

SUPREME COURT OF NIGERIA
FRIDAY 14TH MARCH, 2014. SC. 20/2004
CORAM:- J. A. FABIYI, M. U. PETER-ODILI,
O. ARIWOOLA, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC

CHIEF WAHAB GBEMISOLA APPELLANT
(For himself and on behalf of
Alomo Chieftaincy family)

AND

1. JOHN BOLARINWA
2. ALHAJI TIAMIYU OYEBESI RESPONDENTS
(For themselves and on behalf of
Onigboho of Igboho Chieftaincy family)

ACTIONS - Judgment - Estoppel - Plea of - Party may be precluded from contending the contrary of any precise point - That had been distinctively put in issue - And determined with certainty against him (H1)

ACTIONS - Pleadings - Estoppel - Defence of - Where pleadings are necessary - Estoppel should be set up with sufficient particulars - To show plaintiff the basis on which he is estopped from re-litigating (H2)

LAND LAW - Title - Proof - Respondents are entitled to the declaration they seek from trial court - Since they have beside the traditional history - Pleaded two other modes to prove title to land (H3)

APPEALS - Concurrent findings - Supreme Court is slow in setting aside such findings - As it allows appeals on the findings on the basis that the same are perverse (H4)

LAND LAW - Title - Traditional history - Test - Kojo II v. Bonsie - Best way to test such history is by reference to facts in recent years - As established by evidence in relation to land in dispute (H5)

LAND LAW - Trespass - Damages - Plaintiff is entitled to nominal

1130 Gbemisola v. Bolarinwa (2014) 3 KLR (pt. 343) 1129:

damages for trespass - Even if no loss is caused - And if loss is caused
- Same is recovered according to general principle (H6)

FACTS

Before the High Court of Oyo State, plaintiffs/respondents instituted this action against defendant/appellant, claiming declaration of title in respect of the disputed land, damages for continuing trespass and perpetual injunction restraining appellant from trespassing on the land. To prove their case, respondents gave evidence of traditional history of how their ancestors settled on the land. Respondents further pleaded and gave evidence of numerous positive and unequivocal acts of possession they exercise on the land as shown in Exhibit P1 (their building plan). They also placed reliance on section 46 of the Evidence Act arising from their acts of possession and enjoyment of other lands connected with the land in dispute.

Appellant on the other side relied on traditional history and acts of possession claiming that it was one Alafin Egungunmoju who founded the land in dispute and that one Alomo who came to the town with Alafin Egungunmoju was allotted land which is now known as Jakuta Quarters from where he granted part to respondents' ancestor (Tondi). Appellant pleaded the boundaries of his land but did not file a plan. At the end of hearing, the court believed the evidence and case as presented by respondents. It therefore granted respondents the reliefs they sought. Aggrieved, appellant appealed to the Court of Appeal Ibadan Division. The court heard and dismissed the appeal and affirmed the judgment of the trial court. Still dissatisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the Lower Court was right in affirming the decision of the court of first instance based on respondents’ evidence that Igboho was founded and settled upon by their ancestor, one Tondi in spite of the settled and notorious historical facts that Igboho was founded and settled upon by the Alaafin Egungunmoju and various judicial pronouncement that respondents said evidence is false.

(ii) Whether the case of Kojo II V. Bonsie (1957) 1 WLR 1223 at 1226 is applicable to this cases.

(iii) Whether the lower court was right in affirming the award of damages by the court of first issue.”

HELD (Unanimously dismissing the appeal per MUHAMMAD JSC)

Judgment - Estoppel - Plea of

1. I agree with learned appellant counsel that in a proper case, a party may be precluded from contending the contrary of any precise point that had been distinctively put in issue and solemnly determined with certainty against him. The defence avails the party who raises it whether the issue involved in the earlier decision is one of law or fact or one of mixed law and fact. The principle however ensures if all the preconditions to a valid plea of the defence are met. These are: (i) the same question was decided the earlier proceeding the judicial decision which creates the estoppel is final and (iii) the parties to the judicial decision or their privies were the same as those the subsequent proceedings wherein the plea of estoppel is raised. It does not matter that the judgment being relied upon as an estoppel, which appears to be what the appellant herein seeks to do, is a judgment in rem. Being contra mudum, a judgment in rem binds parties and their privies and non-parties as well. (p. 1141 A)

Pleadings - Estoppel - Defence of

2. Learned respondents' counsel still insists that because parties in the case at hand have not joined issues by their pleadings at the trial court or by any other means on the point decided by this Court in Atoyebi V. Governor of Oyo State (supra), the appellant cannot presently raise the plea. I cannot agree more.

The case at hand is being fought on pleadings. A perusal of the pleadings, particularly that of the appellant, bears out the respondents that the defence of issue estoppel the appellant seeks to raise has not been averred to. The judgment of this Court in Atoyebi V. Governor of Oyo State (supra) the appellant hinges his plea upon is as contained in the law report he cites. This fact is alluded to only in the appellant's

brief. The certified copy of the judgment and/or the proceedings leading to the judgment have neither been pleaded nor Exhibited. Learned respondents counsel is right that by the facts of the case at hand, having not pleaded the facts on the basis of which he raises the defence, the law does not entitle
 B **the appellant to persist in his bid. It is indeed the law that where pleadings are necessary, estoppel should properly be set up as a plea in defence with sufficient particulars to apprise the plaintiff the basis on which he is estopped from re-litigating the particular case or issue. Where there are no**
 C **pleadings the defence should be raised by evidence at the earliest opportunity. (p. 1141 H)**

LAND LAW - Title - Proof

D **3. Learned appellant counsel appears to persist in the misapprehension that respondents' claim is founded only on traditional history. Learned counsel refused to appreciate that beyond their traditional account the respondents also averred to and led evidence in respect of two other modes in proof of**
 E **their title.**

The point must be restated that besides traditional history the record of appeal clearly shows that the respondents had pleaded and led evidence in respect of the two other modes the law recognises title to land could be proved. Proof of their
 F **case on the basis of any of the three modes they relied upon in their pleadings entitles the respondents to the declaration they seek from the trial court. The lower court's affirmation of the trial court's finding that respondents having proved their case**
 G **are entitled to the declaration they seek remains sustainable on any of the two other modes the respondents relied upon and clearly proved by evidence on the record as well.**
 (pp. 1143 E/1147 F)

H *APPEALS - Concurrent findings*

4. Learned respondents counsel has stated the principle correctly that this Court is very slow in setting aside the concurrent findings of fact. The court allows appeals on the basis of these findings only where it is successfully established that

the findings are perverse. A finding or decision of a court may be perverse for more reasons than one: where the court ignored facts or evidence; misconceived the main thrust of the case it adjudicated upon, or took irrelevant matters into account as the basis of its decision or went outside the issues canvassed by the parties to the extent of jeopardizing the merit of the case or committed various errors which faulted the case before it beyond redemption and all of or either of which lapses occasioned miscarriage of justice. It is only then that the appellate court interferes by setting the finding or decision aside. (p. 1146 D) B
C

LAND LAW - Title - Traditional history - Test

5. The best way to test traditional history, it has been held Kojo II V. Bonsie (supra), is by reference to facts in recent years as established by evidence in relation to the land in dispute. With passage of time, the traditional history relied upon by contending parties to make out their respective cases through accounts of witnesses become very hazy rendering it very difficult for the court to decide which side's account to prefer. The principle in Kojo II V. Bonsie entitles the trial court to rely on recent facts adduced by the two sides in determining which of the two historical accounts pertaining the land in dispute is more probable. (p. 1147 A) D
E
F

Trespass - Damages

6. It is idle to challenge the award (not the quantum) of damages against the appellant arising from his trespass established by the evidence on record. The law is that a plaintiff is entitled to nominal damages for trespass even if no damage or loss is caused and if damage or loss is caused same is recovered according to general principle. (p. 1148 C) G

NOTABLE POINT OF INTEREST H

MUHAMMAD JSC

1. Five ways to prove title to land

Learned respondents' counsel is on a firm terrain in his submission

that the law recognises five ways of proving title to land and the respondents are at liberty to rely on one or more of these modes if merely to make assurance doubly sure. In *Idundun & Ors V. Okumagba* (1976) 9 & 10 SC 227, a case cited by learned respondents counsel, this Court at pages 246-250 of the report set out the five different ways of proving of any land in dispute in our courts to include: (1) By traditional Evidence (2) By production of duly authenticated documents of title unless they are documents twenty years old or more that are produced from proper custody (3) Acts of possession in and over the land in dispute extending over a sufficient length of time, numerous and positive enough as to warrant the inference that the persons thus in possession are the true owners (4) Acts of long possession and enjoyment of other land situated and connected with the land in dispute by locality or similarity that the presumption under Section 45 of the Evidence Act applies and the inference can be drawn that what is true of the one piece of land is likely to be true of the other piece of land and (5) Proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would in addition, be the owner of the land in dispute. (p. 1143 F)

REPRESENTATION

S. B. Ajayi, for the Appellant

F R. A. Ogunwole (SAN), with O. Oni, for the Respondents

CASES REFERRED TO

Kojo II v. Bonsie (1957) 1 WLR 1223

Atoyebi v. Gov. of Oyo State (1994) 5 SCNJ 62

G Idundun v. Okumagba (1976) NMLR 200

Fadiora v. Gbadebo (1978) 3 SC 219

Abraham v. Olorunfemi (1991) 1 NWLR (pt. 155) 53

Romaine v. Romaine (1992) 4 NWLR (pt. 238) 668

Tiza v. Begha (2005) 5 SC 1

H Fagunwa v. Adibi (2004) 7 SC (pt. 11) 99

Adebayo v. Babalola (1995) 7 NWLR (pt. 408) 383

Shanu v. Afribank Nig. Plc (2002) 17 NWLR (pt. 795) 185

Bwacha v. Ikenya (2011) 1-2 SC (pt. 11) 186

Sosan v. Odemuyiwa (1980) 1 NSCC 673

Adone v. Ikebodu (2001) 7 SC (pt. 111) 22

Balogun v. Akanji (1988) 1 NWLR (pt. 70) 301

Adewuyi v. Odukwe (2005) 14 NWLR (pt. 945) 473

STATUTE REFERRED TO

Evidence Act 2004, ss. 34, 46, 109, 111, 112

B

LEAD JUDGMENT BY MUHAMMAD JSC

This is an appeal from the judgment of the Ibadan Division of the Court of Appeal, hereinafter referred to as the lower court, in appeal No.CA/I/6/99 delivered on the 4th day of November, 2003 affirming the judgment of the Oyo State High Court, hereinafter referred to as the trial court, in Suit No.HSK/26/92. C

Briefly put, the facts of the case are that the respondents as plaintiffs had sued the appellant, defendant at the trial court, for declaration of title in respect of the tract of land situate, lying and being at Oke Igboho, stretching behind Oke Igboho Baptist Primary School down to Akuro and up to Sanya Dam, Igboho in Orelope Local Government area of Oyo State; N50,000 damages for continuing trespass since 1991 and perpetual injunction to restrain the defendant, his agents or privies or any person whosoever claiming through or under him from committing further acts of trespass on the land in dispute. D E

In proving their case, besides traditional history, the respondents pleaded and gave evidence of numerous positive and unequivocal acts of possession they exercise on the land in dispute as shown in Exhibit “P1”, their building plan. They also relied on section 46 of the Evidence Act arising from their acts of possession and enjoyment of other lands connected with the land in dispute. F G

The Appellant also relied on traditional history and acts of ownership.

The 1st respondent and through five other witnesses testified at the trial court that the land in dispute was founded by Prince Tondi who had sojourned to Igboho from Eruwa having lost a chieftaincy title to his younger brother. Igboho was then a mountainous jungle of many caves inhabited by numerous reptiles. Having founded Igboho, Tondi in company of his three wives and others settled at Igbo Iho. They named the river in the wilderness they settled Sanya. H

Having settled and fully controlled the vast land, Tondi whose people had gone into farming, allowed portions of the land he founded to persons who subsequently came by Igboho. Jakuta quarters was the last portion of the land Tondi founded which piece he gave to defendant's forefathers. Olomo was their head and Appellant's ancestor. The boundaries of the land in dispute is demarcated red on respondents, plan No ADAKS 59D/09/94, Exhibit "P1".

Appellant's defence is that their ancestor was granted the tract of land by the Alafin Egungunoju who founded Igboho. The appellant comes from the Olomo Chieftaincy family and contends that the Olomo family was never under the Onigboho of Igboho. Tondi, the respondents, ancestor, the appellant further contends, got lost in the course of his hunting adventure and was discovered by Boni of Isale in the Igboho wilderness. The latter handed over Tondi to Alafin Egungunoju. The Alafin quartered Tondi in the Olowo Njaye compound of Igboho. The land in which the Okehe Baptist primary School is situate, it is appellant's further case, was granted by Alomo through Onigboho.

At the end of trial, including addresses of counsel, the trial court found merit in respondents' case and granted them the entire reliefs they urged on the court. Dissatisfied, the appellant appealed to the lower court. Finding no merit in the appeal, the lower court dismissed same and affirmed the trial court's judgment. The appellant has further appealed to this Court on a Notice containing four grounds.

Parties have filed and exchanged briefs of arguments in compliance with the Rules of this Court. They adopted the briefs at the hearing of the appeal on 17th December, 2013. The appellant distilled three issues on the basis of which he urges us to determine the appeal. The issue reads:-

"(i) Whether the Lower Court was right in affirming the decision of the court of first instance based on respondents' evidence that Igboho was founded and settled upon by their ancestor, one Tondi in spite of the settled and notorious historical facts that Igboho was founded and settled upon by the Alaafin Egungunoju and various judicial pronouncement that respondents said evidence is false.

(ii) Whether the case of Kojo II V. Bonsie (1957) 1 WLR 1223 at 1226 is applicable to this cases.

(iii) Whether the lower court was right in affirming the award

of damages by the court of first issue.”

The two issues the respondents formulated in their brief for the determination of the appeal read:-

“5.01 Whether the lower court was right in confirming the decision of the learned trial judge in his application of the principle of law in Kojo II v. Bonsie (1957) 1 WLR at 1226 without recourse to the case of Atoyebi & Anor v. Governor of Oyo State & Ors (1994) 5 SCNJ 62 and/or ‘The History of the Yoruba’s by Samuel Johnson.

5.02 Whether in all the circumstances of this case, the lower court was right in confirming the decision of the learned trial judge on the award of damages in favour of the Respondents.”

The appeal will be determined on the basis of the issues distilled by the appellant.

It seems to me that appellant’s overriding grouse under the three issues he proffers for the determination of the appeal relates to the lower court’s affirmation of the trial court’s judgment in spite of the latter’s refusal to be bound by the decision of this Court in Atoyebi & anor v. Governor of Oyo State and others (1994) 5 SCNJ 62 at 69.

Appellant’s secondary complaint is to the effect that given the finding of this Court in the Atoyebi & anor V. Governor of Oyo State and others (supra) that Tondi whom the respondents assert to be the founder of Igboho, including the land in dispute, never was but instead appellant’s ancestor was the original founder of the Igboho Chieftaincy house, the bottom had long ago been taken out of respondents claim.

Expatiating, learned appellant counsel submits that the law recognises Traditional history as one of the five ways of proving title to land. In the case at hand, learned counsel further submits, whereas the respondents as plaintiffs assert that Tondi, their ancestor, was the founder of Igboho, the appellant in joining issue with the respondents contends that Alaafin Egungunaju from whom Alomo, their ancestor, derived title, was the founder of Igboho. Appellant’s position, submits learned appellant counsel, in the light of the decision of the Supreme Court in the Atoyebi & anor V. Governor of Oyo State and others (supra), must prevail. The apex Court, learned counsel submits, had affirmed the 1972 finding of Adenekan Ademola J, as he then was, that Tondi was never the founder and owner of Igboho.

Instead, learned counsel further submits, the apex Court on the basis the traditional history of the parties in the *Atoyebe & anor V. Governor of Oyo State and others* (supra) held Alepata rather than Onigboho to be the overlord chief in Igboho. This finding of the Supreme Court, contends learned appellant counsel, puts appellant's traditional history on a higher pedestal and the lower court's affirmation of the trial court's contrary finding on the issue manifestly wrong.

The effect of the Supreme Court's decision in the *Atoyebe & anor v. Governor of Oyo State and others* (supra) dovetails into appellant's arguments under his second issue. The apex Court's finding since 1994 that Tondi never founded Igboho cannot be ignored, submits learned appellant counsel, by any subordinate court in this country. The effect of the finding of the apex Court in *Atoyebe and anor V. Governor of Oyo State and others* (supra) is that respondents' historical account is false. Resultantly, it is contended, the account cannot be on the same pedestal as the account the appellant proffers. Where appellant's traditional history is manifestly stronger than that of the respondents, the principle enunciated in *Kojo II V. Bonsie* (1957) 1 WLR 1223 at 1226 becomes inapplicable. It is only where the traditional accounts of the two sides remain in conflict such that the court does not know on whose account to rely that a court by the principle in *Kojo V. Bonsie* (supra) resorts to acts of recent possession of the two sides to resolve the conflicting claims of the parties. The lower court's affirmation of the trial court's wrong application of the principle in *Kojo II V. Bonsie* (supra) having caused miscarriage of justice, contends learned counsel, requires to be interfered with.

Adopting their arguments under the 1st and 2nd issues, learned appellant counsel insists that the respondents have not proved their case and the affirmation of the trial court's erroneous decision by the lower court being perverse must be set-aside. The trial court's award of damages to the respondents for trespass was based on respondents evidence of recent acts of possession it found to be more probable.

This decision is only sustainable, argues learned counsel, on the proof of trespass by the respondents in relation to the land in dispute. Where the evidence adduced by the respondents is shown to be incapable of establishing their right to the land they allege the

appellant stands in trespass of, respondents claim must fail. Learned appellant counsel urges the resolution of all the three issues as well as the determination of the appeal in their favour.

Responding, learned respondents' counsel submits that appellant cannot be right in his contention that the lower court's affirmation of the trial court's decision was done in ignorance of the Supreme Court's decision in *Atoyebi V. Governor of Oyo State* (1994) 5 SCNJ 62. The decision, it is argued, was neither an issue at the lower court nor in this Court. Although the respondents had in paragraph 22 of their amended statement of claim signified an intention to ostensibly rely on "*a number of cases now pending in the High Court, Court of Appeal and in the Supreme Court,*" the respondents had at the end of trial sought and obtained leave from the trial court to delete that last sentence of paragraph 22. Having not led any evidence on the said portion of their pleading, the trial court in indulging them deleted that part of respondents' pleadings.

Learned respondents' counsel further contends that since parties had neither pleaded nor joined issues on the judgments in Suit No HOY/12/72 and *Atoyebi V. Governor of Oyo State* (supra), appellant cannot now raise the plea. By the combined operation of Sections 109, 111 and 112 of the Evidence Act 2004, learned counsel further submits, a law report does not constitute a certified true copy of the judgment it reports. The two judgments the appellant alludes to can neither be relied upon to contradict a witness under Section 34 of the Evidence Act nor support facts that had neither been pleaded nor established. Again, from the pleadings and evidence in the instant case, argues learned counsel, it is evident that the parties as well as the subject matter in *Atoyebi V. Governor of Oyo State* (supra) are not the same as in the instant case. The earlier case, submits learned counsel, cannot rule the instant case.

Further arguing the first issue for the determination of the appeal, learned respondents counsel submits that appellant appears to have forgotten that respondents had pleaded three main modes the law entitles them to in proving their title. Apart from their traditional account, it is submitted, they also relied on acts of possession and Section 46 of the Evidence Act in relation to land connected with the one in dispute. And, learned respondents counsel contends, proof of the averments through all the three modes were given by

the respondents. The judgment of the trial court and indeed its affirmation by the lower court which recognize and endorse the extant principles on the matter cannot be wrong. Most importantly, it is submitted, being concurrent findings of fact, this Court must be slow in tempering with them. Relying inter-alia on *Idundun & Ors V. Okumagba & Ors* (1976) NMLR 200 at 201, *Fadiora V. Gbadebo* (1978) 3 SC 219, at 228-229, *Ito Ekpe* (2000) 2 SC 98 at 105-107, *Abraham V. Olorunfemi* (1991) 1 NWLR (Pt.155) 53 at 61-62 and *Romaine V. Romaine* (1992) 4 NWLR (Pt 238) 668, learned counsel urges that the first issue be resolved against the appellant.

On their 2nd issue, learned respondents counsel refers to paragraphs 23, 24 and 25 of their pleadings, Exhibit “P1”, the evidence of “PW1”, Mr. Adetunji Adeleke, their licensed surveyor, at page 40 lines 1-3 and 30 and the testimonies of “PW5” and “PW6” at page 49 lines 4-7 and page 54 line 29 to page 55 lines 1-7 all in proof of appellant’s act of trespass and further submits that the appellant, who had not filed any survey plan gave conflicting evidence of the boundaries of the land in dispute through his witnesses in contesting respondents case. Learned respondents counsel contends that the conclusion of the trial court at page 109 lines 28-32 of the record as affirmed by the Court of Appeal at page 186 of lines 14-30 the record cannot be faulted. These are concurrent findings of fact that draw from the evidence on record and have necessarily to persist. Relying on *Tiza V. Begha* (2005) 5 SC 1 at 17, *Idundun V. Okumagba* (supra) and *Fagunwa V. Adibi* (2004) 7 SC (Part 11) 99 at 116, learned counsel urges the resolution of the issue in their favour and the dismissal of the unmeritorious appeal.

Now, the questions to answer in the resolution of the issues the appeal raises and by extension the determination of the appeal are principally whether the lower court has wrongly denied the appellant reliance on the judgment of this Court in *Atoyebi V. Governor of Oyo State* (supra) a judgment he forcefully contends constitutes estoppel by record and whether the concurrent findings of fact of the two courts below can, at this level, lawfully be interfered with.

Appellant’s contention is that since this Court had in *Atoyebi V. Governor of Oyo State* (supra) declared, contrary to what the respondents assert, that Tondi their ancestor is not the original founder of Igboho including the land in dispute, neither party can presently

contend otherwise.

I agree with learned appellant counsel that in a proper case, a party may be precluded from contending the contrary of any precise point that had been distinctively put in issue and solemnly determined with certainty against him. The defence avails the party who raises it whether the issue involved in the earlier decision is one of law or fact or one of mixed law and fact. The principle however enures if all the preconditions to a valid plea of the defence are met. These are: (i) the same question was decided the earlier proceeding the judicial decision which creates the estoppel is final and (iii) the parties to the judicial decision or their privies were the same as those the subsequent proceedings wherein the plea of estoppel is raised. See Adebayo V. Alhaji Yakubu Babalola & 2 Ors (1995) 7 NWLR (Pt 408) 383, Shanu & Anor V. Afribank Nigeria Plc (2002) 17 NWLR (Pt.795) 185 and Hon Emmanuel Bwacha V. Hon Joel Danlami Ikenya & 2 Ors (2011) 1-2 SC (Pt.11) 186. ***It does not matter that the judgment being relied upon as an estoppel, which appears to be what the appellant herein seeks to do, is a judgment in rem. Being contra mudum, a judgment in rem binds parties and their privies and non-parties as well.*** In Sosan & Ors V. Odemuyiwa (1980) 1 NSCC 673 this Court at pages 680 of the report not only distinguished between a judgment in rem and one in personam but restated the principle on estoppel thus:-

“The rule of estoppel per rem judicatam may also apply in the case of a decision or judgment in rem. In such a case the decision is binding both on parties (or privies) as well as on non-parties whether it is used as a foundation of an action or relied upon as a bar... a judgment is in rem when and where it is a solemn pronouncement upon the status of a particular subject matter. The term judgment in rem is clearly understood in law as a judgment of a court of competent jurisdiction determining the status of a person or thing or the disposition of a thing. The action which ends in such a judgment should be an action filed for such determination...”

Learned respondents’ counsel still insists that because parties in the case at hand have not joined issues by their pleadings at the trial court or by any other means on the point decided by this Court in Atoyebi V. Governor of Oyo State

(*supra*), **the appellant cannot presently raise the plea. I cannot agree more.**

The case at hand is being fought on pleadings. A perusal of the pleadings, particularly that of the appellant, bears out the respondents that the defence of issue estoppel the appellant seeks to raise has not been averred to. The judgment of this Court in *Atoyebi V. Governor of Oyo State (supra)* the appellant hinges his plea upon is as contained in the law report he cites. This fact is alluded to only in the appellant's brief. The certified copy of the judgment and/or the proceedings leading to the judgment have neither been pleaded nor Exhibited. Learned respondents counsel is right that by the facts of the case at hand, having not pleaded the facts on the basis of which he raises the defence, the law does not entitle the appellant to persist in his bid. It is indeed the law that where pleadings are necessary, estoppel should properly be set up as a plea in defence with sufficient particulars to apprise the plaintiff the basis on which he is estopped from re-litigating the particular case or issue. Where there are no pleadings the defence should be raised by evidence at the earliest opportunity. See *J. O. Awiawo & another V. Attorney General North Central State & 2 ors* (1973) 6 SC 34 at 38 and 39, *Sosan & ors V. Odemuyiwa* (1986) 1 NSCC 673 at 68 and *Okafor Adone & ors V. Ozo Gabriel Ikebudu & Ors* (2001) 7 SC (Pt.111) 22.

In *Clay Ind (Nig) Ltd V. Aina* (1997) 8 NWLR (Pt.516) 208 at 229 this Court held that as a general principle of the law, estoppel must be pleaded before the trial court otherwise it cannot be raised on appeal. More particularly, in *Odi V. Iyala* (2004) 8 NWLR (Pt.875) 283 at 306, the court specifically held thus:-

"Is brief the forum to raise the special defence of estoppel per rem judicatam? I think not. The case must be made out in the pleadings before argument can be taken on it in the brief on appeal. The law is elementary that estoppel per rem judicatam is a special defence available to a defendant, which must be specifically pleaded in the statement of defence. See Egbe V. Adefarasin (1987) 1 NWLR (Pt.47) 1; Sosan v. Ademuyiwa (1986) 3 NWLR (Pt.27) 241; Oshodi v. Eyifunmi (2000) 13 NWLR (Pt. 684) 298. In the circumstances, I will not consider the supplementary brief in this appeal." The forego-

ing catches up with the appellant and it is for that reason his 1st issue, respondents 1st also, is hereby resolved against him.

Under his 2nd issue, the appellant seeks to know whether the principle in *Kojo II V. Bonsie* (supra) has rightly been applied in the instant case by the two courts below. It is argued all over again that this Court having held in *Atoyebe V. Governor of Oyo State* (supra) that Tondi, respondents' ancestor, was never the founder of Igboho which includes the land in dispute, respondents' traditional history ipso facto collapses. Respondents' very weak traditional account cannot, therefore, compete with appellant's account. The recourse to recent acts of possession of the two sides by the two courts when the traditional accounts of the two sides, given the decision of the Supreme Court in the *Atoyebe V. Governor of Oyo State* (supra), are no longer in conflict such that the one cannot be preferred against that of the other, is perverse.

Now, for all the reasons adumbrated earlier in this judgment in resolving his 1st issue against him, appellant's 2nd issue must also fail. The plea of estoppel the appellant raised and by virtue of which he urged that the respondents be estopped from further grounding their title on traditional history that had already been pronounced upon, as correctly contended by learned respondents' counsel, remains unavailing to the appellant.

Secondly, ***learned appellant counsel appears to persist in the misapprehension that respondents' claim is founded only on traditional history. Learned counsel refused to appreciate that beyond their traditional account the respondents also averred to and led evidence in respect of two other modes in proof of their title.*** Learned respondents' counsel is on a firm terrain in his submission that the law recognises five ways of proving title to land and the respondents are at liberty to rely on one or more of these modes if merely to make assurance doubly sure. See *Balogun V. Akanji* (1988) 1 NWLR (Pt 70) 301 at 321. In *Idundun & Ors V. Okumagba* (1976) 9 & 10 SC 227, a case cited by learned respondents counsel, this Court at pages 246-250 of the report set out the five different ways of proving of any land in dispute in our courts to include: (1) By traditional Evidence (2) By production of duly authenticated documents of title unless they are documents twenty years old or more that are produced from proper custody (3) Acts of pos-

session in and over the land in dispute extending over a sufficient length of time, numerous and positive enough as to warrant the inference that the persons thus in possession are the true owners (4) Acts of long possession and enjoyment of other land situated and connected with the land in dispute by locality or similarity that the
 B presumption under Section 45 of the Evidence Act applies and the inference can be drawn that what is true of the one piece of land is likely to be true of the other piece of land and (5) Proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such connected or adjacent land would in
 C addition, be the owner of the land in dispute. See also *Adewuyi v. Odukwe* (2005) 14 NWLR (pt 945, 473, and *Makanjuola V. Balogun* NWLR (Pt.108) 192.

In the case at hand, the respondent from their pleadings in
 D paragraph 3-12, 15-21 of their amended statement of claim as well as paragraphs 3-10 of their amended reply to appellant's statement of defence relied on three distinct modes to establish their root of little to the land in dispute. Apart from traditional history which they specifically averred to in paragraphs 3-9 and 26 of their amended
 E statement of claim, they also pleaded acts of possession respect of the land in dispute paragraphs 3-10 of their amended reply to appellant's amended statement of defence and paragraphs 10-12 and 16-21- of their amended statement of claim. Respondents further resorted
 F to Section 46 of the Evidence Act as a root of their title in paragraphs 12a-15 of their amended statement of claim. In proof of these pleadings, they tendered Exhibit "P1" their plan of the land in dispute and Exhibits "P2-P15", the last of which Exhibits was tendered through DW2, appellant's own witness.

G After summarizing the pleadings and evidence of parties in the case, the trial court at page 107 line 16 to page 108 line 4 of the record of appeal proceeded to hold inter- alia thus:-

*"So far, we have considered traditional evidence which is just one of the five ways of establishing ownership of land as enumerated
 H by the Supreme Court in the case of Idundun Vs. Okumagba (1976) 9 & 10 SC 227. So far since the decision reached is that the evidence of tradition preferred (sic) by the two parties in this case is inconclusive, the case must rest on question of fact. In which circumstance the plaintiffs must prove act of ownership or acts of possession extending*

over a sufficient length of time, numerous and positive enough to warrant the inference that they are the exclusive owners. See Ekpo v. Ita (1932) 11 NLR 68. Let us go back to the factual situation and see how the plaintiffs have been able to discharge the onus placed on them by law.”

The court then held at page 110 of the record thus:-

“I hold the view that the plaintiff, having regard to the facts and the evidence before the court have shown sufficient acts of possession on the land in dispute, numerous and positive enough to warrant the inference that they are the exclusive owners of the land. But that is not the end of the matter.”

The court continued thus:-

“Exhibit P1 clearly shows that the land in dispute is just a small portion of the large track of land that is being claimed by the plaintiffs. In other words, the land in dispute is surrounded by the plaintiffs’ family land in respect of which numerous acts of possession has been carried out. To that extent, I am of the opinion that the plaintiffs are entitled to take advantage of Section 46 of the Evidence Act. I therefore so hold.”

In affirming the foregoing findings of the trial court and the court’s award of damages to the respondents, the lower court found at page 186 of the record firstly thus:-

“What the plaintiff claimed in the court below is a declaration of right to possessory hilt on the land in dispute, under the customary right of possession. See MOGAJI vs ODOFIN 1985 7 S.C. 59 to establish the claim, the court below was entitled to require and consider that the proof of possession by the plaintiff was made to the hilt. The rule in KOJO II vs. BONSIE supra is one such which indicates a proof, to consider acts of recent possession of the land in dispute. In my opinion and I so rule the learned trial judge in the court below was right to consider and determine the person entitled to a declaration of customary right of possession on the land in dispute by considering the acts of recent possession of both parties on the land; and prefer that of the respondent.”

The court further held as follows:-

“The evidence tendered in the court below show; not only that the land in dispute had long been in occupation, possession and exclusive use of the plaintiff; but also that the surrounding areas to

the specific area in dispute; the area including the Baptist Primary School; had continued to be in exclusive possession of the plaintiff. Ordinarily Section 46 of the Evidence Acts application would have assumed possession of the adjoining land to the plaintiffs' land as being in the possession of the plaintiffs. See THOMAS vs HOLDER
 B *13 WACA; IDUNDUN vs OKUMAGBA (1976) 1 NWLR supra. (11) FASORA vs BEYOKU 1988, 2 NWLR, (Pt. 76) p.263 at 271."*

In relation to appellant's trespass, the lower court concluded thus: -

C *"The court below showed in his (sic) evaluation of the evidence tendered by defendant that the several acts of the defendants is clear evidence of entry into the land in the possession of the plaintiff. The acts of trespass on the plaintiffs land are established."*

D Appellant's grouse under his 2nd and 3rd issues for the de-termination of the appeal is that the foregoing concurrent findings of fact by the two courts are wrong and necessarily have to be inter-fered with.

Learned respondents counsel has stated the principle correctly that this Court is very slow in setting aside the con-current findings of fact. The court allows appeals on the basis of these findings only where it is successfully established that the findings are perverse. A finding or decision of a court may be perverse for more reasons than one: where the court ig-nored facts or evidence; misconceived the main thrust of the case it adjudicated upon, or took irrelevant matters into ac-count as the basis of its decision or went outside the issues canvassed by the parties to the extent of jeopardizing the merit of the case or committed various errors which faulted the case before it beyond redemption and all of or either of which lapses occasioned miscarriage of justice. It is only then that the ap-pellate court interferes by setting the finding or decision aside.
 F
 G

See Clifford Osuji V. Nkemjika Ekeocha 6-7 SC (Pt.11) 91 and E.C. Udengwu V. S. Uzuegbu (2003) 11 SC 135. In the instant case, the
 H appellant has not succeeded in establishing that the concurrent find-ings of the two courts are bedeviled by any of the vices the law recog-nizes as indicative of perversity the findings to entitle this Court to interfere. Firstly, the lower court's affirmation of the trial court's ap-plication of the principle in Kojo II V. Bonsie (supra) cannot be faulted.

The best way to test traditional history, it has been held Kojo II V. Bonsie (supra), is by reference to facts in recent years as established by evidence in relation to the land in dispute. With passage of time, the traditional history relied upon by contending parties to make out their respective cases through accounts of witnesses become very hazy rendering it very difficult for the court to decide which side's account to prefer. The principle in Kojo II V. Bonsie entitles the trial court to rely on recent facts adduced by the two sides in determining which of the two historical accounts pertaining the land in dispute is more probable. The trial court's finding at pages 108 line 26 and 110 lines 5-15 clearly shows its purpose and position on the point. The court thereat enthused as follows:-

"In the instant case the Defendant has failed to show the identity of his land with certainty. I do not therefore believe that any acts of possession he purported to have carried out were in respect of the land in dispute as shown in Exhibit I in this proceedings. To that extent, I hold the view that the plaintiffs having regard to the facts and evidence before the court have shown sufficient acts of possession on the land in dispute numerous and positive enough to warrant the inference that they are the exclusive owners of the land." The lower court cannot be said to be wrong in its affirmation of the foregoing application of the correct principle enunciated in Kojo II V. Bonsie supra.

The point must be restated that besides traditional history the record of appeal clearly shows that the respondents had pleaded and led evidence in respect of the two other modes the law recognises title to land could be proved. Proof of their case on the basis of any of the three modes they relied upon in their pleadings entitles the respondents to the declaration they seek from the trial court. The lower court's affirmation of the trial court's finding that respondents having proved their case are entitled to the declaration they seek remains sustainable on any of the two other modes the respondents relied upon and clearly proved by evidence on the record as well.

Again, it is beyond dispute as held by the lower court at page 186 of the record that the law is:-

"Trespass is after all an invasion of another into the land in

the possession of the plaintiff.” See also Udo V. Obot (1989) 1 NWLR (Pt 95) 59 and Ayinde V. Salawu (1989) 3 NWLR (Pt.109) 297.

Having correctly stated the principle the court proceeded and rightly too, to affirm the trial court’s findings based on the evidence led that the appellant is a trespasser in the following words:-

B *“The tract of land in the possession of the plaintiffs in the court below is the area in which the trespass is found to have been committed. I find no error in the assessment and evaluation of the evidence in this matter on appeal and find correct the conclusion by the trial judge... I affirm in its entirety the judgment of the court below.”*

C ***It is idle to challenge the award (not the quantum) of damages against the appellant arising from his trespass established by the evidence on record. The law is that a plaintiff is entitled to nominal damages for trespass even if no damage or loss is caused and if damage or loss is caused same is recovered according to general principle.*** See Ummina V. Okwuraiye (1978) 6-7 SC 1 at 11-12, and Osuji V. Isiocha (1989) 3 NWLR (Pt.111) 623 at 634.

E Having failed to show that the concurrent findings of facts of the two courts on the points articulated under appellant’s 2nd and 3rd issues for the determination of the appeal are perverse, the issues are resolved against him. On the whole the unmeritorious appeal is hereby dismissed at a cost of N100,000 in favour of the respondents.

F

FABIYI JSC

I had the advantage of a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree completely with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and deserves an order of dismissal.

H The appellant’s counsel tried to cling tenaciously to the decision of this court in Atoyebi v. Governor of Oyo State & Ors. (1994) 5 SCNJ 62. The decision was never in issue before the trial court. As a general principle of the law, estoppel must be pleaded before the trial court; otherwise it cannot be raised on appeal. See: Odi v. Iyala (2004) 8 NWLR (Pt.875) 238 at 306; Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1; Sosan v. Ademuyiwa (1986) 3 NWLR (Pt. 27) 241;

Oshodi v. Eyifunmi (2000) 13 NWLR (pt.684) 298.

Let me say it clearly that the appellant's surmised 'joker' failed to hit the target. My learned brother dealt with the point considerably with sharp focus. I am at peace with same.

For my above remarks and the detailed reasons adumbrated in the lead judgment, which I hereby adopt, I too feel that the appeal lacks merit and should be dismissed. I order accordingly and endorse all consequential orders therein contained, inclusive of that relating to costs.

PETER-ODILI JSC

I agree completely with the reasoning and judgment just delivered by my learned brother, M. D. Muhammad, JSC and to underscore that support I shall make some comments.

The respondents as plaintiffs claimed against the appellant as defendant as follows:

i. Declaration that the Onigboho of Igboho Chieftaincy Family is subtitled to statutory Right of Occupancy to all that track of land situate, lying and being at Oke Igboho stretching from behind Oke Igboho Baptist Primary School down to Akuro and to Sanya Dam, Igboho, Orelope Local Government of Oyo State.

2. N50,000.00 damage for continuing trespass being committed on the said track of land by the defendant, his servants, agents, privies etc since 1991.

3. Perpetual injunction restraining the defendant, his servants or agents or privies or any person whosoever claim through or under him from committing further acts of trespass on the said track of land.

FACTS BRIEFLY STATED:

The respondents instituted the action for themselves and as representatives of Onigboho of Igboho Chieftaincy Family whilst the defendant was sued for himself and as representative of Alomo Chieftaincy Family.

The respondents pleaded and gave traditional history of how their ancestors first settled on the land in dispute and tendered some documents in proof. As part of their traditional history was that one of the wives of their ancestor, Tondi was childless but later gave birth

to a male child named SANYA. That the wilderness in which Tondi stayed was named Iju Sanya and the river from which they were fetching water to cook and drink became known as Odo Sanya meaning Sanya River, which name the river has had and also Sanya Dam. It was admitted by DW7 under cross-examination that there had been about sixteen Onigbohohos after Tondi.

Not in dispute are two historical features caused to be there by the ancestors of the respondents and these being Agbamo Rock and Olorunda shrine both reflected on the Respondents' plan. Also not disputed is that respondents, ancestor granted Jakuta Quarters to the appellant's ancestors where he and members of his family currently live.

Apart from the traditional history, respondents also pleaded and gave evidence of acts of possession.

The appellant relied on traditional history and acts of possession claiming that it was Alafin Egungunmoju who founded Igboho and that Alomo who came to Igboho with Alafin Egungunmoju was allotted land which is now known as Jakuta Quarters from where he granted part to respondents' ancestor, Tondi. He pleaded the boundaries of his land but did not file a plan.

Judgment was given against the defendant in the High Court and his appeal to the Court of Appeal Ibadan was dismissed hence this appeal to the Supreme Court.

The hearing at the Supreme Court took place on the 17th day of December, 2013 at which learned counsel for the appellant, Mr. S. B. Ajayi adopted the Brief of Argument he had settled and filed on the 1/11/2011. He raised three issues for determination which are as follows:

1. Whether the lower court was right in affirming the decision of the court of first instance based on the respondents' evidence that Igboho was founded and first settled upon by their ancestor, one Tondi, in spite of the settled and notorious historical facts that Igboho was founded and settled upon by the Alafin Egungunmoju and various judicial pronouncement that respondents evidence is false.

2. Whether the case of *Kojo v Bonsie* (1957) 1 WLR 1223 at 1226 is applicable in this case.

3. Whether the lower court was right in affirming the award of damages by the court of first instance.

Mr. R. A. Ogunwole SAN adopted the Brief of Argument of the respondents settled by the learned senior counsel, filed on 19/9/11 and deemed properly filed on 4/6/12. He formulated two issues for determination which are thus:

1. Whether the lower court was right in confirming the decision of the learned trial judge in his application of the principle of law in *Kojo II v Bonsie* (1957) 1 WLR at 1226 without recourse to the case of *Atoyebe & Anor. v. Governor of Oyo State & Ors* (1994) 5 SCNJ 62 and/or “the History of the Yorubas” by Samuel Johnson. B

2. Whether in all the circumstances of this case, the lower court was right in confirming the decision of the learned trial judge on the award of Damages in favour of the respondents. C

I shall utilize the issues as framed by the appellant for convenience though issues r and z would be taken together.

ISSUES 1 & 2

The questions herein raised have to do with the Court of Appeal being right in affirming the decision of the trial court based on the evidence that Igboho was founded and first settled upon by Tondi their ancestor and whether the case of *Kojo II v Bonsie* is applicable in this case. D E

Learned counsel for the appellant contended that traditional history is one of the five recognised ways of proving title to land in dispute. He relied on the case of *Idundun v Okumagba* (1976) 1 NWLR (Pt. 200) 210 - 211. That the court of Appeal, without considering the case of *Atoyebe & Anor v Governor of Oyo State & Ors* (1994) 5 SCNJ at 69 per Belgore JSC (as he then was) cited to it, thus failing to resolve the disagreement as to the founder and settler of Igboho in appellants favour and thereby rendered a wrong decision. F G

It was submitted for the appellant that the respondent’s traditional history that Tondi, their ancestor was the founder and settler of Igboho had collapsed and died since the decision of *Adenekan Ademola J.* (as he then was) in Suit No. HOY/12/72 and this court in the *Atoyebe’s* case (supra) in 1994, no claim whether in respect of land or chieftaincy by the respondents, family i.e. Onigboho family, could be based and sustained on the traditional history that Tondi was the founder and first settler of Igboho. H

Mr. Ajayi of counsel further submitted that the case of *Atoyebe*

v Governor of Oyo State (supra) was cited to the court below but that court failed to apply it thus departing from the doctrine of State Decisis.

For the appellant was contended that the rule in *Kojo II v Bonsie* (supra) will only be applicable when there is conflict in the traditional histories of the parties, that is where there is no way of preferring either of the histories. That the lower court merely affirmed the trial court's application of the principles in *Kojo II v Bonsie* (supra) by reference to recent acts of possession and without a consideration of the effect of the Supreme Court's decision in *ATOYEBI'S* case (supra) on the appeal before it which would have shown that the root of the respondent's title to the land in dispute is untrue and false. That the lower court did not have a conflicting traditional history necessitating the application of the rule in *Kojo II v Bonsie*.

Learned counsel for the respondents', R. A. Ogunwole SAN referred to Section 109 of the Evidence Act on what qualifies as a public document. He also referred to Sections 111 and 112 of the same Evidence Act in the fact that only certified true copies of such public document are admissible in evidence and no other. He cited *John Umogbai & Ors v. Ifemera Aiyemhoba & Ors* (2002) 8 NWLR (Pt.770) 687 at 694; *Lawson v. Afani Construction C. Limited* (2002) 2 NWLR (Pt.752) 585 at 613 - 615.

That the judgment in Suit No. HOY/12/72 was referred to in *Atoyebi's* case (supra) and yet the appellants are using them as if they are relevant to this case which they are not. That the Court of Appeal did not make use of it in coming to its decision because it was neither pleaded nor formed one of those documentary evidence that have been properly admitted. Learned senior counsel said it is trite law that only the judgment given by a court can be relied upon as the conclusive proof of the matters decided between parties to a case. He referred to section 54 of the Evidence Act and the Supreme Court case in, *Attorney-General of Plateau State v. Attorney-General of Nasarawa State* (2005) 4 SC 55 at 65.

Mr. Ogunwole SAN of counsel further submitted for the respondents that the book "The history of the yorubas" by Samuel Johnson referred to by appellant as a historical authority on the founding and over lordship of Igboho was neither pleaded nor evidence adduced to show that the book is widely acknowledged in Nigeria or

elsewhere as a standard work or authority on the stated traditional history so as to enable the court take judicial notice of it thereby needing no further proof. He cited section 73 of the Evidence Act; *Idundun v. Okumagba* (1976) NMLR 200 at 210.

Learned Senior Advocate stated on that the resolution of conflict in traditional evidence is not based on credibility of witnesses because matters of tradition were matters beyond living memory to which the principles of law in *Kojo II v. Bonsie* apply but other evidence which are within living memory whereby credibility of witness would come into play. He cited *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426 at 423 - 433.

He went on to contend that the *Atoyebi's* case was never pleaded nor was the judgment tendered at the hearing and it is trite that the court cannot speculate on the contents of documents not tendered before it. He relied on *Kofi Gbajo v. Ogungburegui* (1961) 1 ALL NLR 853 at 854.

Mr. Ogunwole SAN said that from the evidence proffered by the witnesses for the plaintiffs, it is clear and unequivocal that whilst the court believed the story of the respondents on acts of trespass committed by the appellants, the court disbelieved the evidence of the appellants in its entirety.

The contest as I can see from my humble view point is that the appellant posits the trial court ought not to have found for the plaintiffs now respondents on their claim for ownership of the land in dispute based on respondent's evidence that *Igboho* was founded and first settled upon by their ancestor, one *Tondi* since that is not the correct position of things in view of the case of *Atoyebi & Anor v. Governor of Oyo State & Ors* (1994) 5 SCNJ 62 at 69 per *Belgore JSC* (as he then was). Also that the Court of Appeal or court below ought not to have agreed with the ownership conclusion of the trial court, however by-passing the decision of this Apex Court in *Atoyebi* (*supra*) on the ground that the earlier case of *Atoyebi* aforementioned was not relevant to this case in point and contending traditional histories of either side being conflicting and not easy to resolve, it was safe to ground their affirmation of the judgment in the trial court on acts of recent possession of the respondents in a way towing the principle in *Kojo II v. Bonsie* (1957) 1 WLR 1223 at 1226.

The respondents took the posture that the appellant ought not

to have relied on the judgment in Suit No. HOY/12/72 referred to in Atoyebi's case (supra) as it was not pleaded and the lapse is not cured by the production of such a reference in a Law Report. Also for discountenancing is the book "The history of the yorubas" by Samuel Johnson on the founding and over lordship of Igboho as equally irrelevant. That the case of Atoyebi (supra) cannot be applied in this case on the principle of Res Judicata as the parties are not the same and the judgment constituting facts in issue are not the same as the case in hand.

I shall cite the salient part of the judgment of the trial court per Arasi J, thus:

"In the instant case the defendant has failed to show the identity of his land with certainty. I do not therefore believe that any acts of possession he purported to have carried out was in respect of the land in dispute as shown in Exhibit P1 in this proceeding. To that extent, I hold the view that the plaintiffs having regard to the facts and the evidence before the court have shown sufficient acts of possession on the land positive enough to warrant the inference that they are the exclusive owners of the land. But that is not the end of the matter.

Exhibit P1 clearly shows that the land in dispute is just a small portion of the large track of land that is being claimed by the plaintiffs. In other words, the land in dispute is surrounded by the plaintiffs' family land in respect of which numerous acts of possession has been carried out. To that extent, I am of the opinion that the plaintiffs are entitled to take advantage of Section 46 of the Evidence Act. I therefore so hold."

In reaching its decision the trial High Court acknowledged the conflict in the traditional histories on each side and being unable to resolve the conflict, preferred to utilize the principle of acts of recent possession which the court of trial said resided in the plaintiffs/respondents.

The Court of Appeal agreed with the decision and reasoning of the trial court and affirmed the judgment based on acts of recent possession agreeing that the traditional histories conflict cannot be resolved and the principle in *Kojo II v. Bonsie* applicable.

In view of these divergent postures of the parties, I think it needful to get into what the Atoyebi's case was all about for an in-

depth understanding and how it affects or does not affect the case in hand and it is as follows:

Atoyebi & Anor. v. Governor of Oyo State & Ors (1994) 5 NWLR (Pt.344) 290 at 297 - 298.

The fact of this case briefly stated is that the case is a chieftaincy dispute and the contest between the Onigboho of Igboho and the Alepata of Igboho in Oyo State. The appellants, who were plaintiffs, brought in the High Court of Oyo State holden at Ibadan, a representative action on behalf of the ruling houses of Onigboho against the Governor and Government of Oyo State and the Alepata of Igboho. They claimed three declarations:

1. That the letter of the Governor of Oyo State designated the Alepata as the most Senior Traditional Ruler in Igboho is contrary to the traditional history of Igboho and therefore illegal null and void.
2. That the Onigboho is the only traditional ruler in Igboho;
3. That the Alepata is a quarter Chief in Igboho.

At the trial, evidence was led by both parties and Adio J. found that The Alepata of Igboho was not a traditional ruler in Igboho, he is also not the head chief in Igboho or the senior traditional ruler. The court therefore dismissed all the claims of the plaintiff who appealed to the Court of Appeal which also dismissed the appeal and the plaintiff/appellant appealed to the Supreme Court which held in a leading judgment of Belgore JSC (as he then was) thus:

"The plaintiff/appellant claim to represent the two ruling houses that in rotation present Onigboho of Igboho. Unfortunately evidence of this rotation was not presented to court and Exhibit 12, the report of Mr. C. E. B. B. Simpson's Report on his enquiry under Section 37 (3) Chieftaincy Law held on 10th June, 1957 said as much. However, the plaintiff's claim to be descendants of one Tondi, a hunter from Eruwa who actually, according to them, founded Igboho. As against this claim, the 3rd defendant's assertion is that Oyo was at one time deserted and one Eguguoju, an Alafin, settled at Igboho, having founded the place. What is not in dispute, however, is that Igboho at all material period up to and after Eguguoju was under Oyo Empire and whether Alafin founded Igboho or not he was the undisputed overlord.... The plaintiffs claim the present Onigboho is about the seventeenth in succession but by 1957 they could only

indicate four generations of Onighohos and name of Tondi was never mentioned. As the aborigines they claim superiority over whoever is Alepata of Igboho who they regard as mere ward head at Igboho. The trial Judge, after reviewing all the evidence of 3rd defendant and his witnesses and recent situation whereby he regarded Alepata as the superior ruler of Igboho and that Onigboho was under him. The trial Judge never relied on traditional history alone but found that the recent situation dating several years convinced him that the Alepata must be the overlord of Onigboho and not the other way round. He relied on the enquiry held in 1957 (Exh.12) and that of 1982 resulting in the government of former western Region of Nigeria recognizing Alepata as the superior Chief of Igboho.

The surprising element in this matter is that the witnesses for the plaintiffs even could not agree on genealogy of Onigboho whereas in the petition to Ministry of Chieftaincy Affairs (Exhibit 11) they named nine previous Onigbohohos, the one on the date of the petition being the tenth. There has been evidence of more than this number. The enquiry under chieftaincy Law Section 376) in operation in 1957 by the Local Government adviser, Mr. Simpson dated 10th June, 1957 whose Report is Exhibit 12 at trial court recommended as follows:

1. "I recommend that Jeremiah Afolabi is recognized as Onigboho of Igboho.
2. I recommend that Government makes it clear that the Alepata is recognized as head chief in Igboho.
3. I recommend that when the Chieftaincy declarations for Igboho are made that one unified set of king makers for all titles be included so as to stop any split in the town... the council should be instructed to (have one unified set of king makers)." (Brackets are mine).

The learned jurist went on to state:

"The remarkable aspect of this report is that both parties vying for Onigboho's stool in 1957 never mentioned Tondi as founder or first settler at Igboho. The name Tondi as the ancestor came up for the first time in a land dispute No.HOY/20/72 where Adenekan Ademola J (as he then was) totally disbelieved the story that Tondi was the founder of Igboho; a far reaching finding not appealed against up to now. Even though it was a land matter but traditional history of who first settled and who owned the land came to play prominently.

Trial court had no difficulty in finally rejecting the present plaintiff's case and dismissing it, Court of appeal upheld the decision of the High Court.

Upon the foregoing the government has all along found in favour of superiority of Alepata as the overall ruler of Igboho and that any other chief in that town including the Onigboho ranks after him. This conclusion is based on traditional history after various enquires.

The concurrent findings of the courts below on facts as well as on law cannot be in the absence of any wrong assessment of evidence, or miscarriage or anything perverse. In the present instance I can find nothing perverse or illegal or irregular in the findings of facts by trial court as upheld by Court of Appeal. I have therefore no reason to interfere with those findings."

The features produced by the facts of this case from court of first instance, the court below and now the present the indisputable fact, that the Atoyebi's case cannot be ignored whether or not it is applicable is for the prevailing circumstances to dictate. The none application by the trial court of the Atoyebi's case is understandable since the trial court felt it was not equipped to delve into such a weighty case coming from the Supreme Court with the embedded materials within including the findings of a fact finding committee and an earlier judgment of Adenekan Ademola J. (as he then was) in NO.HOY/20/72 where the learned judge disbelieved the story of the party before him on the founding of Igboho town by Tondi, the ancestor of the plaintiffs/respondents herein. In the Atoyebi judgment of the Supreme Court, Belgore JSC (as he then was) stated that Tondi, ancestor of the plaintiff/respondent herein in their claim in the case of Atoyebi was from the reports and other documents including the judgment of Adenekan Ademola J. (as he then was) earlier referred was not the founder of Igboho, the large area of which the land in dispute is part. The situation therefore throws up the scenario that even though Tondi is not the founder of the Igboho land, it is not doubtful that a grant of the land including the piece of land now in contention was granted to Tondi thereby making it of no moment the matter of the application or not of the Atoyebi case.

The Atoyebi case having not had the issue of Tondi not founding the place having not been appealed on, the Atoyebi case remains

the authority on who founded Igboho which is not Tondi which produces the difficulty of the trial court in the resolution of the conflict of the traditional histories of the parties and its only way out being a resort to acts of recent possession which inured in favour of the plaintiff/respondents.

B Also cannot be faulted the none application of Atoyebi (supra) or the ignoring thereof since there was sufficient materials including the Survey Plan, Exhibit P1 tendered by the respondents showing the area in dispute and the neighbouring adjoining land all in the possession of the respondents granted them by the founding owners of the land. It is in that light that the contending versions of traditional histories which could be easily untied would be allowed to rest since one of the five ways of proving ownership being acts of recent possession as stated in *Kojo II v. Bonsie* (1957) 1 WLR 1223 at D 1226 was at hand for use to settle the matter.

The respondents in view of the none disputed fact that a grant of the area including the one in contention along with its larger part were granted by Alepata as overlord in Igboho the matter of the founding in Atoyebi. This grant has its effect that the land title passed to the respondent and cannot now be described as a tenancy nor can it be taken as a temporary licence status. Therefore the respondents could successfully maintain their claim in trespass against the appellants for which an injunction would lie as the two courts below F decided and gave effect to.

Clearly the concurrent findings of the trial court, affirmed by the Court of Appeal cannot be interfered with since there is no perversity or wrong application of the law in those findings. I resolve these issues in favour of the respondents and against the appellant.

G ISSUE 3

The question herein is whether the lower court was right in affirming the award of damages by the trial court.

H Canvassing on behalf of the appellant, Mr. Ajayi of counsel adopted all their arguments on issues now and two above and said the court of trial granted to the respondent as plaintiff N5,000.00 damages against appellant then defendant which award was affirmed by the lower court. That the award of damages for trespass was based on the recent acts of possession which the court below held to be correct. Mr. Ajayi said once Issues one and two were resolved in

appellant's favour, the award of damage must also be set aside.

This being because once the court below dismissed respondent's claim for title, it would not have awarded that sum of N500.00 or any sum at all as damages for trespass.

For the appellant was submitted that the respondents demonstrated their disrespect and disregard for the Supreme Court and its judgment and orders in pursuing matters that had been decided against them since 1994. That it is inappropriate to compare "clear, positive, consistent and long" acts of possession with "traditional history of possession" That the proper comparison should be the traditional histories of the parties. B C

For the appellant was put forth the submission that having pleaded traditional history, the respondents, acts of possession can only be of any value if their traditional history is at least probable even if it is not better than that of the appellant. He said in the present action respondents, traditional history had been declared false and so the various acts of possession of the parties would lead to the resolution of the dispute between them. That in the circumstances the award of damages cannot be justified. D

For the respondent's was that the lower court was right in confirming the award of damages for trespass committed by the appellants since the trial court made a finding of intrusion by the defendant to the land in dispute which amounted to an act of trespass for which the defendant is liable in trespass. E

The trial court had found and decided as follows: F

"The intrusion of the defendant to the land in dispute is an act of trespass for which he is liable in damages. I therefore find trespass proved. But the plaintiffs are asking for a whopping sum of N50,000.00 against the defendant. As the law stands, damages for G trespass are expected to be nominal unless it could be shown that the defendant committed the said trespass by force of arms or does any damage to the trespassed property. So far, there is no such evidence before this court. I am therefore of the view that N500.00 should be H adequate and I accordingly award same."

The Court of Appeal had no difficulty in agreeing with that of court of first instance when it stated thus:

"The evidence tendered in the court below show; not only that the land in dispute had been in occupation, possession and ex-

clusive use of the plaintiffs, but also that the surrounding areas to the specific area in dispute, the area including the Baptist primary School, had continued to be in exclusive possession of the plaintiff. Ordinarily Section 46 of the Evidence Act's application would have assumed possession of the adjoining land to the plaintiffs' land as being
 B *in possession of the plaintiff...*

...The track of land in the possession of the plaintiff in possession of the plaintiffs in the court below is the areas on which trespass is found to have been committed. I find no error in the assessment and evaluation of the evidence in this matter on appeal and find
 C *correct the conclusion made by the trial judge."*

In the same vein, I see myself flowing along these concurrent findings of the two courts below which are in line with the established position of our courts including the present one that damages are to
 D be awarded in acts of trespass once effective possession as in the case at hand is provided. I am relying on the cases of Fagunwa v. Adibi (2004) 7 SC (Pt.11) 99 at 116; Tiza v. Begha (2005) 5 SC 1 at 17; and celebrated Idundun v. Okumagba (1976) 9 & 10 SC 227.

I also resolve this issue of damages against the appellants and
 E in favour of the respondents.

All questions successfully resolved against the appellant and anchoring on the better articulated reasoning in the lead judgment. I also dismiss the appeal which lacks merit.

F _____

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Musa Dattijo Muhammad, JSC just delivered.
 G The three issues distilled by the appellant for the determination of the appeal were beautifully discussed and properly resolved against the appellant.

I am in total agreement with the reasoning of my learned brother in the resolution of the said issues in the appeal and the
 H conclusion arrived thereat that the appeal is devoid of merit. I have nothing more to add.

In the circumstance, I also dismiss the appeal and will abide by the consequential order in the lead judgment including that on costs in favour of the respondents. Appeal is dismissed.

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother, Dattijo Muhammad, JSC. I agree that the appeal is lacking in merit and should be dismissed.

It is well spelt out on record that the plaintiffs/respondents claimed the title of Onigboho of Igboho having derived same from Tondi the hunter, being the first settler on the land described by the plaintiff as stool land. The defendant/appellant although he denied that Tondi founded the land, he did not however counter claim; each party proceeded to give evidence of its acts of possession on the land.

It is the plaintiffs/respondents' claim that they granted part of the stool land to the Alomo Chieftaincy family, which part extend to Jakuta stretching from behind Oke Igboho Baptist Primary School. The defendant/appellant outrightly denied this assertion and proceeded to show that the Alomo family had a right to sell or alienate what the plaintiffs claim as part of Igboho Chieftaincy stool land.

The learned trial judge, considered the evidence of acts of possession of the land by parties and came to conclusion that the testimony offered by the plaintiffs/respondents was clear, consistent and credible while that of the defendant/appellant based on traditional history of possession, did not measure up to the principles established in the decision of Ekpo V. Ita (1932) II NLR 68. The trial court therefore, in view of the conflict in the evidence of traditional history offered by both sides, resolved to employ the principles of law enunciated in the case of Kojo II V. Bonsie i.e. to say consideration of an act of recent possession and use of the land.

The determinant central focus of the appellant in this appeal is the authority in the case of Atoyebi & Anor V. Governor of Oyo State (supra) wherein reliance was made on the judgment of this court which held that Tondi was never the founder of the Onigboho. It is the respondents, contention however that prince Tondi founded the land in dispute. For purpose of resolving this strong felt issue, recourse ought be had to the pleadings of the parties coupled with the evidence adduced and the case laws wherein the court also sought leverage by relying on the principle laid down in Kojo II V. Bonsie by taking into account acts of recent possession by both parties.

I wish to state at this point that the land in dispute is contained within Onigboho. It is also significant to restate that at paragraph 19 of the defendant's amended Statement of defence at page 26 of the record, the appellant averred that a grant was made at Jakuta Quarters Igboho to Tondi and his family to settle upon. This
B outright grant has nothing to do with the decision of this court in the case of Atoyebi, wherein it was held that Tondi was not the founder of Igboho. There is, in other words a remarkable distinction between a grant and being a founder. Consequently, the restatement made
C by the defendant at paragraph 19 supra was an admission against interest.

Furthermore, it is also the intention of the defendant/appellant to use the outcome in the case of Atoyebi as an estoppel to the claim in question. The law is trite and well settled that before "cause of
D action estoppel" and "issue estoppel" could be raised, they must be pleaded. The case of Atoyebi heavily relied upon by the appellant was neither pleaded nor was the judgment tendered at the trial court hearing. The lower court is expected and enjoined to be bound by the record of appeal and the legal evidence contained therein. As
E rightly submitted by the respondents' counsel, the case of Atoyebi relied upon does not aid the appellant's position in this case.

However and that notwithstanding, even on the pleadings of the plaintiffs, the proof of their source of title were traditional history,
F acts of possession, and enjoyment of other connected lands adjacent to the land in dispute. The learned trial court judge after having taken the totality of the pleadings and evidence of all parties into consideration, did in my considered opinion correctly summarize the entire situational circumstance of the case before it at pages 107, 108 and
G 110 of the record of appeal. The lower court in further reviewing the proceedings of the trial court also came to an affirmative finding at page 186 of the record. The reproduction of all the foregoing references are done by my learned brother in the lead judgment. It is unnecessary to again repeat the same missionary journey.

H The decisions of the two lower courts are concurrent and the law is well settled that the appeal court will not normally interfere where a court of trial unquestionably evaluates and justifiably appraises the facts; what the Court of Appeal ought to do in the circumstance is to find out whether there is evidence on record on which

the trial court could have acted. Once there is such sufficient evidence warranting the trial court in arriving at its findings of fact, the appellate court cannot therefore interfere. See Akpagbue V. Ogu (1976) 6 SC 63; Woluchem V. Gudi (1981) 5 SC 291; Amadi V. Nwosu (1992) 5 NWLR (Pt.241) 273; Ezekwesili V. Agbapwonwu (2003) 9 NWLR (Pt.825) 337. Also in Tiza v. Begha (2005) 5 SC 1 at 17 this court per Onu, JSC said:

“It is now trite law that concurrent findings of the trial court and the Court of Appeal cannot be set aside by this court except such findings is not supported by evidence. See Emeagwara V. Stan PPL (2000) 78 LRCN 1701 at 1720...”

The law is further well pronounced that Evaluation of evidence and the ascription of probative value to evidence are the primary functions of a court of trial, which heard, saw and duly assessed the witnesses. The duty of the Court of Appeal is to find out whether there is evidence on record on which the trial court could have acted.

Appellate court can also in perverse findings tamper with the evaluation of evidence or where on the face of the record it is clear that justice has not been done in the case. See Lawal v. Adekoya (1974) 6 SC 83 and Balogun v. Akanji (1988) 1 NWLR (Pt.70) 301, See also Nsirim V. Nsirim (2001) FWLR (Pt 96) P433 at 445. In other words, the appellate court will not interfere with the finding of fact made by the trial court unless it is shown that such finding does not derive from the evidence before that court or is not related thereto. See again Ogundule V. Chief Olabode (1973) 2 SC 71. The appellants have not shown any special and exceptional reason why the concurrent judgments of the two lower courts should be interfered with.

My learned brother Dattijo Muhammad, JSC had adequately treated all the issues raised in this appeal. I endorse his comprehensive reasoning and conclusions arrived thereat in the lead judgment and also dismiss this appeal as lacking in merit. I further abide by all the orders made therein the lead judgment inclusive of that made as to costs.