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

ON THURSDAY, THE 22ND DAY OF JULY, 2010

BEFORE THEIR LORDSHIPS

PETER OSARETINMWEN ISIBOR - JUDGE (PRESIDED)
MARY NEKPEN ASEMOTA - JUDGE
OHIMAI OVBIAGELE - JUDGE

APPEAL NO. CCA/8A/2007

B E T W E E N

IGBINEDION UJIAGBE é é é é é é APPELLANT

A N D

1. FRANK ACHIOYA
2. AYO ACHIOYA é é é é é é RESPONDENTS

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

This is an appeal against the judgment of the Esan Central Area Customary Court, Irrua in suit No. ECACC1/45T/2002 delivered on the 11th day of October, 2005.

Two separate suits namely: IACC/10/2002 and IACC/11/2002 were filed by the first respondent and the appellant respectively at the Igueben Area Customary Court, Igueben. In the first suit, IACC/10/2002 instituted by the first respondent (as plaintiff), he claimed against the appellant (as defendant) a

declaration of title over a piece of land measuring approximately 120 feet by 80 feet at Eguare Okalo, ₦500,000.00 (five hundred thousand naira) damages for trespass and perpetual injunction.

The second suit, IACC/11/2002 was instituted by the appellant (as plaintiff) against the two respondents jointly and severally for a declaration of title over a piece of land measuring two native plots at Eguare Okalo, ₦500,000 (five hundred thousand naira) damages for trespass and perpetual injunction.

By an order of the Igueben Area Customary Court, Igueben dated the 13th day of August, 2002, the two suits were transferred to Esan Central Area Customary Court, Irrua and renumbered as ECACC1/44T/2002 and ECA1/45T/2002 respectively. The two suits were subsequently consolidated by that court on the application of the appellantôs counsel at the trial court.

The respondentsô case at the trial court was that the land in dispute situate at Idumu-Isimokhai Okalo was part of a large expanse of land deforested by the grandfather of the first respondent, named Abasi. He built a house on a part and farmed on the other part. At his death, the large expanse of land was inherited by his first son, Mr. Omosokpia, and Achioya Abasi, the father of the first respondent. They both lived and farmed on the land. In 1972, the father of the first respondent gave the piece of land in dispute to him as a gift ***inter vivos*** to build a house. Long before this time, the grandfather of the first respondent invited the appellantôs father from Idumu-Idubor to Idumu-Isimokhai to settle

when he had the misfortune of losing his male children to death.

The appellantôs father was given a piece of land to build a house. The said land had earlier been given to one Ojo by the grandfather of the first respondent. Ojo lived there and when he died, his children vacated the land. The land given to the appellantôs father did not extend to the land in dispute, but shares a common boundary with it at the back. The appellantôs house is by the side of the first respondentôs fatherôs house.

The land in dispute was being used for farming seasonal crops by the family members of the respondent and there are no economic crops on it.

In 2002, the first respondent arrived from Lagos to commence building on the land. He was challenged by the appellantôs children who destroyed the building foundation and his materials. He reported the matter to the police and they were arrested.

On the other hand, the appellantôs case was that his father deforested the land including the land in dispute and built a house on a part of it. The land in dispute is at the back of the deforested land.

Sometime ago, when the appellantôs pit toilet collapsed, he began to dig another one, and was challenged by the father of the 2nd respondent. He went to the elder brother of the first respondent who confirmed that the respondentsô land did not extend to the portion. The father of the 2nd respondent got him arrested and brought workers who started building activities on the land. The old and new

toilets he was constructing were destroyed by the 2nd respondentôs father.

The appellant denied knowledge of the circumstances of his birth and how he was given the name óIgbinedionô.

The trial court, after hearing evidence and a visit to the ***locus in quo***, in a considered judgment found in favour of the respondents. It granted reliefs (a) and (c) of the respondentsô claim which were for a declaration of title, an order of perpetual injunction and awarded ₦50,000.00 (fifty thousand naira) as general damages for trespass.

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 five additional grounds of appeal. Subsequently, also with leave of this Court, the appellant amended his additional grounds of appeal. The six amended grounds of appeal without their particulars are reproduced as follows:

ñ1. The trial court erred in customary law and thereby misdirected itself when it refused to admit a Certified True Copy of a judgment of the Magistrate Court, Igueben in charge No. MCB/47C/2002 delivered on 13/4/2004 when it held that óNo nexus and relevancy is shown between the document sought to be tendered and this case. The part of the document also sought to be tendered also offends against S. 34 of the Evidence Act.ô

2. The trial court erred in customary law when it consolidated the

claims/suits of both parties and ***suo motu*** designated the parties but delivered judgment only on the claim/suit of the plaintiff.

3. The trial court erred in customary law and thereby misdirected itself when it failed to pronounce judgment on the defendantôs (now appellant) counterclaim.

4. The trial court erred in customary law when it held that the failure of both plaintiffs and defendant to call one Joseph Achioya as witness affected the case of the respective parties but went ahead to enter judgment for the plaintiff.

5. The trial court erred in customary law and thereby misdirected itself when it held that the plaintiffs are entitled to a customary right of occupancy over the land, the subject matter of this action, measuring approximately 80 feet by 120 feet, lying and situate at Eguare Okalo.

6. The trial court erred in customary law having not properly evaluated the evidence before it and thereby misdirected itself as to the evidential value placed on the evidence of the witnesses before it.ò

Counsel for the parties filed and exchanged their respective briefs of argument in consonance with the rules of this Court. Learned counsel for the appellant, D. I. Achi Esq., formulated three issues for determination as follows:

ñ1) Whether the trial court did not err in customary law and thereby misdirected itself when it refused to admit into evidence the certified

true copy of judgment in charge No. MCB/47C/2002 tendered by the appellant herein (Ground 1).

2) Whether the trial court was right in customary law to have delivered a single judgment after consolidation of the appellantôs and the respondentsô suits and failed to pronounce on the counterclaim. (Grounds 2 and 3)

3) Whether the trial court properly evaluated the evidence placed before it before arriving at his (sic) judgment. (Grounds 4, 5 and 6)ò

On his part, learned counsel for the respondents, J. E. Omomhenle Esq., formulated three issues for determination as follows:

ñ1. Whether the trial court erred in law and thereby misdirected itself when it refused to admit in evidence, the certified true copy of the judgment in Charge No. MCB/47C/2002 tendered by the appellant herein.

2. Whether the trial court was right to have delivered a single judgment after the consolidation of the suits of appellant and respondents.

3. Whether the court properly evaluated the evidence placed before it before arriving at its judgment.ò

It is pertinent to deal first with the preliminary objection raised by the respondentsô counsel in his brief before deciding which of the issues formulated by both counsel is preferred.

The respondentsô counsel filed a notice of intention to rely upon a preliminary objection dated the 31st day of May, 2010. The appellantôs counsel vehemently opposed the said notice and urged this Court to strike it out for failure of the respondents to file their brief as ordered by the court at the last date of adjournment.

Surprisingly, the respondentsô counsel conceded to the submission of the appellantôs counsel and the notice was accordingly struck out by this Court on the 1st day of June, 2010. Thereafter, the respondentsô counsel filed the respondentsô brief of argument, wherein he incorporated the arguments on the preliminary objection, contending that this appeal is incompetent.

The issue that arises is whether the respondentsô notice of preliminary objection is competent before this Court.

Order 17 rule 1 of the Customary Court of Appeal Rules, 2000 provides as follows:

> ñA respondent intending to rely upon a preliminary objection to the hearing of an appeal shall file such notice giving the appellant seven clear days after service thereof before the hearing setting out the grounds of objection.ò

The purpose of the rule is to adequately notify the other party of what to expect in court and prepare to defend the case in order to avoid a breach of the principle of fair hearing.

It is instructive to note that the appellant did not file a reply brief ostensibly because the notice of preliminary objection had been struck out.

The respondents in this appeal, having withdrawn the notice of preliminary objection, the bottom is therefore knocked out of the preliminary objection. The effect of non-compliance is as provided in Order 17 rule 3. Under the said rule, this Court is either to refuse to entertain the objection or adjourn the hearing of the objection with costs. This appeal, having been adjourned for judgment the only option available to this Court is to refuse to consider the arguments on the preliminary objection for non-compliance with the rules of this Court. See the Court of Appeal decision in the case of Uba v. Etiaba (2008) 6 N.W.L.R. (Part 1082) 154 at 167 ï 168 rr. 20 & 21. Order 10 rules 1 and 3 relied upon in that case is similar to Order 17 rules 1 and 3 of the Rules of this Court.

We have carefully examined the issues as formulated by both counsel which issues are quite similar. However, we prefer the issues formulated by the appellantôs counsel as they are more encompassing. We adopt them with some slight modifications as follows:

1. Whether the trial court erred in customary law and thereby misdirected itself when it refused to admit in evidence the certified true copy of the judgment in Charge No. MCB/47C/2002 tendered by the appellant herein. (Ground 1)

2. Whether the trial court was right in customary law to have delivered

a single judgment after the consolidation of the appellantôs and respondentsôsuits and whether it occasioned a miscarriage of justice. (Grounds 2 and 3)

3. Whether the trial court properly evaluated the evidence placed before it before arriving at its judgment. (Grounds 4, 5 and 6)

Arguing issue one, learned counsel for the appellant submitted that judgment or proceedings in a previous case is admissible in a later case between the same parties and their privies to show the nature of the case put up in the previous case as well as to point out the inconsistency on the part of one party or the other in a later case.

He contended that the trial court ought to have admitted in evidence the judgment of the Igueben Magistrateôs Court in which the respondents were the complainants and two of the appellantôs children were the accused persons, as this would have availed the court the opportunity to see the inconsistency in the case put forward by the respondents.

He further submitted that the failure of the trial court to do so on the ground that it had no bearing with the case before it, was a misconception of the law. He cited the following cases in support:

1. Okonkwo v. Kpajie (1992) 2 N.W.L.R. (Part 226), 633 at 636 rr. 2 and 3.

2. Ezewusim v. Okoro (1993) 5 N.W.L.R. (Part 478) 484 rr. 9 and 10.

It was counselôs submission that although the result of a criminal case cannot be used to establish a civil claim, however, a statement made by a witness in any previous judicial proceedings is admissible in a subsequent proceeding (which may be civil) to contradict any witness in the later proceedings. He relied on the case of Ezewusim v. Okoro (supra) at page 484 r. 10.

Counsel cited the case of Nwanguma v. Ikyaande (1992) 8 N.W.L.R. (Part 258) 192 and submitted that a party is at liberty to tender a certified true copy of a previous proceedings as part of his case in a case between him and his adversary as a fact in issue under Section 52 of the Evidence Act or to establish that a suit previously existed between him and the other party or his privies before the court in order to discredit any witness.

He contended that the judgment was relevant and germane to the appellantôs case and the refusal by the trial court to admit it in evidence occasioned a serious miscarriage of justice.

Counsel submitted that the trial court had a duty to admit or consider the relevance of the said judgment in its entirety rather than insisting on the portion to be tendered. He added that the trial court could only have seen the relevance of the said judgment or lack of it by considering the entire judgment and failure to do so was procedurally wrong. He relied on the following cases:

1) INEC v. Oshiomhole (2009) 4 N.W.L.R. (Part 1132) 607 at 624 r. 8

2) Awuse v. Odili (2005) 16 N.W.L.R. (Part 952) 416 at 448 r. 27.

Counsel submitted that the trial court, not being an appellate court, ought not to have re-evaluated the said judgment, it should rather have taken judicial notice of it by virtue of section 73 of the Evidence Act.

Replying on issue one, learned counsel for the respondents submitted that the trial court was right when it refused to admit in evidence the judgment of the Igueben Magistrateôs Court because it was irrelevant and had no bearing with the case at the trial court. He relied on the case of Barclays Bank of Nigeria Ltd. v. Alh. Mainada Abubakar (1977) A.N.L.R. P. 278 at 279 for the proposition that where an evidence goes to no issue it should be rejected.

He contended that the document sought to be tendered by the appellant failed to satisfy the conditions laid down in section 34 of the Evidence Act to make it admissible. Counsel cited the case of Majekodunmi v. The Queen (1952) 14 W.A.C.A 64 at 66 in support of this proposition.

Counsel further submitted that the trial courtôs rejection of the document did not occasion any miscarriage of justice. He added that even if the document had been admitted, it would not have had any probative value and the court would have reached the same verdict.

According to counsel, it is settled law that where a trial court wrongly rejects evidence, its judgment would not be set aside if the admission of the evidence would not have resulted in a different conclusion. He referred to Section 227 (1) and (2) of the Evidence Act, 2004 and cited the following cases in

support:

1) Okoro v. State (1998) 14 N.W.L.R. (Part 584) 181 at 208 C – D (S.C)

2) Ajayi v. Fisher (1956) 1 N.S.C.C. 82 at 208 C – D (S.C)

3) Anyanwu v. Mbara (1992) 5 N.W.L.R. (Part 242) 386 at 400 F – H (S.C)

We have carefully considered the submissions of learned counsel for the parties on this issue. The main thrust of learned counsel for the appellantôs submission is that the trial court erred when it failed to admit in evidence the judgment of the Magistrateôs Court, Igueben in Charge No. MCB/47C/2002. This issue arose from an interlocutory ruling in the course of trial by the lower court.

The respondentsô counsel at the trial court sought to tender the certified true copy of the judgment through the D.W. 3. The appellantôs counsel objected to its admissibility on the grounds that it was not relevant and had no nexus with the case. In its ruling at pages 94 – 97 of the record of appeal, the trial court, made specific findings that the particular portions of document sought to be tendered was a reference and summation of the evidence of some witnesses, address of counsel as well as information received from a person named in the document whom the trial Magistrate stated was met at the ***locus in quo*** and who was reflected as having been a witness at the trial. The court observed that the full text of the evidence of the witnesses was not produced in the document. It

also ruled that the said document offends Section 34 of the Evidence Act, and was not relevant to the proceedings before it.

The position of the Law is that evidence given in a previous case is not admissible by the court in a latter proceeding or case except where Section 34(1) of the Evidence Act is applicable.

Such evidence could only be used for purposes of cross-examination in order to discredit such a person or persons called to testify in the later case. See the following cases:

1) Alade v. Aborishade (1960) S.C.N.L.R. 398; (1960) 5 F.S.C. 167
2) Ayanwale v. Atande (1988) 1 N.W.L.R. (Part 68) 22 at 29.
3) Momodu Ajala v. Samuel Awodele & anor (1971) N.M.L.R. (Part 1) 127.

It is quite clear from the Record of Appeal that the judgment of the Igueben Magistrateôs Court was sought to be tendered through the last witness for the appellant long after the respondents had closed their case at the trial court. It was not used to contradict statements made by the respondents and their witnesses. In the case of Ezewusin v. Okoro (supra) cited by learned counsel for the appellant, the situation was different from this present appeal. The certified true copy of the proceedings in the Mgbidi Magistrateôs Court was sought to be tendered to contradict or impeach the testimony of the first respondent (D.W. 6). The trial judge rejected the document on the ground that in a civil case, the admissibility of

such a document was subject to the rules of pleadings. On appeal, the Court of Appeal per Edozie (JCA) held:

> ñA statement made by a witness in a previous judicial proceeding is admissible in a subsequent judicial proceeding to contradict him without the statement having been pleaded provided the requirement that the witness must be shown the portions of the statement with which to contradict him is complied with.
>
> In the instant case the trial judge was in error when he refused to admit the certified true copy proceedings in the Magistrateôs Court on the ground that it was not pleaded.ò

Under Section 34 of the Evidence Act, the evidence given by a witness in a judicial proceeding may be relevant in proving in subsequent judicial proceedings the truth of the fact which it states, when the conditions for the application of the section are fulfilled. The said evidence may thereafter be tendered and admitted in evidence. See Alade v. Aborishade (supra).

It is pertinent to state here that it is only the part of the record containing the evidence in question that should be tendered. The other parts are irrelevant and inadmissible. See the case of Adeleke v. Adewusi (1961) 1 All N.L.R. 37.

In the instant appeal, the trial court rightly refused to admit in evidence the judgment of the Magistrateôs Court, Igueben when it observed that what was sought to be tendered was a summary of the evidence of some of the witnesses at

the Magistrateôs Court rather than the full testimony of the witnesses, among other discrepancies.

In our view, the trial court painstakingly considered the judgment of the Magistrateôs Court Igueben and made findings of fact concerning the admissibility or otherwise of the said document, and we do not see the need to disturb its findings which we do not find to have been perverse. See the following cases:

1. Ifer v. Ikyanyon (2001) 4 N.W.L.R. (Part 703) 324 at 331 r. 14
2. Akinloye v. Eyilola (1968) N.M.L.R. 92
3. Wulgo v. Bakar (1993) 3 N.W.L.R. (Part 596) 539.

Issue one is therefore resolved in the negative.

Issue two is whether the trial court was right to have delivered a single judgment after the consolidation of the two suits. Learned counsel for the appellant submitted that the trial court after making an order of consolidation of the two suits i.e ECACC/45T/2002 and ECACC/44T/2002, erred in customary law when it ***suo motu*** designated the respondents as plaintiffs and the appellant as defendant/counter-claimant and delivered judgment only in respect of suit No. ECACC1/45T/2002.

It was his submission that where suits are consolidated, each suit remains a separate and distinct action upon which the court must give a separate verdict. He relied on the following cases:

1. Chime v. Ezea (2009) 2 N.W.L.R. (Part 1125) 263 at 301 ratio 52.
2. Ezike v. Egbuaba (2008) 11 N.W.L.R. (Part 1099) 627 at 632 ï 633, rr. 5, 7, 8, & 9.
3. Kalu v. Chima (2007) 17 N.W.L.R. (Part 1062) 187 at 190 rr. 1, 2, 3, 4 and 7.
4. Enigwe v. Akaigwe (1992) 2 N.W.L.R. (Part 225) 505 at 509 r. 4.
5. Haruna v. Modibbo (2004) 16 N.W.L.R. (Part 900) 487 at 510 r. 22.
6. Ume v. Ifediorah (2001) 8 N.W.L.R. (Part 714) 35 at 39 rr. 7 and 8.

He submitted further that parties were entitled to prove their cases individually on their merit. He added that evidence in proof of one case would not necessarily constitute evidence in proof of the other regardless of the fact that the same evidence and same witness would have been used by the respective parties. He cited the case of Ume v. Ifediorah (supra) at 39 r. 8.

It was counselôs submission that the trial courtôs failure to pronounce on the respective suits amounted to a fundamental procedural irregularity, which occasioned a miscarriage of justice to the appellant.

He urged this Court as an appellate court to make the appropriate orders/or directives setting aside the judgment or send it back for a retrial before another panel of the lower court. He relied on the case of Kalu v. Chima (supra) at page 189 r. 2.

Counsel submitted in the alternative, that the appellantôs claim having been converted into a counter-claim by the trial court ***suo motu***, and the respondents having failed to establish any defence, judgment should have been given to the appellant in the counter-claim. He added that the respondents at that stage were deemed to have admitted it. Counsel relied on the following cases:

1) Ogbonna v. A.G. Imo State (1992) 1 N.W.L.R. (Part 220) 647 at 658 rr. 12 and 14

2. Yahaya v. Chukwura (2002) 3 N.W.L.R. (Part 753) 20 at 23 r. 2.

Finally on this issue, counsel submitted that failure of the trial court to pronounce a verdict separately on the two suits or to pronounce a verdict on the appellantôs counter-claim occasioned a serious miscarriage of justice.

He urged this Court to set aside the sole judgment delivered by the trial court and enter judgment for the appellant as per his ñcounter-claimò or in the alternative order a retrial.

Replying on this issue, learned counsel for the respondents referred to page 7 ï 10 of the record and contended that the consolidation of the suits was done on the application of counsel for the appellant at the trial court. He submitted that what is required in a judgment of this nature is that the trial court adverted its mind to all the issues arising from the consolidated suits and addressed them adequately.

He argued that both parties filed identical claims, relied on traditional history to establish their respective claims, and the trial court after a careful consideration preferred the respondentsô case to that of the appellant

Counsel added that the conclusion reached reflected the views of the trial court of the issues in dispute in the two suits, and that the appellantôs contention that each suit at consolidation remains separate and distinct upon which the court must pronounce separate verdict was unfounded. He relied on the case of Alphonsus Nkuma v. Joseph Otunuya Odili (2006) 6 N.W.L.R. (Part 977) 587 at 593 ï 594 r. 9.

He submitted that the first respondent proved his case by a preponderance of evidence by showing how his grandfather deforested the entire land and how it eventually passed on to him. Counsel contended that facts are important in a case and referred to the dictum of Pats Acholonu JSC in Obasi Bros Co. Ltd. v. Merchant Bank of Africa Securities Ltd (2005) 9 N.W.L.R. (Part 929) 117 at 123 where counsel were admonished not to concentrate on the law alone and relegate the facts which gave rise to the law to the background.

It was counselôs submission that where there are two claimants to a parcel of land, a declaration of title is made in favour of a party who proves a better title. He cited in support the case of Adole v. Gwar (2008) M.J.S.C. Vol. 5 page 38 at 46 r. 14.

We have considered the submissions of both counsel on the issue.

Consolidation of suits is employed to save costs where one action would adequately determine the rights of the parties who have the same interest, in order to guard against multiplicity of suits. See the following cases:

1. Nasr v. Complete Home Enterprises (1977) 5 S.C. 1,
2. Lediju v. Odulaja (1943) 17 N.L.R. 15.

It is pertinent to state here that in the instant appeal, the appellant as well as the respondents filed separate suits over the same subject matter claiming similar reliefs.

The grouse of the appellant under this issue is that the trial court rather than pronounce a separate verdict on the suits, gave a single judgment which occasioned a miscarriage of justice.

We agree with learned counsel for the appellant that in a consolidated action, both suits retain their separate identities and each must be considered on its merits and a verdict given in respect of each suit. See the following cases:

1) Enigwe v. Akaigwe (supra)
2) Dugbo v. Kporoaro (1958) W.R. N.L.R 73.

We note that the authorities relied upon by learned counsel for the appellant represent the position of the Law. These were cases which emanated from various High Courts. However, the present appeal emanated from an Area Customary Court which gives it a different flavour. Appellate courts now treat the proceedings of area and customary courts with caution. Great latitude is now

being given to the proceedings from these courts by not insisting on strict compliance with the rules of evidence and procedure. This is to ensure that substantial rather than technical justice is done. The appellate courts hardly interfere once it is apparent on the face of it that the proceedings have been conducted in such courts in a manner leading to substantial justice.

See the following cases:

1) Ikpang v. Edoho (1978) L.R.N. 29, 35 ï 36.

2) Ieka v. Tyo (2007) 1 N.W.L.R. (Part 1045) 385 at 389 ratio 4.

3) Chief Karima Ajagunjeun & 5 Ors v. Sobo Osho of Yeku Village (1977) 5 S.C. 89.

In the instant appeal, although the trial court failed to give separate verdicts on the consolidated suits, we are firmly of the view that all the issues raised in the suits were addressed by the trial court in its judgment. In any event, it is trite that it is not every mistake that will lead to a reversal of the judgment of the trial court. A judgment of the trial court would not be set aside because it failed to deal with one of the consolidated suits and pronounce a verdict.

Furthermore, we agree with learned counsel for the respondents that the trial court in its judgment adequately addressed all the issues that arose from the consolidated suits which were identical. There was therefore no miscarriage of justice.

Issue two is therefore resolved in favour of the respondents.

On issue three, learned counsel for the appellant submitted that the trial court did not properly evaluate the evidence placed before it. He contended that it is trite law that trespass is actionable at the instance of a person in possession of land and that from the record, it was not established that the respondents were in possession of the land in dispute.

He submitted that for the plaintiff in an action for trespass to succeed, he must not only prove that he is in possession, he must also prove the exact area of land trespassed upon. He referred to the case of Ansa v. Ishie (2005) 15 N.W.L.R. (Part 948) 210 at 215 ï 216 rr. 6 and 7.

It was counselôs submission that although the respondents filed a litigation survey plan, they failed to establish the exact area allegedly trespassed upon by the appellant.

He contended that the trial court was in error when it awarded ₦50,000.00 as damages against the appellant for trespass after it had held at page 138, lines 16 ï 19 of the record that the respondents did not establish special damages that his blocks were damaged.

Counsel submitted that the trial courtôs findings that the parcel of land in dispute was the respondentsô because some of their family members had land in the area was speculative and not borne out of evidence on the record. He added that the fact of proximity to the land in dispute is not evidence ***per se*** of

ownership.

According to counsel, proximity could have been an accident of history which may not necessarily determine that ownership of land is in favour of a party in proximity. He relied on the case of Dagaci of Dere v. Dagaci of Ebwa (2006) 7 N.W.L.R. (Part 978) 382 at 397 r. 10.

He submitted that the trial court during its visit to the ***locus in quo*** found out that the land in dispute was less than 120 feet by 80 feet but it went ahead to grant 120 feet by 80 feet to the respondents.

Counsel submitted that while a court of law has powers to award less than is claimed, it has no discretionary or judicial power to award more than what is claimed or is available to be awarded. He relied on the case of Ogunyade v. Osunkeye (2007) 15 N.W.L.R. (Part 1057) 218 at 223 rr. 2 and 3.

He submitted that the trial courtôs holding that Joseph Achioya could have been a vital witness to both parties, more particularly to the appellant and failure to call him as a witness affected the appellantôs case, amounted to speculation which courts are precluded from indulging in. He relied on the following cases:

1. Ikenta Best (Nig) Ltd. v. A.G. Rivers State (2008) 6 N.W.L.R. (Part 1084) 612 at 624 r. 17.
2. Omidiora v. F.C.S.C. (2007) 14 N.W.L.R. (Part 1053) 17 at 22 r. 6

It was his contention that the trial courtôs resolution of the said weakness in the case against the appellants in favour of the respondents occasioned a severe

miscarriage of justice.

Counsel argued that there was no evidence on the record from the respondents which materially contradicted the appellantôs evidence as it related to the said Joseph Achioya and submitted that where evidence of a party is unchallenged and uncontroverted in any way material, the court should act on it and find in his favour. He cited the following cases in support of this proposition:

a. Ogunyade v. Osunkeye (supra) at 227 r. 5

b. Owners, M/V Gongola Hope v. S.C (Nig) Ltd. (2007) 15 N.W.L.R. (Part 1056) 189 at 194 r. 4.

c. Hilary Farm Ltd. v. M/V ñMahtraò (2007) 14 N.W.L.R. (Part 1054) 210 at 215 r. 3.

d. NBA v. Ekemezie (2008) 12 N.W.L.R. (Part 1100) 326 at 327 r. 1.

Finally, counsel urged this Court to set aside the judgment of the trial court and enter judgment in favour of the appellant or in the alternative order a retrial before another panel.

In his response to this issue, learned counsel for the respondents submitted that the trial court adequately evaluated the evidence adduced by the parties before arriving at its judgment.

He contended that the respondents gave credible evidence of how the 1st respondentôs father deforested the entire land and how it eventually passed on to him. He added that he exercised acts of possession by regularly planting seasonal

crops on it. It was counselôs submission that the respondents gave credible evidence to the effect that their family owns the land adjacent to the one in dispute.

He submitted that one of the ways of proving title to a piece of land is proof of possession of adjacent land in circumstances which render it probable that the owner of such land would in addition, be the owner of the disputed land. He cited the following cases:

1. Chief Appolos N. Amadi v. Felix Chinda & ors (2009) M.J.S.C. Vol. 4 page 120 r. 7(5);
2. Idundun & ors v. Okumagba & ors (1976) 9 ï 10 S.C. 227;
3. Atanda v. Ajani (1989) 3 N.W.L.R. (Part 1111) 511 part 514 paragraphs A ï F and
4. Ajiboye v. Isholo (2008) M.J.S.C. Vol. 11 page 191 at 196 r. 6.

He submitted that the respondents filed a litigation survey plan and that it was misleading for the appellant to state that the respondents did not establish the exact area trespassed upon or that the trial court awarded more land than it found to exist.

Counsel submitted that it is trite law that no particular number of witnesses is required for the proof of any fact. He cited in support the case of Universal Trust Bank Nigeria Ltd v. Alh. Adams Ajagbule & anor (2006) 2 N.W.L.R. (Part 965) 447 at 454 para. 7.

It was his further submission that although the court held that Joseph Achioya could have been a vital witness to both parties, it did not hold that failure to call him as a witness affected the respondentsô case as contended by the appellantôs counsel. He referred to page 137 lines 19 ï 22 of the record and stated that the trial court merely repeated the submission of the defence counsel.

Finally he urged the court to affirm the decision of the trial court.

We have considered the submissions of both learned counsel on this issue. This issue involves the facts and the evaluation of the facts by the trial court.

In a claim for a declaration of title, the duty of the trial court is mainly to ascertain whether the parties have discharged the burden of proof to entitle either of them to a declaration. See the case of Kodilinye v. Mbanefo Odu (1936) 2 W.A.C.A 337.

This burden is discharged when credible evidence of the highest probative value adduced by the plaintiff is of sufficient strength to outweigh other evidence and establish without equivocation the title of the plaintiff. See the case of Mogaji v. Odofin (1978) 4 S.C. 9.

In the instant appeal, both parties traced their root of title through traditional history i.e deforestation by their grandfather and father respectively. The Supreme Court in the ***locus classicus*** of Idundun v. Okumagba (1976) 9 ï 10 S.C. 227 set out five ways of proving ownership wherever title to land is in issue. These are:

1. By traditional evidence
2. By production of document of title duly authenticated and executed.
3. By acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference of true ownership.
4. By acts of long possession and enjoyment.
5. By proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would in addition, be the owner of the land in dispute.

See also the following cases:

1. Piaro v. Tenalo (1976) 12 S.C. 31
2. Ezeoke & ors v. Nwagbo & anor (1988) 1 N.W.L.R. (Part 772) 616.
3. Oladipupo & anor v. Olaniyan & ors (2000) 1 N.W.L.R. (Part 624) 556 at 564.

Apart from traditional evidence, the respondents also adduced evidence which was believed by the trial court that the adjacent land to the land in dispute were owned by the respondentsô family members which made it probable that he is the owner of the land in dispute. See the following cases:

1. Idundun v. Okumagba (supra)
2. Balogun v. Akanji (2005) 10 N.W.L.R. (Part 933) 394 at 397 r. 1

The appellant and his witness in their testimony could not dislodge the respondentsô claim that the land where he built his house was given to his father by the first respondentôs grand father.

In our considered view, the trial court amply evaluated the evidence and preferred the respondentsô case to that of the appellant. It is trite that an appellate court would not disturb the findings of fact of trial court where supported by sufficient evidence. See the following cases:

1. Onuche v. Anyogwu (2001) 6 N.W.L.R. (Part 708) 127 rr. 2, 3, 4.
2. Woluchem v. S. Gudi (1981) 5 S.C 319
3. Alhaji S. A. Kazeem & anor v. Madam Wemimo Mosaku & 2 ors (2007) 17 N.W.L.R. (Part 1064) 523 at 527 r. 4.

Counsel for the appellant made heavy weather of the fact that the trial court awarded more land than what was revealed on the land in dispute during the visit to the ***locus in quo***. From the evidence adduced, the parties were not in doubt as to the location and dimension of the land. The trial court merely gave an approximation of the land during the visit to the ***locus in quo.*** This does not derogate from the dimension as stated in the two litigation survey plans, tendered by both parties and relied upon by the trial court.

Issue three is therefore answered in the affirmative.

Having resolved the three issues in favour of the respondents, we hold that this appeal has no merit and it is accordingly dismissed

Consequently, the judgment of the Esan Central Area Customary Court, Irrua delivered on the 11th day of October, 2005 with the consequential order made therein are hereby affirmed.

The appellant is to pay the respondents costs which we have assessed at ₦3,000.00 (Three thousand naira).

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HON. JUSTICE P. O. ISIBOR

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HON. JUSTICE M. N. ASEMOTA

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HON. JUSTICE O. OVBIAGELE

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