

SUPREME COURT OF NIGERIA

TUESDAY 18TH JUNE, 1996. SC. 86/1991

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

NELSON OLORUNNIMBE GBAFE APPELLANT

AND

1. PRINCE FRANK GBAFE

(For himself and Imiokposokeke
family of Atte Clan)2. THE MILITARY GOVERNOR RESPONDENTS
OF BENDEL (now Edo State)3. THE ATTORNEY-GENERAL
OF BENDEL (now Edo State)4. THE COMMISSIONER FOR
LOCAL GOVERNMENT
AND CHIEFTAINCY AFFAIRS,
BENDEL (now Edo State)**APPEALS** - Issues - Considered by the Court of Appeal - Whether sufficient for proper determination of the appeal.**APPEALS** - Evaluation of evidence - By the trial court - When an appellant should not substitute its own view.**CHIEFTAINCY MATTERS** - Validity of appointment - Where the nomination of appellant was invalid - Whether his installation as the Chief is null and void.**EVIDENCE** - Burden of proof - Where it shifted to the defendant who made an assertion - The onus of adducing further evidence is on him.**EVIDENCE** - Weight or value - Admissible evidence - May not have a probative value of weight.**EVIDENCE** - Wrongful exclusion of evidence - Whether a ground for reversal of a decision - In all circumstances.**EVIDENCE** - Inference - Exhibits - Matters upon which the parties could not agree justifiably - Whether to be resolved by drawing inference.**LEGISLATION** - Chieftaincy matters - Gazetted notification of appoint-

ment of Chief- Whether capable of curing the defect in the appointment.

JUDGMENTS - *Hypothetical questions - In respect of a chieftaincy dispute - Whether high court has jurisdiction to determine it.*

FACTS

Before the Igarra High Court of the defunct Bendel State, 1st respondent and another as plaintiffs filed an action against the defendant/appellant and 2nd to 4th respondents. Plaintiffs claimed inter alia, that the appointment of appellant as the Ogiewa of Atte Clan was null and void, as he was not a member of the Imiokposokeke family whose turn it was to produce a candidate to fill the vacant chieftaincy stool of Ogiewa.

The trial court found in favour of the plaintiffs as the appellant was not able to prove his assertion that 1st respondent declined nomination and appointed appellant to take over the chieftaincy. Appellant's appeal to the court of Appeal was dismissed. Being dissatisfied, appellant has further appealed to the Supreme Court raising 5 issues

ISSUES FOR DETERMINATION

“(i) Whether or not the learned Justices of the Court of Appeal were right in holding that Exhibit ‘N’ was inadmissible.

(ii) Whether or not the learned Justices of the Court of Appeal correctly and comprehensively framed or identified the issues for determination to encompass all appellant's grounds of appeal for the purpose of proper and complete determination of the appeal before them. Etc, see p. 1152

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

Evidence - Weight or value

1. In law, it is necessary to appreciate or note that there is a clear distinction between the question whether evidence is admissible and the question of its probative value or weight to be attached to it. The fact that evidence, oral or documentary, is admissible does not mean that it has weight. It may not have any probative value or any weight at all, though admissible. The court below seemed not to have made the distinction. Exhibit “N” being the minutes which the witness alleged that she took at the said meeting was admissible as the minutes allegedly taken at the meeting by the said witness and no more. The weight, if any, to be attached to it was a different matter (p. 1153 B)

Wrongful exclusion of evidence

2. Though the court below was wrong in holding that Exhibit "N" inadmissible, it is not every slip committed by a Judge in his judgment will result in the appeal being allowed. The mistake committed by a Judge to be fatal, must have occasioned a miscarriage of justice. In the case wrongful rejection of admissible evidence by a court, in particular, provision of section 226(2) of the Evidence Act is that the wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same. (p. 1153 D)

Issues - Considered by the Court of Appeal

3. I have read the pleadings filed by the parties and the evidence led by the parties before the learned trial Judge and I am of the firm view that the following statement made by the court below on what were the crucial, fundamental or main issues in this appeal represented the true position:

"Now, returning to the issue at hand, there is no dispute whatever from both sides, that at the meeting of Imioyeka Ruling House, Atte on the 3/9/82, whereat a new Ogiewa was to be nominated. There was also no dispute that the first respondent was unanimously nominated as the Ogiewn elect. The controversy or the disputed facts were:

- (i) Whether the first respondent rejected the nomination*
- (ii) Whether the first respondent nominated the appellant, and*
- (iii) Whether the appellant was legally qualified to be nominate and installed as Ogiewa."*

The foregoing issues raised questions crucial to the outcome of the appeal. They constituted the main issues for determination in the appeal. (p. 1154G)

Appeals - Evaluation of evidence

4. Where a trial court evaluates the evidence and appraises the facts, the issue of credibility of witnesses is entirely for him unless he has failed to make good use of his advantage of seeing and hearing the witnesses during their testimony. It is not the business of an appellate court to substitute its own view for the view of the learned trial Judge. Further, no special circumstances have been shown to warrant the interference of this court with the concurrent finding, on the point, by the learned trial Judge and the court below. The answer to the first part of the question raised under issue 3 is in the affirmative. (p. 1156 H)

Evidence - Inference

5. The issue of the question of whether the 1st respondent declined to accept his nomination at the family meeting and nominated the appellant could not be resolved by drawing any inference from the Exhibits mentioned above from which the 1st respondent had dissociated himself or from Exhibit “N” the alleged type-written copy of the minutes of the family meeting which, for sufficient reasons given by the 1st respondent, was not a true and accurate record of the minutes of the said meeting. In the circumstance, the learned trial Judge was right in holding that the manuscript of the minutes of the meeting should be produced and the court below was right in upholding the decision. An important though controversial and fundamental issue like that could not be resolved by drawing inferences from matters upon which, justifiably, the parties could not agree. (p. 1158 C)

Burden of proof

The 1st respondent asserted, and the appellant agreed with him, that members of the family nominated him (1st respondent) at the family meeting for the purpose of filling the vacancy in the chieftaincy. The 1st respondent consequently discharged the burden on him to prove his assertion. It was the appellant, however, who asserted that the 1st respondent nominated him after declining to accept his (1st respondent's) nomination. As the 1st respondent did not agree with the assertion, the burden was on the appellant who made the assertion, to prove it. The onus of proving a particular fact is on the party who asserts in. Further, in civil cases, the onus of proving particular fact is fixed by the pleadings. It does not remain static but shifts from side to side. The onus of adducing further evidence is on the person who will fail if such evidence is not adduced. (p. 1158 G)

Judgments - Hypothetical questions

7. It was rightly found by the learned trial Judge, and the finding was affirmed by the court below, that the appellant was not a member of Imiokposokeke family whose turn it was to provide a candidate for the purpose of filling the vacancy. Therefore, if the 1st respondent declined to accept his own nomination and nominated the appellant to take his own place, the nomination would be null and void as not being in accordance with or in contravention of the provisions of the registered declaration. In the circumstance, an approval of the appointment or installation of the appellant as ogiewa by all the members of the ruling house would be null and void and section 150 of the Evidence Act would not have been applicable. In any case, the issue raised in the appellant's brief was not, in fact,

based on what happened. The question was merely hypothetical. The high lacks jurisdiction to determine hypothetical questions. (p. 1159 G)

Validity of appointment of a chief

- B 8. It was established in the trial court, and affirmed by the court below, that it was the turn of Imiokposokeke family to provide a candidate and that appellant was not a member of that family. It was also established, and affirmed by the court below, that, in any case, the 1st respondent was person nominated at the meeting of die members of the ruling house that the evidence or contention of the appellant that the 1st respondent declined the nomination and nominated the appellant was not true. Therefore, any purported appointment, installation or recognition of the appointing of the appellant as Ogiewa was null and void for being based on an invalid nomination. (p. 1160 H)

D ***Gazetted notification of appointment of a chief***

9. The notice given for general information in the Gazette, Exhibit “B” B.S.L.N. 31 of 1985, could not validate the nomination of the appellant which was irregular. Indeed, it was never stated anywhere therein that ill was what it was intended to do. Notification in the Gazette of an otherwise invalid appointment would not cure the legal defect in the appointment. The learned trial Judge was, therefore, right in making the finding and the court below was right in affirming it that the appointment of the appellant was null and void. (p. 1161 B)

F ***NOTABLE POINTS OF INTEREST***
ADIO JSC

1. Briefs of appeal - Argument to be based on issues raised

- G On that ground alone, the brief filed by the appellant was bad as it was not in a proper form. In the circumstance, the issues set down in the appellant’s brief in the court below served no useful purpose. After setting out, in a brief, the issues for determination counsel should not proceed to argue the appeal by arguing the grounds of appeal one after the other. The proper thing for him is to base his argument on the issues set down for determination and not on the grounds of appeal. However, there is authority for the proposition that a bad brief need not be struck out. The court should make the best that it can out of it. (p. 1154 C)

2. Finding not supported evidence can be reversed

Therefore, if, as was contended in the appellant’s brief, the finding, on the

point, by the learned trial Judge was not supported by evidence, the court below could reverse the finding. However, in this case, there was evidence question was whether the evidence was credible. The court below reviewed and considered the evidence led by both parties before the learned trial Judge and came to the conclusion that the appellant was a son of Benson Gbafé and not a member of Imiokposokek family. It included the evidence that the mother of the appellant was a little girl when she married Benson and the evidence of the appellant that it was an abomination for a child to deny his father. (p. 1156 C)

REPRESENTATION

Appellant absent and not represented by counsel
Respondent present but not represented by counsel

CASES REFERRED TO

Udeze v. L (1990)1 N.W.L.R. (Pt. 125) 141
Idundun v. Okumagba (1979) 9 - 10 S.C. 227 at p. 245
Obiora v. Osele (1989)1 N.W.L.R. (Pt 97) 278
Alade v. Olukade (1976) 2 SC. 183 at p. 189
Lemgbe v. Imale (1959) W.R.N.L.R. 325
Ike v. Ugboaja (1993) 9 KLR 62
H.M.S. Ltd v. First Bank Ltd. (1991)1N.W.L.R. (Pt. 167)290
Sali v. The State (1984) 10 S.C. 111 at pp. 112-113
Nwabuwkwu v. Ottih(1961)2SCNLR232; (1961) 1 All N.L.R. 487
Lokoyi v. Olojo (1983)8 S.C. 61 at 63-73
Adimora v. Ajufo (1988)1 NSCC. 1005 at 1016
Akpapuna v. Nzeka II (1983)7 S.C. 1 at 26
Ganiyu v. Kale (1982) 12 S.C. 252 at 271

STATUTE REFERRED TO

Evidence Act ss. 151, 226(2), 137(1) & (2)

LEAD JUDGMENT BY ADIO JSC

In the Igarra Judicial Division of the High Court of the defunct Bendel State of Nigeria, the respondent and one other person, as plaintiffs, for themselves and on behalf of their family known as Imiokposokeke family in Atte, Akoko-Edo Local Government Area, brought an action against the appellant and the 2nd to 4th respondents. The claim was as follows:

“Declarations:

(1) That it is the turn of the Imiokposokeke family in the Imioveka

Ruling House, Atte, to produce, instal or appoint, as the case may be, a candidate to fill the vacant stool or title of Ogiewa of Atte Clan, Akoko-Edo Local Government Area, Bendel State of Nigeria in accordance with the Traditional Rulers and Chiefs Edict, 1979.

B (2) *That the first plaintiff, Prince Francis Gbafe, the nominee of the Imiokposokeke family is the right person to the title or stool of Ogiewa of Atte in accordance with the current Traditional Rulers and Chiefs Edict 1979 regulating succession to the title of the Igiewa.*

C (3) *That the first plaintiff has been duly nominated by the Imioveka Ruling House, and therefore he should be appointed and installed as the Ogiewa of Atte by setting in motion forthwith all machineries of government towards this effect by the 2nd, 3rd and 4th defendants, while the appointment (if any) of first defendant should be cancelled or declared null and void and of no effect as being against the provisions of the Traditional Rulers and Chiefs Edict 1979.*

D (4) *That the 2nd, 3rd and 4th defendants are individually or jointly and severally wrong to recommend, recognise, appoint or deal with, in any manner (if already done) or should not appoint or have appointed first defendant as the Ogiewa of Atte Clan, contrary to the provisions of the Traditional Rulers and Chiefs Edict, 1979.*

E (5) *That the 1st defendant is from Imiomoshi and not being from Imiokposokeke family is not qualified to ascend the throne or take the title of Ogiewa of Atte Clan, in accordance with the provisions of the Traditional Rulers and Chiefs Edict 1979.*

F (6) *A perpetual injunction restraining the first defendant from parading himself as the Ogiewa of Atte and 2nd, 3rd and 4th defendants from appointing and/or recognising in any manner whatsoever the first defendant as the Ogiewa of Atte Clan."*

G The parties were agreed on certain aspects of the case. It was, for example, common ground that there was only one ruling house, known as Imioveka ruling house, in relation to the Chieftaincy in question. The six family sub-units, in order of rotation were: Imiomosi (to which the last holder of the title in question belonged), Imiokposokeke, Imiokhanigbe, Imiakpasi, Imiorerue and Imioshimi.

H After the death of the last holder of the title, it became necessary to nominate another person to fill the vacancy in accordance with the provisions of the relevant registered chieftaincy declaration. A meeting of the family, attended by the representatives of the sub-units of the family, was held for the aforesaid purpose on the 8th of September, 1982. It was the turn of the Imiokposokeke sub-unit of the family to produce a candi

date. It was common ground that the 1st respondent was nominated. The case of the 1st respondent was that he accepted the nomination and went to Lagos to pack his things before his installation. According to the 1st respondent, on his return from Lagos, he saw the person who acted as Secretary at the meeting. She gave him a copy of what was said to be a type-written copy of the minutes of the meeting held by the family. He observed, on reading it, that it was not an accurate record of the proceedings at the meeting. The document was Exhibit "A" and it contained a statement, which was not true, that after his nomination and with the permission of members of the family present at the meeting, he nominated the appellant to succeed the last holder of the title. The position of the appellant was that it was true that the 1st respondent, after thanking the family for nominating him, declined to accept his nomination and with the permission of the family nominated him (the appellant) for the purpose of filling the vacancy.

The 1st respondent contended that apart from other things, the appellant was not qualified for nomination because the sub-unit of the family to which the appellant belonged was the same as the sub-unit of the family to which the last holder of the title belonged and it was, therefore, not the turn of that sub-unit to produce a candidate for the purpose of filling the vacancy. In fact, the 1st respondent's contention was that the father of the appellant was the last holder of the title whose death created the vacancy which was to be filled. The appellant's position was that his mother was not an indigene. His mother married Gbafe, the last holder of the title after the death of the appellant's father, Awodi Balogun, who belonged to the family sub-unit that was to produce a candidate for the purpose of filling the vacancy. The said Gbafe took care of him (appellant) till he grew up and that was why, in accordance with the native law and custom of the area, he was bearing the name of Gbafe as his surname.

The learned trial Judge after a meticulous consideration of the evidence and the submissions made by the learned counsel for the parties, gave judgment for the 1st respondent. He granted all the reliefs. The appellant lodged an appeal against it to the Court of Appeal. The court below dismissed the appeal. The appellant, dissatisfied with the judgment of the court below, has appealed to this court.

One of the complaints in the appellant's brief was, inter alia, that the court below did not consider all the grounds of appeal and/or the issues set down for determination in the appellant's brief one by one. I am not surprised that the court below identified the real issues requiring determination for the purpose of determining the appeal instead of wasting its time on what, in my view, were minor matters or issues which would not have

resolved any issue conclusively. It seemed to me that it was the usual practice for the appellant to repeat or split one issue into two or three. What was done in relation to the framing of the ground of appeal and framing of issues in the present appeal was a repeat-performance of what was done in the court below. Altogether there were more than seventeen grounds of appeal and in many cases a ground of appeal had more than two particulars of misdirection.

Be that as it may, the issues set down in the appellant's brief for determination, adopted by the 1st respondent and which this court will consider for the purpose of the determination of this appeal, are as follows:-

"(i) Whether or not the learned Justices of the Court of Appeal were right in holding that Exhibit 'N' was inadmissible.

(ii)(a) Whether or not the learned Justices of the Court of Appeal correctly and comprehensively framed or identified the issues for determination to encompass all appellant's grounds of appeal for the purpose of proper and complete determination of the appeal before them.

(b) If the answer to (a) is (in) the negative, whether or not the learned Justices of the Court of Appeal completely determined the appeal before them as required by law.

(iii) Whether or not the Justices of the Court of Appeal were right in refusing or failing to review and/or reverse the findings of fact of the trial Judge to the effect that appellant was not from Imiokposokeke family and that 1st respondent did not decline his nomination as the Ogiewa-elect and in turn nominate the appellant.

(iv) Whether or not the learned Justices of the Court of Appeal were right in holding that even if 1st respondent rejected his own nomination and nominated appellant to replace him (and the entire Imioveka Ruling House accepted him) with the full knowledge that the successor must be from Imiokposokeke family his nomination would be illegal, null and void and that he (appellant) cannot call in aid the provisions of S. 150 of the Evidence Act.

(v) Whether or not the learned Justices of the Court of Appeal were right in dismissing appellants Appeal and upholding the orders made by the trial Judge in his judgment notwithstanding the existence and subsistence of Exhibits B and T3."

In dealing with issue 1, the learned counsel for the appellant, in the appellant's brief, referred to the evidence of the person who acted as the Secretary of the family at the meeting held by members of the family to nominate a candidate. She told the court that she was the person who wrote down the minutes of the said meeting and that Exhibit "N" was a

copy of the minutes of the meeting. *Alade v. Olukade* (1976) 2 SC 183 at p. 189 was cited and it was submitted that Exhibit “N” not being a document, that was inadmissible in law in any event and its admissibility not having been challenged the trial court, and the court below ought not to have held that it was inadmissible. It was argued in the 1st respondent’s brief that was to be understood from the findings of the learned trial Judge and the remark of the Justices of the court below was that Exhibit “N” had no probative value. B

In law, it is necessary to appreciate or note that there is a clear distinction between the question whether evidence is admissible and the question of its probative value or weight to be attached to it. The fact that evidence, oral or documentary, is admissible does not mean that it has weight. It may not have any probative value or any weight at all, though admissible. C

The court below seemed not to have made the distinction. Exhibit “N” being the minutes which the witness alleged that she took at the said meeting was admissible as the minutes allegedly taken at the meeting by the said witness and no more. The weight, if any, to be attached to it was a different matter. D

Though the court below was wrong in holding that Exhibit “N” was inadmissible, it is not every slip committed by a judge in his judgment that will result in the appeal being allowed. The mistake committed by a judge, to be fatal, must have occasioned a miscarriage of justice. See: *Udeze v. Chidebe* (1990) 1 NWLR (Pt.125) 141. In the case of wrongful rejection of admissible evidence by a court, in particular, the provision of section 226(2) of the Evidence Act is that the wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the Court of Appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same. See: also *Idundun v. Okumagba* (1976) 9-10 SC 227 at p.245. In the view of the appellant, the wrongful rejection of Exhibit “N” resulted in miscarriage of justice because if it had not been rejected and the weight it deserved was attached to it, the court below would have found that the defence of estoppel put up by the appellant was well-founded. The question whether the weight, if any, that should be attached to Exhibit “N” would have been capable of sustaining the appellant’s defence of estoppel is an entirely different issue which will be dealt with elsewhere in this judgment. E F G H

With reference to the second issue, in the appellant’s brief, for determination, what were the crucial issues for determination in this case were straightforward. I agree with the submission made for the appellant

that it was the duty of the court below to hear and determine appeals properly brought before it from the lower courts. It must decide one way or the other all issues properly raised which are necessary [or the determination of the appeal. It was argued in the appellant's brief that having regard to the grounds of appeal, filed and argued, the Justices of the court below were wrong in holding that the only issue arising from this appeal was as stated by them at page 333 lines 10-17 of the record of proceedings. It was further submitted that the court below did not correctly frame the issues for determination. The submission made in the 1st respondent's brief was that what was important was whether the court below identified the real issues involved in the appeal. A close examination of the appellant's brief filed in the court below showed that after setting out therein the issues identified for determination, the appellant's counsel then proceeded to argue the appeal on the basis of the grounds appeal which were altogether nineteen grounds. On that ground alone, the brief filed by the appellant was bad as it was not in a proper form. In the circumstance, the issues set down in the appellant's brief in the court below served no useful purpose. After setting out, in a brief, the issues for determination counsel should not proceed to argue the appeal by arguing the grounds of appeal one after the other. The proper thing for him is to base his argument on the issues set down for determination and not on the grounds of appeal. See: *Ojibah v. Ojibah* (1991) 5 NWLR (Pt.191) 295.

However, there is authority for the proposition that a bad brief need not be struck out. The court should make the best that it can out of it. See: *Chinweze v. Masi* (1989) 1 NWLR (Pt.97) 254; and *Obiora v. Osele* (1989) 1 NWLR (Pt.97) 278.

Further, I have pointed out above that there were repetitions in the grounds of appeal filed in the court below and that in some cases what should have constituted one ground of appeal was split into two or more grounds with series of particulars of error or misdirection in each case. In a situation like that what was important was whether the issues formulated, on the basis of which the court below determined the appeal, covered all the complaints in the grounds of appeal. I have read the pleadings filed by the parties and the evidence led by the parties before the learned trial Judge and I am of the firm view that the following statement made by the court below on what were the crucial fundamental or main issues in this appeal represented the true position:

"Now, returning to the issue at hand, there is no dispute whatever from both sides, that at the meeting of Imioveka Ruling House, Atte on the 3/9/82, whereat a new Ogiewa was to be nominated. There was also no dispute that the first respondent was unanimously nominated as the Ogiewa

elect. The controversy or the disputed facts were:-

- (i) *Whether the first respondent rejected the nomination*
- (ii) *Whether the first respondent nominated the appellant, and*
- (iii) *Whether the appellant was legally qualified to be nominated and installed as Ogiewa.”*

The foregoing issues raised questions crucial to the outcome of the appeal. They constituted the main issues for determination in the appeal. If the answer to each of them was in the negative the appellant’s appeal would have collapsed like a pack of cards. The answer to the question raised under issue (ii)(b).

The question raised under the third issue was whether the court below was right in refusing to review or reverse the findings of fact made by the trial Judge that the appellant was not a member of Imiokposokeke sub-unit family and that the first respondent did not decline his nomination as the Ogiewa elect and in turn nominated the appellant. Reference was made, in the appellant’s brief, to the pleadings and the evidence led by both parties in relation to the question of whether the appellant was a member of the Imiokposokeke family. The contention of the 1st respondent was that the appellant was the son of the last holder of the title in question who belonged to a sub-family unit other than the Imiokposokeke family that was entitled to produce a candidate for the purpose of filing the vacancy. The last holder of the title was one Benson Gbafé. It was further stated by the 1st respondent that the appellant was Nelson Olorunnibe Gbafé, the son of the said Late Benson Gbafé. Apart from the oral testimony of witnesses, on the point, the appellant was described, in many newspaper publications tendered by the 1st respondent and admitted, as Nelson Olorunnimbe Gbafé, son of Benson Gbafé, who had ascended the throne of his father (Gbafé). The foregoing statement or description of the appellant in the newspapers, consequent upon his purported appointment and installation as the Ogiewa, were not denied and no step was taken to correct what the appellant knew was the description of him given in the newspapers. Instead, the strategy adopted by the appellant was to lead evidence for the purpose of showing that his real natural father was one Awodi Balogun but that he (appellant) was bearing the surname of Benson Gbafé (the last holder of the title) because his mother was a non-native or a non-indigine of Atte. After his father’s death, his mother married Benson Gbafé and since he took over the responsibility of taking care of him (appellant) he had to bear the name of Benson Gbafé as that was the custom of Atte.

The issue involved was a pure and straight forward question of

fact. The appellant conceded the point but it was contended for him that the finding of the learned trial Judge, which the court below affirmed, on the point, was perverse. The issue involved could only be resolved on the basis of the evidence led by both parties and it depended on the credibility which could properly be ascribed to the evidence given by the witnesses who testified for each party. This was more so as none of the parties produced a certificate concerning the registration of the birth of the appellant. A finding of fact that is not supported by evidence is perverse and can properly be reversed by an appellate court. See: *Lengbe v. Imale* (1959) SCNLR 640; (1959) WRNLR 325; and *Fatuade v. Onwoamanam* (1990) 2 NWLR (Pt. 132) 322. Therefore, if, as was contended in the appellant's brief, the finding, on the point by the learned trial Judge was not supported by evidence, the court below could reverse the finding. However, in this case, there was evidence but the question was whether the evidence was credible. The court below reviewed and considered the evidence led by both parties before the learned trial Judge and came to the conclusion that the appellant was a son of Benson Gbafe and not a member of Imiokposokeke family. It included the evidence that the mother of the appellant was a little girl when she married Benson Gbafe and the evidence of the appellant that it was an abomination for a child to deny his father. The court below, on the point, rightly stated inter alia, as follows:-

"In any event, whether the 1st respondent rejected his own nomination or not and whether he nominated the appellant the appellant could not qualify as the Ogiewa until it is proved that he came from Imiokposokeke family. If he was not from that sub-family, his nomination was obviously illegal, null and void, and section 150 of the Evidence Act cannot be invoked to qualify him. The finding that the appellant was the son of that Ogiewa was based on the preponderance of evidence adduced and accepted by the learned trial Judge. There was the evidence led by the 1st respondent that the appellant was the natural son of Late Ogiewa of Atte Clan. The learned trial Judge evaluated that evidence led against the evidence led by the appellant and his witness (sic) and decided to accept as credible the evidence led by the respondent. The finding that the appellant was the son of Benson Gbafe was supported by the evidence adduced at the trial and an appeal court cannot disturb such a finding based on evidence led and accepted by the trial court."

Where a trial court evaluates the evidence and appraises the facts, the issue of credibility of witnesses is entirely for him until he has failed to make good use of his advantage of seeing and hearing the witnesses during their testimony. It is not the business of an appellate court to substitute its

own view for the view of the learned trial Judge. See: Bamgboye v. Olarewaju (1991) 4 NWLR (Pt.184) 132; Kimdey v. Military Governor of Gongola State (1988) 2 NWLR (Pt.77) 445 at p.459. Further, no special circumstances have been shown to warrant the interference of this court with the concurrent finding, on the point, by the learned trial Judge and the court below. The answer to the first part of the question raised under issue 3 is in the affirmative. See: Are v. Ipaye (1990) 2 NWLR (Pt.132) 298. B

With reference to the question whether the 1st respondent declined his nomination by the family and in turn nominated the appellant, the position of the 1st respondent was that he accepted the nomination while the position of the appellant was that the 1st respondent declined the nomination and, with the consent of the members of the family, nominated him, the appellant. It was common ground that the family nominated the 1st respondent for the purpose of filling the vacancy in the chieftaincy in question. The Onus was, therefore, on the appellant to prove his assertion that the 1st respondent declined the nomination and, in turn, with the consent of the family, nominated him. The appellant, for the purpose of discharging the burden on him, relied heavily on the contents of the minutes of the meeting, Exhibit "N" which, according to the 1st respondent, did not contain an accurate record of the proceedings at the meeting. It was not an authentic record of the minutes of the meeting. Reference was made to Exhibit "A" which was also said to be a copy of the minutes of the meeting recorded by the secretary of the family at the meeting in question, and to the fact that the contents of Exhibit "A" were not, word for word, the same as the contents of Exhibit "N". The court below held that as there were circumstances, warranting the authenticity of Exhibit "N" being doubted, the hand-written record of the proceedings made at the meeting which was allegedly used to make Exhibit "N" should have been produced by the appellant or caused by him to be produced by the secretary of the family who recorded the minutes in her own handwriting particularly when Exhibit "N" or "A" was not signed by the 1st respondent who was present at the meeting. C D E F G

It was submitted for the appellant that the Exhibit "N" was a valid legal evidence which the learned trial Judge should have acted upon. It was also submitted that by not cross-examining the D.W. 2 on the question whether he (the 1st respondent) nominated the appellant the 1st respondent was estopped from denying it. Finally, it was argued that it could be inferred from Exhibits G, H, J, K, N, O, P, Q and R that the 1st respondent was not speaking the truth, on the point. H

It was pointed out in the 1st respondent's brief that the issue here too was a question upon which there had been a concurrent finding of fact by the learned trial Judge and the court below. No special circumstances warranting the interference of this court with the finding had been shown. It was submitted that the 1st respondent, if he so desired, could decline to accept his own nomination but he had no power under the registered declaration to nominate another person in his place.

The position of the 1st respondent was that he knew nothing and had nothing to do with Exhibits G, H, J, K, N, O, P, Q and R and that he was not the writer of any of the aforesaid Exhibits said to be written by him. The issue of the question of whether the 1st respondent declined to accept his nomination at the family meeting and nominated the appellant could not be resolved by drawing any inference from the Exhibits mentioned above from which the 1st respondent had dissociated himself or from Exhibit "N", the alleged type-written copy of the minutes of the family meeting which, for sufficient reasons given by the 1st respondent, was not a true and accurate record of the minutes of the said meeting. In the circumstance, the learned trial Judge was right in holding that the manuscript of the minutes of the meeting should be produced and the court below was right in upholding the decision. An important though controversial and fundamental issue like that could not be resolved by drawing inferences from matters upon which, justifiably, the parties could not agree. This was more so, when there were two versions of the type written copies of the minutes, Exhibit "A" and "N" which were not identical in various material particulars. Each of the aforesaid two irreconcilable versions of the minutes of the said meeting was allegedly signed by the secretary of the family and by the eldest man in the family and thumb-printed by the same set of members of the family that attended the alleged meeting. In any case, there was no provision in the registered declaration, regulating or concerning the appointment of any person to fill a vacancy in the chieftaincy, empowering a person who, for reasons best known to him, declines his nomination to nominate another person to fill the vacancy. On this point too, there were concurrent findings of the trial judge and the court below and no special circumstances were shown to enable this court to interfere.

The 1st respondent asserted, and the appellant agreed with him, that members of the family nominated him (1st respondent) at the family meeting for the purpose of filling the vacancy in the chieftaincy. The 1st respondent consequently discharged the burden on him to prove his assertion. It was the appellant, however, who asserted that the 1st respondent nominated him after declining to accept his (1st respondent's) nomination.

As the 1st respondent did not agree with the assertion, the burden was on the appellant, who made the assertion to prove it. The onus of proving a particular fact is on the party who asserts it. See: *Okubule v. Oyagbola* (1990) 4 NWLR (Pt.147) 723 and *Ike v. Ugboaja* (1993) 6 NWLR (Pt.301) 539. Further, in civil cases, the onus of proving a particular fact is fixed by the pleadings. It does not remain static but shifts from side to side. The onus of adducing further evidence is on the person who will fail if such evidence is not adduced. See: *Nigerian Maritime Services Ltd. v. Afolabi* (1978) 2 SC 79 at p. 84; and *H.M.S. Ltd. v. First Bank Ltd.* (1991) 1 NWLR (Pt.167) 290. The answers to the questions raised under the third issue are in the affirmative. B C

The question raised under the 4th issue was whether the court below was right in holding that even if the 1st respondent rejected his own nomination and nominated the appellant to replace him and the entire Imioveka ruling house accepted him with full knowledge that a successor must be from Imiokposokeke his nomination would be illegal, null and void and that he (appellant) could not call in aid the provision of section 150 of the Evidence Act. It was argued in the appellant's brief that if the 1st respondent declined to accept his nomination and nominated the appellant, an estoppel would arise under the provision of section 150 of the Evidence Act to prevent the 1st respondent from contending that the appellant was not a member of Imiokposokeke family. According to him, there was evidence that the kingmakers accepted the appellant's nomination. The submission in the 1st respondent's brief was that there was no provision in the registered declaration, Exhibit "T3". authorising or permitting a person, who refuses to accept his own nomination, to nominate another person to replace himself. The purported or alleged nomination of the appellant by the 1st respondent was therefore, illegal. D E F

I think that there is substance in the submission made for the 1st respondent. It was the registered declaration, Exhibit "T3", that contained the provisions pertaining to the appointment of a person as Ogiewa. It was rightly found by the learned trial Judge, and the finding was affirmed by the court below, that the appellant was not a member of Imiokposokeke family whose turn it was to provide a candidate for the purpose of filling the vacancy. Therefore, if the 1st respondent declined to accept his own nomination and nominated the appellant to take his own place, the nomination would be null and void as not being in accordance with or in contravention of the provisions of the registered declaration. In the circumstance, an approval of the appointment or installation of the appellant as Ogiewa by all the members of the ruling house would be null and void and section 150 of G H

the Evidence Act would not have been applicable.

In any case, the issue raised in the appellant's brief was not, in fact, based on what happened. The question was merely hypothetical. The High Court lacks jurisdiction to determine hypothetical questions. See: Salihu v. The State (1984) 10 SC 111, at Pp. 112-113.

The question raised under the fifth issue was whether the Justices of the Court of Appeal were right in dismissing the appellant's appeal and upholding the orders made by the trial judge in his judgment notwithstanding the existence of Exhibits "B" and "T3". Exhibit "B" was a Government Notice BSLN 13 of 1985, given in the Extraordinary Gazette No. 29 Vol. 22 of 26th April, 1985. The notice given about the appointment of the appellant was as follows:-

"It is thereby notified for general information that in exercise of the powers conferred on it by section 19(1) of the Traditional Rulers and Chiefs Law, 1979 and by virtue of all other laws enabling in that behalf, the Executive Council of Bendel State of Nigeria has approved the appointment of Prince Nelson Olorunnibe Gbafe as the Ogiewa of Atte in Akoko-Edo Local Government Area with effect from 1st December, 1982.

Dated at Benin City this 24th day of April, 1985"

It was argued in the appellant's brief that there was no claim by the 1st respondent that the notice should be set aside. The notice was, according to the appellant, a statutory instrument which was binding on everybody, including a court of law.

It was further submitted that notwithstanding the judgment of the learned trial Judge, which was affirmed by the court below, Exhibit "B" was still an existing law which was still binding and effective. The submission in the brief of the 1st respondent, with which I agree, was that as the alleged nomination of the appellant was irregular, any purported appointment, approval of appointment, or recognition of appointment by the 2nd, 3rd and 4th respondents was irregular. In the circumstance, it was further submitted, the Justices of the Court below were, therefore, right in dismissing the appellant's appeal and upholding the orders made by the learned trial Judge. In this case, the crucial issue was whether the nomination of the appellant was valid. To determine whether the nomination was valid one has to refer to Exhibit "T3", the registered declaration which contained provisions regulating the appointment to the chieftaincy. The declaration enumerated the number and gave the names of the families that were entitled to provide candidates for the purpose of filling a vacancy in the Chieftaincy. It also contains a provision that the filling of the vacancies should be by rotation among the families constituting the ruling house. It was established in the trial court, and affirmed by the court below, that it

was the turn of Imiokposokeke family to provide a candidate and that the appellant was not a member of that family. It was also established, and affirmed by the court below, that, in any case, the 1st respondent was the person nominated at the meeting of the members of the ruling house and that the evidence or contention of the appellant that the 1st respondent declined the nomination and nominated the appellant was not true. Therefore, any purported appointment, installation or recognition of the appointment of the appellant as Ogiewa was null and void for being based on an invalid nomination. The notice given for general information in the Gazette, Exhibit "B", B.S.L.N. 31 of 1985, could not validate the nomination of the appellant which was irregular. Indeed, it was never stated anywhere therein that that was what it was intended to do. Notification in the Gazette of an otherwise invalid appointment would not cure the legal defect in the appointment. The learned trial Judge was, therefore, right in making the finding and the court below was right in affirming it that the appointment of the appellant was null and void. The court below was right in dismissing the appellant's appeal and upholding the orders made by the learned trial Judge notwithstanding the existence and subsistence of Exhibits "B" and "T3". The answer to the question raised under fifth issue is in the affirmative.

The appeal lacks merit and is hereby dismissed with N1,000.00 costs.

BELGORE JSC

I agree that this appeal lacks merit. The concurrent findings of fact by the two lower courts were on clear evidence in support of the case of the first respondent and there is no reason advanced to interfere with their decisions.

I agree that the appeal fails and it must be dismissed. I therefore agree with the judgment of my learned brother, Adio, J.S.C. in dismissing this appeal and making the same consequential orders as contained in the said judgment.

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment of my learned brother Adio, J.S.C. and I agree with his reasoning and the conclusions reached. I adopt them as mine.

For the reasons stated, I too, will dismiss the appeal. I abide by all the consequential orders contained in the lead judgment of my learned

brother.

MOHAMMED JSC

B I have had the privilege of reading in draft the judgment of my learned brother Adio, J.S.C., and I entirely agree with him that this appeal is without any merit and ought to be dismissed. All the issues raised for the determination of this appeal have been adequately considered in the lead judgment.

I have nothing more to add.

C The appeal is dismissed. I also award N1,000 costs for the respondents.

ONU JSC

D I read in draft the judgment of my learned brother Adio, J.S.C. I agree with his reasoning and conclusions that this appeal must perforce fail and it is also dismissed by me.

E I only wish to elaborate briefly on three points - the admissibility of Exhibit 'N'; whether the Court of Appeal by failing to consider all the nineteen grounds of appeal filed had not caused a miscarriage of justice to be occasioned thereby and whether the appellant had not established by credible evidence that he is a member of the Imiokposokeke Family of Imioveka Ruling House of the Ogiewa Chieftaincy of Atte and to have been re-nominated by the respondent to replace him (respondent) - which, in my view, would suffice to dispose of this appeal.

F The Imiokposokeke Family having met to nominate the plaintiff, 1st respondent hereinafter referred to respondent, as Ogiewa - elect of Atte Clan of Akoko-Edo Local Government Area of Edo State on 8th September, 1982, the burden which lay on the appellant who asserted that Exhibit 'N' was the purported record or minutes of that meeting and had the duty to establish it (Exhibit 'N') as credible evidence through DW 2 since it was tendered and marked rejected. Indeed, what is to be understood from the findings of the Court of Appeal is that Exhibit 'N' had no probative value. This is what the learned trial Judge said of that Exhibit (Exhibit 'N')".

H *"To convince this court that Exhibit 'N' is the true recording of the event that took place at the meeting of 8/9/82 convened by Imioveka Ruling House, the manuscript must be produced. In the absence of this, Exhibit 'N' is not worth more than the paper on which it is written."*

Be it noted that the authenticity of Exhibit 'N' having been challenged by the 1st and 2nd respondents in their pleadings and evidence, the appellant had failed to discharge the duty that lay on him to prove that

avermment. Besides, PW 6 John Gbafé, who was one of those accredited representatives present at the said meeting on 8/9/82 denied signing anything at the said meeting of Imioveka Ruling House.

Significantly too, the respondent who was alleged to have nominated the appellant after rejecting his own nomination did not sign Exhibit 'N'. Consequently, respondent could not be bound by the contents of the said Exhibit 'N'. He who avers must prove. See: *International Bank for West Africa Ltd. v. Oguma Associated Companies (Nig.) Ltd.* (1986) 2 NWLR (Pt.20) 124; *Nwabuoku v. Ottih* (1961) 2 SCNLR 232; (1961) 1 All NLR 487; *Omoriegie v. Omigie* (1990) 2NWLR (Pt. 130) 29 at 39 and *Nwogo v. Njoku* (1990) 3 NWLR (Pt.140) 570. As the respondent neither wrote nor signed Exhibit 'N' the provisions of section 90(4) of the Evidence Act applies. That section provides as follows:-

"For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his hand, or was signed or initiated by him or otherwise recognized by him in writing as one of the accuracy of which he is responsible."

Furthermore, before arriving at the conclusion that Exhibit 'N' was not worth the paper on which it was written, the learned trial Judge observed inter alia thus:

"DW 2, the Secretary of the Ruling House said in evidence that she came down with the manuscript of the alleged minutes to Igarra in the company of the 1st plaintiff to have it typed and that Exhibit "N" was the typed-script. The manuscript was not produced as the authority for the production of Exhibit "N" and not being a signatory to Exhibit "N" the legal burden is on the defendants to prove the Secretary of Imioveka Ruling House, she should be in the custody of the manuscript of the minutes she recorded at the meeting of 8/9/82. I believe that there is a manuscript hence the necessity of typing to have enough to distribute."

In confirming the above stance taken by the trial court, the court below held as follows:-

"From what I have said of Exhibit "N" I do not believe the first plaintiff rejected his nomination. I believe that when the first plaintiff travelled to Lagos Exhibit "N" was prepared in his absence by some mischief makers. This being so I reject the submission of counsel on estoppel by conduct against the first plaintiff."

Much later in their judgment the court below in further affirmation of the trial court's finding of fact said:-

"After a calm view of the entire evidence adduced, I am of the

opinion that the finding of facts by the learned trial Judge was amply justified. The documentary evidence Exhibit "N" on which the respondent relied upon was clearly in admissible and in any event, there was the possibility of its being exploited as the learned trial Judge had found"

One error one has to correct in both decisions is that while Exh. "N" was admissible the weight to attach to it is nil. Subject to this, it is clear from the foregoing that these findings constitute concurrent findings by the two courts below which unless special circumstances are shown that the decision is erroneous or perverse, ought not to be lightly upset. See: *Alhaji v. K.O.A. Are & Anor v. Raji Ipaye & Ors.* (1990) 2 NWLR (Pt.132) 298 at 319; *Ojomu v. Ajao* (1983) 9 SC 22 at 53; (1983) 2 SCNLR 156 at 169; *Lokoyi v. Olojo* (1983) 8 SC 61 at 63-73; (1983) 2 SCNLR 127 at 132 and *Adimora v. Ajufo* (1988) 1 NSCC 1005 at IOJ6; (1988) 3 NWLR (Pt.80) 1. This, the appellant has been unable to do. Furthermore, the provisions of Section 137(1) and (2) (now section 38(1) and (2)) of the Evidence Act do not apply; they can only apply when the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal. In the case in hand, the commission of a crime is not directly in issue. What indeed is in issue is whether or not the respondent rejected his nomination as the Ogieawa-elect and nominated appellant in his stead. It is enough therefore for the respondent to adduce credible evidence that Exhibits "A" and "N" did not reflect accurately what was decided at the meeting of the Imioveka Ruling House held on 8/9/82. The appellant's grouse would have been well founded if Exhibit "N" had any weight. Since it had no weight whatsoever the defence of estoppel put up by the appellant would not avail him. Thus, the provisions of Section 150 (now Section 151 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria 1990) which states:-

"151. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest, to deny the truth of that thing"

will not avail him either. As the court below succinctly and rightly held:

"Having regard also to the fact that the first defendant (the appellant) has always believed himself as a member of Imiokposokeke, section 150 Evidence Act presupposes that the person who relies on its provisions is a person who has been misled by the conduct of the other person who under the circumstances knew that he was deceiving the other person."

See also the case of *Joe Iga & Ors. v. Ezekiel Amakiri & Ors.* (1976) 1 SC 1 at 12-13. I accordingly do not share appellant's view, drawing an infer-

ence from the principles established in the above case, that respondent by his words and conduct wilfully caused him to believe that he is from the Imiokoposokeke family, a state of affairs which the respondent knew to be false and had caused him (appellant) to act upon.

On the issue of non-consideration of the 19 grounds by the court below while it is the law that appeals are allowed on grounds of appeal and not on the issues (See *Anukwua v. Ohia* (1986) 5 NWLR (Pt.40) 150; *Akpapuna v. Obi Nzeke II* (1983) 7 SC 1 at 26 ; (1983) 2 SCNR 1 and *Ganiyu Kale v. Coker* (1982) 12 SC 252 at 271, since issues are formulated on the basis of the grounds and arguments are advanced not on the grounds of appeal but on the issues thus formulated. (See: *Daniel Dibiamaka & Ors. v. Osakwe & Ors.* (1989) 3 NWLR(Pt.107) 101; (1989)5 SCNJ 30; *Momodu v. Momodu* (1991) 1 NWLR (Pt.169) 608 and *Din v. African Newspapers* (1990) 3 NWLR (Pt.139) 392). if as happened in the instant case, the court below call in mind the substance of the claim in the trial court and the grounds upon which the appeal was being canvassed, justice between the parties would have been amply done. Indeed, as often happens, one needs not canvass the whole gamut of the issues since one of the many grounds argued through the issues formulated therefrom, may dispose of an appeal. It is therefore not always necessary to consider all the grounds of appeal via the issues; what is important is for the Court of Appeal to identify the real issue or issues in controversy in appeal as happened in the instant case. Thus, the court below, in my opinion, was justified to arrive at the following conclusions and that it left no stone unturned in doing so when it held that:-

"All the 19 grounds of appeal argued by the appellant's counsel question (sic) the finding:- (1) that the 1st respondent did not (a) reject his nomination as the Ogiewa-elect and (b) did not nominate the appellant to replace him and (2) that the appellant, being the son of Late Benson Gbafe and also being an Enabo was not qualified to be appointed as the immediate successor to the erstwhile Ogiewa who was from the same sub-ruling house as the appellant.

After a calm view of the entire evidence adduced, I am of the opinion that the finding of facts by the learned trial Judge was amply justified. The documentary evidence Exhibit "N" on which the respondent relied upon (sic) was clearly inadmissible any in any event, there was the possibility of its being exploited as the learned trial Judge had found. And it seems to me that whether Colonel Isa intimidated the kingmakers into changing the minutes or not is besides the point as clearly there was evidence that the respondent promptly denied the minutes as couched in Exhibit "N"

In any event, whether the 1st respondent rejected his nomination

or not and whether he nominated the appellant could not qualify him as the Ogiewa until it is proved that the case from Imiokposokeke family - if he was not from that sub-family, his nomination was obviously illegal, null and void, and section 150 of the Evidence Act cannot be invoked to qualify him. The finding that the appellant was the son of that Ogiewa was based on the preponderance of evidence adduced and accepted by the learned trial Judge. There was the evidence led by the respondents which was accepted by the learned trial Judge that the appellant was the natural son of Late Ogiewa of Atte Clan.”

In my considered view the issues formulated and considered by the court below properly arose from the grounds of appeal filed. Some of the grounds admittedly touched mainly on injunction while ground 18 questioned the propriety of the entertainment of the respondent's action. The appellant did not advance any argument in support of grounds 18 and 19, the latter in which the appellant was of the view that the only way the respondent could have challenged the decision of the Bendel (now Edo) State Executive Council was through the prerogative writ of certiorari

The grounds were accordingly deemed as abandoned.

Once the court below found, as it rightly did, that the appellant was not from Imiokposokeke family, it follows that his nomination, approval and installation were null and void and of no effect whatsoever. In a situation like this, it becomes unnecessary to question the issue of injunction already granted to restrain the 2nd, 3rd and 4th respondents from continuing their recognition of the appellant.

The entire case, in my view, turned on the facts and the findings of the trial court and confirmation of same by the court below which, in my view cannot be faulted.

On whether the appellant had not by credible evidence shown that he is a member of the Imiokposokeke Family of Imioveka Ruling House of the Ogiewa Chieftaincy of Atte and to have been renominated by the respondent to replace him, by the provisions of paragraphs 1, 2, 3 and 4 of the Registered Declaration of Traditional Rulers and Chiefs Edict, 1979 BSLN 162 of 1979 (vide Exhibit “T3”) pursuant to which the respondent's nomination as Ogiewa of Atte was made it is prescribed as follows:-

“1. There is only one Ruling House in Atte known as Imioveka comprising six kindreds known as Imiomoshi, Imiokposokeke, Imiokhanigbe, Imiakpasi, Imiorerue and Imioshemia in that order.

2. Succession rotates around the six hundred in the order stated above and is by selection.

3. To qualify, a candidate must be a patrilineal descendant of the

Ruling House or where he is a patrilineal descendant of the Ruling House must be born of a non-indigenous Atte woman. He must be free from any contagious disease, serious physical deformity, and insanity. He must not be an ex-convict.

4. When a vacancy occurs, the eldest male of the Ruling House summons and presides over a meeting of all the adults in the Ruling House for the purpose of nominating and selecting a candidate or candidates. A candidate or candidates are then presented to the kingmakers comprising twelve senior Okpa Title Holders made up of the two most senior from each of the six Kindreds in the Ruling House. Where only one candidate is presented, the kingmakers approve of him, otherwise the kingmakers select a candidate by consensus or a simple majority.”

The learned trial Judge had held on the preponderance of evidence, inter alia that the respondent, the nominee of the Imiokposokeke family, is the right person to the title or stool of Ogiewa of Atte in accordance with the current traditional rulers and Chiefs Edict, 1979 regulating succession to the title of the Ogiewa. That the respondent had been duly nominated by the Imioveka Ruling House, and therefore he should be appointed and installed as the Ogiewa of Atte by setting in motion forthwith all machineries of government towards this effect by the second, third and fourth defendants, while the appointment (if any) of the appellant is declared cancelled and declared null and void and of no effect, as being against the provisions of the Traditional Rulers and Chiefs Edict, 1979. It was held in addition that the appellant is from Imiomoshi family and not from Imiokposokeke family and is not qualified to ascend the throne to take the title of Ogiewa of Atte Clan.

The court below confirmed the trial court’s decision together with the order for perpetual injunction restraining the appellant from parading himself as the Ogiewa of Atte and on the second, third and fourth defendants from appointing and/or recognising in any manner whatsoever the appellant as the Ogiewa of Atte Clan.

In the premises, even if the respondent rejected his nomination, which is denied, the appellant could not have been validly nominated to replace him based on the following empirical grounds:-

(a) there was overwhelming evidence adduced at the trial that appellant is not from the Imiokposokeke family whose turn it was to produce the Ogiewa-elect of Atte but that he hailed from the Imiomoshi Family.

(b) that the provisions of section 151 of the Evidence Act will not avail the appellant as he was not misled or deceived by the respondent who after his nomination innocently went to Lagos to prepare for the installation ceremony only to be stalled by the act of the appellant, who, so to say,

grabbed the stool of Ogiewa behind his back.

(c) that appellant knew all along that being an “Enabo” child of Chief Benson Gbafe, he could not belong to Imiokposokeke Family vide paragraph 2 of Exhibit “T3” (ibid). His own family is Imiomoshi.

(d) The respondent had contended that the appellant was the son of the last holder of the Ogiewa of Atte Clan and who belonged to the Imiomoshi family as opposed to his own sub-unit of Imiokposokeke family that was entitled to produce a candidate for the purpose of filling the vacancy. He demonstrated without any visible challenge that the appellant (Nelson Olorunnibe Gbafe) is the son of the late Ogiewa of Atte, Benson Gbafe, and that by strict adherence to Exhibit “T3” he (appellant) was not yet qualified to ascend the stool.

The respondent’s overwhelming oral and documentary evidence which the appellant sought to circumvent by pleading and adducing ingenious evidence of his entitlement and that the respondent voluntarily abdicated and subjugated his (respondent’s) rights to his (appellant’s), were rightly rejected by the two courts below. I think they were right.

(e) It having been conclusively shown that the provisions of Exhibit “T3” (ibid) were not complied with in the purported nomination, appointment and approval of the appellant by the 2nd, 3rd and 4th defendants as the Ogiewa of Atte his nomination is null and void and of no effect. The court below, in my view, was therefore justified to have affirmed the trial court’s decision and accordingly dismissed appellant’s appeal as there was no miscarriage of justice occasioned thereby.

It is for these reasons and the fuller ones set out in the judgment of my learned brother Adio, J.S.C. that I too, dismiss the appeal. I abide by the consequential orders contained in the lead judgment inclusive of those as to costs.

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