

SUPREME COURT OF NIGERIA
FRIDAY 24TH FEBRUARY, 2017. SC. 218/2004
CORAM:- M. U. PETER-ODILI, K. B. AKA'AH, K. M. O. KEKERE-EKUN, C. C. NWEZE, E. EKO, JJSC

1. ASANI SOGUNRO & 5 OTHERS APPELLANTS
AND
1. AREMU YEKU
2. JIDE KOTOYE
3. AYINDE SHOWUNMI RESPONDENTS
(For themselves and on behalf of
Somolu Okunseinde Family)

PLEADINGS - Binding nature of - Once pleadings are filed and exchanged - Parties and Court are bound by same - And evidence which is not in conformity with pleadings - Goes to no issue (H1)

LAND LAW - Title - Proof - Traditional evidence - Such evidence must be cogent and positive - As where it is contradictory - It will be treated as unreliable and must be rejected (H2)

EVIDENCE - Land law - Hear say evidence - Exception to - Traditional evidence - Witnesses who give the evidence will not necessarily give eye witness account - Hence such evidence is by virtue of E.A. 2011 s. 66 - Delisted from hear say rule (H3)

LAND LAW - Title - Traditional evidence - Weight - Where Court finds such evidence to be cogent and not contradictory - It will be sufficient to support claim for declaration of title (H4)

LAND LAW - Title - Proof - Traditional evidence - Conditions - A party cannot merely rely on such evidence - As he is bound to plead founder of land - How land was founded - And particulars of intervening owners (H5)

EVIDENCE - Evaluation - Ascription of probative value based on

credibility of witness - Is exclusive role of trial Court - Which appellate Court does not venture into (H6)

EVIDENCE - Evaluation - Interference - Basis - Save trial Court adduces wrong reason for assessing witness - Appellate Court would seldom interfere with its ascription of credibility to witnesses (H7)

APPEALS - Concurrent findings - Validity - As appellants did not succeed in impeaching concurrent findings of lower Courts - There is no justification for Supreme Court to interfere with the findings (H8)

FACTS

Before the High Court of Ogun State Otta Judicial Division, plaintiffs/appellants commenced this action by Writ of Summons, claiming a declaration of forfeiture of defendants/respondents’ tenure under native law and custom. Appellants also claim possession of the land in issue. Appellants’ case is that respondents being tenants of appellants have by their actions denied appellants’ title and have claimed ownership absolutely or through other source. At the hearing of the matter, seven witnesses testified in favour of appellants. On their part, respondents’ case was put forward by their five witnesses.

In his address at the end of the oral testimonies, learned counsel for respondents contended that appellants failed to establish that they (respondents) were their customary tenants. He explained that the ancestors of respondents settled at the land in issue. Counsel pointed out that appellants and their witnesses confirmed that the ancestors of respondents, namely, Odeyale and Odeleye founded Olowotedo and created Oluweri Stream. On the other hand, learned counsel for appellants urged the Court to find that they made out a case that it was appellants’ ancestors, namely, Abinu and Adetonlu, who first settled on the land, having migrated from Ile-Ife, stopping over at Ijebu-Ode. In its judgment, the Court

dismissed appellants' claims. Dissatisfied, appellants appealed to the Court of Appeal, Ibadan Division. The Court in its judgment, dismissed the appeal. Still aggrieved, appellants appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether having regard to the pleadings and totality of evidence adduced, the Court below was right in dismissing the appellants' appeal?

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

PLEADINGS - Binding nature of

1. In the first place, as the question of acquisition was not pleaded it went to no issue. The explanation is simple. Once pleadings are ordered, filed and exchanged, the parties, and indeed the Courts, are bound by them. The implication, therefore, is that evidence must be led in accordance with the averments therein. That explains the impregnable prescription that evidence which is not in conformity with the pleadings goes to no issue.

This ubiquitous principle in the vocabulary of pleadings applies with equal force whether the pleadings and evidence are those of the plaintiff or the defendants.
(p. 230 G)

LAND LAW - Title - Proof - Traditional evidence

2. In his submission, that also exposed the inconsistency in the appellants' traditional evidence: a situation which is at odds with the settled position that for traditional evidence to sustain a claim for declaration of title, it must be cogent, direct and positive. On the contrary, where evidence of traditional history is contradictory and incredible, it would be treated as unreliable and must hence be rejected and the action is liable to be dismissed.
(p. 235 B)

Hear say evidence - Exception to - Traditional evidence

3. My Lords, permit me to point out, by way of prefatory remarks, that this Court has warehoused an impressive corpus of jurisprudence on the genre of the accepted mode of establishing title to land known as traditional evidence or traditional history.

This sort of evidence, namely, traditional evidence, which, in actuality, is a bit of ancient history, is evidence as to rights alleged to have existed beyond the time of living memory proved by members of the community or village who claim the land as theirs or who defend a claim to such.

It is against this background that Courts have recognised the obvious fact that the witnesses, who are called upon to give traditional evidence, would not necessarily be in a position to give an eye-witness account. Invariably, such witnesses cannot speak from personal knowledge as they merely repeat the story which their ancestors had told them. That notwithstanding, the Law, in its wisdom, allows such evidence, most probably, in view of the fact that much of our past is practically unrecorded. Clear evidence of the wisdom of the Law in this regard could be found in Section 44 of the Evidence Act (applicable at the material time; now, Section 66 of the Evidence Act, 2011) which delisted this category of evidence from the hear-say rule and elevated it to the status of admissible evidence. (pp. 236 A/G)

LAND LAW - Title - Traditional evidence - Weight

4. This is the background to the prescription which has crystallised from decided cases that, once traditional evidence is found to be conclusive and cogent, there would be no need whatsoever to require further proof.

In consequence, where a Court finds evidence of traditional history to be cogent, neither contradictory

nor in conflict or competition with that of the defendant, and accepts it, it would be sufficient to support a claim for declaration of title to land. (p. 237 C)

LAND LAW - Title - Proof - Traditional evidence - Conditions

5. It has to be emphasised, however, that these broad prescriptions are hedged around with qualifications. Thus, it has now been settled that traditional evidence must be such as to be consistent and properly link the plaintiff with the traditional history relied upon. Above all, it is not sufficient for a party who relies for proof of title to land on its [traditional evidence], as in the instant case, to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial.

Such a party is bound to plead such facts as (1) who founded the land; (2) how the land was founded and (3) the particulars of the intervening owner through whom he claims. And now this! Where such a party projects two competing histories of his ownership in support of his claim, he would have failed to prove the case he set out to propound. If he is the plaintiff, his claim must be dismissed. If he is the defendant, he would have failed to make out a defence against the traditional history of the plaintiff. (p. 237 G)

EVIDENCE - Evaluation

6. My Lords, since trial Court's ascription of probative value was based on the credibility of witnesses, I have an obligation to remind Your Lordships that every trial Judge is in a better position than the appellate Court to decide the issue of credibility of the witnesses. The reason is not farfetched. He (the trial Judge) has the singular advantage of seeing and observing the witnesses. He watches their demeanour; candour or partisanship; their integrity and manners. These advantages are not normally enjoyed by an appellate Court which only has the cold

printed evidence to contend with.

What is more, as a vital area of credibility, it is only the trial Court which saw and watched the demeanour of the witness that has the exclusive role of watching the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it. This is the basic premise that yielded the logic in the reasoning of the decisions of this Court that where the issue is that of credibility of witnesses, the appellate Court has a very limited, if any, scope to interfere. Thus, it (the appellate Court) can only do so when the trial Court decided to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document.
 (p. 243 D)

EVIDENCE - Evaluation - Interference - Basis

7. In effect, therefore, unless the trial Court adduces a wrong reason for believing or disbelieving a witness, an appellate Court would seldom, interfere with its ascription of credibility to witnesses. Put differently, it is only where the appellate Court, either because the reasons given by the trial Judge are not satisfactory or because it unmistakably, so appears from the evidence, is satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses, that it could properly interfere. In such a case, the matter would then become at large in the appellate Court. (p. 244 D)

APPEALS - Concurrent findings - Validity

8. As the appellants did not succeed in impeaching the concurrent findings of the lower Courts by accentuating their perversity, I have no justification for interfering with them. In all, I find no scintilla of merit in the appellants' complaint against the judgment of the lower Court. I therefore unhesitatingly enter an order dismissing this

appeal. (p. 245 C)

NOTABLE POINT OF INTEREST

PETER-ODILI JSC

1. Land law – Proof of title – Modes of

It is now trite that five modes are utilised in establishing title to land and in this, the case of *Idundun v. Okumagba* (1976) 9 - 10 SC has been very helpful and those methods are thus:-

1. Traditional evidence.
2. Production of documents of title which are duly authenticated.
3. Acts of selling, leasing, renting out all or part of the land of farming on it or on a portion of it.
4. Acts of long possession and enjoyment of the land, and
5. 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. (p. 252 C)

REPRESENTATION

R. O. Sadik for the Appellant

Dele Oloke for the Respondent

CASES REFERRED TO

Onwuka v. Omogui (1992) 3 NWLR (pt. 230) 393

Okoro v. Dakolo (2006) LPELR -2461 (SC) 19-20

Akinloye v. Eyiola (1968) NWLR 92

Alli v. Alesinloye (2000) FWLR (pt. 15) 2610

Obulor v. Obiora (2001) 4 SC (pt. 1) 77

Eze v. Atasie (2000) FWLR (pt. 13) 2180

Emegokwe v. Okadigbo (1973) 4 SC 113

Akinterinwa v. Oladunjoye (2000) LPELR 358 (SC) 18

Aminu v. Hassan (2014) LPELR - 22008 (SC) 24

Idahosa v. Oronsaye (1959) 4 FSC 166

NIPC Ltd v. Thompson Organization Ltd. (1969) NMLR 99

Ogbodo v. Adelugba (1971) 1 All NLR 68

Ipinlaiye II v. Olukotun (1996) 6 NWLR (pt. 453) 148

Paul v. George (1959) SCNLR 510

Ajoke v. Oba (1962) 1 SCNLR 137

B STATUTE REFERRED TO

Evidence Act 2011, s. 66

LEAD JUDGMENT BY NWEZE JSC

C At the High Court of Ogun State, Otta Judicial Division, the appellants in this appeal (as plaintiffs) caused a Writ of Summons to be issued against the respondents herein (defendants). Pleadings were settled and exchanged; amended and exchanged.

D The case of the appellants, as could be gleaned from Paragraph 33 of the Further Amended Statement of Claim, was expressed thus *“The defendants being tenants of the plaintiffs have by their actions denied the plaintiffs’ title and have claimed ownership absolutely or through other source.”* The reliefs sought were

E couched thus:

“34 (a) A Declaration of forfeiture of the defendants’ tenure under native law and custom;

(b) Possession of the said land.”

F Seven witnesses testified in favour of the plaintiffs. On their part, the defendants’ case was put forward by their five witnesses. In his address, at the end of the oral testimonies, learned counsel for the defendants contended that the plaintiffs failed to establish that they (the defendants) were their customary tenants at Ibasá.
G He explained that the ancestors of the defendants settled thereat. He pointed out that the plaintiffs and their witnesses confirmed that the ancestors of the defendants, namely, Odeyale and Odeleye founded Olowotodo and created Oluweri Stream or river.

H Contrariwise, learned counsel for the plaintiffs urged the Court to find that they made out a case that it was the plaintiffs’ ancestors, namely, Abinu and Adetonlu, who first settled on the land, having migrated from Ile Ife, stopping over at Ijebu Ode. They finally, settled down at the land in dispute. In its judgment of Octo-

ber 21, 1988, the Court, (hereinafter referred to as “*the trial Court*”), dismissed the plaintiffs’ claim.

Like the trial Court, the Court of Appeal (hereinafter, simply, referred to as “*the lower Court*”), also dismissed the Plaintiffs’ appeal to it from the said judgment.

This further appeal to this Court is the appellants’ expression of their disavowal of the validity of the reasoning of the lower Courts judgment. Although three issues were originally formulated in the brief of argument filed on May 14, 2012, learned counsel for the appellants abandoned the second and third issues at the hearing of the appeal on November 29, 2016.

They were accordingly, struck out. In effect, only the subjoined first issue is outstanding in the appellants’ favour:

Whether the lower Court have (sic) sufficiently considered the findings of the trial Court as to the establishment by the respondents of long settlement on the disputed land their root of title by way of long settlement or sufficient traditional evidence?

On his part, learned counsel for the respondents formulated two issues. As a logical corollary to the approach of the learned counsel for the appellants, he [the respondents’ counsel], also abandoned the second issue in the brief filed on March 30, 2015, although deemed properly filed on November 29, 2016. Thus, only the first issue in the said brief is outstanding in favour of the respondents. It was framed thus:

Whether having regarding (sic) to the pleadings and totality of evidence adduced, the Court below was right in the (sic) dismissing the appellants’ appeal?

My Lords, in my humble view, the phraseology of the outstanding issue one in the respondents’ brief is more felicitous than the woolly tenor of the appellants’ outstanding issue. Above all, it is even more succinct and more precise apropos the appellants’ main grouse against the judgment of the lower Court. It will accordingly, be adopted in the determination of this appeal. Thus, the issue for determination is:

Whether having regard to the pleadings and totality of evidence adduced, the Court below was right in dismissing the appel-

lants' appeal?

Before dealing with this issue, it would be necessary to dispose of the Preliminary objection of the respondents. The gist of the said objection, argued on page 3-5 of the respondents' brief, was that the appellants', in their Ground Four of the Notice and
B Grounds of Appeal, raised the issue of acquisition for the first time without obtaining the leave of Court.

It was pointed out that, at the lower Court, the respondents canvassed the same objection: an objection which the said lower
C Court upheld. Learned counsel submitted that the only option left for the appellants was to challenge the lower Court's order striking out the said ground by complaining against it. He cited several cases on the point that the ground formulated on the said question of acquisition before this Court neither arose nor emanated from
D the lower Court's decision, paragraphs 5.3, page 4 of the respondents' brief.

The appellants attempted to debunk these arguments in their Reply brief deemed properly, filed on November 29, 2016. Like
E the respondents/objectors, the appellants too placed reliance on so many decided cases.

Without much ado, there is no gainsaying the fact that this objection was well-taken. Indeed, it may only suffice to refer to the view of the lower Court on this point. According to the Court:

F *As the issue of acquisition was not pleaded in the lower Court and without any comment in a (sic) judgment of the lower Court, such non-issue is incompetent to be argued on appeal based on the case (sic, cases) of Akibu v. Oduntan (2000) 7 SCNJ 189; Egbe v. Alhaji (1998) 1 NWLR (pt 128) 540, 598. (Page 181 of the*
G *record)*

In the first place, as the question of acquisition was not pleaded it went to no issue. Onwuka v. Omogui (1992) 3 NWLR (pt. 230) 393. ***The explanation is simple.***
H ***Once pleadings are ordered, filed and exchanged, the parties, and indeed the Courts, are bound by them. The implication, therefore, is that evidence must be led in accordance with the averments therein. That explains the***

impregnable prescription that evidence which is not in conformity with the pleadings goes to no issue. Okoro v. Dakolo (2006) LPELR -2461 (SC) 19-20.

This ubiquitous principle in the vocabulary of pleadings applies with equal force whether the pleadings and evidence are those of the plaintiff or the defendants. B

Akinloye v. Eyiola (1968) NWLR 92, 95; Alli v. Alesinloye (2000) FWLR (pt. 15) 2610, 2653, D - H; [2000] 6 NWLR (pt. 660) 177; Obulor v. Obiora (2001) 4 SC (pt. 1) 77, 79-80; (2000) 8 NWLR (pt.714) 25. C

As this Court had once, explained, the rationale behind this principle of law is that by our adversary system of civil procedure in the High Court, facts are first erected on the pleadings before the trial of the case. This is to foreclose the likelihood of springing surprises at the trial and to circumscribe the compass or breadth of divergences. This inviolable or sacrosanct rule is only subject to the fairly liberal rules appertaining to the amendment of pleadings. D

Thus, if and when parties join issues in the settled pleadings; E
amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts, Okoro v. Dakolo (supra) 42-43, paragraphs D-A; Eze and Ors v. Atasie and Ors (2000) FWLR (pt 13) 2180, 2189; (2000) 10 NWLR (pt F 676) 470; Emegokwe v. Okadigbo (1973) 4 SC 113; Obimiami Brick and Stone (Ng.) v. A.C.B. Ltd. (1992) 3 NWLR (pt.229) 260; Akinterinwa and Anor v. Oladunjoye (2000) LPELR 358 (SC) 18; Aminu and Ors v. Hassan and Ors (2014) LPELR - 22008 (SC) 24, A- C; Idahosa v. Oronsaye (1959) 4 FSC 166; [1959] SCNLR 40. G

Others include, NIPC Ltd v. Thompson Organisation Ltd (1969) NMLR 99, 104, (1969) 1 All NLR 138; Ogbodo v. Adelugba (1971) 1 All NLR 68; Ipinlaiye II v. Olukotun (1996) 6 NWLR (pt. H 453) 148, 165 - 166; Paul v. George (1959) SCNLR 510; Ajoke v. Oba (1962) 1 SCNLR 137; George v. UBA Ltd (1972) 8 - 9 SC 284, 274; Njoku v. Eme [1973] 5 SC 293; Oke-Bola v. Molake

[1975] 12 SC 61.

What is more, as learned counsel for the Objector pointed out, without the leave of Court such a fresh issue cannot be taken up on appeal. The cases on this point are too many that they need not delay us here. Howbeit, one or two of them may be cited, B Ejiiofodo v. Okonkwo [1982] 11 SC 74; Agbiti v. NA (2011) LPELR - 2994 (SC); Stirling SC Eng (Nig) Ltd v. Yahaya (2005) LPELR - 3118 (SC); Gwede v. INEC and Ors (2014) LPELR -23763 (SC); Edjekpo and Ors v. Osia and Ors (2007) LPELR - 1414 (SC); C Ibrahim v. Lawal (2015) LPELR -24736 (SC); Dagaci of Dere and Ors v. Dagaci of EBWA and Ors (2006) LPELR -911 (SC); Petrojessica Ent. Ltd and Anor v. Leventis Tech Coy. Ltd (1992) LPELR - 2915 (SC).

In all, I find sufficient merit in the respondents' Preliminary D Objection and I accordingly, sustain and uphold it. In consequence, I hereby strike out Ground One of the Notice of Appeal for being incompetent.

ARGUMENTS ON THE SOLE ISSUE FOR DETERMINATION
E SOLE ISSUE

Whether having regard to the pleadings and totality of evidence adduced, the Court below was right in dismissing the appellants' appeal.

APPELLANTS' CONTENTION

F At the hearing of this appeal on November 29, 2016, learned counsel for the appellants, R. O. Sadik, adopted the appellants' brief of argument, which as shown above, was deemed, properly filed on November 29, 2016. He equally, adopted the reply brief G deemed properly filed on November 29, 2016. He relied on the arguments on both processes as his argument in the appeal.

It was contended that the traditional history of the appellants reveals that their great ancestor known as Abinu was the first person to settle on the land in dispute, citing Ogedengbe and Ors H v. Balogun and Ors (2007) 3 SC (pt 11) 71, 79. In counsel's submission, a claim of title must be made with certainty in a defined area. As such, before a declaration of title could be made, the land to which it relates must be ascertained with certainty.

Learned counsel pointed out that the appellants, at the trial, gave un-contradicted evidence that the said Abinu migrated from Ile - Ife and finally settled on all that parcel of land at Igaun which includes Ibaso which is the land in dispute. He further pointed out that the appellants established by evidence that the respondents and their forefathers were paying yearly tributes to the appellants and only stopped such tributes when the appellant instituted this case at the trial Court. Somewhat, most curiously, although counsel abandoned the third issue which was on acquisition, he failed to abandon submissions on it on paragraphs 5.4 - 5.7 of the brief. Be that as it may, having struck out that issue, these arguments go to naught.

He inveighed against the lower Court's judgment which, in his submission, neglected the question of identity of land, contending that the identity of the land in dispute is not only crucial but has to be determined first before the issue of title to land, citing *Balogun v. Akanji* (2005) 3 - 4 SC 95 which relied on *Idundun v. Okumagba* [1976] 9-10 SC (Reprint) 140; (1976) 9-10 SC 27 on the five methods of proving ownership of land. He finally, cited *Kojo II v. Bonsie and Anor* (1957) 1 WLR 1223, 1226.

On the question of customary tenancy, it was submitted that a customary tenant is entitled to use and occupy, subject to payment of rent and good behaviour; a claim by a tenant to share common or equal rights with the landlord or overlord is against allodial rights and the territorial duty of the tenant to pay rent to the allodial owner, *Archibong and Ors v. Ita and Ors* (2004) All FWLR (pt 199) 930, 960.

Counsel maintained that where the respondents as customary tenants to the appellants fail to pay their rent, they are bound to forfeit such once there is a breach of the incidence of tenancy and the tenant would be liable to be visited with the punishment of forfeiture, *Okpala and Ors v. Okpa and Ors* (2005) 1 SC (pt 111) 25, 34. As pointed earlier, although counsel abandoned the third issue of acquisition, he failed to apply to have the arguments on it in the brief (paragraphs 2.14 -2.23, pages 4-5) to be struck out.

He urged the Court to allow the appeal.

SUBMISSIONS OF THE RESPONDENTS

Dele Oloke, Learned counsel for the respondents, adopted the brief filed on March 30, 2015, although deemed filed on November 29, 2016. In the said brief, it was pointed out that the appellants, by their pleadings and evidence, predicated their case on traditional evidence of settlement. In addition, they averred that the respondents were their customary tenants, citing paragraphs 5-8 of the Further Amended Statement of Claim, pages 65 -69 of the record.

Counsel drew attention to paragraph 6 of the Further Amended Statement of Defence, page 53 of the record. He explained that the respondents therein denied the issue of customary tenancy. They, in fact, pleaded that their ancestors, Somolu and Okuseinde, who came from Igbein, originally settled at the vast area of land which included the land in dispute.

He pointed out that the evidence of the appellants' PW2 was at variance with the averments in paragraph 6 of the Further Amended Statement of Claim that it was Adejonlu that granted land to the respondents' predecessors-in-title and not Abinu as PW2 claimed in his testimony. Counsel, further pointed out that the evidence of PW2, at page 79 of the record, to the effect that Odeyale founded Olowotodo was also at variance with the averment in paragraphs 6 and 7 of the Further Amended Statement of Claim that Odeyale came to settle with Adejonlu at Olowotodo. He accordingly, invited the Court to hold that the above pieces of evidence, at variance with the pleadings, must be discountenanced, *Ademoso v. Okoro* (2005) All FWLR (pt 227) 844; *Orizu v. Anyaegbunam* (1978) 5 SC 21.

He canvassed the view that since, from the testimony of PW2, Odeyale, actually, founded Olowotodo and thus, was not the appellants' customary tenants, that evidence decimate the foundation of their claim woven around customary tenancy.

Turning to the appellants' traditional evidence, counsel drew attention to the evidence elicited from PW1 under cross examination to the effect that Ibasas is the location where hunters roast

animals which they kill in the bush. In addition, that palm oil is processed in Ibasa. He also referred to page 84 of the record where PW3 admitted that Ibasa is a place where they make palm oil. He pointed out the consistency of these pieces of evidence with the averments in the respondents' pleadings and indeed vindicated the meaning which the respondents ascribed to Ibasa in paragraph 9 of their Further Amended Statement of Defence, page 53 of the record. ***In his submission, that also exposed the inconsistency in the appellants' traditional evidence: a situation which is at odds with the settled position that for traditional evidence to sustain a claim for declaration of title, it must be cogent, direct and positive.*** Olujebu of Ijebu v. Osho Eleda of Eda [1973] 2 SC 143; Ogun v. Akinyelu (2005) All FWLR (pt 243) 601. ***On the contrary, where evidence of traditional history is contradictory and incredible, it would be treated as unreliable and must hence be rejected and the action is liable to be dismissed.*** Salami v. Gbodoolu (1997) 4 NWLR (pt. 499) 277.

Expectedly, counsel endorsed the approach (page 8 of the respondents' brief) of the trial Court at page 124 and 125 of the record: an approach which was affirmed by the lower Court. He noted that the submissions at page 5.01 of the appellants' brief, on the identity of the land in dispute, bear no relationship with Grounds 1 and 2 of the Notice and Grounds of Appeal and the issues framed therefrom.

Against the background of the evidence on record and the concurrent findings thereon, he derided the sustainability of the appellants' claim that their progenitor, Abiru, migrated and settled at Gaun which includes Ibasa. He maintained that the lower Court considered the pleadings, evidence on record and the trial Court's findings thereon and affirmed the said findings, citing Onalaja JCA (pages 9 and 10 of the respondents' brief). He urged the Court to resist the temptation of interfering with the said concurrent findings, Kalango v. Governor of Bayelsa State (2009) All FWLR (pt 476) 1839.

RESOLUTION OF THE SOLE ISSUE

My Lords, permit me to point out, by way of prefatory remarks, that this Court has warehoused an impressive corpus of jurisprudence on the genre of the accepted mode of establishing title to land known as traditional evidence or traditional history. Ohiaeri and Anor v. Akabueze and Ors (1992) LPELR -2360 (SC) 39; Alade v. Awo (1975) 4 SC 215; Idundun v. Okumagba (1976) 1 NMLR 206.

This sort of evidence, namely, traditional evidence, which, in actuality, is a bit of ancient history, is evidence as to rights alleged to have existed beyond the time of living memory proved by members of the community or village who claim the land as theirs or who defend a claim to such land, Dike and Ors v. Nzeka and Ors (1986) LPELR - 945 (SC) 23 -24; D-A.

Somewhat most intriguingly, even very senior counsel do not seem to appreciate that, in a strict sense, that type of evidence (traditional evidence) is no more than hearsay evidence, Alade v. Awo (1975) LPELR 400 (SC) 12. True indeed, it is hearsay upon hearsay, Alade v. Awo (supra); Obasi and Anor v. Onwuka and Ors (1987) LPELR - 2152 (SC) 6- 7. This must be so because it deals with events which occurred long ago, and the history of which has been handed down from father to son, or from generation to generation, Alade v. Awo (supra); Obasi and Anor v. Onwuka and Ors (supra).

Almost always, the rights which the parties seek to establish by traditional evidence are such as had existed outside living memory or that “*existed beyond the time of living memory...*”, per Lord Cohen in *The Stool of Abinabina v. Enyimadu* Vol XII WACA 171, 172 (italics supplied).

It is against this background that Courts have recognised the obvious fact that the witnesses, who are called upon to give traditional evidence, would not necessarily be in a position to give an eye-witness account. Invariably, such witnesses cannot speak from personal knowledge as they merely repeat the story which their ancestors had told them. That notwithstanding, the Law,

in its wisdom, allows such evidence, most probably, in view of the fact that much of our past is practically unrecorded, Dike and Ors v. Nzeke and Ors (supra) 12, paragraphs A - F. ***Clear evidence of the wisdom of the Law in this regard could be found in Section 44 of the Evidence Act (applicable at the material time; now, Section 66 of the Evidence Act, 2011) which delisted this category of evidence from the hear-say rule and elevated it to the status of admissible evidence.*** Obasi and Anor v. Onwuka and Ors (supra). B

This is the background to the prescription which has crystallised from decided cases that, once traditional evidence is found to be conclusive and cogent, there would be no need whatsoever to require further proof. Akinyili v. Ejidike [1996] 5 NWLR (pt.449) 381, 417; Balogun v. Akanji [1988] 1 NWLR (pt.70) 301; Amajideogu v. Ononaku (1988) 2 NWLR (pt.78) 614. C

In consequence, where a Court finds evidence of traditional history to be cogent, neither contradictory nor in conflict or competition with that of the defendant, and accepts it, it would be sufficient to support a claim for declaration of title to land. Adesanya v. Aderonmu and Ors (2000) LPELR - 1450 (SC) 19; A-C; Alade v. Awo (1975) 4 SC 215, 228; Olujebu of Ijebu v. Oso, The Elede of Eda (1972) 5 SC 143, 151; Nwosu v. Udeaja (1990) 1 NWLR (Pt.125) 188; Idundun v. Okumagba (1976) 9-10 SC 227; Aikhionbare -Ohen - Eriaria of Evboriara and Ors v. Omeregie Enogie of Ev Buoba - Ohen Village and Ors (1916) LPELR -271 (SC) 18, paras. B-C; Alli and Anor v. Alesinloye and Ors (2000) LPELR - 427 (SC) 83, B-D; Akhionbare v. Omoregie (1976) 12 SC 11 at 27. D

It has to be emphasised, however, that these broad prescriptions are hedged around with qualifications. Thus, it is now been settled that traditional evidence must be such as to be consistent and properly link the plaintiff with the traditional history relied upon. Owoade v. Omitola (1988) 2 NWLR (pt.77) 413. ***Above all, it is not sufficient*** E

for a party who relies for proof of title to land on its [traditional evidence], as in the instant case, to merely prove that he or his predecessor in title had owned and possessed the land from time immemorial. Akinloye v. Eyiola (1968) NMLR 92; Olujinle v. Adeagbo [1988] 2 NWLR (pt. 75) 238; Adejumo v. Ayantegbe (1989) 3 NWLR (pt.110) 417; Anyanwu v. Mbara (1992) 5 NWLR (pt. 242) 386, 399; Alli and Anor v. Alesinloye and Ors (2000) LPELR - 427 (SC) 27 - 28, E-B.

Such a party is bound to plead such facts as (1) who founded the land; (2) how the land was founded and (3) the particulars of the intervening owner through whom he claims. Akinloye v. Eyiola (supra); Olujinle v. Adeogbo (supra); Adejumo v. Ayantegbe (supra); Anyanwu v. Mbara (supra) 386, 399; Alli and Anor v. Alesinloye and Ors (supra) 27 - 28, E-B.

And now this! Where such a party projects two competing histories of his ownership in support of his claim, he would have failed to prove the case he set out to propound. If he is the plaintiff, his claim must be dismissed. If he is the defendant, he would have failed to make out a defence against the traditional history of the plaintiff. Ohiaeri and Anor v. Akabeze and Ors (1992) LPELR - 2360 (SC) 19, A - C.

HOW DID THE APPELLANTS FARE AT THE LOWER COURTS?

As indicated at the outset of this judgment, issues were joined in the settled pleadings; pleadings which were exchanged; amended and exchanged. While the appellants (as plaintiffs) wove their case around the testimonies of their seven witnesses, the respondents (as defendants) put across their defence through the testimonies of their five witnesses.

Did these witnesses of the appellants (as plaintiffs) fare well apropos the averments in the pleadings? I would at this point, invite the trial Court and the lower Court to answer the question. First, the trial Court. After summing up the case of the plaintiffs (now, appellants), as put forward by the PW2, *“the plaintiffs’ principal witness,”* pages 115 of the record, the Court found that:

“...this witness did not give sufficient historical and traditional evidence. *Being a principal witness, his evidence was comparatively terse when compared with that of the key witness of the defendant.* His cross examination revealed much more which I will highlight in this review of evidence.” (Italics supplied for emphasis) B

The Court went ahead to highlight what it referred to as the “*concessions*” of the said witness, (page 116 of the record). It then, proceeded, in tandem with the age-long rule in Mogaji and Ors vs Odofin and Ors (supra) to weigh witnesses of the parties on an imaginary scale, (page 116-123 of the record). It announced its findings thus: C

“From my observations during the review of the evidence of all the witnesses for plaintiffs and defendants I have found that *the evidence of the plaintiffs do not agree with their pleadings.* Most of the witnesses, particularly, their principle witness, second PW, Joseph Akinwunmi, not only gave contradictory evidence but *during cross examination confirmed most of the assertions and claims of the defendants.* I have highlighted those differences... such as the founding of Olowotedo, granting of land to Odeleye. D E

The vital point which goes in favour of the defendants is the answer to the nature and type of Iganun people. Both the plaintiffs and the defendants agree that Iganun people are fishermen, live near Ogun river and although some of the plaintiffs’ witnesses quickly added that some of the Iganun people farmed but predominantly they are fishermen. The evidence of the defendants agreed to (sic) their claim in that both Iganun and Ibassa are villages belonging to Igbein people. There is sufficient evidence to that effect. What of the particular evidence that there is a Bale at Ibassa by name, Bamgboye, son of Okuseinde, who derived his authority from the Igbein people which evidence was not contradicted and which I accept... F G

...It was clear from the traditional evidence of both parties that *the evidence of defendants by far outweighed those of the plaintiffs and that will entitle the defendants to judgment. The plaintiffs have failed to discharge the onus placed on them.*... H

I will also assess existing factual evidence of contemporary acts and events.... The defendants *gave evidence of several acts of ownership, they built houses, this was admitted by the plaintiffs. Even by (sic) Mr. Awoyinka admitted this. They created streams, they worshipped idols* and on top of it *they sold land to Dr. Bankole to which the plaintiffs did not object—all these are consistent and acts of ownership.*”
 (pages 124 -125 of the record, italics supplied for emphasis)

The lower Court affirmed these findings. Speaking for the said Court, Onalaja, JCA, found that:

“...In the consideration of the cases of the parties as they testified, the learned trial Judge applied the rule in *Mogaji v. Odofin* (1973) 3-4 SC 91.... The learned (sic) Judge concluded rightly that [the] appellants *did not discharge the burden of proof placed on appellants* (sic, them) and based on the findings of facts dismissed the claims. The learned trial judge also relied *on the assessment and ascription of probative value based on the credibility of witnesses.*
 ...After a careful consideration of the findings of facts... I find *the findings of facts not to be perverse as they were borne out from the evidence...*”

Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial Judge and *when based on credibility of witnesses, an appellate Court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours (sic) of the witnesses as the Appeal Court deals with printed record.* The only way open to the Appeal Court to interfere is where it was established that the learned trial Judge failed to take advantage of having seen and heard the witnesses then an Appeal Court may interfere, *Elendu v. Ekwoaba* [1998] 12 NWLR (pt 573) 320: *Woluchem v. Gudi* (1981) 5 SC 291”.

(Page 183 of the record; italics supplied)

Now, it is evident that the concurrent findings of the lower Courts were firmly, anchored on the redoubtable decisions of this Court. As shown above, it has been tolerably settled that if and

when parties join issues in the settled pleadings; amend and join issues on their amended pleadings, thenceforth, they are bound by them and so they cannot orbit outside the compass of the issues so joined in search of more luxuriant facts.

In one word, evidence (and this was the concurrent findings of the lower Courts with regard to the testimonies of the plaintiffs/appellants' witnesses) which is at variance with the pleadings go to no issue, *Okoro v. Dakolo* (supra) 42-43, paragraphs D-A; *Eze and Ors v. Atasie and Ors* (supra) 2180, 2189; *Emegokwe v. Okadigbo* (supra); *Obimiami Brick and Stone (Nig.) v. A.C.B. Ltd* (supra); *Akinterinwa and Anor v. Oladunjoye* (supra); *Aminu and Ors v. Hassan and Ors* (supra); *Idahosa v. Oronsaye* (supra); *NIPC Ltd. v. Thompson Organisation Ltd* (supra); *Ogbodo v. Adelugba* (supra); *Ipinlaiye II v. Olukotun* (supra) 165 - 166; *Paul v. George* (supra); *Ajoke v. Oba* (supra); *George v. UBA Ltd* (supra); *Njoku v. Eme* (supra); *Oke-Bola v. Molake* (supra).

With regard to the question of traditional evidence of the plaintiffs/appellants, the trial Court's findings, affirmed by the lower Court, were that:

"Most of the witnesses, particularly, their principal witness, second PW, Joseph Akinwunmi, not only gave contradictory evidence but during cross examination confirmed most of the assertions and claims of the defendants. I have highlighted those differences... such as the founding of Olowotodo, granting of land to Odeleye.

The vital point which goes in favour of the defendants is the answer to the nature and type of Iganun people. Both the plaintiffs and the defendants agree that Iganun people are fishermen, live near Ogun river and although some of the plaintiffs' witnesses quickly added that some of the Iganun people farmed, but predominantly they are fisherman. The evidence of the defendants agreed to (sic) their claim in that both Iganun and Ibassa are villages belonging to Iganun people.

There is sufficient evidence to that effect... What of the particular evidence that there is a Bale at Ibassa by name, Bamgboye, son of Okuseinde, who derived his authority from the Igbein peo-

ple which evidence was not contradicted and which I accept...

...It was clear from the traditional evidence of both parties that the evidence of defendants by far outweighed those of the plaintiffs and that will entitle the defendants to judgment. The plaintiffs have failed to discharge the onus placed on them..."

^B (Pages 124 -125 of the record; italics supplied for emphasis)

Again, these findings are in the good and cherished company of the attitude of this Court to the mode of establishing title to land by traditional evidence. As already shown above, traditional evidence must not only be cogent; it must neither be contradictory nor in conflict or competition with that of the defendant for the Court to accept it before it would be sufficient to support a claim or declaration of title to land.

^D This, according to the lower Courts, the plaintiffs/appellants failed to do; hence, their case was rightly dismissed, *Adesanya v. Aderonmu and Ors* (supra), *Alade v. Awo* (supra); *Olujebo of Ijebo v. Oso*, *The Eleda of Eda* (supra), *Nwosu v. Udeaja* (supra); *Idundun v. Okumagba* (supra); *Aikhionbare -Ohen - Eriaria of*
^E *Evboriara and Ors v. Omeregie Enogie of Ev Buoba - Ohen Village and Ors* (supra), *Alli and Anor v. Alesinloye and Ors* (supra); *Akhionbare v. Omoregie* (supra).

Worse still, as the trial Court found at page 125 of the record; a finding affirmed by the lower Court "*The plaintiffs have failed to*
^F *discharge the onus placed on them.*" True, indeed, they (plaintiffs/appellants) underrated the enormity of the onus on them for their traditional evidence, as the trial Court found, was not only inconsistent; their so-called traditional evidence was not properly linked
^G with them (plaintiffs), *Owoade v. Omitola* (supra).

Even then, there was another glaring omission in the case of the plaintiffs/appellants. The rationale of all binding authorities is that it is not sufficient for a party (such as the appellants herein) who relied for proof of title to land on it (traditional evidence) to
^H merely prove that he or his predecessor in title had owned and possessed the land from time immemorial, *Akinloye v. Eyiola* (supra); *Olujinle v. Adeogbo* (supra); *Adejumo v. Ayantegbe* (supra); *Anyanwu v. Mbara* (supra); *Alli and Anor v. Alesinloye and Ors*

(supra).

Simply put, they (the plaintiffs/appellants) failed to discharge the burden of proof on the pleadings as required of claimants of title to land through traditional evidence, Akinloye v. Eyiola (supra); Olujinle v. Adeogbo (supra); Adejumo v. Ayantegbe (supra); Ayanwu v. Mbara (supra); Alli and Anor v. Alesinloye and Ors (supra). Little wonder then why the trial Court found that the principal witness,

PW2, *“did not give sufficient historical and traditional evidence. Being a principal witness, his evidence was comparatively terse when compared with that of the key witness to the defendants,”* (page 116 of the record; italics supplied for emphasis).

Finally, attention may now be drawn to the finding of the lower Court that *“[t]he learned trial Judge also relied on the assessment and ascription of probative value based on the credibility of witnesses,”* (page 183 of the record, italics supplied for emphasis).

My Lords, since trial Court’s ascription of probative value was based on the credibility of witnesses, I have an obligation to remind Your Lordships that every trial Judge is in a better position than the appellate Court to decide the issue of credibility of the witnesses. The reason is not farfetched. He (the trial Judge) has the singular advantage of seeing and observing the witnesses. He watches their demeanour; candour or partisanship; their integrity and manners. These advantages are not normally enjoyed by an appellate Court which only has the cold printed evidence to contend with. Nwankpu and Ors v. Ewulu and Ors (1995) LPELR -2107 (SC) 32, A-B.

What is more, as a vital area of credibility, it is only the trial Court which saw and watched the demeanour of the witness that has the exclusive role of watching the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it. Kayode Ventures Ltd v. The Hon. Minister, FCT and Ors (2010) LPELR - 1681 (SC) 60, C- E; Makanjuola v. Balogun (1989) 3

NWLR (pt. 108) 192, 218; Atolagbe v. Shorun [1985] 1 NWLR (pt 2) 60; Duru v. Nwosu [1989] 4 NWLR (pt 113) 24, 39; Lagga v. Sarhuna (2008) LPELR 1740 (SC) 66, A- E.

This is the basic premise that yielded the logic in the reasoning of the decisions of this Court that where the issue is that of credibility of witnesses, the appellate Court has a very limited, if any, scope to interfere. Thus, it (the appellate Court) can only do so when the trial Court decided to believe a witness quite contrary to the trend of accepted evidence or where oral testimony is contrary to the contents of a written document, Ndukwe v. Acha and Ors (1998) LPELR -1977 (SC) 14, A-B; Agbonifo v. Aiwereoba and Anor (1988) 1 NSCC 237, 245; (1988) 1 NWLR (pt.70) 325.

In effect, therefore, unless the trial Court adduces a wrong reason for believing or disbelieving a witness, an appellate Court would seldom, interfere with its ascription of credibility to witnesses. Put differently, it is only where the appellate Court, either because the reasons given by the trial Judge are not satisfactory or because it unmistakably, so appears from the evidence, is satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses, that it could properly interfere. In such a case, the matter would then become at large in the appellate Court. This is as much a settled principle of English Law, Watts (or Thomas) v. Thomas (1947) 1 All ER 582 as it is a settled position in this country, Nwankpu and Ors v. Ewulu and Ors (1995) LPELR - 2107 (SC) 32, C- E.

Instructively, the lower court, prior to its affirming of the position of the trial Court, gave a careful consideration of the findings of facts. It found *“the findings of facts not to be perverse as they were borne out from the evidence.”* (Page 183 of the record). It rightly, concluded that:

“Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned

trial Judge and *when based on credibility of witnesses, an appellate Court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours (sic) of the witnesses as the Appeal Court deals with printed record.* The only way open to the Appeal Court to interfere is where it was established that the learned trial Judge failed to take advantage of having seen and heard the witnesses then an Appeal Court may interfere, *Elendu v. Ekwoaba* (1998) 12 NWLR (pt. 573) 320; *Woluchem v. Gudi* (1981) 5 SC 291. (Page 183 of the record; italics supplied)

As the appellants did not succeed in impeaching the concurrent findings of the lower courts by accentuating their perversity, I have no justification for interfering with them, Afolayan v. Ogunrinde and Ors (1990) LPELR - 198 (SC) 20 - 21, F-B; Enang v. Adi (1981) 11-12 S.C.25, 42; Okagbue v. Romaine (1982) 5 SC 133, 170-171; Lokoyi v. Olojo (1983) 8 SC 861, 68-73; (1983) 2 SCNLR 127; Ojomu v. Alao (1983) 9 SC 22, 53; (1983) 2 SCNLR 156; Alade v. Alemuloke [1988] 1 NWLR (pt. 69) 207, 212. ***In all, I find no scintilla of merit in the appellants' complaint against the judgment of the lower Court. I therefore unhesitatingly enter an order dismissing this appeal.*** Appeal dismissed.

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Chima Centus Nweze JSC and to show my support of the reasoning from which the decision came about, I shall make some remarks.

This appeal comes against the judgment of the Court of Appeal, Ibadan Division on the 21st day of May, 2002. The appeal was against the Ruling of Jacob A. O. Sofolahan J. of Ogun State High Court sitting Abeokuta delivered on the 21st day of October, 1988 dismissing the claim of the appellants then plaintiffs. The appellants being dissatisfied appealed to this Court by way of application for leave, leave was granted and Notice of Appeal was filed and a motion for interlocutory injunction was also

filed to restrain the respondents from continuing the sales and trespass on the land subject matter of the appeal pending the final determination of the appeal.

In reaction, the respondents filed a Notice of Preliminary Objection and appellants filed a counter affidavit.

B BACKGROUND FACTS:

The position of the appellants as seen from their pleadings and evidence are that their progenitor migrated from Ile-Ife, settled on the land in dispute called Ibasa. The appellants pleaded further that after their several years of settlement and farming at Ibasa, the Odeyale came to settle with Adejonlu and the said Odeyale was settled at Olowotedo, Thereafter, Odeleye who in company of his brother, Yeku came to settle with Odeyale who after abandoning his former settlement at Olowotedo, settled at Ibasa.

The appellants therefore claimed that these 3 brothers were their Customary Tenants.

The appellants pleaded in paragraph 5 of their Further Amended Statement of Claim with respect to the meaning of Ibasa as follows:-

“The word Ibasa is from the word where the son of Abinu was using as hunting hut whenever he went on his hunting expedition and on any return, usually refer to the place as Ibasa where he left his meat whenever he was going to send any of his wives to bring meat from his hut.”

The respondents on the other hand also based their case on traditional evidence based on settlement as well as act of ownership and not only denied the historical facts set up by the appellants which purportedly linked them with appellants ancestors but also vehemently denied the issue of Customary Tenancy. The respondents pleaded that their ancestor Somolu originally settled on a vast parcel of land which included the land in dispute. The whole land was demarcated on plan No. AK/7741/OG drawn by D. O. Akingbogun I. S. The plan was tendered as Exhibit B at trial.

Contrary to the meaning ascribed to Ibasa by the appellants, the respondents’ case was that Ibasa derives its name from the place where Somolu’s wives and children were processing palm fruits collected from his Palm Tree Plantation. The respondents

pleaded and relied on several shrines planted and worshipped by their ancestors and which were still worshipped in recent times as claim of ownership both in old and recent times. Those shrines include Ogun, Oya, Obatala, Sango and Oluweri.

The fuller details in the facts are well presented in the lead judgment and no useful purpose would be achieved in repeating them except for when the need for reference to any part thereof arise later. B

On the 29th day of November, 2016 date of hearing, learned counsel for the appellants, Chief Rasheed Oluwatoyin Sadik adopted their Brief of Argument filed on 14/5/2012 and deemed filed on the same day. Also a Reply Brief filed on 21/9/15. C

Dele Oloke Esq. of counsel for the respondents adopted their brief of argument filed on 30/3/15 and deemed filed on the 29/11/16. In it, they raised a Preliminary Objection and proffered the arguments within that brief of argument. D

It is to be said that nothing can happen in this appeal without first tackling and settling the objection as raised as on it depends the competence of the appeal and the competence or jurisdiction of the Court to go further. The reason being that the success of the Preliminary Objection could produce the end of the case, see: E

1. G. C. E. V. Akande & ORS (2010) 18 NWLR (pt. 1225) 506. F

2. SPDC Nig. Ltd v. Amadi & Ors (2011) 14 NWLR (Pt. 1266) 157 at 183.

PRELIMINARY OBJECTION:

The respondents/objectors raised an objection challenging the competence of Ground 1 contained in the appellants' Notice of Appeal on the following reasons:- G

1. That the said ground 1 did not flow and emanate from the judgment of the Court below out of which this appeal arose. H

2. The said ground did not properly contain complaint against the decision of the Court below.

Canvassing their position, learned counsel for the respond-

ents stated that in the Court below the appellants in their Ground 4 of the Notice of Appeal raised the issue of acquisition for the first time without obtaining the leave of Court. That at the hearing of the appeal in the lower Court the respondents had raised an objection to the competence of that ground on the basis that it was a fresh issue and leave of Court was necessary to sustain it and in the absence of such leave the ground lacked competence. That this objection was upheld by the Court below which struck out the said ground.

Learned counsel said the appellants did not challenge that order of striking out of the ground by raising a complaint against it in the Notice of Appeal. That the appellants have proceeded to formulate a ground herein which neither arose nor emanated from the decision of the Court below on the issue of acquisition. That this goes against settled law that a ground to be competent must arise or flow from the judgment appealed against. He cited *Obatoyinbo v. Oshotoba* (1996) 5 NWLR (pt. 450) 531 at 549; *Sanusi v. Ayoola* (1992) 9 NWLR (Pt.265) 275; *Akibu v. Oduntan* (2000) 13 NWLR (Pt.685) 446.

He concluded by saying that the order appealable in this case is the order striking out the said Ground 1 contained in the Notice of Appeal on the issue of acquisition.

Responding, learned counsel to the appellants sequel to their Reply Brief referred to the Counter-Affidavit deposed to by Onaiwu Emmanuel Omoregbe dated 4th May, 2010. That the Preliminary Objection dated 12th day of April, 2010 and the prayer sought for are distinct from the Notice of preliminary Objection now incorporated in the respondents' brief of argument. That the earlier Notice of Preliminary Objection of the Objector seems to have been abandoned after the filing of the appellants' counter affidavit.

He stated that the appellants are vehemently opposing this Preliminary Objection incorporated in the Objectors' brief.

Learned counsel for the appellants contended that the Objectors ought to seek leave of Court to make the Notice of Objection valid before the oral hearing of the appeal commences other-

wise the complaint is deemed waived and objection abandoned. He cited the case of *Oforkire & Anor v. Madiuke & Ors* (2003) FWLR (Pt. 147) 1090 at 1097.

He stated that the Objection should be struck out, the objection having been raised without leave of Court.

This objection is predicated on Ground One of the appellant's Notice of Appeal which is outlined below thus:-

"The Learned Justices of the Court of Appeal erred in Law by not giving judgment in favour of the appellants when there is evidence that the respondents' were the appellants' family Customary Tenants."

The particulars showed that the acquisition was made under State Notice NO. 147 Published in Ogun State Gazette NO, 47 Vol. II of 29/11/86.

In the Court of Appeal the objectors raised objection to the competence of that ground based on the fact that being a fresh issue, leave of the Court was required to sustain the ground and that leave was neither sought nor obtained and that Court of Appeal agreed with the objection and upheld it stating thus:-

"As the issue of acquisition was not pleaded in the lower Court and without any comment in a judgment of the lower Court, such non - issue is incompetent to be argued on appeal based on the case of Akibu v. Oduntan (2000) 13 NWLR (Pt. 685) at 446; Egbe v. Alhaji (1999) 1 NWLR (Pt. 128) page 540 at 598. Grounds 1 & 4 are hereby struck out."

In spite of that Ruling of the Court below, the appellants did not appeal it, rather came before this Court on a Notice of Appeal that did not include that decision as one of the complaints. It is therefore to be said that the present Notice and Grounds of Appeal cannot be sustained in the absence of the scaling of that hurdle. The implication is that the current notice of appeal's ground one lacks competence as what is being pushed forward did not arise or flow from the judgment appealed from. I refer to *Akibu v. Oduntan* (2000) 13 NWLR (Pt.685) 531 at 540; *Sanusi v. Ayoola* (1992) 9 NWLR (pt.265) 275. The ground one and issue arising therefrom are struck out.

I shall now go into the main appeal and the sole surviving issue.

MAIN APPEAL

SINGLE ISSUE:

B Whether having regard to the pleadings and totality of evidence adduced, the Court below was right in dismissing the appellants' appeal.

Learned counsel for the appellants submitted that the traditional history of the appellants reveal that appellants' great ancestor known as ABINU was the first person to settle on the land in dispute. That the appellants at the trial gave un-contradicted evidence that the said ABINU migrated from Ile-Ife and finally settled on all that parcel of land at IGUAN which include IBASA which is the land subject matter of this appeal. That the appellants have established by evidence that the respondent and forefathers were paying yearly tributes to the appellants and only stopped paying such tributes when the appellants instituted this case at the trial Court. He further contended that the land in dispute was acquired by the Ogun State Government and so the land lawfully acquired has to be excised from the original land and such remaining land properly identified to ascertain the remaining portion subject matter of this suit. He cited *Obikoya & Sons Ltd. v. Governor of Lagos State (1987) NWLR (Pt.50) 385.*

From the appellant it was stated that the compulsory acquisition was made by the Ogun State Government in 1986 during the pendency of the case at the trial Court and it was a fact unknown to either party at the time and the implication is that the pleadings needed be amended so that the actual description and identity of the land will be ascertained. That the identity of the disputed land being crucial, the identity must first be cleared before the issue of the title to the land would be gone into. He cited *Balogun v. Akanji (2005) 3-4 SC 95.*

That the decision of the Court below ought to be reversed in favour of the appellants or in the alternative an ordering of a retrial of this suit.

Learned counsel for the respondent contended that appel-

lants' assertion was not sustainable in the light of the evidence proffered and the finding of the learned trial judge. That there is inconsistency in the appellants' traditional evidence and so the Court of trial and affirmed by the Court below was correct in treating the evidence as unreliable and to be rejected, the consequence being the dismissal of the case. He cited *Oliyebe of Ijebu v. Osho Eledo of Eda* (1973) 2 SC 143; *Ogun v. Akinyelu* (2005) All FWLR (pt.243) 601; *Salami v. Gbodoolu* (1997) 4 NWLR (Pt. 499) 277.

The learned trial judge based on what was before him stated thus:-

"From my observation above, during the review of evidence of all the witnesses for plaintiffs and defendants, I have found that the evidence of the plaintiffs do not agree with their pleadings. Most of their witnesses particularly their principal witness, 2nd PW Joseph Akinwumi not only gave contradictory evidence but during cross-examination, confirmed most of the assertions and claims of the defendants."

The Court after weighing the traditional evidence of both sides concluded that:

"Plaintiffs must succeed on the strength of their evidence but on the whole, it was clear from the traditional evidence of both sides that the evidence of the defendants by far outweighs those of the plaintiffs and that will entitle the defendants to judgment. The plaintiffs have failed to discharge the onus placed on them."

On appeal, the Court of Appeal per Onalaja JCA stated thus:

"In the consideration of the cases of the parties as they testified, the learned trial Judge applied the rule in Mogaji v. Odofin (1973) 3/4 SC 91; Akande v. Alagbe (2000) 15 NWLR (pt.690) G page 353 CA; Tinubu v. Khalil & Dibbo Trans Ltd. (2000) 11 NWLR (pt. 677) page 171 SC. The learned judge concluded rightly that appellants did not discharge the burden of proof placed on appellants and based on the findings of facts dismissed the claims."

The Court below stated further as follows -

"The attitude of an appellate Court to findings of fact is well settled that an Appeal Court generally will not disturb findings of facts by the learned trial judge unless the findings of facts are per-

verse. After a careful consideration of the findings of facts as reflected in the quoted part of the judgment, I find the findings of facts not to be perverse as they were born out from the evidence, thereby I find no legal basis to disturb them. Respondents' argument on the findings of facts were sound and convincing, they are therefore resolved in favour of the respondents. See Sosanya v. Onadeko (2000) 11 NWLR (pt.67) at page 34 CA, Kalango v. Governor of Bayelsa State (2009) All FWLR (pt.476) at 1839 esp, Ratio7."

It is now trite that five modes are utilised in establishing title to land and in this, the case of *Idundun v. Okumagba* (1976) 9 - 10 SC has been very helpful and those methods are thus:-

1. Traditional evidence.
2. Production of documents of title which are duly authenticated.

3. Acts of selling, leasing, renting out all or part of the land of farming on it or on a portion of it.

4. Acts of long possession and enjoyment of the land, and

5. 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.

In the case in hand, each side had set up its version of how they came to the land and its ownership and this brings to mind the locus classicus guide in the case of *Kojo II v. Bonsie & Anor* (1957) 1 WLR 1223 at 1226 wherein it was held that:-

"The dispute was all as to the traditional history which had been handed down by word of mouth from their forefathers. In this regard, it must be recognized that in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatsoever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet but may be honest in their belief. In such a case, demeanour is title guide to the truth. The best way is to test the traditional history by reference

to the facts in recent years as established by evidence and seeing which of two competing histories is more probable.”

In the Further Amended Statement of Claim seen at page 65 - 69 of the record, paragraphs 6, 7 and 8 specifically, the appellants as plaintiffs in the trial Court pleaded thus:-

“6) After several years of settlement and farming at Ibas, the first person who came to Adejonlu to ask to settle with Adejonlu was one Odeyale who came from Abeokuta.

7) Adejonlu then settled with Odeyale at Olowotodo but the said Odeyale came back and abandoned the place to come back to Adejonlu as the Odeyale was attacked by Armed Robbers.

8) While Odeyale came back to live with Adejonlu at Ibas Jinadu, Odeleye came to live with Odeyale and later another brother of Odeyale called Yeku came to join them to live there.”

The position of the plaintiffs/appellants in pleading was denied by the defendants/respondents who pleaded that their ancestors Somolu and Okuseinde who came from Igbein originally settled at the vast area of land which included the land in dispute.

In evidence in Court, PW2 stated thus:-

“Adejonlu is my great grand-father, Abinu is the father of Adejonlu. Those who came to ask for farming land from Abinu were Odeyale and Odeleye (they are brothers). They came from Abeokuta and were granted land to farm.”

This piece of evidence contradicts the pleadings in paragraph 6 where it was stated that Adejonlu granted the land to the respondents' predecessor-in-title and not Abinu as stated in the evidence of PW2.

Again, on the issue of Olowotodo, a portion of the land in dispute PW2 stated as follows:-

“I do not know Adejonlu and Abinu. I know Odeyale. I grew up to meet him on the land, I agree that Odeyale founded Olowotodo.”

This part of the evidence is clearly at variance with paragraphs 6 and 7 of the plaintiffs amended pleadings and so supported the reaction of the learned trial judge in his finding when he disregarded the contradicting piece of evidence in keeping with

the cases of *Ademeso v. Okoro* (2005) All FWLR (Pt.227) 844; *Orizu v. Anyaegbunam* (1978) 5 SC 21.

For effect, the learned trial judge stated thus:-

“Again although the plaintiffs stated in paragraph 7 of their further amended statement of claim that Adejonlu then settled with Odeyale at Olowotodo and the 2nd PW so gave evidence but under cross-examination, the 2nd PW retracted and said, ‘I agree that Odeyale founded Olowotodo’. This is exactly the case of the defendant as laid in paragraph 25 of their amended statement of defence to the effect that Odeyale a son of Somolu also founded Olowotodo...”

Also, this witness said that it was in his presence (although he was young) when Odeyale and Odeleye granted land nonetheless, in another breadth, he stated that he met Odeyale on the land. If he met Odeyale on the land, obviously that land could not have been granted in his presence.”

His Lordship after the assessment of the evidence founded follows:

“The view I hold is that either there was no grant at all, or at best this witness was telling the untruth.”

Indeed from the records, including the pleadings, evidence, the assessment and evaluation thereof, the trial Court was on track and the Court below was equally correct in finding for the respondents on the preponderance of evidence. Those concurrent findings and conclusion being unassailable and no miscarriage of justice shown, this Court is loathe to interfere or disturb them as the only safe way is to go along with those findings well founded upon due consideration.

From the foregoing and the better laid out reasoning of my learned brother, C. C. Nweze JSC, I see no basis to do otherwise than to dismiss this appeal as lacking in merit. Appeal is dismissed as I abide by the consequential orders made.

H

AKA'AH'S JSC

I read before now the judgment of my learned brother, Nweze JSC dismissing the appeal. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The appellants as plaintiffs commenced the action by Writ of summons before the High Court of Ogun State, Otta Judicial Division in suit No. HCT/5/85 claiming against the defendants (now respondents) that the defendants, are native customary tenants of the plaintiffs in respect of the land occupied for farming by them at Ibasa, Iganun Village of Ogun State, have denied and still deny the plaintiffs title thereto and have claimed and still claim to be the absolute owners of the said premises and the land thereto contrary to native law and custom. They sought the following reliefs in paragraph 34 of the Further Amended Statement of Claim filed on 17/10/86-

“34 Whereof the plaintiffs claim:-

(a) A declaration of forfeiture of the defendants’ tenure under native law and custom.

(b) Possession of the said land.”

The defendants who laid claim to a wider area of land defended the action for themselves and on behalf of Somolu/Okuseinde family and asserted that Somolu was the original owner of the land in dispute and averred in paragraphs 4, 5, 6, and 43 of the Amended Statement of Defence as follows:-

“4. The defendants state that the vast area of land including IBASA, GAUN, LEKE, OLOWOTEDO, OFADA, MAKOGI, MAGBORO, IBAFO, AREPO, PAKURO, MOWE, MOKOLOKI, OBA, BISODUN and ORILE IGBEIN originally belong (sic) to the people of Igbein as their homestead. All the villages mentioned above were established by Igbein people and live therein.

5. In or around 1830, the people left their homestead to settle at Abeokuta in the area now known as Igbein Township because of incessant wars but continued to exercise acts of ownerships over the land within the homestead.

6. Somolu was the original owner of the land in dispute as he settled on it when he left Orile Igbein over 100 years ago.

43. *WHEREOF the defendants state that the plaintiffs claim is misconceived, frivolous and abuse of Court process and should be dismissed with costs.*”

The plaintiffs called 7 witnesses before closing their case while the defendants called 5 witnesses. Learned counsel for the parties thereafter addressed the Court and in a reserved judgment delivered by Sofolahan J on 21/10/88, he found that the traditional evidence called by the defendants outweighed those of the plaintiffs. He dismissed the plaintiffs’ case and entered judgment in favour of the defendants. The plaintiffs were not satisfied and appealed to the Court of Appeal, Ibadan on 21/5/2002. That Court dismissed the appeal as devoid of merit. The lower Court found that there was no legal basis to disturb the findings of facts of the learned trial Judge. The appellants were aggrieved and filed a further appeal to this Court.

This appeal turns on the concurrent findings of fact made by the two lower Courts as issues 2 and 3 in the appellants’ brief were abandoned. The preliminary objection raised by the respondents concerning the issue of acquisition of the land is no longer necessary since the appellants abandoned issue no.3.

The parties staked their claim to the disputed land on traditional history. The plaintiffs claimed they are descendants of Abinu, who migrated from Ile-Ife and first settled on the land. His son, Adejonlu succeeded Abinu and it was during his time that Odeyale who hailed from Abeokuta settled with Adejonlu at Olowutedo. Later Jinadu Odeneye went to live with Adejonlu. Another brother of Odeyale called Yeku joined them to live at Ibasa. At the end of every year, Odeyale, Jinadu. Odeneye and Yeku took the farm produce-yams and palm oil as tribute to Adejonlu.

In paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 30, 33 and 34 of the Further Amended Statement of Claim the Plaintiffs averred thus:-

“14. These children of Yeku, Odeneye and Odeyale in later years instead (sic) bringing this tribute in form of yams, palm produce and corn now asked that these be compounded in form of

money and were paying the Adejonlu family the sum of 5 pounds now N10.00 including palm wine which was paid at the end of every year, that is December.

15. *The plaintiffs averred that it was the 1st defendant who some years ago came and suggested that this tribute be paid during the yearly Agemo Festival.* B

16. *The defendants stopped this payment about 5 years ago.*

17. *The Plaintiffs averred that the main reason for the stoppage was that some five years ago one Chief Adeyemi Lawson wanted a vast area of land from Ibaso.* C

18. *The plaintiffs were consulted and arrangement concluded to demarcate the area to be sold to the said Chief Adeyemi Lawson.*

19. *Consequent upon this, the tenants, that is, the defendants came to the Plaintiffs on the IPABI day, that is, the beginning of Agemo Festival and would want to know their share of the proceeds, they being only customary tenants* D

20. *The Plaintiffs averred that the tenants including the defendants were told to come back on the ERIN day of Agemo when the family shall have deliberated on this.* E

21. *The plaintiffs averred that the tenants including the defendants never came back instead went to Igbehin people at Abeokuta who in turn reported to Alake that the plaintiffs were worrying them an allegation the plaintiffs vehemently denied.*

22. *By some kind of compromise the said Chief Adeyemi Lawson suggested that the proceeds be shared by the plaintiffs taking a half, the defendants a quarter and Igbehin people a quarter.* F

23. *The plaintiffs averred that they refused on the basis of sharing with Igbehin people who are considered as strangers on the land.* G

24. *The plaintiffs averred that the defendants had ever since denied and still deny the plaintiffs as their overlord contrary to native laws and customs.* H

30. *The defendant in collaboration with some other unknown people had ever since been dealing illegally with the land and have sold, leased or alienated over 200 hectares of the land with un-*

known people.

34. *Whereof the plaintiffs claim;-*

(a) *A declaration of forfeiture of the defendants' tenure under native laws and custom.*

(b) *Possession of the said land."*

B From the pleadings and evidence adduced, it is clear that the parties relied on traditional history for their claim of title to the disputed land. The learned trial Judge reviewed the evidence of the rival traditional histories narrated by the respective parties and preferred the evidence led by the defendants to that led by the plaintiffs both in regard to traditional history and to acts of ownership. This is what he said regarding the evidence of 2nd PW, Joseph Akinwunmi who was the star witness of the plaintiffs at pages 116 - 118 of the record:-

D *"I must say that this witness did not give sufficient history and traditional evidence. Being a principal witness, his evidence was comparatively terse when compared with that of the key witness to the defendants. His cross-examination revealed much more*
 E *which I will highlight in this review of evidence. His first concession was that Abinu was not an Egba. He agreed that the place where they make palm oil is called Ibassa where they will make Eku (a round hole for mashing palm oil seeds) and where animals were killed in the bush and roasted is only called Ileba. This is*
 F *obviously contrary to the pleadings of the plaintiffs. Again, although the plaintiffs stated in paragraph 7 of their further Amended Statement of claim that "Adejonlu" then settled with Odeyale at "Oluwatedo and the 2nd PW so gave evidence, but under cross-*
 G *examination, the 2nd PW retracted and said "I agree that Odeyale founded Oluwatedo". This is exactly the case of the defendants as laid in paragraph 25 of their amended statement of Defence to the effect that Odeyale a son of Somolu also founded Olowotedo. Linked with paragraph 4, Olowotedo is among the other areas*
 H *founded by the Igbein people as their homestead to which the defendants belong. Also this witness said that it was in his presence (although he was young) when Odeyale and Odeleye were granted land nonetheless, in another breadth, he stated that he met Odeyale*

on the land. If he met Odeyale on the land, obviously that land would not have been granted in his presence. The view I hold is that either there was no grant at all or at best, this witness was telling the untruth. He agreed also that the defendants sold part of the land to one Dr. Bankole, an Agriculturalist who I shall refer to later but he claimed that they, the plaintiffs, did not quarrel with Dr. Bankole when the land was sold to him in order to avoid breach of the peace.

One other point that I like to highlight is that the defendants in paragraph 29 of their Further Amended Statement of Defence alleged that Iganun village is very close to the Ogun river hence the plaintiffs are predominantly fishermen and are not Egbas. The 2nd witness agreed under cross-examination that most people in Iganun are fishermen.”

The Court of Appeal also reviewed the evidence called by the parties and concluded that the only way an Appeal Court can interfere with the assessment and ascription of probative value of the evidence made by the trial Court is where it is established that the learned trial judge failed to take advantage of having seen and heard the witnesses.

It has not been argued that the Court below was wrong in holding that there was evidence in support of the findings made by the trial Judge. The arguments advanced by the learned counsel for the appellants is that the appellants at the trial gave uncontradicted evidence that Abinu migrated from Ile-Ife (cradle of Yorubas) and finally settled on all that parcel of land at Iganun which includes Ibasas which is the land the subject matter of the appeal and that the appellants established by evidence that the respondents and their forefathers were paying yearly tributes to the appellants and only stopped paying such tributes when the appellants instituted this action at the trial Court.

The learned trial judge after highlighting the concessions made by 2nd Pw under cross-examination which ran contrary to the plaintiffs' pleadings found that this would water down any serious weight that could be attached to his evidence-in-chief and

that the accounts were inaccurate.

In this appeal as was the case in *Aseimo v. Abraham* (2001) 16 NWLR (Pt. 738) 20 the trial judge duly took note of the fact that the parties relied on traditional history and acts of ownership and he found the evidence in both inadequate in support of the plaintiffs' case and adequate in support of the defendants' case and judgment was entered in favour of the defendants. The findings made by the trial Judge were affirmed by the Court of Appeal. There were thus concurrent findings of fact and this Court will not interfere with concurrent findings of fact of the trial Court and the Court of Appeal unless such findings are perverse. See: *Odonigi v. Oyeleke* (2001) 6 NWLR (Pt. 708) 12. In that case, *Kalgo JSC* in the leading judgment held that the findings of the trial Court were made after an adequate evaluation of the evidence. The Court of Appeal did not itself neglect to consider the evidence on record. The effort of the counsel for the plaintiffs directed at persuading this Court to interfere with the findings of fact made by the trial Judge in regard to title to the land is in the circumstances, futile.

The same scenario has manifested itself in this appeal. I have no hesitation whatsoever in dismissing the appeal because it totally lacks merit. It is for this reason and the more comprehensive reasons contained in the judgment of my learned brother, *Nweze JSC* that I found that the appeal is lacking in merit. I accordingly dismiss it and further affirm the judgment of the lower Court.

KEKERE-EKUN JSC

This appeal is against the judgment of the Court of Appeal, Ibadan Division delivered on 21/5/2002 dismissing the appellants' appeal and affirming the judgment of the High Court of Ogun State, Otta Judicial Division delivered on 21/10/98. The appellants, as plaintiffs at the trial Court instituted an action against the respondents, as defendants for the following reliefs, as set out in paragraphs 33 and 34 of their Further Amended Statement of Claim as follows:

"33. The defendants being tenants of the plaintiffs have by

their actions denied the plaintiffs' title and have claimed ownership absolutely or through other source.

34. Whereof the plaintiffs claim:

a. A declaration of forfeiture of the defendants' tenure under native law and custom.

b. Possession of the said land."

B

Both sides called witnesses and tendered documentary evidence. At the conclusion of the trial, the appellants' claims were dismissed in their entirety on the ground that the traditional evidence led by the respondents far outweighed the evidence of the appellants and that the appellants failed to discharge the onus on them to prove their claim. They were dissatisfied and appealed to the Court below, which on 21/5/2002, dismissed the appeal. They are still dissatisfied and have further appealed to this Court.

The appellants in their brief of argument, which was deemed filed on 14/5/2015, formulated 3 issues for the determination of the appeal. The issues are as follows:

D

"1. Whether the lower Court have (sic) sufficiently considered the findings of the trial Court as to the establishment by the respondents of long settlement on the disputed land their root of title by way of long settlement or sufficient traditional evidence.

2. Whether the respondents by the totality of evidence before the trial Court are customary tenants of the appellants.

3. Whether the issue of acquisition of the land in dispute was given consideration by the lower Court more especially when the fact of acquisition has affected the identity of the disputed land during the pendency of this matter at the trial Court."

F

However, at the hearing of the appeal on 29/11/2016, learned counsel, R.O. SADIK ESQ. withdrew issues 2 and 3.

G

The respondents raised a preliminary objection to Ground 1 of the notice of appeal on the ground that the issue of acquisition of the disputed land by the Ogun State Government was not an issue decided by the Court below, as that Court had in the course of its judgment struck out Ground 4 of the notice of appeal, which raised the same issue on the ground that the issue of acquisition was not pleaded in the trial Court and no comment was made in

H

the judgment appealed against.

Learned counsel argued that having not appealed against the striking out of their Ground 4, the appellants could not raise the acquisition of the land as a ground of appeal before this Court.

B Having carefully examined the Notice of Appeal at pages 187 - 190 of the record, it would appear that the ground of appeal in contention is Ground 3 and not Ground 1. I also note that the principal issue formulated from Ground 3 of the notice of appeal is issue 3 which has been withdrawn.

C However, in arguing issue 1, learned counsel for the appellant included in paragraphs 5.1, 5.4 to 5.8 of his brief submissions on the alleged acquisition of the land by the Ogun State Government in 1986, contending that there was a need for the pleadings and plans to be amended to identify and ascertain the portion of
D land that remained after excision of the acquired portion therefrom.

The law is trite that issues for determination in an appeal must be formulated to fall within the scope of the grounds of appeal filed. They should not be prolix and should not include matters not in any of the grounds of appeal. See: *Onwumere v. The State* (1991) 4 NWLR (pt. 186) 428 @ 445 B; *Egbe V. Alhaji* (1990) 1 NWLR (pt. 127) 546. It is equally trite that grounds of appeal are not formulated in abstract. For grounds of appeal to be competent, they must be predicated on the ratio of the decision
E appealed against. See: *Ikweki Vs. Ebele* (2005) 11 NWLR (pt, 936) 397; *Mercantile Bank of Nig. Plc V. Nwobodo* (2005) 14 NWLR (pt.945) 379; *Egbe v. Alhaji* (supra). In other words, the grounds of
F appeal must be based on the decision of the lower Court, which
G should in turn be based on the issues joined by the parties in their pleadings, evidence adduced in support thereof and the submissions of counsel on the law applicable to the facts so established by evidence. See: *Chami V. U.B.A. Plc* (2010) 6 NWLR (Pt.1191) 474 @ 502 C - D.

H I am of the considered view that having incorporated arguments based on an incompetent ground of appeal within the sole remaining issue for determination, the argument on the incompetent ground has tainted the entire issue and it is liable to be struck

out, leaving this appeal with no leg to stand on.

It must be stated that in any event, the appellants have an uphill task in this appeal. This is because it is not the practice of this Court to interfere with concurrent findings of facts by the two lower Courts, unless the appellants are able to show that the findings are perverse, that there has been a miscarriage of justice or some other violation of some principles of law or procedure. See: NICON V. Power & Industrial Engineering Co. Ltd. (1986) 1 NWLR (pt.27) 1; Afolalu V. The State (2010) LPELR SC.193/2008; Achiakpa & Anor. V. Nduka & Ors (2001) LPELR - SC.28/1996; Kalango V. Governor of Bayelsa State (2009) ALL FWLR (Pt.476) 1839 @ 1864 G-H. B C

On the merit of the appeal, as determined by my learned brother, Chima Centus Nweze, JSC, I agree with him that the lower Court was right in holding that no substantial or cogent reason had been advanced by the appellant to warrant interference with the thorough evaluation of evidence by the trial Court. D

Whichever way one looks at it, this appeal is completely devoid of merit. It is hereby dismissed. I abide by the consequential orders made in the lead judgment including the order as to costs. E

EKO JSC

On 21st May, 2002 the Court of Appeal, Ibadan Division (hereinafter called the “*Court below*”) dismissed the appeal of the Appellants herein, from the decision of the Ogun State High Court sitting at Otta. This is a further appeal from the decision of the Court below. F G

Four grounds of appeal were presented at the Court below. Two of these 4 grounds, that is: ground 1 complaining about the jurisdiction of the trial Court to entertain the suit (which was abandoned) and ground 4 raising the issue of acquisition which was not pleaded in the trial Court and in respect of which the trial Court made no comment were struck out. However, two grounds, that is 2 and 3 survived. Out of these two grounds, the Court adopted the H

issue formulated therefrom by the Respondents, to wit -

“Whether from the pleadings and totality of evidence adduced the appellants proved their case to entitle them to the reliefs sought.”

B This is clearly an issue of facts.

The Court below, on this issue of fact, stated inter alia in its judgment at pages 183 and 184 of the Records thus -

“...The learned (trial) Judge concluded rightly that the appellants did not discharge the burden of proof placed on (them) and based on his findings of facts dismissed the claims. The learned (trial) Judge also relied on his assessment and ascription of probative value based on the credibility of witnesses.

The attitude of an appellate Court to findings of fact is well settled that an Appeal Court generally will not disturb findings of fact by the learned trial Judge unless the findings of fact are perverse. After a careful consideration of the findings of facts, as reflected in the quoted part of the judgment I find the findings of facts not to be perverse as they are borne out from the evidence thereby.

E *I find no legal basis to disturb them -*

Evaluation, assessment of evidence and ascription of probative value to evidence is primarily the function of the learned trial Judge and when based on credibility of witnesses an appellate Court is handicapped for lack of opportunity of seeing, hearing and watching the demeanours of the witnesses as the appeal deals with printed record.

The only way open to the Appeal Court to interfere is where it was established that the learned trial Judge failed to take advantage of having seen and heard the witnesses then an Appeal Court may interfere -

Applying the above settled principle to the facts of this appeal I see no legal basis to disturb the findings of facts by the learned trial Judge that he failed to take advantage of having seen and heard the witnesses thereby the issue is resolved against the appellants but in favour of (the) respondent.”

The foregoing decision of the Court below has now come under flak of the appellants herein on three (3) grounds of appeal,

namely:

“1. The learned Justices of Court of Appeal erred in law by not giving judgment in favour of the Appellants when there is evidence that the Respondents were the Appellants’ family’s customary Tenant.

PARTICULARS OF ERROR

(a) The evidence of the Plaintiffs/Appellants and their witnesses showed that the Defendants/Respondents paid tributes to the Plaintiffs/Appellants up till the time when Plaintiffs/Appellants instituted action at the Trial Court.

(b) There is evidence that Plaintiffs/Appellant made customary grant of the land in dispute to the ancestor of the Defendants/Respondents.

2. The Learned justice of the Court of Appeal erred in Law by giving judgment against the Appellants when evidence showed that the Appellants’ great ancestor ABINU was the first person to settle on the land in dispute.

(a) The Appellants at the Trial Court gave evidence of the migration of ABINU from ILE-IFE and his eventual settlement on E all that parcel of land at Iganun including the land in dispute.

(b) Evidence of Boundary-men showed that the Appellants have been in possession of the land in dispute from time immemorial.

3. The Learned justices of the Court of Appeal erred in Law by dismissing the Appeal without giving consideration to the issue of acquisition of the disputed land which has been acquired by the State government, which acquisition had affected the identity of the disputed land.

PARTICULARS OF ERROR

(a) The acquisition of the disputed land was made under the Ogun State Notice No. 147 and Published in Ogun State Gazette No. 47 volume 11 of 20th November, 1986.

(b) The acquisition was made during the pendency of this matter at the Trial Court, but was not raised then since parties were not aware of it. It is therefore an issue that will necessitate the amendment of pleadings and plans so that the issue could be tried

and put before the trial Court as to the actual description of the land in dispute.

(c) The issue of acquisition of the disputed land had affected the identity and size of the land subject matter and unless this issue is resolved, the identity of the land will remain absurd.

(d) The Trial Court was not aware of the acquisition of the disputed land, otherwise the learned Trial judge will have put into consideration the claims of each party under the law governing the acquisition and the judgment of the Trial Court is not likely to be the same."

My Lords, Grounds 1 and 2, above reproduced, are on facts or at best on grounds of mixed law and facts which the Appellants cannot lay before this Court without leave first sought and granted. See: *OJEMEN v. MOMODU* (1953) 1 SCNLR 1882; *CUSTOMS v. BARAU* (1982) 10 SC. 483.

This is a civil appeal. Neither of the two grounds comes within the ambit of Section 233(2) of the 1999 Constitution and thus entitles the Appellants to bring the appeal on grounds 1 and 2 as of right.

None of the grounds involves questions of law alone, or interpretation or application of the Constitution, or any questions as to whether any of the fundamental human rights guaranteed under Chapter 4 of the Constitution has been, is being or is likely to be, contravened in relation to any person. The two grounds are not anywhere related to any question as to the office or tenure of office of the President or Vice President of the Federal Republic of Nigeria, or the office or Deputy Governor of any of the 36 States. Grounds 1 and 2 contained in the Notice of Appeal, filed on 25th November, 2005, require leave, and in the absence of the leave first sought and granted before their filing the two grounds, in view of Section 233(2) of the 1999 Constitution, are incompetent.

The Court below in its judgment ruled on the preliminary objection and held that ground 4 of the Notice of Appeal to that Court, raising the issue of acquisition which was not pleaded in the trial Court and in respect of which the trial Court made no comment, was incompetent. The said ground 4, adjudged incom-

petent, was accordingly struck out. The appellants are wallowing in the same error in this Court.

The same “*issue of acquisition of the disputed land which has been acquired by the State Government*”, which acquisition has affected the disputed land is being raised in this Court, not as a complaint against the ruling/decision of the Court below upholding the preliminary objection, but an entirely fresh substantive issue. The issue is fresh and extraneous to the proceedings at the two Courts below. Because an appeal is not an inception of a new case, but a continuation of the dispute inter partes from the trial Court; no new issues are raised or permitted and no fresh evidence are taken, without leave of Court. See OREDOYIN v. AROWOLO (1989) 4 NWLR (pt.114) 172 at 211. B C

Grounds 3, raising an issue which has not arisen from the Court below, is incompetent. The attempt here to steal the show at the highest level without leave has been depreciated by this Court in AJUWON v. ADEOTI (1990) 21 NSCC (pt.1) 408 at 452; (1990) 2 NWLR (pt.132) 271 at 296 per Nnaemeka-Agu, JSC. D

The three grounds of appeal before us, My Lords, are incompetent. They are accordingly struck out. The appeal, bereft of any competent ground of appeal, is also incompetent. Accordingly the appeal is hereby struck out. It is unfortunate that this incompetent appeal has occupied the precious time and space of this Court for so long a time and thus depriving other competent and valid appeals the precious time and space. E F

I read in draft the judgment just delivered by my learned brother, C.C. NWEZE, JSC, in this appeal. I hereby adopt the judgment, even as to the merits of the appeal, including the consequential orders made therein. G