**MADAM I. ARASE**

**V.**

**PETER U. ARASE**

IN THE SUPREME COURT OF NIGERIA

8TH DAY OF MAY, 1981

SUIT NO. SC. 60/1980

**LEX (1981) - SC. 60/1980**

OTHER CITATIONS

(1981) 5 S.C. (REPRINT) 21

2PLR/1981/8 (SC)

**BEFORE THEIR LORDSHIPS:**

SODEINDE SOWEMIMO, J.S.C.

MUHAMMED BELLO, J.S.C:

CHUKWUNWIKE IDIGBE, J.S.C.

AUGUSTINE NNAMANI, J.S.C.

MUHAMMADU LAWAL UWAIS, J.S.C.

**BETWEEN**

MADAM I. ARASE – Appellant

AND

PETER U. ARASE – Respondent

**ORIGINATING COURT(S)**

1. FEDERAL COURT OF APPEAL (Omoigberai Eboh, Nnaemeka-Agu, JJ.C.A. - Agbaje, J.C.A. dissenting)

2. HIGH COURT BENIN

**REPRESENTATION**

S. S. G. ENERMERL for Appellant.

M. S. OKEAYA-INNEH for Respondent.

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

REAL ESTATE AND PROPERTY LAW - LAND:- Title to land – Proof of under customary law – Bini landholding system – Essential principles

REAL ESTATE AND PROPERTY LAW - LAND:- Possessory title – Meaning – Whether defines Bini landholding interest – Whether Bini landholding practices is sui generis in a class of its own

CUSTOMARY LAW- Land holding rights under Bini customary law system – Proof of title by virtue of grant or inheritance – Role of the Oba of Benin – Other relevant considerations

CHILDREN AND WOMEN LAW: *Women and Real Estate/land –* Acquisition of property with disputed titles – *Women and Customary Law –* Customary law of inheritance and succession to property under Bini Customary Law – Implication for women landholding opportunities

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Supreme Court – Powers – When it can sit as a trial court

WORDS AND PHRASES:- “Possessory Rights” – Meaning

**MAIN JUDGMENT**

**IDIGBE, J.S.C.** (DELIVERING THE JUDGMENT OF THE COURT):

This is an appeal by the defendant, Madam Iserhienrhien Arase, from the judgment of the Federal Court of Appeal (Omoigberai Eboh, Nnaemeka-Agu, JJ.C.A. - Agbaje, J.C.A. dissenting) dated the 23rd day of January, 1979, which confirms the decision of Obaseki, J. (as he then was) of the 24th day of July, 1975 in a matter which ordinarily should present little or no difficulty but, as is usual with cases involving the customary law relating to land transfer in Benin, has become complicated by Bini native law and custom on the subject. These proceedings initiated by the respondent, the plaintiff Peter Uyi Arase, were commenced by a writ of summons of the 16th day of September, 1971 and the questions in dispute between the parties, really, are: which of them is entitled (1) to be declared ‘owner’ under the customary laws of the BIN people of the land and house thereon situated at 22 Ozah Street in Ward ‘C’ in Benin City? (2) to possession thereof and (3) which of them is deserving of an order restraining the other from entering the said premises?

The background to this unfortunate case and all the relevant facts appear to me to be sufficiently recounted in the lead judgment of Nnaemeka-Agu, J.C.A. In the Federal Court of Appeal - hereinafter referred to, simply, as ‘the Court of Appeal” - that I feel justified in making reference only to so much of the facts as I consider necessary, in my view, to throw sufficient light on the questions for determination in the appeal before us. The case of the respondent (plaintiff in the court of trial) is that he inherited the land in dispute in accordance with Bini native law and custom from his father, Uyi Arase. The appellant (defendant in the court of trial), claimed to have purchased the land from one Osazevbide (sometimes in these proceedings spell as Osazenwinde) Ediae hereafter referred to, simply, as “Ediae” - who himself inherited the land in dispute from his (Osazervbide’s) late father but who - according to the plaintiff was permitted by Chief Arase (the plaintiff’s father) to live on the said land in his capacity of servant of Chief Arase. Uyi Arase never made a grant of either the land or the house to Ediae: nor did Chief Arase make any to Osazevbide’s father. The house later became a subject of controversy between Uyi Arase (hereafter referred to as “Uyi’) and Ediae who claimed ownership of it; this gave rise to proceedings in the Benin City customary Court case No. 24/60 (Exhibit “C’ in these proceedings In which Uyi sought “an order of Court on defendant (Ediae) to quit plaintiff’s inherited land situated at Oza Street”). Following an order of retrial, made in pursuance of an appeal by Ediae from the decision given against him on the 5th day of July, 1960, in Exhibit “C”, the Benin City Customary Court on 22nd November, 1961, by Exhibit “L” in these proceedings, dismissed Uyi’s claim; he then applied for a “Review”, by the President of the Customary Courts, of the decision in Exhibit “L”. The President of the Customary Courts on 24th June, 1962, in a judgment (Exhibit “L” in these proceedings), refused to “interfere” with the judgment of the Benin City Customary Court in Exhibit “L”.

Before giving a summary of the case of the defendant (appellant herein) in the court of trial, I consider it necessary to refer to parts of the decision in Exhibit “M” as I am of the view that they are bound to throw considerable light on both the argument of counsel here, in this Court, as also on my judgment in this appeal. Part of the ratio of the decision of the learned President of the Customary Courts in Exhibit “M” reads:-

‘The trial court did not declare the defendant the owner of the plot in dispute. It carefully avoided making any finding of ownership but it found as a fact that defendant had lived on the land for 25 years since his father died... Since the plaintiff’s father put the defendant’s father in possession to live there .... as someone in need of accommodation it will be unreasonable to eject him or his descendants without good cause shown.... In the circumstances, I will not interfere with the judgment of the lower court.” [Italics ours]

On the 1st February, 1952, however, Ediae by Exhibit “G” in these proceedings applied to the Oba of Benin through the Ward G, plot (or land) Allotment Committee ‘for approval to survey the land” in dispute; and the Oba gave his approval and, accordingly, endorsed Exhibit “G” on 17th July, 1954. Pending the approval of the application in Exhibit “G”, Uyi sent a petition to the Benin City Council (Ikore-do) in which he opposed Ediae’s application. The Ikoredo resolved on 1st May, 1954, that the land in dispute to which Exhibit “G” refers is the property of the late Chief Arase the father of Uyi; and further that the property had been inherited by Uyi under Bini customary law. I pause to observe that there is no evidence that the resolution in Exhibit D was specifically brought to the notice of the Oba before he endorsed Exhibit “G”. However, on the 5th day of March, 1955, the respondent applied through the Chairman of the same Ward “G” Plot Allotment Committee by Exhibit “A” for approval to survey’ the plot in dispute which he described in that Exhibit as “remnant of his late father’s plot”, that is, the property of Chief Arase. The Committee recommended the application for the Oba’s approval with the following endorsements “recommended for approval on the face of the Ikoredo’s judgment of 1st May, 1954.” The Oba later endorsed his approval on Exhibit “A” on 3rd June, 1954.

While litigation between Uyi and Ediae, in respect of the plot in dispute raged in the courts (Exhibits “C” and “L” refer), the appellant negotiated with Ediae for purchase of the house on the said plot and paid £40 (N80.00) part of the total purchase price of £140 (N280.00) for the same on the 17th day of November, 1960. (Exhibit “H” (1) refers.) Exhibit “H” (1) dated 17th November, 1960 is titled “House Purchase Agreement” and it is significant that part of it reads: ‘The said house will be handed over to the purchaser [Madam I. Arase, that is, the appellant herein] after I [Osazevbide] finish my case” [Note: Square brackets and contents therein supplied by me for emphasis]. It was part of the respondent’s case that the appellant, when she bought the house on the land in dispute was aware of the court proceedings then pending in respect of the land in dispute and house thereon. After the court proceedings ended in November 1961, with the decision of the learned President of Customary Courts (Exhibit “M” refers), Uyi with whom Ediae had pleaded to be allowed to continue in occupation of the house allowed Ediae to remain; he however, did so unaware of the fact that Edlae - with whom the appellant lived in the said house - had “sold” the same to the appellant. Later, Ediae packed away from the house, but the appellant pleaded with Uyi, who agreed, that she be allowed to remain but to leave as soon as she could secure good accommodation elsewhere. Uyi died in 1967 and the respondent after inheriting the land in dispute under Bin! customary law, yielded to the plea of the appellant that she be given further time to look for alternative accommodation; the respondent then was still unaware of the secret sale transaction between Ediae and the respondent. I pause again to observe that on 16th October, 1962, the appellant while still living in the house and before the death of Uyi applied to the Ward “G” Plot Allotment Committee for approval ‘to survey a plot ... with a house at Oza Street ... No. 22 Ozah Street Benin City sold to me by Osazevbide Ediae”; this application was refused. When the respondent asked the appellant to vacate the premises she not only refused to do so but claimed the same; whereupon the respondent commenced these proceedings claiming:-

“(a) Declaration of Title to the land and house situate in Ward “G” at 22 Oza Street Benin...

(b) Recovery of possession of the said piece or parcel of land and house there-on...

(c) An order of perpetual injunction to restrain the defendant, her servants or agent from entering the said land and house ...”’

The case of the appellant, in the main, was that she purchased part of the property in dispute from Ediae on 17th November, 1960, for £40, (N80.00) and later on 9th January, 1971, she bought the balance, that is, the remaining portion of the property, and paid £100 (N200.00) being balance of the purchase money as agreed in Exhibit “H(1)”. She testified that she lived on the property and had, since the purchase of the property, erected three additional rooms to the house thereon; in addition she always paid water and development rates due on the property as well as the electricity bills due on the house thereon. She denied she asked, from the respondent, to be allowed to stay in the house.

The learned trial Judge in the court below after listening to the evidence and examining the exhibits in these proceedings entered judgment for the respondent in terms of his claims; on appeal by the appellant the said judgment was, as stated earlier, confirmed by the Court of Appeal. The appellant appeals from the said judgment of the Court of Appeal on three grounds; these read:-

“(1) The learned justices of appeal erred in their majority judgment aforesaid, when they dismissed the defendant appellant’s appeal and confirmed the decision of the lower court:

(a) when on the authorities of decided cases and the evidence before the lower court which was on record, the plaintiff respondent was not entitled to the reliefs sought and in particular, to a declaration of title to the land !n dispute; and

(b) when Exhibits “A” and “D”, the pivot of the plaintiff/respondent’s case which he relied on for proof of his title ... did not amount to a grant or evidence of a customary grant of the land by the Oba under Bini native laws and customs or otherwise constitute documents of title.

(2) The learned justices of appeal erred in law In their majority judgment implied revocation of Exhibit “G” by Exhibit “G” for reasons stated in the judgment when:

(i) these circumstances or reasons do not accord with the Bini customary law on the subject and in particular, as decided by the Supreme Court in the case of Okeaya Inneh vs. Aguebor (1970) 1 All N.L.R.

(ii) the resolution in Exhibit “D” being the resolution of a Native Council (i.e. the Benin City Council) and not the judgment of a court, has no operative effect either directly or indirectly on Exhibit “G”; the said Exhibit “D” is of no evidential value.

(3) The learned justices of appeal erred in law in their majority judgment in up-holding the decision of the lower court by granting the plaintiff/respondent possession against the defendant/appellant on the doctrine of nemo dat quod non habet, when the case or dispute is not between the defendant/appellant’s predecessor in title, the alienor, (who is not a party) and the plain-tiff/respondent.”

I think it is necessary, at this stage, to refer to the relevant findings of fact on which the learned trial Judge based his decision; and these are contained in that part of his judgment which reads:

“Having heard the evidence of the parties and their witnesses, I find as a fact that the defendant is in possession of the house and land in dispute (2) I also find that ... Ediae put her in possession in pursuance of a sale he made to her as far back as 17th November, 1960... (4) I find that the Benin Native Authority on 17th July, 1954, gave approval to... Edlae’s application Exhibit “G” dated 1st February, 1952, to survey the plot with a view to putting a new pattern of building. (5) This was on the recommendation of Ward “G.... dated 12th April, 1952, that there was no dispute of any kind. (6) I find as a fact that there was a dispute as to the ownership of the land at the time and that Chief Obayagbona and the others who signed the endorsement that there was no dispute of any kind were aware of that dispute. (7) I find as a fact that the plaintiff’s father brought this dispute by petition to the Benin City Council meeting by petition dated 14th July, 1952. (8) I find as a fact that Benin City Council met on the matter on 29th and 30th April, and 1st May, 1954, and passed the following resolution: [set out in Exhibit D] (9) I find as a fact that this decision was taken before the approval endorsed on ... Ediae’s and as such the endorsement was an error subsequently amended by the approval on Exhibit “A”, Uyi Arase’s application dated 5th March, 1955, on 3rd June, 1958. (10) I find as a fact that Ward “G” Council accepted the Benin City Council decision and acted on it when Exhibit “A” the application for survey of the plot by Arase was made to them. This application was subsequently refused by the Oba on 3rd June, 1958...’ [Italics supplied by me for emphasis]

Having made the foregoing observations and particularly those relating to Exhibit “G” and “A” the learned trial Judge continued in this vein:

“... It is to be observed that the approval given to Uyi Arase in Exhibit “A” amounts to a withdrawal of the approval given to Osazenwinde Ediae in Exhibit “G”. This is as a result of the decision of Ikoredo on the objection made by Uyi Arase. The Native Authority [of] the City Council is a body and where there are conflicting claims to right to survey it is entitled to determine the issue and choose the applicant for whom the survey should be done after hearing the parties. That is what it did and the Ward Council accepted the decision and acted on it ... (15) I find that the plaintiff is the eldest son of Uyi Arase and that Uyi Arase is dead. (16) I find that the plaintiff has performed the 1st and 2nd burial of his late father according to Benin custom. (17) I also find that the plaintiff has done the Ukomwen (elsewhere in these proceedings spelt Ukpomwen) of his late father and that title to his father’s properties including the land in dispute devolved on him on the completion of the 2nd burial ceremonies and Ukomwen. (18) I find as a fact that title to the land in dispute under Bini customary law has devolved on the plaintiff.” [Brackets and Italics by me.]

Now, the principal complaint of the appellant in the Court of Appeal and in this court is that the learned trial Judge misdirected himself in law when, without any evidence on the point or proof, he held that the approval given to Uyi Arase in Exhibit “A” amounts to a withdrawal of the approval given to Osazenwinde Edlae in Exhibit “G”. Learned counsel for the appellant contends that by the earlier approval of the allocation of the land in dispute to Ediae (Exhibit “G”) the Oba had divested himself of the legal estate in the land and he could no longer transfer any legal title to Uyi Arase by the purported subsequent ‘transfer-exercise” contained in Exhibit “A”. Learned counsel for the appellant further contends that there is no evidence in support of the finding of the learned trial Judge that a subsequent approval by the Oba of allocation to an individual made by a Plot Allotment Committee of a plot under its area of authority, but in respect of which there already exists an approval by the Oba of allocation to another, amounts to a “setting-aside” or “withdrawal” of the earlier approval; nor is there any evidence whatsoever as to the circumstances in which an “approval” given by the Oba could be withdrawn or set aside. Whereupon learned counsel submits that the issue was not one on which any inference should be drawn but one in respect of which there ought to be positive evidence.

Dealing with the foregoing submission their Lordships of the Court of Appeal in their majority judgment delivered by Nnaemeka-Agu, J.C.A. observed:

“It is conceded on both sides that there is unchallenged evidence that an approval once given can be set aside and subsequent application for approval entertained; 3rd P.W. Dickson Idiagbe, testified as follows:

‘If there is any decision from a competent body to set aside a prior approval the Ward can entertain a subsequent application.’

“It is noteworthy that this evidence says that it is a ‘competent body’ which will set aside a prior approval. He did not suggest who comprised the competent body nor is there evidence as to the manner of setting aside such approval.”

Their Lordships then referred to the observations made in respect of this issue by this court pursuant to the evidence given by an expert witness on the custom of Bin! people in the case of Okeaya Inneh vs. Aguebor (1970) 1 All N.L.R. 1 at pp.8-10; the most relevant portion thereof reads:-

“(1) an approval once given remains valid until set aside by the Oba of Benin when evidence is subsequently produced of a prior approval for the same land, the second approval being bona fide and in ignorance of the existence of an earlier one;

(2) it is contrary to Benin custom to set aside an earlier approval made in error upon an ex parte application by one of the affected parties. In other words, to set aside an approval made in error the two parties affected by the conflicting grants must be present before the Oba at the same time and his decision must be communicated to them after an open hearing at the Oba’s Palace. Such decision [by the Oba] must also be communicated to the Ward Allotment Committee from which the two conflicting recommendations had emanated...” [Italics added by me for emphasis].

Having referred to the above relevant custom of the Bini people their Lordships of the Court of Appeal made detailed observations on, as well as their deductions from, the evidence before the lower court on the priority of “approvals” by the Oba in respect of Exhibit “A” “D” and “G” under the customary laws of the Binis; and I think it is necessary to quote at length at this stage from the lead judgment to which the majority subscribed:

“Admittedly paragraph (1) envisages a hearing before the Oba himself; the issue of delegation of the hearing of the Ikoredo (Benin City Council) was not canvassed for the reason that its competence to hear and determine the issue was not raised on the pleading. The fact is that as the record of the relevant proceedings shows, both parties appeared before the Council - apparently willingly - to present their case, that the people of the relevant Ward appeared and testified on the issue as to who owned the plot, that the appropriate Ward Committee accepted the decision of the Ikoredo on the matter as final and binding, and (sic) that case of the customary courts before whom their decision on the matter came thereafter (Exhibit C, L, and M) (did not) indeed in any way question their competence to inquire into the matter, raised a strong probability that at the time of the inquiry and resolution in Exhibit D the Benin City Council (Ikore-do), and not the Oba in person, was the appropriate forum for resolving issues of conflicting claims to land in respect of which approval was granted by the Oba in Benin City. Since this appeared to be so, then as the recommendation to the Ward Plot Committee was, on the principles and procedure set out above, a necessary condition precedent to the Oba’s approval, it appears to us that in view of the Resolution Exhibit “D”... the recommendation of Exhibit “G”... of Osazenwinde Ediae’s predecessor-in-title for approval had been in effect set aside by Exhibit “D” (sic) before the Oba (read by the Oba who did not appear to have known about Exhibit “D” on 17th July, 1954) purported to approve it.” [Brackets and Italics supplied by me for emphasis.]

Having said this much their Lordships by way of alternative deduction continued thus:-

‘Alternatively, it may be said that when the Ward Plot Committee after the inquiry and the resolution in Exhibit “D” recommended Uyi Arase’s application, Exhibit “A”, ‘on the face of Ikoredo’s judgment of 1st May, 1954', that is Exhibit “D”, and the Oba endorsed his approval on the said recommendation, he impliedly set aside the earlier approval ...” (Italics mine)

There is no doubt that their Lordships of the Court of Appeal in that part of their majority judgment set out above and to the margin of which has been endorsed in capital the letters (Q2) and (R) confirm the views of the learned trial Judge in respect of the “conflicting approvals of the Oba” as expressed in “Item 9” of his findings of fact [as set out in the earlier quotation to the margin of which is endorsed in capital the letter (M)] and also in that part of his judgment set out earlier and to the margin of which has been endorsed in capital the letter (N). With the greatest respect to their Lordships of the Court of Appeal, I am unable to find anything from the recorded evidence in these proceedings either in support of the view expressed by them in that part of their judgment set out above and to the margin of which is endorsed the letter (O) to the effect that the facts before the trial court show (i) that the parties concerned with Exhibit “D” (i.e. Ediae and uyi Arase) appeared before the Ikoredo, (ii) that they each gave evidence before that body, (iii) that the people of the relevant Ward appeared and testified before that body in the presence of the parties concerned; or to justify the inference made by their Lordships that there is a strong ‘probability’ (a word which imports “speculation” on the part of their Lordships) that at the time of the inquiry and resolution, to which Exhibit “D” relates, the Benin City Council, that is, the Ikoredo, and not the Oba [and this part of their inference undoubtedly runs counter to the evidence of custom relevant on the issue as accepted by this court in Okeaya-Inneh v. Aguebor (Supra) - see (9170) 1 ALL N.L.R. 1 at pp. 9 - 10 paragraph (j) was the appropriate forum for resolving issues of claims to land involving conflicting approvals by the Oba. Further, in their majority judgment their Lordships of the Court of Appeal observed:-

“If it was the contention of the appellant that Ikoredo had no power to inquire into the issue of disputed lands in the wards in Benin City she ought to have raised the lack of jurisdiction in her statement of defence to have enabled the respondent call evidence on the point upon which the court below and this court could have decided on its jurisdiction or lack of it.”

Again, with every great respect to their Lordships of the Court of Appeal, it does appear to me that notwithstanding the manner in which learned counsel for the appellant has attacked Exhibit “D”, the real question here relates to the value, if any, of that exhibit; It is not one of res Judicata but that which relates to the precise position and powers of the Benin City Council, on the issue of recommendation to the Oba for his approval of plots allocated to individuals in Benin. It is a matter of customary law on which the lower court must receive evidence before taking a decision on the precise value and effect of the Resolution of the Ikoredo in Exhibit “D”. It is desirable that I should here, set out the Resolution in question (i.e. in Exhibit “D”); it reads:-

“Petition by Uyi Arase re plot dispute in Wand G..... Resolved: That in view of the evidence given by the Oza quarter people in favour of the petitioner Uyi Arase as the legitimate son and next of kin to late Chief Arase who was the rightful owner of the plot of land in dispute and to whom Ediae the father of Osazenwinde [hitherto in this judgment referred to simply as Ediae, that is, the father of the defendant in Exhibits C, L and M and through whom the appellant claims] the second party in the case was merely a step-son and could not inherit late Arase according to custom and also in view of the uncorroborated statement made by Osazenwinde, the plot in question is therefore adjudged to Uyi Arase for survey and building purpose... Sgd. OJo Igbinovia Chairman Sgd: Ewe-kaguosadoba Ag. City Council Clerk. Copy to Uyi Arase [Note: The resolution is not copied to Osazenwinde Ediae; the other party]” [Square brackets and contents supplied by me.]

As I have observed there is need to know what exactly is the position or power of the Ikoredo in relation to plot allocation. If as their Lordships stated they were unable to find any such powers in the statute which brought the Benin City Council into existence, and if their Lordships’ view that the power of Ikoredo to deal with allocation of plots stems from Bini customary law must prevail then that view has to be supported by evidence on the point. As a matter of law, the burden of adducing this evidence would appear to be on the respondent who seeks to rely on it and who will fail on the ground of priority of conflicting claims If no further evidence was received on the issue. [See: Sections 136(2) and 138 of the Evidence Law, Cap. Western Region applicable to Bendel State in these proceedings.] That apart, however, it is a vital issue on custom and in respect of which a court adjudicating on it must receive evidence. Here, I would gratefully adopt the observations of Mbanefo, F.J. (as he then was) on this issue in Agidigbi Uwagboe and others vs. Evhuomwan (1959) 4 F.S.C. 91 at 92, and particularly, on the powers, If any, of the Ikoredo (i.e. the Benin City Council) with regard to plot allocation under Bini customary law and the position of conflicting approvals by the Oba in respect of land allocated to individuals; said the learned Judge:-

‘The question then is which of this contention is right according to Benin customary law. Is the appellant correct [in] contending that there could be no proper approval by the Oba unless the application was recommended by the Ward Council. Where the Ward Council failed to recommend can the Benin City Council [i.e. the Ikoredo] on its own initiative make recommendations to the Oba? What is the effect of the Oba’s approval on the prior approval given by him to someone else do respect of the same plot? What are the respective powers, if any of the Ward Council and of the Benin City Council with regard to allocation of plots under Benin customary law, or if both were the creation of statutes under the statutes creating them? What standing, if any, has the Benin City Council [i.e. the Ikoredo] in this matter? For a proper decision of this it is essential that these questions should be clearly investigated and answered. The learned trial Judge has not done that... I feel that in as much as these issues were not investigated the case should be remitted back for a new trial as they are in my view vital to a decision of the real issues in this case.” [Square brackets and contents therein supplied by me.]

Now, on this very important issue there is no evidence whatsoever as to the kind of body the “Ikoredo” (i.e. the Benin City Council) is or, what powers, if any, it has under statute or customary laws; nor is there any evidence whatsoever on the position under Bini customary law of conflicting approvals by the Oba in respect of the same parcel of land. The only testimony which has a very remote but certainly imprecise bearing on this matter was ferretted in cross-examination from the third witness for the respondent Dickson Idiaghe who said:-

“If there is any decision from a competent body setting aside a prior approval the Ward can entertain a subsequent application.” [Italics by me.]

No attempt was made in the lower court to improve on this evidence. There is no evidence as to what exactly is a “competent body’ or what it comprises or consists of, under Bini customary law and/or whether it has powers to set aside a prior approval; nor is there evidence as to whether it is the Plot Allotment Committee for the Ward concerned or the Ward itself that may, in circumstances stated in the evidence of Dickson Idiaghe, entertain a subsequent application in respect of a plot in the Ward; and if it is the latter (i.e. the Ward itself) and not the Allotment Committee, there is no evidence as to how exactly such an imprecise body is to operate or discharge this particular duty under customary law. It follows from the foregoing observations, therefore that the Court of Appeal must, in my respectful view, be wrong in their view that Exhibit “G” was set aside by Exhibit “A”.

Now, a curious aspect of the case of the parties in these proceedings is that each of them rely on the documentary approval by the Oba of Benin to the applications for survey of the land in dispute by their respective predecessors-in-title as evidence of a grant of the said land by the Oba to their respective predecessors-in-title; these documents in question are Exhibits “A” and “G” and respectively they read:

Exhibit A dated 5th March, 1955:

“ ... I have the honour most respectfully to apply for your kind approval to survey the remnant of my late father’s, Chief Arase’s plot situated at Oza Street In your Ward ....

Your obedient servant Uyi Arase.

Recommended for approval on the face of Idoredo’s judgment dated 1 at May, 1954.

Sgd: Chairman 28th April, 1958

Approved 3rd June, 1958" [Italics supplied by me for emphasis].

Exhibit “G” dated 1st February, 1952:

“ ... I beg for approval and survey of a plot situate at Ward “G” Ozah Street, having boundary with Mr. Imasogle. The area of the plot is ... with an existing ancient building ... of my late father Edlae of Ozah Street ... As I now wish to put a new pattern building on the site in this current year, I shall be extremely grateful if this ... application could be considered ...

Your obedient servant, Osazevbide Ediae.

Recommended for your approval as there is no dispute of any kind.

Sgd ............

Chairman .........

17th July, 1954" [Italics supplied by me for emphasis].

In both the trial court and the Court of Appeal, Exhibits “A” and “G” were each treated as “a grant” from the Oba; however, I must hasten to add that Ganiyu Agbaje, J.C.A. in his dissenting judgment was of the firm view that neither document can in law, be correctly regarded as a grant. I must say that given the latitude of a close and careful study of the words of the said document, there is very strong temptation for me to associate myself with the views of their Lordships in the Court of Appeal and the trial court and, therefore, to regard each of them as “an approval of an application for land already in the possession of the predecessor-in-title” of each of the applicant concerned with these exhibits, and consequently to regard each of these documents as a grant or evidence thereof. The issue, however, is not res integra and in the words of Lawton, L.J. in Lim vs Camden Health Authority (1979) 1 Q.B. 196 at 221. “I have to remind myself that like the centurion at Capernaum, I am a man under authority - that of decided cases” which, although not binding on this court at all event [as they were in the situation with which Lawton, L. J. found himself in the case of Camden Health Authority (Supra)], certainly ought not to be so easily and readily departed from. This issue came up before this court and was thoroughly considered in Okeaya - Inneh vs. Aguebor (1970) 1 All N.L.R. 1; It was in respect of a document very similarly worded as Exhibits “G” and “A”, to wit: application ‘for approval to erect a residential building on my plot measuring ........ and situate at ...........:’ In that case, My brother, Udo Udoma, J.S.C. delivering the judgment of this court with which Coker, J.S.C. and Fatal-Williams, J.S.C. (as he then was) concurred, observed:-

“... Her application, exhibit “B”, upon which she placed much reliance is not of any assistance to her for the purpose of acquiring land under Bini customary law. Exhibit “B” on the face of it is an application for an approval to erect a building upon a piece of land already acquired. It is not one seeking the Oba’s approval for the acquisition of land.

On the face of the application exhibit.”B”, there. couldnot have been any. grant of land by the Oba of Benin to the respondent, nor would any approval by the Oba be regarded as related to any such grant ... We are satisfied that on the evidence ... it was not proved that there was any grant of land made to the respondent by the Oba of Benin in accordance with the Bini customary law ..:’ [See Oksaya-Inneh vs. Aguebor (Supra) at 11 and 12: [Italics supplied by me].

Having said this much, I think it is now desirable to consider whether the respondent has in any way proved his case and, whether it was, indeed, right for the trial court to have given judgment in terms of his claims. Nowhere in his statement of claim in these proceedings did the respondent plead that his predecessor-in-title had a grant from the Oba, nor did he state how his predecessor-in-title came on the land. The most relevant paragraphs of his statement of claim on this vital issue are 4, 5, 6 and these read:-

(4) The plaintiff avers and will establish at the trial that the said property shown in pink in the said survey plan was inherited by him in accordance with Bini native law and custom.

(5) The plaintiff will at the trial adduce the customary evidence of inheritance and title to the said house and land and will rely on same too.

(6) The plaintiff will in further support of his title to the said property rely on the following documents relating to the said property at the trial.

(a) A customary grant or approval dated 5th March, 1955 and approved on 3rd June, 1958 by the Akenzua 11... Oba of Benin, the traditional trustee of all land in Benin City [Note: This is one of the Exhibits which I discussed in the earlier paragraph - Exhibit “A”; which was said by both the trial court and the Court of Appeal to have “set aside” an earlier approval Exhibit “G”].

(b) The Benin City Council Resolution dated 29-30th April and 1st May, 1954, in connection with the said property.

(c) A certified true copy of the court proceedings and judgment in the Benin Customary Court case No. 24/60 between Uyi Arase vs. Osazovbide Ediae.” [Square brackets and contents supplied by me.]

It is now settled by decided cases that “basically all land in Benin is owned by the Community for whom the Oba of Benin holds the same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land........” [See Add Gold v. Beatrice Osaseren (1970) 1 All N.LR. 125 at 132; Okeaya - Inneh v. Aguebor (1970) 1 All N.L.R. 1 at 8 and 9; Aigbe v. Edokpolo (1977) 2 S.C.1. I have already stated that neither Exhibit “A” nor “G” is a grant from the Oba of Benin; consequently the question whether the one was effectively set aside by the other appears to me to be irrelevant to the principal issue, that is, which of the predecessors-in-title of the parties to these proceedings was placed on the land by the Oba. The procedure for obtaining land in Benin from the Oba was considered by me in Atiti Gold vs. Beatrice Osaseren in B/14A/65 decided on 21st January, 1967, and was approved by this court in Add Gold v. Osaseren (1970) 1 All N.L.R. at 132, 134; see also on this point Kayode Eso, J.S.C. in Vincent Bello vs. Magnus Eweka S.C. 90 of 1979 decided on 30th January, 1981. The said procedure was also considered in Okeaya - Inneh vs. Aguebor (Supra) at pp. 8, 9 and 10. It is clear from all these cases that in proving title under Bini customary law title is not always established merely by production of a document to which the Oba’s approval has been endorsed, and this is particularly so where, as here, each of the parties can produce such a document, one of which even bears an earlier date of approval. For as was stated by Coker, J.S.C. In Atiti Gold vs. Beatrice Osaseren (Supra) at 134:

“ ... The question at all times was which of the parties had made a good title to the land and certainly not which of them first obtained the Oba’s approval which, according to the evidence again rightly accepted by the learned Chief Justice, was but a single though culminating step in a whole chain of events and conditions to be strictly fulfilled by a prospective purchaser” [and I would respectfully add that the production of the Oba’s approval sometimes and more so in cases of competing approvals by the Oba in respect of the same land, is only one of many steps though a culminating step in proof of title to the said land].

It seems clear from decided cases that the system of allocation of lands in Benin City by the Oba through Ward - Plot All otment Committees is considerably recent. Cases abound which show that allocation by the Oba through the agency of Ward Councils began in the early fifties; and that allocation through the Plot Allotment Committees began in the early sixties [in respect of the latter agency - see Okeaya - Inneh v. Aguebor (Supra) at pp. 8-9]. Obviously, there is bound to be difficulty of proof in relation to allocation of plots prior to the fifties and in respect of which there has been no documentation or record of any kind. It seems to me that in respect of such situations parties to the case must rely on other evidence, in proof of their title to land in Benin Urban, than a grant thereof from the Oba. Bearing this in mind, I now turn to consider how the learned trial Judge dealt with this aspect of the case. Firstly, he took the view, which, with very great respect to him, I have shown to be in error, that Exhibit “A” set aside the grant in Exhibit “G”. There-after, he arrived at the following findings of fact, viz:- that (a) the plaintiff (i.e. respondent) is the eldest son of Uyi Arase; (b) he has performed the burial ceremonies of his father; (c) title to his father’s property including the land in dispute devolved on him on completion of the burial ceremonies and; (d) title to the land in dispute under Benin customary law has devolved on the plaintiff. Later, in the judgment I will say more with regard to items (c) and (d) of the said findings of the learned trial Judge. Secondly, having made these findings, the learned trial Judge made considerable use of Exhibit “A” and the findings of the Benin City Council (the Ikoredo) in Exhibit “D” and came to the conclusion that the predecessor-in-title of the respondent was properly or lawfully on the land. In upholding the judgment of the trial court the Court of Appeal reasoned very much in the same manner relying on Exhibits “A” and “D” and on the findings in the latter.

As I already stated Exhibit “A” is not a grant and cannot properly be regarded as having superseded Exhibit “G” which de facto is an earlier document albeit, for reasons already stated, also not a grant from the Oba. Again, there is no evidence that the parties hereto were present at the hearing by the Ikoredo which resulted in the resolution in Exhibit “D”; and while that resolution is, ex facie, copied to Uyi Arase the predecessor-in-title to the respondent, there is no indication that it was ever copied to Ediae, the predecessor-in- title to the appellant. In the circumstances, I respectfully incline to the view that it was wrong for the courts below to rely on these documents in the way they did. I am, therefore, firmly of the view that the submissions of learned counsel in respect of grounds (1) (b), 2 (1) are correct. I am also of the opinion that with regard to ground 2 (ii) I will be content to say that for the reasons stated in this judgment regarding the document Exhibit “D”, that document (Exh.D) has no evidential value. I make no pronouncement on the argument relative to the value of that document as a plank on which to rest a defence, or support a plea, of estoppel per rem judicatam.

Having expressed my view on Exhibits “D” and “A” as I have done in the preceding paragraph I do not consider that the matter should rest there. It, therefore behoves me to consider the remaining two grounds, that is (1) (a) and (3). Ground (1) (a), in effect, complains that there is not enough evidence on which to support an award of declaration in terms of the writ and that on the authority of decided cases it was wrong for the trial court to make such an award, and that the Court of Appeal erred in law in sustaining the same. An important aspect of the evidence relating to the Bini customary law of inheritance which was received in these proceedings is to this effect: the eldest son of a deceased person does not inherit the deceased’s property until after the completion of the “second” or secondary burial ceremonies that Is, funeral obsequies. The completion is marked by a ceremony by members of the family called “Ukpomwan”; this ceremony is performed by the members of the deceased’s family for the eldest son at the latter’s request. It is only after this ceremony of Ukpomwan that the family distributes the property of the deceased. Upon “distribution”, all property of the father that is, all the property owned by the deceased, “automatically’ become that of the eldest son. Some of the personal effects are distributable to the other children but that only takes place after the principal personal effects have been given to the eldest son. The principal house in which the deceased lived in his lifetime and died is called “the Igiegbe”; that always passes by way of Inheritance on distribution to the eldest son. However, until the exercise of distribution under customary law has been performed, the eldest son retains all the property of the deceased in trust for him-self and the children of the deceased. [See the evidence of Eligiate Ogagun P.W.3.] Although the eldest son (i.e. the respondent herein) claimed in his evidence that on completion of the father’s second burial ceremonies, there was distribution of the property and he was given the land and property in dispute (according to him, the distribution of property took place on 14th May, 1947), his second witness (P.W. 2 Michael Osagie) said in evidence that up till the time he gave evidence there has been no distribution of the property of the deceased.

Now, the evidence of Michael Osagie is undoubtedly in conflict with that of the respondent on a most material issue; and there is nothing in the judgment of the trial court to show that that court adverted to this contradiction much less which of the contradictory evidence was preferred or accepted; and it is not within the province of any other court to decide on this issue, that is, of preference. That being the true position it seems to me that If there is enough evidence to warrant the conclusion that the land and property in dispute belonged to Uyi Arase in his lifetime, then on the evidence accepted by the trial court (i.e. that the second burial ceremonies had been performed and that the respondent is the eldest son of Uyi Arase) under Bini customary law, the property in dispute as well as all other property of the deceased is, at best, currently being held by the respondent in trust for himself and the children of his father. And this takes me to the next question which is whether there is enough evidence to support the finding of the trial court that the land and property in dispute belongs to the respondent? This question really is, which of the predecessors-in-title to the parties to these proceedings, on the preponderance of the evidence recorded, is the owner of the land and property in dispute?

The system of proper recording or documentation of plot allocation in Benin City by the Oba through the agency of Ward Councils and, latterly, Plot Allotment Committees came into operation in very recent years - about early 1950; the precise point in time in which it began has, as far as I know, never been the subject of judicial comment. However, prior to this era (i.e. 1950) there were always transfers and allocations of plots in Benin City by the Oba through his authorised agents, and like every other issue in judicial proceedings, proof of such allocations or transfers made in very early times by the Oba must be by the best available evidence other than (or, not necessarily) documentary grants or approvals. On that basis, therefore, I observe upon a close examination of the Exhibits in these proceedings, particularly Exhibit “N” -which, incidentally, was received in evidence at the instance of the appellant - that the learned President of the Customary Courts, Benin City who reviewed the judgment in Exhibit “L”, after reading through the proceedings in Exhibit “L” and hearing the parties in the same proceedings, found as a fact: that it was the “plaintiff’s father’ (i.e. Uyi Areas’s father - the grand-father of the respondent) “who placed the defendant’s father’ (i.e. the father of Osazenwinde Ediae - the father of the appellant’s vendor) “in possession of the house on the land to live there ... as one in need of accommodation; and for that reason it would be unreasonable to elect Osazenwinde Ediae or his descendants without good cause shown ... If there is anyone who could have ejected the defendant” - the learned President went on in Exhibit “M” -”it is the plaintiffs senior brother [i.e. Uyi Arase’s senior brother] who claimed to have inherited the father’s houses.” The underlined passage in the judgment is, to my mind, the true ratio of the decision in Exhibit “M” which (exhibit) incidentally is the main plank of the appellant’s defence in these proceedings. That decision was given as far back as 1962 and there has been no appeal from it. In other words the appellant for over twelve years felt content with the view expressed by the learned President in the underlined portion of the decision in Exhibit “M”. Having said this much, I bear in mind that the learned trial Judge preferred the respondent’s case to that of the appellant and I can find nothing on the record which leads me to the conclusion that he was wrong in so doing. I also bear in mind that the learned trial Judge, quite rightly in my view, found as a fact that “the defendant (i.e. the appellant) bought the land from Osazevbide Ediae a tenant who was not granted possessory title but lived on the land by virtue of the occupational rights granted by plaintiff’s father (i.e. respondent’s predecessor-in-title) to his (Osazevbide Ediae’s) father.” I am satisfied that there is, in the circumstances, enough evidence on record to justify the conclusion that as between the parties to these proceedings the land in dispute and property thereon belonged to the predecessor-in-title of the respondent.

The next relevant question is whether on the evidence before him it was right for the learned trial Judge to make a declaratory award to the respondent in terms of the claims on his writ? I am clearly of the view that the answer to this question must be in the negative. In the first place I am unable to subscribe to the finding of fact by the learned trial Judge that “title to the land in dispute under Benin customary law has devolved on the plaintiff” i.e. the respondent).

This finding cannot possibly bear examination in the light of the evidence of Michael Osagie P.W.2 and Dickson Idiaghe P.W.3 to which I referred earlier; and as I said before the evidence on record, at best, support the view that the respondent now holds in trust for himself and the children of his father (the deceased) the land in dispute and property thereon. Learned counsel for the appellant has, indeed, strenuously put forward a sustained and in many ways persuasive argument to the effect that since (1) the claims on the writ were not made on behalf of the respondent and members of the deceased family and, (2) there is no evidence that the land in dispute and the property is, under Bini customary law, the “Igiegbe” of the late Uyi Arase, the claims should be dismissed. With respect to him, I am unable to accede to these submissions; the contentions based thereon seem to me, really, to look away from the practical realities of the facts on record in these proceedings. The principal questions for decision in this case concern the immediate parties thereto and the main point in the first contention relates to issue of representation of the respondent’s privies. In other words, had this claim been made in a representative capacity an award of declaration of title to the property concerned in such capacity, cannot on the available evidence, in my view, be faulted. This court is empowered, in circumstances, where the justice of the case demands it to “amend any defect or error in the record of appeal..:’ and generally it has ‘full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the Supreme Court...” (See section 22 of the Supreme Court Act 1960). I incline, therefore, to the view taken, in a similar situation, by the West African Court of Appeal in Divisional Chief Gbogbolulu of Vakpo vs. Head Chief Hodo (1941) 7 W.A.C.A. 164, and will amend the award by the trial court, in this case, to reflect the interest of the privies of the respondent as the evidence on record truly justifies, that is, an award of title to the respondent and members of the family of the late Uyi Arase. I did so also in a similar situation in 1961; [see lro Ezera vs. lyima Ndukwe (1961) All N.L.R. 564 at 570] Therefore, after I shall have expressed my view on the second contention of learned counsel for the appellant with respect to the “Igiegbe” issue, I propose to frame an appropriate award.

I now come to deal with the issue relating to the “Igiegbe”. The sum of the contention of learned counsel for the appellant on this Issue, is that since there is no evidence that the land and property in dispute is that in which the deceased, Uyi Arase, lived and died, and since further, there is no evidence that the property of the deceased will ever be distributed or as to how soon it will be distributed, it will be wrong to make an award of the property in dispute to the respondent qua respondent; for all we know, it is possible that the property may, in the end, be “distributed” to a member of the family other than the respondent. The short answer to this contention is that the essence of an award in favour of the respondent is that as between the appellant and the respondent the former will as from the date of such award be forever shut-out from making any further claims to this land and property; it will forever be determined that she has no right whatsoever to the property. The other issue really relates to what the individual rights of the members of the family of Uyi Arase may be later on and which of them may, in the end, be considered the right person to inherit the “Igiegbe” which may or may not turn out to be the land and property in dispute? The answer, in my view - in the words of Graham Paul, C.J. in the well known Sapele Land Case [Chief Ayomano and Edwin Omarin vs. Olu Ginuwa 11 (1943) 9 W.AC.A. 85 at 91 ] - is, ‘that is a matter for the clan” (and here, substitute for the word ‘clan” the Uyl Arase family”)”to settle among themselves.” On the issue whether the respondent is entitled to an order for possession and also an injunction restraining the appellant from entering the land in dispute, I am in agreement with the order made by the learned trial Judge and his reasons therefore. The appellant paid money to Ediae for this property well knowing that there was a case pending in court between the parties in respect of it.

In the penultimate paragraph of their judgment their Lordships of the Court of Appeal observed:

“All the grounds of appeal argued before us having failed, we dismiss the appeal and confirm the judgment of the High Court in Suit B/85/71... subject only to an amendment of the first head of the claim and statement of claim to a declaration of possessory title.” [Italics by me.]

Earlier their Lordships observed:-

‘This is a very strong piece of evidence coming from the defendant and sup-porting the plaintiff’s case; and that coupled with the other findings we have referred to the plaintiff is at least entitled to a declaration of possessory title ... We are satisfied that the learned judge was entitled to take Exhibit “M” into account and that the plaintiff is entitled as against the defendant, on a totality of the evidence, to a declaration of possessory tide. [Italics by me.]

In this court, and as appears from his written brief, learned counsel for the respondent has prayed in aid of the award of “possessory title” the decision of the Federal Supreme Court in Agidigbi Uwagboe vs. Evhuomwan (1959) 4 F.S.C. 91. There is, I think, a misunderstanding of the statement of Mbanefo F.J. (as he then was) in that case; and since that decision there is a tendency on the part of some members of the lower Bench and as well as counsel to regard the nature of tenure of, or title to, land under Bini customary law as “Possessory Title”. Personally, I do not consider it correct to hold that title to land under Bini customary law is “possessory title”; and certainly not in the sense in which the term is used and understood in the English legal system; nor do I regard the statement of Mbanefo, F. J. in Agidigbi (Supra) as justification for such a view. That statement in my view, must be read with the understanding that parties to the case made a concession which ought to be confined to the facts of that case; Mbanefo, F. J. said:-

“it is common ground, as the learned Judge [i.e. in the court below] found that there is no individual ownership of land in Benin; all Benin lands are vested in the Oba and the people. The declaration which the respondent seeks, there-fore, is no more than for a possessory title ..:’ [Italics square brackets and contents therein supplied by me. See Agidigbi (Supra) at 91 ].

I pause to observe that this part of the decision in Agidigbi (Supra) is, in my view, obiter. In a case which came before this court in 1969, this court took the view that the question whether tenure under Bini customary law involves “possessory title” is one in which evidence must be received. [See Adegboyega and others vs. Ighinosun and other (Registered Trustees of the Apostolic Church Benin City) (1969) 1 All N.L.R. 1 at 10]. “Possessory Title” stems from adverse possession and effluxion of time under the Limitation Law or Act; and it is basically a squatter’s title. Stroud’s Judicial Dictionary dealing with this subject states: “A possessory title to land might perhaps be defined as a title undefended by muniments and the holder of which had only undisturbed and unqualified length of possession on which to rely.” [Stroud’s op cit. 4th Edition, Vol.4 p.2068.] In Jowitt’s Dictionary of English Law [2nd Edition Volume 2], possessory title is defined as: “a squatter’s title...; the title acquired by occupying land for twelve years without paying rent or otherwise acknowledging the title of the true owner’ [Jowitt’s Dictionary op. cit p.1390]. It seems clear to me that title under Bini customary law is certainly much more than possessory title; nor is it founded on adverse possession. It is certainly not a freehold because the owners right of transfer of his interest therein is subject to this limitation that he must obtain the consent of the Oba; yet, it is not a leasehold. Tenure or Title under Bini customary law is, in my respectful view, sui generis; and hence I take the view that a claim for title to land based on Bini customary law and, ex hypothesi, an award therefore ought to be ‘for a declaration of title under Bini customary law.”

My Learned Brothers, the result then is that this appeal will, for the reasons given in this judgment, be dismissed but the terms of the award by the trial court will be amended to read:

‘The plaintiff Peter Uyi is hereby awarded:

(a) as trustee for and on behalf of members of the Uyi Arase family a declaration of title, under Bini Customary Law, to the land and property together with the house thereon lying and situate at Ward G in Benin City and known as No. 22 Oza Street In Benin shown verged pink on Survey Plan No. OM3616 prepared by Obediah E. Omoregie, licensed surveyor dated 8th October, 1971, and countersigned by the Surveyor General of Midwestern Nigeria as No. 115/1613 on 18th October, 1971, evidence in these proceedings as Exhibit B.

(b) It is hereby ordered that the plaintiff may recover possession of the land and property described in (a) above for the Uyi Arase family as trustee thereof; and

(c) It is hereby ordered that the defendant be and is hereby restrained from entering the land and property described in (a) above.”

It is further ordered that this shall be the judgment of the High Court Benin in Suit B/85/71. The respondent shall have costs in this court assessed at N320.00, whereof N20.00 represents out of pocket expenses.

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

I have read with admiration the judgment (in draft) of my noble brother Idigbe. He had reviewed some of the cases which deal with Benin Customary law on Land. I had thought that there had been series of judgments of this Court affecting land in Benin and the views of this Court on the Customary Law applicable. In the olden times, the Oba of Benin used to grant land himself directly. Later on a new system was devised by which application for grant of land is usually submitted through either the Benin City Council or the Ward Allotment Committee for submission for approval by the Oba. In order to avoid disputes the Ward Allotment Committee usually send representatives to inspect the land, and if it is free of disputes, beacons are put on the land. This I think should have happened in this case but surprisingly, no grant of land was asked for by either parties but instead, applications submitted were for survey and erection of building. I am quite satisfied that some time in the past the land had been granted to the Uyi Arasi family. Succession to land and building in Benin had been through family to succeeding family. In distribution, the eldest son succeeds to the house and premises of the head of the family.

With regard to the judgment of the Court of Appeal however, I wish to draw attention to that portion of the dissenting judgment of Agbaje, J.C.A. which was to the effect that no grant was made to either parties in the appeal before them.

I agree with the judgment of my brother Idigbe, J.S.C. and the amended order suggested by him. I also agree with his award of costs. I will order a dismissal of the appeal.

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

I have earlier read the judgment just delivered by my brother, Idigbe, J.S.C. All the authorities relevant to land tenure law and custom in Benin City painstakingly reviewed by my learned brother make it dear that the Oba of Benin is the fountain from which all titles to ownership of land in Benin City flow. I agree with the conclusion reached by my learned brother that neither party, in the case on appeal in these proceedings, proved a direct grant by the Oba to the party or his or her predecessor. In my view it would not be doing justice to dismiss the claim of the plaintiff simply because he has failed to prove a grant when there is other evidence, i.e. descent of the land to him through inheritance, supporting his claim. Such a course would cause great hardship to grantees to whom successive Obas had made grants since time immemorial but who, because of the passage of time and the absence of documentary evidence, would not be able to prove such grants.

It ought to be borne in mind always that at common law, where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B, he (party A) is entitled to succeed: per Lord Diplock in Ocean Estates Ltd. v. Norman Pinder (1969) 2 A.C. 19 at 24-25 and cited in Anukand v. Ekwonyeaso (1980) 1 L.R.N. 346 at 351. By virtue of the provisions of section 14 of the High Court Law, Cap. 65, 1976 Laws of the Bendel State of Nigeria, Vol.lll p.1670, the High Court of Bendel State is empowered to enforce this rule of the common law. I am satisfied that the Respondent proved a better title than the Appellant.

Accordingly, ’I agree that the appeal should be dismissed. I also agree with all the orders made by my learned brother, Idigbe, J.S.C.

**NNAMANI, J.S.C.:**

I had the advantage of reading in draft the judgment just delivered by my learned brother, Idigbe, J.S.C. I entirely agree with the reasoning and the conclusions therein. All the issues raised before us in this appeal have, in my view, been exhaustively dealt with in the said judgment. The appeal ought to fail. I would therefore also dismiss it. I agree with all the orders made by my brother, Idigbe, J.S.C.

**UWAIS, J.S.C.:**

I have had the opportunity of reading in draft the judgment read by my learned brother Idigbe, J.S.C. I agree with the reasons he gave for dismissing the appeal and I have nothing to add. I also agree with the suggested amendment to the terms of the award made by the trial court.

I shall therefore dismiss the appeal with costs to the respondent assessed at **~~N~~**320.00.

Appeal dismissed.