**JOSHUA GUTING**

**V.**

**TUNYANG DAVWANG**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 3RD DAY OF MAY, 2013

CA/J/107/2012

**LEX (2013) - CA/J/107/2012**

**OTHER CITATIONS**

2PLR/2013/92

(2013) LPELR-21921(CA)

**BEFORE THEIR LORDSHIPS**

OYEBISI FOLAYEMI OMOLEYE, JCA

JUMMAI HANNATU SANKEY, JCA

PETER OLABISI IGE, JCA

**BETWEEN**

JOSHUA GUTING - Appellant(s)

**AND**

TUNYANG DAVWANG - Respondent(s)

**REPRESENTATION**

OKEY AKOBUNDU Esq, with Miss B. OKAFOR - For Appellant

**AND**

F. T. KUMAH Esq, with Miss AJARA GIDADO - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE/LAND LAW - OWNERSHIP OF LAND:- Proof of – Whether it is not the law that being in possession of a parcel of land loaned to a person under native law and custom will crystallize into acts of ownership – Whether possession such will never decree title in favour of such a possessor of another person's land

REAL ESTATE/LAND LAW - DECLARATION OF TITLE TO LAND:- Evidence required to found claim – Where party and their witnesses gave conflicting history of party’s root title – Whether court bound to treat such root as unreliable

REAL ESTATE/LAND LAW - TITLE TO LAND:-Five methods laid down by the Supreme Court for proving ownership of land - By traditional evidence - By production of documents of title - By acts of ownership extending over a sufficient length of time which acts are numerous and positive enough to warrant the inference that the person is the true owner - By proof of possession of connected and adjacent land in circumstances rendering it probable that the owner of such connected or adjacent and would in addition be the owner of title land in dispute

REAL ESTATE/LAND LAW - TITLE TO LAND - EVIDENCE - TRADITIONAL HISTORY:- What a claimant who relies on traditional history as root of his title must establish to succeed - Need to establish how his ancestor or the original owner acquired the land i.e. whether by settlement, conquest or grant – Need for traditional evidence adduced to be cogent, uncontracdicted and conclusive if the party is to succeed

REAL ESTATE/LAND LAW - TRESPASS TO LAND:- Rule that a claim for trespass to land is rooted in exclusive possession and to succeed the plaintiff must establish his right to exclusive possession with very lucid and clear evidence – Whether claimant needs to satisfy the court as to the precise nature of the title claimed whether it is by virtue of original ownership or customary grant or conveyance or sale by customary law

REAL ESTATE/LAND LAW - TRESPASS TO LAND:- Where a defendant claims to be the owner of the land in dispute and puts the title to the land in issue – What plaintiff must prove to succeed – Need to establish by credible evidence that he has a better title than the defendant – Need to do that by relying solely on the strength of his own case and not on the perceived weakness in the case of the defendant unless the weakness actually strengthens or supports the ground upon which the Plaintiff based his title

CONSTITUTIONAL LAW - RIGHT TO COUNSEL: Section 36 (1) of 1999 constitution of Nigeria – Deprivation of right to file Respondent's Brief of Argument through a Legal practitioner of choice - Right to defend self in person or by a legal Practitioner of own choice – Whether right of defence by counsel of one's choice apply also in civil cases and appeals

CONSTITUTIONAL LAW:- Interpretation of Paragraph 12 and 18 (1-3) of fifth schedule part 1 to the 1999 Constitution (as amended) – Code of Conduct Tribunal – Establishment, power and functions - Whether Court of Appeal has original jurisdiction to deal with the issue of breach of code of conduct by a public officer

CONSTITUTIONAL AND PUBLIC LAW – JUDIARY – JURISDICTION:- Breach of provisions of the Code of Conduct for public officers under section 172 of the Constitution - Fifth schedule part 1 to the Constitution of the Federal Republic of Nigeria as amended – Whether jurisdiction to hear question regarding same vests exclusively in the Code of Conduct Tribunal – section 153 of the 1999 Constitution (third schedule) - Whether Federal High Court is not competent thereto

CONSTITUTIONAL LAW:- Section 172 of the Constitution - Whether precludes public officers from taking up other business endeavours except farming – Categories of public officers affected – Whether extends to law lecturers enrolled to practice as Barristers and Solicitors of the Supreme Court while still under full time employment with a public university – Court with jurisdiction to enquire into the question – Whether exclusive to the Code of Conduct Tribunal

PUBLIC AND CONSTITUTIONAL LAW:- Interpretation of provisions of the Constitution or a statute – Duty of court to read together related provisions of the constitution or the statute in order to discover true meaning of the provisions – Justification - Settled principle of interpretation that a provision of the Constitution or a stature should not be interpreted in isolation but rather in the context of the Constitution or statute as a whole - Where the words of a statute are plain and unambiguous – Whether no interpretation is required as the words must be given their natural and ordinary meaning

PUBLIC LAW AND JURISPRUDENCE:- Interpretation of the law – When purposive interpretation would be useful - Whether applies to - Sections 2(1) and 24 of the Legal practitioners Act, Laws of the Federation of Nigeria 2004 – Whether proper to interpret processes signed in the name of a law firm and not the name of a legal practitioner as one incurably defective having not been initiated by due process of law

PUBLIC AND CONSTITUTIONAL LAW:- Interpretation of provisions of the Constitution – Rule that sections of the constitution should interpreted using a liberal approach - Broad interpretation or a global view – Objective – To secure an approach which often lead to harmonious interpretation which will tally with reason

PUBLIC LAW AND JURISPRUDENCE - RIGHT TO COUNSEL:- Nigeria’s Adversarial system of adjudication –Major feature of that system as the passive role of the Judge - Importance of the right to counsel in the presentation of cases and in arguing appeals – Presumption that the average lay man is totally ignorant of the law and of court procedure and cannot be expected to argue grounds of appeal – Whether includes as a cardinal part of the right to fair hearing under section 33(1) of the 1979 constitution the right to have his case properly presented or his appeal effectively argued by a legal practitioner who alone can adequately present his case or argue his appeal in both civil and criminal cases

ETHICS - LEGAL PRACTITIONER:- Rule in Okofor vs Nweke - Sections 2(1) and 24 of the Legal practitioners Act, Laws of the Federation of Nigeria 2004 – Meaning of legal practitioner - Duty of counsel to sign court processes in name as recognised in the Supreme Court Roll instead of with the name of law firm – Justification

ETHICS – LEGAL PRACTITIONER:- Law teacher full employed in a public university – Whether pursuant to Section 172 of the Constitution is precluded from engaging in private practice including as a legal practitioner except farming - Effect of the Regulated and other professions (Private Practice Prohibition) (Law Lecturers Exemption) order No.2 of 1992 made pursuant to section 1 (5) of the Regulated and other professions (private practice prohibition) Act Cap 390 LFN 19 which exempted a public officer who is in full time employment as a Law Lecturer from the prohibition imposed by the just cited laws – Validity

EDUCATION AND LAW:- Law Lecturer employed by a public university who is also enrolled as Solicitor and Advocate of the Supreme Court – Whether precluded from practice as legal practitioner – Whether cannot sign legal processes – Whether a breach of the Code of Conduct to sign court processes or practice as a legal practitioner

ELDERS AND LAW:- 80 year old farmer as witness in land proceedings – Inability to recall relevant evidence – How treated by court

FOOD AND AGRICULTURE LAW – FARM LAND:- Dispute over farmland – Implication for food security and productivity – Duty of court to resolve same – How treated

FOOD AND AGRICULTURE:- Farming – Constitutional backing - Section 172 of the Constitution - Whether allows every category of public officer to engage in farming

CUSTOMARY COURT TRIALS:- Nature of – Applicable law – Whether law of the area concerned – Nature of evidence – Whether what is of paramount importance in the conduct of such cases is evidence of substantial justice and the absence of any miscarriage of justice in general – Whether strict adherence to the rules of practice and procedure in trials in all Customary or Native courts in this Country is practically unknown – Justification

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PRELIMINARY OBJECTION:- Order 10 of the Rules of the Court of Appeal – Whether enures to the benefit of a Respondent who conceives that he has a viable objection to the hearing of the appeal filed against him and that the objection if taken is capable of terminating the appeal

APPEAL - INTERFERENCE WITH FINDINGS OF CUSTOMARY COURT:- Duty of an Appellate court not disturb the findings of an area court or Customary Court in matters peculiarly within their knowledge especially where it has been demonstrated by trial court that it appreciated the evidence and issues raised before it in its Judgment – Nature of evidence required to challenge same -

APPEAL - INTERFERENCE WITH FINDINGS OF CUSTOMARY COURT:- Rule that appellate courts hearing appeals from Customary Courts should not interfere with their findings except where grave miscarriage of justice had occurred on the face of the record of proceedings and the conclusion of the Customary Court is patently perverse – Implication – Need for appellate courts to consider the substance of the proceedings of Native, Customary or Area Courts liberally – How done

APPEAL - PRELIMINARY OBJECTION:- Whether a preliminary objection can only be taken against the hearing of an Appeal and not against the competence of the brief of a party to the appeal – Whether the purpose of a preliminary objection is to contend that the appeal is fundamentally defective or incompetent – Where success of a preliminary objection would only serve to oust an offending brief and oral argument from counsel responsible for the defective brief but not terminate the brief – Whether the preliminary objective not proper

APPEAL - PRELIMINARY OBJECTION:- Whether it is an anathema or antithesis for an Appellant to file an objection against the hearing of his own appeal - Where an appellant observers anything wrong with the brief filed by a respondent – Whether the door open to him is to file a reply brief in answer to that point

APPEAL - PRELIMINARY OBJECTION:-Where an Appellate court is faced with a preliminary objection bordering on jurisdiction in an appeal – Whether it is always better and neater to determine the merit or otherwise of the Notice of preliminary objection before delving into the merit of the appeal

COURT – EVALUATION OF EVIDENCE:- Trial court – Primary responsibility of the trial court to fully consider in totality the evidence of both parties placed before the court – Need for the trial Judge to put the evidence on the imaginary scale of justice and weigh it to determine the party in whose favour the scale tilts by making necessary finding of facts and then come to a logical conclusion – Effect of failure thereto

EVIDENCE - ADMITTED FACT:- Rule that fact admitted needs no further proof – Whether the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions -Judicial admissions – Whether are conclusive and no further dispute on the fact admitted should be entertained by the court

EVIDENCE - EVALUATION OF EVIDENCE:- Primacy of trial court who heard and observed the witnesses in evaluation of evidence - Exceptional cases – When an appellate court is deemed to be in a position to examine the fact or evidence led at the trial court in order to discern whether the ascription of probative value to the evidence led at trial court was misplaced or misapplied – Guiding principles for appellate court

EVIDENCE - UNCHALLENGED AND UNDISPUTED EVIDENCE:- Rule that facts contained in an affidavit form part of documentary evidence before the court - Where an affidavit is filed deposing to certain facts and the other party does not file a counter affidavit - Whether the facts deposed to in the affidavit would be deemed unchallenged and undisputed

PLEADINGS:- Signing of legal documents and processes of courts – Whether by virtue of section 2 (1) and 24 of the Legal practitioners Act only a person enrolled to practice as a solicitor and Advocate in Nigeria can sign court processes – Whether a question of procedure or jurisdiction - Whether any court process including Brief(s) of Argument in appeal matters signed by any other person or organization shall be rendered null and void and would be discountenanced by the relevant Court

INTERPRETATION OF STATUTE – THE CONSTITUTION AND STATUTE: The approach of court in interpreting the provisions of the Constitution or a statute

INTERPRETATION OF STATUTE - SECTION 2 (1) AND 24 OF THE LEGAL PRACTITIONERS ACT, LAWS OF THE FEDERATION OF NIGERIA, 2004: Interpretation of section 2 (1) and 24 of the Legal practitioners Act, Laws of the Federation of Nigeria, 2004 as to who can sign legal documents and processes of courts

INTERPRETATION OF STATUTE - PARAGRAPH 12 AND 18(1-3) OF THE FIFTH SCHEDULE PART 1 TO THE 1999 CONSTITUTION (AS AMENDED) - Meaning thereof

**MAIN JUDGMENT**

**PETER OLABISI IGE, J.C.A. (Delivering the Leading Judgment):**

The action leading to the appeal herein was commenced by the Appellant as plaintiff at GRADE Area court Panyam claiming a piece of land described as farmland lying and situate at LUKUM-KOPAL District in MANGU LOCAL GOVERNMENT AREA OF PLATEAU STATE ON THE GROUND THAT THE Defendant now Respondent in this court trespassed on the aforesaid land on 20th May, 2002. The Appellant on that score prayed the Area court for the following namely:-

1. That the court should order the Defendant out of the land.

2. That the court should declare him (plaintiff now Appellant) to be the owner of the land and that the Area court should restrain the Defendant's family, son, wife, relation, servant and privies from entering the land.

The Respondent denied and disputed the claims of the Appellant and pleaded that he was not liable to the claims of the Appellant. The matter proceeded to trial. The Appellant called six (6) witnesses while the Respondent called five (5) witnesses. There was a visit to the land in dispute by the members of the Area Court and on the 27th day of June, 2002, the said Area Court Grade 1 Panyam gave Judgment in the matter and concluded as follows:-

"It is for the Plaintiff to identify with certainty the land in dispute. And where the identity of the land in dispute is acknowledged by both parties white on appeal the Appeal Court will not disturb such concensus. See the case it not disturb such concensus. See the Delebe v. Nwakogor (1986) 5 NWLR 315 (sic) pt.41 CA. In this case the identity of the land that the plaintiff witnesses failed though he himself was able to take the court round Boundary witnesses. In a customary land dispute in Plateau state the most competent witness is the one having a boundary with the land in dispute. This position stands as sole creator in the absence of any other traditional evidence of evidence of knowledge in the disputed land.

Finally we can and up (sic) this judgment without mentioning some of the Mwaghavul Customary Law. Though that was no witness called to testify in such areas, but we are confident, Mwaghavul law of the land of Mwaghavul people. If the law agreed but either judge or his member are confident with the Customary Law of the parties. There is no need to call ascertion because one of the plaintiff's brother still live within the land in dispute. It is the law of the land that (Lu-kichen mar) in Mwaghavur language. The brother of the plaintiff as far as law is concerned will still enjoy the land apart from the ruins of the defendant where he was cultivating before. Finally, it is not the duty of the court to go into the fact who is the first settler on the land. This is because if we go into that it may create trouble within the area, because that is never in dispute the defendant is not challenging him that he is the first settler. The issue is the owner of the land, in dispute, we therefore, declared title owner of the land to defendant as required by law. No cost awarded"

The Appellant as plaintiff was dissatisfied with the Judgment of the Area court Grade 1, Panyam and filed an appeal against the decision of the court of First instance to the Customary Court of Appeal on 18/7/2002. He filed a sole ground of Appeal stating the Judgment was:

"against the weight of customary evidence adduced before it"

Leave of Customary Court of Appeal was later obtained and five additional grounds of appeal were added. The Appellant's appeal to the Customary Court of Appeal, Jos Plateau state was eventually heard on 6th July, 2010 and Judgment was delivered on 21st day of June, 2011 by the Customary Court of Appeal of Plateau State of Nigeria coram SHA President, CCCA, KYANTU JUDGE, CCA now President of the Customary Court of Appeal Plateau State and GOTEP, JUDGES, CCA.

The Customary Court of Appeal hereinafter called the lower court held on page 149 of the Record thus:-

"The position of the law is that he that asserts must prove. Therefore the law expects the plaintiff to prove his case. In proving it he founded his claim on inheritance. By that the law expects him to trace his root of title from who founded the land and how it moved to him. Where there is uncertainty in the root of succession such a Plaintiff fails. See Kodinye v. Odu at p.337.

We have shown that in the evidence to support the Plaintiff he fell short of the legal requirement. Mr. Bashir also rely on possession over a sufficient length of time as admitted even by the defendant' But the law will not recognize a possession that is not founded in law and by law. His traditional history having failed his possession will not avail him as the weakness of the defence case cannot be used to his advantage."

The court below then relied on the case of Nana Darku Frempong II v. Nana Owudu Aseku Brempong II 14 WACA 13 where the decision of Kodilinye v. Odu supra was cited and relied upon, concluded on page 150 of the Record as follows:-

While we have admitted there are areas in the evidence that seem to go for the Plaintiff but they go to no issue because he failed to establish this traditional history above decision decide the Appellant's fate Mr. Bashiru in his first issue for determination accused the trial court of awarding title to the defendant who did not counterclaim.

We agree that the pronouncement was wrong but we cannot because of that disturb the trial court's judgment but instead of decreeing title to the defendant, we say the plaintiff's claim fails and we enter Judgment for the defendant.

The appeal therefore lacks merit and it is dismissed with the modification above.

The plaintiff now Appellant was again aggrieved by the decision of the court below and filed notice and Grounds of Appeal dated 11th day of August, 2011 (pages 151 - 153 of the Record) it contains four grounds of appeal. The four grounds of appeal without their particulars are as follows:-

GROUND ONE: 1

The Judgment is against the weight of the traditional evidence led.

GROUND TWO: 2

The Plateau State customary court of Appeal, Jos erred in law when it held that the Appellant did not by custom prove his title to warrant a declaration of title by affirming the trial court's judgment.

GROUND THREE: 3

The Plateau State Customary Court of Appeal, Jos erred in law when it herd that the Appellant could not prove his title by acts of possession; and possession.

GROUND FOUR: 4

The Learn Justices of the Plateau State Customary Court of Appeal, Jos erred in law in affirming the judgment of trial court when the defendant failed to prove the LOANING of land in dispute to the Appellant's parents and this has occasioned a miscarriage of justice."

It must be mentioned that the Record of Appeal in this matter was deemed properly compiled and transmitted to this court on 3rd day of July, 2012. The Respondent's brief of argument dated 22nd day of August 2012 was filed on 24th day of August, 2012 and deemed duly filed by this court on 26th day of November, 2012.

The Appellant filed Appellant's Reply Brief dated 27th day of November, 2012 on the same date wherein the Appellant raised preliminary objection to the Respondent's Brief that it should be struck out for being incompetent and that this court has no jurisdiction to entertain same. The Appellant filed similar Notice of Preliminary objection on 17th day of January 2012 supported by 5 paragraphs Affidavit. The Respondent filed "Respondent's Brief of Argument in Reply to the Appellant's preliminary objection Dated the 17th day of January, 2013 on point of Law." The Notice of preliminary objection was moved and replied to on 6tn day of February, 2013 before the Appellant's Learned counsel Okey Akobundu Esq., adopted his brief of Argument on the appeal. The learned counsel to the Respondent also adopted the brief of Argument filed on behalf of the Respondent.

The Appellant had in his Notice of Preliminary objection contended that the process filed by A. S. Shaakaa Esq., for the Respondent is incompetent and that this court lacks the requisite jurisdiction to entertain the process prepared and filed by a public officer in this appeal.

It is settled law that when an Appellate court is faced with a preliminary objection bordering on jurisdiction in an appeal it is always better and neater to determine the merit or otherwise of the Notice of preliminary objection before delving into the merit of the appeal. See B.A.S.F. NIGERIA LIMITED ANOR VS FAITH ENTERPRISES LTD (2010) 1 SCM 41 AT 52 D - E where COOMASSIE, JSC had this to say:-

"Before proceeding to consider the submissions of learned counsel to the parties on the substantive matter as contained in their respective briefs of argument, it is pertinent in my view to consider an important issue of jurisdiction raised by the respondents herein, This is so because the issue of jurisdiction is so fundamental, and being a threshold issue. It is imperative to have it determined first before proceeding to the substantive matter since lack of it would deprive the court the power to pronounce on the main issue"

The Notice of objection will be dealt with first because it is partly predicated on lack of jurisdiction on the part of this court to entertain the Respondent's brief prepared and signed by a Public Officer.

Now the said NOTICE OF PRELIMINARY OBJECTION prays this court for the following orders:-

"(a) An order striking out the Respondent's Brief of Argument dated the 22nd of August 2012 and filed on the 24th day of August 2012 and the entire arguments therein.

GROUNDS OF OBJECTION:

(a) The said process was prepared by A. S. Shaakaa practicing under the name and style of A. S. SHAAKAA, Jr. & PARTNERS,

(b) The said A. S. Shaakaa is a full time lecturer in the University of Jos and a public servant within the extant provisions of the Laws of the Federal Republic of Nigeria.

(c) The said public servant is disallowed by law to carry on business as a legal practitioner and to take briefs for and on behalf of litigant(s). He is not entitled to appear before this honourable court in that capacity.

(d) The only business the Lecturer and public servant is allowed to carry on by law is farming.

(e) The process therefore filed by the said A. S. Shaakaa before this honourable court is incompetent and this court lacks the requisite jurisdiction to entertain the process prepared and filed by the said public servant in this Appeal."

It was accompanied by 5 Paragraph Affidavit as stated hereinbefore wherein the following are stated:-

"I Benedette Okafor, female, Christian and Legal Practitioner of No.4b Barracks Road, Jos, do hereby make this oath and state as follows:-

1. That I am counsel in the law firm of Messrs. OKEY AKOBUNDU & Co Legal Practioners to the Petitioner/Applicant in both the petition (sic) and this application and by virtue of which position I am conversant with the act deposed herein.

2. That I was a student in the University and graduated from the Faculty of Law in the year 2008 and I know as a fact that the counsel to the Respondents in the Appeal is a lecturer in the University of Jos.

3. That I was informed by my principal and lead counsel, Okey Akobundu in our office and I verily believe him the said A. S. Shaakas is his call mate and they both served together and were in private legal practice here in Jos before the counsel took up full employment with the University of Jos six years ago.

4. That Dr. A. S. Shaakaa's staff file number with the University of Jos is 4513 and he is a senior Lecturer and Head of Department,

5. That I depose to this affidavit in good faith, believing its contents to be true and correct to the best of my knowledge, information and belief. And in accordance with the oaths Act, Laws of the Federation of Nigeria, 2004."

In the argument canvassed in the Appellant's Reply Brief to support the objection, the learned counsel to the Appellant Okey Akobundu, Esq., submitted that by sections 172, 318, the fifth schedule, parts 1 sections 1 and 2(a) & (b) and 11(15) of the constitution of the Federal Republic of Nigeria as amended, Dr. A. S. Shaakaa, the learned counsel to the respondent who he said is a full time staff/Lecturer of the University of Jos, is not entitled to engage in the running of a Private Legal Practice while he still remains so employed and that he was therefore not competent to prepare and sign the Respondent's Brief of Argument and other processes in this matter on behalf of the Respondent. That by section 172 of the constitution every person in the public service of the Federation shall mandatorily observe and conform to the Code of Conduct.  
He relied on the definition assigned to public service of the Federation in section 318 of the 1999 constitution as amended to include among others, service as a staff of any Education Institution established or financed principally by the Government of the Federation. The code of conduct a public officer is to conform is contained in paragraph 2(b) of the fifth schedule, part to the constitution which provides:-

"Without prejudice to the generality of the foregoing paragraph, a public officer shall not

(a) Receive or be paid the emoluments of any public office at the same time he receives or is paid the emoluments of any other public office; Or

(b) Except where he is not employed on full time basis engage or participate in the management or running of any private business profession or trade but nothing in this subparagraph shall prevent a public officer from engaging in farming."

The Appellant Learned counsel also enlisted paragraph 19 on the meaning of business and list of sixteen categories of Public officers covered by the terms and definition in paragraph 19 of the fifth schedule as including all staff of Universities. That with effect from 29/5/2006 and by virtue of section 172 of the constitution the Respondent's learned counsel cannot engage in private practice, That University of Jos was established vide Cap 118 Laws of the Federation of Nigeria. That Dr. A. S. Shaakaa is a Public officer in the service of the Federation.

It is his submission that while still in the full time employment with University of Jos Dr. A. S. Shaakaa runs a Private Legal practice in Jos under the name and style of A. S. SHAAKAA & PARTNERS and it was in that capacity that he prepared and signed Respondent's Brief of Argument notwithstanding that the constitution prohibits him from engaging or participating in the management or running of any private profession other than farming. All these according to Okey Akobundu Esq., make Respondents learned counsel incompetent to validly sign the Respondent's brief of argument and other processes on behalf of the Respondent as he did in this appeal.

The Appellant's counsel was not unmindful, according to him of the provisions of Regulated and other professions (Private Practice Prohibition) (Law Lecturers Exemption) order No.2 of 1992 made pursuant to section 1 (5) of the Regulated and other professions (private practice prohibition) Act Cap 390 LFN 19 which exempted a public officer who is in full time employment as a Law Lecturer from the prohibition imposed by the just cited laws. Appellant nevertheless submitted that the exemption order does not apply in the circumstances of this case and as such does not avail the Respondent's counsel on the grounds that:-

(i) The law exempting the Lecturers cannot excuse Dr. A. S. Shaakaa having regard to the provisions and combined effect of Section 172 and paragraph 2 (b) part 1 of the fifth schedule to the Constitution.

(ii) That the powers of National Assembly to make law to exempt some cadre of public officers only extends to Retired Public officers and Declaration of assets under paragraph 4 and 114 of part 1 of fifth schedule) respectively.

(iii) That even if order 2 of 1992 has permitted the law lecturer like Dr. A. S. Shaakaa to engage in private practice it can only stand to the extent of its inconsistency with the constitution being an existing law vide section 315 (1) of the 1999 Constitution as amended.

He relied on the case of ATTORNEY-GENERAL OF ABIA STATE & ORS VS. ATTORNEY GENERAL OF THE FEDERATION (2002) 5 NWLR (PART 763) 264 AT 479 C-H.

To learned counsel the Regulated and other (Professions Private Practice Prohibition) (Law Lecturers Exemption) No. 22 of 1992 which purports to confer the right to engage in private practice to Lecturers like Dr. A. S. Shaakaa shall become null and void to the extent of its inconsistency. That Dr. A. S. Shaakaa is not entitled to engage in the private practice of law. He relied on the following cases:

1. FIRST BANK OF NIG. PLC & ANOR V. MAIWADA (2003) FWLR (PT.151) 2001 AT 2014 - 2015 C - C.

2. NEW NIGERIA BANK PLC V. DENCLANG LTD & ANOR (2005) 4 NWLR (PART 916) 549 AT 574 d AND 583 C- D.

3.   Black's Law Dictionary 5th Edition used by Supreme Court in defining the term "Practice of Law" in the case of JUSTICE F. O. M. ATAKE V. CHIEF NELSON A. AFEJUKU (1994) 9 NWLR (PT.368) 379 AT 427.

He also relied on the cases of KNIGHT FRANK & RUTLEY NIGERIA & ANOR VS ATORNEY GENERAL OF KANO STATED (1998) 1 NWLR (PART 556) 1 AT 19 F-G AND ONWUCHEKWA VS NDIC (2002) 5 NWLR (PT.760) 461 AT 471.

In conclusion, the summary of Appellant's argument against the validity of the Respondent's brief and as to whether Dr. Shaakaa could engage in private Legal Practice can be found in paragraphs 2.17 - 2.18 of Appellant's argument on the Notice of Preliminary objection thus:

"Put differently, the signing of the Respondent's Brief of Argument in this matter as well as other processes therein by Dr. A. S. Shaakaa, tantamount to practicing law by Dr. A. S. Shaakaa and since the constitution forbids him from privately practicing law; he cannot validly prepare and sign the said respondent's Brief of Argument and the other processes.

Since the private practice of law by Dr. A. S. Shaakaa is forbidden by the Constitution, and since preparation and signing of the Respondent's Brief of Argument is part and parcel of the practice of law that is prohibited by Constitution, it follows that the preparation and signing of the Notice of Appeal in this Appeal by A. S. Shaakaa is unconstitutional, null and void." (sic).

In reply to the above submission on the Appellant's Notice of Preliminary objection the learned counsel to the Respondent informed the court that a reply on point of law was filed. It is the contention of the Respondent that grounds (a)-(e) of the objection and paragraphs 2-4 of the Affidavit in support are a gross misconception of the law by the appellant. The Respondent listed the reasons for so contending.

1. The Respondent submitted that the Appellant's objection is not the kind of objection contemplated under order 10 Rule 1 of the Court of Appeal Rules 2011, That the right to raise preliminary objection to the hearing of an appeal or any other matters connected thereto lies with the Respondent and not the Appellant, He relied on the case of OKEM ENTERPRISES (NIG) LTD V. NLEMIGBO (2003) 5 NWLR (Part 813) 376 at 390 - 392.

He opined that the objection of the Appellant is incompetent.

2. The learned counsel to the Respondent is of the view that the grounds that Dr. A. S. Shaakaa is a public officer in the employment of the University of Jos and cannot validity sign Court processes on behalf of the Respondent as contended by the Appellant or that he runs or manages a Law firm known as A. S. Shaakaa Jr/Partners are issues which this Honourable court has no jurisdiction to take judicial notice pursuant to section 122 (1) (2) of the Evidence Act 2011.

That the burden of proving the facts asserted and grounds relied upon by the Appellant in the objection rests squarely on the Appellant as required under section 131- (1) and (2) of the Evidence Act 2011. That mere averment without evidence in proof of the facts asserted is no proof unless the facts are admitted. He placed reliance on the case of ADEGBITE VS OGUNFOLU (1990) 4 NWLR (PT 146) 578.

3. The Respondent argued that the law is settled that it is not the business of the court to conduct investigation to arrive at the evidence required to establish a party's case relying on the cases of:

(a) ONIBUDO V. AKIBU (1982) 7 SC 60 AT 62.

(b) ADISA V. AFUYE (1990) 1 NWLR (PT.318) 75 AT 86 AND

(c) SANTILI V. OKOYA (1994) 4 NWLR (PT.338) 256 AT 303.

That the court can only consider facts placed before it and cannot indulge in speculation or conjecture. He cited in support the cases of:

(1) ORHUE V. NEPA (1998) 7 NWLR (PT.557) 189

(2) NWACHUKWU V. THE STATE (2002) 2 NWLR (PT.751) 366.

(3) ACB PLC V. EMOSTRADE LTD (2002) 8 NWLR (PT.770) 501.

He urged this court overrule the objection.

4. That the process which the Appellant dissipated so much energy upon as incompetent before this court was in fact signed by C. T. TAMEN ESQ., and NOT by Dr. A. S. SHAAKAA.

"as disclosed from signature and the positive mark on the name of C. T. Tamen" which the learned counsel to Respondent urged this court to take judicial notice of in reaching a decision on the Preliminary objection. He relied on (1) section 122 (2) (m) of the Evidence Act 2011.

2. AGBAISI V. EBIKOREFE (1997) 4 NWLR (PART 502) 603.

3. WELLINGTON V. REG. TRUSTEES OF THE IJEBU-ODE GOODWILL SOCIETY (2002) 3 NWRL (PART 647) 30 and

4. ABIODUN VS. AG. FED (2007) 15 NWLR (PT.1057) 359.

5. He submitted that this court is not in want of jurisdiction but must not be cajoled by the Appellant to wrestle jurisdiction from the code of Conduct Tribunal in that by part 1, paragraph 15(1) and 18(b) and (2) of the fifth schedule and section 172 of the 1999 Constitution of Nigeria as amended and fifth Schedule part 1 sections 1 and 2(a) & (b) thereto the exclusive jurisdiction to hear and determine complaints arising from the breach of the Code of conduct by a Public officer is originally vested in the Code of Conduct Tribunal and not this court. He finally urged this court to dismiss the preliminary objection with substantial costs as being highly hypothetical and a product of gross misconception of the law.

The Respondent's first argument against the Appellant's Notice of preliminary objection is that it does not fall within the type of Preliminary objection envisaged under order 10 Rule 1 of the court of Appeal Rules 2011 which provides :-

"10(1) A Respondent intending to rely upon a preliminary objection to the hearing of the Appeal shall give the Appellant three clear days notice thereof before the hearing setting out the grounds of objection and shall file such notice together with twenty copies thereof with the Registry within the same time."

The Respondent therefore contended that Appellant enjoys no such right as according to him the right to raise objection to the hearing of an appeal lies with the Respondent and NOT the Appellant.

Can it be said that the Notice of Preliminary objection filed by the Appellant is designed to forestall the hearing of the appeal herein?

It is correct to say that the provisions of order 10 of the Rules of this court enure for the benefit of a Respondent who conceives that he has a viable objection to the hearing of the appeal filed against him and if the objection is capable of terminating the appeal that will be the end of the appeal B.A.S.F. (Nig) Ltd. v. Faith Enterprises Ltd (2010) 1 SCM 41 at 65 C - D per Adekeye J.S.C.

It is therefore clear that it is anathema or antithesis for an Appellant to file an objection against the hearing of his own appeal. See CHIEF GAFARU AROWOLO V. CHIEF SUNDAY EDUN OLOWOOKERE & ORS (2011) 11 - 12 (Pt.1) SCM 1 at 22 BC PER I. T. MUHAMMAD JSC, who said:-

"It must be observed however, that, it appears a novelty where an appellant files a preliminary objection against a respondent's brief. A preliminary objection which normally stems from a respondent aims at challenging the competence of an appeal, with a view to nipping it in the bud. However if it is the appellant that observers anything wrong with the brief filed by a respondent, the door open to him is to file a reply brief in answer to that point",

See further - Lafia Local Government v. The Executive Governor, Nasarawa State & Ors (2012) 17 NMLR (part 1328) 94 at 724 D - F where RHODES-VIVOUR, JSC had this to say:-

"A preliminary objection can only be taken against the hearing of an Appeal and not against the competence of the brief of a party to the appeal. The purpose of a preliminary objection is to contend that the appeal is fundamentally defective or incompetent. If it succeeds, the hearing of the appeal abates. See Odunukwe vs Ofomata 44 NSCQR page 379; 2010 18 NWLR (Part 1225) 404; NEPA Vs Ango (2001) 15 NWLR (Part 737) p.627. In the instant case if the preliminary objection succeed in the court of Appeal that court would have discountenanced the offending brief, decline to entertain oral argument from counsel responsible for the defective brief, but proceed with the hearing of the appeal. This is a wrong use of preliminary objection, Highlighting the state of the brief at the hearing of the appeal would have been enough"

Itis my view that the Appellant Notice of Preliminary objection is not challenging the hearing of the appeal herein but asking this court to strike out the Respondent's Brief of Argument dated 22-8-2012 filed on 24-8-2012 on the ground among others that the Legal Practitioner that signed the said brief A. S. Shaakaa of counsel practicing under the name and style of A. S. SHAAKAA Jr. & PARTNERS is a FULLTIME LECTURER AT THE UNIVERSITY OF JOS AND A PUBLIC SERVANT WITHIN THE EXTANT PROVISIONS OF THE LAWS AND CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA.

In the course of his argument the learned counsel to the Respondent contended that:

"...the court Processes which the Counsel to the Appellant has engaged himself with hermeneutic vigour to discredit as being signed by Dr. A. S. Shaakaa, a Public Officer, is competent before this Honourable Court having been signed by C. T Tamen Esq,, and not Dr. A. S. Shaakaa as disclosed from the signature and the positive mark on the name of C. T. Tamen Esq.,"

It must be pointed out that there is no scintilla of evidence before this court to show that it was C. T. Tamen Esq., and not A. S. Shaakaa that signed the impugned Respondent's Brief of Argument. The Learned counsel to the Respondent cannot inform this court vide his argument on the Notice of preliminary objection as to the person that signed the Respondent's Brief. It amounts to giving evidence from the Bar. The only place he could have joined issue with the Appellant would have been a counter Affidavit to deny the supporting Affidavit of the Appellant to the Notice of the objection. Paragraphs 3 and 4 of the said Affidavit in support sworn to by BENEDETTE OKAFOR a Legal practitioner in Messrs Okey Akobundu & Co., Appellant's Counsel deposed as follows:-

"3. That I was informed by my principal and lead counsel, Okey Akobundu in our office and I verily believe him the said A. S. Shaakaa is his call mate and they both served together and were in private legal practice here in Jos before the counsel took up full employment with the University of Jos six years ago.

4. That Dr. A. S. Shaakaa's staff file number with the University of Jos is 4513 and he is senior Lecturer and Head of Department."

The Respondent did not deem it fit to file counter Affidavit to debunk or controvert the facts asserted by the Appellant in his Affidavit. That being the case the Respondent having failed to contradicts the material averments in the supporting Affidavit by way of a counter affidavit is deemed to have admitted those facts to the effect that A. S. Shaakaa is a senior Lecturer at the university of Jos and a public officer as stated in the Affidavit in support, see: CHIEF M. A. INEGBEDION V. DR. SELO-OJEMEN & ANOR (2013) 1 SCM 74 AT 82 where ALAGOA, JSC said:-

"The appellant did not file a counter Affidavit to contradict this assertion and it is deemed admitted by the Appellant. This postulation of the law has indeed become sacrosanct. In Adeyenu Abosede Badejo v. Federal Ministry of Health (1996) 8 NWLR (Part 464) 15 the Supreme Court per Mohammed, JSC said as follows:-

"It is an elementary principle of law that the facts contained in an affidavit form part of documentary evidence before the court.

Where an affidavit is filed deposing to certain facts and the other party does not file a counter affidavit, the facts deposed to in the affidavit would be deemed unchallenged and undisputed"

It now remains for me to find out if the very fact of Respondent learned counsel being a Law Lecturer at the University of Jos and a Public servant makes the Respondent's brief signed by him incompetent notwithstanding that the signatory to it is a Legal Practitioner called to the Nigerian Bar.

The Appellant had complained that the learned counsel to the Respondent was in breach of paragraphs 1 and 2 of the code of conduct for public officers contained in the fifth schedule part 1 to the Constitution of the Federal Republic of Nigeria as amended vide section 172 of the said Constitution which Provides:-

"A person in the Public Service of the Federation shall observe and conform to the Code of Conduct"

Paragraphs 1 and 2 of the aforesaid code of conduct for Public Officers which no doubt includes a Lecturer or university Teacher, pursuant to the provisions of part II of the FIFTH SCHEDULE to the Constitution provide:-

"1. A public officer shall not put himself in a position where his personal interest conflicts with is duties.

2. Without prejudice to the generality of the foregoing paragraph a public officer shall not -

(a) receive or be paid the emoluments of any public office at the same time as he receives or is paid the emoluments of any other public office or

(b) except where he is not employed on full time basis, engage or participate in the management of running of any private business, Profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming"'

It is the law that the courts in interpreting the provisions of the Constitution or a statute must read together related provisions of the constitution or the statute in order to discover true meaning of the provisions. See the cases of;

1. RT. HON. ROTIMI CHIBUKE AMAECHI V. INEC & ORS (2008) 5 NWLR (PART 1080) 227 AT 314 H per OGUNTADE, JSC.

2. ACTION CONGRESS (A.C.) & ANOR V. INEC (2007) 12 NWLR (PART 1048) 222 AT 259 B - D B where KATSINA-ALU JSC later CJN RTD had this to say:-

"It is a settled principle of interpretation that a provision of the Constitution or a stature should not be interpreted in isolation but rather in the context of the Constitution or statute as a whole. Therefore, in construing the provisions of a Section of a statute, the whole of the statute must be read in order to determine the meaning and effect of the words being interpreted: see Buhari & Anor v. Obasanjo & Ors. (2005) 13 NWLR (PT.941) 1 (219). But where the words of a statute are plain and unambiguous, no interpretation is required, the words must be given their natural and ordinary meaning."

3. JUMANG SHEUM & ANOR V. F. GOBANG (2009) 7 SCM 165 AT 176 H - I per FABIYI, JSC who said:-

"Perhaps I need to further reiterate the fact here that when relevant sections of the constitution are being interpreted, there should be a liberal approach. It is sometimes referred to as broad interpretation or a global view. Such an approach often lead to harmonious interpretation which will tally with reason. Refer to Rabiu v. The State (1980) 8 - 11 SC 130 at 151, 195. Related section of the constitution ought to be interpreted together. See Senator Abraham Adesanya v. The President of the Federal Republic & Anor  (1981) 5 SC 112 at 131, 132. A narrow interpretation of an earlier section of the Constitution should not be made in isolation in such manner that will make a later section moribund."

The law is now firmly settled in Nigeria as to who can sign legal documents and processes of courts. By virtue of section 2 (1) and 24 of the Legal practitioners Act only a person enrolled to practice as a solicitor and Advocate in Nigeria can sign court processes. Any court process including Brief(s) of Argument in appeal matters signed by any other person or organization shall be rendered null and void and would be discountenanced by the relevant Court See EMMANUEL OKAFOR & ORS vs AUSTINE NWEKE & ORS (2007) 5 SCM 180 AT 187 per ONNOGHEN JSC.

The case was followed and reaffirmed in numerous decisions of the apex court viz:

1. MRS OLAYINKA ADEWUMI & ORS VS MR AMOS OKETADE (2010) 4 SCM 1 AT 6 Per NIKI TOBI, JSC.

2. SLB CONSORTIUM LIMITED Vs N.N.P.C. (2011) 5 SCM 787 AT 198 - 199 per ONNOGHEN, JSC.

3. FIRST BANK OF NIGERIA PLC & ANOR VS ALHAJI SALMANU MAIMADA (2013) 5 NWLR (PART 1348) 44 AT 482 F-H TO 483 A - D per FABIYI JSC who held:-

"The decision in Okafor vs Nweke was basically determined based on the provision of sections 2(1) and 24 of the Legal practitioners Act, Laws of the Federation of Nigeria 2004. It is apt to reproduce here below the stated sections of the law for ease of reference and undiluted appreciation.

Section 2 (1) of the law provides as follows:

"Subject to the provisions to this Act, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on the roll."

Section 24 of the Legal Practitioners Act provides thus:

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say - "legal practitioner" means a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings"

In interpreting the law, the court was invited to embark upon purposive interpretation. It was contended that a negative interpretation of the law should be avoided as such is against the canon of interpretation of laws.

It is not in doubt that in deserving situations, purposive interpretation should be employed by the court.

The purpose of legislation is of paramount factor. The purpose of section 2(1) and 24 of the Act is to ensure that only a legal practitioner whose name is on the roll of this court should sign court processes. It is to ensure responsibility and accountability on the part of a legal practitioner who signs a court process. It is to ensure that fake lawyers do not invade the profession. This, in my considered opinion, accords with the sacred canon of interpretation of law. See: Ibrahim vs Barde (1996) 9 NWLR (PT.474) 513; United Agro Ventures Vs F.C.M.B. (1998) 4 NWLR (Pt.547) 546; I.B.W.A. VS Imano (Nig) Ltd. & Anr. (1988) 2 NSCC 245, (1988) 3 NWLR (PT.85) 633.

Another very recent decision on the matter is the case of ALHAJI FATAYI AYODELE ALAWIYE VS MRS ELIZABETH ADETOKUNBO OGUNSANYA (2013) 5 NWLR (PT.1348) 570 at 612 E - H where CHUKWUMA-ENEH, JSC who read the lead judgment held:-

"The two cases are on all fours. There can be no gainsaying that the principle in Okafor vs Nweke (supra) binds this court in deciding the instant case that the said initiating, processes have been wrongfully signed and issued by "Chief Afe Babalola, SAN & Co." anon cognizable legal practitioner under the law and clearly are void processes as the proper name of the person as enrolled to practice law in this country under the Legal Practitioners Act. See: Section 2 and 24 of the Legal practitioners Act and Okafor v. Nweke (supra). Anything short of this manner of signing and authenticating of legal processes is unacceptable. It is clear that the jurisdiction of the trial court unquestionably has been clearly rendered unequivocally of no effect by the nullities of the initiating processes in this matter ab initio and so also its decision and the decision of the lower court on the appeal therefrom and that they (i.e. the two lower courts), each of them, if I may repeat, have no jurisdiction to entertain the matter. In short, the action has not been initiated by due process of law not have the necessary conditions to enable the two lower courts invoke their jurisdiction to deal with the matter, fulfilled and consequently, the action is a nullity and must be voided. And I so hold.

In view of the above settled position of the law can it be said as canvassed by Appellant's learned counsel that the Respondent counsel, a legal practitioner, who is a law Teacher and an employee of University of Jos could not sign the Respondent's Brief of Argument in this appeal on the alleged ground that he is a public officer in alleged breach of code of conduct for public officer contained in paragraphs 1 & 2 of code of conduct for public officers 5th schedule to 1999 constitution as amended, already reproduced? I think not. I must say with all sense of responsibility that the thunder in the argument of Akobundu Esq, learned counsel to the Appellant brings no lightning. The reason is not farfetched.

The argument of the Appellant overlooked the clear provisions of paragraphs 12, 15(1) and 18 (1-3) of the code of conduct for Public officers just cited paragraphs 1 and 2 of which appellant relied upon for this objection.

Paragraph 12 and 18 (1-3) of the aforesaid code of conduct for Public officers are as follows:-

"12 Any allegation that a public officer has committed a breach of or has not complied with the provisions of this code shall be made to the code of conduct Bureau.

15(1) There shall be established a tribunal to be known as code of conduct Tribunal which shall consist of a Chairman and two other persons.

18 (1) Where the Code of Conduct Tribunal finds a public officer guilty of contravening of any of the provisions of this code it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly.

(2) The punishment which the code of conduct Tribunal may impose shall include any of the following:-

(a) vacation of office or seat in any legislative house, as the case may be;

(b) disqualification from membership a legislative house and from the holding of any public office for a period not exceeding ten years; and

(c) seizure and forfeiture to the state of any property acquired in abuse or corruption or office

3. The sanctions mentioned in sub-paragraph (2) hereof shall be without prejudice to the penalties that may be imposed by any law where the conduct is also a criminal offence."

See also paragraphs 3 of the Code of Conduct Bureau established by section 153 of the 1999 Constitution (third schedule) which provides:-

"3. The Bureau shall have power to:-

(e) receive complaints about non-compliance with or breach of the provisions of the code of conduct or any law in relation thereto, investigate the complaint and where appropriate, refer such matter to the Code of Conduct Tribunal"

I therefore agree with the submission of the Learned Counsel to the Respondent on the Notice of preliminary objection that this court has no original jurisdiction to deal with the issue of breach of code of conduct alleged against the Respondent's counsel in order to nullify or strike out the Respondent's brief as being incompetent. This court cannot exercise any jurisdiction to strike out or discountenance the Respondent's brief on account of the allege breach of code of conduct for Public officers. Jurisdiction to punish for any proven breach of the said code resides in the Code of Conduct Tribunal. I hold that the learned counsel to the Respondent is eminently qualified to sign the Respondent's Brief of Argument having regard to the provisions of sections 2(1) and 24 of the Legal Practitioners Act 2004.

I am not unmindful of the other submission of the Appellant/Applicant on the Notice of preliminary objection that the Respondent's Learned counsel is not exempted in the circumstances of this case from the provisions of the Regulated and other Professions (Private Practice prohibition) (Law Lecturers Exemption) order No.2 of 1992 made pursuant to section 1(5) of the Regulated and other Professions (Private Practice Prohibition Act Cap 390 LFN 1990.

I am of the firm opinion that the provisions of the above quoted law are not an infraction of section 172 of the Constitution of the Federal Republic of Nigeria on the constitutional directive to Public officers to observe and conform to the code of conduct and they do not whittle down paragraphs 1 and 2 of the Code of Conduct for Public officers. I have calmly read the provisions of the said law. To my mind the Provisions of the Regulated and other professions (Private Practice Prohibition Law Lecturers exemption) order No. 2 of 1992 clearly and in a most ardent manner exempt the Learned counsel to the Respondent from the Prohibitions intended by section 1 (1) of the Regulated and other Professions (Private and practice prohibition) Act and he is thus entitled to engage in the Private practice of law while in full time employment with the University of Jos.  
Furthermore it will be a breach of section 36 (1) of 1999 constitution of Nigeria to deprive the Respondent of his right to file Respondent's Brief of Argument through a Legal practitioner of his choice. See CHIEF JAMES NTUKIDEM & ORS v. CHIEF ASUQUO OKO & ORS (1986) 5 NWLR (PART 45) 909 AT 920 D - H TO 921 A per KAZEEM JSC. At page 936 A - C of the Report OPUTA, JSC in his concurring judgment had this to say:-

"Sections 21(2) and 21(5) of the 1960 Constitution (under which Gokpa's case was decided) correspond to Section 33 (4) and 33 (6) (c) of the 1979 constitution. There is in each a specific provision that a person accused of Criminal Offence has the right "to defend himself in person or by a legal Practitioner of his own choice" The question that now arises is - Will this right of defence by counsel of one's choice apply also in civil cases and appeals? To answer this question correctly one has to bear in mind the fact that we in Nigeria operate the adversary system. Now the major feature of that system is the passive role of the Judge only goes to emphasise the active role of counsel in the presentation of cases and in arguing appeals. The average lay man who is totally ignorant of the law and of court procedure cannot be expected to argue grounds of appeal. Raising issues of law if he has a right to fair hearing under section 33(1) of the 1979 constitution that wilt certainly include the right to have his case properly presented or his appeal effectively argued by a legal practitioner who alone can adequately present his case or argue his appeal. The right to fair hearing in civil cases and appeals will certainly be hollow and empty if it did not include the right to be represented by counsel."

Consequently the Notice of preliminary objection incorporated and argued in the Appellant's Reply Brief dated 27th November, 2012 and filed the same date is hereby dismissed for lacking in merit. I also dismiss the Appellant's Notice of preliminary objection dated 17th day of January, 2012 filed on 17th January, 2013 with costs of N20,000 in favour of the Respondent.

Now to the consideration of the appeal on the merit.

The Appellant formulated three issues for determination namely:-

1. Whether or not the Appellant/plaintiff's unchallenged oral evidence of first settlement inheritance and acts of possession was not sufficient proof for a declaration of title in favour of the Appellant.

2. Whether or not the burden of proof did not shift from the Appellant to the Respondent who alleged that the Appellant's possession of the land in dispute was on the basis of loan to the parents of the Appellant by the Respondent.

3. Whether or not the evaluation of the oral evidence by the Plateau State Customary Court of Appeal is not against the weight of the traditional evidence led before the trial court.

The Respondent also formulated three issues for the consideration of the appeal viz:-

1. whether the Appellant in the lower court did successfully prove his radical root of title of traditional history of first settlement and inheritance by credible evidence to be entitled to a declaration of title in his favour.

2. If the answer to issue 1 is in the negative whether having failed to prove his radical title of first settlement and inheritance, the Appellant could rely on acts of possession of the land to be entitled to a declaration of title in his favour?

3. Whether the concurrent findings of the trial court and the lower court respectively were not based on proper evaluation of the evidence adduced in this suit at the trial court?

I am of the view that this appear can be determined on issues 1 and 2 formulated by the Appellant and on issue three formulated by the Respondent. I will therefore consider this appeal on the issues as harmonized.

ISSUE 1

WHETHER OR NOT THE APPELLANT'S UNCHALLENGED ORAL EVIDENCE OF FIRST SETTLEMENT,INHERITANCE AND ACTS OF POSSESSION WAS NOT SUFFICIENT PROOF FOR A DECLARATION OF TITLE IN FAVOUR OF THE APPELLANT.

The learned counsel to the Appellant Okey Akobundu Esq., stated that this issue covers grounds 2 and 3 of the Appeal. He predicated his argument on the locus classicus case of D. O. IDUNDUN & ORS V. DANIEL OKUMAGBA (1976) 9 - 10 SC 227 AT 246 on the five methods of proving title to a land in dispute by the supreme court of Nigeria and the case of ODUNKWE V. OFOMATA (2010) 18 NWLR (PT.1225) 404 at 411 wherein learned counsel said the Supreme Court reiterated the principles laid down is IDUNDUN V. OKUMAGBA SUPRA. He lists the five methods. He submitted that proof of ownership by one of the five methods is sufficient. He cited the cases of OMORIEGE VS. IDUGIE MWANYE (1985) 2 NWLR (PART 5) 41 and NELSON VS. HERBERT OKOYO & ORS (1996) 1 SCNJ 1 AT 20 & 21.

According to the Appellant he did not only rely on traditional evidence to prove his case, the acts of possession and long possession were all satisfactorily proved to warrant a declaration of title in favour of the Appellant contrary to the holding of the plateau state customary court of Appeal Jos in its Judgment contained on pages 137 - 150 of the Record of Appeal.

It is the submission of the Appellant that the lower court did not advert its mind to the issue of first settlement as conclusively proved at the trial court to hold that the line of succession of the Appellant/Plaintiff was contradictory and not proved. The learned counsel to the Appellant contended that the holding of the lower court is not supported by the totality of evidence before the trial court that the Appellant established his ownership of the land in dispute by evidence of first settlement and in addition by evidence of other acts of ownership which were not disputed. He cited and relied on the case of ARUM V. NWOBODO (2004) 9 NWLR (PT.878) 411 AT 442 - 443 where, according to the Appellant, the court held that the strict rules of pleadings, procedure and evidence are not applicable in proceedings before a customary court. That attainment of substantial justice based on the reasonable practice tradition and custom of the local people should be the paramount consideration. Appellant summarized the evidence of the Appellant and his witnesses at the lower court and argued that the Appellant was not cross examined on his lineage by the Respondent but only proceeded to lay foundation for his defence that it was the Defendant/Respondent's parents that loaned the land in dispute to Plaintiff/Appellant's parents.

That the finding on alleged contradictions in the evidence of the Appellant and his witnesses by the lower court was not consistent with the evidence given by the Appellant and the Respondent. That minor variation in the names of the lineage of the plaintiff and his witnesses did not in itself weaken the Appellant's case for the following reasons:-

(a) The parties knew their parents and so it was not a live issue.

(b) The Respondent Defendant asserted that the Appellant/Plaintiff's parent was loaned the land in dispute;

(c) Commonsense inference in this case from all these is that Appellant/plaintiff was in firm possession for a long period of time considering the ages of the parties and their witnesses. That evidence of illiterate witnesses should receive liberal treatment from the court. He relied on the case of NICHOLAS MBAGU v. AGBARAKWE AGOCHUKWU (1973) 3 ECSLR PART 1 90 AT 96 and on the submission that there was no cross examination to challenge the lineage of plaintiff by Defendant at trial court he relied on the case of GAJI vs PAYE (2003) 8 NWLR (Pt.823) 605.

The Appellant stated that the Area court made a definite finding that the Appellant/plaintiff's forebears were the first settlers on the land in dispute contrary to the holding of the lower court that the case was not  
proved. He relied on the portion of the Area court's Judgment at page 27 of the record where the trial court said:-

"Finally, it is not the duty of the court to go into the fact who is the first settler on the land. This is because if we go into that, it may create trouble within the area, because that is never in dispute. The defendant is not challenging him that he is the first settler."

The Appellant submitted that if the Respondent did not challenge Appellant as the first settler it means that the customary court of Appeal, Jos erred in affirming the decision of the trial court to declare the land in dispute in favour of the Respondent/Defendant.

That the customary court was wrong in holding that possession will not avail the Appellant on the ground that Appellant failed on the traditional history of inheritance. That ownership of land could be proved by cogent evidence of traditional evidence and numerous act of ownership and possession relying on the case of NEWMAN OLODO & ORS V. CHIEF BURTION M. JOSIAH & ORS (2010) 18 NWLR (PT.1225) 653 at 683. That there is nothing wrong in the Appellant relying on the weakness and evidence of the Respondent in the trial Area court to support and strengthened his case so long as the original case of the Appellant is strong enough to stand alone.

He relied on the cases of:

1. Yele Oyeneyin & Anor v. Dr. K. Akinkugbe & Anor (2010) 4 NWLR (Pt.1184) 265 at 393.

2. Ajani (1989) 2 NWLR (Pt.424) 283 and

3. Nkodo v. Obiano (1997) 5 NWLR (Pt.503) 341.

The Appellant finally submitted on this issue that the Appellant adequately provided enough evidence to warrant a declaration of title in his favour and he urged this court to so hold.

In his own submission on issue 1 the Respondent's learned counsel Dr. A. S. Shaakaa said the Appellant failed to adduce credible evidence of traditional history of first settlement and inheritance to be entitled to a declaration of title in his favour and in the circumstance the lower court was right in affirming the decision of the trial court. The Respondent's contention is also that the submissions of the Appellant contained in paragraphs 4:01 - 4:19 pages 4-10 of the Appellant's Brief to the effect that the Appellant successfully proved by credible evidence the issue of first settlement and inheritance as well as acts of possession, long possession to warrant declaration of title in Appellant's favour cuts the picture of a drowning man struggling to hold on to everything within sight to stay or remain afloat. That it is incumbent on a party that asserts the existence of a fact to prove same vide section 133(1) (2) of the evidence Act 2011. He relied on the cases of Ezike vs Ezeugwu (1992) NWLR (Pt.236) 432 and UNIBEN ORG. LTD vs K. T. Org. Ltd (2007) 14 NWLR (Pt.1055) 441 at 464 - 465 G-B, 47 E - G.

That the Appellant in this case who had the onus to prove exclusive ownership of the land in dispute failed to discharge the onus of proof that rests with him. According to the learned counsel the Appellant must satisfy the court as to:

(a) The precise nature of the title claimed, that is to say whether it is by virtue of original ownership, customary grant conveyance, sale under Customary law, long possession or otherwise and

(b) Evidence establishing title of the nature claimed

(c) That the Appellant cannot rely on the weakness in the defence case but on the strength of his own case. He placed reliance on the cases of:

1. ADETUTU ADESANYA VS ALHAJI S. D. ADEROUNMU (2000) 2 SCNQR 1180 AT 1191 C

2. ODUM v. UGANDEN & ORS (2009) 4 NWLR 321 AT 344.

3. EGBENSIMBA V. ONUZURIKE (2002) ALL FWLR (PT.128) 1380

4. OSIEGBU V. OKON (2005) 16 NWLR (PT.950) 61 AND

5. DIM V. ENEMUO (2009) 4 NWLR 536 AT 561 Ratio 78.

The Respondent submitted that Appellant and all his witnesses failed to demonstrate any knowledge of the traditional history of first settlement and inheritance to support the exclusive ownership of the disputed land. That once evidence of the Appellant's radical title failed the Appellant cannot prop it up with act of possession to have title in his favour. He relied on the case of MORAKINKO V. ADESOYERO (1995) 7 NWLR (PT.409) 602 AT 616 - 617 HA.   
That the concurrent findings of the two courts below are justified based on the principle of land ownership espoused in MORAKINYO vs ADESOYERO supra PAGE 614 F where Respondent's learned counsel quoted :-

....the time the res4ondents settled on the land is immaterial if there is evidence accepted by the trial court appellant's family immaterial owns the land in dispute."

That the efforts of the Appellant in trying to find fault with the finding of the lower court that the evidence of traditional history given by Appellant and his witnesses was contradictory is misconceived. The Respondent submitted that there is remarkable difference in the testimonies of the Appellant's witnesses which did not help the case of the Appellant but rather destroyed Appellant's root of title and that the lower court had no option but hold that the pieces of evidence given were contradictory. That the decision of the lower court tallies with what the supreme court decided in OLODO vs JOSIAH (2010) 18 NWLR (PT 1225) 653 AT 674 C.

The Respondent in reply to issue as to the parties knowing the parents of one another said that is not the same as tracing the root of title to the Appellant's forebears which Respondent said the Appellant failed to do. The Respondent submitted that the Respondent evidence of the traditional history of first settlement and inheritance was accepted by trial court and the lower court affirmed it. That the case 223 was used by the lower court to weigh the evidence of the respective traditional history of the land in dispute. The Respondent relied on the case of Balogun vs Akanji (1988) 1 NSCC 180 at 188 ratio 40-50 to justify the concurrent findings of the lower courts. He also relied on the case of Kumaga Dauda Vs Kave IBA (2007) 2 NWLR (Pt.1078) 324 to urge the court to resolve issue one against the Appellant.

It must be borne in mind that the claim of the Appellant against the Respondent is for a farmland lying and situate at Lukum in Kopal Village in Mangu Local Government Area which he claimed the Respondent trespassed upon and cultivated.

It is trite law that a claim for trespass to land is rooted in exclusive possession and to succeed the plaintiff must establish his right to exclusive possession with very lucid and clear evidence. He must satisfy the court as to the precise nature of the title claimed-that is to say whether it is by virtue of original ownership or customary grant or conveyance or sale by customary law. See AUGUSTINE OBINECHE & ORS V. HUMPHRE AKUSOBI & ORS (2010) 8 SCM 126 AT 142 H - I per ADEKEYE, JSC. This the Plaintiff can do by any one of the five methods laid down by the apex court in the land and to prove any of the ownership in accordance with the prescription and principles governing each of the five different methods of ownership of land. See J. O. OSIDELE & ORS V. MOSES O. SOKUNBI (2012) SCM 146 AT 159 per I. T. MUHAMMAD JSC who said:  
It is trite that in a claim of title the Plaintiff can succeed if he establishes his claim through any one of the following five ways:-

1. By traditional evidence

2. By production of documents of title.

3. By acts of ownership extending over a sufficient length of time which acts are numerous and positive enough to warrant the inference that the person is the true owner.

4. By proof of possession of connected and adjacent land in circumstances rendering it probable that the owner of such connected or adjacent and would in addition be the owner of title land in dispute.

See Idundun & Ors vs Okumgba & ors (1976) NSCC 44 (1916) 9 - 10SC 227; Onoregie v. Emiefinvaiwe & Ors (1985) 2 NSCC 838; Made v. Chunda (2009) 10 NWLR (Pt.1148) 107; Nwokorobia v. Nwogu (2009) 10 NWLR (Pt.1150) 553".

On what a claimants who relies on traditional history as root of his title must establish to entitle him to the relief sought the supreme court in the case of ALHAJI GANIYU MUYUBI BAKARE ISEOGBEKUN & ORS V. ALHAJI SIKIRU GBORIGI ADELAKUN & ANOR (2013) 2 NWLR (PART 1337) 140 AT 165 B-D MUKHTAR, JSC (Now CJN) who read the lead Judgment held:-

"The plaintiffs did not prove their root of title to the land to the land, for they have not testified as to how the said land in dispute devolved on the said Ajegun Bashua. The position of the law is that a party who hinges his claim on declaration of title to land vide traditional history he must establish how his ancestor, the original owner acquired the land i.e. whether by settlement, conquest or grant Authorities abound that a claim predicated on traditional history or evidence must be proved by any these methods and traditional evidence adduced must be cogent, uncontracdicted evidence must also be conclusive if the party is to succeed. See Aikhionbare v. Omoregie (1976) 12 SC 11; Kodinye v. Mbanefo Odu 2 WACA 336 and Eboha v. Anakwerize (1967) FNLR 279, (1967) SCNLR 97."

This submission of Appellant is no doubt an invitation to this court to interfere in the concurrent findings of the trial court and the court below in order to decipher from the evidence led by the Appellant and his witnesses whether it was true that his evidence of inheritance was smooth sailing. The position of the Appellate court concerning evaluation of evidence given in a case has always been that the evaluation of evidence adduced and ascription of probative value or weight to such evidence is the primary duty of the trial Judge who saw and heard the witnesses. That the trial Judge has always being in the best position to assess the credibility and the demeanour of witnesses. See HALIMA HASSAN TUKUR v. GARBA UMAR UBA & ORS (2013) 4 NWLR (PT.1343) 90 AT 129 E - H where ARIWOOLA JSC held:-

"However, when the evaluation of evidence by a particular trial Judge is in issue or being challenged, the guiding principles are as follows:-

(i) Whether the evidence is relevant

(ii) Whether the evidence is credible

(iii) Whether the evidence is conclusive

(iv) whether the evidence is probable than that given by the other party.

See: Mogaji Vs Odofin (1978) 4 SC 91.

Therefore, it is the primary responsibility of the trial court to fully consider in totality the evidence of both, parties placed before the court. In doing this, the trial Judge shall put the evidence on the imaginary scale of justice and weigh it to determine the party in whose favour the scale tilts by making necessary finding of facts and then come to a logical conclusion.

But when the trial court saddled with the responsibility of evaluating evidence fails so to do, or to do so properly then on appellate court is entitled to intervene and reevaluate such evidence. Otherwise, the appellate court has no business interfering with the findings of the trial court on such evidence. See: Agbi & Anor vs Ogbeh & Ors (2006) 7 SCM 1; (2006) 7 NWLR (Pt.990) 65 Fagbenro Vs Bashaya v. State (1998) 5 NWLR (Pt.550) 351; Ojokolobo v. Alamu (1998) 9 NWLR (Pt.565) 226; Sha v. Kwan (2000) 5 SC 178; (2000) 8 NWLR (Pt.670) 685 Military Governor of Lagos State & Ors v. Adebayo Adeyiga & Ors (2012) 2 SCM 183 at 210 (2012) 5 NWLR (Pt.1293) 291."

See also

(1) Purification Technique Nig. Ltd. & Ors v. Rufai Jubiri & Ors (2012) 10 SCM 107 at 136 A - B.

(2) Alhaji Silipawu Omotayo v. Cooperative Supply Association (2010) 8 SCM 169 at 184 H - I per OGBUAGU, JSC.

In some exceptional cases however an appellate court is also in a position to examine the fact or evidence led at the trial court in order to discern whether the ascription of probative value to the evidence led at trial court was misplaced or misapplied. See the case of Omotayo vs Cooperative Supply Association Supra page 186 E - F per OGBUAGU, JSC.

Now the Appellant's (plaintiff at the trial court) case as presented at the trial court was that he inherited the land from "his father GANDON, GANDON inherited the land from my grandfather GUTING, GUTING inherited same from Dyekat and Dyekat got same from Kromsham, Kromsham is the one that clear (sic) the land" page 4 -5 of the Record.

One the boundary men around the land in dispute, Appellant testified in this manner viz.

"The land I sued the defendant over shared common boundary demarcation with the following people:-

The farm of the defendant by the south, one Tuhurse the younger brother of the defendant by the East. The ruin of one Nduby the North Yauwunse by the West respectively" page 5 of the Record.

Under cross-examination by the Defendant now Respondent in this court the Appellant said:-

"I will not be in position to say who are the first, but from all indication, my parents are the first to settled there (sic) house I am Madaki of that area. I am the one allocated (sic) the land to defendant to settled (sic)"

Page 6 of the Record.

PW2, who said he was 90 years when he testified said under examination-in-Chief as follows:-

"Plaintiff is the first settler in the area and the rest of us came latter and found him there, later we decided to leave one by one, some of us are staying in Mangu and some now stay in different location in Kopal...

I am now aware Plaintiff's father named Dyelkat is the one that cleared the land, Guting got land the land from Dyetkat and Gudon got the land from Guting and Dapas the Plaintiff inherited the land from the above mentioned supra. There is nothing in the land apart from the olive tree (1) the defendant do not have a land in that area.

Pages 6 - 7 of Record

Under cross examination PW2 said:-

"If there is any gathering or festival in the house, it is the defendant that will be delegated to speak on behalf of the Plaintiff, it does not mean that the house belongs to him or he is the owner of the area"

Pages 7 - 8 of Record.

Answering question(s) from the Court PW2 FURBUK FWANGMUT said:-

"Yes I agree that the plaintiff is my relation and I have a farm in that area but we have decided to leave all to plaintiff.  
.........  
It is true the defendant have a land in that area which shared common boundary demarcation with the one in dispute."

Page 8 of the Record.

PW3 was one MANGUT I. T. NAMANG. He testified he had land which share common boundary with Plaintiff's farm. That his own (PW3) farmland was by the WEST while the one in dispute is by the west - North.

In re-examination PW3 stated:-

"My farm is being cultivated by the Plaintiff and one angle, and Ibrahim Wetsar. Dipil is the first settler in Kopal and not Jipal I that I say defendant do not have a land in that area, I say that because the person who say he has land in that area is telling lies"

Pages 8 - 9 of Record.

PW4 - VWENTYANG WAMTUHUN an 85 year old farmer said he did not know the rightful owner of the land in the area.

Pages 9 - 10 of Record.

PW5 Wetbang Finok on his part said that who first settled in kipal. That the man first of all house is known as Lukum and that Plaintiff came hence the first settler.

Pages 10 - 11 of Record.

PW6 was one DABEL VEM, 75 years. He told the Court thus:-

"I know both parties in court I only know about our Idol worshipping place, but I do not know anything on the land" page 6 of the Record,

The Defendant on his part testified that the farm land belonged to him. He testified thus:-

"I know the Plaintiff and the farmland he sued me over it.  The farmland belongs to me because I inherited the land from my father Davwang. Davwang got the land from Dabok, Dabok got same from dicking and deding inherited it from Retduh is the one that clear the land. I have the following as my witnesses of boundary demarcation:-

Musa by West, Tanko by the east, Gonmang, by the South and Chukle by the West while Ibrahim is by the North and I also bounded by the west "Sarkin Wari"

Plaintiff did not have any land in that area, he only have ruins in that which it was my parent that loan the land to plaintiff's parent to build on the house on the land"

Pages 12 - 13 of Record.

Under cross examination Defendant said:-

"You are the one enjoying the fruits of the trees in the land because they are planted by you, I have a place when all men in that area do sit and discuss matters within our village. Before the land was loaned your parent cooked local wine to my parent base on the Mwaghavul tradition. I will not be in a position to know who and who were present that drink the wine because it has taken long time. I do not know where you people emigrated (sic) from before coming to settle with us finally."

Pages 13 of the Record,

DW2 was CHULKE JELAHAN who shared boundary demarcation with the Defendant's land. He testified and confirmed his land share boundary with Defendant's land. He (DW2) was not cross examined. Page 14 of the Record  
DW3 was Musa Plan, 80 years he confirmed he shared boundary demarcation with the land in dispute by the West. He was not cross examined as to who owned the land and on the fact that he shared boundary demarcation with the Defendant's land see page 15 of the Record.

DW4 was TANKO DAVWANG testified that the land belonged to the Defendant and that he DW4 shared boundary demarcation with the defendant's land by the West -South and that the Defendant inherited the land from his parents. That the Plaintiff had no land in the area.

The only cross-examination by Plaintiff went thus:-

"Yes, it's the same farm but it has been share to us long ago even over 75 years now"

DW5 was YAVURUK YAMTAL 75 years Old. He testified that the land belonged to Defendant and that he (DW5) had boundary demarcation with Defendant's land by the East. Page 17 Record of Appeal.

I have gone through the tedium of examination of the salient aspects of the parties evidence so as to bring to the fore where the pendulum swings.  
I have carefully examined and weighed the evidence led by the Appellant in support of his position that he inherited the land from his father, I agree with the courts below that there are material contradictions in the evidence of traditional history being peddled by the Appellant. While the Appellant claimed that it was KROMSHAM his great grandfather that cleared the land, PW2 who was 90 years old at the time he testified said it was Dyekat that cleared the land. Under examination in-chief PW2 said Defendant had no land in the area but under further examination by the trial court he stated the defendant has land sharing demarcation with the land in dispute. The 3rd PW said he shared boundary with Plaintiff on the land by the West but the Plaintiff said it was one YAVWUNSE that shared boundary demarcation with him by the west. In re-examination PW3 said his own land was being cultivated by Plaintiff on one angle and that the first settler in Kopal was DEPARI not JIPAL. PW4 knew nothing about the ownership of the land.

The evidence of the defendant and his witnesses was more credible and convincing than that of the Appellant and his witnesses. The Appellant had contended that the Respondent did not contest the lineage of the Appellant. The issue in this appeal is not about lineage of the parties but about who among the two contenders established how he became the owner of the land in dispute vide traditional method of inheritance.

Appellant is also of the view the Defendant who testified in his defence that his parents loaned the land in dispute to the parents of the Appellant had the onus to discharge and proved the truth of the loan. In another breath the Appellant submitted that minor variation in the names of lineage of Plaintiff and his witnesses did not in itself weaken appellant cases for reasons that:-

(a) The parties knew their parents and so it was not a live issue.

(b) The Respondent asserted that Appellant's parent was loaned the land in dispute.

(c) Commonsense inference in this case from all this is that Appellant was in firm possession for a long period of time considering the ages of the parties and their witnesses.

What I understand the Appellant to be saying is that granted that it was true the parents of the Respondent loaned the land to Appellant's parent, the ages of the witnesses who testified confirmed that the Appellant and his parent had been given possession of the land vide the loan which has ripened into doctrine of long possession which will entitle the Appellant to a declaration of title against the Respondent. It is not the law that being in possession of a parcel of land loaned to a person under native law and custom will crystallize into acts of ownership that will decree title in favour of such a possessor of another person's land. The title in the land never passed to the Appellant. This to me is an admission of the Defendant's assertion that it was his parents that loaned the land in dispute to the Appellant.

Perhaps the sheath Anchor of the appellant in this appeal is the conclusion of the trial court on page 27 of the record wherein it said:-

"Finally it is not the duty of the court to go into the fact who is the first settler on the land. This is because if we go into that, it may create trouble within the area, because that was never in dispute the defendant is not challenging him that he is the first settler"

The Appellant construed the above as admission by the Respondent that the Appellant great grandfather founded the land in dispute. I am of the firm view that that cannot be meaning or inference to be ascribed or drawn from finding of the trial court on the aspect of first settler. The totally of the evidence must be examined. The court of trial, the court below and this court will only ruminate globally on the evidence before the Area Court being a Customary Court where pleadings do not operate in order to find out whether the trial court was right in its conclusion. The appellate courts hearing appeals from Customary Courts have been enjoined not to interfere with their findings except where grave miscarriage of justice had occurred on the face of the record of proceedings and the conclusion of the Customary Court is patently perversed. See CYPRIAN ONWUAMA VS LOTUS EZEKOLI (2002) 5 NWLR (PART 760) 353 at 365 D - F where UWAIFO J.S.C. (as he then was) said:-

"It has also been argued that the evidence led by the Respondent was not satisfactory. It must be remembered that this case was tried in a Customary Court where pleadings are unknown. The proceedings in such court are to be considered upon a broad view as to whether they were conducted in pursuit of the justice of the case presented by both parties. In other words, appellate courts are to consider the substance of the proceedings of Native, Customary or Area Courts liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether substantial justice has been done to the parties within the procedure permitted by such courts. See Dinsey Vs Ossey (1939) 5 WACA 177; Jumai Alhaji Zaria Vs Yar Maituwo (1966) NMLR 56; Ikpang Vs Edoho (1978) 6-7 SC 221; Ibero Vs Ume-Ohana (1993) 2 NWLR (Pt.277) 510; Chukwueke Vs Okoronkwo (1999) 1 NWLR (Pt.587) 410; Duru Vs Onwumelu (2001) 18 NWLR (Pt.746) 672).

The case of Lawal Vs Olufowobi (Supra) originated in the High Court and was tried on the pleadings of the parties. By such procedure any party who relies on traditional history to prove title to land must plead the particulars to support that history."

Kalgo J.S.C. on his part said in the same Judgment on page 359 H to 37A A thus:-

"I only wish to emphasise the position and the principle involved in trials before the Customary or "Native" Courts in this Country. The trial of this case commenced are to a great extent relaxed. This is covered in most cases by law of the area concerned because what is of paramount importance in the conduct of such cases is evidence of substantial justice and the absence of any miscarriage of justice in general, Strict adherence to the rules of practice and procedure in trials in all Customary or Native courts in this Country is practically unknown. The main reason for this is that the rationale for creating them is for the need to make the administration of justice available to common man in a simple, cheap and uncomplicated form."

See also A. AGBEJE VS AJIBOLA Supra page 144 A - B and 149 A - B.

It was the Appellants witnesses particularly PW3 who stated the Appellant was cultivating his land that stated in re-examination thus:-

"Depari is the first settler in Kopal and not Jipal"

Page 9 of the Record

This was after the said PW3 had in examination-in Chief said Defendant is from Jipal. PW5 also said:-

"I only come to testify in respect of who is the first settler in Kipal. The man was first of all settled in Kopal ... Plaintiff is Depari while the defendant is Jipal"

Page 11 of the Record.

This to my mind informed the finding or statement of the trial court about the first settler on the land. And that was the reason the trial court said it would not go into it so that it would not breed trouble in the area.

The land Appellant was claiming was as he put it on page 3 of the record viz:-

STATEMENT OF CLAIM:-

I SUED THE DEFENDANT NAMED Tunyang over, a farmland lying and situated at Lukum in Kopal Village Mangu Local Government Area."

There was no claim for Kopal village before the trial court but a claim for farmland at Lukum in Kopal Village. The said findings on page 27 lines 5 - 9 is of no moment and cannot help the Appellant in this appeal.

In the result issue 1 is hereby resolved against the Appellant.

ISSUE 2

WHETHER OR NOT THE burden of proof did not shift from the Appellant to the Respondent who alleged that the Appellant's possession of the land in dispute was on the basis of loan to the parents of the Appellant by the Respondent's parents.

This issue was tied to ground four of the Notice and grounds of Appeal. The Appellant adopted his submissions on issue 1, on possession and acts of possession over a long period of time and that the issue of loan raised by the Respondent further supported and confirmed that the Appellants has been in possession. That the Respondent also stated what the Appellant has was a ruin upon which he built a house and it was his parents (Respondent's) that gave that land to the Appellant's parents. The learned counsel to the Appellant Okey Akobundu Esq., submitted that by the combined evidence of the Appellant, that is, his traditional evidence established a firm case to warrant the grant of the reliefs sought on Appellant's favour. The Appellant counsel opined that it was incumbent on the Respondent to prove that the presence of appellant on the land in dispute was as a result of the LOAN alleged y Respondent. That none of the appellant's witnesses offered credible evidence on the issue. He relied on the case of GEORGE ONOBRUCHERE & ANOR VS INWROMOEBO ESIGINE & ANOR (1986) PT.1 - NSCC VOL.17 343 - 352.

He drew attention to the evidence of DW2, DW3 DW4 and DW5 to submit that their evidence showed that none of them was present to witness the loan including the Defendant who was 75 years and DW3 who was 80 years old. That the issue of loan was a mere assertion. That Respondent made attempt to establish traditional method of Mwaghavul people on loan of land transaction but that he failed to discharge the burden of proof to establish that Appellant was on the land in dispute by virtue of the alleged loan. The learned counsel submitted that the lower court was wrong in its decision on the issue. He urged the court to set aside the Judgment of lower courts.

In his own Reply on issue two the learned counsel to the Respondent Dr. Shaakaa submitted that the Appellant having failed to establish his case on the traditional history of first settlement and inheritance he was not entitled to hang on acts of possession or acts of ownership to ask the lower court to declare title to the land in his favour. He too adopted his submissions on issue 1 to submit that Appellant has failed to establish his radical title. He relied on the case of MORAKINYO Vs ADESOYERO (1995) 7 NWLR (PT. 409) 602 AT 616 - 617 H - A.  
On the appellant's submission that the Respondent failed to prove that his parent loaned the farmland in dispute to the parents of the Appellant, the Respondent's learned counsel submitted that since the Appellant failed to prove his radical title, the Appellant cannot rely on acts of possession now to seek declaration. He relied on the case of JINADU VS ESUROMBI ARO (2005) 14 NWLR (Pt.944) 142 AT 201 E to submit that the fact that the Appellant have ruins on the land in dispute or that appellant's brother still lives on the land which Appellant regarded as acts of possession cannot avail Appellant to obtain title to the land. He relied on BALOGUN VS AKANNI supra, MORAKINYO VS ADESOYERO supra AND JINADU VS ESUROMBI supra. That it was not necessary for the trial court to consider acts of possession when appellant failed to establish his rights to the land by traditional history or inheritance, his acts of possession is no longer a valid possession but acts of trespass relying on the cases of:

1. FASORO & ANOR VS BEYIOKU 7 ORS (1988) 2 NWLR (PT 75) 263.  
AND

2. MOSES OKHUAROBO VS CHIEF EFBAREUB AIGBE (2002) 9 NWLR (PART 771) 29 AT 85 - 86.

That the contention of Appellant that Respondent did not prove loan transaction concerning the land is of no moment as both lower courts have found evidence of the Respondent more credible and reliable than that of Appellant. He urged the court to discountenance Appellant's arguments in paragraphs 5.00 - 5.10 of the Appellant's brief and that issue 2 be resolved in Respondent's favour.  
The law is firmly settled that a claim for trespass postulates that the plaintiff is maintaining that he is in exclusive possession of the land.

However once a defendant claims to be the owner of the land in dispute the title to the land is put in issue. In order to succeed in such a situation the Plaintiff must establish by credible evidence that he has a better title than the defendant. This he must do by relying solely on the strength of his own case and not on the perceived weakness in the case of the defendant unless the weakness actually strengthens or supports the ground upon which the Plaintiff based his title. See:

(1) JULES VS AJANI (1980) 5 - 7 SC 96.

(2) PIARO VS TENALO (1976) 12 SC 31.

In this case it was the Appellant that laid claim to the farmland in dispute and asking for an order of injunction to restrain the defendant and members of his family from further trespassing on the land. The Defendant in his defence had maintained that the land in dispute belonged to him through inheritance and that the ruins over which the Plaintiff, the Appellant herein built a house was given to Appellant's parent on loan by the parents of the Defendant in this appeal. The burden is therefore first and foremost on the Appellant to give credible or prima facie evidence of ownership of the farmland before onus could shift on the Respondent. In this case the Appellant and his witnesses gave conflicting evidence with regard to the inheritance upon which Appellant founded his claim. There is a great lacuna in his evidence as he was unable to tell the court how his progenitor or ancestor acquired the land. As highlighted under issue one, Appellant's witnesses gave contradictory and inconsistent evidence in support of the Appellant's avowed root of title. The pivot of his claim to title thus became unreliable and the lower courts particularly the Area court had no difficulty in holding against appellant that his root of title was faulty. The findings of the lower courts cannot be faulted. See NEWMAN OLODU & ORS vs CHIEF BURTON M. JOSIAH & ORS (2010) 18 NWLR (PART 1225) 653 AT 673 C - D Per FABIYI JSC who held:

"the court below righty in my view, appraised the above. It found that from the evidence of Cersham Newman and DW3 there emerged a major conflict. It felt that the effect of it was that it succeeded to destroy the case of the Appellants and knocked off the bottom of their claim to title and left the case of the respondents solid and monolithic.  
I agree with same. This is because where as in this case for a claim for a declaration of title, the appellants and their witnesses gave conflicting history of appellant's root title such root would be treated as unreliable. See Mogaji Vs Cadbury Nigeria Ltd (1985) 2 NWLR (pt.7) 393. The court below was on a firm stance in the position taken by it, I cannot fault same."

I hold that the Customary Court of Appeal Plateau State was right in upholding the Judgment of trial court which held that the Appellant failed to prove his case against the Respondent for declaration of title in respect of the farmland claimed.

I am of the settled view that contrary to the contention of the Appellant that the Respondent did not establish the loan transaction concerning the land, the Respondent did through his own evidence and that of his witnesses. All the boundary men or boundary demarcation witnesses mentioned by Respondent were all called to give evidence and their evidence was confirmed when the Area court went for the inspection of the property/land in dispute.  
On page 25 lines six to 14 the trial court held thus:-

"Let us look carefully at the two parties argument, did the Plaintiff established (sic) evidence in accordance of the traditional history of the land as mentioned (supra). Instead of establishing such evidence he bends his evidence only on the idol worshipping area and his ruins. He also bends his evidence that he is the first settler of that area. But throughout his evidence and witnesses he did not establish evidence of facts where he lived before coming to settle in that area."

Then on same page 25 of the record lines 31-33 to page 26 lines 1- 11 the trial court held concerning the defendant's case as follows:-

"Nevertheless let us look at the evidence of the defendant and witnesses though both parties traced the inheritance of the land in this court as required by the law. In the case of the Plaintiff he fails because most of his witnesses have no land within that area as the law required. In the case of the defendant he is within the armpit of the law because he was able to trace the inheritance of the land from the person who cleared the land up to the person who he succeeded. And were convinced because he was able to produce four demarcation witnesses from North, West and South and East. Though the witness by the east was no? called to testify in court. But the Plaintiff agreed during inspection that the witness by the east has a farm land which shore boundary demarcation with the land in dispute"

More importantly the Appellant admitted that the land was loaned to his parents by the Respondent's parents as he relied on the fact of loan to claim long possession that he thought the lower courts could have used in his (Appellant) favour. The admission could be found in paragraphs 4.13 a-c and 5.02 of the Appellant's Brief of Argument as follows:-

"4.19 We submit that the minor variation in the names of the lineage of the Plaintiff and his witnesses did not in itself weaken the case of the Appellant/Plaintiff at the trial court for the following reasons,

(a) The parties knew their parents and so it was not a live issue

(b) The Respondent/Defendant asserted that the Appellant's parent loaned the land in dispute;

(c) Commonsense inference in this case from all these is that Appellant/Plaintiff was in firm possession for a long period of time considering the ages of the parties and their witnesses.

5.02. My Lord, whilst we adopt out submission on issue 1 on possession and acts of possession over a long period of time the issue of loan raised by the Respondent /Defendant further confirms that the Appellant/Plaintiff's has been in possession page 6 - lines 1 - 5, page 15 lines 10 - 15 of the Record of Appeal."

The Appellant having admitted that the land was loaned to his parents which assertion he is now using to establish long possession to seek declaration of title in his own favour due to his failure to establish traditional history or evidence of inheritance he cannot contend again that Defendant did not proof that the land was loaned to Appellant's parents by Respondent's parent. Fact admitted needs no further proof. See MR. SUNDAY ADEGBITE TAIWO VS SERAH ADEGBORO & ANOR (2011) 11 NWLR (PART 1259) 562 AT 583 H TO 584 A- C per RHODES-VIVOUR JSC who held:

"Finally on this point, in the Court of Appeal, learned counsel for the Bank and the auctioneer, Mr. Lambo Akanbi (as he then was) agreed that the notice of only one day given by the auctioneer before the auction sale of the property on 17/6/89 was contrary to the requirements of section 79 of the Auctioneers Law. Section 75 of the Evidence Act states that:-

No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have been admitted by their pleadings.

Provided that the court may, it its discretion, require the facts admitted to be proved otherwise than by such admissions.

See: Cardoso Vs Daniel (1986) 2 NWLR (PT.20) p.1. Judicial admissions are conclusive, That is to say where a party agrees to a fact in issue, it is no longer necessary to prove that fact. In effect, after an admission no further dispute on the fact admitted should be entertained by the court. This is the strongest proof of the fact in issue. The fact in issue is whether 7 days notice was given by the auctioneer before the auction sale was conducted on 17/6/89."

The Appellant cannot approbate and reprobate as he did in his brief contending in one breath that the evidence or assertion of Respondent that the land was loaned to Appellant confirmed that Appellant has been in long possession of the farmland and yet went to contend in paragraphs 5.06 - 5.09 that the Respondent did not discharge the burden on him that the Plaintiff got the land by virtue of the alleged loan.

See: CHIEF ALBERT ABIODUN ADEOGUN & ANOR V. HON. JOHN O. FASOGBON & ORS (2011) 8 NWLR (PT.1250) 427 AT 454 per CHUKWUMA-ENEH JSC, See also APGA & ANOR VS. CHIEF VICTOR UMEH & ORS (2011) 8 NWLR (PT.1250) 544 AT 569 G - H 570 A - C.

Consequently issue 2 is resolved against the Appellant.

ISSUE 3

WHETHER THE CONCURRENT FINDINGS OF THE TRIAL COURT AND THE LOWER COURT WERE NOT BASED ON PROPER EVALUATION OF THE EVIDENCE ADDUCED IN THIS SUIT AT THE TRIAL COURT?

The Appellant argued that if the Customary Court of Appeal, Jos, had adverted its mind to abundant evidence of proof and evaluated same the decision would have been to declare that Appellant actually proved his ease.

In what appears to be a repetition of the argument contained in paragraph 14-15 of the Appellant under issue 1 the Appellant repeated the same submission in paragraph 6.03 - 6.05 of Appellant's brief under issue 3. Appellant further argued that the finding of first settlement was never challenged and thus a sufficient proof of the Appellant's claim. That the only reason the trial court gave for its refusal to apply its undisputed findings of trial court on page 27 of the Record of Appeal was that it will cause trouble within the area and that contrary to the one of the five methods of proving title to a land the Customary Court of Appeal, Jos, upheld the Judgment of the trial court. To learned counsel the abundant evidence of the Defendant and his witnesses supported possession and acts of possession relying on the evidence of DW1 and DW5. He therefore submitted that evidence of DW1 and DW5 showed that the Appellant's parents first settled on the land in dispute planted trees in exercise of their right of ownership enjoying the fruit of trees planted on the land in further exercise of Plaintiff's acts ownership.

In Reply on issue 3 the Respondent learned counsel stated that the kernel of issue 3 is that the concurrent finding of the trial court and the lower court was based on a proper evaluation of the evidence adduced by the parties. He contended that the submissions of Appellant as contained in paragraphs 6.00 - 6.08 of the Appellant's brief of argument are misconceived. He relied on the cases of EKREBE Vs EKREBE (2005) 2 SMC 392 D and BALOGUN VS. LABIRAN (1988) 1 NSCC 1056 AT 1065 - 1066 RATIO 35 - 5. That the duty to ascribe credibility to witnesses and evidence adduced in a case is upon the trial court which according to the Respondent the trial court discharged creditably. The Respondent contended that the quoted finding of the trial court on page 27 of the record was nothing more than obiter dicta of the trial Area Court as according to Respondent the Area Court did not entertain any doubt about who was the owner of the land in dispute. That the lower court did the right thing in affirming the trial court's decision. That evidence of possession cannot grant title to Appellant when he had failed to prove his radical title to the land. Respondent urged the court not to disturb the concurrent findings of fact in this suit based on the decision in the case of BALOGUN VS LABIRAN (SUPRA). He urged that issue 3 be resolved in favour of the Respondent and on that note urged this court to dismiss this appeal with substantial costs.

I have to reiterate again that an Appellate court will not disturb the findings of an area court or Customary Court in matters within their knowledge especially where it has been demonstrated by trial court that it appreciated the evidence and issues raised before it in its Judgment. See KUNA DOGO V. YAYA ADAMU 1998 3 NWLR (PART 540) 159 AT 167 C - D a Judgment of this court which incidentally was delivered by Jos Division of this Court, Oguntade JCA (later JSC Rtd) held:-

"In Emarieru Vs Ovirie (1977) 2 SC 31 at 42 - 43. The Supreme Court per Udo Udoma J.S.C. observed:

"suffice it to say that in our view the Customary Court showed proper and sufficient appreciation of the issues in controversy between the parties, which issues may accurately be described as peculiarly within its knowledge, and its judgment in such matters should not have been disturbed. Indeed that was the view long ago expressed by the privy council in Abakah Nthah Vs Bennieh 2 WACA. 1 when their Lordships said on page 3:

It appears to their Lordships that decisions of Native Tribunals on such matters which are peculiarly within their knowledge, arrived at after fair hearing of relevant evidence, should not be disturbed without very clear proof that they are wrong"

His Lordship also held on the same page 167 of the decision thus:-

"The conclusion of the lower court that the witnesses called by the Plaintiff had proved Plaintiff's claim was a usurpation of a function which belongs to a trial court. The evidence given by Plaintiff's witnesses could only have established the claim of the plaintiff if the trial court had found the evidence credible and acceptable. Once the trial court had rejected the evidence, it was an error on the part of the lower court to have substituted its view of the evidence for that of the trial court which heard and saw the witnesses testify: See Balogun & ors Vs Agboola (1974) 1 All NLR (Pt.11) 65 at 73, Chief Victor Woluchem & Ors v. Chief Simion Gudi (1981) 5 SC 291 at 326"

I have again critically and extensively examined the evidence given by the Appellant and his witnesses vis-a-vis the Defendant's testimony and his witnesses and I am quite convinced that the trial court meticulously and painstakingly evaluated the pieces of evidence given before it by the parties and came to a just and apt conclusion in holding that the plaintiff failed to prove this case as required by law.

The Appellant cannot in the circumstance argued that the lower court, wrongly upheld the decision of trial court. The Record of appeal clearly revealed that the lower court deployed its knowledge of the law relating to declaration of title to land to the facts and evidence before the trial court, before it dismissed the appellant's appeal. The lower court justified its findings on pages 149 & 150 of the Record as follows:

"The position of the law is that he that asserts must prove. Therefore the law expects the Plaintiff to prove his case in proving it he founded his claim on inheritance. By that the law expects him to trace his root of title from who founded the land and how it moved to him where there is uncertainty in the root of succession such a plaintiff facts. See Kodilinye Vs Odu at p.337.

We have shown that in the evidence to support the plaintiff he fell short of legal requirement. Mr. Bashiri also relied on possession over a sufficient length of time as admitted by even defendant. But the law will not recognize a possession that is not founded in law and by law. His traditional history having failed, his possession will not avail him as weakness of defence case cannot be used to his advantage. See Yusuf Vs Adegoye supra cited by the Respondent's Counsel.  
Page 149 lines 1- 16. At page 150 lines 15 - 18 the lower court held positively as follows:-

"While we have admitted there are areas in the evidence that seem to go for the plaintiff but they go to no issue because he failed to establish his traditional history above decision decide the Appellant fate"

I have come to the irresistible conclusion that both the trial court and court below have amply and justifiably appraised the facts or evidence on record. The appellant has failed to identify credible grounds fatal enough to upturn the concurrent findings of the two courts below. In the result it will not be right for this court to interfere with those findings in the absence of any compelling circumstances shown by the Appellant.

Issue 3 is also resolved against the Appellant.

On the whole the appeal lacks merit and same is hereby dismissed. The Judgment of the Customary Court of Appeal, Jos delivered on 21st day of June, 2011, which affirmed the decision of GRADE I AREA COURT, PANYAM, PLATEAU STATE OF NIGERIA delivered on 27th day of June, 2002 is hereby confirmed. The Appellant shall pay N50,000 costs to the Respondent.

**OYEBISI FOLAYEMI OMOLEYE, J.C.A.:**

I read in draft the leading judgment just delivered by my learned brother, Ige JCA.

I agree that both the preliminary objections as well as the substantive appeal are devoid of merit. I also dismiss them accordingly. I abide by the consequential orders made in the said leading judgment, including those for costs regarding the preliminary objections and the main appeal.

**JUMMAI HANNATU SANKEY, J.C.A.:**

I have read the Judgment, in draft, of my learned and noble lord, Ige, J.C.A., and I agree with him. There is really no substance or merit in the Appeal, given the facts assiduously canvassed and agitated. To my mind, this Appeal stands dismissed and is hereby dismissed.

I abide by the consequential orders in the lead Judgment.