

SUPREME COURT OF NIGERIA
6TH APRIL, 2001. SC.19/1997
CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC.

JOSEPH ADEBAYO OSAGUNNA APPELLANT
AND
1. THE MILITARY GOVERNOR OF EKITI STATE
2. THE ATTORNEY-GENERAL OF EKITI STATE
3. SECRETARY IJERO LOCAL GOVERNMENT
4. ELIJAH OLADELE AYENI RESPONDENTS
5. CHIEF INURIN ABISOYE
6. CHIEF AROWOLO EISINKIN
7. CHIEF KASUMU EJEMU

In Re:

1. CHIEF AYOOLA ADEOSUN
(The Ologun Asao of Ipoti Ekiti) APPLICANTS
2. OMOBORIOWO ADEJUWON
(On behalf of themselves and on behalf of
the Amilede Ruling House of Ipoti Ekiti)

APPEALS - Dismissal - Death of appellant - An appeal shall not be dismissed - For the mere reason that the appellant is dead (H 3)

CLAIMS - Death of a plaintiff - Application for substitution of such plaintiff - Depends on whether the claim survives the plaintiff (H 1)

PRACTICE & PROCEDURE - Substitution - Appeal - The applicants will fail - If they have not shown that they are the persons entitled to be substituted (H 2)

FACTS

The plaintiff as against the 4th defendant was the rightful suc-

cessor under the Ipoti customary law and usages to the vacant Olupoti Chieftaincy. The Chieftaincy declaration under which the 4th defendant claimed to have been validly appointed was not in accord with Ipoti age long customary law and usages. The 4th-7th defendants appealed to the Court of Appeal against part of the judgment of the trial court, the 8th defendant having in the meantime died. The plaintiff also appealed against another part of the judgment of that court. The Court of Appeal dismissed the plaintiff's cross-appeal and allowed the main appeal of the 4th-7th defendants. Strangely enough, the defendants cross-appealed against part of the finding of the Court of Appeal. The plaintiff is now dead and following the death of the plaintiff/appellant, the applicants have brought this application praying this court for an order that the applicants be substituted for the named applicant now dead to prosecute this appeal for themselves and on behalf of the other members of the Amilede descendants/branch of the Onidasa Ruling House of Ipoti Ekiti.

HELD: (Unanimously dismissing the appeal per lead ruling of **OGUNDARE JSC**)

Claims - Death of plaintiff

1. No doubt, the Plaintiff/Appellant is dead. Can there be substitution for him? This depends on whether the action survives him. I have examined his three claims, particularly the declarations sought by him in claim (1). Claim 1(vii) which sought a declaration to have his appointment approved by the State Government obviously died with the Plaintiff. Indeed, he had abandoned this claim before his death. All the other declarations in claim (1) and Claims (2) & (3) - all relate to the question whether Exhibit D accords with the Ipoti customs and usages in the appointment of the Olupoti. It is my respectful view that those claims do not die with the Plaintiff; they survive him. (p. 1095 A)

Substitution - Appeal

2. I must say at the onset that, with respect to learned Senior Advocate, I do not share his view that an inference could be drawn from the record before us that the deceased Plaintiff/Appellant prosecuted his action as a

representative of his family. At no time, therefore, could the deceased be said to be representing his own family; he was all along fighting his own cause. I do not see how the Applicants could take over the prosecution of this appeal in a representative capacity when the action was not fought in that capacity.

Not having shown, therefore, that they are persons entitled to be substituted for the deceased Plaintiff/Appellant this application of theirs must fail and it is accordingly dismissed by me. (p. 1097 A & E & 1101 G)

Appeals - Dismissal - Death of appellant

3. Before I end this ruling I need to consider the submission of learned counsel for the 4th-7th Respondents that we dismiss the appeal for the reason that the appellant is dead. I do not think we should accede to this request. First, Order 8 rule 9(5) of the Rules of this Court speaks of "*the appeal shall be struck off the hearing list*". If sub-rule (5) of rule 9 must be strictly adhered to at this stage it is both the appeal of the deceased Appellant and the cross-appeal of the 4th-7th Respondents that would of necessity be affected. Secondly, what is before us now and on which we are ruling upon is the application of the Applicants for substitution. It may well be that after delivering this ruling the 4th-7th Respondents would want to substitute someone for the deceased so that their appeal, which is crucial to the validity of the appointment of the 4th Respondent) could heard and disposed of. (p. 1101 H)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Death of a sole plaintiff - Will not cause the abatement of the suit

It is a well settled principle of law that where a sole or surviving plaintiff dies or a sole or surviving defendant also dies, provided the cause of action is such that survives, the facts of the death of both parties will not cause the abatement of the suit although the proceedings will be temporarily stayed until an order can be obtained substituting the names of such other persons for the deceased parties. (p. 1102 H)

2. *Implication of suit brought in a representative capacity*

It cannot be disputed that where an action is instituted in a representative capacity and/or against persons in a representative capacity, that action is not only by or against the named parties, they are also by and against those the named parties represent. Consequently, if all the named parties die, the action will naturally subsist on behalf of or against those represented by the deceased named parties but who have not been stated nomine. (p. 1103 G)

3. *Representative capacity - When court should amend the capacity*

In the same vein, where a plaintiff did not expressly sue in a representative capacity and there had been evidence to show he was so suing, the law is such case is that the court should aim at doing substantial justice and save multiplicity of suits by amending the capacity in which the suit is brought so as to bring it in line with the evidence. It would not matter whether or not an application for such an amendment had been applied for and obtained.

Where, however, the plaintiff made out no case in a representative capacity, such a proceeding cannot be a proper one where an amendment of the writ of summons and/or the Statement of claim can be made for that, by itself, would not cure the lack of evidence on the issue of representation. See Onwunalu Ndidi and Another v. Osademe (1971) 1 ALL N.L.R. 14 at 16. (p. 1104 B & D)

REPRESENTATION

Chief G.O.K. Ajayi, SAN (J.K. Ajayi & Miss O.T. Morohundiya With him) for the Applicants.

O. Adewale Esq. Attorney-General, Ekiti State (L.B. Ojo DCL Ekiti State with him) For 1st - 3rd Respondents.

H J.O. Disu, for 4th - 7th Respondents/Cross Appellants.

CASES REFERRED TO

Afolabi v. Adekunle (1983) 1 ANLR 470-478

Kojo Atta v. Kwaku Apawu & Ors. (1941) 7 WACA 75, 76

Dokubo v. Bob Manuel (1967) 1 ALL NLR 113 at 121

Mba Nta & Ors v. Ede Nweke Anigbo 7 Anor. (1972) 5SC. 156 at 174-175

Shelle v. Chief Asajon (1957) 2 FSC 68

B

Habib Disu v. L.W. Daniel Kalio FSC 216/1962

Nwanyieke Mbanu v. Godfrey Mbanu (1961) ANLR 679

Eyesan v. Sanusi (1984) 15 NSCC 271, 283

Obi Okonji and others v. George Njokanma (1989) 4 N.W.L.R. (Part 114) 161

C

Afolabi and others v. Adekunle and Another (1983) 2 S.C.N.L.R. 141

Onwunalu Ndidi and Another v. Osademe (1971) 1 ALL N.L.R. 14 at 16

LEAD RULING BY OGUNDARE JSC

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Following the death on 21st October 2000 of Joseph Adebayo Osugunna, the Plaintiff/Appellant, the Applicants herein brought this application praying this Court *"for an order that the Applicants be substituted for the names Appellant now dead, to prosecute this appeal for themselves and on behalf of the other members of the Amilede Descendants/ branch of the Onidasa Ruling House of Ipoti Ekiti"*. This application is supported by an-affidavit sworn to by one Adefemi Olowolaiyemo, the penultimate paragraphs of which read as follows:

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"1. That I am a member of the Amilede Descendants/branch of the Onidasa Ruling House of Ipoti Ekiti and have the authority of the family to swear to this affidavit.

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3. That I know that the Appellant however died in Abeokuta Ogun State on the 21st of October 2000 and was buried on the 8th of December 2000 in Ipoti Ekiti. A copy of the Appellant's Death Certificate is now produced and shown to me marked Exhibit 'AOI'.

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4. Although the action under appeal involved a dispute as between the Plaintiff (now deceased) and the 4th Defendant as to who was rightly entitled to be made the Olupoti of Ipoti-Etiti, a number of other vital issues were raised and contested in relation to rights of a number of

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families in relation to the Olupoti Chieftaincy title.

5. *The plaintiff claimed that only three families which formed the Amilede Descendants/families were entitled to present candidates for the Olupoti Chieftaincy whilst the 4th-7th Defendants contended that there was only one Ruling House, the Onidasa Ruling House which consisted of the five families, all of which were entitled to present candidates for the Olupoti Chieftaincy.*

6. *The plaintiff's case was that only the Asao, Emila and Ejemu families which together formed the Amilede Descendants/branches could present candidates for the Chieftaincy, the plaintiff being a member of the Asao family.*

7. *Although the plaintiff/Appellant is now dead, there remains unresolved the substantial issues which were contested between the five constituent families of the Onidasa Ruling House of Ipoti Ekiti, of which three are on the plaintiff's side whilst the remaining two are the families of the Defendant/Respondent.*

8. *That this appeal challenges the determination of the Court of Appeal that, although the Kingmakers had failed to comply with the requirements of Ipoti-Defendant/Respondent, that failure was not important.*

9. *As members of the larger number of families interested in succession to the Olupoti Chieftaincy, all the members of the deceased Plaintiff fought the action were vitally interested in the ultimate out-come of the action especially as it relates to the question whether or not the 4th Defendant has been selected in accordance with the Ipoti-Ekiti native law and custom.*

10. *It is therefore in the interest not only of the other members of the Amilede and Onidasa ruling house but also that of the whole of Ipoti-Ekiti that the issue of compliance of native law and custom be resolved on the merits.*

11. *The claims on the Writ of Summons and the pleadings of both parties show abundantly that the plaintiff's action was in reality as well as appearance, fought by him not only for him but also for and on behalf of the Amilede Descendants/Families of Ipoti Ekiti.*

12. *The deceased plaintiff had initially been unanimously chosen by the members of the Asao, Emila, Ejemu families/branches - the Amilede Descendants - as their candidate for the Olupoti Chieftaincy and thereafter authorized by the Amilede Descendants to institute the action Suit No: AK/62/88 to vindicate the rights of the family as well as his own.* B

13. *It is only by substituting the chosen representatives of the Amilede descendants i.e. the Asao, Emila and Ejemu families that the appeal can be properly re-constituted so that the real issue in controversy between the real parties to the action can be decided by the Courts.* C

14. *At a meeting of the Amilede Descendants comprising the Asao, Emila and Ejemu branches of the Onidasa Ruling House held at Asao's compound Ipoti-Ekiti on the 12th of December, 2000 the members of the families appointed the Applicants as representatives of the Amilede Descendants aforesaid, to replace and be substituted for the Plaintiff (now deceased) to prosecute the pending appeal in the Supreme Court in Suit No: SC/19/1997. A copy of the Minutes of the said Meeting is now produced and shown to me marked 'AO2'.* D E

15. *The justice of the case demands that the representatives now chosen by the Amilede Descendants/branches of the Onidasa Ruling House be now permitted to prosecute the appeal for themselves and on behalf of the Amilede Descendants/branches of the Onidasa Ruling House being the Asao, Emila and Ejemu families of Ipoti Ekiti."* F

The plaintiff/Appellant had in his personal capacity, sued the defendants/Respondents herein claiming as per paragraph 36 of his Further and Further Amended Statement of Claim -

"DECLARATION THAT: G

1. (i) *The Declaration purportedly made under S.5 (i) of the Chief's Edict 1984 as the Customary Law Regulating the selection of the Olupoti of Ipoti Chieftaincy approved on 24/12/87 registered on 24/12/87 is defective faulty and objectionable and it is not a true reflection/codification of the Customary law regulating the selection of a person to be the holder of the Olupoti Chieftaincy and should, therefore be null and void and of no effect whatsoever.* H

(ii) *All actions purported to have been taken by:*

(a) *The so called Head of the Onidasa Ruling House namely, Chief Adaramola Adesuyi, the Ejisun.*

(b) *The so called kingmakers of the Olupoti of Ipoti Chieftaincy, namely Chief's Inurin Abisoye, Arowolo Bisinkin and Zasuzu Ejesu respectively: and*

(c) *The secretary of Ijero Local Government in the purporyrf nomination and selection of one Dr. Elijah Oladele Ayeni under the provision/authority of the said declaration is unlawful, null and void and of no effect whatsoever*

(iii) *The purported selection of Mr. Elijah Oladele Ayeni as Olupoti - elect by the said so called kingmakers is unlawful, null and void and of no effect whatsoever.*

(iv) *The Asao, Emila and Ejemu Families/branches, otherwise known as Amilede houses of the Oladele Ruling House are the only and truly sons (princes) of the Onidasa Ruling House of Ipoti Ekiti and the said Ruling House that can lawfully nominate a candidate(s) for selection into the vacant stool of the Olupoti of Ipoti by the true knigmakers, the Iwarafa mefa (the Inner Council) excluding the Olupoti of Ipoti namely Chief Odofin of Ipoti, Onijiyan of Ejiyan, Odofin Ejiyan, Ajana Owa and Odofin Owa in accordance with the customary law of the Ipoti-Ekiti Community.*

(v) *The proper and true Head of the Onidasa Ruling House is Chief Asao and not Chief Ejina.*

(vi) *Thw Aworos, namely, ChiefAworokin, Aworojasin and Asalu are the true and only accredited channel of consultation with the Ifa oracle in thhe nomination and selection processes(s) of a person to fill the vacant stool of the Olupoti of Ipoti Chieftaincy.*

(vii) *The plaintiff, namely, prince Joseph Adebayo Osugunna having been unanimously, properly, duly and jointly nominated by the Asao, Emila and Ejomu (Amilade) families/branches of the Onidasa Ruling House for the vacant stool of Olupoti be approved by the Ondo State Government.*

(2) *An Order compelling the Executive Council of Ondo State*

to direct the Committee of the Ijero Local Government charged with the making of declarationd under S.I of the Chiefs Edict, 1984 to amend the said Olupoti Chieftaincy declaration or make a new declaration to relect the true customary law regulating the selection of a person to be the holder of the Olupoti Chieftaincy.

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3. AN INJUNCTION:

(i) Restraining the 1st, 2nd and 3rd derfendants by themselves or their servants and or agents or other-wise however from implementing or giving effect to thhe purported nomination and or selection of the 4th defendant, namely, Elijah Oladele Ayeni as the Olupoti of Ipoti or Oba-elect.

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(ii) Restraining the 4th defendant, namely, Elijah Oladele Ayeni from parading or holding out himself as the Olipoti Ekiti and from exercising any of the Olupoti royal functions."

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In his Further and Further Amended Statement of Claim, he averred as follows:

1. The plaintiff is a Prince of Onidasa Ruling House of Ipoti Ekiti, the son of late Deacon John Osagunwa who was himself a prince E and son of the 9th Olupoti of Ipoti Ekiti namely, Oba Arojoye otherwise known as Adeoye Agbada, Ogidan and is a candidate aspiring for nomination/selection to the vacant stool of the Olupoti of Ipoti Ekiti Chieftaincy.

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9. The plaintiff avers and will contend that the competent accredited kingmakers of the Olupoti of Ipoti Chieftaincy under the native law and custom of Ipoti-Ekiti are the members of the Inner Council excluding thhe Olupoti namely Chief Odofin Ipoti representing Ipoti quarter and two Chiefs each of the other two quarters constituting Ipoti Ekiti Community, Chief Sajiyan and Odofin Ejiiyan/both of Ejiiyan quarter, Ajana Owa and Odofin Owa both of Owa quarter. The plaintiff will rely on Bovell-jones Intelligence Report of 1936 and Morgan's verbatim Report No.181 at the trial of this suit.

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10. The plaintiff avers that the 5th, 6th and 7th defendants are not the kingmakers (Iwarefamefa) under the Ipoti Native Law and Custom and therefore acted ultra vires and without any authority whatsoever un-

der Ipoti Native Law and Custom in selecting the 4th defendant to fill the vacant stool of the Olupoti of Ipoti. The plaintiff will rely on the documents listed in paragraph 9 above.

B 11. The plaintiff avers that none of the surviving members of the said Iwarefa mefa (kingmakers) was consulted by anybody on the existing vacancy stool of the Olupoti of Ipoti.

C 12. The plaintiff will further contend that from time immemorial and in Ipoti traditional history, none of the ten past Olupotis that reigned before now emerged from the 4th defendant's house/family. Plaintiff pleads answers to questionnaire by the late Oba J. A. Ajayi Ajigunna the latest Olupoti to join his ancestors and the letter attached therewith.

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D 16. The plaintiff avers that the Onidasa Ruling House consists of three (3) branches only with a common ancestry and not five (5). These three branches are namely:-

- (a) Emila
- (b) Asao and
- E (c) Ejemu.

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F 18. The plaintiff would also contend that the 4th defendant hails from Ejisun family which is not a member of the said Amilede families of the Onidasa Ruling House. The Ejisun family from time immemorial produced the Olori Emese, meaning the Head Messenger to the Oba and whenever a holder of the said title became too old to run errands he was honoured with the minor Ejisun Chieftaincy title by virtue of which he presided as the Olori-Ebi Oba over the meetings of the Ejisun and Olomo families G both quartered within the royal Idasa Compound to facilitate the efficient and convenient performance of their services to the Oba.

H 19. The plaintiff shall contend that the Olomo family is not a member of the Amilede families of the Onidasa Ruling House. The Olomo family from time immemorial produced the Akede Oba (Oba's pilot). Chief Olomo is a minor chieftaincy with a staff of office called and known as the Omo from which, the title Olomo derived.

20. The plaintiff avers that Idasa is the Royal Compound of the

Olupoti Chieftaincy from time immemorial."

In their Further Amended Statement of Defence, the 1st-3rd Defendants/Respondents averred, inter alia, thus:

"(3) *In further answer to paragraph 1, the 1st-3rd defendants aver that the plaintiff sought nomination with Onidasa Ruling House and contested for the vacant stool of Olupoti along with the 4th defendant but lost the election so conducted by the kingmakers to the 4th defendant herein.*

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(6) *In answer to paragraphs 7 and 8 of plaintiffs claim, the 1st-3rd defendants aver that -*

(i) *The 5th-7th defendants are by history and custom, kingmakers in Ipoti.*

(ii) *The 8th defendant is a member of Onidasa Ruling House and by virtue of his position as the head of the Onidasa, he presides over the Onidasa Ruling House."*

The 4th-8th Defendants/Respondents, for their part, pleaded, inter alia, as follows:

"1. *The 4th, 5th, 6th, 7th and 8th Defendants admit paragraph 1 of the Further Amended Statement of Claim only in so as the plaintiff claims to be a Prince of the Onidasa Ruling House of Ipoti Ekiti but deny that he is still a candidate aspiring for nomination/selection to the stool of the Olupoti into which the 4th Defendant had been nominated and selected.*

2. *In answer to paragraph 5 of the Further Amended Statement of claim, the 4th Defendant states that he is a member of the Ejisun family which is a branch of Onidasa Ruling House. The 4th Defendant further states that the Ejisun family traditionally produces the Olori-Emese (meaning the 'Head of the palace administration and security') and the Ejisun who is the Head of the Onidasa Ruling House.*

5. *The 8th Defendant admits paragraph 8 of the Further Amended Statement of Claim in so far as he is a minor chief of Ipoti and states further that he is the auuthentic Head of the Onidasa Ruling House of Ipoti and also known and called Olori-Ebi Onidasa under the Ipoti*

Native law and custom. The 8th Defendant will rely on the Intelligent Report: Ijero District by Mr. T. B. Bovell-Jones dated June, 1936. The 8th Defendant will further rely on the Report of the Morgan Chieftaincy Review Commission in respect of the Olupoti Chieftaincy.

B 6. *The 4th-8th Defendants deny paragraph 9 of the further Amended Statement of Claim and state that the kingmakers for Olupoti of Ipoti Chieftaincy under the Native Law and Custom of Ipoti Ekiti are:-*

1. *Odoḡin Ipoti*
2. *Inurin Ipoti*
- C 3. *Eisaba Ipoti*
4. *Eisinkin Ipoti*
5. *Ejemu Ipoti.*

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D 14. *The 4th-8th Defendants deny paragraph 18 of the Furhter Amended Statement of claim and state that the 4th Defendant hails from Ejisun family which is a branch of Onidasa Ruling House. The Ejisun family from time immemorial produce the Olori-Emese meaning "the*
 E *Head of Palace administration and security". Whenever the post of the Ejisun becomes vacant, the incumbent Olori-Emese is elevated to the post of Ejisun who presides over any meeting of the Onidasa Ruling House which consists of the five (5) branches.*

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F 24. *The 4th-8th Defendants deny paragraphs 31 ans 32 of the further Amended Statement of claim and state that the nomination/selec-
 G tion of the 4th Defendant was in accordance with Ipoti Native law and custom as well as the procedure prescribed in the Chiefs law and guide-
 lines set out in the registered Declaration relating to the Olupoti of Ipoti.*

25. *The 4th-8th Defendants deny paragraphs 33 and 34 of the further Amended Statement of claim and state that the Ipoti Aworos do not have any preinstallation function to perform in the nomination/se-
 H lection processes of an Olupoti of Ipoti.*

26. *The 4th-8th Defendants deny paragraphs 35(a)-(e) and 36 (1)-(3) of the further Amended Statement of claim and state that the rec-
 ommended Declaration contained on page 80 of the White paper Two on*

reflection/statement of a person to the vacant stool of the Olupoti of Ipoti which was based on the totally of the evidence adduced before the Morgan Chieftaincy Review Commission on Olupoti chieftaincy on 14th November, 1978."

From the pleadings and the claims of the plaintiff two facts appear to constitute his case. First, that he the plaintiff as against the 4th Defendant, was the rightful successor, under Ipoti customary law and usages, to the vacant Olupoti chieftaincy. Secondly, that the Chieftaincy Declaration under which the 4th Defendant claimed to have been validly appointed, was not in accord with Ipoti age long customary law and usages. In this regard, it was plaintiff's contention, among others, that the Onidasa Ruling House consisted of only the three families of Emila, Asao and Ejemu, otherwise collectively known as Amilede family. The 4th-8th Defendants claimed that apart from the three families mentioned by the plaintiff, there were two other families namely Ejisun (to which the 4th Defendant belongs) and Olomo, that belonged to the Onidasa Ruling House. These are the two principal issues placed before the trial High Court and the Court of Appeal. The trial High Court held-

(1). That the Olupoti of Ipoti Chieftaincy Declaration had not been approved by the State Executive Council in accordance with the provisions of the enabling Edict and was therefore null and void.

(ii) That there is only one Ruling House of the Olupoti Chieftaincy - the Onidasa Ruling House consisting of five families and that Chief Ejisun was the head of the Ruling House.

(iii) That Ipoti native law and custom as reflected in Exhibit D requires that the name of names of the candidates of the Olupoti Chieftaincy be sent to the Aworos for consultation with the Ifa Oracle and that this custom was violated in the selection of the 4th Defendant and that his said selection was therefore null and void.

(iv) That the kingmakers are Odofin Ipoti. Chief Inurin, Chief Eisinkin, Chief Eisaba and Chief Ejemu as contende for by the Defendants.

(v) That the Olupoti Chieftaincy Declaration was defectives, null and void because

- (a) it violated the customary law of thhe Ipoti community and
- (b) it was not published as required by law; and
- (c) it was not approved by the appropriate authority.

The 4th-7th Defendants appealed to the Court of Appeal against
 B part of the judgment of the trial Court, the 8th Defendant having in the
 meantime died. The plaintiff also appealed against another part of the
 judgment of that Court. The Court of Appeal dismissed the plaintiff's cross-
 appeal and allowed the main appeal of the 4th-7th Defendants upholding
 in the main (1) that there are five families constituting the Onidasu Ruling
 C House which is the only ruling house in respect of the Olupoti chieftaincy
 and (2) that the Chieftaincy Declaration accorded with the customary law
 and usages of Ipoti. Still dissatisfied with the judgment of the Court of
 Appeal, the plaintiff appealed to this Court against the second finding of
 D the Court of Appeal. It would appear that he had abandoned his claim
 1(vii) for his appointment to be approved by the State Government. This
 is borne out by the only issue placed by the plaintiff before this Court for
 determination, that is to say:

E *"Having held that there had been a violation of the native law
 and custom of the Ipoti Ekiti in the selection of the 4th Defendant was the
 Court of Appealed entitled to uphold the validity of the said selection
 upon a ground which was founded upon a case which was completely
 F contrary to the case made by Defendants in the Court below?"*

Strangely enough the 4th-7th Defendants also cross-appealed
 against the finding of the Court of Appeal that the Chieftaincy Declaration
 was valid. Their contention is that there is a clause in the Declaration
 which is incorrect and should be expunged. Incidentally, this is the clause
 G that was not adhered to by the kingmakers before he was appointed by
 them. Both appeals have not yet been argued; I would therefore, refrain
 from commenting on their merits at this stage. Suffice it to say, however,
 that both parties have grouses, though of different nature, against the cor-
 H rectness of the Chieftaincy Declaration which all the Defendants all along
 held out to be correct. Thus, the only issue left to be finally resolved in this
 action is the correctness of the Chieftaincy Declaration relating to the
 Olupoti Chieftaincy (Exhibit D) vis-a-vis the custom and usages of the

Ipoti community.

It is with the background of this case I have narrated above that I now proceed to consider the application for substitution now before us. **No doubt, the Plaintiff/Appellant is dead. Can there be substitution for him? This depends on whether the action survives him. I have examined his three claims, particularly the declarations sought by him in claim (1). Claim 1(vii) which sought a declaration to have his appointment approved by the State Government obviously died with the Plaintiff. Indeed, he had abandoned this claim before his death. All the other declarations in claim (1) and Claims (2) & (3) - all relate to the question whether Exhibit D accords with the Ipoti customs and usages in the appointment of the Olupoti. It is my respectful view that those claims do not die with the Plaintiff; they survive him.** I say this because the Chieftaincy Declaration is not limited to the occasion of the filling of the existing vacancy in the Olupoti Chieftaincy; it is for all time. And the validity of the appointment of the 4th Defendant/Respondent - and indeed of all future appointments by the office of the Olupoti - depends on the validity of Exhibit D.

The next question now is who can be substituted for the deceased Plaintiff/Appellant? Chief G.O.K, Ajayi, SAN, while conceding that the plaintiff sued in his personal capacity, submitted that a close look at the proceedings would disclose that he was suing in a representative capacity on behalf of his family. Citing *AFOLABY V. ADEKUNLE* (1983) 1 ANLR 470-478 learned Senior Advocate submitted that once it was clear that a person was making a claim on behalf of a group, that group was the real plaintiff before the Court and the Court would treat him as suing on behalf of that group. Learned counsel submitted that in the event of the death of that person, the Court would expect the group to bring forward other names to represent the named representative who was dead.

O. Adewale Esquire, the learned Attorney-General of Ekiti State submitted on behalf of the 1st-3rd Defendants/Respondents, that the application was misconceived and should be dismissed. He observed that the deceased Plaintiff/Appellant sued in a personal capacity. Learned Attorney-General referred to Order II rule 38 of the Ondo state High Court

(Civil Procedure) Rules (applicable in Ekiti State) and submitted that only the deceased's legal representatives could successfully apply to be substituted for the deceased Appellant. He argued that as there was nothing in the affidavit in support of the application of the Applicants that they were such legal or personal representatives of the deceased, they were not entitled to the order sought. Learned Attorney-General urged us to find that at no time was the deceased Appellant representing the Applicants or the people they now too claimed to represent. He submitted that the main issue in contention between the deceased and the 4th Respondent was whether or not the deceased Appellant was entitled to have his name submitted along with those of the 4th Defendant/Respondent and others to the "Ifa" oracle for consultation. Learned Attorney-General submitted that this was a claim that could not outlive the deceased Appellant. He submitted that AFOLABI V. ADEKUNLE relied on by Chief Ajayi SAN was neither applicable nor relevant to the present case. He referred us to OTAPU V. SUMMONU (1987) 2 NSCC 677, 709 and observed that the action was not endorsed as a representative action. Finally, learned Attorney-General urged the Court to refuse the application as being incompetent and to strike out the appeal pursuant to Order 8 rule 9(2) of the Supreme Court Rules.

J. O. Disu Esquire, for the 4th-7th Defendants/Respondents submitted that the appeal was brought in a personal capacity by the deceased Appellant and referred to Order 5 rule 11 of the High Court Rules. he submitted that no inference of representative capacity by the deceased could be drawn from the record. Learned counsel observed that the 1st Applicant testified at the trial as PW6 and did not claim in his evidence that the deceased was representing his interests. Mr. Disu referred to the finding of the trial court and affirmed by the Court of Appeal that there was no Amilede ruling house but Onidasa ruling house and argued that to allow Applicants to come in the case in the manner prayed for by them would run counter to the concurrent findings of the two Courts below. He submitted that this appeal died with the deceased Appellant and cited OYEYEMI V. COMMISSIONER FOR LOCAL GOVERNMENT, KWARA STATE (1992) 2 NWLR 661, 675. He too urged us to refuse

this application and strike out the appeal.

Chief Ajayi, in a short reply, while conceding that the action was filed as a personal action, submitted that the deceased Appellant made some of his claims on behalf of his family.

I must say at the onset that, with respect to learned Senior Advocate, I do not share his view that an inference could be drawn from the record before us that the deceased Plaintiff/Appellant prosecuted his action as a representative of his family. It is clear from the pleadings and the claims that the main goal of the Plaintiff was to gain the office of the Olupoti for himself. And in so doing he had to show that he was duly selected by the family entitled so to do and was appointed by the right customary kingmakers. He had to show also that his principal rival (the 4th Defendant/Respondent) is not from the family entitled to the office of the Olupoti and thus disqualified him from holding the office. He had to show also that the kingmakers who appointed the 4th Defendant had no right or power under Ipoti customs and usages to appoint an Olupoti. It was in the process of discharging the burden on him that he had to discredit the Chieftaincy Declaration (Exhibit D) as not in accord with the customary law of Ipoti. **At no time, therefore, could the deceased be said to be representing his own family; he was all along fighting his own cause. I do not see how the Applicants could take over the prosecution of this appeal in a representative capacity when the action was not fought in that capacity.** The case of AFOLABI V. ADEKUNLE (supra) learned Senior Advocate relied on is not just apposite. In that case, the plaintiffs sued for a declaration of title to land. Both plaintiffs and defendants agreed that the original owner of the land in dispute was the Ataoja granted the land to their father, Adekunle. The defendants however contended that the land was granted by Ataoja to the Oshogbo Hausa Community whose Seriki (leader) sold it to the 1st defendant. The trial judge found as a fact that the said land in dispute was part of a larger area of land granted by the Ataoja to the father of the 1st plaintiff but that as the 1st plaintiff did not sue in a representative capacity for himself and on behalf of the Adekunle family, he non-suited him. On plaintiffs' appeal to the Court of Appeal, that Court upheld the learned trial judge's finding of

fact a to the grant to Adekunle, amended the plaintiffs' writ of summons by altering the capacity in which the 1st plaintiff sued, set aside the trial court's order of non-suit and, in its place, entered judgment for the 1st plaintiff for a declaration of title as claimed. On defendant's further appeal to this Court, this Court upheld the amendment made by the Court of Appeal. In the lead judgment of Aniagolu JSC, the learned Justice of this Court opined at page 478 of the Report:

"And so, both in his pleadings and in his evidence, the first plaintiff had admitted, and conceded, that the land in dispute and the larger area of land of which the land in dispute formed a part, belonged to him and the other children of J. F. Adekunle. There was therefore, no dispute between him and the said other children of J. F. Adekunle. Having found as a fact that the land in dispute rightly belonged to J. F. Adekunle, and, by implication, that persons entitled to the estate of the said J. F. Adekunle were the other children of F.J. Adekunle, could the court be doing justice if it failed to grant a declaration of title to the first plaintiff and the rest of the children of the said J. F. Adekunle? I think not.

It is the duty of courts to aim at, and to do, substantial justice and to allow such formal amendments, in the course of the proceedings, as are necessary for the ultimate achievement of justice and the end of litigation."

The learned Justice of the Supreme Court cited with approval GBOGBOLULU V. ITODO (1941) 7 WAACA 164, 165 and KOJO ATTA V. KWAKU APAWU & ORS. (1941) 7 WACA 75, 76 where the West African Court of Appeal laid down the circumstances under which the court should grant amendment of claim to make clear the capacity in which the plaintiff sued and the defendant was sued. Obaseki JSC at page 484 of the Report restated the law clearly. He said:

"This court has held time without number that once the pleadings and evidence show conclusively a representative capacity and the case was fought throughout in that capacity, the trial court can justifiably properly enter judgment for or against the party in that capacity, even if amendment to reflect that capacity had not been applied for and obtained See AYENI V. SOWEMIMO (1982) 5 SC.60; DOKUBO V BOB

MANUEL 91967) 1 ALL NLR 113 at 121; MBA NTA & ORS V. EDE NWEKE ANIGBO 7 ANOR. (1972) 5SC.156 at 174-175; SHELLE V. CHIEF ASAJON (1957) 2 FSC 68; HABIB DISU V. L. W. DANIEL KALIO FSC 216/1962 decided on 7th March 1964."

AFOLABI V. ADEKUNLE is concerned with the amendment of the capacity of a party and not with substitution we are concerned with in this application.

The capacity in which the deceased Plaintiff/Appellant instituted this action is not in dispute; it is in his personal capacity. The Appellants implicitly admit as much. For in paragraph 4 of the affidavit of Adefemi Olowolaiyemo in support of their application, the deponent testified that:

"Although the action' under appeal involved a dispute as between the Plaintiff (now deceased) and the 4th Defendant as to who was rightly entitled to be made the Olupoti of Ipoti-Ekiti, a number of other vital issues were raised and contested in relation to rights of a number of families in relation to the Olupoti Chieftaincy title."

The deceased Plaintiff/Appellant could not have sued in a representative capacity as his writ was not so endorsed as required by Order 5 rule 11(1)(a) of the Ondo State High Court (Civil procedure) Rules 1987, which provides:

"(1) Before a writ is issued it shall be endorsed -

(a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he is sued;"

I have earlier in this judgment decided that this appeal did not die with the deceased of learned Attorney-General and Mr. Disu in this regard. The Claim 1(vii) of the deceased Appellant which I hold died with him, is not an issue in this appeal which is concerned primarily with the validity of the Olupoti Chieftaincy Declaration. (Exhibit D). This is also the issue in the cross-appeal.

I now go back to the question: who can be substituted for the deceased Appellant? Order 8 rule 9(2) of the Supreme Court Rules provides:

"(2) If it is necessary to add or substitute a new party for the deceased an application shall, subject to the provisions of rule 11 of this

Order, be made in that behalf to the court below or to the Court either by any existing party to the appeal or by any person who wishes to be added or substituted."

The rule is silent on who is entitled to be added or substituted. I, therefore, fall back on the Rules of the trial High Court. Order 11 rule 38 of the Ondo State High Court (Civil Procedure) Rules 1987 (applicable in Ekiti State) provides:

"38. *In case of the death of a sole plaintiff, or sole surviving plaintiff, the Court may, on the application of the legal representative of such plaintiff, enter the name of such representative in the place of such plaintiff in the suit, and the suit shall thereupon proceed;"....*

This rule is in pari materia with the old Order 17 rule 4 of the Rules of the Supreme Court (England) (latterly) O.15 r.7 RSC and now part 19.8 CPR) which had come for interpretation in a number of cases. In such cases as BURSTAL V. REARON (1883) 24 chD 126; LONG V. CROSSLEY (1979) 13ch.D 38; Re Atkin's Estate (1875) 1 ch.D 82; Re Dynevor, etc. Co (1878) W.N. 199; nad Re Commercial Bank of London (1888) WN E 214, it was held by the Courts that on the death of a sole plaintiff after action brought in a case where the cause of action survives, his executor or administrator may obtain an order to carry on the proceedings.

In NWANYIEKE MBANU V. GODFREY MBANU (1961) ANLR 679,- a case not dissimilar to the case on hand - following the death of the appellant Nwanyieke Mbanu, Ephraim Nnabugwu applied to the Federal Supreme Court for leave to be substituted. The pleadings showed that the applicant had such an interest in the subject-matter of the action as might have entitled him to be added as a party to the action, and might also have entitled him to be added as a party to the action, and might also have entitled him to bring an appeal under subsection (6)(a) of section 110 of the Constitution of the Federation, 1960 (see now sub-section (5) of section 233 of the Constitution of the Federal Republic of Nigeria, 1999). The applicant did not apply to be made a party to the action; and, at the time of the appellant's death the time for appeal had expired; so that the course was then closed to him. There was no transmission of the appellant's death. The federal Supreme Court held that a person to whom a deceased

party's interest in the subject matter of proceedings has not been transmitted on the death of the party, will not, on his own motion, be substituted as a party to the proceedings in the place and stead of the deceased. In EYESAN V. SANUSI (1984) 15 NSCC 271, 283 Obaseki JSC gave an indication as to who can be substituted where a party dies. He said: B

"If the cause of action is not that survives the death of either party, appointment of a person or persons to carry on the proceeding in place of the deceased party is a necessary function of the court either of 1st instance or of appeal on application by the personal representative of the deceased or the beneficiaries of the estate or on application by represented parties or on application by the other party so that the proceedings can be brought to a close. TESI OPEBIYI V. SHITU OSHOBOJA & ANOR. (1976) 10SC. 195." C

(underlinings are mine) D

In the matter on hand, the Applicants have not shown that they are the legal or personal representatives of the deceased Osagunna nor have they shown that the latter's interest in the subject matter of the proceedings herein has been transmitted to them on his death. It may be that they and the people they now seek to represent have sufficient interest in the only issue left to be determined in the appeal to this Court. That by itself alone will not entitle them to be substituted for the deceased Appellant. As the Federal Supreme Court observed in MBANU V. MBANU, it may be that the interest of the Applicants and the people they seek to represent, in the Olupoti Chieftaincy Declaration would entitle them to be joined with the deceased Osagunna as plaintiffs in the action or to entitle them to appeal pursuant to subsection (5) of section 213 of the Constitution of the Federal Republic of Nigeria, 1979 (now section 233(5) of the Constitution of the Federal Republic of Nigeria 1999), the fact remains that they did not avail themselves of any of these rights. **Not having shown, therefore, that they are persons entitled to be substituted for the deceased Plaintiff/Appellant this application of theirs must fail and it is accordingly dismissed by me.** E F G H

Before I end this ruling I need to consider the submission of learned counsel for the 4th-7th Respondents that we dismiss the ap-

peal for the reason that the appellant is dead. I do not think we should accede to this request. First, Order 8 rule 9(5) of the Rules of this Court speaks of *"the appeal shall be struck off the hearing list"*. If sub-rule (5) of rule 9 must be strickly adhered to at this stage it is both the appeal of the deceased Appellant and the cross-appeal of the 4th-7th Respondents that would of necessity be affected. Secondly, what is before us now and on which we are ruling upon is the application of the Applicants for substitution. It may well be that after delivering this ruling the 4th-7th Respondents would want to substitute someone for the deceased so that their appeal, which is crucial to the validity of the appointment of the 4th Respondent) could heard and disposed of.

I award N1,000.00 Costs of this application to the 4th-7th Respondents only; the 1st-3rd Respondents have not filed a brief in this appeal.

E **WALI JSC**

I have had the privilege of reading before now the lead Ruling of my learned brother Ogundare, JSC just delivered and I agree with the reasoning and conclusion contained therein.

F The applicants are neither legal or personal representatives of Joseph Adebayo Osugunna, the deceased appellant, nor have they shown that the interests of the deceased appellant in these proceedings is such that it can be said to ahve been transmitted to them on his death. The application for substitution is without merit and it is hereby refused, and accordingly dismissed with costs as contained in the lead Ruling.

H **IGUH JSC**

I have had the privilege of reading in draft, the ruling just delivered by learned brother, Ogundare, J.S.C. and I am in complete agreement with him that this application is without substance and should be dismissed.

It is a well settled principle of law that where a sole or surviving

plaintiff dies or a sole or surviving defendant also dies, provided the cause of action is such that survives, the facts of the death of both parties will not cause the abatement of the suit although the proceedings will be temporarily stayed until an order can be obtained substituting the names of such other persons for the deceased parties. An order could be made with the leave of court for the action to be continued in the names of the legal or personal representatives of the parties. See Sellors v. Goode (1892) 3 L.R.Ir. 298, Laleye v. Imoru 18 N.L.R. 96. The Rules of Court in this regard do not touch upon the substantive law relating to the survival of causes of action on the death of either of the parties to an action. If the cause of action is such that terminates on the death of either party, for example, a claim in defamation, then that would be the end of the action. See Battyany v. Walford (1887) 36 Ch.D. 269, James v. Morgan (1909) I.K.B 564. But if the cause of action is such that survives, then the Rules of Court on the subject come into play.

It is plain to me that the applicants in the present application do not claim to be the legal or personal representatives of the deceased plaintiff/appellant in this straight forward action in which the dispute, as between the deceased plaintiff and the 4th defendant is primarily who was entitled to be made the Olupoti of Ipoti-Ekiti. Learned Senior Advocate for the applicants founded his application on the ground that the deceased plaintiff had filed his action and fought the same in a representative capacity for himself and on behalf and on behalf of members of the Amilede families. He therefore submitted that any of the members of the Amilede families he represented, such as the applicants, would be entitled to be substituted in place of the deceased plaintiff so that the appeal can be properly continued and the real issue in controversy between the "real parties" to the action determined by the court.

It cannot be disputed that where an action is instituted in a representative capacity and/or against persons in a representative capacity, that action is not only by or against the named parties, they are also by and against those the named parties represent. Consequently, if all the named parties die, the action will naturally subsist on behalf of or against those represented by the deceased named parties but who have not been stated

nomine. The position would appear to be the same whether it is an action on trial or on appeal. The case or appeal, as the case may be, subsists after the death of the named plaintiffs or defendants but cannot be prosecuted until living persons from those represented have been substituted for the named dead parties. See Obi Okonji and others v. George Njokanma (1989) 4 N.W.L.R. (part 114) 161.

In the same vein, where a plaintiff did not expressly sue in a representative capacity and there had been evidence to show he was so suing, the law is such case is that the court should aim at doing substantial justice and save multiplicity of suits by amending the capacity in which the suit is brought so as to bring it in line with the evidence. It would not matter whether or not an application for such an amendment had been applied for and obtained. See Mba Nta and others v. Ede Anigbo and Another (1972) 5 S.C.158 at 174 - 176, Afolabi and others v. Adekunle and Another (1983) 2 S.C.N.L.R. 141, Ayeni v. Sowemimo (1982) 5 S.C. 60 etc. Where, however, the plaintiff made out no case in a representative capacity, such a proceeding cannot be a proper one where an amendment of the writ of summons and/or the Statement of claim can be made for that, by itself, would not cure the lack of evidence on the issue of representation. See Onwunalu Ndidi and Another v. Osademe (1971) 1 ALL N.L.R. 14 at 16.

In the present case, no evidence of any representation of any group of persons or families by the deceased plaintiff was given by him or by any of his witnesses. I therefore find it difficult to accept the submission of learned Senior Advocate, Chief Ajayi, that an inference could be drawn from the records that the deceased plaintiff prosecuted his action in a representative capacity for himself and on behalf of members of the Amilede families. I cannot see my way clear in drawing such an inference. In my view, the applicants have not established that the deceased plaintiff prosecuted his action in a representative capacity for and on their behalf and the other members of the Amilede families. In the circumstance, I find myself unable to accede to the application for the substitution of the applicants in place of the named deceased appellant. This is because the sole ground for the application, that is to say, that the said applicants are unnamed parties to the suit represented by the deceased plaintiff has not been

established and is, with respect, misconceived.

Learned Senior Advocate relied heavily on the decision in Joseph Afolabi and others v. John Adekunle and Another (1983) 1 ALL N.L.R. 470 at 478 and strenuously argued that this court can still grant this application in spite of the fact the action was brought by the deceased plaintiff B in his personal capacity.

It seems to me, with respect, that the decision of this court in Adekunle's case would appear to have been grossly misunderstood. In that case, there was abundant evidence before the court that the land in dispute belonged to the 1st plaintiff and other members of Adekunle family. Both in his pleadings and in his evidence, the 1st plaintiff admitted that the land in dispute belonged to him and the other children of J. F. Adekunle. He had not claimed ownership of the land personally or to the exclusion of the other children of the said J. F. Adekunle. The question D that arose for consideration, was this. The court, have found as a fact that the land in dispute rightly belonged to the 1st plaintiff and the other children of the said J. F. Adekunle, would it be doing justice if it failed to grant a declaration of title to the 1st plaintiff and the rest of the children of the E said J. F. Adekunle even though the 1st plaintiff had sued the defendants in the wrong capacity. It was held by this court that having come to the conclusion that the 1st plaintiff had sued in a wrong capacity but had made out a case in another capacity, it would be quite proper and in the interest F of justice for the court to make the necessary amendment to the writ of summons to reflect the correct representative capacity under which the said 1st plaintiff should have sued.

The facts of the present case are distinguishable from those of the Adekunle case. In the present case, as I have already pointed out, there is G no evidence that the deceased plaintiff prosecuted his action for and on behalf of any one else and I am unable to see the relevance of the Adekunle case in the present application.

It is for the above and the more detailed reasons contained in the H leading ruling of my learned brother Ogundare, J.S.C. that I, too, dismiss this application as lacking in merit. I abide by the orders including those ass to costs therein made.

EJIWUNMI JSC

I have had the privilege of reading before now the draft of the ruling just delivered by my learned brother Ogundare JSC. It is manifest from this application that the central issue raised by it is whether the applicants could be substituted for the deceased plaintiff/appellant. As all the arguments by learned counsel have been duly considered for and against the said application, I do not need to add anything further to the well reasoned argument for the conclusion reached that the application lacks merit. I would therefore also dismiss the application for the reasons so given.

I also agree for the reasons given in the lead ruling that it can not be proper to accede to the request of learned counsel for the 4th-7th respondents that the appeal be dismissed on the ground that the appellant is dead by virtue of the provisions of Orders 8 Rules of this Court. Now the provisions of Order 8 Rule 9(5) of the Rules, plainly says that:-

"Where an appeal has been set down for hearing and the Court is or becomes aware that a necessary party to the appeal is dead the appeal shall be struck off the hearing list."

In my humble view, having regard to the facts before this Court, the appeal should be struck out and not dismissed. And I so hold. I also agree with the other orders made in the leading judgment including the order as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the ruling of my learned brother Ogundare, JSC. I agree completely with it. There is nothing I can usefully add.

H