

**SUPREME COURT OF NIGERIA**  
 23RD MAY, 1995. SC.218/1989  
**CORAM:- S.M.A. BELGORE, A.B. WALI,**  
**I.L. KUTIGI, S.U. ONU, Y.O. ADIO, JJSC.**

1. OBAMOSHOOD OSUOLALE ADEYERI

(The Aseyin of Iseyin)

2. THE SECRETARY, ISEYIN SOUTH

..... APPELLANTS

LOCAL GOVERNMENT, ISEYIN

3. JOSEPH FANIYI ONIFADE

AND

ADERIBIGBE ATANDA & 4 OTHERS

..... RESPONDENTS

**APPEALS** - *Argument of Counsel - Is to be based on the issues formulated - And not on the grounds of appeal.*

**APPEALS** - *Issues - Oral submission that is not based on any raised is - Whether competent*

**APPEALS** - *Reversal - Error of lower court - That fall under matter - Supreme Court can determine - Will not ground reversal of judgment*

**CUSTOMAR LAW**- *Proof of custom by evidence - Burden of proof o respondents - Whether discharged as to entitle them to the relief claim*

**CHIEFTAINCY MATTERS** - *Onus on the plaintiff - To prove that claimant was validly nominated and appointed - Is discharged vide respond, evidence.*

**JUDICIAL PRECEDENTS** - *Larbi's case principle - That is related to arbitration proceeding - Is not applicable in the present case*

### **FACTS**

In the High Court of Oyo State, the respondents filed an action against the appellants claiming inter alia, that the appointment of the 3rd appellant as Baale of Malete was against their custom and tradition, and therefore null and void. They established that appointment to the chieftaincy title rotates within three ruling families in accordance with a customary procedure. Respondent claimed that while the 3rd appellant's appointment as the Baale of Malete was not done according to the traditional procedure, that of the 5th respondents was properly done but he was denied recognition.

The appellants denied the respondents' claim setting up a different case in their defence. The trial court found in favour of the respondents. Appellants' to the Court of Appeal was dismissed. They have further appealed to Supreme Court upon six issues.

**ISSUES FOR DETERMINATION:**

(1) *Whether the Court of Appeal was right in affirming the judgment of the High court when it is clear that the court erred in law in dealing with the evidence relating to traditional history by not applying the rule in KOJO VS. BONISIE (1957) 1 W.L.R. 1223 at 1226.*

(2) *Whether the Court of Appeal was right in upholding the judgment of the High Court when the court failed to apply the rule in LARBI VS. KWES 113 WACA 81 at 82 to the findings of the investigative panel of inquiry instituted dance with customary law and usage to resolve the conflict between the two parties as regards the number of ruling houses, the order of rotation and the ruling house next entitled to fill the vacancies in the Chieftaincy.*

(3) *Whether the Court of Appeal was right in holding that the finding of the trial judge (which itself was under attack) to the effect that there are Ruling Houses as against two, knocked off the bottom out of the entire case of the defendants when that issue was not the only issue in the case and the other issues are not dependent thereon.*

(4) *Whether the Court of Appeal was right in upholding the grant of relief (b) to the respondents when such relief was not supported by the evidence in the High Court.*

(5) *Whether the Court of Appeal was right in upholding the decision of the granting relief (f) to the respondents when there was no evidence before the High Court to support the grant.*

(6) *Whether the Court of Appeal was right in failing to consider grounds 5, 7, 8 and 9 of the grounds of appeal when such grounds raise substantial law and facts necessary for the determination of the case before the court."*

**HELD** (Unanimously dismissing the appeal per lead judgment of ADIO JSC)  
**Oral submission that is not based on any raised issue**

1. The rules on framing of issues in appeals, which had been laid down by this court in many decided cases, clearly show that issues are an indispensable part of an appellate brief because a point not raised as an issue in the brief cannot be entertained in oral argument. No issue was formulated or raised in the brief on the question of evolution or devolution of native law and custom. Therefore, the oral submissions made by the learned counsel for the appellant on the question were incompetent. (p 1182 H)

***Argument of counsel - Is to be based on the issues***

2. Arguments of counsel in a brief of argument filed in appellate courts should be based along the lines of the issues formulated for the appeal and not on the grounds of appeal. Any breach of the foregoing rule or requirement by a party constitutes non-compliance with the relevant rule and is irregular. In the circumstances stated above, the appellants should expect the court below to deal with the appeal before it on the basis of the issues, if any, formulates the appellants' brief and not on the basis of the grounds of appeal. If appellants erroneously committed an irregularity by arguing the appeal on basis of grounds of appeal instead of arguing it along the lines of issues formulated or which should have been earlier formulated, the court below did not have to commit the same error. (p. 1184 C)

***Judicial precedent - Larbi's case principle***

3. There was no evidence that the panel of inquiry, as constituted by the 1st appellant, ever announced its decision. The proceedings, if any, before the panel could not be described properly as arbitration proceeding, inevitable conclusion to which I have come is that the alleged principle in Larbi's case is inapplicable to the finding or decision, if any, of the panel of inquiry allegedly set up by the 1st appellant. The court below was, therefore right in upholding the judgment of the learned trial Judge which did not apply the rule in Larbi's case to the alleged findings of the panel of inquiry set up by the 1st appellant (p. 1186 A)

***Appeals - Error of lower court***

4. It is not every error committed by a lower court that will lead to reversal of its judgment by an appeal court. An error that can warrant the reversal of the judgment of a lower court must have substantially affected the decision. I have carefully read the questions raised by the said grounds of appeal and after due consideration, I have come to the conclusion that they were matters which this court could determine effectively as the evidence on record relating to them did not raise the issue of credibility of witnesses. (p. 1187 B)

***Proof of custom by evidence***

5. A custom is a question of fact to be proved by evidence. The evidence which the respondents led on the native law and custom, with which the purported appointment of the 3rd appellant did not comply, and which was accepted by the learned trial Judge, and the findings on which the court below affirmed or on the basis of which the court below itself made findings, as the case might be, clearly showed that the respondents had discharged the burden on them. In the circumstance, the answer to the question raised under the

4<sup>th</sup> issue is in the affirmative. The court below was right in upholding the grant of relief (b) to the respondents. The relief was supported by evidence. (p. 1192 C)

***Chieftaincy matters - Onus on the plaintiff***

6. With particular reference to the question raised under the 5th issue, the respondents led evidence which enabled the learned trial Judge to make findings affirmed by the court below or on the basis of which the court below itself made the findings, as the case might be, that, inter alia, that the appointment of the 5th respondent as Baale Malete received the consent of the heads of compounds in Malete; that the 5th respondent as presented by his ruling house to the Baale Koso as Baale Malete elect, and that the Baale Koso duly presented the 5th respondent to the Aseyin of Iseyin (1st appellant) as Baale Malete elect. The onus is on the plaintiff in a claim for chieftaincy declaration to prove that the claimant of the title was validly nominated and appointed in accordance with customary law relating to the chieftaincy. The foregoing evidence showed that the burden was discharged (p. 1192 E)

**NOTABLE POINTS OF INTEREST**

**ADIO JSC**

***1. Proper framing of an issue***

A party should not frame an issue in a manner that makes it impossible for court seised of the matter to approach the determination of the issue with fairness and an open mind or without requiring the view of the party on certain of the issue to be accepted or assumed as absolutely correct. The question raised under the first issue is, therefore, whether the Court of Appeal was right in affirming the judgment of the High Court bearing in mind the rule *Kojo v. Bonsie*. (1957) 1 W.L.R. 1223 at 1226 in relation to traditional evidence. (p. 1181 E)

**ONU JSC**

***2. How customary law is proved***

While it is well settled that customary law is a question of fact to be proved by evidence vide section 14 of the Evidence Act, a party who alleges a particular custom must adduce sufficient evidence in support to establish its need to the satisfaction of the court, I am satisfied that in the instant case, the respondents adduced sufficient credible evidence in line with their pleadings to be entitled to judgment and the court below rightly, in my view, held the same. (p. 1197 A)

***3. Property of lower court's incidental order***

I am of the view that even if the Respondents in the instant case had not specifically sought or claimed the relief to restrain the 3rd Appellant from

parading himself as Baale Malete, Iseyin and from performing the functions of that office, the learned trial Judge would still have been perfectly right to make an order of injunction against the 3rd Appellant as ancillary to decision arrived at and necessary to protect the Respondents' rights. Indeed, both the Court of Appeal Act in section 16 and the Rules are consistent with the incidental order the court below made herein even though neither party asked specifically for it. (p. 1198A)

### **REPRESENTATION**

Chief Afe Babalola, SAN with Mr. L.O. Fagbemi and Mr. A. Acquah for the appellants  
Mr R. A. Sarumi for the respondents

### **CASES REFERRED TO**

- D Kodjo v. Bonsie(1957) 1 W.L.R. 1223 at 1226
- Dilibe v. Nwakozor (1986) 5 N.W.L.R. (Pt. 41) 315
- Onyeso v. Nnebedun (1992) 3 N.W.L.R. (Pt. 229)315
- Ojibah v. Ojibah (1991) 5 N.W.L.R (Pt. 191) 296
- Larbi v. Kwesi 13 W.A.C.A. 81 at 82
- E Olubode v. Salami (1985) 5 N.W.L.R (Pt. 7)282
- Narumal & Sons Nigeria Ltd. v. Niger Benue Transport Co. Ltd. (1989) 2 N.W.L.R. (Pt. 106) 730 at p. 742
- Abisi v. Ekwealor (1993) 6 N.W.L.R. (Pt. 302)643
- National Investment & Property Co. Ltd. v. Thompson Organization (1969) 1 ALL N.L.R 138 at p. 142
- F Olagbemiro v. Ajagunbade III (1990) 3 N.W.L.R. (Pt. 136) 37
- Agbetoba v. Lagos State Executive Council & ors.(1991) 4 N.W.L.R. (Pt. 188) 664
- Olabanji v. Omokewu (1992) 6 N.W.L.R. (Pt 250) 671
- G Olowu v. Olowu (1985)3 NWLR (Part 13) 372 at 385
- Agbai v. Okogbue (1991)7 NWLR (Part 204)391 at 427
- A. G. Anambra State v. Okafor (1992)2 NWLR (Part 224)396 at 421
- Inyang v. Ita (1929)9 N.L.R. 84
- Oyediran v. Amoo (1970)1 All NLR 313
- H Okolo v. Uzoka (1978)4 S C. 77
- Garba v. University of Maiduguri (1986)1 NWLR (Part 18)550 at 575
- Hon. Justice Ademola v. Chief Sodipo (1989)5 NWLR (Part 121)
- Adigun v. A.G. of Oyo State (1987)1 NWLR (part 53)678
- Usman v. Umaru (1987) 3 NWLR (Part 62) 655 at 672
- Uku v. Okumagba (1974) 1 All NLR (part 1) 474

Adele v. Oyegbade (1967) N.M.L.R. 136

Alonge v. I.G. of Police (1959) 4 F.S.C. 203 at 205

Adelumola v. The State (1988) 1 N. W.L.R. (Part 73) 683 at 691

Igbo v. The state (1975) 9-11 S.C. 129

Ibodo v. Enarofia (1980) 5-7 S.C. 42 at 58

### **LEAD JUDGMENT BY ADIO JSC**

In the High Court of Justice, Oyo Judicial Division, Oyo State of Nigeria, the respondents instituted an action against the appellants. The reliefs claimed by the respondents, as stated in paragraph 30 of their Amended Statement of Claim were as follows:-

*“(a) Declaration that under native law and custom of Iseyin, Oyo State, the only person duly appointed by the 1st plaintiff and other compound heads of Malete, Iseyin, and presented to the 1st defendant, as the prescribed authority for approval, by the Baale Koso, Iseyin, is the only person duly appointed as Baale Malete, Iseyin;*

*(b) Declaration that the purported appointment of the 3rd defendant as Baale Malete without the consent and permission of the 1st plaintiff and other compound heads of Malete, Iseyin in 1983 is against the custom and tradition of Malete people and as such is null and void;*

*(c) Declaration that the purported approval of the appointment of the 3rd defendant by the 1st defendant as Baale of Malete, Iseyin is against native law and custom of Malete, Iseyin and as such is null and void;*

*(d) Declaration that the purported recognition of the 3rd defendant as Baale Malete, Iseyin by the 2nd defendant is null and void;*

*(e) Perpetual injunction against:*

*(i) the 1st and 2nd defendant respectively restraining them from approving and recognising respectively, the 3rd defendant as Baale Malete, Iseyin*

*(ii) the 3rd defendant restraining him from parading himself as Baale of Malete, and/or performing the rites, duties and functions of Baale Malete, Iseyin;*

*(f) Declaration that the 5th plaintiff is the person duly appointed as Baale Malete, Iseyin by the 1st plaintiff and other compound heads of Malete Iseyin and presented to the 1st defendant through the Baale Koso for approval in 1983.”*

Pleadings were duly filed, amended and duly exchanged. The evidence led by the respondents was that there were three ruling houses entitled to provide or present a candidate to fill a vacancy in Baale of Malete, chieftaincy in turn or rotation. The usual procedure whenever there was a vacancy in the chieftaincy was that the compound heads, other than the compound heads of the three ruling houses, would nominate a candidate from the ruling house whose turn it was to present a candidate and present him to the Aseyin of Iseyin

through the Baale Koso for approval of his appointment. The purported appointment of the 3rd defendant as Baale of Malete which the Aseyin of Iseyin purported to approve or recognize was not done according to the aforesaid procedure and the purported appointment and recognition were null and void. Evidence was also led by the respondents that the appointment of the 5th respondent of Baale Malete, Iseyin was in accordance with the aforesaid native law and custom but the Aseyin of Iseyin (1st appellant) refused to approve or grant recognition to the appointment when the appointment of the 5th respondent was submitted through the Baale Koso to the 1st appellant for approval or recognition. Instead of doing the correct thing, the 1st appellant granted his approval or recognition to the purported appointment of the 3rd appellant. It was not the turn of the ruling house of the 3rd appellant to provide a candidate.

On the other hand, the appellants' case, as presented, was that there were only two ruling houses capable of providing or presenting a candidate for the purpose of filling a vacancy in the Baale of Malete chieftaincy. It was the turn of the family of the 3rd appellant to provide a candidate for the purpose of filling the vacancy.

It was also contended that it was not necessary to obtain the consent of all compound heads before the vacancy could be filled.

The learned trial Judge, after due consideration of the evidence before him and of the submissions made by the learned counsel for the parties, granted all the reliefs claimed by the respondents, except item (e) (i), which related to the relief for a perpetual injunction restraining the 1st and 2nd defendants/appellant, respectively, from approving and recognising the 3rd appellant as Baale of Malete. Dissatisfied with the judgment of the learned trial Judge, the appellants lodged an appeal against it to the Court of Appeal. The court below dismissed the appeal and affirmed the judgment of the learned trial Judge. Dissatisfied with the judgment of the court below, the appellants lodged a further appeal to this court.

The parties filed and exchanged briefs. There were six issues raised for determination in the appellants' brief and there were three issues set down in the respondents' brief. I think that it is better to use the issues framed for determination in the appellants' brief for the determination of this appeal though some of the issues, as framed, have some shortcoming in that they were more like grounds of appeal rather than issues based on grounds of appeal, for examples, the first and the second issues for determination.

The six issues set down in the appellants' brief for determination are as follows:-

*"(1) Whether the Court of Appeal was right in affirming the judgment of the High Court when it is clear that the court erred in law in dealing with the evidence relating to traditional history by not applying the rule in Kojo v. Bonsie (1957) 1 WLR 1223 at 1226.*

*(2) Whether the Court of Appeal was right in upholding the judg-*

*ment of the High Court when the court failed to apply the rule in Larbi v. Kwasi 13 WACA 81 at 82 to the findings of the investigative panel of inquiry instituted in accordance with customary law and usage to resolve the conflict between the two parties as regards the number of ruling houses, the order of rotation and the ruling house next entitled to fill the vacancies in the chieftaincy.*

(3) Whether the Court of Appeal was right in holding that the finding of the learned trial Judge (which itself was under attack) to the effect that there are three Ruling Houses as against two, knocked off the bottom out of the entire case of the defendants when that issue was not the only issue in the case and the other issues are not dependent thereon. B

(4) Whether the Court of Appeal was right in upholding the grant of relief (b) to the respondents when such relief was not supported by the evidence adduced in the High Court. C

(5) Whether the Court of Appeal was right in upholding the decision of the High Court granting relief (f) to the respondents when there was no evidence before the High Court to support the grant. D

(6) Whether the Court of Appeal was right in failing to consider grounds 5, 7, 8 and 9 of the grounds of appeal when such grounds raise substantial issues of law and facts necessary for the determination of the case before the court.”

In dealing with the first and the second issues this court will make the best use of them, it can, notwithstanding their shortcomings. A party should not frame an issue in a manner that makes it impossible for the court seized of the matter to approach the determination of the issue with fairness and an open mind or without requiring the view of the party on certain aspect of the issue to be accepted or assumed as absolutely correct. The question raised under the first issue is, therefore, whether the Court of Appeal was right in affirming the judgment of the High Court bearing in mind the rule in *Kojo v. Bonsie* (1957) 1 WLR 1223 at 1226 in relation to traditional evidence. What warranted the contention of the appellants that the rule in *Kojo's* case, *supra*, should have been applied was that the learned trial Judge could not come to a definite conclusion on the native law and custom applicable in relation to the number of ruling houses that were entitled to provide a candidate for the purpose of filling a vacancy in the Baale of Maleté chieftaincy and the method of selecting such a candidate, on the basis of the evidence of traditional history led by the appellants or by the respondents. The contention of the appellants was that, in the circumstances, the best way was to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. The respondents contended, *inter alia*, that if the family of the Are Alarafa was not a ruling house in relation to Baale of Maleté, a member of the family could not have been appointed as Baale Maleté on two separate occasions. One of E F G H

them reigned continuously for a period of thirty years when he died and the other reigned continuously for a period of 45 years when he died. The respondents pointed out that, altogether seven persons had at different times, so far, reigned as Baale of Maleté. Only one of them was from Olose ruling house and that was after two persons from Are/Alarafa ruling house and two persons from Atogun ruling house had reigned as Baale of Maleté. There was no evidence that the Olose ruling house lodged any protest or fielded any candidate for any of the four vacancies. If it was never, in the circumstances, contended that Olose ruling house had, because of that alone, lost its right as one of the ruling houses, then there was no legal basis for the contention that, Are/Alarafa ruling house had lost its right as a ruling house in relation to Baale of Maleté chieftaincy. If, as stated in paragraph 4.4 at page 4 of the appellants' brief, there had been only even previous Baales of Maleté and the Alarafa ruling house had produced two of them who reigned for continuous periods of 30 years and 45 years respectively, the Atogun ruling house produced four and Olose ruling house produced only one after Alarafa and Atogun ruling houses had together produced four Baales of Maleté without Olose ruling house forfeiting or being deprived of its right as a ruling house, there was, as the respondents rightly contended, no legal basis for contending that the Are/Alarafa ruling house had forfeited or lost its right as a ruling house merely because the Atogun ruling house and Olose ruling house has continuously, between them, produced three Baales of Maleté. The yardstick which was used in the case of Olose ruling house should also be used in the case of Are/Alarafa ruling house. That is only fair to all the parties.

On the whole, and having regard to all the circumstances of this case, if the Are/ Alarafa ruling house, as had been shown in this case, produced a candidate on each of the two different occasions, who held the title of Baale Maleté for a period of 30 years and 45 years, respectively, until the times of their death, the mere fact that the Atogun ruling house and the Olose ruling house produced three persons who held the title one after the other could not by that reason alone result in the forfeiture or loss of the right of the Are/Alarafa ruling house to continue to provide a candidate to be appointed as Baale of Maleté. It could not be rightly said, in the circumstances of this case, that Are/Alarafa ruling house was remotely connected with the Baale of Maleté chieftaincy. On the contrary, the Are/Alarafa ruling house had continuously been closely connected with and generally recognised as a ruling house in relation to Baale of Maleté chieftaincy up till today.

It is necessary at this stage, to dispose of the submission made by the learned counsel for the appellants on the question of evolution and devolution of custom. The learned counsel for the respondents argued that the question was not raised as an issue and was not argued in the appellants' brief and, for that reason, it could not be argued in this court without leave. I think that there was substance in the submission of the learned counsel for the respondents. The rules of framing of issues in appeals, which had been laid down by this court in many decided cases, clearly show that issues are an indispensable part of an appellate brief because a point not raised as an issue in the brief cannot be entertained in oral argument. See *Dilibé v.*

Nwakozor (1986) 5 NWLR (Pt.41) 315; and Onyesoh v. Nnebedum (1992) 3 NWLR (Pt.229) 315. No issue was formulated or raised in the appellants' brief on the question of evolution or devolution of native law and custom. Therefore, the oral submissions made by the learned counsel for the appellants on the question were incompetent.

Closely connected with the foregoing is the question raised under the 6th issue in the appellants' brief, which was whether the court below was right in failing to consider grounds 5, 7, 8 and 9 of the grounds of appeal when such grounds raised substantial issues, of law and facts necessary for the determination of the case before the court. The appellants in paragraph 6.14 of their brief set out in detail, particulars of the reliefs claimed by the respondents. In order to fully understand the situation, including the important mistake made by the learned counsel for the appellant, it is necessary to set out paragraphs 6.7, 6.8, 6.9, 6.12 and 6.13 which are as follows:-

"6.7 The learned trial Judge made no finding of fact on and left undecided the other crucial issues as to:-

(i) Which of the 3 ruling houses identified by him has the turn to provide the candidate.

(ii) Whether or not the 5th respondent is from that ruling house.

(iii) Whether the nomination of the 5th respondent, having been carried out by 13 of the 17 compounds satisfied the customary procedure claimed by the respondents and accepted by the High Court that a valid nomination could only be carried out by ALL the 17 compounds.

(iv) Whether the reliefs sought were supported by evidence.

6.8 Without resolving these issues however, the learned trial Judge granted all the reliefs claimed by the respondents, which reliefs could only have been properly granted if the issues above had been resolved in their favour based upon the evidence adduced.

6.9 On appeal the Court of Appeal was so influenced by the finding of the High Court that there were three ruling houses that that court did not consider it necessary to consider the other issues raised in the other grounds of appeal before it.

6.12 The appellants also submit that the finding that there were 3 ruling houses could not, and did not answer the other weighty issues contained in paragraph 6.7 supra all of which were germane to the grant or refusal of the reliefs claimed by the respondents in the lower court.

6.13 The grounds of appeal which the Court of Appeal failed to consider or deal with these issues and attacked (sic) the grant to the respondents of reliefs which were not supported by the evidence and finding of fact of the learned trial Judge.

It was pointed out, in the appellants' brief, that the first item in the

reliefs claimed by the respondents, which related to the requirements for compliance with the native law and custom in relation to a valid appointment as Baale of Maleté, though an important aspect of the case, was not the only important aspect of the matter. There were other important aspects of the case which were separate and distinct from the first item to which grounds 5, 7, 8 and 9 of the grounds of appeal related and which the court below did not consider.

It was obvious from the brief which the appellants filed in the court below and from the way in which the sixth issue in the appellants' brief in this court was framed, that the appellants partly argued the appeal in the court below on the basis of the issues formulated in the brief filed in the court below and partly on the basis of the grounds of appeal in the court below and that the arguments of the learned counsel for the appellants in the court below in relation to the questions raised in the 5th, 7th, 8th and 9th grounds of appeal were based on the grounds of appeal aforesaid and not along the lines of any issues formulated for the appeal. Arguments of counsel in a brief of argument filed in appellate courts should be based along the lines of the issues formulated for the appeal and not on the grounds of appeal. Any breach of the foregoing rule or requirement by a party constitutes non-compliance with the relevant rule and is irregular. See *Ojibah v. Ojibah* (1991) 5 NWLR (Pt.191) 296 in which this court at page 316 stated, per Nnaemeka-Agu, J.S.C., inter alia, as follows:-

*"Before I stop, I must note that learned Senior Advocate for the respondent after formulating the issues went ahead to argue the appeal on the grounds of appeal. This court has made it clear that to now argue one's appeal on grounds of appeal rather than issues formulated for the appeal is a case of non-compliance with the rules and one which makes the task of the court much more difficult. It will no longer be tolerated. But as the appellant who filed his brief out was absent and not represented at the hearing has taken no objection to this as he should, we allowed the irregular practice this time."*

In the circumstances stated above, the appellants should expect the court below to deal with the appeal before it on the basis of the issues, if any, formulated in the appellants' brief and not on the basis of the grounds of appeal. If the appellants erroneously committed an irregularity by arguing the appeal on the basis of grounds of appeal instead of arguing it along the lines of issues formulated or which should have been earlier formulated, the court below did not have to commit the same error.

I now come to the second issue raised in the appellants' brief. It was stated in the appellants' brief that the complaint of the appellants, in this connection, was that the learned trial Judge erred in law by failing to apply the principle in *Larbi v. Kwasi*, 13 WACA 81 at 82 to the facts of the case before him and the Court of Appeal also erred in law by upholding the judgment of the learned trial Judge. The 1st appellant alleged that when he received two nominations for appointment as Baale of Maleté chieftaincy, which was vacant, he caused an inquiry to be carried out by a panel headed by himself to find out or determine the number of ruling houses eligible to

present a candidate for the vacant chieftaincy and the ruling house next entitled to present a candidate. According to the appellants, both parties participated in the proceedings of the inquiry and presented their cases. The inquiry, at the end of the exercise found that only two ruling houses, Atogun and Olose, were eligible to present candidates and that the 3rd appellant was the unanimous choice of both ruling houses. As a result, his candidature was approved. The contention of the appellants, based on what was said to be the principle in Larbi's case, *supra* was that where matters in dispute between two parties are investigated at a meeting and in accordance with customary law and general usage, a decision is given, it is binding on the parties and the court will enforce such a decision. B

The submission made for the respondents was that the purported investigation conducted by the 1st appellant was stage managed by the 1st appellant in favour of the 3rd appellant. The alleged or purported investigation lasted for one day and the 3rd appellant was installed the following day as Baale of Maleté by the 1st appellant. The panel never met again after the meeting which lasted for one day and no decision of the panel, as constituted, was taken. Further, the panel was not an independent body whereas the body that conducted the proceedings in Larbi's case, *supra*, was an independent body. For those reasons, the decision, if any, of the panel which was set up by the 1st appellant could not be binding on the parties. C D

The panel set up by the 1st appellant was not set up by the 1st appellant under native law and custom; the averment in paragraph 10 of the Amended Statement of Defence of the 1st and 3rd appellants was that the 1st appellant set up the panel in exercise of the powers conferred upon him by or under the Chiefs Law. Further, the panel of inquiry was not a body which was chosen by the parties and, in the circumstances of this case, it could not be said that the parties were bound by its decision, if any. What according to the head note, was involved in Larbi's case, *supra* was arbitration proceeding, the general principles governing such proceeding, and the effect of one party withdrawing before completion of such arbitration. In Larbi's case, *supra*, there had been an award according to native law and custom in an arbitration involving the parties and it was contended that one of the parties could withdraw from the proceedings. The West African Court of Appeal, following, *inter alia*, the general principles governing arbitration set out in *Foli v. Akese* (1930) 1 WACA 1, held that the arbitration was valid and binding and that it was repugnant to good sense to allow the losing party to reject the decision of the arbitrators to whom he had previously agreed. In *Foli's* case, *supra*, the court stated, *inter alia*, as follows:- E F G

"These may be summed up in the statement that in submissions to arbitration the general rule is that as the parties choose their own arbitrator to be the Judge in the disputes between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts. H

There was no question of the parties engaging in the joint submission or reference of the dispute, if any, between them to arbitration and there was no award according to native law and custom made as a result of the proceeding conducted by the panel of enquiry set up by the 1st appellant. There was also the question whether the 1st appellant had power under the Chiefs Law to set up a panel of inquiry to determine the issues involved. There was no evidence that the panel of inquiry, as constituted by the 1st appellant, ever announced its decision. The proceedings, if any, before the panel could not be described properly as arbitration proceeding. The inevitable conclusion to which I have come is that the alleged principle in Larbi's case is inapplicable to the finding or decision, if any, of the panel of inquiry allegedly set up by the 1st appellant. The court below was, therefore, right in upholding the judgment of the learned trial Judge which did not apply the rule in Larbi's case to the alleged findings of the panel of inquiry set up by the 1st appellant.

The third issue set out for determination in the appellants' brief was whether the court below was right in holding that the finding of the learned trial Judge to the effect that there were three ruling houses as against two, knocked the bottom out of the entire case of the defendants/appellants when the issue was not the only issue in the case and the other issues were not dependent thereon. The arguments or submissions of the appellants in their brief in relation to the present issue were practically their submissions in relation to the sixth issue in which there was a complaint that the court below failed to consider the questions raised by the 5th, 7th, 8th and 9th grounds of the grounds of appeal. In particular, it was submitted in relation to the sixth issue that the first item in the relief claimed by the respondents, concerning the requirements for compliance with the native law and custom in relation to a valid appointment as Baale of Maleté, though an important aspect of the case, was not the only aspect of the matter. There were other important aspects of the case which were separate and distinct from the first item, to which grounds 5, 7, 8 and 9 of the grounds of appeal related and which the court below did not consider. My determination on the 6th issue was that the question raised by the grounds of appeal were argued on the basis of the grounds of appeal instead of their being argued along the lines of issues formulated or which should have been formulated in the appellants' brief in the court below. See Ojibah's case, *supra*. What the appellant did in relation to the aforesaid grounds of appeal was, as I earlier pointed out above, an irregularity and the court below did not have to commit the same error.

The foregoing was not the end of the matter. The other crucial issues to which grounds 5, 7, 8 and 9 related and which, according to the appellants, the court below did not consider were, as stated in paragraphs 6.7, 6.12 and 6.13 of the appellants' brief as follows:-

*"(i) which of the three ruling houses identified by him (learned trial*

*Judge) has the turn to provide the candidate.*

(ii) *whether or not the 5th respondent is from the ruling house.*

(iii) *whether the nomination of the 5th respondent having been carried out by 13 of the 17 compounds satisfied the customary procedure claimed by the respondents and accepted by the High Court that a valid, nomination could only be carried by all the 17 compounds.*

(iv) *whether the relief sought were supported by evidence."*

Assuming, for the purposes of argument, that the court below did not consider the questions raised by grounds 5, 7, 8 and 9 of the grounds of appeal, it does not mean that the appellants' appeal must on that ground alone automatically succeed, it is not every error committed by a lower court that will lead to reversal of its judgment by an appeal court. An error that can warrant the reversal of the judgment of a lower court must have substantially affected the decision. See *Olubode v. Salami*. (1985) 2 NWLR (Pt.7) 282. I have carefully read the questions raised by the said grounds of appeal and, after due consideration, I have come to the conclusion that they were matters which this court could determine effectively as the evidence on record relating to them did not raise the issue of credibility of witnesses. Generally, when evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of evidence by the trial court; an appellate court is in as good a position as the trial court to do its own evaluation. See *Narumal & Sons Nigeria Ltd. v. Niger Benue Transport Co. Ltd* (1989) 2 NWLR (Pt.106) 730 at P.742; and *Abisi v. Ekwealor*, (1993) 6 NWLR (pt.302) 643. At the end of this judgment it will be seen that practically all the questions raised by grounds 5, 7, 8 and 9 of the grounds of appeal, which were set out in paragraph 6.7 of the appellants' brief, have been determined in other connections in this judgment. On the question of whether it was the turn of the ruling house of the 5th respondent to present a candidate to fill the vacancy, the evidence of the 5th respondent was that it was the turn of his ruling house to present a candidate. His evidence was corroborated by the evidence of the 1st P. W. which was as follows:-

*"it is now the turn of Are ruling house."*

The ruling house of the 5th respondent is otherwise known as Are ruling house. The 5th respondent and the 1st P.W. were cross-examined and they were unshaken. In any case, the evidence led by the respondents was that selections for appointment were on rotation and the other two ruling houses had had their own turns.

With reference to the question whether the 5th respondent belonged to Are/ Alarafa ruling house that was entitled to provide a candidate for the present vacancy in the chieftaincy, the evidence of the 4th respondent was that the Are family presented the 5th respondent to the Bale Koso. The 2nd P.W. was the Bale Koso and his evidence was that he knew the 5th respondent and that he (5th respondent) was presented to him (Bale Koso) sometime in 1983 as the Bale Maletete elect. He, 4th respondent, took the 5th respondent to the Aseyin of Iseyin (the 1st appellant) who de-

mandated that a letter should be submitted on the matter to him. The letter was submitted and the 1st appellant confirmed that the letter was received by him. The letter, which was written by Are/Alarafa ruling house, was Exhibit “A” which speaks for itself. There was, therefore, no doubt of any kind that the 5th respondent belonged to the aforesaid ruling house. Nobody has asserted that

B Exhibit “A” was forged.

The averments in the Amended Statement of Claim was inter alia, that the Heads of Compounds in Malete used to participate in the appointment of a candidate for the purpose of filling a vacancy in Baale of Malete chieftaincy. They used to decide on the suitability and popularity of the candidate after

C the ruling house entitled to provide a candidate had nominated him. There was evidence that, in all, there were seventeen compounds in Malete. The contention of the appellants, which was also the question under the 5th issue in the appellants’ brief, was whether the nomination of the 5th respondent having allegedly been carried out by 13 out of the 17 compounds satisfied the

D custom claimed by the respondents and allegedly accepted by the High Court that a valid nomination could only be carried out by all the seventeen compounds. The court below affirmed the judgment of the High Court. I am afraid the situation had not been accurately stated in the appellants’ brief. After a careful reading of the pleadings, the judgment of the High Court and the evidence led by the respondents, the impression, which is fair, that I had was that the heads of compounds in Malete used to perform

E their relevant function or functions in connection with the appointment of a candidate as a body and not individually. If they acted as a body a decision on a candidate favoured by a simple majority of them would be enough. If they were expected to act individually and their decision was to be unanimous in the sense that a candidate must be approved by all the seventeen of them before he could validly be appointed then it

F would have been enough if only one of them refused to attend their meeting or refused to vote in favour of a candidate if, as in the present case, there was a dispute among the ruling houses as to the order of rotation then one of the ruling houses (which is represented by a head of a compound) would have been able to precipitate a crisis or a statement. One was, therefore, not surprised that after the 5th respondent and other witnesses who testified on the point had earlier stated that there were seventeen

G compounds in Malete each of which was headed by a compound head, they went further to testify that the compounds of the three ruling houses, as a matter of practice, were not always allowed to participate in the process. I am, therefore, in agreement with the submission of the learned counsel for the respondents that it was the practice that during the deliberation concerning the appointment of a new Baale of Malete the

H three ruling houses were usually not allowed to take part. There was no averment in the pleadings filed by the parties or in the oral evidence led by them that the decision of the seventeen heads of compounds in relation to a candidate must be made not as a body and must be unanimous.

It was argued in the appellants’ brief that the finding that there were three ruling houses could not and did not answer the other weighty questions

contained in paragraph 6.7 in the appellants' brief, all of which were germane to the grant or refusal of the reliefs claimed by the respondents in the lower court. Practically, all the issues have been dealt with in this judgment. The learned trial Judge, in resolving the issue in favour of the 5th respondent's ruling house, made the following statement in the judgment:-

*"I must confess that I find it very difficult to comprehend the notion, within native law and custom, of an acting Baale as put forward by the defence. Someone who acts in a position as a temporary measure for another must naturally vacate such position when the substantive designee of the position becomes prepared to assume it."*

It is enough, in this connection, to state that though the appellants in their brief criticised the foregoing statement of the learned trial Judge, which statement the court below affirmed, the true position showed that the 1st appellant, the 3rd D.W. whose name was Adeoti, and any other witness who testified to the effect that the two persons from the ruling house of the 5th respondent who at different times held the title of Baale of Malete did so in an acting capacity, wanted to mislead the court. Their alleged reason for stating that the two persons held the title in an acting capacity was that on the first occasion the person who would have held the title went to fight in the Dahomean War and on the second occasion the Olose and the Atogun ruling houses that could have provided a candidate to fill the vacancy could not agree on a candidate. The "foregoing was also the reason for the decision of the inquiry appointed by the 1st appellant (the Aseyin of Iseyin) and presided over him. His evidence was, inter alia, as follows:-

*"Our investigations revealed that the Atogun and Olose ruling houses are those entitled to present a candidate. We found that Alarafa Ajala family were related to Atogun and Olose families by marriage. Alarafa and Ajibade acted as Bales Malete when the families of Atogun and Olose were away to the Dahomey War. I therefore approved the candidature of the 3rd defendant and he was installed the second day."*

The decision of the inquiry, set up by the 1st appellant and presided over by him, was the decision which the appellants contended, under issue 2 above, was binding on the ruling house of the 5th respondent on the basis of the rule or principle in Larbi's case, *supra*. The learned trial Judge gave due consideration to the evidence led, on the point, by the appellants and stated that he found it very difficult to comprehend the notion, within native law and custom, of an acting Baale as put forward by the defence. In the view of the learned trial Judge someone who acted "in a position as a temporary measure for another must naturally vacate the position when the substantive designee of the position became prepared to assume it."

On the basis of the view expressed by the learned trial Judge, when the Dahomey war ended the member of the 5th respondent's ruling house acting as Baale of Malete should have vacated the position for someone from the Atogun ruling house or from the Olose ruling house. In the same way, on the second occasion when someone from the ruling house of the 5th respon-

dent also allegedly held the title in an acting capacity; that person should have vacated the position for another person from Atogun or Olose ruling house when the alleged wrangling between the Atogun and Olose ruling houses ended. Instead of vacating the position what happened was that each of the two persons from the-ruling house of the 5th respondent continued holding the title, continuously till their death, for 30 years or 45 years; as the case might be. There was no significant or fundamental difference between the basis' for the view expressed by the learned trial Judge on the matter and the true position stated by the appellants in paragraphs 23 to 27 of the appellants' Further Amended Statement of Defence on the implication and meaning of a person acting as Baale of Malete, which are as follows:-

*"23. That when Adebiofon died Ajadi who should have filled the vacant stool had gone to Dahomean War with other male members of Atogun and Olose families, leaving only women and young children at home, and in consequence there was no adult male member from both families to fill the vacant stool.*

*24. That when the stool remained unfilled, Malete was not represented in Aseyin's traditional Council and this made the then Aseyin, Oba Majaro, to ask members of Atogun and Olose families to appoint a Baale but because there was no adult male members at home the two families headed by Mafoluku, the oldest woman then alive daughter of Alarafa Ajala and wife of Ajadi, sent to Ajadi to return home or ask any adult male member at the war front to come home to fill the vacant stool.*

*25. That Ajadi refused to come home but in order to keep the vacancy unfilled until his return he sent his father-in-law, Ajarafa Ajala, he made to act for him as Baale until he would return to take over; and because of the affection Atoogun and Olose families had for Alarafa, all the women at home asked Mafoluku to present her father to Aseyin to act as Baale pending the return of her husband and in consequence Alarafa also represented Malete in the Aseyin's traditional Council while acting as Baale.*

*26. That when Alarafa Ajala died Ajadi had not still returned and just as it was being proposed to ask Ajibade son of Alarafa Ajala, to step into his father's shoes as acting Baale, Layiwola a member of Atogun Ruling House and son of Ateteba returned from the war front and was therefore appointed by both Ruling Houses as the Baale of Malete.*

*27. That Layiwola died before long and at a time when Adigun of Olose family and Kelani of Atogun had both returned from the war front and there was a long drawn and protracted dispute as to who should fill the vacancy for many years and in consequence Ajibade who had already been proposed and put up as regent after the death of his father was with consent of both families again asked to act as Baale and representative of Malete in Aseyin's traditional Council pending the time the two Ruling*

Parties are bound by their pleadings See National Investment & Property Co. Ltd., v. Thompson Organisation Ltd., (1969) 1 All NLR 138, at p. 142.

Paragraph 25 of the Further Amended Statement of Defence, quoted above, showed that the message allegedly sent back by Ajadi was that this father-in-law, Alarafa Ajala, be made to act for him as Baale until he (Ajadi) returned to take over and that all the women at home asked Mafoluku to present her father to act as Baale pending the return of her husband. The averment in paragraph 27 of the said Further Amended Statement of Defence was that when a vacancy in the Baale of Malete chieftaincy occurred again and there was wrangling between Atoogun and Olose ruling houses on the question of nominating a candidate, Ajibade from the 5th respondent's family was, with the consent of both ruling houses (Atoogun and Olose), asked to act as Baale of Malete pending the time that the two ruling houses would settle the dispute between them. The averment in paragraph 28 of the Further Amended Statement of Defence was that when another vacancy in the chieftaincy subsequently occurred and the dispute between Atogun and Olose ruling house had been settled, Adekanbi from Atogun ruling house was appointed the Baale of Malete. What is important or relevant, for the present purpose, was that the acting appointment in the cases mentioned above was, in the first place made pending the return of Ajadi from the Dahomey war when he would take over and in the second case the acting appointment was made pending the time that the two ruling houses would settle the dispute between them. The duration of the acting appointments, as stated in the paragraphs of the Further Amended Statement of Defence quoted above, was consistent with the view of the learned trial Judge on the meaning and the implication of the word “act” as used in relation to acting in a position. The criticism of the view, expressed by the learned trial Judge on the point, was, therefore, unwarranted and unjustified.

In the case of the question raised under the 4th issue, the relief claimed by the respondents was a declaration that the purported appointment of the 3rd appellant as Baale Malete without the permission or consent of the 1st respondent and other compound heads of Malete, Iseyin in 1983 was against the custom and tradition of Malete people and as such was null and void. The evidence led by the respondents, which was accepted by the learned trial Judge and affirmed by the court below, was inter alia, that under the native law and custom of Malete there were three ruling houses capable of producing or nominating a candidate for the purpose of filling a vacancy in Baale of Malete chieftaincy. The ruling house of the 5th respondent was one of the three ruling houses. It was the turn of the ruling house of the 5th respondent to nominate a candidate to fill the vacancy in question in the Baale of Malete chieftaincy and the consent of the compound heads in Malete was necessary. The respondents further led evidence that the consent or permission of the

compound heads in Malete was not sought nor obtained for the purported appointment of the 3rd appellant and he was not, in accordance with native law and custom, presented to the Baale Koso who should in turn present the 3rd appellant to the Aseyin of Iseyin. The 3rd appellant never contended that the consent or permission on the heads of compounds of Malete was ever sought or obtained for his purported appointment as Baale of Malete. He was never presented, as Baale of Malete elect, to the Baale Koso. In fact, the contention of the appellants was that it was not necessary to obtain the consent or permission of the heads of compounds of Malete to the appointment of a person as Baale of Malete and that it was not necessary to present such a person to Baale Koso.

With reference to the native law and custom of Malete which the respondents alleged were not complied with in the case of the purported appointment of the 3rd appellant it has to be stated that custom is a rule which in a particular district or area had, from long usage, obtained the force of law. A custom is a question of fact to be proved by evidence. See *Olagbemiro v. Ajagungbade III*, (1990) 3 NLWR (Pt.136) 37; and *Agbetoba v. Lagos State Executive Council & Ors.* (1991) 4 NWLR (Pt.188) 664. The evidence which the respondents led on the native law and custom, with which the purported appointment of the 3rd appellant did not comply and which was accepted by the learned trial Judge, and the findings on which the court below affirmed or on the basis of which the court below itself made findings, as the case might be, clearly showed that the respondent had discharged the burden on them. In the circumstance, the answer to the question raised under the 4th issue is in the affirmative. The court below was right in upholding the grant of relief (b) to the respondents. The relief was supported by evidence.

With particular reference to the question raised under the 5th issue, the respondents led evidence which enabled the learned trial Judge to make findings affirmed by the court below or on the basis of which the court below itself made the findings, as the case might be, that inter alia, there were three ruling houses capable of nominating a candidate to fill a vacancy in Baale of Malete chieftaincy; that the ruling house of the 5th respondent (Are/Alarafa ruling house) was one of the ruling houses; that the 5th respondent was a member of Alarafa ruling house; that it was the turn of Alarafa ruling house to nominate a candidate to fill the vacancy in question in Baale of Malete chieftaincy; that the 5th respondent was the person nominated by the Alarafa ruling house for the aforesaid purpose; that the appointment of the 5th respondent as Baale Malete received the consent of the heads of compounds in Malete; that the 5th respondent was presented by his ruling house to the Baale Koso as Baale Malete elect, and that the Baale Koso duly presented the 5th respondent to the Aseyin of Iseyin (1st appellant) as Baale Malete elect. The onus is on the plaintiff in a claim for chieftaincy declaration to prove that the claimant of the title was validly nominated and appointed in accordance with customary law relating to the chieftaincy. See *Olabanji v. Omokewu* (1992) 6 NWLR (Pt.250) 671. The foregoing evidence showed that the burden was discharged. In the circumstance, the answer to the question raised under the 5th issue is in the affirmative. The court below was right in upholding the decision

of the learned trial Judge granting relief (f) to the respondents as there was ample evidence before him to support the grant.

On the whole, the appeal does not succeed. The judgment of the court below, affirming the judgment of the learned trial Judge, is hereby affirmed. The appeal is accordingly dismissed with N1,000.00 costs to the respondents.

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**BELGORE JSC**

B

I read in advance the judgment of my learned brother, Adio, J.S.C. and I also agree that this appeal lacks merit. The concurrent findings of the courts below cannot be faulted and the reasoning of each of that court that the respondents have a valid against the appellants has been well articulated. I adopt the reasons of Adio J.S.C. as mine in also dismissing this appeal and I make the same order as to costs.

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C

**WALI JSC**

D

I have been privileged to read in advance a copy of the lead judgment of my learned brother, Adio J.S.C. and I agree with his reasoning and conclusion for dismissing the appeal. I hereby adopt them as mine.

The concurrent findings of the two lower courts are unimpeachable. Accordingly, I also dismiss this appeal and abide by the consequential order made in the lead judgment as to costs.

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E

**KUTIGI JSC**

I read before now the judgment just delivered by my learned brother Adio, J.S.C. I agree with him that the appeal fails. It is accordingly dismissed and the judgments of the lower courts confirmed. I subscribe to the order for costs.

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F

**ONU JSC**

G

Having been privileged to have a preview of the judgment of my learned brother, Adio, J.S.C. just delivered. I am in entire agreement therewith that the appeal lacks merit and ought to fail.

I wish, however, in amplification to comment thereon as follows:-

The facts giving rise to the case need no restatement here; they are as lucidly set out in the judgment of my learned brother. Suffice it to say that the trial High Court of Oyo State sitting in Ibadan (coram: Olowofoyeku, J.) had no difficulty in weighing the evidence adduced before it, following strictly the pleadings, to find in favour of the plaintiffs/respondents to the effect that

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three ruling houses and not two existed to fill the vacancy of the Baale Maleté, Iseyin, though it was unnecessary to seek the consent of compound heads before filling that vacancy. The Court of Appeal, Ibadan, (hereinafter referred to as the court below) affirmed that decision of the trial court and this led the parties to formulate the following issues for the determination of this court to which a further appeal has lain in an exchange of briefs. On the part of the defendants/appellants the following six issues were proffered, to wit:

1. Whether the Court of Appeal was right in affirming the judgment of the High Court when it is clear that the court erred in law in dealing with the evidence relating to traditional history by not applying the rule in *Kojo v. Bonsie* (1957) 1 WLR 1223 at 1226.

2. Whether the Court of Appeal was right in upholding the judgment of the High Court when the court failed to apply the rule in *Larbi v. Kwasi*. 13 WACA 81 at 82 to the findings of the investigative panel of inquiry instituted in accordance with customary law and usage to resolve the conflict between the two parties as regards the number of ruling houses, the order of rotation and the ruling house next entitled to fill the vacancies in the chieftaincies:

3. Whether the Court of Appeal was right in holding that the finding of the learned trial Judge (which itself was under attack) to the effect that there are three Ruling Houses, as against two, knocked the “bottom out of the entire case of the defendant” when that issue was not the only issue in the case and the other issues are dependent thereon.

4. Whether the Court of Appeal was right in upholding the grant of relief (b) to the respondents when such relief was not supported by the evidence adduced in the High Court.

5. Whether the Court of Appeal was right in upholding the decision of the high Court granting relief (f) to the respondents when there was no evidence before the High Court to support the grant.

6. Whether the Court of Appeal was right in failing to consider grounds 5, 7, 8 and 9 of the grounds of appeal when such grounds raise substantial issues of law and facts necessary for determination of the case before the court. On February 27, 1995 when this appeal came up for hearing, learned Senior Advocate for the appellants and learned counsel for the respondents each elaborated on their briefs after adopting same. In my brief consideration of the issue formulated by both sides, I intended to stick to those formulated by the appellants and to approach them by way of issues 3, 5 and 6 together, all of which correspond to ground 3 and issues 1 and 2, each of which corresponds to grounds 1 and 2 respectively.

Issues 3, 5 and 6

It is the learned Senior Advocate for the appellant’s contention jointly on the above issues as borne out of appellant’s written brief firstly, that it was the respondents’ case that there were three ruling houses providing candi-

dates in rotation for the Baaleship of Malete, namely Olose, Are/Alarafa and Atogun whereas the appellants contended that there were only two ruling houses, to wit: Olose and Atogun. Secondly, that it was the respondents' case that under customary law -

(i) it was the turn of Are/Alarafa ruling house to produce a candidate to fill the vacancy

(ii) that a valid nomination of a candidate would be carried out if all seventeen compounds in Malete participated

(iii) that a candidate nominated from any ruling house must be presented through Baale Koso, the prescribed authority who, in the instant case, is 1st appellant, before a valid appointment for such candidate can be made by the prescribed authority

(iv) that the 5th respondent is the candidate duly nominated as Baale Malete, Iseyin by the 1st respondent and other compound heads of Malete and presented through the Baale Koso to the prescribed authority i.e. 1st appellant for approval.

Learned Senior Advocate then argued that the court below having upheld the respondents' case as stated above, thus affirming the trial Judge's decision to the effect that because there are Three Ruling Houses as opposed to the Two asserted by the appellants, the "*bottom is knocked out of the entire case of the defendants*" constituted faulty reasoning.

Thirdly, that the court below having further failed to consider the other issues, which the appellants demonstrated are not dependent on the number of Ruling Houses, it went wrong, particularly as it upheld the decision of the trial court, granting relief (f) to the respondents, evidence of which was not adduced at the trial. Besides, learned Senior Advocate maintained, grounds 5, 7, 8 and 9 of the grounds of appeal were not considered in the court below even though these grounds raise substantial issues of law and facts necessary for the determination of the case. In addition, learned counsel argued in oral expatiation that the trial court as well as the court below overlooked the very vital principle of law that where a plaintiff's case is predicated on native law and custom, the onus is on the plaintiff to establish by evidence that native law and custom. After learned S.A.N. had adverted our attention to some pages of the record and what the respondents had pleaded, in their Amended Statement of Claim as the clear constituents of native law and custom in relation to the appointment and presentation of a Baale, we were further referred to paragraphs 17 and 18 of the Amended Statement of Claim. As to how there was no presentation but only an appointment, we were referred to the Record, and particularly the evidence of P.W.1 clearly stating the evolution and devolution of custom in relation thereto. Reliance was placed on the cases of Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372 at 385; Aghai v. Okoghue (1991) 7 NWLR (Pt.204) 391 at 427 and Halsbury's Laws of England, 4th

Edition, Vol. 12, paragraph 406, page 5. After learned Senior Advocate had pointed out how evidence adduced by the respondents was at variance with their pleading, namely that they were talking of compound heads and not the Iseyin Community, he indicted the assertion by them that there was rotation among the Baales which negated their entire case. After referring us to some passages in the Record, learned Senior Advocate concluded his submission by saying that all issues raised by the respondents were irrelevant to the case before the court, citing in support thereof the case of A.G Anambra State v. Okafor (1992) 2 NWLR (Pt.224) 396 at 421.

Now, the pith and substance of the appellants' case is that there are only two Ruling Houses - Olose and Togun who select and appoint a Baale in Malete vide paragraph 2 of the 1st and 3rd appellants' Amended Statement of Defence. It was their further contention that it is after appointing the Baale that they (appellants) send him direct to the 1st appellant without the other compound heads playing a part in the exercise. The trial court however found as a fact that there are in fact three Ruling Houses in Malete, to wit: Olose, Atogun and Alarafa with 1st respondent playing a vital role in the exercise and that the compounds Heads concerned do in fact participate as a matter of practice in the exercise of selecting a new Baale. This concurrent finding of fact, based as it were, on the learned trial Judge's conclusion to the effect that -

*"I cannot say that the entirety of the plaintiffs' case has been well put, for there are serious omissions in the evidence led, such as in relation to paragraph 21 of the statement of claim dealing with the application of the tradition to previous Baales, which could have made a lot of difference to their case. But from my acceptance of their case that the previous Baales from the Are/Alarafa ruling house held the position in their own right, the notion of an acting Baale being incongruous in the circumstances; added to my view of the procedure for appointment of Baales by the defence as being unlikely and may lead to chaos, I consider that the plaintiffs' case as to the procedure for the appointment of a Baale of Malete after a vacancy over the procedure that has been put forward by the defendants, and given confirmation by the court below, wherein it held inter alia that -*

*"I am in entire agreement with all the above findings and conclusions of the learned trial Judge. They are exhaustive and painstaking. They are logical and accord with reason and commonsense and in my view, represent the custom and tradition of the people. The finding of the learned trial Judge that there are three ruling houses as against two knocked off the bottom out of the entire case of the defendants. Commonsense will not dictate that the two ruling houses (Olose and Togun) alone will select, appoint and present the Baale elect to the 1st defendant for approval while the fifteen remaining compounds remain passive in the procedure leading to the appointment of their Baale"* has inevitably led to the collapse of the edifice of the appellants' case. Consequently, there are no substantial issues left to be decided or upon which the

appellant's case can be sustained vis-a-vis the respondents'. Be it noted that the appellants did not counter claim at all against the respondents; such as that the appointment of the 5th respondent should be set aside for any irregularities or that 5th respondent was not from Are Alarafa Ruling House or further still that his appointment was made by wrong and unidentified person or persons in the event of appellants' defence of Two instead of Three Ruling Houses failing. While it is well settled that customary law is a question of fact to be proved by evidence vide section 14 of the Evidence Act, a party who alleges a particular custom must adduce sufficient evidence in support to establish its existence to the satisfaction of the court vide *Inyang v. Ita* (1929) 9 NLR 84; *Olowu v. Olowu supra* and *Agbai v. Okogbue (supra)*, I am satisfied that in the instant case, the respondents adduced sufficient credible evidence in line with their pleadings to be entitled to judgment and the court below rightly in my view, affirmed the same. The above cases therefore are distinguishable from the instant case.

On the appellants' grouse as to whether the court below was right in upholding the decision of the trial court granting relief (f) to the respondents when there was no evidence before the trial court to support the grant, suffice it to say that since the trial court had found all the other reliefs claimed except item (i) asking for perpetual injunction against 1st and 2nd respondents respectively, restraining them from approving and recognising the 3rd respondent as Baale of Malete, Iseyin, proved on the pre-ponderance of evidence in respondents' favour, the finding in respect of relief (f) which asks for a declaration that the 5th respondent is the person duly appointed as Baale Malete, Iseyin by the 1st respondent and other Compound Heads of Malete and presented to 1st appellant through the Baale koso for approval in 1983, logically follows. It accordingly equally follows that item e(ii) which asks for perpetual injunction against the 3rd appellant restraining him from parading himself as Baale of Malete, and/or performing the rites, duties and functions of Baale Malete, Iseyin, should be granted as a matter of course and the decision of the trial court which was affirmed by the court below be regarded as rightly upheld. Regarding the restraint of the 3rd appellant from parading himself as Baale Malete and from performing the functions of Baale by an injunction, I am of the firm view, that even if the respondents had not claimed an injunction to restrain the 3rd appellant from parading himself as Baale, the very fact that their case succeeded against the appellants was enough for the court to grant an injunction against them as an incidental relief necessary for protecting their (respondents') rights as established at the trial. See *Oyediran v. Amoo* (1970) 1 All NLR 313; *Okolo v. Uzoka* (1978) 4 S.C. 77; *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt. 18) 550 at 575; *Hon. Justice Adenekan Ademola v. Chief Harold Sodipo & ors.* (1989) 5 NWLR (Pt. 121) 329 at 346 and 347 and *Akinbobola v. Plisson Fisko (Nigeria) Ltd.* (1991) 1 NWLR (Pt. 167) 270 at 284. One may then ask, if the 3rd appellant was not restrained from parading himself as Baale Malete,

- Iseyin and from performing the functions of Baale as argued by the appellants, what would be the essence of the whole action and how else would the effect of the judgment be felt and become enforceable? I am of the view that even if the respondents in the instant case had not specifically sought or claimed the relief to restrain the 3rd appellant from parading himself as Baale Malete,
- B Iseyin and from performing the functions of that office, the learned trial Judge would still have been perfectly right to make an order of injunction against the 3rd appellant as ancillary to the decision arrived at and necessary to protect the respondents' rights. Indeed, both the Court of Appeal Act in section 16 and the Rules are consistent with the incidental order the court below made herein even though neither party asked specifically for it. See Adigun & ors. v. A-G. of Oyo State (1987) 1 NWLR (Pt.53) 678;
- C Garba v. University of Maiduguri (supra) and Usman v. Umaru (1987) 3 NWLR (Pt.62) 655 at 672. Compare Amanabu v. Okafor (1966) 1 All NLR 205 at 207; Uku v. Okumagba (1974) 1 All NLR (Pt.1) 474; Sachia v. Kwande Local Government Council (1990) 5 NWLR (Pt.152) 548 at 561 and Re V.G.M. Holdings Ltd. (1941) 3 All E.R. 417. As there was overwhelming preponderance of evidence that tilted the scale in
- D favour of the respondents on the number of Ruling houses and the trial court, rightly in my view, considered the case in its totality before arriving at the conclusion it did, the three issues considered above are all collectively answered in the affirmative.

#### Issue 1

- In the light of all I have said in my consideration of Issues 3, 5 and 6 above, my answer to this Issue too must perforce be in the affirmative. My reasons are firstly, that at the end of the day, the appellants' case will collapse and fail if there is a finding (which indeed there is) that there are Three Ruling houses while the respondents' case will collapse and fail if the finding is that there are only Two Ruling Houses. Before arriving at the conclusion that the evidence of the witnesses of the respondents preponderates on this crucial point, the learned trial Judge made a dispassionate and painstaking
- F review of the evidence of the witnesses called by both sides.

Secondly, when the learned trial Judge came to the irresistible conclusion that -

- "I must confess that I find it very difficult to comprehend the notion, within native law and custom of an acting Baale as put forward by the defence. Someone who acts in a position as a temporary measure for another must naturally vacate such position when the substantive designee of the position becomes prepared to assume it"*
- G

- He need not be an expert in customary law generally, or that of Iseyin in particular, to accept the story on the point by either of the parties. Indeed,
- H the learned counsel for the appellants quoted him out of context. Thus, the court below was entitled and indeed perfectly right to accept, the learned trial Judge's approach to the crucial point when he held inter alia -

*"I agree completely with the learned counsel for the respondents that the learned trial Judge made a dispassionate and painstaking review of*

*the evidence adduced by both parties on this issue before he made his finding. I also agree that he was quoted out of context."*

Thirdly, the learned trial Judge having found on the preponderance of evidence before him that both Alarafa and Ajibade from Are Alarafa Ruling House were appointed and had reigned as Baale Malete as of right for 30 and 45 years respectively until their death, the issue or concept of a regent or acting Baale, being repugnant to the customs of Iseyin, does not arise and the learned trial Judge never so indicated. Neither had trial Judge who was using evidence adduced as his only guide, in my view, imported any modern meaning or otherwise into a purely traditional transaction. On the issue of succeeding Baales of Malete, Iseyin the learned trial Judge after sufficiently advertng his mind thereto, held that there was no issue thereon except that 3rd appellant from the Atogun Ruling House, was the subject-matter of the instant case whereas the last incumbent, Egunjobi, was also from the same Atogun Ruling House.

The learned trial Judge's findings of facts relating to succession based on rotational system and given confirmation in the decision of the court below which the learned Senior Advocate now impugns as being in disregard of or in derogation from traditional history, is in my respectful view, of no relevance here. This is because the proposition of law relating to traditional history as decided in *Kojo II-v-Bonsie* (1957) 1 WLR 1223; *Adenle-v-Oyegbade* (1967) NMLR 136 and a host of other cases by this court, is that: where there is a conflict of traditional history, one side or the other must be mistaken, yet both maybe honest in its belief. In such a case demeanour is of little guide to the truth. The best way to test the traditional history is by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable. Thus, as Obaseki, J.S.C. puts it in *Oyibo Iriri and Others -v- Eseroraye Erhurhobara & Another* (1991) 2 NWLR (Pt.173) 252 S.C. (more relevant in land disputes):

*"Traditional evidence being hearsay upon hearsay do not always have the sanctity of truth although the witness may be testifying truthfully about the information handed down to him".*

In the instant case, none of the parties relied on traditional evidence to support their case. The demeanour of the witnesses was essential to the proof thereof and the trial court which saw and heard them testify unquestionably evaluated the evidence and appraised the facts which cannot be faulted and the Court of Appeal did not substitute its views for those of the trial court. See *Akinloye & Anor v. Eyiyoala and Ors.* (1968) NMLR 92 at 95. The matter was a straight forward one of oath against oath to be established through credible evidence of the witnesses. See *Joshua Alonge v. I.G. of Police* (1959) SCNLR 516; (1959) 4 FSC 203 at 205; *Bayo Adelumolav. The State* (1988)1 NWLR (Pt.73) 683 at 691 and *Anthony Igbo v. The State* (1975) 9-11 S.C. 129. The trial court which heard and watched the witnesses testify, thereafter expressed its preference for the respondents' case; it was pre-eminently in a better position to make that finding. See *Akpauna . & Ors. v. Obi Nzekwa II* (1983) 2 SCNLR 1; *Etowa Enang & Ors. v. Fidelis Adu* (1981) 11-12 S.C. 38, 40

and Akinloye v. Eyiola (supra). The court below having affirmed that finding of the trial court, this court will be loath to interfere therewith.

Issue 2

The issue here is whether the court below was right in upholding the judgment of the High Court when that court failed to apply the rule in *Larbi v Kwasi* (1950) 13 WACA 81 at 82. It is enough to dispose of this issue by saying that the purported investigation by the 1st appellant being a stage-managed one that lasted a day, culminating in the installation of the 3rd appellant the second day as Baale, Maleté by 1st appellant, the trial court was right to hold that no decision was ever taken by the Panel as constituted: From the evidence of 2nd P.W. Joseph Onaolapo Ajeigbe, the Baale Koso, confirmed by 1st appellant who was Chairman of the panel which lacked independence because of its breach of the principle of *Nemo debet esse iudex in propria causa* (no one should be judge in his own cause) and a fortiori not constituting a binding arbitration on the parties thereto, is distinguishable from the decision in *Larbi v Kwasi* (supra). In that case, an arbitration award according to native customary law was held to be valid and binding because it was repugnant to good sense to allow the losing party to reject the decision of the arbitrators to whom he had previously agreed.

Finally, the attitude of this court to concurrent findings of two lower courts is too well known to need reiteration here. Suffice it to say that it will decline to interfere with such findings of facts unless the appellant can show special circumstances e.g. that a serious violation of some principles of law or procedure has occasioned a miscarriage of justice thereby. See *Alhaji K.O.S. Are & Anor v. Raji Ipaye & Ors.* (1990) 2 NWLR (Pt.132) 298 at 317; *Enang -v- Adu* (1981) 11-12 S.C. 25 at 42; *Ojomu -v- Ajao* (1983) 9 S.C. 22 at 53 and *Ibodo v Enarofia* (1980) 5-7 S.C. 42 at 58. No such circumstances have been disclosed in the instant case to warrant my interference therewith. This issue is also resolved against the appellants.

It is for the above reasons and those elaborately set out in the judgment of my learned brother, Adio, J.S.C. with which I agree entirely that I dismiss this appeal with the same consequential orders therein contained.