IN THE SUPREME COURT OF NIGERIA

Suit No: SC134/2002

Petitioner: Alimi Akanbi Dada
And
Respondent: Chief Jonathan Dosunmu

Date Delivered: 2006-09-22

Judge(s): Idris Legbo Kutigi,Umaru Atu Kalgo,Niki Tobi, Mahmud Mohammed, Walter Samuel Nkanu Onnoghen

Judgment Delivered

This is an appeal against the judgment of the Court of Appeal holden at Ibadan in appeal No CA/1/7 1/95 delivered on the 14th day of February, 2002 in which the Court allowed the appeal of the present Respondent against the judgment of the Ogun State High Court of Justice holden at Ilaro in suit No HCL/9/83 delivered by Folarin Onashile J, on the 21st day of September, 1987 dismissing the claim of the present Respondent who was the Plaintiff in that Court.

The facts of the case include the following:

In a writ of summons filed on 10th February, 1983 the present Respondent as Plaintiff, claimed against the Appellants, then Defendants, the following reliefs: -

'(a) Declaration that the Plaintiff is the person entitled to a Right of Occupancy on a piece or parcel of land situate, lying and being at Otta and more particularly described in plan No SEW/2446/5 attached to the Deed of Conveyance registered as No 12 at page12 in volume 63 dated 21st day of September, 1977.

(b) N200.00k being damages against the 1st and 2nd Defendants for trespass committed by them when they went on the land, uprooted the Plaintiff\'s survey pillars, removed his Notice Board and put a building foundation on the land.

(c) Injunction to restrain the Defendants, their agents, servants and privies from further trespassing on the land. Annual rental value of the land is N20.00k.'

Originally, the action was against Emmanuel Adebiyi, Eunice Makanjuola Bamisebi and Alimi Akanbi Dada. The 1st and 2nd Defendants were alleged by the Respondent, as Plaintiff, to have sold a large piece or parcel of land including the portion in dispute to the Plaintiff. They (1st and 2nd Defendants) did not file a Statement of Defence in the action and later died in the course of the proceedings leaving the 3rd Defendant as the sole Defendant in the action. There is no doubt that the original 1st and 2nd Defendants sold a large piece or parcel of land to the Respondent and executed a conveyance in his favour dated 21/9/77, which was tendered and admitted in the proceedings as Exhibit D. It is the case of the Respondent that after the conveyance of the land, he took possession of same and exercised maximum acts of ownership thereon including the letting out of portion thereof to tenants for farming purposes and the sale and grant of leaseholds to others without let or hindrance except on 4/5/83 when the Defendant raised a caution on Certificate of Occupancy LUD6/R/1261 with plan No FN2934C of 9/7/81 in respect of a portion of the land in dispute. The Respondent also pleaded in paragraphs 26 and 26a of the Further Amended Statement of Claim as follows: -

'26. That after buying the land, the Plaintiff sold part of it to one Saka Ogungbemi who has since been granted a Certificate of Occupancy on the land and has started erecting a building on it.

26a. The Plaintiff in exercise of right of ownership also granted some portions of the land in dispute to his wives, brothers and sisters and those area including others have not been built upon are being cultivated by Taoridi and Amusa Bankole.'

The Appellant denied that the land in dispute forms part of the land of the original 1st and 2nd Defendants, though he admits that the Defendants are related and own different portions of land in the area including the land in dispute.

The Appellant also contended that he was not aware of the sale of the land to the Respondent by the original 1st and 2nd Defendants until much later and further, that the portion in dispute belongs to him, not the 1st and 2nd Defendants. It is important to note that in paragraph 1 of the Further Amended Statement of Defence, the Appellant denied the facts pleaded in paragraphs 26 and 26(a) as reproduced supra, among other paragraphs of the Further Amended Statement of Claim. As stated earlier at the conclusion of trial, the learned trial Judge dismissed the action of the Plaintiff on the ground that the land for which the Plaintiff sought declaration has not been sufficiently identified. The Court of Appeal, however, set aside that finding and granted the reliefs earlier reproduced in this judgment.

As required by the Rules of this Court, both Counsel filed and exchanged their briefs of argument. In the Appellant's brief of argument filed on 28/1/02 by learned Counsel, Kunmi Lalude Esq., which was subsequently adopted in argument of the appeal on 27/6/06, two issues have been identified for the determination of the appeal. These are as follows: -

'(1) Whether the lower Court was right in holding that the identify of the land in dispute was established and thereby proceeded to grant the claim for declaration and injunction without addressing the overwhelming evidence to the contrary. (This issue relates to grounds 3, 4, 5 and 6 of the grounds of appeal.)

(2) Whether the lower Court was right in holding that notwithstanding the breach of the Rules governing writing of Briefs, the Court below was doing substantial justice by overlooking the Respondent's non-compliance. (The issue relates to grounds 1 & 2).'

The two issues as formulated by learned Counsel for the Appellant were adopted by learned Counsel for the Respondent in the Respondent's Brief filed by A.F. Okunuga Esq. on 28/2/03 and adopted in argument of the appeal.

From the nature of the issues as formulated, issue No 2 ought to have come before issue No 1 particularly as issue No 2 challenges the competence of the appeal before the lower Court and it is only after determining that issue that it would be proper to consider issue No 1, which in effect, attacks the merit of the decision on the substantive case. In this judgment therefore, I will proceed to treat issue No 2 before considering issue No 1, if need be.

In arguing issue No 2, learned Counsel for the Appellant referred to the Preliminary Objection he raised to the Respondent's Brief, who was Appellant before the lower Court, and stated that no Reply brief was filed in response to that objection; that the lower Court erred in holding that despite the fundamental defects in the Brief, it could rely on same so as to do substantial justice between the parties. Learned Counsel submitted further that failure to file a reply brief means an acceptance of all issues of law raised in the Court below so that the lower Court ought to have struck out the Brief of the present Respondent particularly as the issues formulated by the then Appellant in the Court below were not related to the grounds of appeal. Learned Counsel then urged the Court to resolve the issue in favour of the Appellant.

On his part, learned Counsel for the Respondent submitted that the proper procedure for raising a Preliminary Objection as stated in Nsirim vs. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 296, is that by the provisions of Order 6 Rule 5 of the Court of Appeal Rules and the decision in Okonji vs. Nsokanma (1999) 12 S.C (Pt. 11) 150 at 159, the filing of a reply brief is not mandatory, that in so far as there was no ground of appeal challenging the claim of the Appellant before the trial Court as per the Writ of Summons coupled with the absence of a Notice before the lower Court for the trial Court's judgment to be sustained on other grounds such as claiming as per Writ, it was not necessary to file a reply brief in answer to the issue of the Further Amended Statement of Claim so claiming.

On the issue of tying issues formulated to the grounds of appeal, learned Counsel submitted that the present attitude of the Court is to do substantial justice between the parties by dealing with the substance of the appeal rather than clinging to technicalities and cited and relied on Adesina v Aiyegbaju (1999) SCN (Pt. 3) 357 at 367 and urged the Court to resolve the issue against the Appellant.

In the reply brief filed on 26/5/03, learned Counsel for the Appellant submitted that it is now too late in the day for learned Counsel for the Respondent to contend that learned Counsel for the Appellant did not file a Notice of Preliminary Objection in the Court below before raising the objection in his Brief of argument particularly as learned Counsel neither filed a reply brief nor made oral submission to that effect in the lower Court; that failure to file a reply brief to a Respondent's Brief containing new issues amounts to the Appellant conceding the contentious issues, relying on Okoye vs. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (Pt. 199) 501 at 533 - 534.

To begin with, the procedure for raising a Preliminary Objection to the grounds of appeal in the Court of Appeal has been laid down by this Court in the case of Nsirim vs. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 296 and I do not intend to restate them here except to say that for an objection to the competence of ground or grounds of appeal to be validly raised and thereby worthy of consideration by the Court, the Respondent must first and foremost file a motion on Notice in the Court stating the grounds on which the objection is based so as to give notice to the Appellant, otherwise, the Appellant would be taken by surprise. The Respondent subsequently follows it up with the filing of the Respondent's brief in which arguments on the objection is preferred. In the instant case, it is not disputed that learned Counsel for the Appellant in this Court did not file a Motion on Notice before the lower Court in which he raised the alleged objection against the grounds of appeal before that Court. He only raised the objection in his Respondent's Brief and preferred argument therein.

It is also not disputed that learned Counsel for the Appellant before the lower Court, never filed a reply brief to the issues canvassed in the objection as raised, neither did he prefer any oral argument thereon.

I hold the view that failure to file a motion on Notice as required by the Rules of Court affects the competence of the objection as raised in the Respondent's Brief and as such, Counsel to the Appellant had no obligation to file a reply thereto - the said objection being incompetent. Rules of Court are meant to be obeyed so as to ensure that justice is done to the parties and the Court saddled with the responsibility of administering same.

That apart, the objections as raised and contained in the Respondent's brief at pages 143 - 165 of the record particularly at pages 145-148 are two fold, viz:

(a) that the claim of the Appellant before the trial Court to wit:

'whereof the Plaintiff claims as per his Writ of Summons'

made the claim incompetent particularly as a Statement of Claim supersedes the Writ of Summons and any relief not mentioned or stated in the Statement of Claim is by law deemed abandoned and

(b) that the issues for determination were not related to the grounds of appeal. Learned Counsel stated specifically that

'Nowhere did the Appellant tie any issue to a particular ground or grounds of appeal. The Appellant has therefore left the Respondent and the Court to fish from the voluminous grounds and to relate a particular issue or issues for determination to a ground or grounds of appeal.'

See page 147 of the record.

On ground (a) of the grounds of objection, it must be noted that the Respondent/objector, granted that his objection was validly taken, which I do not concede, did not cross appeal against the judgment of the trial Court, which was in his favour neither did he, in accordance with the applicable Rules of Court file any Respondents Notice calling on the Court of Appeal to confirm the judgment of the trial Court on any other ground - say the incompetence of the action resulting from the absence of any reliefs claimed in the Further Amended Statement of Claim - other than the grounds stated by the trial Court in its judgment on appeal.

These are the two known legal ways by which the Respondent before that Court could have legally challenged the

decision of the trial Judge particularly as he was not the Appellant. I hold the view that he cannot achieve that purpose by way of a Preliminary Objection since the challenge is directed at the validity of the judgment of the Court. That being the case, I hold the view that the Appellant in such a situation has no obligation whatsoever in law to file a reply brief in response to such a presumptuous objection, which was not worth the paper it was written on. That being the case, I hold the further view that the failure to file a reply brief in the circumstance has no adverse legal effect on the case of the Appellant before the lower Court. Failure to file a reply brief to a Respondent's Brief can only be fatal to the case of the Appellant if the issues raised in the Respondent's Brief are weighty, substantial, competent, and relevant in law. Where they are not, as in the instant case, the Appellant must be spared the expenses involved in money and time in filing a reply brief to a worthless objection.

On ground (b) of the grounds of objection, it must be noted from the onset that the objection is not that the issues as formulated by the Appellant before the lower Court did not arise or flow from the grounds of appeal but that the said issues were never tied to any ground or grounds of appeal. In other words the issues validly arise from the grounds of appeal, the only trouble is that Appellant's Counsel failed to tie them to the relevant grounds of appeal, it is on that basis that learned Counsel for the Respondent called on the lower Court to discountenance the Appellant's brief. The question is whether that will result in substantial justice between the parties.

My reaction to the issue under consideration is simply that though it is very necessary and desirable for the learned Counsel for the Appellant to always relate or tie the issues formulated for determination in the Appellant's brief to the grounds of appeal from which the said issues are distilled, failure to do so may not necessarily result in the issues being struck out for being incompetent particularly where in the opinion of the Court, the issues can validly be distilled from the grounds of appeal and in such a situation, the Court can on its own take a close look at the grounds of appeal and the issues as formulated and in order to do substantial justice between the parties which is the preoccupation of the Court, consider the said issues in its judgment in the discharge of its obligation to the parties under the constitution of this nation. I am a firm believer in the principles of substantial justice at the expense of justice according to technicalities or formality. In certain appropriate cases, the Courts can and in fact do formulate their own issues from the grounds of appeal where the issues formulated by learned Counsel for the Appellant are found to be either inadequate or grossly or fundamentally defective.

It must be noted that the above position is very different from one where the issues formulated for determination do not arise or are not distillable from the grounds of appeal as filed. In that case, the law is long settled that such issues are irrelevant to the appeal and would therefore be discountenanced by the Court. Every issue for determination must be formulated from one or more grounds of appeal and any issue which does not arise from the ground of appeal is incompetent. See Osinupebi vs. Saibu (1982) 7 S.C. 104 at 110-113; Government of Gongola State vs. Tukur (No 2) (1987) 2 NWLR (Pt. 56) 308; Western Steel Works Ltd. vs. Iron & Steel Workers Union (No 2) (1987) 1 NWLR (Pt. 49) 284.

The complaint of the Appellant in the instant case, however, and as stated earlier in this judgment is not that the issues do not flow from the grounds of appeal as filed which would, on the authorities cited supra have made the issues irrelevant to the determination of the appeal and therefore liable to be struck out, but that learned Counsel for the Appellant in the lower Court omitted to tie the issues so formulated to the grounds of appeal. However, when one looks at the Respondent's Brief before the lower Court, learned Counsel for the Respondent did tie the issues to the relevant grounds of appeal - see pages 148 - 149 of the record. I therefore hold the view that the failure of Counsel for the Appellant to tie the issues to the grounds of appeal did not result in a miscarriage of justice and consequently find no merit in issue No 2 as formulated and argued by Counsel for the Appellant in this appeal and therefore resolve same against the Appellant.

In arguing issue No 1, learned Counsel for the Appellant submitted that the first duty of a Plaintiff who seeks a declaration of title to land is to show the Court clearly, the area of land to which his claim relates and relied on the case of Baruwa vs. Ogunsola (1938) 4 WACA 159 at 160 for that submission.

Referring to the averments in the Statement of Claim, learned Counsel submitted that the Respondent failed woefully to discharge the onus of proof which lies on him for a claim of declaration and that where the area of land claimed is not

identified with certainty, the Plaintiffs claim must be dismissed, relying on Nwonye vs. Bolarin (1991) 4 NWLR 257; Aweni vs. Owrunkosebi (1991) 7 NWLR 336, Okere vs. Nwoke (1991) 8 NWLR 317; that from the evidence in support of the pleading that the Plaintiff sold part of the land in dispute and made gifts of other portions to various individuals, the Plaintiff has failed to prove the identity of the land upon which the claim for declaration and injunction is based. Learned Counsel urged the Court to resolve the issue in favour of the Appellant.

On his part, learned Counsel for the Respondent referred the Court to paragraph 3 of the Further Amended Statement of Claim and the reaction of the Appellant thereto, in paragraphs 1 and 27 of the Further Amended Statement of Defence and stated that the declaration of title which the Respondent sought is based on survey plans - exhibits B and E and further referred to the evidence of 1st DW at page 70 where the witness stated that the land in exhibits B and E is almost the same. Learned Counsel proceeded to refer to the findings of the trial Court at pages 112 to 113 to the effect that 'the identity of the land in dispute is neither well defined nor proved....', and that of the Court of Appeal at pages 193 -194 to the effect that the finding of the trial Court 'was not only perverse but also made an award to Respondent who did not counter claim...' and submitted that Appellant has failed to attack the findings of the Court of Appeal on the identity of the land in dispute and urged this Court to hold that the said findings were correctly made.

It is settled law that parties and the Court are bound by the pleadings of the parties. In the instant case, the Respondent pleaded in paragraphs 26 and 26a that he has been exercising acts of ownership over the land in dispute for which he seeks a declaration of title, by sale of a portion thereof to a purchaser who subsequently obtained a Certificate of Occupancy in respect of his portion. The Respondent further pleaded that in addition to the portion sold, he has granted other portions of the land to his wives, brothers and sisters. Apart from the pleadings in paragraphs 26 and 26a, the Respondent testified inter alia at page 65 of the record thus: -

'Before this dispute arose, I sold a portion of the land in dispute to one Saka Ogungbemi who has already built a house on the portion. I also gave portions of the land in dispute to my wife and other members of my family who have not done anything on the portions. I want the Court to give me judgment.'

The above was in evidence in chief. Under cross-examination the Respondent stated thus: -

'I sold a portion of the land in dispute to Saka Ogungbemi sometime in 1976 say around the middle of that year. Exh. 'B' does not contain the house of Saka Ogungbemi. I confirm that Saka Ogungbemi built a storey building on the portion sold to him and he even has a C/O.'

It is settled law, which law has acquired notoriety, that in a claim for declaration of title to land, the onus is on the Plaintiff to establish his claim upon the strength of his own case and not upon the weakness of the case of the Defendant. The Plaintiff must therefore satisfy the Court that upon the pleadings and evidence adduced by him, he is entitled to the declaration sought.

That apart, the Plaintiff must first and foremost plead and prove clearly, the area of land to which his claim relates and the boundaries thereof and if the location and size of the land is in issue, the Plaintiff must prove the exact location and the area being claimed. It follows therefore that proof of the identity of the land in dispute is a sine qua non to establishing a case of declaration of title to land. In the instant case, the Plaintiff claimed title to the area verged red in exhibit B but by his pleadings and evidence at the trial, he has sold a portion of the area so verged and claimed to one Saka Ogungbemi who has not only built a storey building on the portion sold to him but has obtained a Certificate of Occupancy in respect of same. In short, the Respondent has by his pleadings and evidence de-vested himself of any title or claim to the portion so sold to Saka Ogungbemi. That apart, the Plaintiff by his admission in evidence, has not indicated the portion of the land sold to Saka Ogungbemi and over which a Certificate of Occupancy had been obtained so the Court cannot legally exempt that portion of land from the area verged red over which the declaration of title is sought and was granted by the Court of Appeal. Legally speaking, can the Respondent eat his cake and still have it back'

That apart, the picture of the area of land being claimed by the Plaintiff becomes more confusing when one takes into consideration, the fact that the Plaintiff also granted portions of the land to his wives, brothers and sisters thereby

ceasing to own the said portions, which portions are also not clearly delineated in the survey plan - exhibit B. The question is whether having regards to the admitted sale and grant of portions of the land being claimed to various persons whose portions have not been clearly delineated in exhibit B being the plan to which the declaration of title is tied, it can legally be said that the Plaintiff, in attempt at discharging the burden of proof placed on him by law, has proved clearly the area of land for which he seeks declaration of title. The answer, with respect to the lower Court is clearly in the negative. It must be noted that the identity of the land we are talking about in the instant case is of two fold- (a) the identity of the land as it relates to the external boundaries, which in the instant case is not in doubt having regards to the survey plans filed in the action particularly exhibit B, and (b) the identity of the land as it relates to those who own portions of land as granted or sold or given by the Plaintiff within the land in dispute verged red which in the instant case, has not been clearly delineated in exhibit B. It is only in relation to (b) that there is uncertainty as to the area the Plaintiff is seeking the declaration of title particularly as I hold the view that it will be illegal for the Plaintiff to be granted title to portions of land over which he had voluntarily relinquished title for valuable consideration.

It must be borne in mind that a grant or refusal of a declaration either of title to land of a legal right, or otherwise involves the exercise of the discretionary powers of the Court which discretion must be exercised judicially and judiciously. I hold the view that it would not be a judicial and judicious exercise of discretion to grant the declaration sought having regard to the facts of this case particularly as it would result in injustice to those who have, by the admission of the Respondent, acquired title to their own portions which the Respondent still seeks to claim as his own. Since the portions sold and given by the Respondent have not been clearly delineated in exhibit B, they cannot be cut off from the land comprised in the said exhibit 'B' so as to award title in the remainder to the Respondent, which would have been the just thing to do if the portions had been so delineated.

I hold the view that by the pleading of the Respondent alone, it is clear that he ought not to have been awarded title to the land in dispute, having regards to paragraphs 26 and 26a of further Amended Statement of Claim and the evidence. I hold the further view that the trial Court was right in holding that the Respondent did not prove the identity of the land over which he sought declaration of title and that the Court of Appeal erred in holding that the above finding by the trial Court was perverse as it has been demonstrated in this judgment that the said finding is supported both by the Pleading of the Respondent and his testimony thereon.

I therefore resolve the issue in favour of the Appellant.

In conclusion, I find merit in this appeal, which is accordingly allowed with N10, 000.00 costs against the Respondent.

Appeal allowed.

Dissenting Judgment delivered by Idris Legbo Kutigi, J.S.C.

I have had the privilege of reading in advance, the judgment just rendered by my learned brother Mohammed, JSC. I agree with his reasoning and conclusions. From the pleadings of the parties and the evidence led thereon (including those of the surveyors), it is absolutely clear that the parties know the land in dispute. The Plaintiff apart from tendering his Deed of Conveyance as document of title to the land also showed how he sold parts of the land to other persons who had developed and obtained their documents of title as well. He also gave parts of the land to his wives, brothers and sisters, which are being used for farming purposes. (See paragraphs 26 & 26a of the Further Amended Statement of Claim). All these in my view go to show that the Plaintiff has being exercising acts of possession and ownership over the land covered by his Conveyance. It is unthinkable to say that because the Plaintiff has not excluded the portions of land sold or given out to other people by him, he has as a result thereby failed to identify the land in dispute! That conclusion is wrong in my view. It cannot in my view be suggested that the Defendant is representing those 'other people' who bought from the Plaintiff and who have not made any claim against him (the Plaintiff)! The portions of land sold or given out are not in dispute. I entirely agree with the judgment of the lower Court that the trial High Court erred in dismissing the Plaintiff's claims. I hold that the Plaintiff proved his case and is entitled to succeed as elaborated in the judgment of my learned brother Mohammed J.S.C., which I read before now and which I endorse.

Accordingly, the appeal is dismissed and the judgment of the Court of Appeal is confirmed. I award N10, 000.00 costs in favour of the Plaintiff/Respondent against the Defendant/Appellant.

Judgment delivered by Umaru Atu Kalgo, J.S.C.

I have read in advance the judgment of my learned brother Onnoghen, J.S.C. just delivered. I agree with his reasoning and conclusions reached therein and find that there is merit in the appeal I therefore allow it and abide by the consequential orders made therein including the order as to costs.

Judgment delivered by Niki Tobi, J.S.C.

The Respondent as Plaintiff in the High Court filed an action against the Appellant as Defendant. He asked for three reliefs: declaration of Right of Occupancy on a piece or parcel of land lying and situate at Otta, N200.00 damages for trespass and injunction to restrain the Defendant from further trespass on the land.

The case of the Plaintiff is that sometime in 1976, Emmanuel Adebiyi approached him and offered to sell to him a piece or parcel of land in Odota Awurela family land, Idi-lroko, which he claimed belonged to his mother, Eunice Makanjuola Bamisebi. On 4th April 1976, the Plaintiff bought the land from Emmanuel Adebiyi for the sum of N1, 200.00. The transaction was witnessed in writing and signed by Emmanuel Adebiyi, his mother as well as some important and principal members of Odota-Awurela family. Plaintiff took immediate possession of the land after the purchase.

Sometime in 1982, a minor business disagreement led to a strained relationship between the Plaintiff and Emmanuel Adebiyi. In 1983, the Plaintiff observed that the Defendant commenced a building foundation. Although the matter was reported to Emmanuel Adebiyi and his mother, both showed no concern or interest. The matter was thereafter reported to the police.

Plaintiff said in evidence that at the time of the survey of the land in dispute, it was discovered that there was a dispute as to the boundary of the land in dispute with the land of Adeyemi Akinsanya and Samuel Ajasa both at the two extremes of the land in dispute.

The case of the Defendant is that Odota Awurela who was his ancestor was the original owner and settler on Odota Awurela family land in Otta of which the land in dispute is a portion. One of the children of Odota Awurela was Bamisebi who had three wives namely Ogisanyin, Dada Atan and Ajayi Opoki. The Defendant and Samuel Ajasa Dada are from Dada Atan's side, while Eunice Makanjuola Bamisebi, the mother of Emmanuel Adebiyi was from Ogisanyin side.

In 1958 when Bamisebi died, his land was partitioned into three parts among the three branches of his three wives. On protest, the Plaintiff released the portions of the land of Akinsanya and Ajasa Dada to them but refused to release the Defendant's land.

The learned trial Judge dismissed the claim of the Plaintiff. On appeal, the Court of Appeal allowed the appeal. That Court granted the declaratory and injunctive reliefs of the Plaintiff. The Court said at page 197 of the Record:

'Applying the above authorities and considering the totality of the evidence from the printed evidence after a cool calm view of the evidence acting judicially and judiciously, considering the circumstances of the case, Appellant is entitled to the declaratory and injunctive reliefs claimed by him against the Respondent and I so grant the Appellant's reliefs 1 and 3 as claimed in the Writ of Summons though I depreciate the lazy way of concluding the Statement of Claim that Plaintiff claims as per the Writ of Summon.'

Dissatisfied, the Appellant has come to this Court. Briefs were filed and exchanged. The Appellant formulated the following issues for determination:

'(1) Whether the lower Court was right in holding that the identity of the land in dispute was established and thereby proceeded to grant the claim for declaration and injunction without addressing the overwhelming evidence to the contrary. (This issue relates to grounds 3, 4, 5 and 6 of the grounds of appeal).

(2) Whether the lower Court was right in holding that notwithstanding the breach of the Rules governing writing of Briefs, the Court below was doing substantial justice by over looking the Respondent's non-compliance. (The issue relates to grounds 1 & 2).'

The Respondent adopted the above two issues formulated by the Appellant.

Learned Counsel for the Appellant, Mr. Kunmi Lalude, contended on Issue No 1 that the first duty of a Plaintiff who comes to Court to claim a declaration of title to land is to show the Court clearly, the area of land to which his claim is based. Citing the case of Baruwa v. Ogunsola (1938) 4 WACA 159 at 160, learned Counsel submitted that from the averments in the statement of claim, the Plaintiff/Respondent failed woefully to discharge the onus of proof, which lies on the Plaintiff claiming that the land in dispute has a common beacon. Where the area of land claimed is not identified with certainty, the Plaintiffs claim must be dismissed, argued Counsel. He cited Nwonye v. Bolarin (1991) 4 NWLR 257; Aweni v. Olorunkosebi (1991) 7 NWLR 336 and Okere v. Nwoke (1991) 8 NWLR 317.
He submitted that on the averments in the Statement of Claim, the evidence on behalf of the Plaintiff of the sale of parcel of the land in dispute and the gift to various individuals, the Plaintiff has failed to prove the identity of the land upon which he claims a declaration and injunction. He called in aid, the evidence of the Plaintiff at page 65, lines 15 to 21 and 25 to 32 of the Record. Referring to the evidence of the Head of Odota Family, learned Counsel contended that if the land in dispute belonged to the father of Makanjuola and Appellant's mother, the Respondent's vendor had no right to sell; consequently the Respondent had no title to the land in dispute on the principle of law that no one can sell what he does not have (nemo dat qod non habet).

Learned Counsel referred to the averments in paragraphs 7 and 8 of the Statement of Claim on power of attorney and submitted that, as the power of attorney was not tendered in evidence, the Respondent's vendor had no authority to sell the land in dispute.

Learned Counsel submitted on Issue No 2 that failure on the part of the Respondent to file a reply brief amounted to a concession on the part of the Respondent and Appellant's brief in the Court below ought to have been struck out, a situation which should have resulted in the striking out of the entire appeal.

Learned Counsel also submitted that as the issues formulated by the Appellant in the Court below were hot related to the grounds of appeal, all the issues should have been struck out, a situation which should have resulted in the striking out of the entire appeal. Counsel urged the Court to allow the appeal and set aside the judgment of the Court of Appeal and affirm the judgment of the High Court.

Learned Counsel for the Respondent, Mr. A. F. Okunuga took Issue No 2 first. He submitted that the proper procedure of raising a preliminary point of law to the competence of an appeal is by a Notice of Preliminary Objection stating the grounds why the appeal ought not to be entertained or by motion on notice. He cited Chief O. N. Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 296. He pointed out that the Appellant did not file in the Court below, any Notice to contend that the judgment of the trial Court be sustained on grounds other than the grounds relied upon by the trial Judge.

On whether the issues formulated by the Appellant in the Court of Appeal be struck out as not having been tied to the grounds of appeal, learned Counsel submitted that in the quest for doing substantial justice, this Court as well as the Court of Appeal have on several occasions repeated that it is better to deal with the substance of the appeal rather than clinging to technicalities. He cited Chief Adesina v. Otan-Aiyegbaiu (1999) SCW (Pt. 3) 357 at 367.

On Issue No 1, learned Counsel referred to the findings by the learned trial Judge and the Court of Appeal in respect of

Exhibits 'B' and 'D' and argued that the Appellant had failed to attack the findings of the Court of Appeal on the identity of the land in dispute.

On the issue whether the Respondent proved good title to warrant the declaration sought, learned Counsel made reference to paragraphs 8, 9, and 10 of the Further Amended Statement of Claim and paragraphs 12 to 24 of the Amended Statement of Defence and submitted that the Respondent has discharged the burden on the state of the pleadings and evidence. Relying on Exhibit 'D', executed by Eunice Bamisebi, learned Counsel submitted that by virtue of section 18 of the Lands Instrument Registration Law, the registration of the exhibit under that law raises a presumption that the execution was rightly and regularly done in the absence of any evidence to the contrary. It is the contention of learned Counsel that as Appellant joined no issue on the validity or due execution of Exhibit D in his pleadings, the Court of Appeal rightly found in favour of the Respondent.

Like the Respondent, I should take Issue No 2 first as it affects the Preliminary Objection. They are in two parts: (1) failure on the part of the Respondent to file a reply brief and, (2) failure on the part of the Respondent to tie the issues formulated to the grounds of appeal.

Let me take the first one on reply brief. By Order 6 rule 5 of the Court of Appeal Rules, 1990, a reply brief 'shall deal with all new points arising from the Respondent's brief.' See Akinrinmade v. Lawal (1996) 2 NWLR (Pt. 429) 218; K H. Eze Uneji v. Attorney General of Imo State (1995) 4 NWLR (Pt. 391) 552. A reply brief is filed when an issue of law or arguments raised in the Respondent's brief call for reply. See Nwali v. The State (1991) 3 NWLR (Pt. 182) 663. Although the filing of a reply brief by an Appellant is not mandatory in the sense of compulsion, where a Respondent's brief raises issues or points of law not covered in the Appellant's brief, an Appellant ought to file a reply brief in the interest of his case. See Popoola v. Adeyemo (1992) 8 NWLR (Pt. 257) 1; Shuabu v. Maihodu (1993) 3 NWLR (Pt. 284) 748; Chukwuogor v. Attorney General Cross River State (1998) 1 NWLR (Pt. 534) 375.

I have carefully examined the brief of argument of the Respondent in the Court of Appeal as Appellant's brief, vis-a-vis that of the Appellant as Respondent's Brief and I do not see the failure on the part of the Respondent in that Court to file a reply brief is prejudicial to his case in that Court. I say this because the issues formulated by both parties in the Court of Appeal are generally similar, dancing around the almighty Exhibit 'D', the identity of the land in dispute and a possible allusion between Chief Jonathan Dosunmu's vendors and Alimi Akanbi Dada as it relates to the credibility of evidence before the trial Court.

Where an Appellant in anticipation of the case of a Respondent presents his case in his Brief, and the anticipation works in the sense that the Respondent has not introduced any new point, a reply brief is otiose. I see such a situation in the two briefs filed in the Court of Appeal. The objection therefore fails.

I go to the second one. In Idika v. Erisi (1988) 2 NWLR (Pt. 78) 563, Nnaemeka-Agu, J.S.C., said at page 579:

'I wish to seize this opportunity to emphasize that issues or questions for determination are framed from the grounds of appeal properly before the Court. They do not arise in nubibus from the skies. One or more grounds of appeal raise an issue for determination.'

In Nkado v. Obioma (1977) 5 NWLR (Pt. 503) 31, Onu, J.S.C., said at page 47:

'... This is because, it is contended on their behalf, quite rightly in my view, that although they filed six grounds of appeal, their issues for determination relate only to grounds one to four. That being so, grounds five and six are deemed to have been abandoned by them.'

In Alhaji Animashaun v. University College Hospital (1996) 10 NWLR (Pt. 476) 65, Belgore, J.S.C. (as he then was) said at page 70:

'The general rule is that the issues for determination must be relevant to the grounds of appeal filed in Court, if not those issues are incompetent. The overriding principle cause of justice, the umbrella under which the lower Court sought

refuge, with greatest respect, does not avail an Appellant whose grounds of appeal cannot be linked in any way whatsoever with the issues formulated for determination. These issues are incompetent and they ought to be struck out as such.'

In Alhaji Kari v. Alhaji Ganavam (1997) 2 NWLR (Pt. 488) 380, Ogundare, J.S.C., said at page 394:

'Though Order 6 rule 5(1) of the Rules of this Court requires that the brief of the Appellant shall contain what are, in the Appellant's view, the issues arising in the appeal, that does not mean that the Appellant is free to put forward any issue unrelated to the grounds of appeal, for it is only such issues that can arise in the appeal... Consequently, I uphold Mr. Oni's objection and strike out Issues 2 to 5 formulated in the Appellant's brief and the arguments thereon. This appeal will now be determined on Issue (1) only.'

It is clear from the above authorities that issues not formulated from the grounds of appeal will go to no issue and will be struck out. What did the Court of Appeal say about the issue before the Court' Relying on Ogun v. Akinyelu (1991) 10 NWLR (Pt. 624) 671 at 685, the Court of Appeal said at pages 177 and 197 of the Record:

'Applying the above to the instant appeal, the faulty and inelegant Appellant's brief in doing substantial justice still be used in the consideration of the aspect... The Respondent's preliminary questions succeeded but refused on doing substantial justice...'

The role of the Court is to apply the principles of substantial justice according to law. The principles cannot be applied outside the law or in contradiction of the law. A Court of law will not be performing its role as an independent umpire if it bends backward to do justice to one of the parties, at the expense of the other party. Justice, that very expensive commodity in the judicial process, should be evenly spread between the parties.

Where a rule of Court has clearly and unambiguously provided for a particular act or situation, the Courts have a duty to enforce the act or situation and here, the issue of doing substantial justice does not or should not arise. The party who failed to comply with the rule has himself to blame. He cannot be heard to canvass the omnibus ground of doing substantial justice.

The Court of Appeal agreed that the preliminary questions succeeded but tried its hand and decided the matter on substantial justice. With the greatest respect, the Court went too far. What the Court did is what Belgore, J.S.C. (as he then was) asked the Court of Appeal not to do in Alhaii Animashaun v. University College Hospital.

As the Court of Appeal said that the objection on the issues succeeded, I have the right to come to the conclusion that the brief filed by the Respondent as Appellant in the Court of Appeal was filed without issues. In view of the fact that issues are major components of a brief, I am of the view that in law, the brief filed by the Appellant in the Court of Appeal is incompetent. It is accordingly struck out. Logically, this means that an incompetent Appellant's brief cannot give rise to a competent appeal, the appeal filed by the Respondent in the Court of Appeal is incompetent. It is accordingly struck out.

Normally, this should be the end of this matter in favour of the Appellant. I should take Issue No 1 in the event that I am wrong on Issue No 2.

In paragraphs 26 and 26A of the Further Amended Statement of Claim, the Plaintiff/Respondent averred:

'26. That after buying the land, the Plaintiff sold part of it to one Saka Ogungbemi who has since been granted a Certificate of Occupancy on the land and has started erecting a building on it.

26A. The Plaintiff in exercise of right of ownership also granted, some portions of the land in dispute to his wives, brothers and sisters and those areas including others have not been built upon are being cultivated by Taoridi and Amusa Bankole.'

In his evidence in-chief, Plaintiff/Respondent confirmed the above averments at page 65 of the Record when he said:

'Before this dispute arose, I sold a portion of the land in dispute to one Saka Ogungbemi who has already built a house on the portion. I also gave portions of the land in dispute to my wife and other members of my family who have not done anything on the portions. I want the Court to give me judgment as my claim.'

Reacting to the above averments in paragraphs 26 and 26A of the Further Amended Statement of Claim and the evidence in Court, learned Counsel for the Appellant submitted that if the Respondent divested himself, upon his own admission, of a portion of the land in dispute to Saka Ogungbemi who holds a Certificate of Occupancy thereof and his wives, brothers and sisters, can the Respondent lawfully ask for a declaration that he is entitled to a Certificate of Occupancy over the entire land in dispute' Can he ask for damages for trespass when, from his own admission, he was no longer in possession' Can he ask for an injunction over a piece of land upon which he no longer has an interest'

In my view, the above are very pertinent and relevant questions that I expected the Court of Appeal to answer. Perhaps, I will be able to get at the bottom of the matter if I examine the evidence slowly and carefully.

It is in evidence that the transaction for the sale of the land to the Appellant by Emmanuel Adebiyi was evidenced in writing on 4th April, 1976. Appellant signed tenancy agreements with the tenants on 10th September 1976. About seventeen months from the date of the sale of the land to the Appellant, Exhibit D was made. Exhibit D was executed on 21st September 1977. Exhibit D therefore qualifies as the original title to the land. Unlike Exhibit D, Exhibit B is later in time. It was made for the purpose of the case. PW3 said so.

Dealing with the concession made by the Respondent to Adeyemi Akinsanya and Samuel Ajasa Dada as it relates or ought to relate to Exhibit D, the learned trial Judge said at pages 107 and 108:

'It is doubtless that at the time the Plaintiff made the admitted concession the Deed of conveyance with the survey plan containing the land in dispute therein was already in existence having regard to the date of 21/9/77 on which it was executed. It follows therefore that the alleged concession made by the Plaintiff to Adeyemi Akinsanya and Samuel Ajasa Dada was only by words of mouth and not a physical concession on the very land in dispute which if truly made would have caused a reduction in the area of the land in dispute amounting to an alteration in substance in the Deed of conveyance Ex. D. There is no evidence that following the alleged concession, the land in dispute was re-surveyed to excise the portions conceded and to reflect the same in the new survey plan and a deed of conveyance in favour of the Plaintiff.'

The analogy one can draw from the above as it relates to the allocation of portions or parcels of the land to Saka Ogungbemi, the wives of the Respondent and other members of the family, is that such allocation should cause a reduction in the area of the land and an alteration of Exhibit D. Such a situation will definitely affect the identity of Exhibit D. If Exhibit D did not show the allocations to Saka Ogungbemi, the wives of the Respondent and other members of the family, possibly on the ground that the allocation was later in time, what will be the explanation of the absence of that information in Exhibit B, which came after the allocation'

The learned trial Judge made the point at page 109 of the Record and I will quote him in extenso:

'All the acts of possession and exercise of acts of ownership pleaded, claimed and given in evidence by the Plaintiff are not shown in Ex. 'B' which is specifically and purposefully prepared in respect of this dispute... All these grants made by the Plaintiff in exercise of his possession and ownership are important land marks which are necessary to support the Plaintiff's claim of the land in dispute, but which are conspicuously absent in the survey plan Ex. 'B'.'

The learned trial Judge was not happy that Exhibit 'B' did not indicate the allocation of the land to the persons and the specific boundaries of the land. He found that Exhibit 'B' is at variance with the pleadings of the Plaintiff. He said at page 112 of the Record:

'... the survey plan Ex. 'B' is conspicuously silent on all these features and to this extent, the plan Ex. 'B' is at variance

with the Plaintiff's Pleadings, evidence and claim and the variance between the pleadings and evidence of the Plaintiff and his survey plan Ex. 'B' created an uncertainty as to the claim of the Plaintiff to the land in dispute. The uncertainty raises a doubt in the mind of the Court as to whether the land in dispute is the one sold to him by his vendor and that it is that very land he has surveyed in both Exhibits 'D' and 'B' respectively. In resolving the doubt, I say with emphasis that the land on both Exhibits is not the land sold to the Plaintiff, the result is that the identity of the land in dispute is not well defined nor proved.'

The Court of Appeal was not happy with the above. The Court said that the findings were unjustified. Let me quote a relevant portion of the judgment:

'The learned trial Judge who stated that he believed 3rd PW and accepted his testimony made u-turn to state that Appellant did not show allocation to wives, brothers and sisters in Exhibits 'B' and 'C'.'

Why the word 'u-turn'' Did PW3 give evidence in respect of the allocation to the wives, brothers and sisters' PW3 gave expert evidence as a surveyor and tendered Exhibit 'B'. What has that to do with the evidence on allocation to justify the conclusion of the Court of Appeal that the learned trial Judge made a u-turn' Considering the fact that the word in the context means a complete change of mind or direction, resulting in the opposite of what has gone before, the expression, with the greatest respect to the Court of Appeal, is wrong. The learned trial Judge, in my opinion, was consistent on the issue in his judgment. Accordingly, I hold that the finding of the learned trial Judge is not perverse as wrongly held by the Court of Appeal.

I entirely agree with the learned trial Judge that Exhibit 'B' is at variance with the pleadings and evidence of the Respondent in Court. I base my agreement on the averments in paragraphs 26 and 26A of the Further Amended Statement of Claim and the evidence of the Respondent which I have quoted above in respect of allocation of portions of the land to Saka Ogungbemi, his wives, brothers and sisters. As Exhibit 'B' did not contain that information, the learned trial Judge rightly came to the conclusion that the exhibit is at variance with the pleadings and the evidence in Court.

An impression is created that there is no dispute as to the identity of the land in dispute. Let me take that now and I will go to the pleadings. In paragraph 3 of the Further Amended Statement of Claim, the Respondent averred:

'The Plaintiff states that the land in dispute is particularly described in Plan No FF/071/09/86 drawn by Mr. Femi Falade, a licensed surveyor dated the 16th January 1986 and attached to the Statement of Claim.'

The Appellant joined issues with the Respondent in paragraphs 1 and 27 of the Further Amended Statement of Defence:

'1. The Defendant denies paragraphs 2a, 3, 6, 7, 8, 9, 10, 11, 14, 19, 20a, 20b, 21, 22, 23, 24, 25, 26 and 26a of the Further Amended Statement of Claim.

27. Plan No FF07/OG/86 drawn by the Plaintiff does not show the true position of the land in dispute in relation to other pieces of land around it. The true position is shown by Plan No HU/OG/0017 drawn by Alhaji T. A. Hussain on 26/9/93 and attached to the Statement of Defence.'

Based on the above state of the pleadings, learned Counsel for the Respondent submitted that in paragraph 27 of the Further Amended Statement of Claim as contained in page 45B4 of the Record of Appeal, the Respondent's claim of declaration of title is based on the same survey plan as shown at page 45C1 of the Record.

Is Counsel correct' I think not. Paragraph 27, page 45B4 reads:

'Whereof the Plaintiff claims as per his Writ of Summons.'

The Writ of Summons at page 2 of the Record sought declaration to Right of Occupancy in respect of piece or parcel of land particularly described in Plan No SEW/W/2446/5. The Writ of Summons at page 45C1 sought declaration to Right

of Occupancy in respect of piece or parcel of land in Plan No FF/071/OG/86. There is no Plan No FF07/OG/86 as averred in paragraph 27 of the Further Statement of Claim. Can that be for Plan No FF/071/OG/86 in the Writ of Summons at page 45C1 of the Record' Whatever is the situation, this much is clear that the parties clearly joined issues on the identity of the land in dispute. And that gave the burden of proof to the Respondent.

I now take the issue of not tendering the Power of Attorney by the Respondent. Paragraphs 7 and 8 of the Further Amended Statement of Claim reads:

'The Plaintiff further that Adebiyi assured him that he had the authority of his mother one Eunice Makanjuola Bamisebi and Principal members of the Odota Awurela family to sell the land. The Plaintiff states that in consequence of this, he made further enquiries from Thomas Bamisebi (deceased) then Head of Odota family, Eunice Bamisebi, Samuel Ajasa Dada, Senior brother to Defendant, Joshua Ojo, and Alimi Odunsi Fagbayi (present Head of Family), all Principal members and donees of the Power of Attorney of Odota family who confirmed the authority of Adebiyi to deal with the land.'

The law is elementary that he who alleges a fact has the duty to prove the fact. In paragraph 8 of the Further Amended Statement of Claim, the Respondent averred to the existence of a Power of Attorney. The burden was therefore on the Respondent to tender the document. He failed to do so. I have the temptation to invoke section 149(d) of the Evidence Act, 1990 against him.

I think I can stop here. From whatever angle one looks at the appeal, it succeeds. It succeeded at the preliminary objection stage. I allow the appeal. I award N10, 000.00 costs against the Respondent and in favour of the Appellant.

Dissenting Judgment delivered by Mahmud Mohammed, J.S.C.

The Respondent in this appeal was the Plaintiff at the State High Court of Justice of Ogun State sitting at Ilaro Judicial Division where by a Writ of Summons, he instituted his action against the Appellant and two others now deceased as Defendants and claimed against them jointly and severally as follows:

'(a) Declaration that the Plaintiff is the person entitled to the Rights of Occupancy on a piece or parcel of land situate, lying and being at Otta and more particularly described in plan No SEW/W/2446/5 attached to the Deed of Conveyance Registered as No 12 at page 12 in Volume 63 dated 21st day of September, 1977.

(b) N200.00k being damages against the 1st and 2nd Defendants for trespass committed by them when they went on the land, uprooted the Plaintiffs survey pillars, removed his notice board and put a building foundation on the land.

(c) Injunction to restrain the Defendants, their agents, servants and privies from further trespassing on the land.'

In the course of the hearing of the action however, 1st and 2nd Defendants died and the action against them particularly the specific claim of trespass in relief (b) against them, was struck out leaving the Appellant as the only Defendant in the case to defend reliefs (a) and (c) remaining for adjudication. The case was therefore heard between the parties in this appeal on the Plaintiff's further amended Statement of Claim and the Defendant's further amended Statement of Defence. The Plaintiff testified in support of his claim and called six other witnesses. The Defendant also testified in his defence and called six other witnesses. A number of relevant documents comprising among others, the Deed of Conveyance and survey plans of the parties on the land in dispute were tendered and received in evidence.

The Plaintiff's case as pleaded and supported by evidence is that in 1976, one Emmanuel Adebiyi approached him and offered for sale, a parcel of land at Odota Awurela family land, Idi-Iroko Road, Otta. Mr. Adebiyi claimed that the parcel of land belonged to his mother Eunice Makanjuola Bamisebi, the daughter of Moses Bamisebi of Odota Awurela family, the original owner of the land in Otta. The Plaintiff on being satisfied after enquiries from the members of Odota Awurela family accepted the offer and bought the parcel of land at N1, 200.00. The transaction was witnessed in writing signed

by the parties and principal members of Odota Awurela family. The sale transaction was later confirmed by a Deed of Conveyance executed by the parties to the sale on 21-9-77 after which the Plaintiff assumed effective possession and control of the parcel of land. While the parcel of land was in possession and ownership of the Plaintiff, he sold part of it to other persons who had developed and obtained title documents to their holdings and gave part of it to his wives, brothers and sisters being used for farming. A dispute however arose between the Plaintiff and the Defendant over the parcel of land bought by the Plaintiff because the Defendant wanted to assert his right over the parcel of land sold without the consent of his own mother who ought to have a share in the land. The Plaintiffs action at the trial High Court was therefore a step taken to resolve this dispute.

The Defendant's defence to the action was predicated on the fact that the entire parcel of land sold to the Plaintiff ought not to have been sold without the knowledge and consent of his mother who also had interest in the land in question. The Defendant, who did not counterclaim for title to any portion of the land, merely urged the trial Court to declare the sale null and void and dismiss the Plaintiff's claim.

In his judgment delivered on 21-9-1987, the learned trial Judge after evaluating the evidence called by the Plaintiff in support of his claim that he is entitled to the Right of Occupancy in respect of the land he bought, and the Defendant's defence that the sale of the land to the Plaintiff was void, found that the Plaintiff had failed to prove his claim and dismissed the action against the Defendant. However, the judgment did not stop at the dismissal of the Plaintiff's case because in the course of the consideration of the Defendant's defence to the action, the learned trial Judge quite contrary to the pleadings of the parties and evidence, made a different case for the Defendant by finding and declaring that the land bought by the Plaintiff forms part and parcel of the land of the Defendant, inspite of the fact that the Defendant did not file any counter claim to warrant such finding and declaration.

Dissatisfied with this decision, the Plaintiff appealed against it to the Court of Appeal Ibadan, which in its judgment delivered on 14-2-2002, found the decision of the trial Court against the Plaintiff perverse having regard to the evidence on record and allowed the appeal. The present appeal is by the Defendant who is now the Appellant while the Plaintiff is the Respondent.

The two issues for determination in this appeal as framed in the Appellant's brief of argument and adopted by the Respondent in his brief are:

'(1) Whether the lower Court was right in holding that the identity of the land in dispute was established and thereby proceeded to grant the claim for declaration and injunction without addressing the overwhelming evidence to the contrary (This issue relates to grounds 3, 4, 5 and 6 of the ground of appeal).

(2) Whether the lower Court was right in holding that notwithstanding the breach of the Rules governing writing of Briefs, the Court of below was doing substantial justice by overlooking the Respondent's non compliance. (The issue relates to grounds 1 & 2).'

Starting his argument with the first issue, the Appellant's Defendant's learned Counsel relying on Baruwa v. Ogunsola (1938) 4 WACA 159, said the Respondent as Plaintiff at the trial Court claiming for declaration of title to land had the responsibility of showing to the Court clearly, the area of land to which his claim relates. Learned Counsel pointed out that from the Statement of Claim, the Respondent has failed to discharge the burden of showing the land he claimed resulting in his action being dismissed by the trial Court on the authority of the Court of Appeal decisions in Nwoye v. Bolarin (1991) 4 NWLR (Pt.184) 257; Aweni v. Olorunkosebi (1991) 7 NWLR (pt.203) 336; and Okere v. Nwoke (1991) 8 NWLR (Pt.209) 317. This is because according to learned Counsel, from the Statement of Claim and the Plaintiff's evidence that he sold part of the land in dispute while he gave part of it to his wives, brothers and sisters, the Plaintiff had failed to prove the identity of the land upon which he claims a declaration and injunction. In further argument, learned Counsel observed that there is also evidence on record from the Head of Odota family that the land in dispute belonged to the father of Eunice Makanjuola Bamisebi and the mother of the Appellant which made the sale of the land to the Respondent without the knowledge or consent of the Appellant's mother void resulting in depriving the Respondent of title to the land in dispute. The maxim of nemo dat quod non habet was relied upon by Counsel who concluded that the appeal be allowed on this issue as the Court below was in error in holding that the Plaintiff had

established the identity of the land he claimed having regard to the Plaintiff's evidence of sale and gift of part of the land which learned Counsel also re-emphasised in the Appellant's reply brief of argument.

The Respondent in his brief of argument had identified two complaints of the Appellant in this issue. The first one is that the land claimed by the Respondent as Plaintiff had not been identified with certainty and that the Respondent did not prove good title to the land in dispute. In respect of the identity of the land in dispute, paragraph 3 of the further amended Statement of Claim was referred to which learned Counsel to the Respondent said averred the land claimed by the Respondent. Learned Counsel then referred to paragraphs 1 and 27 of the Defendant's further amended Statement of Defence and submitted that the land in dispute averred in paragraph 27, is the same land claimed by the Plaintiff now Respondent. Going to the evidence of the Plaintiff's third witness Femi Falade who surveyed the land in dispute for the Plaintiff, and the evidence of the Defendant's surveyor DW 1, and the findings of the trial Court based on the pleadings and evidence of the parties on the identity of the land in dispute, learned Counsel argued that the findings of the trial Court on the issue of identity of the land was clearly perverse as found by the Court of Appeal in its judgment allowing the Respondent's appeal after re-evaluating the evidence on record. Counsel then asserted that since the Appellant had not attacked the evaluation of the evidence by the Court of Appeal at pages 193-194 of the record on the identity of the land in dispute, this Court is urged to hold that the findings are correct.

On the complaint of the Appellant that the Respondent did not prove good title to the land in dispute to justify granting him declaration, the Appellant's Counsel pointed out that the Respondent had traced the root of his title to the land in dispute to Odota Awurela family, through the father of Eunice Bamishebi whose own portion of the family land was sold by Emmanuel Adebiyi by which Eunice Bamishebi executed the Deed of Conveyance Exhibit 'D' in favour of the Respondent. Learned Counsel further observed that the Appellant too in his further amended Statement of Defence in paragraphs 6, 12 and 24, traced the root of his title to the same land in dispute to the Odota Awurela family. On proof of good title, learned Counsel referred to the evidence of the seventh Plaintiff's witness, Alimi Odunsi who was the head of Odota Awurela family at pages 67-68 of the record and submitted that on the evidence, the Plaintiff/Respondent had clearly proved a better title to the land in dispute and on the authority of the case of Ajuwon v. Akanni (1993) 9 NWLR (Pt.316) 182 at 206, the Plaintiff/Respondent having discharged the burden placed upon him, was entitled to judgment as found by the Court below. This is particularly so, concluded the learned Counsel, when the parties in this appeal did not join issue on the validity or due execution of the Deed of Conveyance Exhibit D on the pleadings.

The primary duty on a Plaintiff, who comes to Court to claim a declaration of title to land, is to show the Court clearly the area of land to which his claim relates so that the land can be identified with certainly. In other words, in an action for declaration of title to land, the onus is on the Plaintiff to prove title to a defined area to which the declaration can be attached. See Baruwa v. Ogunsola (1938) 4 WACA 59; Odesanya v. Ewedemi (1962) 2 SCNLR 23; Kwadzo v. Adjei (1944) 10 WACA 274; Oluwi v. Eniola (1967) NMLR 339; Olusanmi v. Oshasona (1992) 6 NWLR (Pt. 245) 22; Arabe v. Asanlu (1980) 5-7 SC 78 at 89 and Auta v. Ibe (2003) 13 NWLR (Pt. 837) 247 at 265. Where the land being claimed is contained in a survey plan, it is the duty of the Plaintiff to serve the plan on the Defendant to enable him know the land being claimed against him. See Elias v. Omo-Bare (1982) 5 SC. 25 at 38-40. Such survey plan must show clearly the dimensions of the land, the boundaries and other features. This is because a plan prepared by a licensed surveyor has been held to be the best way of discharging the onus \'of establishing an entitlement to a piece of land with ascertainable boundaries, if available. See Arabe v. Asanlu (1980) 5-7 SC 78 at 89 and 92.

To ascertain the exact claim of a Plaintiff in a land suit, one generally must have recourse to the Writ of Summons and the claim as endorsed in the Statement of Claim. However, just as in determining whether an averment in a particular paragraph of a Statement of Claim is traversed, one is not limited to a particular paragraph of the Statement of Defence but to the entire defence as stated in Iga v. Amakiri (1976) 11 SC. 1; Pan Asian African Co. Ltd v. Nation Insurance Co (Nig) Ltd (1982) 9 SC. 1 and Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519. So by way of analogy, to ascertain the Plaintiffs claim, it is necessary to examine not only the Writ of Summons but also the paragraphs of the Statement of Claim as well as plans filed along with the Statement of Claim.

In the dispute between the parties in this case, I have earlier in this judgment reproduced the Plaintiff's claim as endorsed on the Writ of Summons which reflected the Plaintiff's claim as per the Writ of Summons contained in the further amended Statement of Claim. As I have already stated in this judgment that relief (b) for damages for acts of

trespass on the land in dispute claimed against the 1st and 2nd Defendants alone resulting in the relief being swept away with the striking out of the 1st and 2nd Defendants from the case, the reliefs remaining which were contested between the Plaintiff now Respondent and the 3rd Defendant remaining to defend the case now the Appellant, are reliefs (a) and (c) which I have earlier produced in this judgment.

Some of the relevant paragraphs of the Plaintiff's Further Amended Statement of Claim in which the identity of the parcel of land claimed was pleaded are paragraphs 3, 11, 21, 22, 26 and 26a below:

'3. The Plaintiff states that the land in dispute is particularly described in plan No FF/071/OG/86 drawn by Mr. Femi Falade a licensed surveyor dated 16th January, 1986 and attached to the Statement of Claim.

11. The Plaintiff states that he then bought the land from Emmanuel Adebiyi for N l, 200.00k (one thousand, two hundred naira) and the transaction was evidenced in writing dated 4/4/76 signed by Adebiyi and his mother Eunice Bamisebi, Chief Alimi Odunsi, also known as Fanbayi (the present Head of the family) Joshua Ojo, Samuel A. Dada (senior brother of the Defendant), all principal members of Odota-Awurela family.

15. The Plaintiff states that at the time he was making a plan of the land for the Conveyance, there was a dispute as to the exact boundary between Adebiyi and Eunice Bamisebi on the one hand and Adeyemi Akinsanya and Samuel Ajasa on the other. That in consequence of the settlement the Plaintiff had to concede a small fraction of the land bought by him to (sic).

21. The Plaintiff states that he informed the Defendant who was his personal tailor of the sale of the land at the time of the sale and the Defendant did not lay claim to the land.

22. The Plaintiff states further that a road was made to demarcate the said land from the land of the Defendant by the Plaintiff, the Defendant and other members of Odota family.

26. That after buying the land, the Plaintiff sold part of it to one Saka Ogungbemi who has since been granted a Certificate of Occupancy on the land and has started erecting a building on it.

26(a) The Plaintiff in exercise of right of ownership also granted some portions of the land in dispute to his wives, brothers and sisters and those areas including others have not been built upon are being cultivated by Taoridi and Amusa Bankole.'

From the showing of the Defendant as portrayed from his reaction to the Plaintiff's averments above, the relevant paragraphs 1, 6, 8, 26, 27, 28, 29, 31, 34, 37, 38, and 40 of the further amended Statement of Defence are:

'1. The Defendant denies paragraphs 2(a), 3, 6, 7, 8, 9, 10, 11, 14, 19, 20a, 20b, 20c, 21, 22, 23, 24, 25, 26 and 26(a) of the further amended Statement of Claim.

6. The land in dispute forms part of a larger area of land originally settled upon by Odota-Awurela a hunter and farmer who migrated to Otta from Ile-Ife more than 200 years ago.

8. After building his house at Idota, Odota -Awurela went to a large area of land including the land in dispute, which he settled upon for farming purposes.

26. In 1958, Bamisebi's land, including the land in dispute was partitioned among the three stocks. The land in dispute forms part of the portion given to Olaomo Okeaga, the daughter of Dada Atan. Those who partitioned the Bamisebi's land among the stocks are Joshua Isadare, Chief Momoh Ogunmuyiwa, and Isiaka Raji (now deceased).

27. Plan No FT07/OG/86 drawn by the Plaintiff does not show the true position of the land in dispute in relation to other pieces of land around it. The true position is shown by plan No HU/OG/CC/17 drawn by Alhaji T.A. Hussain on 26/9/83 and attached to this Statement of Defence.

28. The Defendant has a house on part of the portion of land partitioned to his own stock. Others to whom the Defendant's stock gave land and who built houses on the land include Timothy Ajose, Bola Adesiyan, Joseph Orogbo, Isaiah Ogunseye, Idowu Olabisi and others who have not built on plots granted to them.

29. With reference to paragraph 15 of the amended Statement of Claim, the Defendant states that when the Plaintiff trespassed on the land in dispute, and the land of Adeyemi Akinsanya and Samuel Ajasa, each of us chased him out of the land.

31. At the Police Station, the 1st Defendant Emmanuel Adebiyi confirmed that the area in dispute belongs to the Defendant and it was the Plaintiff who left a portion of the land sold to him and moved to the land in dispute.
34. The matter was taken to Mr. Adeyemi Akinsanya where the 1st Defendant confirmed that the Plaintiff went outside the area sold to him and trespassed on the Defendant's land i.e. the area now in dispute. ...

37. The Plaintiff pleaded several times with the Defendant to get the land in dispute sold to him, but he refused.

38. The Defendant was not aware of the purported sale of the land in dispute to the Plaintiff until long after the dispute had arisen.

40. The Defendant will contend at the trial that the sale of the land in dispute to the Plaintiff is void ab initio.'

From these paragraphs of the Statement of Claim and the Statement of Defence of the parties in this appeal, there is no dispute whatsoever between the parties on the identity of the land in dispute being claimed by the Plaintiff/Respondent described in the plan attached to Deed of Conveyance Exhibit 'D' and the plan attached to the further amended Statement of Claim Exhibit 'B' on the one hand and the same land in dispute described in the Defendant/Appellant's plan Exhibit 'E' attached to the further amended Statement of Defence. In other words, the same land in dispute being claimed by the Respondent whose root of title was traced to the original owner of the land Odota Awurela family is the same land in dispute which the Appellant traced title to Odota Awurela family. It is the same land the Defendant/Appellant described in paragraph 34 of the Statement of Defence as the 'area now in dispute' which he refused to sell to the Plaintiff/Respondent. It is the same land in dispute, the sale of which to the Plaintiff/Respondent the Defendant/Appellant was not aware of describing the sale as 'purported' and urging the trial Court to declare the sale void ab-initio.

From the evidence adduced by the parties on the identity of the land in dispute between them, the Defendant's/Appellant's survey plan admitted as Exhibit 'E' which the trial Court preferred as clearly showing the land in dispute, shows the land claimed by the Plaintiff/Respondent as 4429.59 square metres verged yellow and marked 'A'. This land in dispute is shown as forming part of the Defendant/Appellant's land verged blue and marked 'A' and 'C'. In the same plan, the land in dispute is verged red and marked A, the same as the land claimed by the Plaintiff/Respondent.

In the Plaintiffs/Respondent's survey plan admitted in evidence as Exhibit 'B', the land claimed is shown verged red in boundary, while the Defendant's land is verged blue. The same size of the land claimed by the Plaintiff/Respondent in Exhibit 'B' verged red is also described as the land in dispute. In his oral evidence, the licensed surveyor who produced the plan Exhibit 'B' who testified as PW 3, said, all the features on Exhibit 'B' were present when he carried out the survey of land in January, 1986 and that the area shown in the plan Exhibit 'B' verged blue being the Defendant\'s land, was shown to him by the Plaintiff. Similarly the evidence of the Defendant/Appellant's surveyor, PW 1, who produced the plan Exhibit 'E', said in his oral evidence that the land in dispute in both survey plans of the parties admitted in evidence as Exhibits 'B' and 'E', is almost the same. Certainly, from the expert evidence called by the parties on the identity of the land in dispute, that identity was never in dispute between the parties.

However, inspite of the clear position of the parties on their pleadings and the evidence as to the identity of the land in dispute, the learned trial Judge in his judgment quite contrary to the evidence before him, on his own, made an issue out of it by putting the identity of the land in doubt and proceeded to resolve the doubt against the Respondent in favour of

the Appellant by declaring the land in dispute as forming part of the Appellant's land, inspite of the fact that he did not even counter-claim for it. It was for this reason that Onalaja J.C.A., in his judgment on appeal against the judgment of the trial Court, quite rightly in my view, found the judgment of the trial Court perverse and set it aside. Part of this decision of the Court below at pages 193-194 of the record of this appeal reads:

'The learned trial Judge who stated that he believed 3rd PW and accepted his testimony made u-turn to state that Appellant did not show allocation to wives, brothers and sisters in Exhibit 'B' and 'D' as 1st DW the Respondent\'s lands surveyor testified that the land in dispute in both Exhibits 'B' and 'E' were almost the same and led the learned trial Judge to find that this piece of evidence supports the finding that the land in Exhibit 'B' and 'D' was not the land sold to the Plaintiff, and that this piece of evidence supported the claim of the Respondent who did not set up a counter claim. This finding was not only perverse but also made an award to the Respondent who did not counter-claim ran contrary to the rule that a Court must not make a case contrary to the relief or claim sought from the Court.'

I entirely agree. The judgment of the trial Court was clearly perverse for being quite contrary to the evidence on record particularly on the issue of the identity of the land in dispute. In setting aside the judgment of the trial Court, the Court below was merely applying the law on the bindingness of pleadings, not only between the parties but also the Court. Therefore any evidence on facts outside pleadings must be jettisoned as they go to no issue. See George v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 71; N.L.P.C. Ltd v. The Thompson Organisation (1969) 1 All NLR 138 and Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285 at 299. Though the claim of the Plaintiff/Respondent was rather inelegantly formulated by not excluding the portions of the land in dispute sold or allocated to his wives, brothers and sisters, the fact that the nature of the dispute between him and the Appellant which put the entire parcel of land bought by him from the descendants of Odota-Awurela family in dispute as having been sold without the consent of the Appellant's mother, the Respondent having proved his title to that same land in dispute, is entitled to the declaratory relief sought. This is because the attitude of this Court and indeed all other Courts is to do substantial justice without undue adherence to technicalities. Justice can only be done if the substance of the matter is fully examined. Reliance on technicalities leads to injustice. Nishizawa v. Jethwani (1984) 12 SC 234 at 279; Okaroh v. The State (1990) 1 NWLR (Pt. 125) 128 (1990) 1 SCNJ 124 at 130; Dr. Okonjo v. Dr. Odje & Co. (1985) 10 SC 267; Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at 717 and Shuaibu v. Nigeria-Arab Bank Ltd (1998) 5 NWLR (Pt. 551) 582 at 596.

As learned Counsel for the Plaintiff/Respondent correctly put it, parties did not properly join issue on the identity of the land claimed by the Plaintiff/Respondent. As I have earlier stated in this judgment, a Plaintiff seeking a declaration of title to land has the primary duty or burden to prove clearly and unequivocally the precise area to which his claim relates. That is the law. However, that burden will not arise where the identity of the land in dispute was never a question in issue. That issue will only arise where the Defendant raises it in his Statement of Defence and supported by evidence. See Ezendu v. Obiagwu (1986) 2 NWLR (Pt. 21) 208; Fatuade v. Onwoamanam (1990) 2 NWLR (Pt. 132) 322; Ezukwu v. Ukachukwu (2004) 17 NWLR (Pt. 902) 227 and Ogun v. Akinyelu (2004) 18 NWLR (Pt. 905) 362 at 385. In the present case, the issue of the identity of the land in dispute was made an issue by the learned trial Judge in his own judgment resulting in that judgment being set aside on appeal on the main ground of being perverse by the Court below, the judgment of which is now on appeal. Therefore on the state of the law, the Appellant not having raised the issue of the identity of the land in dispute in his Statement of Defence and supported by evidence, cannot raise the issue in vacuum in the Court of Appeal or in this Court. In other words to allow the Appellant's appeal on this issue is tantamount to allowing the appeal on the issue raised by the trial Court in the absence of the relevant facts on pleading and the evidence to support it on record.

In any case even in cases where the issue of the identity of the land being claimed had been properly raised leading to the setting aside of the judgment of the trial Court or appellate Court on the ground that the area of land granted to the party claiming is indefinite and unascertainable, if the party claiming had proved his claim on preponderance of evidence on record, the attitude of this Court in such circumstances had been to order a retrial and not to dismiss the appeal outright. See Akpan Obong Udofia v. Okon Akpan Udo Afia 6 WACA, 216 at 217 and Arabe v. Adanlu (1980) Volume 12 NSCC 213 at 218 where Bello, J.S.C. (as he then was, of blessed memory) said:

'I have pointed out earlier on that learned Counsel for the Appellant failed to show on the sketch plan, the area of the

part awarded to the Appellant. It appears from the judgment of the trial Court that the part of the land granted to either party cannot be ascertained with reasonable certainty. Inspite of their commendable effort to determine and identify the part either party is entitled to, the judgment of the Judges of the trial Court does not show definite and precise boundary of either party of the land awarded to the parties. It follows therefore that the judgment cannot stand. Accordingly, the Court of Appeal, following Akinolu Baruwa v. Ogunsola & Ors (supra) and Akpan Udo Obong Udofia v. Okon Akpan Udo Afia (supra), acted rightly in setting aside the judgments of the lower Courts on the simple ground that the area granted to either party is indefinite and unascertainable. However having regard to the fact that the Appellant is entitled to a portion of the land in dispute, I am of the opinion that it is not just and equitable to dismiss his claim. For dismissal of his claim may operate as an estoppel in that no further claim of ownership of any part of the land in dispute can be made by the Appellant in any subsequent proceedings between him and the Respondent. Being a representative action, the same estoppel would operate against all and every member of the Isolo of Isanlu Isin family in favour of all and every member of the Asanlu family. In my view the proper order to make under the circumstances of the case is to remit the case to the trial Court to ascertain the exact part of the land in disputes, which belongs to the Appellant and to the Respondent respectively as was done in Akpan Obong Udofia & Anor. v. Okon Akpan Udo Afia & Ors (supra).'

Applying this decision to the present case, it is quite clear that the Respondent in the present case is on a more solid position regarding his claim than the Appellants in Arabe v. Asanlu (supra) in whose favour a retrial was ordered solely for the trial Court to determine the exact and precise area of the land in dispute each of the parties was entitled. This is because in the case at hand, the exact boundaries of the land being claimed by the Plaintiff/Respondent in his survey plan Exhibit 'B' are the same as the boundaries of the land in the Defendant's/Appellant's survey plan Exhibit E in respect of which he is challenging the title acquired by the Plaintiff/Respondent as the result of the purchase of same from the descendants of Odota Awurela family, the original owners of the land in dispute. Since there is no dispute between the Respondent and the members of his own family comprising his wives, brothers and sisters to whom he had allocated part of the land in dispute for farming or the party to whom the Respondent sold part of the land claimed by him upon which a certificate of occupancy had been obtained and a house built there upon, and in the absence of any dispute between the Appellant and the persons to whom the Respondent had given or sold part of the land claimed, there is no need to send this case back to the trial Court for that Court to determine the exact or precise area of land now remaining under the entitlement of the Respondent, in the absence of a counter-claim for the whole land or any part thereof by the Appellant.

On the question of whether the Respondent had proved his claim to have been entitled to the declaration sought against the Appellant, I say the evidence in support of the claim of the Respondent is overwhelming particularly the evidence of Alimi Odunsi the then Head of the Odota-Awurela family who supported the Respondent's claim. The Court below in my view was right in granting the Respondent's reliefs on the evidence on record.

The second issue is whether the lower Court was right in holding that notwithstanding the breach of the Rules governing writing of Briefs, the Court below was doing substantial justice by overlooking the Respondent's non-compliance. The complaint of the Appellant in this issue is that since the Respondent as Appellant in the Court below did not tie the issues formulated in his brief of argument to the grounds of appeal and having also failed to file a reply brief to the Preliminary Objection raised by the Appellant in his Respondent\'s brief in that Court, the Respondent's appeal ought to have been struck out for failing to comply with the mandatory rules of the Court below.

The Respondent relying on the decision in Nsirim v. Nsirim, (1990) 3 NWLR (pt.138) 285 at 296, argued that the Appellant not having properly raised his Preliminary Objection to the Respondent's appeal at the Court below, that Court was right in hearing the appeal, particularly when the Appellant did not file any Respondent's Notice in that Court to contend that the judgment of the trial Court be sustained on grounds other than the grounds relied upon by the trial Judge. Learned Counsel for the Respondent therefore argued that the issue raised in the Appellant's Brief as Respondent in the Court below not being a new issue, the filing of a reply brief was not necessary on the authority of Okonji v. Njokanma (1999) 14 NWLR (pt.638) 250 also reported in (1999) 12 SC (part 11) 150 at 159. Concluding his argument on this issue learned Counsel maintained that the Court below was right in doing substantial justice to the appeal before it.

This issue simply deals with the effect of the failure of an Appellant in appeal to file a reply brief in response to a

Preliminary Objection raised by the Respondent in the Respondent's Brief of argument. Failure to file a reply brief to respond to the Respondent's Preliminary Objection to the competence of the Appellant's appeal arising from filing a bad Appellant's Brief, does not automatically lead to the upholding of the Preliminary Objection and striking out of the appeal as conceived by the Appellant in this issue. A reply brief required to be field by an Appellant under order 6 rule 5 of the Court of Appeal Rules, only affords an Appellant an opportunity to respond to any new points arising from the Respondent's brief. It is obviously not a necessity or mandatory as claimed by the Appellant. See Okonji v. Njokanma (1999) 14 NWLR (pt.638) 250 at 269. In any case the position of the law in dealing with an appeal where the Appellant does not file a reply brief to the Preliminary Objection to the appeal raised in the Respondent's brief has been decided by this Court in Salami v. Mohammed (2000) 9 NWLR (pt. 673) 469 at 476 where Wali J.S.C. stated the position as follows:

'In the Brief filed by the learned Counsel for the Respondent, the question of competency of the appeal was raised. The 1st point raised was that the Appellant argued in his Brief the grounds of appeal instead of the issues formulated therein. The second point was that the grounds of appeal did not arise from the proceedings in the Court of Appeal. He urged this Court to strike out the grounds of appeal and to make an order dismissing the appeal. There was no reply brief filed by the Appellant in response to the two preliminary points raised in the Respondent's Brief. The Appellant's Counsel did not put up appearance in Court on the day the appeal was taken. So the Appellant\'s appeal was taken as argued on the brief he had filed.'

The appeal in that case was consequently heard on the merit together with the Respondent's Preliminary Objection, the second leg of which ultimately succeeded and the appeal was struck out for having been filed without leave.

This same procedure adopted in Salami v. Mohammed (supra) was adopted by the Court below in hearing the Respondent's appeal in the absence of a reply brief in response to the Preliminary Objection raised by the Appellant. The Court below indeed duly considered the Appellant's Preliminary Objection and refused it before proceeding to determine the appeal before it on the merit. Part of the Ruling on the Preliminary Objection at page 176 of the record reads:

'In the result of the preliminary question raised by respondent is refused though forcefully argued as in my assignment respondent was not misled as respondent filed a prolix statement of defense notwithstanding the lazy way of concluding paragraph 27 of the Statement of Claim.'

It can be seen that the appellant's preliminary objection was duly considered and effectively determined by the court below in accordance with the law.

On the whole, having carefully considered the two issues formulated by the appellant in the determination of this appeal, I am unable to see any justification in allowing this appeal resulting in the restoration of the judgment of the trial court which the court below set aside on the ground of being perverse for finding for the appellant what he did not claim. This is particularly so when there is no appeal against the decision of the court below that the judgment of the trial court was perverse. I therefore dismiss the appeal and affirm the judgment of the court below in ensuring justice in the settlement of the dispute between the parties.

The Respondent shall have N10, 000.00 costs against the Appellant.