

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC228/2001

**Petitioner:** Mr. Audu Otukpo

And

**Respondent:** Apa John

Date Delivered: 2012-03-23

**Judge(s):** Walter Samuel Nkanu Onnoghen, Ibrahim Tanko Muhammad, Olufunlola Oyelola Adekeye, Bode Rhodes-Vivour, M

## Judgment Delivered

This is an appeal against the judgment of the Court of Appeal, Holden at Kaduna in Appeal No CA/K/110/1997 delivered on the 14th day of December, 1999 in which the court dismissed the appeal of the appellant and affirmed the decision of the Kaduna State High Court of Justice, Holden at Kaduna in suit No KDK/KAD/335/1994 delivered on the 20th day of January, 1997 in favour of the respondents who were the plaintiffs in the action.

The action involves a piece of land measuring about 7 x 50 feet which adjoins Plot No A2, Ungwai Television, Kaduna. The respondents took out a writ of summons against the appellant claiming a declaration that the small piece of land, supra belongs to them, Sixty thousand naira (N60,000.00) damages for trespass and injunction.

Appellant counter-claimed for title and an order nullifying and invalidating the certificate of occupancy No KDH/A/007143, Two hundred thousand naira (N200,000.00) damages for trespass and an injunction. The trial court granted the reliefs of the respondents and dismissed the counter-claim.

It is the case of the respondents that their late father, John Agbalikwunu purchased the disputed land from one Mallam Ali and got into possession of same; that after the construction of the dual carriage way from Kaduna town to Command Secondary School junction, their father wanted to start development of the land only to be confronted by one Audu Zakwai who laid claim to the portion now in dispute meaning 50 x 7 feet resulting in a peaceful settlement by which John Agbalikwunu, respondents' father paid the sum of one thousand (N1,000.00) to the said Audu Zakwai for the disputed piece or portion of the land in full settlement for which Audu Zakwai issued a receipt which was tendered in the proceedings and marked Exhibit 1. After the death of John Agbalikwunu, the appellant, sometime in 1994 laid claim to the piece of land which resulted in the instant suit. Exhibit 2 is the Certificate of Occupancy obtained by the respondents in respect of the land in dispute, which appellant sought to set aside.

On the other hand, the case of the appellant is that in 1974 he purchased a piece of land at Ungwar Television Kaduna from one Gimba James and built a mud house thereon in which he kept his senior wife while he lived at Kaduri Prison Staff Quarters with his second wife; that he completed a second house on the land in 1978; that during the construction of the express way in 1977 part of the land was affected as the first building was demolished, leaving a small piece which appellant used for farming that the said piece is the subject of the dispute between the parties.

The issues for determination as identified in the appellant brief filed on 7th November, 2005 by E. O. Aneme, Esq. are as follows:-

'1. Whether the appellant did not prove fraud in the procurement of the Certificate of Occupancy No KDH/A007143, i.e 'Exhibit 2' by the late John Agbalikwunu.

2. Whether from the totality of evidence before the trial court, the respondents proved their claim and the appellant did not prove his counterclaim and the judgment not perverse to warrant the interference of the Court of Appeal.'

The above issues were adopted by learned counsel for the respondents in the respondents brief deemed filed on 24th September, 2008. From the two issues reproduced supra, it is very clear that the appeal is on the facts of the case, not law.

In arguing Issue 1, learned counsel for the appellant submitted that appellant proved the allegation of fraud in the procurement of the Certificate of Occupancy in question, Exhibit 2, referring to the evidence of appellant at page 58 line 379 where appellant is reported to have said 'They must have stolen my plot' and that the same was corroborated by the evidence of DW4 at pages 66 and 67 lines 598-622 and DW5 at 69 and 70 lines 652 - 660; that the above evidence was not challenged.

On the sub-issue of pleading of particulars of fraud as provided under Order 24 Rule 6(1) of the Kaduna State High

Court (Civil Procedure) Rules 1987, learned counsel submitted that the particulars need not be itemized; that it is sufficient if sufficient particulars are found in the relevant pleadings showing fraud, for which he referred to paragraphs 18, 20, 33 and 34 of the Statement of Defence and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondents submitted that fraud was raised by appellant as an issue to defeat the declaration of title claimed by the respondents and being a criminal allegation, it has to be proved beyond reasonable doubt relying on Section 13(1) of the Evidence Act; *Ndoma-Egba v ACB PLC* (2005) ALL FWLR (Part 283) 152 at 171; *Ogbole v Lawani* (2000) FWLR (Part 187) 844 at 859 etc; that appellant failed to discharge the burden placed on him by law that appellant has not demonstrated that the findings of the lower courts on the matter are perverse.

It is the further submission of learned counsel for respondent that even though fraud was pleaded, no particulars thereof were supplied by appellant contrary to the provisions of Order 24 Rule 6 of the Kaduna State High Court (Civil Procedure) Rules, the case of *Adimora v Ajufor* (1988) 3 NWLR Cpt.8) 1 at 13; *West African Breweries Ltd v Savannah Ventures Ltd* (2002) FWLR (Part 112) 53 at 74; *Okonkwo v Cooperative and Commerce Bank (Nig) Plc & Ors* (2003) FWLR (Part 154) 457 at 518 and urged the court to resolve the issue against appellant.

Before proceeding to decide whether appellant met the standard of proof required in a criminal allegation - whether in a criminal matter or civil proceedings - it is necessary to determine whether the issue of fraud was pleaded by appellant as required by the relevant Rules of court. In the respondent's brief of argument there is no doubt that respondents agree that fraud was duly pleaded by appellant as it was submitted on their behalf in paragraph 5.01 last sentence at page 4 of the brief as follows:

'We submit therefore, that fraud was therefore not merely raised but raised as an issue to defeat the declaration of title claimed by the respondents.'

However the dispute between the parties in relation to the issue under consideration has to do with the issue as to whether appellant provided particulars of the alleged fraud and whether he proved the allegation beyond reasonable doubt.

Order 24 Rule 6(1) of the Kaduna State High Court (Civil Procedure) Rules provides that fraud must be specifically pleaded so as not to take the opposite party by surprise.

It is however the case of the appellant that sufficient particulars of the fraud alleged can be inferred from paragraphs 18, 20, 33 and 34 of the Statement of Claim. The question is what is the reaction of the lower court to the issue under consideration' At page 186 of the record, the Court had this to say inter alia:

'I have carefully considered the averments in paragraph 18, 20, 30 and 39 of the Statement of Defence/Counterclaim where the allegation of fraud was made. The issue of fraud is directly in issue, however the particulars of fraud has not been specified as required by Order 24 Rule 6(1) of the Kaduna State High Court (Civil Procedure) Rules. I also fined that the appellant has not proved the allegation of fraud beyond reasonable doubt. The appellant did not prove fraud in the procurement of the Certificate of Occupancy No KDH/A/0077143.

What did the trial court say in relation to the matter' At pages 99 - 100, the trial judge found as follows:-

'I was urged to infer particulars of fraud from the counter-claim/statement of defence.

By paragraphs 18, 20, 34 and 39 of the statement of defence/counterclaim, fraud has been made an issue. The defendant did not give particulars of fraud. Under Order 24 Rule 6 (1) of the High Court (Civil Procedure) Rules 1987 fraud has to be specifically pleaded.'

The findings of facts in relation to the issue under consideration by the lower courts are concurrent and are borne out of the evidence on record. Learned counsel for appellant had also not demonstrated that the said findings are perverse as required by law.

In my judgment, the fact that appellant has urged the court to infer from the paragraphs of the statement of defence/counter claim particulars of fraud is a clear admission that the said particulars had not been specifically pleaded otherwise there would be no need to infer them. Secondly, it is trite law that in any proceeding, whether criminal or civil where allegation of the commission of a crime is an issue the allegation must be proved beyond reasonable doubt - see Section 13(1) the Evidence Act. In the instant case the criminal allegation relate to the commission of the crime of fraud by the respondents in relation to the procurement of the Certificate of Occupancy in question which appellant failed to prove.

On Issue 2, learned counsel for appellant submitted that the respondents failed to prove their case on the balance of probabilities as required by Section 137(1) of the Evidence Act; that it was rather the appellant who proved his counterclaim and ought to have been given judgment; that respondent failed to prove their root of title either by evidence of traditional history or documentary evidence; that the alleged sale of the property to the father of the respondents was not proved; that the sum of N1,000.00 allegedly paid for the land in Exhibit 1, was 'kola' and not a consideration for the

land as a result of which counsel submitted that there was no valid contract of sale of the said land: that the use of Exhibit 2, the Certificate of Occupancy, to prove title is erroneous as the same was obtained by fraud; that appellant has an equitable interest in the land having built and farmed thereon after entering into an agreement with the original owner; that there is no evidence of possession to entitle the respondents to judgment.

On the other hand, learned counsel for the respondents submitted that the lower courts were right in holding that the respondents proved their case by evidence and therefore entitled to judgment; that the onus is on the respondents to prove their title which they discharged; that the case of the respondents is based on sale of land as means of acquiring title thereto; that Exhibit 1 is evidence of the sale, which confirmed payment for the transaction; that evidence of root of title had been concurrently found by the lower courts and have not been shown to be perverse. He therefore urged the court not to disturb the said findings; that there is evidence of acts of ownership by the father of the respondents and the respondents including - farming thereon; that appellant only started laying claims to the land four years after the death of the father of the respondents; that appellant failed to establish his counter-claim and as such his claim was rightly dismissed.

It is settled law that title to land can be proved in any of the following ways:-

- (a) By traditional evidence which is usually based on history of the people;
- (b) By documents of title such as conveyance, etc;
- (c) Acts of possession spanning over a period of years;
- (d) By acts of ownership exercised over the land over a period of time; and
- (e) Proof of possession of adjacent or connected land under Section 46 of the Evidence Act, Cap. 112, Laws of the Federation, 1990.

The above principles have been stated by this court in a number of cases including *Idudun v Okumagba* (1976) NMLR 200 at 210 - 211; *Fasoro v Beyioku* (1988) 2 NWLR (Part 76) 261 at 271; *Ezeoke v Nwagbo* (1988) 1 NWLR (Part 72) 616 at 628.

The five ways of proving title to land in an action for declaration of title are tied to the root of title of the claimant/plaintiff in the sense that it is the way the plaintiff/claimant proves or establishes his root of title. In short, the root of title of a plaintiff may be traceable to/or through the traditional/historical evidence of the people/land in question, or through the documents conferring title on the plaintiff or through acts of ownership exercised by the plaintiff and/or his predecessor(s) in title, or by acts of long possession and undisturbed possession or by proving that the plaintiff/claimant is in possession of adjacent or connected land such as to raise a strong possibility that the land in dispute must of necessity belong to the plaintiff/claimant.

In the instant case, both parties are agreed that the claim of the parties particularly the respondents who were the plaintiffs at the trial court is based on sale of the portion of land in dispute. Exhibit 1 was tendered and admitted as evidence of the payment of N1, 000.00 for the particular partition of the land concerned. The argument by learned counsel for appellant that the said Exhibit 1 is a 'kola agreement' is not supported by evidence accepted and acted upon by the lower courts.

It is settled law that a plaintiff in an action for declaration of title to land must succeed on the strength of his case and not on the weakness of the defence though where the case of the defence supports that of the plaintiff, the plaintiff can take advantage of same in establishing his claim - see *Woluchem v Gudi* (1981) 5 SC 291; *Mogaji v Cadbury Nig Ltd* (1985) 2 NWLR (Part 7) 393.

The respondents tendered Exhibit 2, a Certificate of Occupancy in respect of the land in dispute, which appellant contends that was obtained by fraud but has to prove same as held in issue No 1 supra. However, a certificate of occupancy, as has been held by this court in a number of cases, is a prima facie evidence of title or possession which is, however not a conclusive proof of title to the land it relates - See *Registered Trustees Mission v Mrs. E. I. Oloweni* (1990) 6 NWLR (Part 158) 514.

The question is what is the evidence on record in proof of the case of the parties and what the reaction of the lower court is thereto' The case of the respondents is that their father bought the land from one Audu Zakwai and later obtained a Certificate of Occupancy in relation thereto; that they had been on possession of the land until 1994 when their peaceable possession was disturbed by the appellant. The trial judge accepted the evidence adduced and stated, inter alia, at page 100 of the record as follows:-

'The PW1 traced the root of title of late John Agbalikwunu to a sale agreement between him and one Malam Ali. She also gave evidence as to acts of ownership. She has been corroborated by PW2. The PW2 and PW3 also gave credible evidence as to the making of Exhibit 1. The PW5 only testified as to the fact that she grew up and saw her late father (John Agbalikwunu) on the land. The PW 4 tendered the certificate of occupancy Exhibit 2.'

The trial court concluded its findings at page 102 as follows:-

'The plaintiffs and their witness have led credible evidence of title. It is my view that the plaintiffs have proved their case by way of evidence of credible witnesses.'

After comparing the case of the plaintiffs with that of the defendant, the trial judge rejected the case of the defendant/counter-claimant in the following words:

'It is my finding of fact that the defendant (DW1) was confused or was not sure of the date he bought the piece of land from Gimba James. Initially he said 1970, then he said 1974 then he said he cannot remember the date. The case had to be adjourned. On the adjourned date, he said it was 21st September 1974.

The alleged sale agreement was rejected in evidence. The DW2 wanted to salvage the situation. He said that he wrote the sale agreement for the parties. That it was on 21st February, 1974 that the agreement was written. He gave his age as 30 years on the day of his testimony. That means he was 9 years old when he wrote the agreement for the parties. He does not appear to me to be a witness of truth. The DW3 only testified on the efforts to resolve the disputes of the parties. He knew nothing about the root of title. The DW4 on the other hand believed that the defendant owns the land. Her believe (sic) was based on what the defendant told her on her trip to Zaria. Another ground was that the defendant granted her permission to erect a temporary security guard's room and also to dump the scrap of a vehicle. I have earlier said that those pieces of evidence are to be expunged.'

It is settled law that it is the duty of the trial judge to evaluate the evidence placed before him and to ascribe probative value thereto. It is also settled law that an appellate court can only intervene where the trial judge fails to evaluate the evidence properly.

In the instant case, the lower court after considering the evaluation of evidence and findings of the trial court supra came to the following conclusion; at page 190 of the record:

'The findings of the trial judge, in my opinion is apt, it is supported by the totality of the evidence adduced. It is not perverse. There is no reason whatsoever to tamper with his findings. From the evidence adduced by both parties, it is clear that the respondents have a better title and are entitled to judgment. See *Aromire v Awoyemi* (1972) 1 All NLR101 .....

The above constitute concurrent findings of facts by the lower courts. Where there is no clear evidence of error in law or fact which may lead to or occasion a miscarriage of justice, this court will not interfere with the concurrent findings of facts. For this court to so interfere, it must be satisfied by the appellants that there exists substantial error apparent on the face of the record of proceedings showing that the said findings are perverse, which has not been satisfactorily demonstrated in this case - see *Ibodo v Enarofia* (1980) 5 - 7 SC 42: *Ogundiyan v State* (1991) 4 SC 160.

It is my judgment that the above findings of the lower courts are adequately supported by evidence on record and as such I see no reason why the findings should be disturbed by this court.

In conclusion I find no merit whatsoever in the appeal which is consequently dismissed by me.

The judgment of the lower court in appeal No CA/K/110/97 delivered on 14th December, 1999 is hereby affirmed by me with N50,000.00 costs in favour of the respondents

Judgment delivered by

Ibrahim Tanko Muhammad. JSC

I read before now the judgment just delivered by my learned brother, Onnoghen, JSC.

I agree with him entirely that the appeal lacks merit. The appeal is hereby dismissed by me. I abide by all orders made in the lead judgment including order as to costs.

Judgment delivered by

Olufunlola Oyelola Adekeye. JSC

I was privileged to read in draft the judgment just delivered by my learned brother W. S. N Onnoghen JSC. I agree with his reasoning and conclusion. I however wish to add a few words to his conclusion on the two issues raised for determination in the appeal.

The issues for determination settled by the appellant read:-

1) Whether the appellant did not prove fraud in the procurement of the Certificate of Occupancy No KDA/A/007/143 i:e 'Exhibit 2' by the late John Agbalikwunu.

2) Whether from the totality of evidence before the trial court, the respondents proved their claim and the appellant did not prove his counter claim and the judgment not perverse to warrant the interference of the Court of Appeal.

In the action before the Kaduna State High Court, the plaintiffs now respondents before this court, and the defendant

now appellant, pursued competing claims to title in respect of a piece of land 7' x 50' in dimension at Guari adjoining the express road to Command Secondary School at A2 Unguwar Television Kaduna. The respondents sued the appellant in a representative capacity for and on behalf of the surviving children of late John Agbalikwunu for:-

- a) A declaration of title to the disputed piece of land.
- b) Damages of N60,000.00 for trespass
- c) An order of perpetual injunction.

While the appellant counter claimed for:-

- a) Declaration of title to the same piece of land.
- b) An order nullifying and invalidating the Certificate of Occupancy No KDA/A/007/143.
- c) A sum of N200,000.00 as general damages for trespass.
- d) An order of perpetual injunction.

Parties filed and exchanged pleadings. The respondents relied on Documents tendered as Exhibits 1 and Exhibit 2 as the root of their late father's title to the disputed land. Exhibit 1 - is an acknowledgment of payment of a sum of N1,000.00 by their late father to one Audu Zakwai, and Exhibit 2 a Certificate of Occupancy. The appellant in paragraphs 18 and 20 of the statement of defence and paragraphs 33 and 34 of the counter-claim raised the issue of fraud in the procurement of Exhibit 2 the Certificate of Occupancy by the respondent's father - late John Agbalikwunu.

The relevant paragraphs read as follows:-

Paragraphs 18:

'In answer to paragraphs 10 and 11 of the statement of claim, the defendant avers that late John Agbalikwunu obtained the said C of O (if any) by fraud since he included the defendants land in the C of O without the defendant's consent.'

Paragraphs 20:

'During the time of John Agbalikwunu he concealed the fact that he included the defendants land in his (John Agbalikwunu), C of O. It was after John's death that the plaintiffs now came to lay claim to the defendants land relying on the fraudulently obtained C of O.'

Paragraph 33:

'When John Agbalikwunu died and sometimes in 1994 the plaintiffs started laying claim to the defendants land (main plot) and the defendant discovered to his surprise at Barnawa Area Court when the plaintiffs arraigned him for criminal trespass in respect of the same land that John Agbalikwunu obtained C of O covering his John's own land and the defendants own land (main plot) without the defendant's consent.'

Paragraph 34:

The defendant avers that John Agbalikwunu obtained the C of O by fraud. The contention of the appellant is that the Certificate of Occupancy Exhibit 2 obtained in respect of a disputed land was fraudulently procured from the appropriate authority - Ministry of Lands and Housing.

It is imperative at this stage to highlight the effect of a Certificate of Occupancy in respect of claim of title to land. A Certificate of Occupancy is only prima facie evidence of title to land or exclusive possession of land. Consequently, if it is successfully challenged, it can be nullified. Where there is evidence to show that the certificate was wrongfully obtained the court is entitled to nullify it.

In order to succeed in a claim to title a party who held a Certificate of Occupancy will need to show his root of title that is through his vendor and that the vendor or seller has to show valid title to the land over which the purchaser secured his Certificate of Occupancy. This is because the Certificate of Occupancy can only be valid if the root of title originates from the customary owners of the property.

Where a competent authority properly issues a Certificate of Occupancy it raises the presumption that the holder is the owner in exclusive possession of the land to which the Certificate relates. It also raises the presumption that at the time it was issued; there was not in existence a customary owner whose title has not been revoked. However these presumptions are rebuttable. Where it is proved by evidence that another person had a better title to the land before the issuance of the

Certificate of Occupancy the court can revoke. *Okpalugo v Adesoye* (1996) 10 NWLR (Part 476) page 77; *Auta v Ibe* (2003) 13 NWLR (Part 837) page 247; *Dakat v Dashe* (1977) 12 NWLR (Part 531) page 46.

In short the mere production of a Certificate of Occupancy by a party does not by itself entitle the party to a declaration.

The appellant had ample opportunity before the trial court to prove and establish his allegation of fraud against the respondents in the procurement of Exhibit 2.

The appellant testified and called four witnesses. He failed to substantiate the allegation of fraud pleaded through his testimony or that of his witnesses so as to defeat the claim of the respondents to declaration of title.

Fraud is defined as an intentional perversion of truth for the purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. It is something dishonestly and morally wrong. Fraud has to be pleaded with particularity and established in evidence. A person alleging fraud is not only required to make the allegation in his pleadings but must set out particulars of fact establishing the alleged fraud, so that the defendant goes into court prepared to meet them. *Olufumise v Falana* (1990) 3 NWLR (Part 136) page 1; *UAC v Taylor* (1936) 2 WACA page

170; *Usefowokan v Idowu* (1969) NMLR page 77; *Ntuks v M.P.A* (2007) 13 NWLR (Part 1051) page 392

Where a person alleging fraud does not specifically plead it, a court cannot of its volition raise it, as a court is bound to consider only issues raised on the pleadings before it. *Obijuru v Ozims* (1985) 2 NWLR (Part 6) page 187; *Nwadike v Ibekwe* (1987) 4 NWLR (Part 67) page 718; *Abacha v Fawehinmi* (2000) 6 NWLR (Part 660) page 228

Section 138 of the Evidence Act stipulates as follows:

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(1) 'If the commission of a crime by a party to any proceedings is directly in issue in any proceedings civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person had been guilty of a crime or wrongful act is subject to the provisions of section 141 of this Act, on the person who asserts it whether the commission of such act is or is not directly in issue in the action.

(3) If the prosecution proves the commission of a crime beyond reasonable doubt the burden of proving reasonable doubt shift on to the accused.

It is clear from the foregoing provision of the Evidence Act that fraud being criminal in nature must be proved beyond reasonable doubt. The burden is on the person who asserts that a person is guilty of a crime. In this appeal that burden must be discharged by the appellant who alleged fraud in the procurement of Exhibit 2 the Certificate of Occupancy secured by the late father of the respondents in respect of the disputed land.

Section 24 Rule 6 (1) of Kaduna State High Court Civil Procedure Rules 1987 provides that where fraud is alleged the particulars of the fraud must be specifically pleaded.

This is strengthened by the fact that parties are bound by their pleadings. Evidence of facts not pleaded should not be admitted.

The court is also not permitted to formulate issues not raised in the pleadings. *W. A. B. Ltd. v Savannah Ventures Ltd* (2002) 10 NWLR (Part 775) page 401; *N.I.P.C. Ltd. v Thompson Organization Ltd.* 1969 NSCC page 161; *Alunloye v Eyiyea* (1967) NSCC page 16; *Okebola v Mosake* (1975) 9 NSCC 464 Since the appellant had failed to adduce supportive evidence for the allegation of fraud, it was not proper for the trial court to embark upon examination of the Certificate of Occupancy tendered as Exhibit 2 when such examination will amount to a fact finding investigation that leads to discovery of facts which could have been proved by evidence. All the court could have done was to evaluate it alongside other evidence in the case in order to make findings of fact on issues before it.

The contention of the appellant in the second issue is that the judgment of the trial court was perverse, and the Court of Appeal should have interfered with it to set it aside. The findings of fact of a court will be perverse where:-

a) It is speculative and runs counter to the evidence.

b) Where the trial court took into account a matter which it ought not to have taken into account and shuts its eyes to the obvious.

c) When it has occasioned a miscarriage of justice.

*Atolagbe v Shorun* (1985) 1 NWLR (Part 2) page 360; *Adimora v Ajufo* (1988) 3 NWLR (Part 80) page 1; *Agbomeji v Bakare* (1998) 9 NWLR (Part 564) page 1

It is pre-eminently the duty of the trial court to see, hear and assess each witness as to decide whether he or she should be believed or not and where the trial court has discharged that responsibility, the appellate court will not interfere with such finding unless they are shown to be perverse, unsupported by evidence or based on inadmissible evidence. *Agbi v Ogbé* (2006) 1 NWLR (Part 990) page 65; *Ojokololo v Alamu* (1998) 9 NWLR (Part 565) page 226; *Sha v Kwan* (2000) 5 SC page 178; *Fagbenro v Arobadi* (2006) 7 NWLR (Part 978) page 174.

In civil trials where the finding or non-finding of fact by a trial court is questioned on appeal, the appellate court will seek to know the following:-

a) The evidence before the court

b) Whether the trial court accepted or rejected any evidence upon the correct perception

c) Whether the trial court correctly approved the assessment of the evidence before it and placed the right probative value on it.

d) Whether the trial court used the imaginary scale to weigh the evidence in either side.

e) Whether the trial court upon the preponderance of evidence appreciated which side the scale weighed having regard to the burden of proof.

Agbonifor v Aiwereoba (1988) 1 NWWL (Part 70) page 325; MISR (Nig) Ltd. v Ibrahim (1974) 5 SC 55; Egonu v Egonu (1978) 11-12 SC 111; Anyakora v Obiakor 5 NWLR (Part 919) page 507; Mogaji v Odofoin (1978) 4 SC 97

In this appeal both parties claimed and counter claimed before the trial court for declaration of title. The learned trial judge considered the evidence of the root of title of both sides - and puts the totality of the evidence adduced on an imaginary scale, weighed them together and saw which was heavier before coming to the conclusion as to which evidence it accepted or rejected based on preponderance of evidence. The trial court found in favour of the plaintiffs/respondents. The lower court affirmed the judgment of the trial court.

The Supreme Court will not disturb the concurrent findings by a trial court and the Court of Appeal where there is sufficient evidence to support them, unless there is a miscarriage of justice, or violation of some principles of law and procedure by the two courts which are glaring on the face of the record. This court has no reason to depart from the findings of fact of the two lower courts. Ibodo v Enaforia (1980) 5-7 SC page 42; Akinola v Oluwo (1962) ISINWR 352; Fatoyinbo v Williams (1956) SC NLR page 274; Are v Ipaye (1990) 2 NWLR (Part 132) page 248; Atuyeye v Ashamu (1987) 1NWLR (Part 49) page 267.

With fuller reasons given in the lead judgment of my learned brother W. S. N. Onnoghen JSC. I also find no substance in the appeal-and it is accordingly dismissed.

I adopt the consequential orders made in the lead judgment as mine.

Judgment delivered by

Bode Rhodes-Vivour. JSC

I have had the privilege of reading in draft the leading judgment of my learned brother, Onnoghen JSC. I am in full agreement with his Lordships reasoning and conclusion.

Both parties claim ownership of a piece of land measuring 7ft x 50 ft adjoining Plot No A2 Ungwai Television, Kaduna. It is the respondents as plaintiffs case that their later father, John Agbalikwunu purchased the land from Audu Zakwai who issued him a receipt Exhibit 1. The respondents eventually obtained a certificate of occupancy - Exhibit 2.

Aside from tracing his own root of title the appellant argued that there was fraud in the procurement of the - Certificate of Occupancy No KDA/A/0077143.

The issue was how to plead fraud and prove it.

The appellant observed that he pleaded fraud and that particulars of fraud can be inferred from paragraphs 18, 20, 33 and 34 of the statement of claim.

The learned trial judge had this to say:

'By paragraphs 18, 20, 34 and 39 of the defence/counterclaim, fraud has been made an issue. The defendant did not give particulars of fraud. Under Order 24 Rule 6 (1) of the High Court (Civil Procedure) Rules 1987 fraud has to be specifically pleaded.'

The Court of Appeal agreed with the trial court when it said

'..... I have carefully considered the averments in paragraphs 18, 20, 30 and 39 of the Statements of Defence/Counterclaim where the allegation of fraud was made. The issue of fraud is directly in issue, however the particulars of fraud has not been specified as required by Order 24 Rule 6 (1) of the Kaduna State High Court (Civil Procedure) Rules. I also find that the appellant has not proved the allegation of fraud beyond reasonable doubt. The appellant did not prove fraud in the procurement of the certificate of occupancy No KDA/A/0077142.'

I agree. Where fraud is directly in issue it must be pleaded and particulars supplied. The party relying on fraud then has a further and final task to prove it beyond reasonable doubt. See Order 24 Rule 6 of the Kaduna State High Court (Civil Procedure) Rules. Highgrade Maritime Services Ltd v First Bank of Nig. Ltd (1991) 1 NWLR (Part 167) page 290

A pleading of fraud means in effect that the respondent was deliberately dishonest in obtaining the Certificate of Occupancy for the land in question. Such an allegation must be pleaded and particulars given so that the respondent is not taken by surprise.

The appellant did not give particulars of fraud rather he wanted the court to infer the details of fraud from the pleadings; neither did he prove his averments on fraud beyond reasonable doubt. There are concurrent findings of fact by both courts below that there was no fraud in the procurement of the Certificate of Occupancy No KDA/A/0077143, by the respondents, and this fact is supported by evidence.

The long settled position of the law is that concurrent findings of fact would rarely be disturbed by this court except they

are perverse. The principle upon which this court would be compelled to disturb concurrent findings was well laid down in *Thomas v. Thomas* 1947 AC page 484 and followed in several cases by this court.

Much weight must be attached to findings of fact by the trial court. After all it is in that court that witnesses are assessed and evidence evaluated in the light of impressions which the court forms of them. This court would disturb concurrent findings of fact if they are not sound. See *Ebba v Ogodo* (1984) 4 SC page 84; *Cameroon Airlines v Otutuizu* (2011) 1-2 SC (Part 111) page 200

Concurrent findings of fact that the Certificate of Occupancy No KDA/A/0077143 was not obtained by fraud was correctly established by the trial court and affirmed by the Court of Appeal. I agree with both courts. There is no plausible reason to disturb these findings.

For the reasons given above and more particularly those given by Hon. Justice Onnoghen, I dismiss the appeal with costs of N50,000.00 to the respondents.

Judgment delivered by

Mary Ukaego Peter-Odili. JSC

The respondent as plaintiff in the trial court sued in a representative capacity while the appellant was defendant/counter claimant in that court of trial being the Kaduna High Court in Suit No KDH/KAD/33/94 claiming a declaration that a small piece of land measuring 7 x 50 adjoining Plot No A2 Ungwar Television, Kaduna is part of the said plot No A2 Ungwar Television, Kaduna and also a declaration for trespass and an Order of perpetual injunction and N60, 000.00 as damages for trespass.

The appellant on his part counter-claimed against the respondents for a declaration of title in respect of same piece of land situate and lying at Guari Road, adjoining the express road to Command Secondary School, Television Village, Kaduna and also an Order nullifying and invalidating the Certificate of Occupancy No KDH/A/007143 and an Order of perpetual injunction against the respondents and N200, 000.00 as general damages for trespass.

Pleadings were filed and exchanged and trial concluded and judgment delivered by the trial court on 20/1/97 granting all the reliefs sought by the respondents and dismissing all appellant's counter claim. The appellant was aggrieved and dissatisfied with the said judgment and appealed to the Court of Appeal, Kaduna Division in Appeal No CA/K/110/97. On the 14/12/99 the Court of Appeal, Kaduna gave its judgment dismissing the appellant's appeal and affirming the trial court's decision. The appellant, dissatisfied has now appealed to this court.

On the 24/1/12 date of hearing, learned counsel for the appellant, E. C. Aneme adopted the appellant's brief filed on 7/11/05 in which were formulated two issues for determination which are:

1. Whether the appellant did not prove fraud in the procurement of the Certificate of Occupancy NoKDH/A/007143 i.e. 'Exhibit 2' by the late John Agbalikwunu.
2. Whether from the totality of evidence before the trial court the respondents proved their claim and the appellant did not prove his counter claim and the judgment not perverse to warrant the interference of the Court of Appeal.

The respondents filed their brief on 6/7/07 and it was deemed filed on the 24/9/08. The respondents through learned counsel on their behalf, Mr. Z. Oche adopted the issues as couched by the appellant.

Under Issue 1 which had to do with whether or not fraud was prove in the procurement of the Certificate of Occupancy by the late John Agbalikwunu, learned counsel for the appellant contended that the fraud was evident and the particulars of fraud had been properly pleaded as required by Order 24 Rule 6(1) of the Kaduna State High Court (Civil Procedure) Rules1987. He cited *Saraki v Kotoye* (1990) 6 SCNJ 31.

That the essence of pleadings is to put the other party on notice of the case of his opponent and this was done in this instance as respondents were not taken by surprise once they were aware from the pleadings that the Certificate of Occupancy No KDH/A/007143 i.e 'Exhibit 2' was being questioned by the appellant.

Responding, Mr. Oche for the respondents said Exhibit 2 confirmed the title over the disputed piece of land on Late John Agbalikwunu. That fraud being a criminal allegation connotes something dishonest and morally wrong and must be proved beyond reasonable doubt. He cited: *West African Breweries Ltd v Savannah Ventures Ltd & 5 Ors* (2002) FWLR (Part 112) 33 at 75; Section 138(1) Evidence Act; *Ndoma-Egba v A. C. B. Plc* (2005) All FWLR (Part 283) 152; *Ogbole v Lawani* (2000) FWLR (Part 187) 844 at 859; *Jiwul v Dimlong* (2002) FWLR (Part 11) 481 at 507; *Aiyedun v Ajani* (1980) 5 -7 SCNJ 96.

Learned counsel for the respondents submitted that the appellant testified as DW1 and called four other witnesses that as given in evidence the late John Agbalikwunu had purchased the disputed piece of land from Mallam Ali and on an agreement brokered by Mai Ungwar Hassen (PW2) had to pay Mallam Andi Zakwai the sum of N1,000.00 and was issued with Exhibit 1. Going on, Mr. Oche of counsel said from the available evidence, fraud had not been proved and



no new facts have been proffered by the appellant different from the materials at the two courts below upon which a new finding can be made now. That pleading do not take the place of evidence. He referred to *New Nigerian Bank Plc v Denclag Ltd & Anor* (2004) All FWLR (Part 228) Page 606; *Ajiwon v Akanni* (1993) 12 SCNJ 32. That the particulars of fraud were absent in the particulars of the claim and so fraud cannot, as appellant wants, be read into the pleadings. He cited: *Ikare Community Bank Nig Ltd v Adamu Wagon* (2005) All FWLR (Part 265) 1089; *Buhari v Obasanjo* (2005) 7 SCNJ 21; *Adimora v Ajufo* (1988) 3 NWLR (Part 8) 1 at 13; *West African Breweries Ltd v Savannah Ventures Ltd* (2002) FWLR (Part 112) 53 at 74; *Okonkwo v Cooperative and Commerce Bank (Nig) Plc.* (2003) FWLR (Part 154) 457 at 518. A major pillar upon which the claim of the appellant as defendant/counter claimant was built is that the late John Agbalikwunu, predecessor in title of the respondent had procured the Certificate of Occupancy No KDH/A/007143 by fraud. For this allegation of fraud to be taken seriously there is need to be fulfilled certain conditions. Order 24 Rule 6 Kaduna State High Court (Civil Procedure) Rules has provided that where fraud is alleged, the particulars of the fraud must be specifically pleaded. It is on that basis that I would quote the related paragraphs of the pleadings of the defendant/appellant as follows:

'18. In answer to paragraph 10 and 11 of the Statement of Claim, the defendant avers that late John Agblikwunu obtained the said Certificate of Occupancy (if any) by fraud since he included the defendant's land in the Certificate of Occupancy with the defendant's consent.

20. During the lifetime of John Agbalikwunu, he concealed the fact that he included the defendant's land in his (John Agbalikwunu's) C of O. It was after John's death that the plaintiff's now came to lay claim to the defendant's land relying on the fraudulently obtained Certificate of Occupancy.

33. When John Agbalikwunu died and sometime (sic) in 1994, the plaintiff started laying claim to the defendant's land (main plot) and the defendant discovered to his surprise at Barnawa Area Court when the plaintiff arraigned him for criminal trespass in respect of the same land that John Agbalikwunu obtained a C of O covering his (John's) own land and the defendant's land (main plot) without the defendant's consent.

34. The defendant avers that John Agbalikwunu obtained the certificate of Occupancy by fraud.'

These pleadings speaking for themselves have no particulars or specifics and fall short of what is required when fraud is put forward in a claim over title for land. Therefore the allegation falls flat and goes to no issue being an empty drum or shell. I place reliance on *Ikare Community Bank Nig Ltd v Adamu Wagon* (2005) All FWLR (Part 265) 1089; *Buhari v Obasanjo* (2005) 7 SCNJ 21; *Adimora v Ajufo* (1988) 3 NWLR (Part 8) 1 at 13; *West African Breweries Ltd v Savannah Ventures Ltd* (2002) FWLR (Part 112) 53 at 74; *Okonkwo v Cooperative and Commerce Bank (Nig) Plc.* (2003) FWLR (Part 154) 457 at 518.

Thus Issue 1 is resolved in favour of the respondent as the appellant was far off the mark in proving the fraud alleged.

On Issue No 2 on whether or not the Court of Appeal properly evaluated the evidence in proof of the claim and counter claim, learned counsel for the appellant said from the totality of the evidence the findings of the trial Judge were perverse as the evidence weighed in favour of the appellant. That the respondent failed to prove his case as plaintiff and it was the counter-claim of the appellant as defendant that ought to have been upheld. That the respondent pleaded and failed to prove their root of title. He said Exhibit 1 was written in Hausa which was not translated at the trial court.

Mr. Aneme, learned counsel for the appellant said the use of the Certificate of Occupancy No KDH/A/007143 i.e. Exhibit 2 to attempt to prove title was erroneous as it is only a prima facie evidence of title which is rebuttable. That appellant successfully rebutted that title on the establishment that the Exhibit 2 was obtained by fraud. That a Certificate of Occupancy creates a term of years only, therefore a purchaser with an equitable interest which is indefinite cannot be superceded by a legal estate holder by virtue of a Certificate of Occupancy. The reasoning of the law being that a plaintiff must not be allowed to set up his legal estate on fraud. That the defendant's equity in the circumstances prevails over the legal estate of the plaintiff. He cited the cases: *The Registered Trustees of the Apostolic Church v Mrs. Emmanuel Olowobeni* (1990) 6 NWLR (Part 158) 514 at 536; *Ogunleye v Babatayo Oni* (1990) 2 NWLR (Part 135) 745; *Chiroma v Suina* (1986) 1 NWLR (Part 19) 752; *Haruna v Ojukwu* (1991) 7 NWLR (Part 202) 206 at 223 - 224.

For the appellant was further contended that the respondents did not prove their claim for title to the disputed plot through any of the five ways enumerated by law rather it was appellant who proved his title and counter claim in more than one of the five ways viz; traditional evidence by defence witnesses, by documentary evidence and the long acts of possession from 1974 to 1994 without disturbance. He referred to *Fasoro v Beyioku* (1988) 2 NWLR (Part 76) 263 at 271.

Mr. Aneme of counsel went on to state that the trial court had adjourned the case from 2/6/95 to 16/9/95 to enable the appellant (DW1) to recall and refresh his memory and so the court ought to have disregarded the earlier statement of 2/6/95 during appellant's imbalance. That appellant was old, sickly and due for an operation at the time of that

testimony. That this weakness the respondent should not take advantage of since he must succeed on the strength of his own case. That the trial Judge misplaced the burden of proof on the appellant. He referred to *Owoade v Omilola & Ors* (1988) 2 NWLR (Part 77) 413; *Fabunmi v Ade* (1985) 1 NWLR (Part 2) 299; *E. Chukwueke v Nwankwo* (1985) 2 NWLR (Part 6) 195 at 201.

Learned counsel for the appellant concluded by saying that they had shown that the trial court and the Court of Appeal were in error and the judgment perverse and against the weight of evidence and thereby warrants the interference of this court to reverse the situation.

In response, Mr. Oche for the respondents said they led credible evidence on the validity of their title. That there is evidence on record that leave was sought for and obtained for Exhibit 1 to be translated from Hausa into English and the translation done. That to challenge the issue on appeal here, leave ought to be sought and obtained being matter of mixed law and fact and failure therefore makes the submission untenable. He said appellant proffered evidence outside of their pleadings which go to no issue. He cited *Adimora v Ajufo* (1988) 3 NWLR (Part 80) 1; *Okoro v Dakolo* (2006) 7 SCNJ 284 at 316.

On the matter of trespass, learned counsel for the respondents said that at the time appellant trespassed into the land respondent was properly in the land in possession and as owner. That the actual possession of the respondent held sway. He cited *Aromire v Awoyemi* (1972) 2 SC 182; *Ekpe v Uyo* (1986) 5 SC 1 at 29 - 30.

He stated in conclusion that this court should affirm the judgment of the Court of Appeal and hold that the respondents proved their claims while the appellant failed woefully to prove his counter claim and is not entitled to the relief sought in this appeal which should be dismissed.

Indeed, it is difficult to disturb the concurrent findings of fact of the two courts below as there is enough from which the court of trial could find favourably on the validity of the title of the respondent part of which is the transaction evidence of the sale of land, the attempt to impeach that document at the appellate stage notwithstanding. Also not established by the appellant is a better title or claim from that of the respondent. From the above and the fuller reasons of my learned brother W.S.N. Onnoghen. JSC, in the leading judgment, I dismiss the appeal and affirm the judgment and Orders of the Court of Appeal which had earlier dismissed the appeal to it from the High Court of trial.

I abide by the consequential orders in the leading judgment.