

SUPREME COURT OF NIGERIA

4TH JUNE, 1999. SC.176/1992.

**CORAM:- M. L. UWAIS CJN, A. B. WALL, A. I. IGUH,
S. O. UWAIFO, E. O. AYOOLA, JJSC.**

ALAM OPARAJI & 2 ORS. PLAINTIFFS/APPELLANTS
(For themselves and on behalf of the in Suit HOG/24/81
Umuhorum Umunwanyi Community of
Ohuba, Ohaji)

V.

NWOSU OHANU & ORS. DEFENDANTS/RESPONDENTS
(For themselves and as representing
the Umuagor Obosima Community, Ohaji)

AND

COLUMBUS OGIDEREJI & 3 ORS. ... PLAINTIFFS/RESPONDENTS
(For themselves and on behalf of Umuagor in suit HOG/27/81
Obosima Community, Ohaji)

AND

ALAM OPARAJI 16 ORS. DEFENDANTS/APPELLANTS
(For themselves and as representing
Umunwanyi Ohubo Community, Ohaji)

APPEALS - *Concurrent findings of fact - Supported by sufficient evidence - Circumstances that will warrant the Supreme Court to interfere with such findings.*

ARBITRATION - *Customary arbitration - Finality of - Where two parties to a dispute voluntarily submit to arbitration - And agree to be bound by the decision - They cannot subsequently resile from the decision once pronounced.*

ARBITRATION - *Customary law - Requirements - Of a valid and binding arbitration under customary law.*

ARBITRATION - *Estoppel - Customary law - Arbitration decision - Has the same authority as the judgment of a judicial tribunal - And thus create an estoppel.*

ARBITRATION - *Customary arbitration - Divergent evidence - Of a customary law arbitration - In such a case the court should make specific finding of fact - On whether there was a properly constituted arbitration.*

EVIDENCE - *Document - Customary law arbitrations - Written decisions of the arbitrations - Failure to produce in court - Issues arising from the non-production.*

EVIDENCE - *Evaluation of evidence - Where a trial court unquestionably evaluates the evidence - And there is abundant evidence on record - On which the learned trial judge acted - The Court of Appeal was right to affirm the findings of fact.*

FACTS

In the High Court of Imo State sitting at Oguta, the plaintiffs/appellants in a representative capacity brought an action (Suit No. HOG/24/81) against the defendants/respondents also in a representative capacity claiming for a declaration that they are entitled to the customary right of occupancy over the land in dispute situate in Ohuba, Ohaji; damages and perpetual injunction. While the defendants, as plaintiffs, by a cross-action (Suit No. HOG/27/81), claimed against the plaintiffs, as defendants, for a declaration that they are entitled to the customary right of occupancy of the parcel of land in dispute situate at Obosima Ohaji, damages and perpetual injunction. The two suits were consolidated. Both parties belonged to the same autonomous community, namely, the Ohuba autonomous community in the Ohaji/Egbema/Oguta Local Government Area of Imo State. They also claimed roughly the same piece or parcel of land. The plaintiffs case is that the land in dispute is owned and possessed by their family. They relied essentially on traditional history and acts of possession to establish their case. The defendants, on the

other hand similarly based their ownership of the land in dispute on evidence of tradition and acts of possession thereof from time immemorial. Both parties also pleaded and relied heavily on two customary law arbitrations between them in respect of the land in dispute which were headed by P.W.5 and P.W. 7 respectively. Each side gave a different version of the decisions of the arbitration panels and called evidence in support of their divergent versions. Each of the parties claimed that the decisions of the arbitrations were in its favour and each called evidence to support its assertion in this regard.

At the conclusion of hearing, the learned trial judge after a careful review of the evidence was of the view that the issue of estoppel founded on the two arbitration proceedings was not established by the parties. He preferred generally the case of the defendants on the issues of traditional history and acts of possession of the land in dispute to that of the plaintiffs. Consequently, he proceeded to dismiss the plaintiffs claims in their entirety. On the other hand, he found for the defendants and entered judgment in their favour. Dissatisfied, the plaintiffs appealed to the Court of Appeal, Port Harcourt Division, which court in a unanimous decision dismissed the appeal. The plaintiffs have further appealed to the Supreme Court. Both parties raised two issues respectively but the appeal was determined on a lone issue.

ISSUE FOR DETERMINATION

Whether or not the decisions in the two customary law arbitration proceedings between the parties in respect of the land in dispute were established or sufficiently proved before the court.

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

Customary arbitration - Finality of

1. Where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back

out of or resile from the decision so pronounced. See Opanin Kwasi and others v. Joseph Larbi (1952) 13 W.A.C.A. 76 (P.C.). (p. 1657 E)

Arbitration - Customary Law

B 2. Arbitrations at customary law must, however, be distinguished from arbitrations under the Act. The Nigerian law recognizes and accepts the validity and binding nature of arbitrations under customary law if it is established -

C (i) that both parties submitted to the arbitration;
 (ii) that the parties accepted the terms of the arbitration and
 (iii) that they agreed to be bound by the decision of the arbitra-
 tors. (p. 1657 H)

D ***Arbitration - Estoppel***

3. It ought to be pointed out that a customary law arbitration decision has the same authority as the judgment of a judicial tribunal and will be binding on the parties and thus create an estoppel. Whether, however,
 E such a decision will operate as estoppel per rem judicatam or issue estop-
pel can only be decided where the terms of the decision are clearly
 known and ascertained and, where they so operate, both parties are en-
 titled to invoke the plea. See Idika and other v. Erisi and others (1988) 1
 F N.S.C.C. 977 at 986. (p. 1658 B)

Customary arbitration - Divergent evidence

4. Where there are divergent evidence of a customary law arbitration,
 G the court should make specific finding of fact on whether there was a
 properly constituted arbitration since if the answer is in the affirmative
 and no serious irregularity in the proceedings is alleged, the result of its
 findings would be binding on the parties and thus enable the court to
 arrive at a just decision in the suit in which it is raised. See Idika and
 H others v. Erisi and others, (supra). The issue in the present case, how-
 ever, is not whether there were properly constituted customary law arbi-
 trations. No such issue was pleaded or placed before the trial court.
 Indeed, none of the parties challenged, no matter how remotely, the com-

position, conduct or validity of the arbitrations. Accordingly, the results of the arbitrations would be binding on the parties but only if they are ascertained and certain. What was seriously in dispute were the precise decisions of the two arbitration panels as each side gave a different version of what these decisions were. (p. 1659 F)

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Evidence - Documents

5. It is therefore clear to me from the mass of contradictory and divergent evidence in respect of the decisions in the aforesaid customary law arbitrations that the all important pronouncements and decisions in issue were both in writing and in the possession of the appellants and/or their witnesses, to wit, P.W. 5 and P.W.7. These vital documents are, without doubt, the best evidence of the decisions in controversy between the parties. The appellant, or indeed both parties, failed to produce them but relied on the secondary evidence in respect of the arbitration awards without offering any evidence on why the written and best evidence of the decisions were not produced before the court. It seems to me utterly strange and completely baffling that the appellants, in particular, whose witnesses were in possession of these best evidence with held these vital documents without any explanations whatever for their non-production. Two issues easily arise from this non-production of the decisions and proceedings of the two arbitrations in question. The first is the presumption under section 149(d) of the Evidence Act. The above presumption, therefore, arises against a party to a proceeding who withholds a particular available material evidence and fails to call other relevant evidence on the issue. The best evidence in respect of the arbitration decisions in issue is clearly the written proceedings themselves. These were not produced by the appellants in whose actual or constructive possession they were. I think it can be inferred in the circumstances that if the written decisions of the arbitrations were produced, they would be unfavourable to the appellants. See Bello v. Kassim (1969) N.M.L.R. 148 at 152, Okunzua v. Amosu (1992) 6 N.W.L.R. (part 248) 416 at 435. The second issue that arises from this non production of the said written decisions of the arbitrators concerns the Basic principle of law

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that a trial court must not rely on a document not tendered as an Exhibit before it except of course, where its contents have been rendered admissible in law, such as where after sufficient foundation has been laid, secondary evidence thereof is admitted in evidence. The simple rationale in this regard is that without a consideration of the document itself, in this case the recorded proceedings of the customary law arbitrations in issue which was not tendered in evidence, a trial Judge would not be in a position to arrive with any degree of precision at the actual decisions of the arbitration panels relied on by the parties. See Olagbemiro v. Ajagungbade 111 (1990) 3 N.W.L.R. (Part 136) 37 at 63. (p. 1661 H)

Evidence - Evaluation

6. The learned trial Judge thus rejected the appellants' version of the findings and decisions of the arbitration panels. Indeed he also rejected the version of the respondents as to the decision of both arbitrations. These are findings of fact and where, as in the present case, a trial court unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. See Akinloye and Another v. Eyiola and others (1968) N.W.L.R. 93 at 95, Enang v. Adu (1981) 11-12 S.C. 25 at 39. In the present case, there is abundant evidence on record on which the learned trial Judge acted in arriving at his finding of fact that the precise decisions of the arbitration panels were not satisfactorily established before the trial court. In the circumstances the court below was quite right in affirming these findings of fact. (p. 1664 D)

Appeals - Concurrent findings

7. In the same vein, this court will not interfere with the concurrent findings of a trial court and the court below on essentially issues of fact where there is sufficient evidence in support of such findings, as is the case in the present action, unless a substantial error apparent on the face of the record of proceedings is shown or there is established a miscarriage of justice or violation of some principles of law or procedure. See Enang v. Adu (1981) 11-12 S.C. 25, Woluchem v. Gudi (supra), Ike v.

Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 569, Igwego v. Ezengo (1992) 6 N.W.L.R. (Part 249) 561 at 576 etc. I can find no reason in the present case upon which I can interfere with the concurrent findings of fact of both courts below in the present case. (p. 1665 A)

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NOTABLE POINT OF INTEREST

IGUHJSC

1. The repugnancy of allowing a losing party to resile from the decision of the arbitrators

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I should also observe that where an arbitration under customary law is pronounced valid and binding, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he had previously agreed. See Joseph Larbi and Another v. Opanin Kwasi and Another (supra). (p. 1658 E)

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REPRESENTATION

Appellants absent and unrepresented

K. C. O. Njemanze Esq. for the respondents

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CASES REFERRED TO

Kwasi v. Larbi 91952) 13 W.A.C.A. 76 (P.C.)

Oline v. Obodo (1958) S.C.N.L.R. 298

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Njoku v. Ekeocha (1972) 2 E.C.S.L.R. 199

Idika v. Erisi (1988) 1 N.S.C.C. 977 at 986, (1988)2 N.W.L.R. (Part 78) 563

Chikwendu v. Mbamali (1980) 304 S.C. 31 at 48

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Bello v. Kassim (1969) N.M.L.R. 148 at 152

Okunzua v. Amosu (1992) 6 N.W.L.R. (part 248) 416 at 435

Olagbemi v. Ajagunbade 111 (1990) 3 N.W.L.R. (Part 136) 37 at 63

Gbajor v. Ogunburegui (1961) 1 All N.L.R. 853

Agu v. Ikewibe (1991) 3 N.W.L.R. (Part 80) 385

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STATUTE REFERRED TO

Evidence Act; s. 149(d).

LEAD JUDGMENT BY IGUH JSC

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division which had on the 22nd day of November, 1991 dismissed the appeal by the plaintiffs from the decision of Ukattah, J., as he then was, sitting at Oguta in the High Court of Imo State.

The proceedings are in respect of two consolidated suits. The plaintiffs, for themselves and as representing the Umuhorum Umunwanyi Community of Ohuba, Ohaji had in Suit No. HOG/24/81 claimed against the defendants, for themselves and as representing the Umuagor Obosima Community of Ohaji, as follows -

"(a) Declaration that the plaintiffs are entitled to the customary right of occupancy over the land called "Wemewara/Ogbutara" situate in Ohuba, Ohaji.

(b) Ten thousand naira (N10,000.00) being general damages for trespass.

(c) Perpetual injunction restraining the defendants, their agents, wives, relations, inlaws, workmen from entering the said land to carry out any form of farming or building."

The defendants, as plaintiffs, by a cross-action in suit No. HOG/27/81, claimed against the plaintiffs, as defendants, as follows -

"(a) Declaration that the plaintiffs are entitled to the customary right of occupancy of that piece or parcel of land know as and called "Uzo Abotorobo-Ugbirigba" otherwise called "Ohia oru Umuagor" situate at Obosima Ohaji, within this jurisdiction which annual value is N10.00.

(b) N25,000.00 (twenty-five thousand naira) general damages for trespass into the various portions of plaintiffs' land verged red within that verged green in survey plan No. VLD. 125/81.

(c) Perpetual injunction restraining the defendants, their agents, servants and all others claiming through or under them from causing wastes on and from entering the land again."

Pleadings were ordered in the consolidated suits and were duly settled filed and exchanged.

At the subsequent trial, both parties testified on their own behalf

and called witnesses. It is clear from the evidence that both parties belonged to the same autonomous Community, namely, the Ohuba autonomous Community in the Ohaji/Egbema/Oguta Local Government Area of Imo State. They also claimed roughly the same piece or parcel of land, although from the survey plans filed, the parcel of land claimed by the defendants appears to be slightly larger than that claimed by the plaintiffs.

The plaintiffs' case as pleaded and testified to is that the land in dispute is owned and possessed by their family of Umuohorum, Umunwanyi, Ohuba. They relied essentially on traditional history and acts of possession to establish their case. The defendants, on the other hand, similarly based their ownership of the land in dispute on evidence of tradition and acts of possession thereof from time immemorial. Both parties also pleaded and relied heavily on two customary law arbitrations between them in respect of the land in dispute which were headed by P.W. 5 and P.W. 7 respectively. Each side gave a different version of the decisions of the arbitration panels and called evidence in support of their divergent versions. From the evidence tendered at the trial, it is clear that there was no agreement between the parties as to the real decisions of the arbitrations. Each of the parties claimed that the decisions of the arbitrations were in its favour and each called evidence to support its assertion in this regard.

At the conclusion of hearing, Ukattah, J., as he then was, after a careful review of the evidence was of the view that the issue of estoppel founded on the two arbitration proceedings was not established by the parties. He was satisfied that neither P.W. 5 nor P.W. 7 found, by way of customary law arbitration, that the land in dispute belonged to the plaintiffs. He preferred generally the case of the defendants on the issues of traditional history and acts of possession of the land in dispute to that of the plaintiffs. Consequently, he proceeded to dismiss the plaintiffs' claims in their entirety. On the other hand, he found for the defendants and declared their entitlement to the customary right of occupancy over the piece or parcel of land in dispute known as and called "Ohia Oru Umuagor" or "Ogbotorobo Ugbirigba" situate at Umuagor, Obosima and more par-

particularly delineated and shown in plan number VLD125/81, Exhibit F, and therein verged red. The defendants were also awarded N3,000.00 as general damages for trespass together with an order of perpetual injunction restraining the plaintiffs, their servants, agents and/or workmen from any further entry upon or in any way interfering with any part of the said land outside the area allowed the 2nd plaintiff for his palm plantation.

Dissatisfied with this judgment of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Port Harcourt Division, which court in a unanimous decision dismissed the appeal on the 22nd day of November, 1991.

Aggrieved by this decision of the Court of Appeal, the plaintiffs have now appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and the respondents respectively.

Two grounds of appeal were filed by the appellants against this decision of the Court of Appeal. It is unnecessary to reproduce them 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 two issues distilled from the appellants' grounds of appeal set out on their behalf for the determination of this appeal are as follows -

"1. When parties to a case agree that the dispute had been duly submitted to arbitration, but disagree on the outcome of the submission and give conflicting evidence on what the decision of the arbitration was, is it not the duty of the trial court to make a specific finding on what the outcome of the submission was?"

2. Would a finding one way or the other of what the decision of the arbitrators was not have disposed of this case?"

The respondents, on the other hand, equally submitted two issues which, in their opinion, are sufficient for the determination of this appeal. These are couched thus -

"1. Whether the Justices of the Court of Appeal were right by holding that the Trial Court made specific findings on the arbitrations pleaded by the parties to this suit.

2. *Whether the Justices of the Court of Appeal were right in affirming the decision of the Trial Court that evidence of native arbitration tendered at the trial cannot be of any help in arriving at a just decision in this case."*

I have examined the two sets of issues identified in the respective briefs of the parties and it is apparent that they deal entirely with the proof or otherwise of the customary law arbitration decisions pleaded and relied upon by the parties in the establishment of their cases. I will accordingly examine this issue in my determination of this appeal. B

At the oral hearing of the appeal, both the appellants and D.O. C Lijadu Esq., the learned counsel who settled their brief of argument, were absent but duly served. In their brief of argument, however, it was submitted, relying on the decision in Kwasi v. Larbi (1950) 13 W.A.C.A. 76 at 77 that where parties submit their dispute to customary law arbitration, as in the present case, such arbitration decision becomes binding on them and none of the parties will be entitled to reopen the question decided as such a decision may be successfully pleaded by way of estoppel. It was stressed that both the appellants and the respondents agreed E that the question of ownership of the land in dispute was submitted to their traditional ruler-in-council for arbitration. Each of the parties claimed, both in their pleadings and in their evidence before the trial court, that the arbitration awards ended in their favour. Relying on the decision in Idika v. Erisi (1988) 2 N.W.L.R. (Part 78) 563 and Ojibah v. Ojibah (1991) 5 F N.W.L.R. (Part 296) 314 the appellants argued that it was incumbent on the learned trial Judge, firstly, to make a specific finding of what the results of the arbitrations were as it was no longer open to either of them to resile from them and, secondly, to proceed thereafter to consider the G issue of Estoppel per rem judicatam against the party who lost. In their view, the learned trial Judge neglected to consider properly the issue of arbitration as pleaded by the parties by not determining which of the versions of the arbitration decisions was true. This, they contended, H amounted to the court closing its eyes to the whole essence of and philosophy behind customary arbitrations under our law. They submitted that the trial Judge, having erroneously failed to make a specific find-

ing as to which of the parties the decisions of the arbitrations favoured, the court below ought to have ordered a retrial of the consolidated suits.

Learned counsel for the respondent, K. C. O. Njemanze Esq., in his reply, adopted the respondents' brief of argument. He equally stressed
 B that both parties pleaded and relied on two customary law arbitrations which were conducted by P.W.5 and P.W.7 respectively with D.W.2, D.W.6, and other cabinet chiefs and elders of the community as members. He submitted that from the evidence tendered at the trial, there was
 C no agreement or certainty as to what the decisions of the arbitrations were. Each side claimed that the decisions of the arbitrations ended in its favour. He contended that if a decision of an arbitration panel under customary law must be binding or create an estoppel per rem judicatam, it must be established by evidence that the alleged decision was in fact
 D pronounced and that it was certain. This, both parties failed to establish, particularly as P.W. 7 admitted that the decision he reached with his cabinet chiefs over the dispute was in writing and documented. The alleged written decision was neither produced before the court nor was any
 E evidence adduced to explain why it was not tendered before the court. Learned counsel referred to the decision in Kodilinye v. Mbanefo Odu 2 W.A.C.A 336 and argued that the appellants, as plaintiffs in the consolidated suits, had the duty of proving their case and must rely on the
 F strength of their case and not on the weakness of the defence. He stressed that the appellants, on the finding of the trial court as affirmed by the court below, failed to prove that the arbitrations in issue ended in their favour or that the decisions they relied on were either conclusive or certain. He submitted that the Court of Appeal, in the circumstances, was
 G right to have declined to interfere with such a finding of fact which was based on the credibility of the witnesses. Citing the decision in Nnaji for v. Ukonu (1986)4 N.W.L.R (Part 36) 505, learned counsel submitted that
 H there is a presumption of law that the findings of fact of a trial Judge who saw and heard the witnesses are right until otherwise established. He contended that the appellants failed to show that the findings of both courts below on the issue of arbitration are wrong. He urged the court to dismiss the appeal.

As I have already indicated, the sole issue for resolution in this appeal relates to whether or not the decisions in the two customary law arbitration proceedings between the parties in respect of the land in dispute were established or sufficiently proved before the court. This matter received exhaustive consideration from the learned trial Judge. Said he -

"Plaintiffs counsel addressed me extensively on arbitration and its effect. He referred to the pleading of the defendants and submitted that they pleaded that the P.W. 5 and P.W. 7 each looked into the matter at different times and said that the defendants could not be heard to say that other persons took part in the arbitration so as to call such persons to contradict the evidence of P.W.5 and P.W.7. But both the P.W. 5 and P.W. 7 testified that they each looked into the matter with other persons. They did not say that each looked into the matter alone. Each of the parties claimed that the decision of each of the arbitrations was in its favour and each called a witness to support its assertion in this regard. If the decision of a native tribunal must create an estoppel per rem judicatum it must be shown by evidence that the said decision was pronounced and that it was certain."

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

"The P.W. 7 admitted that the decision he reached with his cabinet over the dispute between the parties was documented. The document was not produced and he did not say why it was not produced. Moreover, the evidence of the P.W. 7 under cross-examination creates much doubt in the mind of this court as to whether he spoke the truth when he said that his arbitration found for the plaintiffs, for, he did admit that, when, subsequent to the arbitration, the parties quarrelled again over the land and went to the police, he made a written statement to the police in which he stated that it was decided by him and his cabinet that the parties should continue to farm, each, on its own portion of land. It is apposite to set out verbatim the relevant evidence of the P.W. 7 on this point."

"Put: (by counsel for defendants): You told the Police that you settled the matter and told the parties to go, each, to farm on its portion as their forefathers did."

"Answer: (by witness) Yes, I said so."

This witness also admitted that it was the defendants, who, some-time after the arbitration, complained to him that the plaintiffs trespassed on the land and he directed them to the police. I do not hold that the evidence of native arbitration is of any help in arriving at a just decision in this case."

He concluded -

"After a very careful examination of the evidence of the parties I have come to prefer the case of the defendants to that of the plaintiffs and in particular I make the following findings of fact:

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- 2.
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- 5.
- 6. That neither the P.W. 5 nor the P.W. 7 found, by way of an arbitration, that the land in dispute belonged to the plaintiffs."

The same received a close attention from the Court of Appeal in the leading judgment of Omosun, J.C.A. with which Onu, J.C.A., as he then was, and Ndoma-Egba, J.C.A. entirely agreed. In respect of the second arbitration by P.W.7 and his cabinet, the court below observed thus -

"If ever there was a conflict of evidence on a vital issue, this was the case and what did the learned Judge make of all this. The learned Judge considered this issue of arbitration in detail for at pages 199-200 he reviewed the evidence of the appellants and why he could not accept itIn my opinion, the learned Judge rightly rejected the evidence of P.W. 7 on the arbitration. He explicitly said why at pages 199 - 200 of the printed records. The decision of the native arbitration by P.W. 7 was recorded. It was not produced. That would have been the best evidence of the decision reached by P.W. 7 and his cabinet since both parties are giving different versions of the decision.

Why withhold this vital document? Furthermore, by his own showing in the witness box he clearly created doubt in the mind of the

court when he admitted in his statement to the Police that he settled the matter and told the parties to go each to farm on its portion of land as their forefathers did. The evidence of D.W. 7 confirms that P.W. 7 was not telling the truth. The learned Judge saw and heard this witness. His credibility is at stake. I am reluctant to differ from the learned trial Judge's observation about his credibility. It was a poor showing." B

The Court of Appeal next turned to the first arbitration by P.W.5, D.W.2 and other elders of the community and stated as follows -

"As to the evidence of P.W.5 there is the evidence of D.W.2 that the minutes of the proceedings were recorded. Surprisingly, P.W. 5 made no reference to such a record. It seems to me that if the parties were in agreement with the decision of P.W. 5 which was first in time, there was no necessity for P.W. 7 and his cabinet to arbitrate on it again. At best they would have confirmed the decision of P.W. 5 instead of going the whole hog again. It is noted that the learned Judge also rejected the version of the respondent as to the decision of both arbitrations..... That is a finding. He did not stop at that. He then went on to consider other points on which issues were joined and gave judgment for respondents." C D E

I think I ought to start by restating the well settled principle of law that **where two parties to a dispute voluntarily submit the issue in controversy between them to an arbitration according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out of or resile from the decision so pronounced.** See Opanin Kwasi and others v. Joseph Larbi (1952) 13 W.A.C.A. 76 (P.C.), Ozo Ezejiofor Oline and others v. Jacob Obodo and others (1958) S.C.N.L.R. 298, Philip Njoku v. Felix Ekeocha (1972) 2 E.C.S.L.R. 199, Eguere Inyang v. Simeon Essien (1957) 2 F.S.C. 39 etc. F G H

Arbitrations as customary law must, however, be distinguished from arbitrations under the Act. The Nigerian law recognizes and accepts the validity and binding nature of arbitrations

under customary law if it is established -

(i) that both parties submitted to the arbitration;

(ii) that the parties accepted the terms of the arbitration

and

B (iii) that they agreed to be bound by the decision of the arbitrators.

It ought to be pointed out that a customary law arbitration decision has the same authority as the judgment of a judicial tribunal and will be binding on the parties and thus create an estoppel.

C Whether, however, such a decision will operate as estoppel per rem judicatam or issue estoppel can only be decided where the terms of the decision are clearly known and ascertained and, where they so operate, both parties are entitled to invoke the plea. See Idika and other v. Erisi and others (1988) 1 N.S.C.C. 977 at 986, (1988)2 N.W.L.R. (Part 78) 563, Mogo Chikwendu v. Mbamali and Another (1980) 304 S.C. 31 at 48, Joseph Larbi and Another v. Opanin Kwasi and Another (1950) 13 W.A.C.A. 81, Opanin Kwasi and Another v. Joseph Larbi and Another (supra), Ahiwe Okere and others v. Marcus Nwoke and others (1991) 8 N.W.L.R. (Part 209) 317. I should also observe that where an arbitration under customary law is pronounced valid and binding, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he had previously agreed. See Joseph Larbi and Another v. Opanin Kwasi and Another (supra) and Agu v. Ikewibe (1991) 3 N.W.L.R. (Part 80) 385.

G As already observed, both parties to the present proceedings pleaded and relied on two customary law arbitrations between them in respect of the land in dispute. The first of these arbitrations was headed by P.W. 5, a one time councillor with D.W. 2 and other elders of the community as members. The second arbitration was by P.W. 7, the H natural ruler of the community with his entire cabinet chiefs as members. As already indicated earlier on in this judgment, each party gave a different version of what was decided by the arbitrators and called evidence in support of their divergent and contradictory versions. Each side claimed

that the decision of each of the arbitrations was in its favour and called witnessed to support its assertion in this regard.

Learned counsel for the appellants has pointed out in his brief that since the parties never challenged the composition, conduct or validity of the arbitrations in issue, it was incumbent on the learned trial Judge to make specific findings on their outcome from the totality of the evidence before the court as the result of the arbitrations would be binding on the parties and might found a plea of estoppel. He submitted that what the trial court ought to have done was to evaluate the evidence and find out which of the two versions in issue that was true. He contended that the trial court was in error in not determining which of the said two versions that was true. He further submitted that the Court of Appeal was in similar error by upholding the procedure adopted by the trial court in the matter. In his view the only option open to the court below was to allow the appeal and remit the case for a retrial before another Judge of the relevant Judicial Division.

With the greatest respect to learned counsel for the appellants, it does not seem to me correct to suggest that the learned trial Judge failed to evaluate the evidence before him on the issue of the two customary law arbitrations relied upon by both parties. I find it difficult to accept, also, that the court below was in any error by affirming the findings of the trial court on the issue of the two arbitrations in question. Without doubt, **where there are divergent evidence of a customary law arbitration, the court should make specific finding of fact on whether there was a properly constituted arbitration since if the answer is in the affirmative and no serious irregularity in the proceedings is alleged, the result of its findings would be binding on the parties and thus enable the court to arrive at a just decision in the suit in which it is raised. See Idika and others v. Erisi and others, (supra).** The issue in the present case, however, is not whether there were properly constituted customary law arbitrations. No such issue was pleaded or placed before the trial court. Indeed, none of the parties challenged, no matter how remotely, the composition, conduct or validity of the arbitrations. Accordingly, the results of the arbitra-

tions would be binding on the parties but only if they are ascertained and certain. What was seriously in dispute were the precise decisions of the two arbitration panels as each side gave a different version of what these decisions were. The court of trial was therefore
 B faced with a determination of this issue, namely, whether it was the appellants' or the respondents' version of the results of the arbitrations that it found established or whether, indeed, both versions proved unreliable and were not therefore established as provided by law.

With great respect to learned counsel for the appellants. I cannot accept that the learned trial Judge failed to evaluate the evidence with regard to the different versions of the decisions that were handed down by the arbitration panels as testified to by the parties. He did certainly evaluate the evidence most painstakingly and as exhaustively as he possibly could. In my view, his decision, as affirmed by the court below, to the effect that the evidence of customary law arbitrations offered by the parties was of no assistance in arriving at a just decision in the case and that he was unable to accept that P.W.5 or P.W.7 found, by way of
 D arbitration, that the land in dispute belonged to the appellants, cannot be
 E faulted. I will now deal with the two arbitrations. I will start with the first arbitration of 1979 which was conducted by P.W.5, D.W. 2 and other selected elders of the community.

The totality of the evidence adduced before the trial court by the parties with regard to the first arbitration was utterly conflicting, contradictory and created clear uncertainty as to the real decision that was pronounced by the arbitrators. Whereas the appellants testified that the arbitrators adjudged them the owners of the land in dispute, the respondents claimed that the arbitration confirmed their title in respect of the same land. Significantly D.W.2, a member and Secretary to the arbitrations panel testified as follows -
 F
 G

"Sometime in 1979, I had occasion to look into a dispute between the parties with P.W. 5 and others. We heard the parties and I took minutes of what they said. I was a teacher then and I was invited by P.W. 5 to be a member of the panel. We decided that the land in dispute belonged to Umuagor." (Underlining supplied for emphasis)
 H

under cross-examination, D.W.2 stated thus -

"I took down minutes of what was said. It was first sketchy notes I took at the request of Ekwueme. (i.e. P.W.5 and chairman of the panel). After we conferred and gave our decision, I left for my station, leaving the papers with Ekwueme. I did not have in mind that I should retain the papers." (Words in brackets supplied for clarity) B

It is clear from the records that D.W. 2 was hardly challenged on his evidence that the records of the arbitration panel which included their decision, was at the conclusion of the exercise handed over to P.W. 5, their chairman. I will have cause to return to this aspect of the case later in this judgment. C

The second arbitration was conducted in 1981 by P.W.7, the natural ruler of the community with his cabinet chiefs which included D.W.7. Once again, the evidence adduced before the trial court showed that each party claimed that the arbitration panel awarded the land in dispute to them. But, equally significant, is the fact that, as in the first arbitration, the proceeding of the second panel was admittedly in writing. P.W. 7, the natural ruler of the parties and chairman of the panel testified E thus -

"In 1981 I and members of my cabinet looked into a dispute between the parties. The dispute was over farmland known as Wemewara and Ogbutara. We heard the parties and their witnesses. We inspected the lands. We found that both parties were farming at random on both lands without demarcation." F

Under cross-examination, P.W.7 answered as follows -

"We recorded our decision. We found that the plaintiffs are the owners of the land and that was why the defendants cooked for both sides to eat before the defendants were allowed to farm. Our decision was put in writing. I do not have it here." (underlining supplied for emphasis) G

Although two more witnesses testified for the appellants after the evidence of P.W. 7 was taken, no attempt was made by the appellants to produce before the court or tender the written decision of the second arbitration panel on this material and vital issue. **It is therefore clear to** H

me from the mass of contradictory and divergent evidence in respect of the decisions in the aforesaid customary law arbitrations that the all important pronouncements and decisions in issue were both in writing and in the possession of the appellants and/or their witnesses, to wit, P.W. 5 and P.W.7. These vital documents are, without doubt, the best evidence of the decisions in controversy between the parties. The appellant, or indeed both parties, failed to produce them but relied on the secondary evidence in respect of the arbitration awards without offering any evidence on why the written and best evidence of the decisions were not produced before the court. It seems to me utterly strange and completely baffling that the appellants, in particular, whose witnesses were in possession of these best evidence withheld these vital documents without any explanations whatever for their non-production.

Two issues easily arise from this non-production of the decisions and proceedings of the two arbitrations in question. The first is the presumption under section 149(d) of the Evidence Act. This section of the Act provides thus -

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

- (a)
- (b)
- (c)
- (d) *that evidence which would be and is not produced would, if produced, be unfavourable to the person who withholds it;*
- (e)"

The above presumption, therefore, arises against a party to a proceeding who withholds a particular available material evidence and fails to call other relevant evidence on the issue. The best evidence in respect of the arbitration decisions in issue is clearly the written proceedings themselves. These were not produced by

the appellants in whose actual or constructive possession they were. I think it can be inferred in the circumstances that if the written decisions of the arbitrations were produced, they would be unfavourable to the appellants. See Bello v. Kassim (1969) N.M.L.R. 148 at 152, Okunzua v. Amosu (1992) 6 N.W.L.R. (part 248) 416 at 435. B

The second issue that arises from this non production of the said written decisions of the arbitrators concerns the Basic principle of law that a trial court must not rely on a document not tendered as an Exhibit before it except of course, where its contents have been rendered admissible in law, such as where after sufficient foundation has been laid, secondary evidence thereof is admitted in evidence. The simple rationale in this regard is that without a consideration of the document itself, in this case the recorded proceedings of the customary law arbitrations in issue which was not tendered in evidence, a trial Judge would not be in a position to arrive with any degree of precision at the actual decisions of the arbitration panels relied on by the parties. See Olagbemiro v. Ajagunbade 111 (1990) 3 N.W.L.R. (Part 136) 37 at 63, Gbajor v. Ogunburegui (1961) 1 All N.L.R. 853, Sommer and others v. Federal Housing Authority (1992) 1 N.W.L.R. (Part 219) 548 at 557/558. C D E

There is next the further cross-examination of P.W. 7 where he stated as follows - F

"Put: You told the police that you settled the matter and told the parties to go, each to farm on its own portion as their forefathers did?

Ans: Yes I said so."

(Underlining supplied for emphasis)

I agree entirely with both courts below that by this admission, P.W. 7 clearly created doubt in the mind of the trial court as to his credibility when he claimed that his arbitration panel awarded the land in dispute to the appellants, having regard to his subsequent evidence to the effect that he merely advised each party to farm on its own portion of the land as their forefathers did. H

As I have already observed, I think it should be made clear that

the issue in this appeal is not whether there were arbitrations which were binding on the parties. Arbitrations, there were, but the real issue is whether the resultant decisions of these arbitrations were established before the trial court. The case of the appellants is that the learned Judge failed to resolve the mass of conflicting evidence on the issue before him and make a finding thereupon. With profound respect, however, this case of the appellants seems to me totally misconceived and lacking in substance. In this regard, it cannot be doubted that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses. It is equally clear to me, from the well considered judgment of the learned trial Judge, that he effectively and laboriously discharged these functions. In no equivocal terms and after a thorough evaluation of the evidence, he found -

"That neither the P.W.5 nor the P.W. 7 found, by way of an arbitration, that the land in dispute belonged to the plaintiffs."

The learned trial Judge thus rejected the appellants' version of the findings and decisions of the arbitration panels. Indeed he also rejected the version of the respondents as to the decision of both arbitrations. These are findings of fact and where, as in the present case, a trial court unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the Court of Appeal to substitute its own views for those of the trial court. See Akinloye and Another v. Eyiola and others (1968) N.W.L.R. 93 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 Court of Appeal ought to do is to ascertain whether there is evidence on which the trial court acted. Once there is such evidence on record from which the trial court arrived at its findings of fact, the appellate court will be rendered impotent and cannot interfere. See Akpagbue v. Ogu (1976) 6 S.C. 63, Odofin v. Ayoola (1984) 11 S.C. 72.

In the present case, there is abundant evidence on record on which the learned trial Judge acted in arriving at his finding of fact that the precise decisions of the arbitration panels were not

satisfactorily established before the trial court. In the circumstances the court below was quite right in affirming these findings of fact.

In the same vein, this court will not interfere with the concurrent findings of a trial court and the court below on essentially issues of fact where there is sufficient evidence in support of such findings, as is the case in the present action, unless a substantial error apparent on the face of the record of proceedings is shown or there is established a miscarriage of justice or violation of some principles of law or procedure. See Enang v. Adu (1981) 11-12 S.C. 25, Woluchem v. Gudi (supra), Ike v. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539 at 569, Igwego v. Ezengo (1992) 6 N.W.L.R. (Part 249) 561 at 576 etc. I can find no reason in the present case upon which I can interfere with the concurrent findings of fact of both courts below in the present case.

In the final result, this appeal fails and it is hereby dismissed with costs to the respondents against the appellants which I assess and fix at N10,000.00.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Iguh, J.S.C. I entirely agree that this appeal lacks merit.

I accordingly adopt his reasons and conclusion. I too dismiss the appeal and award N10,000.00 costs in favour of the respondents against the Appellants.

WALI JSC

I have been privilege to have had a preview of the lead judgment of my learned brother Iguh, JSC and I entirely agree with his reasoning and conclusion that the appeal lacks merit.

For the same reasons stated in the lead judgment, I also hereby dismiss the appeal and adopt the order of costs made therein.

UWAIFO JSC

I read in advance the judgment of my learned brother Iguh, JSC just delivered. I fully agree with him that the appeals lacks merit. The simple issue this court has been asked to decide is whether there was any helpful evidence of arbitration upon which the litigations between the parties could have been decided. There was conflicting evidence of arbitration by both sides. But the appellants whose success in the contest appeared to depend so much on the result of the arbitration failed to prove that the arbitration was in their favour. They specifically alleged that the arbitration was recorded. The record which is the best evidence of what was decided was not produced by them and no reason for failure to do so was given. The fact that there was arbitration could therefore not be of help to them.

I too dismiss the appeal with costs of N10,000.00 to the respondents.

AYOOLA JSC

I have had the privilege of reading in draft the leading judgment delivered by my learned brother, Iguh JSC. Being of the view that he has fully dealt with the main issue decisive of the appeal, and being in entire agreement with his reasoning and conclusion, I have nothing to add. I, too would dismiss this appeal with costs to the respondents as ordered in the leading judgment.

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