

**SUPREME COURT OF NIGERIA**  
20TH JANUARY, 1995 SC. 72/1989  
**CORAM:- M.L. UWAIS, A.B. WALI, U. MOHAMMED.**  
**S.U. ONU, A.I. IGUH, JJSC.**

1. CHIEF ADIO SONEKAN  
2. CHIEF BENDE ALAWALA .....PLAINTIFFS/RESPONDENTS

AND

1. THE MILITARY GOV. OGUN STATE  
2. OBA OYEBADE LIPEDE, THE  
ALAKE OF ABEOKUTA ..... 2ND - 6TH APPELLANTS  
3. BARRISTER TUNDE ELEMIDE & 3 OTHERS

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*APPEALS - Issue - That has no bearing to any ground of appeal - Whether it can be argued,*

*APPEALS - Declaration of customary law - By the Court of Appeal - Though improper - No miscarriage of justice was occasioned.*

*APPEALS - Correct legal conclusions - Where trial Court's decision is not leased on demeanour of witnesses - Whether court of Appeal can draw correct conclusions from the facts.*

*CHIEFTAINCY MATTERS - Wrongful appointments - Where 3rd appellant is not from the ruling line - Whether his chieftaincy appointment is void.*

*EVIDENCE - Uncontroverted evidence of the plaintiffs - In respect of applicable customary law - Whether the court is bound to accept it.*

*EVIDENCE - Native law and custom - Collapse of the defence - When plaintiffs' oral evidence of custom remained uncontroverted.*

*PLEADINGS - Binding effect of pleadings - Whether court can adjudicate any matter - Not put in issue by the pleadings.*

**FACTS**

The plaintiffs/Respondents filed an action before the Ogun State High Court against the Defendants/Appellants in respect of a chieftaincy dispute relating to the Ashipa Egba Chieftaincy of Itoko - Abeokuta. The plaintiffs contested that the 1958 registered declaration (Exh. 18) which formerly applied in respect of appointment of the Aslupa Egba is no longer the law having been repealed by virtue of a 1976 legislation. Appointment to the said chieftaincy now has to be in accordance with the Itoko Customary Law. Applying this customary law, Ashipa Egba chieftaincy title is to rotate only between the Balogun and Jagunna line of Chiefs both of Itoko Abeokuta. Plaintiffs claimed that the appointment of 3rd Defendant by the other Defendants pursuant to Exh. 1H is null and void. Appointment of the 1st plaintiff as the Ashipa Egba is valid being properly done under the applicable customary law.

The trial High Court found in favour of the Defendant and dismissed the plaintiffs' claim. Plaintiffs' appeal to the Court of Appeal was allowed in part. Being dissatisfied, the Defendants (save the Military Gov. Ogun State, 1st Defendant) have now appealed to the Supreme Court, to determine inter alia, the customary law regulating succession to the Ashipa Egba Chieftaincy.

**HELD** (Unanimously dismissing the appeal per led judgment of **ONU JSC**)

***Issue that has no bearing to any ground of appeal***

1. This specific issue which has no visible bearing on ground one of the grounds of appeal cannot properly and rightly, in my view, be argued when no amendment was made to the pleadings before the case went to trial, during trial or on appeal in the Court below. Furthermore, then has been no leave sought and obtained by the Appellants to argue it as a new issue. (p. 202 B)

***Binding effect of pleadings***

2. The principle further enunciates that courts are bound to decide only the case as formulated on the pleadings of the party. It is not within the office of a court to enter any inquiry outside the pleadings or in adjudicate on any matter not put in issue by the pleadings. This is exactly what the Appellants are seeking to do in the instant case. In other words, what indeed the appellants are doing or seeking to do amounts to an attack on

what was not available in the court below.(p. 203 D)

***Plaintiff's Oral evidence of custom - When uncontroverted***

3. In the instant case, with the removal of the carpet from under the feet of the 2nd to 6th Appellants, who had rested their defence on Exhibit 18 and relied on no other evidence of Native Law and Custom apart from it (Exhibit 18), the entire edifice of their defence collapses. The oral evidence led by the Respondents in line with their pleadings Implemented by the contents of Exhibits 1 and 2, therefore remained uncontroverted. (p. 206 E)

***Declaration of customary law by Court of Appeal***

4. In embarking on declaring the customary law itself, the Court below was substituting its view for that of the trial Court (See Balogun v. Agboola (1974) S.C.111 at 118-119 which it ought not to do. However, since evidence abound on the record and the trial court failed to so declare, what the Court below set out to do itself which was not its duty, that part of the proceedings being only superfluous would not, in my view, amount to miscarriage of justice.(p. 207 A)

***Uncontroverted evidence of the plaintiffs***

5. Furthermore, since Exhibit 18 relief upon by the Appellants has been own to be otiose, having been revoked by operation of law, and the only evidence of Customary Law before the Court was that given by the Respondents which was uncontroverted and unchallenged, the principle of law that where the evidence given by the Respondents is uncontroverted and unchallenged, the Court is bound to accept and act on it will come into play. (p. 207 C)

***Whether chieftaincy appointment is void***

6. Since it is common ground between the parties that the 3rd Appellant is neither from the Balogun nor from the Jagunna line of Chiefs in Itoko, he was by no stretch of imagination eligible to be appointed the Ashipa Egba. His purported appointment to that stool, was illegal, null and void. (p. 212 F)

***Whether appellate court can draw correct conclusion from the facts***

7. As the decision of the trial court was in the main not based on the demeanour of witnesses, the court below as an appellate court, was in as good a position to draw correct legal conclusions or inferences from

admitted or disputed facts.(p. 213 G)

## **NOTABLE POINTS OF INTEREST**

### **ONU JSC**

#### *1. Change in the law will not affect vested rights*

- B Rights which had become vested will not be affected by subsequent change in the law. This is trite law. Thus, in the case in hand, the 3rd Appellants's right (if any) to be appointed Ashipa Egba only accrued on 19th December, 1983, when the last holder of the title, Chief M.A Bolarinwa, died.(p. 209 B)

C

### **UWAIS JSC**

#### *2. Appointment of a recognised chief and a minor chief*

- D There is a distinction in the manner in which a recognised chief and a minor chief are appointed under the Chiefs Law, Cap. 20. In the case of the former the customary law applicable is exclusively that in respect of which a declaration has been made by a committee of the competent council. Any other customary law or tradition, which is not contained in the declaration, cannot be relied upon or be observed in appointing a
- E recognised chief. (P. 217 G)

#### *3. Lacuna in document can be filled by oral evidence*

- F Suppose I am wrong in holding that Exhibit 18 is spent and obsolete and, therefore, it is not applicable to the selection of Ashipa Egba as a minor chieftaincy (which I do not concede), the Exhibit does not spell out what manner of people from Itoko township should be considered for the chieftaincy. The declaration (Exhibit 18) is therefore inexhaustive. It contains lacuna, which has been pleaded by the Respondents in Paragraph 7 of the Amended Statement of claim quoted above. The lacuna can be
- G filled by calling both oral and documentary evidence.(p. 220 E)

### **IGUH JSC**

#### *4. Proof of applicable customary law*

- H On the issue of the applicable customary law, section 14(1) of the Evidence Act provides that customary law is a matter of fact to be pleaded and proved by evidence unless it has been judicially noticed. In other words, customary law is a matter of evidence on the facts presented before the court and must therefore be proved in any particular case

unless it is of such notoriety and has been so frequently applied by the courts that judicial notice would be taken (hereof without evidence required in proof. (p. 222 F)

### **RERESENTATION**

O. Ojutalayo Esq. for the Appellants.

**B**

L.O Fagbemi for the Respondents.

### **CASES REFERRED TO**

Bala v. Bankolo (1986) 3 NWLR (Part 27) 141 at 143

**C**

A.C.B. Ltd v. A.G. Northern Nigeria (1967) NMLR 231

Ogida v. Oliha (1986) NWLR (Part 19) 786

Ejowhomu v. Edok-Eter Ltd (1986) 9 S.C. 41 at 90; (1985) 5 NWLR part 39) 1 at 16

Eliochin v. Mbadiwe (1986) 1 S.C. 99 at 146 - 148 (1986) (part 14) 47 at 72

**D**

A.G. of Oyo State v. Fairlakes Hotel Ltd. (1988) 5 NWLR (part 92) at 24

Enang v. Adu (1978) 11 S.C. 25

Adio v. The State (1986) 2 NWLR (part 24) 581

Overseas Construction Company (Nig.) Ltd. v. Creek Enterprises (Nig.) Ltd (1985) 3 NWLR (part 13) 407; (1985) 2 S.C. 158 at 164

**E**

Metalimpex v. A-G Leventis & Co. Ltd. (1976) 2 S.C. 91 at 107

Emegokwe v. Okadigbo (1973) 4 S.C. 113 at 117 -118

George v. Dominion Flour Mill Ltd. (1963) 1 All NLR 71 at page 77

Ekpenga v. Ozogula 11 (1962) 1 SCNLR 423; (1962) All NLR (part 1) 264

Balogun v. Agboola (1974) S.C. 111 at 118-119

Weste African Shipping Agency (Nig) Ltd. v. Alhaji Musa Nalla (1978) 3 S.C. 21 at page 31

**F**

Omoregbe v. Lawani (1980) 3- 4 S.C. 1 at 22 - 23

Emaphil v. Odili (1987) 4 NWLR (part 67) 915 at 939

Edewor v. Uwegba (1987) 1 NWLR (part 50) 313 at 343 - 345

**G**

Odofin v. Ayoola (1984) 7 S.C. 11

Mogaji v. Cadbury (Nig.) Ltd. (1985) 2 NWLR 393 at 395

Preston Holder v. Thomas 12 WACA 78

Afolabi v. Governor of Oyo State (1985) 9 S.C. 117

Adigun v. Attorney-General, Oyo State (1987) 3 S.C. 250

**H**

Nnajofofor v. Ukonu (1986) 4 (NWLR) 505

Anla v. Ayanbola (1977) 4 S.C. 63

Ebba v. Ogodo (1984) 1 SCNLR 372

Akinloye v. Eyiola (1968) NMLR 92 at 95

Okafor v. Idigo (1984) 1 SCNLR 481 at 499-501

Giwa v. Erinmilkun (1961) All N.L.R. (part 2) 294 at 295

West African Shipping Agency (Nig.) Ltd. v. Alhaji Musa Kalla 1978 3 S.C. 21 at 31

Imana v. Robinson (1979) 3-4 S.C. 1 at 22

B

**STATUTES REFERRED TO**

Chiefs Law, Cap. 19 Laws of Western Region of Nig. 1959 pt. 2 ss.9, 4,5, 22(2)

Evidence Act. Cap. 62 ss. 14(1), (3), 136

C

Interpretation Act. Cap. 192 s. 6 (1)

Interpretation Law of Ogun State Cap. 50 s. 53(9)

Constitution of the Fed. Rep. of Nig. 1979 s 236

Court of Appeal Act. s.16

D

**LEAD JUDGMENT BY ONU JSC**

The plaintiffs' (herein Respondents') claim against the six defendants (2nd to the 6th, who are now Appellants herein) contained in their writ of summons filed in the Ogun State High Court and dated 19th day of July, 1984, is as follows:-

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" (a) A Declaration that the Itoko Customary Law in Abeokuta affirmed in writing by the Chiefs and people of the area in 1958 and 1968 on the appointment of a candidate to the Ashipa Egba chieftaincy Title classified as a minor chieftaincy Title is to the effect that such appointment has to be made in rotation between the Balogun line of Chiefs and the Jagunna line of Chiefs both of Itoko Abeokuta.

F

(b) A Declaration that the application of the 1957 registered Declaration in respect of the Ashipa Egba Chieftaincy Title has been revoked by virtue of W.S.L.N. No. 6 of 1976 and that the purported appointment of the 3rd defendant as Ashipa from 1st May, 1984, made mala fide by the 2nd, 3rd, 5th and 6th Defendants by the application of the 1957 registered Declaration is illegal null and void.

G

(c) An, Order directing the 2nd defendant to perform his statutory duty as prescribed authority bona fide under the Chiefs Law - to wit: to approve the appointment of the 1st plaintiff as the holder of the Chieftaincy Title of Ashipa Egba which had been made and notified to him for approval by those entitled to do so under Itoko Customary Law."

H

Pleadings were ordered, filed and exchanged by the parties. While the Re-

spondents eventually amended their Statement of Claim, the 2nd to 6th Appellants did the same by amending their Statement of Defence.

The facts of this case arose out of a dispute between the Respondents and the Appellants relating to the Ashipa Egba Chieftaincy which prior to 1976 was a recognised chieftaincy to which part 2 of the Chiefs Law, Gap. 19, Laws of Western Region of Nigeria, 1959 applied and had a registered Chieftaincy Declaration. By virtue of section 9 of the Chiefs Law (supra), the registered Declaration became the only Customary Law applicable to or regulating the filling of the vacant title of Ashipa Egba. B

The Chieftaincy declaration in respect of Ashipa Egba vide Exhibit 18 it will be recalled was put to use in appointing the two immediate past Ashipa Egba called Chiefs Ogundipe and Bolarinwa in 1958 and 1968 respectively. C

The Respondents' case is that according to the customary law of Itoko to which the Ashipa Egba Chieftaincy is associated, there are only two fines of Chiefs viz, the Balogun and Jagunna, entitled on rotational basis, to fill any vacancy in the Chieftaincy. They contended that the 3rd Appellant does not belong to any of the two lines of Chiefs and has no right to become Ashipa Egba. They tendered two letters (Exhibits 1 and 2) forwarded to the Alake of Egbaland in 1956 and 1968 as part of the Customary Law governing the appointment of an Ashipa Egba and contended that Exhibit 18 (the 1958 registered Declaration) is no longer applicable and that 1st Respondent having been appointed by the OJogun Chiefs of Itoko as Ashipa, the 2nd Appellant should be compelled to approve his appointment. D E

The Appellant on the other hand contended that the only customary law relevant for the succession to the Ashipa Egba Chieftaincy is the 1958 registered Declaration viz. Exhibit 18 notwithstanding the deletion of the chieftaincy (Ashipa Egba) from the list of recognised Chieftaincies by W.S.L.N. 6 of 1979, adding that the appointment of 3rd Appellant was based on Exhibit 18 simpliciter. F G

In its judgment delivered on 10th July, 1985, the High Court (per Adegboyega Odunsi, J.) dismissed the Respondents' claim.

Aggrieved by the said decision the Respondents appealed to the Court of Appeal sitting in Ibadan on seven grounds. That court (hereinafter referred to as the court below) (per Kutigi, J.C.A. (as he then was), Omololu-Thomas and Sulu-Gambari, JJCA) allowed their Appeal in part. H

Being dissatisfied with this decision, the Appellants (without 1st defendant) have appealed to the Supreme Court on ten grounds con-

200 Sonekan v. Mil. Gov. Ogun State (1995) 1 KLR Onu JSC  
tained in their Notice of Appeal filed on 8th of July, 1988.

Parties exchanged briefs of argument in accordance with the rules of this Court. The appellants formulated five issues which the Respondents in turn have adopted as follows:-

(a) *Whether the 1st leg of the plaintiffs/ Respondents' claim is not misconceived when the Chieftaincy in dispute is an Egba General Title and not an Itoko Chieftaincy Title.*

(b) *What is the Custom or Customary Law regulating succession to Ashipa Egba Chieftaincy.*

(c) *Whether Exhibit '18' (the Registered Registration) had been revoked by Western State Legal notice No. 4 of 1976 so as to render it inapplicable to Ashipa Egba Chieftaincy.*

(d) *Whether the Court of Appeal possesses the jurisdiction to make a Chieftaincy Declaration of the Custom governing Aship Egba.*

(e) *Whether the Learned Trial Judge properly evaluated the evidence proffered (sic) by both sides and rightly held that the 3<sup>rd</sup> Defendant/Appellant had been duly appointed as Ashipa Egba in accordance with Customary Law pertaining to the Chieftaincy.*

Before we heard this appeal on 24th October, 1994, however, the Appellants with the leave of court amended their former Notice of Appeal by substituting same with a new Notice of Appeal dated 10<sup>th</sup> October, 1994 with minor amendments to some of the ten grounds but not necessitating the filing of a fresh Appellant's brief. 1st defendant, against whom no evidence was adduced in the trial court nor argument proffered in the court below, and who requested us in writing to be absent in this appeal as well as to be excused from filing a brief of argument, had his prayer accordingly acceded to. Learned counsel on either side each thereafter expatiated on his brief after respectively adopting the same.

**ISSUE (a):**

In arguing this issue which relates to ground one, our attention was first drawn to the first of the Respondents' reliefs contained in the statement of claim. It is then contended that by that their claim what the Respondents were seeking as a Declaration of the Custom of Itoko people in respect of the Ashipa Egba Chieftaincy which is a General Title of the Egbas with jurisdiction spanning all over Egba land including Itoko Township. Being an Egba General Title, it is contended, the holder of Ashipa Chieftaincy becomes a member of the Egba Chieftaincy Committee and by tradition and under the law, it was the duty of the Chieftaincy Committee to regulate the Customary Law governing succession to the Ashipa



Egba Chieftaincy. The Respondents, it is pointed out, tendered Exhibit T which is a letter of recommendation to the Chieftaincy committee through the Alake of Abeaokuta as to what the writers wanted to be regarded as the Customary Law governing succession to Ashipa Egba for the consideration of the Committee when making Declarations in 1958. The representation of the writers of Exhibit 1 as to the rotational system, it is maintained, was not accepted by the Committee. Further, that a letter of protest against the appointment of Chief Bolarinwa the Jagunna of Itoko as Ashipa Egba was issued in the form of Exhibit '2'. The protest, it is contended, was predicated on the ground that according to the rotational system, it was not the turn of the Jagunna to be appointed as the appointment of Chief Bolarinwa, the Jagunna of Itoko was affirmed. C

It is next submitted that an appointment into Egba Chieftaincy Committee is not governed by the Customary Law of a Ruling House; such that in this case, the appointment of an Ashipa cannot be regulated by the Custom of Itoko Township, "A Ruling House". It is then argued D "that the duties of an Ashipa transcends Itoko Township as he is to be Ashipa over all Egba Townships including Itoko, although the holder of the Title must come from that Township. It is therefore submitted that the only Customary Law that can govern Ashipa Egba Chieftaincy is that made by the Chieftaincy Committee and registered as required by Law. E

The Declaration sought by the Respondents, it is further contended, was misconceived as the Customary Law applicable to Ashipa Egba not being that of Itoko Township alone but that made by the Chieftaincy Committee of which Ashipa is a member, they are bound by the case put forward by them in the writ from which they cannot depart. F After citing in support of the latter proposition, the cases of Bala v. Bankole (1986) 3 NWLR (part 27) 141 at 143; A.C.B. Ltd, v. A.G. Northern Nigeria (1967) NMLR 231 and Qgida v. Oliha (1986) 1 NWLR (part 19) 786, it is argued that contrary to the view expressed by the justices of the G Court below, the declaration sought by the Respondents was for the Custom of Itoko relating to Ashipa. It is finally contended that it was wrong of the Justices to have held that in asking for a Declaration of Itoko Customary Law on the appointment of Ashipa Egba -

H "...In effect, they are asking for pronouncement of the Customary Law pertaining to the appointment of the Ashipa Egba Chieftaincy. There is therefore no misconception as what is relevant is still the Customary Law pertaining to the appointment of Ashipa Egba.

With utmost due respect, the point sought to be made herein by the ap-

pellants is untenable. The Court below so held when in its judgment it stated without mincing words inter alia that-

*“This point was not taken at the lower court and may now be untenable but even if the matter is pursued, I do not share the view that the relief sought is misconceived”*

- B There is no appeal against this conclusion as none of the grounds of appeal filed by the Appellants to this Court attacks the decision of the Court below on this point. This specific issue which has no visible bearing on ground one of the, grounds of appeal cannot properly and rightly, in my view, be argued when no amendment was made to the pleadings before the case went to trial, during trial or on appeal in the Court below. Furthermore, there has been no leave sought and obtained by the Appellants to argue it as a new issue. See *Eiowhomu v. Edok-Eter Ltd.* (1985) 5 NWLR (part 39) 1 at 16 and *Eliochin v. Mbadiwe* (1986) 1 S.C. 99 at 146-148; (1986) 1 NWLR (part 14) 47 at 72. The issue as raised in this Court is accordingly declared incompetent.
- D Further still, there are no special circumstances disclosed to warrant it being entertained herein. See *A.G. of Oyo State v. Fairlakes Hotel Ltd.* (1988) 5 NWLR (Part 92) at 24; *Enane v. Adu* (1978) 11 S.C. 25 and *Adio v. The State*, (1986) 2 NWLR (part 24) 581. The issue is accordingly struck out.

- E In the alternative, I hold that the issue and a fortiori the ground upon which it is based lacks merit. The first relief claimed by the Respondents in the High Court quite apart from being misconceived by the Appellants, is distorted, quoted out of context, misunderstood and with an interpretation alien to it foisted on it by them.

- F The contest in the High Court was on the basis of the Respondents unequivocally asserting that the appointment of Ashipa Egba was made in rotation between the Balogun and Jagunna lines of Itoko Chiefs while the Appellants Contended that it was indiscriminately open to all indigenes of Itoko town. The Appellants in the High Court did not complain that they were misled or that they needed further and better particulars from the respondents. It is in my view too late in the day for them now to complain in this Court. The Respondents did not, in the High Court, seek any pronouncement from that court on the Customary Law governing the “*appointment into Egba Chieftaincy Committee.*”

- H Membership of the Egba Chieftaincy from that Court on the Customary Law governing the “*appointment Committee as disclosed in evidence is but one of several rights, duties or privileges appertaining to the title of Ashipa Egba hitherto a “recognised” but now a “minor” Chieftaincy, once he has been so appointed in accordance with the Customary Law*

*governing his appointment. Thus it seems to me inconceivable for the Appellants to speculate by urging that “an appointment into Egba Chieftaincy Committee is not governed by the Customary Law of a Ruling House and in this case the appointment of an Ashipa Egba cannot be regulated by the Custom of Itoko township “A ruling House.”*

(Underlining is mine).

The Appellants by this contention would seem to me to lose sight of the fact firstly, that an Ashipa Egba does not get appointed as a member of the “*Egba Chieftaincy Committee*” until he is first made an Ashipa Egba. Secondly, that for the Appellants to argue that the appointment of an Ashipa Egba cannot be regulated by the custom of Itoko township- a ruling house is to make a case for the Respondents otherwise than as formulated by them (Respondents) themselves. Thirdly, that by their (Appellants) taking that stand or making that argument, is for them to clearly overlook an essential principle of the rules of pleading in our adversary system of jurisprudence that each party is free to formulate his own case and once formulated he is bound by his pleadings and cannot without necessary amendment, urge a case different from that formulated in his pleadings. The principle further enunciates that courts are bound to decide only the case as formulated on the pleadings of the party. It is not within the office of a court to enter any inquiry outside the pleadings or to adjudicate on any matter not put in issue by the pleadings. See Overseas Construction Company (Nig.) Ltd, v. Creek Enterprises (Nte.) Ltd. & Anor. (1985) NWLR (part 13) 407; (1985) 2 S.C. 158 at 164; Metalimpex v. A-G Leventis & Co. Ltd. (1976) S.C 91 at 107; Emepokwe v. Okadigbo (1973) 4 S.C. 113 at 117-118; George & ors. v. Dominion Flour Mill Ltd. (1963) 1 All NLR. 71 at page 77. This is exactly what the Appellants are seeking to do in the instant case. In other words, what indeed the appellants are doing or seeking to do amounts to an attack on what was not available in the court below.

I therefore agree with the Respondents’ submission that what they were in effect asking for was a declaration that the Itoko Customary Law on the appointment of an Ashipa Egba be carried out on a rotational basis between the Balogun and the Jagunna lines of Itoko Chiefs which, shorn of obvious semantics, is a pronouncement that what they were seeking in the first leg of their reliefs was no more, than that the Customary Law guiding the Itoko people in their choice (which is exclusively theirs) of a candidate to fill the new de-recognised stool of Ashipa Egba from among the numerous citizens of the town, be adhered to.

Finally, there being no allegation by the Appellants of an irregularity on the face of the writ, this issue be and is (in the alternative) resolved against them.

### **ISSUE (B)**

This issue which is relevant to grounds 2 and 4 of the grounds of appeal asks of what the Custom or Customary law regulating succession to Ashipa Egba Chieftaincy is.

Two questions, in my opinion, naturally emanate as off-shoots of this issue. They are:

- (i) *Is Exhibit '18' (the 1958 Registered Declaration) still operative after 1976 as the Customary Law regulating the Ashipa Egba Chieftaincy?*
- (ii) *If the answer is in the positive, is Exhibit '8' exhaustive of the Customary Law regulating the Ashipa Egba Chieftaincy?*

While at the trial the Appellants answered the above two questions in the positive, the Respondents for their part, gave a negative answer.

Now, Exhibit '18' is the 1958 Registered Declaration relating to the Ashipa Chieftaincy Title and made at the time pursuant to Sections 4 and 5 of part 2 of the Chiefs Law, Cap. 19 Western Regions of Nigeria, 1959, the corresponding provisions of which are now to be found in Part 3 of the Chiefs Law, Cap. 20 Laws of Ogun State, 1978.

It is common ground between the parties that prior to 1976, the Ashipa Egba Chieftaincy was a recognised Chieftaincy to which Part 2 of the Chiefs Law (*ibid*) applied. In 1976, however, with the promulgation of Western State Legal Notice No. 6 (W.S.L.N. No. 6) -The Recognised Chieftaincies Revocation and Miscellaneous Provisions) Order - the application of Part 2 of the Chiefs Law to the Ashipa Egba Chieftaincy was revoked. In effect, that Chieftaincy, by operation of law, became a minor Chieftaincy to which Part 3 of the law became applicable. That being the case, Exhibit '18' became inapplicable and no longer affected the appointment to be made into such Chieftaincy after the coming into operation of W.S.L.N. No. 6 of 1976. In other words, Exhibit '18' which hitherto applied to a recognised Chieftaincy became inoperable by reason of the fact that the Ashipa Egba Chieftaincy became a minor chieftaincy once it was de-recognised.

The inapplicability of the provisions of sections 4 and 5 of the Chiefs Law (*ibid*) having to do with recognised Chieftaincy (*ibid*) aside, the application of Exhibit 18 to the minor chieftaincy of Ashipa Egba would run counter to the tenor and the general intendment of the Chiefs Law Cap. 20 as well as the W.S.L.N. No. 6 of 1976. This is because when the selection of the Ashipa Egba was governed by Part 2 of the

Chiefs Law as a recognised Chieftaincy, the Alake of Egbaland was not the prescribed authority but rather part of the selection or recommending process. With the de-recognition of the chieftaincy and its demotion to a minor chieftaincy, the Alake of Egbaland became the prescribed authority. It will be absurd therefore to maintain a situation where the Alake shall be the prescribed authority as well as a kingmaker, both rolled into one. Thus, the provision in Exhibit 18 making the Alake a kingmaker will be perfectly in order before the amending law came into force moreso, that at the time, the confirming or prescribed authority was the Governor-in-Council and in a setting that the chieftaincy was recognised and governed by Part 2 of the Chiefs Law, After the amendment of the latter Law in 1976, to have retained the Alake as one of the kingmakers, as reflected in Exhibit 18., in a set up where he is made the confirming or prescribed authority, would be absurd and unlawful.

For the above reasons, it is clear that Exhibit 18 is clearly inapplicable to the Ashipa Egba Chieftaincy, now a minor chieftaincy.

What then, one may ask, is the applicable customary Law? Now, section 14(1) of the Evidence Act, Cap. 62 of the Laws of the Federation of Nigeria, 1958 (now Cap. 112 Laws of the Federation of Nigeria, 1990) provides:

*“14 (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence.”*

The Respondents in paragraphs 5, 6 and 7 of the amended statement of claim pleaded the customary law which they claimed was applicable. The paragraphs are set out hereunder as follows:-

*“5. the plaintiffs state that on 1st September, 1958, the Chiefs and people of Itoko affirmed in writing the customary law of Itoko as regards the appointment of a candidate to the Chieftaincy title of Ashipa Egba and forwarded the re-statement to a number of functionaries including the ‘Secretary, Egba Divisional Council, Abeokuta.*

*6. the plaintiffs state that on 1st April, 1968, a number of chiefs in Itoko re-stated the same customary law in a letter forwarded to the erstwhile Prescribed Authority Late Oba Samuel Gbadebo II, The Alake of Abeokuta. The second plaintiff is a signatory to the letter of April, 1968.*

*7. The plaintiffs state that the customary law of Itoko is to the effect that the appointment of a candidate to the Ashipa Egba Chieftaincy title shall be in rotation between the Balogun Line of Chiefs and the Jagunna*

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*Line of Chiefs both of Itoke, Abeokuta. The last holder of the Chieftaincy title in question i.e. late Chief MA, Bolarinwa was appointed in 1968 under the custom. Other previous holders of the Ashipa Egba Chieftaincy title were Chief Lokiti-Balogun; Chief Jibode-Jagunna; Adelano-Balogun; Chief Sobulo-Jagunna; Chief Igbein-Jagunna (died after installation), Chief Bolarinwa-Jagunna replaced Chief Ayodeji-Balogun who stepped down because of old age. The rotational custom spanned a period of more than 60 years."*

The Respondents led evidence in proof of these averments, relating to the Customary Law on rotation between the Balogun and Jagunna lines of the Ashipa Egba Chieftaincy pleaded above through PW1, PW2 and PW3. It was through the latter witness under cross-examination that Exhibit 18 was received in evidence. Thus, other than Exhibit 18, the Appellants themselves pleaded and proved no other Customary Law throughout the proceedings. In cases of Customary Law and traditional evidence, it is good law that it is desirable that a person other than the person asserting it should also testify in support thereof. Since Native Law and Custom must be strictly proved, it is, therefore, unsafe to accept the statement of the only person asserting the existence of a custom, as conclusive. See *Ekpenga v. Ozogula II* (1962) 1 SCNLR 423; (1962) 1 All NLR (Part 1) 264 (Reprint).

In the instant case, with the removal of the carpet from under the feet of the 2nd to 6th Appellants, who had rested their defence on Exhibit 18 and relied on no other evidence of Native Law and Custom apart from it (Exhibit 18), the entire edifice of their defence collapses. See *Oba R.A.A. Oyediran of Igbonia v. His Highness, Ona Alebiosu II & Ors* (1992) 6 NWLR (Part 249) 550 at page 558. The oral evidence led by the Respondents in line with their pleadings supplemented by the contents of Exhibits 1 and 2, therefore remained uncontroverted. The learned trial Judge, consistent with his holding that only Exhibit 18 was the applicable Customary Law found no need for giving any consideration to the evidence of the Customary Law given by the Respondents. He made this palpably clear when in his judgment he said *inter alia* -

*"Exhibit 18 remains the Customary Law and it is idle in the circumstances to talk about kingmaker other than those provided for therein, or about a rotational system of appointment or selection of an Ashipa Egba."*

It is little wonder then that the Court below rightly, in my view, reversed this decision of the learned trial Judge since the Customary Law

governing the appointment to the Ashipa Egba Chieftaincy was, as given in evidence by the Respondents, that supported by Exhibits 1 and 2. It needs to be pointed out that in embarking on declaring the customary law itself, the Court below was substituting its view for that of the trial Court (See Balogun v. Agboola (1974) S.C111 at 118-119 which it ought not to do. However, since evidence abound on the record and the trial court failed to so declare, what the Court below set out to do itself which was not its duty, that part of the proceedings being only superfluous would not, in my view, amount to miscarriage of justice. See Ebon v. Akpotu (1968) AH NLR. 220 at 224. B

Furthermore, since Exhibit 18 relied upon by the Appellants has been shown to be otiose, having been revoked by operation of law, and the only evidence of Customary Law before the Court was that given by the Respondents which was uncontroverted and unchallenged, the principle of law that where the evidence given by the Respondents is uncontroverted and unchallenged, the Court is bound to accept and act on it will come into play. See West African Shipping Agency (Nig.) Ltd. v. Alhaili Musa Kalfa (1978) S.C. 21 at page 31; Omoregbe v. Lawani (1980) 3-4 S.C.1 at 22-23; Emaphil v. Odili (1987) 4 NWLR (Part 67) 915 at 939 and Section 136 of the Evidence Act. It being the principle of law that civil cases are decided on the balance of probabilities, since the Appellants adduced no evidence of Customary Law to tilt the scale in their favour, their success in the trial Court was rightly overturned by the Court below. See Owoho v. Dada (1984) S.C.119 at 167. Leg (II) of this issue posed above is answered in the negative. This is because assuming (without conceding) that Exhibit 18 is the Customary Law applicable to the Ashipa Egba Chieftaincy, it is clearly in exhaustive of the Customary Law governing that Chieftaincy since it became de-recognised and Section 4(2) (a) Part 2 of the Chiefs Law, Cap. 20 of Ogun State became inapplicable. A close look at Exhibit 18 depicts that it does not contain anything on the ruling house or family where the Ashipa Egba should come from; rather it only contains the kingmakers whose duty is to appoint. It is in this wise that Exhibit 18, if applicable at all, can be said to be in exhaustive of the Customary Law governing the appointment of the Ashipa Egba. In other words, in the absence of Exhibit 18, recourse will be had to evidence, both oral and documentary such as Exhibits 1 and 2) and the uncontroverted oral evidence of the respondents in the instant case, to prove the particular Customary Law that Chieftaincy. See Edewor C D E F G H

v. Uwegba (1987) 1 NWLR (Part 50) 1313 at 343-345. The factual position in law (the decision whether or not Exhibit 18 had become legally moribund is indeed a question of law) is that with the coming into force of W.S.L.N. No. 6 of 1976, Exhibit 18 became spent.

It is for the foregoing that my answer to Limb (1) of this issue is also accordingly rendered in the negative.

### ISSUE (C)

The gist of the Appellants' argument on this issue, which asks whether Exhibit '18' (the Registered Declaration) had been revoked by W.S.L.N. No. 6 of 1976 so as to render it inapplicable to Ashipa Egba Chieftaincy, is that Exhibit '18' remains in full force in its applicability to the minor chieftaincy of Ashipa Egba (governed by Part 3 of the Chiefs Law) notwithstanding the fact that it was expressly and statutorily made to apply to recognised Chieftaincy (governed by Part 2 of the Chiefs Law) (ibid). I fully endorse the respondents' argument on this point that to so hold would amount to a clear refusal to recognised the change introduced by the amendment effected by W.S.L.N, No. 6 of 1976 (ibid). The amendment introduced in my view, was to wipe away the use of registered declarations in respect of the Ashipa Egba Chieftaincy among other minor Chieftaincies which hitherto enjoyed privileges as recognised chieftaincies. This, I hold, accords with the intendment of the law maker. I endorse all that I have said under issue (b) above. In addition, I am of the view that a declaration such as Exhibit 18 derived its root, existence and validity from section 4 in Part 2 of the Chiefs Law (ibid). It is a piece of delegated legislation made pursuant to the powers conferred by that section. Once, as shown in this case, the application of section 4 itself has been revoked by W.S.L.N. No. 6 of 1976, Exhibit 18 has no legal root upon which it can continue to stand. As Oputa, JSC, had occasion to point out in *Odofin v. Ayoola* (1984) 7 S.C. 11 "*when the root ceases to stand, the stem and branches will fall with the root.*" See also *Mogaji v. Cadbury (Nigeria) Ltd.* (1985) 2 NWLR, 393 (ratio 9), *Primate Adejobi's case* (1978) 3 S.C. 65 and *Preston Holder - Thomas* 12 WACA. 78. To hold that Exhibit 18 applies to the minor chieftaincy of Ashipa Egba, therefore, is to make a pronouncement that Part 2 of the Chiefs Law applies to minor chieftaincy and thus a negation of the provisions of W.S.L.N. No. 6 of 1976 as well as sections 4 and 22(2) of the Chiefs Law, Cap. 20 of Ogun State. While Part 2 of the Chiefs Law is not a repealed Ordinance, it only became inapplicable to the Ashipa Egba Chieftaincy by operation of law. Sec Section 6(1)(b) of the Interpretation Act Cap. 192 Laws of the Federation 1990 which provides:



6(1) the repeal of an enactment shall not -

(a) X X X X X X

(b) *Affect the previous operation of the enactment.*”

The case of Uwaifo v. Attorney-General, Bendel State (supra) called in aid by the Appellants, is rather in support of the Respondents’ case against the Appellants’. The ratio decidendi of the above case is that the rights of parties are to be governed by the state of the law when the cause of action arose. Its corollary is that rights which had become vested will not be affected by subsequent change in the law. This is trite law. Thus, in the case in hand, the 3rd Appellant’s right (if any) to be appointed Ashipa Egba only accrued on 19th December, 1983, when the last holder of the title, Chief M.A. Bolarinwa, died. See Afolabi v. Governor of Oyo State (1985) 9 S.C 117. As at 19th December, 1983, therefore, the law applicable to the Ashipa Egba Chieftaincy by which the rights of the parties were governed, was section 22(2) in Part 3 of the Chiefs Law, Cap. 20, 1978; Part 2 thereof (having similar provisions Part 2 of the 1958 repealed law) which ceased to apply to the Ashipa Egba Chieftaincy since 1976 by virtue of W.S.L.N. No. 6 of 1976.

My answer to this issue is in the negative.

#### **ISSUE (D)**

It needs to be pointed out here that in discussing this issue which is twofold, it is only ground 5 that is germane while ground 8 is irrelevant. The first is whether the court below was wrong to have granted a declaration of the Customary Law of Ashipa Egba Chieftaincy in line with the 1st relief sought by the respondents, “*when in fact the plaintiffs have not proved their applicable custom.*” The second is whether the Court of Appeal possesses the jurisdiction to make a declaration off Customary Law.

Having given adequate treatment to the first leg of this issue elsewhere in this judgment, notably under Issue (a), I do not deem it necessary to give it any further consideration, except to add that it does not strictly arise as a matter raised or emanating from grounds 5 and 8. L4 accordingly discountenance it.

In relation to the second leg of this issue wherein the appellants enquire whether the court below possesses the jurisdiction to make a Chieftaincy Declaration of the Custom governing Ashipa Egba, I wish to remark that even though I have elsewhere in this judgment considered the point, a further expatiation on the matter has to be made, if only to ventilate the opposing view point.

The appellants have attacked the course adopted by the court

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below and have submitted, firstly that it is not that court's business to  
make Declarations of Customary Law. Secondly, that there is no lacuna  
in Exhibit 18, which has made all-embracing provisions for those entitled  
to appoint and those eligible for appointment to the Ashipa Egba Chief-  
tancy. Thirdly, that the court below has exceeded its jurisdiction in for-  
B mulating the Customary Law or "filling a lacuna" in Exhibit 18 where  
there is none.

I will begin in the reverse order by considering the third point first.  
Having already held that upon de-recognising the Ashipa Egba, Exhibit 18  
by W.S.L.N. No. 16 of 1976 automatically became inoperative and no  
C longer had application to the Ashipa Egba chieftaincy. The answer to the  
second point is that with the non-existence or invalidity of Exhibit 18 by  
its repeal, any argument about its having a lacuna becomes otiose. On the  
first point, while I agree with the respondents that the High Court is a  
court of unlimited jurisdiction by virtue of section 236 of the Constitution  
D of the Federal Republic of Nigeria 1979 and that the Court below has  
wide powers by virtue of Section 16 of the Court of Appeal Act to make  
any orders which the High Court ought to have made, it is in my view,  
not the business of the courts to make declarations. But in Adigun & ors.  
v. Attorney-General. Oyo State (1987) 3 S.C 250 what the Supreme Court  
E said at page 276 of the Report in that regard is instructive. It said:

*"The learned trial judge was perfectly justified to have referred to the  
procedure for making declarations of customary law regulating the ap-  
pointment of Chiefs under the Chiefs' Law by bodies other than the court.  
F The Court of Appeal quite properly held that "it is not the business of the  
courts to make declarations of customary law relating to the selection of  
Chiefs under the Chiefs Law. But it is the business of that to make a  
finding of what the customary law is and apply the law for declara-  
tions." (Underlining is mine for emphasis.)*

G Thus when Sulu-Gambari, J.C.A. in his lead judgment (concurrent in by  
Kutigi, JCA, as he then was, and Omololu-Thomas, JCA) held:

*"Even if it is accepted (which is contended) that Exhibit '18' is that  
Declaration governing the appointment of Ashipa Egba, there is still the  
problem of the omission of those eligible to fill the post, where a declara-  
H tion is shown to be in exhaustive of the relevant Customary Law appro-  
priate and applicable in determining the succession to the Title the Chief-  
tancy concerned there is said to have existed a lacuna; when there is  
such a lacuna recourse will have to be made to evidence....."*

He was, in my view, perfectly right. However, when, with utmost due

respect to him, he took on the duty to cull out, what in his opinion by way of court orders, were the Customary Laws governing the appointment of a candidate to the Ashipa Egba Chieftaincy Title and more daringly, the procedure governing the appointment of Ashipa of Egba which was no more within his province, he was “*not making a finding of what the customary law is and apply the law for declarations.*” However, as I had occasion to point out hereinbefore, there being abundance of evidence before the trial court for that court to have made such orders, as the learned justice made, I can at best regard this approach to his making of a Chieftaincy Declaration in relation to the Ashipa Chieftaincy, not that of substituting his views for those of the trial court but erroneously setting out what by evidence was already on record although that act has not been shown to have occasioned a miscarriage of justice. See Balogun v. Agboola (supra); Nnajofofor v. Ukonu (1986) 4 NWLR 505 at 517 and Anla v. Ayanbola (1977) 4 S.C. 63. I adopt my consideration in respect of issues, (a)(b)(c) dealt with above. My answer to the second leg of this issue is accordingly resolved against the appellants. D

**ISSUE (E)**

The contention of the appellants under this issue is whether the learned trial Judge properly evaluated the evidence proffered by both sides and rightly held that the 3rd Defendant/Appellant had been duly appointed as Ashipa Egba in accordance with the Customary Law pertaining to the Chieftaincy. E

The respondents in paragraphs 5,6 and 7 of the Amended Statement of Claim pleaded the Customary Law relating to the Ashipa Egba Chieftaincy. This, as clearly demonstrated above, was to the effect that the Ashipa Egba Chieftaincy was always at least in the past 60 years, made in rotation without deviation between the Balogun and the Jagunna lines of Chiefs in Itoko township of Abeokuta. F

The respondents testified on oath, subjected to searching cross-examinations and tendered exhibits, to wit: notably Exhibits 1 and 2 in support of their averments. Having received evidence from both sides, the learned trial Judge reviewed what Customary Law evidence the respondents adduced and the evidence of the appellants hinged on Exhibit ‘18’, the bedrock of the defence. He did not evaluate the evidence; indeed he considered evaluation unnecessary and concluded respect of Exhibit 18 thus: G H

*“Exhibit 18 remains the customary law and it is idle in the circumstances to talk about kingmakers other than those provided therein,*

or about a rotational system of appointment or selection of an Ashipa Egba. The court below reversed that trial court's decision when, in allowing the appeal in part, it held inter alia as follows:-

“The learned trial judge did not delve properly on the evidence of tradition adduced by the appellants and he did not seem to have appraised and assessed the evidence in that regard as he ought to have done. Where, therefore, there is evidence of facts which ought to have been taken account of or considered and properly appraised which were not adverted to or inadvertently omitted, which omission can be said to have occasioned a miscarriage of justice, then the Court of Appeal will be entitled and indeed has a duty to make findings on such evidence. It is obviously the duty of the trial court to evaluate relevant and material evidence and decide on the issues as raised on the pleadings before it. I am therefore satisfied that the court has not evaluated the evidence led by the appellants to prove the customary law governing the succession to Ashipa Egba chieftaincy and from the evidence contained in the record, I hold that the appellants have conclusively proved the particular custom and entitled to the declaration sought under the first leg of their claim. See - the cases of THOMAS VS. THOMAS (1957) A.C. 484; FATOYINBO VS. WILLIAMS (1956) 1 F.S.C 87 and LAWAL VS DAWODU&ORS, (1972) 1 All N.L.R. (PART 2) 286. In the last case, the Supreme Court held; although this court re-hears the case on appeal, it does this only on the records and, where it is quite clear that evidence has been led in the lower court which established a fact, it will make necessary finding which the lower court failed to make.”

I agree with the above findings in their entirety as they are amply supported by the facts and the law inclusive of the authorities. Over and above this, since it is common ground between the parties that the 3<sup>rd</sup> Appellant is neither from the Balogun nor from the Jagunna line of Chiefs in Itoko, he was by no stretch of imagination eligible to be appointed the Ashipa Egba. His purported appointment to that stool was illegal, null and void. The cases of Woluchem & ors. v. Gudi (1981) 5 S.C. 291 at 294; Ebba v. Ogodo (1984) 1 SCNLR. 372; Mogaji v Odofin (1978) 4 S.C. 19; Akinloye v. Eviyola (1968) NMLR. 92, at 95, Okafor v. Idigo (1984) 1 SCNLR 481 at 499-501; Salawu Olayaniu &Oyun Traditional Council v. Shittu Ajibole & ors. (1987) 1 SCNJ. 1 and Adenoju Ayanwale & ors. v. Babalola Atanda & ors. (1988) 1 S.C.NJ 1 at 21 and 22; (1988) 1 NWLR (pt. 68) 22 are of no avail to the appellants, being irrelevant to the

case in hand. Apart from the foregoing, the appointment of the 3rd Appellant was so characterised by some irregularities that the learned trial Judge was compelled to comment thereon when he held inter alia:

*“It would appear however, from the evidence led for the plaintiffs that they are also challenging the appointment of the 3rd defendant as Ashipa Egba for alleged irregularities.”*

One of such irregularities is that, were Exhibit 18 to be the applicable Customary Law (which is denied), only 4 out of 12 Chiefs referred to as those eligible to nominate and Ashipa Egba, appointed 3rd appellant. That irregularity out to vitiate the appointment. For, as provided in Section 53(a) of the Interpretation Law of Ogun State, Cap. 50:

*“53. Save as may be otherwise expressly provided in any written Law -(a) Whenever any act or thing is by any written law required to be done, or any decision taken, by a body or persons consisting of not less than three such act or thing may be done, or such decision taken, in the name of that body by a majority of those persons.”*

In the instant case, the decision was not taken by the majority of 12 members constituting the kingmakers in the purported appointment of 3rd Appellant as Ashipa Egba. It was demonstrated through PW1 at the trial how a letter written to the 1st defendant by the 2nd Appellant vide Exhibit 11, bore the thumbprint of 6th Appellant who purported to be the Akogun, one Asimi Noji, even though he was not. Further, satisfactory evidence was led to show that at the purported meeting at the 2nd Appellant's palace where the 3rd Appellant was appointed Ashipa; neither the 1st Respondent nor PW3 who are Chiefs in their own rights, were invited to attend. In addition, satisfactory evidence was adduced to show that 3rd Appellant was not appointed Ashipa Egba in accordance with the Itoko Customary Law; neither were 4th to the 6th Appellants appointed to the chieftaincies purportedly held by them. Moreover, the explanation that PW3's absence at the meeting where 3rd Appellant was purportedly appointed Ashipa Egba was due to indisposition, was punctured when PW3 in his own testimony denied he was sick on the fateful day, 30th April, 1984, adding that he was never invited to the meeting. As the decision of the trial court was in the main, not based on the demeanor of witnesses, the court below as an appellate court was in as good a position to draw correct legal conclusions or inferences from admitted or disputed facts. See *Okpiri v. Jonah* (1961) 1 All NLR. 102, *J.E. Ehinmare & Anor. v. Okaka Emhonyon* (1985) 1 NWLR. 177 and *Metal Impex Ltd, v. A.G. Leventis Ltd.* (1976) 2 SC. 91 at 102. Had the learned trial Judge given any or adequate consideration to the irregularities set out

above, he would have arrived at a different conclusion.

I adopt all I have said under issues (a) (b) (c) and (d) respectively and accordingly answer this issue in the negative.

For all I have been saying, this appeal, in my view, lacks merit and it is accordingly dismissed by me with costs assessed in the Respondents' favour in the sum of #1,000 only.

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### UWA1S JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Onu. J.S.C. I agree with the judgment. However, I desire to add the following.

It seems to me that the main question in this appeal on which all other issues rest is: what is the position of a declaration of customary law made in respect of a recognised chieftaincy when such chieftaincy gets reduced to a "*de-recognised*" or a minor chieftaincy? In other words: is a declaration of a customary law pertaining to a recognised chieftaincy applicable to a minor chieftaincy when the former chieftaincy becomes demoted to the position of the latter? The learned trial judge (Odunsi, J.) held and the Appellants herein contend that the declaration applies to the minor chieftaincy. The Court of Appeal (Kutigi, J.C.A., as he then was, Omololu-thomas and Gambari, JJ.CA.) on the other hand held otherwise.

The title in dispute (Ashipa Egba Chieftaincy) became a recognised by virtue of the Recognised Chieftaincies Order, 1959, W.R.L.N.R. No. 22 of 1959, which came into force with retrospective effect on 8th January, 1958. A "*recognised chieftaincy*" is, by definition under the Chiefs Law, Cap. 20 of the Laws of Ogun State, 1978, a chieftaincy to which the provisions of Part 2 of the Chiefs Law, Cap. 20 apply. While a "*minor chieftaincy*" is a chieftaincy other than recognised chieftaincy. Section 4 subsection (1) of the Chiefs Law, Cap. 20 provides that a Committee of a Local Government Council can make a declaration of the customary law applicable to the selection of a person to be the holder of a recognised chieftaincy. The section reads -

"4. (1) *Subject to the provisions of this Law, a committee of a competent council -*  
 (a) *may; and*  
 (b) *shall, if so required by the Commissioner, make a declaration in writing stating the customary law which regulates the selection of a person to be the holder of a recognised chieftaincy.*

It was pursuant to these provisions that Egba Divisional Council made a declaration (Exhibit 18) in 1958 to regulate the selection to the chieftaincy of Ashipa Egba. The declaration has only 4 paragraphs which read thus:-

*“(i) When the post of Ashipa Egba is vacant the appointment is made from Iloko township only.* B

*(ii) The following persons shall be the Kingmakers in respect of this title:- The Alake of Abeokuta, the Iwarefa. Ogboni (that is to say the six senior Ogboni) of Ifoko township and the six senior Ohrogun of Itoko.*

*(iii) When a vacancy occurs in the Ashipa Egba Chieftaincy the Alake shall summon a meeting of the Kingmakers at which meeting a candidate for the title shall be selected. In making their selection the kingmakers shall have regard to the qualifications and disqualifications set out in section 10 of the Chiefs Law, 1957, and in the event of there being more than one candidate shall take into account the relative ability, character and popular support of each candidate before making their final selection.* C D

*(iv) After all other formalities connected with the appointment, including approval by the Governor-in-Council, have been completed but before installation, the Alake shall present the new Ashipa Egba to the people of Itoko township. Made by the Chieftaincy Committee otherwise known as the native Law and Custom Committee of the Egba Divisional Council which has been designated as the competent Council by W.R.L.N. No. 352 of 3rd November, 1955, and signed by the Chairman and Secretary of the Committee this 1st day of November, 1958”.* E F

The declaration was approved by the Minister of Local Government on 14 November, 1958 and was registered by the Permanent Secretary, Ministry of Local Government on the 14th day of November, 1958.

An Order was made on the 5th day of February, 1976 revoking the recognition accorded to the Chieftaincy of Ashipa Egba. The Order was titled - The Recognised Chieftaincies (Revocation and Miscellaneous Provisions) Order, 1976, W.S.L.N. No. 6 of 1976. Section 2 of the Order provides - G

*“2. The application of part II of the Chiefs Law to any chieftaincy in the Western State other than those listed in the first column of the Schedule to this Order is hereby revoked.”* H

The chieftaincy of Ashipa Egba was not amongst the chieftaincies listed in the Schedule to the Order.

On 19th December, 1983, the now minor chieftaincy of Ashipa Egba became vacant following the death of the person holding the chieftaincy. The 1st Respondent, as Balogun of toko, was appointed by the Balogun line of chiefs as the Ashipa Egba in succession to the late Ashipa Egba. The appointment was forwarded to the 1st appellant by a letter for his  
 B (1st Appellant) approval. Instead the 2nd Appellant got appointed as the Ashipa Egba. Hence the suit instituted by the 1st and 2nd Respondents in the High Court of Ogun State against the Appellants. They claimed, as per their writ of summons, as follows:-

C “7. *The Plaintiffs’ claim against the defendants are (a) A declaration that the Itoko Customary Law in Abeokuta affirmed in writing by the chiefs and people of the area in 1958 and 1968 on the appointment of a candidate to the Ashipa Egba chieftaincy title classified as a minor chieftaincy title is to the effect that such appointment has to be made in*  
 D *rotation between the Balogun Line of Chiefs and the Jagunna Line of Chiefs both of Itoko, Abeokuta.*

(b) *A declaration that the application of the 1957 registered declaration in respect of the Ashipa Egba Chieftaincy title has been re-  
 E voked by virtue of W.S.L.N. No. 6 of 1976 and that the Purported ap-  
 pointment of the 3rd Defendant as Ashipa Egba as from 1st may, 1984 made mala fide by the 2nd, 3rd, 4th, 5th and 6th defendants by the application of the 1957 registered declaration is illegal, null and void.*

(c) *An order directing the 2nd Defendant to perform his statu-  
 tory duty as Prescribed Authority bona fide under the chiefs law to wit:  
 F to approve the appointment of the 1st Plaintiff as the holder of the chief-  
 taincy title of Ashipa Egba which had been made and notified to him for  
 approval by those entitled to do so under Itoko customary law.”*

At the conclusion of the case the learned trial judge held, in a consid-  
 G ered judgment, that the effect of the 1976 Order, (W.S.L.N. No. 6 of 1976) was  
 to make the chieftaincy in dispute a minor chieftaincy, thus taking it out of the  
 ambit of Part 2 of the Chiefs Law, Cap. 20 and thereby making the Alake of  
 Egbaland (1st Appellant) the prescribed authority in respect of the chief-  
 taincy. He further held that in all chieftaincies in which there are registered  
 H declarations in existence before the 5th day of February 1976 (when the 1976  
 Order came into force) which became minor chieftaincies by virtue of the  
 Order, the customary law applicable to them is that which had been so  
 declared. He, therefore, held that the 1958 Declaration (Exhibit 18) is the cus-  
 tomary law still applicable to the Ashipa Egba Chieftaincy at the time mate-  
 rial to this case. He gave his reason for so holding as follows -



*“To hold otherwise, would, in my opinion, throw open a flood-gate of chieftaincy disputes which the Chiefs Law, 1957 was intended to prevent. Part 2 of the Chiefs Law, 1957 was not repealed. Exhibit 18 remains the customary law and it is idle in the circumstances to talk about kingmakers other than those provided for therein, of about a rotational system of ap- B  
pointment or selection of an Ashipa Egba. This is the interpretation of the effect of Western State Legal Notice No. 6 of 1976 which, in my view, is intelligible and consistent with the relevant provisions of the Chiefs Law, 1957 or the Chiefs Law, Cap. 20, Laws of Ogun State of Nigeria, 1978.”*  
The Court of Appeal disagreed with these findings of the learned trial C  
judge. It reasoned as follows, as per Gambari, J.C. A. -

*“With much respect, I do not share this view. By virtue of Sections 4 and 5 of the Chiefs Law, the 1958 declaration could be made for the purpose of regulating the selection or appointment of a chief to which those sections relate being “recognized chieftaincies” by virtue of Section 2 of the said D  
law. Apart from Part 2 of the Chiefs Law dealing with the recognized chiefs in respect of which a declaration could be made as was done in Exhibit “18” any chieftaincy other than the recognized chieftaincies falls to be deter-  
mined by Part 3 of the Chiefs Law which deals with minor chieftaincies.*

*Further, by virtue of the Recognized chieftaincies (Revocation and Miscellaneous Provisions) Order W.S.L.N. No. 6 of 1976, the said E  
Part 2 of the Chieftaincy Law applies only in relation to the chieftaincies in Ogun State specifically scheduled in the Subsidiary Legislation - seep Section 2 thereof. The chieftaincy title of Ashipa Egba is not one of those F  
specifically mentioned thereunder- Such chieftaincy therefore is governed  
by Part 3 of the Chieftaincy Law and not pan 2.*

*This being the case, Exhibit “I8” which is a declaration would not affect the appointment of such chieftaincy to be made after the com-  
ing Q into operation of W.S.L.N. No. 6 of 1976”*

I think the Court of Appeal was right. There is a distinction in the G  
manner in which a recognised chief and a minor chief are appointed under the Chiefs Law, Cap. 20. In the case of the former the customary law applicable is exclusively that in respect of which a declaration has been made by a committee of the competent council. Any other custom- H  
ary law or tradition, which is not contained in the declaration, cannot be relied upon or be observed in appointing a recognised chief, in section 9 of the Chiefs Law, Cap. 20 provides -

*“9. Where a declaration in respect of a recognised chieftaincy is regis-*

*tered under this Part, the matters therein stated (including any recommendation under paragraph (b) of sub-section (2) of section 4) shall be deemed to be the customary law regulating the selection of a person to be the holder of that chieftaincy to the exclusion of any other customary usage or rule."*

B With regard to the latter (minor chieftaincy) there is no declaration to be made or registered in respect of the chieftaincy. Although the appropriate customary law is, by inference, to be observed, since section 22 subsections (2) and (3) of the Chiefs Law, Cap. 20 states –

C *"2 Where a person is appointed, whether before or after the commencement of this Law, to fill a vacancy in the office of a minor chief by those entitled by customary law so to appoint and in accordance with customary law, the prescribed authority may determine the dispute.*

D *(3) Where there is a dispute whether a person has been appointed in accordance with customary law to a minor chieftaincy the prescribed authority may determine the dispute."*

E There is no indication in the Law as to how the customary law applicable is to be ascertained. Therefore, it follows on that premise, that the ordinary or general procedure of proving customary law becomes applicable. Section 14 subsections (1) and (3) of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990, which applies, provides –

F *"14 (1) A custom may be adopted as part of the law governing particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a custom shall lie upon the person alleging its existence*

G *(2) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them.*

H The question then that arises is: in calling evidence to establish the customary law applicable to Ashipa Egba chieftaincy will Exhibit 18 be relevant or even be the exclusive customary law applicable as held by the learned trial judge? I think the answer to the question is to be found inter alia in the provisions of the Interpretation Act, Cap. 192 of the Laws of the Federation of Nigeria, 1990. By section 4 subsection (2) (c) thereof –

“(2) Where an enactment is repealed and another enactment substituted for it, then-  
.....”

(c) Any subsidiary instrument in force by virtue of the repealed enactment shall, so far as the instrument is not inconsistent with the substituted enactment, continue in force as if made in pursuance of the substituted enactment.” B

Now section 4 of the Chiefs Law. Cap. 20, by virtue of which Exhibit 18 was made, has not been repealed but the chieftaincy of Ashipa Egba ceases, by the operation of the (1976) revocation Order (W.S.L.N. No. 6 1976), to be a recognised chieftaincy. Consequently, Part 2 of the Chiefs Law ceases to apply to the chieftaincy. It follows, by analogy to section 4 subsection (2) (c) of the Interpretation Act, Cap. 192, that Exhibit 18 (which is a statutory instrument) ceases to have effect. Furthermore, by the repeal of the Recognised Chieftaincies Order, 1959 D (W.R.L.N. No. 22 of 1959) by the 1976 Order (W.S.L.N. No. 6 of 1976), so far as it applies to the Chieftaincy of Ashipa Egba, Exhibit 18, though not expressly or specifically revoked is deemed to be “spent” and “obsolete”. Both the words “spent” and “obsolete” have been defined on pp. 357 and 358 of Craies on Statute Law. 17th Edition, as follows – E

“Spent - that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorized or required.”

“Obsolete” where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.” F

The trial court, in this case, did not advert its mind to the effect of the repeal of the 1959 Order by the 1976 Order with regard to the Chieftaincy of Ashipa Egba. It. therefore, made the wrong finding in respect of the customary law applicable to the chieftaincy of Ashipa Isgba as a minor chieftaincy. The Respondents pleaded the relevant Customary law in paragraph 7 of their Amended Statement of Claim, which read thus - G H

7 “The plaintiffs state that the customary law of Itoko is to the effect that the appointment of a candidate to the Ashipa Egba chieftaincy title shall be in rotation between the Balogun Line of Chiefs and the Jagunna Line of Chiefs both of Itoko, Abeokuta.

*The last holder of the chieftaincy title in question Le. late Chief M.A. Bolarinwa was appointed in 1968 under the custom. Other previous holders of the Ashipa Egba Chieftaincy title were Chief Lokiti - Balogun; Chief Ogundipe - Jagunna; Chief Bolarinwa - Jagunna replaced Chief Ayodeji - Balogun who stepped down because of old age.*  
 B *The rotational custom spanned a period of more than 60 years”*  
 and adduced evidence accordingly. The Court of Appeal was therefore right when it held as follows (as per Gambari J.C.A.) -

*“I came to the conclusion therefore that the declaration in Exhibit “18” governing the appointment of the Ashipa Egba chieftaincy has ceased to have any effect since the coming into operation of the Western State Legal Notice No. 6 of 1976. Having so held and in the absence of any other registered declaration on the customary law governing the appointment of the Ashipa Egba chieftaincy, recourse had to be made to the evidence adduced both documentary or oral to establish the relevant customary law in this case.....*  
 D *I am therefore satisfied that the court has not evaluated the evidence led by the appellants to prove the customary law governing the succession to Ashipa Egba Chieftaincy and from the evidence contained in the record, I hold that the appellants have conclusively proved the particular custom and (are) entitled to the declaration sought under the first leg of their claim.”*  
 E

Suppose I am wrong in holding that Exhibit 18 is spent and obsolete and, therefore, it is not applicable to the selection of Ashipa Egba as a minor chieftaincy (which I do not concede), the Exhibit does not spell out what  
 F manner of people from Itoko township should be considered for the chieftaincy. The declaration (Exhibit 18) is therefore inexhaustive. It contains lacuna, which has been pleaded by the Respondents in/Paragraph 7 of the Amended Statement of claim quoted above. The lacuna can be filled by  
 G calling both oral and documentary evidence - See chief Edewor v. Chief Owegba & Ors. (1987) 2 S.C. 49 at p. 117; (1987) 1 N.W.L.R. (PART 50) 313 at p. 345F where I made the following observation -

*“It is clear, therefore, that the Declaration is inexhaustive of the relevant customary law of the Agbon Clan applicable to the title of Otota.*  
 H *Then how can the lacuna be filled? Customary law is proved by evidence and as the 1959 Constitution of Agbon Clan had been put in evidence, recourse would have to be made to it. So also to any other available documentary evidence adduced in the case”.*

In the present case, the Respondents tendered Exhibits 1 and 2

and called oral evidence (P.W1. PW2 and PW3) to prove the lacuna. This was not controverted by the Appellants. All they did was to tender Exhibit 18 while cross-examining PAV.3. Consequently, there is no doubt that the Respondents had proved their case also in this regard.

It is for these and the reasons contained in the judgment read by my learned brother, Onu, J.S.C., that I agree that the appeal has no merit. B  
It is accordingly hereby dismissed with N 1,000.00 costs to the 1st and 2nd Respondents. I adopt the consequential Orders in the said judgment.

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#### **WALI JSC**

I have had a preview of the lead judgment of my learned brother, Onu, JSC and I agree with the reasoning and conclusion for dismissing the appeal.

For the same reasons stated in the lead judgment of my learned D  
brother, I also hereby dismiss this appeal with N1,000.00 casts to the respondents.

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#### **MOHAMMED JSC**

I also agree that this appeal must fail for the reasons given in the judgment of my learned brother, Onu, JSC., which I have had the advantage of reading in draft. I have nothing more to add.

In the result, this appeal fails and it is dismissed. I award N 1,000.00 costs in favour of the respondents. F

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#### **IGUH JSC**

I have had the privilege of reading, in draft, the lead judgment just delivered by my learned brother, Onu, J.S.C. and I am in full agreement with him that this appeal is without substance and should be dismissed. The main issue upon which this appeal revolves is whether the (document, Exhibit 18, is still operative after 1976 as the customary law governing the Ashipa Egba Chieftaincy title. G

Exhibit 18 is the 1958 Registered Declaration relating to the Ashipa H  
Egba Chieftaincy title. It was made pursuant to section 4 and 5 of the Chiefs Law, Cap. 19, Laws of Western Region of Nigeria, 1959 which in pari materia with sections 4 and 5 of the Chiefs Law, Cap. 20, of Ogun State, 1978.

It is common ground between the parties that prior to 1976, the Ashipa Egba Chieftaincy was a recognised chieftaincy title to which Part 2 of the Chiefs Law applied. Section 4(1) of the Chiefs Law makes it clear that -the Declaration was intended to regulate the selection of a person to be the holder of a recognised chieftaincy, not, a minor chieftaincy. In 1976, however, the application of Part 2 of the Chiefs Law to the Ashipa Egba Chieftaincy was revoked by virtue of the provisions of Western State Legal Notice No. 6 of 1976 titled *“The Recognised Chieftaincies (Revocation and Miscellaneous Provisions) Order”*. As a result, the said Ashipa Egba Chieftaincy was thereby de-recognised and it thus became a minor chieftaincy to which part 3 of the law applied. It seems to me plain that Exhibit 18 was not intended to apply to any but a recognised chieftaincy. The Declaration therefore ceased to apply to the Ashipa Egba Chieftaincy when the said chieftaincy was de-recognised and reduced to minor chieftaincy.

Appointment into minor chieftaincy, such as Ashipa Egba is governed by Part 3, section 22(2) of the Chiefs law which provides as follows:-

*“Where a person is appointed, whether before or after the commencement of this Law, to fill a vacancy in the office of a minor chief by those entitled by customary law so to appoint and in accordance with customary law, the prescribed authority may approve the appointment.”*

It is my view that the Declaration, Exhibit 18, is inapplicable to the Ashipa Egba Chieftaincy, a minor chieftaincy, since the coming into force of the Western State Legal Notice No. 6 of 1976 and that the purported appointment of the 3rd appellant as the Ashipa Egba on the 1st day of May, 1984 by the 2nd, 4th, 5th and 6th appellants based on the application of the Declaration, Exhibit 18, is null and void.

On the issue of the applicable customary law, section 14(1) of the Evidence Act provides that customary law is a matter of fact to be pleaded and proved by evidence unless it has been judicially noticed. In other words, customary law is a matter of evidence on the facts presented before the court and must therefore be proved in any particular case unless it is of such notoriety and has been so frequently applied by the courts that judicial notice would be taken thereof without evidence required in proof. See *Giwa v. Erinmilokun* (1961) All N.L.R. (Part 2) 294 at 295.

The respondents established by evidence what the customary law of the parties at all material times was in the matter of the appointment of an Ashipa Egba. This is to the effect that the appointment of a person to the Ashipa Egba Chieftaincy has to be made in rotation between the Balogun and

the Jagunna lines of chiefs. No other customary law was pleaded or proved by the appellants who only relied on Exhibit 18 as containing the applicable customary law. The respondents' evidence on the issue of the applicable customary law therefore remained uncontroverted and was rightly accepted by the court below. See *West African Shipping Agency Wig.) Ltd, v. Alhaji Musa Kalfa* 1978 3 S.C. 21 at 31; *Omogbe v. Lawani* (1980) 3-4 S.C. 108 at 112, *Imana v. Robinson* (1979) 3-4 S.C 1 at 22 etc. etc. B

I think it ought to be observed too that it is common ground between the parties that the 3rd appellant is neither from the Balogun nor from the Jagunna lines of chiefs. He could not therefore be eligible for appointment as the Ashipa Egba. In my view, his purported appointment, C without doubt, was illegal and null and void.

It is also worthy of note that the respondents challenged the purported appointment of the 3rd appellant to the chieftaincy title on the ground of various irregularities. It is plain to me that the 3rd appellant was not properly selected according to the prevailing customary law to D entitle him obtain the approval of the 2nd appellant for appointment to the Ashipa Egba chieftaincy title.

It is for these and the more elaborate reasons contained in the lead judgment that I, too, will dismiss this appeal. I abide by the consequential orders including the order as to costs therein made. E

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