MR. SUNDAY OLUSI

V.

MR. JULIUS OLAITAN OBANIYI

IN THE SUPREME COURT OF NIGERIA

HOLDEN IN ABUJA

SC/65/2018

MOHAMMED LAWAL GARBA
MOORE A. A. ADUMEIN
STEPHEN JONAH ADAH
JAMILU YAMMAMA TUKUR
MOHAMMED BABA IDRIS

FRIDAY, 4TH JULY 2O25

Action: Preliminary objection thereto - nature thereof

Action: Preliminary objection thereto - purpose thereof - the principle in Uwemedimo & Anor vs. Mobil Producing Nigeria Unltd. & Anor (2019)12 NWLR (pt. 1685)27

Action: Relief claimed - where there are alternative reliefs - nature thereof - the principle in The M. V "Caroline Maersk" Sister Vessel to MV "Christian Maersk" vs. Nokoy Investment Ltd. (2002)2 NWLR (pt. 782) 472

Action: Issues for determination - formulation thereof - purpose thereof

Court: Preliminary objection - duty of court therein

Land Law: Declaration of title - requirements thereof

Land Law: Declaration of title - proof thereof - modes of proof thereto

Land Law: Declaration of title - onus on claimant - how discharged

Land Law: Possession of land - whether entitles a person to sue for trespass

Land Law: Possession - where both parties claim possession to land - whether possession is ascribed to a party who shows better title

Land law: Identity of land in dispute - proof thereof

Issues:

1.**Whether from the pleadings and available evidence on record**, **the respondent proved his case and** whether the counter-claim of the appellant was not proved. (Distilled from Grounds 1, 2, 7 and 8 of the Notice of Appeal).

2. **Whether the land adjudged the respondent was ascertainable in extent** and boundaries and whether the **appellant did not ascertain the land claimed by him**. (Distilled from Grounds 3, 5, and 6 of the Notice of Appeal).

3. **Whether an action in trespass can lie from the pleadings and available** evidence on record. (Distilled from Ground 4 of the Notice of Appeal).

Facts:

The Plaintiff/Respondent sued the Defendant/Appellant at the Ondo State High Court, sitting at Akure seeking declaration of Customary Right of Occupancy, injunction and damages for trespass in respect of a piece or parcel of land called Akoko. The parties filed and exchanged their pleading. The case went to hearing.

At the end, judgment was delivered in favor of the Plaintiff/Respondent. Dissatisfied, the Defendant/Appellant unsuccessfully appealed to the Court of Appeal Akure Division, hence this further appeal to the Supreme Court

Held (unanimously dismissing the appeal):

1. *On nature of preliminary objection-*

A preliminary objection to the hearing of an appeal is a special procedure where by a respondent may contend the competence of the appeal which, if upheld, has the effect of striking out the appeal. Our Rules of Court allows a respondent to file a preliminary

objection where the respondent believes the appeal to be incompetent.

2. *On purpose of preliminary objection-*

The purpose of the preliminary objection is to contend that the appeal is defective or incompetent. It is geared towards terminating the hearing of an appeal in limine. See the case of **Contract Resources Nig. Ltd v. United Bank *for* Africa Plc (2011) 14 NWLR (Pt 1266) 157**. In the case of **Uwemedimo & Anor v. Mobil Producing Nigeria Unltd. & Anor (20'19) 12 NWLR (Pt 1685) 27**, this court per Eko, JSC, explained the nature of a preliminary objection thus:

> **A preliminary objection is raised where a *party* fails to comply with the enabling law and/or the rules of Court in initiating his action: Oloriode v. Oyebi ('1984) 1 SCNLR 390, (1984) 5 SC 1, (1984) 15 NSCC 286. As the name implies, preliminary objection is the initial objection to the commencement of the thing objected to: Akpan v. Bob (2010) All FWLR (Pt. 501 896, (2010) 17 NWLR (Pt. 1223)** 421; Sani v. Okene Local Government **Traditional Council (2008) All FWLR (Pt. 429) 464, (2008) 12 NWLR (Pt. 1102) 691.**
>
> **A notice of preliminary objection and the defence on the merits are not the same thing. Where a notice of preliminary objection raises issues which the defendant or respondent could develop into his defence on the merits; it is proper at the stage to discountenance such notice of preliminary objection... .A notice of preliminary objection is a pre-emptive strike at the suit or action which it intends to terminate or terminates in limine the hearing of the suit**

or action: N.U.T Taraba State v. Habu (2018) 14 LPELR – 44057 (SC). It therefore, ceases to be preliminary objection if it raises issues *for* the defence on the merits with the aim of a judgment of dismissal in favour of the respondent".

3. *On duty of court in a preliminary objection-*

   It is therefore, essential *for* the court to be sure the objection raised at the preliminary stage of the proceeding is truly pre- emptive, rather than reactive. It must also be found to be competent before it is entertained by the court.

4. *On purpose of formulating issues for determination-*

In the instant case, the objection raised as to whether the appellant's issues formulated for determination of the appeal are competent has nothing to do with whether the appeal itself is competent or is in line with the law. The purpose of formulating issues for determination in an appeal has been laid out in **a** plethora of decision of this court. Generally, it is settled that the main purpose of the formulation of issues *for* determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of appeal filed. This is in the interest of accuracy, clarity and brevity, is to isolate in the grounds of appeal filed, the critical issues relevant for determination of the appeal. Hence, an issue may be limited to one ground or traverse more than one ground of appeal. See the cases of **Igago v. The State ('1999) 12 SCNJ 140 @ 156; Musa Sha (Jnr.) & Anor v. Da Rap Kwam & Ors. (2000) 8 NWLR (Pt. 670) 685, (2000) 2 NSCQR 802, (2000) LPELR 3031; Unity Bank Plc & Anor. v. Bouari (2008) 2 SCM 193; Yadis Nig. Ltd v. Great Nig. Insurance Company Ltd (2007) 10 SCM 183; Ogbuanyinya & Ors. v. Obi Okudo & Ors. (1990) 4 NWLR (Pt. 146) 551 at 568.**

Formulation of issues for the determination of an appeal therefore, cannot be an issue of preliminary objection.

5. *On hypothetical nature of the objection-*

Similarly, the second leg of the objection which is whether an appellant can appeal against the decision of the High Court directly to this Court is with due respect hypothetical. This appeal, from our record is against the decision of the Court of Appeal, Akure Judicial Division in Appeal No: CA/AK/47/2012, delivered on 23/10/2017. It is not an appeal from the High Court. This preliminary objection therefore, is not only malformed, it is deficient in substance. This is not a preliminary

objection so called that should engage the court in this case. The preliminary objection, not meeting the requirement of the law is incompetent and it is hereby struck out.

6. *On requirement of the law in a claim for declaration of title to land-*

> The claim of the respondent, is that of title to land. In this type of claim, the law requires that the claimant put before the court evidence and prove his claim on the balance of probabilities or, on the preponderance of evidence. The Evidence Act 2011, is so clear and explicit on the placement of burden and standard of proof in civil cases. A little survey of the relevant provisions will suffice at this point. Section 131. On burden of proof, specifies that: - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of *proof* lies on that person. 132. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that persor who would fail if no evidence at all were given on either side. 133 Burden of proof in civil cases. (1) in civil cases, the burden of first proving existence or non-existence of a fac lies on the party against whom the judgment of the cour 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 who, judgment would be given if no more evidence were adduced, and so on successfully, until all the issues in the pleadings have been dealt with. (3) Where there are conflicting presumptjons, the case if the same as if there were conflicting evidence. 134. Standard of *proof* in civil cases. The burden of *proof* shall be discharged on the balance of probabilities in all civil proceedings.

7. *On ways of proof of title to land-*

The law is well settled that every civil case before the court requires proof. The prove comes from what the claim is and the available evidence. In the instant case, the claim is *for t*itle to land. For proof of title to land, this court has over the years moved consistently to lay out five modes of proving title to land. The five ways of proving title to land are: (a Traditional evidence. (b) Production of document of title. (c Proof of acts of ownership extending over a sufficient length *of* time, numerous and positive enough as to warrant the inference that the persons exercising such acts are the true owners of the land. (d) Acts of long possession and enjoyment of the land. (e) By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land if the owner of the land in dispute.

8. *On how claimant may prove title to land-*

A claimant may make a choice on which way he directs his evidence to establish his title in court. A claimant may also, rely on one or more of the ways to establish his title. However, one mode of proving title will suffice if the claimant brings in credible evidence to have it proved.The cases cited by both sides of the divide as recounted above are clearly on point. See the cases of **Idundun v**. **Okumagba (1976) 1 NMLR 200; Makanjuola v**. **Balogun ('1989) NWLR (Pt**. **108) 192; Olukoya v**. **Ashiru (2006) All FWLR (Pt**. **322) 1479**.

9. *On whether respondent relied on traditional history-*

In the instant case, the respondent majorly elected to establish his title through the traditional evidence. paragraphs 7 to 9 of the amended statement of claim, set the one thus:

7. The land is known as Akanyi land because Akanyi was the first person to settle on the land during the rnigration and was carrying out a lot of activities on the land, hence, the name Akanyi land.

8. This Akanyi was the leader of Apa risu Family of Ayeteju **Quarters in Ikokumo Akoko**.

9. After Akanyi, the following people **held the land as leaders ofAparisu Familu in succession**,. **namely; Ajayi**, **Olishua who later became an Oba of Ikakumo**. **Olubopa also an C)ba of Ikakumo**, **Arinnahun**, **Uhojori**, **Maliki**, **Adamu Olojo**, **Zacheaus**, **Sunday Obanyi and presently Simeon Obaniyi**.

The respondent presented four witnesses and submitted five documentary exhibits before the trial court. The respondent's witnesses gave detailed evidence regarding the ownership of the disputed land. They clearly stated that Akanyi was the original founder of the land, and he subsequently transferred it to Olisa, then to Olubopa, Anirnshaun, Uhofori and finally to Maliki, the grandfather of the claimant, who is now the respondent. the land then passed to Adamu Olojo, followed by Zaccheus Sunday Obaniyi (the respondent's father), and is currently held by the family head, Simeon Obaniyi.

10. *On whether land in dispute was well known and properly identified by exhibits before the court-*

    The trial court as well as the lower court concurrently found that the land in dispute is well known to the parties and that the issue of the identity of the land is well sorted out by the survey, Exhibit P3 and other exhibits before the court Exhibits P1 and P4, in particular, which were previous judgments of court, gave an overwhelming weight to the case of the respondent. The issues raised in this appeal were raised and dealt with by the lower court. The testimony of the witnesses called by the respondent were in support of the respondent's title to the land. The land was well identified. There is clearly no error in the concurrent findings of fact made by the lower courts.

11. *On whether possession entitles a person to sue for trespass-*

    Arguments were generated by the appellant on the issue of whether the respondent who claimed to be land owner should claim and get judgment *for* trespass to land. It is no doubt, a fact

in our laws that possession entitles a party to sue *for* trespass to the land.

12. *On where both parties claim possession to a disputed land-*

However, it is also, conclusively true and settled law that where both parties before the court are in a field claiming possession, the possession being disputed, trespass will be at the suit of that one who can show that the title is in him See **Motunwase v. Sorungbe & Anor (1988) LPELR – 1920 SC); Ayanboye & Ors. v. Aburime (1994) LPELR – 3314 SC)**. In the instant case, the respondent has proved a better title to land. so the lower courts cannot be faulted for granting the relief of trespass against the appellant. The core claim of the respondent in this case is for title to land and what he must significantly prove before the court is the issue of his ownership of the land and not possession of the land. The lower court was therefore, right to affirm the issue of trespass against the appellant.

13. *On nature and purpose of alternative relief-*

This submission of the learned counsel for the appellant is not only an aberration, it is misconceived. An alternative relief in a claim is a secondary or substitute remedy that a claimant asks the court to grant in case the primary relief is not granted. It is a fallback option or a second-choice remedy that is meant to cover situations where the main relief is denied . The nature of alternative relief was explained by this court in the case of **The M.V. "Caroline Maersk" Sister Vessel to MV "Christian Maersk" v. Nokoy Investment Ltd (2002) 12 NWLR (Pt. 782) 472 at pg. 509**, where Ayoola, JSC, held thus:

> **"Where a plaintiff sets up two or more inconsistent sets of material facts and claims relief on each of them in the alternative**, **he will be granted such relief as the set of facts he established would entitle** him. Only one of two or more alternative **reliefs will be granted**. **Where the plaintiff on a set of facts ask *for* a relief and a second relief "further**, **or in the alternative "to the first**, **it is for the court to decide on the facts and on principle whether the grant of second relief as a further (additional) relief will not amount to double compensation *for* the** same cause of action, in which case the **second relief should not be granted**. **Where** a plaintiff is uncertain whether the facts he reiies or merely as an alternative, he can claim the subsequent relief as a 'further or alternative relief'. Where the first and principal relief is exhaustive of his remedy, there would be no need to grant the **subsequent relief claimed as a "further or** alternative relief". It was in this sense that this court said (per Kutigi, JSC) in Agidigbi v. Agidigbi (1996) **6** NWLR (Pt. 454) 300, 313: **"Where a claim by a party to a suit succeed and the court grants same**, **there will be no need to consider any alternative claim thereto**. "

The trial court and the lower courts were therefore, in order when after granting the primary relief of the respondent, the alternative relief was struck out. Any insinuation to the effect that the respondent's alternative relief was struck out because the respondent did not proof his primary relief in the circumstance, is not only unjustifiable but misleading.

14. *On prove of boundaries and identity of land in dispute-*

The two lower courts effectively dealt with the issue of the boundaries and extent of the land in dispute. The appellant still raised the issue here and contended that there were deficiencies

in Exhibits P3 and P5, which he said could not be cured by oral evidence. The record shows clearly that Exhibit P3, is Plan No. DIS/OD/1090/2007/002, while Exhibit P5, is a copy of the Plan tendered by the defendant as Exhibit "P5" re-confirmation of document dated 5th August, 1995, Exhibit D1. The Plan was tendered to show the specific lane in dispute bewtween the parties. The PW1, Simon Ajayi Olunloyo, testified exclusively on the location and identity of the land.

15. *On whether concurrent findings are unassailable-*

The trial court believed this evidence to be credible and equalfy stated in his judgment that the evidence was not "shaken under cross-examination"

From the record before us and the sound conclusions from the two lower courts, I am of the firm view that the concurrent findings of fact by the two lower courts are unassailable. All these issues are resolved against the appellant.

History of the case:

Supreme Court:

Names of Justices who sat on the appeal: MOHAMMED LAWAL GARBA, MOORE A. A. ADUMEIN, STEPHEN JONAH ADAH, JAMILU YAMMAMA TUKUR, MOHAMMED BABA IDRIS

Appeal No: SC/65/2018

Date of judgment: Friday, 4th July, 2025

Names of Counsels: T. M. Ogunmoroti, Esq., with Ayetunde Adeleke, Esq. for the Appellant And Victor U. Udeh, Esq., with Ekere Bassey, Esq., for the Respondent.

JONAH, JSC (delivering leading judgment): This appeal ernanates from the decision of the Akure Division of the Court of Appeal in **Appeal No**: **CA/AK/47/2012**, delivered on the 23rd day of October, 2017. In its decision, the lower court dismissed the appeal of the appellant and affirmed the judgment of the trial court, **in Suit No**: **HIK/22/2006**, delivered on the 23'd *day* of January, 2012, by the trial State High Court, holding at lkare, Ondo State. The trial court had entered judgment in favour of the plaintiff and dismissed the counter-claim of the defendant The background facts of this case are that the respondent herein as the plaintiff sued the appellant (as defendant) at the trial court claiming the following reliefs via its Amended Statement of Claim:

a. **A Declaration that the Plaintiff's family is the rightful owner of that piece/parcel of land known as Akanyin land**, **Ikakumo-Akoko and he is entitled to the customary right if occupancy thereof**.

OR

A Declaration that on the basis of the judgment in suit No; IK/56/73 – CHIEF DANIEL OLUSI V. ADAMU OLOJO & ORS, **decided at Owo/Ikare Grade 'A' Customary Court and Suit No**: **HAD/19/74 – Chief Daniel Olusi v. Adamu Olojo & Ors. Decided at the High Court of justice Ado.Ekiti on 27th January**, **1978**, **the Plaintiff is entitled to the Customary right of occupancy of the Akanyin land**, **Ikakumo-Akoko**.

b An Order of injunction retraining the **Defendant either by himself**, **his agents and/or anyone claiming through him or any member of the class may belong to through whom he is acting or claiming from committing trespass or further act *of* trespass on Akanyin land**.

c. A sum of N1,000,000.00 (One Million Naira) as damages

The parties filed and exchanged their respective pleadings. The case went into hearing. The trial court bylts judgment dated 23'd day of January, 2012, granted the reliefs of the respondent and dismissed the counter-claim of the appellant.

Aggrieved by the decision of the trial court, the appellant appealed to the lower court. The lower court, after hearing the appeal, delivered its judgment on the 23rd day of October, 2017, wherein it dismissed the appeal and affirmed the judgment of the trial court.

The appellant, still dissatisfied with the judgment of the lower court, has now appealed to this court via an eight Grounds Notice of Appeal filed on the 2nd day of March, 2022.

The Record of Appeal was compiled and transmitted to this court. Counsel *for* both parties submitted and exchanged their brief of arguments on behalf of their clients .

Learned counsel *for* the respondent, Mr. Victor U. Udeh, Esq., raised a Preliminary Objection to the hearing of this appeal. The said Objection is contained in the Respondent's Brief of Argument filed on the 23rd day of September, 2022. Counsel for appellant filed a Reply Brief on the 9th day of October, 2023, in which he responded to the Respondent's Objection .

The Preliminary Objection, being an issue of jurisdiction will be addressed first.

Preliminary Objection :

The Preliminary Objection raised by the respondent is challenging the Appellant's Brief of Argument in the instant appeal. The grounds for the Objection are as follows:

a. **The appellant's appeal is incompetent as the appellant's issues for determination do not emanate from the issues decided by the Court of Appeal**, thereby robbing this court of **jurisdiction to entertain the appeal**.

b. **The appellant is appealing against the judgment of the trial court at the Supreme Court**.

From the above grounds, counsel distilled two (2) issues *for* the determination of the Objection, thus:

1. **Whether the appellant's issues** formulated *for* determination of this **appeal are competent?** (Ground of 1 of the Objection).

ii. **Whether an appellant can appeal against the decision of the High Court** directly to the Supreme Court. (Ground 2 of the Objection).

Arguing these issues, learned counsel for the respondent submitted that an issue for determination which attack the proceedings or judgment from which the appeal did not emanate, cannot be competent. He relied on the cases of: **Balogun v**. **Adejobi (1995) 1 SCNJ 242; Oduntan v**. **General Oil Limited (1995) 4 SCNJ 145; Ani v**. **Ani CA 43**. Counsel reproduced the issues raised by the appellant's counsel *for* the determination of this appeal and further canvassed that the appellant committed a fatal error by formulating issues for determination of the instant appeal based on the judgment of the trial court, instead of the lower court's judgment. He argued, that by so doing, the appellant's issues have been rendered incompetent and liable to be struck out. He cited **Anogwie & Ors**. **v**. **C)dom & Ors**. **(2015) LPELR - 5576**.

On the second issue, counsel *for* the respondent, submitted that, where the grounds of appeal do not attack the ratio of the decision being appealed against, the appeal is incompetent and the appellate court is bereft of the jurisdiction to consider and determine same. He referred the court to **Agbaka & Ors**. **v**. **Chief Jeremiah Amadi & Anor** (1998) LPELR-231 SC; Umana tl v. NDIC (2016) LPELR – **42556 SC**. He urged the court to so hold and discountenance the entire issues *for* determination as formulated by the appellant, *for* being incompetent, same not having emanated from the live issues decided by the lower court.

Reacting to the Objection, learned counsel for the appellant, reproduced the Grounds for the Objection, the two issues raised by the respondent and canvassed that issues for determination formulated from Preliminary Objection are strange and are without any link or nexus. He cited: **Oteri Holdings Ltd v**. **Oluwa (2021) 4 NWLR (Pt**. **1766) P**. **334 at 361** – **362**.

The learned counsel submitted that none of the two issues formulated has any nexus, link, bearing or connection with the grounds of appeal nor flow therefrom. He urged the court to dismiss the Preliminary Objection, same being misconceived and cannot fly. He reasoned that there is a subsisting notice of appeal filed with the leave of this court

and granted on the 8th February, 2022. He referred the court to pages 370 – 375 of the record of appeal.

To begin with, we must have the basic understanding of what a preliminary objection means and obviously indulge in knowing the nature of a preliminary objection.A preliminary objection to the hearing of an appeal is a special procedure where by a respondent may contend the competence of the appeal which, if upheld, has the effect of striking out the appeal. Our Rules of Court allows a respondent to file a preliminary objection where the respondent believes the appeal to be incompetent. The purpose of the preliminary objection is to contend that the appeal is defective or incompetent. It is geared towards terminating the hearing of an appeal in limine. See the case of **Contract Resources Nig**. **Ltd v**. **United Bank *for* Africa Plc (2011) 14 NWLFt (Pt 1266) 157**. In the case of **Uwemedimo & Anor v**. **Mobil Producing Nigeria Unltd**. **& Anor (20'19) 12 NWLR (Pt 1685) 27**, this court per Eko, JSC, explained the nature of a preliminary objection thus:

> **A preliminary objection is raised where a *party* fails to comply with the enabling law and/or the rules of Court in initiating his action**: **Oloriode v**. **Oyebi (’1984) 1 SCNLR 390**, **(1984) 5 SC 1**, **(1984) 15 NSCC 286**. **As the name implies**, **preliminary objection is the initial objection to the commencement of the thing objected to**: **Akpan v**. **Bob (2010) All FWLR (Pt**. **501 896**, **(2010) 17 NWLR (Pt**. **1223)** 421; Sani v. Okene Local Government

Traditional Council (2008) All FWLR (Pt. 429) 464, (2008) 12 NWLR (Pt. 1102) 691.

> **A notice of preliminary objection and the defence on the merits are not the same thing. Where a notice of preliminary objection raises issues which the defendant or respondent could develop into his defence on the merits; it is proper at the stage to discountenance such notice of preliminary objection... .A notice of preliminary objection is a pre-emptive strike at the suit or action which it intends to terminate or terminates in limine the hearing of the suit or action: N.U.T Taraba State v. Habu (2018) 14 LPELR – 44057 (SC). It therefore, ceases to be preliminary objection if it raises issues *for* the defence on the merits with the aim of a judgment of dismissal in favour of the respondent".**

It is therefore, essential *for* the court to be sure the objection raised at the preliminary stage of the proceeding is truly pre- emptive, rather than reactive. It must also be found to be competent before it is entertained by the court.

In the instant case, the objection raised as to whether the appellant's issues formulated for determination of the appeal are competent has nothing to do with whether the appeal itself is competent or is in line with the law. The purpose of formulating issues for determination in an appeal has been laid out in **a** plethora of decision of this court. Generally, it is settled that the main purpose of the formulation of issues *for* determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of appeal filed This is in the interest of accuracy, clarity and brevity, is to isolate in the grounds of appeal filed, the critical issues relevant for determination of the appeal. Hence, an issue may be limited to one ground or traverse more than one ground of appeal. See the cases of **Igago v. The State ('1999) 12 SCNJ 140 @ 156; Musa Sha (Jnr.) & Anor v. Da Rap Kwam & Ors. (2000) 8 NWLR (Pt. 670) 685, (2000) 2 NSCQR 802, (2000) LPELR 3031; Unity Bank Plc & Anor. v. Bouari (2008) 2 SCM 193; Yadis Nig. Ltd v. Great Nig. Insurance Company Ltd (2007) 10 SCM 183; Ogbuanyinya & Ors. v. Obi Okudo & Ors. (1990) 4 NWLR (Pt. 146) 551 at 568.** Formulation of issues for the determination of an appeal therefore, cannot be an issue of preliminary objection.

Similarly, the second leg of the objection which is whether an appellant can appeal against the decision of the High Court directly to this Court is with due respect hypothetical. This appeal, from our record is against the decision of the Court of Appeal, Akure Judicial Division in Appeal No: CA/AK/47/2012, delivered on 23/10/2017. It is not an appeal from the High Court. This preliminary objection therefore, is not only malformed, it is deficient in substance. This is not a preliminary objection so called that should engage the court in this case. The preliminary objection, not meeting the requirement of the law is incompetent and it is hereby struck out.

Having disposed of the Preliminary Objection, I shall now consider the appeal on its merit.

MAIN APPEAL:

Counsel *for* the appellant, Taiwo Martins Ogunmoroti, Esq., in the Appellant's Brief of Argument filed on 13th July, 2022, submitted three (3) issues for the determination of this appeal, to wit:

> 1.**Whether from the pleadings and available evidence on record**, **the respondent proved his case and** whether the counter-claim of the appellant was not proved. (Distilled from Grounds 1, 2, 7 and 8 of the Notice of Appeal).
>
> **2**. **Whether the land adjudged the respondent was ascertainable in extent** and boundaries and whether the **appellant did not ascertain the land claimed by him**. (Distilled from Grounds 3, 5, and 6 of the Notice of Appeal).
>
> **3**. **Whether an action in trespass can lie from the pleadings and available** evidence on record. (Distilled from Ground 4 of the Notice of Appeal).

Learned counsel for the respondent, Victor U. Udeh, Esq., or his own part, in the Respondent's Brief of Argument filed or the 23rd September, 2022, distilled a sole issue for thc determination of this appeal, thus:

Whether the learned justices of the Court of **Appeal were right when they dismissed the appellant's appeal and affirmed the** judgment of the trial court". (Distilled from Grounds 1, 2, 3, 4, 5, 6 and 7 of the Notice of Appeal).

The three (3) issues raised by the appellant, sufficiently address his grievances. This appeal shall therefore, be determined using the appellant's three issues. I shall take the three issues together.

Issues One. Two and Three:

On the first issue, relying on the authorities of: **Inwelegbu v. Ezean ('1999) 12 NWLR (Pt. 630) pg. 306 at 279 E** – H; **Gwar v. *Adofe* (2003) 3 NWLF: (Pt. 808) pg. 516 at 546 B** – F; **Adelakun v. Ise Ogbekun (2003) 7 NWLR (Pt. 819) pg. 295 at 310 D** – G; **Mban v. Bosi (2006) 11 NWLR (Pt. 991) pg. 400 at 412 D – H** and **Idundun v. Okumagba (1976)9/10 SC 227;** counsel *for* the appellant reproduced the five ways of)roving title to land and argued that there is no evidence about how the descendants of Akinyin came about the land.

He canvassed that the respondent failed to lead evidence ir line with his paragraphs 7, 8 and 9 of his Amended Statemen of Claim god that the respondent must fail in his k)id fo declaration of title to the land in dispute. He cited: **Nikafishir Co. Ltd v. Lavina Corp (2008) 16 NWLR (Pt. 1114) P. 509 536, B – F**. He reasoned that a party who failed to prove his root of traditional history cannot rely on act of possession since a party cannot eat his cake and have it back and that a person cannot have two bites at the same cherry. He relied on the case of **Ukaegbu v.**

Nwololo (2009) 3 NWLR (Pt. **1127) P**. **221** – **222 H** – **A**. The learned counsel canvassed that the respondent was not in possession of the land and that if he had been in possession and had litigated on the land in dispute twice as held by the lower court, the alternative relief would have been granted by the trial court but that relief was refused. He drew the attention of the court to the finding *of* the lower court on page 224 of the record of appeal. He noted that the said finding was not appealed against and that where a finding of a court is not appealed against, such a finding will be binding on all parties. He cited **Anazodo v**. P.**I**. **T (Nig**.**) Ltd (2008) 6 NWLR (Pt**. **1084) P**. **529**, **543** – **545**, ; F- **G**, **D**. He stated that the respondent is not the owner of he land in dispute and has not proved the declaratory reliefs sought. That by the evidence of the DWI as contained ir pages 165 – 166, 168 of the record of appeal, the appellan established his__Qwnership of the land in dispute. He urgec the court to allow the appeal, upturn the decision of the cour below and dismiss the respondent's claims.

On the second issue, counsel for the appellant argued that the respondent failed to ascertain the extent of the land claimed by him, hence, his claim ought to have been dismissed. He contended that if the land in dispute were to be exactly the same land as in exhibits Pl and P2 according to the PW3, that the alternative relief of the respondent would have been granted.

Learned counsel for the appellant canvassed that the evidence of PW4, (Respondent's Surveyor) made a nonsense of, and rendered sterile the evidence of PW3 on the exactitude or exactness of the land in exhibits P1 and P2 with the land in exhibits P3 and P4. He noted that the deficiency or malnutrition in exhibit P3 and P5 cannot be cured, altered or changed through oral evidence in the face of the evidence of PW3. Counsel urged the court to hold that Ihe boundaries and extent of the land in dispute have not 3een proved and that the respondent is not entitled to the declaration granted in his favour. Moreover, that the appellant has been able to ascertain and prove the boundaries of the land. He referred the court to paragraJ?b 5 *of* his Amended Statement of Defence on page 104 – 108 of the record of appeal.

On the third issue, learned counsel *for* the appellant argued that that a customary tenant cannot be a trespasser on a land granted to him by his landlord. He submitted that a customary tenant is only enjoined to sue for forfeiture of his tenancy and not for an action in trespass. He cited the cases of **Lawani v**. **Adeniyi ('1964) 3 NSC 23 at 233; Adeleke v**. **Adewusi (1961) SCNLR 58 (1961) 1 All NLR 37 and Nwaokoro v**. **Egbenoma (1997) 11 NWLR (Pt**. **528) P**. **238 at 247 – 248**. He stated that the reliefs granted to the respondent are irregular,

inconsequential, inappropriate, and invalid. He urged the court to so hold.

Reacting to these issues, learned counsel *for* the respondent submitted that, it is not the function of the appellate court to make findings of fact where such has already been done by the lower courts. He cited the cases of: **Olarenwaju v**. **Governor of Oyo State (1992) 9 NWLR (Pt**. **265) 335;** Nwosu v. Board of Customs & Excise (1988) 5 NWLR (Pt. 225); Motun Wase v. Sorungbe (1988) 5 NWLR (Pt. 92) 90.

Counsel submitted that the-entire argument of the appellant, at paragraphs 300 – 308 in the Appellant's Brief of Argument, are grossly misconceived. That the respondent via the testimony of PWI clearly, identified the land in dispute and stated the exact description of the land, including all the boundary marks such as streams, rivers, rocks, as well as the surrounding lands belonging to other families. He maintained that the PWI was never shaken under cross-examination and that the PW2 further buttress the evidence of the PWI . That the respondent who testified as PW3, gave detailed evidence of ownership of the land in dispute. That it was based on the overwhelming evidence adduced by the respondent, both at the trial and the lower court, that made the lower courts to hold that the respondent has duly established his case on the balance of probabilities. He

posited that this court does not make a practice of setting aside the concurrent findings of fact by the lower courts except in exceptional circumstances such as, where the findings are demonstrated to the satisfaction of the court to be perverse, contrary to substantive law or procedural law. He referred the court to the case of **Abdullahi v**. **FRN (2016) LPELR – 40101 (SC)**.

Counsel reasoned that the evidence of the PWI , PW2, PVV3 and PW4 as well as Exhibits P1, P2 and P3, showed that the respondent overwhelmingly __ Identified and successfully established title over the land in dispute. Moreover, that the activities of the appellant over the said land by entering upon same and felling trees amount to an act of trespass, hence, the order of the trial court against the appellant for trespass. That the appellant has failed to show while the unassailable concurrent findings of the lower courts should be disturbed. He cited: **Enang v**. **Aclu (1981) 11 – 12 SC; Nwadike v**. **Ibekwe (1987) 12 SC**. Counsel observed that both the trial and lower courts placed reliance on Exhibits P1, P2, P3, P4 as well as the testimonies of PWI , PW2, PW3, and PW4 and correctly found that the respondent has sufficiently established his claim on the balance of probabilities and consequently entered judgment in his favour. He urged the court to dismiss the appeal and affirm the judgment of the lower court.

On the points of law, counsel for the appellant, submitted that PWI did not ascertain the land in dispute. He pointed out that what the respondent relied upon and chronicled as the evidence of PW3, is what he pleaded in paragraph 9 of the amended statement of claim, which the respondent abandoned during trial court. He noted that pleadings are no substitute for evidence and cannot take such place. He citec –Nikafishin Co. Ltd v. Lavina Corp_ (2008) '16 NWLR (Pt **1114) P**. **509 at 536**, **B** – **F**. Counsel contended that the failure of the respondent to give evidence as to how his ancestor founded the land was fatal to the respondent's case He argued that there are no clear intervening owners of the land in the evidence adduced by the respondent. He cited **Nwakorobia v**. **Nwogu (2009) 10 NWLR (Pt**. **1150) P**. **553 at 573**, **H**, **575H**, **589 E** – **G**.

The claim of the respondent, is that of title to land. In this type of claim, the law requires that the claimant put before the court evidence and prove his claim on the balance of probabilities or, on the preponderance of evidence. The Evidence Act 2011, is so clear and explicit on the placement of burden and standard of proof in civil cases. A little survey of the relevant provisions will suffice at this point. Section 131. On burden of proof, specifies that: - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that

those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of *proof* lies on that person. 132. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that persor who would fail if no evidence at all were given on either side. 133 Burden of proof in civil cases. (1) in civil cases, the burden of first proving existence or non-existence of a fac lies on the party against whom the judgment of the cour 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 who, judgment would be given if no more evidence were adduced, and so on successfully, until all the issues in the pleadings have been dealt with. (3) Where there are conflicting presumptjons, the case if the same as if there were conflicting evidence. 134. Standard of *proof* in civil cases. The burden of *proof* shall be discharged on the balance of probabilities in all civil proceedings.

The law is well settled that every civil case before the court equires proof. The prove comes from what the claim is and he available evidence. In the instant case, the claim is *for* itle to land. For proof of title to land, this court has over the years moved consistently to lay out

five modes of proving title to land. The five ways of proving title to land are: (a Traditional evidence. (b) Production of document of title. (c Proof of acts of ownership extending over a sufficient length *of* time, numerous and positive enough as to warrant the inference that the persons exercising such acts are the true owners of the land. (d) Acts of long possession and enjoyment of the land. (e) By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land if the owner of the land in dispute. A claimant may make a choice on which way he directs his evidence to establish his title in court. A claimant may also, rely on one or more of the ways to establish his title. However, one mode of proving title will suffice if the claimant brings in credible evidence to have it proved.The cases cited by both sides of the divide as recounted above are clearly on point. See the cases of **Idundun v**. **Okumagba (1976) 1 NMLR 200; Makanjuola v**. **Balogun ('1989) NWLR (Pt**. **108) 192; Olukoya v**. **Ashiru (2006) All FWLR (Pt**. **322) 1479**.

In the instant case, the respondent majorly elected to establish his title through the traditional evidence. paragraphs 7 to 9 of the amended statement of claim, set the one thus:

> **7. The land is known as Akanyi land because Akanyi was the first person to settle on the land during the rnigration and was carrying out a lot of activities on the land, hence, the name Akanyi land.**
>
> **8. This Akanyi was the leader of Apa risu Family of Ayeteju Quarters in Ikokumo Akoko.**

9. After Akanyi, the following people held the land as leaders ofAparisu Famulu in succession,. namely; Ajayi, Olishua who later became an Oba of Ikakumo. Olubopa also an C)ba of Ikakumo, Arinnahun, Uhojori, Maliki, Adamu Olojo, Zacheaus, Sunday Obanyi and presently Simeon Obaniyi.

The respondent presented four witnesses and submitted five documentary exhibits before the trial court. The respondent's witnesses gave detailed evidence regarding the ownership of the disputed land. They clearly stated that Akanyi was the original founder of the land, and he subsequently transferred it to Olisa, then to Olubopa, Anirnshaun, Uhofori and finally to Maliki, the grandfather of the claimant, who is now the respondent. the land then passed to Adamu Olojo, followed by Zaccheus Sunday Obaniyi (the respondent's father), and is currently held by the family head, Simeon Obaniyi.

The trial court as well as the lower court concurrently found that the land in dispute is well known to the parties and tha the issue of the identity of the land is well sorted out by the survey, Exhibit P3 and other exhibits before the court Exhibits P1 and P4, in particular, which were previous judgments of court, gave an overwhelming weight to the case of the respondent. The issues raised in this appeal were raised and dealt with by the lower court. The testimony of the witnesses called by the respondent were in support of the respondent's title to the land. The land was well identified. There is clearly no error in the concurrent findings of fact made by the lower courts. Arguments were generated by the appellant on the issue of whether the respondent who claimed to be land owner should claim and get judgment *for* trespass to land. It is

no doubt, a fact in our laws that possession entitles a party to sue *for* trespass to the land.

However, it is also, conclusively true and settled law that where both parties before the court are in a field claiming possession, the possession being disputed, trespass will be at the suit of that one who can show that the title is in him See **Motunwase v**. **Sorungbe & Anor (1988) LPELR** – **1920 SC); Ayanboye & Ors**. **v**. **Aburime (1994) LPELR** – **3314 SC)**. In the instant case, the respondent has proved a better title to land. so the lower courts cannot be faulted for granting the relief of trespass against the appellant. The core claim of the respondent in this case is for title to land and what he must significantly prove before the court is the issue of his ownership of the land and not possession of the land. The lower court was therefore, right to affirm the issue of trespass against the appellant.

Furthermore, the appellant in his brief at para 304 canvassed thus:

> **304 My lords**, **assuming without conceding that the respondent can rely on acts of possession**. **My lords**, **the respondent in possession of the said land? My lords**, **he is not because**, **if her had been in possession and had litigated on the land in dispute twice as held by the learned justices of the Court of Appeal on page 354 of the record of appeal**, **the alternative relief would have been granted by the**

learned trial judge but that prayer was bluntly refused on page 224 of the record of appeal as follows:

> **"Since the first declaration will be granted, the alternate prayer will have to be struck out and also because the ingredients *for* its grant were not made out at the trial... The alternate prayer *for* declaration based on estoppel is struck out"**

My lords, above finding was not appealed against, and where the finding of a court is not appealed against, such a finding will be binding for all eternity. See Anazodo v. P.I.T. (Nig.) Ltd (2000) 6 NWLR (Pt. 1084) P. 529, 543 – 545, F – G, D.

This submission of the learned counsel for the appellant is not only an aberration, it is misconceived. An alternative relief in a claim is a secondary or substitute remedy that a claimant asks the court to grant in case the primary relief is not granted. It is a fallback option or a second-choice remedy that is meant to cover situations where the main relief is denied . The nature of alternative relief was explained by this court in the case of **The M.V. "Caroline Maersk" Sister Vessel to MV "Christian Maersk" v. Nokoy Investment Ltd (2002) 12 NWLR (Pt. 782) 472 at pg. 509**, where Ayoola, JSC, held thus:

> **"Where a plaintiff sets up two or more inconsistent sets of material facts and claims relief on each of them in the alternative, he will be granted such relief as the set of facts he established would entitle him. Only one of two or more alternative reliefs will be granted. Where the plaintiff on a set of facts ask *for* a relief and a second relief "further, or in the alternative "to the first, it is for the court to decide on the facts and on principle whether the grant of second relief as a further (additional) relief will not amount to double compensation *for* the same cause of action, in which case the second relief should not be granted. Where a plaintiff is uncertain whether the facts he reiies or merely as an alternative, he can claim the subsequent relief as a 'further or alternative relief'. Where the first and principal relief is exhaustive of his remedy, there would be no need**

to grant the subsequent relief claimed as a "further or alternative relief". It was in this sense that this court said (per Kutigi, JSC) in Agidigbi v. Agidigbi (1996) 6 NWLR (Pt. 454) 300, 313: "Where a claim by a party to a suit succeed and the court grants same, there will be no need to consider any alternative claim thereto. "

The trial court and the lower courts were therefore, in order when after granting the primary relief of the respondent, the alternative relief was struck out. Any insinuation to the effect that the respondent's alternative relief was struck out because the respondent did not proof his primary relief in the circumstance, is not only unjustifiable but misleading.

The two lower courts effectively dealt with the issue of the boundaries and extent of the land in dispute. The appellant still raised the issue here and contended that there were deficiencies in Exhibits P3 and P5, which he said could not be cured by oral evidence. The record shows clearly that Exhibit P3, is Plan No. DIS/OD/1090/2007/002, while Exhibit P5, is a copy of the Plan tendered by the defendant as Exhibit "P5" re-confirmation of document dated 5th August, 1995, Exhibit D1. The Plan was tendered to show the specific lane in dispute bewtween the parties. The PW1, Simon Ajayi Olunloyo, testified exclusively on the location and identity of the land.

He testified at pages 131 to 132 of the record as follows :

I live at Aiyeteju Quarter, Ikakumo-Akoko. I am a farmer. I know the plaintiff and the defendant. The plaintiff is from Aparisu family of Ikakumo-Akoko. The defendant is from Ayindu family. The land in dispute is called Akanyin. I know the land called Awen. Akanyin land belongs to the plaintiff family. Awen land belongs to the defendant's familyAyindu. I know the boundaries of the Akanyin family land. Facing river Ose at the top end ofAkanyin land, the land is bounded on the right is the Obasunloye family which is a branch of Arepin family. Further down on the same side after leaving a place called Okanandu stream, the land bounded by Awen land belonging to the defendant's family. I know Obaro family. I know the Akanle family. They all share boundaries with land in dispute. Oludo family is known to me. The family has land which shares boundary with Akanyin family land. These three families have their land on the left-hand side of the land known as Akanyin, if one is facing River Ose. The other side of River Ose (which is a boundary) is owned by Ayere Town in Kogi State.

The trial court believed this evidence to be credible and equalfy stated in his judgment that the evidence was not "shaken under cross-examination" From the record before us and the sound conclusions frorr the two lower courts, I am of the firm view that the concurren findings of fact by the two lower courts are unassailable. All these issues are resolved against the appellant.

Having resolved all the issues against the appellant, this appeal is bereft of any merit. It is hereby dismissed. The judgment of the lower

court in **Appeal No**: **CA/AK/47/2012**, delivered on the 23'd day of October, 2017, is affirmed.

The appellant is to pay a cost of N2 Million to the respondent.

Appeal Dismissed.

IDRIS, JSC: I had a preview of the judgment delivered by my learned brother, Lord Justice **Stephen Jonah Adalr**, **JSC**. I completely agree with the reasoning, conclusions, decisions and orders therein .

JAMILU, JSC: I read before now the draft of the lead judgment prepared by my learned brother **STEPHEN JONAH ADAH JSC** and I agree that the appeal is bereft of any merit. It is hereby dismissed.

ASEIMO, JSC: I read, in draft form, the lead judgment just delivered by my learned brother, Stephen Jonah Adalr, JSC. I agree with the reasoning and conclusions of my learned brother.

There is no legal or factual justification for the respondent's purported preliminary objection. In the first place, the appellant's notice of appeal, which spans pages 370 to 375 of the record of appeal, is not against a decision of a High Court. It is clearly against the decision or judgment of the Court of Appeal, holden at Akure, delivered on the 23'd day of October, 2017.

Secondly, the court has made it clear, in its many decisions, that the process of a preliminary objection should only be employed or used to

challenge an appeal or a cross appeal which is so fundamentally incompetent that the court is prevented from hearing it and not in the circumstances of this appeal, where the respondent's only grouse centres on how the issues, identified by the learned counsel for the appellant, are couched. See, for example, the cases of **General Electric Co**. **v**. **Harry Akande (2010) 18 NWLR (Pt**. **1225) 596; Nigerian National Petroleum Corporation v**. **Famfa Oil Ltd**. **(2012) 17 NWLR (Pt**. **1328) 148** and **General Mohammed A**. **Garba (Rtd**.) **v**. **Mustapha Sani Mohammed & 2 Ors**. **(2016) 16 NWLR (Pt**. **1537) 114 at 145**, per Kekere-Ekun, JSC (now CJN).

It is for the above few reasons and the very articulate reasons given by my learned brother that I also dismiss the respondent's preliminary objection and the appeal itself.

I abide by all the orders made in the lead judgment.

Appeal dismissed.

GARBA, JSC: I have read a copy of the Lead Judgment written by my Learned Brother, Stephen Jonah Adah, JSC in this appeal and agree, for the reasons set out therein, that the appeal is devoid of merit to deserve dismissal.

The Appellant has woefully failed to demonstrate that the concurrent decision by the two (2) lower courts is perverse or in error of the law; substantive or procedural, or that it occasioned a real rniscarriage of justice to warrant interference therewith by the court.

The Appeal is dismissed by me too in terms of the Lead Judgment.,