**CHIEF TITUS ANAMASONYE ONWUGBELU**

**V.**

**MR. EJIOFOR EZEBUO AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 21ST DAY OF FEBRUARY, 2013

CA/E/56/2009

**LEX (2013) - CA/E/56/2009**

OTHER CITATIONS

2PLR/2013/38  
 (2013) LPELR-20401(CA)

**BEFORE THEIR LORDSHIPS**

MOJEED ADEKUNLE OWOADE, J.C.A

ISAIAH OLUFEMI AKEJU, J.C.A

EMMANUEL AKOMAYE AGIM, J.C.A

**BETWEEN**

CHIEF TITUS ANAMASONYE ONWUGBELU - Appellant(s)

AND

1. MR. EJIOFOR EZEBUO

2. MR. JOHNBOSCO OHAELI

3. ODIONYE OHAFUGWO

4. MR. CHUKWUDI ODIONYE - Respondent(s)

**ORIGINATING STATE**

ANAMBRA STATE HIGH COURT

**REPRESENTATION**

O.R. ULASI (SAN) - For Appellant

AND

I. I. ONYIUKE - For Respondent

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

REAL ESTATE AND PROPERTY LAW – LAND **-** FAMILY LAND**:** Inherent right of every member of a family to be allotted part of family land for residence or farming to support himself and his immediate family – Basis – Nature of as a right of occupancy he can legally enforce against the family head or any member of the family that is unlawfully depriving him thereof – Whether a non member of a family does not have and cannot therefore exercise such a right

REAL ESTATE AND PROPERTY LAW – LAND - FAMILY LAW:- Family land and exercise of acts of ownership over same - Whether non-members can exercise any right over family land - Whether mere possession of land belonging to another for a long time can confer a prescriptive title

REAL ESTATE AND PROPERTY LAW – LAND:- Ownership and acts of ownership distinguished – Whether one cannot really talk of acts of ownership without first establishing that ownership - Where a party's root of title is pleaded a grant, or a sale or conquest etc – Need for that root to be established first before any consequential acts following therefrom can then properly qualify as acts of ownership

REAL ESTATE AND PROPERTY LAW – LAND- OWNERSHIP OF LAND AND TRESPASS:- Title to land - Where the title pleaded has not been proved - Whether unnecessary to consider acts of possession as they become no longer acts of possession but acts of trespass

REAL ESTATE AND PROPERTY LAW – LAND- TITLE TO LAND BY PRESCRIPTIVE RIGHT:-General Rule that long possession cannot ripen into ownership of land under customary tenancy - Mere possession of land belonging to another for however long a time cannot confer a prescriptive title – Whether proof of having built houses on the land and lived thereon for years cannot help a party to attract the equitable intervention of court to moderate or modify the application of the rule – Relevant considerations

REAL ESTATE AND PROPERTY LAW – LAND - DAMAGES:- General damages- Special damages- Need for a claim for special damages to be specifically or specially pleaded - Whether an appellate Court can interfere with an award of special damages by a trial Court where the award is not supported by any evidence proving the claim for special damages

TORT AND PERSONAL INJURIES - TRESPASS:– How proved – Rule that wrongful possession of customary law no matter how long is still a trespass and cannot give rise to a prescriptive title - Situations where a loss, though the actual and unexpected result of a trespass, is incapable of exact quantification – Whether general damages can be claimed, and if claimed, awarded – Basis – Rule that it will be unjust not to compensate a victim of such loss with general damages merely because the value of the loss is incapable of exact quantification

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PLEADINGS:- Principle that pleadings do not constitute evidence and that unless admitted expressly or by implication, the facts pleaded themselves cannot be regarded as proven and so will require evidence to prove them – Implication for claim of special damages – Whether pleadings of fact with regard to a claim for special damages can found the claims sought - Need for the particulars of items claimed and their exact value must be proven by evidence – Effect of failure thereto

APPEAL- FRESH ISSUE:- Need for leave to raise fresh issue

COURT - DUTY OF COURT:-Duty of court in evaluating evidence before it - Need to refer to all evidence, consider them and if it decides not to rely on any evidence, state so expressly and explain the reason therefore – Whether to simply ignore evidence for any reason cannot be justified in law

EVIDENCE - DUTY OF COURT:- Evidence not evaluated by trial court - Proof that it is legally inadmissible and irrelevant – Whether important in determining whether the error in ignoring it is substantial or has caused a miscarriage of Justice

EVIDENCE – PLEADINGS:- Whether constitute evidence - Effects of unpleaded facts

EVIDENCE:- Burden of proof in civil proceedings – How discharged - Section 133(1) of the Evidence Act 2011

EVIDENCE - ADMISSIBILITY OF HEARSAY EVIDENCE:- Whether hearsay evidence is admissible to prove the truth of its content - Sections 37 and 38 of the 2011 Evidence Act – Whether the Evidence Act provides for the situations where such statement can be admitted

EVIDENCE - ORAL ACCOUNT OF THE CONTENT OF DOCUMENT:Admissibility - Whether oral accounts of such facts can be admitted in evidence when it has not been shown that such documents are missing or destroyed – Combined effect of Section 125, S.87(e), S.89(c) and S.90(1)(a) of the Evidence Act, 2011 – How treated

EVIDENCE - ADMITTED FACT**:** When a fact is deemed admitted – Whether extends to neither specifically denying nor denying by implication having regard to other facts averred in the pleadings

EVIDENCE - EVALUATION OF EVIDENCE:- Meaning - Where the trial court has properly evaluated the evidence and reached conclusions or decisions justified by the evidence - Whether an appellate Court has no power to interfere with the conclusions or decisions resulting from such evaluation - Where the trial Court fails to evaluate the evidence before it or does so improperly – Whether appellate Court can intervene and itself evaluate or re-evaluate such evidence

EVIDENCE - UNPLEADED FACT:- Evidence of unpleaded facts - Whether not admissible and if admitted is not worthy of consideration by the trial court as it goes to no issue

PLEADINGS - DAMAGES - SPECIAL DAMAGES AND GENERAL DAMAGES:- Nature of – Distinction - Need for a claim for special damages to be specifically or specially pleaded and strictly proved – Basis of General damages as loss that is the natural or probable result or that can be assumed as likely in the usual course of things to result from such wrongful act complained of and thus do not require to be specifically pleaded and strictly proved

**MAIN JUDGMENT**

EMMANUEL AKOMAYE AGIM, J.C.A (DELIVERING THE LEADING JUDGMENT):

On the 2nd of December, 2004, the appellant, as plaintiff, commenced suit No. HIN/55/2004 against the respondents, as defendants, at the Anambra State High court at Ihiala claiming for:

(a) A declaration that the compound of the plaintiff given to him as ana-obu in 1952 by the family still holds.

(b) An order of perpetual injunction restraining the defendants, their sons, servants, agents, privies, workmen or any person however mentioned from committing further acts of trespass on the land given to the plaintiff by the Umuonyegbonu family in 1952 as his ana-obu

(c) The sum of N500,000 (five hundred thousand naira) only being general damages for trespass committed by them on the plaintiff's ana-obu.

The defendants in their further amended statement of defence dated 25th July, 2007 but filed on 8th August, 2007 included a counter-claim for:-

(i) Declaration that the 3rd defendant is entitled to the customary right of occupancy of the piece or parcel of land verged blue on plan no GIKS/AND02/2007

(ii) Declaration that the 2nd defendant is entitled to the customary right of occupancy of the piece or parcel of land verged purple on plan no GIKS/AND02/2007

(iii) Declaration that the customary right of occupancy dated the 12th day of March 1996 and Registered as No 48 at page 48 in volume 87 of the lands Registry in the office at Awka on 6/9/90 is null and void and of no effect.

(iv) SPECIAL DAMAGES

(a) 12 palm trees at N100,000.00 per tree     =     1,200,000.00

(b) 3 Bread fruit trees at N120,000.00 per tree     =     360,000.00

(c) 2 Mango trees at N100,000.00 per tree     =       200,000.00

(d) 12 Plantain trees at N500,00 per tree       =      6.000.00

TOTAL                 = N1,7660.000.00

Total special Damages N1,766,000.00 (one million seven hundred and sixty six thousand naira) only.

(v) N2,000,000.00 (Two million naira) Damages for trespass.

(vi) Perpetual Injunction restraining the plaintiff his heirs, agents, privies, or howsoever from entering the defendants lands, or remaining on it or doing anything on it inconsistent with the rights of the defendants thereon and of their possession.

The plaintiff filed a reply and defence to the said further amended statement of defence and counter-claim. After conclusion of evidence and addresses by both sides judgment was delivered by the Court a quo on the 30th June, 2008 dismissing the plaintiffs claims for lack of merit and granting the defendants counter-claim in the following terms:-

1. The 3rd defendant Odionye Ohafugo is entitled to and is the person in possession of the customary right of occupancy in and over the piece or parcel of land verged blue on the survey plan GIKS/AN02/2007.

2. The 2nd defendant John Ohaeli is entitled to and is the person in possession of the customary right of occupancy in and over the piece or parcel of land verged purple on survey plan No. GIKS/AND02/2007.

3. The customary right of occupancy upon which a certificate of occupancy was granted and registered as No. 48 at page 48 in volume 87 at the Lands Registry Awka is null, void and of no effect and is hereby by order of court cancelled.

4. The plaintiff is hereby restrained perpetually either by himself his heirs, agents or successors-in-title from remaining in or trespassing into or doing anything inconsistent with the rights of the defendants on the land in question.

5. On special damages, the court considers the life span or the trees and economic crops and the yield there from and enter a total sum of N250,000.00 in favour of the defendants.

6. General damages for trespass are assessed at N100,000.00.

Dissatisfied with this judgment, the plaintiff, now appellant, commenced this appeal No. CA/E/56/2009 by filing a notice of appeal on 29th July, 2008 containing five grounds of appeal. With the leave of this  Court obtained in 16th February 2011, the appellant on the 21st of February, 2011 filed a notice of additional grounds of appeal containing 8 additional grounds of appeal.

Both sides filed their briefs of argument in this appeal and adopted same as their respective arguments in this appeal.

The appellant in his brief of argument raised the following issues for determination in this appeal:-

1. Whether the appellant was an adult by 1952 to be entitled to be given ANA OBU?

2. Whether the appellant was given the land in dispute by Okpara Ikpendu in 1952?

3. Whether the appellant exercised maximum acts of possession in the land in dispute as to be entitled to it?

4. Who, as between the appellant and the respondents, made out a case to be entitled to their respective reliefs?

5. Whether the learned trial judge properly evaluated the evidence adduced by the parties.

The respondents in their brief of argument raised the following issues for determination in this appeal

1. Whether on the pleadings and the evidence led, the trial Court was right in finding that it was the duty of Anamasonye family and not  Ikpendu or the larger Onwugbonu family to give ana-obu to the plaintiff?

2. Whether the trial Court was right in finding that from the pleadings and evidence led, the plaintiff trespassed into the land of 3rd defendant while he was away from home?

3. Whether the defendants/respondents on their pleadings and the evidence led are entitled to succeed on their claim as found by the learned trial Judge?

4. Whether the trial court considered the whole evidence and issues in the case before coming to its decision that defendants counter-claimants/respondents are the owners of the land in dispute?

I prefer to determine this appeal on the basis of the issues raised by the appellant.

I will start with the fifth issue. The appellant complained that the trial Court did not evaluate the totality of the evidence (viva voce and documentary) placed before it, and referred to two specific pieces of evidence that were not considered by the trial Court in its judgment. These include the evidence of PW2, and the evidence of appellant's long possession and occupation of the suit land. After also contending that the trial Court did not resolve the conflict in the testimonies of the defence witness, he urged this Court to interfere and consider evidence of PW2.

The respondents, on the other hand argued that the trial Court considered in full all the evidence adduced by both parties before reaching the conclusion that the plaintiff is not the owner of the suit land and that it belongs to the respondents.

I agree with the submission of Learned Counsel for the appellant that the trial Court did not consider the evidence of PW2 and the documentary exhibits in its decision and reached certain conclusions on the evidence without showing how it arrived at those conclusions. For example, it held that there are material contradictions in the evidence adduced by the appellant, his witness and the pleadings without pointing to such contradictions. The judgment of the trial Court does not show that it considered all the evidence before it. The trial Court should have equally highlighted all the evidence of both sides on each issue in the case, analyze the evidence of each side on the point, demonstrate its reasoning behind any view or decision it reaches on the evidence and on the issue. The judgment of the trial Court shows that the trial Court did not do this. There can be no proper review and devaluation of evidence, when the trial Court disregards or fails to refer to or consider in its judgment, part of the evidence of a party, and reached conclusions without reference to the evidence that supports such a conclusion. Both Counsel have correctly stated the law on what a proper evaluation of evidence by a trial Court entails. This matter is clearly settled by a very long line of decisions including the ones cited by both sides in their brief. This Court per Fabiyi JCA (as he then was) in ENEMUO VS. DURU & ORS (2004) 9 NWLR (Pt.877) 75 at 103 restated the position of the Supreme Court in MOGAJI VS. ODOFIN (1978) 4 SC 91 at 93 and BELLO VS. EWEKA (1981) 1 SC 101 that "evidence with probative value adduced on both sides will be put on an imaginary scale to view which side such evidence tilts. This is a graphic description of proof on the balance of probability as dictated by sections 135(1) and 137(1) of the Evidence Act Cap. 112, Laws of Federal Republic of Nigeria 1990."

In the case of AWUDU VS. DANIEL (2005) 2 NWLR (Pt. 909) 199 cited by Learned Counsel for the appellant this Court restated that "It is also well established that the proper procedure to follow in considering evidence adduced at the trial is first to consider that of the plaintiff and his witnesses and then to consider that led by the defence. Then after considering the evidence of both parties, it will take the evidence led by both parties and put it in the imaginary scale (as outlined in MOGAJI VS. ODOFIN (1974) 4 SC 91. It will weigh and determine it on preponderance of credible evidence which has more weight." In ODUWOLE & ORS VS. LSDPC & ORS (2004) 9 NWLR (Pt. 878) 382 at 401, this Court held 7 that "Before accepting the evidence of a party and rejecting the evidence of the other Party, the trial court is to set up an imaginary judicial scale, put the evidence adduced by the plaintiff on one side of the scale and put the evidence of the defendant on the other side and weigh them together. In so doing, it is not the number of witnesses called by either party that determines where the imaginary scale of justice tilts but the preponderance of the qualitative and probative value of the evidence adduced."

Evaluation of evidence entails the consideration of every evidence on an issue. In considering such evidence the Court has a duty to consider the relation between the evidence and the issue as well as the probative value of such evidence. This will involve a thorough appraisal, analysis and assessment of the evidence that will logically result in a conclusion of Law or an inference of fact. See AWUSE VS. ODILI (2005) 16 NWLR (Pt. 952) 416 at 506. Evaluation of evidence provides or explains the factual basis of the reasoning or decision of the Court. It demonstrates the relationship or connection between the decision and the evidence before the Court. It helps an understanding of how the Court arrived at its conclusions on the facts. It is an indicator of whether the trial Court dispassionately considered and gave due regard to every admitted evidence before it.

Learned Counsel for the Appellant has argued that in a situation such as the one in this case where the trial Court did not properly evaluate the evidence before it, this Court can do what the trial court failed to do. Evaluation of evidence is primarily the duty of the trial Court. Where the trial court has properly evaluated the evidence and reached conclusions or decisions justified by the evidence, this Court, as an appellate Court has no power to interfere with the conclusions or decisions resulting from such evaluation. Where the trial Court fails to evaluate the evidence before it or does so improperly, this Court can intervene and itself evaluate or re-evaluate such evidence see ELI DAKUR VS. ALI DAPAL & ORS (1998) 10 NWLR (Pt.571) 573 at s86, 588 - 589.

As I have earlier held, it is clear that the trial Court did not properly evaluate the evidence before it in that it failed to consider or even refer to the entire testimony of pw2 and the documentary exhibits. The question that arises at this juncture is whether this Court should intervene for this reason as learned counsel for the appellant has urged us to do. Two judicial approaches to this question have emerged through the cases. The one is that a failure to evaluate or evaluate properly should automatically result in an intervention. The other is that the failure to evaluate or properly evaluate can warrant an intervention only if it can be shown that its correction will - change the judgment or decision. On the general principle that it is not every error in the proceeding or judgment of a trial court that must result in the impeachment of the decision of a Court and that it is only such error that is substantial or has occasioned a miscarriage of Justice in that the decision results from the error, I will prefer the second approach used by this Court in DAKUR VS. DAPAL supra when it held 12 that -

"For an appellant who complains of improper evaluation of evidence to succeed, he must be able to identify or specify the evidence improperly evaluated or not evaluated and show convincingly that if the error had been corrected, the judgment appealed against cannot stand."Learned Counsel for the appellant through out his argument of this issue failed to show that if the parts of the evidence that were ignored were considered, the decision that the appellant is not entitled to the suit land will certainly be impeached. Learned Counsel did not refer to the contents of the documentary evidence and did not point out the contradictory aspects of the evidence of the defence to show how they would have affected the decision on the entitlement of the appellant to the suit land. Learned Counsel referred to some portions of the testimony of pw2 concerning an arbitration that was held over the dispute between appellant and 3rd respondent over the suit land. Learned Counsel for the respondents replied that the trial court was right to have ignored the testimony of pw2 because it is inadmissible evidence in that "the fact it seeks to prove is not pleaded and is hearsay."

Pw2 stated that his testimony derived from what they were told. Let me quote his exact words reproduced at paragraph 430 at page 23 of the appellant's brief as follows: "my evidence is based on what they told us during our arbitration." With regards to the partitioning of the Onwugbenu farm land he said "We were not told that they hadn't shared their land." The evidence he gave consisted of what they were told about the grant of the suit land by Okpara Ikendu to the appellant and the previous decisionsof the Umuejiofor extended family in favour of the appellant. I think that such evidence being hearsay is of no probative value because it is inadmissible evidence to prove the truth of the statements made concerning who owns the Suitland. Sections 37 and 38 of the 2011 Evidence Act clearly provide that such statement whether in oral or documentary form is not admissible to prove the truth of its content. See AWUSE VS. ODILI (supra) held 25. The Evidence Act provides for the situations where such statement can be admitted in Ss. 39-57. The statement of pw2 does not fall within any of the said exceptions.

I also agree with the submission of Learned counsel for the respondents that the fact that at the request of the 3rd respondent in 2003, pw2 participated in an arbitration concerning a matter at Ihiala Magistrate Court over the land in dispute between appellant and 3rd respondent and the fact that such an arbitration held and made an award which is in writing is not pleaded in any of the pleadings before the trial Court. I have carefully gone through all the pleadings and have not found such facts pleaded in any of them. The evidence of pw2 of such unpleaded facts is not admissible and if admitted is not worthy of consideration by the trial court as it goes to no issue. See OSIEGBU & ORS VS. OKOH & ORS (2005) 16 NWLR (pt.950) 58 at 75 -76 held 5 and EMEGOKWE VS. OKADIGBO (1973) 4 SC 113 at 117. Furthermore, pw2 who said "I have a copy of what we tendered to the Court. I also have copies of the earlier decisions by the kindred and the village," failed to tender these documents in evidence. Since these facts are contained in documents, I do not think that oral accounts of such facts can be admitted in evidence when it has not been shown that such documents are missing or destroyed. Section 125 of the Evidence Act provides that all facts, except the contents of documents, may be proved by oral evidence. However, by virtue of S.87(e) of the Evidence Act 2011 oral accounts (like the testimony of pw2) of the contents of a document given by a person who has himself seen it, is secondary evidence. By virtue of S.89(c) and S.90(1)(a), such oral accounts of the content of a private document by a person who has himself seen it can be admissible as secondary evidence when it is shown that the original has been destroyed or lost and in the latter case all possible search has been made for it. But in this case, pw2 said that they have copies of the said private documents. Clearly the testimony of pw2 on the arbitration proceedings and award, as well as the previous decisions of the kindred and village are inadmissible, so that even if the facts sought to be proved are pleaded or were not hearsay, the testimony remains inadmissible. I therefore agree with the Learned Counsel for the respondents that the said testimony is inadmissible evidence. But I must caution here that it is not correct to suggest as Learned Counsel for the respondent has done that the trial Court was right to ignore such evidence by reason of their legally inadmissible nature. Part of the duty of a Court to properly evaluate the evidence, before it, is to refer to all evidence, consider them and if it decides not to rely on any evidence, state so expressly and explain the reason therefore. To simply ignore it for any reason cannot be justified in law. That evidence is legally inadmissible and irrelevant is important in determining whether the error in ignoring it is substantial or has caused a miscarriage of Justice. This is because in determining this question, the Court will have to consider if such ignored evidence is in the first place relevant, legally admissible and credible. If it is not, the error will be treated as not substantial.

Courts can act only on evidence that is legally admissible, relevant, credible and with probative value. See MOGAJI VS. ODOFIN (1978) 4 SC 91 at 94. As this Court held in ENEMUO VS. DURU (Supra) held 7 the evidence that will be put on an imaginary scale during evaluation of evidence by a trial Court is evidence with probative value. And as the Supreme Court held in MOGAJI VS. ODOFIN, false and unreliable evidence does not assist the course of Justice and will therefore be rejected or eliminated in coming to a decision. Having stated as above, I think that even if the trial court had considered the testimony of the pw2, the decision that the appellant is not entitled to the Suitland would have remained the same. The testimony of pw2 would have had no effect on the decision.

Since the Learned Counsel for the appellant did not border to show that if the documentary exhibits had been considered the judgment would have been different, I will say nothing on that. Throughout the argument of all the issues in the appellant's brief non of the documentary exhibits was referred to. The appellant who tendered exhibits A, B, C and D at the trial nisi prius did not even rely on any of them in arguing his appeal concerning his entitlement to the land. He himself saw no need to use them in arguing his case. While this may not afford the trial Court justification for not referring to them, it shows the role the appellant played in encouraging this error.

The appellants did not show the material conflicts in the defence evidence. It is not enough to allege that the trial Court did not consider the material contradictions in the defence evidence. The appellant has a duty to specify these material conflicts and show how the decision would have been affected by such conflicts or contradictions. In the light of the foregoing, I hold that the appellant has failed to show that the error of the trial Court in not properly evaluating the entire evidence before it, in that it did not consider evidence of pw2 and the documentary evidence occasioned a miscarriage of Justice. Be that as it may, in the interest of substantial justice, I will consider the evidence of PW2 and the documentary exhibits in the determination of the remaining issues that deal with the issue of ownership of the suitland.

In dealing with the question of whether the trial court did consider the whole evidence before it, Learned Counsel for the respondent introduced the issue that the appellant did not in his amended statement of claim plead and did not give evidence of the boundary of the land in dispute and that Exhibit D, his survey plan showed some boundary men but non of these was called to testify as to the boundary of the land. I do not think that learned counsel can competently make this argument. It does not come within the subject being argued under issue No. 5 of appellant's brief and issue No. 4 of respondent's brief. The appellant never contended that the trial court did not consider the evidence of boundary of the suitland. It is not one of the reasons for the decision of the trial court. There is no ground of appeal raising this issue. Learned counsel for the Respondent obviously wants the judgment of the trial court to be affirmed on this further ground. He has filed no respondents notice to seek such affirmation as is required by Order 9 Rule 2 of the Court of Appeal Rules 2011. Furthermore it is being raised for the first time here. It was not raised at the trial court. Leave of this Court is therefore required to raise it as a fresh issue. See Oseni vs. Bagulu & Ors (2009) 18 NWLR (Pt. 1172) 164 (SC). Important as this point is, it has not been properly brought before us and so cannot be countenanced. I will therefore refuse to consider it.

I will now deal with issues Nos 1 and 2 together. The arguments of Learned Counsel for the appellant under issues Nos 1 and 2 attacked the part of the judgment of the trial Court stating that "I am satisfied that the plaintiff got his share of Anamasonye Onwugbonu's land and that he disposed of it. I am also satisfied that Okpara Ikpendu could not have granted Ana-obu to the plaintiff in 1952 for obvious reasons:-

(1) Onwugbonu's lands had been shared by then.

(2) The plaintiff was an infant and could not have been eligible for Ana-obu.

(3) The plaintiff could not as a small boy afford all the items which he listed he used to apply for the Ana-obu.

(4) The plaintiff was entitled to Ana-obu from his father's title to Anamasonye's land and property.

(5) It was therefore the duty of the Anamasonye family not Ikpendu or the Onwugbonu larger family to give Ana-obu to the plaintiff."

Learned counsel for the appellant contend that this conclusion and the reasons upon which it is based are wrong. I will now proceed to find out if the trial Court was right in the reason and conclusion. I will start with the first reason that Onwugbonu's lands had been shared by 1952. In respect of this issue, the Learned Counsel for the appellant did not argue that the lands had not been shared as at then. His argument under issue No 1 is that not all the lands were shared. The question which he raised and answered under that issue is "was the entire land of Onwugbenu all shared out before 1952 so that there was no land that bigger family held jointly? This was the focus of all his arguments under issue No. 1. Implicit in this argument is that the entire Onwugbonu land was not shared out and that, after the partition, some part of the land was not partitioned and remain held as Onwugbonu family property. Learned Counsel argued that it is from this remaining part that the appellant was given ana-obi by Okpara Ikendu, the then head of the family. He relied on the evidence of the appellant and DW1 to show that Onwugbonu family also gave out lands to other persons.

Learned Counsel for the respondent replied that the entire Onwugbonu lands were partitioned amongst the four sons and no part was left to be held as Onwugbonu family land by 1952. Let me find out the position of each side on this matter in their pleadings and evidence.

The appellant’s position in his pleadings is contradictory. He pleaded in paragraphs 19, 20, 21 and 22 of the amended statement of claim that Onwugbonu family gave ana obu to himself, Ezebuo Anamasonye (his elder brother) and non members of Onwugbonu family like Ohagudosi, Ndimaeme, Innocent Ndimaeme and Hycinth. In paragraph 15 of his reply to the defence and counter-claim he contradicted the above position by stating that "No other person was given ana-obu on this land now in dispute except myself."

The respondents on the other hand were consistent in their pleading inparagraphs 11 and 12of their defence and counter claim that Onwugbonu family did not give land to anybody including the appellant. They stated therein that a substantial part of the suitland was inherited by the 3rd respondent while the 1st and 2nd respondents have their own portions thereon, and that the appellant by his acts of trespass seeks to annex these lands as his personal property. They also stated that they caused Ohagudos and Innocent to be charged and successfully prosecuted at Ihiala Magistrate Court for forcefully and surreptitiously entering the land to cut down economic trees. Learned Counsel has argued that a statement of DW1, which he reproduced in the appellant's brief supports the case of the appellant that Onwugbonu family gave land to him and other persons. Let me consider the merit of this argument. Under cross-examination DW1 stated that "Michael Emenike gave Ana Obi to my father. He gave one part of his own land to my father." Let me point out here that it is the first sentence in this statement that Learned Counsel for the appellant reproduced at paragraph 4.09 page 11 of appellant's brief as evidence coming from DW1 in support of their position on this matter. It is clear from the above statement at lines 1 - 2 of page 123 of the record of this appeal that Learned Counsel who did not quote the full statement of DW1 proceeded immediately to state that "it is very important to note that Michael Emenike was an Okpara who succeeded Ikpendu and followed with the question - "from which land did Michael Emenike give Ana Obi to Ezebuo DW1's father? He thereby created the impression that Michael Emenike gave Ezebuo, the father of the 1st respondent, land from the Onwugbonu family land. I agree with the submission of Learned Counsel for the respondent that if Learned Counsel for the appellant had read the entire statement of DW1, he could not have posed that question. This is because it would have been obvious to him that Michael Emenike gave part of his own share of the land to Ezebuo. This is further confirmed by the DW1's subsequent testimony still under cross-examination that "Nobody was given Ana obi on Dara Ulasi's land. The land was partitioned into four parts for the four sons of Dara Ulasi. My father begged Michael and he gave my father a part of his own ad my fatheradded it to his own and live there." It is clear that the position of the respondents was consistent both in their pleadings and the evidence. The respondents sufficiently denied or controverted the pleading and evidence of the appellant that the entire Onwugbonu land was not partitioned, that some part remained as family land and Onwugbonu family gave out portions of such family land to appellant and others.

The appellant in his pleadings clearly admitted that before 1952 the landsbelonging to Onwugbonu had been partitioned amongst his four sons. The initial case he put forward in his amended statement of claim was that Onwugbonu family with the consent of its then family head, Okpara Ikpendu gave him ana-obi from Onwugbonu family land. He never mentioned the reasons given by the respondents for challenging his occupation of the suitland, even though he extensively pleaded this challenge in the statement of claim. The respondents in paragraph 3 in their further amended statement of defence and counter-claim stated that" In further answer to paragraph 3 of the amended statement of claim the defendants aver that the land in dispute "Ana Urasi" purportedly granted to the plaintiff by Onwugbonu family had before the date of the alleged grant been partitioned among the four sons of Akunata Onwugbonu namely: Ohafugwo, Anamasonye, Emenike and Ohiaeli and each retained his share which descended to the individual descendants of the four sons." The appellant in his reply and defence to the counter-claim did not respond to the fact of partition of the lands of Onwugbonu raised for the first time by the respondents. It was obvious from that paragraph 3 of the further amended statement of defence and counter-claim that the respondents raised the defence that the lands having been partitioned, no family land existed and so appellant could not have been given ana-obi out of a non-existent family land. This defence struck at the heart and foundation of the appellant's case. Yet he did not reply to it and kept silent.

In paragraph 9 of the further amended statement of defence and counter claim, the respondents stated that -

"A substantial part of the land in dispute was inherited by the 3rd defendant while the 1st and 2nd defendants have their own portions thereon all of which the plaintiff by his trespassory acts seeks to annex as his personal property."

Again the appellant did not join issues with this defence in his reply and defence to the statement of defence and counter-claim. He remained silent in the face of this defence that also attacks the foundation of his case. As held by the Supreme Court in OWOSHO VS. DADA (1984) 7 SC 149 at 163 - 164

"a fact is deemed admitted if it is neither specifically denied nor denied by implication having regard to other facts averred in the pleadings ... Refusal to admit a particular allegation in a statement of claim must be stated specifically the absence of which amounted to an admission"

This passage which restated the settled law on this point was quoted in extenso and relied on by this court in SODIPO & ORS VS. OGIDAN & ORS (2007) LPER - 3962(CA) per Ogunbiyi JCA (as she then was) at pages 33 -34.

Finally in paragraph 6 of his reply and defence to the counter-claim, the appellant expressly admitted that the lands were already shared by averring that

"The same Okpara Ikpendu who gave the plaintiff ana-obi gave Ezebuo Anamasonye too from the already shared lands."

I agree with the submission of Learned Counsel for the respondent that this is a clear admission of the fact of partition of the said land of Onwugbonu. The trial Court was right to have relied on this averment to hold that the appellant admitted that the land was shared.

In his evidence, the PW1 maintained inconsistent positions. In one breadth he said he was given ana obi from Onwugbonu family land. In another breadth he acknowledged the existence of Anamasonye family land. It should be recalled that the appellant, 1st and 2nd respondents are members of Anamasonye family, a unit of the larger Onwugbonu family. The remaining three units are Ohafugwu, Emedike and Ohaeri. They are the four sons of Onwugbonu. He acknowledged the existence of Anamasonye family land under cross examination in his testimony thus:

"We have not shared our family land as Umuanamasonye when I sold, I showed the 1st defendant another piece of land. The remaining land which the 1st defendant and myself own together are (1) Okpara be Anamasonye, (2) the land we have at Mbana Umuokarafor (3) Land at Owere Ezeagu (4) Antogurugwu Okija (5) Land at Egbu awani. That's all. It is not true that I sell off family land at will since the death of my brother. I did not disagree with Ejiofor because he said that the land which I fight for is not part of our family land. Anamasonye family has lands at the places where I have mentioned."

The appellant did not explain the reason for this inconsistent positions. If the lands of Onwugbonu had not been shared, then you cannot talk of the Anamasonye family land without explaining how it came into being. If Anamasonye family land exists then it lends credence to the consistent position of the respondents that the lands of Onwugbonu were partitioned amongst his four sons before 1952. That is the only available explanation for the existence of Anamasonye family land.

The PW2 testified under cross-examination that

"'We are not told that the Onwugbonus had shared their lands. As at the time of our arbitration they hadn't shared their lands. My evidence is based on what they told us during our arbitration. It is not based on my personal knowledge."

This testimony of no probative value and is not useful. First, as I had held earlier, it is not legally admissible evidence to establish the truth of its content, being hearsay. It cannot be used to determine the truth about the partition or non partition of the said land. Furthermore it is laden with an inherent contradiction and illogicality. If your evidence is not from your personal knowledge and is based on what you are told, how did you come to the conclusion that the Onwugbonu lands had not been shared as at the time of the arbitration, when you had stated earlier that you were not told that the lands had been shared. PW2's testimony clearly begs this question.

In arguing this appeal, Learned Counsel for the appellant took the clear position that the entire land of Onwugbonu was shared before 1952 but that the family of Onwugbonu still held some land as family land and that it is out of such remaining family land that Okpaara Ikpendu gave appellant the land to reside in 1952. Having admitted that Onwugbonu lands were shared amongst the four sons of Onwugbonu namely Ohafugwu, Anamasonye, Emedike and Ohaeri, the legal burden is on the appellant to prove on a preponderance of evidence his assertion that "it is not the entirely of the land that was shared. In the face of this admission, it is the appellant's case that will fail if no evidence is adduced to show that not all the land was partitioned and that Onwugbonu family still retained same land from which he was given his ana obi. If no evidence of the existence of such land is adduced, it follows, that there was no Onwugbonu family land existing and so non was given to the appellant in 1952 as he claimed. S.133(1) of the Evidence Act 2011 provides that in civil cases, the burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

Furthermore it is the appellant who is alleging that the entire land of Onwugbonu was not partitioned. In line with the general principle that he who alleges or asserts must prove, he has the duty to prove that the entirety of Onwugbonu land was not partitioned and that some remained and is being held as Onwugbonu family land. See S.131(1) of the Evidence Act 2011 which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.

In AGALA VS. OKUSIN & ORS (2010) 10 NWLR (Pt. 1202) 412 the Supreme Court held per Mukhar JSC (as she then was) that "Civil cases are determined on a preponderance of evidence and balance of probabilities and so he who asserts a fact must prove that fact with credible evidence that is relevant to the matter in controversy not evidence that is irrelevant and inconsequential to the success of the claim. See also EGBUNIKE & ANOR VS. ACB LTD (1995) 2 SCNJ 58 (SC) and CHABASAYA VS. ANWASI (2010) 10 NWLR (Pt.1201) 163 (SC).

A party in a civil case, on whom lies the burden of proving the existence of a fact he alleges or asserts, can only discharge the burden by producing relevant, admissible and credible evidence to prove such fact on a preponderance of evidence or balance of probabilities. Beyond his own oral testimony in Court the appellant adduced no other evidence to prove the existence of any land held by Onwugbonu family. He did not call any member of Onwugbonu family to testify on his behalf on this matter. Members of Anamasonye family, namely, 1st and 2nd respondents gave evidence that the Onwugbonu land was partitioned.

Anamasonye share of the land was also partitioned amongst his children and that appellant was not given ana obi by Onwugbonu family. He could not call even the members of his immediate family, Anamasonye family to testify on his before on this matter. He could not call any of the persons who was present on the 28th December 1952 when the Okpara Ikpendu gave him land. He could not call as a witness any of the 24 persons who participated in the settlement of the matter pending at Ihiala Customary Court caused by the placing of the juju on the land by the 3rd respondent in 1991. Non of the said 24 persons whose name is on the written report of the decision taken during the settlement was called as a witness to testify in support of the report. He could not call Ohagudosi, Innocent and Hyacinth non members of Onwugbonu family whom he said were given lands by the family, to corroborate his testimony that Onwugbonu family land did give them land. They are in a better position to assert the existence of their right in the land. The appellant offered no explanation for his inability or failure to call any of the above mentioned persons as a witness in support of his case. The appellant tendered exhibit B to support his case. Exhibit B contains the proceeding of Ihiala Customary Court, and the report of the kindred arbitration submitted to the Court. The report did not indicate the basis of the observation and findings that the land in dispute between the appellant and 3rd respondent belonged to "umunna" was given to the appellant by Ikpendu Ohafugwu. The appellant offered no explanation for his inability or failure to call any of the above mentioned persons as a witness in support of his case.

The 2nd respondent is stated in the report as having been in the arbitration meeting. He is listed therein as no 11. In his testimony here in Court he denied the contents of the report, under cross examination he admitted being present at the arbitration in the meeting. He denied signing the report. Yet it is indicated at the foot of the report that he and five others signed the report on behalf of the family. He is listed as no. 6 signatory. His signature is not on the report. Against his name is typed "(sgd)". No report was produced bearing his signature or the signature or thumb print of the other signatories. He also stated that

"we did not decide that Titus is the owner of the land."

This contradicts the content of the report that appellant acquired the land from late Ikpendu Ohafugwu. It is noteworthy that this evidence was not given by 2nd respondent in his examination-in-chief. It was elicited from him by Learned Counsel for the appellant during cross-examination. It is surprising that Learned Counsel for the appellant did not confront him with the report bearing his signature or even the one forming part of exhibit B from the Customary Court. This unchallenged evidence of the 2nd respondent renders the report forming part of exhibit B doubtful and unreliable.

Furthermore the 3rd respondent who was listed as No 18 in the report as one of those present at the arbitration and whom the record of the proceedings of the Customary Court of 7th May, 1992 show was present when the report was submitted to that Court was not even confronted with the said report during his testimony that the land in dispute between him and the appellant belongs to him. Exhibit B shows that the Customary Court Ihiala after receiving the report struck out the Suit. It did not enter any judgment for any of the parties. The court said –

"This matter is struck out because it is settled out of Court."

So the rival claim of the parties were not decided. Apart from introducing the report of arbitration, exhibit B is not useful in determining the question of who is entitled to the suitland.

The effect of the partition by Onwugbonu of his land amongst his four sons before he died is that upon his death each of his son remained the individual owner of his share of Onwugbonu land. The partition by him of his land amongst his four sons resulted in a permanent division of the land into separate shares taken as private property by each of his sons. This is clear from the entire tenor of the pleadings and the evidence. The permanent nature of the division is the basis of the claim of the respondents and the cause of this dispute. This is captured by the testimony of the 2nd respondent as DW2 that

"I refused his offer on the ground that I and my children have no other land and we will not live on the air. I also refused because his father got the same share size as my father so there was no reason for him to take my own land. On the day he came with the drinks, he said that the family/Umunna had saved me otherwise he would have dealt with me. He then went away.

I know the plaintiff’s father's property because I knew they were shared. I used to go and work for the plaintiff's father on his farm. I also know the portions of land which the father of the 1st defendant go and the fourth share to my other uncle. The plaintiff has his own fathers share and also encroached upon and took my own father’s share which is my own."

The partition by Onwubonu of his land, while he was alive, operated upon his death to prevent his property from falling into joint or communal ownership by his family. Onwugbonu family had no land to give the appellant and lacked the capacity to give land belonging to someone else. See OJELADE VS. SOROYE (1998) 5 NWLR (pt.549) 284. Even where family ownership existed, it will be extinguished upon the partition of the land so communally held by the family. Partition terminates co-ownership for ever and results in each person owning his separate share. See AYEM & ORS. VS. SOWEMIMO (1982) 5 SC 29 or (1982) All NLR 52 per Udo Udoma JSC and SOWUNMI & ORS VS. AYIUDE & ANOR (2010) LPER - 4973 (CA) per Kekere-Ekun JCA held 1.

Some of the other reasons the trial Court relied on for its holding that Okpara Ikpendu could not have given the appellant ana obi in 1952 are that the appellant was entitled to ana-obi from Anamasonye family land and that the duty to give him ana obi is that of Anamasonye family and not Ohafugwu family. A highlight of the ancestral or traditional history of Onwugbonu family will help the determination of this point. Onwugbonu had four sons, namely, Ohafugwu, Anamasonye, Emedike and Ohaeri. Ohafugwu is the father of Okpara Ikpendu and the 3rd respondent, Okpara Ikpendu being the 1st son of Ohafugwu. Anamasonye is the father of Ezebuo and appellant. Ezebuo (the father of the 1st respondent) is the first son. Emedike is the father of Michael Emedike. Ohaeri is the father of the 2nd respondent (even though it later turned out that he is Ezebuo's son.) The 3rd respondent is the father of the 5th respondent.

The respondents led evidence to establish that by Okija custom, the family head can give ana-obi to members of his family only. DW1 testified under cross-examination that according to Okija custom, it is the okparas right to give ana obi if the other beneficiaries are of the same parents with him. The 3rd respondent testifying as DW2 said under cross-examination that

"If the plaintiff has to be given ana-obi, it is Ezebuo who should give him ana obi and not Ikpendu. The reason is that since all the lands had been shared, Ezebuo his elder brother is the one to give him ana obi. Ikpendu my elder brother will give me and Michael will give to his siblings."

Dw3 testified in examination in chief that

"Anoutsider cannot give Ana Obi to anybody. It has to be the eldest brother like in my own case that will give ana obi. It is not a public affair."

Ezebuo, appellant's elder brother was the head of Anamasonye family at the time. Okpara Ikpendu, the elder brother of the 3rd respondent was the head of Ohafugwu family, Michael Emedike was then the head of Emedike family. Ohaeri family had its own head.

The above evidence of DW1, DW2 and DW3 remain unchallenged and uncontradicted and so must be taken as establishing the facts alleged therein. I therefore hold that the appellant being a member of Anamasonye family is under Okija custom entitled to request for ana obi only from the head of his family. The evidence of DW1, his nephew and DW2 (3rd respondent) is that the appellant did exercise his right to request for ana obi from Ezebuo, the then head of Anamasonye family and that Ezebuo granted his request and gave him land called ngwulu be Ogbuelu as arua obi. According to these witnesses, the appellant sold the said land to one Bertrand Obodozie. This evidence of DW1 and DW2 remained unchallenged and uncontradicted and as such must be acted upon as establishing the truth of the facts alleged therein. For the forgoing reasons, I uphold the decision of the trial Court that Okpara Ikpendu could not have granted ana-obi to the appellant in 1952 for the reasons that the appellant was entitled to ana obi from Anamasonye family land and that it was the duty of Anamasonye family not Ikpendu or Onwugbonu larger family to give anaobi to the appellant.

The contention of Learned Counsel for the appellant that the Okija custom on the giving of ana obi was not proved is not correct. The evidence referred to above clearly establish the existence of that rule of native law and custom. There is no doubt that the way and manner the trial Court approached the application of the said rule may have given the impression that it was doing so on the basis of the personal knowledge of the trial judge and not on the basis of the evidence before the court. In any case the Okija rule of custom of ana obi is not different from the general rule of customary law on the right of a member of the family to live and farm on family land. Every member of a family has an individual right to be allotted a portion of the family land for residence or farming to support himself and his mediate family. This individual right is inherent in a member of the family by virtue of his membership of the family. It is a right of occupancy he can legally enforce against the family head or any member of the family that is unlawfully depriving him thereof. See the oft quoted decision in Lewis vs. Bankole (1908) 1 NLR 81. See also Nigeria Land Law 1982 Edition by B.O. Nwabueze, Nwamife, Enugu pages pp 156 - 158. A non member of a family does not have and cannot therefore exercise such a right. The appellant not being a member of Ohafugwu family has no right to be given any part of Ohafugwu family land as his ana obi. I uphold the decision of the trial Court that the appellant could not have been given the suitland as ana obi in 1952 since he is not a member of Ohafugwu family.

The second reason given by the trial court for holding that okpara Ukpendu could not have given ana-obi to the appellant in 1952 is that the plaintiff was an infant and could not have been eligible for ana-obi." Learned Counsel for the appellant in the appellant's brief argued extensively against this part of the judgment. He attacked the reasoning behind the conclusion that the appellant was an infant in 1952 and argued that the trial court." Evaluation of the evidence on the age of the appellant was one sided and perverse. He contended that there is no evidence from the respondents that a particular age must be attained for one to be entitled to ana-obi and argued also that the appellant was an adult, over 18 years of age when he was given his ana obi by okpara Ikpendu.

The respondents in their brief did not reply to the above mentioned arguments under issue No 1 of the appellant's brief concerning the age of the appellant at 1952. The respondents remained silent in the face of those arguments. What is the effect of this failure by the respondents to reply to the arguments under issue No 1 of the appellants brief. Should the respondents be deemed to have conceded to those arguments. Through the cases, two judicial approaches have emerged on how to deal with failure to reply to an argument on a point. One approach is to treat the failure to so reply as a concession or admission that the said argument is correct. This was the approach adopted by this Court sitting in Jos in the case of BORNO STATE INDEPENDENT ELECTORAL COMMISSION & ORS VS. KACHALA (2005) LPELR - 7464. In that case, Learned Counsel for the respondent had in the respondent's brief urged the Court to strike out ground 3 of the appeal as incompetent. Learned Counsel for the appellants submitted no argument on the point in his reply brief. This court per Nzeako JCA "relying on IRO VS. ECHEWENDU (1996) 8 NWLR (pt.468) 629, AYALOGU VS. AGU (1998) 1 NWLR (pt. 532) 129, LORI VS. AKUKALIA (1998) 12 NWLR (pt.579) 592 and BRIFINA LTD VS. INTER-CONTINENTAL BANK LTD (2003) 5 NWLR (pt. 814) 540 held that

"he will be taken as having nothing to urge on that objection and will be deemed to admit it. The principles as applied by the Courts are that where a fresh issue raised in the respondent's brief of arguments requiring to be countered, is not addressed and countered in his reply brief by the appellant, the issue so raised remain conceded."

The second approach is that the Court should not treat the argument not replied to as automatically correct merely because it was not replied to. It should still find out if the said argument as it stands has merit. If the Court finds that it has merit, uphold it. If it finds that it has no merit dismiss it. This is the approach adopted by this Court, sitting in Abuja, in the case of TRACTOR & EQUIPRIENT (NIG) LTD & ORS VS. INTEGRITY CONCEPTS LTD & ANOR (2011) LPELR - 5034 following the approach of the Supreme Court in ECHERE VS. EZIRIKE (2006) All FWLR (pt.323) 1597 at 1608 per Onnoghen JSC and Ogbuagu JSC at 1610. This court quoted in extenso the statements of their Lordships of the Supreme Court in Echere's case. Let me reproduce here the part of the statement of Ogbuagu JSC that

"It is to be borne in mind and this is also settled that, failure of a respondent to file a respondent's brief is immaterial and of no moment. This is because an appellant must succeed or fail in his own brief. In other words, that an appellant succeeds on the strength of his own case. It is not automatic that when once a respondent fails to file his brief, that is it, the appellant automatically must win or succeed in the appeal. Following this approach, this court in the Tractor Equipment's case held per Galinje JCA that "the import of the respondents failure to file a brief of argument in response to the appellant's brief of argument is that they are deemed to have conceded to the issues, raised and argued in the Appellant's brief of argument. In the instant appeal, the argument proffered by the Appellant shall be given due consideration even though the respondents have failed to file a respondents brief of argument."

The Court also relied on JOHNHOLT VENTURES VS. OPUTA (1996) 9 NWLR (pt.470) 10.

This Court, sitting in Kaduna, in MACHIKA VS. IMAM & ORS (2010) LPELR - 4448 also adopted this approach. After relying on the cases of KHAKIL VS. YARADUA, NNAMANI VS. NNAJI (1999) 7 NWLR (610) 313, AKANBI VS. ALATEDE (2000) FWLR (1) 928, IRO VS. ECHEWENDU (supra) to hold that where it is necessary for an appellant to respond to issues raised in the respondents brief and he fails to do so, he is deemed in law to have conceded to the points raised in the respondents brief, the court went further to rely on the decision in AGBABLA VS. OKOJIE (2004) 15 NWLR (897) 503 to hold that the law in its wide wisdom says that in spite of or despite the absence of an answer to such points raised in the preliminary objection and therefore conceding to them by the appellant, the preliminary objection is not to be automatically upheld by the Court. In other words, the absence of a reply brief from the appellant and his deemed concession to the preliminary objection, success therefore is not automatic and the Court still has the duty to consider if it is sustainable in law."

I prefer to follow the second judicial approach here. It furthers more the substantial justice of a case. Where one party in a case has argued a point whether of law or fact, he thereby invites the Court to judicially determine the issue so argued. The argument serves to invoke and guide the Courts judicial inquiry into the issue. The contrary or alternative argument by the other side is to provide an alternative or balanced guide for the Court on the matter. The absence of such reply cannot be taken to mean that the pending argument represents the law and the facts of the case. The appellant's argument serves to show that the judgment is wrong in a particular respect having regard to the facts and the law. The arguments remain mere inferences or opinions of law and facts on the basis of the evidence on record. It is the state of the facts on record and the existing relevant law that will determine the validity of such argument and not the absence of an alternative or contrary opinion. It will help the substantial justice of the case if the merit of the pending argument is considered on the basis of the facts before the Court and the existing law relevant to the facts of the case.

I will now proceed to consider the merit of the argument under issue No 1 of the appellants brief, even though the respondents have offered no reply thereto.

I agree with Learned Counsel for the appellant that it was the respondents who first raised the issue of the age of the appellant as at 1952. The respondents raised it as a defence to the appellant’s averments in his amended statement of claim that he was given land as ana obi by okpara Ikpendu on the 28th December 1952. The respondents averred in paragraph 2 of their further amended statement of defence and counter-claim that

"in further answer to paragraph 3 of the amended statement of claim the defendants aver that the plaintiff was about 14 years old in 1952 and would not have thought about Ana obi at that age"

The appellant responded by stating in paragraph 2 of his reply and defence to the counter claim that

"by 1952 when ana-obi was given to him, he was over 18 years of age."

In contending in paragraph 5 I therein that okpara Ikpendu died in 1938, the respondents averred that the appellant was a toddler or not born at all as at that date. In replying in paragraphs 8 and 9 of the reply to the further amended state of defence and counter- claim that okpara Ikendu did not die in 1938 but in 1954, the appellant averred that he was a man as at 1954 and was the one sent to inform 1st respondent of the death of Ikpendu.

In his evidence in examination in chief, the appellant testified that he was 75 years on 8th June 2000 (the day he testified in Court). Under cross-examination he said

"by 1952 I was an adult and entitled to a grant of a residential plot. I was born in August 1934." Further under cross-examination, he said "I passed standard six in 1956."

The 3rd respondent testifying as DW2 stated that he is 70 years of age and

"Okpara Ikpendu Ohafugwo Onwugbonu is my elder brother. He is dead. He died a very long time ago. At the time of his death, the plaintiff did not know him well because the plaintiff was still a small boy at the time Okpara Ikpendu died."

It is common ground between both sides that the 3rd respondent is older in age than the appellant. This fact was expressly admitted by the appellant in paragraph 32 of his amended statement of claim that

"Odionye-Oha- Afugwo is one of the members of the family and now the oldest man in the family while the plaintiff is the second oldest".

Throughout his testimony as DW2, the 3rd respondent did not state his age with any exactitude. On the 22nd January 2008 while testifying he said his age was "above 70 years." Under cross-examination he said "I was older than 19 years" when appellants mother was married into the family. He had said in examination in chief that "I was over thirty years old when okpara Ikpendu died". He could not reckon his age by dates but could only do so by reference to events because, according to him, he did not go to school and so was not literate. It is therefore clear that he was not certain about his exact age at any point in time. The trial Court was therefore wrong to have assumed his age as 70 years as at 22nd January, 2008. His evidence showed that he was "above 70 years old" on that day but was not certain of the exact figure after 70 years. It is therefore not possible to determine his exact age as at 1952 reckoning from 22nd January 2008 using the approximated age of above 70 years. The Court was wrong to base the calculation on its own supposition instead of the evidence before it. A Court can only act on the evidence before it and nothing else. It can only deal with the case as presented by the parties. It cannot decide a case of different from the one made by the parties. If the witness said I am over 70 years, the Court cannot give him a different age and act on the age not supported by the evidence. This clearly is not consistent with a fair trial.

Using the approximated age of "above 70 years" as at 2008 to reckon 3rd respondent's age as at 1952, the result should be that 3rd respondent was above 14 years as at 1952. I agree with Learned Counsel for the appellant that "above 70 years" could mean any figure after 70 and this can mean 100 years. The same goes for the age "above 14 years." Furthermore, there was no need for the trial Court to have sought to determine the age of the appellant by reference to the age of the 3rd respondent. This is because the matter was clearly resolved by other facts in the pleadings and theevidence of pw1. The respondents in paragraph 2 of the further amended statement of defence and counter-claim averred that the appellant was about 14 years old in 1952. The appellant in paragraph 2 of the reply and defence to counter claim stated that he was over 18 years in 1952.

The difference between the two figures stated by both sides as the age of the appellant in 1952 is 4 years. The respondents led no evidence to show that the appellant was 14 years in 1952 as alleged by them in their pleading. The only clear evidence they led as to the age of the appellant before 1952 seem to give credence to the position of the appellant that he was over 18 years in 1952. Under cross-examination the 3rd respondent as DW2 testified that "plaintiff as a small boy knew Ikpendu. The plaintiff had not grown up when Ikpendu died." The respondents had stated in paragraph 4 of their further amended statement of defence and counter-claim that Ikpendu died in 1938. So if appellant was a small boy who knew Ikpendu even before 1938 then it stands to logically reason that he may have been over 18 years of age in 1952. This is because from 1938 to 1952 is 14 years. Before 1938 he was already a small boy who knew Ikpendu. It is highly probable that such a small boy who was capable of knowing somebody may have been above 5 years. This is more consistent with the evidence of the appellant that he was 75 years as at 8th June, 2006 when he gave evidence at the trial Court. It is obvious that the trial Court did not evaluate the evidence before it properly and made wrong inferences of fact from the evidence as a result.

For the above reasons I hold that the decision of the trial court that okpara Ikpendu could not have granted ana-obi to the appellant in 1952 because the appellant was an infant and could not have been eligible for ana obi is wrong. Having held that the appellant was over 18 years, the third reason for the said trial court's decision that appellant could not as a small boy afford the items required to apply for ana obu also fails.

In the light of this holding, I do not think that there is any need to consider the further argument of the Learned Counsel for the appellant that there was no evidence from the respondent that a particular age must be attained for one to be entitled to a land for his personal residence. In any case there is abundant evidence consistent with the pleadings that a person must have attained adult age to be entitled to ana obu.

On the whole, I uphold, the decision of the trial Court that okpara Ikpendu did not give the appellant the suitland as ana-obi 1952. The resolution of issue No 1 in favour of the appellant and the failure of the second reason for the decision of the trial court did not affect the decision because it still stands on the basis of the other reasons that have been held as correct and valid. Since the failure of the second reason has not impeached the decision or affected it in any way, it is not substantial and has not occasioned a miscarriage of Justice.

I will now deal with issue No 3 of the appellant's brief. Under this issue, Learned Counsel for the appellant argued that by virtue of the appellant's long possession of the land he is entitled to the land. Learned Counsel for the respondent under issue No 2 of the respondent's brief has argued replicando that since appellant has not proven his root of title to the land, his acts of long possession of the land cannot be relied on as evidence of title as they are no longer acts of possession but acts of trespass. The admitted evidence is that the appellant has built three houses on the suitland and has been living thereon for many years now. It is this long occupation he relies on also as founding his claim of title to the land. This prompted the question posed by his counsel at the trial court and repeated here as follows –

"How can one build houses on a land that was not his and live there for many years without interference and now people come to claim that land? Arising from this question is the issue of whether the appellant occupied the land without interference or challenge?"

The appellant himself testifying as PW1 said in examination in chief that the 3rd respondent interfered with and challenged his occupation of the land by placing juju on the land in 1991, which, all agree is the customary practice of disputing title to land. Testifying further in examination in chief the appellant said "Nobody interfered again until 16th May 2004, Odionye the 3rd defendant came with the other defendants and some other persons and ordered Ejiofor the 1st defendant to uproot all the beacons on my land. I went to Ejiofor who was uprooting and damaging the beacons and asked whether he knew that he was offending the law? He pushed me down and when I got up he slapped me and I fell down again ... On that duty, they cut down my peer tree." He restated these facts in cross examination. The 3rd respondent testified as DW2 that "the plaintiff took my land and built a house on it while I was away from home for about three years." He stated in cross-examination that "the plaintiff still holds the land forcefully." DW1 (1st respondent) and DW3 corroborate this evidence of DW2 that is unchallenged and uncontradicted.

The DW1 (1st respondent) who is appellants nephew testified in examination in chief that parts of the land occupied by the appellant belong to the Ohaeri family, Emedike family and Fidelis Onunkwo. Having held that the appellant has no title to the suitland his act of forcefully occupying the land of the 2nd and 3rd respondents, for however long amount to trespass and so cannot defeat an existing right of ownership and cannot be relied on to found ownership title to the occupied land. As the Supreme Court held per Oputa JSC in FASORO & ANOR VS. BEYIOKU & ORS (1988) LPELR 1249 (SC) held 4 or (1988) 1 NSCC 705 or (1988) 2 NWLR (pt.76) 263, "One cannot really talk of acts of ownership without first establishing that ownership. Where a party's root of title is pleaded as, say a grant, or a sale or conquest etc, that root has to be established first, and any consequential acts following therefrom can then properly qualify as acts of ownership. In other words acts of ownership are done because of and in pursuance to the ownership. Ownership forms the quo warranto of these acts as it gives legality to acts which would have otherwise been acts of trespass." His lordship further held that where the title pleaded has not been proved, it will be unnecessary to consider acts of possession for the acts then become no longer acts of possession but acts of trespass. See also OYEDARE VS. KEJI (2005) 7 NWLR (pt.925) at 504-585 per Kutigi JSC and BELLO VS. AKANJI (1988) 1 NWLR (pt.70) 301. The fact the appellant has lived on the land for some years cannot operate to abrogate the existing ownership title of the 2nd and 3rd respondents and other persons to their land. The evidence of DW1 and DW2 is that the appellant forcefully entered the land, destroyed the crops and economic trees of the 3rd respondent, hurriedly built the houses thereon, surveyed the land and obtained a customary certificate of occupancy over the land without the knowledge of the persons holding the right of ownership of the land. He lived on the land for many years. All agree that since 1991, when 3rd respondent returned from his sojourn elsewhere till now, he has continued to challenge appellant’s occupation of this land. Both sides agree that title to the land was held under Okija native law and custom. It is settled by a long line of decisions that the general rule of Customary law is that the mere possession of land belonging to another for however long a time cannot confer a prescriptive title. The fact that the appellant has built houses on the land and lived thereon for years cannot help him to attract the equitable intervention of this court to moderate or modify the application of the above mentioned rule because of the manner he acquired and retained possession of the lands comprising the suitland and the fact that the houses were, as DW1 testified, hurriedly built even by night using lantern, and, as all agree, in the absence of the 3rd respondent and without his knowledge. The Supreme Court relying on the decisions in AJAO VS. OBELE (2005) 5 NWLR (pt.918) 400 and MOGAJI. CADBURY NIG. LTD. (1985) 2 NWLR (pt.7) 393 restated the law clearly in ADAWON VS. ASOGBA & ORS (2007) LPELR 3970 (CA). In that case, the trial customary Court had decided that anybody who acquired a parcel of farm land for over 12 years without molestation, challenge or disturbance from any quarter and never paid Isakole to anybody becomes the rightful owner of such land. The Supreme Court held that "But that is not the law. Long possession cannot ripen into ownership of land under customary tenancy... long possession is more of a weapon of defence on equitable grounds to defeat claims for declaration of title and trespass against the true owner." The arguments of the appellant under issue No.5 fail for the above reasons.

The remaining issue for determination is issue No 4 of appellants brief which also covers issue No 3 of respondents brief. I have already held herein that the appellant failed to prove his root of title to the suitland and therefore failed to prove his entitlement to any of the reliefs sought in his claim.

I have also held that following Onwugbonu's partition of his lands amongst his four sons, each became the individual owner of his share which subsequently devolved on his descendants as family land. As a result of this partition of Onwugbonu lands, Onwugbonu descendants do not own any land jointly or communally as family land. Therefore it could not have given appellant part of a nonexistent family land. So appellant's occupation of the land of 2nd and 3rd respondents on the basis of his claim that Onwugbonu family gave him the land amounts to trespass.

The appellant did not only trespass into the land of 2nd and 3rd respondents, he trespassed into land belonging to other persons including 1st respondent, his nephew. The 1st respondent testified in examination in chief that "The land in dispute was only between the plaintiff and Odionye 3rd defendant. It is in this court that I saw that the plaintiff claims the entire land including our own. I don't know whether the plaintiff at the time of the attempted settlement made a survey plan of the land. I saw a survey plan for the first time in this Court. I have a common boundary with him at some part. He never told me that he was making a survey of the land. He ought to have told me. Inside this land that he claims now, I have my own land. He and my father had partitioned all their lands. My father the elder of the two who ought to take before the plaintiff took the part on the North but in the plan which the plaintiff tendered in Court, he now claims all the lands including my fathers. He even claimed that Odionye's land is my father's farm land. The plaintiff has no building on Anamasonye's land. Other persons who have land in that area claimed by the plaintiff include one Fidelis Onukuru of Umudaraike, Michael Emedike. None of these people know that the plaintiff had taken over their lands at that spot. My father said that Umuonwugbonu partitioned their property while Onwugbonu was still alive. In that wise all Onwugbonus lands were shared into four and each person goes back to share with his own siblings. The land claimed by the plaintiff does not belong to Anamasonye family alone. The plaintiff is also claiming the land of Ohaeri family, that of Emedike family and that of Fidelis Onunkwo. None of these persons knows that the plaintiff made survey plan. He built the main house on Odionye's land and built the small house and toilet on Ohaeri's land. None of these persons gave land to the plaintiff. The Anamasonye family never granted any portion of the dispute land to the plaintiff. My father gave him Anaobi at Anaogbuehi. The plaintiff sold it to the son of Bertrand Obodozie."

It is clear from exhibits D, E and F, the appellants survey plan of the suitland and the 2nd and 3rd respondents' survey plan of the same land, that the land surveyed by the appellant and comprised in exhibit D and the survey plan attached to exhibit A, the customary certificate of occupancy, includes the lands of the 1st, 2nd, 3rd respondents and other persons. DW4 who surveyed the lands of these respondents testified that he superimposed the appellants plan on the 2nd and 3rd respondents' plan. The evidence of ancestral or traditional history established the root of title of the 2nd and 3rd respondents to their lands.

In the light of the foregoing I hold that the 2nd and 3rd respondents proved their counter-claim for title to their respective lands on a preponderance of evidence. However I do not think that the counter-claim for special damages of N1,760,000.00 was proved. I agree with learned counsel for the appellant that there was no basis for the award by the trial Court of the sum of N250,000 as special damages in favour of the respondents.

A claim for special damages must be specifically or specially pleaded. The respondents specifically and specially pleaded their claim for special damages by giving the particulars of the items destroyed and the value of each item.

In line with the principle that pleadings do not constitute evidence and that unless admitted expressly or by implication, the facts pleaded themselves cannot be regarded as proven and so will require evidence to prove them, the particulars of items of loss and their exact value must be proven by evidence. In the absence of evidence proving them, such facts will be treated as unproven. In this case, the respondents led evidence in respect only of the exact number and types of trees and the type of crops destroyed but led no evidence of the specific value of each of such tree or crop. So there is no evidence of the exact value of what was destroyed. It is clear therefore that the trial court arrived at the sum of N250,000 as special damages by assumption or speculation. This is contrary to the settled law on proof and award of special damages.

The requirement of strict proof of special damages derives from the principle that the loss for which it is being claimed is the actual and extraordinary result of the trespass. This is distinct from the loss that is the natural or probable result or that can be assumed as likely in the usual course of things to result from such trespass, for which general damages lie. This class of damages do not require to be specifically pleaded and need no strict proof or proof at all. The requirement of strict proof of special damages is that the claimant must prove the items of loss and the value of each item of loss with arithmetical exactitude. It must be exactly quantified or calculated. There is no room for assumptions or speculative assessment. The loss assumed as likely in the usual course of things to result from the trespass are incapable of exact quantification and so need not be strictly proven or proven at all in some cases depending on the Justice of the case See OBASUYI & ANOR. VS. BUSINESS VENTURES LTD. (2000) LPELR -2155 (SC) per Iguh JSC held 1, 5, 6 and 7.

It is important to note that in situations where a loss, though the actual and unexpected result of a trespass, is incapable of exact quantification, general damages can be claimed, and if claimed, awarded. For it will be unjust not to compensate a victim of such loss with general damages merely because the value of the loss is incapable of exact quantification. That is however not the situation here.

In our present case, the appellant specifically claimed for special damages, the items of loss and the exact value of each item were stated. Therefore evidence establishing the exact value of each item as pleaded must be adduced. It was not done. The claim was not proven. The award by the trial court is therefore baseless. See ANTHONY VS. GIWA & ANOR (2011) LPELR - 5103 (CA) per Kekere-Ekun JCA held 1, 3, 6 and 7. See also ODUMOSU VS. ACB (1976) 11 SC 55, NNPC VS. CLFCO NIG. LTD. (2011) 4M JSC 142 at 174.

An appellate Court can interfere with an award of special damages by a trial Court, where the award is not supported by any evidence proving the claim for special damages. Such an award is clearly perverse.

The counter-claim for special damages ought to have failed. The award of special damages of N250,000 by the trial Court is wrong. The appeal against this award is allowed. The award is hereby set aside.

On the whole this appeal fails on all other issues. The appellant shall pay cost of N30,000.00 to the respondents.

**MOJEED ADEKUNLE OWOADE, J.C.A:**

I have had the privilege of reading in draft the judgment delivered by my learned brother E. Akomaye Agim JCA. I agree with the reasoning and conclusion and I abide with the consequential orders.

In particular, I agree with the lead judgment that the counter-claim for special damages ought to have failed and that the award of special damages of N250,000.00 which was pleaded but not proved was wrong.

Special damages must be pleaded and proved. An award of special damages, unlike an award of general damages is not based on the discretion of the trial court but on credible evidence adduced before the trial court which strictly prove the plaintiff s entitlement to the award. Garba v. Kur (2003) 11 NWLR (Pt. 831) 280.

It is a settled principle that special damages must not only be specifically pleaded with relevant particulars, but must also be strictly proved with credible evidence, without such proof, as in the instant case, no special damages can be awarded. See Garba v. Kur (supra), Osuji v. Isiocha (1989) 3 NWLR (Pt. 111) 623, Alhaji Otaru & Sons Ltd. v. Idris (1999) 6 NWLR (Pt. 606) 330.

For these and the fuller reasons contained in the judgment of my learned brother Agim JCA., I also dismiss the appeal on all other issues except the appeal against the award of special damages which is allowed.

**ISAIAH OLUFEMI AKEJU, J.C.A:**

I have had the opportunity of reading before now the judgment just delivered by my learned brother, EMMANUEL AKOMAYE AGIM JCA. It is obvious that all the issues raised in the appeal have been exhaustively considered, and resolved. I agree with the reasoning in the judgment as well as the conclusion that the appeal is lacking in substance. I too dismiss the appeal and abide by the consequential orders including the award of costs.