

SUPREME COURT OF NIGERIA

14TH DECEMBER, 2001. SC. 43/1997

**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

CHIEF OHWOVWIOGORIKINE

(The senior Odion & Clan Head

of Uwherun) & 3 ORS. PLAINTIFFS/RESPONDENTS

(For themselves and on behalf

of Erovie Quarters, Uwherun Clan)

AND

1. CHIEF OLORI EDJERODE

(The Odion of Ehre Quarter) & 3 ORS.)

5. ATTORNEY-GENERAL DEFENDANTS/APPELLANTS

DELTA STATE

6. THE COMMISSIONER FOR LOCAL GOV-

ERNMENT & CHIEFTAINCY AFFAIRS,

DELTA STATE

CHIEFTAINCY MATTERS - Cause of action - Traditional Rulers and Chiefs Edict of 1979 (Bendel State) - The cause of action - Did not accrue until appointments were made - In accordance with the Edict (H 3)

CHIEFTAINCY MATTERS - Commencement of action - Plaintiffs could not have commenced action when the Edict was promulgated in 1979 - But when the appointment of 1st appellant was made in 1985 (H 4)

CHIEFTAINCY MATTERS - Courts - Justifiability - Present action - Being on declaration of the customary law - And not claims in respect of chieftaincy matters - Is justifiable as the jurisdiction of the court - Has not been ousted by the Edict (H 6)

CONSTITUTIONAL LAW - Applicable Constitution - It is the 1979 Constitution not the 1963 Constitution - That applies to a cause of action

3712 Ikine v. Edjerode (2001) 12 KLR (pt. 131) 3711; (2001) 18 NWLR
accruing in 1985 (H5)

COURTS - *Abuse of court processes- For an action to be declared an abuse of court processes - There must be two or more actions between the same parties - In respect of the same subject matter - In one or more courts - At the same time (H7)*

LIMITATION OF ACTIONS - *Statute Bar - Whether an action is statute barred- Depends on the nature- And relevant provisions of the statute (H2)*

WORDS & PHRASES - *"Cause of action" - Definition of the expression (H1)*

FACTS

In the High Court the present respondents as plaintiffs had sued the 1st - 4th appellants for declarations as to the appointment of the Senior Odion Uwherun in accordance with the tradition, native law and custom of Uwherun clan, Ughelli Local Government of Bendel State and for a declaration restraining the 1st defendant, his servants, agents or privies from functioning or continuing to function as Senior Odion of Uwherun pending the determination of the suit.

On being served with the writ, the counsel for the 1st - 4th appellant filed a motion on notice dated 22/2/88 for orders dismissing the action for being frivolous, vexatious, oppressive and an abuse of the process of the court. In the supporting affidavit the appellants disclosed that the respondents had in another suit; suit No. *UHC/34/87* sued them for reliefs similar to those in the present proceedings. In the counter affidavit of the respondents it was disclosed that a notice of discontinuance had been filed by the respondents in suit No. *UHC/34/87* and the suit had been struck out from the list of the court in March 1988 before the motion on notice to dismiss the action was brought by the appellants.

The trial Judge after listening to the motion in his ruling acceded to the prayers of the appellants. He therefore dismissed the present sui on

the grounds that it was an abuse of the process of the court and was also statute barred as urged by the appellants. The respondents who were dissatisfied with the ruling appealed to the Court of Appeal. The court found in favour of the respondents and set aside the decision of the trial court. The appellants being dissatisfied have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

- (i) *whether this action is not statute barred;*
- (ii) *whether the trial Court has jurisdiction to entertain the reliefs endorsed on the writ of summons;*
- (iii) *whether the action is not an abuse of judicial process.*

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

“Cause of action” - Meaning

1. What then are the principles to bear in mind when determining the term “cause of action”? With regard to that question, may I refer to the case Amodu V Amodu (1990) 5 NWLR (Pt. 150) 356 where at 367, Agbaje JSC, in the course of his judgment accepted the following definitions of the expression “cause of action” when he quoted the following definitions of the term:-

“The term “cause of action” means all those things necessary to give a right of action whether they are to be done by the plaintiff or third a third person” Hernaman Smith (1855) 10 Exch 659, per Parke B. at p. 666. “Cause of action” has been held from the earliest time to mean every fact which is material to be proved to entitle (he plaintiff to succeed - every fact which the defendant would have a right to traverse. “Cooke GILL (1873) L.R.8CP 107 per BrettJ, at p.116.”

I also adopt the above definitions of the expression “cause of action”.
(p. 3724 D)

Limitation of Actions - Statute bare

2. It is common ground that the question as to whether an action is statute barred is dependent on the nature of the action, and the relevant

provisions of the statute of limitations. (p. 3725 A)

Chieftaincy matters - Cause of action

3. *"The cause of action in this case although provided for under Section 8 of the Traditional Rulers and Chiefs Edict of 1979 (Bendel State) yet it did not arise until April, 1985. I think it will lead to an absurdity for anyone to take an action within six years of the promulgation of the Edict of 1979 when no appointment had been made in accordance with the provisions of the said Edict*

C For that view of the Court below, and with which I am in full agreement, may I refer to the case of *Turburville and Another V. West Ham Corporation* (1950) 2 K.B.D. 208. (p. 3725 H)

D Chieftaincy matters - Commencement of action

4. Reverting to the issue under consideration in this appeal the argument proffered lacks merit. While it is clear that the Traditional Rulers and Chiefs Edicts of 1979 (Bendel State) was promulgated in 1979, the Plaintiffs could not have commenced any action until the appointment of the 1st Appellant in April 1985.

The argument advanced for the Appellants that the Respondents would have commenced action against the Bendel State Executive Council soon after the promulgation of the Traditional Rulers and Chiefs Edict of 1979, must also be F rejected. (p. 3726 E)

Constitutional law - Applicable constitution

5. *"In this case the endorsement on the Writ discloses a cause of action as from April 1985 and it is the 1979 Constitution that applies and not the 1963 Constitution. This case must be distinguished from that of Uttih V. Ononyivwe (1991) 1 NWLR (Pt. 116) 202, where the Supreme Court held that by reasons of Section 161 (3) and 36 of the 1963 Constitution and the Chiefs Law Cap 37, a Court of Law has H jurisdiction to entertain the Plaintiffs' claims."*

The view of the Court below, quoted above is undoubtedly right upon the facts and circumstances of this appeal. (p. 3728 E)

Chieftaincy matters- Courts- Justifiability

6. It follows that in respect of all the claims, it seems apparent on a proper reading of the claims that the reliefs sought by the Respondents are for declaration of the Customary law with regard to the appointment of the Senior Odion of Uwherun. It is not, in my respectful view, as argued for the Appellants both in the Appellants' brief and their Reply brief, claims in respect of Chieftaincy Matters. Their claims are pointedly for declarations in respect of the Customary Law with regard to the C appointment of the Senior Odion of Uwherun.

The Court of Appeal quite properly held that "it is not the business of the courts to make declarations of customary law relating to the selection of Chiefs under the Chiefs' Law. But it is the business of the court to make a finding of what the customary law is and apply the law for the purpose of the claims for declarations."

On this issue, it is my humble view that the contention of the Appellants that the claim before the Court as presently revealed in the Writ of Summons must be rejected. The authorities that have been reviewed above show very clearly that the action is justifiable. (pp. 3731 D/3732 G)

Courts - Abuse of court processes

7. With due respect to the learned Counsel for the Appellants. It is my view that the Appellants' contention lacks merit. I am firmly of the opinion that an appeal upon the facts in the printed record does not support their contention. From the facts, already reviewed, it is manifest that before hearing of this action commenced, the Respondents had clearly discontinued with Suit No. *UHC/34/87*, which formed the subject of their complaint. If it has to be restated; for an action to be declared frivolous, vexatious, oppressive and an abuse of the process of Court, it must be shown quite clearly that there are two or more actions between the same parties in respect of the same subject matter in one or more courts at the same time. This is not the position in respect of this appeal. (p. 3733 B)

NOTABLE POINTS OF INTEREST
EJIWUNMI JSC

1. The right use of a reply brief

Before considering the arguments in the briefs, it is pertinent to observe that
 B the right of the Appellants to file a reply brief is not to be used as a second
 opportunity to re-argue the argument already proffered for the Appellants in
 the Appellants' brief. My understanding of a reply brief is for Learned Counsel
 for the Appellants to present argument in answer to that of the Respondents,
 C and which had not been addressed in the Appellants' brief. It is in my view
 an unwarranted waste of the time of the Court for counsel to represent
 argument which had already been set down in the Appellants' brief. It is clear
 from a cursory reading of the reply brief filed of the Appellants in the instant
 D appeal, the reply brief is unnecessary and should not have been filed. A reply
 brief should be strictly limited to finding answers to questions raised in the
 Respondents' brief, and which the Appellants had not addressed or dealt
 with in the Appellants' brief. (p. 3722 D)

E

ONU JSC

2. Jurisdiction of the court must not be lightly taken away - But must be preserved

F It is trite that the jurisdiction of the State High Court cannot be taken away
 except that the very clear words and intention of a law validly made. See
 Halsbury's Laws of England, 4th Edition, Volume 10 paragraph 720. Put
 in another way, if such a provision in a statute ousting the ordinary
 G jurisdiction of the court must be constructed strictly, this means that if such
 a provision is reasonably capable of having two meanings, that meaning
 shall be taken which preserves the ordinary jurisdiction of the court. See
Anisminic v. Foreign Compensation Commission (1969) 2 AC (H.L.) 147 at 170.
 H (p. 3748 F)

3. Declaration can be granted without a subsisting cause of action

This Court has held in several cases that a declaration can be granted to

a party that conceives that he has a right even if there is no subsisting cause of action. (p. 3748 H)

UWAIFO JSC

B

4. A justifiable dispute arises only when steps are taken to implement a statute or legislation

This argument implies that a statute, for example, which creates a disability whether specifically or generally must be challenged in good time by whoever may be affected by it within any relevant limitation period. This cannot be right. Many statutes and subsidiary legislation usually lie dormant in the statute book. There is no obligation on those likely to be affected by them

D

to rush to litigation. But when any step is taken to implement such a statute or subsidiary legislation e.g. a registered declaration of custom regarding chieftaincy, then a dispute would arise giving rise to a cause of action. It is then the person aggrieved can prosecute an action on it effectively: see *Adimora v. Ajufo* (1988) 3 NWLR (pt.80) I at 17. (p. 3753 E)

REPRESENTATION

F

Dafe Akpedeye Esq. with him Miss Q. Efiuvwere - for the Appellants

Respondents not presented in the court

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CASES REFERRED TO

Adigun v. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 678 at 698

Cowbie v. Gill 1973 L.R. SCP. 107 at 110

Amodu v. Amodu (1990) 5 NWLR (Pt.150) 356

H

Turburville & anor. v. West Ham Corporation (1950) 2 K.B.D. 20g

Uwaifo v. A.G. Bendel State (1982) 7 S.C. 124

A.G. Imo State v. A.G. Rivers State (1983) 8 S.C. 10

Garnett v. Bradley (1878) 3 App. Cas. 944 at 966.

STATUTES REFERRED TO

Limitation Law of Bendel State of Nigeria 1976 Section 4(1)(a)

B Traditional Rulers and Chiefs Edict of 1979 (Bendel State)

LEAD JUDGMENT BY EJIWUNMI JSC

C This appeal emanated from the Court of Appeal (Benin Division) where the appeal of the Respondents was upheld. This was as a result of the appeal of the Respondents to that Court against the decision of the High Court in suit No. UHC/9/88. In that suit, the respondents had by their writ of summons claimed for the following reliefs:-

D “(1) A declaration that in accordance with the tradition, native law and custom of the Uwherun Clan, Ughelli Local Government Area of Bendel State, within the jurisdiction of this Honourable Court, the Senior Odion Uwherun is appointed from EROVIE Quarter and EROVIE only, and is not subject to rotation among the five quarters
E which make up Uwherun.

(2) A declaration that EROVIE Quarter is the only Ruling House in Uwherun Clan.

F (3) A declaration that the purported appointment and subsequent gazetting of the 1st defendant from Ehery Quarter as the Senior Odion of Uwherun is contrary to Uwherun native law and custom; usage and tradition and is therefore null and void and should be set aside.

G (4) An injunction restraining the 1st Defendant, his servants, agents, or privies or any of the 1st - 4th Defendants from functioning or continuing to function as Senior Odion of Uwherun pending the determination of this suit.”

H It would appear that upon being served with this writ, the Learned Counsel on behalf of the 1st - 4th Appellants filed a motion on Notice dated 22/2/88 under the inherent jurisdiction of the Court for orders dismissing the action in suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process of the Court. The motion was supported by an affidavit of eleven (11) paragraphs sworn by one Chief Hivite Egoh,

the 2nd Appellant in this appeal. It is in that affidavit that the Appellants disclosed that the Respondents had in suit No. UHC/34/87, sued them for reliefs similar to those that they are now seeking in the present proceedings. In that affidavit also, the steps already taken in suit No. UHC/34/87, were also disclosed. I refer in this regard to paragraphs 5 and 6 of the said affidavit, and which read thus:-

“Para. 5 That on the 12th day of August, 1987, the Plaintiffs/Respondents obtained a temporary injunction against me and the other Defendants/Applicants/Respondents pending the determination of the motion on notice for interim injunction.

Para. 6. That the motion for the interim injunction was argued on the 22nd of October, 1987 and in a considered ruling delivered on the 19th day of November 1987, this Honourable Court dismissed the motion and accordingly discharged the temporary injunction. Thereafter, pleadings were ordered whereby the Plaintiffs/Respondents were ordered to file their statement of claim within 30 days and the Defendants/Appellants/Respondents were also ordered to file their statement of defence within 30 days after service on them of the statement of claim.

The Respondents filed a counter-affidavit dated the 20th of April, 1988, and sworn by Chief Edison Obrutse, the 2nd Respondent in this appeal. In the said counter-affidavit, they replied to several of the allegations contained in the affidavit of the Appellants in support of their motion. It is, in my view, relevant to reproduce paragraph 4 of the said counter-affidavit having regard to the facts disclosed therein:-

“Para. 4: That with regard to paragraphs 7-11 of the affidavit in support of the motion, I say as follows:-

(a) After our motion for interim injunction had been refused and pleadings ordered, we made up our minds to discontinue the action in UHC/34/87 as it couched in quaitimet form.

(b) As the event we wanted to stop immediately had taken place, it became necessary to bring a new action to fight the new situation.

(c) After series of meetings of the Erovie Quarter, we on 9/2/88 filed Notice of Discontinuance of Suit No. UCH/34/84 against all the Defendants. I attach a certified true copy of the said Notice of Discon

tinuance and mark same as Exhibit Z.

(d) That the Notice of Discontinuance was entertained on 24/3/88 without opposition from the Defendants/Applicants. Suit No. UHC/34/87 was then struck out with N100.00 costs in favour of the Defendants/Applicants herein. I attach the original copy signed by the Honourable Judge and with the seal of the Court and mark same as Exhibit Z1.

(e) We have never had the intention of prosecuting the same case with two separate suits. We have never contemplated abusing the process of this Honourable Court, much less execute it.

(f) We are prosecuting suit No. UHC/9/88 and no more. We have nor naira-power. It is the 1st-4th Defendants/Appellants that are oppressing the Erovie Quarter with naira-power. Their motion was filed on 22/2/88. They did not find out at the Registry if anything had been done to Suit No. UHC/34/87.

It is thus clear from the affidavit and counter-affidavit of the parties, that though Suit No. UHC/34/87, was filed as alleged by the Appellants, however, that action had been struck out from the list of the Court since the 24th of March, 1988. Apart from the motion on notice dated 10th March, 1990, it must be noted that the 1st-4th Appellants also filed two other motions on notice in respect of this matter against the Respondents. The first one to which reference was made earlier in this judgment was dated, the 2nd December, 1988. The other one that was filed by them, was dated the 22nd December, 1988. These two motions on notice remained on the list of the Court until the 27th of February, 1990, when they were struck out on the application of their Learned Counsel, Chief A.O. Akpedeye.

Thereafter, Learned Counsel for the 1st-4th Appellants, moved their motion dated 10th of March 1990. By that motion, the Appellants prayed the Court for the following orders:-

"1. Dismissing this action in Suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process of the Court.

2. Dismissing this action in Suit No. UHC/9/88 on grounds:

(a) that the Court has no jurisdiction to entertain it;

(b) that the subject matter of the suit being the appointment and

recognition of a Chief is not justiciable

3. *And for any further or other order or orders as this Honourable Court may deem fit to make in the circumstances”.*

The motion, which was supported by a 17 - paragraph affidavit, was sworn by Chief Hivite Egoh, the 2nd Appellant. After hearing the argument of Counsel for the parties, the Learned Trial Judge delivered a considered ruling. By his reasoning in the said ruling, the Learned Trial Judge acceded to the prayers of the Applicants/Appellants. He accordingly dismissed Suit No. UHC/9/88, on the grounds that the action was an abuse of the process of Court, and also statute barred. The Court therefore lacked jurisdiction to entertain it.

As the Respondents were dissatisfied with the ruling of the Court, an appeal was lodged in the Court of Appeal. Pursuant thereto the appeal was heard in the Court below. And that Court found in favour of the Respondents. The leading judgment of the Court, delivered by Ige, JCA, was concluded thus:

“It is true that in an earlier Suit No. UHC/34/87 was brought by the Appellants against the Respondents in 1987, but a motion of discontinuance had been filed on 19/2/88 in respect of same. Suit No. UHC/34/87 was then struck out on 24/3/88 with N100.00 costs awarded in favour of the Respondents. The case No. UHC/9/88 filed on 25/1/88 from the facts endorsed on the writ of summons cannot be held prima facie to be frivolous, vexatious or an abuse of Court or judicial process in any way. An order made upon a notice of discontinuance cannot operate as a bar to any subsequent suit based upon the same facts. I do not see how the Respondents have been harassed or oppressed by the writ taken out in Suit No. UHC/9/88.”

As the 1st-4th Appellants were dissatisfied with the judgment of the lower Court, they have appealed to this Court. Pursuant they sought leave to appeal to this Court upon the grounds of appeal for which leave was granted to them. I do not deem it necessary to reproduce them in this judgment. Thereafter the Learned Counsel for the Appellants, acting in consonance with the Rules of this Court, filed and served the Appellant’s brief. The Respondents, upon being served with the Appellants’

brief filed, their Learned Counsel also filed and served the Respondents' brief. A reply brief was however filed for the Appellants upon being served with the Respondents' brief.

B In the Appellants' brief, the following are the issues identified for the determination of the appeal:-

(i) whether this action is not statute barred;

(ii) whether the trial Court has jurisdiction to entertain the reliefs endorsed on the writ of summons;

C (iii) whether the action is not an abuse of judicial process.

In the Respondents brief, three issues were also identified for determination of the appeal. But as they are similar to those set out above from the Appellants' brief, I do not need to have them copied here. The merit of this appeal would accordingly be determined upon D the issues set down in the Appellant's brief. Before considering the arguments in the briefs, it is pertinent to observe that the right of the Appellants to file a reply brief is not to be used as a second opportunity to re-argue the argument already proffered for the Appellants in the Appellants brief. My understanding of a reply brief is for Learned E Counsel for the Appellants to present argument in answer to that of the Respondents, and which had not been addressed in the Appellants' brief. It is, in my view an unwarranted waste of the time of the Court for counsel to represent argument which had already been set F down in the Appellants' brief. It is clear from a cursory reading of the reply brief filed for the Appellants in the instant appeal, the reply brief is unnecessary and should not have been filed. A reply brief should be strictly limited to finding answers to questions raised in the Respondents' brief, and which the Appellants' had not addressed or G dealt with in the Appellants' brief.

Be that as it may, I will now set down the argument advanced on behalf of the Appellants, in respect of the 1st issue. In this issue, the Appellants are asking whether this action is not statute barred. H The argument of Learned Counsel for the Appellants proceeds upon the basis that the action being in the nature of a Tort, its commencement is limited to 6 years from the date of the cause of action. And cited the provisions of Section 4(1)(a) of the Limitation Law, Cap 39, of the laws of Bendel

State, 1976, in support of that submission. Next, it is submitted for the Appellants that the Court below fell into error when it held that the cause of action occurred in April 1985, when the 1st Appellant was gazetted as the Senior Odion of Uwhurun. He, therefore, argued in the Appellants' brief, that as the appointment of the 1st Appellant was made in accordance with the provisions of the Registered Chief-taincy Declaration published in Bendel State Legal Notice No. 88, of 1979, the cause of action for the Respondents commenced from the date of the publication of the said gazette. And he further argued that the Respondents should have commenced their action by that date. It is further contended for the Appellants that, the action could have commenced against the Bendel State Executive Council, if they had felt aggrieved with the publication of the gazette in which the 1st Appellant was appointed as the Odion. They don't, it is argued, have to wait for nine years for the 1st Appellant to be appointed to commence the action to claim the rights they are now claiming by this action. In support of that submission made for the Appellants, the following cases were referred to:- Adigun v. A.G. Oyo State (1987) 1 NWLR (Pt. 53) 678 at 698; (1987) 3 SC. P250 at 275; Adefulu & 12 ors. v. Oyesile & 5 ors. (1989) 12 S.C. 43; (1989) 5 NWLR (Pt. 122) 372 at 403.

Having regard to the argument of learned Counsel for the Appellants, that the Court below fell into error by holding that the Respondents commenced their action well within the limitation period, learned Counsel submitted that the authorities; namely, Solomon v. African Steamship Co. Ltd. 9 NLR p.99; Cowbie v. Gill 1973 L.R. SCP. 107 at 110; and Letong v. Copper 1965, 1 QB 222 at 224, relied upon by the Court of Appeal do not apply to the facts of the case under consideration. He further contended that this Court, on the authority of Fred Egbe v. Hon. Chief Judge Adefarasin (1987) 1 NWLR (Pt. 47) 1, should have no difficulty in holding that the action is statute barred.

The reply of the Respondents to the argument advanced for the Appellants in respect of the 1st issue is that the contention made by the Appellants that the cause of action arose since the publication of B.S.L.N. No. 88 of 1979 was promulgated was wholly wrong. It is therefore argued for the Respondents that the Court of Appeal was right in its

conclusion that the cause arose in April 1985 when the 1st Appellant was made the Senior Odion of Uwherun. And, therefore, urged that the decision of the Court below on the point be upheld. In addition to that submission, it was argued in the Respondent's brief that S.4(1)9 of the Limitation Law of the Bendel State of Nigeria 1976 is not applicable to the facts as the action, in the view of learned Counsel for the Respondents, was not founded in tort nor in contract.

It is further argued for the Respondents that a declaratory relief may be made in favour of a Plaintiff when there is no cause of action. He cites as authorities for this proposition, the following cases: Kaduna State v. Hassan (1985) (Pt. 8) 2 NWLR 483 at 497; Beredugo v. College of Science & Technology, (1991) (Pt. 187) 4 NWLR 651.

In my respectful view, the main question for consideration in this issue is whether the Court below was right to have held that the action was not statute barred. ***What then are the principles to bear in mind when determining the term "cause of action"? With regard to that question, may I refer to the case Amodu v. Amode (1990) 5 NWLR (Pt. 150) 356 where at 367, Agbaje, JSC in the course of his judgment accepted the following definitions of the expression "cause of action" when he quoted the following definition of the term:-***

"The term "cause of action" means all those things necessary to give a right of action whether they are to be done by the plaintiff or a third person" Hernaman v. Smith (1855) 10 Exch 659, per Parke B, at p.666. "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse." Cooker GILL (1873) L.R.8C. P. 107 per Brett J, at p.116."

I also adopt the above definitions of the expression "cause of action". In the context of this appeal it is necessary also to advert to the question as to when the cause of action might be affected by the statute of limitations if pleaded by the opposite party. It will be recalled that one of the challenges mounted against the claim of the Respondents in this appeal is that the action was statute barred. As previously stated, the Court below took the contrary view by holding that the action was not statute

barred. ***It is common ground that the question as to whether an action is statute barred is dependent on the nature of the action, and the relevant provisions of the statute of limitations.***

In the instant case, the case as aforesaid is predicated upon the appointment of the 1st Appellant as the Senior Odion of Uwherun in April 1985. Though the action by itself was not identified as one sounding in contract or tort, the provisions of Section 4(1)(a) of the Limitation Law of Bendel State of Nigeria 1976, was considered applicable by the Court below.

Its provisions read thus:-

“4(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say

(a) Action founded on simple contract or on tort”

In any event there has been no objection to that approach. What is in contest in this appeal is whether the Court below was right to have held that the date for the commencement of the action arose in April 1985, and not September 1979, the latter date being the position taken by the Appellants; and which was when the Bendel State Legal Notice No. 88 of 1979 was promulgated. In arriving at that conclusion, the Court below, per the judgment of Ige, JCA, with Akpabio and Ogebe, JJCA concurring, said thus:-

“It is very essential when dealing with Limitation Statutes to determine the precise date upon which the cause of action arose because it is then that time will start to run.

“A cause of action arises when there is in existence, a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.”

See the cases of Solomon v. African Steamship Co. Ltd. 9 NLR. P. 99; Cooke v. Gill 1873 L.R. SCP 107 at 110 and Letang v. Copper 1965 1 QB. 222 at 224”.

After a review of the facts germane to the determination of whether the cause of action was statute barred or not, learned Justice of the Court, Ige, JCA, then made this apt observation. It reads:-

“The cause of action in this case although provided for under

Section 8 of the Traditional Rulers and Chiefs Edict of 1979 (Bendel State) yet it did not arise until April, 1985. I think it will lead to an absurdity for anyone to take an action within six years of the promulgation of the Edict of 1979 when no
B appointment had been made in accordance with the provisions of the said Edict.”

For that view of the Court below, and with which I am in full agreement, may I refer to the case of Turburville and anor. v. West Ham Corporation (1950) 2 K.B.D. 208. This was a case
 C of some assistant school teachers and the adjustment of their salaries during the 2nd World War. The teachers put salary claims which their corporation-employer rejected. Time, it was held, would not com-
 D mence in respect of their cause of action, consequent upon the rejection of their claims, until that rejection was communicated to them
 and not before. Hence, it was held, inter alia, that the plaintiff’s cause of action did not accrue until they received notice of rejection of their
 claims on 25th February 1946, and therefore the time limit had not
 expired when the Writs were issued on 23rd January, 1947.

**Reverting to the issue under consideration in this ap-
 E peal, the argument proffered for the Appellants lacks merit. While it is clear that the Traditional Rulers and Chiefs Edict of 1979 (Bendel State) was promulgated in 1979, the Plaintiffs
 F could not have commenced any action until the appointment of the 1st Appellant in April 1985.**

**The argument advanced for the Appellants that the Re-
 spondents would have commenced action against the Bendel
 State Executive Council soon after the promulgation of the
 G Traditional Rulers and Chiefs Edict of 1979, must also be re-
 jected.**

In this regard, it must be borne in mind the settled principle
 that it is the right of a Plaintiff to initiate action against a Defendant
 who he believed had a right to a relief. In the instant case, the Re-
 H spondents cannot be faulted for bringing their action against the Ap-
 pellants as they have done in this case. And as I am clearly of the view
 from what I have said above that the action was not statute barred, this
 issue must be resolved against the Appellants. And I so hold.

Issue II. With regard to this issue, the question raised therein for

the Appellants, is whether the trial Court has jurisdiction to entertain the reliefs endorsed on the Writ of Summons. In the view of learned Counsel for the Appellants, the trial Court has no jurisdiction to adjudicate over the claim of the Respondents. The claim, it is argued for the Appellants, is an attempt to challenge the competence of the Executive Council of the Bendel State Government with regard to the enactment of the Traditional Rulers and Chiefs Law No. 16 of 1979. And it is therefore contended for the Appellants, that the trial Court was right to have held that it had no jurisdiction to entertain the suit. In support of that submission reference was made to the following cases:- *Utih v. Onoyivwe* (1991) 1 NWLR (Pt. 166) 166 at 202; *Mustapha v. Govt. of Lagos State* (1987) 2 NWLR (Pt. 58) 538 and *Alao v. Akano* (1988) 1 NWLR (Pt. 71) 431 at 433. B C

Next, it is argued in the Appellant's brief that the Bendel State Legal Notice (B.S.L.N.) No. 88 of 28th September 1979, created vested rights which accrued to the Appellants in September, 1979. These rights, according to their learned Counsel are protected by the provisions of Sections 161(3) and 1265(1) of the 1963 Constitution, and also, Sub-sections (a) and (c) of Section 32 of the Traditional Rulers and Chiefs Law No. 16 of 1979. The rights so vested, the Appellants further argued, are protected by the combined effect of the provisions of Section 11 (1)(c) of the Interpretation Act (Cap 192) Vol. 10 of the Laws of the Federation of Nigeria and Section 6(6)(d) of the 1979 Constitution, and preclude the Courts from adjudicating in respect of matters ousted by the Traditional Rulers and Chiefs Law. E F

The contention for that position of the Appellants is that the provisions of the said Traditional Rulers and Chiefs Law qualify as existing law within the meaning of the 1979 Constitution. For this submission, reference was made to: *Uwaifo v. A-G. Bendel State* (1982) 7 S.C. 124; *A-G. Imo State v. A-G Rivers State* (1983) 8 S.C. 10. Finally on this issue, it is contended for the appellants that the claims of the Respondents, not being justiciable, the Court below was wrong to have held to the contrary. Reliance is placed for that contention on *Adigun v. A-G. Oyo State* (1987) 1 NWLR (Pt. 53) 678 at 698. G H

For the Respondents, the thrust of the arguments set out in the

Respondents' brief, is that the Appellants' contention that the Appellants have a vested right which remains protected is erroneous. It is also argued for the Respondents that the Appellants are wholly wrong in the submission made for them that as a result of such vested rights, the jurisdiction of the trial Court is ousted in chieftaincy matters by virtue of the provisions of Section 161(3) and 37 of the 1963 Constitution. It is also argued for the Respondents that in this case, the Appellants and the trial Counsel, wholly misconceived the claim of the Respondents. They contend that what they were challenging in Court was not the registered declaration of Bendel State Legal Notice No. 88 of September, 1979, but the appointment of Chief Edjerode as the Senior Odion of Uwherun Clan. And that the appointment of Chief Edjerode as the Senior Odion of Uwherun Clan was not in accordance with their established native law and custom for such an appointment. Therefore, it is argued for the Respondents that the provisions of Section 274(b) of the 1979 Constitution do not apply to the instant case.

I think a convenient starting point in the resolution of the contentions of Counsel in this issue, is to first advert to the decision of the Court below. In the course of delivering the leading judgment, Ige, JCA, said, inter alia, thus:-

"In this case the endorsement on the Writ discloses a cause of action as from April 1985 and it is the 1979 Constitution that applies and not the 1963 Constitution. This case must be distinguished from that of Utih v. Ononyiwue (1991) 1 NWLR (Pt. 116) 202, where the Supreme Court held that by reasons of Section 161(3) and 36 of the 1963 Constitution and the Chiefs Law Cap 37, a Court of Law has no jurisdiction to entertain the Plaintiff's claims"

The view of the Court below, quoted above is undoubtedly right upon the facts and circumstances of this appeal.

One of the issues raised in the case of Chief Aliu Abu & Ors. v. Chief Abubakar Zibri Odugbo & Ors. S.C. 112/96 (2001) 7 S.C. (Pt. I) 168; (2001) 7 S.C.N.J. 170 was similar to the question now under consideration. As what I said in the course of my judgment is appropriate answer to this question, I will therefore quote, in extenso, what I said, inter alia, in that judgment at pp. 288-290, thus:-

"It cannot be disputed that with the coming into force of the 1979

Constitution the 1963 Constitution went in abeyance and will only apply to causes of actions that arose under it. Both parties agreed that the cause of action in this matter arose in 1985. Therefore and in the light of the provisions of section 4(8) of the 1979 Constitution, any law enacted by the Bendel State Government before the coming into force of the 1979 Constitution and which contradicts any of the provisions of the said Constitution after it came into force is either modified or repealed to conform with the Constitution. It is in order to provide for this type of a situation that section 274 of the 1979 Constitution was enacted”.

“It is therefore my view that, taking into consideration the provisions of the 1979 Constitution (supra) the ouster clauses in the Traditional Rulers and Chiefs Law 1979 of the defunct Bendel State, now applicable to Delta State, stood impliedly repealed or modified by the 1979 Constitution in order that it is brought into conformity with its provisions. The fact that Decree No. 1 of 1984 suspended section 4(8) of the 1979 Constitution, will not revive the ouster clauses in the Traditional Rulers & Chiefs Laws 1979 since the Decree did not contain express provisions to that effect, and nor can such manifest intention be gathered from its provisions. The Traditional Rulers and Chiefs Laws 1979 of Bendel State stands repealed in part. See pages 366-368 of Craies on Statute Law (7th Edition).

The decision in Uwaifo’s case prohibits the courts, even after 1st October, 1979 from questioning any Edict or Decree made between 1st January 1966 and 30th September, 1979 on the ground that the person or authority which made it had no capacity or power to make it, but did not preclude the courts from questioning the validity of such laws or any of their provisions that are inconsistent with the provision of the 1979 Constitution. In other words, courts are precluded from questioning the capacity and power of the authorities in promulgating such laws. They are equally prohibited from questioning the validity of what the authorities did under such laws or interfering with any accrued or subsisting rights by virtue of such actions at the time they were still valid and subsisting. In Uwaifo’s case, supra, Idigbe, JSC succinctly stated the Law thus:-

“It seems to me that while the Constitution empowers the courts to

inquire into the validity of any existing law, it clearly intends that the courts should not inquire into proceedings which seeks to determine issues or question as to the competence of any authority of person (i.e Legal capacity, power, legal qualification or jurisdiction of any authority or person) to make any existing law promulgated between 15th January, 1966 and 1st October, 1979.”

It is important to note that the preclusion or prohibition is limited and confined to existing laws. It therefore becomes abundantly clear that if such laws or any of their provisions are inconsistent as from 1st October 1979 with the provisions of the 1979 Constitution, such laws or any of their provisions whether or not pronounced upon by the courts as being inconsistent with the said Constitution, are impliedly rewarded or modified to conform with its provisions. Likewise, all things done or purported to be done under such impliedly repealed or modified laws after 1st October 1979, are equally of no effect. In *Garnett v. Bradley* (1878) 3 App. Cas. 944 at 966, commenting on the issue of implied repeal of a statute by another, Lord Blackburn stated thus-

*“I shall not attempt to recite all the contrarieties which make one statute inconsistent with another. The contraria which make second statute repeal the first. But there is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely that when new enactment is couched in a general affirmative language and the previous law, whether a law of custom or not, can well stand with it for the language used is all in the affirmative, there is nothing to say that the old law shall be repealed... But when the new affirmative words are, as was said in *Stradling v. Morgan Plowd*, 206 such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together, the second repeals the first.”*

It is therefore my view that this aspect of the 2nd issue must be resolved against the Appellants.

The next question that I would deal with, however, briefly is whether the trial Court having regard to the claims before it, is vested with the jurisdiction to entertain the action. It is common ground in this

appeal that objection was taken by the Appellants to the claim of the Respondents upon being served with their Writ of Summons. Pleadings have not been filed and exchanged. However, from the wording of their claim(1), the Respondents are seeking for a declaration that according to the custom of the Uwherun Clan, the Senior Odion Uwherum is appointed from Erovie Quarter and Erovie Quarter only, B and is not subject to rotation among the five quarters which make up Uwherun.

The 2nd claim which is that Erovie Quarter is the only Ruling House in Uwherun Clan, is in terms also a declaration for the Customary law with regard to that claim. By their 3rd head of claim, the Respondents are claiming that the purported appointment and subsequent gazetting of the 1st Appellant from Ehre Quarter as the Senior Odion of Uwherun is contrary to Uwherun native law and custom, usage and tradition. This claim is evidently also for a declaration of the Customary law governing the appointment of the Senior Odion of Uwherun. ***It follows that in respect of all the claims, it seems apparent on a proper reading of the claims that the reliefs sought by the Respondents are for declaration of the Customary Law with regard to the appointment of the Senior Odion of Uwherun. It is not, in my respectful view, as argued for the Appellants both in the Appellant's brief and their Reply brief, claims in respect of Chieftaincy Matters. Their claims are pointedly for declaration in respect of the Customary Law with regard to the appointment of the Senior Odion of Uwherun.*** C D E F

Having regard to the argument proffered for the Appellants, on this point, I will refer to the following cases where the point was considered and firm pronouncement made thereon. In Adigun v. Attorney General of Oyo State & Ors. (1987) 1 N.W.L.R (Pt. 53) 678 at p. 702, Obaseki, JSC, said:-

"On the issue of jurisdiction, learned counsel submitted that the making of declarations in respect of customary law relating to selection of Chiefs is purely administrative under the provisions of section 4 of the Chiefs Law Cap 21 Laws of Oyo State 1978 and that it is not a function exercisable by the Court or vested in the court. The exercise of such functions is not directly related to the general jurisdiction of the

courts under section 236(1) of the Constitution of the Federal Republic of Nigeria 1979. He then referred to: *Merchants Banks Ltd. v. Federal Minister of Finance* (1961) All NLR 598; *Carltona Ltd. v. Commissioner of Works* (1943) 1 All ER 560 at 564; *Bull v. Attorney General for N.S.W.* (1916) 2 AC. 564. Learned Counsel therefore urged the court to hold that in respect of Chieftaincy matters, the courts have only supervisory or appellate jurisdiction on the making of declarations as to customary laws relating to the selection of traditional chiefs under the law.”

“It is clear from the Chiefs’ Law that the court cannot assume the functions of the Chieftaincy Committee as regards the making of declarations of customary law governing the selection and appointment of traditional chiefs. The Appellants have not by their claim asked for that declaration. What the Appellants seek is a declaration that Ogunmakinde Ande is under the customary law of Iwo the only Ruling House. In carrying out this judicial task, the court will from the evidence adduced ascertain and find whether there is customary law on the matter, what the customary law is and then decide whether on the evidence, Ogunmakinde Ande is the only Ruling House in Iwo from which Oluwo of Iwo can be selected and appointed. It cannot, in my view, be correctly and legally argued that the High Court cannot entertain and adjudicate on such a claim in exercise of its unlimited jurisdiction vested in it by section 236(1) of the Constitution of the Federal Republic of Nigeria 1979. I prefer Chief F.R.A. Williams’ submission on this point.”

Before that firm view referred to above, proceeding from Obaseki JSC, his Lordship had also, in *Adigun v. A-G. of Oyo State* (supra), made the following observation at page 689:-

“The learned trial Judge was perfectly justified to have referred to the procedure for making declarations of customary law regulating the appointment of Chiefs under the Chiefs’ Law by bodies other than the court. **The Court of Appeal quite properly held that “it is not the business of the courts to make declarations of customary law relating to the selection of Chiefs under the Chiefs’ Law. But it is the business of the court to make a finding of what the customary law is and apply the law for the purpose of the claims for declarations.”**

On this issue, it is my humble view that the contention of the Appellants that the claim before the Court as presently revealed in the Writ of Summons must be rejected. The authorities that have been reviewed above show very clearly that the action is justiciable. B

I now turn to the fourth issue. Here the Appellants are contending that the action of the Respondents is frivolous, vexatious, oppressive and an abuse of the process of the Court. The submissions in support of this contention are not dissimilar to that which they sought to persuade the Court below to hold in their favour. C
With due respect to the learned Counsel for the Appellants, it is my view that the Appellants' contention lacks merit. I am firmly of the opinion that an appeal upon the facts in the printed record does not support their contention. From the facts, already reviewed, it is manifest that before hearing of this action commenced, the Respondents had clearly discontinued with Suit No. UHC/34/87, which formed the subject of their complaint. If it has to be restated; for an action to be declared frivolous, vexatious, oppressive and an abuse of the process of Court, it must be shown quite clearly that there are two or more actions between the same parties in respect of the same subject matter in one or more courts at the same time. This is not the position in respect of this appeal. D E F

In the result, for all the reasons given, this appeal is completely devoid of any merit. It is therefore dismissed in its entirety. The Respondents are entitled to their costs, and are awarded N10,000.00.

KARIBI-WHYTE JSC G

I had the privilege of reading the judgment of my learned brother, Ejiwunmi, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal lacks substance and ought to fail. I therefore hereby dismiss the appeal for the reasons given in the leading judgment. H

I also abide by the costs awarded.

OGUNDARE JSC

I read in advance the judgment of my learned brother, Ejiwunmi, JSC just delivered. I agree with him that the appeal lacks merit and ought to be dismissed. Without any hesitation, I too dismiss it and order that the suit UHC/9/88 filed by the Plaintiffs/Respondents on 25/1/88 be heard expeditiously by another Judge of the High Court of Delta State.

The Plaintiffs had in that suit filed on 25th January 1988 claimed from the Defendants (1st - 4th of whom are appellants in this appeal and shall hereinafter be referred to as Defendants simpliciter) as hereunder.

“(1) A declaration that in accordance with the tradition, native law and custom of the Uwherun Clan, Ughelli Local Government Area of Bendel State, within the jurisdiction of this Honourable Court, the Senior Odion Uwherun is appointed from EROVIE Quarter and EROVIE Quarter only, and is not subject to rotation among the five Quarters which make up Uwherun.

(2) A declaration that EROVIE Quarter is the only Ruling House in Uwherun Clan.

(3) A declaration that the purported appointment and subsequent gazetting of the 1st defendant from EHERE Quarter as the Senior Odion of Uwherun is contrary to Uwherun native law and custom, usage and tradition and is therefore, null and void and should be set aside.

(4) An injunction restraining the 1st Defendant, his servants, agents, or privies or any of the 1st - 4th Defendants from functioning or continuing to function as Senior Odion of Uwherun pending the determination of this Suit.”

On the Defendants being served with the writ of summons on 16th February 1981, they on 22nd February filed a motion praying the trial High Court for an order

“Dismissing this action in Suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process of the Court.”

The prayers were subsequently amended by another motion filed on 2/12/88 to read:

“1. Dismissing this action in Suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process of the Court.

2. *Dismissing this action in Suit No. UHC/9/88 on grounds:*

(a) *that the Court has no jurisdiction to entertain it;*

(b) *that the subject matter of the suit being the appointment and recognition of a Chief is not justiciable. (sic justiciable)"*

In the supporting affidavit of Chief Hivite Egoh, 2nd Defendant to the first motion, he deposed, inter alia, as follows: B

"3. That the writ of summons in this suit was served on me on Tuesday, the 16th day of February, 1988, in which the plaintiffs/respondents are claiming:-

(i) A declaration that in accordance with the tradition, native law and custom of the Uwherun Clan, Ughelli Local Government Area of Bendel State, within the jurisdiction of this Honourable Court, the Senior Odion of Uwherun is appointed from EROVIE Quarters, and EROVIE Quarter only, and is not subject to rotation among the five Quarters which make up Uwherun. D

(ii) A declaration that EROVIE Quarter is the only Ruling House in Uwherun Clan.

(iii) A declaration that the purported appointment and subsequent gazetting of the 1st defendant from EHERE Quarter as the Senior Odion of Uwherun is contrary to Uwherun native law and custom; usage and tradition and is therefore, null and void and should be set aside.

(iv) An injunction restraining the 1st Defendant, his servants, agents, or privies or any of the 1st - 4th Defendants from functioning or continuing to function as Senior Odion of Uwherun pending the determination of this Suit." F

4. That in a similar action in suit No. UHC/34/87 the plaintiffs/respondents, sued me and the other defendants/applicants/respondents herein in which they claim reliefs very similar to the reliefs sought in the present action namely:- G

(i) A declaration that in accordance with the tradition, native law and custom of the Uwherun Clan, Ughelli Local Government Area of Bendel State, within the jurisdiction of this Honourable Court, the Senior Odion of Uwherun is appointed from EROVIE Quarters and H

EROVIE Quarter only and is not subject to rotation among the five Quarters which make up Uwherun.

(ii) A declaration that EROVIE Quarter is the only Ruling House in Uwherun Clan.

(iii) A declaration that the Bendel State Legal Notice (BSLN) No. 88 of 1979 published in Bendel State of Nigeria Gazette No. 51 vol. 16 at page B. 138 which purports to create five Ruling Houses in Uwherun and further purports to rotate the Senior Odionship among the five Quarters is contrary to Uwherun native law and custom tradition and usage, null and void and of no effect and should be set aside.

(iv) A declaration that the threatening act of the 5th and the 6th defendants to appoint the 1st defendant as the Senior Odion of Uwherun is contrary to Uwherun native law and custom and usage and is therefore null and void and of no effect whatsoever.

(v) An order of interim injunction to restrain the 5th and the 6th defendants from appointing, recognising and/or gazetting the 1st defendant or any of the 1st-4th defendants, their servants, agents or privies, or any other person other than the 1st plaintiff as the Senior Odion of Uwherun pending the determination of this suit.

(vi) An order of permanent injunction restraining the 5th and the 6th defendants from appointing, recognising and/or gazetting 1st defendant or any of the 1st-4th defendants their servants, agents or privies or any other person other than the 1st plaintiff as the Senior Odion of Uwherun, pending the determination of this suit.

5. That on the 12th day of August, 1987, the plaintiffs/respondents obtained a temporary injunction against me and the other defendants/applicants/respondents pending the determination of the motion on notice for interim injunction.

6. That the motion for the interim injunction was argued on the 22nd of October, 1987 and in a considered ruling delivered on the 19th day of November 1987 this Honourable Court dismissed the motion and accordingly discharged the temporary injunction. Thereafter, pleadings were ordered whereby the plaintiffs/respondents were ordered to file their statement of claim within 30 days and the defendants/applicants

/respondents were also ordered to file their statement of defence within 30 days after service on them of the statement of claim.

7. That after I was served the writ in this case, I made inquiries in the High Court registry, Ughelli through the Assistant Chief Clerk who told me that the Plaintiffs/respondents have not filed their statements of claim as ordered by this Honourable Court. B

8. That I and the other defendants/applicants feel very greatly embarrassed of facing two law suits in the hands of the plaintiffs/respondents in respects of the same subject-matter at the same time.

9. That our counsel, Chief A.O. Akpedeye has advised me, C and I verily believe in his advice that by maintaining two actions at the same time over the same subject-matter against me and the other defendants/applicants/respondents, the plaintiffs/respondents have abused the process of the Court.

10. That the action of the plaintiffs/respondents is an oppression as it is a clear show of Naira-power." D

In the counter affidavit of Chief Edison Obrutse, 2nd Plaintiff, sworn to on 20/4/88 the deponent deposed as follows:

"3. That I admit paragraphs 1-6 of the affidavit in support of E the motion.

4. That with regard to paragraphs 7 -11 of the affidavit in support of the motion, I say as follows:-

(a) After our motion for interim injunction had been refused and pleadings ordered, we made up our minds to discontinue the F action in UHC/34/88 as it was couched in quia timet form.

(b) As the event we wanted to stop immediately had taken place, it became necessary to bring a new action to fight the new situation.

(c) After series of meetings of the Erovie Quarter, we on 9/2/ G 88 filed a Notice of Discontinuance of Suit No. UHC/34/87 against all the Defendants. I attach a Certified True Copy of the said Notice of Discontinuance and mark same as Exhibit 'Z'.

(d) That the Notice of Discontinuance was entertained on 24/ H 3/88 without opposition from the Defendants/Applicants. Suit No.

UHC.34/87 was then struck out with N100.00 costs in favour of the Defendants/Applicants herein. I attach the original copy signed by the Honourable Judge and with the seal of the Court and mark same as Exhibit 'X1'.

B (e) We have never had the intention of prosecution (sic) the same case with two separate suits. We have never contemplated abusing the process of this Honourable Court, much less execute it.

C (f) We are prosecuting Suit No. UHC/9/88 and no more. We have no Naira nor Naira-power. It is the 1st - 4th Defendants/Applicants that are oppressing the Erovie Quarter with Naira-power. Their motion was filed on 22/2/88. They did not find out at the Registry if anything had been done to suit No. UHC/34/87."

D In his further affidavit filed on 9/6/88, Chief Egoh deposed as follows:

1. That the Senior Odion of Uwherun clan is a Chief.

2. That the appointment and recognition of the Senior Odion of Uwherun is a chieftaincy matter.

E 3. That the 1st defendant/applicant was appointed the Senior Odion of Uwherun in April, 1985, in accordance with the approved Uwherun Senior Odion Chieftaincy Declaration 1979, as published in the Bendel State Government Extra-ordinary Gazette No. 51, Vol. 16 at page B. 138 of 28th day of September, F 1979. Photocopy of the Bendel State Legal Notice 88 of 1979 is herewith annexed and marked as Exhibit 'A'.

G 4. That the appointment of the 1st Defendant/applicant as the Senior Odion of Uwherun was approved by the Bendel State Executive effective from the 23rd day of April 1985, as was published in the Bendel State Government Extra-ordinary Gazette No. 43 Vol. 24 at page B. 35 referred to as Bendel State Legal Notice 18 of 1987, herewith annexed and marked as Exhibit 'B'.

H 5. That I have been advised by Chief A.O. Akpedeye, our counsel, and I verily believed and rely on his advice that this Honourable Court has no jurisdiction to entertain the claim of the plaintiffs/respondents being a claim based on chieftaincy matter.

6. That I swear to this further and better affidavit in sup

port of the motion seeking to dismiss the claim of the plaintiffs/respondents.”

The Defendants’ 2nd motion was supported by an affidavit sworn to by the 2nd Defendant incorporating the essential facts deposed to earlier by him in his affidavit and further affidavit in support of the first motion. B

The Plaintiffs also filed a motion on 29/12/88 seeking to strike out the Defendants’ further affidavit of 9/6/88. On 27/2/90, the Defendants’ two motions were by leave of Court withdrawn and struck out with costs to the Plaintiffs. There appears to be some confusion arising on the record of appeal with regard to the Defendants’ motions, particularly their motion of 2nd December 1988. I say this because the record of the proceedings of 27/2/90 reads, in part: C

“Chief A.O. Akpedeye applies to withdraw Defendants’ motion filed on 22/2/88. D

Dr. Akpojaro is not opposed, but wants cost of such withdrawal since the defendants/applicants failed to go on with this motion after plaintiffs had filed this counter affidavit. He has asked for N500.00 cost. E

Chief Akpedeye says he will not make any offer.

Court: Application by learned counsel for the 1st - 4th defendants/applicants to withdraw their motion filed in this suit on 22/2/88, is hereby granted N25.00 cost to the plaintiffs/respondents. F

Motion struck out.

(sgd.) JUDGE (27/2/90)

Chief Akpedeye also applies to withdraw their motion dated 2nd December, 1988.

Dr. Akpojaro is not opposed, but wants this to be on terms of G N500.00. Chief Akpedeye offers nothing.

Court: Application by learned counsel for the 1st-4th defendants/applicants to withdraw this motion dated 2nd December, 1988 is hereby granted, and motion is accordingly struck out. N50.00 cost to the Plaintiffs/respondents. H

(Sgd.) J.A. Onobun,

JUDGE

27/2/90"

On 19th December 1990, however, the record shows that chief Akpedeye, for the 1st - 4th Defendants, moved the Court.

B "under the inherent jurisdiction of Court under s.6(3) of the Nigeria Constitution of Nigeria 1979 praying for the following orders. *"1. Dismissing this action in Suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process of the Court.*

C *2. Dismissing this action in Suit No. UHC/9/88 on grounds:*
(a) that the Court has no jurisdiction to entertain it;
(b) that the subject matter of the suit being the appointment and recognition of a Chief is not justiciable."

D As the trial High Court's ruling that led to the appeal now before us arose out of the proceedings of 19th December 1988, I will not say anything further on the seeming confusion, more so that it has not been raised by the Plaintiffs in this appeal before us.

E On the application of the Defendants to dismiss Plaintiffs' claims being heard, the learned trial Judge (Onoriobe, J), in a ruling delivered on 27th February 1991 found -

F 1. *"The present suit was filed on 25th January, 1988, when the 1st suit No. UHC/34/87 which was struck out on 24th March, 1988, was still in existence. It is pertinent to point out at this stage that the present suit No. UHC/9/88 and suit UHC/34/87 relates to the same parties and the same subject matter. It is my considered view that the presence of the two suits supra in this court at the same time before the first suit was struck out on 24th March, 1988 amounts to a flagrant abuse of the process of this Honourable Court and can be dismissed for this reason only."*

G 2. *"The present action suit No. UHC/9/88 was filed on 25/1/88 well over 6 years from the date of accrual of the cause of action. I agree with the brilliant submission of learned counsel Chief H A.O. Akpedeye for the Applicants and G.A. Osadiaye for the 4th to 5th Defendants/Respondents and plaintiffs/Respondents' case was statute barred by virtue of section 4(1)(a) of the Limitation Law (Cap. 89) Laws of Bendel State of Nigeria 1976 reproduced above, because the cause of action arose on*

28/9/79 when Bendel state Legal Notice No. 88 of 1979 was published.”

3. “I agree with the submission of G.A. Osadiaye, Esq., Senior Legal Officer who associated himself with the brilliant submission of Chief A. O. Akpedeye, that the issue raised by the Writ of Summons was a Chieftaincy matter where there was a registered Declaration.” B

4. “I also agree with him that claims 1 and 2 in the Writ of Summons sought to nullify the said registered Declaration and that claim 3 was a product of claims 1 and 2. I am of the firm view that Section 32(a) of the Traditional Rulers and Chiefs Edict 1979 were made before 1st of October, 1979, when the Nigeria Constitution came into force. I also agree that 1979 Traditional Rulers and Chiefs Edict was existing law in respect of which the courts have no jurisdiction.” C

The learned Judge concluded:

“The result is that the Suit No. UHC/9/88 is hereby dismissed on the following grounds:

- (i) Abuse of the process of Court;
- (ii) Being Statute barred;
- (iii) Lack of jurisdiction of Court to entertain it, with costs of N200.00 in favour of the Applicants and N100.00 in favour of the 5th to 6th Defendants/Respondents.” E

Being aggrieved, the Plaintiffs appealed to the Court of Appeal (Benin Division). In the lead judgment of Ige JCA, with which Akpabio and Ogebe JJ.CA agreed, the Court below came to the conclusions-

(a) “It is true the Bendel State LN No. 88 of 1979 had been in existence since 1979 and the provisions of section 161(3) and 165(1) of 1963 Constitution were the existing laws as at that time, but the cause of action did not arise until the Plaintiffs felt aggrieved by the appointment of 1st Respondents as Senior Odion of Uwherun in April, 1985. Whether or not the claim was in contract or in Tort, time begins to run from April 1985 and not the time BSLN No. 88 of 1979, and Section 32(a) and (c) of the Traditional Rulers and Chiefs Law No. 16 of 1979 came into force. I do not agree with the submission of the Respondents that this case is caught by the Limitation Law of Bendel State of 1976.” F

(b) I agree with the submission of the Respondents that the H

jurisdiction of the Courts will be ousted if the cause of action had arisen since 1979 - See the cases on

Mustapha v. Governor of Lagos State (1987) 2 NWLR (pt. 58) 539 and Alao v. Akano (1988) 1 NWLR (pt. 71) 43..

B *The jurisdiction of the Court will then be excluded by Section 32(a) and (c) of the Traditional Rulers and Chiefs law No. 16 of 1979 and the 1963 Constitution if the action is instituted for the determination of any question relating to the selection, suspension, appointment, installation, deposition, suspension or abdication of a Chief.*

C *The position has been made different under the 1979 Constitution which confers general and unlimited jurisdiction under sections 6 and 236 upon the Courts.*

D *In this case the endorsement on the Writ discloses a cause of action as from April 1985 and it is the 1979 Constitution that applies and not the 1963 Constitution."*

E *(c) It is true that an earlier suit No. UHC./34/87 was brought by the appellants against the Respondents in 1987, but a motion (sic) of discontinuance had been filed on 19/2/88 in respect of same. Suit No. UHC/34/87 was then struck out on 24/3/88 with N100.00 costs awarded in favour of the Respondents.*

F *The case No. UHC/9/88 filed on 25/1/88 from the facts endorsed on the Writ of summons cannot be held prima facie to be frivolous, vexatious or an abuse of Court or judicial process in any way. An order made upon a notice of discontinuance cannot operate as a bar to any subsequent suit based upon the same facts. I do not see how the Respondents have been harassed or oppressed by the writ taken out in suit No. UHC/9/88."*

G *The Defendants have now appealed against that decision to this Court upon four grounds of appeal and have raised, in their brief of argument, the following three issues as calling for determination:*

- H
1. Whether this action is not statute-barred;
 2. Whether the trial Court has jurisdiction to entertain the reliefs endorsed on the writ of summons; and
 3. Whether the action is not an abuse of judicial process.

The issues formulated in the Plaintiffs/Respondents' brief are similar to the above.

Issues 1 & 2:

I think these two issues can be taken together as the dominant question arising in each is (1) when did the cause of action arise in this matter? Was it 28/9/79 when BSLN No. 88 - Declaration of Customary Law regulating succession to the title of Senior Odion of Uwherun, was made? Or 10/7/85 when the Executive Council of Bendel State approved the appointment of Chief Olori Edjerode, 1st Defendant, as the Senior Odion of Uwheru? If the cause of action arose on the former date, the 1963 Constitution would apply to determine the Court's jurisdiction and, if there was jurisdiction, the action taken in February 1988 would clearly be statute-barred. But if it is the latter date, the 1979 Constitution would apply to determine the court's jurisdiction and there could be no question of the application of the Limitation Law to bar the action by effluxion of the statutory period of six years.

It is settled law that it is the plaintiff's claim that determines the question of the Court's jurisdiction - See: Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt. 81) 129; Adeyemi v. Opeyori (1976) 9-10 SC 31; Ege Shipping & Trading Ind. v. Tigris International Corp. (1999) 10-12 SC. 60; (1999) 14 NWLR (Pt. 637) 70 at p. 89; Warri Refining & Petrochemical Co. Ltd. & Anor. v. Onwo (1999) 12 NWLR (Pt. 630) 312 at 326. Where pleadings have been filed, the issue of the court's jurisdiction is determined from the averments in the plaintiff's statement of claim. Where this is not the case, one has to look at the claim as endorsed on the writ of summons.

In the case on hand, pleadings have not been filed by the time the Defendants brought their motion to dismiss the case for want of jurisdiction. While this course of action is permissible - See: National Bank of Nigeria Ltd. & anor. v. J.A. Shoyoye & anor. (1977) ANLR 168 - in an appropriate case however the court may order that pleadings be filed and evidence taken before the issue of jurisdiction is considered - See: Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) ANLR 326. From the Plaintiff's claims as endorsed on

their writ of summons it is clear that what they are complaining about is the appointment of the 1st Defendant as the Senior Odion of Uwherun which appointment according to them, is against their customary law. It is generally agreed that that appointment was made on 10/7/85. That date, in my respectful view, would be the date the Plaintiffs cause of action accrued - See Julius Berger (Nig.) Plc. v. Omogui (2001) 15 NWLR 401. And as at that date, the 1963 Constitution which ousted the jurisdiction of courts in chieftaincy matters had ceased to have effect and the 1979 Constitution which gave the State High Courts unlimited jurisdiction was in effect.

In the result I resolve Issues 1 & 2 in favour of the Plaintiffs.

Issue 3:

What constitutes an abuse of process of court where two actions on the same subject matter and between the same parties are pending at the same time, has recently been pronounced upon by this Court. In *Central Bank of Nigeria v. Saidu H. Ahmed & Ors.* (2001) 5 SC. (Pt. II) 146; (2001) 7 SCM 85, 113; (2001) NWLR I did define the expression thus:

"What is meant by abuse of process of court? It simply means that the process of the court has not been used bona fide and properly."

All the authorities examined in the case by both Ejiwunmi, JSC and my humble self boil down to this simple definition.

On the facts of the present case, I think the Court below decided rightly when it held that there was no abuse of judicial process by the Plaintiffs. It is on record that the Plaintiffs filed their present action on 25/1/88 and filed the notice of discontinuance of their previous action (UHC/34/87) on 19/2/88. The Defendants was not served with the writ of summons in the second action until 16/2/88. The first action had been struck out on 24/3/88, long before the Defendants brought their first motion to dismiss. I cannot see there has been an abuse of judicial process or harassment of the Defendants as contended by them.

It is for the reasons above and the more detailed reasons given in the lead judgment of my learned brother, Ejiwunmi, JSC that I too dismiss this appeal and affirm the judgment of the Court of Appeal.

I award costs of this appeal assessed at N10,000.00 in favour

of the Plaintiffs/Respondents.

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Ejiwunmi, JSC just delivered, I am in entire agreement with him that the appeal lacks substance and ought therefore to fail.

I wish to expatiate briefly on the matter as follows:

The facts of the case herein on appeal consisting wholly of documentary evidence in the writs, affidavits and counter affidavits as well as several documents thereto annexed as exhibits from the volume of the affidavit evidence on record, the substance of the claim of the Plaintiffs/Respondents (hereinafter referred to as Respondents) centered around two points viz:

(a) The right to succeed to the Traditional Rulership Title of the SENIOR ODION of Uwheru Kingdom following the demise of the former holder in 1985.

(b) The validity vel non of the existing declaration or codification of the customary law regulating succession to the title published as BSLN 88 of 1979.

On the 12th day of August, 1987, the Respondents obtained an interim injunction through a motion ex parte to restrain the Defendants/Applicants in Suit No. UHC/34/87. The motion on notice came for argument on the 23rd day of October, 1987 and on the 19th day of November, 1987, the Trial Judge delivered a considered Ruling dismissing the motion wherein he discharged the order of interim injunction. Thereafter, the court ordered pleadings whereby the Respondents were given 30 days within which to file their statement of claim and the defendants 30 days within which to file their statement of defence, after service on them of the statement of claim. Rather than comply with the order for pleadings made by the Court, the Respondents instituted a fresh Suit No. UHC/9/88 on the 25th day of January, 1988 against the Appellants claiming reliefs identical to those in the Suit UHC/34/87 still pending in the same court. The Appellants raised preliminary objections and sought to dismiss Suit No. UHC/9/88 on the grounds that:

(a) it was frivolous, vexatious, oppressive and an abuse of judicial process.

(b) that the court has no jurisdiction to entertain the suit.

(c) that the suit is time barred.

B The Respondents later applied to discontinue Suit No. UHC/34/87 and the same was struck out on 23rd March, 1988, some 3 months after it has existed concurrently with Suit No. UHC/9/88 in the same court.

C On 27th February, 1991 the Ughelli High Court delivered a well considered Ruling dismissing the Respondents claim with costs.

Being dissatisfied with the said Ruling the Respondents appealed to the court below sitting in Benin City which allowed the Appeal on 27th July, 1995 and ordered that the case be tried de novo by another Judge of the Warri High Court.

D Concluding, Ige, J.C.A., who wrote the leading judgment and concurred in by Akpabio and Ogebe, JJ.C.A, held as follows:

E *“The case No. UHC/9/88 filed on 25/1/88 from the facts endorsed on the Writ of summons cannot be held prima facie to be frivolous, vexatious or an abuse of judicial process in any way. An order made upon a Notice of Discontinuance cannot operate as a bar to any subsequent suit based on the same facts. I do not see how the respondents have been harassed or oppressed by the writ taken out in Suit No. UHC/9/88.*

F *On the final analysis I hold that this appeal succeeds in that the action is not statute-barred, nor is it frivolous or vexatious action or an abuse of court process. I rule that the applicable laws empower the lower court with jurisdiction to hear the case on merit.*

G *The Ruling of the lower court given on 27/2/91 is hereby set aside and case is remitted to the Delta High Court, Warri to be tried by another Judge de novo”*

H Aggrieved by the decision of the court below, the 1st - 4th Appellants have now appealed to this court on four grounds with leave.

The three issues submitted as arising for determination of this Court by the Appellants which the Respondents have adopted (in both their Brief and Reply Brief) although they have rendered them slightly differ

ently are:

1. Whether this action is caught by Section 4(1)(a) of the Limitation Laws of Bendel State of Nigeria 1976 (defunct) but now applicable to Delta State.

2. Whether the Writ as formulated with 4 reliefs deprives the trial court of jurisdiction to entertain it, whether as a whole or in part only.

3. Whether the trial court was right to have acceded to the view that this action is frivolous, vexatious, oppressive and an abuse of court process.

At the hearing of this appeal on 18th September, 2001, learned counsel for the Appellants after adopting their joint Brief and Reply Brief through their counsel, expatiated briefly on three issues serially and in my treatment of them, I intend to adopt a similar approach as follows:

Issue 1

Section 4(1)(a) of the Limitation Law 1976 Bendel State (defunct) now applicable to Delta State provides as follows:

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on simple contract or tort."

It is clearly wrong for the Appellants to argue that the action arose since September, 1977 when the BSLN was promulgated. The cause of action arose in April, 1985 when the 1st Defendant/Appellant was made the Senior Odion of Uwherun. Section 4(1)(a) is inapplicable in this case which is neither founded in tort nor in contract. Indeed, a declaratory relief or declaration can be made even when there is no cause of action. See Attorney-General of Kaduna State v. Hassan (1985) 2 NWLR (Part 8) 483 at 497 C-D; Beredugo v. College of Science and Technology (1991) 4 NWLR (part 187) 651. 12 Back to top. The 1979 Constitution Section 6(6)(b) clearly permits this action while the 1963 Constitution does not apply.

The Appellants' contention that the action giving rise to the instant appeal as held by the trial court was intended to annul the Bendel State Legal Notice No.88 of 1979 which codified the customary practices of the Uwheru people relating to the selection, appointment and succession of their Traditional Ruler - the Senior Odion - a Chieftaincy title, by the

combined provisions of Section 161(3) of the 1963 Constitution of Nigeria and Section 32(a)(c) of the Bendel State of Nigeria (Delta State of Nigeria) Traditional Rulers and Chiefs Law No. 16 of 24th August, the primary jurisdiction of the court is completely ousted and
 B has no application vide Section 236 of the 1979 Constitution.

From the foregoing, my answer to issue 1 is rendered in the negative.

ISSUE 2

C The Writ with its 4 reliefs (which is all that is before the court in this case at the present stage) on its face deprives the trial court of jurisdiction to entertain the action whether as a whole or in part only. What the Appellants seem to be arguing is that once the word “Chief” or “Chieftaincy” is mentioned in a writ, the jurisdiction of the court is
 D ousted. With due respect, this is an erroneous view. The trial court got carried away by the Appellants’ wrong view and so dismissed this action hastily: hence he shut the door of justice against the Respondents. The Respondents as turned out, were not given the chance to state their case, or so to say, denied the chance to state their case
 E even at the stage of pleadings. This is because, it is trite law that it is the statement of claim that determines the jurisdiction of a court vide *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Part 81) 129.

In the instant case, it was wrong to have dismissed the case without the statement of claim having been filed. See *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria Ltd.* (1976) 6 SC. 175 at 185 LL 21 - end of page, 186-193 and *Kalio v. Daniel Kalio* (1975) 2 SC. 15 at 22. It is trite that the jurisdiction of the State High Court cannot lightly be taken away except by very clear words and intention of a law validity made. See *Halbury’s Laws of England*, 4th Edition, Volume 10 paragraph 720. Put in another way, if such a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly, this means that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which
 F preserves the ordinary jurisdiction of the court. See *Anisminic v. Foreign Compensation Commission* (1969) 2 AC (H.L.) 147 at 170 and *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria* (1976) 6 SC. 175 at 188. This Court has held in several cases that a declaration can be
 H granted to a party that conceives that he has a right even if there is no

subsisting cause of action. In the case of *Yahaya Adigun v. Attorney General Oyo State* (1987) 1 NWLR (Part 53) 678 at 702 or (1987) 3 SCNJ 118 at 135 LL 26-45 page 136 LL 6-19 of SCNJ which is on all fours with the Plaintiffs/Respondents' case per Obaseki, JSC, it was held that: B

"It cannot, in my view, be correctly and legally argued that the High Court cannot entertain and adjudicate on such a claim in the exercise of its unlimited jurisdiction vested in it by Section 236(1) of the Constitution of the Federal Republic of Nigeria 1979 (Ibid). As Karibi-Whyte, JSC, put it in Amaye v. Associated Contractors (1990) 6 SCNJ 149 at 162 - 163 it is the pleading of the Plaintiff that the court should look at before it makes up its mind as to whether it has or it has not got jurisdiction in the matter before it. The step taken by the learned trial Judge has led to grave miscarriage of justice. See D Utih v. Onoyivwe (1991) 1 NWLR (Part 166) 166; 4 SCNJ (1991) 25 at 65-66. The Appellants, it would appear clear made heavy weather of Section 274(b) of the 1979 Constitution as regards existing laws. It must be borne in mind however that what the Respondents were challenging in court was not the registered declaration of Bendel State, titled BSLN No. 88 of September, 1979 but the appointment of 1st Appellant (Chief Olori Edjerode) as the Senior Odion of Uwherun Clan. The Respondents' claim was that the appointment of Chief Edjerode as the Senior Odion was not in accordance with the established native law and custom Therefore, Section 274(b) of the 1979 Constitution on the issue of non-justiciability of existing law as preserved by Section 6 (b), (d) of the 1979 Constitution does not arise. Be it noted that BSLN No. 88 of September, 1979 did not actually appoint Chief Edjerode (1st Appellant) as the Senior Odion. F It only merely approved the appointment - the appointment being normally done by the Community in accordance with the established native law and custom. It is this appointment that the Respondents challenged in court. Section 274(4)(b) of the 1979 Constitution does not apply. See Ekezhi v. Military Governor of Bendel State (1992) 3 H NWLR (Part 221) 39 ratio 6 and page 51. "

I am of the firm view that this case cannot be dismissed on the ground that it is frivolous, vexatious, oppressive and an abuse of the process of the court. It is settled law that it is only an abuse of the process of a court when a party brings to court frivolous and vexatious suits.

B See *Green Laigh v. Mellard* (1974) 2 All E.R. 255 C.A.; *Wright v. Bennet* (1948) 1 All E.R. 227 and *Asher v. Secretary of State for the Environment* (1974) 2 All E.R. 156. The best example of such frivolous and vexatious suits are when an appeal brought by a person when the action is not in conformity with Section 213 of the Constitution of the Federal Republic of Nigeria 1979 either under sub-section (1) or (2) thereof to the Supreme Court (in pari materia with Section 233(1) and (2) of the 1999 Constitution).

C This Court per Aniagolu, JSC in *Professor Ayodele Awojobi v. Dr. Samuel Osaigbovo Ogbemudia* (1983) 8 SC. 92 at page 96 after dismissing the appellant's appeal for lacking in merit, held as follows:

"Speaking for myself, I consider the frequency with which this appellant goes in and out of our courts as bringing him dangerously within the meaning of a vexatious litigant who should be restrained by the courts on the principles and jurisdiction laid down in Lawrence v. Norreys (1890) 15 App. Cas. 210 and Haggarg v. Felicier Freres (1892) A.C. 61.

The appellant's frequent actions in courts have now become an abuse of the process of the courts.

F *In the instant appeal, this court, clearly has no jurisdiction to entertain this matter, which must be dismissed. It is a matter for regret that the highest court in the land should be subjected to entertain a frivolous matter of the type of this appeal, in the fact of every weighty matters connecting parties aggrieve, with which this Court has to deal, in the interest of the Nation, within the Constitution of Nigeria."*

G And in the case of *Eshugbayi Eleko v. Frank Morris Baddeley & Anor.* (1925) 6 NLR 65, it was held that an action which is frivolous and vexatious and an abuse of the process of court could be dismissed.

In the instant appeal, Suit No. UHC/34/87 was filed purposely to stop 1st Defendant/Appellant being approved as the Senior Odion of

Uwherun. The speed at which the Appellants moved was very fast in their defence approach. Albeit, the event sought to be prevented nevertheless took place in that the Respondents on the 19/12/88 filed a NOTICE OF DISCONTINUANCE of Suit No. UHC/9/88. The 1st - 4th Appellants in their capacity as defendants without ascertaining from the court Registry Ughelli the status of Suit No. UHC/34/87, filed a motion on 22/2/88 i.e. 3 days after the Notice of Discontinuance, calling for dismissal of this Suit (No. UHC/9/88) for being frivolous, vexatious, oppressive and an abuse of the process of court. etc. B

On 24/3/88, Suit No. UHC/34/87 was struck out based on the Notice of Discontinuance. The 1st-4th Appellants were present in court with their counsel, Chief A.O. Akpedeye and costs of N100 were awarded in their favour. C

On 2/12/88 the Appellants purported to file a motion “*Amending the prayers sought by the 1st defendant/appellant in these proceedings.*” D

This motion was among the many motions withdrawn by the Appellants on 27/2/90 and was struck out with N50.00 costs in favour of the Respondents. It is to be noted that the motion had been filed nine months after Suit No. UHC/34/87 had been discontinued. The affidavit in support of the motion calling for “dismissing Suit No. UHC/9/88 for being frivolous, vexatious, oppressive and an abuse of the process always repeated paragraph “That I and the other defendants fell greatly embarrassed of facing two suits in the hands of the Plaintiffs in respect of the same subject matter at the same time” even though 1st - 4th Appellants were aware that only one suit was and is pending in court, the earlier suit having been discontinued and struck out with costs in Appellants’ favour many months earlier. Indeed, the last motion that was filed on 19/3/90 was 2 years after Suit No. UHC/34/87 was withdrawn and struck out. The question one may then ask is, how long after Suit No. UHC/34/87 has been discontinued and struck out will it continue to haunt Respondents from the grave? And furthermore, can the Appellants continue to eat their cake and have it? Or for how long can the Appellants benefit from striking out Suit No. UHC/34/87 and still use it as a weapon of attack? F

Indeed, at all times material to this case on appeal, only Suit No. G

UHC/9/88 was pending against the Appellants, their non-existent and unfounded complaints persist. The Respondents have not demonstrably been shown to have abused the process of the court and their action has not been frivolous, vexatious and oppressive either. The Appellants have neither in any way been prejudiced nor over-reached.

B Not certainly in the absence of pleadings. 17 Back to top

It is in the light of the above and more, that I hold that this action is not statute-barred in that the cause of action arose in 1985 and not 1979. Also, that the court clearly has jurisdiction to entertain it, more especially as it is declaratory in form and the use of the word
C “Chief” or “Chieftaincy” does not eo ipso deprive the trial court of power to entertain the case. Such suit must be clear in term to be able to deprive the court of its jurisdiction. The trial court acted post haste and indeed prematurely in shutting the door of justice against
D the Respondents in a matter where pleadings had not been ordered, filed and exchanged.

My answer to issue 3 is accordingly rendered in the negative.

It is for the above reasons and those fully set out in the leading judgment of my learned brother Ejiwunmi, JSC that I too dismiss this
E appeal, affirm the decision of the court below and make similar consequential orders inclusive of costs as contained in the leading judgment.

F

UWAIFO JSC

I read in advance the judgment of my learned brother, Ejiwunmi, JSC. I agree with him that the appeal lacks merit for the reasons he gives.

G The respondents (as plaintiffs) filed suit No. UHC/34/87 against the appellants (as defendants) claiming six reliefs in respect of the Bendel State Legal Notice (BSLN) No. 88 of 1979 which recognised five Ruling Houses in Uwheru Clan, Ugehlli Local Government Area. Before pleadings were filed, the respondents filed another suit No.
H UHC/9/1988 in respect of the same subject-matter but this time seeking only four reliefs, all of them similar to four of the reliefs in the earlier suit.

The respondent subsequently brought a motion seeking to have

suit No. UHC/9/88 dismissed on the grounds that (a) it was frivolous, vexatious, oppressive and an abuse of the process of the court; (b) the court has no jurisdiction to entertain it; and (c) the subject-matter being the appointment and recognition of a chief, it is not justiciable. The trial court presided over by Onoriabe, J, in a considered ruling B given on 27 February, 1991 found merit in the three grounds and dismissed the suit. However, the Court of Appeal, Benin Division, on 14 July, 1995 allowed the appeal against that judgment and remitted the case to the Delta State High Court to be heard by another judge.

Before this court, three issues have been raised for determina- C tion. They are framed more or less along the lines of the grounds upon which the suit was dismissed at the trial court, and are:

1. Whether this action is not statute barred.

2. Whether the trial court has jurisdiction to entertain the re- D liefs endorsed on the writ of summons.

3. Whether the action is not abuse of judicial process.

The first issue is canvassed on the basis that BSLN 88 made on 25 September, 1979 created a cause of action which accrued from that date. That being so, that the action brought by the respondent E on 25 January, 1988 was statute bared, not having been brought within six years from 25 September, 1979. This argument implies that a statute, for example, which creates a disability whether specifi- F cally or generally must be challenged in good time by whoever may be affected by it within any relevant limitation period. This cannot be right. Many statutes and subsidiary legislations usually lie dormant in the statute book. There is no obligation on those likely to be affected by them to rush to litigation. But when any step is taken to imple- G ment such a statute or subsidiary legislation e.g. a registered declaration of custom regarding chieftaincy, then a dispute would arise giving rise to a cause of action. It is then the person aggrieved can prosecute an action on it effectively: See *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1 at 17; *Afolayan v. Ogunrinde* (1990) 1 NWLR (Pt. 127) 369 at 382.

The second issue is whether there is jurisdiction in the courts to H entertain the reliefs sought. The appellants argue that the 1963 Constitu

tion applies because the cause of action accrued in 1979 before the 1979 Constitution came into force. The 1963 Constitution prohibited litigation in chieftaincy matters. The executive had the final say. But the 1979 Constitution conferred jurisdiction in the courts on those matters. Of course, because the appellant misconceived the time of
B accrual of a cause of action, they stuck to their argument which I find untenable.

As to whether the action was an abuse of judicial process, the appellants rely on the fact that the respondent had two writs on the
C same subject-matter pending in court. But the respondents discontinued the earlier writ which contained six reliefs and decided to continue the later one which sought four reliefs. The Law is that abuse of court process in regard to multiple actions between the same parties on the same subject-matter may arise when a party improperly uses
D judicial process to the irritation, annoyance and harassment of his opponent not only in respect of the same subject-matter but also in respect of the same issues in the other action or actions: See *Okafor v. A.G. Anambra State* (1991) 6 NWLR (Pt. 200) 659 at 681; *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156. It cannot amount to abuse
E of court process if what is done was that the plaintiff filed another action in order to substitute it for the one already pending. He may decide to do this instead of seeking an amendment of the earlier suit. I am of the view that there is no abuse of court process in the present
F instance.

I find no merit in this appeal and dismiss it with N10,000.00 costs against the appellants. It is ordered that the case should proceed to trial before another judge of Delta State High Court.

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