

**SUPREME COURT OF NIGERIA**

23RD. JUNE, 2000. SC. 304/1991

**CORAM:- M. E. OGUNDARE, U. MOHAMMED, S. U. ONU,  
A. I. IGUH, A. I. KATSINA-ALU, S. O. UWAIFO,  
E. O. AYOOLA, JJSC**

ALHAJI KARIMU ADISA ..... DEFENDANT/APPELLANT  
AND  
EMMANUEL OYINWOLA & 4 ORS. .... PLAINTIFFS/  
(For themselves and on behalf of ..... RESPONDENTS  
Ikolaba Chieftaincy family)

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**ACTIONS** - *Jurisdiction - High Court - Stare decisis - The decision in Sadikwu v. Dalori - There is nothing decided in that case - That is authority on which to rely - To determine the question which has arisen in the present case.*

**ACTIONS** - *Parties - Necessary Party - Duty of a Plaintiff - Is to bring to court a party whose presence is crucial to the resolution of the case*

**ACTIONS** - *Retrial - Proper order - Claim that was not properly constituted - The action would not be struck out in the present case - Since the Plaintiff could easily apply to join the defendant's family at a retrial - Without much amendment*

**CONSTITUTIONAL LAW** - *High Court - Jurisdiction - Construction by implication - To construe by implication one section of the Constitution - As restricting the plenitude of jurisdiction granted to the High Court in another section - The implication must not only be explicit - But also necessary*

**CONSTITUTIONAL LAW** - *High Court - Jurisdiction - Unlimited jurisdiction - The provisions of s. 236 (1) of the 1979 Constitution - Did not permit the unlimited jurisdiction vested in the High Court of a State*

*to be limited - Other than as the Constitution itself may have provided*

**JUDGMENTS** - *Departure from - Oyeniran v. Egbetola - Decision in that case - Reasons why the decision in that case - Should be overruled and departed from*

**JUDGMENTS** - *Evidence - Evaluation of - Misconception of case - Judgment that was fundamentally flawed - By the Court's misconception of the plaintiff's case - And failure to accept or reject the evidence of a witness - Cannot be allowed to stand*

**JUDICIAL PRECEDENTS** - *Stare decisis - When the doctrine is not applicable - A previous decision is not to be departed from - Or even followed - Where the facts or the law applicable in the previous case - Are distinguishable from those in the later case*

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**JURISDICTION** - *High Court - Unlimited jurisdiction - The jurisdiction is described as unlimited only because it is presumed to exist - Unless it is expressly curtailed by statute*

**LAND LAW** - *Land Use Act - Jurisdiction of the High Court - Sections 39 and 41 of the Act - Purpose of - The purpose which the sections are designed to serve is clear - They do not limit the jurisdiction of the High Court*

**LAND LAW** - *Land Use Act - Non urban land - Concurrent jurisdiction - Of the Customary Court and the High Court - It is sensible to preserve the choice of forum - Which a litigant had always enjoyed in respect of non urban land - Before the introduction of the Act*

**LAND LAW** - *Land Use Act - Rights of occupancy - Power to grant - The Power to grant Statutory right of occupancy is vested in the Governor - While the Local Government is given power to grant customary right of occupancy*

**LAND LAW** - *Title to land - Acquisition by grant - Reliance on - Where a plaintiff relies on acquisition of title by grant - And fails to prove it - The Court cannot make a case for him on a different form of acquisition*

**LAND LAW** - *Title to land - Acquisition of - Idudun v. Okumagba - That case deals with five ways in which ownership of land may be proved - And not the ways of acquiring title to land*

**LAND LAW** - *Title to land - Grant - Proof of - Traditional history - Where the plaintiffs rely on acquisition of title by grant - Proof of such grant by traditional history arises only where the facts of such grant was so ancient - As to be beyond the memory of living witnesses*

**LAND USE ACT** - *Rights of occupancy - Although the Act created rights of occupancy that may be regarded as new tenures in land - It did not introduce a completely novel concept of rights and interest in and over land.*

**STATUTES** - *Interpretation - Ambiguity in the effect of a statute - The literal meaning of a section of a statute may be clear - But there may be ambiguity in the effect of the statute - Occasioned by the inclusion of the provisions of the section in the statute*

**STATUTES** - *Interpretation - Construction by implication - Resort to*

*construction by implication is permissible - Only if the meaning of a statute is not clear*

**STATUTES** - Interpretation - Presumption of law - The law presumes against construing statutes so as to oust the jurisdiction of a superior court of record - Unless there is explicit expression to that effect in the legislation

**SUPREME COURT** - Erroneous decision - *Oyeniran v. Egbetola* - The decision in that case - Was erroneous and made per incuriam

**SUPREME COURT** - Previous decision - Departure from - Attitude of the Supreme Court - The court has not laid down a hard and fast rule - Exhausting the area within which to warrant a departure from a previous decision - Each case must be decided on its special facts and circumstances

**SUPREME COURT** - Previous decision - Superior argument - The Court will not depart from its Previous decision merely because of superior argument.

**SUPREME COURT** - Previous decisions - Departure from - Principle guiding - The Supreme Court will depart from its previous decisions - Which are shown to be vehicles of injustice - Or given per incuriam - Or clearly erroneous in law

**WORDS & PHRASES** - ‘‘Urban area’’ - Under the Land Use Act - What it means

**WORDS & PHRASES** - Statutory right of Occupancy - And Customary right of occupancy - Their proper definitions

## H FACTS

In the High Court of Oyo State, the plaintiffs/respondents claimed as representatives of the Ikolaba chieftaincy family against the defendant in his personal capacity, a declaration to a customary right of occupancy

to a piece of land described as "land of Ikolaba of Igbetti" situate at Kishi in Oyo State, damages for trespass and injunction. The plaintiffs' case was that sometime in 1940 Oba Ladigbolu, the Alafin of Oyo sent one Wusimi to Igbetti to "apportion" land to the chiefs. That as a result of this "assignment" the eleven chiefs in Igbetti including Ikolaba got lands "allocated" to them. That the land allocated to chief Ikolaba became the land of Ikolaba Chieftaincy family and is the land in dispute in this case. The plaintiffs claimed that only chiefs have land in Igbetti and holding among the chiefs are in accordance with the grant made by Ilusinmi. The defendant was sued in his personal capacity because it was alleged he trespassed on the land sometime in 1981. The defendant's defence was that the land belonged to his family called Asunmode family. He averred that allocation of land to Igbetti Chiefs was merely for the purpose of enabling them to collect customary tributes from tenant farmers who were not indigenes of Igbetti without a transfer of interest to those chiefs. From the plans which were put in evidence by the parties, it is clear that the area to which the plaintiffs laid claim was vast covering 174.25 hectares of which the area trespassed on by the defendant was relatively microscopic. The area which the defendant alleged belonged to his family covered 163.416 hectares.

The learned trial judge approached the case on the footing that the claim was against the defendant in a representative capacity and that the plaintiffs' case was based on traditional evidence. Relying on the principle in *Kojo II v. Bonsie and ors* (1957) 1 WLR 1223, he held that the plaintiffs have established their right to the relief claimed. The defendant's appeal to the Court of Appeal was dismissed. Dissatisfied the defendant has further appealed to the Supreme Court. The appeal are in two parts. The first deals with the question of the jurisdiction of the High Court and, the second with the question of the merits of the case. The defendant raised five issues on the whole for the determination of the appeal but the appeal was determined based on three issues

### **ISSUES FOR DETERMINATION**

(1) *"Whether the Court below was not in error in failing to see that the trial court lacks jurisdiction over claims as formulated by the*

plaintiff having regard to the provisions of the Land Use Act particularly Section 39 and 41 thereof".

"(2) Whether or not the plaintiffs who pleaded and based their root of title in an action for Declaration of title on traditional history of a particular grant, can rely on grant by another person and exercise of acts of ownership and are these conflicting claims not fatal to their claim for title.

"(3) Whether in a claim for declaration of title and injunction against a particular party, in his personal capacity, the court can give judgment in respect of the entire family land and can such judgment bind the family."

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

**Words & Phrases - Urban area**

1. "Urban area" is such area of the State as may be so designated by the Governor pursuant to section 3 of the Act. (p. 1938 F)

**Rights of Occupancy - Power to grant**

2. The power to grant statutory right of occupancy to any person for all purposes, whether in an urban area or not, is by section 5 (1) (a) of the Act vested in the Governor, while by virtue of section 6 (1) of the Act, the Local Government is granted power to grant customary rights of occupancy in respect of land not in an urban area. It is thus clear that the power to grant customary rights of occupancy is exclusively that of the Local Government. (p. 1938 G)

**Words & Phrases - Statutory right of Occupancy**

3. By virtue of section 51 (1) (a) of the Act "statutory right of occupancy" is defined in terms of grant. However, "customary right of occupancy" was defined, not solely in terms of grant, but as "the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local Government under this Act." (p. 1939 A)

***High Court - Laws defining jurisdiction***

4. Where the question arises as to the jurisdiction of the High Court, it is essential to examine the laws defining the jurisdiction of the High Court both at the time the action was instituted and up to the time judgment was given. Authority for the view that so long as a court acquires jurisdiction before delivering judgment, its decision cannot be attacked on the ground of want of jurisdiction, is Adani v. Igwe [1959] NSCC 84. (p. 1943 D)

***Stare decisis - When the doctrine is not applicable***

5. A previous decision is not to be departed from, or even followed, where the facts or the law applicable in that previous case are distinguishable from those in the later case. Where relevant statute laws have changed since the previous decision, what is called for is "distinguishing" rather than "departure". The doctrine of stare decisis is based, first and foremost, on the relevant likeness between two cases - the previous case and the one before the court. Where there is no relevant likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. In this case, a significant difference between the present case and the Sadikwu case is that the scope of the jurisdiction of the High Court of the State has changed since the action in Sadikwu v. Dalori (supra) was instituted. Besides, the Laws applicable for the determination of the jurisdiction of the High Court in Sadikwu are not the same as are applicable in this case. (p. 1945 B)

***Stare decisis - The decision in Sadikwu v. Dalori***

6. It is sufficient to say, for the moment and for the purpose of the case in hand, that there is nothing decided in Sadikwu v. Dalori that is authority on which to rely to determine the question which has arisen in this case of the jurisdiction of the High Court of Oyo State. (p. 1946 A)

***Supreme Court - Previous decision***

7. In the recent case of Okulate v. Awosanya (2000) 2 NWLR (Part 646) 530 this court restated the principle that it is entitled to depart or overrule

its previous decision in an appropriate situation when invited to do so. It set out the situations in which it would do so, as decided by this court in a host of cases. In the earlier case of Odi & Anor v. Osafire & Ors [1985] 1 NSCC 14, this court considered extensively its attitude to the question of overruling or departing from its previous decisions drawing, largely, from the practice in other common law jurisdictions and having regard to the status of this court as the successor to the Privy Council as the final court of appeal. The principle that emerged at the end of the reflective, analytical and comparative exercise is that this court has jurisdiction to overrule or depart from its previous decisions. Obaseki, JSC, who delivered the leading judgment in that appeal said (at p. 29):

*"The sovereign powers of the State which are shared among the three arms of Government - the Executive, the Legislature and the Judiciary - by the Nigerian Constitution 1979 as amended enabled such corrective processes in the interest and the good of all persons in and all citizens of Nigeria. Thus the Judiciary Committee of the Council has, in its advisory capacity to the Sovereign of the British Empire since the 19th century, given repeated expression to the fact that it will not be bound by the erroneous previous decisions of the court and that for good and compelling reasons it will depart from such decisions and overrule them in the interest of justice and the law. These decisions must be clearly shown to be (1) vehicles of injustice or (2) given per incuriam or (3) clearly erroneous in law."* (p. 1948 F)

### ***Previous decision - Departure from***

8. Although an examination of the law reports reveals how in each case where the court had been invited to overrule or depart from its previous decision, the court had reacted to such invitation, care must be taken not to trammel the attitude of the court by rigid guidelines. It is to be accepted that this court as the final appeal court should be trusted to know when it appears right to overrule or depart from its previous decision. For my part, I find the opinion of Bello, JSC, in Odi & Anor v. Osafire & Anor (supra) apt when after setting out the guidelines deduced from authorities thus: (at. p. 41)



"...the attitude of this court on the issue may be stated thus: that the Court will not adhere to the rule of stare decisis but will depart from its previous decision if such decision is inconsistent with the provisions of the Constitution or if it is erroneously reached per incuriam and will, if followed, perpetuate hardship and considerable injustice or it will cause temporary disturbance of rights acquired under it or will continue to fetter the exercise of judicial discretion of a court."

he went on to say:

"It may be emphasized that the Court has not laid down a hard and fast rule exhausting the area within which to warrant a departure from a previous decision. Each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice which in my view, is the paramount determinant factor in this respect.' (Emphasis mine) (p. 1949 D)

### ***Previous decision - Superior argument***

9. While it is easy to handle decisions which were give per incuriam in the sense that there had been ignorance or omission to make use of relevant statute or they were made contrary to provision of such statutes, probably, out of inadvertence, the same cannot be said of a decision which the court has been invited to depart from because a more persuasive and cogent argument had been advanced by counsel. In such a case, the prevailing attitude, it would appear, is that the court will not depart from its previous decision merely because of superior argument. That much was said by Eso, JSC, in Odi & Anor. v. Osafire & Anor (supra) when he said at p. 43:

"To decide whether the previous decision had been erroneous, what is it that impels the Supreme Court to reconsider its view? I have found the authorities to which Chief Gani Fawehinmi referred us very useful in connection with this. Is the Supreme Court to listen to re-argument of the case, though with more authorities on the points? If the points canvassed in the second proceedings are merely points that had earlier been canvassed and all that is being done is to put in more emphasis, by way of more authorities on those points, it is my considered

view that that would not amount to a case the Supreme Court should reconsider its view." Eso, JSC, suggested a 'fresh element' test and I agree with him. (p. 1950 C)

***Judgments - Oyeniran v. Egbetola***

B 10. In this case there are compelling reasons why the decision in Oyeniran v. Egbetola should be overruled and departed from. First, the decision was given without regard to section 236 (1) of the 1979 Constitution. Secondly, it was given in reliance on the decision in Sadikwu v. Dalori C (supra) whereas that decision, as has been discussed in this judgment, was based upon Northern Nigerian laws which were not relevant for the determination of the ambit of the jurisdiction of the High Court of Oyo State. Those Northern Nigeria laws were not the same as the laws applicable in Oyo State. Thus, while, for instance, section 17 (1) of the High Court Law of Northern Nigeria which was applied in Sadikwu v. Dalori (supra) expressly, excluded the jurisdiction of the High Court in respect of land matters subject to the provisions of the Land Tenure Law, that D was not the position in Oyo State. (p. 1951 A) E

***High Court - Unlimited jurisdiction***

F 11. Before the promulgation of the 1979 Constitution, High Courts both in the Northern as well as in the Southern States were regarded as courts of unlimited jurisdiction by virtue of their status as superior courts of record. In Olaniyi v. Aroyewun (1991) 5 NWLR (part 194) 652, Bello, CJN, said:

G "*prima facie the High Court, being a Superior Court of Record, was a court of unlimited jurisdiction....*"

I suppose that the jurisdiction is described as unlimited only because it is presumed to exist in any case unless it is expressly curtailed by statute, as has been done in several regional or state law before the promulgation of the 1979 Constitution. (p. 1951 D) H

***Constitutional Law - High Court***

12. The provisions of section 236 (1) of the 1979 Constitution did not

permit the 'unlimited' jurisdiction vested in the High Court of a State to be limited other than as the Constitution itself may have provided. That was said by this court in the recent case of Okulate v. Awosanya (supra) in consonance with similar view expressed in Bronik Motors Ltd. v. Wema Bank Ltd (1983) 1 SCNLR 296, and Savannah Bank of Nigeria Ltd v. Pan Shipping & Transport Agencies Ltd (1987) 1 NWLR (part 96) 212. The answer to the question whether the jurisdiction of the High Court of a State is curtailed after the 1979 Constitution had come into effect is therefore, not to be found in State legislation but, solely, in the Constitution itself. (p. 1952 B) C

### ***High Court - Land Use Act***

13. It is evident that whereas section 39 of the Act expressly excluded courts other than the High Court from exercising jurisdiction in matters specified therein, no such exclusion was expressed in section 41 of the Act. It must be emphasised that the enquiry is not whether the High Court derived its jurisdiction in proceedings mentioned in section 41 from that section or the Act itself, but whether the provisions of section 41 excluded the jurisdiction of the High Court. There being no such express exclusion of jurisdiction in section 41, the proponents of exclusive jurisdiction of the area court or the customary court can only succeed in their proposition if a resort to construction by implication is capable of producing such result. (p. 1953 B) D E F

### ***Interpretation - Construction by implication***

14. The law is clear that resort to construction by implication is permissible only if the meaning of a statute is not clear. The principle is stated in Craies on Statute law, 7th Edition, at page 109, thus: G

*"If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inference and supply omissions."* (p. 1953 E) H

### ***Interpretation - Ambiguity in the effect of a statute***

15. The literal meaning of a section of a statute may be clear, but there

may be a degree of obscurity and ambiguity in the effect of the statute occasioned by the inclusion of the provisions of the section in the statute. It is in this wise that in considering a statute one may not limit oneself to literal clarity of a section in determining whether or not there is an ambiguity in the statute. For my part, although in literal terms there may not be an ambiguity in the provisions of section 41 of the Act, I cannot say with certainty that the inclusion of the section in the Act has not created some ambiguity as to the jurisdiction of the High Court in proceedings relating to customary rights of occupancy. Were that not so, the divergent views expressed hitherto in several decisions of this court, and of the Court of Appeal, in regard to the effect of the Act on the jurisdiction of the High Court, would not have emerged. I therefore approach the question of interpretation of the Act on the footing that recourse may be had to construction by implication. (p. 1953 G)

### ***Interpretation - Presumption of law***

16. The principle of construction of statute is now well established. The law presumes against construing statute so as to oust or restrict the jurisdiction of a superior court of record unless there is explicit expression to that effect in the legislation. In Shodeinde v. The Registered Trustees of Ahmaddiya Movement in Islam (1980) 1-2 SC 225, 229, Aniagolu, JSC, said:

"....it is the recognised general law that, *prima facie*, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior tribunal, unless on the face of the proceedings, it is expressly shown that the particular matter is within the cognisance of the court."

There is no need to multiply dicta and quotations which all go to show that an authority to deprive the High Court of its jurisdiction is not to be presumed without express words. That principle of construction, well established in general law, takes on a stronger form when, as in this case, it is only the Constitution itself that can curtail the unlimited jurisdiction of the High Court which it had granted. (p. 1954 C)

***Jurisdiction - Construction by implication***

17. To construe, by implication, one section of the Constitution as restricting the plenitude of jurisdiction granted to the High Court in another section, the implication must not only be explicit, but also necessary. It B can only be necessary if both cannot co-exist without creating an absurdity or a situation in which the two provisions become unworkable. (p. 1954 G)

***Land use Act - Jurisdiction of the High Court*** C

18. The purpose which sections 39 and 41 of the Act are designed to serve is clear. Section 39 excludes area courts and customary courts from exercising jurisdiction in respect of land the subject of a statutory D right of occupancy. Unlike under the land Tenure Law system, under the Act statutory right of occupancy can now only be granted by the Governor of a State. Section 41 redefines the jurisdiction of the courts referred to therein so as to ensure that courts, such as the customary courts in E southern parts of the country which had previously been exercising concurrent jurisdiction with the High Court without distinction by classification of land, have their jurisdiction limited as stated therein. When properly viewed, the two sections do not limit the jurisdiction of the High Court. (p. 1955 B) F

***Land Use Act - Non urban Land***

19. Contrary to the submission of Dr. Adediji-Kayode, the Attorney-General of Osun State, that there is an absurdity in the notion that the G area court and the customary court and the High Court would have concurrent jurisdiction, I fail to see an absurdity in a system which had operated without hitch in several parts of the south of the country before the introduction of the Act. It appears to me a sensible thing to do, to H preserve the choice of forum which a litigant had always enjoyed to choose his forum in respect of non-urban land which may not necessarily be of little value and disputes about which may raise, sometimes, questions of considerable complexity. (p. 1955 F)

***Land Use Act - Statutes***

20. Although the Act created rights of occupancy that may be regarded as new tenures in land, it did not completely wipe away all incidents and relationships that existed, or is capable of existing, in dealings with land. It is clear that rights and interests in land previously vested in persons and occupancy of land under customary tenure, continue to play prominent roles as the transitional provisions and the definition of customary right of occupancy in the Act show. The Act by creating rights of occupancy, in substance, described rights and interests in land in new terms. In my opinion, it does not introduce a completely novel concept of rights and interest in and over land into the jurisprudence of our land law, owing its incidents and origins exclusively to statute. (p. 1956 E)

***Supreme Court - Decisions***

21. In my judgment the decision of this court in Oyeniran v. Egbetola (supra) was erroneous and made per incuriam. This court should not be bound by that decision which would create much unnecessary problems and difficulties in States where area courts and customary courts or courts of equivalent jurisdiction do not exist and may lead some State Governors to resort to designating land in all areas of the State as urban land contrary to the spirit and intention of the Act. I hold that the High Court had jurisdiction to try the proceedings and resolve the jurisdictional issue against the defendant. (p. 1958 D)

***Title to land - Acquisition of***

22. The several ways in which title in land can be acquired should not be confused with the several ways in which such acquisition can be proved. The much cited case of Idundun & Ors v. Okumagba & Ors [1976] Vol1. 10 NSCC 446 deals with "five ways in which ownership of land may be proved." and not the ways of acquiring title to land. In short Idundun & ors v. Okumagba & Ors deals with matters of evidence rather than question of substantive law of acquisition of title. It is for this reason that acquisition of title by gift, grant, or purchase was not mentioned. (p.

***Title to land - Grant***

23. Where, as in the present case, the plaintiffs rely on acquisition of title by grant, proof of such grant by traditional history arises only where the fact of grant was so ancient as to be beyond the memory of living witnesses. Facts which are within living memory are properly to be proved by evidence of living witnesses to the event and not by evidence of tradition permitted by section 45 of the Evidence Act. (See Commissioner of Lands v. Kadiri Adigun (1937) 3 WACA 206.) (p. 1961 D) C

***Acquisition by grant - Reliance on***

24. I agree with the learned counsel for the defendant that where the plaintiff relies on acquisition of title by grant and fails to prove it, the court cannot make a case for him on a different form of acquisition. Where in a claim for a declaration of title to land, title is claimed by grant, the court has to be sure of the nature of the grant before a declaration is granted. The principle that should have guided the trial court and the court below has been stated thus: D E

*"Where a party relies on, and pleads a grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. Other evidence of acts of possession after the grant will merely go to strengthen the grant. But where as in this case, the proof of the grant is inconclusive, the bottom is knocked out of the plaintiff/appellant's claim. When his root ceases to stand, the stem and branches will fall with the root. In other words, where the radical title pleaded in not proved, it is not permissible to support a non-existent root with acts of possession, it is not permissible to substitute a root of title that has failed with acts of possession which should have derived from that root."* (Per Oputa, JSC in *Odofoin v Ayoola* [1984] NSCC, 711, 731). (p. 1962 A) F G

***Evidence - Evaluation of***

25. In my view, the judgment of the High Court and the court below were fundamentally flawed by their misconception of the plaintiffs' case H

and failure to accept or reject the evidence of a witness who claimed to be a living witness to the grant alleged. The judgments of the High Court and the court below should not be allowed to stand in these circumstances. (p.1962 G)

B

***Actions - Parties***

26. The duty of a plaintiff to bring to court a party whose presence is crucial to the resolution of the case has been stated in several cases. See Ekpere v. Aforije (1972) All NLR (part 1) 220 where the action was struck out because the proper defendants were not made parties.) In the present case, the defendant was alleged to be a trespasser over a very minute portion of a vast area of land to which the plaintiffs sought a declaration of title. It was clear from the pleadings that the cause of action was in respect of that relatively small portion on which he was erecting a building. Yet, right from the outset, the plaintiffs claimed against him in his personal capacity a declaration of customary right of ownership over a vast area, without joining the family through whom he claimed and who should have been the proper defendant in respect of the claim to the vast area of land, the interest in which was not claimed to be vested in the defendant in his personal capacity. I think this case falls within the principle in and is not unlike the case of Ekpere v. Aforije (supra). (p.1963 D)

***Actions - Retrial***

27. I would not strike out the case, since I think that the plaintiffs could easily apply to join the defendant's family at a re-trial and not much massive amendment will be occasioned by reason alone of such joinder. A re-trial will save the plaintiffs the expense of preparing a fresh plan and will occasion less delay in getting the matter tried once again. The proper order to make in the circumstances is to order a re-trial of the action. (p.1963 H)



*1. When the decision in Sadikwu v. Dalori should not be relied on*

The submission that Sadikwu v. Dalori was wrongly decided is, in my view, correct if the provisions of the 1979 Constitution should have been taken into consideration in determining the jurisdiction of the High Court in that case. Although the action in Sadikwu v. Dalori was commenced B before the promulgation of the 1979 Constitution, judgment of the High Court was not given until after October, 1979 when the Constitution had already come into force. By that date, whatever restriction there may have been on the jurisdiction of the High Courts in States to which the Land Tenure Law and the High Court Law of the former Northern Nigeria C applied, had been removed by the provisions of section 236 (1) of the Constitution. However, that point has not been taken on this appeal. I am content to leave the decision whether or not Sadikwu v. Dalori (supra) should be departed from till such time as a case arises touching on D the jurisdiction of the High Court in a state in which the Land Tenure Law and the High Court Law of Northern Nigeria, or similar enactment, were applicable. (p. 1945 E)

### **OGUNDARE JSC**

*2. When a case is said to be decided per incuriam*

And when is a case said to be decided per incuriam? Karibi-whyte JSC provided the answer when at p. 493 of the Report he said-

*"A case is decided per incuriam where a statute or rule having statutory effect or other binding authority which would have affected the decision, had not been brought to the attention of the Court.- See African Newspapers v. Federal Republic of Nigeria (1985) 2 NWLR (pt.6) 137."*

The learned Justice of the Supreme Court later in his judgment at p. 494, adopted the view of Cross on precedent in English law (1961) p.139 to this effect:

*"The principle appears to be that a decision can only be said to be Per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made*

*the decision different from what it was."* (p.1966 C)

### **IGUHJSC**

#### *3. The object of all interpretation of a Statute*

- B It is right to bear in mind the well established principle of law that the safer and more correct course of dealing with a question of construction is to take the words of the document or statute themselves and arrive, if possible, at their meaning without, in the first instance, reference to cases. See Barrell v. Fordree (1932) A.C. 676 at 682 per Lord Warrington of Clyffe. The rule of construction is "to intend the legislature to have meant what they have actually expressed". See R. v. Banbury (Inhabitants) (1834) 1 A and E 136 at 142 per Parke J. The object of all interpretation of a statute is to discover the intention of Parliament but such
- D intention must be deduced from the language used for it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law. See Davies Jenkins and Co. Ltd v. Davies (1967) 2 W.L.R. 1139 at 1156 per Lord Morris of Borth-y-Gest. Where the
- E language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. Where, therefore, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. See Cartledge v. E. Jopling and Sons Ltd (1963) A. C. 758. (1996 B)

#### *4. The mere vesting of jurisdiction in inferior courts does not operate to oust the jurisdiction of the High Court*

- G Speaking for myself, I must confess that the words employed by the law makers in conferring power or jurisdiction to the Area Courts, the Customary courts and other courts of equivalent jurisdiction under section 42 of the Act seem to me plain. They do not, in my view, admit of any
- H ambiguity whatsoever. The mere vesting of jurisdiction in the named inferior courts does not and cannot operate to oust the jurisdiction of the state High courts over the same subject matter without any specific or express provision to that effect. (p. 1997 F)

*5. It is erroneous to import the word "exclusive into S. 41 of the Land Use Act*

I am therefore of the firm view that having expressly employed the word "exclusive" to qualify jurisdiction in section 39 (1) of the Act but omitted the use of the same word in section 41, the obvious intention of the law makers was not to confer exclusive jurisdiction on the Area and Customary Courts under the said section 41 of the Land Use Act. It seems to me erroneous on point of law to import the word "exclusive" into section 41 of the Act. The meaning and intention of a legislation must be deduced from the plain and ambiguous expressions therein used rather than from extraneous notions of what is just or convenient. See Ahmed v. Kassim (1958) 3 F.S.C. 51. (p. 1999 C)

*6. The legal status of the Land Use Act vis-a-vis the 1979 Constitution*

I think, with respect, that it is a misconception to suggest that the Land Use Act, 1978 is part of the 1979 Constitution by virtue of the provisions of section 274 (5) of the said Constitution. This is because it is now settled that notwithstanding the fact that the Land Use Act, 1978, pursuant to section 274 (5) of the Constitution became an extra-ordinary statute by virtue of its entrenchment in the Constitution, it still remains essentially a Federal Act or enactment. Although it may not be abrogated except as prescribed by the Constitution, this does not make it an integral part of the Constitution. Where, therefore, its provisions are inconsistent with that of the Constitution, such provisions are to the extent of such inconsistency void. See Nkwocha v. Government of Anambra State (1984) 6 S.C. 362 at 365 and 403. The Constitution being the supreme law of the land towers above other laws or enactments and its provisions cannot be made subject to any other Act or enactment except by direct and clear provisions to that effect. (p. 2001 E)

**UWAIFO JSC**

*7. The effect of s. 274 of the 1979 Constitution*

It must therefore be said a fortiori that when the 1979 Constitution came

into force, it became a matter beyond dispute that the said s. 41 was incapable of undermining s. 236 (1) of the Constitution because s. 274 of the Constitution which recognises the Land Use Act as an existing law, as already shown, makes such existing law "Subject to the provisions of this Constitution." So that even though s. 274 (5) preserves the potency of the provisions of the Land Use Act, it can only possibly do so to the extent that they must remain subject to the provisions of the Constitution itself. (p. 2018 G)

C 8. *The effects of s. 41 of the Land Use Act*

Happily, s. 41 of the Land Use Act is plain enough not to cause any constitutional difficulties. This provision has achieved certain goals. First, it declines to give jurisdiction to those other courts in respect of urban lands but rather implies that they have no such jurisdiction. Second, it does not attempt to take away or detract from the unlimited jurisdiction conferred on a State High Court under s. 236 (1) of the Constitution by refraining to use the word "exclusive" in the jurisdiction it has granted to those courts. Third, customary or similar courts in Southern Nigeria whose jurisdiction in land matters in most cases depended on the value of the land, and in some cases had no such jurisdiction at all, now have jurisdiction in land matters, although only in rural areas, irrespective of the value of the land. The result is that while a State High Court has exclusive jurisdiction over lands in urban area by virtue of s. 39 (1) of the Land Use Act, it shares concurrent jurisdiction with the customary or other court of equivalent jurisdiction by virtue both of its own entrenched unlimited jurisdiction under s. 236 (1) of the Constitution and the jurisdiction conferred on the said customary court or other court by s. 41 of the Land Use Act. (p. 2019 A)

H 9. *The effect of the Land Tenure Law on the jurisdiction of the High Court*

I may only add by way of a footnote that the Land Tenure Law (Cap. 59), Laws of Northern Nigeria no longer makes any difference to the jurisdiction of the High Court in the Northern State in land matters except

perhaps where they involve Islamic personal law regarding a wakf, gift, will or succession. I do not by this give any opinion on that aspect as I have not had the benefit of arguments on it. (p. 2020 C)

*10. Where a trial court lost its bearing in a case - Effect*

When it appears that a trial court has obviously lost its bearing in a case in the sense that it did not quite appreciate the pleadings and evidence led in support so as to make findings on it, nor the case made by the respective parties so as to be able to assess each party's case, and over and above that it applied wrong principles, as in the present case, it is as good as the case not having been heard and determined. The lower court fell into grave error when it upheld the judgment arrived at by the trial court in such circumstances. For the above reasons and those fully stated by my learned brother Ayoola JSC, I would therefore allow this appeal and set aside the judgments of the two courts below. This is a case fit for a rehearing: see Ojogbue v. Nnubia (1972) 1 ALL NLR 226. (p. 2022 H)

**REPRESENTATION**

Olaseni Okunloye with Olayinka Bolanle for the defendant/appellant  
Kolawole Esan Esq. with Miss Folorunso Lufadeju for the plaintiffs/respondents

**As amici curiae:**

Godwin Kanu Agabi, SAN (Attorney-General of Nigeria) with him Mrs. Y. O. Fasade - Director Civil Litigation, F. K. Bebu - Principal Legal Officer, Rotimi Jacobs and Emmanuel Akpomudje.

K. Sofola, SAN with Dr. O. Sofola and Halima Umar Erena.

C. O. Akpamgbo, SAN with I. C. Anumudu and Miss Racheal Ordu.

Dr. Y. Kayode-Adedegi - A-G Osun State, with A. O. Adeniyi - State Counsel.

Awa O. Kalu - A-G Abia State, with J. Ukpai and Miss C. Atuloma.

Miss O. O. Bello for Alhaji Abdulahi Ibrahim, SAN.

B. R. Makanju.

Kola Babalola.

**CASES REFERRED TO**

- Salati v. Shehu (1986) All NLR 53, 76  
Sadikwu v. Dalori (1996) 4 SCNJ 20; (1996) 5 NWLR (Part 447) 151  
Oyeniran v. Egbetola (1997) 5 SCNJ 94; (1997) 5 NWLR (Part 504)  
B Salati v. Shehu (1986) 1 NWLR (pt.15) 198  
Odigie v. Obiyan (1997) 10 NWLR (Pt. 524) 197  
Okulate v. Awosanya (2000) 2 NWLR (Part 646) 530  
Odi v. Osafire [1985] 1 NSCC 14  
Olaniyi v. Aroyewun (1991) 5 NWLR (part 194) 652  
C Bronik Motors Ltd. v. Wema Bank Ltd (1983) 1 SCNLR 296  
Nkwocha v. Governor of Anambra State (1984) 6 SC 362

**STATUTES REFERRED TO**

- D Land Use Act (Cap 202) Laws of the Federation, 1990, ss. 2, 3, 5, 6, 34, 36, 39 and 41  
Land Tenure Law (Cap 41) Laws of Northern Nigeria, 1963; s. 41  
High Court Law (Cap 49) Laws of Northern Nigeria 1963 s. 17  
E Constitution of Nigeria, 1979; ss. 236 (1); 274; 9 (2)  
High Court Law of Oyo State, s. 19  
Evidence Act, s. 45  
Constitution of the Federal Republic of Nigeria; 1999; s. 272 (1)

F  
**BOOKS REFERRED TO**

- Craies on Statute Law, 7th ed. p. 109  
Cross on Precedent in English Law (1961) P. 139

G  
**LEAD JUDGMENT BY AYoola.JSC**

- This is an appeal from the decision of the Court of Appeal (Akanbi, Kutigi, JJ.C.A (as they then were) and Omololu-Thomas, JCA). That court dismissed an appeal from the decision of the High Court of Oyo State (Okeyode Adesina, J) whereby judgment was entered against the defendant. The original plaintiff was one Alhaji Jimoh Akano, described as the Ikolaba of Igbetti, who claimed as representative of the Ikolaba family against the defendant, in his personal capacity, a declaration of
- H

customary right of occupancy to a piece of land described as 'land of Ikolaba of Iggetti', situate at Kishi in Oyo State, damages for trespass and injunction. Adesina, J., on 2nd July, 1985 entered judgment for the plaintiff, granted the declaration sought, awarded damages against the defendant for trespass and restrained him from committing further acts of trespass on the land. The defendant's appeal to the Court of Appeal was dismissed on 21st June, 1988.

The original plaintiff having died sometime in September 1985, four persons were substituted as plaintiffs 'for themselves and as representatives of Ikolaba Chieftaincy family'. For convenience, the appellant, and the respondents, who were, respectively, appellants and respondents in the court below, are referred to in this judgment, respectively, as 'the defendant' and 'the plaintiffs'.

This appeal and judgment are in two parts. The first deals with the question of the jurisdiction of the High Court and, the second with the question of the merits of the case. Evidently, the second question arises only if the High Court was properly siesed of the suit in the first place. Since the jurisdictional issue is threshold issue, it is expedient that it be disposed of first. A narration of the facts of the case as they relate to the merits of the case is postponed till later in the judgment.

The defendant, by the appellant's brief, raised the jurisdiction question thus:

*"Whether the Court below was not in error in failing to see that the trial court lacks jurisdiction over claims as formulated by the plaintiff having regard to the provisions of the Land Use Act particularly Section 39 and 41 thereof".*

The issue was raised neither in the High Court nor in the Court of Appeal. However, that notwithstanding, it is an issue which has been properly raised in this appeal. It is right to observe that had the issue been raised in those two courts, they, bound by decisions of this court, would have held, rightly, that the High Court had on jurisdiction. In one or two cases which will be presently considered, this court decided that exclusive jurisdiction to try proceedings in respect of customary rights of occupancy is vested pursuant to section 41 of the Land Use Act (Cap

202: Laws of the Federation, 1990) ("the Act") in the area court, customary courts or courts of equivalent jurisdiction in a state. Since the question has arisen in this case whether this court should depart from those decisions, counsel, drawn in such a manner as to reflect a wide range of opinion, have been invited to address the court on this issue as amici curiae. It is right, at the outset, to acknowledge and put on record the learning and industry that the amici curiae have demonstrated in the amici curiae briefs which have been of much assistance in the determination of this issue.

The jurisdictional issue arose because the plaintiffs have sought in the High Court of Oyo State a declaration of customary right of occupancy pursuant to the Act. The object of the Act was, as contained in the preamble:

*"to vest all land comprised in the territory of each State (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Governments"*

Section 2 of the Act provides that from the commencement of the Act "all lands in urban areas shall be under the control and management of the Governor of each State" while "all other land shall, subject to this Act, be under the control and management of the Local Government within the area of jurisdiction of which the land is situated." **"Urban area" is such area of the State as may be so designated by the Governor pursuant to section 3 of the Act.**

The power to grant statutory right of occupancy to any person for all purposes, whether in an urban area or not, is by section 5 (1) (a) of the Act vested in the Governor, while by virtue of section 6 (1) of the Act, the Local Government is granted power to grant customary rights of occupancy in respect of land not in an urban area. It is thus clear that the power to grant customary rights of occupancy is exclusively that of the Local Government.



By virtue of section 5 (1) (a) of the Act "statutory right of occupancy" is defined in terms of grant. However, "customary right of occupancy" was defined, not solely in terms of grant, but as "the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local Government under this Act." B

By virtue of the transitional provisions made in sections 34 (2) and 36 (2) of the Act the rights of owners of land prior to the commencement of the Act were recognised and protected to such extent as was specified in the Act. C

It is against the background of the scheme and purpose of the Act as summarised above that the jurisdiction issue has been raised. Part VII of the Act deals with "Jurisdiction of the High Courts and other Courts". The relevant sections for the purpose of this appeal are sections 39 and 41. Section 39 of the Act provides as follows: D

*"39 (1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings-*

*(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act, and for the purposes of this paragraph, proceedings include proceedings for a declaration of title to a statutory right of occupancy.* E

*(b) Proceedings to determine any question as to any person entitled to compensation payable for improvements on land this Act.* F

*(2) All laws, including rules of court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which this section relates and the laws shall have effect with such modification as would enable effect to be given to the provisions of this section"* G

Section 41 of the Act provides that:

*"An area court or a customary court or other court of equivalent jurisdiction in a state shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act, and for the purpose of this paragraph proceedings* H

*include proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section."*

B It was argued in the appellant's brief of argument that having regard to the provisions of the Act just quoted and some previous decisions of this court, the court below should have seen, as the trial judge also ought to have seen, that the High Court had no jurisdiction to entertain the action. The previous decisions on which reliance was placed  
C were: Salati v. Shehu (1986) All NLR 53, 76; Sadikwu v. Dalori (1996) 4 SCNJ 20; (1996) 5 NWLR (Part 447) 151; and, Oyeniran & Ors v. Egbetola & Anor (1097) 5 SCNJ 94; (1997) 5 NWLR (Part 504) 122. Dr Kayode-Adedeji, Attorney-General of Osun State, who appeared amicus curiae,  
D supported these submission. For their part, the plaintiffs by their respondents' brief of argument, argued that "the High Court, the area and customary court have unfettered concurrent jurisdiction to entertain proceedings dealing with a customary right of occupancy under section 41  
E of the Land Use Act, 1978." It was submitted that if it were the intention of the legislators that only area courts or customary courts should have original jurisdiction in respect of customary right of occupancy, the legislators would have clearly said so by the inclusion of the word "exclusive" in section 41 as it did in section 39. To hold otherwise, it was  
F submitted, would be to import into that section what was clearly not the intention of the legislator. It was argued that to interpret section 41 as granting exclusive jurisdiction to the court mentioned in that section would curtail the "unlimited jurisdiction" granted to the High Court of a State by  
G section 236 (1) of the 1979 Constitution and that any such construction would render section 41 void by reason of inconsistency with the said provision of the 1979 Constitution. Finally, learned counsel for the plaintiffs urged this court to review and over-rule the three decisions relied on  
H by the defendant as they were give "oblivious of the provisions of section 236 (1) of the 1979 Constitution as amended by the Constitution (Suspension and Modification) Decree No 107 of 1993".

The position taken by learned counsel for the plaintiffs found

ample support in the well researched and helpful submissions of Mr Kanu G. Agabi, SAN, Attorney-General of the Federation, Mr Kehinde Sofola, SAN, Mr Clement Akpamgbo, SAN, Mr Abdullahi Ibrahim, SAN, and Mr Awa Kalu, Attorney-General of Abia State who all appeared on the invitation of the court as amici curiae. Since there is considerable unanimity in the submissions which cover substantially the same grounds, what can be regarded as the common ground in the submissions can be stated without diminishing from the weight and cogency of individual submission.

The submissions went thus: first since section 41 omitted the word 'exclusive' to qualify the jurisdiction granted to the courts mentioned in that section the intention of the legislator was not to confer exclusive jurisdiction on those courts; secondly, the opinion expressed by Karibi-Whyte, JSC, in Salati v. Shehu (supra) that the jurisdiction of the High Court and area courts and customary courts under the Act are mutually exclusive having been given obiter, should not have been relied on in Sadikwu v. Dalori (supra); thirdly, had this court considered the effect of section 236 (1) of the 1979 Constitution, section 41 would have been differently interpreted; fourthly, the Act was not an integral part of the 1979 Constitution, therefore such of its provisions that are inconsistent with the provisions of the Constitution are void to the extent of such inconsistency; fifthly, the unlimited jurisdiction which the High Court of the State had before the commencement of the Act cannot be taken away by implication, and the court should approach the question of the jurisdiction of the High Court on the footing that it exists to determine any suit whatsoever except what is expressly excluded. Both Mr Akpamgbo and Mr Kalu criticised those opinions which had tended to make the jurisdiction of the High Court conditional on the existence or absence of an area court or a customary court in the area where the land is situate.

For his part, Chief Kola Babalola, learned counsel in a pending appeal in which similar jurisdictional issue has been raised, argued that the jurisdiction of the High Court depended on whether the suit is in respect of 'granted' customary right of occupancy or right of occupancy which had not been granted but can be taken as having become vested in

terms in terms of section 36 (2) of the Act. He buttressed his argument by a comparison of the wording of section 39 (1) where the jurisdiction of the High Court was specifically mentioned to include disputes concerning 'deemed' statutory rights of occupancy and the omission of such 'deemed' customary rights of occupancy in defining the jurisdiction conferred on area and customary courts in section 41. In his submission, where the dispute relates to a granted customary right of occupancy the area court or customary court has exclusive jurisdiction.

The question in Salati v. Shehu (supra) was whether a Muslim Area Court had jurisdiction to try proceedings in respect of land subject of a statutory right of occupancy. This court (Eso, Nnamani, Uwais, (now CJN), Karibi-Whyte and Kawu, JJ.S.C.) came to a unanimous decision that the Muslim Area Court had no such jurisdiction. Uwais, JSC, (as he then was) who considered the matter in some detail in the context of the Land Tenure Law applicable in the Northern states and the Act, had this to say (at [1986] 1 NSCC 144):

*"What emerges therefore is that the jurisdiction now exercisable by Area Courts in land matters is limited to disputes related to such land, the right of occupancy of which is a customary right of occupancy."*

There was no issue in the case as to the power of the High Court to exercise jurisdiction in respect of proceedings concerning a customary right of occupancy. However, Karibi-Whyte, JSC, having dealt with the issue in the case, and after referring to sections 39 (1) and 41 of the Act proffered the opinion (at page 150) as follows:

*"There is no ambiguity in the two sections that the exclusive right of occupancy is vested in the High court of the state, whereas jurisdiction in respect of customary right of occupancy is vested in the Area of Customary Court."*

So far, no one can raise any objection to this statement. But, then, the opinion was further expressed by the learned Justice, that:

*"The exercise of these jurisdictions will seem to me mutually exclusive. There is no doubt therefore that the one cannot exercise the jurisdiction of the other."*

Needlessly, much problem has been engendered by this opinion

which was evidently made obiter and is consequently not binding. Although reference was made to the opinion in Sadikwu v. Dalori (supra) in the leading judgment of this court delivered by Wali, JSC, it is clear that he fell short of endorsing the obiter dictum of Karibi-Whyte, JSC.

The question in Sadikwu v. Dalori (supra) was whether the High Court of Borno State had jurisdiction in proceedings in respect of land not designated urban land. This court (Uwais, CJN, Wali, Kutigi, Ogwuegbu, and Mohammed, JJSC) in unanimous decision upholding the decision of the Court of Appeal, held that the High Court had no jurisdiction. We are now urged to depart from that decision. Sadikwu v. Dalori originated from an action commenced in the High Court of Borno State on July 19, 1979, that is, before the commencement, in October, 1979, of the 1979 Constitution.

**Where the question arises as to the jurisdiction of the High Court, it is essential to examine the laws defining the jurisdiction of the High Court both at the time the action was instituted and up to the time judgment was given. Authority for the view that so long as a court acquires jurisdiction before delivering judgment, its decision cannot be attacked on the ground of want of jurisdiction, is Adani v. Igwe [1959] NSCC 84.** In Sadikwu v. Dalori (supra), the relevant Laws at the time when the action was commenced were the Act, the Land Tenure Law (Cap. 41 Laws of Northern Nigeria, 1963) applicable to Borno State, and the High Court Law (Cap. 49 Laws of Northern Nigeria). By the time the judgment was given in the High Court, the 1979 Constitution had come into force. This should have raised the question, not pursued on this appeal, whether that Constitution should not have been taken into consideration when the question of the jurisdiction of the High Court came to be considered both in the Court of Appeal and in this court.

Section 41 (1) (a) of the Land Tenure Law provided that:

*"The High Court shall have exclusive jurisdiction in (a) proceedings in which the right of the Governor or the Minister to grant a statutory right over any land is in dispute."*

Section 41 (2) (a) of the same Law provided that:

"A native court of competent jurisdiction shall have jurisdiction in proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right of occupancy where all parties are subject to the jurisdiction of native courts, B subject nevertheless to the provisions of paragraph (b) of subsection (3) ...."

Subsection 3 referred to, provided, in effect, that the High Court shall have jurisdiction in proceedings in respect of any land the subject of C a statutory right of occupancy granted by a native authority or of a customary right of occupancy where one or more of the parties are not subject to the jurisdiction of native court and when there is no native court of competent jurisdiction available to try the proceedings.

Section 17 (1) of the High Court Law (Northern Nigeria) provided that:

D "Subject to the provisions of the Land Tenure Law and any other written law the High Court shall not exercise original jurisdiction in any suit or matter which (a) raises any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of a native E court."

The effect of section 17 (1) of the High Court Law (Northern Nigeria) was to curtail, in express terms, prior to the coming into force of the 1979 Constitution, the jurisdiction of the High Court in matters concern- F ing title to land and customary rights of occupancy.

A statement in the leading judgment in Sadikwu v. Dalori (supra) may lead to an erroneous impression that it was held in that case that section 41 of the Act restricted the jurisdiction of the High Court just as G section 17 (1) of the High Court Law (Northern Nigeria) did. Wali, JSC, said at page 163:

"In my view S. 17 (1) of the High Court Law of Northern Nigeria applicable to Borno State goes to support S. 41 of the Land Use Act, 1978 and S. 41 (2) (a) of the Land Tenure Law."

H I am not persuaded that it was suggested by this passage that section 41 of the Act vested exclusive jurisdiction in the Area Court. All that the statement was intended to convey, in the light of what had been discussed in the judgment, was that to define the jurisdiction of the High

Court of the State to which the High Court Law referred to applied, the provisions of the three statutes should be read together. It is to be noted that section 41 of the Act does not by itself deal with the jurisdiction of the High Court.

Should we overrule Sadikwu v. Dalori (supra) as we were invited to do? **A previous decision is not to be departed from, or even followed, where the facts or the law applicable in that previous case are distinguishable from those in the later case. Where relevant statute laws have changed since the previous decision, what is called for is "distinguishing" rather than "departure".** The doctrine of *stare decisis* is based, first and foremost, on the relevant likeness between two cases - the previous case and the one before the court. Where there is no relevant likeness between the two, it is an idle exercise to consider whether the previous one should be followed or departed from. In this case, a significant difference between the present case and the Sadikwu case is that the scope of the jurisdiction of the High Court of the State has changed since the action in Sadikwu v. Dalori (supra) was instituted. Besides, the Laws applicable for the determination of the jurisdiction of the High Court in Sadikwu are not the same as are applicable in this case.

The submission that Sadikwu v. Dalori was wrongly decided is, in my view, correct if the provisions of the 1979 Constitution should have been taken into consideration in determining the jurisdiction of the High Court in that case. Although the action in Sadikwu v. Dalori was commenced before the promulgation of the 1979 Constitution, judgment of the High Court was not given until after October, 1979 when the Constitution had already come into force. By that date, whatever restriction there may have been on the jurisdiction of the High Courts in States to which the Land Tenure Law and the High Court Law of the former Northern Nigeria applied, had been removed by the provisions of section 236 (1) of the Constitution. However, that point has not been taken on this appeal. I am content to leave the decision whether or not Sadikwu v. Dalori (supra) should be departed from till such time as a case arises touching on the jurisdiction of the High Court in a state in which the Land

Tenure Law and the High Court Law of Northern Nigeria, or similar enactment, were applicable. **It is sufficient to say, for the moment and for the purpose of the case in hand, that there is nothing decided in Sadikwu v. Dalori that is authority on which to rely to determine the question which has arisen in this case of the jurisdiction of the High Court of Oyo State.**

However, the case of Oyeniran v. Egbetola (supra) is in a different category. In that case, sometime in 1982, or so it would appear, the plaintiffs sued the defendants in the High Court of Oyo State claiming a declaration that they "by customary occupation are entitled to the customary right of occupancy" of a farmland, damages for trespass and injunction. The High Court granted all the reliefs sought. The defendants, for the first time on their appeal to the Court of Appeal questioned the jurisdiction of the High Court to try the action. They contended that by virtue of sections 39 and 41 of the Act, the High court lacked jurisdiction to try the action. The Court of Appeal rejected the contention, they being of the view that since the word 'exclusive had been omitted in section 41 of the Act it would be wrong for them to supply the missing word and that section 236 of the 1979 Constitution had granted unlimited jurisdiction to the High Court of a State. In the event, they dismissed the appeal. The same question was raised on the further appeal to this court. This court (Wali, Kutigi, Ogwuegbu, Mohammed and Onu, JJSC,) allowed the appeal and struck out the suit on the ground that the High Court had no jurisdiction to try the proceedings.

It has been argued on this appeal that we should depart from the decision of this court in that case. But, first, let me summarise the reasoning by which this court came to the decision. Mohammed, JSC, who delivered the leading judgment recognised that the view held by Karibi-Whyte in Salati v. Shehu (supra) was obiter, but, nevertheless he was prepared to be persuaded by that view. He held that Wali, JSC, had in Sadikwu v. Dalori (supra), interpreted section 41 of the Act as conferring exclusive jurisdiction on the area court and that he was bound by that decision.

However, he seemed to have resorted to construction by implication when



he said at page 132 of the law reports:

*"This classification of land tenure which the Land Use Act 1978 brought into the land law of this country and identification of courts to adjudicate in disputes the subject of the respective land tenure is deliberate. It is my view that the legislature by classification of land tenures and assigning jurisdiction to particular set of courts for determination disputes arising from such land holdings, does not want the courts to exercise concurrent jurisdiction over such matters."* B

He drew support for this view from the view expressed by Uwais, JSC (as he then was) in Salati v. Shehu (1986) 1 NWLR (pt.15) 198 where the following statement was made: C

*"Now the division of jurisdiction of the courts established in a State in respect of land matters is contained in sections 39, 40 and 41 of the Land Use Act, 1978. The division appears to follow the classification of land into urban areas and non-urban areas."* D

Although this statement had tended to suggest mutually exclusive jurisdictions of the High Court, on the one part, and the area and customary courts, on the other, it, like the opinion of Karibi-Whyte, JSC, in the same case, was obiter. Nevertheless, the opinion of Mohammed, JSC, stated above is of sufficient importance in the debate as to merit close attention and should not be glossed over. E

Wail, JSC, agreed with the reasoning and conclusion of Mohammed, JSC. However, Kutigi, JSC, it would appear, allowed the appeal for reasons other than those stated by Mohammed, JSC. Kutigi, JSC, held that the decision in Sadikwu v. Dalori (supra) applied only where a High Court and an Area Court or a Customary Court existed side by side. His view was that where that is the situation, "the High Court would have no jurisdiction in respect of proceedings for a declaration of title to a customary right of occupancy except an area or customary court." Where area courts and customary courts do not exist, in his view, the High Court would have jurisdiction in such matters as a court of equivalent jurisdiction. Ogwuegbu, JSC, allowed the appeal, apparently, because he felt bound by the decision in Sadikwu v. Dalori (supra). He being of the view that this court in Sadikwu v. Dalori (supra) had adopted the opinion F G H

expressed obiter by Karibi-Whyte, JSC, in Salati v. Shehu (supra) was of the opinion that it needed legislative intervention to restore "the concurrent jurisdiction that existed before the 1978 Act." Onu, JSC, while acknowledging that the Land Tenure Law had no relevance to the case, relied on section 19 of the High Court Law of Oyo State which gave appellate jurisdiction to the High Court from decisions of the customary court, and held that original jurisdiction was not vested in the High Court. It is evidence that the reasons why this court held that the High Court had no jurisdiction in the matter were diverse and, somewhat diffused. That by itself may not be sufficient reason for departing from the decision. However, there seems to be uncertainty as to what that case actually decided. In an opinion given by Kutigi, JSC, albeit obiter, in Odigie v. Obiyan (1997) 10 NWLR (Pt. 524) 197, it was stated that his court held in the case that "under section 41 of the Land Use Act, the High Court of a state has no original jurisdiction in proceedings in respect of land situate in a rural area except the customary court or Area courts. It also held that in a place where there is no Area or Customary Court, the High Court would have jurisdiction in such situation and not otherwise." To ascertain the exact principle on which this court acted in the case may prove an elusive exercise. Be that as it may, I recur to the main question: Should this court continue to be bound by this solitary decision?

**In the recent case of Okulate v. Awosanya (2000) 2 NWLR (Part 646) 530 this court restated the principle that it is entitled to depart or overrule its previous decision in an appropriate situation when invited to do so. It set out the situations in which it would do so, as decided by this court in a host of cases. In the earlier case of Odi & Anor v. Osafire & Ors [1985] 1 NSCC 14, this court considered extensively its attitude to the question of overruling or departing from its previous decisions drawing, largely, from the practice in other common law jurisdictions and having regard to the status of this court as the successor to the Privy Council as the final court of appeal. The principle that emerged at the end of the reflective, analytical and comparative exercise is that this court has jurisdiction to overrule or depart from its previous decisions.**

Obaseki, JSC, who delivered the leading judgment in that appeal said (at p. 29):

*"The sovereign powers of the State which are shared among the three arms of Government - the Executive, the Legislature and the Judiciary - by the Nigerian Constitution 1979 as amended enabled such corrective processes in the interest and the good of all persons in and all citizens of Nigeria. Thus the Judiciary Committee of the Council has, in its advisory capacity to the Sovereign of the British Empire since the 19th century, given repeated expression to the fact that it will not be bound by the erroneous previous decisions of the court and that for good and compelling reasons it will depart from such decisions and overrule them in the interest of justice and the law. These decisions and overrule them in the interest of justice and the law. These decisions must be clearly shown to be (1) vehicles of injustice or (2) given per incuriam or (3) clearly erroneous in law."*

Although an examination of the law reports reveals how in each case where the court had been invited to overrule or depart from its previous decision, the court had reacted to such invitation, care must be taken not to trammel the attitude of the court by rigid guidelines. It is to be accepted that this court as the final appeal court should be trusted to know when it appears right to overrule or depart from its previous decision. For my part, I find the opinion of Bello, JSC, in Odi & Anor v. Osafire & Anor (supra) apt when after setting out the guidelines deduced from authorities thus: (at. p. 41)

*"....the attitude of this court on the issue may be stated thus: that the Court will not adhere to the rule of stare decisis but will depart from its previous decision if such decision is inconsistent with the provisions of the Constitution or if it is erroneously reached per incuriam and will, if followed, perpetuate hardship and considerable injustice or it will cause temporary disturbance of rights acquired under it or will continue to fetter the exercise of judicial discretion of a court."* he went on to say:

*"It may be emphasized that the Court has not laid down a*

*hard and fast rule exhausting the area within which to warrant a departure from a previous decision. Each case must be decided on its special facts and circumstances with a view to avoiding perpetuating injustice which in my view, is the paramount determinant factor in this respect.*" (Emphasis mine)

The question has sometime arisen: Should this court depart from its previous decision just because after listening to more qualitative and persuasive argument it becomes convinced that the pervious decision erroneous? In one form or the other the question has arisen in the present case. Counsel for the defendant has argued that all that the plaintiffs have done was to present the same arguments as were as advanced in the previous case, perhaps, this time with the weight of learned friends of the court to their advantage. **While it is easy to handle decisions which were give per incuriam in the sense that there had been ignorance or omission to make use of relevant statute or they were made contrary to provision of such statutes, probably, out of inadvertence, the same cannot be said of a decision which the court has been invited to depart from because a more persuasive and cogent argument had been advanced by counsel. In such a case, the prevailing attitude, it would appear, is that the court will not depart from its previous decision merely because of superior argument. That much was said by Eso, JSC, in Odi & Anor. v. Osafire & Anor (supra) when he said at p. 43:**

*"To decide whether the previous decision had been erroneous, what is it that impels the Supreme Court to reconsider its view? I have found the authorities to which Chief Gani Fawehinmi referred us very useful in connection with this. Is the Supreme Court to listen to re-argument of the case, though with more authorities on the points? If the points canvassed in the second proceedings are merely points that had earlier been canvassed and all that is being done is to put in more emphasis, by way of more authorities on those point, it is my considered view that that would not amount to a case the Supreme Court should reconsider its view."*

Eso, JSC, suggested a 'fresh element' test and I agree with him.

In this case there are compelling reasons why the decision in Oyeniran v. Egbetola should be overruled and departed from. First, the decision was given without regard to section 236 (1) of the 1979 Constitution. Secondly, it was given in reliance on the decision in Sadikwu v. Dalori (supra) whereas that decision, as has been B discussed in this judgment, was based upon Northern Nigerian laws which were not relevant for the determination of the ambit of the jurisdiction of the High Court of Oyo State. Those Northern Nigeria laws were not the same as the laws applicable in Oyo State. C Thus, while, for instance, section 17 (1) of the High Court Law of Northern Nigeria which was applied in Sadikwu v. Dalori (supra) expressly, excluded the jurisdiction of the High Court in respect of land matters subject to the provisions of the Land Tenure Law, that was not the position in Oyo State. D

Before the promulgation of the 1979 Constitution, High Courts both in the Northern as well as in the Southern States were regarded as courts of unlimited jurisdiction by virtue of their status as superior courts of record. In Olaniyi v. Aroyewun (1991) 5 E NWLR (part 194) 652, Bello, CJN, said:

*"prima facie the High Court, being a Superior Court of Record, was a court of unlimited jurisdiction...."*

I suppose that the jurisdiction is described as unlimited only F because it is presumed to exist in any case unless it is expressly curtailed by statute, as has been done in several regional or state law before the promulgation of the 1979 Constitution.

The coming into force the 1979 Constitution had a considerable G impact on the jurisdiction of the High Courts of the States. While prior to that Constitution there was no express vesting of judicial power in the judicature and the jurisdiction of the High Courts of the States was to be found in state legislation which tended to vary from state to state, a change was effected by section 236 (1) of the 1979 Constitution which H provided as follows:

*"Subject to the provision of the Constitution and in addition to such other jurisdiction as may be conferred upon it by law the High Court*

*of a State shall have unlimited jurisdiction to hear and determine any civil proceeding in which the existence or non-existence of a legal right, power, duty, liability, privilege, interest, obligation, or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person."*

The provisions of section 236 (1) of the 1979 Constitution did not permit the 'unlimited' jurisdiction vested in the High Court of a State to be limited other than as the Constitution itself may have provided. That was said by this court in the recent case of Okulate v. Awosanya (supra) in consonance with similar view expressed in Bronik Motors Ltd. v. Wema Bank Ltd (1983) 1 SCNLR 296, and Savannah Bank of Nigeria Ltd v. Pan Shipping & Transport Agencies Ltd (1987) 1 NWLR (part 96) 212. The answer to the question whether the jurisdiction of the High Court of a State is curtailed after the 1979 Constitution had come into effect is therefore, not to be found in State legislation but, solely, in the Constitution itself.

The question is: Did section 41 curtail the unlimited jurisdiction of the High Court prescribed by section 236 (1) of the 1979 Constitution even assuming, without deciding, that the provisions of the Act were capable of doing so? Were the Act merely to have effect as a Federal enactment as section 274 (6) of the Constitution provided, it was incapable of curtailing the jurisdiction conferred by section 236 (1), since, by virtue of section 1 (3) of the Constitution, any other law inconsistent with the provisions of the Constitution is void to the extent of such inconsistency. However, the Act is not just a 'Federal enactment' but one which has been given a special status by section 274 (5) of the Constitution which provided that its provisions shall "apply and have full effect in accordance with their tenor and to the like effect as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this constitution." I am not unaware of the pronouncements of this court on section 274 (5) in several cases, such, for instance, as Nkwocha v. Governor of

Anambra State (1984) 6 SC 362. Were the matter not subject to authority, I would have thought that section 274 (5) has incorporated by reference the provisions of the Act into the Constitution. Happily, I do not have to decide the issue because, in my opinion, what is decisive of the jurisdiction issue in this case is whether, as a matter of construction, B there is anything in section 41 of the Act that curtailed the jurisdiction of the High Court.

It is evident that whereas section 39 of the Act expressly excluded courts other than the High Court from exercising jurisdiction in matters specified therein, no such exclusion was expressed C in section 41 of the Act. It must be emphasised that the enquiry is not whether the High Court derived its jurisdiction in proceedings mentioned in section 41 from that section or the Act itself, but D whether the provisions of section 41 excluded the jurisdiction of the High Court. There being no such express exclusion of jurisdiction in section 41, the proponents of exclusive jurisdiction of the area court or the customary court can only succeed in their proposition if a resort to construction by implication is capable of producing E such result.

The law is clear that resort to construction by implication is permissible only if the meaning of a statute is not clear. The principle is stated in Craies on Statute law, 7th Edition, at page 109, F thus:

*"If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inference and supply omissions."*

The literal meaning of a section of a statute may be clear, G but there may be a degree of obscurity and ambiguity in the effect of the statute occasioned by the inclusion of the provisions of the section in the statute. It is in this wise that in considering a statute one may not limit oneself to literal clarity of a section in determining H whether or not there is an ambiguity in the statute.

For my part, although in literal terms there may not be an ambiguity in the provisions of section 41 of the Act, I cannot say

with certainty that the inclusion of the section in the Act has not created some ambiguity as to the jurisdiction of the High Court in proceedings relating to customary rights of occupancy. Were that not so, the divergent views expressed hitherto in several decisions of this court, and of the Court of Appeal, in regard to the effect of the Act on the jurisdiction of the High Court, would not have emerged.

I therefore approach the question of interpretation of the Act on the footing that recourse may be had to construction by implication. The principle of construction of statute is now well established. The law presumes against construing statute so as to oust or restrict the jurisdiction of a superior court of record unless there is explicit expression to that effect in the legislation. In Shodeinde v. The Registered Trustees of Ahmaddiya Movement in Islam (1980) 1-2 SC 225, 229, Aniagolu, JSC, said:

".... it is the recognised general law that, *prima facie*, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior tribunal, unless on the face of the proceedings, it is expressly shown that the particular matter is within the cognisance of the court."

There is no need to multiply dicta and quotations which all go to show that an authority to deprive the High Court of its jurisdiction is not to be presumed without express words. That principle of construction, well established in general law, takes on a stronger form when, as in this case, it is only the Constitution itself that can curtail the unlimited jurisdiction of the High Court which it had granted. To construe, by implication, one section of the Constitution as restricting the plenitude of jurisdiction granted to the High Court in another section, the implication must not only be explicit, but also necessary. It can only be necessary if both cannot co-exist without creating an absurdity or a situation in which the two provisions become unworkable.

Having proceeded thus far on an assumption that the provisions



of the Act have been incorporated into the Constitution, I hasten to add that, without that assumption, the matter in hand could be easily disposed of since the provisions of an enactment in conflict with Constitution are void. Where, had there been express provisions in an enactment such would be void for inconsistency with the Constitution, it will be an absurd and futile exercise to proceed to read into that enactment, by implication, such provisions as would have been void were they to have been expressly stated. B

The purpose which sections 39 and 41 of the Act are designed to serve is clear. Section 39 excludes area courts and customary courts from exercising jurisdiction in respect of land the subject of a statutory right of occupancy. Unlike under the land Tenure Law system, under the Act statutory right of occupancy can now only be granted by the Governor of a State. Section 41 redefines the jurisdiction of the courts referred to therein so as to ensure that courts, such as the customary courts in southern parts of the country which had previously been exercising concurrent jurisdiction with the High Court without distinction by classification of land, have their jurisdiction limited as stated therein. When properly viewed, the two sections do not limit the jurisdiction of the High Court. D E

Contrary to the submission of Dr. Adedeji-Kayode, the Attorney-General of Osun State, that there is an absurdity in the notion that the area court and the customary court and the High Court would have concurrent jurisdiction, I fail to see an absurdity in a system which had operated without hitch in several parts of the south of the country before the introduction of the Act. It appears to me a sensible thing to do, to preserve the choice of form which a litigant had always enjoyed to choose his forum in respect of non-urban land which may not necessarily be of little value and disputes about which may raise, sometimes, questions of considerable complexity. F G H

It is, in my opinion, expedient to deal with a passage in the judgment of Mohammed JSC which I have quoted earlier in this judgment.

There, as I understand it, it was implied that the Act created a new tenure and therefore a new right which justified a mutually exclusive division of jurisdiction between the High Court, on the one hand, and the courts mentioned in section 41 of the Act, on the other. That appears to be a proposition in line with the principle in the old case of Barraclough v. Brown (1897) AC 615 in which the question raised was whether an action for a declaration of right would lie on a statute which gave a new right to recover certain expenses in a court of summary jurisdiction from persons not otherwise liable. Holding such action not to lie Lord Watson in a passage much often quoted said:

*"The right and the remedy are given uno flatu, and one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore by plain implication enacted that no other court has any authority to entertain or decide these matters."*

**Although the Act created rights of occupancy that may be regarded as new tenures in land, it did not completely wipe away all incidents and relationships that existed, or is capable of existing, in dealings with land. It is clear that rights and interests in land previously vested in persons and occupancy of land under customary tenure, continue to play prominent roles as the transitional provisions and the definition of customary right of occupancy in the Act show. The Act by creating rights of occupancy, in substance, described rights and interests in land in new terms. In my opinion, it does not introduce a completely novel concept of rights and interest in and over land into the jurisprudence of our land law, owing its incidents and origins exclusively to statute.** The rights created by the Act are not of the same character as those rights to which the principle in Barraclough's case applied. Besides, the ambit of section 236 (1) of the Constitution is so wide, and should be so liberally construed, that there is not much room any more for the application of the principle in Barraclough's case to cases where, notwithstanding that the rights litigated on have

been created by statute, they are, nevertheless, legal rights. Rights of occupancy are legal rights notwithstanding that they are created by statute.

It is expedient at this stage to dispose of the submission by Chief Kola Babalola. His submission bears repetition. In substance, it is that the High Court has jurisdiction to try proceedings in respect of customary rights of occupancy other than such rights granted by the Local Government. For this submission he relied on the literal text of section 41 of the Act in which, according to him, the jurisdiction granted to the courts therein mentioned were by reference only to customary right of occupancy granted by a Local Government. In his submission the absence of any mention of other customary right of occupancy is significant, and leads to the conclusion that the High Court would have jurisdiction to try proceedings in respect of such other customary right of occupancy.

Attractive as this submission may appear to be at the first blush, it breaks down when closely considered. It shares with the argument of those who would read exclusivity into section 41 of the Act, the defect that nothing in that section expressly excludes the jurisdiction of the High Court, either totally or partially. Besides the submission fails to explain the source of the jurisdiction which it claims for the High Court in respect of proceedings in respect of customary rights of occupancy not granted but which existed as a fact. One more reason why the argument must fail is that proceeding in section 41 of the Act have been stated to include "proceedings for a declaration of title to a customary right of occupancy." Such would include proceedings relating to customary rights of occupancy other than one granted by the Local Government. It is clear that the jurisdiction of an area court or a customary court under section 41 is not limited to proceedings in respect of 'granted' customary rights of occupancy only.

There seems to be an inherent and fundamental flaw in any approach to the determination of the question of the jurisdiction of the High Court in respect of proceedings which relate to customary rights of occupancy, that would make section 41 of the Act a starting point of its

enquiry even though there is nothing in that section which expressly makes the jurisdiction conferred on the courts mentioned therein exclusive. The jurisdiction which the High Court exercise in proceedings relating to rights of occupancy is not derived from the Act. Section 39 of the Act, while declaring such jurisdiction in regard to statutory rights of occupancy, has as its operative purpose the exclusion of other courts from the exercise of original jurisdiction in such proceedings. When a question arises as to the jurisdiction of the High Court in proceedings relating to customary rights of occupancy, the proper approach is first, to have regard to the amplitude of the jurisdiction granted to the High Court in section 236 of the 1979 Constitution, and then enquire whether there is anything in that Constitution which has excluded the jurisdiction of the High Court in proceedings relating to customary rights of occupancy.

**In my judgment the decision of this court in Oyeniran v. Egbetola (supra) was erroneous and made per incuriam. This court should not be bound by that decision which would create much unnecessary problems and difficulties in States where area courts and customary courts or courts of equivalent jurisdiction do not exist and may lead some State Governors to resort to designating land in all areas of the State as urban land contrary to the spirit and intention of the Act. I hold that the High Court had jurisdiction to try the proceedings and resolve the jurisdictional issue against the defendant.**

I now turn to the second part of the appeal that concerns the merits of the case. By reason of the death of the original parties to the case the present parties were substituted parties, but that has made no difference to the merits of the case. The plaintiffs' case by their statement of claim, as finally amended, was that the land in dispute was the property of Ikolaba Chieftaincy. It was averred that the plaintiffs' ancestor settled at a place called Ogunte Kekere and thereafter moved to another place called Ogunte Nla/Iju where the land now in dispute is situated. The pleading of the plaintiffs is remarkable for its lack of precision. It would appear that the title claimed by the plaintiffs was one by grant

sometime in 1940. Facts relating to that grant were pleaded in paragraphs 8-11 of the statement of claim as finally amended. In summary, the facts pleaded were that sometime in 1940 Oba Ladigbolu, the Alafin of Oyo sent one Ilusimi to Ighetti to "apportion" land to the chiefs, that as a result of this "assignment" the eleven chiefs in Igbetti including Ikolaba B got lands "allocated" to them, that the land allocated to Chief Ikolaba became the land of Ikolaba Chieftaincy family and is the land in dispute in this case. It was averred in paragraph 10 of the statement of claim that: "only chiefs have land in Igbetti and holding among the chiefs are in accordance with the grant made by Ilusinmi." C

The defendant was sued in his personal capacity because, it was alleged, he trespassed on the land sometime in 1981. The defendant's defence was that the land belonged to his family called Asunmode family. He averred that allocation of land to Igbetti chiefs was merely for the purpose of enabling them to collect customary tributes from tenant farmers who were not indigenes of Igbetti without a transfer of interest to chief so allocated land. D

From the plains which were put in evidence by the parties, it is clear that the area to which the plaintiffs laid claim was vast, covering 174.25 hectares (431 acres) of which the area trespassed on by the defendant was relatively microscopic. The area which the defendant alleged belonged to his family covered 163. 416 hectares. E F

The learned trial judge approached the case on the footing that the claim was against the defendant in a representative capacity and that the plaintiff's case was based on traditional evidence. In the event, after rejecting the traditional evidence adduced by both parties he, relying on the principle in Kojo II v. Bonsie and ors (1957) 1 WLR 1223, 1226, G proceeded to test the probability of that same traditional history, already rejected, by reference to recent acts as established by the evidence. He found that farms and buildings have been erected on the land by persons who obtained grants from the plaintiffs' family, unchallenged by the defendant's family, and concluded that plaintiffs have established their H right to the relief claimed.

On appeal to the Court of Appeal by the defendant several issues

were taken. Three of these were (1) whether the learned trial judge was correct to have applied the principle in Kojo II v. Bonsie, (2) whether on the pleadings and the evidence the plaintiffs could be said to have proved their case; and, (3) whether the suit was properly constituted. The Court of Appeal held that the trial judge was correct in his application of the principle in Kojo II v. Bonsie; that the plaintiffs' were "relying solely on the grant from Onigbetti Chieftaincy Family; that Oba Ladigbolu by his intervention did not grant any land to Ikolaba; that since the question of the constitution of the action was not raised at the trial it could not be raised in the appeal, and that if it could be so raised the defendant had held himself out as defend in a representative capacity. In the event, the Court of Appeal dismissed the defendant's appeal.

On his appeal to this court, several issues have been raised by counsel on behalf of the defendant on the appellant's brief of argument, apart from the issue of jurisdiction that has already been considered. Of the remaining issues, it is expedient to consider the second and the third, first. Those issues are as follows:

"(2) *Whether or not the plaintiffs who pleaded and based their root of title in an action for Declaration of title on traditional history of a particular grant, can rely on grant by another person and exercise of acts of ownership and are these conflicting claims not fatal to their claim for title.*

"(3) *Whether in a claim for declaration of title and injunction against a particular party, in his personal capacity, the court can give judgment in respect of the entire family land and can such judgment bind the family.*"

The first of these issues was formulated from ground 3 of the grounds of appeal which in substance complained that by reason of the imprecision of the title claimed by the plaintiffs, the two lower courts should not have given judgment for the plaintiffs for the declaration sought. On the first of the two issues it was submitted by counsel on behalf of the defendant that it is only when there is conflict in the traditional history given by both parties that the test laid down in Kojo II v. Bonsie should apply and that the plaintiffs having by themselves given conflicting histo-

ries of their title their claim should have been dismissed. It was further submitted that once the root of title claimed by the plaintiffs has failed, the court should not have relied on acts of possession. For his part, counsel for the plaintiffs argued that the plaintiffs did not rely on self-contradictory roots of title and that the opinion of the court below should be upheld. B

**The several ways in which title in land can be acquired should not be confused with the several ways in which such acquisition can be proved. The much cited case of Idundun & Ors v. Okumagba & Ors [1976] Vo1. 10 NSCC 446 deals with "five ways in which ownership of land may be proved." and not the ways of acquiring title to land. In short Idundun & ors v. Okumagba & Ors deals with matters of evidence rather than question of substantive law of acquisition of title. It is for this reason that acquisition of title by gift, grant, or purchase was not mentioned. Also, the principle in Kojo II v. Bonsie (supra) relates to facts which the court should advert to in coming to a conclusion on the probability of evidence of tradition. Where, as in the present case, the plaintiffs rely on acquisition of title by grant, proof of such grant by traditional history arises only where the fact of grant was so ancient as to be beyond the memory of living witnesses. Facts which are within living memory are properly to be proved by evidence of living witnesses to the event and not by evidence of tradition permitted by section 45 of the Evidence Act. (See Commissioner of Lands v. Kadiri Adigun (1937) 3 WACA 206.)** C D E F

The title relied on by the plaintiffs was one by grant in 1940. The 6th plaintiff witness gave evidence that he was alive when his father helped in partitioning the land and that he knew the extent of land partitioned to the Ikolaba Chieftaincy family. He said that "After the Yokolu crisis Budo Toolo was assigned to Ikolaba for the purpose of collecting tributes.", thus lending some support to the defendant's case as to the effect of the exercise which took place in 1940 which have been variously described as allocation assignment, and partition. Unfortunately, the trial judge did not comment on this evidence. He did not say whether G H

he believed it or not. Rather, he proceeded on the wrong footing that the plaintiffs' case was one to be proved by evidence of tradition and, failing which, by acts of possession. **I agree with the learned counsel for the defendant that where the plaintiff relies on acquisition of title by grant and fails to prove it, the court cannot make a case for him on a different form of acquisition. Where in a claim for a declaration of title to land, title is claimed by grant, the court has to be sure of the nature of the grant before a declaration is granted. The principle that should have guided the trial court and the court below has been stated thus:**

*"Where a party relies on, and pleads a grant as his root of title, he is under a duty to prove such grant to the satisfaction of the trial court. Other evidence of acts of possession after the grant will merely go to strengthen the grant. But where as in this case, the proof of the grant is inconclusive, the bottom is knocked out of the plaintiff/appellant's claim. When his root ceases to stand, the stem and branches will fall with the root. In other words, where the radical title pleaded in not proved, it is not permissible to support a non-existent root with acts of possession, it is not permissible to substitute a root of title that has failed with acts of possession which should have derived from that root."* (Per Oputa, JSC in *Odofin v Ayoola* [1984] NSCC, 711, 731).

In my opinion, the trial Court and the Court below both misunderstood the case and did not pay attention to the manner of acquisition of title relied on by the plaintiffs. The Court of Appeal committed an error in holding that the plaintiffs "relied solely on the grant from Onigbeti Chieftaincy Family.", when that was not the plaintiffs' case. They were both in error in approaching the matter as one to be settled by acts of ownership. **In my view, the judgment of the High Court and the court below were fundamentally flawed by their misconception of the plaintiffs' case and failure to accept or reject the evidence of a witness who claimed to be a living witness to the grant alleged. The judgments of the High Court and the court below should not be allowed to stand in these circumstances. If this had been the only fault in the proceedings the appropriate order would have been to order a**



rehearing of the case by the High Court. However, there is a second issue to be addressed.

I now proceed on that second issue. At the address stage, counsel for the defendant at the trial was recorded as saying that: "the claim as framed is not properly constituted." The learned trial judge held that: "The claim was fought by the parties in representative capacity." When the issue of the constitution of the action was raised in the court below that court held that the point was not raised in the court of trial. In that view, they were in error. However, the court below proceeded to consider the issue and said (Per Omololu-Thomas, JCA):

*"Even though the defendant was sued in his own name, it would seem that he was apparently defending the action in a representative capacity, as he was not claiming the whole land covered by exhibit for himself, but for his family. In that case he could have joined other members of his family."*

There was no counter-claim by the defendant. The question of his claiming land for his family did not arise. **The duty of a plaintiff to bring to court a party whose presence is crucial to the resolution of the case has been stated in several cases. See Ekpere v. Aforije (1972) All NLR (part 1) 220 where the action was struck out because the proper defendants were not made parties.)**

**In the present case, the defendant was alleged to be a trespasser over a very minute portion of a vast area of land to which the plaintiffs sought a declaration of title. It was clear from the pleadings that the cause of action was in respect of that relatively small portion on which he was erecting a building. Yet, right from the outset, the plaintiffs claimed against him in his personal capacity a declaration of customary right of ownership over a vast area, without joining the family through whom he claimed and who should have been the proper defendant in respect of the claim to the vast area of land, the interest in which was not claimed to be vested in the defendant in his personal capacity. I think this case falls within the principle in and is not unlike the case of Ekpere v. Aforije (supra). However, I would not strike out the case, since I think that**

the plaintiffs could easily apply to join the defendant's family at a re-trial and not much massive amendment will be occasioned by reason alone of such joinder. A re-trial will save the plaintiffs the expense of preparing a fresh plan and will occasion less delay in getting the matter tried once again. The proper order to make in the circumstances is to order a re-trial of the action.

In sum, for the reasons which I have stated, I allow the appeal. I Set aside the judgments of the High Court of Appeal. I order that the action be retried by the High Court of Oyo State. At such a re-trial, the plaintiffs are at liberty to apply for a joinder of the defendant's family and to amend their pleadings accordingly. I order that the plaintiffs pay N10,000 costs to the defendant being costs of the appeal.

D

### OGUNDARE JSC

I have read in advance the judgment of my learned brother Ayoola JSC just delivered. I agree with his conclusion on issue (1) that this court should depart from its earlier decision in Oyeniran v. Egbetola (1997) 5 NWLR 122 and that the trial High Court had jurisdiction to try the case leading to this appeal. I agree entirely with his reasoning leading to this conclusion and I adopt same as mine. I also agree with him that this case is a proper case where an order of retrial should be made

In his amended brief of argument the Appellant herein has set out five questions as calling for determination in this appeal. My learned brother Ayoola JSC has recapped the facts leading to the plaintiff's action, the claims of the plaintiff and the submissions of learned counsel, including the amici curiae; I need not set them out again in this judgment. The plaintiff (who is hereinafter referred to as Respondent) has, in his brief, in respect of Question I which reads:

*"whether the Court below was not in error in failing to see that the trial Court lacks jurisdiction over the claims as formulated by the plaintiff having regard to the provisions of the Land Use Act particularly sections 39 and 41 thereof."*

Has invited this Court to review and overrule its decision in

(i) Salati v. Shehu (1986) 1 NWLR 98

(ii) Sadikwu v. Dalori, (1996) 5 NWLR 151

(iii) Oyeniran v. Egbetola, (1997) 5 NWLR 122

Although my learned brother Ayoola JSC has dealt exhaustively with this question in his judgment and has come to a conclusion with which I am in full agreement, I still feel I should say few words of my own on the said question.

His Lordship, the Chief Justice of Nigeria invited a number of learned counsel as amici curiae, to assist the Court in resolving Question 1 in the light of Respondent's request that we review and overrule our previous decisions. The following responded to the invitation of the Honourable the Chief Justice, filed briefs and presented, either by themselves or through their junior counsel, oral arguments at the hearing of the appeal. They are:

1. Hon. Kanu O. Agabi, SAN, The Attorney-General of the Federation, as he then was.

2. Hon. Kehinde Sofola SAN;

3. Hon. C. O. Akpamgbo SAN;

4. Hon. Abdullahi Ibrahim, OFR, SAN:

all three are former Attorneys-General of the Federation.

5. Hon. Dr. Yemi Kayode-Adediji, Attorney-General of Osun State; and

6. Hon. Awa U. Kalu, Attorney-General of Abia State.

I hereby express the deep appreciation of this Court for the invaluable assistance they rendered to the Court. Their contributions have assisted the Court in no small measure in the resolution of the task before it.

My Lord Ayoola JSC has restated the circumstances under which this Court would overrule its earlier decision by a later decision; I do not think I need add more to all that he said except, perhaps, to mention that this Court had the opportunity in the recent past to review the circumstances once again. In is in Rossek & Ors. v. African Continental Bank & Ors. (1993) 8 NWLR 382 I said therein at page 447 of the Report:

*"Having regard to the opinions expressed and the state of the*

authorities as they stand, I am of the firm view that this Court as the final court in this country has the power and jurisdiction to depart and overrule its previous decision whether or not by a Full Court where it is shown that the previous decision is inconsistent with the provisions of the constitution or it is erroneously reached per incuriam or will perpetuate injustice. But, as Eso JSC warned in Odi v. Osafire, this court should not overrule itself on the slightest pretence. It must be remembered that the doctrine of Stare Decisis or precedent is an indispensable foundation on which to decide what the law is and unless there is certainty in the law there will be on equilibrium in society."

And when is a case said to be decided per incuriam? Karibi-whyte JSC provided the answer when at p. 493 of the Report he said-

"A case is decided per incuriam where a statute or rule having statutory effect or other binding authority which would have affected the decision, had not been brought to the attention of the Court.- See African Newspapers v. Federal Republic of Nigeria (1985) 2 NWLR (pt.6) 137."

The learned Justice of the Supreme Court later in his judgment at p. 494, adopted the view of Cross on precedent in English law (1961) p.139 to this effect:

"The principle appears to be that a decision can only be said to be Per incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of a failure to mention a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was."

On the facts and the law the case of Salati v. Shehu (supra) was rightly decided notwithstanding the dictum of Karibi-whyte JSC to the effect that:-

"The exercise of these jurisdictions will seem to me mutually exclusive. There is no doubt therefore, that the one cannot exercise the jurisdiction of the other."

This dictum is merely obiter; it has led to some difficulties in subsequent cases. I agree entirely with what my learned brother Ayoola JSC said about it as well as his review and consideration of, and conclu-

sion on, Sadikwu v. Dalori (supra). He has adequately dealt with these in his judgment; I need not add anything more to what he has said. I do not think we should overrule, in this case, Sadikwu v. Dalori.

I now turn to the case of Oyeniran v. Egbetola (supra). As has rightly been pointed out by Ayoola JSC, different reasons were given by the Justices of this Court that decided that case, for their respective decisions even though they all arrived at the same conclusion that the trial High Court in that case (that is, High Court of Oyo State) had no jurisdiction to try the case. In none of the judgments in that case was consideration given to section 236 (1) of the Constitution of the Federal Republic of Nigeria, 1979 which prescribed the unlimited jurisdiction of the High Court of a State. It was this jurisdiction the High Court of Oyo State had when it became seised in 1982 of the action in Oyeniran v. Egbetola. There is nothing in section 41 of the Land Use Act which can be said to have expressly or by necessary implication, taken away this jurisdiction in matters relating to Land situate in non-urban areas of Oyo State. That is assuming, without so deciding, that the Land Use Act is an integral part of the Constitution, which in my respectful view, it is not. The Act is only given special protection by the Constitution from the vagaries of amendments and repeals. No part of it can override any section of the Constitution.

Some of their Lordships felt bound by the earlier decision of this Court in Sadikwu v. Dalori (supra) without adverting their minds to the fact that, as at the time that case was commenced, the jurisdiction of the High Court of Borno State where it originated was governed by section 17 of the High Court Law of Northern Nigeria, Cap. 49 Laws of Northern Nigeria 1963 which provided:

*"17. (1) Subject to the provisions of the Land Tenure Law and of any other written law the High Court shall not exercise original jurisdiction in any suit or matter which-*

*(a) raises any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of a native court;*

*(b) is subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or the dis-*

*position of property on death.*

(2) *The provisions of subsection (1) shall have effect except-*

(a) *in so far as the Governor may by order in Council otherwise direct;*

B (b) *in suits transferred to the High Court under the provisions of the Native Courts Law or of any law replacing the same."* (underlining is mine)

and section 41 of the Land Tenure Law, Cap 59 Laws of Northern Nigeria 1963 which provided:

C "41, (1) *The High Court shall have exclusive original jurisdiction in the following proceedings-*

(a) *proceedings in which the right of the Governor or the Minister to grant a statutory right of occupancy over any land is in dispute;*

(b) *proceedings by way of petition of right;*

(c) *proceedings by the Attorney-General under the provisions of subsection (1) of section 39.*

E (2) *A native court of competent jurisdiction shall have jurisdiction in the following proceedings -*

(a) *proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right of occupancy where all parties are subject to the jurisdiction of native courts, subject nevertheless to the provisions of paragraph (b) of subsection (3):*

G *Provided that nothing herein contained shall be deemed to confer jurisdiction on any native court in regard to disputes relating to inter-tribal boundaries:*

(b) *Proceedings under the provisions of subsection (2) of section 39.*

H (3) *The High Court and District Court (Within the respective limits prescribed in the District Court Law) shall have jurisdiction in the following proceedings -*

(a) *proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right*

*of occupancy where one or more of the parties are not subject to the jurisdiction of native courts;*

*(b) proceedings of the description referred to in paragraph (a) of subsection (2) where there is no native court of competent jurisdiction available to try the proceedings;*

*(c) proceedings in respect of any land the subject of any right of occupancy other than those otherwise specifically described in this section.*

*(4) "Proceedings in respect of any land the subject of a right of occupancy" shall include proceedings for a declaration of title to a right of occupancy.*

*(5) (a) Proceedings for the recovery of rent payable in respect of any certificate of occupancy may be taken in the High Court or a District Court (within the respective limits prescribed in the District Courts Law) by and in the name of any administrative officer or by and in the name of any other officer appointed by the Minister in that behalf.*

*(b) proceedings for the recovery of rent payable in respect of any statutory right of occupancy granted by a native authority or any customary right of occupancy may be taken by and in the name of the native authority concerned in a native court of competent jurisdiction."* both of which had no application in Oyo State. I think Ayoola JSC is right to say that the decision in Oyeniran v. Egbetola was given per incuriam and for the reasons given by him, which reasons I subscribe to and adopt as mine, the case was wrongly decided and ought to be departed from. Consequently, I arrive at the same decision in respect of Issue (1) formulated by the Appellants and hold that the trial High Court had jurisdiction to try this case. Grounds 1 and 2 of the amended notice of appeal, therefore, fail.

Issues 2 - 5 are better taken together. They read:

(2) Whether or not the plaintiffs who pleaded and based their root of title in an action for Declaration of title on traditional history of a particular grant, can rely on grant by another person and exercise of acts of ownership and are these conflicting claims not fatal to their claim for title

(3) Whether in a claim for declaration of title and injunction against a particular party, in his personal capacity, the court can give judgment in respect of the entire family land and can such judgment bind the family.

(4) Whether occupation of a small portion of land comprised in the land in dispute is sufficient evidence of the exact location and extent of land in dispute.

(5) Can the plaintiffs lay claim to land which from their own pleading and evidence they have given away to other parties?"

I agree with the views expressed by my learned brother Ayoola JSC that as the events in this case occurred within living memory, it would be inappropriate to talk of traditional history. Nor would the case of Kojo II v. Bonsie & Ors. (1957) 1 WLR 1223 at 1226 and the Nigerian cases that followed that case apply. It is a case of determining the credibility or otherwise of the witnesses that testified of events in which they took part or that came to their knowledge. Unfortunately, in this case, the learned trial judge made no findings of fact, notwithstanding that the parties led copious evidence in support of their conflicting claims as to who granted land to the plaintiffs' family or how they came to be on the land in dispute. It is clear that the learned trial judge was evasive on these issues which are vital to the determination of the case before him. Which are vital to the determination of the case before him. I am, therefore, not satisfied that he has taken proper advantage of having seen and heard the witnesses in the case. The proper order to make in the circumstance is one of retrial before another judge of the High Court of Oyo State - Okpiri v. Jonah (1961) 1 All NLR 102; (1961) ANLR 112; Shell - Bp v. Cole (1978) 3 SC 183; Total v. Nwako (1978) 5 SC 1.

It is for the reasons given above and the other reasons given in the lead judgment of my learned brother Ayoola JSC that I too allow this appeal, set aside the judgments of the two Courts below and order that this case be reheard before another judge of the High Court of Oyo State. And in view of the fact that this case was instituted in 1982, that is 19 years ago I order that the rehearing be taken expeditiously. I abide by the order for costs made by my learned brother Ayoola, JSC.



**MOHAMMED JSC**

My learned brother, Ayoola, JSC, has permitted me to read the draft of his judgment in advance and I agree with his conclusion. I only wish to explain the similarities of legislations which convinced me to hold B in Oyeniran v. Egbetola (1997) 5 NWLR (part 504) 122 that the trial High Court had no jurisdiction to try the case leading to this appeal.

The facts of this case have been given adequately in the leading judgment written by Ayoola JSC., and I need not repeat them in my contribution. Three previous decisions of this court have been relied C upon in the appellants' brief showing that the trial High Court of Oyo State had no jurisdiction over claims as formulated by the plaintiff having regard to the provisions of the Land Use Act, particularly section 39 and D 41.

I do not want to delve into the origins and history of the land tenure systems in Nigeria. In a nutshell however, in 1977 the Federal Military Government set up the Land Use Decree Panel headed by a Justice of the Supreme Court with the following terms of reference: E

*"i. To undertake an in-depth study of the various land tenure, land use, and land conservation practices in the country and recommend steps to be taken to streamline them;*

*ii. To study and analyse all the implications of a uniform land F policy for the country;*

*iii. To examine the feasibility of a uniform land policy for the entire country, make necessary recommendations and propose guidelines for implementation;*

*iv. To examine steps necessary for controlling future land use G and also opening and developing new land for the needs of government and Nigeria's population in both urban and rural areas and to make appropriate recommendations".*

The report of this panel was never made public. But the Federal H Military Government adopted the trusteeship tenure which embraced many of the essential principles of the Northern Nigeria Land Tenure Law. The trusteeship method of Land tenure aimed at vesting all land tenure

land comprised in the State, other than Federal lands, in the military government of the state in trust to be administered for the use and common benefit of all Nigerians and by establishing uniform national principles. These principles are as follows:

B        *"(a) The maximum interest the citizen is allowed in land is the right of occupancy; but the developer owns his improvements on the land;*

C        *(b) Dispositions are subject to control without reference to ethnic origin of the transferee;*

C        *(c) private land rights are subject to and must give way to overriding public interest; and*

*(d) Security of tenure is dependent on land use".*

D        (See R. W. James on Nigerian Land Use Act: policy and principles)

I have referred to the above facts in order to show that in promulgation of the Land Use Act the government adopted mainly the essential principles of the Northern Nigeria Land Tenure Law. In considering E the jurisdictional issue raised in this appeal it will be educative to consider the provisions of Sections 39 (1) & (2) and 41 of the Land Use Act, 1978. If these Sections are juxtaposed with Section 41 of the Land Tenure Law, Cap 59 Laws of the Northern Nigeria 1963 one can see F great points of similarities between the two enactment's. I will start with Section 41 of the Land Tenure "Law of Northern Nigeria which was earlier in time. Part of the section which is relevant to this appeal provides as follows:

G        *"41. (1) The High Court shall have exclusive original jurisdiction in the following proceedings-*

*(a) Proceedings in which the right of the Governor the Minister to grant a statutory right of occupancy over any land is in dispute:*

*Proceedings by way of petition of right*

H        *(b) Proceedings by the Attorney-General under the provisions of subsection (1) of section 39.*

*(2) A native court of competent jurisdiction shall have jurisdiction in the following proceedings-*

*(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of a customary right of occupancy where all parties are subject to the jurisdiction of native courts, subject nevertheless to the provisions of paragraph (b) of subsection (3) provided that nothing herein contained shall be deemed to confer jurisdiction on any native court in regard to disputes relating to inter-tribal boundaries:*

*(b) proceedings under the provisions of subsection (2) of section 39.*

*(3) The High Court and District Court (within the respective limits prescribed in the District Courts Law) shall have jurisdiction in the following proceedings-*

*(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or of customary right of occupancy where one more of the parties are not subject to the jurisdiction of native courts;*

*(b) Proceedings of the description referred to in paragraph (a) of subsection (2) where there is no native court of competent jurisdiction available to try the proceedings;*

*(c) Proceedings in respect of any land the subject of any right of occupancy other than those otherwise specifically described in this section.*

*(4) "Proceedings in respect of any land the subject of a right of occupancy" shall include proceedings for a declaration of title to a right of occupancy".*

I will now refer to section 17 (1) (a) of the High Court Law, Cap 49 Laws of Northern Nigeria. It provides as follows:

*17. (1) Subject to the provisions of the Land Tenure Law and of any other written law the High Court shall not exercise original jurisdiction in any suit or matter which-*

*(a) raises any issue as to the title to land or as to the title any interest in land which is subject to the jurisdiction of a native court;"*

As can be seen, the jurisdiction of the High Court was ousted in respect of matters concerning title to land, which is subject to jurisdiction

tion of the Area Courts. I have mentioned earlier that the Federal Government, in promulgating the Land Use Act adopted mainly the essential principles of the Northern Nigeria Land Tenure Law. I will now reproduce Section 39 (1) and (2) and 41 of the Land Use Act For easy comparison. Section 39 (1) and (2) reads:

*"39 (1) The High Court shall have exclusive original jurisdiction respect of the following proceedings-*

*(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings includes proceedings for a declaration of title to a statutory right of occupancy.*

*(b) Proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under the Act.*

*(2) All laws, including rules of court, regulating the practice and proceeding of the High Court shall apply in respect of proceedings to which this section relates and the laws shall to be given to the provisions of this section:.*

*Section 41 of the Land Use Act deals with the jurisdiction have effect with such modification as would enable effect Area Courts and Customary Courts in land matters in the following provision:*

*"41. An area court or customary court or other court or equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act; and for the purpose of this paragraph proceedings includes proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section".*

One can see from the wording of the two enactments that there are points of similarities between the two laws. Wali J.S.C. considered the two enactments in his judgment in Sadiku v. Dalori (1996) 5 NWLR (part 447) 151, particularly at page 163 wherein he said;

*"In substance the purpose of S. 41 of the Land Use Act, 1978*

and S.41 (2)(a) of the Land Tenure Law is the same. The provisions of the two laws provide for conferment of jurisdiction on Area Customary Court in respect of proceedings involving the statutory or customary right of occupancy granted by a Local Government or a Local Authority. In my view S. 17(1) of the High Court Law of Northern Nigerian applicable B to Borno State goes to support S. 41 of the Use Act 1978 and S.41(2)(a) of Land Tenure Law. I cannot therefore see how S. (17 (1) of the High Court Law, reading it with the provisions of sections 39 and 41 of the Land Use Act 1978 and S.41 of the Land Tenure Law, can confer juris- C diction in land matters specifically excluded by those laws".

It is mainly due to the decision in Sadikwu v. Dalori (Supra) that I found that I had no alternative, under the rule of state decisis other than to adhere to the principle of law laid down in that decision. My learned brother Ogwuegbu J.S.C. in his contribution to the lead judgment in D Oyeniran v. Egbetola (Supra) considered the issue of jurisdiction of the courts in Northern States of Nigeria and their sister courts in Southern States and opined as follows:

"The jurisdiction of the courts established for Northern Nigeria E as can be seen in section 41 of the Land Tenure Law followed the division of the right of occupancy and the same jurisdiction of courts was adopted in sections 39 (1) and 41 of the Land Use Act. 1978. One can therefore say that the jurisdiction of the courts in the Northern States of F Nigeria in relation to land disputes arising out of land held under statutory right of occupancy granted by the Governor and land subject to a statutory right of occupancy granted by a local government or of a customary right of occupancy granted by a local government remained the G same both before and after the land Use Act.

The High Courts and Customary Courts in the Southern States had concurrent original jurisdiction in proceedings in respect of land the subject of customary right of occupancy. In fact the bulk of such cases are initiated in the High Court and this preference can be found in the H history of Customary Courts particularly in the Eastern States of Nigeria and some of those States do not even think of establishing one. I must however state that Sadikwu v. Dalori (Supra) is binding on me. See

*Layanju v. Araoye (1961) 1 SCNLR 139; All NLR 90 and Osumanu v. Seidu (1949) 12 WACA 437. It is hoped that the legislature will amend section 41 of the Land Use Act by restoring the concurrent jurisdiction that existed before the 1978 Act. This will remove the obvious jurisdictional difficulty which may arise."*

I must explain that when I wrote the judgment of Oyeniran v. Egbetola (Supra) it did not occur to me that Sadikwu v. Dalori (Supra) was filed before 1979 Constitution became operational. It is also clear that the wide and all embracing jurisdiction of a state High Court under the provisions of section 236 (1) of 1979 Constitution was not made an issue in the appeal. The court below did consider the Constitutional provision, but as my attention was focused on the binding authority of Sadikwu v. Dalori (Supra) I did not see it necessary to consider the constitutional provision suo motu.

The wide and all embracing jurisdiction of the State High Court under section (236 (1) of 1979 Constitution has some limitations. It is very clear that the State High Court has no jurisdiction to determine a matter which involves Islamic Personal Law either at appellate or at first instance jurisdictions and there is no provision in the constitution which dealt with the issue of Islamic Personal Law at first instance level. I am not unmindful of the decision of this court that the land Use Act is not an integral part of the constitution - See Nkwocha v. Governor of Anambra State (1984) 6 S.C. 362 at 365 and 403. Therefore the Act (Land Use Act) could not find place in the opening words of section 236 (1) of the Constitution, viz, "subject to the provisions of this constitution" thus, unlike Islamic Personal Law which is outside the jurisdiction of a State High Court, a provision of the Land Use Act cannot be said to be excluded.

Be that as it may, have considered the individual briefs written by the learned counsel who appeared before us, including those who answered our invitation to appear as amicus curiae, I am quite satisfied that a High Court of a State has jurisdiction in respect of proceedings dealing with which is subject to both statutory Right of Occupancy granted by the Governor and Customary Right of Occupancy granted by

the Local Government.

For these reasons and the fuller reasons in the judgment of my learned brother, Ayoola, J.S.C. I agree to depart from the decision made in the case of Oyeniran v. Egbetola (Supra). I abide by all the consequential orders made in the lead judgment.

B

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### ONUJSC

I have had the advantage of a preview of the judgment of my learned brother Ayoola, JSC just delivered. I entirely agree with his reasoning and conclusion that this Court should depart from its earlier decision in Oyeniran v. Egbetola (1997) 5 NWLR (part 504) 122. I accordingly overrule it. I am in entire agreement with him too that this is a proper case where to order a retrial. I wish to comment on the case briefly as follows:-

C

D

The appeal herein which emanated from the Court of Appeal, Ibadan Division (hereinafter referred to as the Court below) originated in the High Court of Oyo State (Coram, Adesina, J.) where the Respondents as plaintiffs succeeded in being awarded all their claims for declaration to a Customary Right of Occupancy, damages for trespass and perpetual injunction, thus impelling the Defendant, herein Appellant to appeal unsuccessfully to the Court below. The Appellant has now further appealed to this Court on five grounds.

F

The dominant question (one of jurisdiction) submitted by the Appellant in his Amended Brief which the Respondents hereto appeared to have adopted at the hearing of this appeal- the same which was effectively augmented in the submissions of learned amici curiae, who themselves proffered written Briefs, succinctly asks:-

G

*"whether the Court below was in error in failing to see that the trial Court lacks jurisdiction over claims as formulated by the plaintiffs having regard to the provision of the Land Use Act particularly sections 39 and 41 thereof."*

H

(Issues 2-5 will be considered later by me in this judgment). The Respondents then proceeded to invite us to review our earlier deci-

sions in:-

- (i) Salati v. Shehu (1986) 1 NWLR (part 15) 98.
- (ii) Sadikwu v. Dalori (1996) 5 NWLR (part 447) 151; and
- (iii) Oyeniran v. Egbetola (1997) 5 NWLR (part 504) 122.

B Now, Section 39 (1) of the Land Use Act (Cap. 202) (hereinafter referred to simply as the Act) states:

*"39 (1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings-*

C *(a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act, and for the purpose of this paragraph, proceedings include proceedings for a declaration of title to a Statutory Right of Occupancy;*

D *(b) proceedings to determine any question as to the person entitled to compensation....."*

Section 41 (ibid) on the other hand provides that:-

E *"An Area Court or Customary Court or other Court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a Customary Right of Occupancy granted by a Local Government under this Act; and for the purposes of this paragraph proceedings include proceedings for a declaration of title to a Customary*  
 F *Right of Occupancy and all laws including rules of Court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be give to this section."*

G The overriding question simply put, is whether the jurisdiction of the High Court is confirmed to proceedings in respect of a statutory right of Occupancy granted or deemed to have been granted by the Governor or whether it also has jurisdiction in respect of proceedings relating to a Customary Right of Occupancy granted by a Local Government. The Respondents in this regard have submitted that the High Court had  
 H rightly exercised its jurisdiction even though it was proceeding in respect of Customary Right of Occupancy granted by a Local Government, although mindful of the fact that the propositions made thereto were clearly contradictory to this Courts' earlier decisions. It was therefore urged



upon us to overrule the three cases set out above because they offend Section 236 (1) of the 1979 Constitution which provides as follows:-

*"236 (1) Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence Committed by any person.*

*(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the High Court in exercise of its Appellate or Supervisory jurisdiction."*

In Adediran & Anor. v. Inter land Transport Limited (1991) 9 NWLR (part 214) 155 at 179 G-H, Karibi-Whyte, JSC held as follows:-

*"The basic law of this Country is the Constitution of the Federal Republic 1979, which came into force on the 1st October, 1979. Section 1(1) makes the Constitution Supreme, and its provisions have binding force on all persons and authorities throughout the Country."*

Similarly, in Kalu v. Odili (1992) 5 NWLR (part 240) 130 at page 188 (F) this Court per Karibi-Whyte, JSC in interpreting the provisions of Section 1 (1) of the Constitution held inter alia "it is both a fundamental and elementary principle of our law that the Constitution is the base law of the land. It is the Supreme law and its provisions have binding force on all authorities, institutions and persons throughout the Country - S. 1 (1)."

There have been a plethora of authorities on how constitutional provisions vis-a-vis the Act (the latter now incorporated in the former) should be construed. Thus, while interpreting the 1979 Constitution in Mohammed & Anor. v. Olawunmi & Ors. (1990) 2 NWLR (part 133) 458 at page 484 (b), this Court (per Nnaemeka-Agu, JSC) said, inter alia, as follows:-

"This question involves a consideration of the principle of interpretation of the Constitution. I believe it is right to that the provisions of the Constitution, like any other, ought to be interpreted on the principle of ut res magis valeat quam pereat - that is liberally. In Nafiu Rabiu v. Kano State (1980) 8-11 S. C. 130, Udoma, JSC, expressed the approach thus:-

*"My Lords it is my view that the approach of this Court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim ut res magis valeat quam pereat. I do not conceive it to be the duty of this Court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."*

See also Acqua Limited v. Ondo State Sports Council (1990) 4 NWLR (part 91) 622 at 654-655 and Ishola v. Ajiboye (1994) 1 NWLR (part 352) 506 at 558(g). Similarly, faced with the interpretation of the provisions of the Land Use Act, this Court held in Garuba Abioye & Ors. v. Sa'adu Yakubu & 6 Ors. (1991) 5 NWLR (part 190) 130-256 that the Act was to be interpreted in its ordinary, natural grammatical and literal meaning. See also Akintola v. Oyelade (1993) 3 NWLR (part 282) 379; thus, by virtue of Section 236 (1) (ibid) of the 1976 Constitution, the jurisdiction of the High Court is unlimited and subject only to the provisions of the Constitution. In addition, a right conferred by the Constitution cannot be taken away by any other statutory provision except the Constitution itself and law so made will be void to the extent of its inconsistency.

Irrespective of what Karibi-Whyte, JSC said in his contribution on Salati v. Shehu (Supra) to the effect that:-

*"There is no ambiguity in the two sections that the exclusive original jurisdiction in respect of land held under a statutory right of Occupancy is vested in the High Court whereas jurisdiction in respect of Customary Right of Occupancy is vested in Area or Customary Courts. The exercise of those jurisdictions will seem to me mutually exclusive. There is no doubt that one cannot exercise jurisdiction of the other."*

I am in entire agreement with my learned brother Ayoola, JSC when he said that neither Salati v. Shehu (Supra) nor Sadikwu v. Dalori (Supra) should be overruled. This is because the real issue before this Court in that case (Salati v. Shehu) was whether a Customary or Area Court had jurisdiction in respect of disputes on land the subject of a statutory right of Occupancy thus the statement of Karibi-Whyte, JSC is, with due respect, Obiter despite the fact that the dictum has led to some difficulties. This is unlike in Oyeniran v. Egbetola (Supra) where for one reason or the other, this Court did not consider or had the benefit of or was oblivious of the provision of Section 236 (1) of the 1979 Constitution. I am therefore of the firm view that to this extent the decision was reached per incuriam. But, before the Supreme Court being the highest court of the land can overrule its previous decisions, it will only do so in the interest of justice. See Odi v. Osafire (1985) 1 NWLR (part 1) 17; Bucknor-Maclean v. In-Iaks (1980) 8-11 S.C.1 and Chief F. R. A. Williams v. Daily Times of Nigeria Limited (1990) 1 NWLR (part 124). In fact before the Supreme Court will overrule its previous decision such a decision must be erroneous and that it is a vehicle of injustice. See Bucknor-Maclean v. Inlaks (Supra) and Williams' Case (Supra). Otherwise, the doctrine of State decisio or precedent predominates. See Clement v. Iwuanyanwu (1989) 3 NWLR (part 107) 39; Eperokun v. University of Lagos (1986) 4 NWLR 162 at 123. This Court has said more than enough on what constitutes Per incuriam and when a case may be so decided to leave no one in doubt. In the recent case of Rossek & Ors. v. African Continental Bank & Ors. (1993) 8 NWLR (part 312) 382 at 447 Ogundare, JSC held:-

*"Having regard to the opinions expressed and the state of the authorities as they stand, I am of the firm view that this Court as the final Court in this Country has the power and jurisdiction to depart and overrule its previous decision whether or not by a full Court where it is shown that the previous decision is inconsistent with the provisions of the Constitution or it is erroneously reached Per incuriam or will perpetuate injustice. But as Eso, JSC warned in Odi v. Osafire, this Court should not over rule itself on the slightest pretence. It must be remembered that*

*the doctrine of stare decisis or precedent is an indispensable foundation on which to decide what the law is and unless there is certainty in the law there will be no equilibrium in society."*

And as to when a case is said to be decided Per incuriam, Karibi-B Whyte, JSC gave the following answer at page 493 of the Report thus:-

*A case is decided Per incuriam where a statute or rule having statutory effect or other binding authority which would have affected the decision, had not been brought to the attention of the Court. See African Newspapers v. Federal Republic o Nigeria (1985) 2 NWLR (part 6) 137."*

Turning once more to the case of Oyeniran v. Egbetola (Supra) it is pertinent to observe firstly, that this Court comprised of my humble self as a member of the panel of five that sat. In the appeal which emanated from the High Court, Oshogb, (formerly in Oyo, but now in Osun State) to the Court below sitting in Ibadan an issue of jurisdiction came up for the first time with the ground of appeal among others, attacking the High Court decision as follows:-

*"The learned trial judge erred in law when he assumed jurisdiction over the land in dispute and which land is to Customary Right of Occupancy."*

Be it noted that before the commencement of the Act, the High Courts and Customary Courts in Southern Nigeria had concurrent jurisdiction in land in all areas of the State, but with its enactment, the dichotomy of urban and non-urban was introduced.

And as pointed out in the leading judgment of my learned brother Ayoola, JSC, varying reasons were proffered by the justices in their judgments later highlighted in the Brief of amicus curiae, C.O. Akpamgbo, SAN. What transpired was that in that appeal where Mohammed, JSC, wrote the leading judgment, we unanimously allowed the appeal by striking out the suit because in none of the judgments were the provisions of Section 236(1) of the 1979 Constitution (ibid) considered. For instance, it was not shown that when in 1982 as Suit No. HOS/38/82 the case in Oyeniran v. Egbetola was commenced before Ajileye, J, anything was said that the jurisdiction of that High Court was precluded or taken away by section 41 of the Act in matters relating to land situate in non-urban

areas of Oyo (now Osun) State; it having been decided by this Court in Nkwocha v. Governor of Anambra State (1984) 6 S. C. 362 at page 365 and 403 that the" ..... Act is a Federal enactment." and " shall continue to have effect as, what it already is a Federal enactment."

The Constitution being the Supreme law of the land, stands above B other enactments, statutes or laws and its provisions cannot be made subject to any other Act or enactment except by direct and clear provision to that effect. It necessarily follows, therefore, that even if Section 41 of the Act were to be read as ousting the jurisdiction of the High Court C (which is not conceded) and despite the Act (by virtue of Section 274(5) of the 1979 Constitution) being incorporated or entrenched therein), it is not an integral part of the said Constitution, and therefore any of its provisions which is inconsistent with the Constitution, is to that extent D null and void.

The case of Sadikwu v. Dalori (Supra) appears, different in that at the time that case was commenced, the jurisdiction of the High Court of Borno State where it was commenced, was governed by Section 17 of the High Court law of Northern Nigeria, 1963 which provided:- E

*"17(1) Subject to the provisions of the Land Tenure Law and of and of any other written law the High Court shall not exercise original jurisdiction in any suit or matter which-*

*(a) raises any issue as to the title of any interest in land which is F subject to the jurisdiction of a Native Court;*

*(b) is subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or the disposition of property death*

(2) The provisions of subsection (1) shall have effect except:- G

*(a) In so far as the Governor may by order in council otherwise direct;*

*(b) In suits transferred to the High Court under the provisions of the Native Courts Law or of " any law replacing the same."* H

and Section 41 of the Land Tenure Law, Cap, 59 Laws of Northern Nigeria, 1963 which provided:-

*"41(1) The High Court shall have exclusive jurisdiction in the*

*following proceedings:-*

*(a) proceedings in which the right of the Governor or the Minister to grant a statutory right of Occupancy over any land is dispute;*

*(b) proceedings by way of petition of right;*

B *(c) proceedings by the Attorney-General under the provisions of sub-section (1) of Section 39."*

(2) A native Court of competent jurisdiction shall have jurisdiction in the following proceedings:-

C (a) proceedings in respect of any land the subject of a statutory right of Occupancy granted by a native authority or of a Customary Right of Occupancy, where all parties are subject to the jurisdiction of native Courts, subject nevertheless to the provisions of paragraph (b) of sub-section (3):

D provided that nothing herein contained shall be deemed to confer jurisdiction on any native Court in regard to dispute relating to inter-tribal boundaries.

(b) proceedings under the provisions of subsection (2) of Section 39.

The High Court and District Court (within the respective limits prescribed in the District Courts Law) shall have jurisdiction in the following proceedings:-

F (a) proceedings in respect of any land the subject of a statutory right of occupancy granted by a native authority or a Customary right of Occupancy where on or more of the parties are not subject to the jurisdiction of native courts;

G (b) proceedings of the description referred to in paragraph (a) of subsection (2) where there is no native Court of competent jurisdiction available to try the proceedings;

H (c) proceedings in respect of any land the subject of any right of Occupancy other than those otherwise specifically described in this section.

(4) "proceedings in respect of any land the subject of a right of Occupancy" shall include proceedings for a declaration of title to a Right of Occupancy.

(5)(a) proceedings for the recovery of rent payable in respect of any Certificate of Occupancy may be take in the High Court or a District Court (within the respective limits prescribed in the District Courts Law) by and in the name of any administrative officer or by and in the name of any other officer appointed by the Minister in that behalf; B

(b) proceedings for the recovery of rent payable in respect of any statutory right of Occupancy granted by a native by and in the name of the native authority concerned in a native Court of competent jurisdiction, both laws which have never been applicable to Oyo state until the innovation brought by the Act promulgated no 29th march, 1978." C

The remaining four issues (2-5) which I propose to consider together hereunder read:-

*"(2) Whether or not the plaintiffs who pleaded and based their root of title in an action for Declaration of title on traditional history of a particular grant can rely on grant by another person and exercise of acts of ownership and are these conflicting claims not fatal to their claim for title. D*

*(3) Whether in a claim for declaration of title and injunction against a particular party, in his personal capacity, the Court can give judgment in respect of the entire family land and can such judgment bind the family. E*

*(4) Whether occupation of a small portion of land comprised in the land in dispute is sufficient evidence of the exact location and extent of land in dispute. F*

*(5) Can plaintiffs lay claim to land which from their own pleading and evidence they have given away to other parties?" G*

The short answer here is that rather than consider what credibility to attach to the evidence of the host of witnesses called the learned trial Judge opted to consider traditional history which the Court below confirmed but which was either non-existent or inapplicable. It is apt for my learned brother Ayoola, JSC, to have ruled that the issues when considered separately or together are meritorious. H

In sum, I am in agreement with my learned brother Ayoola, JSC that Oyeniran v. Egbetola was given per incuriam and ought to be de-

parted from. It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother Ayoola, JSC, that I, too, allow this appeal and make similar consequential orders for an expeditions re-hearing of the case in the Oyo State High Court, at the behest of the Honourable Chief judge of Oyo State, together with the costs awarded therein.

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### IGUH JSC

I have had privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, J.S.C. and I am in complete agreement with him that there is definite merit in this appeal and that the same ought to be allowed.

In view, however, of the legal interest that the question posed under issue I in the briefs of argument of both parties has generated, I find it necessary to say a few words of my own in relation thereto.

The relevant issue in controversy under issue I deals with whether the High Court of Justice of Oyo State or, indeed, the High Courts of Justice of the States, have original jurisdiction to entertain proceedings concerning land subject of a customary right of occupancy, having regard to the provisions of section 41 of the Land Use Act, 1978.

The facts that gave rise to this appeal have been fully set out in the leading judgment and it is unnecessary to recount them all over again. I need only state that the respondents, as plaintiffs, in the High Court of Oyo State had instituted an action against the defendant, now appellant, claiming a declaration of title to a customary right of occupancy to a piece or parcel of land described as the land of Ikolaba of Igbeti, Kishi in Oyo State, N1000.00 damages for trespass and perpetual injunction to restrain the defendant from further acts of trespass on the land. The subject matter of the dispute between the parties related admittedly to a piece or parcel of land not in an urban area and therefore subject to a customary right of occupancy. The submission of the appellant is that the land in dispute being the subject of a customary right of occupancy, the trial High Court by virtue of the provisions of section 41 of the Land



Use Act, 1978 had no original jurisdiction to entertain the action. For the respondents, it was contended that section 41 of the Land Use Act, 1978 did not by any means oust the original jurisdiction of the High Court in respect of proceedings concerning land subject of a customary right of occupancy.

In view of the previous decisions of this court in Salati v. Shehu (1986) 1 N.W.L.R. (Part 15) 198, Alhaji Sadikwu v. Alhaji Dalori (1996) 5 N.W.L.R. (Part 447) 151 and Abraham Oyeniran v. James Egbetola and Another (1997) 5 N.W.L.R. (Part 504) 122, some of which contained various obiter dicta touching on the issue in controversy between the parties together with the invitation to this court by the respondents that the said decisions ought to be reviewed and overruled as they were not only inconsistent with the provisions of section 236 (1) of the 1979 Constitution but that they were reached per incuriam and have led to a perpetuation of injustice, a number of senior and eminent learned counsel which included counsel with pending appeals in this court involving the said issue were invited as amici curiae to address the court on the question raised. Following this invitation, Kanu G. Agabi, Esq. S.A.N. and learned Attorney-General of the Federation, as he then was, Kehinde Sofola, Esq. S.A.N., C.O. Akpamgbo Esq., S.A.N., Alhaji Abdullahi Ibrahim, S.A.N., Dr. Y. Kayode-Adedeji, Attorney-General, Osun State, Awa U. Kalu Esq., Attorney-General of Abia State, B.R. Mekanju Esq. and Chief Kola Babalola of learned counsel filed very useful and thought provoking briefs of argument.

I think I ought at this stage to express profound gratitude to these learned gentlemen of both the inner and utter bar for the scholarly presentation of both their briefs of argument and oral submissions before the court as amici curiae. Their respective briefs of argument were clearly comprehensive, impressive and exhibited much learning and industry. I must take this opportunity to express my appreciation to them for professional assignments well executed.

Learned leading counsel for the appellant, O. Okunloye Esq., in his arguments, relied heavily on the decision of this court in Alhaji Salati v. Alhaji Shehu (supra). In that case, Karibi-Whyte, J.S.C., dealing with

the relevant sections of the Land Use Act commented as follows:-

".....Section 39 (1) specifically relates to proceedings in respect of any land subject of a Statutory Right of Occupancy granted by the Military Governor or deemed to be granted ..... On the other hand  
 B Section 41 confers jurisdiction on Area Courts or Customary Courts or Courts of equivalent jurisdiction in respect of Customary Right of Occupancy granted by a Local Government under this Act. There is no ambiguity in the two sections that the exclusive original jurisdiction in respect  
 C of land held under Statutory Right of Occupancy is vested in the High Court of the State. Whereas jurisdiction in respect of Customary Right of Occupancy is vested in the Area or Customary Courts. The exercise of these jurisdiction will seem to me mutually exclusive. There is no doubt therefore that the one cannot exercise the jurisdiction of the other."

D In his view, the issue in controversy between the parties was clearly settled by this court in the Salati case. The court below ought therefore to have held itself bound by the said decision under the doctrine of stare decisis.

E Learned counsel further submitted that this court has recently thrown some light on this jurisdictional question in the subsequent decisions of this court in Alhaji Sadikwu v. Alhaji Dalori and Abraham Oyeniran and others v. James Egbetola and Another (supra). In the latter case,  
 F Mohammed, J.S.C. had observed :-

"..... if we apply the 'ejusdem generis' canon of statutory construction where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated. ....

G Following this canon of construction of statutes it is my view that only courts of equivalent jurisdiction with the Area or Customary Court shall have original jurisdiction in respect of any land the subject of Customary Right of Occupancy granted by a Local Government. .... It is my view  
 H that the legislature by classification of land tenure and assigning jurisdiction to particular set of courts for determination of disputes arising from such land holdings does not want the courts to exercise concurrent jurisdiction over such matters."

He contended that from the above cases, a State High Court does not have original jurisdiction over a cause or matter that is subject of a customary right occupancy. He argued that section 236 (1) of the 1979 Constitution, as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993 under which the respondents have invited this court to overrule the above three decisions does not apply to the Salati and Sadikwu cases. In his view, the decisions in the two cases cannot be faulted as the 1979 Constitution was not in existence at the time of the institution of both actions. He contended that the two decisions are without fault. He therefore urged the court to decline the respondents' invitation to overrule them. He turned to the decision in the Egbetola case and submitted that this court has not been shown in what respect the decision went wrong. Learned counsel accordingly urged the court to strike out the plaintiffs' action for want of original jurisdiction on the part of the trial High Court.

Learned leading counsel for the respondents, K. Esan Esq. in his reply submitted that the State High Courts and the Area Courts and Customary Courts have unfettered concurrent jurisdiction to entertain proceedings dealing with a customary right of occupancy under section 41 of the Land Use Act, 1978. He explained that while section 39 (1) of the Act vests exclusive jurisdiction in a State High Court in respect of proceedings relating to statutory right of occupancy, that word, "exclusive" is conspicuously omitted in section 41. He argued that if it was the intention of the legislators that only the Area Court or the Customary Court should have original jurisdiction in respect of proceedings relating to customary right of occupancy, they would have clearly said so by the inclusion of the word "exclusive" in section 41 of the Act as they did in section 39 (1). He submitted that by virtue of section 236 of the 1979 Constitution, the High Courts have unlimited jurisdiction to hear and determine any civil and criminal proceedings. This unlimited jurisdiction is only subject to any other provision of the Constitution itself to the contrary. He contended that there is no such contrary provision in the Constitution and that the original jurisdiction of the State High Courts in matters involving customary right of occupancy is not therefore disturbed

by section 41 of the Land Use Act. Learned counsel drew the attention of the court to the decisions in the Salati, Sadikwu and Egbetola cases (supra) and submitted that they were, with respect, decided per incuriam as this court seemed oblivious of the provisions of section 236 (1) of the 1979 Constitution as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993. He referred to the Salati case and submitted that from the suit number, the case was commenced in 1982 after the promulgation of the Land Use Act, 1978. He pointed out that the Sadikwu case was commenced in 1979 and that the onus was on the appellant to establish that the decisions was given before October, 1979 when the 1979 Constitution was promulgated. He contended that it was a misconception for the appellant to state that the Land Use Act is part of the 1979 Constitution but that at all events, there is nothing in section 41 or in any other section of the Land Use Act that limits the original jurisdiction of the State High Courts in respect of proceedings concerning land subject of a customary right of occupancy. It was his final submission that the said three cases ought to be reviewed and overruled as, according to him, they are leading to a perpetuation of injustice.

Learned Attorney-General of the Federation, as he then was, and Senior Advocate of Nigeria, Kalu G. Agabi, Esq. Kehinde Sofola Esq; S.A.N., C.O. Akpamgbo Esq. S.A.N., Alhaji Abdullahi Ibrahim, S.A.N. and Awa U. Kalu., Esq., Attorney-General of Abia State in their respective briefs as amici curiae were broadly in agreement with the learned respondent's counsel that the State High Courts have unlimited original jurisdiction over land the subject of a customary right of occupancy granted by a Local Government and that section 41 of the Land Use Act in no way prohibits the State High Courts from exercising original jurisdiction in such matters. They were in agreement that prior to the promulgation of the Land Use Act, the jurisdiction of the High Courts in the southern States in land matters was unlimited. It was their submission, therefore, that such unlimited jurisdiction cannot be removed otherwise than by express and very clear terms. They argued that under no stretch of the imagination can it be suggested with any degree of seriousness that the provisions of section 41 of the Land Use Act, as couched, ex-

pressly removed or abrogated the said unlimited jurisdiction of the High Court in land matters.

Attention was also drawn to section 23 (1) of the Constitution of the Federal Republic of Nigeria, 1979 under which the State High Court were inter alia vested with unlimited jurisdiction to hear and determine civil and criminal proceedings subject only as otherwise prescribed by the Constitution itself. More importantly, it was pointed out severally by learned amici curiae that whereas section 39 (1) of the Land Use Act, inter alia, confers exclusive original jurisdiction in the State High Courts in respect of proceedings concerning land the subject of a statutory right of occupancy, that word exclusive is carefully omitted in section 41 of the Land Use Act which vests jurisdiction in respect of proceedings subject to a customary right of occupancy on the Area Courts or Customary Courts. It was submitted that this omission cannot be accidental and that the obvious implication is that the High Courts are not deprived of jurisdiction in respect of land subject to customary right of occupancy. There is broad agreement also as between all amici curiae that the decisions in Salati, Sadikwu and Egbetola cases, in so far as they purport to lay down that the State High Courts have no jurisdiction to entertain proceedings the subject of a customary right of occupancy must be considered as erroneous and therefore liable to be departed from by this court.

Learned Attorney-General for Osun State, Dr. Yemi Kayode-Adedeji in his own submission appeared more inclined to the appellant's line of argument. His contention was that section 41 of the Land Use Act vests unlimited original jurisdiction in respect of proceedings concerning land subject to a customary right of occupancy granted by a Local Government to Area Courts, Customary Courts or other courts of equivalent jurisdiction. He then argued that in so far as this original jurisdiction of the Area Courts or the Customary Courts is not limited by either the value or size of the land, it would be absurd for the High Court to have concurrent original jurisdiction on the same subject with the Area courts and Customary Courts. In his view, section 41 of the Land Use Act ousts the original jurisdiction of the High Court in respect of proceedings concern-

ing land the subject of customary right of occupancy. He urged the court to uphold its previous decisions in the Salati, Sadikwu and Egbetola cases.

B. R. Makanju Esq., of counsel, was next to address the court. He and Chief Kola Babalola are both counsel in another pending appeal in this court involving exactly the same issue now under consideration and were invited by the court as amici in the present appeal.

C Mr. Makanju, in his submissions was of the view that although the High Courts of the southern States before 1978 had unlimited original jurisdiction to entertain land matters situate any where, section 41 of the Land Use Act which was promulgated into law on the 29th March, 1978 ousted this unlimited original jurisdiction of the High Court in respect of proceedings concerning land subject to a customary right of occupancy.

D The contention of Chief Kola Babalola, on the other hand, is that although section 41 of the Land Use Act vests the Customary Courts and the Area Courts with jurisdiction over cause pertaining to disputes in respect of land subject to a customary right of occupancy granted by the E Local Government, this jurisdiction, he argued, is not exclusive as that section does not expressly so state. Accordingly, the State High Courts have jurisdiction to entertain such disputes arising from land the subject of a customary right of occupancy granted by the Local Government. F He pointed out, however, that it is obvious that section 41 of the Act is silent on the court with jurisdiction to entertain proceedings in respect of a customary right of occupancy deemed to be granted under section 36 (2) of the Land Use Act. It was his submission that it is the State High Courts that have jurisdiction to entertain such actions and not the Area or G Customary Courts.

H It is crystal clear that the main question for determination under issue 1 is whether the original jurisdiction of the State High Courts in respect of land is confined to proceedings relating to a statutory right of occupancy granted or deemed to have been granted by the Governor of a State or whether it extends to proceedings in respect of a customary right of occupancy granted or deemed to have been granted by a Local Government. In other words, have the State High Courts concurrent

original jurisdiction with the Area Courts and the Customary Courts in respect of proceedings concerning land situate in non-urban areas and therefore subject to customary right of occupancy.

Before I deal with this all important question, it ought to be stressed that the issue under consideration is entirely that of jurisdiction B which is clearly very fundamental in any given proceeding. The question of jurisdiction strikes at the root of any cause or matter and consequently raises the issue of the competence of the court to adjudicate in a particular proceeding. See Madukolu and others v. Nkemdilim (1962) 1 All C N.L.R. 587 at 595 and Skenconsult (Nigeria) Limited and Another v. Ukey (1981) 1 S.C.6 at 26. Any defect in competence is fatal as such proceedings become null and void; it would not matter how well conducted and decided the proceedings were.

For a better appreciation of the issue in question and having D regard particularly to the submissions of the learned amicus curiae, Chief Kola Babalola, I think it may be necessary to draw attention to the basic fact that under the Land Use Act, 1978, two rights of occupancy were thereby created. These comprise of :- E

(i) Statutory right of occupancy  
and

(ii) Customary right of occupancy.

The Statutory right of occupancy is of two classifications. The first is F the statutory right of occupancy granted by the Governor pursuant to section 5 (1) (a) of the Act. This reads thus:-

*"It shall be lawful for the Governor in respect of land whether or not in an urban area -*

*(a) to grant statutory rights of occupancy to any person for all G purpose ....."*

There is then the second type of statutory right of occupancy which is deemed to have been granted by the Governor by virtue of section 34 (2) of the Act. That section of the Act reads as follows:- H

*"Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory*

*right of occupancy issued by the Governor under this Act."*

The customary right of occupancy under the Land Use Act, for its own part, is similarly of two classifications. These comprise, firstly, of the customary right of occupancy granted by the Local Government  
B in accordance with section 6 (1) (a) of the Act which stipulates thus:-

*"It shall be lawful for a Local Government in respect of land not in an urban area-*

*(a) to grant customary rights of occupancy to any person or  
C organisation for the use of land in the Local Government Area for agricultural, residential and other purpose....."*

There is, secondly, the customary right of occupancy deemed to have been granted by the Local Government in accordance with section 36 (2) of the Act which provides as follows:-

D *"Any occupier or holder of such a land, (i.e. land not in an urban area) whether under customary rights or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes, continue to be entitled to possession of the land for use  
E for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government ....."* (Words in brackets supplied)

There therefore exists in both cases of statutory and customary  
F rights of occupancy a deemed grant as an actual grant. An actual grant is a grant made by the Governor of a State or a Local Government whilst a deemed grant comes into existence by the operation of law. See savannah Bank (Nig.) Ltd. v. Ajilo (1989) 1 N.W.L.R. (part 97) 305. It is in the  
G light of the foregoing that Chief Kola Babalola submitted with considerable force that although there is nothing in section 41 of the Act that expressly ousts the original jurisdiction of the High Courts to entertain proceedings concerning land subject to a customary right of occupancy, the jurisdiction of the Area Courts and the Customary Courts thereunder  
H is limited to proceedings concerning actual grants of customary rights of occupancy by Local Governments but does not extend to proceedings involving customary rights of occupancy deemed to have been granted. This is because, according to learned counsel, section 41 of the Act



which counters the Area Courts and Customary Courts with jurisdiction is confined to proceedings in respect of a customary right of occupancy granted by a Local Government under that Act and no more. I will deal with this submission later in this judgment. It suffices to say at the present time that the question, as I have stated earlier on, is whether or not the State High Courts have original jurisdiction over disputes concerning land in non-urban areas and therefore subject to a customary right of occupancy, whether actually granted or deemed to have been granted by a Local Government.

Although it is section 41 of the Land Use Act that is directly in issue and calls for consideration in this case, I think it will be necessary to consider it along-side section 39 of the same Act in view of the fact that both sections are apposite and germane to the issue for determination in this appeal.

Section 39 of the Land Use Act provides as follows:-

*"39 (1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings:*

*(a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph proceedings includes proceedings for a declaration of title to a statutory right of occupancy;*

*(b) proceedings to determine any question as to the persons entitled to compensation payable for improvements on land under this Act.*

*(2) All laws, including rules of Court, regulating the practice and procedure of the High Court shall apply in respect of proceedings to which the section relates and the laws shall have effect with such modifications as would enable effect to be given to the provisions of this section"*

There is also section 41 of the same Act which provides thus:-

*"41. An area court of customary court or other court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act; and for the purposes of this paragraph, pro-*

*ceedings includes proceedings for a declaration of title to a customary right of occupancy and all laws, including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section."*

B Before I embark on the interpretation of section 41 of the Land Use Act 1978, it is right to bear in mind the well established principle of law that the safer and more correct course of dealing with a question of construction is to take the words of the document or statute themselves and arrive, if possible, at their meaning without, in the first instance, C reference to cases. See Barrell v. Fordree (1932) A.C. 676 at 682 per Lord Warrington of Clyffe. The rule of construction is "to intend the legislature to have meant what they have actually expressed". See R. v. Banbury (Inhabitants) (1834) 1 A and E 136 at 142 per Parke J. The D object of all interpretation of a statute is to discover the intention of Parliament but such intention must be deduced from the language used for it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law. See Davies Jenkins and Co. Ltd E v. Davies (1967) 2 W.L.R. 1139 at 1156 per Lord Morris of Borth-y-Gest. Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. Where, therefore, by the use of clear and unequivocal language capable of only one meaning, F anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. See Cartledge v. E. Jopling and Sons Ltd (1963) A. C. 758.

There can be no doubt that a casual reading of sections 39 (1) and 41 of the Land Use Act, 1987 creates an initial but clearly erroneous G impression, in my view, that the High Courts, of the one part, and the Area Courts, the Customary Courts and other courts of equivalent jurisdiction in a State, of the other part, have exclusive jurisdictions in respect of proceedings relating to land subject to statutory and Customary rights H of occupancy respectively. I entertain no doubt that this approach is patently wrong and positively misleading. It is therefore necessary to examine those two sections of the Act critically to arrive at their correct construction.

It is beyond doubt from the plain and unambiguous provisions of section 39 (1) of the Land Use Act that they vest original and exclusive jurisdiction in the clearest possible terms on the State High Courts in respect, inter alia of all causes or matters relating to land the subject of a statutory right of occupancy granted by the State Governor or deemed to have been granted by him under that Act. It is as regards the provisions of section 41 of the Land Use Act and whether or not those provisions oust the jurisdiction of the State High Courts with regard to proceedings in respect of a customary right of occupancy, whether granted by a Local Government or deemed to have been granted by it under the Act that this case is now concerned with.

It cannot be disputed that section 41 of the Land Use Act, 1978 in similar unequivocal terms confers jurisdiction on the Area Courts, the Customary Courts or other courts of equivalent jurisdiction in a State to entertain actions relating to disputes over land subject to a customary right of occupancy granted by a Local Government under the Act or for a declaration of title to a customary right of occupancy to such land. A close examination of the provisions of sections 39 and 41 of the Act clearly reveals that whereas the State High Courts are under section 39 thereof expressly vested with exclusive jurisdiction in respect of proceedings relating to land the subject of a statutory right of occupancy, that significant word, "exclusive", is conspicuously dropped, omitted and was not employed by the same law maker in section 41 of the Act which permits or allows the Area Courts, the Customary Courts and any other courts of equivalent jurisdiction to exercise original jurisdiction in respect of matters therein stipulated. Speaking for myself, I must confess that the words employed by the law makers in conferring power or jurisdiction to the Area Courts, the Customary courts and other courts of equivalent jurisdiction under section 42 of the Act seem to me plain. They do not, in my view, admit of any ambiguity whatsoever. The mere vesting of jurisdiction in the named inferior courts does not and cannot operate to oust the jurisdiction of the state High courts over the same subject matter without any specific or express provision to that effect.

Original jurisdiction can be and is quite often exercised concur-

rently by courts various status. It is clear to me that the omission by the law makers to employ the word "exclusive" or, indeed, any other similar word to qualify the jurisdiction vested in the name inferior courts under section 41 of the Act is an unmistakable indication that they did not intend to confer such exclusive jurisdiction on those courts. If such exclusive jurisdiction was intended, it seems to me that the law makers would quite easily, as they did in respect of Section 39 (1) of the Act, use the word "exclusive" in section 41 of the Act as follows -

C *"An Area Court or Customary Court or other court of equivalent jurisdiction in a State shall have exclusive jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act ....."*

D This the law makers, in their infinite wisdom, did not do. I think it is clearly not permissible in law to read into section 41 of the Act what it evidently does not say. Not having introduced the word "exclusive" in that section of the Act, it is not the duty of the court to read into it what it does not contain.

E It seems to me that Section 41 of the Land Use Act should under the cardinal principles of interpretation and construction of documents and statutes be given its plain, ordinary, natural, grammatical and literal meaning and a court of law is without power to import into the meaning of a word, clause or section of a statute something that it does not say. See Bronik Motors Ltd. and Another v. Wema Bank Ltd. (1983) 6 S.C. 158, Abioye v. Yakubu (1991) 5 N.W.L.R. (Part 190) 130 at 233, Imah v. Okogbe (1993) N.W.L.R. (Part 316) 159 at 195. See too Jamal Steel Structures Ltd. v. African Continental Bank Ltd. (1973) 11 S.C.77 at 85 and Board of Customs and Excise v. Barau (1982) 10 S.C. 48 at 130. In this regard, the point must be stressed that it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. As this was expressed by Lord Mersey in the decision of Her Majesty's Privy Council in Thompson v. Goold and Co. (1910) A.C. 409 at 420:-

*"It is a strong thing to read into an Act of Parliament words*

*which are not there, and in the absence of clear necessity, it is a wrong thing to do. Here, I see no necessity at all for introducing the words".*

So, too, in another decision of Her Majesty's Privy Council in Vickers, Sons and Maxim Ltd. v. Evans (1910) A.C. 444 at 445 Lord Loreburn, L.C. dealing with the same principle of law put the matter as follows:-

*"The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself".*

I am therefore of the firm view that having expressly employed the word "exclusive" to qualify jurisdiction in section 39 (1) of the Act but omitted the use of the same word in section 41, the obvious intention of the law makers was not to confer exclusive jurisdiction on the Area and Customary Courts under the said section 41 of the Land Use Act. It seems to me erroneous on point of law to import the word "exclusive" into section 41 of the Act. The meaning and intention of a legislation must be deduced from the plain and ambiguous expressions therein used rather than from extraneous notions of what is just or convenient. See Ahmed v. Kassim (1958) 3 F.S.C. 51.

I think I ought to point out that before the Constitution of the Federal Republic of Nigeria, 1979 came into force on the 1st day of October, 1979, High Courts in the Southern States being superior courts of record enjoyed "unlimited" jurisdiction unless where this was expressly curtailed by statute. This unlimited jurisdiction of the High Courts was preserved by section 236 (1) of the 1979 Constitution subject only to the provisions of the Constitution itself, that is to say, it was limited only by any provisions of the Constitution to the contrary but not by any other legislations. See Okulate v. Awosanya (2000) 2 N.W.L.R. (Part 646) 530, Savannah Bank of Nigeria Ltd. v. Pan Shipping and Transport Agencies Ltd. 1987 1 N.W.L.R. (Part 96) 212 Bronik Motors Ltd. v. Wema Bank Ltd. (supra). In the same vein, a right conferred or vested by to H Constitution cannot be taken away or interfered with by any other legislation or statutory provision except the Constitution itself and any such other law purportedly made abrogating a right conferred by the Constitu-

tion will be void to the extent of its inconsistency. See Tukur v. Government of Gongola State (1989) 4 N.W.L.R. (Part 117) 517 at 541, Oloba v. Akereja (1988) 3 N.W.L.R. (Part 84) 508 at 523.

In this regard, it should be pointed out that a strong leaning exists against the construction of a statute or a provision thereof so as to oust or restrict the jurisdiction of the superior courts, such as the State High Courts. So, in the Privy Council decision in Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1960) A. C. 260 at 286 Viscount Simonds expressed this proposition of law as follows :-

*"It is a principle not by any means to be whittled down that the subject's recourse to Her majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair, J. called it in Francis v. Yiewsley and West Drayton Urban District Council, (1957) 2 Q.B 136 at 148, a "fundamental rule" from which I would not for my part sanction any departure".*

Section 41 of the Land Use Act does not in any way whittle down the unlimited jurisdiction of the State High Courts in land matters whether situate in urban or rural areas. It does not also expressly confer the Area Courts and the Customary Courts with exclusive jurisdiction over disputes concerning land subject to customary right of occupancy. In my judgment, therefore, section 41 of the Land Use Act does not oust the jurisdiction of the State High Courts in respect of disputes over land subject to a customary right of occupancy. It is my view that the State High Courts along side the Area Courts and Customary courts have unfettered concurrent original jurisdiction in respect of claims pertaining to land subject to customary right of occupancy granted by a Local Government under the Act.

It may be useful at this stage to draw attention to section 274 (5) of the 1979 Constitution which provides as follows :-

*"274 (5) Nothing in this Constitution shall invalidate the following enactments, that is to say -*

- (a) the National Youth Service Corps Decree 1973;*
- (b) the Public Complaints Decree 1975;*
- (c) the Nigerian Security Organisation Decree 1976;*

*(d) the Land Use Decree 1978, and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of this Constitution".* B

The above, without doubt, raises the issue of the legal status of the Land Use Act, 1978 vis-a-vis the 1979 Constitution.

Learned counsel for the appellant has submitted that by virtue of the said section 274 (5) of the 1979 Constitution, no section of that Constitution shall be evoked to invalidate any provision of the Land Use Act and that being later to section 236 (1) of the Constitution, its provisions shall prevail over those of the earlier section 236 (1) of the Constitution. Learned counsel was contending, in effect, that the Land Use Act was part of the 1979 Constitution, that the provisions of the Land Use Act, 1978 have the same weight and force as those of the Constitution pursuant to the said section 274 (5) and that section 236 (1) of the Constitution cannot therefore alter the provisions of the Land Use Act in general or section 41 thereof in particular. D E

I think, with respect, that it is a misconception to suggest that the Land Use Act, 1978 is part of the 1979 Constitution by virtue of the provisions of section 274 (5) of the said Constitution. This is because it is now settled that notwithstanding the fact that the Land Use Act, 1978, pursuant to section 274 (5) of the Constitution became an extra-ordinary statute by virtue of its entrenchment in the Constitution, it still remains essentially a Federal Act or enactment. Although it may not be abrogated except as prescribed by the Constitution, this does not make it an integral part of the Constitution. Where, therefore, its provisions are inconsistent with that of the Constitution, such provisions are to the extent of such inconsistency void. See Nkwocha v. Government of Anambra State (1984) 6 S.C. 362 at 365 and 403. The Constitution being the supreme law of the land towers above other laws or enactments and its provisions cannot be made subject to any other Act or enactment except by direct and clear provisions to that effect. It is thus plain that even if section 41 of the Land Use Act were to be read as ousting the jurisdiction of the H

State High Courts, and I have made it abundantly clear that this is not the case, any of its provisions which is inconsistent with the Constitution is to the extent of such inconsistency null and void.

I will briefly advert to Mr. Babalola's submission to the effect that having regard to the literal text of section 41 of the Land Use Act, the Area Courts and Customary Courts have no jurisdiction to entertain proceedings in respect of customary right of occupancy deemed to be granted under section 36 (2) of the Act. I need only state that my learned brother, Ayoola, J.S.C. in his judgment did adequately dispose of this matter. I entirely share his views on the issue and I have nothing more to add. In my judgement, the jurisdiction of the Area Courts and the Customary Courts under section 41 of the Act is not limited to disputes arising from land the land the subject of a customary right of occupancy granted by the Local Government alone but covers proceedings in respect of customary right of occupancy deemed to be granted under section 36 (2) of the Act. I will now turn to the three decisions of this court sought to be departed from.

Learned counsel for the appellant relied heavily on the decisions of this court in Salati v. Shehu, Sadikwu v. Dalori and Oyeniran v. Egbetola and submitted that the full effect of sections 39 (1) and 41 of the Land Use Act was pronounced by this court in those cases. He argued that the Court of Appeal ought to have held itself bound by the pronouncements he alluded to and to have held that the State High Courts have no original jurisdiction to entertain proceedings concerning land subject to customary right of occupancy.

For the respondents, it was argued that although the decisions in the above cases appeared to be contrary to the bulk of their submissions, this court should hold that those decisions were reached per incuriam and must therefore be departed from.

There can be no doubt that there is ample jurisdiction in the court to depart from its previous decision or decisions if such previous decisions are erroneous on point of law or inconsistent with the Constitution or were given per incuriam or if their application to further cases will perpetuate or occasion miscarriage of justice. This court may also



depart from its previous decisions where such decisions are impeding the proper development of the law or have led to results which are unjust, undesirable or contrary to public policy. See Gabriel Tewogbade v. Obadina (1994) 4 N.W.L.R. (Part 338) 326 at 351, Egbe v. Yussuf (1992) 6 N.W.L.R. (Part 245) 1 at 15, Akinsanya v. U.B.A. Ltd. (1986) 4 N.W.L.R. B (Part 35) 237, Rossek v. African Continental Bank Ltd. (1993) 8 N.W.L.R. (Part 312) 382 at 431

Now, in Salati v. Shehu (supra) the real issue before the court was straight forward and clear. This was whether the Area Court or Customary Court had jurisdiction over a dispute concerning land situate C in the urban area of Benue State and therefore subject of a statutory right of occupancy. There was no question whatever in that case as to whether the High Court had jurisdiction to entertain suits in respect of land subject D to a customary right of occupancy.

It was the unanimous decisions of this court that the land in dispute being one held under a statutory right of occupancy and not under customary right of occupancy, it was the High Court that had jurisdiction to entertain the suit and not the Area Court. My learned E brother, Karibi-Whyte, J.S.C. in the course of his judgment in that case observed thus:-

*"There is no ambiguity in the two sections that the exclusive original jurisdiction in respect of land held under a statutory right of F occupancy is vested in the High Court whereas jurisdiction in respect of customary right of occupancy is vested in Area or Customary Courts. The exercise of those jurisdiction will seem to me mutually exclusive. There is no doubt that one cannot exercise the jurisdiction of the other."* G

It is clear to me that no one can seriously contest the correctness of the first sentence of the above observation. All the arguments between the parties stem from the last two sentences of the passage which opinion, without the faintest doubt, is entirely obiter and does not H therefore constitute a binding precedent. In my view, the decision in the Salati case in respect of the real issue before the court is impeccable and I cannot see my way clear to fault it.

There is next the decision in Sadikwu v. Dalori (supra). My

learned brother, Ayoola, J.S.C. has in his leading judgment dealt extensively with this decision and I am in respectful agreement with his reasoning and conclusion on the question. I do not see anything in the ratio decidendi in the Sadikwu case which is a binding authority on which to determine the jurisdictional issue that has arisen for decision in the present case. I therefore have no reason at the present time for departing from the decision of this court in that case until the question in issue is raised in an appropriate cause.

There is finally the decisions of this court in Oyeniran v. Egbetola (supra). In that case the plaintiffs instituted an action in the High Court, Oshogbo for a declaration of title to a farm land subject to a customary right of occupancy. At the conclusion of hearing the High Court granted all the reliefs sought. At the Court of Appeal, the question of jurisdiction was raised and it was held that the State High Court had jurisdiction to entertain the action. On further appeal, this court reversed the Court of Appeal and held that the High Court had no original jurisdiction to entertain the proceeding in view of the provisions of section 41 of the Land Use Act. It is obvious that the court in coming to this conclusion was persuaded by the said obiter dictum of Karibi-Whyte, J.S.C. in the Salati case and the decision in the Sadikwu case which were perceived as interpreting section 41 of the Land Use Act to mean that the Area Courts were thereby conferred with exclusive original jurisdiction in matters pertaining to customary right of occupancy. Indeed, Ogwuegbu, J.S.C. in his concurring judgment seemed to express dissatisfaction with the decision in the Sadikwu case felt that the decision was binding on him. Said the learned Justice:-

*"The High Courts and Customary Courts in the Southern States had concurrent original jurisdiction in proceedings in respect of land the subject of customary right of occupancy. In fact the bulk of such cases are initiated in the High Court ..... I must however state that Sadikwu v. Dalori (supra) is binding on me ..... It is hoped that the Legislature will amend section 41 of the Land Use Act by restoring the concurrent jurisdiction that existed before the 1978 Act....."*

It is also evident that the effect of section 236 of the 1979 Constitution

was not adverted to before the decision in the Egbetola case was made.

I have, however, closely examined the provisions of sections 39 (1) and 41 of the Land Use Act 1978 and came to the conclusion for reasons already given that the State High Courts have original jurisdiction to entertain proceedings in respect of land subject to customary right of occupancy. The decision in Oyeniran v. Egbetola (supra) is clearly erroneous on point of law, inconsistent with the provisions of the 1979 Constitution and was clearly given per incuriam. It is my view, therefore, that sufficient reasons have been established to warrant a departure by this court from its decision in the Oyeniran v. Egbetola case.

On the merits of the case, I am in complete agreement with my learned brother, Ayoola, J.S.C. that this appeal ought to be allowed. Accordingly, I, too allow this appeal, set aside the judgment of the two courts below and order that the suit be retried by the High Court of Oyo State as expeditiously as possible. I abide by the order as to costs made in the leading judgment.

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### KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Ayoola, JSC in this appeal. I entirely agree with it. The Respondents as plaintiffs brought this action against the Appellant as Defendant claiming the following reliefs:

(1) Declaration as to the customary Right of Occupancy to all that piece or parcel of land of Ikolaba of Igbeti, Kishi, Oyo Division, Oyo State of Nigeria as shown in plan No, ALS/OYI/82.

(2) The sum of N1,000.00 (one thousand naira) bring damages for continuing trespass committed by the defendant, his servants, and or agents to the parcel of land.

(3) perpetual injunction to restrain the defendant, his servants and or agents from committing further trespass to the said land.

Adesina J., on 2 July, 1985 entered judgment for the plaintiffs. He granted the declaration sought, awarded damages against the Defendant for trespass and restrained him from committing further acts of

trespass on the land in question. The Defendant's appeal to the Court of Appeal was dismissed on 21 June, 1988. He has further appealed to this Court.

The original parties to this action died at different times in the course of the proceedings and were duly substituted by the present plaintiffs and Defendant.

The Defendant, by the Appellant's brief, raised five issues for determination in this appeal. These are:

(1) Whether the court below was not in error in failing to see that the trial court lacks jurisdiction over the claims as formulated by the plaintiff have regard to the provisions of the Land Use Act particularly Sections 39 and 41 thereof.

(2) Whether or not the plaintiffs who pleaded and based their root of title in an action for declaration of title on traditional history of a particular grant, can rely on grant by another person and exercise of acts of ownership and are these conflicting claims not fatal to their claim for title.

(3) Whether in a claim for declaration of title and injunction against a particular party, in his personal capacity, the court can give judgment in respect of the entire family land and can such judgment bind the family.

(4) Whether Occupation of a small portion of land comprised in the land in dispute is sufficient evidence of the exact location and extent of land in dispute.

(5) Can the plaintiffs lay claim to land which from their own pleading and evidence they have give away to other parties?

For their part, the plaintiffs, by their Respondents' brief, formulated the following issues:

(1) Whether in view of sections 39 and 41 of the land Use Act, the trial court lacked jurisdiction to try the plaintiffs' claims as formulated, sections 236 of the 1979 Constitution as amended by Decree 107 of 1993 notwithstanding.

(2) Whether there were conflicting claims of root of title in the plaintiffs' case.

(3) Whether the application of the rule in *Kojo v. Bousie* (1957)

1 WLR 1223 was appropriate in the circumstances.

(4) Whether the case was fought by the parties in a representative capacity.

(5) Whether the identity of the land in dispute was in dispute between the parties.

(6) Whether the Court of Appeal was right in dismissing the appeal before it on grounds of acts of ownership by the Respondents.

This appeal is in two parts. The first deals with the question of the jurisdiction of the trial High Court and, the second with the question of the merits of the case. This judgment will also be in two parts. I deal first with the issue of jurisdiction.

ISSUE ONE:

As I have already indicated, the defendant raised the issue thus:

*"Whether the Court below was not in error in failing to see that the trial court lacks jurisdiction over the claims as formulated by the plaintiff having regard to the provisions of the Land Use Act particularly Section 39 and 41 thereof."*

It was submitted for the defendant that on the showing of the plaintiffs the trial High Court lacked jurisdiction to adjudicate over their claims and the Court of Appeal ought to have suo motu struck out the claims. It was pointed out that the original jurisdiction of the High Court in respect of land matters is as provided under Section 39 of the Land Use Act, 1978 which provides as follows:

*"39(1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings:*

*(a) Proceedings in respect of any land the subject of a statutory right of occupancy granted by the Military Governor or deemed to be granted by him under this Decree; and for the purpose of this paragraph proceedings includes proceedings for a declaration of title to a Statutory Right of Occupancy.*

*(b) proceedings to determine any question as to any person entitled to compensation payable for improvements on land under this Decree.*

*(2) All laws including rule of Court, regulating the practice and*

*procedure of the High Court shall apply in respect of proceedings to which the section relates and the laws shall have effect with such modifications as would enable effect to be given to the provisions of this section."*

B It was submitted that the jurisdiction to entertain proceedings dealing with a customary right of occupancy is vested in the customary or Area Courts in a State by virtue of Section 41 of the land Use Act. Section 41 of the Land Use Act provides as follows:

C *"41. An area court or customary court or other court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Decree; and for the purposes of this paragraph proceedings includes proceedings for a declaration of title to a customary*  
D *right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modification as would enable effect to be give to this section."*

For the above submissions learned counsel for the defendant  
E relied on Alhaji Bata Bakin Salati v. Alhaji Talie Shehu (1986) 1 NWLR (pt. 15) 98; Alhaji Abubakar Sadikwu v. Alhaji Abba Dalori (1996) 5 NWLR (pt. 447) 151; Oyeniran v. Ogbetola (1997) 5 NWLR (pt. 504) 122. It was stressed that based on the decisions of this court in the  
F above mentioned cases, a State High Court does not have original jurisdiction over a cause that is subject of the a customary right of occupancy.

The learned counsel for the plaintiffs contended the contrary. It  
G was submitted that the High Court, the Area and Customary Courts have unfettered concurrent jurisdiction to entertain proceedings dealing with a customary right of occupancy under section 41 of the Land Use Act. While section 39 (1) of the Act vests exclusive jurisdiction in a State High Court in respect of statutory right of occupancy, the word is conspicu-  
H ously ommitted in section 41. It was therefore the submission of the plaintiffs that if it were the intention of the legislators that only the Area Court or Customary Court should have original jurisdiction in respect of customary right of occupancy, the legislations would have clearly said so

by the inclusion of the word "exclusive" as they did in section 39 (1). It was argued that to hold otherwise, would be importing into that section what was clearly not the intention of the legislators. Counsel submitted that it was wrong to read into a statute what the statute does not say. Counsel relied on the case of Board of Customs & Excise v. Barau (1982) B 10 SC 48 at 130.

Learned Counsel for the plaintiffs further submitted that by virtue of section 236 of the 1979 Constitution, the High Court of a State has unlimited jurisdiction to hear and determine all cases. Section 236 (1) of the 1979 Constitution provides: C

*"236 (1) Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person."* (underlining for emphasis). D E

It was pointed out that the unlimited jurisdiction of the State High Court in both civil and criminal matters is subject only to the provisions of the Constitution. Therefore it was submitted neither the Land Use Act in its entirety nor section 41 of the Land Use Act could take away, limit, restrict or detract from that unlimited jurisdiction. It was again pointed out that the Land Use Act is itself an existing law by virtue of section 274 (5) and (4) of the 1979 Constitution and its validity and continued existence was assured by section 274 (3) of the Constitution. The Land Use Act, it was said, is not part of the Constitution and could therefore not whittle down or override any provision of the Constitution. Counsel relied on the case of Nkwocha v. Governor, Anambra State (1984) 6 SC. 362. F G H

It was yet again submitted that the Land Use Act, an existing law which the Constitution by virtue of section 274(1) say "shall have effect with such modifications as may be necessary to bring it into conformity

with the provisions of this Constitution." cannot by virtue of its own section 41 override the unlimited jurisdiction of the High Court provided in section 236 (1) of the Constitution.

It was argued that the cases of Salati v. Shehu (supra); Sadikwu v. Dalori (supra); Oyeniran v. Egbetola (supra) cited by learned counsel for the Defendant were oblivious of the provisions of section 236 (1) of the 1979 Constitution as amended. Pursuant to the submissions on behalf of the plaintiffs, the learned counsel called upon this court to review and overrule the decisions in the above stated cases in which this court decided that exclusive jurisdiction to try proceedings in respect of Customary rights of occupancy is vested in the area courts and customary courts pursuant to section 41 of the Land Use Act. In this regard Counsel have been invited to address the court on this issue as amici curiae. Accordingly counsel have filed their briefs to assist this court in the determination of this issue.

I have already stated the position of the plaintiffs on this issue. It is right to observe that the plaintiffs' position has found ample support in the helpful submissions of Mr. Kanu G. Agabi, SAN, Attorney-General of the Federation, Mr. Kehinde Sofola, SAN, Mr. Clement Akpamgbo, SAN, Alhaji Abdullahi Ibrahim, SAN and Mr. Awa Kalu Attorney-General of Abia State. The submissions were first, that while the word "exclusive" was expressly used in section 39 thus conferring sole jurisdiction to the State High Courts in matters covered by that section, the said word is conspicuously committed from the provisions of section 41 which allows "area, customary and any other courts of equivalent jurisdiction" to exercise jurisdiction in matters covered therein. The omission of the word "exclusive" clearly shows that the exclusive original jurisdiction has not been conferred on area and customary courts in proceedings relating to land subject of a customary right of occupancy. Secondly, the opinion expressed by Karibi-whyte, JSC in Salati v. Shehu (supra) that "The exercise of these jurisdictions will seem to me mutually exclusive. There is no doubt therefore that the one cannot exercise the jurisdiction of the other" is Obliter and should not have been relied on in Sadikwu v. Dalori (supra). Thirdly, that section 236 (1) of the 1979 Constitution has



conferred unlimited jurisdiction to try cases on the State High Court. So that if this court had considered the effect of section 236 (1) of the 1979 Constitution, section 41 would have been differently interpreted. Fourthly, the Land Use Act is not an integral part of the Constitution and could therefore not whittle down or override any provision of the Constitution. B Therefore if any of its provisions are inconsistent with the provisions of the Constitution, such provisions of the Land Use Act are void to the extent of such inconsistency. Some of the learned counsel criticised those opinions which had tended to make the jurisdiction of the State C High Court dependant on the existence or absence of an area court or a customary court in the area where the land in question is situate.

I shall now consider the decisions in Salati v. Shehu (supra); Sadikwu v. Dalori (supra); Oyeniran v. Egbetola (supra).

In Salati v. Shehu (supra) the land in dispute is a developed land D situated in an area designated as urban by the Governor of Benue State exercising his powers under the Land Use Act. The plaintiff nevertheless brought an action in the Muslim Area Court against the Defendant "seek- E ing court assistance for revocation of sale" of the land.

The only issue before the Supreme Court was whether the Muslim Area Court had jurisdiction to entertain a dispute relating to developed land in an urban area of the State which land was the subject of a statutory right of occupancy. It was argued that it was Benue State High F Court that had jurisdiction in the case and not the Area Court. The Supreme Court by a unanimous decision held that the land being one held under a customary right of occupancy, it was the High Court that had jurisdiction and not the area court.

There was no issue of jurisdiction over land subject of a customary right of occupancy under section 41 of the Land Use Act. Karibi- Whyte, J.S.C at p.215 of the report rightly limited issue to section 39 when he said:

*"The appeal succeeds or fails on the only ground argued and H relied upon by counsel to the appellant, namely that the trial court i.e. the Makurdi Area Court has no jurisdiction in respect of the matter before it and that accordingly its decision was a nullity."*

But then at p.218 of the Report Karibi-Whyte JSC added:

"There is no ambiguity in the two sections that the exclusive original jurisdiction in respect of land held under statutory right of occupancy is vested in the High Court of the State, whereas jurisdiction in respect of customary right of occupancy is vested in the Area or customary courts. The exercise of this jurisdiction will seem to be mutually exclusive. There is no doubt therefore that the one cannot exercise the jurisdiction of the other." (underlining for emphasis).

This opinion was clearly made obiter and is therefore not binding. The unanimous decision of this Court in the Salati case is impeccable and the question of over-ruling it does not arise.

In Sadikwu v. Dolari supra the land in dispute was allocated to both the Plaintiff and Defendant in January 1978 and June 1979 respectively by the Maiduguri Local Authority. Both parties were separately issued with certificates of Customary Right of Occupancy by the Authority. The plaintiff then sued for title at the High Court. The High Court gave judgment for the plaintiff. On appeal to the Court of Appeal, the question of jurisdiction was raised. The Court of Appeal allowed the appeal on the ground that the High Court lacked original jurisdiction. The plaintiff appealed to this court. In a unanimous decision the Supreme Court upheld the decision of the court of Appeal and dismissed the appeal.

Before Commenting on this decision, I think it is right to review the facts of Oyeniran v. Egbetola (supra). In this case, the plaintiffs instituted an action in the High Court seeking a declaration that by Customary Occupation, they were entitled to the customary right of occupancy to a farmland at Songbe/Idi-Iroko, Kuta in Iwo East Local Government Area in Osun State. The High Court assumed jurisdiction and gave judgment on the claim. On appeal to the Court of Appeal, the question of jurisdiction was raised. That court held that the High Court was right and dismissed the appeal. On a further appeal to this Court, the Court held that the High Court had no jurisdiction in the matter, relying on the decision in Sadikwu v. Dalori supra. But in Sadikwu v. Dalori (supra), this court based its decision on the provisions of section 17 of the High

Court law of the Northern States which provides that:

"17. (1) *Subject to the provisions of the Land Tenure Law and of any other written Law the High Court shall not exercise original jurisdiction in any suit or matter which -*

(a) *raises any issue as to the title to land or as to the title to any interest in land which is subject to the jurisdiction of a native court.*" B

It will be seen clearly that at the time this case was instituted, the jurisdiction of the High Court of Borno State was governed by S. 17 of the High Court Law of Northern States. The Borno State High Court, by Virtue of the High Court Law, had no original jurisdiction in matters relating to title to land or interest therein which is subject to the jurisdiction of a native court. This, it must be noted, was before the 1979 Constitution. C

I turn now to Oyeniran's case. Before the 1979 Constitution in the west, the High Court and Customary Court had concurrent jurisdiction. This court decided this case as though the High Court, Oshogbo had no jurisdiction as it is the case with the High Court in the Northern States. This is because this court held that it was bound by its decision in Sadikwu v. Dalori (supra). I have earlier shown that the decision in Sadikwu's case was based on section 17 of the High Court Law of Northern States which ousted the original jurisdiction of the High Court in matters relating to title to land or interest therein in matters subject to the jurisdiction of a native court. It is to be observed here that the High Court of Northern States has exclusive original jurisdiction in matters relating to title to land which is the subject of statutory right of occupancy. Section 41 (1) of the Land Tenure Law provides thus: D

"41. (1) *The High Court shall have exclusive original jurisdiction in the following proceedings -* E

(a) *Proceedings in which the right of the Governor or the Minister to grant a statutory right of occupancy over any land is in dispute;*

(b) .....

(c) ..... F

This Court, in the three cases under discussion, was concerned with the construction of sections 39 and 41 of the Land Use Act. In doing so, the court did not consider the effect of section 236 of the H

1979 Constitution. Section 236 of the 1979 Constitution has vested unlimited jurisdiction in the State High Court to try all cases. Section 236 (1) of the 1979 Constitution provides as follows:

"236 (1) *Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.*"

The unlimited jurisdiction of the State high Court in civil and criminal matters only subject to the provisions of the Constitution. It will be seen clearly that neither the Land Use Act in its entirety or section 41 thereof or any other law for that matter could take away, limit, restrict or detract from that unlimited jurisdiction. Section 236 has vested the High Court with unfettered and unlimited jurisdiction. See Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 6 S.C. 158 at 195; Tukur v. Government of Gongola State (1989) 4 NWLR (pt. 117) 517 at 541-2; Savannah Bank of Nigeria v. Pan Atlantic Shipping Trans Ltd. (1987) 1 NWLR (pt. 49) 212 at 229; Salami v. Chairman LEDB (1989) 5 NWLR (Pt. 123) 539. This Court per Obaseki, JSC in Salami's case held:

*"The jurisdiction of the High Court of a State is unlimited both in civil and criminal matters and as prescribed by section 236 (1) of the Constitution of the federal Republic of Nigeria as amended."*

The Land Use Act is itself an existing law by virtue of section 274 (5) of the 1979 Constitution and its validity and continued existence was assured by section 274 (3) of the Constitution. The Land Use Act is not an integral part of the Constitution and could therefore not whittle down or override any provision of the Constitution - See Nkwocha v. Governor Anambra State (1984) 6 S. C. 362. Thus it is clear that the Land Use Act, not being an integral part of the Constitution, where its provisions are inconsistent with those of the Constitution, then those provisions are to that extent, void. See the decisions of this Court in

Adisa v. Oyinwola (2000) 6 KLR Katsina-Alu JSC 2015  
Lenboye v. Ogunsiji (1990) 6 NWLR (pt. 155) 210; Ebiteh v. Obiki  
(1992) 5 NWLR (pt. 243) 599 among others.

It is now clear and beyond any argument that section 41 of the Land Use Act 1978 cannot oust the unlimited jurisdiction of the State High Court as provided by section 236 of the 1979 Constitution as amended. Besides, when the provisions of section 39 (1) and section 41 of the Land Use Act are compared, it will be seen that while section 39 (1) vests "exclusive" jurisdiction in a State High Court in respect of proceedings relating to statutory right of occupancy, the word "exclusive" is conspicuously omitted in section 41. I think if it were the intention of the legislators that only the area court or customary court should have original jurisdiction in respect of customary right of occupancy, the legislators would have clearly said so by the inclusion of the word "exclusive" in section 41 of the Act just as they did in section 39 (1). I believe that the omission of the word "exclusive" is deliberate. The omission of the word was intended not to confer exclusive jurisdiction on Area Court or Customary Court. While in view of section 236 of the 1979 Constitution the provisions of section 39 (1) of the Land Use Act would appear to be a supplusage, section 41 seems in order. Section 41, as I see it, was intended to confer some of the jurisdiction of the State High Court on Area Court or customary court.

In the final analysis I agree entirely with my learned brother Ayoola, JSC that the decision of this Court in Oyeniran v. Egbeloa (Supra) was erroneous and made per incuriam. This court should not be bound by that decision. On the Merits

I now turn to the second part of this appeal which concerns the merits of the case. I agree with the lead judgment that both the High Court and the Court of Appeal misconceived the plaintiffs' case and both courts failed to accept or reject the evidence of a witness who claimed to be a living witness to the grant alleged.

It will also be observed that the Defendant was sued in his personal capacity. He claimed that the piece of land in dispute was given to him by a family. The plaintiffs did not join the family through whom the defendant claimed. It is necessary that the family be made a party.

In the circumstances I would also allow the appeal and set aside the judgments of the High Court and the Court of Appeal. I remit the case to the High Court of Oyo State for a retrial. At the retrial the parties are at liberty to amend their respective pleadings. The plaintiffs shall pay costs of N10,000.00 to the Defendant.

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**UWAIFO JSC**

I read in advance the judgment of my learned brother Ayoola JSC. I fully agree with his reasoning and conclusions both as to the question of jurisdiction and the merit of the case. I shall add a few words in support.

I think sections 39 (1) and 41 of the Land Use Act should be read with section 236 (1) of the 1979 Constitution [now s. 272 (1) of the 1999 Constitution] in mind. The relevant portion of the provisions of s. 236 (1) in regard to this civil reads:

*"Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue....."*

This provision gives unlimited jurisdiction to the High Court of a State to hear and determine any civil matters, including land matters wherever the land may be situated, subject to any relevant provision in the Constitution.

Attention has been drawn to s. 274 (5) of the 1979 Constitution and the decision of this court in Nkwocha v. Governor of Anambra State 1984) 6 SC. 362 at 403 where, in construing the effect of that section as it relates to the entrenched Land Use Act, it was said that the Act is not really part of the Constitution. I also hold that view. What can be said is that the Constitution specifically (1) preserves that Act from being invalidated like any other Act can be (2) provides that any amendment to it or a repeal of any of its provisions or of the Act itself shall be in the same

way the Constitution may be amended. That certainly does not make it an integral part of the Constitution. In fact S. 275 (5) itself makes a distinction between the Constitution and the said Land Use Act and the other three enactments mentioned therein when it says: "Nothing in this Constitution shall invalidate the following enactments....."

The effect of s. 274 (1) is to make the Land Use Act subject to the Constitution since it is regarded as an existing law and deemed to be an Act of the National Assembly when it says:

*"274 (2) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be -*

*(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws."*

It is true that s. 274 (5) uses the expression that the provisions of the Land Use Act "shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution." Even so, the actual language of s. 39 (1) of the Land Use Act cannot by any means be said to be in conflict with s. 236 (1) of the Constitution. It provides:

*"39 (1) The High Court shall have exclusive original jurisdiction in respect of the following proceedings -*

*(a) proceedings in respect of any land the subject of a statutory right of occupancy granted by the Governor or deemed to be granted by him under this Act; and for the purposes of this paragraph, proceedings include proceedings for a declaration of title to a statutory right of occupancy."*

Before the promulgation of the 1979 Constitution, the jurisdiction of the High Courts was regulated by the Laws of the States or, where still applicable, of the former Regions. In the Southern States the High Courts generally had unlimited jurisdiction in land matters except as may relate to inheritance or disposition of property on death or such other peculiar matters (as in the North) as provided in the relevant High

B Court Laws which to some extent took account of the original jurisdiction conferred by other Laws on Native Courts or Customary Courts and accordingly excluded the jurisdiction of the High Courts in those matters: s. 9 of the High Court Law (Cap. 44) Vol. II Laws of Western Region Nigeria, 1959; s. 14 High Court Law (Cap. 61) Vol. IV Laws of Eastern Nigeria; s. 17 (1) of High Court Law (cap. 49) Laws of Northern Nigeria. The decisions arrived at in Salati v. Shehu (1986) 1 NWLR (Pt. 15) 198 and to a large extent Sadikwu v. Dalori (1996) 5 NWLR (pt. 447) 151 can be understood in that light when faced with the interpretation of C s. 41 (2) of the Land Tenure Law (Cap. 59) Laws of Northern Nigeria. Section 41 (1) (a) of that Law gave exclusive jurisdiction to the High Court in land matters only where a statutory right of occupancy granted by the Governor or Minister (Commissioner) was involved, while s. 42 D (2) gave jurisdiction to native courts where the grant was a customary right of occupancy provided the parties were subject to the jurisdiction of native courts. By and large, s. 41 (1) (a) is similar to s. 39 (1) of the Land Use Act while s. 41 (2) is similar to s. 41 of the Act.

E It was section 236 (1) of the 1979 Constitution which conferred unlimited jurisdiction on State High Courts throughout the country. In view of this the exclusive jurisdiction given by s. 39 (1) of the State High Courts across Nigeria must not be understood as limiting the High Court F jurisdiction to statutory right of occupancy granted in respect of lands in urban areas, but that its proper meaning is that it excludes any other courts from having jurisdiction over lands in urban areas. In the same way, it must be recognised that section 41 of the Land Use Act does not and cannot derogate from the original jurisdiction of State High Courts in G any land matter. It merely gives original jurisdiction to other courts mentioned or anticipated therein. It has not excluded the State High Courts from entertaining land matters in rural areas going by its wording. It must therefore be said a fortiori that when the 1979 Constitution came H into force, it became a matter beyond dispute that the said s. 41 was incapable of undermining s. 236 (1) of the Constitution because s. 274 of the Constitution which recognises the Land Use Act as an existing law, as already shown, makes such existing law "Subject to the provisions of



this Constitution." So that even though s. 274 (5) preserves the potency of the provisions of the Land Use Act, it can only possibly do so to the extent that they must remain subject to the provisions of the Constitution itself. Happily, s. 41 of the Land Use Act is plain enough not to cause any constitutional difficulties. It provides:

*"41. An area court or customary court or other court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a Local Government under this Act; and for the purposes of this paragraph proceedings includes proceedings for a declaration of title to a customary right of occupancy ....."*

This provision has achieved certain goals. First, it declines to give jurisdiction to those other courts in respect of urban lands but rather implies that they have no such jurisdiction. Second, it does not attempt to take away or detract from the unlimited jurisdiction conferred on a State High Court under s. 236 (1) of the Constitution by refraining to use the word "exclusive" in the jurisdiction it has granted to those courts. Third, customary or similar courts in Southern Nigeria whose jurisdiction in land matters in most cases depended on the value of the land, and in some cases had no such jurisdiction at all, now have jurisdiction in land matters, although only in rural areas, irrespective of the value of the land.

The result is that while a State High Court has exclusive jurisdiction over lands in urban area by virtue of s. 39 (1) of the Land Use Act, it shares concurrent jurisdiction with the customary or other court of equivalent jurisdiction by virtue both of its own entrenched unlimited jurisdiction under s. 236 (1) of the Constitution and the jurisdiction conferred on the said customary court or other court by s. 41 of the Land Use Act.

In interpreting the relevant sections of the Constitution and the Land Use Act, I have given the words used therein their plain and ordinary meaning. That is because the words themselves appear clear and unambiguous to me. When the words of a legislation or constitution are clear, plain and unambiguous, there is no need to give them any other

meaning than their ordinary, natural and grammatical construction would permit unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the legislation or constitution: see Ogbunyiya v. Okudo (1979 All NLR 105; Ifezue v. Mbadugha (1984) 1 SCNL 427; B Shell Petroleum Development Co. (Nig.) Ltd. v. Federal Board of Inland Revenue (1986) 8 NWLR (pt. 466) 256; National Bank of Nigeria Ltd v. Weide & Co. (Nig) Ltd. (1996) 8 NWLR (pt. 465) 150. I have reached the conclusion as my learned brother Ayoola JSC that Oyeniran v. Egbetola C (1997) 5 NWLR (pt. 504) 122 was wrongly decided. It was inconsistent with s. 236 (1) of the 1979 Constitution [now s. 272 (1) of the 1999 Constitution] and must be departed from.

I may only add by way of a footnote that the Land Tenure Law (Cap. 59), Laws of Northern Nigeria no longer makes any difference to D the jurisdiction of the High Court in the Northern State in land matters except perhaps where they involve Islamic personal law regarding a wakf, gift, will or succession. I do not by this give any opinion on that aspect as I have not had the benefit of arguments on it. I am profoundly grateful E to those who responded to the invitation extended to them to act as amici curiae on this issue of jurisdiction in this appeal. Their contributions were very helpful to me in reaching my conclusions.

As regards the merit of the present case, it seems plain to me F that the learned trial judge misunderstood the crucial evidence as to the origin of the title to land claimed by both sides. The plaintiffs/respondents pleaded on paras. 8, 9, 10 and 11 of the statement of claim as follows:

G "8. The plaintiff further avers that during the Yokulu crisis of 1940 when the Igbetti Chiefs revolted against Oba Folarin Akangbe over the collection of customary tenants from Settlers on Igbetti Community land the Alaafin of Oyo Oba Ladigbolu intervened and appealed to the Chiefs to be calm and that he will see that justice was done.

H 9. Oba Ladigbolu then sent Ilusinmi to Igbetti to apportion land to the Chiefs. When Ilusinmi got to Igbetti and contacted the Seriki of Igbetti to assist in carrying out the order given by the Alaafin (sic). The Seriki of Igbetti at that time was Adediran who was sick and could not go

*to allocate the lands so he sent one of his children Yesufu Adetola now the Seriki of Igbetti to go with Ilusinmi to carry out the assignment.*

*10. The Plaintiff avers that as a result of this assignment the Eleven chiefs in Igbetti get lands allocated to them. The Chiefs were Seriki, Ikolaba, Akehinke, Saagbon, Sagbo, Elerugba, Aboke, Abosanto, Agoro, Abosinwo and Alemoso.*

*11. The land so allocated to Ikolaba as a result of this exercise has since remained the Ikolaba Chieftaincy family land and it is on this land that trespass has been committed."*

The defendant/appellant also pleaded in paras. 7, 7(a), 8, 10, 11 and 12 of the statement of defence as follows:

*"7. Onigbetti Siyanbola I moved from Igbetti to its present site after the said Fulani War settled the Defendant's ancestor on a very large tract of land which included the land in dispute. The Defendant's ancestor was never a tenant of Seriki family.*

*7(a) Oba Siyanbola I granted land to several other persons including the ancestors of Sagbon and Oloro families of Igbetti. The land granted to the defendant's ancestor was bounded on one side by the land granted to the ancestor of Sagbon Family and on the other side by the land granted to the ancestor of Oloro family.*

*8. Upon the death of Ajayi Abanise his said land devolved on his children under Native Law and Custom and thus became family land. The land was managed and controlled by successive heads of Asunmode family namely Alanu, Omotosho and Akangbe who is the current head of the family.*

*10. With reference to paragraphs 5, 6 and 7 of the Plaintiff's Amended Statement of Claim, the Defendant admits the averment in so far as it states that the Plaintiff's family first settled at Ogunte Kekere. But the defendant says that about forty (40) years ago, the then head of the plaintiff's family, GBOPA approached the then Bale of Igbetti, OBA FOLARIN I for a parcel of land on which to settle following a fire disaster which destroyed their village and all their properties at Ogunte Kekere. The said Oba Folarin I ascended the throne of Igbetti after the death of Oba Siyanbola I.*

11. *The Defendant says further that Oba Folarin I, being a relation of the Defendant's ancestor, admonished the defendant's ancestor to grant land to the said Gbopa and his family, the Ikolaba family of Igbetti. And the Defendant's ancestor agreed to do so.*

B 12. *The Defendant avers further that following the agreement referred to in paragraph 11 above, the then Onigbeti of Igbetti, OBA FOLARIN I sent Elemosho Alao who was a Chief under him to go with both the plaintiff's Head of Family and the defendant's ancestor to demarcate the land to be granted to the plaintiff's family."*

C I can see from the above pleadings that both rely on grants made in recent times by or through the intervention of some natural rulers, the defendant adding that it was his ancestor who was urged by one of the said natural rulers, Oba Folarin I, to grant land to the plaintiff's ancestor. D Evidence was led along those pleadings. It was for the learned trial judge to examine the evidence on the alleged grants made within living memory - about 1940 - and make findings as to which side was preferable upon the preponderance of credible evidence. He did not do so. But rather he E talked of traditional evidence, and at the same time spoke of grant but arrived at the conclusion that the evidence of tradition by each side conflicted. He said he could not rely on the evidence of tradition. But he went further to say that the evidence of tradition by the plaintiffs was F "weak". Before he proceeded to call in aid the rule in Kojo II v. Bonsie (1957) 1 W.L.R. 1223, he said:

G *"As I had stated earlier both the tradition (sic) evidence of the plaintiff and defendant are defective but what is the court left to consider having regard to all the circumstances of the case? In a situation like this, the court should have a recourse to facts of recent possession spanning over a period."*

H I am afraid the learned trial judge, with due respect to him, made a complete muddle not only of the rule in Kojo II v. Bonsie, which I do not intend to restate here as the Law Reports are replete with it, but also of the case as a whole. The pleadings and evidence do not call for recourse to that rule at all.

When it appears that a trial court has obviously lost its bearing in

a case in the sense that it did not quite appreciate the pleadings and evidence led in support so as to make findings on it, nor the case made by the respective parties so as to be able to assess each party's case, and over and above that it applied wrong principles, as in the present case, it is as good as the case not having been heard and determined. The lower court fell into grave error when it upheld the judgment arrived at by the trial court in such circumstances. For the above reasons and those fully stated by my learned brother Ayoola JSC, I would therefore allow this appeal and set aside the judgments of the two courts below. This is a case fit for a rehearing: see Ojogbue v. Nnubia (1972) 1 ALL NLR 226; Awote v. Owodunmi (No.2) (1987) 2 NWLR (pt. 57) 367; Oro v. Falade (1995) 5 NWLR (pt. 396) 385. I accordingly order that the case be remitted to the Oyo State High Court to be reheard by another Judge. I abide by the consequential orders made by Ayoola JSC, including the order for costs.

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