IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON MONDAY THE
11TH DAY OF MAY, 2020.

BETWEEN: APPEAL NO. B/6A/19

1. PA. JOHN AYEGIDI
2. MR. VINCENT ERHABOR
3. MR. OGBEIDE IMADE
4. MR. OSARENREN OTASOWIE
(VICE CHAIRMAN, UTEKON DEVELOPMENT ASSOCIATION)
5. CHIEF SUNDAY OMOROSE (OHEN-OVIA)
(FOR THEMSELVES AND ON BEHALF OF UTEKON COMMUNITY)
6. AISAGBONRIOBA ONAWUYE
(FOR THEMSELVES AND ON BEHALF OF UTEKON COMMUNITY)

} APPELLANTS

AND

1. HIS HOLINESS HARRISON OKAO, J.P. (OHEN-OSA)
2. CHIEF EMWINROMWANKHOE OKAO
(ODIONWERE OF UKPOKE COMMUNITY)
3. PA. MOSES OBAYUWANA
4. MR. NOGHEGHASE 'EASY' OSAYI
YOUTH LEADER, UKPOKE COMMUNITY
(FOR THEMSELVES AND ON BEHALF OF THE UKPOKE COMMUNITY)

} RESPONDENTS

JUDGMENT

This is an appeal against the judgment of the Ovia North East Area Customary Court, Okada, delivered on the 25th of July, 2018.

The succinct facts of the case are that before the institution of the case at the lower court, the Appellants' Community (Utekon) summoned the Respondents' community (Ukpoke) to the

palace of the Oba of Benin claiming ***inter alia*** that the Respondents' community is not an independent community but a camp under the Appellants' community.

His Royal Majesty, the Oba of Benin allegedly adjudicated over the matter and ruled that the Appellants' community (Utekon) and the Respondents' Community (Ukpoke) are separate and distinct communities.

The Appellants being dissatisfied with the decision of the Oba of Benin, filed a claim in the court below as Plaintiffs while the Respondents as Defendants, counter-claimed against the Appellants, each party claiming some declaratory and injunctive reliefs.

Both parties called a host of witnesses and at the close of the case, the court delivered its judgment, dismissing the claim of the Appellants and granting the Respondents' counter-claims.

Dissatisfied with the judgment of the trial court, the Appellants have appealed to this Court on the following Grounds of Appeal:

GROUNDS OF APPEAL:

1. The judgment is against the weight of evidence.

2. The Learned President and Members gravely erred in law and occasioned grave miscarriage of justice when they dismissed the Plaintiffs' Claims in its entirety contrary to the applicable provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended and the Land Use Act 1978 on which the Claims were based and cited before the trial Court.

PARTICULARS OF ERROR:

a. The Land in dispute is in the rural area of Ovia North East Local Government Area of Edo State of Nigeria

b. The trial Court is bound to apply the Constitution of the Federal Republic of Nigeria, 1999 as amended and the Land Use Act 1978 but failed to apply same in relation to the disputed land.

3. The trial Court was in grave error when it held that the Plaintiffs failed to prove their claims in the face of overwhelming evidence of the Plaintiffs title, occupation and use above the standard of proof attainable in civil proceedings contrary to preponderance of evidence and many others binding on the trial court.

4. The trial court erred in law and occasioned grave miscarriage of justice when it awarded Plaintiffs large expanse of land in the Counter-Claim of 29th August, 2013.

PARTICULARS OF ERROR:

a. The Court cannot award any Claim/Relief not claimed in the Plaint/Claim.

b. Defendants' Counter-Claim of 29/8/2013 or any other claim on record did not contain claim of any part of the Plaintiffs' parcel of land or camp of whatever description, yet the court erroneously awarded such claim.

c. Any evidence purportedly given without any claim in the Originating Plaint/Claim is irrelevant and cannot properly be acted upon by the trial Court as it did.

5. The trial Court erred in law when it held that the Defendants/Counter-Claimants proved their case as required by law when their case was riddled with intrinsic contradictions and material contradictions under cross-examinations.

PARTICULARS OF ERROR:

a. The Counter-Claim did not contain any camp of the Plaintiffs' land as part of it but Exhibit J, the Litigation Survey Plan of the Defendants depicted Camps.

b. DW5, Chief Eduwu Ekhator contradicted the Litigation Plan and DW11, who is the 2nd Defendant and DW7, Surveyor Anao Eguaveon on the issue of Defendant's Claim to Camps.

c. 1st Defendant as DW11 was contradicted on material parts of the Claim, including the Claim to existence of market.

d. The receipt of the customary gifts of the newly admitted Odions in Utekon by the 2nd Defendant/Respondent.

6. The Learned President and Members of the Ovia North East Area Customary Court misdirected themselves in law when they held:

> ***"The defendants/counters claimants or their part sought to establish by their evidence that they are not a camp under Utekon but a distinct community by their oral and documentary evidence. DW11 said Ukpoke has been in existence from Ogiso Era and then tendered exhibit J. It is pertinent to state at this point that it is not in doubt that both parties from their evidence recognize the place of the Oba of Benin in matter pertaining to Benin customary traditions and willingly subjected themselves to the palace for resolution of their dispute which we have held did not pass the test of customary arbitration. The plaintiffs having failed to accept the declaration and that same was not published. It however does not deemphasize the role of Oba of Benin as the custodian of Benin customs and tradition which both the plaintiffs and defendant/counter claimants are a part of. We make particular reference to exhibit J not unmindful of the submission of the plaintiff counsel that exhibit J is not***

a document of title. We agree with learned counsel for the plaintiff that exhibit J is not a document of title. However a close look at Exhibit 'J' shows it was dated in 1943 precisely 13th April addressed to the Okao, Odionwere, Edion and IgheleUkpoke village area, appointing them as members of building of plot allotment committee for Ukpoke village area. This letter was signed by the Oba of Benin and made reference to an earlier appointment that stood cancelled by virtue of this current letter. This exhibit cannot be washed away or swept under the rug, it in our view goes to establish the fact that Ukpoke is a distinct and on its own and not a camp as claimed by the plaintiff in this case. It has been held in a plethora of cases that documentary evidence in the best form of evidence. See OGBEIDE V OSIFO (2009)3 NWLR (PT 1022)432 at 441.

PARTICULARS OF MISDIRECTION

a. Exhibit 'J' told lie of itself and the same ought not to have been relied upon by the court.

b. The Court ought not to have relied on Exhibit 'J' for declaration of title to land in favour of the Respondents as doing so will tantamount to overruling itself in the same proceedings.

c. Plot allotment Committee for the allocation of lands in Benin City by the Oba of Benin was put in place in the early 1961.

d. As at 1943 there was no Committee known as the Plot Allotment Committee in Benin Division let alone Ukpoke.

e. The Respondents who claim for trespass in land and damages basing their action on traditional history which failed any other evidence adduced by them based on possession cannot succeed since possession cannot hang from nowhere.

f. Ukpoke was not a part of Benin City but a part of Benin Division.

7. The Learned President and Members of the Ovia North East Area Customary Court misdirected themselves in law when they held:

"***Assuming but not conceding that the traditional history expoused by both parties is inconclusive and the evidence established by the defendant/counter claimants through exhibit J is also not acceptable and recourse is had to the principle in KOJO V BONSIE (Supra); we are unable to shut our eyes to the evidence of DW5, who said in visiting the two communities the panel saw an MTN mast and when asked Utekon said they neither knew who owns it or how it got there and the Ukpoke***

people contracted it or leased it MTN who pay them rent for their for their land.

This piece of evidence was not challenged under cross examination by the plaintiffs. The presence of an MTN mast which Ukpoke people claim they leased out the land for show acts of recent possession.

On the basis of what we have said above, we prefer the evidence of the witnesses called by the defendants/counter claimants to that called by the plaintiffs especially evidence DW11.

Consequently we hold that on the preponderance of evidence the plaintiffs have failed to establish their claim as required by law. on the contrary hold that the defendants/counter claimants in this case have established their counter claim to be entitled to judgment. The plaintiffs claim fails in its entirety.

The counter claim succeeds and the defendants/counter claimants are hereby granted:

1. ***A declaration that Ukpoke is a separate community and therefore independent of plaintiff's community/Utekon.***
2. ***The defendants/counter claimants are also granted a declaration that they are the owners in possession of all that parcels of land lying and situated at Ukpoke community in Ovia North East Local Government Area which is well known to the parties and more particularly shown on the defendants/counter claimants litigation survey plan this suit and within the jurisdiction of this Honourable Court and therefore entitled to Customary Right of Occupancy.***
3. ***The plaintiffs by themselves agents and privies are hereby perpetually restrained from ceding, selling, allocating in any manner whatsoever any part of the defendants/counter claimants community/communal land known as Ukpoke community, Ovia North East Local Government Area."***

PARTICULARS OF MISDIRECTION:

a. The court was in doubt and that doubt could have led to the dismissal of the case of both parties. Both parties could not establish their case based on declaratory reliefs they sought according to Customary Law on proof of ownership of land.

b. The court having rejected the customary arbitration panel's report should not have turned around to use the evidence of the chairman of the customary arbitration panel to resolve any issue in the case.

c. Exhibit J is a document that should not have been relied upon because it speaks a lie of itself.

d. The parties to the case were not given equal treatment in the judgment.

e. DW5 in the case is the chairman of the customary arbitration panel which report was jettisoned by the court. He was not a licensed surveyor who surveyed the land.

f. The surveyor who surveyed that land did not reflect MTN Mast in the Litigation Survey he did on behalf of the Defendants/Respondents.

g. The court was engaged in approbating and reprobating at the same time.

Thereafter, Counsel for the parties filed and exchanged their respective briefs of arguments in consonance with the rules of this Court.

The learned counsels for the parties addressed this Court on the 7th of February, 2020 and the matter was adjourned to Friday the 24th of April, 2020 for judgment. However soon after the matter was adjourned for judgment, the Covid 19 Pandemic resulted in the indefinite shutting down of courts across the nation. Consequently, this Court was unable to deliver its judgment within the period of ninety days as stipulated by ***Section 294(1) of the 1999 Nigerian Constitution***.

However by virtue of ***Section 294 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended),*** the judgment of a Court cannot be set aside solely on the ground that it was delivered outside the ninety (90) days period after final addresses unless the party complaining has suffered a miscarriage of Justice. See ***N.B.C vs. Okwejimino (1998) 8 NWLR Pt 561 Page 295 at 305 paragraphs B-G; Ogundele vs. Fasu (1999) 9 SCNJ Page 105 at 112 Paragraphs 10-30; and MR. S.C. OKAFOR v. SPRING WATER NIGERIA (SWAN) LIMITED (2014) LPELR-24147(CA).***

Consequently, for the aforesaid reasons and pursuant to the provisions of ***Section 294 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)***, this judgment is being delivered after the expiration of the period of ninety days.

In his Brief of Argument, the learned Counsel for the Appellants, ***E.O.Ofiyegbe Esq.*** identified a sole issue for Determination as follows:

"Whether having regard to the evidence and the entire circumstances of this case, the Appellants appeal is meritorious and ought to be allowed?"

Arguing the sole issue for determination, the learned counsel submitted that the Appeal has merit and should be allowed for the reasons articulated in his written address.

Before embarking on his arguments, learned counsel sought the leave of the Court to withdraw grounds 2, 3, 4 and 5 of the original grounds of Appeal and to argue the sole issue for determination based on the amended ground 1 of the original grounds of Appeal and grounds 6 and 7 of the additional grounds of Appeal.

Thereafter, he submitted that the lower Court was in grave error when having held that the Customary arbitration did not pass the test of a customary arbitration, still went ahead to emphasise the role of the Oba of Benin as the custodian of Benin customs and traditions. According to him,

that position was not in dispute in the suit and the Court should have restricted itself to the case made by the parties before it.

Furthermore, he submitted that the lower Court was in grave error when it made reference to Exhibit J which was made in 1943 and asserted that the same cannot be washed away or swept under the rug and used same in concluding that Ukpoke is distinct and on its own and not a camp as claimed by the Appellants and went ahead to declare that the Respondents are the owners of all that parcels of land lying and situate at Ukpoke Community, having held that the traditional history exposed by both parties was inconclusive.

Learned counsel referred to the finding of the court at pages 246 – 247 where they held thus:

"We make particular reference to exhibit J not unmindful of the submission of plaintiff counsel that exhibit J is not a document of title. We agree with learned counsel for plaintiff that exhibit J is not a document of title."

He contended that having so held, the lower Court ought not to have turned around to rely on the same exhibit J to declare title to the land in favour of the Respondents under customary law because doing so amounted to overruling itself in the same proceedings contrary to law. See ***Y.A. Lawal v. Chief Yakubu Dawudu & Anor (1972) ALL NLR (reprint) 707.***

Counsel submitted further that the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor (1970) ALL NLR (reprint) 1*** decided thus:

"(a) that all lands in Benin Division are vested in the Oba of Benin who is the trustee or legal owner thereof on behalf of the people of Benin who are beneficiaries in respect thereof;

(b) in respect of Benin City itself, the Oba of Benin had by 1961 appointed ward allotment committees in respect of 12 wards into which the City had been divided shortly before this for the purpose of plot allocation;

(c) whereas any grantee of land in Benin City before 1961 might not be able to produce the approval in respect thereof reduced by the Oba of Benin into writing, such a grantee after this period must be able to produce such evidence;

(d) one of the several functions of a ward plot allotment committee is to recommend plot applications to the Oba of Benin for approval;

(e) an applicant for land in Benin City as from 1961 has to direct his application in writing to ward plot allotment committee of his choice".

Learned counsel submitted that all other area or towns and villages had no Plot Allotment Committee set up by the Oba of Benin. That the Plot Allotment Committee was established in 1961 by the Oba of Benin for Benin City only and that Ukpoke, the Respondents' Community has never being part of Benin City. He submitted that Exhibit 'J' was purposely made by the Respondents for the purpose of this case at the lower court.

He further submitted that the Respondents claimed for title to land, trespass and damages based on evidence of traditional history which the lower Court held was inconclusive and any other evidence adduced by them based on possession cannot hang on anything. For this view, he referred to the case of ***Ndukwe v. Acha (1998) 6 NWLR Part 552, 25 at 37, 38*** where the court stated thus:

"On Duty on Claimant for trespass and damages who relies on traditional history-

Where a party who claims in trespass in land and damages bases his action on traditional history and that claim fails, any evidence adduced by him in support thereof based on possession cannot succeed since possession cannot hang from nowhere. [Odofin v. Ayoola (1984) 11 SC 72 referred to.].(P. 38, para. H)

He submitted that when an attempt to prove a root of title fails, acts of possession based on that root of title cannot sustain a claim for title. See ***Odofin v. Ayoola (1984) 11 SC NLR; Dabo v. Abdulaihi (2005) 7 NWLR (Pt. 923) 181; Ukaegba v. Nwololo (2019) 3 NWLR (Pt. 1127) 194 at 221-222.***

He posited that this allegedly erroneous position of the lower Court should not be allowed to stand. That the Courts are enjoined to resolve and deal effectively with any crime like fraud once the same rears its head. He referred to the case of ***Okoya & 2 Ors v. Santilli & 2 others 1993-1994, Vol. 2 All Nigeria Law Reports, 387 at 415*** where ***Belgore J.S.C.*** stated thus:

"A court upon discovering an illegality during a trial, must take cognizance of that illegality even if not triable in that court but in another tribunal. Once a transaction is illegal, it is void and all things emanating from the transaction is a nullity."

Learned counsel emphasised that the lower Court ought not to have relied on Exhibit 'J' which he alleged was criminally forged by the Respondents for the purpose of their case at the lower Court.

He contended that the lower Court was therefore wrong when it made the following findings:

"The defendants/counters claimants or their part sought to establish by their evidence that they are not a camp under Utekon but a distinct community by their oral and documentary evidence. DW11 said Ukpoke has been in existence from Ogiso Era and then tendered exhibit J. It is pertinent to state at this point that it is not in doubt that both parties from their evidence recognize the place of the Oba of Benin in matter pertaining to Benin customary traditions and willingly subjected themselves to the palace for resolution of their dispute which we have held did not pass the test of customary arbitration. The plaintiffs having failed to accept the declaration and that same was not published. It however does not deemphasize the role of Oba of Benin as the custodian of Benin customs and tradition which both the plaintiffs and defendant/counter claimants are a part of. We make particular reference to exhibit J not unmindful of the submission of the plaintiffs' counsel that exhibit J is not a document of title. We agree with learned counsel for the plaintiffs that exhibit J is not a document of title. However a close look at Exhibit 'J' shows it was dated in 1943 precisely 13th April addressed to the Okao, Odionwere, Edion and Ighele Ukpoke village area, appointing them as members of building of plot allotment committee for Ukpoke village area. This letter was signed by the Oba of Benin and made reference to an earlier appointment that stood cancelled by virtue of this current letter. This exhibit cannot be washed away or swept under the rug, it in our view goes to establish the fact that

Ukpoke is a distinct and on its own and not a camp as claimed by the plaintiffs in this case. It has been held in a plethora of cases that documentary evidence in the best form of evidence. See OGBEIDE V OSIFO (2009)3 NWLR (PT 1022)432 at 441."

He therefore urged this Honourable Court to set aside the above findings of fact.

Learned counsel also referred to the decision of the lower Court at page 243 lines 6 to 12 where they held as follows:

"From the evidence above we are unable to agree with the defendants/counter claimants that the plaintiff's claim is caught by the principle of previous customary arbitration. It is clear from the sum total of the plaintiff's evidence that they did not agree with the verdict of this Royal Majesty. We according hold that the defence, of customary arbitration cannot validly inure in favour of the defendants/counter claimants in this case."

He submitted that the lower Court having rejected the customary arbitration panel's report should not have turned around to use the evidence of the Chairman of the customary arbitration panel to resolve any issue in the case.

Furthermore, counsel submitted that the lower Court also erred in law when it was engaged in speculation in descending into the arena of advocacy by the use of the following words:

"Assuming but not conceding that the traditional history exposed by both parties is inconclusive and the evidence established by the Defendants/counter claimants exhibits J is not acceptable and recourse is had to the principle in KOJO v. BONSIE (supra)….."

He submitted that it is not the Court's duty to investigate what might be the true nature of a claim by a party to a dispute and then proceed to make a declaration or finding which the party has not specifically sought. That the court may not speculate on or supply evidence or work out the mathematics of arriving at an answer in a case which only evidence tested under cross examination could supply. He referred to the dictum of ***Iguh, J.S.C. at page 419*** in the case of ***Okoya & 2 ors v. Santilli & 2 ors (supra)***. He maintained that it is not the function of the Court to deal with speculation. See ***Bagboye v. UNILORIN (1999) 10 NWLR (Pt. 622) 290;*** and ***NICON v. Power and Industrial Engineering (1986) 1 NWLR Pt. 14 pg 1.***

He contended that it was wrong for the court to use what it had earlier rejected because the Court cannot overrule itself in the same proceedings. That a trial court is not entitled to alter its ruling on an issue previously decided by it in the course of the same proceedings. See ***Y.A. Lawal v. Chief Yakubu Dawudu & Anor (1972) ALL NLR (reprint) 707***. Again, he submitted that the Court having rejected the arbitration report became *functus officio* as far as that issue was concerned. See ***Eden v. Akamkpa (2000) L.G. (2000) 4 NWLR (Pt. 651) 70 C.A. A.G. Kwara v. Lawal (2018) 3 NWLR Pt. 1606, 266 at 290-291***.

Counsel submitted that the parties to the case were not given equal treatment in the judgment. That the PW5 in the case is the Chairman of the customary arbitration panel which report was jettisoned by the court. That he was not a licensed surveyor who surveyed the land and whatever reference to any survey ought not to have been considered in the case. That the surveyor who surveyed that land did not reflect the MTN mast in the Litigation survey which he did on behalf of the Respondents. That the Court was engaged in approbating and reprobating at the same time and was therefore wrong when it held *inter alia* that the traditional history exposed by both parties is inconclusive and that they preferred the evidence of the witnesses called by the Respondents to that called by the Appellants and that the Respondents established their counter claim to be entitled to judgment while the Appellants' claim failed in its entirety.

He therefore urged the Court to set aside the judgment.

In opposition to this appeal, the learned counsel for the Respondents ***P.C.Ibekwe Esq,*** in his Brief of Argument, identified a sole issue for determination as follows:

"Whether from the totality of the evidence and the entire circumstances of this case, the Appellants appeal is meritorious and ought to be allowed?"

Opening his arguments on the sole issue for determination, the learned counsel for the Respondents submitted that from the totality of the evidence and the entire circumstances of this case, the appeal has no merit and should be dismissed in its entirety.

He further submitted that the lower court was right when it held that the Appellants having failed to accept the ruling of the customary arbitration of the Oba of Benin did not in any way de-emphasize the role of the Oba of Benin as the custodian of Benin customs and tradition.

He contended that the counsel to the Appellants misunderstood the position of the lower court on the customary arbitration of the Oba of Benin because the lower court did not at any time reject

the customary arbitration, rather it held that the arbitration cannot stop the Appellants from approaching court.

He further submitted that the lower court at page 243 lines 6 to 12 of the record did not reject the Customary Arbitration Panel's report when it held thus:

"from the evidence above we are unable to agree with the Defendants/Counter Claimants that the Plaintiffs claim is caught by the principle of previous customary arbitration. It is clear from the sum total of the Plaintiffs evidence that they did not agree with the verdict of his Royal Majesty. We accordingly hold that the defence of customary arbitration cannot validly inure in favour of the Defendants/Counter Claimants in this case".

Counsel posited that the lower court did not reject the Customary Arbitration, rather it held that the Appellants having subjected themselves to the Customary Arbitration of the Oba of Benin and having shown by conduct that they did not accept the verdict same cannot stop them from approaching the court of law.

He submitted that the totality of the Appellants contention and argument against the judgment of the lower court is based on issues of facts and it is well known principle of law that evaluation and ascription of probative value to evidence is the sole function of the trial court.

For this view, he referred to the case of ***Akanbi v Oyewale 2008 Vol. 52 WRN pg. 46 particularly at pg. 65 lines 40 to 45*** where ***Chidi Nwaoma Uwa JCA*** stated thus:

"It is trite that the evaluation and ascription of probative value to evidence is the sole function of the trial judge, more especially where the evaluation is based on credibility of witnesses, the court of Appeal is handicapped and sparingly holds otherwise. The trial judge would have had the privilege of seeing and hearing witnesses before making its findings, as the learned trial judge did in this case. It is not the business of this court to substitute its views of evidence for that of the learned trial judge. There would be a miscarriage of justice if this court were to adopt such a course when it is unwarranted, unless of course the findings are perverse which is not the case here".

Learned counsel submitted that the learned trial judge in this case, having listened to the facts of the case through the witnesses, he had the opportunity to watch their demeanor in the witness box and was therefore in the best position to ascribe probative value to their evidence and to make proper findings. He therefore urged the Court to hold that the findings made by the trial court is correct and not perverse.

Furthermore counsel referred the Court to the case of ***Anyegwu v. Onuche 2009 Vol. 11 WRN pg. 1 particularly at pg. 7 Ratio 3*** where the Supreme Court stated thus:

"It is a settled principle of law that where a trial court has carried its assignment satisfactorily, an Appeal Court shall be left with no option but to affirm such decision. To do otherwise will institutionalize what the Appellant is complaining of, that is: miscarriage of justice."

He urged this Court to hold that the trial court carried out its assignment in this case satisfactorily and urged the Court to hold that the trial court was right when it held in the judgment in page 248 of the Record thus:

"On the basis of what we have said above, we prefer the evidence of the witnesses called by the Defendants/Counter Claimants to that called by the Plaintiffs especially evidence of DW11. Consequently, we hold that on the preponderance of evidence, the Plaintiffs have failed to establish their claim as required by law. On the contrary hold that the Defendants/Counter Claimants in this case have established their claim to be entitled to judgment. The Plaintiffs claim fails in its entirety, the counter claim succeeds".

Counsel submitted that the trial court having had the privilege of hearing and seeing the witnesses who testified before it was in the best position to evaluate and ascribe the probative value to the evidence as it did in this case and he urged the Court to so hold.

He further referred the Court to the case of ***Ogunbamibi v Badagry L.G (2009) Vol. 9 WRN pg. 156 particularly at pg. 162 Ratio 6*** where the court held as follows:

"It is however a settled principle that the evaluation of evidence, findings of fact and the ascription of probative value to such evidence are primary function or responsibilities of the trial court which had a singular advantage and privilege of hearing and seeing the witnesses who testified before it and an Appellant court which did not have such an advantage or privilege is usually reluctant to interfere with such findings or evaluation except in some exceptional circumstances where the said trial court failed to make proper use of its opportunity or privilege or has made a wrong conclusion from the admitted or proved facts".

Learned counsel urged the Court to hold that there are no such exceptional circumstances in this case to warrant the Court to interfere with the findings of the trial court.

Furthermore counsel submitted that the trial court was right when it held at page 247 of Record thus:

"Assuming but not conceding that the traditional history espoused by both parties is inconclusive and the evidence by the Defendants/Counter Claimants through Exhibit J is also not acceptable and recourse had to be made to the principle in Kojo v Bonsie (Supra) we are unable to shut our eyes to the evidence of DW5 who said in visiting the two communities the panel saw an MTN Mast and when asked Utekon said they neither knew who owns it or how it got there and Ukpoke people said they contracted it or lease it to MTN who paid them for their rent on their land, this piece of evidence was not challenged under cross examination by the Plaintiffs. The presence of MTN mast which Ukpoke people claim they leased out the said land shows acts of recent possession".

He posited that the Appellants' counsel misconstrued and misconceived the above position and findings of the trial court by erroneously submitting that the trial court rejected the traditional history espoused by both parties. He maintained that the trial court did not in any way reject the traditional history espoused by both parties rather the trial court said that the principle of recent possession as laid down in the case of ***Kojo v Bonsie (supra)*** favoured the Respondents in view of the recent acts of possession which was demonstrated by the Respondents by leasing their land to MTN for erection of a mast.

He urged the Court to hold that the trial court was right in relying on the principle of ***Kojo v Bonsie.***

Learned counsel submitted that the Appellants in their Amended Appellants Brief of Argument made reference to Exhibit J and stated that Exhibit J was forged. He submitted that forgery is a serious criminal allegation that requires proof beyond reasonable doubt and that he who asserts must prove. See ***Hilary Farms Ltd v M/V Mahtra (2007) Vol. 153 LRCN pg. 34 particularly at pg. 36 Ratio 3.***

He maintained that the onus is on the Appellants to prove such criminal allegation of forgery.

Furthermore he submitted that it was clearly shown that Exhibit J emanated from the palace of the Oba of Benin and the Appellants had every opportunity to ascertain the authenticity or otherwise of Exhibit J and failed to do so.

Responding to the contention of the Appellants' counsel that exhibit J dated 13th April 1943 signed by the Oba of Benin and addressed to the Okao, Odionwere, Edion and Ighele of Ukpoke Village Area did not emanate from the palace of the Oba of Benin, counsel submitted that such

argument is not tenable as the said exhibit J was tendered and admitted in evidence without any objection from the Appellants neither did they cross examine the witness on it. He posited that it is not the duty of the Appellate Court to evaluate documents or evidence.

Furthermore he submitted that the case of ***K.S. Okeaya v Madam Ekiomado Aguebor (1970) All NLR (reprint 1)*** cited by the Counsel to the Appellants does not in any way support their argument in respect of exhibit J as there is nowhere in the said case where the court stated that any letter or correspondence made prior to 1961 appointing or giving power to appoint Plot Allotment Committee did not emanate from the Palace of the Oba of Benin. He said that from the surface of the above mentioned authority as quoted by the counsel to the Appellants it was only stated in paragraph C thus: ***"that whereas any grantee of land in Benin City before 1961 might not be able to produce the approval in respect thereof, reduced by the Oba of Benin into writing, such a grantee after this period must be able to produce such evidence."***

Learned counsel contended that the above authority quoted by the Appellants in their brief is misconceived as the authority did not state that the Oba of Benin did not appoint or give powers to appoint Plot Allotment Committees before 1961. He urged the Court to hold that the trial court was right when it attached probative value to exhibit J and discountenanced the argument of the learned counsel to the Appellants in respect of the said exhibit.

He referred the Court to the case of ***Anyegwu v Onuche (Supra) Ratio 5*** where the Supreme Court stated thus:

"The large number or large retinue of witnesses called by a party, or the bulkiness or beauty of a document should not influence the mind of a trial judge. What must influence his mind in ascribing the probative value is the quality of the evidence or document tendered. In achieving that, the judge has to have regard to, among other things, the following:

1. ***Admissibility of the evidence***
2. ***Relevancy of the evidence***
3. ***Credibility of the evidence***
4. ***Conclusivity of the evidence***
5. ***Probability of the evidence in the sense that it is more probable than the evidence of the other party***
6. ***Finally, after having satisfied himself that all the above have been complied with, he shall now apply the law to the situation presented in the case before him so as to arrive at a conclusion in one way or the other. This assignment is an exclusive preserve of the trial judge".***

From the foregoing, he urged the Court to hold that the trial court was right when it held thus:

"We agree with the learned counsel for the Plaintiff that exhibit J is not a document of title. However a close look at exhibit J shows it was dated in 1943 precisely 13th April and addresses to Okao, Odionwere, Edion and Ighele of Ukpoke Village Area appointing them as members of Building and Plot Allotment Committee for Ukpoke Village Area, this letter was signed by the Oba of Benin and made reference to an earlier appointment that stood cancelled by the virtue of this current letter. This exhibit cannot be washed away or swept under the rug, this in our view goes to establish the fact that Ukpoke is a distinct community on its own and not a camp as claimed by the Plaintiff in this case."

Counsel posited that the major contention of the Appellants in the court below was that the Respondents Community (Ukpoke) is a camp under the Appellants Community (Utekon) and not a distinct community. That from the finding of the trial court in respect of exhibit J which points to the fact that the Oba of Benin as far back as 1943 recognized the position of the Respondents community (Ukpoke) as a distinct and separate community from Utekon Community, he urged the Court to hold that the trial court rightly evaluated exhibit J and ascribed the proper probative value to it, as it is a primary duty of the trial court to evaluate evidence and ascribe the proper probative value to it.

Furthermore, he submitted that the arguments of the learned Counsel to the Appellants that the Oba of Benin does not appoint plot allotment committees in the areas outside Benin City is most misconceived as the Oba of Benin is the custodian of all lands in Benin speaking areas of Edo State and the Oba started appointing plot allotment committees prior to 1943.

He posited that the Appellants' star witness PW12 in the court below stated in his evidence under cross examination in page 138 and 139 of the Records that Ovia and Okhuae deities do not coexist in the same community and went further to state that; when Okhuae deity was brought to Appellants community (Utekon) they ordered it to be taken to Respondents Community (Ukpoke) as both deities do not coexist in the same community. He therefore submitted that the trial court was right in finding that the Appellants Community (Utekon) having ordered that Okhuae deity be taken to the Respondents Community (Ukpoke) to avoid the coexistence of both deities in the same communities, that was an indication that both communities are separate and distinct in all ramifications and he urged this Court to so hold.

Finally, he urged this Court to uphold the judgment of the trial court and dismiss this Appeal with substantial costs.

Upon receiving the Respondents' Brief of Argument, the learned counsel for the Appellant filed a Reply Brief.

In his Reply Brief, learned counsel referred to the Respondents' counsel submission at paragraph 4 of page 3 where he stated thus:

"It is our further submission that the lower court was right when it held that the Appellants having failed to accept the ruling of the customary arbitration of the Oba of Benin does not in any way deemphasize the role of the Oba of Benin as the custodian of Benin customs and tradition, we urge my Lord to so hold."

Replying to that submission, he submitted that the role of the Oba of Benin in customary arbitration was not in dispute in the case before the lower Court and the lower Court did not consider same, so the position of the Respondents is therefore non sequitur.

Again, he referred to their submission at paragraph 1.01., page 3 where he stated thus***:*** ***"Furthermore my Lord, it is our humble submission that the Counsel to the Appellants with due respect misunderstood the position of the lower court on the Customary Arbitration of the Oba of Benin as the lower court did not at any time reject the Customary Arbitration, rather it held that the Customary Arbitration of the Oba of Benin cannot stop the Appellants from approaching court."***

Responding he submitted that the lower Court entertaining the matter at all shows that the decision of the customary arbitration was not binding because where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication to be bound by the decision, the same is final and constitute estoppel *per rem judicatum* as far as that issue is concerned. See ***Okala v. Udah (2019) 9 NWLR (Pt. 1678) 562, 576-577.***

He submitted that a case that has been decided cannot be retried.

In reply to the Respondents' counsel submission that the evaluation and ascription of probative value to evidence is the sole function of the trial judge, he submitted that the appeal of the Appellants is based principally on the lower Court overruling itself in the same proceedings which is contrary to law. That it has nothing to do with evaluation or ascription of probative value to evidence. He maintained that the position of the Respondents is erroneous and that the Respondent did not address their submission that the Court cannot overrule itself in the same proceeding. He said that having conceded that position of the law, the Respondents have nothing to hang upon. He relied on the case of: ***Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414 at 456*** where the court exposited thus:

"On effect where a party fails to reply to a submission of the other party on a point-

Where a party makes a submission on a point but the opponent omits to reply to the submission, the submission made will be deemed to have been impliedly conceded by the opponent."

Responding to the Respondents' counsel's submission that the alleged forgery of Exhibit J was not proved beyond reasonable doubt, learned counsel referred to Section 16 of the Evidence Act 2011 and submitted that any customary law that is judicially noticed need not to be proved.

He submitted that the procedure of acquiring land under Benin Customary law has been judicially noticed in the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor*** so the forgery which he alleged is apparent in Exhibit 'J' ought to have been noticed by the lower Court because there was no Plot Allotment Committee in place in the year 1943 so the question of appointing members to same ought not to have arisen at all.

He submitted that a trial Court is not expected to accept and act on a notoriously false statement. See ***Salami v. Alh. M.J.M. Muse Family (2019) 13 NWLR (Pt. 1689) 301 at 321.*** Counsel contended that in this case, relying on the decision in ***K.S. Okeaya v. Madam Ekiomado Aguebor's case***, the trial court ought to have judicially noticed the notorious fact that Exhibit "J" was forged. He submitted that Exhibit "J" is a document which the lower Court and this Honourable Court have the privilege of going through and evaluating. See ***Arije v. Arije (2018) 16 NWLR (Pt. 1644) 67 Pp. 83-84.***

He posited that as it turned out, the document was not useful to the Respondents because the lower Court held thus: ***"We make particular reference to exhibit J not unmindful of the submission of the Plaintiff counsel that exhibit J is not a document of title. We agree with learned counsel for Plaintiff that exhibit J is not a document of title."*** He said that this damaging position taken of Exhibit "J" tendered by the Respondents was not appealed against. He referred to the case of ***Exxon Mobil Corp. v. Archianga (2018) 14 NWLR (Pt. 1639) 229, 251*** where the court held that: ***"Findings of fact not appealed against persist and remain binding on the parties; as facts not disputed are taken as admitted or accepted."***

He posited that it is evident that the Respondents are not appealing against the Court's position on Exhibit "J" and Exhibit "J" is clearly against the decision of the Supreme Court in ***K.S. Okeaya v. Madam Ekiomado Aguebor (supra***) which the Court ought to take judicial notice of. That Exhibit "J" not been a title document cannot be relied upon to grant title of land to the Respondents.

Learned counsel submitted that the Respondents in their brief of argument at paragraphs 1.20, 1.21, 1.22, 1.23 and 1.24 at page 8 are arguing issues that are absolutely irrelevant to the appeal of the Appellants based on the grounds of appeal and issue for determination. He therefore urged that they ought to be discountenanced. He relied on the case of ***Adedeji v. Obajimi (2018)***

16 NWLR (Pt. 1644) 146 at 161, where the Supreme Court held that ***"Argument of counsel not tied to any ground of appeal goes to no issue"***.

During the adoption of briefs by learned counsels for the parties, both counsels made some further oral submissions in adumbration of their briefs.

In adumbration, ***N.L.Omoruyi Esq.*** for the Appellants submitted that the thrust of their arguments in this appeal is that the lower court cannot overrule itself in the same proceedings. He emphasised that the lower court should have taken judicial notice of the Supreme Court's decision in the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor (supra***).

On his part, ***P.C.Ibekwe Esq.*** submitted that the Appellants' Reply Brief falls short of a Reply Brief. That the purpose of a Reply Brief is to enable the Appellant to articulate his arguments on some new issues arising from the Respondent's Brief. For this view, he referred the Court to an article titled: ***PRAGMATIC PRINCIPLES OF BRIEF WRITING IN APPELLATE COURTS IN NIGERIA (2012), BY HON. JUSTICE P.A.AKHIHIERO***. He said that in the instant appeal, the arguments in the Reply Brief were merely to strengthen the Appellants' Brief. He therefore urged the Court to discountenance the Reply Brief.

In adumbration, the learned Respondents' counsel submitted that the lower court never overruled itself on Exhibit J, rather the court held that Exhibit J cannot be swept under the rug. According to him, Exhibit J established the fact that the Respondents' community is separate and distinct from the Appellant's community. He submitted that the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor (supra)*** is not applicable to this appeal.

Upon a careful examination of the Issues formulated by the learned counsels for the parties I observed that the sole issue for determination formulated by each of them are almost identical. I am of the view that the issues are quite germane to the just determination of this appeal. I therefore adopt the Appellants' sole issue for determination as follows:

"Whether having regard to the evidence and the entire circumstances of this case, the Appellants appeal is meritorious and ought to be allowed?"

Before I resolve the sole issue for determination in this appeal, I wish to point out that in his Brief of Argument, the learned counsel for the Appellants sought the leave of the Court to withdraw Grounds 2, 3, 4 and 5 of the original Grounds of Appeal and to argue the sole issue for determination based on the amended Ground 1 of the original grounds of Appeal and Grounds 6 and 7 of the additional grounds of Appeal. As a matter of fact that is exactly what he did.

It is settled law that any ground of appeal which is not argued is deemed abandoned and ought to be struck out. See ***IDAKWO (RTD) v. IBRAHIM & ORS (2011) LPELR-8936(CA)***; and ***SNIG (NIG) LTD v. WEMA BANK PLC (2016) LPELR-40576(CA).***

Sequel to the above authorities, the said Grounds 2, 3, 4 and 5 of the original Grounds of Appeal which were not argued under the sole issue for determination are deemed abandoned and accordingly struck out. I will now proceed to resolve the sole issue for determination which is whether having regard to the evidence and the entire circumstances of this case, the Appellants appeal is meritorious and ought to be allowed?

In order to resolve this issue, I will highlight the salient aspects of the Appellants complaints in this appeal and resolve them seriatim.

In the first place, the Appellants have contended that since the lower court held that Exhibit J is not a document of title, the court should not have relied on it to declare title in favour of the Respondents. According to them, having held that Exhibit J is not a document of title, the lower court ought not to have turned around to rely on the same Exhibit J to declare title to the land in

favour of the Respondents because that was tantamount to overruling itself in the same proceedings contrary to law.

Going through the judgment of the trial court, I observed that the court did not really rely on Exhibit J as a document of title. The pertinent part of the judgment states thus:

"We agree with the learned counsel for the Plaintiff that exhibit J is not a document of title. However a close look at exhibit J shows it was dated in 1943 precisely 13th April and addressed to Okao, Odionwere, Edion and Ighele of Ukpoke Village Area appointing them as members of Building and Plot Allotment Committee for Ukpoke Village Area, this letter was signed by the Oba of Benin and made reference to an earlier appointment that stood cancelled by the virtue of this current letter. This exhibit cannot be washed away or swept under the rug, this in our view goes to establish the fact that Ukpoke is a distinct community on its own and not a camp as claimed by the Plaintiff in this case." (Underlining, mine)

From the underlined portion of the judgment, it is evident that the court was relying on Exhibit J not as a document of title but to ***establish the fact that Ukpoke is a distinct community on its own and not a camp as claimed by the Appellants in this case.***

Sequel to the above, it is clear that when the trial court held that Exhibit J is not a document of title, the lower court did not overrule itself in the same proceedings when it later held that Exhibit J established the fact that Ukpoke is a distinct community on its own and not a camp as claimed by the Appellants. The only way the court could have been said to have overruled itself is if the court had subsequently held that Exhibit J is a document of title. There is nowhere in the judgment where they held that Exhibit J is a document of title. The submission of the Appellants' counsel in this regard is therefore misconceived and it is accordingly overruled.

Secondly, the Appellants contended that the lower court should not have relied on Exhibit J because the said exhibit ***"was criminally forged by the Respondents for the purpose of their case in court".*** Now it is beyond argument that forgery is a crime. Thus the burden is on the Appellants to prove beyond reasonable doubt that the Respondents forged Exhibit J. This duty is vested on them by virtue of ***Section 135(1) and (2) of the 2011 Evidence Act*** which provides that-

"1. If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal it must be proved beyond reasonable doubt.

2. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to Section 139 of this Act, on the person who asserts at, whether the commission of such act is or is not directly in issue in the action."

In the case of ***NDUUL v. WAYO & ORS (2017) LPELR-44607(CA),*** SANKEY, J.C.A exposited thus:

"In respect of the substantive Appeal, I am again in harmony with the lead Judgment that the Appellant, having alleged the criminal offence of forgery against the 1st Respondent, failed to offer proof beyond reasonable doubt of the alleged offence vide the facts in his affidavit and documentary evidence. In other words, the evidence offered in this regard fell far short of the standard of proof required where a criminal allegation is made in civil proceedings. The Appellant failed to show that the said letter of termination of appointment enclosed in the Form CF001 was forged or falsified or even that the 1st Respondent made a false representation to Section 31(6) of the Electoral Act, 2010 (as amended) as contended."

See also the following authorities on the same point: ***SENATOR IYIOLA OMISORE & ANOR v. OGBENI RAUF ADESOJI AREGBEOLA & ORS (2015) LPELR-25820(CA); Anambra State Environmental Sanitation Authority v. Ekwenem (2009) 13 NWLR (PT 1158) 410 S.C.;***

Babatunde v. Bank of the North Ltd (2011) LPELR-8249 (SC); and ***Board of Customs & Excise v. Barau (1982) LPELR-786(SC).***

In their spirited attempted to convince the Court that Exhibit J was forged the very learned counsel for the Appellants relied heavily on the decision of the Supreme Court in the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor (1970) ALL NLR (reprint) 1,*** where the apex Court held inter alia as follows:

"(a)all lands in Benin Division are vested in the Oba of Benin who is thus trustee or legal owner thereof on behalf of the people of Benin who are beneficiaries in respect thereof;

(b)in respect of Benin City itself, the Oba of Benin had by 1961 appointed ward allotment committees in respect of 12 wards into which the City had been divided shortly before this for the purpose of plot allocation;

(c)whereas any grantee of land in Benin City before 1961 might not be able to produce the approval in respect thereof reduced by the Oba of Benin into writing, such a grantee after this period must be able to produce such evidence;

Arguing quite ingeniously, learned counsel submitted that all other areas or towns and villages had no Plot Allotment Committee set up by the Oba of Benin. That the Plot Allotment Committee was established in 1961 by the Oba of Benin for Benin City only. That Ukpoke, the Respondents Community has never being part of Benin City but has been a community of its own outside Benin City. That there was no Plot Allotment Committee in Benin City not to talk of same outside Benin City so Exhibit 'J' was purposely made by the Respondents for the purpose of their case at the Court below.

I observed that the above submissions of the learned counsel is not supported by any evidence adduced at the trial. There was no evidence on when the Plot Allotment Committees were set up or the various communities where these Plot Allotment Committees were set up. In his additional oral arguments at the hearing of this appeal, the learned counsel who appeared for the Appellants emphasised that the lower court should have taken judicial notice of the Supreme Court decision in the case of ***K.S. Okeaya v. Madam Ekiomado Aguebor (supra).*** I think they are trying to rely on the finding of the apex Court in Ratio (b) and (c) of the said case where they held as follows:

"***(b) in respect of Benin City itself, the Oba of Benin had by 1961 appointed ward allotment committees in respect of 12 wards into which the City had been divided shortly before this for the purpose of plot allocation;***

(c) whereas any grantee of land in Benin City before 1961 might not be able to produce the approval in respect thereof reduced by the Oba of Benin into writing, such a grantee after this period must be able to produce such evidence"

It must be observed that the apex Court did not categorically state that the Plot Allotment Committees were all appointed ***in 1961*** but that ***by 1961 the Oba of Benin had appointed ward allotment committees in respect of 12 wards.*** The year they were appointed remains uncertain. This position is reinforced by Ratio (c) where the Court stated thus: "***any grantee of land in Benin City before 1961 might not be able to produce the approval in respect thereof reduced by the Oba of Benin into writing".*** The use of the phrase "***might not be able",*** is an indication of uncertainty. Thus the issue of whether the Plot Allotment Committees were not in existence in 1943 is quite speculative. The standard of proof of a crime is not left for conjectures and speculations. The standard of proof is beyond reasonable doubt. See: ***section 135(1) of the Evidence Act, 2011***. See also the following cases: ***Aigbadion V. State (2000) 4 SC 1; Oseni V. State (2012) 2 MJSC (Pt. II) 123; Nwosu V. The State (1998) 8 NWLR (Pt. 562) 433 Bakare V.***

The State (1987) 3 SC 1; R.V. Lawrence (1932) 11 NLR 6; Okonji V. The State (1987) 1 NWLR (Pt. 52) 659; Otki V. Attorney

Thus, going through the entire evidence adduced at the trial court, there is no scintilla of evidence adduced by the Appellants to prove that Exhibit J was criminally forged by the Respondents for the purpose of their case in court. I agree with the learned counsel for the Respondents that the allegation of forgery was not proved beyond reasonable doubt as required by ***Section 135(1) and (2) of the 2011 Evidence Act***. The submissions of the learned counsel for the Appellants in this regard are therefore overruled.

Again, in this Appeal, the learned counsel for the Appellants contended that the lower court having rejected the customary arbitration panel's report ought not to have turned round to use the evidence of the Chairman of the panel to resolve any issue in this case.

On the above submission I wish to observe that that the verdict of the trial court was that from the evidence adduced, they were unable to agree with the Respondents that the Appellants' claim is caught by the principle of previous customary arbitration. The court simply held that the defence of customary arbitration could not avail the Respondents. The issue of the *viva voce* evidence of the Chairman of the panel (D.W.5) which the court relied upon was in relation to the MTN mast which he said that he saw on the land. Relying on that piece of evidence, the trial court stated *inter alia* thus:

"***we are unable to shut our eyes to the evidence of DW5, who said in visiting the two communities the panel saw an MTN mast and when asked Utekon said they neither knew who owns it or how it got there and the Ukpoke people contracted it or leased it MTN who pay them rent for their for their land.***

This piece of evidence was not challenged under cross examination by the plaintiffs. The presence of an MTN mast which Ukpoke people claim they leased out the land for show acts of recent possession.

On the basis of what we have said above, we prefer the evidence of the witnesses called by the defendants/counter claimants to that called by the plaintiffs especially evidence DW11.

Consequently we hold that on the preponderance of evidence the plaintiffs have failed to establish their claim as required by law. On the contrary, we hold that the defendants/counter claimants in this case have established their counter claim to be entitled to judgment. The plaintiffs claim fails in its entirety."

Thus, the trial court was relying on the evidence of the D.W.5 for the sole purpose of applying the principle as enunciated in the classical case of ***Kojo II vs Bonsie (1957) WLR 1223.***

The essence of the ***Rule in Kojo II vs Bonsie (1957) WLR 1223*** is that where two competing evidence of traditional history are before a Court, the Court can look at acts of possession and ownership in recent times and resolve the dispute in favour of the party who is shown to have been performing acts of possession and ownership in recent times on the land in dispute. See: ***KOJO V. BONSIE (1957) 1 WLR 122 ODOFIN v. AYOOLA (1984) 11 SC 72; BALOGUN V. AKANJI (2005) 10 NWLR (PT 933) 394. In IHEANACHO v. MATHAS CHIGERE (2004) 7 NWLR (PT 901) 180.***

This is essentially what the trial court did in the instant case when they held that ***the presence of an MTN mast which Ukpoke people claim they leased out show acts of recent possession.*** As the court rightly observed, the evidence of the D.W.5 concerning the mast was not challenged under cross examination by the Appellants.

It is settled law that failure to cross-examine the evidence of a witness on a particular matter is that the adversary accepts the truth of the matter as led in evidence. See ***GAJI V. PAYE (2005)***

5 SC 53, AMADI V. NWOSU (1992) 5 NWLR (pt 241) 273,284. In the case of ***Oforlete Vs State (2000) 12 NWLR (Pt 681) 415, Achike JSC*** restating the implication of the failure of the adversary to cross-examine the evidence of a witness, went further to emphasize the purpose of cross-examination thus:- ***"After all, the noble art of cross-examination constitutes a lethal weapon in the hands of the adversary to enable him effect the demolition of the case of the opposing party.....plainly it is unsatisfactory if not suicidal bad practice for counsel to neglect to cross-examine a witness after his evidence in order to contradict him or impeach his credit..."***

Furthermore, I agree entirely with the submission of the learned counsel for the Respondents that it is the duty of the trial court to evaluate evidence. This is because the trial judge had the opportunity of hearing and watching the demeanor of witnesses as they testified. See ***Nnadozie v. Mbagwu (2008) All FWLR (pt. 405) 1613, (2008) 1 SC (pt. 11) 43, Agbi v. Ogbeh (2006) 5 SC (pt. 11) 129; C. K. & WMC Ltd vs. Akingbade (2016) 14 NWLR (pt. 1533) 487 @ 509. See also Okedare vs. Adebara (1994) NWLR (pt. 230) 426; Udensi vs. Odusote (2003) 6 NWLR (pt. 817).*** In the instant case, the trial court exercised its prerogative of evaluating the evidence of the D.W.5 and accepting his evidence on the MTN mast to enable it make a finding on the evidence of the traditional history of the land.

I therefore hold that the trial court rightly applied the rule in ***Kojo II vs Bonsie (1957) WLR 1223*** when they relied on the evidence of the D.W.5 to establish some acts of recent possession on the part of the Respondents.

Finally, I am of the view that upon the preponderance of evidence adduced before the trial court, the court rightly arrived at its verdict that the Appellants failed to establish their claim as required by law and that the Respondents established their counter claim to be entitled to judgment. The sole issue for determination is therefore resolved against the Appellants.

Having resolved the sole issue against the Appellants, I am of the view that this appeal lacks merit and it is accordingly dismissed with ₦50,000.00 (fifty thousand naira) costs in favour of the Respondents.

P.A.AKHIHIERO
JUDGE
11/05/2020

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