

SUPREME COURT OF NIGERIA

30TH MAY, 1997. SC. 25/1994

**CORAM:-S.M.A.BELGORE, I.L.KUTIGI, E.O.OGWUEGBU,
S.U.ONU, A.I.IGUH, JJSC.**

PRINCE OYESUNLE ALABI OGUNDARE & ANOR. APPELLANTS
(For himself and on behalf of Ogundare
Ruling House of Asundunrin Chieftaincy Family)
AND

1. SHITTU LADOKUN OGUNLOWO
(for himself and on behalf of Ibitan Ruling House)
2. GOVERNOR OF OSUN STATE RESPONDENT
3. ATTORNEY-GENERAL OF OSUN STATE
4. HIS HIGHNESS OBA OMO-WONUOLA
OYESOSIN (Elejigbo of Ejigbo)

APPEALS - *Issues - That were not canvassed before the lower courts - Cannot be raised - Without leave of the Supreme Court.*

CHIEFTAINCY MATTERS - *Ruling house - Where one ruling house surrendered its turn to another - It will be the turn of the next ruling house - To present a candidate.*

CHIEFTAINCY MATTERS - *Declarations on chieftaincies - Are useful guides as to the order of succession - Even where the chieftaincy is derecognized by government.*

SUPREME COURT - *Matters decided by the trial court - And not argued before the Court of Appeal - Are not competent before the Supreme Court - Save with leave of Court.*

FACTS

The plaintiffs/appellants filed an action before the trial high court against the defendants/respondents claiming entitlement to present a candidate for the vacant stool of Baale of Isundunrin. This chieftaincy was previously recognized but later derecognized to a minor Chieftaincy under the Prescribed Authority of Elejigbo of Ejigbo. There are 5 ruling houses entitled to rotational succession to the chieftaincy. The plaintiffs belong to the 4th ruling house in the list. When it was the turn of the 1st to present a candidate in 1962, it had a private arrangement by which it allowed the 2nd to present a

candidate.

Now that another vacancy arose, the 2nd wanted to present a candidate which was refused by the other ruling houses. It would have been the turn of the 3rd ruling house (Ibitan) to present a candidate but for the intervention of the Ogundare ruling house (the 4th) that led to this action. The trial court found in favour of the plaintiffs. Upon an appeal to the Court of Appeal, the trial court's judgment was set aside. The plaintiffs have now appealed to the Supreme Court seeking to make the Declaration irrelevant as the Chieftaincy is no longer a recognized major one.

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

Supreme Court - Matters decided by the trial court

1. By canvassing in this Court matters decided in the trial Court and not adverted to in the Court of Appeal, without leave having been obtained to argue matters not argued in the Court of Appeal, such matters or issues are incompetently before this Court and will be discountenanced. This Court is only competent to entertain appeals from the Court of Appeal and not from any Court below the Court of Appeal. (p. 1114 H)

Issues - That were not canvassed before the lower courts

2. Similarly the appellate Court will deal only with matters duly canvassed at the trial Court and appealed against. The issues of fair-hearing or breach of sections 20, 21 and 22 (6) of Chiefs Law never came into argument at the trial Court nor at the Court of Appeal, and no leave having been obtained to argue them as novel issues not raised in the Courts below, are not competent for argument in this Court. There was no pronouncement on these issues at the trial Court, and no appeal was lodged on this failure in the Court of Appeal, it is therefore incompetent in this Court for the appellants to start raising issues of lack of fair hearing, or breach of natural justice in the conduct of investigation into the selection of Baale of Isundunrin. In the absence of a decision on a point, and that point has been canvassed at the trial Court, the course open to the party aggrieved is to appeal against that non-decision. (p. 1115 A)

Where one ruling house surrendered its turn to another

3. The five ruling houses exist and this is not in dispute. It is also not in dispute that without involving the three other Ruling Houses, the Mobile and Ogunlanade Ruling Houses concluded an arrangement whereby the former Ruling House had to forgo their turn in 1963 for the latter. Had they involved the other three Ruling Houses in this secret arrangement, the story might

likely be different. Once Mobile surrendered their right for Ogunlanade Ruling House, the next House to present a candidate is Ibitan. The Court of Appeal was therefore justified in holding that the Ibitan Ruling House this time around was to present a candidate in setting aside the decision of the trial Court. (p. 1115 D)

Declarations on chieftaincy

4. It must be pointed out that Declarations on chieftaincies were the results of investigation as to the native laws and customs of the localities as unanimously or over-whelmingly agreed by them. They are useful guides when those chieftaincies are derecognised as to the laws and customs of the people as to succession and order of succession. There can be law derecognising a chieftaincy, that is mainly for government purpose, it does not mean the chieftaincy does not exist because the community served by each chief does not necessarily cease to exist. The Declarations are the statement in permanent form as to the mode of succession of chieftaincy in each community in regard to tradition, native law and custom. (p. 1115 F)

NOTABLE POINT OF INTEREST

OGWUEGBUJSC

1. Derecognition of Chieftaincy does not invalidate the Declaration

It was also erroneous for the plaintiffs/appellants to lead evidence of native law and custom regulating the Baale of Isundunrin Chieftaincy outside the Chieftaincy Declaration of 1958 (Exhibit "D") which contains a legally binding written statement of the customary law regulating the selection and appointment of a candidate when a vacancy occurs. It must be restated that where a declaration exists in respect of a recognized chieftaincy, the reduction in rank of that chieftaincy to a minor one does not change the customary law as contained in the declaration relating to entitlement, selection and appointment to it. The provisions of such a declaration should prevail until it is amended. (p. 1117 H)

REPRESENTATION

P. O. Jimoh-Lasisi for appellant

Chief O. Afolabi for 1st respondent

Isiaka O. Adeleke (Senior State Counsel) for 2nd and 3rd respondents

CASES REFERRED TO

Aboyegi v. Momoh (1994) 8 KLR 1

Ogoyi v. Umagba (1995) 10 KLR 1982

Oduntan v. General Oil Ltd. (1995) 4 KLR 796
 Adesokan v. Adetunji (1994) 10 KLR 85
 Okumagba v. Egbe (1965) ALL N.L.R. 64 at 67
 Ayoade v. Military Governor of Ogun State (1993) 8 N.W.L.R. (Pt. 309) 111
 Oladele v. Aromolaren II (1996) 6 KLR (Pt 42) 1032

STATUTE REFERRED TO

Chiefs Law 1957 ss. 4 (2), 20, 21, 22 (6)

LEAD JUDGMENT BY BELGORE JSC

The appellants were plaintiffs at the trial High Court asking for declaration that the plaintiffs' family are the Ruling house to present a candidate for the vacant stool of Baale (Asundunrin) of Isundunrin. The chieftaincy of Baale Isundunrin was previously recognized but later derecognised to a minor chieftaincy under the prescribed Authority of Elejigbo (Ogiyan) of Ejigbo in 1976. Under the native law and custom of Isundunrin which found legality in a declaration by virtue of s. 4 (2) Chiefs Law 1957 was made on 13th August, 1958 [See Declaration of Customary Law Regulating the selection of Baale of Isundunrin 1958]. The declaration identified five ruling houses of Isundunrin as follows :

1. Mobile
2. Ogunlanade
3. Ibitan
4. Ogundare
5. Tanpe

The order in the Declaration is the succession line. At the time of 1958 Declaration, the incumbent Baale was Fagbemi Oloyede who belonged to Tanpe Ruling House; he died in 1962. Oloyede was succeeded as Baale by Amusa Amusan Oyewale from Ogunlanade Ruling House; he in turn died in 1985. By the order of the Declaration and by native law and custom, the next Baale should come from Mobile Ruling House when Oloyede of Tanpe Ruling House died in 1962. There was however a private arrangement ("treaty" according to parties) between Mobile Ruling House and Ogunlanade Ruling House whereby Mobile surrendered the succession right to Ogunlanade Ruling House in 1963. This agreement was strictly between the two Ruling Houses and others, to wit, Ibitan, Ogundare and Tanpe were not party to it. When Oyewole died in 1985, Ogunlanade Ruling House, apparently in accordance with its agreement with Mobile Ruling House invited Mobile Ruling House to present a candidate. A dispute therefore ensued as the Ruling Houses that were not parties to the agreement between Mobile and Ogunlanade main-

tained they were not bound by it. The 4th Respondent, who was the prescribed authority, called the entire parties together - the five ruling houses. At the meeting both Mobile and Ogundare Ruling Houses claimed the right to present a candidate. Thus the problem defied solution at that stage. Under the Declaration and by native law and custom, the order of succession was in B favour of the next Ruling House after Ogunlanade, that is to say, Ibitan Ruling House. The 4th Respondent (Elejugbo) thereafter called another meeting attended only by Mobile and Ogundare Ruling Houses. The 1st appellant, Oyesunle Alabi Ogundare was then presented as a candidate. This was communicated to the 2nd respondent, the Governor, who protested the C nomination as a result of the petitions received and also no doubt after referring to the Declaration. The government therefore advised the 4th respondent to shelve further action on the matter so that 1st appellant would not be appointed.

A government investigation discovered the swapping arrangement between Mobile and ogunlanade and concluded that Ibitan ruling house was D to present a candidate. The 4th respondent was therefore advised to revoke any nomination or selection already made and to invite Ibitan ruling House to present a candidate. 4th Respondent obeyed this directive. He advised the 1st appellant to withdraw from parading himself as the Baale Osundunrin. This led to the litigation by the 1st appellant and others which culminated in E this appeal.

At the trial Court the appellants were granted all the reliefs sought. This led to the appeal to the Court of Appeal. It is remarkable that the trial Court held that the Declaration had set down the order of succession in accordance with the custom of Osundunrin but at the same time held that the 1st F appellant (as a plaintiff) was properly selected as Baale. The Court of Appeal set aside the judgment of the trial Court and dismissed the plaintiffs' case. There was no appeal against the decision of the trial Court recognizing the Declaration as the true sequence of succession to the Court of Appeal.

The appeal to this Court has tried to make much of the Declaration as G irrelevant as the Baale of Isundunrin is no longer a recognized major Chief. In all appeals, the issues to be argued are those based on the grounds of appeal by either side on the finding of the trial judge on the Declaration and the argument not on that issue was not relevant. (*Aboyeji v. Momoh* (1994) 4 NWLR (Pt 341) 646, 664; *Ajadi v. Okenihun* (1985) 1 All NLR 213, 219. H **By canvassing in this Court matters decided in the trial Court and not adverted to in the Court of Appeal, without leave having been obtained to argue matters not argued in the Court of Appeal, such matters or issues are incompetently before this Court and will be discountenanced. This Court is only competent to entertain appeals from the Court of Appeal and not from any**

Court below the Court of Appeal. [Ogoyi v. Umagba (1995) 9 NWLR (pt. 419) 283, 293; Oduntan v. General Oil LTD. (1995) 4 NWLR (pt. 387) 1, 10]. Similarly the appellate Court will deal only with matters duly canvassed at the trial Court and appealed against. The issues of fair-hearing or breach of sections 20, 21 and 22 (6) of Chiefs Law never came into argument at the trial Court nor at the Court of Appeal, and no leave having been obtained to argue them as novel issues not raised in the Courts below, are not competent for argument in this Court. There was no pronouncement on these issues at the trial Court, and no appeal was lodged on this failure in the Court of Appeal, it is therefore incompetent in this Court for the appellants to start raising issues of lack of fair hearing, or breach of natural justice in the conduct of investigation into the selection of Baale of Isundunrin. In the absence of a decision on a point, and that point has been canvassed at the trial Court, the course open to the party aggrieved is to appeal against that non-decision. [Saude v. Abdullahi (1989) 4 NWLR (pt. 116) 387, 433, 434; Adesokan v. Adetunji (1994) 5 NWLR (pt. 346) 540, 575, 576].

The five ruling houses exist and this is not in dispute. It is also not in dispute that without involving the three other Ruling Houses, the Mobile and Ogunlanade Ruling Houses concluded an arrangement whereby the former Ruling House had to forgo their turn in 1963 for the latter. Had they involved the other three Ruling Houses in this secret arrangement, the story might likely be different. Once Mobile surrendered their right for Ogunlanade Ruling House, the next House to present a candidate is Ibitan. The Court of Appeal was therefore justified in holding that the Ibitan Ruling House this time around was to present a candidate in setting aside the decision of the trial Court.

It must be pointed out that Declarations on chieftaincies were the results of investigation as to the native laws and customs of the localities as unanimously or over-whelmingly agreed by them. They are useful guides when those chieftaincies are derecognised as to the laws and customs of the people as to succession and order of succession. There can be law derecognising a chieftaincy, that is mainly for government purpose, it does not mean the chieftaincy does not exist because the community served by each chief does not necessarily cease to exist. The Declarations are the statement in permanent form as to the mode of succession of chieftaincy in each community in regard to tradition, native law and custom.

For the foregoing reasons, I find no merit in this appeal and I dismiss it with N1,000.00 costs to each set of respondents against the appellants.

KUTIGIJSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Belgore, JSC. I agree with him that the appeal lacks merit and ought to be dismissed. The Court of Appeal was right when it said :-

B *"The correct finding or conclusion opened to the trial court having rightly and properly found that the Mobile Ruling House wantonly wasted or abandoned or waived its chance on the rotational order, and which waiver the Ogunlanade Ruling House, which was the next Ruling House to Mobile, appropriately cashed upon, the next ruling house after Ogunlanade C on the rotational order, which it had accepted is Ibitan Ruling House. It is an old adage that "opportunity once lost can never be regained, so let it be with Mobile Ruling House..... The first respondent not being a member of Ibitan Ruling House, it stands to reason, cannot become Baale of Isundunrin immediately. He has to wait for the turn of his ruling house on D the order of rotation before he can produce his own candidature. The first respondent having sought and obtained the chieftaincy when it was not the turn of his Ruling House to produce Asundunrin acted wrongly or illegally. Consequently his selection, appointment and approval was null and void."*

As I said the appeal is devoid of merit and it is hereby dismissed with E costs as assessed.

OGWUEGBUJSC

I have had the opportunity of reading the judgment of my learned F brother Belgore, J.S.C just delivered. I agree with his reasoning and conclusions. I however wish to make the following contribution only for the sake of emphasis.

The plaintiffs who are the appellants in this court based their case on the native law and custom relating to the Baale of Isundunrin Chieftaincy. The G issues canvassed in the court of trial were :-

1. The number and identity of the Ruling Houses entitled to the chieftaincy;
2. the rotational order of secession by the Ruling Houses;
3. the Ruling House entitled to provide a candidate on the death of H the last incumbent; and
4. the method or procedure for filling the vacancy.

The learned trial judge found that the earliest recorded and reliable history of the Isundunrin Chieftaincy is Exhibit "D" which sets out clearly the number and identity of the Ruling Houses as :

1. Mobile
2. Ogunlanade,
3. Ibitan,
4. Ogundare and
5. Tanpe

and that the above order provides the sequence of succession. He rejected the rotational order pleaded and relied upon by the plaintiffs which placed Tanpe Ruling house first and Ibitan last.

The learned trial judge also found that Mobile Ruling House con-signed its turn to Ogunlanade Ruling House and "wantonly wasted its chances in the rotational order." (See Exhibit "L"). He later in his judgment held as follows:

"The ruling houses have so badly disrupted this sequential order that it will be making the rules of law supersede the rules of equity to hold that any one ruling house should now resume a third turn while another has not taken a second turn."

He finally held that Ogundare ruling house is the next ruling house to present a candidate for a second round after Amusa Amusan Oyewale Kehinde from Ogunlanade ruling house. By importing equitable consideration into his judgment, the learned trial judge by what I term judicial legislation threw over-board and or repealed Exhibit "D" which is the applicable customary law to the chieftaincy. The court does not have that power. The office of the judge is jus dicere, not jus dare. See Okumagba v. Egbe (1965) All N.L.R. 64 at 67.

The Court of Appeal in setting aside the decision of the learned trial judge correctly observed as follows :

"The correct finding or conclusion opened (sic) to the trial court, having rightly and properly found that Mobile ruling house wantonly wasted or abandoned or waived its chance on the rotation order; and which waiver the Ogunlanade ruling house which was the next ruling house to Mobile, appropriately cashed upon the next ruling house after Ogunlanade on the rotation order, which it had accepted, is Ibitan ruling house. Next to Mobile on the order of rotation is Ogunlanade who provided the immediate past Asundunrin or Baale of Isundunrin, Oba Amusa Amusan Kehinde Oyewale. The ruling house whose turn it is to provide Baale according to the order of rotation accepted by the trial court, is Ibitan."

It was also erroneous for the plaintiffs/appellants to lead evidence of native law and custom regulating the Baale of Isundunrin Chieftaincy outside the Chieftaincy Declaration of 1958 (Exhibit "D") which contains a legally binding written statement of the customary law regulating the selection and

appointment of a candidate when a vacancy occurs. It must be restated that where a declaration exists in respect of a recognized chieftaincy, the reduction in rank of that chieftaincy to a minor one does not change the customary law as contained in the declaration relating to entitlement, selection and appointment to it. The provisions of such a declaration should prevail until it is amended. See Agbetoba v. Lagos State Executive Council (1991) 4 N.W.L.R. (Pt. 188) 664, Ayoade v. Military Governor of Ogun State (1993) 8 N.W.L.R. (Pt. 309) 111 and Oladele & Ors. v. Aromolaren 11 & Ors. (1996) 6 N.W.L.R. (Pt. 453) 180.

Consequently, the court below was right in declaring the selection, appointment and approval of the 1st respondent as the Asundunrin of Isundunrin a nullity.

In the circumstances, I am satisfied that this appeal lacks merit and it is hereby dismissed with N1,000.00 costs to each set of respondents.

D

ONU JSC

I have had the privilege of reading in draft the judgment of my learned brother Belgore, J.S.C. just read. I am in entire agreement with him that the appeal lacks merit and must perforce fail.

This is a case in which the trial court accepted, rightly in my view, the order of succession to the Baleship of Isundunrin as set out in the Exhibit D - the Declaration in relation to that chieftaincy which, although once a recognized chieftaincy, has by law been de-recognized and now falls under the aegis of the Ogiyan of Ejigbo as prescribed Authority. It was common ground at the trial in which the parties thereto joined issues that Exhibit D although ceased to have the force of a regulation governing the succession table in which the Ruling houses were acknowledged to be Mobile, Ogunlanade, Ibitan, Ogundare and Tanpe in that order of rotation, it (Exhibit D), was albeit used as guideline in the selection process. See Jeje Oladele & ors. v. Oba Adekunle Aromdaran & ors. (1996) 6 NWLR (part 453) 180 at pages 207 - 208.

Were one to agree with the argument put forward by the 1st Plaintiff/Appellant that it was the turn of his Ruling House - the Ogundare Ruling House - as opposed to what Mobile and Ogunlanade felt constitute an agreement reached between their two Ruling houses in 1963 to the effect that swap be allowed, the endorsement of their contention by the prescribed Authority (i.e. 4th defendant/Respondent) that it was the turn of Ogundare Ruling House (who after all argued that Exhibit D no longer existed); and who now presented a candidate, whereas it was the turn of Ibitan Ruling house which had initially foot-dragged in the face of a looming controversy before finally

claiming its right under Exhibit D, the five Ruling houses would be thrown into confusion. Commenting on the so-called swapping the learned trial Judge held, quite rightly in my view, thus:

"I find it difficult to accept the reason they gave for the so-called swapping. In law, there is privity of contract. It is between the contracting parties who must stand or fall, benefit or lose from the provisions of their contract. Their contract cannot bring third parties nor can third parties take or accept liabilities under it, nor benefit there-under. See Ikpeazu v. A.C.B. (1965) N.M.L.R. 374-378. Under the circumstance, I hold that when Mobile ruling house consigned its turn to Ogunlanade ruling house, it wantonly wasted its chance in the rotational order." C

The learned trial Judge even though he awarded the Respondents their claim in its entirety, went on to hold later down in his judgment, thus accepting the tacit ascendancy of Exhibit D as follows:-

"I agree that the Declaration set the pace for the custom pertaining to the chieftaincy, and provided the sequence for the succession as:" D

1. Mobile
2. Ogunlanade
3. Ibitan
4. Ogundare
5. Tanpe

The ruling houses have so badly disrupted this sequential order that it will be making the rules of law to supersede the rules of equity to hold that any one ruling house should now resume a third turn while another has not taken a second turn." E

The court below (as an appellate court) in reversing the trial court after evaluating the evidence on the Record and drawing the necessary inference from the facts found, held inter alia correctly and faultlessly, in my view, as follows:-

"Be that as it may, it was not the case of either party before the learned trial Judge that the customary law applicable to the chieftaincy is repugnant to natural justice and good conscience. That is the only ground by virtue of S. 13 (1) of the Oyo State High Court Law that a Customary Law can be cut down. The court having found as set out above that the declaration, either rightly or wrongly, was applicable to the chieftaincy he was duty bound to give effect to it rather than wrongly importing the principle of equity, which, in any case, is not the case presented before him, into the matter. He quible (sic) and he is not entitled to equivocate on the rejection of the case adumbrated (sic) in the first and second respondents' statement of claim, he ought to have refused their claim and found that the deposition G H

of the first respondent by the fifth respondent was proper, because the first and second respondent failed to prove that the chieftaincy is governed by a customary law other than 1958 Declaration. It follows that the plaintiffs failed to prove the customary law governing their case. The issue of right to a chieftaincy has always been in the nature of customary law which has always been a question of fact to be established by evidence: Giwa v. Erinmilkun (1961) All NLR. 294, 296. They, therefore, failed and the case ought to be dismissed" See also Olowu v. Olowu (1985) 12 SC. 84 at 133-134.

All the three questions proffered at the instance of the appellants in his brief in this appeal are by the reasons given by me above answered in the affirmative. A fortiori, they are resolved against the appellants.

It is for these reasons and the fuller ones ably articulated in the leading judgment of my learned brother Belgore, JSC that I too dismiss the appeal and make the same consequential orders as contained therein.

D

IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Belgore, J.S.C. and I agree entirely that this appeal is without substance and ought to be dismissed.

The learned trial judge after a close examination of the evidence of custom pertaining to the Chieftaincy in issue rightly, in my view, found as follows:-

"I agree that the Declaration set out the pace for the custom pertaining to the Chieftaincy, and provided the sequence for the succession as:-

1. *Mobile*
2. *Ogunlanade*
3. *Ibitan*
4. *Ogundare*
5. *Tanpe."*

G

The above finding which was not appealed against is a total rejection of the plaintiffs' case in respect of the rotational order they pleaded in paragraph 7 of their Statement of Claim. On this issue alone, the appellants' claims were liable to fail.

H

The learned trial Judge instead of applying the rotational order he found established regrettably introduced issues unsupported by any evidence of custom before him and thereby held that based on a "rotational order in equity" it was the Ogundare and not the Ibitan Ruling House that was entitled to produce the next Chieftaincy candidate. This finding is clearly

wrong and out of alignment with the rotational order he had quite rightly found established. Based on the said customary rotational order, there can be no doubt that succession to the stool of Isundunrin was the turn of Ibitan ruling House and not the Ogundare Ruling House. The Court below so found and I can find no reason to interfere with this finding which is in strict accordance with the established customary law before the Court.

B

Consequently, the 1st appellant was not appointed in accordance with the customary law pertaining to the Chieftaincy stool in issue. This appeal therefore fails and it is hereby dismissed. I abide by the order for costs made in the leading judgment.

C

D

E

F

G

H