IN THE COURT OF APPEAL

AKURE JUDICIAL DIVISION

HOLDEN AT AKURE

ON FRIDAY THE 3RD DAY OF JUNE, 2016

BEFORE THEIR LORDSHIPS:

HON. JUSTICE SONTOYE DENTON WEST — JUSTICE, COURT OF APPEAL (PRESIDING)

HON. JUSTICE MOHAMMED A. DANJUMA — JUSTICE, COURT OF APPEAL

HON. JUSTICE JAMES SEHU ABRIYI — JUSTICE, COURT OF APPEAL

APPEAL NO: CA/AK/180/2013

SUIT NO. HK/24/2008

BETWEEN:

SAMUEL ILESANMI — APPELANT

AND

1. GABRIEL OGUNLEYE
2. MINISTRY OF LAND & HOUSING — RESPONDENTS

REPRESENTATION

HUSSEIN AFOLABI, ESQ. - FOR THE APPELLANT

OLAWOLE LOUIS OMOTOSHO ESQ. - FOR THE RESPONDENTS.

JUDGMENT

(DELIVERED BY HON. JUSTICE MOHAMMEED A. DANJUMA, (JCA)

This is an appeal against the decision of the Ondo State High Court of Justice sitting at Ikare – Akoko delivered by **Hon. Justice N.S. Adeyanju** on the 6th day of August, 2013 in suit No.

HIK/24/2008 whereas the 1st and 2nd plaintiffs/respondents' suit against the defendant/appellant succeeded.

The trial court had allowed the claims of the plaintiffs now respondents for forfeiture of land granted to the 1st defendant/appellant for cultivation of arable crops: and directed that the appellant or anybody claiming through him to vacate the land in dispute and further ordered or restrained the appellant or any person claiming through him from further entering, farming on, alienating or doing anything inimical to the interest of the 1st respondent's Iye family of Arigidi – Akoko, on the family land known to both parties as such.

The appellant felt dissatisfied with the decision and hence this appeal brought by a notice of appeal dated 6/8/2013 and filed 12/8/2013.

In the appellant's brief of argument filed on 22 – 2- 2014 which was adopted, two issues for determination have been raised. They are:

1. *Whether Exhibit D2 was rightly expunged from the records by the learned trial judge (Ground 1)*
2. *Whether considering the facts of this case, the appellant challenged the title of his overload thereby forfeiting all rights previously pertaining to him in relation to the land in dispute as a customary tenant or whether an order of forfeiture ought to have been granted in the circumstances of this case.*

The respondents adopted the two issues formulated supra in his own respondent's brief of argument dated 31 -3-2014.

Arguments of the appellant on issue 1

<u>ISSUE ONE:</u>

On this issue, the appellant by his counsel referred us to the pleadings of the appellant. That the 1st defendant denies paragraph 5 of statement of claim and admits that a grant was given to him in the year 1981 vide a document which he pleaded. Learned counsel refers to the evidence of PW1 which supports the grant to the appellant of the land for the use of farming. That the PW1 said that they gave the land to the appellant to farm maize and other arable crops. The evidence of PW2 and PW3 is to the effect that the authorized leaders (or head of the family and another) were the grantors on behalf of the Iye family, was referred to in affirmation of the fact that he was granted the land for farming by the family.

The learned counsel further in submission pointed out that Exhibit D2 was tendered by the appellant/defendant in corroboration or affirmation of the evidence of grant to him as testified

to by the PW1, PW2 and PW3. He wondered why the learned trial judge expunged the document from the evidence after its admissions as an exhibit on the ground that it was found to be inadmissible registrable document of title under section 16 of the Lands Instrument Registration Laws of Ondo State.

The learned counsel argued that the findings or view of the trial judge was perverse and not supported by the law. Learned counsel is of the view that Exhibit D does not qualify as an instrument as defined by Section 2 of the Land Instrument Registration Laws of Ondo State; and that is therefore not caught or covered by Section 16 of that law and needs not be registered before it can be used in evidence (mainly to show grant)

It was conceded that while Exhibit D2 is not admissible as a proof of title pursuant to Section 16 of the said law, it was admissible in proof of an appropriate equitable interest in the land in dispute to the appellant by the Iye Family.

Onoche V. Ikem (1989) 4 NWLR (pt.116) 458 at 466, paragraph E; Akinduro V Alaya (2007) 15 NWLR (pt. 1057) 312 at 339, Paragraph D-E were referred to in support.

That the said Exhibit was not tendered as evidence of title or ownership but to show grant, which was a common ground of all the parties. That it was not tendered as a source or root of title. That it was tendered to merely prove that the Iye family put the appellant on the land in dispute and nothing more.

The cases of **Okoy V. Dumez (Nig) Ltd. (1985) 1 NWLR (pt.4) 783 and Agwunedu V. Onwemere (1994) 1 NWLR (pt.321) 375** were referred to buttress the contention that even unregistered registrable instrument as a document was admissible to prove the facts pleaded.

It was therefore contended that Exhibit D2 was wrongly expunged and should be restored in the evidence for the just determination of this appeal.

The respondent, on this issue had argued thus;

1. **Whether Exhibit D2 was rightly expunged**

His counsel after referring to the word *"give"* as appearing on Exhibit D2, relied on the Oxford Advanced Dictionary of current English (5th Edition) edited by A.S. Horn by which he defines *"give"* as causing someone or something to have or receive something , causing someone or something to receive, hold , have or own something, etc. From this definition, the learned counsel contends that Exhibit D2 was a document since it purported to give or grant to the appellants an interest in land.

That the appellant sought to tender it for that purpose and nothing more; that by virtue of Section 16 of the Land Instrument Registration Laws of Ondo State, Exhibit D2 cannot be pleaded or given in evidence in any court as affecting land unless same, is registered. That it was tendered as proof of interest in the land in dispute.

That the obligation to stamp the exhibit D2 was on the appellant by virtue of Section 21 (4) of the Stamp Duties Law of Ondo State. See: **Odumade V. Ogunnaike (2011) ALL FWLR (566) 529**

That it was not proved that exhibit D2 was not tendered to prove an equitable interest at the trial and cannot be done in the appellate court.

That the document was tendered as evidence of a grant and must be used for that purpose, that a party tendering a document had the obligation to tell the court the purpose for the tender. Refer to **Agbodika V. Onyekaba (2011) FWLR (Pt. 62) CA 1915.**

That exhibit D2 was rightly expunged, as the tender thereof was for leasehold, customary tenancy or ownership that was a grant and which required registration to be admissible in court. That it was rightly expunged

ISSUE NO. 2

On this issue, the learned counsel submitted that a customary tenant could hold land in perpetuity subject to good behaviour. He relies on the cases of **Agomua V. Agomua(1992) NWLR (pt. 216) 236 @ 250 Paragraph F- G; Ajao V. Obele (2005) ALL FWLR(pt.262) 544.** He contended that if an occupier/customary tenant alienates or attempt to alienate the land granted to him he is said to have conducted himself improperly and is liable to forfeit his grant. See **Ashogbon V. Oduntan (1935) 12 NLR 7 @ Paragraphs 8-9, per Graham J.**

If a customary tenant denies the title of the land owned by the family, he said to have conducted himself improperly. **Oloto V. Dauda & Ors. (1904) 1 NLR 58**

Learned counsel referred to other instances of a bad customary tenant such as (a) where a tenant refuses or fails to acknowledge the ownership or reversionary interest of the grantors in the land as in **Uwani V. Okom & Ors. (1928) 8 NLR; Chief Etim & Ors. V. Chief Eke & Ors. (1914) 16 NLR 43**

(b) bad behaviour to the Chief or Family Head of the grantor family is also a grave act of misconduct so also are adultery with a member of the grantor's family and insolence. See **Oshogbo. V. Oduntan (1935) 12 NLR 7 @ 8-9.** Per Graham. J. refusal to pay tribute, see **Salami V. Salami (2008) ALL FWLR (Pt. 438)200**. That the title of the Iye family was challenged by the substitution of DW2 as the Head of the Iye Family rather than the 1st respondent.

That the appellant mapped out the land and sold to unsuspecting buyers such as Sunday Ese. That there was uprooting of palm trees from the land; that the Exhibit D, (survey plan) would not have been a cause for grouse if it had shown or been couched that it was to relate to Iye family property given to the appellant for the purpose of farming.

That rather than being so, it showed that it related to the appellant's property - says DW1, the elder brother of the appellant was said to be the head to their own Iye family attempting to liquidate the respondent's Iye family property. The learned counsel was vehement that the denial of the respondent's Iye family by the appellant was too obvious to hold otherwise.

The execution of exhibit D2 was suspected as the interpreters and witnesses to the execution and attestation of the jurat were not called despite the renunciation that the respondent was too old and were stark illiterates and did not sign.

That the appellant's claim to the Iye family was wrong as he was not patriarchal related.

That the appellant had said the land was not a gift but given to him for agricultural purposes*. "The land belongs to Iye family".*

That the appellant cannot claim right of headship in Iye family as they are of Osunla family and being in-laws and not patriarchal Iye family members.

He urged that the issue be resolved in favour of the 1st respondent and the decision of the trial court be upheld and costs be awarded against the appellant.

IN REPLY TO RESPONDENT ON ISSUE 2

Whether the appellant had challenged the title of the grantor and whether the order of forfeiture ought to be granted. It was argued that the trial judge had found that the appellant was a customary tenant of the 1st respondent and there was no appeal on these findings of fact. That an appellate court has no duty to interfere with such finding of facts where there is no appeal on same.

Counsel submits therefore, that being a customary tenant, the appellant holds the land in perpetuity subject to good behaviour and can only be dislodged by a claim for forfeiture for any good reason under customary tenure. The case of **Agum V. Aguwa (1992) 1 NWLR (Pt. 216) 236 at 250** **paragraphs F-G** was referred. Learned counsel submitted that the appellant paid tribute to his over lord occasionally as testified to in satisfaction of the incidence of customary tenancy, as it was an incident thereof. Counsel referred the court to the evidence in that respect on page 63 of the record of appeal, refers to **Abudu Lasisi & Anor. V. Oladapo Tuni &Anr. (1974) ALL NLR 923(1974) 9 NSCC 613 @ 616.**

The learned counsel contended that the appellant holds possession in perpetuity unless he forfeits it on such grounds as alienating a portion of the land to others without prior consent of the grantors , or by putting the land to other uses other than those originally agreed upon or by failing to pay the customary tribute or by denying the title of his overlords.

The appellant had argued that he had not challenged or denied the over lordship of the Iye family but had only challenged or denied that the 1st respondent was a member of the Iye family. Furthermore, that this was done at the filing of the statement of defence when the suit claiming forfeiture had already been instituted.

That what transpired in the course of the case after the institution of the suit cannot materialise to a ground of forfeiture against the appellant; that it is trite that it is not every act of misbehaviour or misconduct on the part of the customary tenant that leads to forfeiture. See **Are V. Ipaye (1990) 2 NW LR (pt. 132) 298; Odunsi V. Bamgbola (1995) 1 NWLR (pt. 374) 641 at 665 – 666.**

On the fact of the survey of the land relied upon for the order of forfeiture the learned counsel contended that from the survey plan, Exhibit D1, it was obvious that the appellant had been in possession for 10 years before he surveyed the land and the Iye family was aware of the survey before it executed Exhibit D2. That by the survey, the appellant had not challenged the title of the Iye family.

On the fact of uprooting the old palm trees and replacing them with high yielding palm trees, it was argued that this was in *tandem* with mechanized farming and agricultural development being the purpose for which the grant was made as can be seen on Exhibit D2.

It was also contended that it was not proved that the appellant sold any portion of land to anybody, let alone one Sunday Ese as alleged. It was argued that the courts are loath at granting forfeiture, except in situation where a refusal to grant forfeiture will be glaringly unjust.

That it was obvious that the respondent Iye family know and consented to the survey plan made (i.e. Exhibit D1). Secondly, the appellant had been farming on the land for 30 years before the institution of the suit against him.

Counsel submits that a customary tenant forfeits his customary right to occupation and use of land where he denies the customary landlord's title or alienates without consent the whole or part of the parcel of the land let out to him under customary law.

That the 1st respondent denied that a document was executed in favour of the appellant; contending that what that means is that the document Exhibit D2 never existed. That having been tendered and admitted, the onus was on the 1st respondent to show that it was forged; and that

allegation being one relating to the commission of a crime, the onus was on the 1st respondent to prove same beyond reasonable doubt as enjoined by Section 137 (2) of the Evidence Act 2011. (As amended). That not leading evidence, the burden was not discharged; that the relation between the parties was as stipulated in Exhibit D2 **Ikoku V. Oli (1962) ALL NLR Vol 1 (pt. 1) 194 at 199; Adelaja V. Fanoiki & Anr. (1990) 2 NWLR (pt. 131) 137 at 153, paragraphs B-D.**

It was therefore urged on this court to allow the appeal, set aside the decision of the trial court and to hold that the appellant had not by the evidence led been shown to earn an order for forfeiture of the grant of land made to him by the Iye family.

The appellant's reply brief of argument in a way argued his contention as relating to the Exhibit D1 (survey plan) and contended that the 1st respondent was estopped from complaining in that regard. He referred copiously to **Morayo V. Okiade 8 WACA 46 at 47 – 48.**

The learned counsel reiterated that exhibit D2 speaks for itself and contained the illiterate jurat, presupposing that the content had been read and explained to the respondents before the customary grade 1 court -in the language they understood before they appended their thumb impression thereto. That the exhibit was valid and properly executed in favour of the appellant.

After a careful perusal of the record of appeal and in particular the pleadings, evidence and the exhibits tendered, I do not think that there is any question as to the validity and the mutual acknowledgement of exhibits D1 and D2 tendered in this case. I shall come to it later. I shall however proceed straight into the resolution of the two issues agreed upon by the parties as being germane for the determination of this appeal.

Issue one – asks the question *whether the expurgation of exhibit D2 after the tender and admission of same in evidence was justified in law?*

It is obvious to me that the expurgation was not justified. The law is that evidence that are relevant in the sense that they are tendered to prove or disprove a fact in issue or fact relevant. Every relevant fact is admissible. See Section 6, 8, 10 of the Evidence Act

The document, Exhibit D2 has not by law been rendered inadmissible. The contention of the respondent against it is that the family did not execute any document for the appellant. Having perused the evidence of the parties and the findings of the trial court, it is obvious as found by the court that the respondents executed exhibit D2 granting the land for the purpose of mechanized farming and agriculture purposes to the appellant.

The respondents cannot resile from the agreement which had also by their testimonies confirmed and relied upon for their contentions. It is therefore, not conscionable to resile therefrom. They are estopped from denying its existence and execution by their exhibit D, the survey plan drawn

by the appellant and complained about as an indication of an act done without permission of the Iye family, was an act that was actually done and the plan (Exhibit D1) brought into being before the grant but recognized and ratified by the respondent (Iye family) in that it is copiously and clearly so recited and referred to by the respondent, grantors themselves in the Exhibit D2- effecting the said grant.

As submitted by the appellant, which I agree with, the respondents cannot now complain or make that plan a subject of any action for forfeiture as it was not a denial of their title or an act done in challenge of any title or instruction.

The exhibit D2 and its reference to exhibit D1 was not therefore an embodiment of illegality nor was it a forged document. In this wise, therefore, the appellant's counsel is right when he submitted that the denial by the respondent was a reaction to an act by which they had been estopped in law; I dare agree also that any challenge to it does not show convincingly that it had suffered from or was a product of undue influence, misrepresentation of fraud or was a crime which was a crime which last incidence must be proved beyond reasonable doubts as enjoined by Section 137(2) of the Evidence Act 2011 as (Amended).

To expunge the exhibit D2 as done would mean that best evidence of the terms of the grant had been jettisoned. Upon what then did the trial court hold that the appellant was in violation of the grant?

A decision based on the content of a document in variation to the document amounts to altering or varying the content. That cannot be done, except under Section 133 Evidence Act.

A documentary evidence or document, once admitted shall be part of the evidence led in the case and it is duty of the court to consider all evidence, including the evaluation of the documents before arriving at a decision. To fail to do so will amount to denial of the right of fair hearing. What was the purpose of the exhibit D2? It was pleaded and testified to: tendered to show that the appellant was granted a piece of land as a customary tenant for farming purposes in respect of mechanised cultivation of specified arable crops and promotion of agriculture in Nigeria and Ondo State in particular.

How then can a document intended to be the evidence of the grant containing the reasons for the grant be inadmissible or irrelevant in the face of the claim that the property was so granted as contained in the said document?

The judgement of the trial court alludes to and relies on the documentary evidence it had purportedly expunged nonetheless. As expunged document stands in the same pedestal as a rejected document.

In that regard, this court had clearly stated recently in **Emokpae V. Stanbic IBTC PM Ltd. (2015) (pt. 1487) 57 at 75**. In the lucid and captivating contribution of my lord Obaseki -Adejumo, JCA applying **Oguntayo V. Adelaja (2009) 15 NWLR (pt. 1163) 150** and other decisions of the Supreme Court thus:

> **"It is trite law that a court of record should not rely on document tendered in evidence but rejected. In the case the usual order to be made by court on that rejected the document is "the document is tendered but marked rejected"**
>
> **The consequential effect of this is that such a document naturally does not exist at the trial court; it has no probative value for the determination of the case in dispute. The lower court is therefore enjoined to desist from relying on such evidence so rejected. See Oguntayo V. Adelaja (2009) 15 NWLR (pt. 1163) 150, Terab V. Lawan (1992) 3 NWLR Addisen United Ltd. Vs Lion of Africa Insurance Ltd. (2010) LPELR 3596; Agbaje V. Adigun (1993) 1 NWLR (pt. 296) 261; A.T.P.Nig. Ltd. &Anr. V. Drake& Skull (Nig.) Ltd. (2003) 3 NWLR (pt. 649) 484; Jimoh Adebakin V. Sabitiyu Odujebe (1973) 1 NMLR 148. "**

In the instant case the trial judge acted on materials in a document which was tendered in evidence but rejected, this with respect to the trial judge is a misapplication of the law.

How can the document not be admissible or become irrelevant where a breach of its terms is alleged by the grantor thereof against the grantee? It is a consensual document and exhibit that is most relevant and the epicentre of the suit and relationship between the parties herein. Section 16 of the Land instrument Registration Law of Ondo state harped upon for expurgation by the learned trial judge, I must say with due respect does not operate against the admissible relevance and use of the said Exhibit D2.

It is clear to me that it is only when the document is sought to be tendered for the purpose of proving title or interest in land, that it shall not be pleaded, tendered or admitted for that purpose if not registered.

If, however the purpose of reliance on the document is to show that a grantee lawfully entered into possession and was using or exercising acts of possession lawfully pursuant to the document, then it is not tendered with a view to proving title or possessory right or any claim to the land.

If the purpose of the document being tendered is to show in defence that the respondent was not in violation of the terms and condition of the grant, then it is an admissible document even if it was not registered. It was used merely as proof of an agreement to enter into land and cultivate and therefore relied upon as a defence.

The appellant never used it to institute an action for claim nor did he use it for counterclaim. There was neither any of these done in this matter now before this court. In the circumstance, I shall and do resolve issue No. 1 in favour of the appellant that the expurgation of exhibit D2 was wrong. I accordingly restore same to the record of the court for the just determination of this matter, by this court.

The exhibit D2 being documentary evidence, the appellate court such as this court is in good position as the trial court to evaluate such as evidence.

I shall, therefore consider the evidence led inclusive of exhibit D2 just restored in my consideration of issue No 2, as implored by the appellant's counsel

ISSUE NO 2.

The summary or essential gist of this issue is, whether the trial court rightly made an order of forfeiture upon the grounds relied upon.

I do not think so.

Exhibit D1- the survey plan was shown earlier in this judgement as ratified. Its existence had been waived as it existed to the knowledge of the respondent who saw nothing wrong with it. They referred to it in the body of the document of grant. What acknowledgement and ratification can be more than this? They never showed how it ever prejudice them. I do not think it aided the parties in identifying the specified quantum of land granted. They were surely estopped from resiling from acknowledging its existence after referring to it and making the grant covering the area specified by the exhibit D1(the plan), thus enabling the appellant to farm thereon the portion indicated or mapped out. The fact of the exhibit D1 cannot be used as a valid ground for forfeiture. As for the activity of farming on the land in the character of uprooting old palm trees and replacing with modern or high yield palm trees as even conceded or admitted by the appellant, it is my view that the exhibit D2 shows that the grant was for the cultivation of arable crops like yam, maize, plantain and cassava.

Though palm trees are not arable crops and not therefore indicated as included *sui generis* or expressly in the list in exhibit D2, I have, however, scrutinized the evidence on record and do not find where the grantors indicated in exhibit D2 or evidence that the land granted to the appllant was palm farm which palm trees should not be tampered with.

It was only in their oral evidence that it was testified to that old palm trees were uprooted and replaced with high yielding ones from Nifor Edo State.

Although there is no evidence that the land was essentially for a palm tree plantation, which it could not have been as the grant made in 1980 was for cereal and root crop and plantain. The suit was not taken until November, 2008. A period of 28 years. This is about 30 years as claimed by the appellant.

The PW1 in his evidence said the appellant was challenged when his driver brought a tractor on the land after 3 years of farming and uprooted some palm trees. That the appellant continued adamantly and even exceeded the boundary of land given to him. The extent of the excess was not proved. That he sold land to one Sunday Ese for N440, 000 for 4 plots and unauthorized contrary to yoruba custom. That it was transverse generally but was not a deficiency as held at the trial.

I do not see any proof of the sale of land as claimed and denied. On the preponderance of evidence this had not been proved. No evidence of the document of sale was tendered nor did any witness testify in corroboration. There was no indication of the period date, size or area of the granted land sold out as claimed.

Further on the palm trees, I would think that the replacement of old palm trees as done and admitted, was considered by the appellant as 'the promotion of agriculture in Nigeria and in particular in Ondo State in giving effect to the terms of the grant (Exhibit D2). However, it is my view that "the promotion of agriculture in Nigeria and Ondo state in particular" should be construed to mean the promotion of mechanized farming of the types of crops enumerated in the document of grant (i.e. Exhibit D2) made between the parties.

That will explain why the respondent timeously upon noticing the uprooting of old palm trees protested. But as I said supra, the land was not a palm plantation which can be said to have been altered. Although there was no proof of the complaint of exceeding the boundary of the allocated land, I do not think that the act of using the land for added cultivation of palm trees and uprooting of the grantees' old palm unheeded would be an act inconsistent with the terms of the grant and a challenge to the ownership and over lordship of the respondent's Iye family, if it was a wholesale planting of new or improved palm trees on the land in predominance to the other crops that were sanctioned for cultivation on the land as in exhibit D2. If that was, then the character of the grant and use of the land would have been unilaterally altered. It was not so said. The appellant had maintained and contended that he did not challenge the lordship of the Iye family as his customary landlord. Before then I should re-iterate that the law frowns at alienating without consent as that will be violation of the tenant's obligation.

Alienation or threatened alienation is viewed with seriousness because of the tenant's opposition to the grantor's title. It creates the danger that *"if it is not promptly detected, the over lords may one day be faced by an occupier who would aver that the overlords have acquiesced in or tolerated*

act adverse to their title". See **Onisowo V. Fagbenro noted at page 257, Nigerian Land Law, B. O Nwabueze 1973** (Nwanife publishers)

The cutting of economic trees or uprooting of the palm trees thereon the land and their replacement was not shown to be such acts of magnitude intended to change the character of the farm or convert the land into the tenant's ownership. That may not therefore, constitute a denial of the landlord's title.

From the grant and the unlimited period or undefined period of the use of the land, it would appear that the grant was not for the cultivation of seasonable crops for a specified period only.

In the circumstances, the prolonged and indefinite or indeterminate period can accommodate the replacement and replacement of the old palm trees. However, the use of same would appear to me be a conversion of the landlord's property after unauthorised improvement thereof. Mandate ought to be obtained to enjoy the replaced palms or pay tribute thereon, specifically being an added crop.

The title of the landlords is said to have been challenged by the claim that appellant was a member of the Iye grantor's family whilst the 1st respondent was said not to be a member of the said family. The appellant's claim that he was a member may be said to be supported by the exhibit D2, that referred him as *"our son"* though in a lose sense, it may be an acknowledgement of relationship. However, as the supreme Court held in **Oyewole V. Akande (2009) 177 LRCN 76, page 94 EE,** there is no customary law which forbids a yoruba man from tracing his membership of a family along his maternal line. (Per Oguntade JSC)

The finding of the trial court that appellant was not a member of the Iye family appears perverse the exhibit D2 and not supported by evidence of the experts in yoruba law as relating the Iye family.

In the face of **Oyewole V. Akande (Supra)** I hold that the appellant was not shown to be a stranger. Though not a stranger, can a member of a family be granted a portion of a family land for a specified use? Yes, he could.

Having been granted, the tenure of customary grant still applied with all the incidences appurtenant thereto; which includes the obligation of non- denial or challenge of the title of the overlord grantor as the customary grantee was none the less still customary tenant in respect of the unpartitioned and shared land.

The 1st respondent along with another were expressed as having brought a representative action on behalf of the family. It was not personal. It was pleaded that he was the current head of the family, along with 2nd plaintiff who was a principal member.

The 1st respondent was a joint or co – owner of the property and enjoys the property together with others. They suffer together if the property is subject to litigation. That means that a challenge to the membership of the 1st respondent of the Iye (grantors) family simply means that the Iye family had no right to allow the 1st respondent act for it or that the said family misrepresented its headship; that was a challenge to the legality of Iye authorization of power of attorney as conferred on the 1st respondent.

A challenge to the 1st respondent's authority based on membership was a challenge to the family. That the challenge to the customary grantor's title and authority to deal in the land. See **Osuji V. Ekeocha (2009) 177 LCRN 134 at 187 EE** on the fact that joint owners suffer jointly if the property is subject to litigation. The Iye family therefore suffer the same challenge to its head of family herein.

The appellant had argued that the challenge only came up at the stage of the suit by his pleadings after the suit was filed and constituted; not prior to the suit to warrant a forfeiture. That may, technically be so; but in the face of the planting of improved palm trees thereon the land without permission, it could be inferred that the thought of challenge or animus to treat or use the property as an outright grant had been conceived; hence the implied challenge to the efficacy or locus standi of the 1st plaintiff to represent the Iye family in the suit.

There is, however, no appeal or challenge against the finding of fact that the 1st respondent was a member of the Iye family as made by the trial court. That finding stands and against the appellant challenge of his status and ipso facto the family's right and action over the land when it recognized and acted through the said respondent.

Indeed as even member of a family are liable for forfeiture, See **Inasa V. Oshodi(1934) Ac 99(page) 1930 10 NLR, 4(FC) and Onisiwo V. Fagbenro,** the entire members of a family forfeited their tenancy on the account of 3 principal members there of granting a sublease of the land granted to that family. It may have been otherwise if that sub grantor were not principal members and the family did not support their action.

Have the respondent waived this challenge?

The respondents insisted even at the trial, that the land granted be reverted to them. However, a court of law is also a court of equity and will consider in the particular circumstances of each case whether forfeiture or some other remedy would be the proper course. As the keeper of the conscience of native communities and of the realm, could forfeiture be ordered in this matter?

The appellant had been on the land for a long time. He was not proved to have alienated any portion without authority and at all. It was not shown that the replaced palm trees were going to be used as proof of change of ownership to the land and warning had not be issued.

The appellant conceded to the erroring the misconduct of challenge against the 1st respondent and shows some remorse in that he repeatedly continually and by the address of his learned counsel in both the appellant's brief of argument and the appellant's reply brief of argument that he acknowledged the over lordship of the Iye family as the grantor of the land to him as a customary tenant.

The remorseful conduct of the appellant and the fact that he had not been shown by such act of proved alienation or notice to outsider that the property was his nor turned the usage of the land to other purpose like building of residence or offices or majorly differing economic activity, would in the equitable jurisdiction of this court be considered.

This is a situation where I think the trial court ought to have warned the appellant not to continue to exhibit the truculent and provocative attitude he had shown as the court may not be further prepared to forbear in their favour and any purported lease/sale was void and the proceeds thereof accrued for the use and benefit of the grantor family and unsevered property.

A serious act of misconduct exhibited as in the challenge raised no doubt, but this court finds and holds that the appellant had not "claimed absolute ownership as wrongly held by the trial court, at page 28 of its judgement.

This view of the trial judge would appear to have influenced his refusal to grant the reliefs against forfeiture and thus proceeding to make restraining orders against act not proved to have been done. The orders were presumptive, just as the order of restraining against entry, farming on the land was otiose.

Appellant was already on the land and without an order of ejection, he cannot be ordered no to enter. Is it re – entry that is contemplated?

I however, endorse the portion of the judgement and order that the appellant shall not do anything inimical to the interest of the Iye family (Plaintiff) of Arigidi Akoko in respect of the family land, which may be recovered upon good and provable grounds or by mere reasonable notice as it is not a grant in perpetuity or an outright grantor sale.

I do think that the learned trial judge with due respect, shut his eyes to the very obvious evidence led and drew wrong conclusion from the accepted facts or proved facts. A re- evaluation of the evidence led has led me to a different conclusion as made by the trial court. On the authority of

Osuji V. Ekeocha (supra), this is a good case to interfere in the exercise of the evaluation of evidence and the inferences as drawn by the trial judge.

This, I do, notwithstanding that it is the trial judge alone that had the benefit of hearing witnesses and parties testify and it is he that observed their demeanour, but from the records, it is patently obvious that good advantage was not taken of this opportunity and appellate court such as this court may, therefore, step in to rectify the error of perversity as a dispassionate appraisal of the evidence given in support of each party's case had not been carried out.

This appeal is allowed as the order for forfeiture as made is set aside and relief granted accordingly.

Costs: Appellant shall pay the cost of the suit both at the trial court and in this court, in spite of his success. The justice of this case so demands. I assess cost at the trial court at N50,000 and this court at N50, 000 (Fifty Thousand Naira Only)

N100, 000 as costs shall be paid in favour of the 1st respondent herein by the appellant.

The appellant shall additionally pay as compensation the sum of N400, 000 (Four Hundred Thousand Naira Only) for the act of challenge made. This order is made in the interest of justice of the case to assuage the hurt done to the respondent's dignity as an overlord and to re-enforce the assurance of the grantor's allodial title. This is not an order for a relief not claimed, nor is this court acting as a father christmas for compensating a party whose right to merger of granted right with his reversionary title had been put on hold by this court on equitable grounds.

Appeal allowed.

MOHAMMED AMBI-USI DANJUMA,
JUSTICE, COURT OF APPEAL

Appearances

1. HUSSEIN AFOLABI, ESQ. FOR THE APPELLANT
2. OLAWOLE LOUIS OMOTOSHO ESQ. FOR THE RESPONDENTS.

JAMES SHEHU ABIRIYI (JUSTICE, COURT OF APPEAL)

I had the privilege of reading before now the lead judgement just delivered by my learned brother **Danjuma,** JCA.

He has exhaustively dealt with the issues for determination. I adopt the reasoning and conclusions in the lead judgement as mine in also allowing the appeal.

I set aside the order of forfeiture made by the lower court.

However, I beg to differ from my learned brother on the consequential orders made in the lead judgement.

I make no orders as to cost.

JAMES SHEHU ABIRIYI

JUSTICE, COURT OF APPEAL

SONTOYE DENTON WEST, JCA

I have read before now the draft of the lead judgement of my learned brother, **Hon. Justice Mohammed Ambi-Usi Danjuma JCA,** and I agree entirely with the opinion and conclusions expressed therein.

The judgement of the lower court proceeded on the footing that the Appellant/ Defendant had claimed absolute ownership of the said land (see page 28 of its judgement) and thereby granting the relief of forfeiture and restraining order against acts not proved to have been done by Appellant.

It is in the light of the foregoing that I align with the interference of this court as captured in the lead judgement in rectification of this perversity (see **Atolagbe Vs. Shorun(1985) 1 NWLR (Pt. 2) 360 Odiba Vs Azege (1998) 7 S.C. (pt. 1) 79** and also allow this appeal. The order for forfeiture is hereby set aside and I also abide with all the consequential order made in the lead judgement

SONTOYE DENTON WEST

JUSTICE, COURT OF APPEAL