

SUPREME COURT OF NIGERIA
28TH JUNE, 2001. SC. 163/1996
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
S. U. ONU, U. A. KALGO, S. O. UWAIFO, JJSC.

CHIEF KALADA R. I. NTEOGWUILE DEFENDANT/APPELLANT
AND
CHIEF ISRAEL U. OTUO PLAINTIFF/RESPONDENT

***APPEALS** - Reevaluation of evidence and findings - Was validly done by the Court of Appeal - In exercise of its powers - Having observed the relevant criteria (H 6)*

***APPEALS** - Reversal - Where the decision of the lower court - Is not based on the credibility of witnesses - Appeal court has a duty to reverse it - If it is satisfied that the decision was wrong (H 3)*

***COURTS** - Suo motu issues - Court was in error - To raise suo motu issues - And use it against a party - Without hearing the parties (H 4)*

***EVIDENCE** - Expert opinion - Where the writer of the opinion - Is absent as a witness - The opinion must be put - To another expert in the same field for confirmation - Before it becomes part of the evidence to be relied upon (H 2)*

***JUDICIAL PRECEDENTS** - Distinguishing - The decision in Olowu v. Olowu - Is properly distinguished from the facts of this case (H 5)*

***PLEADINGS** - Issues - Evidence - Trial judge was in error - To have based his conclusion - On facts neither pleaded nor testified to in evidence - By the parties (H 1)*

FACTS

The plaintiff now respondent originally sued one defendant - Chief Brown Brown claiming a declaration that the Okan-Ama stool is

the paramount chieftaincy stool of Unyeada town and that he the plaintiff is the present incumbent on the said stool amongst other claims. The present appellant was later joined on his application as 2nd defendant.

The 2nd defendant now appellant denied the plaintiff's claim that his family was the Royal family of Unyeada and averred that it was his own family that was the Royal family and the 1st defendant also denied the plaintiff's claim. The trial judge after close of evidence dismissed the claim whereupon the plaintiff appealed to the Court of Appeal. It unanimously allowed the appeal and set aside the decision of the trial court. The 2nd defendant has therefore appealed to the Supreme Court alone as the 1st defendant had died before judgment at the trial court.

ISSUES FOR DETERMINATION

“1. Was the Court of Appeal justified in setting aside the learned trial judge's determination that the declaration sought by the Plaintiff that Otuo Family is the Royal House entitled to produce the Okan-Ama had not been conclusively proved.

2. Not having disturbed the determination of the High Court that the plaintiff had failed to plead and prove the native law and custom which entitled the Otuo House or anyone else to be Okan-Ama of Unyeada, was the Court of Appeal entitled to grant the declaration sought by the Plaintiff.

3. Was the Court of Appeal entitled to grant the declaration sought by the Plaintiff when the High Court did not make a finding of fact on the Plaintiff's averment and evidence that saw (sic) members of the Otuo ruled Unyeada since 1827?”

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

Pleadings - Issues - Evidence

1. I have myself read paragraphs 2 and 3 of the respective pleadings and there is no where in the said pleadings where the founding of Old Unyeada was raised nor who the administrator was. As no issue was joined by the parties in their pleadings as to the founding of Old Unyeada, the court below was perfectly right in holding that the learned trial judge was in

error to have saddled the plaintiff with the burden of proving that his ancestor founded Old Unyeada. The learned trial judge was grossly in error to have relied and based his conclusion on facts which were neither pleaded nor testified to in evidence by the parties before it. He ought to have confined himself to the questions raised by the parties to the exclusion of other questions. (p. 2218 F)

Evidence - Expert opinion

2. Granted that the plaintiff tendered exhibit "C", it was no licence for the learned trial judge to comb the said exhibit and use any material that came his way as if they were facts pleaded and evidence adduced at the trial. Assuming that the parties joined issue on the founding of Old Unyeada, before the opinion expressed in Exhibit "C" could become part of the evidence which the trial court could act upon and in the absence of the writer as a witness, such opinion must be put to another expert in the same field who is a witness in the case for his confirmation. Where this is done, the opinion properly becomes part of the evidence in the case and the trial judge is entitled to consider it as such. Exhibit "C:" does not qualify as an opinion of a writer on Nigerian Law whose opinion can be cited before the courts with persuasive effect. To say the least, what the learned trial judge did with Exhibit "C" is akin to an investigation out of court. (p. 2219 B)

Appeals - Reversal

3. The court of Appeal re-heard the case on the printed record. It has the same right to come to decisions on issues of fact as well as law as the trial judge recognising the essential advantage of the trial judge of seeing the witnesses and watching their demeanours. Since the decision of the trial judge was not based on the reliability of the witnesses, the court below had a duty to reverse it having satisfied itself that that decision was clearly wrong. Having read the evidence adduced in the court of trial, I am satisfied that reversal of the findings of the trial court by the court below was right. (p. 2221 B)

Courts – Suo motu issues

4. Native law and custom pertaining to the Chieftaincy Stool was not an issue in the proceedings. None of the parties made it an issue and it was erroneous for the learned trial judge to suo motu raise the issue and without hearing from the parties on it, use it against the plaintiff. Both parties relied on traditional history and the plaintiff led traditional evidence which was not considered by the learned trial judge but which the court below considered, believed and accepted to support the declaration sought by the plaintiff. Based on the traditional evidence and documentary evidence (Exhibits “A”, “B” and “D”), the court below granted the declaration sought. (p. 2222 G)

Judicial precedents - Distinguishing

5. The decision of this court in Olowu & ors. v. Olowu & Or. Supra is wrongly interpreted by the defendant. The issue in Olowu v. Olowu centred on whether the estate of an intestate should be distributed according to Benin or Yoruba native law and custom. The plaintiffs averred that the “distribution” is most irregular and contrary to both the Yoruba custom and also the Bini custom alleged to have been invoked. They averred and undertook to prove at the trial that the estate of the deceased intestate is governed by Yoruba custom. No where in the statement of claim were the constituents of Benin native law and custom of distribution pleaded and no evidence was led by any one of the witnesses called at the trial to prove any breach of the Benin customary law of distribution. The Yoruba native law and custom was also not proved by the parties. Having regard to the state of pleadings and evidence led, this court held that a party who alleges that a particular customary law has been contravened in the doing of an act, must specifically, plead the particular provisions of that customary law which he alleges to have been breached. The facts of that case are poles apart from the facts of the instant appeal. The ratio in Olowu’s case is therefore inapplicable to this case. None of the parties pleaded or relied on any native law and custom as the basis of his case. I will again conclude this issue by holding that the court below was right to have granted the declaration

sought by the plaintiff. (p. 2223 D)

Appeals – Reevaluation of evidence and findings

6. The court below reversed the findings and conclusion reached by the learned trial judge, re-evaluated the evidence and made its own findings. B
I have earlier in this judgment said that the Court of Appeal has the same right to come to decisions on issues of fact as well as law as the trial judge. In such a situation, the appellate court must:

(i) recognise the onus on the appellant to satisfy it that the deci- C
sion of the trial judge is wrong,

(ii) recognise the essential advantage enjoyed by the trial judge in seeing the witnesses and watching their demeanours and

(iii) bear in mind that in cases which turn on the conflicting D
testimony of witnesses and belief to be reposed in them, an appellate court can never recapture the initial advantage of the trial judge who saw and believed them.

Having said that the court below was right to have interfered with the findings of the learned trial judge as they are not supported by E
the evidence, it is idle for the defendant to contend that the court below was not entitled to grant the declaration sought by the plaintiff because the trial judge did not make a finding of fact on the plaintiff's averment and evidence forgetting that those findings had been reversed. (p.2224E) F

NOTABLE POINTS OF INTEREST

ONUJSC

1. *Pleadings - The function is to eliminate surprise on the other party* G
The Appellant would appear to have become oblivious of the fact that the main reason for the insistence by the High Court on the filing of pleadings in all cases is to ascertain, with as much certainty as possible, the issues and to narrow the scope of controversy between the parties and thus prevent a surprise being sprung upon the other parties. With re- H
spect, what the Appellant is presently seeking to do is to spring a surprise on the Respondent by raising the issue of failure to plead rules of native law and custom at this final appeal stage. I take the view that had the

Appellant in fact raised this issue at the trial, the trial court would have been oblige to refuse to entertain it. (p. 2227 C)

2. Appeals - Issue is to relate to the grounds of appeal

B It is now settled law that any issue formulated in a Brief, which does not relate to the grounds of appeal is incompetent. In the instant appeal, since the issue under consideration is neither referable to any ground of appeal contained in the Notice of appeal nor in the Additional Grounds of Appeal, and no leave has been sought and obtained to argue any such ground, C I agree that the appeal is incompetent and a fortiori is unarguable. (p. 2227 F)

UWAIFO JSC

D 3. Evidence - Intelligence Report

An Intelligence Report is a public document made by a public officer and is presumed to contain a true information and is admissible in evidence. In the case of *The Irish Society v. The Bishop of Derry* 12 Cl. & F. 641 E at 668 [see 8 E.R. 1561 at p. 1573], Mr. Baron Parke said: "*In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be F concerned in such cases or not.*"

An Intelligence Report is a public document under section 109 of the Evidence Act and is receivable in evidence in appropriate circumstances and given due consideration by the court. (p. 2234 H)

G

REPRESENTATION

Chief G. O. K. Ajayi SAN with Miss T. Morohundiya for the appellant. Kehinde Sofola Esq. SAN with Lanre Ogunlesi for the respondent.

H

CASES REFERRED TO

Dipcharima & Anor. v. Ali & Anor. (1974) 1 All NLR 908 at 910
George v. Dominion Flour Mills (1963) 1 SCNLR 117

Odogwu v. Odogwu (1990) 4 NWLR (Part 43) 224
 Luigi Ambrosini Ltd. v. Bakare Tinko & Anor. (1999) 9 NLR 8
 Domingo Paul v. F. A. George (1959) 4 FSC 198
 Olowosago v. Amuda Adebajo & Ors. (1988) 4 NWLR (Part 88) 275
 Humani Ajoke v. Amusa Yesufu Oba & Anor. (1962) 1 All NLR 73 B
 Liadi Giwa v. Bisiriyu O. Erinmilokun (1961) 1 All NLR (Part 2) 294
 Ademoyega v. Igbinosun & Ors. (1969) 1 NMLR at page 13 and 15
 Odiese & Anor. v. Agho & Anor. (1972) 1 All NLR (Part 1) 175

LEAD JUDGMENT BY OGWUEGBU JSC

The plaintiff, now respondent originally sued one defendant – Chief Brown Brown - claiming a declaration that the Okan-Ama Stool is the Paramount Chieftaincy Stool of Unyeada Town, that the plaintiff is the present incumbent on the said Stool, a declaration that the defendants’ forcible installation of himself as the Okan-Ama of Unyeada on 12th January, 1980, with the aid of armed policemen is contrary to Unyeada Native Law and Custom and is therefore null and void and perpetual injunction restraining the defendant from parading himself as the Okan-Ama of Unyeada. The present appellant applied to be joined as 2nd defendant. He was accordingly joined by order of court dated 28th July, 1980. D E

Pleadings were ordered, filed and exchanged. The claim was amended with an additional relief as follows: F

“The plaintiff’s claim against the defendants is for:

(i) A declaration that the Okan-Ama Stool is the Paramount Chieftaincy Stool of Unyeada Town, and the Plaintiff is the present incumbent on the said Stool. G

(i)(a) A declaration that the Otuo House is the Royal Family of Unyeada, and entitled to produce the Okan-Ama of Unyeada.

(ii) A declaration that the Defendant’s forcible installation of himself as the Okan-Ama of Unyeada with the aid of armed Policemen is contrary to the Native Law and Custom of Unyeada and is null and void. H

(iii) N10,000.00 (Ten Thousand Naira) being general damages for trespass in that the Defendant broke into the Otuo Royal Shrine and

looted away the traditional drum called “Akama” and has polluted the Shrine.

(iv) A perpetual injunction restraining the defendant from parading himself as the Okan-Ama of Unyeada, and from continued custody of the “Akama” traditional drum”.

The plaintiff further amended his statement of claim with leave of court and the action proceeded to trial on the further amended statement of claim and the statement of defence of each of the two defendants.

After due trial on the evidence, the court of first instance found as follows:

“Finally, the claim of the Plaintiff, except the part declaring that the Paramount Chieftaincy Stool in Unyeada Town is the Okan-Ama, the other claims of the Plaintiff had not been established and are not, therefore, granted and are hereby dismissed.”

The plaintiff appealed to the Court of Appeal. That court in a unanimous judgment allowed the appeal and set aside the decision of the trial court. The court below held at pages 476 – 477 of the record of proceedings:

“As I have said *supra*, this case is tied in the main to traditional history and the aspect of custom has to do with the slaughtering of native cow and the beating of Akama drum. The appellant at the court of trial established his claim on the balance of probabilities. In the result, the two issues formulated by the respondent having been resolved against him, this appeal therefore succeeds and I therefore make the following declarations:-

(i) A declaration that the Okan-Ama Stool is the Paramount Chieftaincy Stool of Unyeada Town and the Plaintiff/Appellant is the present incumbent on the said stool.

(i)(a) A declaration that the Otuo House is the Royal Family of Unyeada, entitled to produce the Okan-Ama of Unyeada.”

The 1st defendant died at the close of the case but before judgment was delivered at the trial court. The appeal in the court below proceeded against the surviving second defendant who has now appealed to the Supreme Court against the decision of the Court of Appeal. The notice of appeal contains six grounds of appeal (pages 486 –489) and

three additional grounds were filed with the leave of court. From the grounds of appeal, three issues were formulated by the defendant for determination in the appeal.

“1. Was the Court of Appeal justified in setting aside the learned trial judge’s determination that the declaration sought by the Plaintiff that Otuo Family is the Royal House entitled to produce the Okan-Ama had not been conclusively proved.

2. Not having disturbed the determination of the High Court that the plaintiff had failed to plead and prove the native law and custom which entitled the Otuo House or anyone else to be Okan-Ama of Unyeada, was the Court of Appeal entitled to grant the declaration sought by the Plaintiff.

3. Was the Court of Appeal entitled to grant the declaration sought by the Plaintiff when the High Court did not make a finding of fact on the Plaintiff’s averment and evidence that saw (sic) members of the Otuo ruled Unyeada since 1827?”

Subject to some reservations, the plaintiff adopted the above three issues formulated by the defendant.

The facts of this case may be briefly stated. The plaintiff initially instituted the action leading to this appeal against one defendant – Chief Brown Brown. The claim against the said Chief Brown has been set out above. The present appellant became aware of the proceedings, sought and obtained leave of court to be joined as 2nd defendant. On being joined, the 2nd defendant in his statement of defence claimed that his family, the Nteogwuile Family is the Royal Family of Unyeada and entitled to provide the Okan-Ama. The 1st defendant denied the plaintiff’s claim and maintained that what had occurred on 12th January, 1980 was not an installation of himself as Okan-Ama of Unyeada but a celebration of his appointment and recognition by the Rivers State Government as the Clan head of the entire Unyeada Clan. The 2nd defendant lent support to the contention of the 1st defendant that the latter was never installed Okan-Ama of Unyeada as claimed by the plaintiff and that the 1st defendant only celebrated his recognition as a Clan Head of the entire Unyeada by the Rivers State Government.

While on the summary of the facts of the case, paragraphs 2, 3, 4 and 5 of the further amended statement of claim and the corresponding paragraphs of the statement of defence of the 2nd defendant throw more light on the main contentions of the parties. The said paragraphs of the pleadings are as follows:

Further Amended Statement of Claim

"2. The Otuo House is the Royal family of Unyeada. King Otuo was the King of old Unyeada. He lived between 1770 and 1849. In a War with Bonny in 1926, old Unyeada fell and King Otuo Ogbalakon moved across the river and founded the present Unyeada Town. Since the founding of the present Unyeada Town in 1827, Otuo lineage has been the royal lineage and all the rulers of Unyeada have come from the Otuo Royal Family. These facts are supported by documentary evidence, and the Plaintiff will rely on the following documents at the trial to prove these facts...

3. King Otuo Ogbalakon died in 1849 and since then, the following descendants of his have ruled Unyeada.

Chief Ogbilikama Eyewa Otuo II

Chief Otuile Otuo III

Chief Uko Otuo IV

Chief Ikwuruyok Otuo V

Chief Ekon Otuo VI

Chief Gwenden Otuo VII

4. When Chief Gwenden Otuo VII won the battle to royalty against Chief Ibiambo, he was traditionally installed as Okan-Ama of Unyeada in 1929... Chief Gwenden Otuo VII died in 1942 and was succeeded by Chief Fredrick Otuo VIII who ruled until 1972 when he died.

5. on 23rd April, 1977, the Plaintiff was installed as King Otuo IX, Okan-Ama of Unyeada. The installation is published with photograph at page 13 of the Nigerian Tide of May 3, 1977 and will be relied on at the trial... A feature of the crowning of the King of Unyeada is the slaughter of a native cow; and this was done when the plaintiff was installed.

Statement of Defence of 2nd Defendant

"2. The 2nd Defendant denies paragraph 2 of the amended statement of claim in its entirety and states further that Otuo House is never and can never be the Royal Family of Unyeada and Otuo was never known as a King in Unyeada, neither was any of his descendants made King or called a King of Unyeada. That he had a War against hostilities in days of yore if at all he did, would not without more make him Okan-Ama of Unyeada. B

2. Paragraph 3 of the amended Statement of Claim is denied, and the 2nd Defendant avers that the Royal Family of Unyeada is the Nteogwuile Family and lineage runs thus:.....

4. The 2nd Defendant denies paragraph 4 of the Plaintiff's amended C

Statement of Claim, and in further answer, says that Chief Ibiambo Ebirien Afi Nteogwuile won the battle to royalty and became Okan-Ama the XIII of Unyeada till he died...

5. The 2nd Defendant denies paragraph 5 of the amended Statement of D

Claim. In further answer to the same, the 2nd Defendant avers that on the inclusion of Western Indoni to the Rivers State in 1976 by the Military Government, the Nteogwuile family wrote a letter dated 24th day of January, 1977, to the Rivers State Government reporting of the dispute E

in the Okan-Ama Stool of Unyeada Town. The letter shall be founded upon..."

ISSUE NO. 1

Coming back to the issues identified in the defendant/appellant's brief, Chief Ajayi, SAN complained of various findings of the court below. F

The main complaints are on whether the founding and rulership of Old Unyeada was an issue on the pleadings, whether evidence on matters not pleaded by the defendant was admissible and whether the trial court based its decision on findings not supported by evidence. The court below held G

that the founding and rulership of old Unyeada are not issues between the parties since the fact of the founding of Old Unyeada and who ruled it was not pleaded by the defendant and evidence on that cannot be sued against the plaintiff. H

It was the contention of Chief Ajayi, SAN that in paragraph 2 of the statement of defence of the 2nd defendant, the kingship of the plaintiffs was denied and put in issue and the court below was therefore in

error in supposing that the origins of Otuo House and its position as the only lineage or family which had always ruled Unyeada was not in issue. As to whether the evidence on matters not pleaded by the defendants that Nteogwuile was the ruling House of Unyeada showed that Ogbalakons
B could not have been King of Old Unyeada and disproves the impression created by paragraph 2 of the statement of claim that Otuo lineage commenced from Ogbalakon's Kingship of Old Unyeada. In the circumstances, evidence tending to disprove the impression is relevant and admissible as a rebuttal of a fact pleaded by the opposite party. He cited the
C case of Bamgboye v Olanrewaju (1991) 4 NWLR (Pt. 184) 132 at 155. On whether there was no evidence before the High Court upon which the learned trial judge based his findings that the Old lineages re-established themselves in new Unyeada, Chief Ajayi submitted that the evidence to
D that effect was provided by the plaintiff himself in Exhibit "C" which he produced in evidence.

In reply to issue (1) Mr. Sofola, SAN submitted in the defendant/respondent's brief that after the re-evaluation of evidence led in the
E trial court which is within the competence of the court below, that court from the totality of evidence came to the conclusion that the findings of fact by the learned trial judge are not supported by the evidence placed before him and the decision based on those findings is perverse. The
F learned Senior Advocate of Nigeria also submitted that the case made by the plaintiff before the trial court is that Otuo Ogbalakon was the King reigning in Unyeada in 1826, that there was a war in which the town's army was defeated, their King abandoned the town and founded another town which he named Unyeada and to avoid confusion, people began to
G refer to the earlier town as Old Unyeada and the new one as simply Unyeada, that this was about 1827 and since then, it is only the descendants of Otuo Ogbalakon that have been reigning in the new Unyeada and that according to the case made by the plaintiff, both on the pleading and
H on the evidence, the question, who founded Old Unyeada and how Otuo Ogbalakon came to be the war leader and ruler in about 1826 to 1827 are irrelevant. Learned Senior Advocate of Nigeria pointed out that in his evidence in chief, the defendant told the court that "Nteogwuile is the

founder of Unyeada” and thereafter gave the names of persons who he alleged had been Kings of Unyeada without stating the periods they reigned.

On whether evidence on matters not pleaded by the defendant was admissible, it was submitted that plaintiff tendered Exhibit “C” in support of his contention that it was his ancestor Otuo Ogbalakon that founded the new Unyeada but the learned trial judge in writing his judgment quoted a long passage from Exhibit “C” and based on the passage, came to the conclusion that Otuo was not the founder of the Old Unyeada and not King at Old Unyeada as if the author of Exhibit “C” was a witness. It was submitted that in doing that, the trial judge breached the rule against hearsay evidence. The court was referred to Aguda on Law and Practice Relating to Evidence in Nigeria 2nd edition paragraph 9.11 p.158.

As to whether the trial court based its decision on findings not supported by evidence as found by the court below, it was submitted that the court below is right in holding that there was no evidence in support of the learned trial judge’s finding that the old lineages even if they re-established themselves in the new Unyeada, continued to rule in the new town and that the finding of the learned trial judge has its foundation in Exhibit “C”, a book containing a purported research findings of the author who was not called as a witness to test the veracity and authenticity of his finding and that the defendant wrongly labelled page 83 of Exhibit “C” as evidence.

There are other minor complaints by the defendant on the findings of the court below and these will be dealt with while considering core sub-issues argued above.

The court below re-evaluated the evidence led at the trial court and held that the findings of the learned trial judge are not supported by the evidence placed before him and that his decision based on those findings is perverse. It proceeded to make the following findings:

1. That plaintiff’s case was not based on the founding of Old Unyeada and that neither party claimed to have founded Old Unyeada in the pleadings.
2. That the plaintiff’s claim was that at the time Old Unyeada was destroyed Otuo Ogbalakon was its King and when it was destroyed, he

founded a new Unyeada which he ruled until his death and ever since then, his descendants have ruled Unyeada.

3. That none of the parties made the founding of Old Unyeada part of his case and that no evidence was led in support of the founding of Old

B Unyeada.

4. That the learned trial judge was in error to have extracted from Exhibit “C” the founding of Old Unyeada because the product of that exercise is at variance with the pleadings and evidence before him.

C 5. Therefore, the founding of Old Unyeada and its administration were not raised in the pleadings and as such not an issue between the parties.

The learned trial judge in his judgment quoted extensively from Exhibit ‘C’ (p. 82 from line 10 to p. 83 lines 1 – 11). From the extract, the learned trial judge made the following findings:

D *“From this (Exhibit “C”) it is clear that Otuo was not the founder of the Old unyeada and, in fact, was not the King at Old Unyeada. The administrator was one who founded Oyerile lineage which is but Nteogwuile lineage and from that lineage or connected with it, was the*
 E *founder of Old Unyeada. No doubt also that Otuo Ogbalakon was the founder of new Unyeada but the old lineages re-established there. If they re-established there, then the administrator was, thus, one from Oyerile lineage or Nteogwuile lineage. The plaintiff’s assertion and proof was*
 F *thus, partially true and partially false. False in that they were not administrator of the Village in Old Unyeada but founded new Unyeada.”*

I have myself read paragraphs 2 and 3 of the respective pleadings and there is no where in the said pleadings where the founding of Old Unyeada was raised nor who the administrator was.

G **As no issue was joined by the parties in their pleadings as to the founding of Old Unyeada, the court below was perfectly right in holding that the learned trial judge was in error to have saddled the plaintiff with the burden of proving that his ancestor founded Old**
 H **Unyeada. The learned trial judge was grossly in error to have relied and based his conclusion on facts which were neither pleaded nor testified to in evidence by the parties before it. He ought to have confined himself to the questions raised by the parties to the**

exclusion of other questions. See Ochonma v. Unosi (1965) NMLR 321, Aermacchi SPA & Ors. v AIC Ltd (1986) 2 NWLR (Pt.23) 443, African Continental Seaways Ltd. v Nigerian Roads & General Workers Ltd. (1977) 5 SC. 235 at 248, Overseas Construction Co. Ltd v. Creek Enterprises Nig. Ltd. & Or. (1985) 12 SC 158 at 164 and Kuti v. Balogun (1978)1 SC.5.

Granted that the plaintiff tendered exhibit “C”, it was no licence for the learned trial judge to comb the said exhibit and use any material that came his way as if they were facts pleaded and evidence adduced at the trial. Assuming that the parties joined issue on the founding of Old Unyeada, before the opinion expressed in Exhibit “C” could become part of the evidence which the trial court could act upon and in he absence of the writer as a witness, such opinion must be put to another expert in the same field who is a witness in the case for his confirmation. Where this is done, the opinion properly becomes part of the evidence in the case and the trial judge is entitled to consider it as such. See Concha v. Murieta (1889) Ch. D.543 at 554 and R. v. Somers (1963) 3 All E. R. 808. Exhibit “C” does not qualify as an opinion of a writer on Nigerian Law whose opinion can be cited before the courts with persuasive effect. To say the least, what the learned trial judge did with Exhibit “C” is akin to an investigation out of court.

There is also no averment or evidence to support the finding of the trial judge that old lineages which had been administering he old town re-established themselves in the new town and therefore, continued to administer or rule in the new town. The plaintiff both in his statement of claim and evidence maintained that since the founding of the present Unyeada town in 1827, Otuo lineage has been the Royal lineage and all the rulers of Unyeada have come from the Otuo family. With the death of Otuo Ogbalakon in 1849 and since then his descendants have ruled Unyeada from Chief Eyewa Otuo II to Chief Gwenden Otuo VII who was installed as Okan-Ama in 1929 when he died. The plaintiff succeeded him and was installed as King Otuo IX, Okan-Ama of Unyeada in 1977. PW2 (Frank Waribo Eneyor) a man of over eighty years of age

testified for the plaintiff. Part of his evidence went thus:

“I am a native of Unyeada and I live at Otibok with my father Chief Waribo. I know the history of Unyeada and I can say those I saw when I grew up. The present seat of Unyeada was founded by Chief Otuo Ogbalakon. The Otuo family is the Royal Family right from origin. The 1st King of the present Unyeada is Otuo Ogbalakon. The first son Ogbilikana Eyewa Otuo, succeeded him... Then Gwenden took over from him. Then followed by Fredrick Otuo and after him comes Israel U. Otuo. No one outside the Otuo family had ever been King of Unyeada.”

His evidence was in line with the line of succession pleaded by the plaintiff in paragraph 2 of the statement of claim. He narrated how the installation was carried out with the slaughtering of native cow by the plaintiff and the beating of the talking drum (Akan-Ama). He was not shaken by the long and rigorous cross-examination of counsel for both defendants. PW.3, PW4 and PW.5 testified for the plaintiff. On the cumulative effect of the evidence of these witnesses the court below said:

“It should be noted that PW2, a man of over 80 years personally knew three of the previous Kings from Otuo House before the appellant and he played a role in the installation of the appellant as the oldest man, came from Otibok compound according to his testimony... PW3 another citizen of Unyeada from Etekan compound also testified for the appellant... The evidence of PW4 corroborated that of the appellant that Otuo was King of both Old and New Unyeada and his family is the Royal family... Again, there was the evidence of PW5 a chief from the neighbouring village of Asarama to the effect that the Head of Otuo family is the Okan-Ama... These pieces of evidence are corroborated by Exhibits “A”, “B” and “D” tendered by the appellant.”

Turning to the case of the defendant, the court below said:

“There is no evidence that the Respondent traced his claim to the Okan-Amaship of Unyeada to their ancestor at Old Unyeada and there is no such evidence in the record of proceedings. The Respondent merely claimed that Nteogwuile was the King of Unyeada town and gave a list of rulers. He did not plead what he did to acquire the Kingship. See paragraph 3 of the Defendant’s Statement of Defence.”

There was no dispute on the evidence before the trial judge that Otuo Ogbalakon was the founder of the present Unyeada. He failed to make a specific finding that the founder of the new Unyeada started its rulership and since the death of its founder, persons of his lineage have ruled Unyeada. He also failed to make a specific finding as to who was the ruler of the Old Unyeada if it was not Otuo Ogbalakon at the outbreak of war with Bonny in 1826. B

The court of Appeal re-heard the case on the printed record. It has the same right to come to decisions on issues of fact as well as law as the trial judge recognising the essential advantage of the trial judge of seeing the witnesses and watching their demeanours. Since the decision of the trial judge was not based on the reliability of the witnesses, the court below had a duty to reverse it having satisfied itself that that decision was clearly wrong. See *The Queen v. Ogoto (1961) NSCC 311* and *Powell & Wife v. Streatham Manor Nursing Home (1935) A.C. 243 at 255*. Having read the evidence adduced in the court of trial, I am satisfied that reversal of the findings of the trial court by the court below was right. D E

ISSUE NO. 2

The second issue canvassed in the defendant/appellant's brief is that the court below did not disturb the finding of the learned trial judge that the plaintiff failed to plead and prove the native law and custom which entitled the Otuo House or anyone else to be Okan-Ama of Unyeada and that the court below should not have granted the declaration sought by the plaintiff. F

The learned trial judge introduced the issue of custom in his judgment when he held as follows:- G

"The nature of this case, the Okan-Amanship of Unyeada is a Stool that is tied with the native law and custom. Chieftaincy institution is deep rooted in the peoples custom and as such will involve the native law and custom of the people. It is, therefore, my view that for the plaintiff to succeed in his claim, he has to aver facts which, under the said native law and custom, entitled him to the Stool." H

In its own judgment, the court below made the following find-

ings in relation to the issue of native law and custom raised by the trial judge:

“After a perusal of the above quoted pleadings of the appellant, I am not in doubt that what the appellant pleaded is traditional history and not custom in the true sense of it. The appellant quite apart from documentary evidence also adduced traditional evidence in proof of his traditional history. He who asserts must prove...”

In F. M. Alade vs. Lawrence Awo (1975) 4 S.C 215 at 223 – 224, the Supreme Court had this to say about traditional evidence:-

‘... More often than not, the rights which parties seek to establish by traditional evidence are such as had existed outside living memory. It is therefore, recognised that the witnesses who are called upon to give traditional evidence would not necessarily be in a position to give an eye-witness account. Such witnesses cannot speak from personal knowledge; they merely repeat the story which their ancestors had told them. Our legal system, in its wisdom, allows such evidence, most probably, in view of the fact that much of our past is practically unrecorded.’ The above quoted statement of Supreme Court is apposite to the kind of evidence led by the appellant in proof of his case at the lower court.”

The court below went on at page 476 and held as follows:

“The onus is on a plaintiff in a claim for chieftaincy declaration to prove that the claimant of the title was validly nominated and installed in accordance with the customary or traditional history relating to the chieftaincy...”

As I have said supra, this case is tied to traditional history and the aspect of custom has to do with the slaughtering of native cow and the beating of Akama drum. The appellant at the Court of trial established his case on the balance of probabilities.”

(The underlining is for emphasis)

Native law and custom pertaining to the Chieftaincy Stool was not an issue in the proceedings. None of the parties made it an issue and it was erroneous for the learned trial judge to suo motu raise the issue and without hearing from the parties on it, use it against the plaintiff. Both parties relied on traditional history and

the plaintiff led traditional evidence which was not considered by the learned trial judge but which the court below considered, believed and accepted to support the declaration sought by the plaintiff. Based on the traditional evidence and documentary evidence (Exhibits “A”, “B” and “D”), the court below granted the declaration sought. B

It was contended in the defendant/appellant’s brief that courts have held that where a party’s claim is based on entitlement under any native law and custom, that party must plead and prove that native law and custom. Reliance was placed on *Olowu v. Olowu* (1985) 3 NWLR C (Pt. 13) 372. It was therefore submitted that the determination of the learned trial judge that the plaintiff failed to plead and prove a material fact not having been disturbed by the court below, the same stands as one reason why the plaintiff’s claim failed. D

The decision of this court in *Olowu & ors. v. Olowu & Or.* Supra is wrongly interpreted by the defendant. The issue in *Olowu v. Olowu* centred on whether the estate of an intestate should be distributed according to Benin or Yoruba native law and custom. E The plaintiffs averred that the “distribution” is most irregular and contrary to both the Yoruba custom and also the Bini custom alleged to have been invoked. They averred and undertook to prove at the trial that the estate of the deceased intestate is governed by F Yoruba custom. No where in the statement of claim were the constituents of Benin native law and custom of distribution pleaded and no evidence was led by any one of the witnesses called at the trial to prove any breach of the Benin customary law of distribution. G The Yoruba native law and custom was also not proved by the parties. Having regard to the state of pleadings and evidence led, this court held that a party who alleges that a particular customary law has been contravened in the doing of an act, must specifically, H plead the particular provisions of that customary law which he alleges to have been breached. The facts of that case are poles apart from the facts of the instant appeal. The ratio in *Olowu*’s case is therefore inapplicable to this case. None of the parties pleaded or

relied on any native law and custom as the basis of his case. I will again conclude this issue by holding that the court below was right to have granted the declaration sought by the plaintiff.

ISSUE NO. 3

B Whether the Court of Appeal was entitled to grant the declaration sought by the plaintiffs when the High Court did not make a finding of fact on the plaintiff's averment and evidence that several members of Otuo House ruled Unyeada since 1827.

C It was submitted in the appellant's brief that the learned trial judge made no finding of fact on disputed issue, that the main and the only pillar upon which the plaintiff rested his case was the fact that his ancestors had ruled in new Unyeada. That once he failed to secure a finding of fact upon which the declaration could be founded, the declaration could not stand. In the plaintiff's brief, it was submitted that the defendant is in error in the above submission and that the law is that where there is ample evidence and the trial court failed to evaluate it and make proper findings of fact unless, the matter rests on credibility of witnesses in which case a retrial may be ordered.

The court below reversed the findings and conclusion reached by the learned trial judge, re-evaluated the evidence and made its own findings. I have earlier in this judgment said that the Court of Appeal has the same right to come to decisions on issues of fact as well as law as the trial judge. In such a situation, the appellate court must:

- (i) recognise the onus on the appellant to satisfy it that the decision of the trial judge is wrong,
- G (ii) recognise the essential advantage enjoyed by the trial judge in seeing the witnesses and watching their demeanours and
- (iii) bear in mind that in cases which turn on the conflicting testimony of witnesses and belief to be reposed in them, an appellate court can never recapture the initial advantage of the trial judge who saw and believed them.

Having said that the court below was right to have interfered with the findings of the learned trial judge as they are not supported by

the evidence, it is idle for the defendant to contend that the court below was not entitled to grant the declaration sought by the plaintiff because the trial judge did not make a finding of fact on the plaintiff's averment and evidence forgetting that those findings had been reversed.

I have reproduced several passages of the findings and conclusions of the court below in this judgment. In coming to its conclusion, the court below believed and accepted the traditional evidence of the plaintiff, his witnesses – PW 2, PW3, PW4 and PW5 which corroborated one another and in turn, all corroborated exhibits “A”, “B” and “D”. Based on the findings of the court below on the evidence tendered by the plaintiff, the result is a rejection of the case put up by the defendant.

For the foregoing reasons, the appeal lacks merit and I hereby dismiss it and affirm the decision of the Court of Appeal, Port Harcourt Division delivered on 26th March, 1996. The plaintiff will have costs of N10,000.00

BELGORE JSC

I read in advance the judgment of my learned brother, Ogwuegbu JSC with which I am in full agreement. For the reasons fully set out in the said judgment I also find no merit in this appeal and I dismiss it with N10,000.00 costs to respondent against the appellant.

ONU JSC

I had the opportunity of reading before now the judgment of my learned brother Ogwuegbu, JSC just delivered. I am in entire agreement with him that the appeal lacks merit and ought therefore to fail.

The three issues, which eventually came to be identified for our determination by either party to the case read as follows:

1. Was the Court of Appeal justified in setting aside the learned trial Judge's determination that the declaration sought by the Plaintiff that the Otuo Family is the Royal House entitled to produce the Okan-Ama had not been conclusively proved.
2. Not having disturbed the determination of the High Court that

the Plaintiff had failed to plead and prove the native law and custom which entitled the Otuo House or anyone else to be Okan-Ama of Unyeada, was the Court of Appeal entitled to grant the declaration sought by the Plaintiff?

B 3. Was the Court of Appeal entitled to grant the declaration sought by the Plaintiff when the High Court did not make a finding of fact on the Plaintiff's averment and evidence that several members of the Otuo House ruled Unyeada since 1827?

C As I consider the learned trial judge to have rambled and to have gone into issues not strictly canvassed before him in his judgment and that all told, I cast my lot with the court below as unimpeachable when he tried the case, I only wish to expatiate on issue No. 2 whose complaint on pain of repetition, is as follows:

D *"Not having disturbed the determination of the High Court that the Plaintiff had failed to plead and prove the native law and custom which entitled the Otuo House or anyone else to be Okan-Ama of Unyeada, was the Court of Appeal entitled to grant the declaration sought by the Plaintiff?"*

The issue is based entirely upon that part of the judgment of the learned trial Judge wherein he observed:

F *"The nature of this case, the Okan-Amaship of Unyeada is a stool that is tied with the native law and custom. Chieftancy institution is deep rooted in the people's custom and as such will involve the native law and custom of the people. It is therefore, my view that for the Plaintiff to succeed in his claim he has to aver facts which under the said native law and custom, entitles him to the Stool. A clear look at the further Amended Statement of Claim will show in paragraphs 2,3, and 4 of the averments. The Plaintiff merely averred that his ancestor, Otuo, was the King of Unyeada and the founder of the new Unyeada. It is clear from the evidence and the Exhibits tendered that Otuo was not the King of the old Unyeada but was the founder of new Unyeada. There is no averment that the founder of a place is, by their custom, the Paramount Chief or Okan-Ama. If this is the custom, it was not averred and was not proved".*

In the first place, nowhere in the record of proceedings of the court below, was this matter raised, argued and determined by the court. For that reason I uphold the Respondent's submission that the issue should not be allowed to be argued. Even in the trial court the matter was never in controversy. Moreover, it would have amounted to a serious misdirection had the trial court put into consideration the issue now raised but which was not raised on the pleadings. See *Dipcharima & Anor. v. Ali & Anor.* (1974)1 ALL NLR 908 at 910; *Kachikwu Farms Ltd. v. Attorney-General Bendel State* (1986)1 NWLR (Part 19) 695 at 701 and *George v. Dominion Flour Mills* (1963)1 SCNLR 117. Had the appellant wanted to make an issue of it, he would have raised it by his pleading. The Appellant would appear to have become oblivious of the fact that the main reason for the insistence by the High Court on the filing of pleadings in all cases is to ascertain, with as much certainty as possible, the issues and to narrow the scope of controversy between the parties and thus prevent a surprise being sprung upon the other parties (See Odogwu v. Odogwu (1990)4 NWLR (Part 43)224). With respect, what the Appellant is presently seeking to do is to spring a surprise on the Respondent by raising the issue of failure to plead rules of native law and custom at this final appeal stage. I take the view that had the Appellant in fact raised this issue at the trial, the trial court would have been obliged to refuse to entertain it. See *Luigi Ambrosini Ltd v. Bakare Tinko & Anor.* (1999)9 NLR 8; *Domingo Paul v. F. A. George* (1959)4 FSC 198; *Hunmani Ajoke v. Amusa Yesufu Oba & Anor* (1962)1 All NLR 73 and *Adegbenor v. Attorney-General of the Federation & Ors.* (1962)1 All NLR 428 FSC. It is now settled law that any issue formulated in a Brief, which does not relate to the grounds of appeal is incompetent. See Alhaji Chief Abu Momodu & Ors. v. Alhaji A. G. Momoh and Anor.(1991)1 NWLR (Part 169) 608 at 620-621 and Olowosago v. Amuda Adebajo & Ors. (1988) 4 NWLR (Part 88) 275. In the instant appeal, since the issue under consideration is neither referable to any ground of appeal contained in the Notice of appeal nor in the Additional Grounds of Appeal, and no leave has been sought and obtained to argue any such ground, I agree that the appeal is incompetent and a fortiori is unarguable.

The Appellant has submitted that the failure of the Respondent to plead the native law and custom should have resulted in the dismissal of his appeal at the court below, citing in support of the proposition the case of Olowu & Ors. v. Olowu & Anor. (1985) 3 NWLR (Part 13) 372; also reported at (1985) 12 SC. 84. As succinctly put at paragraph 9.04 of the Appellant's Brief;

"But our courts have held repeatedly that where a party's claim is based upon settlement under any native law and custom, he must plead that native law and custom. See Olowu v. Olowu (1985) 3 NWLR (Part 13) 372. Failure to do so in this case was fatal to the Plaintiff's case, and the Court of Appeal should have so held."

I share the Respondent's view that this submission is misconceived and unsustainable, it being due to an erroneous interpretation of the decision of the Supreme Court in the case cited in support therefore adding, that it is the Respondent's wish to point out that it was he who raised the issue in Particulars of Error in one of his grounds of appeal to the effect that:

"As neither party to the case based its claim to royalty on a particular native law and custom, it is not open to the court suo motu to raise the issue of native law and custom which is not raised by the parties in their pleadings or evidence."

The Appellant in the instant case, it is contended, has not pointed out in the judgments by the learned Justices of the Court below where any or all of them based their decision on any plea based on the existence of any native law and custom. It has been held in cases such as Laidi Giwa v. Bisiriyu O. Erinmilokun (1961) 1 All NLR (Part 2) 294 at Oloto v. Dawodu 1 NLR 57; Ademoyega v. Igbinosun & Ors. (1969) 1 NMLR 9 at pages 13 and 15 Onisemo v. Fagbenro 21 NLR 3 that:

"It is a well established principal of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been so frequently followed by the courts that judicial would be taken of it without evidence required in proof."

In the Olowu case (Supra) the Appellant had pleaded that the distribution of the property of the deceased who had died intestate contravened na-

tive law and custom and this Court held that under that circumstance it was incumbent on the Appellant to have pleaded facts in proof of native law and custom and to have led evidence on it. As the Appellant had pleaded that his case was founded upon a contravention of native law and custom, then and in that event it was incumbent on him to plead and B prove the relevant native law and custom. As Obaseki, JSC pointedly put it at page 107 of the same Report:

"The Plaintiffs averred that the 'distribution' is most irregular and contrary to both Yoruba custom and also Benin custom alleged to C have been invoked by them. No where in the Amended Statement of Claim were the constituents of Bini native law and custom of distribution pleaded. Consequently, no evidence was led by any of the witnesses called at the trial to prove any breach of the Bini customary law of D distribution. Since they were the parties who pleaded these facts, they ought therefore to lead evidence in proof."

I am respectfully in agreement with the Respondent's submission that the suggestion that by virtue of the decision of the Supreme Court in that case, the Respondent herein is obliged to plead that contents of native E law and custom are an erroneous interpretation and that by the application of the decision of the Supreme Court in that case, neither the original Grounds of Appeal nor the Amended Grounds of Appeal raised the issue now in the Brief under consideration. For that reason, the Respondent F contended, he had made the above submissions only in the events that this court decided to hear the argument on the point. The question was then asked why it is not quite clear to the Respondent why and for what purpose the Appellant made the following statement in his Brief to wit:

"The Supreme Court has held that if the court below gave judgment for a party on several distinct grounds, for the party dissatisfied G with the judgment to succeed on appeal, he must challenge and do so successfully every single ground on which the judgment was based. Failure to do so on even one ground will lead to a dismissal (sic) of the H appeal. See Odise & Anor. v. Agho & Anor. (197)1 All NLR (Part 1) 175."

It was next contended that the Respondent's understanding of this being

that if the appellant failed on any of the six ground contained on the Notice of Appeal and three in the Additional ground, then the appeal should be dismissed. If understood in this way, there would be a misunderstanding of the novel proposition of the law which would mean that the court below would be re-writing its judgment, namely, by arguing the grounds of appeal instead of the issues etc.

Thus, the conclusion arrived at by the Appellant was to the effect that:-

"On the above premises, it is obvious that the Chieftaincy matter had not been settled and the declaration sought by the plaintiff that Otuo Family is the Royal House of which is entitled to produce the Okan-Ama, had not been conclusively proved but rather, the case made out is well contradicted by both their witnesses and the documents tendered. It has also been established that Plaintiff is not, therefore, the present incumbent as what he was installed could not be that of Okan-Ama but Chief of Otuo lineage.

On the whole, it is now clear that the Paramount Chieftaincy Stool at Unyeada Town is the Okan-Ama and this both the Plaintiff and the Defendants agree and I, therefore, uphold that part of the declaration and not that the Plaintiff is the present incumbent.

Finally, the claim of the plaintiff, except the part declaring that Paramount Chieftaincy Stool in Unyeada town is the Okan-Ama, the other claims of the Plaintiff had not been established and are not, therefore, granted and are hereby dismissed."

The court below in reversing the trial court's findings of facts on appeal per Roland, J.C.A held, inter alia, thus:

"....From the totality of the evidence adduced by the parties before the trial court as borne by the record of proceedings I have no difficulty in holding the view that the findings of fact by the leaned trial judge are not supported by the evidence placed before him. His decision based on his findings is perverse, thus making it necessary for this court to interfere and then evaluate the evidence. Generally, when evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of evidence

by trial court, an appellate court is in as good a position as the trial court to do its own evaluation which is what I have done in the present case. See Olowu v. Olowu (1985) 3 NWLR (part 13) at 372; Agbai v. Okogbu (1991) 7 NWLR (part 204) 391; Olagbemiro v. Ajagunbag III (1990) 3 NWLR (part 136) 37; Agbetoba v. L.S.E.C. (1991) 4 NWLR (part 188) 664." B

Later down in its judgment, the court below further held, rightly in my view as follows:-

"...The onus is on plaintiff in a claim for Chieftaincy declaration to prove that the claimant of the title was validly nominated and appointed in accordance with the customary law or traditional history relating to the Chieftaincy. See Olabanji v. Omokewu (1992) 6 NWLR (part 250) 671; Adeyeri I v. Atanda (1995) 5 NWLR (part 397) 512. C

As I have said supra, this case is tied in the main to traditional history and the aspect of custom has to do with the slaughtering of native cow and the beating of Akama drum. The Appellant at the court of trial established his claim on the balance of probabilities. In the result, the two issues formulated by the Respondent having been resolved against him this appeal therefore succeeds and I make the following declaration:- D

(i) A declaration that the Okan-Ama Stool is the Paramount Chieftaincy Stool of Unyeada Town and the Plaintiff/Appellant is the present incumbent on the said Stool. F

(i)(a) A declaration that the Otuo House is the Royal Family of Unyeada, and entitled to produce the Okan-Ama of Unyeada.

For the avoidance of doubt, the judgement and the order made by the learned trial Judge on 19th day of January, 1988 are quashed and set aside." G

In the case herein where the learned trial Judge clearly went into issues not canvassed before him and the question is, who is entitled to be declared Okan-Ama, the conclusion arrived at by the court below is in my view amply justified and it is affirmed by me. H

It is for the reasons contained in this judgement and the fuller ones set out in the leading judgement of my leaned brother Ogwuegbu,

JSC that I, too, dismiss the appeal and abide by the consequential orders inclusive of those as to cost.

KALGO JSC

B I have read in advance the judgment of my learned brother Og-
wuegbu JSC just delivered and I entirely agree with him that there is no
merit in the appeal and it ought to be dismissed. I agree with his reason-
ing and conclusions in dismissing the appeal and I adopt them as mine.
C Accordingly, I also dismiss the appeal and abide by the consequential
orders made including costs.

UWAIFO JSC

D I read in advance the judgment of my learned brother Ogwue-
gbu JSC with which I agree. The three issues raised for determination
have been extensively considered. All three issues have a bearing on the
issue as to what is the position occupied by Otuo family in Unyeada. An
important approach to the case contested by the parties demands, in my
E view, a proper consideration and resolution of that issue. I shall say a
few words about that.

The case of the plaintiff is that Otuo Ogbalakon was the reigning
King of Unyeada Town in or about 1826. There was a war in which the
F town's army suffered a defeat. The King abandoned the town and founded
another town which he named Unyeada. It would appear that in order to
avoid confusion, the earlier Unyeada was regarded as Old Unyeada. Otuo
Ogbalakon continued to reign. The defendants denied that Otuo
Ogbalakon was ever King of Unyeada, old or new. Rather they claim that
G Nteogwuile family was the Royal family of Unyeada. It is common ground
that Otuo Ogbalakon founded the new Unyeada. Having regard to the
view of the learned trial judge that although Otuo Ogbalakon founded
Unyeada, he was not the King and the "old lineages [as in the old Unyeada]
H re-established there ", it is no doubt a vital enquiry whether Otuo Ogbalakon
was King of Unyeada.

I begin by referring to portions of relevant averments in the state-
ment of claim and to the respective separate statement of defence of the

1st and 2nd defendants. In the further amended statement of claim, para.2 thereof, it was averred inter alia:

"The Otuo House is the Royal Family of Unyeada. King Otuo Ogbalakon was the King of old Unyeada. He lived between 1770 and 1849. In a War with Bonny in 1826, old Unyeada fell and King Otuo Ogbalakon moved across the river and founded the present Unyeada Town. Since the founding of the present Unyeada Town in 1827, Otuo lineage has been the royal lineage and all the rulers of Unyeada have come from the Otuo Royal Family. These facts are supported by documentary evidence, and the plaintiff will rely on the following documents at the trial to prove these facts:-

(a) Intelligence Report on the Bonny Tribe, by Major H. Webber (1931) Ref. C90/26, File No. 27226 pages 14 and 14, National archives, Ibadan.

(b) Intelligence Report on Andoni Tribe, by M. D.W. Jeffreys (1930) Ref. EP. 7237 Minloc 6/1/135 Vol. 1, pages 29-30, National Archives, Enugu."

The 1st defendant in his amended statement of defence averred in para. 2 inter alia:

Para. 2 "..... the stool of Okan- Ama of Unyeada Town is in dispute between the Otuo and the Nteogwuile families in Unyeada Town and has not been settled."

On his part, the 2nd defendant averred inter alia paras. 1 and 2 of his statement of defence as follows:

Para. 1 "..... the plaintiff's ancestor Ogbalakon is a stranger from Agwutobolo in Andoni and is not a member of Nteogwuile family which is the Royal Family in Unyeada Town."

Para. 2 ".....Otuo House is never and can never be the Royal Family of Unyeada and Otuo was never known as a King in Unyeada, neither was any of his descendants made King or called a King of Unyeada. That he lead (sic) a War against hostilities in days of yore if all he did, would not without more, make him the Okan-Ama of Unyeada."

In his evidence, the plaintiff who testified as p.w. 1 had this to say:

"Otuo refers to my great-grand father the founder of Unyeada.

There is a Royal House in Unyeada and the Royal House is Otuo Royal House. Otuo was the king of old Unyeada. During the War between Bonny and Unyeada, around 1826, old Unyeada fell and Otuo crossed and founded the present Unyeada. He crossed the River to find the present
 B *Unyeada around 1827. Since then his descendants had been the ruling family of Unyeada. He died around 1849.*

The children of Otuo who had been ruling Unyeada are Chief Ogbilikana Nyewa Otuo II, Chief Otuibe Otuo III, Chief uko Otuo IV,
 C *Chief Ikwuruyok Otuo V, Chief Ekon Otuo VI, Chief Gwenden Otuo VII and Chief Fredrick Otuo VIII and Chief Israel Otuo IX"*

Among the documents tendered by the plaintiff and admitted in evidence was the Intelligence Report by Major H. Webber. It is exhibit A which was prepared in 1931. There had been a written Treaty between the
 D King of Bonny and the people of Andoni. Oto Oboloaria of Ayanda signed on behalf of Ayanda Town of Andoni. Major Webber made some reference to this Treaty in connection with the position of Oto Oboloaria in Ayanda. [I have stated the name Oto Oboloaria as was written in the
 E Intelligence Report]. Major Webber recorded this relevant entry in the said Report:

"Oto Oboloaria of Ayanda (as written in the Treaty), or Otuogblikia as it should be more correctly spelt, is reported to have been
 F *a very powerful King and after the Agreement (Treaty) had been signed, was most successful in keeping his tribesmen to its terms."*

It may be necessary to remark that 'Oto' is the same as 'Otuo', Ayanda' is the same as 'Unyeada' and 'Otuogblikia' is the same as 'Otuo Ogbalakon'.
 G The passage from the intelligence Report should be so appreciated.

The above-quoted passage is an observation in an intelligence Report of direct relevance to a point in dispute in this case which should have been given its rightful place and proper consideration by the learned trial judge. But it would appear, with all due respect to him, that he never
 H adverted to it. An Intelligence Report is a public document made by a public officer and is presumed to contain a true information and is admissible in evidence. In the case of *The Irish Society v. The Bishop of Derry* 12 Cl. & F. 641 at 668 [see 8 E.R. 1561 at p. 1573], Mr. Baron Parke

said:

"In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor B may be concerned in such cases or not."

An Intelligence Report is a public document under section 109 of the Evidence Act and is receivable in evidence in appropriate circumstances and given due consideration by the court.

As can be seen from the excerpts of the parties' averments quoted above, while the plaintiff claimed that Otuo Ogbalakon was the King of Unyeada, the defendants vehemently denied it. The 1st defendant said Otuo family of the plaintiff and Nteogwuile family of the 2nd defendant were disputing the Kingship. The 2nd defendant said Otuo was never D known as a King of Unyeada. Had the learned trial judge made proper use of the Intelligence Report (exhibit A) it would have been obvious to him that the Nteogwuile family was making a case that was difficult to accept. What was referred to as King is now Okan-Ama. That is com- E mon ground. Although the lower court did not specifically refer to that passage in the said exhibit A which contains the information that Otuo was King, it made the following observation inter alia and conclusion, per Rowland JCA:

"Furthermore, the (trial) court found as a fact that Otuo F Ogbalakon founded Unyeada but he was not King The evidence of p.w.4 corroborated that of the appellant that Otuo was King of both old and new Unyeada and his family is the royal family. Again, there G was the evidence of p.w. 5 a chief from the neighbouring village of Asarama to the effect that the Head of Otuo family is the Okan-Ama. These pieces of evidence are corroborated by exhibits 'A', 'B' and 'D' tendered by the appellant."

The above observation and conclusion of the lower court which H are clearly justified leave me in no doubt that the claim of the plaintiff that Otuo family is the royal family is the royal family in Unyeada is not without foundation. The trial court accepted that Otuo Ogbalakon founded

the new Unyeada but held that the family lineages in the old Unyeada re-established in the new Unyeada and that therefore Otuo Ogbalakon was not ruler or Okan-Ama. It must be remarked that the finding that the old lineages in old Unyeada re-established in the new Unyeada was based on facts contained in a book (exhibit C) tendered in circumstances which made it inadmissible and consequently those facts do not constitute evidence a court may rely on. The result is that the findings of the trial court that Otuo family is not the royal family appear to me perverse.

This was compounded by the learned trial judge raising suo motu the question of native law and custom of the people being tied to the Stool of Okan-Ama. He said that "the Okan-Amaship of Unyeada is a stool that is tied with the native law and custom" and that "for the plaintiff to succeed in his claim he has to aver facts which under the said native law and custom entitles him to the Stool." It is clear from the pleadings that neither party raised the issue of the Stool of Okan-Ama being tied to some specific incidents of native law and custom other than what the plaintiff pleaded inter alia in paragraph 5 of his further amended statement of claim that-

"A feature of the crowning of the King of Unyeada is the slaughtering of a native cow; and this was done when the plaintiff was crowned."

The learned trial judge was therefore in grave error to have expected any other type of native law and custom of the people and accordingly misdirected himself by relying on *Olowu v Olowu* (1985) 12 SC 84 to say that the plaintiff's case was not made out in the absence of evidence in support of such native law and custom which neither party called upon him to ascertain.

I am satisfied that the lower court reached the right decision by reversing the trial court and granting the plaintiff the appropriate reliefs. For the above reasons and those more elaborately stated by my learned brother Ogwuegbu JSC, I dismiss this appeal with N10, 000.00 costs to the plaintiff/respondent.