

**SUPREME COURT OF NIGERIA**  
FRIDAY 24TH MAY, 2013. SC. 150/2002  
**CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,**  
**S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC**

FOOLORUNSHO OLUSANYA ..... APPELLANT  
AND  
ADEBANJO OSINEYE/OSINLEYE ..... RESPONDENT

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EVIDENCE - Unchallenged evidence - Weight - For failure of appellant to call the vital witnesses - Court may by Evidence Act s. 167(c) & decision in Ogbuanyinya's case - Draw inference as to existence of facts - Where there is no evidence to the contrary (H1)

LAND LAW - Parties - Competing possession - Where two parties claim possession of land - Possession is given to the one - That has a better title (H2)

PLEADINGS - Evidence - Absence of - On the authority of Newbreed Ltd case - Appellant's claims 1-5 fail - As no evidence was adduced to support them (H3)

COSTS - Award - Purpose of - Costs are to compensate successful party - Without being punitive to unsuccessful party - And wrong exercise of discretion on costs - Can be varied by CA under s. 16 of its Act (H4)

***FACTS***

Plaintiff/appellant and defendant/respondent are neighbours by virtue of the fact that appellant and respondent's father purchased adjacent pieces of land from one Pa Ogunmeru. Appellant's main contention is that respondent buried his father on the access road on the land thereby denying him (appellant) access to his building. This situation led to the institution of this action by appellant at the High Court of Ogun State Sagamu, seeking inter alia, for declaration that respondent has no right to block the access road, damages and order of injunction against respondent.

Respondent's position is that the area described by appellant

as access road was not actually an access road, but a part of respondent's land. Pleadings were filed and exchanged by the parties. Witnesses equally testified for both parties. In its judgment, the court dismissed appellant's claim in its entirety and awarded cost in favour of respondent. Being dissatisfied, appellant lodged an appeal at the Court of Appeal, Ibadan Division. The Court allowed the appeal on cost but dismissed the other reliefs sought by appellant. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

*"Whether the Courts below were correct in their concurrent finding that the Appellant has not established any right of easement to entitle the Appellant to the reliefs sought at the trial court."*

**HELD** (Unanimously dismissing the appeal per

**ALAGOA JSC)**

*EVIDENCE - Unchallenged evidence - Weight*

**1. On these the learned trial Judge said at page 49 of the Record of Appeal as follows,**

***"These facts raised by the Defendant were not contravened to make a court not to believe that these events really took place."***

***I cannot agree more with the learned trial Judge. These are vital witnesses who should have been called and what should one presume by the failure of the Appellant to call them? Section 167 of the Evidence Act 2011 states as follows,***

***"The Court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case and in particular the Court may presume that:-***

***(c) Evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it."***

**In OBIANWUNA OGBUANYINYA & ORS V. OBI OKUDO & ORS (1990) 7 SC (PART 1) 66 this court Per Karibi-Whyte, JSC, held that a court is bound to draw the inference as to the existence of facts where there is no evidence to the**

**contrary.** (p. 2235 A)

*LAND LAW - Parties - Competing possession*

**2. It is settled on the authorities that where two parties claim to be in possession of land, the law ascribes possession to the one that has a better title.** (p. 2237 G)

*PLEADINGS - Evidence - Absence of*

**3. With respect to head of claim (3) - “N100,000.00 being damages for nuisance committed by the Defendant when the Defendant has caused rainwater to be discharged from the roof of his building which is adjacent to Plaintiff’s land on the Plaintiff’s land” no evidence was led on this head of claim by the Appellant in the High Court. The learned trial Judge aptly put the position this way, “I have gone through the evidence led by the Plaintiff, I regret that in no part of his case did he say anything about this issue although he pleaded it. The matter therefore goes to no issue because it is the duty of the court to decide upon facts led before him in court and not for him to presume the evidence.**

**In NEWBREED ORGANISATION LTD V. J. E. ERHOMOSELE (2006) 5 NWLR (PART 974) 499 this Court held thus:**

**“It is now settled that pleadings do not constitute evidence and therefore where such pleading is not supported by evidence oral or documentary it is deemed by the court as having been abandoned.”**

**Head of Claim (5) which is for “Perpetual injunction restraining the Defendant his agents, servants and/or privies from continuing the nuisance complained of in (3) above” being dependent on claim (3) also fails.**

**Thus the trial court was right to have dismissed all these heads of claim - (1) - (5) and the Court below was right to have affirmed that decision.** (p. 2238 G)

*COSTS - Award - Purpose of*

**4. Costs awarded are supposed to be compensatory to a successful party without being punitive to an unsuccessful party**

**and costs that are awarded to serve as a deterrent to an unsuccessful party to prevent him from filing future claims of a particular kind, are certainly punitive and a court that awards such costs cannot be said to be exercising its discretion judiciously and judicially. The power to vary such an order on costs wrongly exercised by the High Court is vested in the Court of Appeal by Section 16 of the Court of Appeal Act and the Court of Appeal Rules. The lower court was therefore right to have varied the trial Court's order on costs from N7,500.00 to N2,500.00 in the circumstances.** (p. 2240 G)

## NOTABLE POINTS OF INTEREST

### ALAGOA JSC

#### 1. Easement – Meaning of

Before delving into a discussion of the issue proper it is pertinent to determine what an easement or Right of Easement is. BLACKS LAW DICTIONARY 7TH EDITION defines easement as,

*“an interest in land owned by another person, consisting in the right to use or control the land or an area above or below it for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license an easement may last forever but it does not give the holder the right to possess, take from, improve or sell the land. The primary recognized easement are (1) A right of way (2) a right of entry for any purpose relating to the dominant estate (3) a right to the support of land and building (4) A right of air and light (5) a right to water (6) a right to do some act that would otherwise amount to a nuisance and (7) a right to place or keep something on the servient estate.”*

In *DE FACTO BAKERIES AND CATERING LTD V. AJILORE & ORS* (1974) 1 ALL NLR PART II page 385 at 392, this Court defined an easement as,

*“a right enjoyed over the property of another person and must be created by a grant express, implied or presumed, or by statute. It is not by itself an incorporeal hereditament in the sense that it is like other forms of personal property of being purchased or sold by any-*

*body. It is rather a right appurtenant to a corporeal hereditament a right which is enjoyed as part of a real property...*"(p. 2234 A)

## **2. Evaluation of evidence – Procedure for**

In MOGAJI v. ODOFIN (1978) 4 SC 91 at 93 - 96 this Court stated the prerequisites for arriving at a decision. It was therein stated that before a Judge comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on an imaginary scale. He will put the evidence adduced by the Plaintiff on one side of the scale and that of the Defendant on the other side of the scale and weigh them together. He will then see which is heavier not by the number of witnesses called by each party but by the quality or the probative value of the testimony of those witnesses. That is what is meant when it is said that a civil case is decided on the balance of probabilities. (p. 2237 H)

## **REPRESENTATION**

J. O. Jaiyeola, Esq., for the Appellant

O. Oshobi, Esq., with P. V. Abba Esq., O. Ben Omotehinse, Esq., O. C. Obayuwana (Miss) and A. B. Ige, for the Respondent

## **CASES REFERRED TO**

Labiya v. Anretiola (1992)10 SCNJ 1

Okunzua v. Amosu (1992) 6 NWLR (pt. 248)

Ogbuanyinya v. Okudo (1990) 7 SC (pt. 1) 66

Jones v. Chapman (1848) 2 Exch. 803

Canvet Island Commissioners v. Preedy (1922) 1 Ch. 179

Mogaji v. Odofin (1978) 4 SC 91

Baba v. Nig. Civil Aviation (1991) 7 SCNJ 1

Jiaza v. Bamebose (1999) 7 NWLR (pt. 610) 182

Dibiamaka v. Osakwe (1989) 3 NWLR (pt. 107) 101

Onwuka v. Ediala (1989) 1 NWLR (pt. 96) 182

Balogun v. UBA Ltd (1992) 7 SCNJ 61

Ifeta v. SPDC Nig. Ltd (2006) 8 NWLR (pt. 983) 585

Woluchem v. Gudi (1981) 5 SC 291

**STATUTES REFERRED TO**

Evidence Act 2011, s. 167

Court of Appeal Act, s. 16

**BOOK REFERRED TO**

B Blacks Law Dictionary 7<sup>th</sup> Ed

**LEAD JUDGMENT BY ALAGOA JSC**

C This is an appeal against the judgment of the Court of Appeal Ibadan Division (hereinafter referred to as the lower court or the court below) delivered on the 26th April, 2001 which affirmed the judgment of Ademola Bakre J. of the Sagamu High Court in Suit No. HCS/21/91 delivered on the 28th February, 1996. In the said High Court, the present Appellant as Plaintiff took out a writ of summons D against the present Respondent as Defendant, seeking the following reliefs:-

1. Declaration that the Defendant has no right to erect a wall blocking the access way leading to the Plaintiff's residence situate, lying and being at Nomegun Quarters, Itun Igodo, Ode Remo.

E 2. N50,000.00 being damages for erecting of the said wall on the said access way by the Defendant which erection has made it impossible for the Plaintiff to gain access to the Highway and to the use and enjoyment of his said residence.

F 3. N100,000.00 being damages for nuisance committed by the Defendant when the Defendant has caused rain water to be discharged from the roof of his building which is adjacent to the Plaintiff's land on the Plaintiff's land.

G 4. Mandatory injunction compelling the Defendant to remove the said wall and any other obstacles he has erected to create any road obstruction on the said access way.

5. Perpetual injunction restraining the Defendant, his agents, servants and/or privies from continuing the nuisance complained of in (3) above.

H Pleadings were filed and exchanged by the parties. The Statement of claim is at pages 12 - 16 of the Record of Appeal while the Statement of Defence is contained at pages 17 - 22 of the Record of Appeal. The Appellant called two witnesses - PW1 a Surveyor while he testified for himself as PW 2. The Respondent called two witnesses

- DW 1 Salitu Ogunsanya, a bricklayer by trade and neighbor while he gave evidence on his behalf as DW 2.

The facts of the case briefly are that the Appellant and Respondent are neighbours at Itun Igodo Quarters Ode Remo, the Appellant and the Respondent's father having purchased adjacent pieces of land from one Pa Ogunmeru. Appellant purchased his piece of land in 1960 while the Respondent's father purchased his own piece of land in 1952. Survey plans relating to the land and prepared by PW 1 were tendered and admitted in the trial court as exhibits A and B. What was in serious contention in the High Court and the court below was the allegation by the Appellant that the Respondent buried his father on the access road thereby denying him access to his building. The Respondent said he lodged a complaint before the Town Planning Authority whose officials came on to the site and placed a contravention notice, in spite of which the Respondent later fenced the grave. Appellant sought for an order of court that the road be left as it was in 1960. Respondent's position was that the area described as an access road by the Appellant was actually not an access road but part of his (Respondent's) father's property. In a considered judgment delivered on the 28th February, 1996, the learned trial Judge dismissed the Appellant's claim in its entirety and awarded N2500.00 costs in favour of the Respondent.

Aggrieved the Appellant appealed to the Court below which allowed the appeal of the Appellant on costs while dismissing the appeal on the other reliefs sought by the Appellant. This is a further appeal by the Appellant to this court. By leave of this court the Notice of Appeal filed in the Registry of the Court below at Ibadan on the 17th July, 2001 was deemed properly filed and served on the 23rd June, 2004. Consisting of two Grounds it is reproduced hereunder from pages 117 and 118 of the Record of Appeal. -

### **"3. GROUNDS OF APPEAL**

*1. The Learned Justices of Appeal Court erred in law when they held that the Plaintiff/Appellant failed to establish that the wall fence and tomb blocking the access in dispute was not described as access road, street, footpath, footway and or highway. And "failed to establish the burden on him the blockade ...on an access road without any grant of easement did not constitute a breach of easement."*

### **PARTICULARS**

(a) *There is evidence of existence of the Access way in Exhibits A, B and C.*

(b) *There is evidence of user of the access road for over twenty (20) years.*

2. *The learned Justices of the Court of Appeal misdirected themselves when they held that “the wall fence and tomb blocking the Access in dispute was verged RED in Exhibit B whilst existing road and street were shown the grave and wall fence blocking access was not described as access road, street, footpath, footway and or high-way” and thereby came to wrong decision.*

#### **PARTICULARS**

(a) *Exhibits A, B and C clearly have described in them the area in dispute as “Access”.*

(b) *There is clear evidence in the Record describing the area in dispute as “Access Road”.*

3. *Additional grounds of Appeal shall be filed later.*

#### **4. RELIEF SOUGHT FROM THE SUPREME COURT**

*Setting aside the judgment of the Court of Appeal on Declaration as to the blocking of the Access Way.”*

This appeal came up before us for further hearing from the lower court on the 4th March, 2013. Respondent’s motion for extension of time to file his Brief of Argument filed on the 26th September, 2012 and to deem the said Brief of Argument already filed and served as properly filed and served was moved by O. Oshobi of Counsel and granted by this Court and the Brief deemed properly filed same day i.e. 4th March, 2013. J. O. Jaiyeola Counsel for the Appellant adopted and relied on the Appellant’s Brief of Argument dated 20th August 2004 and filed same day as his argument in this appeal. O. Oshobi who appeared with P. V. Abba, O. Ben Omotehinse, O. C. Obayuwana (Miss) and A. B. Ige, as Counsel for the Respondent adopted and relied on the Respondent’s Brief of Argument dated the 4th September, 2012, filed same day but deemed properly filed and served on the 4th March, 2013 as Respondent’s Argument in this appeal. Distilled from the Grounds of Appeal and contained at page 6 of the Appellant’s Brief of Argument are the following issues:-

*“1. Whether the Court below was right when it held that the trial court’s finding of fact that the Appellant failed woefully to establish the burden on him that the blockade by fence wall and the grave*



*of the Respondents father on access road without any grant of easement did not constitute a breach of easement was perverse as the finding was borne out from the printed record.*

2. *Whether the Court below was right when it held that it has not seen or is there legal justification that the learned trial judge exercised his judicial discretion by the learned trial Judge lacks substance and meritorious.*

3. *Whether on the evidence adduced by the Appellant in this case the Appellant was entitled to judgment on claims 1, 2 and 4 as endorsed in his Writ of Summons dated the 28th March, 1991.*

The Respondent distilled the following sole issue from the Grounds of Appeal in Paragraph 3.1 at page 5 of the Respondent's Brief of Argument:-

*"Whether the Courts below were correct in their concurrent finding that the Appellant has not established any right of easement to entitle the Appellant to the reliefs sought at the trial court?"*

In DOKUN AJAYI LABIYI V. ALHAJI MUSTAPHAR MOBERUAGBA ANRETIOLA & ORS (1992)10 SCNJ 1 this Court viewed with disfavor the proliferation of issues for determination formulated from the grounds of appeal. It is better for a number of grounds where appropriate to be formulated into a single issue running through them. I think the proper issue for determination of this appeal is the lone issue formulated by the Respondent which is,

*"Whether the Courts below were correct in their concurrent finding that the Appellant has not established any right of easement to entitle the Appellant to the reliefs sought at the trial court."*

At page 48 of the Record of Appeal the Learned Trial Judge had said as follows:

*"In this judgment, call it by any name, there is only one claim that is the claim that the Defendant has no right to erect a wall blocking the access way leading to the Plaintiff's residence situate, lying and being at Numegun Quarters Igodo, Ode-Remo." The lower court had in the same vein at page 102 of the Record of Appeal said as follows; "The crux of this appeal is whether the Appellant enjoyed a right of easement to his building/residence situate, lying and being at Nomegun Quarters, Itun Igodo, Ode Remo on which the Respondent erected a wall which blocked the access way that led to Appellant's residence."*

Before delving into a discussion of the issue proper it is pertinent to determine what an easement or Right of Easement is. BLACKS LAW DICTIONARY 7TH EDITION defines easement as,

“an interest in land owned by another person, consisting in the right to use or control the land or an area above or below it for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license an easement may last forever but it does not give the holder the right to possess, take from, improve or sell the land. The primary recognized easement are (1) A right of way (2) a right of entry for any purpose relating to the dominant estate (3) a right to the support of land and building (4) A right of air and light (5) a right to water (6) a right to do some act that would otherwise amount to a nuisance and (7) a right to place or keep something on the servient estate.”

In DE FACTO BAKERIES AND CATERING LTD V. AJILORE & ORS (1974) 1 ALL NLR PART II page 385 at 392, this Court defined an easement as,

“a right enjoyed over the property of another person and must be created by a grant (express, implied or presumed, or by statute. It is not by itself an incorporeal hereditament in the sense that it is like other forms of personal property of being purchased or sold by anybody. It is rather a right appurtenant to a corporeal hereditament a right which is enjoyed as part of a real property...” See also GABRIEL OKUNZUA V. E. B. AMOSU & ANOR (1992) 6 NWLR PT. 248, 437.

Appellant’s evidence as PW 2 is contained at pages 34 - 36 of the Record of Appeal. He said that the Respondent buried his father across the access road to his residence which made him petition the Sanitation Office at Abeokuta. His letter to the Sanitation Task Force was referred to the Sagamu Zonal Town Planning Authority who accompanied him to the site where he issued a notice of contravention. Under cross examination he said he did not know why the Respondent was not prosecuted. Appellant never thought it fit to call the Sanitation Authority as witness. The Respondent had stated that the Appellant (PW 2) had taken the matter to the Town Planning Authority in Sagamu, to the Governor’s Office in Abeokuta, to the Re-gency Council in Ode Remo and finally before the Alaye of Ode -

Remo who all told the Appellant that there was no access road in the area that he claimed there had been an easement to his land.

***On these the learned trial Judge said at page 49 of the Record of Appeal as follows,***

***“These facts raised by the Defendant were not contravened to make a court not to believe that these events really took place.”*** B

***I cannot agree more with the learned trial Judge. These are vital witnesses who should have been called and what should one presume by the failure of the Appellant to call them? Section 167 of the Evidence Act 2011 states as follows,*** C

***“The Court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case and in particular the Court may presume that:-*** D

***(c) Evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it.”***

***In OBIANWUNA OGBUANYINYA & ORS V. OBI OKUDO & ORS (1990) 7 SC (PART 1) 66 this court Per Karibi-Whyte, JSC, held that a court is bound to draw the inference as to the existence of facts where there is no evidence to the contrary.*** E

At page 35 of the Record of Appeal the Appellant as PW 2 had said in his evidence in chief as follows, *“I built my house on my land”* F but while being cross-examined he said, “The land I bought did not include the access road.” PW 1 Usman Kehinde Kunle Quadri, a Registered Surveyor who had been on the job for thirty years said in evidence at page 31 of the Record of Appeal that he prepared exhibits A and B on behalf of the Appellant. Exhibit A is a Survey Plan while Exhibit B is a dispute plan. Exhibits A and B were tendered through Mr. Quadri. His evidence was that he met everything on the ground in exhs. A & B. His evidence under cross examination at pp. 31-32 of the Record of Appeal is reproduced hereunder as follows, G H

***“The area verged red showing a grove (sic) grave is diagonally opposite Plaintiff’s house. It is not within the area verged green. The area verged green is the area being claimed by Plaintiff my client.”***

This is what the learned trial judge had to say in summing up

this piece of evidence -

*"I can say with certainty that although the Plaintiff called Mr. U. K. K. Quadri, the Surveyor as 1st P.W. who tendered exhibits A and B, that very witness told the Court that although he indicated the bury (sic) and the fence around it they were outside the land of the Plaintiff."*

DW1 Salitu Ogunsanya's evidence is at page 37 of the Record of Appeal. A Bricklayer, block maker and farmer, he lives about four houses away from the Appellant and knows the Appellant the Respondent and the Respondents father whom he said is now dead. He also knows the land over which the Plaintiff has sued. Of this subject matter DW 1 said as follows,

*"The father (sic) the Defendant left a space in the front of his house as passage, this is what the Plaintiff described as a road. This is not the case."*

This piece of evidence was not punctured by cross examination. Respondent was emphatic in his evidence as DW 2 at pages 37 - 39 of the Record of Appeal that there was no access road where the Appellant had claimed there was an access road. He maintained that the land being referred to as access road by the Appellant belongs to his father. This piece of evidence tallies with the evidence of DW1 and PW1. Nothing in the evidence of the Appellant and indeed any of the other witnesses shows the grant of right of easement to the Appellant. As rightly pointed out by the learned trial Judge at page 49 of the Record of Appeal,

*"the plaintiff did not tender any evidence of grant in writing before this court, there was also no evidence of easement by prescription from time immemorial. I therefore cannot say on the balance of probability that he has established a right of easement."*

If the easement by the Respondent's father was impliedly granted to the Appellant, he (Respondent's father) would not have shown him (the Respondent) that same spot as his last resting place upon his demise. The submission in paragraph 4, page 7 of the Appellant's Brief of Argument that the grant of easement could have been implied does not hold water here. Also ridiculous if not downright dishonest is counsel's submission in paragraph 5 at page 7 of the Appellant's Brief of Argument that the evidence of DW 1 was in support of the Appellant's case that an access road existed. At the risk

of sounding repetitive DW1 had said in his evidence at page 37 of the Record of Appeal inter alia,

*“The father of the Defendant left a space in the front of his house as passage; this is what the Plaintiff described as a road. This is not the case.”*

Thus the evidence of DW1, same as that of PW1, and the Respondent were direct and should have left no one in doubt as to the non existence of an access road which the Appellant claimed existed. What I find intriguing is that even PW1 and DW1 who had close dealings with the Appellant, in their evidence said there was no access road contrary to the stand and expectations of the Appellant. PW1, Surveyor Quadri prepared exhibits A and B for and on behalf of the Appellant while DW 1, Salitu Ogunsanya a bricklayer and block molder, had, as neighbor to the Appellant been employed by the Appellant to do some work for him. Both denied the existence of an access road.

Even the Appellant had unwittingly admitted under cross examination at page 35 of the Records that “the land I bought did not include the access road.” The fact that the Appellant and his vendor got to the land that was sold to the Appellant through a road as testified by the Appellant at Page 35 of the record of Appeal does not ipso facto mean that the said road is an access road. Under cross examination at page 38 of the Record, the Respondent said that he never knew that the Appellant was using what he called an access road while building his (Appellant’s) house. He also while admitting that there was some alteration on exhibit D which is the Conveyance of the Respondent’s father’s land said the dimension of the land had not been tinkered with.

***It is settled on the authorities that where two parties claim to be in possession of land, the law ascribes possession to the one that has a better title.*** See JONES V. CHAPMAN (1848) 2 Exch. 803; CANVET ISLAND COMMISSIONERS v. PREEDY (1922) 1 Ch.179.

In MOGAJI v. ODOFIN (1978) 4 SC 91 at 93 - 96 this Court stated the prerequisites for arriving at a decision. It was therein stated that before a Judge comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on an

imaginary scale. He will put the evidence adduced by the Plaintiff on one side of the scale and that of the Defendant on the other side of the scale and weigh them together. He will then see which is heavier not by the number of witnesses called by each party but by the quality or the probative value of the testimony of those witnesses. That is what is meant when it is said that a civil case is decided on the balance of probabilities. See also *ALHAJI ABDULLAHI BABA V. NIGERIAN CIVIL AVIATION & ANOR* (1991) 7 SCNJ 1; *JIAZA V. BAMEBOSE* (1999) 7 NWLR (PART 610) 182; *DIBIAMA V. OSAKWE* (1989) 3 NWLR (PART 107) 101 at 113; *ONWUKA V. EDIALA* (1989) 1 NWLR (PART 96) 182; *ALHAJI MOHAMMED LA'ARO BALOGUN V. UNITED BANK FOR AFRICA LTD.* (1992) 7 SCNJ 61.

I am in agreement with the court below that the High Court did just that in arriving at its decision in favour of the present Respondent for all the reasons already stated. The Court below was also in my view right to have upheld the finding of the High Court dismissing the other heads of claim much of which depend on the first head of claim that has failed. A look at the second head of claim — “N50,000.00 being damages for the erection of the said wall on the said access way by the Defendant which erection has made it impossible for the Plaintiff to gain access to the Highway and to the use and enjoyment of his said residence situate, lying and being at Nomegun Quarters, Itun Igodo, Ode-Remo” is linked to the first head of claim, so also is the fourth head of claim for “Mandatory injunction compelling the Defendant to remove the said wall and any other obstacles he has erected to create any road construction on the said access way.” Since head claim one for easement has failed claims 2 and 4 highlighted also fail.

**With respect to head of claim (3) - “N100,000.00 being damages for nuisance committed by the Defendant when the Defendant has caused rainwater to be discharged from the roof of his building which is adjacent to Plaintiff’s land on the Plaintiff’s land” no evidence was led on this head of claim by the Appellant in the High Court. The learned trial Judge aptly put the position this way, “I have gone through the evidence led by the Plaintiff. I regret that in no part of his case did he say anything about this issue although he pleaded it. The matter therefore goes to no issue because it is the duty of the**

***court to decide upon facts led before him in court and not for him to presume the evidence.*** In *ETOWA ENANG & ORS V. E. I. ADU* (1981) 1 NSCC 453 at 459 lines 15 - 20 it was said clearly that any pleading not backed by evidence goes to no issue and should be disregarded by the court."

**In NEWBREED ORGANISATION LTD V. J. E. ERHOMOSELE** (2006) 5 NWLR (PART 974) 499 this Court held thus:

***"It is now settled that pleadings do not constitute evidence and therefore where such pleading is not supported by evidence oral or documentary it is deemed by the court as having been abandoned."*** See also *EZEANAH v. ALHAJI ATTAH* (2004) 2 SCNJ 200; (2004) 7 NWLR (PT. 873) 468; *IFETA V. SPDC NIG. LTD* (2006) 8 NWLR (PART 983) 585; *WOLUCHEM V. GUDI* (1981) 5 SC 291; *BASHEER v. SAME* (1992) 4 NWLR (PT. 236) 491; *UWEGBA V. ATTORNEY GENERAL, BENDEL STATE* (1986) 1 NWLR (PT. 16) 303; *ADEGBITE V. OGUNFAOLU* (1990) 4 NWLR (PART 146) 578; *AJUWON V. AKANNI* (1993) 9 NWLR (PART 316) 182; *ELEGUSHI V. OSENI* (2005) 14 NWLR (PART 945) 348.

***Head of Claim (5) which is for "Perpetual injunction restraining the Defendant his agents, servants and/or privies from continuing the nuisance complained of in (3) above" being dependent on claim (3) also fails.***

***Thus the trial court was right to have dismissed all these heads of claim - (1) - (5) and the Court below was right to have affirmed that decision.***

There is a plethora of case law on the attitude of the Supreme Court to concurrent findings of fact by the lower courts. In *AMADI V. NWOSU* (1992) 6 SCNJ. 59 this Court per Karibi Whyte, JSC held that, *"It is now well settled that this court will not disturb the findings of fact of two courts below unless there is manifest error which leads to some miscarriage of justice or violation of some principles of law procedure"*

In *IGWEGO v. EZEUGO* (1992) 6 NWLR (PART 249) 561, H Ogwuegbu, ISC, said as follows:-

***"This Court will not in the circumstances of this case interfere with the concurrent findings of fact on essentially issues of fact there being no established miscarriage of justice or violation of some prin-***

*ciple of law or procedure.”*

Olatawura, JSC, in ABIODUN FAMUROTOI V. MADAM S. AGBEKE (1991) 5 NWLR (PART 189) 1, said,

*“It has consistently been the practice of this court as shown by a long line of authorities that where there are concurrent findings of fact such findings will not be disturbed unless they are perverse.”* See also OJOMO V. AJAO (1983) 2 SC 156; OGBECHIE V. ONOCHIE (1988) 1 NWLR (PART 20) 370; NIGERIAN BOTTLING CO. LTD V. CONSTANCE O. NGONADI (1985) 1 NWLR (PART 4) 737; EHOLOR v. OSAYANDE (1992) 7 SCNJ. 217; BALOGUN & ORS v. AGBOOLA (1974) 1 ALL NLR (PART 2) 66; NWADIKE v. IBEKWE (1987) 4 NWLR (PART 67) 7128; UKPE IBODO & ORS V. IGUISI ENAROFIA (1980) 5 - 7 SC 42; OGUNBIYI V. ADEWUNMI (1988) 5 NWLR (PT. 93) 215, AKEREDOLU V. AKINREMI (1989) 3 NWLR D (PT. 108) 164. The list of cases on this subject matter is inexhaustive.

The judgment of the High Court was neither perverse nor occasioned a miscarriage of justice. It did not violate any of the principles of law or procedure nor was it bedeviled by any of the shortcomings variously enunciated in the authorities cited and the lower court was right to have affirmed that decision and dismissed the claims of the Appellant. I am not unaware of the setting aside of the trial court’s order on costs by the court below. The trial court had awarded N2,500.00 costs to the Respondent on grounds which the learned trial Judge did not disguise as punitive occasioning a wrongful exercise of discretion. In AKINBOBOLA V. PLISSAN FISCO (1991) 1 NWLR (PART 167) 270 this court per Kawu, JSC held that,

*“the award of costs, is of course always at the discretion of the court which discretion must be exercised judiciously and judicially.”*

***Costs awarded are supposed to be compensatory to a successful party without being punitive to an unsuccessful party and costs that are awarded to serve as a deterrent to an unsuccessful party to prevent him from filing future claims of a particular kind, are certainly punitive and a court that awards such costs cannot be said to be exercising its discretion judiciously and judicially. The power to vary such an order on costs wrongly exercised by the High Court is vested in the Court of Appeal by Section 16 of the Court of Appeal Act and the Court of Appeal Rules.*** See EMAVWORHE ETAJATA & ORS V. PETER



OLOGBO & ANOR (2007) 16 NWLR (PART 1061) 554. ***The lower court was therefore right to have varied the trial Court's order on costs from N7,500.00 to N2,500.00 in the circumstances.***

What is of significance in this appeal is that all the claims before the High Court by the Appellant (then Plaintiff) failed and were rightly dismissed by that Court. An appeal by the Appellant to the Court below failed. For all the reasons advanced in this write up this further appeal by the Appellant to this court also lacks merit and is dismissed. The judgment of the lower court delivered on the 26th April, 2001 is hereby affirmed by me. Parties are however to bear their own costs.

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**MUHAMMAD JSC**

I read before now the judgment just delivered by my learned brother Alagoa, JSC. I agree with him that the appeal lacks merit. I, too, dismiss the appeal and abide by consequential orders made in the lead judgment including order on costs.

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**GALADIMA JSC**

I have had the privilege of reading in draft the leading Judgment of my Lord, ALAGOA JSC. I entirely agree with his reasoning and conclusion which I adopt as mine. I too, find that the appeal is devoid of any merit, same is hereby dismissed. The Judgment of the Court of Appeal, Ibadan Division delivered on the 26th April, 2001, is hereby affirmed by me. No order as to cost.

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**OGUNBIYI JSC**

I read in draft the lead judgment just delivered by my learned brother Alagoa, JSC and I agree that the entire appeal is devoid of any merit and ought to be dismissed.

Just for purpose of emphasis, I wish to state that it is the pleadings of parties that give the reason for proof of a claim before a court. Without proper and well informed pleadings any evidence given will have no basis and therefore go to no issue. The corollary is also true that facts deposed to on the pleadings which are not admitted by the

opponent ought to be proved by evidence or else they are deemed abandoned. The onus is therefore on the plaintiff who asserts in civil proceedings to plead both the facts he sought to prove and also lead cogent and credible evidence in proof of those facts on the balance of probability before Judgment could be given in his favour.

B In the appeal at hand, the present appellant was also an appellant at the Court of Appeal being the plaintiff at the trial High Court wherein he took out a writ of summons against the Respondents as the Defendants. The claim was accordingly dismissed by the trial judge who also awarded costs of N7,500.00k in favour of the respondents.

C On an appeal, the lower court, by its concurrent judgment upheld the decision of the trial court to the exclusion of the appeal against on order of costs.

D The law is trite and well settled in plethora of decided authorities that the court ought to be wary in its attitude to concurrent findings of fact by the lower courts. In other words, such findings by the courts will not normally be disturbed or interfered with unless there is manifest error which will lead to miscarriage of justice or violation of some principles of law or procedure. See *Amadi V. Nwosu* (1992) 6 E SCNJ 59. The appellant in this case has not graded the uphill task in the absence of asserting any reason why this court should upset or interfere with the concurrent findings of the two lower courts.

F The onus is on the appellant to first proffer conditions precedent which must be objective on tangible fact and not subjective. The findings in the circumstance therefore remain resolute and ought not to be disturbed.

G On the question of costs awarded by the trial court, the lower court acted within reason in reversing the same. With cost following events and merely compensatory in nature, the exercise of discretion by the trial court in awarding same was certainly excessive and not judicial or judicious as rightly found and held by the lower court.

H By its very nature, punitive costs will operate to vitiate or undermine proper exercise of judicial and judicious discretion. The appeal on the totality is devoid of any merit and I also dismiss same in terms of the lead judgment of my learned brother and adopt all the orders made therein inclusive of that made as to costs.