IN THE SUPREME COURT OF NIGERIA

Suit No: SC275/2001

Petitioner: Raphael Waka Ogbimi
And
Respondent: Niger Construction Ltd

Date Delivered: 2006-04-07

Judge(s): Sylvester Umaru Onu , Umaru Atu Kalgo , George Adesola Oguntade , Mahmud Mohammed , Walter Samuel Nkan

Judgment Delivered

This is an appeal against the judgment of the Court of Appeal, Benin Division in appeal NO. CA/B/28/97 delivered on 4/4/2001 in which it set aside the judgment of the trial court delivered on 22nd September, 1995 in suit No. S/102/91. When the appeal came up for hearing on 12/1/06 both counsel, though served were absent without explanation. The appeal was therefore taken as argued on the briefs already filed in accordance with the Rules of this court.

By a writ of summons filed on 14/11/91, the appellant, as plaintiff claimed damages against the respondent for trespass in that the respondent, without appellant\'s authority or consent broke and entered the appellants land along Benin/Warri Express Road, Amukpe town and excavated and carried away there from laterite. He claimed special damages amounting to N764, 451.25 and N235, 548.49 as general damages.

The case of the appellant is that in January 1978, the Amukpe Community who are the original owners of a large piece or parcel of land, gave a portion thereof to the appellant in return for which appellant gave customary items including drinks and some money following an application for the grant. Appellant said he was consequently put in possession of the said piece or parcel of land. He utilised the land for farming purposes. In Amukpe Town land is, by the customs and traditions of the people, communally owned. Appellant stated that sometime in November 1991, the defendant, without any lawful excuse broke and entered the appellant\'s said piece or parcel of land and dug and removed laterite therefrom and refused to stop despite his protests. The respondent is said to have removed from that piece of land a total of over 79706.784 cubic meters of laterite for which appellant claimed the special damages.

On the other hand, the case of the respondent is that it dug two burrow pits on a piece of land which forms part of a large piece of land that was compulsorily acquired by the Bendel State Government, the portion of which the government released to it upon application for the purpose; that before the government approval was received the respondent entered into a lease agreement with Amukpe Community in respect of the land and paid the sum of N10, 000.00 apart from compensation for crops on the said land. The agreement with the community was entered into in November, 1990. The respondent therefore denied the claim of the appellant.

At the trial, appellant called four witnesses and also testified on his own behalf while the respondent called one witness. Appellant in addition, tendered, inter alia, exhibit B being a letter written by one of the witnesses of the appellant as Secretary to the Amukpe Community conveying the community\'s approval of appellant\'s application for a customary grant of land and giving dimensions thereof. On the other hand, respondent tendered Bendel State Gazzette No. 104 of 2nd November, 1988 which allegedly compulsory acquired the land as exhibit F; while the deed of lease it entered with the community was admitted as exhibit G. At the end, the trial court found that appellant had proved his case and entered judgment in his favour resulting in an appeal before the Benin division of the Court of Appeal.

The issues for determination before the Court of Appeal were as follows:-

\"1. Whether the learned trial judge was right in holding that the document conveying land to the respondent need not be stamped or registered, since same was a customary grant.

2. Whether the learned trial judge was right in holding that the purported grant of communal land to the respondent was valid, despite the absence of the consent of the head of the community.

3. Whether the learned trial judge was right in holding that the land compulsory acquired by the Bendel State Government was not identified by the appellant when in fact he failed to attach proper and/or any weight to exhibit \"E\", \"F\" and \"G\" which clearly indentified same.\"

In its judgment delivered on 4th April, 2001, the Court of Appeal dealt only with issue No. 1 and held as follows:

\"It is manifest from the records that the judgment of the lower court is based solely on exhibit \"B\". The wrongful admission of exhibit \"B\" by the learned trial judge, made the court to erroneously hold that the land in dispute belongs to the respondent. If exhibit \"B\" is expunged from the records there will be no contest between the parties.

I therefore expunge exhibit \"B\" from the records as it was wrongly admitted by the trial court.

In the light of the foregoing, I consider it a barren exercise to proceed to consider issues (2) and (3) in this appeal as they will not serve any useful purpose. I therefore have no hesitation in allowing this appeal..... \"

The present appellant, who was a respondent at the Court of Appeal is not satisfied with that judgment and has therefore appealed to this court. According to learned counsel for the appellant, the issue for determination, as stated in the appellant\'s brief filed by A.B. Odiete Esq, on 26/10/2001 at page 2 thereof, is as follows:-

\"Were the Learned Justices of the Court of Appeal, Benin, right in setting aside the judgment of the learned trial judge on the ground that exhibit \"B\" should not have been admitted since the said exhibit \"B\" which was not registered pursuant to the Land Instrument Registration Law was the sole basis of vesting title in the land on the appellant.\"

The present respondent has not cross appealed against the non consideration of issues (2) and (3) by the Court of Appeal.

Before proceeding with the arguments on the sole issue for determination, there is on record what purports to be a preliminary objection contained in the respondent\'s brief filed by Ralh Kosi Nwalia Esq on 20/2/2003. The uniqueness of the preliminary objection makes it necessary for me to reproduce same in extenso. It reads:

\"Preliminary objection.

The respondent will contend at the hearing of this appeal by way of a Preliminary Objection that this appeal is incompetent in that the following grounds contained in the Notice of Appeal dated 31/5/2001 wherein the appellant apparently framed its issues involve questions of fact, mixed law and fact, whereas no leave on them was obtained.

The grounds and their respective particulars are as Follows:

(i) Ground I - All the particulars contained therein,

(ii) Ground II - All the particulars.\"

I must confess that I have never come across a preliminary objection in this form. Not only did learned counsel not file a formal application by way of motion on notice separately at the registry of this court, the so called preliminary objection is devoid of substance. For instance the grounds of appeal and their particulars complained of are not reproduced neither has learned counsel for the respondent, apart from stating what has been reproduced supra, proceeded to present any argument on the said objection in the respondent\'s brief. In short learned counsel has not demonstrated to this court how the grounds of appeal in this appeal are of fact or mixed law and fact thereby requiring leave to appeal; the objection is therefore not worth the paper it is written on; it is an exercise in futility particularly since the central issue in the appeal revolves around wrongful admission of a document said to be one affecting interest in land and thereby

needing to be stamped and registered. To determine the issue this court will have to interprete the contents of exhibit \"B\" so as to resolve the issue as to whether it concerns an interest in land, even though written in the form of a letter.

Therefore, for the benefit of learned counsel for the respondent and others who may still suffer from such delusion the law is settled that where the issue(s) raised in the ground(s) are on legal interpretation of deeds, documents, terms of art, words or phrases, and the inference drawn therefrom, the ground(s) are of law - see Comex Ltd vs N.A.B. Ltd (1997) 49 LRCN 815 at 832 and 833 per Ogundare, JSC. It is therefore my considered view that the purported preliminary objection is not only grossly incompetent but calculated to waste the time of this court particularly as it is without merit.

In arguing the appeal, learned counsel for the appellant submitted that exhibit \"B\" is only a letter informing the appellant that his earlier application for a customary grant of land has been approved; that it is not a grant on its own which would have made it an instrument within the contemplation of the Land Instrument Registration Law Cap 81, laws of Bendel State 1976, as applicable to Delta State; that it does not matter that the letter, exhibit \"B\", contains all the information needed in a deed.

Submitting by way of an alternative, learned counsel stated that even if the said exhibit B is expunged from the record, the Court of Appeal decision will still be set aside because parties have agreed in their pleadings that the original owner of the land in dispute was the Amukpe Community; that there is evidence that appellant gave customary drinks to the Community in January 1978 for the piece of land and that he was put in possession thereof; that exhibit \"D\" is a survey plan appellant commissioned to be made of the land in dispute sometime in 1982; that the trial court found that the respondent who dug a pit on the land in 1990 had no title to the land and that it trespassed thereon. Learned counsel submitted that the above findings of facts have not been set aside; that the trial court also found that appellant was granted the piece of land and put in possession by the Amukpe Community and that appellant has proved his case of trespass against the respondent particularly as trespass is a wrong against possession, relying on Shitu vs Egbeyemi (1996) 40/41 LRCN 1292 at 1299 per Ogundare, JSC and at 1300 per Belgore, JSC; Amakor vs Obiefuna (1974) 1 NMLR 331 at 335 per Fatayi Williams JSC (as he then was). Finally learned counsel urged the court to resolve the issue against the respondent and allow the appeal.

On his part, learned counsel for the respondent submitted that the Court of Appeal is right In holding that exhibit \"B\" is an instrument requiring registration within the meaning of section 16 of the Lands Instrument Registration Law. Learned Counsel referred to the definition of instrument as contained in section 2 of the law and submitted that since exhibit \"B\" purports to transfer and/or confer an interest in land, it is an instrument which must be registered, and that failure to do so renders the document inadmissible by virtue of section 16 (2) of the law, relying on Uzoegwu vs Ifekandu (2001) 17 NWLR (pt. 741) 49.

Turning to the consequences of expunging exhibit B from the record, learned counsel agrees with the lower court that the said exhibit B was the sole basis for entering judgment against the respondent by the trial court and that without it there was no other means of vesting title to the land on the appellant and urged the court not to interfere with that holding. Finally learned counsel urged the court to resolve the issue against the appellant and dismiss the appeal.

The issue of admissibility of exhibit \"B\" as raised in this appeal involves the interpretation of the document, which appellant presents as a mere letter conveying approval of Amukpe Community of the application of the appellant for a grant of a piece of land, to determine whether it is an instrument affecting interest in land thereby rendering same inadmissible in law without stamping and registration. That is the primary issue while the secondary issue or sub-issue is whether apart from exhibit B, there is other evidence to support the findings of the trial court in favour of the appellant, or whether it is correct to say from the record that exhibit \"B\" was the sole basis for the award of judgment to the appellant as held by the lower court.

To resolve the primary issue, it is necessary to reproduce the said exhibit \"B\" - the bone of contention. It reads as follows:-

\"Amukpe Community

Postal Agency, Box 30
Amukpe, Via Sapele
Tel. 054-41935
12th January, 1978

Mr Raphael W. Ogbimi
31, Oriaku Street
Sapele.

Dear Sir,

Re: Your application for a piece of land measuring 759ft x 59ft x 759ft x 598ft along NEPA line off Amukpe/Eku Road. Amukpe

Following your application for the above piece of land and our inspection of the said land and the customary drinks you gave to the community, we are happy to inform you that the community has granted you the said piece of land under Amukpe customary law i.e forever and ever. The area granted to you measures approximately 759 feet by 598 feet by 759 feet by 598 feet.

Yours faithfully
For:
The Amukpe Community

Sign """""
Secretary.\"

The question is whether the above contents, even though written in the form of a letter qualifies as an instrument under the Land Instruments Registration Law Cap. 81 Laws of Bendel State 1976 as applicable to Delta State. To answer the question, we have to have recourse to the provisions of section 2 of that law which defines \"instrument\" as follows:-

\"Instrument\" means a document affecting land in the state whereby one party (hereinafter called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or interest in the state.....\"

Does exhibit B qualify as an instrument within the definition reproduced above' There is no doubt that exhibit B, is a document in the form of a letter. A cursory look at exhibit B clearly shows that it purports to transfer and/or confer an interest in the piece of land described therein on or to the appellant. Exhibit B was written for and on behalf of Amukpe Community, the original owners of the land in dispute who thereby qualify to be described as grantors while the appellant, on whom the interest is conferred or transferred to, is clearly the grantee. By the transfer or conferment of the said interest, the Amukpe Community thereby extinguished its interest in the land in favour of the appellant. I therefore agree with the conclusion of the lower court that exhibit \"B\" \"purports to transfer the land in dispute to the respondent by Amukpe Community. Exhibit \"B\" is therefore an instrument as defined under section 2 of the Land Instrument Registration Law Cap 81 Laws of Bendel State of Nigeria 1976 - applicable in Delta and Edo States.\"

I hold the further view that what is material in interpreting exhibit \"B\" for the purpose of the applicable law is not the form the document was written but its contents. There is no doubt that exhibit B was written as a letter addressed to the appellant but its contents reveal it as an instrument affecting land and therefore subject to registration before it can be admissible in evidence in any proceedings.

In the present case both parties and the court agree that exhibit \"B\" was neither stamped nor registered but was duly tendered and admitted in evidence at the trial despite the objection of learned counsel for the respondent. The question

that follows is whether that admission in evidence by the trial court is right in law. Section 16 of the law under consideration provides thus:-

\"No instrument shall be pleaded or given in evidence in any court as affecting any land unless same shall be registered in the proper office as specified in section 3.\"

From the above it is clear and I agree with the lower court that exhibit \"B\" which was not registered in accordance with the above provisions is thereby rendered inadmissible and that its admission by the trial court was erroneous and subject to be set aside. I therefore hold the view that the lower court was correct in expunging the said exhibit \"B\" from the record on the ground that it was legally inadmissible in the first place.

However, the sub-issue that now falls for determination is whether the said exhibit B was the sole basis for the decision of the trial judge in favour of the appellant so as to render its expungation sufficient to set aside that judgment.

Section 227 of the Evidence Act, 1990 provides as follows:-

\"227 (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

(2) The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same.

(3) In this section the term \"decision\" includes a judgment, Order, finding or verdict.\"

For our purpose sub-section (1) of section 227 is relevant and applicable. The lower court had held inter alia that \"it is manifest from the records that the judgment of the lower court is based solely on exhibit B\" - (emphasis supplied by me). The question remains whether that court is right in so holding.

To answer the question we have to look at the evidence and the findings of the trial court on the relevant facts. I had earlier in this judgment stated that appellant called four witnesses excluding himself who testified in person. All the four witnesses and the appellant are natives of Amukpe Community, original owners of the land. There is no dispute that appellant\'s claim to the disputed land is based on customary grant - not on conveyance. All the witnesses of the appellant including appellant himself testified to the customary grant of the land in dispute to the appellant by Amukpe Community after appellant had applied to the community for the said grant and that appellant provided the necessary customary drinks etc and was thereafter put in possession thereof. Exhibit D clearly shows that in 1988 appellant surveyed the land in dispute. The trial court, in resolving the issue as to whether or not appellant was granted the land in dispute found as follows at page 48 of the record:

\"In the absence of a contrary evidence as to customary mode of alienation of land in Amukpe I accept the evidence of the plaintiff and his witnesses that the land in dispute as shown in exhibit \"A\" was lawfully granted to him by the Amukpe Community.\"

As stated earlier in this judgment, the above finding or holding by the court is based on the testimony of the witnesses for the appellant and the appellant himself. PW.1 at page 13 of the record stated inter alia thus:

\"The land was formally owned by the Amukpe Community. I am born in Amukpe and I am one of the dignatories in Amukpe. The plaintiff came to the Amukpe community and applied for land and this was given to him by the Amukpe Community.\"

PW.2 also stated at page 14 as follows:

\"The land in dispute belongs to the plaintiff.\" Under cross examination PW 2 said \"Amukpe Community gave the land to the plaintiff for purpose of building. I am from Amukpe....\"

PW3 was the licensed surveyor who carried out a survey of the land in dispute following the institution of the action and produced survey plan which was tendered and admitted as exhibit \"A\". PW4 was a former secretary of Amukpe Community who wrote and tendered exhibit \"B\". He testified at page 17 of the record as follows:-

\"On 12/1/78 the plaintiff applied to Amukpe Community for a piece of land along the express way leading to Warri from Amukpe. This land was on the left hand side of the road. The Amukpe Community sent people to inspect the land. The Community granted him the piece of land. The plaintiff later brought customary gift of drinks and kolanuts to the Amukpe Community". we put the plaintiff in possession.\"

This witness, like the previous ones was not challenged as to the alleged grant to and/or possession of the land by the appellant. The evidence of the appellant on the issue is very much the same as those of PW1, PW2 and PW4 except that appellant added that he, in addition to the traditional drinks, \"gave some money with which I wedged the kola nuts.\"

From the evidence as reproduced in this judgment, it is clear that there is abundant evidence, apart from exhibit \"B\" which was rightly expunged from the record by the lower court, to ground the finding by the trial court that the land was lawfully granted to the appellant in accordance with the customs of Amukpe Community. That being the case, I hold the further view that the lower court was in error when it held that exhibit \"B\" was the sole basis for the trial court finding that the land was granted to the appellant, the said holding not being supported by evidence on record. In the circumstances I have no alternative than to come to the conclusion that the lower court though right in holding that exhibit B is an instrument that ought to have been registered before being pleaded, tendered and admitted in evidence and that failure to do so rendered the said exhibit \"B\" inadmissible and consequently expunged same from the record, the said lower court erred in setting aside the judgment of the trial court in view of the abundance of evidence in proof of the customary grant of the land in dispute to the appellant by Amukpe Community, which grant was not seriously challenged by the respondent. I therefore hold that the wrongful admission of exhibit B by the trial court in itself is no ground for the reversal of the judgment of the trial court particularly as it has been demonstrated that the said exhibit \"B' did not affect the said judgment of the trial court since the decision would still have been the same without exhibit \"B\" in view of the testimonies of the witnesses and the appellant and the findings of the trial court on the matter.

There being no cross appeal against the failure of the lower court to resolve issues (2) and (3) before it, if follows that the findings of the trial court that the respondent is a trespasser on the land in dispute and that it had failed to prove that the land in dispute forms part of the land compulsorily acquired by the Government of Bendel State in 1988 stand unchallenged and this court has no jurisdiction to disturb the said findings.

In conclusion I find merit in this appeal which is accordingly allowed. The judgment of the lower court is hereby set aside while the judgment of the trial court is hereby restored. It is further ordered that appellant be and is entitled to costs which I assess and fix at N8,000.00 in the lower court and N10,000.00 in this court against the respondent.

Appeal is allowed.

Judgement delivered by
Sylvester Umaru Onu. J.S.C.

I have been privileged to read before now the judgment of my learned brother Onnoghen, JSC just delivered. I am in entire agreement with him that Exhibit \'B\', albeit that it is couched as a letter from the Amukpe Community granting Appellant the piece of land, has by its terms turned it into an instrument affecting land as defined in section 2 of Land Instruments Registration Law Cap.81, Laws of Bendel State 1976 as applicable in Delta State. Since the document was not registered pursuant to the requirements of the law the trial High Court was in error in admitting it in evidence and giving it efficacy as partly supporting the Appellant\'s claim for interest in land.

The Court of Appeal was therefore right, in my view, in finding the document inadmissible and proceeding to expunge it from the evidence in support of the Appellant\'s case in the trial court.

Be that as it may, since apart from the contents of Exhibit \'B\' there was overwhelming evidence from the Appellant and his four witnesses called by him in support of his case on the record in support of his claims for title and possession of the land alleged to have been trespassed, the court below therefore ought to have proceeded by applying section 227(1) of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990 to affirm the trial High Court\'s judgment in favour of the respondent in respect of trespass and the award of damages to the Appellant. See Okobia v. Ajanya & Anor (1998) 6 NWLR (Pt.554) 348; Saraki v. Mrs. Kotove (1992) 9 NWLR (Pt.554) 348.

For the foregoing reasons and the fuller ones set out in the leading judgment of my learned brother Onnoghen, JSC I too, allow the appeal, set aside the decision of the Court of Appeal, and restore that of the trial court. I abide by the orders made therein inclusive of those as to costs.

Judgement delivered by
Umaru Atu Kalgo. J.S.C.

I have had the opportunity of reading in advance the leading judgment of my learned brother Onnoghen JSC just delivered in this appeal. I agree with him that there is merit in the appeal and it ought to be allowed.

The substantive issue in controversy between the parties was whether there was sufficient and reliable evidence to prove that the appellant was granted the land in dispute by the Amukpe Community of Delta State. There was evidence at the trial that the appellant applied to the Amukpe Community for grant of a piece of land owned by them, and by a letter written by P. W. 4 on the instruction of the said community, the application was approved and the land in dispute was granted to the appellant. The letter which contained the description and extent of the land granted to the appellant, was admitted in evidence as Exhibit \"B\" at the trial. Exhibit \"B\" was neither stamped nor registered under any law. There is no doubt that by the contents of Exhibit \"B\", the Amukpe Community have granted the land described therein to the appellant. This, therefore qualified Exhibit \'B\' to be an instrument affecting land within the meaning of Section 2 of the Land Instrument Registration Law (Cap. 81) Laws of Bendel State 1976 applicable to Delta State. And by subsection (2) of Section 16 of the said law, such instrument cannot be admitted in evidence unless it was registered under the said law. Therefore since Exhibit \"B\" was not stamped and registered as required by section 16 of the said law it could not be legally admitted in evidence. It was therefore, in my view, properly expunged from the record by the Court of Appeal.

Apart from Exhibit \"B\" was there any credible and acceptable evidence supporting the grant of the land in dispute to the appellant' The answer is that there were 4 witnesses who testified on behalf of the appellant at the trial, who confirmed that the land in dispute was granted to the appellant by the Amukpe Community. This evidence was not denied or challenged by the respondent. Therefore although the learned trial judge relied on Exhibit \"B\" and other unchallenged evidence to give judgment in favour of the appellant the expulsion of Exhibit \"B\" alone, from the totality of the evidence at the trial, would not affect or invalidate his decision. See Section 227 (1) of Evidence Act, and Mrs. F. M. Saraki & Anr V. N. A. B. Kotove (1992) 9 NWLR (Pt. 264) 156; Qkobia V. Ajanya & Anr (1998) 6 NWLR (pt. 554) 348; Egbaran & Ors V. Akpoto & Ors (1997) 7 NWLR (Pt. 514) 559. With the evidence of the 4 witnesses in support of the grant to the appellant the decision of the learned trial judge cannot be disturbed. The Court of Appeal was therefore wrong in setting aside that decision in favour of the respondent.

In conclusion, I find myself in complete agreement with Onnoghen JSC that there is merit in this appeal. I allow it and set aside the decision of the Court of Appeal and restore that of the trial court. I abide by the order of costs made in the leading judgment.

Judgement delivered by
George Adesola Oguntade. J.S.C.

The appellant was the plaintiff at the Sapele High Court of Edo State and the respondent the defendant. The plaintiff had claimed pecuniary damages from the defendant being compensation for the damage he suffered when the defendant without justification entered land in the possession of the plaintiff to excavate therefrom some quantity of laterite.

The parties filed and exchanged pleadings. It is apparent from the facts pleaded that the nature of the dispute between parties was simple to understand. In paragraphs 4, 5, 6, 7, 8 and 9 of the amended statement of claim, the plaintiff pleaded:

\"4. The Plaintiff avers that on or about the 5th of November, 1991, the Defendant unlawfully broke into the Plaintiff's said land at Amukpe and dug same and remove laterite therefrom.

5. The Plaintiff avers that he protested to the Defendant asking them to stop digging the land by a letter dated the 11th of November, 1991 by the Plaintiffs Solicitor, Mr. J. Y. Odebala which letter was served on the Defendant at their Warri office by hand. At the hearing of this action, the Plaintiff will rely and found upon the said letter.

6. The Plaintiff avers that in spite of all his protests, the Defendant continued their digging of laterite from the said land thereby rendering the land almost completely useless.

7. The Plaintiff avers that the Defendant removed well over 79706.784 cubic meters of laterite from the land and as a result the Plaintiff has suffered damages. These was equal to 16987.80563 tipper of 4.692 cubic metres.

8. The Plaintiff employed Mr. N. E. Egbivwie, a Licensed Surveyor to survey the land and to show the area dug by the Defendant. The said Surveyor carried out the job and produced Plan DT/ONE/921. At the hearing the Plaintiff will rely and found upon the said Plan.

9. The Plaintiff avers that the original owners of the land were the Amukpe Community. In January 1978, the Amukpe Community made a Customary grant of the land to the Plaintiff after the Plaintiff had given the Community customary drinks and immediately thereafter put the Plaintiff in possession. At the trial the Plaintiff will rely and found upon the document given to the Plaintiff by the Amukpe Community. The Plaintiff has been in effective possession of the land ever since. No (sic) has been farming on the land, and some of his relations also have crops on the land. The Community before making of the grant to the Plaintiff sent delegates to inspect the land and marked same with sticks.\"

The defendant in paragraphs 5 to 9 of the Statement of defence pleaded thus:

\"5. However Defendant avers that it dug two borrow pits as sub-contractors in the execution of the Benin/Warri Road dualization project. Before digging the borrow pits Defendant inquired to know the owner of the land in question which said inquiry revealed that the land was acquired by the Bendel State Government as far back as 1988 vide Bendel State Notice No. 104 dated 2nd November, 1988.

6. Consequently upon paragraph 5 above, Defendant negotiated and got the permission of the Bendel State Government through the Ministry of Land and Survey before embarking on the digging of the borrow pit. Plaintiff will rely at the trial on Gazette No. 104 dated 2nd November, 1988 as well as the sketch plan of the area acquired and all correspondence between Defendant and the Bendel State Ministry of Lands and Survey with respect to the borrow pit.

7. Defendant further avers that it paid compensation to crops owners on the land before it commenced digging. It was the payment of compensation to crops owners that prompted Plaintiff to write the letter referred to in paragraph 5 of the Statement of Claim. Plaintiff had no crops on the land before Defendant dug the borrow pit.

8. Defendant avers that all lands within Amukpe are communal and prior to the permission granted Defendant by the then Bendel State Government Defendant negotiated with the accredited represen'tatives of the community who permitted Defendant to dig the borrow pits upon a lease agreement dated 30th November, 1990 for a consideration of N10,000.00 (Ten Thousand Naira). Defendant will rely on various Court judgment in proof of the fact that Amukpe land is communal. Plaintiff being an individual has no locus to bring this action.

9. Specially the Defendant dug the borrow pits within the land acquired by the then Bendel State Government and would contend at the trial that Plaintiff not being the owner of the land has no locus to bring this action.

The suit was heard by Nwulu J. At the trial, the Plaintiff testified and called four other witnesses. The plaintiff testified that the land was granted to him by the Amukpe community. The General. Secretary of the Amukpe Community testified as P.W.4. He stated that his community granted the land in dispute to the plaintiff. Further, he tendered an exhibit \'B\', a letter to the Plaintiff, conveying the grant of the land to him. It is helpful to reproduce the relevant proceedings of court as to the tendering of exhibit \'B\' from page 17 of the record of proceedings:

\"The Amukpe community gave the Plaintiff a written approval of the grant. As at l2/1/78. I was the General Secretary of Amukpe Community. I wrote the letter to the Plaintiff. I see this letter. It is the one written by me on behalf of Amukpe Community. Mr. Oweka seeks to tender same. Mr. Yekoyie objects. Says the document since it concerns land should be registered and stamped.

Court: This objection is over ruled. In my view, this is a customary grant. Document dated 12/1/78 is tendered and marked Exhibit 'B'. After this Exhibit \'B\' we put the Plaintiff in possession.\"

The defendant called two Witnesses. They testified in substantial conformity with the averments in the Statement of defence. The trial court in its judgment on 22-9-95 at pp. 48 and 49 of the record of proceedings reasoned thus:

\"The Plaintiff asserted that the said land was granted to him by the Amukpe Community.
In proof of this he tendered Exhibit \'B\' - the letter with which the community granted him the land. He went further to call the General Secretary of the said community (PW4) one William Ikoge who attested to the due execution of the document Exhibit 'B'. This witness testified that the Amukpe Community put the Plaintiff in possession of the land after why had written Exhibit \'B\' to him

On this point, Mr Yekovie had argued that the said land being communal land it could not be lawfully alienated to the plaintiff without the consent of the head of the Amukpe Community.

He relied on the case of A. Agbioe II & 3 Ors. v. E.T.A. Sappor 12 WACA P.187 at 189 a case which originated from the former Gold Coast Colony now Independent State of Ghana. I wish to say on this that no evidence was led as to Amukpe Customary Law with regard to alienation or communal land. I hope that it is not being suggested by counsel that customary land tenure law is uniform throughout Nigeria and indeed the entire Coast of West Africa. In the absence of a contrary evidence as to custo'mary mode of alienation of land in Amukpe I accept the evidence of the Plaintiff and his witness that the land in dispute as shown in Exhibit \'A\' was lawfully granted to him by the Amukpe Community.

The Defendants on the other hand have asserted that the land which the Plaintiff claims to be his own was granted to them by the Bendel State Government for public purpose. The only proof proffered in support of this assertion is the produc'tion of Exhibit \'F\' - Bendel State Gazette No. 66 Vol. 25 of 2nd November, 1988. That acquisition by the Bendel State Government was in respect of four parcels of land in Amukpe and Jesse Areas. The boundaries of the acquired areas were spelt out in the said Gazette. At page 87 of the said Gazette the following appears: -

A Plan showing the site is available for inspection during office hours at the Military Governor\'s Office etc. etc.\'

The above mentioned Plan in my view should have been tendered by the Defendants along with Exhibit \'F\' to show that the land being claimed by the Plaintiff falls within the area granted to them by the Bendel State Government. This was not done.

Again the Defendants have asserted that they acquired the said land from the Amukpe Community. In support of this they tendered a Deed of Lease -Exhibit \'G\' by which the said land was leased to them by the said community. No witness was called by them to establish the due execution of this document. I do not think that it is just enough to tender such a document which cannot answer to the description of an ancient document without calling either the Solicitor who prepared it or at least one of those who executed it to testify. I cannot therefore attach any weight to Exhibit \'G\'. Having come to the conclusion that the disputed land is the bonaflde property of the Plaintiff and that the Defendants entered thereon without his consent and excavated laterite. What is left for me is to assess damage arising therefrom\"

The defendant, dissatisfied with the judgment of the trial court brought an appeal against it before the Court of Appeal, Benin Division (i.e. court below). Before the court below, parties filed and exchanged briefs. The issues formulated by the appellant (i.e. the defendant) for determination by the court below were three and read:

\" 1. Whether the learned trial Judge was right in holding that the document conveying land to the respondent need not be stamped or registered, since same was a customary grant.

2. Whether the learned trial Judge was right in holding that the purported grant of communal land to the respondent was valid, despite the absence of the consent of the head of the community.

3. Whether the learned trial Judge was right in holding that the land compulsorily acquired by the Bendel State Government was not identified by the appellant when in fact he failed to attach proper and/or any weight to Exhibit \'E\', \'F\' and \'G\' which clearly identified same.\"

The court below in its judgment on 4-04-2001 only considered the first issue for determination above. At pages 107-108 of the record of proceedings, the court below in its judgment concluded thus:

\"It is manifest from the records that the judgment of the lower court is based solely on Exhibit \'B\'. The wrongful admission of Exhibit \'B\' by the leaned trial Judge, made the court to erroneously hold that the land in dispute belongs to the respondent. If Exhibit \'B\' is expunged from the records there will be no contest between the parties.

I therefore expunge Exhibit \'B\' from the records as it was wrongly admitted by the trial court.

In the light of the foregoing, I consider it a barren exercise to proceed to consider issues (2) and (3) in this appeal as they will not serve any useful purpose. I therefore have no hesitation in allowing this appeal. I allow the appeal. I set aside the judgment of Nwulu, J., delivered on 22/9/95 including the awards made therein.\"

The Plaintiff has come on a final appeal before this court. In his appellant\'s brief, the issue for determination in the appeal was identified as thus:

\"Were the learned Justices of the Court of Appeal, Benin, right in setting aside the judgment of the leaned trial Judge on the ground that exhibit \'B\' should not have been admitted since the said exhibit \'B which was not registered pursuant to the said Instrument Registration Law was the sole basis of vesting title in the land on the appellants.\"

The above issue, on a first look, would appear to raise only the question of the admissibility in evidence of exhibit B. An analysis of it however, would appear to entail a poser, as to whether the Court of Appeal was right, to have set aside the judgment of the trial court, solely on the ground that exhibit \'B\' was inadmissible. Another way to put the same issue is - was the fact that exhibit \'B\' was inadmissible, a sufficient basis to set aside the judgment of the trial court' In the appellant\'s brief, counsel argued from both perspectives. He argued first, that exhibit \'B\' was correctly admitted by the trial court and secondly that in any case the plaintiffs claim being an action in trespass, it was sufficient if the plaintiff was in possession of the land even if he had no title thereto.

My learned brother Onnoghen JSC has in the lead judgment shown why exhibit \'B\', a land instrument, which ought not have been received in evidence unless registered was erroneously admitted in evidence by the trial court. I agree with

him. But was the court below right to have set aside the judgment in plaintiffs favour just because exhibit \'B\' was erroneously admitted in evidence' I think not. I think that the error of the court below stemmed from its failure to advert its mind to the nature of plaintiff/s claim; and the well established principle of land Law, that a person shown to be in possession of land can successfully maintain an action in trespass against all persons except one who can show a better title.

The Plaintiff, in his evidence at page 25 of the record had testified as to his possession thus:

\"I started farming on the land with my relations who farmed on it with my permission.\"

The trial judge in his judgment at pages 49-50 of the record said:

\"Having come to the conclusion that the disputed land is the bonafide property of the Plaintiff and that the defendants entered therein without his consent and excavated laterite, what is left for me is to assess damages arising therefrom.\"

The implication of the above conclusion of the trial court is that:

(1) The Plaintiff was the owner of the land.

(2) The plaintiff was in possession of the land.

(3) The defendant, whilst the land was in the possession of the plaintiff went thereon to excavate laterite.

The result is that, when exhibit \'B\' was rejected in evidence by the court below, that only displaced the fact that the plaintiff was the owner of the land. The facts that the plaintiff was in possession of the land and that the defendant without plaintiffs consent went on the land to excavate laterite were not displaced. Those two facts were good enough to ground a judgment in trespass in favour of the plaintiff.

The plaintiff in this case had only claimed in trespass. He had not claimed for declaration of title. In Amakor v. Obiefuna [1974] 3 S.C. 67 at 75-76, this Court per Fatayi-Williams, J.S.C (as he then was) observed:

\"It is trite law that trespass to land is actionable at the suit of the person in possession of the land. That person can sue in trespass even if he is neither the owner or a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong-doers except a person who could establish a better title. Therefore, anyone other than the true owner, who disturbs his possession of the land, can be sued in trespass and in such an action, it is no answer for the defendant to show, (as the defendant/respondent had sought to show in paragraph 7 of his statement of defence, although he gave no evidence in support of this averment), that title to the land is in another person.\"

Similarly in Okolo v. Uzoka [1978] 4 S.C. 77 at 87, this court said:

\"It is the law and this court has so held times without number that trespass to land is actionable at the suit of the person in possession of the land. Amakor v. Obiefuna [1974] 1 All N.L.R. (Part 1) pg. 119; Adeshoye v. Shiwoniku 14 WACA 86; Emegwara & Others v. Nwaimo & Others 14 WACA 331.

The slightest possession in the plaintiff enables him to maintain trespass of the defendant cannot show a better title. (Whittingdom v. Boxall [1943] 12 LJ. QB. 318); Nwosu v. Otunola [1974] 1 All NLR (Pt.l), page 533.'

The lower court was clearly in error to have set aside the judgment in favour of the plaintiff. I therefore agree with the lead judgment by my leaned brother Onnoghen JSC. I would also allow this appeal and restore the judgment of the trial court. I would award the same costs as in the lead judgment.

Judgement delivered by
Mahmud Mohammed. J.S.C.

I have had the opportunity of reading in advance the judgment of my learned brother Onnoghen JSC just read. I entirely agree with him in his consideration of the main issue in this appeal that Exhibit \'B\', though a simple letter from the Amukpe Community to the appellant, the terms contained in the letter have turned it into an instrument affecting land as defined under section 2 of the Land Instruments Registration Law, CAP 81 of the Laws of Bendel State as applicable in Delta State. As the document was not registered in compliance with the requirement of the law, the trial High Court was in error in admitting it in evidence and partly relying on it to support the appellant\'s claim for interest in land. The court below was therefore right in finding the document inadmissible and in expunging it from the evidence in support of the appellant\'s case before the trial court.

However, apart from the contents of Exhibit \'B\' there was overwhelming evidence from the appellant and the witnesses called by him on the record to support the appellant\'s claims for title and possession of the land alleged to have been trespassed upon by the respondent. The court below therefore ought to have proceeded under section 227(1) of the Evidence Act CAP 112 of the Laws of the Federation of Nigeria 1990 to affirm the judgment of the trial High Court in respect of the liability of the respondent in trespass and award of damages to the appellant.

Accordingly, I also allow the appeal in this respect and abide by the orders in the lead judgment including the order on costs.