**ALHAJI I.A ONIBUDO & ORS**

**V.**

**ALHAJI A.W AKIBU & ORS**

IN THE SUPREME COURT OF NIGERIA

THE 9TH DAY OF JULY, 1982

SC. 50/1981

**LEX (1982) - SC. 50/1981**

OTHER CITATIONS

2PLR/1982/7 (SC)

(1982) All N.L.R 207

(1982) 7 S.C. 29

**BEFORE THEIR LORDSHIPS**

GEORGE SODEINDE SOWEMIMO, JSC

MOHAMMED BELLO, JSC

CHUKWUWEIKE IDIGBE, JSC

ANDREWS OTUTU OBASEKI, JSC

ANTHONY NNAEMEZIE ANIAGOLU, JSC

**BETWEEN**

ALHAJI I.A ONIBUDO & ORS - Appellant(s)

AND

ALHAJI A.W AKIBU & ORS - Respondent(s)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, LAGOS JUDICIAL DIVISION

2. HIGH COURT OF LAGOS

**REPRESENTATION**

G.O.K AJAYI, SAN with F.A. ADEOYE - For Appellant

AND

F.R.A. WILLIAMS, SAN with E. O. SOFUNDE and O.J. IDIGBE - For Respondent

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

RELIGION/CUSTOMARY LAW:- Tenets of the Islamic Law – Judge learned in Islamic law – Whether entitled to take judicial notice of Islamic law tenet – Need to restrict admission of Islamic Law rule to statutory provisions relating to same – Where Statute requires any issue relating to Islamic Law for determination be treated as a question of fact – Need for same to be pleaded and expert advice adduced in support

RELIGION AND LAW:- Islam - Ownership of mosque – “mosque is regarded as the House of Allah. It belongs to no one. It is not a property which could be inherited and it could not be claimed by anyone. If a moslem builds a mosque, unless it is within the walls of his compound, the property in it will automatically become a charity for religious use of the Moslem Community. Not even the person who builds it with his own money has the right to exclude any moslem from praying in it. You cannot possess what you have given away for the worship of God and it is a gift which you cannot recover" – Implication for justice administration

NONPROFIT AND CHARITY LAW:- Religious community – ownership of mosque – How determined – Whether an individual can own a mosque – Effect of gifting a mosque to a mosque – Whether can be reversed – Imam – Status – Effect of a suit in which Imam of a mosque is joined as such in his official capacity – Whether binding on worshippers at the Mosque

**PRACTICE AND PROCEEDINGS ISSUES**

ACTION:**-** Pleadings - Provisions made, in lieu of the old procedure of Demurrer which in most cases have been abolished – Peremptory disposal of cases at the close of plaintiff's statement of claim or at the close of both the plaintiff's and defendant's pleadings – Power of the Court to to dismiss the plaintiff's case, or the defence, or strike out the pleadings of either the plaintiff or the defendant or both, or act upon any point of law on which the Court is satisfied the case may be disposed of, either in part or in whole – Whether the Court may do this, and often does this, without hearing any evidence - Effect

COURT:- Duty of court not to inquire into the case outside of court even if such case is limited to examination of documents in evidence

EVIDENCE:**-** Judicial notice – Islamic Law - Whether the High Court of Lagos State is permitted to take judicial notice of the tenets of Islamic Law – Requirement for same to be pleaded and expert advice adduced in support

**MAIN JUDGMENT**

A. N. ANIAGOLU, J.S.C. (DELIVERING THE LEADING JUDGMENT):

This appeal was brought by the plaintiffs against the judgment of the Federal Court of Appeal dismissing their claim and setting aside the earlier judgment of the High Court of Lagos, in their favour, granting them a declaration of title to the land they claimed and the Mosque thereon, and possession of the said land and Mosque.

The claim was instituted in the Lagos High Court, for themselves and on behalf of the SUNMONU ONIBUDO family by ADEWUYI ONIBUDO; ALHAJI ABDUL KAREEM SHITTA, and ALHAJI GANIYU SARUMI. Although they got judgment in the High Court for a Declaration of title and Possession only, their claim included two further heads for an Account and for an Injunction both of which were dismissed. The full particulars of the claim as endorsed on the Writ of Summons were as follows:

"The plaintiffs (sic) claim against the Defendants jointly and severally are for:

(1) A declaration that SUNMONU ONIBUDO FAMILY is the owner of the parcel or piece of land situate, lying and being at 1, Onibudo Street, Lagos with the Mosque thereon.

(ii) Possession of the said land with the Mosque thereon.

(iii) An account of all monies collected by the Defendants and payment over to the Plaintiffs as the accredited representatives of the SUNOMONU ONIBUDO FAMILY.

(iv) An injunction to restrain the Defendants, their servants, agents and privies from collecting monies from the occupiers tenants and worshippers of the said land and Mosque.

Annual Rental value - =N=100.00

DATED at Lagos this 9th day of January, 1976.

(Sgd.) ALAHAJI ISOLA A. OLORUNNIMBE,  
Plaintiffs' Solicitor,  
20 Ereko Street,  
Lagos State."

As shown in the writ, the land in dispute is situate at No.1 Onibudo Street, Lagos, and from the plaintiffs' pleadings and evidence, it is said to form part of a larger area of land in that part of Lagos formerly known as EBUTE-AWO now called OKO-AWO

A survey-plan of the land in dispute was made by a licensed surveyor, one MARCELLINO AUGUSTINE SEWEJE (P.W.1), and was tendered by him in evidence as Exhibit A. This area in dispute is therein verged red and is shown to be part of a larger area of land verged blue, measuring about 136.89 square yards, and enclosed within the confluence of three streets, namely, MOSALASI AND OROYINYI STREETS and RECLAMATION ROAD. The plan shows the said larger area of land to be the subject of grants made by the Onibudo family to various grantees, including the L.S.D.P.C. The area in dispute verged red in the plan, Exhibit A, is marked "MOSQUE" and the same Mosque is shown and occupies the same position in the sectional plan of OKO AWO area, tendered by the Licensed Surveyor as Exhibit B. In both plans the Mosque is shown to be situate beside a street running within the afore-said larger blue verged area of land and marked "Onibudo Street".

It is common ground that the present Mosque, standing on the land in dispute, is an ultra modern building which has replaced an earlier mud-walled hut and Mosque and which was built with the voluntary financial contributions made by the Muslims of the Oko Awo Area (sometimes referred to as Oko Awo Muslim Community) including the plaintiffs. It is equally common ground that those Muslims of the said Oko Awo Area freely worship in the said Mosque and, therefore have an interest in the Mosque and a fortiori, in these proceedings. I shall return to a discussion of this point later in this judgment.

The three defendants were sued in their personal and individual capacities. The plaintiffs have sworn that the 2nd defendant, Alhaji Tabraniyu Olowo, is the acting Imam of the Mosque, appointed by them on the death of the substantive Imam, one Oluwa, in Mecca while on pilgrimage, while the defendants have contended ,that the 2nd defendant is the substantive Imam, properly appointed, and a descendant of one Imam Nolla to whom they traced their ancestry. But whether it is claimed that the 2nd defendant was occupying his position in an acting or in a substantive capacity, the fact remains that he is, in fact, the present Imam of the Mosque: Counsel for the plaintiffs has asserted that only the three defendants were sued because they were the ones who trespassed upon the land in dispute and were the ones challenging the title of the plaintiffs. Again the capacity in which the defendants were sued, in the context of the interest of the Oko Awo Muslim Community in the *res litigiosa*, will be further discussed later in this judgment.

The plaintiffs filed their statement of claim pursuant to the Order of Court. It was clear, however, from the statement of claim, that at the close of the plaintiffs' pleadings nothing, by way of civil injury, had been alleged against either the named defendants or the Oko Awo Muslim Community. The Statement of claim, as filed, reads:

"**STATEMENT OF CLAIM**

1. The Plaintiffs who sue in a representative capacity are descendants of (sic) one Sunmou Onibudo-Deceased.

2. The first Defendant who is a native of Ilorin in Kwara State came from the Gold Coast now Ghana to live in Oko Awo area of Lagos many years ago.

3. The Second Defendant who is a native of Badagry in Lagos State was brought to Lagos by only Hadji Raimi Ligali - a member of the Plaintiffs' Family to live at Oko Awo area of Lagos.

4. The third Defendant who is a native of Epe in Lagos State is a tenant in Oko Awo area of Lagos living in Funsho Family House.

5. The Defendant (sic) are not members of Sunmonu Onibudo Family.

6. The property (hereinafter referred to as "the Property") the subject matter of this suit is situate at Oko Awo area of Lagos known as No.1 Onibudo Street, Lagos.

7. The progenitor of the Plaintiffs - one Sunmonu Onibudo - was a wealthy landowner who was very versed in Holy Koran.

8. The said Sunmonu Onibudo owned a large area of Ebute Awo now called Oko Awo portion of which the property is built.

9. The said Sunmonu Onibudo was in physical possession of the whole land at Oko Awo in Lagos exercising maximum acts of ownership without let or hindrance from anyone and indeed a street adjoining his land was named after him as Onibudo Street, Lagos.

10. The plaintiffs aver that in the year 1894 - the Sunmonu Onibudo built a Mosque on a portion of the property - which was later numbered as No.1 Onibudo Street, Lagos.

11. That after the death of SUNMONU ONIBUDO his descendants had been in possession of the whole land including No.1 Onibudo Street, Lagos and exercising maximum acts of ownership thereon by sale and by mortgage.

12. Under and by virtue of a Crown Grant dated the 4th day of October, 1894 and registered as No. 52 at page 101 in Volume 8 of the Register of Deeds kept at the Lagos State Land Registry - part of the land was granted to one MUHAMMED MUSTAFA one of the descendant of SUNMONU ONIBUDO.

13. The descendants of SUNMONU in the year 1922 under and by virtue of a Deed of Conveyance dated the 20th day of October, 1922, and registered as No. 111 at page 448 in Volume 159 of the Register of Deeds kept at the lands Registry Lagos a portion of the said property was sold to one GEORGE E.A. DA-COSTA.

14. That in the year 1959 when one ASANI OLUWA the Imam of the said property died - all members of the SUNMONU ONIBUDO FAMILY appointed the 2nd Defendant as the Imam of the said Mosque.

15. The Plaintiffs further aver that the Defendants have no right or interest in the said property.

16. Whereof the Plaintiffs claim as per writ of Summons. Dated at Lagos this 29th day of June 1976."

What the Defendants should have done at the close of plaintiffs' pleadings, was to move the Court, as they were perfectly entitled to do under the Rules, to strike out the claim, and the statement of claim, as disclosing no cause of action, against the defendants. This they did not do. Instead they proceeded to file their statement of defence and answer the plaintiffs' pleadings.

Provisions have been made, in lieu of the old procedure of Demurrer which in most cases have been abolished, in the High Court Rules of the various States in the country, for peremptorily disposing of cases at the close of plaintiff's statement of claim or at the close of both the plaintiff's and defendant's pleadings. The issue, in the Eastern States, for example, is dealt with under Order XXIX of the High Court Rules, 1963 Laws of Eastern Nigeria and, in the Western States, in Order 22 of the High Court Civil Procedure Rules. In each case the Court is empowered to dismiss the plaintiff's case, or the defence, or strike out the pleadings of either the plaintiff or the defendant or both, or act upon any point of law on which the Court is satisfied the case may be disposed of, either in part or in whole.

The Court may do this, and often does this, without hearing any evidence (see: K. ONWONT A V. E.J. MINAISE (1952) 14 W.A.C.A. 77). The misconception held by some, based on ODIYE v. OBOR (1974) 2 S. C.21 at 3, that once pleadings have been filed by the plaintiff and the defendant, the Court is obliged to hear evidence and can only dispose of the case upon a determination of the evidence so heard, was recently rejected by this Court in SC.29/1981 LASISI FADARE and Others v. Attorney-General of Oyo State decided on 2nd April 1982 (yet unreported). Part of what this Court held in the case was that:

"the preliminary point of law can be taken after the receipt of the statement of claim and before any defence is filed. The party in such a case relies on point of law even if the issues of fact in the statement of claim are conceded. If he fails, an order would be made by the Court ordering the filing of a statement of defence and the suit would proceed to trial."

In the Lagos State, from where this case originated, similar provision has been made which would have enabled the defendants to peremptorily have the case struck out or dismissed, without filing their statement of defence, or going into any form of trial. It is Order 22 of the High Court of Lagos State (Civil Procedure) Rules Cap. 52 Vol. III of the Laws of the Lagos State of Nigeria 1973. Rule 4 of the said Order, which particularly applies, stipulates that:

"4. The Court or a Judge in Chambers may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge in Chambers may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The defendants having, however, filed their statement of defence, it became clear, from the contents thereof, that they were denying the plaintiffs' title of ownership to the land in dispute and the Mosque thereon, and were challenging the plaintiffs to a strict proof of the said title. Paragraphs 1, 3, 6, 8, 9, 11 and 13, of the Statement of defence make this abundantly manifest. For their importance these paragraphs are set out hereunder as follows:

"1. The defendants deny paragraphs 2,3,4,8,9, 10, 11, 12, 13, 14 and 15 of the Statement of Claim and put the Plaintiffs to the strictest proof of the various allegation of facts contained therein.

3. The defendants admit paragraphs 5 and 6 of the Statement of Claim. The property which is the subject matter of this action was originally settled upon by IMAM NOLLA (Deceased) who built a mud and thatched roof house as a Praying Ground "MOSQUE" sometime in 1832.

6. The defendants state that ONIBUDO FAMILY PROPERTIES are covered by various DEEDS OF CONVEYANCE registered as No. 24 at page 24 in volume 337 and No. 14 at page 14 in volume 337 respectively kept in the LANDS REGISTRY, LAGOS: excluding the land in dispute.

8. In denying paragraphs 8 to 11 of the Statement of Claim, the defendants aver that neither SUNMONU ONIBUDO (deceased) nor late BRAIMOH MOGAJI ONIBUDO throughout their life time claimed the land in dispute.

"9. The defendants aver that after the reclamation exercises of the OKO AWO AREA by the GOVERNMENT the said land in dispute is vested in L.S.D.P.C. (formerly L.E.D.B.) and thereafter the possessory right and interest of the land is vested in OKO AWO MUSLIM COMMUNITY and contained using the land as a Mosque.

11. The defendants aver that SUNMONU ONIBUDO and his descendants have neither been in possession nor exercised any act of ownership on the said land, nor contributed to the development of the land.

13. The defendants will contend at the trial that by series of letters ONIBUDO DESCENDANTS have always sought permission to use the property in dispute."

The star witness for the plaintiffs was the 1st plaintiff, ALAHJI IMRAN ADEWUYI ONIBUDO, a retired civil servant. He swore that the entire land verged blue in the plan, Exhibit A, belonged to SUNMONU ONIBUDO who built a mosque on part of it in October 1894 with mud and bamboo. After the death of Sunmonu, his own father and other relations became seised of the land in possession.

But the same witness, in the course of the same evidence, swore that the land verged blue in Exhibit A, originally belonged to AYUBA, who, according to him, was the father of Sunmonu. He was emphatic, in the course of his evidence, that the area in dispute was part of the land belonging to Sunmonu and that the plaintiffs were claiming through Sunmonu. And so, in one breath the land in dispute belonged to Ayuba the father of Sunmonu; in another breath the land belonged to Sunmonu.

It was never the contention of the plaintiffs that the land descended to Sunmonu on the death of his father Ayuba. If the origin of the ownership of the land was Ayuba, then the origin of the ownership of the plaintiffs could not be from Sunmonu since their contention had never been that the land descended from Ayuba to Sunmonu and from Sunmonu to the plaintiffs.

Again, the evidence of this witness was that one MOHAMMED MUSTAPHA was Sunmonu's brother and that the said Mustapha did not own any portion of the land verged blue in Exhibit A, yet, paragraph 12 of the Statement of Claim averred that by virtue of a Crown Grant dated 4th October, 1894 and registered as No. 52 at page 101 in Vol. VIII of the Register of Deeds kept at the Lagos State Land Registry, part of the land verged blue in Exhibit A was granted to Mohammed Mustapha, described therein as one of the descendants of Sunmonu. Surely, Mustapha could not have been a brother of Sunmonu and at the same time a descendant of Sunmonu. Being Sunmonu's brother it would follow that Mustapha was a son of Ayuba, and that if the land descended from Ayuba, Mustapha would undoubtledly be a co-owner of the land as a descendant of Ayuba. Yet, Mustapha was said, in oral evidence, to own no land within the area verged blue in Exhibit A, even though the pleadings ascribed to him the ownership of part of the land by virtue of the aforesaid Deed of Grant.

One of the documents tendered by the plaintiffs' in proof of their case was a conveyance, said to be of part of the land, by BRAIMOH ONIBUDO and others, to GEORGE E.A.L. DA COSTA in 1922, tendered as Exhibit C. The recital in Exhibit C attributed the ownership of the land to Ayuba, and stated that the entire Ayuba's land was transferred by the Government, upon Crown Grant dated the 4th day of October, 1894, registered as No. 52 in Vol. VIII at page 101 of the Register of Crown Grants kept in the Lands Registry, Lagos, to Mohammed Mustapha, described therein as the eldest son of Ayuba.

I pause to observe that in view of the confused state of the plaintiffs' evidence, there certainly was a need for more convincing evidence from the plaintiffs in order to grant a declaration of title to them.

The defendants' case, as shown from the evidence of the only witness for the defence, one ALHAJI ABDUL AKIBU, was that neither the land in dispute nor the Mosque thereon belonged to Onibudo Family; that both the land and the Mosque belonged to the Muslim elements of Oko Awo Area in Lagos; that the Mosque was built by one IMAM NOLLA long before he was born 16th December 1898 (see Exhibit L); that all the Imams of the Mosque came from Imam Nolla Family and that no member of the Onibudo Family had ever challenged anyone about the Mosque until the 1st plaintiff started giving trouble.

Exhibit N was a brochure issued on 14th July, 1973 on the occasion of the laying of the foundation stone of the new ultra modern Lagos Central Mosque and its complex. It was the contention of the plaintiffs that the occasion was chairmanned by the Chief Imam of Lagos. Alhaji Abdul Akibu admitted in evidence under cross-examination that he was a member of the Committee which prepared and issued the brochure. A list of Ratibi Mosques under Lagos Central mosque was set out in the said brochure. In item 7 thereof is inserted "ALFA SUNMONU ONIBUDO" Mosque. The plaintiffs contended that by this the defendants, through Alhaji Abdul Akibu, had admitted that the mosque on the land in dispute belonged to Sunmonu. To this Alhaji Abdul Akibu gave the lame explanation that the said "Alfa Sunmonu Onibudo" Mosque, as shown in the said brochure, was a "mistake".

In spite of this obviously unacceptable "mistake" of the defendants, the burden of proof was upon the plaintiffs to prove their title clearly, emphatically and satisfactorily. It may not be an unattainable height requiring mathematical exactitude, but certainly a plaintiff has not yet set himself on the journey of discharging the onus by presenting to Court inconsistent and contradictory story based upon inconclusive evidence of family lineage. The rigors of proof may somewhat have been ameliorated by the opinion of Privy Council in *STOOL OF ABIN v. CHIEF KOLO ENYIMADU* [1953] A.C. 207, yet, the fact remains, that in order to get the Court to declare title in a plaintiff, the proof of ownership must be by facts which are cogently satisfactory.

The Federal Court of Appeal, in allowing the appeal of the Defendants and dismissing the plaintiffs' claim, based its judgment (as per Uthman Mohammed, J.C.A., with whose judgment the rest and Nnaemeka-Agu, J.J.C.A. - concurred) mainly on two grounds:

1. That after examining the plan attached to Exhibit F which was a true copy of the Crown Grant registered in favour of Mohammed Mustapha, they were satisfied.

(a) That the evidence of the Surveyor Marcelline Augustine Seweje "had fallen short of accurate details", and

(b) That the land in dispute on which the Mosque stands "does not fall within the land area belonging to Sunmonu Onibudo".

2. That under Islamic Law, a Mosque is regarded as the House of Allah, belonging to no one, and incapable of being inherited by anyone.

With much respect to the Court of Appeal- and to the panel which, with respect, I regard as a strong panel- the two grounds are beset with errors. On the First Ground, the learned Justice of the Court of Appeal (Uthman Mohammed. J.C.A.) stated that the trial Judge had not compared the exhibits with the evidence adduced and that he had "volunteered" to do so. He proceeded to examine the evidence of Alhaji Imran Adewuyi Onibudo, who gave evidence that the Mosque was within the land shown in the plan, Exhibit A, belonging to Sunmonu Onibudo, and compared that with the evidence of the first defendant, Alhaji Abdul Akibu, who said that Mohammed Mustapha did not own any land within Exhibit A. He then examined the plan attached to the Crown Grant, Exhibit F, and upon his findings rejected the evidence of the surveyor as lacking in accurate details. The Surveyor, he said, had testified that all the land verged blue in Exhibit A belonged to Sunmonu Onibudo, whereas, on examination of Exhibit F, one would see that the Crown Grant in favour of Mohammed Mustapha "was contiguous to the Mosque."

The learned Justice of the Court of Appeal stated further that somewhere on the eastern side of Mustapha's land, the land of Sunmonu Onibudo had been marked on the plan and that the land on which the Mosque stands was not shown to be adjoining the land of Sunmonu Onibudo; that Mustapha's land was nearer to the Mosque than Sunmonu's; that Exhibit A, the land on which the Mosque is situate, had been marked in the middle of the area verged blue, and that since the Mosque is in the middle of the area verged blue, then the land of Mustapha must also be included in the area because the land of Mustapha and the Mosque were contiguous.

The learned Justice then proceeded to examine the evidence of the 1st witness for the plaintiffs, Alhaji Onibudo, in relation to the plan attached to Exhibit C and came to the conclusion that there was a piece of land shown in the plan to lie-in-between the Mosque and the land Sunmonu Onibudo. In conclusion the learned Justice then stated his satisfaction "that the land of the Mosque in dispute does not fall within the area belonging to Sunmonu Onibudo."

It is to be noted

(i) That it was not part of the case of the defendants that the land on which the Mosque stands did not lie within the area verged blue in Exhibit A;

(ii) That the licensed surveyor was not challenged in cross as to the relative position of the Mosque to any land mark within the area verged blue in Exhibit A;

(iii) That the Surveyor was not asked to compare the plan Exhibit A with the plan attached to Exhibit F, when he gave evidence; and

(iv) That the plan attached to Exhibit F had not been produced in evidence yet when the Surveyor gave evidence as the first witness for the plaintiffs. The Surveyor therefore had no opportunity to compare the two plans.

With respect, it was no part of the appellate duty of the Justice to go on this voluntary voyage of his own aimed at producing evidence for the parties. His, was to deal with the evidence adduced by the parties and pronounce upon it, in accordance with the law. Moreover, it was wrong of the Court, and unfair to the Surveyor, to condemn the Surveyor upon evidence on which the Surveyor was not given opportunity to venture an opinion. The duty of the production of facts is that of the parties; the duty of evaluation of facts produced is, in our country where cases have ceased to be tried in some parts by the jury, that of the trial Judge whose function is to decide on credibility. The Appellate Court is perfectly entitled, on appeal, to draw proper inferences from specific facts proved, and while giving weight to the opinion of the trial judge, form its independent opinion upon drawing these inferences. (*WATT OR THOMAS v. THOMAS* [1947] A.C. 484 at 488).

As has been pointed out by this Court in *Bornu Holding Company Ltd. v. Alhaji Hassan Bogoco* (1971) 1 All N.L.R. 324 if it becomes necessary that a point or points arising for determination in a case should be further clarified by evidence after the close of trial, it is the duty of the trial Judge to invite the parties to supply such evidence or explain such point or points and it would be wrong for the Court to proceed to inject its own views for matters on which there should be, but which there was no evidence before the Court.

On 12th June, 1980 when the Court of Appeal delivered its judgment in this appeal, its procedure was still governed by the provisions of the old Supreme Court Rules, the new Federal Court of Appeal Rules, 1981, S.1. 10 of 1981, not yet having come into being.

Under Order VII Rule 24 of the said Supreme Court Rules, there is power for the Court of Appeal to hear new evidence in an appropriate case. Though this power is one which is most infrequently utilized since it is the trial Court which should normally sift such evidence against the totality of the evidence adduced, yet, in an appropriate case, the Court of Appeal can hear further evidence on appeal. The Court of Appeal could have exercised this power in the instant case if it so desired.

All in all, it is my humble view that this exercise conducted and carried out by the learned Justice of Appeal, to which the rest of the panel concurred, was erroneous. And that brings me to the Second Ground on which the Court of Appeal allowed the appeal, namely, the issue of the Islamic Law. Again, it should be noted that no evidence whatever was led before the trial Court on the tenets of the Islamic Law. Indeed, no such evidence could properly have been led without amendment of the pleadings, since the issue was never pleaded by either side. The issue was one which needed to be pleaded if either party was to rely on it, in order that no party should be taken by surprise.

The learned Justices of the Court of Appeal held, inter alia thus:

", I cannot see the justification in saying that both land and the mosque on it belong to the Plaintiffs. Under the Islamic Law, a mosque is regarded as the House of Allah. It belongs to no one. It is not a property which could be inherited and it could not be claimed by anyone. If a moslem builds a mosque, unless it is within the walls of his compound the property in it will automatically become a charity for religious use of the Moslem Community. Not even the person who builds it with his own money has the right to exclude any moslem from praying in it. You cannot possess what you have given away for the worship of God and it is a gift which you cannot recover. The case of this mosque is a simple illustration of what I have said above... The question is who has the title? Surely "it cannot be the Respondents because as I said earlier the property being a house of Allah could not be inherited."

Where was the evidence on which the Court based these conclusions? None whatever.

The case was tried in Lagos and the land the subject-matter of the dispute is situate in Lagos. The laws applicable would, therefore, be those of the High Court Law of Lagos, Cap. 52; and the Evidence Law of Lagos State, Cap. 39, volume II - all contained in the Laws of the Lagos State of Nigeria 1973.

Section 56 (1) and (2) of the Evidence Law of Lagos State have almost identical wordings with s. 56 (1) and (2) of the Evidence Act, the difference lying in the change of the words "native Law and Custom" in the Evidence Act to "customary Law" in the Evidence Law of Lagos State. The said Section 56 of the Lagos Evidence Law provides

"(1) When the court has to form an opinion upon a point of foreign law, customary law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon the point of persons specially skilled in such foreign law, customary law, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts."

What the Islamic Law, in relation to Mosques, provides, is a matter for experts in Islamic Law proven by evidence heard from them, by the trial Court, on the subject; or as provided by s. 58 of the Evidence Law of Lagos State, proven "by any book or manuscript recognised by natives as a legal authority." As to the latter, the West African Court of Appeal, in interpreting the said S. 58, decided in *BELLO ADEDIBU v. GBADAMOSI ADEWOYIN and ANOR.* (1951) 13 WACA. 191 that the book must be shown to be recognised by natives as a legal authority. Moreover, as I have already said, the issue must be raised in the pleadings before the proof. Again, the Court of Appeal erred on this second ground on which it based its judgment.

But the plaintiffs/appellants do not necessarily get title by reason of this. Contrary to Mr Ajayi's contention, the resolution of these two points in favour of the appellants would not necessarily, having regard to all that has been said hereinbefore in this appeal, restore the judgment of the High Court in their favour.

The evidence clearly shows that the present Mosque was built by, and with the financial contributions of, the Oko Awo Muslim Community. The said Oko Awo Muslim Community has undoubted interest in the said Mosque. They were not joined in the suit. But, ideally, they ought to have been joined either by the plaintiffs at the institution of the claim, or by the named defendants who, at some stage after the institution of proceedings, could have applied to defend the action, in a representative capacity, for themselves and for and on behalf of the Oko Awo Muslim Community in accordance with Order 13 Rule 14 of the High Court of Lagos State (Civil Procedure Rules, Cap. 52 *ADEGBITE v. LAWAL* 12 W.A.C.A. 398).

Plaintiffs' Counsel, Mr. Ajayi, S.A.N., explained that they sued the three defendants as persons interfering, in trespass, with their land; that they were not intent on ejecting the Oko Awo Muslim Community from the Mosque nor did they want to prevent the said Muslim Community from worshipping in the Mosque. After all, he said, both the plaintiffs and the defendants are Muslims enjoying communal worship in the Mosque.

That may well be so, but the defendants have pleaded in their statement of defence that the Mosque and the land on which it stands do not belong to the plaintiffs, stating, in paragraph 3 thereof, that the property was originally settled upon by IMAM NOLLA who built the original mud-walled-Mosque in 1832, and that neither Sunmonu Onibudo nor Braimoh Mogaji Onibudo "throughout their life claimed the land in dispute." They stated further (Paragraph 9) that the Government reclaimed the land in dispute and vested the possessory right and interest of the land" in the Oko Awo Muslim Community. The defendants, were, therefore, clearly challenging the claim of title laid by the plaintiffs over the land and Mosque, and were asserting ownership over the same.

Admittedly the defendants were sued personally and judgment against them would be personal, so that the issue of res judicata against the Muslim Community of Oko Awo might not arise as such. But, such a judgment could be pleaded by the plaintiffs, in subsequent proceedings, as an act of possession in favour of the plaintiffs (see: *ABABIO II v. PRIEST-IN-CHARGE, CATHOLIC MISSION* (1935) 2 W.A.C.A. 380). Moreover, the Oko Awo Muslim Community whose Imam was one of the three defendants sued, will require to tender serious explanations, in subsequent suits by the plaintiffs, over the ownership of the land and Mosque, on why they knowingly stood by and allowed their Imam and others to fight, in their personal capacities, the ownership of the land and Mosque, without applying to join and put their own claim into the contest, on the well known principles laid down in numerous decided cases (see: *IDOWU ALASE AND OTHERS v. SANYA OLORI ILU AND OTHERS* [1965] N.M.L.R. 66) including the Privy Council judgment in *NANA OFORI ATTA v. NANAABU BONSU* [1958] A.C. 95 following the judgment of Lord Penzance in *WYTCHERLEY v. ANDREWS* (1871) L.R. 2 P and M 237 at 328 - principles lately reviewed by this Court in SC 66/1981 *Sowemimo v. Somisi* (yet unreported) decided on 14th May, 1982.  
A judgment against the Imam in relation to the Mosque could, conceivably, be argued as binding upon the Muslim Community in respect of the Mosque, by reason of the Imam, in his position as the Imam, epitomizing all the Muslim Community stood for, in respect of the Mosque, on the analogy of a head of family not needing authority to sue or defend in protection of family property as held in *BASSEY v. COBHAM and Another* (1924) 5 N.L.R. 92 and *CHIEF DUKE and Ors. v. ETUBOM HENSHAW* (1944) 10 W.A.C.A. 27 at 31.

Not having joined the Oko Awo Muslim Community in this suit and it being necessary, as I have said, that the interest of the community should be adjudicated upon, it is now necessary to decide on what order to make in this appeal. Should this Court:

(i) Dismiss the appeal simpliciter and thereby confirm the judgment of the Court of Appeal dismissing the plaintiffs' claim especially in view of the confused state of their evidence earlier pointed out by me;

(ii) Order a new  trial of the case in the High Court before another Judge; or

(ii) Order a new trial of the case

(iii) Non-suit the plaintiffs; or

(iv) Simply strike out the case?

To dismiss the appeal and thereby confirm the Order of dismissal made by the Court of Appeal, of the plaintiffs' case, will undoubtedly occasion injustice to the plaintiffs whose proprietary interest in some portion, even if undefined area of the land, will forever be obliterated, as they could, in any subsequent claim over the land, or part thereof, be met with a plea of estoppel per rem judicatam. Such a course, where it can be avoided, will not, (as has been stated in the Privy Council judgment in *AZUIKE UME and Others V. ALFRED EZECHI and Others* [1964] 1 W.L.R. 701 cited with approval by this Court in *YESUFU DELE and FAMILY v. ADELALU and FAMILY* (1966) N.M.L.R. 105) be followed by the courts. I am therefore, of the view that a dismissal order is, in all the circumstances, inappropriate.

On the issue of whether to order a new trial or strike the case out, Mr. Ajayi, in his submission, would prefer an order for retrial, with liberty for the parties to apply for any amendments they may wish, while Chief Williams would prefer a striking out. Faced with -

(i) The non-joinder of the Oko Awo Muslim Community;

(ii) The inadequacy in the plaintiffs' pleadings;

(iii) The confusion in the account given by the plaintiffs about their family lineage; and

(iv) The admission of the defence of item 7 of the brochure, Exhibit N, calling the Mosque, "Alfa Sunmonu Onibudo" Mosque.

I think that the best order that would have met the justice of the case would have been one non-suiting the plaintiffs. This is because the plaintiffs, having regard to what I have already said about their proprietary interest in some portion, though undefined area of the land, have not failed in toto and the defendants would not themselves be entitled to judgment. (See: *Craig v. Craig* *[1960] 1 All N.L.R. 173; Chief Dada v. Chief Ogunremi [1967] N.M.L.R.* 181; *African Continental Bank Ltd. v. Chief Festus Sunmoila Yesufu* *(1980) 1-2 S.C. 49)*.

But, there is no provision either in the High Court Law of Lagos State or in the High Court of Lagos State (Civil Procedure) Rules. Cap 52 Vol. III, Laws of the Lagos State of Nigeria 1973, for an order for Non-Suit.

It would, therefore not have been competent for the High Court to make an order for non-suit in this case, (see the judgment of this court in *Alhaji Nurudeen Akinola Lawal v. National Electric Power Authority and Electricity Corporation of Nigeria* [1976] 3 S.C. 100 at 129-131) and, in fortiori, this Court, having regard to Section 22 of the Supreme Court Act, 1960, and Order 7 Rule 26 of the Supreme Court Rules 1977, would be equally incompetent to make an order for non-suit in the case.

By reason, however, of the statement of claim not disclosing a cause of action as I had already stated, even though the respondents did not apply to have the case struck out, the best course is to strike out the case. Accordingly, this appeal is allowed. The order of the Federal Court of Appeal dismissing the plaintiffs' claim is hereby set aside and in lieu thereof, it is hereby ordered that the plaintiffs' claims be, and are hereby, struck out.

Should anyone desire to institute fresh proceedings, then all parties who have any claim in respect of the subject-matter of the dispute could be brought in, and with properly got-up pleadings, all claims of all the contending parties could be determined at one and the same time.

Costs in the appeal will be as contained in the order of my learned brother, Sowemimo, J.S.C., the Presiding Justice.

**G. S. SOWEMIMO, J.S.C**.:

I have had a preview of the draft of the judgment just delivered by Aniagolu, J.S.C. I am in complete agreement with him that the claim in the lower Court should be struck out.

The appeal against the judgment of the Federal Court of Appeal Lagos is allowed and is set aside. No order as to costs.

**M. BELLO, J.S.C**.:

I have had a preview of the judgment of my learned brother, Aniagolu, J .S.C. I agree that the appeal should be allowed and the decision of the Court of Appeal dismissing the claim of the Appellants should be set aside and Instead a judgment striking out the Appellants' claim should be entered.

As has been fully set out in the judgment of Aniagolu, J.S.C., the Court of Appeal based its decision to dismiss the claim on two grounds which, in my opinion, are both wrong. The learned Justices of the Court of Appeal certainly erred in law in volunteering to investigate out of court, as appears from their judgments, into matters which had neither been canvassed by the parties at the trial nor at the hearing of the appeal before them. It is clear that the numerous points - which the learned Justices discovered from the examination out of court of the exhibits in these proceedings and upon which they partly based their decision were matters which ought to have been brought out in court at the trial of the case in the court of first instance or at the hearing of the appeal in the Court of Appeal. The record of appeal does not show that any of the numerous points discovered by the Justices in that extra curia exercise was brought out in court at the trial or at the hearing of the appeal. The record does not show any of the points was canvassed by the parties.

It needs to be emphasized that the duty of a court is to decide between the parties on the basis of what has been demonstrated, tested, canvassed and argued in court. It is not the duty of a court to do cloistered justice by making an inquiry into the case outside court even if such inquiry is limited to examination of documents which were in evidence, when the documents had not been examined in court and their examination out of court disclosed matters that had not been brought out and exposed to test in court and were not such matters that, at least, must have been noticed in court.

With regard to the dismissal of the Appellants' claim on the ground of Islamic Law, I think I may take judicial notice of the fact that Uthman Mohammed, J.C.A., who delivered the lead judgment with which the two other Justices concurred, is learned in Islamic Law and is entitled to take judicial notice of such Law in a proper case. I take it that he correctly stated the tenet of Islamic Law in his judgment wherein he said:

"Under the Islamic Law, mosque is regarded as the House of Allah. It belongs to no one. It is not a property which could be inherited and it could not be claimed by anyone. If a moslem builds a mosque, unless it is within the walls of his compound, the property in it will automatically become a charity for religious use of the Moslem Community. Not even the person who builds it with his own money has the right to exclude any moslem from praying in it. You cannot possess what you have given away for the worship of God and it is a gift which you cannot recover"

It is transparently clear from the very case presented by the Appellants that since their ancestor, Sumonu Onibudo, had built the mosque in 1894 on his land and had dedicated it to the Moslem Community, the Appellants are incapable of inheriting the mosque under Islamic Law and are not therefore entitled to the declaration and possession granted them by the High Court, Lagos.

However, the High Court of Lagos State is not permitted by section 73 of the Evidence of Law, Cap. 39 of Laws of the Lagos State of Nigeria, 1973, or any other Law to take judicial notice of the tenets of Islamic Law. Consequently, as has been amply stated in the judgment of Aniagolu, J. S. C., any issue relating to Islamic Law for determination in the High Court of Lagos State ought to be treated as a question of fact which must be pleaded and expert advice adduced in support. The tenets of Islamic Law, as stated by Uthman Mohammed, J.C.A., was not pleaded and it was not established by evidence. Since the appeal in the Court of Appeal was governed by the Laws of the Lagos State, the court of Appeal was duty bound to apply such Laws in the determination of the appeal. It is therefore not a proper case for Uthman Mohammed, J.C.A., to take judicial notice of Islamic Law. The Court of Appeal was wrong to apply Islamic Law under the circumstances of the case. In my view, the Court of Appeal is only entitled to take judicial notice of Islamic Law in cases where the courts of first instance are empowered by law to take judicial notice of such law. This must inevitably be so because of the provisions of section 16 of the Federal Court of Appeal Act, 1976, which among other things provides:

"16. The Court of Appeal may make an interim order or grant any injunction which the court below is authorised to make or grant and generally shall have full jurisdiction over the whole proceedings as if the proceedings have been instituted in the Court of Appeal as court of first instance ...”

I may only add that the effect of consecrating a parcel of land as a mosque under Islamic Law and the means and manner of securing enforcement of Islamic Law by the High Court of Lagos State have in these proceedings been brought to the notice of the Moslem Community of Oko Awo. If the Appellants decide to have a second bite of the apple by relitigating the claim, the community may no doubt take the appropriate steps to secure the enforcement of Islamic Law in their favour.

Finally, I may point out that notwithstanding the success of the Appellants in the appeal, they are not entitled to have the judgment in their favour by the High Court restored because their Statement of Claim disclosed no reasonable cause of action. The trial court ought to have the claim struck out under Order 22 rule 4 of the Lagos High Court Rules. Accordingly, the claim should be struck out. I agree with the order as to costs.

**C. IDIGBE, J.S.C**.:

I have had the advantage of a preview of the judgment just delivered by my Lord, Aniagolu, J.S.C. For the reasons therein stated, I too would allow this appeal. I agree that the claims of the appellants be, and are hereby struck out. I endorse the order as to costs proposed in the said judgment.

**A. O. OBASEKI, J.S.C**.:

I have had the advantage and pleasure of reading in draft, the judgment just delivered by my learned brother, Aniagolu, J.S.C. It expresses accurately my opinions on the issues raised before us in the appeal and I agree with it.

For the reasons stated therein, I would and I hereby allow the appeal against the decision of the Federal Court of Appeal. I also agree with my learned brother, Aniagolu, J.S.C. that the judgment of the Federal Court of Appeal dismissing the claim of the plaintiffs/appellant be set aside and in its stead an order striking out plaintiffs' claim be substituted. Finally, I agree with the order for payment of costs in this appeal made by my learned brother, Sowemimo, J.S.C.