

**SUPREME COURT OF NIGERIA**

4TH MAY, 2012. SC. 12/2006

**CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD,  
B. RHODES-VIVOUR, N. S. NGWUTA,  
M. U. PETER-ODILI, JJSC**

1. CHIEF SHAMSUDEEN

AFOLABI AYORINDE

(Baale of Ikija Community)

2. CHIEF MODIU OYEBOLA

(Balogun of Ikija Community)

3. CHIEF AMBALIU EJALONIBU

(Otun of Ikija Community)

4. CHIEF IYANDA ABUDU

..... APPELLANTS

(Osi of Ikija Community)

(for themselves and on behalf of the  
people of Ikija Community in Ifo Local  
Government Area of Ogun State)

AND

1. CHIEF HASSAN SOGUNRO

2. CHIEF SALISU AJIBAWO & 5 Ors ..... RESPONDENTS

(for themselves and on behalf of the  
People of Ibaragun community)

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EVIDENCE - Previous proceedings - Evidence of - Admissibility -  
Evidence Act s.34(1) - Where issues are the same - Court will admit  
such evidence - But facts must be pleaded (H1)

EVIDENCE - Examination of witnesses - Meaning - Evidence in chief  
testifies plaintiff's case - Cross examination tests credibility of stated  
testimony - While re-examination restores credibility to the testimony  
(H2)

LAND LAW - Title - Proof - Plaintiff must rely on strength of his case  
- To establish acts of ownership - And not on weakness of defence  
(H3)

LAND LAW - Evidence - Rule in *Kojo II v. Bonsie* - Application - The

rule cannot be applied to present case - Since the traditional evidence was conclusive (H4)

APPEALS - Evidence - Evaluation - Findings of trial court - Appellate court does not interfere - When credibility of witness is involved - But it may re-evaluate evidence (H5)

LAND LAW - Actions - Proof - Onus - Proof is on preponderance of evidence - And onus is on party who will fail - If no evidence is adduced on either side (H6)

APPEALS - Concurrent findings - Supreme Court will not interfere - Since the findings are not perverse - And there was no miscarriage of justice (H7)

### ***FACTS***

The land in dispute is vast area of land situate at Ikija village in Ogun State. By a writ of summons, plaintiffs/respondents brought this action in a representative capacity at the High Court of Ogun State, Otta Division. Respondents claimed inter alia, against defendants/appellants (also in representative capacity) a declaration of title to customary right of occupancy of the said land. Respondents relied on traditional evidence in proving their root of title. Seven witnesses were called by respondents. Appellants equally traced their root of title by traditional evidence and called five witnesses. Appellants tendered several exhibits including Exhibit E – evidence of previous litigation proceedings over the same land. Having heard both parties, the court refused to rely on the evidence of the previous proceedings. The court rather relied on the traditional evidence of respondents and consequently ruled in their (respondents') favour. This did not go down well with appellants. Hence, they lodged an appeal at the Court of Appeal, Ibadan Division. The court dismissed the appeal and affirmed the judgment of the trial court. Dissatisfied again, appellants filed appeal at Supreme Court.

### ***ISSUES FOR DETERMINATION***

1. Whether the evidence, Exhibit E and F admitted by the trial court with the consent of both parties and before the two lower courts was not a proceeding and, or judgment before the two lower

courts, irrelevant and inadmissible within the purview of Section 34, sub-section (1) of the Evidence Act, Cap E 14, volume 6, Laws of the Federation, 2004 and was rightly excluded in the determination of the herein matter by the two lower courts.

2. Whether the lower court (Court of Appeal, Ibadan Judicial Division) was right to have held that the trial judge, Bakare, J observed, applied and relied on the Rule in *Kojo II v. Bonsie* 1957 1 WLR p. 1223 at 1226 in the determination of the herein action and, or finding for the plaintiffs, now respondents.

3. Whether in view of the available evidence on Record from both parties, the Rule and, or principle in *Kojo II v. Bonsie* 1957 1 WLR p.1223 at 1226 applies to the instant matter and ought to have been observed, applied and relied upon in the determination of this action by the two lower courts.

4. Whether the trial court had properly evaluated the evidence of the parties and their witnesses in the herein matter as to have precluded the lower court (Court of Appeal, Ibadan Judicial Division) from disturbing the findings and judgment of the trial court.

5. Whether the lower court was right to have held or confirmed that there had been no perversion or miscarriage of justice in the findings, conclusion and judgment of the trial judge.

**HELD** (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

*Previous proceedings - Evidence of - Admissibility*

**1. This section allows a court to make use of evidence of previous proceedings where the maker is dead, cannot be found, or is incapable of giving evidence in a case where the questions in issue are substantially the same in the previous proceedings as in the present proceedings. Before this can be done the facts must be pleaded. This subsection is also applicable where the judgment relied on has been set aside on appeal and even where a retrial is ordered. If on the contrary the judgment relied on was held to be a nullity for lack of jurisdiction such a judgment cannot be relied on under section 34(1)(c) of the Evidence Act. (p. 1904 C)**

*EVIDENCE - Examination of witnesses - Meaning*

**2. Evidence in Chief is an opportunity for the plaintiff and his witnesses to state their case on oath. Cross-examination is to test the credibility of testimony given in Evidence in Chief, while Re-examination is an opportunity for the witness to restore credibility to his testimony.** (p. 1905 D)

*LAND LAW - Title - Proof*

**3. In this case the respondents as plaintiffs relied on traditional evidence, while the appellants as defendants also relied on traditional evidence. The plaintiffs traced their genealogy to Ibaragun the founder of Ibaragun land. The defendants/appellants traced their genealogy to Kunrunmi the founder of Ikija, which is included in the area now in dispute. The onus is on the plaintiff to establish his title to land and this he does by proving acts of ownership extending over a sufficient length of time. He relies on the strength of his case and not on the weakness of the adverse party's case. It is only where evidence of traditional history is inconclusive to establish plaintiff's title that traditional history must be tested by reference to the facts in recent years as established by evidence.** (p. 1906 G)

*LAND LAW - Evidence - Rule in Kojo II v. Bonsie - Application*

**4. After a detailed review of evidence the learned trial judge found, rightly in my view that the fathers of the appellants paid Isakole (tribute) to the Ibaraguns as their customary tenants. The evidence of witnesses called by the appellants was rightly rejected by the learned trial judge for good and sufficient reason. In view of the compelling and conclusive evidence led by the respondents there was no need to rely on the Rule in Kojo II v. Bonsie & Anor supra since traditional evidence was not inconclusive. Who owns the land in dispute was easily resolved by the learned trial judge.** (p. 1907 E)

*APPEALS - Evidence - Evaluation - Findings of trial court*

**5. Evaluation of evidence comes in to forms - (a) Findings of**

**fact based on the credibility of witnesses, and (b) Findings based on evaluation of evidence.**

**In (a) an appeal court should be slow to differ from the trial judge. After all it was he that saw and heard the witnesses, he watched their demeanour and so his conclusions must be accorded some respect. But in (b) an appeal court is in as good a position as the trial court to evaluate the evidence. In both (a) and (b) the conclusion of the trial judge should be accorded much weight except found to be perverse. Trial courts receive evidence. That is perception. It is then the duty of the court 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.**  
(p. 1908 E)

#### *Actions - Proof - Onus*

**6. Ikija land falls within the land in dispute. The identity of the land is not in issue, PW 2, 3, and 4 are Ikija people. They admitted that their fathers paid Isakole (tribute) to the Ibaraguns (respondents). They further admitted that they (Ikija people) are customary tenants of the Ibaraguns. Proof in Civil cases is on preponderance of evidence. That means one sides position outweighs the other. In civil matters the onus of proof shifts from the plaintiff to the defendant and vice versa. The onus always rests on the party who would fail if no evidence is adduced on either side. Evidence led by the respondents is of such high quality that the learned trial judge was right to reject evidence led by the appellants and grant the respondent their reliefs. The Court of Appeal was correct to confirm the judgment of the trial court. Evaluation of Evidence by the learned trial judge was flawless.** (p. 1908 H)

#### *APPEALS - Concurrent findings*

**7. There was no miscarriage of justice since it is so obvious that Rules of procedure were strictly followed, and standard of proof attained to the satisfaction of the courts below and this court. The judgment of the learned trial judge was based on well examined and accepted evidence. This is a case of**

***concurrent findings by the courts below. This court rarely disturbs concurrent findings of fact but would not hesitate to set aside such findings if satisfied that there are exceptional circumstances, such as the findings are perverse, or unsupportable by evidence, or there has been a miscarriage of justice.***

B (p. 1909 D)

### **REPRESENTATION**

Dr. F. Jolaosho with Mrs. R. Ndini, for the Appellants

C Chief (Dr.) V.A. Odunaiya, for the Respondents

### **CASES REFERRED TO**

Sanyaolu v. Coker (1983) 14 NSCC 119

Ayinde v. Salawu (1989) 3 NWLR (Pt. 109) 297

D Shanu v. Afribank Nig. Plc (NO.2) (2002) 6 SCNJ 454

Owoyemi v. Adekoya (2003) 12 SCNJ 131

Onu v. Idu (2005) 5 SCNJ 23

Yusuf v. Adegoke (2007) 4 SCNJ 77

Elias v. Disu (1962) 2 NSCC 152

E Idundun v. Okumagba (1979) 9-10 SC 227

Obidiozo v. The State (1987) 18 NSCC (Pt. 2) 1239

Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 1412

Agbahomovo v. Eduyegbe (1999) 2 SCNJ 94

F Agedegudu v. Ajerifuja (1953 - 1964) 3 NSCC 89

Mogaji v. Cadbury Nig. Ltd (1985) 16 NSCC (Pt. II) 95

Are v. Ipaye (1990) 3 SC (Pt. II) 109

Obioha v. Duru (1994) 10 SCNJ 48

### **STATUTES REFERRED TO**

G Evidence Act Cap E14 LFN 2004, s. 34(1)

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

The respondents as Plaintiffs sued the appellants (defendants)

H on a writ of summons and statement of claim for:

1. A declaration that the plaintiffs are the persons entitled to customary right of occupancy in respect of the vast area of land situate lying and being of and around Idi Orogbo area, Ikija village in Ogun State of Nigeria.

2. A declaration that the 1st, 2nd and 3rd defendants are customary tenants of the plaintiffs.

3. Recovery of possession of the vast area of land situate, lying and being at and around Idi Orogbó area, Ikija village in Ogun State of Nigeria held under customary tenure in that the defendants committed acts inconsistent with and in defiance of the plaintiffs, refusing to pay annual rent/tribute and selling and leasing the said land. B

4. Declaration that all sole or leases or purported sales or leases allegedly made by the defendants were null and void.

5. Perpetual Injunction restraining the defendants from further selling or leasing the said land. The annual rental value is N500.00 C

The case was tried on pleadings. In their statement of claim the plaintiffs traced their traditional history of the land in dispute, to IBARAGUN the founder of the Ibaragun land. The defendants traced their traditional history to KUNRUNMI; seven witnesses were called by the plaintiffs, while the defendants called five witnesses. In all six documents were admitted in evidence as exhibits, Trial commenced on the 28th day of March 1994 and was concluded on the 7th of December, 1994, Judgment of the High Court (trial court) was delivered on the 23rd day of February, 1995. In that judgment the learned trial judge found: D E

*“That the ancestor of the Plaintiffs was Ibaragun while the ancestor and leader of the defendants was Kunrunmi, and that Kunrunmi paid Isakole as customary tenant to the Ibaraguns”* F

His lordship concluded that the plaintiffs are entitled to a customary right of occupancy, and granted all the plaintiff claims. The defendants lodged an appeal. It was heard by the Court of Appeal, Ibadan Division. That court affirmed the judgment of the trial court and dismissed the appeal with N5, 000 costs against the defendants/ appellants. This appeal is against that judgment. G

In accordance with well settled Rules of appellate practice briefs were filed and exchanged. The appellants brief was deemed filed on 26/3/09, while the respondents brief was deemed filed on 4/12/09. An appellant's reply brief was deemed filed on 9/2/11. Learned counsel for the appellants' formulated five issues for determination. They are: H

1. Whether the evidence, Exhibit E and F admitted by the trial court with the consent of both parties and before the two lower courts

was not a proceeding and, or judgment before the two lower courts, irrelevant and inadmissible within the purview of Section 34, sub-section (1) of the Evidence Act, Cap E 14, volume 6, Laws of the Federation, 2004 and was rightly excluded in the determination of the herein matter by the two lower courts.

B 2. Whether the lower court (Court of Appeal, Ibadan Judicial Division) was right to have held that the trial judge, Bakare, J observed, applied and relied on the Rule in *Kojo II v. Bonsie* 1957 1 WLR p. 1223 of 1226 in the determination of the herein action and, or finding for the plaintiffs, now respondents.

C 3. Whether in view of the available evidence on Record from both parties, the Rule and, or principle in *Kojo II v. Bonsie* 1957 1 WLR p.1223 at 1226 applies to the instant matter and ought to have been observed, applied and relied upon in the determination of this D action by the two lower courts.

4. Whether the trial court had properly evaluated the evidence of the parties and their witnesses in the herein matter as to have precluded the lower court (Court of Appeal, Ibadan Judicial Division) from disturbing the findings and judgment of the trial court.

E 5. Whether the lower court was right to have held or confirmed that there had been no perversion or miscarriage of justice in the findings, conclusion and judgment of the trial judge.

Learned counsel for the respondents formulated two issues.

F They are:

1. Whether evidence of a deceased in a previous case, the judgment of which was later set aside on appeal, and a new trial held without the witness being called, is still relevant in the later proceedings under section 34 of the Evidence Act, and if so, to what extent.

G 2. Whether the plaintiff/respondents tendered evidence of such quality and quantity which entitled them to the reliefs sought.

I have examined the issues formulated by both sides. I shall consider the issues formulated by the appellants' in resolving this appeal as they appear to portray their real grievance.

H At the hearing of the appeal on the 14th of February 2012 learned counsel for the appellants', Dr. F. Jolaosho adopted the appellant brief deemed filed on 26/3/09 and reply brief deemed filed on 9/2/11 and urged this court to allow the appeal, Chief (Dr.) V.A. Odunaiya adopted the respondents' brief deemed filed on 14/12/9



and urged this court to dismiss the appeal. The findings of the learned trial judge are as follows:

1. Ibaragun founded Ibaragun land which included the land in dispute,

2. Ibaragun gave land to people around to settle which settlement later become the villages which included the area known as Ikija and now in dispute. B

3. The people settled were all regarded as customary tenants and they paid tribute (Isakole).

4. The ancestors of the plaintiffs/respondents was Ibaragun while the ancestor of the defendants/appellants was Kunrunmi and that Kunrunmi paid Isakole as customary tenant to the Ibaraguns. C

5. The relationship of overlord and customary tenants descended upon the descendants of Ibaragun and Kunrunmi respectively. D

6. The claim for forfeiture succeeds and order of forfeiture is accordingly granted.

7. Since the defendants had no title, all sales, leases of purported sales or leases were null and void, and

8. The defendants are perpetually restrained from further selling or leasing the said land. E

The Court of Appeal agreed with all these findings and dismissed the appeal, I shall now consider the issues for determination of this appeal. (i.e. the issues formulated by the appellants). F

## ISSUES 1

Learned counsel for the appellants' observed that the learned trial judge was wrong not to have considered Exhibits E and F under section 34(1) of the Evidence Act, Contending that the exclusion of both exhibits occasioned a miscarriage of justice. Reliance was placed on Ikenye v. Ofune 1985 16 NSCC pt. 1 p. 379, Ayinde v. Salawu 1989 2 NWLR pt. 109 p. 297. He urged this court to resolve this issue in favour of the appellants. G

Learned counsel for the respondents' observed that since the proceedings in Exhibit E were set aside by the judgment in Exhibit F, Exhibit E is no longer relevant for any purpose whatsoever. Reliance was placed on Shofoluwe v. R. 1951 13 WACA p. 264, Alade v. Borishade 1960 5 FSC 167/168. H

The live point in issue 1 is that had the learned trial judge in-

voked section 34 (1) of the Evidence Act and relied on Exhibit E and F there would not have been a miscarriage of justice to the appellants. Section 34 (1) of the Evidence Act states that:

“Evidence given by a witness in a Judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent Judicial proceeding, or in a later stage of the same Judicial proceeding the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable.”

***This section allows a court to make use of evidence of previous proceedings where the maker is dead, cannot be found, or is incapable of giving evidence in a case where the questions in issue are substantially the same in the previous proceedings as in the present proceedings. Before this can be done the facts must be pleaded. This subsection is also applicable where the judgment relied on has been set aside on appeal and even where a retrial is ordered. If on the contrary the judgment relied on was held to be a nullity for lack of jurisdiction such a judgment cannot be relied on under section 34(1)(c) of the Evidence Act.*** See *Sanyaolu v. Coker* 1983 14 NSCC p.119, *Afribank Nig PLC v. Shanu* 1997 7 NWLR pt.514 p.601. Exhibit E is suit No.88/CV/69. It was heard in a Customary Court. His Highness Oba Samuel Adesina Gbadebo (deceased) gave evidence on the issue in his case. The customary court gave judgment against the defendant. That court said:

“In the light of this decision...I shall not grant the plaintiffs claim for forfeiture and recovery of possession but I shall allow the defendant to be in occupation provided the ownership of the plaintiffs is recognized that is by making order for the continuing the annual tribute of 4 tins of palm-oil.”

An appeal was lodged in the High Court. The appeal is Exhibit F, Suit No. AB/14A/73. The High Court said:

“The judgment of the learned president including the order as to costs is hereby set aside. As it is none of my business sitting as an appellate court to make findings of fact and I have none before me

*upon which I can enter a judgment in favour of the appellant, I must send the case back for retrial before the Egba Divisional Grade 'A' Customary Court which happily is now presided over by a new President."*

Exhibit F is the appeal against Exhibit E, Exhibit F set aside Exhibit E, Notwithstanding that Exhibit E was set aside by Exhibit F, the learned trial judge could still rely on testimony in Exhibit E by virtue of the provisions of Section 34 of the Evidence Act. The question is whether the testimony of His Highness Oba Samuel Adesina Gbadebo in Exhibit E not relied on by the learned trial judge makes any difference.

In evidence in Chief, Oba S.A. Gbadebo said: "...Ibaragun Community owns the land in dispute..."

In cross examination he said: "...I cannot tell whether the Ikija villagers pay tribute to Ibaraguns on the land."

***Evidence in Chief is an opportunity for the plaintiff and his witnesses to state their case on oath. Cross-examination is to test the credibility of testimony given in Evidence in Chief, while Re-examination is an opportunity for the witness to restore credibility to his testimony.*** Ikija villages are within Ibaragun

land, the land in dispute. The testimony of the witness in cross examination is the truth as perceived by him. It is inconclusive as to whether the Ikija villagers pay tribute to the Ibaraguns on the land in dispute. There was no miscarriage of justice by the trial court not relying on Exhibit E. The judgment of the trial court, confirmed by the Court of Appeal is correct notwithstanding the fact that Exhibits E and F were not referred to by the learned trial judge.

ISSUES 2 & 3

Learned counsel for the appellants observed that the Court of Appeal held that the trial judge applied the Rule in *Kojo II v. Bonsie* 1957 1 WLR p. 1223 contending that nowhere in the judgment of the trial court is this so, Reference was made to pages 135 and 137 of the judgment of the Court of Appeal, Learned counsel argued that both sides relied on traditional history, and evidence led was conflicting, contending that the trial court ought to have applied the Rule in *Kojo II v. Bonsie* supra. *Are v. Ipaye* 1990 3 SC pt. 11 p. 108, *Irimi v. Erhurhobara* 1991 3 SC p. 1. He submitted that facts in recent years before the judgment of the trial court ought to have been the guiding

consideration which the courts below would have found the evidence given of traditional history by the appellants more probable. He urged this court to reverse the judgment of the courts below.

Learned counsel for the respondents observed that the Court of Appeal showed a deep consideration of the traditional history of both parties the acts of recent possession of the plaintiffs and employed the rule in *Kojo II v. Bonsie* supra. He submitted that this court is urged to hold that the learned trial judge took the proper approach as suggested in the case of *Kojo II v. Bonsie* supra in that the trial court considered ]the evidence adduced on both sides of acts of ownership in recent year before concluding that plaintiffs/respondent traditional history was more probable.

The issues have two sides.

1. Whether the trial judge applied the Rule in *Kojo II v. Bonsie* 1957 1 WLR p. 1223.

2. Whether the Rule in *Kojo II v. Bonsie* (supra) should be applied in this case.

Ownership of land may be proved in any of the following five ways:

1. by the traditional evidence;
2. by production of documents of title which are duly authenticated;
3. by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it;
4. by acts of long possession and enjoyment of the land; and
5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute. *Idundun v. Okumagba* 1976 9- 10 SC 227, *Piaro v. Tenalo* 1976 12 SC 31, *Omoregie v. Idugemwanye* 1985 2 NWLR Pt. 5 41.

***In this case the respondents as plaintiffs relied on traditional evidence, while the appellants as defendants also relied on traditional evidence. The plaintiffs traced their genealogy to Ibaragun the founder of Ibaragun land. The defendants/appellants traced their genealogy to Kunrunmi the founder of Ikija, which is included in the area now in dispute. The onus is on the plaintiff to establish his title to land and this he does by proving acts of ownership extending over a sufficient length***

**of time. He relies on the strength of his case and not on the weakness of the adverse party's case. It is only where evidence of traditional history is inconclusive to establish plaintiff's title that traditional history must be tested by reference to the facts in recent years as established by evidence.**

In the case of *Kojo II v. Bonsie & Anor* 1957 1 WLR p.1223<sup>B</sup> the Privy Council explained the position in these words:

*"The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard it must be recognized that, in the course of transmission from generation to generation mistakes may occur without any dishonest motives whatever, witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the more probable."*<sup>C</sup>

This is the Rule in *Kojo II v. Bonsie* Supra, and it has been<sup>E</sup> followed repeatedly in our courts. See *Ekpo v. Ita II* NLR p. 68, *Okiji v. Adejobi* 1960 5 FSC p. 44, *Jegede v. Gbajumo* 1974 10 SC p. 183. **After a detailed review of evidence the learned trial judge found, rightly in my view that the fathers of the appellants paid Isakole (tribute) to the Ibaraguns as their customary tenants. The evidence of witnesses called by the appellants was rightly rejected by the learned trial judge for good and sufficient reason. In view of the compelling and conclusive evidence led by the respondents there was no need to rely on the Rule in *Kojo II v. Bonsie & Anor* supra since traditional evidence was not inconclusive. Who owns the land in dispute was easily resolved by the learned trial judge.**<sup>F</sup>

On whether the learned trial judge applied the Rule in *Kojo II v. Bonsie & Anor* supra, this is what that court had to say:<sup>H</sup>

*"...In my view, the traditional history of the Ibaraguns is conclusive and acceptable. I accept it as against the inconclusive and unreliable story narrated by the defendants."*

In *Ihiri v. Erhubobara* 1991 2 NWLR pt. 173 p.252 it was said

that where the traditional history is inconclusive the learned trial judge is estopped to accept one side of evidence against the other conflicting side of evidence. If the evidence of traditional history is conclusive a trial judge is entitled to accept it as against evidence of traditional history which is in conflict and it is not supported by evidence of recent acts of possession.

The above shows clearly that the learned trial judge accepted the traditional history of the respondents, as conclusive and accepted it. The judge had no need to apply the Rule. Reference by the Court of Appeal to the Rule was unnecessary as the facts and circumstances of this case are clear, I am satisfied also that reference by the Court of Appeal to the Rule in *Kojo II v. Bonsie & Anor supra* has not led to a miscarriage of justice since the case was resolved on sound evidence.

#### ISSUES 4 AND 5

Learned counsel for the appellants submitted that the learned trial judge failed to properly evaluate the evidence of both parties and this resulted in erroneous and wrong finding for the respondents, and the Court of Appeal failed to interfere with the said findings. He urged this court to allow the appeal. Learned counsel for the respondents observed that the courts below showed deep consideration of the traditional history of both parties and came to the correct finding. He further observed that there is no evidence of perversion or miscarriage of justice. He urged this court to dismiss the appeal.

***Evaluation of evidence comes in to forms - (a) Findings of fact based on the credibility of witnesses, and (b) Findings based on evaluation of evidence.***

***In (a) an appeal court should be slow to differ from the trial judge. After all it was he that saw and heard the witnesses, he watched their demeanour and so his conclusions must be accorded some respect. But in (b) an appeal court is in as good a position as the trial court to evaluate the evidence. In both (a) and (b) the conclusion of the trial judge should be accorded much weight except found to be perverse. Trial courts receive evidence. That is perception. It is then the duty of the court 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.***

***Ikija land falls within the land in dispute. The identity of***

***the land is not in issue, PW 2, 3, and 4 are Ikija people. They admitted that their fathers paid Isakole (tribute) to the Ibaraguns (respondents). They further admitted that they (Ikija people) are customary tenants of the Ibaraguns. Proof in Civil cases is on preponderance of evidence. That means one sides position outweighs the other. In civil matters the onus of proof shifts from the plaintiff to the defendant and vice versa. The onus always rests on the party who would fail if no evidence is adduced on either side. Evidence led by the respondents is of such high quality that the learned trial judge was right to reject evidence led by the appellants and grant the respondent their reliefs. The Court of Appeal was correct to confirm the judgment of the trial court. Evaluation of Evidence by the learned trial judge was flawless.***

Miscarriage of justice occurs when the court fails to do justice. D  
See Nnajofo v. Ukonu 1986 4 NWLR pt.36 p.505, Amadi v. NNPC 2000 10 NWLR pt.674 p. 76. ***There was no miscarriage of justice since it is so obvious that Rules of procedure were strictly followed, and standard of proof attained to the satisfaction of the courts below and this court. The judgment of the learned trial judge was based on well examined and accepted evidence. This is a case of concurrent findings by the courts below. This court rarely disturbs concurrent findings of fact but would not hesitate to set aside such findings if satisfied that there are exceptional circumstances, such as the findings are perverse, or unsupportable by evidence, or there has been a miscarriage of justice.*** See Iroegbu v. Okwordu 1990 6 NWLR pt. 159 p. 643, Balogun v. Adejobi 1995 2 NWLR pt.376 p. 131. The findings by the learned trial judge, confirmed by the Court of Appeal that the respondents are the owners of the land in dispute and the appellants are the customary tenants of the respondents are not perverse. They were findings based on compelling and conclusive evidence. G

This appeal is dismissed with costs of N50, 000, 00 to the respondents. H

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### ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of

my learned brother RHODES-VIVOUR, JSC just delivered. I agree with his reasoning and conclusion that the appeal is devoid of merit and deserves to be dismissed.

The appeal is basically on the facts of the case as found by the trial judge and affirmed by the lower court on appeal. The instant  
B appeal is therefore one grounded on concurrent findings of facts. It is settled law that this court, the supreme court of Nigeria, does not make a practice of interfering with concurrent findings of facts except appellant adduces special reasons that would compel the court to  
C interfere by setting aside the said findings. The special circumstances or reasons which may persuade the court to so interfere include an existence on the face of the record of substantial error committed by the lower courts; that the said decision is not supported by evidence which we also describe as a perverse decision; or that it was reached  
D on application of wrong principle(s) of substantive law or procedure, etc. See *Awoniyi V. Shodeke* (2006) 8M JSC 34 at 49. *Omoboriola V. Military Governor of Ondo State* (1998) 14 NWLR (pt. 584) 89 at 107.

I have gone through the argument on all the five issues raised  
E in this appeal by learned senior counsel for appellants and have not seen where learned Counsel demonstrated that the instant appeal falls within any or a combination of the exceptions to the general rule of non interference with concurrent findings of facts to justify a disturbance of the said findings by this Court. I am therefore satisfied  
F that this is not one of the appropriate cases where this Court should interfere with the said findings.

It is for the above and the more detailed reasons contained in the said lead judgment of my learned brother RHODES-VIVOUR,  
G JSC, that I too dismiss the appeal and abide by the consequential orders made in the said lead judgment, including the order as to costs. Appeal dismissed.

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H **MUHAMMAD JSC**

I read the judgment just delivered by my learned brother, Rhodes-Vivour, JSC. I agree with him in his conclusion. I adopt his reasoning and abide by the orders made therein.



**PETER-ODILI JSC**

This is an Appeal by the substituted named Defendants/Appellants for the Original deceased named Defendants/Appellants by order of this Court made on 22nd day of April, 2008 against the Judgment of the Court of Appeal, Ibadan Judicial Division which upheld the judgment of Hon. Justice G. Ademola Bakare of the High Court of Justice, Shagamu Judicial Division in the transferred matter from Otta Judicial Division of Ogun State High Court in Suit NO. HCT/169/82 between Chief Hassan Sogunro & others v. Suberu Omitogun & others. B  
C

In the action before the High Court, the Plaintiffs claimed against the Defendants jointly and severally is for:-

(a) A DECLARATION that the plaintiffs are the persons entitled to a customary right of occupancy in respect of the vast area of land situate, lying and being at and around Idi-Orogbo Area, Ikija Village in Ogun State of Nigeria.

(b) A DECLARATION that the 1st, 2nd and 3rd Defendants are customary tenants of the Plaintiffs.

(c) Recovery of possession of the vast area of land situate, lying and being at around Idi-Orogbo Area, Ikija Village in Ogun State of Nigeria held under customary tenure in that the Defendants committed acts inconsistent with and in defiance (sic) of the plaintiffs' title to the said land namely denying the title of the plaintiffs, refusing to pay annual rent/tribute and selling and leasing the said land. E  
F

(d) A DECLARATION that all sales or leases allegedly made by the defendants were null and void.

(e) PERPETUAL INJUNCTION restraining the defendants from further selling or leasing the said land. G

The Annual Rental Value is N500.00k. For a better understanding it seems necessary to recapture the Statement of Claim of the Plaintiffs at the Court of trial, viz:-

**STATEMENT OF FACTS:**

(a) IBARAGUN (Hereinafter referred to as the "Founder") was a Hunter who migrated from Ile-Ife with his wife called POROYE and his slaves namely, Orisadare, Ogunbunmi and Orisapekun. H

(b) The founder left Ile-Ife on the instruction of Ifa deity which instructed him to depart Ile-Ife for a new settlement to stem the ca-

lamities which befell the founder and his wife as a result of the death of their children.

(c) The founder embarked on the journey and travelled through many places carrying on his hunting expedition along the route until the Founder arrived at Aro where the Found, his wife and his slaves  
B stayed for a short period.

(d) The Founder, his wife and slaves departed from Aro and continued their journey until they arrived at a place called Paree. This is where the Founder first settled near the stream called Paree with his  
C wife and slaves.

(e) The founder regularly went on hunting expedition from PAREE into the forest while leaving his wife and slaves at Paree. While on one of his expeditions, the founder founded the Village called Itakanna.

(f) The Founder was at Itakanna when the Dahomey war broke out and the Founder erected wall round the Village called Itakanna. The wall is still there up till now. The founder cultivated farms and built huts at Itakanna.

(g) The founder gave birth to four children namely Arosere,  
E Odunjo, Kumuyi and Abogunde.

(h) The Founder, his wife, children and slaves later migrated from Itakanna until they arrived at a place beside the Ogun River. The Founder and Members of his entourage settled at this new place and its environs and the Founder called "the new settlement  
F "Ibaragun."

(i) The founder carried hunting expedition into the forest near Ibaragun and established small huts in such forest where he stayed for days on hunting expedition. The founder made settlement in such  
G places.

(j) The founder killed elephants and cut into pieces at the Ikija where he had hunts and this is the reason that fowls are not rear at all at Ijika. Some of the villages where the founder established settlements are now called Ikija Ajangboju, Ntabo, Salu and Orogbe, Oba  
H Karounwi, Oba Oke, Oba Oseri, Ilate, Magbon Agbawon, Church, Agbawon Etido, Agbawon Oniyan, Lisa, Olayemi, Demokula, Alapandi, Iyedi, Iyedi Balogun, Ishola, Arugudu, Asaa, Alagbe, Ayegebe, Shonde Inikosi, Yawota, Ijere.

(k) Later, strangers came and met the Founder at Ibaragun

and the Founder granted land at his Settlements to the strangers for farming Purposes.

(l) The Founder granted the land at Ikija first to one Kunrunmi from Abeokuta and one Ogungbade was later introduced to the Founder by Kunrunmi and the founder granted Ogungbade land at Ikija too. Both Kunrunmi and Ogungbade were paying Tributes of yam, maize, beans and oil to the Founder. Kunrunmi was a Hunter who migrated from Ikija Abeokuta to Ibaragun. Kunrunmi asked for Land and was granted land at Ikija by the Founder for Kunrunmi's farming and hunting expeditions.

(m) The Successors of Junrunmi and Ogungbade were paying Tributes to the Children of the Founder. And other Customary Tenants of whom were granted land at Ikija village were paying Tributes - yams, maize and beans to the children of the Founder.

(n) The Plaintiffs equally stated that in about 1967, the then Baale of Ikija Village, Bisiriyu Ilo let the customary tenants at Ikija village to challenge the over lordship of the Plaintiffs and refused to pay tribute to the Plaintiffs.

(o) That the Predecessors-in-title of the Plaintiffs instituted an action against the People of Ikija under Bisiriyu Ilo and the people of Ikija Village.

(p) That some customary tenants at Ikija village still acknowledge the over lordship of the Plaintiffs, but that the Defendants (now Appellants) denied the over lordship of the Plaintiffs and that the Defendants embarked on massive sale and alienation of the land in dispute without the authority and consent of the Plaintiffs.

(q) The Plaintiffs, now Respondents, in paragraphs 14 (a) to (g) of the Statement of Claim, traced the genealogy of the plaintiffs from the Ibaragun till the present named Plaintiffs and thereafter averred at paragraph 15 of the Statement of Claim that they are the Customary Owners of the land in the villages surrounding, or adjacent to the land in dispute.

(r) The Plaintiffs then stated that they plead and will at the trial rely on proceeding and judgment in Suit No. 88CV/69, Between Chief Suberu Ajibawo & Others v Bisiriyu Ilo.

The Further Amended Statement of Defence is as follows:-

(a) The land in dispute was first settled upon by Kunrunmi who founded it and named it "*IKIJA AFALU*", now known as "*IKIJA*

*VILLAGE”.*

(b) Kunrunmi was a Hunter who migrated from Ikija, Abeokuta, after leaving Orile Ikija in the first instance.

(c) Kunrunmi killed an Elephant in Ikija Afalu where he cut some into pieces and for this reason fowls are never reared at Ikija Village.

(d) Upon the founding of Ikija Afalu, Kunrunmi invited Ogungbade and Akinlatun both of whom were hunters and farmers, to settle with him at Ikija and its environs.

(e) Kunrunmi equally invited Lugbojo and Samuel Peters to settle with him. Samuel Peters later settled in a vicinity of Ikija Afalu called Ebute Samuel, a place named after him.

(f) Kunrunmi and his associates from Ikija, Abeokuta established other villages around Ikija, including Ntabo, Orogbe, Alatise Ajangboju, Andiri, Longo, Aboleja, Etimeta Koyeri and Ebute Samuel.

(g) The Bisiriyu Ilo who was sued in Suit NO: 88CV/69 was never Baale of Ikija upon the demise of Baale Akiode before Raji Soyoola was installed as Baale.

(h) Kunrunmi exercised various acts of ownership on the said parcel of land in dispute which has the following places/areas as its boundaries:

(i) At the right side, it is bounded by land of Orudu Oluwa and Agira families;

(ii) On the front side, it is bounded by land of Orudu Oluwa and Orudu Agira families;

(iii) At the back, it is bounded by Igboire land and old Ibaragun settlement where Igboire people settled the Ibaraguns before the disaster befell them about 40 years ago.

(i) According to the Defendants, the Ibaraguns popularly referred to as “Depes” by Egbas were fishermen who were settled on the shores of Lawariwa Stream by Igboire people who are also Egba indigenes from Abeokuta.

(j) That about 40 years ago, the sheds of Ibaraguns where the Ibaraguns lived and carried out their fishing expedition were overrun by water waves and rendered them homeless.

(k) That Ikija Community used to alienate land to deserving persons in their capacity as owners of the parcels of land at Ikija village as they did to the Ibaraguns when they were in need.

(l) That the Ibaraguns after the disaster approached the then Baale of Ikija for land to settle upon and on compassionate ground, both the Baale and his Chiefs-in-Council agreed to allow them to settle on part of their land.

(m) That in response, the Defendants' ancestors thereafter collected from the Plaintiffs' ancestors two bottles of Schnapps and blessed them on the land. B

(n) According to the Defendants/Appellants, since then both communities have been living together amicably and intermarrying each other until sometime later when some Ibaraguns began to feel ashamed of their status as Customary Tenants who could not sell or alienate land at Ikija, they eventually began to make trouble with the Ikija people whose ancestors were their overlords. C

**FACTS BRIEFLY STATED:-**

By a Writ of Summons dated 5th day of November, 1992, the then Plaintiffs/Respondents Counsel, Chief B. F. Adeeko on 5th day of November, 1992 filed at the High Court of Justice of Ogun State, Otta Judicial Division, the suit, wherein the Named Plaintiffs/Respondents, in a Representative capacity on behalf of themselves and the People of Ibaragun Community, claimed amongst other things, namely, Declaration of title to Customary Right of Occupancy in respect of vast area of land situate, lying and being at Idi-Orogbo area, Ikija Village in Ogun State; Declaration that the Defendants are customary Tenants of the Plaintiffs; Recovery of possession of the land and Perpetual Injunction etc. E F

The fore-stated plaintiffs/Respondents sued originally (i) Suberu Omitogun (Baale of Ikija) (ii) Aileru (iii) Salisu Alajo in a Representative capacity on behalf of themselves and the People of Ikija community. The plaintiffs/Respondents filed 20 paragraphs Statement of Claim, wherein they relied heavily as their root of title-traditional evidence, tracing their descent to their founder and 1st Settlor, Ibaragun, whom they claimed migrated from Ile-Ife with his wife called Poroye and his three slaves, namely, Orisadare, Ogunbunmi and Orifapekan, whilst the Defendant/Appellants originally filed 25 paragraphs Statement of Defence, which was later amended with leave of the Trial Court, and of which the Amended Statement of Defence was of 25 paragraphs, having only the addition of paragraphs 9A and 10A in the Amended Statement of Defence, wherein the Defendants/Appel- H

lants equally had as their root of title, traditional evidence, tracing their descent to their founder and settler, Kunrunmi, who upon finding and, or settling on the land, named the area as Ikija Afalu, now Ikija Village.

At the hearing, after close of pleadings, the Plaintiffs/Respondents called 7 witnesses, whilst the Defendants/Appellants called 5 witnesses in proof of averments in their respective pleadings. The defendants/appellants thereafter with leave of the trial Court filed a Further Amended Statement of Defence dated 4/11/94 on 7/11/94. Still at the hearing, the trial court, at the request of and with the consent of both parties through their respective counsel, admitted in Evidence (i) the Certified True Copy of the Judgment of the then Abeokuta Grade A Customary Court, Ake, Abeokuta in Suit NO. 88CV/69, as Exhibit “E” and (ii) the Judgment of the then Western State High Court, Abeokuta Judicial Decision, presided over by Hon. Justice Agbaje, in Suit/Appeal NO. AB/14A/73 respectively as Exhibit “F”, Between Chief Suberu Ajibawo and Others (Plaintiffs) v. Bisiriyu Ilo (Defendants), the fore-fathers of the Plaintiffs/Respondents and Defendants/Appellants, in respect of the same property and subject matter as in the instant matter decided by Bakare, J and Appeal herein, along with Composite Survey Plans presented by the parties earlier admitted as Exhibits A, B, C and D etc.

Upon conclusion of receipt of evidence in support of pleadings from both parties, the trial judge gave counsel to both parties opportunity to address court, and upon conclusion of address, in the course of writing his Judgment, the trial Court considered and made use of only Exhibits A, B, C and D, but excluded or did not consider at all, not to talk of making use of, Exhibits ‘E’ and ‘F’ substantially relied upon by the defendants/appellants in support of their case, and thereafter found for and, or gave judgment for the Plaintiffs/Respondents herein. Dissatisfied with the Judgment, the defendants, through a new counsel, appealed against the Judgment of the High Court, by filling a Notice of Appeal dated 20th day of February, 1995 on 19th of May, 1995 to the Court of Appeal, Ibadan Judicial Division. And on 24th November, 2000, with the leave of court, the defendants/appellants filed Amended Notice of Appeal, wherein the Grounds of Appeal were amended.

In accordance with the Rules of the Court of Appeal, the Ap-

pellants filed Appellants' Brief of Arguments on 26th February, 2002, whilst the plaintiffs/respondents filed Respondents' Brief of Arguments on 9th August, 2002, of which on 8th May, 2003, the Court of Appeal heard the Appeal and delivered the Judgment of the court on 8th July, 2003. The Appellants, being dissatisfied with the Judgment of the Court of Appeal, filed Notice of Appeal to the Supreme Court on 6th October, 2003 through their then counsel, O. Ayanlaja, SAN. And upon receipt of Record of Appeal from the Court of Appeal to the Supreme Court, the appellants changed their counsel to the Chambers of Messrs Femi Jolaoso Chambers. And the new counsel, Comrade Femi Jolaoso on 17th December, 2007, filed NOTICE OF DEATH OF NAMED DEFENDANTS/APPELLANTS; Motion on Notice for amongst other Orders, Leave to substitute the Named applicants for all the deceased Appellants, to represent themselves and the entire people of Ikija Community for purpose of appealing against the Judgment of Court of Appeal to the Supreme Court; Other of the Court granting the Appellants/Applicants LEAVE to amend the Notice of Appeal and for LEAVE to appeal against the concurrent findings of both the Trial Court and the Court of Appeal, together with Affidavit in Support of Motion and Brief of Arguments. And on 22nd April, 2008, the Supreme Court, Coram Niki Tobi JSC, G.A. Oguntade, JSC, M. Mohammed, JSC, F. F. Tabai and J. O. Ogebe, JSC granted all the seven Reliefs/Orders as prayed on the Motion paper. On April 23rd, 2008, in accordance with the aforesaid Orders of the Court granted the Amended Notice of Appeal was duly filed and had since been served.

#### JUDGMENT OF THE HIGH COURT:

On Thursday, the 23rd day of February, 1995, Justice G. ADEMOLA BAKARE, the trial Judge who had before then got transferred from Otta Judicial Division to Shagamu Judicial Division of Ogun State High Court, delivered his Judgment in the Suit. In the Judgment, His Lordship, Bakare, J, found and, or held amongst other things in favour of the Plaintiffs/Respondents at pages 21 to 22 of the Record as follows:-

*“(a) Ibaragun founded Ibaragun land which included the land in dispute;*

*(b) Ibaragun gave land to people around to settle which settled later became the mentioned villages which included the area*

now known as Ikija and in dispute;

(c) *The people settled were all regarded as customary Tenants and they paid Tribute (Isakole);*

(d) *The Ancestors of the plaintiffs was Ibaragun while the Ancestor of the Defendants was Kunrunmi and that Kunrunmi paid Isakole as customary tenant to the Ibaraguns;*

(e) *The relationship of overlord and customary tenants descended upon the descendants of Ibaragun and Kunrunmi respectively;*

(f) *The claim for forfeiture succeeds and order of forfeiture is accordingly granted;*

(g) *Since the Defendants had no title, all sales, leases of purported sales or leases were null and void; and*

(h) *The Defendants perpetually restrained from further selling, or leasing the said land.*”

JUDGMENT OF THE COURT OF APPEAL IBADAN JUDICIAL DIVISION:

On Tuesday the 8th day of July, 2003, the Court of Appeal, Ibadan Judicial Division, Coram: Victor A.O. Omake (Presiding) Francis Fedode Tabai, JCA and O. O. Adekeye, JCA delivered the Judgment of the Court in the Appeal of the Appellants. In the Judgment, their Lordships at pages 132 to 138 of the Report amongst other things dismissed the appeal of the Appellants, found and:-

“(a) *The Judgment of the Court below showed a deep consideration of the traditional history of both parties the acts of recent possession of the plaintiffs and employing the rule in KOJO V. BONSIE.*

(b) *The testimony of the plaintiffs even before the Defendants so deposed showed that Kunrunmi the Ancestor of the Defendants met Ibaragun on Ikija land and that the said Kunrunmi paid tribute over to Ikija land to Ibaragun.*

(c) *The only purpose that the Record of proceedings in the previous proceedings between the same parties can be used for is to cross-examine the witness.*

(d) *The Court below dutifully with knowledge of the law of evidence did not use the contents of Exhibit ‘F’ since its contents are not relevant to the proceedings on which he presided because it is wrong to treat evidence or testimony given by a witness in a previous*



*suit when that witness is not seen, heard or cross-examined.*

*(e) There is no perversion or miscarriage of justice in the conclusive of the trial Court.”*

On the day of hearing, 14th February, 2012, learned counsel for the Appellants adopted their Brief settled by Femi Jolaoso filed on 24/9/08 and deemed filed on 26/3/09. Also adopted is the Reply Brief filed on 22/10/09. In the appellants' Brief were couched five issues for determination as follows:-

(i) WHETHER the Evidence, Exhibit 'E & F' admitted by the Trial Court with the consent of both parties and before the two Lower Courts was not a proceeding and, or Judgment before the two Lower Courts, irrelevant and inadmissible within the purview of section 34, Sub-section (1) of the Evidence Act, Cap. E14, Volume 5, Laws of the Federation, 2004 and was rightly excluded in the determination of the herein matter by the two Lower Courts.

(ii) WHETHER the lower Court (Court of Appeal, Ibadan Judicial Division) was right to have held that the trial Judge, Bakare, J. observed, applied and relied on the Rule in KOJO II v. BONSIE (1957) 1 W.L.R. 1223 at 1226 in the determination of the herein action and, or finding for the Plaintiffs, now Respondents

(iii) WHETHER in view of the available Evidence on Record from both parties, the Rule and, or Principle in KOJO II v. BONSIE (1957) 1 W.L.R. 1223 at 1226 applied to the instant matter and ought to have been observed, applied and relied upon in the determination of this action by the two lower Courts.

(iv) WHETHER the Trial Court had properly evaluated the evidence of the parties and their witnesses in the herein matter as to have precluded the lower Court (Court of Appeal, Ibadan Judicial Division) from disturbing the findings and judgment of the trial Court.

(v) WHETHER the lower Court was right to have held or confirmed that there had been no perversion or miscarriage of justice in the findings, conclusion and judgment of the trial Judge.

Learned counsel for the respondents adopted their Brief filed on 13/1/09 and deemed filed on the 14/12/09 and in the Brief was formulated two issues for determination, viz:-

1. Whether evidence of a deceased in a previous case the judgment of which was later set-aside on appeal, and a new trial held without the witness being called proceedings under Section 34 of the

Evidence Act, and if so, to what extend?

2. Whether the plaintiff/respondents tendered evidence of such quality and quantity which entitled them to the reliefs sought?

Learned counsel for the Appellants, Dr. Jolaoso submitted that by the facts shown in evidence and the proceedings contained in the judgment in the previous proceedings as contained in Exhibits “E” and “F” apart from being relevant duly satisfied the proviso (a) of Section 34 (1) of the Evidence Act and so the afore stated evidence should not have been excluded in the determination of the matter by the trial court and on appeal by the Court below. He cited *Sanyaolu v. Coker* (1983) 14 NSCC 119; *Ayinde v. Salawu* (1989) 3 NWLR (Pt. 109) 297; *Francis Shanu v. Afribank Nigeria Plc* (NO.2) (2002) 6 SCNJ 454 at 477; *Owoyemi v. Adekoya* (2003) 12 SCNJ 131 at 149; *Onu v. Idu* (2005) 5 SCNJ 23 at 38 - 39; *Yusuf v. Adegoke* (2007) 4 SCNJ 77 at 98 - 99. That it is settled law that evidence wrongly excluded by the two Courts below can be re-admitted, re-suscitated and made use of by this court on appeal, particularly when its exclusion has occasioned a miscarriage of justice by the failure of the two courts to make use of the said evidence of *Oba-Adesina Gbadebo II* of *Egba* land, favourable to the appellants in the evaluation, weight and probative value to be attached. He cited *Elias v. Disu* (1962) 2 NSCC 152 at 154; *Idundun v. Okumagba* (1979) 9 - 10 SC 227; *Obidiozo v. The State* (1987) 18 NSCC (Pt. 2) 1239 at 1248; *Udeze v. Chidebe* (1990) 1 NWLR (Pt. 125) 1412; *Gbafe V. Gbafe* (1996) 167 at 177; *Agbahomovo v. Edueyegbe* (1999) 2 SCNJ 94 at 104 - 106.

Dr. Jolaosho of counsel stated further that it was erroneous for the Court of Appeal to have ascribed the application of the principle of *Kojo II v. Bonsie* (1957) 1 WLR 1223 at 1226 when the trial court did not do so. That the two Courts below were under a duty to find which of the two histories proffered by the parties was more probable after testing each against the other available evidence in the case. He cited *Agedegudu v. Ajerifuja* (1953 - 1964) 3 NSCC 89 at 94; *Mogaji V. Cadbury (Nig.) Ltd* (1985) 16 NSCC (Pt II) 95 at 991; *Are v. Ipaye* (1990) 3 SC (Pt II) 109 at 123; *Obioha v. Duru* (1994) 10 SCNJ 48 at 58. That when the court can neither find any of the two histories probable or conclusive that the court would declare both inconclusive and proceed to decide the case on the basis of

numerous and positive acts of possession and ownership. He referred to *Lawal v. Dawodu* (1972) 7 NSCC 515 at 529; *Mogaji v. Cadbury (Nig.) Ltd.* (1995) 16 NSCC (Pt. II) 959 at 991; *Balogun v. Akanji* (1988) 1 NWLR (Pt.70) 301 at 315.

Learned counsel for the Appellants stated that this is a proper case for the intervention of the appellate court in the evaluation and findings of the Courts below as those findings came out of improper evaluation and exclusion of valuable pieces of evidence. Also there was a miscarriage of justice. Chief Odunaiya for the Respondents submitted in response said the proceedings in Exhibit 'E' having been set aside in judgment Exhibit 'F' is no longer relevant for any purpose whatsoever and so it cannot be used to import Section 34 of the Evidence Act since the requirements for its application have not been met. He referred to *Alade v Borishade* (1950) 5 FSC 167/168; *Shofoluwe V. R* (1951) 13 WACA 264. That with the exclusion of Exhibits 'E' and 'F', this Court is urged to hold that the trial Court took the proper approach as suggested in the case of *Kojo II v. Bonsie* (1957) 1 WLR 1123 when it considered the evidence adduced on both sides of acts of ownership in recent years before concluding that plaintiff's traditional history was more probable. That the Court of Appeal was right to have affirmed what the trial court did. He further contended that it is now trite that where evidence of traditional history has failed as in this case, evidence of long possession built on that traditional history also fails. That long possession by a customary tenant does not confer title to the land in the tenant's family. He cited *Dagaci of Dere v. The Dagaci of Ebwa* (2006) 2 FWLR (pt.311) 2433 at 2488; *Suleiman v. Hannibal Johnson* (1951) 13 WACA v. 213 at 215; *Sasay v. New Independent Rubber Ltd* (1977) SC 143.

For the Respondents was submitted that the issue of Limitation raised by Defence counsel in his final address cannot apply as it was not raised in the pleadings. Also Limitation Law does not apply to any claim founded on customary land tenure as a grant under customary law is a grant in perpetuity and can only be revoked on attempted alienation, abandonment or challenge of overlord's title. He cited *Abraham v. Olorunfemi* (1992) 1 NWLR (Pt. 165) 53 at 70; *Mora v. Nwalusi* (1962) 1 All NLR 682; *Muemue v. Gaji* (2000) FWLR (Pt. 15) 2764 at 278. He concluded by saying that this appeal is on concurrent findings of the two Courts below and the reason for this

interference with those findings can only be where it is shown that there was substantial error on the face of the record, decision not supported by evidence or procedure or on findings which are perverse. He referred to Awoniyi v. Shodeke (2006) Vol. 8 MJSC 34 at 49; Omoboriola II v. Military Governor of Ondo State (1998) 14 B NWLR (Pt. 584) 89 at 107.

The Reply Brief of the Appellants is clearly a rehash of the earlier arguments and nothing new on law. The above being the summary of the submissions of counsel on either side of the divide, C each urging for a finding of this Court in his favour. The bullet points of each counsel's position are as follows:-

For the Appellants the exclusion of Exhibits 'E' and 'F' by the trial High Court and supported by the Court of Appeal led to the trial Court's wrong evaluation of the evidence before it which lacked the D material evidence which would have changed the course of events. The Court of Appeal did not agree with that point of view as it went along with the stance of the Respondent that those Exhibits were strangers to the proceedings under review and the trial court was right to have had them excluded or expunged.

E These two contending postures make it necessary to showcase what the Court below did base on their review or consideration of the earlier proceedings in the Court of trial and so I would like to quote verbatim and maybe at the risk of verbosity quote extensively F from that judgment upon which this appeal is based so that the line of thought is better viewed within an environment of a brighter light. That judgment of the Court of Appeal which lead was made by V. A. O. Oimage JCA are as follows:-

G *"The Judgment of the Court below showed a deep consideration of the traditional history of both parties, the acts of recent possession of the plaintiffs, and employing the rule in KOJO v. BONISIE, 1957 10 WLR. The court ruled in favour of the plaintiffs, and granted all the reliefs sought by the plaintiffs. It is against this ruling that the appellants have submitted that the quality of evidence tendered by H the plaintiff now respondent did not entitle the respondent to the judgment granted in their favour. The respondent has also asked whether the appellants' averment is correct.*

*It is preferable to commence the consideration of the issues by putting into focus the real issues determined; and the evidence be-*

fore the Court below. The introduction into the proceedings in the Court below matters which the Court below did not rightly considered by the appellant made the respondent to formulate issue one which will be considered presently. In his brief filed on 28/2/02, the appellant surreptitiously introduced as matters before the Court below, the averment that the Court below had to determine the issue before it as to whether plaintiffs were uncertain that ancestor of the plaintiff now respondent was the first settler of Ibaragun. There was no such uncertainty in the testimonies of the plaintiffs and their witnesses that their ancestor was the first settler in Ibaragun. The defendant did not file a counter claim; the defendant only offered a defence that their ancestor called Kunmi, settled in Ikija. The testimony of the plaintiff even before the defendant so deposed; showed that Kunmi the ancestor of the defendants met Ibaragun on Ikija land, and that the said Kunmi paid tribute over Ikija land to Ibaragun. The appellants' brief contained more salient issues on which he relied for his submission which did not feature in the evidence before the court. This leads inevitably to wrong submissions and conclusions in the appellants' brief. For instance the appellants' quoted extensively and relied on Exhibit 'F', tendered in the proceedings but which was not used to cross examine any of the witnesses. Exhibit 'F' is the record of the proceeding in the customary court in Suit No. 88/W/69. The defendant proceeded to appeal on the judgment which favoured the respondent; the Court below reportedly set aside the proceedings in the customary court. The evidence therein became null and void and cannot be used as evidence in a subsequent proceeding unless the witness is dead or cannot be found; see section 34; now Section 35 Evidence Act Cap 112; Laws of the Federation of Nigeria. The only purpose that the record of proceeding in the previous proceedings between the same parties can be used for is to cross examine the witness. See *ARIRU v. AJIWOGBO* 1962, 1 All NLR 629 - 630. The said exhibit F was never referred to in the proceedings in the Court below besides it being tendered and admitted in evidence. The court below dutifully with knowledge of the law of evidence did not use the contents of Exhibit 'F', since its contents are not relevant to the proceedings on which he presided because it is wrong to treat evidence or testimony given by a witness in a previous suit when that witness is not seen, heard or cross-examined. See

*LAWAL OBAWOLE v. B. COKER 1994, 5 NWLR (Pt. 416).*

*The appellants have in their brief treated as evidence the contents of Exhibit 'F', in the proceeding before the Court below when the appellant quoted the evidence of the late Oba Alake in the earlier proceedings, as it the late Oba Alake testified before the Court below in the matter on which this appeal is filed. The evidence is irrelevant in the proceedings in the court below, unhappily the appellant had founded his submission on the wrong and irrelevant evidence which did not feature at all in the Court below, and the learned trial court did not rely on it for determination of the claim. In this appeal, the court will consider only the issues upon which the court made its findings and conclusion.*

*The submission of the appellant which introduced the contents of Exhibit 'F' is mischievous if not mischievous; it is struck out.*

*Issue one of the respondent succeeds; the issue is resolved against the appellant. As recorded above, both the appellant in his sole issue, and the respondent in his issue two asked whether the plaintiffs' tendered evidence of quality and quantity to be entitled to the relief sought; and obtained. What is the evidence tendered by the parties in the Court below, I will consider this before the value of the evidence, that is to say whether the evidence is probative in being credible or not contrary to the statement contained in the appellants' brief the plaintiffs in the Court below had pleaded; and had no doubt as tendered in the evidence before the court that Ibaragun was the founder of the land in issue, including Idi Orogbo Ikija, Italo and the other named neighbouring villages. The plaintiffs and the defendants both tendered plans in Exhibit A, B, C. The defendants now appellants tendered: Exhibit 'C', The Court below found that the boundary in all, the plans is the same. The court found also the, Exhibit C, is a copy of Exhibits A & B, with the names altered. The Court below identified as certain that both, parties were referring to the same land; on which the Court below adjudicated. In his pleadings in the Court below the plaintiffs had said that the ancestor of the defendant obtained land from the ancestor, of the plaintiff's and paid tribute on the land to the plaintiffs. That besides that the descendants of Kunmi, the ancestor of the defendant also paid; tributes of yam, beans and palm oil to the descendants of the, plaintiffs. These averments were proved by the testimonies of the plaintiff and their witnesses. The*

*plaintiffs' testimony that they have obtained once an order of the court which entitled them to claim from the defendants in recent time also, Isakole; or a tribute on the land was confirmed in the testimony of the defendants' witness.*

*Even in the face of 1st defendant's denial of this event in court, he admitted in cross examination that these were once a suit between the plaintiffs and the defendants over and which was reversed in the Court below. The defendants did not counter claim but attempted to raise an issue that the plaintiff had an overload of grant to them by the Aworis. The defendant did not deny that they had leased; sold out or claim for themselves the land which the plaintiff deposed that is held of them. That Kunmi is the owner of the land in dispute who settled thereon. The above issues raised by the defendants are sufficient evidence of denial of the rights of the plaintiffs over the land in dispute, and that it is adequate to demand repossession of the land by the plaintiffs. Except in recent times, evidence tendered showed that the plaintiff had exercised a right to receive tributes on the land from the defendants. The learned trial judge in the Court below weighed carefully the traditional evidence tendered by both parties, and applied the rule in KOJO v. BONSIÉ (1957) 1 WLR 1223, and the decision in IRIRI v. ENHUBARE 1991, 2 NWLR (pt. 173) 252, at 269, to arrive at the conclusion of preference for the evidence tendered by the plaintiffs in order to award judgment in favour of the plaintiff. It is our law that the findings of fact are based on what the Court below sees as credible evidence which he accepts. The judge in the Court below is the master in that court and the Court of Appeal will be reluctant to interfere where there has been a proper evaluation of the evidence POPOOLA v. ADEYEMI (1992) 8 NWLR Pt. 257 (II) ELIBA v. OGODO 1984 SCNJ.*

*I find no perversion or miscarriage of justice in the conclusion of the trial court and affirm the judgment of the court below. In the event, the appeal fails; it is dismissed with costs assessed at N5, 000.00 against the appellants."*

As is evident the two Lower Courts accepted the traditional history proffered by the plaintiffs/respondents including even their possessory rights which the Defendants/Appellants challenged and in so doing denied the over lordship of the Plaintiffs/Respondents. Within that mind set, the appellants had even proceeded to alienate part of

the land under a claim of ownership forgetting that a customary tenant occupying land does not possess ownership title to the land however long that occupation. When such misbehaviour as exhibited by these ownership attacking acts done by the defendants/appellants then the resultant effect is forfeiture even when not part of the claim of the plaintiff/respondent as the case in hand. This is so because forfeiture comes into operation by law and the court has no discretion in the matter. The findings and conclusion of the two Courts that plaintiff' ancestor Ibaragun granted the land to Defendants' ancestor-Kwunmi are unassailable. This is all the more so in a situation as the present where the two parties claimed to be in possession of the land, the deciding factor then becomes which of them has the better title and in this respect that of the plaintiffs/respondents have not be impugned and the Lower Courts were right to have found for the respondents. See *Chikere v. Okegbe* (2000) FWLR (pt. 25) 1005; *Makinde v. Akinwale* (2000) FWLR (Pt. 25) 1562; *Taiwo v. Akinwunmi* (1975) 4 SC 143. The Appellants' situation (even if they hoped for it) has not been helped by their defence counsel's final address. It was not pleaded and the consequence is that it is of no moment as it goes to no issue as however strong the counsel's feelings buttressed by academic postulations pandering to an intellectual bent, nothing would change as counsel cannot take the place of a party who ought to have had such a legal defence properly situated in their pleadings. Moreover what is at play is a claim founded on customary land tenure to which Limitation Law does not apply to since a grant under customary law is a grant in perpetuity and can only be revoked as in this case by the attempted alienation and challenge of the over lord's title. I rely on the following judicial authorities: - *Abraham v. Olurunfemi* (1992) 1 NWLR (Pt.165) 53 at 70; *Mora v. Nwalusi* (1962) 1 All NLR 682; *Muemue v. Gaji* (2000) FWLR (Pt. 16) 2764 at 2781.

From the foregoing and the fuller and better articulated lead judgment of my learned brother, Bode Rhodes-Vivour JSC, I uphold the judgment of the Court of Appeal in its affirmation of the judgment of the trial High Court.

I abide by the consequential orders of the lead judgment.