

SUPREME COURT OF NIGERIA
7TH MARCH, 1997. SC. 230/1994
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC

LAWANIADESOKAN & 3 OTHERS	DEFENDANTS/
(For themselves and on behalf of Gbangbade	APPELLANTS
Erun ruling House of the Onitede of	
Tede Chieftaincy)	
AND	
PRINCE MICHAEL OYETUNJI	PLAINTIFF/
OKEYOYIN ADEGOROLU & 3 OTHERS	RESPONDENTS

ACTIONS - *Abuse of court's process - Plaintiff's action is not an abuse of court's process*

ACTIONS - *Cause of action - Whether the averments in the statement of claim - Disclose a good cause of action*

ACTIONS - *Locus standi - Chieftaincy matters - Whether plaintiff has the locus - to institute the action*

APPEALS - *Judgments - Written judgment of retired justice of Court of Appeal - Delivered after such retirement - Is a nullity.*

APPEALS - *Judgments - Pronounced opinion of a retired Court of Appeal justice - Is proper and valid.*

FACTS

Before the Oyo State High court, the plaintiff/respondent filed an action seeking certain declarations and injunction in respect of the Onitede of Tede Chieftaincy. The plaintiff filed his statement of claim and served all the defendants. Four of the defendants now appellants applied to the trial court for an order striking out and dismissing the action for being frivolous, lack of locus standi and for not disclosing reasonable cause of action.

The motion was argued and in a subsequent ruling, it was dismissed by the trial court. Defendants' appeal to the Court of Appeal was dismissed. Being dissatisfied, they have further appealed to the Supreme Court raising 5 issues.

ISSUES FOR DETERMINATION

"1. Whether the written opinion of a Justice of the Court of Appeal can be delivered in a judgment delivered after he has retired from the Court of Appeal Bench.

2. Whether the Court of Appeal discharged its judicial responsibility to determine all the issues raised before it in this case. Etc, see p. 509

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

Judgment of retired justice Court of Appeal

1. On the strength of these authorities, I am in agreement with the appellants that the written judgment on page 191 of the record of appeal signed by Agoro JCA and purportedly delivered on 27th February 1991 after he had retired in December 1990, is a nullity and I so declare. (p. 512 F)

Pronounced opinion of a retired Court of Appeal justice

2. The final conclusion I reach on this issue is that while I am of the view that the written opinion of a Justice of the Court of Appeal cannot be delivered after he has retired from the court, on the facts of this case where the opinion of Agoro JCA was pronounced by Ogwuegbu JCA as provided for in section 258(2) of the Constitution, the Court of Appeal was duly constituted as provided in section 226 of the Constitution, when judgment was delivered by it in this case on 27th February 1991. Ground 1, therefore, fails. (p. 516 B)

Actions - Locus standi

3. Plaintiff has averred that he had been chosen by his ruling house to succeed to the chieftaincy and his name had been submitted to the Kingmakers for consideration. He averred also that it was the turn of his ruling house to present a candidate. It must be remembered that the issue of locus standi is not dependent on the success or merits of a case but on whether the plaintiff has sufficient interest in the subject-matter of the dispute. I am of the view that the two courts below are right in holding that plaintiff's interest in the Onitede chieftaincy as averred in his pleadings are sufficient to give him a standing to institute his action. (p. 517 B)

Cause of action

4. There are sufficient averments in the amended statement of claim to constitute a cause of action. I, therefore, agree with the two Courts below that the plaintiffs pleadings disclose a good cause of action. The arguments of the appellants on their Brief only go to the merits of the case which consideration is premature at this stage. They base their arguments on issues extrinsic to

the plaintiff's amended statement of claim, and such arguments are rightly ignored by the court below. (p. 518 D)

Abuse of court's process

5. Having held that the plaintiff has locus standi and that his amended statement of claim discloses a good cause of action I must, of necessity, hold that his action is not an abuse of the process of the court, as erroneously contended by the appellants. (p. 518 G)

REPRESENTATION

K Alawode for the Appellants

B. Igw, SAN with A. Mustafa for 1st Respondent

O. A. Boade, Ag. DDLAS Oyo State for 2nd - 4th Respondents

CASES REFERRED TO

Anyaoke v. Adi (1985) 1 NWLR 342 at 350

Ogbunyija v. Okudo (1979) 6-9 SC 31 (1979) NSCC 77

A.G. of Imo State v. Attorney-General of Rivers State (1983) 8 SC 10

Aliyu v. Sodipo (1994) 8 KLR 56

Savage v. Uwaechia (1972) 3 SC 214 at 221

Kusada v. Sokoto Native Authority (1968) 1 All NLR 377 at 382

Kano v. Gbadamosi Oyelakin (1993) 4 KLR 93

Adesokan v. Adetunji (1994) 10 KLR 85

Effiom v. The State (1995) 1 KLR 7

Obayogie v. Oyowe (1994) 5 NWLR (Part 346) 637

Aladegbemi v. Fasanmade (1988) 3 NWLR (Part 81) 129

Ayoade v. Military Governor of Ogun state (1993) 8 NWLR (Part 309) 171

STATUTES & RULES REFERRED TO

Supreme Court Rules O. 6 r. 9

Court of Appeal Act Cap. 75 LFN 1990 s. 11

Constitution of Nigeria 1979 ss. 258(2), 220

High Court (Civil Procedure) Rules of Oyo State O. 23 r. 4

BOOK REFERRED TO

Halsbury's Laws of England (4th Edition) vol. 10 para. 726

LEAD JUDGMENT BY OGUNDARE JSC

This is a further appeal from an interlocutor decision of the High Court of Oyo State given on 11/7/88 wherein that Court held that:

"..... the plaintiff has locus standi to present this action and that the action is not frivolous, vexatious, and an abuse of process of court. The action also discloses a cause of action."

The plaintiff had by a writ of summons issued in February 1988 sued three Defendants (now Respondents in this appeal) claiming:

B "(a) Declaration that according to the law, custom and tradition of Tede there are only THREE ruling houses for the Onitede of Tede chieftaincy to wit, Daodu Agba, Adekalu and Egbeomo.

(b) Declaration that the instrument dated 18th day of January, 1958 and registered on the 12th day of February, 1958, in so far as it purports to declare the customary law prevailing in Tede with respect to the appointment to the Onitede of Tede Chieftaincy is wrongful, illegal and void.

(c) Declaration that Adekalu is the rightful ruling house to present a candidate for the Onitede of Tede Chieftaincy.

D (d) Declaration that the plaintiff is the Onitede-elect appointed in accordance with the law, custom and tradition of Tede.

(e) Injunction restraining the defendants, their servants, officers and agents from inviting any family other than the plaintiff's ruling house, Adekalu, to present a candidate for the vacant Onitede of Tede Chieftaincy, and from acting pursuant to or taking any steps to implement the aforesaid registered 'declaration'."

Subsequently, Lawani Adesokan, Tijani Adetokun, Alhaji salawu Oladoy in and Waidi Adeyemi, on behalf of themselves and on behalf of Gbangbade Erun Ruling House of the Onitede of Tede, sought and obtained an order of court to join in the action as co-defendants. The plaintiff filed his statement of claim and served copies on all the defendants. The 4 new defendants (who are now appellants before us and shall hereinafter be so referred to) thereafter/applied to the trial court for an order striking out the plaintiff/respondent's statement of claim and dismissing this action" on the grounds:

G "1. The action is frivolous, vexatious and an abuse of the process of the court.

2. The plaintiff/respondent has no locus standi to institute this action.

H 3. The plaintiff/respondent's statement of claim in this case discloses no reasonable cause of action."

The motion was argued and in a ruling given on 11/7/88 the learned trial Judge (Aderemi, J.) dismissed the application.

The appellants thereupon appealed to the Court of Appeal with leave of that court but the appeal was dismissed on 27/2/91. The appellants being

again dissatisfied with the judgment of the Court of Appeal have further, with leave of the Court of Appeal, appealed to this court upon 5 grounds of appeal.

Pursuant to the Rules of this court the parties filed and exchanged their respective briefs of arguments, except the 1st - 3rd Defendants/Respondents who did not file any written brief. At the oral hearing of the appeal, B learned counsel for the appellants and plaintiff/respondent proffered oral arguments in elucidation of their respective briefs. Although the 1st - 3rd defendant/respondents were represented by counsel at the hearing, he was not heard as he did not file any brief on behalf of his clients - see Order 6 rule 9, Supreme Court Rules. C

In the Brief of the Appellants the following issues are set out as calling for determination in this appeal, to wit:

"1. Whether the written opinion of a Justice of the Court of Appeal can be delivered in a judgment delivered after he has retired from the Court of Appeal Bench. D

2. whether the Court of Appeal discharged its judicial responsibility to determine all the issues raised before it in this case.

3. Was the Court of Appeal correct to have confirmed the High Court's decision on the issue of locus standi?

4. Whether the Court of Appeal was right to have held that the E plaintiff/Respondent's statement of claim disclosed a cause of action.

5. Was the Court of Appeal correct to have held that the High Court rightly held that the plaintiff/Respondent's action was not frivolous, vexatious or an abuse of the process of the court."

In the Brief of the plaintiff/Respondent, the issues which, are not F dissimilar are formulated thus:

"1. Whether the Court of Appeal was duly constituted when the judgment subject of this appeal was delivered on 27th day of February 1991.

2. Whether the Court of Appeal discharged its judicial responsibility to determine all the issues raised before it in this case. G

3. Whether the two lower courts were right in holding concurrently that the plaintiff/Respondent has locus standi and that his statement of claim disclosed a cause of action

4. Whether the two lower courts were right in their concurrent decisions that the plaintiff/Respondent's action was not frivolous, vexatious H or an abuse of the process of the court."

I shall, in determining this appeal, consider Issue 1 as formulated in the two Briefs first and take the other issues together as they dovetail into each other.

ISSUE(1):

The facts on which this issue is predicated are rather simple and undisputed. The appellants's appeal was heard by the Court of Appeal (Ibadan Division) on 28th November, 1990 and the coram was Ogwuegbu, JCA (as he then was), Akpabio and Agoro JJ.CA. At the conclusion of oral hearing, judgment was reserved and was eventually delivered on 27th February 1991. Agoro JCA retired from service in December 1990 but a written judgment signed by him and in which he merely said:

"I agree"

was included in the record of appeal to this court. The proceedings for 27th February 1991 read:

"Court:- The lead judgment is written and read by Akpabio, J.C.A. dismissing the appeal with N200.00 costs against the appellants and in favour of the plaintiff/respondent.

Ogwuegbu and Agoro JJ.CA. concurred, Agoro, J.C.A. gave his consent at the conference on the appeal before he retired in December, 1990.

*(Sgd.) E.O. OGWUEGBU
JUSTICE, COURT OF APPEAL
27-2-91"*

It is the complaint of the appellants that the Court of Appeal was not duly constituted on the day it determined the appeal before it in this case and that, therefore, its decision given on 27/2/91 is null and void. The appellants argue that the concurring judgment of Agoro J.C.A. was invalid in that the learned Justice of the Court Appeal was without jurisdiction to deliver a concurring judgment in the case on 27/2/91. They cite, in support of their submission, section 9 of the Court of Appeal Act and the decisions in Ogbunyiya & Ors. v. Okudo & Ors. (1979) 6-9 SC 32 and Nyarko v. Akowuah, 14 WACA 427. The appellants refer to a portion of the judgment of Akpabio JCA and argue that Ogwuegbu JCA held a contrary view. It is consequently submitted that:

"..... the above-mentioned opinions are diametrically opposed. That in the lead judgment prevailed because of the concurring judgment of the late Hon. Justice Agoro. The said concurring judgment was therefore fatal to the Court of Appeal's decision."

It is submitted for the Respondent that in view of the express statement made by Ogwuegbu JCA on the day judgment was delivered to the effect that Agoro JCA gave his concurrence at the Conference on the appeal before he retired in December 1990, the Court of Appeal was properly constituted when the appeal before it was determined. It is further submitted that for the appellants to succeed in their contention they must disprove Ogwuegbu

JCA's statement and this they have failed to do. It is also submitted that the constitution of the Court of Appeal on the day a judgment was delivered cannot be used to impeach such a judgment. Support for this submission is found in section 11 of the Court of Appeal Act, Cap 75 Laws of the Federation of Nigeria 1990 which provides:

"11. When, after an appeal in any cause or matter has been fully heard before the Court of Appeal, judgment is reserved for delivery on another day, then, on the day appointed for delivery of the judgment, it shall not be necessary for all those Justices before whom the appeal in the cause or matter was heard to be present together in court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other Justice; and in any such case the judgment of the Court of Appeal shall have the same force and effect as if the Justice whose opinion is so read had been present in Court of Appeal and had declared his opinion in person."

Section 258(2) of the Constitution, A. Anyaoko & Ors. v. Dr. F. Adi & Ors. (1985) 1 NWLR 342 at 350 per Irikefe JSC (as he then was) and Lawani Adesokan & Ors. v. Sunday Adetunji & Ors. (1994) 6 SCNJ 123 where the opinion of Olatawura JSC who participated at the hearing of the appeal but had retired before judgment was given, was pronounced by Uwais JSC (as he then was), who presided over the hearing of the appeal.

I have given careful consideration to the submissions of the parties. With respect to learned leading counsel for the Respondent, I do not think that section 11 of the Court of Appeal Act covers the issue under consideration here. That section covers the case where all the Justices that sit on an appeal are still in service on the day of judgment and have written and signed their judgments and, because some or all cannot be present to deliver judgment, give same to other justices to read on their behalf. Nor does the dictum of Irikefe JSC in Anyaoko & Ors. v. Dr. F. Adi & Ors. (supra) go far enough to cover the facts of the case on hand. In that case, Irikefe JSC said:

"For the purpose of this appeal only Section 258(2) with the proviso thereto arises for interpretation. From the foregoing, it would appear that once the panel that heard the case on appeal was properly constituted, that is competent, a judgment read within the following permutations would nevertheless be valid and unimpeachable:-

(a) *One Justice sitting alone to read his own signed judgment to which the others who sat with him had earlier signified their concurrence in writing. (The case here)*

(b) *All the justices who sat in the case sitting together to read their own individual opinions one after the other.*

(c) *Justices, other than those who sat to hear the case sitting to*

read the judgments already signed and authenticated, produced by those who actually sat over the case." (Underlining is mine)

The dictum covers the case where a written judgment signed by a serving Justice is either read by him or by some other Justice on his behalf.

Section 226 of the Constitution provides for the constitution of the B Court of Appeal in the hearing and determination of an appeal before it. It reads:

"226. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Federal Court of Appeal shall be duly constituted if it consists of not less than three Justices of the C Federal Court of Appeal, and in the case of appeals from -

(a) a Sharia Court of Appeal, if it consists of not less than three Justices of the federal Court of Appeal learned in Islamic personal law, and

(b) a Customary Court of Appeal, if it consists of not less than three Justices of Appeal learned in Customary law."

D In the present case, Agoro JCA who took part at the hearing had retired by the time the Court of Appeal gave judgement. He had thus ceased to be a judge of that Court. Any written judgment given by him after he had ceased to be a judge of the Court of Appeal would be given without jurisdiction and would consequently be a nullity. This court so decided in Ogbunyiya & Ors. v. E Okudo & Ors. (1979) 6-9 SC 31; (1979) NSCC 77 where a judgment given by Nnaemeka-Agu JCA in the High Court of former Anambra State two days after he had ceased to be a judge of that court and had been appointed a judge of the Court of Appeal, was declared a nullity. See also Nyarko v. Akowuah (supra) where the defunct West African Court of Appeal declared ultra vires F and a nullity a judgment delivered by one Mr. Spooner at a time when his authority to preside over the Chief commissioner's Court had lapsed. **On the strength of these authorities, I am in agreement with the appellants that the written judgment on page 191 of the record of appeal signed by Agoro JCA and purportedly delivered on 27th February 1991 after he had retired in G December 1990, is a nullity and I so declare.**

But this is not the end of the matter. At page 173 of the record of appeal, Ogwuegbu, JCA made the following pronouncement on 27th February 1991:

"Agoro J.C.A. gave his concurrence at the conference on the ap- H peal before he retired in December, 1990."

This pronouncement is in line with the practice of this court and of the Court of Appeal in similar circumstances.

The practice is predicated on section 258(2) of the constitution which came for consideration in Attorney-General of Imo State v. Attorney-General

of Rivers State (1983) 8 SC 10. Idigne, JSC (of blessed memory) was a member of the full court that heard the appeal. Before judgment was given on 12th August 1983, he died. On the day judgment was delivered Fatayi-Williams, CJN after delivering his own judgment, pronounced the opinion of late Idigbe JSC and, in doing so, observed at pages 10-12 of the report:

"In accordance with the provisions of section 258 subsections (2) B and (3) of the constitution of the Federal republic of Nigeria 1979, I would also pronounce the opinion of the late Justice Idigbe that the claims should be dismissed for the reasons stated by Justice Sowemimo in his judgment. The late Justice Idigbe was a member of the panel which heard the case and which later agreed that the claims should be dismissed for those reasons. C

Subsections (2) and (3) of section 258 of the Constitution to which I have referred read -

'(2) Each Justice of the Supreme Court or of the Federal court of appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a writ- D ten opinion:

Provided that it shall not be necessary for all the Justices who heard the cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing. E

(3) A decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members.'

To my mind, the phrase 'may be pronounced' used in subsection (2) above can only mean, in the context, 'to utter, speak, declare aloud, or proclaim'. Moreover, since the phrase is obviously intended to distinguish F what 'may be pronounced' from what 'may be read', What is pronounced cannot be the same as what is read from a typewritten or handwritten script. It must mean, and I so hold, what is orally proclaimed or declared aloud from personal knowledge.

In view of the interpretation which I have put on the phrase 'may be G pronounced', I also hold that any of the Justices of the Supreme Court who heard any cause or matter can, after a decision has been arrived at by all the Justices, pronounce the opinion of another Justice who, for one reason or another, is unable to reduce his opinion into writing or be present when the judgment in the case is being delivered by each of the other Justices." H

The practice has been followed ever since by both this court and the Court of Appeal in circumstances where a Justice of either court who sat on an appeal and deliberated at conference on the appeal died or retired before delivery of judgment. A few examples will suffice. In Ibrahim Kano v. Gbadamosi Oyelakin

514 Adesokan v. Adegorolu (1997) 3 KLR Ogundare JSC

(1993) 3 NWLR 399, 424, Shehu Usman Mohammed, JSC (of blessed memory) who sat at the hearing of the appeal and took part in the subsequent conference died before the date of judgment, the presiding Justice, Uwais JSC (as he then was) made the following pronouncement, after delivering his own judgment:

B *"My learned brother, the late Mohammed, JSC who took part in the hearing of this appeal and the conference which we held immediately thereafter died in a motor accident on Tuesday, the 9th day of February, 1993.*

In accordance with the provisions of Section 258 subsection (2) of the Constitution of the Federal Republic of Nigeria, 1979 I hereby pronounce that he was of the opinion that the appeal should succeed and that it should be allowed with N1,000.00 costs to the appellant."

C Again, in Alhaji A. Aliyu v. Dr. J. A. Sodipo (1994) 5 SCNJ 1, 23 on the retirement of Olatawura JSC who sat at the hearing of the appeal and took part in the conference but retired before judgment, the following pronouncement D was made by Uwais JSC who presided:

"The Honourable Justice Olajide Olatawura, who sat with us on the 14th day of February, 1994 to hear this appeal, retired on the 3rd day of May, 1994. Before his retirement, he took part in the conference which we held on the 23rd day of February 1994 on the appeal and he was of the E opinion that the appeal should be dismissed.

In accordance with the provisions of the proviso to section 258 subsection 2 of the Constitution of the Federal Republic of Nigeria, 1979 Cap 62 of the Laws of the Federation of Nigeria, 1990 and the decision of this court in A.G. of Imo State v. A.G. of Rivers State, (1983) 8 S.C. 10 at pp. F 10-12; (1983) 2 SCNLR 108. I hereby pronounce the opinion of Hon. Olajide Olatawura that the appeal be dismissed for the reasons contained in the judgment read by my learned brother Ogundare, JSC., the draft of which he read before his retirement."

See also: Lawani Adesokan & Ors. v. Sunday Adetunji & Ors. (supra) where a G similar pronouncement was made. Incidentally the present appellants were appellants also in that case.

H It is interesting to observe that the practice in this country is not dissimilar to the practice in England notwithstanding that there is no provision similar to section 258(2) of the Constitution in their Statute book. The following statement appears in Halsbury's Laws of England (4th edition) Volume 10 at paragraph 726:

"where one of the members of an appellate court dies after the hearing but before judgment has been delivered, it would seem that a judgment written by the deceased member before his death may be adopted by

one of the other members as his own, if it to stand as part of the decision of the court."

The authority for this statement is to be found in Inland revenue Commrs v. Wilsons (Dunblane) Ltd. (1954) 1 ALL.E.R. 301 at 305; (1954) 1 NLR 282 at 288 HL where Lord Normand delivered as his own and opinion prepared by Viscount Simon before his death. Lord Normand said:

"My Lords, before Lord Simon's Lamented death I had intimated to him that I would concur with an opinion prepared and finally revised by him in this appeal. In these circumstances, I am to deliver his opinion as my own. I shall thus have the privilege of preserving his judgment on one of the last Scottish appeals heard by him. Before I read it, I may be allowed to associate myself with the words of my noble and learned friend on the Woolsack about Lord Simon. It is, indeed, true that Scottish lawyers share with their English brethren the grievous sense of loss that his death has brought to all of us. Here, then, is his opinion which I adopt as my own."

In Re McConnell, Hunter v. McConnell (1956) NI 156, (a Northern Ireland case) the court granted leave to enter the appeal for rehearing where the two remaining judges did not agree. No doubt, prudent dictates that, in such a case, the opinion of a deceased or retired judge should not be allowed to sway the appeal either way as the parties would be deprived of his reasoning leading to his own conclusion.

It was the course taken in the Northern Ireland case that Mr. Alawode has urged on us in this appeal. Learned counsel argues in his Brief that Akpabio and Ogwuegbu JJ.CA came to "diametrically opposed" opinions. Akpabio JCA, in his lead judgment observed:

"However in the instant case, the learned trial judge found that the parties were different as the plaintiff/respondent was suing for himself as an individual, and not on behalf of a ruling house, and also that one of his reliefs No (d) was a new one, not included in any of the two previous cases. He therefore held, rightly in my view, that whether an appeal was pending in any of the two earlier cases or not would not have any bearing whatsoever on the present suit. He therefore rightly held that the present suit was not frivolous, vexatious or an abuse of the process of court. So that sub-head of the application was rightly decided."

Ogwuegbu, JCA, on the other hand, said:

"I think that plaintiff/respondent should have waited for the outcome of the appeal in HOY/23/87. His impatience gave the impression that suit No. HOY/14/88 is an abuse of the process of court."

He followed immediately by saying:

"Be that as it may, I am not convinced that the action giving rise to

this appeal is not properly constituted. Which ever way the appeal in suit No. HOY/23/87 goes, it will not defeat the claim of the plaintiff/respondent in the present appeal."

Both learned Justices came to the conclusion that the appeal failed. I cannot see that, in this case, both learned Justices disagreed as to persuade me to B invoke the decision in In Re McConnell (supra):

The final conclusion I reach on this issue is that while I am of the view that the written opinion of a Justice of the Court of Appeal cannot be delivered after he has retired from the court, on the facts of this case where the opinion of Agoro JCA was pronounced by Ogwuegbu JCA as provided for C in section 258(2) of the Constitution, the Court of Appeal was duly constituted as provided in section 226 of the Constitution, when judgment was delivered by it in this case on 27th February 1991. Ground 1, therefore, fails.

OTHER ISSUES:

(I) Locus standi:

D It is the contention of the appellants that the plaintiff/respondent lacked standing to sue in that his election by the Adekalu ruling house as a candidate for the Onitede Chieftaincy was in breach of thee existing chieftaincy declaration in respect of the office and was therefore an exercise in futility.

E I find no substance in the arguments of the appellants on this issue. To determine whether the plaintiff has locus standi it is to the statement of claim one looks - see: Order 23 rule 4 High Court (Civil Procedure) Rules of Oyo State. Indeed, that was the only pleadings before the trial court when the appellants brought their application that has led to this appeal. In that state- F ment of claim, the plaintiff pleaded thus:

"1. The plaintiff is a Prince of Tede in Ifedapo Local Government, and comes from the Adekalu Ruling House of Onitede of Tede chieftaincy.

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5. The plaintiff has interest in the Onitede of Tede Chieftaincy, as he G has been chosen by the ruling house that is entitled to present him, as the Onitede-elect.

6. The plaintiff's name has been submitted by his family to the Kingmakers."

I think these averments show that plaintiff has sufficient interest in H the Onitede chieftaincy to clothe him with standing to institute his action. Unlike the situation in Momoh v. Olotu (1970) 1 ALL NLR 117 at 123; (1970) ANLR 121 at 127 where Sir Ademola, CJN observed:

"Now, what is the averment in paragraph 1? The plaintiff says that he is a member of the Olukare family. The question may be asked, is it

enough for the plaintiff to state that he is a member of the family? Has he not got to state that he has an interest in the chieftaincy? Surely not every member of a chieftaincy family as such has interest in the chieftaincy title. We are of the view that it is not enough for the plaintiff to state that he is a member of the family; he has to state further that he has an interest in the chieftaincy title, and furthermore, state in his statement of claim how his interest in the chieftaincy title arose. It is difficult to say on the pleadings filed that the plaintiff has any locus in the matter."

Plaintiff has averred that he had been chosen by his ruling house to succeed to the chieftaincy and his name had been submitted to the Kingmakers for consideration. He averred also that it was the turn of his ruling house to present a candidate. It must be remembered that the issue of locus standi is not dependent on the success or merits of a case but on whether the plaintiff has sufficient interest in the subject-matter of the dispute. I am of the view that the two courts below are right in holding that plaintiff's interest in the Onitede chieftaincy as averred in his pleadings are sufficient to give him a standing to institute his action. Going by the pleadings and claims, plaintiff's action is a challenge to the correctness of the chieftaincy declaration approved for the Onitede chieftaincy.

It is my view that members of a ruling house have a right to challenge such a declaration that, they honestly believe, is not in accordance with the customary law of their community. I, therefore, find no merit in the appellants' challenge of plaintiff's standing in instituting his action

(ii) CAUSE OF ACTION:

Going by plaintiff's amended statement of claim, he contends that the chieftaincy declaration approved in 1958 for the Onitede chieftaincy does not correctly reflect the custom of the Tede community as to the number of ruling houses entitled to the Onitede chieftaincy. What is a cause of action is defined by this Court, per Fatayi-Williams JSC (as he then was) in Savage v. Uwaechia (1972) 3 SC 214 at 221; (1972) ANLR 255 at 261, in these words:

"A cause of action is defined in Stroud's Judicial Dictionary as the entire set of circumstances giving rise to an enforceable claim. To our mind, it is, in effect, the fact or combination of facts which give rise to a right to sue and it consists of two elements - the wrongful act of the defendant which gives the plaintiff his cause of complaint and the consequent damage. As Lord Esher said in Cooke v. Gill (1873) L.R. 8 C.P 107 and later in Read v. Brown (1888) 22 Q.B.D 128 (C.A.), it is every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. (See also Kusada v. Sokoto Native Authority. S.C. 131/68 delivered on 13th December, 1968, where the definition in Read v.

Brown (supra) was referred to with approval."

See also Jackson v. Spittall (1870) LR 5 CP 542 at 552 where Breet J observed thus:

"It is that which in popular meaning - for many purposes, in legal meaning - is 'the cause of cause of action', viz, the act on the part of the part B of the defendant which gives on the part of the defendant which gives the plaintiff his cause of complaint."

Whether or not the plaintiff is able to prove his case, is another matter. And it is to the writ and pleadings that one has look to see upon what the action is based - Kusada v. Sokoto Native Authority (1968) 1 ALL NLR 377 C at 382, (1968) ANLR 366 at 370 where Lewis JSC delivering the judgment of this court observed:

"..... whether there was a good cause of action must be determined when the writ and pleadings had been filed so that it would have become possible to see on what the action was based, for instance D whether it was based on an enforceable contract or in tort."

There are sufficient averments in the amended statement of claim to constitute a cause of action. I refer in this respect to paragraphs 8 -15 (where the custom relating to the number of ruling houses entitled to the Onitede chieftaincy was pleaded). Paragraphs 16-20 where the existence of a 1958 chieftaincy declaration is pleaded and that it is not in accord with the custom of E Tede). Paragraph 22 (where it is pleaded that it is the turn of the plaintiff's ruling house to present a candidate that occurred in the chieftaincy following the demise on 2nd July 1986 of Oba Salami Aderounmu Olukotun Alebiosu 11), paragraphs 23 and 24 (where plaintiff's selection by his ruling house and F his appointment by the Kingmakers are pleaded) and paragraphs 25-28 (where it is pleaded that the defendants/respondents have refused or neglected to approve his appointment and that the 3rd defendant has called on appellants' family to present a candidate. **I, therefore, agree with the two Courts below that the plaintiffs pleadings disclose a good cause of action. The arguments G of the appellants on their Brief only go to the merits of the case which consideration is premature at this stage. They base their arguments on issues extrinsic to the plaintiff's amended statement of claim, and such arguments are rightly ignored by the court below.**

Having held that the plaintiff has *locus standi* and that his amended H statement of claim discloses a good cause of action I must, of necessity, hold that his action is not an abuse of the process of the court, as erroneously contended by the appellants.

In conclusion, this appeal fails and it is hereby dismissed by me with N1,00.00 cost awarded in favour of the plaintiff/respondent only.

BELGORE JSC

By the writ and finally by their statement of claim, the plaintiffs clearly manifest they have a cause of action to pursue. The averments in the statement of claim reflect that they have proper locus standi to prosecute the action. The pleadings are replete with the facts in dispute and the persons affected by the issues that it will amount to mischief to claim the action is B frivolous, vexatious and an abuse of process of the Court. I find nothing wrong with the decision of the trial court upheld by the Court of Appeal. I also, by adopting the fuller reasons in the judgment of Ogundare, J.S.C., dismiss this appeal for want of merit and I, make the same consequential orders as C to costs.

MOHAMMED JSC

I agree that this appeal has failed and ought to be dismissed. My learned brother. Ogundare, J.S.C., in his judgment, had considered all the issues raised and, in a thorough finding, found against the appellants. I agree D that the appeal at the Court of Appeal was saved by the pronouncement made by Ogwuegbu, J.C.A. (as he then was) that Agoro, J.C.A. before his retirement had given his opinion concurring that the appeal be dismissed. The judgment recorded, where Agoro, J.C.A., was said to have written, "I agree" after his E retirement, is not a valid judgment because the learned justice was of no further force or authority to write any judgment after his retirement.

In a situation like the case in hand the correct practice is for the presiding justice to pronounce the opinion of the justice who left the service, due to death, retirement or removal, before the delivery of the judgment. - see Ibrahim Kano v. Gbadamosi Oyelakin (1993) NWLR 399 AND Lawani Adesokan and Ors. v. Sunday Adetunji and ors. (1994) 6 SCNJ 123. F

Consequently, this appeal fails and it is dismissed. I also award N1,000.00 costs in favour of the plaintiff/respondent

ONU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother Ogundare, J.S.C. and I am in entire agreement with him that the appeal lacks merit and ought to be dismissed. G

The facts of the case giving rise to the appeal herein have been so amply taken care of in the lead judgment that I need not repeat them here. H

I wish, however, to make the following few comments of mine in expatiation on issue I separately and issues 2, 3 and 4 together as follows:-

ISSUE 1

It is now settled through decided cases that where a judgment is

delivered outside the three months prescribed by section 258(1) of the Constitution of the Federal Republic of Nigeria, 1979 (thereinafter referred to shortly as "the Constitution") after final addresses, it is a nullity. See Ifezue v. Mbadugha (1984) 1 SCNLR. 427; (1984) 5 S.C. 79; Effiom v. The State (1995) 1 NWLR (Part 373) 507 and Boyi v. A-G. of Bendel State (1984) 9 SC. 66. The principle enunciated in the above cases, I presume, will only apply when the authority of the judge to so deliver his judgment is neither ousted nor has lapsed as firmly decided by this court in Ogbunyiya v. Okudo & ors. (1979) 6-9 S.C. 32; (1979) 3 L.R.N. 318 and followed by the Court of Appeal in its recent decision of Obayogie v. Oyowe (1994) 5 NWLR (Part.346) 637.

In the case in hand, the judgment of Agoro, J.C.A. at page 191 of the Record of appeal purported to have been delivered on 27th February, 1991, after he had retired in December, 1990, would clearly, in my opinion, amount to a nullity but for the saving grace emanating from the pronouncement of Ogwuegbu, J.C.A.(as he then was) at page 173 of the Record of appeal wherein the learned Justice made the following pronouncement:

"Ogwuegbu and Agoro, JJ.C.A. concurred. Agoro J.C.A. Gave his concurrence at the conference on the appeal before he retired in December, 1990."

The above extract renders pertinent the provisions of section 258(2) of the Constitution which relevantly provides that

"Each Justice of the Supreme Court or of the Federal Court of Appeal shall express and in writing that he adopts the opinion of any other Justice who delivers a written opinion:

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of Justice may be pronounced or read by another Justice whether or not he was present at the hearing."

Thus, it is glaring that the constitution of the Court of Appeal on the day the judgment was delivered cannot, under any guise be used to impeach that judgment. See in this regard the provisions of Section 11 of the court of Appeal Act, cap. 75 Laws of the Federation, 1990 to the effect that

"When after an appeal in any cause or matter has been fully heard before the Court of Appeal judgment is reserved for delivery on another day, then, on the day appointed for delivery of judgment, it shall not be necessary for all those Justices before whom the appeal in the cause or matter was heard to be present together in court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other Justice; and in any such case the judgment of the court shall have the same force and effect as if the Justice whose opinion is so read had been present in court and

had declared his opinion in person."

The above provisions were given extensive consideration and interpretation in the case of Anachuna Anyaoko & ors. v. Dr. F. Adi & ors. (1985) 1 NWLR (Part 2) 342 wherein Irikefe, J.S.C. as he then was said inter alia at page 350:

"For the purposes of this appeal only Section 258(2) with the proviso thereto arises for interpretation. From the foregoing, it would appear that once the panel that heard the case on appeal was properly constituted, that is competent, a judgment read within the following permutations would nevertheless be valid and unimpeachable:-

(a) One Justice sitting alone to read his own signed judgment to which the others who sat with him had earlier signified their concurrence in writing (The case here).

(b) All the Justices who sat in the case sitting together to read their own individual opinions one after the other.

(c) Justices, other than those who sat to hear the case sitting to read the judgments already signed and authenticated, produced by those who actually sat over the case.

In the case under (c) it would be in order for a like number of justices to sit at the reading of the judgments as those who had sat over the case, or for one, or two, as the case may be, to sit and read the judgments of the others.

It seems to me that, the essential element with regard to the validity of a judgment delivered on appeal, is the existence of an acknowledgment in writing or by pronouncement, by every individual justice, as to what his or her opinion is on the said judgment, so that quantification of the opinions may be made, should the need arise, under section 258(3). This would ensure easy ascertainment of the opinions if unanimous, and if split, what constitutes the majority opinions."

The complaint of the appellants under this issue by the provisions of the Court of Appeal Act (ibid) and the first permutation propounded by Irikefe, J.S.C. (as he then was) represents where two Justices sat on 27th February, 1991 when the judgment was delivered while one only (Agoro, J.C.A.) delivered the written judgment duly pronounced thereat in his place. See also the pronouncement of Fatayi-Williams, C.J.N. in A.G. of Imo State v. A.G. Rivers State (1983) 8 S.C. 1` at pages 10-12; (1983) 2 SCNLR. 108 wherein the learned H Chief Justice pronounced posthumously the judgment of Idigbe, J.S.C. of blessed memory and in Lawani Adesokan & ors. v. Sunday Adetunji & ors. (1994) 5 NWLR (Part 346) 540; (1994) 6 S.C.N.J. 123 where the opinion of Olatawura, J.S.C. who had sat on the panel of full court that heard the appeal

and had retired before its delivery, had the same pronounced by Uwais, J.S.C. (as he then was) in compliance with section 258(2) of the constitution. It is interesting to note that learned counsel for both parties in the later case are also appearing in the instant appeal while the present appellants happened to be the appellants therein.

B I am therefore in complete agreement with the submission of learned counsel for the respondents that in the absence of any application at the appellants' instance that this issue be reconsidered by this court, the appellants are bound by that decision. The issue is accordingly answered in the affirmative and the complaint lacking in merit, stands dismissed.

C ISSUES 2, 3 AND 4:

In my brief consideration of issues 2, 3 and 4 taken together it is pertinent to stress firstly, that this is an appeal on an interlocutory decision (Ruling) of the High Court of Oyo State holden at Oyo (coram: Aderoju Aderemi, J.) dismissing the appellants' application that the 1st respondent's suit be D dismissed. What it is remembered that at the time the application brought by the appellants who joined in the suit on their own volition and that only the statement of claim of the 1st respondent was filed before the trial court and further, that neither the original defendants nor the appellants herein had filed their respective statements of defence, the material worthy of consideration E was 1st plaintiff's/respondent's statement of claim. See Aladegbemi v. Fasanmade (1988) 3 NWLR (Part 81) 129.

Now, in the suit brought by the 1st respondent herein for certain declarations, the crucial matter raised for the consideration of this Court by the appellants in this appeal is the locus standi of the 1st respondent in which F recourse must be necessity be had to the statement of claim, particularly to the averments therein. The 1st respondent has in paragraphs 1, 5, 6, 7, 8, 21, 22, 23, 26, 27, 28 and 29 of his Amended Statement of Claim averred in more than passing comments or bland averments in demonstration of his overriding interest in the Onitede of Tede Chieftaincy that in fact, his civil rights therein G were in imminent danger of being assailed, invoked what he asserts in his pleading is his standing to institute the action herein in unequivocal terms inter alia that -

"1. The plaintiff is a prince of Tede in Ifedapo Local Government and comes from the Adekalu ruling house of Onitede of Tede chieftaincy.

H *5. The plaintiff has interest in the Onitede of Tede chieftaincy, as he has been chosen by the ruling house that is entitled to present him, as the Onitede-elect.*

6. The plaintiff's name has been submitted by his family to the kingmakers.

7. *The plaintiff avers, that by the law, custom and tradition of the people of Tede there are only three ruling houses for the Onitede of Tede chieftaincy, and these are Daodu Agba, Adekalu and Egbeomo.*

8. *These three are the only ruling houses from the time that Tede was founded.*

21. *The last Oba of Tede, Salami Aderounmu Olukokun Alebiosu II B joined his ancestors on 2 July, 1986.*

22. *The last two Onitede having come from Egbeomo and Daodu Agba ruling houses respectively, the next and rightful ruling house to present a candidate for the vacant stool of Onitede is the plaintiff's ruling house Adekalu.*

23. *On the 25th of October, 1987 the Plaintiff was unanimously elected Onitede-elect and on the 27th of October his name was forwarded to the Onitede chieftaincy committee for approval. The plaintiff pleaded the letter containing the information.*

26. *On the 12th May, 1987 the 3rd defendant issued a publication D calling for a family that is not a chieftaincy family, Gbangbade Erun family instead of the plaintiff's family Adekalu to present a candidate.*

27. *The plaintiff avers that the action of the 3rd defendant is calculated to introduce into the Onitede chieftaincy elements which do not belong to the said royal chieftaincy family and particularly to deny the plaintiff's E ruling house, Adekalu its rightful heritage and himself becoming the Onitede.*

28. *The plaintiff also avers that by this action the 3rd defendant wants to violate the law, custom and tradition of Tede and also violate his right and the rights of his ruling house.*

29. *Unless restrained the three defendants will take steps to fill the F stool of Onitede with a member of Gbangbade Erun family contrary to the law, custom and tradition of Tede people, and to the detriment of the plaintiff who has been appointed Onitede-elect in accordance with the law, custom and tradition of Tede people."*

It is also the 1st respondent's case that both himself and the entire G members of the three ruling houses were not aware of the chieftaincy declaration purportedly made incorporating a fourth ruling house Gbangbade Erun) in respect of the Onitede of Tede chieftaincy. It is further averred in the Amended statement of claim that the purportedly made declaration was not a reflection of the true native law and custom of Tede and more specifically, that H by paragraph 20 thereof, twelve reasons given therein when proved by evidence, will nullify the purported declaration. Hence, his nomination by his (Adekalu) family entitled to do so under the native law and custom of Tede, warranted his selection which, as transpired, was forwarded to the Kingmakers,

who in line with their duties under the native law and custom of Tede, approved same and sent it to the 3rd defendant (4th respondent herein). It was because the 4th defendant/respondent refused or neglected to act on the same action that led to the institution of the action giving rise to the appeal herein.

B The averments, among others are but the assertions to which the appellants are yet to respond and which they did not allow the 1st respondent to prove by way of evidence before the trial High Court when they brought their application which was dismissed. There is, in my respectful view, no material before the High Court to show that the purportedly made
C declaration had been used to the advantage of the appellants or that when they were called upon by the 4th defendant/respondent to present a candidate for the Onitede of Tede vacant stool, a candidate had been so presented or selected. This singular act of default, with profound respect, is an admission on the part of the appellants of the averment in paragraph 20 of the 1st
D respondents' Amended Statement of Claim. This is apart from the well established principle of law that the appellants accept as correct all the averments contained in the Amended Statement of Claim in the consideration of the type of application brought by them. Also, the purported declaration not having been tendered for the trial court to take notice of it, the submission by the
E appellants in their brief that the trial court ought to have taken judicial notice of it and give effect thereto, is preposterous in view of the weight averments on the illegality of it which was yet to be controverted by them (appellants) in their filing of a Statement of Defence. What is more, the declaration is not an instrument published in a government gazette. Rather, it is, when duly regis-
F tered, that it will serve as an embodiment of legally written statement of the customary law of a particular area (in this case Tede) setting out clearly the method regulating the nomination and selection of a candidate to fill a vacancy in the chieftaincy of the area and this, to avoid uncertainty in the customary law of the area. See Ayoade v. Military Governor of Ogun State
G (1993) 8 NWLR (Part 309) 171 and Jokanola v. The Military Governor of Oyo State & Or. (1996) 5 NWLR (Part 446) 1 at 14. I am therefore satisfied that the 1st respondent rightly instituted this action as the Onitede-elect having been selected by his family in accordance with the native law and custom associated with the Onitede of Tede chieftaincy from time immemorial. The
H respondent's interest in the Onitede of Tede chieftaincy is as clearly set out in paragraphs of the Amended Statement of Claim and hereinbefore set out; these averments glaringly support the findings of the trial court contained in its ruling dated 11th July, 1988 and confirmed by the decision of the court below dated 27th February, 1991.

Another complaint of the appellants under these issues is that it is settled law that a plaintiff who has no locus standi to institute an action has no reasonable cause of action and that this point was not considered by the court below. I take the firm view that this cannot be said to be a genuine complaint on a close look at the conclusions arrived at by that court. After upholding the findings of the trial court on the issue of locus standi, the court below went on to hold after considering paragraphs 25 and 26 of the Amended Statement of claim (ibid) as follows:

"I think it was on the basis of the averment contained in paragraph 26 above that the 4th-7th defendants/appellants were impelled to come to court and apply to be joined in the suit as defendants. In this respect, one is bound to ask "if the writ of summons and statement of claim did not disclose any cause of action, why then did the appellants bother to apply to be joined?" What is a cause of action has been defined by this court in several cases as to warrant being set out here. Suffice it to say that the sum total of the wrong complained of which impelled a plaintiff to go to court to seek redress is the cause of action. See Lasisi Fadare & ors. v. Attorney-General of Oyo State (1982) 4 S.C. 1 at 67 where Aniagolu, J.S.C. applying the Judicial definition of the term "cause of action" in Read v. Brown (1889) 22 Q.B. 128 at 131 (per Lord Esher, M.R.), said of a cause of action as -

"denoting every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court."

See also other cases in which this Court had occasion to set out the definition of the term (cause of action), to wit: Egbe v. Adefarasin (1985) 1 NWLR (Part 3) 549; Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 689; M. E. kushika Roberts v. Attorney-General & 3 Ors. (1966) L.L.R1; Okechukwu Adimora v. Nanyelugo Ajufo & ors (1988) 3 NWLR (Part 80) 1at 17 and Bello v. A.G. of Oyo State (1986) 5 N..W.L.R. (Part 45) 828 where this Court held inter alia-

"In the present action the respondent had clearly stated in his statement of claim his cause of action against the first three defendants, whom he sued, and they have not appealed in this case. But as it was the Appellants who themselves applied to be joined as 4th - 7th defendants that now complained that there was no cause of action against the 1st, 2nd and 3rd defendants who were originally sued, there was certainly a cause of action....."

And in Adefulu v. Oyesile (1989) 5 NWLR (Part 122) 377 at 410 where this court held (per Obaseki, J.S.C.) that -

"In ascertaining whether the plaintiffs in an action have locus standi, the pleadings i.e. the statement of claim must disclose a cause of action

vested in the plaintiff. Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 669 at 685-688 para. B. The averments in the pleadings will disclose the rights and obligations or interests in the plaintiffs which have been violated. Momoh v. Olotu (1970) 1 All N.L.R. and Oloriode v. Oyebi (1984) 1 SCNLR. 390."

Having said this much I need only to stress that this appeal stands B dismissed in as much as it is bereft of any merit and the court below in my opinion duly discharged its statutory functions of considering all the issues and points raised in the appeal of the appellants before arriving at its decision to uphold the decision of the trial court. In this regard, it is equally trite law that where the concurrent findings on facts presented to the trial court and the C court below, as here, have not been shown to be perverse or to have occasioned a miscarriage of justice, this court will not interfere with the same. See S. O. Adeyeye v. Alhaji S. Ajiboye (1987) 3 NWLR (Part 61) 432; (1987) 7 S.C.N.J. 1 and I. U. Nwagwu & anor. v. V. O. Okonkwo (1987) 3 NWLR (Part. 60) 314; (1987) 7 SCN.J. 72.

D On whether the two lower courts were right in their concurrent decisions that the 1st respondent's action was not frivolous, vexatious or an abuse of the process of court, it is pertinent to point out that as the complaints hereof are predicated on the order of dismissal made by the trial court in respect of Suit No. HOY/23/87 and the contention that the 1st respondent was E bound by that order and as such cannot relitigate all the claims enumerated therein, those complaints in view of the decision of the full panel of this court in Lawani Adesokan & ors. v. Sunday Adetunji (1994) 5 NWLR (Part 346) 540; (1994) 6 S.C.N.J. 123, have become otiose. For the above reasons and the more elaborate ones set out in the leading judgment of my learned brother Ogundare, F J.S.C., I too, dismiss this appeal and make the same consequential orders inclusive of those as to costs.

IGUHJSC

G I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogundare, J.S.C. I agree entirely with his reasoning and conclusion therein and adopt the same as mine. I desire, however, to say a few words of my own in view of the constitutional nature of the first issue as formulated by the parties in their briefs of argument.

H This first issue questions whether the written opinion of a Justice of the court of Appeal can be delivered after he has retired from the Court of Appeal bench.

The appeal against the decision of the learned trial Judge in this case was heard on the 28th of November, 1990 by Ogwuegbu, J.C.A., as he then

was, presiding; Akpabio and Agoro, JJ.C.A. Judgment was thereafter reserved. On the 27th February, 1991 when the judgment of the court was delivered, Agoro, J.C.A. had retired from the Court of Appeal. Only Ogwuegbu, J.C.A., as he then was, and Akpabio, J.C.A., sat in the delivery of the said judgment. The relevant portion of the court's record of proceedings on the date judgment was delivered reads as follows -

"The lead judgment is written and read by Akpabio, J.C.A. dismissing the appeal with N200.00 costs against the appellants and in favour of the plaintiff/respondent.

Ogwuegbu and Agoro JJ. C.A. concurred. Agoro, J.C.A. gave his consent at the conference on the appeal before he retired in December, 1990.

SGD. E. O. OGWUEGBU

E. O. OGWUEGBU

JUSTICE, COURT OF APPEAL,

27-2-91"

It is beyond dispute from the record of proceedings that Agoro, J.C.A. attended the conference on the appeal. It is also clear that he gave his consent to the dismissal of the appeal at the said conference before he retired in December, 1990. He had however retired from the Court of Appeal as at the 27th February, 1991 when judgment in the appeal was delivered by that court.

It cannot be doubted that if a Justice of the Court Appeal, although he took full part in the hearing of an appeal, physically joins in the delivery of the judgment in the appeal in his capacity as a Justice of the Court of appeal after the date he ceased to be a member of that Court, either by retirement, dismissal or elevation to a higher bench, he would be acting without jurisdiction. Such judgment would therefore be totally ineffective, null and void. See Ogbunyiya and others v. Okudo and others (1978) 3 L.R.N 318 at 327 - 328. There is however, the provision of Section 258(2) of the Constitution of the Federal Republic of Nigeria, 1979 which provides thus -

"258(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing, that he adopts the opinion of any other Justice who delivers a written opinion: Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing."

It is clear that pursuant to section 258(2) of the 1979 Constitution, once a panel of the Court of Appeal Justices who heard an appeal is competent and properly constituted, it is not necessary for all the Justices who heard the cause or matter to be present at the delivery of judgment. But the opinions

of any Justices who were in the panel that heard the appeal, but are unable to take part in the delivery of the judgment, may be read or pronounced at the time of the delivery of the judgment by any other Justice, whether or not he was present at the hearing.

This provision of Section 258(2) of the 1979 Constitution has received judicial interpretation in the decision of this court in Anyaoke and others v. Dr. Felix Adi and others (1985) 1 N.W.L.R. (Part 2) 342 at 350 where Irikefe, J.S.C. as he then was, pronounced thus -

"For the purposes of this appeal, only Section 258(2) with the proviso thereto arises for interpretation. From the foregoing, it would appear that once the panel that heard the case on appeal was properly constituted, that is, competent, a judgment read within the following permutations would nevertheless be valid and unimpeachable:-

(a) One Justice sitting alone to read his own signed judgment to which the others who sat with him had earlier signified their concurrence in Writing.

(b) All the Justices who sat in the case sitting together to read their own individual opinions one after the other.

(c) Justices, other than those who sat to hear the case sitting to read the judgments already signed and authenticated, produced by those who actually sat over the case".

In the present case Agoro, J.C.A. who took full part in the hearing of the appeal retired from service in December, 1990 before judgment in the cause was delivered on the 27th February, 1991. Both Ogwuegbu, J.C.A. as he then was, and Akpabio, J.C.A., who sat in the delivery of the said judgment, however, read their respective written judgments. The concurring judgment of Agoro, J.C.A., who gave his consent to the leading judgment of Akpabio, J.C.A. at the conference on the appeal before his retirement in December, 1990 was duly pronounced by Ogwuegbu, J.C.A., as he then was. This, in my view, fully satisfied the provisions of section 258(2) of the Constitution of the Federal Republic of Nigeria 1979.

I am therefore satisfied that the judgment of the court of Appeal in this case is entirely valid, unimpeachable and in accordance with section 258(2) of the Federal Republic of Nigeria, 1979 and I so hold.

It is for the above and the more elaborate reasons contained in the leading judgment of my learned brother, Ogundare, J.S.C. that I, too, dismiss this appeal and endorse the order as to costs therein made.