

SUPREME COURT OF NIGERIA
9TH MAY, 1997. SC. 27/1990
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC

ABRAHAM OYENIRAN & ORS. APPELLANTS
AND
JAMES EGBETOLA & ANOR. RESPON-
DENTS

LAND LAW - *Jurisdiction - Land subject to customary right of occupancy grant - Under the Land Use Act - High court has no original jurisdiction vide s. 41 of the Act.*

LAND USE ACT - *Jurisdiction - Ejusdem generis rule - Customary right of occupancy - Only area court, customary Court or courts of equivalent jurisdiction - Can determine land matters related to customary right of occupancy.*

STATUTES - *Interpretation rule - The law must be read as a whole - In order to understand its ordinary meaning.*

STATUTES - *Construction - Ejusdem generis rule of construction - When applied in relation to court of equivalent jurisdiction - Legal implications.*

WORDS & PHRASES - *"Exclusive" - By its proper definition - Cannot fit into s. 41 of the Land Use Act.*

FACTS

Before the Oshogbo High Court, the plaintiffs/respondents filed an action against the defendants/appellants claiming inter alia, entitlement to the customary right of occupancy in respect of the land in dispute. The trial court found in favour of the respondents. The appellants appealed to the Court of Appeal where it raised the issue of jurisdiction for the 1st time since the land in dispute is subject to customary right of occupancy.

The Court of Appeal felt that the High Court had jurisdiction and dismissed the appeal after considering all the issues raised. Being dissatisfied, the appellants have further appealed to the Supreme Court raising 6 issues out of which only the issue of jurisdiction was determined.

ISSUE FOR DETERMINATION

5. Whether Court of Appeal was right to have upheld the trial Judge's finding that the State High Court has jurisdiction over land the subject matter of a Customary Right of Occupancy.

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

Interpretation rule

1. The word "exclusive" which the lower court pointed out to have been omitted in Section 41 of the Land Use Act, 1978, could not fit into the definition of the provisions of the section. The rule of interpretation is that the Act must be read as a whole in order to understand its ordinary meaning. (p.944F)

Words & Phrases - "Exclusive"

2. The word "exclusive" has been defined in Webster's New Twentieth Century Dictionary thus: "excluding all others, shutting out other considerations, not shared or divided; sole; single; as an exclusive right". Since the jurisdiction to determine proceedings in respect of customary right of Occupancy is shared between area courts, customary courts or other courts of equivalent jurisdiction, the word "exclusive" cannot fit into the provisions of section 41 of the Land Use Act, 1978. (p. 945 B)

Ejusdem generis rule of construction

3. If we apply the "ejusdem generis" canon of statutory construction where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. See Campbell v. Board of Dental Examiners 53, California Appellate Reports 3d 283. Following this canon of construction of statutes, it is my view, that only courts of equivalent jurisdiction with the area court or customary court shall have original jurisdiction in respect of any land the subject of a Customary Right of Occupancy granted by a Local Government.³ This of course is subject to the existence of such courts in the state concerned. In this appeal the issue of a court of equivalent jurisdiction does not, in fact, arise because there is a customary court in Iwo East Local Govern-

³ The statement of Ogwuegbu JSC at p. 951A explained what the situation had been in the Eastern States where most of the States are not even thinking of establishing customary courts. It is also recognized by Mohammed JSC here that the issue of customary court having original jurisdiction is subject to its existence in the State concerned. The major question now is, what should be the situation in Anambra State for example where the customary court judges are not from the legal profession and would not allow legal practitioners to appear before them? Should such a State that has no competent customary court be deemed as not having customary court at all? Also see Kutigi JSC p. 948 E.

ment Osun State, where this appeal emanated. (p. 945 D)

Jurisdiction - Land subject to customary right of occupancy

4. Therefore under the provisions of section 41 of the Land Use Act the High Court of Osun State has no original jurisdiction in proceedings in respect of Customary Right of Occupancy granted by a Local Government in that state. The matter may reach the High Court on appeal. Finally, I am bound to follow Sadikwu v. Dalori (supra) and in addition to my opinion above, I agree that the High Court of Oshogbo now in Osun State has no original jurisdiction in proceedings in respect of any land the subject of customary right of occupancy granted by a Local Government. This appeal therefore succeeds on the issue of jurisdiction only. (p. 946 E)

NOTABLE POINTS OF INTEREST**MOHAMMED JSC***1. Legislature deliberately removed concurrent jurisdiction in land matters*

This classification of land tenure which the Land Use Act 1978 brought into the land law of this country and identification of courts to adjudicate in disputes the subject of the respective land tenures is deliberate. It is my view that the legislature, by classification of land tenures and assigning jurisdiction to particular set of courts for determination of disputes arising from such land holdings, does not want the courts to exercise concurrent jurisdiction over such matters. (p. 945 F)

2. Prior to Land Use Act - High Court had unlimited jurisdiction in land matters

Prior to the enactment of the Land Use Act, in 1978, both High Courts and the Customary Courts in Oyo State had unlimited jurisdiction in land matters. The customary courts were however made to apply the customary law of the place where the land was situated. There was then no classification of land holdings as has now been done in the Land Use Act 1978. The present classification has assigned jurisdiction to a hierarchy of courts based on the location of the land the subject matter in dispute. (p. 946 B)

KUTIGI JSC*3. Where there is no customary court High Court will have jurisdiction*

But where there is no Area court or a Customary Court, a High Court being "other court of equivalent jurisdiction" under section 39(1) of the Act shall have original jurisdiction to deal with proceedings relating to such land. Section 39(1) of the Act apart, Section 236(1) of the 1979 Constitution gives unlimited jurisdiction to a State High court subject only to the provisions

of the Constitution itself. To that extent, I believe the Court of Appeal was wrong when it held that both the High Court and the Area or Customary Courts have concurrent jurisdiction in respect of lands covered by section 41 (supra). (p. 948 E)

OGWUEGBU JSC

4. Jurisdiction - Position in the Southern States

The High Courts and Customary Courts in the Southern States had concurrent original jurisdiction in proceedings in respect of land the subject of customary right of occupancy. In fact the bulk of such cases are initiated in the High Court and this preference can be found in the history of Customary Courts particularly in the Eastern States of Nigeria and some of those States do not even think of establishing one. I must however state that Sadikwu vs Dalori (supra) is binding on me. It is hoped that the Legislature will amend section 41 of the Land Use Act by restoring the concurrent jurisdiction that existed before the 1978 Act. This will remove the obvious jurisdictional difficulty which may arise. (p. 951 A)

PRESENTATION

A. O. Bada for the Appellants

Chief O. Afolabi for the Respondents

CASES REFERRED TO

Salati v. Shehu (1986) All NLR 53, at page 76

Sadikwu v. Dalor (1996) 4 (pt 40) 796

Board of Custom and Excise v. Barau (1982) 10 S.C. 48 at 130

Pix Grantle Co. Ltd. v. Ministry of Housing and Local Government (1959) 3 All E.R. at page 60

Metropolitan Gas Company v. The Federated Gas Employees Industrial Union (1924) 35 CLR 449

Corkery v. Carpenter (1951) 1 K.B. 102

Layanju v. Araoy (1961) All N.L.R. 90

Osumanu v. Saodu 12 W.A.C.A. 437

Oloriegbe v. Omotesho (1993) 1 KLR 38

STATUTES REFERRED TO

Land Use Act 1978 ss. 39(1), 41, 6, 30, 40

Constitution of Nigeria 1979 s. 236(1)

Customary Court Law Cap. 33 Laws of Oyo State 1978

LEAD JUDGMENT BY MOHAMMED JSC

This is an appeal from the judgment of the Court of Appeal, Ibadan

Division. In it's decision, the lower court affirmed the judgment of Ajileye J. of Oyo state High Court which the learned trial judge delivered at Oshogbo. The claim of the plaintiffs, who are respondents in this appeal, as per their Writ of summons, is as follows:

"(i) Declaration that the Plaintiffs, by customary occupation are entitled to the Customary Right of Occupancy to the Plaintiffs' Songbe/Idi-Iroko Farmland situate lying and being at songbe/Idi Iroko, Kuta in Iwo East Local Government Area of Oshun Division of Oyo state of Nigeria;
(Relevant Plan of the said disputed land to be filed with the Statement of Claim will show specific delimitations.)

(ii) N1000 being General Damages against the Defendants for trespass committed upon the said Farmland by the said Defendants and/or their Agents between February, and May, 1982.

(iii) INJUNCTION restraining the Defendants, their agents, Servants and/or Privies from further acts of trespass upon the said Farmland".

From the reliefs claimed in the Writ of Summons, the parties are in dispute over title to a piece to a piece of farmland at Songbe/Idi Iroko, Kuta, in Iwo East Local Government Area, now in Osun State. At the conclusion of the trial the learned trial judge, in a considered judgment, found in favour of the plaintiffs/respondents and granted all the reliefs sought for in the writ. In claim (ii) however the trial court awarded only N750.00 damages. Dissatisfied with the decision of the trial High court the appellants appealed to the Court of Appeal.

At the Court of Appeal the appellants brought in for the first time the issue of jurisdiction. Ground 5 reads:

"The learned trial judge erred in law when he assumed jurisdiction over the land in dispute and which land is subject to customary Right of Occupancy".

Two issues were raised in respect of Ground 5. They are:

"(i) Whether the High court had jurisdiction to adjudicate on the matter before it having regard to the provisions of the Land Use Act 1978, particularly sections 39 and 41 thereof.

(ii) Whether there is anything on the record to show that the land in dispute is in a rural area".

The Court of Appeal considered all the issues including the issue questioning the jurisdiction of the High Court to adjudicate in the matter and in a considered judgment it dismissed the appeal. The appellants have further appealed to this court on five grounds of appeal. The following 6 issues have been formulated by the appellant for the determination of the appeal:

"1. Whether the Learned Trial Judge was right in finding for the plaintiffs/respondents, when the plaintiffs/respondents had not proved a case

of trespass against the Defendants/appellants to the satisfaction of the Court.

2. *Whether the plaintiffs/respondents who claimed title to the land in dispute on the ground of settlement by their ancestor have established such title.*

3. *Whether the Court of Appeal was right in upholding the finding by the Learned trial Judge that exhibits C and C1 estop the defendants/appellants in spite of the evidence adduced by 3rd DW (Page 29) and 4th D.W. under cross examination page 32 lines 24 - 25 of the Record of Appeal) and admission by the plaintiffs/respondents on page 77 - "Portions of the original tract of land were later conceded to*

(i) Oyakowide and Oyeleke - Exhibit "B"

(ii) Bakare and Adedokun - Exhibits "C and C1 by settlement".

4. *Whether the Court of Appeal was right in holding that the plaintiffs/respondents are entitled to title to the land in dispute when on pages 102 - 103 of the Record of Proceedings it was held that the traditional evidence given by the 3rd P.W. was inadmissible.*

5. *Whether Court of Appeal was right to have upheld the trial Judge's finding that the State High Court has jurisdiction over land the subject matter of a Customary Right of Occupancy.*

6. *Whether the Court of Appeal was right to have drawn inference that it was the plaintiffs/respondents' case that Morolahun made a grant of land to Ashomogbele on which the later settled - (vide pages 108 - 109 last paragraph of the Record of Appeal)".*

Respondents counsel, Mr. Adebayo Thanni, adopted the above issues and based his submissions on them. In Issue 5 the appellants raised a fundamental legal argument, to wit, the trial High Court has no jurisdiction in respect of proceedings which concern the grant of a customary right of occupancy by a Local Government. That being so, I will first deal with Issue 5. If I agree with the submission of the learned counsel the appeal will be determined on that issue alone.

The first point to consider before going into the issue of jurisdiction is the location of the land in dispute. It had been held by the Court of Appeal in the lead judgment delivered by Ogundare, JCA (as he then was) that the land in dispute was subject to customary right of occupancy, in the following decision.

"The simple answer is that Kuta where the land in dispute is situate is not an urban area for the purposes of the Land Use Act 1978 as it has not been so declared - see: Land Use (Declaration of Urban Areas, Fees & Forms) Regulations which declared the following cities and towns as urban areas, to wit, Ibadan, Ogbomosho, oshogbo, Ilesha, Iwo, Ede, Ila-Orangun,

Oyo, Iseyin, Ikirun, Shaki, Ile-Ife, Ikire, Ejigbo, Eruwa, Okuku, Kishi, Moniya, Idi-Ayunre, Ijebu-Ijesha, Osun, Iyana-Offa, Okeho and Ilobu. Kuta, not being on the list of Urban areas must be regarded as a rural area and the land in dispute is therefore land the subject of a customary right of occupancy as defined in section 50(1) of the Act".

B There has been no appeal against the decision above. I will now move to the issue of jurisdiction which has been raised by the appellants in issue 5. Learned Counsel for the appellants submitted that the proper venue for proceedings in respect of lands the subject of Customary Right of Occupancy is the Customary Court or Area Court. He referred to sections 39(1) and 41 C of the Land Use Act, 1978 and supported his submission with the decisions by this court in the cases of Alhaji Baba Bakin Salati v. Alhaji Talle Shehu (1986) All NLR 53, at page 76; and Alhaji Abubakar Sadikwu v. Alhaji Abba Dalori (1996) 4 SCNJ 209. For ease of reference I will reproduce hereunder the provisions of sections 39(1) and 41 of the Land Use Act, 1978:

D *"39(1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings:-*

(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by the Military Governor or deemed to be granted by him under this Decree; and for the purpose of this paragraph proceedings includes proceedings for a declaration of title to a statutory right of occupancy;

E *(b) Proceedings to determine any question as to the person entitled to compensation payable for improvements on land under this Decree.*

(2) All laws, including rules of Court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this Section relates and the laws shall have effect with such modifications as F would enable effect to be given to the provisions of this section".

The provisions of Section 41 reads:

G *"41. An area court or customary court or other court of equivalent jurisdiction in a state shall have jurisdiction in respect of proceedings in respect of customary right of occupancy granted by a Local Government under this Decree; and for the purposes of this paragraph proceedings includes G proceedings for a declaration of title to a Customary Right of Occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section."*

H It is correct, as the learned counsel has submitted, that this court had handed down decisions in which it interpreted the provisions of section 41 of the Land Use Act, 1978, as conferring original jurisdiction in proceedings in respect of Customary right of Occupancy granted by a Local Government only to the Area Courts or Customary Courts. Those decisions were given

in Salati v. Shehu (supra) and Sadiku v. Dalori (supra).

In Sadiku v. Dalori (supra) Wali J.S.C., in the lead judgment, which he wrote, affirmed a decision of the Court of Appeal, Jos Division, that the High Court had no original jurisdiction to determine a matter which concerns proceedings involving a grant of a Customary Right of Occupancy by a Local Government.

This was the view held by Karibi-Whyte, J.S.C., although Obiter, in the case of Alhaji Baba Bakin Salati v. Alhaji Talle Shehu (supra) wherein he opined at page 76 thus:

"39 (1). Specifically relates to "proceedings in respect of any land subject of a statutory right of occupancy granted by the Military Governor or deemed to be granted....." On the other hand Section 41 confers jurisdiction on Area Courts or Customary Courts or Courts of equivalent jurisdiction in respect of customary right of occupancy granted by a Local Government under this Act. There is no ambiguity in the two sections that the exclusive original jurisdiction in respect of land held under statutory right of occupancy is vested in the High Court of the State, whereas jurisdiction in respect of customary right of occupancy is vested in the Area or Customary Courts. The exercise of these jurisdiction will seem to me mutually exclusive. There is no doubt therefore that the one cannot exercise the jurisdiction of the other".

In it's judgment in the case in hand the Court of Appeal compared the provisions of sections 39 (1) and 41 of the Land Use Act 1978 and concluded that in section 39 (1) it had been provided expressly that the High Court had exclusive jurisdiction in respect of lands the subject of statutory right of occupancy. And in section 41 the word exclusive has been omitted. Ogundare, J.S.C., (as he then was) pointed out that it was not the function of the courts to supply in section 41 the missing word. He supported this view with the case of Board of Custom and Excise v. Barau (1982) 10 S.C. 48 at 130. The Lower court went further and said that it is settled rule of interpretation that a distinct and an unequivocal legislative act would be required in order to add to or take away an already conferred jurisdiction of a Superior Court of Law. It supported this view with the cases or Seward v. Cruz (1884) 10 App. Cases 59 and Jammal Steel Structures Ltd. v. African Continental Bank Ltd. (1973) 11 S.C. 77 at 95 - 96. The learned justice of the Court of appeal further referred to section 236 (1) of the Constitution which provides a wide and all-embracing jurisdiction of a State High Court and pointed out that unless there was anything in the Constitution limiting the extent of the State High Court's jurisdiction he would conclude that the High Court of a State would have jurisdiction over the land in dispute in the case in hand.

The learned counsel for the appellants on his part submitted that section 6 of the Land Use Act, 1978, empowered the Local Government

to grant customary right of occupancy in respect of land within it's area of jurisdiction. Counsel further argued that from the wordings of sections 39 (1) and 41 of the Act there are limitations to the jurisdiction of both the High Court and Area court/Customary Court. In section 41 of the Act there is a reference to "other courts of equivalent jurisdiction". Customary courts and B Area Courts are not Courts of equivalent jurisdiction with the High Court. Learned Counsel Mr. Bada pointed out that the Land Use Act made a radical change in the land tenure in the State. It creates two types of rights i.e. (a) Statutory Right of Occupancy and (b) Customary right of Occupancy. These two types of rights were not in existence before the promulgation of the Act C on 29th March, 1978. This Act also provides that proceedings in respect of each of these rights should commence either in the High Court or Area Court/ Customary Court. It therefore, follows that any litigant who is seeking for a remedy under the Act must go to the appropriate Court. I refer my Lords to the case of Pix Grantle Co. Ltd. v. Ministry of Housing and Local Government (1959) 3 All E.R. at page 60 or (1960) A.C. 260 at 302.

- D _____ I have looked into the provisions of S. 41 of the Land Use Act, 1978, and, in my respectful view, I will interpret it in the same way as my learned brothers, Karibi-Whyte, JSC., and Wali, J.S.C., had done. **The word "exclusive" which the lower court pointed out to have been omitted in Section 41 of the Land Use Act, 1978, could not fit into the definition of**
- E **the provisions of the section. The rule of interpretation is that the Act must be read as a whole in order to understand it's ordinary meaning.** See the Australian case of Metropolitan Gas Company v. The Federated Gas Employees Industrial Union (1924) 35 CLR 449. In an English case of Corkery v. Carpenter (1951) 1 K.B. 102 it was held:
- F *"It is often tempting to look only at the section that seems immediately applicable to the problem in hand. But this is as likely to lead to a misconception of the total effect of the provision as is the reading of a passage of a novel out of its context. Likewise, a word of indefinite meaning may well include certain things when used in one Act, but have its scope limited in the context of another. So the word "carriage" was held from the context in which*
- G *it appeared in the Licensing Act 1872 (UK) and the Highways Act 1835 (UK) to include a bicycle but did not have this meaning when used in a Turnpike Act."*

Coming back to the case in hand, it is important to refer to the opening words of section 41 of the Act. It reads:

- H *"An Area Court or Customary Court or other court of equivalent jurisdiction in a state shall have jurisdiction in respect of proceedings in respect of customary right of occupancy.."*

This means that a number of courts in the state with equivalent jurisdiction with area court and customary court could exercise jurisdiction in proceedings in respect of Customary right of Occupancy. **The word "exclusive" has been defined in Webster's New Twentieth Century Dictionary thus: "excluding all others, shutting out other considerations, not shared or divided; sole; single; as an exclusive right".** Since the jurisdiction to determine proceedings in respect of customary right of Occupancy is shared between area courts, customary courts or other courts of equivalent jurisdiction, the word "exclusive" cannot fit into the provisions of section 41 of the Land Use Act, 1978.

If we apply the "ejusdem generis" canon of statutory construction where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. See Campbell v. Board of Dental Examiners 53, California Appellate Reports 3d 283. Following this canon of construction of statutes, it is my view, that only courts of equivalent jurisdiction with the area court or customary court shall have original jurisdiction in respect of any land the subject of a Customary Right of Occupancy granted by a Local Government. This of course is subject to the existence of such courts in the state concerned. In this appeal the issue of a court of equivalent jurisdiction does not, in fact, arise because there is a customary court in Iwo East Local Government Osun State, where this appeal emanated.

This classification of land tenure which the Land Use Act 1978 brought into the land law of this country and identification of courts to adjudicate in disputes the subject of the respective land tenures is deliberate. It is my view that the legislature, by classification of land tenures and assigning jurisdiction to particular set of courts for determination of disputes arising from such land holdings, does not want the courts to exercise concurrent jurisdiction over such matters. In his contribution to the case of Salati v. Shehu (supra) Uwais, J.S.C., (as he then was) held as follows:

"Now the division of jurisdiction of the courts established in a state in respect of land matters is contained in sections 39, 40 and 41 of the Land Use Act, 1978. The division appears to follow the classification of land into urban areas and non-urban areas".

It is relevant to observe that the jurisdiction of area courts which was considered in the cases of Salati v. Shehu (supra) and Sadikwu v. Dalori (supra) is similar to the jurisdiction of customary courts in land matters in Iwo East Local Government Area, now in Osun State. See customary Court Law, Cap. 33 Laws of Oyo State, 1978. Prior to the enactment of the Land Use

Act, in 1978, both High Courts and the Customary Courts in Oyo State had unlimited jurisdiction in land matters. The customary courts were however made to apply the customary law of the place where the land was situated. There was then no classification of land holdings as has now been done in the Land Use Act 1978. The present classification has assigned jurisdiction to a hierarchy of courts based on the location of the land the subject matter in dispute. It seems to me that as development reaches the rural areas the State Governor would invoke the power given to him under section 3 of the Land Use Act, 1978, and declare the area an urban area. Once that is done all land cases in the area declared urban shall be the exclusive jurisdiction of the High Court. Until such a declaration is made all disputes relating to land the subject of a customary right of occupancy granted by a Local Government shall originally, be determined only by an area court or customary court where such courts are available. As I mentioned above, a customary court is available in Iwo East Local Government Area, Osun State. **Therefore under the provisions of section 41 of the Land Use Act the High Court of Osun State has no original jurisdiction in proceedings in respect of Customary Right of Occupancy granted by a Local Government in that state. The matter may reach the High Court on appeal.**

Finally, I am bound to follow Sadikwu v. Dalori (supra) and in addition to my opinion above, I agree that the High Court of Oshogbo now in Osun State has no original jurisdiction in proceedings in respect of any land the subject of customary right of occupancy granted by a Local Government. **This appeal therefore succeeds on the issue of jurisdiction only.** It is allowed. The judgments of both the trial High court and the Court of Appeal are hereby set aside. The action filed by the respondents in oshogbo High Court is hereby struck out. The appellants are awarded N1,000.00 costs in this appeal and N750.00 costs in the High Court.

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Uthman Mohammed and I agree with his reasoning and conclusion for allowing the appeal.

For the same reasons advanced in the lead judgment, I also allow this appeal, set aside the judgments and orders of the two Courts below and strike out the suit for want of jurisdiction of the trial High Court.

I adopt order of costs made in the lead judgment.

KUTIGI JSC

The preliminary issue for determination in this appeal is whether or not the trial High Court had jurisdiction to adjudicate in the land dispute before it having regard to the provisions of Sections 39 & 41 of the Land Use Act, 1978, which read as follows:-⁴

The plaintiffs claimed as follows:-⁵

On whether the land in dispute is situate in an urban or rural area, the learned B trial judge had this to say:-

"In my view, a claim for customary right of occupancy is sufficient to convey to the defendants and the court that the land in dispute is not in an urban area. The defendants do not contest this case on the basis that the land is situated in an urban area. I do not consider an omission by the plaintiffs, C in the circumstances, to establish distance from the town centre, as fatal to plaintiffs' case."

The Court of Appeal on its own part (per Ogundare J.C.A. who read the lead judgment) stated thus:-

"While I do not necessarily agree with the reasoning of the learned D trial judge, I must however say I agree with his conclusion on the point. The simple answer is that kuta where the land in dispute is situated is not an urban area for the purposes of the Land Use Act 1978 as it has not been so declared - see: Land Use (Declaration of Urban Areas, Fees and Forms) Regulations. Kuta, not being on the list of urban areas must be regarded as a E rural area and the land in dispute is therefore land subject of a customary right of occupancy as defined in section 50(1) of the Act. It is only where land is situate in a town declared to be an urban area that the question of its distance to the city centre arises for the purpose of determining whether it is within an urban area as so defined in the Legal Notice or F outside it as it is not all land within the boundary limits of a town so declared is in an urban area."

The lower courts therefore rightly found in my view that the land in dispute is situated in a rural area and therefore subject of a customary right of occupancy. So the question now is -which court has jurisdiction in the matter? G

⁴ See p. 942 D

⁵ See p. 940 B

Is it the High Court, an Area Court or a customary court, having regard to the provisions of sections 39 and 41 of the Land Use Act (supra)? H

The answer would appear to be provided by a recent decision of this Court in SADIKWU v. DALORI (1996) 5 NWLR (part 447) 151 where the dictum of Karibi-Whyte, JSC., in SALATI v. SHEHU (1986) 1 SC. 332, (1986) ALL NLR 53; (1986) 1 NWLR (part 15) 198 to the effect that:-

"There is no ambiguity in the two sections (meaning section 39 and 41) that the exclusive original jurisdiction in respect of land held under statutory right of occupancy is vested in the High Court of the state, whereas jurisdiction in respect of customary right of occupancy is vested in the Area or Customary Courts. The exercise of these jurisdictions will seem to me mutually exclusive. There is no doubt therefore that one cannot exercise the jurisdiction of the other."

was adopted and applied. But those cases when carefully examined would be seen to deal with conditions in the Northern States of Nigeria where generally there are Area Courts as provided in section 41 (ibid). These decisions therefore cannot strictly be said to apply to States or places where there are no Area or Customary Courts. The decision in SADIKWU v. DALORI (supra) is therefore in my view limited to areas where a High Court and an Area Court or Customary Court exist side by side. In such a situation, the High Court would have no original jurisdiction in respect of proceedings for a declaration of title to a customary right of occupancy except an Area Court or a customary court. **But where there is no Area court or a Customary Court, a High Court being "other court of equivalent jurisdiction" under section 39(1) of the Act shall have original jurisdiction to deal with proceedings relating to such land. Section 39(1) of the Act apart, Section 236(1) of the 1979 Constitution gives unlimited jurisdiction to a State High court subject only to the provisions of the Constitution itself. To that extent, I believe the Court of Appeal was wrong when it held that both the High Court and the Area or Customary Courts have concurrent jurisdiction in respect of lands covered by section 41 (supra).**

Now, in this case the evidence led and which was accepted by the lower courts was that kuta where the land in dispute lies is situated is a rural area. Also there was no dispute that there was a customary court in the area where these proceedings could have been initiated. The High court therefore clearly had no jurisdiction to entertain the case when a customary court was available.

This appeal must therefore succeed on the preliminary issue of jurisdiction only. It is accordingly allowed. The judgments of both the trial High Court and the Court of Appeal are set aside. Suit No. HOS/38/82 filed in Osogbo High Court on 14/5/82 is hereby struck out. This shall be the order of the High Court. I endorse the order for costs as contained in the lead judgment of my learned brother, Mohammed, JSC., which I read before now and with which I agree.

H _____

OGWUEGBU JSC

This appeal arose from an action instituted in 1982 in High Court of the former Oyo State holden at Oshogbo. The respondents herein who were plaintiffs in that court claimed as follows⁶ in their Writ of summons:

At the close of hearing, the learned trial Judge found in favour of the plaintiffs. Aggrieved by the decision of the learned trial Judge, the defendants B appealed to the Court of Appeal, Ibadan Division.

In ground five of their grounds of appeal, they raised the issue of the jurisdiction of the learned trial judge in adjudicating over the case in view of the provisions of sections 39(1)(a) and 41 of the Land Use Act, 1978.

The court below in its judgment held that both the High Court and C the Area or Customary court would have concurrent jurisdiction in respect of lands covered by section 41 of the said Act.

Still not satisfied with the decision of the court below, the defendants have further appealed to this court and raised the same issue of jurisdiction among other issues. D

Sections 39(1)(a) and 41 of the Land Use Act provide:⁷

Both the High Court and the Court of Appeal found that the land the subject matter of the proceedings is in a rural area and it is therefore under the control and management of the Local Government within the area of jurisdiction of which the land is situated. E

The recent decision of this court in Sadikwu vs Dalori (1996) 5 N.W.L.R. (Pt. 447) 151 is based on section 41 of the Land Use Act which is set out above. In that case, this court adopted the dictum of karibi-Whyte, JSC. in Salati vs shehu (1986) 1 N.W.L.R. (Pt. 15) 198 where he said:

"S. 39(1) specifically relates to "proceedings in respect of any land F subject to a statutory right of occupancy granted by the Military Governor or deemed to be granted " On the other hand Section 41 confers jurisdiction on area Courts or Customary Courts or Courts of equivalent jurisdiction in respect of customary right of occupancy granted by a Local Government under this Act. There is no ambiguity in the two sections that the G

⁶ See p. 940 B

⁷ See p. 942 D

exclusive original jurisdiction in respect of land held under statutory right of occupancy is vested in the High Court of the State, whereas jurisdiction in H respect of customary right of occupancy is vested in the Area or Customary Courts. There is no doubt therefore that the one cannot exercise the jurisdiction of the other."

The issue before this court in Salati vs Shehu (supra) was whether

the Muslim Area Court at Makurdi, Benue State has jurisdiction to entertain a dispute relating to developed land in urban area of the State which land is subject to a statutory right of occupancy. The court held that since the action relates to land held under statutory right of occupancy, it is the Land Use Act and not the Islamic Law which is applicable and the land in dispute having been declared an urban area, only the High Court of Benue State has jurisdiction to entertain a suit in respect of it. Section 39(1) of the Land Use Act applied and as section 41 of the Land Use Act did not arise for a decision in that case, the observation of Karibi-Whyte, J.SC., remained as obiter dictum until Sadikwu vs Dalori (supra) when this court adopted the dictum.

In both cases section 41(1) and (2) of the Land Tenure Law, Cap. 59 Laws of Northern Nigeria, 1963, was considered. It provides as follows:-

"41(1) The High Court shall have exclusive original jurisdiction in the following proceedings -

(a) proceedings in which the right of the Governor or the Minister to grant a statutory right of occupancy over any land is in dispute;

(2) An area court of competent jurisdiction shall have jurisdiction in the following proceedings -

(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by a local authority or of a customary right of occupancy where all parties are subject to the jurisdiction of area Courts, subject to the provisions of paragraph (b) of subsection 3: Provided that nothing herein contained shall be deemed to confer jurisdiction on any area court in regard to disputes relating to intertribal boundaries:

(b) proceedings under the provisions of subsection (2) of section 39."

The jurisdiction of the courts established for Northern Nigeria as can be seen in section 41 of the Land Tenure Law followed the division of the rights of occupancy and the same jurisdiction of courts was adopted in sections 39(1) and 41 of the Land Use Act, 1978. One can therefore say that the jurisdiction of the courts in the Northern States of Nigeria in relation to land disputes arising out of land held under statutory right of occupancy granted by the Governor and land subject to a statutory right of occupancy granted by a local government or of a customary right of occupancy granted by a local government remained the same both before and after the Land Use Act.

The High courts and Customary Courts in the Southern States had concurrent original jurisdiction in proceedings in respect of land the subject of customary right of occupancy. In fact the bulk of such cases are initiated in the High Court and this preference can be found in the history of Customary Courts particularly in the Eastern States of Nigeria and some of those States do not even think of establishing one.

I must however state that Sadikwu vs Dalori (supra) is binding on me. See Layanju vs. Araoye (1961) All N.L.R. 90 and Osumanu vs Saodu 12 W.A.C.A. 437. It is hoped that the Legislature will amend section 41 of the Land Use Act by restoring the concurrent jurisdiction that existed before the 1978 Act. This will remove the obvious jurisdictional difficulty which may arise.

With the above back ground, I agree with the lead judgment of my learned brother Mohammed, J.S.C. I abide by the consequential orders made by him including the order as to costs.

ONU JSC

I had the advantage to read before now the judgment just delivered by my learned brother Mohammed, JSC and with it I am in entire agreement that the appeal succeeds and it is allowed by me.

I need only to expatiate on Issue 5 formulated by the appellant which, being decisive of the matter because it is founded on the jurisdiction of the trial court to entertain the case, or whether the Court of Appeal was right to have upheld the trial Judge's finding that the State High Court has jurisdiction over land the subject matter of a Customary right of Occupancy.

The dichotomy between what hierarchy of courts have jurisdiction to entertain suits in respect of land the subject of a statutory right of Occupancy, etc. in so far as the High Court of a State is concerned and those in respect of a customary right of occupancy since the coming into force of the Land Use Act. 1978 as enacted in sections 39(1) and 41 respectively, have been the subject of interpretations by this court through decided cases for which, see the dictum of Karibi-Whyte, J.S.C. in Salati v. Shehu (1986) 1 NWLR (Part 15) 198. See also (2) Chukwujekwu v. Olalore (1992) 2 NWLR (Part 221) 86; and (3) Oloriegbe v. Omotesho (1993) 1 NWLR (Part 270) 386. Indeed, it is trite that parties cannot by consent or waiver confer jurisdiction on the court where there is no jurisdiction in a court to try the case.

Be that as it may, I wish to call in aid and found on the latest decision of this Court in Alhaji Abubakar Sadikwu v. Alhaji Abba Dalori (1996) 4 SCNJ. 209; (1996) 1 RMLR (Part 2) 135; (1996) 5 NWLR (Part 447) 151, from which I have no reason to deviate wherein Wali, JSC, delivering the judgment of the Court had the following to say on the point while dismissing the appellant's appeal; affirming the Court of Appeal's judgment and declaring the proceedings in the High Court null and void and ultimately striking it out:

*"On land subject to customary right of occupancy, section 41 of the Land Use Act provides as follows:-"*⁸

While Section 2 and subsection (a) of s. 41 of the land Tenure Law provide

"2. An area court of competent jurisdiction shall have jurisdiction in the following proceedings:-

(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by a local authority or a customary right of occupancy where all the parties are subject to the jurisdiction of area courts; subject
B nevertheless to the provisions of paragraph (b) of s. (3).

The provisions of s. 3(a) referred to in s. 2(a) supra confer jurisdiction in the High Court and or in District Court, the latter within the Limits prescribed in the District Court Law, to exercise jurisdiction in proceedings affecting land in similar situations as stated in s. 2(a) where one or more of the
C parties are not subject to the jurisdiction of Area Courts or where there is no Native or Area Court of competent jurisdiction to entertain the proceedings.

In substance the purpose of S. 41 of the Land Use Act, 1978 and s. 41(a) of the Land Tenure Law is the same. The provisions of the two Laws provide for conferment of jurisdiction on Area or Customary Court in respect of proceedings involving the statutory or customary right of occupancy
D granted by a Local Government or a Local Authority. In my view, s. 17(1) of the High Court Law of Northern Nigeria applicable to Borno State goes to support s. 41 of the Land Use Act, 1978 and s. 41(2) (a) of the Land Tenure Law. I cannot therefore see how s. 17(1) of the High Court Law, by reading it with the provisions of sections 39 and 41 of the Land Use Act 1978 and s. 41
E of the Land Tenure Law, can confer jurisdiction in land matters specifically excluded by those Laws. Section 3 of the Land Use Act has conferred power on the Governor of the State to designate any land under his management and control by virtue of s. 2 of the Land Use Act as an Urban Area. Where that is done the jurisdiction in respect of proceedings affecting
F such land become vested in the High Court since the certificate granted or deemed granted "is a Statutory Right of Occupancy under the Act."
In the case before us there is no evidence of such a declaration under Section

⁸ See p. 942 D

3 of the Land Use Act, 1978 in respect of the Area in dispute. The disputed
G area remains within the control of Borno Metropolitan Council which is for this purpose either a local authority or a local government. The Land Tenure Law S. 41(2) and the Land Use Act, 1978 s. 41 are all existing laws by virtue of s. 274(4) (b) of the 1974 Constitution as stated by the Court of Appeal, but I am afraid I disagree with the Court below when it stated that "at the time the suit was instituted on 19th July, 1979 in the High Court the
H applicable law would be the relevant provision of the Land Use Act since it was deemed to have been an Act of National Assembly, consequently S. 41 prevailed over s. 41(2) (b) of the Land Tenure Law (supra)." Since both laws

are existing laws by virtue of s. 274(b) section 41 of the Land Use Act shall only prevail over s. 41(2) and (b) to the extent the latter is in conflict with the former. See Salati v. Shehu (1986) All NLR. 53, particularly at 61 where Uwais (as he then was) admirably and thoroughly dealt with an issue of a similar nature as in this case which involved the interpretation of sections 39 and 41 of the Land Use Act and relating to proceedings in respect of land subject to a Statutory or Customary right of Occupancy granted either by the Governor or the Local Government, as the case may be."

With regard to Osun State, the application of the Land Tenure Law is out of the question but by section 19 of the High Court Law of Oyo State (now applicable to Osun State) -

"The High Court shall have appellate jurisdiction to hear and determine appeals from customary courts and appeals from decisions of magistrates on appeal from customary courts in accordance with provisions of any law relating thereto."

Clearly, under the above law, therefore, original jurisdiction would not appear to be vested in the High court in respect of customary right of occupancy save by way of appeals from customary courts through magistrates courts to the High Court. It is for these reasons that I have no hesitation in adopting the reasoning of my learned brother set out above in appellants' issue 5 challenging the jurisdiction of the High Court of Osun State holden at Osogbo wherein the respondents to the appeal were claiming title for a declaration to a customary right of occupancy over land subject to native law and custom in a non-urban area and in a state where customary courts exist. I too will accordingly answer the issue in the negative and declare the decisions of the two courts below a nullity.

It is for these reasons and those elaborately set out in the judgment of my learned brother Mohammed, J.S.C. that I too allow this appeal and accordingly strike it out. I abide by the consequential orders he had made.

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