

SUPREME COURT OF NIGERIA

19TH MAY, 2000. SC. 140/1994

**CORAM:- A. B. WALI, M. E. OGUNDARE, E. O. OGWUEGBU,
A. I. IGUH, S. O. UWAIFO, JJSC.**

1. MUSA SHA (JNR) PLAINTIFFS/APPELLANTS

2. BITRUS SHA DUNG

(For themselves and on behalf of LO-KWEI

FAMILY)

AND

1. DA RAP KWAN DEFENDANTS/

2. SALE MANDYENG RESPONDENTS

(For themselves and on behalf of LO-KAZANG FAMILY)

3. JOS LOCAL GOVERNMENT COUNCIL

4. JOS/BARKIN LADI

TRADITIONAL COUNCIL

***APPEALS** - Evidence - Evaluation of - The evaluation of evidence and the ascription of probative value to such evidence - Are the primary functions of the trial court - And where such court unquestionably evaluates the evidence - It is not the business of the appellate Court to interfere*

***APPEALS** - Ground of appeal - Omnibus ground of appeal - The meaning, scope and impact of the Omnibus ground of appeal*

***APPEALS** - Issues - Court of Appeal - Power to formulate issues - The Court of Appeal has the power to formulate an issue for determination suo motu - So long as it is satisfied that the issues - As framed by the parties would not lead to a proper determination of the appeal - And the issue thus raised is covered by the grounds of appeal filed*

***APPEALS** - Issues - Framing of - Issues for determination may be framed by the parties or by the court - But the issues must at all times be related to the grounds of appeal filed*

***APPEALS** - Issue - Incompetence - An appellate Court can only hear*

and decide on issues raised on the grounds of appeal filed before it - And an issue not covered by the ground of appeal is incompetent

APPEALS - Issue - Omnibus ground of appeal - Issue reframed by the Court of Appeal - Where it is amply covered by the Omnibus ground of appeal before the court - It is proper.

APPEALS - Issues - Purpose of - The main purpose of the formulation of issues for determination - Is to enable the parties to narrow the issues in controversy.

APPEALS - Order of retrial - Where an appeal is allowed because of failure of the trial court to make findings on material issues - And the determination of such material issues depends on the credibility of witnesses - The proper order to make is that of retrial.

FACTS

In the High Court of Plateau State, holden at Jos, the plaintiffs/appellants for themselves and on behalf of the Lo-Kwei family claimed against the 1st and 2nd defendants/respondents, for themselves and on behalf of the Lo-Kazang family, together with the 3rd and 4th defendants/respondents jointly and severally for inter alia: a declaration that the 2nd defendant being not a member of the Lo-Kwei family is not eligible and indeed not entitled to contest the Post of GWOM KABONG (i.e. Village head of Kabong) and/or to be selected, elected, installed or otherwise whatsoever; and an order that the Gwom Kabong should be selected from the members of the Lo-Kwei family to the exclusion of the members of the Lo-Kazang family. The plaintiffs' case is that Lo-Kwei family is one of the three ruling families in Du District. Kwei, the founder of the Lo-Kwei ruling family, was one of the two sons of Du Bwot. Lo-Kwei family was the founder of Kabong Village and had always produced the Village head of Kabong whose title is Gwom Kabong. The plaintiffs' claimed that it was much later in time that members of the Lo-Kazang family came and met members of the Lo-Kwei family in Du District.

The Lo-Kwei family allowed Lo-Kazang family to settle with them as neighbours and the two families had since been living together and interacting in various ways. They however stressed that only members of the Lo-Kwei family were entitled to be appointed Gwom Kabong and that members of Lo-Kazang family had never aspired nor had any of them ever been made the village head of Kabong. It was not until in 1987 that the 1st and 2nd defendants' people started to aspire to the post of Gwom Kabong. And, on the 12th October, 1988 the 3rd defendant wrote a letter appointing the 2nd defendant as the Gwom Kabong, hence this action. For their part the 1st and 2nd defendants, while admitting that the Plaintiffs' family is one of the three ruling families in Du District, denied that Kabong Village was founded by the Lo-Kwei family. They claimed that Kabong was founded by Du Bwot, the father of Kwei and Zang, the respective founders of Lo-Kwei and Lo-Kazang families. The defendants stated that members of Lo-Kwei and Lo-Kazang families are one and the same people as they are blood relations and cannot therefore inter-marry. They claimed that both families hold their meetings together, own their land jointly and do a number of other things together as blood relations. It is the case of the defendants that since Lo-Kwei and Lo-Kazang are one entity, the 2nd defendant is entitled to be appointed the Gwom Kabong. The 3rd and 4th defendants which are the Jos Local Government and the Jos/Barkinladi Traditional Council offered no evidence at the trial.

At the conclusion of hearing, the learned trial judge, in a reserved judgment found for the plaintiffs. He was of the view that only the members of the Lo-Kwei family could contest or be selected or appointed Gwom Kabong. Although he held that the only issue for determination was whether or not the 2nd defendant was a member of the plaintiffs' family and also found that both families did not inter-marry, he proceeded to state that it was not relevant to resolve whether the two families were related to each other by blood through a common forefather, Du Bwot in order to decide whether the defendants could as of right contest the Gwom Kabong chieftaincy. He then went on to nullify the 2nd defendant's selection as Gwom Kabong on the ground that he was not from the Lo-

Kwei family and therefore not entitled to be selected as the Village head of Kabong. Dissatisfied, the 1st and 2nd defendants appealed to the Court of Appeal, Jos Division. Five grounds of appeal were filed. Grounds 2, 3, 4 and 5 were withdrawn and struck out together with issues for determination formulated from them. The defendants were left with the omnibus ground of appeal and the issue for determination distilled from it. The issue was reformulated by the Court of Appeal and that Court unanimously allowed the appeal, set aside the judgment of the trial court and remitted the case to the High Court of Plateau State before another judge for retrial. The plaintiffs have now appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when the said issue does not and cannot arise from the solitary ground of appeal filed"

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

Issues - Purpose of

1. The main purpose of the formulation of issues for determination is to enable the parties to narrow the issue or issues in controversy in the grounds of appeal filed in the interest of accuracy, clarity and brevity. See Ogbuanyinya and others v. Obi Okudo and others (1990) 4 N.W.L.R. (Part 146) 551 at 568. (p. 1618 B)

Issue - Incompetence

2. An appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See Management Enterprises v. Otusanya (1987) 2 N.W.L.R. (Part 55) 179. (p. 1818 C)

3. Issues - framing of

What the Court of Appeal has to consider in an appeal is not the grounds

appeal but the issues raised from such grounds of appeal for determination. In this connection, it is firmly settled that issues for determination may be those framed by either one or both of the parties. They may also comprise issues reframed by the court after a consideration of those set out by the parties along side the grounds of appeal filed. The Court of Appeal is at liberty and possesses the jurisdiction to modify or reject all or any of the issues formulated by the parties and frame its own issues or, as pointed out above, to reframe the issues formulated by the parties if, in its view, such issues will not lead to a proper determination of the appeal. However, the issues framed, whether by the parties or by the court, must at all times be related to the grounds of appeal filed. See Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (Part 104) 373 at 422. (p. 1618 E)

Appeals - Issues - Court of Appeal - Power

4. I cannot therefore accept the submission of learned counsel for the appellants that the Court of Appeal was in error and without power in law to formulate an issue for determination suo motu in the appeal and to base its decision thereon, so long as that court was satisfied that the issues, as framed by the parties, would not lead to a proper determination of the appeal and the issue thus raised is covered by the grounds of appeal. (p. 1619 A)

Appeals - Ground of appeal

5. It will be necessary to examine briefly meaning and impact of the general or the omnibus ground of appeal. This, generally speaking, is said to imply that the judgment of the trial court cannot be supported by the weight of the evidence adduced by the successful party which the trial court either wrongly accepted or that the inference drawn or conclusion reached by the trial court based on the accepted evidence cannot be justified. Additionally, it covers cases where there is no or acceptable evidence to support the findings of the trial court. It also concerns situations in which when the evidence adduced by the appellant is weighed on the imaginary scale against that adduced by the respondent, the evidence in favour of the appellant, qualitatively speaking, outweighs that

adduced on behalf of the respondent to the extent that the judgment given in favour of the respondent can be said to be against the totality of the evidence adduced before the trial court. See Anachuna Anyaoke and others v. Dr. Felix Adi and (1986) 3 N.W.L.R. (Part 31) 731. (p.1619D)

B

Issue - Omnibus ground of appeal

6. I have myself closely studied the issue as reframed or modified by the Court of Appeal and it is clear to me that it is amply covered by the omnibus ground of appeal before the court. It seems to me that the submission of learned counsel for the appellants that the reframed issue did not arise from the ground of appeal filed is based, with respect, on a total misunderstanding and misconception of the full scope, implications and nature of the general or omnibus ground of appeal. I can find nothing wrong with the issue formulated by the Court of Appeal as it arose from the omnibus ground of appeal filed. It seems to me that having regard to the questions in controversy between the parties, the reframed issue would lead to a more judicious and proper determination of the appeal than the original issue formulated by the defendants. (p. 1620 H)

Appeals - Evidence

7. It cannot be over-emphasized that the evaluation of relevant and material evidence before the court 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 while they testified. Where such court of trial unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the appellate court to substitute its own views for the trial court. See Woluchem v. Gudi (1981) 5 S.C. 291 at 320, Akibu v. Opaleye and Another (1974) 11 S.C 189 at 203, Atanda v. Ayeni (1989) 4 N.W.L.R. (Part 111) 511 at 524. The position in the present case is that the trial court failed to consider all the relevant evidence adduced before it and therefore reached its decision without evaluating the totality of the evidence led before it. (p. 1624 A)

Appeals - Order of retrial

8. The court below was absolutely right when it failed to speculate on the effect of the evidence thus ignored in the final decision of the case by the trial court had this material evidence been duly considered. Finally, where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such material issues depends on the credibility of witnesses, as in the present case, the proper order to make is that of a retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (Part 230) 426. The Court of Appeal was therefore right to have ordered a retrial in this case. (p. 1624 D) C

NOTABLE POINTS OF INTEREST

WALI JSC

1. Principle guiding the evaluation of evidence D

The learned trial judge failed to apply the guiding principle laid down by this Court in A.R. Mogaji & Ors. v. Madam Rabiatu Odofin & Ors. [1978] 3 SC 91, particularly at page 93 wherein it is stated -

".....in deciding whether a certain set of facts given in evidence by on party in a civil case before a court in which both parties appeal is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of all the facts must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it;" (p. 1625 C) E F

OGWUEGBU JSC

2. The function of Court to do justice G

It is a fundamental function of court to do justice to the parties who appear before it in its pursuit of due and proper administration of justice. It cannot close its eyes to obvious errors committed by counsel as a result of inexperience or ignorance where such error can lead to injustice if left uncorrected. (p. 1631 A) H

REPRESENTATION

Dr. S. S. Ameh SAN with Mr. Mak-Nath E. Ahiakwo for the appellants
D. D. Rimdan Esq. with Mr. Nimnan Denden for the respondents

B CASES REFERRED TO

Momodu v. Momodu (1991) 1 N.W.L.R. (Part 169) 608 at 621

Onafide v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at 157

Bankole v. Mojidi (1991) 8 N.W.L.R. (Part 24) 523 at 537

Ogbodo v. Adelugba (1971) 1 All N.L.R. 68 at 71

C Nta v. Anigbo (1972) All N.L.R. (Part 2) 74 at 80

Ogbuanyinya v. Obi (1990) 4 N.W.L.R. (Part 146) 551 at 568

Management Enterprises v. Otusanya (1987) 2 N.W.L.R. (Part 55) 179

Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (Part 104) 373 at 422

D Anyaoke v. Adi (1986) 3 N.W.L.R. (Part 31) 731

Woluchem v. Gudi (1981) 5 S.C. 291 at 320

Akibu v. Opaleye (1974) 11 S.C 189 at 203

Atanda v. Ayeni (1989) 4 N.W.L.R. (Part 111) 511 at 524

E

LEAD JUDGMENT BY IGUH JSC

The proceedings leading to this appeal were first initiated on the 22nd day of July, 1988 in the High Court of Justice of Plateau State of Nigeria, holden at Jos. In that court, the plaintiffs, for themselves and on behalf of Lo-Kwei family claimed against the 1st and 2nd defendants, for themselves and on behalf of the Lo-Kazang family, together with the 3rd and 4th defendants jointly and severally as

F follows -

G "A declaration that the 2nd defendant being not a member of the Lo-Kwei family is not eligible and indeed not entitled to contest the post of GWOM KABONG (i.e. village head of Kabong) and/or to be selected, elected, installed or otherwise whatsoever.

H (b) A perpetual injunction restraining the 2nd defendant from contesting or otherwise seeking to be selected as the Gwom Kabong (i.e. village head of Kabong).

(c) A perpetual injunction restraining both the 3rd and 4th de-

fendants from appointing and/or installing the 2nd defendant, SALE MANDYENG, as the Gwom Kabong (i.e. the village head of Kabong).

(d) An order that the Gwom Kabong (village head of Kabong should be selected from the members of the Lo-Kwei family to the exclusion of the members of the Lo-Kazang family.

(e) An order deeming the 2nd plaintiff DA BITRUS SHA DUNG as duly selected and installed as the Gwom Kabong (village head Kabong) as being the only candidate originally nominated by the Lo-Kwei family in accordance with the Birom Native Law, Custom and tradition.

(f) Nullification of the appointment of the 2nd defendant.

(g) And such further relief appearing herefrom."

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

The case accordingly proceeded to trial and the parties testified on their behalf and called witnesses.

The plaintiffs' case as pleaded and testified to is that Lo-Kwei family is one of the three ruling families in Du District. Kwei, the founder of the Lo-kwei ruling family, was one of the two sons of Du Bwot. Lo-Kwei family was the founder of Kabong village and had always produced the village head of Kabong whose title is Gwom Kabong. The plaintiffs claimed that it was much later in time that members of the Lo-Kazang family came and met members of the Lo-Kwei family in Du District. The Lo-Kwei family allowed the Lo-Kazang family to settle with them and the two families had since been living together and interacting in various ways. They however stressed that only members of the Lo-Kwei family were entitled to be appointed Gwom Kabong and that members of the Lo-Kazang family had never aspired nor had any of them ever been made the village head of Kabong. It was the Lo-Kwei family that had always produced the village head of Kabong, otherwise known as Gwom Kabong right from the appointment of Shom Tiri as the first Gwom Kabong until this day. They stated that the Lo-kazang family had always supported the Lo-Kwei family and the head of the latter family, in appreciation of this loyalty, had occasionally delegated the 1st defendant to represent the Lo-Kwei family at certain functions. It was not until in 1987 that the 1st and

2nd defendants' people started to aspire to the post of Gwom Kabong. So, on the 12th October, 1988, the 3rd defendant wrote a letter appointing the 2nd defendant as the Gwom Kabong. The plaintiffs' family and the Kabong community rejected this appointment as null and void and a violation of their customary law hence this action.

B For their part, the 1st and 2nd defendants, while admitting that the plaintiffs' family is one of the three ruling families in Du District, denied that Kabong village was founded by the Lo-Kwei family. They claimed that Kabong was founded by Du Bwot, the father of Kwei and Zang, the
C respective founders of Lo-Kwei and LO -Kazang families. The defendants stated that members of Lo-Kwei and Lo-Kazang families are one and the same people as they are blood relations and cannot therefore intermarry. They claimed that both families hold their meetings together, own
D their land jointly and do a number of other things together as blood relations. It is the case of the defendants that since Lo-Kwei and Lo-Kazang are one entity, the 2nd defendant is entitled to be appointed the Gwom Kabong. The 3rd and 4th defendants which are the Jos Local Government
E and the Jos/Barakin Ladi Traditional Councils offered no evidence at the trial.

At the conclusion of hearing, the learned trial judge, Azaki. J., as he then was, after a review of the evidence found for the plaintiffs. He was of the view that only the members of the Lo-Kwei family could
F contest or be selected or appointed Gwom Kabong. Although he held that the only issue for determination was whether or not the 2nd respondent was a member of the appellants' family and that both families did not inter-marry, he proceeded to state that it was not relevant to resolve
G whether the two families were related to each other by blood through a common forefather, Du Bwot in order to decide whether the respondents could as of right contest the Gwom Kabong chieftaincy. He then went on to nullify the 2nd defendant's selection as Gwom Kabong on the ground
H that he was not from the Lo-Kwei family and therefore not entitled to be selected as the village head of kabong. He decreed as follows:-

"In my judgment, the plaintiffs have proved their case against the defendants. One of the reliefs sought is the declaration of the second

plaintiff as the duly selected Gwom Kabong. This relief shall not be granted as there is evidence that there were 3 other candidates for the contest besides the 2nd defendant. The plaintiffs are entitled to the reliefs as in the orders, following:-

1. *It is hereby declared that SALE MANDYENG, being not a member of Lo-Kwei family, is not eligible to contest the chieftaincy of Gwom Kabong.* B

2. *The selection, appointment and installation (if already installed) of SALE MANDYENG as the Gwom Kabong is hereby declared null, void and of no effect whatsoever.* C

3. *SALE MANDYENG is, from now on, restrained from enjoying the rights and privileges, and performance of the functions of Gwom Kabong howsoever.*

4. *The Jos Local Government Council and Jos/Barkin Ladi Traditional Council are each hereby restrained from dealing with SALE MANDYENG as Gwom Kabong.* D

5. *The Sole Administrator of Jos Local Government Council and the Secretary of Jos/Barkin Ladi Traditional Council are each hereby ordered within a period of six months from this day to conduct a fresh exercise for the selection of Gwom Kabong from among the members of Lo-Kwei family which is composed of Lala Gari, Lala Mading Tang, Lala Da Chunung and Lala Majei Wei."* E

Dissatisfied with the said judgment, the 1st and 2nd defendants lodged an appeal against the same to the Court of appeal, Jos division, which court in a unanimous decision allowed the appeal, set aside the judgment of the trial court and remitted the case to the High Court of Justice, Plateau State for a retrial before another Judge. F G

Aggrieved by this decision of the Court of Appeal, the plaintiffs have now appealed to this court. I shall hereinafter refer to the plaintiffs either as the plaintiffs or the appellants and the 1st and 2nd defendants either as the defendants or the respondents in the course of this judgment. H

One ground of appeal was filed by the appellants against this decision of the Court of Appeal. This ground of appeal is as follows:-

"1. The learned Justices of the Court of Appeal erred in law when they held:

"It is my considered view that the issue that calls for determination in this appeal is whether or not the learned trial judge has properly evaluated the evidence adduced by both parties and has drawn the correct inference from the facts proved".

and this has occasioned miscarriage of Justice.

PARTICULARS

(i) The Appellants in the court below (now 1st and 2nd respondents) filed only the omnibus ground;

(ii) But the only issue raised and argued by them borders on burden of proof which never emanated from the said ground;

(iii) Notwithstanding the foregoing, the Court of Appeal suo motu raised its own issue, to wit, evaluation of evidence by the learned trial Judge;

(iv) The said issue raised by the Court of Appeal was clearly not before it, neither did it arise from the only ground filed by the appellants in the court below."

Pursuant to the rules of this court, the parties, through their respective counsel, filed and exchanged their written briefs of argument.

The one issue distilled from the appellants' ground of appeal set out on their behalf for the determination of this court is as follows -

"Whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when the said issue does not and cannot arise from the solitary ground of appeal filed"

The respondents, on the other hand, submitted that the single issue for the determination of this appeal is, in their opinion, as follows -

"Whether upon the totality of the state of pleading, evidence adduced and addresses of Counsel, the Court of Appeal was right in setting aside, by a unanimous decision, the judgment of the High Court on the ground that the trial Judge had not properly considered and evaluated the totality of evidence before him to draw the correct inference therefrom."

I have closely examined the two issues identified in the respective briefs of the parties and it seems to me that having regard to the ground of appeal filed, the issue formulated on behalf of the appellants falls within the parameter of their ground of appeal. Indeed, it is my further view-that the respondents' issue does not, strictly speaking, arise B from the ground of appeal filed by the appellants. I shall therefore adopt the issue formulated by the appellants for my determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel C for the parties adopted their respective briefs of argument and proffered additional submissions in amplification of the same.

The main argument of learned counsel for the appellants, Dr. S. S. Ameh, S.A.N. is that the issue raised by the Court of Appeal for the determination of the appeal before it did not arise from the ground of ap- D peal filed by the respondents and that the said issue was therefore incompetent. He conceded that the only issue before this court for the determination of the present appeal is whether the Court of Appeal was right in law in formulating an issue for determination of the appeal suo motu and E basing its decision thereon when the said issue did not arise from the ground of appeal filed. He referred the court to the decision in Saka Atuyeye and others v. Ashamu (1987) 1 N.W.L.R. (part 49) 267 and submitted that the ground upon which the Court of Appeal based its decision did not F arise from the general or the omnibus ground of appeal filed by the appellants before it. He was, however, in agreement that the issue raised by the appellants for the determination of this appeal properly arises from their ground of appeal. He submitted that it is the issues and not the G grounds of appeal that are argued. He referred to the decision in Jimo Odubeko v. Victor Oladipo Fowlwer & Another (1993) 7 N.W.L.R. (part 308) 637 at 653 and contended that since the issue formulated by the Court of appeal was not related to the respondents' ground of appeal H before that court, the said issue together with the ground of appeal should have been struck out.

Turning to the facts of the case, learned counsel referred to the findings of the trial court that only members of the Lo-Kwei family can

contest or be appointed the Gwom Kabong. He also drew attention to the issue for determination set out, quite rightly, by the trial court. This was whether or not the 2nd respondent is a member of the Lo-Kwei family. He stressed that this issue was resolved against the 2nd respondent. He argued that this is a finding of fact which the court below ought not to have interfered with. He urged the court to allow the appeal, set aside the decision of the Court of Appeal and restore the judgment of the trial court.

Learned Counsel for the respondents, Mr. D. D. Rindan in his reply pointed out that the respondents, as appellants, before the Court of Appeal only relied on the omnibus ground of appeal and the first issue formulated by them in support of that ground. He contended that the Court of Appeal was entitled to modify any issue for determination raised by the parties so long as this did not alter its substance. This, in the present case, was whether or not the learned trial Judge failed to evaluate, weigh or to draw positive inference from the evidence of the parties before him which could have tilted the balance of probabilities in favour of the respondents. He argued that all the Court of Appeal did in the present case was to modify the issue identified by the parties for the determination of the court and that this, it did, without altering its substance in any manner. He submitted that there is ample jurisdiction in the Court of Appeal to reformulate an issue so long as such an issue arises from the ground of appeal filed. This, he argued, is what the Court of Appeal did. In his view, the argument that the issue formulated by the respondents as modified by the Court of Appeal, did not arise from the omnibus ground of appeal is based on a total misunderstanding of the nature and scope of that ground of appeal. In this regard, he relied on the decision of this court in Anachuna Anyaoke and others v. Dr. Felix Adi and others (1986) 3. N.W.L.R. (part 31) 731.

On the facts of the case, learned counsel submitted that the trial court failed to consider and to weigh in the imaginary scale the totality of the evidence adduced in favour of the respondents in the case before reaching its decision in favour of the appellants. In particular, he pointed out that the trial court failed to consider and to evaluate the evidence of a number of witnesses called on behalf of the respondents whose evidence was pa-

tently cogent on the issue that both parties are one family - wise and not different. In this regard, he argued that the trial court failed to determine properly where the preponderance of probabilities in the case rested in arriving at its judgment. He submitted that the Court of Appeal was right in setting aside the judgment of the trial court and remitting the case for a retrial before another Judge of the High Court of Justice, Plateau State. B

As I have already indicated, the sole issue for resolution in this appeal as identified by the appellants is whether the Court of Appeal was right in law in formulating an issue for the determination of the appeal and basing its decision thereon when such issue did not arise from the ground of appeal filed. In tackling this question, it is desirable to take a quick glance at the proceedings before that court. The respondents, as appellants, in the Court of Appeal filed five grounds of appeal against the decision of the trial court. It is unnecessary to reproduce them in this judgment. It suffices to state that five issues were distilled from their grounds of appeal. I think I should point out that the present appellants, as respondents, in that court adopted all five issues raised by the respondents for the determination of the appeal. C D E

At the hearing of the appeal, learned counsel for the defendants. Mr. Rimdan, abandoned grounds 2, 3, 4, and 5 of their grounds of appeal and the same were accordingly struck out by the court of Appeal. The court was then left with only ground 1 which is the general or the omnibus ground of appeal. This reads as follows - F

"That the decision is against the weight of evidence"

The striking out of the said grounds of appeal clearly affected the original five issues formulated for the resolution of that court. Accordingly, issues numbers 2, 3, 4, and 5 which no more related to any ground of appeal were equally struck out. G

The lone surviving issue before the court below for the determination of the appeal was framed thus -

"Whether the learned trial Judge was not looking for proof beyond reasonable doubt, as if it were a criminal matter, rather than a mere preponderance of probabilities, appropriate in civil cases in his approach to this case." H

As I have already indicated, the appellants, as respondents in the court below had adopted this issue in their brief of argument. Both parties, therefore, relied on the same issue for the determination of the appeal.

In the appellants' brief before the court of Appeal, the respondents B argued inter alia as follows -

"It will also be contended at the hearing of this appeal that a leading witness for the principal Respondents, P.W. 6 (A.D Nyam), had testified on oath to signing Exhibit 4, the list of nominated candidates for Chieftaincy which list contained 2nd Appellant's name (Page 63, L. 31 - C Page 64, L. 31 of the Record). The Learned Judge should have drawn a positive inference from this fact in favour of 2nd Appellant but failed to do so. This evidence further strengthened the uncontradicted testimony of D.W. 3, KABIRI KIM, the District Head of Du in whose jurisdiction D Kabong is a village, that the two families are regarded as one family. Additionally, 2nd Appellant's testimony remains unchallenged that one tok Labar from Lo-Kazang family had once been nominated for chieftaincy of Kabong but chose to decline (Page 82 lls 29 - 33 of the Record). E It is submitted that these two instances of nominating members of Lo-Kazang family constitute ample proof that they are eligible to contest the chieftaincy of Kabong village."

In their respondents' brief, the present appellants in the court F below replied inter alia as follows

"First, the appellants have made reference to Exhibit 4 out of context. The witness, P.W.6 (A. D. Nyiam), in his evidence said that he objected to Exhibit 4 as it included the name of the 2nd Appellant who is not eligible to vie for the post of the Chief of Kabong. Hence apart from G his resistance at signing Exhibit 4, he refused to forward Exhibit 4 to the officials who conducted the selection (Page 64 lines 6-9). Hence Exhibit 4 did not form the basis of the purported selection of the 2nd Appellant as the Gwom Kabong. In any case, the claim of the 2nd Appellant to the H membership of the Lo-Kwei family, his irregular inclusion among the list of persons nominated to contest for the stool in question, his purported selection and appointment were vehemently resisted at every stage by the 1st and 2nd Respondents, the Lo-Kwei family as well as the entire Kabong

Clan or community as amply demonstrated in the evidence. The evidence of D.W. 3, Kabiri Kim, the District Head of Du Does not in any way assist the case of the Appellants. In his official capacity as the District Head, he attempted to reconcile the parties and in his own words "Lo-Kwei was not satisfied with my action, hence this Suit" The contention that the evidence of the 2nd Appellant remains unchallenged, that one Tok Labar from Lo-Kazang family had once been nominated for the Chieftaincy of Kabong but choose to decline is not supported by the Record"

It is plain from the briefs of argument of the parties in the Court of Appeal and the oral submissions of their learned counsel that the main complaint of the respondents, as appellants in the court, was that the conclusions reached by the learned trial Judge on the evidence could not be justified. The trial court was also accused of giving credibility to the evidence of the witnesses of the appellants while ignoring what was described as the cogent and material testimony of the respondents' witnesses. It was also argued that the learned trial Judge failed to draw positive inference on the strong evidence before him in favour of the defendants. Having regard to certain findings of the trial court, it was the contention of the defendants that they did establish their defence on the balance of probability.

The Court of Appeal gave extensive consideration to all the vital questions in controversy between the parties and came to the conclusion that the real issue between the parties centered around the omnibus ground of appeal which it stated, had been fully argued. It said:-

"In the light of the above, it is my considered view that the appellants have argued the omnibus ground both in their brief and oral argument."

It then concluded:-

"It is my considered view that the issue that calls for determination in this appeal is whether or not the learned trial judge has properly evaluated the evidence adduced by both parties and has drawn the correct inference from the facts proved."

It is this issue formulated by the Court of Appeal that the appellants have questioned in this appeal. The lone issue they have raised in this appeal is

whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when, according to them, the said issue did not arise from the omnibus ground of appeal filed by the defendants in that court.

B I ought to start by pointing out that **the main purpose of the formulation of issues for determination is to enable the parties to narrow the issue or issues in controversy in the grounds of appeal filed in the interest of accuracy, clarity and brevity. See Ogbuanyinya and others v. Obi Okudo and others (1990) 4 N.W.L.R. (Part 146) 551 at 568.**

C **An appellate court can only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any ground of appeal is incompetent and will be struck out. See Management Enterprises v. Otusanya (1987) 2 N.W.L.R. (Part 55) 179, Attorney-General Anambra State v. Onuselogu Enterprises Ltd. (1987) 4 N.W.L.R. (Part 66) 547, Oniah v. Onyia (1989) 1 N.W.L.R. (Part 99) 514 at 579, Adelaja v. Fanoiki and Another (1990) 2 N.W.L.R. (Part 131) 137** at 148. I will later in this judgment deal with whether or

D not the issue formulated by the court below is covered by the omnibus ground of appeal filed before it. It suffices for the moment to state that **what the Court of Appeal has to consider in an appeal is not the grounds appeal but the issues raised from such grounds of appeal for determination.**

E

F

In this connection, it is firmly settled that issues for determination may be those framed by either one or both of the parties. They may also comprise issues reframed by the court after a consideration of those set out by the parties along side the grounds of

G **appeal filed. The Court of Appeal is at liberty and possesses the jurisdiction to modify or reject all or any of the issues formulated by the parties and frame its own issues or, as pointed out above, to reframe the issues formulated by the parties if, in its view, such**

H **issues will not lead to a proper determination of the appeal. However, the issues framed, whether by the parties or by the court, must at all times be related to the grounds of appeal filed. See Nzekwu v. Nzekwu (1989) 2 N.W.L.R. (Part 104) 373 at 422, Momodu**

v. Momodu (1991) 1 N.W.L.R. (Part 169) 608 at 621, Onafide v. Olayiwola (1990) 7 N.W.L.R. (Part 161) 130 at 157 and John Bankole and others v. Mojidi Pelu and others (1991) 8 N.W.L.R.. (Part 24) 523 at 537, I cannot therefore accept the submission of learned counsel for the appellants that the Court of Appeal was in error and without power in law to formulate an issue for determination suo motu in the appeal and to base its decision thereon, so long as that court was satisfied that the issues, as framed by the parties, would not lead to a proper determination of the appeal and the issue thus raised is covered by the grounds of appeal. I will now turn to the second arm of the issue raised for determination in this appeal. This is whether or not the issue formulated by Court of Appeal arises from the general or the omnibus ground of appeal filed.

In this connection, it will be necessary to examine briefly meaning and impact of the general or the omnibus ground of appeal. This, generally speaking, is said to imply that the judgment of the trial court cannot be supported by the weight of the evidence adduced by the successful party which the trial court either wrongly accepted or that the inference drawn or conclusion reached by the trial court based on the accepted evidence cannot be justified. Additionally, it covers cases where there is no or acceptable evidence to support the findings of the trial court. It also concerns situations in which when the evidence adduced by the appellant is weighed on the imaginary scale against that adduced by the respondent, the evidence in favour of the appellant, qualitatively speaking, outweighs that adduced on behalf of the respondent to the extent that the judgment given in favour of the respondent can be said to be against the totality of the evidence adduced before the trial court. See Anachuna Anyaoke and others v. Dr. Felix Adi and (1986) 3 N.W.L.R. (Part 31) 731, Chief Mba Ogbodo v. Daniel Adelugba (1971) 1 All N.L.R. 68 at 71, Mba Nta and others v. Edo Nwede Anigbo and others (1972) All N.L.R. (Part 2) 74 at 80. Indeed in the Anachuna Anyaoke and others v. Dr Felix Adi and others case (supra) at p. 742, Uwais, J.S.C., as he then was, rounding up his observation with regard

to the full implications of the omnibus ground of appeal succinctly concluded thus -

"In deciding upon these issues, it may be relevant to consider whether the trial Judge was right in giving credibility to the testimonies of witnesses called by the successful party. If the credibility was wrongly given, then that would of course affect the cogency given to the testimonies."

See too Saka Afuyeye and others v. Ashamu (1987) 1 N.W.L.R. (Part 49) 267 at 282. So wide, therefore, is the meaning, scope and impact of the omnibus ground of appeal.

I have earlier on in this judgment reviewed the main complaints of the respondents, as appellants, in the court below both from their brief of argument and the oral submissions of their learned counsel. These include their contention that the conclusions reached by the trial court on the evidence could not be justified, that the trial Judge was wrong in giving credibility to the testimony of witnesses called by the plaintiffs, that this necessarily affected the cogency given to the said testimony and that the learned trial Judge failed to draw positive inference on the strong evidence before him in favour of the defendants. It is plain to me that these are all matters which, in law, rightly arise from the omnibus ground of appeal filed by the defendants before the Court of Appeal.

It is clear from the record that the Court of Appeal after due consideration of the issue formulated by the defendants together with the omnibus ground of appeal filed came to the conclusion that the more appropriate issue that called for determination was whether or not the learned trial Judge had properly evaluated the evidence adduced by both parties and had drawn the correct inference from the facts proved. This, as I have observed, the Court of Appeal was perfectly entitled to do as it was of the opinion, and quite rightly in my view, that the issue as framed by the defendants would not lead to a judicious and proper determination of that appeal. **I have myself closely studied the issue as reframed or modified by the Court of Appeal and it is clear to me that it is amply covered by the omnibus ground of appeal before the court. It seems to me that the submission of learned counsel for the appellants**

that the reframed issue did not arise from the ground of appeal filled is based, with respect, on a total misunderstanding and misconception of the full scope, implications and nature of the general or omnibus ground of appeal. I can find nothing wrong with the issue formulated by the Court of Appeal as it arose from the omnibus ground of appeal filed. It seems to me that having regard to the questions in controversy between the parties, the reframed issue would lead to a more judicious and proper determination of the appeal than the original issue formulated by the defendants.

Turning now to the merits of the case, there can be no doubt that the learned trial judge rightly identified the one single issue for determination by the court. This is whether Lo-Kwei and Lo-Kazang are one and the same family. The trial court resolved this issue in the negative that is to say, against the defendants. In the course of his judgment, however, the learned trial Judge found it irrelevant to consider or make a finding to whether or not members of the Lo-Kwei and Lo-Kazang families are related to each other by blood. Said he -

"For the determination of this suit I do not consider it relevant to make a finding as to whether or not members of Lo-Kwei and Lo-Kazang families are related to each other by blood through a common forefather, Du Bwot. Even if I were to find that they all descended from Du Bwot I shall not ignore the overwhelming evidence which would seem to be that along the line of descendancy Lo-Kwei and Lo-Kazang formed separate family units. The generations before these family units may have had names other than Lo-Kwei and Lo-Kazang."

Criticising this refusal of the trial court to make a finding as to whether or not members of Lo-Kwei and Lo-Kazang families are related to each other by blood through a common forefather, Du Bwot, the Court of Appeal stated -

"I find the learned trial Judge's reasoning, with respect, rather strange. It is strange in the sense that if one is faced with the task of establishing whether or not two families are one and the same, surely one of the most important thing to establish is whether they are blood relations. Apart from that, there is no evidence on the record, not to talk

of overwhelming evidence, that showed that along the line of descendancy, Lo-Kwei and Lo-Kazang formed separate family units which the trial Judge said he could not ignore. There is also no iota of evidence to show that the families bore other names other than Lo-Kwei and Lo-Kazang. I believe that it was wrong for the learned trial Judge not to have made a finding whether or not the two families are related by blood. This is moreso, as issues have been joined both in the pleadings and evidence adduced with one side claiming that they alone descended from Du Bot and the other side claiming both of them descended from Du Bwot."

C I think the above criticism of the trial court's judgment by the Court of Appeal is well founded and cannot be faulted. This is particularly so as D.W.1. in his evidence testified thus -

"I live in Du I know the plaintiffs. They are children from my house. In my house there are two branches. They are from Lala Lo-Kwei. I am from Lala Lo-Kazang. These branches all comes from one father Du Bwot. Du Bwot was the father of Kwei and Kazang. We do not inter marry. The reason is because we are of the same blood."

E There is also the evidence of D.W. 2 as follows -

"I know the plaintiffs. They are from my house. We are related through Lo-Kwei and Lo-Kazang whose father was Du Bwot. Lo-Kwei and Lo-Kazang are one."

F Additionally there is the testimony of D.W. 3, the District Head of Du who, following the intervention of some elders with regard to the dispute between the Lo-Kwei and Lo-Kazang, accepted their finding that both were of the same family. He also testified that right from his youth and from what he learnt from the elders, the two families are the same. D.W.

G 4 also testified that the appellants and the respondents were brothers and of one family. The same was the case D.W. 5 and D.W. 6 who testified in the same vein. D.W. 6, in particular, said Lo-Kwei and Lo-Kazang were brothers and that both descended from Du-Bwot.

H The learned trial Judge completely ignored and failed to consider these vital pieces of evidence in favour of the respondents and made no findings on them. I think this was a grave mistake on the part of the trial court. This is because it cannot be dismissed lightly that a finding that

members of both Lo-Kwei are related to each other by blood, that they comprise one and the same family and that they are brothers who descended from Du Bwot would assist in no small way in the determination of the real issue in controversy between the parties.

Dealing with this aspect of the case, the Court of Appeal stated - B

"In his judgment, the trial Judge has extensively summarised the evidence by both parties. In his findings, it appears he has accepted some of the evidence adduced by the appellants. By deciding in favour of the respondents, it is clear that he has rejected the appellants' evidence that the two families are one. However, throughout the judgment, it does not appear that he has considered the evidence on this issue. He has not advanced any reason for rejecting the evidence. No reason was given for accepting or preferring the respondents' evidence to that of the appellants. The trial Judge considered only the evidence of DW 6 which he rejected. D.W. 6 was not the only witness who testified that Lo-Kwei and Lo-Kazang are the same family. What then is the trial Judge's finding in respect of the evidence of DW 1, DW 2, DW 3, DW 4 and DW 5? The trial Judge has not considered their evidence nor made any finding on the evidence. I therefore find that the trial Judge has not properly considered and evaluated the totality of evidence before him. C D E

Whether or not the learned trial Judge would accept the evidence of the appellant's witnesses, had he considered the evidence depends on the credibility of the witnesses. An appellate court cannot substitute its own views for the views of the trial court, when the decision of the trial court is based on the credibility of witnesses." F

It concluded -

"In the circumstances, since the trial Judge has not considered and evaluated the totality of the evidence before him, the appeal succeeds. I cannot speculate as to what the trial Judge's finding would have been had he considered the totality of the evidence adduced by the parties. Since his finding will necessarily involve the credibility of the witnesses, an appellate court must not interfere. This, in my view, is a proper case for retrial." G H

I agree entirely with the above observations of the Court of Appeal and

fully endorse them.

It cannot be over-emphasized that the evaluation of relevant and material evidence before the court 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 while they testified. Where such court of trial unquestionably evaluates the evidence and justifiably appraises the facts, it is not the business of the appellate court to substitute its own views for the trial court. See Woluchem v. Gudi (1981) 5 S.C. 291 at 320, Akibu v. Opaleye and Another (1974) 11 S.C 189 at 203, Atanda v. Ayeni (1989) 4 N.W.L.R. (Part 111) 511 at 524,

The position in the present case is that the trial court failed to consider all the relevant evidence adduced before it and therefore reached its decision without evaluating the totality of the evidence led before it. The court below was absolutely right when it failed to speculate on the effect of the evidence thus ignored in the final decision of the case by the trial court had this material evidence been duly considered.

Finally, where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of such material issues depends on the credibility of witnesses, as in the present case, the proper order to make is that of a retrial. See Karibo v. Grend (1992) 3 N.W.L.R. (Part 230) 426. The Court of Appeal was therefore right to have ordered a retrial in this case.

The conclusion I therefore reach is that this appeal is without substance and the same is hereby dismissed with costs to the respondents against the appellants which I assess and fix at N10,000,00.

H **WALI JSC**

I have had the privilege of reading in advance a copy of the lead judgment of my learned brother Iguh, JSC and I am in complete agreement with the reasons contained therein for dismissing the appeal.

The thrust of the complaint by the Respondents in the Court of Appeal was that the learned trial judge failed to consider or give any weight to the evidence adduced by them that the two families of Lo-Kwei and Lo-Kazang are blood relations. The Court of Appeal, after a painstaking consideration of the evidence adduced in the case and the briefs of argument filed by the parties came to the conclusion, rightly in my view, that the learned trial judge was wrong in his conclusion that it was irrelevant to consider or make a finding as to whether the two families, i.e. Lo-Kwei and Lo-Kazang, are blood relations

As shown by the Court of Appeal in its unanimous judgment, the trial court ignored almost the entire evidence of the Respondents in support of this claim. The evidence of D.W. 1, D.W. 2, D.W. 3, D.W. 4 D.W. 5 and D.W. 6 was not considered by the learned trial judge. The learned trial judge failed to apply the guiding principle laid down by this Court in A.R. Mogaji & Ors. v. Madam Rabiātu Odofin & Ors. [1978] 3 SC 91, particularly at page 93 wherein it is stated -

".....in deciding whether a certain set of facts given in evidence by on party in a civil case before a court in which both parties appeal is preferable to another set of facts given in evidence by the other party, the trial judge, after a summary of all the facts must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other, and then apply the appropriate law to it;"

and also page 94 -

"In short, before a judge before whom evidence is adduced by the parties before him in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses."

Since the trial court had failed to be guided by the principle stated above, the Court of Appeal was absolutely right in setting aside the judgment and making an order of a retrial before another judge of the same jurisdiction. See Solomon v. Mogaji (1982) 11 SC 1 at 24.

B It is for this and the fuller reasons given in the lead judgment of my learned brother Iguh, JSC that I also hereby dismiss this appeal and affirm the order of a retrial made by the Court of Appeal. I adopt the order of costs made in the lead judgment.

C

OGUNDARE JSC

I have read in advance the judgment of my learned brother Iguh JSC just delivered. I agree entirely with him that the only issue placed D before this Court for the determination of his appeal must fail. That only issue reads:

"Whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when E the said issue does not and cannot arise from the solitary ground of appeal filed."

That issue had been exhaustively dealt with by my learned brother Iguh, JSC in his judgment. No doubt what the Court of Appeal did in this matter F when the appeal was before them was perfectly within their rights. Consequently the only issue placed before us which is predicated on the only ground of appeal lacks substance.

I have no hesitation whatsoever in dismissing this appeal with costs as assessed by my learned brother Iguh, JSC.

G

OGWUEGBU JSC

I had a preview of the judgment of my learned brother Iguh, H J.S.C. just delivered. I agree that the appeal lacks merit.

The first two respondents as plaintiffs in the High Court of Plateau State, Jos Judicial Division instituted the action leading to this appeal challenging the selection of the 2nd defendant/respondent as the village

Head of Kabong. The plaintiffs instituted the action for themselves and as representing Lo-Kwei family. The first two defendants were sued for themselves and as representing Lo-Kazang family. The third defendant is the Jos Local Government Council and the fourth defendant is Jos/Barakin Ladi Traditional Council.

The claims of the plaintiffs/appellants are set out in paragraph 31 of their amended statement of claim but only claims (a) and (d) and the findings of the courts below on them are relevant to this appeal. Claims (a) and (d) read:

"31. Whereupon the plaintiffs claim against the defendants jointly and severally:

(a) A declaration that the 2nd defendant being not a member of the LO-KWEI Family is not eligible and indeed not entitled to contest the post of GWOM KABONG (i.e Village Head of Kabong) and/or to be selected, elected, installed or otherwise whatsoever.

(b)

(c)

(d) An Order that the Gwom Kabong (Village Head of Kabong) should be selected from the members of the Lo-Kwei Family to the exclusion of the members of the Lo-Kazang Family.

(e)

(f)

(g)"

Pleadings were ordered, filed and exchanged. The plaintiffs' case at the hearing was that LO-Kwei family is one of the three ruling families in DU Bot District, that Kwei the founder of LO-Kwei ruling family was one of the two sons of DU Bot and that LO-Kwei was the founder of Kabong village and the family has always produced the village head of Kabong who is called Gwom Kabong and that it was much later in time that members of LO-Kazang family came and met the members of the LO-Kwei family in DU District. The plaintiffs further testified that LO-Kwei family allowed LO-Kazang family to settle with them as neighbours and the two families have since then lived together, interacted in various ways and that members of LO-Kazang family neither aspired to nor were

made village head in Kabong.

The 1st and 2nd defendants/respondents admitted that LO-Kwei family is one of the three families in DU District. They denied that Kabong village was founded by the LO-Kwei family. They claimed that Kabong was founded by DU Bot, the father of Kwei and Zang, that Kwei and Zang were the founders of LO-Kwei and Zang families. They claimed that members of LO-Kwei and LO-Kazang are the same in that they are blood relations, that LO-Kazang is part and parcel of LO-Kwei and in proof of that, they led evidence to show that LO-Kwei and LO-Kazang hold their family meetings together, own lands jointly, paste skulls of animals they kill during hunting on the wall of their family houses and do not intermarry as they are members of the same family. As LO-Kwei and LO-Kazang are one and the same, the 2nd defendant/appellant is entitled to become the Gwom Kabong. The learned trial judge in a reserved judgment held in part:

".....there is no doubt that only the members of LO-Kwei family can contest or be selected or appointed the Gwom Kabong. The only issue before me for determination is whether or not the 2nd defendant is a member of LO-Kwei family" (the underlining is for emphasis only).

He made other findings such as the high degree of interactions between the members of the two families and very close association which exists between them. He also found that the two families hold joint meetings and act jointly in certain matters even those affecting the chieftaincy. He drew attentions to Exhibit "13" and its translation Exhibit "13A" which contain the minutes of their joint meetings and also Exhibits "12" and "15" which are copies of petitions against the recognition of LO-Dakpu as a ruling house in Kabong and these petitions were jointly signed by members of LO-Kwei and LO-Kazang. The learned trial judge also found that:

"The relation is also signified by the absence of intra-marriage by their members". (The underlining is for emphasis).

After highlighting the various areas of co-operation and interactions, he curiously came to the conclusion that:

"For the determination of this suit, I do not consider it relevant to make a finding as to whether or not members of LO-Kwei and LO-

Kazang family are related to each other by blood through a common fore father, DU Bwot. Even if I were to find that they all descended from DU Bwot I shall not ignore the overwhelming evidence which would seem to be that along the line of descendancy LO- Kwei and LO-Kazang formed separate units....."

B

He finally granted all but one of the reliefs sought by the plaintiffs, whether the parties are related by blood is a central issue in the case and the learned trial judge should have made a finding on it one way or the other in view of the mass of conflicting evidence on it adduced by both parties.

C

The 1st and 2nd defendants were naturally aggrieved by the decision and appealed to the Court of Appeal, Jos Division. As was expected, the appeal was allowed. Five grounds of appeal were filed by the 1st and 2nd defendants. Ground 2, 3, 4 and 5 were withdrawn and struck out together with issues for determination formulated from them. The appellants in that court were left with the omnibus ground of appeal and the issue for determination distilled from it reads:

D

"Whether the learned trial judge was not looking for proof beyond reasonable doubt as if it were a criminal matter rather than a mere preponderance of probabilities, appropriate to civil cases in his approach to this case."

E

The court below after a careful consideration of paragraphs 5.01 and 6.02 of the appellants' brief of argument observed as follows:

F

"..... it is my view that the appellants are complaining that the inference drawn and the conclusion reached by the trial judge based on the accepted evidence cannot be justified. It is my considered view that the issue that calls for determination in this appeal is whether or not the learned trial judge has properly evaluated the evidence adduced by both parties and has drawn the correct inference from the facts proved."

G

It was on the above issue that the court below considered and allowed the appeal of the 1st and 2nd defendants.

H

"The plaintiffs were not satisfied with the judgment of the Court of Appeal and appealed to this court. Their complaint as set out in paragraph 4 of their brief of argument under the heading "Issue For Determination"

nation" reads:

"Whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when the said issue does not arise from the solitary ground of appeal filed."

B The plaintiffs/appellants submitted in their brief in this court that the only issue for determination formulated by the 1st and 2nd defendants as appellants in the court below did not arise from the subsisting omnibus ground of appeal after grounds 2, 3, 4 and 5 of the grounds of
C appeal were abandoned and struck out and that the court below should have struck out the lone issue instead of formulating an issue suo motu for the 1st and 2nd defendants. Counsel referred the court to the following cases in support of his argument:

Ugo v. Obiekwe & Or. (1989) 1 N.W.L.R. (Pt. 99) 577 at 580,
D Attorney-General of Kwara State & Ors. v. Raimi Olawale (1993) 1 N.W.L.R. (pt. 272) 645 at 660, Odubeko v. Fowler & Or (1993) 7 N.W.L.R. (Pt. 308) 637 at 653 and Akinfolarin & Ors. v. Akinnola (1994) 3 N.W.L.R. (Pt. 335) 659 at 680.

E It was submitted in the brief of the 1st and 2nd defendants/respondents that the plaintiffs who were respondents in the court below adopted the issues for determination formulated by the 1st and 2nd defendants/appellants in that court. That in their brief of argument in that court,
F they (defendants/appellants) contended that the learned trial judge failed to draw positive inference from the ample evidence before him in their favour and that the conclusion reached by him based on the accepted evidence could not be justified. We were urged to hold that the sole issue for
G determination formulated by the defendants and adopted by the plaintiffs/appellants was based on and did arise from the omnibus ground of appeal.

I am unable to uphold the contention of the plaintiffs/appellants that an appellate court cannot re-frame issues for determination which
H arise from the grounds of appeal filed in an appeal. It is a primary duty of courts to identify and decide on issues in dispute between the parties before them. Where an issue for determination arising from the grounds of appeal is wrongly formulated by either of the parties to an appeal, an

appellate court can suo motu correct the wrongly formulated issue. It is a fundamental function of court to do justice to the parties who appear before it in its pursuit of due and proper administration of justice. It cannot close its eyes to obvious errors committed by counsel as a result of inexperience or ignorance where such error can lead to injustice if left uncorrected. So long as it will not lead to injustice to the opposite side, appellate courts possess the power and in the interest of justice, to reject, modify or re-frame any or all issues formulated by the parties after a careful consideration of the issues as set out in the brief and the grounds of appeal filed. This power of an appellate court has never been in doubt.

As long as the issue re-framed is anchored on the ground of appeal filed, the opposite party cannot complain. See the cases of Ogbuanyinya & Ors. v. Okudo & Ors. (No. 2) (1990) 4 N.W.L.R. (Pt. 146) 551 and Bankole v. Pelu (1991) 8 N.W.L.R. (Pt. 211) 523. It is legitimate to do so and the court below was right in re-framing the issue for determination. In this appeal, the appellants herein as respondents in the court below adopted the sole issue identified by the appellants and fully argued it in their brief. What the court below did was to re-frame it to reflect the ground of appeal and the arguments on it as contained in the respective briefs. The appellants' complaint before us that the court below re-framed the issue suo motu and that the issue did not arise from the omnibus ground of appeal has no legal basis. See Akpan v. The State (1992) 6 N.W.L.R. (Pt. 248) 439.

For the above reasons and the fuller reasons in the judgment of Iguh, J.S.C., with which I am in full agreement, I too will dismiss the appeal with N10,000.00 costs to the 1st and 2nd respondents.

UWAIFO JSC

I read in advance the judgment of my learned brother Iguh JSC and for the reasons he has fully given, I agree that the appeal lacks merit.

At the trial court, there was conflicting evidence as to whether LO-KWEI and LO-KAZANG families are related by blood. The action by LO-KWEI family against LO-KAZANG family was as to who be-

tween the members of the two families was entitled to contest the post of the village Head of Kabong. One of the reliefs sought was a "declaration that the 2nd defendant being not (sic) a member of the LO-KWEI Family is not eligible and indeed not entitled to contest the post of GWOM KABONG (i.e. Village Head of Kabong) and/or to be selected, elected, installed or otherwise whatsoever."

The appellants (as plaintiffs) pleaded, among other averments, the following paragraphs 4, 11 and 12 of their amended statement of claim:

"4. *The Lo-Kwei family is one of the three ruling families in Du District. The others are Lo-Gwom and Lo-Dung Zang. Only these three families have always met to discuss the affairs of the district as well as chieftaincy matters. Non-Members of these families can only attend as observers.*

11. *Kwei, the founder of Lo-Kwei Ruling Family is one of the two sons of Du Bwot and Kwei had four children who now constitute the four branches that make up the Lo-Kwei Family. These four branches are Lala Gari, Lala Mading Tang, Lala Da Chung and Lala Majei Wei.*

12. *It was much later in time that members of the Lo-Kazang Family came and met the members of the Lo-Kwei Family in Du District. The Lo-Kwei Family allowed the Lo-Kazang Family to settle with them as neighbours and the two Families have since then been living together. As neighbours, the two families have been interacting continuously in various ways but members of the Lo-Kazang Family have never aspired nor have they ever been made village head of Kabong except to support Lo-Kwei Family members in vindicating their chieftaincy rights."*

The 1st and 2nd respondents (as defendants) responded in paragraphs 2, 7 and 8 of their amended statement of defence as follows:

2. *The 1st and 2nd defendants admit paragraph 4 of the statement of claim and state further that 1st and 2nd defendants are members of Ko-Kwei family, as they are blood relations.*

7. *The 1st and 2nd defendants deny paragraph 11 of the statement of claim and put the plaintiffs to the strictest proof thereof.*

8. *The 1st and 2nd defendants deny paragraph 12 of the statement of claim and put plaintiffs to the proof thereof. In further answer to*

paragraph 12 of the claim, the 1st and 2nd defendants state that members of Lo-Kwei and Lo-Kazang are the same, and use to hold their family meeting the same. The Register containing minutes of one of the said meetings is hereby pleaded."

It therefore became an issue whether both families were related by blood. That would require a finding by the trial court on the conflicting evidence led on this case by both sides. But the trial court held on the point as follows:

"For the determination of this suit I do not consider it relevant to make a finding as to whether or not members of Lo-Kwei and Lo-Kazang families are related to each other by blood through a common forefather Du Bwot. Even if I were to find that they are all decended (sic) from Du Bwot I shall not ignore the overwhelming evidence which would seem to be that along the line of decendancy (sic) Lo-Kwei and Lo-Kazang formed separate family units. The generations before these family units may have had names other than Lo-Kwei and Lo-Kazang."

The defendants complained in their appeal to the Court of Appeal on a number of grounds. Eventually, only one ground survived, namely, that the judgment was against the weight of evidence. The Court of Appeal considered the issue for determination framed from that ground by the defendants who were the appellants before that court. The court considered that a more appropriate issue was "whether or not the learned trial judge has properly evaluated the evidence adduced by both parties and has drawn the correct inference from the facts proved." On the whole the lower court came to the conclusion that the trial court was not justified in failing to consider the evidence on the issue of blood relationship and for not giving reasons for accepting other evidence led by the present appellants and rejecting that led by the respondents. The appeal was allowed and the case remitted for retrial.

The appellants before this court decided to hang their appeal against that decisions on one issue for determination which was framed thus:

"Whether the Court of Appeal was right in law in formulating an issue for determination suo motu and basing its decision thereon when

1634 Sha v. Kwan (2000) 5 KLR Uwaifo JSC
the said issue does not and cannot arise from the solitary ground of appeal filed?"

B I think it would be a misconception to argue that a court cannot suo motu reformulate an issue arising from a ground or grounds of appeal if the interest of justice demands this. A court must have the authority to do that when the grounds of appeal and argument canvassed permit such a reformulation if the issue formulated by the appellant or the respondent appears awkward or not well focused. In Akpan v. The State (1992) 6 NWLR (pt. 248) 439 at 466, Karibi-Whyte JSC said briefly but decidedly: "I find it a little difficult to appreciate why Mr. Okonkwo thinks that the court cannot suo motu correct a wrongly formulated issue for determination."

D The Court of Appeal was right to have reformulated the issue for determination based on the ground of appeal. This was to enable it to give proper consideration to the argument advanced before it. It was in the interest of justice. The issue was well within the compass of the ground of appeal. The only issue relied on by the appellants having been answered in the affirmative and their complaint brought in respect of the judgment of the lower court, I, too, dismiss the appeal and award N10,000.00 costs to the respondents.

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