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

ON MONDAY, 23RD FEBRUARY, 2009

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR é é JUDGE (PRESIDED)

MARY NEKPEN ASEMOTA (MRS) é JUDGE

PETER AKHIMIE AKHIHIERO é é JUDGE

APPEAL NO. CCA/7A/2005

BETWEEN:

IVAIVBUNU ARONOBE OISEWEME é APPELLANT

AND

MOSES OMAGE é é é é é RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Uzebba District Customary Court, Uzebba, delivered on the 19th of May, 2004 in Suit No. UDCC/45/2001.

In the said suit, the respondent (as plaintiff) claimed against the appellant (as defendant) as follows:

ñ1. N50,000 (fifty thousand naira) special and general damages in that between the 17th February, 2001 and the 14th of March, 2001, the defendant broke and entered the farm of the plaintiff without his consent and authority, cleared same and destroyed some rubber trees belonging to the Plaintiff at Ugbihomehai bush farm Avbiosi New, having common boundaries with

Amos Oiseweme to the bottom, the plaintiffôs rubber farm to the top, Ohioma to the left an Ohiokhuabo to the right, a place within the jurisdiction of the Honourable Court.

2. An order of perpetual injunction restraining the defendant, his servants, agents, and privies from further acts of trespass on the plaintiffôs land.ò

At the trial court, the respondent testified that in 1962 he bought the parcel of land in dispute situate at Ugbehomehai bush from 15 one Igbuan Ighore for the sum of £25.00 (twenty five pounds). Upon purchase, he entered into a written agreement with the said Igbuan Ighore. The original copy of the agreement was tendered at the Area Customary Court, Sabongidda-Ora in a case between the respondent and one Isaac Ebohon, which was still pending at the time of the trial. The photo copy of the agreement was admitted as Exhibit óAô at the trial court.

Sometime ago, the respondent obtained a judgment at the Area Customary Court, Afuze, against one Felix Uanlevbare Olime for trespass on the said land. The same Felix Uanlevbare Olime sold the land in dispute to one Abu Adodo. The respondent obtained an injunction from the Afuze Area Customary Court to restrain F. U. Olime, Abu Adodo, Oruame Oiseweme and some other persons from further trespassing on the said land. Between February and March, 2001, the appellant entered the land without the consent and authority of the respondent and planted ducanut trees, kolanut trees and cocoa, hence the suit was instituted against him at the trial court.

Upon the conclusion of his testimony, the respondent did not call any witness.

The appellant testified in his defence at the trial and called one witness. He stated that the land in dispute originally belonged to his grand father, Oiseweme and that his father inherited the land from his grandfather. The disputed land was given to his uncle, Amos Oiseweme, and after the death of Amos Oiseweme, one Oruame Oiseweme, the younger brother of Amos, took possession of the land.

The appellant maintained that the land in dispute was given to him by the said Oruame Oiseweme. On the left, the land has a common boundary with Ohiomah Akhagbe, by the right, Ohiokhiogbo Atane and on the top of the farm is a rubber plantation, and after that, a cocoa farm owned by Imevbore Olime. The rubber plantation was given by Imevbore Olime to one Igbuan who sold part of it to Omage, the respondentôs father.

The respondent was not at home when his father acquired the land. When he returned home, Oruame Oiseweme showed the respondent the land, although he did not know the exact size of the rubber plantation sold by late Igbuan.

One Ojeikhoba Igbuan testified as the only defence witness. He stated that his father, Igbuan, sold a rubber plantation to the respondentôs father. He maintained that it was not all the rubber plantation that was sold to the respondentôs father. When the respondent came home, he showed him the boundaries of the land. The D.W. 1 stated that the respondent later sued him at the Magistrateôs court, Afuze, because he did not give him the piece of land, which did not belong to his (D.W. 1ôs) father.

At the conclusion of the trial, the court gave judgment in favour of the respondent. The sum of N7,000.00 (seven thousand naira) was awarded as general damages and an order of perpetual injunction was made, restraining the appellant, his servants, agents and privies from further acts of trespass on the respondentôs land.

Dissatisfied with the judgment, the appellant filed a notice of appeal with two original grounds, dated the 26th day of May, 2004.

With the leave of this Honourable Court, the appellant filed three additional grounds of appeal. All the grounds of appeal are reproduced hereunder as follows:

ORIGINAL GROUNDS OF APPEAL

ñ1. That the entire judgment is against the weight of evidence

2. That the entire judgment is unwarranted and not backed up with law.ò

ADDITIONAL GROUNDS OF APPEAL

ñ1. The trial District Customary Court, Uzebba, erred in law and thereby came to a wrong conclusion, when, without first taking a plea from the Defendant/Appellant to the Plaintiff/Respondentôs claim as required by law, it proceeded to the hearing, trial and determination of the case thereby rendering the entire trial and all other processes taken therein including and in particular the judgment delivered thereto after it failed to take plea to the Plaintiff/Respondentôs claim, a nullity and of no effect whatsoever.ò

PARTICULARS OF ERROR

(a) It is an elementary but a mandatory principle of law that before proceeding to hearing, trial and determination of any cause or matter, the plea of the Defendant to the case must first be taken or obtained and so recorded in the record book by the court.

(b) There is not the slightest indication in the entire record of proceedings in this case that plea was ever taken at any stage of the proceedings if at all. See particularly pages 27 to 28 where the Plaintiffôs claim was amended and Plaintiffôs case was opened by the Plaintiffôs testimony therein.

2. The trial District Customary Court, Uzebba erred in law when it held at page 38 lines 27 to 29 that Exhibit óCô is an Appellate (sic) judgment given by Owan Area Customary Court, Afuze, which uprooted Oiseweme from the land, which said conclusion influenced its decision in this case.

PARTICULARS OF ERROR

(a) The said judgment i.e. Exhibit óCô speaks for itself. It did not say that Oiseweme has been uprooted from the land.

(b) The judgment and order made therein is restricted and confined to the rubber plantation in dispute in that case and did not include or extend to any undeveloped land as the judgment did not say so and the purported undeveloped land was not in issue in that case.

(c) That the said judgment did not determine the issue of title to the land as that was not the case before that court. What was before the court was the identity of the land in question which was dealt with by the defunct District Customary Court, Sabongidda-Ora. See page13 lines 27 to 30 of the record of proceedings.

(d) Exhibit óAô did not state the number of acres involved in the purported sale nor the boundaries of the land or rubber plantation.

(e) That Amos Oiseweme through whom the Defendant is claiming was specifically mentioned by the Plaintiff at page 29 lines 4-5 of the record as having common

boundaries with the land in dispute without going further to state their boundary marks or boundary features.

3. The trial court erred in law when in its judgment, it **suo motu** imported the issue of cross-examination of the Defendant and his sole witness in the penultimate paragraph of page 39 of the record of proceedings, notwithstanding that there was nothing to indicate that such took place in the recorded evidence as contained in the printed record, which said view or position greatly influenced the trial court in coming to its wrong conclusion and its judgment in the case.ò

Subsequently, the parties filed and exchanged their briefs of argument, in accordance with the rules of the Court.

On the 28th of April, 2008, O. D. Ejere Esq., and O. B. Amu Esq., learned counsel to the appellant and the respondent respectively, adopted their written briefs of argument and the appeal was adjourned to the 23rd of June, 2008 for judgment.

While the panel was considering the case for judgment, we discovered that the record of proceedings was incomplete. Specifically, we observed that the evidence of the D.W. 1, which both the counsel and the trial court referred to in their briefs and judgment respectively, was not contained in the record of appeal forwarded to this Honourable Court.

Consequently, hearing notices were served on the counsel to the parties to appear before this Court on the 26th of May, 2008 to further address us on the incomplete record of appeal.

On the said 26th day of May, 2008, both counsel addressed the Court and the Court made an order directing the Registrar of the trial Uzebba District Customary

Court, Uzebba, to produce the record book of that court containing the said proceedings in Suit No. UDCC/45/2001 now on appeal. The matter was thereafter adjourned to the 23rd of June, 2008.

On the 23rd of June 2008, the Registrar of the trial court produced the court record book which was duly examined by this Court and the counsel to the parties and it was confirmed that the evidence of D.W.1 was recorded therein. Having satisfied itself that the evidence of D. W. 1 was contained in the record book of the trial court, this Court made an order incorporating the certified true copy of the evidence of D. W. 1 into the record of proceedings by reference. Certified true copies of the evidence of D.W.1 were served on the Court and the counsel to the parties.

Sequel to the foregoing developments, the appellant amended additional ground three of their grounds of appeal to read as follows:

ñAMENDED ADDITIONAL GROUND THREE

The trial court erred in law when in its judgment it failed to give consideration or proper consideration to the evidence of the DW.1 and its effect on the case of the parties, which said failure greatly influenced the courts decision against the Defendant/Appellant thereby occasioning a miscarriage of justice.

PARTICULARS OF ERROR

The trial District Customary Court merely at page 39 made very brief reference to the cross examination of the DW. 1 in its judgment and no moreò.

Arising from the amendment of the grounds of appeal, both parties effected consequential amendments to their briefs of argument. Both counsel adopted their amended briefs of argument and the appeal was adjourned for judgment.

In the appellantôs amended brief of argument, the learned counsel for the appellant, O. D. Ejere Esq., formulated four issues for determination as follows:

ñ1. Whether the failure of the trial court to take or obtain the plea of the Appellant to the claim and record same as required by law had not rendered the entire proceedings in the case and the judgment thereto (given after the failure to take the said plea) a nullity and of no effect whatsoever.

2. Whether the trial courtôs judgment is not against the weight of evidence (both oral and documentary) adduced at the trial having failed to weigh or properly weigh, assess, evaluate and balance the case of the parties against each other before arriving at its decision in favour of the Plaintiff/Respondent?

3. Whether the trial court was not in error occasioning a miscarriage of justice when it held at page 39 lines 23 to 25 and 37 to 38 of the record that Exhibit óCô(an appellate judgment given by the defunct Owan Area Customary Court, Afuze in its then appellate jurisdiction) had uprooted the Defendantôs (Appellant herein) root of title derivable from Oiseweme, when in fact the subject matter in Exhibit óAô is not one and the same with the land in dispute in this present case.

4. Whether the failure of the trial court to consider or properly consider the evidence of DW. 1 and its effect on the case of the parties had not adversely influenced the decision of the court in the case against the Defendant/Appellant?ò

In his brief of argument, the learned counsel for the respondent, O.B. Amu Esq., formulated four issues for determination which are essentially the same as the issues formulated by the appellant. It is however pertinent to observe that in formulating their issues for determination, both counsel failed to tie the grounds

of appeal to the issues formulated. It is settled law that an issue for determination must relate to a ground of appeal. See the following cases:

(1) Odite v Aniemeka (1992) 7 N.W.L.R. (Pt. 251), p. 25

(2) Kalu v Odili (1992) 5 N.W.L.R. (Pt. 240), p. 130

(3) Ceekay Traders Ltd v General Motors Ltd. (1992) 2 N.W.L.R. (Pt. 222) p. 532.

Upon a careful consideration of the issues as formulated by the parties, we adopt the issues as formulated by the appellants and tie them to the relevant grounds of appeal as follows:

1. Whether the failure of the trial court to take or obtain the plea of the appellant to the claim and record same as required by law had not rendered the entire proceedings in the case and the judgment thereto, a nullity and of no effect whatsoever (Additional Ground 1).
2. Whether the trial courtôs judgment is not against the weight of evidence (both oral and documentary) adduced at the trial, having failed to weigh or properly weigh, assess, evaluate and balance the case of the parties against each other before arriving at its decision in favour of the Plaintiff/Respondent (Original Ground 1).
3. Whether the trial court was not in error occasioning a miscarriage of justice when it held at page 39 lines 23 to 25 and 37 to 38 of the record that Exhibit óCô (an appellate judgment given by the defunct Owan Area Customary Court, Afuze in its then appellate jurisdiction) had uprooted the appellantôs root of title derivable from Oiseweme, when in fact the subject matter in Exhibit óAô is not one and the same with the land in dispute in this present case (Additional Ground II).

4. Whether the failure of the trial court to consider or properly consider the evidence of D.W. 1 and its effect on the case of the parties had not adversely influenced the decision of the court in the case against the appellant. (Amended Additional Ground III).

From the issues formulated above, it would be observed that the issues do not cover Original Ground II which states that the entire judgment is unwarranted and not backed up with law. Consequently, that ground is deemed to have been abandoned, and it is accordingly struck out.

Arguing the first issue for determination, the learned counsel for the appellant, O.D. Ejere Esq., submitted that the failure of the trial court to take and record the plea of the appellant (who was not represented by a counsel) to the claim as required by Order IX rules 1 to 5 of the Customary Courts Rules of 1978 of Bendel State, now applicable to Edo State of Nigeria, is fatal to the entire proceedings and rendered same a nullity. He cited the following cases in support of his proposition:

1. Fawehinmi Construction Co. Ltd v Obafemi Awolowo University (1998) 59 L.R.C.N. 3809.
2. Okeke v State (2003) 5 MJSC 44
3. Tobby v State (2001) F.W.L.R 52

He submitted that the rule on the mandatory nature of a plea applies to both criminal and civil proceedings. He maintained that the use of the word ósha llô in Order IX is imperative and makes it mandatory for the court to take and record the plea of a Defendant to any claim brought against him in any cause or matter. He cited the following cases in support:

1. Onochie & Ors v Odogwu & Ors (2006) 2 SCM 95 ratio 5
2. Ifezue v Mbadugha & Anor (1984) 5 S.C. 79
3. Makelu v Federal Commissioner for Works and Housing (1976) 3 S.C. 35
4. Madam Alake Aroyewun v Joseph Adebanji (1976) S.C. 22.

Replying to the arguments on Issue I, O. B. Amu Esq., submitted that failure to comply with the provisions of the 1978 Customary Court Rules can only be treated as an irregularity and cannot nullify the proceedings.

He maintained that while civil matters are proved on the preponderance of evidence, the burden of proof is higher in respect of criminal cases.

Finally, he submitted that rules of court must be obeyed and the trial court complied with the provisions of Order XXIV of the 1978 Customary Court rules of Bendel State as applicable in Edo State of Nigeria.

We have considered the arguments on both sides in respect of Issue I, which is on the effect of the failure of the trial court to take and record the plea of the appellant to the claim. The appellant is urging this Court to declare the entire proceedings a nullity on account of this.

Upon a careful consideration of the provisions of Order IX of the 1978 rules, we are of the view that the relevant order is Order IX rule I (1) which according to the side notes, is on ñPlea in civil and criminal matters.ò The said Order IX rule 1 (1) provides as follows:

> ñ1 (1) The subject of a charge shall be read out by the clerk to the defendant, who shall be asked how he pleads to it, and his

15 answer shall be recordedò (underlining mine).

It is evident that the order is clearly in relation to a charge and not a claim, the side notes not withstanding. The maxim is expressio unius personae vel rei, est exclusio alterius (the express mention of a person or a thing means the exclusion of another).

From the foregoing, it is our view that the word óshallô should be restricted to the plea in respect of a charge in a criminal trial. The position is buttressed by the fact that the appellant could only cite criminal cases to support his argument. We have read the only civil case which he cited, to wit:

Fawehinmi Construction Co. Ltd. v Obafemi Awolowo University (1998) 59 L.R.C.N. 3809, and we observed that the case is not relevant to the issue of a plea being mandatory in a civil case. As a matter of fact, the Fawehinmi Construction Co. case (supra), dealt with the failure of a court in a criminal trial to take the plea of an accused person. In the said case, at p. 3813 in ratio 3, the Supreme. Court held that:

> ñIf a criminal record contains a charge and the evidence of parties, addresses by counsel and the judgment and sentence and it is discovered that the charge was not read and explained to the accused and no plea was taken, the entire trial will be a nullity.ò

We uphold the submission of the learned counsel to the respondent that the failure to take the plea can be regarded as an irregularity which cannot vitiate the entire proceedings. See Order XXIV of the Customary Courts Rules, 1978 of Bendel State, now applicable to Edo State.

In the event, we resolve Issue I in the negative.

Issue II is whether the trial courtôs judgment is not against the weight of evidence (both oral and documentary) adduced at the trial, having failed to weigh or properly weigh, assess, evaluate and balance the case of the parties against each other before arriving at its decision in favour of the Respondent.

Arguing this Issue, the appellantôs counsel submitted that the judgment of the trial court is clearly against the weight of evidence adduced at the trial. He contended that if the court had properly assessed the case of the parties, it would have found that of the appellant more meritorious than that of the respondent.

The learned counsel submitted that the trial court, without considering the case of the appellant against the respondent, held that the respondent had proved his title vide Exhibit óAô ï the sales receipt on the land, dated May 20th, 1962, Exhibit óBô an order of interlocutory injunction in suit No. OACCA/1A/91 and Exhibit óCô, an appellate judgment given by the Owan Area Customary Court, Afuze. But the court only made a terse remark that the appellant and his witness ñwere having their tongues in their cheeksò when during cross examination, they claimed not to know when the respondent sued one Olime and obtained an injunction against Oruame and Adodo.

The appellantôs counsel further submitted that the trial court wrongly interpreted the contents of Exhibits óAô, óBô and óCô. He contended that the said Exhibits are clearly in relation to a rubber plantation without more. This is quite different from the land in dispute.

Finally, he submitted that there is unchallenged and uncontroverted evidence that it was the respondentôs father who actually purchased the rubber plantation and that the respondent was only shown the land later by Oruame Oiseweme and the D.W. 1.

The trial court did not consider this piece of valuable evidence at all.He concluded that the decision of the trial court in the circumstance was perverse and urged this Court to draw the correct inference from the available facts and properly interpret Exhibits óAô, óBô and óCô to hold that the land in dispute is quite different. He cited thefollowing cases in support of his submission:

(1) Woluchem & Ors v Gudi (1981) 5 S.C. 319; and

(2) Mogaji v Odofin (1978) 4 S.C. 91

In his reply to Issue II, O. B.Amu Esq., submitted that the judgment of the trial court is not against the weight of evidence and that the trial court at page 39 of the record of proceedings, correctly considered the case of the respondent against that of the appellant before it found in favour of the respondent.

Counsel further submitted that the trial court weighed the evidence of the D.W. 1 which he maintained was in conflict with that of the appellant as to the boundary men and rightly held that the D. W.1 could not be believed.

Finally, he submitted that Abu Adodo, Oruame Oiseweme and others mentioned in Exhibit óBô were privies to Felix Olime in the interlocutory application before the Afuze Area Customary Court.

Being privies, they were bound by what affect their root of title. He maintained that since Olime was eventually uprooted from the land by the judgment in Exhibit óCô, his privies ceased to have any claim to the land or any part thereof. He argued that if Abu Adodo or Oruame Oiseweme through whom the appellant is laying claim to the land, was claiming independently of Olime, either of them could have filed a counter-affidavit or an interpleader summons to challenge the respondent at that time.

The respondentôs counsel concluded that the trial court had no other option but to hold in favour of the respondent.

Essentially, under Issue II, the appellant is contending that the trial court did not properly evaluate the evidence at the trial. Upon a careful consideration of the judgment of the trial court, it is evident that the court specifically addressed the issue as to the root of title of the parties. In the process, the court considered the documents of title tendered by the respondent, to wit: the sales receipt Exhibit óAô, the order of interlocutory injunction Exhibit óBô, and the court judgment Exhibit óCô together with the evidence of the respondent at the trial.

The court juxtaposed the oral and documentary evidence of the respondent with that of the appellant and preferred that of the respondent.

It is settled law that the evaluation of evidence and the ascription of probative value are the primary functions of the trial court which saw, heard and assessed the witnesses. See the following cases:

1. Abidoye v Alawade (2001) 85 L.R.C.N. 736
2. Agbeje v Ajibola (2002) 93 L.R.C.N. p. 1
3. Okwejiminor v Gbakeji (2008) 5 N.W.L.R. (Pt. 1079), page 172 at 181.

Upon a careful consideration of the evaluation and findings of the trial court, we have no reason to fault the inference drawn from the oral and documentary evidence adduced at the trial. Accordingly, we resolve Issue II in the negative.

Issue III is whether the trial court was not in error when it held that the judgment of the Afuze, Area Customary Court tendered as Exhibit óCô, had uprooted the appellantôs root of title derivable from Oiseweme, when the subject matter in Exhibit óAô is not one and the same with the land in dispute in this present case.

Arguing this Issue, O. D. Ejere Esq., submitted that the trial court wrongly assumed that the land in dispute in the case and the rubber plantation mentioned in Exhibits óAô, óBô and óCô is one and the same. He maintained that the said Exhibit óCô relate to a rubber plantation and should not by any stretch of imagination be extended to

any other land around the rubber plantation. The case of the respondent in Exhibit óCô was not for a declaration of title to the land around the rubber plantation and so title over that portion was not in issue.

He further contended that neither Exhibits óAô, óBô nor óCô, stated the number of acres involved nor the boundaries of the rubber plantation or the so called undeveloped land mentioned in Exhibit óAô and óBô. Moreover, while the appellant traced his root of title through Oruame Oiseweme to Amos Oiseweme and eventually to his grandfather and father, the respondent could not establish how Igbuan Ighore came to own the land, which he bought from him. He submitted that the respondent therefore failed to establish his root of title to the land and even the rubber plantation he claimed to have purchased.

Finally, he submitted that it is the same Amos Oiseweme who the appellant traced his title to that the respondent specifically mentioned as having a common boundary with his land. The only reasonable inference to be drawn from this fact is that Amos Oiseweme actually farmed on the land before it was passed on to the appellant.

He urged this Court to answer Issue III in the affirmative and allow this appeal.

In his reply, the learned counsel for the respondent submitted that the land which the respondent occupies is the entire land covered by Exhibit óAô. He further submitted that Oiseweme through whom the appellant is tracing his root of title, was a privy to Felix Olime in Exhibit óBô, who was restrained by the order of the Area Customary Court. Furthermore, Exhibit óCô was in favour of the respondent. He therefore argued that Oiseweme cannot have a better legal right to the disputed land than Olime the alleged owner. Once Olime was uprooted from the land, it consequently affected his privy, Oiseweme.

The counsel maintained that the only parcel of land which relates to this appeal is the rubber plantation or farmland of about twenty native acres with the undeveloped farmland around it, belonging to the respondent measuring about forty native acres. The land in dispute in this appeal is one and the same with the one in Exhibits óAô, óBô and óCô, he added.

Issue III is quite similar and connected to Issue II. It borders on the findings of the trial court based on the evidence adduced at the trial. The bone of contention is whether the judgment of the Afuze Area Customary Court in Exhibit óCô had vitiated the

appellantôs root of title. The respondent tendered the judgment to establish his title to the land in dispute. The appellant and his witness, D.W.1, claimed that they did not know anything about the proceedings culminating in Exhibit óCô. The trial court evaluated the evidence of the parties and made a finding in favour of the respondent to the effect that the appellantôs root of title which was traced to Felix Olime had been vitiated by Exhibit óCô. This finding can only be faulted in this appeal if it is found to be perverse. The authorities are settled on this point. See the following cases:

1. Woluchem v Gudi (1981) 5 S.C. 319
2. Bamgbade v Balogun (1994) 1 N.W.L.R. (Pt. 323), p. 718
3. Okegbemi v Akintola (2008) 4 N. W.L.R. (Pt. 1076), p.53 at 58 ratio 7.

The appellant has not proved the finding of the trial court to be perverse. We therefore resolve Issue III in the negative.

Issue IV is whether the failure of the trial court to consider or properly consider the evidence of the D.W.1 and its effect on the case of the parties had not adversely influenced the decision of the court in the case against the appellant.

In his argument on this issue, O. D. Ejere Esq., submitted that the failure of the trial court to properly consider the evidence of the D.W.1 and its effect on the case of the parties had adversely

influenced the decision of the trial court in deciding the case against the appellant.

He contended that the trial court made an incomplete re-statement or review of the evidence of the D.W.1 and that the court merely re-stated the aspect of the D.W.1ôs evidence which it perceived would not knock the bottom off the respondentôs case. He further contended that if the court had fully considered the evidence of the witness, it would have strengthened the appellantôs case against that of the respondent because the evidence of the D.W. 1 was neither contradicted by the respondent in his evidence nor challenged by way of cross- examination of the witness.

He finally urged the court to invoke its power to believe the evidence of the D.W.1 and consider the effect of the evidence on the case. He urged the court to resolve this issue in the affirmative.

In his reply, O. B. Amu Esq., submitted that the trial court did not fail to properly consider the evidence of the D.W. 1. He maintained that the evidence of D.W.1 was correctly stated and that the appellant is merely speculating.

Counsel further submitted that the oral evidence of the D.W. 1

cannot change the contents of Exhibit óAô which is a document of over twenty years old. He urged the Court to reject the submission that the respondent did not dispute or challenge the evidence of D.W.1.

The preliminary question to be resolved under this issue is firstly, whether the trial court considered the evidence of the D.W. 1 at all. There is no doubt that the trial court gave consideration to the evidence of this witness. It will be recalled that it was in the judgment of the trial court that this panel spotted the references to the evidence of the D.W.1 which was inadvertently omitted from the record of appeal before us. Thus, it cannot be seriously contended that the trial court did not consider the evidence of this witness.

The second preliminary issue is whether the evidence was properly considered by the court. The learned appellantôs counsel has submitted that the re-statement or review of the evidence of D.W. 1 was incomplete. We do not think it is expedient for a trial court to reproduce verbatim the testimony of a witness in its judgment. A summary of the relevant aspects of his testimony will suffice in the judgment.

We have examined the record of the testimony of the witness as contained in the judgment and we are of the view that the relevant portions were re-stated therein.

On the issue of whether the trial court properly considered the evidence of the D. W. 1 and its effect on the case, we are satisfied that the trial court made relevant references to the evidence of this witness while considering the root of title of the parties and specifically made a finding that the witness did not know anything about the previous suits in court which substantially established the respondentôs root of title.

Having resolved Issues I, II, III and IV in the negative, we hold that this appeal lacks merit and it is accordingly dismissed. The judgment of the Uzebba District Customary Court, Uzebba, delivered on the 19th day of May, 2004 and the consequential orders made therein are hereby affirmed.

The sum of N3,000.00 (three thousand naira) as costs is awarded in favour of the respondent.

HON. JUSTICE P. O. ISIBOR

HON. JUSTICE M. N. ASEMOTA (MRS)

HON. JUSTICE P. A. AKHIHIERO

O. D. Ejere Esq.	é	é	Counsel for the Appellant
O. B. Amu Esq.	é	é	Counsel for the Respondent