IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON THURSDAY THE
15TH DAY OF JULY, 2021.

SUIT NO: HCU/13/2017

BETWEEN:
1. EMMANUEL EBADAN
2. OZIEGBE ABURE } ***……CLAIMANTS***

AND

KELLY ORIRI……DEFENDANT/COUNTER-CLAIMANT

JUDGMENT

The Claimants instituted this suit *vide* a Writ of Summons and Statement of Claim dated the 20th of March, 2017, seeking the following reliefs:

(a) A declaration that immediately before the Land Use Act (Decree) 1978, the 1st Claimant Mr. Emmanuel Ebadan was the owner in possession under Uromi Native Law and Custom of all that piece or parcel of land lying, situate and being at Ukpofaan Eko, Idunhun-ehan, Arue, Uromi in Esan North East Local Government Area of Edo State; more particularly described and delineated in the Claimant's Litigation Survey Plan and that he is the only person entitled to apply and be granted a Statutory Right (Certificate) of Occupancy in respect of the said land;

(b) A declaration that the decision by the Onojie of Uromi that the land belongs to the Defendant contrary to all available evidence and without hearing from the Claimants is a violation of the Claimants' right of fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria 1999 as amended, it is null and void and of no effect;

(c) A declaration that the Defendant's acts of coming on to the 1st Claimant's land destroying the economic trees and selling parts of it to other persons, is an act of trespass;

(d) An Order of Perpetual Injunction restraining the Defendant, his Agents, privies, servants or whosoever from any further acts or trespass on the Claimants' said land; and

(e) N100, 000,000.00 (One Hundred Million Naira) general damages for Defendant's acts of trespass and destruction of 1st Claimant's economic trees on the land.

By the Defendant's Statement of Defence and Counter-Claim dated on the 20th day of December 2017, the Defendant counter–claimed against the Claimants as follows:-

(i) A declaration that the Defendant is the proper person entitled to apply for and be granted statutory right of occupancy in respect of all that vast expanse of land measuring approximately 1500 feet, lying and situate at Idikhumun Uzenema-Arue, Uromi an area within the jurisdiction of this Honourable Court;

(ii) The sum of N500,000.00 (five hundred thousand naira) only being general damages for trespass by the Claimants unto the said land;

(iii) A perpetual injunction restraining the claimants, their agents, servants or privies from further encroaching unto the said vast expanse of land.

At the hearing, the Claimants testified and called four witnesses, to wit: Joseph Ebadan, Anthony Ebadan, Paul Igbo Ehimen and John Aigbe who testified as CW1, CW2, CW3 and CW4 respectively.

The Claimant's case is that the 1st Claimant is the owner by inheritance, and the 2nd Claimant is the caretaker of the disputed parcel of land which is situate at Ukpofa-Eko, Idumhun-ehan, Arue, Uromi Esan North East Local Government Area of Edo State.

According to the Claimants, the land in dispute was originally deforested by the 1st Claimant's grandfather by name Ebadan-Awa. After deforesting the land, the said Ebadan-Awa farmed on the land for many years, planting economic and cash crops such as pepper-fruit trees, bitter kola trees, mango trees, duca nut trees, kola nut trees etc.

When Ebadan-Awa died over 70 years ago, his only son by name Omohimhi Ebadan inherited the land and continued to farm on the land. Sometime later, Omohimhi Ebadan relocated to Northern Nigeria and instructed the 2nd Claimant who is his cousin, to take care of the land. Thereafter, the 2nd Claimant continued to harvest the crops, sell them and remit the proceeds of sales to the owner.

Omohimhi later died sometime in the late 70s and his eldest surviving son, the 1st Claimant, inherited the land and instructed the 2nd Claimant to continue looking after the land for him.

According to the Claimants, many people in Arue community have come to the 2nd Claimant in his capacity as the caretaker of the land, to solicit for parcels of land either for farming purposes or as building plots, and with the approval of the 1st Claimant, the 2nd Claimant has given out such plots without any challenge from any person.

They said that sometime in January 2017, the Defendant who claimed that he is the "Onyan-Ebho" (the Lord of the land) suddenly trespassed into the land, cutting down economic trees thereon, laying out the land in plots and selling same.

Subsequently, the 2nd Claimant reported the destruction of the economic trees to the Police, and the Defendant went into hiding when the police came for him.

According to the Claimants, the Defendant's grandfather Oriri and his father Itila (Hitler), never laid claim to the Claimant's land in dispute while they were alive.

The Claimants maintained that when the dispute was referred to the Onojie of Uromi for settlement, the Onojie decided that the land in dispute belongs to the Defendant, without hearing from the Claimants and the elders. Emboldened by the decision of the Onojie, the Defendant allegedly embarked on the destruction of some economic crops on the land. The Claimants maintain that Oriri, the Defendant's grandfather never owned any land, but only squatted with Ebewele at Ihonbodo and never laid claim to the land in dispute during his life time.

On his part, the Defendant testified and called two witnesses, to wit: Michael Oamen and Oseyi Ehibhatiomhan who testified as DW1 and DW2 respectively. The Defendant's case is that he is the owner of the vast expanse of land measuring approximately 1500ft by 2000ft lying situate and being at Idikhumun, Uzenema-Arue, Uromi which said land is separated by two roads beginning from Idikhumun junction to Uzenema in Arue-Uromi. That the land is bounded on the right by the land of late Mr. Okoduwa, on the left, by the land of Mr. Akinbo Eranga, at the back, by the land of Akhere and at the front by the land of Areghan Ebewele.

According to the Defendant, there is no place known as Idumhunehan in Arue and the place called Ukpofa-Eko referred to by the Claimants is inside the Defendant's land now in dispute. Furthermore, he stated that the 2nd claimant is not the caretaker of the Ebadan-Awa's family but has been his own caretaker before this dispute arose.

He said that his great grandfather, late Pa. Ukudo deforested the vast expanse of land over 150 years ago and exercised acts of ownership on same by planting economic trees like ducanut, native pears, avocado pear, bitter kola, rubber, mango, pepper fruit, banana, timber etc. That the 2nd claimant has since 2003 been rendering account to him from the proceeds he sold from the economic trees on the land in dispute until about the year 2014.

The defendant maintained that as the owner of the land now in dispute, he has been in exclusive possession of same and that the 2nd claimant has been selling his land fraudulently without his consent. That some of the land the 2nd claimant fraudulently sold were retrieved by him.

The defendant stated that he is the senior Onyan-Ebho, traditional head of the three villages that make up Arue and that he has never intimidated the 2nd claimant at any time. That when the 2nd claimant started disputing the land now in dispute with him, he reported the matter to the palace of the Onojie of Uromi Kingdom who assigned some chiefs to look into the matter and at the end, the palace confirmed that the land in dispute belongs to the defendant.

He stated that he inherited the land from his late father, Pa. Itila after performing his final burial rites in accordance with Esan native law and Custom as applicable to Arue-Uromi, and that his late father also inherited same from his grandfather, late Pa. Oriri who also inherited same from his great grandfather, late Pa. Ukpudo. That all his predecessors in title exercised ownership rights over the land now in dispute by planting some economic trees thereon without any challenge from anybody.

At the close of evidence, the learned counsel for both parties filed their written addresses and adopted same.

In his written address, the learned counsel for the Defendant, ***C.O. Akue Esq.*** from the Law Firm of ***Dr. P.E.Ayewoh Odiase & Co.,*** formulated two issues for determination as follows:

1. ***WHETHER THE 1ST CLAIMANT HAS FULLY DISCHARGED HIS EVIDENTIAL BURDEN OF PROOF ENTITLING HIM TO THE JUDGMENT OF THIS HONOURABLE COURT?***
2. ***WHETHER FROM THE TOTALITY OF EVIDENCE BEFORE COURT, THE DEFENDANT HAS NOT ESTABLISHED A BETTER TITLE THAN THE CLAIMANTS?***

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE 1:

WHETHER THE 1ST CLAIMANT HAS FULLY DISCHARGED HIS EVIDENTIAL BURDEN OF PROOF ENTITLING HIM TO THE JUDGMENT OF THIS HONOURABLE COURT?

On issue one, learned counsel submitted that the 1st claimant's ownership claim to the land in dispute is bare, spurious and unfounded. That from the contradictory and irreconcilable, evidence of the claimants and their witnesses, it is obvious that the 1st claimant's ownership claim is shrouded in mystery and conjecture.

He posited that the claimants maintained that the land in dispute is situate at Ukpofan-Eko, Idumhun-ehan, Arue Uromi as contained in the Litigation Survey Plan, Exhibit "B" but the 2nd Claimant told the Court under cross-examination that the land in dispute is situate at Ihonbodo.

He posited that while the CWI who did not state the location of the land in his statement on oath, told the Court under cross-examination that the land in dispute is situate at Ihonbodo, the CW2 who did not also state the identity of the land in his Statement on Oath, however told the Court under cross-examination, that the land in dispute is between Idikhumun and Uzenema. Furthermore, he said that the CW2 told the Court under cross-examination that Ihonbodo is a village of its own.

Counsel also pointed out that the CW3 who claimed that he has been farming on the land in dispute for the past fifteen years without being able to identify the disputed land in his Statement on Oath, told the Court under cross-examination that the land in dispute is situate at Uzenema.

He submitted that it is not the duty of the Court to pick or choose which of the claimants' conflicting stories to believe or disbelieve. See the case of ***Adegbayi V Ishola (2003) 11 NWLR part 871, page 353 at 350 – 351.***

He submitted that the Claimants have failed to establish the identity of the land for which the 1st claimant is seeking declaration of title. He further submitted that the first duty

on a claimant for a declaration of title to land is to show clearly the land to which the claim relates, its exact boundaries and extent. See ***Ejebu V Okoko (2001) 44 WRN page 141 at P. 155 line. 40.***

He further submitted that by the conflicting evidence of the claimants and their witnesses regarding the identity of the land in dispute, it becomes doubtful where the land the 1st Claimant is claiming in Arue Uromi, is situate. He therefore submitted that this Honourable Court cannot make a declaration of title over a parcel of land that is uncertain, unidentifiable and imprecise and relied on the case of ***Ogedengbe V Balogun (2007) Vol. 153 LRCN, Page 197 at page 215KF*** where the Supreme Court held as follows:

"It is settled that before a declaration of title is given, the land to which it relates, must be ascertained with certainty. The test being whether a Surveyor can from the record, produce an accurate plan".

He further submitted that the evidence of the 2nd Claimant, CW1, CW2 and CW3 under cross-examination, contradicts, Exhibit "B", the Litigation Survey Plan which shows that the land in dispute is at Ukpofan-Eko, Idumu-Ehan as against the oral evidence of the CW1, CW2 and CW3 which places the land in dispute in Idumu-Obodo, Idikhumun and Uzenema. He relied on the case of ***Onwuchekwa V Ezeogu (2002) 18 NWLR, part 799, page 333 at P. 346 paras. C – D***, where the Court held that a Survey Plan must correspond with the land in dispute.

He submitted that since the evidence proffered by the Claimants' witnesses conflict with Exhibit "B", the Litigation Survey Plan, oral evidence cannot be adduced to vary the contents of a written document. See the case of ***Anyanwu V Uzowuaka (2009) 7 M.J.S.C, page 1 at P. 22 paras D-E.***

Again he submitted that since the oral evidence of the 2nd claimant and his witnesses, has discredited Exhibit "B" the Litigation Survey Plan, it is devoid of any evidential value and this Honourable Court should not attach any weight to a document that has been impugned. See ***Trade Bank Plc V Dele Morenikeji (Nig.) Ltd. (2005) 6 NWLR part 921, page 309 at 315.***

Counsel submitted that although the CW4 told the Court under re-examination that he does not know whether Ukpofa-Eko, Idumu-Ehan is inside Idumobodo, the evidence of the CW3 under cross-examination that Idumu-Obodo is a Quarters of its own, that Idumu means Quarters and that there cannot be a Quarter inside another Quarter, has cast aspersion on the said piece of evidence by affirming that Idumu-Obodo and Idumu-ehan are two separate and distinct Quarters in Arue-Uromi.

He submitted that the evidence of the 1st claimant who is seeking declaration of title, is predicated on hearsay. That the 1st claimant admitted under cross-examination that everything contained in his Statement on Oath was what he was told by the 2nd Claimant. He therefore submitted that the implication of the said admission is that he knows nothing about the land in dispute outside what he was told by the 2nd Claimant. On meaning and import of hearsay evidence, he cited the case of ***Onovo V Mba (2014) 14 NWLR (Part 1427)391 at 417***.

Counsel submitted that the 1st Claimant has abandoned reliefs A - E of his Statement of Claim as no evidence was led in proof of same. He further submitted that where a party refuses to lead evidence in proof of his pleadings and by extension, his reliefs, and his case is bound to crumble. See the case of ***Olonade V Sowemimo (2006) 2 NWLR part 963, page 30 at P. 40, para. G.***

He submitted that pleadings, however elegant they may be, cannot be adopted to take the place of evidence. That this is what the 1st claimant tried to do when he stated in paragraph 12 of his Statement on Oath that he adopts and relies on their Joint Statement of Claim. He further submitted that by its nature, a statement of claim cannot assume the character of evidence unless facts constituting same are deposed to in a statement on oath and adopted before the Court can rely on same. That even a Statement on Oath not adopted remain lifeless and cannot be acted upon by the Court. See ***Idris V ANPP (2008) 8 NWLR part 1088, page 153.***

He therefore submitted that since the 1st claimant has abandoned his reliefs as contained in paragraph 28 of their joint statement of claim by not leading any evidence thereon, this Honourable Court should dismiss same.

ISSUE 2:

WHETHER FROM THE TOTALITY OF EVIDENCE BEFORE COURT, THE DEFENDANT HAS NOT ESTABLISHED A BETTER TITLE THAN THE CLAIMANTS?

On issue two, counsel submitted that the Defendant has led cogent and credible evidence in proof of his counter-claim before this Honourable Court. He submitted that the defendant who relied on traditional history, led evidence of how the land in dispute which formed part of a vast expanse of land was deforested by his great grandfather after which it devolved on his grandfather, then to his father, and finally on him through inheritance. He submitted that the evidence of the defendant is consistent with evidence of traditional history. See the case of ***Iroagbara V Ufomadu (2009) 30 W.R.N, Page 1 at P. 16 lines. 10 – 15***.

He submitted that the defendant also led credible evidence of the identity of the land in dispute. The defendant and his witnesses maintained in their Statements on Oath and during cross-examination, that the land in dispute is situate at Idikhumun, Uzenema Arue Uromi. He submitted that the evidence elicited from the CW3 under cross-examination reveals that the CW3's son bought a parcel of land from the defendant in the same Quarters where the land in dispute is situate. He said that the law is settled that where there is evidence of ownership of adjoining land, the owner of such connected or adjacent land is deemed to be the owner of the land in dispute. See ***Ayanwale V Odusami (2012) Vol. 204 LRCN, page 198 at page 212FP.***

He contended that the evidence of the CW3 who told the Court that his son bought land from the defendant in the same area where the land in dispute is situate, further consolidates the ownership claim of the defendant in respect of the land in dispute. On circumstance under which a party can rely on the evidence of his adversary which supports his case, he cited the

case of ***Adewuyi V Odukwe (2005) 4 F.W.L.R., part 292, page 2099 at Pp.2116; 2118, paras. B – C; G.***

He submitted that the evidence of the DWI that he was present when the 2nd Claimant showed the defendant the extent of his father's property, part of which is in dispute and that of the DW2 who mentioned the names of persons who were present when the defendant was shown his father's property including the land in dispute, remains unchallenged and uncontroverted and further solidifies the defendant's claim to the land in dispute. On effect of unchallenged evidence, he cited the case of ***Benbock Ltd V First Atlantic Bank PLC (2007) 51 W.R.N, page 181 at p. 193 lines 20 – 30.***

He further submitted that the claimants who had the opportunity to challenge that piece of evidence by showing that the land in dispute never belonged to the defendant's father, did not do so during cross-examination. Furthermore, that the 1st claimant told the Court under cross-examination that he does not know whether the land in dispute was deforested by the defendant's great grandfather. On the effect of failure to challenge a witness on a particular matter, he cited the case of ***Gaji V Paye (2003) 8 NWLR part 823, page 583***.

He submitted that there is evidence before the Court that the land in dispute is popularly known as Oriri bush and that it was deforested by the defendant's great grandfather. He submitted that the effect of the Claimants' inability to challenge the aforesaid evidence amounts to an admission and cited the case of ***Olosun V Ayanrinola (2009) 16 W.R.N. page 113 at P. 125 lines 25 – 30.***

Counsel submitted that the law is trite that once it is proved, as in the instant case, that original ownership of property is in a party, the burden of proving that the said party has been divested of the ownership, rest on the other party see the case of ***Orlu V Gogo-Abite (2010) Vol. 181 LRCN, page 193 at page 216 EE.***

He submitted that the claimants have failed to prove that the original ownership of the land in dispute no longer resides with the defendant in line with the above judicial authority as the 1st Claimant admitted that he has no personal knowledge of all the facts contained in his Statement on Oath in respect of the land in dispute as his Statement on Oath is predicated on what he was told by the 2nd claimant.

Counsel submitted that the evidence of the defendant and his witnesses have passed the acid test of what a counter-claimant must establish in order to succeed in a claim for declaration of title and he referred to the case of ***Obineche V Akusobi (2010) 30 WRN page 117 at P. 137 lines. 25 – 50***.

Counsel submitted that where two competing parties claim to be in possession of the land in dispute as in the instant case, the law ascribes possession to the one with a better title. See ***Ogbu V Wokoma (2005) 4FWLR part 292 at page 2123 at P. 2146, paras. C – D.*** He submitted that from the evidence before Court, it is clear that the defendant is the person in possession of the land in dispute and not the 1st claimant whose evidence is anchored purely on hearsay. He therefore submitted that since the defendant has established his title to the land

in dispute through credible evidence by leading evidence of traditional history and acts of long possession, issue two should be resolved in the affirmative.

In his written address, the learned counsel for the Claimant, ***O.V.Omoijahe Esq.*** formulated three issues for determination as follows:

1. ***Whether the claimants have successfully discharged the burden placed on them by law to entitle them to the reliefs claimed;***
2. ***Whether the Onojie of Uromi has the jurisdiction to make the purported pronouncement as to the ownership of the land in dispute; and***
3. ***Whether the defendant has successfully discharged the burden placed on him by law to enable him succeed in his counter-claim.***

Thereafter, he argued the three issues seriatim.

ISSUE ONE:

Whether the claimants have successfully discharged the burden placed on them by law to entitle them to the reliefs claimed.

Arguing this first issue, the learned counsel submitted that the Claimants have successfully discharged the burden placed on them by law to prove their title to the land in dispute on the balance of probability or on the preponderance of evidence

IDENTITY OF THE LAND IN DISPUTE

On the identity of the land he submitted that it is trite law that in a claim for a declaration of title to a piece or parcel of land, it is the paramount duty of the claimant to give an adequate description as to the identity boundaries and extent of the land he is claiming with certainty and accuracy. He said that this burden can be discharged by the claimant either by oral description or by a survey plan and cited the case of ***Bwale Tapshang v Daluk Lekret (2000) 20 WRN 16.***

He submitted that the Claimants have discharged this onus by filing and tendering a survey plan admitted as Exhibit B, showing the identity, boundaries and extent of the land in dispute. He said that this piece of evidence was neither challenged nor controverted and he referred to the case of ***Ayuya V. Yorin (2011) 10 NWLR (Pt 1254), 135*** where the Supreme Court held thus:

"where a Plaintiff claims ownership of a piece or parcel of land against his neighbor and describes the boundaries of the land in a survey plan which is tendered and admitted in evidence and the survey plan clearly refers to the particular piece or parcel of land in dispute, it cannot be said that the identity of the land is unknown. What the claimant needs to do is to establish his title to the land in dispute by one of the five methods of proving ownership of the land".

However counsel submitted that in the instant suit, the land in dispute is well known to the parties and the only issues being raised by the defendant is as to the name of the location.

He submitted that the Claimants have successfully led credible evidence before this Honourable Court establishing the identity of the land known as Idumhun-Ehan, situate at Ukpofan-Eko, Arue. He said that they further led oral evidence to show that the land is situate at Ihonbodo Village, Arue, where the 1st Claimant and the Defendant hail from. That CW2 a native of Ihonbode Village also testified that the land shares a common boundary with his own land at Ihonbodo village. He posited that there is evidence before this Honourable Court that the three villages that make up Arue, viz:-Ihonbodo, Uzenema and Isua have their farm lands situate within their own territorial boundaries. He said that the land in dispute, being Ihonbodo Land, will certainly be situate in Ihonbodo Village, and not Uzenema Village as being argued by the Defendant.

DEFENDANT'S COUNSEL SUBMISSION AS TO CONTRADICTION

Learned counsel referred to the submission of the learned counsel to the defendant on some alleged conflicting evidence given by the Claimants and their witnesses regarding the name of the location of the land in dispute as follows:

i. That the survey plan gave the location of the land as Ukpofan_Eko, Ideumhun-EkanArus, Uromi; and
ii. That while CW3 said the land is at Uzenema, CW2 said the land is between Idihunmu and Uzenema and that CW2 told the court that Ihonbodo is a village of its own.

Counsel submitted that there is no conflict in the Claimants' case to cause any material damage. He said that the most important thing is that the defendant is not misled as to the identity of the land the Claimants are claiming. That the Defendant actually said that the 2nd Claimant is his own caretaker of the particular land and that he is in exclusive possession of the land through the caretaker.

He submitted that there is no conflict between Exhibit B and the evidence of the Claimants and their witnesses. He contended that the 2nd Claimant in his deposition dated 25/1/2018, stated clearly in paragraph 6 that the land is situate at Ukpofan-Eko at Ihonbodo Village Arue and that the land is called Idumhun- Ehan and is not separated by any road. That it is common knowledge in Arue that Ihonbodo Village being the eldest of the three brother villages is sometimes referred to as Arue, even though the three villages are collectively called Arue as a community. To buttress the point, he referred to the following evidence before this Court:

a. 2nd claimant, while giving evidence in court as to the location of Chief Tony Arienih's house, said: " Chief Tony Anenih's house is not in Uzenema, but in Arue" (meaning Ihonbodo);
b. The Defendant himself under cross examination named the three villages that make up Arue community as: - "Arue (Ihonbodo) Isua and Uzenema". He had said he is not from the same village as the 2nd claimant;
c. DW1 in paragraph 12 of his deposition described the land in dispute as being separated by the "Two roads leading from Arue (Ihonbodo) to Uzenema";

d. DW2 in his deposition stated in paragraph 4 that:- "The vast expanse of the land in dispute is situate on both sides of the Uzenenna-Arue road, Arue –Uromi. The first Arue above means Ihonbodo. Thus Ihonbodo and Arue are sometimes used interchangeably;
e. DW1 under cross examination said: "it is true I am from Arue. I know Arue has three villages. I am from Ihonbodo village. The Defendant is also from Ihonbodo village";
f. The defendant and his witnesses under cross-examination admitted that the three villages in Arue community have their farmlands within their territorial boundaries.

Counsel submitted that it follows therefore that Ihonbodo village or "Idikhumu" which is a quarter in Ihonbodo, cannot have its farmland inside Uzenenma Village, as being claimed by the defendant and his witnesses. He posited that the CW3 gave evidence that he did not grow up in Arue, but was born and raised at Ivue Uromi, hence his native name "Ivue". He said that he did not depose to the location of the land in dispute and all he said was that the 2nd claimant gave him the land he has been farming on.

He submitted that his response under cross examination that the land, which is located between Idikhumu and Uzenema, is at Uzenema (since the 2nd claimant that gave him the land is from Uzenema) is not a contradiction serious enough to cast doubt on the claimants' case. He therefore urged the Court to hold that the claimants have successfully identified the land they are claiming, as required by law.

PROOF OF TITLE

Counsel submitted that it is settled law that in a claim of this nature, there are five methods by which a claimant can prove his title to the land in dispute, to wit:-

1. By production of documents of title;
2. By traditional history;
3. By acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference that the person is the true owner;
4. By acts of possession and enjoyment of the land; and
5. By possession of connected or adjacent land in circumstances rendering it probable that the owner of such land would in addition be the owner of the land in dispute.

See: ***ALLI V. ALESHINLOYE (2000) 16 WRN 1; IDUNDUN V OKUMAGBA (1976) NMLR 200, 210;*** and ***NKANDO V OBIANO (1997) 50 LRCN 1084***.

He submitted that from the Claimants' statement of claim and evidence in Court, it is clear that they are relying on all the methods, except the production of document of title.

TRADITIONAL HISTORY

He submitted that it is settled law that a party who relies on traditional history would need to plead the names of his ancestors, to narrate a continuous chain of devolution to the satisfaction of the Court, not allowing any gap defying explanation or leading to a prima facie collapse of the traditional history. He said that the history must show how the land by a system of devolution eventually came to be owned by the Claimant.

See:- ***AKINLOYE V EYIYOLA (1965) NMLR 92;*** and ***OWOADE V OMITOLA (1988) 2 NWLR (PT 77) 413***.

He submitted that the Claimants have met the requirements as enumerated in the above stated authorities. That they have pleaded the names of the 1st claimants' ancestors – Ebadan-Awa who deforested the land, to Omonhimhin his son and only child and to Emmanuel Ebadan – Omonhimhin's Eldest surviving son, who is the present owner and the 1st Claimant. Furthermore, he posited that the Claimant's witnesses also testified to the effect that it is common knowledge in Arue that the land in dispute belongs to Ebadan Awa who deforested same many years ago and that upon his death, the land devolved on his descendants Omonhinmhin and Emmanuel Ebadan.

He said that the Cw2, Ebadan Anthony who is not related to the 1st Claimant, testified that the land in dispute shares a common boundary with his own land, and that it belongs to the 1st claimant who has been in actual possession through the 2nd Claimant.

He said that the CW1, Pa Joseph Imhandonbinyen, the second most senior Arue elder at the time, gave unchallenged and controverted evidence before this court that the Defendant's grandfather, Oriri was a stranger in Arue having been brought there as a little boy by one Akhokhoa Ukpudo and his fellow hunters like Ebewele and others many years ago. That from the uncontroverted evidence of CW1, it is clear that the Defendant's grandfather, Oriri, was never Ukpudo's son. Also, that Oriri, the defendant's Grandfather, has no biological father in Arue and therefore the Defendant has no great grandfather in Arue, who could have deforested the land in dispute about 150 years ago as he claimed.

Counsel contended that if the land in dispute had in fact been deforested by Ukpudo, as contended by the Defendant, it is Ukpudo's descendants that would have challenged the Claimants over ownership of the land and not the Defendant. It is also worthy of note that while they were alive, the Defendant's grand-father – Oriri and father,Itila, never claimed ownership of the land now in dispute.

He submitted that the traditional history relied on by the Claimants is credible and is not contradicted and the position of the law is that where evidence of traditional history is not contradicted or in conflict and is found by the court to be cogent, it can support a claim for declaration of title to land: See:- ***EZEKONKWO V OKEKE (2002) 14 NWLR (Pt 777) 1; ALLI V ALESHINLOYE (2000) 6 WRN 1; and NWOSU V. UDEAJA (1990) 1 NWLR (Pt 125) 188.***

He urged the Court to hold that the Claimants' traditional history is reliable and cogent and therefore supports their claim of title to the land in dispute.

THE 3RD– 5TH METHODS OF PROOF OF TITLE

Learned counsel argued the following methods of proof together, to wit:

I. Acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference that the claimant is the true owner;

II. ***Acts of long possession and enjoyment of the land; and***

III. ***Possession of connected and 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.***

He submitted that the claimants have led credible evidence to prove the above listed methods in proof of their title to the land in dispute. That the 2nd Claimant who has been taking care of the land for the 1st claimant testified that he has been doing so for the past 60 years now, and that in exercise of the possessory and proprietary rights conferred on him by the 1st Claimant and his late father, he has been giving out parts of the 1st claimant's land to other people for either farming or building purposes.

He posited that the CW3, Mr. Ivue, in his evidence corroborated the 2nd claimant's evidence on this point and stated that he was one of such beneficiaries of part of the land for farming purposes and that he has farmed on the land for 16 years now. That the 2nd claimant also testified that he was the one that gave late Chief Tony Anenih the piece of land adjacent to the land in dispute on which he built his country home, being part of the 1st Claimant's land he is looking after and this piece of evidence was not contradicted. That the 2nd Claimant also testified that his own house, built over 40 years ago, in which he currently lives, was built on the 1st claimant's land, adjacent to the land in dispute and that he has been farming on the land since the 1950's.

He maintained that it is common ground between the 1st Claimant and the Defendant that the 2nd Claimant has been in long actual and effective possession of the land in dispute, albeit with each of them saying that the 2nd claimant is in possession of the land on his behalf. He contended that the right person to identify the party on whose behalf he has been in possession of the land in dispute, is the 2nd claimant himself and he has in his evidence before this Honourable court, declared categorically that he has been holding the land for and on behalf of the 1st claimant and not the Defendant. That from the above scenario, it becomes clear that it is the 1st claimant who has been in long and effective possession of land, in dispute.

He therefore urged the Court to invoke the provision of ***Section 35 Evidence Act 2011*** on acts of possession and enjoyment of land as evidence of ownership or right of occupancy of the 1st Claimant.

He submitted that the Claimants having proved their acts of long possession and ownership of the land in dispute, the burden of proving that they are not the owner, now shifts to the Defendant by virtue of the provision of ***S. 143 of the Evidence Act 2011***. He cited the case of: ***OMONUWA V OKPERE (1991) 5 NWLR (Pt. 189) 36.***

He submitted that the Defendant was unable to discharge this burden placed on him by ***S. 143 of the Evidence Act***. He therefore urged the Court to hold that the Claimants have successfully proved their ownership of the land in dispute on the balance of probability or on the preponderance of evidence.

TRESPASS TO THE LAND

Counsel submitted that the Claimants have successfully established their long and effective possession of the land in dispute and the Defendant's trespass and are therefore entitled to damages for trespass and injunction against the Defendant and relied on the following decisions: ***BAMGBOYE V OLUSOGA (1996) 4 NWLR (Pt 444) 520; ATUNRASE V SUNMOLA (1985) 1 NWLR (Pt. 1) 105; UDO V ONOT (1989) 1 NWLR (Pt 895) 59; and AYINDE V SALAWA (1989) 3 NWLR (Pt 109) 297.***

He urge the Court to hold that the Defendant is liable for trespass on the Claimants' land and to award the damages and injunction claimed by the Claimants against him.

WHETHER THE ONOJIE HAS JURISDICTION TO MAKE PRONOUNCEMENT AS TO THE OWNER OF THE LAND IN DISPUTE

Learned counsel submitted that the Onojie of Uromi lacked the jurisdiction to make any pronouncement on ownership of the land having regard to the provision of the ***Land Use Act 1990, and the designation of Urban Area (order) 1987.*** He referred the Court to the provisions of ***section 39 (i) of the Land Use Act 1990*** and the ***Designation of urban Areas order 1987.***

He therefore urged the Court to declare the alleged decision of the Onojie of Uromi with respect to the land in dispute, null and void and of no effect.

ISSUE THREE

Whether the Defendant has successfully discharged the burden placed on him by law to enable him succeed in his counter claim.

Learned counsel submitted that it is the same burden placed on the claimant to prove his title to the land in dispute, which is placed on the defendant/counter-claimant.

IDENTITY OF THE LAND

He submitted that the defendant has failed to prove the identity of the land with the requisite certainty and accuracy as required by law, to make him succeed in his counter-claim. He posited that in the first place, the defendant, thinking that the land is situate in Uzenema Village, decided to change his place of origin from Idikhumu-Ihonbodo village to idikhumu-Uzenema village (even when there is no Idikhumu in Uzenema). Consequently, he said that the Defendant and his witnesses continued to maintain that the land is situate in Uzenema even in the face of overwhelming evidence that the land cannot be in Uzenema village.

He said that under cross-examination, the defendant and his witnesses named the three villages that make up Arue community as:-Arue or Ihonbodo, Uzenema and Isua. He said that DW1& DW2 stated that they are from Idikhumu quarters same as the Defendant. DW1 also stated categorically that both he and the defendant are from Ihonbodo Village and that they and the 2nd Claimant (who is from Uzenema) are from different villages. He said that it is clear from the above that Idikhum quarters is in Ihonbodo village and not Uzenema.

Counsel said that the Defendant and his witnesses also told the Court that each of the three villages has its own farmland situate within its own territorial boundaries. That it is

therefore clear from the above pieces of evidence that the defendant is not from Uzenema and that Idikhumui/Ihonbode's farmland cannot be situate at Uzenema as claimed by the defendant.

Counsel submitted that apart from not knowing the name of the place where the land is situate, the defendant and his witnesses also gave conflicting descriptions of the land. He said that the defendant and DW1 in their depositions said that the land in dispute is divided by the two roads leading from Arue to Uzenema but in his evidence in court, the DW1 said that the land is divided by only one road. Furthermore, he pointed out that DW2 in his deposition said that the land is situate on both sides of the road leading from Arue to Uzenema. That the defendant, who claimed that the land is situate in Uzenema stated, under cross examination, that the land starts from Idikhirmu (which he said is inside Uzenema) and ends at Uzenema.

Counsel however referred the Court to the survey plan which they also relied upon which shows that the land in dispute is not separated by any road but is situate between the two tarred roads leading from Arue (Ihobodo) to Uzenema and it is on Ihonbodo Land.

Furthermore, he said that the defendant pleaded the names of his supposed boundary men, but failed to call any one of them as his witness to come and tell the court how the land is situate at Uzenema. Rather, he called two of his "boys" as DW1 and DW2. He submitted that this failure of the defendant to call such vital anal material witnesses, is fatal to his case as it is caught by ***S. 167 (d) of the Evidence Act 2011*** as amended, that their evidence would have been unfavourable to him.

He submitted that where a claimant fails to prove the identity boundaries and extent of the land he is claiming, his action should be dismissed. See: ***Basil Fajibe (2002 8NWLR (Pt 1270) 217. (2) ALIZE V. NWOSU (2002) 8NWLR. (Pt 787) 369.*** He therefore urged the Court to hold that the defendant has failed to successfully identify the land he is claiming with the requisite certainty and accuracy.

DEFENDANT'S PROOF OF TRADITIONAL HISTORY

Counsel submitted that the Defendant has also failed to prove his ownership by traditional history. He submitted that a party relying on traditional history to prove his title would need to plead the names of his ancestors, to narrate a continuous chain of devolution to the satisfaction of the Court, not allowing any gap or gaps defying explanation or leading to a prima-facie collapse of the traditional history. That the history must show how the land by a system of devolution eventually came to be owned by the Claimant. See: - ***AKINLOYE V EYIYOLA (1965) NMLR 92; and OWOADE V OMITOLA (1988) 2NWLR (Pt 77) 413***

He submitted that the Defendant has not been able to narrate his traditional history in a continuous chain of devolution from his alleged great-grand-father, some 150 years ago to the present day. That there is a gap of at least, 70 (seventy) years in his narrative, leading to a prima-facie collapse of his traditional history.

He said that the defendant in desperation turned around to claim that the 2nd Claimant, that instituted this joint action against him, is now his "caretaker" of the land who has been managing the land for him. That the defendant further claimed that the 2nd Claimant's father

was his grandfather's caretaker, and that on his demise, the 2nd claimant took over. He said that strangely enough, the defendant does not know the name of 2nd claimant's father whom he wrongly called him Oziegbe. He said that the 2nd claimant has however refuted the defendant's claim as untrue.

He said that another damaging blow to the traditional history of the defendant is the unchallenged and uncontradicted evidence of CW1, that Oriri, the defendant's grandfather, had no biological father in Arue, having been brought there many years ago as a child. That he was placed under the care of one Akhokhoa who was the 1st son of Ukpudo. He maintained that it is clear that the defendant has no great grandfather in Arue that could have deforested the land in dispute, 150 years ago.

Counsel submitted that it is also significant to note that none of Pa Ukpudo's descendants has ever challenged the Claimants over the ownership of the land in dispute. That in his evidence in court CW1 listed the descendants of Ukpudo, and Oriri, the defendant's grandfather was not one of them. That the defendant's ancestry in Arue ended with his grandfather Oriri, according to CW1.

He therefore urged the Court to hold that the defendant's traditional history is neither cogent nor reliable and so cannot support his counter-claim for declaration of title to the land in dispute.

ACTS OF LONG POSSESSION

Counsel submitted that the proper person who can tell the court the person on whose behalf he has been in possession over the years, is the same 2nd Claimant and he has unequivocally told this court that the person on whose behalf he has been in possession of the land is the 1st claimant and that the land is the 1st claimant's and that the defendant is a trespasser. He submitted that in view of the 2nd Claimant's evidence on the point, it is clear that the person who has exercised long acts of possession is the 1st Claimant and not the Defendant. He therefore urged the Court to hold that the defendant his failed to prove his alleged acts of long possession of the land in dispute.

DAMAGES FOR TRESPASS

On the Defendant's claim for damages for trespass and injunction he submitted that the relief must also fail because trespass is actionable at the suit of the person in possession. See: ***BAMGBOYE V OLUSOGA (Supra)***. He reiterated that since the Defendant was unable to prove that he is in possession of the land in dispute, he cannot maintain an action in trespass against the true owner and his caretaker.

I have carefully considered all the processes filed in this suit, together with the evidence led, the exhibits admitted in the course of the hearing and the addresses of the respective Counsels to the parties.

Upon a careful examination of the Issues formulated by learned counsel for the parties, I observe that the Defendant filed a Counter-Claim in this suit so I am of the view that the two issues for determination in this suit are as follows:

1) ***Whether the Claimants have proved their case on the preponderance of evidence to warrant the judgment of this Court in their favour? and***
2) ***Whether the Defendant/Counter-Claimant has proved his counter-claim against the Claimants on the preponderance of evidence to warrant the judgment of this Court in his favour?***

I will now proceed to resolve the two issues seriatim.

ISSUE 1:

Whether the Claimants have proved their case on the preponderance of evidence to warrant the judgment of this Court in their favour?

In a claim for a declaration of title to land, the burden is on the Claimant to satisfy the Court that he is are entitled, on the evidence adduced by him, to the declaration which he seeks. The Claimant must rely on the strength of his own case and not on the weakness of the defendant's case. See: ***Ojo vs. Azam (2001) 4 NWLR (Pt.702) 57 at 71; and Oyeneyin vs. Akinkugbe (2010) 4 NWLR (Pt.1184) 265 at 295***.

It is now settled law that there are five ways of proving ownership of land. These are as follows:
I. By traditional evidence;
II. By the production of documents of title;
III. By proving acts of ownership;
IV. 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; and
V. By acts of long possession and enjoyment of the land.
See: ***Idundun vs. Okumagba (1976) 9-10 S.C. 227***.

The point must be made that any one of the five means will be sufficient to prove title to the land as each is independent of the other. See: ***Nwosu vs. Udeaja (1990) 1 NWLR (Pt.125) 188; and Anabaronye & Ors. vs. Nwakaihe (1997) 1 NWLR (Pt.482) 374 at 385.***

In the instant suit, from the evidence led, the Claimants appears to be relying on the first, third, fourth and the fifth means of proof. To wit: proof by traditional evidence; by acts of ownership; possession of connected or adjacent land; and by acts of long possession and enjoyment of the land.

The Claimants' traced the traditional history of the land from one Ebadan- Awa who allegedly deforested the land, to Omonhimhin his son and to Emmanuel Ebadan – Omonhimhin's Eldest surviving son, who is the present owner and the 1st Claimant in this suit.

It is settled law that in a claim for declaration of title to land, the Claimant has the burden to establish his claim by credible evidence. The first duty on the Claimant in a land suit is to lead evidence that will establish the identity of the land in dispute. Even where he has traced his genealogy accurately and such genealogy is not linked to a definite parcel of land,

which is the subject of the claim, there will be no parcel of land upon which the declaration can be tied to, as the declaration cannot be made in vacuum. In the absence of proof of identity of the land to which the declaration can be related, the declaration cannot be made. See ***Awote v. Owodunni (No. 2) (1987) 2 NWLR (pt. 964) p. 337 and Nwokidu v. Okanu (2010) 3 NWLR (pt. 1181) p. 362***.

Furthermore, proof of identity of the land in dispute may be done either by oral description of the land through the viva-voce evidence of witnesses especially boundary men or by tendering in evidence a survey plan of the disputed land or by both methods. ***REGISTERED TRUSTEES METHODIST CHURCH NIG & ANOR V. ADENIJI & ORS (2012) LPELR-19899(CA).*** See also the case of ***Awote & Ors. v. Owodunni & Anor. (1987) 2 NWLR (pt. 57) 366 at 371.***

In the instant case, the Claimants tendered a litigation survey plan admitted as Exhibit B in a bid to establish the identity of the land known as Idumhun-Ehan, situate at Ukpofan-Eko, Arue. Upon a cursory examination of Exhibit B, I observed that the identity boundaries and extent of the 1st Claimant's land are delineated in the area verged green, while the disputed portion is verged red within the area verged in green. This is documentary evidence showing the boundary features of the disputed land. It is noteworthy that the Defendant did not file any litigation survey plan to challenge the contents of Exhibit B. The settled legal position remains that a litigation survey plan which is not countered will be taken as accurately reflecting the disputed land. See ***ADELAJA v. ALADE (1999) 6 NWLR (PT 608) 544 or (1999) LPELR (109) 1 at 17 - 18, ADESANYA v. ADERONMU (2000) 9 NWLR (PT 672) 370 or (2000) LPELR (145) 1 at 24 and OGUN v. AKINYELU.***

Apart from the Litigation Survey Plan, the Claimants also led oral evidence to show that the land is situate at Ihonbodo Village, Arue, where the 1st claimant and the Defendant hail from. CW2 a native of Ihonbodo Village, also testified that the land shares a common boundary with his own land in Ihonbodo village.

In his written address the learned counsel for the Defendant made some submissions on some alleged contradictions in the Claimants' case on the identity of the land. According to him, in the litigation survey plan (Exhibit B), the Claimants gave the location of the land as Ukpofan_Eko, Ideumhun-EkanArus, Uromi, while CW3 said that the land is at Uzenema and CW2 said the land is between Idihunmu and Uzenema.

It must be emphasized that the law does not insist that there must be no contradictions in the evidence of witnesses called by the same party on any issue in contention. The principle is that the contradictions by witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole by that party or as to the reliability of such witnesses. See: ***Nwokoro & Ors v. Onuma & Anor (1999) LPELR-2126(SC); Taiwo & Ors v. Ogundele & Ors (2012) LPELR-7803(SC)***.

On the whole, I do not think that there is any material contradiction on the issue of the identity of the land in dispute. There may be some disparity in respect of the names ascribed to the land by the parties but I agree with the submission of the learned counsel for the Claimants

that the most important thing is that the Defendant is not misled as to the identity of the land in dispute. Clearly, the identity of the land in dispute is quite certain to the parties. The dispute between them is as to the ownership of the land.

In the case of ***THE REGISTERED TRUSTEES OF FULL GOSPEL APOSTOLIC MISSION v. SHITTU BANJOKO BELLO (2012) LPELR-19912(CA)***, while expositing on the effect of ascribing different names to a land in dispute the Court stated thus:

"Moreover, the respondent counter-claimed the same piece of land and both of them cannot be heard to contend that they did not know what they were fighting for. Whether the disputed land is situate at Salami street Akute or Taye Bello street Akute as variously testified to by the D.W.2 and the D.W.3 did not diminish the fact that the disputed piece of land is known to the parties to be located at Akute, therefore ascribing different names to the street the land is situate was immaterial and of no moment to the issue of the identity and location of the disputed plot of land. For the propositions above see the cases of Ezeudu and Ors. v. Obiagwu (1986) 2 NWLR (pt. 21) 208 at 220, Ayuya v. Yonrin (2011) ALL FWLR (pt. 583) 1842 at 1865, Dosunmu v. Joto (1987) 4 NWLR (pt. 65) 297, Makanjuola v. Balogun (1989) 3 NWLR (pt. 108) 192 at 204, Aromire v. Awoyemi (1972) 1 ALL NLR (pt. 1) 101 at 113, Nwokorobia v. Nwogu and Ors . (2009) 10 NWLR (pt. 1150) 553 at 584, Salami v. Gbodoolu (1997) 4 NWLR (pt. 499) 227, Anyanwu and Ors. v. Uzowuaka and Ors . (2009) 13 NWLR (pt. 1159) 445 at 475 - 476, Adenle v. Olude (2002) 18 NWLR (pt. 799) 413 at 433 - 434, Ogunyanwo and Ors. v. Oluwole (2009) 16 NWLR (pt. 1167) 391 at 403 - 404."

Furthermore, the Defendant is aware that the land in dispute is the same land over which the 2nd Claimant has been the undisputed caretaker. The 1st Claimant and the Defendant are in agreement that the 2nd Claimant is the caretaker of the particular land. The dispute however is that each of the 1st Claimant and the Defendant is asserting that the 2nd Defendant is his caretaker. I am of the view that the proper person to establish on whose behalf he has been taking care of the land is the 2nd Claimant himself and he has unequivocally told this court that he is the caretaker on behalf of the 1st Claimant. Thus the issue of identity of the land in dispute was firmly established by the Claimants.

Coming to the issue of proof by traditional history, the settled position of the law is that where a party relies on traditional history in proof of title to land, he must give satisfactory evidence as to how he derived the particular title pleaded and claimed. He is bound to plead and establish facts such as:

1. Who founded the land;

2. How he founded the land; and

3. The particulars of the intervening owners through whom he claims;

See: ***Nruamah v Ebuzoeme (2013) LPELR-19771(SC); Onwugbufor v Okoye (1996) LPELR-2716(SC); Dike v Okoloedo (1999) 7 S.C. (PT 111) 35; Ngene v Igbo (2000) LPELR-1987(SC); Ezeokonkwo v Okeke (2002) 5 S.C. (PT 1) 44***.

Once a party pleads and traces his root of title to a particular person, he must establish how that person came to have title invested on him. He must not only establish his own title, but he must also satisfy the Court as to the title of the source from whom he claims to derive his title to the land, more so when his title is challenged. See: ***Ogunleye v Oni (1990) 4 S.C. 130, (1990) LPELR-2342(SC); Osafile v Odi (1994) LPELR-2784(SC); Ngene v Igbo (supra).***

The Claimants in proof of their case, relied on traditional evidence. The evidence adduced by the Claimants must therefore be examined. The witnesses for the Claimants all testified that the land in dispute was originally deforested by the 1st Claimant's grandfather by name Ebadan-Awa. After deforesting the land, the said Ebadan-Awa farmed on the land for many years, planting economic and cash crops such as pepper-fruit trees, bitter kola trees, mango trees, duca nut trees, kola nut trees etc.

When Ebadan-Awa died over 70 years ago, his only son by name Omohimhi Ebadan inherited the land and continued to farm on the land. Sometime later, Omohimhi Ebadan relocated to Northern Nigeria and instructed the 2nd Claimant who is his cousin, to take care of the land. Thereafter, the 2nd Claimant continued to harvest the crops, sell them and remit the proceeds of sales to the owner.

Omohimhi later died sometime in the late 70s and his eldest surviving son, the 1st Claimant, inherited the land and instructed the 2nd Claimant to continue looking after the land for him.

According to the Claimants, many people in Arue community have come to the 2nd Claimant in his capacity as the caretaker of the land, to solicit for parcels of land either for farming purposes or as building plots, and with the approval of the 1st Claimant, the 2nd Claimant has given out such plots without any challenge from any person whatsoever.

In this regard I will refer to some portions of the deposition of the ***C.W.3 Paul Ehimen Ivue***. In paragraphs 2 to 7 of his deposition he stated as follows:

"2. That I know the land in dispute;

3. ***That I have farmed and I'm still farming on the land in dispute with the permission of the 2nd Claimant for the past 15 (fifteen) years, planting yams, maize, cassava and other food crops without disturbance from anybody;***
4. ***That I know as a fact that everybody in Arue knows that the land in dispute belongs to Ebadan-Awa, the 1st Claimant's grandfather with the 2nd Claimant as his Caretaker, hence anybody who has anything to do on the land usually goes to the Claimants to seek permission;***
5. ***That I knew Oriri, the Defendant's grandfather and he never claimed to be the owner of the land in dispute;***
6. ***The Defendant's father, though he died young, never laid claim to the land before his death; and***

7. ***That I am therefore surprised to hear that the Defendant, a little boy of yesterday is now claiming to be the owner of not only the land in dispute but also all the land in Arue, under a non-existent title of Onyan-ebho."***

The 2nd claimant also testified that he was the one that gave late Chief Tony Anenih the piece of land adjacent to the land in dispute on which he built his country home, being part of the 1st Claimant's land he is looking after. He also testified that he built his own house over 40 years ago on the 1st claimant's land, adjacent to the land in dispute and that he has been farming on the land in dispute since the 1950's. All these pieces of evidence were not contradicted at the trial. The evidence of the Claimant's witnesses on the traditional history of the land was not discredited under cross examination.

The Defendant also relied on traditional evidence to prove his title to the land. According to him, his great grandfather, late Pa. Ukudo deforested the vast expanse of land over 150 years ago and exercised acts of ownership on same by planting economic trees like ducanut, native pears, avocado pear, bitter kola, rubber, mango, pepper fruit, banana, timber etc. He maintained that the 2nd Claimant has been his caretaker over the land and has been rendering account to him from the proceeds of sale of some of the economic trees on the land in dispute until about the year 2014.

The Defendant maintained that as the owner of the land now in dispute, he has been in exclusive possession of same through the 2nd Claimant. He said that he fell out with the 2nd Claimant when he fraudulently sold some portions of the land and refused to remit the proceeds of sale to him. He said that he is the senior Onyan-Ebho, traditional head of the three villages that make up Arue. That when the 2nd claimant started disputing the land now in dispute with him, he reported the matter to the palace of the Onojie of Uromi Kingdom who assigned some chiefs to look into the matter and at the end, the palace confirmed that the land in dispute belongs to the defendant.

He stated that he inherited the land from his late father, Pa. Itila after performing his final burial rites in accordance with Esan native law and Custom as applicable to Arue-Uromi, and that his late father also inherited same from his grandfather, late Pa. Oriri who also inherited the land now in dispute from his great grandfather, late Pa. Ukpudo. That all his predecessors in title exercised ownership rights over the land now in dispute by planting some economic trees thereon without any challenge from anybody.

Upon a juxtaposition of the evidence of traditional history of the Claimants with that of the Defendant, it is evident that there is a conflict. Each party has adduced some pieces of evidence to trace how the land allegedly devolved on them. The two versions of the evidence of traditional history are irreconcilably conflicting.

It is settled law that where both sides to a dispute claim ownership of land and both base their claim through traditional or ancestral history or ownership the party that adduces better evidence will be entitled to the judgment of the Court. See ***Osu v. Igiri (1988) 1 NWLR (pt.69) p.221***. To determine which version of traditional history to believe and prefer, the trial Court has the duty to determine from the evidence adduced before him by the process of

appraisal and evaluation of the evidence and application of the law to the evidence so adduced. See ***Onwubuariri v. Igboasoiyi (2011) 3 NWLR (pt.1243) p.357***.

However where the trial Court finds itself in a dilemma or difficulty as to which version of the traditional histories to believe or accept, the Court is enjoined to follow and apply the principle enunciated in the case of ***Kojo v Bonsie (1957) 1 W.L.R. p.1223*** . The rule of ***Kojo II v. Bonsie (supra)*** postulates that where, in the determination of a declaration of title to land, as in the instant case based on traditional history, the evidence of traditional history relied upon by both parties is conflicting, in the sense that it is not clear to the trial Court as to which version to believe, the trial Court should make reference to evidence of acts of recent possession and ownership to determine the version that is more probable. This legal proposition has been accepted and applied by the Supreme Court in a plethora of cases. See ***Popoola v. Adeyemo (1992) NWLR (pt.257) p.1; Sanusi v. Ameyogun (1992) NWLR (pt.237) p.527; Raimi Ajao Ojokolobo & Anor v. Lapade Alamu & Anor (1998) 7 S.C. (pt.1) p.38; Sanusi v. Adebiyi (1997) 11 NWLR (pt.530) p.565; Obasi v. Onwuka (1987) NWLR (pt.61) p.364; Okochi v. Animkwoi (2003) 18 NWLR (pt.851) p.1; Cosmos Ezukwu v Ukachukwu (2004) 7 S.C.N.J. p.189 and Iheanacho v. Chigere (2004) 17 NWLR (pt.901) p.130.***

At this stage, since it is not clear which of the two versions to believe, I will apply the principle in the case of ***Kojo II v. Bonsie (supra)*** by making reference to evidence of acts of recent possession and ownership to determine the version that is more probable.

At the trial, the Claimants adduced evidence of some acts of recent possession which I find quite striking. The 2nd Claimant who is the undisputed caretaker of the land stated that he has been farming and is still farming on the land in dispute with the permission of the 1st Claimant without disturbance from anybody. Again under cross examination he stated that they gave a part of the land to late Chief Tony Anenih on which he built his country home adjacent to the land in dispute. All these pieces of evidence were not contradicted at the trial, the Defendant even unwittingly corroborated the evidence of the land given to Chief Tony Anenih when he stated that the 2nd Claimant received the sum of seven million naira from Chief Anenih for the sale of the land. On the part of the Defendant, he was unable to adduce any evidence of his acts of recent possession.

These undisputed acts of recent possession by the Claimants clearly validates their evidence of the traditional history of the land in line with the rule in ***Kojo II v. Bonsie (supra).***

From the foregoing, I am of the view that the evidence of the traditional history of the land adduced by the Claimants is more credible than that of the Defendant. I hold that on the preponderance of evidence, the Claimants have established the title of the 1st Claimant to the land in dispute by their evidence of the traditional history of the land.

On the other means of proof by acts of ownership; possession of connected or adjacent land; and by acts of long possession and enjoyment of the land, it is evident that all these means of proof relate to acts of possession. It is settled law that where a claimant in an action for declaration of title to land relies as his proof of title, on acts of ownership and possession in and over the land in dispute, extending over a sufficient length of time and are numerous and

positive enough to warrant the inference that he is the true owner of the land and satisfactorily discharges the burden of proof on him in that regard, he will be entitled to the declaration sought. See: ***Ishola Vs Abake (1972) 5 SC 321, Onwugbufor Vs Okoye (1996) 1 NWLR (Pt 424) 252, Jinadu Vs Esurombi-Aro (2009) 9 NWLR (Pt 1145) 55, Olagunju Vs Adesoye (2009) 9 NWLR (Pt 1146) 225, Nwankwo Vs Ofomata (2009) 11 NWLR (Pt 1153) 496 Edohoeket Vs Inyang (2010) 7 NWLR (Pt 1192) 25***.

From the totality of the evidence in this case, the parties are agreed that over time, the 2nd Claimant has been the caretaker of the land in dispute. He has been in possession of the land as the caretaker not as the owner. In other words the 2nd Claimant is the undisputed agent of either the 1st Claimant or the Defendant. According to him, he is the caretaker of the 1st claimant and not the Defendant. I agree with the submission of the learned counsel for the Claimants that the 2nd Claimant is the best person to identify the person on whose behalf he is taking care of the land in dispute. Having identified the 1st Claimant as his principal, it is a settled principle of agency that he who acts through another is deemed to act himself (***qui facit, per alium facit per se***). Consequently, the possession of the agent is on behalf of his principal. Thus the acts of ownership and possession of the 2nd Claimant can be imputed on the 1st Claimant who is deemed to have been in possession of the land in dispute.

There is a presumption of ownership in favour of the person in possession. See: ***section 143 of the Evidence Act, 2011.*** In the old case of ***Pius Amakor v. Benedict Obiefuna (1974) 3 SC 75-76,*** the Court exposited thus:

"It is trite law that trespass to land is actionable at the suit of the person in possession of the land. The person can sue for trespass even if he is not the owner nor a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong doers, except a person who could establish a better title. Therefore anyone other than the true owner who disturbs his possession of the land, can be sued in trespass and in such an action, it is no answer for the Defendant to show that the title to the land is in another person. To resist the Plaintiffs claim, a Defendant must show either that he is the one in actual possession or that he has a right to possession."

There is irrefutable evidence that the 2nd Claimant has been farming on the land in dispute with the permission of the 1st Claimant and giving out portions of the land to people without disturbance from anybody. Sequel to the foregoing, I am of the view that the 1st Claimant has established a better title to the land in dispute based on the numerous acts of ownership and possession exhibited by him through the 2nd Claimant.

The 1st Claimant having established his title to the land in dispute by evidence of the traditional history of the land and evidence of ownership and possession, I do not think it is necessary for me to consider the remaining means of proof by possession of connected or adjacent land; and by acts of long possession and enjoyment of the land. As I earlier stated in this judgment, any one of the five means will be sufficient to prove title to the land as each is

independent of the other. See: ***Nwosu vs. Udeaja (1990) 1 NWLR (Pt.125) 188; and Anabaronye & Ors. vs. Nwakaihe (1997) 1 NWLR (Pt.482) 374 at 385.***

From the foregoing, I hold that the 1st Claimant is the owner in possession under Uromi Native Law and Custom of all that piece or parcel of land lying, situate and being at Ukpofaan Eko, Idunhun-ehan, Arue, Uromi in Esan North East Local Government Area of Edo State; more particularly described and delineated in the Claimant's Litigation Survey Plan and that he is the only person entitled to apply and be granted a Statutory Right of Occupancy in respect of the said land.

However, it must be noted that apart from the claim for declaration of title, the Claimants are also seeking some other ancillary reliefs in this suit. The further reliefs are as follows:

"(b) A declaration that the decision by the Onojie of Uromi that the land belongs to the Defendant contrary to all available evidence and without hearing from the Claimants is a violation of the Claimants' right of fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria 1999 as amended, it is null and void and of no effect;

(c) A declaration that the Defendant's acts of coming on to the 1st Claimant's land destroying the economic trees and selling parts of it to other persons, is an act of trespass;

(d) An Order of Perpetual Injunction restraining the Defendant, his Agents, privies, servants or whosoever from any further acts or trespass on the Claimants' said land; and

(e) N100, 000,000.00 (One Hundred Million Naira) general damages for Defendant's acts of trespass and destruction of 1st Claimant's economic trees on the land."

Before I consider the merits of the Defendant's Counter-Claim, I will briefly make my findings on the merits of the Claimants' ancillary reliefs.

On the declaration that the decision by the Onojie of Uromi that the land belongs to the Defendant is a violation of the Claimants' right to fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria 1999, it is trite law that it is the duty of a party that has alleged the breach of his right to fair hearing to prove the allegation. A party that alleges denial of fair hearing must demonstrate and prove specific acts of such denial. See: ***EJEKA v STATE (2003) 6 SCM 1; GBADAMOSI v DAIRO (2007) 1 SCNJ 444; MAGAJI v NIGERIA ARMY (2008) 8 NWLR (1089) 338; and NGADI v FRN (2018) LPELR - 43636.***

At the trial, the Claimants adduced uncontroverted evidence to the effect that when the dispute was referred to the Onojie of Uromi for settlement, the Onojie decided that the land in dispute belongs to the Defendant, without hearing from the Claimants. Upon the evidence before me, I am of the view that the Claimants were not given any fair hearing before the Onojie of Uromi arrived at his decision that the land in dispute belongs to the Defendant.

On the consequence of non-compliance with the principle of fair hearing, the Court in ***A.G. RIVERS v. UDE [2006] 17 NWLR [Pt. 1008] 436, held:***

"...The right to fair hearing is a fundamental constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria 1960, 1979 and 1999, and a breach of it in trials or adjudication vitiates the proceedings rendering the same null and void and of no effect. Any judgment which is given without due compliance and which has breached fundamental right of fair hearing is a nullity and is capable of being set aside either by the Court that gave it or by an appellate Court...".

Since the decision of the Onojie was in breach of the right to fair hearing it is therefore unconstitutional, null and void.

Next is on the declaration that the Defendant's acts of coming on to the 1st Claimant's land destroying the economic trees and selling parts of it to other persons, is an act of trespass. It has been established that the 1st Claimant has been in exclusive possession of the land in dispute through the 2nd Claimant who has been his caretaker. It is settled law that trespass to land is the wrongful invasion of the private property of another. It is trespass to land provided the entry into the land of another by a person is not authorized. It is rooted in a right to exclusive possession of the land allegedly trespassed. It is trite that trespass to land is actionable at the instance of a person in possession of the land - see the cases of ***Ndukuba v. Izundu (2007) 1 NWLR (pt. 1016) 432, Okoko v. Dakolo (2006) 14 NWLR (Pt. 1000) 401 and Yusufu v. Keinsi (2005) 13 NWLR (pt. 943) 554.*** There is no evidence suggesting that the 1st Claimant had transferred his ownership to any other person. Rather there is abundant evidence that he is still in actual possession of the land through his caretaker who is the 2nd Claimant.

Furthermore, at the trial, the Claimants adduced evidence to show that the Defendant who claimed that he is the "Onyan-Ebho" (the Lord of the land) actually trespassed into the land, cutting down economic trees thereon, laying out the land in plots and selling same. It is worthy of note that the Defendant to a large extent did not deny the allegation of trespass rather he sought to justify his actions on the land by his unsubstantiated claims that he is the "Onyan-Ebho" (the Lord of the land). In the event a case of trespass is clearly established against him.

On the relief of N100, 000,000.00 (One Hundred Million Naira) general damages for Defendant's acts of trespass and destruction of 1st Claimant's economic trees on the land, it is settled law that where a claim is made for damages for trespass and it is neither particularized as special damages nor claimed as such, the damages so claimed would clearly amount to a claim in general damages.

General damages are damages which the law implies or presumes to have accrued from the wrong complained of or as the immediate, direct and proximate result or the necessary result of the wrong complained of. A trial Court has the discretionary power to award general damages and when exercising such discretionary powers, it has the duty to calculate what sum of money will be reasonably awarded in the circumstance of the case. See ***TAYLOR V. OGHENEOVO (2012) 13 NWLR (pt. 1316) pg. 46 @ 66 paras F-H, GARBA v. KUR (2013) 13 NWLR (pt. 831) and BELLO v. AG. OYO STATE (1986) 5 NWLR (Pt. 45) 828***.

Thus, in awarding general damages, the Court would simply be guided by the opinion and judgment of a reasonable man. General damages are loses which flow naturally from the

defendants act. See ***IJEBU-ODE LOCAL GOVT. V. ADEDEJI BALOGUN & CO. LTD. (1991) 1 NWLR (Pt. 165) 136***.

The guiding principles for the award of damages for trespass to land is to compensate the victim for the loss he has suffered. It is a discretionary power of the Court which ought not to be exercised arbitrarily. ***BAYELSA STATE GOVERNMENT & ANOR v. MR. ORIAKU EGEMZE & ORS (2019) LPELR-49088(CA).***

Furthermore, general damages may be awarded for trespass to land in recognition of the proprietary interest of the Claimant having regard to the circumstances of the case. See: ***Umunna & Ors. v. Okwuraiwe & Ors (1978) LPELR-3378(SC); Osuji & Anor v. Isiocha (1989) LPELR-2815(SC); Adamu v. Esonanjor (2014) LPELR-41137(CA); Haruna & Anor v. Isah & Anor (2015) LPELR-25894(CA)***.

In the instant case, the Claimants adduced sufficient evidence to establish the fact that the Defendant's acts of trespass actually occasioned the 1st Claimant's loss of some plots of land and some economic trees. Unfortunately, the Claimants did not specify the value of these items. In the absence of any specific value, I will exercise my discretion to award the sum of N2, 000,000.00 (two million naira) as general damages.

On the relief of a perpetual injunction on the Defendant it is settled law that once trespass has been proved, an order of injunction becomes necessary to restrain further trespass. See: ***ADEGBITE VS. OGUNFAOLU (1990) 4 NWLR (PT. 146) 578; BABATOLA VS. ALADEJANA (2001) FWLR (PT. 61) 1670 and ANYANWU VS. UZOWUAKA (2009) ALL FWLR (PT. 499) PG. 411.***

In the event, I hold that the Claimants are entitled to a perpetual injunction to restrain the Defendant, his Agents, privies or servants from any further acts or trespass on the Claimants' land.

On the Claimant's Claim, I hold that the Claimants have proved their case on the preponderance of evidence to warrant the judgment of this Court in their favour. Issue one is therefore resolved in favour of the Claimants.

ISSUE 2:

Whether the Defendant/Counter-Claimant has proved his counter-claim against the Claimants on the preponderance of evidence to warrant the judgment of this Court in his favour?

In his Counter-Claim, the Defendant counter-claimed against the Claimants seeking reliefs for declaration, perpetual injunction and damages for trespass on the same land. I am of the view that since it is the same land the Defendant is laying claim to in his counter claim, I

cannot give title of the land in dispute to the 1st Claimant and turn round to uphold the Defendant's counter claim.

In ***UWAGBOE OSAGIE & ORS V IGBINOSUN OBAZEE & ORS (2013) LPELR - 21994 (CA)*** the Court of Appeal, while pronouncing on whether a counter-claim would fail where the main claim succeeds held, per LOKULO-SODIPE JSC on pages 44 - 45 paragraphs F - E as follows: - ***"As already stated by me Appellants are very correct regarding their analysis of a counter-claim. The Appellants would however appear to have seriously misapprehended the manner of a trial in an action with a counter claim to the extent that they would appear to believe that evidence adduced in a case with a counter claim is compartmentalized or categorized into "evidence in the main suit" and "evidence in the counter claim" as it were. All that is required in a trial on pleadings is for the trial Court to identify the matters on which parties have joined issues and call for resolution and use the evidence adduced before it on the said issues... to resolve the issues in dispute...Therefore since the evidence adduced in the main claim is upheld then it follows that the counter-claim (though a separate claim that can stand on its own) is left bereft of evidence to support it. Therefore it is my finding on this issue that the learned trial Judge was right in dismissing the Appellants' counter claim."***

It is evident that since the Claimants and the Defendant are relying on conflicting evidence of traditional history of the land, the grant of one would necessarily negate the grant of the other. Both of them cannot be granted. In other words, a finding, upholding the Claimant's version of the traditional history of the disputed land automatically means a rejection of the Defendant's version.

The law is that where the facts are intertwined and interwoven as regards a claimant's action and a defendant's counter claim, the success of the claimant's claim would mean the failure of the defendant's counter claim. See: ***Aunam (Nig.) Ltd Vs UTC (Nig) Ltd (1995) 4 NWLR (Pt 392) 753, Unokan Enterprises Ltd Vs Omuvwie (2005) 1 NWLR (Pt. 907) 293, 315 at 316, Ago Vs Federal Mortgage Finance Ltd (2013) LPELR 22820(CA), Digital Security Technology Ltd Vs Andi (2017) LPELR 43446(CA), Ebibokofie Vs Tume (2018) LPELR 45620(CA), Iyua Vs Paul (2019) LPELR 47226(CA), Rikichi Vs Gambo (2019) LPELR 47676(CA).***

In view of the foregoing, I am of the view that it would be a worthless exercise to consider the merits of the Defendant's counter-claim at this stage. The counter-claim is deemed to have failed and it is accordingly dismissed. Issue 2 is therefore resolved in favour of the Claimants.

Having resolved the two issues for determination in favour of the Claimants, I hereby dismiss the Counter-Claim of the Defendant and grant the Claimants' Claims as follows:

(a) A declaration that immediately before the Land Use Act (Decree) 1978, the 1st Claimant Mr. Emmanuel Ebadan was the owner in possession under Uromi Native Law and Custom of all that piece or parcel of land lying, situate and being at Ukpofaan Eko, Idunhun-ehan, Arue, Uromi in Esan North East Local Government

Area of Edo State; more particularly described and delineated in the Claimant's Litigation Survey Plan and that he is the only person entitled to apply and be granted a Statutory Right (Certificate) of Occupancy in respect of the said land;

(b) A declaration that the decision by the Onojie of Uromi that the land belongs to the Defendant contrary to all available evidence and without hearing from the Claimants is a violation of the Claimants' right of fair hearing as enshrined in the Constitution of the Federal Republic of Nigeria 1999 as amended, it is null and void and of no effect;

(c) A declaration that the Defendant's acts of coming on to the 1st Claimant's land destroying the economic trees and selling parts of it to other persons, is an act of trespass;

(d) An Order of Perpetual Injunction restraining the Defendant, his Agents, privies, servants or whosoever from any further acts or trespass on the Claimants' said land; and

(e) N2, 000,000.00 (Two Million Naira) general damages for Defendant's acts of trespass and destruction of 1st Claimant's economic trees on the land.

The sum of N100, 000.00 (one hundred thousand naira) costs is awarded in favour of the Claimants.

Hon. Justice P.A.Akhihiero

15/07/21

<u>COUNSELS:</u>

O.V.OMOIJAHE ESQ----------CLAIMANT

DR. P.E.AYEWOH-ODIASE ----------DEFENDANT/COUNTER-CLAIMANT