

SUPREME COURT OF NIGERIA
9TH DECEMBER, 2011. SC. 195/2004
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH, M.
S. MUNTAKA-COOMASSIE, J. A. FABIYI, B. RHODES-
VIVOUR, JJSC

1. GABRIEL ADEKUNLE OGUNDEPO APPELLANTS
2. MRS. IYABO OLADAYO ADENIRAN
[Substituted by Order of Court on 24/03/03]
AND
THOMAS ENIYAN OLUMESAN RESPONDENT

EVIDENCE - Civil matters - Facts - Determination - Court must put two sets of facts presented by parties in an imaginary scale - Then decide upon the preponderance of credible evidence - Which weighs more and is preferable to the other (H1)

DOCUMENTS - Conveyance - Evidence - Conclusiveness - Where parties have embodied the terms of their relevant agreements into written documents - No extrinsic evidence is admissible to contradict the terms therein (H2)

CONTRACTS - Determination of - It is not for court to rewrite contract made by parties - Court is to interpret the contract as contained in the instrument (H3)

LAND LAW - Title - Proof - Onus on plaintiff - He needs to succeed on the strength of his own case - And not to rely on the weakness of defence (H4)

EVIDENCE - Land law - Proof - S.135 of Evidence Act 1990 - Since plaintiff herein has asserted that he was entitled to the land - Onus is on him to prove same (H5)

APPEALS - Finding of fact - Appellate court should not interfere with finding of fact if supported by evidence - Save where the finding is perverse (H6)

APPEALS - Evidence - Re-evaluation - Justification - Where credibility of witness is not in issue - Appellate court is in good position as trial court - To re-evaluate a piece of evidence (H7)

FACTS

Plaintiff/appellant/cross-respondent commenced this matter before the High court of Oyo State, Ibadan, where he made claims against defendant/respondent/cross-appellant for trespass, damages and injunction over a piece of land. By the amended statement of defence, respondent denied the claim of appellant and also filed a counter claim praying for a declaration of title to the same land in dispute. Both parties at the trial court traced their title to a common vendor, Alhaji Y. A. Folarin who sold the said land in dispute to both of them. The vendor probably executed distinct and separate conveyances to them. In order to prove his case, appellant put in evidence a number of documents including a Deed of Conveyance, exhibit A2.

At the end of trial, the court made finding of fact to the effect that exhibit A2 does not cover the land in dispute. Despite the finding, judgment was entered in favour of appellant. It was alleged that the trial court before delivering its judgment refused or failed to evaluate the case for respondent. Dissatisfied, respondent appealed to the Court of Appeal, Ibadan Division. The court equally affirmed the findings of trial court and made an order of retrial of the case before another judge of the High court. Dissatisfied with the judgment, both parties filed appeal and cross-appeal before Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether or not the learned justices of the Court of Appeal wrongly evaluated the judgment of the learned trial judge, who had unquestionably and properly evaluated the evidence and came to a right conclusion and which wrong evaluation led to wrong interference with the findings of fact of the learned trial judge and the making of a wrong order of retrial.

2. Whether or not, on a proper consideration of the pleadings and oral evidence and on a proper interpretation of the documentary evidence and on a proper application of the correct law to all the issues raised before the Court of Appeal, the appeal of the respondent before the court below should have been dismissed and the judg-

ment of the learned trial Judge affirmed.

3. Whether or not this is a proper case in which the Supreme Court will interfere with exercise of discretion of the Court of Appeal set aside its decision and restore the judgment of the learned trial Judge."

HELD (Unanimously dismissing the appeal and allowing the cross-appeal per **FABIYI JSC**)

Civil matters - Facts - Determination

1. The real complaint of the appellants is that the Court below wrongly applied the principle enunciated in the case of *Mogaji v. Odofin* (1978) 4 SC 91 in its re-evaluation of crucial and material evidence adduced by the parties. On the other hand, the respondent maintained that the court below showed an exhibition of appreciation of the principles of law as set out in the above stated authority. It will not be out of place to set out the principles laid down by this court in *Mogaji v. Odofin* (supra) at page 93 per Fatayi-Williams, JSC (as he then was) as follows:-

"In other words, the totality of the evidence should be considered in order to determine which has weight and which has no weight. Therefore in deciding whether a certain set of facts given in evidence by a party in a civil case before a court which both parties appear is preferable to another set of facts given by the other party, the trial Judge, after a summary of all the facts, must put the two sets of facts in 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..." (p. 2421 H)

Conveyance - Evidence - Conclusiveness

2. This matter essentially has to do with due consideration of written documents to wit: conveyances followed up certificates of Statutory Rights of occupancy. Exhibits A, A1 are Deeds of conveyance tendered by the original appellant while Exhibit A2 is his Certificate of Statutory Right of occupancy. On the other hand, Exhibit 'H' is the respondent's deed of conveyance while Exhibit J is his Certificate of Statutory Right of occupancy.

I wish to state it here that where parties have embodied the

terms of their relevant agreement(s) into written documents, no extrinsic evidence is admissible to add to, vary, subtract from or contradict the terms of such written instruments.

In respect of Exhibits A, A1 and A2 tendered by the appellants, no oral evidence can subtract or add to the contents of same. This is because the documents must be used as hangers with which to assess the veracity of any made up oral evidence. Parol evidence may be coloured to suit the whims and caprices of the witness but documentary evidence remain sacrosanct and inviolate at all times.
(pp. 2422 E/2425 H)

CONTRACTS - Determination of

3. I need to still point out at this stage that it is not the business of a court to re-write parties' contract for them. The duty of the court is to interpret the contract as contained in the instrument made by the parties on their own free volition. A court of record should never accede to the importation of unrelated 'grey' areas of the law by a party to prop what is not contained in the instrument made by the parties. (p. 2423 E)

Title - Proof - Onus on plaintiff

4. The above views were well made. I am, with no doubt, at one with the stance taken by both courts in respect of the vital point. The appellants' claim was predicted on the deeds of conveyance to wit: Exhibits A and A1. Exhibit A2 is the Certificate of Statutory Right of Occupancy procured by him from the Governor of Oyo State over 20 years after the conveyance in Exhibits A and A1. The same dimension of the land attached to the two deeds of conveyance which did not include the land in dispute is repeated in the plan attached to the Certificate of Statutory Right of Occupancy Exhibit A2 procured by him. It is glaring that the three Exhibits did not support the appellants' claim. There is nothing else to consider save to dismiss the original plaintiff's claim. The plaintiff needed to succeed on the strength of his own case and not rely on the weakness of the defence, if any.
(p. 2425 A)

Land law - Proof - S.135 of Evidence Act 1990

5. Finally on the point under discussion, it was the plaintiff who as-

serted that he was entitled to the land in dispute vide exhibits tendered by him. Essentially, he who asserts must prove same. See: Section 135 of the Evidence Act, 1990 which is here relevant and of moment. The plaintiff's assertion has been found to miss the target to his own chagrin. (p. 2425 E)

B

APPEALS - Finding of fact

6. An appellate court will not make it a practice to set aside a finding of fact if such is supported by evidence on record. However, where a finding is perverse, it will certainly be set aside as properly done by the court below in this matter. (p. 2425 G)

C

Evidence - Re-evaluation - Justification

7. Where credibility of a witness is not in point, a Court of Appeal can re-evaluate such evidence. This court in Ebba v. Ogodo (1984) 1 SCNL 372 stated as follows:-

D

"Where the conclusion is arrived at without any real controversy e.g. in the case of documentary evidence... where there is oral evidence which involves merely an admission by the adversary or there is an unchallenged piece of evidence, the Court of Appeal should consider itself to be in good as a position as the trial court, in so as the evaluation of such evidence aforesaid... is concerned." (p. 2426 E)

E

NOTABLE POINTS OF INTEREST

F

FABIYI JSC

1. Land law – Definition of "Appurtenance"

I have taken a hard look at the contents of Exhibits A & A1 and cannot see where it is stated that the parcel of land conveyed therein was to be 'with its appurtenances' as pleaded by the plaintiff in paragraphs 9 and 10 of the Statement of Claim over which he clung tenaciously to his self created issue of reclamation. Appurtenance is defined as that which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal and which passes as incident to it, as a right of way or other easement of land - Joplin Waterworks Co. v. Jasper County 227 MO 964, 38 S. W 2nd 1068, 1076. See: Black's Law Dictionary, Sixth Edition at page 103. The land conveyed in Exhibit A has clear boundaries with beacon demarcations. Its area as a whole is 2131.59 sq.

H

yards or thereabout and demarcated by Survey Pillars WY 2123, WY 2122, WY 2124, WY 2125 and WY 2126, delineated on a plan annexed, thereon edged red. That was what was passed by Alhaji Y. Folarin to the original plaintiff. One can hardly surmises the rational for the pawn played by the plaintiff with the issue of reclamation which in its real essence was his own creation to score an undeserved advantage over his adversary, as it were. Such was not backed by the terms of the conveyance in Exhibits A and A1. Yet the plaintiff tried to pursue his desire with unusual fervour or undue frenzy generated by his counsel. (p. 2422 H)

2. *When order of retrial is irrelevant*

The question whether an order of retrial will be made by an appellate court depends on the circumstances as justice of a particular case may dictate. Some of such circumstances may be stated as follows:-

1. An order of retrial should not be made where the appellate court is in a position to do justice after considering evidence that is basically documentary.
2. A retrial cannot be ordered where the evidence which the parties chose to present is there and the approach of the trial court in law is there; if the approach was wrong and the decision was wrong it should be corrected by the appellate court and the right decision given.
3. A retrial should not be ordered if the litigation will be unnecessarily prolonged, as in this case which was initiated in 1988.
4. It would not be ordered where the order of retrial would occasion injustice to the parties herein.
5. It will not be ordered when the judgment of the trial court has demonstrated in full, a dispassionate consideration of the issues properly raised and heard and has reflected the result of such an exercise. Where a judgment fails this test, it will be ordered. (p. 2426 G)

H **REPRESENTATION**

A. Agboye with D. Oladele and Y. Raimi, for the Appellants
 Dr. J. O. Olatoke with B. O. Omodara (Miss) and M. A. Adelodun, for the Respondent.

CASES REFERRED TO

- Okeowo v. Migliore (1979) 11 SC 138 at 201
Owade v. Omitola (1988) 2 NWLR (Pt. 77) 413
Osawaru v. Ezeiruka (1978) 6-7 SC 135 at 145
UBN v. Prof. Ozigi (1994) 3 NWLR (Pt.333) 385
Okubule v. Oyagbola (1990) 4 NWLR (Pt.147) 72 B
Aromire v. Awoyemi (1972) 1 ALL NLR (Pt.1) 101
Jadesima v. Egle (2003) 10 NWLR (Pt.827) 1 at 30
Isiyaku v. Zwingina (2003) 6 NWLR (Pt.817) 560 at 576
Odukwe v. Ogunbiyi (1988) 8 NWLR (Pt. 561)339 at 352 C
Nader v. Board of Custom & Excise (1965) NWLR 99 at 101
Khalil & Dibbo Transport Ltd. V. Odumade (2000) FWLR (Pt.17) 163

STATUTES REFERRED TO

- Evidence Act Cap. 114 LFN 1990, ss. 132 (1), 135 D
Supreme Court Act, s. 22

BOOK REFERRED TO

- Black's Law Dictionary 6th ed. p. 103 E

LEAD JUDGMENT BY FABIYI JSC

The appeals herein were filed by both sides of the divide against the judgment of the Court of Appeal, Ibadan Division delivered on 9th January, 2002. Therein, the appeal was allowed and the case was remitted back to the trial High Court, Ibadan for retrial before another judge. F

The original plaintiff in his statement of claim, asked for:-

“1. N10,000.00 (Ten Thousand Naira) being damages for trespass when the defendant unlawfully entered the land in the possession of the plaintiff situate at Lagos- Ijebu Road, near Niger West Challenge Area. Ibadan sometimes in 1987 which trespass is still continuing. G

2. Perpetual injunction restraining the defendant, his servants or agents from entering the land in dispute or from committing further acts of trespass thereon” H

In paragraph 27 of the Statement of Defence and counter-claim the defendant claimed against the plaintiff as follows:-

“(i) Declaration of Titleship/Ownership of the land verged RED on Survey Plan No.RADS/OY/651/89 drawn by A. A. Adeyemi, Licensed Surveyor. A Survey Plan No. ISO/OY/121/88 drawn by F. U. Iyawo, Licensed Surveyor. Both survey plans covering the same land (that is the land in dispute).

B *(ii) Courts confirmation Order of the Grant of the Certificate of Occupancy dated 25/8/88 and Registered as an instrument No. 47 at Page 47 Vol. 2869 in the Land Registry at Ibadan to which was attached survey plan No. ISO/OY/121/88 drawn by F. U. Iyawo, Licensed Surveyor, the defendant having been in effective prior possession before the grant; and*

C *(iii) A perpetual injunction restraining the plaintiff from ever going unto the land or laying any claim unto the land.”*

The learned trial Judge, Adekola, J. (as he then was) garnered D evidence adduced by the parties and their respective witnesses. He was duly addressed on some grey areas of the law; as it were. He applied the law to the facts to the best of his ability and found in favour of the plaintiff in his judgment which was delivered on 18th July, 1990. Therein, the defendant was found to be a trespasser and E an award of N2,000:00 general damages was made against him. Further, an order of injunction was granted against him, his servants, agents or privies or anybody claiming through him from committing further acts of trespass on the land in dispute. All the three reliefs F raised in the counter-claim were dismissed.

The defendant felt irked by the stance taken by the trial court and appealed to the court of Appeal, Ibadan Division (hereinafter referred to as “the court below”, for short). The court below heard the appeal and in the judgment handed out on 17th January, 2007, G it allowed the appeal and resolved the complaint relating to evaluation of evidence in favour of the defendant/appellant thereat.

The trial court’s judgment was set aside and the case was re-mitted back for retrial by another judge. The above position taken by the court below precipitated appeal and the cross appeal, both filed H with leave, to this court. In respect of both appeals, briefs of argument were filed by parties. When the appeal was heard on 20th September, 2011, each learned counsel adopted and relied on the briefs filed on behalf of his client.

In respect of the main appeal, the three issues couched for

determination read as follows:-

“1. Whether or not the learned justices of the Court of Appeal wrongly evaluated the judgment of the learned trial judge, who had unquestionably and properly evaluated the evidence and came to a right conclusion and which wrong evaluation led to wrong interference with the findings of fact of the learned trial judge and the making of a wrong order of retrial. B

2. Whether or not, on a proper consideration of the pleadings and oral evidence and on a proper interpretation of the documentary evidence and or a proper application of the correct law to all the issues raised before the Court of Appeal, the appeal of the respondent before the court below should have been dismissed and the judgment of the learned trial Judge affirmed. C

3. Whether or not this is a proper case in which the Supreme Court will interfere with exercise of discretion of the Court of Appeal set aside its decision and restore the judgment of the learned trial Judge.” D

On behalf of the respondent, two issues were decoded with adequate precision. They read as follows:-

“1. Whether the court below was right in concluding that the Defendant’s case was not given a fair consideration or evaluation before decisions were reached on crucial points; and E

2. Whether on the available material, plaintiff proved title to the land in dispute.” F

And, in respect of the cross-appeal, the lone issue formulated by the cross-appellant reads as follows:-

“Whether having regard to the unchallenged concurrent findings made by the trial court and the court below, the plaintiff’s claim ought not to have been dismissed” G

I tried but I could not see any issue formulated by the cross-respondent in respect of the cross-appeal.

The points seriously agitated by the parties in both appeals are inter-related. Indeed, they appear intertwined. As such, I shall treat both appeals together in the prevailing circumstance. H

The real complaint of the appellants is that the Court below wrongly applied the principle enunciated in the case of Mogaji v. Odofin (1978) 4 SC 91 in its re-evaluation of crucial and material evidence adduced by the parties. On the other

hand, the respondent maintained that the court below showed an exhibition of appreciation of the principles of law as set out in the above stated authority. It will not be out of place to set out the principles laid down by this court in *Mogaji v. Odofin (supra)* at page 93 per Fatayi-Williams, JSC (as he then was) as follows:-

“In other words, the totality of the evidence should be considered in order to determine which has weight and which has no weight. Therefore in deciding whether a certain set of facts given in evidence by a party in a civil case before a court which both parties appear is preferable to another set of facts given by the other party, the trial Judge, after a summary of all the facts, must put the two sets of facts in 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...”

The above principles have been reiterated by this court in many other cases. For further elucidation or education, I need to cite the cases of *Bello v. Ewaka* (1981) 1 SC 101; *Aromire v. Awoyemi* (1972) 1 ALL NLR (Pt.1) 101; *Owade v. Omitola* (1988) 2 NWLR (Pt.77) 413; *Adisa v. Ladokun* (1973) 1 ALL NLR (Pt. 2) 18; *Woluchem v. Gudi* (1981) 5 SC 291; *Duru v. Nwosu* (1989) 4 NWLR (Pt.113) 24.

This matter essentially has to do with due consideration of written documents to wit: conveyances, followed up certificates of Statutory of Rights of occupancy. Exhibits A, A1 are Deeds of conveyance tendered by the original appellant while Exhibit A2 is his Certificate of Statutory Right of occupancy. On the other hand, Exhibit ‘H’ is the respondent’s deed of conveyance while Exhibit J is his Certificate of Statutory Right of occupancy.

I wish to state it here that where parties have embodied the terms of their relevant agreement(s) into written documents, no extrinsic evidence is admissible to add to, vary, subtract from or contradict the terms of such written instruments. See section 132 (1) of the Evidence Act, 1990 and the case of *UBN v. Prof. Ozigi* (1994) 3 NWLR (Pt.333) 385.

I have taken a hard look at the contents of Exhibits A & A1

and cannot see where it is stated that the parcel of land conveyed therein was to be 'with its appurtenances' as pleaded by the plaintiff in paragraphs 9 and 10 of the Statement of Claim over which he clung tenaciously to his self created issue of reclamation. Appurtenance is defined as that which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal and which passes as incident to it, as a right of way or other easement of land - Joplin Waterworks Co. v. Jasper County 227 MO 964, 38 S. W 2nd 1068, 1076. See: Black's Law Dictionary, Sixth Edition at page 103. The land conveyed in Exhibit A has clear boundaries with beacon demarcations. Its area as a whole is 2131.59 sq. yards or thereabout and demarcated by Survey Pillars WY 2123, WY 2122, WY 2124, WY 2125 and WY 2126, delineated on a plan annexed, thereon edged red. That was what was passed by Alhaji Y. Folarin to the original plaintiff. One can hardly surmise the rational for the pawn played by the plaintiff with the issue of reclamation which in its real essence was his own creation to score an undeserved advantage over his adversary, as it were. Such was not backed by the terms of the conveyance in Exhibits A and A1. Yet the plaintiff tried to pursue his desire with unusual fervour or undue frenzy generated by his counsel.

I need to still point out at this stage that it is not the business of a court to re-write parties contract for them. The duty of the court is to interpret the contract as contained in the instrument made by the parties on their own free volition. A court of record should never accede to the importation of unrelated 'grey' areas of the law by a party to prop what is not contained in the instrument made by the parties. See: Jadesima v. Egle (2003) 10 NWLR (Pt.827) 1 at 30; Isiyaku v. Zwingina (2003) 6 NWLR (Pt.817) 560 at 576.

It is extant in the record of appeal that the learned trial Judge evaluated Exhibits A and A1 along with the self made reclamation issue as depicted above and found in favour of the appellant without considering the documentary and oral evidence adduced by the respondent. The learned trial Judge nailed the respondent's case, as it were. In line with the principles laid down in Mogaji v. Odojin (supra) the learned trial Judge should have considered the two versions of evidence put forward by the parties simultaneously and put same on

an imaginary scale to see who had the upper hand. But that was not the case.

The above is not the end of the scenario herein. It is curious that despite the alleged undue reclamation and user of the land by the appellant for over 20 years the land in dispute was not included
B in the plan submitted by the appellants to the Governor of Oyo State for the grant of Exhibit A2, the certificate of Statutory Right of Occu-
pancy to him. This salient point raises a presumption against the original plaintiff. It shows that he was putting up a volte-face.

C It is extant in the record that the evidence adduced by the respondent and his witnesses were jettisoned by the trial Judge. The evidence of the appellant's brother to wit: DW. 3, his caretaker was against the appellant's interest. He supplied sand to the respondent when he was building his house to the knowledge of the original
D plaintiff who came to Ibadan from Lagos at least once a month at the material time. The evidence of the respondent himself was not considered by the trial court.

The court below got it right in its assessment that from the record, it is clear that before the learned trial Judge considered part
E of the evidence of the respondent he had predetermined the issues submitted for consideration by the parties. Same, in my opinion, has the semblance of a mistrial. The court below did a nice job by setting such related unwholesome findings of the trial court aside.

F Both courts below had cause to pronounce that the documents of title which the plaintiff pleaded and tendered at the trial do not cover the land in dispute. The trial Judge at page 83 lines 27 -35 of the record of appeal had this to say:-

G *"Having regard to the pleadings and the evidence before the court there is no doubt in my mind that the area in dispute was a marshy area when the land was originally sold to the plaintiff's vendor, Alhaji Y. A. Folarin by Otatutu family and that the plan attached to the deed of conveyance, Exhibit A did not include the marshy area and so also the marshy area was never included nor alluded to
H in the deed of conveyance Exhibit 42 (sic). Exhibit A1 executed in favour of the plaintiff by Alhaji Y. A. Folarin."*

The court below, on its own part at page 164 of the record of appeal had this to say:-

"In my consideration, there is nothing in the documentary evi-

dence relied upon by the respondent to show that any marshy or submerged land outside that specified in Exhibit A was “intended and actually conveyed to the respondent.”

The above views were well made. I am, with no doubt, at one with the stance taken by both courts in respect of the vital point. The appellants’ claim was predicted on the deeds of conveyance to wit: Exhibits A and A1. Exhibit A2 is the Certificate of Statutory Right of Occupancy procured by him from the Governor of Oyo State over 20 years after the conveyance in Exhibits A and A1. The same dimension of the land attached to the two deeds of conveyance which did not include the land in dispute is repeated in the plan attached to the Certificate of Statutory Right of Occupancy Exhibit A2 procured by him. It is glaring that the three Exhibits did not support the appellants’ claim. There is nothing else to consider save to dismiss the original plaintiff’s claim. The plaintiff needed to succeed on the strength of his own case and not rely on the weakness of the defence, if any. See: *Motunwase v. Sorungbe* (1988) 4 NWLR (Pt. 92) 90 at 101.

Finally on the point under discussion, it was the plaintiff who asserted that he was entitled to the land in dispute vide exhibits tendered by him; essentially. He who asserts must prove same. See: *Okubule v. Oyagbola* (1990) 4 NWLR (Pt.147) 72; *Osawaru v. Ezeiruka* (1978) 6-7 SC 135 at 145, *Odukwe v. Ogunbiyi* (1988) 8 NWLR (Pt. 561)339 at 352. **See: Section 135 of the Evidence Act, 1990 which is here relevant and of moment. The plaintiff’s assertion has been found to miss the target to his own chagrin.**

An appellate court will not make it a practice to set aside a finding of fact if such is supported by evidence on record. However, where a finding is perverse, it will certainly be set aside as properly done by the court below in this matter. See: *Akulaka v. Yongo* (2002) 5 NWLR (Pt. 759) 133 at 161; *Enang v. Adu* (1981) 11-12 SC 25; *Nwosu v. Board of Customs & Excise* (1988) 5 NWLR (Pt. 93) 225; *Nneji v. Chukwu* (1996) 10 NWLR (Pt.478) 265; *Fabumiyi v. Obaje* (1962) NMLR 242; *Akinola v. Oluwo* (1962) 1 SCNL 352.

In respect of Exhibits A, A1 and A2 tendered by the ap-

pellants, no oral evidence can subtract or add to the contents of same. This is because the documents must be used as hangers with which to assess the veracity of any made up oral evidence. See: Thompson v. Arowolo (2003) 7 NWLR (Pt.818) 163 at 196. **Parol evidence may be coloured to suit the whims and caprices of the witness but documentary evidence remain sacrosanct and inviolate at all times.**

That takes me to the 2nd issue which relates to order of retrial made by the court below. Both sides of the divide in this appeal strenuously maintained that the order is unwarranted. Both parties are at one that this case can be settled on documentary evidence alone. It follows that as pronounced by this court in Olujinle v. Adeagbo (1988) 2 NWLR (Pt.75) 239 at 254 -

“It was not enough that the Chief President took umbrage under hackneyed subterfuge of demeanour of the witnesses. But in a case like this in which documentary exhibits have been admitted in evidence, demeanour plays an insignificant, if any, role. The documents tendered in this case should have been used as a hanger with which to assess oral testimony.”

Where credibility of a witness is not in point, a Court of Appeal can re-evaluate such evidence. This court in Ebba v. Ogodo (1984) 1 SCNL 372 stated as follows:-

“Where the conclusion is arrived at without any real controversy e.g. in the case of documentary evidence... where there is oral evidence which involves merely an admission by the adversary or there is an unchallenged piece of evidence, the Court of Appeal should consider itself to be in good as a position as the trial court, in so as the evaluation of such evidence aforesaid ... is concerned.”

The question whether an order of retrial will be made by an appellate court depends on the circumstances as justice of a particular case may dictate. Some of such circumstances may be stated as follows:-

1. An order of retrial should not be made where the appellate court is in a position to do justice after considering evidence that is basically documentary. See: Okeowo v. Migliore (1979) 11 SC 138 at 201.

2. A retrial cannot be ordered where the evidence which the

parties chose to present is there and the approach of the trial court in law is there; if the approach was wrong and the decision was wrong it should be corrected by the appellate court and the right decision given. See: *Nader v. Board of Custom & Excise* (1965) NWLR 99 at 101; *Khalil & Dibbo Transport Ltd. V. Odumade* (2000) FWLR (Pt.17) 163 at 173. B

3. A retrial should not be ordered if the litigation will be unnecessarily prolonged, as in this case which was initiated in 1988.

4. It would not be ordered where the order of retrial would occasion injustice to the parties was herein. C

5. It will not be ordered when the judgment of the trial court has demonstrated in full, a dispassionate consideration of the issues properly raised and heard and has reflected the result of such an exercise. Where a judgment fails this test, it will be ordered. See *Ojogbue v. Nnabia & Ors.* (1972) ANLR 226. D

I need to note it that in this matter, the vital documentary evidence produced by the appellants are Exhibits A, A1 and 42. On the part of the respondent, the vital documentary evidence him are Exhibits H and J relating to deed of conveyance between him and Alhaji Y. A. Folarin in respect of the produced by land in dispute and his Certificate of Statutory Right of Occupancy issued to him by the Governor of Oyo State without any hindrance on the disputed property; respectively. E

As earlier on said, both the trial court and the court below found that Exhibits A and A1 which the plaintiff relied on as evidence of title do not cover the land in dispute. That being the case, the unchallenged findings remain binding on the parties. The case of plaintiff should fail for failure to prove his title to the land in dispute. On the other hand, the case of the respondent is proved by his deed of conveyance - Exhibit 'H' which directly relates to the land in dispute. Exhibit J, his Certificate of Statutory of Right of Occupancy which relates to the land in dispute further fortifies his claim. F G

Acting under the provision of Section 22 of the Supreme Court Act, I hereby set aside the order of the court below wherein it ordered a retrial. That order was most unwarranted. I hereby dismiss the claim of the appellants before the trial court as their appeal herein is, in substance, dismissed. The order setting aside the retrial order does not enure positively in their favour. The cross-appeal is hereby H

allowed. Judgment is entered in respondent's favour as per his claims before the trial court as set out above at the initial stage of this judgment. The order setting aside the order of retrial by the court below enures to his benefit. The appellants/cross-respondent shall pay N50,000:00 costs to the respondent/cross-appellant.

B

MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal Ibadan delivered on 17th January, 2002 allowing the Appellant's appeal and ordering the re-hearing of the Plaintiffs case afresh by another Judge of the High Court. Both parties were obviously not happy with that judgment which led the appellant appealing against it, while the Respondent challenged it in a Notice of a Cross-appeal.

D The crux of the dispute between the parties whose root of title to the land in dispute is from the common vendor Alhaji Y. A Folarin's whether or not the land in dispute formed part of the land sold to the plaintiff/Appellant by the said common vendor in 1959. In an attempt to prove the case, the plaintiff put in evidence a number of documents including Exhibit A2. Making his findings on the case of the Plaintiff, the learned trial Judge said at page 88 of the record as follows - *"Having regard to the Pleadings and the evidence before the Court there is no doubt in my mind that the area in dispute was a marshy area when the land was originally sold to the plaintiff's vendor Alhaji Y. A. Folarin by Otatutu family and that the Plan attached to the Deed of Conveyance Exhibit A executed in favour of late Y. A. Folarin did not include the marshy area and so also the marshy area was never included nor alluded to in the Deed of Conveyance Exhibit A2 executed in favour of the Plaintiff by Alhaji Y. A. Folarin."*

The effect of the above finding is obvious. It is to the effect that Exhibit A2 which the plaintiff relied on to prove his title did not cover the land in dispute.

H This ought to have been the end of the case resulting in the out right dismissal of the plaintiffs claims at the trial Court. Unfortunately the Court below which affirmed this finding of the trial court also fell into the same ditch when it said at page 164 of the record as follows - *"It is pertinent at this juncture to point out that all of Exhibits*

A, A1, A2, B and C relied upon by the Respondent established his title ONLY to that piece of land detailed in the plan attached to the conveyance in Exhibit "A." The said land is demarcated and circumscribed by survey pillars WY 2122, WY 2123, WY 2124, WY 2125 and WY 2126. The said land and its dimensions are repeated in the Respondent's Certificate of Statutory Right of Occupancy Exhibit A2. The Respondent's Plan Exhibit C and the Appellant's Plan Exhibit G. In my consideration, there is nothing in the documentary evidence relied upon by the Respondent to show that any marshy or submerged land outside that specified in Exhibit "A" was intended and actually conveyed to the Respondent." And yet proceeded to make an order of retrial instead of dismissing the plaintiffs/Respondent's cross-appeal, allowing the appeal and dismissing the plaintiffs case at the trial Court as the land in dispute was not part of the land conveyed to the Respondent. The law is indeed well settled that an order of retrial should not be made where the appellate court is in a position to do justice after considering the evidence that is basically documentary as stated in *Okeowo v. Migliore* (1979) 11 SC. 138 at 201. This is exactly what the court below failed to do in this case on the documentary evidence on record. Therefore, on the effect of these findings of Courts below alone which are based on documentary evidence, the Court below on hearing the appeal before it, ought to have dismissed the plaintiffs/Respondent's case rather than ordering the re-hearing of the case.

It is for the above reasons and fuller reasons given by my learned brother Fabiyi, JSC in his leading judgment with which I entirely agree, that I also set aside the re-trial order by the Court below and allow the cross-appeal with N50,000.00 costs in favour of the Respondent/Cross-Appellant.

CHUKWUMA-ENEH JSC

I have read in advance the judgment prepared and just delivered by my learned brother Fabiyi JSC with which I agree and for the reasons stated therein. I also set aside the order of the lower court for trial de novo and allow the appeal in favour of the Respondent/Cross-Appellant. I abide by all the orders contained the lead judgment.

MUNTAKA-COOMASSIE JSC

The plaintiff claims against the defendant for trespass, damages and injunction. By the amended statement of defence, the defendant denied the claim of the plaintiff and filed a counter claim by praying for a declaration of title to the same land in dispute. Both parties in the trial court traced their title to a common vendor who sold the said land in dispute to both of them. He was Alhaji Y. A. Folarin, who probably executed distinct and separate conveyances to them.

At the end of the trial judgment was entered apparently in favour of the plaintiff and against the defendant. It was alleged that the trial court before delivering its judgment refused or failed to evaluate the case for the defendant. The trial court finally rejected the defence case. The defendant unsuccessfully appealed to the Court of Appeal Ibadan Division both parties filed their respective briefs of argument.

I was privilege to read in draft the illuminating judgment of my learned brother John Fabiyi JSC with which I am in total agreement. I too, for the reasons he has stated in the lead judgment which, with respect I adopt as mine, I too dismiss the plaintiff's case and allow the cross-appeal. I abide by the consequential orders made by my learned brother. I endorse the order as to costs.

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RHODES-VIVOUR JSC

At the High Court Ibadan the appellant as Plaintiff sued the Respondent as defendant as follows:

1. The plaintiffs' claim against the defendant is for the sum of N10,000,00 (ten thousand naira) being damages for trespass when the defendant unlawfully entered the land in the possession of the plaintiff situate at Lagos Ijebu Road, near Niger West Challenge Area, Ibadan sometime in 1987 which trespass is still continuing.

2. Perpetual injunction restraining the defendant, his servants or agents from entering the land in dispute or from committing further acts of trespass thereon.

The defendant counterclaimed as follows:

(i) Declaration of Titleship/ownership of the Land verged RED in Survey plan No: RADS/OY/651/89 drawn by A. A. Adeyemi, Li-

censed Surveyor. And Survey Plan No.ISO/OY/121/88 drawn by F. U. Iyawe, Licensed Surveyor. Both Survey plans covering the same land (that is, the land in Dispute)

(ii) Courts confirmation Order of the Grant of the Certificate of Occupancy dated 25/8/88 and Registered as an instrument No. 47, page 47 vol. 2869 in the Land Registry at Ibadan, to which was attached survey Plan NO. ISO/OY/121/88 drawn by F. U. Iyawe, Licensed Surveyor, the defendant having been in effective prior possession before the grant. B

(iii) A perpetual injunction restraining the plaintiff from ever going into the land or laying any claim into the land. C

Both sides claim title to land and trace their title to a common vendor - Alhaji Y. A. Folarin. They claim he sold the land to them. The simple and clear issue for determination is whether the land in dispute is part of the land sold to the plaintiff by Alhaji Y. A. Folarin. In paragraph 9 of the plaintiff's pleadings, in support of his claim to title it is averred thus: D

"9. The said Y. A. Folarin in his life time by deed of conveyance dated 25th July, 1959 and registered as No. 47 at page 47 in volume 312 in the land registry at Ibadan sold the said parcel of land to the Plaintiff and with its appurtenances which is the whole of the area verged Red on Plan attached. E

The Plaintiff relied on Exhibit A2 Deed of Conveyance in support of the pleading. The learned trial judge said and quite rightly too that: F

"Having regard to the pleadings and the evidence before the court there is no doubt in my mind that the area in dispute was a marshy area when the land was originally sold to the plaintiffs vendor, Alhaji Y. A. Folarin by Otatutu family and that the plan attached to the Deed of Conveyance Exhibit A executed in favour of late Y. A. Folarin did not include the marshy area and so also the marshy area was never included nor alluded to in the Deed of Conveyance Exhibit A2 executed in favour of the plaintiff by Alahji Y. A. Folarin. G

In agreeing with the observation of the trial court, the Court of Appeal said: H

"In my consideration, there is nothing in the documentary evidence relied upon by the respondent to show that any marshy or submerged land outside that specified in Exhibit A was intended and actually conveyed to the respondent."

The well settled position of the Law in claims for Title to land is that the onus of proving title to land is on the plaintiff and he succeeds only on the strength of his own case and not on the weakness of the defendant's case. In discharging that onus, the appellant as plaintiff relied on Exhibits A, A1, A2 to prove title over the land he
B bought and the marshy area, subsequently reclaimed.

The plan attached to the Deed of Conveyance Exhibit A, executed in favour of Y. A. Folarin by Otatutu family did not include the marshy area, Exhibit A2, the Deed of Conveyance executed in favour of the plaintiff/appellant by Y. A. Folarin did not also include the
C marshy area. The plaintiff appellant failed to establish his title to the marshy land. The trial court ought to have dismissed his claim but strangely went ahead to grant title to the plaintiff over the reclaimed land. The Court of Appeal was correct when it allowed the appeal
D but wrong when it ordered a re-hearing.

Two of the several instances when an appellate court would order a re-trial are:

1. Where a finding depends to a large extent on the credibility of witnesses.

E 2. When the trial court fails to make specific findings of facts before it and also fails to draw inferences from facts before it, - See Shell. B P. v. Cole 1978 3 SC p.193, Okpiri v. Jonah 1961 1 SCNLR p.174.

F An order for re-trial should not be made where the plaintiff fails completely to prove his case and it is clear that there is no substantial irregularity on the record, or/and where after considering the evidence the appellate court is in a position to do substantial justice between the parties. The plaintiff/appellant relied on Exhibit A, 41
G and A2 to ray claim to ownership of the marshy area of land, subsequently reclaimed, beside his own land. The respondent relied on Exhibit H and J, Deeds of Conveyance between him and Alhaji Y. A. Folarin in respect of the land in dispute for which he gets a Certificate of Occupancy.

H There are this two competing sets of documents. Exhibits A, 41 and 42 on one side and Exhibits H and J on the other side. After a full and dispassionate consideration of these exhibits it is clear that the plaintiff was unable to prove title to the marshy area. On the other hand the respondent's documents cover the area in question.

Since it is so clear that the plaintiff failed woefully to prove his case the Court of Appeal ought not to have ordered a re-trial. It should have dismissed the plaintiffs claim.

The provisions of Section 22 of the Supreme Court Act empower this court to ensure that issues in controversy between the parties are resolved once and for all time. When, as in this appeal the Court of Appeal fails in that regard this court must rise to the occasion and do what the Court of Appeal ought to have done. B

In the light of the fact that documents produced and relied on by the appellant do not show his right to title over the land in dispute whereas the respondent documents bear him out as entitled to title over the land in dispute, the claim of the appellant is dismissed and I abide with all the orders proposed by my learned brother Fabiyi, JSC. C

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