

SUPREME COURT OF NIGERIA
13TH JULY, 2001. SC. 111/1997
CORAM:- S. U. ONU, A. I. IGUH, A. I. KATSINA-ALU,
O. ACHIKE, E. O. AYoola, JJSC.

THE CHAIRMAN, NATIONAL APPELLANT
POPULATION COMMISSION

AND

1. THE CHAIRMAN, IKERE LOCAL
GOVERNMENT

2. HIS HIGHNESS, OBA ADEGBOYE
AKAIYEJO II (The Ogoga of Ikere) RESPONDENTS

3. IKERE LOCAL GOVERNMENT
(For themselves and on behalf of the
entire members of the Community of
Ikere Local Government, Ondo State)

AFFIDAVITS - Conflicts in affidavit - The authority of *Nwosu v. Imo State Environmental Sanitation Authority* is not applicable - And is distinguished (H 4)

AFFIDAVITS - Documents - Resolution of disputed facts by documents - The weight and value of the documents tendered by the appellant - Are dependent on oral evidence of witnesses - And it was wrong to elevate documents to conclusive evidence of their contents (H 3)

EVIDENCE - Affidavits - Resolving conflicts in affidavits - The principle laid down in *Falobi v. Falobi* - Applies to a variety of proceedings - And is not restricted (H 1)

EVIDENCE - Affidavits - Whether a case may be heard entirely on affidavit evidence or not - Is determined by the nature of the issues - Whether they are of contentious facts or not (H 2)

PRACTICE & PROCEDURE - Evidence - Affidavits - Hurried pro-

ceedings - Proceedings should not be hurried at the expense of justice - As it may amount to a burying of justice (H 6)

TRIBUNALS - *Census Tribunal - The census complaint - Was not such as could be heard entirely on affidavits - And the entire proceedings were thus vitiated (H 7)*

TRIBUNALS - *Fact finding tribunal - Credibility of witnesses - The procedure adopted by the tribunal - For determining credibility of witnesses it had not seen - Is unsupported by law and wrong (H 5)*

FACTS

The National Population Commission pursuant to the powers conferred upon it by the National Population Commission Act conducted the enumeration of the population of Nigeria through a census between the 29th and 30th November 1991. The Commission returned a figure of 59,527 for the Ikere Local Government. The Respondents thereupon for themselves and on behalf of the community of Ikere Local Government presented a complaint to the census Tribunal alleging among other things, that the results as it relates to their local government was erroneous and grossly inaccurate, adducing various reasons for their contention. Some of the reasons included inadequacy of enumeration centres, shortage of enumerators leading to failure to count some people, etc. The Commission on its part denied and countered the allegations whereupon the Tribunal ordered for evidence to be given by affidavit. The affidavits, counter-affidavits and further affidavits placed before the tribunal were in conflict.

The tribunal in its decision dismissed the affidavits sworn on behalf of the respondents as untruthful and held that the claim of the respondents were false and as such the census figures released for Ikere Local government was valid. The Respondents successfully appealed to the Court of Appeal on the procedure adopted in reconciling the conflicting affidavits without calling oral evidence. The Court of Appeal unanimously allowed the appeal and ordered a fresh trial. The Commission

has therefore appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) *Considering the strange, grossly irregular and very unusual procedure adopted by the trial Tribunal in dealing with this case, whether or not the lower court was right in ordering that the respondent’s petition be tried by a differently constituted Tribunal.*

(ii) *Whether having regard to the totality of the affidavits filed by the parties and the materials supplied by them, the lower court was right in coming to the decision it made.”*

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

Evidence - Affidavits

1. Evidently, both counsel accept and acknowledge the authority of cases such as Olu Ibukun v Olu Ibukun [1974] NSCC 91; Falobi v Falobi [1976] 576; and Akinsete v. Akindutire [1966] 1 ALL NLR 147, [1966] NSCC 147. The principle for which they stand is not difficult to state, and I state it simply thus: where the affidavits conflict on a disputed material fact, a court called upon to resolve an issue of fact sought to be established by the conflicting affidavits should not resolve such issue merely on the conflicting affidavits but should hear oral evidence from the deponents and such other witnesses as the parties may be advised to call. As can be seen from these cases, the principle is not limited to particular types of proceedings but is applicable to a variety of proceedings. Akinsete v Akindutire were proceedings to set aside sale of attached property on allegation of misconduct and undervalue; Olu Ibukun v Ibukun were proceedings in an application for alimony pendente lite made pursuant to s.70(2) of the Matrimonial Causes Decree, 1970; Falobi v Falobi related to an originating application brought on the ground of wilful neglect to maintain children. None of these proceedings were writ cases. (p. 2817 B)

Whether a case may be heard entirely on affidavit

2. Whether proceedings may be heard entirely on affidavit evidence or

not is not to be determined by the form of the proceedings but by the nature of the issues and the parties reaction to the facts in issue in the proceedings. Where there is no contentious issue of facts in the proceedings no reasonable objection can be taken to a hearing on the affidavits. It is when there is serious dispute as to facts to be resolved that trial on affidavits is inappropriate. (p. 2818 H)

Affidavits - Documents

C 3. In this case there is a serious misconception in the approach of learned counsel for the Commission and of the Tribunal itself. They were both under a misconception in thinking that disputed facts are resolved by the production of enumeration forms N.C.P. 01 and, in holding the view that reliance on demographic theories, historical background and socio-political events, which may show the serious improbability of the accuracy of the figures declared by the Commission and put a serious question mark on the accuracy of the figures declared and the efficiency of the entire exercise itself, together with the allegation of bias in the conduct of the exercise are all irrelevant.

F The value and weight to be attached to the N.P.C. 01 forms themselves are dependent on the oral evidence of the enumerators on the one hand and the witnesses who challenged not only the accuracy of the enumeration but also of the general conduct of the exercise on the other. To hold otherwise would elevate the forms to conclusive evidence of what they declared, when the law does not so provide. Even if the forms are presumptive evidence of the facts recorded therein, and I do not so decide, they cannot be such evidence of the flawlessness of the exercise.

G Production of the forms in evidence cannot by itself be an answer to allegation of partial enumeration or of bias in the conduct of the exercise. (p. 2819 B)

Affidavits - Distinguishing

4. The case of Nwosu v. Imo state Environment and Sanitation Authority (1990) 2 NWLR (pt 135) 688 and Fashanu v Adekoya (1974) 1 All NLR 35, 48 on which learned counsel for the Commission relied are not

apt. In *Nwosu's case*, this case while acknowledging the authority of such cases as *Falobi v Falobi*, and *Akinsete v Akindutire* went on to say that: "*it is not only by calling oral evidence that such conflict could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another.*" In *Fashanu v Adekoya* the documentary evidence referred to were mostly documents emanating from the defendant which tended to dent his credibility. In that case the value of the trial court not only hearing but also seeing the witnesses in order to ascribe credibility to their evidence was not whittled down. In this case if the forms NPC-01 had been the respondents' forms or if the respondents have admitted or accepted their contents, for instance, by endorsing them, the Commission's argument in this regard would probably have been unanswerable. But that is not the case. (p. 2819 G)

Fact finding tribunal - Credibility of witnesses

5. On numerous issues of fact, the affidavits were in serious conflict. For a fact-finding tribunal, such as the Tribunal in this case, to claim to be in a position to comment on the credibility of witnesses it has neither heard nor seen and, whose credibility has not in any way been affected by any documentary evidence that is capable of being a challenge to their credibility, is a feat which the law neither recognises nor accepts. In the circumstance of this case, there cannot be any reasonable doubt that the proceedings were seriously flawed by the procedure adopted by the Tribunal. (p. 2820 C)

Practice & procedure - Hurried proceedings

6. Notwithstanding that the procedure adopted by the Commission may have been good intentioned in an effort to dispose of as many complaints as possible within a limited time, proceedings cannot be hurried at the expense of justice. Justice delayed, it is often said, is justice denied, but it is equally true that justice hurried may be justice buried. As I read several provision of the Act, trying the complaint by affidavit should be more of the exception than the rule. That exception can only be justified

where there is no serious dispute as to the facts. That is not the position in this case. (p. 2820 F)

Tribunals - Census tribunal

- B 7. From the facts of this case it is clear that the complaint was not such that should have been heard entirely on affidavits. The procedure adopted by the Tribunal was contrary to well established principles and is not in accord with the spirit of the rules of procedure contained in the Third schedule. The court below was right in holding that the entire proceedings were vitiated by the procedure adopted by the Tribunal and that the judgment of the Tribunal should be set aside. (p. 2821 C)

NOTABLE POINT OF INTEREST

D **AYOOLA JSC**

1. Counsel should present their argument in briefs lucidly in order to aid the court

- I feel no hesitation in dismissing this appeal, but not without commenting on the care with which counsel for the parties have prepared their briefs and not without commending them on the lucid presentation of their respective arguments. Much assistance has been derived from the clarity of their reasoning which, I must say, is worthy of emulation by other counsel practising before this court. (p. 2821 E)

REPRESENTATION

Frank O. Ezekwueche for the Appellant.

- G Chief Wole Olanipekun, S. A. N., (with him O. Olanipekun, O. Adebola, S. A. Basambo, Miss J. Adewumi, and Miss O. Omotade) for the Respondents.

CASES REFERRED TO

- H Olu Ibukun v. Olu Ibukun (1974) NSCC 91
Falobi v. Falobi (1976) 576
Akinsete v. Akindutire (1966) 1 ALL NLR 147, (1966) NSCC 147
Nwosu v. Imo state Environment and Sanitation Authority (1990) 2

NWLR (pt.135) 688

Fashanu v Adekoya (1974) 1 All NLR 35, 48

Government of Ashanti v. Adjuah Korkor (1974) 1 All NLR 280

Uku & Ors. v. Okumagba (1974) 1 All NLR 475 at 496, (1974) 3 SC. 35

Eboh & Anor. v. Oki & Ors. (1974) NSCC 26

B

Ebohon v. Attorney-General of Edo State (1997) 5 NWLR (Part 505)
298 at 309

STATUTES REFERRED TO

C

National Population Commission Act : Cap. 270 Laws of the Federation
of Nigeria 1990 - S. 1, S. 26 A

National Population Commission (Amendment) Decree 1992 (Decree No.
26) - S. 26 A(7)

Uniform Civil Procedure Rules - O. 39, rr. 1 & 2

D

BOOKS REFERRED TO

Practice and Procedure of the Supreme Court, Court of Appeal and High
Courts of Nigeria 1995 para. 1.09 by Aguda

E

English Annual Practice 1999 para. 38/2/1

LEAD JUDGMENT BY AYoola JSC

The main question in this appeal is whether the procedure adopted
by the Census Tribunal in trying on affidavits the complaint brought be-
fore it by the respondents pursuant to the National Population Commis-
sion Act [Cap 270: Laws of the federation of Nigeria, 1990] (as amended
and further amended) ("the Act") has vitiated the proceedings.

G

By section 1 of the act the National population Commission ("the
Commission") was established for the Federal Republic of Nigeria. By
section 6(a) the Commission is to:

*"undertake the enumeration of the population of Nigeria peri-
odically, through censuses, sample surveys or otherwise."*

H

Section 26A of the Act, as amended by the National population Amend-
ment Act, 1991, provides that:

"There shall be established in designated centres census Tribu-

nal to hear complaints and objections to census result as they relate to the specific Local Government Areas or Localities."

The Act as amended by the 1991 amendment Act was further amended by the National Population Commission (Amendment) Decree 1992 (Decree N0.26) which introduced subsection 7 of section 26A of the Act. Sub-section 7 of section 26A provides that:

"The rules of procedure to be adopted by the Census Tribunal in hearing complaints and objections to census result shall be as set out in the Third Schedule to this Act."

The Third Schedule prescribed comprehensive rules of procedure to be followed by the Census Tribunal.

In determining the main issue in the this appeal, the path of enquiry is whether the prescribed procedure for the census Tribunal justified the procedure adopted by the Tribunal. The Third Schedule made provision covering several aspects of procedure, including the presentation of complaint, the contents of complaint and several others. However, only some of them which have bearing on this appeal need be highlighted. Paragraph 15(2) provides as follows

" The Tribunal in the hearing and determination of the complaint shall not be obliged to confine its enquiry to the issues raised by the complaint and the reply, if any, and may, with or without ordering or allowing-

(a) the amendment of any statement of the facts and grounds relied upon in support of the complaint or the amendment of any admission or denial contained;or

(b) the facts or grounds set out in the reply (but subject always and having due regard to the time limited by paragraph 2 of this Schedule for presenting complaint),

inquire into any other issue otherwise appearing, as the Tribunal may deem necessary for the purpose of the full and proper determination of the complaint."

Paragraph 17 of the third Schedule provides that:

"Every complaint shall be heard in open court."

Paragraph 22 provides that in the event of the Chairman of the Tribunal

who begins the hearing being disabled by illness or otherwise, it may be recommenced and concluded by another Chairman to be appointed by the Chief justice of Nigeria. Paragraph 37 (1) gives the Tribunal power to call witness. It provides that:

"On the hearing of a complaint, the Tribunal may summon any person as a witness who appears to the Tribunal to have been concerned in the census."

Paragraph 37(2) provides that :

"The Tribunal may examine any witness so summoned or any person in the Tribunal although such witness or person is not called and examined by any party to the complaint, and thereafter he may be cross-examined by or on behalf of the complainant and the respondent."

Finally, paragraph 45-(1) provides that:

"Subject to the express provision of this Schedule the practice and procedure of the Tribunal in relation to a complaint shall be assimilated as nearly as may be to the practice and procedure of the High Court in the exercise of its civil jurisdiction, the Civil Procedure Rules or Civil Procedure Code shall apply with such modification as may be necessary to render them conveniently applicable, as if the petitioner and the respondent were respectively the plaintiff and the defendant in civil action."

Pursuant to the powers conferred upon it by the Act the Commission conducted the enumeration of the population of Nigeria through a census between the 27th and 30th November, 1991. The Commission returned a figure of 59,527 for the Ikere Local Government. The respondent in this appeal for themselves and on behalf of the entire members of the Community of Ikere Local Government presented a complaint to the census Tribunal alleging, among other things, that the results relating to the Ikere Local Government of 59,257 were erroneous, unsustainable and grossly inaccurate. In their complaint they advance severally reasons why the returns could not have been accurate. They referred to what they chose to describe as "accepted norms and principles of population dynamics," they alleged a confirmation of "the prejudices and misconceptions which led to the Commission's negative head

count in Ikere Local Government. "They called in aid political history of the area and its environs and the political, educational, social and economic development of the area over the years. The Commission says in this appeal that all of these are theoretical. However, in paragraph 12 of the complaint the respondents alleged that (i) the enumeration centres allocated to Ikere Local Government were grossly inadequate; (ii) there was shortage of enumerators as a result of which many people were not counted particularly in the hamlets and farmsteads; and, (iii) many enumerators were not present during the period of enumeration. They alleged in their paragraph 5 (c) *"underlying prejudices and misconceptions."*

The Commission for its part, in its reply averred in paragraph 3 that:

"In further answer to paragraphs 5,6, and 7 of the objection, the respondents aver that they employed a de facto enumeration method, as distinct from the de jure method, whereby only person physically seen by the enumerators within an enumeration area between the 27th to 30th November 1991 (herein after called "the census period") were counted."

In paragraph 7 of the reply they averred that no farmstead, hamlets or villages were left uncounted and that they engaged a sufficient number of enumerators for the census exercise. There were, without doubt, factual issues to try in the matter having regard to the complaint, taken in its totality, and the Reply.

As confirmed by the preface to the Decision of the Census Tribunal on the 1991 National Census Exercise, evidence was ordered by Tribunal to be given by affidavit. Affidavit and counter affidavit were subsequently filed. Early in the preface the Tribunal limited itself by making it clear that in arriving at a decision, it had not taken into consideration argument not germane to the simple fact of de-facto counting. It stated that:

"Statistical data supplied by the Complainants which cannot be verified and which were not requested for on the N.P.C. 01 forms are considered irrelevant for our decision. N.P.C. 01 forms comprise questionnaire for which enumerators sought and received answers from physi-

cally present members of households. Evidence on these forms constitute the major evidence of whether a person in the area were counted."

In another part of the preface, the Tribunal stated that:

"...in the peculiar circumstance of matters which this fact-finding Tribunal has to decide, we are of the view that the evidential burden of establishing non-enumeration by the Complainant is not discharged by the mere listing of places or persons not counted. The complainant has to prove that the complaint is genuine by convincing evidence of the existence of the persons and/or of the localities between the 27th to 30th November, 1991." (Emphasis mine)

The affidavit, counter-affidavits and further affidavits placed before the Tribunal on the factual issues were in conflicts. The affidavits in support of the complaint consisted of affidavits of enumerators and residents of the area. For its part the Commission denied the facts deposited to the affidavits of the respondents' witness and produced enumeration forms. Commenting on the affidavit of the two enumerators who swore to facts in support of the respondents' case, the Tribunal said that having assessed "the quality and contents" of their affidavit evidence it was of the view they were untruthful. It held that the respondents have not proffered any satisfactory evidence to support partial enumeration of any locality. It also found that: "every village, hamlet, farmstead or household, said not to have been enumerated by the Respondent have been accounted for and shown enumerated with exhibits to support the affidavit evidence." In one instance, concerning enumeration of the collage of Education, there were affidavit, counter affidavit, further affidavit and further counter- affidavit all conflicting on facts.

At the end of the trial on affidavit the Tribunal came to the conclusion that:

"On the evidence before us, we find that the witness for the complainants have not been very truthful. All the place which they swore were not counted, were indeed counted."

In the result it held that the provisional census figures released for Ikere Ekiti Local Government Area was valid.

The respondent appealed to the Court of Appeal where, as can

be expected, one of their main complaints was that the procedure adopted by the Tribunal was erroneous. The issue was raised thus:

"Whether the Tribunal was not in a fundamental error in not directing that oral evidence be given to resolve the many irreconcilable conflicts in the diverse affidavit, counter-affidavits and replies to counter affidavits filed by the parties before making use and relying on same."

The Court of Appeal, in a unanimous decision had no difficulty in answering in the affirmative. Akpabio, JCA, who delivered the leading judgment of the Court of Appeal described the procedure adopted by the Tribunal as "very strange, grossly irregular and very unusual." In the result., that court concluded that: "The trial or purported trial in this case must therefore be set aside and fresh trial ordered."

On this appeal by the Commission from the decision of the court below, three issues were raised by learned counsel for the Commission. However, since the decisive and fundamental issue is as regard the procedure adopted by the Tribunal, it will be sufficient to resolve the appeal on that issue. The substance of the well presented arguments advance by Mr Ezekwueche, learned counsel for the Commission, is that a census suit is not like what he described as "the usual run-of-the-mill" suits where only oral evidence must be used or called to resolve conflicts. Proceeding from this standpoint he submitted that it is not in every case where oral evidence is not used to resolve conflicts in affidavit that the court sets aside the trial for a new one, and that for a trial to be set aside, there must be an issue or matter so fundamental or pertaining to the substance of the dispute between the parties which would not been otherwise resolved without recourse to oral evidence. In his submission, the Tribunal was justified in making use of documentary evidence to resolve the conflicts in the affidavit of the parties, such documentary exhibits being N.P.C 01, which in learned counsel's submission held the key to the resolution of the question regarding whether or not a person or place was enumerated or partially enumerated.

For his part, Chief Olanipekun, learned counsel for the respondents, submitted that the third Schedule to the Act rather than direct that the Tribunal should limit the hearing to affidavits by several of its provi-

sion enjoins and encourage that the oral evidence be taken. He submitted that it is now settled law that where, as in this case, a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponent or such witness as the parties may be advised to call. B

Evidently, both counsel accept and acknowledge the authority of cases such as *Olu Ibukun v Olu Ibukun* [1974] NSCC 91; *Falobi v Falobi* [1976] 576; and *Akinsete v. Akindutire* [1966] 1 ALL NLR 147, [1966] NSCC 147. The principle for which they stand is not difficult to state, and I state it simply thus: where the affidavits conflict on a disputed material fact, a court called upon to resolve an issue of fact sought to be established by the conflicting affidavits should not resolve such issue merely on the conflicting affidavits but should hear oral evidence from the deponents and such other witnesses as the parties may be advised to call. As can be seen from these cases, the principle is not limited to particular types of proceedings but is applicable to a variety of proceedings. *Akinsete v Akindutrie* were proceedings to set aside sale of attached property on allegation of misconduct and undervalue; *Olu Ibukun v Ibukun* were proceedings in an application for alimony pendente lite made pursuant to s.70(2) of the Matrimonial Causes Decree, 1970; *Falobi v Falobi* related to an originating application brought on the ground of wilful neglect to maintain children. None of these proceedings were writ cases. C D E F

Any claim that evidence by affidavit is absolutely prohibited in the trial of an action will be as extravagant as a claim that trial by affidavit is completely unrestricted. As an example, in the Uniform Rules introduced in the 1987 by the Nigeria Law Reform for adoption by High Court and which, on the authority of *Aguda, Practice and procedure of the supreme Court of Appeal and High Court of Nigeria*, 1995, para. 1.09, have been adopted by 'most of the courts with the notable exception of H Lagos,' provision was made in order 39,r.2 as follows: G H

"(1) The Court or Judge in Chambers may, at or before the trial of an action, order or direct that all or any of the evidence therein shall

be given by affidavit.

(2) *An order or direction under this Rule may be made or given on such terms as to the filing or given copies of the affidavits or proposed affidavits and as to the production of the deponents for cross-examination as the court or judge in Chambers may think fit but, subject to any such terms and to any such subsequent order or direction of the court or a judge in Chambers, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.*" (Emphasis mine)

This, obviously, is an exception to rule 1 of the same order which provides that:

"Subject to these Rules, to the Evidence Act, and to any other enactment relating to evidence, any fact require to be proved at the trial of any action commenced by writ by the evidence of witness shall be proved by examination of the witnesses orally and in open court."

Commenting on similar provision in O.38, r.2 of the English Rules of the Supreme Court, the learned editors of the English Annual practice 1999, at para 38/2/1, stated that: "It is not practicable to make such an order where the evidence will be strongly contested and its credibility depends on the Court's view of the witness." Similarly, in *Aguda*, (op. Cit.) Commenting on O. 39, r.2 of our Uniform Rules, it was stated that:

"The discretion of the trial court to order that all or any of the evidence required in a trial be given by affidavit must be exercised with care since it is in the interest of justice that in case where there are serious dispute as to facts witnesses testifying to the facts should be subjects of cross-examination by the opposing party."

Neither O 39, r.1 nor r.2 applies to proceedings begun by origination summons, or by motion or petition in which evidence by affidavit is the rule rather than the exception. In this case the proceedings are begun by complaint but paragraph 45 of the third Schedule to the Act provided in effect that the proceedings shall as far as possible be assimilated to one as between a plaintiff and a defendant for the purpose of the application of the High Court rules of procedure.

Whether proceedings may be heard entirely on affidavit

evidence or not is not to be determined by the form of the proceedings but by the nature of the issues and the parties reaction to the facts in issue in the proceedings. Where there is no contentious issue of facts in the proceedings no reasonable objection can be taken to a hearing on the affidavits. It is when there is serious dispute as to facts to be resolved that trial on affidavits is inappropriate. B

In this case there is a serious misconception in the approach of learned counsel for the Commission and of the Tribunal itself. They were both under a misconception in thinking that disputed facts are resolved by the production of enumeration forms N.C.P. 01 and, in holding the view that reliance on demographic theories, historical background and socio-political events, which may show the serious improbability of the accuracy of the figures declared by the Commission and put a serious question mark on the accuracy of the figures declared and the efficiency of the entire exercise itself, together with the allegation of bias in the conduct of the exercise are all irrelevant. D E

The value and weight to be attached to the N.P.C. 01 forms themselves are dependent on the oral evidence of the enumerators on the one hand and the witnesses who challenged not only the accuracy of the enumeration but also of the general conduct of the exercise on the other. To hold otherwise would elevate the forms to conclusive evidence of what they declared, when the law does not so provide. Even if the forms are presumptive evidence of the facts recorded therein, and I do not so decide, they cannot be such evidence of the flawlessness of the exercise. Production of the forms in evidence cannot by itself be an answer to allegation of partial enumeration or of bias in the conduct of the exercise. The case of Nwosu v. Imo state Environment and Sanitation Authority (1990) 2 NWLR (pt 135) 688 and fashanu v Adekoya (1974) 1 All NLR 35, 48 on which learned counsel for the Commission relied are not apt. In Nwosu's case, this case while acknowledging the authority of such cases as *Falobi v Flaobi*, and *Akinsete v Akindutire* went on to say F G H

that: *"it is not only by calling oral evidence that such conflict could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another."* In *fashanu v Adekoya* the documentary evidence referred to were mostly documents emanating from the defendant which tended to dent his credibility. In that case the value of the trial court not only hearing but also seeing the witnesses in order to ascribe credibility to their evidence was not whittled down. In this case if the forms NPC-01 had been the respondents' forms or if the respondents have admitted or accepted their contents, for instance, by endorsing them, the Commission's argument in this regard would probably have been unanswerable . But that is not the case.

On numerous issues of fact, the affidavits were in serious conflict. For a fact-finding tribunal, such as the Tribunal in this case, to claim to be in a position to comment on the credibility of witnesses it has neither heard nor seen and, whose credibility has not in any way been affected by any documentary evidence that is capable of being a challenge to their credibility, is a feat which the law neither recognises nor accepts. In the circumstance of this case, there cannot be any reasonable doubt that the proceedings were seriously flawed by the procedure adopted by the Tribunal. Notwithstanding that the procedure adopted by the Commission may have been good intentioned in an effort to dispose of as many complaints as possible within a limited time, proceedings cannot be hurried at the expense of justice. Justice delayed, it is often said, is justice denied, but it is equally true that justice hurried may be justice buried. As I read several provision of the Act, trying the complaint by affidavit should be more of the exception than the rule. The exception can only be justified where there is no serious dispute as to the facts. That is not the position in this case.

Learned counsel for the Commission took an unduly narrow view of the issues in the case when he argued that several of the facts deposed to in the affidavits in support of the complaint and comments of the court below on the facts which disputed, were outside issues raised

by the complaint. As rightly pointed out by Chief Olanipekun, Learned counsel for the respondents, the Tribunal is not limited by such issues having regard to the provision of paragraph 15(2) of the Third Schedule.

Thus, even if Mr Ezekwueche was right in his submission that the issues raised in the complaint were narrower than those disclosed in the affidavits, and I do not decide that they were, paragraph 15(2) shows that the Tribunal could not close its eyes to the numerous facts disclosed in the affidavits which were relevant to the validity of the entire exercise and which were disputed facts.

From the facts of this case it is clear that the complaint was not such that should have been heard entirely on affidavits. The procedure adopted by the Tribunal was contrary to well established principles and is not in accord with the spirit of the rules of procedure contained in the Third schedule. The court below was right in holding that the entire proceedings were vitiated by the procedure adopted by the Tribunal and that the judgment of the Tribunal should be set aside.

I feel no hesitation in dismissing this appeal, but not without commenting on the care with which counsel for the parties have prepared their briefs and not without commending them on the lucid presentation of their respective arguments. Much assistance has been derived from the clarity of their reasoning which, I must say, is worthy of emulation by other counsel practising before this court. Be that as it may, I dismiss this appeal with ₦10,000 costs to be respondents.

ONUJSC

This appeal is sequel to the decision of the Court of Appeal, Benin Division (hereinafter in the rest of this judgment referred to as the Court below) which allowed the appeal and set aside the judgment of the Census Tribunal on the ground that oral evidence was not called at the trial to resolve conflicts in the affidavit evidence of the parties.

I have been privileged to read before now the judgment of my learned brother Ayoola, JSC. I am in entire agreement therewith that the

appeal lacks merit and ought therefore to fail. It is accordingly dismissed by me.

I wish to add by way of elaboration a few words of mine as follows:

B While the Appellants submitted three issues as arising for our determination, the Respondents proffered two such issues (distilled from the nine grounds of appeal culled from the Tribunal Decision) for our consideration. These latter issues, which I adopt and consider as ample enough to dispose of the appeal, complain as follows:

C “(i) *Considering the strange, grossly irregular and very unusual procedure adopted by the trial Tribunal in dealing with this case, whether or not the lower court was right in ordering that the respondent’s petition be tried by a differently constituted Tribunal - Grounds 4, 6, 8 and 9.*

D (ii) *Whether having regard to the totality of the affidavits filed by the parties and the materials supplied by them, the lower court was right in coming to the decision it made – Grounds 5 and 7.”*

Commencing with Issue No. (i), the learned counsel for the
E Appellants submitted that in all, there were twenty-six affidavits, counter-affidavits, and replies to counter affidavits filed before the Tribunal. Out of all these, twenty-two were filed by the Appellants while the remaining four were filed by the Respondents. Serious issues ranging from non-
F enumeration, partial enumeration in some areas, sabotage on the part of the Respondent’s officials, usage of obsolete maps for Ikere Local Government, false declarations etc. were raised in the Appellants’ affidavits but only some of these grave allegations were glibly denied in the Respondents’ counter affidavits. Clearly in all these affidavits which are
G replete with irreconciliations on material issues, the contentions of the parties are diametrically opposed to one another. Such conflicts in the affidavits can be deciphered in the affidavit evidence on whether indeed certain large areas like the Ogoga’s palace and household, compounds,
H Agamo settlement, College of Education, Ogurinde’s Compound or household or household Nos. 21A and 23 Isaoye Street etc were partially, fully or not enumerated at all.

Furthermore, there are conflicts in the affidavits on whether or

not the map used by the Respondents for Ikere Local Government Area is realistic or not. The affidavits of Foluke Ojo and the one purportedly made by Aduloju Lawrence, for instance, are patently in conflict. Hence, the Tribunal in its judgment held inter alia as follows on them:

"We have examined the affidavit evidence for the complaints with respect to non-enumeration or partial enumeration of localities. We concede that partial enumeration is difficult to prove since only the respondents conducted the census between 27th and 30th November, 1991. The complainants have not proffered any satisfactory evidence to support partial enumeration for any locality. On the other hand, every Village, hamlet, farmstead or household, said not to have been accounted for and shown enumerated with exhibits to support the affidavit evidence. On the evidence before us, we find that the witnesses for the complainants have not been very truthful. All the places, which they swore, were not counted, were indeed counted. We find that the localities complained about as not having been demarcated and enumerated because they are outside the areas covered by the map used by the National Population Commission, were found to have been counted." (Underlining is for emphasis and comment).

Be it noted that the Tribunal in reaching its decision did not call for oral evidence before resolving the numerous conflicts in favour of the Appellants to the prejudice of the Respondents. This, in my view, is not only indicative of an abdication of judicial duty but a grave injustice to the complainants. This is the moreso, as it is procedurally wrong and indeed unfair, in my view, to discredit somebody who is supposed to have given evidence under the sanctity of an oath without watching and studying his demeanour and without probing the veracity or otherwise of his averments in the affidavit. See the underlined observation of the trial Tribunal (*supra*) above, to wit: *"On the evidence before us, we find that the witnesses for the complainants have not been very truthful"* when the credibility of the purported witnesses was being impugned whereas as a matter of fact, such named witnesses neither gave evidence on oath nor were they cross-examined. Be it further noted that in this country as with other countries in any common law jurisdiction, the preponderance

of judicial authorities has crystallised in the unequivocal conclusion that the judicial approach or procedure to be adopted by a court when faced with irreconcilable affidavits is to call oral evidence to reconcile them. See this Court's decision by Fatayi-Williams JSC (as he then was) in B Falobi v. Falobi (1976) NSCC 576 at 581. Wherein the learned Justice at the latter page of the Report (in similar circumstances, with the case in hand) said:

"We have pointed out on numerous occasions that when a court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call. It does not matter whether none of the parties asked to be allowed to cross-examine any of the deponents or to call any witness. Such omission by the parties should not be taken to amount to consent that affidavit evidence should be used in such circumstances..... Since the decision of both the High Court and the former Western State Court of Appeal were based on these conflicting affidavits, we do not think they should be allowed to stand." (Underlining is mine for emphasis).

See also Akinsete v. Akindutire (1966) All NLR 137; Govern-ment of Ashanti v. Adjuah Korkor (1974) 1 All NLR 280. In the case of F Uku & Ors. v. Okumagba (1974) 1 All NLR 475 at 496; (1974) 3 SC.35 at 36, the principle decided therein is that the court, where the need arises, should invite evidence to clear issues where there are conflicts. See further Olu-Ibukun and Anor. v. Olu-Ibukun (1974) NSCC 91 particularly at page 95 where Akinsete's case (supra) was cited with ap-
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proval by Onyeama, JSC as he then was, wherein the learned Justice opined thus:

"In the face of the direct conflict of affidavit on crucial facts the learned trial Judge, we think, should have heard oral evidence from H the deponents or such other witnesses as parties may be advised to call." See also Eboh and Anor. v. Oki & Ors. (1974) NSCC 26.

Be it also noted that the only exception to the rule of calling evidence to reconcile conflicting affidavits is where such conflicts are better resolved

in the substantive action or suit vide Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688 and Fashanu v. Adekoya (1974) All NLR 32.

Thus, while the National Population Commission (Amendment Decree) No. 26 of 1992 setting up the Tribunal did not direct that the Tribunal should limit the hearing of complaints before it to the filing of affidavit evidence without taking oral evidence from the parties, the law would appear to blow hot and cold when at the same time it provides that it enjoins the Tribunal to go to the root of every complaint brought before it and not to make a half-hearted attempt at scratching same on the surface, as for instance, when applying the High Court Civil Procedure Rules vide paragraph 45(1) of the Third Schedule. See also paragraph 17 of the Third Schedule which makes provision for every complaint to be heard in open court and that in doing this, the Tribunal is given powers to summon witnesses to give evidence.

In view of the foregoing, I am in agreement with the Respondents' submission that the procedure adopted by the Tribunal is strange or very unusual; that the Respondents were not afforded a fair hearing vide to Section 33(1) of the Constitution of 1979 (now Section 36(1) of the 1999 Constitution) and that the rules of Natural Justice were denied them. Finally, I agree with the Respondents that in as much as the conflict precipitated in the affidavit evidence had not been resolved. (See Ebohon v. Attorney-General of Edo State (1997) 5 NWLR (Part 505) 298 at 309) which decided that when the court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponent or such witnesses as the parties may be advised to call. In the instant appeal, no such procedure was observed. In the light of the above consideration by me, I will resolve this issue against the Appellant.

On Issue No.(ii) which clearly overlaps issue No.(i), I will, without hesitation, adopt the reasoning and conclusion of my learned brother Ayoola, JSC by answering same in the affirmative. The judgment of the lower Tribunal is not only perverse but it also amounts to cloistered justice. The tribunal therefore clearly gravely erred. I will accordingly

therefore resolve this issue against the Appellants and in consequence, dismiss the appeal while affirming the judgment of the court below as did my learned brother Ayoola, JSC in his more detailed judgment which I adopt as mine. I award costs to the Respondents assessed at N10,000.00.

B _____

IGUH JSC

C I have had the privilege of reading in draft the judgment just delivered by my learned brother Ayoola, J.S.C. and I agree with him that this appeal is lacking in substance and ought to be dismissed.

D The one single issue that I desire to point out is that the case before the Tribunal was tried entirely on affidavit evidence pursuant to the order of the Tribunal. A total of twenty six affidavits, counter- affidavits and replies to counter-affidavits were filed before the Tribunal in the suit. Very grave issues ranging from non-enumeration to partial enumeration in some areas, sabotage on the part of the respondent officials, use of obsolete map for Ikere Local Government, false declaration etc E were raised in these affidavits and denied in the counter-affidavits.

F A study of these sets of sworn affidavits unmistakably shows that they are replete with irreconcilable conflicts and/or differences on material issues and that the contentions of the parties before the tribunal were diametrically opposed to each other.

The Tribunal, however, without viva voce evidence from the parties was able to hold as follows:-

G *"We have examined the affidavit evidence of every witness for the complainants with respect to non-enumeration or partial enumeration of localities on the evidence before us, we find that the witnesses for the complainants have not been very truthful.*

H The Tribunal further, considered the various other areas of complaints relied upon by the appellant and denied by the respondents and found itself able to make findings of fact based on the said affidavits and counter-affidavits of the parties without calling for viva voce evidence from them. This seems to me a gross error in the exercise of the evaluation of evidence of the parties by the Tribunal.

The law is well settled that when a court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case in order to resolve the conflict properly should first hear oral evidence from the deponent or such other witnesses as the parties may call. See Joseph Falobi v. Elizabeth Falobi (1966) 1 All N.L.R. 147, Olu-Ibukun and Another v. Olu-Ibukun (1974) 2 S.C. 41 at 48, Eboh v. Willie Oki & Another (1974) 1 S.C 179 at 187, Uku and others v. Okumagba and other (1974) 3 S.C. 35 at 56 etc. It seems to me clear that since the decision of the Tribunal was based on affidavits which were patently irreconcilably in conflict, such a decision cannot be allowed to stand and the court below was perfectly right, therefore, when it set aside the judgment of the Tribunal and ordered that the petition of the respondents be tried de novo before another Tribunal.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ayoola, J.S.C. that I, too, dismiss this appeal as totally unmeritorious. I abide by the order as to costs contained in the leading judgment.

KATSINA-ALU JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother AYoola, JSC. I agree with it. And for the reasons he has given, I would also dismiss the appeal with =N10,000.00 costs to the Respondents.

ACHIKE JSC

I have had the privilege of reading the leading judgment of my learned brother, Ayoola, JSC; which I adopt as mine. I award costs to the Respondents assessed at N10, 000.00.