

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 61/1995

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU, A. I.
IGUH, A. I. KATSINA-ALU, E. O. AYOOLA, JJSC.**

CHIEF MENE KENON & 3 ORS. DEFENDANTS/APPELLANTS
(For themselves and on behalf
of the people of Nwebiara)

AND

CHIEF ALBERT TEKAM & 4 ORS. PLAINTIFFS/RESPONDENTS
(For themselves and on behalf
of the people of Barako)

APPEALS - Concurrent findings of lower courts - Will not be interfered with - Unless there is an error that will occasion a miscarriage of justice (H 9)

CONSTITUTIONAL LAW - Fair hearing - S.33 (1) 1979 Constitution - There was no breach of the right to fair hearing - In the circumstances of this case (H 5)

EVIDENCE - Locus in quo - As there was no serious conflict or doubt - In the evidence of the plaintiffs and defendants - A visit to the locus was not necessary nor desirable (H 6)

EVIDENCE - Proof - Fair hearing - The appellants who allege a denial of fair hearing - Must show that their civil right and obligation - Have been adversely affected (H 2)

FAIR HEARING - Bias - The decision in an earlier suit by the trial judge - Did not affect his determination - Of the present proceeding sufficiently - To raise a question of likelihood of bias (H 3)

FAIR HEARING - Bias - Waiver - The absence of complaint by the

2462 Kenon v. Tekam (2001) 7 KLR (pt. 126) 2461; (2001) 14 NWLR

defendants - On the likelihood of bias in the trial judge at the trial - Did not amount to a waiver (H 4)

FAIR HEARING - *Meaning - S.33 (1) 1979 Constitution - Meaning of fair hearing (H 1)*

LAND LAW - *Title - Consolidated actions - As both parties are plaintiffs - They each have a burden to convince the court - Of their superior title to the land (H 7)*

LAND LAW - *Title - Cross action - Plaintiffs were able to discharge their burden of proof - On the balance of probabilities - Unlike the defendants (H 8)*

FACTS

The appellants in this case were defendants before the trial court in a consolidated action for declaration of title to land while the respondents were the plaintiffs. The respondents had sued in their own separate suit for a declaration that they were entitled to a customary right of occupancy to land situate at Barako village in Bori Local Government Area. They equally claimed for damages and perpetual injunction against the defendants. The appellants had equally in their own suit claimed as plaintiffs for the same reliefs.

At the consolidated trial the respondents led traditional evidence as to settlement on the disputed land by their ancestors and tendered various exhibits including a native court judgment over the piece of land as well as an arbitration award over the land. They also alleged that the defendants' ancestor had come on part of the land in dispute as a result of the grant made to him by the plaintiffs' ancestor and had lived peacefully on the land granted to him. But his descendants had started trespassing on the land leading to the present suit. The defendants naturally led evidence on a conflicting traditional evidence. The trial court at the end of trial gave judgment for the respondents and dismissed the appellants' cross-action. Their appeal to the Court of Appeal Port-Harcourt Division

was dismissed and they have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the hearing and determination of these actions by F.N.N. ICHOKU, J. were not prejudiced by the previous decision of same Judge in Suit No. FHC/183/72 between ZORGBINI NANWIN v. JAMES DEKOO delivered on 17th August, 1993 which was tendered in this suit by the plaintiffs as Exhibit “A” and therefore amount to a serious violation of Section 33(1) of the Constitution of the Federal Republic 1979.

(2) Whether in view of the conflict of evidence as to the physical objects on the land in dispute in this case, it was not necessary for the learned trial Judge to have conducted a visit to the locus in quo to ascertain the truth of the conflicting evidence before coming to a final decision in this case. Etc. see p. 2472

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

Fair hearing - Meaning

1. The sub-section confers on every citizen with a grievance the right of access to the courts. It leaves the doors of the courts open to any person desiring to ventilate his grievance there. It also makes it obligatory on the court or tribunal that will determine the rights of the person to accord him a fair hearing. Fair hearing in this context involves (i) a hearing that does not contravene the principles of natural justice; and (ii) a hearing that must consist of the whole hearing when tested from the point of view of a reasonable person who was present at the trial, whether, from his observation, justice has been done in the case. Sub-section (1) of section 33 entrenches the common law concept of natural justice with its twin pillars, namely:

- (a) that a man shall not be condemned unheard; and
- (b) that a man shall not be a judge in his own cause. (p. 2474 H)

Evidence - Proof - Fair hearing

2. The burden is on the defendants to show that the adjudication by Ichoku, J. complained of led to a failure of justice. In other words, the

appellants who allege that they have been denied right to a fair hearing must show that their civil rights and obligations have been adversely affected by the alleged breach. The defendants' challenge in this appeal is not that they were not heard. Rather they are saying that the trial judge B was biased or partisan. (p. 2475 D)

Fair hearing - Bias

3. I am unable to hold that the decision in Suit No. PHC/183/72 (Exhibit C "A") affected the trial judge's determination of the present proceedings as to lead to the conclusion that he made up his mind in advance and was unlikely to approach the present case with an open mind as to raise the question of real likelihood of bias on his part.

D I do not see how the decision of the trial judge in Suit No PHC/183/72 (Exhibit "A") affected his judgment in the present proceedings as to lead to the conclusion that he made up his mind in advance and was unlikely to approach the present case with an open mind as to raise the issue of real likelihood of bias on his part. (p. 2475 H)

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Fair hearing - Bias - Waiver

4. In the present proceedings there was not the slightest complaint of any likelihood of bias on the part of the trial judge throughout the proceedings. It was also submitted in the plaintiffs' brief that the defendants F waived their right to object at the first opportunity. On the question of waiver, the court below after referring to the principle of waiver as restated by this court in *Enigwe v. Akaigwe* (1992)2 NWLR Pt.225)505 at 535 concluded as follows:

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"By force of the above authority, it does appear to me that the Appellants cannot be regarded as having completely waived their right to complain about breach of right to fair hearing arising from the disqualification of the learned trial Judge to hear the present case if indeed there H was sufficient material to that effect. From the facts of the case, it is my considered view that there is not sufficient material to sustain the allegation of likelihood of bias on the part of the learned trial judge in hearing the case."

I agree with the above views of the court on waiver. It is of fundamental importance that justice should both be done and be manifestly seen to be done. (p. 2477 C)

Constitutional law - Fair hearing

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5. After applying the above principles, and having regard to the circumstances of this case, my conclusion is that there was no breach of the defendants' right to a fair hearing as enshrined in section 33(1) of the 1979 Constitution (section 36(1) of the 1999 Constitution). (p. 2478 C)

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Evidence - Locus in quo

6. In the proceedings on appeal, there is no serious conflict in the evidence of the plaintiffs with that of the defendants as was the case in *Seismograph Services (Nig.) Ltd. V. Akporuovo* (supra) where the trial judge was faced with two conflicting evidence as to whether or not the buildings were standing on the land in dispute. There is also no doubt in the evidence of the plaintiffs and the defendants which a judicial inspection of the land would clear. The above finding cannot be faulted and I agree with the court below that from the pleadings and the evidence led, a visit to the locus was neither necessary nor desirable. It is also pertinent to state that at no stage in the proceedings did any of the parties request the court to visit the *locus in quo*. (p. 2479 C/2480 B)

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Title - Consolidated action

7. In a consolidated action, both parties are plaintiffs and in this case, each is claiming declaration of title to the pieces of land in dispute. The defendants appear to have overlooked the fact that each party had assumed the burden of satisfying the court either by conclusive traditional evidence or by evidence of exercise of maximum acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that he is exclusive owner of the land in dispute. See *Chief L. A. Odunsi, Ojora of Lagos & Ors. v. F. E. Pereira & Ors.* (1972) 1 SC.52. (p. 2481 D)

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Title - Cross action

8. The plaintiffs satisfied the courts below by both traditional evidence and evidence of the exercise of maximum acts of ownership and the case was decided on the balance of probabilities.

B I have gone through the pleadings, the evidence of the parties and the judgments of the courts below and from the state of the pleadings and evidence, it is difficult to see how the defendants could have succeeded on their defence let alone their cross-action for declaration of title. It is very clear that the defendants failed woefully on the evidence.
C (p. 2481 F)

Appeals - Concurrent findings

D 9. Above all, it should be emphasized that this is an appeal against concurrent findings made by two courts below and unless there is error on the face of the record occasioning a miscarriage of justice, this court will not interfere. (p. 2481 H)

E NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. Fair hearing - Categories of unfair trials

F Unfairness of a trial comes in two broad categories. One is procedural unfairness that arises where the court or tribunal adopts a procedure which does not ensure that one or both of the parties are not put at a disadvantage. The commonest forms are where a party had been deprived of an opportunity of a hearing or where there is no procedural equality between the parties. Substantive unfairness arises where the
G judge approaches his adjudicative function with a mind closed or a mind influenced by considerations other than the facts in evidence before him or facts on which the parties are in agreement, or is influenced by factors extraneous to his proper role as an umpire. (p. 2483 C)

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2. Bias - Meaning

The latter aspect of unfairness is often described as bias. Bias in its ordinary meaning is opinion or feeling in favour of one side in a dispute

or argument resulting in the likelihood that the judge so influenced will be unable to hold an even scale.

Foreknowledge of the fact is an aspect of such bias. Where a judge has foreknowledge of the facts he does not come to the dispute with an openness of mind that would enable him to hold an even scale. B Therein lies the unfairness. That is one aspect of bias that is alleged in this case. Another aspect is that the trial judge was likely to be biased in favour of his previous decision. It is this latter aspect that I find of some weight and worthy of close consideration. (p. 2483 F) C

3. Foreknowledge of facts by trial judge- Its effect

As to foreknowledge of the facts, no one can doubt that foreknowledge of primary facts disqualifies a judge. However, in this case I do not think that the finding made in the suit No. PHC/183/72 between different parties D in respect of a different parcel of land as to the probability of the traditional history of one of the parties in the case is such foreknowledge of the facts as would disqualify the trial judge from a fair trial of this case in which the sets of evidence put on scale of probability are not between E the same parties. This is one of the factors which distinguish this case from cases such as Abbey v Lampsey 12 WACA 156 where a re-hearing is ordered before a judge other than the one before whom an abortive trial was held by reason of foreknowledge of the facts. (p. 2483 H) F

4. Allegations of unfairness should be timely raised

Although a party may not be held to have waived his right to complain about unfairness of a trial, where the alleged unfairness is not obvious, G and the allegation of unfairness needs considerable persuasion to sustain it, the conduct of the party complaining in not raising an objection to the proceedings at the trial may indicate that the complaint is the mere after-thought of a loser. Thus, if as argued by learned counsel for the appellant in this appeal, a reasonable person would have come to a certain conclu- H sion that the trial judge could not enter into the trial with an open mind, one may wonder why the appellants and their counsel, all reasonable men, waited till judgment was against them before they suddenly discov-

ered how a reasonable person would have viewed the proceedings?
(p. 2485 H)

REPRESENTATION

- B O. S. Bolaji, Esq. for the Defendants.
R. A. Ogunwole, Esq. for the Plaintiffs.

CASES REFERRED TO

- C G.M. Boyo (1970) All NLR 114
Deduwa v. Okorodudu (1976) 9-10 SC.329 at 348-349
Obadara v. C.O.P. (1965) NMLR 39 at 44
LPDC v. Gani Fawehinmi (1985) 2 NWLR (Pt.7) 300 at 333
Adigun v. Attorney-General, Oyo State (1987) 1 NWLR (Pt.53) 678
D Oyelade v. Araoye & Attorney-General (1968) NMLR 41
Ariori v. Elemo (1983) 1 SCNLR 1 at 2
Olue & Ors. v. Enenwali & Ors. (1976) 2 SC.23 at 37 and 38
Mohammed v. Kano N.A. (1968) 1 ALL N.R. 424 at 426
E Adomba v. Odiese (1991) 1 N.W.L.R. (Pt.125) p. 165 at 180
Abaye v. Ofili (1986) 1 NWLR (Pt.15) 138
R. v. Huggins (1895-99) All E.R. (Rep.) 314
R. v. Sunderland Justices (1901) 2 KB 357 at 373
F Enigwe & Ors. v. Akaigwe & Ors. (1992) 2 NWLR (pt.225) 505
Chukwuogor v. Obuora (1987) 3 NWLR (Pt.61)

STATUTES REFERRED TO

- Constitution of Nigeria 1979 S.33 (1)
G Constitution of Nigeria 1999 S.36 (1)
Evidence Act S.74 (1)

LEAD JUDGMENT BY OGWUEGBU JSC

- H This is an appeal against the judgment of the Court of Appeal, Port-Harcourt Division delivered on 22nd March, 1994. It involves Suit Nos. PHC/9/70 and PHC/113/72 which were consolidated by the agreement of both parties. The respondents in this appeal were the plaintiffs in Suit

No. PHC/9/70 and defendants in Suit No. PHC/113/72. After the consolidation, plaintiffs in Suit No. PHC/9/70 became plaintiffs in the consolidated suits while the plaintiffs in Suit No. PHC/113/72 became defendants and they are the appellants in this court. The defendants lost in the High Court and their appeal to the Court of Appeal was unsuccessful B hence the present appeal.

The respondents as plaintiffs in Suit No. PHC/9/70 sued the defendants claiming the following reliefs in paragraph 23 of their Amended Statement of Claim as follows:

“(a) *A declaration that the Plaintiffs are entitled to customary rights of occupancy of adjoining portions of land known as Nomabon, Nwebente and Gboro, situate, lying and being at Barako Village in Bori Local Government Area.* C

(b) *N1,000.00 (One Thousand Naira) as damages for trespass committed by the defendants on the said land between 1969 and 1970.* D

(c) *Perpetual Injunction restraining the Defendants, their servants and agents from further acts of trespass.”*

In Suit No. PHC/113/72 which is a cross-action the plaintiffs who are defendants in the consolidated suits claim as follows in paragraph 9 of their amended statement of claim.

“(i) *A declaration that the Plaintiffs herein are entitled to the customary right of occupancy over the land in dispute known as ‘NOMABON and GBORO’ situate at Nwebiara Gokana, in Bori Local Government Area which is also the subject matter in Suit No. PHC/9/70.* F

(ii) *N800.00 damages for trespass in that the Defendants wrongfully entered upon the said Plaintiffs’ land which had been and have remained in the firm and peaceful possession of the Plaintiffs.* G

(iii) *Perpetual Injunction restraining the Defendants, their servants and/or agents from committing further acts of trespass on the said land.”*

From the facts disclosed in the plaintiffs’ statement of claim and evidence called by them, the founder of Gokana was one Gberesaako. He H settled in a place now known as Gioko Village of Gokana. The plaintiffs’ ancestor Gberederakina (otherwise known as Lauko) was one of the fourteen children of Gberesaako the founder of Gioko the oldest village in

Gokana followed by Barako. It was Gberederakina who first settled on the land in dispute referred to as Nomabon, Nwebente and part of Gboro and exercised various acts of ownership on the said land including erection of buildings and farming thereon. He (Gberederakina) also brought powerful jujus which he kept in various shrines on the land in dispute. It was part of the plaintiffs' case that after several generations of their ancestors had used the land in dispute, there was a great drought and they moved to part of Gboro which is the name of their family head who led them to their new settlement. Their original settlement was called Nomabon (meaning old settlement). That Gboro land was populated with many "KO" trees hence the land was referred to as Barako meaning land of "KO" trees. In or about 1929, the Anglican Mission wanted to establish a primary school and the people of Nwebiara (defendants') wrongly gave them part of the plaintiffs' land. One Nariyar Dugbor the then head of Barako people got to know about the grant and proceeded to destroy the defendants' farmlands in retaliation. He was charged and convicted at Kono-Ogoni Native Court for conduct likely to cause a breach of the peace. That even though Dugbor was convicted, the court recognised that the land where the primary school was built belonged to the plaintiffs. The certified copy of the judgment of the native court was admitted in evidence as Exhibit "D" "D1". In 1948 another dispute arose between the parties over the said primary school and this led to an arbitration award to the effect that the school in question should be known as N.I.P. School, Barako. That the arbitration award was embodied in the native court Review No. 206/78 and Appeal No. 226/48 (Exhibit "E").

It was the case of the plaintiffs that Sanwunwa the ancestor of the defendants originally lived in a village called Kaa. His wife was Monalo, daughter of Karanwa one of the plaintiffs' ancestors. As a result of an inter communal war between Kaa and Yeghe people resulting in the destruction of the old settlement of Kaa people, the defendants' ancestor Sanwunwa with his wife Monalo fled to Barako to his father-in-law Ntekaranwa for shelter. At his request, his father-in-law granted to him a piece of land verged thick black in the plaintiffs' survey plan Exhibit "C". The area granted to him was indicated as "Nwebiara" meaning "behind Biara" from

which the defendants Village Nwebiara derived its name. For many years the ancestors of both parties lived in peace until 1929 when the defendants' went outside the area granted to them and purported to grant a portion of the land in dispute to the Anglican Mission as narrated above. As to the immediate cause of the action leading to this appeal, the plaintiffs alleged that in 1969 and 1970, the defendants trespassed on the land in dispute in Nomabon, Nwebente and Gboro by erecting houses and farming thereon. B

The defendants' case is as set out in their Amended Statement of Claim and Further Amended Statement of Defence supported by the evidence of seven witnesses filed by them. They admitted that Gberesaako C was the founder of Gioko the oldest village in Gokana. They, like the plaintiffs claimed to be descendants of Gberesaako. According to them, their ancestor Gbereyekigbe one of the sons of Gberessaako founded Nomabon and Gboro which are the two adjoining parcels of land forming D the land in dispute. It is the defendants' case that the plaintiffs' ancestors are normadic native doctors and soothsayers who migrated from Ko to settle in Barako.

Both actions were consolidated and tried by Ichoku, J. (as he E then was). He found for the plaintiffs and dismissed the defendants' cross-action. As I stated earlier, the defendants appealed to the Court of Appeal, Port Harcourt Division and their appeal was dismissed hence the further appeal to this court. Briefs of argument were filed and exchanged F by both parties. In their brief of argument, the defendants identified the following seven issues for determination in the appeal:

“(1) Whether the hearing and determination of these actions by F.N.N. ICHOKU, J. were not prejudiced by the previous decision of same Judge in Suit No. FHC/183/72 between ZORGBINI NANWIN v. JAMES G DEKOO delivered on 17th August, 1993 which was tendered in this suit by the plaintiffs as Exhibit “A” and therefore amount to a serious violation of Section 33(1) of the Constitution of the Federal Republic 1979. (2) Whether in view of the conflict of evidence as to the physical objects H on the land in dispute in this case, it was not necessary for the learned trial Judge to have conducted a visit to the locus in quo to ascertain the truth of the conflicting evidence before coming to a final decision in this

case.

(3) *Whether the trial judge properly evaluated the evidence adduced by the Defendants in this case and made specific findings of fact on crucial issues joined on the pleadings and the evidence of the parties as required by the law before coming to his final decision in the case.*

(4) *Whether the traditional evidence of the plaintiffs was cogent and reliable enough to entitle them to succeed on their claim.*

(5) *Whether there are serious mis-directions and errors in law and on the facts on the part of the learned trial judge sufficient to warrant a setting aside of his decision in this case.*

(6) *Whether the learned trial Judge was right in law in awarding to the plaintiffs a declaration that they are entitled to the Customary Rights of Occupancy of the adjoining portions of land known as “Nomabon, Nwebente and Gboro” when the plaintiffs in their evidence in chief asked for a declaration as per their Writ of Summons which merely claimed, inter alia, a declaration of title to the land called NWEBENTE.*

(7) *Whether the Defendants did not prove their title to the land alleged to be in dispute in the cross-action Suit No. PHC/113/72 to entitle them to judgment as per their amended statement of claim in the said suit.”*

The plaintiffs identified five issues which are covered by the issues identified by the defendants. I consider it appropriate to fall back on the more comprehensive issues formulated by the defendants.

The defendants have complained that the hearing and determination of the consolidated suits by Ichoku, J. were prejudiced by his decision in Suit No. PHC/183/72 between *Zorgbini Namwin v. James Dekoo* delivered on 17th August, 1993 which decision was tendered by the plaintiffs in the present proceedings as Exhibit “A”. It was argued in the defendants’ brief that these amount to serious violation of section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979 which guarantees that in the determination of his civil rights and obligations every person is entitled to a fair hearing by a court or tribunal established by law in such a manner as to secure its independence and impartiality. This complaint is based on the fact that Ichoku, J. decided Suit No. PHC/183/72 between the parties therein and the relief claimed by the plaintiff in

that case was for a declaration of title to land known as and called Nomabon situate along Nweo/Barako Road in Gokana. That the plaintiff in that case who is a member of Nweo village relied on traditional history and contended that his ancestor founded the land. The defendant on the other hand is a member of Barako village and he, too, relied on traditional history claiming that Nomabon land was founded by his ancestor called Gberederakina. That Ichoku, J. in that suit accepted the traditional evidence of the defendant as more probable and dismissed the plaintiff's action. Counsel cited the cases of *In Re. G.M. Boyo* (1970) *All NLR* 114, *Deduwa v. Okorodudu* (1976) 9-10 *SC* 329 at 348-349, *Obadara v. C.O.P.* (1965) *NMLR* 39 at 44 and *LPDC v. Gani Fawehinmi* (1985) 2 *NWLR* (Pt.7) 300 at 333. B C

It was further contended in the defendants' brief that having regard to the decision of Ichoku, J. in Suit No. PHC/183/72 that Nomabon and its adjoining lands were founded by the ancestors of the Barako people namely, Gberederekina, it follows that he was partisan as to that particular issue in the present proceedings within the meaning of the expression in *LPDC v. Fawehinmi* (*supra*). The case of *Adigun v. Attorney-General, Oyo State* (1987) 1 *NWLR* (Pt.53) 678 at 719-720 was also cited and we were referred to section 73(1) of the Evidence Act now section 74(1) Cap 112 Laws of the Federation of Nigeria, 1990. We were urged to allow the appeal on this ground because Ichoku, J. breached the provisions of section 33(1) of the 1979 Constitution in that there was real likelihood of bias or prejudice on his part and that the court below was in error not to have allowed their appeal on this ground. D E F

It was submitted in the plaintiffs' brief that parties in the previous case are not the same as those in the present proceedings and that the judgment Exhibit "A" was tendered to show that the plaintiffs have been defending their interest on part of the land now in dispute. That when Exhibit "A" was about to be tendered through P.W.8, learned counsel for the defendants objected to its admissibility on the ground that "*the parties are not the same and the lands are not the same*," that the learned trial judge ruled on the objection and the defendants did not appeal against the ruling. It was also submitted that in his final address before the trial G H

judge, defendants' counsel referred to Exhibit "A" and submitted that the fact that the case of the plaintiff in Exhibit "A" was dismissed does not confer right of ownership of the land to the defendant in that case. The plaintiffs herein submitted in their brief that Exhibit "A" was tendered to show act of possession and that there was no survey plan to relate the land the subject matter of the earlier case to the land now in dispute and that the trial judge did not make use of Exhibit "A"

As to section 74(1) of the Evidence Act, it was submitted that the sub-section deals with facts which the court must take judicial notice of and that a judge cannot take judicial notice of a judgment because the judgment is to be certified under section 110 of the Evidence Act and properly tendered before it can be admissible in evidence. It was the submission of plaintiffs' counsel that the defendants' counsel did not object to Ichoku, J. adjudicating on the matter and that a reasonable man present in court cannot complain that the learned trial judge was biased.

Plaintiffs' Counsel agreed with the principles of law enunciated in the cases cited by the defendants' counsel but contended that in those cases the parties affected took objection to the adjudicator hearing the case at the earliest opportunity and that the facts and circumstances of those cases are completely different from the present. He referred to the cases of *Oyelade v. Araoye & Attorney-General* (1968) NMLR 41, *Ariori v. Elemo* (1983)1 SCNLR 1 at 2, *Olue & Ors. v. Enenwali & Ors.* (1976)2 SC.23 at 37 and 38.

The complaint of the defendants is based on the violation of section 33(1) of the 1979 Constitution which provides:-

"33 - (1) *In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.*"

The sub-section confers on every citizen with a grievance the right of access to the courts. It leaves the doors of the courts open to any person desiring to ventilate his grievance there. It also makes it obligatory on the court or tribunal that will determine the rights of

the person to accord him a fair hearing. Fair hearing in this context involves (i) a hearing that does not contravene the principles of natural justice; and (ii) a hearing that must consist of the whole hearing when tested from the point of view of a reasonable person who was present at the trial, whether, from his observation, justice has been done in the case. Sub-section (1) of section 33 entrenches the common law concept of natural justice with its twin pillars, namely:

- (a) that a man shall not be condemned unheard; and
- (b) that a man shall not be a judge in his own cause.

See *Deduwa v. Okorodudu* supra at 246, *Mohammed v. Kano N. A.* (1968) 1 All N.R.424 at 426. See generally *Judicial Review of Administrative Action* by S. A. De Smith 2nd ed. pages 135 – 144 for the concept of natural justice.

The burden is on the defendants to show that the adjudication by Ichoku, J. complained of led to a failure of justice. In other words, the appellants who allege that they have been denied right to a fair hearing must show that their civil rights and obligations have been adversely affected by the alleged breach. The defendants' challenge in this appeal is not that they were not heard. Rather they are saying that the trial judge was biased or partisan.

I have read the lengthy judgment of the learned trial judge. The plaintiff in the earlier case (Exhibit "A") is in no way related to any of the parties in the present proceedings except that the defendant in the said case is a member of the family of the present plaintiffs. There is also no proof that the same parcel of land is being litigated upon in the present proceedings. Even though the objection to the admissibility of Exhibit "A" was overruled, the learned trial judge accepted the contention of the defendants' counsel that the land the subject-matter of Exhibit "A" is not the same as the parcel of land the subject of the present proceedings.

I am unable to hold that the decision in Suit No. PHC/183/ 72 (Exhibit "A") affected the trial judge's determination of the present proceedings as to lead to the conclusion that he made up his mind in advance and was unlikely to approach the present case

with an open mind as to raise the question of real likelihood of bias on his part.

Dealing with this issue the court below found as follows:

“However, as has been pointed out earlier, neither the parties nor the subject matter Exhibit “A” is the same as in the present case. The mere fact that the name of the subject matter in the two cases is Nomabon and adjoining lands is of no consequence: *Adomba v. Odiese* (1991) 1 N.W.L.R. (Pt 125) p.165 at 180. A party cannot be allowed to set up a different case in each of the hierarchy of courts: *Abaye v. Ofili* (1986) 1 NWLR (Pt. 15) 138; *Attorney-General of Anambra State v. Onuselogu Enter. Ltd.* (1987) 9-11 SC. 197 at 202. The Appellants’ case in the court below was that the subject matter and the parties in Exhibit A were not the same as those in the present case. They cannot on appeal adopt a stance giving the impression that the subject matter is the same.

From the facts of the case, it is my considered view that there is not sufficient material to sustain the allegation of likelihood of bias on the part of the learned trial judge in hearing this case.”

I do not see how the decision of the trial judge in Suit No PHC/183/72 (Exhibit “A”) affected his judgment in the present proceedings as to lead to the conclusion that he made up his mind in advance and was unlikely to approach the present case with an open mind as to raise the issue of real likelihood of bias on his part.

Some of the cases decided on the issue of impartiality in the adjudicatory process are: *Deduwa v. Okorodudu* (*supra*), *Obadare & Ors. v. President, Ibadan West District Grade D Customary Court* (1964) 1 All NLR 336 at 334, *Kujore & Ors. v. Otubanjo* (1974) 10 SC 173, *Metropolitan Properties Co. (FSC) Ltd. V. Lannon* (1969) 1 Q.B.577, *Re Cayman Islands Public Service Co. Ltd.* (1967) 11 WIR 262 (This is a West Indian case); and *L.P.D.C. v. Gani Fawenhimi* (*supra*). The guiding principles are expounded in these cases.

In Kujore’s case, the sole President of a Customary Court who sat over a land dispute was alleged to be legal adviser to one of the parties to the dispute. When the matter of his association with the party was raised at the commencement of the trial, the learned President maintained

his peace. The question for this court to decide when the case came on appeal was whether from the material available, the inference can and should be drawn that there is real likelihood of bias on the part of the learned President. Of course, this court held that the absence of immediate retort from the learned President at the time of the allegation, which he must have known to be true, a reasonable person making such a factual complaint would conclude that the learned President was bent on hearing the case in spite of the allegation and that no further proof of likelihood of bias was necessary.

In the present proceedings there was not the slightest complaint of any likelihood of bias on the part of the trial judge throughout the proceedings. It was also submitted in the plaintiffs' brief that the defendants waived their right to object at the first opportunity. On the question of waiver, the court below after referring to the principle of waiver as restated by this court in *Enigwe v. Akaigwe* (1992)2 NWLR Pt.225/505 at 535 concluded as follows:

"By force of the above authority, it does appear to me that the Appellants cannot be regarded as having completely waived their right to complain about breach of right to fair hearing arising from the disqualification of the learned trial Judge to hear the present case if indeed there was sufficient material to that effect. From the facts of the case, it is my considered view that there is not sufficient material to sustain the allegation of likelihood of bias on the part of the learned trial judge in hearing the case."

I agree with the above views of the court on waiver. It is of fundamental importance that justice should both be done and be manifestly seen to be done. See *Metropolitan Properties Ltd. V. Lannon* (1968)3 All E.R. 304. At page 310, Denning, M. R. stated the principles of fair hearing thus:

"The court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that the judge would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to

other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: See *R. v. Huggins* (1895-99) All E.R. (Rep.) 314; *R. v. Sunderland Justices* (1901) 2 KB 357 at 373. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think that he did. Justice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking: "the judge was biased."

After applying the above principles, and having regard to the circumstances of this case, my conclusion is that there was no breach of the defendants' right to a fair hearing as enshrined in section 33(1) of the 1979 Constitution (section 36(1) of the 1999 Constitution).

The next complaint of the defendants is that in view of the conflict in the evidence as to the physical objects on the land in dispute in the case, it became necessary for the trial judge to conduct a visit to the *locus in quo* in order to ascertain the truth before coming to a final decision in the case. After enumerating the alleged conflict in the evidence adduced by the plaintiffs and the defendants, learned counsel submitted that there is no way a court exercising its judicial powers can come to any reasonable and fair conclusion without visiting the land in dispute. He referred to the cases of *Seismograph Services (Nig.) Ltd. V. Ogbeni* (1976) 4 SC 85 at 104 and *Enigwe & Ors. v. Akaigwe & Ors.* (1992) 2 NWLR (Pt. 225) 505 at 525 – 526. Reliance was also placed on proviso (ii) of section 77(d) of the Evidence Act. It was finally submitted on this point that the conclusion of the learned trial judge as to the features of the land in dispute is perverse.

For the plaintiffs, it was submitted in their brief that the proviso is an enabling provision of the law which gives the court power to visit the *locus* and not an authority for the submission that failure to visit the scene is detrimental to the case of either of the parties. Plaintiffs agree that in certain cases a visit to the *locus* is indispensable for a trial judge to resolve the dispute between parties as was the case in *Seismograph Ser-*

vices (Nig.) Ltd. V. Esiso Akporuovo (1974)6 SC.119 at 128 – 129 and *Seismograph Services (Nig.) Ltd. V. Ogbeni* (supra) and that the facts of those cases do not apply to the facts of the present case having regard to the pleadings and the evidence. The court was referred to the cases of *Idundun v. Okumagba* (1976)1 NMLR 200 at 201, *Chukwuogor v. Obuora* B (1987)3 NWLR (Pt.61) and *Amata v. Modekwe & Ors.* (1954)14 WACA 580 at 581 – 582. Section 77(d)(ii) of the Evidence Act reads:

“(d)(ii) *If oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such a material thing for its inspection, or may inspect any movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute*” C

In the proceedings on appeal, there is no serious conflict in the evidence of the plaintiffs with that of the defendants as was the case in *Seismograph Services (Nig.) Ltd. V. Akporuovo* (supra) where the trial judge was faced with two conflicting evidence as to whether or not the buildings were standing on the land in dispute. There is also no doubt in the evidence of the plaintiffs and the defendants which a judicial inspection of the land would clear. D E

On whether a visit to the scene was necessary, the Court of Appeal held:

“*The bone of contention was the customary right of occupancy over the land in dispute and being consolidated actions the onus lay on each side to prove its case. Each party relied on traditional history and act of long possession. The Respondents also relied on ownership and possession of connected or adjoining lands. Admittedly, possession of a disputed piece of land by a party is a vital factor in determining the ownership of that land since it is the law that if the traditional histories of claimants to a piece of land are inconclusive the histories are tested against the recent acts of possession and ownership of the parties on the land in dispute. Respondents do not dispute the presence of Appellants on the land in dispute. In paragraphs 20, 21 and 22 of the amended statement of claim the Respondents pleaded that between 1969 and 1970, the Appellants trespassed on various parts of the land in dispute by mak-*” F G H

ing farms and building houses thereon. Surely if the trial judge could on the evidence before him decide on whether or not the appellants were on the land in dispute the contention that he ought to have visited the locus in quo is baseless. The learned trial judge was quite aware that the
 B Appellants were on the land but he held, quite rightly, in my view, that the Appellants' buildings on the land constituted the causes of action in this case."

**The above finding cannot be faulted and I agree with the court below that from the pleadings and the evidence led, a visit to
 C the locus was neither necessary nor desirable. It is also pertinent to state that at no stage in the proceedings did any of the parties request the court to visit the locus in quo.**

In the remaining issues for determination, the defendants' com-
 D plaints hinge on improper evaluation of evidence by the trial judge, misdirections and errors in law and on facts and whether the defendants did not prove their title to the land in dispute in their cross-action. I will consider them together since they touch on the evidence before the trial
 E judge. The learned trial judge found as follows:

"As I had stated earlier that the pleadings raised the issue who first settled on the land, is it Plaintiffs' ancestors or the Defendants' ancestors? In order to establish who first settled on the land, both parties
 F are relying on traditional evidence and acts of ownership. The evidence of each party as to their traditional evidence (sic) had been dealt with in the review of the evidence of all the witnesses earlier in this judgment. Thus putting the two traditional histories, who then had given cogent traditional history? From the findings and the foregoing, I have got no
 G hesitation in holding that the Plaintiffs had given cogent traditional history and I accept theirs as probable (sic) true than that of the Defendants."

After a careful evaluation of the evidence adduced by the parties, he
 H found internal conflict in the traditional evidence of the defendants' witnesses, and came to the conclusion that the question of testing the defendants' traditional evidence with that of the plaintiffs does not arise. See *Mogaji & Ors. v. Cadbury Nig. Ltd. & Ors. (1985)2 NWLR (Pt.7)393 at*

395. That notwithstanding, the learned trial judge again, painstakingly, considered the acts of possession exercised by the parties and after making specific findings of fact held as follows:

“Having, therefore, held that the entire land belong to the Plaintiffs before they granted the area now occupied by Nwebiara people to them, the other lands of the Plaintiffs had been shown to belong to them, then the area in dispute which is within the larger expanse of land, would, undoubtedly, be that of the Plaintiffs.”

The court below considered the findings of fact made by the trial judge and came to the following conclusion:

“From all the excerpts from the judgment granted above it is crystal clear that the learned trial judge considered the evidence proffered by the parties and made specific findings on the issues relating to the extent of the land in dispute, the founder and possession thereof as well as land connected therewith. I will also resolve this issue against the Appellants.”

In a consolidated action, both parties are plaintiffs and in this case, each is claiming declaration of title to the pieces of land in dispute. The defendants appear to have overlooked the fact that each party had assumed the burden of satisfying the court either by conclusive traditional evidence or by evidence of exercise of maximum acts of ownership extending over a sufficient length of time, numerous and positive enough to warrant the inference that he is exclusive owner of the land in dispute. See *Chief L. A. Odunsi, Ojora of Lagos & Ors. v. F. E. Pereira & Ors. (1972) 1 SC.52. The plaintiffs* satisfied the courts below by both traditional evidence and evidence of the exercise of maximum acts of ownership and the case was decided on the balance of probabilities.

I have gone through the pleadings, the evidence of the parties and the judgments of the courts below and from the state of the pleadings and evidence, it is difficult to see how the defendants could have succeeded on their defence let alone their cross-action for declaration of title. It is very clear that the defendants failed woefully on the evidence. Above all, it should be emphasized that

this is an appeal against concurrent findings made by two courts below and unless there is error on the face of the record occasioning a miscarriage of justice, this court will not interfere. See *Chukwuogor v. Obuora (supra)*, *Woluchem v. Gudi* (1981)5 SC.319 at 326-330 and *B Overseas Construction Co. (Nig.) Ltd. V. Creek Enterprises (Nig.) Ltd. & Ors. (1985)3 NWLR 9Pt.13)407.*

For these reasons the appeal of the defendants must fail and I will dismiss it with N10,000.00 costs to the plaintiffs.

C

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother E. Ogwuegbu, JSC in this appeal. I agree with him that the Appellant's appeal against the judgment of the Court of Appeal fails and is dismissed. I abide by the costs awarded in the leading judgment.

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IGUH JSC

I have had the privilege of reading in draft the just delivered by my learned brother, Ogwuegbu, JSC and I agree that this appeal is without merit and should be dismissed.

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For the reasons he has ably given in the said judgment, I, too, dismiss this appeal and abide by the same order as to costs as therein made.

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KATSINA-ALU JSC

I have had the advantage of reading in advance the judgment of my learned brother OGWUEGBU, JSC. in this appeal. I entirely agree with it. For the reasons which he gives, I also would dismiss the appeal with N=10,000.00 costs to the plaintiffs.

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Ogwuegbu, JSC. I am in entire agreement with him that there is no merit in the appeal and with the reasons he gives for that decision.

One aspect of the appeal on which I briefly comment is that raised by the first issue for determination, namely: Whether the trial judge having tried an action between parties who are not parties to this case and in respect of a different parcel of land, and having in that case accepted as more probable the evidence of traditional history identical to that advanced by the respondents in this case, the appellants have had a fair hearing in terms of section 33(1) of the 1979 Constitution.

Unfairness of a trial comes in two broad categories. One is procedural unfairness that arises where the court or tribunal adopts a procedure which does not ensure that one or both of the parties are not put at a disadvantage. The commonest forms are where a party had been deprived of an opportunity of a hearing or where there is no procedural equality between the parties. Substantive unfairness arises where the judge approaches his adjudicative function with a mind closed or a mind influenced by considerations other than the facts in evidence before him or facts on which the parties are in agreement, or is influenced by factors extraneous to his proper role as an umpire.

The latter aspect of unfairness is often described as bias. Bias in its ordinary meaning is opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the judge so influenced will be unable to hold an even scale.

Foreknowledge of the fact is an aspect of such bias. Where a judge has foreknowledge of the facts he does not come to the dispute with an openness of mind that would enable him to hold an even scale. Therein lies the unfairness. That is one aspect of bias that is alleged in this case. Another aspect is that the trial judge was likely to be biased in favour of his previous decision. It is this latter aspect that I find of some weight and worthy of close consideration.

As to foreknowledge of the facts, no one can doubt that fore-

knowledge of primary facts disqualifies a judge. However, in this case I do not think that the finding made in the suit No. PHC/183/72 between *different parties* in respect of a *different parcel of land* as to the probability of the traditional history of one of the parties in the case is such
 B foreknowledge of the facts as would disqualify the trial judge from a fair trial of this case in which the sets of evidence put on scale of probability are not between the same parties. This is one of the factors which distinguish this case from cases such as *Abbey v Lamptey 12 WACA 156*
 C where a re-hearing is ordered before a judge other than the one before whom an abortive trial was held by reason of foreknowledge of the facts.

The contention of the appellants in this case is that Ichoku, J., having found that Nomabon which was the land in dispute in suit PHC/
 D 183/72 and the adjoining land which they claimed included the "NDP school in issue in this case." belong to the Barako people, it having been founded by their ancestor namely, Gberederekina; he could not have an open mind as to the founder of Nomabon and the adjoining land. It was
 E further argued that he must necessarily be partisan as to that particular issue in the present case. They invoked the principle in *LPDC v Gani Fawehinmi* (1985) 2 NWLR (Pt. 7) 300 at 333.

In my view *Gani Fawehinmi's* case is not relevant. That case
 F was one in which the complainant was also the judge. There is no such bias here. The ground that is relevant to this aspect of the appellant's contention is that a man is likely to be biased in favour of his own decision. Barring cases in which previous decisions are used as estoppel
 G justice would not seem to be manifestly done were an issue of fact already pronounced upon by a judge to be re-submitted to the same judge for decision. However, issues of fact are resolved in civil cases on preponderance of evidence. Where the parties are not the same and the facts are at large, determining where the balance of probability tilts is
 H dependent on a new set of evidence and no reasonable embarrassment is occasioned so as to make a judge to be biased in favour of his previous finding. Probability of a fact must be seen as matter of preference between two sets of conflicting evidence given in a particular case. When,

therefore, in suit PHC/183/72 Ichoku, J., stated that:

"The traditional history of the Defendant, as supported with other facts in this case, is more acceptable than the plaintiffs," and also that: "It is clear that the traditional history of the Defendant is more acceptable and probable and also backed by facts and other lands surrounding the land in dispute are directly connected with the Defendant such as the land of Pianu Deako, the forest and the shrine Kol - Tanigo and the NDP Mission and other boundary neighbours coming from Barako." (Emphasis is mine) he was weighing two sets of evidence in a case to which the present parties were not parties.

However, learned counsel for the appellant argued with some force thus:

"...if an ordinary reasonable person acquainted with the foregoing facts is asked, his answer will definitely be this 'what do you expect, after ICHOKU, J., had in suit No. PHC/183/72 held that NOMABON and the adjoining lands belong to Barako people, how then do you expect him to decide otherwise in the present action?' This certainly will be the view of the common man or the ordinary reasonable citizen whose impression is the barometer for ensuring justice in a particular case. A reasonable person in this wise is not a Barrister who knows the procedural rules."

I cannot conceive of a reasonable man who will come to an opinion over a matter without knowledge of the facts or of the circumstances. Such a man would better be described as a rash person. The reasonable common man described in Adigun v AG Oyo State (1987) 1 NWLR (Pt 53) 678 at 719-720 referred to by learned counsel for the appellants is one who seeks half truths by asking inadequate questions. I venture to think that a judge is not bound to stick to a finding which cannot be binding on the parties before him for the simple reason that the parties were different.

Although a party may not be held to have waived his right to complain about unfairness of a trial, where the alleged unfairness is not obvious, and the allegation of unfairness needs considerable persuasion to sustain it, the conduct of the party complaining in not raising an objec-

tion to the proceedings at the trial may indicate that the complaint is the mere after-thought of a loser. Thus, if as argued by learned counsel for the appellant in this appeal, a reasonable person would have come to a certain conclusion that the trial judge could not enter into the trial with an open mind, one may wonder why the appellants and their counsel, all reasonable men, waited till judgment was against them before they suddenly discovered how a reasonable person would have viewed the proceedings? The conclusion which seemed reasonable is that they did not raise objection to Ichoku, J., entering into the trial because they did not doubt his ability to enter into the trial with an open mind and with fairness. That initial re-action of the appellants and their counsel to the ability of Ichoku, J., to conduct a fair trial of the case confirms the view I hold of the matter.

In the final analysis whether a trial had been fair or not depends on the circumstances of each case. After an anxious consideration of the circumstances of this case, I am unable to come to the conclusion that the trial had been unfair.

For this and for all the detailed reasons contained in the judgment of my learned brother, Ogwuegbu, JSC, on the rest of the issues in the appeal I too would dismiss the appeal with =N=10,000 costs to the respondent.

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