

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2013. SC. 345/2002
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

1. OKWARA OJINAKA

OKWARANONOB

2. THOMAS OKWARA

..... APPELLANTS

3. GODWIN AZONOB

(For themselves and on behalf of

Nkanu family of Dikenafai)

AND

1. IBEKE MBADUGHA

2. DOMINIC UKEGBU

3. FREDRICK NJOKU

..... RESPONDENTS

4. JONATHAN EBIRIM

5. UZOMA ODOMENA

(For themselves and on behalf of

Umuosu Umuchoke of Okwe)

APPEALS - Court - Finding - Failure to challenge - Where finding of lower court is not appealed against - The finding is deemed to be valid and subsisting - And appellate court will not disturb it (H1)

APPEALS - Judgment - Correctness of - Court of Appeal meticulously arrived at its decision - Hence its judgment is unassailable - As the errors of the trial court have all been shown (H2)

LAND LAW - Evidence - Traditional history - Weight - Although such evidence is hearsay - But Evidence Act s. 44 provides that where title is in issue - Evidence of communal tradition concerning the title is relevant (H3)

LAND LAW - Title - Identity of land - Proof - Okolo v. Dakolo - Plaintiff succeeds only where he has ascertained identity of the land in dispute - And its boundaries with precision (H4)

FACTS

Before the High Court of Abia State Okigwe, plaintiffs/appellants filed suit No. HO/3/71 while defendants/respondents filed suit No. HO/4/71. The two suits were consolidated. Respondents claim for declaration of title over the piece of land known as Ngboko Umudoji and Obiulo situate in Nkahu Dikenafa, damages for trespass on the said land and order of injunction. Appellants claim for declaration of title over the land known as Uhumueleke, Ofeiyi Umuchine and Ikpa Nrurumiri, damages for trespass on the said land and perpetual injunction.

The matter went to trial at the end of which the learned trial Judge found for appellants (suit No. HO/3/71). He declared their entitlement in respect of Umudoji and Obiulo parcels of land, awarded them damages for trespass and restrained respondents from further trespass on the said land. The learned Judge also found for respondent (No. HO/4/71) in respect of the Uhumuelebe land only. It awarded respondents N200.00 damages for trespass and restrained appellants from further trespass on the land. Aggrieved, both sides appealed to the Court of Appeal Owerri Division. After hearing the appeals, the court allowed the appeal of respondents by granting the reliefs they sought in suit No. HO/4/71. The appeal of appellants and their suit No. HO/3/71 were dismissed. Dissatisfied, appellants lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the learned Justices of the Court of Appeal were not in error in coming to the conclusions that the traditional history belatedly filed by the defendants/respondents in their further amended statement of claim in suit No. HO/4/71 after the close of the plaintiffs/appellants’ case remained unchallenged and uncontradicted even though the plaintiffs/appellants had in their further amended statement of defence denied the traditional history saying that it is ‘fabricated for the purposes of the case’.

(ii) As the issue that has been joined by both sides from the pleadings in suit No. HO/3/71 was solely on the ownership of the land in dispute from the immemorial and possession, were the learned Justices of the Court of Appeal not grossly in error in using the traditional history belatedly pleaded only on suit No. HO/4/71 to determine suit No. HO/3/71, and by suing same in overruling and up-

turning the decision of the trial court in suit No. HO/3/71?

HELD (Unanimously dismissing the appeal per
MUHAMMAD JSC)

Court - Finding - Failure to challenge

1. I am in complete agreement with learned counsel to the respondents that given the foregoing position of the appellants as defendants in suit No. HO/4/71, it no longer lies in their mouth to complain that respondents' delay in obtaining leave to and amending their statement of claim had adversely affected their case and the lower court's refusal to so hold entitles them to an interference by this court in that regard. Indeed, as learned respondents' counsel further submitted, both sides amended their pleadings consequent upon the leave granted them by the trial court.

In any event, the order of the trial court granting the respondents leave to amend their statement of claim, remains, within the context of S.318 of the 1979 Constitution, the court's decision. My examination of the record of this appeal confirms learned respondents' counsel's submission that the appellants have not appealed against that order. The very order was neither made an issue at and decided by the court below nor was leave of this court obtained to raise and argue same as a fresh issue. The applicable principle in this regard is that where an appellant did not appeal against the finding of a lower court, the finding is deemed to be valid, subsisting and the appellate court will not disturb it. Appellants cannot, therefore, be heard on the issue at this stage. The issue as raised and argued is accordingly hereby discountenanced.

(p. 3019 E)

Judgment - Correctness of

2. I cannot agree more. The duty of an appellate court is to particularly ensure that the decision appealed against draws from the admissible evidence on record from which the trial court's decision must necessarily arise. A step-by step ac-

count of how the lower court arrived at its decision, as attempted above, shows how meticulous the court has been. The pitfalls the trial court allowed itself to be enmeshed in have all been demonstrated by the court below thereby rendering its judgment in that regard unassailable.

B *By their remaining issues the appellants are saying that the findings of the court below are erroneous and we must revisit them. I am of the humble but firm and considered view that they are not entitled to that relief. The lower court has in the exercise of its appellate powers complied with all the necessary principles it should.* (pp. 3024 B/3025 G)

LAND LAW - Evidence - Traditional history - Weight

3. The appellants have also accused the court of relying on respondents' hearsay traditional history. Though it is true that evidence of traditional history is by the strict rules of evidence hearsay and inadmissible, it is however, by section 44 of the Evidence Act which provides that where title to or interest in family or communal land is in issue, evidence of family or communal tradition concerning such title or interest is relevant.
E (p. 3024 D)

LAND LAW - Title - Identity of land - Proof

4. It must further be stressed at this stage that the plaintiff in each of the cases in the consolidated suit that led to the judgment of the court below appealed against succeeded only where he has ascertained the identity of the land in dispute and its boundaries with precision. In Okoko v. Dakolo (2006) All FWLR (Pt. 336) 201, this court restated the importance of the evidence of boundary in land disputes giving it a centre stage because it places the court in a good position to determine ownership with aid of other evidence. (p. 3024 E)

H REPRESENTATION

J. C. Okafor with H. O. Okwara, for the Appellants

F. Chukwuemeka Ofodile, SAN with C. C. Iwunu-Mojekwu, for the Respondents

CASES REFERRED TO

Alade v. Awo (1975) 4 SC 215
Akhionbare v. Omoregie (1976) 12 SC 11
Biariko v. Edeh-Ogwuile (2001) 12 NWLR (pt. 726) 235
Ebu v. Abanio (1957) 2 WALR 55
Nwidenyi v. Aleke (1996) 4 NWLR (pt. 442) 349
Nwayanwu v. Nweke (1995) 5 NWLR (pt. 394) 227
Da Costa v. Ikomi (1968) 1 All NLR 394
Piaro v. Tenalo (1976) 12 SC 31
Balogun v. Akanji (1988) 1 NWLR (pt. 70) 301
Wema Bank Ltd. v. Kurunwi (1975) NSCC (Vol. 9) 4
Adesanoye v. Adetonoye (1971) NSCC (Vol. 7) 144
Ewo v. Ani (2004) 3 NWLR (pt. 861)

STATUTE REFERRED TO

Evidence Act, s. 44

LEAD JUDGMENT BY MUHAMMAD JSC

This is the appeal against the judgment of the Court of Appeal Owerri Division, delivered on the 9th of April, 1998 in respect of the appeal and cross-appeal from the decision of the Abia State High Court sitting at Okigwe dated 22nd September 1989. The former court shall, hereinafter, be referred to as the court below and the latter as the trial court. A summary of the facts of the case which brought about the appeal is attempted at once.

The two suits Nos. HO/3/71 and HO/4/71, filed at the trial court by the Nkahu and the Umuchoke families respectively, against each other were consolidated, heard and determined. For the purpose of the consolidation, the plaintiffs in suit No. HO/3/71, the appellants before us were regarded as the plaintiffs with the plaintiffs in suit No. HO/4/71, the respondents in the instant appeal, being the defendants in suit No. HO/3/71 the plaintiffs claimed thus:

“(a) Declaration that the plaintiffs are entitled to the customary right of occupancy to the piece of land known as and called Ngboko Umudoji and Obiulo situate in Nkahu, Dikenafa.

(b) N200.00 damages for trespass to the said land.

(c) Injunction to restrain the defendants, their servant and their agents from... with the plaintiffs’ ownership and possession of the

said land.”

In suit No. HO/3/71, the plaintiffs’ claim was for:-

“(a) Declaration that the plaintiffs are entitled to the customary right of occupancy over the Uhumueleke, Ofeiyi Umuchine and Ikpa Nrurumiri.

B (b) N600.00 as general damages for trespass committed by the defendants on the plaintiffs’ land- in dispute.

(c) Perpetual injunction restraining the defendant, their heirs, agents, servants and all those claiming through them from further trespass on the plaintiffs’ land.”

C After a full trial, the trial Judge in a considered judgment found for the plaintiffs in suit No. HO/3/71. He declared their entitlement in respect of Umudoji and Obiulo parcels of land, awarded them damages for trespass and restrained the plaintiffs in suit No. HO/4/71, the defendants in the consolidated suit, from further trespass on the said parcels of land. The trial court also found for the plaintiffs in suit No. HO/4/71 in respect of the Uhumuelebe parcel of land only. It awarded them N200.00 damages for trespass and restrained the plaintiffs in suit No. HO/3/71 from further trespass on the said land.

E Dissatisfied with the decision of the trial court both sides appealed to the court below which judgment at page 307 of the record of appeal concludes thus:-

“In the result, I allowed the defendants/appellants’ appeal, dismiss the plaintiffs/appellants appeal and set-aside the judgment of the lower court given on 22nd September 1989. I hold that the action in suit No. HO/4/71 ought to have succeeded and judgment given for plaintiffs therein, who are now the defendants/appellants. I therefore grant the relief claimed in their entirety, that is order as follows:-

G (a) A declaration that plaintiffs in suit No. HO/4/71 are entitled to the customary right of occupancy to the entire land called Uhu Umueleke, Ofeiyi Umuchime and Ikpa Nrumiri verged Pink on survey plan No. OKE/D26/73 (Exhibit D).

H (b) N600.00 general damages against the defendants, thereon for trespass in the said land and

(c) A perpetual injunction restraining the said defendants by themselves, their agents, servants and heirs or otherwise howsoever from further acts of trespass on the land in question.

I dismiss suit No. HO/3/71. I award costs of N1,500.00 in

each of the suits No. HO/3/71 and no. HO/4/71 as cost in the court below and N2000.00 in respect of each of the two appeals as cost in this court to the defendant/ appellants."

The plaintiffs in suit No. HO/3/71 being aggrieved by the foregoing decision have appealed to this court.

Parties have filed and exchanged their briefs of arguments, including appellants' reply brief as arguments for and against the appeal. The four questions the appellants raised in their brief of argument as calling for answers in the determination of the appeal. See pages 4-5 of the appellants' brief of argument, are:-

"(i) Whether the learned Justices of the Court of Appeal were not in error in coming to the conclusions that the traditional history belatedly filed by the defendants/respondents in their further amended statement of claim in suit No. HO/4/71 after the close of the plaintiffs/appellants' case remained unchallenged and uncontradicted even though the plaintiffs/appellants had in their further amended statement of defence denied the traditional history saying that it is 'fabricated for the purposes of the case'.

(ii) As the issue that has been joined by both sides from the pleadings in suit No. HO/3/71 was solely on the ownership of the land in dispute from the immemorial and possession, were the learned Justices of the Court of Appeal not grossly in error in using the traditional history belatedly pleaded only on suit No. HO/4/71 to determine suit No. HO/3/71, and by using same in overruling and upturning the decision of the trial court in suit No. HO/3/71?

(iii) Whether the learned Justices of the Court of Appeal were not in error in coming to the following decision:

"it is said that under section 145 (of the Evidence Act) while possession may raise a presumption of ownership it does not do more and cannot stand when another person proves a good title. See Da Costa v. Ikomi (1968) All NLR 394 at 398; (1968) SCNLR 537 Sunday Piaro v. Tenalo (1976) 12 SC 31 at 43.

In this particular case, the defendants/appellants proved good title by their traditional history.'

(iv) Whether the learned Justices of the Court of Appeal were not in error in holding that suit No. HO/4/71 ought to have succeeded and judgment given for the plaintiffs therein."

The four issues the respondents distilled at page 4 of their brief

as calling for determination in the appeal are:-

“3.01. Whether the court below was right in its treatment of the parties’ case on traditional history.

3.02. Whether on the totality of the pleadings and evidence the court below was right in setting aside the judgment for the defendants/respondents/plaintiffs in suit No. HO/4/71.

3.03. Whether the court below was right in holding to wit:-

‘The other is on the effect of section 145 of the Evidence Act in regard to the presumption of ownership raised thereunder by a person in possession. That presumption cannot arise when title has been proved by a person against whom it is sought to be raised. It is said that under section 145, while possession may raise a presumption of ownership, it does not do more and cannot stand when another proves good title See Da Costa v. Ikomi (1968) 1 All N.L.R. 384 at 398; (1968) SCNLR 537 Sunday Piaro v. Tenalo (1976) 22 SC 31 at 43 in this particular case, the defendants/appellants proved good title by their traditional history.

3.04. Whether the court below was right in entering judgment for the plaintiffs (Respondents in this appeal) in suit No. HO/4/71.”

On their 1st issue, learned appellants’ counsel submits that it is erroneous for the court below to allow respondents’ appeal on their traditional history that was belatedly introduced into the case. The court’s further finding that the appellants did not challenge the belatedly introduced traditional history is not supported by the record of appeal. The appellants, it is submitted, specially denied in paragraph 8 of their further amended statement of defence the averment in paragraph 8 of their further amended statement of defence, the averments in paragraphs “13” “14” “15” “16” and “17” of respondents’ amended statement of claim stating that the traditional history therein averred to is fabricated for the purposes of the case. The case that brought about the appeal and the judgment of the court below appealed against, it is contended, has a chequered history. The case stated in 1964 and journeyed through the civil war years until 1985 when the trial court determined the consolidated suit. Learned appellants’ counsel submits that respondents did not seek and obtain the leave that allowed them to introduce the traditional history on the basis of which the court below held for them until 1st June 1988 after the appellants had closed their case and midstream during the

testimony of defendants/respondents' first witness.

In a further argument, learned appellants' counsel contends that in a case hearing which commenced in 1964, a traditional history introduced in 1988 cannot rightly be said to have stood the test of time. Ownership of land in that situation should be determined on the basis of ownership and possession from time immemorial parties joined issue on. Appellants, it is argued were over-reached since they were never given the opportunity to recall their witnesses for further cross-examination. The cases of *Alade v. Awo* (1975) 4 SC 215 & *Akhionbare v. Omoregie* (1976) 12 SC 11 relied upon by court below, learned counsel submits, are not applicable to facts of the instant case. As a whole, learned counsel submits, respondents' traditional history as testified to only by DW1 is so spurious that no reasonable tribunal could rely on it. The court below, contends learned counsel, is in manifest error to have relied on such evidence.

On appellants' 2nd issue after a rehash of their arguments on their 1st issue, learned appellants' counsel submits that the court below failed to realize that it was dealing with the trial court's judgment that arose from consolidation of the two suits of both sides. The trial court, it is submitted, rightly treated each of the two consolidated suits separately in its judgment. Learned counsel referred to the trial court's judgment at pages 164-165 lines 20- 31 and line 1-2 respectively and the stance of the court below at page 302, lines 14-21 which counsel called unorthodox to buttress appellants point. In any event, learned counsel argues, it is not necessary for a claimants to plead more than one out of the five ways of establishing his entitlement to land to succeed. The appellants in the instant case are at liberty to and they relied on ownership and possession from time immemorial. The court below is wrong to have held differently. Relying on *Biariko v. Edeh-Ogwuile* (2001) 12 NWLR (Pt.726) 235; *Kweku Minta Ebu v. Kwamin Antradu Abanio* (1957) 2 WALR 55; *Nwidenyi v. Aleke* (1996) 4 NWLR (Pt. 442) 349 and *Nwayanwu v. Nweke* (1995) 5 NWLR (Pt. 394) 227, learned counsel urges that the issue be resolved in appellants favour.

In arguing appellants' 3rd issue, learned counsel having referred to the findings of the lower court at page 304, lines 13-24 contends that same is erroneous particularly "the court's reliance on the case of *Da Costa v. Ikomi* (1968) 1 All NLR 394 at 398; (1968) SCNLR

537 and Sunday Piaro v. Tenalo (1976) 12 SC 31 at 43 which do not apply to the facts of the instant case. In effect, it is argued, the court below is wrong in its conclusion that section 145 of the Evidence Act does not avail the appellants who had failed to put up a contrary traditional history to that of the respondents' and had by account of
B their traditional history proved good title. The trial court's findings at page 166, lines 23-31 and 167, lines 7-12 which the court below disturbed, learned counsel submits are unassailable. He urges that the lower court's findings to the contrary as to the applicability of
C section 145 of the Evidence Act to the facts of the case at hand, in resolving the 3rd issue in the appeal, be set-aside.

On appellants' 4th issue, it is argued that the lower court is in error as to the onus of proof on the respondents' vis-à-vis their claim in suit No. HO/4/71. The court's findings on the traditional history of
D the respondents, learned counsel re-emphasizes is indefensible. The traditional account which is conjectural, submits learned counsel, cannot, by any stretch of imagination be said to be clear. It is submitted that the court relied only on the evidence of PW1 to make its conclusions. Learned counsel submits that in resolving the 4th issue in favour
E of the appellants as well, the appeal should be allowed.

Responding to appellants arguments under their 1st issue, learned counsel to the respondents submits that the appellants cannot be taken seriously on the question of the respondents alleged delay in amending their statement of claim in suit No.-HO/4/71, Re-
F spondents' application for the said amendment, learned counsel argues, was never opposed by the plaintiffs/appellants and ruling granting the respondents leave to amend their statement of claim and resting their case on the traditional history averred therein has not been
G appealed against. Besides, months after the respondents had amended their statement of claim in suit No. HO/4/71, the appellants by their motion on notice dated 13/2/89 sought leave of the trial court to amend their statement of defence with a view to streamlining their defence in the suit. The appellants indicated 'at that time that they
H did not intend to call further evidence to the one they already called. The appellants, submits learned respondents' counsel, were duly obliged. The appellants, contends learned counsel, deliberately abstained from joining issues with the respondents as to the latter's traditional history Paragraph 8 of appellants' statement of defence in

suit No. HO/4/71. It is contended, cannot be said to be in effective traverse of the averments in paragraph “13” “14” “15” “16” and “17” of the respondents’ statement of claim. Indeed, submits learned respondents counsel, having failed to plead a contrary position, the appellants could not have led evidence on the non-existing averments. Counsel urges that the issue be resolved against appellants. B

On their 2nd issue, learned respondents’ counsel contends that on the totality of the pleadings and evidence of parties the lower court’s decision setting aside the trial court’s judgment cannot be faulted. The lower court, learned counsel submits, considered the case of both sides on the merits. Counsel alluded to page 299 lines 37-40; 300 lines 6-19; 302 lines 21-33; 303 lines 18-20; 306 lines 8-18 of the record showing the extent to which the court below went in considering the case of both sides. The court, he contends, not only realized that the separate cases of the two sides must retain their respective identities but went further to state how the trial court breached that requirement and delved into the errors which necessitated setting the trial court’s judgment aside. Having pitched their case by their pleadings, entirely on acts of possession against that of the traditional history and possession set-up by respondents, appellant’s case, submits learned respondents’ counsel, came squarely within Oputa, JSC’s dicta in *Balogun v. Akanji* (1988) 1 NWLR (Pt. 70) 301 at 322 and the lower court, argues learned counsel brought itself within the purview of this court’s decision in *Balogun v. Akande* (supra). Appellants’ act of possession in the face of respondents’ evidence of traditional history became inconsequential. Learned counsel insists that appellants 2nd issue be resolved against them as well. C D E F

On the 3rd issue, learned counsel for the respondents submits that a party’s case in a suit hangs squarely on the party’s pleadings. G Whereas the appellants by their pleadings have averred the Ikwe stream to be their boundary, the respondent averred to the contrary stating in their pleadings in the two suits that their boundaries go beyond the Ikwe River. The trial court’s finding at page 152 mat Ikwe stream, contrary to what the appellants’ pleaded is not the boundary between the lands of the opposing sides, learned respondents counsel contend, puts a complete end to appellant’s case. Yet the trial court held to the contrary. It is that perverse finding, submits learned respondents’ counsel that the court below reversed at page 300 lines H

12-28 of the record.

On their 4th issue, learned respondents' counsel submits that the lower court entered judgment for the respondent in suit No. HO/4/71 on four grounds that court's acceptance of their traditional history in the suit against appellants' acts of possession in suit No. HO/3/71; preference for respondents' case as to the situs of the Ikwe stream and rejection of appellant's case on same, acts of possession by Usunkwu to Nwanyimuka and her Aro fiend Ojiyi down to Obasi and the failure of the trial Judge to consider the two separate suits in the consolidated case. These are formidable issues which the appellants only scratched in their arguments before this court.

Appellants' cry that the lower court relied only on the evidence of one witness in preferring the traditional history of the respondents to find for them, submits learned counsel, remains feeble. Most certainly, it is further argued, corroboration of evidence is an unknown principle in civil litigation. As a whole, the judgment of the lower court appealed against, submits learned respondents' counsel is so impregnable that appellants, as demonstrated, stand no chance of having it set aside. Learned counsel urges that their 4th issue be resolved in their favour and against the appellants and the appeal with all the issues resolved against the appellants, be dismissed.

The appellants' reply brief is a complete effort to re-argue the appeal. Same is hereby accordingly discountenanced.

Resolution of the 1st and 2nd issues distilled by the appellants in this appeal, in my firm and considered view, evolves from the answers one eventually gives to appellants' query against the lower court's judgment for the respondents; which judgment primarily hangs on respondents' amended "statement of claim in suit No. HO/4/71 incorporating traditional history as a root of title.

Two principles readily come to mind, that parties are bound by their pleadings and that a decision of a court of competent jurisdiction persists until same is set aside on appeal.

It is not in doubt that in the instant case, pleadings were ordered, settled, exchanged and amended. In suit No. HO/3/71, the last in time and therefore relevant pleadings are the amended statement of claim dated 26-6-1987 at pages 45-46 of the record of appeal and the statement of defence dated 11-6-65 at pp. 6-9 of record.

In suit No. HO/4/71 on the other hand, the last pleadings in

time are the amended statement of claim dated 24/6/88 at pages C 81-88 of the record and the further amended statement of defence at pages 115-118 of the record. It is evident from the record of this appeal that the appellants did not oppose respondents' application to amend their statement of claim. Indeed, as submitted by learned respondents' counsel, in spite of the latter's amendment introducing traditional history as their root of title, the appellants in paragraph "5" "6" "7" and "8" of the affidavit in support of their subsequent application to further amend their statement of defence indicated their resolve not to call further evidence in the case. For their significance and ease of reference, these paragraphs in appellants' supporting affidavit are hereunder reproduced. C

"5. That the plaintiffs filed amended statement of claim after we had closed our case as the plaintiffs in the consolidated cases.

6. That I have been informed by my counsel, C.E. Agbu Esquire and I verily believe him, that in order to stream line our defence it is necessary that we file a further amended statement of defence.

7. That I exhibit here to marked exhibit "A" our further amended statement of defence E

8. That we do not intend to call further evidence in this case."

I am in complete agreement with learned counsel to the respondents that given the foregoing position of the appellants as defendants in suit No. HO/4/71, it no longer lies in their mouth to complain that respondents' delay in obtaining leave to and amending their statement of claim had adversely affected their case and the lower court's refusal to so hold entitles them to an interference by this court in that regard. Indeed, as learned respondents' counsel further submitted, both sides amended their pleadings consequent upon the leave granted them by the trial court. F G

In any event, the order of the trial court granting the respondents leave to amend their statement of claim, remains, within the context of S.318 of the 1979 Constitution, the court's decision. My examination of the record of this appeal confirms learned respondents' counsel's submission that the appellants have not appealed against that order. The very order was neither made an issue at and decided by the court H

below nor was leave of this court obtained to raise and argue same as a fresh issue. The applicable principle in this regard is that where an appellant did not appeal against the finding of a lower court, the finding is deemed to be valid, subsisting and the appellate court will not disturb it. Appellants cannot, therefore, be heard on the issue at this stage. The issue as raised and argued is accordingly hereby discontinued. See *Wema Bank Ltd. v. Kurunwi* (1975) NSCC (Vol. 9) 4 at 5, *Adesanoye v. Adetonoye* (1971) NSCC (Vol. 7) 144. Appellants' 1st issue is resultantly resolved against them.

Now, since the appellants cannot make an issue out of respondents delay in amending their statement of claim, the extant pleadings of both sides, in suit No. HO/4/71, therefore, remain respondents' amended statement of claim dated 24th June 1988 and appellants' further amended statement of defence dated 13th February 1989. The success or otherwise of the respondents who are the plaintiffs in that suit depends on their ability to prove the pleaded facts in their amended statement of claim. Paragraphs "13" "14" "15" "16" and "17" of the amended statement of claim of the respondents contain the traditional history averred to as their root of title. The appellants in para. 8 of their further amended statement of defence purport to join issues with plaintiffs/respondents on their root of title thus:-

"8. The defendants deny paragraph "13" "14" "15" "16" and "17" of the amended statement of claim and stated that the traditional history of the plaintiffs is fabricated."

It is significant to add that further to the foregoing pleadings, the respondents herein had also pleaded the features and boundaries of the land in dispute in paragraphs "3" "4" "5" "6" "7" and "8". Significantly, the land they claim which is the same land the appellants claim in suit No. HO/3/71, is bounded on North by Owoko stream, in the South by the Nrurumiri and the Iyi-Orie stream runs demarcating the land in dispute from the land of the Umuafai people. Such other features as pleaded in the listed paragraphs specify the land in dispute in relation to such other surrounding lands.

The appellants in paragraphs "3" and "4" pleaded the boundaries of the land in dispute as well as their root of title. In paragraph 3 of their amended statement of claim it is *inter-alia* averred thus:-

"...The parcels of land now in dispute are known as Ngboko,

Umudoju Airo Obulo land ... The parcels of land are in Nkahu in Dikenafai and are shown in plan number SE ^ EC5OA/66/73 which was filed already in court. The boundaries of the said parcels of land are clearly shown in the plan. Separating the land in dispute and that of the plaintiffs' village from the defendants' land is a stream known as Ikwe. The stream is' the boundary of plaintiffs and the defendants land. Both parties always kept to this boundary until the dispute." B

Paragraph 4 on the appellants' root of title reads:-

"4. The lands in dispute have been in the ownership and possession of the plaintiffs' family from time immemorial. The plaintiffs have exercised acts of ownership and possession in and over the said lands including farming thereon, cutting economic trees and tapping palm tress. The plaintiffs' juju is also placed on the said land. Members of the plaintiffs' family also live in Obiulo land." C

It is glaring from the pleadings of the parties in the two suits D that the facts the appellants pleaded as their root of title in suit No. HO/3/71 which facts constitute their defence in suit No. HO/4/71 is ownership and possession of the land in dispute from time immemorial. The respondents' root of title, on the other hand, is the traditional history they pleaded in suit No. HO/4/71 on which they also E solely relied as defence in suit No. HO/3/71.

The complaints levied against the lower court's decision in respect of the other three issues distilled by the appellants are essentially that the court did not adequately consider their case and that the traditional account given by the respondents is not of such quality F to warrant the indulgence the lower court obliged respondents.

Be it outrightly stated that as a general rule the appellants who have pleaded acts of possession as their root of title to the land in dispute are relying on the presumption that possession is nine-tenth G of the law and that being in possession they are by section 146 of the Evidence Act presumed to be the owners. It is appellants' assertion, therefore, that the onus of proving that they are not the owners of the land in dispute is on the respondents who affirms to the contrary. H The respondents who have pleaded traditional history as their root of title defeat the claim of the appellants where the court finds their traditional evidence conclusive. Where the respondents' traditional account is however found to be inconclusive, it then becomes mandatory for the court to look at the acts of possession of the two sides

in determining on whose side the presumption operates. See Balogun v. Akanji (2005) 10 NWLR (Pt. 933) 394 and Oyadare v. Keji (2005) 7 NWLR (Pt. 925) 571. The question to answer is to what extent did the court below comply with the principles enunciated in these cases given the facts of the instant case?

B In allowing respondents' cross-appeal and setting aside the judgment of the trial court in favour of the appellants the court below firstly held at pages 299 lines 37-40, thus:-

C *"The learned trial Judge held that there was no denying the fact that the defendants/appellants gave Obasi permission to live on the land, that he and his descendants paid tribute to the defendants/appellants' ancestors and to the present defendants/appellants and that Obasi died and was buried there.*

D *The second fact was in regard to the claim by the plaintiffs/appellants that Ikwe stream formed the boundary between them and the defendants/appellants. The defendants/appellants said the stream runs through their land and that they live on both sides of it. The learned trial Judge accepted the version of the defendants/appellants which was even supported by a witness of the plaintiffs/appellants.*
E *He said..."*

The lower court further reasons for the interference with the findings of trial court are supplied at p. 302, lines 21-33 as follows:-

F *"It must be realized that the plaintiffs/appellants did not say how they got to or came to own the land. It is not enough for them to simply deny, the traditional history of the defendants/appellants. They must either put forward a contrary history or adduce such an overwhelming evidence of acts of ownership and possession numerous and positive and covering a long period to make the traditional*
G *history of the defendants/appellants un-maintainable that the only inference will be that although the plaintiffs/appellants had no history; they do not owe their presence on the land to the defendants/appellants. The learned trial Judge failed to perform that simple primary function and he cannot be seen to have done so..."*

H The lower court, having found that the trial court had failed to properly evaluate the cases of the parties and drawn the correct inferences, embarked upon that exercise at pages 303-304, lines 6-40 and 1 -7 respectively by dealing with appellants case first thus:-

"The evidence of Innocent Okwaraojinaku, 1st plaintiff in suit

No. HO/3/71, who testified as P.W.1 on acts of ownership and possession is not much of substance. On question of Obasi who he claimed they put on the land, conflicted with P.W.5 and said Obasi and his children were driven away from the land and that he was not buried there. Whereas P.W.1 said Obasi and his wife were buried on the land. I have already said that the learned trial Judge rejected the plaintiffs/appellants' version and preferred the defendants/respondents' story. That story is founded on the traditional history of ownership of title relied on by the defendants/appellants. In all the circumstances of the case, the plaintiffs/appellants did not satisfy the principle in *Ewo v. Ita* (supra) ...”

Rationalizing why the errors of the trial court must be corrected, the lower court continued as follows:-

“The farming activities indicated in their survey plan, exhibit “A”, are largely those, carried out after these suits were first filed in D 1964. The claim that Ikwe stream was their boundary with the defendants/appellants founded their claim on false assertion. So, the question for their being in possession from the immemorial was baseless, and not supported by evidence.”

The court then proceeded to consider the case of the respondents thus:-

“The defendants/appellants on the other hand gave clear evidence of traditional history and some acts of ownership and possession in addition. They indicated also some juju shrines of theirs on the land and called their juju priest, Anowo Okpara (P.W.7), to testify.”

Having weighed the case of each side on the imaginary scale, the court below held as follows:-

“In the circumstances of the case presented by either side, the defendants/appellants were entitled to succeed in reliance on their traditional history which the learned trial Judge ought to have accepted if he had not made the grave error of saying it was inconclusive. The law is that evidence of traditional history which is not contradicted or in conflict and is cogent is sufficient to support a claim for declaration of title. See *Alade v. Lawrence Awo* (1954) 4 SC 215 at 228; *Akhionbare v. Omoregie* (1976) 12 SC 11 at 27.”

The court continued thus:-

“It is only where and when traditional evidence is inconclusive

that the court will be obliged to look at the acts of possession of the parties and therefore determine on whose side the presumption in section 145 of the Evidence Act will operate.” And concluded thus:-

“In the case at hand on appeal where the trial court held that the traditional evidence led was conclusive, there was no need whatsoever to require further proof.”

I cannot agree more. The duty of an appellate court is to particularly ensure that the decision appealed against draws from the admissible evidence on record from which the trial court’s decision must necessarily arise. A step-by step account of how the lower court arrived at its decision, as attempted above, shows how meticulous the court has been. The pitfalls the trial court allowed itself to be enmeshed in have all been demonstrated by the court below thereby rendering its judgment in that regard unassailable. The appellants have also accused the court of relying on respondents’ hearsay traditional history. Though it is true that evidence of traditional history is by the strict rules of evidence hearsay and inadmissible, it is however, by section 44 of the Evidence Act which provides that where title to or interest in family or communal land is in issue, evidence of family or communal tradition concerning such title or interest is relevant. See Ewo v. Ani (2004) 3 NWLR (Pt. 861).

It must further be stressed at this stage that the plaintiff in each of the cases in the consolidated suit that led to the judgment of the court below appealed against succeeded only where he has ascertained the identity of the land in dispute and its boundaries with precision. In Okoko v. Dakolo (2006) All FWLR (Pt. 336) 201, (2006) 14 NWLR (Pt. 1000) 401 this court restated the importance of the evidence of boundary in land disputes giving it a centre stage because it places the court in a good position to determine ownership with aid of other evidence. See also Onu v. Agu (1996) 5 NWLR (Pt. 451) 652; Ekpemupolu v. Edremoda (2009) All FWLR (Pt. 473) 1270, (2009) 8 NWLR (Pt. 1 142) 166 and Ayuya v. Yonrin (2011) All FWLR (Pt. 583) 1842, (2011) 10 NWLR (Pt. 1254) 135.

In the case at hand the necessity of establishing the identity of the land claimed by each of the two plaintiffs in the two consolidated

suits is as stated by the trial court at page 152 lines 14-23 of the record as follows:

"From the pleadings, evidence and plans, the issue is whether the Ikwe stream is the boundary separating the two lands, in which case the area called Uhumueleke including the portion verged yellow (old habitation) in dispute becomes part of the plaintiffs' land or whether the defendants' land of Umuchoke, Umuazu, Okwe extends over Ikwe stream in which case, the area shown in exhibit D as the land in dispute which marked across the Ikwe stream forms part of the defendants' land therefore theirs."

The court's finding in respect of this fundamental issue reads:-

"I am satisfied and find as a fact that the Ikwe stream is not the boundary between the plaintiffs and the defendants' lands and that the defendant's land extends across to the other side of Ikwe stream including the area verged yellow on the Western side to the old habitation of the defendants and 'Uhu-Umuleke' land having 'Nkora' as boundary with the land of Umueju people of Dekenafai."

The court below affirmed the trial court's foregoing finding at page 100, lines 12-28 of the record of appeal thus:-

"The second fact was in regard to the claim by the plaintiffs/appellants that Ikwe stream formed the boundary between them and the defendants/appellants. The defendants/appellants said the stream runs through their land and that they live on both sides of it. The learned trial Judge accepted the version of defendants/appellants which was even supported by a witness of plaintiffs/appellants."

It is amazing and the lower court had so held that trial court in spite of its finding that the appellants did not establish with certainty the identity of the land in dispute proceeded to find for them.

By their remaining issues the appellants are saying that the findings of the court below are erroneous and we must revisit them. I am of the humble but firm and considered view that they are not entitled to that relief. The lower court has in the exercise of its appellate powers complied with all the necessary principles it should.

It is for that particular reason that appellants' 2nd and 3rd issues are resolved against them and the appeal, with all the grounds of appeal in the appellants' notice of appeal having failed, held to be unmeritorious. The appeal is resultantly dismissed. The lower court's

decision is accordingly hereby affirmed. Parties are to bear their respective costs.

ONNOGHEN JSC

B I have had the benefit of reading in draft the lead judgment of my learned brother, M.D. Muhammad, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

C I therefore order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

D I was privileged to have read the lead judgment of my learned brother, Musa Dattijo Muhammad, J.S.C. I entirely agree with the conclusion reached by my learned brother. I have nothing more to add I too dismiss the appeal as unmeritorious.

E

NGWUTA JSC

F I read in draft the lead judgment just delivered by my Lord, Muhammad, J.S.C. I entirely agree with the reasoning and conclusion.

Therefore, I also dismiss the appeal as lacking in merit.

ARIWOOLA JSC

G My learned brother, Dattijo Muhammad, J.S.C. obliged me with the draft of the lead judgment just delivered. I am in agreement with the reasoning therein and the conclusion beautifully arrived thereat. I have nothing more to add. I also hold the appeal to be
H devoid of any merit. It is liable to dismissal.

Accordingly, it is dismissed. I abide by the consequential orders including order on costs. Appeal dismissed.