**MISS HELEN EGBUCHE**

**V.**

**MR. PATRICK OKECHUKWU EGBUCHE**

IN THE COURT OF APPEAL OF NIGERIA

THE 9TH DAY OF DECEMBER, 2013

CA/E/82/2008

**LEX (2013) - CA/E/82/2008**

OTHER CITATIONS

(2013) LPELR-22512(CA)

2PLR/2013/109

**BEFORE THEIR LORDSHIPS**

ADZIRA GANA MSHELIA, J.C.A

IGNATIUS IGWE AGUBE, J.C.A

EMMANUEL AKOMAYE AGIM, J.C.A

**BETWEEN**

MISS HELEN EGBUCHE - Appellant(s)

AND

MR. PATRICK OKECHUKWU EGBUCHE (Diokpa/Head Egbuche Family suing through His Attorneys, MRS THERINE AFULENU IBISI (NEE EGBUCHE) and MRS. LILY OBANYE (NEE EGBUCHE) - Respondent(s)

**REPRESENTATION**

BOSA ANYA EJI, Esq. - For Appellant

AND

CHIDI OBIEZE Esq with UCHE ADUBA - For Respondent

**ORIGINATING COURT**

ANAMBRA STATE HIGH COURT

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

REAL ESTATE AND PROPERTY LAW - LAND:- Duty to prove identity of land- what a claim for damages for trespass presupposes

CUSTOMARY LAW: - Inheritance rights of female children –Relevant considerations

CHILDREN AND WOMEN LAW: Female Children and customary rights of Inheritance - Right of Inheritance: Onitsha customary law – Interest of female children – How treated – Attitude of court thereto - Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- When appellate court will interfere with the trial court's finding of facts or its other decision on the facts – Proper time to raise an objection based on procedural irregularity - When leave of court is not required to bring an appeal

COURT - Whether trial court can review its decision refusing the application of a party to amend his pleadings – Whether decisions must be based on evaluation of the evidence on the point - Purpose of evaluation of evidence - Duty to consider every issue raised before it - How discretion must be exercised

EVIDENCE- VISIT TO LOCUS IN QUO - Purpose of - When required - What it presupposes - Whether trial court to suo moto embark on a visit to the locus in quo

EVIDENCE - Primary burden of plaintiff to prove his case without reference to the defence-need for consistent evidence and not contradictory evidence - Who is a truthful witness

JUDGMENT AND ORDER:- What determines whether a decision is final or interlocutory

**MAIN JUDGMENT**

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

By a writ of summons dated 22-11-2002 and filed same day, the respondent herein, as plaintiff commenced suit No. 0/436/2002 in the High Court of Anambra State at Onitsha against the appellant herein as defendant, claiming for:

(a) The sum of N100,000.00 being damages for trespass

(b) A perpetual injunction restraining the defendant either by herself, or her privies or by any person whosoever, from interfering with, or exercising any acts of ownership whatsoever over the said one storey building and bungalow, the subject matter of this suit.

The parties filed and exchanged pleadings. The plaintiff elicited evidence through 3 witnesses, in support of his claim. 5 witnesses including the defendant herself testified in support of the defence. The case was tried on the basis of the following pleadings - Amended statement of claim, further amended statement of defence and further amended reply to further amended statement of defence. I have observed that the further amended statement of defence which is contained in pages 63-70 of the record of this appeal has a counter-claim following its last paragraph. For reasons not stated in the records, Learned Counsel for the defendant in the written address dated 28th June, 2007 and filed same day at the trial court made no reference to it, did not urge the trial court to grant it and concluded the address by simply urging that the plaintiff's claims be dismissed. Learned Counsel for the plaintiff in his "Final Written Address" dated 3rd July 2007 and filed same day, also did not say anything about the said counter-claim. The trial court in its judgment made no pronouncement concerning the said counter-claim even though it acknowledged that the case was heard on the basis of the three pleadings listed above in the following words. "Pleadings were ordered and duly filed and exchanged. The suit was then heard on the basis of the amended statement of claim which was dated and filed on the 21st day of June, 2006 and the further amended reply to the further amended statement of defence of the 15th day of December 2006." In this appeal no mention is made of the said counter-claim in the grounds of appeal, the issues and arguments. By a motion on notice dated and filed on 8th June 2007, the defendant had sought for the leave of the trial court to further amend the further Amended Statement of defence. It is noteworthy that the proposed further further Amended Statement of Defence that was filed and sought to be deemed as regularly filed had no counter- claim in it. This application was opposed by the plaintiff. The trial court in its ruling of 12th June 2007 refused this application to further amend the further Amended Statement of defence. The Defendant dissatisfied with this ruling on the 14th June 2007 filed a notice of appeal containing one ground of appeal.

After the close of evidence and final addresses by both sides, the trial court on the 12th September 2007, rendered judgment holding that the plaintiff proved his claims against the defendant and granted the reliefs claimed by the plaintiff in his amended statement of claim.

Dissatisfied with this judgment, the defendant on the 10th December 2007 commenced this appeal No. CA/E/82/2008 by filing a notice of appeal containing 12 grounds of appeal.

The parties in this appeal have filed and exchanged their respective briefs of argument as follows - appellant's brief of argument, respondent's brief and appellants reply brief.

The respondent filed a notice of his intention to rely on a preliminary objection on 4th June 2008 which he argued in pages 4-6 of his brief. The objections in the notice of preliminary objection are that -

1. The record of appeal and the appellant's brief of argument in this appeal are defective and incompetent.

2. The notice and grounds of appeal filed on 13-6-2007 is incompetent.

The grounds for these objections as stated in the said notice are -

1. That two appeals have been mixed up, in this appeal, to wit, the Appeal on the interlocutory ruling of the trial court, filed on 13-6-2007 and shown on pages 85a and 85b of the Records, and the Appeal against the final judgment of the trial court filed on 10th December, 2007 and shown on pages 151-159 of the Records.

2. There ought to be different sets of records for the two appeals.

3. There ought to be two different sets of Appellants' brief of argument for the two appeals.

4. Before the two appeals can be taken together, there should be an order of Court consolidating the two appeals, for the purpose of hearing only.

5. None of the requirements in items 2 to 4, were complied with.

6. The Ruling of 12-6-2007 was an exercise of discretion by the trial Court, and leave of Court is required before an Appeal on it will be filed.

The appellant's reply to the argument of the preliminary objection is contained in pages 1, 2, 3 and 4 of the appellant's reply brief.

Since the preliminary objection challenges the competence of the appeal, let me consider it first, before determining the merit of the appeal if need be.

Learned counsel for the respondent has argued that the appellant argued two different appeals on one record of appeal and in one brief of argument without first having sought for and obtained the leave of this court to consolidate the two appeals, and that there ought to be a separate record and a separate brief of argument for each appeal and on which basis an application for consolidation of the two appeals can be made to this court.

Learned Counsel for the respondent further argued that the ruling of 12-6-2007 refusing the further amendment of the further amended statement of defence is an interlocutory decision in the exercise of the trial court's discretion and therefore an appeal against it cannot competently be made without the leave of the trial court or of this court to appeal against it as an appeal on mixed law and fact and as an appeal against an interlocutory decision. On the basis of these arguments, Learned Counsel for the respondent urged this court to hold that this appeal is incompetent and defective and dismiss same. Learned Counsel for the appellant argued in reply that the current judicial disposition is that an interlocutory appeal should wait and be taken up with the final appeal against the judgment at the conclusion of trial and not be pursued to the frustration or detriment of the pending and ongoing trial and that it will be wrong to argue that an interlocutory appeal has been abandoned merely because no record of appeal was transmitted and no brief of argument of same was filed. Learned Counsel further submitted that only an appeal that has been entered and given appeal numbers can be consolidated and that the respondent has not shown that he will suffer any injustice if the interlocutory appeal is considered in this appeal. Learned Counsel also argued that it is the nature of a decision and not the nature of the proceedings that determine whether the decision is final or interlocutory. According to Learned Counsel where the decision determines the rights of the parties with regard to the subject matter of the particular application and there is no room for the trial court to revisit the issue, then it is a final decision even though made in an interlocutory application and has not determined finally the pending suit. Learned counsel submitted that the ruling finally determined the issue of the entitlement of the appellant to further amend the further amended statement of defence and is therefore a final decision as it cannot be revisited by the trial court. He argued that an appeal against an exercise of discretion does not always involve consideration of facts. According to Learned counsel where the ground of appeal involves disputation of facts, it is an appeal on fact or mixed law and fact but where the ground complains of the inference drawn from undisputed facts or the application of wrong principles to undisputed facts then it is an appeal on law. Learned Counsel then submitted that the lone ground of appeal against the ruling which complained about the reasons given by the trial court for refusing the application was a complaint about the wrong application of principles of law to undisputed facts and therefore is a ground of law. Learned Counsel then finally submitted that the appellant did not need leave of court to appeal and therefore the appeal against the ruling was competent.

Arising for determination from the above arguments of both counsel in support or against the preliminary objection are the following issues:

1. Whether a ruling refusing an application to amend a pleading is a final or interlocutory decision.

2. Is an appeal against the exercise of discretion by a court one of facts or mixed law and facts or law

3. Whether an interlocutory appeal that the appellant chose not to separately pursue, but take up along with an appeal against the final judgment following conclusion of the trial, can be argued together with the final appeal on the same record of appeal and in the appellants brief in the final appeal without leave of court to do so or an order of consolidation of the two appeals.

I will consider the issues in the sequence stated above beginning with first issue. I agree with the submission of Learned Counsel for the appellant that what determines whether a decision is final or interlocutory is the nature of the decision and not the nature and stage of the proceedings in which the decision or order was made. See the decision of the Supreme Court in IGUNBOR V. AFOLABI (2001) 11 NWLR (PT. 723) 148 AT 165, cited by Learned Counsel for the appellant. What must be looked for in considering the nature of the decision is the effect of the decision on the pending proceedings or the issues in controversy or the rights of the parties in the suit. The decision will be a final decision if it terminates the pending proceeding or determines the right of the parties in the suit or determines the issue or subject matter in controversy and the court that rendered the decision or a court of co-ordinate jurisdiction has no power to revisit or reconsider the decision. It is this lack of jurisdiction of the court that gave the decision or made the order to revisit or review it that makes it final. So a final decision is one which by its nature cannot be reconsidered by the court that rendered it. The fact that the decision was made during an interlocutory trial or hearing of an issue in a pending suit will not rob it of its character as a final decision.

The Supreme Court in IGUNBOR V. AFOLABI (supra) restated the law in the following words - "The determination of the question whether an order is interlocutory or final has never been one of mean difficulty. The test has been to look at the nature of the order made rather than the nature of the proceedings resulting in the order. What has to be considered is whether the order has finally determined the rights of the parties in the proceedings in issues appealed against and whether the rights of the parties in the substantive action have been finally disposed of see ...? A final order or judgment at law is one which brings to an end the rights of the parties in the action. It disposes of the subject matter of the controversy or determines the litigation as to all parties on the merits. On the other hand, an interlocutory order or judgment is one given in the process of the action or cause, which is only intermediate and does not finally determine the rights of the parties in action. It is an order, which determines some preliminary or subordinate issue or settles some steps or questions but does not adjudicate the ultimate rights of parties, in the action. However, where the order finally determines the rights of the parties as to the particular issue disputed, it is a final order even if arising from an interlocutory application. For instance, an order of committal for contempt arising in the course of proceedings in an action is a final order see ...?The instant case as rightly submitted by appellant's counsel, is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the Learned Trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other court of co-ordinate jurisdiction. The order of the learned trial judge is therefore a final order. An appeal on the said order is as of right under Section 220(1) of the Constitution 1979."

It is beyond argument that the decision of a trial court refusing the application of a party to amend his pleadings cannot be reviewed or reconsidered by the court that refused the application. The decision determines the merit of the application to amend and the entitlement of the applicant to such amendment. The court that rendered it or a court of coordinate status has no jurisdiction to reconsider the decision. If the applicant is dissatisfied with the decision, he can only appeal against it to a court higher in the judicial hierarchy and with the appellate jurisdiction to entertain the appeal. Therefore I hold that the ruling of the trial court refusing the defendant's application to further amend the further amended statement of defence is a final decision in a civil proceeding. Since it is a final decision, leave of court to appeal against it is not required by virtue of S. 241(1)(a) of the 1999 Constitution of Nigeria which provides that-

"An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases -

(a) Final decision in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance."

Let me now consider the second question of whether the appeal against the decision is one of law or of fact or mixed law and fact. Generally the exercise of discretion by a court involves having regard to the peculiar circumstances of the particular case. For this reason an exercise of discretion must always involve a consideration of the facts of the case. I therefore disagree with the submission of Learned Counsel for the appellant that an exercise of discretion does not always involve consideration of facts. But, it is not all appeals against a court's exercise of discretion that involves questions of fact. Where the appeal complains about the inference or conclusion drawn by the Court from undisputed facts or how law was applied to undisputed facts, it is a question of law. Where the appeal complains about the courts determination of issues of facts or that the courts decision is against the weight of evidence or that it does not meet the justice of the case considering the circumstances of the case then it involves a question of fact.

At this juncture it becomes necessary to find out what was the complain in the sole ground of appeal in the notice of appeal against the ruling of 12th June 2007. For ease of reference, the ground is reproduced here as follows –

"The learned trial judge erred in law when he refused the defendant/appellant amendment of the Further Amended Statement of Defence to bring the evidence in line with the pleadings and when the defendant/appellant had not closed his case and the hearing had not closed.

**PARTICULARS**

(1) Amendment can be made at any stage of the proceeding and even on appeal.

(2) Amendment will be granted when hearing had not closed.

(3) The amendment will be made where it is to bring the pleadings in line with the evidence already before the court."

Let me also look at the ruling complained of. For ease of reference it is also reproduced here as follows- "RULING: I have seen the proposed amendment which the defendant seeks to make. I am of the view that it is very substantially material to the issues in controversy. It is as a result of circumstances which are similar to the one under consideration that the Supreme Court in the case of OWENA BANK V. OLATUNJI (2002) 13 NWLR (PT. 781) 259 AT 344 paragraphs E-F had the following to say:-

To allow an amendment which will introduce a new issue after a party has closed his case amounts to a denial of the rule of audi alterem partem"

In the earlier case of AGBONI V. AIWEREOBA (1988) 1 NWLR (PART 70) 325 at 342, the Supreme Court put it more succinctly in the following terms:-

"I would wish to underscore the fact that the adversary system of the administration of justice which we operate has no room for any sneak game of hide and seek. It does not permit a defendant to conceal vital evidence in his case from his adversary and his witnesses until they have testified and closed their case."

In the present case, the plaintiff has since closed his case before the defendant came up with this amendment which I consider to go to root of the matter in this suit. She is not allowed to do so. This application is clearly not brought in good faith. It is therefore hereby refused."

It is obvious that the trial court refused the application because it was brought after the plaintiff had closed his case and sought to introduce new facts thereafter. The complain in the ground of appeal is that an amendment can be made at any stage of the proceedings and that the amendment should have been granted as it was meant to bring the evidence in line with the pleadings.

It is glaring that this ground of appeal is not complaining about any determination of issues of facts. It is complaining about the application of the legal principle of fair hearing in the determination of the application on the undisputed fact that it was made after close of the plaintiff's case and the failure to apply the legal principle that an amendment can be granted at any stage of the proceedings until judgment. The appeal clearly involves a question of law, to wit, whether it will accord with the requirement of fair hearing to allow an amendment of the statement of defence to introduce new fact after the plaintiff has closed his case, but before the defendant concluded his evidence.

Since the appeal involves a question of law, it does not require the prior leave of court to bring it. This is so by virtue of S.241(1) (b) of the 1999 Constitution which provides that an appeal shall lie from the decisions of the trial court in civil or criminal proceedings as of right in cases where the ground of appeal involves questions of law alone.

It is therefore clear from the foregoing that the preliminary objection that the notice and ground of appeal filed on 13-6-2007 is incompetent because it is an interlocutory decision and that it involves questions of mixed facts and law has no basis and therefore fails. It is hereby dismissed.

The other objection that the record of appeal and the appellant's brief of argument in this appeal are defective and incompetent because there is no separate record for the notice of appeal filed in 13-6-2007 and no separate brief of argument of same. I fail to see how the absence of those processes for the appeal of 13-6-2007 that has not even been entered in this court, affect the record of this appeal and the appellant's brief of argument herein. The objection lacks merit and is accordingly dismissed.

In arguing the preliminary objection contained in the notice of preliminary objection filed on 4-6-2006 the respondent raised and argued an objection that was not contained in the notice of preliminary objection. Learned Counsel submitted that this appeal is incompetent and defective because the appellant consolidated two different appeals without the leave of court and without any right to do so. There was no objection in the notice to the competence or hearing of this appeal. It is my view that such argument cannot lie since notice of it was not given as required by Order 10 Rules 1 of the 2011 Court of Appeal Rules which provide that -

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

I will refuse to entertain that argument in keeping with Order 10 Rule 3 of the 2011 Court of Appeal rules which provides that this court may refuse to entertain the objection or may adjourn the hearing thereof at the costs of the respondent or may make such other order as it thinks fit.

In any case, assuming such objection was competently made and therefore admissible, it lacks merit. This is because the notice of appeal is against only one decision, to wit, the judgment of Anambra State High Court delivered on 12th September 2007 and all the grounds therein attack only that judgment. The appeal against that judgment was entered in this court on 10-3-2008 as CA/E/82/2008. The record of this appeal on the front page refers to the judgment in respect of which it was compiled as the judgment of 12-9-2007. So the processes that commenced and entered this appeal related only to this appeal. It is only in the appellant's brief of argument that she sought to argue the ground of appeal in the notice of appeal filed on 13-6-2007 and stated therein that she "will apply to the court to entertain the interlocutory appeal with the final appeal." There is nothing in the record showing that she so applied. Since she did not apply; it means that she has abandoned the intention to apply to this court to entertain the interlocutory appeal with the final appeal. Since she has not so applied the issue of two separate appeals being argued together or mixed has not arisen. This court cannot consider an application that has not been made. Until it is made the issue for determination of the appeal filed on 13-6-2007 and the argument thereof separately set out at pages 2 and 4 of the appellant's brief in anticipation that the application to entertain same with this appeal will be made and will be granted, remain invalid and cannot be considered by this court in the determination of this appeal.

The case of IWUCHUKWU V. NWIZU (1994) 7 NWLR (PT 357) 379 AT 407 AND 48 cited by Learned Counsel for the respondent is distinguishable from this present case because the material facts on the mixture of appeals are not the same. In Iwuchukwu's case there was actual mix up of two interlocutory appeals with the main appeal. The three appeals were separately filed against decisions of the trial court in the same case. The mix up of the appeals started from the settlement and compilation of records. A single document was issued stating the conditions for the three appeals. Although separate deposits were demanded and paid for, the preparation and transmission of the record of each appeal was not done rather, one single record was compiled for, the three appeals. In the respective briefs of argument of the parties, all the three appeals were argued together. The Supreme Court held that "the record of appeal does not show that the 3 pending appeals were consolidated by Order of this Court of Appeal or indeed the Federal High Court. The confusion, therefore, arose at the time of settling the record of proceedings for the purpose of the main appeal to the lower court." The court further held that "it is clear that there had been a mix up with regard to the 2nd and 3rd appeals because they were not ripe for hearing, the necessary briefs not having been filed, and more importantly, those appeals not having been consolidated together with the substantive appeal," In our present case there is no such confusion in the preparation of records and the appellant who has expressed an intention to apply to have the interlocutory appeal taken along with the main appeal, has not applied. It is noteworthy that in IWUCHUKWU'S case where the Court of Appeal heard the interlocutory appeals along with the main appeals without an order of consolidation of the appeals and when the interlocutory appeals were not ripe for hearing, the Supreme Court held that even though the Court of Appeal erred, Since there had been no miscarriage of Justice in doing so, the proceedings and decisions in the main appeal were not vitiated.

On the whole, I hold that the entire preliminary objections lack merit and are accordingly hereby dismissed.

I will now proceed to consider the issues raised for determination in this appeal in the respective briefs of the parties herein I have already held herein that the issue for determination of the interlocutory appeal and the arguments of same at pages 2 and 4 are not valid for consideration by this court in this appeal since the appellant has not applied to this court to consider them along with this appeal. Therefore the said issue for the determination of the appeal filed on 13-6-2007 at page 2 of the appellant's brief and the argument of same at page 4 of the same brief are hereby struck out. Accordingly, issue No 1 of the respondents brief and the argument of same in response to the appellant's issue and arguments of the interlocutory appeal filed on 13-6-2007 are also not valid for consideration and are hereby equally struck out.

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

2. Whether the learned trial judge was right to have relied on the Further Amended Reply filed by the respondent to determine this suit.

3. Whether the learned trial judge was right and properly directed himself as to the nature of issues placed before him by the parties in their pleadings and evidence i.e. the issue of title/ownership, the Onitsha native law and custom, onus and burden of proof when he held that the one storey building was part of IBA EGBUCHE and whether the plaintiff discharged the onus of proof on the plaintiff that the one storey building was part of IBA EGBUCHE under Onitsha native law and custom.

4. Whether the learned trial judge made a correct approach to the evidence led by the parties by not considering the conflicting evidence and evidence elicited during cross-examination of the plaintiff's witnesses before coming to his decision and whether there was bias/fair trial in the circumstances of this suit.

5. Whether the plaintiff/respondent prove that the defendant/appellant trespassed into IBA EGBUCHE i.e. put in tenants into IBA EGBUCHE and collected rents from tenants therein and whether the judgment was correct.

6. Whether the learned trial judge ought to have struck out this suit for being incompetent.

The respondent's brief raised the following issues for the determination of this appeal -

2. Whether the trial court was right in holding that the IBA EGBUCHE, consists of the storey building and the annexed bungalow?

3. Whether the failure of the trial Court to record his findings at the visit to the locus in quo, has vitiated the Court's findings that the plaintiff has proved his case?

4. Whether the further Amended Reply was proper in law, and whether the trial Court had the right to make use of it, as part of the pleading?

5. Whether the Appellant has the right to raise a fresh issue on Appeal, without the leave of this Court?

6. Did the plaintiff prove trespass by the Appellant?

Considering the judgment of the Court delivered on 12-9-2007 the grounds of this appeal, the issues raised by both parties for the determination of this appeal and the arguments of same in their respective briefs of argument, I prefer to adopt issues number 2 and 6 in the appellant's brief as the 1st and 2nd issues for the determination of this appeal and couch the third issue for the determination of this appeal thus -

Whether the trial Court was right to have held that the plaintiff proved his claims against the defendant. This will cover the issues number 3, 4 and 5 of the appellants brief and the issues numbered 5.2, 5.3 and 5.6 in the respondent's brief.

Therefore I will determine this appeal on the basis of these three issues which I reproduce here for clarity and avoidance of doubt as follows-

1. Whether the learned trial judge was right to have relied on the Further Amended Reply filed by the plaintiff to determine this suit.

2. Whether the learned trial judge ought to have struck out this suit for being incompetent.

3. Whether the trial Court was right to have held that the plaintiff proved his claims against the defendant.

Let me start with the first issue of whether the trial Court was right to have relied on the further Amended Reply filed by the respondent to determine the suit before it. I have observed that the appellant did not object to the said further amended reply when it was filed and served on her before the parties started eliciting evidence. The appellant should have at that stage applied to the trial court to strike out the entire further amended reply or the offending portions. She did not. However Learned Counsel for the appellant did raise and argue this issue in his final address at the trial court. It was not considered by the court. The trial Court had a duty to consider and determine this issue when it was argued before it. It clearly abdicated its judicial responsibility to consider every issue raised by parties in case, however trivial or frivolous it may consider them to be. It smacks of lack of respect for a party's right to fair hearing if an issue raised and argued by it is completely ignored by a court in its judgment. It renders the impartiality and transparency of the Judge suspect.

I understand the argument of Learned Counsel for the appellant to be that since the trial court failed to consider and determine the appellant's said complain, this court should consider and determine it. I will certainly do so. It is my view that the appellant had consented to the wrong procedure by failing to timeously object to the use of the further amended reply before taking any further step in the proceedings. Having gone ahead and participated in the trial including eliciting her own evidence in support of her case on the basis of the pleadings as they stood in the case. She had clearly consented to the wrong procedure and waived her right to object to any irregularity in the further amended reply. It was belated to have raised it in her final address because at that stage evidence had been taken and concluded on the basis of the pleadings as they stood. The Supreme Court held in SAUDE V ABDULLAHI (1979) NWLR (Pt 116) 387, that "It has since been established by a plethora of authorities that the appropriate time at which a party to proceedings should raise an objection based on procedural irregularity is at the commencement of the proceedings or at the time the irregularity arises. If the party sleeps on that right and allows the proceedings to continue on the irregularity to finality, then the party cannot be heard to complain, at the concluding stage of the proceedings or on appeal thereafter that there was a procedural irregularity which vitiated the proceedings." For the above reasons I hold that the complain by the appellant under issue No 1 is not valid. Issue No 1 herein is therefore resolved in favour of the respondent.

I will now deal with the second issue of whether the trial court should have struck out the suit for being incompetent. Under this issue, Learned Counsel for the appellant has argued that the power donated by the respondent to his attorneys in exhibit P1 did not include the power to institute the suit at the trial court. Learned counsel based this argument on his further contention that the power donated under exhibit P1 was to inter alia commence legal proceedings concerning the respondent's personal right in the one storey building and bungalow at the back of No 39 Okosi Road, Onitsha, but the Iba Egbuche the subject of the suit at the Trial Court is the family property of Egbuche family.

Learned Counsel for the respondent, has in his respondent's brief argued that the above issue cannot be raised and argued in this appeal without the prior leave of this court first sought for and obtained to raise and argue it as a fresh issue since it was never raised at the Trial Court. This was the only argument made by the Learned Counsel for the respondent in reply to the argument of learned counsel for the appellant. Learned Counsel for the appellant in his appellant's reply brief argued that the power of attorney was challenged in paragraph 2 of the further amended Statement of defence and so is not a fresh issue, that it is an issue of jurisdiction and so can be raised at any stage of the proceedings and even for the first time on appeal and that being an issue of jurisdiction the leave of this court is not required to raise it as a fresh issue in this appeal.

Let me straightaway say that the complain in issue No 2 is not primarily one of jurisdiction. The primary issue is what is the nature of the right the respondent has in the Iba Egbuche? Is it a right personal to him or one common to the family? This is the issue raised in that complain. The understanding of the appellant is that if it is a right belonging to the family he has no right of personal action to enforce such right and therefore cannot donate the power to sue in respect of that right to his attorneys and therefore any donation of such power is incompetent, and will have the effect of robbing such attorneys of the locus standi to institute any action in pursuance of such power. If this understanding of the appellant is right, it becomes clear that the lack of locus standi and the consequent lack of jurisdiction are secondary issues deriving from the determination of the primary question. The primary issue referred to above is being raised here for the first time. It is clear from the record of this appeal, the right of the respondent in the Iba Egbuche as the Diokpa of Egbuche family is not part of the dispute that was tried at the Trial Court. It was agreed by all parties that as the Diokpa he had an exclusive personal right of occupancy and control of the Iba Egbuche. I fail to see how the appellant can now on appeal raise a dispute that did not exist at the trial so as to ground an objection to the jurisdiction of the trial court. I agree with the submission of learned counsel for the respondent that it is a fresh issue and require the leave of this court to raise and argue it. It is not disputed that the appellant has not obtained the leave to raise and argue the issue.

However, I agree with the contention of Learned Counsel for the appellant that the respondent should have raised his objection to this issue as a ground of objection in a written Notice of Respondent's intention to rely on a preliminary objection as required by Order 10 rule 3 2011 Court of Appeal Rules. For this reason I will discountenance the arguments of Learned Counsel to the respondent under issue No 5 of the respondents brief in objection to this issue being raised and argued with leave by the appellant.

Whatever the case, issue No 2 herein as raised and argued lacks merit since the respondent had at the trial agreed that as the Diokpa of Egbuche family he had the exclusive personal right to occupy and control the Iba Egbuche. What was in dispute at the trial was whether the one storey building was part of the Iba Egbuche and whether the respondent or his attorneys had any right to interfere with or manage the personal estate of the appellant's father. For the above reasons issue No 2 herein is resolved in favour of the respondent.

I will now consider the third issue of whether the trial court was right to have held that the respondent proved his claims.

The claims of the respondent as contained in his writ of summons and paragraph 21 of the amended statement of claim is reproduced at pages 1 and 2 of this judgment. The basis of the respondent's claim is his ownership of the right of occupancy of the Iba Egbuche (the ancestral family house of Egbuche family) in his life time as the Diokpa of the family of Egbuche in accordance with the native law and custom of Onitsha. This right of the respondent is not disputed. What is disputed is the history, extent and content of the Iba Egbuche. The appellant maintains that the Iba consists of a one storey building and a 4 bedroom bungalow behind it. The respondent on the other hand asserts that the Iba Egbuche consists of just the 4 bedroom bungalow. It is this dispute that was tried by the trial court. In its judgment the trial court stated thus - "I have, consequently, formed the humble opinion that the singular question for determination in this suit is simple and straightforward. It has to do with the character of the "Iba" of the Egbuche family of the parties on record. Whilst the plaintiff says that the "Iba" consists of a storey building together with a four room bungalow annexed thereto, the defendant accepted that the four room bungalow is the "Iba" but denied that the storey building is a part of it."

It is obvious from the amended statement of claim that the complain of the respondent against the appellant which formed the cause of the action filed by the respondent is that the appellant without the knowledge and consent of the respondent let out the one storey building that is part of the Iba Egbuche to tenants and is collecting rents therefore, claiming that the said storey building is the personal property of her late father (the immediate past diokpa of Egbuche family) and was not part of the Iba. The respondent filed the suit at the trial court claiming for perpetual injunction to restrain the appellant from further interference with the building or exercising any acts of ownership over the building and for damages for trespass: So proof that the Iba Egbuche included the one storey building was the foundation upon which the success of the claims of the respondent depended. By virtue of S.131 of the 2011 Evidence Act, the respondent who desired that the reliefs claimed by him be granted by the court on the basis that the one storey building is part of the Iba Egbuche had the legal burden to prove that the one storey building was part of the Iba. By virtue of S.134 of the 2011 Evidence Act, this burden of proof shall be discharged on a balance of probabilities or preponderance of evidence. To discharge this burden, a plaintiff shall elicit credible evidence that is consistent with his pleadings and will succeed only on the strength of his own case and not the weakness or absence of a defence except that he can rely on any part of the pleading or the evidence of the defence that supports his case. See MINI LODGE LTD & ANOR V. NGEI & ANOR (2009) 18 NWLR (Pt.1173) 254.

Therefore, a trial court must consider first the case of the plaintiff on his pleadings and the evidence to find out if he discharged the burden to proof his case. It is only after the court has satisfied itself that the plaintiff has discharged the burden to prove his claim, that it can proceed to consider if the defendant discharged the evidential burden to defend the case established by the plaintiff and then weigh the case of the plaintiff against that of the defendant to find out which is weightier. S.133(2) of the 2011 Evidence Act provides that-

1. "In civil cases, the burden of first proving 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.

2. If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with."

To proceed straight to considering the case of one side against the other without first determining that the plaintiff had discharged the legal burden to prove his claim, disregards the above provisions of S.133(2) and gives the impression that the trial court may not have directed its mind to the law that the plaintiff has the primary burden to prove his case without reference to the defence.

Learned Counsel for the appellant has argued under issue No 3 of his brief that the trial court did not direct itself properly as to who has the onus of proof that the one storey building was part of the Iba and that the appellant let it out to tenants. According to the said Learned Counsel the trial court "wrongly placed the burden and onus of proof on the defendant" and that "since the defendant only came to defend the suit it was wrong for the Learned trial Judge to have placed the onus on the defendant to prove that the one storey building was part of Iba Egbuche or that she did not trespass into Iba Egbuche."

Learned Counsel for the respondent did not respond to this argument of the appellant. I have calmly and carefully read through the brief of the respondent. Apart from stating that "the respondent discharged the onus of proof on him, to show that the appellant put in rent paying tenants in the IBA and that having given that evidence the onus shifted to the appellant to challenge it, first, by cross-examination on that fact and then thereafter leading evidence in rebuttal," it remained silent on whether the trial court misdirected itself on who has the burden of proof and wrongly placed the burden of proof on the appellant. Notwithstanding this lack of response on the point by the respondent, I will proceed to consider this question. The judgment of the trial court is contained in eight pages at pages 143-150 of the record of this appeal. After setting out side by side, the summary of some of the evidence led by each party in three pages, the trial court stated that -

"Upon the close of their respective cases by the parties both counsel addressed the court. I have considered, carefully, the evidence adduced by the parties and their witnesses in contesting this suit. I have also considered, with rapt attention, the submissions of both counsels in contesting this matter. I have, consequently, formed the humble opinion that the singular question for determination in this suit is simple and straightforward. It has to do with the character of the "Iba" of the Egbuche family of the parties on record. Whilst the plaintiff says that the "Iba" consists of a storey building together with a four room bungalow annexed thereto, the defendant accepted that the four room bungalow is the "Iba" but denied that the storey building is a part of it. The basic considerations for the just determination of this suit, therefore, turns more on questions of facts rather than those of the law. That being the case, I have here before me, the oaths of the plaintiff and his witnesses to weigh against those of the defendant and her witnesses. The plaintiff has sued the defendant claiming damages for trespass and injunction. The basis of his claim is that, as the diokpa of the family, he is in the possession of the "Iba" thereof. That the defendant interfered with his possession aforesaid by putting rent paying tenants into the "Iba"."

After this statement the trial court proceeded to state some of the materials facts agreed upon by the parties. Thereafter it stated that-

"The point of divergence has to do only with the question, which of the structures within the said No. 39 Okosi Road, Onitsha make up the "Iba"? The plaintiff said that it is the said one storey building together with a bungalow annexed thereto. The defendant, on the other hand, accepted that the bungalow is the "Iba" but added that it is detached from and separate from the one storey building which, according to her, is not part of the "Iba". I find it very difficult to agree with the defendant that the one storey building is not part of the "Iba". It is clearly part of the "Iba". I say so because when the three sons of the late Okunwa J.C. Egbuche (senior) partitioned and shared amongst themselves the compound, No. 39 Okosi Road, Onitsha, they carefully omitted to make the portion where the thatched house of their deceased father stood part of the exercise. The said portion where the thatched house stood is today accommodating the storey building and the bungalow, the subject of litigation. The inescapable inference is that it was not made part of the sharing exercise because it is the Iba. The plaintiff insisted that the storey building and the bungalow constitute a single structure. The defendant stated to the contrary. I am, however, of the humble opinion that whether or not they constitute separate structures is not relevant. This is because both of them were erected on the portion where the thatched house aforesaid stood. It is that portion, with all the structures thereon, which make up the "Iba".

The trial court then proceeded to state that -

"Be that as it may, the parties agreed that the diokpa lives in the "iba". It follows, inexorably, that when Okunwa J.C. (junior) left his two storey building to live in the one storey building, the subject of litigation, he did so because he was the "diokpa". It was also for the same reason that upon the demise of the said Okunwa J.C. Egbuche (junior)' the plaintiff moved into the aforesaid one storey building. Apart from the above stated circumstances, I am particularly impressed by the testimony of PW1, Lily Obanye. He is a daughter to the late Okunwa J.C. Egbuche (senior). Okunwa J.C. Egbuche (junior), Onuora, and the plaintiff are all her brothers. [On] cross-examination, her credibility remained intact. I have no doubt in my mind that she is a witness of the truth. However, out of the abundance of caution, at the conclusion of evidence by both parties, the court moved to the locus in quo, in the presence of the defendant and the counsel for the parties. I went there simply to see things by myself so as to enable me strengthen my resolve and confirm my fears about the credibility of the testimonies of the defendant and those of her witnesses. I completely agree with the testimonies of the plaintiffs witnesses. There is no bungalow on the disputed premises, which is different from the storey building, the subject of litigation. Rather what the defendant referred to as a bungalow is only an extended part of the storey building, which was designed in such a manner that a part thereof is not decked. It is for the above reasons that I am of the humble opinion that the case of the plaintiff has weighed more than that of the defendant in the imaginary balance. The plaintiff has proved his claims against the defendant. The sum of N10,000.00 damages is, therefore, hereby awarded against the defendant in favour of the plaintiff for trespass on the disputed premises. The defendant, her agents, and/or privies is also hereby restrained, perpetually, from interfering, in any manner whatsoever, in the "Iba Egbuche" situate at No. 39 Okosi Road, Inland Town, Onitsha. No order as to cost."

It is glaring from the above quoted portions of the judgment of the trial court that it considered the case presented by both sides together, weighing one against the other. It did not address its mind to the law that both parties do not have the same level of responsibilities in terms of the legal requirements of proof in the case. It did not address its mind to the law that the respondent as plaintiff had the primary responsibility to prove his claim without reference to the condition of the case of the defendant and that if the plaintiff fails to discharge this responsibility; his case will fail irrespective of the case presented or not presented by the defendant. The judgment does not show that the trial court satisfied itself that the respondent discharged this duty nor did it show that the court considered that the evidential burden did shift to the appellant as defendant to defend the case established by the respondent. It is glaring from the above quoted portions of the judgment of the trial court that it did not consider if the respondent discharged his primary burden to prove his case. The trial court after stating that the point of divergence between the parties is whether the Iba consists of only the bedroom bungalow or both the one storey building and the bungalow, did not consider the respondent's pleadings and evidence that support his assertion that the Iba consists of the one storey building and the 4 bedroom bungalow. Rather the trial court preceded straight to state its disagreement with the appellant's assertion that the one storey building is part of the Iba and indicated why it said so. Subsequently it stated that it is impressed with the testimonies of respondent's witnesses particularly PW1 and that it agrees with them. The reason the learned trial Judge gave for visiting the locus in quo was that he wanted to see things himself to enable him strengthen his resolve and confirm his fears about the credibility of the defendant and those of her witnesses. The trial court clearly did not direct itself as to who has what onus of proof as between the parties and whether the onus of proof was discharged. The approach of the trial court in first expressing its disagreement with the appellant's case before stating its belief of respondent's witnesses and visiting the locus in quo to confirm the court's fears about the credibility of the appellant's witnesses give the impression that it placed the primary burden of proof on the appellant instead of the respondent (the plaintiff). The importance of the trial court directing itself as to who has what burden of proof and considering if such is discharged is that it enables the trial court to have the right compass or formula as it embarks on a consideration of the relationship between the admitted facts and the issues in the case and help it arrive at the right answers on the issues in the case. The trial court started properly when it said that the determination of the suit turns more on questions of facts rather than of law.

After that, it stated how it was going to carry out the determination of the questions. I understand it to have said that being that the determination turns more on questions of facts than of law, it was going to weigh the testimonies of the respondent and his witnesses against those of the appellant and her witnesses. This approach does not show regard for the provisions of Ss.131, 133(1) and (2) and 134 of the 2011 Evidence Act and is therefore wrong. It is like starting a sea voyage without the right navigation instruments that will ensure that it is a charted voyage that will follow the right routes and arrive at the right destination. Even the approach it expressly stated it was adopting it did not follow it. Apart from stating that it believed the respondent and his witnesses and does not believe the appellant and her witnesses, it did not weigh the testimonies of each against the other on any issue. It referred to the undisputed facts, namely, that the land in No 39 Okosi Road, Onitsha was shared amongst the three sons of Okunwa J.C. Egbuche (SNR) excluding the portion where the thatch house was located and that a diokpa lives in the Iba as reasons for not agreeing with the appellant that the Iba consists of the bungalow alone and relied on its view of the suit property during its visit to the locus in quo in coming to the conclusion that the case of the respondent was weightier than that of the appellant and on this basis held that the respondent had proved his claims.

The trial court failed to consider the many factual issues that were thrown up by the evidence of both sides. Beginning the determination of the point of divergence between the two parties by a conclusion that the one storey building is part of the Iba and that it disagree with the appellant that the one storey building is not part of the Iba is like starting the resolution of a mathematical question from the answer. Whatever was said from that point was meant to justify the conclusion and the reason for the visit to the locus.

The approach of the trial court to the trial of the factual issue of whether the Iba consists of the one storey building and the 4 bedroom bungalow or only the 4 bedroom bungalow was wrong. It is obvious from the judgment that as a result of this wrong approach, the trial court did not evaluate the evidence of both sides. It gives credence to the argument of Learned counsel for the appellant under the third issue in the appellant's brief that the trial court did not approach the evidence before it correctly as it did not consider and evaluate the conflicts in the evidence of the witnesses for the respondent and that the trial court failed in its duty to evaluate relevant and material evidence before it.

In all situations that a court has to decide a case on the basis of the evidence adduced by all sides to the case, it must evaluate the evidence as a basis for its decision. Evaluation of evidence is an indicator that the court correctly approached and considered every admitted and relevant evidence in reaching its decision. Lack of evaluation or improper evaluation of evidence indicates that the court wrongly approached the evidence before it and has disregarded all or some material evidence or has not correctly analysed or appraised the material evidence before it in reaching its decision. This court in ONWUGBELU V. EZEBUO & ORS (UNREPORTED DECISION DELIVERED ON 21-2-2013 IN CA/E/56/2009 in restating the requirement of a proper evaluation stated that- 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... 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....... 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 586, 588 - 589.

In the case of AWUDU VS. DANIEL (2005) 2 NWLR (Pt. 909) 199 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 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."

The trial court's complete agreement with the testimonies of the respondent's witnesses and disagreement with the appellant's assertion that the Iba does not include the one storey building is not based on an evaluation of the evidence contained in the testimonies of each side and their witnesses. The decision of a trial court that it believes or disbelieves any evidence on any point must result from an evaluation of the evidence on the point. As the Supreme Court held in the locus classicus of Mogaji & Ors v. Odofin & Ors (1978) 4 SC (Reprint) 53 at 65. "before a Judge before whom evidence is adduced by the parties before him in a Civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witness called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on a balance of probabilities." In BABA V. NIGERIAN CIVIL AVIATION & ANOR (1991) 7 SCNJ 1. The Supreme Court held that it is the "Law that facts on any issue in a civil case are assessed and evaluated by holding the evidence called by both sides to the conflict on the issue on either side of imaginary Judicial balance and weighing them together, whatever outweighs the other ought to be accepted". Such an evaluation is not constituted by setting out side by side the summary of some of the evidence led by either side. It involves a consideration of the relations between the evidence and the issues as well as the probative value of such evidence. Such a consideration involves a thorough appraisal analysis and assessment of the evidence that will logically result in a conclusion of Law or an inference of fact. See ONWUGBELU V EZEBUO (Supra) and AWUSE V ODILI (Supra). I agree with the submission of Learned Counsel for the appellant that the trial court cannot abandon the duty to evaluate evidence "by taking refuge in the clouds of 'I believe and 'I do not believe without really evaluating the evidence of vital witnesses"

It is the further submission of Learned Counsel for the appellant that if the trial court abandons this duty, the use of the expressions "I believe" and "I do not believe" will not stop this court from itself evaluating the evidence and seeing whether there is any justification for believing or accepting a particular evidence. 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.

It is trite law that is restated by a long line of judicial decisions that the appellate court cannot interfere with the trial court's finding of facts or its other decision on the facts, unless in cases where there was no evaluation of evidence or there is improper evaluation of the evidence or it has not properly utilized the advantage of seeing and listening to the witnesses, or where the wrong conclusions are drawn from the evidence. In EBOLOR V.  OSAYANDE (1992) 7 SCNJ 212 the Supreme Court held that "Once this court is satisfied that the court of trial did not properly evaluate the evidence or that it made a wrongful approach to the evidence tendered before it, or has in any way not properly utilized the advantages of seeing or listening to the witnesses then a special circumstances has been shown, the confirmation of the finding by the Court of Appeal notwithstanding. So it has the right, indeed the duty to intervene." This court in ONWUGBELU V. EZEBUO & ORS (Supra) held "p. 10". See ALSO DAKUR V. DAPAL & ORS (1998) 10 NWLR (PT. 571) 573 AT 586, 588 - 589.

Since the trial court did not evaluate or properly evaluate the evidence before it, this court will now evaluate the evidence before the court on the issue of the exact content or extent of the Iba to find out if the decision of the trial court that the Iba consists of the one storey building and the 4 bedroom bungalow and the decision that the respondent proved his claims is justified by the evidence. Before commencing the evaluation of the evidence of both sides on the extent of the Iba, it is important to remember that an evaluation of the evidence elicited by either side on an issue must involve a consideration of both the pleadings and the evidence because evidence is led on the basis of and in proof of the facts in the pleadings and must be consistent with the pleadings. Therefore the pleadings determine the case established by the evidence. The respondent as plaintiff elicited evidence consistent with paragraphs 9 to 18 of the amended statement of claim that -

(a) that the Iba occupies part of a larger parcel of land comprised in and situate at No. 39 Okosi Road, Onitsha

(b) The said No. 39 Okosi road Onitsha was inherited by appellant's father (Okonwa J.C. Egbuche (JNR), the respondent and Onuorah Egbucha from their late father Okonwa J.C. Egbuche (SNR), the original owner, as his only male children.

(c) While alive, Okonwa J.C. (SNR) built and lived in a thatch house on a portion of No. 39 Okosi Road, Onitsha.

(d) The said three male children of Okonwa J.C. Egbuche agreed amongst themselves to partition part of No. 39 Okosi road, Onitsha amongs themselves. Each person became the absolute owner of the portion partitioned to him.

(e) The residential thatch house of their father was occupied by Okunwa J.C. Egbuche (JNR), appellant's father as the eldest male child of Okunwa J.C. Egbuche (SNR)

(f) The thatch house was not included in the part of No. 39 Okosi Road, Onitsha partitioned amongst the three sons of Okunwa J.C. Egbuche (SNR).

The respondent's amended statement of claim and his further amended reply to the further amended statement of defence conflict on the origin and history of Iba Egbuche. Paragraphs 9 to 16 of the amended statement of claim state that Okunwa J.C. Egbuche JNR established the Iba Egbuche by building the thatch house, living therein with his family throughout his life time and being buried therein on his death. Paragraph 12 of the said amended statement of claim state that "this thatch house, in accordance with Onitsha native laws and custom, became the Iba ancestral house of late Okunwa J.C. Egbuche (SNR) and will pass in succession to each successive diokpa/Head of Okunwa J.C. Egbuche (Snr)'s family, ad infinitum. Paragraph 11 of the same amended statement of claim state that the appellant's father as the eldest son of late Okunwa J.C. Egbuche (Snr) moved into the thatch house and assumed the Headship/Diokpaship of the family of late Okunwa J.C. Egbuche (Snr).

Paragraph 13 of the amended statement of claim state that "having taken possession of the Iba Okunwa J. C. Egbuche (SNR), the late Okunwa Joseph Chukwunweike Egbuche (JNR) as Diokpa, now proceeded to allocate the rest of No 39 Okosi road, Onistsha amongst himself and his two other brothers."

Paragraph 14 state that by virtue of this allocation, the late Okunwa Joseph Chukwunweike Egbuche (jnr) allocated to himself the front portion of No 39 Okosi Road Onitsha' on which he set up a two storey building and gave two other portions to both Patrick Okechukwu Egbuche and Onuorah Egbuche. Both of them have developed their own portions allocated to them.

Paragraph 15 of the said amended statement of claim state that "the thatch house of their father remained the IBA and was later developed into a storey building and a bungalow by late Okunwa Joseph Chukwunweike Egbuche (Jnr) and Patrick Okechukwu Egbuche, contributing money jointly for the project. This development was necessary in order that their sisters who had or may have problems in their matrimonial homes will have a place of residence. Presently one of their sisters, Mrs Catherine Afulenu Ibisi has been living in the IBA for over twenty years now."

The above narrative is the origin and history of Iba Egbuche averred in the amended state of claim.

In the respondent's further amended reply to the further amended statement of defence, the origin and history of Egbuche is differently stated in paragraphs 5 and 6 thus –

"The late Okunwa J.C. Egbuche (Jnr) marked out the 'Iba' with the consent of his brothers. This was later developed jointly by himself and the plaintiff, into a storey building and bungalow. The late Okunwa J.C. Egbuche (jnr) never or at all built a bungalow where the plaintiff built his own house. The plaintiff denies paragraph 6(b) of the further Amended Statement of defence and in answer thereto, avers that late Okunwa J. C. Egbuche (Jnr) as head of family occupied the storey building at No 39 Okosi road, Onitsha being the Iba. After his second burial the plaintiff as the current diokpa or Head of family now occupies the said 39 Okosi Road, Onitsha, as Iba. The whole of the storey building and annexed bungalows was marked out and developed by the late Okunwa J. C. Egbuche Jnr and the Plaintiff as their father, Okunwa J. C. Egbuche Snr's Iba, and the rest of the land was apportioned amongst the three of them."

It is clear that the two versions of the origin and history of the Iba Egbuche conflict on who established the Iba, when it came into existence and its nature at the beginning. While the amended statement of claim state that it was established by Okunwa J.C. Egbuche (SNR), the further amended reply to the further amended statement of defence state that it was founded by Okunwa J.C. Egbuche (JNR) with the consent of his two brothers. While the amended statement of claim state that Iba Egbuche existed in the life time of Okunwa J.C. Egbuche (SNR) and was inherited by Okunwa J.C. Egbuche (JNR) and subsequently by the respondent down the line, the further amended reply state that it was the three sons of Okunwa J.C. Egbuche (SNR), who after his death marked out the area on which the Iba was to be built and appellant's father and the respondent developed it into a storey building and a bungalow as Iba Egbuche. While the amended statement of claim state that the Iba was initially a thatch house which was later develop into a one storey building and bungalow, the further amended reply state that it was initially a storey building and a bungalow built on the area marked out for the building of Iba Egbuche. The origin and history of Iba Egbuche is obviously important in determining the exact nature of and extent of Iba Egbuche.

Let me look at the evidence elicited by the respondent to prove the averment in his pleadings that the Iba consist of the one storey building and the bungalow behind it. The plaintiff elicited evidence through three witnesses. PW1, Lily Obanye, appellant's aunt gave evidence consistent with the amended statement of claim except in certain material respect, as follows. PW1 under cross-examination stated that the "thatch house is no more in that it got burnt and that the appellant's father and the respondent built the one storey building in its former position." This testimony conflicts with paragraph 15 of the amended statement of claim which stated that the thatch house "remained the Iba and was later developed into a storey building and a bungalow by the appellant's father and the respondent. PW1 also testified under cross-examination that the appellant's father "lived in the one storey building until he died. He was buried inside the building. He was buried inside the building because as the diokpa, it had to be so."

This contradicts her further testimony under cross-examination that Okunwa J.C. Egbuche (SNR) and appellant's father were buried in the middle of the 4 bed room bungalow.

PW1 had earlier under cross-examination stated that "Before he died, my father owned No.39 Okosi Road, Onitsha. The portion was allocated to him by the family. He built a thatched house on the land. When he died, he was buried in the said thatched house. Upon the death of my father Chukwunwike inherited the said No. 39 Okosi Road, Onitsha. Okechukwu and Onuorah were thereafter allocated portions by Chukwunwike for their respective living purposes. Chukwunwike being the 1st son lived in the thatched house of my father. After allocating portions of the same No 39 Okosi Road, Chukwunwike lived in the thatched house of my father and also retained the ownership and possession of the front path of the same 39 Okosi Road Onitsha where he has since built a two storey building. Chukwunwike has now built a storey building where the aforesaid thatched house was standing. He also built a bungalow on the said portion. Under the native law and custom of Onitsha, the storey building and the bungalow built on the position of the thatched is called "Iba". Under the custom of Onitsha, Iba is occupied by the 1st son, also known as diokpa. Upon the demise of the diokpa, the Iba is taken over by the next in the order of seniority in the family. Chukwunwike is the same person as Okunwa J. C. Egbuche Junior. He is dead. He lived in the Iba. When he died, Okechukwu took over the Iba. Chukwunwike and Okechukwu Pulled resources together with which they erected the storey building and the bungalow which today make up the Iba.

This testimony of PW1 conflict as to who built the one storey building, in one breadth she said it was appellant's father. In another breadth she said it was jointly built by the appellant's father and respondent. It also conflicts as to why the storey building should be treated as Iba. She had stated that the storey building and the bungalow were jointly built by the appellant's father and the respondent herein as Iba Egbuche in this testimony she states that they are Iba Egbuche because the appellant's father built them in the exact portion of land where the thatch house was located. The evidence of PW2, Augustine Okafor in examination in chief (contained in his sworn written statement) is consistent with the averments in the amended statement of claim. He stated in paragraph 9 of his sworn written statement that "With the assistance of the plaintiff, their father's thatch house, which is now the IBA, ancestral house, was developed into a modern structure comprising a storey building with an annexed bungalow." This part of PW2's testimony conflicts with PW1's testimony that the thatch house was burnt and ceased to exist and that the appellant's father and the respondent had to build a one storey building and a 4 bedroom bungalow in its former place.

Under Cross-examination PW2 testified that "under the custom of Onitsha, diokpa is buried in the Iba where one exists. Where Okunwa Egbuche was buried was formerly a thatched building and now a bungalow. Iba is the compound of the ancestor of the family." He also said that "Okunwa Chike Egbuche Junior was buried in the Iba because he was the diokpa. When I die, I would be buried in the Iba of my father." He said further that "I don't remember the year Okunwa Egbuche junior died. I don't remember when the one storey building in the Iba of Egbuche was erected."

The evidence of Akunne Moses Okafor in examination -in-chief is consistent with the amended statement of claim and the evidence of PW1 and PW2, that the thatch house where Okunwa J.C. Egbuche SNR lived and was buried is the ancestral house (Iba). He also stated that with the assistance of the respondent the Iba "was developed into a modern structure comprising a storey building with an annexed bungalow and that "the Iba Egbuche is comprised of a storey building and bungalow and is situate behind the two storey building at No. 39 Okosi Road Onitsha". He further stated that the appellant "cannot tell the males of Egbuche family where the Iba is situate as she has no locus."

Under cross-examination, PW3 stated that "I don't know the year Okunwa and his brother shared their father's properties. They did not share it." This conflicts with the averment in paragraphs 13 and 14 of the amended statement of claim and the testimonies of PW1 and PW2 and his own testimony in examination in chief that appellant's father did share portions of No. 39 Okosi Road, Onitsha between himself and his two brothers. He further testified under cross-examination that - "Six tenants live in the one storey building Okunwa Egbuche junior was buried inside the Iba Ikechukwu Egbuche and his mother lives at No 50 water works road Onitsha. Behind the storey building is a three room bungalow. Okunwa kept a small poultry within the premises. Besides the three rooms, there are other six rooms where tenants are staying. No 63 Tasia Road belonged to Okunwa Egbuche Junior. There are tenants there. I collected the rents of the place on the instructions of the plaintiff, Okechukwu Egbuche. Oknuwa Egbuche junior was buried inside the one storey building". This testimony conflicts with testimonies of PW1 and PW2 that the appellant's father was buried in the bungalow behind the one storey building. The testimony also introduces the fact that besides the 3 or 4 bedroom bungalow, there are six other rooms occupied by tenants and a poultry behind the one storey building.

PW3 finally stated under cross-examination that "Diokpa is buried in the Iba which may be different from his living house. Where a family had no existing Iba, the diokpa may summon a meeting of the male members of the family who may then decide where to site an Iba for that family. Diokpa is buried in the lba."

The question that ought to be considered at this juncture in keeping with S.133(2) of the 2011 Evidence Act, is whether the respondent adduced evidence which ought reasonably to satisfy the trial court that the assertion of the fact that Iba Egbuche consists of the one storey building and the 4 or 3 room bungalow behind it is established. Let me consider the question.

All the witnesses of the respondent agree that under Onitsha native law and custom the diokpa is buried in the Iba. The witnesses agree that Okunwa J.C. Egbuche (SNR) and his son, Okunwa J.C. Egbuche (JNR (appellant's fathers) were buried in Iba Egbuche. All witnesses also agree that Iba Egbuche as established by Okunwa J.C. Egbuche (SNR), (the father of Okunwa J.C. Egbuche (JNR), Patrick Okechukwu Egbuche (respondent) and other children,) was a thatch house situate on a portion of No. 39 Okosi Road, Onitsha. Okunwa J.C. Egbuche (SNR), upon his death was buried in that thatch house. All the respondent's witnesses agree that the one storey building and the bungalow behind it were not the Iba Egbuche established by Okunwa J.C. Egbuche (SNR). There is therefore need for some explanation of why the respondent is now claiming that the Iba consists of a one storey building and a bungalow when the Iba Egbuche established by Okunwa J.C. Egbuche SNR was a thatch house. The testimonies of the witnesses were not consistent in providing this explanation. PW1, PW2 and PW3 gave consistent evidence in their examination in chief (sworn statements) that the thatch house remained and was developed into a modern one storey building and a bungalow behind it. This gives the impression that the thatch house continued and was restructured into a one storey building and a bungalow. PWI testified differently under cross-examination that the thatched house was no more in existence because it got burnt and that thereafter the appellant's father and the respondent jointly built the said one storey building and bungalow in the place where the thatched house used to be. She also stated that under the native law and custom of Onitsha, the storey building and the bungalow built on the position the thatched house stood is called Iba.

PW2 under cross-examination also stated differently that "under the custom of Onitsha, diokpa is buried in the Iba where one exists. Where Okunwa Egbuche was buried was formally a thatched building and now a bungalow." So the testimonies of the witnesses of the respondent on how the thatched house which was the Iba Egbuche changed to a one storey building and or a bungalow are not consistent. Their testimonies also conflict on whether the thatched house Iba changed to a one storey building and a bungalow or just a bungalow.

The testimonies of the respondent's witnesses are consistent on the fact that the grave of Okunwa J.C. Egbuche (SNR) is in the middle of the 4 bed room bungalow. All the witnesses testified that the grave of Okunwa J.C. Egbuche (JNR) is also in the middle of the 4 bedroom bungalow behind the one storey building PW1 and PW3 who had testified that appellant's father was buried in the bungalow behind the storey building contradicted themselves by testifying in another breadth that he was buried in the storey building.

The exact place of burial is important because as all the witnesses have testified a diokpa is buried in the Iba. Therefore the fact that the two previous diokpas were buried in the 4 bed room bungalow behind the storey building establishes that the 4 bedroom bungalow behind the storey building is the Iba.

All the respondent's witnesses testified that one storey building and 4 bedroom bungalow were jointly built by the appellant's father and the respondent. PW1 under cross-examination testified differently that the appellant's father "has now built a storey building where the aforesaid thatched house was standing. He also built a bungalow on the said portion."

Let me also consider the pleading and evidence of the respondent on how the one storey building and the 4 bedroom bungalow are situated on No. 39 Okosi Road Onitsha. All the witnesses testify that both are located behind a two storey building built by appellant's father. The amended statement of defence and the testimonies of all the witnesses refer to them as "a storey building and a bungalow." However PW2 and PW3 in their sworn statements referred to them as "a storey building with an annexed bungalow" PW3 in the same sworn statement referred to them as a storey building and a 4 bedroom bungalow. PW1 clearly described the location of the two thus - "Behind the one storey building is a bungalow. The bungalow has 4 bedrooms. Both Okunwa J.C. Egbuche Senior and Junior were buried in the middle of the said 4 room bungalow. The centre of the 4 room bungalow is open." PW2 under cross-examination had said "where Okunwa Egbuche was buried was formerly a thatched building and now a bungalow.... Okunwa Egbuche Junior was buried behind the one storey building that is the Iba." PW3 under cross-examination described how they were located thus - "Behind the storey building is a three bedroom bungalow. Okunwa kept a small poultry within the premises. Besides the three rooms, there are other six rooms where tenants are staying."

The testimonies of the witnesses are not consistent both with themselves and the amended statement of claim on the evidence that it is a storey building and annexed bungalow. As is obvious, the amended statement of claim and the preponderance of the testimonies of the respondent's witnesses particularly of PW1, PW2 and PW3 under cross-examination show that the one storey building and the 4 room bungalow are located separate from each other.

In the light of the state of the evidence of the respondent's witnesses and the amended statement of claim highlighted above, I hold that the respondent failed to adduce evidence which ought reasonably to satisfy the court that he had established that the Iba Egbuche consisted of a one storey building and the 4 bedroom bungalow behind it and not the 4 bedroom bungalow only. Evidence which ought to reasonably satisfy a court that the existence of a fact is established must be consistent evidence and not contradictory evidence. MINI LODGE LTD & ANOR V NGEIR & ANOR (2009) 18 NWLR (Pt. 1173) 254 where the Supreme Court per Adekeye JSC held that "In a claim for a declaration of title to Land the onus of proof lies on the plaintiff who must succeed on the strength of his own case, and he cannot achieve this through conflicting or contradictory evidence but by cogent and credible evidence." Where the testimony of a witness as to the existence of a fact contains two conflicting versions, it is inconsistent. See OMEREDE V ELEAZU & ORS (1996) 6 NWLR (Pt. 452) 1. Where the evidence of a witness called by a party conflicts with the evidence of another witness called by the same party on the existence of a fact, the evidence of both witnesses are inconsistent and unreliable EBOADE & ANOR V AFOME & ANOR (1997) 5 NWLR (Pt 506) 490. It is trite law that inconsistent evidence is not reliable evidence. See OMEREDE V. ELEAZA & ORS (Supra) AMADI & ORS V THE STATE (1993) NWLR (Pt 314) 644. The court cannot choose and pick between conflicting testimonies of witnesses on the existence of a fact, which to believe and which not believe. It must disregard the two conflicting versions as unreliable. See BOY MUKA V THE STATE (1976) 9 - 10 SC, AGBO V THE STATE (2006) 1 SC (PT 4) 73

Some of the testimonies particularly those of PW2 and PW3 under Cross-examination support some of the averments in the appellant's further amended statement of defence; particularly paragraphs 10 and 14(b) of the further amended statement of defence that the 4 bedroom house is the Iba Egbuche and does not include the one storey building. The testimonies of the respondent's witnesses particularly PW3 support paragraphs 6(b) and 10 of the further amended statement of defence that the appellant's father also built a 6 bedroom building behind the one storey building in addition to the 2 storey building, the one storey building and 4 bedroom bungalow behind it. The testimony of PW3 under cross-examination that he collected rents from tenants in No. 63 Tasia Road belonging to the appellant's father on the instruction of the respondent supports the averment in paragraph 16(b) of the further amended statement of defence that "the respondent, PW3 and others have been collecting rents from tenants in the properties of the appellant's father which includes No. 63 Tasia Road, Onitsha. It is obvious from the further amended statement of defence that the appellant conceded that the 4 bedroom bungalow was the Iba Egbuche and laid no claim to it as part of her father's personal estate and that she laid claim to the one storey building as part of her father's personal estate and is challenging the right of the respondent and others to manage her father's personal estate or collect rents therefrom. It is obvious from the entire tenor of the pleadings and the testimonies of the respondent's witness that he is contending that the one storey building is not part of the personal estate of the appellant's father so the appellant has no right to lease out rooms to tenants in the one storey building and collect rents therefrom, and that the right to do so belongs to him as the diokpala. It is obvious from the amended statement of claim particularly paragraphs 18, 19 and 20 that the above claim of the appellant is the cause of the action brought by the respondent at the lower court desiring that judgment be given to enforce his right as the diokpa of Egbuche family in Iba Egbuche. He therefore had the duty of first proving that the one storey building is part of Iba Egbuche. As I had already held, he has failed to adduce evidence which can reasonably satisfy this court that he has established that the one storey building is part of Iba Egbuche and therefore not part of the personal estate of appellant's father. The result is that the evidential burden never shifted to the appellant to rebut the case established by the respondent. By virtue of S.133(2) 2011 Evidence such a burden can only shift to the appellant, if the respondent had discharged the burden to adduce evidence that reasonably satisfies the court that it had established that Iba Egbuche includes the one storey building.

Even though the evidential burden to rebut the case made out by the evidence adduced by the respondent did not shift to the appellant, she the appellant did adduce evidence at the trial in support of her defence to the respondent's claim. I will consider the evidence, since the trial court considered part of it in the judgment from which this appeal arose.

The appellant elicited evidence through DW1, DW2, DW3 and DW4. DW1, Ernest Okafor stated in paragraphs 3 and 4 of his sworn statement adopted as his evidence in examination-in-chief) thus - "I know the 6 room bungalow, and one storey building and 2 storey building respectively of Late Okunwa J.C. Egbuche (Jnr) situate within No 39 Okosi Road, Inland Town, Onitsha. The one storey building was owned solely by Late Okunwa Egbuche (Jnr) who lived therein till his death. Throughout hislifetime, Okey Egbuche never disputed the ownership of the house with Late Okunwa Egbuche (Jnr). I also know the 4 room bungalow behind the one storey building of late Okunwa J.C. Egbuche (Jnr). Okunwa J.C Egbuche (Jnr) died sometimes in 1998 and as Diokpala was buried in the 4 room bungalow. The 4 room bungalow is the IBA Egbuche. That under Onitsha native law and custom the house of a man does not become IBA. His eldest child (Diokpa) will mark out IBA and his personal house will devolve according to whether he made a Will or gift intervivos or under custom. Late Chief Philip Anatogu Onowu of Onitsha devised his personal living house to his second son while his IBA devolved on his first son under Onitsha native law and custom. If he made no Will, his personal house will devolve on his children. Late Okunwa J.C. Egbuche (Jnr) marked out IBA which is the place where the 4 room bungalow is and where he was buried".

This testimony was not shaken during cross-examination. DW2, the appellant in paragraphs 5, 6, 7 and 8 of her sworn statement (adopted as her evidence in examination-in-chief) stated that "Under Onitsha native law and custom, the entire house and compound of a deceased Onitsha man does not wholly and automatically become his IBA. The Diokpa (head of his family) shall mark out a portion as IBA and then share the remainder among the surviving male children of the deceased Onitsha man. When the thatched house of my grandfather late Okunwa J.C. Egbuche (Snr) fell into ruins, my father Okunwa J. C. Egbuche (Jnr) as the eldest son and the Diokpa of Okunwa J.C. Egbuche (Snr) marked out a portion of No 39, Okosi Road, Inland Town, Onitsha as IBA and then shared the remainder among the surviving male children of Okunwa J. C. Egbuche (Snr) i.e. himself, Onuorah and the plaintiff. Late Okunwa J. C. Egbuche (Jnr) was buried inside the IBA in accordance with Onitsha native law and custom that stipulates that Diokpa/Head of family is buried inside IBA. At the time of sharing the portion on which my father later erected his 2 storey building was in dispute between our family and Okpanku family.

My father Okunwa J. C. Egbuche (Jnr) took his own share upon which he erected a storey building, a 2 storey building, a 3 room bungalow respectively. He also built a poultry, which he later converted into 6 room's bungalow. The plaintiff got the portion on which late Okunwa J. C. Egbuche (Jnr) earlier erected a bungalow. Late Onuorah Egbuche also got his own portion on which he built an house. Late Onuorah Egbuche and plaintiff walled their respectively portions.

My father built a one storey building wherein resided throughout his lifetime while my mother late Obiageli Egbuche (alias Madam Cash), myself and my siblings lived in the 2 storey building. I am still living in the 2 storey building erected by my father. When my mother died she was buried on the ground floor of the 2 storey building. Later my father single handedly and without contribution by anybody including theplaintiff erected a 4 room bungalow in the portion he marked out as IBA. Before his death, my father instructed the plaintiff to raise the IBA into as storey building to accommodate any of their returning sisters but despite the fact that the plaintiff had spent donkey years abroad he has not done so but claims my father’s storey building as IBA. It is the 4 room bungalow situate behind my father’s one storey building that is IBA Okunwa J. C. Egbuche (Snr).

My father Okunwa J. C. Egbuche (Jnr) died on February 7th 1998 and as the Diokpa of Egbuche, he was buried inside the 4 room bungalow behind his one storey building. Late Okunwa Egbuche (Snr) was also buried there".

She stated under cross-examination that - "I did not meet my grandfather, Okunwa Egbuche Senior. Iba Okunwa Egbuche Junior is a bungalow behind a storey building. I don't know whether Okunwa Egbuche Senior had an Iba. I know the building that is in dispute in this suit. It is not true that the front of it is a storey building whilst the back thereof is bungalow. The storey building and the bungalow are different structures. The bungalow and the storey building are not the same structure. There is a space between them to show that they are different structures".

Patrick Okey Egbuche, the plaintiff, had been in England since before the war. It was not the plaintiff who sent the bulk of the money for the building of that house. The house was built before the plaintiff traveled to overseas. The house in dispute was started in 1962 and completed in 1963".

DW3, T.O. Agwsiobo, testified in paragraph 4 of his sworn statement (adopted as his evidence in examination in chief) that - "Two houses cannot be IBA. Diokpa is buried in the IBA. Since Late Okunwa J. C. Egbuche(Jnr) was buried in the 4 room bungalow behind his one storey building then under Onitsha native law and custom the 4 room bungalow is the IBA of Egbuche especially as his father, Late Okunwa J. C. Egbuche (Snr) was buried therein too. The one storey building of Late Okunwa J. C. Egbuche (Jnr) is not IBA Egbuche" Under cross-examination DW3 stated that –

"I know the property in dispute. It comprises of a two storey building, a storey building, and a bungalow building. There are also some other adjoining houses. One of the adjoining houses is a bungalow. There is also a temporary building which is used as a palm mine bar. I don't know Iba Okunwa Egbuche. The defendant showed to me the property that is being contested. She showed to me the two storey building, the bungalow, and the storey building. The bungalow and the storey building are two different structures. There is a space between the bungalow and the storey building."

DW4, Nwobu Ntefe, testified in paragraphs 3 and 4 of his sworn statement (adopted as his evidence in examination) as follows - "I know No 39, Okosi Road, Onitsha. I know the one storey building of Late Okunwa J. C. Egbuche (Jnr) that is situate within No 39, Okosi Road, Onitsha. Late Okunwa Joseph Chike Egbuche (Jnr) lived in the one storey building till his death. I also know the 2 storey building, 3 room bungalow, 4 room bungalow IBA Egbuche, 6 room bungalow all situate within 39, Okosi Road, Onitsha. I also know the one storey building of Late Okunwa J. C. Egbuche (Jnr) situate at No. 63, Tasia road, Onitsha." He stated under cross-examination that - "I know the house which is now in dispute. It is not the entire compound that is in dispute in this suit. The house in dispute is the storey building which was built by Okunwa. The Iba is behind it. There is the three room building which also situates behind. The Iba and the storey are not one house. They are two different buildings. The two houses have a space of more than 10ft between them. I built the houses there including the house at Tasia".

The testimonies of all the witnesses for the appellant are consistent on the facts that the 4 bedroom bungalow behind the one storey building is the Iba, that the appellant's father built the 2 storey building, one storey building, the 4 bedroom bungalow (Iba) a 6 bedroom bungalow on 39 Okosi road, Onitsha, the last two diokpas were buried in the 4 bedroom bungalow, there is a space separating the one storey building from the 4 bedroom house and so the two are separate, where a diokpa lived may not be the Iba and that the one storey building is part of the personal estate of the appellant's father.

Some of the testimonies of the respondent's witnesses support the testimonies of the appellant's witnesses that the Okunwa J.C. Egbuche SNR and Okunwa J.C. Egbuche JNR were buried in the 4 room bungalow, that a diokpa when he dies is buried in the Iba, the 4 bedroom bungalow is the Iba, that appellant's father also built a 3 room bungalow and a 6 room house behind the one storey building, and that the one storey building is separate from the 4 bedroom bungalow housing the graves of the two former diokpas.

Having highlighted the state of the pleadings and the evidence adduced by both sides, the question that arises is whether the finding, holdings or conclusions of the trial court in its judgment is justified by the above state of evidence. The trial court held that "the exact portion within the compound, where their father's thatch house stood, was not part of the sharing exercise. Non of the sons of the said J. C. Egbuche (Senior) got it as part of his own share. Rather, a storey building and a bungalow were erected thereon". This decision cannot be justified ---

(a) In the face of the conflict in the evidence of the respondent's witnesses as to whether the thatch house was developed into a storey building and bungalow or into a bungalow or was burnt and ceased to exist before the storey building and bungalow were built.

(b) Without evidence of the exact extent of the area occupied by the thatch house so as to know if the storey building was within that area.

(c) Without resolving the conflict between paragraphs 10, 11, 12, 13, 14 and 15 of the amended statement of claim on one hand and paragraph 3 of the respondent's further amended reply to the further amended statement of defence. While the amended statement of claim state that the storey building and bungalow resulted from the development of an existing Iba Egbuche which was a thatch house, the further amended reply state differently that the area where the storey building and bungalow were built was marked out by appellant's father, with the consent of the respondent and their brother for the building of Iba Egbuche. It is noteworthy that paragraph 3 of the respondent's further amended reply is consistent with the testimonies of DW1, DW2, and DW3 that after the thatch house got burnt, fell into ruins and ceased to exist, the appellants father as diokpa marked out the area for the Iba Egbuche to be built.

(d) In the face of the consistent testimonies of DW1, DW2, DW3, that after the thatch house was burnt, the appellant's father marked out the area for the Iba to be built and built the 4 bedroom bungalow as the Iba.

(e) Since all sides agree that the grave of Okenwa J. C. Egbuche (SNR), who on his death was buried in the thatch house, is now in the 4 bedroom bungalow, built after the burning of the thatch house. This shows that it is the bungalow that is built in the exact spot where the thatch house stood.

In view of this mutually accepted fact that the grave of Okenwa J. C. Egbuche (SNR) who was buried in the thatch house before the 4 bedroom was built, is now in the middle of the parlour of the 4 bedroom bungalow is clear evidence that it is the 4 bedroom bungalow that it is in the exact spot where the thatch house stood.

(f) All parties agree that the portion occupied by the 4 bedroom bungalow was not part of the shared area. While the respondent assert that the area occupied by the one storey building was not shared as it was treated as land meant for the building of the Iba, the appellant on the other hand contended that the area occupied by the one storey building was part of the land shared to her father, Okenwa J. C. Egbuche (JNR) and he built the 2 storey building and the one storey building and 6 bedrooms as his personal properties. The identity of the area of the portion of the land occupied by the storey building was clearly an issue.

There is no evidence of the exact extent of the portion of the land in No 39 Okosi Road, Onitsha that was shared by the three brothers. Such evidence like a Survey Plan would have shown clearly whether the one storey building is standing within or outside the shared area. Where the extent or area or identity of a Suitland is in issue, it is the duty of the party claiming for the enforcement of any legal rights in the Suitland to prove the extent or area of such land with certainty. Where there is no evidence of the limit, extent or area of the particular land, then the identity of the land is uncertain. The requirement to prove the extent or area of the portions of the land in No 39 Okosi Road, Onitsha that was share or not shared is a fundamental part of the requirement of proof of a plaintiffs claim for the enforcement of any legal right in the land. It is obvious that if there is no evidence to show that the portion of the land where the one storey building stands is part of the land that was not shared, then the claim of the plaintiff must fail. This is because if it is not in the part of the land that was not shared, it follows that it was not in part of land marked out for the building of an Iba. The need for this proof is made more acute by the consistent testimonies of Dw1, Dw2, Dw3 and Dw4 that appellants father single handedly built it as his personal property and the inconsistent testimonies of PW1, PW2 and PW3 as to whether it was jointly built by appellant's father and respondent or appellant's father alone. For the above reasons I hold that that the inference by the trial court that the area occupied by the one storey building is not part of the Shared land is wrong. It is hereby set aside. For the above reasons, I also hold that the decision of the trial Court that the storey building is standing on the exact spot where the thatch house stood is wrong and is hereby set aside.

The trial court held that the parties agreed that the diokpa lives in the Iba and that therefore appellant's father lived in the one storey building as diokpa and following his death, the respondent moved in to live there by virtue of his office as diokpa. The evidence does not show that the parties agreed that a Diokpa lives in the Iba. Even the respondent's witnesses did not agree that the Iba is the living house of the  Diokpa. PW3 testified that "Diokpa is buried in the Iba which may be different from his living house" DW1 testified that the Diokpa may live in his personal house but that does not make where he lives the Iba, and that the personal living house is different from the Iba. DW2 testified that her father built the one storey building and lived there as his personal house and not as Ibe and that her father built the 4 bedroom bungalow to be used as Iba. Dw4 testified that "two houses cannot be Iba. Diokpa is buried in the Iba." Since late Okunwa J.C. Egbuche (JNR) was buried in the 4 room bungalow behind his one storey building then under Onitsha native Law and Custom, the 4 room bungalow is the Iba of Egbuche especially as the grave of his father; late Okunwa J. C. Egbuche (SNR) was there too. The one storey building I of late Okunwa J. C. Egbuche (JNR) is not Iba Egbuche. I therefore, hold that the decision of the trial court that the parties agreed that a Diokpah lives in the Iba and that appellant's father lived in the one storey building as Iba is not correct as it is contrary to the evidence. It is hereby set aside.

The trial court said it was impressed with the testimony of DW1 and that it has no doubt that she is a witness of truth. There is no doubt that a trial Judge who saw and heard the witnesses testify has the exclusive province to Judge their demeanor and their credibility. But its Judgment must be founded on a proper evaluation of the evidence showing the reasons for regarding a witness as truthful or not. The trial Court after stating that she is the daughter of Okunwa J. C. Egbuche (SNR) and the sister of Okenwa J. C. Egbuche (JNR) and the respondent, proceeded to state that he had no doubt that PW1 is a witness of truth. But can PW1 whose evidence is clearly equivocal and inconsistent on some material facts be rightly regarded as a witness of truth? I have highlighted the inconsistencies earlier in this Judgment. I do not think that such a witness can rightly be described as a witness of truth. The Supreme Court in EZEMBA V. IBENEME & ANOR (2004) 4 NWLR (Pt 894) 617 held that "no witness who has given on oath inconsistent evidence of a material fact is entitled to the honour of credibility. Such a witness does not deserve to be treated as a truthful witness." PW1, even though a sister of the appellant's father is supporting the respondent, his other sibling, in this case. She with Mrs. Catherine Afulemu Ibisi instituted the suit at the trial court against the appellant as attornies for the respondent. She is obviously partisan in this case. It was therefore wrong for the trial court to have considered the fact that she is a sister to Okunwa J. C. Egbuche (JNR) in holding the view that she is a witness of truth. The trial court did not consider that the Sworn Statements of PW1 and DW2 (appellant) show that; there was in existence an acrimonious dispute between the respondent and PW1 with others against the appellant over the control and management of the estate of appellant's father, Okenwa J. C. Egbuche (JNR).So that assuming her evidence was consistent, there was still good reason to rely on it with caution

The trial court Suo moto visited the locus in quo in the presence of the appellant and counsel to both sides. It stated its reason for the visit thus - "I went there simply to see things by myself so as to enable me strengthen my resolve and confirm my fears about the credibility of the testimonies of the defendant and those of her witnesses".

The learned counsel for the appellant has argued that the visit to the locus in quo was unnecessary, that the trial Judge abandoned what he was required to do during such visit and did not take any evidence either at the locus or in court after the visit. Learned counsel also argued that a visit to the locus in quo is not an avenue for the trial Judge to alter the pleadings or substitute his opinion for the evidence of the parties or to make up, amend or correct the case of the plaintiff, neither is it an avenue or opportunity for the trial Judge to show his prowess.

Learned Counsel for the respondent under issue no 3 in the respondents brief stated that "upon completion of evidence, the plaintiff moved the court to visit the locus in quo with a view to ascertaining whether the "storey building and bungalow" meant two separate buildings or one building with a peculiar design, the front being a story building while the back is a bungalow". He referred to page 141, Lines 11 - 13 of the record of this appeal. I have read the entire page 141. Immediately after counsel for the appellant announced the closure of the defence, the trial court ordered as follows:-

"The defence Counsel has 14 days within which to file and serve the written submissions of Counsel. Upon service of the same on him, the plaintiff's counsel shall also have 14 days within which to respond.

Court will visit the locus in the presence of both counsel for the parties to enable the court see the features on the land. Suit is adjourned to 18-7-07 for adoption". This is contained at lines 7-13 of page 141 of the record.

It is clear from the reproduced portion of page 141 of the record of this appeal that the statement of learned counsel for the respondent that it was the plaintiff that moved court to visit the locus is not correct. It was the trial court that suo moto decided to visit the locus. Secondly the statement of Learned Counsel for the respondent that the court went to ascertain if the one storey building and the bungalow are two separate buildings is not correct. The court at page 141 stated that the visit was to enable it see the features on the land and in the Judgment stated that " I went there to see things by myself so as to enable me strengthen my resolve and confirm my fears about the credibility of the testimonies of the defendant and those of her witnesses".

It was wrong for the trial court to suo moto embark on a visit to the locus in quo. Such a visit will accord more with the requirement of fair hearing if it is made with the consent of both parties or upon the application of any of them. A visit to the locus in quo is part of the process of calling evidence in support or clarification of the oral evidence of a material thing other than a document. It is for the parties to call such evidence as is material to their case. Where a court of its own motion decides to embark on such a visit, it exposes itself to the fear of the real likelihood that it is biased in favour of one side This is more so where as in this case it expressly states that it is embarking on a search in support of the opinion it has formed and it relies on its observation during such visit the which observation must favour one party against the other. The Supreme Court in ANYANWU V. MBARA & ANOR (1992) 6 SCNJ 90 held that-

"It is a course which a Judge can take only with due caution - with full advertence to the fact that, as he is not a party in the case, it is better for one of the parties to apply for it. But where, from the quality and quantity of the evidence called by both sides he finds himself in a position in which, without supplementing what he has heard with what he can see, he can only accredit one version of the conflicting evidence and discredit the other mechanically, he should bring to the notice of the parties the need for a visit to the locus and get their consent or acquiescence to it. On the above principles, it appears clear to me that in the instant case, the learned trial judge had no power to order the visit in the first place without the consent of the parties or application by any of them... The position of the trial Judge is that of an impartial umpire and he lacks the power to call any witness or evidence without the consent of the parties"

It was wrong for the trial Judge to have said in its Judgment that the visit was to enable him strengthen his resolve and confirm his fears about the credibility of the testimonies of the defendant and those of her witnesses. By that statement it was obvious the trial court had reached a decision before proceeding on the visit to confirm his decision. I agree with the submission of Learned Counsel for the appellant that by this statement the Learned trial Judge had before the visit and conclusion of hearing and addresses by counsel already made up its mind against the appellant, and that therefore the Trial Court did not visit the Locus as an impartial arbiter.

It is clearly within the discretion of the trial court to determine whether in the light of the evidence before it there is the need for such a visit. The discretion must be exercised judicially and judiciously. See UKAEGBU & ORS V NWOKOLO (2009) 3 NWLR (Pt 1127) 194 (SC) and AJAO V ADIGUN (1993) 3 NWLR (Pt 282) 389. The decisions of the trial court to Suo Motu embark on such a visit to strengthen its resolve and confirm its fears about the credibility of a party and her witnesses is not a judicial and judicious exercise of discretion. It is glaringly an improper exercise of discretion.

The visit to the locus in quo presupposes that the taking of evidence is still ongoing in the proceedings to enable the court make up its mind in the proper determination of the question in dispute. So where the trial Court has expressed that it has made up its mind on the state of the evidence before it, it becomes obvious that the visit was unnecessary. The legally recognized purpose of such visit, through the cases, is to clarify or resolve any doubt arising from the state of the oral evidence given in court concerning the existence or condition of any material thing (movable or Immovable). In BRIGGS V BRIGGS (1992) 3 SCNJ 75 The Supreme Court restated in extensor that" The purpose of a visit to the locus in quo is not to recite the evidence already led but to clear doubt which might have arisen about the conflicting evidence or apparent misrepresentation of fact by either side. Where there is conflicting evidence in relation to the objects, boundaries, natural or man-made in respect of a land in dispute or in relation to where an accident had occurred e.g. motor traffic offences or any other criminal offence where the issue of relative positions of witnesses are concerned, the court ought to resolve the conflict by a visit to the locus. What looks convincing or inconclusive on a plan may affect the justice; of the case unless the court, the parties and their counsel and witnesses go to the site. What is frowned upon when such a visit takes place is for the judge making himself a witness. The judge's observation on such visits will definitely be accorded respect as to the true position of what he saw on the ground. This however should not be confused with laid down procedure on visit to the locus in quo. Invariably the purpose of the visit is to avoid a miscarriage of justice." See also AJAO & ORS V. ADIGUN (Supra) --- and SHEKSE V PLANKSHAK & ORS (2008) S.C. 178

The contention of Learned Counsel for the appellant that the trial court did not take any evidence at the Locus or in court after the visit and that it did not do what was required of it is valid. The Law and practice on visit to locus in quo is prescribed in S. 127 of the 2011 Evidence Act. This is the source of the power of the court to carry out such visit. For case of reference, I will reproduce the provision here. It states:

If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it deems fit-

i. require the production of such material thing for its inspection, or

ii. inspect any movable or immovable property the inspection of which may be material to the proper determination of the question in dispute.

"(2) When an inspection of property under this section is required to be held at a place outside the courtroom, the court shall either:-

(a) be adjourned to the place where the subject-matter of the said inspection may be and the proceeding shall continue at that place until the court further adjourns back to its original place of sitting, or to some other place of sitting; or

(b) Attend and make an inspection of the subject-matter only, evidence, if any, of what transpired there being given in court afterwards, and in either case the defendant: if any, shall be present.”

It is obvious that the procedure prescribed by S.127 was not followed by the trial court in this case. It appeared to have acted pursuant to S.127(2)(b) because it did not adjourn the proceedings to the place of inspection, and rather attended the place. There is nothing in the record to show that evidence of what transpired there was given in Court after the visit as required by S.127(1)(b), of the 2011 Evidence Act. Therefore its decision, on the basis of the visit, that "I completely agree with the testimonies of the plaintiff's witnesses. There is no bungalow on the disputed premises which is different from the storey building, the subject of litigation. Rather what the defendant referred to as a bungalow is only an extended part of the storey building which was designed in such a manner that a part thereof is not decked" has no evidential foundation as it is not based on any evidence of what transpired during the inspection. As the Supreme Court held in SHEKSE V PLANKSHAK & ORS (Supra) Per OGEBE JSC that "where a trial judge makes a visit to Locus- in-quo, it is not proper for him to treat his perception at the scene as a finding of fact without evidence of such perception being given by a witness either at the Locus or later in Court after the inspection".

In OGUNDELE V FASU (1999) 9 SC 44 the Supreme Court per IGUH JSC held that a trial Court, after such a visit, "must' arrive at its Judgment not on the impression from its visit to the Locus-in-quo but upon its impressions from the totality of the legal evidence adduced before the court." In OLUMOLU V. ISLAMIC TRUST OF NIGERIA (1996) 2 NWLR (Pt 430) 253, the Supreme Court per IGUH JSC held that "the point must be emphasized that a trial Judge should under no circumstance put his personal observations at a Locus- in-quo in place of the evidence before the Court. The main purpose of a view or a visit to the Locus-in-quo is to assist the Court to understand fully the questions in issue in a case, to appreciate and follow the evidence before it and properly to apply such evidence in arriving at its decision. It is imperative that a Judge must, on such inspections, avoid placing himself in the position of a witness, which he is not, and arriving at conclusions based on his personal observations of which there is no evidence on record. See also EBOADE & ANOR V ATOMESI & ANOR (1997) 5 NWLR (Pt 506) 490

It is glaring that the trial Court reached the above quoted decision on the basis of its perception at the scene of visit and not on the basis of its impression from the totality of the evidence before it. For this reason; the decision is hereby set aside.

It is obvious from the Judgment that the trial court did not consider whether the respondent had proved that the appellant did trespass on the Iba Egbuche and made no finding of the fact of such trespass. The trial Court after holding that the Iba Egbuche consists of the one Storey building and the 4 bedroom bungalow behind it proceeded to hold without more, that the respondent had proved his claims against the appellant and then proceeded to grant the reliefs claimed. A claim for damages for trespass presupposes that the plaintiff is asserting that the party against whom the claim is made (defendant) has entered into the property in the exclusive possession of the plaintiff or belonging to the plaintiff as the case may be without the consent or authority of the plaintiff. Equally, a claim for injunction to restrain further interference or claim of ownership presupposes that there is such interference or claim. A claim may, as in this case, be predicated on a claim of right of ownership of some right or interest in the property thereby making it imperative that such underlying primary question be first determined. But the determination of such underlying question does not automatically determine the claim predicated on it. Rather it serves to clear the way for the determination of the claim. So that if as in this case, the trial court determines that the suit property belongs to the plaintiff or is legally in his exclusive possession, it does not render the defendant liable in damages for trespass without a determination or finding that he or she did commit some act of trespass. In our present case there was no finding by the trial court that the appellant committed any act of trespass on the Iba Egbuche. The trial court did not determine that question and did not consider whether the evidence proved that the appellant trespassed on Iba Egbuche. There was therefore no basis for the award or grant of the relief's of damages for trespass and injunction to restrain the appellant from interfering in the Iba Egbuche. The decision of the trial court that the respondent proved his claims against the appellant following its determination that the Iba Egbuche consists of the one storey building and the 4 bedroom bungalow would have been proper if the claim in the Suit was for a declaration that the Iba Egbuche consists of the one Storey building and the 4 bedroom bungalow. Such a decision cannot stand on the basis of such a determination where the claims are for damages for trespass and injunction to restrain further interference without a determination that such trespass was committed or interference exist or is threatened. For this reason the decision that the respondent proved his claims against the appellant is hereby set aside. Issue No 3 is therefore resolved in favour of the appellant.

The resolution of issues Nos 1 and 2 in favour of the respondent have no effect on the outcome of this appeal as they do not touch on the real issue in dispute at the trial and in this appeal which is issue No 3.

On the whole, this appeal succeeds as it is meritorious. It is hereby allowed. Accordingly, the entire Judgment of the High Court of Anambra sitting at Onitsha in Suit No 0/436/2007 delivered on 12th September, 2007, including the award therein of N10,000 damages for trespass in favour of the respondent against the appellant and the order of injunction restraining the appellant, her agents and or privies perpetually, from interfering, in any manner whatsoever in the Iba Egbuche at No 39 Okosi Road, inland Town, Onitsha are hereby set aside.

The respondent shall pay the appellant cost of N50,000.00.

**ADZIRA GANA MSHELIA, J.C.A.:**

I have read before now, the lead judgment of my learned brother **Agim, JCA** just delivered with which I respectfully agree. For the same reasons lucidly set out in the judgment which I adopt as mine, I too allow the appeal as same is meritorious. I also set aside the judgment of the High Court of Anambra State sitting at Onitsha in suit No. 0/436/2002 delivered on 12th September, 2007, including the award therein of N10,000 damages for trespass in favour of the respondent against the appellant and the order of injunction restraining the appellant, her agents and or privies perpetually, from interfering, in any manner whatsoever in the Eba Egbuche at No. 39 Okosi Road, Inland Town, Onitsha. I abide by the order for costs proposed in the aforesaid lead judgment.

**IGNATIUS IGWE AGUBE, J.C.A.:**

I have read the Judgment just delivered by my learned brother and he has admirably dealt with all the Issues that fell for determination. I have nothing more to add to his well reasoned and comprehensive Judgment than to agree with him that the appeal is meritorious and hereby succeeds. The judgment of the lower court in Suit No. 0/436/2007 delivered on 12th September, 2007 including the award of damages of N10,000.00 in favour of the Respondent and the order of injunction are hereby set aside.

I abide by the Order as to costs.