

COURT OF APPEAL IBADAN DIVISION
5TH MAY, 2011. CA/I/53/06
CORAM:- S. D. BAGE, M. FASANMI, J. S. IKYEGH, JJCA

IJEBU-ODE LOCAL GOVERNMENT COUNCIL APPELLANT
(Joined by the order of the Court
of Appeal dated 10th May, 2004)

AND

1. MR. T. LADIPO SEGUN & 3 Ors RESPONDENTS
(Head and accredited representative of Chief
Oluogben Segun Family of Ijebu-Ode. Substituted
by order of Court dated the 21st of October, 2002)

EVIDENCE - Testimony - Of a dead witness in previous proceeding
- S.34(1) Evidence Act was complied with - Since appellant is deemed
to have participated in the proceedings - By proxy through 2nd-4th
respondents (H1)

LAND LAW - Title - Competing claims - Where such claims arise - An
avermment of possession is an averment of ownership of the disputed
land (H2)

ACTIONS - Limitation - Plea of - Must not be based on previous
evidence of dead witness - But it is based on statement of claim - To
know when cause of action arose - And was equally filed in court
(H3)

EVIDENCE - Defences - Laches & acquiescence - Proof of the de-
fences - Are dependent on evidence of defendants that raised them
- And not on previous evidence of the dead witness in exhibit B (H4)

PLEADINGS - Binding nature of - Parties are bound by their plead-
ings - And evidence on an un-pleaded material fact is irrelevant - But
if wrongfully admitted - Same must be expunged (H5)

FACTS

This appeal arose from decision of the High Court of Ogun
State, Ijebu-Ode in a pending representative suit, wherein it admit-

ted in evidence the testimony of a dead witness in an aborted previous proceeding i.e. Exhibit B before another Judge of the High court. Appellant was not a party in Exhibit B. However, as at the time Exhibit B was conducted, 2nd and 4th respondents were sued as tenants of appellant. In its contention, appellant stated that proviso (a) to section 34(1) of the Evidence Act was not complied with by 1st respondent in the High Court, before Exhibit B was admitted in evidence. Appellant further pointed out that exhibit B was recorded on 27th October, 1999, while appellant, was joined in the suit on 10th May, 2004, and could not have had the opportunity to cross-examine the witness in exhibit B. Appellant also stated that exhibit B was not pleaded and should not have been admitted in evidence as appellant was not put on notice of its use in the pending proceeding before the High Court.

On the other side, 1st respondent contended that having regard to the facts that 1st respondent replaced the deceased as head of the family in the representative suit pending in the High Court, and appellant being the landlord of 2nd respondent, the proviso (a) to section 34(1) of the Evidence Act was not breached by admitting exhibit B in evidence. It was contended contrariwise on proviso (b) to section 34(1) of the Evidence Act that 2nd respondent participated in the previous proceeding in exhibit B as appellant's privy and therefore had the opportunity to cross-examine the deceased witness in exhibit B, which satisfied the requirement under proviso (b) of the Evidence Act of section 3(a) (1). It is further stated that evidence for one reason or the other not subjected to cross-examination does not become inadmissible as that should go to the weight to be attached to the evidence especially in respect of the evidence of a dead witness. 1st respondent finally submitted that there was substantial compliance with the issue of pleading and consequently urged that the appeal be dismissed.

ISSUES FOR DETERMINATION

(a) Whether Exhibit B which is a record of the previous proceeding in the aborted trial was rightly admitted by the learned trial judge under section 34(1) of the Evidence Act.

(b) Whether the Exhibit B a record of previous proceedings need not be pleaded for it to be admitted in a subsequent trial ordered to be conducted afresh.

HELD (Unanimously allowing the appeal per **IKYEGH**

JCA)

EVIDENCE - Testimony

1. The crux of the appeal is on the admissibility in evidence of the testimony of a dead witness in previous proceeding under section 34(1) of the Evidence Act.

In respect of the appellant, it was not a named party in the previous proceeding in Exhibit B dated 27.10.99, having been joined in the action on 10.5.04, well after the proceeding in Exhibit B had closed. However, it is clear that 2nd-4th respondents in the present proceedings were sued in the court below where they claimed to be appellant's tenants. The 2nd-4th respondents are accordingly, privies in estate of the appellant, making the appellant a "party" in the wide sense of the word in the first proceeding in Exhibit B through them.

In my considered view, proviso (a) to section 34(1) of the Evidence Act (supra) was met by the admissibility of Exhibit B.

The 2nd-4th respondents were no doubt direct parties in the previous proceeding in Exhibit B and had the right and opportunity to cross-examine the witness in the previous proceeding in Exhibit B, which equally served as the presence and participation of appellant, their alleged landlord. Consequently, the appellant would be taken to have fought the legal battle in the previous proceeding in Exhibit B by proxy through its tenants, behind a hedge, so to say.

Proviso (b) to section 34(1) of the Evidence Act was, in my view, met by the admissibility in evidence of the previous proceeding in Exhibit B. (pp. 2462 G/2464 B)

LAND LAW - Title - Competing claims

2. The larger picture of the dispute in both the previous proceeding in Exhibit B and the pending proceeding concerns a piece of land. The claim and counter-claim put ownership of the disputed piece of land in issue. And, in such situation, an averment of possession is an averment of ownership - See England v. Palmer (1955) 14 WACA 659 at 660 thus:

“In a trespass action an averment of ownership is consistent with and in my view amounts to an averment of possession, for ownership may be proved by proof of possession.”
(p. 2464 G)

B *ACTIONS - Limitation - Plea of*

3. In determining the plea of limitation, for example, it shall not be necessary to base it on the previous evidence of the dead witness, but on the statement of claim to know when the cause of action arose and when it was filed in the court below.
C (p. 2465 B)

EVIDENCE - Defences - Laches & acquiescence - Proof

4. Also, in respect of the defences of laches and acquiescence,
D **all would depend on the evidence of the defendants raising the defences to prove them, not on the previous evidence of the dead witness in Exhibit B.** (p. 2465 C)

PLEADINGS - Binding nature of

E **5. Parties are bound by their pleadings. Evidence on an unpleaded material fact goes to no issue. If such evidence is inadvertently admitted, same must be expunged at the end of the day. See Okonji v. Njokanma as follows:**

F ***“It therefore follows that under our law a wrongfully admitted piece of evidence is not sacrosanct; it is still subject to the closest scrutiny by the appellate courts. The appellate courts are under a duty to cut down and expunge any evidence that is wrongfully admitted.*** (p. 2467 C)

G
NOTABLE POINTS OF INTEREST

IKYEGHJCA

1. Meaning of privy

H Coker v. Sanyaolu (1976) 9-10 S.C 203 at 223 thus:

“Privies are of three classes and they are:

(1) Privies in blood (as ancestor and heir);

(2) Privies in law (as testator and executor; intestate and administrator) and

(3) Privies in Estate (which we think is germane to the case in hand) as Vendor and purchaser, lessor and lessee (see also 15 Halsbury's Law of England 3rd Edition p.196 Article 372). ”

Phipson on Evidence (12th Edition) paragraph 707 page 309 on the scope of privies thus:

“Privies are of three classes: (1) Privies in blood, as heir and ancestor or co-parceners(sic); but not father and child where the latter sues under independent statutory title; (2) privies in law, as executor to testator, or administrator to intestate (sometimes called privies in representation); (3) privies in estate or interest, as vendor and purchaser grantor and grantee; donor and donee; lessor and lessee; joint-tenants; or successive bishops, rectors and vicars.” (p. 2463 E)

BAGE JCA

2. Admissibility of document under the Evidence Act

A court of law can Rule on the Admissibility or otherwise of a Document by examining the contents of the Document in the light of the Evidence Act. If the contents of the Document sought to be admitted are not in line with the Evidence Act in the sense that they violate the provision or provisions of the Act, the court is competent to reject it. That is the whole essence of admissibility of the Document. Although, a court of Law can reconsider its earlier decision on the Admissibility or in Admissibility of the Document at the stage of writing judgment, that is not the same thing as saying that the court must wait for other Evidence before it to Rule on the Document tendered.

In general, where a document which is inadmissible in evidence is admitted at trial, such document must be rejected on appeal. (p. 2468 A)

REPRESENTATION

Mr. A. A. Ogunba, for the Appellant

Mr. A. O. Ayanlaja, S.A.N. with Mr. Ogunyemi, Mr. A. Adeleke and Mr. Oguntayo, for the Respondents

CASES REFERRED TO

Ekpan v. Uyo (1986) 3 NWLR (Pt. 26) 63

Moronu v. T.O.S. Benson (1965) LLR 78

- Buhari vs. INEC & 4 Ors (2008) 72 SC (Pt. 1) 1
England v. Palmer (1955) 14 WACA 659
Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301
Adenuga v. Odumeru (2003) NWLR (Pt. 821) 163
Ita v. Ekpenyong (2001) 1 NWLR (Pt. 695) 587
B Adeleke v. Akanji (1994) 4 NWLR (Pt. 314) 715
Sosan v. Ademuyiwa (1980) 3 NWLR (Pt. 27) 241
Yassin v. Barclays Bank (1968) 1 ALL NLR 171
Okwa v. Iwerebor and others (1969) NSCC (Vol. 6) 73
C Obawole v. Coker (1994) 5 NWLR (Pt. 345) 416
F.A.T.B. Ltd v. P.I.C. Ltd (2003) 12 S.C. (Pt.1) 90
Eghabamien v. F. M. B. N. (2002) 17 NWLR (Pt. 797) 488
Shanu v. Afribank (Nig) PLC (2002) 17 NWLR (Pt. 798) 185

D **STATUTE REFERRED TO**

Evidence Act Laws of Federation 1990, s. 34(1)

BOOKS REFERRED TO

- Halsbury's Law of England 3rd ed. P.196 Article 372
E Phipson on Evidence 12th ed. Para.707 p.309
Jowitt's Dictionary of English Law 2nd ed. p. 1,432 – 1,433
Oxford Advanced Learner's Dictionary 6th ed. p. 955

LEAD JUDGMENT BY IKYEGH JCA

- F The appeal emerged from a decision of the High Court of Justice of Ogun State sitting at Ijebu-Ode in the Ijebu-Ode Judicial Division admitting in evidence the testimony of a dead person in aborted previous proceeding before another Judge of the High court
G of Justice of the same jurisdiction. The appellant's notice of appeal with two grounds of appeal was dated and filed on 2.12.05, from which two issues were distilled for determination on the appeal in the appellant's amended brief of argument dated 3.7.07, but filed on 23.2.2010, and deemed duly filed on 21.10.2010, as follows:
H “(a) *Whether Exhibit B which is a record of the previous proceeding in the aborted trial was rightly admitted by the learned trial judge under section 34(1) of the Evidence Act.*
(b) *Whether the Exhibit B a record of previous proceedings need not be pleaded for it to be admitted in a subsequent trial or-*

dered to be conducted afresh.”

Issue (a) on the first ground of appeal was argued first to this effect. Exhibit B, a record of the previous proceeding in the aborted trial, was the undisputed evidence of a dead person, but the appellant, joined as 3rd defendant in the suit by order of the Court of Appeal, Ibadan, on 10.5.2004, was not a party in the previous proceeding in Exhibit B. As at the time the previous proceedings in Exhibit B were conducted, the 1st and 2nd defendants therein, were sued as tenants of the present appellant, the owner of the disputed land who has been in undisturbed possession of same before the dispute, therefore proviso (a) to section 34(1) of the Evidence Act was not complied with by the 1st respondent as plaintiff in the court below, before the previous proceeding were admitted in evidence as Exhibit B. B
C

It was, also submitted on issue (a) that Exhibit B was recorded on 27.10.1999, while 3rd defendant, now appellant, was joined in the suit on 10.5.2004, and could not have had the opportunity to cross-examine the witness, Rev. F. O. Segun, in Exhibit B, infringing proviso (b) to section 34(1) of the Evidence Act by the reception in evidence of the previous proceeding in Exhibit B. It was submitted further on issue (a) that the issues of possession and mesne profits were raised in the previous proceeding in Exhibit B and the witness, Rev. F. O. Segun, was cross-examined upon them, while in the present proceeding pending in the court below, the issues therein are possession; ownership; equitable defences of laches and acquiescence; Limitation Law; Mesne Profits; declaration and injunction, differing from the issues raised in Exhibit B, breaching proviso (c) to section 34(1) of the Evidence Act by admitting in evidence the previous proceeding in Exhibit B. As a result, the previous proceedings in Exhibit B should not have been admitted in evidence following the cases of *Shanu v. Afribank (Nig) PLC* 242, and *Eghabamien v. F. M. B. N.* (2002) 17 NWLR (Pt. 797) 488 at 502, D
E
F
G

Issue (b) was argued next to the effect that the previous proceeding in Exhibit B was not pleaded and should not have been admitted in evidence as appellant was not put on notice of its use in the present proceeding before the court below, therefore it should be expunged on ground of its inadmissibility as an un-pleaded piece of evidence vide *F.A.T.B. Ltd v. P.I.C. Ltd* (2003) 12 S.C. (Pt.1) page H

The amended brief of argument of the 1st respondent dated and filed on 1.7.09, adopted the two issues for determination on the appeal formulated by appellant. Learned senior counsel, Mr. Ayanlaja, for 1st respondent contended that having regard to the facts that 1st
B respondent replaced the deceased Rt. Rev. Festus Segun as head of the family in the representative suit pending in the court below, and the appellant being the landlord of 2nd respondent, proviso (a) to section 34(1) of the Evidence Act was not breached by the admissi-
C bility in evidence of the previous proceeding as Exhibit B vide Jowitt's Dictionary of English Law (2nd Edition) Vol. 2 and Phipson on Evidence (11th Edition) paragraph 707 page 320.

It was contended contrariwise on proviso (b) to section 34(1) of the Evidence Act that 2nd respondent participated in the previous
D proceeding in Exhibit B as appellant's privy and had the opportunity to cross-examine the deceased witness in Exhibit B, which satisfied the requirement under proviso (b) of the Evidence Act of section 3a(1); also, evidence for one reason or the other not subjected to
E cross-examination does not render it inadmissible as that should go to the weight to be attached to the evidence especially in respect of the evidence of a dead witness vide *Okwa v. Iwerebor and others* (1969) NSCC (Vol. 6) 73 at 75.

Learned Senior counsel for 1st respondent submitted on proviso (c) to section 34(1) of the Evidence Act that, the substance of
F the case is the ownership of the land in dispute and all the other claims merge into it, more so the operative phrase in the proviso is "substantially", making the issues in the previous proceeding in Exhibit B and the pending proceedings in the court below are same.

Learned senior counsel for 1st respondent capped his contention on issue (a) that evidence such as contained in Exhibit B is not
G admitted for the truth of it, but to show such evidence was rendered by the dead witness, leaving the issue of its weight to be assessed by the trial court at the end of the day vide the cases of *Shanu v. Afribank*
H (Nig) PLC (2002) 17 NWLR (Pt. 798) 185 at 202 and *Obawole v. Coker* (1994) 5 NWLR (Pt. 345) 416 at 433 to 434.

Learned senior counsel for 1st respondent argued on issue (b) that pleadings are to contain facts, not documents, and documents need not be pleaded so long as relevant facts covering, the docu-

ments are pleaded vide the cases of *Arabambi v. A.B.I. Ltd.* (2006) Vol. 3 M.J.S.C. 6 at 67 and *Allied Bank (Nig) Ltd. v. Akubueze* (1967) 6 NWLR (Pt. 509) 374 at 403; consequently, the contents of Exhibit B are evidence to prove facts set in 1st respondent's pleadings, showing 1st respondent complied with the issue of pleadings and the appeal should be dismissed. B

2nd respondent's brief of argument dated and filed on 29.10.08, substantially followed the arguments of appellant adding the case *Sanyaolu v. Coker and Another* (1983) 3 S. C. 124 to support appellant's arguments on issue (a) upon which learned counsel for 2nd respondent aligned himself with the appellant on issue (a). C

Learned Counsel for 2nd respondent also aligned his client's case with appellant's case on issue (b) and added the cases of *Overseas Construction Co. Ltd. v. Creek Enterprises Ltd.* (1985) 5 NWLR (pt.13) (Pagination not supplied) and *Ipinlaiye v. Olukotun* (1995) 6 NWLR (Pt. 453) (Pagination not supplied) on the issues that parties are bound by their pleadings and, any party intending to rely on a piece of evidence ought to lay the foundation of the facts for the piece of evidence in the pleadings respectively, and concluded by urging for the Ruling of the court below admitting Exhibit B in evidence to be upturned. E

The 3rd-4th respondents' joint brief of argument dated 16.4.07, but filed on 7.11.08, also adopted appellant's case on the appeal with the following elaboration. That appellant was joined in the suit because 2nd respondent was no longer the owner of the disputed land, same having been alleged to belong to appellant. That it will be contrary to the principle of fair hearing if Exhibit B is allowed to be evidence in the substantive case when appellant had no opportunity to cross-examine the witness that gave evidence in Exhibit B; that the issues in the substantive suit have increased as appellant is now claiming ownership of the disputed land, while in the previous proceeding in Exhibit B, only 1st respondent claimed ownership of the land, showing there are more parties and issues than existed in Exhibit B; and that Exhibit B is useful only for cross-examination as held in the cases of *Sosan v. Ademuyiwa* (1980) 3 NWLR (Pt. 27) 241 at 243 and *Awara v. Alalibo* (2003) 3 MJSC 157. F G H

In aligning further with appellant, 3rd-4th respondents contended on issue (b) that the previous proceeding in Exhibit B being

in a special class of documents relating to judicial proceedings at which appellant was not a party or represented, it should have been pleaded by the 1st respondent vide the cases of *Kayode v. Odutola* (2001) 5 NSCQR (II) 223 at 725, *Adenuga v. Odumeru* (2001) 1 NSCQR 148 151, and *Elegushi v. Oseni* (2005) 23 NSCQR 193 at 198; and
 B the appeal should be allowed and the document, previous record of proceeding, be marked “rejected” accordingly.

Appellant’s amended reply brief dated 29.2.2009, but filed on 2.2.09, re-emphasized *Shanu v. Afribank Plc* case (supra) at page
 C 224 on the contention that 1st respondent tendered the previous proceeding to avoid the trial de novo ordered by the Court of Appeal on account of which it should have been rejected in evidence; and that the material facts constituting the evidence in the previous proceeding should have been pleaded vide the case of *Ita v. Ekpenyong* (2001) 1 NWLR (Pt. 695) 587 at 617.
 D

2nd-4th respondents aligned themselves with the appellant and urged for the appeal to be allowed both in their briefs of arguments and the oral submissions of their respective learned counsel. I think the alignment in question is highly improper as held by the Supreme
 E Court in the case of *Adenuga v. Odumeru* (2003) NWLR (Pt. 821) 163 at 8 as follows:

*“The 4th to 7th respondents filed a brief of argument in which learned counsel for them virtually aligned himself with the case of the appellants. At the hearing of the appeal this court pointed it out to
 F the learned counsel that since he filed no appeal on behalf of the 4th to 7th respondents, he could not be heard upon such a freak advocacy intended to project the appellants’ position. Accordingly, I intend to discountenance the brief of argument filed on behalf of the
 G 4th to 7th respondents and will not entertain the oral argument of Mr. S. B. Monokpo as counsel for them.”*

The crux of the appeal is on the admissibility in evidence of the testimony of a dead witness in previous proceeding under section 34(1) of the Evidence Act, the relevant portion of
 H which, for a start, I copy below:

“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, of in a later stage of the same judicial proceeding, the truth of the facts which it

states, when the witness is dead.....provided.

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;
and

(c) that the questions in issue were substantially the same in the first as in the second proceeding.”

It was not disputed that Rt. Rev. Segun represented 1st respondent and their family in the previous proceeding in Exhibit B and 1st respondent replaced him in that capacity in the pending substantive proceeding as the eldest member of their family having the same interest in the disputed piece of land. And in that wise, 1st respondent is the privy in blood and in estate of Rt. Rev. Segun, the deceased, in my view. ***In respect of the appellant, it was not a named party in the previous proceeding in Exhibit B dated 27.10.99, having been joined in the action on 10.5.04, well after the proceeding in Exhibit B had closed. However, it is clear that 2nd-4th respondents in the present proceedings were sued in the court below where they claimed to be appellant’s tenants. The 2nd-4th respondents are accordingly, privies in estate of the appellant, making the appellant a “party” in the wide sense of the word in the first proceeding in Exhibit B through them.*** See *Coker v. Sanyaolu* (1976) 9-10 S.C 203 at 223 thus:

“Privies are of three classes and they are:

(1) Privies in blood (as ancestor and heir);

(2) Privies in law (as testator and executor; intestate and administrator) and

*(3) Privies in Estate (which we think is germane to the case in hand) as Vendor and purchaser, lessor and lessee (see also 15 Halsbury’s Law of England 3rd Edition p.196 Article 372). ”*See also our decision in *Adeleke v. Akanji* (1994) 4 NWLR (Pt.314) 715 at 730 (G) and *Phipson on Evidence* (12th Edition) paragraph 707 H page 309 on the scope of privies thus:

“Privies are of three classes: (1) Privies in blood, as heir and ancestor or co-parceners; but not father and child where the latter sues under independent statutory title; (2) privies in law, as executor

to testator, or administrator to intestate (sometimes called privies in representation); (3) privies in estate or interest, as vendor and purchaser grantor and grantee; donor and donee; lessor and lessee; joint-tenants; or successive bishops, rectors and vicars. ”

See again Jowitt’s Dictionary of English Law (Second Edition) pages 1432 - 1433 cited by learned senior counsel, Mr. Ayanlaja, for 1st respondent. **In my considered view, proviso (a) to section 34(1) of the Evidence Act (supra) was met by the admissibility of Exhibit B.**

The 2nd-4th respondents were no doubt direct parties in the previous proceeding in Exhibit B and had the right and opportunity to cross-examine the witness in the previous proceeding in Exhibit B, which equally served as the presence and participation of appellant, their alleged landlord. Consequently, the appellant would be taken to have fought the legal battle in the previous proceeding in Exhibit B by proxy through its tenants, behind a hedge, so to say. See by analogy Nana Oforiatta II and Others v. Nana Abu Bonsra II and Others Privy Council cases by Olisa Chukura page 656 at 659 - 660 thus:

“... for instance, when a tenant is sued for trespassing on his neighbor’s land and he defends it on the strength of the landlord’s title, if the tenant loses the action, the landlord would not be allowed to litigate the title over again by bringing an action in his own name... Sometimes they apply to be joined as parties, on other occasions they regard the named party as their champion... If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences.”

Proviso (b) to section 34(1) of the Evidence Act was, in my view, met by the admissibility in evidence of the previous proceeding in Exhibit B.

The larger picture of the dispute in both the previous proceeding in Exhibit B and the pending proceeding concerns a piece of land. The claim and counter-claim put ownership of the disputed piece of land in issue. And, in such situation, an averment of possession is an averment of ownership - See England v. Palmer (1955) 14 WACA 659 at 660 thus:

“In a trespass action an averment of ownership is consistent with and in my view amounts to an averment of possession.”

sion, for ownership may be proved by proof of possession.

See also Badejo v. Sawe (1984) 6 S.C. 350.

All the new defences of laches, acquiescence, and limitation law are, in my view, follow-up or fall-out and/or matters arising from the heart of the controversy in the previous proceeding in Exhibit B and the pending proceeding in the court below. Both are adjunct to the main dispute centering on exclusive possession of the disputed piece of land.

In determining the plea of limitation, for example, it shall not be necessary to base it on the previous evidence of the dead witness, but on the statement of claim to know when the cause of action arose and when it was filed in the court below.

Also, in respect of the defences of laches and acquiescence, all would depend on the evidence of the defendants raising the defences to prove them, not on the previous evidence of the dead witness in Exhibit B.

Besides, proviso (c) to section 34(1) of the Evidence Act does not state the questions in the previous proceeding should be the same as in the present proceeding. The key words are “substantially the same” meaning “something which was not exactly a repetition of.” See *Re Burford* (1932) 2 Ch. 122 followed in *Moronu v. T.O.S. Benson* (1965) LLR. 78 at 82. Section 34(1) (c) does not talk of reliefs but of “questions” meaning the matter or topic or problem under discussion in both proceedings - see *oxford Advanced Learners Dictionary* (6th edition) page 955 on the meaning of “question.” And, in my modest view the questions or problem for discussion in the former proceeding and in the current proceeding hinge on land dispute in the broad sense of the word. All the questions in both proceedings, accordingly, hinge on the same disputed Piece of land.

In other words, the reliefs claimed in the previous proceeding continued in the previous proceeding vide paragraph 21 of the amended statement of claim in pages 21 and 53 of the compiled record of appeal which incorporated by reference paragraphs (i) and (ii) of the application for a writ of summons in page 3 of the record on the recovery of possession of the disputed land and mesne profits; compared with the appellant’s counter-claim of ownership and possession of the disputed land plus a permanent injunction vide

pages 19-20 of the record. Both disputants are, on that platform, fighting over exclusive possession of the land. Because, as held in *Balogun v. Akanji* (1988) 1 NWLR (Pt.70) 301 at 322 per Oputa, J.S.C. (as he was):

“...possession is 9/10 of the Law”

B In the instant case, appellant’s entry into the legal fray to protect its alleged reversionary interest in the disputed land allegedly threatened by the 1st respondent’s action seeking for recovery of same from appellant’s tenants, the 2nd - 4th respondents, showed
C appellant’s action is the offshoot of 1st respondent /suit over the same subject matter from which ancillary issues in the shape of legal defences by the other respondents cropped up.

By the appellant intervening to protect its alleged reversion by way of counter-claim for declaration of title, permanent injunction,
D et cetera, against 1st respondent, over the same parcel of land the latter seeks to recover from 2nd - 4th respondents, it cannot, with respect, be said the questions in the previous proceeding in Exhibit B are not substantially the same with the present action - see *Ekpan v. Uyo* (1986) 3 NWLR (pt.26) 63, on the right of a landlord to inter-
E vene by way of joinder in an action to protect reversionary interest over land held by a tenant sued in the original action in respect of the land. Proviso (c) to section 34(1) of the Evidence Act was, also, not violated by the admission of the previous proceeding in evidence as
F Exhibit B. Issue (a) is resolved against the appellant.

The pleadings comprising 21 paragraphs of the amended statement of claim found in pages 2 - 7 and 51 to 54 of the compiled record did not aver the incidents of section 34(1) of the Evidence Act. In the case of 259 at 280 - 281, the Supreme Court held in the
G lead judgment of *Achike, J.S.C.* (now of blessed memory) *inter alia* that:

*“It is manifest that under section 34(1) of the Evidence Act, the admissibility of Exhibit B would depend on a party’s satisfactory pleading of material facts not evidence - that brings him within the
H purview of that sub-section. This will include the fact of the litigated suit, whether the witness whose testimony is sought to be relied upon is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or etc...”*

The respondents not having pleaded this fact of death of Obidi,

yet testified to it, it is a matter that goes to no issue under our rules of pleadings and that piece of evidence will neither avail the appellants nor the respondents. See Adimora v. Ajufo (1988) 3 NWLR (Pt.80) 1 and Emegokwue v. Okadigbo (1973) 4 S.C. 113. Of course, at the end of the day, it is the respondent's case that has been weakened by that pleading error. B

The sum total of what we are trying to establish is that the statement made by one Obidi in suit No.1/1931 in Exhibit B which is crucial to the respondents' case that could have been admitted in evidence under section 34(1) of the Evidence Act had the proper foundation been laid both in the respondents' pleadings and in evidence. C

Parties are bound by their pleadings. Evidence on an unpleaded material fact goes to no issue. If such evidence is inadvertently admitted, same must be expunged at the end of the day. See Okonji v. Njokanma (supra) as follows: D

"It therefore follows that under our law a wrongfully admitted piece of evidence is not sacrosanct; it is still subject to the closest scrutiny by the appellate courts. The appellate courts are under a duty to cut down and expunge any evidence that is wrongfully admitted. See Ugbala v. Okorie (1975) 12 S.C. 13-15 and Yassin v. Barclays Bank (1968) 1 ALL NLR 171 at 179-180." E

see also Ita v. Ekpenyong (supra) and F.A.T.B. Ltd. v. P.I.C Ltd. (supra) cited by appellant's learned counsel, and George v. Dominion Flour Mills Ltd. (1963) 1 All N.L.R 71 at 77. F

In the final analysis, the appeal on issue (b) (supra) has merit and is hereby allowed. The Ruling of the court below, (Ojo, J.) admitting the previous proceedings of 27.10.1999, as Exhibit B, is set aside and, an order marking the said previous proceeding "Rejected" is hereby substituted. Parties to bear their costs as the error in admitting the previous proceeding in question that gave rise to the appeal was occasioned by the court below. G

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BAGE JCA

I had the privilege of reading the draft the lead judgment of my brother, Ikyegh J.C.A. He has meticulously dealt with all the is-

sues canvassed in the appeal. I only need to add a few words on the issue of admissibility of documents before the court.

A court of law can Rule on the Admissibility or otherwise of a Document by examining the contents of the Document in the light of the Evidence Act. If the contents of the Document sought to be admitted are not in line with the Evidence Act in the sense that they violate the provision or provisions of the Act, the court is competent to reject it. That is the whole essence of admissibility of the Document. Although, a court of Law can reconsider its earlier decision on the Admissibility or in Admissibility of the Document at the stage of writing judgment, that is not the same thing as saying that the court must wait for other Evidence before it to Rule on the Document tendered. See:-Buhari vs. INEC & 4 Ors (2008) 72 S.C. (Pt.1) 1.

In general, where a document which is inadmissible in evidence is admitted at trial, such document must be rejected on appeal. See:-Torti vs. Ukpabi & 2 Ors (7984) 7 S.C, 370 at pp 479 - 420; Ajayi vs. Fisher 1 F.S.C. 97; Esso West Africa Incorporated vs. Alli (1968) N.M.L.R. 414 at 423; Jacker vs. International Cable Co. Ltd (1888) L.T.R. 13. Finally, I agree with the lead judgment, that the appeal on issue (B) has merit is hereby allowed by me. The Ruling of the court below, (Ojo, J.) admitting the previous proceeding of 27/10/99, as Exhibit B, is also set aside by me, and an order marking the said previous proceeding "Rejected" is hereby substituted. I abide by the order as to costs contained in the lead judgment.

FASANMI JCA

I read in advance the leading judgment of my learned brother G J. S. Ikyegh, J.C.A.

I agree entirely with the reasoning and conclusion and abide by the consequential orders contained therein.

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