ALHAJI TUANI SALAMI

V.

CHIEF SURAKATU GBODOOLU CHIEF BABALOLA, N. LADOT AFIN, Chief OPEBIYI, ODOFIN TAFIN SUNMONU ADEOGUN, ARE TAFIN

SUPREME COURT OF *NIGERIA*

ISC.62/1991

SALIHU MODIBBO ALFA BELGORE, *J.S.C.(Presided)* MICHAEL EKUNDAYO OGUNDARE, J.S.C.
UTHMAN MOHAMMED, J.S.C.SYLVESTER UMARU ONU, J.S.C. YEKINI OLAYIWOLA ADIO, *J.S.C. (Read the Leading Judgment)*

FRIDAY, 11TH April, 1997

APPEAL – Findings fact of trial court - Attitude of appellate court thereafter

*JUDGMENT AND ORDER - Consequential orders - Where a plaintiff had failed to prove his case proper order to make****

*****JUDGMENT AN ORDER – financial order - When it"sfW1fld not* be m&1e,.

LAND LAW - *"Land" – Meaning of - How to describe for purpose of pro forfeit therein.*

LAND Law - Declaration of entitlement to statutory right of occupancy - Burden on plaintiff claiming - How discharged - Whether Can relies on kinesis in defendant's case.

LAND LAW - Title to land - Evidence of traditional history thereon - When it can ground claim title - When it cannot - Where not conclusive – What plaintiff should now to succeed.

LAND - Title to land- Identity of land in dispute - duty on plaintiff to prove with certainty - When survey plan necessary - When unnecessary

PRACTICE AND PROCEDURE - Findings of fact of trial court - Attitude of appellate court thereto.
PRACTICE AND PROCEPURE - Judgment and order - Consequential orders where a plaintiff has failed to prove his case - Proper order to make.
PRACTICE AND PROCEDURE - Retrial order when it should not be made.
WORDS AND PHRASES - "Land" - Meaning of - How to describe for purpose of proof of title thereto.

Issue:

Whether from The totality of the evidence adduced at the trial, the respondents described the onus of proof necessary to entitle them to the relief's claimed. .

Facts:
The respondents herein were the plaintiffs at the High Court of Ogun State, Abeokuta where they sued the appellant and claimed a declaration of entitlement to statutory right of occupancy, damages for trespass and an injunction in respect of a parcel of land which they claimed belonged to them.

The evidence led by the respondents was *inter alias,* that the whole area verged "red" on the survey plan, Exhibit "A", formed part of a larger parcel of land originally settled upon by the Tafin community members when they migrated from their Tafin homestead at Osiele to Abeokuta allegedly in 1830. According to them, part o{the area verged red was granted absolutely to one Unload, a chief of Tafin, arid another portion was granted to one Latifu Adewuyi while the parcel of land adjacent to the land of their, community was similarly granted absolutely to Adao (appellant's) community.

The appellant's case was that the whole land verged "red" in the survey plan (Exhibit "B") was owned by one Oluwo Adao, the appellant's ancestor, who was the founder of Adao Aboni family: He (the appellant's ancestor) acquired it by settlement, when he migrated from Adao homestead to Abeokuta in 1830. The land in dispute, according to the appellant, was within Adao family land." On acts of years exercised on the land in dispute by his family, the appellant led evidence that his family had on the land in dispute a portion thereof designated as "Igbo Ita" demarcated originally by eight palm trees planted by his ancestor out of which four were still on title land in dispute. Appellant's family granted permission to one Latifu Adewuyi (5th P.W.) to be on the land in dispute. When one Alhaji Abudu attempted to cause a surveyor to survey the land in 1971, the appellant's family successfully resisted the move. The lbarapa Community Chiefs intervened and resolved the conflict in the matter in favour of the appellant. . The incident and. the resolution of it in favour of the appellant's family were known to the 1st P.W. {n 1982, the 5th P.W. converted the temporary shed which he erected, with the permission of the appellant's family, on the land in dispute to a permanent structure. The appellant gave the 5th P. W. a notice to quit and made a report of the matter to the police. The police arrested the 5th P.W. and he was released when he gave an undertaking to give up possession.

In its judgment, the High Court dismissed the entire case. The court held that there were contradictions 'between' the contents of the survey plan tendered by the respondents (Exhibit A) and the oral evidence led by the land also in the evidence of 'the respondents' witnesses on the location of the land" in dispute. The respondents were not satisfied with the judgment and they appealed to the Court of Appeal, which allowed the appeal and ordered a re-trial me appellant then appealed to the Supreme Court.

Held (Unanimously allowing tie appeal): On Meaning of "land" and how described
The word" *land"* ordinarily mean Saying soil or earth or the solid part of the mean's surface as drifting pushed from sea. Since land is by its very nature an immovable object, its location is

such as import in

On Burden of proof on plaintiff claiming declaration of statutory right of occupancy . In an action that a declaration statutory right of occupancy, the buren in on; the plaintiff to satisfy' the" court that 'he is entitled"on'the1evidence adduced by him to the declaration claimed. He must rely little strength of his own case and not on the weakness of the defendant's case for the purpose of discharging there under. This is under includes the requirement this chief must prove to identity of the land coed by him .if their parties are not . If plaintiffs to fulfill this requirement, his Claim will be dismissed mid judgment entered the defendant. However, such a judgment decrees-no title in the defendant who has not sought a declaration. *(1935) 2WA:CA336 Imah v. Okogbe* (13) 9 NWEW (P. 916) *15, Makanjuola v. Balogun* (1989) 3NWLR *(PCI08Y192 Adebisi v. Ekwealor* (1993) 6 NWERC (Pt302) 643 referred to *(Pp. 285,paras F-G 288, para. E)*

On Burden on plaintiffs seeking titled land to prove identity of land in faction' for a declaration statutory tight of discrepancy, when the "parties, by the, evidence. Add both or a land documentary, are *item* on the identify of the land in dispute, the fact that different names are described to it or the area where if is located is call different names is not fatal to the plaintiff's

It is impossible to ascertain with seasonal led agree of certainty the location of the land in dispute or a situation in which some of the witnesses who testified, on the point for a plaintiff stated that at the land is located in one place and other witnesses say it is at another place or other places. Thus, where draw the evidence of a plaintiff's witnesses, it is not probably possible to ascertain the location identity of the land in dispute, the production of a survey plan may be an answer or provide, a solution to the problem. In the instant case, the production of a survey plan did not provide an answer as the survey plan Exhibit A tendered by the plaintiffs was not only unhelpful, but it was misleading and confusing relation to the identity allocation of the land in dispute *[Abiodun v. Fasanya,* (1974) 11 SC *61- Makanjuola v. Balogun* (1989) 3 NWLR (Pt.108) 192; *Ojibah* v. *Ojibah (1991)* 5 NWL (Pt.191) 296 referred to *(Pp.* 288289, *paras. F-A)* Per OGUNDARE J.S.C. at page 292,paras.D-F:

Their Lordships, Per Omololu Thomas, J.C.A. said:
"It is not uncommon under native law and custom that different names are given by different people and communities to the same area of land which is subject matter of dispute under native law and custom." Until the greatest respect to their Lordships, the issue here is not opposite. It is not a case of dealing the land in dispute different fames by different witnesses. It is a case if contradictions in the location of the land, that is as to whether the, land is in Tafin (where it would be if the. Plaintiffs story of settlement is correct) or Oke- Adao (if it is "the defendant's story that is the correct version) or in Oke & Regba or Iregba. As the witnesses for the plaintiffs could not abreast, the location of the land, rather than its identity plaintiffs must fart in their claims and those claim is were rightly dismissed by the tria1 court."

On Reliance in traditional history to support claim of title to land Where evidence of traditional history is not contradicted in conflict an found by the court to be cogent it can support a claim for a declaration, or statutory right 'of occupancy; If the hence of traditional history is no conclus1ve then the court should consider evidence of- recent acts of possession and of ownership. If the plaintiff waits to prove not it then list claim should be dismissed. In-this case, as all traditional

evidence led on the respondents did not establish that as, they alleged, they title on particular parcel of land in Abeokuta, there could be no question of
giving consideration to any purported acts of session or of ownership on their part since *nemo dat quot! Non Jipbet o* Ode gives what is not his. *[Olujebu of Ijebu* v. *511 Motunwase* v. *Sorungbe* (1988) 5NWISHG 1.97) *90 Odofin* v. *Ayoola (1984)* 11 SC. 72; *Magaji* v. *CIJD & IIFR (Nigeria) Ltd* (1985) 2 NWLR (Pt.7) 393; *Anyaduba* v. *Interim Renowned Trading Co. Ltd.* (1992) 5 NWLR (Pt243) 535 referred to]. *(P.290, paras, D-E,G)*

On Proper order to make where plaintiff has failed to prove" his case Where a plaintiff has failed *in toto* to prove his case at the trial court, the case should be dismissed and an appellate court should not order a ref trial or a non-stiff to do so will amount only to giving the plaintiff another opportunity of proving what he had failed to prove in the first instance. *[Elias* v. *Disw (1962)* 1 SCNLR *361Total(Nig J) Ltd: v. (iko* (l978) 5 & CI *George* v. *George* (1964) 1 All NLR136 *referred to (P72 para.* C) On *When are trial order should not be made.*

As it is the duty of court to do complete justice. In act case, if a Court of Appeal on a proper consideration before it comes to the conclusion that it justice between the parties, a retrial should. This is also in conforming to the provisions of the Supreme Court Act. *[Sanusi v. Ameyogur"* 4 NWLR EPt.237) *527;Adeyemo* v. *Arokopo* (1988) 2NWLR"(Pf.79) *703Fatoyinbo v. Williams* (1956) *SCNLR274;Okoye v. Kpajie (1973)'NMLR 84;/monlkhe* v. *A.G. Bendel State* (1992) 6 NWL Pg. 48) 396 referred to (P.295 *paras. D-E)*

On Attitude of appellate court to findings draft of trial court Where a trial court which has the advantage of seeing land hearing the witnesses has CODI to specific findings off ton tile evidence on issues before it an appellate court what that for such opportunity should refrain from coifed reminding unless it can show that the conclusion on follow from the evidence before it. *[Odofin* v. *Ayoola* 72 *Ebba* v. *Ogodo* (1984) 1 *SCNLR372; lyaro v State* l WLR (Pt.69) *256; Ajayi* v. *Texaco (Nig) Ltd;* (1981) (Pt.62) 577 *;Onwuka v Eniola* 1989) *INWLR (Rt96J: l82; dului v Nwosu 1992) 5NWLR(Pt.241)273 Odinaka v. MO. (1*992) 4NWLR (Pt.233) 1 referred to]. *(Pp. 29, para 511)* Nigerian Cases Referred to in the Judgment:

Abiodun v. *Fasanya* (1974) 11 SC 611 *Abisi v Ekwealor* (1993) 6 NWLR (Pt.302) 643 Adeyemo v. *Arokopo* (1988) 2 NWLR (Pt.79) 703. *Agbonifo* v. *Aiwereoba* (1988) 1 NWLR (Pt.70) 325 *Ajayi* v. *Texaco (Nig.) Ltd.* (1987) 3 NWLR (Pt.62) 577 *Amadi* v. *Nwosu* (1992) 5 NWLR (Pt.241) 273

Ali Aduba v. *Nigerian Renowned Trading Co. Ltd.* (1992) 5.NWLR (Pt.243), 535 .
Aseagba v. fodile (1972) 6 SE. 237
Atanda v. *AJan{(1989)* 3 NWLR (Pt.U1}511
Bakare v. Apena (1986) 4NWl.R \Pt33) 1
Dibiamaka v. *Osakwe* (1989) 3 NWLR (Pt.1O7) 101
Duru v. Nwosu (1989) 4 NWLR (Pt.I13) 24
Ebba v. Ogodo (1984) 1 SGNLR 372
Ekpon Ita (1932) 11 NLR68.
Ekretsu v. Oyobebere(1992) 9 NWLR (Pt.2-66) 438

Elendu v. Ekwoaba (1995} 3-NWLR (Pt38u} 704
Elias v. Disu (1962) l SGNLR 361
Emegokwue v. Okadigbo. (1973)4 SEIL 3
Fatoyinbo v. WilIiams (1956) SGNLR 274
George v. George (1964) 1 Alli NLR 136
lmah v. Okogbe (1993) 9 NWLR (Pt.316) 159
lmonikhe v. A.G; Bendel State 1992),6 NWLR (Pt:248) 396 *lyaro v. State* (1988) FLR(Pt69) 256 *odilinye v. Odu* (1935)2 WACA 336 *Makanjuola Balogun 1989) NWLR* (Pt 108) 192 *Mogaji v. Hury (Nig.) Ltd:* (1985) 2 NWER (Pt.7f393 *Motunwase v. Sorungbe (1988)* 5 NW1.R(Pt.92) 90 *Odinaka v. Maghdiu* (1992) 4 NWLR-(Pt.233) 1 *Odofin v. Ayoola* (1984) 11 SC. 72
Ojibah v. Ojibah (1991,) 5 NWL & (RL19 f)' 296
Ikoye v. Kpajie (1973) NMLR 84
Olabanji v. Omokewu (1992) 6 NWLR(Pt!250) 671 *Olanrewaju v. Ga v. Oyo State* (1992) NWLR (Pt.265) 335 *Olujebu of ljebu v. Osa* (1972) 5 S.C.143
Onwuka v. Ediala(1999) 1 NWLR(Pt:96) 182
Oizu v. Anyaegbunam (1975) 5 SC. 1
komaine v. Ramame (1992) 4 NWLR(Pt.238) 650
Sanusi v. Ameyagun (1992) 4 NWLR(Pt237) 527
Total (Nig. Ltd. v. Nwako (1978)'5EC.

Nigerian Statutes Referred to in the Judgment
Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 S. 12(a) Supreme Court Act a p. 424, Laws of the Federation of Nigeria, 1990, S. 22

Foreign Case Referred to in the Judgment:
Ermpong v. Brempang (1952)14 W ACA 13
Book Referred to in the Judgment:
Webster Dictionary, 2nd Ed. P. 1098

Appeal:

This was an appeal against the decision of the Court of Appeil1 setting aside the judgment of the High Court which had dismissed the respondents case and order trial. The Supreme Court, in a unanimous decision, allowed the appeal and restored the judgment of the High Court.

History of the Case:

Supreme Court:
Names of Justices that sawn the Appeal: SalihuM6dibbo Alfa Belgore, J,S.C. *(Presided);* Mikhael Ekundayo, Ogundare J.S.C.; Uthman Mohammed, J.S.C.; Sylvester Umaru Onu, J.S.C.; Yekini Olayiwola Adio, *J.S.C.(Read the1eading judgment).*
Appeal No: SG,62/199l
Date of Judgment *Friday,* 11th April, 1997
Names of Counsel. Afolabi Fashanu, Esq. - *for other Appellant* O. Alli Esq. With him Kehinde Kola Eleja, S.U. Solagberu) *for the Respondents*

Court of Appeal

Division of the Court of Appeal from which the Appeal was brought:
Court of Appeal lbadan.
Names of Justice that sat on the Appeal: Idris Legbo Kutigi; J.C.A.*(Presided); John Ezekiah Omololu Thomas; J.C.A. (Read the Leading Judgment* Emanuel Obioma. Ogwuegbu, .J.C.A.
Appeal No: CA/I/61188
Date-of Judgment:: Wednesday, 12th July, 1989 N*ames of counsel –L D, Fagbemi, Esq.* (with him, A.O.Osundina (Mrs - *for the Appellants* Chief Toye Coker, SAN(with him, Afolabi Fashanu, Esq.) – *for the Respondent*

High Court:
Name or the High Court: High Court, Abeokuta *Name of the judge:* Adegboyega Odunsi, J.
Suit No: AB/19/83
Date of Judgment: Wednesday, 18th December 1985 *Names of Counsel:* Falode -*for the Plaintiffs O.O. Idowu, on the Defendants*

Counsel: .
Afolabi Fashanu Esq. for the Appellant.
Yusuf. O. Alli Esq.: (with him Kehinde Ola Eleja is B. Solagberu) - *for the Respondents* -

ADIO, J.S.C. (Delivering the Leading Judgment): In the High Court of Justice
Abeokuta Judicial Division of Ogun State, the reliefs claimed, in paragraph 1 of the Statement of Claim, by the respondents against the appellant were as follows:

Declaration that the plaintiffs are entitled to certificate of occupancy over the piece or parcel of land in respect of the area verged yellow excluding the area upon which Adewuyi built his house as indicated on survey plan No. AK. 5997 *LOG* drawn by D:O. Akingbogun B Licensed Surveyor of Ibadan.

Five Hundred Naira general damages for trespass committed by the defendant who without consent 01' permission of the plaintiffs unlawfully entered the land and started the erection of a building foundation on the land. Injunction to restrain the defendant his servants and/or agents from further acts of trespass on the land.

Pleadings were filed and duly exchanged by the parties. The evidence led by the respondents was *intern alia,* that the whole area "verged real on the survey plan, Exhibit *"N',* formed proffer larger parcel of land originally settled upon by the Tafin community members when they migrated from their Tafin homestead at

Osiele to Abeokuta allegedly in 1830. According to them, part of the area verged red was granted absolutely to one Onlado, a chief of Tafin, and another portion was granted to one Latifu Adewuyi while the parcel of land adjacent to the land of their community was similarly granted absolutely to Adao (appellant's) community.

The appellant’s case was that the whole land verged "red" in the survey plan (Exhibit "B:') was owned by one Oluwo Adao, the appellant's ancestor, who was the founder of Adao Aboni family: He (the appellant'1fancestor) acquired it by settlement when he migrated from Adao

homestead to Abeokutain'1830. The land in dispute, according to die appellant; was with if Adao family land" On acts of ownership exercised on the land in dispute by his family, the appellant led evidence that his family had on the land in dispute a portion thereof designated as "Igbo Ifa" demarcated originally by eight palm trees planted by his ancestor out of which four were still on the land in dispute. Appellant's family granted permission to one.

Latifu Adewuyi (5th P.W.) to be on the land in dispute. When one Alhaji Abudu attempted to cause a surveyor to survey the land in 1971; the appellant's family successfully resisted t to move. The Ibarapa Community. Chiefs intervened and resolved the conflict in the matter in favour of-the appellant: the 1st P. W knew The incident and the resolution of it in labor of the appellant's family. In 1982, the 5th P.W. converted the temporary shed which he erected, with the permission of the appellant's family on the bitted in dispute to' a permanent structure. The appellant gave the 5th P. W. a notice to quit and 'made a report of the matter to the police. The police arrested the 5th P.W and he was released when he gave an undertaking to give up possession.

Mater due consideration of the evidence led by the parties and' of the submissions of their learned counsel, the learned trial judge dismissed the respondents' claim in its entirety. The learned trial Judge pointed out that there were contradictions between the contents of the survey plan, tendered by the respondents, (Exhibit "A"), and the oral evidence led by the respondents and contradictions in the evidence of the respondents' witnesses on the location of the land in dispute. It was not a case of witnesses referring to the location of the land in dispute by

A different names m" which case it could be that the parcel of land being referred to by the witnesses-by different names was the same. The evidence been given by the purported to show that the land in dispute was at separate and different places. On the whole, - the learned trial judge rejected the evidence led by the respondents and accepted-the appellant's evidence. He, therefore dismissed the respondents.

Dissatisfied, with the judgment of the learned trial Judge/the respondents lodged an appeal against it to the Court of Appeal which allowed the appeal: The court below set aside the judgment of the learned trial Judge and ordered a retrial. The coJll1 embarked upon the consideration and evaluation of the evidence before the learned trial Judge. In the view of the court below, the question of the location of the land in dispute was not raised and the learned trial Judge was wrong to allow its views on the credibility of the respondents witnesses, on the point to influence it in the evaluation of the evidence the making of findings of fact on other aspects of the. Further, in the view on the court below the approach of the learned trial Judge to the case as a whole was wrong and the proper order to make, in the circumstances, was an order for a retrial.

Dissatisfied, with judgment of the court below "the appellant lodged an appeal against into this court. In accordance with the rules of this court the parties filed and exchanged beliefs. The appellant filed an appellant's brief and the respondents filed a respondent brief. The appellant also filed a reply brief. The appellant in entities anyone issue for determination in his brief while the respondents, in their-own brief, identified only one issue for determination. The issue identified for determination in the appellant's brief appeared to me to be more comprehensive

and I will use it for the determination of this appeal. It was as follow:

"Whether from the totality of the evidence adduced at the trial, the respondents discharged the onus of proof necessary to entitle them to the reliefs claimed."

" The burden is on a plaintiff who is claiming a statutory, right of occupancy to satisfy the court that he is entitled on the evidence adduced by him to the declaration claimed. He must rely on the strength of his own case and not on the weakness of the defendant's case, for the purpose of discharging the burden. See *Kodilinye v. Odu (1935)* 2 WAF2A336; *and lmah* v. *Okogbe. (1993) 9NWLR(Rt.316)* 159. The burden on the plaintiff, in the circumstance, includes the requirement that it is for him to prove the identity - of the land claimed, by - him if the parties are not *ad idem* on the identity on the land. See: *Makanjuola* v. *Balogun* 0989) 3 NWLR (pt. 108) 192...lf a-plaintiff fails to fulfill the requirement, that is, top rove or establish the identity of the land in dispute his claim for a declaration of statutory right of occupancy will be dismissed; See *Makanjuola' & case supra.* In view of the fundam_nta1 importance of the requirement, it was one of the first issues dealt with by the learned trial Judge. His conclusion was that the respondents did not establish the identity of the land (as part of the land on which members on the respondents' Community settled). The court below reversed the finding. The finding of the - learned trial Judge, which the court below reversed was as follows:

"Although there is no dispute as to the identity of the land which is the subject matter of this case is surprising that whilst the 1st plaintiff says that the land is at Tafin, the and plaintiff says that it is at Oke Adao and the 5th P.W. says it is at Oke Aregba. There is no evidence that Tafin, Oke Ado Oke Aregba and Aregba are one and the' same thing;- .The contradictions in the evidence .of the plaintiffs' witnesses highlighted above make it difficult to believe the contention of the plaintiffs that the land in-dispute belonged to Tafin Community or that they granted any land to Adao Community." .

In the view of the court below, the learned trial Judge, having stated in his judgment that the identity of the land which was the subject matter of this action was not in doubt, was wrong-"in holding that the evidence of the respondent witnesses on the location of the land in dispute' was contradictory, that, for that " Quality in a1lowing IDS erroneous view about the credibility of the witnesses-to influence him in making findings of fact in other respects. The court-below stated, *interact;* as follows:-

"The respondent's counsel on the-other hand said that the appellants and their witnesses were unable to say with certainty in which area the land in undisputed is located. I must pause here and observe straightaway that nowhere in the respondent s pleadings did he raise such issue. The respondent filed Exhibit "B" describing the land as being at Oke Adao whilst the appellants filed Exhibit A and B stated that it is Aregba. The issue as canvassed by the respondent not having been raised the trial Judge was wrong to have relied upon it. He further submitted that the appellants' evidence and those other witnesses 'were at variance with their pleadings.

The point here on that submission is that all the different names given in that case-will lowly go to no issue: The learned trial Judge ought therefore to have so considered and ignored them.

Even then, if such issue-had been raised, and I am wronging construct, the passage of the onus is on1y the respondent, and NOT the appellants to prove the pavement. It is only then that the learned trial Judge can therefore make a finding on the issue. As no such issue was raised, no such finding was called for.

It is significant to note that from the pleadings the land in dispute as edged yellow- in Exhibit "A" was admitted and no further proof of-the identity of the land was required on "the appellants part. The learned trial Judge therefore appeared to be a bit confused; in that the real issue before is as to the ownership of the land in dispute (Exhibit A as admitted which formed part of the area originally settled upon by the appellants according to their case and by the respondent's family according to his case His views' on the contradictions of the evidence of appellants' witnesses and his disbeliefs by reason of these, led him erroneously to evaluate the evidence other that ti1l trees Oddly enough he did this on the basis of the respondent's case after he had discredited the appellants witnesses.; It is not uncommon under native law and custom that different names are given by different people and communities to the same area of land, which is subject matter of, dispute under native law, and custom:"

The appellant, in' his brief pointed out that the respondents, purported to trace their root of title to Tafin, community which was said to have settled on a large piece of land (edged reading Exhibit A which included the land in dispute edged yellow in Exhibit A. It was also pointed out that it was the case of the respondents that the whole land, edged red in Exhibit which included the land edged yellow in the same Exhibit, was at Aregba and that members of Tafin (appellants') community were the first set of people who settled on the land. It was submitted that since the respondents based their alleged ownership of the land edged red in Exhibit "A" on settlement; the oral evidence led by them on the alleged settlement should not differ in material particulars from the relevant averments in their pleadings otherwise their, claim must fail. The appellant setout the discrepancies C or contradictions in the oral evidence led on the identity location of the area edged red in Exhibit "A" and pointed out that there was no evidence that the various places mentioned were one and the same place particularly having regard to the evidence of the 6th P.W. that the place upon which one Aregba settled was known as Aregba; It was contended that what the appellant admitted was that the land in dispute was edged yellow in Exhibit A. It was contended that that could not be taken as an admission that the appellants 'in community settled on the large parcel of land edged red in Exhibit *"N'* which included the land in dispute edged yellow in the same survey plan.

The submission in the respondents brief in relation to the identity/location of the land in dispute was that there was no cross appeal against the finding of the learned trial Judge that there was no dispute as to the identity of the land which was the subject matter, of this case. It was pointed out that the averment in paragraph 5 of .the statement of claim was that the land in dispute was edged yellow on Exhibit “A" and the appellant in paragraph 1 of the statement of defence admitted.

Paragraph 5 of the' statement of claim Further the, surveyors of both parties testified, that the land in dispute in Exhibits "A and "B" were more or less identical. It was, therefore, submitted that the circumstance, the respondents did not have to discharge the burden of proving the identity of the land in dispute.

The word land? In its ordinary meaning means any ground, soil or earth or the solid part of the earth's surface as distinguished from sea. See *Webster Dictionary, 2nd ed.,* 1998. The fact is that, by its very nature, land ordinarily is an immovable object. Its location is such an important part of its description that it is doubtful whether a description of it for the purpose of identification, can be said to be complete without mentioning its location. The averment in paragraph 5 of the statement of claim, which the appellant admitted, was that the land in dispute was edged yellow on Exhibit" A and no more. That was not an admission that the area edged yellow on Exhibit "A" was necessarily the land or any part of the land on which the members of the appellants' community settled when they allegedly migrated from their hometown to Abeokuta. The question whether members of the respondents' community migrated from somewhere to a place in Abeokuta and, if so, the land on which they settled, was raised in paragraph 8 of the statement of claimed the appellant in paragraph 4 of the statement of defence denied it. Even in that case; some how the respondents did not state in paragraph 8 of the statement of claim the name of the place on which they allegedly settled. Paragraph 8 of the statement of claim reads:

"The plaintiffs state that due who are averted Red on the survey A plan No. AK5997/G forms part of a larger parcel of land originally settled upon by Tafin community when they migrated from Tafin homestead at Osiele to Abeokuta as the result of inter tribe at war inc or around 1830.

If, as he1d by the court below, the real issue before the learned trial Judge was as to the ownership of the land in dispute (Exhibit A as admitted) which formed part B of the area originally settled-upon by the respondents according to their case and by the appellants family according to his cases then the identity /location of the land upon which the members of respondents community settled on the emigration *from*, their home nested to Abeokuta; was, not only a relevant fact it was a fundamental issue. It does not appear, therefore to become who say or to tend that the identity/location of the land in dispute which formed part of the land on which members, of the respondents' community allegedly. Settled was mot raised-as an issue. It was raised and, the parties joined, issue on it. The learned trial Judge was not, as stated by the court below, a bit confused. He was clear his in to the real issue.
The court below stated-that if the issue of identity/location of the land in dispute had been raised it (court below) would have held that the onus was on the appellant and not the respondents to prove the pavement

With respect, it has to be pointed out that the appellant who was the defendant in this did not counter-claim for declaration of statutory right of 'Occupancy in relation to the land in dispute "the plaintiff Who is claiming statutory) right of occupancy related of a parcel and to prove that if he claim to the declaration being sought. One of the telling that he has to prove idea succeeded is the identity of the land in dispute other wise his claim will be dismissed See *Makanjuola's* case; *supra.* If on the whole the pure the plaintiff is not discharged the weakness of the defendant's case will not help him the proper judgment, in the circumstance, is for the defendant, such as judgment-decrees no title to the defendant he not living of sought the declaration. See: *Kodilinye's case supra;* and *Abisi* v. *Ekwealor.* (.1993): 6NWLK(Pt.302) 643.

The court below observed that it was not uncommon under native law and custom that different names could be given by different people and communities to the same area of land, which was

subject matter under native law and custom. If the power concern is decided the parties as attach into the land dedication of entitle men *See Lodun v. Fasanya,(1'74)11* 61, at pp.76 G. & *T,J.* When the parties by the evidence adduced other a land documentary, are the identity of dispute, fact that different nature are ascribed to it m the area where *It* is located is ca1l all not, fatal to the plaintiff's claim. *See Makanjuola's case, supra;*

The foregoing position or situation is separate "and distinct from the situation in which, from the evidence lea by a plaintiff, it is impossible to ascertain with reasonable degree of certainty, the location" of the land indispute or, a situation in which some of the witnesses' who testified, on the point, for a plaintiff stated that the land indispute was located in one place and other witnesses testified that it was at another place or another places-", Where, from the evidence of a plaintiff's witness .or witnesses it is not Reasonably possible to ascertain the location/identity.

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The *foregoing was not all.* The *contradictions in the evidence led by the resp*ondents on *the identity /location of the land have their* own *legal implications. The first place, I have-pointed that where* a *plaintiff fails* to *establish the identity* of *the land being claimed by him, his* claim *will be dismissed.* Even *if there* requirement like that in a claim for a declaration of statutory right of discrepancy, as the claim of the respondents was based on the members of *their communi*ty having settled on a large parcel of land; which included the land in Ife, the onus was on them to establish the identity/location of the parcel of land which they settled. It is a fact which by itself or in connection with other facts :s the existence or non-existence of the fact in issue or the relevant fact able or improbable. See: *Sectiorrr2(a) of the Evidence Act.* If, as in the present the respondents were unable to establish the precise identity or location of the Ipon which *their* ancestors allegedly settled, *it* may reasonably be inferred that beers of the respondents' community never settled on the land edged red in "A" at all or that if they settled anywhere-in Abeokuta it was not on the of land edged red in Exhibit "A" which included the land in dispute.

Where evidence of traditional history is not contradicted or in conflict and D I by the court to be cogent, it can support a claim for a declaration of statutory of occupancy. See *Olujebu of Ijebu v. Oso* (1972) 5 S.C. 143: *and Atanda v.* (1989) 3 NWLR (Pt.111) 511: If the evidence of traditional history is not then the court should consider evidence of recent acts of possession and ownership. See: *Motunwase v. Sorungbe:(1988)* 5 NWLR (Pt.92) to have reference to the evidence of various acts of ownership alleged by both.

'The learned trial Judge duly considered the evidence. He, justifiably, in new, accepted the evidence led, on the, point, ,by the appellant and rightly the evidence led by the respondents. The court below was of the view that med trial Judge should not have accepted the evidence led by other appellant acted the evidence led, on the, point, by the respondents. It was, however, in this point, to note that the7 appellant was the defendant and that he did not, F
or claim for a declaration or claim any thing. Further, the court below itself t think that the evidence led by the respondents could justifiably warrant 19 judgment in their favour; the court ordered a retrial. There is one vital I this connection. It is that there could be no question of giving consideration purported acts of possession or of ownership on the part of the respondents traditional evidence led by them did not establish that, as they alleged, they G on any particular

parcel of land in Abeokuta. *Nemo dat quod non habet* means that no one gives what he does not possess or does not belong to him *vaduba, v. Nigerian Renowned Trading Co. Ltd.* (1992) 5 NWLR (Pt.243) allegations that the respondents granted part of the land in dispute or that they led to exercise any act of possession or of ownership in relation to it could are not be sustained. Nobody can give what he has not got. The learned trial right when he came to the following conclusion in relation to the claim statutory right of occupancy.

Upon a careful consideration of the evidence adduced by the parties, I prefer the defendant's evidence to -that of the plaintiffs'. The evidence of traditional history given by the plaintiffs is unsatisfactory and judgment should on that ground, be for-the defendant See *Frempong* v. *Brempong* 14 W ACA 13. It is the. Plaintiffs whose relief but they have failed to prove that they are entitled to what they claim either by evidence *of* tradition or by acts *of* ownership as laid down in *Ekpo* v. *Ita* (1932) II, NLR 68. The claim for declaration must, for reasons stated above, be dismissed.

Ifa plaintiff-who claims for statutory right *of* occupancy fail to establish or prove his claim by evidence of traditional history or by proof of acts *of* ownership and/or possession, his claim is liable to be dismissed. *See Dibiamaka* v. *Osakwe* (1989)'3 NWLR (Pt. l07) 010 1. An order for retrial was not the proper order to make in the circumstances of this case. The view of the court below could not, on the facts, be sustained as the learned trial Judge properly identified the issues involved and adequately dealt with them. His approach in dealing 'with the case was, therefore not wrong. The respondent's claim was dismissed by the learned trial Judge because their claim failed in *toto.* Where a plaintiff has failed in *toto* to prove his case in the court below, an appellate court should not order a retrial or a non suit if to do so will amount only to giving the plaintiff another opportunity *of* proving what he had failed to prove in the first instance. See *Elias v. Disu* & *Anor."* (1962) 1 All NLR 214;(1962) ISCNLR 361.

The appeal succeeds. The judgment of the Court of Appeal dated 12th.July, 1989 is hereby' set aside. In its place is restored the judgment *of* the earned trial Judge dated 18th December, 1985, the appellant IS awarded'N300 as costs in the" court l below and Nl, 000.00 as costs in this court.'

BELGORE, J.S.C.: A plaintiff has the duty to prove his case and where there are material conflicts in his case, he has failed to prove what he prays the court grant him. In a case like the one in hand where the trial court was in no doubt as to the identity of the land in dispute and he has ably reviewed the evidence and made his findings in line with that evidence, the appellate court ought not to interfere with the findings. The Appeal Court ought not interfere with clear findings of fact based on the evidence of the trial court when there are no justifiable exceptions to this time honoured principle of law - *Amadi v. Nwosu* (1992) 5 NWLR (Pt.241}273; *Odinaka* v. *Moghalu* (1992) 4NWLR.;(pt.233) *1;-Romaine* v. *Romaine* (1992) 4 NWLR (Pt.238) 650; and *Olanrewaju v. Governor of Oyo State* (1992) 9 NWLR (Pt.265) 335 and contrast with situations in *Olabanji* 11. *Omokewu* (l992)6 NWLR (Pt:250)'67J and *Ekretsu* v. *Oyobebere* (1992) 9 NWLR (pt266) 438. The respondents by giving various mines to the land in dispute failed to confuse the trial.

High Court, unfortunately he had some success at the Court of Appeal where retrial was wrongly

ordered.- All the known principles and guidelines by this c9urt on retrial are not present in this case. See *Duru* v. *Nwosu(1989)* 4 NWLR (Pt:l13) *24; Agbonifo* v. *Aiwerioba* (1988) 1 NWLR.(pL70) 325; *Bakare v. Apenaf(1986)* H 4 NWLR (Pt.31) 1; *Adeyemo v. Arokopo(1988)* 2 NWLR(Pt.19) 1G3', Total Nig.) *Lt &* v. *Nwako* (1978)5 S.C. 1;14, George v. George (19M) 1 All NLRB6.

I therefore find great meet in this appeal and for the above-reasons and fuller reasons in the judgment of *my* learned brother, Adio). Which I adopt a1so as mine, I allow this appeal and restore the judgment of the trial High Court. I make the same consequential orders as in the lead judgment.

OGUNDARE J.S.C " I have had the advantage of a preview of the judgment of my learned brother Adio, J.S:C .trust delivered. I agree with his reasoning and conclusion that there is merit in this appeal: The learned trial Judge correctly identified the issue involved in the placing, by the witnesses for the plaintiffs, of the land in dispute in different locations in Abeokuta. The learned trial Judge observed.

"Although there is no dispute as to the identity of the land which is the subject matter of this case; it is surprising that whilst the 1st plaintiff says that the land is at Tafin, the 2nd plaintiff says that it is at eke Adao and the 5th H.W says that it is at Oke Aregba. There is no evidence that Tafin, Oke Adao, Oke Aregba and Aregba are on the name thing contradictions with the evidence of the (plaintiffs' witnesses highlighted above make It difficult to believe the contention of the plaintiff's the land in dispute belonged to Tafin Community or that they granted any land 10 Adao community.

Considering the evidence adduced for the plaintiffs the observation was rightly made. The observation 'showed that the learned judge had full grasp and understanding of the case before him if anyone was confused, it was, 'with I profound respect, their Lordships of the court of Appeal when they equated the placing of the land in dispute indifferent-locations with giving the land different names. Their Lordships, Omololu-Thomas, J.C.A. said: -

"It is not uncommon under native law and custom that different names are given by different people and communities to the same area of land, which is subject matter of dispute under native law and custom. With the greatest respect to their Lordships, the issue here is not apposite. It is not a case of calling the land in disputed different names by different witnesses. It is a case of contradictions in the location of the land, that is as to whether this in Tafin (where it would be if the plaintiffs story of settlement is correct) or Oke Adao (if it is the defendant story that is the correct version) orin Oke Aregba or Aregba. As the witnesses for the plaintiffs, could not agree as to the1ocation of the land, rather than its identity, plaintiffs, must fail in their claims and those claims were rightly witnessed by, the trial court There is no basis for an order of retrial as the conditions' for such an order are not present here - see: *Total (Nig) Ltd:* v. *Nwakt '(l978)* 5 S.C. 1 at 4; *George v. George (1964)* 1 All NLR 136. I too allow-this appeal set aside the judgment of the Court of Appeal and restore that of the trial High Court dismissing plaintiff' s. I abide by the order for costs made by Adio, J.S.C.

MOHAMMED, J.S.C.:I have had the privilege of reading the judgment of my learned brother,

Adio, J.S.C. in plaintiff I agree with him in there statement in this appeal and it ought to be allowed. I agree that the learned trial Judge was right to dismiss the claim, it the – respondents cause is quite pill in that they failed to case. The Court of Appeal is therefore in error to reverse the decision of the trial, court and order for criteria of the non.

Consequently, this appeal allowed. The judgment of the co*urt* of Appeal

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A given by them and their witnesses which is conflicting and contradictory, would be treated as unreliable - See *Mogaji* v. *Cadbury (Nigeria) Limited* (-198512NWLR (Pt.7) 393 at 430 and *Odoftn* v. *Ayoola (supra)*. The instant case on appeal is not a case where judgment is given on facts not pleaded as observed by the court below. Thus, th_ authority of *Emegokwue* v. *Okadigbo* (1973) 4 J.S.C 113 cited in-support thereof by that court-is irrelevant and inapplicable to the facts of this case. The court below in its consideration of the state of the pleadings, particularly paragraph 3 of the Statement of Defence, held that no specific issue was raised as to whether the land in dispute is located within Tafin Community land at Aregba or located within Adao Aboni family land. The court further shifted the onus on the respondent and not on the appellants to prove the averment. With utmost due respect, the court below misconstrued the issues raised in the pleadings. This it did by taking paragraph 3 in isolation without a consideration of other relevant paragraphs namely, paragraphs 5, 6 and 7 of the Statement of Defence.

In a claim for declaration of title to land the plaintiff must succeed on the strength of his own' case and not {)n the weakness of the defendants' and as the respondents in the case herein on appeal have failed to discharge the burden placed on them, (see *Kodilinye v. Mbanefo Odu (*1935)'2W ACA 336 *and Elendu* v. *Ekwoaba* (1995) 3 NWLR (Pt.386) 704 the trial court rightly, in my view, dismissed the respondents' case. The count below as also wrong not only in reversing the tables but in ordering a retrial. As the duty of court should be, to do complete justice in each case "if a Court of Appeal on a proper consideration of the case before it comes to the conclusion that it can do complete justice between the parties, a retrial should not be ordered. *See Sanusi v. Ameyogui* (1992), 4 NWLR (Pt.237) 527 at 556 and *Adeyemo* v. *Arokopo* (1988) 2 NWLR(Pt.79) 703 at 711. Indeed, as this court has held in a long line of decided cases, such as *Fatoyinbo* v. *Williams* (1956) SCNLR 274;(1956) 1 FSC 87; *Okoye* v. *Kpajie* (1973) NMLR 84; *Imonikhe* v. *A.G. Bendel* (1992) 6 NWLR (Pt.248) 396 and by the application of the provisions of section 22 of the Supreme Court Act, 1960 (now Cap. 424) Laws of the Federation of Nigeria 1990:

"An order for retrial is not necessary if an appeal court can 'in exercise of its appellate jurisdiction do justice in the case and bring the litigation to an end. "I so hold and decide in the instant case. For these reasons and the fuller ones contained in the leading judgment of my learned brother Adio, J .S. C., I will allow this appeal and make similar consequential orders inclusive of those as to costs".

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Appeal allowed