

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2014. SC. 173/2004
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, B. RHODES-VIVOUR,
K. B. AKA'AH, J. I. OKORO, JJSC**

1. RAMONU RUFAL APENA
2. JIMOH RUFAL APENA APPELLANTS
AND
1. OBA FATAI AILERU
2. ALHAJI SHITTU BAKARE RESPONDENTS
(As head and accredited
representative of Ojuwoye Community)

ACTIONS - Success of - Basis - Claim of plaintiff as well as defence of defendant - Are won and lost on pleadings - And on evidence led in support thereof (H1)

PLEADINGS - Purpose of - It is to give the other side at the earliest opportunity - The case he is to meet - As there is no better notice of case a party intends to make - Than his pleadings (H2)

PLEADINGS - Contradictory evidence - Evidence led at trial which is at variance with pleadings - Goes to no issue and must be rejected or discountenanced (H3)

PLEADINGS - Binding nature - Parties are bound by their pleadings - And no party is allowed to set up a case different from his pleadings - Otherwise such new case must be discountenanced (H4)

LAND LAW - Title - Root of - Proof - The parties are not of same Ojuwoye community - And appellants failed to plead source of title of the community - That granted the disputed land to their grandfather (H5)

ACTIONS - Proof - Burden of - Lies on party who alleges the existence of any fact - And/or on a person who would fail - If no evidence at all were given on either side (H6)

LAND LAW - Judgment - Res judicata - CA rightly held that the plea was not raised by judgments referred to by appellants - As nothing therein shows that appellants are members of Ojuwoye community (H7)

FACTS

Before the High Court of Lagos State, plaintiffs/respondents commenced this action against defendants/appellants, claiming damages for trespass, order for perpetual injunction restraining appellants from the disputed land and order directing appellants to render full account of all rents collected from the tenants on the land. Respondents' contention is that the land in dispute was initially inhabited by Odu-Abore and Aileru who were joint owners of the land. They went on to state that the land later on devolved on them. According to respondents, the families were later known as Ojuwoye community. Respondents further asserted that their progenitors gave customary licence to one Osu-Apena, the grand father of appellants to farm on the land. It is their contention that Ojuwoye community determined the licence long ago during the life time of Osu-Apena.

On the other hand, appellants admitted that they are not members of Ojuwoye community. They further admitted that the whole of the land at Ojuwoye Mushin, Lagos State is the communal land of Ojuwoye community which ownership is vested in the said community and respondents have no locus standi to institute the action against appellants. It is also the admission of appellants that it was Ojuwoye community which allotted the land in dispute to their progenitor (Osu-Apena). After hearing in the matter, the learned trial Judge found that respondents and appellants belong to the same Ojuwoye community. Judgment was entered for appellants. Dissatisfied, respondents appealed to the Court of Appeal, Lagos Division. The court set aside the decision of the trial court. Aggrieved, appellants lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether it can be adjudged as the Court of Appeal so decided, that Aileru and Odu Abore families, and both families alone, constitute the Ojuwoye community, to the exclusion of all other families in Ojuwoye, in view of the Supreme Court judgments in the consoli-

dated suit Nos. 113 and 114/1950 Sunmola Aganran & 7 Ors V. J.F. Kanson (Exhibit D5) (b), suit No. 127 of 1944 - Yesufu Ajose, Sanusi Olowu, Gbadamosi Aileru, Amodu Iyalode, Salami Akinsanya (For themselves and as representatives of the Ojuwoye community V. Sunmola Aganran & Ors.

2. Whether from the totality of the evidence canvassed by the appellants herein at the trial of this suit, the Court of Appeal was right in assuming and concluding that the appellants derived their title from another "Ojuwoye community" which was not the same with the respondents' Ojuwoye community who were the descendants of Aileru and Odu Abore families when both the appellants and respondents relied on the plan tendered as exhibit "A" in suit No. 127 of 1944, confirmed and reinforced in consolidated suit Nos. 113 and 114/50. Did this assumption result in a miscarriage of justice?

3. Whether the appellants from the oral and documentary evidence adduced at the trial are members of the Ojuwoye community to justify their occupation and possession of the land in dispute.

4. Whether the respondents who were plaintiffs in this suit, discharged the burden of proof placed on them in establishing that the appellants (defendants) were "TRESPASSERS" and not "ALLOTTEES" to justify the claim in trespass, and injunction granted to them by the appellate court, in reversing the judgment of the High Court."

HELD (Unanimously dismissing the appeal per **OKORO**

JSC)

ACTIONS - Success of - Basis

1. I wish to start by stating that in a civil case, the claim of the plaintiff is won and lost first on the pleadings and secondly on the evidence led in support of averments in the statement of claim. Equally, the defence of the defendant is based on the facts averred in his statement of defence and evidence in support thereof. (p. 2917 G)

PLEADINGS - Purpose of

2. The purpose of pleading is to give the other side at the

earliest opportunity, the case the other side is to meet. It is important to state further that there cannot be a better notice of the case a party intends to make than his pleadings. It is a notice and can never be substituted for the evidence required in proof of the facts pleaded, subject however to an admission made by the other party. (p. 2917 H)

PLEADINGS - Contradictory evidence

3. I need to emphasize also that evidence led at the trial which is at variance with the pleadings goes to no issue and must be rejected or discountenanced. (p. 2918 A)

PLEADINGS - Binding nature

4. Again, it is necessary to remind us of the elementary but fundamental rule of pleadings that parties are bound by their pleadings. No party will be allowed to set up a case other than that which is captured in his statement of claim or defence as the case may be. Therefore, parties must stick to their averments in their pleadings else, such a new case must be discountenanced.

In the instant case, it is clear, as was rightly stated by the court below, that the case was won and lost on the pleadings. Both the appellants' and respondents' counsel have lavishly reproduced paragraphs of both the statement of claim and statement of defence in their briefs to buttress the fact I have stated above. The court below did the same. I have no choice than to follow suit. (p. 2918 C)

LAND LAW - Title - Root of - Proof

5. Simply put, the Ojuwoye community which gave them the land is different from the respondents. For me, I think the court below was right to hold that the appellants referred to another Ojuwoye community other than that made up of the families of Odu Abore and Aileru. I agree with the court below that the learned trial judge was wrong and proceeded from nothingness to hold that the appellants and respondents belong to the same Ojuwoye community.

It is quite clear that the appellants, though they made

reference to Ojuwoye community other than that of the respondents, they failed to plead and lead evidence to show where they were coming from. Having pleaded that this land belongs to Ojuwoye community, it is either the appellants accepted the respondents as the said community or ought to have led evidence to prove the components or constituents of the one they were referring to. The appellants, as it turned out, have failed to do any of the two. They failed woefully to show the source of the title of the Ojuwoye community which granted the land in dispute to Osu Apena, their grandfather. This much, the lower court clearly stated, which I agree entirely. (p. 2921 H)

ACTIONS - Proof - Burden of

6. The law is elementary that the burden of proof is on the party who alleges the existence of any fact. By Section 131(1) of the Evidence Act 2011, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof in a civil suit or proceeding lies on that person who would fail if no evidence at all were given on either side (Section 133 of the Evidence Act 2011). (p. 2922 D)

Judgment - Res judicata

7. On the various judgments referred to by the appellants, the lower court has this to say on page 232 of the record:

“The defendant pleaded that he was relying on some judgments for his assertion that he belonged to Ojuwoye community. None of the judgments tendered raised a plea of res judicata or issue estoppels against the plaintiff on the defendant’s membership of plaintiff’s Ojuwoye community.”

I agree. There is nothing in those judgments which suggests that the appellants are members of Ojuwoye community. If those judgments consolidated their position, why did they emphatically state in their pleading that they are not members of Ojuwoye community and that the land was given to their ancestor by Ojuwoye community, but not that of the

respondents? The appellants must admit that they lost this case on the pleadings and there is nothing that can be done at this stage.

The sum total of all I have been saying above is that the appellants have failed to show why this court should upturn the judgment of the Court of Appeal in this matter.
 (p. 2922 G)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Action for trespass – Basis for success

Trespass to land is actionable in a suit filed by the person who is in possession of the land. The identity of the land must not be in dispute. It must be clearly ascertained. In this case there is no dispute as to the identity of the land. The burning issue is that both parties claim to be in possession of the same land. Both parties cannot be in possession of the same land. Surely one of them must be in lawful possession while the other is the trespasser. Where, as in this case both parties claims to be in possession of the same land, the law ascribes possession to the party with better title. See: Mogaji v. Odofin (1978) 4 SC P. 91.

There is said to be trespass when someone having no title to the land interferes with the possession of another person who has a good title to the land. Trespass is thus a breach of a right of possession. An action for trespass thus pre-supposes that the plaintiff is in possession.

Once the plaintiff can establish possession to the land his action for trespass succeeds. The defendant can only succeed if he can show a better title. (p. 2924 F)

AKA’AHS JSC

2. Res judicata – Conditions for

For a plea of res judicata to succeed it must be shown that:

- (a) the parties;
- (b) the issues; and
- (c) the subject matter in the previous action were the same as those in the action in which the plea is being raised. Once these in-

gredients of res judicata are established, the previous judgment estops the party from making any claim contrary to the decision in the previous case. (p. 2933 C)

REPRESENTATION

Folami Fashe, Esq., with Segun Akintan Esq. and Ikhide Ehighelua, Esq., for the Appellants

C. V. C. Ihekweazu, Esq., with M. B. Jimoh-Akokun Esq., for the Respondents

CASES REFERRED TO

Udo v. Obot (1989) 1 NWLR (pt. 95) 59

Achinakpa v. Nduka (2001) 7 SC (pt. III) 125

Okukije v. Akwido (2001) FWLR (pt. 39) 1487

Dokubo v. Omoni (2001) FWLR (pt. 6) 1804

Okonkwo v. Okere (2002) 5 SC (pt. I) 58

Ojo v. Kamalu (2005) 12 SC (pt. 11) 1

Anyah v. African Newspapers of Nig. Ltd (1992) 7 SCNJ 47

Osho v. Foreign Finance Corporation (1991) 4 NWLR (pt. 184) 157

Peenok Invest. Ltd v. Hotel Presidential Ltd. (1992) NSCC 477

Akaninwo v. Nsirim (2008) 9 NWLR (pt. 1093) 439

Nnadozie v. Mbagwu (2008) 3 NWLR (pt. 1074) 363

Obiaku v. Ekesiobi (2003) FWLR (pt. 166) 661

Tsokwa v. UBN (1996) 12 SCNJ 445

Mogaji v. Odofin (1978) 4 SC 91

STATUTE REFERRED TO

Evidence Act LFN 2011, ss. 131(1), 133

LEAD JUDGMENT BY OKORO JSC

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal number CA/L/404/98 delivered on 30th November, 2000 wherein the lower court set aside the judgment of the trial High Court and entered judgment for the present respondents. Dissatisfied with the decision of the Court of Appeal setting aside the judgment they won, the appellants have appealed to this court. A synopsis of the facts will suffice.

The respondents were the plaintiffs in suit No. LD/1727/88 at

the Lagos State High Court and claimed against the 1st appellant (as 1st defendant) following reliefs:

B “(1) *The sum of N200.00 (Two Hundred Naira) being special and general damages for trespass committed by the defendant by himself, his servants, workmen, assigns, privies and agents or otherwise howsoever on all that piece or parcel of land situate, lying and being at Amu Street, Mushin shown in plan Nos. A/of/1095/LA/156 and A/of/1095/LA/157.*

C “(2) *An order of perpetual injunction restraining the Defendant by himself, his agents or otherwise on all that piece or parcel of land, lying and being at Amu Street, Mushin in plan numbers A/of/1095/LA/156 and A/of/1095/LA/157.*

D “(3) *An order directing the defendant to render full account of all rent or mesne profit collected from tenants on the land in dispute to the plaintiff and pay over the said rent or mesne profit to the plaintiffs.*”

E The respondents also filed a similar claim against the 2nd appellant who is the brother of the 1st appellant. The 2nd suit number was LD/1728/88. At the trial, both parties and the court agreed that the judgment In LD/1727/88 should bind the parties in suit No. LD/1728/88.

F The land in dispute, according to the respondents was first inhabited by Odu-Abore and Aileru who jointly owned the land and that the said land devolved on the respondents. The two families became known as Ojuwoye community. According to them, their progenitors gave customary licence to one Osu-Apena, the grand father of the appellants for farming. It is their contention that Ojuwoye community determined the licence long ago during the life time of G Osu-Apena.

H In paragraph I of the appellants’ statement of defence, they admit that they are not members of Ojuwoye community. And in paragraph 3, admit that “*the whole of the land at Ojuwoye Mushin, Lagos State is the communal land of Ojuwoye community which ownership is vested in the said community and the plaintiffs have no locus standi to institute this suit against the defendants.*” They also admit in paragraph 14 of their said statement of defence that it was Ojuwoye community which allotted the land in dispute to Osu-Apena, their progenitor.

At the High Court, the learned trial judge entered judgment for the defendants, now appellants. The plaintiffs, (now respondents), not being satisfied with the judgment, appealed to the Court of Appeal which set aside the decision of the trial court and entered judgment for the plaintiffs/respondents. The appellants are dissatisfied with the judgment of the lower Court and have appealed to this Court. B They filed notice of appeal dated 4th January, 2001 containing six grounds of appeal out of which the appellants have distilled four issues for the determination of this appeal. The four issues are:-

“1. Whether it can be adjudged as the Court of Appeal so C decided, that Aileru and Odu Abore families, and both families alone, constitute the Ojuwoye community, to the exclusion of all other families in Ojuwoye, in view of the Supreme Court judgments in the consolidated suit Nos. 113 and 114/1950 Sunmola Aganran & 7 Ors V. J.F. Kanson (Exhibit D5) (b), suit No. 127 of 1944 - Yesufu Ajose, Sanusi D Olowu, Gbadamosi Aileru, Amodu Iyalode, Salami Akinsanya (For themselves and as representatives of the Ojuwoye community V. Sunmola Aganran & Ors.

2. Whether from the totality of the evidence canvassed by the appellants herein at the trial of this suit, the Court of Appeal was right E in assuming and concluding that the appellants derived their title from another “Ojuwoye community” which was not the same with the respondents’ Ojuwoye community who were the descendants of Aileru and Odu Abore families when both the appellants and respondents F relied on the plan tendered as exhibit “A” in suit No. 127 of 1944, confirmed and reinforced in consolidated suit Nos. 113 and 114/50. Did this assumption result in a miscarriage of justice?

3. Whether the appellants from the oral and documentary G evidence adduced at the trial are members of the Ojuwoye community to justify their occupation and possession of the land in dispute.

4. Whether the respondents who were plaintiffs in this suit, discharged the burden of proof placed on them in establishing that the appellants (defendants) were “TRESPASSERS” and not H “ALLOTTEES” to justify the claim in trespass, and injunction granted to them by the appellate court, in reversing the judgment of the High Court.”

It is however the view of the respondents that two issues are relevant for the determination of this appeal. The two issues as for-

mulated by their counsel are as follows:-

“1. Whether the Court of Appeal was right when they held that the plaintiffs/respondents were entitled to succeed on their claim for damages for trespass and injunction.

2. Whether the Court of Appeal was right when they held that the defendants/appellants failed to lead any evidence as to the composition of his own Ojuwoye community and the source of title of the said Ojuwoye community in dispute.”

I intend to be guided by the issues formulated by the appellants.

The submission of Segun Akintan, Esq., learned counsel for the appellants on the first issue is that the Court of Appeal reversed the judgment of the High Court based on their conclusion that *“Ojuwoye community”* consists of only the Aileru and Odu Abore families, and that the Ojuwoye community pleaded by the respondents consists of only the Aileru and Odu-Abore families to the exclusion of all other families, to justify the respondents’ claim for trespass and injunction. Learned counsel questioned what oral and documentary evidence the respondents canvassed, and/or placed before the court in establishing this *“exclusive right”* to communal land, as against the evidence of the appellants in negating that exclusivity, bearing in mind that it is a cardinal principle of law that, he who asserts must prove, referring to S. 138 of the Evidence Act.

According to learned counsel, the case of the respondents as plaintiff was anchored in paragraphs 6, 10, 11, 12, 13, 14 and 16 of their amended statement of claim on page 67 of the record of appeal while that of the appellants as defendants was anchored in paragraphs 3, 4, 5, 6, 7, 14, 15 and 16 of their amended statement of defence. After listing those paragraphs and referring to previous judgments in respect of Ojuwoye community land, learned counsel submitted that, in as much as exhibit *“A”*, a certified true copy of original plan No. A151/1944 made by E. O. Aiyede LS dated 16/9/43, which was used in all the Supreme Court suits referred to by him, and also used in the present suit, clearly indicate and refer to the predecessors in title of the appellants herein i.e. Osu Apena as owners of farmland at Ojuwoye community, the respondents cannot dispossess them of their right over this land in as much as they are in use and occupation of their respective allotments.

It was his further submission that the respondents in this suit are estopped from laying claim to the land occupied by the appellants which from the composite plans, exhibits D9 and D10, shows that No. 32 Cash Sheet and No. 28 Amu Street claimed by the respondents fall within the land allotted to Osu Apena as farmland of Osu Apena in exhibit A in the previous Supreme Court suits, and rendered as exhibit P6 in the present suit. B

Learned counsel further argued, submitted and urged the court to so hold that the issue as to who constitutes the Ojuwoye community, and whether one party has the right to dispossess another of its farmland, has long been adjudicated upon and laid to rest by this court in previous decisions and that it would amount to the grossest abuse of court process to re-litigate these issues again, referring to the following cases: Udo v Obot (1989) 1 NWLR (Pt. 95) 59, Achinakpa V. Nduka (2001) 7 SC (Pt. III) 125 at 134, Okukije V. Akwido (2001) D FWLR (Pt. 39) 1487. C

On the second issue, learned counsel submitted that there was never a deposition on the pleadings, and/or in the oral evidence of the appellants where the appellants (a) treated Ojuwoye community as ordinary or common citizens who reside at Ojuwoye community and/or (b) refer to another Ojuwoye community separate and distinct from the ones known and pleaded by the respondents. That it amounted to an error on the part of the Court of Appeal, and it resulted in a miscarriage of justice when they concluded thus at page 320 of the records in their judgment as follows: F

“...Although the defendant pleaded that there existed another Ojuwoye community other than the one pleaded by the claimant, the defendant did not lead any evidence as to the composition of his own Ojuwoye community, and how the said Ojuwoye community came to own the land in dispute in the first place... From the pleadings the parties were talking of two separate and distinct Ojuwoye communities.” G

Learned counsel, submitted in conclusion that there was no pleading to the effect as concluded by the Court of Appeal, neither was there any evidence led on the existence of another Ojuwoye community. H

On the third issue as to whether from the oral and documentary evidence adduced before the trial court, the appellants are mem-

bers of Ojuwoye community, the appellants repeated their argument in issue one and I do not intend to also repeat the exercise.

In respect of the fourth issue which is dependent on the outcome of the other issues, learned counsel submitted that the respondents had no locus to institute this action for trespass because they were not in possession of the land in dispute since trespass to land is actionable at the instance of the person in possession. He cited the cases of *Dokubo V. Omoni* (2001) FWLR (Pt. 6) page 1804 and *Eze Okonkwo V. Okere* (2002) 5 SC (Pt. 1) 58. He urged this court to hold that the preponderance of evidence as to possessory and legal rights to the land in dispute as established, tilts in favour of the appellants, and that in view of this rights, the appellants are not accounting parties to the respondents as they are bona fide land owners in Ojuwoye communal land.

In response to the first issue of the appellants, which is the respondents' 2nd issue, the learned counsel for the respondents referred to paragraphs 6, 12 and 13 of their statement of claim and paragraphs 1, 3, 5 and 14 of the appellants' statement of defence and submitted that the Court of Appeal was right when it held that the appellants did not lead any evidence as to the composition of their own Ojuwoye community and how the said community came to own the land in dispute in the first place. That the reliance placed on exhibits D5 and D8 to establish Ojuwoye community is an after-thought not supported by the case pleaded by the appellants in their statement of defence. Also submitted is that the appellants failed to establish that their grand-father Osu-Apena was a party in exhibits D5 and D8. Learned counsel further argued that issue of exhibits D5 and D8 constituting issue estoppels was not raised by the appellants by way of cross-appeal and therefore this court cannot entertain the section of issue 1 dealing with exhibits D5 and D8 raising issue estoppels. This argument appears to have covered issues two and three.

In respect of issue four which tallies with the respondents' issue two, learned counsel for the respondents referred to several paragraphs of both the statement of claim and defence and submitted that the effect of the appellants' admission of paragraphs 12 and 13 of the 2nd further amended statement of claim contained in paragraph two of the 2nd further amended statement of defence is that:

i) The appellants are the sons or descendants of one Osu-Apena

(now deceased).

ii) Osu-Apena is not a member of Odu-Abore/Aileru families of Ojuwoye community.

Learned counsel submitted that the respondents have stated emphatically that the land in dispute was founded by Odu Abore and Aileru who jointly made up Ojuwoye community and that the lower court was right when they held that the respondents were entitled to succeed on their claims for damages for trespass and injunction, the licence granted the appellants having been determined in the life time of their grandfather.

Referring to the evidence of Ramonu Rufai Apena on page 94 of the record (lines 16 - 25) he submitted that there were inconsistencies as follows:-

1. Osu Apena his grandfather was the head of Ojomo Eyisha family.

2. The whole land at Ojuwoye originally belong to Ojomo Eyisha family.

3. I am not related to Odu Abore and Aileru families but I am a member of Ojuwoye family.

4. I am claiming as Ojuwoye community.

Learned counsel then asked if Ojomo Eyisha family owned the whole land at Ojuwoye as claimed by the appellants under cross-examination, the appellants failed to plead the traditional history of Ojomo Eyisha family and this is fatal to their claim of title to the land in dispute, relying on the case of Ojo V. Kamalu (2005) 12 SC (Pt 11) 1 at 40. It is his further submission that their claim was debunked by exhibits P2 and P3 which are subsisting judgments between Fabunmi, the head of Ojomo Eyisha family and Agaran the Baale of Ojuwoye. Learned counsel urged this court to resolve these issues in favour of the respondents.

I wish to start by stating that in a civil case, the claim of the plaintiff is won and lost first on the pleadings and secondly on the evidence led in support of averments in the statement of claim. Equally, the defence of the defendant is based on the facts averred in his statement of defence and evidence in support thereof. The purpose of pleading is to give the other side at the earliest opportunity, the case the other side is to meet. It is important to state further that there cannot be a better

notice of the case a party intends to make than his pleadings. It is a notice and can never be substituted for the evidence required in proof of the facts pleaded, subject however to an admission made by the other party. I need to emphasize also that evidence led at the trial which is at variance with the pleadings goes to no issue and must be rejected or discountenanced.

See Anyah V. African Newspapers of Nig. Ltd (1992) 7 SCNJ 47, Obmiami Brick & Stone Nig. Ltd. V. African Continental Bank Ltd. (1992) 3 NWLR (Pt. 229) 250, American Cynamid Company V. Vitality Pharmaceuticals Ltd (1991) 2 NWLR (Pt. 171) 15.

Again, it is necessary to remind us of the elementary but fundamental rule of pleadings that parties are bound by their pleadings. No party will be allowed to set up a case other than that which is captured in his statement of claim or defence as the case may be. Therefore, parties must stick to their averments in their pleadings else, such a new case must be discountenanced. See Osho & Anor. V. Foreign Finance Corporation & Anor (1991) 4 NWLR (Pt 184) 157, Peenok Investment Ltd V. Hotel Presidential Ltd. (1992) NSCC Vol. 13 477, Akaninwo V. Nsirim (2008) 9 NWLR (Pt. 1093) 439.

In the instant case, it is clear, as was rightly stated by the court below, that the case was won and lost on the pleadings. Both the appellants' and respondents' counsel have lavishly reproduced paragraphs of both the statement of claim and statement of defence in their briefs to buttress the fact I have stated above. The court below did the same. I have no choice than to follow suit.

The respondents (as plaintiffs) in their 2nd further amended statement of claim pleaded as follows in paragraphs 3 to 6 and 12 to 16:

"3. The said land forms portion of a vast area of land which was first settled upon by one Odu-Abore and Aileru about three hundred years ago.

4. The said Odu-Abore and Aileru arrived there together and exercised maximum acts of ownership and possession over the vast area for very many years until their death.

5. On their death, they were succeeded by their descendants who together used the land in common.

6. *The descendants of Odu-Abore and of Aileru together with their domestics are now referred to as the Ojuwoye community and consist of an amalgam of the descendants or family of Odu-Abore and of Aileru.*

12. *The plaintiffs aver that the defendant is a son and/or a descendant of one Osu-Apena now deceased.* B

13. *The said Osu-Apena is not a member of Odu-Abore/Aileru families of Ojuwoye (Ojuwoye community).*

14. *The plaintiffs aver that over fifty years ago, one Osu-Apena was orally granted a customary licence to farm on a portion of Ojuwoye Community land including the land in dispute by the Ojuwoye Community.* C

15. *The said customary licence was to be determined at any-time by the Ojuwoye community during the tenure or after the licensee has ceased to farm on the said land.* D

16. *The said customary licence to farm on a portion of Ojuwoye community land was determined long ago before the death of Osu-Apena by Ojuwoye community when the said Osu-Apena ceased farming on the said land."*

Also, the appellants (as defendants) in paragraphs 1, 3, 4, 5, 14 and 15 of their 2nd further amended statement of defence pleaded thus:

"1. *The defendant admits paragraphs 2, 7, 11, 12 and 13 of the 2nd further amended statement of claim.*

3. *The defendant in answer to paragraph 8 of the 2nd further amended statement of claim avers that the whole of the land at Ojuwoye Mushin Lagos State is the communal land of Ojuwoye community which ownership is vested in the said community and the plaintiffs have no locus standi to institute this suit against the defendant.* F G

4. *The defendant in answer to paragraph 9 of the 2nd further amended statement of claim avers that whilst it is conceded that the community can grant innumerable leases and customary tenancies in respect of their land, Rse (sic) do not apply to the land in dispute as well as to the adjacent land which have been allotted to their members of which the defendant herein is one of them.* H

5. *The defendant in further answer to paragraph 9 of the 2nd further amended statement of claim avers that possession of com-*

munal land which has been allotted to a member of the community for his use and occupation is exclusive and the community cannot sue for trespass to the land as long as it is in actual possession of that member of the community to whom it is allotted.

B 14. *The defendant avers that one Osu-Apena his progenitor was a prominent member of the Ojuwoye community among others to whom two parcels of land was allotted by the Ojuwoye community from time immemorial for use and occupation as was the custom in those days.*

C 15. *The defendants aver that his progenitor was in exclusive possession of the said two parcels of land until his death in 1922 when his descendants succeeded to his interest in the said land."*

I have already stated that it is the pleadings of the parties that lay out the case of each party. Thus, from the pleadings of the respondents, their root of title to the disputed land is traceable to their ancestors Odu-Abore and Aileru who jointly founded and settled on the land about three hundred years ago. They also pleaded and testified that these two progenitors jointly founded a community known as Ojuwoye community made up of the descendants of Odu-Abore and Aileru. The land in dispute, according to them is the communal land of Ojuwoye community as the licence to use same given to Osu Apena, the grandfather of the appellants had since been determined. They further stated that the appellants were the sons of Osu-Apena and that the said Osu Apena was not a member of the Ojuwoye community, reference to paragraphs 12 and 13 of the 2nd amended statement of claim.

On the other hand the appellants, as defendants admitted in paragraph I of their statement of defence that their grandfather (and by extension themselves) was/are not members of Odu Abore and Aileru families, the joint founders of Ojuwoye community. Although the appellants accept that the land in dispute was allotted to their grand father Osu-Apena, they however do not accept the respondents as the Ojuwoye community which gave them the land. As was pointed out by the court below, they appear to be referring to another Ojuwoye community.

In its judgment the court below held as follows:-

"On the evidence led before the trial judge and the pleadings, it was apparent that the defendant's case was that he did not belong

to Odu-Abore and Aileru family which the plaintiffs described as Ojuwoye community. Although the defendant pleaded that there existed another Ojuwoye community other than the one pleaded by the plaintiffs the defendant did not lead any evidence as to the composition of his own Ojuwoye community and how the said Ojuwoye community came to own the land in dispute in the first place.” (See B p. 320 of the record)

The above finding of the Court of Appeal is key to the determination of this matter. Learned counsel for the appellants argued that the above finding did not mirror the correct position of the appellants in the case. But looking at the pleadings above, the appellants clearly stated that Osu-Apena was not a member of Odu-Abore/ Aileru families. They however pleaded that they derived their possession from “Ojuwoye community” which was not the same as the one of the respondents who are the descendants of Odu Abore and Aileru. D That is why they stated emphatically that the respondents had no locus to bring the suit against them. On page 93 of the record, the 1st appellant in his evidence in chief testified as follows:

“It is true that my progenitor Osu-Apena was not related to Odu Abore or Aileru family. He was a prominent member of Ojuwoye E community. The Ojuwoye land belong to Ojuwoye community. It is Ojuwoye community that can institute this action.”

That was not all. Under cross examination, the same appellant stated on page 93 of the record as follows:-

“The two families Odu Abore and Aileru are not the people F referred to as Ojuwoye community.”

Except I do not understand simple English language which I think I do, the appellants by their pleadings and the evidence I have reproduced above, stated emphatically that contrary to the assertion G by the respondents that Ojuwoye community “consists of an amalgam of the descendants or families of Odu Abore and Aileru”, “the two families Odu Abore and Aileru are not the people referred to as Ojuwoye community.”

Simply put, the Ojuwoye community which gave them H the land is different from the respondents. For me, I think the court below was right to hold that the appellants referred to another Ojuwoye community other than that made up of the families of Odu Abore and Aileru. I agree with the court below

that the learned trial judge was wrong and proceeded from nothingness to hold that the appellants and respondents belong to the same Ojuwoye community.

It is quite clear that the appellants, though they made reference to Ojuwoye community other than that of the respondents, they failed to plead and lead evidence to show where they were coming from. Having pleaded that this land belongs to Ojuwoye community, it is either the appellants accepted the respondents as the said community or ought to have led evidence to prove the components or constituents of the one they were referring to. The appellants, as it turned out, have failed to do any of the two. They failed woefully to show the source of the title of the Ojuwoye community which granted the land in dispute to Osu Apena, their grandfather. This much, the lower court clearly stated, which I agree entirely.

The law is elementary that the burden of proof is on the party who alleges the existence of any fact. By Section 131(1) of the Evidence Act 2011, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof in a civil suit or proceeding lies on that person who would fail if no evidence at all were given on either side (Section 133 of the Evidence Act 2011). See Calabar Central Co-operative Thrift & Credit Society Ltd & Ors. V. Bassey Ebong Ekpo (2008) 5 NWLR (Pt. 1083) 362, Nnadozie V. Mbagwu (2008) 3 NWLR (Pt. 1074) 363, Peter Obiaku V. Ignatius Ekesiobi (2003) FWLR (Pt. 166) 661, Tsokwa V. UBN (1996) 12 SCNJ 445.

The failure to lead evidence to prove the origin of the appellants' Ojuwoye community is the bane of their case.

On the various judgments referred to by the appellants, the lower court has this to say on page 232 of the record:

“The defendant pleaded that he was relying on some judgments for his assertion that he belonged to Ojuwoye community. None of the judgments tendered raised a plea of res judicata or issue estoppels against the plaintiff on the defendant’s membership of plaintiff’s Ojuwoye community.”

I agree. There is nothing in those judgments which sug-

gests that the appellants are members of Ojuwoye community. If those judgments consolidated their position, why did they emphatically state in their pleading that they are not members of Ojuwoye community and that the land was given to their ancestor by Ojuwoye community, but not that of the respondents? The appellants must admit that they lost this case on the pleadings and there is nothing that can be done at this stage.

The sum total of all I have been saying above is that the appellants have failed to show why this court should overturn the judgment of the Court of Appeal in this matter. Accordingly, this appeal is devoid of merit and is hereby dismissed. I affirm the judgment of the Court of Appeal. I award costs of N100,000.00 in favour of the respondents.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead Judgment of my learned brother OKORO JSC just delivered.

My learned brother has dealt exhaustively with the issues raised in the appeal for determination and resolved them. I cannot improve on it.

I accordingly agree with the reasoning and conclusion of my learned brother that the appeal lacks merit and should be dismissed and order accordingly.

I abide by the consequential orders made in the said lead Judgment including the order as to costs. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

I have had the privilege of reading before now this all encompassing lead judgment rendered by my lord Okoro JSC, I entirely agree with his lordship that the appeal lacks merit and same be dismissed. What else can one do apart from dismissing this appeal when all the issues sent to us have failed. I too, like my brother Okoro JSC, found no merit in this appeal; I therefore dismiss it and affirm the decision of the Court below.

RHODES-VIVOUR JSC

I have had the benefit of reading in draft the leading judgment of my learned brother, Okoro, JSC. I agree with his lordship that the Court of Appeal was right to upset the judgment of the trial High Court and enter judgment for the respondent, dismissing the appeal. This case was lost on the pleadings. The courts have said on several occasions that parties are bound by their pleadings. This case brings into focus the importance of well drafted pleadings and this court restated the rigid rule of pleadings and evidence in: *George & Ors. v. Dominion Flour Mills Ltd. (1963) 1 ALL NLR P.71*. When it said that:

“The fairness of a trial can be tested by the maxim audi alteram partem. Either party must be given an opportunity of being heard, but a party cannot be expected to prepare for the unknown and the aim of pleadings is to give notice of the case to be met; which either party to prepare his evidence and arguments upon the issues raised by the pleadings and saves either side from being taken by surprise. Incidentally, it makes for economy. The plaintiff will, and indeed must, confine his evidence to these issues, but the cardinal point is the avoidance of surprise.”

Parties must call evidence to support their pleadings and evidence led which is contrary to pleaded facts is never admitted. The main claim of the respondents as plaintiffs was for special and general damages for trespass on land situate at Amu Street Mushin shown in plan Nos. Alof/1095/LA/156 and Alof/1095/LA/157 and injunction.

Trespass to land is actionable in a suit filed by the person who is in possession of the land. The identity of the land must not be in dispute. It must be clearly ascertained. In this case there is no dispute as to the identity of the land. The burning issue is that both parties claim to be in possession of the same land. Both parties cannot be in possession of the same land. Surely one of them must be in lawful possession while the other is the trespasser. Where, as in this case both parties claims to be in possession of the same land, the law ascribes possession to the party with better title. See: *Mogaji v. Odofin (1978) 4 SC P. 91*.

There is said to be trespass when someone having no title to the land interferes with the possession of another person who has a good title to the land. Trespass is thus a breach of a right of posses-

sion. An action for trespass thus pre-supposes that the plaintiff is in possession.

Once the plaintiff can establish possession to the land his action for trespass succeeds. The defendant can only succeed if he can show a better title.

To succeed both parties must plead names, history of their ancestors to show a continuous chain of devolution. They must plead genealogy and lead evidence in support of their pleadings. See *Ayanwale v. Odusami* (2011) 12 SC (Pt. iii) P. 59.

The plaintiff/respondent pleaded that the land was first inhabited by Odu-Abore and Aileru. They owned the land jointly. The land devolved on the respondents, and the two families, Odu-Abore and Aileru are known as Ojuwoye Community. The plaintiffs/respondents successfully pleaded the source of their title and called credible evidence in support of pleaded facts. Can that be said to be the case with the appellants? The appellant failed to trace their own line in their leading. They were unable to lead evidence worth mentioning as there was little or no pleading to support their claim to title of the disputed land. The sad state of the appellants pleadings explains why judgment was entered for the respondents by the Court of Appeal and affirmed by this court. The appellants failed woefully to show that they have a better title than the respondents. On the state of the pleadings and evidence led it becomes abundantly clear that the appellants trespassed on the respondents land and an injunction was correctly granted by the Court of Appeal to restrain them permanently from such acts.

For this and the more detailed reasoning in the leading judgment, the appeal is dismissed with costs of N100,000 in favour of the respondents.

AKA'AHS JSC

I have been privileged to read in draft the judgment just delivered by my learned brother, Okoro JSC. And to borrow the words of Obaseki and Eso JJSC in *Ayeni & Others VS Sowemimo* (1982) 5 SC 60, he has given a detailed and thorough treatment of the issues raised in the appeal. I only wish to say something on allotment as argued by the appellants just for emphasis.

The Plaintiffs (now respondents) had taken out two separate suits Nos. ID/1727/88 and ID/1728/88 on 15th and 16th December 1988 against Ramanu Rufai Apena and Jimoh Rufai Apena respectively claiming against each of the defendants-

1. The sum of N200.00 being special and general damages for trespass committed by the defendant, by himself, his servants, workmen, privies and agents or otherwise howsoever on that all that piece or parcel of land situate lying and being at Mushin plan of which will be filed later.
2. An order of Injunction restraining the defendant by himself, his servants, workmen, privies and agents or otherwise however on that all that piece or parcel of land situate lying and being at Mushin Plan of which will be filed later.

On 19th March, 1992, Olorunimbe J. sitting at the Lagos High Court, Ikeja, with the consent of the parties, ordered that the decision in Suit No. ID/1727/88 shall bind the sister Suit No. ID/1728/88. It should be noted that the defendants in the two suits are brothers and the land in dispute is the same, the difference being that each of the defendants was occupying a separate portion of the land.

The plaintiffs lost at the High Court but that decision was overturned in the Court of Appeal which entered judgment in favour of the Plaintiffs. The defendants being dissatisfied with the decision of the Court of Appeal Lagos have now appealed to this court and they submitted four issues for determination. As I indicated earlier, my learned brother, Okoro JSC meticulously dealt with all the issues raised before he reached the conclusion dismissing the appeal. I cannot improve on his reasoning and conclusion but wish to touch on issue 4 on whether the respondents who were the plaintiffs in this suit discharged the burden of proof placed on them in establishing that the appellants (defendant) were (sic) “*TRESPASSERS*” and not “*ALLOTEES*” to justify the claim for trespass and injunction granted to them by the Appellate Court in reversing the judgment of the High Court. It is intertwined with all the other issues. Learned counsel for the appellants referred to paragraphs 14, 15, 16, 17, 18 and 20 of the Statement of Claim and the oral evidence given by 1st appellant, Alhaji Ramoni Rufai Apena wherein he confirmed and restated the fact that his progenitor was in exclusive possession of the two parcels of land until his death in 1922 and thereafter his descen-

dant succeeded to his interest in the said land whereas the plaintiffs were never in possession nor did they acquire any right of possession of the land, it was wrong for the court below to have found that the appellants had trespassed on the disputed land since trespass can be maintained only against a party who is not in possession. Learned counsel also wondered why the suit was instituted only in 1998 after Osu Apena to whom the land was allotted had died as far back as 1922. He further argued that the respondents did not establish any legal right to justify what the lower court did in granting them an order of injunction.

In response, learned senior counsel for the respondents referred to paragraphs 12 and 13 of the 2nd Amended Statement of Claim which the defendants (appellants) admitted in paragraph I of the 2nd Further Amended Statement of Defence and the Court of Appeal's observation that at the trial, the defendant did not give evidence as to how the land in dispute came to be owned by his own Ojuwoye Community which allotted the land in dispute to his grandfather, Osu Apena. He contended that the conclusion reached by the Court of Appeal that the case made by the plaintiffs at the trial was not effectively challenged and therefore they were entitled to succeed on their claims for damages for trespass and injunction was right since the plaintiffs pleaded their source of title but the defendants failed woefully to plead their source of title to the land. He further submitted that the nature of allotments made to the defendant's grandfather was also pleaded and evidence adduced and referred to the evidence of the 3rd Plaintiff Tijani Akinliyi under cross-examination on the issue of the nature of allotment. He submitted that where evidence is led by a party to any proceedings and is not challenged by the opposite party who had the opportunity to do so. It is always open to the court seised of the proceedings to accept the unchallenged evidence before it and cited *Odunsi VS Bamgbala* (1995) 1 NWLR (Pt. 374) 641 at 663 in support.

In his judgment the learned trial Judge had found the following facts proved which led to the dismissal of the plaintiffs' case:

"1. That the Ojuwoye Community comprise Aileru and Odu - Abore families but is not limited to them. Osu Apena the progenitor of the defendant and by extension the defendant is part and parcel of OJUWOYE COMMUNITY."

2. *That the large area of land which the land in dispute forms part was allotted to Osu-Apena as of right without of (sic) any string attached condition imposed. The land was not leased as in the cases of PW1 and PW4".*

B In reversing the said findings and entering judgment for the plaintiffs the court below per Oguntade, JCA (as he then was) held at page 321 - 322 of the records:-

C *"...It is my firm view that the finding that the Ojuwoye Community was not limited to the member of Aileru and Abore family was not appropriate having regard to the manner the parties fought the case on their pleadings. From the pleadings the parties were talking of two separate and distinct Ojuwoye Communities. The plaintiffs sued as the heads and representatives of Ojuwoye Community which was another name for the descendants of Odu-Abore and Aileru D family. In paragraph 7 of the 2nd Further Amended Statement of Claim, the plaintiffs pleaded that the 1st plaintiff was the head of the said Ojuwoye Community. More important, they pleaded that the defendant's progenitor Osu Apena and by extension the defendant were not members of the said Ojuwoye Community. Osu Apena was E not and could not therefore have been allotted land as a member of a family or community to which he did not belong. The defendant agreed that Osu-Apena and himself by extension were not members of the plaintiffs Ojuwoye Community. The defendant however said F that the land in dispute was allotted to his grandfather, Osu Apena by another Ojuwoye Community; and that the plaintiffs lacked the locus standi to bring this suit on behalf of the Ojuwoye Community known to the defendant".*

G Earlier in the judgment, Oguntade JCA (as he then was) in considering the pleadings had drawn a distinction between those who ordinarily resided in Ojuwoye and were referred to as Ojuwoye Community and the descendants of Odu Abore and Aileru who were also called Ojuwoye Community. He stated at page 319 thus:

H *"In the excerpts of the plaintiffs' 2nd Further Amended Statement of Claim reproduced above, the plaintiffs traced their title to the land in dispute to their ancestors. Odu-Abore and Aileru. These two persons it was pleaded, first settled on the land about three hundred years ago. It was further pleaded that the descendants of Odu-Abore and Aileru are now known and referred to a (sic) Ojuwoye*

Community. In the description of themselves as the descendants of Odu-Abore and Aileru as Ojuwoye Community, it is manifest that the plaintiffs were not referring to the common or ordinary citizens of Ojuwoye or citizens who live or reside at Ojuwoye. Rather, they pleaded that the descendants of Odu-Abore and Aileru, known and referred to as the “Ojuwoye Community” consist of an amalgam of the descendants or family of Odu-Abore and Aileru”. The defendants on the other hand would appear to have treated ‘Ojuwoye Community’ in its general concept as citizens who reside at Ojuwoye. The defendant never pleaded how their own ‘Ojuwoye Community’ derived title to the land in dispute although it was pleaded that the said ‘Ojuwoye Community’ allotted the land in dispute to their progenitor Osu Apena many years ago”.

The bedrock of this appeal therefore has to do with the type of allotment which the appellants’ progenitor obtained from the Ojuwoye Community. In paragraphs 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16 of the 2nd Further Amended Statement of Claim the Plaintiffs averred as follows:

“1. The Plaintiffs are the Heads and accredited representatives of Ojuwoye Community and are prosecuting this action for and on behalf of the Ojuwoye Community.

2. The land in dispute is lying at 28 Cash Street Olorunsogo Mushin within Ikeja Judicial Division.

3. The said land forms portion of a vast area of land which was first settled upon by one Odu-Abore and Aileru about three hundred years ago.

6. The descendants of Odu-Abore and of Aileru together with their domestics are now referred to as the Ojuwoye Community and consist of an amalgam of the descendants or family of Odu-Abore and Aileru.

7. The 1st Plaintiff is the head of Ojuwoye Community and the traditional ruler of Mushin (Olu of Mushin).

8. The Ojuwoye Community have continuously exercised maximum acts of ownership and possession over the said vast area of land since the death of Odu-Abore and Aileru without let or hindrance from any quarters.

9. Such acts of ownership and possession have included granting innumerable leases and customary tenancies of the said vast area

of land including the land in dispute (No 28 Cash Street) and the adjacent plots of land.

10. The Plaintiffs aver that their right over the vast area of land and the land in dispute was confirmed in the consolidated suit Nos. 1/291/58 and HK/108/61 between KASALI AKINLIYI & OTHERS AND WILLIAM LADEGA, CHIEF JIMOH AILERU & OTHERS AND LASISI SALU and Appeal No. SC/1/1967 BETWEEN WILLIAM LADEGA VS. KASALI AKINLIYI.

12. The Plaintiffs aver that the defendant is a son and/or a descendant of one Osu-Apena now deceased.

13. The said Osu-Apena is not a member of Odu-Abore/Aileru families of Ojuwoye (Ojuwoye Community).

14. The Plaintiffs aver that over fifty years ago, one Osu-Apena was orally granted a customary licence to farm on a portion of Ojuwoye Community land including the land in dispute by the Ojuwoye Community).

15. The said customary licence was to be determined at any-time by the Ojuwoye Community during the tenure or after the licence has ceased to farm on the said land.

16. The said customary licence to farm on a portion of Ojuwoye Community land was determined long ago before the death of Osu-Apena by Ojuwoye Community when the said Osu-Apena ceased farming on the said land”.

In his traverse the Defendant in the 2nd Further Amended Statement of Defence averred as follows in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9:-

“1. The Defendants admits paragraphs 2, 7, 11, 12 and 13 of the 2nd Further Amended Statement of Claim.

2. The Defendant admits paragraph 1 of the 2nd Further Amended Statement of Claim only to the extent that the first plaintiff is the Head of Ojuwoye Community and deny every other allegation of fact contained therein.

3. The Defendants in answer to paragraph 8 of the 2nd Further Amended Statement of Claim avers that the whole of the land of Ojuwoye Mushin, Lagos State is the communal land of Ojuwoye Community which ownership is vested in the said Community and the Plaintiffs have no locus standi to institute this suit against the Defendant.

4. *The Defendant in answer to paragraph 9 of the 2nd Further Amended Statement of Claim avers that whilst it is conceded that the Community can grant innumerable leases and customary tenancies in respect of their land these do not apply to the land in dispute as well as to the adjacent land which have been allotted to their members of which the Defendant herein is one of them.* B

5. *The defendant in further answer to paragraph 9 of the 2nd Further Amended Statement of Claim avers that the possession of communal land which has been allotted to a member of the Community for his use and occupation is exclusive and the community cannot sue for trespass to the land as long as it is actual possession of that member of the community to whom it is allotted.* C

6. *The Defendant avers that this has been confirmed in previous judgments and the Plaintiffs are therefore stopped from re-litigating the matter.* D

7. *The Defendant pleads and would rely at the trial on the following judgments:-*

(a) *Suit No. 78/1932 - J. KOSOKO VS. J. GBADAMOSI-*

(b) *Suit No. 92/43 - GBADAMOSI AILERU & OTHERS VS. JUBRIL AKINLIYI* E

(c) *Suit No. 127/1944 - YESUFU AJOSE & OTHERS VS. SUNMMOLAAGANRAN*

(d) *Suit No. 11/1950 - SUNMOLA AGANRAN & OTHERS VS. J.F KAMSON*

(e) *Suit No. 114/1950 - SUNMOLA AGANRAN & OTHERS VS. SANUSI OLOWU & OTHERS* F

8. *The Defendant in answer to paragraph 10 of the 2nd Further Amended Statement of Claim avers that the judgments pleaded are inapplicable to this suit and would rely on the legal maxim RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET.* G

9. *The Defendant in answer to paragraph 20, 21 and 22 of the 2nd Further Amended Statement of Claim avers that the judgments pleaded cannot operate against the Osu-Apena family in respect of their land at Ojuwoye, Mushin pursuant to the judgment in Suit No. 13/1913 OSU APENA VS FAFUNMI which will be founded upon at the trial"* H

Where a party alleges that the allotment of a parcel of land to him is absolute, the burden is on him to prove it. See: Ajeja VS Ajayi

& Another (1969) NSCC Vol. 6 page 57. The appellants admitted they were allotted the land by the Ojuwoye Community. There was also a crucial admission that they did not belong to any of the two families of Odu-Abore or Aileru who came together to be known as Ojuwoye Community as their progenitor Osu-Apena did not claim affinity with either Odu-Abore or Aileru. Based on this fact the lower Court drew the correct inference that the parties were talking of two separate and distinct Ojuwoye Communities. If the appellants were staking their claim to being absolute allottees of the disputed land on the premise that they belonged to Ojuwoye Community, they ought to have pleaded and shown how they as members of the Ojuwoye Community had equal right to the said land as opposed to being resident in the community but which they did not. As a result the defendants' (appellants) assertion that the allotment made to Osu-Apena was as of right and not a lease was not made out. The onus is on the party and anyone claiming through him to establish a claim to an exclusive grant of the family or communal property. See: Samuel Adenle VS Michael Oyeboade (1967) NMLR 136.

The averment by the plaintiffs that Osu-Apena was orally granted a customary licence to farm on the land which tenancy was determined long before the death of the said Osu-Apena was not dislodged. Based on the principle that where land is allocated to another for erecting temporary structures or is licensed to use the land during his lifetime or upon the occurrence of an event, such land would revert to the grantor upon the occurrence of the event or when the licensee is no more. The licensee cannot pass title to his successor-in-title. See: Chuku VS Wuche (1976) NSCC Vol. 10 page 563 at 565. Even if the appellants continued to use the land after their progenitor had died, they could only do so with the permission of the respondents.

The learned trial Judge was unable to support the finding he made that the Ojuwoye Community was not limited to the Aileru and Odu-Abore families; hence the lower court's interference with that finding. On the pleadings the lower court stated that for the defendants to mount an affective challenge of the facts pleaded by the plaintiffs they should have pleaded the composition of the Ojuwoye Community which allotted the land in dispute to their grandfather, Osu-Apena and how that community derived title to the land. So

there was paucity of pleadings on this material fact and the lower court was right to interfere with the judgment as the issue did not involve credibility of witnesses. The lower court also pointed out that although the defendants relied on some judgments for the assertion that they belonged to Ojuwoye Community, none of the judgments tendered raised a plea of *res judicata* or issue estoppel against the plaintiffs on defendants' membership of Ojuwoye Community from whom the plaintiffs derived their title. None of the suits pleaded by the defendants were prosecuted or defended in a representative capacity except the present one; hence the lower court peremptorily dismissed the defendants' case on the plea of *res judicata* or issue estoppels.

For a plea of *res judicata* to succeed it must be shown that:

- (a) the parties;
- (b) the issues; and

(c) the subject matter in the previous action were the same as those in the action in which the plea is being raised. Once these ingredients of *res judicata* are established, the previous judgment estops the party from making any claim contrary to the decision in the previous case. See: *Fadiora VS Gbadebo* (1978) 3 SC 219; *Ebba VS Ogodo* (2000) 10 NWLR (Pt. 675) 387; *Long-John VS Blakk* (2005) 17 NWLR (Pt. 953) 1; *Ajiboye VS Ishola* (2006) 13 NWLR (998) 628; *Balogun VS Ode* (2007) 4 NWLR (Pt 1023) 1; *Omnia Nigeria Limited VS Dyktrade Limited* (2007) 15 NWLR (Pt. 1058) 576; *Igbeke VS Okadigbo* (2013) 12 NWLR (Pt. 1368) 225. In all the cases relied upon by the defendants the parties in those suits cannot be said to be the same as in the present suit.

It is for these reasons and the more comprehensive reasons contained in the leading judgment of my learned brother, Okoro, JSC that I agree that the appeal totally lacks merit and deserves to fail. I accordingly dismiss it and abide by the order on costs contained in the leading judgment.