

described in Survey Plan No. ISO/ED/D55/2010 dated 7th December, 2010.

- (2) The sum of N2, 000,000.00 (Two Million Naira) as general damages for trespass into the said parcel of land by the Defendants.
- (3) An order of perpetual injunction restraining the Defendants, their agents, servants, privies and assigns from further trespassing on the Plaintiff's land.

On the 11th day of January, 2013, in compliance with the extant Rules of this Court, the Claimant frontloaded her list of witnesses to be called at the trial with their witnesses statement on Oath as well as documents to be relied on.

On the 22nd day of March, 2013, the Defendants filed their Joint Amended Statement of Defence and Counter Claim which they inelegantly couched as "Proposed Amended Statement of Defence and Counter Claim." It was attached to a Motion on Notice which also had the Defendants' List of Witnesses including their Statement on Oath as well as List of Documents.

The Defendants' Counter claimed against the Claimant is as follows:

COUNTERCLAIM

1. The defendants adopts 1 ó 18 of the amended joint statement of defence above in proof of their counter claim

2. Wherefore the defendants counter claims against the claimant as follows;
- (a) A declaration that the 2nd defendant is the rightful person best to apply for a Certificate of Occupancy in respect of that whole parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 215 and 216, 217 to 218.
 - (b) A declaration that the acts of the claimant entry into the said land and claim to same amounts to trespass.
 - (c) Perpetual Injunction restraining the claimant by herself, agents, servants, privies and or any other person whatsoever from further entering, interfering or doing anything whatsoever that violates the defendants right of possession, use and enjoyment of the above stated land.
 - (d) The sum of N5,000,000:00 (Five Million Naira) as general damages for trespass into the said parcel of land by the plaintiff.ö

The Claimants however did not file a defence to the Counter Claim of the Defendants. The implication of this is trite that if the Claimant fails in her claims, the Counter claim of the Defendant is deemed admitted. See MAOBISON

Now, pleadings having been exchanged the Claimant opened her case by calling C.W.1 on Thursday, the 16th day of January, 2014. On Thursday, the 26th day of June, 2014, the Claimant closed her case in the course of hearing the case of the Claimant. Five (5) witnesses testified for her, including herself and they were accordingly cross-examined by the learned counsel to the Defendants. The evidence of these witnesses is as follows:

C.W.1:

ØI, FRANCIS USEGHESE IYAWÉ, (M) CHRISTIAN, NIGERIAN CITIZEN OF NO. 87, EKENWAN ROAD, BENIN CITY, DO HEREBY MAKE OATH AND SAY AS FOLLOWS:-

1. I am a Registered and Licensed Surveyor.
2. I know the claimant, Mrs. Vero Edo.
3. Sometime in December 2010, the Claimant commissioned me to prepare a litigation survey of the land in dispute in this case. The land is at Irhirhi/Ugiokhuen Community, Benin City.
4. The survey was carried out on the parcel of land and I produced the plan of my survey and I signed it and gave claimant a certified true copy.

5. The claimant showed me her title documents which included Oba's approval for two parcels of land measuring 100 feet x 200 feet each in the name of Messrs Osadebamwen Okhionkpanwonyi (Uyi) and Nosa Okhionkpanwonyi respectively. Claimant also showed me copies deeds of transfer between her above named vendors and herself for the two parcels of land measuring 100 feet x 200 feet each.
6. I can recognize the plan which I numbered as No. ISO/ED/D55/2010 and dated the 7th day of December, 2010.
7. I saw the features I inserted in the plan.
8. The Claimant showed me the land and the features on the land. The area verged red is the area in dispute claimed by the defendants.
9. I showed the 1st defendant's buildings within the claimant's land as shown to me by the claimant on the plan, among other things.
10. I swear to this affidavit, bona fide, believing the facts to be true to the best of my knowledge, information and belief.

C. W. 2:

I, MRS. VERO EDO, (F) CHRISTIAN, NIGERIAN CITIZEN OF NO. 3, ARALA STREET, OFF AIRPORT ROAD, BENIN CITY, DO HEREBY MAKE OATH AND SAY AS FOLLOWS:-

1. I am the Claimant in this suit.

2. I know the defendants, who are Nigerian citizens residing within the Jurisdiction of this Honourable Court.
3. I am the owner in possession of a piece of land situate of Irhirhi/Ugiokhuen area measuring approximately 200ft by 200ft at ward 36A with ward beacon numbers 381-392, 305, 335 to 337 and 393-404, 337-338 and 367-369.
4. The piece of land was transferred to me absolutely by Messrs Osadebamwen Okhionkpanmwonyi also known as Osadebamwen Uyi and Nosa Okhionkpanwonyi 100ft by 200ft each sometime in March, 1996. I have copies of the deeds of transfer.
5. The piece of land I got through Mr. Osadebamwen Uyi was acquired by Mr. Osadebamwen Uyi by an application to the Oba of Benin dated 2/1/1977 and was approved by the Oba of Benin on the 12/2/1977, while the piece of land I got from Nosa Okhionkpanmwonyi was also acquired vide an application to the Oba of Benin dated 11/2/2976 and approved on 12/2/1977 by the Oba.
6. The two Oba's approvals mentioned in paragraph 5 above were handed to me by my vendors and are currently with me.
7. Since I acquired the two parcels of land in 1996, I have been in undisturbed, quiet and peaceful possession of the parcel of land.
8. I deposited four trips of sands and one trip of granite on the said land. I have photographs of the sand and granite on the said land.

9. I paid individuals who had rubber plantation on the parcel of land. I was issued receipts by these individuals and the receipts are with me.
10. I commissioned a surveyor to survey the parcel of land and he produced a property survey plan number ISD/ED/62/2000 dated 24/03/2000 and litigation survey plan number ISO/ED/D55/2010 dated 7/12/2010.
11. I was surprised when I got information sometime in September, 2009 that the 2nd and 3rd defendants had mobilized workers to my parcel of land and had started developing same.
12. Apart from the fact that the Defendants employed workers who have been working relentlessly on the land, they also employed thugs who armed themselves with offensive weapons in order to ward off anybody who challenged their claim on the land.
13. The defendants' agents also destroyed my beacon blocks and used the four trips of sand and one trip of granite I deposited on the said piece of land.
14. Consequent on the activities of 2nd and 3rd defendants on my land, I consulted my Solicitors Osawaru Yesufu & Co. who wrote a petition dated 4/9/2009 to the Assistant Inspector General of Police, Zone 5 Benin City, since 3rd defendant had already been using the police at the state headquarters, Benin City against one of my vendors, Mr. Osadebamwen.

15. At the police station upon invitation, the 3rd defendant claimed he bought part of my land from 2nd defendant for the 1st defendant and further boasted to me that he was going to frustrate me from repossessing my land since the defendants have the money to get whatever they want.
16. On the 10/09/2009 when policemen accompanied me to the land, the defendants were still busy working on my land in company of thugs armed with various offensive weapons.
17. I was then advised by the police at the AIG's office to consult my lawyer to institute an action against the defendants.
18. While my complaints was being investigated by the police and an action instituted by my Solicitors, the defendants were building on my land day and night and a building is now erected on the land with a fence.
19. The defendants have continued to trespass on my land.
20. I claim against the defendants as per paragraph 18 of my further amended statement of claim dated 28th May, 2012.
21. I swear to this affidavit, bona fide, believing the facts to be true to the best of my knowledge, information and belief.ö

C. W.3

ØI, MR. OSADEBAMWEN UYI, (M) CHRISTIAN, NIGERIAN CITIZEN OF IRHIRHI COMMUNITY BENIN CITY, DO HEREBY MAKE OATH AND SAY AS FOLLOWS:-

1. I know the claimant in this suit, Mrs. Vero Edo.
2. I transferred a piece or parcel of land situate at Irhirhi/Ugiokhuen Village measuring 100ft by 200ft at Ward 36A to the claimant in this suit sometime in March 1996. If I see the deed of transfer, I will recognize it.
3. The piece or parcel of land was acquired by me by an application to the Oba of Benin through Irhirhi/Ugiokhuen Ward 36A Plot Allotment Committee dated 2/1/1977.
4. Upon receipt of my application, the said plot allotment committee sent Mr. Monday Idahor and others to the said piece of land for inspection. The piece of land was free from dispute and was a virgin land and Mr. Monday Idahor reported these facts to the committee, who then forwarded my application to the Oba of Benin.
5. My application was approved on the 12/2/1977 by His Highness Oba Akenzua II. I gave the Oba's approval to the claimant after the transfer and if I see it I will recognize it.

6. At the time I applied for and got approval for the same piece of land, the chairman of the Irhirhi/Ugiokhuen Ward 36A Plot Allotment Committee was Chief Reuben Iserhrienrhien, also known as Chief Reuben Iserhienrhien Odin.
7. After the claimant acquired the piece of land from me, she went on to pay individuals who with my permission had rubber trees on the land and she did cut the rubber trees down.
8. Since the claimant acquired the property from me, she has been in undisturbed, quiet and peaceful possession of the parcel of land until sometime in September, 2009 when I noticed that the 2nd and 3rd defendants broke into the claimant's parcel of land and mobilized workers and started developing same. I reported this to the claimant.
9. The parcel of land encroached upon by the defendants is one and the same with the one I sold to the claimant.
10. I swear to this affidavit, bona fide, believing the facts to be true to the best of my knowledge, information and belief.

C. W.4:

ØI, CHIEF REUBEN ISERHIENRHIEN ODIN, (M) TRADITIONALIST, NIGERIAN CITIZEN OF IRHIRHI COMMUNITY BENIN CITY, DO HEREBY MAKE OATH AND SAY AS FOLLOWS:-

1. I am a Bini man and I am conversant with the method of acquisition of land under Bini Native Law and Custom.
2. Prior to the promulgation of the Land Use Act in 1978, the Oba of Benin was the Trustee of all communal lands in Benin under Benin native law and custom and was vested with the legal estate of Benin communal land.
3. In pursuance of the power vested in him, the Oba of Benin constituted various ward plot allotment committees who were charged, among other things, with the responsibility of:
 - (a) allotting land to an applicant after satisfying themselves that such a land was free and without dispute.
 - (b) recommending an applicant's application to the Oba of Benin for approval.
4. The Oba of Benin, Oba Akenzua II of blessed memory appointed me chairman of Irhirhi/Ugiokhuen Ward 36A Plot Allotment Committee by letter dated 12/01/65.
5. I know Mr. Osadebaamwen Uyi, the claimant's predecessor in title.
6. Mr. Osadebaamwen Uyi applied for and got Oba of Benin's approval for a parcel of land situate at Irhirhi/Ugiokhuen village area at ward 36A measuring 100ft by 200ft while I was chairman of the said Ward Plot Allotment Committee.

7. Upon receipt of Mr. Osadebaamwen Uyi's application dated 12/1/77, the committee sent Mr. Monday Idahor who was a pointer in the ward among others to inspect the land and ascertain its state. Upon satisfaction that the land was a virgin land and free from any dispute, the committee forwarded Mr. Osadebaamwen Uyi's application to the Oba for approval.
8. His Highness Oba Akenzua II approved Mr. Osadebaamwen Uyi's application on 12/2/1977. If I see the Oba's approval, I will recognize it.
9. I am also known as Chief Reuben Iserhienrhien.
10. I swear to this affidavit, bona fide, believing the facts to be true to the best of my knowledge, information and belief.

C. W. 5:

I, MR. MONDAY IDAHOR (M) CHRISTIAN, NIGERIAN CITIZEN OF IRHIRHI VILLAGE, BENIN CITY, DO HEREBY MAKE OATH AND SAY AS FOLLOWS:-

1. I know Mr. Osadebamwen Uyi, the claimant's predecessor in title.
2. Mr. Osadebamwen Uyi applied for Oba's approval through the Irhirhi/Ugiokhuen Ward 36A Plot Allotment Committee for a parcel of Land measuring 100ft by 200ft in 1977 when I was a pointer in the said ward.
3. Upon receipt of Mr. Osadebamwen Uyi's application for the said parcel of land, the plot allotment committee headed by Chief Reuben Iserhierhien

Odin sent me and other pointers to inspect the said land in order to ascertain its state.

4. During inspection of the said parcel of land, we discovered that the land was free from dispute and was indeed a virgin land. We reported these facts to the plot allotment committee.
5. The plot allotment committee then forwarded Mr. Osadebamwen Uyi's application to His Highness Oba Akenzua II who approved same.
6. I swear to this affidavit, bona fide believing the facts to be true to the best of my knowledge, information and belief.

During the hearing of the case of the Claimant, nine (9) Exhibits were admitted in evidence which are as follows:

1. Exhibit A - Litigation Survey of the Claimant with Plan No. ISO/ED/D55/2010 and dated 7/12/2010.
2. Exhibit B - Deed of Transfer of March, 1996 between Mr. Nosa Okhionkpaimwonyi and the Claimant.
3. Exhibit B1 - Deed of Transfer of March, 1996 between Mr. Osadebamwen Okhionkpaimwonyi and the Claimant.
4. Exhibit C - Oba's Approval issued in favour of Mr. Nosa Uyi dated 11-2-76 and approved on 12/2/77.

5. Exhibit öC1ö - Obaø Approval issued in favour of Mr. Osadebamwen Uyi dated 2-1-77 and approved on 12/2/77.
6. Exhibit öDö - Purchase Receipt for Rubber Plantation Farm from Frank Omoruwa to the Claimant for the sum of N4,500.00 dated 26/6/2000.
7. Exhibit öD1ö - Purchase Receipt for Rubber Plantation Farm from Frank Irowa to the Claimant for the sum of N9,000.00 dated 22/3/2000.
8. Exhibit öD2ö - Purchase Receipt for Rubber Plantation Farm from Mrs. Edegbe to the Claimant for the sum of N15,000.00 dated 18/1/2002.
9. Exhibit öEö - Photocopy of Property Survey of the Claimant with Plan No. ISO/ED/52/2000 and dated 24/3/2000.

The Defendants opened and closed their defence and Counter Claim on Thursday, the 3rd day of March, 2016 by calling two witnesses, excluding the 1st Defendant. Afterwards, they were accordingly cross-examined by the learned counsel to the Claimant. The evidence of D.W. 1 and D.W.2 are as follows:-

D.W. 1:

I, MR. LUCKY OBANOR, male, Christian, Nigerian Citizen and resident at No. 3 Osagiede Street, off Upper Adesuwa road GRA, Benin City do hereby make Oath and states as follows:-

1. That I am the 2nd defendant on record.
2. That I know the claimant in this suit.
3. That the 1st defendant is the rightful owner of and or is the best person to apply for a Certificate of Occupancy in respect of all that whole parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 36A, Oredo Local Government Area, Edo State with beacon blocks Nos. 215 and 216, 217 to 218 and not Irhirhi.
4. That Ugiokhuen and Irhirhi areas were together in the past and at a point they were divided into two separate villages distinct from each other. Ugiokhuen is independent and exists on its own and not under any other village. I am relying on a Letter dated 5th September 2008 from the Oba of Benin as my evidence in this matter.
5. That I, the 2nd defendant is the Ohen of Ugiokhuen and therefore knows the history of the two villages very well and the lands which fall within both villages.

6. That the piece of land was transferred to the 1st defendant by me by virtue of a Deed of transfer dated 18th May 2006. I am relying on the deed of transfer as a receipt of consideration and as my evidence in this suit.
7. That I acquired same vide inheritance and subsequently obtaining a power of administration dated 29th November 2004 to administer the estate of my late father, Pa Efese Obanor. I am relying on the said power of administration as my evidence in this suit.
8. That the 1st defendant upon acquisition of the land contacted a Surveyor who surveyed the parcel of land. I am relying on a Certified True Copy of the Survey Plan as my evidence in this suit.
9. That Osadebamwen Okhionkpanwonyi and Nosa Okhionkpanwonyi are not the owners of the land in issue as they are from Irhirhi and therefore do not have any interest in the land and so they are not in any position to sell or transfer the land in issue.
10. That immediately the 1st defendant acquired the land from me he took possession by clearing the bush on the land and that there was no evidence of any human activity on the land.
11. That the claimant was never in possession of the land and it is not true that she put sand or granite on the land.

12. That the 1st defendant is the owner of the land and it is on that capacity that he is building on it.
13. That nobody destroyed the claimant's beacon blocks or used the claimant's trip of sand and granite as the claimant did not put any there.
14. That nobody used the Police and thugs to harass the claimant and that the claimant's trespass was only reported to the police who started investigating the matter.
15. That while the land was being developed the claimant's vendor came to the site to threaten the workers claiming that he was the owner of the land and that he had sole to the claimant.
16. That it was the claimant who brought thugs to destroy the moulded blocks on the land and threatened to deal with anyone ruthlessly if they go near the land.
17. That I rely on my statement as my evidence in support of my defence and counter claim.
18. That I counter claim against the claimant as follows:
 - (a) A Declaration that the 2nd defendant is the rightful person best to apply for a Certificate of Occupancy in respect of that whole

parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 215 and 216, 217 to 218.

- (b) A declaration that the acts of the claimant entry into the said land and claim to same amounts to trespass.
- (c) Perpetual Injunction restraining the claimant by herself, agents, servants, privies and or any other person whatsoever from further entering, interfering or doing anything whatsoever that violates the defendants right of possession, use and enjoyment of the above stated land.
- (d) The sum of N5, 000,000.00 (Five Million Naira) as general damages for trespass into the said parcel of land by the plaintiff.

19. That I make this statement in good faith believing same to be true and in accordance with the Oaths Law.ö

D.W 2:

öI, MR. OGIE, Male, Christian, Nigeria Citizen do hereby make oath and states as follows:-

1. That I am the 3rd defendant on record.
2. (Sic)
3. That I know the claimant in this suit.

4. That the 1st defendant is the rightful owner of and or is the best person to apply for a Certificate of Occupancy in respect of all that whole parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 36A, Oredo Local Government Area, Edo State with beacon blocks Nos. 215 and 216, 217 to 218 and not Irhirhi.
5. That Ugiokhuen and Irhirhi areas were together in the past and at a point they were divided into two separate villages distinct from each other. Ugiokhuen is independent and exist on its own and not under any other village.
6. That I assisted the 1st defendant in the acquisition of the parcel of land from the 2nd defendant and also contacted a lawyer who carried the necessary search in the lands Registry and the land was not encumbered.
7. That the 1st defendant upon acquisition of the land contacted a Surveyor who surveyed the parcel of land.
8. That immediately the 1st defendant acquired the land from the 2nd defendant he took possession by clearing the brush on the land and there was no evidence of any human activity on the land.

9. That the claimant was never in possession of the land and it is not true that she put sand or granite on the land.
10. That the 1st defendant is the owner of the land and it is on that capacity that he is building on it.
11. That nobody destroyed the claimant's beacon blocks or used the claimant's trip of sand and granite as the claimants did not put any there.
12. That nobody used the Police and thugs to harass the claimant and that the claimant's trespass was only reported to the police who started investigating the matter.
13. That while the land was being developed the claimant's vendor came to the site to threaten the workers claiming that he was the owner of the land and that he had sole to the claimant.
14. That it was the claimant who brought thugs to destroy the moulded blocks on the land and threatened to deal with anyone ruthlessly if they go near the land.
15. That the claimant has no cause of action against me.
16. That I rely on my statement as my evidence in support of my defence and counter claim.

17. That I make this statement in good faith believing same to be true and in accordance with the Oaths Law.ö

In the course of hearing the defence and counter claim of the Defendants, two [2] Exhibits were admitted in evidence as follows:

1. Exhibit öFö - Deed of Transfer between the 2nd Defendant and the 1st Defendant dated the 18th day of May, 2006.
2. Exhibit öGö - Property Survey Plan of the 1st Defendant with Plan No. JAA/ED/76/2006 and dated 23-5-06.

On Monday, the 25th day of April, 2016, the Counsel to the adverse parties adopted their Final Written Address on behalf of their respective clients.

In the Final Written Address of the Defendants prepared by their learned counsel, E.O. Osaghae, Esq. of Edward Aibangbee Law Firm, One Issue was canvassed for determination as follows:-

öBetween the Claimant and the 2nd defendant who had proved to have a better title?ö

The learned counsel to the Defendants argued this lone issue, cited authorities and urged this Court to dismiss the claim of the Claimant and give judgment in favour of the Defendants as per their Counter claim.

The Claimant's Final Written Address was prepared by K.O. Longe, Esq. of K.O. Longe & Co. wherein the learned counsel canvassed three issues for determination as follows:

1. Who between the claimant and the defendants made a better title to the land in dispute according to Benin customary law?
2. Whether the claimant is not entitled to damages for trespasses?
3. Whether the claimant is not entitled to be granted an order of perpetual injunction against the defendants?

The learned counsel to the Claimant argued the above issues seriatim, cited authorities and finally concluded that the Claimant has proved her title to the land in dispute and entitled to judgment.

COURT:

I have carefully considered the claims of the Claimant and the Counter claim of the Defendants, the pleadings, evidence led, Written Addresses of the learned counsel to the parties including the authorities cited by them in support of their argument. I am of the firm view that the single narrow issue to be determined in this case is as follows:-

öWhether the Claimant or Defendants have proved their cases on the balance of probability or preponderance of evidence.ö

From the pleadings of the parties, the facts of the case is straight forward. The Claimant claims that she is the owner of the 200feet by 200feet of land in dispute; that she purchased it in two separate purchases from two different persons in March, 1996 each being 100feet x 200feet respectively; that the 2nd and 3rd Defendants trespassed on the land sometime in September, 2009; that despite her challenging the trespassers, they continued and completed their buildings on part of the land in dispute. The case of the Defendants is that the 200feet by 200feet land in dispute belongs to the 1st Defendant; that the 1st Defendant got the land vide a Deed of Transfer from the 2nd Defendant in May, 2016; that the 2nd Defendant acquired the land through an inheritance.

Now, it is trite that there are five mode of proving title to a land and the proof of any one of them is sufficient. See the Supreme Court case of ALHAJA SILIFATU OMOTAYO V. CO-OPERATIVE SUPPLY ASSOCIATION (2011) VOL. 202 LRCN PAGE 134 where Adekeye, JSC held at page 167 paragraphs KJJ thus:

ōThere are five ways of proving or establishing title

to land or ownership of land. They are by:

- (1) Traditional evidence
- (2) Production of documents of title duly authenticated in the sense that their due execution must be proved unless

they are documents twenty or more years old produced from proper custody.

- (3) By positive acts of ownership extending over a sufficient length of time.
- (4) By acts of long possession and enjoyment of the land.
- (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.

The establishment of one of the five ways is sufficient proof of ownership.ö

It is also elementary law that parties are bound by their pleadings. See the Supreme Court case of BENSON AGBULE V. WARRI REFINERY PETROCHEMICAL CO. LTD (2013) VOL. 217 LRCN PAGE 132 where Rhodes-Vivour, JSC held at page 172F thus:

öParties are bound by their pleadings. That in effect means that if pleadings are to be of any use, parties must be held bound by them.ö

And it is also elementary that all Civil Cases are decided on the balance of probabilities and the preponderance of evidence which onus of proof first lies on the Claimant. See ALHAJI AMINU ISHOLA V. UNION BANK OF NIGERIA

LIMITED (2005) NSCQR VOL. 21 PAGE 167 where U.A. Kalgo, JSC held at page 180 that:

“It is the general and accepted principle of law that all Civil Cases or claims are proved on the balance of probabilities and on the preponderance of evidence not on evidence beyond reasonable doubt. And although the onus of proof shifts depending on the nature of evidence produced, the initial duty is always on the Plaintiff to prove his case.”

In the case under consideration, the Claimant prayed for a declaratory relief that she is the one entitled to the statutory right of occupancy of the land in dispute measuring approximately 200 feet by 200 feet at Ward 36A with beacon numbers 381-392, 305, 335 to 337 and 393- 404, 337-338 and 367-369 and more particularly described in Survey Plan No. ISO/ED/D55/2010 dated 7th December, 2010.

In attempting to prove the identity of the above described land, the Claimant tendered Exhibits A, B and B1, C and C1. It is a trite law that where a Claimant Claims for trespass in a land matter, he must prove with clarity the identity of the land. See CHIEF J. E. BABATOLA V. OBA ALADEJANA, THE ALAWOROKO (2006) NSCQR VOL. 6 PAGE 1017 where Uthman Mohammed, JSC held at pages 1026-1028 that:-

“In a land dispute the boundaries of the land in dispute must be proved with certainty, such that a Surveyor, taking the record, could produce a Survey Plan showing with accuracy the land in dispute. In a claim for trespass and injunction the onus is on the Plaintiff to prove the identity of the land trespassed upon with clarity and certainty. This is mandatory because where an area of land is uncertain, it will be difficult and impossible to prove trespass to the land and thereafter grant injunction.”

Exhibit “A” is a Litigation Survey Plan founded on Exhibits “B” & “B1” and “C” and “C1”. The maker of Exhibit “A” is one Surveyor Francis Useghese Iyawe who testified for the Claimant as CW1. His evidence on the identity of the land was not shaken during cross examination as he answered questions on cross examination and said:

“Exhibit “A” is what I found on the land as directed by Claimant. It is not my professional duty [to know] if she [the Claimant] acquired the [disputed] land validly or not.” (parenthesis supplied by me)

The land in dispute was also identified by the CW2, CW3 and CW4 with the exception of CW5, one Monday Idahor who said he was a “Pointer” when 100feet by 200feet was applied for in 1977. Under cross examination, he said:

“The land in Exhibit B1 is not the same as that of Claimant. Exhibit B1 has no relationship with the land I am here [in court] for.” (parenthesis supplied by me).

On Exhibits “B” and “B1”, the name and signatures of the CW5 were on them. The Learned Counsel to the Defendant now submitted on the above that the identity of the land was not established by the Claimant. The question to ask at this juncture is whether oral evidence can be used to destroy documentary evidence as contained in Exhibits “A”, “B”, “B1”, “C” and “C1” herein? The answer is a no following a long line of decisions of the Supreme Court on the point. See for example the Supreme Court case of VINCENT U. EGHAREVBA V. DR. OROBOR OSAGIE (2010) VOL. 180 LRCN PAGE 75 where Ogbuagu, JSC held at pages 103 ó 104 Z ó JJA thus:-

“It is now firmly settled that documentary evidence is the best evidence. It is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except where fraud is not pleaded í . It is trite law that where there is oral as well as documentary evidence, the latter should be used as a hanger from which to assess the oral evidence.”

I hold therefore that the identity of the land as established through Exhibits “A”, “B”, “B1”, “C” and “C1” has been proved by the Claimant.

From the pleadings and evidence led, both Claimant and Defendants-cum-Counter Claimants relied on document in proving their title to the land in dispute. While the Claimant tendered Exhibits òAö, òBö, òB1ö, òCö, òC1ö, òDö, òD1ö , òD2ö and òEö to prove her case, the Defendants tendered Exhibits òFö and òGö to prove their Counter claim.

While there seems to be cohesion in the chain of title of the Claimant, that of the Counter Claimant seems to be disjointed. What do I mean? The Claimant tendered Exhibit òAö which properly described the property in dispute. She also called the Surveyor who made the document to testify in Court. She testified for herself and tendered Exhibit òBö and òB1ö which were the Deeds of Transfer between the Vendors of the land in dispute and herself. She also tendered Exhibits òCö and òC1ö which were the Oba¸s Approvals to the land in dispute. Claimant also tendered Exhibits òDö, òD1ö and òD2ö which were the receipts of purchase of the rubber plantation farm on the land in dispute. And finally, the Claimant tendered Exhibit òEö which was her Property Survey on the disputed land.

The Defendants however on their own tendered Exhibit òFö which was the Deed of Transfer between the 2nd Defendant (Transferor) and 1st Defendant (Transferee) as well as Exhibit òGö which was a Property Survey of the 1st Defendant.

The evidence on record is that the 2nd Defendant who testified as DW1 is the Transferor in Exhibit 1 while the Transferee did not testify in this case. Paragraphs 1 and 3 of the evidence of the DW1 is apposite on this. It is again reproduced for emphasis as follows:

1. That I am the 2nd defendant in this suit.
2. That the 1st defendant is the rightful owner of and or is the best person to apply for a Certificate of Occupancy in respect of all that whole parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 36A, Oredo Local Government Area, Edo State with beacon blocks Nos. 215 and 216, 217 to 218 and not Irhirhi.

At paragraph 7 of his evidence on Oath, the DW1 said he acquired the disputed land in dispute vide inheritance and subsequently obtained a power of administration dated 29th November, 2004 to administer the estate of his late father, Pa Efese Obanor. He relied on this document. This document was never admitted in evidence. The position of the law on this act of the DW1 is that document, if tendered, would have worked against the Defendant. See Section 167 (d) of the Evidence Act, 2011.

The DW1 testified at paragraph 8 of his evidence on oath that the 1st defendant contracted a Surveyor who surveyed the land in dispute. He thereafter

tendered the Survey Plan, Exhibit "G". This evidence of the DW1 is hearsay evidence. He did not brief the Surveyor to produce or make Exhibit G. How did Exhibit "G" get to the hand of the DW1? The evidence of the DW1 on this point being hearsay evidence is discountenanced by me. Since neither the maker of Exhibit "G" nor the 1st Defendant testified, I shall not attach any weight to the said Exhibit "G". On this issue, I rely on the Supreme Court case of MISS FELICIA OSAGIEDE OJO V. DR. GHARORO AND ORS (2006) NSCQLR VOL. 25 PAGE 712 where Niki Tobi, JSC held at page 731 thus:

“When a third party relates a story to another as proof of contents of a statement such story is hearsay. Hearsay evidence is an evidence which does not derive its value solely from the credit given to the witness himself but which rests also, in part, on the veracity and competence of some other person. A piece of evidence is hearsay if it is evidence of the contents or a statement made by a witness who is himself not called to testify.”

The DW1 also testified at paragraph 10 of his evidence that the 1st Defendant took possession of the land. This evidence does not also lie in the mouth of the DW1 as it is also hearsay evidence and it is accordingly discountenanced by me.

What I can say of the DW1 in trying to establish the rights of the 1st Defendant in this case is that he is a busy body. He is a sympathizer crying more that the bereaved.

Furthermore, it also seems to me that the Learned Counsel to the Defendants is not abreast of the case of the Defendants when he submitted in his Final Written Address as follows:

“On the side of the defendants they have shown that the 1st defendant who is the ohen of the Area(sic); Ugiokhuen transferred the portion of land 200feet by 200feet to the 2nd defendant. Exhibit C was tendered to show the transfer and exhibit D;(sic) a Survey Plan was tendered. These defence also was in proof of the Counter claim.”

With respect, the Learned Counsel to the Defendants, from the above, is wrong. Beside, this submission of the Learned Counsel cannot take the place of evidence on record. This is trite. See UNION BANK OF NIGERIA PLC & ANOR VS AYODARE AND SONS (NIG) LTD & ANOR (2007) NSCQR VOL. 30 PAGE 1 at page 46 per W.S. Nkanu Onnoghen, JSC where W.S. Onnoghen, JSC held at page 46 thus:

“It is also settled law that address of counsel however brilliant, cannot take the place of evidence particularly where there is no evidence, as in the instant case, in support of the submission(s).”

The misconception of the Learned Counsel to the Defendants may have arisen primarily because of the counter claim of the Defendants where their first prayer is as follows:

õ(a) A declaration that the 2nd defendant is the rightful person best to apply for a Certificate of Occupancy in respect of that whole parcel of land measuring 200feet by 200feet lying and situate at Ugiokhuen Village Ward 215 and 216, 217 to 218.ö
(Underlining supplied for emphasis).

The above prayer is completely at variance with the pleadings of the Defendants from paragraphs 1 ó 18 and the evidence on oath of both the DW1 and DW2. The above prayer stands on nothing and must fall. This is the trite position of the law that where a defendant fails to prove his counter claim, his counter claim stands dismissed. See ALHAJI BUBA USMAN v. MOHAMMED TAMINU GARKE (2003) NSCQR VOL. 15 PAGE 24 where Niki Tobi, JSC held at page 46 thus:

õA counter-claim like the main claim or the plaintiff's claim must be proved on balance of probability as any other civil matter. Where the defendant fails to prove his counter-claim, his action stands dismissed and will be dismissed.ö

It is my view that the pleadings of the Defendants and the evidence led by them do not accord with the counter claim of the defendants.

Flowing from my reasoning above, it is my firm view that the balance of probabilities preponderate in favour of the Claimant as his root of title is unbroken. The Claimant has pleaded and testified on Oath that having bought the land in dispute in 1996, she took effective possession of same until sometime in September, 2009 when the 2nd and 3rd defendants trespassed on it and began to erect a structure on it. The defendants did not deny that they erected a structure on the land but rather, the DW1 and DW2 testified that the land in dispute belonged to the 1st Defendant who did not testify in the case.

Having held therefore that the Claimant has proved a better title, I hold that the entering into the land by the 2nd and 3rd Defendants is an act of trespass without the consent of the Claimant.

I therefore answer the lone issue for determination in the affirmative in favour of the Claimant and against the Defendants in the following terms:

1. The Claimant is the one entitled to the declaration of statutory right of occupancy in respect of the parcel of land situate at Irhirhi/Ugiokhuen Village measuring approximately 200feet by 200feet at Ward 36A with beacon block numbers 381-392, 305 to 337 and 393-404, 337-338 and 367-

369 and more particularly described in Survey Plan No. ISO/ED/D55/2010 dated 7th December, 2010.

2. An order of perpetual injunction restraining the Defendants, their agents, servants, privies and assigns from further trespassing on the Claimant's land as described above.
3. The sum of ₦500,000.00 (Five Hundred Thousand Naira) as general damages for the acts of trespass into the said parcel of land by the Defendants.

The Counter-claim of the Defendants is hereby dismissed.

HON. JUSTICE V. O. EBOREIME
JUDGE
THURSDAY, 16TH JUNE, 2016

COUNSEL:

J.E. Edosa (Miss) for the Claimant.

S.I. Ndukwu (Mrs) for the Defendants.

