

SUPREME COURT OF NIGERIA
FRIDAY 5TH JUNE, 2015. SC. 202/2002
CORAM:- I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE, O. RHODES-VIVOUR,
N. S. NGWUTA, J. I. OKORO, JJSC

IBRAHIM SAKATI APPELLANT
AND
1. JABULE BAKO
2. SABO BAWURI KUNINI RESPONDENTS

MARITIME LAW - Fishing - Right of - Is limited to the portion within the borders of the communities - Hence miscarriage of justice was not occasioned by trial court's interpretation of respondents' claim (H1)

MARITIME LAW - Fishing - Right of - Regulations - Legal Notice Regulation 4(5) was not meant to take away the right - But to regulate exercise of same (H2)

ACTIONS - Civil matters - Proof - Standard of - Such matters are decided on balance of probabilities - Hence trial Area Court rightly found that evidence of respondents outweighed that of appellant (H3)

APPEALS - Fresh issue - Party raising an issue for the first time must do so by leave of court - Save where the issue is on jurisdiction - Which is the foundation of adjudication (H4)

APPEALS - Issues - Raising of - Where court advances reasons for not dealing with an issue - An aggrieved person can raise any or all the reasons given by the court - As an issue on appeal (H5)

FACTS

Plaintiffs/respondents commenced this action against defendant/appellant at the Area Court No. II sitting in Jalingo Taraba State. The parties lay conflicting claims to fishing right over a fish pond. One Wakili Malue who was in charge of the affairs of Muri Emirate

Council declined to settle the dispute. Consequently, respondents approached the court. After hearing witnesses in the matter, the court ruled in favour of respondents. Appellant was therefore ordered to vacate the pond with immediate effect.

Appellant was aggrieved and as a result unsuccessfully appealed to the Upper Area Court, Jalingo. The court dismissed the appeal and affirmed the judgment of the trial Area Court. Appellant appealed further to the State High Court sitting in its appellate jurisdiction. The appeal was equally dismissed. In his further quest for justice, appellant appealed to the Court of Appeal Jos Division. The court heard and dismissed the appeal. Aggrieved, appellant lodged appeal in the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in affirming that asserting right of fishing means the same thing as title to fishing and then held that the Appellate High Court Judges, Jalingo, did not change any cause of action, and no miscarriage of justice was occasioned by the construction or meaning of Respondents’ claim?”

2. Whether the Court of Appeal was right in deciding this case against the Appellant on the ground that the traditional evidence of the Respondents at the trial Court completely overwhelmed that of the Appellant and were rightly accepted?

3. Whether the learned Justices of the Court of Appeal were right when they held that after going through the entire record of proceedings, they could not see any holding of the trial Area Court II Jalingo that could be said to be perverse, unreasonable or not supported by evidence?

4. Whether the Court of Appeal was not in error in deciding that the Appellant needed the leave of the lower Court to raise a fresh issue on jurisdiction?

5. Whether learned Justices of the Court of Appeal were right to hold that the issue of locus standi of the Respondents was raised for the first time in the Court of Appeal?

HELD (Unanimously dismissing the appeal per
NGWUTA JSC)

MARITIME LAW - Fishing - Right of

1. From the above, it is clear that the operative words are: (1) “right”, whether asserted or possessed, and (2) “title”, all in relation to the fishing pond in dispute. The question is: Is there any difference in meaning between the words “right” and “title” in relation to property such as the pond in dispute in this case?

What is in issue is the right or title to fishing in the pond. The respondents explained in their Statement of Complaint that: “From there we went to court in Kunini and reported the matter” and the complaint was that “... after the defendant went and sold the pond to other people”.

In substance, the complaint is that the defendant denied the plaintiff the right or title to fish in the pond and purported to sell same to other people. It was not the pond in itself that was sold but the right or title to fish therein. In explaining their claim, the Respondents said, inter alia:

“...from there the Court told us to manage our portion of the pond and the defendant also to take charge of his portion...”

The body of water in which the parties dispute title or right to fishing may not be a pond properly so called. At the locus in quo the trial Area Court asked the DW5 to “show the Court the pond in this dispute, to which the witness answered:

“This is the pond it started from the south here where it joined the River Benue at the East behind Tungan Ladan.”

From the evidence in the record, it would appear that the “pond” runs from its source through different communities and empties into the Benue River. Each community claims exclusive right or title to fish within the portion of the pond running through its territory. The respondents’ claim to title to fish in the pond is limited to the portion within its borders. In my view, based on what has been stated above, the Court below was right to have affirmed that asserting right of fishing means the same thing as title to fishing. The decision affirmed by the Court below flows directly from the substance of the respondents’ claim and ipso facto, no miscarriage of justice was occasioned by the Court’s interpretation of the respondents’ claim. (p. 2104 B)

MARITIME LAW - Fishing - Right of - Regulations

2. Prior to the enactment of the Wild Animal Law Cap 140, Laws of Northern Nigeria and the Regulation made pursuant to same, each community through which the pond flows from its source to the Benue River had a customary right to fish in the portion running through it. This includes the parties herein - the Kuninis and the Jengos.

Regulation 4(5) of the Legal notice did not, and was not intended to take away the right of any community through which the pond passes to fish in that portion flowing through its territory. The regulation is meant to regulate the exercise of right to fishing which the community already possesses. The licence granted under the Regulation is a condition precedent to the exercise of a right possessed by the community in the same way as a right to drive one's own vehicle is conditional, inter alia, on possession of valid vehicle particulars and driver's licence.

Obviously, any applicant for a licence to fish in the pond must be one who could fish as of right if the regulation was not made. The regulation is meant to regulate existing right and preserve order in the community. The Court of Appeal, contrary to the argument of the appellant, did not confer ownership of the pond on the respondents, but merely confirmed the respondents' customary right to fish in the pond, subject to a licence to exercise the said right. I resolve issue one against the appellant. (p. 2105 H)

ACTIONS - Civil matters - Proof - Standard of

3. Messrs. Lewis & Peat (NRI) Ltd. v. A.E. Akhimien (1976) 1 All NLR (Pt. 1) 460 at 468-469 wherein this Court held, inter alia:

"It is an elementary principle in civil proceedings that civil cases are decided on a balance of probabilities based on preponderance of evidence."

Based on the principle above, the trial Area Court No. 2 put the evidence led by either party in the imaginary scale and found that the evidence of the respondents outweighed that of

the appellant. In other words, the trend of the evidence preponderates in favour of the respondents and this, with due respect to the learned Counsel for the appellant, is what the Court meant by saying that:

“... the traditional evidence of the respondents at the trial Court completely overwhelmed that of the appellant and were rightly accepted” albeit in a rather colourful language. It follows, consequentially, that the Court of Appeal was right in holding:

“... that after going through the entire record of proceedings they could not see any holding of the trial Area Court II, Jalingo that could be said to be perverse, unreasonable or not supported by evidence.”

If there is any perversity or anything unreasonable or not supported by evidence, the appellant whose duty it is to establish same, has failed to do so. (p. 2108 F)

APPEALS - Fresh issue

4. It follows therefore that the respondent agreed with the appellant that the lower Court erred in holding that the appellant needed leave to raise the fresh issue of jurisdiction. The rules require a party raising an issue in appeal for the first time to do so by leave of Court. But the issue of jurisdiction is radical and at the foundation of adjudication and if a Court acts without jurisdiction the entire process is a nullity.

The Court cannot decline to deal with an issue of jurisdiction raised for the first time on appeal without leave. The issue of jurisdiction cannot be defeated by any provision of the rules of Court. (p. 2110 B)

APPEALS - Issues - Raising of

5. I am of the view that when a Court advances several reasons for not dealing with an issue raised before it, a person aggrieved can raise anyone, or all the reasons given by the Court as an issue or issues in the appeal. The issue is not defeated by the fact that the appellant chose one of several reasons and left the other issues in the appeal. I resolve issue 5 in favour of the appellant against the respondents. Be that

as it may, the resolution of appellant’s issues 1 to 3 renders his victory in issues 4 and 5 pyrrhic. (p. 2110 F)

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Appeals – Reply brief – Purpose of

In this case, the learned Counsel for the appellant not only reproduced the four issues raised and argued in the respondents’ brief but reproduced the respondents’ argument in each issue and proceeded to reply to some, issue by issue. By Order 6 Rule 5(3) of the Rules (supra), appellant may or may not file a reply brief. Appellant need not file a reply brief except in response to a new issue raised in the respondents’ brief.

The intendment of Order 6 Rule 5(3) (supra) is not to confer a right on the appellant to repeat the argument in his brief, perhaps, with a view to improving the brief or bringing in new issues upon which the respondents could have no right of reply. Nor can it be employed as a forum for laying emphasis on the arguments in the appellant’s brief. Once the respondent has answered in his brief the issues raised and canvassed in the appellant’s brief issues are joined in the brief and the appellant is not allowed to reargue the issues so joined either for emphasis or expatiation. That would amount to taking undue advantage of the respondent who has no right of reply. (p. 2102 H)

2. Evidence – Burden of proof

Proof is the means or process of establishing the truth of what is asserted by one side and denied by the other side of a dispute.

The primary onus of proving his case lies on the plaintiff. The onus may be discharged in the pleadings since there is no onus to prove what has been admitted.

There being no pleadings filed, the totality of evidence adduced by both side has to be considered in relation to the substance of the plaintiffs’ complaint against the defendant to determine whether or not the burden of proof has been discharged. The burden of proof here means the burden of adducing evidence and this may shift depending on the preponderance of evidence.

It rests on the party who would fail if no evidence at all or no more evidence were led on either side. (p. 2108 C)

REPRESENTATION

Prof. S. S. Shikyel, for the Appellant

O. Jolaawo (with him F. C. Ani), for the Respondents

B

CASES REFERRED TO

Nwadenyi v. Aleke (1996) 4 NWLR (pt. 442) 349

Faganwu v. Nathaniel (2004) 7 SCNJ 322

C

Osafire v. Odi (1994) 2 SCNJ 15-16

Onigbinde v. Akibu (1982) 7 SC 60

Okporiri v. Jonah (1961) 1 SCNLR 174

Nwoke v. Okeke (1994) 5 SCNJ 102

Oyakhire v. State (2006) NWLR (pt. 1001) 157

D

Chevron Nig. Ltd. v. Lonestar Drilling Nig. Ltd. (2007) 7 SC (pt. 2) 27

Beloxi Co. Ltd. v. South Trust Bank (2012) 2 NWLR (pt. 1285) 605

A-G Federation v. Abubakar (2007) 10 NWLR (pt. 1041) 1

Ogunyade v. Oshunkeye (2007) All FWLR (pt. 389) 1179

E

Odukwe v. Ogunbiyi (1988) 8 NWLR (pt. 561) SC 330

Oguntayo v. Adelaja (2009) 15 NWLR (pt. 1163) SC 150

Obueke v. Namchi (2012) NWLR (pt. 1314) 327

F

STATUTES REFERRED TO

Wild Animal Law Cap 140 Laws of Northern States 1963

Gongola State Fisheries Regulations Gazette as Gongola State Legal Notice No. 3 of 1989

Evidence Act 2011, ss. 132, 143

G

LEAD JUDGMENT BY NGWUTA JSC

The parties herein had conflicting claims to fishing right over the fish pond called NYAWAL in Taraba State. When one Wakili Malue who was in charge of the affairs of Muri Emirate Council declined to settle the dispute, the Respondents herein (as plaintiffs) took the matter to the Area Court No. II sitting at Jalingo, Taraba State. Part of the claim reads:

“...from there we went to Court in Kunini and reported the

matter. Already the defendants have taken money from the people N1,000.00k so the Court directed that we be given our share too, so, the people brought N800,00k to the Court which was given to us, from there the Court told us to manage our portion of the pond and the defendant also to take charge of his portion, but when we put our people to manage our portion the defendant went and drove them away, because of this, I went to Court and complained and the Court asked the defendant to withdraw his people. That is all my complaint.”

In its judgment the Area court, having reviewed the totality of the evidence led by the parties held:

“In view of the above we are satisfied that the water in dispute (Nyawal) is the property of the plaintiffs Bako and Bawuro all of Kinini because they have established their title of the water before this Court because of this, therefore, we order the defendant to leave the water for the plaintiffs immediately and in addition he will refund to the plaintiffs all their process fees in Court.”

The defendant (now appellant) appealed the judgment of the Area Court to Upper Area Court sitting at Jalingo. In its judgment delivered on 2nd August 1990, the Upper Area Court found in favour of the Respondents, thus:

“It is my submission therefore that the trial Area Court decision hereby regards with the testimonies before it, was in a better position to see, watch and evaluate evidence before it. Based on the above reasons, this honourable Court do hereby set aside the appeal of the appellant. The decision or judgment of the trial Area Court No. 2 Jalingo is hereby affirmed. All monies realised on the pond because of the Court Order are to be refunded to the Respondents.”

Still not satisfied, the appellant appealed to the High Court of Taraba State sitting at Jalingo. The three-man panel of Judges led by the then Taraba State Hon. Chief Judge, dismissed the appeal in the following terms:

“On the whole we found no merit in this appeal and accordingly this appeal is hereby dismissed with cost at (N100.00) one hundred naira.”

The judgment dismissing the appeal was delivered on 13/2/92.

On 7/2/95, the Court of Appeal sitting at Jos granted the

appellant's trinity reliefs and extended time by 14 days for the appellant to appeal the judgment of the High Court in its appellate jurisdiction. On 16/2/95, the appellant filed a notice of appeal on three grounds of appeal.

In the judgment delivered on 13/7/2000, the Court of Appeal in dismissing the appeal, held: B

"In view of the foregoing, I have no hesitation in holding that the traditional evidence of the Respondents at the trial Court completely overwhelmed those of the Appellant, and were rightly accepted. This appeal therefore fails and is hereby dismissed with costs of N4,000.00 (Four Thousand Naira) in favour of the Respondent." C

Aggrieved by the judgment of the Court below, appellant filed a notice of appeal containing five grounds of appeal on 9/10/2000. Though a further amended notice and grounds of appeal was filed on 14/2/2014 but deemed filed on 11/3/2014 and another notice tagged Further Notice and Grounds of Appeal filed on 6/2/2015 was deemed filed on 10/2/2015, there is nothing in the case file to indicate that an amended notice of appeal was ever filed. I assume that the amended notice of appeal was inadvertently omitted in the compilation of the records. The operative notice and grounds of appeal is the one deemed filed on 10/2/2015 on which five grounds of appeal were endorsed. E

Learned counsel for the parties filed and exchanged briefs of argument. In *Nwadenyi & Ors v. Aleke* (1996) 4 NWLR (Pt. 442) 349 at page 356, it was held that issues in an appeal are not formulated to coincide with the number of grounds of appeal and that an issue must arise from one or a combination of grounds of appeal. Contrary to the principle stated above the learned counsel for the appellant formulated five issues from his five grounds of appeal. Good practice does not command the formulation of an issue from every ground of appeal. F

The five issues are reproduced hereunder:

1. *Whether the Court of Appeal was right in affirming that asserting right of fishing means the same thing as title to fishing and then held that the Appellate High Court Judges, Jalingo, did not change any cause of action, and no miscarriage of justice was occasioned by the construction or meaning of Respondents' claim? (Formulated from Ground 1 of the further further amended notice of appeal)* H

2. *Whether the Court of Appeal was right in deciding this case against the Appellant on the ground that the traditional evidence of the Respondents at the trial Court completely overwhelmed that of the Appellant and were rightly accepted? (Formulated from Ground 2 of the further further amended notice of appeal)*

B 3. *Whether the learned Justices of the Court of Appeal were right when they held that after going through the entire record of proceedings, they could not see any holding of the trial Area Court II Jalingo that could be said to be perverse, unreasonable or not supported by evidence? (Formulated from Ground 3 of the further further amended notice of appeal)*

C 4. *Whether the Court of Appeal was not in error in deciding that the Appellant needed the leave of the lower Court to raise a fresh issue on jurisdiction? (Formulated from Ground 4 of the further further amended notice of appeal)*

D 5. *Whether learned Justices of the Court of Appeal were right to hold that the issue of locus standi of the Respondents was raised for the first time in the Court of Appeal? (Formulated from Ground of the further further amended notice of appeal). ”*

E Learned Counsel for the appellant failed to state from what ground of appeal issue five was distilled. However, from the trend in the formulation of issues in the appellant’s brief, it is safe to assume that issue five was framed from Ground 5 of the further further amended notice of appeal.

F In his brief of argument, learned Counsel for the Respondents framed four issues for determination. The four issues are reproduced hereunder:

G “i. *Whether the lower Court rightly held that the Appellate High Court did not misconceive or change the nature of the Respondent’s claim before the trial Court. (Distilled from Ground one of the further further Amended notice of Appeal).*

H ii. *Whether the lower Court rightly held that traditional evidence of the Respondents at the trial Court completely overwhelmed those of the Appellant and were rightly accepted. (Distilled from Ground two of the further further Amended notice of Appeal).*

iii. *Whether the lower Court rightly held that there was no holding of the trial Area Court II Jalingo that could be said to have been perverse, unreasonable or not supported by evidence. (Dis-*

tilled from Ground three of the further further Amended notice of Appeal).

iv. Whether the lower court rightly held that the Appellant needed its leave to raise the issue of lack of locus standi of the Respondent to initiate the action for the first time before it. (Distilled from grounds four and five of the further further Amended notice of Appeal)."

Arguing issue one in his brief, learned Counsel for the appellant reproduced and impugned the finding of the Court below that:

"It is my view that the expression 'possessory right to the fishing pond asserting right of fishing in the disputed pond' meant the same thing as 'title to the fishing pond'. In effect therefore, issue No. 1 must be resolved in favour of the Respondents, namely that the Appellate High Court Judges did not change any cause of action and no miscarriage of justice was occasioned by the construction or meaning of Respondents' claim given by the Appellate High Court Judges"

Learned Counsel interpreted the above reproduced view of the Court below to mean that the Respondents have exclusive right to the fishing pond in the sense that they do not share allodia right of ownership with any other person. He relied on *Faganwu & Anor v. Nathaniel Adibi & 2 Ors* (2004) 7 SCNJ p.322 at 340.

Learned Counsel referred to the Wild Animal Law Cap 140 Laws of Northern States 1963 and the Gongola State Fisheries Regulations Gazette as Gongola State Legal Notice No. 3 of 1989, all of which he said were applicable to Taraba State.

In the Regulation, he said two types of water were defined, namely, private water and natural water. He reproduced Regulation 4(5) of the Legal Notice which provides:

"Reg. 4(5). No person shall catch fish in any water other than private water except in accordance with a licence issued under these regulations."

Regulation 2 provides:

"Regulation 2: Private water means any water which is artificially enclosed on a piece of land which is the property of the person claiming ownership of the water."

Learned Counsel argued that by the combined effect of Regulations 4(5) and (2) of the defunct Gongola State Legal Notice No. 3 of 1989, applicable in Taraba State, ownership of water depends on

whether such water is artificial or natural, adding that by Regulation 4(5) of the Legal Notice (supra) exclusive ownership of natural water by community or individual is prohibited.

He referred to page 62 lines 33-34 of the record wherein the appellate High Court sitting at Jalingo found that: “Counsel on both sides agree (sic) that the pond in dispute is a natural water” and contended that the Respondents do not have title to fishing in the disputed pond. He referred to the judgment of the trial Area Court that “the water in dispute (Nyawal) is the property of the plaintiff...”, the judgment of the Upper Area Court in its appellate jurisdiction dismissing the appeal, and to the judgment of the Appellate High Court Jalingo to the effect that:

“The Respondents are merely asserting their rights of fishing in the disputed pond, the right which the appellant attempted to usurp by unilaterally selling out fishing right in the pond...” and submitted that the Court of Appeal erred in conferring ownership of fishing pond on the Respondents and urged the Court to so hold.

Arguing issues 2 and 3 together, on proof of the Respondents’ title to the fishing pond in dispute, learned counsel referred to Section 132 of the Evidence Act, 2011 (as amended) on the burden of proof in civil cases on the person who would fail if no evidence at all was given on either side. He referred to *Osafile & Anor v. Paul Odi & Anor* (1994) 2 SCNJ pp 15-16, *Onigbinde v. Akibu* (1982) 7 SC p.60 in support of his argument that the Respondents who claimed ownership of the fishing pond had the burden to lead sufficiently credible and cogent evidence in proof of their claim.

He argued that the possession of the fishing pond by the appellant preceding the commencement of the suit created a presumption of ownership of the pond in favour of the appellant. He relied on Section 143 of the Evidence Act 2011 (as amended).

He contended that the burden of proof that the appellant who was in possession was not the owner was on Respondents. He relied on *Okporiri v. Jonah* (1961) 1 SCNLR 174, *Marcus Nwoke v. Ahiwe Okeke* (1994) 5 SCNJ p.102 at 118 in urging the Court to interfere with the findings of the Court below as the same was erroneous.

Learned Counsel referred to the observation of the Court below to the effect that “... there has been much incoherence, not only in the particulars of claim but also the evidence of both the plaintiffs

and the defendants (sic)” and argued that the Court of Appeal having found much incoherence in the particulars of claim and the evidence of the Respondents, was wrong to have held that the judgment of the trial Area Court was not perverse, unreasonable or not supported by evidence.

He referred to a portion of the judgment of the Court below to the effect that there was no survey plan and that the fishing pond was a natural pond that flowed not only through the village of the Respondents (Kunini) but also to other villages including that of the appellant known as Jengos and argued that the Court below was in error in the conclusion that the traditional evidence of the respondents at the trial Court completely overwhelmed that of appellants.

Relying on the provision of Regulation 4(5) of the Legal Notice (supra) and the fact that the respondents did not tender a licence as required by the Regulation, he contended that the Court below was in error in granting title to the pond to the Respondents. He stated that the Respondents traced the root of title to the pond to the Munga people but failed to call evidence to prove their claim of derivation of title from the Munga people.

He referred to the evidence of DW1 and DW2 which he said was rejected by the Court of Appeal and argued that the Court below drew a wrong conclusion from accepted evidence and the extant law on the subject matter. He urged the Court to interfere with the concurrent findings of fact by the lower Courts as the Court below was in error in dismissing the appeal.

Taking issues 4 and 5 together, he stated that a party seeking to raise and argue in the appellate Court any fresh issue not argued in the Court of first instance must seek leave to do so. He said that exception to the rule is the issue of jurisdiction which can be properly raised and argued with or without leave. He referred to *Omaghomi & 6 Ors v. Nigerian Airways Ltd. (in liquidation) & 5 Ors* (2006) 18 NWLR (Pt. 1011) p.310 at p.327 paras H-H, *Oyakhire v. The State* (2006) NWLR (Pt. 1001) 157 at 171 and contended that the Court below was in error when it struck out Ground 2 of the Appellant’s Ground of Appeal which questioned the locus standi of the Respondents to commence the action as the issue, being one of jurisdiction, did not require leave of Court to be raised and argued.

Further, he said that the Court below was in error to have held

that the issue was raised before it for the first time. He referred to page 56 lines 24-28 of the record wherein the Appellate High Court Jalingo, suo motu, invited learned Counsel for the parties to address it on whether, in view of the existing laws, an individual can claim title to natural ponds in the State. He said that the High Court in its ap-
B pellate jurisdiction having heard from Counsel to the parties and considering the provisions of Regulation 4(5) of the defunct Gongola State Fisheries Regulation 1989 held that only the State Government can bring such action.

C He urged the Court to hold that the Court below was in error when it held that the issue of locus standi was a fresh issue and that the appellant needed leave to raise it before the Court below. He urged the Court to allow the appeal and set aside the judgment of the lower Court as, among other reasons, the respondents lacked
D the capacity to sue in respect of the disputed pond and ipso facto the trial Court lacked jurisdiction to determine the suit.

Taking issues 1 and 3 together, learned Counsel for the Re-
spondent argued that the Court below was right to have affirmed the decision of the High Court and that this Court has no reason to dis-
E turb the concurrent findings of the Courts below. In the alternative, he argued that even if the lower Court erred (which he did not concede) the appellant did not suffer any miscarriage of justice therefrom. He referred to the trial Area Court No.2 as an inferior Court
F without record, a Court of summary jurisdiction and said that the procedure for commencement of suit before the trial Area Court in a State within the former Northern Region of Nigeria is generally regulated by the 1968 Area Courts Edict.

He said that the cause of action in a case in the Area Court can
G be properly captured by a holistic view of the statement of complaint and the evidence adduced by the parties and urged the Court to so hold. He relied on *Chevron Nig. Ltd. v. Lonestar Drilling Nig. Ltd.* (2007) 7 SC (Pt. 2) p.27 in urging the Court to peruse all processes before the trial Area Court to ascertain the cause of action. He relied
H on *Beloxxi & Co. Ltd. v. South Trust Bank* (2012) 2 NWLR (Pt. 1285) 605, *A-G Federation v. Abubakar* (2007) 10 NWLR (Pt. 1041) 1 at 75 paras E-G for the meaning of the term “cause of action”.

He argued that the High Court of Taraba State sitting in Jalingo was right in its decision that the claim in the trial Area court bordered

on Respondents' right to fishing on the disputed pond. Learned Counsel argued that though the claim may appear to be ownership of the pond it is really meant to establish the respondent's fishing right to the Nyawal pond which they claim the appellant encroached upon and sold to other people. He argued that though no survey plan was filed, the parties know the portion of the fish pond in dispute. B

He said that the fish pond in dispute flowed through the appellant's village to the respondents' village and that the respondents fished in the pond until sometime in 1989 when the appellant took over the pond by force and sold same and that was the basis of respondents' claim in the trial Area Court. He reproduced the testimonies of the PW1 and PW2 and concluded that the respondents' principal claim was an order to restrain the appellant from wrongfully interfering with the respondents' fishing right in the Nyawal pond. C

He said that the claim was made under the traditional freehold D system; hence the respondent relied on traditional history to prove their claim, adding that the appellant's contention that the cause of action was the ownership of the pond was misconceived. He referred to the totality of the evidence of the five witnesses called by the respondent and said that the pond cut across the Jenjos village of appellant and the Kuninis village of respondents and that each village has exclusive right to fish in the part of the pond running through it. E

He referred to the evidence of the respondents' witnesses and the visit of the Court to the locus in quo and said that it was in evidence that there was an ant-hill as well as a palm tree marking the boundary between the portion of the pond in the appellant's village and the portion that ran through the respondents' village and submitted that the appellate High Court was right in holding that: F

"It is my view that the expression 'possessory right to the fishing pond' Asserting right of fishing in the disputed pond." G

Meant the same thing as title to the fishing pond.

He urged the Court to affirm the decision of the Court below that the cause of action is principally possessory right to fishing in the disputed pond with the issue of title to the pond being ancillary to the main claim. H

He referred to page 135 of the record for the holding of the Court below that the finding of the cause of action before the trial Area Court by the High Court did not occasion a miscarriage of jus-

tice, a finding against which there is no appeal.

Arguing that the appellant conceded the finding by not appealing against it, he relied on *Ogunyade v. Oshunkeye* (2007) All FWLR (Pt. 389) 1179 at 1206-1207 to the effect that:

B *“Any point of law or fact not appealed against is deemed to have been conceded by the party against whom it was decided and the point of law remains valid and binding on the parties.”*

C If there is an error in the judgments of the two Courts below, which he did not concede, he relied on *Odukwe v. Ogunbiyi* (1988) 8 NWLR (Pt. 561) SC 330 at 350 and *Oguntayo v. Adelaja* (2009) 15 NWLR (Pt. 1163) SC 150 at 201 in support of his contention that not all errors in a Court’s judgment should lead to a reversal of the judgment especially when no form of injustice is shown to have resulted from the error, if any. He urged the Court to resolve issues 1 D and 3 against the appellant.

Issue 2 is on the decision of the court below to the effect that:

“Traditional evidence of the Respondents at the trial Court completely overwhelmed those of appellant and was rightly accepted.”

E Learned Counsel argued that the concurrent findings of facts made by the four courts below in favour of the respondents ought to stand and not be disturbed as the appellant did not show exceptional circumstances upon which the findings can be reversed. He relied on *Obueke & 2 Ors v. Namchi & 2 Ors* (2012) NWLR (Pt. 1314) 327, *Military Governor Lagos State v. Adeyiga* (2012) 5 NWLR (Pt. 1293) F 291 at 331 paras. C-E, *Adm/Exec. Estate Abacha v. Eke-Spiff* (2009) 7 NWLR (Pt. 1139) p.97 at 145.

He referred to what he called:

G *“...the chequered history of this case and the long line of Courts of law that have had the several opportunities to re-evaluate the evidence and affirmed the decisions of the Trial Area Court”*; and submitted that it is not safe for this court to disturb these findings.

H He referred to and relied on *Woluchem v. Gudi* (1981) 5 SC 319 at 326-330, *Overseas Construction Co. Nig. Ltd. v. Creek Enterprises Nig. Ltd.* (1985) 3 NWLR (Pt. 13) p.407, *Layinka v. Gegele* (1993) 3 NWLR (Pt. 283) 518 at 526, 530 to show that the Court will decline an invitation to interfere with the concurrent findings of the lower Courts where the appellant has not shown exceptional circumstances for so doing.

Learned counsel referred to the judgment of the Court below that there has been much incoherence in the particulars and evidence of the parties as obiter dictum which cannot constitute a ground of appeal. He relied on *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) SC 228 at 297, 351.

On the appellant's invocation of Section 143 of the Evidence Act (supra), learned counsel argued that the facts and circumstances of this case show clearly that the said provisions was in contemplation throughout the proceedings at the trial Area Court and it was the reason respondents were called upon to prove their title to the pond. B

He argued that the presumption created by Section 143 of the Evidence Act is rebuttable and in effect shifts the burden of initial proof on the respondents and once the respondents discharge the burden on them, it shifts back to the appellant to prove a better title to the pond. He relied on *Ishola v. UBN Ltd* (2005) 6 NWLR (Pt. D 922) page 422 at 440 for proof in civil case on the balance of probabilities and preponderance of evidence and not proof beyond reasonable doubt. He argued that the respondents, having discharged their burden on the balance of probabilities, the lower court was right to have affirmed the decision of the trial Area Court to the effect that the respondents had proved their claim. He urged that issue 2 be resolved in favour of the respondents and against the appellant. C

On issue 4 on whether the Court below was right that the appellant needed leave to raise the issue of locus standi for the first time before it, he argued that the court below declined to deal with the issue because the same is incompetent for proliferation and the appellant never appealed against the decision and having been deemed to have conceded same, he is estopped from raising it in this appeal. He urged the Court not to entertain issues 4 and 5 canvassed by the appellant in his brief. E

Learned counsel conceded, in the alternative, that the High Court suo motu raised the issue of locus standi contrary to the position taken by the Court below. Counsel however responded to the argument of the appellant that the respondents lack the locus standi to institute action by saying that Grounds 4 and 5 of the further further amended Notice of Appeal and the argument canvassed thereon are vague and unfocused and therefore not competent to be determined by the Court. F

Learned counsel conceded the Legal Notice No. 3 of 1989 and the fact that the subject matter is “Water other than private water” but argued that the regulation does not oust the right of the respondents who had ownership prior to the regulation. He argued that if the respondents did not acquire their title to the pond before the coming into effect of the regulation the requirement of a licence and/or the power being vested in the government would not have arisen. He argued that ownership of property is constitutionally guaranteed and cannot be taken away except by strict compliance with the law for adequate compensation. He relied on Section 40 of the 1979 Constitution applicable at the material time and now Section 43 of the 1999 Constitution of the Federal Republic of Nigeria.

He relied on *LSDPC v. Foreign Finance Corporation* (1987) 1 NWLR (Pt. 50) p.50 at 413, *A-G Bendel v. Aideyan* (1999) 4 NWLR D (Pt. 118) p.646. He argued that the regulation does not affect the traditional ownership of properties before its effective date.

Learned Counsel referred to the Black’s Law Dictionary 9th Edition at page 955 where it is also stated that:

“In its legal significance, land is not restricted to the earth’s surface but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as grass and liquids...” and relying on *Amachree v. Kubo* (1974) 2 NLR 108, *Adogan v. Aina* (1964) 1 All NLR 127 and the doctrine “*quic quid plantatur solo solo cedit*”, he said land includes, inter alia, rivers, ponds, streams, etc. He referred the Court to *Osho v. Olayioye* 1966 NMLR 320. He stated that the ownership of the pond, Nyawal, is ultimately bound by the provisions of the Land Use Act and so respondents’ existing rights in the pond before its coming into force is preserved.

From the above, he argued that the respondents have the requisite locus standi to institute the action. By way of summary, learned counsel presented a re-cast of his argument on his four issues and urged the Court to dismiss the appeal.

Learned Counsel for the appellant filed a document he headed: *“Appellant’s Reply Brief of Argument” purporting same to be the reply brief contemplated by Order 6 Rule 5(3) of the Supreme Court Rules which provides, inter alia, that “The appellant may also file in the Court and serve on the Respondent a reply brief...”*

In this case, the learned Counsel for the appellant not only

reproduced the four issues raised and argued in the respondents' brief but reproduced the respondents' argument in each issue and proceeded to reply to some, issue by issue. By Order 6 Rule 5(3) of the Rules (supra), appellant may or may not file a reply brief. Appellant need not file a reply brief except in response to a new issue raised in the respondents' brief. B

The intendment of Order 6 Rule 5(3) (supra) is not to confer a right on the appellant to repeat the argument in his brief, perhaps, with a view to improving the brief or bringing in new issues upon which the respondents could have no right of reply. Nor can it be employed as a forum for laying emphasis on the arguments in the appellant's brief. Once the respondent has answered in his brief the issues raised and canvassed in the appellant's brief issues are joined in the brief and the appellant is not allowed to reargue the issues so joined either for emphasis or expatiation. That would amount to taking undue advantage of the respondent who has no right of reply. D
See *Ochemaje v. The State* (2008) 6-7 SC (Pt. 11) p.1.

As I said earlier herein, learned Counsel for appellant reproduced each of respondents' four issues, reproduced the respondents' argument on each issue and then offered a reply to the respondents' reply to his own argument in his brief. This is a ding-dong affair in the filing of briefs of argument in an appeal and will not be tolerated. I will ignore appellant's reply for what it is: a repetition of the arguments on issues joined and canvassed in both briefs. E

Appellant's issues 1 to 5 and Respondents' issues 1 to 4 were reproduced earlier in this judgment. Though differently couched, appellant's issues 1 to 4 and respondents' issues 1 to 4 are in substance, the same. The respondents have no issue corresponding to appellant's issue 5. I will determine the appeal on appellant's five issues. F G

RESOLUTION OF ISSUES:

Issue 1:

"Whether the Court of Appeal was right in affirming that asserting right of fishing means the same thing as title to fishing and then held that the Appellate High Court Judges, Jalingo did not change any cause of action and no miscarriage of justice was occasioned by the construction of meaning of Respondents' claim." H

My Lords, from the issue as framed, the two operative expres-

sions are: (1) right of fishing and, (2) title to fishing. The question then is whether or not the two expressions mean one and the same thing in relation to the disputed fishing pond.

In his argument on the issue, learned Counsel for the appellant expanded the two expressions to include a third one, thus: (1) B possessory right to fishing pond; (2) asserting right of fishing in the disputed pond, and (3) title to the fishing pond.

From the above, it is clear that the operative words are: (1) “right”, whether asserted or possessed, and (2) “title”, all C in relation to the fishing pond in dispute. The question is: Is there any difference in meaning between the words “right” and “title” in relation to property such as the pond in dispute in this case?

Of the various explanations of right, the one most appropriate D to the facts of this case is:

“In a narrower signification, an interest or title in an object of property; a just and legal claim to hold, use or enjoy it, or to convey or donate it, as he may please.” (See Black’s Law Dictionary Special Deluxe Fifth Edition at page 1189).

E On the other hand, the same source at page 1331 defines title to mean, inter alia: “The union of all the elements which constitute ownership.” The words “right” and “title” are synonymous just as the words “shut” and “close”.

What is in issue is the right or title to fishing in the pond. F The respondents explained in their Statement of Complaint that: “From there we went to court in Kunini and reported the matter” and the complaint was that “... after the defendant went and sold the pond to other people”.

G ***In substance, the complaint is that the defendant denied the plaintiff the right or title to fish in the pond and purported to sell same to other people. It was not the pond in itself that was sold but the right or title to fish therein. In explaining their claim, the Respondents said, inter alia:***

H ***“...from there the Court told us to manage our portion of the pond and the defendant also to take charge of his portion...”***

The body of water in which the parties dispute title or right to fishing may not be a pond properly so called. At the

locus in quo the trial Area Court asked the DW5 to “show the Court the pond in this dispute, to which the witness answered:

“This is the pond it started from the south here where it joined the River Benue at the East behind Tungan Ladan.”

From the evidence in the record, it would appear that the “pond” runs from its source through different communities and empties into the Benue River. Each community claims exclusive right or title to fish within the portion of the pond running through its territory. The respondents’ claim to title to fish in the pond is limited to the portion within its borders. This is why the Court in Kunini *“told us to manage our portion of the pond and the defendant also to take charge of his portion...”*

In my view, based on what has been stated above, the Court below was right to have affirmed that asserting right of fishing means the same thing as title to fishing. The decision affirmed by the Court below flows directly from the substance of the respondents’ claim and ipso facto, no miscarriage of justice was occasioned by the Court’s interpretation of the respondents’ claim.

In arguing his issue one, learned Counsel for the appellant, in apparent extension of the issue as raised, placed heavy reliance on the provisions of Section 52 of the Wild Animal Law Cap 140 Laws of Northern Nigeria, 1963 and Regulation made pursuant to same and gazetted as Legal Notice No. 3 of 1989. He relied on Regulation 4(5) thereof to argue that *“no individual or community can claim ownership of it.”*

Regulation 2 of the Legal Notice defines private water thus:

“Private water means any water which is artificially enclosed on a piece of land which is the property of the person claiming ownership of the water.”

From the evidence in the record, it is beyond dispute that the pond, originating from a source and running through communities, including those of the parties herein, is not private water with the intendment of the Regulation. Regulation 4(5) provides:

“No person shall catch fish in any water other than private water except in accordance with a licence issued under these regulations.”

Prior to the enactment of the Wild Animal Law Cap 140,

Laws of Northern Nigeria and the Regulation made pursuant to same, each community through which the pond flows from its source to the Benue River had a customary right to fish in the portion running through it. This includes the parties herein - the Kuninis and the Jengos.

B Regulation 4(5) of the Legal notice did not, and was not intended to take away the right of any community through which the pond passes to fish in that portion flowing through its territory. The regulation is meant to regulate the exercise of right to fishing which the community already possesses. The licence granted under the Regulation is a condition precedent to the exercise of a right possessed by the community in the same way as a right to drive one's own vehicle is conditional, inter alia, on possession of valid vehicle particulars and driver's
C licence. The condition for the exercise of the right to fish in the pond is similar to a condition for the exercise of a right of audience of a legal practitioner imposed by the Legal Practitioners Act Cap. 11 Laws of Federation of Nigeria 2004, Section 8(2) which provides:

E "S.8(2): No Legal Practitioner (other than such a person is mentioned in subsection (3) of Section 2 of this Act) shall be accorded the right of audience in any Court in Nigeria in any year unless he has paid to the Registrar in respect of that year such practicing fee as may be prescribed from time to time in accordance with the provisions of this Section."

F Obviously, any applicant for a licence to fish in the pond must be one who could fish as of right if the regulation was not made. The regulation is meant to regulate existing right and preserve order in the community. The Court of Appeal, contrary to the argument of the appellant, did not confer ownership of the pond on the respondents, but merely confirmed the respondents' customary right to fish in the pond, subject to a licence to exercise the said right. I resolve issue one against the appellant.

H Issues 2 and 3 were argued together.

Issue 2: "Whether the Court of Appeal was right in deciding this case against the appellant on the ground that the traditional evidence of the respondents at the trial Court completely overwhelmed that of the appellant and were rightly accepted..."

Issue 3:

“Whether the learned Justices of the Court of Appeal were right when they held that after going through the entire record of proceedings they could not see any holding of the trial Area Court II, Jalingo that could be said to be perverse, unreasonable, or not supported by evidence...” B

Issue 2 calls for a comparative consideration of the evidence adduced by both sides on crucial elements of the case at the trial Area Court No. 2.

In cross-examination, the appellant as defendant put the question to the respondents, as plaintiffs: C

“Q. How do you come about the joint ownership of the pond?”

Ans: When we first came to Kunini we first met Munga people who migrated to the other side a long time ago before even my grandfather was born. When these Munga people were leaving they requested a horse from our people in place of the pond. We came from Kwararaga. The division came because the Munga people showed us the place and told us that that was the division between us and the Jenjos people and we should not interfere with the other side.” D

The veracity of the above answer was not questioned by the appellant. On being asked to describe the pond and its demarcation, the respondents’ witness named a palm tree and anthill as the boundaries between the parties in respect of the pond. The palm tree and the anthill were identified by the respondents to the trial Area Court at the visit to the locus in quo. The respondents denied ever paying money to the appellant for the use of the pond. F

On being asked by the court whether he was aware that the Jenjos used to fish in the pond too, the PW2 answered thus: *“I have never seen them ”.* G

PW11 was specific in describing the demarcation of the pond. He was asked by the appellant: *“What can you tell the Court to confirm that you know this pond we are talking about?”* He answered:

“By the North of the pond there is a palm tree and also by the south but by the South has fallen down and there is a demarcation between the Kunini and the Jenjos side.” H

Contrary to the evidence of the appellant that the pond was given to *“our great grandfather”*, DW1 who claimed he was over 40 years old said that the pond was given to the grandfather of the

defendant who gave the pond to his own grandfather and that he had been in charge of the pond for about forty years. In other words, the DW1, contrary to the defendants' case, is claiming the pond as having been given to his grandfather by the defendant's grandfather. It follows that the DW1 as witness for the defendant, is setting up a case different from that of the defendant.

Further, if the DW1 was about forty years old and had been in charge of the pond for about forty years, what was his age when he took charge of the pond? He said he was about ten years old. At whatever age he was, his evidence is adverse to the evidence and claim of ownership of the pond by the defendant.

Proof is the means or process of establishing the truth of what is asserted by one side and denied by the other side of a dispute. See *Ajikawo v. Ansaido (Nig) Ltd* (1991) 2 NWLR (Pt. 173) 359.

The primary onus of proving his case lies on the plaintiff. The onus may be discharged in the pleadings since there is no onus to prove what has been admitted. See *Lawrence Onyekachukwu v. Ekwubiri & Ors* (1966) 1 All NLR 34, *Alhaji Aliyu Balogun v. Alhaji Shittu Labiran* (1988) 6 SCNJ 71 at 85.

There being no pleadings filed, the totality of evidence adduced by both side has to be considered in relation to the substance of the plaintiffs' complaint against the defendant to determine whether or not the burden of proof has been discharged. The burden of proof here means the burden of adducing evidence and this may shift depending on the preponderance of evidence.

It rests on the party who would fail if no evidence at all or no more evidence were led on either side.] See ***Messrs Lewis & Peat (NRI) Ltd v. A.E. Akhimien* (1976) 1 All NLR (Pt. 1) 460 at 468-469 wherein this Court held, inter alia:**

"It is an elementary principle in civil proceedings that civil cases are decided on a balance of probabilities based on preponderance of evidence."

Based on the principle above, the trial Area Court No.2 put the evidence led by either party in the imaginary scale and found that the evidence of the respondents outweighed that of the appellant. In other words, the trend of the evidence preponderates in favour of the respondents and this, with due respect to the learned Counsel for the appellant, is what the

Court meant by saying that:

“... the traditional evidence of the respondents at the trial Court completely overwhelmed that of the appellant and were rightly accepted” albeit in a rather colourful language. It follows, consequentially, that the Court of Appeal was right in holding: B

“... that after going through the entire record of proceedings they could not see any holding of the trial Area Court II, Jalingo that could be said to be perverse, unreasonable or not supported by evidence.”

If there is any perversity or anything unreasonable or not supported by evidence, the appellant whose duty it is to establish same, has failed to do so. C

The respondents as plaintiffs led evidence to identify the pond by name and demarcation from the portion belonging to the appellant. They traced their title to the original owners and occupants of the area of the pond. This evidence was consistent in material particulars. On the contrary, the DW1 said that the grandfather of defendant (now appellant) gave the pond to his own (DW1) grandfather and that he had been in charge of the pond for about forty years. E

So the witness made a different case from the appellant whose case he came to support, setting up his own claim to the pond. Above all, he did not know the demarcation of the pond of which he was in charge for about forty years. This does not advance his claim to the pond nor help the case of the appellant who called him to the stand. DW2 said there was no demarcation between the appellant and the respondent in respect of the disputed pond. F

He did not know the name of the pond as he wrongly called it Kyau. I resolve issue 2 and 3 in favour of respondents and against the appellant. G

Issues 4 and 5:

(i) Issue 1: “Whether the Court of Appeal was not in error in deciding that the Appellant needed the leave of the lower Court to raise a fresh issue on jurisdiction...” H

(ii) Whether learned Justices of the Court of Appeal were right to hold that the issue of locus standi of the respondents was raised for the first time in the Court of Appeal....”

Learned counsel for the respondent did not address issue 4 on jurisdiction in his brief. The consequence of failure of respondent to reply to an issue raised in the appellant's brief is tantamount to conceding that issue. See *Eravwodoke v. U.B.Th.M.B.* (1993) 2 NWLR (Pt. 277) 592 at 596 Ratio 7, *Okongwu v. NNPC* (1989) 4 NWLR (Pt. 115) 30.

It follows therefore that the respondent agreed with the appellant that the lower Court erred in holding that the appellant needed leave to raise the fresh issue of jurisdiction. The rules require a party raising an issue in appeal for the first time to do so by leave of Court. But the issue of jurisdiction is radical and at the foundation of adjudication and if a Court acts without jurisdiction the entire process is a nullity. See *Osadebay v. A-G Bendel State* (1991) 1 NWLR (Pt. 169) 525.

The Court cannot decline to deal with an issue of jurisdiction raised for the first time on appeal without leave. The issue of jurisdiction cannot be defeated by any provision of the rules of Court. See *S. O. Akegbejo & 3 Ors v. Dr. D. O. Ataga & 3 Ors* (1998) 1 NWLR (Pt. 534) 459 at 469. The issue is resolved in favour of the appellant against the respondents.

In issue 5, learned Counsel for the respondents, dealing with locus standi, argued that the court below did not decline to deal with the issue only because it was raised for the first but also declined to deal with the issue because it was incompetent for proliferation.

I am of the view that when a Court advances several reasons for not dealing with an issue raised before it, a person aggrieved can raise anyone, or all the reasons given by the Court as an issue or issues in the appeal. The issue is not defeated by the fact that the appellant chose one of several reasons and left the other issues in the appeal. I resolve issue 5 in favour of the appellant against the respondents. Be that as it may, the resolution of appellant's issues 1 to 3 renders his victory in issues 4 and 5 pyrrhic.

On the whole, having considered all the issues canvassed in this appeal, I am satisfied that the judgment of the Area Court II, Jalingo, Taraba State was examined and affirmed by the Upper Area Court, the High Court of Taraba State in its appellate jurisdictions and the Court of Appeal, Jos. It is a concurrent finding of four Courts.

I find no perversity or substantial error either in substantive or procedural law that needs to be corrected. There is therefore no ground for this Court to disturb the judgment. See *Dibiamaka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101, *Bankole v. Pelu* (1991) 8 NWLR (Pt. 211) 23. Nor can it be said that the finding of the trial Area Court affirmed by three Courts below was based on wrong premises. See *Ebba v. Ogodu* (1984) 4 SC 84. B

In the final analysis, I find no merit in the appeal. Consequently, I order that the appeal be, and is hereby, dismissed. Appellant shall pay costs assessed at N100,000.00 to the respondents. C

MUHAMMAD JSC

I read before now the judgment of my learned brother, Ngwuta, JSC, just delivered. I agree with his reasoning and conclusion. I dismiss the appeal. I abide by all orders, including one on costs made by my learned brother, Ngwuta, JSC. D

MUNTAKA-COOMASSIE JSC

This is an appeal against the decision of the Court of Appeal, Jos Division hereinafter called the Court below. E

The matter started in the Area Court No. II, sitting in Jalingo, Taraba State. After the hearing of the witnesses the trial court delivered its ruling in favour of the plaintiffs, Bako and Bawuro and the defendant was ordered to vacate the pond immediately. The defendant was aggrieved and as a result unsuccessfully appealed to the Upper Area Court, Jalingo which court dismissed the appeal by defendant and affirmed the judgment of the Area Court, i.e. trial court. F G

A further appeal to the High Court in its appellate jurisdiction was dismissed. The further and further appeal i.e. fourth court, which the appellant sought redress was the Court of Appeal which also dismissed the appellant's appeal. The last court, i.e. court below was clear in its judgment that the pond belongs to the respondents. H

The appellant was not happy with the judgment of the court below and finally appealed to this court and filed a Notice of appeal containing four (4) grounds of appeal. They are hereunder reproduced without their particulars:-

1. The learned Justices of the Court of Appeal erred in Law when they found and held:

“It is my view that the right to the fishing” Asserting right of fishing in the disputed pond” meant the same thing as “title to the fishing”.

B 2. The learned justices of the Court of Appeal Jos misdirected themselves on the fact when they found and held:-

“.... I have no hesitation in holding that the traditional evidence of the respondents at the trial court completely overwhelmed those of the appellant and were rightly accepted”.

C 3. The learned Justices of the Court of Appeal Jos misdirected themselves on the fact when they found and held:-

D “After going through the entire record of proceedings I cannot see any holding of the trial Area Court II Jalingo that could be said to have been perverse, unreasonable or not supported by evidence”.

4. The judgment is against the weight of evidence.

E Out of these four grounds, five (5) issues were formulated by the appellant and at the end urged us to allow the appeal. I rely on the appellant’s amended brief of argument filed and adopted before us on 9/3/15.

The respondents on their part adopted their respondents’ sequentially amended brief of argument. He then urged this court to dismiss the appeal.

F My learned noble lord had allowed me before today to have a preview of his lead judgment just read. I looked at it and I agree with his lordship’s reasons and conclusion. I agree that since the concurrent judgments of the four lower courts were not proved to be perverse or wrong this court will not disturb their judgments. *Odofin v. Ayoola* (1984) 11 SC, 72.

H All in all and based on the fuller reasons competently stated in the lead judgment of my noble lord Okoro JSC, I too hold that the appeal clearly lacks merit same is hereby dismissed. I endorse the orders as to costs.

RHODES-VIVOUR JSC

I was privileged to read in draft the leading judgment delivered by my learned brother, Ngwuta, JSC. An Area Court in Jalingo, Taraba

State decided that the pond belongs to the Respondents. This finding was affirmed by an Upper Area Court, a High Court and the Court of Appeal. It is well settled that this court would upset findings of the two courts below only if special circumstances, to wit: the findings are found to be perverse or there are grave errors of procedure or substantive law which has resulted in a miscarriage of justice. See Ugwuanyi v. F.R.N. (2012) 3 SC (Pt. ii) p.95, A.C.N. v. Lamido & 4 Ors (2012) 2 SC (Pt. ii) p.163. B

The findings by the courts below are the findings of four courts saying the same thing. That the Respondents own the Pond. The Appellant has been unable to show to this court that the same findings by four courts are wrong, consequently, the said finding, should not be upset as it is true. C

For this, and the very detailed reasoning and conclusion in the leading judgment I also would dismiss the appeal with costs of D N100,000 to the Respondents.

OKORO JSC

I read before now the judgment of my learned brother, Ngwuta, JSC just delivered. I agree with the reasons given to arrive at the conclusion that this appeal has no merit and warrants an order of dismissal. My learned brother has meticulously and quite efficiently dealt with the salient issues nominated by the parties for the determination of this appeal. I shall however add a few words of mine in support of the judgment. E
F

It has to be noted that this matter has already been decided by four courts in favour of the respondents herein. The Area Court No. II, sitting in Jalingo, Taraba State decided that: G

“In view of the above, we are satisfied that the water in dispute (Nyawal) is the property of the plaintiffs Bako and Bawuro all of Kinini because they have established their title of the water before this court because of this, therefore, we order the defendant to leave the water for the plaintiffs immediately and in addition he will refund to the plaintiffs all their process fees in court.” H

The above decision was affirmed by the Upper Area Court, Jalingo. A further appeal to the High Court in its appellate jurisdiction was dismissed. The fourth court which appellant sought redress, the

Court of Appeal, also dismissed appellant's appeal. The four courts below have spoken with one voice that the pond belongs to respondents. If there were more courts after the Court of Appeal it appears appellant would have gone to try his luck before coming here.

B Let me make it abundantly clear that it is now well settled that this court will not disturb the findings of facts of two courts below unless there is manifest error which leads to some miscarriage of justice or a violation of some principles of law or procedure which makes the judgment perverse. In the instant case, there are findings of more
C than two courts. Indeed, it is the findings of four courts below, and before this court can interfere with their collective and concurrent findings, it must be shown that such findings were perverse as stated above. See *Amadi v. Nwosu* (1992) 6 SCNJ 59, *Onwujuba v. Obienue* (1991) 4 NWLR (Pt. 183) 16, *Odofin v. Ayoola* (1984) 11 SC. 72,
D *Ogundipe v. Awe* (1988) 1 NWLR (Pt. 88) 188.

May I also add that concurrent findings of two or more lower courts cannot be interfered with by the Supreme Court unless they are not justified by the evidence adduced and has led to or occasioned miscarriage of justice. See *Osho v. Foreign Finance Corporation & Anor* (1991) 4 NWLR.
E

Evidence shows that this body of water which naturally flows, empties itself into the Benue River. If I understand the meaning of pond to be a body of water which does not flow into any other body
F of water, the use of the word "pond" as referring to the body of water in this case, may well be incorrect. It seems it is a body of water flowing from a source and passing through both the appellant's and respondents' communities. Why then would the appellant assert a
G right to the "pond" including the section belonging to the respondents? I am satisfied that the decision of the four courts below serves the justice of this case. I have no reason whatsoever to disturb the well reasoned decision made by these courts. I rather affirm and uphold them.

H It is on the above reasons of mine and the more elaborate ones ably adumbrated in the lead judgment that I agree that this appeal has no merit at all. I also dismiss same. I abide by all the consequential orders made in the lead judgment, that relating to costs, inclusive.