

SUPREME COURT OF NIGERIA
17TH JULY, 1998. SC. 171/1995
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC

ALHAJI (CHIEF) SUNMONU AGBABIAKA

(Suing as Head of the Okota family of Isolo,
Lagos State)

..... APPELLANT

Substituted by order of Court dated the 4th
February, 1992 for CHIEF FASALI AJOSE
IBIOYINMI (Deceased)

AND

AKIBU OKANLANWON SAIBU & 11 ORS. RESPONDENTS

***ACTIONS** - Claims - Made as head of family - For the plaintiff to succeed - It must be established that he was at all material times - The head of the family.*

***APPEALS** - Evaluation of evidence - Where the finding of fact in issue was as a result of a proper evaluation of the evidence by the trial court - The Court of Appeal was in error to have interfered with the finding.*

***APPEALS** - Concurrent findings of fact - That has not been shown to be perverse or patently erroneous - There is no reason to interfere with same.*

***APPEALS** - Judgment - Error therein - It is only when an error is substantial - In that it occasioned a miscarriage of justice - That an appeal court is bound to interfere.*

***CUSTOMARY LAW** - Headship of a family - If it is in issue - Must be established by evidence of customary law.*

***INJUNCTIONS** - Mandatory injunction - Where the appellant failed to establish his claims - There is no basis upon which an order of mandatory*

injunction - Should be granted against the respondents.

PARTIES - *Head of family - Party suing in that capacity - Where substituted without deleting the capacity - New party must be shown to be head of the family.*

FACTS

In the Ikeja Judicial Division of the High Court of Lagos State the plaintiff/appellant by his predecessor, Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko, deceased and suing as the head of the OKOTA FAMILY of Isolo, in Lagos State commenced an action on the 7th day of December, 1982 against the defendants/respondents claiming jointly and severally inter alia, a declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family Land. The original plaintiff in the suit died on the 29th day of May, 1987, after hearing has commenced. On application to the trial court, one chief Fasali Ajose Ibiyinmi was substituted in place of the deceased. Both parties are members of the land owing Okota chieftaincy family. The plaintiff claimed that the defendants had intermeddled with certain parcels of their family land, thus challenging the authority of the accredited head of the family. The activities of the defendants were said to include disposal of family land without the head of the family who was the only person entitled to manage the Okota family land. The parties vigorously joined issue on the question of the headship of the family.

At the conclusion of hearing, the learned trial judge, after a close review of the evidence dismissed the plaintiff's claims in their entirety. He held, in the main, that neither the plaintiff nor his predecessor was established to have been appointed the head of the Okota family and that the defendants on record were not connected with any of the conveyances, Exhibits 2-25, tendered by the plaintiff in a bid to establish the defendants' unauthorized dealings with the family land in dispute. Accordingly, the learned trial judge held that the plaintiff had failed to prove that the defendants were accountable to the plaintiff as claimed. The plaintiff's claim for injunction was also dismissed as unsubstantiated.

Dissatisfied, the plaintiff lodged an appeal to the Court of Appeal, Lagos Division. While this appeal was pending, the plaintiff, Chief Fasali Ajose Ibiyinmi died. On yet another application, the Court of Appeal substituted Alhaji (chief) Sunmonu Agbabiaka in place of the deceased. The appeal was duly heard and was dismissed in an unanimous judgment. Aggrieved by this decision of the Court of Appeal, the plaintiff has further appealed to the Supreme Court raising six issues but the court found that the lone issue raised on behalf of the defendant adequately covers the plaintiff's issues.

ISSUE FOR DETERMINATION

Whether the decision of the Court of Appeal which affirmed the judgment of the learned trial Judge could be faulted in the light of the evidence before the court.

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

Customary law - Headship of a family

1. There can be no doubt that the question of headship of a family is a matter which, if it is in issue, must be established by evidence of customary law. This is because customary law which varies from one place to another is entirely a matter of evidence to be decided on the facts presented before the court and must therefore be proved ⁹ in any particular case unless it is of such notoriety and has been so frequently followed by the courts that judicial notice thereof would be taken without evidence required in proof. See David Olagbemiwo v. Oba Ajagungbade III and Another (1990) 3 N.W.L.R. (Part 136) 31 at 37, Abibatu Folami v. Flora Cole (1990) 2 N.W.L.R. (Part 133) 445. The onus is on the party who relies on customary law to establish the same. See too Giwa and other v. Ekinmilokun and other (1961) 1 S.C.N.L.R. 377. (p. 2164 D)

⁹ In Rabiu v. Abasi (1996) 7 KLR (pt 43) 1380 and Okonkwo v. Okagbue (1994) 14 KLR 1, question concerning proof of customary law was also considered

Appeals - Evaluation of evidence

2. In the present case, however, the finding of fact in issue was as a result of a proper evaluation of the evidence by the trial court and it was neither perverse nor was it reached as a result of any inference drawn from facts found by the trial court.¹⁰ The Court of Appeal, with profound respect, was therefore in error to have interfered with this finding of the trial court in issue. (p. 2167 E)

Actions - Claims

3. It is thus beyond dispute that the plaintiff's claims against the respondents were made virtute officii, namely, by virtue of the plaintiff's alleged position as the head of the Okota family. It was not a suit instituted by him in any other capacity, such as, simply as a mere member of the family in issue. For the plaintiff's case to succeed, therefore, there must be established that he was at all material times and up to the date of judgment in the suit the head of the Okota family of Isolo. The capacity under which the suit was instituted is clearly a cardinal part of the claim and it is a basic principle of law that he who asserts must prove that which he asserts. It is plain to me that the plaintiff's action is bound to fail without proof of his headship of the Okota family of Isolo as he had claimed. (p. 2168 F)

Appeals - Concurrent findings of facts

4. Both the trial court and the court below were in agreement that the substituted plaintiff, Chief Fasali Ajose Ibioyinmi, was not proved to have been appointed head of the Okota family under Yoruba customary law. This raises the issue of concurrent findings of fact in respect of which it is trite law that unless such findings are found to be perverse or are not supported by the evidence or were reached as a result of a wrong approach to the evidence or a wrong application of a principle of

¹⁰ In Oro v. Falade (1995) 5 KLR 1201, Gbafé v. Gbafé (1996) 6 KLR (pt 42) 1144 and Ezeafulukwe v. John Holt Ltd. (1996) 2 KLR (pt 38) 300 the attitude of appellate Courts to the evaluation of evidence by the trial court fell for consideration.

substantive law or procedure, this court, even if disposed to come to a different conclusion upon the printed evidence cannot do so. See Enang v. Adu (1981) 11 - 12 S.C. 25 AT 42. In the present case, however, the finding in issue has not been shown to be perverse or patently erroneous and I have no reason to interfere with the same. (p. 2169 D)

B

Parties - Head of family

5. It is necessary to state that only the names of the deceased plaintiff were dropped in the substitution exercise and nothing else. There was no application for the deletion of the capacity or family status in respect of which the deceased plaintiff sued as expressed in the writ of summons and the further amended Statement of Claim. It seems to me crystal clear that on the substitution of the deceased original plaintiff with Chief Fasali Ajose Ibiyinmi, the claim thereafter underwent an automatic change thus reading in place of the deceased Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko as follows -

C

D

"Chief Fasali Ajose Ibiyinmi (Suing as head of the Okota family of Isolo, Lagos State)"

E

In the circumstance, it cannot be seriously contended that the plaintiff's suit would stand any chance of succeeding unless it is established that the substituted plaintiff was at all material times the head of the Okota family of Isolo. (p. 2170 B)

F

Judgment - Error therein

6. It can thus be seen that although the court below, with profound respect, was in error to have interfered with the finding of the trial court to the effect that the appointment of the deceased original plaintiff as the head of Okota family was not established, the issue is by no means any matter of great moment in the determination of this appeal. This is because, it is not every error or mistake in a judgment that will result in an appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an appeal court is bound to interfere. See Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282, Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 . The

G

H

error in issue is neither substantial nor has it occasioned any miscarriage of justice. It is for this reason that it must be discountenanced as immaterial and not affecting the final decision of the court below in this appeal. (p. 2170 G)

B

Mandatory Injunctions

7. Apart from the failure by the appellant to establish his headship of the Okota family of Isolo in terms of his claims, it was the further finding of the trial court that the respondents were not accountable to the appellant as claimed. The reason given was that the appellant failed to establish any nexus between any of the respondents on record and the Vendors in Exhibits 2 - 2S which transactions were the basis of the claims for an account and payment over of what was found due to the appellant. The Court of Appeal, for its own part, considered extensively the evidence before the trial court on the issue. I have myself given the above observations close consideration and must state that I have no reason to interfere with these views of both courts below. I am also in agreement with the Court of Appeal that in view of the above findings, there is no basis upon which an order of mandatory injunction should be granted against the respondents. (p. 2171 C)

F **REPRESENTATION**

G. Bello Esq., for the Appellant
Respondent absent and unrepresented

CASES REFERRED TO

- G Olagbemiwo v. Ajagungbade III (1990) 3 N.W.L.R. (Part 136) 31 at 37
- Folami v. Cole (1990) 2 N.W.L.R. (Part 133) 445
- Giwa v. Ekinmilokun (1961) 1 S.C.N.L.R. 377
- Enang v. Adu (1981) 11 - 12 S.C. 25 AT 42
- H Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282
- Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 556
- Ukejianya v. Uchendu 13 W.A.C.A. 45 at 46
- Amandambu v. Okafor (1966) 1 ALL N.L.R. 205

Warner v. Simpson (1952) 2 W.L.R. 109

Col. Rotimi v. Mc Gregor (1974) 11 S.C. 133 at 152

Okpiri v. Jonah (1961) ALL N.L.R. 102 at 104

Lawal v. Dawodu (1972) 8-9 S.C. 83 at 114

Balogun v. Agboola (1994) 10 S.C. 111 at 118

B

Akpagbue v. Ogu (1976) 6 S.C. 63

Odofin v. Ayoola (1984) 11 S.C 72

RULES REFERRED TO

C

Supreme Court Rules, Order 2 Rule 11 and Order 6 Rule 8 (6)

LEAD JUDGMENT BY IGUH JSC

In the Ikeja Judicial Division of the High Court of Lagos State, the plaintiff, who is now the appellant, by his predecessor, Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko, deceased, and suing as the head of the OKOTA FAMILY of Isolo, in Lagos State commenced an action on the 7th day of December, 1982 against the respondents, who therein were the defendants, claiming jointly and severally as follows -

E

"(a) A declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family land.

(b) A full and correct statement of all monies collected by the defendants and each and every one of them, their servants and/or agents whether as rent, premium or otherwise from any person or persons to whom they have purported to grant plots or portions of Okota family land or otherwise received for and on account of the family land.

F

(c) Payment over to the Plaintiff of the gross sum so collected or received by the defendants and each and every one of them.

G

(d) An order of mandatory injunction restraining the defendants and each and every one of them, their servants or agents, from dealing in any manner whatsoever with the land subject matter of this case (including leasing, selling, letter or otherwise putting any person or persons on the land or taking any moneys worth from them for making a grant to such person or persons or in respect of any previous grant made to any person or persons.)"

H

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

The original plaintiff in this case was one Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko who was described in the Writ as the head of the
 B Okota family. He had filed the suit in his capacity as the head of the said Okota family of Isolo in Lagos State.

Hearing in the suit commenced on the 27th January, 1987. After two witnesses had testified, the original plaintiff in the action died on the
 C 29th day of March, 1987. On application to the trial court, one Chief Fasali Ajose Ibioyinmi was substituted in place of the deceased Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko. Thereafter, the case proceeded to completion.

At the conclusion of hearing, the learned trial Judge, Onalaja, J.,
 D as he then was, after a close review of the evidence on the 22nd June, 1990 dismissed the plaintiff's claims in their entirety. He held, in the main, that neither the plaintiff nor his predecessor, Alhaji (Chief) Agbabiaka Aluko, was established to have been appointed the head of the Okota
 E family of Isolo in the Lagos State and that the defendants on record were not connected with any of the conveyances, Exhibits 2 - 2s, tendered by the plaintiff in a bid to establish the defendants' unauthorized dealings with the family land in dispute. Accordingly, the learned trial Judge held
 F that the plaintiff had failed to prove that the defendants were accountable to the plaintiff as claimed. The plaintiff's claim for perpetual injunction was also dismissed as unsubstantiated.

Dissatisfied with this decision of the trial court, the plaintiff on the 22nd day of August, 1990 lodged an appeal against the same to the
 G Court of Appeal, Lagos Division.

While this appeal was pending, the plaintiff, Chief Fasali Ajose Ibioyinmi died on the 16th day of October, 1990. On yet another application, the Court of Appeal on the 4th day of February, 1992 substituted
 H Alhaji (Chief) Sunmonu Agbabiaka in place of the deceased Chief Fasali Ajose Ibioyinmi. The appeal was duly heard by the Court of Appeal on the 7th day of February, 1995. In a unanimous judgment, on the 4th day of May, 1995, the plaintiff's appeal was dismissed and the decision of the

trial court was affirmed.

Aggrieved by this decision to the Court of Appeal, the plaintiff has further appealed to this court. I shall hereinafter refer to the plaintiff and the defendants in this judgment as the appellant and the respondents respectively.

It is unnecessary to reproduce the appellant's eight grounds of appeal in this judgment. It suffices to state that the parties, pursuant to the Rules of this Court, filed and exchanged their written briefs of argument.

The appellant, in his brief of argument, formulated six issues for determination in this appeal. These were couched as follows -

"1. Were not the learned Justices of the Court of Appeal not in error in holding that the learned trial Judge did not make out a case for the Defendants/Respondents, inconsistent in some respects with their pleadings, and based in other respects on facts and points of law not pleaded, relied upon or canvassed at the trial of the suit.

2. On the face of the pleadings and the evidence adduced, can it rightly be said that the trial Judge's reference to facts not pleaded, was merely a general statement of legal principles and that he was merely drawing a caveat on the subsequent issue he discussed in respect of the certified true copies of the Conveyances marked Exhibits 2 - 2S as maintained by the Honourable Justice A. U. Kalgo, J.C.A. who read the lead Judgment?

3. Was the appointment of Chief Fasali Ajose Ibioyinmi as head of the Okota family in the circumstances of this case so important as to invalidate the proceedings if strict proof of the same was not forthcoming? Was it relevant considering the fact that he had obtained an order of court to prosecute the action that had been properly filed by his predecessor, Alhaji (Chief) Tijani Agbabiaka.

4. If the appointment of Chief Fasali Ajose Ibioyinmi as head of the Okota family was so relevant, and a matter on which the parties had joined issue, did the learned trial Judge make any specific findings of fact on the issue? Or did the Court of Appeal in exercise of its powers under the Act and Rules of Court make any such finding, and if not what

should be the result?

5. *Should not the learned Justices of the Court of Appeal have made the declaration sought by the Plaintiff, after finding that he had been properly appointed head by the family, and had properly instituted the proceedings in this case?*

6. *Similarly, should not the learned Justices of the Court of Appeal have granted the Injunction claimed by the Plaintiff against the defendants, when they, as well as the trial Judge had before them the uncontradicted evidence of the 2nd witness for the Plaintiff, that is, Fatayi Adeyemi Obalola Agbabiaka, that the defendants before the court had sold family land, and were continuing doing so."*

The respondents, for their own part, submitted just one issue in their brief of argument as arising in this appeal for the determination of this court. This, in effect was whether the decision of the Court of Appeal which affirmed the judgment of the learned trial Judge could be faulted in the light of the evidence before the court.

I have closely examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that the lone issue raised on behalf of the respondents adequately covers the six issues set out in the appellant's brief of argument. I shall, therefore, adopt in this judgment the issue formulated in the respondents' brief for my determination of this appeal. I shall in doing this, however, ensure that the entire issues raised on behalf of the appellant are fully considered.

At the oral hearing of the appeal, learned counsel for the appellant, G. Bello Esq. adopted the brief filed on behalf of the appellant and proffered oral arguments in elucidation of the submissions contained under issue 5 as set out in his brief of argument. Both the respondents and their learned counsel were absent in court although served with hearing notices in respect of the hearing of the appeal. Accordingly the court proceeded with the hearing of the appeal ex parte pursuant to the provisions of Order 2 Rule 11 (1) and Order 6 rule 8 (6) of the Rules of this court on the briefs filed by the parties.

Learned counsel for the appellant in his submissions stressed that since the trial court substituted the name of Chief Fasali Ajose Ibiyoinmi

for that of the deceased Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko whom the Court of Appeal found was duly appointed head of the Okota family of Isolo, whether or not the substituted plaintiff was established to be the head of the Okota family could not be regarded as material to the success of the plaintiff's case.

The respondents, for their own part, argued in their brief of argument that failure by the appellant, as plaintiff, to establish his headship of the Okota family was fatal to his case. It was also contended that none of the respondents was connected with Exhibits 2 - 2S and that they were therefore not proved to be accountable to the appellant as claimed.

I think it is necessary before dealing with the issue under consideration to state that both parties to this appeal are members of the land owning Okota chieftaincy family of Isolo in the Lagos State. As pointed out by the trial court, the dispute between the parties seemed to be a case of power tussle between the elderly members of the family represented by the appellant and the younger or dissident group who are represented by the respondents. The appellant, as the plaintiff in the action, had sued as the head of the said Okota family. The main cause of action was the appellant's claim that the respondents, as defendants in the suit, had intermeddled with certain pieces or parcels of their family land, thus challenging the authority of the accredited head of the family. The activities of the respondents were said to include disposal of family land without the head of the family who was the only person entitled to manage the Okota family land. It was alleged that all the proceeds of such transactions or sales were not accounted for by the respondents who shared the same among themselves. Eighteen deeds of conveyance, Exhibits 2, 2a - 2s were tendered by the appellant in support of the alleged sales. As a result, the appellant claimed as set out earlier on in this judgment.

It is quite plain to me that the appellant instituted this action as the head of the Okota family of Isolo in the Lagos State. This is made abundantly clear from the Writ of Summons filed in the suit, the terms of the claims before the court, the averments in the appellant's further amended Statement of Claim together with the viva voce evidence ad-

duced on behalf of the appellant at the trial. There is the main relief claimed in paragraph 33a of the appellant's further amended Statement of Claim. This, at the risk of repetition, is as follows -

"33(a) A declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family land". (Underlining mine for emphasis)

There is also the constitution of the appellant's suit whereby he claimed to be suing as head of the Okota family of Isolo, Lagos State. Additionally paragraphs 1 and 16 of the appellant's further amended Statement of Claim averred thus -

"1. The Plaintiff is the present Head of the Okota family, Isolo and he sues herein as such for himself and on behalf of other Okota family members."

16. The Plaintiff avers that by Yoruba native law and custom, he, as the head of the family is the only person in charge of the management of family land (including making grants, allocations, collection of dues, rents and payments of outgoings) and who can after consultation with the principal family members dispose of family land by lease or sale." (Underlining supplied for emphasis)

There is finally the evidence of the witnesses for the appellant whose testimony was in line with the above averments in the further amended Statement of Claim. The record of proceedings, however, discloses that on this question of the headship of the family, the parties vigorously joined issue thereon in their pleadings. Accordingly, the appellant's witnesses were not spared during their cross-examination on the issue. Additionally, there was also the viva voce evidence of the respondents' witnesses to the effect that neither the deceased original plaintiff, Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko nor Chief Fasali Ajose Ibiyinmi who was substituted in his place was appointed head of the Okota family of Isolo. It is clear to me that the appellant, to succeed, in this action must first and foremost establish his all-important headship of the Okota family of Isolo. I will now examine how the two courts below disposed of this crucial issue.

The learned trial Judge in dealing with this matter stated as fol-

lows -

"The first relief of the plaintiff is for a declaration that as head of the Okota Family, he is the only person entitled to manage Okota family Land, who can after consultation with the principal family members dispose of family property by sale or lease or otherwise The Defendants joined issue with the plaintiff that original plaintiff, Tijani Agbabiaka, was never appointed or elected or selected the head of Okota Family. That the last head of Okota Family unanimously accepted as the head of the family of Okota was Mustapha Kobolu Aregbe who died about 12 years ago. Since his death and as a result of dissension within the family, no other acceptable had of the family, be in Tijani Agbabiaka, now deceased, or the present plaintiff had been appointed to the headship of the family."

As the first relief is predicated on family status, the appointment of the deceased plaintiff and the substituted present plaintiff as head of OKOTA FAMILY must be proved strictly in accordance with YORUBA CUSTOMARY LAW of the area."

He then went on -

"As the plaintiff fails to tender a single deed of conveyance executed by Tijani Agbabiaka for the period of his holding office as head of OKOTA FAMILY spanning over a decade lends credence that there was problem about the headship of OKOTA FAMILY after the death of ALHAJI MUSTAPHA AREGBE."

The deceased plaintiff as well as the present plaintiff have not satisfied me of acts such as selling, leasing or renting out all or part of OKOTA FAMILY land which are acts numerous and positive enough to warrant the inference that as at the time Exhibits 2 - 2s were made, the deceased plaintiff was the head of Okota Family in that between December, 1977 and at the time of his death no act as head of the family was established before me."

A little later in his judgment, the learned trial Judge concluded thus -

"Applying the authorities on proof of Yoruba Customary law under Section 14 Evidence Act of the head of the family, plaintiff has

not established the heavy burden satisfactorily before me the customary law of appointment of the head of Okota Family of Isolo Area of Lagos State.

Exercising my discretion judicially and judiciously on the facts stated above to the declaration by the plaintiff that as head of Okota Family, he was the only person entitled to manage Okota Family land and who can after consultation with the principal members whose appointments were not established before me by tendering a power of attorney from the family or deed of conveyance during the non disputed incumbency of ALHAJI MUSTAPHA AREGBE as the head of Okota Family or during the disputed headship of the original plaintiff, now deceased, make me to hold that the plaintiff in all the circumstances of this case has not satisfied me that he is entitled to the exercise of the courts discretion, should I do so it is an inequitable ground, so I refuse the prayer and the 1st relief of the Plaintiff which is refused and hereby dismissed."

There can be no doubt that the question of headship of a family is a matter which, if it is in issue, must be established by evidence of customary law. This is because customary law which varies from one place to another is entirely a matter of evidence to be decided on the facts presented before the court and must therefore be proved in any particular case unless it is of such notoriety and has been so frequently followed by the courts that judicial notice thereof would be taken without evidence required in proof. See David Olagbemiwo v. Oba Ajagunbade III and Another (1990) 3 N.W.L.R. (Part 136) 31 at 37, Abibatu Folami v. Flora Cole (1990) 2 N.W.L.R. (Part 133) 445. The onus is on the party who relies on customary law to establish the same. See too Giwa and other v. Erinmilkun and other (1961) 1 S.C.N.L.R. 377.

The learned trial Judge having adequately considered the entire evidence adduced before the court categorically came to the conclusion that both the deceased original plaintiff, Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko, and the then plaintiff before him, Chief Fasali Ajose Ibioyinni, had failed to satisfy the court that they were appointed the head of the Okota family. This is a definite findings of fact which an appellate court

will not ordinarily interfere with except in certain circumstances, such as where the trial court did not make a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or it has taken an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they do not flow from the evidence accepted by it. See Okpiri v. Jonah (1961) ALL N.L.R. 102 at 104 - 105, Maja v. Stocco (1968) 1 ALL N.L.R. 141 at 149, Woluchem v. Gudi (1981) 5 S.C. 291 at 295 - 296 and 326 - 329 etc. It is clear to me that the said finding of the trial court is entirely without fault and need not therefore be interfered with.

The Court of Appeal having considered the pleadings of the parties rightly came to the conclusion that they joined issue on the headship of the Okota family. Of the learned trial Judge, the Court of Appeal commented as follows -

"From the above, since he made the finding that the parties joined issue on the headship of the Okota Family, the reasonable thing to do is to make specific finding as to whether Alhaji Tijani Agbabiaka or Alhaji Fasali Ajose Ibiyinmi was properly appointed as such a head or not. He did not do that and instead of doing that the learned trial judge went ahead to determine whether he had jurisdiction to entertain the matter or not. He found that he had jurisdiction. Then he proceeded to discuss what he called "family status" and how to prove headship of a family under the Yoruba Customary law. He held that the issue of headship of a family is a family status and must be proved strictly, but he failed to make any finding on this issue throughout his judgment."

Following the above observation, the court below, with profound respect, was of the opinion, quite wrongly in my view, that special circumstances had arisen in the present case enabling it to evaluate the evidence appearing on the record. The court found itself justified in this exercise in view of its opinion that the trial court failed to make a finding on the all important question of whether or not the deceased original plaintiff was the head of the Okota family.

In the first place, and with the greatest respect to the court be-

low, it cannot be suggested seriously that the trial court failed to make any finding on the issue of whether or not the appellant established that the deceased original plaintiff was appointed to the headship of the Okota family. This is in view of the passages of the decision of the learned trial Judge which I have already set out above. It seems to me crystal clear from those passages that the trial court was satisfied that neither the deceased original plaintiff nor Chief Ibiyinmi was proved to have been appointed the head of the said Okota family.

Nonetheless, the Court of Appeal proceeded to examine the printed evidence before the trial court on the issue and finally concluded thus -

"I therefore have no difficulty in accepting the version of the Appellant on the appointment of Alhaji Agbabiaka as the head of the Okota Family on 31st December, 1977. I do so based on the preponderance of the evidence available at the trial on this issue. See Odofin & Ors. v. Mogaji & Ors (1978) 4 S.C. 91). I therefore find that the appointment of Alhaji Tijani Agbabiaka was properly made and that the action was properly instituted by him as such head."

The Court of Appeal by the above exercise accepted the appellant's version on the appointment of Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko as the head of the Okota family and rejected the respondent's evidence on the issue even though it did not enjoy the privilege of having seen and watched the witnesses testify and there was nothing on the printed record to assist it prefer the evidence of one side as against that of the other.

It cannot be over-emphasized that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses. Where, therefore, a court of trial unquestionably evaluates the evidence and justifiably appraises the facts, as was the position in the present case, it is not the business of the Court of Appeal to substitute its own views for the findings of the trial court. See Akinloye and Another v. Eyiola and others (1968) N.W.L.R. 92 at 95, Enang v. Adu (1981) 11-12 S.C. 25 at 39, Woluchem v. Gudi (1981) 5 S.C. 291 at 320. What the appeal court ought to do is to find out whether there is evidence on

which the trial court have acted as it did. Once there is such sufficient evidence on record from which the trial court arrived at its findings of fact, the appellate court cannot interfere. See Akpagbue v. Ogu (1976) 6 S.C. 63, Odofin v. Ayoola (1984) 11 S.C 72, Amadi v. Nwosu (1992) 5 N.W.L.R. (Part 241) 273 at 280. Where, however, the trial court failed to properly evaluate the evidence before it as a result of which it reached a decision which is perverse, the Court of Appeal has a duty by way of rehearing to evaluate, as if it were the trial court, the evidence that has been adduced. See Adegoke v. Adibi (1992) 5 N.W.L.R. (Part 242) 410 at 427, K. Chellaram and Sons Ltd. v. Abdallah 14 W.A.C.A. 495 at 497 etc. Similarly where there is a finding of fact which, basically, is founded on inference drawn from facts specifically found by a trial court, as against a finding of fact founded on the evaluation of the evidence of witnesses, particularly where their credibility, demeanour and/or bearing came into play, the appellate court will more readily form its independent opinion in the case of the former than in the latter case. See Okpiri v. Jonah (1961) ALL N.L.R. 102 at 104, Lawal v. Dawodu (1972) 8-9 S.C. 83 at 114, Woluchem v. Gudi, (supra), Balogun v. Agboola (1994) 10 S.C. 111 at 118 etc.

In the present case, however, the finding of fact in issue was as a result of a proper evaluation of the evidence by the trial court and it was neither perverse nor was it reached as a result of any inference drawn from facts found by the trial court. The Court of Appeal, with profound respect, was therefore in error to have interfered with this finding of the trial court in issue.

There, is however, no appeal against the above findings of the court below and the matter must therefore end there. I need only state that for the reasons which will presently emerge, it would not appear that this error on the part of the court below is of any material significance as it occasioned no miscarriage of justice in the final result of this appeal.

The Court of Appeal next examined the family status of the substituted plaintiff, Chief Ibiyinmi and came to the following conclusion -

"I have earlier held that Alhaji Tijani Agbabiaka was properly appointed as head of the Okota Family on 31st December, 1977, and

that he properly initiated these proceedings as the Plaintiff. He died on 29th March, 1987. The appointment of his successor, Alhaji Fasali Ajose Ibioyinmi, was in my view, successfully challenged by the Respondents and I agree with the learned trial Judge that the Appellants have failed
 B to prove that he was appointed at the meeting on 3rd April, 1988, as head of the Okota Family as required by Yoruba customary law. This means that he, as Plaintiff, was not entitled to the relief pertaining to the head of Okota Family at the time the trial court gave its judgment. It is my
 C respectful view therefore that the learned trial Judge was right in refusing the declaration sought."

The crucial question now is whether this finding of fact of the trial court as affirmed by the Court of Appeal was in any way fatal to the appellant's claims before the court.

D The appellant's claims against the respondents have already been reproduced earlier on in this judgment. It is not in dispute that the deceased original plaintiff filed his suit against the respondents in his capacity as the head of the Okota family of Isolo in the Lagos State. Indeed,
 E the main relief claimed in the action was framed thus -

"(a) A declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family land".

It is equally clear that it was in the same capacity, that is to say,
 F as the head of the said Okota family of Isolo that the deceased plaintiff made his claims in respect of his ancillary reliefs (b), (c) and (d) reproduced earlier on in this judgment. **It is thus beyond dispute that the plaintiff's claims against the respondents were made virtute officii, namely, by virtue of the plaintiff's alleged position as the head of**
 G **the Okota family. It was not a suit instituted by him in any other capacity, such as, simply as a mere member of the family in issue. For the plaintiff's case to succeed, therefore, there must be established that he was at all material times and up to the date of judgment in the suit the head of the Okota family of Isolo. The capacity under which the suit was instituted is clearly a cardinal part of the claim and it is a basic principle of law that he who asserts must**
 H **prove that which he asserts. It is plain to me that the plaintiff's**

action is bound to fail without proof of his headship of the Okota family of Isolo as he had claimed.

The appellant did however argue that since the action was properly instituted by the deceased original plaintiff whom the Court of Appeal found was the head of Okota family, the nonappointment of Chief Fasali Ajose Ibiyinmi, who was substituted in place of the deceased original plaintiff, as the head of the Okota family was entirely irrelevant and of no consequence in the proceedings.

With respect of learned appellant's counsel, I am unable to accept that the above proposition is well founded. I have already indicated that the deceased original plaintiff constituted his claims in his alleged capacity as the head of the Okota family. This was not only expressed in the Writ of summons but was liberally pleaded in the plaintiff's further amended Statement of Claim. It was also testified to by the plaintiff's witnesses. **Both the trial court and the court below were in agreement that the substituted plaintiff, Chief Fasali Ajose Ibiyinmi, was not proved to have been appointed head of the Okota family under Yoruba customary law. This raises the issue of concurrent findings of fact in respect of which it is trite law that unless such findings are found to be perverse or are not supported by the evidence or were reached as a result of a wrong approach to the evidence or a wrong application of a principle of substantive law or procedure, this court, even if disposed to come to a different conclusion upon the printed evidence cannot do so. See Enang v. Adu (1981) 11 - 12 S.C. 25 AT 42, Nwadike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718, Woluchem v. Gudi, (supra).**

In the present case, however, the finding in issue has not been shown to be perverse or patently erroneous and I have no reason to interfere with the same.

It is now left for me to stress that when on the death of the original plaintiff, Chief Ibiyinmi was substituted in his place, it was only an order of court substituting the name of the said Chief Fasali Ajose Ibiyinmi in place of the deceased Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko. It was to all intents and purposes an amendment of the Writ of

summons by the substitution of Chief Ibiyinmi for the deceased Alhaji (Chief) Agbabiaka Aluko without more.

The law is settled that once ordered, what stood before an amendment of whether a writ of summons or the pleadings is no longer material before the court and no longer defines the issues to be tried. See Grace Amandambu v. Alexander Okafor and Another (1966) 1 ALL N.L.R. 205, Warner v. Simpson (1952) 2 W.L.R. 109, Col. Rotimi v. Mc Gregor (1974) 11 S.C. 133 at 152. **It is necessary to state that only the names of the deceased plaintiff were dropped in the substitution exercise and nothing else. There was no application for the deletion of the capacity or family status in respect of which the deceased plaintiff sued as expressed in the writ of summons and the further amended Statement of Claim. It seems to me crystal clear that on the substitution of the deceased original plaintiff with Chief Fasali Ajose Ibiyinmi, the claim thereafter underwent an automatic change thus reading in place of the deceased Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko as follows -**

"Chief Fasali Ajose Ibiyinmi (Suing as head of the Okota family of Isolo, Lagos State)"

In the circumstance, it cannot be seriously contended that the plaintiff's suit would stand any chance of succeeding unless it is established that the substituted plaintiff was at all material times the head of the Okota family of Isolo. This family status from which the plaintiff derived his legal capacity to institute the claims was not established before the two courts below. I think the court below was perfectly right when it affirmed the finding of the trial court to the effect that the plaintiff was not entitled to the declaratory relief claimed as he failed to establish that he was the head of the Okota family which was the main basis under which the claims were made.

It can thus be seen that although the court below, with proper respect, was in error to have interfered with the finding of the trial court to the effect that the appointment of the deceased original plaintiff as the head of Okota family was not established, the issue is by no means any matter of great moment in the deter-

mination of this appeal. This is because, it is not every error or mistake in a judgment that will result in an appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that an appeal court is bound to interfere. See Oje v. Babalola (1991) 4 N.W.L.R. (Part 185) 267 at 282, Azuetonma Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 556, Ukejianya v. Uchendu 13 W.A.C.A. 45 at 46 etc. The error in issue is neither substantial nor has it occasioned any miscarriage of justice. It is for this reason that it must be discountenanced as immaterial and not affecting the final decision of the court below in this appeal.

There are next the second and their reliefs claimed by the appellant against the respondents. Apart from the failure by the appellant to establish his headship of the Okota family of Isolo in terms of his claims, it was the further finding of the trial court that the respondents were not accountable to the appellant as claimed. The reason given was that the appellant failed to establish any nexus between any of the respondents on record and the Vendors in Exhibits 2 - 2S which transactions were the basis of the claims for an account and payment over of what was found due to the appellant. In this regard, the learned trial Judge stated -

"With regard to reliefs B and C, I hold that the defendants are not accountable to the plaintiff as plaintiff failed to show the nexus between defendants on record and the vendors in Exh. 2 to 2S as the same persons, based upon the pieces of evidence and my findings adumbrated above."

The Court of Appeal, for its own part, considered extensively the evidence before the trial court on the issue and concluded thus -

"In the circumstances, it appears to me very clear that the Appellant has failed to produce sufficient evidence to connect the Respondents with the deeds of conveyances exhibits 2 - 2S to effectively confirm that the Appellants named in the deeds of conveyances were the persons who sold the land described in the conveyances for the amount men-

tioned and to the person named therein. This evidence is very essential in a case like this. I therefore agree with the finding of the learned trial Judge, albeit for different reasons, that the Appellant has failed woefully to connect the Respondents on record with the persons described as Vendors in exhibits 2 - 2S. This disposes of the arguments in issue 5."

I have myself given the above observations close consideration and must state that I have no reason to interfere with these views of both courts below. I am also in agreement with the Court of Appeal that in view of the above findings, there is no basis upon which an order of mandatory injunction should be granted against the respondents.

In the final result, it seems to me that the decision of the court below which affirmed the judgment of the trial court cannot be faulted in the light of the evidence before the court. This appeal accordingly fails and the same is hereby dismissed with costs to the respondents against the appellant which I assess and fix at N10,000.00

E

BELGORE JSC

I agree that this appeal has no merit and the findings of the two Courts below on the facts of this case cannot be faulted. I therefore dismiss this appeal for the full reasons in the judgment of Iguh, J.S.C. I make the same consequential orders as in the said judgment of my learned brother, Iguh, J.S.C.

G

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Iguh, J.S.C. I agree with the conclusion that there is no merit in the appeal and it is accordingly dismissed with costs as assessed.

H

OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother Iguh, J.S.C. I agree with his reasoning and conclusions.

In the High Court of Lagos State, Ikeja Judicial Division, the original plaintiff Chief Alhaji Tijiani Agbabiaka Faniyi Aluko sued the defendants as head of Okota family of Isolo. He sued for himself and on behalf of other Okota family members.

The claims as set out in paragraph 38 of the further amended statement of claim are as follows:

"Wherefore the Plaintiff claims against the defendants jointly and severally:

(a) a declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family land.

(b) A full and correct statement of all monies collected by the defendants and each and every one of them, their servants and/or agents whether as rent, premium or otherwise from any person or persons to whom they have purported to grant plots or portions of Okota family land or otherwise received for and on account of the family land.

(c) Payment over to the Plaintiff of the gross sum so collected or received by the defendants and each and every one of them.

(d) An order of mandatory injunction restraining the defendants and each and every one of them their servants or agents, from dealing in any manner whatsoever with the land subject matter of this case (including leasing, selling, letting or otherwise putting any person or persons on the land or taking any money or moneys worth from them for making a grant to such person or persons or in respect of any previous grant made to any person or persons."

At the close of pleadings, hearing commenced on 28-1-87. The original plaintiff Chief Alhaji Tijiani Agbabiaka Faniyi Aluko after opening his case died on 29-3-87. He was substituted by Chief Fasali Ajose Ibiyomi with leave of court. The case proceeded to completion. The learned trial judge in a considered judgment dismissed the claims of the plaintiff. The plaintiff's appeal to the Court of Appeal was dismissed hence the further appeal to this court. While the appeal was pending in

the Court of Appeal, Chief Fasali A Jose Ibiyinmi died. He was substituted by Alhaji (Chief) Sunmonu Agbabiaka by order of the court below on 4-2-92. He carried on the case as head of Okota family.

Both parties joined issue on the headship of Okota family and this issue was hotly contested at the trial. They belong to the same Okota land owning family in Isolo, Lagos State. This contest is brought out clearly in paragraphs 2, 3, 16 and 38 of the further amended statement of Claim and paragraphs 3, 4, 6 and 20 of the further amended Statement of Defence which read thus:

Further Amended Statement of Claim:

"2. The original plaintiff who was also the previous family head of Okota Alhaji Chief Tijani A. F. Aluko died at Lagos University Teaching Hospital Idi-Araba Lagos on 29th March, 1987.

3. The Plaintiff avers that he was nominated and unanimously appointed the Okota family head by the family members to succeed Chief Alhaji Tijani Agbabiaka Faniyi aluko the previous family head and original plaintiff in the suit, at a meeting of the family held at No. 15 Akinbaiye Street, Lagos on Sunday, 3rd April, 1988. The minutes of the said family meeting will be founded upon at the trial of this action.

16. Of all the five branches, only the Ibiyinmi Branch had never produced a family head before now because it had never had the oldest family member whenever a vacancy occurred in the family headship.

38. WHEREFORE the Plaintiff claims against the defendants jointly and severally:

(a) a declaration that the plaintiff as head of the Okota family is the only person entitled to manage Okota family land and who can after consultation with the principal family members dispose of family property by sale or lease or otherwise.

(b)

(c)

(d) "

Further Amended Statement of Defence:

"3. With reference to paragraph 1 of the further amended statement of claim, the defendants aver that at no time since the death of

Alhaji Mustafa Aregbe has another family head been elected and/or appointed in his place.

4. *The defendants further aver that at no time has the Okota family appointed, elected and/or recognized the former plaintiff the present plaintiff herein as the head of the family.*

6. *With reference to paragraph 6 of the Further Amended Statement of Claim the defendants aver that the former plaintiff was never at any time accepted as the head of Okota family by ALL the other members of the family except whenever it was convenient for them to do so by Alhaji M. O. Odusina and his brother and a few of their henchmen who could easily be led by the nose.*

20. *With reference to paragraphs 1, 2, 3 and 4 of the Amended Statement of Claim the defendants deny that the present Plaintiff was ever appointed and/or elected the head of Okota family on 3/4/88 or at all as no such meeting was held on 3/4/88 or at all."*

From the foregoing, there is no doubt that the original plaintiff instituted the action as head of Okota family and his principal relief in paragraph 38(a) of the further amended statement of claim leaves no one in doubt that this relief can only be granted if Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko and Chief Fasile Ajoye Ibioyinmi who substituted him were each proved to be head of Okota family at the respective stages of the proceedings and up to the date of the judgment of the learned trial judge.

The learned trial judge found that both Alhaji (Chief) Tijani Agbabiaka Faniyi Aluko and Chief Fasile Ajoye Ibioyinmi failed to prove that they were appointed heads of the Okota family. The learned trial judge held as follows:

"The deceased plaintiff as well as the present plaintiff have not satisfied me of acts such as selling leasing or renting out all or part of OKOTA FAMILY land which are acts numerous and positive enough to warrant the inference that as at the time Exhibits 2 - 2S was (sic) made the deceased plaintiff was the head of Okota Family in that between December, 1977 and at the time of his death no act as head of the family was established before me. See Ekpo v. Ita 11 N.L.R. 68. Exercising my discretion judicially and judiciously on the facts stated above

to the declaration by the plaintiff as head of Okota Family as the only person entitled to manage Okota Family land and who can after consultation with the principal members whose appointments were not established before me by tendering a power of attorney from the family or a deed of conveyance during the non disputed incumbency of ALHAJI MUSTAPHA AREGBE as the head of Okota Family or during the disputed headship of the original plaintiff now deceased makes me to hold that the plaintiff in all the circumstances of this case has not satisfied me that he is entitled to the exercise of the courts discretion, should I do so it is an inequitable ground so I refuse the prayer and the 1st relief of the plaintiff which is refused and hereby dismissed."

All the reliefs sought were consequently dismissed by the learned trial judge.

The court below held that Alhaji (Chief) Tijani F. Aluko was properly appointed as head of the Okota family and that the appointment of Chief Fasali Ajose Ibioyinmi was not. It held:

"I have earlier held that Alhaji Tijani Agbabiaka was properly appointed as head of the Okota Family on 31st December, 1977, and that he properly initiated these proceedings as the plaintiff. He died on 29th March, 1987. The appointment of his successor, Alhaji Fasali Ajose Ibioyinmi was in my view successfully challenged by the respondents and I agree with the learned trial judge that the appellant have failed to prove that he was appointed at the meeting on 3rd April, 1988, as head of the Okota family as required by Yoruba customary law. This means that he as Plaintiff was no entitled to the relief pertaining to the head of Okota Family at the time the trial court gave judgment."

Both the trial court and the court below made concurrent finding of fact that Alhaji Fasali Ajose Ibioyinmi did not prove that he was appointed head of the Okota family and therefore not entitled to the relief pertaining to the head of the family at the time the trial court gave its judgment. I must however observe that the finding of the court below on the appointment of the original plaintiff as head of the Okota family is with respect, erroneous. There is no appeal by the respondents on this point and the finding did not affect the outcome of the appeal before that

court.

Proof of the appointment of Chief Fasali Ajose Ibiyinmi as head of the Okota family was crucial in view of the capacity in which the original plaintiff instituted the action and the reliefs claimed in paragraph 38(a), (b), (c) and (d) of the further amended statement of claim. The original plaintiff claimed the declaration "as head of Okota family and the only person entitled to manage Okota family land." Paragraph 1 of the further amended statement of claim also confirmed that Chief Ibiyinmi was head of the Okota family. The said paragraph reads:

"1. The present plaintiff is the present Head of Okota family Isolo and he continues this action as such for himself and on behalf of other Okota family members."

The capacity in which a party institutes an action is a vital factor. The rule of evidence is that he who alleges or asserts the existence of a fact must prove. In this case the burden of proving the particular assertion that Chief Fasali Ajose Ibiyinmi was appointed head of the Okota family at the material time was on the plaintiff who raised it in his pleadings. He failed to discharge the burden and the two lower courts were agreed on that. The plaintiff's case therefore collapsed since the foundation on which the action rested had given way.

As to claims (b) and (c) of paragraph 38 of the further amended statement of claim, the courts below were unanimously in their findings that the plaintiff failed to produce sufficient evidence to connect the defendants with the deeds of conveyance (Exhibits 2 - 2S) to effectively confirm that they were the persons named in the exhibits.

The findings are supported by the evidence adduced. The onus is on the appellant to satisfy the court that his appeal should be allowed. He has not satisfied this court that the courts below were wrong and that their decision should have been in his favour. Having regard to the facts and the findings of the two lower courts, it is, in my view quite impossible to say that they were wrong in coming to the conclusions they arrived at in favour of the respondents. I will therefore decline to review the evidence for a third time. See Chinwendu v. Mbamali & Or. (1980) 3-4 S.C. 31, Woluchem v. Gudi (1981) 5 S.C. 319 and Mora & Ors. v.

2178 Agbabiaka v. Saibu (1998) 7 KLR Ogwuegbu JSC
Nwalusi & Ors. (1962) 2 ALL NLR 675.

In the result, for the above reasons and the fuller reasons given by my learned brother Iguh, J.S.C., in his lead judgment, this appeal must fail and I hereby dismiss it with N10,000.00 costs to the respondents.

MOHAMMED JSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother Iguh, J.S.C., and I agree with him that this appeal has failed. I have nothing more useful to add. The appeal is dismissed. I also award N10,000.00 costs in favour of the respondents.

D

E

F

G

H