground of appeal otherwise it will be incompetent and liable to be struck out.

This is the calamity that befalls appellants' issue 3. Issue 3 of the appellants' issues is incompetent and it is hereby struck out and all arguments in respect thereof are hereby discountenanced. (p. 1592 E)

***LAND LAW - Title - Proof***

3. Now, the age-long established principle of law in relation to burden of proof on a plaintiff seeking a declaration of title to land is for him to establish his case on preponderance of evidence by setting up a prima facie case whereupon the trial court examines the evidence put forward by both parties and weighs same on the imaginary scale, with a view to making a finding as to which side preponderates. (p. 1593 H)

***APPEALS - Concurrent findings - Interference***

4. It is also trite that this court, or any appellate court for that matter, will not ordinarily interfere with a finding of fact which is concurrent from the two lower courts except where there is some miscarriage of justice or where such a decision is perverse or it is in violation of some principles of law or procedure.

After having taken a look at the parties' pleadings and evidence, I find no perversity on the findings of the trial and appellate courts. What both courts did, in my view is quite in order. I resolve issue No. 1 against the appellants.

The Court of Appeal did not interfere with that finding. And it is the general practice of this court not to disturb the concurrent findings of

the trial court and the Court of Appeal unless there appears to be some miscarriage of justice or violation of some principles of law or procedure. (pp. 1594 E/1598 B)

***EVIDENCE - Contradiction in - Effect***

B 5. Now, when a party claims that there is contradiction in the evidence adduced by the other party, he is saying, in other words, that the evidence adduced by that party or specific witness should not be believed or relied upon and consequently, no finding of fact can be founded on his evidence.

C The nature of the contradictions in the plaintiffs' witnesses' testimonies, as viewed by the learned counsel for the respondent with which I agree are two fold:

a) Contradiction as to who, between Ikpeamaze and D Okpokoroipi, actually gave the land in dispute to the respondents and;

b) Contradiction as to the exact nature of the respondents' title, i.e. whether it was indeed by grant or by deforestation.

E Now, it is pertinent to reiterate the general principles of the law on matters of contradiction in evidence of parties before a court. That it is not all contradictions that result in the rejection of the evidence of a witness. It is only those that are material and result in a miscarriage of justice that would warrant such a rejection of evidence.

F I took the pains of going through the gamut of the evidence laid before the trial court, the decision of the trial court and that of the court below. I am in agreement as did the court below, with the trial court that there is no material contradiction in the plaintiffs' evidence which would warrant the reversal of its decision on the basis of G miscarriage of justice howsoever, as the seeming contradictions highlighted by the learned SAN for the appellant could not be said to result in a miscarriage of justice in the circumstances of this case. Accordingly, I resolve issue two in favour of the respondents. (pp. 1595 F/1596 A/1598 D/1599 G)

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***NOTABLE POINTS OF INTEREST***

**MUHAMMAD JSC**

*1. Definition of contradiction*

This court in the case of Ogidi v. State (2003) 9 NWLR (Pt.824) 1 at

pp. 23 - 24 H - A, defined the word contradiction in relation to evidence placed before a court as follows:

*"The word 'Contradiction' is a simple English word. It derives from two Latin words: 'Contra' and 'Deco-ere-dixi-dictum,' meaning, 'to say the opposite', hence, 'contradictum' A piece of evidence contradicts another when it affirms the opposite of what that evidence has stated, not when there is just a minor discrepancy. And two pieces of evidence contradict one another when they are by themselves inconsistent. On the other hand, a discrepancy may occur when a piece of evidence stops short or, contains a little more than what another piece of evidence says or contains some minor differences in detail."* (p. 1595 G)

### **ONNOGHEN JSC**

#### *2. Proof of ownership of land by traditional evidence*

In defence of the claim of the respondents, the appellants presented their own version of traditional history to ground their claim that the land rather belongs to them and that they are in possession thereof. The court is, in the circumstance faced with two conflicting versions of traditional history as to the founding of the land in dispute. Traditional history being of the nature it is -not documented - it usually boils down to the oath of the plaintiff and his witnesses against that of the defendant and his witness and the court is called upon to decide as to which of the versions of traditional history it prefers.

To do this the court usually evaluates the evidence side by side any document, any evidence - if available - and acts of possession by the parties in recent memory. It is after evaluating these pieces of evidence that the court, where possible, decides on which version is preferable and why.

Once the court believes the traditional evidence/history of the plaintiff as to the founding of the land in dispute, it means that the plaintiff has succeeded in establishing his claim of title to the land in dispute and has to succeed. Where title is found to reside in the plaintiff, the possession of the defendant of the disputed land can only be an adverse possession, an evidence of trespass except the defendant proves that he or someone else has a superior title to the land in dispute. (p. 1605 H)

**RHODES-VIVOUR JSC**

*3. Finding on credibility and on evaluation of evidence-Difference*

There is a clear difference between findings of fact based on credibility of witnesses and findings of fact based on evaluation of evidence.

B In the latter case the Court of Appeal is in as good a position to evaluate the evidence as the court of trial. In the former case an Appeal Court would be reluctant to upset the findings of a trial judge. This is so because it was the trial judge who saw and heard the witnesses. He was able to observe their demeanour. As quite rightly pointed out by the Court of Appeal, findings of fact based on credibility of witnesses would be set aside if they are perverse, unreasonable, or not supported by evidence. In this case the findings of fact that the respondents have a better title to the land in dispute to my mind is correct.

D Traditional history/evidence is one of the ways of proving title to land.

History is all about evaluating belief on the basis of credibility. A declaration of title to land is granted at the discretion of the judge after seeing and hearing both sides in the suit. To succeed a party must show how the land devolved and eventually came to be owned by him. The party needs to narrate a continuous chain of devolution. At the end of the oral evidence the judge is to decide which of the two are telling the truth and proceed to grant a declaration of title to the side that impresses him. (p. 1610 H)

**REPRESENTATION**

Mr. I.O. Olorundare, SAN; C. J. Jackponna; O. D. Emobe, Wole Oyeboode and O. Ogundipe; for the Appellants

G Mr. M. U. Uzoma; B. Udemba Esq. for the Respondents

**CASES REFERRED TO**

Nwana v. FCDA (2007) 4 SCNJ 433

Egesimba v. Onuzuruike (2002) 9 SCNJ 46

H Onwuka v. Ediala (1989) 1 NSCC 65 at P86)

Ibator & Ors Barakuro & Ors (2007) 4 SCNJ 27

Asanya Vs State (1991) 3 NWLR (Part 150) 422

Popoola Vs Adeyemo (1992) 8 NWLR (Part 257) 1

Ibori v. Agabi (2004) 6 NWLR (Pt.86) 78 at 111 c - f

Bamgbade Vs Balogun (1994) 1 NWLR (Part 323) 718  
Obawole v. Coker (1994) 5 NWLR (Pt.345) 416 at 439-H  
Adegoke v. Adibi (1992) 5 NWLR (Pt.242) 410 at p.423 A  
Ogidi v. State (2003) 9 NWLR (Pt.824) 1 at pp. 23 - 24 H - A  
Osuji v. Ekeocha (2009) 16 NWLR (Pt.1166) 81 at p.134 B-D  
Adu v. Gbadamasi (2009) 6 NWLR (Pt.1136) 110 at 125 A-C B  
Dogo v. State (2001) 3 NWLR (Pt. 699) 192 at pp. 211 - 212 G-B  
Uwazurike v. A.G. Fed. (2007) 8 NWLR (Pt.1035) 1 at 18-19 H-C

**RULES REFERRED TO**

Supreme Court Rules, O. 2 r. 9 (1) (2)

**LEAD JUDGMENT BY MUHAMMAD JSC**

This appeal is on land matter. It is against concurrent decisions of the High Court of the then East Central State of Nigeria, holden at ABA, which later metamorphosed into the High Court of the present Imo State (trial court) and the Port Harcourt Judicial Division of the Court of Appeal (the court below). The plaintiffs at the trial court, (who are the respondents herein) took out a writ of summons wherein they made the following claims against the defendants (who are now the appellants):

1. "Declaration of title to all that piece or parcel of land known as IKEOHA UMUARAPARA/OKPULOR UMUARAPARA situate at Uratta - Okpu-Umuobo in Aba Urban Division valued at N20.00 annually.

2. N500.00 being general damages for trespass committed by the Defendants on the said land on or about the 13th day of September, 1975.

3. Perpetual injunction to restrain the defendants their servants or agents from committing further acts of trespass on the land."

Paragraph 17 of the Amended Statement of Claim repeated the above reliefs sought from the trial court. The plaintiffs sued the defendants for themselves and as representatives of Umuarapa family in Uratta Community-Okpu Umuobo in Aba Division. The defendants are members of Umuaduru family in the same Uratta community and were sued personally.

The respondents as plaintiffs at the trial court traced their traditional history of the land in dispute by way of grant from Mgboko led

by Afaraukwa, the original customary owners of the vast area of land including the land in dispute. According to the respondents, Mgboko who originally founded the vast area of land including the land in dispute settled Okpokoroipi of Uratta Umuobo, the respondents' kinsman, on a part of the said land. The respondents' people of B Umuarapara in Uratta Umuobo through Ikpeameze traced their kinsman, Okpokoroipi, to Mgboko and Okpokoroipi sub-granted the respondents the land in dispute, being a portion of the land granted to him (Okpokoroipi) by Mgboko.

C The appellants/defendants case was total denial of the defendants' claim over the land in dispute which the defendants claimed was deforested by their own ancestors who were in possession as owners until it devolved on them.

After full trial, the trial court in its judgment found for the plain- D tiffs and granted all the reliefs sought by them. This, on appeal, was affirmed by the court below.

On further appeal to this court, the parties filed and exchanged their respective briefs of argument. Each of the parties' respective counsel adopted his brief of argument in respect of his case on the E hearing date of the appeal. Learned counsel for the respondents filed a Notice of Preliminary Objection which he moved on the hearing date and urged this court to sustain the Preliminary Objection. He embedded arguments thereof in his said brief of argument. The learned F SAN for the appellants fired a response to the Preliminary Objection which he adopted and relied upon.

In his brief of argument the learned SAN for the appellants formulated the following issues for consideration by this court:

1. "Whether in affirming the decision of the trial court, the G court below was not in violation of the well settled principle that in a claim for declaration of title, the onus is on the plaintiff (not the defendant) to prove his title by satisfactory, clear, cogent uncontroverted evidence. (grounds 2 & 3).

2. Whether the contradictions apparent in the respondents' H account of title by traditional history/evidence were not material, and if they were, whether the court of appeal's affirmation of the title of the respondents based on such contradictory account was not perverse and occasioning miscarriage of justice. [grounds 3 and 4].

3. Whether a party who has not proved possession can main-



tain an action for trespass and whether the grant of the relief of general damages for trespass and order of perpetual injunction against the appellants and in favour of the respondents as affirmed by the court below is not perverse. [ground 41].”

Learned counsel for the respondents formulated the following 3 issues for determination: B

1. “Whether the respondents proved “Grant” of the land in dispute traced from Mgboko and whether the appellants specifically appealed against the specific findings of the trial court in respect of the respondents’ traditional evidence of history. C

2. Whether there were material contradictions in the evidence of the respondents’ witnesses as to make the Supreme Court interfere with the concurrent findings of the two lower courts.

3. Whether by the circumstance of this case, the identity of the land, the subject matter of this suit, was in dispute and, if yes, whether D same was proved by the respondents.”

I shall now take a look at the RESPONDENTS’ PRELIMINARY OBJECTION.

The Notice of the Preliminary Objection which was brought pursuant to Order 2(r) 9(1) of the Supreme Court Rules, was filed E on the 25/02/2011.

The Preliminary Objection is based on the following ground.

“Issue 3 formulated and argued by the appellants in the appellants’ Amended Brief dated 5th day of October, 2010 is not derived F from any of the appellants’ grounds of appeal filed in this court.”

The learned counsel for the respondent, after having made reference to the claims of the respondents which bordered on trespass and injunction and the trial court’s findings on such issues argued that issue 3 of the appellants’ brief of argument does not relate G to the grounds of appeal.

There is no ground of appeal in the appellants’ Notice and Grounds of Appeal filed at the court below and this court complaining about the findings on trespass or perpetual injunction neither is there any ground of appeal complaining about damages for injunction. The appellants’ he argued further, accepted in good faith the findings that they are trespassers and never appealed against the said findings at the court below and even at this court. Ground 4 of the Notice of Appeal never raised issue of trespass, damages or injunc- H

tion. Issue 3 is incompetent and it should be struck out. The case of Onyekwelu v. ELF Petroleum Nig. Ltd (2009) 5 NWLR (Pt.1133) 181 at 195 D - G. Learned counsel for the respondents urged this court to sustain the Preliminary Objection and strike out appellants' issue No.3.

B The learned SAN, for the appellants responded to the Preliminary Objection and its argument that the Preliminary Objection is incompetent as it has not complied with the requirements of Order 2 Rule 9(1) and (2) of the Supreme Court Rules and this court should  
C refuse same. He cited and relied on Uwazurike v. A.G. Federation (2007) 8 NWLR (Pt.1035) 1 at pp. 18 - 19 H - C. In the event that this court is minded to hear the preliminary Objection, the learned SAN submitted that the Preliminary Objection is misconceived. After  
D having quoted issue 3 and Ground 4 of the appellants' brief and grounds of appeal, respectively, the learned SAN submitted that Ground 4 of the Notice of Appeal covers issue 3. Issue 3 in the appellant's brief touches both on grounds 3 and 4 and has nexus in them. Ibori v. Agabi (2004) 6 NWLR (Pt.86s) 78 at 111 c - f was cited in support. The learned SAN urged this court to discountenance the  
E respondents' brief in its entirety for being filed out of time with no leave of court sought or granted. He cited and relied on Order 6 Rule 2[5] of the Rules of this court.

F There are two sides to the Preliminary Objection. One is, in the main, dealing with the format as provided by the Rules of court, the second has to do with the substance of the Preliminary objection.

Learned counsel for the appellants submitted that the preliminary objection has not been filed in accordance with Order 2 Rules [1] and [2] of the Supreme Court's Rules. Below is the provision of  
G Order 2[9]:

H 1) "A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the register within the same time.

2) If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit"

On the format of filing a Notice of Preliminary Objection as stipulated by the Rules of this court, it is something, I think which can be determined practically. In this appeal, for instance, it is clear from the records that the Notice of the preliminary objection was filed on 25/2/2011. The respondents' amended brief which contained arguments in respect of the preliminary objection was also filed on 25/2/2011. The appeal was heard by this court on 28/2/2011. Now, granted that the appellant was served with the Notice of preliminary objection on the very date it was filed, there is a time lag of one day for the respondent to comply with the three clear days notice as required by Order 2 '9'(1) set out above. There is nothing to explain away that lacunae. The respondents have thus, seem to have been caught up by the provision of Order 2 9(2). The learned counsel for the respondents in order to regularize the processes applied orally and was granted on the hearing date extension to file brief of argument and to deem same as duly filed and served. This was granted as the learned SAN did not oppose the oral application. This seems to cure the defect in the first leg of the preliminary objection.

On the second leg of the preliminary objection, it is true that applicants' issue three (3) as couched and argued in the appellants' brief deals with issue of possession, trespass and general damages. The issue is related to ground 4 of the grounds of appeal. Ground 4 for the avoidance of doubt, reads as follows:

"The Learned Justices of the Court of Appeal failed to evaluate the appellants' appeal properly and was perverse in affirming all the findings of facts of the learned trial judge.

#### PARTICULARS

a) It was contended before the Court of Appeal that Paragraph 6 of the Amended Statement of Claim was not proved by credible evidence.

b) The learned trial (sic) justices of the Court of Appeal simply held:

'The learned trial judge considered the traditional evidence led by the parties and preferred the version of the respondents.'

c) The appellants contended before the Court of Appeal that the learned trial judge in comparing the two Plans exhibits 1 and 2 found them identical but the location difference (sic) and called upon the court of appeal to resolve the issue of the different locations of

the land but that was not dealt with at all.

d) It was contended in the Court of Appeal that the learned trial judge did not give any reason for preferring the traditional evidence of the respondents to that of the appellants and yet the court simply affirmed the decision of the trial court.”

**B Thus, ground 4 as set out above is primarily on failure of the court below “to evaluate the appellants’ appeal properly” Granted that what this ground and its particulars are alleging is correct, non-evaluation of evidence (I believe, and not evaluate the whole appeal) that of course, is the primary role of the trial court and not that of the court below. Except where there is a call on an appeal court to re-evaluate evidence led before a trial court, the appeal court does not enter into that arena.**  
 (See: Bashaya & Ors v. The State (1998) 4 SCNJ 202; Civil Design  
**C Const. Nig. Ltd. v. Scoa Nig. Ltd. (2007) 2 SCNJ 252.) Again, taking a look at ground 4 and its particulars, there is nothing in relation to possession, trespass and general damages as posited by the respondents. Thus, appellants’ issue 3 and ground 4 of the Grounds of Appeal are not in agreement. Further, I**  
**E fail to see any other ground [s] of appeal from all the grounds of appeal contained in the Notice of Appeal that deals with the issue of possession, trespass and general damages.**  
**The trite position of the law is that an issue for determination must arise from a ground of appeal otherwise it will be incompetent and liable to be struck out.** (See: Nwana v. FCDA (2007)  
**F 4 SCNJ 433 Ibator & Ors Barakuro & Ors (2007) 4 SCNJ 27.)**

**This is the calamity that befalls appellants’ issue 3. Issue 3 of the appellants’ issues is incompetent and it is hereby struck out and all arguments in respect thereof are hereby discountenanced.**  
**G**

I will now deal with the appellants’ remaining issues seriatim.

**H** ISSUE 1 is on the requirement of the law that in a claim for declaration of title the onus is on the plaintiff (not the defendant) to prove his title by satisfactory, clear, cogent and uncontroverted evidence. This issue has been related to grounds 2 and 3 of the Grounds of Appeal. In support of his submission the learned senior counsel for the appellants cited the case of Osuji v. Ekeocha (2009) 16 NWLR (Pt.1166) 81 at p.134 B - D; Obawole v. Coker (1994) 5 NWLR

(Pt.345) 416 at 439 - H; Adegoke v. Adibi (1992) 5 NWLR (Pt.242) 410 at p.423 - A. It is argued by the learned SAN that the trial court decided the case in favour of the respondents solely on the basis of comparison of evidence of the parties and not on the basis of the respondents having discharged the burden placed by law on them upon a satisfactory, clear, cogent and uncontroverted evidence. He submitted further that the Court of Appeal was in error to have acceded to this misnomer. He stated that the corresponding duty of the Court of Appeal is to find out whether there is evidence on record on which the trial court based its finding. He cited the case of Woluchem v. Gudi (1981) 5 SC 291. The learned SAN argued further that the respondents, instead of proving grant by Okpokoroipi in line with their pleadings, gave evidence suggesting that they acquired the land in dispute by deforestation. This tallies with the evidence of Pw1. This, he further argued, gives clear inference that the respondents acquisition of land was no longer by grant from Okpokoroipi as pleaded in paragraph 6 of the Amended Statement of Claim but by deforestation by Ikpeamaeze who was the respondents' family head. Learned SAN maintained that there arises a conflict which is fatal as the title of the respondent cannot be by grant and deforestation at the same time and the plaintiffs' case ought to be dismissed. The case of Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (Pt.7) 393 at 3961 was cited in support, among others.

Learned counsel for the respondents in his submissions stated that the respondents led credible evidence in proof of the grant of the said land in dispute traced from Mgboko to the respondents' Ikeamaeze. Learned counsel cited the evidence of PWs 1 - 3 to show that grant of the said land was fully established. Reference was also made by learned counsel to the case made out by the appellants in proof of their ownership of the land in dispute vis-a-vis the admission of DW1 in the course of trial to show that the findings of facts made by both the trial and the appeal courts were not perverse but borne out of the pleadings and evidence led at the trial court and that the said findings were not appealed against. He made reference to paragraph 10(b) of the Amended Statement of Defence, the evidence of DW1 and DW2.

***Now, the age-long established principle of law in relation to burden of proof on a plaintiff seeking a declaration of title to***

**land is for him to establish his case on preponderance of evidence by setting up a prima facie case whereupon the trial court examines the evidence put forward by both parties and weigh same on the imaginary scale with a view to making a finding as to which side preponderates.**

- B See: Awara & Ors v. Alalibo & Ors (2002) 12 SCNJ 62; Nsirim v. Omuma Const. Co. Ltd. (1994) 1 NWLR (Pt.318) 1.

In his findings of fact, the learned trial judge stated as follows:

- C *"I have considered the two competing traditional histories or evidence of title or ownership of the land in dispute by both parties in this case, and I am much impressed with the traditional evidence of the plaintiffs and their witnesses. They impress me as truthful witnesses and I prefer their evidence to that of the DW1 and his witness."*

- D The court below affirmed the above finding of the trial court. It stated, inter alia:

- E *"It is well settled that a court of Appeal which did not hear or observe the demeanour of witness in the witness box should be reluctant to interfere with the findings of a trial court which had the advantage of seeing and hearing the witnesses and observing their demeanour in the witness box, unless such findings were perverse, unreasonable or not supported by the evidence."*

- F This makes such finding to be concurrent. **It is also trite that this court, or any appellate court for that matter, will not ordinarily interfere with a finding of fact which is concurrent from the two lower courts except where there is some miscarriage of justice or where such a decision is perverse or it is in violation of some principles of law or procedure.** (See: Overseas Construction Ltd. v. Creek Enterprises Nig. Ltd. (1985) 3 NWLR (Pt. 13) 407.) **After having taken a look at the parties' pleadings and evidence, I find no perversity on the findings of the trial and appellate courts. What both courts did, in my view is quite in order. I resolve issue No. 1 against the appellants.**

- H On issue No. 2, the learned Senior counsel for the appellants submitted that the observable contradictions in the respondents' account of traditional history/evidence which were acknowledged by both the trial and the appeal courts were material as to undermine the veracity and/or reliability of that account, and that the Court of

Appeal's affirmation of the respondents' case was perverse resulting to injustice to the appellants' several particulars of the contradictions such as on deforestation, grant, boundaries were highlighted by the learned SAN in his brief of argument. He argued that the contradictions are material and that the court cannot pick and choose which of the versions of land acquisition it should believe. The court below should have dismissed the respondents' case on account of the contradictions. He cited the case of Adu v. Gbadamasi (2009) 6 NWLR (Pt.1136) 110 at 125 A - C; Dogo v. State (2001) 3 NWLR (Pt. 699) 192 at pp. 211 - 212 G - B. The findings of the trial court, learned SAN, submitted were wrong, perverse and not supported by evidence. He urged this court to decide this issue in favour of the appellants.

The learned counsel for the respondents referred to the judgment of the trial court and stated the position taken by that court on the contradictions in the plaintiffs' evidence on the traditional history to the land in dispute that the contradictions in the evidence of the plaintiffs' witnesses were not material and that same did not disturb its findings. Learned counsel made reference to the instances cited by the learned SAN for the appellants as material contradictions. He also referred to the evidence of PWs 1 - 3 and submitted that there were no material contradictions in the respondents' witnesses as to make this court interfere with the concurrent findings of the two lower courts. He urged us to resolve this issue in favour of the respondents.

***Now, when a party claims that there is contradiction in the evidence adduced by the other party, he is saying, in other words, that the evidence adduced by that party or specific witness should not be believed or relied upon and consequently, no finding of fact can be founded on his evidence.*** See: Onwuka v. Ediala (1989) 1 NSCC 65 at P.86. This court, in the case of Ogidi v. State (2003) 9 NWLR (Pt.824) 1 at pp. 23 - 24 H - A, defined the word contradiction in relation to evidence placed before a court as follows:

*"The word 'Contradiction' is a simple English word. It derives from two Latin words: 'Contra' and 'Deco-ere-dixi-dictum,' meaning, 'to say the opposite', hence, 'contradictum' A piece of evidence contradicts another when it affirms the opposite of what that evidence has stated, not when there is just a minor discrepancy. And*

*two pieces of evidence contradict one another when they are by themselves inconsistent. On the other hand, a discrepancy may occur when a piece of evidence stops short or, contains a little more than what another piece of evidence says or contains; some minor differences in detail.”* **The nature of the contradictions in the**

**B plaintiffs’ witnesses testimonies, as viewed by the learned counsel for the respondent with which I agree are two fold:**

**a) Contradiction as to who, between Ikpeamaze and Okpokoroipi, actually gave the land in dispute to the respondents and;**

**C b) Contradiction as to the exact nature of the respondents’ title, i.e. whether it was indeed by grant or by deforestation.**

I think the only simple way for me to resolve such contradictions, is to refer to the parties pleadings and the evidence placed before the trial court, the respondents, who were the plaintiffs, in their Amended Statement of Claim pleaded as follows:

“5. In the olden days the people of Uratta Umuobo migrated from Uratta Okpuala Ngwa in Northern Ngwa to Mgboko and were settled on a vast area of land.

6. Later, the plaintiffs’ people of Umuarapara traced their kingsman (sic) at Mgboko and one OKPOKOROPI of Uratta Umuobo gave the land in dispute being a portion of land granted to him by Mgboko people of Ikpeamaeze of plaintiffs’ family demarcating the same with such life trees as ARI, UKPO UHIARA, UVAH etc.

7. Ikpeameze and his people established their dwellings on part of the land placed their family gods of IHUALA and IHUKAMANU therein and farmed on the remaining portion.

8. The following members of Umuarapara family held the (sic) in dispute in succession without any interruption from the defendants or any other that is to say: Ikpeamaeze, Ogbuji, Izuwa, Ugorji Onyenwa, Onwunli Izuwa, Nwanosike Ugorji and Wamara Onwunli the 1st plaintiff.” (Underlining supplied by me).

Now PW1, (who was the head of respondents’ family and a descendant of Ikpeameeze) in his evidence in chief testified to the following fact.

*“The land in dispute were first granted to Okpokoroipi of Uratta, Umuobo by Mgboko people after the grant, Ikpeamaeze and his*



*kingsman (sic) joined. Okpokoroipi in turn re-allocated a part of the land in dispute to Ikpeamaeze and his kingsman (sic)”* (underlining mine).

While being cross-examined, PW1 maintained his position and stated as follows:

“I said in evidence in chief that Uratta people were settled by Mgboko on the land in dispute. Mgboko settled Uratta and Uratta in turn granted to us a part of the land in dispute. The land in dispute was originally owned by Mgboko.” (underlining mine).

PW2 testified as follows:

“I know the land in dispute. My forebear(er), was known as Afaraukwu. He owned the lands. It was Afaraukwu himself who deforested all the lands he owned. The land in dispute is a part of the lands owned by and deforested by Afaraukwu. During the life time of Afaraukwu some people from Uratta approached him for a grant of some of the lands he owned, and the land in dispute was granted to them amongst others. One of the delegates from Uratta people, Okpokoroipi in turn granted part of it to Umurapara. The plaintiffs are some of the descendants of Umuarapara.” (underlining mine)

PW3, in his evidence in chief stated, inter alia, as follows:

“The name of my family is Uratta in Uratta village. I am the eldest man in Uratta village. I know the parties in this suit. I know the land in dispute. It is called Okpolor Umuarapara land. It is situate at Uratta village. I know the owners of the land in dispute. The land in dispute is owned by Umuarapara family. I know how they came to own the land in dispute. In the olden days when Uratta people migrated from Isiala Ngwa to Mgboko, Mgboko people granted them land for settlement and when they settled, Umuarapara family later migrated to Uratta and my people of Uratta granted Umuarapara people a piece of land from the land already granted to us (Uratta people by Mgboko people where they (Umuarapara family) settled. The name of the head of Uratta people who granted Umuarapara people the land where they settled is called Okpokoroipi. The head of Umuarapara family who on behalf of Umuarapara family received the granted land is called Ikpeamaeze.” (underlining mine).

The learned trial judge made a finding to that effect as follows.

“I find as a fact that the plaintiffs’ ancestor, Ikpeameeze was granted the land in dispute by Okpokoroipi, who was earlier in time

*granted the same land by Mgboko, who had the radical title to the land in dispute.*” (p. 161 of the record). (underlining mine)

Learned counsel for the respondents submitted that in view of the absence of an appeal by the appellants challenging the specific findings of the trial court, the effect of the procedural anomaly is that the appellate court will presume such findings to be correct and cannot interfere. It is beyond dispute therefore, and without any contradiction that it was Okpokoroipi who granted Ikpeameaze the land in dispute’

**The Court of Appeal did not interfere with that finding. And it is the general practice of this court not to disturb the concurrent findings of the trial court and the Court of Appeal unless there appears to be some miscarriage of justice or violation of some principles of law or procedure.** (See: Overseas Construction Ltd. v. Creek Enterprises (Nig.) Ltd. (1985) 3 NWLR (Pt.13) 407.)

**The above x-ray of the pleadings and evidence, as well as the findings of the two lower courts, is capable of resolving the alleged contradiction on whether title to the land in dispute is had by grant or deforestation. It is clear that grant and not deforestation was preferred by the two lower courts.** The trial court stated, inter alia:

*“I have considered the two competing traditional histories or evidence of title or ownership of the land in dispute by both parties in this case, and I am much impressed with the traditional evidence of the plaintiffs and their witnesses. They impress me as truthful witnesses and I prefer their evidence to that of the DW1 and his witness. The contradictions in their evidence do not materially disturb my findings.”* (underlining for emphasis).

Furthermore, from the pleadings and the evidence of the plaintiffs there is no averment or supporting evidence to the fact of acquisition of title in the land in dispute by deforestation by Ikpeameaze as he was described to be the original founder of the said land. The contradiction on grant and deforestation is said to relate to the evidence of PWs 1 and 2.

Learned senior counsel for the appellant gave a summation of the contradictions on grant, deforestation and boundaries. He stated for instance:

a) On deforestation:

*“while PW1 at page 77 lines 4-5 said “Ikpeameaze was the first person to deforest the land in dispute, the PW2 at page 87 lines 30-31 said “It was Afaraukwu himself who deforested all the land he occupied” and further at page 88 lines 1 and 2 said “the land in dispute is a part of the lands owned by the deforested by Afaraukwu”.* B

b) On grant, he cited the following:

*“PW1 at page 74 lines 1-5 said “the land in dispute was first granted to Okpokoroipi of Uratta Umuobo.. . and Okpokoroipi in turn reallocated a part of the land in dispute to Ikepamaeze and his kinsmen.”* C  
He contradicted himself at page 77 lines 8 - 10 when he said “Mgboko settled Uratta and Uratta in turn granted to us the respondents a part of the land in dispute.”

c) On boundaries, he stated:

*“While PW1 at page 73 lines 20 - 25 said that their boundary D neighbours are Umuonuma Okpu people on the North, Uratta people on the west and Uratta and Umuigwe people on the East, PW2 at page 90 line 7 said the boundary neighbours are Umuigwe people, Umuobo and Umuadile and PW3 at page 91 lines 26 - 27 said my people of Uratta have boundaries with Umuarapara family on three E sides of the land in dispute.”*

On all these contradictions, the learned trial judge found that:

*“The contradictions in their evidence do not materially disturb my findings.”* (p. 161 of the record).

The court below, affirmed the trial court’s finding in the following F words:

*“I find no substance in the contradictions referred to in the identity of the land in dispute because the learned trial judge rightly in my view, found that the land in dispute is well known to both G parties even though they call it different names. I fail to see any material contradictions in the respondents’ evidence which is fatal to their case.”* (underlining for emphasis)

**Now, it is pertinent to reiterate the general principles of the law on matters of contradiction in evidence of parties before H a court. That it is not all contradictions that result in the rejection of the evidence of a witness. It is only those that are material and result in a miscarriage of justice that would warrant such a rejection of evidence.** (See: Egesimba v. Onuzuruike

(2002) 9 SCNJ 46; Nsirim v. Nsirim (2002) 2 SCNJ 46; Ezamba v. Ibeneme & Anor (2004) 7 SCNJ 136; Nwokoro & ors v. Onuma & Ors (1999) 9 SCNJ 63.)

***I took the pains of going through the gamut of the evidence laid before the trial court, the decision of the trial court and that of the court below. I am in agreement as did the court below, with the trial court that there is no material contradiction in the plaintiffs' evidence which would warrant the reversal of it's decision on the basis of miscarriage of justice howsoever as the seeming contradictions highlighted by the learned SAN for the appellant could not be said to result in a miscarriage of justice in the circumstances of this case. Accordingly, I resolve issue two in favour of the respondents.***

In the final analysis, this appeal lacks merit and it is hereby dismissed by me with costs of N50,000.00 to the respondents from the appellants.

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### MUKHTAR JSC

I have had the advantage in reading in advance the lead judgment delivered by Muhammad JSC. I am in full agreement with the reasoning and conclusion reached in the lead judgment, but I would by way of emphasis deal with some aspects of this appeal. Three issues for determination were formulated by the appellants in their amended appellants' brief of argument. The learned counsel for the respondents has raised a preliminary objection in respect of the third issue, which reads thus:-

*"Whether a party who has not proved possession can maintain an action for trespass and whether the grant of the relief of general damages for trespass and order of perpetual injunction against the appellants and in favour of the respondents as affirmed by the court below is not perverse."*

In the notice of preliminary objection filed by the learned counsel for the respondents is the following ground of objection:-

*"Issue 3 formulated and argued by the appellants in the appellants' amended brief dated 5th day of October, 2010 is not derived from any of the appellants' grounds of appeal filed in this court."*

The argument in respect of the preliminary objection is in the

respondents' amended brief of argument. In arguing the objection the learned counsel referred to the plaintiffs/respondents' claims, as in the amended statement of claim, which are:-

*"(1) Declaration of title to all that piece or parcel of land known as IKEOHA UMUARAPARA/OKPULOR UMUARAPARA situate at Uratta Okpu-Umuobo in Aba Urban Division valued at N20.00 annually.*

*(2) N500.00 being general damages for trespass committed by the defendants on the said land on or about the 13th day of September, 1975.*

*(3) Perpetual Injunction to restrain the defendants their servants or agents from committing further trespass on the land."*

It is a fact that the learned trial court predicated the following finding on the above pleadings that was supported by evidence:-

*"(a) I find as a fact also that the defendants entered into the land in dispute for the first time on the 13th of September, 1975 when they started setting up their living houses or abode there, as a result of the construction of the Enugu/Port Harcourt Express Road, which engulfed their previous residence in their father's compound.*

*(b) The defendants' entry into the land in dispute and setting up their abode there, were acts of trespass."*

In their reply to preliminary objection, the appellants invoked the provision of Order 2 Rule 9(1) of the Supreme Court Rules which provides the following:-

*"9(1) A Respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out such grounds of objection and shall file such notice together with ten copies thereof with the registrar within the same time.*

*9(2) If the Respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the Respondent or may make such other order as it thinks fit."*

Although rule (1) supra has set out what is expected of a respondent wishing to raise a preliminary objection to an appeal, rule (2) has provided succour in the event that rule (1) has not been complied with. This court on the 28/2/2011 when the appeal was slated to be heard and it was heard did not adjourn the hearing of

the appeal. The appeal is a 2001 appeal and to further adjourn it, would have resulted in to further hardship on the parties, the appeal being an old one. At any rate, the purpose of the notice is to give the appellant sufficient notice within which to reply to the preliminary objection, and obviously the notice in the instant case is sufficient, B since the appellants have been able to file a reply, even if it was filed on the date of the hearing of the appeal. In my view, the purpose has been achieved, since he has already responded to the objection the way he has done. This matter of the treatment of preliminary objection raised and argued in a respondents' brief of argument was dealt C with by Iguh JSC in the case of Auto Import Export v. Adebayo 2002 18 NWLR part 799 page 554, when he said:-

*"It cannot be disputed that the object of the said Order 2 Rule 28(1) of the Supreme Court Rules is to give an appellant notice before the hearing of his appeal and the grounds thereof in order to enable him to be prepared to meet the objection at the hearing of the appeal. I think the rule is a safeguard against embarrassing an appellant and taking him by surprise. This is exactly what the respondents have done in the present appeal by raising their objection E in their briefs of argument. In my judgment, I can see nothing wrong in the procedure the respondents adopted in this appeal by raising their preliminary objection to the appeal in their briefs of argument."* I am fortified by the above stance.

F In the circumstances, I will consider the preliminary objection in the interest of justice. Besides, the court can, where it deems an issue formulated for determination of an appeal is not distilled from a ground of appeal, suo motu strike out the said issue, where it so finds in the course of writing his judgment.

G There are four grounds of appeal filed by the appellants in the notice of appeal. They are:-

H *"1. The learned trial judge erred in law in giving judgment to the plaintiffs/respondents when they failed to prove and establish the grant, the dimension and extent of the land so granted to their ancestors.*

*2. The learned trial judge erred in law in giving judgment to the respondents who failed to establish the identity and boundaries of the land they claimed.*

*3. The learned trial judge erred in law in giving judgment to*

*the respondents who failed to establish their traditional history.*

4. *The learned trial judge erred in law in giving judgment to the respondents in the face of material contradictions in the evidence of the respondents' witnesses on the issues before the court.*”

Examining these grounds of appeal side by side the issue complained against, it is obvious that the issue was not distilled from any of the grounds of appeal. The settled law is that an issue raised for the determination of appeal must derive its source from a ground of appeal. (See Momodu v. Momoh 1991 1 NWLR part 169, page 608, Nteogwuille v. Otuo 2001 16 NWLR part 738 page 58, and Chime v. Chime 2001 3 NWLR part 701 page 527.)

The court will be disposed to striking such issue out. It is in this vein, that I strike out issue (3) supra in the appellants' brief of argument.

The surviving issues for determination are:-

1. Whether affirming the decision of the trial court, the court below was not in violation of the well settled principle that in a claim for declaration of title, the onus is on the plaintiff (not the defendant) to prove his title by satisfactory, clear,, cogent and uncontroverted evidence.

2. Whether the contradictions apparent in the respondents' account of title by traditional history/evidence were not material, and if they were, whether the court of Appeal's affirmation of the title of the respondents based on such contradictory account was not perverse and occasioning miscarriage of justice.

The facts of this case have already been stated in the lead judgment, and the reliefs sought by the plaintiffs/respondents have been reproduced supra. The plaintiffs' claim is predicated on traditional history for which they must adduce credible, cogent and uncontradicted evidence to establish their title. See Aikhionbere v. Omoregie 1976 12 SC. 11. The traditional history of the land was pleaded in the amended statement of claim thus:-

“5. In the olden days the people of Uratta Umunobo migrated from Uratta Okpuala Ngwa in Northern Ngwa to Mgboko and were settled on a vast area of land.

6. Later, the plaintiffs' people of Umuarapara traced their Kinsmen at Mgboko and one IKPOKOROPI Uratta Umuobo gave the land in dispute being a portion of land granted to him by Mgboko

people to Ikpeameeze of Plaintiffs' family demarcating the same with such life trees as ARI, UKPO, UHIARA, UVAHETYE.

7. Ikpeameeze and his people established their dwellings on part of the land, placed their family gods of IHUALA and IHUKAMANU therein and farmed on the remaining portion.

B 8. The following members of Umuarapara family held the land in dispute in succession without any interruption from the defendants or any other that is to say: Ikpeameeze, Ogbuji, Izuwa, Uporgi Onyenwe, Onwunli Izuwa, Nwanosike Ugerji and Uamara Onwunli the 1st plaintiff.

C The plaintiffs adduced evidence in support of the above pleadings, which the learned trial judge believed. It is a cardinal principle of law that civil cases are decided on preponderance of evidence and balance of probabilities. See Elias v. Omo-Bare 1982 5 SC. 25, and D Woluchem v. Gudi 1981 5 SC. 291.

To prove a case of declaration of title to land based on traditional history the party seeking such relief must adduce evidence that is satisfactory, clear, cogent and uncontroverted.

E In the case at hand the plaintiffs adduced evidence that fall within the above description so much so that the learned trial judge made the following finding:-

F *"They impress me as truthful witnesses and I prefer their evidence to that of the D.W.1 and his witness. The contradictions in their evidence do not materially disturb my findings. I find as a fact that the plaintiffs' ancestor, Ikpeameeze, was granted the land in dispute by Okpokoroipi who was earlier in time granted the same by Mgboko who had the radical title to the land in dispute."*

G The finding being finding of facts cannot be disturbed by an appellate court. There was no way the lower court would have interfered with the findings, and it was correct to hold that the findings were not perverse unreasonable or not supported with evidence.

H This appeal is on concurrent findings of facts which the law enjoins this court not to interfere with. The law is settled that the Supreme Court will not disturb concurrent findings of fact made by the High Court and the Court of Appeal, unless the findings are not supported with evidence and are perverse and have occasioned miscarriage of justice. This is not the case in this appeal. See Odonigi v. Oyeleke 2001 6 NWLR Part 708 page 12, Ibodo v. Enarofia 1980 5



- 7 SC 42, and Aseimo & Ors. v. Abraham & Ors 2001 16 NWLR Part 738 page 20.

I also find no merit in this appeal, and I dismiss it. I abide by the consequential orders made in the lead judgment.

B

### **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother MUHAMMAD, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed. C

The issues raised in this court are purely issues of fact. They read as follows:-

1. Whether in affirming the decision, of the trial court, the court below was not in violation of the well settled principle that in, a claim for declaration of title, the onus is on the plaintiff (Not the defendant) to prove his title by satisfactory, clear, cogent and uncontroverted evidence (Grounds 2 & 3).

2. Whether the contradictions apparent in the respondents' account of title by traditional history/evidence were not material and, if they were whether the Court of Appeal's affirmation of the title of the respondents based on such contradictory account was not perverse and occasioning miscarriage of justice (Grounds 3 & 4). E

3. Whether a party who has not proved possession can maintain, an action for trespass and whether the grant of the relief of general damages for trespass and order of perpetual injunction against the appellants and in favour of the respondents as affirmed by the court below is not perverse (Ground 4). F

It should be noted that the facts relevant to the determination of the case were found established by evidence before the trial court which findings were affirmed by the lower court. The issues of fact raised in this court are therefore based on concurrent findings of fact by the lower courts. G

The claim of the respondents to title of the land in dispute is based on traditional evidence/history as to the founding of the land in dispute as how the respondents came to own and possess the land. H

In defence of the claim of the respondents, the appellants presented

their own version of traditional history to ground their claim that the land rather belongs to them and that they are in possession thereof. The court is, in the circumstance faced with two conflicting versions of traditional history as to the founding of the land in dispute. Traditional history being of the nature it is not documented it usually boils  
 B down to the oath of the plaintiff and his witnesses against that of the defendant and his witness and the court is called upon to decide as to which of the versions of traditional history it prefers.

To do this the court usually evaluates the evidence side by side  
 C any document any evidence - if available - and acts of possession by the parties in recent memory. It is after evaluating these pieces of evidence that the court, where possible, decides on which version is preferable and why.

Once the court believes the traditional evidence/history of the  
 D plaintiff as to the founding of the land in dispute, it means that the plaintiff has succeeded in establishing his claim of title to the land in dispute and has to succeed.

Where title is found to reside in the plaintiff the possession of the defendant of the disputed land can only be an adverse possession, an evidence of trespass except the defendant proves that he or  
 E someone else has a superior title to the land in dispute.

In the instant case the trial court found, that both title and possession of the land reside in the respondents and granted all the reliefs claimed in the Statement of Claim. The said findings were affirmed, as earlier stated in this judgment, by the lower court. It is settled law that ordinarily this court will not intervene in the concurrent findings of fact by the lower courts except where the lower court is in violation of fundamental principles of law or where the judgment of the court is demonstrated to be perverse thereby occasioning miscarriage of justice. I hold the considered view that learned senior counsel for the appellants has not demonstrated that this is an appeal in which the court ought to disturb the concurrent findings of fact as he has not proved that the findings are perverse or that they  
 F run counter to the evidence or that the trial judge took into account matters which he ought not to have taken into account which has resulted in a miscarriage of justice - See *Nkado vs Damiano* (1997) 5 NWLR (Pt. 503) 31 at 56. In the instant case, the customary grant of the land from Mgboko was pleaded and admitted by the appellants.  
 G  
 H

In conclusion I too find no merit in the appeal which is hereby dismissed by me, with costs as assessed and fixed in the lead judgment of my learned brother, MUHAMMAD, JSC.

Appeal dismissed.

B

### **TABAI JSC CON**

I have had the benefit of reading, in advance, the lead judgment of my learned brother I.T. Muhammad JSC and I agree with the reasoning and conclusion therein that the appeal lacks merit.

C

By way of emphasis, I wish to comment briefly on the Appellants' issue one. The said issue is stated to be derived from grounds two and three of the Notice of appeal. The Appellants' first issue is "whether in affirming the decision of the trial court, the Court below was not in violation of the well settled principle that in claim for declaration of title, the onus is on the plaintiff (not the Defendant) to prove his title by satisfactory, clear, cogent and uncontroverted evidence". Based on the facts pleaded by the parties and the evidence led by the parties in proof of same, the trial court, in its judgment at page 161 of the record found and concluded as follows:-

D  
E

*"I have considered the two competing histories of evidence of title or ownership of the land in dispute or evidence of title or ownership of the land in dispute by both parties in this case, and I am much impressed with the traditional evidence of the plaintiffs and their witnesses. They impressed me as truthful witnesses and I prefer their evidence to that of the DW1 and his witnesses."*

F

In its judgment the court below made reference to the above and some other findings of the trial court and at pages 232 - 233 of the record stated:-

G

*"It is well settled law that a Court of Appeal which did not hear or observe the demeanour of witnesses in the witness box should be reluctant to interfere with findings of fact of a trial court which had the advantage of seeing and hearing the witnesses and observing their demeanour in the witness box, unless such findings were perverse unreasonable or not supported by the evidence."*

H

The Court, per Akpiroroh JCA cited a number of authorities and concluded as follows:-

*"I have not seen any finding of the trial judge that can be said*

*to have been perverse or unreasonable”.*

Mr. O.I. Olorundare SAN for the Appellants was at pains to fault the above concurrent findings of the two courts below. In paragraphs 4.03 and 4.04 of the Appellants’ brief Mr. Olorundare SAN argued:-

B *“There is a burden on a plaintiff seeking declaration of title which must be discharged before he can get the reliefs sought from the trial court and the success of his case does not depend on the weakness of the defendant’s case. Again it follows that by the burden*  
 C *placed on the plaintiff; the question of establishing his title goes beyond mere comparison of his evidence with that of the defendant for purpose of deciding which of these two is more impressive. This is where both the trial court and the Court below missed the point.*

*My Lords will find that the trial court decided the case in fa-*  
 D *vour of the Respondents solely on the basis of comparison of the evidence of the parties and not on the basis of the Respondents having discharged the burden placed by law on them upon a satisfactory, clear, cogent and uncontroverted evidence. As a corollary the Court of Appeal was in error to have acceded in this misnomer”.*

E I do not, with respect, agree with learned senior counsel for the Appellants that the trial court committed any error by comparing the evidence of the Plaintiffs/Respondents with that of the Defendants/Appellants in deciding which evidence it preferred. What the  
 F trial court did and approved by the court below was the exercise of balancing the legal evidence of the parties on the imaginary scale of justice to enable him determine the party in whose favour the balance tilts. In ODOFIN & ORS vs MOGAJI & ORS (1978) NSCC 275 AT 277 this Court per Fatayi Williams stated the procedure to be  
 G followed in the evaluation of evidence in the following terms:-

*“In other words, the totality of the evidence should be considered in order to determine which has weight and which has no weight at all. Therefore in deciding whether a certain set of facts was given in evidence by one party in a civil case before a court in which both*  
 H *parties appear is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of all the facts, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then*

*apply the appropriate law to it."*

In my view the evaluation procedure adopted by the trial court was in consonance with the above principle on evaluation. After all civil cases are decided on the preponderance of evidence and unless a Plaintiff's case is so patently incredible and unreasonable a trial court is bound to carefully consider the competing evidence of the parties to determine in whose favour the evidence preponderates. On the guiding principles of evaluation (see WOLUCHEM vs GUDI (1981) 5 SC 291; DURU VS NWOSU (1989) 4 NWLR (Part 113) 24; CHUKWU VS. NNEJI (1990) 6 NWLR (Part 156) 363, AKINTOLA VS BALOGUN (2000) 1 NWLR (Part 642) 532.)

Again in the course of its evaluation the trial court expressed its impression about the truthfulness or otherwise of witnesses. In other words, the trial court's evaluation exercise entailed its assessment of the credibility of witnesses. It is settled principle that the assessment of the credibility of witnesses is the exclusive preserve of the trial court which alone has the advantage of seeing and watching the demeanour of witnesses in the course of their testimonies. An appellate court which does not enjoy that benefit of seeing and watching the demeanour of witnesses in the course of their testimonies would not therefore interfere with findings of a trial court flowing partly from its assessment of the credibility of witnesses unless in very exceptional cases. (See ASANYA vs STATE (1991) 3 NWLR (Part 150) 422; POPOOLA vs ADEYEMO (1992) 8 NWLR (Part 257) 1, BAMGBADE vs BALOGUN (1994) 1 NWLR (Part 323) 718.)

The findings of the trial court which I have reproduced above also involved its assessment of the credibility of witnesses. At the same page 161 of the record the trial court further made the following findings.

*"I find as a fact that the plaintiffs' ancestor Ikpeamaeze was granted the land in dispute by Okpokoroipi who was earlier in time granted the same by Mgboko who had the radical title to the land in dispute. I find as a fact also that the defendants entered into the land in dispute for the first time on the 13th of September, 1975 when they started setting up their living houses or abode there, as a result of the construction of the Enugu/Port-Harcourt Express Road which engulfed their previous residence in their father's compound".*

I have carefully examined the evidence on record and I am

satisfied that the findings are supported not only by the evidence of the Plaintiffs but also by the evidence of the Defendants/Appellants.

In these circumstances there is no basis whatsoever for any interference by an appellate court. The court below was therefore perfectly in order when it affirmed those findings.

B In conclusion, I hold that for the reasons which I have highlighted above and the fuller reasons contained in the lead judgment, the appeal has no merit and same is accordingly dismissed. I adopt the costs as assessed in the lead judgment.

C \_\_\_\_\_

### **RHODES-VIVOUR JSC**

I have had the advantage of reading in draft the leading judgment prepared by my learned brother Muhammad, JSC. I agree D with his lordship's reasoning and conclusions. I propose accordingly to add only a few observations. The respondents as plaintiffs' claim was for declaration of title to land, trespass and Injunction. In proof of their claim to title to the land in dispute they relied on traditional history/evidence. The learned trial judge ruled in their favour and E had this to say:

*"I have considered the two competing traditional histories or evidence of title or ownership of the land in this case, and I am much impressed with the traditional evidence of the plaintiffs and their witnesses. They impress me as truthful witnesses and I prefer their evidence to that of the DW1 and his witness"*

F The Court of Appeal agreed with the trial judge. It said:

"It is well settled that a Court of Appeal which did not hear or observe the demeanour of witnesses in the witness box should be G reluctant to interfere with the findings of a trial court which had the advantage of seeing and hearing the witnesses and observing their demeanour in the witness box, unless such findings were perverse, unreasonable or not supported by the evidence.

H I agree with the Court of Appeal. It is the duty of the trial court to receive in its records all relevant evidence. That is perception. The judge proceeds thereafter to weigh the evidence in the context of the surrounding circumstances of the case. That is evaluation. A finding of fact involves both perception and evaluation.

There is a clear difference between findings of fact based on credibil-

ity of witnesses and findings of fact based on evaluation of evidence. In the latter case the Court of Appeal is in as good a position to evaluate the evidence as the court of trial. In the former case an Appeal Court would be reluctant to upset the findings of a trial judge. This is so because it was the trial judge who saw and heard the witnesses. He was able to observe their demeanour. As quite rightly pointed out by the Court of Appeal findings of fact based on credibility of witnesses would be set aside if they are perverse, unreasonable, or not supported by evidence. In this case the findings of fact that the respondents have a better title to the land in dispute to my mind is correct.

Traditional history/evidence is one of the ways of proving title to land. See *Idundun v. Okumagha* 1976 NMLR p. 200.

History is all about evaluating belief on the basis of credibility. A declaration of title to land is granted at the discretion of the judge after seeing and hearing both sides in the suit. To succeed a party must show how the land devolved and eventually came to be owned by him. The party needs to narrate a continuous chain of devolution. At the end of the oral evidence the judge is to decide which of the two are telling the truth and proceed to grant a declaration of title to the side that impresses him. After examining evidence I am satisfied that the learned trial judge was correct in his conclusions and the Court of Appeal was correct to come to the same finding as the learned trial judge. Claims for trespass and injunction rarely fail when a party's claim for Declaration of Title succeeds.

Concurrent findings by the court below will not be disturbed by this court since they are not perverse. They were on the contrary supported by evidence before the trial court. I would also dismiss this appeal with costs of N50,000.00 to the Respondents.