IN THE SUPREME COURT OF NIGERIA

Suit No: SC454/74

Petitioner: Chief Numogun Sam Adeyemi & Ors (For themselves and on behalf of the Emila Family)
And
Respondent: Emmanuel Opeyori

Date Delivered: 1976-10-08

Judge(s): Darnley Arthur Raymond Alexander, Chukwuweike Idigbe, Ayo Gabriel Irikefe

Judgment Delivered

This appeal is from the judgement of the Western State Court of Appeal (Eso and Ogunkeye J. J. A; Akinkugbe J. A. dissenting) dismissing an appeal from the Judgement of the High Court of the former Western State of Nigeria holden at Oshogbo whereby the appellants\' claims in suit HIL/7/71 were struck out for want of jurisdiction.
The claims are for:
\"(1) declaration of title to that piece or parcel of farm-land situate, lying and being at Odo-Omo, Esa-oke, Ijesha North Division, bounded on one side by Obaloro\'s farm land, on the second side by Oshikun\'s farm land, on the third side by Esa-Odo\'s people\'s farm land and on the fourth side by Orisaji\' s farm land.
(2) '300 as damages for wrongful trespass committed by the defendant who has been wrongfully entering the said farm land and with his agents and/or servants have been wrongfully reaping crops from the said farmland since 1962; and
(3) Injunction restraining the defendant, his servants and/or agents from \"trespassing on the said farm land\"
Pleadings were delivered and exchanged on both sides. The case came up for hearing on 16
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November, 1971 when the
learned trial Judge recorded the following notes:
'Parties present: Bola Ige for the plaintiff. Adelekun for the defendant. Mr. Adelekun. counsel for the defendant now informs the court that his client, the defendant now admits paragraph 4 of the plaintiff\'s statement of claim to the extent only that the land in dispute is Emila family land but denies that Chief Numogun had anything to do with the said land.
In view of the foregoing admission by Mr. Adelokun, Court calls for argument from Counsel for both sides as to whether it has original jurisdiction to try this case since on the face of the pleadings in the case the only issue to be tried is whether or not the plaintiffs are members of Emila family, an issue which appears to relate to family status.
Mr. Bola Ige argues for plaintiffs: He submits that the claim is for a declaration of the title to land. Plaintiff\'s contention is that Emila family land is undivided and unpartitioned. Plaintiffs say they are members of Emila family but that is not the main issue in dispute. It is only one of the things to be proved by plaintiffs to succeed in this action ..... Mr. Ige concedes it that the issue whether the plaintiffs are members of Emila family is a matter (sic) of family status. But he submits that the issue is only incidental in this case and not fundamental .....' Mr. Adelekun counsel for the defendant informs the court at this stage that this earlier admission ". comes with the admission of paragraph 3 of the plaintiffs' statement of claim. He says his client admits paragraph 3 of the plaintiffs\' statement of claim '"
The sole issue is whether plaintiffs are members of Emila family. If a court so finds plaintiffs are entitled to a declaration of title to the land in dispute jointly with the defendant. He says it is a matter relating to family status; refers to the Proviso to section 9 (1) High Court Law; says the issue is fundamental and not incidental. Submits the jurisdiction of the court is thereby ousted '...Ruling reserved till 16
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December 1971.
(Sgd.) """""""..
Judge 16/11/71'.
(Brackets and underlining supplied)

The learned trial Judge delivered his Ruling on 16
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December, 1971 and, as already stated, he struck out the claim for want
of jurisdiction. Parts of his ruling read:
' "'. On the face of the plaintiffs\' statement of clam and the defendant\'s defence coupled with the latter\'s counsel\'s (Mr. Adelekun\'s) admissions before me, during arguments as to whether the High Court has original jurisdiction to try this case, it is common ground between the parties to this action that the land in dispute is Emila family land and that the defendant is a member of this family. In paragraph 18 of their statement of claim, the plaintiffs say that the Emila family land has never been partitioned or divided among members of Emila family of which, as I have just said, the defendant is one. Nowhere in the statement of claim is it pleaded that any allotments of the said land had taken place.
Accordingly, I am utterly at a loss to see the basis of the claims for trespass and injunction against the defendant who is admittedly a member of the family which owns the land to which these two claims relate. But the point now calling for a determination by me is whether my jurisdiction is ousted by the proviso to section 9(1) of the High Court Law: .....
And it is to this I shall now address myself'.
(underlining supplied) .
The Learned trial Judge then proceeded to consider the question of ouster of jurisdiction and made the following observations:-
'In deciding whether or not my jurisdiction is ousted by the proviso (i.e. the Proviso to Section 9(1) of the High Court Law Western Region of Nigeria, cap 44 vol II of the Laws of Western Region of Nigeria 1959 Edition, applicable in the former Western State), I must in the first place find out if this issue is one relating to family status and, if so, I must then go on to decide it whether it is fundamental or incidental ""
(Brackets and underlining supplied).
The learned trial Judge then considered the judgements in the case of Adeagbo and others vs Alli Ogunsiji and others (1/122/64 delivered by Akinkugbe J. as he then was - on 28/3/68) and in Nwafia vs. Ububa (1966) N.M. L.R.219 and having arrived at the conclusion that the issue relating to family status was, in the circumstances of the case in hand, fundamental and not incidental (i. e. was a fundamental issue which must be resolved by the court before it can adjudicate
on the claims before it) he held that his Jurisdiction to inquire into the claims was ousted by the proviso to section 9(1) of

the High Court Law aforesaid.
In the Western State Court of Appeal (hereafter called the \"Appellate Court\") the appellants failed to persuade that court
that the trial court erred in law when it held that its jurisdiction was ousted by the proviso aforesaid.
By a majority decision, the Appellate Court held that:-
'the issue of membership of the plaintiffs in the Emila family relates to family status and it is the only issue that needs to be decided in the case notwithstanding the nature of the claim. It is a fundamental issue and not incidental and the learned trial Judge is right in his decision that he has no jurisdiction in the matter.'
Three grounds of appeal were filed in this court by the appellants and they read:
\"(1) The majority of the Court of Appeal erred in law when it held that the lower court was right in holding that it had no jurisdiction to entertain the action when there was no evidence led yet as to the issue of family status, and when the lower court re1ied only on the statements of claim and defence in deciding the issue.
(2) The majority of the Court of Appeal erred in law when it held that the only issue to be decided by the action was one of family status.
(3) The majority Judgement of the court of Appeal erred in law by not holding that the proper course for the lower court was to adjourn the case for issue of family status to be settled by a competent court.'
The first two grounds of appeal were argued before us but the third ground of appeal was abandoned after some effort was
made to argue the same. The sun of the argument in support of grounds (1) and (2) is that the issue of family status was

raised by the trial Judge himself.Neither party had raised it and, in any event the pleadings which raised several other issues did not raise any issue relating

to family status. The trial court therefore erred in law in its decision that its jurisdiction was ousted
It is, in our view, necessary at this stage to set out the relevant portions of the pleadings delivered on both sides long before
November 16
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1971, on which date the learned trial Judge after recording the statements from the Bar by counsel on both sides decided to bear arguments on \"family status'. Parts of the statement of claim read:-
'Statement of Claim
(1) The plaintiffs are members of the Emila family and they sue for themselves and the other members of that family.
(3) The land In dispute is the land edged pink in the plan No OG103/69 filled with the statement of claim.
(4) The land in dispute is Emila family land and has been so since the installation of the first Chief Numogun in the hands and under the supervision of successive Chiefs Numogun as the head of the family.
(5) Emila Family which is a large family is made up of 4 branches namely:
(1) Pasuju
(2) Olalebiagbon
(3) Adeniyi and
(4) Dariorisa.
(6) Pasuju, Olalebiagbon, Adeniyi and Dariorisa were children of Emila, who was the first to settle on Odo-omo farmland many years ago before Esa-oke was founded.
(7) Emila became one of the founders of Esa-Oke, but he kept his homestead and farmland at Odo-omo.
(8) (a) PasuJu begat Ariwolo Oge who begat Bewaji who begat Adeyemi the present Numogun and 1
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plaintiff.
(b) Olalebiagbon begat Odugbeml (Odugba), Bakare and Komolafe; Odugbe bagat David Ajaiyi.
(c) Adeniyi begat Fasuyi and Fagunoye; Fasuyi begat Ogungbayibi and Fagoroye begat Opeyori the father of the defendant.
(d) Dariorisa begat Babajide who bagat ". T. A. Babajide one of the plaintiffs. All the plaintiffs come from one or other of these four branches.
.....
(14) Odo-omo farmland in dispute is made up Igbo-Elefun; Odo Epolu, Oke Opolu, Eresi, Agbokum and Orokin parcels; each of these is only part of the whole of Odo-Omo, although sometimes people who are not members of the Emila family call one or more of these parcels of farmland, jointly or severally, Odo-omo and vice-versa.
(15) The Plaintiffs, their people and ancestors have owned the land and exercised exclusive rights of ownership on the land from time immemorial.
(16) The whole land now in dispute edged pink (on the plan filed in court by plaintiffs) was first settled on when it was virgin forest by the plaintiffs and defendants\' ancestors Emila. Emila came and settled at Odo-Omo farm at Esa-oke. the land in dispute. Later Emila helped in founding Esa-oke but he and his children continued farming at Odo-Qrno, the area in dispute.
18) The whole farmland in dispute has since the death of Emila been farmed in common by his children and his descendants; each descendant is free to cultivate wherever he pleases
.....
(21) The Defendant, his servants and agents have without leave or licence of the plaintiffs entered the land in dispute and claimed exclusive ownership in respect of a large portion of the farmstead even though the land has never been partitioned among descendants of Emila. He has continued to do this in spite of the judgement in suit 15/57 Chief Adeyemi Numogun of Esa-Oke vs. Emman Abudu in the Native court of Esa-oke.(22) The plaintiffs will also rely on the said judgement to buttress their claim .....
(23) Further since 1962 the defendant his servants and Agents have been preventing the plaintiffs and other descendants of Emila their servants and agent from harvesting the palm fruits jointly owned on the land in dispute '". and he has destroyed rubber and cocoa plantations and other economic crops which belong to the plaintiffs and other members of the Emila family """. He has also prevented them (i.e. members of the Emila family) from cultivating wherever they wished on the land in dispute\".

(Brackets and underlining supplied).
Parts of the statement of defence read:-
(1) Save as is expressly admitted herein the defendant denies each and every allegation of fact contained in the statement of claim.
(2) The defendant admits paragraphs 9 and 8(a) of the plaintiffs\' claim. The defendant also admits paragraph 8(c) of the plaintiffs\' claim to the extent that Adeniyi begat Fagore.
(3) The defendant denies paragraphs 1,2. 5. 11, 14. 15. 16. 17. 18. 19, 20(a) 22 and 23 of the plaintiffs\' claim.
(4) The defendant claims that the plaintiffs are not related to the Emila family.
(5) The defendant is one of the great grand children of Ernila whose only son was Adentyi.
(7) The defendant admits paragraph 4 of the statement of claim to the extent that Eresi farmland is Emila farmland but denies that Chief Numogun has anything to do with Emila farmland.
.....
(13) The defendant claims that Emila owned Eresi farm and Onilubo farm and that the two farms were shared by Fagoroye and Agba respectively and that Fagoroye's farm Eresi is now mine.
.....
(17) (a) .....
(b) .....
(c) The fourth plaintiff\'s father was a tenant of the defendant\'s and was paying customary rent accordingly'
(underlining supplied).
We pause to observe that the pleadings exchanged on both sides raise several issues and these include the questions whether:
(1) the land in dispute - admittedly Emila family land - is known as Eresi land'
(2) as claimed by the respondent, Emila had only one son (Adeniyi) or more as claimed by the appellants whose claim to the land derive from their descent from children of Emila other than Adeniyi'
(3) the land, Eresi farmland, now belongs exclusively to the respondent as claimed by him'
(4) if the land is, indeed, communal property of the Emila family, the respondent did in fact trespass thereon'
(5) the appellants are, in the circumstance, entitled to damages and if so in what amount'
(6) the appellants, in the circumstances, are entitled to the order of injunction claimed'
When, therefore, on 16th November, 1971, learned Counsel for the respondent - Mr. Adelekun - told the Court (as appears from parts of the notes recorded on that day and to which reference had earlier on been made) that
\"the defendant now admits paragraph 4 of the statement of claim to the extent only that the land in dispute is Emila family land but denies that Chief Numogun had anything to do with the said land\"
he hardly told the court anything new, save that by that statement from the Bar he settled one of the issues raised by the pleadings by identifying the land in dispute as Eresi farmland. He certainly was not, as the of learned trial Judge appeared to indicate (even if obliquely), informing the court that the defence was for the first time admitting that the land in dispute is Emila family land. Paragraph (7) of the statement of defence filed in court, long before 16th November, 1971, already made this admission. Equally, it was clear from the notes of proceedings on 16th November, 1971, that neither counsel (i.e. for the respondent or for the appellants) raised the question of family status. The learned trial Judge then proceeded to inquire into the question of jurisdiction of the court vis-a-vis the claims before it. It was clearly an exercise which the learned trial Judge embarked upon suo motu; and it was, indeed, an unnecessary exercise which made him readily lose sight of the other issues which the pleadings had patently raised. Having embarked on the self - imposed exercise the learned trial Judge held, albeit erroneously, that

\"the only issue to be tried is whether or not the plaintiffs are members of the Emila family'.
In that frame of mind he observed, in the course of his ruling, as follows:-
'In paragraph 18 of their statement of claim, the plaintiffs say that the Emila family land has never been partitioned or divided among members of Emila family of which, as I have just said, the defendant is one. Nowhere in the statement of claim is it pleaded that any allotment of the said land had taken place. Accordingly, I am utterly at a loss to see the basis of the claim for trespass and injunction against the defendant who is admittedly a member of the family which owns the land to which these two claims relate '..\"
(underlining supplied)
From the above passage in the Ruling it is clear that the trial court fully appreciated that quite apart from ascertaining whether the appellants are members of the Emila family it had a duty to inquire into the issue of trespass.
However it does appear from the said passage that the learned trial Judge was of the view that the respondent being a member of the Emila family could, in no circumstance trespass and be restrained from further trespass, into family or communal land which had not been partitioned.
That view of the learned trial Judge has no legal justification. The head note to the report in the case of Murray v Hall which is authority for the proposition that a co-owner of property can be sued for trespass by another co-owner whom the
former has completely ousted from the use of the same reads:
'Trespass quare clausum fregit lies by one of several tenants in common against his cotenant, where there has been an actual expulsion' (see Murray Ash and Kennedy v. Hall 7 C.B.441 reported in 137 E.R. 175)
Certainly, a co-owner can maintain an action in trespass against the other if he has actually been ousted or dispossessed of
land to which both have communal ownership.
Each of the co-owner is entitled to possession of the entire land and if one co-owner turns out the other from the entire land
or even part of it, that is trespass (see also Voyce v. Voyce and others 171 e.r.885). The principle applies to family land in
Nigeria unless excluded by custom of the people of any specific or particular locality, as the case of Banigo v Banigo, (1943) 8. W.A. C.A.148 clearly shows.
In that case the Swiss Banigo family land (the land in dispute) was occupied by a few members of the said family who had
been allowed to occupy the same on behalf of the entire Swiss Banigo family of which the plaintiff was, by custom, the Head. Walter Banigo was one of the members of the family in actual occupation of the land and in his life time was head of
the Swiss Banigo family. After the death of Walter (in 1930) some of the members of the family in de facto occupation of the land (now defendants) sought to take and use the land as if it were the private or personal property of Walter Banigo and in doing so committed several acts of trespass which gave rise to the court action; the acts of trespass consisted of actions which, in effect, ousted from the land members of the Swiss Banigo family other than descendants of Walter Banigo. The plaintiff\' s claim, as head of the Swiss Banigo family, for trespass succeeded in the court below and on appeal
by the defendants the West African Court of Appeal observed as follows:
'When the defendants on the death of Walter in 1930 started using and occupying the land not on behalf of the Big House (i.e. the Swiss Banigo family) but on their own behalf or on behalf of the late Walter\'s family only, they were clearly committing trespass and the court below has rightly so found " In regard to the submission put forward for the first time in this court that the defendants could not be trespassers because by native custom they had the right, as members of the Big House, to use and occupy the land along with other members, it is sufficient to say that no evidence was led as to the native law and custom applicable, and the question what it may be in any particular area is usually a matter of difficulty and controversy. We could not possibly find in the appellants\' favour on such a point not raised in the court below and not supported by evidence "" \"
(Brackets and underlining supplied)
see Francis Banigo v Johnson Banigo: in re Johnson Banigo and Oswald Kalada (1942)8 W.A. C.A.148 at 151. The learned trial Judge, therefore, had a duty to receive evidence on this issue of trespass which was clearly raised on the pleadings unless his jurisdiction to do so was ousted by any specific provisions of the law. He certainly, erred in law, in holding that he was\"utterly at a loss to see the basis of the claim for trespass and injunction against the defendant who

is admittedly a
member of the family which owns the land to which these . . . . claims relate\"
without first receiving evidence on the point.
Dealing with the question of the trial court\'s jurisdiction to entertain the claims in this suit the learned trial Judge after considering the proviso to sub-section (l) of section 9 of the High Court Law aforesaid, purported to be guided by the decisions in the cases of Adeagbo vs Alli Ogunsiji (Supra) and Nwafia va Ububa (Supra). Parts of the judgement relevant to
the learned trial Judge\'s consideration of this issue read:-
'It is the plaintiffs\' case that they are members of Emila family. And to this the defendant, an undisputed member of this family, says \'No\'. It is evident that if the plaintiffs can make good this contention of theirs, there is nothing standing in their way to the declaration of title sought by them in this case. And indeed this issue, whether the plaintiffs are members of Emila family, appears to me the only issue in the case in hand '".. \"
Thereafter the learned trial Judge held that 'the issue whether the plaintiffs are members of Emila family '... is an issue relating to family status;\" and the issue being fundamental to the claims before him, his jurisdiction to entertain the same
was ousted by the proviso to section 9 (1) of the High Court Law aforesaid. The section and the said proviso read:-
\"9 (1) To the extent that such jurisdiction may be conferred by the Regional Legislature, the jurisdiction by this law vested in the High Court shall include all Her Majesty\'s Civil jurisdiction which at the commencement of this Law was or at any time afterwards may be exercisable in Western State, for the judicial hearing and determination of matters in difference, or for the administration or control of property and persons, and also all Her Majesty\'s criminal jurisdiction which at the commencement of this Law was, or at any time afterwards may be exercisable for the repression or punishment of crimes or offences or for the maintenance of order; and all such jurisdiction shall be exercised under and according to the provisions of this Law and not otherwise:
Provided that, except in so far as the Governor may by order in Counsel otherwise direct and except in suits transferred to the High Court under the provisions of section 28 of the Native Courts Ordinance, the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death\"
It is clear from the above proviso that the High Court of the former Western State is precluded from exercising original jurisdiction in all matters which are subject to the jurisdiction of a customary court and relate to \"marriage, family status, guardianship of property on death\" but where a claim is clearly within the substantive enactment (i.e. within the terms of sub-section (1) of section 9 aforesaid) the High Court is not precluded from adjudicating thereon merely because in the course of such adjudication it becomes necessary to make some casual or incidental inquiry into any of the matters classified in the proviso aforesaid.
It is well known that jurisdiction is determined by the nature of the plaintiff's claim and, in the instant case, not one of the items on the claim raises ex facie any issue which can possibly be regarded as ousting the Jurisdiction of the High Court of
the former Western State within the frame work of section 9 of the said High Court Law. To put it mildly, the difficulty in which the trial Court found itself in this case was brought about by the court itself.
Nothing in the statement of defence in this case raises specifically any question of the status of the respondent or appellants
in the Emila family nor does any of the paragraphs plead specifically to the jurisdiction of the court on ground of family status, or at all, let alone the question whether any such matter was raised bona fide as must be done in such circumstances.
See Nimota Oluwo & another vs Adebowale (1959) 4 FSC 143.
In Ajaka Izenkwe vs. Onyemuche Nnadozie (1953)14 W.A. C.A. 361 the appellants argues that although they had not pleaded to the jurisdiction of the court to entertain a claim in trespass the trial judge ought to have declined to hear the same
when it became apparent that they disputed the respondents\' ownership of the land mentioned in the claim, the West African Court of Appeal held, in dismissing the appeal, that the appellants had not pleaded to the jurisdiction, nor could they have raised any genuine issue as to title and on the face of the pleadings. Delivering the judgement of the court in the

case Coussey J. A. observed:
' ". In the first place it is a fundamental principle that jurisdiction is determined by the plaintiff\'s demand and not by a defendant\'s answer which, as in this case, only disputes the existence of the claim, but does not alter or affect its nature. In other words ordinarily it is the claim and not the defence which is to be looked at to determine the jurisdiction.
Is there anything then in the present suit which should override this principle and compel the court to hold that the prohibition in section 12 of the Supreme Court Ordinance (a section, similar to section 9(1) High Court Law Cap 44 and its proviso) is a bar to the exercise of the Court\'s jurisdiction' The point is, was a bona fide issue of title raised by the defence' Looking at the pleadings it will be observed that in support of his claim in trespass the plaintiffpleaded the fact that his title to the land had been settled, but did not set out his title in the Supreme Court so that it would be put in issue.
A perusal of the defence filed satisfies us that while the fact that the plaintiffs had obtained judgement in the Native Court pleaded in paragraph 3 of the statement of claim was denied by the defence "' they not only failed to plead a title in themselves, but they also failed to plead to the jurisdiction of the Court either in the defence as they should have done, or at the trial .....'
(Brackets and underlining supplied)
At the risk of over-emphasising the point we repeat that it is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of a Court entertaining the same, this is because only too often this point is lost

sight of by Courts of trial, as has happened in the instant case. As earlier stated neither the claim nor the pleadings on both
sides raised any issue of status in the Emila family; and the learned judge\'s notes of statements from the Bar by learned

counsel on both sides do not show any admission by the appellants that any such issue was raised in the present case. We think that in a situation such as this (and even in cases where such an issue is palpably indicated in a defendant\'s pleadings) evidence should - unless, in the interim the opposite party admits the issue - be received on the point in order to
satisfy the court that the issue was being raised bona fide.
Dealing with a comparable situation in which the point was made that the jurisdiction of the former Supreme Court was ousted (pursuant to the provisions in section 12 of the former Supreme Court Ordinance Cap 211, 1948 edition of the Laws
of Nigeria - similar in many respect to provisions in section 9(1) of the High Court Law Cap 44, 1959 Laws of Western Nigeria and its proviso) in a straight forward claim for damages in trespass because the defendant\'s pleadings stated that the
defendant would contend that the issue was that of title to land; Verity C. J. observed:
\"When the matter came before the learned trial judge he on his own motion raised the point that the jurisdiction of the Supreme Court in such circumstances was ousted. This was opposed by Counsel for the plaintiff and various statements were made then from the Bar in regard to the case. The learned Judge took no evidence but came to the conclusion that the jurisdiction ". was ousted by virtue of the proviso to section 12 .....
Now there are two things upon which the learned Judge should have been decided before he came to the conclusion that the jurisdiction of the Supreme Court was ousted. Firstly, that the suit raised an issue as to title to land "' secondly, that the land was within the jurisdiction of a Native court. Both of these things require admission or proof. There was no admission that title to land was raised by this suit for damages for trespass and there was no evidence of that fact. There was no admission that there was a native court having jurisdiction and there is no proof. Reference to the Laws of Nigeria may disclose that there is a Native Court in that area ..... But the Court in rejecting jurisdiction cannot proceed on mere assumption ..... In these circumstances I think the learned Judge erred in coming to the conclusion that it had been demonstrated to him and established that the Court had no Jurisdiction ..... and he should have proceeded to take evidence satisfying himself on the necessary points to enable him come rightly to the conclusion that jurisdiction was ousted ""
Anthony Aburime Vs. The Secretary, Assemblies of God Mission and another (1952)14 WACA 185, 186.
We are undoubtedly satisfied from the pleadings in this case that it will be necessary, inter alia, to determine whether the

appellants belong to the Emila family but such an inquiry does not ipso facto raise an issue of family status.

We endorse the views expressed in the dissenting judgement of Akinkugbe J. A. which read:-
\"In my view on a broad general view as observed in Delesolu\'s case (i.e. Delesolu v. Latunde: CAW /85/71), whenever the question of family status arises it pre-supposes the fact that the person whose status is called in question has been accepted as a member of that family. I shall quote the relevant portion of the judgement in Delesolu\'s case relied upon by the majority judgement (i.e. the majority of the Western State Court of Appeal in that ease). It reads:
The question as to whether a person belongs to a certain family has in our view nothing to do with 'family status\". It would be a different matter if the position of a person as head \"Bale or Mogaji\" of a family is called in question then his status within that family is in issue.
In Arnold Nwafia vs. Nwanakwuo Ububa (1966) N .N. L. R. 219 relied upon by the court of trial in holding that the action raised the issue of family status, the Supreme Court amongst other things held:-
'The term and nature of the claim of the writ notwithstanding the only issue which called for determination, viz ' whether the plaintiff was the Okpala of the Dunu family or in other words whether he was the surviving eldest male child of Dunu is, an issue relating to \"Family Status.' The above view is entirely different from when the claim before the court is to determine whether a person is or is not a member of a family. It is our view that a person\'s status in a family cannot be called in question until he has become a member of the family. It therefore follows that when a person brings an action before the court to determine whether his adversary is a member of a particular family or not the question of the latter\'s status in that family cannot at that stage arise """""". '
\"It is to be noted that what is being inquired into is whether or not the plaintiffs are members of Emila family. If evidence is led the court may find that they are not members of his family and it will be strange to say that they have a status in that family """""
Further, in his dissenting judgement, Akinkugbe J. A. refers to the judgement in Ford v Ford (1946 - 47) C.L.R. 524 which we consider useful in the consideration of the subject and definition of the term \"Family Status\" and we quote from the judgement of Latham C. J. :-
'A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class, have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which in most cases at least could not be created by any agreement of such persons. An alien, for example, as distinct from a subject of the Crown, a married person as distinct from an unmarried person '" are all persons who have a particular status. The mere fact that an alien is an alien means that he is subject to certain disabilities and disqualifications in law. A husband because he is a husband owes special duties to his wife which he owes to no other person and cannot owe merely as a matter of law, to any other person ..... These consequences follow as a matter of law from the fact of membership of a particular class of persons\".
(see Ford v Ford (1946-47)C. L.R. 524 at 529).
It follows, therefore that no question as to a person's status in any particular family can arise until it be first established that he is a member of that family. Both the Appellate court (i.e. the majority) and the court of trial completely misunderstood the judgement of this court in Arnold Nwafia v Ububa (Supra). In that case, what was being inquired into was who as between the parties (i.e. the appellant and the respondent) was entitled to be the Okapa (i.e. Head, as the eldest surviving male) of the Dunu family. As a matter of fact the inquiry was who as between the parties was the eldest surviving male in the line of Aguba in the Dunu family; the post of Okpala entitles the incumbent to occupy as of right the Obu and the Mbala Obu. The inquiry, however, presupposes the fact that the membership of the Dunu family by both parties was never in doubt. In the case in hand the position is different. It has first to be established whether the appellants are members of

Emila family and the pleadings clearly raise no question of the status of either the appellants or the respondent in that family.
The learned trial Judge and the Appellate Court erred in law in holding that an issue relating to family status was raised on the pleadings in the case in hand; what is more, the Appellate Court has not been consistent with its view, on the subject

as
expressed, even if merely obiter, in its earlier decision in Delesolu (Supra) which clearly is in keeping with the law on the

subject.
Since the pleadings raised no issue as to family status the learned trial Judge erred in law in raising the issue suo motu and
his ruling that his jurisdiction to entertain the claims - which, be it remembered, include items unquestionably within his jurisdiction i.e. one of damages for trespass to land and injunction was ousted, is, indeed, clearly erroneous.
This appeal succeeds and the judgement of the Western State Court of Appeal in suit CAW/15/73 dated the 15th day of March, 1974, including the award of ₦62 costs to the respondent together with the Ruling of the High Court of Western
State in suit HILL/7/71 dated the 16
th
day of December, 1971 including the award of ₦105 costs to the respondent are
hereby set aside. In substitution therefore, it is hereby ordered that the claims in suit HILL/7/71 are hereby remitted to the
High Court of Oyo State for hearing and determination by another Judge. Costs previously awarded in both the High Court
of Western State and the Western State Court of Appeal, if already paid, are to be refunded. The appellants are awarded
costs in this appeal assessed at ₦174.00 and in the court below at ₦105.00