

**SUPREME COURT OF NIGERIA**  
7TH DECEMBER, 2012. SC. 77/2007  
**CORAM:- C. M. CHUKWUMA-ENEH, S. GALADIMA,**  
**B. RHODES-VIVOUR, M. D. MUHAMMAD,**  
**C. B. OGUNBIYI, JJSC**

JIMOH ATANDA ..... APPELLANT  
(For himself & on behalf of  
Abosedede Family)

AND

MEMUDU ILIASU ..... RESPONDENT  
(For himself & on behalf of  
Alagbe family)

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LAND LAW - Identity of land - Proof - Plaintiff must prove the description and boundaries of land - To which he lays claim (H1)

LAND LAW - Identity of land - Proof - Exception to - Claimant is to prove identity of land - Only where same has been put in issue in pleadings of parties (H2)

EVIDENCE - Admitted facts - Proof - Facts admitted need no proof - And court is expected to act thereon (H3)

LAND LAW - Identity of land - Difference in names - Effect - Ascribing different names to land by parties - Is immaterial for proving identity (H4)

LAND LAW - Identity of land - Oral evidence - Such evidence is sufficient proof thereof - Which dispenses the need to tender site plan - Especially where court has visited the locus in quo (H5)

LAND LAW - Title - Injunction - Proof - Plaintiff must rely on strength of his case - And not on the weakness of the defence (H6)

APPEALS - Courts - Findings of fact - Failure to appeal - Where appellant fails to appeal against such finding - He will not be allowed to submit thereon (H7)

LAND LAW - Title - Certificate of Occupancy - Proof - Mere possession of the certificate is not conclusive evidence - As it must be shown that there was no holder of a better title (H8)

LAND LAW - Title - Possession - Effect - Where defendant is in possession - Plaintiff must prove a better title than that of the former (H9)

### **FACTS**

Plaintiff/appellant (in a representative capacity) instituted this action against defendant/respondent (in representative capacity) at the High Court of Kwara State, claiming inter alia, a declaration of title to the disputed land measuring 10.804 hectares and order of perpetual injunction restraining respondent from further trespassing on the land. Appellant gave traditional history of how his forefathers first settled on the land. He thus claimed that respondent trespassed on the said land.

On his part, respondent equally gave a traditional evidence of the settlement of his ancestors on the same land. He thus counter-claimed for declaration of title over same land. At the end of the hearing, the learned trial Judge held that appellant and respondent failed to properly prove the identity of the disputed land. Hence, he dismissed the main action and the counter-claim. Appellant felt dissatisfied. Thus he filed appeal at the Court of Appeal, Ilorin Division. The court dismissed the appeal. It is against the latest dismissal of his appeal that appellant has further appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Appellant sufficiently proved the identity of the land in dispute and its Area as 10.804 Hectares to entitle him to judgment on all the heads of his claims.*

*2. Whether the findings by the Court of Appeal that the Appellant has title over land in Abosede is not a proof of exclusive ownership over the subject of dispute and entitles him to judgment.”*

# **HELD** (Unanimously dismissing the appeal per **OGUN-BIYI JSC**)

*LAND LAW - Identity of land - Proof*

**1. The general principle of law governing the claim of title to land is trite and as laid down in plethora of decided authorities. In other words for a plaintiff to succeed in an action for declaration of title to land, the onus of proof lies on him to establish with certainty and precision the identity of the area of land to which he lays his claim. The plaintiff is herewith saddled with the responsibility of proving by evidence and otherwise as well as also describing with such degree of accuracy and aptitude that the identity of the area of land in respect of which he seeks its title is in fact not in any doubt. It is elementary to state therefore that the certainty of the identity of land in dispute is sine qua non a necessity as it was held in the case of Wahabi Maberi v. Oyeniyi Alade (1278) 4 SCNJ 102. It is also trite that the mere mentioning of the area is not enough; the description and extent of the boundaries must be proved with exactitude. (p. 3025 E)**

*Identity of land - Proof - Exception to*

**2. I hasten to add at this point that the foregoing authorities which support the general principle of law are however relaxed and therefore do not apply in certain exceptional situational circumstances. In other words, the burden of proving identity will rest on the claimant only where it forms part of the subject matter, and has been put in issue. The determining factors that put an identity into question are the averments on the pleadings of the parties. It is the defendant therefore and by his statement of defence that can join issues with the plaintiff in that respect. (p. 3026 C)**

*EVIDENCE - Admitted facts - Proof*

**3. The law is therefore well settled and as laid down in plethora of authorities that facts admitted need no proof and the court is expected to act thereon. (p. 3027 D)**

*Identity of land - Difference in names - Effect*

**4. The foregoing serves to confirm that all the parties agreed that in spite of the various names given to the area of land in dispute, they were in fact all referring to the same subject matter. The law is trite that ascribing different names to land by parties is immaterial for purpose of proving identity of land.** (p. 3031 C)

*LAND LAW - Identity of land - Oral evidence*

**5. It is also significant and trite to state herewith that oral evidence of the description of the situation of a land in dispute will serve as sufficient proof of identity and which will dispense with the need to tender a site plan. This is especially where the court has visited the locus in quo.** (p. 3031 E)

*LAND LAW - Title - Injunction - Proof*

**6. The general principle of law in a claim of this nature, that is to say for an order for declaration of title and injunction, the burden of proof is solely on the plaintiff who cannot rely on the weakness of the Defence.** (p. 3032 E)

*Courts - Findings of fact - Failure to appeal*

**7. The learned appellant's counsel by his submission had challenged the lower court on its finding that the land in dispute is a free zone. It goes without saying that where an appellant fails to appeal on a finding of fact made by a court, it would not be allowed to submit thereon. I also hasten to say that from the two issues canvassed by the appellant's counsel before us, the question relating free zone was not one of those raised. It is further relevant to restate that the appellant from all indication did not appeal against the finding by the trial court as contained at pages 48 and 49 supra. This is confirmed by the record of appeal at page 108 where it reveals that the two issues canvassed before the lower court were limited to the identity of the land in dispute and also the evidential effect of Exhibit D. The appellant in the circumstance cannot now be heard to complain against the "free zone" find-**

**ings by the lower court therefore.** (p.3034 F)

*LAND LAW - Title - Certificate of Occupancy - Proof*

**8. The learned appellant's counsel further dwelt at great extent and relied on Exhibits D and C being the certificate of occupancy and the survey plan in favour of the appellant respectively. Before the said documents could achieve the purpose desired by the appellant their legality must exceed the presumptive principle laid down that there was not in existence a holder of a better title. In other words, by mere being in possession of a certificate of occupancy is not ipso facto a conclusive evidence of title or ownership.** (p. 3035 B)

*LAND LAW - Title - Possession - Effect*

**9. The law is trite again I say, and as rightly held by the trial court and affirmed by the lower court that where the defendant/respondent is in possession, the plaintiff/appellant to succeed must prove a better title than that of the former.** (p. 3036 A)

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## NOTABLE POINT OF INTEREST

### **RHODES-VIVOUR JSC**

#### ***1. Pleadings - Binding nature of***

Parties are bound at all times by their pleadings. So, if pleadings are to be of any use parties must be held bound by them. Evidence must only be given of facts pleaded, and any evidence which is at variance with averments in the pleadings would not be considered by the court. Judgment of the court must always be based on matters that are pleaded. (p. 3038 A)

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### **REPRESENTATION**

J. S. Bamigboye; with J. S. Muhammad, for the Appellant  
Adeboye Sobanjo; with Wahab Ismail Lawal, for the Respondent

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### **CASES REFERRED TO**

Ijama Otika Odiche v. Oga Chibogwu (1994) 7-8 SCNJ 317  
Samuel Okedare v. Oba Ahmadu Adebara & Ors. (1994) 6 SCNJ

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Jinadu Ajao and Ors. Vs. Bello Adigun (1993) 3 SCNJ 1

Eng. G. Agbi & ors. vs. Chief Audu Ogbe & ors (2004) 2 SCNJ 1

Okhwarobo v. Chief Aigbe (2002) NWLR (Pt.771) 29

Emily J. Bila Auta vs. Chief Wiley (2003) 7 SCNJ 159.

B Boniface B. Gwar v. S. O. Adole (2003) 3 NWLR (Pt.808) 546

Alli v. Alesinloye (2000) 6 NWLR (Pt.660) 177.

Jinadu Ajao and ors.v. Bello Adigun (1993) 3 NWLR (Pt 287) 389

Simon Ojiakoko v. Obiawuchi Ewuru & ors. (1995) 12 SCNJ 79.

C Wahabi Maberi v. Oyeniyi Alade (1278) 4 SCNJ 102

Mark Ugbo & ors. v. Anthony Aburime (1994) 9 SCNJ 23

Ahwedjo Efetiroroje v. H.R.H. Okpalefe II (1991) 7 SCNJ 85

Fatuade v. Onwoamanam (1990) 2 NWLR (Pt 132) p.322

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### ***LEAD JUDGMENT BY OGUNBIYI JSC***

The plaintiff's claim at the trial High Court of Kwara State was for a declaration of title on a piece of land situate at Budo Isale Olooru village. The claims as stated in both the writ of summons and at paragraph 28 (1)-(5) of the Statement of Claim are as follows:-

E *"28 (1) A declaration that the plaintiff as the head of Abosede family has the customary right to sue for and on behalf of other members of the family.*

F *(2) A declaration that the land situate at Budo Isale in Olooru village measuring 10.804 hectares belong to the Abosede family.*

*(3) An order of this court directing the defendant to pay the compensation of N200,000.00 to the plaintiff for the damages caused to the plaintiff's land.*

G *(4) An order directing the defendant, agents, servants and privies to vacate the land situate at Budo Isale Oloom village.*

*(5) An order of perpetual injunction restraining the defendants, agents, servants and privies acting or purporting to act in any manner as the customary owner of the land situate at Budo Isale Olooru village measuring 10.804 hectares."*

H In response to the plaintiff's claims, the defendant also filed their defence and Counter Claimed that:-

*"they are the traditional owners of the land at Ehinkule/Budo Isale the subject matter of this litigation.*

*An order of perpetual injunction restraining the plaintiff's fam-*

*ily, agents, or privies from committing further act of trespass in the land in dispute. An order nullifying the customary right of occupancy purportedly issued by the Moro Local Government in favour of the plaintiff over the land in dispute.”*

The brief facts of the plaintiff’s case are that he is of a direct lineage to one Mallam Abosede who founded Abosede in Olooru and who was the customary owner of a land measuring 10.804 hectares situate at Abosede area, Olooru village. He claimed that it was his forefather who was the 1st settler and that the Olooru village met his father already on the land. That Abosede is not within Olooru, but near Olooru. That the families known as Olooru are Tambaya, Ile-Alagbe, Ile Ojude and Ile Oju-Oja. That the defendants in this case are Tambaya and Ile alagbe families. That Abdullahi was a muslim, while the fore-father or the plaintiff was a traditionalist who worshipped Orisa-nla and that because of the difference in religions, Abdullahi gave Abosede the present place where his descendant (plaintiff’s family) now live called Budo Isale. It is in the evidence of the defendant in particular DW4 in chief that Budo-Isale Abosede and Ehinkule are one and the same place. The plaintiff alleged that the defendant trespassed onto their land measuring 10.804 hectares. The defendants on their part claimed that a parcel of land given to one Baba Olodo by the Abosede family falls within their land at Ehinkule Ile-Alagbe and deny liability.

In summary the defence case is that when the forefather of the plaintiff came, he met the defendant’s forefather called Abdullahi who founded Olooru, with his four children. That the plaintiff’s forefather was a guest of Abdullahi. The plaintiff/appellant called six witnesses to substantiate their case, and also testified as PW7. On behalf of the defence, five witnesses were also called inclusive of the defendant. Relevant to state that the parties prosecuted the case in representative capacities. At page 50 of the record, the learned trial judge in a reserved judgment held thus and said:-

*“Failure to identify the distinct area covered by this 10.804 hectares is vital to the case of the plaintiff and an injunction cannot be granted on an indefinite portion of land, the area must be distinct. For this reason the claims of the plaintiff at paragraph 28(2), (3), (4) and (5) must fail and it is hereby dismissed.”*

Further still and in respect of the counter claim the learned

trial judge also at the same page held and said:-

*“The counter claim of the defendants also claiming the same portion for the same reason of uncertainty of area and a definite boundary, moreso that the defendants too have not put in any survey plan showing the area on which they desire an injunction to be granted, their counter claim too must fail and it is hereby dismissed.”*

Against the foregoing decision, the appellant filed his Notice of appeal and sought for the following reliefs from the Court of Appeal, Ilorin Division:

*“An order setting aside the judgment of the trial court and substituting therefrom judgment for the Appellant on all his heads of claim.”*

The lower court on the 30th March, 2006 while not all agreeing on reasons, however reached a common conclusion that the appeal was devoid of any merit and dismissed the appeal thereof. It is against the dismissal by the Court of Appeal that the appellant has further appealed to this court. The notice of appeal at pages 155-157 of the record of appeal was filed on the 29th June, 2006 and it contains four grounds of Appeal. On the 25th September, 2012 when the appeal was fixed for hearing the learned counsel Messrs J. S. Bangboye appeared with Y. S. Muhammed and represented the appellant while Messrs Adeboye Sobanjo with Wahab Ismaila also represented the respondent. The learned appellant’s counsel identified their brief filed 20th June, 2007; they adopted and also relied on same in urging that the appeal be allowed. In response, the learned respondent’s counsel, Mr. Sobanjo also adopted and relied on their brief of argument filed 20th August, 2007 and submitted in favour of dismissing the appeal as lacking in merit.

From the said four grounds of appeal, two issues were formulated on behalf of the appellant which same reproduced hereunder were also adopted by the respondent’s learned counsel. The issues are:-

*“1. Whether the Appellant sufficiently proved the identity of the land in dispute and its Area as 10.804 Hectares to entitle him to judgment on all the heads of his claims.*

*2. Whether the findings by the Court of Appeal that the Appellant has title over land in Abosede is not a proof of exclusive ownership over the subject of dispute and entitles him to judgment.”*

The learned appellant's counsel in his submission to substantiate the 1st issue raised conclusively argued and delineated several reasons why the appeal should be allowed on this issue. The learned counsel conclusively re-iterated that in the absence of a specific issue raised as to the identity of the land in the pleadings and evidence led thereon, it cannot be correct to find that the identity of the land in dispute is put into question. That the parties have by consensus identified the land in dispute at the locus in quo and hence the court of Appeal was therefore grossly in error by conceding and allowing the mischief by the respondent on the issue of identity. Counsel further submitted that Exhibit C, the site plan covers the total area in dispute, that is to say 10.804 hectares. In other words, that the extent of the measurement is not meant to cover the whole of Abosede land as erroneously held by the Court of Appeal. Copious reference was therefore drawn to the pleadings at paragraphs 6 and 7 of the Respondent's statement of defence at page 27 of the record of appeal to show that the identity of the land was very well known to the parties. Further reference was also made to the evidence by the appellant's witnesses at pp.57-77 and that also by the respondent's witnesses at pp.77-91 of the record of appeal. That the identity of the land was at the locus in quo clearly specified with all its features to the trial court, and that none of the parties disagreed on the location, situation and/or the area covered by the land. That the lower court also fell into the same error as did the trial court in holding that despite the avalanche of evidence at the trial the identity of the land was not proved. That technicality should not operate to circumvent the end of justice. Reference in support of the submission was relied on the decision in the case of *Odofin v. Oni* (2001) 1 SCN 130.

Furthermore the counsel submitted that the purpose of tendering the customary Right of Occupancy and a site plan admitted as exhibits 'D' and 'C' respectively was therefore only out of abundance of caution (*ex cautilla abundantanti*). That the findings by the Court of Appeal like the trial court on their conclusion that Exhibit C is more than an area of 10.804 Hectares and that it covers the whole of Abosede land is without basis for the following reasons:-

*"(1) Exhibit 'C' merely defines the area over which the Moro Local Government granted a customary Right of occupancy which is Exhibit 'D' and the area is 10.804 Hectares. It stands to reason that*

*Exhibit ‘C’ which defines the area covered by exhibit ‘D’ could not have covered more than 10.804 Hectares, which is the Appellant’s claim as the land in dispute.*

*(2) It is clearly indicated on Exhibit ‘C’ that the area it covers is limited to 10.804 Hectares*

B *(3) There is neither a composite plan showing the limit of 10.804 Hectares area of land as different from Exhibit ‘c’ nor is there any evidence, credible or incredible, that Exhibit ‘C’ is more than 10.804 Hectares.”*

C The learned counsel therefore subscribed to the findings and view held by the dissenting decision of Ogunwunmiju JCA that there was adequate and sufficient description of the land in dispute. That the court should therefore resolve this issue in favour of the appellant.

D In response to the 1st issue raised the learned respondent’s counsel urged that this court should not disturb the findings and conclusions by the learned judges of the Court of Appeal as contained in the record of appeal. That Exhibits ‘C’ and ‘D’ tendered by the appellant covered the whole of Budo Isale and the area of land in dispute is put at 10.804 hectares per Exhibit ‘C’ tendered. That the area of land in question is not properly oriented on the plan and that neither is same drawn to scale and accurate nor did the boundary features reflected thereon. The learned counsel in support of his submission cited the case of Ijama Otika Odiche Vs. Oga Chibogwu (1994) 7-8 SCNJ 317 at 324-325 and also the view held in Samuel Okedare Vs. Oba Ahmadu Adebara & Ors. (1994) 6 SCNJ 254 at 267-268. In the circumstance, the counsel therefore urged that this court should uphold the finding arrived at by the trial judge and also  
 E affirmed by the lower court at page 137 lines 1-4 that the failure to identify the distinct area covered by 10.804 hectares is vital to the case of the plaintiff and that an injunction cannot as a matter of fact be granted on an indefinite portion of land without the area being distinct. Further reference in substantiation was also related to the  
 F case of Jinadu Ajao and Ors. Vs. Bello Adigun (1993) 3 SCNJ 1 at 7. That the findings in the case at hand are neither perverse nor have they led to a miscarriage of justice. Further reference was also drawn to the case of Engineer G. Agbi & ors. vs. Chief Audu Ogbe & ors (2004) 2 SCNJ 1 at 34-43. That the court should therefore discoun-  
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tenance the reference, made to the case of Moses Okhwarobo v. Chief Aigbe (2002) NWLR (Pt.771) 29 at 85.

The learned counsel also drew our attention to the decision in the case of Emily J. Bila Auta vs. Chief Wiley (2003) 7 SCNJ 159. A further call was also made that the following authorities which are not relevant should be discountenanced. The cases are:- Boniface B. Gwar v. S. O. Adole (2003) 3 NWLR (Pt.808) 546 and Alli v. Alesinloye (2000) 6 NWLR (Pt.660) 177. That the combined effect of Exhibits 'C' and 'D' tendered by the appellant is over an uncertain and indefinite land. That this court should therefore uphold the findings by the trial court at pages 47-48 of the record to the effect that the respondents do not pay tribute to anybody on the land they are farming which also forms part of that now claimed by the appellant in this case. The case of Achibong vs. Ita (2004) All FWLR pages 930 cited by the learned trial judge is also commended to this court by the learned respondent's counsel. In other words, that the identity of the land is very uncertain.

The appellant's grouse on the 1st issue raised is simple and straight forward as it poses the question as to whether the appellant has established with sufficient and definite certainty that the land in dispute covers an area of 10.804 Hectares to entitle him to judgment on all heads of his claim. The issue squarely relates to the identity of the land which is the subject of contention.

***The general principle of law governing the claim of title to land is trite and as laid down in plethora of decided authorities. In other words for a plaintiff to succeed in an action for declaration of title to land, the onus of proof lies on him to establish with certainty and precision the identity of the area of land to which he lays his claim. The plaintiff is herewith saddled with the responsibility of proving by evidence and otherwise as well as also describing with such degree of accuracy and aptitude that the identity of the area of land in respect of which he seeks its title is in fact not in any doubt.*** The following authorities are relevant wherewith the identity is in question. Emily J. Binta Auta Vs. Chief Wiley Ibe cited supra; Emmanuel Ilona vs. Sunday Idakwo & ors. (supra), Jinadu Ajao and ors.v. Bello Adigun (1993) 3 NWLR (Pt 287) 389 at 397 and Simon Ojiakoko v. Obiawuchi Ewuru & ors. (1995) 12 SCNJ 79. ***It is elementary to***

**state therefore that the certainty of the identity of land in dispute is sine qua non a necessity** as it was held in the case of Wahabi Maberu v. Oyeniyi Alade (1278) 4 SCNJ 102. **It is also trite that the mere mentioning of the area is not enough; the description and extent of the boundaries must be proved with exactitude.** See the case of Ijama Otika Odicha v. Oga Chibogwu (1994) 7-8 SCNJ 317 at 324-325. The test of certainty and precision is of necessity to ensure whether a surveyor can from the evidence before the trial court produce an accurate plan of such land. See again the cases of Mark Ugbo & ors. v. Anthony Aburime (1994) 9 SCNJ 23 at 34, and Ahwedjo Efetiroroje v. H.R.H. Okpalefe II (1991) 7 SCNJ 85 at 95.

**I hasten to add at this point that the foregoing authorities which support the general principle of law are however relaxed and therefore do not apply in certain exceptional situational circumstances. In other words, the burden of proving identity will rest on the claimant only where it forms part of the subject matter, and has been put in issue.** See the case of Fatuade v. Onwoamanam (1990) 2 NWLR (Pt 132) p.322. **The determining factors that put an identity into question are the averments on the pleadings of the parties. It is the defendant therefore and by his statement of defence that can join issues with the plaintiff in that respect.** Again see the case of Fatuade V. Onwoamanam supra.

With reference to the pleadings of the parties the plaintiff at paragraph 8 of his statement of claim pleaded thus and said:-

*“8. The plaintiff avers that during the life time of the founder of their family (Mallam Sanni Iyanda Abosede) the landed property which is about 10.804 (Hects) which is approximately 10,804 square meters, situates at Abosede Area, Olooru village was happen to be the founder and customary owner without been the tenant of anybody, the plaintiff shall lead evidence to show how the founder came to settle on the land at the hearing of this matter.”*

The defendant vide paragraph 6 of his Statement of Defence/Counter Claim at page 27 of the record of appeal, responded to the plaintiffs paragraph 7 of the statement of claim which preceded the foregoing paragraph 8. It is also relevant to restate that, the said defendant did not however deem it necessary to respond to the plaintiff's

paragraph 8 reproduced supra. It is also pertinent to state that at paragraph 9 of the statement of Defence/counter claim, the defendant did vehemently deny plaintiffs paragraph 9 to 21 in the following terms:-

*“9. The Defendants strictly deny paragraph 9 to 21 of the Statement of Claim and put the plaintiff to the strictest proof thereof.”* B

Having regard to the foregoing deposition of the statement of defence and counter claim, the paragraphs did not contradict the size of the area in dispute which the plaintiff by his paragraph 8 puts at 10.804 Hects. The statement of defence however specifically denied paragraphs 9 - 21 of the statement of claim. In the absence of a denial of the plaintiff’s averment at paragraph 8, it is in law deemed admitted by the defendant/respondent. For the defendant to have joined issue with the plaintiff thereon, he was expected to have clearly, specifically and outwardly registered his denial on the identity of area D of the land in dispute. The authority of the case of Fatuade V. Onwoamanam supra is again relevant in point. See also the case of Owosho V. Adebawale Dada (1984) 7 S.C 149.

***The law is therefore well settled and as laid down in plethora of authorities that facts admitted need no proof and the court is expected to act thereon.*** Suffice it to say that the land in dispute is covered by a customary Right of Occupancy Exhibit ‘D’ and a survey plan Exhibit ‘C’. The fact upon which the exhibits are predicated have been pleaded at paragraphs 23, 24 and 25 of the Statement of Claim which reproduction are as follows:- F

*“23. The plaintiff avers that sometime in 1998 after a meeting with other members of the family agreed to apply to the authority of Moro local government for customary right of occupancy on the land for and on behalf of Abosede family equally agreed to engage the services of surveyor for the site plan of the property.*

*24. The plaintiff further avers that I. K. Imam Eleshin-nla & co wrote a letter dated 30th of May, 2003 to the defendant family through the defendant and equally on the 5th day January, 1999 the authority of Moro local government issued a certificate of customary right of occupancy to the plaintiff for and on behalf of Abosede family, notice is hereby given to the defendant to produce the original copy of the letter written to him by the said I. K. Eleshin-nla & Co at the hearing of this suit.* H

25. *The plaintiff avers that the customary right occupancy referred to in paragraph 24 above, and copy of the said side (sic) plans are hereby pleaded.*”

In response to the foregoing paragraph 23 the defendant/respondent pleaded thus at paragraph 18 of the Statement of Defence and counterclaim:-

*“The Defendant aver that paragraph 23 of the Statement of Claim is not consequential and hinding (sic) on the Defendant as the plaintiff does not have any title over which he could apply and obtain a customary right of occupancy as the traditional title has not been validly extinguished.”*

Following from the foregoing paragraph 18 supra, the defendant/respondent is challenging the title and ownership of the plaintiff/appellant. There was however no response to paragraphs 24 and 25 of the statement of claim relating to the certificate of occupancy covering the land. In other words, the question of identity of the land was not therefore a problem to the defendants. The case of *Owosho V. Adebowole Dada* (supra) is hereby applicable wherein the principle of admissibility as to identity is called into operation. Furthermore and at pages 46 and 47 of the record of appeal the learned trial judge arrived at the following deduction which is worth revisiting wherein he said thus:-

*“The plaintiff gave the area of the land in dispute as 10.804 hectares and PW1 said it starts from Ehinkule to the primary school. A site plan of the whole of Abosede land was tendered and admitted in evidence. The defendants says (sic) the untarred road is the boundary that separates Ehinkule from Budo Isale but D.W.5 said the road was a later development and constructed by people of Onigaari to their village. On his part PW1 said the untarred road from the main road cut through Abosede land. From the above evidence the area of conflict is as to the boundary between plaintiff’s land and defendant’s land. Plaintiff believes that stepping out at the backyard of the Ile Alagbe, you step into plaintiff’s land which is called Ehinkule. PW6 said there is no specific place bearing Ehinkule, that the backyard of any house is Ehinkule in Yoruba Language. The court visited the locus in quo and saw that the land in dispute is behind Ile Alagbe compound. It was observed that the land between the Ile Alagbe and the primary school is a vacant land. The defence agrees that the land*

*on the Primary school side belongs to the plaintiff. It was observed also that there is an untarred road leading to the primary School that cuts across the vacant land. D.W.3 also confirmed that this road was not there originally, it was constructed as a result of recent development. The issue then before the court is:-*

*Where is the boundary between plaintiff's land at Ehinkule and defendant's land. The road said to be a later development and constructed by the people of Onigarri to their village cannot be the original boundary between Olooru and Abosede"*

I have stated earlier in the course of this judgment that the documents Exhibits 'D' and 'C' were pleaded at paragraphs 23 and 25 of the statement of claim and which ought to be read along side paragraph 8 of the same pleading which was deemed admitted by the defendant/respondent and related clearly to the area of land covering 10,804 hectares. Exhibits 'D' and 'C' issued in favour of the appellant therefore confirm that the land as stated in the customary Right of Occupancy is consistent with the appellant's evidence that it is 10.804 hectares in size. By looking at Exhibit 'C' simpliciter and in the absence of any evidence to the contrary by the defendant, the plan is drawn to scale and shows the area covered as 10.804 hectares. This fact having been deemed admitted by the respondent needed no further proof. The peg nos at the boundaries as well as the accurate measurement from one boundary peg to another shown on Exhibit 'C', confirms that the land in dispute is not in doubt.

Furthermore, it is also in evidence that the learned trial Judge visited the locus in quo in company of the parties, their Counsel and also witnesses. The purpose and significance of such visit has been emphasized in the case of Oba E. A. Ipinlaiye II V. Chief Cornelius Oluhotun (1996) 6 MAC 146 wherein it was held at 157 thus:-

*"The purpose of an inspection of a locus by a court of law is not to substitute the eye for the ear but rather to clear any doubt or ambiguities that may arise in the evidence or to resolve any conflict in the evidence as to physical features."*

In line with the foregoing view supra, the trial court as shown on the record of appeal at page 46 of its judgment found thus:-

*"The court visited the locus in quo and saw that the land in dispute is behind Ile Alagbe compound. It was observed that the land between the Ile Alagbe and the primary school is a vacant land. The*

*defence agrees that land on the primary school side belongs to the plaintiff. It was observed also that there is an untarred road leading to the primary school that cuts across the vacant land. D.W.3 also confirmed that this road was not there originally, it was constructed as a result of recent development.*”

B At page 47 of the judgment, the court also had this to say:-  
*“... the area of land in contention is limited to just the 10.804 Hectares between the Ile Alagbe and the Primary School; The said land is behind the compound of Ile Alagbe.”*

C The conclusion to be drawn from the above findings are three-fold:- That

1. The land in dispute is a vacant plot of land lying between Ile Alagbe and the primary school.

D 2. The said vacant land in dispute lying between Ile Alagbe and the Primary school measures 10.804 Hectares.

3. A feature on the land in dispute is an untarred road leading to the primary school that cuts across the vacant land in dispute.

E From the foregoing conclusions I hasten to ask the question, whether it would be correct to say that the land in dispute is unknown to the parties? I will certainly answer this question in the negative. In other words, it is crystal clear to me that both the trial court and the parties are not in doubt as to the location of the land, the size thereof as well as the untarred feature distinguishing same. The foregoing conclusion in other words is sufficient to give the description of  
F the land.

I would also wish to restate that with the analytical and detailed testimony of the evidence of witnesses coupled with the events that took place at the locus, there is sufficient and conclusive reason  
G to presume that parties or the trial Judge were in no doubt as to the identity of the land in dispute. As a consequence I hold therefore that the conclusion arrived thereat by the learned trial Judge at page 49 of his judgment is with all respect a total misunderstanding of the land in dispute. This is what the judge had to say for instance:

H *“it is only where the disputed land is well known, the quantity, extent and area of land are known that a sketch plan can be dispensed with. Here the survey plan exh. C tendered cannot serve that purpose because only the survey plan of contested area is needed. There seems to be nobody out of the 12 witnesses called by the two*

*parties who can say where the land at Ehinkule starts... There is no clear cut of where the land of Abosede starts at the backyard of the Ile-Alagbe and Exh. C has not been of any help in this regard."*

In the review of his evidence earlier at page 46 of its judgment the trial court observed and said thus:

*"As earlier said, the evidence of DW1 and DW4 is that Budo Isale, Abosede or Ehinkule is one and same place. DW1 said "Abosede also called Budo Isale" DW4 said "This place called Ehinkule is the same as Budo - Isale" DW5 said: "when Abosede came he first settled with our father but because of the difference in religion our father told him to settle at Ehinkule. Our father was a Muslim and Abosede worshipped Orisa-nla. It was our father that gave him Ehinkule which is the same as Budo Isale"*

***The foregoing serves to confirm that all the parties agreed that in spite of the various names given to the area of land in dispute, they were in fact all referring to the same subject matter. The law is trite that ascribing different names to land by parties is immaterial for purpose of proving identity of land.*** See the case of J. A. Makanjuola v. Chief Oyelakin Balogun (1989) 5 SCNj 42 and Onwuka v. Michael Ediala & Anor (1989) 1 SCNj 102. ***It is also significant and trite to state herewith that oral evidence of the description of the situation of a land in dispute will serve as sufficient proof of identity and which will dispense with the need to tender a site plan. This is especially where the court has visited the locus in quo.*** The view by this court in the regard has been well specified in the case of Odojin v. Oni (2001)1 SCN. Page 13 at 144.

On the nagging question of the identity of the land in dispute therefore, I am of the firm view that same had been proved by the plaintiff/appellant before the trial court which was grossly in error by holding the contrary or otherwise. I further hold that the justices of the court of Appeal on the majority decision also erroneously fell into the same trap as did the trial judge. In other words, the dissenting view held by Ogunwumiju JCA on this issue is upheld. The 1st issue is therefore resolved in favour of the appellant.

The second issue is whether the finding by the Court of Appeal that the appellant has title over the land in Abosede is not a proof of exclusive ownership over the subject matter of dispute and

entitles him to judgment. From the pleadings of the parties and evidence sought to be adduced by all the plaintiff's seven witnesses as well as the five witnesses on behalf of the defendant, it is apparent that both parties are claiming the title and ownership over the land in dispute. It has also been found as a fact by the trial court that the land  
 B subject of contention is vacant and lying between Ile-Alagbe and the primary school. This in fact is the area measuring 10.804 Hectares. The genesis of the problem between parties had also been well highlighted in the judgment of the trial court at page 47 wherein it said:-

C *"It is to be noted that it was when a stranger was brought unto the land i.e. Baba Olodo being allotted a portion of land that brings (sic) about this dispute"*

It is obvious therefore that the parties had always lived together in harmony before the alienation by the appellant to one Baba  
 D Olodo. The portion encroached upon forms part of the vacant land covering the area measuring 10.804 hectares and which from all indications is between the two locations of land held exclusively by each family. The land appears to be a common land between the parties and which both sides are free to make use of. The deduction  
 E therefore is, as long as the use of the land is by the two parties, there would be no resistance. It was the allocation made to one Baba Olodo a stranger that caused the problem and hence the claim by each party.

F ***The general principle of law in a claim of this nature, that is to say for an order for declaration of title and injunction, the burden of proof is solely on the plaintiff who cannot rely on the weakness of the Defence.*** See the case of Mrs. Hawa Gankon v. Ugochukwu Chemical Industries Ltd. (1993) 6SCNJ 263.

G It was found as a fact at the trial court that the defendant/respondent is in possession of the subject matter. The law is trite that for the plaintiff/appellant to succeed in dispossessing the defendant/respondent he must prove a better title. See the case of Madam Rianatu Shitu v. Alh Y. O. Egbeyemi and 2 others (1966) 7 MAC. P1.

H In his submission the learned appellant's counsel contended vehemently that the appellant had traced his root of title in an unbroken chain over the 10.804 Hectares of land called Abosede land in Exhibit C which is the subject matter of dispute. Counsel argued further that the chain comprising the founder, the heads of the

Abosede family and Trustees of the land in order of succession are as follows:-

1. Mallam sannu Abosede (founder and Deceased)
2. Mallam Jimoh Akanbi (Deceased)
3. Mallam Subairu Ajao (Deceased and
4. Mallam Jimoh Atanda (current head)

B

Counsel re-iterated also that these facts were evaluated and found established by the trial court and affirmed by the Court of Appeal. That the descendants of Abosede continue to enjoy exclusive ownership and possession. The Counsel has called on us to specifically refer to exhibits D and C. and also take note of the dismissal of the Defendant's counter claim by the trial court. Counsel also submitted as perverse the attempt purportedly made by the lower court in awarding to the Respondent a relief he claimed at the trial court and which was dismissed but without any appeal against same thereon. D Reliance was anchored on the decision of this court in the case of Alhaji Abdul-salami Temiola vs Alhaji Mustapha Olohunkun (1999) 4 SCNJ 92 at 103. That the subsistence of the customary Right of occupancy, Exhibit D, by operation of law vests exclusive Right of the land in dispute in the Appellant. That payment of tribute is waivable E and not a sine quo non proof of exclusive ownership. That the findings by the Court of Appeal that the land in dispute was a free zone over which either party is entitled to farm is, with due respect unfounded. That there is no evidence whatsoever from which the lower F court could reasonably have drawn such inference. The learned counsel submitted an error committed by the lower court and urged that the said issue be resolved in favour of the appellant.

In response to the said issue, the learned respondent's counsel submitted briefly and urged this court to dismiss the issue as it is G very presumptuous upon which no court of record is to rely thereon. That the court is only enjoined to act on factual evidence. That the appellant had failed to sufficiently identify the land over which the court is to give them title. That no court is to give judgment in vacuo, H or an order that cannot be enforced thereby making the court a toothless bulldog. That an order of court is meant to be obeyed. That the appellant in the circumstance had failed to prove a better title than that of the Defendant/respondent who had proved by evidence to be in an undisturbed possession.

I have stated earlier in the course of this judgment that the learned trial Judge in his judgment found as a fact that the defendant/respondent is in actual possession of the subject matter in dispute. There is no appeal against this finding of fact. As rightly concluded by the trial court therefore, the onus lies on the plaintiff/appellant to prove absolute and exclusive ownership to the farmland being cultivated by the defendants/respondents before they can dispossess them of their right to continue. This was the view held by this court in the case of *Madam Rianatu Shitu v. Alhaju Y. O. Egbeyemi & 2 ors.* (supra) whereby the case of *Amakor v Obiefuna* (1974) 3 SC page 67 was referred to and followed with approval. With further reference also made at pages 48-49 of the record of appeal the learned trial Judge proceeded with his judgment and said:

*"Although the plaintiff claimed that their forefather Abosede was the 1st settler they did not say or categorical in their evidence that the defendants are their customary tenants in which case they would be required to be paying Isakole (tribute) to the plaintiff family.*

*The nature of customary tenancy is that a customary tenant is entitled to use and occupy the land subject to payment of rent and good behaviour; See Achibong vs. Ita (2004) All FWLR p.930. If the defendant had been farming for so long on the land without any challenge and without paying tribute to the plaintiff, the plaintiff needs more convincing evidence to show that they are the absolute owner of the land in dispute."*

***The learned appellant's counsel by his submission had challenged the lower court on its finding that the land in dispute is a free zone. It goes without saying that where an appellant fails to appeal on a finding of fact made by a court, it would not be allowed to submit thereon. I also hasten to say that from the two issues canvassed by the appellant's counsel before us, the question relating free zone was not one of those raised. It is further relevant to restate that the appellant from all indication did not appeal against the finding by the trial court as contained at pages 48 and 49 supra. This is confirmed by the record of appeal at page 108 where it reveals that the two issues canvassed before the lower court were limited to the identity of the land in dispute and also the evi-***

**dential effect of Exhibit D. The appellant in the circumstance cannot now be heard to complain against the “free zone” findings by the lower court therefore.** It is not also sustainable as submitted by the learned appellant’s counsel that the lower court merely drew a wrong inference as to evidence of exclusive ownership and possession. Rather I hold the view that the conclusion was based on the findings of fact drawn by the learned trial Judge from the evidence adduced before him. B

**The learned appellant’s counsel further dwelt at great extent and relied on Exhibits D and C being the certificate of occupancy and the survey plan in favour of the appellant respectively. Before the said documents could achieve the purpose desired by the appellant their legality must exceed the presumptive principle laid down that there was not in existence a holder of a better title. In other words, by mere being in possession of a certificate of occupancy is not ipso facto a conclusive evidence of title or ownership.** See the case of Chinye A. A. Ezeanah v. Alhaji Muhammed I. Attah (2004) 2 SCNJ 200 wherein this court at page 204 held and said:- C

*“A certificate of occupancy properly issued by a competent authority raises the presumption that the holder is the owner in exclusive possession of the land in respect thereof. Such a certificate also raises the presumption that at the time it was issued there was not in existence a customary owner whose title has not been revoked. The presumption is however reputable because if it is proved by evidence that another person had better title to the land before the issuance of the certificate of occupancy then the court can revoke it.”* D

The Respondent as Defendant adduced evidence at the trial court that they inherited the land from their fore fathers and have since been staying thereon without any challenge from anybody except of course the allocation made to Baba Olodo which has triggered the suit, the subject matter of the case now on appeal. There is also an uncontraverted evidence as found by the trial court at pages 48 and, 49 of its judgment supra that the defendant/respondent have never paid “Ishakole” or tribute to anybody, not even the appellants. Even at the risk of repeating myself, I will again reproduce what the trial court said at page 48 of the record:- E

*“The plaintiff needs to prove absolute ownership of this farm-*

*land being cultivated by the Defendants before they can dispossess the Defendants of their right to continue their farming on the land in dispute.”*

***The law is trite again I say, and as rightly held by the trial court and affirmed by the lower court that where the defendant/respondent is in possession, the plaintiff/appellant to succeed must prove a better title than that of the former. See again: the authority in the case of Madam Rianatu Shittu v. Alh. Y. O. Egbeyemi and 2 others (supra).***

From the foregoing deduction and as rightly arrived at by the lower court, I hold also that in spite of the Certificate of Customary right of occupancy Exhibit D, the plaintiff/appellant had failed to discharge the burden of proving that the family had exclusive possession and/or absolute ownership of the land in dispute. It has been held earlier in the course of this judgment that the appellant was unable to prove by evidence the existence of any official boundary erected physically or recognized traditionally by the two families and hence the finding by the lower court that the area in dispute was “*apparently a no man’s land between the two portions of land held exclusively by each family.*”

With all humility and respect, such finding cannot be faulted and I so hold. In the case of Awote v Owoduni (supra) the appellant failed prove within the land in dispute where their own boundary was. The plaintiff/appellant as rightly held by the lower court was unable to prove exclusive possession and/or absolute ownership of any part or portion of the land in dispute. He cannot in the circumstance be granted a declaration of title as sought. The said issue is therefore resolved against the appellant.

On the totality of this appeal, while issue one on identity resolved in favour of the appellant issue two on the claim of title or ownership is resolved against him. In the result therefore, the appeal is hereby dismissed and I affirm the totality of the judgment of the Court of Appeal wherein the judgment of the trial High Court Kwara State delivered on the 11th February 2002 is hereby affirmed. The appeal is dismissed with an order of N50,000.00 costs awarded in favour of the respondent against the appellant.

**GALADIMA JSC**

I was privileged to read in draft, the Judgment of my brother OGUNBIYI JSC. I agree with the reasoning and conclusion leading to the dismissal of the appeal. I hereby affirm the entire Judgment of the Court of Appeal and abide by the consequential order made herein in the lead judgment including costs. B

**RHODES-VIVOUR JSC**

I read in draft the very comprehensive leading judgment prepared by my learned brother, Ogunbiyi, JSC and I am in complete agreement with the reasoning and conclusions therein. I propose, though to make a few observations. C

A very important issue in this appeal is whether the land in dispute was properly identified. D

The position of the law is that a party who claims declaration of title to land must show or satisfy the court with certainty the area of land in respect of which the claim is made. Failure to satisfy the court would result in the claim being dismissed. It is desirable but not mandatory that a Survey Plan is produced by the plaintiff in a claim for declaration of title. What the court requires is for the land to be precisely identified with definitive certainty, and in discharging this requirement credible evidence can be led to identify the land in question. See Okpaloka v. Umeh (1976) 9 - 10 SC. p.269. How has the plaintiff (appellant) identified the land over which he claims a declaration of title. In paragraph 8 of his pleadings the appellant pleaded as follows: E F

*“8. The plaintiff avers that during the life time of the founder of their family Mallam Sanni Iyanda Abosede the landed property which is about 10.804 (Hectares) which is approximately 10.804 square meters, situate at Abosede Area, Olowu village was happen to be founder and customary owner without been the tenant of anybody, the plaintiff shall lead evidence to show how the founder came to settle on the land at the hearing of this matter.” H*

The above averments were supported by Exhibit C, a survey Plan, Exhibit D, customary right of occupancy, and credible evidence.

The respondents did not respond to the above but averred in their pleadings:-

*“That the land in dispute is and was never Budo Isale but Ehinkule and from time immemorial the defendants have been having the right of ownership over the said parcel of land by farming and giving to others to farm too.”*

Parties are bound at all times by their pleadings. So, if pleadings are to be of any use parties must be held bound by them. Evidence must only be given of facts pleaded, and any evidence which is at variance with averments in the pleadings would not be considered by the court. Judgment of the court must always be based on matters that are pleaded.] See *Oduka v. Kasumu* 1967 1ALL NLR p.293, *Ekpenyong v. Ayi* 1973 5 SC p.169, *Umoffia v. Ndem* 1973 12 SC. p.69, *Shell B.P. v. Abedi* 1974 1 SC p.23. The plaintiff pleaded that the area of land in dispute is 10.804 Hectares, situated at Abosede Area, Olowu Village. Nowhere in the defendants pleadings is this denied. The defendant is taken to have admitted the plaintiff’s averment on the identity of the land in the absence of a denial. It becomes clear that in the absence of a denial by the defendant, that the identity of the land is not contested by the defendant as it is well known to the parties. Exhibits C and D further confirms the identity of the land. The parties are clearly not in doubt as to the location of the land and its size. In sum the decision of the trial court and the majority decision of the Court of Appeal on the identity of the land were wrong. The minority decision of *Ogunwumiju JCA* states the correct position of the law. It is accordingly upheld.

For this, and the much fuller reasoning in the leading judgment the appeal is dismissed with costs of N50,000 to the respondent. Appeal dismissed.

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