

SUPREME COURT OF NIGERIA

12TH JUNE, 1998. SC. 274/1991

**CORAM:- S. M. A. BELGORE, A. B. WALI, M. E. OGUNDARE,
U. MOHAMMED, A. I. IGUH, JJSC**

CHARLES EJIKE & 4 ORS. PLAINTIFFS/APPELLANTS
(For themselves and on behalf of
"NDIOBA" NSUGBE)

AND

NWAKWESI IFEADI & 4 ORS. DEFENDANTS/RESPONDENTS
(For themselves and on behalf of
"NDIEZE" NSUGBE)

COURTS - Customary Courts - Jurisdiction - Transfer of a case from one customary court to another in the same judicial division - The latter customary court would have jurisdiction if the matter was properly transferred to it.

COURTS - Order of transfer - Power of the chief judge under s. 45 Customary Courts Edict 1978 - As the chief Judge had no power to order a transfer - The Order and proceedings following are null and void.

FACTS

The plaintiffs/appellants sometime in 1975 in the High Court of the former East Central State at the Onitsha Judicial Division took out a writ of summons claiming from the defendants/respondents inter alia; "a declaration that the 'Ndi Eze' Society of Nsugbe is untraditional, a violation of Nsugbe native law and custom, and a negation of the concept of Kingship" Pleadings were filed and exchanged. On 27th September, 1979, Obi Okoye. J (as he then was) issued an order under s. 46 (1) of the High Court Law, Cap 61 Laws of Eastern Nigeria transferring the action from the Onitsha High Court to the Awkuzu Customary Court for hearing and determination. The matter was still pending when based on the application of the president of the Customary Court Grade 1 Awkuzu,

Araka, C.J. in the exercise of the powers vested on him under s. 45(1) (b) of the Customary Courts Edict issued on Order transferring the suit from Customary Court Grade 1 Awkuzu to Customary Court Grade 1 Otuocha. Consequent upon this Order, the Otuocha Customary Court Grade 1 heard and determined the action. The plaintiffs case was dismissed.

An appeal was lodged at the High Court of Anambra State where they challenged the jurisdiction of the Otuocha Customary Court to adjudicate on the matter. The appeal was dismissed. They also appealed unsuccessfully to the Court of Appeal. They have now finally appealed to the Supreme Court raising four issues but the appeal was determined based on two issues.

ISSUES FOR DETERMINATION

"(1) Had the Otuocha Customary Court Grade 1 jurisdiction to hear and determine suit No. CCT/22/80, and if not, were the proceedings and judgment in the case not nullities and was the Court of Appeal right in confirming the judgment of the lower court in the case?"

(2) Did the Customary Courts (Repeal) Law (Amendment) Law 1981, Law No. 17 of 1981 and the Customary Courts (Repeal) Law (Amendment) Law 1982 - Law No. 11 of 1982 extend the life of the Otuocha Customary Court so as to validate 'the judgment delivered by that court 'on the 28th day of November, 1980?"

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

Customary courts - Jurisdiction

1. By section 13(4) (a) of the Customary Courts Law, 1977 of the old Anambra State which provides-

"(a) all civil causes and matters other than land causes and land matters shall be tried and determined by a Customary Court established for the Judicial Division within which the defendant was at the time the cause of action arose."

Otuocha Customary Court, being a customary court established under the Onitsha Judicial Division, would have jurisdiction if the matter was

properly transferred to it by the State Chief Judge. Section 12 of the Law deals with the jurisdiction of a customary court while section 13 deals with the venue where an action, civil or criminal, could be heard and determined. Ideally, the Awkuzu Customary Court, another customary court established for the judicial division would have been the more appropriate venue but for the reason that some members of that court, including its president, were interested parties in the action. The president of that court quite honourably, in my respectful view, applied to the Chief Judge for a "reassignment" of the case. In such circumstance, the Chief Judge would, in the exercise of the power conferred on him by section 45(1) of the Law, be in order to transfer the case to another customary court established for the Onitsha Judicial Division, such as Otuocha Customary Court is. (p. 1504 D)

Order of transfer - Power of the CJ

2. As the Chief judge under section 45 had no power to issue an order of transfer on the application of the President of a Customary Court, the order of transfer issued by Araka, CJ on 26th May 1980 is null and void. As this invalid order initiated the proceedings in the Otuocha Customary Court, the proceedings in the latter court are equally null and void. And I so pronounce. (p. 1507 G)

NOTABLE POINTS OF INTEREST

WALI JSC

1. Transfer in customary courts - Need to amend the law

Section 45 (1) (a) and (b) state how the transfer or re-assignment can be initiated. It must be at the request and instance of any of the parties to the proceedings or the Customary Courts Adviser. The transfer in the present case was initiated by a letter emanating from the president of Awkuzu Customary Court. As the power to transfer a case from one court to another is statutory, the provision of the enabling law must be followed. The learned trial chief judge had no inherent power to order the transfer other than by the way and manner provided in section 45 (1) of the Edict. In order to relax the rigidity of the above provision of the

law I am of the opinion that it should be amended to confer on a Customary Court power to request the Chief Judge to re-assign the cause or matter pending before it if for any reason it is of the opinion that end of Justice will be better served by such a transfer. (p. 1509 D)

B

IGUHJSC

2. Irregularity which renders proceedings manifestly incompetent may not be waived

C It was however rationalized by the Court of Appeal that there was only an irregularity in the transfer exercise and that the appellants, having submitted themselves to the jurisdiction of the Otuocha Customary Grade 1, thereby waived this irregularity thus conferring the said court with jurisdiction to hear and determine the suit. With the greatest respect, I
D find myself unable to accept the above rationalization of the court below as either sound or well founded. This is because an application by either a party to a cause or matter or the Customary Courts Adviser to the Hon. Chief Judge of the State or to the Administrative Judge in charge of a
E Judicial Division, as the case may be, for the transfer of a suit from one Customary Court to the other under section 45(1) of Edict No. 3 of 1978 spells out the fundamental conditions precedent for a valid exercise of the jurisdiction in question. Where such conditions precedent, expressly
F stipulated by law, were not complied with by the Hon. Chief Judge or by an Administrative Judge, it seems to me that an order of transfer made under such circumstance must be regarded as incompetent thereby affecting the jurisdiction of the court to which a suit was purportedly transferred. Whilst a simple irregularity in the course of proceedings that are
G competent and within the jurisdiction of a trial court may be waived by a party to a suit, an irregularity which renders proceedings manifestly incompetent, invalid, incurably defective and null and void, thereby affecting the jurisdiction of the court may not be waived. The simple reason
H for this is that acquiescence cannot confer jurisdiction. See Skenconsult (Nig). and Another v. Godwin Ukey (1981) 1 S.C.6 at 26. (p. 1513 F)

REPRESENTATION

J. U. Obiora for the Appellants

Respondents are absent and are not represented by counsel

CASES REFERRED TO

Ochonma v. Quagraine 13 WACA 184

Briggs v. Berambo 13 WACA 262

Madukolu v. Nkemdilim (1962) ANLR 581

Skenconsult (Nig). v. Ukey (1981) 1 S.C.6 at 26

Management Enterprises Ltd. v. Jonathan Otusanya (1987) 2 N.W.L.R. (part 55) 179

Obinonure v. Erinoshio (1966) 1 All N.L.R. 250

Timitimi v. Amabebe 14 W.A.C.A. 374

Mustapha v. Governor of Lagos State (1987) 5 S.C.N.J. 143

Tukur v. Government of Gongola State (1987) 4 N.W.L.R (part 117) 517at 545

STATUTES REFERRED TO

High Court Law Cap 61 Laws of Eastern Nigeria, s. 46 (1)

Customary Courts Edict (Edict No.3 of 1978) as amended ss. 41 (1); 45 (2); 47

Customary Courts Law, 1977, Anambra State s.13 (4) (a)

LEAD JUDGMENT BY OGUNDARE JSC

This case has had a chequered history. The action commenced in the High Court of the former East Central State of Nigeria in the Onitsha Judicial Division in 1975 when the plaintiffs (now Appellants) took out a writ of summons claiming from the Defendants (now Respondents)-

"1. A declaration that the 'Ndi Eze' Society of Nsugbe is untraditional, a violation of Nsugbe native law and custom, and a negation of the concept of Kingship.

2. An order restraining the said 'Ndi Eze Society from maintaining or parading themselves as the 'Eze' (King) of Nsugbe.

3. *An order restraining them from appointing or initiating people as Ndichie which is the prerogative right of the 'Eze' (king) of Nsugbe.*

4. *An injunction to restrain them, their servants and / or agents from using the known regalia of the 'Eze' (King) of Nsugbe, which are red cap, Nkponiru or Mpi-mgbada, and Okpu Ona (brass Cap), or adopting the names; 'Eze' 'Obi' and Igwe', which are nomenclatures reserved for the 'Eze' (the Obi or Igwe) of Nsugbe."*

Pleadings were filed and exchanged. On 27th September 1979, Obi-Okoye, J (as he then was) sitting in the Onitsha Judicial Division of the High Court of Anambra State issued an order under section 46(1) of the High Court Law, Cap 61 Laws of Eastern Nigeria transferring the action from the Onitsha High Court to the Awkuzu Customary court for hearing and determination.

The matter was still pending before the Awkuzu Customary Court when on 26th May 1980, Araka, CJ issued the following order of transfer:

IN THE HIGH COURT OF ANAMBRA STATE OF NIGERIA
IN THE MATTER OF THE CUSTOMARY COURTS EDICT NO. 3 OF 1978 (AS AMENDED BY EDICT NO.22 OF 1970).

IN THE MATTER OF SUIT NO. CCA/1/80 - Charles Ejike & 4 ors. v. Nwakwesi Ifeadi & 4 ors.

IN THE MATTER OF ASSIGNMENT ORDER UPON READING the letter from

President of customary court Grade 1 Awkuzu in respect of the above named suit; AND AFTER CONSIDERING THE POINTS Therein raised: AND IT BEING FOUND EXPEDIENT in the interest of justice that this case be heard and determined by another customary court Grade 1, I, EMMANUEL OSELOKA ARAKA ESQ., CHIEF JUDGE of Anambra state, in exercise of the powers vested in me under S. 45(1) (b) of the Customary Courts Edict (Edict No. 3 1987 as amended by Edict No. 22 of 1978), and all the other powers enabling me in that behalf, do hereby make the following:

ASSIGNMENT ORDER

THAT suit No. CCA/1/80 - Charles Ejike & 4 ors. v. Nwakwesi Ifeadi &

4 Ors. now pending at Customary Court Grade 1 Awkuzu be and is hereby transferred Customary Court Grade 1 Otuocha be heard and determined by that court. GIVEN under the hand and seal of the Hon. The Chief Judge of Anambra State this Monday, the 26th Day of May, 1980."

Consequent upon this order, the Otuocha Customary Court grade B I heard and determined the action. Plaintiff's case was dismissed. They appealed to the High Court of Anambra State where they challenged the jurisdiction of the Otuocha Customary Court to adjudicate on the matter. The appeal was dismissed. Their further appeal to the Court of Appeal C was equally dismissed. They have now finally appealed to this court upon six grounds of appeal. The plaintiffs, through their learned leading counsel, G.R.I. Egonu Esq., S.A.N., filed a written brief of argument on 24/2/92 in which they raised the following questions as calling for determination: D

"(1) Had the Otuocha Customary Court Grade 1 jurisdiction to hear and determine suit No. CCT/22/80, and if not, were the proceedings and judgment in the case not nullities and was the Court of Appeal right in confirming the judgment of the lower court in the case? E

(2) Did the Customary Courts (Repeal) Law (Amendment) Law 1981, Law No. 17 of 1981 and the Customary Courts (Repeal) Law (Amendment) Law 1982 - Law No. 11 of 1982 extend the life of the Otuocha Customary Court so as to validate 'the judgment delivered by F that court 'on the 28th day of November, 1980?

(3) Was the Court of Appeal right in introducing into the appeal before it the issues of submission by the plaintiffs / appellants to the jurisdiction of the Otuocha Customary Court Grade 1 and of waiver to any irregularity as to the order of transfer of the case made by the then chief Judge of the Anambra State of Nigeria and on relying on those G issues in coming to its decision?

(4) a. Was the Court of Appeal right to revert in its judgment to the question of the locus standi of the plaintiffs / appellants when in its earlier Ruling of the 22nd day of February, 1988, it refused the application of the defendants / respondents to raise the question by a respondents H Notice and when there was no appeal against the said Ruling?

(b) *Had the plaintiffs /appellants the locus standi to institute the action?*

(c) *If the plaintiffs /appellants had no locus standi to institute the action, was the Court of Appeal right in confirming the judgment of the lower court dismissing the plaintiffs /appellants' case instead of making an order striking out the said case ?"*

The Defendants did not file a respondent's Brief and pursuant to be Rules of this court the appeal was heard ex parte. Mr. Obiora appeared at the oral hearing on 16/3/98 and proffered oral submissions in expatiation of the arguments raised in the written brief of the plaintiffs.

Questions (1) and (2) are argued together in the brief. Mr. Obiora, in his oral submissions conceded it that the Chief Judge of Anambra State could transfer the case from Awkuzu Customary Court to Otuocha Customary Court . By so conceding, Mr. Obiora appeared to have conceded too that Otuocha Customary Court would have jurisdiction to entertain the action. I think Mr. Obiora is right. **By section 13(4) (a) of the Customary Courts Law, 1977 of the old Anambra State which provides-**

"(a) all civil causes and matters other than land causes and land matters shall be tried and determined by a Customary Court established for the Judicial Division within which the defendant was at the time the cause of action arose."

Otuocha Customary Court, being a customary court established under the Onitsha Judicial Division, would have jurisdiction if the matter was properly transferred to it by the State Chief Judge. Section 12 of the Law deals with the jurisdiction of a customary court while section 13 deals with the venue where an action, civil or criminal, could be heard and determined. Ideally, the Awkuzu Customary Court, another customary court established for the judicial division would have been the more appropriate venue but for the reason that some members of that court, including its president, were interested parties in the action. The president of that court quite honourably, in my respectful view, applied to the Chief Judge for a "reassignment" of the case. In such circumstance, the Chief

Judge would, in the exercise of the power conferred on him by section 45(1) of the Law, be in order to transfer the case to another customary court established for the Onitsha Judicial Division, such as Otuocho Customary Court is. This disposes of the first limb of the arguments in support of Questions (1) and (2). B

The second limb questions the validity of the order of transfer made by Araka, CJ on 26th May 1980. It is contended that as the order was not made on the application of the persons contemplated by section 45(1) but on the letter of the President of the Awkuzu Customary Court, the order is invalid and the proceedings before the Otuocho Customary Court are null and void. C

Section 45 (1) of the Law provides:

"On application by-

(a) any party to a cause or matter; or D

(b) the Customary Courts Adviser;

the Chief judge, in respect of causes or matters pending in any court within Anambra State, or the judge in charge of a judicial Division, in respect of causes or matters pending in a court within that judicial Division, may, at any time or at any stage of the proceedings before final judgment, by order stop the hearing of the cause or matter on such terms as the Chief judge or the judge, as the case may be, may consider just and upon such order being made may, in his discretion- E

(a) if the cause or matter appears to be within the jurisdiction of some other Customary Court, by the same or another order direct that the same be inquired of, tried or determined by such Customary Court as shall appear to have jurisdiction over the same; F

(b) direct in like manner that the same shall be inquired into, tried or determined by a Magistrate's Court; G

(c) if the same be a cause or matter which in his opinion ought for any reason to be transferred from a Customary Court to the High Court, by the same or another order direct that the same be transferred to the High Court;" H

It is clear on the fact of the order reproduced earlier by me in this judgment that it was made in consequence of a letter addressed to the Ho-

nourable Chief Judge of Anambra State by the President of Awkuzu Customary Court before which court the action was then pending for hearing and determination. That is, therefore, a defect patent on the face of the order.

B What is the effect of this defect? In Ochonma v. Quagraine, 13 WACA 184 where a District Officer transferred a case after judgment from a Native Court to the Supreme Court (High Court), it was held by the west African Court of Appeal that he had no power to do so and that the proceedings before the Supreme Court were a nullity. Also, in Chief C Young Briggs v. Berambo & Ords., 13 WACA 262 where an order of transfer to the Supreme Court (High Court) from a Native Court, by a District Officer was held invalid, the proceedings in the Supreme Court were held to be null and void. In Madukolu & Ords. v. Nkemdilim D (1962) ANLR 581, the Federal Supreme Court laid down the conditions to apply in determining the competence of a court to hear and determine a suit. For, unless a court is competent any adjudication would be a nullity. At pages 589-590 of the Report, Bairamian FJ (as the then was) E who read the majority decision of the Court, said:

".....a court is competent when-

(1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

F (2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction: and

G (3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication.

H If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to affect

the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial; in which case the appeal court may not think fit to set aside the judgment. A defect in procedure is not always fatal "

Turning now to the case on hand, if Otuocha Customary Court was incompetent it would be under condition (3) above, on the ground that the order of Araka, CJ which initiated the hearing in that court, was bad in law. The power of the Chief judge under section 45 (1) to transfer a case from a Customary Court is subject to the limitation that an application for that purpose must have first been made to him by any party to the matter or the Customary Courts Adviser. No such application was made by either to Araka, CJ before he exercised, in this case, the power under section 45 (1). Rather than the President, Awkuzu Customary Court making an application for reassignment to the Honourable Chief judge, he should have reported to the Customary Court Adviser who would, if he deemed it fit, apply for transfer under section 45. Section 47 provides for the situation in which the President and members of that court found themselves. It provides:

" 47. (1) *Subject to the provisions of this Edict, (a) Customary Court may, of its own motion or on application of any party to the cause or matter before it, report to the Customary Courts Adviser the pendency of a cause or matter civil or criminal which in the opinion of that court for any reason should be transferred from that court to another Customary Court, a Magistrate's Court or the High Court.*

(2) Upon receiving such a report, the Customary Courts Adviser, may if he deems it fit apply for transfer under section 45 of this Edict or may reject the request for transfer."

As the Chief judge under section 45 had no power to issue an order of transfer on the application of the President of a Customary Court, the order of transfer issued by Araka, CJ on 26th May 1980 is null and void. As this invalid order initiated the proceedings in the Otuocha Customary Court, the proceedings in the latter court are equally null and void. And I so pronounce.

In view of the conclusion I have just reached, it is inadvisable for me to consider the other issues canvassed in this appeal so as not to prejudice any new trial of the action in the appropriate court. Suffice it to say that this appeal succeeds and it is allowed by me. The order of transfer made by Araka CJ on 26th May 1980 as well as the proceedings initiated by it in the Otuocha Customary Court in suit No. CCT/22/80 in that court and the subsequent proceedings, on appeal, before the High Court of Anambra State, Onitsha Judicial Division and the Court of Appeal are all hereby set aside and declared null and void. The appellants are entitled to the costs of this appeal which I assess at N10,000.00 (ten thousand Naira). I make no order as to costs in the Courts below.

D

BELGORE

The law is clear as to what may prompt the Chief Judge to transfer a case from one Customary Court to another. Section 45 (1) of the Edict provides for request for transfer by any of the parties to the proceedings or a customary court adviser before Chief Judge could transfer. Any member of the customary court is not competent to request a transfer of a cause or matter and any transfer based on such request is null void. I therefore agree with Ogundare, J.S.C. that this appeal has merit and I allow it. The respondents will pay the appellants N10,000.00 as the costs of this appeal

G

WALI JSC

I have read before now the judgment of my learned brother Ogundare JSC and I agree with it that having regard to statutory provisions of the law under which the learned trial chief judge of Anambra State purported to have derived and exercised his power of transfer of case No. CCA/1/80 - Charles Ejike and 4 Ors. v. Nwakwesi Ifeadi and 4 Ors. from Grade 1 Awkuzu Customary Court to Customary Court Grade 1 Otuocha within the same Judicial Division, is null and void.

S. 41 (1) of the Customary Courts Edict Edict No. 3 of 1978 as

amended by Edict No.22 of (1972) provides as follows:-

"Section 45 (1) on the application by

(a) any party to the cause or matter; or

(b) the Customary Courts Adviser

The Chief Judge, in respect of causes or matters pending in any court within Anambra State, or the judge in charge of a judicial Division, in respect of causes or matters pending in a court within that Judicial Division, may at any time or at any stage of the proceedings before final judgment, by order stop the hearing of the cause or matter on such terms as the chief judge or the judge, as the case may be may consider just and upon such order being made may, in his discretion-

(a) if the cause or matter appears to be within the jurisdiction of some other Customary Court, by the same or another order direct that the same be inquired of, tried or determined be such Customary Court as shall appear to have jurisdiction over the same;"

Section 45 (1) (a) and (b) state how the transfer or re-assignment can be initiated. It must be at the request and instance of any of the parties to the proceedings or the Customary Courts Adviser. The transfer in the present case was initiated by a letter emanating from the president of Awkuzu Customary Court. As the power to transfer a case from one court to another is statutory, the provision of the enabling law must be followed. The learned trial chief judge had no inherent power to order the transfer other than by the way and manner provided in section 45 (1) of the Edict.

In order to relax the rigidity of the above provision of the law I am of the opinion that it should be amended to confer on a Customary Court power to request the Chief Judge to re-assign the cause or matter pending before it if for any reason it is of the opinion that end of Justice will be better served by such a transfer.

It is for this and the fuller reasons in the judgment of my learned brother Ogundare JSC that I also allow the appeal and abide by the consequential orders made therein by him, including that of cost

MOHAMMED JSC

I agree. The procedure for transferring a case from one customary court to another as was provided under sections 45 (1) and 47 (1) and (2) of Customary Courts Law, 1977 of the old Anambra State was not followed when Araka, C.J. transferred the case in hand from Customary Court Grade 1 Awkuzu to Customary Court Grade 1 Otuocha. The order of Araka C.J. being invalid has rendered the proceedings before all the lower courts in this matter null and void. I also declare such proceedings null and void and for the reasons given in the judgment of my learned brother, Ogundare J.S.C, I also allow this appeal. I abide by the order on costs made in the lead judgment.

D IGUH JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely with the reasoning and conclusion therein contained.

E The main issue that has arisen for consideration in this appeal is whether the order of Araka, C.J., transferring suit No. CCA/1/80, Charles Ejike and others v. Nwakwesi Ifeadi and others from the Awkuzu Customary Courts to the Otuocha Customary Court made pursuant to the provisions of section 45 (1) (b) of the Customary Courts Edict No 3 of 1978 was lawful or otherwise invalid.

The order of transfer in issue runs thus-

G "IN THE HIGH COURT OF ANAMBRA STATE OF NIGERIA
IN THE MATTER OF THE CUSTOMARY COURTS EDICT
NO. 3 OF 1978 (AS AMENDED BY EDICT NO. 22 OF
1978

IN THE MATTER OF SUIT NO. CCA/1/80 - Charles Ejike &
4 Ors Vs. Nwakwesi Ifeadi & 4 Ors.

H IN THE MATTER OF ASSIGNMENT ORDER
UPON READING the letter from

President of Customary Court Grade 1 Awkuzu in respect of the

above named suit; AND AFTER CONSIDERING THE POINTS therein raised:

AND IT BEING FOUND EXPEDIENT in the interest of justice that this case be heard and determined by another Customary Court Grade 1, I, EMMANUEL OSELOKA ARAKA ESQ., Chief Judge of Anambra State, in exercise of the powers vested in me under S. 45 (1) (b) of the Customary Court Edict (Edict No. 3 of 1978 as amended by Edict No. 22 of 1978), and all the other powers enabling me in that behalf, do hereby make the following:

ASSIGNMENT ORDER

THAT suit No. CCA/1/80 -

Charles Ejike & 4 Ors

vs. Nwakwesi Ifeadi & 4 Ors.

Now pending at Customary Court

Grade 1 Awkuzu be and is

hereby transferred to

Customary Court Grade 1

Otuocha to be heard and determined

GIVEN under the hand and seal of

the Hon. the Chief Judge of

Anambra State this Monday, the

26th Day of May, 1980.

CERTIFIED TRUE COPY

(SGD) ??????

REGISTRAR"

It is clear on the face of the said order that the learned Chief Judge issued the same Upon an application by letter from the President of the Customary Court Grade 1, Awkuzu in the Anambra State of the Federal Republic of Nigeria..

Section 45 (1) of the Customary Court Edict No.3 of 1978 provides as follows -

"On application by -

(a) any party to a cause or matter; or

(b) the Customary Courts Adviser; the Chief Judge, in respect of

causes or matters pending in any court within Anambra State, or the Judge in charge of a Judicial Division, in respect of causes or matters pending in a court within that Judicial Division, may, at any time or at any stage of the proceedings before final judgment, by order stop the hearing of the cause or matter on such terms as the Chief Judge or the Judge, as the case may be, may consider just and upon order being made may, in his discretion -

(a) if the cause or matter appears to be within the jurisdiction of some other Customary Court, by the same or another order direct that the same be inquired of, tried or determined by such Customary Court as shall appear to have jurisdiction over the same;

(b) direct in like manner, that the same shall be inquired into, tried or determined by a Magistrate's Court;

(c) if the same be a cause or matter which in his opinion ought for any reason to be transferred from a Customary Court to the High Court, by the same or another Order direct that the same be transferred to the High Court."

It is apparent from the foregoing section of the law that the Hon. Chief of the State or the Hon. Administrative Judge in charge of a judicial Division may exercise his powers thereunder on application by -

- (a) any party to a cause or matter; or
- (b) the Customary Courts Adviser.

The application for the transfer of the above suit from the Awkuzu to the Otuocha Customary Court Grade 1 was by letter, not from any party to the cause or matter or the Customary Courts Adviser, but from the President of the Customary Court Grade 1, Awkuzu. It is not stated the grounds upon which this application was based. It is however clear to me that this order of the Hon. Chief Judge, not having been made in consonance with the provisions of Section 45(1) of the said Customary Courts Edict No.3 of 1978 in that it was not made on the application of any of the parties to the suit or the Customary Courts Adviser, was incompetent and therefore invalid.

It has long been established that a court is said to be competent and therefore to have jurisdiction to entertain or determine a cause or

matter when -

(1) It is properly constituted as regards the number and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

See Madukolu and others v. Nkemdilim (1962) 2 N.S.C.C. 374 at 379-380.

In the present case, the order of transfer was not made in compliance with the express provisions of the relevant law as a stipulated condition precedent for a valid transfer of the suit by the Hon. Chief Judge was plainly breached.

This is because, the application for transfer emanated from the President of the Awkuzu Customary Court, an official not covered by section 45(1) of the Edit. It is my view, therefore, that the trial Otuocha Customary Court Grade 1 had no jurisdiction to entertain the action as the order by which the suit was purportedly transferred to it for hearing and determination was incompetent, invalid and null and void. Nothing, therefore, was Validly and effectively transferred to it for hearing and determination.

It was however rationalized by the Court of Appeal that there was only an irregularity in the transfer exercise and that the appellants, having submitted themselves to the jurisdiction of the Otuocha Customary Grade 1, thereby waived this irregularity thus conferring the said court with jurisdiction to hear and determine the suit.

With the greatest respect, I find myself unable to accept the above rationalization of the court below as either sound or well founded. This is because an application by either a party to a cause or matter or the Customary Courts Adviser to the Hon. Chief Judge of the State or to the Administrative Judge in charge of a Judicial Division, as the case may be,

for the transfer of a suit from one Customary Court to the other under section 45(1) of Edict No. 3 of 1978 spells out the fundamental conditions precedent for a valid exercise of the jurisdiction in question. Where such conditions precedent, expressly stipulated by law, were not complied with by the Hon. Chief Judge or by an Administrative Judge, it seems to me that an order of transfer made under such circumstance must be regarded as incompetent thereby affecting the jurisdiction of the court to which a suit was purportedly transferred.

Whilst a simple irregularity in the course of proceedings that are competent and within the jurisdiction of a trial court may be waived by a party to a suit, an irregularity which renders proceedings manifestly incompetent, invalid, incurably defective and null and void, thereby affecting the jurisdiction of the court may not be waived. The simple reason for this is that acquiescence cannot confer jurisdiction. See Skenconsult (Nig). and Another v. Godwin Ukey (1981) 1 S.C.6 at 26, Management Enterprises Ltd. and Another v. Jonathan Otusanya (1987) 2 N.W.L.R. (part 55) 179, Obinonure v. Erinoshio and Another (1966) 1 All N.L.R. 250 etc. Judgment by a court without jurisdiction is a nullity See Timitimi v. Amabebe 14 W.A.C.A. 374, Mustapha v. Governor of Lagos State (1987) 5 S.C.N.J. 143, Tukur v. Government of Gongola State (1987) 4 N.W.L.R (part 117) 517 at 545. Similarly any review of a void judgment is itself void. See Nyarko v. Akowun 14 W.A.C.A. In my view the irregularity complained of in the present case is fundamental and effected the jurisdiction of the learned Chief Judge to make the order in issue validly. Consequently this rendered the proceedings before the Otuocha Customary Court as incompetent and null and void and this may not be waived.

It is for the above and the more detailed reasons contained in the judgment of my learned brother that, too, allow this appeal, set aside the judgment of the Court of Appeal and declare the proceedings and judgments of the courts below null and void. I abide by the consequential orders including those as to costs made in the leading judgment.