

SUPREME COURT OF NIGERIA
FRIDAY 19TH APRIL, 2013. SC. 172/2004
CORAM:- A. M. MUKHTAR CJN, B. RHODES-VIVOUR,
M. U. PETER-ODILI, O. ARIWOOLA,
K. B. AKA'AH, JJSC

1. ISRAEL ARUM
2. ONYEABOR ARUM APPELLANTS
AND
OKECHUKWU NWOBODO RESPONDENT

APPEALS - Issues - Formulation - Respondent who neither cross appealed nor gave respondent's notice - Cannot formulate issues - That have no relevance to the grounds of appeal (H1)

APPEALS - Preliminary objection - Notice of - By Supreme Court Rules O. 2 r. 9(i) - Respondent relying upon the objection - Must give appellant 3 days notice thereof - Before the hearing (H2)

APPEALS - Record of proceedings - Binding nature of - Appellate court is bound by the record - But Supreme Court can by virtue of SC Act s. 22 - Amend any defect in the record (H3)

APPEALS - Record of proceedings - Transmission of - Appellant is to ensure that the record he proposes to challenge at Supreme Court - Is made available to the court (H4)

JUDGMENTS - Concurring judgments - By 1979 Constitution s. 258(3) - Where decision of court consists of more than one Judge - The concurring opinion of the majority - Shall be the binding judgment (H5)

COURTS - Competence - Defect in - If the composition of a panel changes while oral evidence is still being taken - And a reconstituted panel reaches a decision - That decision is a nullity (H6)

APPEALS - Concurrent findings - Supreme Court does not interfere with the findings of facts of lower courts - That are not tainted with

miscarriage of justice (H7)

LAND LAW - Evidence - Independent witnesses - Weight - Evidence of independent boundary neighbour - Is weightier than that of witnesses who are blood relations of the claimant (H8)

COURTS - Customary courts - Proceedings - Trials in the court is on substance and not form - And appellate court must respect decisions therefrom - Provided nothing therein contravenes the law (H9)

FACTS

Plaintiff/respondent instituted this action against defendants/appellants in the Customary Court at Awkunanaw - Enugu State, wherein he claimed for declaration of title to a customary right of occupancy and for an order of injunction. Appellants denied the claim. Each of the parties presented their case and called three witnesses. The Court in reviewing the evidence found the witnesses called by respondent to be more credible than those who testified for appellants.

Judgment was therefore entered in favour of respondent. Appellants were dissatisfied with the judgment and appealed against it to the State High Court. The court affirmed the judgment of the Customary Court. Appellants further appealed to the Court of Appeal Enugu, which dismissed the appeal. It is as a result of the judgment of the Court of Appeal, Enugu that appellants have finally appealed to Supreme Court. Appellants are inter alia challenging the propriety or otherwise of the constitution of the panel of Justices who heard the appeal at the Court of Appeal and the one that wrote the judgment thereat.

ISSUES FOR DETERMINATION

(i) Is it right in law that the Penal (sic) of Justices of the Court of appeal that delivered the judgment was different from the Panel of Justices that heard the appeal?

(ii) Was Section 36 of the 1999 Constitution of the Federal Republic of Nigeria complied with when Hon. Justice Sule A. Olagunju J.C.A. who did not hear the appeal made very scathing remarks against the appellants which overly influenced the judgment of his two learned Brothers?

(iii) Did the plaintiff give evidence of traditional history of the land in dispute for a declaration of title to be made in his favour on that ground?

(iv) Was the Court of Appeal right in law when it refused to expunge the evidence of Oko Nwobodo Nta who was not called as a witness and suo motu invoked Section 227 of the Evidence Act without calling upon counsel to address it on that issue.

(v) Was the Court of Appeal right in law when it upheld the decision requiring the defendants to prove their case “beyond all reasonable doubts” when no such burden was placed on the plaintiff and when the evidence led by the defendants and their witnesses were not evaluated.

(vi) Was the Court of Appeal right in law when it failed to allow the appeal on the ground that the evidence of the three witnesses for the appellants were not evaluated solely because they came from the same family as the appellants when the respondents failed to address the said issue.

HELD (Unanimously dismissing the appeal per

AKA’AHS JSC)

APPEALS - Issues - Formulation

1. The issues formulated by either party to the appeal should reflect and substantiate the grounds of appeal.

A respondent who has neither cross-appealed nor given a respondent’s notice cannot formulate issues for determination which have no relevance to the grounds of appeal filed.

Where a respondent formulates issues for determination which are not related to the grounds of appeal, such issues for determination are incompetent and are liable to be struck out.

(p. 1593 H)

APPEALS - Preliminary objection - Notice of

2. I have examined the grounds of appeal filed and found that issue iv in the respondent’s brief is a preliminary objection. The respondent did not comply with Order 2 rule 9 (i) of the Supreme Court Rules which requires that-

“A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time”

B The preliminary objection was not properly raised. Issue iv which does not emanate from any Notice of Preliminary objection is incompetent and it is hereby struck out.
(p. 1594 C)

C APPEALS - Record of proceedings - Binding nature of
3. Learned counsel for the respondent is on firm ground when he submitted that the appellate court is bound by the record of proceedings on which the appeal is based and this is subject to this court invoking its power under Section 22 of the Supreme Court Act, 1990 to amend any defect or error in the record. (p. 1596 F)

E APPEALS - Record of proceedings - Transmission of
4. It is the duty of the appellant to ensure that the record which he proposes to challenge at the Supreme Court is made available to the Court.

F Since the appellants neither challenged the record nor applied to this Court to expunge the affidavit of Hon. Justice M. B. Dongban - Mensen J.C.A. on 23rd February, 2004, there is a strong presumption that the record of appeal which was transmitted to this court containing the averments in the affidavit reflects the panel of Justices who heard the appeal on 22nd September, 2003. (p. 1596 H)

G Concurring judgments
5. The foregoing notwithstanding, even if the panel that gave judgment was differently constituted from the one that heard the appeal, this will not result in rendering the judgment a nullity. The same scenario played itself out in Shuaibu v. Nigeria Arab Bank Ltd. (1998) 5 NWLR (Part 550) 582 where Y. O. Adio, J.C.A. (who was not in the panel that heard the appeal) wrote a contributory judgment agreeing with the leading judgment.

ment and Hon. Justice Okezie who took part in the appeal had concurred with the leading judgment. On appeal to this Court, the appeal was dismissed. In the leading judgment delivered by Wali J.S.C., after setting out section 258 (1), (2) and (3) of the 1979 Constitution, held that subsection 3 clearly provides a solution to a situation like the one at hand as it stated that where the decision of the Court consists of more than one Judge, the concurring opinion expressed by the majority Justices shall be the binding judgment. Section 258 (3) 1979 Constitution which has been re - enacted as Section 294 (3) of the 1999 Constitution (as amended) states -

“A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members” (p. 1597 E)

COURTS - Competence - Defect in

6. The picture that emerges from a discussion of the decided cases including the notorious case of Gabriel Madukolu v. Johnson Nkemdilim (supra) where Bairamian F. J. after enumerating the features that make a court competent and ending with the statement that -

“Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication” is that if the composition of the panel changes while oral evidence is still being taken and the re-constituted panel reaches a decision, that decision will be declared a nullity. The reason is not far to seek. A trial court basically deals with evaluation of evidence and one of the key ingredients to be considered is the credibility of witnesses where their demeanour forms an integral part of that evaluation. Where the evaluation is based purely on the printed records, the overriding consideration is whether the burden of proof has been discharged. Where the latter is the case, it does not matter if the panel that heard the case varies, the judgment would at best be declared irregular but would not be nullified unless the irregularity occasioned a miscarriage of justice. (p. 1599 H)

APPEALS - Concurrent findings

- 7. The attitude of this Court is to discourage appellants coming here on adventure of attempting to set aside concurrent findings of fact made by two or more lower courts. Unless the findings of fact as accepted by the trial court which was upheld by the High Court sitting on appeal and further affirmed by the Court of Appeal is against the trend of evidence or is based on evidence that in law is inadmissible, this Court will not interfere with such findings.**
- The explanation of this principle is simple and it is this: the trial court had the best opportunity of seeing the witnesses and hearing them give evidence; that court was best placed to assess such evidence based on the demeanour of each witness. The appellate court has not got these opportunities, it only sees written records and counsel who are not legal witnesses. And so when the High Court agreed with the findings of fact made by the Customary Court which were affirmed by the Court of Appeal, the attitude of this Court is clear; the concurrent findings of fact of the courts below will never be disturbed so far as the findings are not tainted with miscarriage of justice.** (p. 1601 A)

Evidence - Independent witnesses - Weight

- 8. The trial court reviewed the evidence called by the parties and observed that all the witnesses called by the defendants came from the same family with them while those of the plaintiff came from different families. The Court doubted the credibility of the defendants' claims as well as the evidence called since they did not call independent witnesses to testify in proof of their claims. In the same vein the court accepted the evidence called by the plaintiffs and entered judgment in their favour. The evidence of a boundary neighbour and customary tenant who are not related to the claimant is certainly weightier than that of witnesses who are blood relations of the claimant since the latter would merely be protecting their interest in the disputed property. In this regard the evidence of PW1 is against interest which carries the greatest weight and will go in favour of the plaintiff.** (p. 1602 H)

Customary courts - Proceedings

9. The High Court observed that the trial court delighted itself in profuse use of this phrase in the judgment but pointed out that the trial court was a customary court not versed in the intricacies of the rules of evidence and the provisions of the Evidence Act. The lower court felt the issue had to do with evaluation of evidence which the High court embarked upon and in conclusion agreed with the High Court that the use of the phrase “proof beyond reasonable doubt” by the trial court was just an exhibition of adjudicative exuberance of no perceptible evidential value. This court has long recognised the fact that what matters in trials in the Native Courts such as Area or Customary Courts is the substance and not the form. The decisions of such courts are to be accorded respect by appellate courts provided that nothing is done therein which is contrary either to any express requirements of the law or to the principles of natural justice.

It is also necessary to stress the fact that Area or Customary Courts are to be guided and not to be strictly bound by the provisions of the Evidence Act. All substantive principles of law are useless and legal actions cannot be successfully predicated on such principles in court without the existence of facts. The proof of such facts ultimately determines the proof of Evidence in any litigation. (p. 1603 H)

NOTABLE POINTS OF INTEREST

AKA’AHS JSC***1. Distinction between panels that heard appeal and the one that delivered judgment***

The main thrust of this appeal deals with the constitution of the panel which heard the appeal at the lower court and the one that wrote the judgment. It is important to draw a distinction between the panel that heard the appeal and wrote the judgment from the one that delivered the judgment. Section 294(2) of the 1999 Constitution (as amended) provides that -

“294 (2) Each Justice of the Supreme Court or of the Court

of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion:

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing”.
(p. 1594 G)

C **RHODES-VIVOUR JSC**

2. Land ownership – Means of proof

The long settled position of the law is that ownership of land may be proved in any of the following five ways:

1. by traditional evidence;
- D 2. by production of documents of title which are duly authenticated;
3. by acts of selling, leasing, renting out all or part of the land, or farming on it or on a portion of it;
4. by acts of long possession and enjoyment of the land; and
- E 5. by proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute. (p. 1606 D)

F **REPRESENTATION**

Chike Onyemenam with Philips Audu Ojogwu, for the Appellants
J. O. N. Ikeji with F. U. Oraekeyi, for the Respondent

G **CASES REFERRED TO**

- Dibiamaka v. Osakwe (1989) 3 NWLR (pt. 107) 101
Niger Progress Ltd. v. N. E. L. Corp. (1989) 3 NWLR (pt. 107) 68
Nzekwu v. Nzekwu (1989) 2 NWLR (pt. 104) 373
Emmanuel v. Debayo - Doherty (2009) 1 NWLR (pt. 1123) 505
H Burainoh v. Bamgbose (1989) 3 NWLR (pt. 109) 325
A-G Bendel State v. Aideyan (1989) 4 NWLR (pt. 118) 646
Utih v. Onoyivwe (1991) 1 NWLR (pt. 166) 166
Ogunbiyi v. Ishola (1996) 6 NWLR (pt. 452) 12
Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Ishola v. Ajiboye (1994) 6 NWLR (pt. 352) 506

Shuaibu v. Nigeria Arab Bank Ltd (1998) 5 NWLR (pt. 551) 582

Uwechia v. Obi (1973) 2 SC 1

Obiamalu v. Nwosu (1972) 2 SC 15

Omoni v. Tom (1991) 6 NWLR (pt. 195) 93

Adeigbe v. Kusimo (1965) NMLR 286

B

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1979, s. 258(3)

Constitution of Federal Republic of Nigeria 1999, ss. 36, 294(2)(3) C

Evidence Act, s. 227

Supreme Court Act, s. 22

Customary Courts Edict No. 6 1984, ss. 15, 20, 62, 76(11), 77 (11), 179, 180

Supreme Court Rules, O. 2 r. 9(i)

D

LEAD JUDGMENT BY AKA'AH'S JSC

This appeal is a very rare bird to fly at this altitude. The suit which gave rise to the appeal was instituted by the plaintiff now respondent against the defendants/appellants in the Customary Court at Awkunanaw in Suit No.AWK/3/97. His claim was for: E

(a) Declaration of title to a customary right of occupancy to a piece or parcel of land known as and called 'ALA AGU AKPASHA' which is situate at Akpasha Atugbuoma in Akegbe Ugwu Nkanu West Local Government Area of Enugu State. F

(b) Court injunction restraining the defendants, their agents, servants and relations from further trespass into the said land until the matter is disposed of.

The defendants denied the claim. Each of the parties presented their case and called three witnesses apiece. The Customary Court in reviewing the evidence found the witnesses called by the plaintiff to be more credible than those who testified for the defendants and entered judgment in favour of the plaintiff. The defendants were dissatisfied with the judgment of the Customary Court and appealed against it to the High Court. The High Court affirmed the judgment of the Customary Court. The defendants/appellants further appealed to the Court of Appeal which dismissed the appeal. It is from the judgment of the Court of Appeal, Enugu (herein re- G H

ferred to as the lower court) that the appellants have finally appealed to this Court.

The original Notice of Appeal dated 12th and filed 17th February, 2004 contained four grounds of appeal. The further grounds of Appeal dated 24th February, 2004 were filed on 26th February, 2004 (See pages 224 - 227 of the records). From the Notice of Appeal filed, the appellants formulated the following six issues for determination:

(i) Is it right in law that the Penal (sic) of Justices of the Court of appeal that delivered the judgment was different from the Panel of Justices that heard the appeal?

(ii) Was Section 36 of the 1999 Constitution of the Federal Republic of Nigeria complied with when Hon. Justice Sule A. Olagunju J.C.A. who did not hear the appeal made very scathing remarks against the appellants which overly influenced the judgment of his two learned Brothers?

(iii) Did the plaintiff give evidence of traditional history of the land in dispute for a declaration of title to be made in his favour on that ground?

(iv) Was the Court of Appeal right in law when it refused to expunge the evidence of Oko Nwobodo Nta who was not called as a witness and suo motu invoked Section 227 of the Evidence Act without calling upon counsel to address it on that issue.

(v) Was the Court of Appeal right in law when it upheld the decision requiring the defendants to prove their case "beyond all reasonable doubts" when no such burden was placed on the plaintiff and when the evidence led by the defendants and their witnesses were not evaluated.

(vi) Was the Court of Appeal right in law when it failed to allow the appeal on the ground that the evidence of the three witnesses for the appellants were not evaluated solely because they came from the same family as the appellants when the respondents failed to address the said issue.

On his part the respondent submitted eight issues for determination which are:-

(i) Whether it is correct that the panel of the Court of Appeal Justices which heard the appeal on 22nd September, 2003 was not the same as the panel which delivered the court's judgment on 4th

December, 2003 thereby breaching the appellants' fundamental right of fair hearing.

(ii) Whether Section 36 of the 1999 Constitution dealing with the fundamental right of fair hearing of the appellants was in anyway breached, having regard to the errors of fact in the record of appeal which were corrected by the solemn oath (affidavit) of the Hon. Justice M. B. D. Mensem JCA at page 173 of the record and dated 23rd April, 2004. B

(iii) Whether it is correct that it was the judgment of Hon. Justice S. A. Olagunju J.C.A. which in fact influenced the judgments of his two learned brothers who sat with him on the Court's panel on 22nd September, 2003. C

(iv) Whether it was proper for the appellant's counsel to amend the record of appeal, file additional grounds of appeal and argue issues deriving there from without first obtaining leave of the Supreme Court to do so. D

(v) Whether the Court of Appeal was right in holding that the evidence which the respondent led at the trial in proof of his claim was of such quality as to warrant the trial court to give him judgment. E

(vi) Was the Court of Appeal right in law when it refused to expunge the evidence of OKO NWOBODO NTA who was called as a witness and was it correct that the Court of Appeal suo motu invoked Section 227 of the Evidence Act without calling upon counsel to address it on the issue. F

(vii) Whether the Court of Appeal was right in law when it upheld the decision of the lower courts that the use of the phrase "prove beyond all reasonable doubts" by the trial court did not cause a misdirection with respect to the burden of proof placed on the appellants and in the evaluation of their evidence vis-a-vis that of the respondent. G

(viii) Was the lower court right in law when it failed to allow the appeal on the ground that the evidence of the three witnesses for the appellants was not evaluated solely because they came from the same family as the appellants when the respondent failed to address the said issue. H

The issues formulated by either party to the appeal should reflect and substantiate the grounds of appeal. See:

Dibiamaka v. Osakwe (1989) 3 NWLR (Part 107) 101; Niger Progress Ltd. v. N. E. L. Corporation (1989) 3 NWLR (Part 107) 68. **A respondent who has neither cross-appealed nor given a respondent's notice cannot formulate issues for determination which have no relevance to the grounds of appeal filed.**

B Where a respondent formulates issues for determination which are not related to the grounds of appeal, such issues for determination are incompetent and are liable to be struck out.

See: Nzekwu v. Nzekwu (1989) 2 NWLR (Part 104) 373; Emmanuel v. Debayo - Doherty (2009) 1 NWLR (Part 1123) 505.

C I have examined the grounds of appeal filed and found that issue iv in the respondent's brief is a preliminary objection. The respondent did not comply with Order 2 rule 9 (i) of the Supreme Court Rules which requires that-

D "A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time"

E The preliminary objection was not properly raised. Issue iv which does not emanate from any Notice of Preliminary objection is incompetent and it is hereby struck out.

Issues (ii) and (iii) in the respondent's brief were distilled from grounds 5 of the further grounds of Appeal. This Court frowns at proliferation of issues from a single ground of appeal see: Burainoh v. Bamgbose (1989) 3 NWLR (Part 109) 325. Attorney General of Bendel State v. Aideyan (1989) 4 NWLR (Part 118) 646. Utih v. Onoyivwe (1991) 1 NWLR (Part 166) 166 at 214 and Ogunbiyi v. Ishola (1996) 6 NWLR (part 452) 12 at 19. I will discountenance issues (ii) and (iii) as framed by the respondent but consider the appeal on the issues formulated by the appellants.

H The main thrust of this appeal deals with the constitution of the panel which heard the appeal at the lower court and the one that wrote the judgment. It is important to draw a distinction between the panel that heard the appeal and wrote the judgment from the one that delivered the judgment. Section 294(2) of the 1999 Constitution (as amended) provides that -

"294 (2) Each Justice of the Supreme Court or of the Court

of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion:

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing”.

The bone of contention in the appeal is that Hon. Justice Olagunju JCA (of blessed memory) who did not participate in the hearing of the appeal, wrote a judgment which rendered the judgment unsatisfactory and urged this court to set it aside notwithstanding the affidavit that was sworn to by Hon. Justice Dongban - Mensen J.C.A. He cited the cases of *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Ishola v. Ajiboye* (1994) 6 NWLR (part 352) 506 and *Shuaibu v. Nigeria Arab Bank Ltd.* (1998) 5 NWLR (part 551) 582 in support. Learned counsel went further to contend that the judgment of the Court below was overly influenced by the judgment of Olagunju J.C.A. who did not hear the appeal. Learned counsel argued by citing Section 36 of the 1999 Constitution that the aim of the provision is to imbue the litigant with the right to object to any judge he may justifiably want to be on the panel and by denying him that opportunity his constitutional right to fair hearing has been impinged upon.

Learned counsel for the respondent argued that since the record of appeal was not challenged, the affidavit of Hon. Justice M. B. Dongban - Mensen J.C.A. reflected the panel who took the appeal and it included Hon. Justice Olagunju J.C.A. who wrote a concurring judgment as provided by Section 294 (2) of 1999 Constitution. Having written and delivered his opinion it cannot be seriously argued that the appellants' fundamental right of fair hearing has been breached. He contended that neither in the leading judgment of Hon. Justice M. B. Dongban - Mensen J.C.A. nor in the concurring judgment of Hon. Justice Mahmud Mohammed J.C.A. (as he then was) was any reference made directly or indirectly to the judgment written by Hon. Justice S. A. Olagunju J.C.A. to justify the complaint of the appellants that it was his judgment that influenced the findings and conclusion reached in the other two judgments.

The appellants filed the two additional grounds of appeal dated 24th February, 2004 on 26th February, 2004. On 23rd Feb-

ruary, 2004 which was three days before the additional grounds were filed, Hon. Justice M. B. Dongban - Mensem J.C.A. who delivered the leading judgment deposed to an affidavit in which she averred as follows:-

B *"1. That Appeal No.CA/E/60/2002; Israel Arum and Okechukwu Nwobodo was heard and determined by this Panel to wit:-*

Hon. Justice Mahmud Mohammed PJ

Hon. Justice Sule Aremu Olagunju J.C.A.

C *Hon. Justice Monica B. Dongban - Mensem J.C.A.*

2. That on the 4th December, 2003 the lead Judgment of the Court was delivered by me in the open court while Hon. Justice Mahmud Mohammed PJ and Hon. Justice Sule A. Olagunju J.C.A. concurred.

D *3. That in my Record book of the said 4th December, 2003 I inadvertently wrote the name of the Hon. Justice J. A. Fabiyi as member of the Panel instead of Hon. Justice S. A. Olagunju" (see page 173 of the record).*

E The record was thus amended before the appellants filed the additional grounds of appeal wherein they complained of the panel that heard the appeal being different from the one that wrote the judgment in appeal No.CA/E/60/2002. The appellants were aware of the amendment to the record and if they were not satisfied, they ought to have challenged it before proceeding to file the additional grounds of appeal.

Learned counsel for the respondent is on firm ground when he submitted that the appellate court is bound by the record of proceedings on which the appeal is based and this is subject to this court invoking its power under Section 22 of the Supreme Court Act, 1990 to amend any defect or error in the record. See: Sarpong v. COP 12 WACA 26 at 27; Nigerian Produce Marketing Co. Ltd. v. Compagnie Noga D' Importation D' Exportation SS (1971) 1 NMLR 223 at 226.

H ***It is the duty of the appellant to ensure that the record which he proposes to challenge at the Supreme Court is made available to the Court.*** See Uwechia v. Obi & Ors. (1973) 2 SC 1 at pages 5 - 6; Obiamalu v. Nwosu (1972) 2 SC 15 at 17 and Omoni v. Tom (1991) 6 NWLR (Part 195) 93. ***Since the appellants nei-***

ther challenged the record nor applied to this Court to expunge the affidavit of Hon. Justice M. B. Dongban - Mensem J.C.A. on 23rd February, 2004, there is a strong presumption that the record of appeal which was transmitted to this court containing the averments in the affidavit reflects the panel of Justices who heard the appeal on 22nd September, 2003. B

It does occur from time to time that the registry staff who either paste or write out the names of Justices that sit on a panel to hear any matter do make mistakes and this can go unnoticed by the presiding Judge as happened in the present appeal. It is with a view to correcting the anomaly that Hon. Justice M. B. Dongban - Mensem J.C.A. deposed to the affidavit. It would have been otherwise if the depositions came after the appellants had filed the additional grounds challenging the composition of the panel which sat to hear the appeal. The fact that the Presiding Justice signed the record which depicted the panel that sat on 22/9/2003 to include Hon. Justice C. B. Ogunbiyi instead of Hon. Justice S. A. Olagunju does not cure the defect. Furthermore, that learned counsel applied for the certified true copy of the records of proceedings of 22/9/2003 still did not cure the error committed in the listing of the panel lists that heard the appeal. It is only the affidavit deposed by the Honourable Justice Dongban - Mensem who wrote the leading judgment that effectively cleared the air on the panel that heard the appeal. C D E

The foregoing notwithstanding, even if the panel that gave judgment was differently constituted from the one that heard the appeal, this will not result in rendering the judgment a nullity. The same scenario played itself out in Shuaibu v. Nigeria Arab Bank Ltd. (1998) 5 NWLR (Part 550) 582 where Y. O. Adio, J.C.A. (who was not in the panel that heard the appeal) wrote a contributory judgment agreeing with the leading judgment and Hon. Justice Okezie who took part in the appeal had concurred with the leading judgment. On appeal to this Court, the appeal was dismissed. In the leading judgment delivered by Wali J.S.C., after setting out section 258 (1), (2) and (3) of the 1979 Constitution, held that subsection 3 clearly provides a solution to a situation like the one at hand as it stated that where the decision of the Court consists of more than one Judge, the concurring opinion ex- F G H

pressed by the majority Justices shall be the binding judgment. Section 258 (3) 1979 Constitution which has been re - enacted as Section 294 (3) of the 1999 Constitution (as amended) states -

B “A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members”

C In his contributory judgment Ogundare, J.S.C. after setting out the constitution of the panel that heard the appeal and the one that ultimately delivered judgment which included Adio J.C.A. put the following questions to which he provided an answer after reviewing earlier decisions on the matter. He said:

D *“To my mind, it would appear that the Hon. Justice Adio J.C.A. who was not present at the oral hearing of the appeal participated in judgment. The questions then arise: would his participation amount to the proceedings in the Court of Appeal being null and void, as contended by the appellant in the appeal before us? Or would the proceedings just be merely irregular, as contended by the respondent?”*

E After setting out Section 226 of the 1979 Constitution and reviewing earlier decisions of WACA and the stand taken by Ademola CJN in Adeigbe v. Kusimo (1965) NMLR 286; (1965) 4 NSCC 188 and Madukolu v. Nkemdilim (1962) ANLR 581; (1962) 2 SCNLR 341 he arrived at the following conclusion on page 605 -

F *“The correct position, therefore, is that the complaint of the appellant before us that Adio J.C.A. participated in the judgment when he did not join in the hearing is at best, a complaint of irregularity which unless it occasions a miscarriage of justice, will not vitiate the proceedings of the Court below”*

G After reproducing Section 258 (3) 1979 Constitution, he continued -

H *“Of the three Justices that heard the appeal on February 20, 1991, two, that is, Ndoma - Egba and Okezie JJCA ruled in favour of allowing the appeal before them. They constituted a majority of the three Justices that heard the appeal. What it means is that even if Mukhtar J.C.A. had dissented, her dissent would have had no effect on the judgment that the appeal was allowed. Therefore, in my respectful view and having regard to the circumstances, the participa-*

tion of Adio J.C.A. in the judgment of the court below regrettable as it is, did not vitiate the proceedings of the court below. The position would have been otherwise had Okezie J.C.A. or Ndoma - Egba J.C.A. dissented and Adio J.C.A. had joined either of them to form a majority”

In *Adeigbe & Anor. v. Kusimo & Ors*; (1965) 4 NSCC 188 B Ademola CJN held thus:

“In a complaint of nullity the test is whether the complaint is extrinsic to the adjudication; but the plaintiff’s complaint, which was based on the variation in the trial bench, was at bottom a complaint C that the judgment could not be satisfactory on the ground that those who gave it heard all the witnesses, and did not pertain to any matter of jurisdiction, therefore the judgment was not a nullity”

In that judgment Sir Adetokunbo Ademola CJN observed at page 191 supra that - D

“We are in no doubt about the correctness of what the learned appeal Judge said in his judgment that there are abundant decisions in the High Court and in the West African Court of Appeal on the point that where a court is differently constituted during the hearing of a case, or on various occasions when it met or where one member E did not hear the whole evidence, the effect on the proceedings is to render them null and void. The learned judge had in mind among others the following cases - Egba N. A. v. Adeyanju (1936) 13 NLR 77; Tawiah III v. Ekwudzi 3 WACA 52; Otwiwa v. Kwaseko 3 WACA F 230; Damoah v. Taibil 12 WACA 167; Runka v. Katsina N. A. 13 WACA 98”

He took time to explain the difference between the cases where the judgment is declared null and void and those where the judgment is considered to be unsatisfactory or irregular on account G of the variation in the trial bench in these words:

“In the first of these cases, in which the defendant’s witnesses were not heard by two members of the Court, the principle was enunciated that a judgment could not be allowed to stand which was given by judges who had not heard all the evidence; in the other four H cases, the appeal court expressly held that the proceedings were a nullity on that account...”

The picture that emerges from a discussion of the decided cases including the notorious case of Gabriel Madukolu

v. Johnson Nkemdilim (supra) where Bairamian F. J. after enumerating the features that make a court competent and ending with the statement that -

“Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication” is that if the composition of the panel changes while oral evidence is still being taken and the re-constituted panel reaches a decision, that decision will be declared a nullity. The reason is not far to seek. A trial court basically deals with evaluation of evidence and one of the key ingredients to be considered is the credibility of witnesses where their demeanour forms an integral part of that evaluation. Where the evaluation is based purely on the printed records, the overriding consideration is whether the burden of proof has been discharged. Where the latter is the case, it does not matter if the panel that heard the case varies, the judgment would at best be declared irregular but would not be nullified unless the irregularity occasioned a miscarriage of justice.

Apart from alleging that the appellants’ right to fair hearing as provided under section 36 (1) 1999 Constitution has been infringed since they could not object to Justice Olagunju, JCA being a member of the panel for whatever reason other than the fact that he made scathing remarks about the appellants in his judgment, there is nothing on the record to substantiate learned counsel’s submission that Justice Olagunju’s judgment influenced the judgment of Hon. Justices Mahmud Mohammed and Dongban - Mensem, JJCA. Consequently, a variation in the bench does not render the judgment thereby delivered a nullity. The appellants’ complaint that Olagunju, J.C.A. participated in the judgment when he did not join in the oral hearing is at best a complaint of irregularity which has not occasioned a miscarriage of justice. Issues 1 and 2 which were distilled from additional grounds 5 and 6 are resolved against the appellants in favour of the respondent.

The remaining four issues have to do with evaluation of evidence and the conduct of proceedings in the Customary Court. The complaints contained in issues three and four essentially have to do with asking this Court to re-evaluate the evidence adduced before

the Customary Court of Awkunanaw for which there was a concurrent findings of fact by the High Court and the Court of Appeal. The three lower courts arrived at the same conclusion.

The attitude of this Court is to discourage appellants coming here on adventure of attempting to set aside concurrent findings of fact made by two or more lower courts. Unless the findings of fact as accepted by the trial court which was upheld by the High Court sitting on appeal and further affirmed by the Court of Appeal is against the trend of evidence or is based on evidence that in law is inadmissible, this Court will not interfere with such findings. See: Adeleke v. Aserifa (1987) 1 NWLR (Part 49) 284; Chukwuogor v. Obiora (1987) 3 NWLR (Part 61) 454 at 457; Jimoh Garuba v. Isiaka Yahaya (2007) 3 NWLR (Part 1021) 390. ***The explanation of this principle is simple and it is this: the trial court had the best opportunity of seeing the witnesses and hearing them give evidence; that court was best placed to assess such evidence based on the demeanour of each witness. The appellate court has not got these opportunities, it only sees written records and counsel who are not legal witnesses. And so when the High Court agreed with the findings of fact made by the Customary Court which were affirmed by the Court of Appeal, the attitude of this Court is clear; the concurrent findings of fact of the courts below will never be disturbed so far as the findings are not tainted with miscarriage of justice.*** See Mogo Chikwendu v. Mbamali (1980) 3 SC 31; Ojomu v. Ajao (1983) 9 SC 53; Lokoyi v. Olojo (1983) 8 SC 61, Onobuchere v. Esegine (1986) 1 NWLR (Part 19) 797 at 804.

Even though the parties called equal number of witnesses, the trial Customary Court was justified in attaching more weight to the evidence of the plaintiff's witnesses than those called by the defendants/appellants. The 1st plaintiff's witness, Okonkwo Ani said that he bought the land where he built his house from the plaintiff's father. He hailed from Umuigwen Ngene in Umuatugbuoma Akegbe Ugwu Awkunanaw, the same area as the defendants. He further stated that they were empowered to purchase parcels of land from the owners of the area for purposes of libation and cultivation and he is the only one from Umuigwen Ngene who bought a portion of land

from the area in dispute. Ben Igwe who testified as PW2 said both parties were related to him. In his evidence he stated as follows at page 35 of the records on how the 1st defendant went into the disputed land:

"We have a common boundary with the people of Ugwu Agba of Amechi Awkunanaw. Ugwuagba people trespassed into our people's land area and we objected to it. Later Ugwu Agba people realized their mistake and accepted that they actually trespassed into our area and withdrew from it. When peace was restored between the two communities, Umuatugbuoma directed citizens from our community to move into the area for the purpose of cultivation and in agreement with the owners of the land. Onyeabor Arum was among those who went into the area, for the purpose of cultivation. After sometime, Israel Arum used caterpillar and leveled the whole area. Nwobodo Ewo grew annoyed because he leveled the portion without his permission as the owner of the land. He then suspected that Israel Arum was claiming the place as his own the matter was reported to Umuatugbaoma who after looking with the case decided that Israel should give an oath in respect of the land as the owner or in alternative, Nwobodo should give him an oath to take in the same respect. But Israel and brother refused to take or give an oath to Nwobodo. Umuatugbuoma decided that they will stand behind Nwobodo whenever Israel and brother may take the case to"

The cross-examination of PW2 did not elicit any adverse evidence which could render his evidence in chief suspect or unreliable. PW3, Martin Arum who shared the same area with the plaintiff's family testified that the defendants had no parcel of land within the area at all. The defendants on the other hand called John Ani, Amushi Ugwu and Samuel who testified as DW1, DW2 and DW3 respectively. DW1 testified that Israel Arum and Onyeabor Arum are of the same parentage with him. DW2 also testified that the land belonged to them (the defendants) of whom he was a part and to prove that the land was theirs (defendants), their youngest brother, Nweke Aniwegbe was living on the land while DW3 stated that the plaintiff (Nwobodo Ewoanshi) wanted to forcefully take away the land from Israel Arum who is his brother.

The trial court reviewed the evidence called by the parties and observed that all the witnesses called by the defen-

dants came from the same family with them while those of the plaintiff came from different families. The Court doubted the credibility of the defendants' claims as well as the evidence called since they did not call independent witnesses to testify in proof of their claims. In the same vein the court accepted the evidence called by the plaintiffs and entered judgment in their favour. The evidence of a boundary neighbour and customary tenant who are not related to the claimant is certainly weightier than that of witnesses who are blood relations of the claimant since the latter would merely be protecting their interest in the disputed property. In this regard the evidence of PW1 is against interest which carries the greatest weight and will go in favour of the plaintiff. See: Chief Falade Onisaidu & Anor. v. Chief Asunmo Elewuji & Anor. (2006) 13 NWLR (Part 998) 517; Ojiegbe & Ors. v. Okwaranyia & Ors. (1962) ALL NLR 605.

The Customary Court was therefore right to place more weight on the evidence given by the plaintiff's witnesses. The High court on appeal was also right to state that *"much as the defendants' witnesses are not disqualified from testifying for the defendants on ground of their being related to them, the fact that a witness is a blood relation of the party who called him can make the evidence of such a witness less pungent"*.

The lower court considered the issue and stated rightly that it was the duty of the trial court which saw and heard the witnesses, assessed and observed their demeanour that was in the best position to decide which witness to believe. In this case the trial court ascribed probative value to the evidence adduced by each party and it is not the function of the appellate court to replace its views for those of the trial court. This case has gone through the mill and it is not at this stage that the evaluation of evidence will be altered in favour of the appellants. The appellants also made heavy weather of the use of the phrase "proof beyond reasonable doubts" by the trial court to argue that no such burden was placed on the plaintiff/respondent and it was therefore unfair to expect the defendants/appellants to prove their case beyond reasonable doubt.

The High Court observed that the trial court delighted itself in profuse use of this phrase in the judgment but pointed

out that the trial court was a customary court not versed in the intricacies of the rules of evidence and the provisions of the Evidence Act. The lower court felt the issue had to do with evaluation of evidence which the High court embarked upon and in conclusion agreed with the High Court that the use of the phrase “proof beyond reasonable doubt” by the trial court was just an exhibition of adjudicative exuberance of no perceptible evidential value. This court has long recognised the fact that what matters in trials in the Native Courts such as Area or Customary Courts is the substance and not the form. The decisions of such courts are to be accorded respect by appellate courts provided that nothing is done therein which is contrary either to any express requirements of the law or to the principles of natural justice. See: Jimoh Garuba v. Isiala Yahaya (2007) 3 NWLR (part 1021) 390; Okilli v. Isatu 14 WACA 89; Ikeakwu v. Nwankpa (1967) NMLR 224; Iyaji v. Eyigebe (1987) 3 NWLR (Part 61) 527; Ekpa v. Uto (1991) 6 NWLR (part 197) 258; Anyabine v. Okolo (1998) 13 NWLR (Part 582) 444.

In Ikpong v. Edoho (1978) ANLR 196, Aniagolu J.S.C. (of blessed memory) stated at page 206 that guidelines have been settled in the following principles in considering cases heard and determined in the Native Courts:

“Firstly in respect of the claims before those courts it is necessary to look at the substance rather than at the form of the writ (Kwamin Boadu v. Kobina Fosu 8 WACA 187; Oluma v. Tsutsu 10 WACA 89); one therefore, should not examine those writs “microscopically” (Udofia v. Apia 6 WACA 216 at 218) or with the finery of a tooth comb;

Secondly, on the question of procedure adopted by those courts in arriving at their decision subject, we must add, to the overriding principle that they must not be allowed to so fundamentally depart from accepted procedures in deciding their cases that they occasion injustice to either party to a case, an appeal court must not be too strict in regard to matters of procedure adopted in those courts (Dinsey v. Ossei & Anor (1939) 5 WACA 177);

Thirdly, generally, great latitude must be given to, and a broad interpretation placed upon Native Court cases - and one may add customary court determined cases - so that the entire proceedings,

the evidence of the parties and the judgment must be examined in order to determine what the Native or Customary Court case was all about (Ajayi v. Aina 16 NLR 67). The whole conception and result of the proceedings will show what the parties were fighting for; the matters upon which issues were joined, even if technically framed in inappropriate language from the standpoint of legal technocrats, and the decision of the Native or Customary Court on those issues” ^B

It is also necessary to stress the fact that Area or Customary Courts are to be guided and not to be strictly bound by the provisions of the Evidence Act. All substantive principles of law are useless and legal actions cannot be successfully predicated on such principles in court without the existence of facts. The proof of such facts ultimately determines the proof of Evidence in any litigation. ^C

In Chukwuogor v. Obiora supra Oputa J.S.C. defined Evidence in these words at pages 477 - 478. ^D

“In its broad sense, Evidence encompasses and includes the means employed for the purpose of proving a disputed fact”.

Viewed from the propositions stated above, it will be seen that the complaints of appellants relating to the use of the phrase *“proof beyond all reasonable doubts”*, taking of evidence during the inspection of the disputed land and the use of the evidence of Okechukwu Nwobodo including the judgment of Olagunju J.C.A. did not amount to any miscarriage of justice and all that the appellants are strenuously trying to achieve in ranking up these complaints is for this Court to disturb the concurrent findings of fact made by the lower courts. The trial has passed through three strata of courts in which the evidence adduced by the parties was properly evaluated. It is about time that issues pertaining to facts should no longer be entertained by this Court and only serious issues of law should engage the attention of this Court. Appeals such as the present one should attract punitive costs in order to deter would be appellants from embarking on a futile exercise. ^E ^F ^G

I therefore find that the appeal totally lacks merit and it is accordingly dismissed. The judgment of the Customary Court Awkunanaw in Suit No.AWK/3/97 which was affirmed by the High Court Enugu and Court of Appeal Enugu Division is further affirmed by this Court. There shall be N100,000.00 (One Hundred Thou- ^H

sand Naira) costs awarded against the appellants in favour of the respondent.

RHODES-VIVOUR JSC

B The respondent as plaintiff instituted an action in an Awkunanaw customary court for declaration of title to a customary right of occupancy to a piece of land known and called ALA AGU AKPASHA situate at Akpasha Atugbuoma in Akegbe Uguwu Nkanu West Local Government Area of Enugu, Enugu State. That court entered judgment in favour of the respondent. The judgment was affirmed by the High Court and further affirmed by the Court of Appeal. In proof of his case the respondent as plaintiff based his title on his late father's title, and acts of ownership e.g. sale of portion of the land to PW1, successfully preventing trespassers on the land, and on the basis of preponderance of evidence weighing in favour of the respondent, three courts below correctly in my view held that the respondent was entitled to his claim.

E The long settled position of the law is that ownership of land may be proved in any of the following five ways:

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

H The reasoning of the High Court Judge for affirming the judgment of the trial customary court was that there was supportive and independent evidence in addition to the evidence on traditional history led by the respondent. This was confirmed by the Court of Appeal. Where the evidence of traditional history relied on by both sides is inconclusive to establish the plaintiff's title, the plaintiff would only succeed if he is able to prove acts of ownership extending over a sufficient length of time, numerous and positive enough to prop-

erly infer that the plaintiff is the exclusive owner. See; Agedegudu v. Ajenifuja 1963 1 ALL NLR p.109 Jegede v. Gbajumo 1974 10 SC p.183.

The respondent as plaintiff led credible evidence of contemporary acts of ownership e.g. selling part of the land to PW1. Successfully preventing trespassers from encroaching on the land, facts well known to the Umuatugbuoma Community. These, together with compelling evidence of traditional history which showed an unbroken chain of devolution from his father to him justifies judgment in his favour which was confirmed by the High Court and the Court of Appeal.

In this court, learned counsel for the defendant/appellant says that Olagunju, JCA (of blessed memory) who did not participate in the hearing of the appeal wrote a concurring judgment. He submitted that the judgment of the Court of Appeal ought to be set aside. Section 294 (3) of the Constitution states that:

“A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members.”

Three justices sit to hear matters in the Court of Appeal, while five justices sit in the Supreme Court. Except in cases where only a full court can hear, five in the Court of Appeal and seven in the Supreme Court. The judgment of the Court of Appeal now on appeal and which learned counsel for the appellant wants this court to set aside was delivered by Dougban-Mensem, J.C.A. Mohammed JCA, (as he then was) and Olagunju, J.C.A. (of blessed memory) both concurred. It is important the circumstances of every case is examined to see if there is any feature therein that vitiates proceedings.

I am of the view that even if Olagunju, J.C.A. did not participate in the hearing of the appeal and wrote a concurring judgment, the judgment would be irregular, but that would not vitiate proceedings in view of the clear provisions of Section 294 (1) of the Constitution. If Olagunju, J.C.A. (as he then was) had written a dissenting judgment, the majority would be the decision of the court in the light of the provisions of Section 294(3) of the Constitution. *Otawa v. Kwaseko* 3 WACA p.330, *Adeigbe v. Kusimo* 1965 NMLR p.286 are relevant on the issue. I place tremendous weight on the affidavit deposited to by Dougban-Mensem, J.C.A. who wrote and delivered the

leading judgment. In that affidavit his lordship made it abundantly clear that Olagunju J.C.A. sat on the Panel that heard the appeal. That to my mind brings to rest the issue once and for all. There is no longer any room for doubt once a judge of the Court of Appeal states the true position.

B Furthermore, the Record of Appeal is a complete record of proceedings in the Court of Appeal and the High Court and this court is bound by it. In the absence of a challenge to the correctness of the Record of Appeal, the Record of Appeal is deemed to be correct and learned counsel for the appellant who did not challenge it is deemed to have accepted it as a true and correct reproduction of all that transpired in the Court of Appeal. The fact that Olagunju, J.C.A. (as he then was) was on the Panel that heard the appeal is firmly established by the Record of Appeal.

D It happens from time to time that there could be a mix up. A judge who did not sit may appear in the Record as if he sat. This is usually due to Administrative lapse easily corrected when the true facts are revealed.

E For this and the detailed reasoning in the leading judgment prepared by Aka'ahs, J.S.C. which I read in draft, this appeal lacks merit and it is dismissed with costs of N100,000 in favour of the respondent.

F

PETER-ODILI JSC

I am at one with the judgment just delivered by my learned brother, Kumai B. Aka'ahs JSC and in support of the reasoning thereof I shall chip in some remarks.

G This is an appeal by the defendants against the decision of the Court of Appeal, Enugu Division, which had on 4th December, 2003 upheld the decision of E. C. Ahanonu J. of the Enugu State High Court delivered on 1st November, 2000 in favour of the plaintiff/respondent. The Enugu State High Court heard the suit on appeal from Awkunanaw Customary Court which in turn delivered its judgment in suit No.AWK/3/97 on 7th September, 1998 in favour of the plaintiff/respondent. The Court of Appeal, Enugu Division heard the appeal on 22nd September, 2003 Coram: Mahmud Mohammed, Sule Aremu Olagunju and Monica Dongban-Mensem JJCA. The

appellant contends that Olagunju J.C.A. was not part of the panel that heard the appeal but was part of the delivery of judgment. That it was Clara Ogunbiyi J.C.A. who was part of the panel that heard the appeal.

BACKGROUND FACTS

The plaintiff/respondent filed a claim at the Awkunanaw Customary Court seeking the reliefs thus: B

(i) Declaration of title to a Customary Right of Occupancy to a piece or parcel of land known as and called “ALA-AGU AKPASHA” situate at Umuatugbuoma, Akegbe at Nkanu West Local Government Area of Enugu State. C

(ii) Injunction restraining the defendants, their agents, servants and relations from further trespass into the said land until the matter is disposed of.

The defendants/appellants counter-claimed also for title. Both plaintiffs and defendants relied on traditional history to establish their claim and counter claim respectively. In the course of the hearing a petition was written by the defendants complaining that the President of the Court was related to the plaintiff. In reaction the chief Judge ordered trial de novo by the panel excluding the President, Mr. Chime Ani. Both parties called witnesses and a visit to the locus in quo was made. The customary court considered the evidence and delivered its judgment finding in favour of the plaintiff and called in question the credibility of the defendants and their witnesses. E

The defendants appealed to the Enugu State High Court against the judgment of the trial court. The High court dismissed the appeal and defendants/appellants appealed to the Court of Appeal Enugu Division. The Court of Appeal delivered its judgment dismissing the appeal. The appellants have now come before this court and in the main query the constitution of the Panel of Justices that heard the appeal and the Panel that delivered judgment. They contend that one of the panelists who heard the appeal was left out at the judgment, instead Olagunju J.C.A. who did not hear the appeal was part of those who delivered the judgment. Dongban - Mensem J.C.A. who delivered the lead judgment deposed to an affidavit to the effect that the three justices who heard the appeal, viz Mahmud Mohammed, Aremu Olagunju JJCA and herself delivered the judgment. F

Also appealed against is the merit of the case at the lower H

courts. On the 29th day of January, 2013 date of hearing learned counsel for the appellants adopted the appellants' brief settled by Chief Okwuchukwu Ugolo and filed 25/10/04. In the brief were distilled six issues for determination as follows:

B 1. Is it right in law that the Panel of Justices of the Court of Appeal that delivered the judgment was different from the Panel of Justices that heard the appeal.

C 2. Was Section 36 of the 1999 Constitution of the Federal Republic of Nigeria complied with when Hon. Justice Sule A. Olagunju J.C.A. who did not hear the appeal made very scathing remarks against the appellants which overly influenced the judgments of his two learned brothers.

D 3. Did the plaintiff give evidence of traditional history of the land in dispute for a declaration of title to be made in his favour on that ground.

4. Was the court of Appeal right in law when it refused to expunge the evidence of Oko Nwobodo Nta who was not called as a witness and suo motu invoked Section 227 of the Evidence Act without calling upon counsel to address it on the issue.

E 5. Was the Court of Appeal right in law when it upheld the decision requiring the defendants to prove their case "beyond all reasonable doubt" when no such burden was placed on the plaintiff and when the evidence led by the defendant and their witnesses was not evaluated.

F 6. Was the Court of Appeal right in law when it failed to allow the appeal on the ground that the evidence of the three witnesses for the appellants was not evaluated solely because they came from the same family as the appellants when the respondent failed to address G the said issue.

H Learned counsel for the appellants also adopted their reply brief filed on 17/1/05. Learned counsel for the respondent adopted their brief of argument filed on 14/12/04 and which brief of argument was settled by Chief C. H. C. Nwanya. In the brief were formulated eight issues for determination of the appeal and I shall quote them verbatim below thus:

1. Whether it is correct that the panel of the Court of Appeal Justices which heard the appeal on 22nd September, 2003 was not the same as the panel which delivered the Court's Judgment on 4th

December, 2003 thereby breaching the appellants' fundamental right of fair hearing.

2. Whether Section 36 of the 1999 Constitution dealing with the fundamental right of fair hearing of the appellants was in any way breached, having regard to the errors of fact in the Record of Appeal which were corrected by the solemn oath (affidavit) of Hon. Justice M. B. O. Mensem J.C.A. at page 173 of the Record and dated 23rd April, 2004. B

3. Whether it is correct that it was the judgment of Hon. Justice S. A. Olagunju J.C.A. which in fact influenced the judgments of his two learned brothers, who sat with him on the Court's panel on 22nd September, 2003. C

4. Whether it was proper for the appellants' counsel to amend the Record of Appeal, file additional grounds of appeal and argue issues deriving therefrom without first obtaining leave of the Supreme Court so to do. D

5. Whether the Court of Appeal was right in holding that the evidence which the respondent led at the trial in proof of his claim was of such quality as to warrant the trial court to give him judgment and for the two lower courts to affirm the judgment. E

6. Was the Court of Appeal right in law when it refused to expunge the evidence of OKO NWOBODO NTA who was called as a witness and was it correct that the Court of Appeal suo motu invoked Section 227 of the Evidence Act without calling upon counsel to address it on the issue. F

7. Whether the Court of Appeal was right in law when it upheld the decision of the two lower courts that the use of the phrase "prove beyond all reasonable doubts" by the trial court did not cause a misdirection with respect to the burden of proof placed on the appellants and in the evaluation of their evidence vis-a-vis that of the respondent. G

8. Was the Lower Court right in law when it failed to allow the appeal on the ground that the evidence of the three witnesses for the appellants was not evaluated solely because they came from the same family as the appellants when the respondent failed to address the said issue. H

Perusing the questions raised on either side, it seems to me convenient to utilize those as framed by the appellants even though

they are substantially similar as those couched by the respondent.

ISSUES 1 & 2

B These two issues are questions as to whether it was right in law that the Panel that heard the appeal would be different from the panel delivering the judgment. Also if in the circumstances including the scathing remarks against the appellants by Olagunju J.C.A. overtly influenced the judgments of the other two members of the panel and if Section 36 of the 1999 Constitution was complied with.

C For the appellants it was contended that the aim of Section 36(1) of the 1999 Constitution is for a litigant to know who are in the panel of adjudicators and if he has reason why any of the panelists should not be there, it is the litigant's right to raise an objection to the presence of such a Judge. That in the grouse on ground the right of the appellants so to object to a justice delivering judgment when he D was not one of the Justices who heard the appeal was foreclosed because of the stage thereat was judgment stage.

E Learned counsel went on to say that delivery of judgment is an integral part of hearing and determination of cases and where a breach of the said constitutional provision occurs it is a serious irregularity calling into question the jurisdiction of the court to deliver the said judgment. He cited *Ishola v Ajiboye* (1994) 6 NWLR (Pt. 352) 506; *Shuaibu v. Nigeria Arab Bank Ltd.* (1998) 5 NWLR (Pt. 551) 582. For the appellants was further canvassed that the lead judgment F was overtly influenced by the judgment of Olagunju JCA who did not hear the appeal. That the conclusion drawn by Olagunju JCA could not be borne out of the record. He cited snippets of concurring judgment of Justice Olagunju at pages 217 - 218 of the Record to show their displeasure with what the court did and particularly the G learned Justice Olagunju, whose remarks were perverse.

H For the respondent, learned counsel on his behalf contended that an appeal court is bound by the Record of Proceedings on which the appeal is based and in this instance it is the appellants that have produced the Record of Appeal which are placed before this court for its use. That perusing the record it can be seen there was obvious mistakes in the names of C. B. Ogunbiyi JCA and that of J. Fabiyi JCA being brought in as part of the panel of justices at the hearing of the appeal which mistake Dongban-Mensem JCA who delivered the lead judgment clarifying the situation by an affidavit dated 23rd April,

2004. This sworn deposition was not countered by a similar mode in the nature of a counter affidavit. Rather it is learned counsel for the appellants challenging the composition of the justices on the day of hearing.

Learned counsel for the respondent said though it is conceded that the Supreme Court has in an appropriate case, the power to amend the Record under Section 22 of the Supreme Court Act, 1990, such a situation is not existing here and now. He relied on *Akinyede v Opere* (1967) 1 ALL NLR 303; *Asabaro v Aruwaji* (1974) 2 NWLR (pt.58) 587 at 624; *Chineke v Nigeria Airways Ltd* (1988) 3 NWLR (pt. 81) 251; *Ojebene v Esan* (1987) 4 NWLR (pt.63) 49.

Learned counsel for the respondent said clearly there was some confusion as to who was part of the panel that heard and delivered the judgment at the Court of Appeal which confusion was cleared by the sworn deposition of Dongban-Mensem JCA who delivered the lead judgment. That it is instructive that instead of challenging that Affidavit of the Honorable Justice, the appellants' counsel chose to challenge same orally stating that the appellants confirmed that Olagunju JCA was not part of the panel that heard the appeal and should not have made a contributory judgment. From whom he got the confirmation was not made known to court. That the appellants cannot challenge a part of the Record of Appeal which he placed before the Supreme Court by saying the record did not reflect what happened in court. He cited *Akinyede v Opere* (1967) 1 ALL NLR 303; *Asabaro v Aruwaji* (1974) 4 SC 119; *Otapo v. Sunmonu* (1987) 2 NWLR (Pt.58) 587 at 624; *Chineke v Nigeria Airways Ltd* (1988) 3 NWLR (pt.81) 251; *Ojebene v Esan* (1987) 4 NWLR (Pt.63) 49.

For the respondent was stated that from what is available as substantiated by the Affidavit of M. B. D Mensem JCA, Olagunju JCA was one of the three Justices who heard the appeal on 22nd September, 2003 and subsequently delivered a concurring opinion as required by Section 294(1) of the 1999 Constitution and so the fundamental right of fair hearing of the appellants was met. In reply on points of law according to the reply brief, learned counsel for the appellants attempted to impugn the affidavit deposed to by the learned justices of the Court of Appeal Dongban- Mensem on the ground that the deposition was privately made and that the challenge on the matter of the composition of the panel ought to have been made in

open court. That the affidavit aforesaid should be expunged from the Record.

The submission of the appellants' counsel is strange and not supported by the law or practice. Firstly that instead of having the averment in the affidavit controverted by a counter affidavit, it is the address of counsel that is offering the challenge for depositions on oath. At the risk of repeating a law that is now trite, facts in an affidavit not controverted by a counter affidavit are deemed admitted. Also when the learned justice swore to that affidavit to clarify the membership of the panel that heard and delivered the judgment being, Hon. Justice Mahmud Mohammed PJ, Hon. Justice Sule Aremu Olagunju JCA, Hon. Justice Monica B. Dangban-Mensem JJCA, who delivered the lead judgment. Mahmud Mohammed JCA (as he then was) and presided would have denied in counter affidavit if those facts were incorrect, he did not and the same for Olagunju JCA. The deponent further averred to his mistake in writing the name Hon. Justice J. Fabiyi as member of the panel, again Fabiyi JCA (as he then was) would have countered that fact if it was untrue. All these taken in what easily occurs during court sessions where titling of members of a panel are mistakenly stated, all due to the inadvertence of a human error, of the Registrars of court. These are mistakes that commonly occur and rectified as soon as discerned, therefore a judgment cannot be jettisoned merely for such an irregularity which does not go into the root of the matter. I place reliance on *Akinyede v Opere* (1967) 1 ALL NLR 303; *Asabaro v Aruwaji* (1974) 4 SC 119; *Ojebene v Esan* (1987) 4 NWLR (Pt. 63) 49.

The submissions of learned counsel for the appellants in the matter of the Constitution of the panel seem to point to seeking solution from where ever even if not supported by any facts. One of such submissions is the contention that the learned Justice Olagunju not being a member of the panel that heard the appeal and to deliver the judgment, wrote a concurring judgment which influenced the conclusions and decision of that court. This point is to say the least bizarre, that a concurring judgment which is a future event influenced an earlier process, the lead judgment. This is akin to a male child having a first son before the father. An inconceivable scenario indeed and hastens a resolution of the questions herein against the appellants.

ISSUE 3 & 4

In these two issues were the questions whether the plaintiffs gave evidence of traditional history of the land in dispute for a favourable declaration of title and if the Court of Appeal was right in law in refusing to expunge the evidence of Oko Nwobodo and suo motu invoked section 227 of the Evidence Act without calling upon counsel to address it in the issue. B

In the quest to solve these riddles learned counsel for the appellant contended that in an action for declaration of title, a plaintiff has to prove five ways which include traditional history, position orchestrated in the case of *Idundun v. Okumasba* (1976) 1 NMLR 2000. That in achieving the proof of traditional history it must be clear from the evidence how and when the land was settled on, by what custom to confer the title, several ancestors who successively took or shared that title before it devolved on the plaintiff. He relied on *Chime v. Ude* (1993) 3 NWLR (Pt.279) 78 at 87 -88; *Mogaji v. Cadbury (Nig) Ltd* (1985) 2 NWLR (Pt. 7) 393 at 423; *Kalio v. Woluchem* (1985) 1 NWLR (Pt. 4) 610 at 628; *Owoade v. Omitola* (1988) 2 NWLR (Pt.77) 413 at 425; *Udeze v. Chidebe* (1990) 1 NWLR (Pt.125) 141 at 160. C
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For the appellants was further canvassed that the Customary Court in its error deviated from the evidence on Record to allude to the plaintiff now respondent inheriting the land from his grandfather. That this was perverse and should not be allowed to stand. He cited *Olohunde v Adeyoju* (2000) 10 NWLR (Pt. 676) 562 at 586. That the High Court in its appellate jurisdiction equally made perverse findings of the Customary Court. He relied on: *Chime v Ude* (supra); *Fasoro v Beyioku* (1989) 2 NWLR (Pt.76) 263 at 271; *Eronini v Iheuko* (1989) 2 NWLR (Pt. 101) 46 at 66; *Adisa v Oyinwola* (2000) 10 NWLR (Pt.674) 116 at 179). F
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Learned counsel for the appellants said the Supreme Court had laid down the rule that it is not the duty of the court of Appeal to fish around for evidence or presume same when a party fails to produce it. Nor should a court make a case for the parties. He cited *Ohworode v FRN* (2003) 2 NWLR (Pt. 803) 176, *Ituama v Akpe Ime* (2000) 12 NWLR (Pt.680) 156; *Okoye v Dumex Nig Ltd.* (1985) 1 NWLR (Pt.4)783, *Obijuru v Ozima* (1985) 2 NWLR (Pt. 6) 167. For the appellants was also stated that the customary court did not H

direct parties to bring their persons to join at the locus in quo apart from the parties and their witnesses. He also took exception to the interpretation given by the High Court to the various sections of the Evidence Act such as Section 76(11), 77 (11), 179 (180) and also Section 62 of the Customary Courts Edict 1984. That the High court
 B had a duty to expunge findings of fact of a trial court which are not supported by evidence and which are perverse and which as in this case led to a miscarriage of justice. He cited *Ofondu v Niwasha* (1993) 2 NWLR (Pt.275)253 at 258; *Nnajofofor v Ukonu* (1986) 4 NWLR (Pt.36) 505; *Ololunde v Adeyoju* (2000) 10 NWLR (Pt. 676) 562 at
 C 586.

Learned counsel for the appellants went on to say that the judgment of the Customary Court would not have been the same if the statements of *Oko Nwobodo Nta* were expunged, and in keeping
 D with Section 277(1) of the Evidence Act the appellate court is enjoined to expunge such wrongfully admitted evidence. He cited *Okobia v Ajanya* (1998) 6 NWLR (Pt.554) 348 at 360. That Section 227 of the Evidence Act was not one of the issues before the Court of Appeal but that court went ahead to raise it suo motu and without
 E hearing the parties on the point decided the matter before it. That the Supreme Court should not allow this infraction. He relied on *Okafor v. Nwude* (2001) 3 WRN 106 at 134; *Okonkwo v Ikpajie* (1992) 2 NWLR (Pt. 226) 633 at 656.

For the respondent was contended that when the appellants
 F appealed to the High court, it was not the function of that court in its appellate capacity to retry the case of the parties on the printed record. That the duty of the High court in terms of Sections 15 and 20 of the Customary Courts Edicts No. 6 of 1984 to see if there was evidence
 G before the Trial court on which it based its findings and judgment and to satisfy itself that the decision of the trial court was not against any written law or the principles of natural justice, equity and good conscience. That it was proper for the High court as appellate court to affirm the judgment of the trial court. That on appeal to the court of
 H Appeal, that court realizing that the appeal was on issues of fact and that it was the trial court alone who saw and heard the witnesses and so the court below had to adopt a restrained approach to those issues of fact. Also that the court below realized that the ascription of probative value to the evidence and that customary court was not

bound to adhere to technical and strict rules of procedure as obtained in common law courts with the aim of achieving substantial justice. He relied on *Nwannezie v Idris* (1993) 2 SCNJ 139; *Bamgboye v Olanrewaju* (1991) NWLR (pt.184) 132; *Obodo v Ogba* (1987) 3 SC 459 at 481; *Ela Banjo v Tijani* (1986) 12 SC 315 at 368; *Ajao v Alao* (1986) 12 SC 193 at 210 etc. B

Learned counsel for the respondent stated on that the matter of visiting the locus in quo had been considered an imperative requirement by customary court which operate in largely illiterate environments where what the eye can see and observe is at times considered more important than what is said in the witness stand. That it has been stated that a visit to the locus in quo is meant to settle issues which mere hearing without seeing cannot resolve. He placed reliance on *Umar v. Bayero University Kano* (1988) 4 NWLR (pt.86) 85; *Mba v Obule* (1963) 7 ENGLR 51 at 54. He stated on that there was nothing in the conclusion of the court of Appeal in support of the judgment of the High court which warranted calling upon counsel on both sides to address it especially since the issue and arguments thereof were taken up in the briefs of both parties and considered by the court before reaching its decision. C D E

In the matter herein, learned counsel for the appellants seemed to have forgotten the nature of the court of first instance which is the customary court which is a court of summary jurisdiction and at the time of the proceedings of the suit, subject of this appeal, the panel was made up of personnel not legally trained nor expected to be bugged down by the formalities which are a necessity in courts of record. It needs be stated that in customary court, the substance of the facts and evidence proffered are good enough notwithstanding the non-adherence to those technical channels or features for which High courts are expected to utilize. F G

It is trite that proofs of title to land are to be established in any of the five ways orchestrated in the case of *Idundun v Okumagba* supra.

1. Ownership may be proved by traditional evidence/history. H
2. By production of documents of title.
3. Acts of the person claiming the land such as selling, leasing or renting out all or parts of the land-acts extending over a sufficient length of time and are numerous and positive enough as to warrant

the inference that the person is the true owner.

4. Acts of long possession and enjoyment of the land may also be *prima facie* evidence of ownership.

5. Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected
B or adjacent land, would in addition, be the owner of the land in dispute.

Each of these five settled ways can be easily established by the simple question and answer at the customary court without the
C need for any legalese in language, orally or in the documents. The various methods used at the Native/customary courts have been accepted up to this court. It is all the more weighty when the evidence as proffered in the court are re-affirmed by a visit to the locus in quo as done here decision. The essential thing or cardinal principle is the
D attainment of substantial justice based on the reasonable practice, tradition and custom of the local people. See *Kpishi Kwusu v. Vanger Udo* (1990) 2 SCNJ 4.

These facets above stated are what the appellate courts look out for to determine if substantial justice had been done and if the
E decision of the customary court is in tune with common sense and when the answer as in this instance is in the affirmative the matter of who the justice of the cause resides in, is made manifest. I place reliance on *Ogunsina v Ogunleye* (1994) 5 NWLR (pt.449) 346 at 675; *Akunyile v Ejidike* (1996) 5 NWLR (pt.449) 381; *Nwanezie v. Idris*
F (1993) 2 SCNJ 139. There is therefore no gainsaying that the findings of the courts at first instance, High court in its appellate jurisdiction, the court of Appeal cannot now be interfered with or disturbed just for the heck of it. See *Fatoyinbo v. Williams* (1959) 1 FSC 57;
G *Bamigboye v. Olanrewaju* (1991) 5 at 109; *Ajao v Alao* (1986) 12 SC 193 at 210. The issues 3 and 4 are also resolved against the appellants.

ISSUES 5 & 6

These raise the questions whether the court of Appeal was
H right in law when it upheld the decision requiring the appellants to prove the case beyond all reasonable doubts when no such burden was placed on the plaintiff/respondent and when the evidence led by the appellants were not evaluated and also the non evaluation of three witnesses of the appellants because they were from the same

family.

In this regard of non evaluation of evidence and the matter of the burden placed on the plaintiff/respondent, learned counsel for the appellants said a plaintiff claiming declaration of title to land has the onus to prove by credible evidence that he is entitled to the declaration sought. He must succeed on the strength of his own case. He B relied on *Echi v Nnamani* (2000) 8 NWLR (pt.667) 1 at 19. He stated that contrary to the law, the customary court did not consider the case or evaluate the evidence of the plaintiff and cast the entire and an unusual burden of proof on the defendants. That it is interesting to note that no such burden was cast on the plaintiff. That C even if the defendant's evidence is rejected it does not by that alone entitle the plaintiff to judgment. He cited *Fadiora v Abodunde* (1992) 6 NWLR (Pt.246) 221 at 228; *Kodilinye v Odu* (1935) 2 WACA 336; *Jules v Ajani* (1980) 5 - 7 SC 96 at 108; *Ohaeri v Akabeze* D (1992) 2 NWLR (Pt.221) 1 at 17; *Mogaji v Odofin* (1978) 4 SC 91 etc.

Learned counsel for the appellants further contended that the High court was wrong in accepting as proper, the refusal of the customary court to evaluate the evidence of the three witnesses for E the defendants on the ground that they belonged to the same Umu Egbo family. Also that the court of Appeal erred when it did not find that the respondent having not argued the issue raised by the appellants on the rejection of the evidence of those witnesses since the F issue was deemed to have been conceded being not challenged. He cited *Aliyu v Adewuyi* (1996) 4 NWLR (Pt.442) 284; *Labiya v Anretiola* (1992) 8 NWLR (pt.258) 139 at 159 - 160.

That what the court of Appeal did was akin to making a case for the respondent and had even gone into speculation suo motu, G which situation was perverse and so this court should interfere. He cited *Ohwovoriole v Federal Republic of Nigeria* (2003) 2 NWLR (pt.803) 176 at 194; *Odubeko v Fowler* (1993) 7 NWLR (pt.308) 637 at 655 etc. Learned counsel for the respondent said the heavy weather deployed by the appellants on the customary court's use of H the word "proved beyond reasonable doubt" cannot be taken literally since the personnel in that court of trial are not trained lawyers to know the distinction of proof beyond reasonable doubt as in criminal proceedings and the standard in civil proceedings which is on the

balance of probability. He cited Sections 135 and 136 of the Evidence Act; *Latunde v Lajinfin* (1989) 3 NWLR (pt.108) 177; *Ogunnaike v. Ojayemi* (1987) 1 NWLR (Pt. 53) 760.

The questions raised here have been effectively answered in the last two issues in that once the appellate court is satisfied that the Customary Court reached its verdict after its findings based on substantial justice then its use of the word, “beyond reasonable doubt” as standard of proof is neither here nor there in view of the personnel at the Trial customary court not being trained lawyers. Their use of “proved beyond reasonable doubt” is to establish the high degree to which they have accorded the proof before them. I place reliance on *Ogunnaike v Ojayemi* (1987) 1 NWLR (Pt.53) 760.

From the foregoing and the better and fuller reasoning in the lead judgment, I too dismiss this appeal and abide by the orders as made by my learned brother Kumai B. Aka’ahs, JSC

ARIWOOLA JSC

My learned brother, Aka’ahs, JSC obliged me with a copy of the draft lead judgment he prepared and just delivered. I am in total agreement with the reasoning therein as he admirably dealt with all the issues that came up for determination and the conclusion arrived thereat.

I too find the appeal unmeritorious and deserves to be dismissed. Accordingly, it is dismissed by me.

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