

SUPREME COURT OF NIGERIA
23RD SEPTEMBER, 1994 SC. 320/1990
CORAM:- M. BELLO CJN, S. M. A. BELGORE,
I. L. KUTIGI, S. U. ONU, A. I. IGU, JJSC.

CHIEF PETER HIGO AJAKAIYE
CHIEF JOHN EHIMIGBAI OMOKHAFE
(For themselves and on behalf of
Orhial-Orake Ruling House and Members PLAINTIFFS/APPELLANTS
of Otuo Clan Community except the
4th & 5th Defendants and their
supporters)

AND
THE MILITARY GOVERNOR OF
BENDEL STATE OF NIGERIA DEFENDANTS/RESPONDENTS
& 2 OTHERS

AND
CHIEF AGBEBAKU IDEHAI
& ANOTHER DEFENDANTS/RESPONDENTS

APPEALS - Trial court's findings of fact - When rightly set aside by appellate court.

COURTS - Statutory provision for making an order - Where vested in a named officer - Whether court can usurp such function vide its judgment.

COURTS - Function of the court - Remedy not asked for - Whether to be awarded by the court.

CHIEFTAINCY MATTERS - Action to set aside chieftaincy declaration - Whether the declaration was validly made under the enabling statute.

PRACTICES PROCEDURE- Appeals - Subsistence of an appeal - Where the 1st appellant died before hearing - Whether all aspects of the claim are ended thereby.

FACTS

The present action is in respect of the traditional headship of Otuo Community, filed before the Auchu High Court in former Bendel State of Nigeria. The 5th Defendant/Respondent was appointed and approved as the Ovie of Otuo by the 1st to 4th Defendants under the Traditional Rulers and Chiefs Law of Bendel State 1979. The 1st Plaintiff/Appellant was appointed the Ovie elect of Otuo by the kingmakers in accordance with Otuo customary law. The Otuo customary law has maintained a system of succession to the Ovie of Otuo after the incumbent has been on the throne for 10 years. But a 1964 government declaration changed the term to be for life. The people of Otuo kept protesting about the change which led to another government declaration made in 1979 restoring 10 year term for the traditional head (the Ovie) of Otuo.

The Plaintiffs being aggrieved by the said government declarations and the appointment of the 5th Defendant as the Ovie filed this action seeking inter alia, a declaration that the 1964 and 1979 government declarations are null and void. In rendering judgment in favour of the plaintiffs the trial court substituted its own view of how the declaration should be. Defendants' appeal to the Court of Appeal was upheld as that court set aside the trial court's findings of fact. The Plaintiffs being aggrieved have now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in setting aside the trial court's findings that declared the 1964 and 1979 chieftaincy declarations null and void. The 1st Appellant died before the hearing of the appeal and the apex court had to determine effect of his death on the appeal.

HELD (Unanimously dismissing the appeal per lead judgment of **BELGORE JSC**)

Subsistence of an appeal- Effect of 1st appellant's death

1. Looking at the claim, as in the statement of claim in paragraph 75, quoted earlier in this judgment, the pertinent sub-paragraph to the 1st Plaintiff now deceased, is sub-paragraph 3 thereof. The other sub-paragraphs, for the purpose of this appeal are very much alive. The effect of the customary method of succession to the stool of Ovie of Otuo vis-a-vis the declaration of 1964 and that of 1979, and the relevant enabling law i.e. Chiefs Law, must still be considered. The question of whether the 1st Plaintiff was to succeed to the stool died with him. I therefore find that the appeal is properly subsisting. (P.27 L.28)

Statutory provision for making an order

2. Where there is a statutory provision for making an order or declaration and the making of the same is reposed in a named office, whether-Minister or Commissioner, or indeed whether President of the Republic or Governor of a State, such function cannot be usurped by the Court. The furthest a Court of Law can go is to declare as to validity or otherwise of that order or declaration of a public officer; but the court has not got the jurisdiction to take over the functions of such public officer by making its own order or declaration as against the statutory provisions. Learned trial Judge could nullify the Declaration but no law permits him to make the alternative declaration; he was therefore in error to have substituted his own notion of how the declaration ought to be for what a public officer only could make under the Chiefs Law. The Chiefs Law of Bendel State (No. 16 of 1979) clearly lays down the procedure for making a chieftaincy declaration and who is to make it. The court is not to make such a declaration. (P.28 L.9)

Function of the court

3. Of great interest is that nowhere in the claim did the parties ask the trial Court to formulate for them a declaration. The function of the Court is to look into the areas of dispute between the parties and find where the law supports the facts as pleaded by the parties and then give judgment. It is not the function of a judge to award remedy not asked for, he must confine himself to what the parties have put before him. (P.28 L.23)

Trial Court's findings of fact

4. If findings are based on matters not pleaded or evidentially not admissible or are perverse the appellate court will do substantial justice to set them aside. Exhibits 15 and 18, documents of no substance to the case, form the basis for the findings of the trial court on rotation of the stool of Ovie of Otu. Court of Appeal was absolutely right to have set aside the findings. (P.28 L.39)

Whether chieftaincy declaration was validity made

5. On the appeal itself the Declaration of 1964 as well as that of 1979 was validly made after an inquiry as demanded by Chiefs Law (the enabling statute) and was made by the public officer empowered so to make the declaration. (P.29 L.9)

NOTABLE POINTS OF INTEREST

BELLO CJN

1. When chieftaincy declaration may be declared void

- 5 I shall only add that the Declaration made under section 8 of the Traditional Rulers and Chiefs Law 1979 of Bendel State was the law at the material time regulating succession to the title of Ovie of Otuo. The Declaration had the force of law and a court of law had a duty to give affect to it and enforce it. It could only be invalidated or declared void, if it was inconsistent with the
- 10 provisions of any law or with any of the provisions of the Constitution. The trial judge declared it void when there was no such inconsistency. The Court of Appeal quite rightly set aside his decision. (P.30 L.12)

ONU JSC

15 ***2. General effect of death of a party in an action***

- Generally, a dead person is no longer in the eyes of the law a person but in the eyes of the law, he is a person who ceased to have any legal personality from the date of his death and as such, can neither sue nor be sued either personally or in a representative capacity. The personality of a human being is extin-
- 20 guished by his death. The common law principle expressed in the maxim action persnalis moritur cum persona presupposes a cause of action arising when both the plaintiff and the defendant are alive and will regard the cause of action as ceased upon the death of either the plaintiff or the defendant. (P.7L 1)

25 **REPRESENTATION**

Kayode Sofbla with D.O. Coker for the appellants
Chief Ojo Esemokhai for 5th respondent.

CASES REFERRED TO

- 30 Adigun v. A-G Oyo State (1987) 1NWLR 678
Porobo v. Ngbo (1990) NWLR (Pt.134) 566
Obioma v. Olomu (1978) 3 SC 1
Obayagbona v. Obazee (1972) 5 SC 247 4
Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.81) 129
35 Ekwunife v. Wayne (WA) Ltd (1989) 5 NWLR (Pt.122) 422
Ekpenyong v. Nyong (1975) 2SC 71
S.C.O.A Motors Onitsha v. Abumchukwu (1973)4 SC 51

Eguamwense v. Amaghizemwen (1993) 9 NWLR (Pt. 315) 41

Kareem v. Wema Bank (1991) 2 NWLR (Pt. 174) 485

Hodge & Marsh (1936) All E.R. 848

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STATUTES REFERRED TO

Chiefs Law Cap. 19 Laws of Western Region of Nigeria s. 4(2)

Chiefs Law of Bendel State 1979 ss. 16, 3-5. 5(7)

LEAD JUDGMENT BY BELGORE JSC

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The trial of this matter was at Auchi Judicial Division of the High Court of Bendel State. In a further Statement of Claim running to seventy-five paragraphs which in the main recounted the history of Otuo Community and their social organisations, the final paragraph 75 contains the claim which it is useful to set out as hereinunder:

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“A Declaration that the order of rotation of Otuo Ruling Houses as contained in the draft Otuo Chieftaincy Declaration of 23/1/1957 and as amended in the 15/9/1979 draft Otuo Chieftaincy Declaration which makes the rotation Of Otuo Ruling Houses to be in accordance with the descending order of the traditional order of seniority of the Otuo Ruling Houses is the correct and appropriate order of rotation of the Ruling Houses according to Otuo Customary Law regulating the succession to the Traditional Ruler Title of the Ovie (Ororoso) of Otuo and that the said 15th September, 1979 draft Otuo Chieftaincy Declaration be declared as the correct, proper, acceptable and registerable Otuo Chieftaincy Declaration made under Section 3 (2) of the Traditional Rulers and Chiefs Edict (now Law) 1979 of the customary law regulating the succession of the Traditional Ruler Title of the Ovie (or Ororoso) of Otuo Chieftaincy.

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2. A Declaration that:

(a) The registered Otuo Chieftaincy Declaration of 1964.

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(b) The decisions contained in the Bendel State Government white paper on the Report of the Ofili Commission of Inquiry into the Disturbances at Otuo, and

(c) The B.S.L.N. 141 of 1979 Declaration of the Customary Law regulating succession to the Traditional Ruler Title of the Ovie of Otuo; are null and void in that they are contrary to the Otuo Customary Law Regulating order of rotation and succession to the Traditional Ruler Title of the Ovie (Ororoso) of Otuo.

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3. A Declaration *that the 17th December, 1973 appointments of the then*

incoming Otuo Traditional Ruler and Traditional Chiefs whereby the first plaintiff was appointed the Ovie-elect (Oloroso) of Otuo by Otuo Kingmakers presided over by the out-going Ovie of Otuo, chief Igbauma Idehai, are
 5 correct, proper, valid and in accordance with Otuo Customary Law regulating the succession to the Traditional Ruler Title of the Ovie (Oloroso of Otuo and that the First Plaintiff be declared the Lawful holder and validly appointed Ovie (Oloroso) of Otuo being the one duly appointed by those entitled and empowered under Otuo Customary law to appoint an Ovie
 10 (Oloroso) of Otuo.

4. A Declaration that the appointment and approval of the fifth Defendant as the Ovie of Otuo by the First, Second, Third and Fourth Defendants are contrary to the provisions of (The Traditional Rulers and Chiefs Edict (now Law) 1979 and Otuo Customary Law regulating the succession
 15 to the Traditional Ruler Title of the Ovie (Oloroso) of Otuo and that the said appointment and approval he declared null and void

5. A Declaration that the said appointment and approval of the Fifth Defendant as the Ovie of Otuo are also contrary to and at variance with the decision contained in the Bendel State Government White Paper on
 20 the Report of the Ofili Commission of Inquiry into the Disturbances at Otuo and the two Bendel State Traditional Ruler and Chiefs Edicts, 1979, Extraordinary Gazette Number 16 and B.S.L.N. 141 and the said appointment and approval he declared null and void.

25 6. A perpetual injunction restraining the Defendants from holding 5th defendant as the Lawful Ovie (Oloroso) of Otuo or as a Lawful out-going or retiring Ovie (Oloroso of Otuo qualified to head the next kingmakers in the appointment of the succeeding Ovie (Oloroso) of Otuo with his Traditional Chiefs."

30 In the amended Statement of Defence the 4th and 5th Defendants made some admissions but the most pertinent to a decision of this appeal are the ones pertaining to the rotational nature of appointment of Otuo that the custom of Otuo was that the Ovie (Head Chief) should reign for a single term of ten years and any individual so appointed shall not be installed for a
 35 second term. This in essence is that the Ovie of Otuo is not appointed for life. There is a dispute as to the title of Ovie i.e. where it used to be called Oloroso or has always been called Ovie, this however does not affect the main issue. For the purpose of this matter the title Ode will be adhered to. Each party agrees that an Ovie has a single term of ten years and if alive up to that length

of time he abdicates for a new one.

The plaintiffs as well as the 4th and 5th defendants are from Otuo Community. Whilst the plaintiffs belong to Orlirla Ruling House, the defendants 4 and 5 are of Amova Ohigba (or Amoya Nrene).

According to the plaintiffs the Otuo people (Otuo is a corruption of 5 the Benin word (Ghotuo) migrated to the hills where they now have their abodes since the reign of Oba of Benin known as Ozolua between the close of 15th and first half of the first decade of 16th century (1481 - 1504 C.C). They moved out of Benin as war age groups of twelve from six quarters of Benin City; they are conveniently called twelve war companies. These is turn, on 10 getting to the hilly countryside now known as Otuo settled in six group's on the hills around and the six are:

1. Orlumba (also called Olumba)
2. Orlirla (also called Olila)
3. Amoya
4. Iyen (also spelt Iyewu)
5. Izhokha (also spelt Izioha)
6. Imharbu (also spelt Imafun)

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According to the plaintiffs/appellants these six form the principal Otuo quarters or wards now and are the ruling houses". The statement of 20 claim running into over seventy paragraphs and sub-paragraphs attempted a graphic history of Otuo people since they left Benin City about four hundred years ago. There are systems of age groups, promotion from one age group to a higher age group. In the beginning, they were monarchical but when some 25 Ovies became tyrannical it was decided to have a system whereby no Ovie would reign for more than ten years. It was not an election as such that decided who the next Ovie would be; the outgoing Ovie and his council made up of highest age group from the six quarters of Otuo will perform Igbogbo Chieftaincy festival is every ten years and the Ovie performing that festival 30 abdicates for the next Ovie. Thus by age group the oldest members of the Community who are under 90 years but more than 65 years of age known as Ikherho and Ikheheghoki form the new cabinet with the oldest made Ovie. The 35 Otuos agree this was the practice al along and it was respected practice. However, as is common nowadays, far away administrative and political headquarters wade into age old customs and make laws to streamline them or modify them. Thus in 1964, the Government of Mid-Western Region of Nigeria by virtue of section 4(2) Chiefs Law (Cap 19 Laws of Western Region of Nigeria (applicable in Mid-Western Region) made a Declaration (Exhibit I) as follows:

i. 'Ruling quarters

There are six ruling quarters and the identity of each ruling quarter is as follows:

- (1) Oluma – Amohon
- 5 (2) Amoya - Ohigba
- (3) Iyeu (Comprising Uzawa, Imorukpa,
Imakhise and Ikhueran)
- (4) Orake - Olila
- (5) Ihiokpa - Igheha
- 10 (6) Imafun (Obo-Urere) (now ruling)

ii. Order of (Rotation:

The Ovieship rotation in the following order among the ruling quarters:-

- (1) Oluma - Amoho (to present the next candidate)
- 15 (2) Amoya - Ohigba
- (3) Iyeu (comprising Uzawa, Imorukpa,
Imakhise and Ikhueran)
- (4) Orake - Olila
- (5) Ihiokpa - Igheha
- 20 (6) Imafun (Obo-Urere) (now ruling)

iii. Kingmakers:

(a) There are twelve Kingmakers. These are the members of the age-group of an out-going Ovie drawn from the six ruling quarters in the manner described in paragraph 3 (b) of this Declaration. The age-group of an out-
25 going Ovie is called the Igheghoki group and to be eligible for selection as a kingmaker, a member of the group must have performed the ceremony which entitles a member to the staff of office of the Igheghoki group known as "Ugbo."

(b) The two eldest members of the Igheghoki group in each ruling
30 quarter represent each of the six ruling quarters in the college (cabinet) of kingmakers, provided that where a ruling quarter is made up of two or more sub-quarters, the two kingmakers representing the quarter are not drawn from one sub-quarter but from two different sub-quarters, in such a manner that the selection of the quarter's representatives shall from time to time
35 rotate among the sub-quarters.

iv. Qualifications required of Candidates:

The persons who may be nominated to fill successive vacancies in the Chieftaincy shall be -

- (i) Male members of the entitled ruling quarter who belong to the

male line of the quarter.

(ii) *Members of the age-group next in rank to the Igheghoki group.*

v. *Method of Nomination and appointment:*

Upon the notification of a vacancy in the Ovie title by the Secretary of the competent Council. The eldest male member of the ruling quarter shall summon a meeting of the quarter at which a candidate or candidates shall be nominated for presentation to the Kingmakers of Otwa. The Kingmakers shall thereupon meet at the instance of their eldest member and appoint the Ovie, provided that where two or more candidates are nominated by the entitled ruling quarter. The candidate who obtained a majority of votes of the Kingmakers present and voting shall be declared appointed. Notice of meetings or Kingmakers shall be served upon every Kingmakers by the authority empowered to summon meetings of Kingmakers and proof of service shall be furnished in case of dispute.

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vi. *Consent to Appointment:*

No one's consent is required to an appointment to the Chieftaincy.

vii. *Tenure of Office:*

Once an Ovie is appointed, he rules unless he is incapacitated by ill-health or is deposed or abdicates.

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By this Declaration time honoured practice of having Ovie for a single term of ten years was abrogated, as paragraph vii of the Declaration makes clear. This Declaration was resented by all the communities of Otuo and petitions and representations were made to the Government through the Ministry responsible for chieftaincy matters. The republican nature of communal cohabitation among Otuo people was thus replaced by monarchical system. The competent authority under Western Nigeria Legal Notice No. 22 of 1959, Ivbiosakon District Council never took into consideration the peculiar nature of Oviship in Otuo into consideration.

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For the Defendants, it must be stated that not all averments in Statement of claim are admitted. Whilst admitting that the tenure of Ovie of Otuo is a single ten year term, gave a completely different order of seniority in selecting the Otuo. Thus the statement of defence in paragraphs 10, 11, 17, state clearly as follows:

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“The Defendants admit paragraph 23 of the Statement of claim to the extent that Otuo is ruled by Age grade system, with tenure of office for 10 years without re-election. The Defendants deny the other averments contained in paragraph 23 and put the Plaintiffs to the strictest proof of same.

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The Defendants deny the fact that there is anything in Otuo as Ororoship. The Defendants avers that the Ovie of Otuo Chieftaincy title is rotational amongst the six Ruling Houses. The Defendants deny the order of Rotation contained in paragraph 24 of the Plaintiffs' Statement of claim.

5 *In further answer to paragraph 24 of the Plaintiffs' statement of claim, the Defendants aver that evidence shall be led at the trial to prove that Amoya/Ohigbai Ruling House come next to Oluma/Amoho Ruling House. Evidence shall be led to prove that Olila/Orake Ruling House is number 4 in*
 10 *the order of rotation of the Ovie Chieftaincy title in Otuo.*

The Defendants admit paragraph 30 to the extent that the Ovie retire with his age grade at the end of the ten years period of his reign. The Defendants shall at the trial lead evidence of Otuo Custom as regards:-

15 *(a) The appointment of a new Ovie of Otuo.*
(b) The appointment of Erinheha and Eringbeva by the different quarters".

Finally in paragraph 49 of the statement of Defence the following
 20 averments were made:

"In answer to paragraph 75 of the amended statement or claim, the 4th and 5th Defendants aver as follows:-

(a) The Traditional Ruler or Otuo is known as Ovie and not Ororoso.
(b) That there was no draft Otuo Chieftaincy Declaration on 23/1/57 but a
 25 *meeting of the then Ivbiosakon (now Owan) Chieftaincy committee at Otuo.*

(c) That the 1st Plaintiff was not appointed in accordance with the chiefs Law as there was a reigning Ovie of Otuo.

(d) That the Defendants and the Plaintiffs are not competent to draw
 30 *up a Chieftaincy Declaration for Otuo.*

(e) That the Ovie of Otuo and the 1st Defendant were informed in Benin City on the 18th February 1974 that the purported election of the 1st Plaintiff as Ovie elect was illegal and void.

The Defendants shall rely at the trial or this action on the minutes
 35 *of the meeting, held with the Ovie or Otuo and the Otuo kingmakers by the Honourable Commissioner for Local Government and Chieftaincy Affairs on Monday 18th February 1974 and all other documents, papers and materials connected and related to Otuo Chieftaincy in particular the Ovie of Otuo".*

Despite the 1964 Declaration, all the communities of Otuo i.e. the six groups

were averse to the notion of life tenure for their Ovie and preferred the system of ten year single term. There were petitions and representations to the Government in Benin and this led to the new Declaration (Exhibit 2) of 1979 which reads as follows: “DECLARATION MADE UNDER SECTION 8 OF THE TRADITIONAL RULERS AND CHIEFS EDICT, 1979 STATING THE CUSTOMARY LAW REGULATING SUCCESS/ON TO THE TITLE OF OVIE OF OTUO”⁵

There are six Ruling Houses in Otuo known as Oluma-Amahon, Amoya Ohigha, Iyeu (comprising Uzewa, Imorukpa, Imakhise, and Ikhueran), Orake- Olila, Ohiekha-Ighera, and Imafun (Obo-Urere).

2. Succession rotates around the Ruling Houses in the order stated above, and passes at the expiration of the tenth year of an Ovie’s rule.¹⁰

3. To qualify, a candidate must be an adult male of patrilineal descent in the appropriate Ruling House, a member of the Imheheghoki age group and an Erinheha title holder.¹⁵

4. When a vacancy occurs, the eldest male member of the appropriate Ruling House summons and presides over a meeting of the said Ruling House for the purpose of nominating a candidate(s) for presentation to the Kingmakers. There are twelve kingmakers comprising the two eldest members from each of the Ruling Houses drawn from amongst the age group of the decease or outgoing Ovie ‘s age grade Ikheheghoki. Where a Ruling House is sub-divided, selection of the two eldest members shall as much as possible and from time to time reflect the sub-divisions.²⁰

5. The eldest Kingmaker shall summon the Kingmakers’ meeting written notice of which shall be served upon every-Kingmaker by the authority empowered to summon such meeting, and where necessary, proof of service shall be furnished. At the meeting of the Kingmakers called for this purpose and presided over by the eldest kingmaker, the candidate, if one, is approved by consensus or otherwise by a simple majority of votes of those present and voting. DATED at Benin City this 28th day of September 1979”.²⁵
³⁰

After hearing the parties and considering the pleadings, learned trial judge, Akpovi J. (as he then was) came to a conclusion that the plaintiffs case was proved and held that the Declarations of 1964 and 1979 were null and void of no effect. He never stopped here, rather he went further and made declaration in the following vein: “It should be remarked that the 5th defendant who was qualified to perform these ceremonies was not allowed by the people to perform these yearly rituals. The purported nomination of the 5th defendant as Ovie of Otuo as contained in Exhibit ‘21’ was irregular and wrong according to the custom, more particularly when the retiring Ovie Chief³⁵

Igbauma Idehi (PW2) whose prerogative it was to preside over such an exercise was conspicuously absent. The 5th defendant was not a senior Chief of cabinet rank and was not elected by the proper kingmakers. So his appointment was of no effect. I accordingly hold the case of the plaintiffs as proved. I hereby make the following declaration:-

1. That a substitute chieftaincy declaration based on my findings in this case (pages 15 to 16 Supra) be made as relating to the Ororoso or Ovie of Otuo, the seniority, rotation, selection and qualification of the kingmakers and ruling houses based on the evidence led before me, which evidence was a reflection of Exhibit '15', a document prepared and presented to Government by the Ivbiosokon District Council Chieftaincy Declaration Committee of 23rd January, 1957 and Exhibit '18', a Declaration prepared by the Otuo Council of Chiefs on the 15th September, 1979.

2. That as the traditional ruler has been variously called Ororoso or Ovie, the title Ororoso should be preferred as there are many idol priests in Otuo who are properly called Ovie.

3. That the following are hereby declared null and void as being inconsistent with procedure of the chieftaincy law and the chieftaincy customary law of Otuo

(a). The registered Otuo Chieftaincy Declaration of Otuo of 1964 Exhibit '1',

(b) The decisions contained in the Bendel State Government White Paper on the report of the Ofili Commission of Enquiry into the disturbances in Otuo, Exhibit '3' and

(c) The Bendel State Legal Notice No.141 of 1979 as per Exhibit '2', a Declaration of the customary law relating to succession to the traditional ruler title of the Ovie of Otuo.

4. That the appointments of the 1st plaintiff on the 17th December, 1973 as the in-coming traditional ruler and of the traditional chief." presided over by the out-going Ororoso, Chief Igbauma Idehai (PW2) were proper, correct and valid and in accordance with Otuo customary law regulating the succession to the traditional ruler title of Otuo.

5. That the appointment of the 5th defendant as the Ovie of Otuo was also null and void.

As the 5th defendant has already left office by the time of this judgment there would be no need to order an injunction against the 1st to 3rd defendants from treating the 5th defendant as an Ovie of Otuo. An injunction would however issue to restrain the 5th defendant from pulling himself forward as an outgoing or retiring Ovie or Ororoso of Otuo and from regarding himself

as head of the next set of kingmakers from the appointment of the next Ovie or Ororoso of Otuo and his traditional chiefs.

The Plaintiffs are entitled to the costs of this action which I have accessed (sic) at #750.00 against the 4th and 5th defendants jointly and severally.“

This decision led to the appeal to Court of Appeal, Benin Division. It must be pointed out that Exhibit 2 (supra) was made after due enquiry had been made by the Government - Ofili Commission of Inquiry and Ighodaro Chieftaincy Review Commission which led to Traditional Rulers and Chiefs Edict of 1979. The Court of Appeal allowed the appeal. Ogundare, J.C.A. (as he then was) in reviewing what took place in trial Court by way of evidence adverted to the issues formulated by the parties based on grounds of appeal before the Court and faulted the findings of trial High Court which he quoted in extenso with his comments as follows:

“The finding of the learned trial Judge that the incumbent Ovie; Chief Idehai (PW2) abdicated in 1973 is, with utmost respect to the learned judge, not borne out by the preponderance of the evidence before him. He said in his judgment;

“I do not agree with Mr. Esemokhai that there was no vacancy in 1973 when the 1st Plaintiff was appointed Ovie. I have accepted the evidence coming directly from the predecessor-in-office, Chief Igbauma Idehai (PW2) that he had been appointed to rule Otuo for life but when he realized that 2 the people kicked against his life tenureship as inconsistent with Otuo customary law, he complied with that customary law by abdicating his oviership after running his full term of 10 years, and then presided over the lithier king-makers in nominating and electing the 1st plaintiff. He was therefore no longer an Ovie on the 17th of December 1973, when the 1st plaintiff was installed Ovie. Although government in their White paper (Exhibit ‘3’) based on Ofili Commission of Enquiry talks of removing from office Chief Igbauma Idehai (PW2) in 1979, he had long left office”.

Later the learned Judge added:-

“By way of observation I should record that by Exhibits ‘7’, ‘10’ and ‘11’, 3 the official records continued to treat Chief Igbauma Idehai (P. W. 2) as Ovie up to 1975. This means that he was still regarded as Ovie. This is a confusion which arose from the officials treating Chief Igbauma Idehai as still reigning Ovie after 1973 when he had abdicated in accordance with Otuo customary law and the people had long ceased to treat HIM AS Ovie in Otuo. The situation was that he was Ovie de Juro in the hands of the officials and a retired Ovie de facto before the people. This sort of situation arose from the usual bogey of official recognition of chiefs in this country. 1st plaintiff as a chief appointed by his people could not totally hold out himself

as the chief until after Government's recognition or approval. The situation that obtained in Otuo was that Chief Igbauma Idehai had abdicated as Ovie, in 1973 and had customarily presided over the nomination and election of the 1st plaintiff in the same year and the 1st plaintiff had fulfilled all customary procedures and was de facto the ruler of Otuo yet Government went and hand-picked the 5th defendant without the backing of the customary law and procedure and gave him paper recognition as the Ovie of Otuo “.

On what evidence was this finding based? PW2, the incumbent Ovie at the time Exhibit 1 was registered, testified and said in his evidence in chief:-

“I was Oba of Otuo from 1961 to 1973 for 12 years. When I completed my term of office I handed over to the next age group of company. I handed over directly to 1st plaintiff. The Obaship is rotated according to seniority of Oluma, Orlirla, Ohigba”.

Cross-examined, he said:

“I was gazetted for life as Oba”.

The witness was silent as to the method of his abdication. In Exhibits 7 & 7A, however, he attended a meeting on 18/2/74 with the Commissioner for Local Government and Chieftaincy Affairs in his capacity as the Ovie of Otuo. Among other Chiefs and elders of Otuo present at the meeting were the 2nd appellant and the 1st respondent. He spoke at length at that meeting as Ovie. He was quoted as saying at the meeting:

“The Ovie denied that he told the king-makers that he had abdicated and that Chief Ajakaiye was to succeed him”.

Again in Exhibit 11, a letter PW2 wrote on 31st January 1974 in his capacity as Ovie of Otuo, he described the 1st Respondent therein as “*Otuo Traditional Rider elect*”. On 17th April, 1974, PW2 in his capacity as Ovie of Otuo wrote Exhibit 17 to the Hon. Commissioner, Ministry of Local Government and Chieftaincy Affairs and in it he wrote as follows:

Chief Peter Higo Ajakaiye (Elu Edelgbini) of Orihirla as Head of Orlirla Orake Ruling House, the Ororoso of Otuo-elect (First Enriyheha) who is to succeed me either after my death or after the Government has set aside the 3rd February 1964 registered Otuo Chieftaincy Declaration.”

In the face of all these documentary evidence of what the PW2 wrote or said in 1974 it is difficult to see how the trial Judge arrived at his finding that PW2 abdicated in 1973. The learned Judge ought not to have accepted PW2 's oral evidence in court. On the totality of the evidence at the trial, the finding that PW2 had abdicated in 1973 is clearly perverse and I have no hesitation in setting it aside.”

Learned Justice of Court of Appeal held that the 1964 Declaration (Exhibit 1) was validly made by the then Government of Mid-Western State and properly registered. Even though Exhibit 1 did not truly reflect the customary practice of Otuo as regards tenure of office of an Ovie that would not render the Declaration invalid once it was made by proper authority. Unless it was succession to the throne of Ovie, it was valid and remained in force in December 1973 when Chief Idehai was still alive and he could not appoint a successor as he purported to have done. Thus 1964 Declaration remained valid to the exclusion of any other customary practice as regards appointment of an Ovie of Otuo. Chief Idehai could not therefore lawfully have abdicated for another person until he died or was deposed under the Chieftaincy law of the State. Even if there was a vacancy in the stool of Ovie In 1973 it could not be lawfully said that the 1st appellant (now deceased) was duly selected in accordance with the Declaration of 1964 (Exhibit 1), or in accordance with the Chiefs Law of Mid-Western State. Secondly the appointment, as required by law, was not approved by the Governor-in-Council (see S. 16 Chiefs Law of the State)

The Court of Appeal, with regard to the order of the trial Judge amounting to counter declaration to the Exhibits 1 and 2, held that such a declaration was ultra vires of the trial court and that it was as such a nullity. It is not the function of the court to draft a chieftaincy declaration, even though it could declare a declaration null and void. The pedestal relied upon by learned trial Judge, Exhibits 15 and 18 were of no effect as they were not the declarations made by the State Executive Council as required by Chiefs Law. Court of Appeal relied on the judgment of this court in Adigun & Ors vs. Attorney General of Oyo State (1987) 1 NWLR 678, 702; and on Sections 3, 4, and 5 of Chiefs Law 1979 (Bendel State 16 of 1979). Exhibit 15 was never approved by the Region's Minister responsible for chieftaincy matters and subsequent Declaration of 1964 (Exhibit 1) made the Exhibit 15 of no effect whatsoever, this is manifest in the Law itself saying in S.7(5):

“7(5) Upon a declaration in respect of a chieftaincy being made by the minister every declaration made under this law or the repealed law relating to chieftaincy that is not approved shall be void and of no effect”.

Exhibit 18 neither originated from a Traditional Council nor was it approved by the Executive Council of the State. Consequently, held the Court of Appeal, it had no force of law and could therefore form no basis to a declaration for the office of Ovie of Otuo.

As for the order made by trial Court on whether the title of the chieftaincy.

In issue known as Ovie or Ororoso, it was not a prayer asked for by any of the parties. The final decision of Court of Appeal in setting aside the decision of trial court on the Ovieship is in what was recommended in Ofili Commission of Inquiry and accepted by the Government and it is Exhibit 3. The recommendation in Exhibit 3 says:

5 *"The order, of rotation of the Ovieship embodied in the 1964 Otuo Chieftaincy Declaration should be supported and upheld as it is acceptable to the majority of those competent to express an opinion on it".*

Court of Appeal finally put the matter to rest when it held:

10 *"The sum total of all I have been saying is that on the totality of the evidence, both oral and documentary, before the learned trial Judge it is difficult to see how he could, with respect to him, come to the conclusion that there was a customary law in Otuo laying down the order, by seniority of groups of villages or quarters, of rotation for the appointment of the Ovie. In view of this, therefore, there was no stronger evidence to vitiate the report of*
 15 *the Ofili Commission and I am of the view that the government's decision ought not to be interfered with. All the authorities enjoined by law to take part in the making of a declaration having acted within the scope of their authority" it is not the business of a court to superimpose its view on their decision:*

20 *Consequently, I am of the firm view that the learned trial Judge was in error to declare the 1979 declaration void. That declaration has superseded the 1964 declaration and removed from it the patent error of customary law of Otuo as contained in the latter declaration, that is, the life tenureship of the term of office of an ovie. All sides agreed that since the*
 25 *abolition of the monarchy the Ovie had always ruled for 10 years and then replaced To that extent the 1964 declaration was wrong and this error was corrected in the 1979 declaration. The 1964 declaration having been repealed and replaced with the 1979 declaration there was no longer any*
 30 *need to pronounce on it. The 1st appellant's appointment being in accord with the existing declaration and the Law - The Traditional Rulers and Chief Law 1979, the appointment was valid and the trial Judge was wrong to declare it invalid."*

Against this decision an appeal was filed in this court. The Plaintiff/appellants in support of their grounds of appeal formulated the following
 35 issues for determination:

"ISSUE FOR DETERMINATION IN THE APPEAL:

In the Appellants view, the issues which arise for determination by this Honourable Court can be summarized as follows:

(1) Whether the Court below was not in error when it held that the 1964

Chieftaincy Declaration, Exhibit 1 in this case, was properly made, and that it therefore had a binding force of law in respect of the Ovie of Otuo Chieftaincy.

Whether the Court below was not in error when in effect it held that the learned trial Judge was wrong to have made a Declaration in respect of the Ovie of Otuo chieftaincy.

Whether the Court below was right to have set aside the Declaration Order made by the learned trial Judge to the effect that the Chieftaincy declarations of 1964 and 1979 were null and void.

Whether the Court below was not in error when it over-ruled the learned trial Judge in respect of his findings of fact in this case; and whether the judgment of that Court is not against the weight of evidence”.

Before the hearing of this appeal but after the appeal was filed first plaintiff/appellant Chief Peter Higo Ajakaiye died. We raised the effect of that death on the sustenance of this appeal, that is to say, whether the death of 1st plaintiff has not put an end to this matter, the matter being seemingly in personam. Kayode Sofola, Esq., for the appellants submitted that the matter subsists in that the action was in a representative capacity and that the issue of which house was to produce the next Ovie of Otuo is action in rem, not in, personam. He cited Adizua vs Isubua (993)5 NWLR (Pt. 295) 604; Adigun and Ors vs Attorney-General of Oyo State (1987)1 NWLR (Pt 53) 678 Oyeyemi vs Commissioner for Local Government Kwara State (1992)2 NWLR (Pt. 226) 61 and Porobo vs. Ngbo (1990) NWLR (Pt. 134) 566, 574.

For the defendants/Respondents, Chief Esemokhai, of course, insists the matter was dead since the demise of the 1st Appellant and also relied on Adigun and Ors vs Attorney-General of Oyo State (supra). We reserved our ruling to his judgment.

Looking at the claim, as in the statement of claim in paragraph 75, quoted earlier in this judgment, the pertinent sub-paragraph to the 1st Plaintiff now deceased, is sub-paragraph 3 thereof which I quote again:

A declaration that the 17th December, 1973 appointments of the then incoming Otuo Traditional Ruler and Traditional chiefs whereby the first plaintiff was appointed the Ovie - elect (Ororoso) of Otuo by Otuo Kingmakers presided over by the out-going Ovie ofotuo, Chief Igbauma Idehai, are correct, proper, valid and in accordance with Otuo customary law regulating the succession to the Traditional Rule Title of the Ovie (Ororoso) of Otuo and that the First Plaintiff be declared the lawful holder and validly appointed Ovie (Ororoso) of Otuo being the one duly appointed by those entitled and empowered under Otuo Customary Law to appoint on Ovie

28 Ajakaiye v. Mil. Gov. of Bendel State (1994) 13 KLR Belgore JSC
9Ororoso) of Otuo.”

The other sub-paragraphs, for the purpose of this appeal are very much alive.

The effect of the customary method of succession to the stool of Ovie
of Otuo vis-a-vis the declaration of 1964 and that of 1979, and the relevant
enabling law i.e. Chiefs Law must still be considered. The question of whether
5 the 1st Plaintiff was to succeed to the stool died with him. I therefore find that
the appeal is properly subsisting. Claim 3 quoted above is not the main claim,
it is at best ancillary to the main claim and finally died with the 1st plaintiff/
appellant.

Where there is a statutory provision for making an order or declara-
10 tion and the making of the same is reposed in a named office, whether Minister
or Commissioner, or indeed whether President of the Republic or Governor
of a State, such function cannot be usurped by the Court. The furthest a Court
of Law can go is to declare as to validity or otherwise of that order or declara-
tion of a public officer; but the court has not got the jurisdiction to take over
15 the functions of such public officer by making its own order or declaration as
against the statutory provisions. Learned trial Judge could nullify the Decla-
ration but no law permits him to make the alternative declaration; he was
therefore in error to have substituted his own notion of how, the declaration
ought to be for what a public officer only could make under the Chiefs Law.

20 Adigun and Ors vs Attorney-General of Oyo State (1957) 1 NWLR (Pt.
53) 678. The Chiefs Law of Bendel State (No. 16 of 1979) clearly lays down the
procedure for making a chieftaincy declaration and who is to make it. The
court is not to make such a declaration. Of great interest is that nowhere in the
claim did the parties ask the trial Court to formulate for them a declaration. The
25 function of the Court is to look into the areas of dispute between the parties
and find where the law supports the facts as pleaded by the parties and then
give judgment. It is not the function of a judge to award remedy not asked for,
he must confine himself to what the parties have put before him. Adigun and
Ors vs Attorney-General of Oyo State (supra).

30 Exhibits 15 and 18 are not declarations for the purpose of Chiefs Law
(supra) as they were never put before the public officer statutorily empowered
to make declarations. All these, in short, mean that trial Judge overlooked a
fundamental principle of our adjudication process that a Court hears no prayers
than those put before it. Obioma vs Olomu (1978) 3 S.C. 1; Elumeze vs, Elumeze
35 (1969) 1 All N.L.R 311; Chief Registrar vs Amos (1976) 1 S.C. 33; Obayagbona
vs Obazee (1972) 5 S.C. 247.

The appellate court, it has been repeatedly held, must be wary of setting
aside findings of fact by trial judge. That principle subsists up to now in law.

But not all such findings of fact can be found to stand to this principle. If

findings are based on matters not pleaded or evidentially not admissible or are perverse the appellate court will do substantial justice to set them aside. Exhibits 15 and 18, documents of no substance to the case, form the basis for the findings of the trial court on rotation of the stool of Ovie of Otuo. Court of Appeal was absolutely right to have set aside the findings. [Aladegbemi vs Fasanmade (1988)3 NWLR (pt. 81) 129; Agbonifo vs Alerioba (1988)1 NWLR 5 (Pt. 70) 325; Ogbechie vs Onochie (1986)2 NWLR (Pt. 23) 484; Oilfied Supply Centre Ltd. vs Jolmson (1987) 2 NWLR (Pt. 58) 625; Ekwunife vs Wayne (WA) Ltd. (1989) 5 NWLR (Pt. 122) 422].

On the appeal itself the Declaration of 1964 as well as that of 1979 was validly made after an inquiry as demanded by Chiefs Law (the enabling statute) and was made by the public officer empowered so to make the declaration. There was ample evidence before the trial Court, which Court of Appeal highlighted that there were always disputes in the appointment of the ovie of Otuo; and from paragraph 13 of Exhibit 16, a colonial District Officer's Report, the rotational system was set and not in dispute, but there was no particular order of rotation among the villages or quarters from 1870 to 1901 and it was after 1901 that a pattern of rotation emerged which found favour in the Declarations of 1964 and 1979. There were dissents and petitions on 1964 Declaration, but for that period up to 1979 that was the law.

By the 1979 Declaration the matter was settled once and for all. As Ogundare, J.C.A (as he then was) said in his lead judgment, to wit.

"The sum total of all I have been saying is that on the totality of the evidence, both oral and documentary, before the learned trial Judge it is difficult to see how he could, with respect to him, come to the conclusion there was a customary law in Otuo laying down the order, by seniority of seniority of villages or quarters, of rotation for the appointment of the Ovie in view of this, therefore, there was no stronger evidence to vitiate the report of the Ofili Commission and I am of the view that the government decision ought not to be interfered with. All the authorities enjoined by law to take part in the making of a declaration having acted within the scope of their authority, it is not the business of a court to super impose its view on their decision.

Consequently, I am of the firm view that the learned trial Judge was in error to declare the 1979 declaration void. That declaration has superceded the 1964 declaration and removed front it the patent error of customary law of Otuo as contained in the latter declarations, that is, the life tenureship of term of office of an Ovie. All sides agreed that since the abolition of the monarchy the Ovie had always ruled for 10 years and then replaced to that extent 1964 declaration was wrong and this error was corrected in th1979

30 Ajakaiye v. Mil. Gov. of Bendel State (1994) 13 KLR Belgore JSC
declaration. The 1964 declaration having been repealed and replaced with
the 1979 declaration there was no longer any need to, pronounce on it.
The 1st appellant's appointment being in accord with the existing declara-
tion and the law- The Traditional Rulers and Chiefs Law, 1979, the appoint-
ment was valid and the trial judge was wrong to declare it invalid."

5 There was nothing in law to fault the 1979 Declaration and it is valid.
This appeal therefore lacks merit and it is in entirety dismissed. I award #1,000.00
costs against the appellants in favour of each set of respondents.

BELLO CJN

10 I have read the lead judgment of my learned brother, Belgore, JSC. I
agree with his reasoning and conclusion that the appeal should be dismissed.

I shall only add that the Declaration made under section 8 of the
Traditional Rulers and Chiefs Law 1979 of Bendel State was the law at the
material time regulating succession to the title of Ovie of Otuo. The Declara-
15 tion had the force of law and a court of law had a duty to give affect to it and
enforce it could only be invalidated or declared void, if it was inconsistent
with the provisions of any law or with any of the provisions of the Constitu-
tion. The trial judge declared it void when there was no such inconsistency.
The Court of Appeal quite rightly set aside his decision.

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KUTIGI JSC

I have had the opportunity of reading in advance the judgment just
delivered by my learned brother Belgore, J.S.C. I agree with his reasoning and
conclusions. The appeal is dismissed with costs as assessed.

25

ONU JSC

Having had the privilege of reading in draft the judgment of my
learned brother Belgore, J.S.C. just delivered, I agree with it that the appeal
lacks merit and ought to fail.

30 I wish to add by way of emphasis the following contribution of mine.
The two plaintiffs, herein applicants, sued five defendants, two of whom (i.e.

35

4th and 5th are now respondents – the 1st, 2nd and 3rd defendants having declined to take any further part in proceedings after the judgment of the High Court of then Bendel State holden at Auchu - claiming, among other reliefs, what I regard as a most prolix statement of claim abridged herein as follows:

“(1) A Declaration that the order of rotation of Otuo Ruling Houses as contained in the draft Chieftaincy Declaration of 231111957 and as amended in the 151911979 draft Otuo Chieftaincy Declaration which makes the ‘rotation of Otuo ruling Houses to be in accordance with the descending order of the traditional order of seniority of the Otuo Ruling Houses is the correct and appropriate order of rotation of the Ruling Houses according to Otuo Customary law regulating the succession to the Traditional Ruler Title of the ovie (Ororoso) of Otuo and that the said 15th September, 1979 draft Otuo Chieftaincy Declaration be declared and registrable Otuo Chieftaincy Declaration made under 3 (2) of the Traditional Rulers and Chiefs Edict (now Law) 1979 of the Customary law regulating the succession of the Traditional Rulers Title of the Ovie of Ororoso) of Otuo Chieftaincy.

(2) A Declaration that:

(a) The registered Otuo Chieftaincy Declaration of 1984

(b) The decisions contained in the Bendel State Government White Paper on the Report of the Ofili Commission on Inquiry into the Disturbances at Otuo, and

(c) The B.S.L.N. 141 of 1979 Declaration of the Customary Law regulating succession to Traditional Ruler Title of the Ovie of Otuo are null and void in that they are contrary to the Otuo Customary Law Regulation the Order of rotation and the succession to the Traditional Ruler Title of the Ovie (Ororoso) of Otuo.

(3) A Declaration that the 17th December, 1973 appointments of the then incoming Otuo Traditional Ruler and Traditional Chiefs whereby first plaintiff was appointed the Ovie-elect (Ororoso) of Otuo Kingmakers presided over by the Ovie of Otuo, Chief Igbauma Idehai, are correct, proper, valid and in accordance with Otuo customary law regulating the succession to the Traditional Ruler Title of the Ovie (Ororoso) of Otuo and that the first plaintiff be declared the lawful holder and validly appointed Ovie (Ororoso) of Otuo being the one duly appointed by those entitled to and empowered under Otuo Customay Law to appoint an Ovie (Ororoso) of Otuo.

(4) A Declaration that the appointment and approval of the fifth Defendant as the ovie of Otuo by the First, Second, Third and Fourth Defen-

dants are contrary to the provisions of the Traditional Rulers and Chiefs Edict (now law) 1979 and Otuo Customary Law regulating the succession to the Traditional Ruler Title of the Ovie (Ororoso) of Otuo and that the said appointment and approval he declared null and void.

5 x x x x x x x x
A perpetual injunction restraining the defendants from holding 5th defendants out as the lawful Ovie (Ororoso) of Otuo or as a lawful outgoing or retiring Ovie (Ororoso) of Otuo qualified to head the next kingmakers in the appointment of the succeeding Ovie (Ororoso) of Otuo with his Traditional Chief”

10 The facts of the case have been so comprehensively and admirably set out in the lead judgment of my learned brother Belgore, J.S.C. that I do not in any way intend to repeat them.

Pleadings having been ordered and filed, the parties amended their
 15 statement of claim and defence, the latter in which the 4th and 5th defendants made certain admissions pertaining to the rotational nature of the appointment of Otuo, to wit: that the custom of Otuo was that the Ovie should reign for a single term of ten years and any individual so appointed shall not be installed for a second term. In other words, that the Ovieship of Otuo is not
 20 monarchical or hereditary but an office held for a single term of ten years albeit that the differential in what name to call it - Ororoso or Ovie, the fact that its term is for ten years makes for abdication instead of for life and that being agreed to by all, ensures its enduring features.

The two plaintiffs/appellants testified and called five witnesses in support of their case while seven witnesses in all including 5th defendant/respondent gave evidence for the defence. In a reserved judgment, Akpovi, J (as he then was) found for the plaintiffs/appellants, and ordering in conclusion -

“3. That the following are hereby declared null and void as being, inconsistent with the procedure of the Chieftaincy Customary Law of Otuo

30 (a) The registered Otuo Chieftaincy Declaration of Otuo 1964 Exhibit 1

(b) The decisions contained in the Bendel State government white Paper on the Report of the Ofili commission of Enquiry into the disturbances in Otuo; Exhibit 3; and

(c) The Bendel State Legal Notice No. 141 of 1979 as per Exhibit 2,
 35 a Declaration of the Customary Law relating to succession to the traditional ruler title of the Ovie of Otuo.

4. That the appointment of the 1st plaintiff on the 17th December, 1973, as the in-coming traditional ruler and of the traditional Chiefs presided over by the out-going Ororoso, Chief Igbauma Idehai (PW2) were

proper, correct and valid and in accordance with Otuo customary law regulating the succession to the traditional ruler title of Otuo.

5. That the appointment of the 5th defendant as the Ovie of Otuo was also null and void.

As the 5th defendant had already left office by the time of this judgment, there would be no need to order an injunction against the 1st to 3rd defendants from treating the 5th defendant as an Ovie of Otuo. An Injunction would however issue to restrain the 5th defendant from putting himself forward as an outgoing or retiring Ovie or Ororoso of Otuo and from regarding himself as head of the next of kingmaker for the appointment of the next Ovie or Ororoso of Otuo and his traditional Chief.”

Aggrieved by the trial court's decision the defendants/respondents successfully appealed to the court below, which set aside the decision obtained by the plaintiffs/appellants with costs. As earlier pointed out, the 1st to 3rd defendants/respondents took no further part in the proceedings after the judgment of the trial court, while 1st plaintiff/appellant was shown to have died, leaving 2nd plaintiff/appellant. It was also subsequently shown that 4th defendant/respondent also died. However, in their appeal from the court below to this Court the following four issues were submitted on the plaintiffs/appellants' behalf for our determination, to wit:

1. Whether the court below was in error when it held that the 1964 Chieftaincy Declaration, Exhibit 1 in this case, was properly made, and that it therefore had a binding, force of law in respect of the Ovie of Otuo Chieftaincy.

2. Whether the court below was not in error when in effect it held that the learned trial judge was wrong to have made a Declaration in respect of the Ovie of Otuo Chieftaincy.

3. Whether the court below was right to have set aside the Declaration order made by the learned trial judge to the effect that the Chieftaincy Declaration of 1964 and 1979 were null and void.

4. Whether the court below was not in error when it overruled the learned judgment of that court is not against the weight of evidence.

The defendants/respondents also submitted four issues which overlapped plaintiff/appellants and I do not consider it necessary to set them out herein.

I propose to deal only with issues 1 and 2 briefly hereunder as they form the Kernel of arguments canvassed before us and represent what I consider the most of the issues for our determination of the appeal herein.

ISSUES 1:

In considering the argument put forward by the appellants with regard to this

issue, it is pertinent first to cast one's mind back to the declaration sought by them in the trial court. The declarations they were seeking as regards the 1964 Otuo Chieftaincy declaration and the Bendel State Legal Notice (BSLN 141 of 1979) i.e. Declaration of the Customary Law Regulating Succession to the Traditional Ruler Title of Ovie of Otuo as contained in paragraph 2 of the Statement of Claim, were not as to whether they were validly made or registered but the challenge was on the ground that they were contrary to the customary law regulating the order of rotation and the succession to the Traditional Ruler Title of the Ovie of Otuo. Indeed, there the appellants averred that the 1964 and Title of the 1979 Declaration were not registered. As a matter of fact to prove their registration, the appellants called PW1, a Government Official to tender the two Registered Declarations as Exhibit 1 and 2 respectively. It is noteworthy that as appellants' witness, PW1 was not asked by them whether Exhibit 1 and 2 were indeed properly registered. The case put forward by the appellants was that they had no knowledge of the contents of Exhibit 1 when it was made and that it was surreptitiously made. In that regard, they have argued that Exhibit 1 does not indicate the date it was made, the name of the Chairman and Secretary, suggest that those two officials signed the document, indicate the date it was registered if ever it was registered, indicate the name of the person who was supposed to have signed for the Permanent Secretary to the Ministry of Chieftaincy Affairs and whether, indeed, such a person ever signed the document. Since there was never a time in the trial court that there was a challenge to the validity of Exhibits 1 and 2 but rather that the order of rotation did not follow the order of seniority, the learned trial Judge was wrong when he declared unsolicited and suo motu that:

"The following are hereby declared null and void as being inconsistent with procedure of the Chieftaincy Law and Chieftaincy Customary Law of Otuo:

(a) The Registered Otuo Chieftaincy Declaration of Otuo of 1964 Exhibit 1.

(b) The decision contained in the Bendel State Government White Paper on the Report of the Ofili Commission of Enquiry into the disturbances in Otuo, Exh. 3.

(c) The Bendel State Legal Notice No.141 of 1979 as per Exh. 2, a declaration of the Customary Law relating to succession to the Traditional Ruler Title of the Ovie of Otuo. "

In coming to the above conclusion, erroneously though, the learned trial Judge had lost sight of the claim of the plaintiffs before him especially with regard to the declaration they sought. See under Declaration 2 (a) (b) and

(c) set out above. It ought to be borne in mind that a court is to grant to a litigant what he claims and not to act like Father Christmas, doing out what has not been asked for. See Ekpenyong v. Nyong (1975) 2 S.C. 71 at 80; Ubima v. Olomu (1978) 3 S.C. 1 and Makanjuola v. Balogun (1989) 3 NWLR. 192 at 206. Indeed, it is trite law that a litigant cannot be given a relief he did not ask for. See S.C.O.A. (Motor) Onitsha v. Abumchukwu (1973) 4 S.C. 51 at 59-60; John Ezeigbo v. The Lion of Africa Ins. Co. Ltd. (16 - 67) 10 ENLR. 180. It was never a dispute submitted for arbitration crime the trial court that Exhibit 1 was fully registered as required by Section 8(1) of the Chiefs Law. With its registration, it is deemed to be the Customary Law regulating the selection of a person to be the Ovie of Otuo to the exclusion of any other customary usage or rule until repealed. The argument proffered by the appellants that they were not aware of Exhibit 1 is untenable as ignorance of the law is no excuse. The Court below (per Ogundare, J.S.C. as he then was) was therefore correct, in my view, when it held inter alia as follows;

"The sum total of all I have been saying is chat on the totality of the evidence, both oral and documentary, before the learned trial Judge it is difficult to see how he could, with respect to him, come to the conclusion that there was a customary law in Otuo laying down the order, by seniority of groups of villages or quarters of rotation for appointment of the Ovie. In view of this, therefore, there was no stronger evidence to vitiate the report of the Ofili Commission and I am of the view that the government's decision ought not to be interfered with. All the authorities enjoined by law to take part in the making of a declaration having acted within the scope of their authority, it is not the business of a court to superimpose its view on their decision.

Consequently, I am of the firm view that the learned trial Judge was in error to declare the 1979 declaration void. That declaration superseded the 1964 declaration and removed from it the patent error of customary law of Otuo as contained in the latter declaration, that is, the life tenureship of the term of office of an Ovie. All sides agreed that since the abolition of the monarchy, the Ovie had always ruled for 10 years and then replaced. To that extent the 1964 declaration was wrong and this error was corrected in the 1979 declaration. The 1964 declaration having been repealed and replaced with the 1979 declaration there was no longer any need to pronounce on it. The 1st appellant's appointment being in accord with the existing declaration and the law, the Traditional Rulers and Chiefs Law, 1979, the appointment was valid and the trial Judge was wrong to declare it sic valid."

Issue 1 is accordingly resolved against the appellants.

ISSUE 2

The answer to this issue must perforce unequivocally be in the negative. This is so as the court cannot under any guise exercise its jurisdiction outside the powers conferred expressly by the legislature on bodies other than courts
 5 outside the courts' judicial authority as enacted in section 6 and 236 of the 1979 Constitution of the Federal Republic of Nigeria, as amended. Now, Section 3, 4 and 5 of the Traditional Rulers and Chiefs Law 1979, No. 16 of 1979 of the defined Bendel (now Edo) State laid down the procedure for making a Chieftaincy declaration. This law gives to the various bodies or persons functions
 10 to perform and the courts cannot usurp such powers and functions and start on their own to draw up chieftaincy declarations based on their findings in open court as happened on this occasion.

What the learned trial Judge in the instant case had indeed done was to usurp the functions of the law making body - in this case, the Ivbiosakon
 15 District Council - by drawing up a chieftaincy declaration for the people of Otuo. As Omololu - Thomas, J.C.A. aptly put it in Adigun and Others v. Attorney-General, Oyo State Suit No. CA. 1154/84 of 5th December, 1985, a dictum approved by this Court in Adigun & Others v. Attorney-General, Oyo State (1987) 1 NWLR 678 and recently re-stated also by this Court in Eguamwense v. Amaghizemwen (1993) 9 NWLR (Part 315) 1 at page 41:

20 *"It is not the business of the courts to make declarations on Customary Law relating to the selection of Chiefs under that law. The exercise of such functions is not directly related to the general jurisdiction of the Court under Section 236 of the Federal Constitution of 1979 so long as the powers
 25 exercised under the law is within its four corners and is exercised in good faith as being a power lawfully conferred by the legislature (Caltana Ltd. v. Commissioner of Works (1943) 1 All ER 560 at 564 per Lord Green M.R. In the exercise of the courts judicial function under Section 236 of the Constitu-
 30 tions, orders, declaratory of the functions or powers under the law can be made for example with view to determine the validity or otherwise of the existence of a particular custom, in contradistinction from the making of 'DECLARATION' as a form of sub-legislation under the law"*

The court below was therefore, in my firm view, right to have held that the learned trial Judge was in error to have drawn up a declaration for
 35 Otuo people. The learned Judge could, where appropriate and if moved, declare a Chieftaincy Customary declaration null and void. Aku v. Anekwu (1991) 8 NWLR 280. It remains to consider the point we raised regarding what effect the reported death of the 1st plaintiff/appellant, Chief Peter Hig Ajakaiye, before the hearing of this appeal but after the appeal was filed, had upon its

sustenance or its abatement moreso, that the case in hand is seemingly in personam. Generally, a dead person is no longer in the eyes of the law a person but in the eyes of the law, he is a person who ceased to have any legal personality from the date of his death and as such, can neither sue nor be sued either personally or in a representative capacity. The personality of a human being is extinguished by his death. The common law principle expressed in the maxim action personalize moritur cum persona presupposes a cause of action arising when both the plaintiff and the defendant are alive and will regard the cause of action as ceased upon the death of either the plaintiff or the defendant. See Kareem v. Wema Bank Ltd. (1991)2 NWLR (Part 174) 485 C.A.; Akunmoju v. Mosadolorun (1991) 9 NWLR (Part 214) 236 C.A. and Hodge v. Marsh (1936) A.E.R. 848. 5 10

In the case in hand, learned counsel for the plaintiffs/appellants, Mr. Kayode Sofola, submitted that the case subsists in that the action was commenced in a representative capacity and that the issue of which house was to produce the next Ovie of Otuo, is an action in rem and not in Personam. He cited in support of his proposition the cases of Adizua v. Isubua (1993) NWLR (Part 295) 604, where the party asking for a declaration of customary rights died and the application by someone who wished to continue the suit but whose relationship to the deceased could not be shown, was refused; Oyeyemi v. Commissioner for Local Government Kwara State (1992) 2 NWLR (Part 226) 747, where an application was made following the death of the 5th defendant in a case under Chiefs (Appointment and Deposition) Law of Northern Nigeria (applicable to Kwara State) and it was held, allowing the appeal that personal action in that regard died with the person; and also in Porobo v. Ngbo (1990) NWLR (Part 134) 566, 574 in which it was stated by the Court of Appeal, following the decision of this Court in Okonji v. Njokanma (1989) 4 NWLR (Part 114) 16 at 166-7 that when an action is instituted in a representative capacity and or against persons in a representative capacity that action is not only by or against the named parties. They also against by and against those the named parties represented. And so, if all the named parties to the action still subsists on behalf of or against those represent but who have not been stated nominees. For the defendant/respondents, Chief Esemokhai, submitted that the matter was dead since the death of 1st appellant. He relied on Adigun & ors. v. Attorney- General Oyo State (supra). 15 20 25 30

Now, sub-paragraph 3 or Declaration 3 in paragraph 75 of the plaintiff/appellants' statement of claim states

"A Declaration that the 17th December, 1973 appointments of the then incoming Otuo Traditional Ruler and whereby the first plaintiff

was appointed the *Ovie- Elect (Ororoso)* by *Otuo* kingmakers Presided over by the outgoing *Ovie* of *Otuo* Chief *Igbauma Idenai*, are correct, proper, valid and in accordance with *Otuo Customay Law* regulating the succession to the Traditional Ruler Title of the *Ovie (Ororoso)* of *Otuo* being the
 5 one duly appointed by those entitled and empowered under Otuo Customary law to appoint an *Ovie (Ororoso)* of *Otuo*."
 (Underlining above is mine).

The 1st plaintiff/appellant having died between the date of the decision by court below and the hearing of this appeal on 28th June, 1994, that
 10 application was not made for someone alive to be substituted in (deceased's) place, is not, in my respectful view, fatal to the case. The of action will therefore not cease upon 1st appellant's death since it was commenced in a representative capacity, he "*being the one duly appointed those entitled and empowered under Otuo Customary Law to appoint an *Ovie (Ororoso)* of*
 15 *Otuo*". After the death of the 1st appellant not only has 2nd appellant survived him, but by the very nature of the action, the *Ovie* Community's interest in it made it to subsist, albeit that where a situation arisen that both plaintiffs/appellants had died, an application by members the *Ovie* community, especially the *Orhila-Orake* Ruling House, if they applied to be substituted for
 20 them, would rightly and legally step into the shoes to prosecute the case or appeal. Moreover, 1st and 2nd plaintiffs/appellants had sued 5th defendant/respondent jointly in his personal capacity. Since the appointment of 5th defendant/respondent as *Ovie* of *Otuo* (4th defendant having died) was the matter in contest and it was the Amendment of the *Ovie* Chieftaincy Declaration that gave rise to the case hand and the other claims were ancillary thereto,
 25 Claim 3 set out above did not abate with the demise of 1st plaintiff/appellant.

The result of all I have been saying is that the decision of the court below not having been impugned or faulted, this appeal be and is also dismissed by me. I award N 1,000 costs to the respondents.

IGUHJSC

I have had the opportunity of reading in draft the judgment just deliver by my learned brother, Belgore, J.S.C. and I agree entirely with the
 35 reasoning and conclusion therein.

This appeal lacks merit and I too will dismiss it with N 1,000.00 costs to the set of respondents against the appellants.