

**SUPREME COURT OF NIGERIA**  
FRIDAY 16TH MAY, 2014. SC. 265/2003  
**CORAM:- M. MOHAMMED, J. A. FABIYI,**  
**M. U. PETER ODILI, M. D. MUHAMMAD,**  
**K. M. O. KEKERE-EKUN, JJSC**

1. CHIEF JAMES OLUSEYI OLONADE  
2. CHIEF S.A. ADEOGUN ..... APPELLANTS  
(Suing for themselves and on behalf of  
Ijesha Community of Abeokuta)  
AND  
H. BABATUNDE SOWEMIMO ..... RESPONDENT  
(For himself and on behalf of  
Joseph Sowemimo Family)

---

APPEALS - Grounds - Basis - Grounds must relate to judgment of court appealed from - And any complaint that does not flow from the decision - Cannot be legitimately entertained (H1)

APPEALS - Judgment - Error in - Effect - It is not every error of law committed by trial or appellate court - That justifies reversal of the particular court's judgment on appeal (H2)

EVIDENCE - Evaluation - Ascription of probative value to evidence - Are primary functions of trial court - Which saw and assessed the witnesses as they testified (H3)

EVIDENCE - Evaluation - Interference - Where trial court unquestionably evaluates evidence - And justifiably appraises facts - Appellate court should not substitute its views for that of trial court (H4)

COURTS - Action - Standard of proof - Court decides civil matters on balance of probabilities - By placing evidence of both sides on the imaginary scale - And deciding which side's evidence is heavier (H5)

APPEALS - Concurrent findings - Interference - Where appellant fails to show that - Findings of facts he contests do not flow from evidence - His entreaties that the findings be reversed must fail (H6)

### **FACTS**

Before the High Court of Ogun State, plaintiffs/appellants instituted this action praying for declaration that defendant's/respondent's family has forfeited their interest (if any) on the land in dispute as customary tenants of appellants having engaged in acts of misconduct, damages for trespass and perpetual injunction restraining respondent from further trespassing on the land. Respondent's counter claim is for declaration of title, damages and perpetual injunction in respect of the same land to which appellants' claims relate. The subject matter in the case is the two landed properties known as Nos. 82 and 86 Sokenu Road, Oke-Ijeun, Abeokuta, Ogun State. Appellants' contention is that the plots form part of the land granted by Egbas to Ijesha people led by their ancestor Adeleke. And that after the grant, the Ijeshas have continued to exercise various acts of ownership over the land, such as the grant made to respondent's father – Sowemimo under the customary tenancy. Appellants stated that respondent's father had built two houses on the land in dispute and contrary to the terms of the tenancy, abandoned the two plots.

As a result of this, the Ijesha people re-entered the land and let the plots to one Olaogun. The said Olaogun developed the plots and rented same out to tenants on behalf of the Ijesha Community. Respondent's stand is that his father derived title to the plots following absolute grant by Ijeun people (the original owners). Respondent contends that the grant was made many years before the settlement of the Ijeshas on a nearby land. Respondent denied that his father was a tenant to the Ijesha Community. He insists that appellants are trespassers on the land. At trial, the parties called witnesses in proof and in defence of their respective claims. At the close of trial, the court dismissed the claims of appellants and granted the counter-claim of respondent in part. Dissatisfied, appellants appealed to the Court of Appeal Ibadan Division, which dismissed their appeal and upheld the decision of the trial court. Again dissatisfied, appellants have appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*(2) Whether the learned Justices of the Court of Appeal were not wrong in confirming the judgment of the trial court based on acts of possession as opposed to the unproved root of title as pleaded.*

*(3) Whether the Justices of Appeal (sic) were not wrong in their holding that although the learned trial judge directed the visitation to the locus-in-quo, the failure to eventually visit the locus in quo before judgment did not occasion miscarriage of justice.*

**HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

*APPEALS - Grounds - Basis*

**1. It is settled principle of Law that a ground of appeal must arise, flow from or relate to the judgment of the court appealed from. Any complaint that does not flow from the decision appealed against cannot legitimately be entertained by this Court. (p. 1972 H)**

*Judgment - Error in - Effect*

**2. I cannot agree more with the lower court. Appellants' insistence that they still deserve to have the trial court's decision interfered with in spite of the lower court's foregoing unassailable stance on the point remains untenable in law. It is a trite principle that it is not every error of law that is committed by a trial or Appellate Court that justifies the reversal of the particular court's judgment on appeal. For an appellant to secure the reversal of the judgment he appeals against, beyond establishing the error he hinges his complaint upon, he must go the extra mile of establishing that the error complained of and established has substantially affected the result of the decision and/or occasioned miscarriage of Justice. Thus where in spite of the error made out by the appellant, the decision appealed against would not be any different, the appeal would fail. In such an instance the judgment appealed against would not be disturbed. (p. 1974 H)**

*EVIDENCE - Evaluation*

**3. Firstly, evaluation of relevant and material evidence and the ascription of probative value to such evidence are the primary functions of the trial court which saw, heard and assessed**

**the witnesses as they testified.** (p. 1977 B)

*EVIDENCE - Evaluation - Interference*

**4. Where the trial court unquestionably evaluates the evidence and justifiably appraises the facts, as it has been manifestly shown to have been done in the instant case, it is not the business of the lower court, an Appellate Court, to substitute its own views for the views of the trial court. The application of this trite principle by the lower court cannot, certainly, be a basis for the reversal of the court's decision.** (p. 1977 C)

*ACTIONS - Standard of proof*

**5. Secondly, in a civil matter such as this, the court decides the case on the balance of probabilities or preponderance of evidence. The trial court does this by first deciding which evidence it accepts from each of the parties, putting the accepted evidence adduced by the plaintiff on one side of the imaginary scale and that of the defendant on the other side of the scale and weighing them together. The court then decides which side's evidence is heavier, not by the number of witnesses called by either party or on the basis of the one being oral and the other being documentary, but by the quality or probative value of the evidence be it oral and/or documentary.** (p. 1977 E)

*APPEALS - Concurrent findings - Interference*

**6. Where an appellant fails to show that the findings of fact he begrudges do not flow from the evidence on record or that the two lower courts have applied the law wrongly to the ascertained evidence, his entreaties that the findings be reversed must fail. The appellants in the instant case having not discharged the duty the law places on them of demonstrating that the concurrent findings of fact of the two lower courts are perverse cannot, therefore, succeed.** (p. 1978 A)

**REPRESENTATION**

K. O. Obamogie with E. O. Edjeba (Miss), for the Appellants  
Seni Adio Esq., for the Respondent

**CASES REFERRED TO**

- Lagga v. Sarhuma (2008) 6-7 SC (pt. 1) 101  
Contract Resource Nig Ltd v. UBA Plc (2011) 6-7 SC (pt. 111) 150  
Ilema v. Akenzua (2000) 13 NWLR (pt. 683) 92  
Oluhinde v. Adeyoju (2000) 10 NWLR (pt. 676) 562  
Temile v. Awani (2001) 12 NWLR (pt. 728) 726 B  
Atoyebi v. Govt. of Oyo State (1994) 5 NWLR (pt. 344) 296  
Olusanmi v. Osasona (1992) 6 NWLR (pt. 245) 22  
A.G. Leventis Nig. Plc. v. Akpu (2007) 6 SCNJ 242  
Oguntayo v. Adelaja (2009) 6-7 SC (pt. 111) 91 C  
Ohakim v. Agbaso (2010) 6-7 SC 85  
Obasohon v. Omorodion (2001) 7 SCNJ 168  
Okereke v. Nwankwo (2003) 4 SCNJ 211  
Oniah v. Onyia (1989) 1 NWLR (Pt 99) 514  
Akinyili v. Ejidike (1996) 5 NWLR (pt. 449) 381 D  
Aderounmu v. Olowu (2000) 2 SCNJ 180

**STATUTE REFERRED TO**

- Evidence Act, s. 127(1)(b) E

**LEAD JUDGMENT BY MUHAMMAD JSC**

This is an appeal against the judgment of the Ibadan Division of the Court of Appeal hereinafter referred to as the court below, affirming the decision of the Ogun State High Court, hereinafter referred to as the trial court. The Judgment of the court below being appealed against was delivered on 28th day of May, 2003. The trial court's decision the court below affirmed was delivered on 29th July, 1998. The facts of the case that brought about the appeal are as hereinunder summarized. F G

The appellants as plaintiffs at the trial court, for themselves and on behalf of the Ijesha Community of Abeokuta, sued the respondent who, in addition to being the defendant, also counter-claimed for himself and on behalf of the Joseph Sowemimo Family. Appellants' claim as contained in paragraph 35 of their further amended statement of claim is for forfeiture, declaration of title, damages and injunction. Respondent's counter claim is for declaration of title, damages and perpetual injunction in respect of the same piece of land to which appellants' claim relates. The appellants testified and called H

four other witnesses in support of their case. They also tendered one document. In defense of the case and proof of his counter-claim, the respondent testified and called six witnesses. He tendered thirteen exhibits, three of which were through PW6, the first appellant.

B Plots No. 82 and 86 along Sokenu Road at Oke Ijeun in Abeokuta are in contention between the parties. The appellants assert that the plots form part of the land granted by the Egbas to Ijesha people led by their ancestor Adeleke; that after the grant to them by the Egbas, the Ijeshas have continued to exercise various acts of ownership in relation to the parcel granted to them which acts include grants to many people with respondent's father, Sowemimo, being one such beneficiary. The grant made to Sowemimo by the appellants' ancestors is under customary tenancy.

D It is also appellants' case that respondent's father had built two houses on the land in dispute and, contrary to the terms of the tenancy between them, abandoned the two plots. This explains the re-entry into the land by the Ijesha people who thereafter let the two plots to one Alhaji Saubane Olaogun, the Asiri Abo. The said Olaogun has developed the two plots and rents same out to tenants on behalf of the Ijesha Community.

F The respondent, on the other hand, claims that his father derived title to the two plots following absolute grant by Ijeun people, the original owners. The grant to respondent's ancestor was made many years before the settlement of the Ijesha Community on a nearby land. The respondent denies his father ever being a tenant to the Ijesha Community. He insists that the appellants are trespassers.

G In a considered decision, the trial court found that the Ijeshas were not the original owners of the land in dispute and that Sowemimo, respondent's father, had built his two houses on the land in dispute which he acquired from the Ijeuns long before the settlement of the Ijesha Community in Abeokuta. The court further held that there couldn't have been any customary tenancy, therefore, between the Ijeshas and respondent's father. Consequently, the court dismissed H appellants' claim and granted respondent's counter claim in part. It is the dismissal of the plaintiffs appeal against this court decision of the trial court by the court below that brought about the appeal to which this judgment relates. The Notice of Appeal filed on 11th August, 2003, contains five grounds.

Parties have filed and exchanged their briefs of arguments as required by the rules of court. At the hearing of the appeal on 24th February 2014, the said briefs, including appellants' reply brief, were adopted and relied upon by counsel as parties' respective arguments for or in opposition to the appeal.

Respondent's brief contain arguments on the preliminary objection he earlier filed against the competence of the appeal. Learned respondent's counsel did not however formally move this Court at the hearing of the appeal to now enable the court decide one way or the other on the preliminary objection. In the circumstance, respondent is deemed to have abandoned the preliminary objection and same is hereby accordingly discountenanced. See: *Iliya Akwai Lagga v. Audu Yusuf Sarhuma* (2008) 6-7 SC (Pt. 1) 101, *Contract Resource Nig Ltd v. United Bank for Africa Plc* (2011) 6-7 SC (Pt. 111) 150.

The three issues formulated at page 5 of the appellants' brief read:-

*"(1) Whether the Justices of the Court of Appeal were not wrong or committed misdirection of law when they confirmed the granting of the Respondent's counter-claim based on two contradictory roots of his title to the land in dispute. (Ground 1)*

*(2) Whether the learned Justices of the Court of Appeal were not wrong in confirming the judgment of the trial court based on acts of possession as opposed to the unproved root of title as pleaded. (Grounds 4 and 5)*

*(3) Whether the Justices of Appeal (sic) were not wrong in their holding that although the learned trial judge directed the visitation to the locus-in-quo, the failure to eventually visit the locus in quo before judgment did not occasion miscarriage of justice. (Ground 3)"*

The respondent has adopted the foregoing three issues as those calling for consideration in the determination of the appeal.

On their 1st issue, learned appellants' counsel submits that the root of title the respondent relies on in proof of his counter-claim is contained in paragraph 9 of the further amended statement of defence. The respondent is required by law, contends learned counsel, to succeed on the strength of his case. The weakness of the defence will not help him. In support of the submission, learned counsel has cited: *Ilema v. Akenzua* (2000) 13 NWLR (Pt. 683) 92 at 98 - 99,

Oluhinde v. Adeyoju (2000) 10 NWLR (Pt. 676) 562 at 580 and Temile v. Awani (2001) 12 NWLR (Pt. 728) 726 at 755.

The lower court, it is contended, has found that respondent's counter-claim is based on two contradictory roots of title. These findings notwithstanding, the lower court, in spite of the unchallenged evidence of PW2 at page 82 of the record, proceeded not only to affirm the trial court's dismissal of appellants' claim but its partial grant of respondent's counter-claim. The lower court's failure to make specific pronouncement on respondent's contradictory root of title and its affirmation of the trial court's findings in spite of the absence of evidence to support respondent's pleadings are fatal. Learned counsel urges that the issue be resolved in appellants' favour.

Responding, learned counsel submits that appellants' argument under their 1st issue is misconceived. The issue which draws from appellants' ground one, argues learned respondent's counsel must be couched and argued within the ambit of the particular ground of appeal. The respondent, it is argued, neither pleaded contradictory roots of title nor did the lower court in its judgment make any such finding. The respondent, it is submitted, in paragraphs 8 and 9 of his further amended statement of defence succinctly pleaded his root of title and relied on traditional history to prove his claim. Nowhere, it is further submitted, has any contradictory fact in relation to respondent's counter-claim been pleaded. Appellants' arguments in respect of this issue which neither emanate from respondent's pleadings nor the lower court's findings, contends learned counsel, remain unfounded, disingenuous and incompetent. It is urged that in resolving the issue against the appellants the ground of appeal, the issue distilled from same and the arguments advanced thereon be ignored.

Learned respondent's counsel cannot be faulted that in the resolution of appellants' 1st issue the pertinent questions to answer are indeed whether respondent's counter-claim is based on two contradictory roots of title and if so whether the lower court has made specific findings in respect of the pleaded contradictory roots of title. Both sides to the appeal agree that the passage of the lower court's judgment to which appellants' 1st ground of appeal from which their 1st issue arises is at page 226 of the record of appeal. They are right.

Again learned respondent counsel is on a firm terrain that paragraphs 7, 8 and 9 of respondent's further statement of defence con-



tain facts on which respondent's counter-claim inter-alia hinges. The paragraphs are hereinunder supplied for ease of reference.

*"1. The two parcels or land in dispute herein together with the buildings thereon are the properties of Late Joseph Sowemimo the father of the defendant.*

*2. The parcels of land in dispute in this case are within the vast area of land originally settled upon by Ijeun people when Abeokuta was founded by the Egbas around the year 1830.*

*3. Late Joseph Sowemimo (1852 - 1924) got absolute grants of the two parcels of land one after the other from Ijeun Chiefs on behalf of Ijeun people between the year 1893 and 1900 long before the Ijeshas were identified as a group anywhere in Abeokuta."*

The passage in the lower court's judgment to which appellants' 1st ground of appeal from which their 1st issue has been distilled and argued is hereunder reproduced for ease of reference.

*"The case of the defence on the other land was a total denial of the plaintiffs claim. Instead, the defendant denied ever being a tenant of the plaintiffs, rather he set up a rival claim contending that his late father Late Joseph Sowemimo was the owner of the disputed land. The defendant in setting up his defence put forward two contradictory roots of title of the deceased Joseph Sowemimo. In one breadth, he contended that the parcels of land under reference were granted to his late father and another breadth, he contended that his late father must have bought same. It is however interesting to note that the learned trial judge seemed not to appreciate this apparent conflict in the defendant's root of title hence he proceeded to hold that he believed that the land belonged to the defendant's family. Consequently, he granted the declaration sought by the defendant."*

Having summarized respondent's case in the foregoing, the lower court at page 230 of the record proceeded as follows:-

*"At this juncture, it is worthy of note that the defendant's counter-claim amongst other relief for:-*

*'Declaration that Joseph Sowemimo's family is the deemed grantee of the right of occupancy in respect of 2nd parcels of land with the buildings thereon known as No 82 and 86 Sokenu Road, Oke-Ijeun Abeokuta and more particularly described, delineated and verged Red in the survey plan No. AKN/OG/002/LO/95 dated 25-1-95 drawn by S. O Akinde a Registered Surveyor.'*

*...In other words the defendant pleaded grant as his root of title”.*

In spite of the foregoing, the appellants have raised their complaint in their 1st ground of appeal which ground, for ease of reference, is hereunder reproduced:-

B *“1. The learned Justices of the Court of Appeal misdirected themselves in law in dismissing the appellants’ appeal before them having agreed that the respondent as defendant in his defence put forward two contradictory roots of his title to the land in dispute.*

C *PARTICULARS OF MISDIRECTION*

*Having held that the learned trial judge seemed not to appreciate the apparent conflict in the defendant’s root of title upon which he gave judgment to the respondent, the Court of Appeal ought to have allowed the appellants’ appeal.”*

D Looking at appellants’ foregoing ground of appeal, the issue distilled from the ground as well as the arguments advanced thereon, learned respondent counsel is beyond reproach in his submission that appellants’ grouse by virtue of the ground is untenable in law.

E Firstly, the averments in the further amended statement of defence of the respondent do not contain the contradiction in the roots of title the appellants assume the respondent has relied upon to prove his counter-claim. It is equally manifest from the passage in the lower court’s judgment to which appellants’ 1st ground of appeal relates that the court did not make the finding ascribed to it on  
F respondent’s purported reliance on contradictory roots of title in proof of his counterclaim. Indeed, as submitted by learned respondent’s counsel, the passage is the lower court’s summary of the case of the respondent rather than the court’s finding on the point. The appel-  
G lants have even conceded this much at paragraph 5.24 of their amended brief thus:-

*“The lower court instead of making a specific pronouncement on the contradictory root of title of the respondent said at page 233 of the record that there was a justifiable finding by the trial court of a  
H continuous possession of the parcels of land in dispute, in favour of the defendants’ family.”*

It is beyond one’s understanding that the appellants in their 1st ground of appeal rather than appeal against the decision of the court below have done otherwise. ***It is settled principle of Law***

**that a ground of appeal must arise, flow from or relate to the judgment of the court appealed from. Any complaint that does not flow from the decision appealed against cannot legitimately be entertained by this Court.** See Toudus Services Nig Ltd v. Taisei (W.A) Ltd (2006) 6 SC 200 and Veepee Ind. Ltd v. COCA Ind. Ltd (2008) 4 -5 SC (Pt 1) 116. In Atoyebi v. Govt of Oyo State (1994) 5 NWLR (Pt 344) 296 at 305, this Court restated the principle on the point thus:-

*“An appeal presupposes the existence of some decision which is appealed against on a given point. Where therefore, there is no complaint in respect of a decision that has arisen from a judgment appealed against, such a decision may not form the basis of an appeal for determination by an appellate court. The appellate jurisdiction of this Court inter-alia is to review the decision and/or judgments of the Court of Appeal. If, therefore, an issue neither arose nor called for the determination of the Court of Appeal which therefore, did not consider the issue, it seems to me that such an issue may not form the basis of an appeal to the Supreme Court and a purported appeal to this Court on such an issue will be incompetent and may be struck out.”*

It is for these very principles that appellants’ 1st issue for the determination of the appeal is hereby discountenanced.

I now take the liberty of considering appellants’ 3rd issue by deferring their 2nd issue for same to be treated subsequently. Learned appellants’ counsel argues that the lower court’s failure to address the trial court’s refusal to visit, having so directed, the Locus-in-quo for the purpose of ascertaining the identity of the land in dispute, is fatal. Exhibits B, C and D which the lower court relied upon in deciding the identity of the land in dispute, submits learned counsel, are inadmissible and unhelpful. The trial court’s directive for the visit to the locus-in-quo far from being a subsidiary issue as held by the lower court remains a central issue as no decision is possible on the issue before the trial court in the absence of certainty of the identity of the land in dispute. Referring to Olusanmi v. Osasona (1992) 6 NWLR (Pt 245) 22, learned appellants’ counsel urges that the issue be resolved in appellants’ favour and the appeal allowed.

In response, learned respondent’s counsel submits that the visit to the sites of the two plots of land in dispute is not a sine-qua-non for

the determination of the respective claims of the parties before the court. There is no uncertainty as to the identity of the land in dispute. Parties to the dispute, submits learned respondent's counsel, are ad idem on the location and identity of the plots in dispute. Courts, it is submitted, must make their decisions within the purview of the pleadings and evidence adduced in proof of pleaded facts. Evidence abound on the basis of which the trial court which decision the court below rightly affirmed, made its findings. Such a finding cannot be set-aside. Relying on Ejidike v. Obiora 13 WACA 270 at 274, learned respondent's counsel urges that the issue be resolved against the appellants.

The passage in the trial court's proceedings at pages 124 - 125 of the record of appeal the appellants contend the lower court wrongly addressed read:-

*"At this stage, all the parties and their counsel are advised to go back to 82 and 86 Sokenu Road to look at the buildings closely before further cross-examination continues. It is not the practice of this Court to visit the locus-in-quo. The visit by the parties and their counsel will refresh their memories of materials used for the two buildings rooms/shops, location, their sizes of the building, and pieces of land on which they stand. This is necessary so that the court will have a good idea of the two pieces of land and the structures on them."*

The lower court in addressing appellants' complaints in relation to the foregoing passage in the trial court's proceedings stated at pages 235-236 of the record inter-alia thus:-

*"In my view the learned trial judge can use his own observation about the state of anything as revealed in evidence to resolve the conflict between the parties on whether the bungalow on No 82 Sokenu Road was thereby converted into shops by the defendant's family or was totally rebuilt by Saubana Olaogun between 1984 and 1986 as contended by the plaintiffs. See Ejidike vs Obiora 13 WACA 270 at 274..."*

*In the light of the prevailing evidence and exhibit and contrary to the submissions of the learned counsel to the appellants, I hold that there is no miscarriage of justice arising from the failure of the learned trial judge visiting the site of No 82 and 86 Sokenu Road, Abeokuta, the disputed parcels of land in the instant case."*

**I cannot agree more with the lower court. Appellants'**

***insistence that they still deserve to have the trial court's decision interfered with in spite of the lower court's foregoing unassailable stance on the point remains untenable in law. It is a trite principle that it is not every error of law that is committed by a trial or Appellate Court that justifies the reversal of the particular court's judgment on appeal. For an appellant to secure the reversal of the judgment he appeals against, beyond establishing the error he hinges his complaint upon, he must go the extra mile of establishing that the error complained of and established has substantially affected the result of the decision and/or occasioned miscarriage of Justice. Thus where in spite of the error made out by the appellant the decision appealed against would not be any different the appeal would fail. In such an instance the judgment appealed against would not be disturbed.*** See A.G. Leventis Nig Plc. V. Chief Christian Akpu (2007) 6 SCNJ 242, Oguntayo V. Adelaja & others (2009) 6-7 SC (Pt 111) 91 and Chief Ikedi Ohakim & anor V. Chief Martin Agbaso & 4 Ors (2010) 6-7 SC 85.

In the case at hand the lower court has correctly demonstrated that the visit to the locus-in-quo recommended by the trial court was unnecessary and its non-occurrence does not in any way affect the judgment arrived at on the basis of the pleadings and evidence on record. The trial court's decision as affirmed by the lower court must therefore persist. The 3rd issue for the determination of the appeal is resolved against the appellants.

Under their 2nd issue, the appellants argue that they had made out a more credible case than that of the respondent. Learned appellants counsel contends that PW2's evidence has remained unchallenged. PW2, submits learned counsel to the appellants, is the Oluwo of Ijeun and has testified not only to the fact that the Ijeshas were granted the parcels of land which includes the land in dispute 150 years previously, but that no other grant of the same area had been made to any other group of people thereafter. Besides, the evidence of DW7, at page 141, lines 24-25 of the record of appeal, it is submitted, supports appellants' case. In affirming the judgment of the trial court, contends learned appellant counsel, the court below wrongly placed emphasis on the exhibits tendered by the respondent which are of no probative value. Indeed, submits learned coun-

sel, the exhibits rather than substantiate respondent's title do otherwise. Learned counsel prays we so find, resolve the issue against the respondent and allow the appeal.

On appellants' 2nd issue the respondent contends that the appellants who claim being respondent's overlord must, in addition to proving that fact, establish their right of forfeiture upon respondent's misconduct to be entitled to the possession and damages they assert. To disprove appellants' claim, learned respondent's counsel submits, respondent produced evidence particularly through DW2, DW5 and DW7 of various acts of ownership and possession of the two plots in dispute up to the time this action was commenced. The lower court's affirmation of the findings of fact of the trial court on the various acts of possession of the respondent in resolving the issue of abandonment, learned respondent's counsel contends, is what the appellants are challenging under their 4th and 5th grounds of appeal from which their 2nd issue has been formulated.

The appellants, it is further argued, seem however to downplay the added fact that both courts having also found appellants' claim not established dismissed same. The findings of the two courts, learned respondent's counsel submits, cannot be otherwise. Appellants' witnesses, particularly PW2, submits learned counsel, were not precise on the extent and identity of the parcels of land in dispute. The shortcoming coupled with appellant's inadequate pleadings as to the actual time their ancestors made the grant of the land in dispute to respondent's father justify the trial court's dismissal of appellants' claim and its affirmation by the lower court. On the other hand, it is further submitted, all the exhibits the respondent relied upon in defence of the appellants' claim and proof of his counter-claim indicate that the Ijeshas, appellants' ancestors, settled around the disputed plots well after the grant of same to respondent's father by the Ijeuns, the original founders of the land. Exhibits "G" and "F" tendered by the respondent, it is contended, raise a presumption of genuineness which the appellants failed to rebut. Indeed by Exhibit "F", PW7, appellants own crony, confirms that the land in dispute is owned by respondent's family. Relying on *Obasohon v. Omorodion* (2001) 7 SCNJ 168 at 180, *Okereke v. Nwankwo* (2003) 4 SCNJ 211 at 226 - 227, *Oniah v. Onyia* (1989) 1 NWLR (Pt 99) 514 at 532, *Akunyili v. Ejidike* (1996) 5 NWLR (Pt 449) 381 at 405 - 407 and *Aderounmu*

v. Olowu (2000) 2 SCNJ 180 at 192-193, learned respondent's counsel concludes that the concurrent findings of fact of the two courts which draw from evidence on record cannot be set aside. Learned counsel prays that the issue be resolved in their favour and the appeal dismissed. Learned appellants' counsel seems to have ignored, and he must be reminded, certain trite legal principles the application of which to the case at hand is inescapable. B

***Firstly, evaluation of relevant and material evidence and the ascription of probative value to such evidence are the primary functions of the trial court which saw, heard and assessed the witnesses as they testified.*** C

***Where the trial court unquestionably evaluates the evidence and justifiably appraises the facts, as it has been manifestly shown to have been done in the instant case, it is not the business of the lower court, an Appellate Court, to substitute its own views for the views of the trial court. The application of this trite principle by the lower court cannot, certainly, be a basis for the reversal of the court's decision.*** See Magaji v. Odojin (1978) 4 SC 91, Ojokolobo v. Alamu (1998) 9 NWLR (Pt 565) 226 and Sha v. Kwau (2000) 5 SC 178. D E

***Secondly, in a civil matter such as this, the court decides the case on the balance of probabilities or preponderance of evidence. The trial court does this by first deciding which evidence it accepts from each of the parties, putting the accepted evidence adduced by the plaintiff on one side of the imaginary scale and that of the defendant on the other side of the scale and weighing them together. The court then decides which side's evidence is heavier, not by the number of witnesses called by either party or on the basis of the one being oral and the other being documentary, but by the quality or probative value of the evidence be it oral and/or documentary.*** See Fagbenro v. Arobadì (2006) 7 NWLR (Pt. 978) 174. I agree with learned counsel to the respondent that appellants cannot be heard to propound differently. The trial court having conducted the evaluation of evidence adduced by parties before it in the manner the law requires, the lower court's endorsement of that court's judgment remains unassailable. F G H

Finally, learned respondent counsel is again on a firm terrain

that this Court is always hesitant to interfere with the concurrent findings of fact of two lower courts. ***Where an appellant fails to show that the findings of fact he begrudges do not flow from the evidence on record or that the two lower courts have applied the law wrongly to the ascertained evidence, his entreaties*** B ***that the findings be reversed must fail.*** See Sokwo V. Kpongbo (2008) 7 NWLR (Pt 1086) 342, and Dumez (Nig) Ltd V. Nwakhoba (2008) 18 NWLR (Pt 1119) 361. ***The appellants in the instant case having not discharged the duty the law places on them of*** C ***demonstrating that the concurrent findings of fact of the two lower courts are perverse cannot, therefore, succeed.*** Having resolved all the three issues the appellants formulated for the determination of their appeal against them, I find the appeal for that reason devoid of merit. Same is hereby dismissed at a cost of N100,000 D in favour of the respondent.

---

### MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal E Ibadan delivered on 28th May, 2003 dismissing the Appellant's appeal and affirming the judgment of the trial High Court of Ogun State given in favour of the Respondent on 29th July, 2003 in a land dispute between his family the Appellants' family.

F After the exchange of pleadings between the parties at the trial High Court made up of further amended statement of claim and amended statement of defence and counter claim claiming forfeiture, declaration of title, damages and injunction by the plaintiff and counter-claim by the Defendant for Declaration of Title, Damages G and Perpetual Injunction, the parties joined issue on the following -

*“Whether the Defendant’s father SOWEMIMO derived title to the disputed plots of land numbers 82 and 86 Sokenu Road Abeokuta directly from IJEHUN family the original owners of the land or as customary tenant of IJESHA COMMUNITY.”*

H After affording the parties a hearing, the learned trial Judge in a considered judgment found for the Defendant and granted his counter-claim after dismissing the Plaintiffs claims. This appeal therefore is against two concurrent findings of the trial Court and the Court of Appeal. The law is well settled that where there are concurrent



findings of fact by two lower Courts as happened in the present case, a higher Court like this Court cannot interfere except where the findings are perverse or likely to lead to miscarriage of justice. In the instant case, the evidence as borne out from the records in support of the Respondent's counter-claim for title to the two disputed plots of land No. 82 and No. 86 Sokenu Road Abeokuta is indeed overwhelming thereby removing any possibility of interfering by this Court. See Eholor v. Osayande (1992) 6 N.W.L.R. (Pt. 249) 524 at 546 and Okoya v. Santili (1994) 4 N.W.L.R. (Pt. 338) 256 at 562. B

My learned brother Musa Dattijo Muhammad has said it all in the lead judgment which I have had the opportunity of reading before today and with which I entirely agree that this appeal must fail. There is overwhelming evidence on record that the father of the Respondent Sowemimo derived his title to the two plots of land in dispute from Ijehun Family, the original owners of the land and not from the Ijesha family who are customary tenants on the land. Consequently for the above reasons and those carefully put in place in the lead judgment, I too feel that the appeal is devoid of merit and ought to be dismissed and it is hereby dismissed with costs as ordered in the lead judgment. C D E

---

### ***FABIYI JSC***

I have had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed. F

The facts of the matter have been clearly set out by my learned brother. I rely on same. The appellant, as plaintiff claimed declaration of title to the two plots - Nos. 82 and 86 Sokenu Road, Oke-Ijeun, Abeokuta, =N50,000.00 damages and perpetual injunction. The respondent, as defendant, counter-claimed for declaration with respect to the same plots; =N=5,000.00 damages and perpetual injunction as well. G H

The learned trial judge found in favour of the respondent. The appellant appealed to the court below which heard the appeal and dismissed same. This is a further appeal to this court.

I wish to say a word or two on the appellant's first issue which

is - whether the justices of the Court of Appeal were not wrong or committed misdirection in law when they confirmed the granting of the respondent's claim based on two contradictory roots of title to the land in dispute.

As extant in the records, the respondent pleaded grant of the land in dispute to his father by Ijeun clan of Egba long before the Ijeshas were settled on a piece of land nearby at Ago Ijeshas. The trial court so found and same was confirmed by the court below. The trial court never found two contradictory roots of title by the respondent. The counsel for the appellants desired to upgrade his introductory submission as summarized by the Court of Appeal to resolution of issue. Same was no doubt flatly wrong. It should be stated in clear terms that counsel's submission is not part of evidence and should not be equated with resolution of issue by the court. See: *Olufosoye v. Fakorede* (1993) 1 NWLR (Pt.272) 774 at 783.

The two courts below made concurrent findings on the above crucial issue which have not been demonstrated to be perverse or against the current of plausible evidence accepted by the trial court and affirmed by the court below. This court does not form the habit of interfering in such situations. I shall not interfere. See: *Seatrade v. Awolaja* (2002) 2 SC (Pt. 1) 35.

For the above reason and of course the detailed ones adumbrated in the lead judgment which I seek leave to adopt, I too feel that the appeal lacks merit and should be dismissed. I order accordingly and abide by the consequential order therein made; that relating to costs inclusive.

---

G **PETER-ODILI JSC**

I agree in totality with the judgment just delivered by my learned brother, Musa Dattijo Muhammad, JSC. In support of the reasons, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Ibadan Division which had dismissed the appeal from the judgment of the Ogun State High Court sitting at Abeokuta delivered on the 29th of July, 1998 per I.O. Sonoiki J.

The claims of the Appellants from their Amended Statement of Claim are as follows:-

(a) Declaration that the defendant's family has forfeited their interest (if any) on the land in dispute as customary tenants of the Plaintiffs having engaged in acts of misconduct.

(b) Declaration that the plaintiffs are the persons entitled to the grant of statutory right of Occupancy over and in respect of a piece or parcel of land situate, lying and being at Ago Ijesha township, B Sokenu Road, Abeokuta, Ogun State, Nigeria.

(c) N50,000.00 damages for trespass committed by the defendant when he unlawfully entered the land, disturbed the possession of the Plaintiffs' tenant and pulled down the wall fence erected C by the Plaintiffs.

(d) Perpetual Injunction restraining the defendant by himself, his agents, servants or privies from committing any further acts of trespass on the Plaintiffs' land.

The case went on trial and the parties called witnesses in proof D and in defence of their respective claims. At the close of trial, the learned trial judge dismissed all the claims of the plaintiffs and granted the counter-claim of the Defendant in part. Plaintiffs dissatisfied appealed to the Court of Appeal which dismissed their appeal and upheld the decision of the Court of trial. E

Again dissatisfied, the Appellants have appealed to this Court.

#### BACKGROUND FACTS:

The facts bringing out what is at the root of the dispute which were considered from the trial High Court to the Court of Appeal F and now at the Supreme Court are as follows:-

The subject-matter of this case is the two landed properties known as Nos. 82 and 86 Sokenu Road, Oke-Ijeun, Abeokuta. The Plaintiffs' case is that the two parcels of land formed part of a large parcel of land granted by the Egbas to Ijesha people, led by their ancestor, Adelekan. Further, that after the grant by the Egba Chiefs, the Ijesha people exercised various acts of ownership on various portions of the parcel of land which included the grants to many people including the Defendant's father, Sowemimo under customary tenancy. It was under the customary tenancy, the Plaintiffs claimed that H the Defendant's father built the houses on the two parcels of land which are now in dispute.

According to the Plaintiffs, the Defendant's father abandoned the two parcels of land, contrary to the terms of the customary ten-

ancy as a result of which the Plaintiff's Ijesha Community re-entered the two parcels of land and let same to one Alhaji Saubana Olaogun, also known as Asiri Abo, who developed and rented same to tenants on behalf of the Ijesha Community.

However, the Defendant's case supported by empirical evidence is that his father derived title to the two parcels of land on which he erected buildings through Absolute Grants by Ijeun people, the original owners. Furthermore, that the grants were made many years before the Ijesha Community, which the Plaintiffs represent were settled on another portion of Ijeun land nearby. Importantly, the Defendant denied that his father was a customary tenant to the Ijesha Community on the two parcels of land. He pleaded and gave evidence of acts of ownership from the time of the grant to his father, up to the time the Plaintiffs trespassed on the parcels of land. Based on the false claims made by the Plaintiffs, the Defendant instituted a Counter-claim in respect of which he claimed Declaration of Title, Damages and Injunctive Relief.

Briefs were filed and exchanged in keeping with the Rules of this Court and on the 24th day of February, 2014, the appeal was heard. On that day, learned counsel for the Appellant, Mr. K. O. Obamogie adopted the Brief of the Appellant which he settled, filed on 15/12/09 and deemed filed on 17/2/10. He formulated three issues for determination which are stated hereunder thus:-

1) Whether the Justices of the Court of Appeal were not wrong or committed misdirection of law when they confirmed the granting of the Respondent's counter-claim based on two contradictory roots of his title to the land in dispute. (Ground 1)

2) Whether the learned Justices of the Court of Appeal were not wrong in confirming the judgment of the trial Court based on acts of possession as opposed to the unproved root of title as pleaded, (Grounds 4 and 5).

3) Whether the Justices of Appeal were not wrong in their holding that although the learned trial judge directed the visitation to the locus-in-quo, the failure to eventually visit the locus in quo before judgment did not occasion miscarriage of justice, (Ground 3).

Learned counsel for the Appellant also adopted their Reply Brief filed on 2/12/13 and deemed filed on 24/2/14.

Seni Adio, learned counsel for the Respondent adopted their

Brief of Argument settled by himself, filed on 1/8/09 and deemed filed on 24/2/14. In the Brief, the Respondent raised and argued his Preliminary Objection and adopted the issues as drafted by the Appellant. Since the Respondent was not in Court to seek leave to argue and move the Preliminary Objection, it is taken as abandoned and of no moment. B

The Respondent decided to utilize the issues as crafted by Appellants.

#### ISSUE ONE:

Whether the Justices of the Court of Appeal were not wrong or committed misdirection of law when they confirmed the granting of the Respondent's counter-claim based on two contradictory roots of his title to the land in dispute. C

Learned counsel for the Appellant submitted that it is trite law that there is a distinction between a main claim and the counter-claim as the two are separate and independent actions and so the failure of a main claim does not mean the success of the counter-claim. That the counter-claim has to be separately made out on proven facts and evidence. Also that a party who sets up a counter-claim must plead all relevant facts and adduce cogent evidence to prove the facts so pleaded. He cited *Jeric (Nig.) Ltd v U.B.N. Plc* (2000) 15 NWLR (Pt. 691) 447; *Ekwunife v. Ngene* (2000) 2 NWLR (Pt. 646) 650; *Igbinovia v Agboifo* (2000) 12 (Pt. 681) 336. D E

Mr. Obamogie of counsel for the Appellant contended that in the case at hand, the learned trial judge reached his conclusion on the counter-claim without separately considering it instead of using his finding in the main claim to reach that conclusion in the counter-claim which was erroneous. He said it is well settled that a claimant for declaration of title has the onus to satisfy the court that he is entitled on the evidence brought by him to the declaration of title claimed. That the claimant must rely on the strength of his own case and not on the weakness of the defence and if the onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment will be for the defendant. He relied on *Elema v Adenzua* (2000) 13 NWLR (Pt. 683) 92 at 98 - 99; *Olohunde v Adeyoju* (2000) 10 NWLR (Pt. 676) 562 at 580 etc. F G H

For the Appellant was also submitted that in a claim for declaration of title to land, it is now settled law that, there are five ways by

which a claimant can establish his title to a particular piece of land. He cited *Balogun v Akanji* (1988) 1 NWLR (Pt. 70) 30; *Idundun & Ors v Okumagba* (1976) 9 & 10 SC 227 at 246 - 250.

That the Respondent pleaded grant as his root of title and referred to his pleadings and the evidence he proffered such as that of  
B DW5 and DW7.

For the Appellant was submitted that the root of title of grant pleaded by the Respondent is not supported by evidence and is deemed not proved. Learned counsel stated that the evidence proffered is at variance with the pleadings hence it goes to no issue as  
C grant is not synonymous with purchase. That it is a fundamental principle of our law that parties are bound by their pleadings and evidence at variance with the averments in the pleadings go to no issue and should be discountenanced. He referred to *Kode v. Yusuf* (2001)  
D 4 NWLR (Pt. 703) 392 at 409; *Emegokwue v Okadigbo* (1973) 1 All NLR (Pt. 1) 397 at 382 - 383; *Metalompex v Leventis* (1976) 2 SC 291; *Woluchem v Gudi* (1981) 5 SC 291.

It was contended for the Appellant that the Respondent's case is made worse and irredeemably weakened because he never pleaded  
E the particulars of the purchase, particularly the purchase price and how the land was handed over to his father. Also, making it worse is that the Respondent/Counter-Claimant neither pleaded nor tendered any deed of conveyance evidencing the purchase, which he claimed  
F the Late Joseph Sowemimo had.

Mr. Obamogie of counsel said the appellants called PW2, Joseph Sodiya Folakan whose evidence weakened the claim of the Respondent on the purported purchase of land from the Ijeun to Joseph Sowemimo, father of the Respondent. He said this piece of  
G evidence was neither challenged nor shaken by the Respondent under cross-examination and so the evidence should be accepted as the truth of that matter as led in evidence. He relied on the cases of *Omoregbe v Lawani* (1980) 2- 3 SC 108; *Odulaja v Haddad* (1973) 11 SC 357 etc.

H Mr. Seni Adio, learned counsel for the Respondent contended that a sale or purchase of land is within the ambit and not contradictory to an absolute grant of land. That it would have been different if after pleading absolute grant by Ijeun Chiefs the defendant gave evidence of purchase from another grantor. That it is only settlement

that is not consistent with grant because original settlement admits of no previous holder. He cited *Kode v Yusuf* (2001) 2 SCNJ 49 at 71.

For the Respondent was submitted that respondent was consistent both in his pleading and evidence in respect of the absolute grant by sale of the two parcels of land in dispute to his late father by Ijeun people who were the undisputed original settlers. B

That it must be borne in mind that the Defendant relied on traditional evidence to ground his counter-claim for his title. He cited *Idundun v. Okumagba* (1976) 1 NMLR 200.

That the respondent did not put forward two contradictory roots of title and the Lower Court did not make such a finding. C

This issue does not arise from any ground of appeal and had been part of the judgment of the Court of Appeal because the Court utilized what was in learned counsel for the Appellant's Brief at the Court of Appeal. The matter was not part of what was contained during the trial or supported by the Records. The issue therefore being incompetent is struck out. D

### ISSUE TWO & THREE

Whether the learned Justices of the Court of Appeal were not wrong in confirming the judgment of trial Court based on acts of possession as opposed to the unproved root of title as pleaded. E

Whether the Justices of Court of Appeal were not wrong in their holding that although the learned trial judge directed the visitation to the locus-in-quo, the failure to eventually visit the locus in quo before judgment did not occasion miscarriage of justice. F

Learned counsel for the Appellants stated that if the Respondent denies the Appellants being their customary landlord, then the issue of possession is not sufficient to sustain their claim as Respondent must be able to convincingly make out a case of title from where the possession derives. As to the question whether it was by grant or by purchase, the respondent was not able to resolve before the trial Court. That no member of the Ijeun family was called by the Respondent to support his claim that respondent's ownership of the land in dispute came from the Ijeun family. He said it is trite that where the root of title as pleaded by a party fails, possession could not be propped up as a substitute for a failed title. That the failure of the respondent's root of title makes it more probable that the possession of the land in dispute actually derives from the Appellants. He H

referred to pieces of evidence of PW2 which learned counsel said were unchallenged.

For the Appellants was further submitted that the conditions under which the property could have legally reverted back to the appellants are fulfilled. That a denial of the landlordship title is in itself  
B a sufficient misconduct upon which forfeiture could be based notwithstanding the denial of such relationship by the respondent.

He referred to *Taiwo v Akinwumi* (1975) 5 SC 143 at 171; *Muemue v Gaji* (2001) 2 NWLR (Pt. 697) 293.

C Learned counsel for the Appellants stated that the Court below in affirming the judgment of the trial Court placed much emphasis on the exhibits tendered by the Respondent, which exhibits had no probative value and so should not have negatively affected the case of the Appellants.

D Mr. Obamogie of counsel submitted that the confusion generated in respect of the location of the property in dispute was not cleared, rather, it was worsened by the directive of the trial Court for a visit to the locus-in-quo which was not carried out. He relied on *Olusanmi v Osasona* (1992) 6 NWLR (Pt. 245) 22.

E Learned counsel for the Appellant contended that there are contradictions on the traditional history of ownership of the land by the Respondent and in the light of the conflicts in the evidence of the witnesses called by the same party, the rule in *Kojo II v Bonsie* is inapplicable. He cited *Mogaji v Cadbury Nig. Ltd* (1985) 2 NWLR  
F (Pt 7) 393.

In reaction, learned counsel for the Respondent said the two Courts below made use of the findings of continuous possession of the parcels of land to resolve the issue of abandonment by the Plaintiffs/Appellants and the claims for trespass and injunction as contained  
G in the counter-claim of the Defendant/Respondent. He said the Appellants did not plead the time their ancestors were settled on Ijeun land and also failed to plead the time they made the alleged customary grants to the Respondents father, while on the other hand, the  
H Respondent pleaded the time of the absolute grants to his late father of the parcels of land in dispute and went further to plead the time the Ijeshas were settled on the Ijeun land. That it was in consideration of the evidence which the pleadings supported that made the trial Court conclude that the evidence of the Respondent that the Ijeshas



were settled on Ijeun land in 1932 is credible and preferred. He cited *Obasohan v Omorodion* (2001) 7 SCNJ 168 at 180; *Okereke v Nwankwo* (2003) 4 SCNJ 211 at 226 - 227.

Mr. Adio of counsel said the documents tendered by the Respondent in conjunction with other available evidence, the Lower Courts were able to confirm the title of the Respondent's family to the parcels of land in dispute and further to disprove the claims of customary tenancy abandonment and declaration of title by the Appellants. He relied on *Abey v Alex* (1999) 12 SCNJ 234 at 248. B

On the matter of the visit to the locus in quo, Mr. Adio of counsel said there was no need for such a visit since there was enough from which the trial court founded its observation. He cited Section 127(1)(b) of the Evidence Act; *Ejidike v. Obiora* 13 WACA 270 at 274. C

A summary of what is at play is that the parties claim declaration of title respectively and also claims in damages for trespass and injunctive relief. The Appellants additionally claimed forfeiture, stating that the Defendant/Respondent abandoned the parcels of land. To debunk this assertion of abandonment put up by the Appellants, the Respondent by counter-claim for trespass and injunction from their Statement of Defence and evidence through DW2, DW5 - DW7 testified to various acts of ownership and possession of the two properties, up to 1993 when the action was instituted. The trial judge held that the Appellants were unable to prove their root of title to the two parcels of land as the Appellants had relied heavily on the evidence of PW2 as the proof of the title of the Appellants, that the evidence of the witness had no probative value on the issues joined by the parties. An example is PW2 while testifying claimed to be the OLOWU OF IJEUN and that another person, Chief Adeyemi Adeboye was the OLOWU OF EGBA and the Court of trial found that the PW2 was not even an Egba Chief and so not in a position to attest to who the OLOWU OF EGBA was. As if the problems of the Appellants in proof were not bad enough, PW2 said the land in dispute is situated at Ijeun, meanwhile the Appellants' case is that the land is situated at AGO-IGESHA. Abeokuta. He had further testified thus:- D

*"I do not know the land in dispute. I have never visited the land in dispute."* E

The trial Court in the light of these pieces of uncertain evi- F

dence had no difficulty in holding that PW2's evidence lacked probative value. The trial Court then found and was affirmed by the Court below that the acts of possession of the Respondent's family to resolve the issues of the alleged abandonment and trespass as raised by both parties respectively. This is because an action in trespass is based on possession and is maintainable against all except the person with a better title. As a follow up is that there cannot be concurrent possession by two parties claiming adversely against each other, since a resolution either way must be made.

On the forfeiture claim of the Appellants, they must show the misconduct of the person they put into possession before the overlord as the Appellants claim to be can enforce the right of forfeiture and regain possession. See *Aderounmu v Olowu* (2000) 2 SCNJ 180 at 192-193, *Akunyili v Ejidike* (1996) 5 NWLR (Pt. 449) 381 at 405 - 407; *Atolagbe v Shorun* (1985) 4 SC 280 at 274; *Oniah v Onyia* (1989) 1 NWLR (Pt. 99) 514 at 532.

It is worthy of note the concurrent assessment, evaluation and ascription of probative values by the two Courts below with respect to the evidence including the Exhibits tendered from which the conclusion came about that the evidence of the Defendant that the Ijeshas were settled on Ijeun land in 1932 is credible and preferred. Also that in Exhibit F, Alhaji Saobana Olaogun aka Asiriabo associate to the Appellants to whom they claimed to have given the parcels of land after the Respondent's family had abandoned them, confirmed that the Sowemimo family owned the land upon which the three shops were built on No. 82 Sokenu Road, one of the parcels of land in dispute. Again, the two Courts found that in Exhibit H, a Notice to Quit written on the instruction of the Appellants described the relationships between the ijasha Community and the Respondent's father as a LIFE TENANCY which is different from the evidence of Customary Tenancy put up by the same Appellants. It was therefore easy for the two Courts to find and affirmed by the Court of Appeal that the documents tendered together with other evidence proffered, that title resided in the Respondent's family and not the Appellant who could not substantiate their claims of title based on a customary tenancy granted the Respondents which was abandoned.

The concurrent findings and conclusion of the two Courts below, well borne out by the materials available in the record cannot be

interfered with since no perversity has been established, nor did those findings and conclusion emanate from a wrong application of the law, substantive or procedural, not talk about the fact that no miscarriage of justice has been occasioned.

A lot of fuss was made by the Appellants on the non visit to the locus in quo as to bring into question the exact identity or location of the land in dispute. B

The facts and circumstances of this case do not bear out that position of the Appellants as the Court merely wanted the PW6, the 1st Appellant to go visit the land to refresh his memory in the light of his confusing and self-contradictory evidence in relation to the buildings at NO. 82 Sokenu Road. As a refresher on the testimonies in regard to what was on the land in dispute, the Appellants presented a case in Court of trial that the Ogun State Government demolished the two buildings erected by the Respondent's father on Nos. 82 and 86 Sokenu Road for the purpose of road expansion. The Respondent put across in pleading and evidence that the demolition exercise affected a substantial part of No. 86 leaving only the kitchen and store, while the main building on No. 82 was intact. The Respondent's witnesses presented a clear description on the number and nature of the structures on the two parcels of land as pleaded. In fact one of the witnesses for the Appellants, PW3 testified along the line put up by the Respondent on the identity and structures on the land. It was therefore to set PW5 and PW6 on track when the trial court found their evidence confusing and contradictory as to what land they were referring to, that the trial judge directed that they go to the land and confirm what was there. That is not the same as an order for a visit to the locus in quo as a necessity and which visit was not made by Court. This is because Exhibits B, C and D tendered were pictures from the Appellant on the buildings they claimed to have put up there through late Alhaji Olaogun which Exhibits PW6 confirmed to correctly show the building. Again to be stated is that there was clarity in sight of the trial Court of the State of things which enabled the trial court to make its resolution of the conflicts between the parties and the Court of Appeal had no difficulty in so confirming and therefore the Court had no need to visit the locus in quo and the failure to so visit is neither here nor there. There is no mileage to be gained by the Appellants in harping on the absence of the visit to the site. For empha- C D E F G H

sis, a visit to a locus in quo is not a must do before a Court can reach a decision as to where and what land is really in dispute. The trial Court was right and the Court below on firm ground to so affirm that there was no necessity for the visit by court and the directive was not for the Court to visit or for all the parties but for PW5 and PW6 who  
B showed they had lost their way in the course of their evidence. I rely on the case of Ejidike v. Obiora 13 WACA 270 at 274. I resolve the issues 2 and 3 against the Appellants.

From the foregoing and the better presented reasoning in the  
C lead judgment of my learned brother, M. D. Muhammad, JSC, I too dismiss this appeal being unmeritorious.

I abide by the consequential orders made.

---

D ***KEKERE-EKUN JSC***

I have had the privilege of reading in draft the well considered judgment of my learned brother, MUSA DATTIJO MUHAMMAD, JSC just delivered. I agree with the analysis of the issues in contention and the conclusion that the appeal lacks merit. The observations here-  
E under are in support of the lead judgment.

The appellants who were the plaintiffs at the trial court claimed that the parcels of land in dispute known as Nos. 82 and 86 Sokenu Road, Abeokuta, Ogun State form part of a larger tract of land granted  
F to the their ancestor (led by one Adelekan) by the Ijeun Community, the original settlers on the land. They claim that their ancestors exercised various acts of ownership over the land and in the process granted parcels of land to some tenants, including Joseph Sowemimo, the respondent's father, under customary tenancy. It is their contention  
G that the respondent's father abandoned the two parcels of land and that the family stopped paying customary tribute, contrary to the terms of the tenancy. On this basis, the Ijesha Community therefore re-entered the two parcels of land and let same to one Alhaji Saubana Olaogun, also known as Asiri Abo, who developed same and let them  
H to tenants on behalf of the Community. They contend that the respondent trespassed on the land, demolished a fence erected thereon and caused the arrest of some of the tenants found in their various shops. They also alleged that he had been preventing the appellants' workers from carrying out construction of a proposed community

hall. Consequently they instituted an action against him before the High Court of Ogun State, sitting at Abeokuta (the trial court) by a writ of summons filed on 14/4/94.

By their Further Amended Statement of Claim at pages 104 - 108 of the record, the appellants as plaintiffs sought the following reliefs: B

*“1. Declaration that the defendant’s family has forfeited their interest (if any) on the land in dispute as customary tenants of the plaintiffs having engaged in acts of misconduct.*

*2. Declaration that the plaintiffs are the persons entitled to the grant of statutory Right of Occupancy over and in respect of a piece or parcel of land situate, lying and being at Ago Ijesha township, Sokenu Road, Abeokuta, Ogun State, Nigeria.* C

*3. N50,000.00 damages for trespass committed by the defendant when he unlawfully entered the land, disturbed the possession of the plaintiff’s tenant and pulled down the wall fence erected by the plaintiffs.* D

*4. Perpetual injunction restraining the defendant by himself, his agents, servants or privies from committing any further acts of trespass on the plaintiffs’ land.”* E

The respondent on the other hand contends that his father derived his title to the two parcels of land on which he erected buildings through absolute grants by the Ijeun people, the original owners. That the grants were made many years before the Ijesha Community were settled on another portion of Ijeun land nearby. The respondent denied that his father was a customary tenant of the Ijesha community in respect of the two parcels of land or that he ever abandoned the land. He pleaded and gave evidence of acts of ownership from the time of the grant to his father, up to the time the appellants trespassed on the land sometime in June 1993 erecting a fence thereon. F

The defendant/respondent filed a Further Amended Statement of Defence and Counter Claim. In the counter claim, he sought the following reliefs: H

*“10.(1)(a) Declaration that the JOSEPH SOWEMIMO FAMILY is the deemed grantee of the rights of occupancy in respect of two parcels of land with the buildings thereon known as Nos. 82 and 86 Sokenu Road Oke-Ijeun Abeokuta and more particularly de-*

*scribed, delineated and verged RED in the Survey Plan No. AKN/OG/002/LD/95 dated 25/1/95 drawn by S. O. Akinde a registered Surveyor.*

(b) *N5,000.00 damages from the trespass committed on one of the parcels of land known as No. 86 Sokenu Road when the plaintiffs without the consent and authority of the Sowemimo Family caused a wall fence to be erected thereon thereby sealing off the parcel of land and the building thereon.*

(c) *Perpetual injunction restraining the plaintiffs by themselves or through their agents, privies and servants from further trespassing on any of the parcels of land."*

The parties testified in support of their respective positions, called witnesses and tendered exhibits. At the conclusion of the trial, the trial court on 29/7/98 dismissed the appellants, claims and entered judgment for the respondent on his counter claim. The court granted the claims for declaration of title and injunction but refused the claim for damages for trespass. The appellants were dissatisfied with the decision and appealed to the Court of Appeal, Ibadan Division. The appeal was dismissed on 28/3/2003. The appellants have further appealed to this court vide their notice of appeal filed on 11/8/2003 containing 5 grounds of appeal. At paragraph 3.05 on page 5 of the appellants' amended brief of argument, which was deemed filed on 17/2/2010, issue 2 was abandoned. Three issues were formulated from Grounds 1, 3, 4 and 5. The respondent adopted these issues.

The first issue is whether the Justices of the Court of Appeal were not wrong or committed misdirection in law when they confirmed the granting of the respondent's claim based on two contradictory roots of title to the land in dispute.

It is the contention of learned counsel for the appellants that the learned trial Judge based his decision in respect of the counter claim on the findings made in respect of the appellants' main claim. He submitted that a counter claim being a separate action, the respondent seeking a declaration of title in his favour was bound to prove by cogent evidence that he is entitled to the declaration in his favour. He argued further that the trial court ought to have considered and determined the counter claim separately. Referring to the evidence of DW5 and DW7, who testified in support of the counter claim, he contended that they gave contradictory evidence regarding

the respondent's root of title and that the evidence proffered is at variance with his pleading. He argued that even though the lower court agreed and held that the respondent relied on two contradictory roots of title, it failed to make a specific pronouncement on the issue.

It is contended on behalf of the respondent that there is nowhere in the judgment of the lower court that it reached the conclusion that the respondent relied on contradictory roots of title. Learned counsel for the respondent submitted that the portion of the judgment, which the appellants quoted from page 226 of the record is merely a review of the submissions of learned counsel for the appellants before the lower court and that it was in fact lifted from the 5th paragraph of the appellants' brief titled "*Facts of the Case.*" He drew the court's attention to pages 190 - 191 of the record.

The law is settled that a ground of appeal must arise from the judgment appealed against. See: *Yadis (Nig.) Ltd. Vs G.N.I.C. Ltd.* (2007) 14 NWLR (Pt. 1055) 584; (2007) 4-5 SC 236; *Chami Vs UBA Plc* (2010) 6 NWLR (Pt. 1191) 494 SC.

In this case, there was no finding by the lower court that the respondent put up two contradictory roots of title. The portion of the judgment referred to by the appellants at page 226 of the record was lifted verbatim from the appellants' brief at page 191 of the record, particularly paragraph 2.02 thereof. The appellant made the submission in the course of stating the facts of the case. In other words it is the opinion of learned counsel for the appellant and not the finding of the court that the respondent relied on contradictory roots of title. Interestingly enough, the same submission is repeated verbatim in the statement of facts contained at pages 3-4 paragraph 2.05 of the appellants' amended brief of argument. It is instructive that the lower court commenced its consideration of the issues for determination at page 227 of the record, after the statement upon which this issue is based was made. The finding of the lower court on the title of the respondent/counter-claimant is at page 233 of the record. There was no finding that the respondent relied on contradictory roots of title.

I therefore agree entirely with my learned brother, M. D. MUHAMMAD, JSC in the lead judgment that Ground 1 of the notice of appeal not having arisen from the judgment appealed against is incompetent and the arguments in respect thereof are hereby dis-

countenanced. This issue is accordingly resolved against the appellants.

The second issue is whether the learned Justices of the Court of Appeal were not wrong in affirming the judgment of the trial court based on acts of possession as opposed to the unproved root of title as pleaded.

This issue is on the rejection by the two lower courts of the appellants' contention that the properties were abandoned by the respondent's family, which entitled them (appellants) to repossess same. At pages 159 to 162 of the record, the learned trial judge painstakingly reviewed and evaluated the evidence regarding the allegation of abandonment. He made a finding of fact that there was no proof of abandonment as alleged by the appellant. The lower court affirmed this finding at page 233 of the record, where it held:

*"In the instant case, Exhibits B, C and D show the photograph of the main entrance on No. 82 Sokenu to disprove the abandonment and rebuilt claims of the plaintiffs and to establish continuous possession of the defendant's family. Exhibit F shows that Saubana Olaogun (whom the plaintiffs claimed rebuilt both No. 82 and 86 Sokenu) actually acknowledged the defendant's family as owners of No. 82 Sokenu Road. Exhibit G tendered pursuant to Sections 2, 3, 4, 5, 6 and 7 of the Public Archives Act Cap. 376 L.F.N. provided independent and authenticated evidence of the time of settlement of the Ijeshas in Abeokuta in line with the pleadings of the defendant. Exhibit H shows how unreliable the case of the plaintiffs that the defendant's father was a customary tenant to the Ijsha Community, It also shows continuous acts of ownership of the defendant's family. Exhibits I, J - J4 are of the same relevance and probative value with Exhibit H. They negate the story of the plaintiffs that the defendant's family have abandoned the properties in dispute. It must be noted that the Appellants' Brief completely ignored the relevance and probative value of these exhibits put in by the defendants."*

It is not the practice of this court to disturb the concurrent findings of fact by the two lower courts. This is because it is presumed that the conclusions reached by the trial court, which had the unique opportunity of seeing and hearing the witnesses testify on issues of fact, are presumed to be correct. The person seeking to upset the judgment on facts must displace the presumption. He must be able



to satisfy this court that the findings are perverse or that some miscarriage of justice has occurred or that there has been a violation of some principle of law or of procedure. See: Eholor Vs Osayande (1992) 7 SCNJ 217; (1992) 6 NWLR (Pt. 249) 524; Balogun & Ors. Vs Agboola (1974) 1 ALL NLR (Pt. 2) 66; Ogoala Vs The State (1991) 2 NWLR (Pt. 175) 509; Cameroon Airlines Vs Otutuizu (2011) 1 - 2 SC (Pt. III) 200. The appellant herein has failed to displace the presumption in this appeal. There is no justification for interfering with the concurrent findings of fact by the two lower courts. This issue is also resolved against the appellants.

The third issue is whether the Justices of the Court of Appeal were not wrong in their holding that although the learned trial Judge directed the visitation to the locus in quo, the failure to eventually visit the locus in quo before judgment did not occasion a miscarriage of justice?

I am inclined to agree with learned counsel for the respondent that there was no confusion in respect of the location and identity of the properties in dispute. What transpired at the trial court was that under cross-examination PW5 and PW6 gave confusing evidence, which contradicted their pleadings. Of particular relevance is the evidence of PW6 under cross-examination at page 124 of the record. It was at this stage and before the defence had opened their case that the court advised the parties and their counsel to go back to the locus in quo to refresh their memories before further cross-examination could continue. The court wanted the parties to be clear in their testimony. Since only one exhibit, Exh. A, had been tendered at this stage and the defendant and his witness had not testified, it would not be correct to say that the identity and/or location of the disputed property was not clear to the learned trial Judge, as argued by the appellants. It is correct, as argued on behalf of the respondent, that the learned trial Judge was entitled to use the evidence before him, including the documentary evidence, to resolve any alleged conflict as to whether the bungalow on Plot 82 Sokenu Road was converted into shops as contended by the respondent or totally rebuilt between 1984 - 1986 as claimed by the appellants. In the circumstances of this case there was no need for the court to visit the locus. Failure to do so has not been shown to have caused any miscarriage of justice. I therefore resolve issue 3 against the appellants.

On the whole, I agree with my learned brother in the lead judgment that the appeal lacks merit. I also dismiss it with N100,000.00 costs against the appellants and in favour of the respondent.

B

C

D

E

F

G

H