IN THE SUPREME COURT OF NIGERIA

Suit No: SC345/2001

Petitioner: Dr. Augustine N. Mozie,Vincent Mbamalu,Louis N. Madukaife,Gabriel M. Igweze,Andrew Obiechina,Nathan I. Mozie,Registrar of Deed

And

Respondent: Chike Mbamalu,Arinze Mozie,Chike Obiegbu

Date Delivered: 2006-07-14

Judge(s): Idris Legbo Kutig,Niki Tobi,George Adesola Oguntade,Mahmud Mohammed,Walter Samuel Nkanu Onnoghen

Judgment Delivered

This appeal involves land in Omenu family of Umueri, Ogbunike in Oyi Local Government Area of Anambra State. The Omenu family owned the Ani Owelle land, which consisted of a large expanse of undeveloped and uninhabited land.

The 1st appellant, a medical practitioner, desirous of building a cottage hospital and his residential accommodation, applied for a parcel of land in Ani Owelle. He was allocated some plots of land. While it is the case of the plaintiffs/respondents that the application was for four plots, the defendants/appellants said that the 1st defendant/appellant applied for unlimited number of plots, leaving it to the discretion of the family to allocate to him the piece of land, which will be sufficient to accommodate a hospital and a residential accommodation.

The 1st appellant built a hospital on the parcel of land allocated to him. The hospital was duly commissioned in 1984. Trouble ensued in 1985 when the allocation made to the 1st appellant raised some controversy and dispute. The respondents sued the 1st appellant together with the 2nd to 6th appellants and asked for five reliefs. The 7th appellant was also in the suit.

The learned trial Judge dismissed the suit of the plaintiffs/respondents. He said:

'It is my view that in the light of the conflicting evidence adduced by the plaintiffs it cannot be said that EXH 3 or the survey plan attached to EXH 8 is forged. The plaintiffs have not proved the alleged fraud beyond reasonable doubt. I hold that in the light of the evidence of DW1 and DW2 which I believe, EXH 3 and the survey plan attached to EXH 8 could not have been forged.'

On appeal, the Court of Appeal set aside the judgment of the trial Judge. The Court said at page 248 of the Record:

'In the similar manner, since the 1st Respondent took more land than was originally granted to him without recourse to the family, such taking of extra land was done fraudulently and must be set aside. The appeal therefore succeeds and is hereby allowed. Judgment of Amaizu, J. (as he then was) dated 14/7/95 is hereby set aside. The appellants are entitled

to all the Declarations and Orders claimed by them under paragraph 16 of their Amended Statement of Claim ...'

Aggrieved, the appellants have come to this Court. Briefs were filed and duly exchanged. The appellants formulated eight issues for determination, while the respondents formulated four issues. I will not reproduce the twelve issues here. I do not have such space. But I have enough space to ask what are eight issues doing in an appeal that has only five grounds of appeal' This Court has condemned proliferation of issues. As a matter of procedure, issues should not outnumber grounds of appeal. This is because issues are framed from one or more grounds of appeal, preferably more than one ground of appeal. The reverse position is the practice and it is that grounds of appeal outnumber issues. See generally Attorney-General Bendel State v. Aideyan (1989) 4 NWLR (Pt. 118) 646; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566; Adelaja v. Farouk (1990) 2 NWLR (Pt. 131) 137; Anonk Lodge Hotels Ltd, v. Mercantile Bank of Nigeria Ltd (1993) 3 NWLR (Pt. 284) 72.

Let me first take Issue No. 3 of both the appellants and the respondents. Issue No. 3 of the appellants' brief reads:

'Whether the Court below was right in castigating and reversing the submission of the learned Counsel for the defendants/appellants that as none of the plaintiffs/respondents was head of the family and sued in their individual rights, the action was wrongly or improperly constituted and incompetent.'

Issue No. 3 of the respondents' brief reads:

'Whether the Respondents had the competence to maintain this action''

Chief Tochukwu Onwugbufor, learned Senior Advocate for the appellants, submitted that it was wrong to commence and present the action by the three plaintiffs/respondents in their personal capacities as the property in issue was the undivided communal property of all the adult males of Omenu family. Citing Nsima v. Nnaji (1961) All NLR 441 and Nta v. Arugbo (1972) 5 SC 156, learned Senior Advocate contended that in the Eastern States, it is the practice that before a plaintiff can bring an action on behalf of others, he has to obtain the authorisation of those he is to represent and obtain leave or approval of the Court to represent them. Furthermore, the fact that the plaintiffs are suing in a representative capacity ought to have been shown on the writ and statement of claim, learned Senior Advocate argued. He cited Akande v. Araoye (1968) NMLR 283; Oyewole v. Lasisi (2000) 14 NWLR (Pt. 687) 242 at 353; Ifekwe v. Madu (2000) 14 NWLR (Pt. 686) 459 at 478 and Order 4 Rule 1 of the High Court of Eastern Nigeria and now Anambra State.

Learned Counsel for the respondents, Mr. Ben Anachebe, submitted on Issue No 3 of Respondent's brief that the appellants cannot raise in this appeal the issue of competence of the respondents to maintain the action as the issue was very well expressed by the learned trial Judge in his judgment. He argued that in the absence of a cross-appeal the appellants cannot raise the issue. He pointed out that the respondents sued for the protection of not only their individual rights but for the protection of the rights of all Omenu family members excluding the 1st appellant when they claimed in the first head of their reliefs. He finally submitted that it is now too late for the appellants to raise the issue whether the respondents can sue in their own right or not.

With respect, I do not agree with him that the issue cannot be raised in this Court. The competence of a person to file an action relates to jurisdiction and it can be raised in this Court. The respondents cannot shut out the appellants from raising the issue merely because 'the issue was very well expressed by the learned trial Judge in his judgment.' That law is strange to me, if it is law at all.

It is clear that both issues are confined to the competence of the plaintiffs/respondents to sue in the matter. As they do not extend to the competence of the defendants/appellants to defend the action, I shall not go there. This is because parties are, bound by the issues formulated in their briefs. In other words, a party cannot advance an argument outside the issue or issues formulated in the brief without leave of Court. This stems from the larger ambit of our adjectival law that parties are, bound by their briefs.

On the issue of competence of the plaintiffs/respondents to maintain the action, the learned trial Judge said at page 141 of the Record:

'The present suit is instituted by four members of Omenu family in their own right. This fact, in my considered view, has nothing whatsoever to do with the merit of their action. This is because a member of a family having an interest in a family land may sue when the head of family neglects or refuses to do so. It is my view that having taken the action, the person must adduce sufficient evidence to prove his case.'

The Court of Appeal made reference to the above statement of the learned trial Judge. The Court said at page 246 of the Record:

'Before concluding this judgment, I feel obliged to say a few words about the remarks made by the learned Senior Counsel for Respondents, all be it as an aside, i.e. that none of the Appellants was the Head of the Family, and that they all sued individually, and not for and on behalf of the Family. The short answer to this quibble was given by the learned trial Judge of the lower Court himself when he stated in his judgment at page 141 of the records as follows:'

The Court of Appeal then quoted the above statement of the learned trial Judge.

As it is, Issue No. 3 focuses on the above statement of the Court of Appeal and therefore should be taken in that light only.

Paragraphs 1 and 2 of the Statement of Claim aver as follows:

'1. The plaintiffs and the defendants are members of Omenu family of Umueri Ogbunike in Anambra Local Government Area.

2. The Omenu family of Umueri Ogbunike are the owners of that piece or parcel of land known as and called Ana Owelle situate at Umueri Ogbunike and verged green in plan No. MG AN 245/86 filed by the plaintiffs in this suit.'

Paragraphs 2 and 3 of the Statement of Defence aver as follows:

'2. The defendants admit paragraph 1 of the Statement of Claim.

3. Save that the Omenu family of Umueri Ogbunike are the owners of that piece or parcel of land known as and called Ana Owelle situate at Umueri Ogbunike, the defendants deny the rest of the averments in paragraph 2 of the Statement of Claim and will put the plaintiffs to very strict proof.'

It is clear from the above pleadings that parties agree:

(1) that the plaintiffs and the defendants are members of Omenu family of Umueri Ogbunike in Anambra Local Government Area

(2) that the Omenu family of Umueri Ogbunike are the owners of piece or parcel of land known as and called Ana Owelle. It should be mentioned that the Ana Owelle element is averred to in paragraph 3 of the Statement of Claim.

It is elementary law that matters admitted in pleadings need no further proof. See Economides v. Thomopulous Ltd. (1956) 1 FSC 7; Olubode v. Oyesina (1977) 5 SC 79; Balogun v. Labiran (1988) 3 NWLR (Pt. 80) 66; Motunwase v. Sorungbe (1988) 5 NWLR (Pt. 92) 90; Sketch v. Ajagbemokeferi (1989) 1 NWLR (Pt. 100) 678.

It is good law that members of a family can sue in respect of family property. This was the position of the two Courts below and they are right. In Dadi v. Garba (1995) 8 NWLR (Pt. 411) 12, this Court held that a member of a family has capacity to sue to protect family property. Similarly in Babayeju v. Chief Ashamu (1998) 9 NWLR (Pt. 567) 546, this Court also held that any member of the family whose interest is threatened by the wrongful alienation or wrongful interference with the family property can sue to protect his interest whether with the consent or without the consent of the other members of the family, for if he does not act he may find himself being held to be standing by when his rights were being taken away. See also Ugwu v. Agba (1977) 10 SC, 27; Melifonwu v. Egbuyi (1982) 9SC; Orogan v.

Soremekun (1986) 5 NWLR (Pt. 44) 688; Olowosago v. Adebanjo (1988) 4 NWLR (Pt. 88) 275; Odeneye v. Efunuga (1970) 7 NWLR (Pt. 164) 618.

It is in the light of the above authorities that I am unable to agree with the submission of learned Senior Advocate for the appellants that the plaintiffs/respondents ought to have commenced the action in a representative capacity and not in their personal capacity. And what is more, learned Senior Advocate did not see the need to file a cross-appeal against the judgment of the learned trial Judge on the issue.

Learned Counsel cited the case of Ekpendu v. Erika (1959) 4 FSC 79. With respect, the case is not applicable. In that case, the Federal Supreme Court decided that a sale or lease of family land carried out by the head of family, in which the principal members of the family do not concur, is voidable. A sale or lease of such land by principal members without the concurrence of the head of the family is void ab initio. The case, which dealt with the alienation of family property, cannot be authority for suing on family property.

Assuming that I am wrong and the action ought to have been instituted in a representative capacity, what is the position of the law' The rule as to representative actions was derived from the Court of Chancery in England, which required the presence of all parties to an action so as to put an end to the matters in controversy. See Anatogu v. Attorney General of Eastern Nigeria (1976) 11 SC 109. The rule has been described as a 'rule of convenience only.' See Hamisu v. Abergavenny (Marquis of) (1887) 3 TLR 324 at 324. As a rule that was originated for convenience, and for the sake of convenience, it has been relaxed, (see Bedford (Duke of) v. Ellis (1901) AC 1 at page 8). As a rule of convenience, it is a matter, which ought not to be treated as rigid but as a flexible tool of convenience in the administration of justice. See Anatogu v. Attorney General of Eastern Nigeria. In other words, Courts of law should not myopically follow the rule rigidly and fall into a big ditch and find themselves in a state of mirage where it becomes impossible to retrace their steps to do justice in a given case. On the contrary, Courts of law should invoke the rule where it is convenient to do so to assist them in doing justice in a given case. It is this aspect of doing justice in a case that vindicates the element of convenience built into the rule. The rule is not cut-and-dry. After all, justice is paramount in the judicial process. It is the cynosure of the process.

In Wiri v. Wuche (1980) 1-2 SC 1, this Court dealt exhaustively on representative actions. In the case, the Court said:

'The attitude this Court adopts in matters of this nature is not a rigid one. It depends on the facts and circumstances of the case. If there is evidence that the parties appear to possess representative capacity and the authority of those they represent, this Court does not and will not upset a judgment of the lower Court merely on a bare objection of failure to obtain the approval of the Court.'

The Court had earlier said at page 18 of the Report:

'There is no doubt that the authority for plaintiffs to sue on behalf of a community must come from that community and the order for leave to prosecute on behalf of a community under the rules of the High Court of Eastern Nigeria must

come from the Court (and, here, we are in agreement with the decision in Oguchi v. Egbuchi (Supra) (see also the decision of the High Court of Eastern Region in Nsima v. Ole Nnaji and others (1961) 1 All NLR 441; otherwise the plaintiffs must be regarded as prosecuting such proceedings in their personal capacity.'

It was after the Court made the above statement that it came to the conclusion that the Court will not upset a judgment of a trial Judge merely on a bare objection of failure to obtain the approval of the Court. The decision of this Court in Wiri v. Wuche comes to this: although leave is necessary at the trial Court to sue in a representative capacity, an appellate Court will not upset the judgment merely because such leave was not obtained in the trial Court. In Oyewole v. Lasisi (2000) 14 NWLR (Pt. 687) 342, the Court held that where a plaintiff institutes an action in a representative capacity, leave of Court to sue in representative capacity is superfluous. See also Ifekwe v. Madu (2000) 14 NWLR (Pt. 688) 459, where the Court also held that failure to obtain the leave of Court to sue in a representative capacity is not fatal as to vitiate the proceedings. The Court cannot therefore strike out or dismiss an action just because the plaintiff did not obtain the leave of the Court to sue in a representative capacity, as this will defeat the justice of the case. See also Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587.

Let me return to the submission of learned Senior Advocate in respect of Issue No. 3. I have taken it a bit. I should complete it. While Issue No. 3 is confined to the plaintiffs/respondents, the part of the submission of learned Senior Advocate strays to the defendants/appellants. I should take the submission further to justify the position I have taken.

Learned Senior Advocate submitted that when one looks at the position of the plaintiffs/respondents and the defendants/appellants in this case, the action was not properly constituted and that the action was commenced and presented as if it were a personal action between the plaintiffs and the defendants. Citing Awoniyi v. Rosicrucian Order (2000) 10 NWLR (Pt. 676) 522 and Ayorinde v. Oni (2000) 3 NWLR (Pt. 649) 348, learned Senior Advocate contended that none of members of Omenu family apart from the plaintiffs and defendants in their personal capacities were made parties.

As indicated above, the above submission moves outside Issue No. 3 when it extends to the defendants/appellants. And that is against the law of briefs, as it relates to bindingness of issues. I had earlier dealt with that. I will not go further.

I should take the two cases cited by Counsel. In Awoniyi, this Court held that in civil actions, all parties necessary for the invocation of the judicial powers of the Court must come before it so as to give the Court jurisdiction to grant the reliefs sought. This decision of this Court should be taken in the context of the case. The issue was the failure on the part of the applicant in a motion to make the Registrar General of the Corporate Affairs Commission and the Inspector General of Police, parties. It was in that context this Court arrived at the decision. The case did not involve representative action.

In Ayorinde, this Court held that where there is no competent defendant on record before the case went to trial and throughout the trial, the action in respect thereof would be struck out on the ground that it is improperly constituted. In view of the fact that paragraph 1 of the Statement of Claim averred that the plaintiffs and the defendants are members of Omenu family, an averment which was admitted by the defendants/appellants, not much can be made out of the case. This is not a case where all the defendants sued are not members of the Omenu family. It is rather a case where all the defendants, other than the 7th defendant, sued are members of the Omenu family and so an order of striking out the

suit, in my humble view, is neither here nor there.

Let me pause here to deal with two different reliefs sought by the appellants in their briefs: the main brief and the reply brief. While they ask that the appeal be allowed and the judgment of the Court of Appeal be set aside in their main brief, they ask for either striking out the case for being improperly constituted or set aside the judgment of the Court of Appeal in its entirety. This is a very new one in the law of brief writing and I do not think I am prepared to learn it.

It is not my understanding of the law of brief writing that a reply brief seeks a different relief outside the main brief. A reply brief, as the name implies, is a reply to the respondent's brief. A reply brief is filed when an issue of law or arguments raised in the respondent's brief call for a reply. A reply brief should deal with only new points arising from the respondent's brief. In the absence of a new point, a reply brief is otiose and the Court is entitled to discountenance it. A reply brief is not a repair kit to put right, any lacuna or error in the appellant's brief.

The respondent's brief did not deal with striking out of the plaintiffs/respondents' case. There was therefore no legal basis for the last sentence in the reply brief as it affects a supposed alternative order of striking out.

With the diversion on the curious relief in the reply brief, I should now take some evidence to show that the parties, other than the 7th appellant, are members of the Omenu family. The 6th defendant/appellant, as DW1 said in evidence in-chief at page 8 of the Record:

'My name is Nathan Mozie. I live at Omenu Quarters, Omueri, Ogbunike. I am a retired schoolteacher. I know the first defendant. We are from the same family. We have a Omenu family meeting. In 1978, I was the secretary of the Omenu family meeting. During my tenure of office as the Secretary of Omenu family meeting, I received a letter from the first defendant addressed to the family meeting through me as the Secretary.'

DW2, the 2nd defendant/appellant, gave evidence as a member of the Omenu family. He was also a member of the Omenu Land Allocation Committee. It is clear from the evidence of DW1 and DW3 that all the parties in this matter, other than the 7th defendant/appellant, are members of the Omenu family. PW2, as 2nd plaintiff/respondent said in evidence that 1st defendant/appellant is a member of the Omenu family. He, PW2, is also a member of the Omenu family. It is clear from the totality of the evidence that apart from the 7th defendant/appellant, all other persons are members of the Omenu family. I sound repetitive here. I decided to sound repetitive intentionally.

It is not my understanding of the law that all the members of the Omenu family must be specifically named as parties. That will be enumerating or parading a village or community of names which is most unnecessary. That type of enumeration can only be useful in a census exercise, not in a Court of law. So much stationery and time will be wasted and for no good reason.

Another aspect of the law on representative action is that the persons who are to be represented and the persons representing them must have the same interest. In other words, both must have a common interest and a common grievance. Accordingly, where there is a common interest and a common grievance, a representative action will be in order. See Bedford (Duke of) v. Ellis (1910) AC 1 at page 8.

It is not difficult to locate the common interest and the common grievance of the parties in this appeal. It is the Omenu family land, part of which was allocated to the 1st appellant. This is common to all the parties except the 7th appellant who is the Registrar of Deeds and therefore not a member of the family. The land is called Ani Owelle by both parties. That is the common reference point and the melting pot. Can there be a better case of common interest and common grievance than this' I think not.

It is clear from the above that whichever way one looks at Issue No 3, it cannot be resolved in favour of the appellants. This is because the law is certainly not in their favour. On the contrary, the law is, in favour of the respondents, and I so hold.

Let me now take Issue No 1 in the appellants brief and it is whether the 1st appellant was allocated only four plots or an indefinite or unlimited number of plots.

Learned Senior Advocate for the appellants submitted that the learned trial Judge was right in his judgment rejecting the evidence of the respondents that only four plots were applied for in 1977 by the 1st appellant. He submitted that the respondents did not discharge the onus to prove that only four plots were applied for by the 1st appellant. He cited ACB v. Emostrade (2002) 8 NWLR (Pt. 770) 501; Elias v. Omo-Bare (1982) 5 SC 25 and Union Bank v. Nnoli (1990) 1 NWLR (Pt. 145) 530 at 544. He examined the evidence of PW1, PW2, DW1, DW2 and Exhibits 1, 3, 8, 9, 12, 13 and 14.

Learned Counsel for the respondents on Issue No 1 in the respondents brief, submitted that the Court of Appeal was right in holding that the learned trial Judge was wrong in his judgment on the number of plots applied for by the 1st appellant. He called in aid the evidence of PW2.

The evidential burden of proof that the 1st appellant was allocated indefinite number of plots shifts to the appellants after the respondents proved that only four plots were allocated to the 1st appellant. See sections 136 and 137 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria. See also Balogun. v. Labiran (1988) 3 NWLR (Pt. 80) 66; Usman v. Jusfa (1997) 1 NWLR (Pt. 483) 525; Braimah v. Abasi (1998) 13 NWLR (Pt. 581) 167; Eboade v. Atomesin (1997) 5 NWLR (Pt. 506) 490.

Did the 1st appellant discharge the burden placed on him' In other words, did he give evidence that he was allocated indefinite or unlimited number of plots' In his evidence in-chief, 1st appellant as DW3 said at page 99 of the Record:

'I put up an application for the land to the family in 1978. After the family had looked into the application, I was granted the land ... The land Committee carved out the land for my cottage hospital and residential quarters.'

Under cross-examination, 1st appellant said:

'I applied for a piece of land for building a hospital with residential quarters ... I specified that my application is for land to erect a hospital with residential building. I left it open for the authorities in the family to decide on the area that will meet my needs.'

I do not see any evidence on the part of the 1st appellant that he applied and was granted an unlimited number of plots. By the last sentence above, it is clear that the authority to grant number of plots of land to the 1st appellant was with the family of the respondents, as in his own words, 'I left it open for the authorities in the family to decide on the area that will meet my needs.' In the exercise of their authority, the family decided on four plots. I ask: why the furore' After all, the 'authorities in the family' in the context of the evidence of 1st appellant gave final stamp or provided the final stamp and it is four plots. Period or full stop.

What did the respondents say about the issue' PW2 said in evidence in-chief at pages 56 and 57 of the Record:

'In 1977, the 1st defendant applied to the family for four plots of land on which to build a cottage hospital. The family granted the application. In compliance with the usual practice, the members of the land Committee, to which the 2nd ' 6th defendants belonged at the material time, were asked to carve the four plots for the 1st defendant. The four plots would measure 1847.506 sq. meters ... After the grant of the land, there was disaffection and enmity amongst the members of the family. This was because, the portion granted to the 1st defendant by the family and the portion he later claims as having been granted to him by the family was different. The land he claimed was larger than the land he was granted. The land he claimed measured 1.824 hectares or 18,239.186 square metres. The place where he now erected his residential building is not the place he was granted the four plots.'

The above is a more cogent evidence which stands the evidence of DW1 on the head and beyond to a standstill. It overshadows the evidence of DW1. Witness clearly said in evidence that the land 1st appellant claimed was larger than the land he was granted. Even going by the evidence of 1st appellant as stated above, he did not make out a case for allocation of unlimited plots.

Exhibit 12 cannot be useful to the appellants because it did not contain the number of plots allocated to the 1st appellant. On the contrary Exhibit 12 was the application by the 1st appellant. An application can ask for anything under the sun, including the unlimited number of plots but the family may decide to give a specified number of plots.

Based on the evidence before the learned trial Judge, the Court of Appeal said at page 248 of the Record:

'In the similar manner, since the 1st Respondent took more land than was originally granted to him without recourse to the family, such taking of extra land was done fraudulently and must be set aside.'

In the absence of any competing evidence on the part of the appellants, I find it difficult to hold that the above decision is wrong, particularly to the effect that 'the 1st appellant took more land than was originally granted to him.'

The above evidence apart, it is not the usual practice for families to allocate unspecified or unlimited plots of land to persons. The usual practice is that specific number of plots is allocated to persons in need. And that is the case of the respondents. The case of the appellants is a very tall one beyond the tallest human being on earth, and this Court cannot reach that height. Where a practice has been for a very long period, probably competing with time immemorial, the burden is on the party taking the contrary position to lead evidence that the practice was not followed intentionally. I do not see any such evidence on the part of the appellants.

Accordingly, I resolve Issue No 1 in favour of the respondents. I do not see any need to take the other issues. My cup in this appeal is full. I should stop here. In sum the appeal fails and it is dismissed. The judgment of Court of Appeal is affirmed. I award N10, 000.00 costs in favour of the respondents.

Judgment delivered by

Idris Legbo Kutigi, J.S.C.

I have had the privilege of reading in advance the judgment just delivered by my learned brother Niki Tobi J.S.C. I agree with his reasoning and conclusions. The reliefs claimed by the Plaintiffs/Respondents are clearly for the benefit of the entire Plaintiffs' Omenu family including the 2nd to 6th Defendants/Appellants and all adult members of the family. Again the judgment and orders of the Court of Appeal clearly show that they are all for the benefit of the Plaintiffs and the 2nd to the 6th Defendants and all adult members of Omenu family.' The appeal in my view lacks merit. It is accordingly dismissed with N10, 000 costs in favour of the Respondents against the Appellants.

Dissenting Judgment delivered by

George Adesola Oguntade. J.S.C.

The respondents, who are adult members of Omenu family of Umueri Ogbunike of Anambra State brought their suit at the Onitsha High Court, as plaintiffs, claiming against the present appellants, as the defendants, for the following reliefs:

'i. A declaration that the plaintiffs including the 2nd to the 6th defendants and all the adults of Omenu family are entitled to the customary right of occupancy relating to the piece and parcel of land known as and called Ana Owelle situate at Umueri Ogbunike except the area denoted by plan No. ECAS 4/79 of 13/1/79 measuring 1847.506 square metres granted to the 1st defendant by the 2nd to 6th defendants on or about July, 1978 with the consent and authority of the whole Omenu family. The exact delineation of the said land is shown in Plan No MG AN 245/86 verged red, yellow and green.

ii. A declaration that the purported grant by the 2nd to the 6th defendants to the 1st defendant of a larger area of the land other than that denoted in plan No CAS/287/82 of 15/5/82 containing 18.239.186 square metres in the building certificate of occupancy registered as No 32 at page 32 in Volume 555 of the land Registry at Enugu and verged yellow in plan No MG AN 245/86 is done in fraud of the plaintiffs and other adult members of Omenu family except the 2nd to the 6th defen'dants and the said document or grant is void and of no legal effect.

iii. Rectification of the Register in the Land Registry, Enugu regarding the said building certificate of Occupancy No 32 at page 32 in Volume 555 of the Land Registry Enugu issued in favour of the 1st Defendant.

iv. Perpetual injunction restraining the 1st defen'dant himself, his servants, agents and/or privies from further trespassing on land or lands outside the area granted to the 1st defendant denoted in Plan No ECAS 4/79/86.

v. An injunction restraining the 2nd to the 6th defendants by themselves their servants and agents from alienating the said portion of land to the 1st defendant without the consent and authority of the plaintiffs and other adult members of the said Omenu family.'

The parties filed and exchanged pleadings after which the suit was tried by Amaizu J. (as he then was). On 14-07-95, the trial judge dismissed the plaintiffs' claims in their entirety. Dissatisfied, the plaintiffs brought an appeal before the Court of Appeal Enugu Division (i.e. the Court below). On 14/6/2001, the Court below, in a unanimous judgment allowed the appeal. The judgment of the trial Court was set aside and the reliefs sought by the plaintiffs before the trial Court were granted. The Defendants were aggrieved by the judgment of the Court below. They have come before this Court on a final appeal. From their sixteen grounds of appeal, the defendants/appellants have distilled eight issues for determination in this appeal. The issues read:

'1. Whether the Court below was right to rely on EXH 1, loss of the family's minute book and the evidence of PW1 to uphold the plaintiffs' evidence that only 4 plots of land measuring 1847.506 square meters, as against an indefinite number of plots, was approved by the family at the family meeting contrary to the findings of the learned trial Judge who disbelieved the plaintiffs' evidence that only four plots of land was approved by the family for the 1st defendant/appellant.

2. Whether the Court below was right when after finding the defendants/appellants guilty of forgery, it refused or declined to consider the 2nd issue for determination relating to the quantum or number of plots approved by the family for the 1st appellant when that issue was indispensable in the determination of the issue of fraud and should have determined the appeal one way or the other.

3. Whether the Court below was right in castigating and reversing the submission of the learned Counsel for the defendants/appellants that as none of the plaintiffs/respondents was the head of the family and sued in their individual rights, the action was wrongly or improperly constituted and incompetent.

4. Whether the Court below was right in its assessment of evidence on which its finding of fraud was based, to rely on EXH. 6 and the evidence of PW.I. which it isolated for commendation as independent and impartial evidence which lived up to its bidding.

5. Whether the Court below has not misapprehended or misconstrued the standard of proof required in proof of allegation of fraud which is a criminal offence, and whether this has not occasioned a miscarriage of justice to the detriment of the appellants.

6. Whether the Court below was right in failing to construe and consider the effect, import and meaning of EXHS. '2A', '8', '9' and '14' in the light of the case before them, which led them to arrive at a wrong conclusion that fraud was proved.

7. Whether the Court below had not denied the appellants a fair hearing in basing its judgment on the evidence of PW. I and EXHS. 1, 2 and 6 which were in favour of the plaintiffs without any reference or consideration of evidence of the defendants and EXHS. 2A, 3, 8, 9 and 14, which are favourable to the defendants/appellants.

8. Whether the Court below has not misdirected itself by non-direction in failing to observe that on documentary evidence before the Court, the plaintiffs/respondents have tendered conflicting evidence in prove of intention to defraud.'

The plaintiffs/respondents raised four issues for determination, which read:

'1. Whether the Court of Appeal was right in evaluating the evidence and drawing its own conclusions based on all the materials before the Court'

2. Whether it has not been fully been estab'lished beyond all reasonable doubt that the 1st Appellant had by fraudulent and or other dubious means attempted to appropriate for himself more land than had been allotted and approved by the family for his use'

3. Whether the Respondents had the com'petence to maintain this action'

4. Whether the Court of Appeal was in error in commending the former Surveyor-General Mr. Obianwu (P.W.I) as an independent and impartial witness in this case"

I am satisfied that the issues for determination raised by the plaintiffs are fully subsumed under the defendants' four issues. I shall be guided in this judgment by the defendants' issues. I need to expose fully the nature of the dispute leading to this appeal as ventilated by parties in their pleadings. The case made by the plaintiffs in their Amended Statement of Claim may be summarised thus:

The plaintiffs and the defendants belong to Omenu family of Ogbunike which family owned a parcel of land called Ana Owelle. The members of the family used the land in common for farming. A portion of it however was reserved for residential buildings. The practice was that any male adult member of the family who wanted a land for a building applied for and was given a plot upon payment of a token sum of one hundred Naira. In December, 1977, the 1st defendant, at an informal meeting of Omenu family in the house of the 3rd defendant applied in writing to be granted four plots of land to build a cottage hospital. The request of the 1st defendant was granted. In 1978, the membership of the Omenu family land Committee was reconstituted.

The re-constitution brought in the 1st defendant and 2nd to 6th defendants as members of the land Committee. The four plots of land granted to 1st defendant was as depicted on a plan No MG AN/245/86 Ref. To Plan No E.C.A. S4/79, which was deposited by 1st defendant at the Surveyor-General's office, Enugu.

Surprisingly however, the 1st defendant cleared more than the four plots granted him by the family and laid the foundation for a building. The 5th defendant at a family meeting raised the matter but the 1st defendant assured the members that he was not taking more than the four plots granted him by the Omenu family. The family demanded to see a copy of the plan of the land surveyed by the 1st defendant. He promised to produce it later. The 2nd defendant later told a meeting of Omenu family members that six plots and not four were granted to the 1st defendant. However, it was later discovered that 1st defendant was granted 28 plots of land measuring 1,824 hectares instead of the four plots authorised by the family. It was discovered that the 1st defendant had colluded with 2nd to 6th defendants to have 28 plots instead of four allocated to himself. It was in these circumstances that the plaintiffs brought their suit claiming as

earlier set out in this judgment.

The 1st to 6th defendants filed a joint Statement of Defence wherein they denied most of the facts pleaded by the plaintiffs. It was pleaded that the Plan No. MG/AN/245/86 did not represent the land granted by the Omenu family to the 1st defendant. The true plan according to the defendants is the one numbered ECA.4/79 dated 13/l/79. It was pleaded that the 1st defendant applied in writing on 5/8/78 for land to build a cottage hospital and a residential building. The defendant paid N500.00 for the purpose. The family directed members of the land Committee to carve out enough land to accommodate a cottage hospital. The members of the land Committee duly complied and on 10-2-79, the 1st defendant was informed in writing of the grant of his request.

On 17/5/79, an agreement was executed in first defendant's favour and the plan of the land granted him was therein recited. The land so granted to 1st defendant measured 1,824 hectares and the land was shown to the Surveyor by one Albert Onunkwo, the head of Omenu family. A certificate of occupancy was issued in favor of the 1st defendant, there being no objection from the Omenu family. All the members of Omenu family were aware of the grant as a traditional ceremony called Ikpoba-Ani at which members of the family and the head of the family were present was done in 1983. The defendants denied that there was any fraud involved in the grant of the land to the 1st defendant.

The 7th defendant, the Registrar of Deeds denied the facts pleaded by the plaintiffs. He however admitted that the land in dispute belonged to the Omenu family. He pleaded that he acted in good faith without malice in registering the certificate of occupancy in favour of the 1st defendant.

On the state of pleadings before the trial Court, it would appear that there was only a small issue involved in the dispute. The plaintiffs pleaded that the Omenu family granted to the 1st defendant only four plots of land whilst the 1st to 6th defendant claimed that 1,824 hectares of the land owned by Omenu family was granted to the 1st defendant. The trial Court needed to determine which of the two conflicting versions was the more probable.

One of the issues identified by the defendants/appellants as arising for determination in this appeal raises a fundamental question as to the competence of the suit brought by the plaintiffs. Issue No .3 relates to whether or not the plaintiffs' suit at its inception was properly constituted. The issue ought to be taken first because of the effect it may have on the other issues raised.

The appellants' Counsel, Tochukwu Onwugbufo Esq. S.A.N. in his argument in support of issue 3 called our attention to the fact that the plaintiffs had initiated the action in their personal names thus giving the first impression that the land in dispute was their personal property. It was further stated that the plaintiffs had neither sought nor obtained the leave of the trial Court to bring the suit in a representative capacity as stipulated under Order 4 rule 3 of the Anambra State High Court Rules. Similarly, they had not indicated on the Writ of Summons that they were suing in a representative capacity as prescribed under Order 4 rule 1 of the same Rules. Learned Senior Counsel referred us to Jereiah Nsima v. Ole Nnaji & Ors. [1961] I All N.L.R. 441; Mba Nta & Ors. v. Ed. Nwede Anigbo & Anor. [1972] 5 SC. 156; Akande v. Araoye & Anor. [1968] N.M.L.R. 283; Oyewole v. Lasisi [2000] 14 N.W.L.R. (Part 687) 242 at 353; and Ifekwe v. Madu [2000] 14 N.W.L.R. (Pt. 686) 459 at 478-479. Counsel observed that it was not made clear which adult members of the Omenu family supported plaintiffs' suit.

Next, Counsel discussed the nature of the suit brought by the plaintiffs. The plaintiffs were by their pleadings adult members of the Omenu family. They pleaded that more land was granted to the 1st defendant than was approved for him by the family. The 2nd to 6th defendants who were members of the Omenu family's land allocation Committee were alleged to have colluded with the 1st defendant in the matter. Counsel submitted that the plaintiffs had not stated:

(1) the number of the membership of the Omenu family

(2) the number of the adult members they were representing so that it could be ascertained if those in plaintiffs' camp were in the majority. It was not made clear if the 2nd to 6th defendants were being sued as the representatives of Omenu family.

If such was the case, it would have been necessary for leave to be obtained to enable the 2nd to 6th defendants defend the action in a representative capacity - Dokubo & Anor. v. Bob-Manuel & Ors. [1967] I All N.L.R. 113. It was submitted that since the plaintiffs were not the heads of the Omenu family in line with the decision in Ekpendu v. Erika [1959] 4 F.S.C. 79, the plaintiffs' right to sue could only have been derived from under a leave granted to them pursuant to Order 4 rule 3 of the Anambra State High Court Rules - Bulai v. Omoyajowo [1968] N.M.L.R. 160; Adekunle v. Adewale [1983] 8 SC 98; Otapo v. Sunmonu [1989] 2 NWLR (Part 87) 587 and Adewunmi v. A-General, Ekiti State [2002] 2 NWLR (Part 751) 474 at 516. Counsel finally submitted that in the manner plaintiffs suit was pursued, the members of Omenu family were without the necessary distinction made both the plaintiffs and the defendants at the same time contrary to the decision in Okafor v. Nnaife & Ors. [1973], 3 E.C.S.L.R 261 and Onwumalu & Ors. v. Osadume [1971] 1 All N.L.R. 14.

The standpoint of respondents' Counsel was that it was no longer open to the appellants' Counsel to argue that the suit was not properly constituted in view of the fact that the same point had been unsuccessfully raised before the trial Court and the defendants who had judgment in their favour had not raised a cross-appeal against the judgment of the trial Court before the Court below.

In reacting to the contention that plaintiffs' action was not properly constituted, it is important to bear in mind that the consequence of an action brought, which was not properly constituted is the impairment of the jurisdiction of the Court to adjudicate. When the proper parties are not before the Court, such that those who may be affected by the orders of the Court are not before it, the proper course a Court must follow is to direct that all persons interested or likely to be affected by the result, are brought before it. In Oloriode & Ors. v. Oyebi & Ors. [1984] N.S.C.C. 286 at pp. 295-296, this Court per Obaseki JSC said of such situation:

'The statement of claim further discloses in paragraph 9 that the title to the land devolved on Ladega Oyero (deceased) according to native law and custom and that on his death his children, Taiwo Areje (deceased) otherwise known as Agbenaje) and Osu Kehinde (otherwise known as Edun) inherited the land according to native law and custom and at all times exercised all acts of ownership and possession without disturbance from anyone. The children of Taiwo Areje and Osu kehinde are still alive.

The question therefore arises whether an order of dismissal in such a case is not prejudicial to the interest of the Osu Kehinde branch of the Ladega Oyero family or rather to the Ladega Oyero family as a whole. I think it is and the justice of the case will be better met by an order striking out the appellants' claim.

In the final analysis, the question to be determined in this appeal is whether the appellants had locus standi to claim the declaration of title when the facts pleaded in their statement of claim show that title to the land in dispute according to native law and custom vests in the Ladega Oyero family (consisting of Agbenaje family and Osu Kehinde family).

When a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiceable. See Flast v. Cohen 392 US 83 88 S.Ct. 1942; Senator Adesanya v. President of Nigeria and Another (1981) 2 N.C.L.R. 358.

Having pleaded facts which show that the Ladega Oyero family and not Agbenaje family owns the land in dispute, the Agbenaje family is incompetent to prosecute the claim as it stands and since it was not amended, the proper order to make will be an order to strike out the claim and action.'

And at page 297 of the same report, Eso J.S.C. on the same point observed:

'if a person prosecuting an action has no locus standi, should the action be dismissed" Chief Williams submitted, and I am in full agreement, that a person who asserts the right claimed or against whom the right claimed is exercisable must be present to give the Court the necessary jurisdiction. Presence here is not just physical presence. He can put in appearance by Counsel, but if he makes a claim and in a second breath asserts that the claim belongs to another person, that other person cannot be said to be represented to prosecute the claim that has been made on his behalf. Indeed, he may not even be aware of such claim. And the person making the claim will have no standing before the Court as he has no interest in the claim he makes. It is in this context that I will admit the linking of locus standi with the jurisdiction of the Court, for as Obaseki J.S.C. said in the case of Senator Adesanya v. President of Nigeria (1981) 2 N.C.L.R. 358 at p. 393, it is the cause of action that one has to examine to ascertain whether there is disclosed a locus standi or standing to sue.

I have come back again to what the order of the Court ought to have been in Senator Adesanya v. President of Nigeria (supra), the claim of the plaintiff was dismissed and not struck out. See the judgement of Fatai Williams C.J.N. at p.378 of the report. All the Justices in the case agreed with that order. The Supreme Court in Abubakri v. Smith 1973 6S.C.31 merely dismissed the appeal of the appellant from the judgment of the High Court, which had earlier dismissed plaintiff's claim. The question of what order to make in the circumstance was not raised before the Supreme Court in the two cases. Incidentally the Court in Abubakri v. Smith (supra) approved of, and applied the reasoning of Plowman J. in Heyting v. Dupont 1963 1 W.L.R. 1192 who, instead of dismissing plaintiff's claim, merely indicated that he had no jurisdiction to adjudicate upon the plaintiff's claim See p. 1199.

I think the proper order when the Court has no jurisdiction to adjudicate upon a mater for whatever reason, like the parties before the Court having no locus standi, is to strike out the action. It is for these reasons and the reasons well stated by my brother Irikefe J.S.C. in his judgment that I will also allow this appeal and strike out the claims before the Court.'

At this stage, it is necessary to bear in mind the terms of Order 4 rule 5 of the Anambra State High Court rules which provides:

'5 (1) If it shall appear to the Court, at or before the hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the Court may adjourn the hearing of the suit to a future day, to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons or in such other manner as the Court thinks fit to direct; and on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause; provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the Court for leave to appear, and such leave may be given upon such terms (if any) as the Court shall think fit.

(2) The Court may, at any stage of the pro'ceedings, and on such terms as appear to the Court to be just, order that the name or names of any party or parties, whether as plaintiffs or defendants, impro'perly joined, be struck out.'

The purpose of Order 4 rule 5 above is to ensure that Courts bear in mind, the necessity to ensure that the proper parties are before the Court and to take remedial steps to save the situation where an action is not properly constituted.

I have made the point above in order to show that where an action is not properly constituted, the jurisdiction of the Court to adjudicate cannot be invoked. The matter becomes jurisdictional and thus enables the parties to raise the issue of such improper constitution at any stage of the litigation and even for the first time on appeal. It does not matter that the point had been decided at the trial Court against the party raising it on appeal. It is better that a proper ground of appeal be raised and an issue for determination formulated on the point as this enables all parties to know what issue they are to meet on appeal.

But where it is not distinctly raised on appeal and an issue formulated thereon, an appellate Court would still allow a party to raise it and grant to his opponent the opportunity to address it on the point. I am therefore unable to shut out plaintiffs/appellants' contention on the point.

At the trial Court, the defendants raised the issue, but the trial Judge at page 141 dismissed it in these words:

'The present suit is instituted by four members of Omenu family in their own right. This fact, in my considered view, has nothing whatsoever to do with the merit of their action. This is because a member of a family having an interest in family land may sue when the head of the family neglects or refuses to do so.'

The Court below took the same view above and went further to cite the decision of the Court of Appeal in Omorede v. Eleazu [1991] 4 NWLR (Part 183) 65 where Omosun J.C.A. said:

'Even though the interests of individual members of a family or community in family or community land are not exactly identical in content and qualify (quality), a member can properly represent the family or community in defen'ding their rights in the family or community land. (Bulai v. Omoyajowo [Nigerian Quarterly Review] 109 at 114) per Coker, J.S.C. Also [1968] N.M.L.R. 160, Dokubo v. Bob-Manuel [1968] 1 N.M.L.R. 1.'

It seems to me that the two Courts below had both overlooked the necessity for a person suing for and on behalf of a land owning family or community to obtain the leave of the Court to sue in a representative capacity. The question is not whether a member of a family cannot sue to protect family rights in a land. Nobody would argue that such a member could not sue. But where he does, he needs to obtain the leave of the Court. It is of course true, that the Courts have been generous in the grant of the order to bring a representative action where the facts justify it. Even where the leave was not sought or granted, a Court may see the case as a representative action if, satisfied that the action in its nature was fought by the parties in representative capacities. See Jeremiah Nsima v. Ole Nnaji & Ors. [1961] All N.L.R. 459; Bulai & Anor. v. Omoyajowo 1968 N.M.L.R. 160 & Adekunle & Anor. [1983] 8S.C. at pp. 102 to 104.

What then are the facts in this' It was common ground that the land in dispute belonged to the Omenu family of which both plaintiffs and 1st to 6th defendants are members. The 1st defendant wanted land to build a cottage hospital and his residence. As was the practice within the family, he applied to be granted land for the purpose. The plaintiffs claimed that the 1st defendant applied for four plots and that the family granted him the four plots. The 2nd to 6th defendants were the members of the Omenu Land Allocation Committee whose duty it was to mark out the land, which the family had agreed to allocate to members of the family who had applied. The 2nd to 6th defendants claimed that the 1st defendant applied for an unlimited area of land and that the family approved enough land to meet the need of the 1st defendant. Further, that they in compliance with the wish of the Omenu family marked out for 1st defendant, a portion of land much more than four plots of land. The simple issue before the trial Court was whether the Omenu family granted 1st defendant just four plots as contended by the plaintiffs or as much land as 1st defendant needed as contended by the 2nd to 6th defendants.

The plaintiffs claimed that they were adult members of the Omenu family. They did not obtain leave pursuant to Order 4 rule 3 of the Anambra State High Court Rules to bring the suit in a representative capacity. They sued the 1st to 6th defendants claiming as earlier stated in this judgment. The defendants were not sued as representatives of Omenu family. The defendants did not obtain the leave of Court to defend the action as representatives of Omenu family. The result was that the family, which owned the land in dispute, was not made a party to the suit.

It seems to me that, on the undisputed facts before the two Courts below, the major problem with plaintiffs' suit as constituted, was the failure to join as parties to the action, the Omenu family. On the facts presented, the 2nd to 6th defendants were no more than mere agents to the Omenu family. They were merely retained to mark out the lands for applicants to whom the family had made allocation. On those facts, only the Omenu family could say categorically how much land it granted to the 1st defendant. Since the land belonged to the family, it was only the family, which could decide whether or not to bring an action to defend its ownership of the land. The plaintiffs on record had sued in their individual names. They had not stated the number of members that constituted the Omenu family. It was not therefore known if they constituted the majority. On the knowledge which was available, the three plaintiffs could only have been a minority within the family since the 1st to 6th defendants who contended that the land was validly granted to the 1st defendant are also members of the Omenu family and there were six of them. Even if the 1st defendant had taken more land than was granted him, the Omenu family by its principal heads and majority of its members might still decide not to sue its own members to Court over the grant of land to another member. The clear implication is that the Omenu family was a necessary party to the suit.

Now, what makes a person a necessary party to an action' The important or paramount consideration is to make the party bound by the result and to ensure that all matters in controversy are resolved in the suit. Without joining the Omenu family, it became impossible to enforce the decision of the Court in the suit against them. Further, since the land belongs to them, it was not possible to resolve the issue in controversy as to whether or not the family granted four plots or more to the 1st defendant. The injury in respect of which the plaintiffs sought a relief by their suit was done to the Omenu family.

If the only problem with the plaintiffs' suit was the omission to obtain leave, it would have been possible for the Court below and this Court to overlook the omission once satisfied that the true character of the suit was a representative action. More than that however, the failure to join the Omenu family must have a catastrophic effect on plaintiffs' suit.

It seems to me that the Court below was wrong to have taken the view that the plaintiffs validly brought the suit to protect family interest in the land in dispute. The proper position, in my view, is that a member or more members of a family could bring a suit on behalf of a family in order to protect the family interest in the land where it is shown that the family head or principal members have failed or neglected to do so. The important point here is not that the present plaintiffs were without a standing to sue but that they could not sue in their personal names without first obtaining the leave or permission of the trial Court pursuant to Order 4 of the High Court Rules. The writ of summons and other processes issued ought also to show that the plaintiffs were suing in a representative capacity. There was no suggestion that some adult members of the Omenu family authorised the plaintiffs to sue on their behalf. There was no evidence as to the number of such adult members of Omenu family.

Further, the suit was brought against 2nd to 6th defendants as members of the land allocation Committee of the Omenu family. The result is that the Omenu family, which was the owner of the land in dispute, was not made a party to the suit. Was it not possible that the majority of the Omenu family did not approve that the plaintiffs initiate the suit' As the appellants' Counsel put the situation, what we have in this case is a group of Omenu family members suing other members of Omenu family who were in the land allocation Committee. Suppose the Omenu family had in fact authorised the 2nd to 6th defendants to give the land in dispute to the 1st defendant. It has to be borne in mind in this connection that the principal heads of the Omenu family have in fact executed Deeds of transfer of the land to the 1st defendant and a certificate of occupancy issued in his favour.

In Jeremiah Nsima v. Ole Nnaji & Ors. [1961] All N.L.R. 549 at 460-461 (Reprint) Idigbe J. (as he then was) discussing Order 4 rule 3 of the High Court Rules (Eastern Region) which is the same as Order 4 rule 1 applicable in this case said:

'It is therefore clear that under the High Court Rules of the Eastern Region, authority to sue or defend must come from the persons interested ..... The question whether a common interest exists between the members who seek to institute the action and their representative is raised in each of the rules and to that extent, the decided cases in the English Courts in respect of Order 16 rule 9 are of great assistance.

The net result of the many decided cases in England shows that in order to sue in a repre'sentative capacity, it is necessary to satisfy the Court that the members have a common interest in the sense that they have (1) a common grievance as well and (2) that the relief sought by the claim, is in its nature beneficial to them all. Smith & Others v. Cardiff Corporation [1954] 1 Q.B. 216.'

It seems to me that this action was at the beginning, not properly constituted. The plaintiffs had not shown that they had a common interest and a common grievance with all the members of Omenu family and that the reliefs sought, would in their nature be beneficial to other members of the family. There is no evidence that other adult members gave express permission to the plaintiffs to represent them. See Nwakhoba v. Dumez Nigeria Ltd, Ajaokuta [2003] F.W.L.R. (Pt. 179) 1188; Amajideogu v. Ononaku [1988] 2 NWLR (Pt. 78) 614 and Ayinde v. Akanji [1988] 1 NWLR (Pt. 68) 70 at 72.

This conclusion leads to no consequence other than that the plaintiffs not having properly invoked the jurisdiction of the Court should have had their case struck out. This conclusion also makes it unnecessary to consider the merits in other respects of the defendants/appellants' appeal.

It is desirable to give an alternative consideration to the appeal if I were to consider it on the merit and not only on the improper constitution of the suit. I shall proceed to consider the appeal on its merits and in particular, as to whether or not the plaintiffs were able to establish at the trial that the Omenu family granted only four plots of, land to the 1st appellant. The first point to be made here is that the 1st appellant was the 1st defendant at the trial Court. Now, the plank or springboard of the case pleaded at the trial by the Plaintiffs is as averred in paragraphs 5 and 6 of their amended Statement of Claim. The two paragraphs read:

'5. In December, 1977, the 1st defendant had applied to the Omenu family of which both the plaintiffs and the defendants belong, to grant him four plots from the Ana Owelle family measuring 15M x 30M each to enable him to build a Cottage hospital. The 1st defen'dant had submitted his application during an informal meeting of Omenu family in the house of the 3rd defen'dant. At the subsequent Omenu family meeting held in July 1978, the application of the 1st defendant was considered and the Omenu family unanimously agreed to grant four plots to the 1st defendant. In compliance with the usual practice, the meting had requested the land Committee of which the defendants belonged to carve out the four plots. Although it is the general practice for eligible persons applying for one plot of land to pay N100.00 token fee to Omenu family, the 1st defendant's application was not accompanied by any payment. The membership of the Omenu family land Committee was reconstituted in the said 1978 without the approval by the general

meeting of Omenu family as formerly done and that brought in the 1st defen'dant as a member, others are 2nd to 6th defendants. The four plots allocated to the 1st defendant which is verged brown in plan No MG AN/245/86, Ref. to Plan No ECAS.4/79 deposited by 1st defendant in Surveyor General's Office, Enugu was carved out from the side where the proposed expressway was to pass. The deed conveying the land to the 1st defendant was to be signed by five authorised signatories approved by Omenu family meeting. Those signatories were Albert Onunkwo, the 5th defendant, Benson Obiegbu, B. Ejoh Mozie, and the 2nd defendants.

6. Surprisingly to the plaintiffs, in addition to the four plots granted to the 1st defendant by the Omenu family through the 2nd to the 6th defendants, the 1st defendant cleared a large area of land, destroying economic trees. Not only was the area cleared out of proportion with the four plots granted to him, the 1st defendant laid the foundation of his residential house (which he now converted into his hospital) outside the area of four plots allocated to him. When the 5th defendants raised the issues in the family meeting of Omenu family, the 1st defendant pleaded that his former position was too remote from the build'ings of other members of Omenu family and that in any case, he would restrict himself to the four plots allocated to him.'

The 1st to 6th defendants in reaction to the above paragraphs pleaded in paragraphs 6 to 8 of their Statement of defence thus:

'6. The defendants deny paragraph 5 of the State'ment of Claim and will put the plaintiffs to very strict proof. In further answer, the defendants say that the 1st defendant's application, which was for land for Cottage Hospital and a residential building close to the Hospital and accompanied with N500 was made in writing to Omenu Welfare Union through its Secretary on 5th August 1978. The defendants will rely on and found upon this application. In further answer, the defendants say that when the application of the 1st defendant was received, it was considered by the family. The family then requested members of the Land Committee to go to Ana Owelle and carve out a portion that would be sufficient to accommodate the requirements of a Cottage Hospital. The Committee did as directed and the whole family approved their recom'mendation. The grant to the 1st defendant was commu'nicated to him in writing on 10th of February 1979. This written communication will be founded upon at the trial.

7. After the grant and/or donation a memoran'dum of agreement regarding the allocation and dated 17/5/79 was executed between the 1st defendant and the representatives of Omenu family. The said memorandum receited Plan No ECAS4/79 and the beacon numbers marking the boundaries of the area granted.

8. The signatories for the family are the represen'tatives of the four kindred that make up Omenu family namely:

Albert Onunkwo representing Onunkwo family. He is also the Head of Omenu Family.

Andrew Obiechina, 5th defendant representing Obiegbu family.

Edwin Ukeme (now deceased) for the Iwenze family and

Louis N. Madukaife 3rd defen'dant (now deceased) for the Madukaife family.

Benson Obiegbu witnessed the signature of the above named while Vincent N. C. Mbamalu (2nd defendant) witnessed the signature of the 1st defendant.'

On the above state of pleadings, it was a straight fight as to who was right between the parties concerning the quantum of land allocated to the 1st defendant by the Omenu family at their family meeting. The plaintiffs, as the claimants bore the burden of proving that only four plots of land were allocated to the 1st defendant. In this connection, it is to be noted and borne in mind that the 1st defendant never made the admission that only four plots of land were allocated to him. At the trial, the plaintiffs called four witnesses. Of the four, only P.W.2 Arize Tagbo Mozie testified as a member of the Omenu family. At pages 56 - 57 of the record of proceedings, P.W.2 testified thus:

'In 1977, the 1st defendant applied to the family for four plots of land on which to build a cottage hos'pital. The family granted the application. In comp'liance with the usual practice, the members of the land Committee, to which the 2nd - 6th defendants belonged at the material time, were asked to carve the four plots for the 1st defendant. The four plots would measure 1,847.506 sq. metres. Our investigation shows that the 1st defendant did not pay the usual token fee (Ego Iwa Ofia). The four plots of land were carved out adjacent to Onitsha/Enugu Express way. The reason for this is to forestall further encroachment by the government into the said land. There was a deed of conveyance executed between the family and the 1st defendant in respect of the 4 plots of land. On the day I saw it, there was no plan attached to the deed.

After the grant of the land, there was disaffec'tion and enmity amongst the members of the family. This was because, the portion granted to the 1st defen'dant by the family and the portion he later claims as having been granted to him by the family was different. The land he claimed was larger than the land he was granted. The land he claimed measured 1,824 hectares or 18,239,186 square meters. The place where he now erected his residential building is not the place he was granted the four plots.'

In his testimony above, P.W.2 did not testify that he was at the meeting where it was decided to allocate only four plots of land to the 1st defendant. Under cross-examination, P.W.2 agreed that the Omenu family consisted of four branches, namely: Onunkwo, Obiegbu, Iwenze and Madukaife. He agreed that all the heads of the four branches jointly executed a conveyance in favour of the 1st defendant, which said conveyance, the plaintiffs wanted the Court to set aside. He admitted that the head of Omenu family, Albert Onunkwo also signed the conveyance in favour of the 1st defendant. P.W.2 further testified that in 1977 when the family granted the land to 1st defendant, he was only 23 years old and at the time an undergraduate student at the University of Nigeria, Nsukka. At that time, his father, a member of Omenu family was alive. His father was a member of one of the four branches whose representatives signed the conveyance exhibit 9. As to whether he attended the family meetings of Omenu family, it is eye opening to reproduce the question and answer given by P.W.2 under cross-examination at pages 63 - 64 of the record:

'Q: How old are you now'

A: I am 39 years old.

Q: From your evidence that this transaction started in 1977, you were then 23 years of age.

A: Yes

Q: Then your father was living'

A: Yes.

Q: What were you doing at that time'

A: I was an undergraduate of UNN (University of Nigeria, Nsukka).

Q: We take it that from the University you were always attending family meeting.

A: No.

Q: How often did you attend family meetings'

A: I attended those that fell within the holiday period.'

The question that must follow is: If P.W.2, the only witness called by plaintiffs to show that only four plots of land were allocated to the 1st defendant, had not shown or stated that he was at the meeting where such allocation was made, how could anyone come to the conclusion that the Plaintiffs established their case in the circumstances' It is remarkable that the relevant minutes of the meeting of Omenu family was never tendered in evidence as against the evidence of P.W.2, the defence called as D.W.I, Nathan Mozie, who was secretary to the Omenu family at the relevant time. At pages 88 - 89, D.W.I testified thus:

'I am a retired school teacher. I know the first defendant. We are from the same family. We have an Omenu family meeting. In 1978, I was the secretary of the Omenu family meeting. During my tenure of office as the Secretary of

Omenu family meeting, I received a letter from the first defendant addressed to the family meeting through me as the secretary. I have the letter here with me in Court.

Counsel seeks to tender the letter. Letter is shown to D. N. Oguadi Esq. Counsel says no objection. Letter dated 5th August 1978, is received in evidence, and marked Exhibit 12.

The letter was read to the family meeting, it was decided by the meeting that I should write the 1st defendant accepting receipt of the said letter.

After the family had deliberated on the letter i.e. Exhibit 12, it decided to give the 1st defendant land for hospital and residential building. Following the agreement, the family mandated the land Committee to carve out land for the 1st defendant. The land Committee complied with the decision of the family meeting and carved out land for the 1st defendant. The chairman of the family meeting was the 2nd defen'dant, i.e. Mr. Vincent Mbamalu. After the land Committee had delineated the area to be allocated to the 1st defendant, I was asked to send to the 1st defendant the inscription that must be contained in a survey plan to be prepared by the 1st defendant. The said inscription was contained in my letter to the 1st defendant earlier mentioned. The letter shown to me is the letter I wrote to the 1st defendant containing the said inscription agreed by the family meeting.

Letter is shown to D. M. Oguadi Esq., Oguadi Esq. objects to the letter being received in evidence. D. M. Oguadi Esq. says the objection is based on the fact that the letter was not pleaded. Ezeuko, SAN, refers to para'graph 6 and contended that it was pleaded.

Court to the learned SAN: Please read the paragraph. The learned SAN read the paragraph.

Court to D.M. Oguadi Esq.: Are you still objecting or do you want a ruling on the objection' Oguadi Esq. says he is withdrawing his objection.

Letter dated 10th of February, 1979 is received in evidence and marked Exh. 13

We later saw the survey plan prepared by the 1st defendant, we were satisfied that the 1st defendant complied with the instructions contained in Exhibit 13.'

In line with the testimony of D.W. 1, D.W. 2 who was chairman of the Omenu Land Allocation Committee testified thus at pages 94 - 95 of the record:

'I am the chairman of Omenu Land allocation Committee. When Exh. 12 was received in the family meeting, it was referred to my Committee for necessary action. We took action on Exh. 12. The action we took was that we mapped out a portion of land for the applicant enough to meet his needs as per Exh. 12.

The area covered by the 1st defendants' hospital and residence is the area my Committee mapped out for the first defendant. After we had mapped out the area we considered enough to meet the needs of the 1st defendant, we reported back to the family meeting, it was at the family meeting that the secretary, D. W. 1 was given instructions to write Exh. 13.

Exh. 13 contains an inscription we decided should appear on a survey plan to be prepared by the 1st defendant.'

Now in his judgment, the trial judge, Amaizu J. (as he then was) meticulously considered the case made by the parties. At pages 141-142 of his judgment, he reasoned thus:

'In the present case it is the plaintiffs' case that the Umuada intervened and decided that the 1st defendant should confine himself to four plots. Why was not one member of 'Umuada' called to give evidence' Secondly it is the plaintiffs' case that the 5th defendant, a member of the allocation Committee objected to the area presently occupied by the 1st defendant. His evidence is vital in this regard. Why was he not called to give evidence' Thirdly there is a controversy over Exhibit 12. The Chairman and Secretary of the family meeting testified that it was the application, which the first defendant submitted. DW2 said that it was not. Why did the plaintiffs not call one member of Omenu family meeting to buttress their claim'

I have only mentioned a few of the areas the plaintiffs should have called witnesses. It is trite that a Court may presume that evidence, which could be and is not produced could if produced, be unfavourable to the person who withholds it. See section 149(d) of the Evidence Act 1990.

On the other hand two important members of the Land Committee gave evidence for the defence. Their evidence was not shaken by cross-examination. In addition, the defence tendered Exh. 12, which it claimed did the 1st defendant for submit the application land to build a hospital and a residen'tial building. In the case of Kindey & Ors. v. MG of Gongola State & Ors. Vol. 19 Part 1 MSCC Pt. 827 at p.85 Nnaemeka Agu J.S.C. observed as follows:

'No doubt the legal proposition that where there is oral as well as documentary evidence, documentary evidence should be used as a hanger from which to assess if oral testimony is a sound one.'

In my view when the probability of the case of either of the parties is tested by reference to Exh. 12, the evidence of the

Defendants is to be preferred.

The Court below in overruling the trial Court, said at pages 245-246 of the record:

Now, the important thing to note here is that the land in the original Exhibit 1, i.e., Plan No ECAS/4/79 had an area of 1,847.546 sq. metres, which the Appellants say is the equivalent of four plots of land (of 100 ft x 60 ft each) while the land in the amended plan No ECAS/287/82 has an area of 1,824 hectares, which the appellants say is equivalent to 30 plots. From the foregoing, it becomes very clear that in, 1979 when Exhibit 1 was drawn and filed, only 4 plots of land were given to 1st Respondent as per the plan No ECAS/4/79 with area of 1,847.546 sq. meters. How come that in 1982, 3 years after an amended plan with area of land of 1,824 Hectares was fraudulently sub'stituted at the Surveyor-General's office, and the original plan mutilated'

With these discrepancies or mysteries surrounding the filing of 1st Respondent's survey plan, one is left in no doubt that some fraud was perpetrated. And when it is known that the amended plan No ECAS/287/82 was hurriedly used to obtain a Certificate of Occupancy, Exhibit 8, ever before the family knew anything about it, one is left in no doubt that the 2nd - 6th Respondents fraudu'lently or theftuously gave more land to the 1st Respondent than was originally approved by the family. The position would have been different if right from the word 'go', only one survey plan was filed with an area of land of 1,824 Hectares. One would say that that must have been what the family granted him. But in the instant case, no explanation whatsoever has been given as to why it was necessary to file a second survey plan of 30 plots, after an original plan showing 4 plots (or 1,847.546 sq. metres) had earlier been filed. If the above do not prove convin'cingly that 'fraud' has been committed as particularised under paragraph 14 of the amended Statement of Claim, I cannot see what else could amount to fraud.

It is my respectful view that the Appellants proved fraud against the Respondents at the Court below, beyond reasonable doubt and should have been given judgment. With what I have just said above, it becomes unnecessary to consider issue No 2.'

I think, with respect, that the statement of the Court below, reproduced above is largely speculative and based on mere suspicion. Justice, through the Court, is based on the evidence proffered by the parties. A Court must resist the temptation, however alluring, to decide issues on considerations not rooted in evidence. It is logical to think that a land owning family is not likely to grant its members, just as much expanse of land as each wanted without imposing some limits. This is the more so when the land available is limited. This is one occasion when logic must follow the law. But the crucial element is - what was the quantum of land granted by the family' Was it not possible that the fact that the land was to be used for a hospital could influence what one might consider the normal'

The difference between the plans exhibits 1 and 2 is very intriguing in that it conveyed that somebody had changed a plan for four plots to one for about 30 plots. The letter, exhibit 6, written in 1989 confirms this viewpoint. But then again, the conclusion that the difference was fraudulently effected must be tied to the evidence of the exact quantum of land that was granted by the family. Without any evidence from the plaintiffs that they were present at a meeting at which the Omenu family decided to grant only four plots of land to the 1st appellant, the plaintiffs' case must fail. It could not be forgotten that by the nature of their claim, the plaintiffs were alleging that fraud was involved in altering a plan for four

plots to one for 30 plots. The plaintiffs had to prove their case beyond reasonable doubt. See section 137(1) of the Evidence Act and Francis Odiete v. Okorie [1973] 1NMLR 175 and Nwobodo v. Onoh [1984] 1 SC. 1 at 40.

I do not agree that the 1st defendant in this case had the burden to prove that he was granted more than four plots of land. The law is that, it is a plaintiff whose case must fail, if evidence is not called, that must lead evidence in proof of his case. The situation only changes if there are admissions made by a defendant on the pleadings.

The result is that I would have allowed this appeal and restored the judgment of the trial Court had I been able to hold that the suit was properly constituted.

In the final conclusion, this appeal succeeds. The judgments of the two Courts below are set aside. In their place, I make an order striking out plaintiffs' suit. The defendants are entitled to costs in the two Courts below and this Court, which I fix at N2,500.00, N7, 500.00 and N10, 000.00 respectively.

Dissenting Judgment delivered by

Mahmud Mohammed, J.S.C.

This appeal is against the judgment of the Court of Appeal Enugu delivered on 14-6-2001, in which the Court allowed an appeal against the judgment of Amaizu J. (as he then was) of the Anambra State High Court of Justice given on 14-7-1995, dismissing the plaintiffs' claims. The Court of Appeal in its judgment set aside the decision of the trial Court and granted all the reliefs claimed by the plaintiffs. The defendants who were not happy with the judgment of the Court of Appeal have now appealed to this Court.

Apart from the 7th defendant, now 7th Appellant, all the plaintiffs now Respondents and all the remaining 6 defendants now Appellants, are members of the same Omenu family of Umueri Ogbunike in Oyi Local Government Area of Anambra State. The family is the owner of a parcel of land known as Ana Owelle held under customary tenure. The 1st Appellant as a member of the family and being a Medical Practitioner applied to the family for a piece of land to build a cottage hospital. At a family meeting attended by the members of the family land allocation Committee, made up of the 2nd -6th Appellants to consider the 1st Appellant's application, approval was given of specified piece of land measuring 1.847.506 square meters for the 1st appellant as contained in survey plan ECAS 79 of 13-1-1979. However, when the minutes book of family meeting containing the size of the parcel of land allocated to the 1st Appellant was misplaced by the Secretary of the Committee and could not be recovered, the members of the Committee, 2nd -6th Appellants who attended the land allocation Committee meeting, revealed that the size of the family land allocated to the 1st Appellant, was infact, 18,239.186 square meters the replacement of the survey plan upon which a certificate of occupancy was granted to the 1st Appellant. Therefore the main dispute between the parties in this appeal is the size of the parcel of family land allocated for the 1st appellant's cottage hospital.

While the Respondents are claiming that the grant was only in respect of 1,847.506 square meters, the 2nd - 6th Appellants who were members of the family Land Allocation Committee, believed that what was allocated was 18,239.186 square meters.

The Appellants in their brief of argument have identified 8 issues while the respondents in their brief have submitted 4 issues for the determination of the appeal. However it appears from the issues distilled from the grounds of appeal, that the parties themselves are not comfortable with the situation in this case where the Omenu family of the parties which own the Ana Owella parcel of land, part of which is in dispute between the parties in this appeal and which ought to be in a vantage position to say affirmatively, the size of the parcel of land it approved for the 1st Appellant, is not a party in this case. It is not surprising therefore that both the Appellants and Respondents have made the issue of the competence of the action not having been brought in a representative capacity with leave of the trial Court, one of the issues for determination in this appeal. Not only that, by coincidence, both parties made this issue as issue number 3 for determination. The issue in the Appellants' brief of argument reads-

'3. Whether the Court below was right in castigating and reversing the submissions of the learned Counsel for the defendants/appellants that as none of the plaintiffs/respondents was the head of the family and sued in their individual rights, the action was wrongly or improperly constituted and incompetent.'

The third issue as framed in the Respondents brief of argument states -

'3. Whether the Respondents had the competence to maintain this action.'

Having regard to the fundamental nature of the questions raised in the issue by the parties on the competence of the action brought by the respondents against the appellants, the issue must be first resolved to determine the direction in which the remaining issues may take.

Learned Senior Counsel for the appellants had submitted in support of this issue that the respondents as plaintiffs had brought the action in their personal names portraying the land in dispute as their personal property without having sought for nor obtained the leave of the trial Court to bring the action in a representative capacity in accordance with Order 4 rules 1 and 3 of the Anambra State High Court Civil Procedure Rules which also require the Writ of Summons to reflect on its face that the respondents were suing in a representative capacity. The cases of Jeremiah Nsima v. Ole Nnaji & Ors (1961) 1 All NLR 441; Mba Nta & Ors v. Ed. Nweze Anigbo & Anor (1972) 5 S.C. 156; Akande v. Araoye & Anor (1968) NMLR 283; Oyewole v. Lasisi (2000) 14 NWLR (pt. 687) 242 at 353 arid Ifekwe v. Madu (2000) 14 NWLR (pt. 686) 459 at 478-479, were cited and relied upon. The capacity in which the appellants as defendants defended the action was also not clear, pointed learned Senior Counsel who observed that if the appellants defended the action in a representative capacity on behalf of the Omenu family, leave ought to have been sought and obtained as required by Law in view of the decision in Dokubo & Anor. Bob-Manuel & Ors (1967) 1 All NLR 113; that since the respondents are not claiming the status of heads of the Omenu family, having regard to the case of Ekpendu v. Erika (1959) 4 F.S.C. 79,

the authority of the respondents to sue could only have been derived from the leave of the trial Court under its rules and a number of cases including the recent decision at Adewunmi v. Attorney-General, Ekiti State (2002) 2 NWLR (Pt.751) 474 at 516 were relied upon.

For the Respondents, it was argued that the appellants cannot now raise the issue of the competence of the respondents to maintain this action not having appealed against the decision on the issue in favour of the appellants by the trial Court to the Court below. Learned Counsel to the respondents insisted that the respondents brought the action at the trial Court not only in their individual rights but also for the protection of the rights of all the Omenu family members excluding the 1st Appellant. Citing the cases of Oyeneye v. Odugbesan (1922) 4 S.C. 244; Bakare v. A.C.B. (1986) 3 NWLR (Pt.26) 47; Overseas Construction Co. Nig. Ltd v. Creek Enterprises (Nig) Ltd. (1985) 3 NWLR (Pt.13) 407 and Fawehinmi v. Akilu (1987) 4 NWLR (Pt.67) 797, learned Counsel to the respondents argued that it is now too late for the appellants to raise the issue which has now become an academic exercise that cannot be resolved by this Court.

With utmost respect to the learned senior Counsel to the respondents, the respondents not having shown on their Writ of Summons and the Statement of Claim that they had the mandate or authority of the Omenu family, the identity of whose head had not been disclosed throughout the proceedings at the trial Court, the Court below and even in this Court to bring the action, the issue questioning their locus standi to bring the action cannot be an academic exercise. The question to be determined in this issue is whether the respondents as plaintiffs who in their action claimed a number of declaratory and injunctive reliefs against the appellants as defendants, had the locus standi to do so particularly when all the defendants in the action except one, are members of the same Omenu family, the owner of the land, the subject matter of the dispute in the case. The law is clear that when a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justifiable. See Senator Adesanya v. President of Nigeria & Anor (1981) 2 NCLR 358.

Therefore taking into consideration all the circumstances surrounding the institution of this action by the respondents, I entirely agree with my learned brother, Oguntade J.S.C. in his judgment that the trial Court was deprived of the jurisdiction to adjudicate and determine the dispute between the parties. In a situation such as this, the proper order to make is to strike out the action after allowing the appeal on this issue of competence alone.

In the result, I shall also allow this appeal, which is hereby allowed. The judgments of the trial Court and the Court below are set aside and replaced with an order striking out the respondents/plaintiffs' action. I abide by the order on costs in the judgment of my learned brother Oguntade J.S.C. with which I entirely agree.

Judgment delivered by

Walter Samuel Nkanu Onnoghen, J.S.C.

I have had the benefit of reading in draft, the lead judgment of my learned brother Tobi, J.S.C. just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. The facts of the case have been stated in detail in the said lead judgment so I do not intend to repeat them here except as needed in support of the point being made.

The main issue to be determined in this case has to do with the actual number of plots of land applied for by the 1st appellant and approved/allocated by the Omenu family, which is the family of both parties and owns the land in dispute. While the respondents claim that only four plots of land were approved and allocated to the 1st appellant for the purpose of building a cottage hospital and residential quarters, the appellants contend that 1st appellant applied for and was granted indefinite number of plots which leaves the members of the family allocation Committee with the discretion to determine the number of plots sufficient to meet the needs of 1st appellant.

The respondents were the plaintiffs at the trial Court and from the pleadings, bear the burden of proving that only four plots of land were applied for, approved and allocated by the Family Allocation Committee. It is clear from the evidence that the alleged hand written application of the 1st appellant for the four plots was not tendered at the trial, neither was the minute book containing what took place at the family meeting in which the approval was given which would have made it very easy for one to know the exact number of plots applied for and approved. On the other hand, appellants tendered exhibit 12 which is a type written application from the 1st appellant for an unlimited number of plots, which application was allegedly approved by the family and that the plots eventually carved out by the allocation Committee is as reflected in the survey plan attached to the conveyance of the land as evidenced in exhibit 9, which was duly executed by the principal members and representatives or heads of the four quarters making up Omennu family. From the said exhibit 9, 18 plots of land are allegedly carved out for the 1st appellant.

To determine whether the respondents proved their case from the evidence on record, one has to look at the evidence of some of the witnesses particularly PW1, and the relevant exhibits such as exhibits 4, 5 and 6.

PW 1 who gave his name as Amaechi Onyebuchi Obianwu and described himself as the Surveyor-General of Anambra State testified at pages 49 and 50, inter alia, as follows:

'As the Surveyor-General, I take custody of the survey plans of the land in the State. I had the original survey plan of ECAS/4/79 prepared by the late Chief Surveyor Ejike Chidolue before it was mutilated. I still have the mutilated plan ..... . On the 8th of January 1987, I received a letter from Chief Surveyor, Ejike Chidolue requesting the withdrawal of the plan. On the strength of the application to withdraw the survey plan, I gave the survey plan to one Sunday Ikejiana for Ejike Chidolue. On the 9th of January 1987, the same plan was returned to us after amendments as contained in the forwarding letter. I noticed that the plan had been mutilated. I have a certified true copy of the mutilated plan ..... Copy of the mutilated survey, plan received in evidence and marked Exhibit 2. The number on the mutilated Exhibit 2 is the same as the number in the original survey plan. I have plan No EC AS/287/82, originally only one pillar number and part of two boundaries have connection with the original ECAS/4/79. The present mutilated exhibit 2 bears the \'same features and designs as ECAS/287/82..... Exhibit 3.

The original survey plan ECAS/4/79 on the cloth copy (blue copy) was erased, and another plan, which has the features of exhibit 3 plotted on it. I have a photocopy of the letter 8th January 1987 withdrawing ECAS/4/79 ..... Exhibit 4. Letter dated 9th January received in evidence and marked Exhibit 5.

The letter shown to me dated 12/1/89 is my reply to the request made by Justice G. C. Ezekwe in respect of ECAS/4/79..... Letter dated 18/1/89 is received in evidence and marked Exhibit 6.'

From the evidence of PW1, it is clear that the original survey plan for the plots of land is exhibit 1; that later on exhibit 1 was, upon an application (exhibit 4,) withdrawn by the surveyor for the purpose of amending same; that after amendment, it was returned as exhibit 2, which the witness says is a mutilated copy of exhibit 1 with another plan, exhibit 3, superimposed thereon.

Exhibit 4 states as follows:

'EASTERN SURVEYORS COMPANY.

8th January 1987

THE SURVEYOR-GENERAL

SURVEY DIVISION

MIN. OF LANDS, SURVEY & TOWN PLANNING

ENUGU.

Sir,

LETTER OF WITHDRAWAL

I hereby request for the withdrawal of plan No ECAS/4/79 for amendment.

Yours faithfully

(Sgd)

Chief Ejike Chidolue,

Licensed Surveyor.

I withdrew the above plan for Amendment on 8/1/87.

(Sgd)

Sunday Ikejiama

For Chibome L/S.'

On the other hand, exhibit 5 states thus:

'RE: SUBMISSION OF PLANS TO SURVEYOR GENERAL FOR RECORD.

9th January 1987.

The Surveyor General

Survey Div.

Min. of Lands, Survey & Town Planning, Enugu.

Sir,

Re: Submission of Plans to Surveyor General for Record.

I forward you herewith following plan for Re-submission.

S/N.	Plan No.	Name of Owner	Locality	RMKS
1.	EC73/54	For district Counsel	Newi	L.P
		Headquarter		
(5)	ECAS/4/79	Dr. A.N. Mozie	Anambra	L.P

Yours faithfully

(Sgd)

Chief Ejike Chidolue

Licensed Surveyor.'

Exhibit 6 is a letter dated 12th January, 1989 and it states as follows:-

'GOVERNMENT OF ANAMBRA STATE OF NIGERIA

Ministry of Works,

Lands and Transport,

Survey Division

P.M. B. 1084 Enugu

12th January 1989

REF. NO. E. 1938/11/241

Chief G.C. Ezekwe

Of Chief Ezekwe, Amuzie & Co.

Solicitors and Advocates

11 Bishop Anyogu Street

Uwani

Enugu.

Suit No. 0/124/86

Chike Mbamalu & 3 Ors.

And

Dr. Augustine Mozie & Ors.

I have been directed to refer to your letter reference No. GCE/CO/1/89 of 10th January, 1989 and report that our investigation show that Chief (Surv.) Ejike Chidolue, licensed surveyor of No 4 Venn Road, Onitsha who did the surveys registered as ECAS/4/79 and ECAS/287/82 in his letter of No. (reference) but dated 8th January, 1987 requested for the withdrawal of the said plan No ECAS/4/79 for amendment. And from our records/register, at p. 72 one Mr Sunday Ikejiama on the same date i.e. 8th January 1987 signed for Chief (Surv.) Chidolue and collected the said plan No ECAS/4/79 for amendment and returned it on 9th January 1987 after amendment. The said amendment involved the erasure of the original plan, which involved a four-sided figure with an area of 1,847.546 Sq. metres and its replacement with a new seven (7) sided figure with area of 1.824 Hectares. The new sketch thus agrees with the sketch plan No. ECAS/287/82, which is incongruous.

(Sgd)

A.O. OBlANWU

Surveyor-General

For Commissioner.'

(Emphasis Supplied.)

It has to be pointed out that the land comprised in the original plan, exhibit 1, is of an area of 1,847.546 sq. metres which the respondents contend is the equivalent of four plots while the land in the amended plan No ECAS/287/82 - exhibit 3 has an area of 1,824 Hectares which the respondents say is equivalent to 30 plots of land. From the testimony of PW1 and the exhibits reproduced supra it is very clear that in 1979 when exhibit 1 was made and filed, only four plots of land were approved and carved out by the family to the 1st appellant for the purpose of constructing a cottage hospital and residential quarters as evidenced in exhibit 1.

With the above evidence, I hold the view that the respondents' discharged the burden of proof placed on them by law and thereby proved their case on the balance of probability that only four plots of land were carved out for the 1st appellant from the family land. I go further to hold that the respondents also proved the allegation of fraud made against the appellants in the pleadings particularly as exhibit 6 conclusively proved that three years after exhibit 1 was made and filed, an amended plan No ECAS/287/82 (exhibit 3) with an area of land of 1.824 Hectares was substituted at the Surveyor General's office and the original plan, exhibit 1, mutilated. The said exhibit 3 was used by the 1st appellant in exhibit 9 being the conveyance signed by the principal members of the family to obtain a certificate of occupancy over the larger parcel of land than approved and allocated in exhibit 1.

In conclusion, I dismiss the appeal as lacking in merit with costs as assessed and fixed in the lead judgment of my learned brother, Tobi, J.S.C.

Appeal dismissed.

Counsel

Tochukwu Onwubufor SAN .....For the Appellants
with him, Onwubufor (Mrs),Nnaemeka Okoye Esq.

Ben Anachebe Esq. .....The Respondents
with him, C.A. Chuks-Nnadi Esq. Austin A. Akpamgbo Esq. G.M. Chukwukere Esq.Uche Awa (Miss)