

SUPREME COURT OF NIGERIA
4TH DECEMBER, 2012. SC. 52/2006
CORAM:- I. T. MUHAMMAD, J. A. FABIYI,
M. U. PETER-ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC

1. EFFIONG ODIONG MKPINANG
2. EFFIONG ODIONG
3. ETIM ASUQUO EDET OKPO APPELLANTS
4. ASUQUO OKON MKPANG
5. ODIONG EDET ANYIN

(For themselves and on behalf
of Ekeya Okobo in Oron)

AND

1. CHIEF EFFION NDEM
2. CHIEF ETIM ONYUNG RESPONDENTS
3. CHIEF BASSEY EYO BASSEY
4. CHIEF UKPONG BASSEY

(For themselves and on behalf
of Ndon Ebom village Southern
Uruan Uyo)

LAND LAW - Title - Proof - Basis - Pleadings and evidence adduced
by plaintiff - Determine whether or not he has proved his case (H1)

LAND LAW - Title - Proof - Means - Plaintiff may adopt any of the
ways of proving ownership - And his claim should be dismissed -
Where he fails to prove title as pleaded (H2)

APPEALS - Evidence - Orders of court - Retrial order - Correctness
of - Since the evidence borders on credibility of witnesses - Court of
Appeal rightly gave the order (H3)

FACTS

Plaintiffs/respondents (in a representative capacity) sued de-
fendants/appellants (in a representative capacity) at the High Court
of Akwa Ibom State, Uyo. Respondents claimed for a declaration,
damages for trespass and an order of perpetual injunction restrain-
ing appellants from committing further acts of trespass on the land in

dispute. Both parties gave evidence in support of their claims over the disputed land.

The learned trial Chief Judge before dismissing respondents' case found inconsistencies in the various versions of the traditional history given by respondents' witnesses. Thus the court accepted appellants' version of traditional evidence. Being dissatisfied, respondents filed appeal at the Court of Appeal, Calabar Division. The court allowed the appeal and ordered a retrial on the ground that the trial court did not evaluate evidence led by respondents. Aggrieved, appellants appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in holding that the trial court, in the circumstances of this case, ought to have evaluated the Respondents' acts of ownership and possession given its rejection of the Respondents' inconsistent traditional evidence".

HELD (Unanimously dismissing the appeal per
AKA' AHS JSC)

LAND LAW - Title - Proof - Basis

1. With due respect, I do not think the above position as canvassed by learned counsel for the appellants does represent the true state of the law. It is trite that it is the pleadings and evidence adduced by a plaintiff for declaration of title that determines whether he has proved his case or not. In other words, proof of a claim for a declaration of title by means of traditional evidence is not mutually exclusive with other means of proving the claim. (p. 4430 G)

LAND LAW - Title - Proof - Means

2. Thus a plaintiff may adopt one or more of the ways of proving ownership for example, traditional evidence or by means of evidence of acts of ownership or possession. It is only where a plaintiff fails to prove his case by means of traditional evidence and also fails to establish it by means of evidence of acts of ownership and possession, when these were the means pleaded and relied upon that the plaintiff's case should be dis-

missed. (p. 4431 A)

Orders of court - Retrial order - Correctness of

3. Having examined the pleadings and evidence of some of the witnesses called by the respondents as plaintiffs, it became obvious that their evidence ought to have been evaluated. Since the evidence turned on the credibility of the witnesses, the Court of Appeal had no option but order a re-trial. I find that the order for re-trial cannot be faulted.

(p. 4431 D)

REPRESENTATION

O. E. B Offiong SAN, with Adaku I. Onyeama, for the Appellants
P. O. Okolo with I. S. Afegbua Esq., P. E. Ossai, E. C. Uwakwe (Miss)
and P. I. Ekele, for the Respondents

CASES REFERRED TO

Akunyili v. Ejidike (1996) 5 NWLR (Pt. 449) 38
Nkado v. Obiano (1997) 5 NWLR (Pt. 503) 31
Igbojimađu v. Ibeabuchi (1998) 1 NWLR (Pt. 533) 179
Motunwase v. Sorungbe (1998) 4 NWLR (pt. 92) 90
Mogaji v. Odořin (1978) 4 SC 91
Bello v. Emeka (1981) 1 SC 101
Owoade v. Omitola (1988) 2 NWLR (pt. 77) 413
Aromire v. Awoyemi (1972) 1 All NLR (pt. 1) 101
Karibo v. Grand (1992) 3 NWLR (pt. 230) 426
Okeowo v. Migliore (1979) 11 SC 138
Akano v. Oluku (2000) 31 WRN 41
Ohiaeri v. Akabeze (1992) 2 NWLR (pt. 221) 1
Akpan v. Otong (1995) 10 NWLR (pt. 476) 108
Sanusi v. Adebisi (1997) 12 SCNJ 25
Esiaba v. Ojogbo (1999) 10 NWLR (pt. 623) 436

LEAD JUDGMENT BY AKA'AH S JSC

This appeal arose from the judgment of the Court of Appeal, Calabar Division which reversed the decision of Nkop CJ sitting at Akwa Ibom High Court Uyo and ordered a re-trial on the ground of the non-evaluation of the evidence led by the respondents on their

pleaded facts of ownership and possession. The plaintiffs/respondents had sued the appellants in a representative capacity in suit No.HU/4/85 seeking a declaration that they are entitled to the Customary/Statutory Right of Occupancy over the disputed land called 'Esuk Inwang Okon Eyo'; N1,000,000.00 (One Million Naira) being general damages for trespass and a perpetual injunction restraining the defendants, their agents and assigns from ever committing further acts of trespass over the said land. The claim was denied. Pleadings were filed and exchanged and the parties called witnesses. The learned trial Chief Judge of Akwa Ibom State before dismissing the plaintiffs' case found inconsistencies in the various versions of the traditional history given by plaintiffs' witnesses when he stated in the judgment:

"I have carefully considered the two sets of traditional evidence tendered by both parties to this suit. I must confess that it is a bit difficult to test the credibility of the traditional history tendered by the plaintiffs. In the first place, there are some inconsistencies in their various versions" (See page 210 lines 10- 15 of the printed record of appeal).

The learned trial Chief Judge after pointing out what he considered to be the deficiencies in the plaintiffs' evidence accepted the defendants' evidence and held that all recent acts and facts disclosed in evidence tended to support the traditional history tendered by the defendants. He proceeded to dismiss the plaintiffs' case with N1,500.00 (One Thousand, Five Hundred Naira) costs to the defendants. The plaintiffs were dissatisfied with the decision of the learned trial Chief Judge and appealed against it to the Court of Appeal which allowed the appeal and ordered a re-trial. It is against the order of re-trial that defendants/respondents now appealed to the Supreme Court. The parties herein shall be described as defendants/appellants and plaintiffs/respondents respectively. The appellants' Notice of appeal filed on 2/8/2000 contained four grounds of appeal from which a lone issue was distilled from grounds 1 and 2 while grounds 3 and 4 were abandoned and struck out. The issue formulated by the appellants is:

"Whether the Court of Appeal was right in holding that the trial court, in the circumstances of this case, ought to have evaluated the Respondents' acts of ownership and possession given its rejection of the Respondents' inconsistent traditional evidence".

The respondents on their part raised two issues for determination as follows:

“1. Was the lower court right in holding that with numerous acts of ownership and possession as copiously pleaded and evidence led in support, the trial court failed to evaluate the traditional evidence of ownership as presented by the Respondents?” B

2. Was the lower court right in ordering a re-trial of the case owing to lack of examination and evaluation of the credibility of the witnesses and their evidence by the trial court?”

It was argued by the Learned Senior Counsel for the appellants that the finding by the trial court about the inconsistency in the traditional history given by the respondents was not set aside by the lower court herein. Learned Counsel then analyzed the reasoning of the lower Court on the evidence of the plaintiffs which the trial court did not evaluate and which led the lower Court to order the re-trial and submitted that the lower court glossed over very significant issues embedded in the parties' pleadings which would have made it to arrive at a different conclusion. The issues he enumerated are:- C

1. The respondents' pleaded root of title.

2. The inconclusive traditional evidence given by the respondents which was rejected because of its being inconsistent. E

3. The trial court was not bound to consider acts of ownership and possession after rejecting the root of title founded on traditional history.

It is argued that the case of *Akunyili v. Ejidike* (1996) 5 NWLR (Part 449) 38 was wrongly applied because the respondents did not rely on acts of ownership and exclusive possession for their claim of title to the disputed land but rather as acts to show utilization of the fact of first settlement. In this respect the case of *Nkado & Ors vs Obiano & Ors* (1997) 5 NWLR (pt. 503) 31 was more appropriate in deciding the case. It is the contention of counsel that respondents' pleaded root of title and sufficiency of its proof before the trial court are of paramount importance and the backbone of this appeal. F

The respondents in their brief agreed that the statement of claim and the evidence in support showed that the plaintiffs inherited the land in dispute from their ancestors who deforested the land when it was a virgin forest. Learned counsel for the respondents argued that the trial court was bound by law to appraise the evidence, G H

examine the demeanour of the witnesses to check their credibility and then ascribe value to the evidence but it failed to carry out this duty and this led the lower court to allow the appeal and remit the case back for retrial. Learned counsel contended that the trial court did not only fail in its duty but found the duty difficult to handle and so the final order which the Court of Appeal had to make is a direct consequence of its holding that the trial court had failed to evaluate material evidence of numerous acts of ownership and possession allegedly exercised over the land by the plaintiffs/respondents and so the conduct of the trial court had occasioned a miscarriage of justice.

Is the contention of learned counsel for the appellant's right when he argued that the case of *Akunyili v. Ejidike* supra was wrongly applied by the lower court and that instead it was the case of *Nkado & Others vs Obiano & Others* supra that was more appropriate? In the appellants' brief Learned Senior Counsel sought to draw a distinction between the evidence of traditional history which is inconclusive and evidence which is found to be inconsistent and therefore rejected. He submitted that inconclusiveness of traditional evidence in a claim for declaration of title to a disputed land does not arise where one such evidence for either of the parties is rejected on the basis of unreliability, inconsistency or for whatever reason in law. The legal position as enunciated in *Kojo vs Bonsie* (1957) 1 WLR 1223 and applied in *Igbojmadu vs Ibeabuchi & Others* (1998) 1 NWLR (Part 533) 179 is that when the traditional history put forward by a plaintiff is found to be unreliable and therefore rejects it he has failed to prove title based on it and the claim to that title ought to be dismissed. He said that in the instant case under appeal, there is nowhere in the entire judgment of the trial court where the learned trial Judge expressed the view, even remotely, that the traditional evidence or histories of the parties before him were inconclusive as stated by the learned Justice of the Court of Appeal.

With due respect, I do not think the above position as canvassed by learned counsel for the appellants does represent the true state of the law. It is trite that it is the pleadings and evidence adduced by a plaintiff for declaration of title that determines whether he has proved his case or not. In other words, proof of a claim for a declaration of title by means of traditional evidence is not mutually exclusive with other means

of proving the claim. See Kojo vs Bonsie supra; Motunwase vs Sorungbe (1998) 4 NWLR (Part 92) 90. **Thus a plaintiff may adopt one or more of the ways of proving ownership for example, traditional evidence or by means of evidence of acts of ownership or possession. It is only where a plaintiff fails to prove his case by means of traditional evidence and also fails to establish it by means of evidence of acts of ownership and possession, when these were the means pleaded and relied upon that the plaintiff's case should be dismissed.** It is also immaterial whether the learned trial Judge makes a finding that the traditional history of one or both parties is inconclusive. The lower court in its consideration of the complaint of non evaluation or improper evaluation of the evidence observed that the appellants relied in proof of their case on traditional evidence, acts of ownership and possession rightly held by relying on Akunyili vs Ejidike supra that if evidence of traditional history is not conclusive, then evidence, if any, on record of act of ownership or possession should be considered.

Having examined the pleadings and evidence of some of the witnesses called by the respondents as plaintiffs, it became obvious that their evidence ought to have been evaluated. Since the evidence turned on the credibility of the witnesses, the Court of Appeal had no option but order a re-trial. I find that the order for re-trial cannot be faulted.

On the whole I find that the appeal is completely devoid of merit and it is accordingly dismissed. The order of re-trial made by the Court of Appeal is hereby affirmed. The matter is hereby remitted to the Chief Judge Akwa Ibom State High Court for hearing 'de novo' by another Judge. There shall be costs of N50,000.00 (Fifty Thousand Naira) in favour of the respondents in the Appeal.

MUHAMMAD JSC

I read before now the leading judgment just delivered by my learned brother, Akaahs, JSC. I agree with him that the appeal is devoid of any merit. I too, dismiss the appeal. I affirm the judgment of the court below. I abide by consequential order made in the leading judgment including order as to costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Aka'ahs, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

B I seek liberty to chip in a few words of my own. This is an appeal against the judgment of the Court of Appeal, Calabar Division handed out on 22nd day of May, 2000 wherein the decision of Nkop, CJ of Akwa-Ibom State High Court sitting at Uyo was reversed. A retrial was order on the ground of non-evaluation of the evidence led by the respondents on their pleaded acts of ownership and possession; inter alia.

The plaintiffs who are respondents herein sued the defendants/appellants seeking a declaration that they are entitled to the Customary/statutory right of occupancy of the land in dispute; N1,000,000.00 (One Million Naira) as general damages for trespass and an order of perpetual injunction. Upon the exchange of pleadings, the learned trial CJ garnered evidence from both sides and was duly addressed by counsel to the parties. In his judgment, he maintained that it is a bit difficult to test the credibility of the traditional history tendered by the plaintiffs in which some inconsistencies were pinpointed. The plaintiffs' case was dismissed with N1,500 costs. The plaintiffs felt unhappy with the stance posed by the trial court and appealed to the Court of Appeal which allowed the appeal and ordered a retrial. In the same manner, the defendants felt irked with the position taken by the Court of Appeal and have appealed to this court. Briefs of arguments filed on behalf of the parties were adopted and relied upon by senior counsel on both sides of the divide. They equally advanced some useful oral submissions on 2nd October, 2012 when the appeal was heard.

The appellants formulated a lone issue for determination of the appeal as follows:-

H *"Whether the Court of Appeal was right in holding that the trial court, in the circumstances of this case, ought to have evaluated the respondents' acts of ownership and possession given its rejection of the respondents' inconsistent traditional evidence."*

The two issues decoded by the respondents for determination read as follows:-

“1. Was the lower court right in holding that with numerous acts of ownership and possession as copiously pleaded and evidence led in support, the trial court failed to evaluate the traditional evidence of ownership as presented by the respondents?”

2. Was the lower court right in ordering a re-trial of the case owing to lack of examination and evaluation of the credibility of the witnesses and their evidence by the trial court?” ^B

It is basic that in this type of claim made by the plaintiffs, if evidence of traditional history is not conclusive, then evidence, if any, on record of act of ownership or possession should be considered. ^C See: *Motunwase v. Sorungbe* (1988) 4 NWLR (Pt. 92) 90; *Akunyili v. Ejidike* (1996) 5 NWLR (pt. 449) 381 at 406. The Court of Appeal found that the trial court failed to properly appraise the evidence of P.W.1, P.W.2 and P.W.3 in respect of plaintiffs’ pleaded acts of ownership and possession after holding that traditional evidence was incon- ^Dclusive due to internal inconsistencies pinpointed; as all the trial court did was to summarize the evidence. The above finding by the Court of Appeal cannot be faulted in any respect. The trial court had the duty to properly appraise the evidence before it. This is not the same thing as mere summary of evidence. Material evidence to be placed ^E on an imaginary scale must be determined. This should be followed by evaluation of the evidence in order to determine on which side the scale tilts. The trial court that saw and heard the witnesses is pre-eminently qualified to ascribe probative value to such evidence. ^F See: *Mogaji v. Odojin* (1978) 4 SC 91 at 94; *Bello v. Emeka* (1981) 1 SC 101; *Owoade v. Omitola* (1988) 2 NWLR (Pt.77) 413 and *Aromire v. Awoyemi* (1972) 1 All NLR (Pt. 1) 101. In this case the trial court failed to evaluate material evidence on acts of ownership and possession set out by the plaintiffs/respondents and same, no doubt, occasioned miscarriage of justice. ^G Where a court of trial fails to make findings on material issues of fact as herein, the appellate court will have no alternative but to allow the appeal. This is as pronounced by this court in *Karibo v. Grand* (1992) 3 NWLR (Pt. 230) 426. I now move to the order of re-trial made by the Court of Appeal. Let me start by ^H stating it that an order of retrial should not be made where the appellate court is in a position to do justice after considering evidence that does not involve credibility of witnesses or basically documentary. See: *Okeowo v. Migliore* (1979) 11 SC 138 at 201.

In this appeal, credibility of witnesses is involved. It is the trial court which is in a vantage position to consider same. The evidence of the plaintiffs on acts of ownership and possession over the land in dispute is one that borders on credibility of witnesses for which the order of retrial is a sine qua non. In short, I am of the firm view that
 B the Court of Appeal was on a firm ground in the stance taken by it when it ordered that the case be remitted to the trial court for retrial by another Judge. For the above reasons and those carefully adumbrated in the lead judgment, I too feel that the appeal is devoid of
 C merit and should be dismissed. I order accordingly and endorse all consequential orders contained in the, lead judgment; inclusive of that relating to costs.

D PETER-ODILI JSC

The Plaintiffs at the trial High Court by order of court sued in a representative capacity claimed against the Defendants for a declaration that they are entitled to the Customary/Statutory Right of occupancy over an area of land called “ESUK INWANG AKAN EYO.”
 E They also claim One Million Naira (N1,000,000.00) as special and general damages for trespass, an injunction restraining the Defendant and their agent and assigns from further trespass, an order of court ejecting armed servants of the 8th and 9th Defendants who were forcibly occupying the land. During the trial, the 8th and 9th
 F Defendants were struck out on the application of counsel for the Plaintiffs. The trial Court in his judgment dismissed the claim of the plaintiffs. The plaintiffs dissatisfied with the judgment of the trial court to the Court of Appeal, Calabar Division which Court heard the appeal, set aside the judgment of the trial court and ordered that the
 G case be retried by another judge.

The Defendants/Respondents/Appellants now appealed to this Court challenging the order of retrial made by the Court of Appeal. On the 2nd October 2012 at the hearing, learned counsel for the
 H Appellants, Mr. Offiong SAN adopted the Brief of the Appellants filed on 28/3/06 in which was formulated a sole issue based on grounds 1 and 2 of the grounds of Appeal and abandoned grounds 3 and 4.

SINGLE ISSUE:

Whether the Court of Appeal was right in holding that the

trial court in the circumstances of this case ought to have evaluated the Respondents acts of ownership and possession given its rejection of the Respondents' inconsistent traditional evidence.

The Respondents through learned counsel P. O. Okolo Esq. on their behalf adopted their Brief filed on 20/10/2011 and deemed filed 2/10/12 same day of the hearing. In the Respondents' Brief were crafted two issues for determination which are as follows:

1. Was the lower Court right in holding that with numerous acts of ownership and possession as copiously pleaded and evidence led in support, the trial court failed to evaluate the traditional evidences of ownership as presented by the Respondent.

2. Was the Lower court right in ordering a retrial of the case owing to lack of examination and evaluation of the credibility of the witnesses and their evidence by the trial court.

It seems to me that the single issue as framed by the Appellants would suffice, that single issue adequately incorporated the whole of the arguments on either side. I shall therefore use it for the purpose of the consideration of this appeal. The learned Senior Advocate for the Appellants, Mr. Offiong stated that the position of the Court of Appeal glossed over very significant issues embedded in the parties' pleadings and the judgment of the trial Court necessary to guide it to arrive at a proper decision namely:-

i) What was the respondents' pleaded root of title?

(ii) Was the Respondents' evidence of traditional history "inconclusive" or found inconsistent and therefore rejected.

(iii) Was the trial court bound to consider acts of ownership and possession after rejecting the root of title founded on traditional history of the Respondents?

The learned SAN contended that if the Court of Appeal justices had adverted their minds to the salient issues above stated they would have rightly arrived at a different conclusion. That the Respondents' root of title is founded on acquisition by first settlement having pleaded same in paragraph 8 of the Statement of Claim at page 25 of the Record thus:

"The Plaintiffs inherited the land in dispute from their ancestors who were the first to deforest the land in dispute which was then virgin forest owned by nobody."

Mr. Offiong SAN said the appellants denied those averments

of the Respondents and in the Statement of defence at pages 83 and 84 of the Record had set up their own version of traditional history among others at pages 85 - 87 of the Statement of Defence. That each party led evidence in line with their respective pleadings. He went on to submit that describing “acquisition by settlement”, the mode pleaded and relied upon by the Respondents, in *Akano & ors v. Oluku & ors* (2000) 31 WRN 41 at page 56 was stated to be thus:-

“....no more than first or original settlement on the land for whatever purpose.” That the trial High Court rightly did not ascribe any probative value to the evidence of the Respondents’ witnesses and rejected their evidence for inconsistency. That it was therefore wrong of the Court of Appeal to have considered such inconsistency and rejected evidence of traditional history as being “inconclusive” to warrant a resort to acts of ownership and possession which were predicated on the traditional history. Mr. Offiong of counsel for the Appellants said that inconclusiveness of traditional evidence in a claim for declaration of title to a disputed land does not arise, where one such evidence for either of the parties is rejected for whatever reason in law. He referred to *Ohiaeri & Anor v Akabeze & Ors* (1992) 2 NWLR (Pt.221) 1; *Akpan v Otong* (1995) 10 NWLR (pt.476) 108. The learned Senior Counsel went on to say that once one of the traditional histories of either of the parties is found by the trial court to be unreliable, or inconsistent or apparently untrue or dishonest or a conclusive finding is made on one of such versions of competing traditional histories by the trial court, either accepting or rejecting same, the traditional histories adduced by the parties can no longer be said to conflict one with the other, neither can it be said to be inclusive, the other having lost probative value and principles in *Kojo II v. Bonsie and Ekpo v. Ita* can no longer be validly invoked. He cited *Sanusi & ors v. Adebiyi & Ors* (1997) 12 SCNJ 25.

That in the instant case the trial court found the version of the traditional history adduced by the Respondents to be inconsistent, that is, that they suffered from internal conflict which finding is subsisting. He referred to *Esiaba & Ors v. Ojogbo & Anor* (1999) 10 NWLR (Pt.623) 436 at 476; *Olatunji v. Alaba & Anor* (1998) 8 NWLR (Pt.563) 569; *Ogbuekwelu v. Umeanafunkwa* (1994) 4 NWLR (Pt.341) 676; *Eboade & Anor v. Atomesin & Anor* (1997) 5 NWLR (Pt.506) 490 at 502. It was further canvassed by the Appellants that

given the state of the pleadings of the Respondents and their evidence, they premised their case on the traditional history of the land in dispute having been founded by Ebom who subsequently exercised first dominion thereon by the process of the stated acts of ownership and possession thereto. That once the root of title of the Respondents on traditional history was rejected, their case collapsed since they did not rely on any other mode of acquiring title to the land in dispute but the traditional history of first acquisition by their ancestor, Ebom and his subsequent grant to Okon Eyo. He cited *Alli v. Alesinloye* (2000) 4 SCNJ 264 at 285; *Odofin v Ayoola* (1984) 11 SC 72 at 105 - 106; *Balogun & Ors v Akanji & Anor* (1998) 2 SC (Pt.1) 99; *Fasoro & Anor v Beyioku & Ors* (1998) 4 SC 151; *Ude & Ors v Chimbo & Ors* (1998) 12 NWLR (Pt.577) 159 at 189; *Adebayo v Ighodalo* (1996) 5 NWLR (pt.450) 507 at 517; *Lawal & ors v. Olufowobi & ors* (1995) 10 NWLR (pt.477) 177.

In response, Mr. P. O. Okolo, learned counsel for the Respondents submitted that the Statement of claim of the Plaintiffs now Respondents and evidence in support clearly showed that they inherited the land in dispute from ancestors who they said were the first to deforest the land which was at the time virgin forest owned by nobody. That the trial court was obliged to appraise the evidence and look out for the following:-

- (a) The founding of the land in dispute.
- (b) The person who founded the land and exercised original acts of possession.
- (c) The person whom the title in respect of the land had devolved since the first founding.

He referred to *Osafire v Odi* (1994) 2 NWLR (Pt.235) 125 at 127, *Sunday Ukwu Eze & Ors v Gilbert Atasie & Ors* (2000) 10 NWLR (Pt.676) 470 at 482; *Mogaji v Cadbury Nig. Limited* (1988) 2 NWLR (Pt.7) 393; *Ojo v Adejobi* (1978) 3 SC 65; *Elias v. Omo Bare* (1982) 5 SC 25; *Onwuka v Ediala* (1939) 1 NWLR (Pt.96) 182. Mr. Okolo said that the trial Court's failure to properly evaluate the evidence of traditional history of the title led the Court of Appeal to allow the appeal and send back the case for retrial. That if a trial court fails to consider and evaluate the evidence adduced by both parties on certain relevant issues as happened in this case, it is then the duty of the Appellate Court if it does not involve credibility of

witnesses to consider and evaluate such evidence and make proper findings. He cited *Chief Johnson Iwah v. Chief Okoebe* (1993) 9 NWLR (Pt.316) 159. That the trial Court took a decision without explaining how it arrived at the decision and so the Court of Appeal had to intervene and do that which ought to have been done at the first instance. He referred to *Dim v Enemu* (2009) 10 NWLR (pt. 1149) 353 at 396. Mr. Okolo of counsel said the final order of the Court of Appeal for a retrial was correct since the trial court had failed to evaluate the material evidence of numerous acts of ownership and possession exercised over the land by the Plaintiffs/Respondents. Also that the trial Court had failed to consider material evidence on one of the Appellant's root of title which had occasioned a miscarriage of justice and the only way out being a retrial. He cited *Onifade v Olayiwola* (1990) 7 NWLR (Pt.161) 130 at 161; *Mafimisebi v Ehuwa* (2007) 2 NWLR (Pt.1018) 385 at 436; *Salin Yahaya v The State* (2002) 3 NWLR (Pt.754) 289 at 305; *Duru v Nwose* (1989) 4 NWLR (pt. 113) 24 at 43.

The bone of contention in this appeal is whether the Court of Appeal was right to have intervened in the matter of the evaluation of the evidence by the trial Court which the Lower Court found below the standard required, coming to the conclusion that a retrial and nothing else would be appropriate. The next to do now is to see if indeed the Court of Appeal was on the right path. I would like to refer to the case of *Gilbert Onwuka & Ors v. Michael Ediala & ors* (1989) NWLR (pt.96) 1282 wherein this Court, per Oputa JSC stated:

"To evaluate simply means to give value to ascertain the amount, to find numerical expression for etc. Therefore in deciding whether a certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial Judge, after a summary of all facts, must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it. This scale though imaginary is still the scale of justice, and the scale of truth. Such a scale will automatically repel and expel any and all false evidence. What ought to go into that imaginary scale should therefore be no other than credible evidence. What is therefore necessary in

deciding what goes into that imaginary scale is the value, credibility and quality as well as the probative essence of the evidence.”

Of the same frame of opinion, this Court in the more recent case of Dim v Enemu (2009) 10 NWLR (Pt.1149) 353 at 396 held as follows:-

“The evaluation of evidence and ascription of probative value to the testimony of a witness is within the exclusive domain of the trial Court that heard and watched the witnesses testify before it. To determine whether a testimony has probative value, the Court takes into consideration whether the testimony is cogent, consistent and in accord with reason and in relation to other evidence before it. The court also takes into consideration the demeanour personality, reaction to questions under cross-examination in the determination of the issue of credibility of a witness. A determination of the court on credibility is almost sacred.”

Bearing in mind the duty imposed on a trial Court in respect of evaluation of the evidence before it including the credibility of witnesses and assessment of the evidence, therefore merely presenting a summarization of evidence of ownership and possession copiously presented as the Court of Appeal found and as borne out by the record. Also not stating how that Court of trial came by its summarization and conclusion especially when some vital pieces of evidence of some witnesses which ought to have been showcased and placed alongside the contest against such on the imaginary scale. This style of handling of the evidence before that court of trial falling short of the required standard, the Court of Appeal really had no option, unfortunately as it is considering the age of case than to make the order of retrial so that what had been left undone would be carried out at the fresh trial that would ensue, I rely on the cases of Karibo v Grand (1992) 3 NWLR (Pt.230) 426; Mafimisebi v Ehuwa & Ors (2007) 2 NWLR (Pt.1018) 385 at 436; Onifade v Olayiwola (1990) 7 NWLR (Pt.161) 130 at 161.

From the foregoing in which I have attempted to show that there indeed was a mistrial and a failure of the trial issues properly raised by the parties, the error is clearly substantial and just as the Court below could not ignore it, it is equally difficult to pass off as inconsequential. Therefore, in keeping with the fuller reasons in the lead judgment just delivered by my learned brother Aka'ahs JSC, I

dismiss the appeal and affirm the decision of the Court of Appeal including the order for retrial before another judge of the High Court of Uyo. I abide by the consequential orders made in the lead judgment.

B

ARIWOOLA JSC

I had the privilege of reading the draft of the lead judgment just delivered by my learned brother, Aka'ahs, JSC. I agree entirely with the reasoning and the conclusion that the appeal is indeed devoid of merit and substance. The case was rightly ordered for retrial by the court below. In the circumstance, I too dismiss the appeal and abide by the consequential orders in the lead judgment, including the order on costs.

D

E

F

G

H