

SUPREME COURT OF NIGERIA

23RD MAY 1995. SC 64/1993

**CORAM:- S.M.A. BELGORE. A.B. WALI, E.O. OGWUEGBU,
S.U. ONU, Y. O. ADIO. JJSC.**

ADEKUNLE AGBAKIN ORO

(For himself and on behalf of
the entire members of Omu
Ruling House) & 6 OTHERS

.....APPELLANTS

AND

JOSEPH AKANBI FALADE
& 3 OTHERS

.....RESPONDENTS

APPEALS - Issues - Court to consider all issues before it - And confine itself to the issues raised by the parties.

APPEALS - Remittal for hearing by Court of Appeal - Where respondents no cross-appeal - Hearing cannot be ordered.

CHIEFTAINCY MATTERS - Declaration of chieftaincy - Exhibits found unworthy and therefore not given serious consideration - And other findings of trial court - Whether illegal or irregular

EVIDENCE - Evaluation of evidence - By trial court - Where not perverse - Whether appellate court should interfere.

ILLETERACY - Jurat - Absence of it to indicate translation to the illiterates - Whether document executed by the illiterates is null and void.

FACTS

This is a chieftaincy matter about the head chief of Oro Ago in Ifelodun Local government Area of Kwara State. There are two major ruling houses whom the chieftaincy rotates. The two ruling houses have other sub-in order of seniority. It was the turn of the Oke Oro ruling house to be the next chief upon the death of the incumbent. Oke Oro has five sub-houses. It was the turn of the Omugo sub-house to produce the chief. But vide some manipulations and parading of some documents, the Okedaba sub-produced the next chief. The plaintiffs/appellants, some of whom are of the other four Oke Oro sub-houses therefore, filed an action against defendants/respondents claiming inter alia, that it is the turn of the Omugo sub-house to present a candidate for the chieftaincy.

The trial court found for the Plaintiffs. Defendants' appeal to the Court of Appeal was allowed by ordering a retrial based on an issue raised

by that court, without considering the parties' issues before it. Plaintiffs have now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION:

1. *“Whether the lower Court was right when it held that the learned trial judge did not consider the evidence of D. W. 10 (Chief Balogun - the Esinkin of Okeayin).*

2. *Having regard to the claims of the plaintiffs and the findings of fact made by the learned trial Judge, is the lower Court right when it held that central or main issue for determination is that it is Okedaba ruling house that is to present the next Oloro of Oro-Ago when there was no counter-claim and same was not made an issue before the lower court?*

3. *Whether having regard to the facts and circumstances of this case the Court of Appeal was justified in making an order of retrial.*

4. *What is the effect where crucial and fundamental findings of fact of a court are not appealed against? “*

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

Illiteracy - Absence of jurat

1. The six chiefs, who allegedly signed Exhibit 1 are illiterates and there was no jurat to indicate that it was read and translated to them and they understood the document. Not only that, they allegedly appended their names which they could not have done being illiterates. Therefore whether the names or thumb-prints, the jurat's absence makes Exhibit 1 null and void under Illiterates (Protection) Law. (p. 1209 C)

Court to consider all issues before it

2. Learned Justices of Appeal were grossly in error to have even confined themselves to alleged failure to evaluate and make finding on the evidence of D.W. 10. In all the cases before an appellate Court, it is always right to consider all the issues raised except for compelling reasons where those other issues have been obviously overridden by a fundamental defect in one of the issues raised that the trial Court's decision cannot be allowed to stand. It was also an error by the Court of Appeal to overlook the issues raised by the parties and formulate its own issues to replace those made by the parties. The parties should be confined to their field of battle to avoid juridical mismanagement, for to shy away from the issues the parties desire to fight and formulate a new one for them which they never addressed, may result in miscarriage of justice. (p. 1213 D)

Evaluation of evidence

3. It is apparent that the Court of Appeal never adverted fully to what is contained on the written record, had it taken extra care the full impact of the D.W.10's evidence would easily have been gleaned vis-à-vis the evidence of the other defendants and their witnesses which the trial court totally and rightly rejected. Trial court diligently evaluated the entire evidence before it and came to conclusion on the facts that the evidence for the plaintiffs carried convincing weight and that the defendants' evidence for all its defects, cannot be believed. Unless the findings of fact are perverse or inconsistent with the evidence or are otherwise based on evidence not legally admissible, it is not the business of the court of Appeal to interfere with them. (p. 1213 G)

Declaration of chieftaincy

4. The learned trial Judge found nothing worthy of legal declaration of chieftaincy in Exhibit 1 and 1A, the documents are not any document known to law and there is nothing remotely perverse, illegal or irregular in his not regarding them as worthy of serious consideration. He found that D.W.10 was merely meddling in the affairs of Oke-Oro Ruling House to which he did not belong and had no right to interfere with. He found the next sub-house to produce Oloro of Oro-Ago is that known as Omugo and these findings are amply supported by the evidence before him. The announcement by Olupo of Ajase Ipo and Ifelodun Council of Chiefs recognizing the second defendant as Oloro of Oro-Ago was based on their being misled by Exhibits 1 and 1A and that it was not yet the turn of Okedaba to present a candidate. All these are sound findings of fact which the court of Appeal waived off as irrelevant. The Court of Appeal has erred in so doing. (p. 1214 A)

Remittal for hearing by Court of Appeal

5. On what is before this court, it is impossible for this court to order a hearing. There is no cross-appeal by the respondents and this court can only grant what is prayed for legally and procedurally. A successful party who intends this court to vary a judgment of court of Appeal must as a respondent cross-appeal since this court has repealed the filing of the Respondents' Notice. So a decision not appealed against cannot be canvassed in the appellate Court. Similarly a successful party in the Court of Appeal who is averse to some part of that court's decision can only challenge that portion of the decision in the Supreme Court only if there is a cross-appeal filed. (p. 1214 D)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Constituent facts of a good judgment

Every judge has his own style of writing judgments. In my view, the judgment of learned trial judge in this case contains the constituent facts of a good judgment which includes the issues or questions to be decided; the essential facts, namely, the case of each party and the evidence, or, in appeals, the argument in support of each; the resolution of the issues of fact and of law the conclusion or the general inference from the facts and the law as resolved, the verdict and the terminal and consequential orders. (p. 1219 B)

Court not to formulate issues for the parties

2. The evaluation and non-evaluation of the evidence of D.W. 10 was not even one of the issues formulated by the parties in their briefs. The learned justices of the court below left the substance and chased the shadow. It is not within the province of the court to formulate issues for the parties. It should confine itself to adjudication upon the questions raised by the parties before it to the exclusion of other questions which they do not advance. When the court feels inclined to raise such an issue because the issue is material to the determination of the case, parties must be given an opportunity to make their comments upon it before the court takes a decision on it (p. 1219F)

Reason why lower courts should pronounce on all the issues

3. It is also incumbent on all courts below this court to pronounce on all issues raised by the parties and not to restrict themselves to one or more of the issues which in their opinion disposes the case. This is only reasonable because of the obvious danger of a higher court disagreeing with the view held by the court below on the point. (p. 1219 H)

ONU JSC

G Whether trial court evaluated the evidence before it

4. From the totality of the above snippets of overwhelming findings, wherein the learned trial Judge kept in full view and focus the evidence of D.W.10 among others, it cannot be said for whatever reason and under any guise that he did not weigh the evidence adduced by both parties before he arrived at the conclusion he did. This act of balancing, appraisal, weighing and evaluating - call it by what epithets you may employ to show the act of a trial Judge being alive to his responsibility in looking at objectively, cautiously and carefully in his consideration of the two sides to a case, weighing same before arriving at a conclusion - an act this Court by a long line of

decided cases referred to simply as evaluation of evidence, a course which I am satisfied, the trial court clearly adopted in its approach when it evaluated the evidence in the instant case as I have exemplified above. (p 1227 E)

STATUTES & RULES REFERRED TO

Supreme Court Rules O. 8 rr 3(1) & (2) and 13 (2)
Supreme Court Acts s. 22

B

REPRESENTATION

Chief Wole Olanipekun, S.A.N. with R 1 Otaru, F Okoji and Adeleke Adeniyi, for the Plaintiffs/Appellants
Kehinde Sofola, S.A.N. with Abubakar Idris, for the Defendants/Respondents

C

CASES REFERRED TO

Idika v. Erisi (1988) 3 NWLR (Pt. 78) 563;
Atanda v. Ajani (1989) 3 NWLR (Pt 111) 511
Anyaduba v. Nigerian Renowned Trading Co Ltd (1992) 5 NWLR 535
Balogun v. Labiran (1988) 3 NWLR (Pt 80) 66
Ochonma v. Unosi (1965) NMLR 3211
Iriri v. Erhurhobara (1991) 2 NWLR (Pt. 173)
Ukpa v. Utong (1991) 6 NWLR (Pt. 197) 258
Bamgboye v. Olarewaju (1991) 4 NWLR (Pt. 184) 1321
Yesufu v. Co-operative Bank Ltd. (1989) 3 NWLR (pt. 110) 483
Adekeye v. Akin-Olugbade (1987) 3 NWLR (PT. 60) 214
Kotoye v. Central Bank of Nigeria (1989) 1 NWLR (Pt. 98) 419
Mogaji v. Odofin (1978) 4 S.C. 91 at 93-95
Kuti v. Balogun (1978) S.C. 53 at 60
Nwabueze v. Okoye (1988)4 NWLR (Pt 91) 664 at 683
Chief Okpiri v. Chief Jonah (1961)1 All NLR 102 at 105
Chief Ekpere v. Chief Aforije (1972)1 All NLR (Part 1) 220
Chief Ebba v. Ogodo (1984)4 S.C 84
Eperokun v. University of Lagos (1986)H NWLR (Part 34) 162 at 167
National Insurance Corporation of Nigeria v. Power & Industrial Engineering Co. Ltd. (1986)1 NWLR (Part 14) 1

D

E

F

G

LEAD JUDGMENT BY BELGORE JSC

H

This is a chieftaincy matter about the head chief of Oro Ago in Ifelodun Local Government of Kwara State. The parties before us now were among those in the case at the trial High Court, and the Court of Appeal. Suffice here to mention that at the trial High Court the first defen-

dant was Ifelodun Local Government and the 6th defendant, Oba Saliu Alebiosu the Olupo of Ajase-Ipo was the Chairman of Ifelodun Traditional Council. After the High Court judgment the said first and sixth defendants became passive participants, thus preferring to abide by whatever course the case took on appeals to the Court of Appeal and this Court.

B The people of Oro Ago claim to come from Ketu, an Egba town now in the Republic of Benin, long before the colonial incursion broke Africa into colonies. The ruling families, according to both contesting parties to the stool of Oloro, descended from a single ancestor who had seven children. As a result of the prowess in summersaulting exercise, the order of seniority for succession to the stool had been since then established. The
C seven children therefore form the seven ruling houses. However, the seven could be grouped into two branches, to wit, the Oke Oro (which in their dialect they "*pronounce* "*Okoro*") and Ipara. The Oke Oro ruling house comprises five sub-houses as follows:-

- (i) Aworo-Ona
- D (ii) Isaoye
- (iii) Iraye
- (iv) Omugo and
- (v) Okedaba.

The Ipara Ruling house is made up of the remaining two sub-
E ruling houses, viz;

- (i) Oke-Ayin and
- (ii) Aiyetoro.

The last Oloro, Muhammadu Dagba, came from Ipara Ruling house. By uninterrupted custom, the selection of Oloro of Aro Ago has
F always been rotational between Oke Oro and Ipara Ruling Houses and each rotation in a House follows orderly seniority. Thus, the order of seniority in Oke Oro is as given above i.e. Aworo-ona, Isaoye, Iraye, Omugo and Okedaba; and for Ipara, the order of seniority is Oke-Ayin and then Aiyetoro. The only house, according to history based on evidence, that was once
G jumped was Omugo when the incumbent died before the final rites of installation and Okedaba had to produce the next Oloro; but this was long ago. Otherwise the line and custom of succession had always been followed.

The other custom clearly before the trial Court is that the selection of Oloro of Oro Ago is always a matter exclusively for that Ruling House
H next to produce one. Thus, when it is the turn of Oke Oro to produce the chief, the members of that Ruling House meet and consider the candidates presented by the sub-house whose turn is to present a candidate. The other ruling house, Ipara will have nothing to do in the selection, for Oke Oro will also never interfere in the selection of candidate from Ipara. After the death

of late Muhammadu Dagba, the Oloro, the next Oloro must come from Oke Oro. The Oloro before Oba Dagba having come from Iraye sub-house, the next candidate for the stool must come from Omugo sub-house

It must be pointed out that both David Kolade the candidate for Omugo house and Joseph Akanbi Falade from Okedaba house are from Oke Oro Ruling House. They are the 6th appellant and second respondent respectively. The son of the fifth respondent as P.W. 2 gave evidence for the plaintiffs and it is remarkable and revealing what he has to say as follows:

"I know the 5th defendant the Esinkin of Oke-Ayin. He is my father. I am a member of the Oke-Ayin family in Ipara group of ruling houses and I am a native of Oro-Ago. The 5th defendant is one of the kingmakers in Oro land. The 5th defendant is Chief Esinkin of Oke-Ayin in Ipara group. It is not correct to say that my father the 5th defendant is the Chairman of the Council of kingmakers for both the Ipara and Okoro groups of ruling houses in Oro-Ago. There are seven kingmakers in Oro-Ago. Five of who are from Okoro and the remaining two are from Ipara ruling house. At any meeting of the 7 kingmakers the Aworo-ona from Okoro group is the chairman. It is only when the two kingmakers from Ipara meet that the 5th defendant becomes the Chairman. If it is the turn of the Ipara group to present a candidate for the Oloro stool it is their own responsibility. The Okoro group will not intervene. It is only after, the nomination by the Ipara group that the candidate will be presented to the Okoro group as the nominated candidate from Ipara. The Okoro group cannot object to any nomination made by the Ipara group.

Similarly, when it is the turn of the Okoro group to present a candidate the members of the Ipara group will not intervene with the nomination to be made by Okoro which will after the nomination present their candidate to the Ipara group. This is the custom.

I know the late Oloro of Oro-Ago Mohammed Dagba. He was appointed the Oloro of Oro Ago in 1962. He was from Ipara group. The Okoro group did not play any part in the appointment of Oba

Mohammed Dagba. He was nominated and appointed by the Ipara group. After which he was presented to Okoro group.

I know the 2nd defendant Joseph Akanbi Falade and I am aware that he was purportedly appointed the Oloro of Oro-Ago sometime in 1986. I also know the 4th defendant Chief Ogege Arekujo.

I have seen Exhibit 1, the Esinkin of Oke Ayin therein referred to is the 5th defendant, my father. While the Oju of Aiyetoro mentioned in Exhibit 1 is the 4th defendant from Ipara group. Under the native law and custom of the people of Oro Ago for the nomination and appointment of an Oloro of Oro Ago Exhibit 1 was not proper as it violates the custom. Whenever it is the turn of Ipara group to nominate an Oloro it is its own

sole responsibility to nominate the candidate from within the Ipara group. The Ipara group cannot participate in the nomination of a candidate when it is the turn of Okoro group. I know the Olupo of Ajase-po the 6th defendant. I also know the Irepodun/Ifelodun Traditional Council, the 7th defendant on 26th June, 1986 there was a meeting of the Irepodun/Ifelodun Traditional Council at Ajase-po and I was invited by the Council's secretary B to attend the meeting. I attended the meeting. The Olupo of Ajase-po and Chairman of the Traditional Council invited the five groups from Okoro Ruling House of Oro Ago to go home and call a meeting of the kingmakers comprising of Okoro group only and nominate a suitable candidate for the Oloro stool and forward the name of any such nominee to the Traditional C Council of Ajase-po. After this I left Ajase-po with the Okoro group kingmakers. The 5th defendant also attended that meeting. The 3rd defendant was also present at that meeting. I know that the 5th defendant, my father is not literate in both English and Yoruba language."

Cross examination by Otu:

D "I know I am above 50 years old. The founder of my community was one Ajagun. His descendants founded the 7 ruling houses in Oro Ago. There has been piece in Oro-Ago since its inception because of the peoples love for tradition and precedence. It is because of an attempt to overturn this tradition that we now have this suit in Court. The Ipara group is now attempting to overturn the tradition. In 1962, I was in Oro Ago, I remember E that as at 1962 I was still in the Nigeria Police Force. My station then was Ilorin. I have never attended any meeting of the Okoro group or the Okedaba ruling house except the meeting of the Traditional Council which I attended at Ajase-po.

When it is the turn of the Okoro group to nominate and present a F candidate for the vacant stool of Oloro of Oro-Ago it is only the Okoro group that will sign the nomination letter sent to the Traditional Council. The Okoro group will only present the name of their nominated candidate to Ipara group which is normally not involved in signing the nomination letter to be sent to the Traditional Council. Exhibit 1A is the application for G the appointment of the late Oloro of Oro Ago dated 5th May, 1962. The signatories to Exhibit 1A include two names from Omugo"

The application to the Ifelodun Traditional Council, Exhibit 1A captioned: "Application for the Appointment of Oloro of Oro Ago" is certainly the main plank of the defendants/respondents' case. But what did the learned H trial Judge have as evidence on the makers of this document? PW. 3 said he was invited by P'W. 5, Babajamu from Okedaba, to thumb-print the document; he was also the nephew of the late Oba Dagba. However, Babajamu (PW. 5) denied writing the document and that he even did not know when it was thumb-printed. Apart from PW. 3, none of those who purportedly thumb-printed Exhibit 1A was called as witness even though

two of them were alive at the time of trial; in fact one seemed to be all the time in Court. The mischief in Exhibit 1A is that it placed Omugo house next to Aworoono (otherwise known as Oganyin) in seniority to create the impression that Omugo was senior to Iraye and Isaoye. Okedaba was placed last in Exhibit 1A to create the impression that it was the next house to produce Oloro on the demise of Oba Dagba. Learned trial Judge comparing various writings of P. W. 5, Babajamu, including Exhibit 23 which he wrote to one Dr. P.O.A. Dada, and Exhibit 1A, came to the conclusion that P.W. 5 made Exhibit 1A as an interested party for he was also a candidate for the Oloroship for Okedaba House. It is therefore clear that Exhibit 1A was made to confuse or to gain advantage or both to the detriment of the age long tradition of Oro Ago in peaceful rotation of the chieftaincy stool of Oloro. It is interesting that Exhibit 1 is made on the basis of Exhibit 1A which contains all the shortcomings not expected of a genuine document. The six chiefs, who allegedly signed Exhibit 1 are illiterates and there was no jurat to indicate that it was read and translated to them and they understood the document. Not only that they allegedly appended their names which they could not have done being illiterates. Therefore whether the names or thumb prints, the jurat's absence makes Exhibit 1 quoted immediately above a nullity. All the parties agree it is turn of Oke Oro to present a candidate but the twist given to the line of seniority in Exhibit 1A and 1 is what. The documents Exhibits 1A and 1 influenced the decision of Ifelodun Local Government and the Chairman of Ifelodun Traditional Council, Olupo of Ajasepo in arriving at a wrong conclusion and approving the appointment of Joseph Akanbi Falade as the Oloro of Oro-Ago.

The learned trial Judge, after a thorough and painstaking review and evaluation of all the evidence before him came to the conclusion that the present appellants as plaintiffs proved their case to his satisfaction and disbelieved the defendants now respondents. He granted all their prayers and found that the appointment of Joseph Akanbi Falade was null and void and entered judgment for the plaintiffs.

Against the decision of the trial High Court Judge (Orilonise J.), the respondents who were defendants in that Court appealed to the Court of Appeal. Against the Grounds of Appeal, the respondents as appellants in that Court formulated the following issues for determination.

"(1) Whether the learned trial Judge was not in error when he held that Exhibits 1, 1A, 7 and 7A were vitiated by fraud and forgery and that they were thereby null and void.

(2) Whether the learned trial Judge was not in error when he held that Exhibits 1, 1A, 7 and 7A were void because they did not comply with the Illiterates Protection Law, and whether he was right to have voided them.

(3) Whether the learned trial Judge was right when he held that Exhibit 1A formed the basis upon which the appellants founded their case.

(4) *Whether the learned trial Judge was right when he held that the Ipara group of Kingmakers participated actively in the selection, nomination and approval of the 2nd defendant (now appellant) as the Oloro of Oro-Ago, and that such participation was contrary to native law and custom of Oro-Ago.*

(5) *Whether the learned trial Judge was right in his findings as to the customary law relating to the selection, nomination and approval of any Oloro of Oro-Ago, and that the selection, nomination and approval of the 2nd defendant as the Oloro of Oro Ago was null and void”*

Against the issues and grounds of appeal the appeal was fully argued by the parties. The issues as formulated by the present respondents as appellants in the Court of Appeal were similar to those formulated by the present appellants as respondents; thus the Court of Appeal ought to have no difficulty resolving the issues between the parties, Okunola, J.C.A. (with Achike, J.C.A. and Oduwole, J.C.A. concurring) wrote the lead judgment. He reviewed all the evidence in the trial Court and the submissions before him. I have set out the issues as formulated for determination by the respondents as appellants in the Court of Appeal which are identical to those formulated by the present appellants as respondents. However, learned Justices of the Court of Appeal, in the lead judgment, curiously held that the main issue for determination “before us is

“That it is the turn of Okedaba to present the present candidate”

With great respect, the issues formulated never adverted in any line to what I have null and void under illiterates (Protection) Law. D.W. 10, Chief Balogun, the Esikin of Oke Ayin, who also allegedly signed Exhibit 1 was illiterate; so were the others is the strong issue and the decision of the learned trial Judge that those Exhibits are unreliable and never portrayed the true custom of selecting the Oloro of Oro Ago. However, the Court of Appeal decided the appeal certainly not on the issues before it, but on a completely different ground. The evidence of D.W. 10, Chief Balogun Gbenle, the Esinkin of Okeayin (the 5th defendant) was quoted extensively and I feel it is pertinent to quote it in this judgment as follows:

“I know Joseph Akanbi Falade. He is the present Oloro presented by Okedaba ruling family. After the death of Oba Dagba, Owa sent a message to Ola that it was the turn of Okeoro group to present a candidate. Owa is the next to the Oloro-Ola then called a meeting at Aleoko. The meeting was attended by Oro Ago community and traditional Chiefs. At that meeting it was agreed that it was the turn of Okedaba ruling house to present a candidate. Okedaba then presented Joseph Akanbi Falade. The Okeoro group held other meetings after the meeting at Aleoko. I did not attend the other meetings of Okeoro group. The seven kingmakers held a meeting to deliberate on the choice of a candidate from Okeoro group. Only five kingmakers held the meeting to deliberate on the selection and nomination of Joseph Akanbi Falade because two of the seven kingmakers for Oro Ago had died and no replacements had been made. The five kingmakers who met to deliberate on the nomination of Oba Falade are:

- (1) Arogun of Okedaba
- (2) Ajapona Arebedun of Iraye
- (3) Ooju Arekujo of Ayetoro
- (4) Esinkin of Okeayin (myself)
- (5) Asapakin Ajibaye.

The kingmakers accepted the nomination of Joseph Akanbi Falade and wrote to the Ifelodun Local Government at Share for the approval of Oba Joseph Akanbi Falade as the new Oloro of Oro Ago. When the Local Government did not send a reply the kingmakers wrote another letter. There are seven ruling houses in Oro Ago and the Oloro stool is rotated among the ruling houses. There are two groups of Okeoro and Ipara. In the Okeoro group there are Aworoona, Isaoye, Okedaba, Iraye and Omugo in that order of ascension. In the Ipara group are, Okeayin and Ayetoro also in that order. I have known six past Oloros since I was born. They are Oba Ariyunkeye from Okeayin, Oba Salami of Aworoona, Oba Bakare of Ayetoro. Oba Aseperi of Isaoye. Oba Dagba from Okeayin and Oba Akanbi Falade from Okedaba. The kingmakers are the messengers to the Baales and the Baales must know whenever any new Oloro is to be installed. The Baales are responsible for calling on the kingmakers in Oro Ago to arrange for a new Oloro once the Owa informs Chief Ola of the demise of any Oloro of Oro Ago. The kingmakers did not receive any protest letter after it had approved the nomination and selection of Oba Akanbi Falade.”

Learned Justice of Appeal then held that from the quoted evidence above the evidence of D.W.10 was germane to the issue for determination as formulated by him i.e. “That it is the turn of Okedaba to present a candidate” and that trial Court failed to consider this evidence which would have assisted it in arriving at findings of fact. He held D.W. 10 was a vital witness (contrary to what the trial court found as a fact). Because of this alleged failure to consider the evidence of D.W.10, he relied on a number of cases e.g Fatunde v. Onwoamanam (1990) 2 NWLR (Pt.132) 322; (1990) 4 SCNJ 24; that the matter was not properly considered by the trial court. He therefore concluded as follows:

“In sum, this appeal succeeds and it is allowed on the ground that the trial court failed to give consideration to a crucial issue raised in the pleadings and the evidence before it. In consequence, I order that this cause be retried de novo by a different judge of Omu Aran High Court other than those that had at one time or other been involved in the case.”

He relied on Idika v. Erisi (1988) 3 NWLR (Pt. 78) 563; Umar v. Bayero University (1988) 4 NWLR (Pt. 86) 85 and Atanda v. Ajani (1989) 3 NWLR (Pt. 111) 511 to support his ordering trial de novo. It is against this setting aside judgment of the trial court and ordering a retrial that the plaintiffs appealed to this court. The appellants set out the following issues for determination:

“1. Whether the lower court was right when it held that the learned trial Judge did not consider the evidence of D.W.10 (Chief Balogun the Esinkin of Okeayin).

2. Having regard to the claims of the plaintiffs and the findings of

fact made by the learned trial Judge, is the lower court right when it held that the central or main issue for determination is that it is Okedaba ruling house that is to present the next Oloro of Oro-Ago when there was no counter-claim and same was not made an issue before the lower court?

3. *Whether having regard to the facts and circumstances of this case the Court of Appeal was justified in making an order of retrial.*

B 4. *What is the effect where crucial and fundamental findings of fact of a court are not appealed against?"*

The respondents' issues for determination are virtually the same as their counsel adopted the first three issues: the fourth issue he submits is *"purely academic and unrelated ex facie to the judgment of the court below"*

C The D.W. 10 is the 5th defendant/respondent, Chief Balogun the Esinkin of Oke-Ayin, i.e. belonging to the senior of the two sub-houses of Ipara Ruling House. According to preponderance of evidence, even from Joseph Akanbi Kolade who was being installed Oloro from Okedaba by this D.W.10. it was not the function of D.W.10 to participate in the nomi-

D nation of any candidate for Oloro from OkeOro House as he belonged to Ipara House. The learned Justice of the Court of Appeal held, to which his learned brothers concurred, that the evidence of D.W.10 was not considered and that led to the appeal being allowed and a trial de novo being ordered. But the evidence abundantly in the printed record is against this finding. The evidence of D.W.10 is virtually in line with other witnesses for

E defence and very cogent reasons in learned trial Judge's judgment were misapprehended by the Court of Appeal. D.W.10 was one of the principal makers of Exhibits 1 and 1A which learned trial Judge held to be not genuine, his use of the word *"forgery"* notwithstanding. By the evidence before the court there was hardly any body known as *"Oro-Ago Kingmaker"*

F as Exhibit 1 is headed. It is in form of a letter to the Sole Administrator of Ifelodun Local Government saying a group of persons Chief Esinkin (i.e. Balogun, Esinkin of Oke-Ayin, D.W.10), Chief Asapakin, Chief Ajapona, Chief Ooju, Chief Arogun and Chief Oore - has nominated Joseph Akanbi Falade of Okedaba as the new Oloro of Oro-Ago. In Oro Ago, according to

G the evidence before trial Judge and believed in preference to incoherent testimonies of the defendants, the letter Exhibit 1, should not have been relied upon because Esinkin of Oke-Ayin, i.e. D.W.10 ought not to feature as a kingmaker for Oke-Oro as he belongs to Ipara. Again Asapakin for Isaoye and Ajapona for Iraye, are not kingmakers once there was Chief Oloba who is the head of Isaoye and the kingmaker for that family of

H Isaoye, Esinkin and Ooju are for Okeayin and Aiyetoro houses respectively.

Upon all the above evidence, assuming learned trial Judge merely reviewed the evidence of D.W. 10 without evaluating and making a finding on it, the preponderance of evidence as found by him in that the D.W.10 cannot be believed as he merely meddled in a matter of Oke-Oro that never

concerned him. However, having considered Exhibits 1 and 1A, to which D.W. 10 purportedly subscribed and which trial court found to be spurious documents not worthy of any reliance, the bottom is totally knocked out of D.W. 10's evidence. The learned trial Judge found against him evidence of D.W. 10 that Exhibits 1 and 1A could not be relied upon, Exhibit 1 I have explained above; but Exhibit 1A purports to be older document made in 1962 and written to Borin Native Authority now replaced by Ifelodun Local Government. Like Exhibit 1 it is also a letter thumb printed by the alleged writers whose knowledge of the document is disputed. At any rate both Exhibit 1 and Exhibit 1A are not legal document under any Chieftaincy Law and are not Chieftaincy Declarations. There is no seal of any recognised authority on any of them; such letters could be written by any group of persons and they certainly do not attain any force of law. So are Exhibits 2, written by a group calling itself Oro-Ago Princes, Exhibit 5, by a group calling itself Oro-Ago Community and so many others - Exhibits 6, 6A-F, Exhibits 7, 7A, 7B and C. They are either petitions or letters claiming to be authentic order of succession of Oloro.

Learned Justices of Appeal were grossly in error to have even confined themselves to alleged failure to evaluate and make finding on the evidence of D.W.10. In all the cases before an appellate court, it is always right to consider all the issues raised except for compelling reasons, where those other issues have been obviously overridden by a fundamental defect, in one of the issues raised by the trial court's decision cannot be allowed to stand. Anyaduba & Anor v. Nigerian Renowned Trading Co. Ltd. (1992) 5 NWLR (Pt.243) 535; Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131; Balogun v. Labiran (1988) 3 NWLR (Pt. 80) 66 at 80. It was also an error by the Court of Appeal to overlook the issues raised by the parties and formulate its own issues to replace those made by the parties. The parties should be confined to their field of battle to avoid juridical mismanagement, for to shy away from the issues the parties desire to fight and formulate a new one for them which they never addressed may result in miscarriage of justice. U.BA. Ltd. v. Achoru (1990) 6 NWLR (Pt.156) 254; (1990) SCNJ 17; Ochonma v. Unosi (1965) NMLR 321.

It is apparent that the Court of Appeal never adverted fully to what is contained on the written record; had it taken extra care the full impact of the D.W. 10's evidence would easily have been gleaned vis-a-vis the evidence of the other defendants and their witnesses which the trial court totally and rightly rejected. Trial court diligently evaluated the entire evidence before it and came to a conclusion on the facts that the evidence for the plaintiffs carried convincing weight and that the defendants' evidence for all its defects, could not be believed. Unless the findings of fact are perverse or inconsistent with the evidence or are otherwise based on the evidence not legally admissible, it is not the business of the Court of Appeal

to interfere with them. *Highgrade Maritime Services Ltd. v. FBN Ltd.* (1991) 1 NWLR (Pt. 167) 290; *Iririv. Erhurhobara* (1991) 2 NWLR (Pt. 173) 252; *Ekpav Utong* (1991) 6 NWLR (Pt. 197) 358; *Bamgboye v. Olarewaju* (1991) 4 NWLR (Pt. 184) 132.

The learned trial Judge found nothing worthy of legal declaration of chieftaincy in Exhibit 1 and 1A, the documents are not any documents known to law and there is nothing remotely perverse, illegal, or irregular in his not regarding them as worthy of serious consideration. He found that D.W.10 was merely meddling in the affairs of Oke-Oro Ruling House to which he did not belong and had no right to interfere with. He found the next sub-house to produce Oloro of Oro-Ago is the sub-house known as Omugo and these findings are amply supported by the evidence before him. The announcement by Olupo of Ajase Ipo and Ifelodun Council of Chiefs recognising the second defendant' as Oloro of Oro-Ago was based on their being misled by Exhibits 1 and 1A that it was not yet the turn of Okedaba to present a candidate. All these are sound findings of fact which the Court of Appeal waived off as irrelevant. The Court of Appeal has erred in so doing.

On behalf of the respondents, this Court has been asked that in case we found that the Court of Appeal acted in error in their view of the evidence of D.W.10 and how the trial court treated it, this matter should be remitted for hearing by the Court of Appeal on the other issues not considered. On what is before this Court, it is impossible for this Court to order a hearing. There is no cross-appeal by the respondents and this Court can only grant what is prayed for legally and procedurally. A successful party who intends this Court to vary a judgment of the Court of Appeal must as a respondent cross-appeal since this Court has repealed the filing of respondents' Notice. So a decision not appealed against cannot be canvassed in the appellate court *Commerce Assurance Ltd. v. Ali* (1992) 3 NWLR (Pt. 232) 710. Similarly, a successful party in the Court of Appeal who is averse to some part of that Court's decision can only challenge that portion of the decision in the Supreme Court only if there is a cross-appeal filed. *Ceekay Traders Ltd. v. General Motors Co. Ltd.* (1992) 2 NWLR (Pt. 222) 132. Before the respondent's notice under Order 8 rule 3(1) and (2) of this Court was repealed, a party who won in the Court of Appeal could only have part of the judgment varied in the Supreme Court by either filing respondents notice or cross-appealing. See *Attorney-General Oyo v. Fairlakes Hotels Ltd.* (No.2) (1989) 5 NWLR (Pt. 121) 255; *Yesufu v. Cooperative Bank Ltd.* (1989) 3 NWLR (Pt. 110) 483; *Adekeye v. Akin-Olugbade* (1987) 3 NWLR (Pt. 60) 214; *Western Steel Works v. Iron and Steel Workers* (1987) 1 NWLR (Pt. 49) 284; *Kotoye v. Central Bank of Nigeria* (1989) 1 NWLR (Pt. 98) 419.

The powers of this court under S. 22 Supreme Court Act whereby an order the Court below ought to make could be made here, regrettably could not be invoked. Assuming the Court of Appeal considered all other issues instead of relying solely on purported failure to consider the evidence

of D.W. 10, I find no avenue whereby strong and unassailable findings of fact by trial Judge could be set aside without being perverse.

I find great merit in this appeal and the Court of Appeal certainly was in error to have narrowed down the issues it considered, but was in total misapprehension of the facts before the trial court whose findings of fact on all authorities cannot be faulted. For the reasons I have adumbrated above, this appeal therefore succeeds and I allow it. I set aside the decision of the Court of Appeal and in its stead I restore the judgment of the trial Court. I order N1,000.00 as costs in this Court against each set of respondents; N500.00 in the Court of Appeal against each set of defendants/respondents and the costs ordered by the Court of Appeal if already paid to be refunded to the plaintiffs/appellants.

WALI JSC

I have had the privilege of reading before now the lead judgment of my learned brother, Belgore, J.S.C. and I agree with his reasoning and conclusion for allowing the appeal.

For the same reasons contained in the lead judgment. I also hereby allow this appeal and abide by the consequential orders made therein, including that of costs.

OGWUEGBU JSC

I have read the judgment of my learned brother Belgore, J.S.C. allowing this appeal. I agree entirely with his reasoning and conclusion.

The facts having been fully set out in the judgment of my learned brother Belgore, J.S.C. I do not intend to repeat them except to refer to such facts that are necessary to the issue being considered in this judgment.

The appellants were plaintiffs in the High Court of Kwara State holden at Omu-Aran. In paragraph 75 of their further amended statement of claim, they sought the following reliefs against the defendants jointly and severally:-

(i) *A declaration that under the age-long custom and tradition of Oro-Ago relating to the appointment of an Oloro of Oro-Ago, it is now the turn of Omugo Ruling House to present a candidate to be appointed and installed as the Oloro of Oro-Ago after the death of Oba Mohammed Dagba Ariyunkeye II, the late Oloro of Oro-Ago.*

(ii) *A declaration that under the Oro-Ago native law and custom relating to the selection and appointment of Oloro of Oro-Ago, the Ipara group of ruling houses have no say in the selection and appointment of an Oloro of Oro-Ago when it is the turn of Okoro group of ruling houses to present a candidate to ascend the throne of Oloro of Oro-Ago and that the*

purported appointment of the 2nd defendant as the Oloro of Oro-Ago which was championed by the 4th and 5th defendants and or based on the purported nomination papers or letters signed by the 4th and 5th defendants (amongst others) is null and void and of no effect whatsoever.

(iii) A declaration that the 4th plaintiff who is the Oloba (Bale) of B Isaoye is superior in rank to the 3rd defendant and that he, 4th plaintiff is the rightful kingmaker representing Isaoye and that the purported nomination paper of the 2nd defendant signed by the 3rd defendant is null and void and of no effect whatsoever.

(iv) A declaration that the 3rd plaintiff as the Odo-Asi of Aworoona C is the recognised kingmaker for Aworo-ona as well as the chairman of the kingmakers for the Okoro group of kingmakers and that any purported nomination, selection and/or appointment of the 2nd defendant as the Oloro of Oro-Ago without his consent, approval, information or without him signing the nomination paper is null and void and of no effect whatsoever.

(v) A declaration that under the Oro Ago native law and custom, D the 6th and 7th defendants have no right or traditional function to substitute one kingmaker for the other and/or to reject the recognised king-maker and superior chiefs of Oro-Ago in place of lesser and subordinate chiefs for the purpose of constituting the Council of Kingmakers for the appointment E of an Oloro of Oro-Ago.

(vi) A declaration that a purported declaration made in 1962 in respect of the Oloro of Oro-Ago chieftaincy title to the effect that on the demise of Oba Mohammed Dagba, the Okedaba ruling house should produce the next Oloro and which declaration influenced the 1st, 3rd, 4th, F 5th, 6th and 7th defendants to appoint/announce the 2nd defendant as the Oloro of Oro-Ago is not a recognized declaration at all in respect of the Oloro of Oro-Ago chieftaincy title and that any step taken pursuant to it to nominate, select and appoint the 2nd defendant as the Oloro of Oro-Ago is null and void and of no effect whatsoever or in the alternative:

(vii) A declaration that the purported 1962 declaration into the G Oloro of Oro-Ago chieftaincy title which purportedly donated the Oloro title to the Okedaba ruling house on the death of Oba Mohammed Dagba is contrary to the Oro-Ago native law and custom relating to the selection, appointment and installation of an Oloro of Oro-Ago and is therefore null and void and of no effect whatsoever.

(viii) An order of perpetual injunction restraining: H

(i) the 2nd defendant from parading himself as the Oloro of Oro-Ago or from performing any function relating to or connected with the

(ii) the 1st, 3rd, 4th, 5th, 6th and 7th defendants either by themselves, agents, privies, or through any person or persons howsoever from recognising or treating the 2nd defendant as the Oloro of Oro-Ago.”

The learned trial Judge Orilonise, J. after hearing the parties and taking addresses from learned counsel, in a reserved judgment, granted all the above reliefs sought by the plaintiffs. The judgment is dated 19/1/89. Dissatisfied with the decision of the learned trial Judge, the defendants excepting the 1st, 6th and 7th appealed to the Court of Appeal, Kaduna. The court below allowed their appeal, set aside the judgment of Orilonise, J. and ordered that the case be tried de novo by another judge of the Omu-Aran High Court.

The plaintiffs who are dissatisfied with the decision of the Court of Appeal have appealed to this Court. They identified four issues for determination in the appeal. The first three issues were adopted by the respondents in their brief of argument. They considered the fourth issue as academic and unrelated ex facie to the judgment of the court below.

At the hearing of the appeal both learned Senior Advocates of Nigeria appearing for the parties adopted their respective briefs of argument. Each made oral submissions in amplification of some issues argued in the briefs.

The court below set aside the judgment of the learned trial Judge on the ground that he failed to consider the evidence of D.W. 10 (5th defendant Chief Balogun - The Esinkin of Okeayin). It held as follows (Per Okunola, J.C.A.).

“As I indicated supra, I have considered the submissions of both sides on all the salient points and issues raised vis-a-vis the records and the prevailing law. It is for this reason that I make bold to say that the learned trial Judge failed to consider this evidence in his judgment. From the above quoted passage, it is clear that the evidence of D.W. 10 centres on the main issue for determination in this appeal which according to the learned counsel to the appellant in his submission before us is - “that it is the turn of Okedaba to present the present candidate” .It is for this reason that I decline to give my views on other issues raised by counsel to both parties in this appeal. In sum, this appeal succeeds and it is allowed on the ground that the trial court failed to give consideration to a crucial issue raised in the pleading and evidence before it.” (italics is for emphasis)

I will now consider the issue whether the learned trial Judge failed to consider the evidence of D.W. 10. The learned trial Judge in my view, took great pains to review and evaluate the pleadings and the evidence led by both parties. After reviewing the evidence of the witnesses, he said:

“Exhibits 1 and 1A

It is discernible from the foregoing evidence that the most important document on which both the plaintiffs and the defendants rest their

case is Exhibit 1A captioned "Application for the appointment of Oloro of Oro Ago". It is the cornerstone of the plaintiffs' case to the effect that fraud and or forgery had been perpetrated on them since 5th May, 1962 when Exhibit 1A was made and with particular reference to the traditionally and customarily established rotational system of ascension to the Oloro throne based on seniority or age, whether among the members of either of the two groups per se or between each of the two groups of ruling houses namely, Okoro and Ipara respectively. This fraud came to light when Exhibit 1A was attached to Exhibit 1, another document purportedly signed or thumb printed by some Chiefs from the other group of ruling houses whose position and status and whose interference was seriously and respectively questioned and attacked by the plaintiffs."

After the above statement by the learned trial Judge, he proceeded to evaluate the evidence of the witnesses touching on Exhibits "1" and "1A" as well as other documentary Exhibits tendered at the trial. D.W. 10 gave evidence and testified in respect of Exhibits "1" and "1A" in addition to other documentary Exhibits. In answer to cross-examination, D.W. 10 said: "Exhibit 7C was written as a result of a joint meeting between the bales and kingmakers over the appointment of Oba Joseph Akande Falade.

It is not true to say that Chief Ooju Ogege Arekujo is blind. I have seen Exhibits 1, 7, 7A, 7B and 7C. These documents were not personally signed by Chief Ooju Ogege Arekujo.

I was not the Chief Esinkin when Exhibit 1A was written. The meeting of Oro Ago kingmakers relating to Exhibit 1 was held in my house as Chairman of the kingmakers on 17th December, 1985."

The above evidence of D.W. 10 on the documents tendered was fully evaluated by the learned trial Judge along with the evidence of the other witnesses on those documents before he declared Exhibit "1A" null and void and of no effect.

On Exhibit "1" the learned trial Judge held:

"There is evidence which I accept that the signatories to Exhibit 1 including Chiefs Arogun, Esinkin and Oore are illiterates. Exhibit 1 is therefore caught in the webs of the provisions of the Illiterates Protection Law with the drastic effect that in law none of those chiefs who allegedly signed or thumb printed it can be assumed to have understood its contents. The document, Exhibit 1, is therefore voidable and it is hereby voided at the instance of the plaintiff, who have successfully challenged it."

The above passages of the judgment of the learned trial Judge and the evidence of D.W. 10 (5th defendant) under cross-examination go to confirm the fact that the learned trial Judge reviewed and evaluated the evidence of all the witnesses including that of D.W. 10. Exhibits 1, 1A, 7, 7A, 7B and 7C which encompassed the evidence of D.W. 10 were fully considered by the learned trial Judge.

Where the learned trial Judge did not specifically mention the particular witness when he was evaluating the evidence, he considered the evidence of the plaintiffs and those of the defendants together and drew his conclusions.

He concluded his judgment thus:

"On the preponderance of all the available evidence and after a careful and most dispassionate consideration of the submissions of counsel for both the plaintiffs and the defendants, I find the plaintiff case more probable than the defence and in conclusion therefore, I find for the plaintiffs on all the 7 declaratory reliefs sought as set out at the beginning of this judgment." B

Every judge has his own style of writing judgments. In my view, the judgment of learned trial Judge in this case contains the constituent facts of a good judgment which includes the issues or questions to be decided; the essential facts, namely, the case of each party and the evidence, or, in appeals, the argument in support of each; the resolution of the issues of fact and of law; the conclusion or the general inference from the facts and the law as resolved, the verdict and the terminal and consequential orders. C

Even though the learned trial Judge stated that Exhibit "1A" is the most important document on which both parties rested their case, he demonstrated in full a dispassionate consideration of all the issues properly raised and heard. See *Ojogbue & Or v. Nnubia & 4 Ors* (1972) All NLR (Reprint) 664. The evidence of each party was put on either side of the imaginary scale and weighed together having satisfied himself that the evidence was relevant, credible, admissible and conclusive, presumptive or probable before arriving at his conclusion. See *Mogaji & Ors. V. Odofin & Ors* (1978) 4 S.C. 91 at 93-95. D

The Court of Appeal was therefore in grave error when it held that the learned trial Judge failed to consider the evidence of D.W.10 in his judgment. The said court should not have confined itself to the non-evaluation of the evidence of D.W. 10. The evaluation and non-evaluation of the evidence of D.W. 10 was not even one of the issues formulated by the parties in their briefs. The learned Justices of the court below left the substance and chased the shadow. E

It is not within the province of the court to formulate issues for the parties. It should confine itself to adjudication upon the questions raised by the parties before it to the exclusion of other questions which they do not advance. When the court feels inclined to raise such an issue because the issue is material to the determination of the case, parties must be given an opportunity to make their comments upon it before the court takes a decision on it. See *Adeniji & Ors v. Adeniji & Ors* (1972) All NLR (Reprint) 301 and *Kuti v. Balogun* (1978) 1 S.C. 53 at 60. F

It is also incumbent on all courts below this court to pronounce on all issues raised by the parties and not to restrict themselves to one or more of the issues which in their opinion disposes the case. This is only reasonable because of the obvious danger of a higher court disagreeing with the view held by the court below on the point. G

H

It was submitted in the alternative by the learned senior counsel appearing for the respondents that if this court is disposed to allow the appeal, we should do so without costs and that a panel of the Court of Appeal differently constituted be ordered to consider fully the appeal of the defendants before that court.

B I am of the firm view that even if the court below had considered all the issues raised by the defendants/appellants before allowing their appeal, its decision would have been perverse having regard to the impeccable findings of fact made by the learned trial Judge.

There is therefore no basis for the order of retrial made by the court below.

C It is for these reasons and the detailed reasons given in the judgment of my learned brother Belgore, J.S.C. that I too would allow the appeal. I abide by all the consequential orders made by my learned brother, Belgore, J.S.C.

ONU JSC

D

In the High Court of Kwara State before Orilonishe, J. the plaintiffs, now appellants, sued the defendants, now respondents, for the following declaratory orders, viz:-

E *“(i) That it is now the turn of Omugo Ruling House to present a candidate to be appointed and installed as the Oloro of Oro-Ago;*

(ii) That the Ipara group of ruling houses have no say in the selection and appointment of an Oloro of Oro-Ago when it is the turn of Okoro group of ruling houses to present a candidate;

F *(iii) That the 4th plaintiff who is the Oloba (Bale) of Isaoye is superior in rank to the 3rd defendant and the 4th plaintiff is the rightful kingmaker representing Isaoye, and that the purported nomination paper of the 2nd defendant signed by the 3rd defendant is null and void;*

G *(iv) That the 3rd plaintiff as Odo-Asi of Aworo-ona is the recognized king-maker for Aworo-Ona as well as the Chairman of the Kingmakers for the Okoro group of kingmakers; and that any purported nomination, selection and/or appointment of the 2nd defendant as Oloro of Oro-Ago without his consent, approval, information etc is null and void.*

H *(v) That the 6th and 7th defendants have no right or traditional function to substitute one kingmaker for the other and/or reject the recognized kingmakers and superior chiefs or Oro-Ago in place of lesser or subordinate chiefs.*

(vi) That a purported declaration made in 1962 in respect of the Oloro of Ora-Ago Chieftaincy title (spelt out in the plaint at p. 2 paragraph (vi) of the record) is null and void; and

(vii) That the purported 1962 declaration which purportedly donated

the Oloro title to the Okedaba ruling house on the death of Oba Mohammed Dagba is null and void."

They also sought perpetual injunction:-

"(i) against the 2nd defendant from parading himself as the Oloro of Oro-Ago or from performing any function relating to or connected with the Oloro title and

B

(ii) against the 1st, 3rd, 4th, 5th, 6th and 7th defendants either by themselves, agents or privies, from installing or presenting the 2nd defendant as the Oloro of Oro-Ago."

Pleadings were ordered, filed and exchanged by the parties. The plaintiff's further amended their statement of claim and so did the defendants their statement of defence, after which issues were accordingly joined. The defence put forward by the defendants, particularly in respect of the 2nd to the 5th defendants, may be summarised as follows:-

(a) according to the rules of the customary law governing selection, approval and appointment of the Oloro of Oro-Ago, it is the Okedaba Ruling House in Okoro group of ruling houses that has the right to present the 25th Oloro on the demise of Oba Mohammed Dagba;

(b) the 2nd defendant was considered, investigated and found suitable for appointment as the Oloro by Okedaba Ruling House and the Okora group, the joint king-makers of Ipara and that the Okoro group, consented to such appointment;

(c) all the procedure for the appointment of the 2nd defendant as the Oloro was followed;

(d) the overwhelming majority of Oro-Ago people accepted the 2nd defendant as the Oloro:

(e) it is not yet the turn of Omugo Ruling House to present a candidate for appointment and

(f) in the appointment of an Oloro, both joint kingmakers from Ipara and Okoro groups must consent to such an appointment.

The facts of this case are so admirably set out in the lead judgment of my learned brother Belgore; J.S.C. to need any recapitulation or review here. Suffice it to say, that the case went to trial and each side to the contest called witnesses. After addresses by counsel, the learned trial Judge in a considered judgment found for the plaintiffs to whom he granted all the declarations sought. He in addition ordered in their favour the ancillary relief of injunction restraining:-

H

1. The 2nd defendant, Joseph Akanbi Falade, from performing any functions relating to or connected with the Oloro of Oro-Ago title.

2. The 1st, 3rd, 4th, 5th, 6th and 7th defendants either by themselves, agents, privies or through any person or persons howsoever from recognising or

treating the 2nd defendant as the Oloro of Oro-Ago.

Being dissatisfied with the said judgment, the 2nd, 3rd, 4th and 5th defendants appealed to the Court of Appeal (hereinafter referred to as the court below).

The Court below in its judgment dated 2nd October, 1992, reversed the trial court's decision by holding that the failure of that court to touch upon and evaluate in particular the evidence of D.W. 10, Chief Balogun Gbenle, the Esinkin of Okeayin and Chairman of the Kingmakers in Oro-Ago in his consideration of the case of the parties, justified their intervention to set aside the decision on account of misdirection. It then proceeded to set out what it considered vital evidence it left unconsidered and unevaluated, adding, *inter alia*:-

"From the above quoted passage, it is clear that the evidence of D.W.10 centres on the main issue for determination in this appeal which according to the learned counsel to the appellant in his submission before us is:

'That it is the turn of Okedaba to present the present candidate.'

I have brought out the passage to show that by his failure to consider the above evidence, the learned trial Judge had ignored the evidence of a vital witness on a vital or crucial point in the case which would have assisted him in his findings of fact in this case. The question to answer now is what is the attitude of the appellate court where the trial court ignores the evidence of a vital witness as in the instant case? This poser had come for consideration in a number of cases decided by the Supreme Court. Thus, in S. Fatunde v. F.C. Onwoamanam (1990) 2 NWLR (Pt.132) 322: (1990) 3 S.C.N.J. 200 the Supreme Court held that in case of failure to consider evidence of witnesses, appellate court is justified in interfering on such occasions "

The appeal herein, is at the instance of the plaintiffs (who were the respondents in the court below and are hereinafter in the rest of this judgment referred to simply as the appellants) premised on seven grounds of appeal. The defendants (to wit: 2nd, 3rd, 4th and 5th) who were respondents in the court below (1st, 6th and 7th did not participate any more in the proceedings) are hereinafter referred to simply as respondents. The four issues formulated and submitted for our determination from the seven grounds filed by the appellants (the first three which were adopted by the respondents but who have raised objection to the fourth to which I will come shortly) are as follows:

1. Whether the lower court was right when it held that the learned trial Judge did not consider the evidence of D.W. 10 (Chief Balogun the Esinkin of Okeayin) (Grounds 1 & 7).

2. Having regard to the claims of the plaintiffs and the findings of fact made by the learned trial Judge, is the lower court right when it held that the central or main issue for determination is that it is Okedaba Ruling House that is to present the next Oloro of Oro-Ago when there was no counterclaim and same was not made an issue before the lower court (Ground 2)

3. Whether having regard to the facts and circumstances of this case the Court of

Appeal was justified in making an order of retrial (Grounds 3, 4 and 5)

4. What is the effect where crucial and fundamental findings of fact of a court are not appealed against (Ground 6).

I wish to commence my consideration of this appeal by remarking firstly, that when it came up for hearing on February 27 1995, learned counsel on either side each relied on his brief of argument, cited legal authorities and elaborated thereon.

Secondly, because of the crucial role which issue 4, as argued by learned Senior Advocates, plays or assumes therein, I deem it pertinent to consider it first and thereafter issue 1 only in that order.

Issue 4

The question posed by this issue is, what is the effect where crucial and fundamental findings of fact of court are not appealed against?

The first point I wish to consider under this issue is learned Senior Advocate for the respondents submission that as the other grounds of appeal which were filed in the Court below were not pronounced upon by that court but only that relating to the evaluation of the evidence of D.W. 10, the issue as framed is a non issue and should be so declared.

My reasons for not so holding are firstly, because no cross-appeal was lodged in relation to declarations (iii) and (iv) in the Amended Statement of Claim and contained on pages 2 and 3 of this judgment which in context and tenor are peculiar to 4th and 3rd appellants respectively and their sustenance alone as decreed in the judgment of the learned trial Judge, will nullify the purported appointment of the 2nd respondent herein. In this regard, it may be noteworthy to pin-point the evidence of P.W. 5, Dr. P.O.A. Dada, who testified to the effect that the 3rd and 4th appellants are the Bale and kingmaker for Aworoono and Isaoye respectively. That witness also confirmed that the 3rd appellant is the Chairman of the kingmakers for both Okoro and Ipara groups as he is the most senior. This piece of evidence was corroborated by P.W. 7 and P.W. 8 and P.W. 9 confirmed it as well. Further, when the 6th appellant testified as P.W. 2 he was not cross-examined at all when he said that the Alakose is Bale and kingmaker of Omugo ruling house.

D.W. 5, Chief Malomo Babajamu, agreed that the Oloba of Isaoye (4th respondent) is both a Bale and kingmaker, Alato of Okedaba is Bale and kingmaker and that Alakose of Omugo is also a Bale and a kingmaker.

Thus, the unimpeachable conclusions arrived at by the learned trial Judge flowing from the totality of the evidence adduced by the appellants and confirmed in the evidence of D.W. 4, Chief Alago and Secretary of Oro Ago kingmakers comprising Ologunobas in respect of the strategic and crucial roles played by the 3rd and 4th appellants as Bales and kingmakers respectively against which no appeal was made, those findings, in my respectful view, stand forever. See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) 664 at 683; *Kolawole v. Alberto* (1989) 1 NWLR (pt. 98) 382 at 39R and *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt. 110) 417 at 440.

Secondly, in the light of the above, the issue canvassed herein cannot be rightly said to be a non-issue. This is because, here again, as learned Senior Advocate for the respondents urges upon us to consider the other issues but there has been no cross-appeal to this Court as well as there was no counter-claim in the trial court, I will decline the invitation to do so because that will only be necessary if at the end of the day, this court sitting in its appellate jurisdiction, will not only allow the appeal on grounds of misdirection but remit the case back to the court below for the appeal to be re-heard. To adopt the latter course pre-supposes the fact that the trial Judge considered several issues before him but made no findings by appraising the evidence i.e. failing to take advantage of his seeing and hearing the witnesses, whereas the record shows that there was ample evidence before him. See Chief James Okpiri v. Chief Igoni Jonah & Ors (1961) 1 SCNLR 174; (1961) 1 All NLR 102 at 105. See also Polycarp Ojogbue & Anor v. Ajie Nnubia & 4 Ors (1972) 1 All NLR 226 at 231 and 232; Chief J.S. Ekpere & Ors v. Chief Odaka Aforije & 4 Ors (1972) 1 All NLR (Pt.1) 220 and Chief Frank Ebba v. Chief Warri Ogodu (1984) 1 SCNLR 372; (1984) 4 S.C. 84.

As I shall seek to show in my consideration of issue 1 shortly hereunder, this was not so since the learned trial Judge fully considered, evaluated and appraised the case before him. As the respondents did not appeal against some crucial and fundamental findings of fact of the court below, they are taken as having been bound. The issue is therefore neither hypothetical nor academic, invoking this court's answer. See Ikenye Dike & Ors. v. Obi Nzeka & 3 Ors (1986) 4 NWLR (Pt. 34) 144; Eperokun v. University of Lagos (1986) 4 NWLR (Pt. 34) 162 at 167; National Insurance Corporation of Nigeria v. Power & Industrial Engineering Co. Ltd. (1986) 1 NWLR (Pt. 14) 1 and Olaniyi v. Aroyehun (1991) 5 NWLR (Pt. 194) 652.

Issue 4 is accordingly resolved against the respondents.

Issue 1

The question posed here is whether the lower court was right when it held that the learned trial Judge did not consider the evidence of D.W. 10 (Chief Balogun - the Esinkin of Okeayin). With utmost due respect to the learned Justices of the Court below, to hold as they did, that the evidence of D.W. 10 was not considered, appraised or evaluated is not only palpably wrong and a total misapprehension but a clear misdirection on their part. D.W. 10, Chief Balogun, the Esinkin of Okeayin, is the 4th respondent herein; but the 5th defendant in the trial court. He was a vital witness whose evidence the learned trial Judge neither treated with levity nor glossed over, as I shall seek to exemplify hereunder:-

As a preamble to his review of the evidence of the 2nd, 3rd, 4th and 5th respondents and that of their witnesses the learned trial Judge said inter alia the following:-

"Now, a review of the evidence in support of the above averments in the

pleadings of the 2nd, 3rd, 4th, 5th defendants (D.W. 10) as follows." (parenthesis mine).

Coming to the evidence of Chief Balogun Gbenle (5th defendant/4th respondent) the Esinkin of Okeayin, who had testified as D.W. 10 the learned trial Judge in meticulously reviewing and evaluating his evidence said, and I quote in extenso hereunder as follows:-

"Chief Balogun Gbenle the Esinkin of Okeayin was D.W. 10. He said it was his duty, as the Chairman of Oro Ago kingmakers, to inform the Ose group of the nomination of any Oloro elect. He named all the other kingmakers whom he said were Ologunobas. He said it was decided at a meeting of traditional chiefs and the Oro Ago community held at Aleoko that Okedaba ruling house should produce the next Oloro after the death of the 2nd defendant. He said he did not attend any other meetings of the Okoro group apart from the meeting held at Aleoko. According to him seven kingmakers held a meeting to deliberate on the choice of a candidate from Okoro group. He again said that only five kingmakers held the meeting to deliberate on the selection and nomination of Joseph Akanbi Falade (2nd defendant) because two of the kingmakers had died and had not been replaced. He gave the names of these five kingmakers as Arogun, Ajaponna, Oju, Esinkin (himself) and Asapakin. He agreed with the existence of two groups of ruling houses viz Okoro and Ipara and said the Bales are responsible for calling on the kingmakers to arrange for the appointment of a new Oloro once a vacancy occurs as a result of the death, of an, incumbent. He said the 3rd plaintiff is not one of the traditional Chiefs and not a kingmaker in Oro-Ago. He did not know how bravery and valour were used as yardsticks for choosing the candidate to ascend the Oloro stool within the Ipara group. He agrees he does not know how to read or write and that neither himself nor the 4th defendant personally signed or thumb printed Exhibits 7 and 7C on which his names were written by the Secretary one Balogun Alago."

That the learned trial Judge in fact gave a most painstaking, indepth and dispassionate consideration, reviewed and impeccably appraised the evidence adduced by both parties inclusive of D.W.10's is better illustrated from the following snippets or excerpts spanning his judgment which, in my opinion, cannot be faulted thus:

(i) Exhibits 1 and 1A

It is discernible from the foregoing evidence that the most important document on which both plaintiffs and the defendants rest their case is Exhibit 1A captioned

"Application for the appointment of Oloro of Oro Ago."

(ii) *"At the same time and with some equanimity Exhibit 1A formed the basis upon which the defendants founded their case. They relied heavily on it as a document which gave Okedaba ruling house undoubted authority to produce the next Oloro in succession to Oba Mohammed Dagba Ariyunkeye 11. This, to my mind, is the crux of the whole matter"*

(iii) *"Thus, while the defendants stood firmly by Exhibit 1A, the plaintiffs alleged that it was vitiated by fraud and forgery. The plaintiffs complained that*

Exhibit 1A was not written in the name of anybody and neither was it ratified nor approved by the people of Oro Ago. The evidence of P.W. 3 on Exhibit 1A was that one Babajamu wrote the Exhibit and invited him to thumbprint it which he did with his left thumb

Chief Babajamu, D.W. 5 denied being a party to the preparation of Exhibit 1A and did not know when it was thumb printed. He knew P.W. 3 very well and even gave his other name as Kadiri Oloruko- Oba

(iv) *"Surprisingly, none of those who thumb printed Exhibit 1A ever came forward to testify in this case. From the pleadings, the 3rd and 4th defendants both of whom thumb printed Exhibit 1A are still alive but they did not testify, though one of them was present in court. The 2nd and 5th defendants pleaded an affidavit of interpretation of Exhibit 1A but the deponent to the so-called affidavit of interpretation did not testify before the court. I am surprised that the defendants never tendered this affidavit in evidence as they were certainly appreciative of the consequences of perjury."*

(v) *"I have carefully scrutinized the contents of Exhibit 1A. There are 16 thumb print impressions against 19 names appearing thereat. I find that if all the 19 chiefs named in Exhibit 1A were actually parties to its being written, each of them would have insisted on having his thumbprint impression on the document."*

(vi) *"For the purposes of Exhibit 1A, the disputed writings are those appearing in long hand. A comparison of Exhibits 22, 23 and 23A with handwritings in Exhibit 1A easily shows that Chief Babajamu wanted to play smart by changing certain characters of his lettering. This notwithstanding however, some characteristic features of his usual writing habit can be detected from the disputed writings in Exhibit 1A. In this regard, I draw attention to such letters as c, f, k, l, y and O in Exhibit 23, 23A and 1A both in capital and small letters."*

These alphabets and words in the disputed writing bear a semblance of similar alphabets and words in his specimen writing that one does not have to be a handwriting expert to conclude that he wrote the disputed writings in Exhibit 1A.

I find that the characters of these alphabets and words belong to Chief Babajamu's handwriting and I have no hesitation therefore in concluding that the disputed handwritings in Exhibit 1A were in his writing.

On this score alone Exhibit 1A cannot be relied upon to sustain any rights which the defendants or any of them may wish to claim under it. I therefore declare null and void and of no effect the statement and or declaration contained in that part of Exhibit 1A which read:

..... after which Okedaba from Okoro/Aworoona will again follow. Having declared the above quoted portion of Exhibit 1A null and void, it cannot longer avail the defendants and in effect cannot be the basis of the defendant's case."

Before finally finding in favour of the appellants and awarding in their favour all seven declaratory reliefs claimed before him, the learned trial Judge held. Inter alia, as follows:-

(vii) "I believe the plaintiffs and accept as correct and true their evidence that the traditional method of ascension to the throne was once and for all decided and fixed by Ajagun who organised the somersaulting competition. The plaintiffs satisfied me in their proof of that assertion in their evidence before the court whereas the defendants were confused, inconsistent and vague in their attempt to prove their own assertion that after the somersaulting episode ascension to the Oloro stool was based on proven ability, bravery, valour, strength, farming competition and or ability to successfully lead a war.

There was the unchallenged evidence of the 3rd plaintiff (PW.8) that the late Oba Mohammed Dagba recognised him as the Odoasi - Aworo-ona and blessed his appointment as such. The evidence of D.W. 8 and D.W. 12 showed that Chief Esinkin Balogun Okeayin from Ipara group was the Chairman of the kingmakers who deliberated on the selection and appointment of Chief Joseph Akanbi Falade, 2nd defendant as the Oloro of Oro Ago. As Chief Esinkin Balogun Okeayin. (D.W. 10) admitted under cross examination that he was the chairman at a meeting of the Oro Ago kingmakers when the nomination and appointment of Joseph Akanbi Falade was deliberated upon. D.W. 8 who had earlier told the court that chairmanship of the joint meeting of Oro Ago kingmakers is always rotated between Okoro and Ipara, also said that the Esinkin of Okeayin. (D.W. 10) was the chairman of kingmakers when Oba Mohammed Dagba from Ipara group of ruling houses was selected and installed. This piece of evidence belied the evidence of D.W. 6 (Chief ala) that chairmanship of Oro Ago council of kingmakers is rotated between Okoro and Ipara and that when Ipara nominates an Oloro elect the chairman of the kingmakers must be from Okoro and vice versa."

(viii) "On the preponderance of all the evidence and after a careful and a most dispassionate consideration of the submissions of counsel for both the plaintiffs and the defendants; I find the plaintiffs' case more probable than the defence and in conclusion therefore. I find for the plaintiffs on all the 7 declaratory reliefs sought as set out at the beginning of this judgment. I hold that Exhibit 1A is not a chieftaincy declaration strictly so called. See Chief Michael Ugba & 4 Ors v. Attorney-General of Bendel State & 3 Ors (1986) 1 NWLR (Pt.16) 303 where it was held that a chieftaincy declaration is a subsidiary legislation setting down the procedure native law and custom applicable for the appointment of a chief in accordance with existing chieftaincy law."

From the totality of the above snippets of overwhelming findings. Wherein the learned trial Judge kept in full view and focus the evidence of D.W. 10 among others, it cannot be said for whatever reason and under any guise that he did not weigh the evidence adduced by both parties before he arrived at the conclusion he did. This act of balancing, appraisal, weighing and evaluating call it by what epithets you may employ to show the act of a trial Judge being alive to his responsibility in looking at objectively, cautiously and carefully in his consideration of the two sides to a case, weighing same before arriving at a conclusion - an act this court by a long line of decided cases referred to simply as evaluation of

evidence, a course which I am satisfied, the trial court clearly adopted in its approach when it evaluated the evidence in the instant case as I have exemplified above. Such cases are A.R. Mogaji & Ors v. Madam Rabiātu Odofin & Ors. (1978) 4 S.C. 91 at 93/94; Chief Victor Woluchem & Ors v. Chief S. Gudi & Ors. (1981) 5 S.C. 291 at 309; 5.O. Fashanu v. M.A. Adekoya (1974) 6 S.C. 83/91: Akinola & Anor v. Oluwo & Ors (1962) 1 SCNLR 352; (1962) 1 All NLR 224 at 225-226: Akpapuna & Ors v. Obi Nzeka II & Ors. (1983) 7 S.C. 1/126 and Awoyale v. Ogunbiyi (1985) 2 NWLR (Pt.10) 861, to mention but a few. The principle had its origin in English decisions. Thus, in *Coghlan v. Cumberland* (1898) 1 Ch. 704 it was held that: -

“Even where the appeal turns on a question of fact, the court has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking it comes to the conclusion that it is wrong.”

Furthermore, it is an established principle of our law that:-
“It is pre-eminently the bounden duty of the trial court or tribunal to see, hear and assess each witness as to whether he should be believed or not, and where the trial court has discharged that responsibility, the Court of Appeal will not interfere with such findings of the trial court unless they are shown to be perverse or unsupported by evidence” vide Ogbachie v. Onochie (1988) 1 NWLR (Pt. 70) 370 at 379 and Omoregbe v. Edo (1971) 1 All NLR 282 at 289.”

In the instant case in which the trial court did not fail or fall into any error in its discharge of that bounden duty to make findings of fact on the material/ issues adduced before it vide *Kalio v. Woluchem* (1985) 1 NWLR (Pt. 4) 610; *Obiaso & Ors v. Okoye & Ors.* (1989) 5 NWLR (Pt. 119) 80 and *Karibo & Ors v. Grend & Anor* (1992) 3 NWLR (Pt. 230) 426 but fully considered, reviewed and in addition, evaluated the evidence of D.W. 10 amongst that of other witnesses before arriving at the conclusions he did, I take the firm view that he placed all findings and issues on the scale of justice, weighed them on the proverbial imaginary scale and expressed a preference for the appellants’ case which is heavier vide *Mogaji v. Odofin* (supra). It cannot, in my view, be faulted.

As in the instant case, the court below erroneously held that the learned trial Judge did not consider the evidence of D.W. 10, that finding constitutes a misdirection. A misdirection occurs when the issues of fact, the case for the plaintiff or for the defence, or the law applicable to the issues raised were not fairly submitted for the consideration of the jury, where, however, the judge sits without a jury, he misdirects himself if he misconceived the issues or summarised the evidence inadequately or incorrectly, or makes a mistake of law. Thus, where there is some evidence to justify a finding or where a complaint of misdirection constitutes no direction but only findings of facts, the complaint of misdirection would not arise. See *Wahid Chidiak v. A.K.J. Laguda* (1964) NMLR 123 at 125. It is the law that where a misdirection does not occasion a miscarriage of Justice,

the appeal court will not upset the judgment of the lower court and order a retrial vide Order 8 rule 13(2) Supreme Court Rules and *R. Onajobi & Anor v. Bello Olanipekun* (1985) 2 S.C. 156 at 163. Where, as in the instant case, the court below misdirects itself as to the case put forward by the appellants who were plaintiffs in the trial court, this Court sitting on appeal is bound to set aside the judgment. See *Polycap Ojogbue & Ors. V. Ajie Nnubia & Ors* (supra).

In sum, as in the instant case, the trial court did not ignore the evidence of vital witnesses including D.W. 10 as erroneously stated by the court below, the application of the principle laid down on the case of *Fatunde v. Onwuamanam* (supra) to the effect that failure on the part of the trial court to consider the evidence of such witnesses entitles an appellate court in interfering with such decisions, has no relevance and application here whatsoever. My answer to Issue 1 is therefore rendered in the negative. B C

As my answers to the two issues I have considered above sufficiently dispose of the appeal herein, I do not deem it necessary to remit the appeal back to the court below for a rehearing. To do so, in my view, in the circumstances of this case wherein the trial court fully evaluated and appraised the evidence before it came to the right conclusion, is to give the respondents herein a second chance simply to improve their case. See *Onifade v. Olayiwola* (1990) 7 NWLR (Pt. 161) 130. This I will definitely decline to do. D

As there was no cross-appeal by the respondents and their contention made at the tail end of their brief is, in my view, of no consequence, the decision arrived at by the court below must perforce be set aside. See *National Bank of Nigeria Ltd. V. Olatunde & Co. Ltd.* (1994) 3 NWLR (Pt. 334) 512. The respondents have neither complained of any irregularity in the original trial by the trial court vide *Onifade v. Olayiwola* (supra), nor that they were not given a fair hearing. See *Ogbuonkwelu v. Umeanafunbwa* (1994) 4 NWLR (Pt. 341) 675 at Pages 712-713. E F

Having being privileged before now to read in draft the judgment of my learned brother Belgore, J.S.C., I agree with him for the able and eloquent reasons stated therein that this appeal is meritorious and ought to succeed and it is allowed by me. I make the same consequential orders inclusive of those as to costs as therein contained. G

ADIO JSC

I have had the opportunity of reading in draft, the judgment just read by my learned brother Belgore J.S.C. and I agree with it. There is merit in the appeal. I too allow it and abide by the consequential orders including the order as to costs. Appeal allowed. H