

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH APRIL, 2013. SC. 98/2001  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
M. D. MUHAMMAD, JJSC**

DANIEL GARAN ..... APPELLANT  
(For himself, and on behalf of all  
the Children of Late Jacob Garan)  
AND  
STAFF OLOMU ..... RESPONDENT

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APPEALS - Judgment - Error - Effect - An issue that complains about lapse in decision appealed against - Is resolved in favour of appellant - Where there is proof that the error has occasioned miscarriage of justice (H1)

COURT PROCESSES - Writ of Summons - Superseding process - A process is said to supersede another - If it is subsequent to and completely severed from that other (H2)

LAND LAW - Title - Proof - Appellant succeeds in his claim - As he proved better title to that of respondent - Lower court was wrong for not affirming finding of trial court - That was based on pleadings and evidence of the parties (H3)

EVIDENCE - Evaluation - Trial court evaluates and ascribes probative value to evidence - Appellate court does not interfere where credibility of witness is involved - Save where the decision is by wrong inference (H4)

***FACTS***

By a writ of summons filed at the High Court of Delta State, plaintiff/appellant claimed against defendant/respondent the sum of N20, 000 being damages for acts of trespass and an order of perpetual injunction to restrain respondent from further acts of trespass on the land in dispute. By paragraph 19 of appellant's final pleadings, he claims "as per writ of summons". At the trial, learned counsel

for appellant acting as PW6 tendered exhibit D (a certified true copy of the Deed), which had previously been tendered by PW1 – a licensed Surveyor. The court admitted the document in evidence.

At the end of the trial, the court being of the opinion that appellant has proved his title, found in his (appellant's) favour and granted in addition to the N20,000.00k damages, perpetual injunction against respondent from committing further acts of trespass on the land. Dissatisfied, respondent appealed to the Court of Appeal, Benin City Division. The court in its judgment, held inter alia that the trial court was wrong to have allowed the counsel in the matter to tender evidence on a point in the same case. The court allowed the appeal, set aside the judgment of the trial court and ordered that the case be tried before another Judge of the High Court. Aggrieved, appellant lodged appeal at Supreme Court, while respondent cross appealed.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal was right when it held that it was wrong for the trial court to allow learned counsel who conducted the case to give evidence at the trial and tendered exhibit “D”.*

*2. Whether the further amended statement of claim did adopt and incorporate the reliefs in the writ of summons when the appellant averred in Paragraph 19 “wherefore the plaintiff sued the defendant as per writ of summons.*

*3. Whether from the state of pleadings and the evidence tendered by both parties, the appellant was not entitled to the judgment of the Court of Appeal instead of remitting same to the lower court for retrial. “*

**HELD** (Unanimously allowing the main appeal and

dismissing the cross appeal per **MUHAMMAD JSC**)

*Judgment - Error - Effect*

**1. I agree with learned appellant counsel that the foregoing decision which the court below relied heavily upon along with its other reason to set-aside the trial court's judgment does not support the court's decision. In the case at hand, with due**

**deference to the learned Justices of the court below, the procedure adopted by the trial court in allowing pw6 to testify for the plaintiff/Appellant though contrary to practice, it does not constitute such irregularity that renders the entire trial unsatisfactory as the same Exhibit "D" has indeed already been tendered and admitted in evidence through a more competent witness than pw6.**

**An issue in an appeal distilled from a ground of appeal in the appellant's notice complaining about any lapse in the decision being appealed against is only resolved in favour of the appellant not only on the basis of the actual occurrence of the alleged error but on the further proof by the appellant that the occurrence of the error has occasioned a miscarriage of justice.**

**In the instant case Pw6's evidence in no way affects the fortunes of parties and it is perverse for the court below to have interfered with the trial court's decision that persists notwithstanding the fact of pw6's evidence being discounted. In the result, therefore, I resolve appellant's issue in his favour and against the respondent. (pp. 1688 A/1689 E)**

*Writ of Summons - Superseding process*

**2. Learned appellant counsel is on a firm terrain in his submission that the appellant who has "claimed per his writ of summons" in his statement of claim has competent grievance which the lower court wrongly adjudged he does not disclose. A process is said to supersede another if it is subsequent to and completely severed from that other. Once there is interconnectivity between the process that was first in time and the subsequent process, the latter cannot be rightly said to have superseded the former. For supercession of an earlier process by a subsequent process to occur there must be a complete disconnect between the two imposed by the fact of the one completely occupying the place or role of the other. I therefore agree with learned appellant counsel that the decision of the court below to the contrary is perverse. The respondent has also conceded this much in his brief. These reasons inform my resolution of Appellant's 2nd issue in his favour**

**as well.** (p. 1692 H)

*LAND LAW - Title - Proof*

**3. Finally, given the state of pleadings of parties and the evidence they led, has the appellant proved his case? I think he has.** Appellant's case from his pleadings and evidence is that he bought a piece of land measuring approximately 3450 hectares from the Owohwo family of Ekpan Town. His deed of conveyance, Exhibit D, was duly registered. The land was conveyed to him by some members of the Owohwo family.

The land in dispute is fully captured in the survey plan. Exhibit B annexed to the conveyance executed in appellant's favour. The plan was prepared by pw1, Theophilus John and the land is bordered by requisite survey pillars.

Appellant asserts that respondent has trespassed on to the land. He seeks damages and injunction against the respondent.

On his part, the respondent/cross appellant asserts that he acquired the land in dispute from the Abolodje section of the Owohwo family after the land had been partitioned.

Ordinarily, since appellant's claim is for trespass to land, all he needs to establish to succeed is that he either has exclusive possession or the right to such possession of the land in dispute. However since the respondent has asserted ownership of the land in dispute also, title to the land has automatically been put in issue thereby making it necessary for the appellant to establish better title than that of the respondent in order to succeed. The further fact that appellant's claim includes a claim for perpetual injunction also puts issue of the title of parties to the land in dispute in issue as well

The trial court's foregoing finding which stems from the pleadings and evidence of parties in proof of their pleadings is unassailable. The appellant having proved a better title to that of the respondent, he succeeds in his claim. But for the lower court's error in wrongly resolving the two issues this court resolved against the respondent, it would have affirmed the trial court's judgment. On the whole the appeal succeeds. The lower court's judgment is hereby set aside and in its place the

**trial court's judgment restored.** (pp. 1693 D/1694 G)

*EVIDENCE - Evaluation*

**4. It must be remembered that the evaluation of evidence and the ascription of probative value to same is primarily the duty of the trial court. The appellate court undertakes that exercise only where the trial court fails to, arrives at a decision by drawing wrong inferences from the evidence led by parties or the exercise does not depend on the credibility of witnesses which only the trial court is best placed to determine by observing the demeanour of the witnesses in the course of their testimonies before it.** (p. 1694 B) B  
C

**REPRESENTATION**

Chief Fedude Zimughan with Dr. Anthony Okorodas, for Appellant D  
Prince G. E. Odiet, for the Respondent

**CASES REFERRED TO**

- Adelaja v. Alade (1999) 4 SCNJ 225
- Elabanjo v. Tijani (1986) 5 NWLR (pt. 46) 952 E
- Emgbokan v. AIICO Nig Ltd (1994) 6 NWLR (pt. 348) 1
- Okomu Oil Palm Ltd v. Iserhienrhe (2001) FWLR (pt. 45) 670
- Oredoyin v. Arowolo (1989) 4 NWLR (pt. 114) 172
- Larmie v. D.P.M.S Ltd (2005) 18 NWLR (pt. 958) 438 F
- Bakare v. Apena (1986) 4 NWLR (pt. 33) 1
- Ayoola v. Adebayo (1969) 1 ALL NLR 150
- Duru v. Nwosu (1989) 7 SCNJ 154
- Abusomwan v. Aiwerioba (1996) 4 NWLR (pt. 441) 13
- Ajayi v. Joyayemi (2001) FWLR (pt. 55) 586 G
- Ayisa v. Akanji (1995) 7 NWLR (pt. 406) 129
- Awote v. Owoduni (1987) 2 NWLR (pt. 57) 367
- Okeowo v. Migliore (1979) 11 SC
- Sanusi v. Ameyogun (1992) 4 NWLR (pt. 237) 527 H

**STATUTES & RULES REFERRED TO**

- Evidence Act Cap 112 LFN 1990, ss. 95, 97(10), 155(1)(2)
- Land Instrument Regn. Law Cap. 81 Laws of Delta State, s. 30(2)
- High Court (Civil Procedure) Rules of Delta State, O. 25 r. 12(3)

**LEAD JUDGMENT BY MUHAMMAD JSC**

This is an appeal against the judgment of the Court of Appeal, Benin Division, hereinafter referred to as the court below, setting aside the judgment of the Delta State High Court, otherwise referred to as the trial court in this judgment, delivered on 26th September, 1996 in suit No. W/1011986 and remitting same to the trial court for retrial before a judge other than James Omo-Agege CJ against whose judgment the defendant/respondent/Cross appellant's appeal was allowed.

Dissatisfied by the judgment, the plaintiff at the trial court who was the respondent at the court below has, with leave, appealed to this Court on a Notice, see pages 313 - 317 of the record of appeal, containing five grounds. It is pertinent to also note that the defendant at the trial court has similarly cross-appealed against the judgment of the court below on a notice containing four grounds.

The respondent who has raised and argued a preliminary objection against the appellant's appeal appears to have abandoned same as no mention of the objection was made by counsel when the appeal was heard. The preliminary objection based on facts which are, in any event, not borne out by the record of appeal is accordingly hereby struck out.

At the hearing of the appeals, parties adopted and relied on their briefs as arguments for and against the two appeals. They have distilled issues in their briefs for the determination of their respective appeals. The three issues raised in the appellant's brief for the determination of his appeal are:-

*"1. Whether the Court of Appeal was right when it held that it was wrong for the trial court to allow learned counsel who conducted the case to give evidence at the trial and tendered exhibit "D". (This issue covers grounds of appeal)*

*2. Whether the further amended statement of claim did adopt and incorporate the reliefs in the writ of summons when the appellant averred in Paragraph 19 "wherefore the plaintiff sued the defendant as per writ of summons. (This issue covers ground 3 of the grounds of appeal).*

*3. Whether from the state of pleadings and the evidence tendered by both parties, the appellant was not entitled to the judgment*

of the Court of Appeal instead of remitting same to the lower court for retrial. “

On his part, the respondent has distilled four similar issues at pages 9 - 10 of his brief as arising for determination in the appeal. They read:-

*“1.07 Whether the Court of Appeal was right when it held that the learned trial judge was wrong to have allowed a counsel in the legal firm handling the appellant’s case to give evidence on a point directly material to the case.* B

*1.08 Whether the further amended Statement of Claim did adopt and incorporate the reliefs in the writ of summons when the appellant stated in paragraph 19 “wherefore the plaintiff sued the defendant as per writ of summons.* C

*1.09 Whether the learned justices of the Court of Appeal were right to have ordered a retrial.* D

*2.01 Whether from the evidence tendered by both Parties, who discharged the burden of Proof on the balance of probability”*

For the cross appeal, the cross appellant has at pages 3 - 4 of his brief formulated five issues for the determination of the cross appeal. The issues read:- E

*“2.02 Whether the learned justices of the Court of Appeal did not misdirect themselves in law when they failed to consider some of the vital issues raised by the cross appellant as to whether the learned trial judge properly evaluated the evidence before arriving at his conclusion.* F

*2.03 Whether the learned justices of the Court of Appeal were right to have ordered a retrial in this case.*

*2.04 Whether the learned justices of the Court of Appeal did not misdirect themselves in law when they failed to consider and make a Pronouncement on the issue raised by the Cross-Appellant as to whether the learned trial judge was right when he held that the Cross-respondent established his root of title through OVWOHWO family and that the Cross-Appellant has not shown how Aholodje family came to own the land.* G H

*2.05 Whether the learned justices of the Court of Appeal did not misdirect themselves in law when they failed to consider and pronounce on whether the learned trial judge was right in law when he discountenanced plaintiff/cross respondent’s evidence relating to*

*the hut on grounds that same was not pleaded.”*

The appellant/cross respondent’s issues for the determination of the cross appeal at page 1 of his relevant brief read:-

“1. *Whether the learned justices of the Court of Appeal failed to consider the issues raised by the cross-appellant as to whether the learned trial judge properly evaluated the evidence before arriving at the conclusion that the cross-respondent established his soot of title through Owwohwo family and that the cross-appellant did not establish or show how the Aboloje family came to own the land as well as discountenancing the cross respondent’s evidence on grounds that same was not pleaded?*

2. *Whether the learned justices of the Court of Appeal were right to have ordered a retrial in this case?”*

To appreciate the issues as well as the arguments canvassed thereon in the two appeals, it is helpful to recall at this point the facts of the case on which the two appeals predicate.

By a writ of summons dated 24th April, 1986 the plaintiff at the trial court, the respondent at the court below and the appellant herein, claimed against the defendant, the appellant at the court below and the respondent/cross appellant in this Court as follows:-

“(a) *The sum of N20,000.00k being damages for acts of trespass (which are still containing) committed by the defendant in that he, the defendant, wrongfully broke and entered upon the plaintiff’s land situated at Ekpan (Bendel State of Nigeria) within the jurisdiction of this Honourable court during the last six years.*

(b) *Perpetual injunction to restrain the defendant, his servants, agents and/or privies from committing and/or continuing the afore-said acts of trespass.*

A survey plan of the land in question may be filed later. The defendant has failed, refused and/or neglected to stop his acts of trespass in spite of repeated warnings by the plaintiff, hence plaintiff claims as above.”

As ordered by the trial court, pleadings were filed, exchanged and with leave of the very court amended. The case proceeded to trial and was determined on the Plaintiffs/Appellant/Cross respondent’s further amended statement of claim and defendant/respondent/cross appellant’s 2nd amended statement of defence. By paragraph 19 of the plaintiff’s final pleadings, he claims “as per writ of summons.” At



the end of the trial including addresses of counsel, the trial court found for the plaintiff/appellant and granted in addition to the N20,000.00k damages, perpetual injunction against the defendant/respondent/cross appellant his servants, agents and/or privies from committing and/or continuing further acts of trespass on the land in dispute. B

Aggrieved by the decision, the defendant/respondent/cross appellant appealed to the court below on an amended Notice containing nine grounds from which eight issues were distilled for the determination of the appeal. Of these issues, the court below at page 282 of the record of appeal held, per Baaba JCA, as he then was, as follows:- He said C

*"I have carefully studied the issues formulated by the appellant and in my humble opinion issue, No. 2 and 3 argued together and 6 can conveniently dispose of the appeal. So I will proceed to determine the said issues."*

The said issues read:-

*"2. Whether the learned trial judge was right when he allowed a counsel handling the case to testify as a witness in the same case,* E

*3. Whether the learned trial judge did not misdirect himself when he admitted IDI as Exhibit "D" through Pw6.*

*6. Whether the learned trial judge was right in law when he delivered judgment in favour of the plaintiff who did not claim any specific relief in his further amended statement of claim."* F

In resolving the three issues and determining the appeal, the court below at pages 285-286 of the record concluded as follows:-

*"In view of the foregoing, I therefore resolve the two issues, that is issues No 2 and 3 argued together and issue No 6 in favour of the appellant. My answer to both issues is in the negative. With the greatest respect to the learned chief judge. I hold that the learned trial judge was wrong to have allowed a counsel in the legal firm handling the respondent's case to give evidence on a point directly material in the case. I also hold the view that the learned trial judge was wrong to grant reliefs not claimed in the further amended statement of claim having granted leave to the respondent as plaintiff to amend his original statement of claim."* G H

*In the result, the appeal succeeds and is hereby allowed. The*

*judgment of the lower court in Suit No w/101/86 delivered on 26/9/96 is hereby set-aside. The case is hereby remitted to the lower court for retrial before another judge...”*

Now, both the appeal and the Cross appeal are supposedly against the foregoing decision of the court below the determination of which appeals require the resolution of the issues formulated by the two appellants as reproduced earlier in this judgment. I shall consider the appellant/Cross respondents appeal first and on the basis of the issues the appellant distilled in his brief which three issues clearly subsume Respondent/Cross appellant’s four issues.

The main appeal.

On the 1st issue, learned appellant counsel contends that the court below given section 155 (1) and (2) of the Evidence Act Cap 112, Laws of the Federation 1990 and notwithstanding the general rule of practice, the law remains that Pw6 who is counsel to the appellant is a competent witness and his evidence is accordingly admissible. The nature of Pw6’s evidence does not warrant the setting aside of the trial Court’s judgment by the court below. Pw6, submits learned counsel, only identified a document that is already tendered and received in evidence by the court through Pw3. Substantiating his submission, learned counsel refers to pages 82 lines 3-14 and 91 lines 2-23 of the record and insists that Pw6 is a competent and relevant witness and Exhibit “D” tendered through him is admissible by virtue of section 95 and 97 (10 of the Evidence Act and section 30(2) of the Land’s Instrument Registration Law CAP 81 laws of Bendel State applicable to Delta State. Learned counsel further relies on *Abiodun Adelaja & ors v. Yusuf Alade & another* (1999) 4 SCNJ 225 and *Elabanjo v. Tijani* (1986) 5 NWLR (Pt 46) 952 at 952 and urges that the issue be resolved against the respondent.

Under the 2nd issue, learned appellant counsel refers to pages 2-3 of the record of appeal whereat appellant’s writ of summons is set out and pages 71-73 of the record which contain his further amended statement of claim. He dwells particularly at lines 22-23 of pages 73 being paragraph 19 of the further amended statement of claim and submits that by the very paragraph appellant’s writ of summons has been incorporated in the further amended statement of claim. Appellant, learned counsel argues, cannot be said, therefore, to have abandoned the reliefs specifically endorsed in the writ of

summons. The court below, contends counsel, is wrong to have relied on the case of *Emgbokan v. American International Insurance Co. Nig Ltd* (1994) 6 NWLR (Pt 348) 1 in so holding. The correct position of the law, given the particular facts the case at hand, learned appellant counsel further argues, as held by court in *College of Education Warri v. Odede* (1999) 1 NWLR (Pt 586) 253 and *Okomu Oil Palm Ltd v. Iserhienrhe* (2001) FWLR (Pt 45) 670 at 692. He prays that the issue, on these two authorities, be resolved in appellant's favour.

On the 3rd issue, learned counsel relies on *Oredoyin v. Arowolo* (1989) 4 NWLR (pt 114) 172 and submits that an appeal is an invitation to a higher court to renew the decision of a lower court to find out, on proper consideration of the facts before that court and the applicable law, whether the right decision had been reached. In the case at hand therefore, the duty of the court below is to dispassionately review the case based on the materials before it and on concluding that the trial court had properly carried out its function as required by law to affirm that court's decision. The trial court's appraisal of evidence and application of the relevant law to the case at hand, learned counsel contends, is beyond reproach. Both parties in the case had claimed the land in dispute and put their relevant evidence through their witnesses whom the trial court had the privilege of observing in the course of their testimony after which the court preferred appellant's case. The lower court did not review the trial court's impeccable findings on who owned the land in dispute. The lower court's decision, argues learned appellant counsel, borders on technically only. The court's failure to examine the findings, asserts learned counsel, having occasioned miscarriage of justice entitles the appellant to judgment in this Court after the court would have undertaken the exercise. Inter-alia relying on *Larmie v. D.P.M.S Ltd* (2005) 18 NWLR (pt 958) 438; *Bakare v. Apena & Ors* (1986) 4 NWLR (pt 33) 1 at 16-17; *Ayoola v. Adebayo* (1969) 1 ALL NLR 150; *Duru v. Nwosu* (1989) 7 SCNJ 154 at 159 and *Abusomwan v. Aiwerioba* (1996) 4 NWLR (pt 441) 13, learned counsel prays that this court considers the evidence of both sides vis-à-vis appellant's claim in allowing the appeal and restoring the trial court's unassailable judgment wrongly set aside by the court below.

In response to appellant's 1st issue, learned respondent's coun-

sel argues under respondent's 1st issue that it is unprofessional, unethical and legally wrong for a counsel handling a matter to be allowed to descend into the arena of conflict between the parties to testify for his client on a point directly material to the case. It is not in dispute, learned counsel submits, that PW 6 was appellant's counsel  
B at the trial court, had testified in the course of the trial and remained a counsel thereafter. Learned counsel calls in pages 63 line 12, 78 line 21, 87 line 16, particularly 91 line 2-4 etc and submits that exhibit "D" which the trial court held at page 128 lines 28-31 to be a  
C certified true copy of the deed is material evidence. Relying on *Adesanya Idowu v. Adekola* (Supra), learned counsel urges that the lower court's condemnation of the role of appellant's counsel be endorsed.

On appellant's 2nd issue, respondent's 2nd as well, learned  
D counsel submits that plaintiff/appellant's failure to incorporate his reliefs in the statement of claim offends order 25 rule 12 (3) of the Bendel State High Court Civil Procedure rules applicable to the trial court. Learned counsel concedes though that the lapse by the same  
E rules of court is an irregularity that is curable. He submits that this Court in *Oba Joseph Adeyemi Ajayi & 2 Ors v. Oba Joseph Abolarin Joyayemi* (2001) FWLR (pt 55) 586 at 602-603 maintains that non incorporation of reliefs by the plaintiff in his statement of claim remains an irregularity that has to be rectified. In further argument  
F under respondent's 3rd and 4th issues, learned respondent's counsel submits that the court below has in the instant complied with the guidelines this court outlined in many decisions before ordering a retrial. Referring inter-alia to *Abilawon Ayisa v. Olaoye Akanji & 5 Ors* (1995) 7 NWLR (pt 406) 129, *Awote v. Owoduni & Sons* (1987)  
G 2 NWLR (pt 57) 367; *Okeowo v. Migliore* (1979) 11 SC and *Sanusi v. Ameyogun* (1992) 4 NWLR (pt 237) 527 at 556, learned counsel submits that though the retrial ordered by the court below conforms with legal requirements, the higher requirement of justice in the face of the peculiar facts of the case justifies a different approach. The  
H lower court, reiterates the learned counsel, should have evaluated the evidence before it and in doing so would have concluded that appellant is not, having not proved his case, entitled to the reliefs the trial court granted him. Learned counsel urges that this court undertakes that functions and find for the respondent. On the whole, learned

counsel urges that the appeal be dismissed.

I shall endeavour to consider the issues canvassed in the appeal seriatim.

Now, the judgment of the court below is at pages 273 to 306. The court's decision on the first of the three issues it considered in its determination of the appeal before it to wit, the appropriateness of the trial court allowing Pw6, a counsel handling the case of the appellant, to testify in the same case is particularly at pages 282-283. The court firstly found in relation to the issue thus:-

*"It cannot be disputed that in the instant appeal that One Edore Lawson Umuze, an associate in the firm of Akporiaye and Associate, testified as Pw6 while serving as counsel for the appellant. Exhibit "D" the plank on which the plaintiff/respondent built his case, was tendered through Pw6 who served as a counsel for his legal firm as well as a witness before the trial court. In fact the learned counsel for the respondent in his brief conceded that neither a counsel in a legal firm will be a necessary witness. He however submitted that that does not include formal matters such as Identification of documents in custody as is the case in the instant appeal."*

In disagreeing with learned respondent counsel that the evidence of pw6, particularly the tendering of Ex "D" through the witness, which the court found to be directly material in the case, the court proceeded to find the reception of pw6's evidence by the trial court fatal to that court's decision.

In its decision, the court below relied on the case of Adesanya M. A. Adekoya (supra) which is not a decision of this court page 211-212 of the law report the passage the court below invoked. Quashie-Idun J remarks on the issue as follows:-

*"I think that this case amply illustrates the importance of adhering to the practice of not allowing counsel to appear both as counsel and as a witness in the same case."*

*It is my view that the procedure adopted in this case is not only contrary to the practice of the courts but is also an irregularity which has rendered the trial unsatisfactory in that a more competent witness than plaintiff counsel was not called to give evidence on a very important issue in the case."*

*In the circumstance of this case I think the ends of justice will be amply met by ordering a new trial."*

***I agree with learned appellant counsel that the foregoing decision which the court below relied heavily upon along with its other reason to set-aside the trial court's judgment does not support the court's decision. In the case at hand, with due deference to the learned Justices of the court below, the procedure adopted by the trial court in allowing pw6 to testify for the plaintiff/Appellant though contrary to practice, it does not constitute such irregularity that renders the entire trial unsatisfactory as the same Exhibit "D" has indeed already been tendered and admitted in evidence through a more competent witness than pw6.***

In paragraphs 4, 5 & 17 of his further amended statement of claim, the plaintiff/appellant/cross respondent avers as follows:-

*"4 In 1975, by a deed of conveyance registered as No 28 at Page 28 in volume 348 of the Lands Registry in the office at Benin City, the plaintiff acquired a piece of land measuring approximately 3.450 (three point four five nought) hectares situated at Ekpan Town.*

*(5) The said piece of land is shown on survey Plan NO TJM 2040 (prepared by Mr. J. Theophilus John, licensed surveyor of No 49, Warri/Sapele Road, Warri) attached to the Deed of conveyance referred to in the preceding paragraph.*

*(17) The features on the land in dispute are correctly shown on survey plan NO KP 4972 filed along with the amended statement of claim. The plaintiff will found upon and said survey Plan at the trial action."*

The defendant/Respondent/Cross-appellant joined issues with the appellant in his paragraph 4, 5 and 6 of his 2nd amended statement of defence.

In proof of the pleadings in paragraphs 3, 4, 5 and 17 of his further amended statement of claim, the appellant called pw1, who testified at pp 74-75 of the record; inter-alia thus:-

*"Pw1:- I know the Plaintiff in this case. On 22/12/86 he commissioned me to carry out a survey of his land in dispute at Ekpan... I carried out the instruction. He carried me to the site, showed me the features and I carried out the survey. I prepared a plan which I signed with the date and gave him certified true copies of the original plan. I seek to tender the plan. It is plan No KP4972 of 5/1/87."*

The plan was admitted and marked Exhibit "A" by the trial

court.

At page 82 of the record, the plaintiff /appellant, pw3, testified at the trial court in past thus:-

*"I bought the land from Owwohwo family of Ekpan. I bought it in 1975. I surveyed it. It was surveyed by Mr. Theophilus John. There was deed of conveyance... The conveyance was executed by members and myself. This is the agreement. I seek to tender objection, admitted and marked Exhibit "B". I attached a copy of the survey plan to the agreement. The deed was stamped and registered."*

Pw6 testified at page 91 of the record in part thus:-

*"...I can see this document, Exhibit B. It is a certified true copy of a Deed of conveyance dated 31-12-75 which was tendered as Exhibit in suit no w/101/86..... I can see this document marked as Id I. It is a certified true copy of the same document. The deed registered as No 28 at page 28 in volume 348 of the lands Registry in the office at Benin City on 28-1-76. I tender Id I as an Exhibit."*

The trial court on overruling the defendant/respondent's objection further admitted the very same document that was admitted as Exhibits "A" and 'B' as Exhibit "D" through pw6. The court below resolved appellant's 2nd issue distilled from a ground of appeal complaining about the impropriety of the evidence of pw6 that centres entirely on his tendering and having admitted Exhibit D that was already in evidence.

***An issue in an appeal distilled from a ground of appeal in the appellant's notice complaining about any lapse in the decision being appealed against is only resolved in favour of the appellant not only on the basis of the actual occurrence of the alleged error but on the further proof by the appellant that the occurrence of the error has occasioned a miscarriage of justice.*** See Adekunle v. Adegboye (1992) 2 NWLR (Pt 223) 305 at 32 and Bayol v. Ahemba (1999) 7 NWLR (Pt 623) 381.

***In the instant case Pw6's evidence in no way affects the fortunes of parties and it is perverse for the court below to have interfered with the trial court's decision that persists notwithstanding the fact of pw6's evidence being discounted. In the result, therefore, I resolve appellant's issue in his favour and against the respondent.***

The lower court's other reason for allowing respondent's

appeal and remitting appellant's case to the trial court is at page 284 of the record of appeal hereunder reproduced for ease of reference:-

*"There is no doubt that the failure or omission of the plaintiff/respondent to clearly state his claims in his further amended statement of claim is fatal to the plaintiff/respondent case, having regards to the law that a statement of claim ... the writ of summons. Any relief sought in the writ of summons which is not sought for in the statement of claim is deemed to have been abandoned."*

The court relied on the decision of this court it held provided answer to the issue under consideration. The court particularly rested its decision thus:-

*"In the case of Enigbokan v. American International Insurance Co. (Nig) Ltd. (1994) 6 NWLR (Pt 345) 1 at 15-16, where the Supreme Court of Nigeria, per Ogundare, J.S.C. provided the answer to issue No. 6 in the instant appeal at pages 15-16, when the Supreme Court held:-*

*'It is well settled that a Statement of Claim supersedes the writ and must itself disclose a good cause of action- Udechukwu v. Okwuka (1956) 1 FSC 70, 70 (1956) SCNLR 189; Otanioku v. Alli (1977) 11-12 SC 9. To supersede the writ, however, the Statement of Claim must state what is being claimed and not just claiming 'as per the writ of summons'*

*Keshinro v. Bakare (1967) 1 All NLR 280, 284. It follows that to supersede the writ, the Statement Claims must contain a claim or claims therein set out - NTA v. Anisbo (1972) 5 SC 156. Any claim in the writ not claimed in the Statement of Claim is taken to have been abandoned - Lahan v. Lajoyetan (1972 6 SC 190, 192 where Sowemimo J.S.C. (as he then was) stated the law thus;*

*'It is settled law that a Statement of Claim supersedes the writ; hence if some special form of relief be claimed on the writ and not in the Statement of Claim, it will be taken that so much of the claim is abandoned. So also where in the statement of claim a consequential relief is added to the claim in the Writ such additional claim will be deemed as claimed before the Court."*

In spite of the lower court's reliance on the foregoing decisions of this court learned counsel for the appellant insists that the authorities the lower court invoked in resolving the issue are either inapplicable or wrongly applied. Learned counsel refers particularly



to Okomu Oil Palm Ltd. v. Iserhienrhie (2001) 6 NWLR (Pt 710) 660 at 681 and College of Education Warri v. Odede (1999) NWLR (Pt 586) 253 in support of his contention.

In Okomu Oil Palm Ltd v. Iserhienrhie (supra), this court per Uwaifo JSC has amply clarified the principle the court stated in Enigbokan v. American International Insurance Co. Nig. Ltd (supra). B It is clear from the subsequent decision that the lower court is manifestly in error in its application of the principle to the facts of the case at hand. In the Okomu Oil Palm Co. Ltd. case, like in the instant case, the plaintiff in his writ of summons had sought specific reliefs but did C not repeat the reliefs at the end of his amended statement of claim. Instead, he concluded by stating “whereof the plaintiff claims as per writ of summons.” The issue this court considered in the Okomu Oil Palm Co. Ltd case, the very issue that has resurfaced in the instant appeal, is whether the court below is wrong to have found the D appellant’s similar pleadings unavailing to him because of its being bereft of any reliefs and/or a breach of the trial court’s adjectival rules. Learned respondent/cross appellant’s counsel has lavishly argued that since appellant’s further amended statement of claim has superseded the writ of summons, whatever the writ of Summons E contained has become irrelevant. Appellant counsel on the other hand insists that by the reference in his further amended statement of claim to the reliefs contained in the writ, the appellant has incorporated into the statement of claim the reliefs in his writ.

Now, it is glaring that the decision of this court in Enigbokan F v. American International Insurance Co. Nig. Ltd the court below invoked drew inter-alia from Udechukwu v. Okwuka (supra) a case in respect of an action for detinue where, unlike in his writ of summons, the plaintiff failed to aver wrongful detention in his statement G of claim. The statement of claim was found not to have disclosed a cause of action. Uwaifo JSC cleared the seeming fog in the Okomu Oil Palm Co. Ltd case at page 680-681 of the law report as follows:-

“It was in that connection *De Lestang, F.J. observed at p.* H 191:

*“To succeed in a suit in detinue in the circumstances of this case the Plaintiff must establish the wrongful detention of his chattel by the defendant. It follows, therefore, that a plaintiff suing in detinue must aver in his statement of claim wrongful detention of his*

*chattel by the defendant. There was no such averment in the appellant's statement of claim in the Present case. It is true that the writ of summons alleges an unlawful detention by the respondent, but it is, I think, well settled that a statement of claim when filed supersedes the writ of summons and must itself disclose a good cause of action.'*

*There is nothing in this observation as the effect of reference in a statement claim to the writ of summons."*

Stating the principle which governs the issue that called for resolution in the Okomu Oil Palm Co. Ltd case His lordship Proceeded thus:-

*"The issue that has arisen in the present case directly came for resolution in Keshinro v. Bakare (1967) 1 All NLR 280, (1967) NSCC (vol. 5) 279. There, the statement of claim concluded by saying that the plaintiffs claimed as per writ of summons... The court per Lewis JSC held that the statement of principle in Udechukwu v. Okwuka (supra) did not apply in a situation as in the present case; and that there was no question of the general rule of supersession since the statement of claim (not being complete) having failed to set out the reliefs claimed in the writ it became necessary to make reference in it to the writ: see p. 282, I think reference in a statement of claim to the writ for the reliefs claimed makes the statement of claim complete as it incorporates the writ: It is accepted that the synonym of the word "incorporate" includes, roll into one, merge, link with, join together, fuse, assimilate: see Barlett's Roget's Thesaurus, 1st edition, para. 753. 15 at page 663 and para. 757.9 at para 668. I am satisfied that Ubaezonu JCA was right in his observation in Owena Bank case (supra) at pp. 714 - 715 that 'where the statement of claim states that the plaintiff claims 'as per writ of summons', the claim in the writ of summons is incorporated in the statement of claim and becomes part of it.' Once there is such incorporation, the statement of claim is taken to contain the relief stated in the writ, which statement of claim would otherwise have been defective and contrary to the requirement of Ord. 13, r. 7 reproduced above."*

The foregoing authoritatively states the law on the issue which given the facts of the instant case at hand also calls for determination herein.

**Learned appellant counsel is on a firm terrain in his**

*submission that the appellant who has “claimed per his writ of summons” in his statement of claim has competent grievance which the lower court wrongly adjudged he does not disclose. A process is said to supersede another if it is subsequent to and completely severed from that other. Once there is interconnectivity between the process that was first in time and the subsequent process, the latter cannot be rightly said to have superseded the former. For supercession of an earlier process by a subsequent process to occur there must be a complete disconnect between the two imposed by the fact of the one completely occupying the place or role of the other. I therefore agree with learned appellant counsel that the decision of the court below to the contrary is perverse. The respondent has also conceded this much in his brief. These reasons inform my resolution of Appellant’s 2nd issue in his favour as well.*

*Finally, given the state of pleadings of parties and the evidence they led, has the appellant proved his case? I think he has. Appellant’s case from his pleadings and evidence is that he bought a piece of land measuring approximately 3450 hectares from the Owwohwo family of Ekpan Town. His deed of conveyance, Exhibit D, was duly registered. The land was conveyed to him by some members of the Owwohwo family.*

*The land in dispute is fully captured in the survey plan. Exhibit B annexed to the conveyance executed in appellant’s favour. The plan was prepared by pw1, Theophilus John and the land is bordered by requisite survey pillars.*

*Appellant asserts that respondent has trespassed on to the land. He seeks damages and injunction against the respondent.*

*On his part, the respondent/cross appellant asserts that he acquired the land in dispute from the Abolodje section of the Owwohwo family after the land had been partitioned.*

*Ordinarily, since appellant’s claim is for trespass to land, all he needs to establish to succeed is that he either has exclusive possession or the right to such possession of the land in dispute. However since the respondent has asserted ownership of the land in dispute also, title to the land has au-*

**tomatically been put in issue thereby making it necessary for the appellant to establish better title than that of the respondent in order to succeed. The further fact that appellant's claim includes a claim for perpetual injunction also puts issue of the title of parties to the land in dispute in issue as well.** See  
 B Ogunfaolu v. Adegbite (1980) 5 NWLR (Pt 43) 549, Akintola v. Lasupo (1991) 3 NWLR (Pt 180) 508, Ajani v. Ladepo (1986) 3 NWLR (Pt 28) 276 and Fasikun II v. Oluronke II (1999) 2 NWLR (Pt 589) 1 at 18.

**It must be remembered that the evaluation of evidence and the ascription of probative value to same is primarily the duty of the trial court. The appellate court undertakes that exercise only where the trial court fails to, arrives at a decision by drawing wrong inferences from the evidence led by parties or the exercise does not depend on the credibility of witnesses which only the trial court is best placed to determine by observing the demeanour of the witnesses in the course of their testimonies before it.** See Adeye v. Adesanya (2001) 6 NWLR (Pt. 708) 1 SC and Bunyan v. Akingboye (1999) 7 NWLR  
 E (Pt. 609) 31 SC.

At page 135 of the record of appeal, after reviewing the evidence of both sides in the light of their pleadings, the trial court finds:-

**"The position therefore is that while the plaintiff has established his root of title to Ovwohwo family the defendant has not shown how Abolodje family which is a branch of Ovwohwo family came to own the portion of land which they purported to have sold to him; again there is no evidence to show how Ejokuvie family came to own the piece of land which they purported to sell to the defendant as per the unregistered deed admitted as a receipt which is Exhibit F.."**  
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**On the whole I find on balance of probability that the plaintiff has established a better title to the land in dispute than the defendant and hold that the defendant is liable in trespass."**

**The trial court's foregoing finding which stems from the pleadings and evidence of parties in proof of their pleadings is unassailable. The appellant having proved a better title to that of the respondent, he succeeds in his claim. But for the lower court's error in wrongly resolving the two issues this court resolved against the respondent, it would have affirmed**  
 H

***the trial court's judgment. On the whole the appeal succeeds. The lower court's judgment is hereby set aside and in its place the trial court's judgment restored.***

The cross appeal.

The issues raised in the cross-appeal have, in our determination of the main appeal, been considered and determined as well. Cross Appellant cannot re-litigate these same issues. The cross appeal is accordingly hereby dismissed. B

The Appellant/Cross respondent is entitled to costs of the two appeals put at N200,000 cumulatively and ordered against the Respondent/Cross Appellant. C

### **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother MUHAMMAD, JSC just delivered. I agree with his reasoning and conclusion that the appeal has merit and should be allowed. D

The facts of the case, as relevant to the decision, have been stated in detail in the said lead judgment and I do not see the need to repeat them herein except as may be needed for emphasizing the point being made. E

Though it is contrary to the practice of trial courts and in fact a fundamental irregularity, for counsel to appear both as counsel and as a witness in the same case particularly where the evidence he gives is so material that it forms the basis of the decision of the trial court on the matter, the said principle is not applicable to the facts of this case, where the document which Counsel tendered in evidence from the witness box as PW6, was already in evidence and tendered by the maker of document himself as exhibit A - see the evidence of PW1, the Licensed Surveyor. F G

It therefore follows that the re-tendering of the same document by PW6 is a superfluous exercise which added nothing to the case of the plaintiff. I hold the considered view that the admission of exhibit D tendered by PW6, which is the same document earlier tendered by PW1, as Exhibit A and by PW2 as exhibit B has in no way resulted in any miscarriage of justice to justify the setting aside of the proceedings of the trial court. H

On the second relevant issue as to whether the statement of claim supersedes the writ of summons, it is a general rule that a statement of claim supersedes the writ of summons and as such any claim or relief contained in the writ of summons which is not repeated or reproduced in the statement of claim is deemed abandoned, as decided in *Udechukwu v. Okwuka* (1956) 1 FSC 70; (1956) SCNLR 189; *Otanioku v. Alli* (1977) 11- 12 S.C 9; *Keshimro v. Bakare* (1967) 1 ALL NLR 280 at 284. This Court has in the case of *Okomu Oil Palm Ltd v. Iserhienrhie* (2081) 6 NWLR (pt. 710) 660 at 681 and *College of Education Warri v. Odede* (1999) NWLR (pt. 586) 253 which are also on all fours with the instant case, that though a statement of claim which does not contain relief(s) claimed is incomplete, the said statement of claim is complete if it makes reference to the writ of summons for the reliefs it claims because the said writ of summons is thereby incorporated to the statement of claim by reference.

I am of the firm view that the above statement of the law is in accord with the current trend in the development of the law where substantial justice remains the focus of the law, not technicality.

It is also my considered view that the pleading by the plaintiff that “the plaintiff claims as per the writ of summons” does not result in any miscarriage of justice as the defendant is put on notice that the plaintiff is seeking the same reliefs contained in the writ of summons.

It is for the above reasons and the more detailed reasons contained in the lead judgment that I too allow the appeal and dismiss the cross appeal. I also set aside the decision of the lower court and in its place restore the judgment of the trial court.

I abide by the consequential orders made in the lead judgment including the order as to costs.

Appeal allowed, Cross appeal dismissed.

### **MUNTAKA-COOMASSIE JSC**

I was opportune to have read before now this important judgment of my lord M. D. Muhammad JSC. I entirely agree with his Lordship’s reasons and conclusions. I have nothing more useful to add. The cross-appeal is of no moment and same is struck out. Appeal succeeds and is allowed. Judgment of the lower court cannot stand same is set aside. I endorse the order as to costs.

**ARIWOOLA JSC**

My learned brother Dattijo Muhammad, JSC obliged me a preview of the lead judgment just delivered.

His Lordship dealt extensively and exhaustively with the issues raised in the matter. I am in total agreement with the reasoning therein and the conclusion arrived thereat in the said lead judgment. I adopt them as mine. I also allow the appeal, set aside the judgment of the Court below and restore the judgment of the trial High Court. The cross appeal is struck out.

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

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