

2ND MARCH, 2001. SC. 166/1995

1. CHIEF GORDON JOE YOUNG JACK  
2. FORSBURY S. CLARK GEORGEWILL  
3. ENGAR REUBEN JACK (DECEASED) PLAINTIFFS/  
(For themselves and as Representing ..... APPELLANTS  
the Standfast JACK House of Abonnema  
Popularly known as The Iju/Jack Group of  
Houses)

1. CHIEF R.I.T. WHYTE
2. CHIEF B. G. WHYTE (DECEASED)
3. MR. IWO SOKARI DAN AGOGO (DECEASED) ..... DEFENDANTS/  
RESPONDENTS
4. MR. HUMPHREY JONAH WHYTE
5. MR. KELLY FRANCIS WHYTE
6. CHIEF K. J. DAGOGO-JACK (DECEASED)

(For themselves and as Representing the  
Tubofia, Boto and Kaladokubo sections in  
Standfast Jack House popularly known as  
Jack (Iju) Group of Houses)

**EVIDENCE** - Burden of proof - In civil cases - Rests on the party who affirms the issue - As settled by the pleadings - And must not be departed from without reasons.

**EVIDENCE** - Documents - Contradictions - Oral evidence is admissible  
- To assist the court - In determining the probative value of a document.

**EVIDENCE** - Evaluation of evidence - Was not properly done - As trial court failed to consider the conflicting evidence - Of the Appellants.

**EVIDENCE** - Witnesses - Contradictions - In appellants evidence - Confirms the contention of the respondents - As was rightly held by the lower court.

**JUDGMENTS** - Representative action - Judgments therein - Are not personal to the individuals - But would survive their death.

**JUDICIAL PRECEDENTS** - Obiter dictum - The issue decided on - By the lower court - Was obiter - As it was not raised by the parties - And does not affect the final decision of the court

### **FACTS**

The appellants as plaintiffs sued the respondents as defendants in the Rivers State High Court sitting at Degema. They contested the selection and presentation of the 6th defendant and his installation as the paramount head of Iju house as irregular and contrary to Kalabari native law and custom. They therefore sought a declaration to that effect amongst others as well as mandatory and perpetual injunctions against the defendants. The parties at the trial gave partly conflicting history of the lineage of their ancestors up to the founder of the original chieftaincy.

The trial judge after analyzing the facts and evidence before him found in favour of the plaintiffs in his judgment and granted all the declaration sought in their writ. The respondents were dissatisfied and appealed to the Court of Appeal. It reversed the decision of the trial judge, dismissing two of the plaintiffs' claim and striking out the others on the ground that being personal claims they died with the 6th defendant who had died by that time. The plaintiffs being dissatisfied have appealed to

the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Whether the parties sued and were sued in a representative capacity.*

*2. Whether Chief Oba Standfast Jack founded a new war canoe chieftaincy stool (HOUSE) named after himself and thus became the most senior and paramount chieftaincy stool in the Standfast Jack Group of Houses.*

*3. Whether the learned Justices of the Court below were justified in upholding the Defendant’s plea of the Kalabari native law and custom of ‘DUEIN WARI FAFAA’.*

*4. Whether the trial judge observed the rule in MOGAJI V. ODOFIN (1978) 4 SC.91 in writing his judgment.*

*5. Whether claims B, D and E in paragraph 29 of the Better and Further Amended Statement of Claim were properly struck out by the Court of Appeal.”*

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

***Obiter dictum***

1. It is clear from the briefs filed before the court below that no issue questioning the capacity to sue was raised by any of the parties. As such I agree that the decision of the Court of appeal on the issue representative capacity was obiter. Let me emphasise that the issue of representative capacity which Onalaja JCA, dealt with in his judgment, going by the Rules of court and the authorities referred to above, does not affect the final decision of this court, in this appeal. ( p. 947 H )

***Witnesses - Contradictions***

2. Thus the Court of Appeal was in error to hold that Iju/Jack House is still the paramount stool in Iju/Jack Group of Houses. But the Court of Appeal had quite rightly found that the evidence adduced by the appellants before the trial High Court was contradictory. The observation of learned justice of the Court of Appeal reveal sharp contradictions in the

testimonies of witnesses called by the appellants. The further one reads the testimonies of witnesses who gave evidence for the appellants before the trial court the more one can see that the people of Iju/Jack House and Standfast Jack House belong to the same chieftaincy stool. ( p. 948 F & B 949 E )

***Documents - Contradictions***

3. I have looked into all the exhibits and, with respect, what is disclosed in those exhibits has not advanced the case of the appellants any further. On the contrary, they widened the contradiction in the evidence of the appellants before the trial court. For example, some witnesses testified that there was still an Iju/Jack House in Abonnema and some documents said there was none. Which is to be believed? Oral evidence is admissible where it will throw light upon or assist the court in determining the probative value to be attached to a document. A/G Oyo State & 1 Or. V Fairlakes Hotels Ltd. & 1 Or. (1989) 5 NWLR (Pt. 121) 255. ( p. 950 H )

***E Burden of proof - In civil cases***

4. The burden of proof in civil cases rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is an ancient rule founded on consideration of good sense, and it should not be departed from without reasons. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting in any circumstances whatever. If when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him. See Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation (1942) A.C. 154 at 174; Imana v. Robinson (1979) 3-4 SC.1. ( p. 951 B )

H

***Customary law - Native custom***

5. If one reads carefully the testimony of PW1, who is the leading witness of the appellants, one can see that he did not deny the existence of

the Kalabari native law and custom of ‘*DUEIN WARI FAFAA*’. He however gave his own interpretation of the custom as follows: “*Whatever happens, when a man creates a family, that family is never extinct*”. I do not see the difference between this interpretation and the one given by the respondents: i.e. “*Chieftaincy house continues as long as people loyal to it are alive*”. The “*family*” which PW1 said will continue to exist is the chieftaincy family. So the interpretation of the respondents is correct. If Standfast Jack House is a new house distinct from Iju/Jack House why is the name JACK retained by Oba? In his evidence PW1 said “*we can safely say that Iju/Jack House is a Duein Wari. I agree that the interpretation given by the respondent is correct that it is a Kalabari custom that chieftaincy house continues as long as people loyal to it exist.* ( p. 951 D )

### ***Evaluation of evidence***

6. Turning to the evaluation of evidence, I agree that the learned trial judge had not put the evidence adduced by both parties on an imaginary scale and weighed the conflicting evidence before reaching the conclusion that the appellants had proved their claim. From the analysis I have made of the evidence adduced by the appellants it is crystal clear that their claim had not been proved. Issues 2, 3 and 4 are therefore resolved in favour of the respondents. ( p. 951 H )

### ***Judgments - Representative action***

7. I now move to issue 5. In dealing with this issue, Okocha SAN, conceded that the Court of Appeal was in error to have held that reliefs claimed under paragraphs 29(b) 29(d) and 29(e) were personal to the 6<sup>th</sup> Defendant/Respondent, Chief K.J. Dagogo-Jack (deceased). The contest revolved around the paramount stool of Iju/Jack House or Standfast Jack House. In the contest both the plaintiffs/appellants and the defendants/respondents will be affected by the court’s decision. In this action the respondent have been sued in a representative capacity and as such any judgment obtained against them would survive the 6<sup>th</sup> respondent. I therefore agree that the court below was wrong to strike out reliefs (b)

(d) and (e) in the plaintiffs/appellants' claim. ( p. 952 B )

# **NOTABLE POINT OF INTEREST**

## **MOHAMMED.JSC**

B *1. When representative actions will be upheld in the absence of order of court*

I agree that where a representative order would have been granted had it been asked for failure to obtain it will not vitiate the action - see Bulai v. Omoyajowo (1968) 1 All NLR 72. It is not compulsory for a party wishing to sue or defend in a representative capacity to get an order of court before filing his suit. The attitude this court adopts in matters of this nature is not a rigid one. It depends on the facts and circumstances of the case. If there is evidence that the parties appear to possess representative capacity and act or presumably act on the authority of those they represent, this court does not and will not upset on a bare objection of failure to obtain the approval of the court. See Wiri and Ors. v. Wuche and Ors. (1980) 1-2 S.C.1. ( p. 947 F )

E

## **REPRESENTATION**

Appellants not represented.

F O. C. J. Okocha, SAN with F. U. Okoro for the Respondents.

## **CASES REFERRED TO**

MOGAJI V. ODOFIN (1978) 4 SC. 91

Bulai v. Omoyajowo (1968) 1 ALL NLR 72

G Wiri and Ors. v. Wuche and Ors. (1980) 1-2 S.C.I

A/G Oyo State & 1 Or. V. Fairlakes Hotel Ltd. & 1 Or. (1989) 5 NWLR (pt. 121) 255

H Chief P.O. Anatogu & Ors. V. Attorney General, East Central State & Ors. (1976) 11 SC 109

Joseph Afolabi and Ors. V. John Adekunle & 1 Other (1983) 8 SC.

Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation (1942) A.C. 154 at 174;

Imana v. Robinson (1979) 3-4 SC.1.

Bulai & Or. V Omoyajowo (1968) 1 All N.L.R. 72, Dokubo & Ors. v

Bob-Manuel & Ors. (1967) 1 All NLR 113

Mba Nta & Ors. v Anigbo & Or. (1972) 5 SC, 156.

B

### **LEAD JUDGMENT BY MOHAMMED JSC**

This is an appeal from the decision of the Court of Appeal, Port Harcourt Division. The plaintiffs, hereinafter referred to as the appellants, in this appeal, took out a writ from the High Court of Justice, Rivers State, sitting at Degema, and claimed for the following reliefs against the defendants jointly and severally:

C

*“(a) A declaration that both the plaintiffs and 1<sup>st</sup> set of defendants are units under the paramount chieftaincy stool of the Standfast Jack stool and that the head of Oba House is automatically the head of Iju House.*

D

*(b) A declaration that he purported selection and presentation of Chief K.J. Dagogo-Jack as the paramount head of Iju House on the 30<sup>th</sup> day of November, 1985, by the 1<sup>st</sup> set of defendants and his subsequent installation by the 2<sup>nd</sup> set of defendants is most irregular, improper, and contrary to Kalabari native law and custom and also against the time honoured usage and custom of Standfast Jack group of houses.*

E

*(c) A declaration that the Standfast Jack stool is the main or paramount stool of the group of houses (including both plaintiffs and 1<sup>st</sup> set of defendants) that make up the Standfast Jack House otherwise known as Iju Jack House.*

F

*(d) A declaration that the 6<sup>th</sup> Defendant was never installed in view of (a) & (c) above as the paramount Chief of the Standfast Jack House.*

G

*(e) An Order of Mandatory Injunction against the 2<sup>nd</sup> set of Defendants directing them to withdraw the recognition already given to the 6<sup>th</sup> Defendant as the paramount head of the Standfast Jack House otherwise known as IJU JACK HOUSE.*

H

*(f) An Order of Perpetual Injunction restraining the 6<sup>th</sup> defendant personally by himself, and/or through his privies, agents, emissar-*

*ies, etc. from parading himself as the paramount chief of Standfast Jack House and from performing any of the functions incidental to the occupation of that stool.”*

When this appeal was called for hearing a letter written by Chief Richard Akinjide, SAN, was read in court. In the letter the learned Senior Advocate applied for the adjournment of the hearing of the appeal to a date in the year 2001. chief Richard Akinjide, SAN, explained, in his letter, that he was asked to argue the appeal on behalf of the appellants, but he had commitment abroad on the Bakassi case pending at The Hague. Learned counsel for the respondents, Okocha SAN, opposed the application for adjournment pointing out that a comprehensive brief of argument had been filed for the appellants and that he had come with his team of lawyers to respond to the arguments to be made by the appellants. After going through Chief Akinjide’s letter we sustained the objection of Mr. Okocha and directed the learned counsel present in court to highlight the issues in their briefs if they deemed fit. Alhaji Oso, who prepared the brief for the appellants, told the court that he had no mandate from the appellants to represent them before the Supreme Court. We therefore treated the Brief filed for the appellants as having been argued; and when Okocha, SAN, said that he adopted Respondent’s Brief and had nothing to further emphasise, the case was adjourned for judgment.

I now proceed with the judgment. Pleadings were called and delivered. The facts of the case as shown in the Appellant’s Brief are in the following narrative: The parties to this appeal belong to the Standfast Jack House of Abonnema, popularly called Iju/Jack Group of Houses. According t the Appellants, the Standfast Jack stool is the main or paramount stool in Abonnema. This is because the original Iju/Jack House founded by Iju/Jack himself disintegrated during he tenure of Tubofia, the great ancestor of the respondents. Iju/Jack was a wealthy warrior in Kalabari Kingdom but had no biological child of his own. He therefore adopted many children who manned his war-canoe. After the death of Iju/Jack, his brother Oriki succeeded him. After Oriki, Iju/Jack’s adopted son, Tubofia, succeeded him.

The two parties, in this appeal, disagree over the events which

followed the reign of Tubofia. According to the appellants the reign of Tubofia was a disaster. All the wealth left behind by Iju/Jack was vandalized and squandered by Tubofia. The House became insolvent and Tubofia had to disappear. This led to the disintegration of Iju/Jack House. Before the House disintegrated one fugitive Onuoha ran into Iju/Jack House and B was given shelter by Tubofia. Onuoha was later integrated into the House. He married one of the daughters of the family and had three issues from the marriage. One of the sons, Oba, later became rich and established his own War-Canoe. It was this Oba who established Standfast Jack House, C the ancestor of the appellants. It is also the appellants' case that when Iju/Jack House disintegrated it was no longer a War-Canoe. When Oba founded a new War-Canoe, Standfast Jack House became the paramount chieftaincy in the Iju/Jack Group of Houses. The others, Tubofia, Boye-Whyte and Kala-Dokubo became sub-Houses. This dispute which led to D this appeal arose when the 6<sup>th</sup> respondent (now deceased) was installed to sit on the paramount stool of Standfast Jack House.

The respondents' case is that all the parties in this appeal belong to the Iju/Jack House. Both the appellants and the respondents gave the E same history of the lineage of their ancestors up to Iju/Jack the founder of the original chieftaincy. Where they differ is at the stage when Tubofia became the paramount chief. The respondents said that the name "*Standfast Jack*" took its rise from Tubofia, who, during his contact with the Euro- F pean traders was dubbed "*Standfast Jack*" by the European traders after he told them "*I STAND FOR JACK*". This was in reference to the founder of the Iju/Jack House.

During the trial both the appellants and the respondents called G witnesses and documents were also admitted in evidence. The learned trial judge analysed all the facts and evidence before him and in a considered judgment found in favour of the appellants, and granted all the declarations sought for in the writ. Dissatisfied with judgment the respondents appealed to the Court of Appeal. The court below reversed the decision of H the learned trial judge in the following conclusion:

*"After a careful consideration of the issues raised in this appeal and the legal authorities adumbrated above, I come to the irresistible*

conclusion that this appeal succeeds and it is hereby allowed. The judgment of Ndu J in Suit DHC/26/85 delivered on the 30<sup>th</sup> day of September, 1993 is hereby set aside and applying Section 16 Court of Appeal Act cap. 75 Laws of the Federation of Nigeria 1990, the Respondents claims A and C are hereby dismissed. The other claims being personal claims against the 6<sup>th</sup> appellant now deceased having not survived him are struck out but does not operate against his privies, agents and emissaries, having been based on the *Maxim Actio Personalis Moritur Cum Persona*”.

It is against the judgment of the Court of Appeal that the appellants filed this appeal. The following five issues have been identified by Alhaji Oso, learned counsel who wrote the brief for the appellants;

- “1. Whether the parties sued and were sued in a representative capacity.
2. Whether Chief Oba Standfast Jack founded a new war canoe chieftaincy stool (HOUSE) named after himself and thus became the most senior and paramount chieftaincy stool in the Standfast Jack Group of Houses.
3. Whether the learned Justices of the Court below were justified in upholding the Defendant’s plea of the Kalabari native law and custom of ‘DUEIN WARI FAFAA’.
4. Whether the trial judge observed the rule in MOGALI V. ODOFIN (1978) 4 SC.91 in writing his judgment.
5. Whether claims B, D and E in paragraph 29 of the Better and Further Amended Statement of Claim were properly struck out by the Court of Appeal.”

The three issues formulated by learned counsel for the respondents are identical to issues, 1, 2 and 5 in the appellants’ brief. I therefore do not need to repeat them.

I will start with issue 1. The issue deals with a passage in the judgment of the Court of Appeal. In his judgment Onalaja JCA who wrote the lead judgment (with which Edozie and Rowland, JJCA, concurred) held as follows:

“The capacity in which the Respondents instituted the action are as pleaded in paragraph 1 of the Statement of Claim (*supra*). As there

*was no leave granted to the respondents under the Rivers State High Court Civil Procedure Rules 1987 to prosecute the action in a representative capacity and as averred in paragraph 2 supra the action was not prosecuted by the Plaintiffs/Respondents in a representative capacity though some other averments pleaded that the action was being pursued in a representative capacity”.* B

Learned counsel for the respondents, Okocha, SAN, quite helpfully, conceded that the Court of Appeal, perhaps by an inadvertent slip or mistake, did not take notice of the Order made by Opene J (as he then was) that the Defendant/appellants be sued in a representative capacity. The Senior Advocate went further and submitted that it was settled law that failure to obtain leave to sue in a representative capacity was not fatal to and would not vitiate the validity of the action. Where there was no objection to the capacity in which the plaintiff sued and in which the defendant was sued and the suit was prosecuted in that capacity to judgment, or was capable of being so easily understood it will be presumed that leave to sue in such representative capacity was granted. Mr Okocha SAN, referred to Order IV Rule 1 High Court Rules Cap 61 Laws of Eastern Nigeria and Order II Rule 7(1) Rules of the High Court of (Rivers State). See also Chief P.O. Anatogu & Ors. V. Attorney General, East Central State & Ors. (1976) II SC 109 and Joseph Afolabi and Ors. V. John Adekunle & 1 Other (1983) 8 SC. C D E

I agree that where a representative order would have been granted had it been asked for failure to obtain it will not vitiate the action - see Bulai v. Omoyajowo (1968) 1 All NLR 72. It is not compulsory for a party wishing to sue or defend in a representative capacity to get an order of court before filing his suit. The attitude this court adopts in matters of this nature is not a rigid one. It depends on the facts and circumstances of the case. If there is evidence that the parties appear to possess representative capacity and act or presumably act on the authority of those they represent, this court does not and will not upset on a bare objection of failure to obtain the approval of the court. See Wiri and Ors. v. Wuche and Ors. (1980) 1-2 S.C.1. F G H

**It is clear from the briefs filed before the court below that**

no issue questioning the capacity to sue was raised by any of the parties. As such I agree that the decision of the Court of appeal on the issue representative capacity was obiter. Let me emphasise that the issue of representative capacity which Onalaja JCA, dealt with in his judgment, going by the Rules of court and the authorities referred to above, does not affect the final decision of this court, in this appeal.

I now move to issues No. 2, 3 & 4. I shall consider them together. The question in issue 2 there is, whether Chief Oba founded Standfast Jack House Chieftaincy stool and whether it replaced Iju/Jack House and became paramount in Iju/Jack Group of Houses? This indeed is the main issue in this appeal. The argument of learned counsel for the appellants on this issue is that during the reign of Tubofia Iju/Jack House lost all its powers and many important persons left the House and joined other families. When Gbopo (Oba) grew up he met Iju/Jack House had disintegrated. This continued for 42 years and during the interregnum Oba became very powerful. He eventually established his own War Canoe and named the stool Standfast Jack House. Learned counsel, in the appellants brief, relied on the evidence of PW1, PW2, PW3 and PW4 and a number of sundry documents tendered as exhibits during the trial to buttress his submission.

Learned counsel for the appellants tried as best as he could to show that Standfast Jack House is distinct from Iju/Jack House and that it is now the paramount stool in Iju/Jack Group of Houses. **Thus the Court of Appeal was in error to hold that Iju/Jack House is still the paramount stool in Iju/Jack Group of Houses. But the Court of Appeal had quite rightly found that the evidence adduced by the appellants before the trial High Court was contradictory.** In his judgment, Onalaja J.C.A., held;

*“In consideration of conflict of evidence of witness of parties it is material contradiction that matters not minor contradictions especially where the evidence is based on traditional history. At page 151 lines 1-3 of the record of appeal PW2 stated under cross-examination that: “Till today the Iju Jacks Group of Houses still exists in the council and that*

stool still exists.” At page 152 4<sup>th</sup> PW testified in lines 15, 30-32, at 153 line 15-20: “At the moment Chief K.L. Dagogo Jack 6<sup>th</sup> Defendant is now on that stool but the others object and that is why the case is in court,... Under the Kalabari customs when the founder of a stool dies, and his children are there one of them will succeed to the stool... Under B our custom a successor to a stool cannot change the trade name of the stool. Under cross-examination 4<sup>th</sup> PW testified that; I know of Iju/Jack but it is in dispute. There is a place in Abonnema known as Iju Jack. There are 4 paramount compounds in Abonnema. They are Manuel, C Georgewill, Iju Jack and Briggs. At page 153 lines 14 – 18 thus:- “In the Abonnema council of chiefs there is a stool reserved for the Iju Jack House but it has created trouble. Chief K.J. Dagogo sits on that stool but there is trouble over it, that is why there is this case. As at now there is no Oba Standfast Jack Stool.” D

There are sharp material contradictions in testimonies of the 1<sup>st</sup> PW on one part as against 2<sup>nd</sup> and 4<sup>th</sup> PWs whose evidence are ad idem that Iju/Jack House still exists contrary to 1<sup>st</sup> PW who stated that Iju Jack House exists as a shadow house under the umbrella of Oba Standfast E Jack House”.

**The observation of learned justice of the Court of Appeal reveal sharp contradictions in the testimonies of witnesses called by the appellants. The further one reads the testimonies of witnesses who gave evidence for the appellants before the trial court the more one can see that the people of Iju/Jack House and Standfast Jack House belong to the same chieftaincy stool.** For example at page 149 of the record, in an answer to a question during cross-examination, PW1 said; F G

“No house was created in honour of Oba. When we talk of Standfast Jack it includes we and the defendants”.

This clearly affirms the contention of the respondents that Standfast Jack House is the continuation of Iju/Jack House. Although PW1 tried to show that Standfast Jack House was distinct from Iju/Jack House but his evidence seem to confirm the averment of the respondents that the Houses are the same. See page 107 to 108 of the record where PW1 was re- H

corded to have explained the following historical fact:

*“When the Iju house disintegrated the descendants of Tubofia did not desert the place. They were living there when Oba founded the Standfast Jack House. They were happy with the new house and they voluntarily joined Oba (sic) hosue”.*

It is evident from the above excerpt, from the evidence of PW1, that the people in the House of Iju/Jack House, the descendants of Tubofia, did not scatter and joined other families as was pleaded in paragraph 11 of the Plaintiffs Statement of Claim. It should be remembered that Oba was born by fugitive Onuoha in the House. He grew up there and later became paramount chief in Iju/Jack House which is now called Standfast Jack House. It is not strange under the Kalabari custom to see the son of Onuoha succeeding to the stool of Iju/Jack House because the customary law of succession in Kalabari tradition has permitted such rulership. See the evidence of PW1 wherein he said;

*“Under the Kalabari custom, when the founder of a stool dies, and his children are there one of them will succeed to the stool. But where he has no child but has an adopted son, he can be appointed to the stool. Where the founder’s children are minors, an adopted son or a relation can succeed to the stool. If the founder has a brother, his brother must succeed to the stool before a relation”.*

Learned counsel for the appellants submitted that the court below did not look into the documentary evidence which were tendered as exhibits in the case. If it had done so it would establish that Standfast Jack is a new war canoe distinct from Iju/Jack House. He supported this submission with paragraph 3 in Exhibit P3 which reads:

*“The Standfast Jack is distinct from any other House in new Calabar, and it is one of the Senior Houses... It is one of the 4 principal Houses in Abonnema, viz – BOB – MANUEL, THE BRIGGS, THE STANDFAST JACK and the GEORGEWILL HOUSES”.*

**I have looked into all the exhibits and, with respect, what is disclosed in those exhibits has not advanced the case of the appellants any further. On the contrary, they widened the contradiction in the evidence of the appellants before the trial court. For example, some**

witnesses testified that there was still an Iju/Jack House in Abonnema and some documents said there was none. Which is to be believed? Oral evidence is admissible where it will throw light upon or assist the court in determining the probative value to be attached to a document. A/G Oyo State & 1 Or. V. Fairlakes Hotels Ltd. & 1 Or. (1989) 5 NWLR (Pt. 121) 255. The burden of proof in civil cases rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is an ancient rule founded on consideration of good sense, and it should not be departed from without reasons. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting in any circumstances whatever. If when all the evidence, by whomsoever introduced, is in, the party who has this burden has not discharged it, the decision must be against him. See Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation (1942) A.C. 154 at 174; Imana v. Robinson (1979) 3-4 SC.1. If one reads carefully the testimony of PW1, who is the leading witness of the appellants, one can see that he did not deny the existence of the Kalabari native law and custom of ‘*DUEIN WARI FAFAA*’. He however gave his own interpretation of the custom as follows: “*Whatever happens, when a man creates a family, that family is never extinct*”. I do not see the difference between this interpretation and the one given by the respondents: i.e. “*Chieftaincy house continues as long as people loyal to it are alive*”. The “*family*” which PW1 said will continue to exist is the chieftaincy family. So the interpretation of the respondents is correct. If Standfast Jack House is a new house distinct from Iju/Jack House why is the name JACK retained by Oba? In his evidence PW1 said “*we can safely say that Iju/Jack House is a Duein Wari. I agree that the interpretation given by the respondent is correct that it is a Kalabari custom that chieftaincy house continues as long as people loyal to it exist.*”

Turning to the evaluation of evidence, I agree that the

learned trial judge had not put the evidence adduced by both parties on an imaginary scale and weighed the conflicting evidence before reaching the conclusion that the appellants had proved their claim. From the analysis I have made of the evidence adduced by the appellants it is crystal clear that their claim had not been proved. Issues 2, 3 and 4 are therefore resolved in favour of the respondents.

I now move to issue 5. In dealing with this issue, Okocha SAN, conceded that the Court of Appeal was in error to have held that reliefs claimed under paragraphs 29(b) 29(d) and 29(e) were personal to the 6<sup>th</sup> Defendant/Respondent, Chief K.J. Dagogo-Jack (deceased). The contest revolved around the paramount stool of Iju/Jack House or Standfast Jack House. In the contest both the plaintiffs/appellants and the defendants/respondents will be affected by the court's decision. In this action the respondent have been sued in a representative capacity and as such any judgment obtained against them would survive the 6<sup>th</sup> respondent. I therefore agree that the court below was wrong to strike out reliefs (b) (d) and (e) in the plaintiffs/appellants' claim.

The success of the appellants in this issue has not affected the success of the respondents in the main issue, that Standfast Jack House is not distinct from Iju/Jack House and it is not paramount in Iju/Jack Group of Houses. The Court of Appeal is right to dismiss the claim of the appellants and reverse the declarations made in their favour by the trial High Court.

For the above reasons, this appeal has failed and it is dismissed. The judgment of the Court of Appeal allowing the appeal from the decision of the trial High Court and dismissing plaintiffs claims (a) and (c) is hereby affirmed. The respondents are entitled to the costs of this appeal which I assess at N10,000.00

H \_\_\_\_\_

WALI JSC

I have had the privilege of reading in advance a copy of the lead

judgment of my learned brother Mohammed JSC and I agree with his reasoning and conclusion for dismissing the appeal.

I also hereby dismiss this appeal with N10,000.00 costs to the Respondents, adopting the reasons contained in the lead judgment.

B

### OGWUEGBU JSC

I have had the privilege of a preview of the judgment just delivered by my learned brother Mohammed, JSC and I agree entirely with his reasoning and conclusions.

C

The proceedings leading to the appeal before this court commenced in the Degema Judicial Division of the High Court of Rivers State where the appellants as plaintiffs by their writ of summons filed on 16/12/85, claimed six reliefs (a) to (f) which have been set out in the lead judgment and it is not necessary for me to repeat them. Judgment was delivered in favour of the plaintiffs in the trial court and the defendants appealed to the Court of Appeal, Port Harcourt Division and that court allowed their appeal. The plaintiffs were dissatisfied with the judgment and appealed to this court.

D

E

The plaintiffs formulated the following issues for the determination of the court in the appeal:

*“1. Whether the parties sued and were sued in a representative capacity.*

F

*2. Whether Chief Oba Standfast Jack founded a new war Canoe Chieftaincy stool (House) named after himself and thus became the most senior and paramount chieftaincy stool in the Standfast Jack Group of Houses.*

G

*3. Whether the learned Justices of the Court below were justified in upholding the Defendants (sic) plea of the Kalabari native law and custom of “DUEN WARI FAFAA.”*

*4. Whether the trial judge observed the rule in Mogaji v. Odofin (1978) 4 SC 91 in writing the judgment.*

H

*5. Whether claims B, D and E in paragraph 29 of the Better and Further Amended Statement of Claim were properly struck out by the*

*Court of Appeal”*

three issues for determination were identified in the defendants’ brief. These issues correspond with the plaintiffs’ issues 1, 2 and 5. I will therefore be guided by the issues identified in the plaintiffs’ brief of argument.

Starting with the plaintiffs’ first issue as to whether the parties sued and were sued in representative capacity, Okocha, Esq. SAN, counsel for the plaintiffs at page 9 of the defendants/respondents’ brief conceded that the parties sued and were sued in representative capacity and that the position of the court below on the matter should be seen as a mistake though erroneous. He urged the court to hold that the error did not affect the final decision of the court below.

This is a necessary concession. Assuming that the concession was not made the court will not over-look the fact that the whole case from the beginning to the end including the pleadings and evidence was fought on the basis that both parties were prosecuting and defending the action in representative capacity. The judgment of the trial court was given for and against the plaintiffs and the defendants in that capacity and moreover, the title, the statement of claim and defence reflected that capacity. Even if an order to sue or be sued in a representative capacity or an amendment to reflect the capacity was not made or sought, the court will be justified in entering judgment for or against one of the parties notwithstanding such omission. *See Bulai & Or. V Omoyajowo (1968) 1 All N.L.R. 72, Dokubo & Ors. v Bob-Manuel & Ors. (1967) 1 All NLR 113 and Mba Nta & Ors. v Anigbo & Or. (1972) 5 SC, 156.* It was the court below that was in error when it held that no leave was granted to the plaintiffs to prosecute the action as required by the High Court Rules of Rivers State, when in fact, leave was given by Opene, J. as he then was. The opinion expressed by the court below on the issue of representation was purely obiter. It was entirely unnecessary for the decision of the case and was not directly upon the question before the said court. What is more, the error did not occasion any miscarriage of justice.

From the issues identified by both parties at the court below and in this court, the matters in dispute in the entire proceedings relate to the

Paramount Chieftaincy Stool of the Major Compounds or Group of Houses in Kalabari Town of Abonnema in the Akuku-Topu Local Government Area of Rivers State and the question of succession to the Stool. The plaintiffs contended that the Chieftaincy Stool is that of the STANDFAST JACK House of Abonnema otherwise known as IJU/JACK Group of Houses. B

Even though the facts of this case were lucidly set out in the lead judgment of my learned brother Mohammed, J.S.C., I should be permitted to refer to the aspects of the pleadings and evidence that will lead to a better appreciation of the points which are in issue in this judgment. C

The case of the plaintiffs is that they are the direct descendants of Oba, which is said to be known as the “*Standfast Jack House*” in or about the year 1837. They also stated that before Oba founded the said House, there was Iju/Jack who was one of the most powerful Chiefs of Kalabari during the reign of King Amachree I. The said Iju had no biological son but adopted many children which made his war canoe very famous. It was the case of the plaintiffs that when he died, his brother, Oriki succeeded him. He was himself succeeded by one of Iju’s adopted sons, Tubofia. It was their case that Tubofia’s reign was a great calamity and the Iju/Jack House collapsed and disintegrated under him. They further maintained that for about forty two years after the death of Tubofia, Iju/Jack House had no head. The interregnum continued until 1837 when Oba founded his own chieftaincy Stool which he called “*Standfast Jack House*” It was their case that the name “*Standfast Jack*” was originated by Oba, who, on creation of his own stool, adopted the said name because he said “*I stand for everything noble and honourable in Iju/Jack*” in order to preserve the memory of Iju/Jack. They also maintained that the Standfast Jack Stool is the paramount stool for the House to which they and the defendants belong, and that the Iju/Jack House had long ceased to exist and is now a mere “*shadow house*” and that only they, (the plaintiffs) are the direct descendants of Oba, who can ascend the said paramount chieftaincy stool. The plaintiffs also alleged that Oba was a descendant of Onuoha, a fugitive who escaped from an assassin’s bullet and sought refuge and protection from the Iju/Jack House D E F G H

under the reign of Tubofia. Onuoha became a member of Iju/Jack House from where he married and had three children namely, Gboba alias Oba (male), Oruguta (female) and Kaladokubo (male).

The plaintiffs' also maintained that before Oba died in or about 1868, he handed over the Standfast Jack Stool to his brother, Kaladokubo as caretaker and to manage his wealth because his children were minors. On Kaladokubo's death in or about 1883, he handed over the Standfast Jack House (Stool) to Oba's son, Chief Reuben Standfast Jack and since then only the direct descendants of Oba have aspired to and ascended the said Stool until the 6<sup>th</sup> defendant was installed as the Paramount Head of the Iju/Jack Group of Houses on 30<sup>th</sup> November, 1985. The plaintiffs therefore contended that only the direct descendants of Oba can be installed into the paramount chieftaincy stool allegedly created by Oba.

The defendants' case is that all the parties in this appeal belong to Iju/Jack House, which was founded by Iju/Jack in the Kalabari old settlement known as Old Shipping at the time of King Amachree I. The evidence given by both parties as to their genealogy is the same up to Tubofia, an adopted son of Iju/Jack. The defendants maintained that Oba succeeded Tuboia who was in turn succeeded by Kaladokubo who brought the House/Family to the new settlement now known as Abonnema in 1882. that Kaladokubo Standfast Jack was one of the four founding fathers of Abonnema who established the four Paramount Houses/Compounds in Abonnema namely, Manuel (Bob-Manuel), Georgwill, Iju/Jack and Briggs, each of the four Houses had its own Paramount Chieftaincy Stool. The defendants further maintained that the name "*Standfast Jack*" originated from Tubofia, who, during his early contact with the European Traders/Super-cargoes was dubbed "*Standfast Jack*" by the European Traders after he told them: "*I STAND FOR JACK*" which was a reference to the founder of Iju/Jack House of which he was the Head at the time.

The defendants further contended that even though the Iju/Jack House suffered some set backs it did not disintegrate and that a chieftaincy stool once created continues in existence as long as members loyal to the stool are still in existence, hence the Kalabari maxim "*Duein Wari Fafaa*."

That it was the Iju/Jack House Stool that Oba was installed to succeed Tubofia, and it was the same stool that Kaladokubo and several others after him, succeeded. That all persons in the Iju/Jack House starting from Tubofia, were adopted children as Iju/Jack had no natural child of his own, and accordingly, any of the descendent of Iju/Jack House from any of the Tubofia, Oba, Oruguta, Kaladokubo and other branches/Sub-Houses thereof, can aspire to ascend the Iju/Jack Chieftaincy Stool. That it was the same Stool on which the 6<sup>th</sup> defendant was duly and properly installed on 30-11-85 in accordance with Kalabari Native Law and Custom.

The learned trial judge in a considered judgment delivered on 30-9-93 found for the plaintiffs and granted the several declarations and orders claimed by them in paragraphs 29 (a), (b), (c), (d) and (f) of paragraph 29 of their Further Amended Statement of Claim and as stated earlier in this judgment, the defendants who were aggrieved appealed to the Court of Appeal, Port Harcourt Division and their appeal was allowed.

The second issue formulated by the plaintiffs in this appeal as to whether the court below erred in law when it held that the Iju/Jack Chieftaincy Stool and not the Oba Standfast Jack Chieftaincy Stool is the Paramount Chieftaincy Stool in Iju/Jack Group of Houses appears to me to be the main or the principal issue in this appeal. The court below meticulously reviewed the arguments of counsel for both parties as contained in the respective briefs filed by them and related the same to the respective pleadings and the evidence before the learned trial judge. It came to the conclusion that:

*“From the foregoing, there is element of merit on the attack on the judgment of the lower court, on the point. I have taken the pains to reflect portions of the pleadings of the parties above in this judgment and to state that from the pleadings the parties relied on traditional customary law of chieftaincy succession in Kalabari Kingdom and joined issues positively whether there was disintegration of the famous Iju/Jack house during the reign of Tubofia... Under our law he who asserts in the affirmative and would fail if no evidence is called has the burden under section 136 Evidence Act Cap. 112 supra to prove the assertion. There-*

fore the burden whether there was disintegration of Iju/Jack House lies on the Respondents... From the foregoing and the pleadings of the parties the issue of customary law involved in this appeal is the local and particular custom of Kalabari Kingdom in Rivers State... It is common ground that in the consideration of the Kalabari customary law of Chieftaincy succession, the Respondents relied on the evidence of 1<sup>st</sup> PW whilst the Appellants relied on 1<sup>st</sup> DW. The only independent witnesses are 2<sup>nd</sup> and 4<sup>th</sup> PWS. who were, not members of the families of the parties... The appellants contend that the evidence of 1<sup>st</sup> PW conflict on the customary law of succession ... The respondents denied that there was any conflict rather the evidence of 2<sup>nd</sup> PW and 4<sup>th</sup> PW were corroborative of the evidence of 1<sup>st</sup> PW.”

The court below referred to the evidence of PW1, PW2 and PW4 where material conflicts were shown to exist.

PW2 under cross-examination at page 151 lines 1-3 of the record of appeal stated;

“I am not a paramount chief. Till today the Ij/jack group of house still exists in the council and that Stool still exists.”

PW4 in his examination in chief and cross-examination at pages 152 from line 15 to 153 lines 15-25 of the record testified:

“At the moment Chief K.J. Dagogo-Jack (6<sup>th</sup> defendant) is now on that stool but the others object and that is why the case is in court ... Under the Kalabari custom when the founder of a stool dies, and his children are there one of them will succeed t the stool. But where he has no child but has an adopted son, he can be appointed to the stool. Where the founder’s children are minors, an adopted son or a relation can succeed to the stool. If the founder has a brother, his brother must succeed t the stool before a relation. Under our custom a successor to a stool cannot change the Trade name of the stool. I retired form the U.A.C I know of “Iju/Jack” but it is in dispute. There is a place known as Iju/Jack. There are 4 paramount compounds in Abonnema. They are Manuel, Georgewill, Iju/Jack and Briggs. In the Abonnema Council of Chiefs there is a stool reserved for Iju/Jack house but it has created trouble. Chief K.J. Dagogo sits on that stool, but there is trouble over it, that is why

*there is this case. As at now there is no Oba Standfast Jack Stool... I have heard that Oba (a grandson from adoptive line of Iju) later sat on Iju Jack Stool at the old shipping.*" (Underlinings are for emphasis).

From the above excerpts, the court below found that there were material contradictions in the testimonies of PW1 on the one hand and PW2 and PW4 on the other. The evidence of PW1 was that Iju/Jack house exists as a "shadow house" under the umbrella of Oba Standfast Jack House. The court below further found that the learned trial judge did not resolve the material contradictions in the testimonies of PW1, PW2 and PW4 and that the contradictions are crucial and incurable, particularly, the evidence of PW4 that as at now there is no Oba Standfast Jack Stool. It found merit in the complaint of the appellants (defendants) as to the existence of Iju/Jack House Stool. It finally held thus:

*"From the foregoing, the pleadings the evidence the grundnorm is Iju/Jack and was succeeded by Tubofia who during his incumbency saved Onuoha from assassins' bullet and was adopted to Iju/Jack House into which house he married and begat 3 children namely Gbobo otherwise known as Oba a male child, Orubuta (sic) female and Kaladokubo. ... The conclusion is that Iju/Jack house being the Grundnorm the Standfast Jack house is not greater than Iju/Jack House Though there was set-back in Iju/Jack as averred by the Respondents the ancestors of the Appellants did not desert the place as they were living there when Oba founded the Standfast Jack House so Iju/Jack house has not gone into oblivion or (sic) was it obliterated.... The finding is contrary to the accepted Kalabari Customary Law that on the creation of a new Stool, the creator cannot change the original trade name of the founder of the house. The finding of the learned trial judge that Iju/Jack house is shadow house is not only perverse but also was not established that such customary law exists by calling only the 1<sup>st</sup> PW1 contrary to the evidence of 2<sup>nd</sup> PW and 4<sup>th</sup> PW that there is no Standfast Jack House now in existence in Abonnema..."*

The court below considered and weighed carefully the whole evidence before the learned trial judge and did not shrink from its duty by setting it aside when it came to the conclusion that the decision was perverse. It discharged its duty which is to see whether the trial court had

committed some error. An error is perverse when the gravity necessitates the reversal of the decision of the lower court. The decision of the trial judge substantially affected the outcome of the contest. See Mogaji v. Odofin (1978) 4 SC. 91. His finding that the Iju/Jack House disintegrated and existed as a *shadow house* under the umbrella of Oba Standfast Jack House is not supported by the evidence having regard to the violent conflict in the evidence of PW1 on the one hand and PW2 and PW4 on the other. The contradictions are material in nature and crucial to the case of the plaintiffs. The court below was right in interfering with the findings. See Queen v. Ogodo (1961) 2 14 SC., Abisi & Ors. v. Ekwealoa & Or. (1993) 6 NWLR (Pt 302) 649 and Chief Evva v Chief Warri Ogodo & or. (1984) 4 SC. 84 at 88.

On a closer examination of the pleadings and evidence led by both parties, it was common ground that upon the creation of a new house the trade name cannot be changed from the original trade name of the founder of the house. This was admitted by the plaintiffs. This means that Iju/Jack House could not bear another trade name. How then did the plaintiffs come by “*Standfast jack House*”? It would amount to a change of the original trade name which the Customary Law of Kalabari does not sanction. It was therefore a Sub-House to Iju/Jack House as found by the court below.

The 4<sup>th</sup> PW. Who was an independent witness testified as follows:

*“Under the Kalabari custom when the founder of a stool dies, and his children are there one of them will succeed to the stool. But where he has no child but has an adopted son,, he can be appointed to the stool. Where the founder’s children are minors, an adopted son or a relation can succeed to the stool. If the founder has a brother, his brother must succeed to the stool before a relation.”*

The plaintiffs admitted and accepted that Oba, whom they alleged created a new chieftaincy stool, was succeeded by his brother Kaladokubo because Kaladokubo’s children were of tender age. As can be seen, the basis of succession to the chieftaincy stool and the native law and custom governing it were sufficiently established and did not need any further

proof.

There is another complaint of the plaintiffs that in Exhibit P3 and other documentary exhibits tendered by the plaintiffs, the name Standfast Jack was given as one of the Senior Houses in Abonnema and that the court below did not evaluate those exhibits. The short answer is that the court below adverted to them in its judgment. Documentary evidence is usually a very reliable piece of evidence because of its permanency and oral testimony sometimes gives meaning to it. In this case oral evidence impugned their contents. See Eholor v Osayande (1992) 6 M/W/R/(Pt. 249) 524. In section 134 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 wherein provisions are made for the exclusion of oral evidence by documentary evidence, exceptions exist whereby oral evidence may be admissible. Again oral evidence is admissible where it will throw more light upon or assist the court in determining the probative value to be attached to the documentary evidence. The learned trial judge failed to test the veracity of the facts sought to be proved by the several documents tendered by the plaintiffs against the evidence of PW2 and PW4 and thereby attached undue weight to the documentary evidence. The dictum of Niki Tobi, J.C.A. in *Udo v. Chief udom Eshiet* (1994) 8 NWLR Pt. 363 483 at 503 quoted by the plaintiffs at page 15 of their brief is with respect inapplicable to the circumstances of this case.

I will now consider the issue of the striking out of the reliefs claimed by the plaintiffs under paragraphs 29(b) and 29(e) of the Further Amended Statement of claim. Okacha, Esq. SAN in the defendants' brief once more conceded that the court below was in error to have held that the reliefs were personal to the 6<sup>th</sup> defendant now deceased. The court below was grossly in error when it struck out those reliefs. As I had stated earlier in this judgment, the matters in dispute between the parties in these proceedings relate to the Paramount Chieftaincy Stool of one of the major Compounds or Groups of Houses in Kalabari – the Iju/ Jack Stool. Both parties will be affected by the decision of the court on the matters moreso, where the action was prosecuted and defended in representative capacities. Any judgment delivered will affect the parties and their privies.

For all the above reasons and the fuller reasons contained in the judgment of my learned brother Mohammed, JSC. I find no substance in this appeal and I have no hesitation in dismissing it. The defendants are entitled to costs which I assess at N10,000.00.

B \_\_\_\_\_

**KALGO JSC**

I have had the opportunity of reading in draft the judgment just delivered by my learned brother Mohammed JSC in this appeal and I agree with him that there is no merit in the appeal. I am in full agreement with his reasoning and conclusion which I adopt as mine. I therefore dismiss this appeal with N10,000.00 costs in favour of the respondent.

D \_\_\_\_\_

**EJIWUNMI JSC**

I have had the privilege of reading in advance the judgment delivered by my learned brother Uthman Mohammed JSC. I agree with the reasons given for the conclusion he arrived at on each of the issues raised in the appeal and with his decision that this appeal should be dismissed.

For those reasons, I also adopt the judgment as my own, and the appeal is also dismissed by me. I abide also with all the consequential orders made including the order as to costs made in favour of the respondents.

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