IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON MONDAY, THE 10TH DAY OF NOVEMBER 2008

BEFORE THEIR LORDSHIPS

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

APPEAL NO. CCA/26A/2007

B E T W E E N

(1) MR. JOSIAH NAGBONMA
(2) MR OSARETIN IDIAGHE
(3) MR. ROBINSON IGBUDIAN
(4) MR. PATRICK ODIGHI
(5) MR. DICKSON ODIGHI
(6) MR. FELIX ENOGIERU

é é é é APPELLANTS

A N D

DR. R.D.O. IYAMU é é é é é é é é RESPONDENT

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

This is an appeal against the judgment of the Ikpoba-Okha Area Customary Court, Idogbo wherein the respondent (as plaintiff) instituted an action against the appellants (as defendants) jointly and severally claiming as follows:

ñ1. A declaration that the plaintiff is entitled to the customary right of occupancy over that piece or parcel of land measuring approximately

15.3 hectares lying, situate and being at Obayantor 2 village, Benin City which said piece of land is shown and delineated red in the survey plan No. PBOR/82158.

2. ₦500,000.00 general damages for trespass and disturbance of the plaintiffôs business carried on thereon.

3. An order of perpetual injunction restraining the defendants, their servants, agents and privies from further trespassing on or doing anything inconsistent with the plaintiffôs lawful rights over the land.ò

The appellants filed a counter-claim which was withdrawn after evidence had been led by the respondent in defence. The trial court therefore dismissed the counter-claim.

The respondentôs case at the trial court was that the parcel of land in dispute measuring approximately 15.3 hectares was granted to his late father, Osayande Iyamu, by Uhie Community in 1929. The community acting on the authority of the Oba of Benin sent elders from the village to plant Ikhimwin trees on the land to demarcate it. The respondentôs father established a rubber plantation, Rodicos Plantation as well as a primary school, (Rodicos Primary School) on the land. The respondentôs father also gave out portions of the land to some persons to erect buildings.

On the death of the respondentôs father in 1973, title to the land passed to the respondent as the eldest son. He exercised acts of ownership by establishing a

piggery and a poultry farm on the land. Sometime in 2002, the appellants trespassed into the said parcel of land and damaged the respondentôs economic trees in the plantation and were in the process of demarcating the land into plots for sale, when he filed the action at the trial court.

The appellantsôcase on the other hand was that the land in dispute situate at Obayantor II village was granted to one late Pa Ediae Obasuyi by the Oba of Benin sometime in 1916. The Oba of Benin at the time, Oba Eweka II mandated elders from Uhie Community to plant an Ikhimwin tree for Pa Ediae Obasuyi in accordance with Benin customary law relating to land acquisition. In 1944, Obayantor Community established a primary school on the land and invited the respondentôs father to run the school which was known as Rodicos School. The respondentôs father during his life time did not lay claim to the land. After the death of the respondentôs father, the respondent in 1984 came to Obayantor II village and introduced himself to the elders of the Community as the eldest son of late Pa Iyamu. After performing the burial ceremonies of his late father, the respondent was initiated as an elder (Odion) at Obayantor II.

The appellants acting on the authority of the elders of Obayantor II were in the process of demarcating the land in dispute for developmental purposes when they were restrained by a court injunction.

After hearing evidence in the case, the trial court found in favour of the respondent and granted him reliefs 1 & 3 of the claim and awarded the sum of

₦20,000.00 in respect of relief 2 against the defendants jointly and severally for trespass.

Dissatisfied with the decision of the trial court, the appellants filed a notice of appeal with an omnibus ground of appeal and with leave of court filed nine additional grounds of appeal. We observed that the appellantsô counsel in his brief made no reference to the omnibus ground of appeal in the course of listing the grounds of appeal. We also observed that the counsel failed to proffer argument in respect of the omnibus ground of appeal. We are therefore of the opinion that counsel for the appellant abandoned the ground . The said ground of appeal is hereby struck out.

The nine additional grounds of appeal for which arguments were proffered are hereunder reproduced verbatim but without their particulars as follows:-

ñ1. The learned President and members of the Ikpoba-Okha Area Customary Court, Idogbo misdirected themselves and erred on the facts when they held that the evidence of the plaintiffôs root of title is on the old customary grant to the late father under Oba Eweka II when title was evidenced by planting of Ikhimwin tree, when plaintiff throughout the proceedings did not adduce any CREDIBLE evidence whatsoever to show the planting of any Ikhimwin tree for his father by Uhie village or any other persons, on the land in dispute or any where in Obayantor II village.

2. The learned President and members of the Ikpoba-Okha Area Customary Court, Idogbo misdirected themselves and erred on the facts when they said that they disbelieved the testimony of the defendant in this case when there was no basis whatsoever for their disbelief and against the uncontroverted evidence of the plaintiffôs witness (p.w2) and defendantsô evidence of the planting of Ikhimwin tree for Ediae Obasuyi and his delegation by Uhie on the authority of the Oba Eweka II the then Oba of Benin by delegates sent by Elders of Uhie village in accordance with established Benin Customary Law, the consecration of Ogua-edion thereby conferring on Obayantor II village full status of a native administrative unit directly responsible to the Oba of Benin.

3. The learned President and members of the Ikpoba-Okha Area Customary Court Idogbo erred on facts and the law when they concluded that based on traditional evidence of the plaintiff, p.w2, and p.w3, the plaintiff has proved his case, when evidence tendered by him and his witnesses do not support such a conclusion.

4. The learned President and members of Ikpoba-Okha Area Customary Court Idogbo erred in law when it concluded that in the final analysis based on numerous and positive acts of ownership, long possession and enjoyment of the land by the plaintiffôs father, plus the proof of

possession of connected or adjacent land by plaintiff, agents and his late father, the plaintiff has proved his case on preponderance of evidence as required by law, when the Supreme Court has held that under Benin Customary law ownership of economic crops does not confer ownership of land, and when the plaintiff did not throughout his evidence in the proceedings prove his case on a preponderance of evidence or at all.

5. The learned President and members of the Ikpoba-Okha Area Customary Court Idogbo erred in law when they declared that the plaintiff is entitled to the customary right of occupancy over the 15.3 hectares lying, situate and being at Obayantor II village when Obayantor II village has a subsisting indefeasible perpetual grant of Oba Eweka II since 1916.

6. The learned president and members of the Ikpoba-Okha Area Customary Court, Idogbo erred in law when they descended into the arena of conflict and manufactured evidence for plaintiff in their judgment when they said at page 169 lines 10 ï 15 that:

> óFinally he (p.w2) said among others that the planting of Ikhimwin tree in Benin tradition serves two purposes. Firstly, it represents the establishment of Ogua-edion like the one Uhie planted for Obasuyi and Co. and secondly it is used as pillars

to mark boundary and ownership of land as in the case of the plaintiffôs fatherô

when the actual evidence on the record of proceedings at page 37, lines 16 ï 24 which is directly opposite in material particulars is that:

óIt should be noted that the planting of Ikhimwin tree in Benin tradition places (sic) 2 significant roles:

1. The first is like the one Uhie planted for Obasuyi as explained before in this court
2. There is the other one, which is used as boundary/ ownership of land.

The one we (Uhie) gave them was for Edion Shrine and not for them to own land, sell land, we did not demarcate boundary for themô

7. The learned President and members of Ikpoba-Okha Area Customary Court, Idogbo erred in law when they proceeded to give judgment in this case when the written address of the plaintiff which was filed in court was never served on the Defendants, thereby denying the Defendants of the opportunity of exercise their right to respond by way of reply to the said address on points of law.

8. The learned President and members of Ikpoba-Okha Area Customary Court, Idogbo erred in Law when they evaluated only the evidence of

the plaintiff at pages 165 line 25 up to page 169 lines 1 ï 25 and totally failed to evaluate the evidence of the Defendants at all throughout the judgment.

9. The learned President and members of Ikpoba-Okha Area Customary Court Idogbo erred in Law when in their judgment they examined/evaluated and relied on proceedings in the counterclaim when the counterclaim was no longer before them (see page 165 line 16 of the record of proceedings.)ò

Counsel for the parties filed their respective briefs of argument. O. Aigbovo Esq. counsel for the appellants formulated six issues for determination as follows:

ñ1. Whether the Plaintiff/Respondent whose claim to the land which is the subject matter of the appeal is based on the planting of an Ikhimwin tree for his late father by Uhie village which act is one of the methods used for grant of ownership of land under Benin Customary law HAS DISCHARGED the ONUS of leading credible evidence to show the planting, existence and location of the land in dispute entitling him to exclusive ownership of the said land. (Grounds 1, 2 and 3 of the Grounds of Appeal)

2. Whether under Benin Customary Law, Plaintiff/Respondentôs proof of possession of the Land in dispute no matter how long he has used

it for plantation and farming confers on him ownership title to the Land which is within the geographical territory of land over which the Oba of Benin is TRUSTEE or LEGAL OWNER (Grounds 4 and 5).

3. Whether the Land Use Act extinguishes incidents of customary ownership of land under Benin Customary Law and entitles the Plaintiff/Respondent without more to a customary right of occupancy over the land in dispute in the circumstance of this case (Ground 5.)

4. Whether the court in its judgment is permitted to manufacture and rely on evidence tendered by any of the parties to the case in our adversary system of civil adjudication. (Ground 6)

5. Whether a party in a case is entitled to service of court process were required in every case. (Ground 7)

6. Whether the court is under a duty to examine/evaluate the evidence tendered on behalf of all the parties to a case before it can arrive at a considered and well-founded judgment in the case. (Ground 8).

On his part, C. O. Olaye Esq counsel for the respondent formulated six issues for determination as follows:

1. Whether there was sufficient evidence in proof of the Respondentôs case (this issue arises from Grounds 1, 2, 3 and 4 of the further Grounds of Appeal).

2. Whether the learned President and members of Ikpoba-Okha Area Customary Court, Edo State was right in granting the Respondent a customary right of occupancy over the land in dispute.

   Or.

   Whether the grant of a customary right of occupancy to the respondent over the land in dispute was appropriate (this covers ground 5 of the further grounds of appeal)

3. Whether the trial court manufactured evidence in this case (this is based on ground 6 of the further grounds of Appeal) (this is akin to Issue four raised) in the Appellantsô brief)

4. Whether the Appellants were not served with the Respondentôs address from the available facts in this case (this arises from ground 7 of the further grounds of Appeal)

5. Whether from the judgment it was only evidence of the Respondent that the lower court evaluated (this issue is based on ground 8 of the further grounds of Appeal.)

6. Whether there was reliance on the evidence led in support of the counterclaim by the trial court in arriving at its judgment (this arises from ground 9 of the further grounds of appeal.)

We have carefully examined the issues formulated by both counsel. We prefer the issues formulated by the appellantsô counsel except issues 3 & 4 and

adopt same with some modifications. On Issues 3 and 4, we prefer the issues as formulated by the respondentôs counsel in his Issues 2 & 3. The issues therefore are as follows:

ñ1. Whether the plaintiff/respondent whose claim to the land which is the subject matter of the appeal is based on the planting of an Ikhimwin tree for his late father by Uhie village which is one of the method used for grant of ownership of land under Benin Customary Law has discharged the onus of leading credible evidence to show the planting, existence and location of the land in dispute entitling him to exclusive ownership of the said land ï Grounds 1, 2, & 3.

2. Whether under Benin Customary law plaintiff/respondentôs proof of possession of the land in dispute no matter how long he has used it for plantation and farming confers on him ownership or title to the land which is within the geographical territory of land over which the Oba of Benin is Trustee or Legal Owner ï Ground 4

3. Whether the learned President and members of Ikpoba-Okha Area Customary Court, Edo State was right in granting the respondent a customary right of occupancy over the land in dispute or whether the grant of a customary right of occupancy to the respondent was appropriate ï Ground 5

4. Whether the trial Court manufactured evidence. ï Grounds 6 and 9

5. Whether the non-service of respondentôs counselôs address on the appellantsôCounsel occasioned a miscarriage of justice. ï Ground 7

6. Whether the trial court failed to examine/evaluate the evidence of the appellants before it arrived at a decision in the matter. ï Ground 8.

Arguing the first issue, counsel for the appellants submitted that the respondentôs evidence that Uhie village sent a delegation to plant Ikhimwin tree to demarcate the boundaries of the land in dispute for his father was contradicted by P.W.2 who testified that Uhie village did not plant Ikhimwin tree for the respondentôs father but for Ediae Obasuyi.

Counsel contended that the evidence of the respondent on traditional history should be rejected as inconsistent. The contradiction in the evidence of P.W.2 is an admission against interest. Counsel relied on the following cases:

1. Owie v. Ighiwi (2005) 124 LRCN 503

2. Fagunwa v. Adibi (2004) LRCN 4548

Counsel further submitted that the respondent failed to lead evidence or show in the survey plan, the location or existence of the Ikhimwin tree allegedly planted for his father. He argued that the court was bound to accept the uncontroverted evidence of the appellants that the only Ikhimwin tree was planted for Pa Ediae Obasuyi. He contended that if the trial court had any doubt about the clear testimony of the appellants and their witnesses it should have visited the

locus to ascertain the facts for itself. He relied on the case of Uwadiae v. Aburime (1996) 44 LRCN 2419

Counsel submitted that the respondentôs evidence of traditional history to establish his title was full of gaps and contradictions. He contended that the respondent failed to state in evidence when his father acquired the land and that he neither knew the history of Obayantor II nor that of Uhie. Counsel stressed that evidence of traditional history which a witness can not link from time immemorial to the present should not be allowed by the court. He relied on the cases of Alli v. Aleshinloye (2000) 77 LRCN 742, Akanbi v. Salawu (2003) 112 LRCN 2147 (rr. 3 and 5), Morenkeyi v. Adegbosin (2003) 25 WRN 1

Counsel submitted in the alternative that the respondentôs evidence does not support a claim through traditional history as the period is too short to be consistent with claim of ownership or title from time immemorial. He further submitted that the respondent having testified that two of the witnesses who were present when Ikhimwin tree was planted for his father were still alive, but for no reason he failed to call them as witnesses was fatal to his case.. Counsel cited in support of his submission, the case of Lebile v. T.R.T.S.C.Z.N (2003) 11 WRN 1.

Replying on this issue, counsel for the respondent submitted that the respondent at the trial court proved his case on a balance of probability. He contended that based on the classical case of Idundun v. Okumagba (1976) 9 ï 10 S.C 227 at 246 and reaffirmed in Mbani v. Obosi (2001) 141 LRCN 2317 ratio 2

at 2327 and 2328, the respondent was able to prove title by three distinct methods i.e traditional methods, act of selling, leasing or renting out all or part of the land or farming on it and by long acts of possession.

Counsel stated that the respondent testified that Uhie Community acting on the instruction of Oba Eweka II granted his father the land in dispute in 1929 by planting Ikhimwin tree for him and he gave evidence of what his father presented to the Oba when he made the request.

Counsel submitted that the respondentôs fatherôs act of selling, leasing, farming on the land also established his title to the land. Counsel contended that the respondentôs father established a rubber plantation on the land, built residential houses for staff and established a school in 1941. Counsel further contended that the respondentôs father gave out part of that land to some persons as well as Jehovahôs Witness to establish a place of worship without challenge from anyone in Obayantor II.

Furthermore, counsel submitted that the evidence of the P.W.2 was taken out of context. He contended that the said witnessô testimony was clear that Uhie granted the land in dispute to the respondentôs father and land was also granted by the community to Ediae Obasuyi to built Ogua-Edion. Counsel further contended that this does not render the evidence of the witness as an admission against interest.

Finally counsel submitted on this issue that when the evidence of the respondent is juxtaposed with that of the appellants, the respondentôs evidence was more credible or probable.

We have considered the submissions of both counsel on this issue. The respondent based his title on Ikhimwin tree planted for his father by Uhie Community. Under Benin customary law the planting of Ikhimwin tree was the method of indicating grant of land before 1960s. See the case of Uwadiae v. Aburime (1996) 44 LRCN 2419 at 2436. Counsel for the appellants harped on the evidence of the p.w.2 where he stated at page 39 lines 9 and 10 as follows:

> ñUhe (sic) village did not plant Ikhimwin tree for Iyamu
>
> (the father of the plaintiff in this case).ò

This particular witness had earlier said during his testimony at page 37 of the records inter alia that he was sent by his community Uhie to come to court to testify in the case and to confirm that Uhie community gave the land in dispute to the respondentôs father. In lines 24 ï 26 of the same page, he stated

> ñI am here to confirm that Uhie community gave the
>
> land in dispute to the father of the plaintiff.ò

From the totality of the evidence before the trial court, vis-à-vis the evidence in chief of p.w.2 we therefore believe that his evidence under cross-examination where he said Uhie Community did not plant Ikhimwin tree for the

respondentôs father cannot be regarded as too significant to warrant it being termed an admission against interest.

In addition, we have observed that the appellants were sued jointly and severally and not as representatives of Obayantor II Community. Furthermore the appellants based their claim on the grant to Ediae Obasuyi by the Oba of Benin who mandated Uhie to plant Ikhimwin tree for him. The second defence witness Osemwegie Idahosa who described himself as one of the four elders of Uhie village confirmed this when he stated inter alia at page 58 lines 14 ï 17 as follows:

> ñMy father told me about the laws surrounding the planting of Ikhimwin tree. According to the laws the person who the Ikhimwin is planted for owns the village. This Ikhimwin was planted for Obasuyié ò

The only inference that can be drawn from the above is that the land belongs to Ediae Obasuyi, and the appellantsô claim to the land in dispute is through the said Ediae Obasuyi, who curiously is neither a party nor a witness in this action.

The appellants by their own showing have no title or interest in the land Their contention is that the land belongs to one Ediae Obasuyi. That claim per se does not confer title of the land on the appellant. See the case of Dosunmu v. Joto [1987] 4 N.W.L.R (part 65) 297 at 299 ratio 5.

Notwithstanding the evidence of the respondentôs witness which is at variance with that of the respondent in respect of the planting of Ikhimwin tree, as between the respondent and the appellants, the respondent have proved a better title. In the circumstances, we are of the view that the trial courtôs finding that respondent has proved his case on a preponderance of evidence cannot therefore be faulted.

Issue one is consequently answered in the affirmative.

Issue two is whether under Benin customary law, plaintiff/respondentôs proof of possession of land in dispute no matter how long he has used it for plantation and farming confers on him ownership or title to the land which is within the geographical territory of land over which the Oba of Benin is trustee or legal owner.

Arguing this issue, counsel for the appellant submitted that under Benin customary law, land is communally owned with the Oba as the customary trustee or legal owner of all land in Benin kingdom. Counsel contended that possession of farmland only entitles a person to use not ownership of land. He referred to the following authorities:

Okeaya v. Aguebor (1970) NSCC 1 at 6,

Evbuomwan v. Elema (1994) 6 NWLR (part 353)

Lebile v. T.R.T.S.Z.N. (2003) 11 WRN 1.

Counsel submitted that the respondentôs claim that his father built staff quarters and Rodicos Primary School on the land in dispute is unsupported by evidence as neither the staff quarters nor the primary school are shown on the survey plan tendered by the respondent.

Counsel contended that the respondent only had possession of the land in dispute as a farmland and the mere fact that he commissioned a surveyor to survey the farm land by stealth cannot mature to ownership or vesting of radical title on the respondent. Counsel relied on the cases of:

Alli v. Alesinloye (supra) ratio 1

Adedeji v. Oloso (2007) 3 MJSC 56 ratio 3,

Counsel submitted that exhibits B and C (purchase receipts) are not evidence of acts of ownership of the land in dispute. He contended that under Benin customary law owner of crops on farm land or plantation are entitled to compensation for the crops when such land or plantation are allocated to others for building purposes by the community acting on behalf of the Oba of Benin. Counsel further submitted that crops on land is evidence of use not ownership and that exhibits B and C were issued for the purchase of crops from the respondentôs father. The said Exhibits are not documents of title over land. Counsel referred to the case of Evbuomwan v. Elema (supra).

On the other hand, respondentôs counsel submitted in reply to issue two that following Idundun v. Okumagba (1976) 9 ï 10 SC 227 at 246, the respondent has

been able to prove title to the land in dispute by three distinct methods namely traditional evidence, act of selling, leasing and renting out all or part of the land or farming on it, act of long possession of same.

Counsel submitted that there is abundant evidence to show that the respondentôs father had been in possession of the land in dispute for a long time before his demise i.e from 1929 ï 1973. Thereafter the land devolved on him.

Counsel contended that the act of possession was evidenced by the setting up of a plantation on the land in dispute by the respondentôs father. At the demise of the respondentôs father, the respondent built a piggery.

Counsel submitted that the respondentôs father built residential houses for his workers and founded a school, Rodicos Primary School. Furthermore counsel contended that the respondentôs father gave a part of the land to Jehovahôs Witnesses to build their place of worship as well as gave outright grant to persons as shown in exhibits B and C without challenge from anyone from Obayantor II.

We have carefully considered the submissions of both counsel on this issue. This is against the backdrop that the respondent did not rely only on possession to make his case.

The trial court in its conclusion at pages 170 ï 171 lines 31 & 1 ï 5 stated as follows:

> ñIn the final analysis therefore based on the traditional evidence of the plaintiff p.w2 and p.w3 buttressed by the numerous and positive

> acts of ownership, long possession and enjoyment of the land by the plaintiffôs father, plus the proof of possession of connected or adjacent land é é .. we hereby declare that the plaintiff has proved his case on a preponderance of evidence é .ô

From the above, it is evident that the trial court did not base its decision solely on the issue of possession. The facts of the case of Uwadiae v. Aburime (supra) are not on all fours with the present case. In Uwadiaeôs case possession was the main issue in contention, whereas in this case, possession was merely used to buttress the decision of the trial court which was based primarily on traditional history.

We agree with the appellants counselôs submission that under Benin customary law, possession of land and enjoyment of same for farming purposes can never mature to ownership or title without more. See the following cases:

1. Lebile v. T.R.T.C.S.Z.N (2003) 11 WRN 1
2. Okeaya v. Aguebor (1970) N.SC.C. 1 p. at 6
3. Evbuomwan v. Elema (1994) 6 N.W.L.R (part 353) 638

On the issue of possession, the trial court believed the respondentôs testimony that his father gave out portions of the land to some persons and Jehovahôs witnesses to erect residential buildings and a place of worship respectively. These pieces of evidence were not challenged by the appellants. In other words Exhibits ñBò and ñCò were used for some of the transactions. The

respondentôs father could not have exercised these rights of possession if he was not given a customary grant.

The trial court in our view was therefore right to have relied on the above numerous acts of possession to establish ownership of the land in dispute coupled with the traditional evidence.

As stated earlier, the position of the law is that under Benin Customary law, possession of land no matter how long does not mature to ownership.

Issue two is therefore answered in the affirmative.

On Issue three, appellantsô counsel submitted that the fact that the respondentôs father had a farm or plantation on the land in dispute before the advent of the Land Use Act in 1978, does not without more entitle him to ownership or grant of a customary right of occupancy over the land.

Counsel contended that the Supreme Court has held in a number of cases that the Land Use Act has not extinguished incidents of customary ownership of land in Nigeria. Counsel referred to the following cases:

1. Abioye v. Yakubu (1991) 5 N.W.L.R (part 1990) ratio 3a
2. Lebile v. T.R.T.C..S.Z.N. (supra) ratio 2

Specifically, counsel submitted that the Land Use Act did not divest the people of Benin kingdom or the Oba of Benin of the status of trusteeship or the customary ownership of land in rural areas in Benin Kingdom.

Counsel argued that the Land Use Act does not entitle the respondent without more to a grant of customary right of occupancy over the land in dispute.

Counsel further submitted that the respondent would have been entitled to a customary right of occupancy over the land in dispute only if he was able to establish in evidence that he or his predecessor in title had a customary grant transferring ownership of the land in dispute to them by means of any of the customary methods of doing so under Benin customary law. Counsel adopted arguments canvassed by him in arguing Issues one & two.

Replying on Issue three, counsel for the respondent contended that by Section 6 of the Land Use Act, all land in rural areas became the subject of a customary right of occupancy and an Area Customary Court has jurisdiction to entertain matters for a declaration of title to a customary right of occupancy.

Counsel submitted that the respondentôs case at the trial court was not based on possession but on ownership of same under Benin customary law.

We have considered the submissions of both counsel on this issue. It is settled law that all land in Benin kingdom is vested in the Oba of Benin as trustee. It is also settled that possession of a farm land without more does not vest legal title on the user. See Okeaya v. Aguebor (supra) and Evbuomwan v. Elema (supra).

Having earlier resolved the issue that the respondent proved a better title to the land as between the appellants and the respondent, the trial court was right in

its judgment when it held that the respondent is entitled to a customary right of occupancy over the land in dispute. Issue three is therefore answered in the affirmative.

The fourth issue is whether the trial court manufactured evidence. On this issue, learned counsel for the appellant contended that a court cannot set up for the parties a case different from the one set up by the parties in their pleadings or evidence, as to do so would amount to a denial of fair hearing. Counsel referred to the following cases to buttress his argument.

1. Jones v. National Coal Board (1957) 2 All E.R. 155 at 159
2. Ojo-Osagie v. Adonri (1994) 6 N.W.L.R. (part 349) 131
3. University of Calabar v. Essien (1996) 44 L.R.C.N. 2280
4. Nwobodo v. Nwobodo (1996) 4 L.R.C.N 2890

Counsel submitted that the trial court imported into the judgment evidence which was not before the court. Counsel contended that the second respondent witness (p.w2) stated that Uhie planted Ikhimwin tree for Obasuyi and Co to establish Ogue-edion and did not plant Ikhimwin tree for respondentôs father Iyamu, while the court in its judgment stated that the said witness asserted that Ikhimwin tree was planted for respondentôs father, Iyamu to demarcate the boundaries.

Furthermore, counsel submitted that the trial court relied on evidence tendered in the counterclaim which was no longer before the court having earlier

been disposed of by the court. Counsel submitted that a counter claim is a separate and distinct action from the main case. Counsel relied on the case of Jeric Nigeria Ltd v. UBN PLC (2000) 82 L.R.C.N. 3259 ratio 5.

Finally on this issue, counsel submitted that the trial courtôs reliance on such material piece of evidence in its judgment, irredeemably prejudiced the case of the appellants.

Replying on issue four, learned counsel for the respondent submitted that the evidence of the respondentôs witness (p.w2) with regard to the planting of Ikhimwin tree was being taken out of context by the appellants. Counsel contended that the said witness confirmed the respondentôs evidence that his late father was granted land by Oba Eweka II in 1929 by instructing Uhie Community to plant Ikhimwin tree for him.

Counsel submitted that the respondentôs witness testimony was that the Ikhimwin tree planted by Uhie Community at Obayantor II was at the Ogue-edion for the worship of the ancestors and not for Obayantor II to own or sell land. Counsel further contended that the trial court did not raise any issue *suo motu* to justify the calling of parties to address on it. Counsel submitted that although the counterclaim was withdrawn and dismissed by the court the evidence led in the counterclaim formed part of the proceedings which cannot be jettisoned and is binding on the parties.

Counsel submitted that the evidence given at the trial in the claim is not distinguishable from that in the counterclaim. Moreso as the appellantsô counsel had informed court that he was relying on the testimonies of the appellantsô witnesses in support of the counterclaim. He contended that the appellants cannot be heard to complain against the trial courtôs use of evidence given in the counterclaim.

We have also considered the submissions of counsel on this issue. The first complaint of the appellants under this issue is that the trial court imported evidence in the judgment.

The trial court in its judgment made a remark concerning the planting of Ikhimwin tree which appears not be in evidence. However, we observed that counsel for the appellant made heavy weather of it which we believe was unnecessary. This is because there are plethora of authorities that not every slip by a trial court will lead to its judgment being set aside on appeal. See the cases of Osafile and Odi (1990) 3 N.W.L.R. (part 137) at 138 ratio 30, Nwosu v. Imo State Sanitary Authority (1990) 2 N.W.L.R. (part 135) 688 at 708 ratio 34. Furthermore it must be shown that such extraneous matters influenced the decision of the court. See the case of Agbi v. Ogbe (2004) 116 L.R.C.N. 3372 at 3404 ratio 3. We do not believe that that happened in this case.

In the same vein, we also observed that the counterclaim referred to in the judgment was merely to restate the fact that the identity of the land was not in

issue. The issue of identity of the land in dispute certainly did not play any part in the proceedings. Consequently, Issue four is answered in the negative.

Issue five is whether the non-service of the respondentôs counselôs address on the appellantsô counsel occasioned a miscarriage of justice.

Counsel for the appellants submitted on this issue that the non-service of the respondentôs written address on appellantsô counsel before the trial court delivered its judgment strips the court of jurisdiction and it is a breach of the right of fair hearing as guaranteed under section 36(1) of the Constitution of the Federal Republic of Nigeria 1999. Counsel contended that the appellants were denied the opportunity to respond by way of a reply to the written address filed by the respondent. He relied on the case of Osayande v. Etuk (2008) 1 N.W.L.R. (part 1068) 211 at 219 ratio 8.

Replying on this issue, counsel for the respondent submitted that the appellantsô counselôs failure to draw the trial courtôs attention to the fact that he was not served with the respondentôs counselôs address cannot be visited on the respondent.

Counsel referred to the dictum of Niki Tobi JSC in the case of Newswatch Communications Ltd. v. Atta (2006) 139 L.R.C.N. 1894 at 1915 ï 1916 and submitted that the trial court created a conducive environment for the parties to ensure a fair hearing and that a party who failed to take advantage of it cannot turn round to accuse the court of denying him of fair hearing.

We have considered the submissions of both counsel on this issue and observed that respondentôs counselôs written address as well as the appellantsô counselôs written address were incorporated into the record of proceedings at pages 104 ï 115 and 117 ï 129 respectively. Moreover, at page 104 of the record of proceedings the entries made therein showed that on Friday the 2nd day of February, 2007 the respondentôs counsel as well as the appellantsô counsel were both present in court. The respondentôs counsel informed the court that he had submitted his written address to court while the appellantsô counsel told court his address was not ready. Again on the 2nd day of March 2007 at page 116 of the record of proceedings the appellantsô counsel informed court that their address was also not ready and that they had applied to court for the record of proceedings because they could not find their case file. Counsel for the appellants never complained to court that he had not been served with the written address of the respondentôs counsel.

In the circumstance, it is difficult to conclude that the appellantsô counsel was not served with the address. This issue is therefore answered in the negative.

Issue 6 is whether the trial court failed to examine/evaluate the evidence of the appellants before it arrived at a decision in the matter.

Counsel for the appellants submitted on this issue that the trial court evaluated only the evidence of the respondent and failed to evaluate the evidence of the appellants. Counsel contended that the mere reproduction of the testimony

of the witnesses as was done by the trial court in its judgment does not amount to an evaluation of evidence of the witnesses. Counsel referred to the following cases:

1. Basil v. Fajebi (2001) 86 L.R.C.N. 148 ratio 2 & 3
2. Kwajaifa v. Bank of the North (2004) 118 L.R.C.N. 4006 ratio 7
3. Bello v. State (2007) 10 N.W.L.R. (part 1043) 564 ratio 4

Responding on this issue, counsel for the respondent submitted that the trial court properly evaluated the evidence of both parties before arriving at a decision on the matter. He contended that the trial court evaluated the evidence of the parties as it relates to the identity of the land in dispute and submitted that appellants failed to prove a better title and that the appellants admitted trespassing into the land.

We have also carefully examined the record and considered counselôs submissions on this issue. Counsel had contended that the trial court merely reproduced verbatim the testimony of all the witnesses and that this does not amount to an evaluation of the evidence tendered.

The Law reports are replete with authorities of what constitutes a proper evaluation of evidence. See the cases of

1. Atoyebi and Anor v. Gov. of Oyo State & Ors (1994) 17 L.R.C.N. 73
2. A.G. Kwara State v. Olawale (1993) 12 L.R.C.N.

In our considered view, the trial court properly considered the evidence of both parties and preferred the evidence as adduced by the respondent to that of the appellants. In any event, judgment writing is an art and there is no hard and fast rule governing the form a judgment should be written. See the cases of Onajobi & Anor v. Olanipekun & Ors (1985) 11S.C. (part 2) 156 at 163, Balewa v. Doherty (1963) 1 W.L.R. 969 at 960.

It has been held that the judgment of a trial court cannot be said to be deficient of the attributes of a valid judgment if the judgment showed adequate perception of the facts of the case as disclosed in evidence, evaluation of the facts, or disbelief of the witnesses. A trial courtôs duty is to place the evidence adduced before it on an imaginary scale of justice and give judgment in whose favour the evidence tilts. See the case of Odi v. Iyala v. Offo (2004) 116 L.R.C.N. 3271 at 3276 ratio 6.

The trial court considered the evidence adduced by the parties and it noted that the respondent is in possession and that the appellants failed to establish a better title. It believed the evidence of the respondent in respect of a traditional grant to his late father. It is trite that an appeal court would not disturb the findings of a trial court unless such findings are perverse. In this case we do not find the findings as perverse. Issue 6 is answered in the negative.

Having resolved all the six issues in favour of the respondent and having held that the respondent proved a better title, we hold that this appeal lacks merit.

It is accordingly dismissed. Consequently the judgment of the Ikpoba-Okha Area Customary Court, Idogbo delivered on the 24th day of April, 2007 in respect of this case and the consequential order as to costs made therein are hereby affirmed.

The appellants are to pay the respondent costs assessed at ₦3,000.00 (Three thousand Naira)

_____
Hon. Justice Peter Osaretinmwen Isibor

_____
Hon. Justice Mary Nekpen Asemota

_____
Hon. Justice Timothy Ukpebor Oboh

O. Aigbovo Esq. é é é é é Counsel for the appellants
C. O. Olaye Esq. é é é é é Counsel for the respondent