

SUPREME COURT OF NIGERIA
FRIDAY 27TH JUNE, 2014. SC. 234/2004
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC**

1. NNAEMEKA OKOYE
2. NNAEMEKA IBEH
3. GODSON OKEKE (ALIAS OTOO)
4. NWABUNWANNE OBIKE
5. AZOBA IBEH APPELLANTS
6. NWAFOR NDEFO
7. CLEMENT OKEKE
(For themselves and as Members of
Obiajulu Family in Umuokeagu Quarters of
Uru-Owelle section of Nkwelle-Ogidi, Ogidi)
AND
OGUGUA NWANKWO RESPONDENT
(Suing as the Head of Nwankwo
Okonkwo Family as well as the
Representative Head of Obolua Family
In Amangwu Quarters of Ezi-Nkwelle
section of Nkwelle-Ogidi, Ogidi)

ACTIONS - Proof - Burden of - Determination - Burden of proof arises where there are issues in dispute between parties - And to discover where the burden lies - Court must consider the pleadings (H1)

LAND LAW - Title - Proof - Onus - Is on plaintiff who seeks declaration of title - To start the process of testimony - Thereafter defendant proffers his evidence in defence (H2)

ACTIONS - Proof - Standard of - Civil cases are based on balance of probabilities - And onus rests on party who asserts the affirmative - Except in peculiar instances (H3)

PLEADINGS - Purpose of - It affords opponent opportunity of know-

2718 Okoye v. Nwankwo (2014) 6 KLR (pt. 351) 2717; (2014)

ing the case to meet at trial - And all facts relied upon by party before court - Must be pleaded in numbered paragraphs (H4)

COURTS - Actions - Statement of claim - Reply - Determination - Before court decides whether or not there is reply to suit - In respect of averment in statement of claim - It must consider pleadings of parties (H5)

LAND LAW - Possession - Proof - By admitting that plaintiff is in possession of disputed land - Onus of proving that those in admitted possession were not the owners - Shifted to defendants (H6)

LAND LAW - Title - Original owner - Onus of proof - The parties having agreed that original ownership is in plaintiff - Burden of proving that they have been divested of title - Rests upon defendants (H7)

ACTIONS - Proof - Onus - Misapprehension of - Where there is misapprehension as to onus of proof - And a misdirection casting such onus on wrong party - There is likelihood of miscarriage of justice (H8)

EVIDENCE - Land law - Root of title - Lower courts rightly concluded that - Defendants should testify first as per their pleadings - Hence the suit should accordingly be continued at trial court (H9)

FACTS

Plaintiff/respondent (in a representative capacity) commenced this action against defendants/appellants (also in representative capacity) at the High Court of Anambra State Onitsha, seeking for declaration of title over the piece of land in dispute, damages for trespass and perpetual injunction restraining appellants from entering the land without the permission of respondent. Appellants filed their statement of defence in the matter. The case was initially tried by Aneke J. Later on, it started de novo before Okike J.

Upon resumption of the matter, learned counsel for respondent contended that from the state of pleadings, appellants should start by calling their witnesses. Appellants on the other hand argued

that onus of proof on respondent never shifts in land matter. Hence, appellants maintained that respondent should rather start calling witnesses first. In his ruling, the learned trial Judge held that with appellants admitting that respondent was the original owner of the land in dispute, the onus is on appellants to prove an absolute grant of same to them. Dissatisfied with the ruling, appellants lodged appeal in the Court of Appeal Enugu Division. The appeal was dismissed and appellants in consequence have appealed further to Supreme Court.

ISSUES FOR DETERMINATION

The question here posed is whether or not the two courts below were right on the stand that the defendants ought to take the first slot with their witnesses.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

ACTIONS - Proof - Burden of - Determination

1. The onus or burden of proof is merely an onus to prove or establish an issue. There cannot be a burden of proof where there are no issues in dispute between the parties and to discover where the burden lies in any given case, the court has a bounden duty to critically look at the pleadings. (p. 2731 H)

LAND LAW - Title - Proof - Onus

2. The general rule is that it is the plaintiff who seeks a decree of declaration of title that has the onus of proof.

The norm in civil cases is that the plaintiff starts the process of testimony first and his witnesses if any, thereafter the defendant proffers his evidence in defence. (p. 2732 A)

ACTIONS - Proof - Standard of

3. In civil cases, proof is based on balance of probabilities and it rests on the party who asserts the affirmative, in this case the appellant and he failed to discharge the burden on him.

The point has to be made that it is not in all instances where the usual or the norm must play out. This is because certain

peculiar features might present which will change the course of events like who takes the first shot at the evidence.

The courts and counsel should move away from discussing technical matters when the substantial matter in a case is the issue. (p. 2732 E)

B

PLEADINGS - Purpose of

4. The purpose of pleading is to afford the opponent the opportunity of knowing the case he would meet at the trial. It is for that reason that all facts relied upon by the party in a civil matter before a superior court of record must be clearly pleaded in numbered paragraphs. The reason for this principle of practice is that no party should take advantage of locking away facts from his pleadings and unleashing a surprise in court by evidence on a matter not pleaded.

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(p. 2733 A)

Actions - Statement of claim - Reply

5. Before a Court decides whether or not there is an admission or reply to a suit in respect of an averment in a statement of claim, it must consider the entire pleadings of the parties as whole. (p. 2733 C)

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LAND LAW - Possession - Proof

6. By admitting that the respondent's ancestors were and that the respondent is still in possession of the land in dispute or even part of it but on a pledge the onus of proof that those in admitted possession were not the owners of the land in dispute shifted to the defendants/appellants by the operation of Section 145 of the Evidence Law Cap 49 of the Laws of Eastern Nigerian 1963 in force in Imo State. The trial court should have called upon the defendants to begin, not the plaintiff who should not have been called upon to establish what the law presumes in their favour. (p. 2737 B)

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LAND LAW - Title - Original owner - Onus of proof

7. Since the parties agreed and found as a fact by the trial judge that the plaintiffs were the original owners of the land in

dispute, the onus is on the defendants to establish a change of ownership by sale. There is no onus on the plaintiffs to establish a pledge. With that onus being on the defendants, it is their duty to begin to adduce evidence, for it is they who would lose if no more evidence is adduced having regard to the state of the pleadings. Another way of stating it is that when it is accepted by both sides and found as a fact by the trial court that the plaintiffs, ancestor was the “original founder” of the land in dispute, the presumption as their successors in title continued to be owners of the land in dispute until the contrary is proved.

It might seem strange or even radical and revolutionary for a trial court to call on a defendant to take the witness stand by himself or his witnesses before the plaintiff would be heard. But in truth there is nothing novel or out of the ordinary and so the two courts below were well guided by the applicable Rules of Court of the High Court of Anambra State, Order 24 Rule 17 and Sections 135 - 137 of the Evidence Act to decide that the appellant take the first slot of testimony before the respondent as plaintiff. These concurrent findings well founded, I see nothing upon which to base a departure from what they did or upset those earlier findings and conclusion.

Section 135 of the Evidence Act will compel a defendant who admits that the plaintiff is in possession of the land in dispute to establish that such plaintiff is not the owner, a fortiori, a finding by a court that the plaintiff descended from the “original founder” of the land in dispute coupled with the defendant’s averment of sale to them by the plaintiffs will definitely shift the burden of proof on the defendants to show that the original owners had extinguished their title. To hold otherwise will be to “overlook the established rule that once it is proved (here it was admitted by the defendants and found by the trial court) that the original ownership of the property is in a party the burden of proving that the party has been divested of the ownership rests upon the other party. (p. 2737 H)

ACTIONS - Proof - Onus - Misapprehension of

8. It needs be said that when there has been a misapprehen-

sion as to the onus of proof and a misdirection casting such onus on the wrong party, there is therefore a likelihood of a miscarriage of justice. Also such misdirection can also affect the credibility of witnesses. (p. 2739 A)

B LAND LAW - Root of title - Proof

9. From what I have tried to put across above, it is clear that the two courts below were well grounded and sure footed when they concluded that being led by the pleadings of the defendants they should testify first at least to resolve the fundamental and crucial part of the evidence as to the historical background of the land in dispute which they claim resided originally in the plaintiff/respondent's ancestor from which the appellants derived their title which they assert should not be questioned. The conclusion easily made is that the appeal lacks merit and I do not hesitate in dismissing it. I dismiss the appeal and uphold the decision of the Court of Appeal which affirmed the decision of the trial judge ordering that the defendants start their testimony first. Therefore I order that the trial court continues with the suit with the defendants starting their testimony first. (p. 2739 B)

NOTABLE POINT OF INTEREST

F PETER-ODILI JSC

1. Legal and evidential burden of proof

Burden of proof is two-fold. The first is the ability of a plaintiff to establish and prove the entire or reasonable portion of his case before a court of law that can give judgment in his favour. This is always constantly on the plaintiff. The other type is related to particular facts or issues which a party claims exist. It is this burden of proof that oscillates from one party to the other. While the first type of burden of proof is called legal burden or the burden of establishing a case, the second one is called evidential burden.

H The burden of proof in civil cases has two distinct meanings, viz.

(a) The first is the burden of proof as a matter of law and the pleadings usually referred to as legal burden or the burden of establishing a case.;

(b) The second is the burden of proof in the sense of adducing evidence usually described as the evidential burden.

While the legal burden of proof is always stable or static the burden of proof in the second sense i.e. evidential burden of proof may oscillate constantly according as one scale of evidence or the other preponderates. In civil cases, while the burden of proof in the sense of establishing the case initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift from the plaintiff to the defendants and vice-verso as the case progresses. (p. 2733 E/2735 G)

REPRESENTATION

J. E. O. Ogbuli, for the Appellants

Chief Ikenna Egbuna, for the Respondent

CASES REFERRED TO

Longe v. FBN Plc (2006) 3 NWLR (pt. 967) 2

Kala v. Potiskum (1998) 3 NWLR (pt. 540) 1

Buhari v. Obasanjo (2005) 13 NWLR (pt. 941) 1

N.A.S. Ltd v. UBA Plc (2005) All FWLR (pt. 284) 275

ASHDC v. Emekwu (1996) 1 NWLR (pt. 910) 241

Yusuf v. Oyetunde (1998) 12 NWLR (pt. 579)

Olorunfemi v. Asho (2000) 1 SC 15

Federal Mortgage Finance Ltd v. Ekpo (2004) 2 NWLR (pt. 856) 100

Onobruchere v. Esegine (1986) 1 NWLR (pt. 19) 799

Ochonma v. Unosi (1965) NMLR 321

Nigerian Maritime Services Ltd v. Afolabi (1978) 2 SC 79

Aire v. Adisa (1967) 1 All NLR 148

Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 353

Ezeudu v. Obiagwu (1986) 2 NWLR (pt. 21) 208

Kodilonye v. Odu (1935) 2 WACA 336

STATUTES & RULES REFERRED TO

Evidence Act LFN 1990, ss. 131-140

High Court Rules of Anambra State 1988, O. 24 rr. 17(1) - 17(3)

BOOK REFERRED TO

Phipson on Evidence 13th Ed. p. 770

LEAD JUDGMENT BY PETER-ODILI JSC

The respondent herein as the plaintiff in this suit in the High Court of Anambra State holden at the Onitsha Judicial Division, in a representative capacity sued the appellants hereto, as the defendants also in a representative capacity claiming the following reliefs:

A. A declaration that the plaintiff as the head of Nwankwo Okonkwo family as well as the representative head of Obolua family in Anangwo (kindred) quarters of Ezikwelle Ogidi is entitled to inherit under Ogidi Customary Rule of succession and customary right of occupancy at any time, at his will, ALL THAT PORTION OF LAND forming part of his ANCESTRAL HOME (PROPERTY) known as and called OWOKO ORURUIDE LAND valued N200.00 (Two Hundred Naira) lying, being and situate at Amangwu quarters of Ezikwelle Nkwelle Ogidi in Idemili Local Government Area within the jurisdiction of this Honourable Court, the particulars of which will be furnished in a survey plan to be attached to the statement of claim to be attached to the statement of claim to be filed PRIOR OCCUPIED and used by this predecessors in the (occupation) of whom OKONKWO OBOLUA was his grandfather.

B. N5,000.00 damages for trespass in that on or about the month of June 1978 the defendants in collaboration with some hirelings each aiding and abetting the other did break and enter into the plaintiffs ancestral property (LAND) known as and called OWOKO ORURUIDE and therein cleared the bush, felled numerous economic trees including iroko and palm trees of the plaintiffs family, collected palm fruits therefrom, deposited sands, gravels and blocks and did divers manners of work therein without the leave or license of the plaintiff's family. The defendants and their hirelings destroyed the plaintiffs blocks and demolished the plaintiffs foundation and have built and erected shops and constructed structures on portions of the land and have continued to ravage and commit several overt acts of trespass in aggravation on the said OWOKO ORURUIDE LAND.

C. A perpetual injunction restraining the defendants, their servants, agents and hirelings and privies from entering the land described or in any way dealing with or interfering with same without

the permission of the plaintiff.

BACKGROUNDS FACTS

By a claim dated 13/7/81 but filed on 14/7/81 the respondent as plaintiff instituted this action at the High Court of Anambra State and filed a Statement of Claim. In answer the appellants as defendants filed their Statement of Defence. On the 14th day of June, 1988 the case proceeded to trial before Hon. Justice J. G. O. Aneke of the High Court of Anambra State and the case started ‘de novo’ before Chidozie Okike J. on the 9th day of June, 1993. B

Before Chidozie Okike J. on 10th day of June, 1993 when the case came up for hearing the respondent’s counsel argued that from the state of pleadings that the defendants should start the case by calling their witnesses. C

On the 9th July, 1993 the appellants’ counsel replied to the respondent’s argument stating that the onus of proof is on the plaintiff and never shifts in land matters and so the respondents should start first by calling their witnesses. D

On the 23rd day of September 1993, Okike J. stated that the statement of defence being unequivocal that the plaintiff’s ancestor was the original owner of the land in dispute and the position is that with the defendants in their pleading admitting that the plaintiff was the original owner, the onus is on the defendants to prove an absolute grant to them. E

The defendants dissatisfied appealed to the Enugu Division of the Court of Appeal Coram: Mahmud Mohammed, Sule Aremu Olagunju and Clara Bata Ogunbiyi and they affirmed the decision of Chidozie Okike J. and dismissed the appeal. Again dissatisfied the appellants have come before this court on appeal on a two ground Notice of Appeal. I shall restate the grounds without the particulars: F

1. The learned Justice of the Court of Appeal erred in law by holding thus:

“Therefore having regard to the state of pleadings of the parties, it is quite clear that if no evidence at all had been forth coming from the defendants who have stated plainly in their statement of defence that the land in dispute originally belong to the plaintiff’s ancestor... The defendants would definitely have failed. In other words by their own statement of defence, the defendants now appellants have divested the plaintiff now respondent of his right to begin...” H

2. The learned Justice of the Court of Appeal erred in law by failing to consider other issues raised by the pleadings of the parties before coming to the decision that the defendants should begin to lead evidence.

B On the 1st day of April, 2014 day of hearing, learned counsel for the appellants, Mr. Ogbuli adopted his Brief which he settled and filed on 20/9/13 in which he distilled a single issue, viz:

C *“Whether the Justices of the Court of Appeal were right in holding that from the totality of the facts of the case that the appellants ought to call their witnesses first.”*

Chief Ikenna Egbuna of counsel for the respondent adopted his brief which he settled and filed on the 6th day of February 2014. He also adopted the issue as framed by the appellants.

SOLE ISSUE

D The question here posed is whether or not the two courts below were right on the stand that the defendants ought to take the first slot with their witnesses.

E Arguing against that position learned counsel for the appellants stated that in an action for declaration of title, damages for trespass and injunction such as the present case, the plaintiff must succeed or fail on the strength of his own case but not on the weakness of the defence. That the plaintiff is expected to prove his case on the preponderance of evidence and balance of probabilities. That in proving the case, the plaintiff must discharge the burden of proof placed F on him by the issues joined on the pleadings, the evidential burden placed on him by the law and the burden of establishing the admissibility of evidence. He cited *Longe v. FBN Plc* (2006) 3 NWLR (Pt.967) 2 NWLR (Pt.538) 33; *Kala v. Potiskum* (1998) 3 NWLR (Pt.540) 1 at G 17.

Mr. Ogbuli, went on to contend that upon the filing of pleadings by the parties, issues are joined and the state of the pleadings as joined by the parties will determine where the onus lies and who will first discharge the onus of proof. He said this also takes cognizance of H the presumption of law imposed on the trial court by the Evidence Act and other statutes such as Section 131 - 140 of the Evidence Act, Laws of the Federation, 1990.

For the appellants was submitted that the court below erred in its judgment upholding the contention of the respondent that on the

state of the pleadings, the onus is on the defendants to call their witnesses first. That the court failed to draw the distinction between the onus of proving one's case and the duty to call witnesses first. That it is trite law that pleadings are not evidence and a party must lead credible evidence on his pleadings to succeed in a case. Mr. Ogbuli of counsel said by averment in a statement of claim which is not supported by evidence in court is deemed abandoned by the party. That a party can plead a veritable course of action but fail to lead evidence in support of same, such pleading is taken as abandoned. He stated that were there are admissions in the pleadings, the plaintiff is still duty bound to step into the witness box and give the bare bone of his case and his claim against the defendant especially as the defendant might decide not to testify in his defence despite the pleadings and admission thereat. Mr. Ogbuli, said the reason for the scenarios above stated is that the court is not duty bound to enter judgment on the admission of the parties in their pleadings without more, so it is the duty of the plaintiff to get into the witness box and tell the court his case and the fact that is admitted by the defendants. He referred to *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1; *N.A.S. Ltd v. UBA Plc* (2005) ALL FWLR (Pt.284) 275; *ASHDC v. Emekwu* (1996) 1 NWLR (Pt.910) 241; *Yusuf v. Oyetunde* (1998) 12 NWLR (Pt.579); *Olorunfemi v. Asho* (2000) 1 SC 15.

Mr. Ogbuli further stated for the appellants that the parties joined issues on their pleadings on several fronts such as

- a. Arbitration of 1965 by Igwe in Council
- b. How the defendants ancestors came into occupation of the land in dispute.
- c. Identity of the land in dispute
- d. The reason for the plaintiff's ancestors' flight from Ogidi town to Nkwelle Ezunnaka etc.

That these issues are live between the parties which the court shall be called upon to decide. That they, appellants admit that they got the land in dispute from the plaintiffs ancestors, yet the evidence act shifts the onus of proof from the plaintiff to the defendants but this onus can only shift after the plaintiff had presented his case. That the onus on the appellants is to establish by credible evidence that the land validly came to them which is the

shifting onus as distinct from the right to call witnesses.

In response, Chief Ikenna Egbuna submitted for the respondent that the applicable rules of the trial court at the time of the case at the High Court is the High Court Rules of Anambra State 1988, Order 24 Rules 17 (1) to 17(3) while relevant Evidence Act are sections 131 (1) and (2) and 132; Section 133(1) also. That from the provisions of those sections it is abundantly clear that the burden of proof is not static but oscillates according to the circumstances of the case. That it is abundantly clear that the burden of proof is twofold, the first being the ability of a plaintiff to establish and prove the entire case or reasonable portion of his case before a court of law can give judgment in his favour which burden is constantly on the plaintiff. He said the other types are related to particular facts or issues which a party claims exist which is a burden that oscillates from one party to the other. He said while the first type of burden of proof is called legal burden or the burden of establishing a case while the second one is called the evidential burden while the second burden is the one operating in the case at hand.

Chief Egbuna of counsel said the appellants as defendants having asserted in paragraph 3 of their statement of defence that the defendants land named OWOKO OMALACHA was originally the land of the plaintiff's ancestors called AMANGWU brought the evidential burden at play. He cited *Federal Mortgage Finance Ltd v. Hope Offiong Ekpo* (2004) 2 NWLR (Pt.856) 100 at 122.

For the respondent it was also submitted in the pleading of the defendants, that by virtue of the custom of the parties' community Ogidi known as IKWA NKWA OCHU the plaintiff's ancestor to avoid the consequences of his conduct paid with his land by making a gift that is neither revocable nor redeemable. That the appellants having admitted that at one time the radical title was in the respondents the onus is therefore on them to prove that the radical title had been extinguished by the alleged irrevocable and irredeemable gift. A situation which accorded with Order 24 Rule 17 (2) of the High Court Rules of Anambra State, 1988 and Section 133(1) of the Evidence Act, 2011. He cited.

George Onobruhere & Ors v. Iveromoebo Esegine & Ors (1986) 1 NWLR (Pt.19) 799 at 807; *Sampson Ochonma v. Asirim Unosi* (1965) NMLR 321 at 323; *Nigerian Maritime Services Ltd v.*

Afolabi (1978) 2 SC 79 at 84. That the onus to commence this suit at the trial court was on the appellants since they stood to lose if no further evidence is led. He relied on *Aire v. Adisa* (1967) 1 ALL NLR 148 at 151; *Buraimoh v. Bamgbose* (1989) 3 NWLR (Pt.109) 353 at 366.

Chief Egbuna further submitted for the respondents that the Court of Appeal and completely affirmed the findings of the learned trial judge and this court having the policy not to disturb concurrent finding of fact of two courts unless there is some miscarriage of justice or a violation of some principle of law or procedure which will justify such an interference. That since there was nothing negating the acceptance of those said concurrent findings this court should resolve the issue in favour of the respondents and dismiss the appeal. He relied on *Nwobodo Ezeudu & Ors v. Isaac Obiagwu* (1986) 2 NWLR (Pt.21) 208 at 215.

In summary the grouse of the appellant which he had ventilated from the trial court up to the Supreme Court is that the Court of Appeal failed to draw a distinction between the person that will call the first witness in a case and the onus of proof place on a party by the law taking into account the circumstances of this case which included the fact that several issues were joined on the pleadings and the fact that the plaintiff had opened his case and called several witnesses in the proof before the matter started de novo before a new judge.

Reacting to that stance of the appellant, the respondent said that by the provisions of Order 24 Rule 17(2) of the High Court Rules of Anambra State, 1988 and Section 131(1) of the Evidence Act, 2011 and a long line of judicial authorities, the burden of first proving the existence or non existence of fact depends on the state of pleadings of the parties. That with the defendants having pleaded in paragraph 5 of the statement of defence that the land in dispute originally belonged to the plaintiff's ancestor who made an irrevocable and irredeemable gift to their ancestors, that set the stage for the defendants losing if no evidence was led and so they ought to take the first shot in proof.

The above briefly stated is what is being contested here and also what was disputed at the two courts below. The applicable Rules of court and the provisions of the Evidence Act would be quoted

hereunder as guide for what this court should do.

Order 24 Rules 17(1) to 17 (3) of High Court Rules of Anambra State, 1988 provides as follows:

“17(1) The order of proceedings at the hearing of contested case shall be as prescribed in this rule.

B *17(2) The party on whom the burden of proof is thrown by the nature of the material issues or questions between the parties, according as the court may determine shall begin. He shall state his case.*

C *17(3) He shall then produce his evidence and examine this witnesses-in-chief. They may be cross-examined and re-examined”*

From the Evidence Act at Section 131(1) and (2) are prescribed as follows:

D *“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.*

2. When a person is bound to prove the existence of any fact, it is said that burden of proof lies on that person who would fail if no evidence at all were given on either side”

E In Section 132 is found *“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”*

Section 133(1) stipulates thus:

F *“In civil cases, the burden of first proving existence or non existence of a fact lies on the party against whom the judgment of court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.”*

G It needs be said that Section 131-133 of the Evidence Act applicable at the time of the initiation of the cause of action have been replaced by Section 135 - 137 of the Evidence Act Laws of the Federation 1990 which was the law in place at the time of the judgments of the two courts below.

H I shall recapture the salient parts of the judgment of the court below which was anchored in the lead judgment by Mahmud Mohammed JCA (as he then was) at pages 99 and 100 of the Record. I quote as follows:

“Therefore having regard to the state of pleadings of the par-

ties, the relevant parts of which are fully quoted above, on the correct application of the provisions of the section 136 and 137(1) of the Evidence Act Cap 112 of the Law of the Federation of Nigeria 1990 and the cases earlier discussed in this judgment particularly the case of *Adenle v. Oyegbade* (supra), the onus of proof lies squarely with the defendants to start their case by calling the relevant evidence to show how the plaintiff's ancestors made an absolute gift of their land to the defendants' ancestors. Therefore having regard to the state of pleadings of the parties, it is quite clear that if no evidence at all had been forth coming from the defendants who have stated plainly in their statement of the defence that the land in dispute originally belonged to the plaintiff's ancestors, they would have run foul of Section 136 of the Evidence Act and in the absence of evidence on the absolute grant of the land to them, the defendants would definitely have failed. In other words by their own statement of defence, the defendants now appellants have divested the plaintiff now respondent of his right to begin under normal circumstances if the claim of the plaintiff had been effectively traversed in the statement of defence as was the situation in the case of *Are v. Adisa* (1967) 1 ALL NLR 148 at 151. The learned trial judge was therefore right in his decision in his ruling of 23/9/93 now on appeal, in ordering the defendants now appellants to begin. This order no doubt is also in line with the decision of the Supreme Court in *Buraimoh v. Bamgbose* (1989) 3 NWLR (Pt.109) 352 at 366 where *Nnaemeka-Agu, JSC* (as he then was) explained the position of the law that in a case of claim for declaration of title to land as in the present case the onus of proof does not always lie in the plaintiff and concluded -

"Also in quite a number of cases the onus of proof is on the defendant. An example is where the defendant in his pleading admits that the plaintiff was the original owner. The onus is on the defendant to prove an absolute grant to him. See *Ochonma v. Unosi* (1965) NMLR 321."

On the whole this appeal fails and the same is hereby dismissed. The ruling of *Okike J.* of 23/9/93 ordering the defendants appellants to being is hereby affirmed."

A lot of judicial authorities have been cited and I shall have recourse to them to see my way through.

The onus or burden of proof is merely an onus to prove

or establish an issue. There cannot be a burden of proof where there are no issues in dispute between the parties and to discover where the burden lies in any given case, the court has a bounden duty to critically look at the pleadings.

The general rule is that it is the plaintiff who seeks a
 B ***decree of declaration of title that has the onus of proof.*** See
 Onobruhere v. Esegine (1986) 1 NWLR (Pt.19) 799; Kwamina
 Kuma v. Kofi Kuma (1934) 2 WACA 178 at 179; Kodilonye v.
 Mbanefo Odu (1935) 2 WACA 336 at 337; Ayitey Cobblah v. Tettey
 C Gbeke (1947) 12 WACA 294 at 295; Anachuma Nwafor & Ors
 Nwankwo Udegbe & ors (1963) 1 All NLR 107; Nwankwo Udegbe
 & Ors v. Anachuma Nwokafor & Ors (PC) (1963) 1 ALL NLR P417;
 Mogaji & Ors v. Odofin & Anor (1978) 4 SC 91; Bello v. Eweka
 (1981) 1 SC 101 at 117 - 120.

D ***The norm in civil cases is that the plaintiff starts the process of testimony first and his witnesses if any, thereafter the defendant proffers his evidence in defence.***

In L. A. Are v. Adisa v. Anor (1967) 1 ALL NLR 148 held by
 the Supreme Court that in the light of Section 135 of the Evidence
 E Act and of the pleadings, the onus was on the plaintiff to prove his
 averment that the necessary approval was not duly obtained.

In civil cases, proof is based on balance of probabilities and it rests on the party who asserts the affirmative, in this case the appellant and he failed to discharge the burden on
 F ***him.*** Daodu v. NNPC (1998) 2 NWLR (Pt.538) 355 at 365 (SC);
 Lewis & Peat (N.R.I.) Ltd v. Akhimien (1976) 7 SC 157 at 169; Mogaji
 v. Odofin (1978) 4 SC 91; Elias v. Omobare (1982) 5 SC 25.

The point has to be made that it is not in all instances
 G ***where the usual or the norm must play out. This is because certain peculiar features might present which will change the course of events like who takes the first shot at the evidence.***

The courts and counsel should move away from discussing technical matters when the substantial matter in a case is
 H ***the issue.***

Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 AT 297 per
 Parts-Acholonu JSC; Broad Bank (Nig.) Ltd v. S. Olayiwola & Sons
 Ltd (2005) 3 NWLR (Pt.912) 434.

In the matter of who testifies first, at the bottom of it is the

pleadings of the parties.

The purpose of pleading is to afford the opponent the opportunity of knowing the case he would meet at the trial. It is for that reason that all facts relied upon by the party in a civil matter before a superior court of record must be clearly pleaded in numbered paragraphs. The reason for this principle of practice is that no party should take advantage of locking away facts from his pleadings and unleashing a surprise in court by evidence on a matter not pleaded. Buhari v. Obasanjo (2005) 13 NWLR (pt.941) 1 at 193, 200 - 201; Emegokwue v. Okadigbo (1973) 4 SC 113; Pascutto v. Adecentro (Nig.) Ltd (1997) 11 NWLR (pt. 529) 467. B C

Before a Court decides whether or not there is an admission or reply to a suit in respect of an averment in a statement of claim, it must consider the entire pleadings of the parties as whole. Buhari v. Obasanjo (2005) 13 NWLR (pt.941) 1 at 193, 261; Lion of Africa Inc. Co. v. Fisayo (1986) 4 NWLR (Pt.37) 674; A.G. Anambra State v. Onuselogu Ent. Ltd (1987) 4 NWLR (Pt.66) 547; Titilayo v. Olupo (1991) 7 NWLR (Pt.295) 519; Ugochukwu v Co-operative Commerce Bank Co. Ltd (1996) 6 NWLR (Pt.486) 524; Pan Asian African Co. Ltd. N.I.C.O.N. Ltd. (1982) 9 SC 1. D E

Burden of proof is two-fold. The first is the ability of a plaintiff to establish and prove the entire or reasonable portion of his case before a court of law that can give judgment in his favour. This is always constantly on the plaintiff. The other type is related to particular facts or issues which a party claims exist. It is this burden of proof that oscillates from one party to the other. While the first type of burden of proof is called legal burden or the burden of establishing a case, the second one is called evidential burden. Federal Mortgage Finance Ltd v. Ekpo (2004) 2 NWLR (pt. 856) 100 at 122; Ogule Ankpa Agatu Co-operative Group Farming Society v. Nigeria Agricultural and Co-operative Bank (1999) 2 NWLR (pt. 590) 234. F G

At this point I shall restate some of the relevant paragraphs of the pleadings so as to have them in context with the principles of law and the decided cases on the point. Paragraphs 4 and 5 of the statement of claim state: H

“4. The land in dispute is known as Owoko Oruruide and is

situate in Amangwu quarter of Ezi-kwelle and is more particularly known and delineated and verged pink on the plaintiff's Plan No. plan No. ME/1007/81 filed with this statement of claim.

5. The land in dispute originally belonged to one Obolua, the ancestor of the plaintiff from time beyond human memory. The said Obolua got the land as his own share when the people from Amangwu shared their lands in the olden days. The said Obolua begat Okonkwo popularly known as Okpobalaku. Okonkwo begat Nwankwo popularly called Iruiliaku. The said Nwankwo alias Iruiliaku begat the plaintiff. The said Obolua during his life time exercised maximum acts of ownership and possession over the said land such as farming the same and living therein without any let or hindrance."

Reacting to the pleadings of the plaintiff/respondent, the defendants/appellants in their statement of defence averred in paragraph 4, 5 and 6 as follows:-

"4. The defendants deny paragraph (4) of the Statement of Claim and in further answer thereto say that the land in dispute is called Owoko Omalacha. It is situate in Uruowelle Quarters of Nkwelle-Ogidi. It belongs to the defendants' family of Obiajulu as a community. The extent of the defendants' Owoko OMALACHA land, part of which is in dispute in this case is shown verged blue on Survey Plan No. V.D/ASP/82 filed with this Statement of Defence. The plaintiffs survey plan No.MEC/1007/81 shows other pieces of land belonging to other families in Uruowelle Nkwelle-Ogidi.

5. Save and except that the plaintiff, Nwankwo and Okonkwo are descendants of Obolua the defendants deny emphatically paragraph (5) of the statement of claim. In further answer to paragraph (5) of the statement of claim the defendants state that the defendants' OWOKO OMALACHA land was originally the land of the plaintiff's ancestor called Amangwu. Amangwu many years ago, and before the advent of British administration in Nigeria killed a descendant of the defendants' ancestor, Obiajulu, called Okonkwo. Under the customary law of Ogidi, this incident would attract an attack by the aggrieved family of Obiajulu against the offending family of Amagwu and a seizure and loot of Amagwu's chattels and lands. This in customary parlance is called IKWA NKWA OCHU. Under the same customary law of Ogidi two options were open to Amagwu via (a) to give a girl from his own family in replacement of the murdered

Okokwo Obiajulu. (b) To give a parcel of land as compensation. In this way the wrath of the gods of the land and of the defendants' family would be stemmed. Amagwu therefore gave the land shown verged blue on the defendants' plan to the descendants' ancestor Obiajulu. The gift is called in local parlance "NRACHI OCHU" is neither revocable nor redeemable. It is absolute gift by the customary law of Nkwelle Ogidi.

6. From the time of the gift the defendants' ancestor Obiajulu started to make use of the land, inter alia; by cultivating the land, planting and reaping economic fruits on the land, establishing and worshipping two juju shrines on the same and prospecting timber trees. The descendants of Obiajulu referred to in Paragraph (2) herein inherited the land from their father by customary law of Ogidi, lived on the land and exercised maximum acts of ownership over the same as did their father before them, to the knowledge of the plaintiffs' ancestors without let or hindrance from them or any person whatsoever. The defendants inherited the land from their ancestors and, have from time immemorial cultivated it and reaped economic fruits growing thereon, lived on it, cut timber trees and worship their juju thereon."

From the pleadings of the defendants, particularly their paragraph 5, they averred that they agreed that the land in dispute belonging originally to the plaintiff's ancestor called 'AMANGWU and the said Amongwu had made an absolute gift to defendants' ancestor hence the defendants assertion to the entitlement of the land in dispute and that since that gift, the defendants have been exercising powers of ownership.

At this juncture certain facts of a burden of proof need be taken into consideration in order that a court does not just operate in vacuo.

The burden of proof in civil cases has two distinct meanings, viz.

(a) The first is the burden of proof as a matter of law and the pleadings usually referred to as legal burden or the burden of establishing a case.;

(b) The second is the burden of proof in the sense of adducing evidence usually described as the evidential burden.

While the legal burden of proof is always stable or static the

burden of proof in the second sense i.e. evidential burden of proof may oscillate constantly according as one scale of evidence or the other preponderates. In civil cases, while the burden of proof in the sense of establishing the case initially lies on the plaintiff, the proof or rebuttal of issues which arise in the course of proceedings may shift
 B from the plaintiff to the defendants and vice-verso as the case progresses. Federal Mortgage Finance Ltd v. Ekpo (2004) 2 NWLR (pt. 856) 100 at 130 per Olagunju JCA; Balogun v. Labiran (1988) 3 NWLR (pt. 80) 66; Nwosu v Udeoja (1990) 1 NWLR (pt. 125) 188;
 C Elemo v. Omolode (1968) NMLR 359; Chigwu v. Baptist Convention (1968) 2 ALL NLR 294; Adegoke v. Adibu (1992) 5 NWLR (pt. 242) 410.

In Samson Ochonma v. Asirim Unosi (1965) NMLR 321 the facts are thus:

D The plaintiff in this case sued for a declaration of title to a piece of land, damages for trespass and on injunction. In his statement of claim, he pleaded that he was the owner of the land by right of inheritance, and the defendants admitted that he had at one time been the owner.

E The defendant in statement of defence pleaded that the piece of land verged Red was the only piece of land which the defendant had ever obtained from the plaintiff, and that the plaintiff made an absolute grant of it in 1936. The parties were agreed that the transaction of 1936, whatever its nature, included the payment by the defendant, to the plaintiff of a sum of money which they both described as “kola”
 F

The Federal Supreme Court per Brett JSC held that the defendant having admitted that the plaintiff was the original owner of the land, the onus was on him to establish his plea that there had been an absolute grant to him. In Nwobodo Ezeudu & Ors v Isaac Obiagwu (1986) 2 NWLR (pt.21) 208 at 220 per Oputa JSC.
 G

“We have in our Lower Courts almost tacitly accepted that it is a ritual in land cases for the plaintiff to prove the features before
 H calling all boundary men before it can be held that he had established the identity of the land in dispute. This erroneous belief accounts for a good deal of the delays in land cases. The onus on the plaintiff is an onus to prove on issue. Where therefore the identity of the land is not an issue, there, I will make bold to say that the mere

production and tendering of the plaintiff's plan in evidence is enough to establish the identity of the land. In fact in such cases the plan can and should be tendered by consent. See Rowland Omoregie & 3 Ors v Oyamwonyi Iduimuanye & Ors (1985) 2 NWLR (pt.5) 41 at 60".

By admitting that the respondent's ancestors were and that the respondent is still in possession of the land in dispute or even part of it but on a pledge the onus of proof that those in admitted possession were not the owners of the land in dispute shifted to the defendants/appellants by the operation of Section 145 of the Evidence Law Cap 49 of the Laws of Eastern Nigerian 1963 in force in Imo State. The trial court should have called upon the defendants to begin, not the plaintiff who should not have been called upon to establish what the law presumes in their favour. Per Oputa JSC in Ezeudu v Obiagwu D (1986) 2 NWLR (Pt.21) 208 at 221; Lawrence Onyekaonwu & Ors v Ekwubiri & Ors (1966) 1 ALL NLR 32 at 34.

The same principle differently stated in the words of Aniagolu JSC in Ezeudu v. Obiagwu (supra) at 216 are hereby recaptured thus:

"One important feature of this case on appeal is that the defendants have admitted that the plaintiff is in possession of the portion of the land in dispute, explaining that possession by contending that they pledged the land to the plaintiff's ancestor - a pledge which the plaintiff stoutly denied. The plaintiff has asserted that he and his forebears have been in possession of the land by right of their ownership of the land. With this admission by the defendants that the plaintiff was in possession, the onus shifted on the defendants to prove the pledge which they alleged. If they failed to prove the pledge then the presumption of law, having regard to the provisions of Section 145 of the Evidence Act would be that the plaintiff was the owner of the land of which he is in possession. That section rightly states that when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." See George Onobruchere & Anor v. Iwromoebo Esegine (1986) 1 NWLR (Pt.19) 799 (SC).

Since the parties agreed and found as a fact by the trial

judge that the plaintiffs were the original owners of the land in dispute, the onus is on the defendants to establish a change of ownership by sale. There is no onus on the plaintiffs to establish a pledge. With that onus being on the defendants, it is their duty to begin to adduce evidence, for it is they who would lose
 B **if no more evidence is adduced having regard to the state of the pleadings. Another way of stating it is that when it is accepted by both sides and found as a fact by the trial court that the plaintiffs, ancestor was the “original founder” of the land**
 C **in dispute, the presumption as their successors in title continued to be owners of the land in dispute until the contrary is proved.**

It might seem strange or even radical and revolutionary for a trial court to call on a defendant to take the witness stand
 D **by himself or his witnesses before the plaintiff would be heard. But in truth there is nothing novel or out of the ordinary and so the two courts below were well guided by the applicable Rules of Court of the High Court of Anambra State, Order 24 Rule 17 and Sections 135 - 137 of the Evidence Act to decide**
 E **that the appellant take the first slot of testimony before the respondent as plaintiff. These concurrent findings well founded, I see nothing upon which to base a departure from what they did or upset those earlier findings and conclusion.** The case of
 F **Nwobodo Ezeudu & 2 Ors v Isaac Obiagwu (1986) 2 NWLR (Pt.21) 208 at 215 is helpful in that regard.**

Section 135 of the Evidence Act will compel a defendant who admits that the plaintiff is in possession of the land in dispute to establish that such plaintiff is not the owner, a
 G **fortiori, a finding by a court that the plaintiff descended from the “original founder” of the land in dispute coupled with the defendant’s averment of sale to them by the plaintiffs will definitely shift the burden of proof on the defendants to show that the original owners had extinguished their title. To hold other-**
 H **wise will be to “overlook the established rule that once it is proved (here it was admitted by the defendants and found by the trial court) that the original ownership of the property is in a party the burden of proving that the party has been divested of the ownership rests upon the other party.**

It needs be said that when there has been a misapprehension as to the onus of proof and a misdirection casting such onus on the wrong party, there is therefore a likelihood of a miscarriage of justice. Also such misdirection can also affect the credibility of witnesses. See *Onobruhere v. Esegine* (1986) 1 NWLR (pt.19) 799. B

From what I have tried to put across above, it is clear that the two courts below were well grounded and sure footed when they concluded that being led by the pleadings of the defendants they should testify first at least to resolve the fundamental and crucial part of the evidence as to the historical background of the land in dispute which they claim resided originally in the plaintiff/respondent's ancestor from which the appellants derived their title which they assert should not be questioned. The conclusion easily made is that the appeal lacks merit and I do not hesitate in dismissing it. I dismiss the appeal and uphold the decision of the Court of Appeal which affirmed the decision of the trial judge ordering that the defendants start their testimony first. Therefore I order that the trial court continues with the suit with the defendants starting their testimony first. I make no order as to costs. C D E

MUHAMMAD JSC

A draft copy of the judgment just delivered by my learned brother, Peter-Odili, JSC, was made available to me earlier than today. F

I am in agreement with his lordship that the appeal be dismissed for want of merit. The appellants in this appeal were the defendants. The respondent was the plaintiff before the High Court of Anambra State, holden at Onitsha (the trial court). The reliefs and antecedents of the case were set out in the leading judgment and I find no reason to repeat same except where it is necessary, for elucidation. The only issue formulated by the appellants and adopted by the respondent has to do with who, between the plaintiff and defendants, before the trial court, would call witness(es) first in proof of what they/he assert(s). This falls squarely within the principle of BURDEN OF PROOF. Generally, the burden of establishing facts upon G H

which legal rights and liability depends, in accordance with sections 135 and 136 of the Evidence Act , Cap.112, LFN, 1990 (now contained in Cap E14, LFN, 2004, sections 131-132), is on the person who asserts the fact(s). Section 131(1) of the Act provides that whoever desires any court to give judgment as to any legal right which liability is dependent on the existence of facts which he asserts must prove that those facts exist. Section 132 of the same Act provides further that the burden of proof in a suit in a proceeding lies on that person who will fail if no evidence at all were given on either side. While describing the phrase “BURDEN OF PROOF”, Dennis I. H; in his “The Law of Evidence (2nd ed. Sweet & Maxwell, London at p.369) stated, inter alia:

“The Term ‘burden of proof’, also known as “onus of proof”, refers to the legal obligation on a party to satisfy the fact finders, to a specified standard of proof, that certain facts are true. The facts for this purpose are the facts in issue, the facts on which the legal rights and liabilities of the parties to the case depend..... There may be several facts in issue in a given case and the burden of proof of different issues may be differently allocated amongst the parties. For personal injuries caused by negligent driving, the claimant will bear the burden of proof of the defendant's negligence and of the causation of the claimant's injuries by the negligent driving. If the defendant alleges contributory negligence by the claimant, the defendant will bear the burden of proving it.”

Phipson, in his “Phipson on Evidence’, 2005, 6th ed. (Sweet and Maxwell p.125) stated that:

“The Phrase ‘burden of proof’ is used to describe the duty which lies on one or other of the parties, either to establish a case or to establish the facts upon a particular issue.”

In the case of *Elemo v. Omolade* (1968) NWLR 359, it was held that burden of proof has two distinct and frequent confusing meanings. It means:

i. The burden of proof as a matter of law and pleading i.e. the burden as it has been called of establishing a case whether by preponderance of evidence or beyond reasonable doubt, and

ii. The burden of proof in the sense of introducing evidence.

Where the burden is a matter of law and pleading, it is described by different names by legal authors. Phipson, for instance,

quoting from Lord Denning, calls it “persuasive burden” “Legal burden”, “probate burden”, “ultimate burden”, “the burden of proof on the pleadings,” or, “the risk of non-persuasion.” “(see Phipson, *ibid*, p.125). What this connotes is the obligation imposed on a party by a rule of law to prove (or disprove) a fact in issue to the requisite standard of proof. A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question. This burden rests upon a party whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleading and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleading places it. It never shifts and it is always stable.

The burden of proof in the second sense may shift constantly more as one scale of evidence or the other preponderates. In this sense, the onus rests on he who will fail if no evidence at all or no more evidence as the case may be, were given on either side. It rests before evidence is gone into upon the party asserting the affirmative of the issue. The burden of introducing evidence is thus, the obligation on a party to adduce evidence on a particular fact introduced.

Therefore, looking at the general principles of burden of proof or onus of proof, as others may call it, the onus of proof is normally fixed by the state of the pleading and is on the plaintiff, where the defendant denies, to establish the allegation in the statement of claim with a view to proving the whole case as put by him. In this situation, it is the plaintiff that will certainly lose, if no evidence is called at all. Phipson, again, while treating this general rule of burden of proof made references to some of such old cases to show, for instance, that in so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue: *Robins v. National Trust Co.* (1927) A.C. 315 at 520; *Hayton-with-Roby U. D. C. v Hanter* (1955) W.L.R.603. If, when all the evidence is adduced by all the parties, the party who has this burden has not discharged it, the decision must be against him. *Pickup v. Thames Insu. W. Railway* (1886) 12 App. Cas. 41 at 45. The principle is an ancient rule founded on consideration of good sense and it is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case. The burden of proof,

generally, is fixed at the beginning of the trial by the state of the pleadings. *Constructive Line v. Imperial Smelting Corporation* (1942) AC 154 at 174, per Lord Maughan. Further in deciding which party asserts the affirmative, regard must be had to the substance of the issue, where it forms an essential part of a party's case, the proof of which, whether affirmative or negative, must rest on he who makes the assertion. *Soward v. Leggatt* (1936) 7 C & p.613. *Abrath v North Eastern Railway* (1983) 11 QB 440 at 457, per Bowen L. J; *Doe v Johnson* (1844) 7 M & Gr.1047, per Tindal, C.J.

However, as the case is with almost all general principles of the law, there may be some exceptions. The exceptions to this general rule of burden/onus of proof deducible from the provisions of the Evidence Act and the state of the pleadings, may contain, but not be limited to the following:

i. The incidence of the burden placed on the plaintiff can be modified by the pleadings, particularly where the defendant introduces a new issue which will require him to lead evidence in establishing that new issue. This does not necessarily have to do with a counter-claim which is an independent claim of itself which necessitates evidence from the defendant/counter-claimant.

ii. When a rebuttable presumption of law exists in favour of a party, the onus is on the other side to rebut it.

iii. When any fact is especially within the knowledge of a defendant and upon which he would want rely, the burden of proving it is on him.

Now, coming back to the appeal on hand, it is pertinent, I think, to consider the state of the pleadings of the parties when the suit came before the trial court for hearing (i.e. 10-6-93). In his statement of claim, the plaintiff averred as follows:

"4. the land in dispute is known as OWOKO ORURUIDE and is situate in AMANGWU quarter of EZIKWELLE and is more particularly known and delineated and verged pink on the plaintiff's plan No.ME/1007/81 filed with this statement of claim.

5. The land in dispute originally belonged to one OBOLUA the ancestor of the plaintiff from time beyond human memory. The said OBOLUA got the land as his own share when the people of AMANGWA shared their lands in the olden days. The said OBOLUA begat OKONKWO popularly known as OKPOBALAKU. OKONKWO

begat NWANKWO popularly called IRUJIAKU. The said NWANKWO alias IRUJIAKU. The said NWANKWO alias IRUJIAKU begat the plaintiff. The said OBOLUA during his life time exercised maximum acts of ownership and possession over the said land such as farming the same and living therein without any let or hinderance.”

At the end of the Statement of Claim, the plaintiff made me following claim from the defendants: B

“18. Whereof the plaintiff claims from the Defendants as follows:

a. A declaration that the plaintiff as the head of Nwankwo Okonkwo family as well as the representative head of Obolua family in Anangwo (kindred) Quarters of Ezi-Kwelle Ogidi is entitled to inherit under Ogidi LAND forming part of his ANCESTRAL HOME (property) known as and called OWOKO ORURUIDE LAND valued N200.00 (Two Hundred Naira) lying, being and situate at Amangwu Quarters of Ezi-Nkwelle Ogidi in Idemili Local Government Area within the jurisdiction of this Honourable Court,

b. N5,000.00 Damages for Trespass in that in 1978 the defendants in collaboration with some hirelings each aiding and abetting the other did break and enter into the plaintiffs Family ANCESTRAL PROPERTY (Land) known as and called OWOKO ORURUIDE and therein cleared the bush, “felled numerous economic trees including Iroko and Palm Trees of the plaintiffs family, collected Palm fruits there from, deposited sands, gravels and blocks and did divers manners of work therein without the leave or license of the plaintiff’s family. The Defendants and their hirelings destroyed the plaintiffs blocks and demolished the plaintiffs foundation and have built and erected shops and constructed structures on portions of the land and have continued to ravage and commit several overt acts of trespass in aggravation on the said OWOKO ORURUIDE LAND.

C. A PERPETUAL INJUNCTION restraining the Defendants, their servants, agents and hirelings and privies from entering the land described or in any way dealing with or interfering with same without the permission of the plaintiff.” H

In their reaction to the Statement of Claim, the defendants averred as follows:

“6. The defendants inherited the land from their ancestors and, have from time immemorial cultivated it and reaped economic fruits

growing thereon lived on it, cut timber trees and worship their jujus thereon.

16. *The defendants deny that the plaintiff is entitled as claimed in paragraph (18) of the statement of claim or at all and will further plead ownership and long possession, estoppel, lapse of time acquiescence and other legal and equitable defence that are open to them.*"

It will be recalled, my lords, that the plaintiff opened his case in 1988 before Hon. Justice J. G. O. Aneke. Seven (7) witnesses were called by the plaintiff, when upon the creation of Enugu State in 1991, Justice J. G. O. Aneke ceased to be a judge of the High Court of Anambra State as he was from the new Enugu State. The suit was then assigned to Hon. Justice Olike of the Onitsha Judicial Division for a trial de novo.

Upon the matter coming up for trial de novo, before Olike, J. on 10/6/93, the plaintiff's counsel contended (orally) that on the state of the pleadings before the court, the defendants ought to be the first to lead evidence by calling and fielding their witnesses first before the plaintiff. In a ruling on that issue, the learned trial judge upheld the plaintiff's contention and ordered the defendants to call their witnesses first.

The defendants were dissatisfied and they appealed to the Court of Appeal, Enugu Division which affirmed the decision of the trial court. In dismissing the appeal, Mohammed, JCA (as he then was), held, inter

"The onus of proof lies squarely with the defendants to start their case by calling the relevant evidence to show how the plaintiffs' ancestors made an absolute gift of their land to the defendant's ancestors. Therefore, having regard to the state of pleadings of the parties, it is quite clear that if no evidence at all had been forth coming from the defendants who have stated plainly in their statement of defence that the land in dispute originally belong (sic) to the plaintiff's ancestors, they would have run foul of section 136 of the Evidence Act and in the absence of evidence on the absolute grant of the land to them, the defendants would definitely have failed. In other words by their own statement of defence the defendants now appellants have divested the plaintiff now respondent of this right to begin under normal circumstances if the claim of the plaintiff had been effectively traversed in the statement of defence as was the situation in the

case of Are v. Adisa (1967) 1 A NLR 148 at 151. The learned trial judge was therefore right in his decision in his ruling of 23-09-93 now on appeal, in ordering the defendants now appellants to begin.”

I am in complete agreement with my learned brother, Mahmud Mohammed, JCA (as he then was), in his holding as quoted above. I would even go further to add that the principle of shifting of burden of proof in civil cases is not new. It is as old as the Law of Evidence itself (as seen above) and it is not as fixed on the plaintiff as it is on the prosecution in a criminal case.

Black, describes it “shifting the burden of proof”, which he defines as:-

“Transferring it (i.e. burden of proof) from one party to the other, or from one side of the case to the other, when he upon whom it rested originally has made out a PRIMA FACIE case or defence by evidence, of such a character that it then becomes incompetent upon the other to rebut it by contradictory or defensive evidence.” (see: H. C. Black’s Law Dictionary 5th ed. P.1234).

My noble lords, nobody is disputing or denying the operation of the general principle of proof in civil matters by casting the burden of proof on the plaintiff where the averments contained in the statement of claim were traversed by the defendant. In such a situation, the defendant will have to wait for the plaintiff to lead evidence in proof of his averments. This is understandable. It is also elementary, It accords with common sense as he who invokes the aid of the law should be the first to prove his case.

But, where the situation presents a little difficulty is in a statement of defence where the defendant introduces a new issue which transforms his line of defence by transforming him now into an asserter of a fact which requires evidence to be led first in order to discharge the burden now cast on him and in order not to allow the suit to stagnate. By way of example: A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on B, although a defendant. It was B who introduced fraud. It was his duty to prove it in order to succeed. It is only by settling the issue of fraud, firstly, in one way or the other that a meaningful progress can be made by the

court of trial towards the completion of the entire trial.

In their paragraphs 4, 5 and 6 of the Statement of Defence, the defendants/appellants averred as follows:

B “4. The defendants deny paragraph (4) of the statement of claim and in further answer thereto say that the land in dispute is called OWOKO OMALACHA. It is situate in Uruowelle Quarter of Nkwelle Ogidi. It belongs to the defendants’ family of Obiajulu as a community. The extent of the defendants’ OWOKO OMALACHA land, part of which is in dispute in this case is shown verged blue on C survey plan No. 7.D/AS2/82 filed with this statement of defence. The plaintiff’s survey plan No. MEC/1007/81 shows other pieces of land belonging to other families is Uruowelle Nkwelle-Ogidi.

D 5. Save and except that the plaintiff, Nwankwo and Okonkwo are descendents of Obolua the defendants deny emphatically paragraph (5) of the statement of claim. In further answer to paragraph (5) of the statement of claim the defendants’ state that the defendants’ Owoko Omalacha land was originally the land of the plaintiff’s ancestor called AMANGWU. AMANGWU many ma ago, (sic) and before the advent of British administration in Nigeria killed a descendent of the defendants’ ancestor, Obiajulu, called Okonkwo. Under E the customary law of Ogidi, this incident would attract an attack by the aggrieved family of Obiajulu against the offending family of Amangwu and a seizure and loot of Amangwu’s chattels and lands.

F This in customary parlance is called IKWA NKWA OCHU. Under the same customary law of Ogidi, two options were open to Amangwu viz: (a) to give a girl from his own family in replacement of the murdered Okonkwo or (b) to give a parcel of land as compensation. In this way the wrath of the gods of the land and of the G defendant’s family would be stemmed. Amanawu therefore gave the land shown verged blue on the defendant’s plan to the defendant’s ancestor Obiajulu. This gift is called in Local parlance ‘NRACHI OCHU’ and is neither revocable nor redeemable. It is absolute gift by the customary law of Nkwelle-Ogidi.”

H Three assertions stand very clear from the above averments:

a. the defendants claimed to have inherited from their ancestors who had been in occupation of the same land from time immemorial

b. that it was the plaintiff’s ancestors that made an absolute gift

of the land in dispute to the defendants' ancestors who since the time of the gift had been exercising acts of ownership over the land in dispute.

c. That the absolute gift of the land in dispute made by the plaintiff's ancestors was neither redeemable nor revocable under customary law of Nkwelle-Ogidi. B

My lords, if I may ask: who made the above claims/assertions? Can these claims/assertions be traced to the plaintiff's statement of claim? It is clear that it was the defendants who made such claims/assertions and are traceable to their Statement of Defence, Afotiori, C by the operation of sections 135 - 136 of the Evidence Act, the burden lies squarely on the appellants as defendants. This is one of such occasions where the burden of proof in civil trial shifts, I find very solid support in the following Supreme Court cases:

i. *Adenle v. Oyegbode* (1967) NWLR 136. This was an action D for declaration that a piece of land was family land. Both plaintiff and defendant were members of the family. It was common ground between them that the land originally belonged to their family but that the defendant had been in occupation for some years. The main question, therefore, was whether the defendant had been granted E the land outright or had been given a limited possession. The trial judge held that the onus lay on the plaintiff in a claim for declaration of title to land and that he must succeed on the strength of his case particularly where, as in that case, the defendant had been in long F possession. On appeal, the Supreme Court held that while the correct statement of the law in general in a claim for declaration of title to land is that the onus lies on the plaintiff who must succeed on the strength of his own case, that statement must be modified, however, G where the dispute involves what was accepted by both sides as originally family land. In such circumstances the onus lies on the person who claims to be exclusively entitled to the family land to prove it. The court further held that the trial judge therefore had wrongfully placed the onus on the plaintiff, rather than as he would have done, H on the defendant to establish his claim to exclusive grant of the property in dispute.

ii. *Ajide v. Kelani* (1985) 2 NSCC 1298. The respondent (as plaintiff) in the trial court sued the appellant and another (who later died) for a declaration that the plaintiff and the appellant were and

remained co-owners of the property in dispute and for accounts. It was not in dispute that the appellant and the respondent (and the other who died in course of trial), once carried on business as partners under the business name and style of Four Brothers Stores. The property now in dispute was bought by the partnership and was, while the partnership lasted, partnership property. The partnership was dissolved from 3d September, 1968 and the partnership properties were shared out among the partners.

The appellant though he admitted in his pleadings that the property in dispute was originally partnership property sought by his testimony to prove that the property was never partnership property but his own personal property. He also, in the course of his defence, sought to tender a copy of the dissolution agreement of partnership signed by the respondent which showed how the partnership property had been shared but the trial judge rejected as it offended section 198 of the Evidence Act. Some other documents were sought to be tendered by the appellant which were all rejected. The plaintiffs' claim was finally dismissed. On appeal to the Court of Appeal, the decision of the trial judge was set aside and respondent's claim was allowed. On further appeal to the Supreme Court, the court held, inter alia, that in civil cases the onus of proof shifts from plaintiff to defendant and vice versa, from time to time, as the case progresses. Called the ONUS PROBANDI it rests on the party who would fail if no evidence at all, or no more evidence as the case may be, were given on the other side. It may shift constantly according as one side of evidence or the other preponderates. That, having admitted in his pleadings the building to be a partnership property, the onus was on the appellant to prove when it ceased to be a partnership property and became his own and this he failed to prove and in the circumstance the trial court was wrong in dismissing the respondent's claim. Oputa, a former Justice of the Supreme court, in his contribution was very clear on the very point under consideration in this appeal when he said: -

"As a matter of fact, the proper thing to have been done in this case was for the trial court to ask the defendant on whom the onus lay at the close of pleadings to begin see sections 135 and 136 Evidence Act See also *Lawrence Onyekaonwu & Ors v. Ekwubiri & Ors* (1966) 1 A NLR 32 at p.35."

iii. Onobruhere v. Esegine (1986) 1 NWLR (Pt.19) 799. The Supreme Court considered the application of section 137(1) of the Evidence Act regarding the placement of the burden of proof on the parties to a civil case having regard to the state of pleadings where the plaintiff pleaded possession as his root of title and the defendant admitted that possession. It was held that the defendant was to begin:

“In such a case it is the defendant who will begin and if at the close of his case he fails to prove that the plaintiff is not the owner, the plaintiff’s claim succeeds without even the plaintiff giving any further evidence.”

Per Oputa, JSC

iv. Adegoke v. Adibi (1992) 5 NWLR (pt.242) 410 at p.423
Nnaemeka - Agu, a former Justice of the Supreme Court,

“Now it is the law that in a claim for entitlement to a right of occupancy based on title to the land in dispute before the promulgation of the Land Use Act, the onus is on the plaintiff to prove his entitlement to the title. But in civil cases, the onus of proof is not as fixed on a plaintiff as it is on the prosecution in a criminal case. In civil cases, while the general burden of proof in the sense of establishing his case lies on the plaintiff, such a burden is not static as in criminal case. Not only will there be instances in which on the state of pleadings, the burden of proof lies on the defendant but also, as the case progresses, it may become the duty of the defendant to call evidence in proof or rebuttal of some particular point which may arise in the case.”

v. The Federal Supreme Court, in 1965, held that the defendant having admitted that the plaintiff was the original owner of the land in dispute had the onus to establish his plea that there was an absolute grant of the said land to him. This case was like the appeal on hand, where the plaintiff sued for a declaration of title to a piece of land, damages for trespass and injunction. In the statement of claim, it was pleaded that the plaintiff was the owner of the land by right of inheritance. The defendant in his Statement of Defence pleaded that the piece of land verged red was the only piece of land which the defendant had ever obtained from the plaintiff and that the plaintiff made an absolute grant of it in 1936. See: Ochama v Unosi (1965) NMLR, 321,

In his contribution in the matter on appeal, Olagunju, JCA (of blessed memory) had this to say:

“At the first blush, it is tempting to be carried away by the general proposition of the law that in civil matters the burden of proof lies on the plaintiff. That may be so in generality of cases and, therefore, as a general burden of the overall of what is necessary for the plaintiff to prove to succeed where the defendant has joined issue with the plaintiff on all material points. But sometimes the burden of proof may be altered by ‘evidential burden, which as a doctrine of the Law of Evidence imports that where a given allegation, whether affirmative or negative, forms an essential part of a party’s case the onus of proof of such allegation rests on him: See Alade v. Aborishade (1960) 5 FSC. 167, 170- 171; Elemo v. Omotade (1968) NMLR. 359, 361; and Motanya v. Etinwa (1994) 7 - 8 SCNJ (Part 1) 615, 621. It is immaterial that the evidential burden shifted on the pleadings at the onset of the trial as in this case since parties’ case can be settled on pleadings without calling evidence: see Onobruchere v. Esegine (1986) 17NSCC. (Part 1) 343, 348; Adimora v. Ajufo (1988) 79 NSCC. (part 1) 1056.

It could well be that if the pre-trial Settlement of Issues Procedure as provided in rules 16 - 21 of Order 23 of the High Court Civil Procedure Rules of Anambra State, 1988, had been followed it would have obviated the misconception about making the issue to look like shifting the burden of proof on the plaintiff but on a critical view of the law involved the onus still rests on the defendant to first lead evidence. And on that score I cast my lot with the leading judgment.”

Ogunbiyi, JCA (as she then was) capped it all in few words:

“The burden on the appellants may sound unusual or abnormal in the normal course of procedure. However, by the provision of the statutes and also the numerous decided authorities laid down the procedure, abnormal it may seem, is proper and in accordance with the law.”

Finally, my lords, I think on matters of law and practice, our personal/individual view however strong we see it must give way once it is not in accord with the given law or laid down practice, except where we want to cause violence to the law and or the laid down practice. I agree with Peter-Odili, JSC; that this appeal is pregnant with incompetence. I, too, dismiss it. I affirm the decisions of the two

Lower Courts. I make no order as to costs.

MUNTAKA-COOMASSIE JSC

I read before now the dissenting judgment rendered by my lord Sylvester Ngwuta JSC. There is an evidence of research work displayed in this strong judgment. However I remain adamant that the appeal deserves to be dismissed notwithstanding the position taken by my Lord Sylvester Ngwuta JSC.

NGWUTA JSC

I read with admiration the lead judgment just delivered by my learned brother, Peter-Odili, JSC with whom my other learned brothers on the panel concurred.

I regret to say that I cannot, in good conscience, agree with the opinion of the majority. My feeble attempts to persuade my learned brother jurists in the majority to go with me was abortive, hence my dissent.

Endorsed on the Writ of Summons issued on 14/7/87 in the High court of Anambra State are the following reliefs claimed by the Respondent as Plaintiff against the Appellants as Defendants:

“A. A declaration that the plaintiff as the head of Nwankwo Okoronkwo family as well as the representative head of the Obolua family in Amangwu (kindred) quarters of Ezi-Kwelle Ogidi is entitled to inherit under Ogidi Customary Rule of succession and customary right of occupancy at any time at his will, ALL THAT PORTION OF LAND forming part of his ANCESTRAL HOME (PROPERTY) known and called OWOKO ORURUIDE LAND valued N200.00 (Two hundred naira) lying, being and situate at Amangwu quarters of Ezi-Kwelle Ogidi in Idemili Local Government Area within the jurisdiction of this Honourable Court, the particulars of which will be furnished in a survey plan to be attached to the statement of claim to be filed PRIOR OCCUPIED and used by his predecessors in title (occupation) of whom OKONKWO OBOLUA was his grandfather.

B. N5,000.00 damages for trespass in that on or about the month of June 1978 the defendants in collaboration with some hire-lings each aiding and abetting the other did break and enter into the

plaintiffs ancestral property (LAND) known as and called OWOKO ORURUIDE and therein cleared the bush, felled numerous economic trees including iroko and palm trees of the plaintiffs family, collected palm fruits therefrom, deposited sands, gravels and blocks and did divers manners of work therein without the leave or licence of the plaintiff's family. The defendants and their hirelings destroyed the plaintiff's blocks and demolished the plaintiff's foundation and have built and erected shops and constructed structures on portions of the land and have continued to ravage and commit several overt acts of trespass in aggravation on the said OWOKO ORURUIDE LAND.

C. A PERPETUAL INJUNCTION restraining the defendants, their servants, agents and hirelings and privies from entering the land described or in any way dealing with or interfering with the same without the permission of the plaintiff."

D Parties filed and exchanged pleadings. Plaintiff opened his case and called seven (7) witnesses before Aneke, J. However, upon creation of Enugu State from Anambra State in 1991, Aneke, J. returned to his home State (Enugu) and Olike, J. of Anambra State High Court, Onitsha Judicial Division, assumed jurisdiction to try the case de novo.

Upon the matter coming up for trial de novo on 10th June, 1993, learned Counsel for the plaintiff, relying on the state of pleadings, contended that the defendants ought to be the first to open their case and lead evidence. Learned Counsel for the defendants F arguing to the contrary, insisted that the plaintiff ought to start leading evidence first. Olike, J. on 23/9/93 ruled in favour of the plaintiff and ordered the defendants to open their case first.

G Aggrieved by the ruling, the defendants (now appellants), with the leave of the trial Court, appealed to the Court of Appeal Enugu-Judicial Division. The said Court dismissed the appeal on 23/1/2002. The appellants have appealed to this Court on two grounds from which they isolated a lone issue for determination in their brief deemed filed on 15/1/2014. The sole issue reads:

H *"Whether the Justices of the Court of Appeal were right in holding that from the totality of the facts of this case that the appellants ought to call their witnesses first."*

In his brief of argument also deemed filed on 15/1/2014, the Respondent adopted the lone issue framed by the appellants. At the

hearing of the appeal on 1st April, 2014, learned Counsel for the parties, Ogbuli, Esq. for the appellants and Egbuna, Esq. for the respondent - adopted and relied on their respective briefs each urging the Court to decide in favour of his client.

Arguing the lone issue in his brief, learned Counsel for the appellant relied on *Longe v. FBN Plc* (2006) 3 NWLR (pt.967) 228; *Daodu v. NNPC* (1998) 2 NWLR (Pt. 538) 355 in support of his contention that in an action for declaration of title, damages for trespass and injunction, the plaintiff must succeed or fail on the strength of his own case but not on the weakness of the defence. He added that the plaintiff is expected to prove his case on the preponderance of evidence.

Learned Counsel argued that the plaintiff must satisfy the burden placed on him by the issue joined in the pleadings, the evidential burden on him as well as the burden of establishing the admissibility of evidence. He relied on *Kala vs. Potiskum* (1998) 3 NWLR (Pt.540) at 17.

Learned Counsel stated that in order to determine where the onus of proof lies and who will start first, the Court will consider the state of pleadings with respect to issues joined in the pleadings, the presumption of the Evidence Act in Sections 131-140, 135-150 of the Evidence Act 2011 Laws of the Federation 1990.

On the three different meanings of the phrase “burden of proof”, he relied on Phipson on Evidence, 14th Edition; cited with approval and relied on by this Court in *Kala v. Potiskum* (supra). Learned Counsel argued that on its judgment that the onus is on the defendant to call evidence first, the Court of Appeal failed to draw the distinction between the onus of proving a case and the duty to call witnesses first.

He relied on Phipson on Evidence 13th edition at page 770 where the learned author expressed the opinion that:

“... the plaintiff begins, for without an exception the pleadings are opened by him and not by the defendant.”

He relied on Halsbury’s Laws of England 3rd Edition Vol. 15 at page 271 for the learned author/s opinion that the question as to the right to begin is to be settled upon what justice to the parties require. He added that having called seven (7) witnesses before Aneke, J., the plaintiff ought to call his evidence first. He said it would be

inequitable and unjust for the Court to call on the appellants, as defendants, to field their witnesses before those of the plaintiff.

In conclusion, he urged the Court to allow the appeal for the reason that the Court of Appeal failed to draw a distinction between the party to call his witness first and the onus of proof placed on a party by law and facts of the case, the several issues joined and the fact that the respondent had first opened his case and called seven (7) witnesses before another Judge assumed jurisdiction to hear the case de novo.

In dealing with the lone issue in his brief, learned Counsel for the respondent referred to and relied on Order 24 Rules 17 (1) to 17 (3) of the High Court Rules of Anambra State, 1988 applicable to the case. He relied also on sections 131 (1) and (2), 132 and 133 (1) of the Evidence Act 2011 and argued that the burden of proof is not static but oscillates according to the circumstances of the case. He said that the burden of proof is two-fold.

First, the ability of the plaintiff to establish his entire case or reasonable portion thereof before he can get judgment called legal burden or the burden of proving a case and burden of proof of related facts or issues which a party claims exist called evidential burden. He relied on *Federal Mortgage Finance Ltd v. Hope Offiong Ekoo* (2004) 2 NWLR (Pt.856) page 100 at 122 para. C-E. He referred to paragraph 5 of the Statement of Defence for the admission made by the appellants as defendants.

He argued that the appellants having admitted radical title at one time in the respondent had the burden to prove that the radical title had been extinguished by the alleged irrevocable and irredeemable gift alleged made to them. He relied on Order 24 Rule 17 (2) of the High Court Rules of Anambra State 1988 as well as Section 133 (1) of the Evidence Act, 2011. He argued that the onus to commence leading evidence was on the appellants as they would have lost if no evidence was led at the trial Court.

He referred to paragraph 5 of the Statement of Defence and argued that on the strength of the admission therein, the appellants ought to begin. He referred to the decision of the trial Court on the issue of who to begin and said that the decision of the trial Court was affirmed by the Court of Appeal. He urged the Court not to disturb the concurrent findings of the two Courts below. He cited the case of

Nwobodo Ezeudu & 2 Ors v. Isaac Obiagwu (1986) 2 NWLR (pt.21) p. 208 at 215. He urged the Court to dismiss the appeal.

The sole issue calling for resolution is whether or not, from the state of pleadings, the appellants ought to call their witnesses first as decided by the trial Court and affirmed by the Court below.

I propose to examine the relevant paragraphs of the pleadings and case law applicable to the issue in contention. Paragraphs 4 and 5 of both the statement of claim and the statement of defence respectively, are hereunder reproduced:

Statement of Claim:

“4. The land in dispute is known as OWOKO ORURUIDE and is situate in Amangwu quarters of Ezi-Kwelle and is more particularly known and delineated and verged Pink on plaintiff’s plan No. MED/1007/87 filed with this statement of claim.

5. The land in dispute originally belonged to one Obolua, the ancestor of the plaintiff from time beyond human memory. The said Obolua got the land as his own share when the people from Amangwu shared their lands in the olden days. The said Obolua begat Okonkwo popularly known as Okpobalaku. Okonkwo begat Nwankwo popularly called Iruiliaku. The said Nwankwo alias Iruiliaku. The said Nwankwo alias Iruiliaku begat the plaintiff. The said Obolua during his life time exercised maximum acts of ownership and possession over the said land such as farming the same and living therein without any let or hindrance.”

Statement of Defence:

“4. The defendants deny paragraph (4) of the statement of claim and in further answer thereto say that the land in dispute is called Owoko Omalacha. It is situate in Uruowelle Quarters of Nkwelle Ogidi. It belongs to the defendants’ family of Obiajulu as a community. The extent of the defendants’ Owoko Omalacha land, part of which is in dispute in this case is shown verged blue on survey plan No. V.D/AS2/82 filed with this statement of defence. The plaintiffs survey plan No.MEC/1007/81 shows other pieces of land belonging to other families in Uruowelle Nkwelle-Ogidi.

5. Save and except that the plaintiff, Nwankwo and Okonkwo are descendants of Obolua the defendants deny emphatically paragraph (5) of the statement of claim. In further answer to paragraph (5) of the statement of claim the defendants state that the defen-

dants' Owoko Omalacha land was originally the land of the plaintiff's ancestor called Amangwu. Amangwu many years ago, and before the advent of British administration in Nigeria killed a descendant of the defendants' ancestor, Obiajulu, called Okonkwo..."

It is based on the above portions of the pleading that the trial Court came to the conclusion that:

"I therefore hold on the strength of the pleadings that the defendants ought to begin. I so order."

And this decision was affirmed by the Court below.

With profound respect, the fallacy in the concurrent findings of the two Courts below lies in the wrong interpretation of the pleadings relied on and the failure to distinguish between general principles and principles restricted to particular cases.

I intend to resolve the lone issue in the appeal on the two points stated above.

1. Could it be said that the pleading of the parties relate to the same piece of land? The plaintiff, in paragraph 4 of the statement of claim called the land "*OWOKO ORURUIDE*" situate in Amangwu Quarters of Ezi-Kwelle. On the contrary, the defendants, in paragraph 4 of their statement of defence, called the land in dispute "*OWOKO OMALACHA*" situate in Uruowelle Quarter of Nkwelle Ogidi. The name and location of the land in paragraphs 4 and 5 of the statement of claim is different from the name and location of the land in paragraphs 4 and 5 of the statement of defence.

Without evidence to that effect, the Court cannot resort to speculation that the parties referred to the same piece of land. The admission made by the defendants in their paragraph 5 of the statement of defence does not relate to the land claimed by the plaintiff in paragraph 5 of the statement of claim.

In my view, the parties did not join issue *OWOKE ORURUIDE* situate in Amangwu Quarter of Ezi-Kwelle or on *OWOKO OMALACHA* situate in Uruowelle Quarters of Nkwelle Ogidi nor has the admission in paragraph 5 of the statement of defence any bearing to the land referred to in paragraphs 4 and 5 of the statement of claim.

In my view, the identity and location of the land in dispute are not settled as between the parties and it is idle to speculate on the outcome of the case if no evidence is led as the evidence, if led, will

not relate to any fact in contention between the parties. In fact, there is no issue in contention between the parties based on their pleadings which are based on different pieces of land in different locations.

There is no evidence to show directly or by implication that the land called OWOKO ORURUIDE situate in Amangwu quarters of Ezi-Kwelle in paragraph 4 of the statement of claim is the same as the land referred to in paragraph 4 of the statement of defence as OWOKO OMALACHA situate at Uruowelle Quarters of Nkwelle Ogidi. Without more, the pleadings do not raise any issue between the parties in relation to the land claimed by the plaintiff now respondent.

From the state of pleadings, it can hardly be determined who will lose if no evidence is led and, ipso facto, who should start calling evidence even on the general principle that what is admitted need not be proved.

2. Secondly, and perhaps this is more important than the pleadings from which no issue between the parties can be isolated, is the question whether the general principle that what is admitted requires no proof is applicable to action for declaration of a right.

The success or failure of a declaratory relief is dependent on the judicial and judicious exercise of discretion by the Court. It is a discretionary remedy which can be granted by the Court but subject to certain conditions. See Sunday Eguamwense v. Amaghizemwen (1993) 9 NWLR (Pt. 315) 1 at 30 (SC); Egbunike & Anor v. Muonweoku (1961) 1 SCNLR 91/1961 NSCC 40. What is discretionary is not compulsory. It is left to the discretion of the Court.

“Discretion, when applied to a Court of justice, means good discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful, but legal and regular.” Per Lord Mansfield in Case of John Wilkes (1763) 4 Burr (Pt.IV 2539).

Declaration means equitable decision of what is just and proper under the circumstances or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of a case, guided by the principles of law. See Antra Industries Nigeria Ltd v. The Nigerian Bank for Commerce and Industries (1988) 4 NWLR (Pt.546) at 381 SC; Doherty v. Doherty (1964) 1 A NLR 299.

In an action seeking a declaratory relief, the Court can grant the relief but subject to certain conditions. See Sunday Eguamwense

v. Amashizemwen (1993) 9 NWLR (Pt.315) 1 at 30 SC; Egbunike & Anor v. Muonweoku (1961) 1 SCNLR 97/(1961) NSCC 40.

Faced with a declaratory relief, the Court draws inspiration from consecrated principles one of which is that the party seeking the relief must lead evidence upon which the relief is granted or denied, notwithstanding any admission in the defendant's pleading.

The Court has to be satisfied, on the evidence led by the plaintiff, that he is entitled to the relief he seeks. See *Motunwase v. Sorungbe* (1988) 5 NWLR (Pt. 92) 90. This Court has held, in plethora of decided cases, that a declaration of title or right cannot legally be based on admission in the statement of defence. See *Umesie & Ors v. Onuaguluchi & Ors* (1995) LPELR 3368 SC.

In *Bello v. Eweka* (1981) 1 SC 101 at 102 this Court held, *inter alia*:

“... the law is that a declaration of title or right cannot legally be based on admission in the pleading of a defendant.”

In the same case, this Court, while appreciating the general principle of law that what is admitted needs no proof, stated that the general principle does not apply in a claim for declaration of title or right. The Court held, *inter alia*:

“It is true as was contended before us by the appellant's Counsel, that the rules of Court and evidence relieve a party of the need to prove what is admitted but where the Court is called upon to make a declaration of right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the Court by evidence, not by admission in the pleadings of the defendant, that he is entitled. The necessity for this arises from the fact that the Court has a discretion to grant or refuse the declaration and the success of a claimant in such an action depends entirely on the strength of his own case and not on the weakness of the defence.”

In *Obawole v. Williams* (1996) 10 NWLR (pt.477) 146 or (1996) LPELR 2158 (SC), the Court, per Ogundare, JSC, at page 33 paras A-B of the report said:

“Now, the law is that where the Court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the Court by evidence not by admission in the pleadings of the defendant, that he is entitled.” See also *CPC v. INEC* (2012) 2-3 SC 1; *Dumez Nig. Ltd v. Nwokeabia &*

Ors (2008) 12 SC (Pt.111) 142; A-G Rivers State v. A-G Akwa Ibom State & Anor (2011) 3 SC 1.

It would follow from case law that in a claim for declaration of title or right, the plaintiff will lose if no evidence is led irrespective of any admission in the statement of defence.

In my view, based on decided cases of this Court, the plaintiff who seeks a declaration of right or title, a discretionary relief, has to open his case and lead evidence first notwithstanding any admission in the pleading of the defendant. B

It is an established principle that concurrent findings of fact by the trial Court and the appeal Court should not be disturbed by the Supreme Court. See *Njoku & Ors v. Eme & Ors* (1973) 5 SC 293 at 306; *Kale v. Coker* (1982) 12 SC 252 at 271. However, the time-honoured principle is not cast in stone. It is subject to exceptions. C

A concurrent finding of Court by the two Courts below, as in this case, can be disturbed by this Court where the finding is perverse, or there is substantial error either in substantive or procedural law which, if uncorrected, will lead to miscarriage of justice. See *Lokoyi & Anor v. Olojo* (1983) 8 SC 61 at 68; *Akinsanya v. UBA Ltd* (1986) 4 NWLR (pt.35) 273; *Dibiamaka v. Osakwe* (1989) 3 NWLR (pt.107) 101. D

This is an appropriate case for this Court to disturb concurrent findings by the trial Court and the Court of Appeal.

The decisions of this Court relied on in the majority decision are inapplicable to the facts of this case. The authorities dealt with the Rules of Court and Evidence Law that what is admitted requires no proof, This case is an exception to the general rule and provisions of the Evidence Act for a declaration of right or title, a discretionary relief, cannot be based on admission governed by the Evidence Act and Rules of Court. E

This is so because whether there is an admission of the claim in the statement of defence or there is no statement of defence, the declaration can only be granted on the quality of the evidence based on the pleading. It cannot be granted in default of pleading or admission in the pleading of the defendant. It is the plaintiff who will lose if no evidence is led and therefore he has to start. F

In conclusion, I resolve the sole issue in favour of the appellant. I set aside the decision of the trial Court as affirmed by the Court H

of Appeal and order the plaintiff to lead evidence first. Appeal allowed with N100,000.00 costs in favour of the appellant.

ARIWOOLA JSC

B I have had the advantage of a preview of the judgment which has just been delivered by my learned brother Peter-Odili, JSC. I am in agreement with the said judgment which dealt with the sole issue for determination of the appeal beautifully that I have nothing more to add.

C The appeal is devoid of any merit hence it deserves to be dismissed. Accordingly, it is dismissed by me.

I abide by the consequential orders in the lead judgment that the defendants are to start at the trial court by calling evidence first as held by the court and affirmed by the Lower Court.

I also make no order as to costs.

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