IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT AUCHI

ON MONDAY, THE 25TH DAY OF MAY, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA - JUDGE
TIMOTHY UKPEBOR OBOH - JUDGE

APPEAL NO. CCA/20A/2005

B E T W E E N:

EKIEDE UP-PLATEAU IDONIJE : : : : : : : APPELLANT

A N D

ONOMORIN OKHUOYA : : : : : : : : RESPONDENT

J U D G M E N T
DELIVERED BY MARY NEKPEN ASEMOTA (JCCA)

This is an appeal against the judgment of the Owan West Area Customary Court, Sabongidda-Ora in Suit No. OWACCS/48/94 delivered on the 29th day of December, 2004.

The original respondent, Abiodun Okhuoya (deceased), in a representative capacity (as plaintiff) but later substituted with the present respondent in this appeal claimed against the appellant (as defendant) as follows:

ñ1. The sum of three thousand naira (₦3,000.00) being general damages arising from acts of trespass since 1990 till date onto plaintiffôs farm lying and situate at Ivbiuwawa bush, in Uhonmora-Ora, a place within the jurisdiction of this Honourable Court thereto.

2. The sum of three thousand naira (₦3,000.00) being general damages arising from ruthless and unreasonable destruction of the economic crops on plaintiffôs farm herein before described such as plantain, ducanut trees, cashew trees, bananas, orange trees etc. since defendant trespassed onto the said land in 1990 till present.

3. An order of perpetual injunction against the Defendant, his agents, privies, successors-in-title, heirs and servants theretoò.

The respondentôs case at the trial court was that the farmland in dispute measuring about twelve native acres belonged to his father, Jacob Igbuan Okhuoya. It was deforested by his great grand father, Omuarebu. At his demise, it passed to his grand father, Okhuoya and thereafter to his father.

Crops such as cashew, cherry, mangoes, ducanut, oranges, banana, pears, guava and plantain and the ruins of a hut built by Omuarebu are on the land in dispute.

In 1985, one Richard Idonije laid claim to the land. He was summoned before ***Eguarelu***. The land was adjudged by ***Eguarelu*** to be that of the

respondentôs father. Subsequently, Richard Idonije placed ñOkhorò a symbol of ruin and death on the land. He was ordered to remove it by the ***Eguarelu*** and asked to appease the gods, which he did. The appellant had the respondentôs father arrested in 1989 and taken to the Army Barracks in Benin where he was tortured and made to sign a document under threat. In 1990, the appellant entered the land, destroyed the respondentôs fatherôs crops such as cashew, ducanut, mangoes, oranges, guava, banana and plantain and started cultivating it. The appellant has continued his acts of trespass. The respondentôs father instituted this action and while the matter was still pending, he died. The family mandated the respondent to continue with the case.

The appellantôs case on the other hand, was that the land measuring fifty native plots belonged to his late father who deforested it. He inherited it in 1970 when his father died and has been in possession since then. His father planted rubber, ogbono, ducanut, cashew, mangoes as well as kolanut. The boundarymen are Okoolu Ifijeh Jacob to the right, Uduromi Iyele to the left and Uwazekin Asudo to the north. In 1985, while the appellant was away in the army, he was informed by his uncle, Agbede who was the caretaker of the land that the respondentôs father had trespassed onto the land. The matter was reported to Uhonmora Community which decided in favour of the appellant and the respondent was asked to leave the land. The appellant visited home sometime later and observed that the respondentôs father was still farming

thereon. He reported to the Army and the respondentôs father was invited by the Army Public Relations Office in Benin. After listening to both parties, the Army P.R.O sent a letter to the head of Uhonmora Community to look into the matter. The Community wrote to the Army informing them of their findings as well as their earlier decision in 1985 where they had adjudged that the land belonged to the appellantôs father and that the respondentôs father had been asked to leave the land. Based on that, the Army Public Relations Office in Benin prepared a document which both parties and their witnesses signed, which was an undertaking by the respondentôs father to leave the land. In compliance with the undertaking, the respondentôs father vacated the land after six months and the appellant started farming thereon.

After hearing evidence, the trial court in a considered judgment found in favour of the respondent and awarded the sum of ₦1,200.00 as general damages for acts of trespass, ₦1,500.00 as general damages for the destruction of the respondentôs economic crops and made an order of perpetual injunction against the appellant, his servant, agents, privies etc.

Dissatisfied with the decision of the trial court, the appellant filed a Notice of Appeal with an omnibus ground of appeal.

With leave of this Court, he filed two additional grounds of appeal. The grounds of appeal are reproduced as follows:

ñ1. The decision of the learned trial court is against the weight of evidence.

2. The learned trial court erred in law when it held:é óto our own view this document is a public document. The issue now is what of the relevancy of document. Since the rules and the act E.A has specifically stated that we cannot admit a document which is a public document in native (sic) not certified, the relevancy will be put in abeyance until the document is certified. é . On this note if the defendant cannot get the document certified it shall be marked rejectedô, when the document is not a public document and was once admitted in this case as Exh. D2 the contents of which is based on Exh. E in this proceeding when it started ***de novo*** and as Exh. D1 in the earlier proceeding. The document was never marked rejected after all and this has led to a miscarriage of justice

3. The trial court having held thus: ówho buried his father and who gave him this property (land in dispute included) as inheritance. These are issues that would have helped in the quick adjudication of the matter but evidence is silent on it by both partiesô, ought not to have wrongly as it were castigate D.W.2 and D.W.3, rather it should have found against the plaintiff/respondent and found in favour of the defendant/appellant who did not counterclaim as

rightly observed by the court in lines 29 ï 30 page 118 or make an order of non-suit in the peculiar circumstances of this case.ò

Both parties filed their respective briefs of argument in compliance with the rules of this Court. In the course of this appeal, the respondent died. On the application of the appellant and by order of this Court he was substituted with Onomorin Okhuoya.

The appellantôs counsel, A.K.M. Imiewarin Esq., formulated four issues for determination from three grounds of appeal as follows:

ñi. Whether the documents titled óAGREEMENT BASED ON SETTLEMENT ON LAND DISPUTE BETWEEN CPL ALPLATEUS AND MR IGBUAN OKHUOYA,ô is a public document and therefore cannot be admitted without certification even though very relevant to the case.

ii. Whether the Area Customary Court Sabongidda-Ora being in the class of native and/or customary courts, strict procedural law and evidential law are applicable as is being done in the instant case.

iii. Whether the trial court fairly evaluated the evidence adduced at the trial.

iv Whether this is not a proper case for a non-suit.ò

Learned counsel for the respondent, J. Ilevbare Esq., in the amended respondentôs brief of argument adopted the issues as formulated by the appellantôs counsel.

Counsel however raised a preliminary objection to the competence of additional ground 2 and the issue formulated therefrom.

As the preliminary objection is not against the competence of the whole appeal, it will therefore be considered later on in the course of this judgment.

Having examined the issues as formulated by the appellantôs counsel and adopted by the respondentôs counsel in relation to the grounds of appeal, we observed that four issues were formulated from the three grounds of appeal.

It is trite law that it is inappropriate to raise more issues for determination than the number of grounds of appeal filed. Whereas it is an accepted principle that an issue could be properly raised from more than one ground of appeal, not more than an issue can be formulated from a ground of appeal. See the following cases:

1) Adedipe v. Theophilus (2005) 16 N.W.L.R. (Part 951) 250 at 257 ratio 7;

2) U.B.A. Ltd v. Mode (Nig.) Ltd (2001) 13 N.W.L.R. (Part 730) 335;

3) Iweka v. S.C.O.A (2000) 7 N.W.L.R (Part 664) 325;

4) Shona-Jason Ltd. v. Omega Air Ltd (2006) 1 NWLR (Part 960) 1 at 17 ratio 13.

Furthermore, issue ii does not appear to have been distilled from any ground of appeal. It is also trite that every issue for determination must be formulated from a competent ground of appeal. An issue for determination is therefore incompetent when it does not arise from any ground of appeal. Any argument canvassed in support of such an issue will be struck out. See the following cases:

1. Adah v. Adah (2001) 5 NWLR (Part 705) 1, 2001 SCNJ 90 at 97;
2. Alhaji Kokoro-Owo & 6 Ors v. Lagos State Government & 4 ors (2001) 11 NWLR (Part 723) 237.
3. Magit v. University of Agric. Makurdi (2005) 19 N.W.L.R. (Part 959) 211 at 229 ratio 26;
4. Fabiyi v. Adeniyi (2000) 6 N.W.L.R. (Part 662) 532.

In the circumstance, issue ii and the arguments canvassed thereon are hereby struck out.

However, we adopt issues i, iii & iv as formulated by the appellantôs counsel and tie them to the grounds of appeal as follows:

1. Whether the document titled ñAGREEMENT BASED ON SETTLEMENT OF LAND DISPUTE BETWEEN CPL ALPLATEUS AND MR. IGBUAN OKHUOYAò is a public document and therefore cannot be admitted without certification. (Ground 2)

2. Whether the trial court fairly evaluated the evidence adduced at the trial. (Ground 1)

3. Whether this is not a proper case for a non-suit. (Ground 3)

Arguing issue one, the appellantôs counsel submitted that the document which the trial court refused to admit in evidence on the ground that it was not a certified true copy, is not a public document as envisaged by section 109 of the Evidence Act. He contended that the document had its root/foundation from Exhibit ñEò and that the document had earlier been admitted without objection in a previous proceeding. He added that the document was merely implementing the decision in Exhibit ñEò to promote civilian-army cordial relationship.

Counsel argued that admissibility of documentary evidence depends on its relevance and once it is relevant, it is admissible and the weight to be attached to it is considered later.

He relied on the following cases:

1. Kamlen Adda v. Japhet Jassen & anor (2004) 1 QCLRN 127 ratio 8 at page 130;

2. Omega Bank v. OBC Ltd (2005) 21 NSCQR 771 ratio 11 at p. 776

He urged this Court to overrule the decision of the trial court because the military officers are public officers within the meaning of public officers under section 109 of the Evidence Act, 1990.

Replying on Issue one, learned counsel for the respondent submitted that the appellant cannot raise the issue of rejection of a copy of the undertaking signed by the appellant and the respondent as well as their witnesses. He contended that the document, which was made at the Army Public Relations Office, Benin City was not certified and no appeal was lodged against the interlocutory ruling of the trial Court against the admissibility of the said undertaking. He added that the appellant failed to obtain leave before raising the issue before this Court.

Counsel referred to Order 7 rule 2(1) of the Customary Court of Appeal Rules, 2000 and submitted that no appeal can lie from a ruling of the trial court to this Court in an interlocutory matter except it is made within 14 days after the making of such order. He contended that Ground 2 is therefore incompetent, the appeal not having been made within 14 days and leave not having been obtained before its inclusion in a final appeal against judgment. He cited the cases of: Shanu v. Afribank (2000) ANSCQR 1 ratio 7 page 11 para. A & B; Onwe v. Ogbunya (2001) FWLR 37 at 1031 and Ogigie v. Obiyan (1997) 10 NWLR (Part 524) 179 and submitted that there was neither indication on the part of the appellant of his intention to challenge the ruling of the trial court which rejected the document when he sought to tender it nor was there any application before this Court for leave to appeal against the ruling at this stage.

He contended that the trial court did not base its decision on the rejected document and its rejection did not occasion a miscarriage of justice.

Alternatively, counsel submitted on this issue, that the officers of the Army Public Relations Office, Benin are public officers because they adjudicated on a matter and produced copies thereof. He referred to section 109 of the Evidence Act and contended that the military officers were exercising executive powers under a military government.

On the issue of relevancy, he submitted that the appellant failed to take advantage of the courtôs directive to him to have the document certified. He argued that once a court has excluded documentary evidence at a trial, its relevance became a non-issue because there was abundant evidence on which the trial court based its decision.

We have carefully considered the submissions of both counsel on the issue. It is imperative to note that the appellantôs counsel did not file a reply brief to address the weighty issue raised by the respondentôs counsel under issue one by way of a preliminary objection to Ground 2. Ordinarily, the appellant would have been deemed to have conceded that point to the respondent.

Be that as it may, the issue raised and canvassed in the respondentôs brief will be considered on its merit even though there is no reply brief. See the following cases:

1) Ugboaja v. Akitoye ï Sowemimo (2008) 16 N.W.L.R. (Part 1113) 278 at 284 ratio 7 and

2) Williams v. Ibejiako (2008) 15 N.W.L.R. (Part 1110) 367 at 374 ratio 7.

The bone of contention under this issue are two fold. The appellantôs counsel contended that the agreement prepared by the Army not being a public document, did not require certification to make it admissible and the trial courtôs rejection of it was wrongful. On the other hand the respondentôs counselôs contention is that the trial court rightly rejected it and that the appellant failed to seek leave of this Court before appealing against the interlocutory ruling of the trial court. We intend to address the issue of leave first.

Order 7 rule 2(1) of the Customary Court of Appeal Rules, 2000 states as follows:

> ñEvery appeal shall be brought by notice of appeal which shall be lodged in the lower court within thirty days where the appeal is against a final decision and fourteen days where the appeal is against an interlocutory decisioné ..ò

A look at Ground 2 shows that it is an attack on the trial courtôs rejection of the document prepared by the Army titled ñAgreement Based on the Settlement of the land Dispute Between Cpl Alplateus Idonije and Mr. Igbuan

Okhuoya.ò In Ogige v. Obiyan supra cited by the respondentôs counsel, the appellant failed to appeal against the interlocutory order or ruling of the trial court within the time prescribed by the rules of the court and no leave was sought by him to appeal out of time. It was held that the appeal was incompetent. That is the general position of the Law.

However, in a situation where the appeal is against a wrongful admission or rejection of evidence in an appeal against a final decision, as in the instant appeal, the position is slightly different. In the case of Onwe v. Oke (2001) 3 N.W.L.R. (Part 700) 406 at 418 Ejiwunmi JSC held as follows:

> ñé In my humble view therefore, it may be said that ordinarily where an appellant failed to appeal against an interlocutory order or ruling of a trial court within the time prescribed é , he must obtain the leave of court for his appeal to be competent. Where on the other hand, the complaint of the appellant against the ruling is concerned with the wrongful admission of evidence or wrongful rejection of evidence, such an appellant would not require leave of court as the ruling appealed against is not regarded as an interlocutory decision. The appellant may therefore include the ground of appeal against that ruling of the trial court when appealing against the final judgment of the trial court.ò See also the cases of Ukpo v. Imoke (2009) 1 NWLR (Part 1121) 90 at 111 ratio 27, and Jinadu v. Esurombi-Aro (2005) 14 NWLR (Part 944) 142 at 169 ï 170 ratio 39

In this appeal before us, the complaint of the appellant is that the trial court wrongly excluded the document prepared by the Army by its ruling in the course of the trial. In view of what has been said above, we hold that ground 2 is competent and the preliminary objection of the respondentôs counsel is overruled.

Having held that ground two is a competent ground of appeal, we shall now consider Issue one which is predicated on ground two on its merit.

Learned counsel for the appellant has argued strenuously that the rejected document does not have the features of a public document as envisaged in Section 109 of the Evidence Act.

Public documents are defined in section 109 (a)(iii) of the Evidence Act to include ñacts or records of acts of public officers, legislature, judicial and executive whether of Nigeria or elsewhere.ò Generally, public documents are made by public officers in their official capacities. The document in contention was prepared by the Army Public Relations Office in Benin. It certainly falls within acts or record of acts of public officers as envisaged by section 109 of the Evidence Act. Only a certified true copy of such a document is admissible as secondary evidence. See sections 111 and 112 of the Evidence Act. In other words, for such documents to be authentic or relied on by a court of competent jurisdiction, it must be certified. Learned counsel for the appellant seemed to have made heavy weather of the fact that the document is relevant and as such it

ought to have been admitted before the issue of the weight to be attached to it can be considered later.

Admissibility of a document in evidence is governed by three main criteria namely:

a) Is the document pleaded?

b) Is it relevant to the case being tried?

c) Is it admissible in law?

The sum total of the above is that even when a document is relevant but does not meet the requirement of admissibility in law, it cannot be admitted in evidence. See the following cases:

1) Duriya v. Jimoh (1994) 3 N.W.L.R. (Part 334) 609

2) Oyediran v. Alebiosu II (1992) 6 N.W.L.R. (Part 249) 330

3) Okonji v. Njokanma (1990) 14 N.W.L.R. (Part 638) 256 at 254 ratio 4

The admission of a document which otherwise was inadmissible cannot confer any right on a court to ascribe any probative value to that document. See the case of Etajata v. Ologbe (2007) 16 N.W.L.R. (Part 1061) 554 at 564 ratio 11.

In the instant appeal, since the rejected document was inadmissible because it was not a certified true copy, the issue of its relevance becomes a non-issue. The trial court was therefore right to have rejected the document.

Issue one is therefore resolved in favour of the respondent.

On Issue two which is whether the trial court fairly evaluated the evidence adduced at the trial, appellantôs counsel referred to lines 3 ï 5 at page 12 and lines 16 ï 21 at page 35 of the Record of Appeal and submitted that the trial court after finding that the evidence was silent on some vital issues, castigated the appellant and his witnesses. He contended that it however went on to find in favour of the respondent that he had proved possession by inheritance without reference to the fact that neither the respondent nor his witnesses testified as to who buried the respondentôs father. He added that the trial court glossed over this piece of evidence but rather made it an issue in respect of the appellant and his witnesses.

He submitted that the trial court in its judgment did not consider Exhibit óEô, which was the adjudication by the Uhonmora Community at the instance of the Army on the issue of possession.

It was his contention that the trial court misconceived the evidence of D.W.2 and that the evidence of D.W.3 was not inconsistent. He submitted that the trial court failed to make a finding of fact on Exhibit ñEò as well as on whether or not D.W.2, D.W.3, P.W.1 & P.W.2 were boundarymen.

In his response to issue two, learned counsel for the respondent submitted that the comment of the trial court on the burial of the appellantôs father was an opinion which the trial court formed without intent to perverse the case of the

defence. He referred to the comment as an ***obiter dictum***, which should not form part of a ground of appeal. He referred to the cases of:

1) University Press v. Martins (2000) 75 LRCN 475;

2) Achiakpa v. Nduka (2001) 7 NSCQR 341, ratio 16.

He also cited Rochonoh Property Co. Ltd v. Nigerian Telecommunications Plc & Anor (2007) NSCQR 1716 and submitted that when a piece of evidence lacks probative value, neither party nor court should act on it.

He contended that there were aspects of the evidence of D.W.2 and D.W.3 which the trial court found incredible and it did not hesitate to highlight them. He referred to page 58 lines 16 & 17 of the Record and argued that D.W.3 stated under cross examination that the respondentôs father and Adoga Uwanzekin who are from Eme Ora have land on the right hand side of Igbagho road. He stated that a plaintiff can rely on the weakness of the defendantôs case. He cited in support the case of Okere v. Agbodike (1999) 73 LRCN 3620 ratio 2.

He added that the evidence of D.W.2 under cross examination at page 48 lines 6 ï 9 also showed that the respondentôs father had a farm on the land. He contended that these pieces of evidence were not challenged and the trial court was bound to accept them. He cited in support the case of Martkeem Ltd v. M.L. Kent (2005) 22 NSCQR 1037 ratio 2.

Furthermore, he submitted that the trial courtôs visit to the land revealed that the description of the land as given by the respondent and his witnesses tallied with what was observed during the visit. Continuing, he contended that the court found the description of the land given by the appellant as well as his witnesses to be incredible.

It was counselôs submission that the judgment of the trial court was based on traditional evidence and what appeared to be credible acts of possession as well as the observation during the visit to the ***locus***. He contended that the finding of fact by the trial court can only be disturbed where a party fails to trace his title directly to the original owner whose title has been established. He cited in support the case of Morenike v. Adegbosin (2003) 12 MJSC 139 ratio 6.

Finally on this issue, he submitted that the appellant had failed to show how the trial courtôs verdict was perverse and how it had occasioned a miscarriage of justice. He urged this court to dismiss the appeal. He relied on the case of Iheanachor v. Chigere (2004) 48 WRN ratio 10.

We have considered the submissions of both counsel on this issue. The contention under this issue is that the trial court did not properly evaluate the evidence before it.

The trial court after an exhaustive review of the evidence adduced including its observation at the visit to the land held, that the respondent was

able to prove the boundary of the land in dispute which was revealed during the visit to be about 12 native acres. The court further held that it could neither ascertain nor see the end of the 50 native acres as claimed by the appellant.

The trial court also held that the respondent was able to prove who deforested the land and how title devolved on him by inheritance.

The trial court also found that although the appellantôs traditional history of how the land devolved on him by inheritance was straightforward, his witness, D.W.2 stated that the respondentôs father had been on the land in dispute for a long time.

The trial court also found that the ruins of Adogaôs house whom the appellant claimed was given land by his father to build on was not seen on the land during the visit to the ***locus***. The trial court also found that D.W.2 and D.W.3 who testified that they share common boundary with the land in dispute were not consistent in their testimonies.

It held that the respondentôs father was on the land until the appellant came back from the Army. Thereafter, he took the respondentôs father before the Army in Benin and forced him to sign a document that the land belonged to the appellant based on the report of Uhonmora Community.

We are not unmindful of the position of the law that possession no matter how long cannot confer title on a trespasser against one with a better title. The trial court did not base its decision solely on the fact of possession by the

respondentôs father. As stated earlier, the trial court took into consideration factors such as its observation during the inspection of the land in dispute as well as the credibility of witnesses before arriving at its decision.

In our considered view, the trial court properly assessed the evidence before making its findings that the respondent had proved his case.

It is trite law that an appellate court is reluctant to upset findings of fact made by a trial court which had the opportunity of listening to witnesses testify. The evaluation of evidence and the ascription of probative value thereto are primarily the functions of a trial court. It is only where a trial court is proved to have abdicated this function that an appellate court can justifiably step in to do so or set it aside. In the instant case, the judgment of the trial court was amply supported by evidence. See the following cases:

1. Udengwu v. Uzuegbe (2003) 13 NWLR (Part 836) 36 at 156
2. Oduwole v. Aina (2001) 17 NWLR (Part 741) 1 at 47
3. Ukpo v. Imoke (2009) 1 NWLR (Part 1121) 90 at 112 ratio 29.
4. Ndoma-Egba v. A.C.B. PLC (2005) 14 NWLR (Part 944) 79 at 88 ratio 11
5. Akinloye v. Eyiyola (1968) NMLR 92.

In the circumstance, issue two is answered in the affirmative.

Issue three is whether this is not a proper case for a non-suit. Arguing this issue, learned counsel for the appellant submitted that the trial court ought not

to have found in favour of the respondent having held at page 127 lines 3 ï 5 of the records that both parties were silent on some issues which would have helped in the quick adjudication of the case.

He further submitted that there was a ***lacuna*** between the respondentôs claim of 12 native acres and the appellantôs claim of 50 native acres, which was not resolved, yet the trial court held that the respondent had proved possession, more so when Exhibit ñEò was not considered.

Counsel contended that this is a proper case in which the respondent should have been non-suited in the interest of the parties because of the number of material issues which were not canvassed.

Replying on this issue, learned counsel for the respondent submitted that the comment by the trial court was borne out of the fact of the insufficient traditional history as given by the appellant and that it did not occasion a miscarriage of justice. He added that the comment amounts to an *obiter dictum* by the trial court and that in any event, the appellant and his witnesses throughout the trial failed to tell court how he inherited the land in dispute.

He submitted that there is no discrepancy between the 12 native acres claimed by the respondent and the 50 native acres as claimed by the appellant because the trial court found that the appellant failed to show exclusive possession over the 12 native acres claimed by the respondent. He referred to the case of Tamshang v. Lekret (2001) FWLR (Part 42) 181 ratio 2.

Furthermore, he submitted that it cannot be seriously contended by the appellant that Exhibit óEô authorized him to enter the land in dispute as the said document was not signed by the respondentôs father and it had no illiterate jurat on it. He further contended that a trespasser cannot by his acts of trespass claim to have possession of the land he has unlawfully claimed.

Finally, he submitted that Exhibit óEô is not a document of title and that it does not fall within any of the five ways by which a party can establish ownership of land as stated in the case of Idundun v. Okumagba (1976) 10 SC 227.

We have also considered the submissions of both counsel on this issue. Before considering this issue it is appropriate to comment briefly on the approach of counsel for the respondent in arguing a ground of appeal at the conclusion of his submissions on the issues as formulated. This is a rather strange approach. By the rules of this Court, briefs are argued on the basis of issues formulated by the parties and not on the grounds of appeal. There are a plethora of authorities that in a Brief of Argument, the issues and not the grounds are the focus. See the following cases:

1) I.B.W.A. v. Sasegbon (2007) 16 NWLR (Part 1059) 195 at 208 ratio 13;
2) NNB PLC v. Imonikhe (2002) 5 NWLR (Part 760) 294;

3) UTB Nig Ltd. v. Ajagbule (2006) 2 N.W.L.R. (Part 965) 447 at 460 ratio 24; and

4) Busari v. Oseni (1992) 4 N.W.L.R. (Part 237) 557.

In any event, the arguments canvassed by counsel therein had already been considered under issue two.

On the issue of non-suit, a trial court may make the order where the plaintiff has established by evidence some right or interest in the subject matter in dispute such that to dismiss his action would result in the destruction of the right or interest and thereby occasion a miscarriage of justice. See the following cases:

1. Edokpolo v. Asemota (1994) 7 NWLR (Part 356) 314;
2. Craig v. Craig (1966) 1 All NLR 173;
3. Odutola v. Coker (1981) 5 SC 197

However, having earlier held while considering issue two that the trial court properly evaluated the evidence and came to a right decision on the matter, it would be a mere academic exercise to consider this issue, more so when the arguments canvassed by both counsel under this issue are similar to those canvassed under issue two.

Issue three is resolved in the negative.

The three issues having been resolved in favour of the respondent and having held that he proved a better title, we hold that this appeal lacks merit. It

is accordingly dismissed. Consequently, the judgment of the Owan West Area Customary Court, Sabongidda-Ora delivered on the 29th day of November, 2004 in respect of this case and the consequential orders made therein are hereby affirmed.

The appellant is to pay the respondent costs assessed at ₦3,000.00 (three thousand naira).

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Hon. Justice Peter Osaretinmwen Isibor

_____
Hon. Justice Mary Nekpen Asemota

_____
Hon. Justice Timothy Ukpebor Oboh

A.K.M. Imiewarin Esq., é é é é é Counsel for the Appellant

J. Ilevbare Esq., é é é é é é é Counsel for the Respondent