IN THE SUPREME COURT OF NIGERIA

Suit No: SC254/2002

Petitioner: Chief Gibson Pencyl Orunengimo, Mr. Jeremiah Pencyl Nyenge
And
Respondent: Madam Margaret Egebe, Faustina Egebe ,Mr. Kichener Ikoli Egebe

Date Delivered: 2007-07-13

Judge(s): Aloysius Iyorgyer Katsina-Alu ,Mahmud Mohammed ,George Adesola Oguntade, Francis Fedode Tabai ,Christopl

Judgment Delivered

The judgment is sequel to an appeal against the judgment of the Court of Appeal Port Harcourt Division on the 22/5/2002. The judgment itself dismissed the appeal against the judgment of the trial court delivered on the 14/2/86. The Appellants herein who were the Plaintiffs were also the Appellants at the Court below. The writ of summons itself was issued at the Port Harcourt Division of the High Court of Rivers State on the 13/11/75. They sued for themselves and on behalf of Ikoni family of Akakumama Okoroma in Brass Division then of Rivers State but now of Bayelsa State. The Defendants therein are the Respondents both at the Court below and in this Court.In paragraph 12 of the Statement of Claim the Plaintiffs/Appellants claimed as follows:

Wherefore the Plaintiffs claim as against the Defendants is for a declaration of title to that piece or parcel of land known and called Okameinmo Kiri situate at Akakumama Okoroma village Membe in Brass Division of the Rivers State and verged Red in Plan No. ESA/R/407/76 LD dated the 26th of January 1976 in the peaceful possession and ownership of the Plaintiffs and of an annual value of N20.00 (Twenty Naira)The pleadings on which the case was tried are the Statement of Claim at pages 14-18 of the record and the Amended Statement of Defence at pages 85-92 of the record. In the judgment on the 4/2/86 the learned trial Judge Opene J (as he then was) dismissed the Plaintiff\'s claim. The appeal to the Court below was also dismissed.Before this Court the parties through their counsel filed and exchanged their briefs of argument. The Appellants\' brief was prepared by B.E.I. Nwofor, SAN and it was filed on the 24/12/2002. The Respondents\' Brief prepared by Isaac O. Kamalu was filed on the 13/10/2004.In the Appellants\' Brief Mr. Nwofor SAN proposed the following issues for determination:-

(1) Whether the Certificate of Purchase tendered in evidence and marked Exhibit D2 was rightly admitted in evidence, and if not, was there any legal evidence on record to support the concurrent findings of the courts below that Arose gave consent to the sale of the disputed land to Donald Egebe'

(2) Whether the concurrent findings of the courts below that Plaintiffs/Appellants\' family sold the land in dispute to Donald Egebe, the defendant/respondents\' ancestor, is supported by the pleadings and evidence on record and accords with the relevant and applicable principles of law'

(3) Whether the Court below was right in failing to grant declaration of title to the land in dispute in favour of the Plaintiffs/Appellants and in confirming the trial court\'s decision dismissing the action'On his part Mr. Kamalu formulated two issues for determination in the Respondent\'s Brief of Argument. The two issues are:

(1) Whether Exhibit D2 (Certificate of Purchase) was properly admitted in evidence.

(2) Whether on the facts and evidence in this case the Court of Appeal (Port Harcourt Division) was right in upholding the conclusion of the trial court that the Appellants are not entitled to a declaration of title as claimed.On the 17/4/2007 when we heard this appeal learned Senior Counsel for the Appellants, Mr. B.E.I. Nwofor told this Court that as a minister in the temple of justice he would no longer pursue the Appellants\' issue one on the admissibility of the Certificate of Purchase Exhibit D2 and went on to concede the position of the Respondents that the said document was admissible and rightly admitted. He then proceeded to proffer some oral arguments in amplification of the Appellants\' issues two and three, the substance of which was that, in the light of the pleadings and evidence, the concurrent findings of the courts below about the sale of the property was not supported by the evidence and therefore perverse. Mr. Kamalu for the Respondents argued to the contrary.Learned Senior Counsel for the Appellants proffered, in substance, the following submissions. He referred to the pleadings in paragraphs 3, 3a and 11 of me Statement of Defence and submitted that by reason of the contradictions therein, the Respondents were not certain as to the particular land bought and the precise person from whom Donald Egebe bought the land and therefore that their case of the alleged sale

collapsed and crumbled right from their pleadings. Every pleading, it was argued, should be concise, precise, clear and definite and reliance was placed on Folarin v. Durojaiye (1988) 1 NWLR (Part 70) 371 at 364, Bullen and Leake and Jacob\'s Precedents of Pleadings 12th Edition Page 39 and Re Parton, Townsend v. Parton (1882) 30 WR 287. Still on the pleadings in paragraphs 3, 3a and 11 of the Amended Statement of Defence, it was the further submission of learned Senior Counsel that the Respondents failed to specifically plead the alleged sale or other essential ingredients of a valid sale and transfer of absolute title to a family land either under customary law or the received English law. Learned Senior Counsel enumerated six essential ingredients of a valid sale and transfer of absolute title to family land under customary law and submitted that the Appellants failed to plead these ingredients either in respect of \"Ogiogio Kiri\" or in respect if \"Obukiri.\" On the duty on the Respondent\'s to plead the essential ingredients and the effect of the failure so to do he relied on, Aboyade Cole v. Folami (1956) SCNLR 180 at 182-183; Erinosho v. Owokoniran (1965) N.M.L.R 479 at 483; Folarin v. Durojaiye (supra); Taiwo v. Ogunsanya (1967) NMLR 375; Ajada v. Olarewaju (1969) ANLR 374 at 379, and Egonu v. Egonu (1978) 11-12 SC 111 at 131 - 132. He referred to parts of the evidence at the DW1 and DW2 and contended that they were facts not pleaded and therefore inadmissible and urged that they be either expunged or ignored as evidence on facts not pleaded goes to no issue. He further referred to the evidence of the DW2 at page 132 of the record to the effect that Donald Egebe paid '20.00 as against the version that the sale price was '70.00 out of which he paid '65.00 and submitted that the contradiction nullified the probative value on the purchase price.Learned Senior Counsel further referred to the evidence that only part-payment of '65.00 was paid leaving a balance of '5.00 and submitted that a sale predicated upon part-payment and delivery of possession without payment of the full purchase price is bad in law and relied on David Ejiniyi v. Amusa Amusa Adio (1993) 7 NWLR (Part 305) 320 at 338, Odufuye v. Fatoke (1977) 4 SC 11 at 23-24. Still on this question of essential ingredients of a valid sale, Learned Senior Counsel argued, rather strenuously that the Appellants failed to plead the actual delivery and symbolic handling over of the land after payment of the purchase price and which failure is fatal the case of the Appellants. He relied particularly on Uzuchukwu & Ors v. Amaghalu Eki & Ors (1977) 7 NWLR (Part 514) 535 at 550 -557; Edward Egonu v. Madam Eziamaka Egonu (1978) 11-12 SC 111 at 1331 -132 and Erinosho v. Owokoniran (1965) NMLR 479 at 483. It was argued that the legally admissible evidence on facts properly pleaded was grossly insufficient to support the concurrent findings of the two courts below and which findings are therefore perverse.Under the Appellant\'s issue, three references were made to the finding by the Court below that the Appellants\' family originally owned the land and submitted that having so found, the burden of proving that the Appellants have been divested of the ownership of the land rested on the Respondent and that they failed to discharge the said burden.The gist of the arguments of Mr. Kamalu for the Respondents was as follows. He submitted firstly that parties are by their pleadings required to state only the material facts and not the evidence to establish those facts. He relied on Order XXXIII Rule 5 of the High Court Rules of Eastern Nigeria then applicable at the time of trial at the Rivers State High Court, Okagbue & Ors v. Romaine (1982) 13 NSCC 130 at 137; Oguma Associated Companies (Nig) v. I.B.W.A. (1988) 19 NSCC (Part 1) 395. It was also submitted that in order to ascertain the case of a party as pleaded the entire pleadings must be read and not paragraphs in isolation. Reliance was placed on Okoli & Ors v. Inumkwadi & Ors (2003) 18 NWLR 1 at 24; Mobil Producing Unlimited v. Francis Johnson Asunu (2001) 16 N.W.L.R. (Part 740) 723 at 760. Learned counsel referred to the address of counsel for the Appellants at the trial court and contended that the issues between the parties were clearly identified on the state of the proceedings and that the trial court also clearly identified same. It was counsel\'s further submission that the issues raised here in counsel\'s address were not issues raised in the pleadings and if the Appellant\'s wanted to raise them, they ought to have filed a reply to the Statement of Defence. He relied on Gabriel Iwuoha & Anor v Nigeria Postal Services Ltd & Anor (2003) 8 NWLR (Part 822) 308 at 340-341, ELF Petroleum (Nig) Ltd v Onyekwelu (2002) 17 NWLR (Part 797) 461 at 485.The Appellants, he contended, cannot be allowed to take the Respondents by surprise. He submitted that on the state of the pleadings the narrow issue identified by the parties and confirmed by the two courts below is whether the transaction was a grant to Donald Egebe for temporary occupation allowing only thatch houses as claimed by the Appellants or outright sale to him as asserted by the Respondents. Learned counsel submitted that all the material concurrent findings were consistent with the pleadings and the evidence led thereon and therefore not perverse. Learned counsel then highlighted parts of the pleadings and evidence to buttress his argument.

The foregoing represents the substance of the arguments of counsel for the parties. Let me first attend to the question of the alleged imprecise land and boundaries said to be contained in the pleadings of the Respondents over which learned senior counsel for the Appellants made sustained submissions which I have already adumbrated. Although in paragraphs 3 and 3(a) of the Amended Statement of Defence the Appellants made reference to two parcels of land, namely Ogiogiokiri bought from Kanti Ogongon of Egbelu family in Akakumama in Okoroma area and Obukiri bought jointly from one Ayemu Ada Oloko of Dogiwama in Okoroma area and one Johnnie Oruwegimo of Akakema in Nembe, it

is clear from the entire amended Statement of Defence that the portion in dispute is Ogiogiokiri. The identity of the land in dispute was not an issue and the Plaintiffs/Appellants had not the slightest misapprehension about the land in dispute. With respect to the land in dispute learned counsel for the Plaintiffs, in the course of his address on the 5/12/85 had this to say.\"Two pieces of land are involved in the plan Exhibit D7 Obu Kiri which is verged Yellow and the area verged Blue which is called Ogiogio Kiri. Plaintiff does not own Obukiri. DW1 gave evidence that what Donald Egebe bought from Kanti is Ogiogiokiri. Area which we are seeking declaration is the smaller portion within larger land which is Okumumo and Defendants call it Ogiogio Kiri...\"

(See page 161 lines 24-30 of the record.)

Again at page 164 lines 22-24 he said:-

\"We are not claiming Obu kiri which Egebe bought from some other persons. We have nothing to do with Obu Kiri.\"It is clear from the above that the land claimed and which is the land in dispute is the area called Ogiogiokiri by the Respondents and Okameimo Kiri by the Appellants. Besides, it is a Plaintiff who claims a declaration of title to land that has the duty of establishing the identity of the land in respect of which he seeks the declaration and not the defendant unless of course, he counter-claims. See Simon Ojiako and Anor v. Obiawuchi & Ors (1995) 9 N.W.L.R. (Part 420) 460; Ijama Orika Odiche v. Ogah Chibogwu (1994) 7 N.W.L.R. (Part 354) 78 at 87-88; Onwuka v. Ediala (1989) 1 N.W.L.R. (Part 96) 180 at 184; Imah v. Okogbe (1993) 9 NWLR (Part 316) 159 at 175. In this case the parties knew the land in dispute and there was no dispute about it and therefore no issue on it either before the trial court, or at the court below. In the circumstances I find it difficult to comprehend why learned senior counsel devoted so much time on a purported issue which actually was a non issue.Let me now examine the issue which pertains to insufficiency of pleadings. Learned senior counsel for the Appellants, at page 27 of the Appellants\' Brief listed the following as the essential ingredients of a valid sale and transfer of family land under customary law.

(a) that the sale was with the consent of the family;

(b) that the sale was concluded in the presence of witnesses;

(c) the names of the witnesses;

(d) that the witnesses witnessed the actual delivery or handing over of the land to the purchaser;

(e) the purchase price was agreed and that it was fully paid in the presence of witnesses; and

(f) that the purchaser was let into possession of the land. It was his submission that the above essential ingredients were not pleaded by the Respondents in their Amended Statement of Defence, and that any evidence adduced in support thereof was not a legal evidence and therefore that findings based thereon were perverse.The question is whether, for a successful defence of the claim before the court, it was necessary for the Respondents to plead all the above ingredients' The answer to this question will be found in the pleadings of the parties. I start with the case of the Appellants as pleaded in the Statement of Claim. It was pleaded in paragraphs 5, 6 and 7 that the land in dispute is in Okoroma village and that it was founded by a man called Okoroma. Okoroma begat Ovoh who in turn begat Apragan who himself begat Okoni or Ikoni. It was further averred that Ikoni married an Andoni woman and had an only daughter named Arose, who inherited the land on the death of her father. Arose herself had three children, a male and two females. On her death her male child named Pencyl inherited the land and that the Plaintiffs are the descendants of the said Pencyl. In paragraph 8 and 9 of the Statement of Claim the Appellants pleaded:

\"8. Late Madam Arose Ikoni had a maternal brother named Kanti Inogha who is not of Ikoni family. Kanti Inogha around 1930 was so friendly with one Donald Egebe of Nembe that he allowed him to settle temporarily on a portion of the land in dispute with the knowledge and consent of Madam Arose Ikoni where he was only to build a thatch house. The portion allowed the said Donald Egebe for temporary occupation is verged Green in the said plan No. ESA/R/407/76 LD dated 26/1/76 and filed with this Statement of Claim.\"

9. At no time was any portion of the land in dispute or that portion of land allowed the said Donald Egebe to settle temporarily sold to him by the family or any member of the said family or by Kanti Inogha nor could such a sale be made without the knowledge and consent of the family. Donald Egebe who in his life time was a Native Court Clerk and after his retirement from the service became a petition writer could not have bought this land from Ikoni family without entering into a written agreement with the Plaintiffs before his death.\"

In their reaction the Respondents pleaded in paragraph 2 of their Amended Statement of Defence to the effect that the Appellants were not members of Ikoni family but rather of the Kanti Egbelu family of Okoroma area and at some previous occasions they had held out themselves as members of Kanti family. They then pleaded in paragraph 3 thereof thus:-

\"3. In answer to paragraph 3 of the Statement of Claim the Defendants say that the land in dispute is known and called \"Egebekori\" and not Okameimo Kiri as stated by the Plaintiffs. The land in dispute is made of two parcels of land; the

one called \"Ogiogio Kiri\" which Kanti or Canti Ogungon Inogha Egbelu with the consent of Arose and Akarara, Plaintiffs\' predecessors in title sold to late Donald Egebe in 1930. The sale was evidenced by a memorandum in writing which the Defendants will rely upon at the trial....\"Still in respect of the alleged sale the Respondents further pleaded in paragraph 11 thereof in the following terms:

\"11. In answer to paragraph 8 of the Statement of claim the Defendants still say that this land in dispute was bought by late Macdonald Egebe from one Cantee. It is not true that one Kanti Inogha allowed Donald Egebe to settle temporarily on a portion of the land in dispute. Evidence will be led to show that at the time of the said sale Messrs Solomon Idoinyo, Yagaman Igoni and one Ikala were also present, who in fact later helped Donald Egebe to open up the settlement.\" From the pleadings of the parties, both sides are in agreement that the Defendants/Respondents are on the land in dispute. The Plaintiffs/Appellants\' counsel appreciated and restated this in the concluding part of his address at the trial court on the 5/12/85 when in response to Appellants counsel\'s suggestion for an action in forfeiture, he said at page 164 lines 26-28.\"...The remedy is (not) our discretion. We want them to stay on the land but they should recognise our title. That is why we did not sue them for trespass.\" Both sides are also in agreement that the Respondents\' occupation of the land in dispute and whatever rights they enjoy thereon was as a result of the act of Kanti. That being the case it was not necessary to plead the actual delivery or handing over of the land to them. Nor was it necessary to plead that they (Defendants/Respondents) were put into possession, since the Plaintiffs/Appellants had pleaded that they were put into possession by Kanti since 1930. The main aim of pleading by a party is to give the opposing party a fair notice and thus alert him of the case he has to meet so as to enable him to prepare his own side of the case and thus avoid any element of surprise. This principle of pleading has been stated and restated in numerous cases. See Union Bank of Nigeria Ltd (1995) 2 NWLR (Part 380) 647 at 663; Obijuru v. Ozims (1985) 2 NWLR (Part 6) 167; Richard Harold Sodipo v. Lemminkainen Oy & Anor (1985) 2 NWLR (Part 8) 547. The Plaintiffs/Appellants having themselves pleaded that they, through Kanti, handed over the land to the Respondents, albeit for temporary occupation, it is idle for them to contend that the Respondents ought to have pleaded the formal and symbolic handing over of the land. I hold that it was not necessary to plead any formal handing over of the land in dispute. It was therefore not necessary to plead ingredients (d) and (f) postulated above by the Appellants\' counsel. With respect to the remaining four ingredients of a valid sale and transfer of family land, the essential facts constituting these were copiously pleaded in paragraphs 3 and 11 reproduced above. The sale, the fact that the sale was with the consent of the family, that it was concluded in the presence of witnesses and the names of these witnesses were all pleaded in the afore stated paragraphs 3 and 11 of the Amended State of Defence. The other details of the same not pleaded were just the evidence by which the sale was to proved and these need not be pleaded.From the foregoing considerations, the Appellants\' complaint about the lack of or insufficiency of pleading has no merit. It does not arise from the pleadings. The parties in a case and the court are bound by the issues submitted for trial and remain so bound from the court of trial to the final appellate court. An issue not raised in the pleadings and therefore not tried at the court of trial cannot be raised at the Appellate court through the ingenuity of counsel. See Balogun v. Adejobi (1995) 1 SCNJ 242 at 264; (1995) 2 NWLR (Part 376) 131 at 158; Olatunji v. Adisa (1995) 2 SCNJ 90 at 103; (1995) 2 N.W.L.R. (Part 376) 167 at 186. It is not surprising therefore that the issue being strenuously pursued here was neither raised at the trial court nor at the Court of Appeal.Having regard to the facts settled and admitted in the pleadings to the effect that the Appellants are on the land and have been there since 1930 on the authority Kanti, the sole question for determination is the nature of their rights over the land in dispute. Was the land granted by Kanti to Donald Egebe for temporary occupation only as pleaded by the Appellants' Or was it sold by him with the consent of Arose and other members of the Appellants\' family to Donald Egebe as pleaded by the Respondents' But before the resolution of this ultimate question there is the fundamental question of who was this man Kanti in relation to the land in dispute. It was a common ground that Arose was a member of the Appellants\' family. It was even the case of the Appellants that she became head of their family on the death of her father. But the case of the Appellants as pleaded is that Kanti was only a maternal brother of Arose with no intrinsic or blood relationship with the Appellants\' family. He was, according to their case, therefore a stranger having no authority to sell the land in dispute to the Respondent\'s ancestor Donald Egebe.On the other hand, the case of the Respondents was that Kanti was a member of the Appellants\' family or at least that he was represented and held out as such with authority to sell the land to their ancestor Donald Egebe. The learned trial judge identified this issue in the course of his deliberations on the case at page 171 of the record where he stated: \"Another important matter that arises from that is whether the plaintiffs are from Ikoni family as they said or from Kanti family as the Defendants claimed.\" On this issue of whether the Plaintiffs/Appellants\' family is called Kanti or that Kanti is from that family, the Respondents, at the trial, relied heavily on Exh. D5 wherein the Appellants\' family was described as the Kanti Family. For reasons stated in the judgment at pages 173-175 of the record the learned trial judge accorded probative value to the document. I have no cause to fault his

reasoning and conclusion on that document. Still on this issue the Defendants/Respondents again relied heavily on Exhibit D2. At pages 5-14 of the Appellants\' Brief of Argument B.E.I. Nwofor, SAN proffered extensive arguments on the inadmissibility of the said Exhibit. As I stated earlier on the 17/4/2007 in the course of his oral submission, he conceded that the document was admissible and rightly admitted. The said Exhibit D2 was allegedly written by the PW7 and so he was, with the leave of court, called after the Defendants/Appellants had closed their case. He was confronted with Exhibits D8 and D9 which were documents signed by him. The learned trial judge invoked his powers under sections 99, 100 and 107 of the Evidence Act to carry out some comparison of his signature in these documents and that in Exhibit D2 and concluded that Exhibit D2 was prepared by the PW7. In coming to that conclusion he also accorded credibility to the evidence of the DW2. I have also examined the documents and the evidence of the PW7 and DW2 and I have no doubt in my mind that in coming to the conclusion, the learned trial judge carried out a thorough evaluation. I have no cause therefore to interfere with his findings on Exhibit D2.The matter has not ended there. In coming to his conclusion the learned trial judge also relied on some oral testimony of the Plaintiffs witnesses which supported the case of the Defendants/Respondents. First is the evidence of the PW2 who said under cross-examination thus:\"Kanti and the Plaintiffs are of the same family.\"

This evidence is at page 96 lines 9-10 of the record. The next is the PW3. He also said under cross-examination:\"I know that Kanti and Plaintiffs are from the same family.\" This piece of evidence is recorded at page 97 lines 20-21 of the record. And the evidence of the PW6 is also relevant on this issue. He said in his evidence in chief at page 103 lines 25-29 thus:-\"It was Pencyl and Kanti that gave me permission on behalf of Ikoni to saw trees. Pencyl is a son of Arose. Arose is from Ikoni family. Pencyl and Kanti were elders of the Ikoni family at that time.\" The foregoing pieces of evidence from the PW2, PW3 and PW6 firmly supported the case of the Defendants/Respondents that Kanti was a member of the Plaintiffs/Appellants\' family. It is my firm view that the totality of the evidence from Exhibits D2 and D5 the oral testimony of the defence witnesses and the evidence of the PW2, PW3 and PW6 is overwhelming in favour of the case of the Defendants/Respondents that Kanti was from the Appellants\' family and had the authority to sell the land in dispute to the Respondents\' ancestor, Donald Egebe.On this issue the learned trial judge had this to say at page 189-190 of the record:

\"I believe the Defendants that sometime in 1930 that George Oruh asked Egebe whether he would like to buy land and that when he said that he would like to buy a land that George Oruh took him to Kanti who later brought in his sister Arose and a man Akarah and in the presence of DW2 and others, the Plaintiffs\' family sold to Egebe the land in dispute-Egebe Kiri after which Egebe moved in and occupied the land and further that in 1949, Kanti in the presence of and with the consent of Arose and Akarala, made out Exhibit D2 to record what happened in 1930 and which was written by PW7.\"This finding was endorsed by the Court of Appeal in its judgment and I do not fancy any conceivable reason to do otherwise. It is the only reasonable finding and conclusion from the very strong evidence in favour of the Defendants/Respondents.This issue of whether Kanti was a member of the Plaintiffs/Appellants\' family also virtually settles the ultimate issue of whether in 1930 he only granted Donald Egebe temporary occupation of the land in dispute or he, acting for and with the consent and authority of the Plaintiffs\' family sold the land to him. As I have already stated above the learned trial judge thoroughly evaluated the evidence, oral and documentary. At the concluding part of his judgment he made the following findings:-\"After evaluating the evidence adduced on both sides, I find as a fact that sometime in 1930 that George Oruh took Donald Egebe to Kanti, a member of the Plaintiffs\' family who later brought his sister Arose and Akarala and in the presence of the DW2 and others and that with the consent of Arose and Akarala, Kanti sold to Donald Egebe the land in dispute which Egebe occupied and planted some economic crops on it. Further that in 1949 Kanti with the consent of Arose and Akarala gave Egebe Exhibit D2 to record the transaction which took place in 1930.\" These findings were again endorsed by the Court of Appeal. In its judgment the Court of Appeal, per Ogebe JCA, stated at page 301 of the record:\"It is not disputed that they (Plaintiffs/Appellants) were the original owners of the property. Even by their own showing that their ancestors gave it to the Respondents\' father for temporary occupation but the Respondents were able to show that it was more than. It was an outright sale to him and the court believed this evidence. I see no cause whatsoever to interfere with the clear finding of fact of the trial court, which was based on the evidence before it....\"I agree entirely with the view expressed by the Court of Appeal. In view of the overwhelming evidence in favour of the Defendants/Respondents part of which I have noted above and particularly having regard to the contents of Exhibits D2 and D5, the evidence of the defence witnesses which the trial court assessed as credible and aspects of the evidence of the PW2, PW3 and PW6 which supported the case of the Defendants/Appellants, both the trial court and Court of Appeal had no choice but to find in favour of the Defendants/Respondents. There is therefore no cause for any interference with the concurrent findings of the courts below.On the whole and in view of all I have considered above, I hold that there is no merit in the appeal which is

accordingly dismissed. I assess the costs of this appeal at Nl0,000.00 against the Plaintiffs/Appellants.

Judgment Delivered by

Aloysius Iyorgyer Katsina-Alu. J.S.C.

I have had the advantage of reading in draft the judgment delivered by my learned brother Tabai J.S.C. I agree with it and, for the reasons he gives I, too, dismiss the appeal with N10,000.00 costs against the plaintiffs/appellants.

Judgment Delivered by

George Adesola Oguntade. J.S.C.

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai J.S.C. He has ably and comprehensively dealt with the issues in this appeal. I agree entirely with him. I would also dismiss this appeal with costs as assessed in the lead judgment.

Judgment Delivered by

Mahmud Mohammed. J.S.C.

The action on a land dispute from which this appeal arose was fought between the Appellants as Plaintiffs and the Respondents as Defendants in representative capacities for and on behalf of their respective families before the Rivers State High Court of Justice Port-Harcourt. The matter which was commenced since 1975 by a Writ of Summons was heard on pleadings exchanged between the parties. In the course of the hearing of the case at the trial Court, the Appellants/Plaintiffs called seven witnesses to prove their case for declaration of title to the parcel of land in dispute. The Respondents/Defendants on their part called five witnesses to support their case asserting title to the same parcel of land. The case of the Appellants/Plaintiffs was that the parcel of land in dispute is part of their family land; that their family allowed one Donald Egebe, who was the Respondents/Defendants\' ancestor, to settle temporarily on part of their family land, on the condition that he was only to build a thatch house. It was part of the Appellants/Plaintiffs\' case that no portion or part of their family land was at any time ever sold by the family or by any member of the family to the ancestor of the Respondents/Defendants, Donald Egebe.The Respondents/Defendants however in their defence to the action against them had asserted titled to the land in dispute claiming to have brought the same through their ancestor Donald Egebe from one Kanti, a member of the Appellants/Plaintiffs\' family sometime in December, 1930. The Respondents/Defendants also denied part of the case against them that their ancestor Donald Egebe was merely allowed to settle temporarily on the land, maintaining that Donald Egebe was on the land in dispute by virtue of purchase of the same under Native Law and Custom.It was therefore common ground between the parties that the land in dispute originally belongs to the family of the Appellants/Plaintiffs from whom the Respondents/Defendants are claiming to have bought the same under Native Law and Custom in 1930. The question therefore was whether or not the Respondents/Defendants upon whom the burden of proof had shifted upon admitting that the original title to the land in dispute lay with the Appellants/Plaintiffs, had succeeded in proving a valid sale and transfer of title to them under Native Law and Custom. The learned trial judge in his judgment delivered on 4th February, 1986 at the end of the hearing, dismissed the Appellants/Plaintiffs\' claim for declaration of title to the land in dispute having made a finding that the land in dispute was sold by the Appellants/Plaintiffs\' family to Donald Egebe, the Respondents/Defendants\' ancestor. The Appellants/Plaintiffs\' appeal to the Court of Appeal against the judgment of the trial Court was dismissed on 22nd May, 2002 and part this of judgment containing reasons for the dismissal of the appeal at page 301 of the record of the appeal reads '\"The third issue is whether or not the Appellants proved their claim of ownership by credible evidence. It is not disputed that they were the original owners of the property. Even by their own showing that their ancestors gave it to the Respondents\' father for temporary occupation but the Respondents were able to show that it was more than that, that it was an outright sale to him and the Court believed this evidence. I see no cause whatsoever to interfere with this clear finding of fact of the trial Court which was based on the evidence before it.\"

The Appellants/Plaintiffs\' further appeal to this Court, is against this judgment of the Court below mainly on the question of proof of sale of the land in dispute under Native Law and custom.The requirements of the law regarding the proof of root of title to land pleaded by a party in claim for declaration of title arising from a grant, or a sale, is well settled. In Fasoro v. Beyi-Oku (1988) 2 N.W.L.R. (PT. 76) 263 at 271, it was stated as follows '

\"Where a parties root of title is pleaded as say a grant, or sale or conquest etc, that root has to be consequential acts following there from can then properly qualify as acts of ownership.\"The law in this respect is also settled that to transfer an absolute title under customary law, it ought to be pleaded and proved by evidence that the sale was concluded in the presence of witnesses and the names of those witnesses should also be pleaded as the fact that they witnessed the actual delivery or handing over of the land to the purchaser. See Folarin v. Durojaiye (1988) 1 N.W.L.R. (PT. 70) 351 at 365.In the instant case, the Respondents/Defendants have pleaded their root of title in the sale of the land in dispute to their ancestor Donald Egebe. The relevant paragraphs 2a, 5 and 11 in their amended statement of defence at pages 85,

87 and 89 of the record are as follows:

\"2a. The Defendants will at the trial rely on receipt dated 19th April, 1975 for compensation paid in respect of oil exploration on the land in dispute to the Plaintiffs, Defendants and one Ibokolo family by one Chief Olali Bigold Ebahbofa with whom the said parties voluntarily deposited the said compensation. The Defendants will at the trial contend that the Plaintiffs having represented themselves as members of Kanti family in the said transaction are estopped from denying the same. Defendants will further rely on Plaintiffs\' then Solicitors letter dated 17th March, 1975 to same effect.

5. The Plaintiffs now claim ownership of this land because of the death of late MacDonald Egebe the head of the Defendants\' family; the Plaintiffs will therefore be put to the strictest proof of paragraph 3 as to the ownership during the trial.

11. In answer to paragraph the Defendants still say that this land in dispute was bought by late MacDonald Egebe from one Cantee. It is not true that one Kanti Inogha allowed Donald Egebe to settle temporarily on a portion of the land in dispute. Evidence will be led to show that at the time of the sale Messrs. Solomon Idoinyo, Yagaman, Igoni and one Ikata were also present, who in fact later helped Donald Egebe to open up the settlement. Also before the sale Cantee, the vendor made public announcement for any claimant to advance his claim within 7 days. No one objected to the sale. Earlier judgments in the Nembe Native Court Nos. 113/49 and 238/49 had given judgment to the Defendants\' family as owners of this land in dispute, and these judgments, will be forwarded upon at the trial.\"

At the end of the hearing of the witnesses called by the parties in support of their respective conflicting claims of title to the land in dispute, the learned trial judge after reviewing the evidence, preferred the evidence adduced by the Respondents/Defendants in proof of the sale of the land in dispute to their ancestor Donald Egebe and dismissed the Appellants/Plaintiffs\' claim for declaration of title. Part of that judgment at pages 187-188 of the record containing some of the reasons given by the learned trial judge reads '

\"Besides the evidence of DW1 that Kanti sold the land to Egebe with the consent of Arose and that Kanti was the head of the family, DW2 who said that he witnessed the whole transaction said as follows:- \'I know the land called Egebe Kiri. About 1930, one George Oruh met Egebe at Nembe and asked him whether he would buy land. Egebe said that he would buy the land. Oruh said that the land was not his own and then took him to the owner. I and one Joshua Gbolofa took Egebe to Dogu Ewoama. We went to George Oruh\'s house at Ewoama. He sent for the owner of the land, one Kanti Ogongo from Akakumama. Egebe asked him to show him the land. Kanti said that he should come to Akakumama to meet his family. Kanti went to Akakumama and came with his people to Dogu, Ewoama. Then we went to the land a place called Ogiogio. Kanti then sold the land to him. The members of his family that he came with were Arose a woman and a man called Akarala Omoukori.\'\"The Defendants have not only shown the people that were present on both sides during the transaction but also the place and that was in 1930.I will rather prefer the evidence of DW1 and DW2 to the evidence of the Plaintiffs. This view, is fortified by the fact that DW2, the key witness for the Defendant withstood all the cross-examination and was never shaken, he is an old man of over 75 years and I believe him that he saw everything that transpired'Thus, having regard to the relevant facts pleaded in their Amended Statement of Defence and the evidence adduced by the witnesses in support of the purchase of the land in dispute under Native Law and Custom by the Respondents/Defendants from the family of the Appellants/Plaintiffs, the requirements of the law in support of the transfer of title by sale, have been fully satisfied as correctly found by the trial Court and affirmed by the Court below. Further more, the Appellants having failed to discharge the heavy burden placed upon them by law for this Court to disturb the concurrent findings of fact in the judgments of the two Courts below, I entirely agree with my learned brother Tabai, J.S.C, in his lead judgment which I have had the privilege of reading before today, that there is no merit in this appeal. Accordingly I also dismiss the appeal and abide by the order on costs in the lead judgment.

Judgment Delivered b

Christopher Mitchell Chukwuma-Eneh. J.S.C.

I have read in advance the judgment in this matter prepared by my learned brother Tabai J.S.C. I agree with him that the concurrent decisions of both lower Courts are solidly grounded and that the appeal lacks merit and should be dismissed. I also dismiss it. I endorse the orders in the judgment.

Counsel

B.E.I Nwofor SAN

with him

A.G. Warmate Esq

Ugo Nnenoma Esq " For the Appellant

I.O Kamalu " For the Respondent
