

SUPREME COURT OF NIGERIA

FRIDAY 22ND APRIL, 2016. SC. 315/2006

**CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI,
M. D. MUHAMMAD, J. I. OKORO, A. SANUSI, JJSC**

1. ZACHEUS FALEYE
2. CHIEF JONATHAN DOSUMU APPELLANTS
3. MICHAEL DOSUMU
(For themselves and on behalf
of Eleidi-Atala family)

AND

1. MR. RASHEED DADA
2. MR. SARAFA OGUNMUYIWA
3. CHIEF GEORGE OYEDE RESPONDENTS
4. MR. BASHIRU
AJIBOSE-ORISABIAJE
5. MR. RASAKI DADA
(For themselves and on
behalf of Ijagba family)

COURTS - Customary court - Judgment - Validity of - Watch word for appellate court in construing such judgment - Is whether there is substantial justice - And where such exists - There should be no interference (H1)

EVIDENCE - Evaluation - Appraisal of evidence based on credibility of witness - Is the exclusive preserve of trial court - Which is out of range for appellate Court (H2)

LAND LAW - Title - Proof - In an action for declaration of title - Plaintiff has to succeed on the strength of his case - And not on the weakness of the defence (H3)

LAND LAW - Title - Proof - Means of - Ownership of land can be proved by - Traditional evidence - Production of document of title - Acts of ownership - Acts of long possession - Possession of adjacent land (H4)

LAND LAW - Title - Proof - Traditional evidence - Plaintiff relying on such evidence must show - Founder of the land - Mode of founding the land - History of devolution of land to the present (H5)

JUDGMENTS - Mistake - Effect - It is not every mistake or failure made by trial court in its findings - That leads to a reversal of its decision on an appeal (H6)

APPEALS - Findings - Validity of - There is no basis for reversal of decision of CA - As there was sufficient material before the court - From which it made its findings and conclusions (H7)

FACTS

Plaintiffs/appellants commenced this action against defendants/respondents at the Customary Court Ogun State, claiming a declaration of title to the piece of land in dispute and an order of injunction restraining respondents from entering on the land. Appellants' major contention is that their family is the owner of the land in dispute and the respondents were their customary tenants. On the other hand, respondents claimed that the land belong to their ancestor from time immemorial and denied being customary tenants of appellants.

The parties tendered evidence for and against their respective cases. At the end of the trial, the Court gave a majority judgment in favour of respondents. Dissatisfied, appellants appealed to the High Court of Ogun State sitting in its appellate jurisdiction. The Court set aside the decision of the trial Customary Court. Respondents being dissatisfied, appealed to the Court of Appeal Ibadan Division. The Court set aside the decision of the High Court and restored the majority decision of the trial Customary Court. The decision of the Court of Appeal has prompted appellants to appeal to the Supreme Court.

ISSUES FOR DETERMINATION

(i) Whether the learned Justices of the Court of Appeal were correct in holding that the Appellate High Court Judge, in reviewing and evaluating the findings of fact made by the trial Customary Court, wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation of evidence were based on well established principles regulating the interference of an Appellate Court with findings of fact by a trial Court.

(ii) Whether the learned Justices of the Court of Appeal were correct in failing to consider the Appellants' response contained in their Brief of Argument to the issues argued by the Respondents in their own Brief before allowing the Respondents' appeal which failure constitutes a breach of the Appellants constitutional right to fair hearing.

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

Customary court - Judgment - Validity of

1. In taking a view point on which position, whether of the appellants or the respondents should be gone along with, the first port of call in my humble opinion is the Court below where that Court per Fabiyi JCA (as he then was) anchoring the judgment of the Court held that construing the judgment of a Customary Court such as the one in this instance, the watch word for an appellate Court to which the High Court in its appellate jurisdiction would stand, must be substantial justice. That is to say that if the Customary Court's decision which native customs are within their bosom and such is alright and should not be lightly tampered with. The reason for this principle is simple and that is because ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial Court in an appellate jurisdiction which acts on the cold facts from the record. Therefore, that appellate Court will not lightly interfere with the fact made by a Court unless there are compelling and very persuasive reasons and in this case at hand, the reasons must be weighty indeed particularly since the Court at first instance, the Customary Court made a visit to the locus in quo which advantage the High Court did not have. (p. 2488 E)

EVIDENCE - Evaluation

2. I am at one with the Court below that the appraisal of evidence based on demeanour of witnesses and their credibility is the exclusive preserve of the trial Court which is out of range

for an appellate Court and so the judgment of the Customary Court would be given greater latitude and broad interpretation and therefore, the matter of proof of evidence of a native custom is not necessary as members of that Customary Court are already familiar with the operating custom in their area of adjudication and in this case, the trial Court, Ota where the parties and the members of Court are Awori people, therefore the Customary Court members are presumed to have the Awori Custom in their bosom. (p. 2489 C)

C LAND LAW - Title - Proof

3. Also of note is that no Customary Tenants were called in support of the evidence of the Plaintiffs' case and it is to be stated with emphasis that it is trite that in an action for declaration of title, the plaintiff has to succeed on the strength of his case and not on the weakness of the case of the defence. (p. 2493 B)

LAND LAW - Title - Proof - Means of

E 4. It is perhaps appropriate at this stage to remind oneself of how ownership of land is proved where title of the land is in dispute. This is shown in the case of *Idundun v. Okumagba* (1976) 9-10 SC 227, they are:

- F 1. By traditional evidence;**
- 2. By production of document of title duly authenticated and executed;**
- 3. By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership.**
- G 4. By acts of long possession and enjoyment.**
- 5. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition, be the owner of the land in dispute.**

H It needs be said that all the five methods do not have to be present before proof of the said ownership can be said to have been established as only one of the methods above stated is sufficient and this the plaintiff must prove by cogent, satis-

factory and conclusive evidence. (p. 2495 B)

LAND LAW - Title - Proof - Traditional evidence

5. To be good enough, a plaintiff who relies on traditional evidence as in the case in hand must show the following:

- 1. The founder of the land;**
- 2. The mode of founding or discovery of the land;**
- 3. The history of the devolution of the land to the present claimants.**

In this Issue under consideration, it must be stated though it has become trite that it is the duty of the Appellants as Plaintiffs who, claiming a declaration of title based on traditional history to plead their root of title and establish by evidence the traditional history so pleaded stating the name and history of their ancestors, right from the original founder of the land they assert ownership through to the last person Plaintiffs inherited from. (pp. 2495 G/2498 H)

JUDGMENTS - Mistake - Effect

6. For a fact is that it is settled law that it is not every mistake or failure of a trial Court to make a finding on an issue that would lead to a reversal of the decision of the Court appealed if the omission or failure will not affect the justice of the case and will not detract from the determination of the real issue in controversy before the Court. (p. 2498 A)

APPEALS - Findings - Validity of

7. Again to be said is that there was sufficient material before the Court of Appeal from which it reached and made its findings and conclusions and so no need to go into a copious repetitive work in pondering to what the Appellants wanted to be sure all they submitted was attended to since there was no need for such. In doing so, the Court below met the standard reiterated by this Court in *Chabee Baval v Iorkgie Ahemba* (1999) 7 SCNJ 223 in that the Judgment demonstrated in full, a dispassionate consideration of the issues and raised and canvassed before it and there was no perversity nor can it be said that there was a miscarriage of justice. There is no

basis for the call for a reversal of the decision of the Court below since assuming that Court should have considered every minute submission, the decision would not have been different from what it is and there was no denial of fair hearing.

(p. 2499 G)

B

REPRESENTATION

O. O. Ojitalayo with him, I. N. I. Iheanacho, for the Appellants

A. B. Kasunmu, for the Respondents

C

CASES REFERRED TO

Agbeje v. Ajibola (2002) 1 SC 1

Okpiri v. Jonah (1961) All NLR 102

Maja v. Stocco (1968) 1 All NLR 141

D Woluchem v. Gudi (1981) 5 SC 291

Ajero v. Ugorji (1999) 7 SC (pt. 1) 58

Ajagun v. Sobo Osho of Yoku Village (1977) 5 SC 55

Popoola v. Adeyemo (1987) 1 NWLR (pt. 66) 578

Idundun v. Okumagba (1976) 9-10 SC 227

E Jiaza v. Bamgbose (1999) 7 NWLR (pt. 610) 182

Bello v. Eweke (1981) 1 SC 101

Kodilinye v. Odu (1953) WACA 336

Nwokoro v. Nwosu (1994) 4 NWLR (pt. 337) 172

F Ebba v. Ogodo (1984) 1 SCNLR 372

Balogun v. Agboola (1964) 1 All NLR (pt. 2) 66

Ohanaka v. Achugwu (1998) 9 NWLR (pt. 564) 37

STATUTES REFERRED TO

G Evidence Act, s. 149(d)

Constitution of the Federal Republic of Nigeria 1999, s. 116(1)

LEAD JUDGMENT BY PETER-ODILI JSC

The Appellants as Plaintiffs at the Customary Court, Ogun

H State claimed against the Respondents as Defendants the following:-

(a) Declaration of title to the piece of land situate, lying and being at Igbo Eleidi between Osuke and Ijaba Roads Ota.

(b) An order of Injunction to restrain the Defendants, their servants, agents or privies from entering, alienating or doing any-

thing on the land in dispute, Annual rental value of the land is N100.00 (One Hundred Naira).

The case of the Plaintiffs in the Customary Court was that their family is the owner of the land in dispute and the Defendant were their customary tenants on the land in dispute. The Defendants on their part claimed that the land belonged to their ancestor from time immemorial and denied being customary tenants of the Plaintiffs. B

At the end of the proceedings, the Customary Court delivered a majority judgment dismissing the Plaintiffs' case and the Plaintiffs dissatisfied appealed to the High Court Ogun State which Court in its appellate jurisdiction set aside the judgment of the Customary Court. Dissatisfied, the Respondents appealed to the C

Court of Appeal which in turn set aside the decision of the High Court restoring the majority judgment of the trial Customary Court. Aggrieved with the judgment of the Court of Appeal, Coram J.A. Fabiyi, A.A. Augie, G.I. Udom Azogu JJCA, the Plaintiffs/Appellants have approached the Supreme Court by a Notice of Appeal dated 5th October, 2012 on a four ground of appeal but Appellants later abandoned the 4th Ground of Appeal. E

FACTS BRIEFLY STATED:

From the oral evidence put across by the Plaintiffs, their family is the owner of the land in dispute though Plaintiffs admitted that the Defendants (now Respondents) farmed therein as customary tenants to Plaintiffs' family. The Defendants denied the claims of the Plaintiffs, giving evidence to show that they were possession of the land not as customary tenants but as land owners. F

As the proceedings ensued at the trial Customary Court, there was a visit to the locus in quo with the parties in attendance pursuant to a request made to the Court by one of the Defendants. In the end, the Ifo/Ota Grade 1 Customary Court gave a majority judgment of 2 to 1 in favour of the Defendants' family holding that the Plaintiffs did not prove that the farmland in dispute belonged to their family of Eleidi Atala that rather, the land in dispute belonged to the Ijagba family of which the 1st Defendant is the Head. G H

On the 25th day of January, 2016 date of hearing, learned counsel for the Appellants, O. O. Ojutalayo Esq, adopted their Brief of Argument filed on 27/8/2014 and deemed filed on 27/8/2014.

He raised two issues for determination which are thus:-

- (i) Whether the learned Justices of the Court of Appeal were correct in holding that the Appellate High Court Judge, in reviewing and evaluating the findings of fact made by the trial Customary Court, wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation of evidence were based on well established principles regulating the interference of an Appellate Court with findings of fact by a trial Court. (Grounds A and B of the Appeal).
- (ii) Whether the learned Justices of the Court of Appeal were correct in failing to consider the Appellants' response contained in their Brief of Argument to the issues argued by the Respondents in their own Brief before allowing the Respondents' appeal which failure constitutes a breach of the Appellants constitutional right to fair hearing. (Ground C of the Appeal)

A. B. Kasunmu Esq., learned counsel adopted the Brief of Argument of the Respondents filed on 4/3/2015 and deemed filed on 22/4/2015. He utilised the issues as couched by the Appellants. I shall make use of the issues as crafted.

ISSUE NO. 1:

Whether the learned Justices of the Court of Appeal were correct in holding that the Appellate High Court Judge, in reviewing and evaluating the findings of fact made by the trial Customary Court wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation were based on well established principles regulating the interference of an Appellate Court with findings of facts by a trial Court.

Learned counsel for the Appellants submitted that the Court of Appeal or Court below erring at its conclusion failed to appreciate the reasons proffered by the Appellate High Court for intervening the findings of facts and evaluation made by the trial Customary Court. That the High Court carried out a proper review of the findings of fact by the trial Customary Court and drew the appropriate inferences from the evidence led before coming to the conclusion. That what the Court of Appeal did was not borne out of the Record of the Court. He cited the cases of *Akanbi Agbeje & Ors v. Chief Agbaakin Joshua Ajibola & Ors* (2002) 1 SC 1 at 17; *Okpiri v. Jonah* (1961) All NLR 102 at 104; *Maja v. Stocco* (1968) 1 All NLR 141 at 149;

Woluchem v. Gudi (1981) 5 SC 291 at 295 - 295 etc.

For the Appellants were referred to the evidence of PW1, PW2 and others to show that the Appellants owned the land dispute and it was the Customary Court that drew a wrong conclusion which should not be allowed to stand. Learned counsel cited the case of Nathaniel Onwuka Ajero & Anor v. Bernard Ugorji & Ors (1999) 7 SC (Pt.1) B 58 at 66.

That the Court below in upholding the judgment of the trial Customary Court failed to consider some material conflicts in the evidence of the Respondents relied upon by that Court of trial in giving judgment to them without proper evaluation of the totality of the evidence on the issue of picking of Orogbó (bitter Cola) on the land in dispute which the 5th defendant ascribed to himself. That that conflicting evidence not resolved would have been rejected. He cited U.N.I.C v U.C.I. Ltd (1993) 3 NWLR (Pt.593) 7 at P.29. D

Learned counsel for the Respondents reminded the Court that proceedings in the Customary Court are not amenable to Common Law and the Evidence Act and as such they should always be given greater latitude and broader interpretation. He cited Chief Karimu Ajagun & 5 Ors v Sobo Osho of Yoku Village & 13 Ors (1977) 5 SC E 55.

That the position of the law is that where there are two conflicting sets of traditional history, it is not right to assess or determine first which of the two sets of traditional evidence is plausible or credible before reference is made or consideration given to facts in recent time. He relied on Popoola v Adeyemo (1987) 1 NWLR (Pt.66) 578 at 587; Kojo II v Bonsie WLR 1223; Idundun v Okumagba (1976) 9-10 SC 227. Mr. Kasunmu of counsel for the Respondents contended that not one single customary tenant gave evidence on behalf of the Eleidi Atala family and the Plaintiffs never provided the trial Customary Court with sufficient proof of Customary Tenancy and the visit to the locus in quo did not show that the 1st Plaintiff's family had Customary Tenants on the land in dispute. That it is trite law that in an action for declaration of title, the plaintiff must succeed on the strength of his case and not the weakness of the case of the Defendants. He cited Bello v Eweke (1981) 1 SC 101; Kodilinye v. Odu (1953) WACA 336 at 337 .

It was stated that the Appellants were aware of the significance

and importance of the evidence of their tenants yet failed to call them to give evidence, That the survey plan alluded to by 1st Plaintiff was not tendered and so no evidence of its content is admissible. The case of Emmanuel Jiaza v Hassan Bamgbose (1999) 7 NWLR (Pt. 610) 182; Section 149 (d) of the Evidence Act.

B That the trial Customary Court found that the evidence of the PW4 and DW2, both brothers and descendants of late Fagbayi could not be believed after listening to them and seeing them and it was wrong for the Appellate High Court to interfere with the finding of the credibility of witnesses and substitute the trial Court's finding with its own finding.

In brief, the standpoint of the Appellant is stated to be that the Court below was wrong in intervening the review and evaluation of evidence concluded by the appellate High Court of the findings of the trial Customary Court which findings were largely unsupported by evidence on record which made the review exercise concluded by the High Court necessary.

That position of the appellants, the Respondents rejected contending that it is the Customary Court which finding is unassailable and supported by evidence on record.

In taking a view point on which position, whether of the appellants or the respondents should be gone along with, the first port of call in my humble opinion is the Court below where that Court per Fabiyi JCA (as he then was) anchoring the judgment of the Court held that construing the judgment of a Customary Court such as the one in this instance, the watch word for an appellate Court to which the High Court in its appellate jurisdiction would stand, must be substantial justice. That is to say that if the Customary Court's decision which native customs are within their bosom and such is alright and should not be lightly tampered with. The reason for this principle is simple and that is because ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial Court in an appellate jurisdiction which acts on the cold facts from the record. Therefore, that appellate Court will not lightly interfere with the fact made by a Court unless there are compelling and very persuasive reasons and in this case at hand, the reasons must be weighty indeed particularly since

the Court at first instance, the Customary Court made a visit to the locus in quo which advantage the High Court did not have.

The Court of Appeal at page 330 of the Record had stated as follows:-

“The trial Customary Court found that no member of the Plaintiffs’ family farmed or ever farmed on the land in dispute. The 1st Plaintiff in his evidence before the Court said, he farmed on the land. Such was shown to be false during the visit to the locus in quo. The Lower Court played down this point and talked of Plaintiffs being owners of farm land having Customary Tenants. Clearly, the 1st Plaintiff who said he farmed on the land which assertion, if correct, would have put him in possession of the land, found to be false”.

I am at one with the Court below that the appraisal of evidence based on demeanour of witnesses and their credibility is the exclusive preserve of the trial Court which is out of range for an appellate Court and so the judgment of the Customary Court would be given greater latitude and broad interpretation and therefore, the matter of proof of evidence of a native custom is not necessary as members of that Customary Court are already familiar with the operating custom in their area of adjudication and in this case, the trial Court, Ota where the parties and the members of Court are Awori people, therefore the Customary Court members are presumed to have the Awori Custom in their bosom. See Karimu Ajagunjeun & 5 Ors v. Sobo Osho of Yoku Village & 13 Ors (1977) 5 SC 55; Nana Eyebe Abaio II v. Kweku Nsemfo of Kokoo in 12 WACA 127.

The thoroughness with which the Court of Appeal handled what transpired at the trial Customary Court and the interference by the High Court in its appellate capacity is such that I would at the risk of verbosity quote the Court of Appeal copiously from pages 330 to 335 of the Record and thus:-

“With all the above state of the law in view, it is now high time to consider whether the High Court on appeal was right to have interfered with findings of fact mostly based on credibility of witnesses coupled with visit to the locus in quo. The trial Customary Court in arriving at the decision that the plaintiffs did not prove their claim conclusively made 21 findings of fact. The trial Customary Court heard

the witnesses and watched their demeanour before appraising and evaluating their evidence.

The trial Customary Court found that no member of the Plaintiffs' family farm or ever farmed on the land in dispute. The 1st plaintiff in his evidence before the Court said he farmed on the land. Such was shown to be false during the visit to the locus in quo. The lower Court played down this point and talked of plaintiffs being owners of farm land having customary tenants. Clearly, the 1st plaintiff who said he farmed on the land; which assertion, if correct, would have put him in possession of the land, was found to be false. There was sufficient evidence upon which the trial Customary Court based its finding. It was wrong for the lower Court to have attempted to interfere with same. See Nwokoro v Nwosu (1994) 4 NWLR (Pt. 337) 172.

In its second finding of fact, the trial Customary Court found that a survey plan showing the land in dispute as part of the plaintiff's family land, as stated by the 1st plaintiff, was not tendered and that being a learned ex-customary Court president, the 2nd plaintiff was well aware of the importance of the survey plan. The 1st plaintiff in his evidence testified as follows at page 20, lines 19-24 of the record:

"When the case between my family and the Itele people were (sic) going on at Abeokuta High Court, my family surveyed the land and in the survey plan the land in dispute was shown there as part of my family land."

The Lower Court interfered with the finding and maintained that non-tendering of the survey plan was not detrimental as there was no difficulty in identifying the land in dispute. It appears as if the lower Court goofed as the point made by the witness in his evidence has nothing to do with the identity of the land. He desired to show that the land in dispute was surveyed as part of a larger whole alleged as being his family land. The trial Court with common sense approach, maintained that the plaintiffs ought to have shown it to the Court. It occurs to me that the lower Court should have construed the non-tendering of the survey plan adversely against the plaintiffs as dictated by Section 149 (d) of the Evidence Act. See In Re: Adewumi & Ors (1988) 5 NWLR (Pt.83) 483. That is not the end of the matter. The plaintiffs who relied on the alleged survey plan should tender it as extrinsic evidence of its contents is not admissible in evidence. See

Emmanuel Jiaza v. Hassan Bamgbose & Anor (1999) 7 NWLR (Pt.610) 182.

In finding 3, the Customary Court found that 3rd plaintiffs' witness bought trees from the plaintiffs and paid for the same trees to the defendants. The lower Court, an appellate Court, stated that 'his evidence is most incredible and I reject it'. The lower Court was definitely not in a position to test the credibility of witnesses and then accept or reject such evidence. Such was undoubtedly the business of the trial Customary Court which heard evidence from witnesses and watched their demeanour. See *Ebba v Ogodo* (supra).

Findings 4 and 5 deal with demarcation of land. The trial Customary Court believed that it was the demarcation of the Ijagba and Isele family land that Chief Audu Makinde, 1st plaintiffs' witness led them to do and he advised 1st and 2nd Defendants to plant cement pillars on the demarcation line. The demarcation line which runs through plaintiffs' 1st witness' farm was not for the 2nd defendant's farm only. The Lower Court felt that the demarcation was irrelevant to the case as it did not concern the plaintiffs. But the case made by the plaintiffs was that the demarcation did not involve Ijagba family; but only Isele family. The trial Court saw the demarcation line on the land in dispute during the visit to the locus in quo. One cannot surmise the rationale for the unwarranted interference with the finding of fact well made by the trial Court based on evidence on record.

In finding 6, the Customary Court found that in the land, all the farms shown to them by the plaintiffs' 1st witness were all farms which he bought from members of the defendants' family. The lower Court held the finding to be irrelevant because PW1 is a customary tenant to the plaintiffs' family. I cannot follow with adequate precision the rationale of the lower Court judge.

In finding 7, the trial Customary Court said it did not believe that the farm land in dispute was ever called Igbo Eleidi Atala. The High Court erroneously attacked the belief as the writ, according to the lower Court, described the land as Igbo Eleidi. Identity of the land has nothing to do with what the parties call it. See *Assam v. Okpasin* (2000) 10 NWLR (Pt.676) 659.

In finding No. 8, the Customary Court found that the 2nd defendant is a member of Ijagba family. The High Court of Appeal felt that such finding was not detrimental to the plaintiffs' case. The

2nd defendant maintained that he was present at demarcation of the land as a member of Ijagba family.

In finding 9, the Customary Court found that plaintiffs' 3rd witness told the Court that he bought trees from many members of the defendants' family which the plaintiffs did not object to. The lower Court said virtually all the defendants mentioned by the witness were mentioned by the plaintiffs as their customary tenants. I agree with the senior counsel for the appellants that an allegation of customary tenancy is not synonymous with a Proof of such tenancy.

*Findings 10, 15 and 17 relate to what the trial Customary Court believed or did not believe. The lower Court relied on credibility of the witnesses to come to his own conclusions. It appears to me that the learned judge of the Court below forgot that he was not sitting as a Court of first instance. He completely took over the functions of the trial Customary Court by delving into the realm of credibility of witnesses. It goes without saying that he crossed the lane to a territory which is not his own. The findings of fact based on credibility of witnesses by the lower Court on appeal were not validly made. They should not be allowed to stand. An appellate Court generally loathes to review the testimony of witnesses based on credibility. See *Elendu & Ors v Ekwoaba* (1995) 3 NWLR (Pt.386) 704.*

*Findings Nos. 12 and 13 relate to heaps of remains of Odunaro's house and Ogun Idol at the locus in quo. In finding No. 13, the trial Customary Court said it believed that in Awori land, albinos are buried in the bush and not in township. The learned judge of the Court below interfered with the findings despite the fact that they touch on Awori custom presumed to be in the bosom of the members of the trial Customary Court. See *Nana G. Ababio II v. Kweku Nsemfo of Kokoo* (supra); *A.O. Odufuye v J.A. Fatoke* (supra). It was clearly wrong for the Lower Court judge to have interfered with findings touching on Awori custom. From all the above, it is clear that the Appellate High Court Judge wrongly applied principle of law as to evaluation of evidence. He had no right to apprise evidence based on credibility of witnesses which is basically the function of the trial Customary Court. As well, the Lower Court wrongly forayed into an area touching on ascertainment of Awori custom".*

From the record, it can be seen that the 1st plaintiff who had testified of farming on the land in dispute did an about face when

under cross examination he admitted that nobody settled on the land in dispute before and that only the Eleidi Ojuelegba Shrine and Ogun Shrines are present on the land in dispute. Also, evidence on the record is that from the visit to the locus in quo at page 80 of the record of appeal, it is clear that 1st, 2nd and 3rd Plaintiffs did not farm on the land and none of them was able to show their farmland. B

Also of note is that no Customary Tenants were called in support of the evidence of the Plaintiffs' case and it is to be stated with emphasis that it is trite that in an action for declaration of title, the plaintiff has to succeed on the strength of his case and not on the weakness of the case of the defence. C

In this, I rely on the case of Bello v. Eweke (1981) 1 SC 101; Kodilinye v. Odu (1953) WACA 336 at 337.

The Court below was of the view in its findings based on the record of what the Customary Court being that of first instance and the appellate High Court and concluded that the High Court in its appellate jurisdiction went outside its given scope. The lower Court took pains to show the reasons for its own findings and conclusion in taking the side of the Customary Court and rejecting the interference by the High Court. In the consideration before me, I am satisfied that the Court of Appeal was on course, clearly supported by the record and I am saying so for the following reasons:- E

On the visit to the locus, the Customary Court as shown in its inspection record found that the 1st Plaintiff did not farm on the disputed land as he claimed. As if that was not enough, 1st Plaintiff had anchored on a survey plan which he made no effort to produce, thus bringing in the presumption that if the survey plan had been produced, it would have gone against the position of the 1st plaintiff as inferred under Section 149 (d) of the Evidence Act. Therefore, the interference by the Appellate High Court could not be justified. F

See Nwokoro v. Nwosu (1994) 4 NWLR (Pt. 337) 172; In Re: Adewumi & Ors (1988) 5 NWLR (Pt. 83) 483. G

Again of note is what the Court of Appeal found as an aberration, the stance of the appellate High Court that the "evidence of a witness is most incredible and I reject it", as out of place for an appellate Court as in doing that, it entered into the arena which was the exclusive preserve of the trial Customary Court. I rely as the Court below did to the case of Ebba v Ogodo (1984) 1 SCNLR 372; H

Balogun v Agboola (1964) 1 All NLR (Pt. 2) 66; Ohanaka v Achugwu (1998) 9 NWLR (Pt. 564) 37.

In respect to the findings of the trial Court with regard to the demarcation of the Ijagba and Isele family land, the trial Court had found that the demarcation line on the land in dispute during the visit to the locus quo the demarcation did not involve Ijagba family but only Isele family. The Appellate High Court in its view held that the demarcation is irrelevant to the case, a situation showing indefensible interference by an appellate Court as the finding by the trial Court was such that it could only have been done by the Court that had made a physical visit to the scene and not by one merely perusing documents referring to such. In this regard also fell in the finding of the trial Court that all the farms as shown by the plaintiffs' 1st witness were all farms which that witness bought from the defendants' family.

Again, to be denigrated as out of place is the Appellate High Court attacking the belief on the name of the farmland as the writ referred to the land as Igbo Eleidi while the Customary Court did not believe the land was ever called Igbo Eleidi Ataia. This is so because it is trite that the identity of land in dispute has nothing substantial to do with what the parties called it. See Assam v. Okpasin (2000) 10 NWLR (Pt.676) 659.

The deviation from the finding made by the Customary Court on the issue that the 2nd Defendant is a member of Ijagba family which the High Court felt was unimportant because the 2nd Defendant had maintained being present when the demarcation of the land was made, he being a member of Ijagba family.

Again, the Customary Court had found that Plaintiffs' 3rd witness told the Court that he bought trees from many members of the defendants' family which the plaintiffs did not object to. The stance of the High Court in this regard is that voluntarily, all the defendants mentioned by the witness were mentioned by the plaintiffs as their customary tenants and went into the credibility of witnesses in reaching his conclusion, a procedure outside the realm of an appellate Court especially where as in this case, there was no basis for the upsetting of the findings of the trial Court. Also of note is the delving into the Customs of the Awori people and countering the findings of the Customary Court which had been based on the informed knowl-

edge of the custom well within the bosom of the Customary Court members who were in better position to know. I rely on Odufuye v. J.A. Fatoke (1977) 4 SC 11.

Just as the Court of Appeal found, there was no foundation on which the appellate High Court entered into the re-evaluation of the evidence already evaluated by the trial Customary Court and worst still ventured into the position exclusively reserved for a trial Court who had the privilege of seeing the witnesses and assessing their demeanour.

It is perhaps appropriate at this stage to remind oneself of how ownership of land is proved where title of the land is in dispute. This is shown in the case of Idundun v. Okumagba (1976) 9-10 SC 227, they are:

- 1. By traditional evidence;***
- 2. By production of document of title duly authenticated and executed;***
- 3. By acts of ownership extending over a sufficient length of time numerous and positive enough as to warrant the inference of true ownership.***
- 4. By acts of long possession and enjoyment.***
- 5. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition, be the owner of the land in dispute.***

It needs be said that all the five methods do not have to be present before proof of the said ownership can be said to have been established as only one of the methods above stated is sufficient and this the plaintiff must prove by cogent, satisfactory and conclusive evidence. I rely on Aikhionbare v. Omoregie (1976) 12 SC 11.

To be good enough, a plaintiff who relies on traditional evidence as in the case in hand must show the following:

- 1. The founder of the land;***
- 2. The mode of founding or discovery of the land;***
- 3. The history of the devolution of the land to the present claimants.***

I place reliance on Piaro v. Tenalo (1976) 12 SC 31; Ohiari v. Akabeze (1992) 2 NWLR (Pt.221) 1; Anyanwu v Mbara (1992) 5

NWLR (Pt. 242) 386.

A follow up in this proof by traditional history is to be brought out, the fact that there are two conflicting sets of traditional history and the fact that the Court cannot assess or determine first which of the two sets of traditional evidence as between the plaintiffs on the one side and the defendants on the other, which is plausible or credible without reference being made or consideration given to the facts in recent time, a principle now popularly referred to as the principle or rule in *Kojo II v Bonsie* (supra) that the findings made by the Customary Court and accepted by the Court of Appeal after a thorough consideration are the guiding light unlike what the appellate High Court did stemming from its approach from wrong premises and assuming a position outside of its own territory.

My take therefore is that the Customary Court's majority finding and conclusion aptly accepted by the Court below is the correct position of things and in answer to the question posed in Issue I, the Court of Appeal was correct in rejecting what the appellate High Court did. The issue is resolved against the Appellant.

ISSUE NO. 2:

Whether the learned Justices of the Court of Appeal were correct in failing to consider the Appellants' responses contained in their brief of argument to the issues argued by the Respondents in their own brief before allowing the Respondents appeal which failure constitutes a breach of the Appellants constitutional right to fair hearing.

Mr. Ojitalayo of counsel for the Appellants submitted that the Court below was in error in allowing the appeal of the Respondents without considering the response of the Appellants to the issues canvassed by the Respondents before it, thus violating the right to fair hearing of the Appellants as guaranteed by Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria. That the trial Customary Court failed to make proper use of the opportunity of seeing and hearing the witnesses who testified before it which made the review exercise conducted by the Appellate High Court most necessary. Also that the Court below failed to give due consideration to the argument of the Appellants in that connection and so the Appellants' right to fair hearing was breached and miscarriage of justice ensued. He cited *Chiabee Bayol v Iorkghir Ahemba* (1999) 7 SCNJ 223; *Ogboru & Anor v. Uduaghan & Ors* (2012) 2 - 3 SC 56; *Ajuwon*

v Akanni (1993) 12 SCNJ 32; Amayo v Erinwingboro (2006) 5 SCNJ 1.

Learned counsel for the Respondents, Mr. Kasunmu stated that it is settled law that not every mistake or failure of a trial Court to make a finding on an issue will lead to a reversal of the decision of the Court appealed if the omission or failure will not affect the justice of the case and will not detract from the determination of the real issue before the Court. He cited *Onajobi v Olanipekun* (1985) 2 SC (Pt.156); *Ojo v. Babalola* (1994) 4 NWLR (Pt.185) 267 at 282. B

That the failure of the trial Court to consider the response of the Appellants to the issues canvassed by the Respondent will not lead to a reversal of the decision of the Court appealed against unless the failure to consider the response will occasion a miscarriage of justice. He contended that from the evidence properly accepted by the Customary Court and upheld by the Court of Appeal, the Appellants' family were never in possession of the land in dispute and did not farm thereon contrary to the evidence of 1st Plaintiff. It was also stated that the visit to the locus in quo showed that the 1st Plaintiffs family had no farm on the land and indeed the plaintiffs are not entitled to the declaration of title they sought. C
D
E

The summary of the Appellants is that the Court below was wrong in failing to consider the submissions of the Appellants (then Respondents) as contained in their Brief of Argument in response to the two issues argued by the Respondents (then Appellants) before allowing the appeal before it thereby violating the right of fair hearing of the Appellants as guaranteed by Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria which failure occasioned a miscarriage of justice to the Appellants. That the Respondents at the Court below failed to disclose how the error, if any, committed by the Appellate High Court substantially affected the decision of that Court to justify same being set aside. F
G

The Respondents' stance on the other hand is that the failure of the Court below to consider the response of the Appellants to the issues canvassed will not lead to a reversal of the decision of the Court for the reason that the decision of the trial Customary Court on the 1st, 2nd and 3rd findings which were upheld by the Court of Appeal. That even if the trial Court had not held that all the farms shown to them were farms the 1st Plaintiff witness bought from the Defendants H

family, the Customary Court would still not have been wrong in refusing the Appellants claim for declaration of title based on its finding that no member of the Plaintiffs' family farmed on the land dispute and the none tendering of the survey plan.

For a fact is that it is settled law that it is not every mistake or failure of a trial Court to make a finding on an issue that would lead to a reversal of the decision of the Court appealed if the omission or failure will not affect the justice of the case and will not detract from the determination of the real issue in controversy before the Court. See Onajobi v Olanipekun (1985) 2 SC page 156; Ojo v. Babalola (1994) 4 NWLR (Pt.185) 267 at 282.

The Court of Appeal had dwelt comprehensively on the review of the 21 findings of the trial Customary Court made by the Appellate High Court and thereafter supported the findings of the trial Customary Court. In this, the Appellants are of the view that their submissions in the Court of Appeal had not been considered before the Court below allowed the appeal and so they were denied their right to fair hearing. I shall refer to Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria which is as follows:

"In the determination of his civil right and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".

The Appellants had put across the argument that if the Court below had painstakingly considered the argument of the Appellants in response to the issues canvassed by the Respondents now appellants, the Court below would not have disturbed the re-evaluation conducted by the Appellate High Court, the reasons being thus:-

"(1) That the trial Customary Court failed to make a proper use of the opportunity of seeing and hearing the witnesses.

(2) That trial Customary Court drew wrong conclusions from credible evidence before it.

(3) That findings of fact made by the trial Customary Court were perverse in many instances in the sense that the findings did not flow from the evidence led by the parties".

In this Issue under consideration, it must be stated

though it has become trite that it is the duty of the Appellants as Plaintiffs who, claiming a declaration of title based on traditional history to plead their root of title and establish by evidence the traditional history so pleaded stating the name and history of their ancestors, right from the original founder of the land they assert ownership through to the last person Plaintiffs inherited from. I relied on *Total Nigeria Plc v. Nwako* (1978) 5 SC; *Elias v. Cano-Bare* (1982) 5 SC 25. B

In recourse to traditional history as has happened here, there is conflict between that raised by the Appellants/Plaintiffs as against that raised by the Respondents/Defendants that is while the Appellants claimed through Aina Eleidi, the Respondents anchored their claim through their ancestor Ajagba. The situation of this conflict called for a resort to the Rule in *Kojo v Bonsie* (supra) which in brief is to ask what the relationship between the Claimants to recent events on the land such as possession. In this regard, the evidence accepted by the Customary trial Court is that no member of the family of the 1st Plaintiff/Appellant farmed on the land in dispute contrary to the evidence the 1st Plaintiff put forward as having farmed therein which he contradicted under cross-examination in admitting that no member of his family farmed on the land in dispute and no member of his settled on the land. The Customary Court had confirmed this on the visit to the locus in quo. That finding, the High Court did not accept which the Court of Appeal rejected on the ground that the High Court in its appellate jurisdiction interloped into the area exclusively reserved for the trial Court. Indeed, from the record, the majority finding and conclusion of the Customary Court are unassailable and so the Court of Appeal's right in restoring it after the setting aside by the High Court. C D E F G

Again to be said is that there was sufficient material before the Court of Appeal from which it reached and made its findings and conclusions and so no need to go into a copious repetitive work in pondering to what the Appellants wanted to be sure all they submitted was attended to since there was no need for such. In doing so, the Court below met the standard reiterated by this Court in *Chabee Baval v Iorkgie Ahemba* (1999) 7 SCNJ 223 in that the Judgment demonstrated in full, a dispassionate consideration of the issues and raised and H

canvassed before it and there was no perversity nor can it be said that there was a miscarriage of justice. There is no basis for the call for a reversal of the decision of the Court below since assuming that Court should have considered every minute submission, the decision would not have been different from what it is and there was no denial of fair hearing.

In conclusion therefore, I resolve this issue against the Appellants and the two issues effectively resolved against the Appellants. I do not hesitate in dismissing this appeal which is unmeritorious. I dismiss the appeal and affirm the judgment of the Court of Appeal which set aside the decision of the Appellate High Court and restored the judgment of Customary Court.

I award the sum of N100,000.00 costs to the Respondents to be paid by the Appellants.

I. T. MUHAMMAD JSC

I read before now the judgment just delivered by my Learned brother, Peter-Odili, JSC. I am in agreement with his conclusion that the appeal lacks merit. The appeal is dismissed by me. I adopt consequential orders made in the lead judgment including one on costs.

M. D. MUHAMMAD JSC

I had the privilege of reading in draft the lead judgment of my learned brother Mary Ukaego Peter-Odili JSC just delivered and agree with the reasoning and conclusion therein that this appeal lacks merit and that same be dismissed.

I adopt the summary of facts that brought about the appeal as marshaled out in the lead judgment in restating, and purely by way of emphasis, those aspects of the case vis-à-vis the law which make the dismissal of the appeal an imperative. The issues the appellants raise for the determination of their appeal read:-

“1. Whether the learned Justices of the Court of Appeal were correct in holding that the appellate High Court Judge in reviewing and evaluating the findings of fact made by the trial Customary Court wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation of evidence were based on well

established principles regulating the interference of an appellate Court with findings of fact by a trial Court.

2. *Whether the learned justices of the Court of Appeal were correct in failing to consider the appellants response contained in their brief of argument to the issues argued by the respondents in their own brief before allowing the respondents appeal which failure constitute a breach of the appellants' constitutional right of fair hearing.*"

Learned appellants' counsel, certainly, cannot be right in his submission that the Court of Appeal, hereinunder referred to as the lower Court, is wrong in its decision that the appellate High Court, reviewing and evaluating the findings of fact made by the trial Customary Court, had applied wrong principles of law. I shall offer at least two reasons for this view.

Firstly, the task of evaluating evidence and ascribing probative value to same is primarily that of the trial Court that saw and observed the witnesses in the course of their testimony. The appellate Court interferes only if the trial Court had failed to positively use the advantage it had of seeing and observing the witnesses by drawing the wrong conclusions from the proffered evidence. This Court has stated it times without number that it is none of its functions or indeed that of an appellate Court to substitute its own views of the evidence for those of the trial Court that is better placed to deal with those matters. The appellate High Court could only have interfered with the findings of fact of the trial Customary Court when the findings are perverse and/or consequent upon improper exercise of judicial discretion further resulting in miscarriage of justice. See Onowan V. Isherhein (1976) NSCC 535 at 537.

In the case at hand, the trial Court has been painstaking in its appraisal of the facts placed by both sides. The lower Court's decision setting aside the appellate High Court's interference with those findings of the trial Customary Court is unassailable. See Onuoha V. State (1989) 2 NWLR (Pt 101) 12 and Ajayi V. Texaco (1987) 3 NWLR (Pt 90) 503.

Secondly, the trial Court being a Customary Court is given greater latitude in the conduct of proceedings. The Court proceedings persist in spite of its scanty regard to rules of evidence and procedure. The Court is not given to technicalities, a laxity which otherwise

renders such decision open to interference on appeal. Customary Courts are in place to do substantial justice between litigants at little costs and time. The lower Court is therefore right to have found the appellate High Court's judgment that failed to be guided by these overriding and time honoured principles unsustainable. In *Dinsey and Ors V. Ossei & Ors* (1939) 5 WACA 177, the West African Court of Appeal restated the principle thus:-

"It is a principle well established in these Courts, that, in dealing with appeals from Native tribunals, this Court must not be too strict in regard to matters of procedure, that the whole object of such a trial is that the real dispute between the parties should be adjudicated upon and, as is said in the judgment in Archie Kwow V. Ohene Essein Eku II (2 WACA 180) the real issue between the parties must be the test and not merely the wording of the suit."

After citing the foregoing decision with approval, this Court per Uwaifo JSC proceeded in *Owunama V. Ezekoli* (2002) 5 NWLR (Pt.760) at 365 as follows:-

"The proceedings in such Court(s) are to be considered upon a broad view as to whether they were conducted in pursuit of the justice of the case presented by both parties... appellate Court are to consider the substance of the proceedings of Native customary or Area Courts liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether substantial justice has been done to the parties within the procedure by such Courts."

The trial Customary Court had made at least twenty findings of fact in its bid to resolve the dispute presented by the parties to it. The lower Court after its perusal of the record of appeal affirmed the trial Court's findings that the appellants who as plaintiffs had, even through the witnesses they called, failed to establish that they had ever farmed on the land in dispute or otherwise exercised any act of ownership in respect of the land in dispute have not made out their case. Appellants are clearly wrong to further insist in this Court that in spite of the solid findings of fact of the trial Customary Court, the lower Court is wrong in its interference with the appellate High Court's reasoning and conclusion otherwise.

For the foregoing and more so the detailed reasons contained in the lead judgment of my learned brother Mary Ukaego Peter-Odili

JSC, I also dismiss the appeal and abide by the consequential orders made in the lead judgment.

OKORO JSC

At the Customary Court of Ogun State in the Ifo/Ota Grade I Customary Court, the appellants (as plaintiffs) claimed against the respondents (as defendants) as follows:-

(a) A declaration of title to the piece of farm land situate, lying and being at Igbo Eleidi between Osuke and Ijaba Roads, Ota.

(b) An order of injunction to restrain the defendants, their servant, agents or privies from entering, alienating or doing anything on the land in dispute. Annual rental value of the land is N100.00 (One hundred naira).

The case of the appellants at the trial Customary Court was that their family is the owner of the land in dispute. They also admitted that the respondents farmed on the land in dispute as their customary tenants. The respondents on the other hand denied the claims of the appellants and gave evidence to show that they were in possession of the land in dispute not as customary tenants but as owners of the land.

In the course of the proceedings at the trial Customary Court, there was a visit to the locus in quo with the parties in attendance pursuant to the request made to the Court by one of the respondents. At the end of the entire proceedings, the trial Customary Court gave majority judgment of 2 to 1 in favour of the respondents' family. The majority judgment made 20 findings upon which the judgment was predicated.

Dissatisfied with the judgment of the Customary Court, the appellants appealed to the High Court, Ogun State where the majority decision was set aside. The respondents herein appealed to the Court of Appeal which set aside the judgment of the High Court and restored the majority judgment of the trial Customary Court. The appellants have now appealed to this Court. Two issues are submitted for the determination of this appeal. They are:-

1. Whether the learned Justices of the Court of Appeal were correct in holding that the appellate High Court Judge in reviewing and evaluating the findings of fact made by the trial Customary Court,

wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation of evidence were based on well established principles regulating the interference of an appellate Court with findings of fact by a trial Court.

2. Whether the learned Justices of the Court of Appeal were correct in failing to consider the appellants' response contained in their brief of argument to the issues argued by the respondents in their own brief before allowing the respondents appeal which failure constitutes a breach of the appellants constitutional right to fair hearing.

In view of the fact that this appeal relates to a matter which originated from a Customary Court, I wish to state clearly from the outset that in dealing with appeals from Customary Courts which include Area or Upper Area Courts, appellate Courts must not be too strict with regard to matters of procedure or technicality as the whole object of such trials is that the real dispute between the parties should fairly be adjudicated upon. In other words, appellate Courts are enjoined to look at the substance rather than the form when considering the judgment of a Customary Court. See *AKANBI AGBAJE & ORS V. CHIEF AGBA AKIN JOSHUA AJIBOLA & ORS* (2002) 2 NWLR (pt. 750) 127, *DINSEY V. OSSEI* (1939) 5 WACA 177.

Moreso, appellate Courts hearing appeals from Customary Courts are enjoined not to interfere with their findings except where grave miscarriage of justice has occurred on the face of the record of proceedings and the conclusion of the Customary Court is patently perverse. In *ONWUAMA V. EZEKOLI* (2002) 5 NWLR (pt. 760) at 365 paras D - F, this Court, per Uwaifo, JSC, held that:

"It has also been argued that the evidence led by the respondents was not satisfactory. It must be remembered that this case was tried in a Customary Court where pleadings are unknown. The proceedings in such Court are to be considered upon a broad view as to whether they were conducted in pursuit of the justice of the case presented by both parties. In other words, appellate Courts are to consider the substance of the proceedings of Native, Customary or Area Courts liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether substantial justice has been done to the parties within the procedure

permitted by such Courts. See *DINSEY V. OSSEY* (1939) 5 WACA 177, *JUMAI ALHAJI ZARIA v. YAR MAITUWO* (1966) NMLR 66, *IKPANG V. EDOHO* (1978) 6 - 7 SC. 221, *IBERO V. UMEOHANA* (1993) 2 NWLR (pt. 277) 510, *CHUKWUEKE V. OKORONKWO* (1999) 1 NWLR (pt.587) 410, *DURU V. ONWUMELU* (2001) 18 NWLR (pt. 746) 672.” B

With the above in mind, the facts of this case show that the appellants and respondents both relied on traditional evidence on the founding of the land in dispute and acts of possession. A visit to the locus by the Court in company of both parties showed that the respondents were actually the ones in possession of the land. On page 330 of the record of appeal, the Court below states that: C

“The trial Customary Court found that no member of the plaintiffs’ family farmed or ever farmed on the land in dispute. The 1st plaintiff in his evidence before the Court said he farmed on the land. Such was shown to be false during the visit to the locus in quo. The lower Court played down this point and talked of plaintiffs being owners of farm land having customary tenants. Clearly, the 1st plaintiff who said he farmed on the land which assertion, if correct would have put him in possession of the land, found to be false.” E

Even on page 22 of the record, the 1st plaintiff Zaccheus Faleye told the trial Customary Court under cross-examination that:

“No member of my family farmed on the land in dispute; but member of my family farmed opposite the land in dispute.” F

The above was contrary to his evidence in chief when he stated emphatically that he farmed on the land in dispute. The majority members of the trial Court made 20 findings in the course of evaluating evidence and entered judgment for the defendants (now respondents). G

The Court of Appeal found that there was no legal basis or reason for the interference of the appellate High Court with the evaluation of the evidence of the trial Customary Court. I agree with the Court below that the appellate High Court wrongly applied principles of law as to evaluation of evidence as the High Court had no right to appraise evidence based on credibility of witnesses which is basically the function of the trial Court. It appears the High Court forgot that it was sitting as an appellate Court. It is trite that the assessment of credibility of a witness is a matter within the province of the H

trial Court, as it is only that Court that has the advantage of seeing, watching and observing the witness in the witness box. It has the liberty and privilege of believing him and accepting his evidence either as a whole or in part; in preference to the evidence adduced by the defence. See DANIEL SUGH V. STATE (1988) NWLR (pt. 77) 475, ADELUMOLA V. THE STATE (1988) 1 NWLR (pt. 73) 683 at 690, NWANKPU V. EWULU (1995) 7 NWLR (pt. 407) 269, AGBI V. OGBEH (2006) 11 NWLR (pt. 990) 65.

The Court below was right when it rejected the position of the appellate High Court that evidence of a witness was most incredible and, according to the appellate High Court Judge, "I reject it." This was clearly in the exclusive province or domain of the trial Customary Court. Having made such elaborate findings, including a visit to the locus in quo, I agree with the Court below that the trial Customary Court did the best in the circumstance and the High Court had no business in disturbing its findings. Moreso, there was not even one customary tenant who gave evidence on behalf of the appellants who said that the occupants of the land were their customary tenants. The appellants failed to provide the trial Court with any proof of customary tenancy and the visit to the land did not reveal that the appellants had customary tenants on the land in dispute.

On the whole, and based on the fuller reasons enunciated in the lead judgment of my learned brother, Mary Ukaego Peter-Odili, JSC, which I hereby adopt as mine, I hold that there is no merit in this appeal. I accordingly dismiss same. I affirm the judgment of the Court of Appeal. I abide by all consequential orders made in the lead judgment, that relating to costs, inclusive.

G

SANUSI JSC

At the Grade One Customary Court of Ifo/Ota in Ogun State, the appellants as plaintiffs thereat, instituted an action against the defendants now respondents claiming the underlisted reliefs:-

- H 1. A declaration of title to the piece of farm land situate, lying and being Igbo Edidi between Osuke and Ijaba Roads, Ota.
2. An order of injunction to restrain the defendants, their servants, agents' or privies from entering, alienating or doing anything on the land in dispute. Annual rental value of the land is N100.00

(One Hundred Naira Only).

Briefly put, the substance of the plaintiffs'/appellants' claims against the defendants now respondents, was that their family was/is the owner of the land in dispute and that the defendants/respondents who had been farming on the farm land in dispute were simply customary tenants of the plaintiffs family. The defendants now respondents on the other hand denied the plaintiffs' claims and called evidence that they had been in possession of the said farm land for time immemorial and farming on it not as customary tenants, but as owners of same.

After proceedings before the Customary Court (hereinafter to be referred to as "the trial Court"), the trial Court by a majority judgment of 2 to 1 gave judgment in favour of the defendants' family when it held thus:-

"In totality, we find the plaintiffs' claim of title of ownership of the land in dispute failed and judgment cannot be entered in their favour and their claim (sic) is accordingly dismissed."

Being disenchanted with the judgment of the trial Court, the plaintiff/appellant appealed to the High Court of Ogun State sitting in its appellate jurisdiction ("the first appellate Court" for short) which upturned the decision of the trial Court when it held as follows:-

"Accordingly, I hereby allow the appeal and set aside the majority judgment of the lower Court. I hereby grant the plaintiffs a declaration that they are entitled to a customary right of occupancy to the parcel of land situate, lying and being at Igbo Eleide between Osuke and Iyaba roads Ota".

Aggrieved by the judgment of the first or intermediate appellate Court, the respondent herein, appealed to the Court of Appeal (hereinafter to be referred to as ("the lower or Court below) which allowed their appeal and restored the majority judgment of the trial Customary Court. The appellants then became piqued by the judgment of the Court below, hence he appealed to this Court and they jointly filed a notice of appeal dated 5th October 2012, containing five grounds of appeal. Sequel to that, the appellants decoded two issues for the determination of their appeal. The two issues are:-

1. Whether the leaned justices of the Court of Appeal were correct in holding that the appellate High Court Judge in reviewing and evaluating the findings of facts made by the trial Customary Court

wrongly applied the principle of law as to evaluation of evidence when the said review and evaluation of evidence were based on well established principles regulating the interference of an appellate Court with findings of fact by a trial Court.

B 2. Whether the learned justices of the Court of Appeal were correct in failing to consider the appellants' response contained in their brief of argument to the issues argued by the respondents in their own brief before allowing the respondents' appeal which failure constitutes a breach of the appellants' constitutional right to fair hearing.

C On their part, the respondents also formulate two issues for determination in their joint brief of argument filed on 4/3/2015 and the dual issues read thus:-

D (a) Whether the learned justices of the Court of Appeal were correct in holding that the Appellant (sic) High Court Judge, reviewing and evaluating the findings of fact made by the trial Customary Court, wrongly applied the principles of law as to evaluation of evidence when the said review and evaluation were based on well established principles regulating the inference of an Appellate Court with findings of fact by a trial Court.

E (b) Whether the learned justices of the Court of Appeal were correct in failing to consider the appellants' responses contained in their own brief before allowing the respondents' appeal which failure, constitutes a breach of the appellants' constitutional right to fair hearing.

F No doubt, the two set of issues raised by the parties learned counsel are more or less the same in the words employed in couching them. I will as such, utilise the issues raised in the appellants' brief of argument notwithstanding their verbosity since they appear to me to be all encompassing and have also captured the core issues canvassed by the parties' learned counsel and I will consider them together.

G On the first issue, the appellants' counsel submitted that the lower Court's was wrong to hold that the 1st appellate Court had wrongly reviewed and evaluated the facts and evidence adduced at the trial Customary Court. He stated that the lower Court did not appreciate the reasons proffered by the first intermediate appellate Court in arriving at such conclusion leading to its interfering with the

finding of the first appellate Court. He said what the first Appellate Court did was correct and he relied on the authority of *WILFRED OPALOKA & Ors v. BEN UMOH* (1976) 9 & 10 SC 269 of 302. He said the lower Court was wrong in relying on the findings of the trial Court which according to him, were not supported by evidence on the record. He argued that the 21 findings by the trial Court as upheld by the Court below which were not based on proper evaluation of evidence by the trial Court which called for the intervention by the first appellate Court. He contended that the appellants led evidence to establish that they were owners of the farm land in dispute and that the defendants/respondents were only customary tenants, hence the Court below was wrong in its conclusion that the appellants did not prove ownership of the said land since they had never farmed on the land. He cited the case of *NATHANIEL ORONWUTA AJEROI & Anor v. BERNARD UGOJI & Ors* (1990) 7 SC (pt 1) 58 at 66 to support the submission.

Again on the second finding of facts by the trial Court relating to failure of the appellants to tender survey plan of the land in dispute, learned appellants counsel argued that the Court below was wrong in drawing inference of failure on the part of appellants to prove ownership of the land, because issues of identity of the land in dispute were never an issue at the proceedings and all these pieces of evidence called for review by the first appellate Court. He referred to the testimony of PW6 on pages 131 lines 24, 31 of the Record, where evidence was adduced on the non-tendering of the survey plan at the trial Court, adding that, if the Court below had considered that it would have held otherwise. See *OLOWO OKUFUJA v. UDEJENMA AKWIDO* (2001) 1 SC (pt. II) 80 at 140. He also referred to the evidence of PW3 to further buttress the point on the trial Court's findings Nos 7 and 12. The learned counsel for appellants stated that such findings were perverse while findings No 14 was irrelevant.

On the second issue for determination, the learned counsel for the appellants submitted, inter alia, that the failure of the Court below to consider the response of the appellants' counsel violates his constitutional right to fair hearing as enshrined in Section 116(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended. He added that if the Court below had considered his arguments on the issues canvassed by the Respondents, it would not have disturbed

the evaluation made by the first appellate Court. Such failure to consider his arguments, the learned appellants' counsel submitted, had occasioned a miscarriage of justice on the appellants because the Court below did not properly exercise its function in that regard.

On acts of ownership and possession, learned counsel appellants contended that they had proved ownership possession since they showed that their family members had shown more acts of ownership and possession of the land than the respondents' family members as shown in the evidence of 3rd defendant which showed that they were owners of both the land in dispute and also the adjacent land connected to it. However, the Court below failed to consider such pieces of evidence, said the appellants counsel. He then urged this Court for resolve these two issues in his favour.

Reacting, the learned counsel for the respondents submitted that the first appellate Court did not in its judgment, proffer any reason for it to interfere with the evaluation of the evidence already duly evaluated by the trial Court. He contended that an appellate Court lacks the power to appraise evidence based on of credibility of the witness or witnesses, as that is the function of trial Court only, which had the opportunity to see, hear and watch the demeanour of such witnesses. He submitted that the trial Court was correct in relying on act of recent possession to determine the ownership of the land in dispute since the traditional evidence relied upon by both parties was inconclusive. See the evidence of PW1 on page 18 of the Record, to the effect that no member of the plaintiffs' family had ever farmed on the land in dispute. He added that the appellants did not call any of the tenants to give evidence of any tenancy.

Also on issue of survey plan, the respondents' learned counsel contended that allowing failure to tender a survey plan will not operate against them because there was no dispute on the identity of the farm land though he agree and argued that if survey plan had been tendered it would have shed more light on the area in dispute hence the lower Court was correct when it found that the non-tendering of the survey plan had affected the appellants' case, especially in view of the fact that PW1 and other witnesses gave conflicting evidence on the actual identity of the land in dispute. See the evidence of PW1 on pages 20 & 23 and on his cross examination at page 29 of the Record as well as the evidence of PW5 at page 37 and his cross examination

on pages 41 & 42 of the Record.

Then on issue No2, the respondents' counsel argued that failure of trial Court to consider the responses of the appellants to the issues canvassed by the respondents will not lead to reversal of the decision of the Court unless such failure had occasioned miscarriage of justice on them. See OMAJOBI v. OLANIPEKUN (1985) 2 SC (pt 1) 156. He argued that in this instant case, both the appellants and respondents relied on traditional history which are conflicting. He then opined that where there is conflict in the traditional history of the parties, the best way of making reference to the facts in recent years is by seeing which of the two histories is more probable. He submitted that the Court below was right in holding at page 351 of the Record that based on the rule in KOJO v. BONISIE (1957) 1 WLR 1223; "the plaintiffs are not entitled to a declaration of title when the evidence of acts of ownership is put on imaginary scale." He urged this Court to resolve the two issues in his favour and uphold the judgment of the lower Court.

Perhaps it will be apt to start the consideration of the first issue on the argument of the parties learned counsel regarding the evaluation of evidence by the High Court sitting with appellate jurisdiction or the first intermediate Court. The Court below in its judgment had inter - alia stated as below, per Fabiyi JCA as he then was)

"It appears to me that the learned judge of the Court below forgot that he was sitting as a Court of first instance. He completely took over the functions of the trial Customary Court by delving into the realm of credibility of witnesses. It goes without saying, that he crossed the line to a territory which is not his own. The findings of facts based on credibility of witnesses by the lower Court on appeal were not validly made. They should not be allowed to stand. An appellate Court generally loathes to review the testimony of witnesses based on credibility. See Elendu & Ors v. Ekwoaba (1995) 3 NWLR (pt 386) 704."

It is worthy of note, that the trial Court in its judgment made more than 13 far reaching findings and thoroughly considered the testimonies of witnesses who testified before it and evaluated their evidence before drawing inferences or conclusions as to the credibility of each individual witness and taking its stand rejecting or accepting the evidence of each divisional witness who testified before it.

Needless to say, that the trial Court had the singular opportunity to see, hear and watch the demeanour of each witness who testified. However, surprisingly and quite disappointingly, the learned judge of the intermediate Court i.e. the High Court of Appeal in its judgment, wrongly embarked on fresh evaluation when he on some instances, B for instance while referring to a witness's testimony state "his evidence is most incredible and I reject it". Also while considering a portion of its judgment, the intermediate Court also held that "the findings of the trial Court was irrelevant because PW1 was a customary C tenant". Even where the trial Court held that it believed a particular witness or witnesses, the learned High Court Judge gave his own conclusion to upturn where the trial Court stated that it believed or disbelieved a particular witness.

It must be emphasised here and it is even settled law, that an D appellate Court does not as a matter of practice or law interfere where trial Court unquestionably evaluates evidence and justifiably upraises the facts. The reason for this practice is because it is the trial judge who takes down all relevant evidence. Thereafter, when writing his ruling or judgment and the trial judge weighs the evidence in the E surrounding circumstance of the case. That is called evaluation. When evaluation of evidence is properly done, the finding of that trial Court are difficult to be faulted by any appellate Court. See *Osuagwu v. The State* (2013) SC (pt. I) 37. *Ibanga v. Usanga* (1982) 5 SC (Reprint) 49. A trial Judge is therefore at liberty to draw interferences F and deduce or infer from the evidence before him. I must reiterate here, that where evaluation of evidence does not involve the credibility of witnesses but the complaint is simply against the non - evaluation or improper evaluation of evidence by the trial Court, then that G is where an appellate Court is in as good a position as the trial Court, as it can do its own evaluation. See *Adeyeri II v. Atanda* (1995) 5 NWLR (pt 397) 512.

The surrounding circumstance of this instant case, is not an example of a case, where the intermediate Court (i.e. the High Court) H can usurp or assume the position or function of the trial Court, because as I stated earlier, there was already proper evaluation of the evidence by the trial Court and there was no allegation of improper or non-evaluation of the evidence all. The intermediate appellate Court has therefore goofed, when it usurped the function of the trial

Court as rightly held by the Court below. I therefore agree entirely with the Court below that the findings of the intermediate appellate Court should not be allowed to stand, as in adopting his approach, the learned High Court Judge mistook himself to be a trial judge and as such he usurped the trial Court's function without giving any justifiable reason or reasons for doing so. B

It is clear from the evidence borne out from the Record of appeal, that the trial Court made about 21 findings which went a long way in coming to its conclusion that the appellants, as plaintiffs at the trial failed to prove their claims for title to the farmland in dispute. Some of these pieces of evidence which the lower Court endorsed include the facts that none of the plaintiffs ever farmed on the land which had been in possession and ownership of the defendants (now respondents) for time immemorial. Other conclusions reached by it include the followings. C

- (a) that no survey plan was tendered by the plaintiffs/appellants. D
- (b) that 3rd plaintiff bought trees from and paid the defendants. E
- (c) when the trial Court visited the locus in quo, it saw the demarcation of the land.
- (d) that all the farms bought by the first plaintiff were bought from the defendants family members.
- (e) no evidence was led by the plaintiffs to prove that defendant were customary tenants on the said land, the amount they had been paying as rentage or kola and to whom such were paid by the plaintiffs. F

Although in its judgment, the first intermediate Court disbelieved or rejected the above listed and other findings of the trial Court, that was not done within the context or extent the law allows it to do, hence the substitution of them by him in his judgment were rightly rejected by the Court below. The trial Court had visited the land with both parties family members and appraised its identity and demarcation. Its findings on that cannot therefore be faulted or assailed. G H

On the whole, I think it will not be out of place if say a word or two on how title to land can be established. The law has established five modes of proof of title to land. Ownership of land can be proved in any of the following five ways, namely:-

1. By traditional evidence.
2. By production of documents of title.
3. By the exercise of numerous and positive acts of ownership extending over a sufficient length of time to warrant the interference that the person is the owner.

B 4. By act of long possession and enjoyment of the land, and
 5. By proof of possession of adjacent land in the circumstance rendering it probable that the owner of such connected or adjacent land would in addition be the owner of the land in dispute.

C See the case of *IDUNDUN v. OKUMAGBA* (1976) 9 - 10 SC 227.

 It should be noted however, that proof of any of the above mentioned five modes, is enough to establish title to land. See *AIKHIONBARE v. OMOREGIE* (1970) 12 SC II.

D Also, in a claim of declaration of title to land, the onus is on the plaintiff to satisfy the Court that he is entitled on the evidence adduced by him, to the declaration he seeks. The plaintiff must therefore rely on the strength of his own case and should not rely on the weakness of the defendant's case. See *ITAUMA v. AKE-IME* (2001) 7 SC (pt II) 24.

E The plaintiff must show to the Court by credible evidence, that he has a better title than the defendant. See *SODEINDE v. ADENIJI* FSC 5/1962.

F In the instant case, it is clear from the evidence adduced at the trial Court, that the defendants, now respondents, had all along been in possession of the land in dispute without any disturbance or interference and that had been for time immemorial before the time this suit was instituted by the plaintiffs/appellants. Not only that, there was shred of evidence of acts of possession of the said land shown by
 G the defendants because the defendants' family members were the ones tilling or farming on the land. The plaintiffs did not lead any credible evidence to show that they were farming on it as of right for a long time. Evidence also abound that one of defendants had even rented the farm land to farm on. Therefore, it can be said that the
 H defendants had established acts of possession and had also led evidence of act of ownership, in that they were farming on the land, renting it to others and even cutting trees thereon.

 Then coming to the issue of traditional history, it is noted by me, that there had been conflict in the evidence of traditional history,

as adduced by both parties.

Therefore, the evidence of traditional history is inconclusive. It is trite law, that a plaintiff can still establish title in this situation, by showing acts of ownership extending over sufficient length of time numerous and positive enough to warrant the inference that he is the exclusive owner of the land. See ODOFIN v. AYOOOLA (1984) 11 SC 72. B

Also, where both parties rely on traditional evidence, the Trial Court must make clear and positive statement as to which story it accepted and which side it believed before making its findings. See GRAHAM v. EUSMAI (1984) 11 SC 123. As I said earlier, in this instant case, the plaintiffs/Appellants did not show acts of ownership extending over sufficient length of time numerous and positive to warrant drawing inference that they are exclusive owners of the land in dispute. On the other hand, the defendants, now respondents, did show such act of ownership for a long period to warrant drawing the inference that they were the exclusive owners of the land. C
D

In approaching this issue, the trial Court in its judgment accepted that no member of the family of 1st plaintiff ever farmed on the land in dispute and it also confirmed that when it visited the locus in quo and the Court below accepted such findings of the trial Court. As such, the findings of the Court below on that in my view can also not be faulted. I therefore resolve this issue against the appellant. E

Then on the second issue, the appellants grouse is that the trial Court failed to consider their responses to the issues canvassed by the respondents and that such failure had occasioned them miscarriage of justice. To them, the Court below was wrong for not considering their submissions in the appellants' brief of argument before it allowed the appeal. Learned counsel argued that such failure runs riot and violent to the provisions of Section 36 (1) of the 1999 Constitution, in urging this Court to set aside the decision of the Court below. F
G

Conversely, the respondents' learned counsel's contention is that failure to consider the appellants' response to the issues canvassed should not lead to reversal of the lower Court's decision. H

I am inclined to align with the stance of the learned counsel for the respondents that such mistake or failure to consider the appellants' response could not and should not lead to the reversal of the

decision of the lower Court because such failure or omission, if so regarded, will defeat the course of justice, since the case was diligently determined on the merit. On closely examining the decision of the Court below, one is left in no iota of doubt that the lower Court painstakingly dwelt into all the salient issues canvassed by the parties during the hearing of the appeal. The appellants had thoroughly ventilated their grievances before the Court below and the Court had carefully, diligently and painstakingly addressed them before arriving at the conclusion it reached. Also, I am not at one with the appellant's counsel's view that miscarriage of justice was occasioned on them because of such failure, omission or mistake since even if there was no such omission, mistake or failure, the result or conclusion arrived at might not be different from the one reached by the Court below. This issue is therefore also resolve against the appellants herein.

On the whole, both issues have been resolved by me against the appellants. Thus, for this few discourse of mine and for the more detailed reasons given by my learned Mary Ukaego Peter-Odili JSC, which I am in entire agreement with and also adopt as mine. I also find the appeal lacking in merit. I accordingly dismiss the appeal and affirm the judgment of the Court of Appeal in which it set aside the judgment of the High Court of Ogun State, sitting in its appellate jurisdiction and restored the judgment of the Customary Court Grade I. I also award costs of N100, 000 to the Respondents against the Appellants.