

SUPREMECOURTOFNIGERIA
4TH JULY, 1997. SC. 6/1991
CORAM:- M. L. UWAIS CJN, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, S. U. ONU, JJSC

MALLAM HAMIDU MUSA & 2ORS. APPELLANTS
AND
ALHAJI YAHAYA KEFAS YERIMA & ANOR RESPONDENTS

***APPEALS** - Inference - Drawing inference from facts - Where proper - The appellate court is free to do so.*

***APPEALS** - Conclusion of trial court - Where supported by evidence - Appellate court will not disturb it*

***APPEALS** - Interference - Since the Appellants failed to prove that 1st Appellate was selected in accordance with the prevailing native law - The court below was right to interfere with the finding of fact of trial court.*

***EVIDENCE** - Rebuttal - Where Plaintiff adduces evidence which establishes his case and the defendant fails to rebut it - The plaintiff will be entitled to judgment.*

***EVIDENCE** - Evaluation - Where trial court fails to evaluate evidence adduced at the trial - Appellate court will over rule the decision of the trial court.*

***EVIDENCE**- Particulars - Where a party refuses to give particulars of evidence - Which he proposes to call at the trial - Trial court cannot force him.*

FACTS

The Respondents who were plaintiffs at the trial court brought an action against the Appellants claiming certain reliefs. Both parties are descendants of the two ruling clans in Kumbo in Takum Local Government Council of Adamawa State. On the death of the incumbent Chief, both parties nominated their candidates to the vacant stool and presented them to the kingmakers. The kingmakers then selected one of the candidates who will then be handed over to the chairman. The chairman after performance of traditional rites will send the selected candidate to the Uhwesi for turbaning. The selection was not possible as one of the kingmakers could not be reached.

So the chairman selected the 1st Appellant and handed him over for turbaning. The contention of the Respondents was that the 1st Appellant was not selected by the kingmakers and so instituted the action leading to this appeal. The trial court after hearing evidence on both sides dismissed the Respondents claim.

On appeal to the Court of Appeal, the Court of Appeal set aside the judgment of the trial court and granted the Respondents' reliefs. The Appellants have now appealed to the Supreme Court raising 4 issues but the apex court preferred the issues raised by the respondents.

ISSUES FOR DETERMINATION

1. Was the Court of Appeal right in law to have allowed the appeal based on the evidence on the record and the proper inference that ought to be drawn from the facts found at the trial.

2. Whether the Court of Appeal was right in holding that the High Court Judge was wrong in applying the provisions of section 148 of the Evidence Act to the circumstances of the case.

3. Whether the judgment of the Court of Appeal was not backed by the weight of evidence before it.

HELD (Unanimously dismissing the appeal per lead judgment of ON U JSC)
Evidence - Rebuttal

1. It is therefore abundantly clear from the printed record that the Appellants' witnesses gave evidence which was not only conflicting but was at variance with their pleadings. The evidence of the Respondents' witnesses, on the other hand, was not seriously challenged by the Appellants nor did they plead any procedure different from that of the Respondents. It is trite law that where a plaintiff adduces oral evidence which establishes his claim against the defendant in terms of the writ and the evidence is not rebutted by the defendant, the plaintiff is entitled to judgment. The Respondents having established by a preponderance of evidence that 1st Appellant was not selected by the traditional kingmakers in Kumbo and that the procedure and Native law and custom of Kumbo in relation to the selection of a chief was not followed, the Respondents were entitled to judgment as found in their favour by the court below. (p. 1307B)

Inference by appellate court

2. The court below was accordingly, in my opinion, justified in its judgment in allowing the appeal because an appellate court will be free to draw its own inference from the facts as found at the trial if the question relates to the proper inference that ought to be drawn from those facts, moreso when it is of the opinion that the trial court did not take proper advantage of its having see

and heard the witnesses. (p. 1307 D)

Evidence - Failure to properly evaluate by trial court

3. Where, as demonstrated in the instant case the trial court fails to properly evaluate the evidence adduced at the trial as required by law, an appellate court will overrule the decision of the trial court, (p. 1307 H)

Conclusion of trial court supported by evidence

4. This court will however decline to disturb the decision of the Court below in the instant case, as same is supported by the evidence on the printed record. It is also trite law that an appellate court will not disturb the conclusion of a trial court which is supported by evidence, even of the slightest degree, if the only reason for so disturbing it is because it would have, on the same facts come to a different conclusion. (p. 1307 H)

Evidence - Where a party refuses to give particulars

5. In so far as the Appellants' grouse here relates to the Withholding of witnesses and not the withholding of evidence which ought to be produced but was not vide section 149(d) of the Evidence Act, their complaint by reliance on this section which is inapplicable, is in my humble view, misconceived. This is the moreso that the Respondent called PW3, the Chairman of the kingmakers, who confirmed that the 1st Appellant was not selected by the additional kingmakers. The argument that the five kingmakers must be called by Respondents in order to succeed has no legal backing, not least the provisions of Section 178 (now 179) of the Evidence Act. The trial court has no F power to force a party to give the particulars and the extent of the evidence which he proposes to call in the exercise of his right to decide whether to adduced evidence in support of his pleadings or not. (p. 1308 F)

Appeals - Interference

6. The Appellants having failed to discharge the burden on them to show that the correct procedure for the selection of the 1st Appellant as Chief had been followed, the court below was right to interfere with the findings of fact arrived thereat. This is irrespective of the fact that it is settled law that the decision of a court of trial on the facts is presumed to be correct and the presumption must be rebutted by the party seeking to set aside the judgment. (p.1309G)

REPRESENTATION

Chief B. A. Olaogun for the Appellants

P. E. M. Alenkhe, Esq. for the Respondents

CASES REFERRED TO

- B Anyaoke v. Adi (1986) 3 NWLR (Part 31) 731 at page 742
 Atuyeye v. Ashamu (1987) 1 NWLR (Part 49) 267
 Onifade v. Olayiwola (1990) 7 NWLR (Part 161) 130 at 157
 Ogunbambi v. Abowaba 13 W. A. C. A. 222
 George v. Dominion Flour Mills Ltd. (1963) ALL N.L.R. 71 at 77 and 78
 C A.C. B. Ltd. v. A.G. of Northern Nigeria (1967) NMLR 233
 Agoma v. Guinness (Nig.) Ltd. (1995) 2 KLR 404
 Lipede v. Sonekan (1995) 1 KLR 193; (1995) 1 NWLR (Part 374) 668
 Mogaji v. Odofoin (1978) 4 SC. 91

D STATUTES AND RULES REFERRED TO

Court of Appeal Act cap 75 LFN 1990 s. 16

Evidence Act cap 112 LFN 1990 ss. 149 (d), 179

:

LEAD JUDGMENT BY ONU JSC

- E The appellants herein, were the defendants at the High Court of
 Gongola (now Adamawa) State presided over by Buba Ardo, Chief Judge,
 before whom the respondents as plaintiffs claimed the following reliefs:-

“(1) A declaration that the selection and appointment of the 1st
 defendant as the Chief of Kumbo is null and void.

- F (2) A declaration that the said selection and appointment of the 1st
 defendant as the Chief Kumbo was made in breach of the Kumbo Native
 Laws and Custom, Tradition and procedure of the appointment and/or se-
 lection of the new Chief of Kumbo.

- (3) A declaration that ascendancy to the throne of Kumbo is based
 G on patrilineage of the two ruling clans of Imba-Nabu and Imba-Nawha of
 Kumbo.

- (4) A declaration that the 2nd defendant as the Uhvesi of Kumbo
 RITUAL Priest has no traditional power to select the 1st defendant as Chief
 of Kumbo and that his selection of the 1st defendant as the Chief of Kumbo is
 H null and void and of no effect.

(5) An injunction restraining the 2nd and 3rd defendants, their
 agents and/or privies from permitting, ordering and/or instructing the 1st
 defendant to perform the functions and/or act as the Chief of Kumbo.

(6) A declaration that the purported installation of the 1st defen-

dant as the Chief of Kumbo on 27th December, 1985 was contrary to the Native Laws and Custom and Tradition of Kumbo and therefore null and void.

(7) *An injunction restraining the 1st defendant from parading himself as the Chief of Kumbo and/or performing the functions of the Chief of Kumbo.* B

(8) *An order of the Court directing the conducting of fresh selection of the Chief of Kumbo by the traditional kingmakers of Kumbo in accordance with the Kumbo Native Laws and Custom."*

Pleadings were ordered, filed and exchanged with the parties amending and further amending their pleadings before the case went to trial. After the evidence of both sides was heard, the learned Chief Judge in a reserved judgment dated 5th October, 1987 dismissed the respondents' claim; consequent upon which the respondents appealed against the said judgment to the Court of Appeal, Jos Division (hereinafter referred to as the court below). C

The court below after hearing the oral arguments of counsel for the parties founded on their briefs of argument, in what I consider as a well considered judgment dated 30th March, 1989 allowed the respondents' appeal and in the exercise of its powers under section 16 of the Court of Appeal Act, Cap. 75 Laws of the Federation, 1990, granted all the reliefs sought by the respondents as per their writ of summons. The appellants have appealed to this court on a notice of appeal containing four grounds dated 2nd May, 1989 which by an amended notice dated 25th March, 1992, has been substituted with four fresh grounds. D E

I wish to pause here to briefly state the facts giving rise to this case as follows: F

The respondents and the 1st appellant are descendants of the two ruling clans of Kumbo of Takum Local Government Council of Adamawa State, namely Imba Nabu and Imba - Nahwua, both of which contested for the vacant stool of Kumbo following the demise of the incumbent chief, late Chief Mallam Zorto. It is the Native Law and Custom of Kumbo that upon the death of the incumbent Chief the ruling houses send the names of their nominees to the four kingmakers who meet to select one candidate for the vacant stool. The Chairman of the kingmakers is Ikimimore; and when the kingmakers have selected a candidate, they hand him over to the Ikimimore who in turn hands him over to the Uhwesi for the Kumbo traditional rites. At all times relevant to this selection the 2nd defendant, Shikare Ukimore, was the Uhwesi. G H

The kingmakers could not select the candidates after several fruitless meetings because Sule Ake, the leader of the kingmakers refused to at-

tend these meetings for undisclosed reasons. Since Sule Ake declined to attend at such meetings of the kingmakers, the 2nd appellant chose the 1st appellant who, after performing the traditional rites presented him to the Gara (paramount ruler) of Donga for turbaning and 1st appellant was accordingly turbaned. The respondents for their part testified in support of their pleadings B that the 1st appellant was not selected as Chief of Kumbo by the traditional kingmakers and all this in the face of evidence from the appellants which was inconsistent and at variance with their pleadings.

Sequel to the appeal to this Court from the court below, the parties exchanged briefs of argument pursuant to the rules of court. The appellants C submitted four issues as arising for determination, viz:

- 1(a) Whether the Justices of the Court of Appeal were right when they held that the third respondent did not give evidence.
- (b) Whether the Court of Appeal made any finding with regards to the burden of proof on the plaintiff.
- D 2. Whether the Court of Appeal rightly held that there' was no consensus as to which of the contestants should be selected as Chief.
3. Whether the Court of Appeal was right by holding that the High Court Judge was wrong by applying section 148(d) of the Evidence Law in his judgment.
- E 4. Whether the judgment of the Court of Appeal was unreasonable, unwarranted and cannot be supported having regard to the weight of evidence before it.

The respondents for their part, proffered three questions as calling for determination, to wit:

- F 1. Was the Court of Appeal right in law to have allowed the appeal based on the evidence on the record and the proper inference that ought to be drawn from the facts found at the trial.
2. Whether the Court of Appeal was right in holding that the High Court Judge was wrong in applying the provisions of Section 148 of the G Evidence Act to the circumstances of the case.
3. Whether the judgment of the Court of Appeal was not backed by the weight of evidence before it.

I will in my consideration of this appeal adopt the three issues submitted for our determination at respondents' instance. This is because they H logically flow from the grounds of appeal, are more apposite thereto as well as being more precise than the four issues formulated at appellants' instance. For example, this court has decided in relation to general or omnibus grounds of appeal in *Anyaoke v. Adi* (1986) 3 NWLR (Pt.31) 731 at page 742 followed in the case of *Saka Atuyeye & 4 Ors v. Emmanuel Ashamu* (1987) 1 NWLR (Pt.49)

267, that in a civil appeal, a ‘general’ or ‘omnibus’ ground of appeal, that the lower court’s judgment “is against the weight of evidence” is permissible and proper while in a criminal appeal, a ‘general’ or ‘omnibus’ ground that the lower court’s judgment or verdict should be set aside because it “cannot be supported having regard to the evidence” is permissible and proper. However, as in the case in hand issue No.4 submitted at the appellants’ instance to the effect that the judgment of the court below is “unreasonable, unwarranted and cannot be supported having regard to the weight of evidence before it” is a repetition of and indeed the exact replica of the ground from which it is supposed to be formulated, it becomes unspecific and irrelevant, in my view, and ought therefore to be discountenanced. See: *Onifade v. Olayiwola* (1990) 7 NWLR (Pt.161) 130 at 157. B C

At the hearing of this appeal on 7th April, 1997 the learned counsel for both sides each adopted his clients’ brief and expatiated thereon. I wish, in my treatment of the three issues, to consider them together as follows:-

It was firstly contended by Chief B. A. Olaogun, of counsel for the appellants, in his written brief that the Justices of the court below wrongly held in their judgment at page 62, lines 5 to 8 of the Records that “*Upon the completion of pleadings hearing commenced before the Hon. Chief Judge, Buba Ardo, C.J. on the 20th of May, 1986 and was concluded on the 3rd of July, 1987. In the course of the hearing both parties gave evidence and called their witnesses except that 3rd respondent did not give evidence at all.....*” D E

It was then contended that from page 21 of the Records it can be seen with effortless ease, that the 3rd appellant gave evidence at the trial as DW3 from pages 21 to 22. We were therefore urged to hold that the court below was in error when it held that the 3rd respondent did not give evidence. It was also argued that the error is a serious one as it clearly showed that the court below never considered his evidence in its judgment - a failure which has occasioned a miscarriage of justice. We were accordingly urged to set aside the decision since the judgment obtained thereby is wrong. It was further submitted, relying on the case of *Ogunbambi v. Abowaba* 13 WACA 222, that in a civil trial such as this, the law is that the plaintiff must succeed or fail on the strength of his own case and not on the weakness of the case for the defence. G H

It was further contended on appellants’ behalf that the respondents did not discharge the burden on them to prove every allegation made in the case, while the court below made no finding of fact thereon. Had the court done so, it was maintained, the judgment would have been different. For instance, it was further argued, the following facts were never proved by evidence viz:

Firstly, on patrilineage, after our attention was drawn to some pages

in the judgment being attacked, it was submitted, inter alia, that there were no facts pleaded at all in the statement of claim at the High Court which alleged that selection to the chieftaincy of Kumbo is made patrilineal vide pages (IX) to (XII) of the records. The respondents, it was argued, only mentioned it as one of the prayers sought in the reliefs at page (XII), No.3. In the same way, it was maintained, the learned Justices of the Court below in NO.3 of the orders made at page 71, simply said: "that ascendancy to the throne of Kumbo is based on the patrilineage of the two ruling clans of Imba-Nabu and Imba-Nawha." No witness on either side, it was further contended, gave evidence to this effect. It was therefore wrong of the court below to have made an order that the ascendancy to the throne of Kumbo is patrilineal. It was also pointed out that it is trite that any evidence led and not supported by the pleadings goes to no issue vide *George & Sons v. Dominion Flour Mills Ltd.* (1963) 1 SCNLR 117; (1963) 1 All NLR 71 at 77 and 78; *A.C.B. Ltd. v. A.G. of Northern Nigeria* (1967) NMLR 231 and *Orizu v. Anyaegbunam* (1978) 5 SC 21 at 23. It was also maintained that as no facts were pleaded to support patrilineal succession as qualification for selection, the reliance placed on it by the court below is wrong as going to no issue, adding that this court should so hold. We were there after referred to the evidence of PW5 where that witness said inter alia:

"I know Hamidu Musa (1st defendant). He is one of the princes and he is descendant of Unwhemika and is from Imba-Nabu ruling clan and he was one of the contestants."

Other pieces of evidence to show that the 1st appellant was qualified to contest, we were told, can be seen in the testimony of 1st plaintiff who as PW 1 said under cross-examination "*Cross-examined by Aji: I know the 1st defendant. He is one of the Princes of Kumbo. He is eligible to (sic) chieftaincy of Kumbo.*"

From the testimony of the above witness, it was further maintained, it is clear that the 1st appellant is quite eligible to contest for the stool; that there was a contest and he succeeded; that the respondents' case was rightly dismissed by the trial court while the court below was wrong to set it aside.

Secondly, it was contended, that the court below was right when it held that there was no consensus as to which of the contestants should be selected as Chief. After being referred to some passages in the records, it was argued that even though the court below held inter alia that;

"But from the evidence led there is every reason to believe there was no consensus as to which of the contestants should be selected as Chief."

It was quite clear that there was a contest to the stool of Kumbo, and there was a consensus as to the selection of the 1st appellant. Emphasis was placed on the evidence of PW5 earlier adverted to, especially under cross-

examination which confirmed the view that 1st appellant was presented by the 2nd appellant to the 3rd appellant. It was added that since 1st appellant took part in the contest and was presented by 2nd appellant to the 3rd appellant who is the Gara of Donga, then the process of crowning a chief had been duly carried out customarily. It was further submitted that the Gara of Donga as chief, was paid by the Local Government and hence is a public servant to whom the principle of regularity applied in relation to acts undertaken by him in his official capacity. Afortiori, the turbaning of the 1st appellant is regular. The Gara of Donga, it was further contended, cannot be sued since he is an agent of the Wukari Local Government and he acted as such. Therefore, failure to join the Wukari Local Government is itself fatal to the case of the respondents.

Thirdly, is the issue of whether the Justices of the court below were right when they held that the learned trial Judge was wrong in applying section 148 (now section 149) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990 with respect to the failure of the respondents to call the remaining three kingmakers to give evidence as to whether the selection of the 1st appellant as the Chief of Kumbo actually took place. Our attention was then drawn to the main complaint of the respondents at the trial court which was that the 4 kingmakers did not select the 1st appellant as the Chief and that the 2nd appellant single-handedly chose the 1st appellant as the new Chief of Kumbo.

The learned trial Judge, it was argued, had been told in evidence that the delay for many months to select a chief was due to the refusal of one Sule Ake, one of the alleged kingmakers, to attend the meetings called to select the new Chief of Kumbo. It was further shown how during the trial, the other respondents did not call the three kingmakers who had been attending the meetings to select the Chief. Instead, they chose to call the absentee kingmaker - Sule Ake and the Chairman as their witnesses. The respondents, it was further stated, did not hide the truth that the three kingmakers had selected the 1st appellant and recommended him to the 2nd appellant but rather proceeded to allege that the 2nd appellant single-handedly chose the 1st appellant which was not true. It was therefore maintained that in appraising the case for the respondents, the learned trial Chief Judge rightly felt that there must be strong reasons why the respondents failed to call the three kingmakers who had attended the meetings for the selection and thus created a deadlock, pleading the learned Chief Judge to apply section 148(d) of the Evidence Act. It was added that the respondents were definitely afraid to call the three out of the four kingmakers to support their case because they knew that their evidence would be against them. It is important, it was further argued, that since

the case of the respondents at the High Court was not proper but against their Native law and custom, one must feel that the burden on the respondents clearly was to call the 4 kingmakers to testify on this crucial issue. Also, that the learned Chief Judge felt that calling only one of the 4 kingmakers was not enough, thus he was right to apply Section 148(d) (now section 149(d) of the Evidence Act (ibid). It was finally contended that the court below was wrong in law and on the facts to reverse the judgment on this ground, it being trite that the Appeal Court will be very reluctant to disturb the findings of fact by the trial court unless they were found to be grossly wrong.

Fourthly, it was argued, was the use of the word patrilineal as appeared in the Statement of Claim at page (XII) in Relief No.3 regarding which the respondents demonstrated vaguely that the 1st appellant is the son of the 2nd appellant's sister without offering any evidence through any of the witnesses called on the point. At least, it was argued, the respondents ought to have called the sister in question or someone else who had knowledge of the fact but since that fact was not proved by strict evidence, it was unreasonable for the court below in its judgment to have held that the 1st appellant is the son of the 2nd appellant's sister. As the fact was not pleaded, and no evidence was led to prove the assertion, it was unreasonable and clearly wrong for the court below to so hold. Any fact not pleaded, it was argued, goes to no issue at the trial. The cases of *George v. Dominion Flour Mills Ltd.* (supra); and *A.C.B. v. A-G of Northern Nigeria* (supra) were cited to buttress the contention, adding that:

- (a) No expert evidence in keeping with section 61 of the Evidence Law was called to establish patrilineal selection of candidates.
- (b) The 1st appellant is a Prince from the ruling house of Kumbo. It will therefore be unreasonable for the court below to hold as she did that selection of the 1st appellant was not proper.

It is pertinent firstly to point out that the 3rd appellant and DW 3 are not one and the same person. Far from it. That the two persons are different and so bear different names can be seen at pages (iv) and 20 of the records. At page (iv) (supra), the 3rd appellant is known and called Alhaji Danjuma Garshina for short while at page 20, thereof, DW 3 gave his name as Joel Garzama Shimbure. It is therefore wrong and indeed misconceived to regard the two personalities as the same person or that the 3rd defendant gave evidence, which was not considered or evaluated by the court below. The court below was unquestionably right and indeed justified, in my opinion, to have allowed the respondents' appeal based on the evidence on the records and the proper inference that ought to be drawn from the facts found at the trial. Besides, most of the evidence of DW3 was not pleaded and is at variance with

appellants' pleading.

Now, the main issue in contention at the trial was whether the procedure for the selection and appointment of the 1st appellant as Chief of Kumbo was in accordance with the Native Law and Custom of Kumbo which placed the burden of such selection on the traditional kingmakers. True it is that PW 1, PW 2, PW 3, PW 4 and PW 5 each testified about the procedure for the selection of the Chief of Kumbo and all were agreed that this procedure was not followed in the selection of 1st appellant.

Making a sampling of what the plaintiffs witnesses' evidence is all about, the testimony of PW 3 is illuminating on the subject matter in this regard. Said he among other things when examined in chief:-

"My name is Fifgo Indarake Ikimisore.....I have inherited something from my grandfather. I inherited the chairmanship of kingmakers at Kumbo from my father and grandfather.

My duties as Chairman are that we receive and consider the candidates and indicate our respective choices. If three kingmakers choose the same candidate then our decision will be on that one. If there is a tie then I as Chairman I consider the best among them and declare him elected. It does not happen that one candidate having only one kingmaker selecting him up to four places.

After the selection I take the chosen candidate to the mountain. There is a room on the mountain. We keep the candidate in that room and I send for Uhwesi and Agbon Adi who will perform the rites. Ijesoambi is the name of the mountain. Uhwesi will then bless the chief-elect by putting his hand on his head, while the latter is sitting on a stone also called Ijesoambi. Then I bring the Chief elect to his home along with other people. There will then be celebration for 7 days. After 7 days I take him to the Chief of Dong a who will turban."

After listing the ten Chiefs of Kumbo to date including the immediate past incumbent, Zorto Usyi, from whom ruling clans each came and how he took part as kingmaker in the selection of the 9th and 10th chiefs of Chairman, G he continued his evidence-in-chief thus:

"I know the two plaintiffs in this case. They are from Kumbo. 2nd plaintiff was a contestant and he was from Imba-Nabu. The 1st plaintiff is also a Prince and a contestant and he is from Imba-Nawha, he is the grandson of Tivoabin.

I know the 1st defendant. He is from Imba-Nabu and is one of the contestants. I know the 2nd defendant. He is our Chief Priest at Kumbo, and any time a new Chief is selected he has to perform rites according to the customs and traditions of Kumbo.

I know the 3rd defendant. Anytime a new Chief is selected he will turban that Chief.

On the death of Zorto there was no selection for another Chief of Kumbo. According to the customs and tradition, it is when the five of us kingmakers meet that we can choose a chief. I called all the kingmakers for B meeting four times but Sule, the 4th kingmaker failed to turn up on each occasion.

We were summoned to Donga 3 times but I and my kingmakers explained to the Gara of Donga how a chief is selected in Kumbo according to our tradition and customs. Thereupon Uhwesi presented 1st defendant to C the Gara to become the Chief of Kumho. I as the Chairman and my kingmakers and other people made a protest.” (Italics is mine for emphasis).

Subjected to cross-examination PW 3 volunteered the following answers among others:-

“Cross-examination by Adi: There is no Chief in Kumbo. As all of us D kingmakers did not meet, a Chief could not be selected. I have been calling for meetings but Sule has not been coming.”

The last answer the witness proffered under cross-examination was:

“Since Zoro died Yerima (meaning 1st respondent) has been maintaining the village - Kumbo.” (Parenthesis are mine).

E However, in their paragraph 8(b) of the Statement of Defence the appellants averred inter alia as follows:-

“(b) The defendants put the correct and comprehensive list of kingmakers of Kumbo as follows and not as stated in the Statement of Claim paragraph 11.

- F
- 1. Abon Naka Ward*
 - 2. Kendu from Imbandi Ward*
 - 3. Yerima from Imbana Ward*
 - 4. Sule Ake from Imbana Ward*
 - 5. Gage from Immawhesi Ward*
- G
- 6. Uhwesi the 2nd defendant as Chairman.”*

But in their testimony through DW 2, Shikaro, the title holder of Uhwesi of Kumbo, DW3 (Joel Garzama Shimbure), DW 4 (Sule Jiboiwhen) and DW 5 (Bako Ahmadu) each denied the existence of kingmakers in Kumbo. While 1st appellant testifying as DW 1 gave evidence as to the existence of four instead H of five kingmakers in Kumbo, the four names he enumerated differed from those pleaded in paragraph 11 of the Statement of Claim. For, while in paragraph II of the Statement of Claim (ibid) the appellants pleaded thus:

“The four kingmakers of Kumbo are from the ruling clans of Imba-Nabu and Imba-Nawha of Kumbo and are presently: Mainguwa Kunama,

Ali Ikezenden, Dan Azumi Madaki and Sule Ake”

In his testimony before the trial court DW1 said inter alia:

“I became village Head on 12th October, 1985. There is a council of kingmakers in Kumbo for the appointment of Kumbo village Head. The members are Ukweshi of Kumbo, Abon Naka, Audi Figya (who is messenger of Ukweshi who used to deliver their messages), Audi “

It is therefore abundantly clear from the printed record that the appellants’ witnesses gave evidence which was not only conflicting but was at variance with their pleadings. The evidence of the respondents’ witnesses, on the other hand, was not seriously challenged by the appellants nor did they plead any procedure different from that of the respondents. It is trite law that where a plaintiff adduces oral evidence which establishes his claim against the defendant in terms of the writ and the evidence is not rebutted by the defendant, the plaintiff is entitled to judgment. See: *Nwabuoku v. Ottih* (1961) 2 SCNLR 232; (1961) 1 All NLR 487 and *Agoma v. Guinness (Nig) Ltd.* (1995) 2 NWLR (Pt.380) 672. **The Respondents having established by a preponderance of evidence that 1st appellant was not selected by the traditional kingmakers in Kumbo and that the procedure and Native law and custom of Kumbo in relation to the selection of a chief was not followed, the respondents were entitled to judgment as found in their favour by the court below. The court below was accordingly, in my opinion, justified in its judgment in allowing the appeal because an appellate court will be free to draw its own inference from the facts as found at the trial if the question relates to the proper inference that ought to be drawn from those facts, moreso when it is of the opinion that the trial court did not take proper advantage of its having seen and heard the witnesses.** See: *Fatoyinbo v. Williams* (1956) SCNLR 274; *Lipede v. Sonekan* (1995) 1 NWLR (Pt.374) 668 and *Akese v. Ababio* (1935) 2 WACA 264. The court below was further justified, in my view, when upsetting the decision of the trial court it said, inter alia, that:-

“But from the evidence let (sic) there is every reason to believe, there was no consensus as to which of the contestants should be selected as the Chief. However, the case of the appellant (sic) at the trial in a nutshell was that the selection of the 1st respondent was not conducted in accordance with the Native Laws and Custom of Kumbo people, as it was single-handedly done by the 2nd respondent, whose duty was only to perform spiritual rights (sic) and because the 1st respondent was his sister’s son.”

Whereas demonstrated in the instant case the trial court fails to properly evaluate the evidence adduced at the trial(SeeMogajiv.Odofin(1978)4SC 91 as required by lawan appellate court will overrule the decisionof the trial courtThis court will however decline to disturb the decision of the Court

below in the instant case, as same is supported by the evidence on the printed record. It is also trite law that an appellate court will not disturb the conclusion of a trial court which is supported by evidence, even of the slightest degree, if the only reason for so disturbing it is because it would have, on the same facts come to a different conclusion. See: *Ogundulu B v. Phillips & Ors.* (1973) 1 NMLR 267.

With further reference to patrilineage ascendancy to the throne which was argued as not having been proved, a fact not conceded by the respondents, that fact in my view, does not derogate from the findings and holding of the court below that the procedure for the selection of the Chief of Kumbo was not followed in the selection of the 1st appellant. Non-proof of patrilineage, in my opinion, does not defeat all the other reliefs found in the respondents' favour by the court below.

In relation to the finding by the trial court concerning the number of witnesses and the application of the provisions of section 148(d) (now section 149(d) of the Evidence Act, Cap. 112 Laws of the Federation, 1990) I agree with the court below that the view taken by the trial court thereof is misconceived. Said the court below on the matter:-

"The only duty of a court is to determine whether on the totality of the evidence before it, the plaintiff has proved his case. In arriving at the conclusion, the court should not be carried away by the number of witnesses called by any of the parties or any other consideration but should be guided by the quality and probative value of the evidence of the witnesses called. The learned trial Chief Judge was therefore wrong in applying the provisions of Section 148 of the Evidence Act to the circumstances of the case."

See: *Mogaji v. Odofin* (supra)

In so far as the appellants' grouse here relates to the withholding of witnesses and not the withholding of evidence which ought to be produced but was not vide section 149(d) of the Evidence Act, their complaint by reliance on this section which is inapplicable, is in my humble view, misconceived. See: *Ogobodu v. The State* (1986) 5 NWLR (Pt. 41) 294 and *Tewogbade v. Akande* (1968) NMLR 404 at 408. This is the moreso that the respondent called PW3, the Chairman of the kingmakers, who confirmed that the 1st appellant was not selected by the traditional kingmakers. The argument that the five kingmakers must be called by respondents in order to succeed has no legal backing, not least the provisions of Section 178 (now 179) of the Evidence Act. The trial court has no power to force a party to give the particulars and the extent of the evidence which he proposes to call in the exercise of his right to decide whether to adduce evidence in support of his pleadings or not. See: *Mobil Oil Nig. Ltd. v. Federal Board of Inland Revenue* (1977) 3 SC 1 at 15.

The appellants have also submitted that the principle of regularity applies to the Gara of Donga who as an employee of the Local Government should be regarded as a public servant and that he should have been made a party to the suit giving rise to this appeal. I agree with the learned counsel for the respondents that this submission too is misconceived. Nothing on the record suggests that the Gara of Donga is an agent of the Wukari Local Government or that he is a paid servant of that Local Government. Thus, the non-joinder of the Wukari Local Government is, in my view, not fatal to the respondents' case. Issues of facts raised at the trial having been thoroughly thrashed out and taken care of in respect of the selection of the 1st appellant as the Chief of Kumbo regarding which the court below arrived at the conclusion that it was not in accordance with the procedure known to Native Law, custom and tradition of Kumbo, the principle of regularity stands rebutted and cannot now, late in the day, be raised in this court for the first time. See: Akpene v. Barclays Bank of Nigeria Ltd. (1977) 1 SC 47 in which Obaseki, J.S.C. said at page 47 of the Report:

"The general rule adopted in this Court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court (Shonekan v. Smith (1964) All N.L.R. 168, 173) but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which would affect the decision of them, the Court will allow the question to be raised and the points taken (Shonekan v. Smith (supra); Stool of Abinabina v. Chief Kojo Enyimadu (1953) AC 205 at 215) and this prevent an obvious miscarriage of justice."

See: also Fadiora v. Gbadebo (1978) 3 SC 219 at 247; Skenconsult Ltd. v. Secondy Ukey (1981) 1 SC 6 at 18; Enang v. Adu (1981) 11-12 SC 25 and Kukoyi v. Ladunni (1978) 11 SC 245 at 258. While the court below in the instant case confirmed the facts as found by the trial court thus making the two decisions concurrent, it overruled the trial court because the learned trial Chief Judge failed to draw the proper inference that ought to be made from the facts found; furthermore, he failed to properly evaluate the evidence adduced before him as required of him by law in wrongly applying section 148(d) (now section 149(d) of the Evidence Act, Cap. 112 Laws of the Federation 1990.

The appellants having failed to discharge the burden on them to show that the correct procedure for the selection of the 1st appellant as Chief had been followed, the court below was right to interfere with the findings of fact arrived thereat. This is irrespective of the fact that it is settled law that the decision of a court of trial on the facts is presumed to be correct and the presumption must be rebutted by the party seeking to set aside the judgment. See: Folorunso v. Adeyemi (1975) 1 NMLR 128; Osho v. Foreign Finance

Corporation (1991) 4 NWLR (Pt. 184) 157 and William v. Johnson (1937) 2 WACA 253. The mere use of the expression “I know Hamidu Musa (1st defendant). He is one of the Princes and he is the descendant of Uhwhemika and he is from Inba-Nabu ruling clan and he was one of the contestants” as proffered in evidence by PW 5, Kefas Ganta Yerima Kumbo, and canvassed in the appellants’ brief of argument, does not mean that the correct procedure for the selection of the Chief of Kumbo had been followed. Indeed, he was the hand-picked candidate of his uncle, the 2nd appellant in utter disregard of Kumbo native law, custom and tradition.

In conclusion, I am of the firm view that the court below properly used its powers under section 16 of the Court of Appeal Act, 1976 (now cap. 75, Laws of the Federation, 1990) and justifiably allowed the appeal.

In the result, all three issues having from the foregoing been answered in the affirmative, they are each resolved against the appellant. The appeal fails as lacking in merit and I accordingly dismiss it with N1,000.00 costs to the respondents .

UWAIS CJN

I have had the privilege of reading in draft the judgment read by my learned brother Onu, J.S.C. I entirely agree that this appeal lacks merit and that it should be dismissed.

I accordingly hereby dismiss the appeal with N1,000.00 costs to the respondents.

WALI JSC

I have read before now the lead judgment of my learned brother Onu, J.S.C. and I agree with his reasoning and conclusion for dismissing the appeal on the issues canvassed and considered.

It is a misdirection on the part of the learned trial Chief Judge to speculate and conclude thus on the evidence adduced.

“Now supposing the evidence regarding the kingmakers as adduced by the plaintiffs is accepted and the selection of the 1st defendant as the Chief of Kumbo is nullified and a fresh selection is ordered as prayed, how are we to be sure that all the kingmakers including Sule Ako will be present for the fresh selection? No evidence in that regard has been proffered, and it is a fundamental principle that a Court of law should not make an order in vain.

Furthermore, this Court should not be seen to lend its support to a situation whereby the public affairs of a whole community can be brought to

a standstill at the Whims and caprices of a single person. PW 4, Dan-azumi Madaki who is one of the four kingmakers has told the Court in his evidence that “when Zorto had passed away the three kingmakers and the Chairman met but Sule Ake had not attended any of several meetings held.” He was saying this to explain how they failed to select a new chief of Kumbo.”

If the learned Chief Judge had painstakingly and properly considered and evaluated the evidence adduced he would have undoubtedly arrived at the conclusion that the plaintiffs by their evidence proved that the selection and appointment of the 1st defendant as the Chief of Kumbo was done in violation of Kumbo Native Law and Custom, Tradition and procedure. B

Where a plaintiff proffered oral evidence that establishes his case as pleaded, and which is not rebutted or faulted by the defendant, the court will give judgment in his favour. See: Nwabuoku v. Ottih (1961) 2 SCNLR 232; (1961) All NLR 487. C

A careful perusal of the defendant’s evidence as contained in the printed record shows that such evidence is not only conflicting but is in some material part contrary to their pleadings. Such evidence has no value and credibility. In their pleading the defendants pleaded 6 kingmakers, but in the oral evidence given by DW 2, DW 3, DW 4 and DW 5, the existence of kingmakers was denied. It was only 1st defendant that mentioned the names of 4 kingmakers two of which differed from the names of those pleaded. D

It is my view and which I hold that the Court of Appeal was right in considering and re-evaluating the evidence adduced and drawing its own conclusions on the same, when the learned trial Chief Judge had failed to do so. See: Odojin & Ors. v. Mogaji & Or’s. (1978) 4 SC 91 and Obeng Akesse (Odauhene of Otwereso) v. Odakito Takie Ababio 2 WACA 264. E

The learned trial Chief Judge has no duty to speculate that if a fresh selection is ordered it is not certain that all the kingmakers including Sule Ake will be in attendance. This is certainly not a valid reason for him to sustain the appointment of the 1st defendant which was conducted and made in violation of the applicable customary law, tradition and procedure of Kumbo chieftaincy. F G

It is for this and the fuller reasons contained in the lead judgment of my learned brother Onu, J.S.C. that I also hereby dismiss the appeal with N1,000.00 costs to the plaintiffs.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Onu, J.S.C. I agree with him that the appeal lacks merit and ought to be dismissed. The Court of Appeal was right when in setting aside the judgment of H

the trial High Court, it said in part thus:-

“The contention in the present case was that the procedure for the selection and appointment of the 1st respondent had not been properly followed. Both PW 1 and PW 2 gave evidence of the procedure, which evidence was almost on all four?? with that of PW 3, PW 4 and PW 5. The B respondents, apart from giving a list of their kingmakers, which some of their witnesses said did not exist, did not seriously challenge the evidence called by the appellants. They did not even say what the procedure was, except that they argued that the 1st respondent was properly selected. One is bound to conclude from the facts on the printed record of evidence that the C selection and appointment of the 1st respondent was not properly conducted in accordance with the native law and custom of the Kumbo people as alleged by the appellants. There is therefore considerable force in the argument of the learned counsel for the appellants that the learned trial Chief Judge was seriously in error when he failed to properly evaluate the evidence adduced before him as required by law. See: Mogaji v. Odojin (supra). D

I therefore agree with the submission that the learned trial Chief Judge was wrong in dismissing the appellants’ claims.

I also agree that the trial High Court was wrong in dismissing plaintiffs/appellants’ claims and that the Court of Appeal was right in granting E plaintiffs claims.

The appeal therefore fails and it is dismissed with costs of One thousand (N1,000.00) Naira in favour of the plaintiffs/respondents.

F **OGUNDARE.JSC**

I agree with my learned brother Onu, J.S.C. that this appeal is totally lacking in merit.

The plaintiffs and the 1st defendant are members respectively of the Imba-Nabu and Imba-Nawha ruling clans of Kumbo in the Takum Local Government area of Gongola State. They both contested for the office of the Chief Kumbo left vacant by the death of the former holder Mallam Zorto. By the custom of Kumbo both ruling clans, on the office of Chief of Kumbo becoming vacant, would send names of candidates to fill the vacancy to the kingmakers who, in turn, would meet to select one of the candidates as the Chief of H Kumbo. On the selection being made, the kingmakers, who are 4 in number, would hand the selected candidate to the Ikimimore, who is the Chairman and Head of the other 4 kingmakers. The Ikimimore would then present the Chief-elect to the Uhwesi of Kumbo for necessary traditional rites to be performed. The 2nd defendant Shikare Ukimore, was at all times material to this appeal,

the Uhwesi of Kumbo. After traditional rites had been performed, the new Chief was presented to the Gara of Donga for turbaning.

It is plaintiffs' contention that this procedure was not followed in this case. It is their case that they and the defendants were nominated for selection by the ruling clans but without the kingmakers' meeting to select a candidate. The Uhwesi (that is 2nd defendant) presented the 1st defendant to the Gara of Donga (3rd defendant) who turbaned the 1st defendant as the Chief of Kumbo. They instituted the action leading to this appeal claiming against the 3 defendants, as per paragraph 24 of this Statement of Claim, as hereunder:

"1. A declaration that the selection and appointment of the 1st defendant as the Chief of Kumbo is null and void.

2. A declaration that the said selection and appointment of the 1st defendant as the Chief of Kumbo was made in breach of the Kumbo Native Laws and Custom, tradition and procedure of appointment and/or selection of the new Chief of Kumbo.

3. A declaration that ascendancy to the throne of Kumbo is based on patrilineage of the two ruling clans of Imba-Nabu and Imba-Nawha of Kumbo.

4. A declaration that the 2nd defendant as the Uhwesi of Kumbo Ritual priest - has no traditional power to select the 1st defendant as Chief of Kumbo and that his selection of the 1st defendant as the Chief of Kumbo is null and void and of no effect.

5. An injunction restraining the 2nd and 3rd defendants, their agents and/or privies from permitting, ordering and/or instructing the 1st defendant to perform the functions and/or act as the Chief of Kumbo.

6. A declaration that the purported installation of the 1st defendant as the Chief of Kumbo on 27th December, 1985 was contrary to the Native Laws and Custom and Tradition of Kumbo and therefore null and void.

7. An injunction restraining the 1st defendant from parading himself as the Chief of Kumbo and/or performing the functions of the Chief of Kumbo.

8. An order of the court directing the conducting of fresh selection of the Chief of Kumbo by the traditional kingmakers of Kumbo in accordance with the Kumbo Native Laws and Custom."

Pleadings having been filed and exchanged, the action proceeded to trial at which 5 witnesses testified in support of plaintiffs' case and an equal number of witnesses in support of the defence. At the conclusion of trial and after addresses by learned counsel for the parties, the learned trial Chief Judge (Buba Ardo, CJ) in a reserved judgment, found that the plaintiffs failed "to

satisfy me to do anything to interfere with the appointment of DW 1 as the Chief of Kumbo and their action is hereby dismissed in its entirety.”

The plaintiffs appealed against this judgment to the Court of Appeal (Kaduna Division). That court, in a unanimous decision, allowed the appeal, set aside the judgment of the trial Chief Judge and entered judgment for the B plaintiffs in terms of their claims.

Being dissatisfied, the defendants have now appealed to this court upon 4 grounds of appeal and in their brief of argument filed pursuant to the rules of this court set out the following 4 questions as calling for determination, viz:

C 1(a) *“Whether the Justices of the Court of Appeal were right when they held that the third respondent did not give evidence.*

2. Whether the Court of Appeal made any finding with regards to the burden of proof on the plaintiff.

3. Whether the Court of Appeal rightly held that there was no con-
D *sensus at to which of the contestants should be selected as Chief.*

4. Whether the Court of Appeal was right by holding that the High Court Judge was wrong by applying section 148(d) of the evidence law in his judgment.

5. Whether the judgment of the Court of Appeal was unreasonable,
E *unwarranted and cannot be supported having regard to the weight of evidence before it.”*

The plaintiffs (who are respondents in this appeal) in their own brief, frame the following 3 questions:

1. “Was the Court of Appeal right in law to have allowed the appeal
F *based on the evidence on the record and the proper inference that ought to be drawn from the facts found at the trial.*

2. Whether the Court of Appeal was right in holding that the High Court Judge was wrong in applying the provisions of section 148 of the Evidence Act to the circumstances of the case.

G *3. Whether the judgment of the Court of Appeal was not backed by the weight of evidence before it.”*

Going by the judgment appealed against, the grounds of appeal and the questions as framed in the two briefs, the resolution of this appeal revolves around 3 issues, that is to say:

H 1. Did 3rd defendant give evidence?
2. Is section 148(d) (now section 149(d), of the Evidence Act applicable?

3. Is the judgment of the Court of Appeal supported by the evidence?

I shall deal with this appeal on the questions as framed by me.

Question 1

The court below in the lead judgment of Maidama, J.C.A. observed:

“In the course of the hearing, both parties gave evidence and called their witnesses except that the 3rd respondent did not give evidence at all.”
(Italics is mine)

It is contended by the defendants in this appeal that the Court below misdirected itself on the observation that the 3rd respondent (that is, 3rd defendant) did not give evidence. They say that the 3rd defendant testified as DW 3.

I find no substance in defendants’ complaint. I have myself gone through the record of appeal. DW 3 was one Joel Garzama Shimbure, a member of both the Donga Traditional Council and Wukari Traditional Council. The 3rd defendant in this case is Alhaji Danjuma Garshina Garbasa II, the Gara of Donga. Surely, he could not have been one and the same person as DW 3, Joel Garzama Shimbure. The evidence of DW 3 showed that he was not the Gara of Donga.

Question 2:

The learned trial Chief Judge had remarked in his judgment thus:-

“Thirdly, one kingmaker and the Chairman of the kingmakers’ panel only gave evidence for the plaintiffs. Nothing is said about the three remaining kingmakers or, particularly, why they have not been called for the plaintiffs so as to complete the picture more convincingly as far as the five members panel of kingmakers are concerned having regard to the controversy from the defence regarding the panel’s existence. Not calling the three missing kingmakers to give evidence, and not saying anything to explain their absence leave me completely at a loss and in doubt about the veracity of the whole story of the panel of kingmakers. In these circumstances I am at once reminded of the provisions of section 148(d) of the Evidence Act that” the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

It was the view of the learned Chief Judge that the plaintiffs having failed to call the remaining three kingmakers after calling the Chairman of the body of kingmakers and another member of that body, to testify in their favour the presumption in section 148(d) of the Evidence Act (now section 149(d)) would apply against the plaintiffs. Section 149 provides:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume:

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(c) that the common course of business has been followed in particular cases;

(d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;”

C Commenting on the view of the learned trial Chief Judge, the court below, per Maidama, J.C.A. observed:

“With respect to the failure of the appellants to call the remaining kingmakers as found by the learned trial Chief Judge, it must first of all be remembered that it is the right of a party to decide whether to adduce evidence in support of his pleadings or not. The Court has no power to force him to give the particulars of the nature and the extent of the evidence which he proposes to call in the exercise of that right. See: *Mobil Oil Nig. Ltd. v. Federal Board of Inland Revenue* (1977) 3 SC 1 at 15

The only duty of a court is to determine whether on the totality of the evidence before it, the plaintiff has proved his case. In arriving at the conclusion, the court should not be carried away by the number of witnesses called by any of the parties or any/other consideration, but should be guided by the quantity and probative value of the evidence of the witnesses called. The learned trial Chief Judge was therefore wrong in applying the provisions of section 148 of the Evidence Act to his circumstances of the case.”

I have considered the submissions made in the defendants’ brief on this issue. Regrettably, I find no substance in them. The court below was right in holding that section 148(d) (Now 149(d) was wrongly applied by the learned trial Chief Judge to the facts of the case before him. Subsection (d) of section 148(now 149) of the Evidence Act deals with the non-production of evidence and not non production of witness(es) See: *Bello v. Kassim* (1969) NMLR 148 at 152; (1969) NSCC 228 at 233 where this Court, per Coker, Ag. C.J.N. (as he then was) after quoting section 148(d) declared:

“It is clear that the section deals with the failure to call evidence and not the failure to call a particular witness.”

See also: *Tewogbade v. Akande* (1968) NMLR 404, 408 where the former Western State ‘Court of Appeal, per Eso, J.A. (as he then was) observed:

“The position therefore is this, in a civil case, the burden of proof

lies on the person who would fail, assuming no evidence had been adduced on either side. Further, in respect of particular facts, the burden rests on the party against whom judgment would be given if no evidence were produced in respect of those facts. Once that party produces the evidence that would satisfy a jury then the burden shifts on the party against whom judgment would have been given if no more evidence were adduced. However, the court is to presume, without any proof that evidence which could be produced by a person and is not produced by that person but withheld by him would go against that person who withholds such evidence. Thus the court must be satisfied:-

- (1) *That the evidence exists;*
- (2) *That it could be produced;*
- (3) *That it has not been produced; and*
- (4) *That it has been withheld by the person who could produce it.*

Before the court can get along with such presumptions in the instant case, there must be proof that such evidence which the learned trial Judge held to have existed has been withheld by the defendant. Merely not producing evidence would not necessarily amount to withholding such evidence. The two are not synonymous. The court would have to be satisfied however in each case whether the circumstance justifies a finding that the evidence has been withheld."

A party is not bound to call a particular witness if he can prove his case otherwise: See: *Alonge v. Inspector-General of Police* (1959) 4 FSC 203; (1959) SCNLR 516; *Francis Odili v. The State* (1977) 4 SC 1 at 9; *Bello v. Kassim* (supra).

There was evidence produced in this case that the kingmakers did not make a selection. This evidence was given by two of the kingmakers. I know of no rule of law or evidence which lays it down that all the kingmakers must testify on the same issue. I agree with the views of the court below expressed above and find no substance in defendants' complaint.

QUESTION 3:

After a perusal of the record and the reasons given by the Court below for finding for the plaintiffs and after considering the arguments advanced in the briefs before us, I have come to the conclusion that the court below was right in its approach to the case and that it arrived at the right decision on the facts proved in evidence at the trial court. I see no reason to disturb the findings of their Lordship of the court below. I affirm them.

In view of all I have said above, I too, like my learned brother Onu, J.S.C. dismiss this appeal and affirm the judgment of the court below. I abide by the order for costs made in the lead judgment of Onu, JSC Appeal dismissed.