

SUPREME COURT OF NIGERIA
FRIDAY 18th JANUARY, 2013. SC. 131/2003
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-
ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC**

1. MICHAEL ACHILIHU
2. JACOB OGBUKA
3. SAMUEL AGBARA
4. OMENAZU NWACHUKWU
5. ONUKWUFO NWOGU APPELLANTS
6. JOHN AGOMUO
7. BROWN NWALA
8. EBERE APPOLOS
9. OCHIOBI EMEROLE
AND
EZEKIEL ANYATONWU RESPONDENT

LAND LAW - Family land - Sale - The family head acts as trustee of the land - And he cannot transfer the land - Without the consent of principal members of the family (H1)

LAND LAW - Pledge - Redemption time - Length of time of redeeming the land - Or the use it has been put to by pledgee - Is not necessary and cannot be relied on in proof of anything (H2)

LAND LAW - Customary pledge - Principles - Okoiko's case - A pledge is perpetually redeemable - And pledgee is not entitled to compensation - For putting the land to economic uses (H3)

LAND LAW - Pledgee - Duties of - He is to take proper care of the pledged property - And to deliver it to pledgor - When the debt is repaid (H4)

LAND LAW - Customary pledge - Validity - Admission by plaintiff and evidence of PW3 under cross examination - Strengthened defendant's claim - That the land was pledged by family head (H5)

APPEALS - Courts - Findings of fact - Appellate court should not

2 Achilihu v. Anyatonwu (2013) 1 KLR (pt. 322) 1; (2013)

interfere with findings of trial court - Save where there is misdirection by trial court (H6)

FACTS

Plaintiff/respondent/cross-appellant commenced the action in the Abia State (then Imo) State High Court Isiala Ngwa Judicial Division holden at Okpuala Ngwa against defendants/appellants jointly and severally, wherein he claimed for declaration of title, damages for trespass and perpetual injunction restraining appellants from further trespassing on the land.

The court gave judgment in favour of respondent. Appellants were dissatisfied and they filed appeal at the Court of Appeal Port Harcourt Division. The appeal was dismissed. Aggrieved, appellants have further appealed to Supreme Court. Respondent was equally dissatisfied with part of the judgment of the Court of Appeal. Hence, he cross-appealed.

ISSUES FOR DETERMINATION

1. Whether the land in dispute “OKPULO ALAOCHA” is the personal property of late Lazarus Ogbuevule ‘the pledgor’ and not the communal or family property of appellants.

2. Whether the appellants were in trespass when they entered the land in dispute in 1984 after redeeming it and regaining possession from the respondent during the arbitration by the Amala Ohuama Uratta in 1983.

3. Whether the Court of appeal was wrong in holding that there was no credible and reliable evidence of outright sale of the land in dispute to the respondent, and in therefore reversing the decision of the High Court to grant the respondent a declaration of title.

HELD (Unanimously allowing the appeal and dismissing the cross appeal per **AKA’AHS JSC**)

LAND LAW - Family land - Sale

1. As a general rule, the management of family property is put in charge of the family head and he acts as a trustee of such. He should exercise his powers not for his own private advan-

tage but for the benefit of the family and he does not enjoy absolute power in the management of family land per se. He is required to consult the other members of the family and in the case of important decisions such as sale of family land; he must obtain the consent of the principal members of the family. As the head of the family cannot transfer family land as his own exclusive personal property, any transfer of the family property by him without carrying along the principal members is void ab initio. (p. 11 E)

LAND LAW - Pledge - Redemption time

2. Once it is determined that the land is on pledge, the length of time taken to redeem it or the use it has been put to by the pledgee such as planting economic trees (which in this case was the planting of oil palm trees) is no longer an issue, and cannot be relied on in proof of anything. (p. 11 H)

LAND LAW - Customary pledge - Principles

3. In *Okoiko & Anor v. Esedalue & Anor* (1974) 3 SC 15, this Court laid down the principles which govern customary pledges as follows:

(1) That a pledge is perpetually redeemable and the pledgor's family is entitled to redeem the pledged land for the amount of the original loan and for nothing more;

(2) That on redemption by the pledgor, a pledgee of land is not entitled to compensation for putting the land to extraordinary economic uses while in possession.

(3) That when pledged land is being redeemed by the pledgor or successor-in-title the pledgee must account for benefits derived by him from exploitation of the land while in possession; and

(4) That the pledgee in possession must not do anything to clog the pledgor's right of redemption of the pledged land. In other words the concept of a leasehold under common law is alien to customary pledge. (p. 12 A)

LAND LAW - Pledgee - Duties of

4. There is a slight variation in Northern Ngwa concerning the

duties and liabilities of a pledgee under a pledge and the time limit for redemption. The duties of a pledgee in respect of property pledged are to take proper care of the property, to deliver it to the pledgor when the debt is repaid or to deliver it to another person if the pledgor so demands. A pledgee does not have to account to the pledgor for any income or natural increase he obtains from the pledged property while it is in his possession or under his control. It is also permissible and normal for a time limit to be fixed within which a pledge must be redeemed in certain divisions including Northern Ngwa.
 (p. 12 E)

LAND LAW - Customary pledge - Validity

5. This witness admitted under cross-examination that Lazarus Ogbuevule was from Umuagbaghighba family. When cross-examined, the plaintiff said he did not know if Lazarus Ogbuevule was from Umugbai family. He also could not remember if he was the oldest man at the time of the transaction. In the next breath the plaintiff agreed that Lazarus Ogbuevule was the oldest man in his family. The admission coupled with the evidence of PW3 under cross-examination on the Ngwa custom relating to pledge has further strengthened the defendants' claim that Lazarus Ogbuevule pledged the land as head of the Umuagbai family. (p. 16 B)

APPEALS - Courts - Findings of fact

6. This appeal therefore turns on whether the lower courts conformed with the principles of law regulating proper and correct evaluation and appraisal of evidence. It is settled law that an appellate court should not ordinarily disturb or tamper with the findings of facts made by the trial court, particularly if such findings and conclusions reached are supported by credible evidence. This principle is premised on the fact that the duty of appraising of evidence given at a trial is pre-eminently that of the trial court that saw and heard the witnesses. There is an exception to the above rule. The exception is where there is a misdirection by the trial court. Misdirection occurs when the issues of fact in the case for the parties or the law

applicable to the issues raised are not fairly appraised or considered or misconceived or the law applicable is incorrectly applied by the trial court as a result there would be a miscarriage of justice if the decision reached is allowed to stand. Where a trial court has drawn wrong inference from primary facts, the appellate court can reject the inference and make what it considers to be the right inference supported by evidence. It is also trite that where a trial court has failed, as in the instant case in its duty to properly consider the evidence before it which led it to draw wrong conclusions from the evidence it accepted, the appeal court will be perfectly justified in re-evaluating and re-considering the whole evidence in order to arrive at a just decision. (p. 18 A)

NOTABLE POINT OF INTEREST

PETER-ODILI JSC

1. Rules of pleadings

The importance of this statutory provision cannot be over flogged to place things on its proper footing and to underscore the point that the other party cannot be taken unawares as to what the issues in controversy are to enable that adverse party to be prepared and present their side. This to assist the court weighs the balance, adjudicate and reach a decision one way or the other. In the light of the position of pleadings, the pleadings which are specific allegations must be specifically denied. Therefore, there is no room for a defendant to be hedgy and evasive in his answers to the facts averred by the plaintiff. It is so that once that pleading has been specifically put forward the other party who fails to meet those facts directly either by admitting them or denying them that is with specificity, then he is taken to have admitted. (p. 27 H)

REPRESENTATION

N. U. Nwokocha-Ahaniwe with Nnedinma Harry (Mrs.), for the Appellants
Uche S. Awa with Nehemiah Odinaka Uba, for the Respondent

CASES REFERRED TO

- Ojibah v. Ojibah (1991) 5 NWLR (pt. 191) 296
 Agu v. Ikewuibe (1991) 3 NWLR (pt. 180) 385
 Tijani v. Secretary Southern Nigeria (1921) AC 399
 Sunmonu v. Raphael (1927) AC 881
 B Bassey v. Cobham (1924) 5 NLR 90
 Archibong v. Archibong (1947) 18 NLR 117
 D.W. Lewis & Ors. V. Bankole & Ors. (1908) 1 NLR 80
 Okoiko v. Esedalue (1974) 3 SC 15
 C Emarietu v. Ovivie (1977) 2 SC 31
 Ogundulu v. Philips (1973) 1 NMLR 267
 Okolo v. Uzoka (1978) 4 SC 77
 Mogaji v. Odofin (1978) 4 SC 91
 Nor v. Tarkaa (1998) 4 NWLR (pt. 544) 130
 D Garba v. Yahaya (2007) 1 SC (pt. 2) 262
 Abisi v. Ekwealor (1993) 6 NWLR (pt. 302) 643

STATUTES & RULES REFERRED TO

- Evidence Act, s. 75
 E Lands Instruments Registration Law Cap 72 Laws of Eastern Nigeria
 1968, ss. 2, 6, 15
 High Court of Imo State (Civil Procedure) Rules 1988, O. 25 r. 9

LEAD JUDGMENT BY AKA'AHs JSC

- F The respondent/cross-appellant as plaintiff commenced the
 action in the then Imo State High Court Isiala Ngwa Judicial Division
 holden at Okpuala Ngwa (now Abia State) in Suit No. HIN/2/84
 against the appellants/defendants jointly and severally wherein he
 G claimed the following reliefs in paragraph 16 of the Amended State-
 ment of Claim:-

- “1b (i) A declaration that the land known as and called
 “OKPULO ALAOCHA” situate at Uratta Umuocham Village in Isiala
 Ngwa Local Government Area within jurisdiction of this Court is in
 H the possession of the plaintiff who is entitled to the grant to him of a
 Certificate of Occupancy in respect of the said land.

(ii) N1000.00 (One Thousand Naira) damages for trespass in
 that in or about January, 1984 and on diverse days before and there-
 after the defendants without the leave or licence of the plaintiff broke

and entered the said land in concert cleared the same for purposes of farming, damaged the oil-palm plantation, cut the oil palm fronds planted on the said land by the plaintiff and destroyed one thousand cassava plants thereon.

(iii) A perpetual injunction restraining the defendants by themselves, their people, their servants and/or agents from farther interfering with the plaintiff's rights to and interests in the said land". B

The High Court gave judgment in favour of the plaintiff on 14/10/1996. The defendants were dissatisfied by the said judgment and accordingly appealed to the Court of Appeal, Port Harcourt Division. The appeal was dismissed. Aggrieved, the appellants have further appealed to the Supreme Court in their Notice of Appeal filed on 14/2/2003 which contained four grounds of appeal. The respondent was equally dissatisfied with part of the judgment and so cross-appealed on two grounds of appeal filed on 18/2/2003. The respondent also filed Notice of Preliminary Objection. At the hearing of the appeal, learned counsel for the respondent/cross-appellant applied to abandon the preliminary objection and it was accordingly struck out together with the argument in the briefs. C

In the substantive appeal the appellants formulated the following three issues for determination: - E

1. Whether the land in dispute "OKPWO ALAOCHA" is the personal property of late Lazarus Ogbuevule 'the pledgor' and not the communal or family property of appellants (grounds 1, 3 and 4 of the appellants' grounds of appeal) F

2. Whether the appellants were in trespass when they entered the land in dispute in 1984 after redeeming it and regaining possession from the respondent during the arbitration by the Amala Ohuama Uratta in 1983 (grounds 2 and 4 of the appellants' grounds of appeal) G

3. Whether the Court of appeal was wrong in holding that there was no credible and reliable evidence of outright sale of the land in dispute to the respondent, and in therefore reversing the decision of the High Court to grant the respondent a declaration of title. (grounds 1 and 2 of the cross-appeal) H

The respondent/cross-appellant distilled two issues from the main appeal and a lone issue from the cross-appeal. The issues arising from the main appeal are:-

1. Was the land in dispute the personal property of Lazarus Ogbuevule and had Lazarus Ogbuevule any legal title to pass to the respondent?

2. Whether the respondent established his claim on trespass and whether he could be bound by a decision of a native arbitration to which he did not submit and where he was not represented to be heard on his own version of the dispute.

3. Whether the learned Justices of the Court of Appeal were right in unanimously holding as they did that no credible witnesses authenticated the conversion of the pledge to that of an outright sale thereby deleting the words: "who is entitled to the grant to him of the Certificate of Occupancy in respect of the same land" from their final order.

In arguing the main appeal, learned counsel for the appellants referred to paragraphs 2(b), 2(c), 2(d), 9, 10, 15, 16, 23 and 24 of the statement of defence which were reproduced as paragraphs 3(b), 3(e), 3(d), 9, 10, 14, 15, 16, 24 and 25 of the amended statement of defence showing that the land in dispute was communal property which was held in trust by the pledgor but which the plaintiff failed to join issue on in the amended statement of claim. He also referred to the evidence of DW1, DW2, DW3 and DW4 and submitted that once a party refuses to meet the facts directly either by admitting them, he is taken to have admitted them. He went further to contend that even if it can be said that the respondent joined issue on the allegation that the land in dispute is the family property of the appellants, they procured preponderance of evidence in support of their claim. He submitted that the decision of the

Court of Appeal which is predicated on the doctrine of laches and acquiescence flies in the face of their own finding that the land in dispute was on pledge and the possession of the said land by Lazarus Ogbuevule was due to his being the family head. As family head he could do anything with the land short of selling it or otherwise alienating the legal title to the land. He argued that the thumbprint of Job Amalatra in Exhibit 'A' could not help the case of the respondent as that Exhibit was the 1968 pledge agreement which he witnessed and not the alleged 1970 and 1971 out-right sale transaction. It is argued that even if Job Amalaha was part of the 1968 pledge transaction, his actions and those of Lazarus Ogbuevule cannot be held to bind the

other numerous members of Umuagbaghigba family nor can such actions convert the land in dispute from family property to the personal property of Lazarus Ogbuevule.

On issue 2, it is argued that the Court of Appeal made a perverse and unexplainable finding when it held that the trial court was right not to place reliance on Exhibit 'E' which the respondent seriously disputed because he was not a party to the making of the document. Learned counsel argued that Exhibit 'C' tendered and relied on by the respondent and preferred by the trial court is in agreement with Exhibit 'E' on all points except the finding by the arbitrators that the purported conditionality of 94 years clogs the appellants' equity of redemption notwithstanding the fact that the land was on pledge to the respondent. It is learned counsel's submission that Exhibit 'C' is not superior to Exhibits 'E' and F but of co-ordinate status and since Exhibits 'E' and F were earlier in time, they prevail over Exhibit 'C'.

The arguments on issue 3 relate to the appellants' response to the cross-appeal where the respondent was quarrelling with the finding of the court below that there was no evidence of the conversion of pledge of the disputed land to an outright sale. Learned counsel argued that if this Court finds and holds that the land in dispute is the family property of the appellants held in trust for them by the late Lazarus Ogbuevule, then all the evidence in the world that the said transaction between Lazarus Ogbuevule and the respondent transmuted from pledge to sale will serve no purpose because such sale of family property by one member acting alone will be void.

In his response learned counsel for the respondent referred to the receipt Exhibit 'A' which was given by the late Lazarus Ogbuevule in respect of the transaction witnessed by Job Amalaha, a principal member of the appellants' family. It was argued that if the land in dispute was family land, Job Amalaha would have challenged the transaction and refused to sign Exhibit 'A'. It is the contention of learned counsel that Lazarus Ogbuevule claimed the land as his personal property and issued Exhibit 'A' in his own name as the owner of the land in dispute and since no member of the appellants' family challenged the transaction which was made in 1968 when the respondent entered into possession and cultivated the land openly with palm trees which he harvested during the lifetime of Lazarus Ogbuevule coupled

with the subsequent sale of more portions of contiguous land in 1971, the receipt covering the 1968 transaction and that of 1971 should be read as one document. He maintained that Lazarus Ogbuevule transferred the land in dispute to the respondent and this can be inferred from the amended statement of claim and Lazarus Ogbuevule did not require the consent of anybody to alienate his land to the respondent. He submitted that both the High Court and the Court of Appeal were right in holding that the land in dispute was the personal property of Lazarus Ogbuevule and not family property since the appellants did not challenge the transactions during the lifetime of Lazarus Ogbuevule. Learned counsel submitted that these are concurrent findings of fact that should not be disturbed. It is submitted that where parties submit to customary arbitration, they cannot later reject the judgment of that customary arbitration. For this proposition learned counsel cited the following cases in support: Michael Ojibah v. Ubaka Ojibah (1991) 5 NWLR (Part 191) 296; Raphael Agu v. Christian Ikewuibe (1991) 3 NWLR (Part 180) 385.

Learned counsel maintained that the dispute first went before Eze Asuoha of the community and the Eze and his cabinet gave judgment in favour of the respondent but that the respondent did not submit to the jurisdiction of the Amalas, which is an inferior tribunal to that of Eze Asuoha. Since the respondent did not attend the Amala arbitration, the decisions of that tribunal contained in Exhibit 'E' is not binding on him.

On the cross-appeal, learned counsel for the respondent/cross appellant referred to paragraphs 5 and 6 of the statement of claim and the evidence adduced both oral and documentary and submitted that there was abundant and sufficient, cogent, credible and unimpeached evidence to entitle the respondent to full judgment. He urged this Court to restore the final order made by the trial court which entitled the plaintiff/respondent to a grant of the certificate of occupancy in respect of the same land which was deleted by the court below. Learned counsel urged this Court to dismiss the main appeal.

The pivot of this appeal rotates on whether the disputed land is communal land or it was the personal property of late Lazarus Ogbuevule which he first pledged to the respondent but which later transmuted to an outright sale. The learned trial Judge found that

late Lazarus Ogbuevule pledged the land to the respondent. He also found that since 6th of March, 1968 when the pledge took place no one challenged the right of late Lazarus Ogbuevule to pledge the land to the respondent until 1983. The Court reasoned that if the appellants (who were defendants) at the trial court were co-owners of the disputed land with Lazarus Ogbuevule, they should not have sat idly by for 15 years before laying claim to the land. The Court also found that there was no evidence that the pledge was redeemed during the life-time of the pledgor.

The decision of the learned trial Judge was affirmed by the lower court except the relief that the respondent is entitled to the grant to him of the certificate of occupancy in respect of the same land. The reason the lower court gave was that the agreement for the purchase of the land tendered as Exhibit 'A' showed that the seller claimed it as his land and not family land and the appellants never challenged the transaction throughout the lifetime of the seller even though one of the appellants signed Exhibit 'A'. The lower court concluded that the failure of the appellants to do anything in the lifetime of the late Lazarus Ogbuevule and long after his death in 1971 belied their claim that the land was family property.

As a general rule, the management of family property is put in charge of the family head and he acts as a trustee of such. See: Amodu Tijani v. Secretary Southern Nigeria (1921) A.C. 399; Sunmonu v. Raphael (1927) A.C. 881 at 884; Bassey v. Cobham (1924) 5 NLR 90; Archibong v. Archibong (1947) 18 NLR 117. ***He should exercise his powers not for his own private advantage but for the benefit of the family and he does not enjoy absolute power in the management of family land per se. He is required to consult the other members of the family and in the case of important decisions such as sale of family land; he must obtain the consent of the principal members of the family. As the head of the family cannot transfer family land as his own exclusive personal property, any transfer of the family property by him without carrying along the principal members is void ab initio.*** See: D.W. Lewis & Ors. V. Bankole & Ors. (1908) 1 NLR 80.

Once it is determined that the land is on pledge, the length of time taken to redeem it or the use it has been put to by the

pledgee such as planting economic trees (which in this case was the planting of oil palm trees) is no longer an issue, and cannot be relied on in proof of anything.

In Okoiko & Anor v. Esedalue & Anor (1974) 3 SC

15, this Court laid down the principles which govern customary pledges as follows:

(1) That a pledge is perpetually redeemable and the pledgor's family is entitled to redeem the pledged land for the amount of the original loan and for nothing more;

(2) That on redemption by the pledgor, a pledgee of land is not entitled to compensation for putting the land to extraordinary economic uses while in possession.

(3) That when pledged land is being redeemed by the pledgor or successor-in-title the pledgee must account for benefits derived by him from exploitation of the land while in possession; and

(4) That the pledgee in possession must not do anything to clog the pledgor's right of redemption of the pledged land. In other words the concept of a leasehold under common law is alien to customary pledge.

There is a slight variation in Northern Ngwa concerning the duties and liabilities of a pledgee under a pledge and the time limit for redemption. The duties of a pledgee in respect of property pledged are to take proper care of the property, to deliver it to the pledgor when the debt is repaid or to deliver it to another person if the pledgor so demands. A pledgee does not have to account to the pledgor for any income or natural increase he obtains from the pledged property while it is in his possession or under his control. It is also permissible and normal for a time limit to be fixed within which a pledge must be redeemed in certain divisions including Northern Ngwa. (See: Chapter 34 paragraphs 434 (i), 2(c) and 439(i) of Customary Law Manual obtaining in Anambra and Imo States prepared by Dr. S.N.C. Obi, Commissioner for Law Revision, Anambra State of Nigeria 1977).

A close scrutiny of the pleadings and evidence presented by the parties reveals that the respondent staked his claim purely on Exhibit 'A' while the appellants maintained that the transaction was

clouded in secrecy and when it became obvious that Lazarus Ogbuevule pledged the land to the respondent in 1968 which was witnessed by Job Amalaha who later succeeded Lazarus Ogbuevule as the family head, the appellants took steps to redeem the pledge by taking their case to the Ohu-ama Uratta who decided in their favour. The respondent rejected the decision of the Ohu-ama Uratta and reported the case to Eze Asuoha who found for the respondent. In defiance of this latter decision by Eze Asuoha, the appellants entered the disputed land and caused some damage to the oil palms thus prompting the respondent as plaintiff to institute Suit No. HIN/2/84 which is now before this Court as a further appeal from the Court of Appeal Port Harcourt Division.

Learned counsel has argued in his brief that even though the appellants as defendants pleaded in both the statement of defence which they later amended that the land in dispute is communal land, the respondent as plaintiff did not join issue with them nor did he file a reply to counter them.

In paragraphs 3(b) (c) (d), 9 and 10 of the Amended Statement of Defence, the defendants pleaded the following facts:

“3(b) The defendants further aver that “Okpulo Alaocha” is a communal land for the entire family of Umuagbaghigba family to which 1st, 2nd, 3rd, 4th, 8th, 10th and 11th defendants and late Lazarus Ogbuevule belong. Lazarus Ogbuevule was the oldest man and head then of Umuagbaghigba family.

And as the oldest man, he held the land in trust for the rest of the members of the family according to the custom of Umuagbaghigba family that the oldest man or head of family has OKPULO land in trust for the family plus “Ofo na Ogu” which is a symbol of authority for the family. On the death of the oldest man or head of a family the next oldest man succeeds him and enjoys all the rights, privileges his successor enjoyed. The 1st defendant is now the next oldest man and the head of Umuagbaghigba family with “Ofo na Ogu”.

(c) still in farther reply to paragraph 3 of the Amended Statement of Claim, the oldest man having any of the family land in trust cannot pledge or sell it without the consent and approval of the principal members of the family. No member of the defendants’ family was present at the time of the pledge transaction or alleged sale.

(d) In Umuagbaghigba family the following are principal mem-

bers of the family in order of seniority, Lazarus Ogbuevule, Job Amalaha, Phillip Amalaha, Enoch Emereole, Ochiobi Emereole, Michael Achilihu, John Agomuo and several others. None of these people was present to witness the pledge or sale transaction between the plaintiff and Lazarus Ogbuavule Lazarus Ogbuevule until his death
B was a stark illiterate and did not know how to read or write, nor did he know how to sign his name.

9. The defendants aver that OKPULO ALAOCHA land is a communal family land of Umuagbaghigba Umuocham Uratta people. It was the place where the defendants' ancestors like Agbaghigba
C Nwosu and many others lived and died. The name "OKPULO" means a place originally inhabited by a people. Agbaghigba one of the defendants' ancestors lived and died and was buried there. Agbaghigba's grave indicated in defendants' Plan No. ONC/84/IM05 filed with their
D Amended Statement of Defence.

10. The defendants aver further that it is not the custom of Umuagbaghigbo people to sell an "OKPULO" land with their ancestors grave on it.... "

The plaintiff amended his statement of claim. In neither the
E original statement of claim nor the amended one did he join issue with the defendants' claim that the disputed land was communal land. He also did not file a reply to controvert the assertions made by the defendants in their Amended Statement of defence. The only aver-
F ment he made concerning the ownership of the land was the fact that he was not challenged by anyone when he set up the oil palm plantation on the land after it had been granted to him by late Lazarus Ogbuevule and this is contained in paragraph 9 of the Amended Statement of claim which reads:-

G "9. The grantor of the land, the said Lazarus Ogbuevule was alive when the plaintiff set up the said oil palm plantation unchal-
lenged on the land in dispute and he, the grantor aforesaid, also saw the palms grow to maturity and the plaintiff harvest the palm fruits without let or hindrance from whomsoever. The said grantor died
H later in 1971".

The defendants/appellants did not help their case when they denied knowledge of the pledge contained in Exhibit 'A' which was witnessed by Job Amalaha, Osondu Emorole and Innocent Ndumeole. The pledgor as well as Job Amalaha and Osondu Emorole

thumb printed Exhibit 'A'. The transaction was recorded in English and no jurat was affixed to show that the document was read over and explained to them before they appended their signature. However PW4 who also witnessed Exhibit 'A' said it was read over to the illiterate witnesses before they signed. The denial by Job Amalaha of his knowledge of the 1968 transaction notwithstanding there are still pieces of evidence which showed that Lazarus Ogbuevule was not the absolute owner of the disputed land. B

The Plaintiff who testified as PW1 asserted positively that Lazarus Ogbuevule was not from the same family as the defendants and that he was the owner of the land because he Lazarus Ogbuevule inherited it from his (vendor's) father in accordance with the custom of the people. Continuing with his evidence he (plaintiff) stated at page 61 lines 1-13 of the record thus: C

"In 1983 the first defendant Job Amalaha and two others entered into the plantation and made paths around the plantation, Lazarus Ogbuevule died in 1971. I sued the defendants before Eze B.U. Asuoha complaining of defendants' entry into the plantation. They were invited by Eze Asuoha to his palace. The defendants came and there were discussions. The Eze and his cabinet discussed the matter and gave judgment in my favour..." D E

The writer of the receipt Gabriel Nwogu witnessed the case. The judgment was reduced into writing which I submitted here"

PW2 was James Akwarandu Nwachukwu. He stated that he was the Palace Secretary of the Eze of Umuoha and he recorded the proceedings of the dispute between the plaintiff and defendants which were tendered as Exhibit 'C'. PW3 was a member of the Eze-in-council when Exhibit 'C' was recorded. He testified that under Ngwa custom land can be pledged for some years. He stated under cross-examination that a pledge does not end unless it is agreed that it should end at any time the pledged amount is tendered. F G

PW 4, Innocent Ndumole said he came from the same Umuocham kindred as late Lazarus Ogbuevule and when the transaction took place on 3rd June, 1968 he was present. He signed Exhibit 'A' which was written by late Gabriel Nwaogu. He said Exhibit 'A' was read over to the illiterate witnesses before they thumb printed the document. He continued his evidence thus: H

"About 2nd July, 1970 the same late Lazarus Ogbuevule in-

vited me a second time, the 1968 documents were produced before me by both the plaintiff and Lazarus Ogbuevule. They asked me to write on the same paper that Lazarus Ogbuevule has received additional two pounds on the same piece of land which he sold to the plaintiff, I read it over to them in Igbo and I signed and two of them
B signed it as well”.

This witness admitted under cross-examination that Lazarus Ogbuevule was from Umuagbaghighba family. When cross-examined, the plaintiff said he did not know if Lazarus Ogbuevule was from Umugbai family. He also could not remember if he was the oldest man at the time of the transaction. In the next breath the plaintiff agreed that Lazarus Ogbuevule was the oldest man in his family. The admission coupled with the evidence of PW3 under cross-examination
C
D ***on the Ngwa custom relating to pledge has further strengthened the defendants’ claim that Lazarus Ogbuevule pledged the land as head of the Umuagbai family.***

PW4 further explained that Job Amalaha only witnessed the 1968 transaction which was clearly a pledge and not the latter transaction of 1970 which was between the plaintiff on the one hand and Lazarus Ogbuevule on the other which was witnessed by his wife, Oyidia. PW4 emphatically stated that the defendants were not present during the 1970 transaction when it was reduced from pledge to absolute sale.
E
F

The plaintiff was ambivalent on the 1983 arbitration. In one breath he agreed there was an arbitration between him and the defendants over the disputed land and in the next he denied attending the arbitration. This is what he said when he was being cross-examined:
G

“In 1983 the entire Amala conducted an arbitration over the land in dispute between me and the defendants. The Amala did not hold the land in dispute was on pledge to me. They did not ask the defendants to redeem the land from me. I now say that I did not
H *attend the arbitration of the Amala”.*

In his judgment the learned trial Judge stated that there was no evidence before the Court on which he could hold the land in dispute was redeemed during the life time of Lazarus Ogbuevule the pledgor. He continued as follows:

“...whereas there is unanimity by the parties as to the validity of Exhibit ‘C’ except in so far as the defendants said they rejected the decision of the Eze and his cabinet, there is disagreement as to the validity of Exhibit ‘E’ to which the plaintiff denies being a party”.

While it is true that the defendants did not take steps to redeem the pledged land during the life time of Lazarus Ogbuevule, if the evidence adduced at the trial is properly assessed it will become obvious that the plaintiff had something to hide in his denial of attending the arbitration of the Amala. The sequence of events as revealed by both documentary and oral evidence can be said to be as follows:-

The defendants first took the dispute before the Ohu-ama Uratta who decided in their favour and it was resolved that they (defendants) should redeem the land by paying back a total of N546.00 (Five Hundred and Forty-Six Naira) to the plaintiff See Exhibit ‘E’. The defendants then deposited the sum of N546.00 (Five Hundred and Forty-Six Naira) being the total amount that was collected by Lazarus Ogbuevule and were issued with Exhibit ‘F’. The plaintiff rejected the decision of the Ohu-ama Uratta and then took the case to Eze Asuoha. Eze Asuoha inspected the disputed land and one of the observations he made contained in Exhibit ‘C’ was:

“(C) Damage observed was a path made around the oil-palm plantation by the respondents on the order or instruction of Udo-Ala-Uratto where respondents had earlier deposited redemption money for the complainant for the very oil-palm plantation area which he complainant refused”.

Mr. John Agomuo who testified a DW1 stated that he entered the land with the other defendants because they did not accept Eze Asuoha’s decision. He also tendered a survey plan which was admitted as Exhibit ‘C’ showing Okpulo Alaocha land containing the grave of Agbaghigba, the grandfather of the defendants. The plaintiff’s survey plan admitted as Exhibit ‘B’ also contained the Okpulo Alaocha land and marked parcel A which the plaintiff first acquired from Lazarus Ogbuevule.

The evidence adduced before the trial court revealed that there were two customary arbitrations before the matter went to the High Court. As I earlier found, it was the respondent who first rejected the decision of the Ohu-ama Uratta because that decision was not

favourable to him. In the same vein when the appellants found that the decision of Eze Asuoha did not favour them, they equally rejected it and resorted to self help since the first decision was ignored by the respondent.

This appeal therefore turns on whether the lower courts conformed with the principles of law regulating proper and correct evaluation and appraisal of evidence. It is settled law that an appellate court should not ordinarily disturb or tamper with the findings of facts made by the trial court, particularly if such findings and conclusions reached are supported by credible evidence. This principle is premised on the fact that the duty of appraising of evidence given at a trial is pre-eminently that of the trial court that saw and heard the witnesses.
 Emarieru v. Ovivie (1977) 2 SC 31; Ogundulu v. Philips (1973) 1 D NMLR 267 at 272; Okolo v. Uzoka (1978) 4 SC 77 at 86; Mogaji v. Odofin (1978) 4 SC 91; Nor v. Tarkaa (1998) 4 NWLR (Part 544) 130 at 139. Jimoh Garba v. Isiaka Yahaya (2007) 1 SC (pt. 2) 262.

There is an exception to the above rule. The exception is where there is a misdirection by the trial court. Misdirection occurs when the issues of fact in the case for the parties or the law applicable to the issues raised are not fairly appraised or considered or misconceived or the law applicable is incorrectly applied by the trial court as a result there would be a miscarriage of justice if the decision reached is allowed to stand. See Abisi v. Ekwealor (1993) 6 NWLR (Part 302) 643; and Nor v. Tarkaa supra. ***Where a trial court has drawn wrong inference from primary facts, the appellate court can reject the inference and make what it considers to be the right inference supported by evidence. It is also trite that where a trial court has failed, as in the instant case in its duty to properly consider the evidence before it which led it to draw wrong conclusions from the evidence it accepted, the appeal court will be perfectly justified in re-evaluating and re-considering the whole evidence in order to arrive at a just decision.*** See: Highgrade Maritime Services Ltd. v. First Bank of Nigeria Ltd. (1991) 1 SCNJ 110; Onwuka v. Omoghi (1992) 3 SCNJ 98 at 116; Ebba v. Ogodo (1984) SCNLR 372; Okoja v. Ishola (1982) 7 SC 314; Finnih v. Imade (1992) 1 SCNJ 87; A. G. Leventis Ltd. v. Chief Christian

Akpui (2007) 17 NWLR (Part 1063) 416.

The learned trial judge in the resolution of the dispute between the parties correctly held that there was a customary pledge between the plaintiff and Lazarus Ogbuevule and the purported conditionality of ninety-four years contained in Exhibit 'A' was to all intents and purposes an attempt to clog the equity of redemption. In considering the crucial issue whether the land exclusively belonged to Lazarus Ogbuevule or it was communal land over which he superintended as head of the family, he failed to consider the issue but invoked the doctrine of laches and acquiescence to hold that the defendants were not co-owners of the land with Lazarus Ogbuevule and queried why they sat idly by for fifteen years from 1968 to 1983 before they could challenge the right or act of the pledgee. It was this same logic that made the trial Judge to conclude that Job Amalaha was not a co-owner of the land with Lazarus Ogbuevule. The lower court endorsed the finding that the transaction was a pledge but fell into the same error of applying the principle of laches and delay to defeat the appellants' claim to the equity of redemption.

Both the trial Judge and the court below failed to properly appraise the facts and incorrectly applied the law. A proper appraisal of the facts would have led to the inevitable conclusion that the land in dispute was communal land and Lazarus Ogbuevule dealt with it in his capacity as head of the family. Since there is a concurrent finding by the two lower courts that the transaction entered into by Lazarus Ogbuevule and the respondent was a pledge, the equity of redemption cannot be defeated by laches and acquiescence. The purported claim by Lazarus Ogbuevule in Exhibit 'A' that the land was his personal property which he transferred to the respondent without carrying along the principal members of the Ogbaghigba family rendered the transaction void ab initio. The appellants are entitled to redeem the disputed land by returning the total sum of N546.00 (Five Hundred and Forty-Six Naira) to the respondent and no more. The respondent is not entitled to compensation for the oil-palm plantation he planted on the land.

I therefore find that there is merit in this appeal and it is hereby allowed. I set aside the decision of the lower court that the appellants are not co-owners of the disputed land known as "OKPULO ALAOCHA".

I also find that there is no merit in the cross-appeal and I accordingly dismiss it. I assess costs of N100, 000.00 (One Hundred Thousand Naira) in favour of the appellants against the respondent.

B MUHAMMAD JSC

My learned brother, Aka'ahs, JSC, permitted me to read in draft, the judgment just delivered. I agree with his reasoning and conclusion that the main appeal is meritorious and it should be allowed. The Cross-appeal lacks merit and it should be dismissed. I allow the appeal and dismiss the Cross-appeal. I abide by orders made in the lead judgment including that of costs.

D FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Aka'ahs, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the main appeal should be allowed while the cross-appeal deserves an order of dismissal.

Put briefly, Lazarus Ogbuevule, as head of Umuagbaghighba family, pledged family land to the respondent in 1968. This is extant in Exhibit 'A' in which Job Amalaha, a principal member of the family was a witness. In 1970, the pledge was surreptitiously converted to sale to the respondent as it was only the wife of Lazarus who was the witness to the 'sale' transaction. No principal member of the family witnessed the sale transaction of 1970. It hardly needs any gainsaying that Lazarus, as family head, merely held the family property in trust on behalf of the other members. He had no right to convert the family land to his own. The outright sale of family land by Lazarus in 1970 in his private capacity was void ab initio. Such sale was to no avail. See: Solomon v. Magaji (1991) 11 SC 1; Akano v. Ajumo (1967) NMLR 7 and Anibi v. Shotimehin (1993) 3 NWLR (Pt. 282) 461.

Perhaps I need to further elaborate on the point being made by stating it in a clear fashion that in order to effect a valid sale or alienation of family land the head of the family with the majority of principal members must participate in the exercise. See: Aganran v. Olushi & Ors. (1907) 1 NLR 66; Oshodi v. Balogun 4 WACA 1; Cole v. Folami (1956) 1 FSC 66; Adeniji v. Disu (1958) 3 FSC 104 and

Alao v. Ajani & Ors. (1989) 4 NWLR (Pt. 113) 1.

At this juncture, it is apt to point it out that there is concurrent finding by the trial court and the court below that the transaction entered into by Lazarus and the respondent in 1968 was a pledge. It is basic that a pledge can always be redeemed. In customary law, it has always been - 'once a pledge, always a pledge.' See: Melifonwu v. Egbuji (1982) 9 SC 145; Ebevuhe v. Ukparka & Ors. (1996) 7 NWLR (Pt. 460) 254. B

It is clear beyond any iota of doubt, that pledged land, as herein, can be redeemed at any time and same was done at the Arbitration by Amala Ohuama Uratta in 1983. The two courts below, with due diffidence to both of them, went off the track when they placed undue reliance on the doctrine of laches and acquiescence to tilt the scale in favour of the respondent. Such cannot and should not be sustained as it calls for interference by this court. This is so as there can be no lapse of time or question of delay in redeeming a pledged land. Equity of redemption can take place at any future date. It was erroneous of the two courts below to have found otherwise. C D

For the above reasons and the fuller ones ably adumbrated in the lead judgment, I too feel that the main appeal should succeed as it is, no doubt, meritorious. It is hereby allowed. The cross-appeal has no chance to succeed. It is hereby dismissed. I endorse all the other consequential orders contained in the lead judgment; that relating to costs inclusive. E F

PETER-ODILI JSC, CFR

I agree with the judgment just delivered by my learned brother, Aka'ahs JSC and I state my comments in support. G

This is an appeal in respect of the judgment of the Court of Appeal, Port Harcourt Division delivered on the 11th day of December 2002. The respondent cross-appealed. The trial High Court gave judgment in favour of the respondent (plaintiff) on the 14th October 1996. The appellants (defendants) were dissatisfied by the said judgment and appealed to the Court of Appeal Port Harcourt Division. The Court of Appeal or court below after hearing the parties dismissed the appeal hence this appeal with the respondent cross-appealing. H

FACTS BRIEFLY STATED

The respondent hails from Umunkwota Uratta in Isiala Ngwa North Local Government Area in Abia State of Nigeria. The appellants are natives of and resident at Umuocham Uratta Umuoha in the same Isiala Ngwa North Local Government Area within the jurisdiction of Isiala Ngwa High Court.

One Lazarus Ogbuevule (now deceased) pledged a parcel of land said to be owned by him to the respondent for a premium of ₦65.0.0d (N130.00). After paying the said premium the respondent was let into possession of the said land called “OKPULO ALAOCHA”. In 1970 Lazarus Ogbuevule demanded and received from the respondent a further sum of N4.00 thereby making the transaction one of outright sale in freehold to the respondent. It was stated to be a customary sale. A receipt was issued to the respondent which was received in evidence as Exhibit “A”.

In 1971 Lazarus Ogbuevule aforesaid again sold another piece or parcel of land contiguous to the former for ₦94.00 the equivalent of N188.00 which said sum was denoted in the same receipt Exhibit A. the two pieces of land were surveyed and a survey plan exhibit “B” produced. Respondent took possession of the two parcels of land and thereon established an oil palm plantation in the lifetime of Lazarus Ogbuevule. The respondent occupied and harvested the oil palm plantation without hindrance from any one. Lazarus Ogbuevule died in 1971 and in 1983 the appellants entered the said land in Exhibit B at which the respondent sued the appellants before a native tribunal (Eze Asuoha and his cabinet) and got judgment against the appellants. The appellants were not deterred and the respondent sued them in the Isiala Ngwa High Court.

The appellants in pleadings and evidence admitted that the respondent was in possession of the “OKPULO ALAOCHA”. Also admitted by the appellants is that the oil palm trees on the land in disputes were planted and reaped by the respondent. Appellants also did not deny entering the land but said the land communal land and was not the personal land of Lazarus Ogbuevule which he could single handedly alienated at will and to whom.

The appeal was heard on the 23rd October 2012 on which date, learned counsel for appellant, Mr. Nwokocha - Ahaiwe; adopted appellant’s/cross respondent’s brief filed on 13/6/2003. In the brief

of argument were raised three issues for determination, viz:

1. Whether the land in dispute “OKPULO ALAOCHA is the personal property of rate Lazarus Ogbuevule “the pledgor” and not the communal or family property of the appellants.

2. Whether the appellants were in trespass when they entered the land in dispute in 1984 after redeeming it and regaining possession from the respondent during the arbitration by the Amala Ohuama Uratta in 1983. B

3. Whether the court of Appeal was wrong in holding that there were no credible and reliable evidence of outright sale of the land in dispute to the respondent and in therefore reversing the decision of the High court to grant the respondent a declaration of title. C

Mr. Uche Ama, learned counsel for the respondent/cross-appellant adopted their brief titled respondent’s/cross-appellant’s brief filed on 24/9/03 which brief was settled by Chief C. O. Ezekwesiri. D The Preliminary Objection filed and, argued within the brief was withdrawn by the respondent’s counsel and struck out. In the brief were distilled two issues for determination as follows:

1. Was the land in dispute the personal property of Lazarus Ogbuevule and had Lazarus Ogbuevule and legal title to pass to the respondent. E

2. Whether the respondent established his claim on trespass and whether he could be bound by a decision of a native arbitration to which he did not submit and where he was not represented to be heard on his own version of the dispute. F

It seems to me that the Issue one of the appellant and the Issue One of the respondent are in effect one and the same however couched in a different language but an answer to either of them settles the appeal. I shall utilize the Issue one of the respondent for ease and convenience. G

ISSUE ONE: was the land in dispute the personal property of Lazarus Ogbuevule and had Lazarus Ogbuevule any legal title to pass to the respondent?

Learned counsel for the appellant submitted that not only did the appellant adduce sufficient and credible evidence that the land in dispute was their communal property held in trust for them by Ogbuevule which evidence was uncontradicted and unchallenged by the respondent both by pleading and evidence. That the fulcrum H

of the defence of the appellants in the trial court was that the land in dispute was their communal property on pledge to the respondent and that they had redeemed it and was in possession as at the time of the trespass of the respondents in 1984.

That the onus was on the appellants to prove that the land is the family property of the appellant's and they discharged it sufficiently. This is because the respondent did not impugn either in pleadings or evidence the appellant's claim that the property was not the personal land of late Ogbuevule. He cited Order 25 Rule 9 of the Imo State High Court (Civil Procedure) Rules, 1988 applicable to Abia State at the time of the trial, Section 75 of the Evidence Act, laws of the Federation 1990; *Economides v. Thomonulus* (1956) 1 FSC 7; *Atolagbe v. Shorun* (1985) 4 SC (Pt. 1) 250; *Lewis & Peat (NRI) Ltd. v. Akhimien* (1976) 1 ALL NLR 460; *T. Lawal Owosho & Ors v. Michael Adebawale Bada* (1984) 7 SC 149 at 164 etc.

For the appellants was further contended that this court in considering the material, critical and fundamental question of whether the land in question was the bona fide personal property of Ogbuevule or the family property of the appellants held in trust for them by Ogbuevule, the court should adopt its principles laid down in the cases of *Mogaji & ors v. Odojin & Ors.* (1978) 4 SC 93. That having regard to the preponderance of uncontradicted, unchallenged and unimpeached evidence in support of the appellant's defence, the fact that the respondent failed to deny this defence by pleadings, this court should apply the test it had restated often times that the appellants have sufficiently and adequately discharged the onus and burden placed on them by section 139 of the Evidence Act. The implication being that appellants proved that the land in dispute "OKPULO ALAOCHA" is the communal property of the appellants, family.

Learned counsel for the appellants went on to state that once the court has determined that a land is on pledge, the length of time taken to redeem it or the use to which it has been put by the pledgee (such as planting heavily with economic trees as in this case) is longer an issue and cannot be relied on in proof of anything, much less, that it is not the family property of the appellants. He cited *Okoiko & Anor v. Esedalue & Anor.* (1974) NSCC vol. 9 page 153 at 154. That even if the court accepts that Job Amalaha which appeared on Exhibit A and was part of the 1968 pledge transaction, his actions

and those of Ogbuevule, cannot be held to bind the other numerous members of Umuagbaigbe family nor can such actions convert the land in dispute from family property to personal property of Ogbuevule.

In response, learned counsel for the respondent said that Exhibit A, - is a sound evidence of the sale of the land. That the appellants saw the respondent plant oil palm trees on the land in dispute and they said nothing and for over fifteen years the respondent was on the land without any disturbance. That Exhibit A, coupled with undisturbed continuous possession and so the justice of the case was in respondent's favour. He cited *Folashade v. Durosola* (1961) 1 ALL NLR 87. B
C

Learned counsel further submitted that the dispute first went before Eze Asuoha of the community and the Eze and his cabinet gave judgment to the respondent. That all parties submitted to the jurisdiction of the Eze and participated in the proceedings. But the jurisdiction of the subsequent Amala Tribunal, respondent did not attend nor submitted to and so whatever was the outcome could not bind the respondent. He referred to the cases of *Michael Ojibah v. Ubaka Ojibah* (1991) 5 NWLR (Pt. 191) 296; *Raphael Agu v. Christian Ikewuibe* (1991) 3 NWLR (Pt. 180) 385 at 407 - 414. D
E

Learned counsel for the respondent urged the court to uphold the concurrent findings of the two courts below which placed no reliance on Exhibit E, the decision of the customary group of Elders which respondent did not submit to nor attend its proceedings. That there is nothing in the Record to persuade this court to interfere with the two judgments of the Court of Appeal and the High Court. He cited *Abinabina v. Enyimadu* (1953) 12 WACA 171 at 173; *Chinwendu v. Mbamali* (1980) 3-4 SC 31; *Nwobodo Ezeudu v. Isaac Obiagwu* (1986) 2 NWLR (Pt. 21) 208 at 215; *Okereke v. Nwankwo* (2003) 4 SCNJ 211 at 226. F
G

Having stated as much as possible the submissions of counsel from either side, I would want for clarity to restate a short version of what I have available. In brief the two positions of the parties maybe summarized thus: H

For the appellants, that they had the preponderance of evidence in that the land in dispute is their family property held in trust for them at the material time by their then family head, late Lazarus

Ogbuevule. That since the land had been found by the lower courts to be on pledge then there can be no question of delay as lapse of time does not apply in pledges. That Exhibit E, the findings by the arbitrators should be upheld by the court.

The version put forward by the respondent is that the appellants started laying claim over the land in 1983 and it was common ground that respondent planted and harvested the palm trees on the land in dispute and was in possession. That when the appellants entered the land in 1983, they acted so in trespass since their entry was without the leave of the respondent who was properly in the land based on the outright sale to him by the late Lazarus Ogbuevule and their position was accepted by the trial court and affirmed by the Court of Appeal.

The judgment of the Court of Appeal, the salient part of it useful for the purpose of our present discourse would be recaptured here and it is to be found at page 200 of the Record and it is thus:

“This first part of the transaction was clearly a pledge for 94 years and the first defendant in the lower court (now deceased) who was a principal member of the appellant’s family agreed that document as a witness on behalf of the seller. That document as receipt of money paid to the seller and it is not a registrable instrument as claimed by the appellants. In that document, the seller claimed it as his land. He did not say it was family land and Job Amalaha from appellant’s family signed it. If it was truly family land why did the appellants not challenge that transaction throughout the lifetime of the seller? The evidence was that they broke into the land in 1983. What were the appellants doing all those years when the respondent took possession of the land? It is my view that the trial court was right in holding that the land was personal to the seller. I do not agree with the learned counsel for the appellants that the pleadings were not joined on the issue of whether the land was personal or not. From the respondent’s statement of claim, it was upheld that the seller pledged his land to him and Exhibit A makes that abundantly clear.”

At page 201 of the record the learned justices of the Court of Appeal, per Ogebe JCA (as he then was) stated as follows:

“As I said earlier in this judgment, the failure of the appellants to do anything in the lifetime of the late Lazarus Ogbuevule and long after his death in 1971 belies their claim that the land was family

property. Exhibit E was seriously disputed by the respondent. He said he was (not) party to the making of the document and the trial court was right in placing no reliance on it."

The appellants had contended that their statement of defence had put-up a spirited fight that the land in dispute was communal property. That the respondents having the opportunity to traverse that assertion in a reply and also to plead that the land was the personal property of the late Lazarus Ogbuevule. Also that the respondents did not lead evidence in proof of the personal ownership of Ogbuevule, their vendor of the land nor did they respondents establish the root of title of the said Ogbuevule.

The clear implication of these lapses in pleadings by the plaintiffs/respondents and the lack of evidence on these salient issues stated above is that those assertions have been admitted by the respondents in keeping with order 25 Rule 9 of the Imo State High Court (Civil Procedure) Rules, 1988 applicable to Abia State at the time material. That rule provides thus: Order 25 Rule 9:

"Every allegation of fact in any pleading not being a petition or summons, if not denied specifically or by necessary implication or stated to be admitted in the pleading of the opposite party shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not adjudged a lunatic"

Again to be noted is that when an allegation of a material nature is taken as admitted, there would be no need for further evidence in proof thereof. I rely on the cases of Economides v. Thomopolus (1956) 1 FSC 7, Boyle v. Wisemen (1855) 10 Exhibit 647 at 651.

This is in accordance with Section 75 Evidence Act (as amended) which provides as follows:

"75- No fact need to prove in any civil proceedings which the parties thereto or their agent agree to admit at the hearing: or which, before the hearing, they agree to admit by any writing under their hand, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings"

The importance of this statutory provision cannot be over flogged to place things on its proper footing and to underscore the point that the other party cannot be taken unawares as to what the issues in controversy are to enable that adverse party to be prepared and

present their side. This to assist the court weighs the balance, adjudicate and reach a decision one way or the other. In the light of the position of pleadings, the pleadings which are specific allegations must be specifically denied. Therefore, there is no room for a defendant to be hedgy and evasive in his answers to the facts averred by the plaintiff. It is so that once that pleading has been specifically put forward the other party who fails to meet those facts directly either by admitting them or denying them that is with specificity, then he is taken to have admitted.

Having stated these principle and law of pleading, situated in this given scenario, the plaintiff/respondent having been served with the statement of defence asserting that the defendants/appellants claims are that the land is their communal property, it was incumbent on the plaintiff/respondent in their amended statement of claim filed after the defence or even to file a Reply to the statement of defence to aver that the land was not communal but the bona fide personal property of the late Ogbuevule from whom they derived title. Their failure in doing so translates to an admission that the assertion of the defendant/respondent showed the true statement of affairs meaning that the land in dispute was communal land and not personal of Ogbuevule. I place reliance on the following cases:

1. Atolagbe v. Shorun (1985) 4 SC 1 at 250;
2. Lewis & Peat Nig Ltd v. Akhimien (1976) 1 ALL NLR 460
3. T. Lawal Owosho & Ors v. Michael Adebawale Baba (1984) 7 SC 149;
4. Spasco Vehicle & Plant Hire Co. v. Alraine (Nig) Ltd (1995) 8 NWLR (Pt.416) 655

I cannot resist what this court said in *Akeredolu v. Akinremi* (1989) 3 NWLR (Pt. 109) 164 thus:

“The proper function of reply is to raise in answer to the defence any matters which must be specifically pleaded which make the defence not maintainable or which otherwise might take the defence by surprise or which raise issues of fact not arising out of defence. Reply is the proper place for meeting the defence by confession and avoidance.”

From the decision of the court of Appeal what comes up is that they anchored their conclusion on laches and delay on the part of the defendants/appellants. That with the delay the appellants lost the

right to lay claim to the land in dispute. This is a wrong route taken by the court below because the matter of the transaction over the land having been established as arising from a pledge, laches and acquiescence cannot apply as a pledge is perpetually redeemable with the appellants, family at liberty to redeem whenever they wanted to without a time frame.

Also to be noted is that in a pledge planting economic trees or any development on the land would not change the status of the transaction from pledge to freehold. The other areas applying being that on the pledged land being redeemed the pledgee has to account for benefits derived by him from exploitation of the land while in his possession apart from the pledgee while in possession doing nothing to obstruct the pledgor's right of redemption of the pledged land. See *Okoiko v. Esedalue & Anor* (1974) N.S.C.C. Vol. 9 page 153.

From the evidence on ground there was no basis for the two courts below not to have placed reliance on Exhibit E, the findings of customary arbitration, an adjudication which showed both parties fully participated. Again Exhibit C which the courts of first instance and appeal utilized to find for the respondent was not really contrary to Exhibit E since the contents of Exhibit C showed that the other customary panel observed a pathway made around the oil palm plantation by the appellants where appellants had earlier deposited redemption money for the respondent which respondent refused to accept. This action of depositing the money and the place was at the behest of the Udoala Uretta (an arbitration panel earlier in time and represented by Exhibit E.) Noteworthy is that assuming the two documents are opposite on the principle of when the equities are equal, the first in time prevails and in this instance the first in time are Exhibits E and F, another customary panel report.

It is clear from what is available that the two courts below reached a wrong conclusion and as the circumstances proved otherwise. That is that the land was communal land which the respondent did not debunk and it was on pledge to the respondent and could not have been for a period of time 94 years or any other term and passage of time when the redemption was sought no bar to the redemption. Also that a pledged properly remains a pledge and does not convert to an outright sale nor can such a purported sale of family or communal land be done by a member or some members of

the family or community be they leaders or principal members.

From the foregoing and the well reasoned lead judgment, this appeal is allowed and the judgment of the court of Appeal set aside. I abide by the consequential orders in the lead judgment.

CROSS-APPEAL

B This cross-appeal was argued as Issue Three in the respondent's/ cross-appellant's brief and would be restated as we go along, viz:

C Learned counsel for the Cross-appellant submitted that the evidence proffered by them at the Court of Trial evidenced an outright customary sale before witnesses and the provisions of the Land Instrument Registration law 1963 of Eastern Nigeria applicable in Abia State of Nigeria did not apply to the transaction. That Exhibit A was tendered as a receipt and it is receivable in evidence which evidence was uncontroverted.

D He stated that the law is well settled that an unregistered instrument is not admissible to prove title but is certainly admissible to prove payment of money and coupled with possession may give rise to an equitable interest enforceable by specific performance. He referred to *Ogunbemi v. Abowab* 13 WACA 222 *Obijura v. Ozims* (1985) E 2 NWLR (Pt. 6) 167; *Adesina v. Otuewu & Ors* (1993) 1 NWLR (pt. 270) 414. That the purchase receipt coupled with undisturbed continuous possession further confirmed the ownership by respondent. He cited *Folashade v. Duroshola* (1961) 1 SCNLR 150; *Oluwi v. Eniola* F (1967) NMLR 339; *Elema v. Akenzua* (2000) 6 SCNJ 226 at 237.

G Learned counsel for the cross-appellant referred to the evidence of PW4, Innocent Ndumole in proof of the purchase of the land which he said was enough without being specifically pleaded. The reason for that being the Law of Evidence which provides for the pleadings of facts and not evidence. He cited Section 8 of the Evidence Act, *Attorney-general of Anambra State v. C. N. Onuselogu Enterprises Limited* (1987) 4 NWLR (Pt. 66) 547 at 559; *Morohunfolo v. Kwara State College of Technology* (1990) 4 NWLR (Pt. 145) 506 at 518; *Udo & Ors v. Okupa* (1991) 5 NWLR (Pt. 191) 365 at 380.

H The cross-respondent through counsel submitted that the respondent did not cross-appeal at the court below challenging the findings of the trial court that the land in dispute was and still is pledge to him for 94 years nor did he file a respondent's notice asking that the decision of the trial court that he was entitled to the grant of a

certificate of occupancy in respect of the said land should be affirmed by the Court of appeal on other grounds. That the findings by the trial court and Court of Appeal that the land in dispute is on pledge to the cross-appellant is now a concurrent finding of fact and not having challenged this finding in the court below cannot now do so in this court without leave and special circumstance shown. That the issue of whether the trial court's findings that the land was on pledge for 94 years and not sold outright was never before the Court of Appeal and cannot now be raised by the cross-appellant before this court.

Learned counsel for the cross-respondent concluded by saying that there was no satisfactory nor credible evidence of the sale of the land in dispute to the cross-appellant and so the decision of the Court of Appeal should be upheld. He referred to *Efetioroje v. Okpalefe* (1991) NSCC vol. 22 (Pt. 2) 175 at 183.

The issue distilled by the cross-appellant for the determination of the cross-appeal which the learned counsel on their behalf styled Issue 3 in the respondent/cross-appellants brief and it is thus:

Whether the learned Justices of the Court of Appeal were right in unanimously holding as they did that no credible witnesses authenticated the conversion of the pledge to that of an outright sale thereby deleting the words "who is entitled to the grant to him of the certificate of occupancy in respect of the same land" from their final order.

The cross-respondent couched their issue as Issue Three in the Issues for determination and it is thus:

Whether the Court of Appeal was wrong in holding that there was no credible and reliable evidence of outright sale of the land in dispute to the respondent and in therefore reversing the decisions of the High Court to grant the respondent a declaration of title.

Arguing for the cross-appeal, learned counsel for the cross-appellant submitted that Exhibit A is a sound evidence of the sale of the land. That the appellants/cross-respondents saw the cross-appellant plant oil palm trees on the land in dispute and they said nothing and for over fifteen years the cross-appellant was on the land without any disturbance and so it can be said that Exhibit A, the document touted as the sale documents evidencing the outright sale to the Cross-appellant coupled with the undisturbed possession sealed the owner-

ship of the cross-appellant to the land. He cited *Folashade v Durosola* (1961) 1 ALL NLR 87.

Going further learned counsel for the cross-appellant said where the parties submit to customary arbitration they cannot later reject the judgment of that arbitration and that was the case in this instance.

B That therefore the cross-respondent cannot now resale from that arbitration affirmed the sale of the land to the cross-appellant. He relied on *Michael Ojibah v. Ubaka Ojibah* (1991) 5 NWLR (pt. 191) 296, *Raphael Agu v. Christian Ikewuibe* (1991) 3 NWLR (pt. 180) 385 at 407 - 414.

C That Exhibit E evidencing a subsequent judgment of a customary arbitration which the two courts below did not rely on being a fake judgment. He said the cross-appeal should be allowed with the restoration of the order of the trial High Court in full.

D For the cross-respondent learned counsel on their behalf contended that the Court of Appeal was correct in its findings that there was no credible or reliable evidence that the land in dispute on pledge to the respondent was subsequently sold out right to him. That even if the respondent is assumed to have proved that the land in dispute
E is the personal property of the late Ogbuevule, he is still not entitled to a declaration of title unless he shows that title in the property legally passed to him from the owner. That the respondent/cross-appellant did not plead whether the transaction of sale between him
F and the late Ogbuevule was governed by custom or English law and this was as recent as 1970/1971. That whether by custom or English law the cross-appellant ought to have pleaded Exhibit A, the document they posited was the purchase document. The question that would then arise is whether Exhibit A was a registrable document.

G Learned counsel for the cross-respondent further contended that the Exhibit A was a mere receipt and not registrable. From what is before court it is evident that the cross-appellant could not have validly pleaded Exhibit A in view of sections 15, 6 and 2 of the Lands Instruments Registration law, Cap 72, Laws of Eastern Nigeria, 1968
H applicable in Abia State. Those Sections provide as follows:

“Section 15 - No instrument shall be pleaded or given in Evidence in any court as affecting any land unless the same shall have been registered.”

“Section 6: subject to the provisions of this law, every instru-

ment executed after the commencement of this law shall be registered.”

“Section 2: Instrument means a document affecting land in Eastern Nigeria, whereby one party (hereinafter called the grantor) confers, transfers, limits charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to, or interest in land in Eastern Nigeria, and a certificate of purchase and a power of Attorney under which any instrument may be executed, but not a will.”

From the materials available for the purpose of this cross-appeal juxtaposed with the necessary legal provisions, the evidence proffered by the cross-appellant is unreliable and cannot support the position put forward including the lapses in his pleading. As has been severally stated by this apex court that where a plaintiff has brought before the court of trial an action for declaration of title, trespass and injunction the onus is on him to satisfy the court that he is entitled on the evidence brought by him. In doing so he must rely on the strength of his own case and not on the weakness of the case of the defendant. That being so if the onus as in his case has not been discharged, the weakness of the defendant’s case will not support that case of the plaintiff. I rely on *Efetioroje v. Okpalafe* (1991) NSCC vol.22 (pt.2) 175 at 183.

In this instance what the plaintiff/respondent/cross-appellant put forth is definitely below the standard of proof required in a case of this nature of a declaration of title to land. From the above and the better reasoned lead judgment I find no merit in this cross-appeal which I dismiss. I abide by the consequential orders in the lead judgment.

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment just delivered by my learned brother, Aka’ahs, JSC. I agree with the reasoning therein and the conclusion arrived thereat.

There is no doubt that the credible evidence adduced by the appellants has rendered Exhibit A void, wherein Lazarus Ogbuevule the agreed to be the family head had claimed the land in dispute as his personal property void. The land had been shown to be a family

or communal land. It therefore cannot be sold or transferred by any means as a personal property.

Generally, it has long been settled law that sale of family property by the head of the family alone without the consent of the other members is voidable. See; *Bello Adedibu & Anor V. Makanjuola* 10 B WACA 33, *Solomon & Ors V. Mogaji and Ors* (1982) 11 SC (Reprint) 1 (1982) LPELR 3102. The head of the family cannot dispose of family property without the consent of the family. Any such sale being voidable can be avoided as soon as it is discovered.

C However, in the instant case it was established that there was a pledge of the land in dispute but not a sale. It is therefore trite law that if a transaction was a pledge per se in return for a loan of an amount of money, the land is clearly redeemable however long it may be in possession of the pledgee. See; *Iheaguta U. Nwagwu & Anor v. Ohazurike Okonkwo & Ors* (1987) NWLR (Pt.60) 314, (1987) D 7 SCNJ 72, per Kazeem, JSC. Indeed, it has also been held that there is no way long possession by the pledgee of a land can lead to the denial of the right of redemption of the pledged land by the pledgor. The pledgor will always be entitled to redeem. See; *Okoiko & Anor v. Esedalue & Anor* (1974) 1 All NLR (pt. 1) 452, (1974) 3 E SC 15, *Dung v. Chollom* (1992) 1 NWLR (Pt.226) 738, *Damin Anyanwu & Anor V. B. Iwuchukwu* (2000) LPELR 514. As a result, the appellants are entitled to redeem the land in dispute by returning the sum of five hundred and forty six Naira (N546.00) to the respondent. F

For the above short comment and the fuller reasoning of my learned brother in the lead judgment, I hold that the appeal is meritorious and deserves to be allowed. It is hereby allowed by me. The G cross appeal lacks substance and merit. Accordingly it is dismissed by me.

I abide by the consequential orders in the lead judgment including that on costs.

H