

**IN THE HIGH COURT OF THE FEDERAL
CAPITAL TERRITORY, ABUJA
HOLDEN AT ABUJA**

ON THURSDAY, 6TH DAY OF JUNE, 2019

**BEFORE HON. JUSTICE SYLVANUS C. ORIJI
SUIT NO. FCT/HC/CV/138/2014**

BETWEEN

CHUKWUEMEKA SYLVANUS UGWU --- PLAINTIFF

AND

1. PASTOR GBENGA OLAWUMI	}	DEFENDANTS
2. MRS. BRIDGET AMAMBE		
3. FELIX JOHN		
[Acting through his Attorney, Mr. Kingsley Amababe		

JUDGMENT

The plaintiff instituted this suit vide writ of summons on 9/10/2014. The pleadings in this matter are: [i] the plaintiff's amended statement of claim filed on 26/2/2015; [ii] the 2nd& 3rd defendants' joint statement of defence and counter claim filed on 23/6/2016; and [iii] the plaintiff's reply to the 2nd& 3rd defendants' joint statement of defence and defence to counter claim filed on 20/7/2016.

I pause to remark that on 26/2/2015 when the plaintiff filed his amended writ of summons and amended statement of claim, the 3rd defendant was not a party to the suit. After the joinder of 3rd defendant on 9/5/2016, the plaintiff did not file a further amended writ of summons and statement of claim to include 3rd defendant as a party to the suit as directed by the Court. However, the name of the 3rd defendant was reflected on all subsequent processes filed by the plaintiff.

In paragraph 12 of the amended statement of claim filed on 26/2/2015, the plaintiff claims against the 1st& 2nd defendants jointly and severally thus:

- a) A declaration that the plaintiff is the beneficial owner of plots BDS67 and MF14, both plots with common boundary situate at Bwari Dutse Sagwari, Bwari Area Council, F.C.T-Abuja specifically described by survey plan dated 17/11/11 and 20/03/2002 respectively.
- b) A declaration that the plaintiff is in exclusive possession of plots BDS67 and MF14, both plots with common boundary situate at Bwari Dutse Sagwari, Bwari Area Council, F.C.T-Abuja specifically described by survey plan dated 17/11/11 and 20/03/2002 respectively and in exclusion of any right of possession whatsoever by the defendants.
- c) A declaration that the defendants' acts of forceful entry and development, construction of fence and pulling down the plaintiff's existing fence of plots BDS67 and MF14, both plots with common boundary situate at Bwari Dutse Sagwari, Bwari Area Council, F.C.T-

Abuja specifically described by survey plan dated 17/11/11 and 20/03/2002 respectively amount to trespass, mischief and damage on the exclusive right of plaintiff's possession.

- d) An order of perpetual injunction restraining the defendants and defendants' privies, agents, servants and representatives or and by whatever name so called from trespassing or and further trespassing on the plaintiff's right of possession of plots BDS67 and MF14, both plots with common boundary situate at Bwari Dutse Sagwari, Bwari Area Council, F.C.T-Abuja specifically described by survey plan dated 17/11/11 and 20/03/2002 respectively.
- e) An order of payment of N10,000,000.00 for general damages/compensation against the defendants' act of trespass on the plaintiff's right of possession of plots BDS67 and MF14.
- f) Cost of this action.

In paragraph 4 of their counter claim, the 2nd& 3rd defendants seekone relief against the plaintiff, to wit:

The sum of N264,200.00 only as compensation to the nominal complainant who the 2nd and 3rd defendants were at the trial before Grade 1, Area Court, Arab Road, Kubwa, Abuja payable and liquidated by reason of the conviction of the plaintiff [then accused].

At the trial, the plaintiff gave evidence as PW1. He adopted his amended statement on oath filed on 26/2/2015 and his further statement on oath filed on 20/7/2016. PW1 tendered Exhibits A, B, C, D, E, E1-E3, F1-F5, G1-G5, H1, H2, J, K, L, L1, M & N. The 2nd defendant testified as DW1 and adopted her statement on oath filed on 23/6/2016. Kingsley Amabebe - the attorney of the 3rd defendant and the husband of the 2nd defendant - gave evidence as DW2. He adopted his statement on oath filed on 23/6/2016 and tendered Exhibits O, P, Q, R, S & T.

Evidence of the plaintiff:

In his statement on oath filed on 26/2/2015, the plaintiff stated that he is the beneficial owner and in possession of plot BDS67 and plot MF14 situate at Bwari Dutse Sagwari, Bwari Area Council, Abuja and have a common boundary. 1st defendant is a Pastor of a Church and his neighbour occupying a developed block wall fenced plot, which shares boundary with his said plot MF14. The 2nd defendant is a businesswoman who has seriously encroached and trespassed into plot BDS67, the end that stretches into a gully, belonging to him. Plot BDS67 was allocated to one Timothy Ishaku vide Conveyance of Provisional Approval dated 15/5/2001, survey plan [TDP] and receipt of payment by Bwari Area Council, which was later regularised at AGIS. He took possession as the beneficial owner of the said plot BDS67 by purchase vide receipt of purchase or acknowledgement of payment [i.e. Power of Attorney and Sales Agreement both dated 10/3/2010].

He also took possession as the beneficial owner of Plot MF14 by virtue of the Conveyance of Approval re-issued on 19/02/2007 by Bwari Area Council. He has been in quiet possession and enjoyment of both plot BDS67 and plot MF14 with developed block wall fence all round both plots and a bungalow of 5 bed-rooms on plot BDS67 until sometime in 2013/2014 when defendants started trespassing and destroying his block wall fence and carrying out defacing constructions on the plots. 1st defendant encroached and trespassed into plot MF14 at the end that shares boundary with his [i.e. the 1st defendant] plot by destroying the block wall fence and constructing a fence/path-way inside plot MF14. The 1st defendant also moved his Church sign-post from its initial position to the front of plot MF14.

The plaintiff further stated that the 2nd defendant encroached and trespassed into plot BDS67, the end that stretches into a gully, by destroying the block wall fence and constructing un-approved building in the said plot without his consent. He reported these acts of trespass of the defendants to the Nigeria Police and after Police investigation, the defendants were cautioned to desist from trespassing on his right of possession of the said plots. The defendants refused to adhere to the advice of the Nigeria Police and have continued in the acts of trespass by destroying the topography and serenity of his said plots. He has submitted building plan of the said plots of land to the FCDA and he is waiting for its approval. PW1 said he suffered serious trauma, monetary losses and damage occasioned by the continuous acts of trespass of the defendants on the said plots.

In the plaintiff's further statement on oath filed on 20/7/2016, he stated that the 2nd defendant has always claimed ownership of alleged plot BDS67A which is part of his plot BDS67, the end that stretches into a gully. He has never seen the 3rd defendant at his plot BDS67; it was the 2nd defendant who claimed ownership of the alleged Plot BDS67A. He has never engaged the services of thugs against the 2nd & 3rd defendants; but it was the labourers and mason who went to work for him at his plot BDS67 that removed part of the illegal block fence placed by the 2nd defendant and her workers on the plot. The 2nd defendant and her workers broke into his plot BDS67 and constructed illegal block fence. While he was at plot BDS67 with some labourers and mason, the 2nd defendant brought some Police officers who arrested them.

He was arraigned alongside the mason and labourer he engaged for the development work at his plot BDS67 before Grade I Area Court, Kubwa on 19/8/2014. Before his lawyer could come down to the court, and as he has never faced criminal trial and did not know the effect of pleading guilty, he was lured into pleading guilty by the prosecuting Police officer [Cpl. Uchendu Kelechi] to an offence he did not commit; on the ground that he will just pay fine instead of being sent to prison and the parties will then go back to settle the issue of ownership of the plot at the Police station.

The PW1 further stated that when his lawyer discovered that he was "*goaded into pleading guilty*" of offence he never committed, he [his lawyer] advised him not to pay the compensation ordered by Grade 1 Area Court, Kubwa and

immediately filed an appeal against the said judgment to the FCT High Court Appeal Division and also filed this suit. He has never admitted that the 2nd& 3rd defendants own any plot known as plot BDS67A before Grade 1 Area Court, Kubwa or before any other person because the said alleged plot BDS67A does not exist. PW1 tendered the following documents:

- i. Offer of Terms of Grant/Conveyance of Approval from FCTA to the plaintiff dated 19/2/2007: Exhibit A.
- ii. Receipt No. 005495 dated 22/2/07 from Bwari Area Council: Exhibit B.
- iii. Regularization of Land Titles and Documents of FCT Area Councils Acknowledgement dated 8/11/2011 addressed to the plaintiff: Exhibit C.
- iv. Irrevocable Power of Attorney donated by Timothy Ishaku to the plaintiff dated 10/3/2010: Exhibit D.
- v. Conveyance of Provisional Approval dated 15/5/2001 addressed to Timothy Ishaku: Exhibit E; Receipt dated 2/3/2007 issued to Timothy Ishaku: Exhibit E1; Regularization of Land Titles and Documents of FCT Area Councils Acknowledgement dated 27/11/08 addressed to Timothy Ishaku: Exhibit E2; survey plan of plot 67, Dutse-Sagwari: Exhibit E3.
- vi. 5 Photographs: Exhibits F1-F5; another set of 5 photographs: Exhibit G1-G5; 2 memory cards: Exhibits H1 & H2.
- vii. Police investigation report dated 16/2/2015; Exhibit J.

- viii. Application form by Timothy Ishaku dated 15/7/2013: Exhibit K.
- ix. Receipt issued to Timothy Ishaku dated 15/7/2013: Exhibit L; the attached Zenith Bank teller dated 12/7/2013: Exhibit L1.
- x. Sales Agreement between Timothy Ishaku and the plaintiff signed by the parties on 10/8/2010: Exhibit M.
- xi. Certified true copy of proceedings on 19/8/2014 in *Case No. 204/2014* before Grade 1 Area Court, Kubwa; Exhibit N.

During cross examination of the PW1 by the 2nd & 3rd defendants' counsel, he stated that he bought the said plot BDS67 from Timothy Ishaku. The person that took him to the plot is Hon. Zakari Ya'd. Before he bought plot BDS67, he conducted "*window search*" with Hon. Zakari. When he noticed that the 2nd defendant trespassed on plot BDS67 in 2011, he went to Bwari Area Council to complain. Bwari Area Council called John Gabaya [the surveyor of Bwari Area Council]. John Gabaya called the 2nd defendant and told her that she had trespassed on someone's land. They said they will resolve the issue but the 2nd defendant never went to the Area Council. His house was at decking level at that time and Bwari Area Council asked him to continue. He completed the building. Later, the 2nd defendant started building a house in front of his house. He took the matter to the Police. John Gabaya came to the Police and said the Area Council will resolve the issue, but the 2nd defendant never went to the Area Council.

From the TDP of his plot BDS67 [Exhibit E3], plot BDS67A is not in front of his building. From Exhibit E3, the adjoining plots are plot 68, plot 68A, plot 306 and plot 67A. Behind his plot BDS67, there is a rock. Plot BDS67 shares boundary with the major road. There is a plot behind plot BDS67. He was arraigned before Area Court in Kubwa in 2014 and he was convicted for trespass in respect of plot 67A; but he was misled to plead guilty. He explained that the prosecutor told him to agree that he broke the fence, and that if he paid the 2nd defendant for the blocks, she will leave the land. He has paid N50,000.00 out of the N264,000.00 awarded against him to the nominal complainant by the Area Court. He appealed against the judgment but he cannot find the evidence that he appealed.

PW1 further stated under cross examination that he saw the 2nd defendant and her engineer destroying his fence and blocks. He reported her to the Police at Dutse Makaranta and she was arrested. One of the allegations against him at Area Court Kubwa was that he destroyed fence and blocks belonging to the 2nd defendant. The fence in the photograph [Exhibit F1] is the fence he destroyed but he did not destroy blocks. The gully shown on the TDP [Exhibit E1] is not part of plot BDS67; it is the boundary between his plot and the 2nd defendant's plot.

Evidence of the 2nd & 3rd defendants:

The evidence of the 2nd defendant is that the plaintiff's allegation that she encroached or trespassed into any part of Plot BDS67 is false. The only time

she had issue with the plaintiff was when he with his hired thugs invaded plot BDS67A, Dutse Sagwari Layout, Bwari Area Council, Abuja. She lodged a complaint and the plaintiff with his co-accused were tried and convicted by Grade 1 Area Court, Kubwa, Abuja. She lodged the report as the wife to Mr. Kingsley Amabebe who is acting for Felix John[3rd defendant]. The plaintiff and his hired thugs were convicted for the offences of mischief and joint act. Plaintiff and his hired thugs destroyed dwarf fence erected by her husband on the said plot BDS67A measuring about 900 square metres.

During cross examination by plaintiff's counsel, DW1 stated that her husband is the owner of the said plot BDS67A. Her husband was not around when the destruction of their fence on the plot was noticed; so she made the complaint to the Police because what belongs to her husband belongs to her. The fence shown in Exhibit G1 stopped at the point where there is a beacon. The beacon is the demarcation between plot BDS67 and plot BDS67A.

The DW2 [Mr. Kingsley Amabebe] testified that the 2nd defendant is his wife. He asked her to look after the said plot BDS67A measuring about 900 square metres in order to report any criminal trespass committed against the said plot. He erected dwarf fence with a gate on the said plot in order to exercise act of possession granted to him by Felix John [the beneficial owner of the plot] vide an Irrevocable Power of Attorney. Before he gave consideration for the Irrevocable Power of Attorney, he conducted legal search with the Bwari Area Council, Abuja, which confirmed that Mr. Felix John was and he still is

the beneficial owner of the said plot BDS76A. When Mr. Felix John executed the Irrevocable Power of Attorney in his favour, he handed over to him [DW2] the documents relating to the plot as listed in paragraph 11.

The said plot BDS67A is on an official layout approved and endorsed by the Authority of Bwari Area Council. As at the time he began to exercise acts of possession and ownership of the said plot BDS67A, he contacted the Survey Department of Bwari Area Council. The officials of Bwari Area Council were on ground to guide and direct him as to the exact location of the plot as contained and expressed in the approved layout from Bwari Area Council. The allegation of trespass made by the plaintiff against his wife in connection with plot BDS67A is false. He has never been contacted by any Police station for any act of criminal trespass complained by plaintiff or any other person.

Mr. Kingsley Amabebe further stated that the plaintiff with his hired thugs invaded plot BDS67A to destroy and cause mischief against the dwarf fence and other valuables on the plot; they were arrested and arraigned before Grade 1, Area Court, Kubwa, Abuja. They were convicted and sentenced; and ordered to pay the sum of N264,200.00 as compensation to his wife as the nominal complainant, who complained on his behalf. The DW2 tendered the following documents:

- i. Offer of Terms of Grant/Conveyance of Approval dated 19/2/2007 addressed to Felix John: Exhibit O.

- ii. Receipt for the sum of N16,500.00 dated 22/2/2007 issued to Felix John by Bwari Area Council: Exhibit P.
- iii. Survey plan of plot 67A Dutse Sagwari: Exhibit Q.
- iv. Irrevocable Power of Attorney dated 7/2/2011 granted by Felix John to DW2: Exhibit R.
- v. Acceptance of Offer by Felix John dated 23/3/2010: Exhibit S.
- vi. Document titled: Re: Application for search dated 29/1/2014: Exhibit T.

When DW2 was cross examined, he stated that he is aware that his wife said she is the owner of plot BDS67A at the Area Court; whatever belongs to him belongs to his wife. He did a window search before he purchased the plot and after the purchase, he conducted the search in Exhibit T. He does not know the meaning of “*yet to be charted*” in Exhibit T. It is not true that he and his wife were the ones that carved out the portion of land called plot BDS67A out of plaintiff’s plot BDS67.

At the conclusion of trial, the plaintiff’s counsel applied for the Court to visit the *locus in quo*. The Court granted the application and visited the *locus in quo* on 31/5/2018.

At the *locus in quo*, the plaintiff showed the Court the location of plot MF14, the plot of the 1st defendant and the area allegedly encroached upon by the 1st

defendant. He said the 1st defendant intends to use the part of plot MF14 encroached upon as the road to his church [Christ Liberated Church]. The plaintiff also showed the Court the area he referred to as plot BDS67, his house and the area occupied by the 2nd defendant in front of his building. He said the area fenced by the 2nd defendant is part of his plot BDS67. He also pointed out the part of his fence around plot MF14 allegedly pulled down by the 1st defendant; and the part of his fence around plot BDS67 covered with plank which the 2nd defendant allegedly removed.

At the *locus in quo*, the 2nd defendant showed the Court the area she described as plot BDS67A and the boundaries. The 2nd defendant said the area where the plaintiff erected a storey-building behind her plot was not allocated to him and is not part of plot BDS67.

Issues for determination; and Resolution of the Issues:

In the 2nd& 3rd defendants' final address filed on 25/9/2018, Mike Omoegbon Esq. formulated these four issues for determination:

1. Whether, in view of the PW1's witness statement on oath, the claimant has any relief before this Court.
2. Whether the claimant is entitled to any relief against the 2nd and 3rd defendants on the strength of the case before this Court.

3. Whether the case, as being maintained by the claimant in view of exhibits D, E1, E2 and E3, is competent.
4. Whether the 2nd and 3rd defendants are entitled to their joint counter claim.

In the plaintiff's final address filed on 9/10/2018 on the other hand, E. I. Nwude Esq. posed two issues for determination. These are:

1. Whether from the totality of evidence on record the plaintiff has proved his claims in law.
2. Whether from the evidence of the 2nd and 3rd defendants/counter claimants' witnesses the 2nd and 3rd defendants/counter claimants have proved any claim in law.

Let me first consider, as a preliminary issue, the arguments of learned counsel for the 2nd& 3rd defendants in support of his Issue No. 1 above. He stated that the plaintiff's reliefs are set out in paragraph 12 of the amended statement of claim filed on 26/2/2015 but no relief is contained in his amended statement on oath, which he adopted as his evidence in-chief. Also, after the evidence in-chief of PW1 on 19/11/2015, he did not seek any relief before the Court. Mike Omosogbon Esq. cited the case of **Isaac v. Imasuen [2016] 7 NWLR [Pt. 1511] 250** to support the principle that decisions of a law court proceed on the basis of pleaded facts which are established by evidence. It was submitted that the plaintiff is not asking or has not asked anything under oath from the Court;

and it is trite law that no court should make a case for any of the parties before it.

The 2nd& 3rd defendants' counsel also relied on **Badmus v. Abegunde [1999] 11 NWLR [Pt. 627] 493** to support the principle that a court has no power to award to a plaintiff that which he did not claim. He argued that in this case, the plaintiff is deemed to have abandoned the reliefs in his amended statement of claim. It is the law that where there is no evidence in support of a pleading, it is deemed abandoned. Mr. Omosogbon concluded that "*he who asks nothing, wants nothing and gets nothing as the court is not a Father Christmas*". He urged the Court to dismiss the suit on this ground.

In response, E. I. Nwude Esq., learned plaintiff's counsel, relied on the case of **Jekre v. Alokwe [2001] All FWLR [Pt. 47] 1013** to support the view that it is the counsel to the claimant that is expected to make submissions on the reliefs sought by his client and not for the claimant to lead evidence on the itemized reliefs sought in the statement of claim.

Mr. Mike Omosogbon is correct that the plaintiff [as PW1] did not set out his reliefs in his amended statement on oath filed on 26/2/2015, which he adopted as his evidence in-chief. It is also true that when PW1 gave evidence in-chief on 9/11/2015, he did not state his reliefs or state the usual words or cliché recited by plaintiffs[or claimants] when concluding their evidence in-chief, namely: "*I pray the Court to grant the reliefs in my statement of claim*" or "*I seek the reliefs in the statement of claim*".

Now, the questions that call for resolution from the submissions of Mr. Mike Omosogbon are first, whether the reliefs in the statement of claim constitute pleadings; and second, whether the plaintiff's failure to state his reliefs while giving evidence will amount to abandonment of his reliefs in the statement of claim. In Ishoa v. Union Bank of Nigeria [2005] 6 NWLR [Pt. 922] 422, the Supreme Court held that reliefs sought are not facts pleaded *per se* but what a party prays the court to grant at the end of the day; and the paragraph containing the reliefs sought cannot constitute pleadings at all. See also Sterling Bank Plc. v. Katagum Enterprises Ltd. [2015] LPELR-25874 [CA].

In the instant case, since paragraph 12 of the amended statement of claim containing the plaintiff's reliefs does not constitute pleadings, it means that the reliefs cannot be said to have been abandoned by the plaintiff merely because he did not recite the claims in his evidence in-chief or state the usual words or cliché namely: "*I pray the Court to grant the reliefs in my statement of claim*" or "*I seek the reliefs in the statement of claim*". What the courts look for in determining a matter is whether the plaintiff [or claimant] has adduced evidence to support the grant of the reliefs in the statement of claim.

Assuming the argument of Mr. Omosogbon represents the position of the law, he did not consider the evidence of the plaintiff in paragraph 9 of his further statement on oath filed on 20/7/2016, which he adopted on 11/1/2017. In that paragraph, the plaintiff stated:

That I therefore aver that I have the legal capacity to institute this action and that I am not estopped under any known law or statute barred from instituting this suit and obtaining judgment against the defendants in all the reliefs sought therein.

It is evident in paragraph 9 that the plaintiff referred to his reliefs. I hold the view that the plaintiff did not abandon his reliefs. Having resolved this preliminary issue, I now go on to the merits of the case.

From the evidence before the Court and the submissions of both learned counsel, I am of the opinion that there are five issues for determination. These issues are:

1. Whether the plaintiff has proved that he is the beneficial owner of plot BDS67 and plot MF14, both situate at Bwari Dutse Sagwari, Bwari Area Council, Abuja.
2. Whether the plaintiff has proved that the 1st defendant encroached or trespassed on the said plot MF14 in his possession.
3. Whether the plaintiff has proved that 2nd defendant encroached or trespassed on the said plot BDS67 in his possession.
4. Is the plaintiff entitled to his claims?
5. Are the 2nd& 3rd defendants entitled to their counter claim?

ISSUE I

Whether the plaintiff has proved that he is the beneficial owner of plot BDS67 and plot MF14, both situate at Bwari Dutse Sagwari, Bwari Area Council, Abuja.

In relief 1, the plaintiff claims a declaration that he is the beneficial owner of plots BDS67 and MF14 situate at Bwari Dutse Sagwari, Bwari Area Council. It is trite law that the plaintiff must succeed on the strength of his case and not on the weakness of the case of the defendants. The plaintiff has the burden to establish that he is the beneficial owner of the said plots.

In respect of plot MF14, the plaintiff tendered the Offer of Terms/Conveyance of Approval dated 19/02/2007 [Exhibit A] issued to him; and Regularization of Land Titles and Documents of FCT Area Councils Acknowledgement dated 8/11/2011 issued to him [Exhibit C]. From the evidence before the Court, there is no dispute that the plaintiff is the beneficial owner of the said plot MF14. I hold that the plaintiff is entitled to a declaration that he is the beneficial owner of the said plot MF14.

In proof of his assertion that he is the beneficial owner of the said plot BDS67, the plaintiff tendered and relied on Conveyance of Provisional Approval dated 15/5/2001 issued to Timothy Ishaku [Exhibit E]; Irrevocable Power of Attorney dated 10/3/2010 donated to him by Timothy Ishaku [Exhibit D]; Regularization of Land Titles and Documents of FCT Area Councils Acknowledgement dated 27/11/08 addressed to Timothy Ishaku [Exhibit E2]; and the survey plan of the said plot BDS67 [Exhibit E3].

Learned counsel for the 2nd& 3rd defendants pointed out that the plaintiff hinged his claim of ownership of plot BDS67 on the power of attorney dated 10/3/2010 [Exhibit D] donated to him by Timothy Ishaku. He defined a power of attorney as an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority on him to perform certain specified acts on his behalf. Mr. Omosogbon referred to Abubakar v. Waziri [2008] 14 NWLR [Pt. 1108] 507. It was submitted that the plaintiff sued in his personal name and omitted the name of Mr. Timothy Ishaku [his principal]. He concluded that the matter as presently constituted is incompetent for lack of proper parties.

The viewpoint of Mr. E. I. Nwude is that the plaintiff's claim before the Court does not bother on ownership or title to land; but it is an action brought against trespassers [the defendants] by another trespasser [the plaintiff] who alleges that he is in possession of the plots in issue. In the case of declaration of title to land, the plaintiff must prove ownership of the land. This is not so in the case of trespass to land which is predicated on exclusive possession. He cited Oyedare v. Keji & Anor. Vol. 5 S.C.J.L., 1 and Amakor v. Obiefunla [1974] 3 SC 67 to support the principle that trespass to land is actionable at the suit of the person in possession of the land. That person can sue in trespass even if he is neither the owner nor a privy of the owner.

The above view of plaintiff's counsel is a tacit admission that the plaintiff's claim for a declaration that he is the beneficial owner of the said plot BDS67,

cannot succeed. The plaintiff's claim of ownership or title of plot BDS67 is predicated on the Irrevocable Power of Attorney donated to him by Timothy Ishaku. It is trite law that a power of attorney does not transfer title to land. In the case of Ude v. Nwara [1993] 2 NWLR [Pt. 278] 638, it was restated that a power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so it is not an instrument which confers, transfers, limits, charges or alienates any title to the donee. I hold that the plaintiff failed to prove that he is the beneficial owner of the said plot BDS67.

ISSUE 2

Whether the plaintiff has proved that the 1st defendant encroached or trespassed on the said plot MF14 in his possession.

The evidence of the plaintiff is that he has been in possession of plot MF14. The 1st defendant encroached and trespassed into plot MF14 at the end that shares boundary with his [i.e. 1st defendant] plot by destroying the block wall fence and constructing a fence/path-way inside plot MF14. The 1st defendant also moved his church sign-post to the front of plot MF14. At the *locus in quo*, the plaintiff showed the Court the said encroachment into his plot MF14 by 1st the defendant. Mr. Nwude submitted that the 1st defendant did not file any process to challenge the plaintiff's exclusive right of possession of plot MF14.

The 1st defendant did not challenge or controvert the evidence of plaintiff. Without much ado, I answer Issue No. 2 in the affirmative. I hold that the

plaintiff has proved that the 1st defendant encroached or trespassed on his said plot MF14.

ISSUE 3

Whether the plaintiff has proved that 2nd defendant encroached or trespassed on the said plot BDS67 in his possession.

The case of the plaintiff is that the 2nd defendant encroached and trespassed into plot BDS67, the end that stretches into a gully, by destroying his block wall fence and constructing unapproved building in the said plot. On the other hand, the case of the 2nd & 3rd defendants is that the area claimed by the plaintiff as part of his plot allegedly encroachment on is plot BDS67A. The DW2, the husband of the 2nd defendant, stated that Felix John is the beneficial owner of the said plot BDS67A as same was allocated to him vide Offer of Terms of Grant/Conveyance of Approval dated 19/02/2007 [Exhibit O]. The DW2 said he was granted possession over plot BDS67A by Felix John vide an Irrevocable Power of Attorney dated 7/2/2011 [Exhibit R].

Section 131[1] of the Evidence Act, 2011 provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is axiomatic that he who asserts must prove. See **Okon & Anor. v. Offeideh [2013] LPELR-21189 [CA]**. The plaintiff has the burden to prove his assertion that the 2nd defendant encroached or trespassed on his plot BDS67.

The 2nd& 3rd defendants' counsel stated that the plaintiff's case is that "*the 2nd defendant encroached and trespassed into plot BDS67, the end that stretches into a gully ...*" He asked: how does an independent or neutral umpire know that the "*gully*" being used by the plaintiff as a landmark form part of his plot BDS67? Mr. Mike Omosogbon argued that there is a need of an expert witness whose evidence is vital in the determination of this case. He relied on the case of **Okeke v. Nnolim [2015] 5 NWLR [Pt. 1453] 444** to support the view that the onus lies on the plaintiff to prove by credible evidence the area of the land to which his claim relates and the boundaries thereof, the exact location and the size of the land. It was submitted that the burden of proof placed on the plaintiff in this case was never discharged.

The standpoint of learned counsel for the plaintiff is that with respect to plot BDS67 and the alleged plot BDS67A, the law is that when there are competing interests of right to land from a common source, the doctrine of priority of interest will prevail to determine the person in possession; and he who is earlier in time is stronger in law. He referred to **Ilona v. Idakwo & Anor. Vol. 4 S.C.J.L., 765**. He submitted that the plaintiff bought and took possession of plot BDS67 since 2001 vide Exhibit D before the 2nd defendant's purchase of allocation in 2007 vide the Irrevocable Power of Attorney [Exhibit O]. Thus, the 2nd defendant who came later into possession is the one that is trespassing on the plaintiff's earlier right of exclusive possession.

With profound respect, Mr. Nwude's reliance on the doctrine of priority of interest in the instant case is misplaced. This is because the assertion of the 2nd & 3rd defendants is that they are in possession of plot BDS67A, which is not the same as the plaintiff's plot BDS67. In the plaintiff's further statement on oath filed on 20/7/2016, he stated that the alleged plot BDS67A claimed by the 2nd defendant is part of his plot BDS67. It is my humble view that in order for the plaintiff to establish that the 2nd & 3rd defendants trespassed into his plot BDS67, he has to adduce credible evidence to prove his assertion that the area referred to as plot BDS67A by the 2nd & 3rd defendants is part of plot BDS67 and/or that plot BDS67A does not exist. Did the plaintiff prove this assertion?

Firstly, the plaintiff tendered the survey plan of plot BDS67 as Exhibit E3 while DW2 tendered the survey plan of plot BDS67A as Exhibit Q. Exhibit E3 shows that plot BDS67 is bounded by plots 68, 68A, 306 and 67A. Exhibit Q shows that plot BDS67A is bounded by plots 68, 68A, 306 and 67. It must be noted that plot BDS67 and plot BDS67A are in Dutse Sagwari, Bwari Area Council. In my view, it was necessary for the plaintiff - who has the burden of proof in this case - to call a surveyor from Bwari Area Council or any other expert witness to give evidence to support his assertion that the area called plot BDS67A by the 2nd & 3rd defendants is part of plot BDS67 or that plot BDS67A does not exist. The plaintiff failed to do so.

Secondly and flowing from the first point, the plaintiff stated during cross examination that when he noticed that the 2nd defendant trespassed on plot

BDS67 in 2011, he went to Bwari Area Council to complain. John Gabaya [the surveyor of Bwari Area Council] called 2nd defendant and told her that she had trespassed on someone's land. Bwari Area Council said they will resolve the issue but the 2nd defendant never went to the Area Council. The plaintiff did not call the said John Gabaya to confirm that he told the 2nd defendant that she trespassed on the plaintiff's plot BDS67 and the basis for saying so. No other officer of Bwari Area Council was called to give evidence.

Thirdly, the plaintiff did not adduce any credible evidence of the location of plot BDS67 and how he came to the conclusion that plot BDS67A forms part of plot BDS67. During cross examination, the plaintiff stated that when he bought the plot, Hon. Zakari Ya'd took him to the plot. There is no evidence that any surveyor or officer of Bwari Area Council showed the plaintiff the location of plot BDS67. Besides, the evidence of the plaintiff is that he has not obtained building plan approval. This means that the house he built on the plot is without building approval. Thus, the Court can safely infer that the relevant authorities did not confirm the location of his plot BDS67 and were not aware that he built on the plot. In the light of the above, the submission of Mr. Nwude that the survey design with beacon numbers [Exhibit E3] guided the plaintiff's construction of block wall fence round plot BDS67 is not based on the evidence before the Court.

Fourthly, the DW2 gave unchallenged evidence that as at the time he began to exercise acts of possession over the said plot BDS67A, he contacted the

Survey Department of Bwari Area Council. The officials of Bwari Area Council were on ground to guide and direct him as to the exact location of the plot as contained in the approved layout from Bwari Area Council.

The fifth point to support my view that plaintiff failed to prove his assertion that the area referred to as plot BDS67A by the 2nd& 3rd defendants is part of plot BDS67 and/or that plot BDS67A does not exist is that the plaintiff did not adduce any evidence to show that the size or area of the land he occupies as plot BDS67 is less than 904.66 square metres as stated in the survey plan of the plot [Exhibit E3].

The sixth point is that it is evident from the record of proceedings of Grade 1 Area court, Kubwa [Exhibit N] that plaintiff and two others [Rabilu Ahmadu and Bashiru Isah] were charged for the offences of joint act, criminal trespass and mischief based on the complaint of the 2nd defendant. The plaintiff [as 3rd defendant] and the two others pleaded guilty to the charges; and they were convicted. The fact that the plaintiff pleaded guilty to the said charges arising from plot BDS67A adversely affects his claim that plot BDS67A forms part of his plot BDS67 or that plot BDS67A does not exist.

The seventh point is that the Police Investigation Report dated 16/2/2015 [Exhibit J] - which the plaintiff tendered to prove that he reported the alleged acts of trespass by the 2nd defendant on plot BDS67 to the Police - does not support his assertion. As rightly stated by Mr. Mike Omosogbon, the 2nd defendant was not mentioned in the said Police Report. The Police Report

only mentioned the 1st defendant who was reported to the Police by the plaintiff. Besides, neither plot BDS67 nor plot BDS67A was mentioned in the Police report.

In his effort to persuade the Court to reach a decision that plot BDS67A does not exist, Mr. Nwude argued that the search report tendered by the DW2 as Exhibit T confirmed that plot BDS67A *“is yet to be charted”*. It was submitted that the phrase *“yet to be charted”* means *“not yet mapped out”*; and that Exhibit T shows that *“the said Plot BDS67A was a genuine offer but is yet to be mapped out in the layout of Dutse Sagwari, the layout of the subject matter of this suit.”* Learned counsel concluded that by Exhibit T, the 2nd & 3rd defendants did not prove the existence of plot BDS67A in Dutse Sagwari layout.

Exhibit T titled *RE: Application for Search* addressed to DW2 reads in part:

Please be informed that the Zonal Planning Office [BAC] has gone through its records, the finding showed that:

- I. *Plot No. BDS/67A, of about 900 m² in Dutse Sagwari layout bearing FELIX JOHN as contained on the letter of offer submitted is traced on the list of Allottees.*
- II. *Carto unit confirmed that plot No. BDS/67A, Dutse Sagwari layout is yet to be charted.*
- III. *The officer in charge of investigation has confirmed that the Original letter of offer bearing FELIX JOHN submitted for search is genuine.*

Contrary to the reasoning of learned counsel for the plaintiff, I take the view that Exhibit T read as a whole does not convey that plot BDS67A does not exist; and there is no evidence that *“yet to be charted”* in Exhibit T means that plot BDS67A has not yet been mapped out. If the plot does not exist, Exhibit T would have said so; and by the plaintiff’s evidence, John Gabaya did not say that plot BDS67A does not exist. Plaintiff did not tender any search report or any other evidence to show that his plot BDS67 has been charted. I need to add that under cross examination, PW1 stated that the *“gully is the boundary between my plot and the 2nd defendant’s plot.”* This piece of evidence renders untenable the case of the plaintiff that plot BDS67A does not exist.

From all that I have said, the decision of the Court is that the plaintiff failed to prove that plot BDS67A, which is shown on the survey plans - Exhibits E1 and Q - does not exist or that it is part of his plot BDS67. Therefore, it follows that the plaintiff failed to prove that 2nd defendant encroached or trespassed on the said plot BDS67 in his possession.

ISSUE 4

Is the plaintiff entitled to his claims?

Relief I is a declaration that the plaintiff is the beneficial owner of plot MF14 and plot BDS67. I adopt my decision under Issue 1 and hold that this claim only succeeds in respect of plot MF14.

Relief 2 is a declaration that the plaintiff is in exclusive possession of plot MF14 and plot BDS67. There is no dispute that the plaintiff is in exclusive possession of plot MF14 and plot BDS67. This claim is granted.

In relief 3, the plaintiff seeks a declaration that the 1st& 2nd defendants' acts of forceful entry and development on plots MF14 and BDS67 amount to trespass and mischief. By his unchallenged evidence, the plaintiff has proved that the 1st defendant trespassed on his plot MF14. I adopt my decisions under Issues 2 & 3 and hold that this relief is granted against the 1st defendant in respect of the plaintiff's plot MF14.

In relief 4, the plaintiff claims an order of perpetual injunction against the defendants respectively in respect of plot MF14 and BDS67; while relief 5 is the sum of N10 million damages against the 1st& 2nd defendants for trespass. In **Dr. Dalhatu Araf v. Mr. Onyedim [2010] LPELR-3797 [CA]**, it was held that an order of perpetual injunction is granted to protect a party's title and possession of land against the party adjudged to be the trespasser. Thus, when a party proves his claim for trespass to land and the trial court makes the finding of trespass, the claim for damages and injunction must be given against the trespasser. See also the case of **Ogunyombo v. Ookoya [2002] 16 NWLR [Pt. 793] 224.**

I hold that these reliefs are granted against the 1st defendant in respect of the plaintiff's plot MF14. I award general damages of N1,000,000.00 against the 1st defendant for trespass to the plaintiff's said plot MF14.

ISSUE 5

Are the 2nd & 3rd defendants entitled to their counter claim?

The 2nd & 3rd defendants' counter claim of N264,000.00 is the sum awarded as compensation by Grade 1 Area Court, Kubwa against the plaintiff [as accused person/defendant] in the criminal charge. Mr. Mike Omoegbon stated that the counter claim is supported and proved by the evidence of DW1 & DW2.

On the other hand, Mr. Nwude submitted that this Court lacks jurisdiction to grant the counter claim because it was the judgment of a court in a criminal trial, which awarded compensation against the plaintiff. 2nd & 3rd defendants are only entitled to enforce the order made by the Grade 1 Area Court if the order is due for enforcement.

I agree with the submission of Mr. E. I. Nwude. The Court does not need to make any further pronouncement on the sum awarded by Grade 1 Area Court. The judgment of the Grade 1 Area Court is already enforceable against the plaintiff. Thus, the counter claim lacks merit.

CONCLUSION

1. The plaintiff's claims against the 2nd defendant are dismissed.
2. The counter claim of the 2nd& 3rd defendants against the plaintiff is dismissed.
3. I enter judgment for the plaintiff against the 1st defendant as follows:
 - i. A declaration that the plaintiff is the beneficial owner of plot MF14 situate at Dutse Sagwari, Bwari Area Council, Abuja.
 - ii. A declaration that the plaintiff is in exclusive possession of plots BDS67 and MF14 situate at Duste Sagwari, Bwari Area Council, Abuja.
 - iii. A declaration that the 1st defendant's acts of forceful entry and pulling down of the plaintiff's existing fence of plot MF14 situate at Dutse Sagwari, Bwari Area Council, Abuja amount to trespass.
 - iv. An order of perpetual injunction restraining the 1st defendant, his privies, agents, servants or representatives from further trespassing on plot MF14 situate at Bwari Dutse Sagwari, Bwari Area Council, Abuja belonging to the plaintiff and in his possession.
 - v. N1,000,000.00 general damages for trespass.
 - vi. Cost of N100,000.00.

HON. JUSTICE S. C. ORJI
(JUDGE)

Appearance of counsel:

No counsel.