**OMOBUDE ONI**

**V.**

**MR. IMUETINYAN JOHNSON**

IN THE COURT OF APPEAL OF NIGERIA

THE 24TH DAY OF MARCH, 2015

CA/B/47/2013

**LEX (2015) - CA/B/47/2013**

OTHER CITATIONS

2PLR/2015/116 (CA)

(2015) LPELR-24545(CA)

**BEFORE THEIR LORDSHIPS**

IBRAHIM MOHAMMED MUSA SAULAWA, JCA

PHILOMENA MBUA EKPE, JCA

UGOCHUKWU ANTHONY OGAKWU, JCA

**BETWEEN**

OMOBUDE ONI - Appellant(s)

AND

MR. IMUETINYAN JOHNSON - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF EDO STATE, Holden at Benin City

**REPRESENTATION**

H. O. OGBODU, SAN with I. IKPONMWONBA - For Appellant

AND

EHINON OKOH, Esq. - For Respondent

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

REAL ESTATE AND PROPERTY LAW - LAND **–** TITLE UNDER BINI CUSTOMARY LAW:Principles governing the acquisition of valid title to land in accordance with Bini Customary law

REAL ESTATE AND PROPERTY LAW - DECLARATION OF TITLE TO LAND**:** What needs to be proved to succeed – Burden of proof – On whom rests - Onus on the plaintiff who seeks a declaration of title to land – Duty to accurately describe same

CONSTITUTIONAL LAW - FAIR HEARING: Rule against forcing into cases the principles of fair hearing

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH EVALUATION OF EVIDENCE: When an Appellate Court will not substitute its own views on evaluation of

EVIDENCE - EVALUATION OF EVIDENCE: What amounts to proper evaluation of evidence

EVIDENCE - EVALUATION OF EVIDENCE: Whether the evaluation of evidence and ascription of probative value thereto is within the power of the Trial Court and when the Appellate Court can interfere with same

**MAIN JUDGMENT**

UGOCHUKWU ANTHONY OGAKWU, J.C.A.(Delivering The Leading Judgment):

**PROLEGOMENON**

The toreadors in this appeal are engaged in a tussle in respect of the piece of land situate at Okha Village, Ward 29A Sapele Road, Benin City. The Appellant, who was the Plaintiff at the Lower Court, laid claim to the said piece of land, and contending that the Respondent trespassed unto the land instituted proceedings at the High Court of Edo State, Holden at Benin City in Suit No. B/59/2009 claiming for the following reliefs:

***"WHEREFORE****, the Plaintiff claims against the Defendant as follows:-*

*1. A declaration that the Plaintiff is the owner and in lawful possession of all that piece or parcel of land measuring approximately 200 feet by 200 feet lying and situate at Okha Village Ward 29/A, Benin Sapele Road, Benin City and therefore entitled to apply and be granted certificate of Occupancy over same.*

*2. N100, 000:00 (One Hundred Thousand Naira) damages against the Defendant for his acts of trespass unto the land, and claiming same to be his own.*

*3. An order of perpetual injunction restraining the Defendant, his servants, agents and or privies from further acts of trespass unto the Plaintiff's said land."*

**THE TRIAL**

The parties filed and exchanged pleadings and after an inter partes hearing, in which testimonial and documentary evidence was adduced, the Lower Court in its judgment delivered on 26th July, 2012 dismissed the Appellant's case, conclusively holding as follows:

*"Therefore on the preponderance of evidence, the onus of proof placed on the Plaintiff by law has not in my view been discharged to entitle him to the reliefs he seeks for the declaration, injunction and damages for trespass. The Plaintiffs claims are therefore dismissed."*

The judgment of the Lower Court is at pages 54 -104 of the Records.

**THE APPEAL**

The Appellant being dissatisfied with the judgment appealed against the same. The Notice of Appeal is at pages 105 -112 of the Records. The Records of Appeal were compiled and transmitted to this court on 4th February, 2013. On 18th October, 2013, the Court deemed the said Records of Appeal which were transmitted out of time as having been properly transmitted.

The parties filed and exchanged Briefs of Argument. The Appellant's Brief of Argument is dated 26th April, 2013 filed on 29th April, 2013 and deemed as properly filed and served on 18th October, 2013. The Appellant also filed a Reply Brief which is dated and filed on 17th February, 2014. The Respondent's Brief of Argument is dated and filed on 13th August, 2013. At the hearing of the appeal, Chief H. O. Ogbodu, SAN, leading Miss I. Ikponmwonba, adopted the submissions in the briefs filed by the Appellant, which were both settled by Miss I. Ikponmwonba, and he urged the court to allow the appeal. Equally, Ehinon Okoh, Esq., of Counsel for the respondent adopted the submissions in the Respondent's Brief which he prepared and filed, and he urged the court to dismiss the appeal.

The Appellant distilled four issues as arising for determination from the seven grounds of appeal contained in the Notice of Appeal. The said issues which are set out on page 4 of the Appellant's Brief are:

*"1. Whether based on the evidence the Appellant was able to establish his case against the Respondent and was therefore entitled to judgment?*

*2. Whether the Court below was right when it dismissed the case of the Appellant on the ground that the Appellant did not describe with certainty the land in dispute?*

*3. Whether, the Court below was right in raising issues not raised by the parties and deciding them without calling on the parties to address it on the issues so raised suo motu?*

*4. Whether the Lower Court was right when it held that Okha Community was deemed grantee of the land in dispute prior to the Land Use Act?*

The Respondent distilled a sole issue for determination in his Brief namely:

*"Whether the learned trial Judge properly evaluated the evidence before him before coming to the conclusion that on the preponderance of evidence the Appellant did not discharge the onus of proof placed on him by law to entitle him to judgment."*

Even though the issue distilled by the Respondent is distensible, it is on the basis of the issues formulated by the Appellant that I would consider the submissions of learned counsel and resolve this appeal.

**ISSUES FOR DETERMINATION**

For purposes of convenience I will consider Issue numbers one and two together.

**ISSUE NUMBER ONE**

*Whether based on the evidence the Appellant was able to establish his case against the Respondent and was therefore entitled to judgment?*

**ISSUE NUMBER TWO**

*Whether the Court below was right when it dismissed the case of the Appellant on the ground that the Appellant did not describe with certainty the land in dispute?*

**SUBMISSIONS OF APPELLANT'S COUNSEL**

The Appellant submits that he established his case on the preponderance of evidence as he proved due acquisition of the land by his late father under Bini Customary Law, vide Exhibit P, and that he inherited the land after performing the necessary burial ceremonies. The procedure for acquisition of title to land under Bini Customary Law as spelt out in the case ofOKEAYA-INNEH vs. AGUEBOR (1970) ALL NLR (Reprint) 1 at 8 -9 was set out and it was opined that having established the title of his late father, he had discharged the onus placed on him by law and he was entitled to the declaration he sought. The Appellant maintained that he proved the title of his late father, his inheritance of the land and exercise of acts of possession over the land including writing a letter to the Respondent when he trespassed upon the land.

The Appellant contended that prior to the Land Use Act, it was only the Oba of Bini that had power to allocate land in Benin and that after the promulgation of the Land Use Act it was the Governor of a State or Chairman of a Local Government that may grant a right of occupancy over land. The Appellant posited that the Enogie and other members of the Community did not have the authority to allocate or grant interest in land to the Respondent or anybody. It was argued that even though the Appellant was to succeed on the strength of his own case and not the weakness of the defence, the Appellant could take advantage of the evidence of the Respondent favourable to his case. The case of ODI vs. IYALA (2004) 8 NWLR (PT 875) 283 at 308 and 315was cited in supported. The Appellant posited that the testimony elicited from the DW1 and DW2 under cross examination to the effect that prior to the Land Use Act only the Oba could approve allocation of land was against the interest and contrary to the pleadings of the Respondent. He maintained that the Respondent trespassed unto the land that was in the exclusive possession of the Appellant, insisting that the Respondent did not challenge the Appellants root of title.

The Appellant asserted that the Lower Court erred in law when it dismissed the Appellants case and that the findings of the Lower Court were perverse as they were not based on the evidence. This court was urged to intervene in the interest of justice. The cases of MUOJEKWU vs. EJIKEME (2000) 5 NWLR (PT 657) 402 at 425, MAJA vs. STOCCO (1968) 1 ALL NLR 141 and AKINYEMI vs. AKINYEMI (1963) 1 ALL NLR 340 were referred to.

On the second issue, it is the submission of the Appellant that the Lower Court erred in law when it dismissed the Appellant's case on the ground that the Appellant did not describe the disputed land with certainty. The Appellant opined that the disputed land or its location was never put in issue by the Respondent and that the duty to prove the precise area of land to which the claim relates only arises where the defendant disputes the identity or location of the disputed land. The cases of MOHAMMED vs. MOHAMMED (2012) 11 NWLR (PT 1310) 1 and AKPAN vs. UMOH (1999) 11 NWLR (PT 627) 349 were relied upon. The Appellant maintained that the disputed land was well known to the parties and that filing a litigation survey plan was not an absolute necessity; it was therefore concluded that the Lower Court was in error when it held at page 95 lines 9 -15 of the record that it was the duty of the Appellant to properly describe the land referred to in Exhibit P with certainty and accuracy to match with the disputed land.

**SUBMISSIONS OF THE RESPONDENT**

The Respondent submits that the Lower Court had the duty to evaluate the evidence adduced, and that since there was no counterclaim, it was for the Appellant to discharge the burden of proving that he is entitled to the declaration sought. It was opined that the Respondent challenged the Appellant's claim that Exhibit P related to the disputed land, thereby putting the identity of the land in issue and that the Lower Court rightly concluded that the Appellant failed to prove the identity of the land in order to be entitled to the declaration of title sought. The case of ODOCHIE vs. CHIOBOGUM (1994) 7 NWLR (PT 354) 78 at 86 was referred to. While conceding that a plan is not an absolute necessity in every land case especially where the land is well known, the Respondent asserted that having pleaded that Exhibit P did not relate to the disputed land, the Appellant had a duty to match the disputed land with Exhibit P and that the Lower Court rightly held that the Appellant did not prove with certainty the identity of the land as described in Exhibit P.

It is the contention of the Respondent that the Lower Court which had the opportunity of seeing, hearing and watching the witnesses testify, rightly held, after evaluating the evidence, that Exhibit P was not credible evidence.

It was submitted that where Exhibit P is of no probative value, the entire case of the Appellant must fail. The Respondent asserted that Exhibit P being the Oba's approval was not shown by the Appellant to relate to the disputed land.

**RESOLUTION OF ISSUE NUMBERS ONE AND TWO**

These issues deal mainly with the evaluation of evidence, the ascription of probative value thereto and the findings of facts made by the Lower Court. The facts of the case as presented by the Appellant is that his late father acquired the disputed land through the Ward 29A Plot Allocation Committee in accordance with the procedure for acquisition of land under Bini Customary Law and that the Oba of Benin gave his approval to the allocation of the land by Exhibit P. The Appellant further proffered evidence that his late father exercised acts of ownership over the land and that at the death of his father, he, the Appellant, inherited the land having performed the burial ceremony of his father. The Appellant claims to have remained in possession until the Respondent trespassed onto the land.

The Respondent on his part claimed to have acquired the land from the Enogie and Elders of Okha Community and that he paid for the rubber trees that were on the land which was thickly forested. The Respondent maintains that he was in possession of the land and that the land did not belong to the Appellant who was being put forward to front for some land interlopers in Okha Village Community. The Respondent joined issues and insisted that the Oba's approval, Exhibit P, relied upon by the Appellant did not relate to the disputed land. See paragraphs 8 and 13 of the Amended Statement of Defence at pages 11 and 12 of the Records.

Now, it is hornbook law that the evaluation of evidence and the ascription of probative value thereto reside within the province of the court of trial that saw, heard and assessed the witnesses. Where a trial court unquestionably evaluates and justifiably appraises the facts, it is not the business of an appellate court to substitute its own views for the view of the trial court, however, an appellate court can intervene where there is insufficient evidence to sustain the judgment or where the trial court fails to make proper use of the opportunity of seeing, hearing, and observing the witnesses or where the findings of facts by the trial court cannot be regarded as resulting from the evidence or where the trial court has drawn wrong conclusion from accepted evidence or has taken an erroneous view of the evidence adduced before it or its findings are perverse in the sense that they do not flow from accepted evidence or not supported by the evidence before the court. See EDJEKPO vs. OSIA (2007) 8 NWLR (PT 1037) 635 or (2007) LPELR (1014) 1 at 46 47, ARE vs. IPAYE (1990) LPELR (541) 1 at 22, WOLUCHEM vs. GUDI (1981) 5 SC 291 at 320 and FASIKUN II vs. OLURONKE II (1999) 2 NWLR (PT 589) 1 or (1999) LPELR (1248) 1 at 47 -48.

The law is that the conclusions of the trial court on the facts is presumed to be correct, so that presumption must be displaced by the person seeking to upset the judgment on the facts. See WILLIAMS vs. JOHNSON (1937) 2 WACA 253, BALOGUN vs. AGBOOLA (1974) 1 ALL NLR (PT 2) 66 and EBOLOR vs. OSAYANDE (1992) LPELR (8053) 1 at 43. Therefore the nitty-gritty of this matter is whether the Appellant has been able to displace or dislodge the presumption that the findings of facts made by the Lower Court are correct.

As a prelude, let me state that it is now settled law that for the determination of an appeal on issues of facts, it is not the business of an appellate court to embark on a fresh appraisal of the evidence where the trial court has unquestionably evaluated and appraised it, unless the findings arrived at are perverse. See AYANWALE vs. ATANDA (1988) 1 NWLR (PT 68) 22 or (1988) LPELR (671) 1 at 21 and AWOYALE vs. OGUNBIYI (1986) 4 SC 98. In the words of Idigbe, JSC in BOARD OF CUSTOMS & EXCISE vs. BARAU (1982) LPELR 1 at 47:

"It is now settled that if there has been a proper appraisal of evidence by a trial court, a court of appeal ought not to embark on a fresh appraisal of the same evidence in order merely to arrive at a different conclusion from that reached by the trial court. Furthermore, if a court of trial unquestionably evaluates the evidence then it is not the business of a court of appeal to substitute its own views for the views of the trial court."

I have already set out the reliefs claimed by the Appellant.

It is settled law that a plaintiff claiming a declaration of title to land must succeed on the strength of his case and not on the weakness of the defendant's case, except where the defendant's case supports the plaintiff's case. See KODILINYE vs. ODU (1935) 2 WACA 336 at 337, ASHIRU vs. OLUKOYA (2006) 11 NWLR (PT 990) 1 at 19 -20, CLAY INDUSTRIES vs. AINA (1997) 52 LRCN 2029, ODI vs. IYALA (supra) and FAGUNWA vs. ADIBI (2004) 17 NWLR (PT 903) 544 at 568. So it was for the Appellant to establish his entitlement to the declaration sought over the disputed land. This is especially so because the Respondent did not file a counterclaim. The heavy burden of proving title to the disputed land rested squarely on the Appellant. There was no duty on the Respondent to prove his title. See ADEKANBI vs. JANGBON (2007) ALL FWLR (PT 383) 152 at 160G -163E and 165D-F and OWOEYE vs. OYINLOLA (2014) ALL FWLR (PT 721) 1458 at 1477 C-D.

The legal portion has crystallized that there are five ways or methods of proving title to land, namely:

1. By traditional evidence

2. By production of title documents

3. Proving acts of ownerships

4. Acts of long possession and enjoyment of the land.

5. Proof of connected or adjacent land in circumstances which render it probable that the owner of such connected or adjacent land would in addition be the owner of the land in dispute.

See IDUNDUN vs. OKUMAGBA (1976) 9 -10 SC and THOMPSON vs. AROWOLO (2003) 4 SC (PT 2) 108 at 155 -156.

The Lower Court in its judgment at pages 86 -89 of the Records correctly approached the burden on the Appellant and rightly found that the Appellant sought to prove his title to the disputed land through the Oba's approval, Exhibit P, which is documentary and through his father's acts of possession by farming on the land.

The Appellant has set out the requisite procedure for acquisition of title to land under Bini Customary Law positing that the evidence adduced established that his late father validly acquired the land under Bini Customary Law. It seems to me that there isn't much in this appeal that turns on due adherence to the procedure for acquisition of land under Bini Customary Law. The defence put forward by the Respondent is not that the purported acquisition is not in accordance with Bini Customary Law, rather it is that the Appellant has no land near the disputed land and that he is a front for land interlopers; furthermore, that the Oba's approval, Exhibit P, did not relate to the disputed land.

In paragraphs 8, 12 and 13 of the Amended Statement of Defence it was averred:

*"8. The Defendant says that the Plaintiff knows that the land was validly conveyed to the Defendant by the Enogie and Okha Community and that the land does not belong to the Plaintiff rather he is just being put forward to front for some land interlopers in Okha Village Community. The Oba's approval pleaded by the Plaintiff does not relate to Defendant's parcel of land which is facing Benin/Sapele expressway*.

*12. The Defendant says that when the Okha 2 claim to the land was knocked out by the Enogie's Statement, the Plaintiff was brought forward to make his spurious claims to the land in dispute.*

*13. The Defendant states that the Plaintiff has no land near the land in dispute and that the Plaintiff purported Oba's approval does not relate to the land in dispute and states further that the Oba's approval is fabricated for the purpose of this case by Okha 2 propagandists.*"

Therefore on the state of the pleadings, there was an inexorable need for the Appellant to establish that Exhibit P, the Oba's approval was in respect of the disputed land as the effect of the defence raised was to put in issue the identity of the land to which Exhibit P relates. See EZEUDU vs. OBIAGWU (1986) 2 NWLR (PT 21) 208, FATUADE vs. ONWUAMANAM (1990) 2 NWLR (PT 132) 322 and OGUN vs. AKINYELU (2004) 18 NWLR (PT 905) 362 or (2004) LPELR (2319) 1 at 22 -23. The Lower Court was on top of its game when at page 90 of the Records it stated:

*"By these paragraphs, the defendant has successfully put the identity of the land claimed by the Plaintiff in issue."*

In the course of evaluating the evidence adduced and ascribing probative value thereto, the Lower Court stated as follows on pages 92 -94 of the   
Records:

*"That being so, I believe that by the defendant's statement of defence issues have been joined with the Plaintiff's on Exhibit P, and the identity of the land Exhibit P relates to.   
  
The onus is therefore on the Plaintiff to convince this Court that he is entitled, on the evidence adduced by him to the declaration he seeks. The fact that the Plaintiff did not file a reply to the statement of defence does not discharge him from that burden.  
  
As to the identity of the land claimed by the Plaintiff, apart from the fact that the Plaintiff said the land in dispute measures 200ft by 200ft and is located along Benin Sapele Road at Okha village, there is no other description of the land. PW1 said the land has boundary with one Joseph Imasuen. I expected that Joseph Imasuen or any of his descendants would be called to testify to that effect but no such evidence was called. The other boundaries of the land were not defined by either the plaintiff or any of his witness. No evidence of any important specific feature in or bordering on the land claimed by the Plaintiff was also described.  
  
The law is that in a claim for declaration of ownership or exclusive possession of a piece of land, the first duty on the claimant is to describe the land in dispute with such reasonable degree of certainty and accuracy that its identity will no longer be in doubt. The land must be identified positively and without ambiguity. The land must be so described that the Court will be certain and a surveyor would have no problem in identifying its co-ordinates moments."*

In resolving the contention of the Appellant that the land in dispute was known to the parties, thereby making the filing of a plan unnecessary, the Lower Court while agreeing that this was the correct restatement of the law continued at pages 95 -96 stating that:

*"In spite (of) this submission of Plaintiff's counsel, it is worthy of note that the defendant in paragraph 13 of his Amended Statement of defence as earlier referred stated that Exhibit P does not relate to the land in dispute. That is to say that Exhibit P has no nexus with the land the Plaintiff is disputing with defendant which the defendant says is his own. It is therefore the duty of the plaintiff to properly describe the land referred to in Exhibit P with certainty and accuracy to match it with the land the defendant says the plaintiff is disputing with him. Assuming but without conceding that I am wrong, if this court were to issue an injunction against the defendant at the end of the day, with what specifications or description of land will this Court tie to order of injunction. The order will be vague The description of the land as given by plaintiff can fit any land measuring 200ft by 200ft in Okha Village along Benin Sapele Express Way in Ward 29/A. Courts do not make vague but specific orders.  
  
I am more convinced by the submission of defendant's counsel that the plaintiff has not proved with certainty the identity of his land as described in Exhibit P.  
  
Still on this issue of identity, the plaintiff never said in his evidence that he knows the land or that he has ever been there. He said his uncles gave the land out to someone to be farming on it and when that person died, he was replace by another person. But throughout the case for the Plaintiff, the person who was farming on the land before the defendant allegedly went on the land to be erecting his building was not called to testify to know the exact location of the land they farmed on. Since the defendant had disputed the land put in dispute by the Plaintiff who said his land had boundary with Joseph Imasuen, it was incumbent on the Plaintiff in my view to define the boundaries of his land he put in dispute and the exact location of same by filing a survey plan."*

With respect to proof of entitlement to the declaration sought by acts of possession by farming the disputed land, the Lower Court held at page 97 of the records that there was no evidence from the Appellant on the types of crops his father farmed on the land, if they were cash or seasonal crops. While holding that the evidence adduced by the Appellant did not establish the acts of possession by farming the Lower Court stated as follows at page 98 of the Records:

*"It is in evidence from the plaintiff that when his father took possession of the land, he did not survey it, but was only farming on it. Exclusive possession could mean cultivating of the land. See Balogun v Agbesenwa (2001) 17 NWLR (pt 741) Pg 118 at 141.  
  
But the plaintiff's evidence to that effect stands alone. It is not corroborated by any of his witnesses. Since PW1 said that there were crops on the land when he shared Plaintiff's father land never said Plaintiff's father farmed on the land. So I find it difficult to believe him on this issue that (t)he land in dispute is where his father farmed over the years. So I do not believe the Plaintiff.  
  
I observed that the plaintiff in his evidence said that he is not an indigene of Okha which means that his father is not from Okha village but PW1 said Plaintiff's father is from Okha 11. So that Plaintiff in my view does not even know where he hails from. No wonder he is not familiar with the environment and does not know the land and that is why he is not able to describe it with certainty. In fact I believe he knows nothing about it."*

It is pertinent to restate that there was an abiding need for the Appellant to make the necessary nexus and connection between Exhibit P and the disputed land. This he could not do. On the question of farming the disputed land, the evidence adduced was terse and laconic and the Lower Court rightly found the same as not being of a quality to found declaration of title to land. It cannot be disputed that the Lower Court duly appraised the evidence, the findings and conclusions arrived at by the Lower Court accord with common sense and reason based on the available evidence. At the risk of being prolix, I restate that an appellate court will not substitute its own views with those of the trial court, when as in the instant appeal, the trial court has unquestionably evaluated the evidence and justifiably appraised the facts. See NGILLARI vs. NICON (1998) 8 NWLR (PT 560) 1 and AGBABIAKA vs. SAIBU (1998) 10 NWLR (PT 571) 534 or (1998) LPELR (222) 1 at 19 -20. The evaluation of evidence and the findings made by the Lower Court were definitely not perverse. Therefore there is absolutely no basis on which an appellate court can intervene. From all I have said thus far, the inevitable summation is that the Appellant has failed to displace the presumption that the conclusions of the Lower Court on the facts are correct in order to upset the judgment on the facts: EBOLOR vs. OSAYANDE (supra) at 43. Issue Numbers One and Two are therefore resolved against the Appellant.

**ISSUE NUMBER THREE**

*Whether the Court below was right in raising issues not raised by the parties and deciding them without calling on the parties to address it on the issues so raised* suo motu?

**SUBMISSIONS OF THE APPELLANT'S COUNSEL**

The Appellant submits that the Lower Court was in error in raising issues not raised by the parties and deciding the issues so raised without the input of the parties. The issues said to have been raised *suo motu* by the Lower Court on pages 96 to 99 of the Records were referred to and it was posited that the Lower Court was setting up for the parties a case which was not set up by them. It was contended that a court has a duty to limit itself to the issues raised by the parties and that the procedure the Lower Court adopted in raising issues *suo motu* and not giving the parties the opportunity of being heard occasioned a breach of fair hearing which rendered the proceedings null and void. The cases of VICTINO FIXED ODDS LTD vs. OJO (2010) 8 NWLR (PT 1197) 486 and LONGE vs. F.B.N PLC (2010) 6 NWLR (PT 1189) 1 at 22, 31 and 37 were referred to.

**SUBMISSIONS OF THE RESPONDENT'S COUNSEL**

The Respondent submits that it is within the competence of the Lower Court to look at the available evidence and draw the relevant inference from the same. It was posited that the Appellant's submissions were frivolous as the complaint was in respect of findings that were made by the Lower Court arising from available facts.

**RESOLUTION OF ISSUE NUMBER THREE**

It is the trial court that is in the heat of the battle at the trial. The trial court sees the faces of the witnesses, hears their testimony, feels the tension and observes the demeanour of the witnesses. It is therefore within the province of the trial court which saw, heard and assessed the witnesses to evaluate and ascribe probative value to the evidence adduced. This makes a trial judge a peculiar adjudicator. There is a duty on the trial court to receive all available relevant evidence on an issue. This is perception of evidence. After that there is another duty to weigh that evidence in the context of the surrounding circumstances of the case. This is evaluation of evidence. A finding of fact will entail both perception and evaluation. See OLUFOSOYE vs. OLORUNFEMI (1989) 1 SC (PT 1) 29 or (1989) LPELR (2615) 1 at 9, GUARDIAN NEWSPAPER LTD vs. AJEH (2011) 10 NWLR (PT 1255) 574 at 592G and WACHUKWU vs. OWUNWANNE (2011) LPELR (3466) 1 at 50 -51.

There is little or no difficulty with perception of evidence, id est, receive all available relevant evidence. But what amounts to evaluation of evidence? This is a question that was admirably dealt with and answered by Oputa, JSC (of most blessed memory) in ONWUKA vs. EDIALA (1989) 1 NWLR (PT 96) 182 at 208 -209 where he stated:

"What does not evaluation of evidence consist of? What is the meaning of the expression evaluation? To evaluate simply means to give value to, to ascertain the amount, to find numerical expression for etc.....

Now talking of scale naturally leads one to the famous dictum of Fatayi-Williams, JSC (as he then was) in A. R. MOGAJI & ORS vs. MADAM RABIATU ODOFIN & ORS (1978) 4 SC 91 at 93:

'when an appellant complains that a case is against the weight of evidence, all he means is that when the evidence adduced by him is balanced against that adduced by the respondent, the judgment given in favour of the respondent is against the weight which has been given to the totality of the evidence before him, (the trial judge).... Therefore in deciding whether certain set of facts given in evidence by one party in a civil case before a court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial judge after a summary of all the facts, must put the two sets of facts in an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it...'

The scale though imaginary is still the scale of justice, and the scale of truth. Such a scale will automatically repel and expel any and all false evidence. What ought to go into that imaginary scale should therefore be no other than credible evidence. What is therefore necessary in deciding what goes into the imaginary scale is the value, credibility and quality as well as the probative essence of the evidence...Even in Mogaji's case...this court held at p. 94:-

'Therefore in determining which is heavier, the judge will naturally have regard to the following:

(a) whether the evidence is admissible;

(b) whether it is relevant;

(c) whether it is credible;

(d) whether it is conclusive; and

(e) whether it is more probable than that given by the other party.'"

It would appear that evaluation of evidence is basically the assessment of the facts by the trial Court to ascertain which of the parties to a case before it has more preponderant evidence to sustain his claim. See OYADIJI v. OLANIYI (2005) 5 NWLR (PT 919) and AMEYO v. OYEWOLE (2008) LPELR (3768) 1 at 9. The evaluation involves a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. A Court of trial has the duty to consider the evidence adduced in respect of any facts on which issues were joined, decide which evidence to prefer on the basis of how the evidence preponderates and then make logical and consequential findings of facts. See ADEYEYE v. AJIBOYE (1987) 1 NWLR (PT 61) 432 at 451 and STEPHEN v. STATE (1986) 5 NWLR (PT 46) 978 at 1005. There must be on record how the court arrived at its conclusion of preferring one piece of evidence to the other. See AKINTOLA v. ADEGBITE (2007) ALL FWLR (PT 372) 1891 at 1898.

I have considered the fourteen matters set out on pages 20 - 21 of the Appellant's Brief as being the issues raised *suo motu* by the Lower Court. The said matters are:

*"a. No issue was joined by the parties whether the plaintiff knows the land or that he has ever been there.*

*b. No issue was joined by the parties as to whether or not person the plaintiff said was farming on the land in dispute did not come to testify in court.*

*c. The boundaries and location of the land was never an issue before the court.*

*d. No issue was joined by the parties as to who planted crops on the land in dispute and whether or not the plaintiff father farmed on the land.*

*e. No issue was joined on the types of crops the plaintiff father farmed on the land.*

*f. No issue was joined as to whether PW2 was the plaintiffs' family member.*

*g. No issue was joined as to the plaintiff's uncle who drove the defendant out of the land.*

*h. No issue was raised by the parties on the signatories on exhibit P or whether someone signed twice or that PW1 had something to hide.*

*i. No issue was joined on imposition of the figure 2 on what appeared to have been 3 on exhibit 'P'.*

*j. No issue was joined as to the age of exhibit 'P' or whether it is clean or old or whether or not the said exhibit was credible.*

*k. No issue was joined as to whether the plaintiff's father was farming on the land or not.*

*l. No issue was joined as to whether or not the plaintiff is an indigene of Okha or where he hails from.*

*m. No issue was joined as to whether the plaintiff is familiar with the environment or whether he knows the land in dispute and able to describe it with certainty.*

*n. The learned trial judge descended into the arena of dispute unsolicited."*

Unfortunately, I am unable to agree with the Appellant's contention. The said matters which the Appellant posits are issues raised *suo motu* are actually the evaluation of evidence by the Lower Court. The assessment of the evidence before the court to ascertain how the evidence preponderates. It was the reasoned and informed belief by the Lower Court of its preference of one version of the evidence for the other. It encapsulates what informed the Lower Court arriving at the conclusion that the Appellant did not prove his case.

The valiant efforts of the Appellant's counsel to import the principle of fair hearing in this matter are not availing. In BROSSETTE MANUFACTURING NIG. LTD v. M/S OLA ILEMOBOLA LTD (2007) 14 NWLR (PT 1053) 109 at 139F -H, the Supreme Court decried the increasing incidents of counsel forcing into cases the principles of fair hearing even when they are so distinct from the case. The postulations of the Appellant's Counsel in this Issue Number Three is one such instance and I will not be inveigled by the gallantry as there is clearly no issue of fair hearing involved in findings of facts made by the Lower Court in the course of evaluating and ascribing probative value to the evidence adduced. This issue is consequently resolved in favour of the Respondent.

**ISSUE NUMBER FOUR**

*Whether the Lower Court was right when it held that Okha Community was deemed grantee of the land in dispute prior to the Land Use Act?*

**SUBMISSIONS OF THE APPELLANT'S COUNSEL**

The Appellant submits that the Lower Court was in grave error when it held that Okha Community is deemed grantee of the land which the Respondent acquired from them under the Land Use Act, when the evidence on record is that Okha Community is under Benin and that the Oba of Benin is the Trustee and in possession of the entire land in Benin for the Benin People. It was therefore posited that the Oba of Benin is the deemed grantee of the land in dispute and not the Okha Community. The cases of IDEHEN v. OLAYE (1991) 5 NWLR (PT 191) 344 at 357 was referred to.

**SUBMISSIONS OF THE RESPONDENT'S COUNSEL**

The Respondent submits that under the Land Use Act, the owner/occupier of land under customary tenure prior to the promulgation of the Land Use Act are deemed grantees and that a deemed grantee can transfer, convey/assign land, subject to the consent of the Governor. The cases of SAVANNAH BANK NIGERIA LTD v. AJILO (1989) 1 NWLR (PT 97) 305 and ONONUJU v. A-G ANAMBRA STATE (2009) 10 NWLR (PT 1148) 182 at 206 were cited in support. The Respondent therefore maintained that his vendors are the deemed grantees under the Land Use Act and not the Oba of Benin.

**RESOLUTION OF ISSUE NUMBER FOUR**

The gravamen of the Appellant's contention in this issue can be deciphered from the last paragraph of his submission at the Lower Court which he redacted on page 25 of his brief to the effect that:

*"In the instant case, the defendant is not basing his defence on having acquired the land through the Oba of Benin or through the Governor of Edo State. The acquisition of the land by the defendant through community and Enogie is not known to law. Nemo dat quo no habet. You cannot give what you do not have. The community and the Enogie has no land to grant to any body..."*

It seems that in precise terms, the contention of the Appellant is that because the Respondent did not trace his presence on the land to either a grant from the Oba of Benin or the Governor of Edo State that the Respondent cannot be said to have a defence to the Appellant's case. Let me restate that the Respondent did not counterclaim so there was no onus on him to prove his title to the disputed land. The entire burden of proving title rested squarely on the Appellant. The Lower Court was on top of the action in this regard when after holding that Okha Community is deemed grantee of the land that the Respondent acquired from them, continued and stated as follows on page 103 of the Records as follows:

*"Assuming but without concluding that I am wrong, it is the Plaintiff that has to rely on the strength of his case to prove that he is entitled to the declaration of title he seeks on the preponderance of evidence. The defendant in this suit did not counter claim and that being so the law is that no onus of proof rests on him. See**Olokunlade v. Samuel (2010) 17 NWLR (Pt 1276) 290 at 318 where it was held that:*

*'Where the defendants in an action for declaration of title to land did not counter claim, they do not have to prove ownership. All that is required of them is to defend the action.'"*

The Lower Court did not dismiss the Appellant's case because of its having held that the Okha Community are deemed grantees of land under the Land Use Act. The Lower Court held that the Appellant did discharge the onus of proof. Hear the Lower Court at pages 103 -104 of the Records.

*"On the final analysis, from the evidence before me, I find that the Plaintiff has not with certainty described the land to which Exhibit P relates, he has not been able to create a nexus between Exhibit P and the land in dispute, no boundary man, or Joseph Imasuen was called as a witness, neither did he call any of his uncles who he said drove defendant from the land or even those who he said his uncles gave the land to farm as witnesses and no Litigation Survey plan was tendered to link ward beacons in Exhibit P with the land in dispute. The plaintiff has not also proved his claim through Exhibit P and the acts of possession by his father.  
  
Therefore on the preponderance of evidence, the onus of proof placed on the Plaintiff by law has not in my view been discharged to entitle him to the reliefs he seeks for the declaration, injunction and damages for trespass. The Plaintiffs claims are therefore dismissed."*

With respect, it appears to me that the argument of the Appellant in this Issue Number Four is futile and of no utilitarian value since there was no burden on the Respondent to prove ownership of the disputed land, as he did not file a counterclaim. See AWUZIE v. NKPARIAMA (2002) 1 NWLR (PT 741) 1 at 9 -10 and KODILINYE v. ODU (supra).

Be that as it may, the principles governing the acquisition of valid title to land in accordance with Bini Customary law as laid down in a plethora of cases including OKEAYA-INNEH v. AGUEBOR (supra), EVBUOMWAN v. ELEMA (1994) 6 NWLR (PT 353) 638 and OWIE v. IGHIWI (2005) 5 NWLR (PT 917) 184 or (2005) LPELR (2846) 1 at 17 -18 to mention a few, make it clear that the Oba of Benin is the only authority competent under Bini Customary Law to make allocation or grant of Bini Land, since all Bini Lands are Communal property of the entire Bini People and the legal estate in such land is vested and resides in the Oba as trustee for the Bini people. By the principles, the Oba of Benin would, as a rule, approve a recommended application by a Ward Plot Allotment Committee. It is therefore clear that the Oba of Benin is a trustee on behalf of the people of Benin who are beneficiaries of the trust. Now by Section 1 of the Land Use Act, the Governor is the trustee of all land comprised in the territory of each state of the Federation. So upon the promulgation of the Land Use Act, the position of the Oba as trustee of Benin Land became vested in the Governor. The beneficiaries of the trust remain the people of Benin, whether the Trustee be the Oba of Benin or the Governor of the State.

In IDEHEN v. OLAYE (supra) relied upon by the Appellant this court held that all land in Benin is owned by the Community for whom the Oba holds the same in trust. It seems to me that the deemed holder of the right of occupancy under the Land Use Act will be the Community as owners of the land as opposed to the Oba who was the trustee of the community.

In the light of this, I agree with the Lower Court that Okha Community is the deemed grantee of the land by virtue of the Land Use Act: ONONUJU v. A-G ANAMBRA STATE (supra). I hasten to add that this has absolutely no bearing whatsoever on the finding by the Lower Court that the Appellant did not discharge the onus of proof cast upon him by law. This Issue Number Four is accordingly resolved against the Appellant.

**CONCLUSION**

It seems that we have safely navigated the vessel of this Judgment to its berthing point at the quays. From a conflating of the foregoing the issues for determination have all been resolved against the Appellant. The appeal is totally devoid of merit. It fails in its entirety and it is hereby dismissed. The judgment of the High Court of Edo State, Coram: *Edigin, J.*, in Suit No. B/59/2009 delivered on 26th July 2012 is hereby affirmed. The Respondent is entitled to the costs of this appeal which I assess and fix at N50,000.00.

**IBRAHIM MOHAMMED MUSA SAULAWA, J.C.A.:**

My learned brother the ***Hon. Justice U. A. Ogakwu, JCA,*** has graciously served upon me a draft of the judgment just delivered by him. Having had the privilege of perusing the record of appeal and the briefs of argument of the respective learned counsel, I cannot but concur with the reasoning and conclusion reached in the said judgment, to the effect that the instant appeal is devoid of merits. Thus, the appeal is equally dismissed by me for lacking in merits. I abide by the consequential orders affirming the judgment of the High Court of Edo State, delivered on July 26, 2012 in suit No.B/59/2009 by Edigin, J; as well as the N50,000.00 awarded as costs in favour of the Respondent.

**PHILOMENA MBUA EKPE, J.C.A.:**

I have had the opportunity of reading in advance the judgment just delivered by my learned brother **U. A. OGAKWU,** JCA*.* The gravamen of the appeal is the issue of ownership of the piece of land situate at Okha village Ward 29A, Sapele Road, Benin City. The learned trial judge decided in favour of the Defendant/Respondent, hence this appeal.

The Appellants issue No. two is: whether the court below was right when it dismissed the case of the Appellant on the ground that the Appellant did not describe with certainty the land in dispute. In the case of OLUSANMI V. OSHASONA (1992) LPELR 2629 the apex Court clearly stated as follows:

"it has been held by a long line of cases beginning with Baruwa v. Ogunsola (1938) 4 WACA 159 that the onus lies on the plaintiff who seeks a declaration of title to show clearly the area of land to which his claim relates".

It is however trite that the plaintiff can discharge this onus by such oral description of the land that any surveyor acting on such description could produce a plan of the land in dispute.

In the case at hand, the learned trial judge faulted the description of the land in question by the plaintiff/Appellant I have no cause to alter that decision as it behoves on the plaintiff/Appellant to tenaciously hold onto his land through a vivid description of same. Anything short of that will tilt the pendulum of justice to the opposite side.

I tow the line of the learned trial judge that the Plaintiff/Appellant could not lay claim to the said land by any vivid or accurate description of same as required by law. There is indeed no gainsaying the fact that an essential requirement in an action for declaration of title to land is to establish the area of the land in dispute. See TITILOYE V. OLUPO (1991) 7 NWLR (PT.205) 519.

From the totality of all the above and the much fuller and admirably researched reasoning and conclusion of my learned brother in the lead judgment, I too agree that this appeal is totally unmeritorious; it fails entirely and is hereby also dismissed by me. I too affirm the judgment of the lower court Coram EDIGIN J. in suit No.B/59/2009 delivered on the 26th day of July, 2012. I abide by this Lordship's Order as to costs.